Self-determination through an Aboriginal 7th State of Australia: an APG model

Self-determination is not new to Australia. In 1974 the Whitlam government established the NACC (National Aboriginal Consultative Committee) to give Aborigines a voice on the national level. NACC had no land or legislative power.

Only a year after the NACC was created the East Timorese declared independence. They were subsequently invaded by Indonesia. The 26 year campaign for self-determination saw the East Timorese get their country back in 2002.

Two years after NACC was set up, the Inuit sought their own territory in Canada. By 1992, Canada signed an agreement acceding to the demand after a 16 year campaign by the Inuit and by 1999, the Nunavut territory of nearly 2m sq. kms. of territory was up and running with its own Assembly.

The Scots had wanted independence from the UK for some time. Just 4 years after the NACC was active, a referendum was held in Scotland to establish a Scottish Assembly with devolved powers. The referendum failed, but 20 years of campaigning saw a positive result in 1998 and the enactment of the Scotland Act. Since 1998 the Scots have been running their own country with devolved powers. Later this year the Scots will go to another referendum to decide whether to remain within the UK, or become a nation state. Meanwhile, the First Nations Congress, a national voice for Aborigines, represents Aboriginal self-determination. The Congress has neither land nor legislative power.

In a vast political reshaping of the world, more than 80 former colonies comprising some 750 million people have gained independence since the creation of the United Nations. In 40 years Aboriginal self-determination has not advanced one scintilla.

We are left to wonder why Aboriginal self-determination has lagged so badly behind the rest of the world. Is it due to token offerings, or because of the token offerings Aborigines willingly accept? Ever seen a Palestinian Advisory body to Israel? Or a Palestinian 'Israeli of the Year', in order to 'hold a conversation'? So long as Aborigines continue to sit on advisory committees, governments do not have to consider Aboriginal government. Self-determination can be ignored so long as Aborigines get distracted by meaningless gestures like constitutional recognition.

The lack of Aboriginal political development means we are not in a position to demand full-blown self-determination. We lack the 5 key ingredients-

1. a defined territory;
2. a working government;
3. a clear indication of the will of Aboriginal people for self-determination;
4. financial independence that indicates we would not be a burden on the already stretched coffers of the UN, and
5. an international benefactor.

Acknowledging our failings is not a weakness. It helps us take stock. While the international community would likely dismiss Aboriginal claims for external self-determination due to our lack of political development the international community would accept, and Australia does accept, our right to internal self-determination. What model, then, can apply internal Aboriginal self-determination?

When the British colonies decided to create a federation in 1901, they debated the likelihood of new states being added to the original six, so a whole chapter was created in the constitution for this to occur. At the time the federationists expected New Guinea and New Zealand would jump on board. Looking to the future, Australia's founding forefathers also expected new States to be created out of existing ones- section 124 constitution- and accordingly provided for boundary adjustments and giving up of territory to any new State under section 123.

An Aboriginal 7th State of Australia can be created under existing constitutional provisions without the need for referendums. Section 121 of the constitution provides for the Commonwealth parliament to pass legislation establishing a new State. The States can legislate to surrender territory under section 111 of the constitution, but only to the Commonwealth. Once territory has been accepted by the Commonwealth under section 122, Canberra can either make laws for partial self-rule (as was the case in Scotland from 1998 to present) or establish a new Aboriginal State entirely under section 121.

People are understandably wary of legislation for it can be changed or repealed by a later parliament. Not in this case. Section 121gives the Commonwealth parliament the power to establish an Aboriginal 7th State but once used, the power is spent. Federal parliament can try all it likes to undo a newly created State but the protections in the constitution for States means Canberra lacks any constitutional power to undo it.

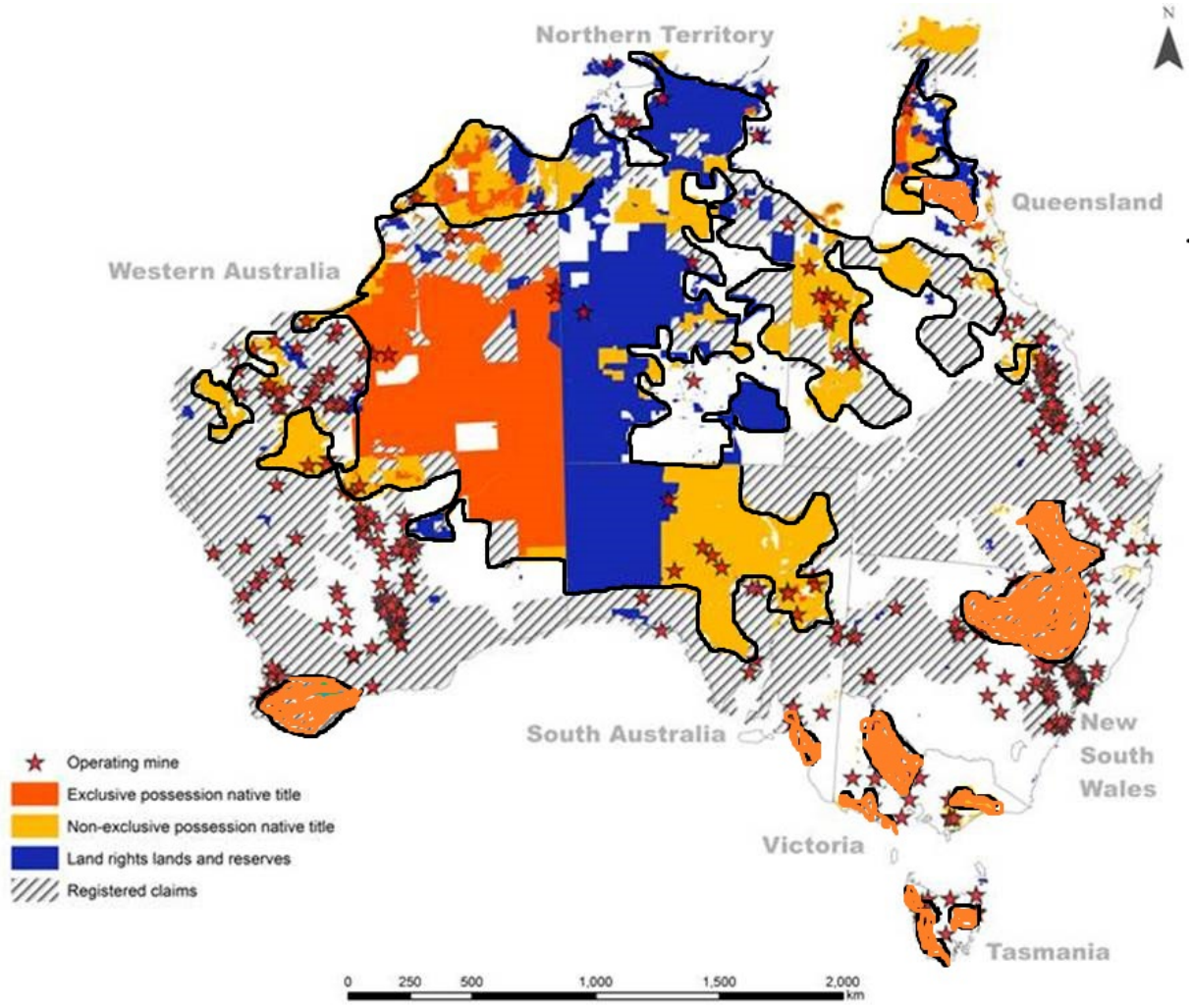
Which is why this model has an advantage over both constitutional reform and a treaty. It does not need a referendum- it relies on existing constitutional provisions which were designed for this purpose. As to a treaty, suppose Pat Dodson acting on behalf of Aboriginal people, and Tony Abbott on behalf of Australia, signed a treaty. The document itself would not create any rights nor impose any obligations, for '*Aboriginal people'* as such have no legal personality. Until the treaty was legislated, the document would not be worth the paper it was written on. That legislation could later be repealed. And anyway, what would be in the treaty? If the treaty was to provide real and meaningful benefits for Aboriginal people its content would probably include the very model under discussion.

What lands would be the territory of the Aboriginal State? Aborigines currently own, or have native title to, 2.3 million square kms of land, or 31% of Australia's land mass. Not all this land could be immediately included in the new State territory, but much of it could. The map below is a crude attempt to suggest a territory. It depicts Aboriginal owned land (blue), exclusive possession native title areas (red) and 'settlement land areas' (orange). 'Settlement land areas' could represent lands necessary for dispossessed Aboriginals to participate in the new Aboriginal State but unable, under current laws, to gain recognition of their rights to

lands taken from them. In other words, legislation establishing the 7th State of Australia could also provide Aboriginal ownership of certain lands without the need for a tribunal or other drawn out process.

It is clear from the examples of East Timor, Nunavut and Scotland that campaigns for self-determination have to run for up to 30 years, not the 3 months or 'during the life of this government' Aboriginal campaigners are used to. A public campaign to gain widespread support for the necessary legislation could take at least 5-10 years, with some legislative steps years after that.

It is evident from the map that many other Aboriginal owned or possessed lands are not included in the new State territory. A new Aboriginal State is a political step towards self-determination and is necessarily a political compromise. The greater the territorial claim for a new Aboriginal State the less likely it will gain broad support. However, not having any lands within the new State does not mean there can be no participation.



To be successful, the structure, laws and representation of an Aboriginal State would need to reflect the distinct features of the people themselves. To make sure that Aboriginals felt the 7th State delivered real self-determination, an Assembly may look and operate quite differently from the parliaments we are accustomed to. The creation of that Assembly needs to be established well in advance of the legislation creating the 7th State. But who could vote for it?

Existing State's electoral laws require a 3 month residency for eligibility to vote or stand for election. The Aboriginal State could do the same although, depending on the whereabouts of its territory, the majority population could be Aboriginal. If the Aboriginal population was not a majority, or would likely soon be a minority, the whole point of the 7th State being an exercise in self-determination would be jeopardised.

One way to overcome the problem of being numerically overun could be to allow all residents of the Aboriginal territory to enrol *plus* all Aboriginals regardless of where they live. This would almost surely guarantee an Aboriginal majority, make the effort worthwhile and at the same time expanding self-determination to more Aboriginal people. Would the Racial Discrimination Act allow for it?

Racially discriminatory laws that favour one race over another by conferring a benefit denied to others is permissible only as a positive discrimination measure. However, there is legal debate about whether such a positive discrimination law can be permanent or only temporary.

Section 25 of the constitution provides a power for States to ban members of any race from voting even though any such law enacted under it would be overridden by the RDA. Nevertheless, campaigners for constitutional reform want the section removed by referendum because, on its face, it promotes racism. That move may be a little hasty. Section 25 could provide the constitutional power for a State to allow Aborigines within that State to not enrol to vote in that State's elections without prosecution. Otherwise, even if Aborigines preferred to vote in the Aboriginal State elections and consented to a State law freeing them from participating in the State within which they resided, the State parliament, without section 25, may lack constitutional power to act on the wishes of local Aboriginal residents.

It would also be advisable to have a written constitution in place before the Commonwealth legislated the existence of the State. Section 106 of the Australian constitution protects State constitutions and provides that, under federation, the only authority to alter them are the State parliaments. If the Aboriginal State wanted customary law to apply to certain areas, the constitution could provide for it. Aboriginal customary law is not recognised as a legitimate source of law under white legal systems. Similarly the rights of Aboriginal land owners within the 7th State would need to spell out whether an Aboriginal group could keep all profits from their lands or whether the State could claim a share of it. Could Aboriginal owners veto any activities on their lands and if so, under what circumstances could the State override the veto?

While section 106 excludes any Commonwealth law from changing a State constitution, section 106 would not be of any use where a Commonwealth law (within constitutional

power) conflicted with a law made under the constitution of an Aboriginal State. Section 109 would make the Aboriginal State law invalid to the extent of its inconsistency with the Commonwealth law.

This rather sketchy outline of the biggest single shift in Australian policy on Aboriginal self-determination leaves many issues unresolved or not mentioned. All the same it represents a massive step forward for Aboriginal people.

There is no compromise to Aboriginal sovereignty or self-determination. Under this model, Aborigines give up nothing. under the model, white Australia gives up a great deal of control over Aborigines and gains respect for having done so.

The model takes the rich historical, cultural and aspirational values that makes up the identity of the Aboriginal people and treats them as assets, not liabilities. It provides an outlet for the free expression of those values, clarifies and consolidates our relationship with Australians, and gives, for the first time, great hope for the future.

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Secretary

APG

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