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Australia

# Without a Treaty, Australia Day Will Always Be Invasion Day

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**For Indigenous Australians, Australia Day commemorates nothing but the invasion of their territories. While the Change the Date campaign gathers momentum, only a Treaty can begin to address the trauma and bloodshed of British settlement.**

It is rapidly becoming a national tradition to return from the Christmas summer holidays and plunge headfirst into the contentious debate over the date of “Australia Day,” our day of national celebration.

The twenty-sixth of January is significant because it marks the anniversary of the arrival of the convict-laden first fleet of ships at Port Jackson. It also commemorates Governor Arthur Phillip raising the British flag at Sydney Cove. It was with this act that British sovereignty was proclaimed over Australia’s eastern seaboard.

That moment was a declaration of war on my people, the oldest continuous living culture in the world (at least 120,000 years). This is why we call Australia Day “Invasion Day.” For us, it is a day of mourning.

Throwing a national party on 26 January is deeply offensive to Australia’s First Nations Peoples. But this should be stating the obvious – the fact that it needs to be spelled out tells you everything you need know about the denial of this country’s past, so widespread among white Australia. It also speaks to the hard work we still need to do to find a true and shared identity that might reconcile Indigenous and non-Indigenous Australians.

There is considerable support for keeping January 26 as Australia Day. But the support is confused; those who support keeping the date say it’s important to maintain tradition. Yet the date has only been observed by all states since 1946, and it has only been a national holiday since 1994.

Fewer than half of those who responded to a 2018 poll were able to accurately nominate why 26 January is significant. Many mistakenly suggested it marked the day Australia was “discovered” by explorer and British naval officer James Cook – which is not the case at all. The land was, of course, already occupied by Aboriginal peoples, but Cook was not even the first European to reach Australia; he was beaten by the Dutch in 1606 and the Spanish later that year. What’s more, Cook first set foot on Australia seventeen years earlier than the First Fleet’s arrival – in April, not January.

As a day of national celebration, 26 January is tarnished. This is not just because of the annual debate. Worse, the date – as well as the lack of a treaty between Aboriginal and non-Aboriginal Australia – adds insult to the economic and social disadvantage First Peoples suffer in one of the world’s richest nations. This is a national disgrace.

## Changing the Date Isn’t Enough

In recent years, the “Change the Date” campaign has gained significant momentum, sparking national debate and receiving media coverage across white Australia. If this in one sense suggests a national awakening, it also carries significant dangers for our fight for sovereignty and justice.

One of the first things you notice about the “Change the Date” debate is a glaring absence of Aboriginal voices. This

is in keeping with the obsession that Australia (progressive Australia included) has with fretting about the so-called “Aboriginal problem.” For all the talk, this never seems to involve opening the conversation to perspectives, solutions, and leadership by First Peoples themselves.

We are also absent from the debate because “unsurprisingly” many of us aren’t interested in helping to alleviate white guilt by moving the date of Australia Day. Given worsening and horrific deaths in custody and a gap in the life expectancy between Indigenous and non-Indigenous men of up to fifteen years, it’s not a pressing concern. In fact, it’s a dangerous distraction from the conversation we should be having, about signing a treaty between black and white Australia.

It shouldn’t be controversial to note that Australia was invaded and that war and mass murder were inflicted on the Aboriginal nations who lived here for thousands of generations prior to colonization.

Just like Native American tribes, Aboriginal people mounted a heroic resistance against colonization. In both cases, many died on both sides. But in both cases, Indigenous fatalities were far greater. That’s why January 26 marks the beginning of a war of racial, cultural, and ecological genocide against my people that continues to this day.

While Black Hawk, Geronimo, Chief Seattle, and Sitting Bull are relatively well-known leaders of the Native American resistance, Aboriginal warriors such as Pemulwuy, Musquito and Windradyne are less famous. Although their bravery in leading the Aboriginal resistance was equal, their histories are only now becoming better documented.

Similarly, it has taken too long to map massacre sites across the country. Work led by the University of Newcastle is gradually rectifying this “so far, they’ve documented a staggering 250 sites between 1788 and 1930. The researchers are still counting.

Today, there is no doubt that successive governors undertook mass murder. This includes Lachlan Macquarie, who led New South Wales’s transition from penal colony to free settlement. For example, in 1816, he ordered that “All Aborigines from Sydney onwards are to be made prisoners of war and if they resist they are to be shot and their bodies hung from trees in the most conspicuous places near where they fall, so as to strike terror into the hearts of surviving natives.”

That’s why Australia Day is, for us, not a celebration. It’s a painful day of mourning.

## Treaty Now!

Without a treaty, the trauma and bloodshed that stretches from our past into the present cannot be confronted; lasting and meaningful reconciliation will be impossible. Indeed, the absence of a treaty is the single biggest roadblock to Australia growing up as a nation. After all, every other Commonwealth country has signed a treaty with its Indigenous people.

King George III’s written instructions to Governor Arthur Phillip in 1787, ordering the establishment of the colony of New South Wales, make no mention of protecting or recognizing Aboriginal lands. Instead, the continent was settled under the doctrine of terra nullius, or “no one’s land.” Despite partial recognition of Aboriginal land rights under the 1993 Native Title Act, the concept of terra nullius continues to shape the occupation of our land and resources.

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A treaty could address this fundamental and formative national myth and help to shed light on a tragic blind spot. This is because, at its core, a treaty is an agreement between sovereigns that recognizes the existence and inalienability of the rights of all parties. Other forms of “recognition,” even if well intentioned, don’t cut it because they do not resolve this fundamental injustice.

Other structural changes have been proposed, including formal, constitutional recognition (in the preamble or body) or the establishment of dedicated Aboriginal representation to interrogate the implications of legislation put before the federal parliament (described by opponents as a “third chamber”). Yet these are dangerous and premature if not first underpinned by a treaty. These measures, like changing the date of Australia Day, need to be negotiated as part of a treaty.

For a just treaty, Indigenous representation cannot be handpicked by non-Indigenous authorities. Instead, every Aboriginal clan and nation across Australia must be consulted on the basis of free and informed prior consent, in accordance with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Upon invasion, there were more than 250 Aboriginal language groups. We are not a homogenous group of people. Broad representation is necessary in order that we all participate.

Although it will be a long and hard fight to get there, we can propose some key principles for a just treaty. As a litany of international examples demonstrate, if we get these wrong, the result may be a bad treaty “which would likely be worse than no treaty at all.

First, the treaty process needs to be a conversation between black and white Australia. This is why the content of a treaty is not just for Aboriginal Australia to decide; critically, non-Aboriginal Australia must ask itself what it would want to see in a treaty with First Australians. This dialogue is as important as the destination, because it will shape the future of Australia and its inhabitants.

Second, the principle of self-determination must be upheld so that Aboriginal representation on any treaty-negotiating body is genuinely representative and has a legitimate mandate from the nations or clans they come from. The diverse approaches to decision-making and representation among the Aboriginal people in Australia must be respected. After all, no one questions non-Indigenous Australia’s right to determine its own decision-making and representation.

Third, because Australia is still a Commonwealth country and a treaty is only binding between sovereign powers, the people of Australia have two options. Either the country must found itself as a republic capable of concluding a treaty with its First Nations in its own right, or it must acknowledge that power to affirm a treaty lies, in the final instance, with the British Crown. Whatever the case, this is important for two reasons. For one, treaties signed with non-sovereign powers (for example, state governments) don’t hold enough weight and are far less open to international scrutiny. Worse, for Aboriginal clans and nations to enter into a treaty with a non-sovereign power downgrades their own sovereignty.

Finally, it must rigorously follow the principles of Free, Prior and Informed Consent as outlined in the UNDRIP.

## Better No Treaty Than a Sham Treaty

The government of my home state of Victoria has been the first to progress a treaty with its First Peoples. But they have failed to address any of the above four principles. This means that the Victorian Treaty has neither attraction

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for, nor credibility with, Blak Victorians, and so fails on every count in regard to the UNDRIP. Most important, Victoria has failed to seize the opportunity to use the treaty process to guide a conversation that builds a shared future between Blak and white.

The process itself has been deeply flawed. The election of Aboriginal representatives to the body charged with designing the treaty, the First People's Assembly, was a sham from the start, and Aboriginal Victorians knew it. This is why only 7 percent of those eligible to vote did so. After receiving considerable feedback from elders and peers about the process, I withdrew myself as a candidate.

On top of this, some Aboriginal clans within the state were outright denied representation, while other representatives were to be handpicked by Aboriginal "corporations."

Further, negotiating treaties with separate Australian states and territories instead of Australia's sovereign authority has raised myriad problems, including questions as to whether such a treaty would bear any international validity.

This is particularly dangerous because, as the first state to begin a treaty process, Victoria will set a precedent that will inform future treaties elsewhere. The governments of Queensland and the Northern Territory are already planning to follow Victoria's example.

In part, Australian states and territories are going it alone and developing state-level treaties because the prospects of a federal treaty are so poor. (This is the case even with the country's first ever Aboriginal "not white" Minister for Indigenous Affairs.) But short-circuiting the national level is a dangerous move.

Until acknowledged and addressed, the trauma and bloodshed of Australia's colonial past will continue to shape its present. To break with this, Australia will need to transform itself radically, to dismantle racist structures and mentalities that persist today, and to redress the ongoing oppression of Indigenous Australians. Without a treaty, this will be incomplete.

Whatever political form justice might take, only a treaty signed with Australia's First Nations will provide a durable basis for recognition between white and black Australians.

Only then will it be possible to resolve the annual debate about Australia's national day. The day a meaningful and valid treaty is signed with First Nations Peoples will be the first day Australia can celebrate without shame or denial.

Source [Jacobin](#), 23 January 2020.

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