Indigenous treaties ‘just playing games with words’

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- CHRIS MERRITT

Two leading constitutional lawyers have warned moves by state governments to grant treaties and sovereignty to Aboriginal communities are mere “word games” that risk raising hopes of something that is beyond their power.

They fear a campaign aimed at winning treaties from state governments will play into the hands of those who are seeking to defeat a promised referendum on indigenous recognition in the -Constitution.

Groups that focused on state-based treaties risked being left with agreements that, no matter what they were called, would fall well short of anything that would be legally recognised as a treaty between sovereign nations.

This assessment, from constitutional lawyers Greg Craven and Anne Twomey, comes after moves toward state-based treaties with Aboriginal communities emerged in Victoria, South Australia and the Northern Territory.

Professor Craven, vice-chancellor of the Australian Catholic University, said state governments were misleading Aboriginal communities and raising false expectations by holding out the prospect of treaties.

While state governments were free to use whatever term they liked to describe deals with indigenous communities, he said, their status at law would not be that of treaties.

States were also free to refer to Aboriginal communities as nations but the mere use of those terms “won’t make them treaties or a nation — they are just playing games with words”.

Professor Craven said state governments would “never be able to make an instrument like a treaty that, in a sense, sits above the constitutional system”.

The real status of such agreements would be that of contracts, because state governments would retain full control over any such “treaties” or “nations”, he said.

Professor Twomey, of Sydney University, believed the problem with the debate was one of terminology and it was misleading to use the term “treaty” to describe what the states were considering.

She said the continued use of the term was creating confusion and much of that had been deliberate.

The states had no power to enter into treaties of the kind that existed between nations because sovereignty in that sense vested with the Queen.

Professor Twomey believes some of those pushing for state-based treaties were doing so in the belief that Aboriginal communities retained full sovereignty, “which does not work as a matter of formal law”.

But other advocates were seeking treaties when they really wanted agreements that were in line with those in Canada and the US concerning matters such as the provision of services, she said.

While the states could validly make such agreements, they could not the basis of dealing with independent sovereign Aboriginal nations.

“It would be better if the term treaty were not used,” she said.

Professor Craven said any agreements the states might make with indigenous communities would fall short of real treaties because state governments would be able to repeal the agreements.

“It’s a pretence. It’s a word game,” he said. Any act by a state government that purported to grant sovereignty to Aboriginal communities would be invalid because it would be inconsistent with the Constitution as creating a cohesive federal nation.

http://www.theaustralian.com.au/national-affairs/indigenous/indigenous-treaties-just-playing-games-with-words/news-story/434a6b8491935cf4e87c8677e93fb686