A treaty would be an agreement that is rather like that of host and guest, with rights and responsibilities for each party.AAP/Joel Carrett

The Indigenous National Constitutional Convention concluded with the Uluru Statement . In contrast to the political expectation that it would simply support symbolic recognition of Indigenous people in the Australian Constitution, the convention went much further, asserting Indigenous sovereignty and making two demands.

First, for a First Nations “voice” to be ensured in the parliament and enshrined in the constitution. Second, for the establishment of a Makarrata Commission “to supervise a process of agreement-making between governments and First Nations and truth-telling about our history”.

The first demand is understandable. Parliamentary representation does not require constitutional change. But it has been Indigenous experience that national bodies established to represent them have been at the mercy of governments. That was the case with ATSIC, disbanded in 2005.

A more significant demand is the Makarrata/treaty process. The whole nation has much to gain from the treaty route. However, if delegates prioritise the less politically controversial constitutional change, they risk derailing the more urgent need for treaties.

Why a treaty is essential

A treaty is an agreement – with guarantees, promises, responsibilities and obligations – between two sovereign peoples about how one party (the settlers) may come onto and share in the resources of the land over which the other party (Indigenous owners) holds sovereignty. A simple analogy: a treaty turns the relationship between settler-coloniser and colonised, based on force, into a more respectful relationship of host and guest.

Under a treaty, hosts and guests have rights, responsibilities and obligations, based on their

standing as equals. What is honoured in the relationship stems from conventions, protocols and laws that protect both parties. This includes sanctions for dishonouring obligations.

Indigenous commitment to a treaty process has been expressed nationwide, over many decades. But it has been hard for those supporting treaties to gain a respected voice in the media or be taken seriously by politicians. They are represented as extremists. This was even the case at Uluru. This fear-mongering is preventing the wider Australian public from engaging in the conversations it needs to have.

One of the so-called dissenters from the Uluru convention, Wiradjuri woman Jenny Munro, asked an important question that remains unanswered: “How does our sovereignty remain intact when we go into the white man’s constitution?”

This highlights a contradiction in the Uluru Statement: how to avoid the risk that any form of constitutional recognition will be made to stand in lieu of treaties, because it privileges a constitution that Indigenous peoples have not signed up for.

Treaties have to be the foundation for constitutional recognition, not the reverse. The recognition of Indigenous peoples within the Australian Constitution is not a right that the Australian settler government legitimately holds, because it does not have a right to constitute itself as a sovereign power. This right could only come from a treaty process. To accept the status of the constitution is, by implication, to concede that treaties will be unnecessary.

The advantages of treaties are little understood. Australian governments have opposed them since Batman’s crude attempt to subvert the colonial government’s land restrictions in 1835. But it is only through treaties that the right of the settler to be here, and thus to write a constitution in the first place, can be legitimised. Without them, there is no legal or moral foundation for Australian nationhood, nor guarantee of protection for Indigenous peoples’ sovereign rights.

A history of treaties in Australia

The British did not enter into treaties with Indigenous people across Australia, as they did in North America

and
New Zealand
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For 200 years, Australia denied that Indigenous sovereignty existed, based on the idea that Indigenous peoples were too primitive or incompetent to warrant recognition. The sovereignty of the Crown was established by force and is maintained through the settler majority population, who hold power and continue to deny Indigenous sovereignty. (The Mabo High Court decision recognised it only until 1788, after which most of it was assumed to be extinguished.)

Indigenous peoples have consistently protested this denial and, just as consistently, sought to meet settlers halfway. But they have been trampled over, disrespected, exploited and subjected to many forms of violence to silence their demands. This does not change the host-guest relationship – it just makes the guests obnoxious.

Treaties are the only way to put this nation on the legal and moral footing that it requires to have legitimacy and integrity. That this is not the case is demonstrated in the ambivalence over Australia Day. There is no day that settler and Indigenous Australians celebrate together, because we are unable to point to the equitable and respectful meeting of two peoples.

A treaty is therefore the only way to establish what the Uluru meeting seeks: a basis for dual and complementary sovereignty. The hosts will have two forms of citizenship: Indigenous and settler. The settler guests will have one, legitimised by treaty.

Seen this way, the treaty process is an agreement between Indigenous nations and the settler nation to form a commonwealth: a settler nation within a confederacy of Indigenous nations. A treaty does not cede the sovereignty of the host, but it does accord rights to the guest, protects both parties, and invites a form of dual sovereignty.

The Canadian example

There are precedents in Canada . There, the treaty-making process includes revisiting original treaties to better honour them, as well as making new treaties with those previously ignored.

The insightful study by settler Canadian and anthropologist Michael Asch should be mandatory reading for those fearful of a treaty path in Australia. In conjunction with the final report of the Truth and Reconciliation Commission of Canada, it is evident even to the cynical that Canada is well in advance of Australia in terms of integrity and goodwill.

Conservatively minded politicians and Indigenous people who are interested in maintaining the status quo like to be alarmist, depicting those committed to treaties as radicals. On the contrary, the treaty path is a generous invitation to settlers to enter into the legal, moral and binding agreements that should have been the foundation act of settlement.

The treaty route is an invitation to all of us, Indigenous and settler, to decolonise so as to create a just and equitable nation. This will not happen without treaties, and it will not happen through constitutional recognition.

Those who push for treaties deserve to be listened to. It is they who imagine a stronger future for Australia, not those who seek limited constitutional recognition.

Gaynor Macdonald does not work for, consult, own shares in or receive funding from any company or organisation that would benefit from this article, and has disclosed no relevant affiliations beyond the academic appointment above.

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Read more http://theconversation.com/after-uluru-we-must-focus-on-a-treaty-ahead-of-constitutional-recognition-78474