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Making up for Lost Time? First Peoples-State Treaty-Making in Victoria

An ANZSOG Teaching Case by Harry Hobbs & Dani Larkin

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Abstract

In 2016, Victoria became the first government in Australia to formally commit to a treaty process with First Nations peoples. However, the historical absence of treaty in Australia meant the concept of a treaty was vague for many people, including government and Indigenous communities. A host of fundamental questions, such as what a treaty might contain or what a proper negotiation process might look like, were unclear or uncertain. This case study explores the slow and deliberate steps taken by the Victorian government as it listened to First Nations communities and built community support and the institutional architecture necessary for treaty talks. Key lessons from Victoria's experience will help inform other states and territories which have since begun their own treaty processes.

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Key points and lessons

- A treaty is a special type of agreement that must meet three conditions: acknowledging Indigenous peoples as a distinct political community, being created through a process of negotiation between equals, and recognising Indigenous peoples' inherent sovereignty by providing for some degree of self-government. As such, it differs from ordinary legal and political agreements that have been struck in Australia in the past.
- The absence of any treaty-relationship in Australia means treaty processes will be more challenging. The institutions and governance architecture will need to be built from the ground up. First Nations and governments will need to understand what a treaty is and what it might mean for community. All sides will also need to develop a negotiation position.
- Treaty processes require the support of both Indigenous and non-Indigenous communities. However, First Nations peoples must be empowered to take the lead and drive the process.
- A treaty defines certain rights and obligations. At its heart, however, a treaty is a relationship building instrument. It is only as effective as the relationship between the parties is successful.

Introduction

'This is about equity and about equality, [and] about identity', said Mick Harding, a Taungurung man from Kulin country, and Co-chair of the Victorian Aboriginal Treaty Working Group in 2017. 'It's about us being the silent people in the street and switching off that silence and us becoming relevant in our own country'¹. The working group had formed one year earlier, when the Victorian government formally committed to commencing a Treaty process with First Peoples whose traditional lands were claimed by the State. In doing so, Victoria became the first jurisdiction in Australia to agree to talk treaty with Aboriginal and Torres Strait Islander peoples.

Treaties are accepted around the world as a means of resolving differences between Indigenous peoples and those who have colonised their lands. They have been reached in the United States and Aotearoa New Zealand, are still being negotiated in Canada today. In contrast, no formal treaty has ever been signed in Australia (Hobbs and Williams 2018, 1). This is despite Aboriginal and Torres Strait Islander peoples calling for a treaty for generations.

The absence of any treaty between Aboriginal and Torres Strait Islander peoples and governments in Australia has affected health and life outcomes of Indigenous Australians. As Djab Wurrung Gunnai Gunditjmarra Victorian woman and Greens Party Senator Lidia Thorpe has stated:

The denial of a treaty for First Nations people remains an injustice in this country. It denies us land, the means to achieve economic independence, self-governance, proper freedom to live in accordance with our culture and even proper recognition of our identity. The priorities for inclusion in treaty negotiation should be led by Aboriginal and Torres Strait Island people (2021, n.p.).

Treaty represents a form of recognition by the State of the special distinct status, cultural identity, and traditional custodianship of country that First Peoples have over Australian land. First Nations people suggest it also represents a form of recognition of continuing sovereignty that First Nations have over Australian land.

The Treaty process in Victoria began in February 2016. That month the Victorian government convened a meeting with representatives from First Peoples communities. The government wanted to understand the community's views on self-determination and the national constitutional recognition process. At this meeting, First Peoples in Victoria were clear. They wanted a treaty.

Minister for Aboriginal Affairs, Natalie Hutchins responded positively, declaring 'Canada have been doing it for a long time, New Zealand has successfully done it, so it's time for Australia to step up' (Fitzsimons 2016, n.p.).

Starting a treaty process today is difficult. The historical absence of treaty in Australia presents several challenges for both government and First Peoples in Victoria. Many Victorians had (and still have) little familiarity with treaties and how they differ from other agreements. Key institutions and infrastructure to facilitate fair negotiations need to be

¹ Mick Harding, Taungurung man from Kulin country, and Co-chair of the Victorian Aboriginal Treaty Working Group (Crothers 2017, n.p.). This case study describes the political communities that possessed the land now called Victoria prior to British colonisation as First Peoples or First Nations Peoples. This is consistent with the terminology adopted by those communities in the First Peoples Assembly of Victoria. We note alternative terms such as 'Aboriginal Victorians' is often used by government, including in the 2018 Treaty Act.

designed and established. Non-Indigenous Victorians also need to learn the value and significance of treaty and become stakeholders in the negotiation process.

Other States and Territories have followed Victoria and made their own commitments to treaty processes. If these processes are to be effective, it is important that key lessons from the Victorian process are identified. In February 2016, no other Australian government had made commitments to treaty processes. It was up to the Victorian government and the First Peoples communities in Victoria to lead the way in designing and negotiating Australia's first First Peoples-State treaty process.

What is a Treaty?

There are many types of agreements between Indigenous peoples and governments in Australia, such as land rights, joint management of national parks, and resource-benefit sharing agreements. These are important agreements that can provide real benefits to Aboriginal and Torres Strait Island peoples, but they are not treaties. A treaty is a particular type of agreement that must satisfy three conditions (Hobbs and Williams 2018, 7-14; Mansell 2016, ch. 6). These conditions are drawn from contemporary international human rights instruments concerning Indigenous peoples and from modern comprehensive land settlements being negotiated in Canada. A treaty:

1. acknowledges Indigenous peoples are a distinct political community
2. is a political agreement reached by a fair process of negotiation between equals, and
3. recognises Indigenous peoples' inherent sovereignty by providing for some degree of self- government.

A treaty will also contain agreements on a range of other matters. This ultimately depends on the views of each party, but it could include financial compensation, return of land, formal recognition of historic wrongs through truth-telling, and symbolic gestures of reconciliation. It could also include other specific matters of importance to each party, including terms related to housing, water rights, and education, among other elements. As Mick Harding, a Taungurung man and Co- chair of the Victorian Aboriginal Treaty Working Group explains, a treaty could provide First Peoples with a more empowered and self-determinative role in governance, decision-making and service-delivery. Treaty can mean that First Peoples are 'directly responsible for some of these things like closing the gap. We can be actively working upon these things for change' (Crothers, 2017, n.p.).

Key Challenges

Treaty promises significant benefits to Indigenous and non-Indigenous Australians. Gunitjmarra woman and Victorian Treaty Advancement Commissioner Jill Gallagher explains:

If we do it properly, we will show that Treaties can deliver outcomes that improve people's daily lives. A treaty will not be a silver bullet. Nothing will change overnight. But locally negotiated Treaties would be the single biggest factor in our communities getting stronger, in my opinion. The evidence shows overwhelmingly that self- determination delivers outcomes (Dragon 2019, n.p.).

However, these benefits will only accrue if treaty processes are successful. The historical absence of Treaty in Australia presents serious challenges. Three key challenges face those responsible in Victoria for developing the first Australian Treaty process.

First, the more than 200-year relationship between the State and Indigenous Australians has left many First Peoples distrustful and cynical of government. Long histories of racist and paternalistic law and policy have disconnected Aboriginal and Torres Strait Islander peoples from country and kin and inhibited their ability to make their own decisions to support their communities. How can the treaty process be designed to overcome that distrust?

Second, as the first jurisdiction in Australia to embark upon a treaty process, participants would be forced to design entirely new institutions. While the experiences of the United States, Canada and Aotearoa New Zealand could inform the Victorian process, treaty infrastructure would still need to be home-grown and develop out of local traditions and systems. This is especially important in Australia given the historical absence of treaty means there are no constitutional principles that govern the relationship between First Nations communities and the State. Jill Gallagher explained the challenge, 'There isn't a roadmap, there isn't a template. We're starting from scratch' (Allam 2019, n.p.). How can this be accomplished?

Third, a treaty is often described as a marriage and not a divorce. It requires the ongoing support and commitment of both parties. This means that a treaty will only succeed if non-Indigenous peoples support it. How can the government and First Peoples in Victoria ensure that non-Indigenous Victorians become stakeholders in treaty?

Overcoming these challenges

First Peoples in Victoria and government may want to make up for lost time, but modern treaties are complex documents, and it is important that the process is not rushed. Aboriginal Victorians and the State government need time to fully prepare for talks. For First Peoples in Victoria, getting ready for treaty means having a clear sense of what a treaty might mean for their communities, as well as a broad consensus on a negotiating position. This can only occur once the infrastructure and institutions to facilitate negotiations are established. This means that it is too early to assess whether the Victorian treaty process has overcome these three key challenges. Nevertheless, the early stages of the process provide four lessons that other States and Territories contemplating or engaging in their own treaty processes should consider.

Empowering First Peoples in Victoria to Lead the Process

From the beginning the treaty process has been led by First Peoples in Victoria with government playing a supportive and facilitative role where necessary. This approach has aimed at overcoming distrust and cynicism amongst First Peoples communities and building support for the process. It has also meant that the process itself has been deliberately slow and measured, allowing time for First Peoples to understand the issues. This can be seen through a brief outline of the development of the First Peoples' Assembly of Victoria – the state-wide representative body empowered to work with government to develop the treaty architecture.

In early 2016, the State government sought to understand how it could better facilitate Indigenous self-determination. Initial conversations held by Elders and community leaders at several locations across the State revealed a desire for treaty. The government was supportive. Victoria's Aboriginal Affairs Minister Natalie Hutchins remarked: 'At the end of the day it's pretty disappointing that we, in the year 2016, don't have a treaty or a national arrangement with our First Peoples' (Fitzsimmons 2016, n.p.).

The State government first established an Aboriginal Treaty Working Group. The Group was tasked with consulting First Peoples in Victoria over the design of an appropriate body to represent them in negotiations (Aboriginal Treaty Working Group 2016, 68). However, these consultations revealed that First Peoples in Victoria desired a broader representative body. Treaty negotiations would have to wait.

The Working Group was comprised entirely of First Peoples in Victoria. It held sixteen consultations across the State. These meetings were complemented by community-run conversations led by self-nominated individuals, and an online portal. Approximately 7,500 First Peoples in Victoria (out of a 2016 self-reported total of 47,788) were consulted or engaged directly through this process (Aboriginal Treaty Working Group 2017, 6). During this time, the Treaty Working Group worked with the Department of Premier and Cabinet to design an Aboriginal Community Assembly. The Community Assembly considered several key questions on the design of the representative body. Questions included:

- How should representatives be elected?
- How should the voting regions be designed?
- How many elected representatives should there be?
- What mechanisms and process will be needed to ensure the Aboriginal Representative Body is accountable to Community? (Gallagher 2021, 223).

Following 18 months of negotiations, a Victorian Treaty Advancement Commission was set up in December 2017. The Commission had several key responsibilities, including guiding the establishment of the representative body. Jill Gallagher, a Gunditjmara woman, was appointed Commissioner. 'I feel very excited that there is a change in the air', she said at the time. 'I hope Victoria – all Victorians, Aboriginal and non-Aboriginal – can pave the way for this to happen, and show the rest of the country it can be done' (Eddie 2017, n.p.).

Gallagher admitted that, despite the work undertaken so far, she had a fear that the State government might abandon the process:

That's always in the back of your mind, but they seem serious about it – I'm confident they're serious about it. We've just got to get it right. If the treaty pathway here in Victoria is symbolic, I don't want a bar of it. That's not going to help anyone. What it has done, it's given us hope. But it can't be symbolic (Eddie 2017, n.p.).

Understanding that Treaty needed to be led by community, the Commission prioritised engagement with First Peoples in Victoria. Gallagher and her staff held conversations and meetings in more than 30 towns and cities across the State, including every town with a population of more than 100 Aboriginal people. Following those meetings, the commission organised the first ever Statewide Elders' Forum, in which over 100 elders from communities across Victoria met and discussed design question. The commission also organised a Statewide Gathering of over 700 community members at the Melbourne Cricket Ground (Gallagher 2021, 227). The results of this process led to key changes from the model recommended by the Treaty Working Group and the Aboriginal Community Assembly. 'That's the beauty of Aboriginal self-determination', said Gallagher. 'We came out with a far stronger model through consultations and redrafting' (Gallagher 2021, 232).

The representative body is named The First Peoples' Assembly. The Assembly is a blended representative body, combining elected First Peoples in Victoria and reserved seats for Traditional Owner groups. After several months of building an electoral roll, elections for the First Peoples' Assembly of Victoria were held in 2019. Despite a low turnout, and some dispute over how Aboriginal people are represented on the Assembly (Maddison, Hurst and Wandin 2021, 179), the body is expected to build its legitimacy over time. The inaugural meeting for the Assembly was conducted in the Victorian Parliament's Legislative Council, reflecting both the significance of the Assembly and the State's commitment to the Treaty process.

Even so, the location provoked mixed reactions. Wathaurong, Gunditjmara and Arrernte man Jordan Edwards was uncertain:

All my people since colonisation have screamed for treaty and now the chance is finally here. I feel the lack of blackness in this process ... A meeting of this magnitude should have been out in the scrub, in the bush, on country (Costa and Dunstan 2019, n.p.).

Gallagher recognised the depth of feeling. She explained the location was chosen because 'Parliament House is the centre of power in this state. It is fitting that our assembly shares the same stage' (Hayman-Reber 2019a). Gallagher continued, noting that 'in this room, in these halls of power draped in our culture, I tell you that our sovereignty will be recognised, it must be recognised' (Wahlquist 2019, n.p.).

Video: Marcus Stewart's first speech to the First Peoples' Assembly of Victoria ([link](#)). All first speeches can be found on the First Peoples' Assembly of Victoria YouTube channel.

Empowering Aboriginal Victorians to lead does not mean that the process has obtained unanimous support. Not all First Peoples in Victoria are content with the process or believe that government is acting in their interests. For instance, the Yorta Yorta Council of Elders have refused to take their seat in the First Peoples' Assembly, arguing that the process is 'a trip wire and only a pathway to assimilation' (Fryer 2019, n.p.). Similarly, the Djab Wurrung Embassy, a group of Traditional Owners protesting VicRoads' plan to cut down sacred trees, launched a 'No Trees, No Treaty' campaign to highlight the state government's refusal to listen to their views (Hayman-Reber 2019b, n.p.). While some opposition may soften if the treaty process continues to progress, many First Peoples in Victoria remain opposed to any state-based treaty, preferring instead to talk with the Commonwealth government at a nation-to-nation level.

Recognising that the Treaty process is dynamic

Empowering First Peoples in Victoria to lead the process might introduce some uncertainty for government: where will the process go? What will it look like? So far, the Victorian government has been flexible and responded to the vision offered by First Peoples in Victoria. Gabrielle Williams, the Minister for Aboriginal Affairs, has explained that the government is committed to 'Listening to Aboriginal Victorians and acting on what they need to determine their own future' (Premier of Victoria, 2022, n.p.).

In doing so, the government has determined that a dynamic process that reflects the concerns and focus of First Peoples in Victoria is more likely to succeed. The development of the Yoo-rook Justice Commission – Australia’s first truth telling commission – exemplifies this point.

The need for a process of truth-telling emerged organically out of the Treaty process. The First Peoples Assembly of Victoria first called for the establishment of a truth telling process in June 2020. When the state government agreed, the Assembly and the government worked together collaboratively to identify an appropriate mandate and consider its design and legal basis. After several rounds of consultation and delays due to Covid-19, the Commission was finally established in 2021. It held its first hearings in April 2022.

The Commission is a complementary mechanism that will support and promote the advancement of treaty or treaties (Letters Patent 2021, 2(f)). The stories that will be told to the Yoo-rook Justice Commission are expected to ‘shape Victoria’s conversation around Treaty-making, as well as the national conversation across Australia’ (First Peoples Assembly of Victoria 2021, 33). Its recommendations are also anticipated to identify matters that may form part of treaty negotiations. The Commission is embedded in and supports the larger treaty process (Hobbs 2022, 7). As Marcus Stewart has stated:

We need to pierce the collective and deliberate amnesia that white Australia wraps itself in. Not so we can wallow in our pain or inflict shame, but so we can reckon with the past, commit to unpicking today’s tangled impacts of colonisation, and spur ourselves on to do better, to be better. That’s what will set this process apart from the countless inquiries and reports that have come before. Because this time, we’ll have a way to keep the politicians to their word. Yoo-rook will help us find the path forward, but Treaty will provide the dotted line that they sign on to hold them and future governments to account (Stewart 2022, n.p.).

Developing key institutions and infrastructure in partnership with Aboriginal Victorians

First Peoples in Victoria are driving the process forward, but Treaty requires the development and establishment of key legal institutions to facilitate and support negotiations. These institutions will ultimately derive their legal authority from enactment in legislation passed by the Victorian Parliament. Yet, Aboriginal Victorians are only likely to engage in talks if treaty infrastructure ensures that the structure and framework of negotiations are fair and equitable. The challenge government decision-makers have faced is how to design Australian-first Treaty institutions in a manner that genuinely engages with the views and interests of First Peoples in Victoria. Three examples outline their efforts.

First, initial conversations in Victoria revealed the desire among First Nations for a state-wide representative body through which they could speak directly to government. Those conversations also revealed a concern that if an Indigenous representative body was established via legislation, it could be abolished by a future Parliament. The Victorian Treaty Advancement Commission explained:

Without a formal connection to Parliament, however, there would be a real risk that the representative body may have limited influence. First Peoples in Victoria sought an innovative legal arrangement. The government was receptive. The First Peoples’ Assembly of Victoria is formally a corporation, meaning that it operates independent of government. However, the Advancing the Treaty Process with Aboriginal Victorians Act 2018 commits the State government to ‘recognise’ the Assembly. If the government subsequently revokes that recognition, it must recognise another Aboriginal Representative Body.

Second, the drafting of the Treaty Act itself speaks to the relationship between First Peoples in Victoria and the State government. Legislation is ordinarily drafted by a small group of people within the executive. This approach is not appropriate for legislation relating to Treaty, for all parties must agree on the framework under which they negotiate. The Treaty Act was therefore developed ‘in partnership’ between the Aboriginal Treaty Working Group and the government. Jill Gallagher explains:

The government worked up successive drafts closely with the Working Group; a process usually strictly protected by Cabinet-in-Confidence provisions designed to exclude all but a few select public servants, statutory drafting experts and legal counsel. Moving away from the public service’s traditional ways of working meant that members of the communities with the most at stake were involved (Gallagher 2021, 224).

Third, in June 2022, legislation to establish a Treaty Authority was introduced into the State Parliament following an [agreement](#) between the government and the First Peoples Assembly ([Video celebrating the Agreement](#)). The Treaty Authority is independent of both the parliament and government. Its role is to act as an impartial umpire, to oversee negotiations, resolve disputes, and ensure a fair process. To do this effectively the Authority cannot simply be a creature of the State; it must be imbued with and reflect the interests and values of both sides to the negotiations. Once again, the State government has understood the need to adapt its ways of thinking.

The Treaty Authority is publicly accountable to the people of Victoria and culturally accountable to First Peoples. As Assembly co-chair and Nira illim bulluk man Marcus Stewart explains, this means the Authority ‘will be guided by Aboriginal lore, law and cultural authority that has been practised on these lands for countless generations’ (Castan, Galloway and Walker 2022, n.p.). The Authority will also be guaranteed public funding which it can control and manage. Long-term financing is critical to ensure that the Authority can perform its functions. The Treaty Authority Bill was passed by the Victorian Parliament in August 2022.

Video: Nine News report on the passage of the Treaty Authority Bill ([link](#)).

Building community awareness and support

A treaty will only endure if both sides recognise its value. Appreciating this fact, the State government has sought to build community awareness and support for the Treaty process. In June 2018, it launched the ‘Deadly Questions’ community education campaign. As part of the campaign, prominent Aboriginal Victorians invited non-Indigenous Australians to ask them ‘Deadly Questions’. Almost 4000 questions were asked, with queries over Aboriginal culture, history and relations with non-Indigenous Victorians. A common question was what a Treaty would mean for First Peoples in Victoria. Answers included:

My hope would be that we change the identity of this nation. To a place that all of us can call home

It means that we’re all entitled and we all share and we all embrace the land that we’re on (Williams and Hobbs 2020, 258).

Initial research suggests modest success; 51 per cent of surveyed Victorians agreed or strongly agreed that ‘the “State Government should formalise new relationships with Aboriginal Victorians,” an increase of seven per cent from before the campaign’ (Aboriginal Victoria 2019, 18).

In February 2021, a second community education campaign was launched. Building on the Deadly Questions campaign, ‘Deadly and Proud’ aims to increase awareness of, and support for, Victoria’s treaty and truth and justice processes. Stories of Aboriginal cultures, resilience and communities are prominently featured in an interactive map, designed by Aboriginal artists Lyn-AI Young and Robert Young, to get ‘more Victorians to feel pride in our shared history’ (Andrews 2021, n.p.). First Peoples’ Assembly Co-chair and Bangerang/Wiradjuri woman Geraldine Atkinson explained, ‘*We are the oldest living culture in the world and we are proud to share our stories with all Victorians as we progress on the path to Treaty, and telling the true history of this country*’ (Andrews 2021, n.p.).

It is too early to tell whether the second community education campaign has increased support for treaty, but at least one important change has occurred. In advance of the State election in November 2022, the Victorian Liberal Opposition has announced that it is committed to Treaty. This marks a change in policy from the 2018 State election, when the Liberal Party had promised to stop the process (Ilanbey 2022, n.p.).

The national debate

Premier Daniel Andrews addressed the First Peoples’ Assembly in the Victorian Parliament the day after its inaugural sitting in December 2019. The Premier stated that he hoped that Australians would look back on the inaugural meeting of the Assembly and recognise:

that this day started a process that got us to a more decent future, a more honest future, a future that is about shared connection [and] a celebration of our rich history, all 40- 50- 60,000 years of it,

while facing up to the terrible injustices of the past. Giving not just a voice but real power to Aboriginal people and building a better Victoria ([Video](#)).

The Victorian Treaty process is playing a leading role in the national debate on constitutional recognition of Aboriginal and Torres Strait Islander peoples. In the 2017 Uluru Statement from the Heart, Aboriginal and Torres Strait Islander delegates to the First Nations National Constitutional Convention called for an Indigenous representative body to be put in the Constitution and a Makarrata Commission to be established by legislation to supervise a process of agreement-making and truth-telling (Uluru Statement from the Heart 2017, n.p.). The federal government initially dismissed these calls. However, the Labor government under Prime Minister Anthony Albanese has committed to pursuing a referendum to put a First Nations Voice in the Constitution and to implementing the Uluru Statement in full. Funds were allocated in the recent budget to establish an independent Makarrata Commission as the foundation for establishing agreement-making and truth-telling.

The Uluru Statement calls for Voice, Treaty and Truth. Victoria is well on the way to realising these reforms. The First Peoples' Assembly of Victoria, the Yoo-rook Justice Commission, and the ongoing treaty process demonstrates that Aboriginal and Torres Strait Islander calls for recognition and reform are possible. Other States have begun to follow. Nevertheless, despite the important steps so far undertaken in Victoria, challenges remain. The success of the treaty process will ultimately turn on whether any treaties are negotiated.

Conclusions

Aboriginal and Torres Strait Islander peoples have long called on Australian governments to negotiate a treaty that recognises their rights and protects their interests. In 2016, the Victorian government formally committed to entering a Treaty process with First Nations peoples within their territory. Other states and territories have subsequently followed. Led by First Peoples in Victoria, the treaty process is an Australian-first. Working in partnership, the State government and First Peoples' Assembly of Victoria are developing novel institutions through which treaty negotiations can be pursued.

Even so, challenges remain. When negotiations eventually begin it will be seen whether the treaty institutions and processes that have been established will work effectively. Will the State government and First Peoples in Victoria be able to reach agreement on key issues? Cobble Cobble woman from the Barrungam nation in South-West Queensland and Balnaves Chair in Constitutional Law, Professor Megan Davis explains that an Australian treaty will take time and:

won't be like a lot of first contact treaties. There are a lot of things the state will say are settled. We won't agree with them on that. And this is why treaty negotiations take a very, very long time (Allam 2022, n.p.).

Those involved in the process understand the pressure and significance of their work. Professor Eleanor Bourke, the Chair of the Yoo-rook Justice Commission has noted:

We are setting the example ... they are watching us, our brothers and sisters elsewhere. It's even been said to me, 'Don't muck it up' (Ore 2022, n.p.).

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