

Australian Capital Territory

The ACT government is committed to self-determination. We have heard loud and clear that treaty is an important issue for Ngunnawal people. Embarking on a treaty process with government is arguably the ultimate expression of self-determination, and the ACT government and ACT Labor are proud to support that process.¹

Rachel Stephen-Smith, ACT MLA and Minister for Aboriginal and Torres Strait Islander Affairs

What is Treaty?

Australian governments and First Nations communities across the continent have signed many agreements.² These include significant arrangements about land rights, native title, and co-management of resources. But these are not treaties. A treaty is a special kind of agreement.

Treaty involves three elements: recognition of Indigenous people as polities, negotiation, and lastly a settlement of claims that provides for Indigenous self-government.

The conditions are important. A treaty is an instrument that is designed to improve the lives of First Nations communities and aims to secure the foundations for a just relationship between Indigenous peoples and the State.

Although each treaty must meet a minimum set of obligations, every Treaty will differ according to the wishes of the parties. The Ngunnawal, Ngambri and the Ngarigu peoples in the ACT will have their own expectations and requirements that need to be met.

What is the history of Treaty in the ACT?

As the site of the nation's capital, protests for treaty have played a prominent role in the ACT.

In the 1971 case of *Milirrpum v Nabalco*, the Northern Territory Supreme Court ruled that native title 'does not, and never has formed, part of the law of any part of Australia'.³ Although rejecting the Yolngu peoples' rights to land, Justice Blackburn recognise the ethical strength of their claim. In a confidential memorandum to the

¹ Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 4 April 2019, 1430 <<https://www.hansard.act.gov.au/hansard/2019/week04/1430.htm>>.

² Material in this factsheet is drawn from George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020).

³ *Milirrpum v Nabalco* (1971) 17 FLR 141, 245.

Government and Opposition, he noted that the morality of a system of Aboriginal land rights was 'beyond question'.⁴

Prime Minister Billy McMahon rejected Aboriginal demands for land rights. In a speech on Australia Day in 1972, he announced that Aboriginal people would be encouraged to apply for leases. In response to McMahon's dismissive statement, four young Aboriginal men drove from Redfern to Canberra and established a tent embassy on the lawns of Parliament House. This tent embassy served as a symbol of 'unextinguished Indigenous sovereignty'.⁵ It called for land rights, compensation, and treaty.

In 1979, the National Aboriginal Conference (NAC), a national elected body of Aboriginal and Torres Strait Islander representatives, passed a resolution calling for a treaty:

That we, as representatives of the Aboriginal Nation request that a treaty of commitment be executed between the Aboriginal Nation and the Australian Government. The NAC request, as representatives of the Aboriginal people, that the treaty should be negotiated by the National Aboriginal Conference.⁶

Later that year the National Aboriginal Conference reframed their proposal. Believing the government might object to the word 'treaty', they instead replaced it with a Yolngu word, calling for a 'Makarrata'. In 1981, the Senate Standing Committee on Constitutional and Legal Affairs examined the legal questions around negotiating a Makarrata. It reported back in 1983, recommending constitutional change to implement a 'compact'. While this did not occur, First Nations peoples continued to press for legal reform.

In 1988, Prime Minister Bob Hawke promised that a treaty would be negotiated during his term of Parliament. Hawke was unable to fulfil his promise. John Howard, then Opposition Leader, vehemently opposed a treaty, considering it 'an absurd proposition that a nation should make a treaty with some of its own citizens'.⁷

The idea of treaty reappeared briefly in the new millennium. In 2000, the Council for Aboriginal Reconciliation released its final report, recommending the Parliament

put in place a process which will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved.⁸

⁴ Memorandum, from Sir Richard Blackburn, quoted in Frank Brennan, *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015) 137-138.

⁵ George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 35.

⁶ Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981' (2011) 42(3) *Australian Historical Studies* 372, 378.

⁷ John Howard, 'Treaty is a Recipe for Separatism' in Ken Baker (ed), *A Treaty with the Aborigines?* (Institute of Public Affairs, 1988) 6, 6.

⁸ Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament* (2000) 106.

The Commonwealth government was not interested in this recommendation, and the campaign for treaty dissipated. It is only in recent years that State and Territory governments, including the ACT government, have begun to talk treaty.

Where are we up to?

In 2018, the Australian Capital Territory Minister for Aboriginal and Torres Strait Islander Affairs declared the ACT government was open to talking Treaty with the First Nations of the Canberra region. In the 2021-22 Budget the government provided \$317,000 to facilitate a conversation with Traditional Owners about what treaty means in the ACT and what a treaty process will look like. In March 2022, Professor Kerry Arabena was appointed to facilitate those preliminary talks.⁹

In the meantime, focus has centred on developing the [*ACT Aboriginal and Torres Strait Islander Agreement 2019-28*](#). The Agreement sets the long-term direction in Aboriginal and Torres Strait Islander affairs in the ACT and obligates the parties of the agreement to work together with the aim of improving the social, environment, economic and cultural infrastructures within their communities.

The formal signing of the Agreement took place in February 2019 between the Aboriginal and Torres Strait Islander Elected Body, the ACT Government and the ACT Public Service.

The Agreement recognises that the land known as the ACT has been occupied, used and enjoyed since time immemorial by Aboriginal peoples in accordance with their traditions. The Agreement is significant as it strengthens the relationship between First Nations peoples and the ACT government. A strong relationship will be vital for successful treaty talks.

⁹ 'Facilitator for Indigenous Treaty Appointed', *Canberra Weekly*, 17 March 2022
<<https://canberraweekly.com.au/facilitator-for-indigenous-treaty-appointed/>>.