

New South Wales

*Treaty can be about completing us. This is our unfinished business. It is about finally and truly expunging the stain of terra nullius – the belief that this was an empty land free for the taking.*¹

Wiradjuri man and journalist, Stan Grant

*...I think the most important point on this one is for Australians to get used to the idea of treaty. It's well established in many other first world nations with a colonial history. It's not a scary thing. It's an agreement.*²

Shadow Minister for Indigenous Australians, Linda Burney

*A Treaty is within our grasp, but 'Treaty' is just the heading of the document, the fine print will not be taken lightly by government and should [not] be taken lightly by us either. Those words, when finalised will affect all generations yet to come. Our sovereignty, and our very survival, may well hang in the balance.*³

Gamilaroi man and founder and CEO of IndigenousX, Luke Pearson

*NSWALC Councillors participated in the forum that produced the Uluru Statement from the Heart. We seek to fulfil the aims of the statement in NSW by working to secure a process that will culminate in a Treaty or Treaties for Aboriginal people.*⁴

NSWALC Five Year Strategic Plan

¹ Stan Grant, 'Without a Treaty and Constitutional Recognition, No Australian is Truly Free', *Guardian Australia*, 15 June 2016 <<https://www.theguardian.com/commentisfree/2016/jun/15/without-a-treaty-and-constitutional-recognition-no-australian-is-truly-free>>.

² Linda Burney on ABC Radio National, *Drive* (Jonathan Green, 3 June 2019) <<https://www.lindaburney.com.au/media-releases/2019/8/2/transcript-radio-interview-abc-rn-drive-monday-3-june-2019>>.

³ Luke Pearson, 'Can a Treaty Shift the Racist Ideology that Plagues Indigenous Affairs? I Hope So', *IndigenousX*, 20 March 2016 <<https://indigenousx.com.au/can-a-treaty-shift-the-racist-ideology-that-plagues-indigenous-affairs-i-hope-so/>>.

⁴ NSW Aboriginal Land Council Strategic Plan 2018 – 2022 (7 March 2018) <<https://apo.org.au/node/271366>>.

What is Treaty?

Australian governments and First Nations communities across the continent have signed many agreements.⁵ 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.

The British negotiated treaties with the Indigenous peoples they met in North America and Aotearoa New Zealand, but they did not do so on this continent. The lack of treaty meant that Australian law disregarded the rights and interests of First Nations peoples.

What is the history of Treaty in NSW?

New South Wales is Australia's first state. It was here that the original failure to recognise First Nations peoples' sovereignty was made.

In 1770, Captain James Cook and the Endeavour arrived on the lands of the Gweagal people at Kamay. Cook had been instructed to take possession of the continent with the 'consent of the natives'.⁶ Cook did not ask permission to land. Neither did he seek the consent of the people who had cared for country for over 60,000 years, when he later claimed possession of the eastern half of the continent for King George III.

In January 1788, that original failure was repeated when Captain Arthur Phillip and the First Fleet arrived on the lands of the Gadigal people at what became Port Jackson. Captain Phillip also did not ask permission to land. Neither did he ask permission to stay.

The British may have been unwilling to pursue a treaty, but Aboriginal people were energetic in seeking to enforce their rights to their land and resources. For example, Eora warrior Woolarawarre Bennelong engaged with Governor Phillip over several years in an effort to 'establish his clan ... in an enduring reciprocal relationship with the British'.⁷

⁵ Material in this factsheet is drawn from George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020).

⁶ Secret Instructions from Baron Ed Hawke, Sir Piercy Brett and Lord C Spencer to James Cook, 30 July 1768, 1.

⁷ Inga Clendinnen, *Dancing with Strangers: Europeans and Australians at First Contact* (Cambridge University Press, 2005) 272.

In October 1790, Burrumattagal elder Maugaron explained to Governor Phillip that his people were angry at the invasion and settlement of their lands at Parramatta. Grace Karskens records Phillip's response:

instead of attempts at compromise or amelioration one might expect from a governor so committed to peaceful relations, Phillip simply reinforced the detachment at Parramatta with more soldiers.⁸

NSW has the largest population of First Nations peoples in the country. It is not surprising that NSW First Nations communities have been active in the push for treaty and land rights. The Aboriginal Tent Embassy, established in 1972, was created by four young Aboriginal men from Redfern – Michael Anderson, Billy Craigie, Bertie Williams, and Tony Coorey.

Several years later in 1977, over 200 Aboriginal community representatives and individuals met at the Black Theatre in Redfern to discuss land rights. The Conference led to the establishment of the first state-wide community land rights organisation. The non-statutory NSW Aboriginal Land Council was integral in driving the passage of the NSW *Aboriginal Land Rights Act* in 1983. During the Second Reading Speech, Frank Walker, the Minister for Aboriginal Affairs, connected the purpose of the bill to treaty, noting that the premise of the Bill:

rejects the approach of our forebears who denied Aboriginal ownership and failed to follow the example of the United States of America, New Zealand and Canada by entering into treaties with the original inhabitants.⁹

Despite this recognition, the Act did not facilitate nor lead to the negotiation of treaties.

Where are we up to?

The **New South Wales Aboriginal Land Council** (NSWALC) is the State's peak representative body in Aboriginal Affairs, protecting the interests and furthering the aspirations of its members and the broader Aboriginal community. In 2017, NSWALC announced that the negotiation of a treaty was one of the key priorities of its five-year Strategic Plan (2018-2022). NSWALC councillors participated in the First Nations Constitutional Convention that culminated in the historic *Uluru Statement from the Heart*.

NSWALC seeks to 'fulfil the aims of (that) statement in NSW by working to secure a process that will culminate in a Treaty or Treaties for Aboriginal people'. Specifically, NSWALC called for both sides of State politics to progress the signing of a treaty between government and the First Peoples of New South Wales, stating that 'working together towards a Treaty presents an opportunity to heal the past' and a 'practical

⁸ Grace Karskens, 'Philip and the Eora: Governing Race Relations in the Colony of New South Wales' (2016) 5(1) *Sydney Journal* 39, 50.

⁹ Cited in New South Wales Aboriginal Land Council, 'Our History' <<https://alc.org.au/our-history/>>.

way for New South Wales to deepen Aboriginal participation in the economy and the broader community'.¹⁰

In March 2019, just prior to the state election, the major parties released their policies regarding Aboriginal affairs. On the matter of Treaty, the **NSW Liberals and Nationals** suggest Treaty is best introduced at the federal level stating that 'as a Coalition, we have made it pretty clear that we think discussions and considerations around Treaty should happen at a Federal level ... that's something that we've been quite open about'.¹¹

NSW Labor - in addition to pledging a suite of policies investing in education, culture, empowerment and reducing the population of Indigenous people in prison - promised a Treaty process in consultation with Indigenous leaders and Elders. Shadow Minister for Aboriginal Affairs and Labor MP David Harris stated that the party was 'fully committed to that (Treaty) and what we want to do is form a partnership with Aboriginal people to determine what that looks like and how that works'.¹²

The **NSW Greens** announced a 5-Point First Nations Justice package based on 'Treaties, de-incarceration, economic empowerment and care for country ... and grounded in First Nations self-determination'. The plan promised 'Treaties now with each of the First Nations peoples in NSW'.¹³

Since the election, the returned **Coalition Government** have not raised any new interest in pursuing a state-based treaty process.

¹⁰ NSW Aboriginal Land Council Strategic Plan 2018 – 2022 (7 March 2018) <<https://apo.org.au/node/271366>>.

¹¹ Brooke Fryer, 'This is Where the Key Players Stand with their Indigenous Policies Ahead of NSW Election', *NITV* (20 March 2019) <<https://www.sbs.com.au/nitv/article/2019/03/20/where-key-players-stand-their-indigenous-policies-ahead-nsw-election>>.

¹² Brooke Fryer, 'This is Where the Key Players Stand with their Indigenous Policies Ahead of NSW Election', *NITV* (20 March 2019) <<https://www.sbs.com.au/nitv/article/2019/03/20/where-key-players-stand-their-indigenous-policies-ahead-nsw-election>>.

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