

Victoria

Treaties can deliver for all citizens, we can share with all Victorians the oldest living culture in the world... Our language, our stories. We can enrich Victoria and all Victorians by exposing them to Victorian Aboriginal cultures.¹

Victorian Treaty Advancement Commissioner, Jill Gallagher

Treaty is about putting our people in the driver's seat so we can have the freedom and power to make our own decisions for our own communities.²

Co-Chair of the First Peoples' Assembly of Victoria, Aunty Geraldine Atkinson

A treaty forces you to see me as an equal, with a separate identity, history and culture that has existed for tens of thousands of years... The thing we want recognised is our sovereignty.³

Kurnai, Gunditjmara, Wiradjuri and Yorta Yorta writer and activist, Nayuka Gorrie

[W]e are not convinced that you can wait for a national process that has never ever delivered in relation to righting these wrongs.⁴

Special Minister of State, Gavin Jennings

What is Treaty?

Australian governments and First Nations communities across the continent have signed many agreements.⁵ These include significant arrangements about land rights,

¹ Nick Baker, 'Victoria is on the Cusp of Historic Treaty Negotiations with its Indigenous Peoples', *NITV* (10 July 2019)

<<https://www.sbs.com.au/news/victoria-is-on-the-cusp-of-historic-treaty-negotiations-with-its-indigenous-people>>.

² Tara Cosoleto, 'Vic Assembly Makes Moves in Treaty Talks', *Newcastle Herald* (25 March 2022) <<https://www.newcastleherald.com.au/story/7672850/vic-assembly-makes-moves-in-treaty-talks/>>.

³ 'Explainer: What is a Treaty?', *NITV* (22 June 2016) <<https://www.sbs.com.au/nitv/explainer/explainer-what-treaty>>.

⁴ Victoria, Parliamentary Debates, Legislative Council, 21 June 2018, 2893–4 (Gavin Jennings).

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

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.

No formal treaty has ever been signed between Aboriginal and Torres Strait Islander peoples and the British or Australian governments. However, Victoria has become the first state to commence a treaty process with Aboriginal peoples in their jurisdiction.

What is the history of Treaty in Victoria?

Victoria was arguably home to the first attempted treaty between First Nations people and European colonisers. In 1835, grazier John Batman sailed across the Bass Strait to engage with Wurundjeri, Bunurong and Wathaurung peoples near the Yarra River. Batman produced a document that he claimed was signed by tribal elders and amounted to a ‘treaty’ that ceded him over 200,000 hectares of land. In return, Batman gave away blankets, knives, flour, and scissors.

However, NSW Governor (this was before Victoria was made a separate colony) Richard Bourke annulled the ‘treaty’ in a [proclamation](#) that read:

Every ... treaty, bargain and contract with the Aboriginal Natives ... for the possession, title or claim to any Lands ... is void and of no effect against the rights of the Crown.⁶

The Governor did not annul the agreement to protect the Wurundjeri from an unfair contract. He objected to the agreement because he did not believe that First Nations peoples had any legal right to the land. The British Crown claimed to own all of Australia and that only it had the authority to sell or distribute land.

The story of Batman’s Treaty is more complex.⁷ Some historians question whether the document was forged. Even if it was signed by Wurundjeri elders, they could not possibly have understood the agreement. Aside from the fact that none of the signatories spoke a common language, the concept of buying and selling land was entirely alien to the Wurundjeri. At best, they may have thought they were allowing Batman and his party temporary access across their country in exchange for gifts.

Nevertheless, in dealing directly with Aboriginal peoples, Batman implicitly recognised their capacity to exercise authority over their land. It was the first time that colonists – however poorly – attempted to negotiate their presence on this continent. The rejection of the Batman treaty set the precedent for Indigenous land ownership rights.

⁶ Proclamation of Governor Bourke, 10 October 1835.

⁷ See Bain Attwood, *Possession: Batman’s Treaty and the Matter of History* (Miegunyah Press, 2009).

This did not change until the High Court of Australia's decision in *Mabo v Queensland (No 2)*. In *Mabo*, the court rejected the idea that First Nations peoples had no rights to land. In 1993, the Commonwealth Parliament passed the *Native Title Act* with the aim to protect native title 'and to ensure workable, certain, land management'.⁸

Following the passage of the *Native Title Act*, several Aboriginal and Torres Strait Islander groups lodged claims, seeking recognition and protection of their rights and interests in land. One of the first claims across the nation was made by the Yorta Yorta people in February 1994. The Yorta Yorta are an Aboriginal Nation whose traditional land extends across north-eastern Victoria and southern New South Wales, around the junction of the Murray and Goulburn rivers. They sought native title over 1,840 square kilometres of their traditional lands.

Unfortunately for the Yorta Yorta, Australian courts held that their native title had been extinguished.⁹ The case exposed the limits of *Mabo (No 2)* and the *Native Title Act*. For areas of the continent most intensively colonised, the decision made it clear that native title would likely be extinguished. First Nations most in need of land justice would find little through native title.

The case thus spurred the development of broader approaches to land reform, particularly in Victoria. In 2010, the Victorian Parliament passed the *Traditional Owner Settlement Act*. Designed '[to advance reconciliation and promote good relations](#)' between the state and Indigenous Australians,¹⁰ the Act enables Victorian traditional owners to pursue a negotiated agreement directly with the state government outside the native title determination process. In 2013, the [first settlement](#) negotiated between the Dja Dja Wurrung and the state government commenced.

The *Traditional Owner Settlement Act* is important, but it is not a treaty. It does not permit First Nations to exercise sovereignty and self-government. It was not until 2016, that the Victorian government would agree to engage in treaty talks.

Where are we up to?

In February 2016, the Victorian government made a commitment to Aboriginal Victorians to enter into discussions about a treaty or treaties.¹¹ Following an Aboriginal Victoria Forum in May 2016, the Victorian government established an Aboriginal Treaty Working Group to lead a consultation process. The Working Group was comprised entirely of Aboriginal people with a balance between male and female representatives. It was not clan-based but was instead comprised of representatives from Traditional Owners groups, state-wide Aboriginal community organisations and

⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2878 (Paul Keating).

⁹ *Members of the Yorta Yorta Aboriginal Community v State of Victoria* [2002] HCA 58.

¹⁰ *Traditional Owner Settlement Act 2010* (Vic) s 1.

¹¹ Material is drawn from Harry Hobbs and George Williams, 'Treaty-Making in the Australian Federation' (2019) 43(1) *Melbourne University Law Review* 178.

members appointed in their individual capacity by the Minister for Aboriginal Affairs.¹²

Consultations were organised independently from government. Initial consultations took place at 10 locations across Victoria in the second half of 2016. A further six consultations were held in March 2017 to refine the structure and framework of the body. Further community-run conversations run by self-nominated individuals were facilitated by the Working Group secretariat.

A report on these consultations was presented to the Aboriginal Victoria Forum at the end of April 2017. The state government committed to provide \$28.5 million to progress the treaty process in the 2017–18 budget. Funding included provision for an Aboriginal Community Assembly to discuss and provide further advice to the Working Group on the design of a representative body, and a Victorian Treaty Advancement Commission to operationalise the outcomes of the Community Assembly.

All Aboriginal Victorians aged over 18 years were eligible to apply for membership of the Aboriginal Community Assembly. Three Aboriginal Victorians reviewed all applications, and 33 people were eventually selected to ensure accurate demographic representation in the Assembly. In November and December 2017, 31 of these members met over six days to deliberate and provide their advice.

The Victorian Treaty Advancement Commission was empowered to guide the establishment of the representative body, maintain momentum for treaty, consult with Aboriginal Victorians, provide research and advice on the process, and keep all Victorians informed. In December 2017, Jill Gallagher was appointed the Victorian Treaty Advancement Commissioner.

In June 2018 legislation passed to establish a legislative basis for negotiating a treaty with Aboriginal people in the State. Importantly, consistent with the principle and purpose of treaty, the legislation was drafted in partnership with the Victorian Treaty Advancement Commission.

That same month, the ‘Deadly Questions’ community education campaign was launched. An online, in print and billboard campaign, Deadly Questions was designed to raise public awareness and support for treaty. Initial research suggests modest success,¹³ improving support for process.

In late 2018, the state-wide representative body was also established. 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,¹⁴ the body is expected to build its legitimacy over time. The election of the Assembly marked the conclusion of the first phase of the Victorian treaty process.

¹² This was the preferred model following consultations, but it did not obtain unanimous support.

¹³ Aboriginal Victoria, *Advancing the Treaty Process: Annual Report and Plan 2018–19* (2019) 18.

¹⁴ See, generally, Sarah Maddison, Julia Hurst and Dale Wandin, ‘The Mess of Colonialism, the Complexity of Treaty’ in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making 250 Years Later* (Federation Press, 2021) 179.

The second phase aims to establish the elements necessary to support treaty negotiations. This includes: an independent Treaty Authority, to oversee and facilitate negotiations; a treaty negotiation framework, setting out rules and processes; a self-determination fund, to finance Aboriginal Victorians negotiations; and a dispute resolution process, to guide the relationship between the parties

Phase 2 began in August 2020. That month, the First Peoples Assembly and the State government began to work together in partnership to establish a treaty negotiation framework. Since then:

- The Dispute Resolution Process was agreed to in February 2021
- Treaty Conduct protocols agreed in April 2021
- Negotiations on Treaty Negotiation Framework and Treaty Authority commenced in May 2021

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.

The treaty process revealed a desire for truth-telling. In March 2021, the Yoo-rrook Justice Commission was established. Australia’s first comprehensive truth-telling commission, the Yoo-rrook Justice Commission is required to support and promote the advancement of treaties.¹⁵ The Commission has a comprehensive mandate to examine systemic and continuing injustices against Aboriginal Victorians in all areas of social, political, and cultural life. It comprises five commissioners (four Indigenous and one non-Indigenous). The Commissioners report to both the Victorian government and the First Peoples Assembly of Victoria. Public hearings were delayed due to Covid, but finally began in April 2022.

To date, Victoria is the most advanced jurisdiction on the journey towards treaty with its First Nations peoples. While there is a long way to go, many jurisdictions are watching the process unfold in Victoria for guidance.

¹⁵ Yoo-rrook Justice Commission, *Letters Patent* (12 May 2021) 2(f).