

# Treaty in 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.”<sup>1</sup>**

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.”<sup>2</sup>**

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.”<sup>3</sup>**

Gamilaroi Man and Founder and CEO of IndigenousX, Luke Pearson

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<sup>1</sup> [Stan Grant, 'Without a Treaty and Constitutional Recognition, no Australian is truly Free', \*The Guardian\*, June 16, 2016.](#)

<sup>2</sup> [Linda Burney, 'Transcript - National Radio Interview - ABC RN Drive', Linda Burney MP, June 2, 2019.](#)

<sup>3</sup> [Luke Pearson, 'Can a Treaty Shift the Racist Ideology that Plagues Indigenous Affairs? I hope so', IndigenousX, March 2, 2016.](#)

## What is treaty?

Australian governments and First Nations communities across the continent have signed many agreements.<sup>4</sup> 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 First Nations people as polities, negotiation, and lastly a settlement of claims that provides for self-government.

The conditions are important. A treaty is an instrument that is meant to reconcile the past with the present and make for a better future for all. A treaty should also improve the lives of First Nations communities and aim to secure the foundations for a just relationship between First Nations peoples and the state.<sup>5</sup>

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'.<sup>6</sup> Cook did not ask permission to land.

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<sup>4</sup> [Harry Hobbs & Georgina Williams, 'Treaty-Making in the Australian Federation', \*Melbourne University Law Review\*, no. 1 \(2019\): 178.](#)

<sup>5</sup> Harry Hobbs, '[Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia](#)', *The International Journal of Human Rights*, no.1-2, (2018): 176.

<sup>6</sup> [Secret Instructions from Baron Ed Hawke, Sir Piercy Brett and Lord C Spencer to James Cook, 30 July 1768, 1.](#)

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, the 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'.<sup>7</sup>

In October 1790, Burramattagal 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."<sup>8</sup>**

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.<sup>9</sup>

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<sup>7</sup> [Inga Clendinnen, \*Dancing with Strangers: Europeans and Australians at First Contact\* \(England: Cambridge University Press, 2005\).](#)

<sup>8</sup> [Grace Karskens, 'Phillip and the Eora: Governing Race Relations in the Colony of New South Wales', \*Sydney Journal\*, no. 1, \(2017\): 39.](#)

<sup>9</sup> [National Museum Australia, \*Defining Moments: Aboriginal Tent Embassy\*, accessed July 20, 2023.](#)

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.<sup>10</sup> The non-statutory NSW Aboriginal Land Council (NSWALC) 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."<sup>11</sup>**

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

## Where are we up to?

NSW Aboriginal Land Council (ALC) 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).<sup>12</sup> NSWALC councillors participated in the First Nations Constitutional Convention that culminated in the historic *Uluru Statement from the Heart* in 2017.

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<sup>10</sup> [New South Wales Aboriginal Land Council, Our History](#), accessed July 20, 2023.

<sup>11</sup> Ibid.

<sup>12</sup> [Analysis & Policy Observatory, NSW Aboriginal Land Council Strategic Plan 2018 - 2022](#), accessed July 20, 2023.

**“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.”<sup>13</sup>**

Specifically, NSWALC called for both sides of state politics to progress the signing of a treaty between government and First Nations People in New South Wales, stating that ‘working together towards a treaty presents an opportunity to heal the past’ and a ‘practical way for New South Wales to deepen Aboriginal participation in the economy and the broader community’.<sup>14</sup>

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’.<sup>15</sup>

At that time NSW Labor pledged a suite of policies investing in education, culture, empowerment and reduction of the population of First Nations people in prison. They also promised a treaty process in consultation with First Nations leaders and Elders. Then Shadow Minister for Aboriginal Affairs and Labor MP, David Harris, stated that the party was ‘fully committed to [treaty] and what we want to do is form a partnership with Aboriginal people to determine what that looks like and how that works’.<sup>16</sup>

The NSW Greens announced a 5-Point First Nations Justice package based on ‘treaties, de-incarceration, economic empowerment and care for Country... and

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<sup>13</sup> [Analysis & Policy Observatory, NSW Aboriginal Land Council Strategic Plan 2018 - 2022.](#)

<sup>14</sup> Ibid.

<sup>15</sup> [ANTAR, NSW State Election Scorecard 2019](#), accessed September 15, 2022.

<sup>16</sup> Ibid.

grounded in First Nations self-determination'. The plan promised 'treaties now with each of the First Nations Peoples in NSW.'<sup>17</sup>

In 2022, NSWALC released an updated Strategic Plan (2022-2026) and outlined advocating for treaty (or treaties) with First Nations People in NSW as a continued key priority.<sup>18</sup>

In January 2023, the then NSW Labor opposition publicly recommitted to initiating a pathway to treaty with First Nations peoples if elected in the March 2023 state election. Labor Leader Chris Minns promised a preliminary \$5 million to support treaty consultations and partnerships with First Nations peoples.<sup>19</sup> Though the treaty process was paused until after the 2023 Voice Referendum, Mr Minns pledged that a pathway to treaty would occur regardless of the referendum's outcome. Consultation processes would first ask if treaty was wanted by First Nations communities and then focus on First Nations peoples preferences for a suitable treaty framework in NSW.<sup>20</sup> Prior to the 2023 NSW election, the Coalition government re-confirmed their position that treaty or treaties should occur at Federal rather than state level.<sup>21</sup>

NSW Labor won the election and formed government in March 2023, with Premier Chris Minns appointing David Harris as the Minister for Aboriginal Affairs and Treaty.<sup>22</sup> Minister Harris has committed to a bottom-up approach to treaties that will strengthen community engagement in treaty negotiations and outcomes.<sup>23</sup>

The NSW government stated they would instigate a twelve-month consultation process with a diverse range of First Nations people once the 2023 Voice

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<sup>17</sup> Ibid.

<sup>18</sup> [New South Wales Aboriginal Land Council, NSWALC Strategic Plan](#), accessed June 13, 2023

<sup>19</sup> [Rani Hayman, 'NSW Labour Commits to Treaty Consultations with Indigenous Community if Elected', ABC News, January 21, 2023.](#)

<sup>20</sup> [ANTAR, 2023 NSW STATE SCORECARD](#), accessed May 19, 2023.

<sup>21</sup> [Tamsin Rose, 'Not on the Agenda: NSW Minister rules out State Treaty with First Nations peoples', the Guardian, March 9, 2023.](#)

<sup>22</sup> [Jarred Cross, 'David Harris named NSW Minister for Aboriginal Affairs and Treaty in new Labor Government', National Indigenous Times, April 4, 2023.](#)

<sup>23</sup> [Reconciliation NSW, 'Reconciliation NSW Welcomes NSW Labor Party Treaty announcement', January 21, 2023.](#)

Referendum was completed. It was said this process would be managed by a Secretariat and three Treaty Commissioners. Although the government backtracked on beginning this process following the Referendum, this format is now expected to underpin upcoming treaty consultations. A report on the consultation findings will be undertaken by a secondary legislative commission and presented to the NSW Parliament.<sup>24</sup>

In the lead up to the Voice Referendum in 2023, the NSW Labor government continued to state their commitment to commence treaty consultations with First Nations peoples by the end of 2023. However, following the outcome of the Referendum in October 2023, Premier Minns walked back plans for treaty and announced any proposals for treaty in NSW arising from the \$5 million year-long consultation process would be taken to voters at an election before being progressed.<sup>25</sup>

In December 2023, NSW Greens MP and spokesperson for First Nations Justice, Sue Higginson, presented a motion to progress treaty processes in NSW. The motion called on the NSW Government to work with federal parliament to ensure a treaty process is supported beyond the election cycle in response to the Minns' government's backwards step on their election promise. The motion passed the state's Upper House with 20-17 in favour.<sup>26</sup>

In April 2024, Minister Harris opened up the recruitment process for the appointment of three Treaty Commissioners that would lead the consultation process with First Nations communities.<sup>27</sup>

Currently, the NSW Government is expecting the treaty consultations with First Nations communities across the state to commence later in 2024. Minister

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<sup>24</sup> [Jarred Cross, 'New NSW Minister for Aboriginal Affairs and Treaty lays out plans', \*National Indigenous Times\*, April 2, 2023](#)

<sup>25</sup> Tamsin Rose, "[NSW treaty will not progress beyond consultation until after election, Chris Minns says](#)," *The Guardian*, October 23, 2023.

<sup>26</sup> Jarred Cross, "[Motion for treaty action passes NSW upper house](#)," *National Indigenous Times*, December 1, 2023.

<sup>27</sup> Tamsin Rose, "[NSW government will try to avoid acting as a 'white colonial' body in treaty consultation](#)," *The Guardian*, April 10, 2024.

Harris is hopeful the process will build community trust after the negative Referendum outcome.<sup>28</sup>

**To follow the most recent developments on treaty in the state, please refer to ANTAR's [Treaty in NSW timeline](#) on our website.**

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<sup>28</sup> Tamsin Rose, "[NSW government will try to avoid acting as a 'white colonial' body in treaty consultation.](#)" *The Guardian*, April 10, 2024.



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to First Nations Peoples as the traditional owners  
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