

Factsheet

# Treaty in Victoria 2023

# Treaty in 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.”<sup>1</sup>**

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.”<sup>2</sup>**

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.”<sup>3</sup>**

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.”<sup>4</sup>**

Special Minister of State, Gavin Jennings

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<sup>1</sup> Nick Baker, [‘Victoria is on the Cusp of Historic Treaty Negotiations with its Indigenous Peoples’](#), *SBS News*, July 10, 2019, 1.

<sup>2</sup> Tara Cosoleto, [‘Vic Assembly Makes Moves in Treaty Talks’](#), *Newcastle Herald*, March 25, 2022, 1.

<sup>3</sup> NITV, [‘Explainer: What is a Treaty?’](#), *SBS News*, June 22, 2016, 1.

<sup>4</sup> Parliament of Victoria, [‘Victoria, Parliamentary Debates, Legislative Council, 21 June 2018, 2893–4’](#), (Parliament of Victoria, 2018): 2992.

## What is Treaty?

Australian governments and First Nations communities across the continent have signed many agreements.<sup>5</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 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 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.

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 jurisdiction in Australia to commence a Treaty process with Aboriginal peoples in Victoria.

## 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.

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

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.'**<sup>6</sup>

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.<sup>7</sup> 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.

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'.<sup>8</sup>

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<sup>6</sup> 'Museum of Australian Democracy', [Proclamation of Governor Bourke, 10 October 1835](https://www.foundingdocs.gov.au/), accessed July 19, 2023, <https://www.foundingdocs.gov.au/>.

<sup>7</sup> See Bain Attwood, *Possession: Batman's Treaty and the Matter of History* (Miegunyah Press, 2009).

<sup>8</sup> 'Commonwealth, Parliamentary Debates', [House of Representatives, 16 November 1993, 2878](#).

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.<sup>9</sup> The case exposed the limits of *Mabo (No 2)* and the *Native Title Act 1993* (Cth). 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 2010* (Vic). Designed 'to advance reconciliation and promote good relations' between the state and Indigenous Australians,<sup>10</sup> 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 2010* (Vic) 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.

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<sup>9</sup> 'AIATSIS', [Members of the Yorta Yorta Aboriginal Community v State of Victoria \[2002\] HCA 58](#), accessed July 18, 2023.

<sup>10</sup> 'Victoria State Government', [Traditional Owner Settlement Act 2010](#), accessed July 18, 2023.

## 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.<sup>11</sup> 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 composed entirely of Aboriginal people with a balance between male and female representatives. It was not clan-based, but was instead representatives from Traditional Owners groups, state-wide Aboriginal community organisations and members appointed in their individual capacity by the Minister for Aboriginal Affairs.<sup>12</sup>

Consultations were organised independently from the Victorian 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

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<sup>11</sup> Material is drawn from Harry Hobbs and George Williams, '[Treaty-Making in the Australian Federation](#)' *Melbourne University Law Review*, no. 1 (2019): 178.

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

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 the momentum for a 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 was 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,<sup>13</sup> improving support for the 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,<sup>14</sup> 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.

The second phase aimed 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

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<sup>13</sup> Aboriginal Victoria, [Advancing the Treaty Process: Annual Report and Plan 2018-19, \(Victorian State Government, 2019\) 18.](#)

<sup>14</sup> 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.

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.<sup>15</sup> 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.

On 10 June 2022, the Treaty Authority was formally signed at the First Peoples' Assembly of Victoria chamber meeting, with Premier Andrews and Minister for Treaty and First Peoples Gabrielle Williams present.<sup>16</sup> As the 'independent umpire' for Treaty processes in Victoria, the Treaty Authority will be an institution that protects First Nations 'lore, law and cultural authority' in Treaty

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<sup>15</sup> 'Yoo-rrook Justice Commission', [Letters Patent](#) (12 May 2021) 2(f), accessed July 12, 2023.

<sup>16</sup> 'Victorian Government', [Pathway to Treaty](#), accessed July 12, 2023.



negotiations whilst drawing upon international Treaty practices that can be found in New Zealand and Canada.<sup>17</sup>

On 23 August 2022, the Victorian Parliament enacted the Treaty Authority and Other Treaty Elements Act.<sup>18</sup> The Treaty Authority has been designed to avoid litigation in Treaty processes, a characteristic of the Native Title Processes that required First Nations peoples to sue the State government for recognition.<sup>19</sup>

Funding of the Treaty Authority will not be influenced by election cycles, but rather operate independently and be quarantined from the State budget to ensure sustainability.<sup>20</sup>

On 20 October 2022, the Victorian government and First Peoples Assembly of Victoria agreed to the Treaty Negotiation Framework. The Framework outlines who can enter Treaty negotiations, how negotiations should be conducted, and the need for state-wide and local Treaties in order to secure First Nations peoples self-determination.<sup>21</sup> The Victorian government and First Peoples Assembly of Victoria also established a Self-Determination Fund that will support First Nations peoples financial independence from the Victorian state during Treaty negotiations and amount to a minimum of \$65 million over three years, however the Treaty Act provides legislative support for additional funding when necessary.<sup>22</sup>

The Assembly's state-wide voting for its second term commenced on 16 May 2023 and was open until 3 June 2023, providing First Nations peoples an opportunity to elect local representatives to engage in Treaty negotiations with the Victorian state.<sup>23</sup>

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<sup>17</sup> Dechlan Brennan, '[First Peoples' Assembly of Victoria takes key step in Treaty process](#)', *National Indigenous Times*, May 22, 2023, 1.

<sup>18</sup> Victorian Government, '[Pathway to Treaty](#)', accessed July 12, 2023.

<sup>19</sup> Dechlan Brennan, '[First Peoples' Assembly of Victoria takes key step in Treaty process](#)', *National Indigenous Times*, May 22, 2023, 1.

<sup>20</sup> Dechlan Brennan, '[First Peoples' Assembly of Victoria takes key step in Treaty process](#)', *National Indigenous Times*, May 22, 2023, 1.

<sup>21</sup> Victorian Government, '[Pathway to Treaty](#)', accessed July 12, 2023.

<sup>22</sup> Victorian Government, '[About the Agreement](#)', accessed July 12, 2023.

<sup>23</sup> 'The Assembly', '[Voting opens in Treaty Elections in Victoria](#)', accessed July 12, 2023.

The successful candidates will represent the second term of the First Peoples' Assembly in Victoria and engage in community yarning's on Treaty and Truth-telling that will inform the Assembly's decision-making.<sup>24</sup>

In May 2023, the First Peoples' Assembly of Victoria and the Victorian Government announced the delegates, comprised of First Nations and non-Indigenous peoples, who will select the Treaty Authority panel members.<sup>25</sup>

It is anticipated that the Treaty Authority members will be finalised before the end of 2023. The Victorian Government has stated that Treaty negotiations with First Nations peoples may now begin.<sup>26</sup>

To date, Victoria is the most advanced jurisdiction in Australia 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.

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<sup>24</sup> 'Treaty for Victoria', [About the Assembly](#), accessed July 12, 2023.

<sup>25</sup> [Dechlan Brennan, 'First Peoples' Assembly of Victoria takes key step in Treaty process', National Indigenous Times, May 22, 2023, 1.](#)

<sup>26</sup> [Dechlan Brennan, 'First Peoples' Assembly of Victoria takes key step in Treaty process', National Indigenous Times, May 22, 2023, 1.](#)

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**ANTAR is proud to acknowledge and pay our respects  
to First Nations Peoples as the traditional owners  
of the lands on which we work across the continent.**

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