

Factsheet

Treaty in the
Australian Capital Territory
2023

ANTAR



Treaty in the Australian Capital Territory

The Parliamentary and Governing Agreement between the Australian Labor Party ACT Branch and the ACT Greens in the 10th Legislative Assembly for the ACT, which was signed by the respective leaders following the elections in October 2020, commits the Parties to 'Undertake discussions on Treaty with traditional owners, informed by Treaty processes underway around the nation.'

Parliamentary and Governing Agreement, 10th Legislative Assembly for the ACT, October 2020.

What is Treaty?

Australian governments and First Nations communities across the continent have signed many agreements.¹ 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: it must recognise First Nations peoples as a polity, distinct from other citizens of the State on the basis of their status as prior self-governing communities; agreement must be reached by a fair negotiation process conducted in good faith and in a manner respectful of each participant's standing as a polity; and the agreement must settle each party's claims in order to develop an enduring partnership based on mutual recognition and sharing. This must include the State recognising or establishing some form of decision-making and control for the Indigenous people that amounts to some form of self-government.²

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.

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

¹[Harry Hobbs and George Williams, 'Treaty-Making in the Australian Federation', *Melbourne University Law Review*, no. 1 \(2019\): 178.](#)

²[George Williams and Harry Hobbs, *Treaty* \(The Federation Press, 2nd Edition, 2020\), 17.](#)

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*, (better known as the Gove Case) 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 recognised the ethical strength of their claim.

In a confidential memorandum to the 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

³ ['ATNS', *Milirrpum v Nabalco* \(1971\), accessed June 25, 2023.](#)

⁴ ['Archive', *Indigenous Issues in the Law: The Progress and Lessons of the last 40 YEARS*, accessed June 25, 2023.](#)

⁵ ['National Museum of Australia', *Aboriginal Tent Embassy*, accessed June 25, 2023.](#)

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

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.

⁶ [Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981', Australian Historical Studies, no. 3 \(2011\): 42.](#)

⁷ [Ken Baker, *Treaty is a Recipe for Separatism* \(Institute of Public Affairs, 1988\).](#)

⁸ [Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament, accessed July 25, 2023.](#)

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 peoples 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 could 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 with all the relevant First Nations groups is vital for successful Treaty talks.

In 2018, the ACT Government began talks to progress a Ngunnawal Territory Treaty. In March 2022, it established a \$20 million Healing and Reconciliation Fund to help support this process, which included funding the preliminary-to-Treaty Healing Project facilitated by Karabena Consulting.

⁹ [Newstime Media, 'Facilitator for Indigenous Treaty Appointed', Canberra Weekly, March 17, 2022, 1.](#)

In July 2022, Professor Arabena provided her Final Report to the ACT Minister for Aboriginal and Torres Strait Islanders, Rachel Stephen-Smith.¹⁰ The report advised that Ngunnawal peoples, as the traditional owners of the ACT region, should be financially compensated for their loss in connection to family and Country, intergenerational trauma, poverty, and institutionalised racism.¹¹ Establishment of a Ngunnawal Future Fund, a Ngunnawal Treaty Unit, Treaty and Truth-telling programs, and a Voice to Parliament reform were additionally recommended to enhance Treaty processes.¹²

The ACT government's consultation and recognition of only Ngunnawal peoples was followed by considerable controversy due to their failure to acknowledge the Ngambri peoples as traditional owners of the ACT regions. One Ngambri representative, Mr House stated: "The name Canberra is derived from the name of our people on Country, the Ngambri/Kamberri. The Government should embrace truth-telling around that story."¹³

In July 2022, Paul House and other House and Williams family members instigated proceedings in the ACT Supreme Court alleging discrimination by the ACT Government under s.27(2) of the *Human Rights Act 2004* (ACT).

As of 27 April 2023, the Ngambri peoples have officially been acknowledged by the ACT government as traditional custodians of the Canberra region, alongside the Ngunnawal people, after a historical Territory government apology. Under the Human Rights Act, Ngambri community members litigated against the Territory government at the ACT Supreme Court.¹⁴ This resulted in a settlement with the Ngambri (Kamberri) people and a revision of the ACT Government's

¹⁰ [Statement: Receipt of Karabena Consulting Report "Implementation Pathways to achieve Ngunnawal, First Nations Peoples and Australian Capital Territory Government Treaties", ACT Government, accessed July 17, 2023.](#)

¹¹ [Implementation Pathways to achieve Ngunnawal, First Nations Peoples and Australian Capital Territory Government Treaties', Karabena Publishing, accessed July 20, 2023.](#)

¹² [Newstime Media, 'Indigenous Treaty facilitator reports to ACT Government', Canberra Weekly, July 7, 2022.](#)

¹³ [Jordan Perry, 'For two decades the ACT govt only acknowledged the Ngunnawal as Traditional Custodians. That's set to change', SBS, July 23, 2023, 1.](#)

¹⁴ [Charlotte Gore, 'ACT government apologises to Canberra's Ngambri people for failing to recognise them as traditional custodians, ABC News, April 27, 2023.](#)

Indigenous Protocol. Minister Stephen-Smith has stated that this acknowledgement will strengthen the ACT's pathway to Treaty as it allows for stronger healing with First Nations peoples living across the ACT.¹⁵

Central to the Settlement Agreement is the publication of an Interim ACT Indigenous Protocol, which importantly, acknowledges that the Ngambri (Kamberri) have self-determined their identity and their traditional connection to the ACT and surrounds.

Among other things, the Interim Protocol also:

- (a) omits the requirement for a Ngunnawal person is to deliver a Welcome to Country at official events, and it can now be any traditional custodian;
- (b) no longer mandates the form in which an acknowledgement of Country is to be given, and the words suggested within the Interim Protocol are provided as a guide only;
- (c) encourages the public to develop their own style and approach to giving acknowledgment. This means ACT Public Servants (which would include ACT public school teachers), and the greater public, are free to acknowledge both the Ngambri and Ngunnawal as traditional custodians;
- (d) no longer requires an acknowledgment of the Ngunnawal people as the traditional custodians of the land be reflected in all ACT Government programs, services, legislation and activities; and
- (e) requires that all ACT boards and committees which need to provide advice to the ACT government in relation to culture, heritage and connection to land matters have a representative from *any* of the families with traditional connection to the ACT.

The Settlement Agreement also saw Members of the ACT Legislative Assembly Chief Minister Andrew Barr, and Ministers Rachel Stephen-Smith and Shane

¹⁵ [Charlotte Gore, 'ACT government apologises to Canberra's Ngambri people for failing to recognise them as traditional custodians', ABC News, April 27, 2023.](#)

Rattenbury, on behalf of the ACT Government, give a genuine public and written apology to the Ngambri (Kamberri) people for the hurt and distress as a result of the Protocol.

Finally, and perhaps most notably, the Settlement Agreement also commits the ACT Government to undertaking a comprehensive review of the Protocol and ACT legislation as part of a wide-reaching consultation process with First Nations peoples, which reflects the development in the understanding of First Nations' history and cultural connections to land and will set the foundations for the ACT Government's approach to healing, reconciliation and Treaty and support participation in the national Voice process.

The ACT government has announced that a First Nations Eminent Panel for Community Engagement and Healing will oversee processes of Treaty and Truth-telling in the ACT. This panel will develop Treaty and truth-telling pathways through advising culturally appropriate governance, mechanisms, and co-design of Voice, Treaty, and Truth.¹⁶ It is anticipated that the eminent panel will be established by the end of 2023, with funding allocated for at least two years. How the process unfolds from here remains to be seen.

Declaration: Dr Ed Wensing provided an Expert Witness Statement to the ACT Supreme Court in *House & House v Australian Capital Territory*. As the matter was settled by mediation, his Statement was not contested in the Court.

¹⁶ ['Aboriginal and Torres Strait Islander Eminent Panel for Community Engagement and Healing', ACT Government, accessed July 19, 2023.](#)

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With thanks:

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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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