

Factsheet

What is Treaty?
2022

ANTAR



What is Treaty?

“Our Aboriginal and Torres Strait Islander tribes were the first sovereign Nations of the Australian continent and its adjacent islands and possessed it under our own laws and customs... With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood ... We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.”¹

Uluru Statement from the Heart

“We as a nation must come face to face with our dark and traumatic history. We must confront the impact of colonisation and begin the process of acknowledgment, recognition and healing... Anyone who has listened to me talk publicly knows that I am concerned with what I call ‘unfinished business’. A Treaty is a good place to start with addressing this unfinished business.”²

NT Treaty Commissioner Mick Dodson

¹ [Uluru Statement from the Heart](#), Uluru, 26 May 2017

² [‘Dodson Named NT Treaty Commissioner’, SBS News](#)

“What Aboriginal people ask is that the modern world now makes the sacrifices necessary to give us a real future. To relax its grip on us. To let us breathe, to let us be free of the determined control exerted on us to make us like you... recognise us for who we are, and not who you want us to be. Let us be who we are – Aboriginal people in a modern world – and be proud of us. Acknowledge that we have survived the worst that the past had thrown at us, and we are here with our songs, our ceremonies, our land, our language and our people – our full identity. What a gift this is that we can give you, if you choose to accept us in a meaningful way.”³

Galarrwuy Yunupingu

“We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights ... And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom.”⁴

The Barunga Statement

³ [Galarrwuy Yunupingu, Rom Watangu](#) (July 2016) The Monthly

⁴ [The Barunga Statement \(1988\).](#)

What is Treaty?

Treaties are accepted around the world as a means of resolving differences between Indigenous peoples and those who have colonised their lands.⁵ They have been struck in the United States and Aotearoa New Zealand and are still being negotiated in Canada today. In contrast, no formal treaty has ever been signed between Aboriginal and Torres Strait Islander peoples and the British or Australian governments.

There are lots of different names for treaty. Sometimes a treaty is called a Settlement, Agreement, Pact, Accord, Covenant, Compact or Makarrata. Regardless of name, they all bind parties together in agreement, outline their rights and obligations, and define the 'rules' of their relationship.

Australian governments and First Nations communities across the continent have signed many agreements. 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. A treaty must meet three conditions.

1. A treaty acknowledges that First Nations peoples were prior owners and occupiers of the land now claimed by the state. It recognises that the state is responsible for the deep injustices done to First Nations peoples and commits through treaty to making amends for this history.
2. A treaty is a political agreement that must be reached by a fair negotiation process. Negotiation is different from consultation. Consultation can be understood as a one-way process. Negotiation involves parties coming to the table as equals working towards a mutually beneficial resolution.

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

3. A treaty contains more than symbolic recognition. A treaty recognises that First Nations peoples never ceded their sovereignty and creates space for First Nations communities to exercise their sovereignty through a form of self-government. It will also contain agreements on a range of other matters, such as land rights, truth-telling, and compensation.

As these conditions suggest, a treaty is not just an ordinary legal agreement. It 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 idea of relationship is important. Treaty is intended to settle outstanding claims, but it is not an endpoint. A new political relationship based on justice and equality is not achieved simply by signing a treaty. A treaty is a marriage, not a divorce.⁶ And like all marriages, it is capable of change and evolution.

Treaties elsewhere?

Aotearoa - New Zealand

The Treaty of Waitangi – Te Tiriti o Waitangi⁷ – is considered one of the founding documents of Aotearoa New Zealand. The Treaty was signed on 6 February 1840 by Māori chiefs and representatives of the British Crown. Initially drafted in English, the Treaty was translated into te reo Māori, and both versions are considered authoritative. However, although the Treaty consists of only three short articles, slightly different wording between the English and Māori versions have caused some contention.

For many years, New Zealand authorities considered the Treaty a 'legal nullity'.⁸ It is only since the 1950s and 1960s, when Māori people began to use it as a

⁶ Cited in Carole Blackburn, '[Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada](#)' (2007) 13(3) Journal of the Royal Anthropological Institute 621, 627.

⁷ [The Treaty of Waitangi](#)

⁸ [Wi Parata v The Bishop of Wellington \(1877\) 3 NZ Jur \(NS\) SC 72, 78](#)

platform for their struggle for sovereignty and land rights that the Treaty took on a more central role in public life. In 1975, the New Zealand government established the Waitangi Tribunal.⁹ A permanent commission of inquiry, the Tribunal interprets the treaty, investigates alleged breaches, and recommends redress.

Canada

In Canada, treaties provide a framework for Indigenous and non-Indigenous peoples to share land, resources, and power, whilst respecting and maintaining their differences. Treaties in Canada are constitutionally recognised agreements between Indigenous peoples, the Crown (the British and later, Canadian governments) and provinces and territories. These treaties outline rights, obligations, and benefits for each party.¹⁰ Between 1701 and 1923, 70 treaties were negotiated on what is now Canadian territory. Since 1973, 25 modern treaties have also been negotiated, with many more in progress.

United States of America

Treaties have defined the relationship between Native American Nations and the United States of America from the time of British settlement. Prior to independence, from 1533 to 1789, the administrators of British colonies undertook treaties with the Native American tribes as equal sovereigns, according them a status equivalent to that of the colonial governments. The first treaty between the US and an American First Nation was the 1788 Treaty with the Delawares.¹¹ However, in 1871, nearly 100 years of treaty making ended when the House of Representatives ceased recognition of American First Nations as independent sovereigns with whom the US could treat. Of course, this change in terminology did not prevent the US government from making agreements with Native American nations, which they continue to do today.

⁹ [The Waitangi Tribunal](#)

¹⁰ [Government of Canada, Treaties and Agreements](#)

¹¹ [Treaty With the Delawares \(1778\)](#)

What is the history of Treaty in Australia?

When the British first arrived on the Australian continent, there were an estimated 750,000 – 1,000,000 Aboriginal and Torres Strait Islander peoples from over 400 separate nations and as many language groups. While the British negotiated treaties with the Indigenous peoples they met in North America and Aotearoa New Zealand, they did not do so on this continent.

In 1770, Captain James Cook was told to ‘take possession of Convenient Situations in the Country in the name of the King of Great Britain’, ‘with the consent of the Natives’.¹² Cook did not do so. Although he met First Nations peoples’ he made no attempt to treat with them. Neither did Governor Arthur Philip when the First Fleet landed in 1788. The lack of treaty meant that Australian law disregarded the rights and interests of First Nations peoples.

First Nations peoples and communities fiercely resisted colonial intrusion to protect their country. Their strength led some British authorities to wonder why no treaty was signed. In 1832, for example, George Arthur, the Governor of Van Diemen’s Land (now Tasmania) noted that it was ‘a fatal error ... that a treaty was not entered into with the natives’. He recommended a treaty be signed before a colony was set up in South Australia.¹³

Not everyone agreed. In 1835, John Batman approached the Wurundjeri peoples with a contract to ‘purchase’ land around what is now Melbourne in Port Phillip Bay. Batman made a tenuous claim over 200,000 hectares of the Kulin nation’s land. However, Governor Bourke annulled the ‘treaty’ in a proclamation that read:

¹² [Secret Instructions from Baron Ed Hawke, Sir Piercy Brett and Lord C. Spencer to James Cook](#), 30 July 1768, 1.

¹³ Lyndall Ryan, [Tasmanian Aborigines: A History since 1803](#) (Allen & Unwin, 2012) 115.

“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.”¹⁴

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.

First Nations peoples continued to agitate for their interests. Sometimes they petitioned the colonial authorities seeking fair treatment. In 1846, Aboriginal people on Flinders Island in the Bass Strait petitioned Queen Victoria. The petitioners had left Van Diemen's Land after reaching an agreement with George Augustus Robinson, a government official.¹⁵ Part of the petition read:

‘Your Petitioners humbly state to Y[our] M[ajesty] that Mr. Robinson made for us & with Col. Arthur an agreement which we have not lost from our minds since & we have made our part of it good.’¹⁶

Historian Henry Reynolds has argued that this agreement amounted to a verbal ‘treaty’ with the Crown.¹⁷ Whether that was the case, the Crown did not honour their agreement.

During the protection era and after Federation, colonial and Australian governments continued to discriminate against First Nations peoples. For this reason, much First Nations advocacy and activism focused on securing citizenship rights, such as the right to vote, rather than treaty. For example, on Australian Day in 1938, the Aborigines Progressive Association and the Australian Aborigines League declared a ‘Day of Mourning’. They called for

¹⁴ [Governor Bourke's Proclamation 1835](#) (UK)

¹⁵ [Petition to Her Majesty Queen Victoria, 17 February 1846](#).

¹⁶ Cited in Bain Attwood and Andrew Markus, [The Struggle for Aboriginal Rights. A Documentary History](#) (Allen & Unwin, 1999) 38.

¹⁷ Henry Reynolds, [Fate of a Free People](#) (Penguin, revised edn 2004).

‘...a new policy which will raise our people TO FULL CITIZEN STATUS and EQUALITY WITHIN THE COMMUNITY.’¹⁸

It was not until after the 1967 referendum that calls for treaty became more pronounced. The first major call came in 1969, when Jack Davis, the President of the Western Australian Aboriginal Association proposed the negotiation of a treaty to recognise Aboriginal peoples as the original owners of the continent. As Davis explained, without a treaty Australia could be ‘charged with unlawful possession of the continent’.¹⁹

Treaty talk was prominent during the 1970s and 1980s. Treaty was a key aspiration of the 1972 Aboriginal Tent Embassy and 1972 Larrakia Petition. 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 requests, as representatives of the Aboriginal people, that the treaty should be negotiated by the National Aboriginal Conference.’²⁰

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.

¹⁸ [The 1938 Day of Mourning](#)

¹⁹ Julie Fenley, [‘The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979-1981’](#) (2011) 42(3) Australian Historical Studies 372, 377.

²⁰ Ibid

In 1988, Galarrwuy Yunupingu and Wenten Rubuntja presented the Barunga Statement to Prime Minister Bob Hawke.²¹ The Barunga Statement was a declaration of the aspirations of 'the Indigenous owners and occupiers of Australia' and a request to the Government for recognition, and the granting of full civil, economic, social and cultural rights. It also called on the Parliament 'to negotiate with us a treaty'. Hawke responded with a promise that a treaty would be negotiated during his term of Parliament.²² Hawke was unable to fulfil his promise.

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.'²³

The Commonwealth government was not interested in this recommendation, and the campaign for treaty dissipated. It is only in recent years that governments around Australia have begun to talk treaty.

Where are we up to?

The Uluru Statement from the Heart²⁴ is the most recent call for self-determination from Australia's First Nations peoples. The bipartisan Referendum Council convened the First Nations National Constitutional Convention at Uluru – Australia's 'red heart' – to discuss constitutional reform and recognition in May 2017. This historic event culminated in the Uluru Statement from the Heart.

²¹ [The Barunga Statement \(1988\)](#).

²² Prime Minister Robert Hawke, [Speech, Barunga Sports and Cultural Festival, Northern Territory](#), 12 June (1988).

²³ Council for Aboriginal Reconciliation, [Reconciliation: Australia's Challenge: Final Report of the Council for Aboriginal Reconciliation to the Prime Minister and the Commonwealth Parliament](#) (2000) 106.

²⁴ [The Uluru Statement from the Heart](#)

The Uluru Statement calls for a First Nations Voice to be put in the Constitution with the power to advise the Australian Parliament on laws that affect Indigenous peoples, and a Makarrata Commission to oversee a process of agreement making and truth-telling.

Makarrata is a Yolngu word that can be understood as meaning ‘the coming together after a struggle’. It is through Makarrata that Aboriginal and Torres Strait Islander leaders from across Australia envisaged ‘a fair and truthful relationship with the people of Australia’ and a brighter future for First Nations based on the principles of justice and self-determination. Through Makarrata, it is hoped that Australia can finally settle its differences, renew its conception of itself, and reconcile the relationship between First Nations and non-Indigenous Australians.

The Turnbull and Morrison’s governments dismissed the idea of a Makarrata Commission. Not all Australian governments have done so.

Victoria

Victoria was the first jurisdiction to commit to a treaty process. In February 2016, the Victorian government made a pledge to Aboriginal Victorians to enter discussions about a treaty or treaties. The process has been deliberately slow to build awareness and support for treaty among Indigenous and non-Indigenous communities, as well as government. Key events are set out below (for more detail please see our factsheet on the Victorian treaty process):

- In June 2018, Australia’s first treaty Act was passed in the Victorian Parliament. The Advancing the Treaty Process with Aboriginal Victorians provides a clear basis for negotiating a treaty with Aboriginal people in the State.
- Later that year, 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. The First Peoples Assembly of Victoria is currently working with the State government to

develop a treaty negotiation framework. The framework will set out the rules and processes for individual First Nations to negotiate their own treaty.

- In March 2021, the Yoorrook Justice Commission was established. Australia's first comprehensive truth-telling commission, the Yoorrook Justice Commission is expected to support and promote the advancement of treaty or treaties.

Northern Territory

The treaty process in the Northern Territory began in earnest in 2018. In April 2018, the four Aboriginal Land Councils and the Northern Territory government agreed to establish a working group to develop a Memorandum of Understanding about how a treaty between the government and the NT's Aboriginal people will progress. The Memorandum of Understanding was signed in June 2018 at the culturally significant Barunga Festival. As part of this agreement, the NT government recognised 'that the First Nation peoples of the NT never ceded sovereignty of their lands, seas or waters'.²⁵

In February 2019, Mick Dodson was appointed the inaugural Treaty Commissioner. After leading a 12-month long consultation process, the Commissioner released a Discussion Paper to the government. A final report was delivered in March 2022. We are now waiting on the government's response.

Queensland

The Queensland government commenced a treaty process in 2019. In July 2019, the government established a bipartisan Eminent Panel of Indigenous and non-Indigenous leaders and a Treaty Working Group to advise on a treaty process. After a period of consultation, the Eminent Panel submitted its recommendations to the government. In February 2021, the Qld government

²⁵ [The Barunga Agreement](#)

established a Treaty Advancement Committee to undertake further consultations to assess support for the process. It submitted a final report to government in October 2021. We are now waiting for a formal response.

South Australia

The South Australian government first announced its support for treaty in December 2016. In February 2017, Dr Roger Thomas was appointed independent Treaty Commissioner and empowered to lead consultations across the State. In July 2017, Dr Thomas released his final report, proposing a framework for treaty negotiations. The government adopted Dr Thomas' framework and in September 2017, the first negotiations in Australia between a government and an Indigenous nation explicitly understood as treaty discussions commenced between South Australia and the Ngarrindjeri nation. These negotiations were abandoned by the incoming Liberal government in June 2018. However, in March 2022, the South Australian Labor party secured government at the state election. Incoming Premier Peter Malinauskas confirmed that the treaty process would be restarted.²⁶

Australian Capital Territory

The Australian Capital Territory is also exploring treaty. In February 2018, the ACT Government declared that it was open to talking treaty. 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 will look like. In March 2022, Professor Kerry Arabena was appointed to facilitate those preliminary talks.

Tasmania

The most recent jurisdiction to commit to exploring a treaty process is Tasmania. In June 2021, the Tasmanian government appointed former Governor Kate Warner and University of Tasmania Law School Dean Tim McCormack to

²⁶ [What SA's new govt wants to achieve in Aboriginal affairs](#)

consult Aboriginal Territorians on treaty. The primary objective of these consultations was to learn from Tasmanian Aboriginal people their thoughts on and aspirations for treaty, truth-telling and reconciliation and to identify possible pathways towards these goals. After four months and more than 100 meetings, a report was delivered in November 2021. It recommended Tasmania establish a truth-telling commission and commit to a treaty process, among other things.

In March 2022, the Premier announced that his government 'will establish an Aboriginal Advisory body that can, through co-design, work with the Government to establish' a truth-telling process and a treaty process.²⁷ The government has allocated up to \$500,000 to support this process.

Western Australia

Western Australia has not committed to a treaty process. However, a 2015 native title settlement has been described as 'Australia's First Treaty'.²⁸ The Noongar Settlement is the largest native title settlement in Australian history. Encompassing approximately 200,000 square kilometres of land and affecting an estimated 30,000 Noongar people, the Settlement resolves native title claims for perpetuity in exchange for a package of benefits including recognition through an Act of Parliament, a perpetual Noongar Boodja Trust, Land Access to certain crown lands for customary activities, Co-operative and Joint management of National Parks and the South West Conservation Estate, and funds and land for the development of a Noongar Cultural Centre. As Glen Kelly, CEO of the South West Aboriginal Land and Sea Council and Noongar lead negotiator, has explained, The Settlement 'will have a massive and revitalising effect on Noongar people and culture'.²⁹ In 2021, the Settlement finally came into effect.

²⁷ [Next steps on pathway to Truth-Telling and Treaty](#)

²⁸ Harry Hobbs, 'The Noongar Settlement: Australia's First Treaty' (2018)

²⁹ [Claimants ink \\$1.3 billion Western Australia Noongar native title deal](#) (2015)

New South Wales

New South Wales has made no moves toward treaty. In January 2018, the former New South Wales Opposition Leader stated Labor would negotiate a Treaty recognising traditional Indigenous ownership of NSW if elected to government in 2019. However, the current NSW Government, to date, has not expressed any intentions towards advancing the Treaty process.

© ANTAR 2022

Email: hello@antar.org.au

Phone: 02 9280 0060

PO Box 77

Strawberry Hills NSW 2012

With thanks:

This background report was authored by
Mr Paul Wright, ANTAR National Director,
Ms Luckylyn Wallace, ANTAR Intern.

This report was revised by
Dr Harry Hobbs (Research Consultant) in 2022.

**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.**

For more information visit:

ANTAR.ORG.AU