The research paper provides a framework for analysing Australia's commitments to its Indigenous Treaty obligations, as the only British settler state that has not made treaties with its Traditional Owners. It is a timely paper, for the purpose of evaluating the Victorian Governments Treaty proposal now on the table, 2016-2019. Discussions are taking place on the creation of a structure that will represent the Victorian Indigenous population on a Treaty proposal, in response to the denial of a formal Treaty at Colonisation. Whether the rhetoric of a Treaty offered by the Government and the process it has created will deliver an acceptable Indigenous chosen structure that includes broader traditional based rights, in accordance with the tradition of reparative justice is now being debated at the Government and community level. I will return to this important question after examining the National and International context of Indigenous Land Justice and Treaty rights.

The paper developed from an overseas study program I completed in North America between July and October 1981. At the time I was fortunate to receive a Commonwealth Overseas Study Award which allowed me travel to North America and return to Australia via London where I did some follow up research on British Colonial policy and practice in Australia in the 18th Century. Of particular importance was the Instructions given to Captain Cook by the British Government to take possession of lands that may be found in the great Southern Ocean. Explicit in Cook’s ‘secret Instructions’ from British Admiralty was to first get the ‘Consent’ of the Traditional Owners before possession could take place-see Secret Instructions to Capt James Cook: National Library, Australia.
The main focus of my visit was to examine Indian Studies programs and particularly those run by American Indian communities on reservations and in schools and Universities. The aim was to learn how they were established and how the concept of Indian Studies was being taught by Indian people drawing on their knowledge, pedagogy of teaching and world view of their history, culture, and human rights. It was hoped that an appropriate model of Indigenous Education taught and run by American Indigenous scholars would provide a guiding framework for Indigenous Studies programs in Australia—see Booklet: *A Look at North American Indian History Programs: Some ideas for Aboriginal Programs in Australia*, Australian Government Publishers Canberra, 1982.

Coming from Australia as an Indigenous and Yorta Yorta visitor, I witnessed how the question of Sovereignty, Land rights and Treaties remained significant issues for local and regional communities in North America. The need to gain a more informed position of the broader International implications of our story was a big challenge. It certainly required a lateral and deep listening approach to the substance of the matter.

The research for this paper is sourced in the foundational history of American Indian and western European relations. It serves as a background to the broader question of Treaty rights as a precondition for Sovereignty, Land Rights, Self Determination and political autonomy within the imposed Settler State. I also examine whether the principle of Self Determination should be a precursor to other rights based issues in accordance with the United Nations Declaration on the right of Self Determination, embodied in Article I. of the Charter of the UN, and Article. 3. of the UN Declaration on the Rights of Indigenous Peoples (DRIP). These are the standard setting instruments of fundamental Human Rights that apply equally to all human societies further encoded into the Indigenous Peoples Declaration in 2007. The DRIP was officially adopted by the Australian Government at a ceremony in Parliament House, in 2009, reversing the decision of the previous Liberal/National Party Government who voted against it in 2007—see *Australia Adopts DRIP, 2009.*
Much of the research for the paper comes from evidence of Treaties in court cases, in North American Indian cultural centers and museums, Indian studies courses and in tribal history books. The journey of enquiry took me to the background of Treaty making in other British colonies with the relevant question in mind: if Treaties and prior occupation and ownership were recognised in these Indigenous territories, why didn’t the British apply the same principles, as they were clearly instructed to follow, in Indigenous Australia?

To explore this complex question more deeply, I will summarise our present understanding of the background to Treaty making in North America and New Zealand and hopefully throw some light on the issues raised, including the attempts of Treaty making in Australia.

The Land Rights question in Canada and the U.S.A

In approaching the rather complex history of land and treaty rights in North America, the fundamental question of whether or not my people had made Treaties with the Colonial overlords was the relevant starting point: No? Why not? Treaties were made with Traditional Owners in Canada and the U.S.A., and have remained the cornerstone of Indigenous rights in both countries. Not that those Treaties were the absolute resolution of the conflict over land and reparation for land loss. The reality is the opposite in that Treaties were signed and indeed, many were and continue to be broken. The narrative of the ‘Trail of Broken Treaties’ that stretched across the path of the treaty making process, reminds us of many broken promises - see ‘The Trail of Broken Treaties’, a cross-country protest, that was staged in the autumn of 1972 in the United States by American Indian and First Nations peoples. Treaties were certainly not the be all and end all, but they were a significant step in treating with the Traditional owners in a fair and just and manner, as the prior occupants and owners.
Recognition of Indian occupancy in North America

The issue of Treaties and recognition of Indians as the prior occupants of their tribal lands goes back to the original principles set down by international law in the fifteenth and sixteenth centuries.

The foundation of this law originated in Spain and was later adopted by the major colonising powers of Europe. The British applied these principles in their settlement of Canada, and subsequently the United States Government applied them in the United States.

European Colonisation of the Americas.

Wherever western European colonisation touched, during the infamous discoveries and subsequent invasion of the Americas, they were confronted by the Traditional Owners of the soil. From the southern part of South America to the northern regions of North America, the land was occupied and owned by peoples erroneously named Indians, by Columbus who believed he had reached Asia in his epic journey of discovery in 1492. A long bow for Columbus to draw but one that remained in the history books for the next two centuries or more. Such an impost in nomenclature of course was, strongly challenged by the Traditional Owners who choose to identify with their own local tribal, clan, territorial, and sovereign group.

Prior to the invasion of Europeans into Indian territories, Indian nations recognised the sovereignty of one another and treated each other as separate independent nations. The same recognition was given by the colonial powers, who engaged in Treaty agreements that guaranteed the Traditional owners ‘free and undisturbed rights’ to their lands.

In North America, recognition of Indian sovereignty and land rights was first legally set down by the Royal Proclamation signed into law by King George III of England in 1763. Nonetheless, there were certain principles of law and morality established before then (Quote from British Columbia Provincial Museum, B.C., Canada, 1982).
International principles

At the time of the colonisation of North America, there was an accepted morality in relation to Indigenous sovereignty and land ownership. This morality was expressed, for example, in the sixteenth century, by the Spanish jurist Francisco’s de Victoria, who is regarded as one of the founders of international law, or the 'Law of Nations'.

Speaking of American Indians, he said that 'the aborigines undoubtedly had true dominion in both public and private matters just like Christians, and that neither their princes nor private persons could be despoiled of their property on the grounds of their not being true owners'. To do so, said de Victoria, would be 'theft and robbery no less than if it were done to Christians'. (Chartier, 1977:20). This fair and balanced application of justice and equality before the law became the central tenants of the Declaration of Human Rights and United Nations Conventions on the Elimination of Racial Discrimination after the second world war.

The arguments of de Victoria, founded on principles of equality, morality, and recognition of prior ownership, were stronger than those of his successors who chose to deal with international relations on the basis of the constructed divide between Christian and non-Christian beliefs. They held the rather misguided belief that Christian States had a God-given right to take the lands and possessions from the people who they regarded as infidels-somebody with no religious belief. This rather erroneous ideology was used to concoct the belief that infidel nations were non-States, that their rulers lacked true jurisdiction, and that their lands were open to be taken without the takers feeling guilty. On the question of land rights, one can see how deep the racial ideology was planted in the colonial mindset and the way it was used to prop up the notion of superiority and white privilege. This was thoroughly entrenched in the human psyche of 16-17th Century Europe. Arguably it was more potent as it became official policy, further justified by land hungry settlers who had vested interests in appropriating Indigenous lands. From this analysis one can better understand how formidable it was by the time it reached Indigenous Australia in
the 18th Century driven by the same mindset and motivations.

The influence of de Victoria on the practice of colonization and justice in the New World is summarised by Indian historians Rupert Costo and Jeanette Henry:

In 1532 the King of Spain directed Franciscus de Victoria to advise him on the rights of Spain in the New World. De Victoria asserted that the aborigines were the true owners of the land. If Spain was to acquire land in the New World, it must be done by treaty with the sovereign Indian nations. The findings of de Victoria were accepted by European countries, and Treaties with the natives were negotiated on the basis of international law (Costo & Henry, 1977:6).

Victoria is consistent in his reasoning and application of the law and the question of morality is a foundational principle of its application. This is further articulated and reinforced by others of authority in Europe who recognised that the original inhabitants of the New World had rights.

'Pope Paul III issued a Papal bull (official statement) in 1537 which stated that] Indians are truly men, they should freely and legitimately enjoy their liberty and the possession of their property'. At this point in the history we have a clear framework of rights based law in relation to the Indigenous world (Indian Lands and Canada’s responsibility-the Saskatchewan position Province of Saskatchewan, p.2.).

‘Aborigines were undoubtedly true owners of the land; free to enjoy their liberty and possession of property and’ ‘if land was to be acquired by the Colonisers in the new country it had to be done by treaty with the sovereign Indian nations’ (Costo&Henry, 1977:6).

It remained to be seen however just how these principles would be applied in the new colonies. The letter of the law and moral values was one thing, and the question of how they would be equally applied in the new colonies was the other?

Doctrine of discovery

As interest in the New World became stronger, the major colonising powers of
Western Europe - Spanish, Dutch, French and English - entered into an arrangement laid down by the Law of Nations called the 'Doctrine of Discovery'. It implied that new territories and their inhabitants became the subject of the colonising power with the qualification that; the inhabitants are in possession of the land, however, until such time that the invading nation negotiated with them to extinguish their title by Treaties. The term ‘inhabitants being in possession’ and the underlying legal tenant of physical occupation of the land as a basis for negotiating prior rights, is an important legal construct that will be returned to in the Australian story.

Land rights in Canada

In Canada, the principles of international law were enacted by the British in the Royal Proclamation of 1763.

The Royal Proclamation was issued by King George III of England, following the Treaty of Paris, in which France ceded all her rights to sovereignty, property and possession in Canada to Great Britain. The Proclamation, which has the force of a statute in Canada, established the government of the territories acquired from France, and announced a new policy with respect to Indians and their lands.

Although it was a new policy, it was described by legal opinion in the 1960s as establishing a charter of Indian rights that did not create new rights but, rather, affirmed old rights. The Proclamation laid the founding principles of Indian rights which were incorporated into Canada's treaty system.

Principles of Indian rights:

1. The Indian allies are not to be disturbed in the possession of their hunting grounds.

2. The hunting grounds that have not been ceded to or purchased by the Crown are reserved for the Indians.

3. No patents should be issued for lands beyond the bounds of the newly created colonies.
4. Private individuals may not purchase the reserved lands, and private persons settled on the lands must leave them.

5. Lands may only be purchased from the Indians by the King at a public meeting held for that purpose (Opekokek, 1980:50).

On the basis of these principles, a procedure for treaty making was developed.

Treaties in Canada

Between 1794 and 1929 the Indian nations in Canada conducted negotiations with the Crown, resulting in the signing of more than twenty major international Treaties. Adhesions were signed up to 1956, and have the same status as the original Treaties (Opekokek, 1980:9).

A similar story can be told of the Indians in what became the United States, following the American War of Independence, 1776.

One of the first acts of the American Congress, before it had even adopted a Constitution, was to pass the North Ist Ordinance of 1778 which said, concerning the Indians, their lands and property shall never be taken from them ‘without their consent’ (Pitcock, 1977:190).

Important to note here the question of ‘consent’ and Cook’s Charter relating to his journey into Indigenous lands in the great southern ocean. This becomes a reoccurring theme in the analysis of the Australian story.

Treaties in the United States

The United States made 394 Treaties with Indian nations and tribes between the years 1778 and 1868. Congress ended treaty making with the Indians through the device of the Indian Appropriations Act in 1871. But the Federal Government
continued to deal with Indian tribes as recognised governments. The process then became one in which agreements were signed and had to be ratified by both houses of Congress (Costo & Henry, 1977: 9).

During the treaty-making period (1778-1871), 'the U.S. maintained a policy of extinguishing native title by negotiating treaty purchases. More than five million square kilometers, 90 per cent of U.S. territory, were purchased under the Treaties mentioned at a cost of $800,000,000 in cash and services' (Cohen, 1960:304).

What is a treaty?

Its meaning in Western legal discourse according to Black's law dictionary is that:

A treaty is an agreement, league or contract between two or more nations or sovereigns, formally signed by properly authorised commissioners and solemnly ratified by the sovereigns as the supreme power of each State. A treaty is an agreement which is also binding in international law.

Justice Marshall, of the United States, in the 1832 decision Worchester v. Georgia, critiques the meaning of Treaties. He claims that international law was invoked by Europeans when entering into Treaties with the Indians. Marshall found that the:

‘Words treaty and nation are words of our own language, selected in our own diplomatic and legislative proceedings, by ourselves, having each a definite and understood meaning. I have applied them to Indians as I have applied them to other nations of the earth; they are applied to all in the same sense’ (Opekokew, 1980:9).

The Indian nations entered into the Treaties to establish peace and friendship with the colonists and to obtain guarantees in exchange for the cession of certain areas of Indian lands.
What was in the Treaties?

A typical treaty both in the United States and Canada included guarantees such as the following:

1. Reserve lands were to be established within the ceded territories for the use of the nations signing the Treaties.

2. Cash payments were paid to the chiefs and their people who were parties to the treaty, and thereafter annuity payments were to be paid to them and their descendants.

3. Farming implements and supplies were provided as an initial outlay, and thereafter ammunition and other hunting and fishing materials were to be furnished to the Indian people on an annual basis.

4. Indians reserved the right to hunt, fish, and trap over unsettled areas of the ceded land.

5. The Government was to establish and maintain schools for the education of the Indian children on the reserves.

6. The Government promised to provide suits of clothing, flags, and medals for the chiefs and headmen of the tribe.

7. The Government was to provide a 'medicine chest' for the use of the Indians.

8. The Government was to provide assistance to advance the Indians in farming or stock-raising or other work (Opekokew, 1980: 12).

The process of treaty making, is one step and whether the conditions and agreements were honored by Governments, is relevant for understanding the Treaty discussions happening in Australia.
What can be learned from the North American experience?

One thing that stands out from the Indigenous nations’ position on Treaties is that the Treaties were a guarantee to them that they would be allowed to live as Indians and govern themselves on their own lands; that is, they would retain their sovereignty and would remain separate, independent nations within a new nation. Treaties laid down the peace terms.

The reality is however, Treaties were not a peaceful solution to European/American Indian relations. There was much conflict and violence that followed during and after the treaty making process.

The policies and practices of the North American governments towards the Traditional Owners were no less formidable than the Colonisation of Indigenous Australia. The Indigenous population was deliberately and systematically removed from their homelands, and forced on to reservations isolated from the general community, and controlled by missionaries and government officials.

Although the Indian nations strongly resisted these genocidal policies and gained Treaties, it was not the end of the struggle. From the time Treaties were signed and reservations granted, there has been a continuous struggle to hold on to their lands and resist further pressures by governments and other vested interest groups to alienate more Indian land for economic purposes. For those tribes which have managed to retain their tribal lands, the advantages can be many: cultural continuity, economic security, and a basis for the exercise of Indian sovereignty, cultural continuity and economic development.

Comparison with Australia

In 1763, King George III issued the Royal Proclamation of Canada, affirming Canadian—Indian rights to undisturbed possession of their land, and
establishing the principle that land had to be acquired from them by the Crown in order to extinguish native title.

Seven years later, in April 1770, Captain Cook took possession of the eastern seaboard of Australia in the name of King George III.

The simple act of planting the flag, making a formal speech and firing a royal salute were considered adequate to assume absolute title to the land, superseding any claim that thousands of years of Aboriginal occupancy verified.

Why was Aboriginal title not recognised in Australia?

To answer this question there are two waves of legal theorising that have created a tension in the Australian case. The 16th century ideas just surveyed faded in relation to an emerging set of 19th century ideas that were less favorable to Indigenous peoples.

The concern of the colonising powers was with the weight of the human rights principle of morality, and the application of justice and equality before the law. It rested on the principle that Indigenous people, whatever their state of civilisation, had equal rights to their possessions as enjoyed by Europeans. This concern was gradually replaced by reverting to old racial ideologies and Anglo centric notions of superiority that were used to relegate black people to the bottom of the social order. Another important factor in the fading of ideas and justice towards the Traditional Owners of the soil, was the different approach that emerged in the thinking of colonial powers of the time. Just four years before Captain Cook first sighted Australia, the British jurist Blackstone admitted the possibility that the American plantations may have been obtained by the right of conquest and the driving out of the natives (Coles, 1981:32). One must remember that when the application of terra nullius was applied to Australia there was an undeclared war of resistance that followed over the ownership and control of land, resources and sovereignty. No fanciful theories of discovery or imported notions of civilisation to justify
land theft have ever changed that reality for the Traditional Owners.

The Law of Nations was construed to become a law which applied only to the superior and ethnocentric notion of so called 'civilised' nations. In England in the nineteenth century, leaders of opinion insisted that the British sovereign had the right to annex land from backward, 'uncivilised' peoples and to deny them their sovereignty (Frost, 1981:515). We can see from this shift in colonial policy driven by the incessant greed for territorial expansion that the 'sequential barriers process' is firmly planted. The application of the moral and legal principles set down by the founding jurists and justice advocates of the 16th Century are no immediate barrier to British thinking. That is no sooner do you remove one barrier to justice then another one is quickly constructed to maintain the status quo. This becomes an important construct for assessing the Indigenous context in Australia. On another level, outside the scope of this paper, it was a key imported western construct used to deny the Yorta Yorta Land Justice in their Native Title Claim,1994-2002 (Atkinson,2001).

The Australian case: how did Britain justify annexation?

What actually happened in Australia in the context of the framework of International principles driven by moral values of the time is the relevant question?

What instructions were given to Cook and the early governors in relation to Aborigines? What debates went on in the British Parliament about the status of Aborigines, and their rights? What arguments did they actually use to defend their genocidal behavior in settling Australia?

We know that Captain Cook had been instructed to take possession of this land 'with the consent of the natives'. The instructions went on to say: ‘if you find the Country uninhabited take Possession for his Majesty’. The reality is however that he claimed possession of the east coast of the continent in 1777 after only a few days' observation of the Aborigines (Barwick, 1980:5).

Knowing nothing of their land tenure system, Cook observed that they 'move about like wild beasts in search of food and reported that 'I never saw one inch of cultivated land in
from 1786 to 1825, the instructions given to the colonial governors made no mention of Aboriginal land rights. It was not until the colony of South Australia was established that a governor was required to recognise Aboriginal rights to occupy their lands - and this instruction was soon cancelled (Barwick, 1980:5).

The degree of frontier violence and conflict that followed over land ownership is beyond the scope of this paper. There is however abundant evidence to show that crimes against humanity continued during and after Colonisation. Historians have re-examined the extent of frontier violence and depopulation in Australia. Christie argues that between 15% and 25%, or 2,000 Aborigines, died by the rifle in Victoria alone and the figure of 20,000 has been suggested for Australia (Reynolds, 1981:99). Reynolds argues that Indigenous depopulation by the rifle in northern Australia was higher than the lives lost in all the overseas wars including Vietnam. The memory of tragic events like these underpin our history of land struggle and remain indelibly embedded in the consciousness of Indigenous and non Indigenous Australians (Cannon, 1993:12–14, 104, 165; Reynolds, 1987:1; Christie, 1979:68–8; Cole, 1984:250; The Killing Times of Australia’s Frontier Wars).

Cook's limited observations of the south-eastern seaboard of Australia were part of the problem, but Joseph Banks' perceptions were probably more significant and influential. Banks claimed that:

…their houses and sheds in the woods, which we failed to find, convinced us of the smallness of their parties. We saw indeed only the seacoast: what the immense tract of inland country may produce is to us totally unknown: we may have liberty to conjecture however they are totally uninhabited' (Brunton, 1998:97).

While not the basis of terra nullius, this view is an important aspect of the ideology of race that continued to be the driving force of colonisation in Australia.

Banks, a man of substantial financial means and even greater political influence than Cook, was the main advocate for the establishment of a British colony in Australia. (Cook, was killed in 1779 in Hawaii, some nine years before the 'First Fleet' arrived at Botany Bay). In the same year that Cook died, Banks (by then President of the Royal Society) advocated the establishment of a penal colony at Botany Bay. Banks' views had huge influence with the Imperial government in the
early 1800s. Cook was a mere naval captain. To use a modern analogy: Cook was
the chauffeur; Banks was the bloke in the back of the stretch-limo, with the ear of
kings and prime ministers.

The weight placed on these observations would have been easier to justify if they
had proved to be correct. But they were not, and the extent to which Banks and the
Colonial Government got it wrong would revisit those who ventured into Aboriginal
territories, and would hound those governments which continued to dwell on legal
fictions into the 21st Century.

Other factors that assisted in denying Indigenous rights related to the distance
between the home government and the events that took place on the ground. From
1788, the common law, as Reynolds argues, 'turned a blind eye to everything that
happened in Australia and retreated further from the real world into the world of
injustice as the 19th Century progressed' (Reynolds, 1987:31–32; Gardiner-
Garden, 1994:5).

Australia was too far away, and Britain was unable to control the colonists and the
Australian courts that aided and abetted the usurpation of Indigenous lands. The
squatters had gained too much power for British Colonial policy to have any real
impact. This is brought home in the instructions to Governors in the establishment
of a colony in South Australia and the actual events that followed. It was easy for
the British Government to issue instructions that recognised Indigenous rights to
the soil. It was much harder to put them into practice, however, when the frontier
was ruled by the gun and not by the letter of law (Havemann, 1999:13–17; Reynolds,

The barriers to land justice in Australia seemed insurmountable but Indigenous
people kept 'chipping away' - an analogy often used to describe the arduous
process of gaining justice. Indigenous rights struck deeply at the morality of
Imperial and Colonial policy in not recognising Indigenous possession and the
extent of land theft that took place.
Batman Treaty, 1835

The story of the Batman Treaty throws the spotlight on several legal principles including prior occupation, customary law, Indigenous land ownership and the false basis of terra nullius. It could never be a model however on how to negotiate a fair just and equitable treaty.

With the application of terra nullius, the British assumed ownership of all the land free of any Treaty agreement or compensation to the Traditional owners for wholesale dispossession and land theft. It never ordered Australian officials to inquire into Aboriginal land ownership, or to extinguish native title by treaty. When Batman attempted to follow convention by making a private treaty with headmen of the Woiwurrung and Bunurong (Kulin) clans, the Traditional owners of land around Melbourne in 1835, the colonial governor quickly declared the treaty to be invalid. The treaty embarrassed and indeed exposed the Governments false premise of terra nullius.

The Batman Treaty went directly to the principle of prior occupation. It recognised Indigenous rights to the soil fifty years after the Crown's assertion of ownership. The treaty, which remains the subject of much debate, was negotiated with the Traditional Owners supposedly in return for the cession of some 600,000 acres of tribal land. The recognition of prior land rights not only undermined the Crown's ownership but it exposed the government's vulnerability. It demonstrated that some colonists were aware of the basic rules of Colonisation and attempted to put them into practice. Batman was no saint however. In Tasmania, he had been engaged as a 'rover', capturing and killing Indigenous Tasmanians in the late 1820s. For the slaughter of fifteen men and the capture of a woman and child, Governor Arthur apparently rewarded him with 2000 acres of land (Turnbull, 1974:98).

In reality the Batman Treaty was a fraudulent attempt to try and hoodwink the Traditional Owners and ride roughshod over their genuine attempts to accommodate white interests within the tribal lands. A co-existive relationship may have been possible; however the notion of alienating land and resources for material goods offered by whites denies the question of occupation and possession
at law (NTA s. 223). The exchange of land rights for trivial material goods reinforces the typical 19th Century view that Indigenous people were not capable of placing the same value in land ownership as Europeans, and ignores the communal and inalienable nature of Indigenous title. In Indigenous epistemology the land was ordained by the Spirit Ancestors. It is regarded as your mother and nurturer of all life and can’t be sold or exchanged for mere Whiteman’s trinkets and material goods. This is still a constant decolonisation process in our education system. Trying to achieve a better understanding of cross cultural beliefs in land tenure and ownership of land in Indigenous epistemology requires a constant effort in Indigenous education and teaching.

The Batman Treaty demonstrated that Indigenous customary law principles were operating on a highly organised level. A traditional ceremony (Tanderrum) conducted by Traditional Owners to give Batman access to their land is further evidence of customary laws being invoked to assert land ownership rights. Writing on this important exchange, Barwick and Kenny argued that when the Traditional Kulin Owners met with Batman, a performance of exchange took place which Batman claimed was a treaty; and from the Indigenous side the Tanderrum ceremony was conducted as a legal and cultural ceremony of access (Barwick, 1984:100-131; Kenny, 2008:1-38).

The question of Indigenous customary law was subsequently recognised in cases by settlers and by the courts in *Milirrpum v. Nabalco* (1971) and *Mabo* (No. 2) 1992. Although the original owners were in some cases willing to accommodate white interests, they were soon to learn that their attempt to reconcile their law with the introduced one was a rather futile exercise. The Crown’s refusal to recognise a treaty with Indigenous occupants was based on the need to secure its position of ownership and to shore up its justification for the appropriation of Indigenous lands without consent or the payment of fair and just compensation. The crown assumed the position of absolute owner of the land, which it treated as being unencumbered by any form of native title an approach dispelled by *Mabo* (No2) 1992). Indeed it was on the basis of *terra nullius* and the Crown’s assertion of ownership that the matter of pre-existing rights was being contested.
Another deceitful factor behind the Batman treaty was the pressure of settler society through its front organisation of Tasmanian men, the Port Phillip Association. They were anxious to get land in Victoria and to get it free and quickly as they could. Another dilemma confronting the land invasion is that Victoria was the Port Phillip District of New South Wales. It was colonised by Tasmania which was outside the limits of location of settlement and according to James Boyce it was an ‘illegal operation’. The Squattocracy was eager to get land and were the main beneficiaries of land appropriation in Tasmania following the ‘Black War’. The Black war refers to the genocide that took place in Tasmania during the period of the 1820s to just before the Batman Treaty was attempted in 1835. Most of the Tasmanian Aborigines were exterminated and those that survived were forcibly removed to reserve land on Flinders Island chosen for their survival and protection from further crimes against humanity during the 'Black War' in Tasmania. This was a ‘smoothing the dying pillow’ pillow exercise for which reserve lands were chosen to segregate and control surviving Indigenous populations after their land was forcibly taken. It began in Tasmania in the early 19th century and became general policy throughout Australia up until the late 20th Century.

The beneficiaries of these segregation policies and the genocide of the ‘Black War’ became part of the squattocracy pressure in Tasmania to appropriate more lands in the Port Phillip District—see: Boyce, J. 1835: *The Founding of Melbourne and the conquest of Australia.*

The British practice of making Treaties to purchase land for settlement raised its head in the 1837 report of a Select Committee of the House of Commons. The findings of the report expressed astonishment that the British Government had completely ignored the claims of the Aborigines as 'sovereigns or proprietors of the soil' and had taken their land from them 'without the assertion of any other title than that of force'. These members of Parliament questioned the Government's 'oversight'. The chief Protector in Victoria George Augustus Robinson, even admitted that he was at 'a loss' when it came to 'conceiving by what tenure the country was held' (Broome, 1994:32; Reynolds, 1987:35; Christie, 1979:42). But the Government's guilt continued to be justified by drawing on the prevailing racial ideology that the Aborigines lacked any
recognisable system of political organisation and customary land tenure. It would take another century and a half for this mindset to be fully challenged and deconstructed by the High Court in the historic Mabo (No.2) decision, 1992. The Court gave short shrift to antiquated racial ideologies about Indigenous land relations and cultural traditions as a basis for not recognising the pre-existence of rights to land. This helped to elevate the question of Treaty rights back to the front of the political and legal agenda.

Contrast with New Zealand

The illegalities of terra nullius and the lack of a Treaty with Indigenous Australians are again exposed when the British reach New Zealand. In 1840, the British Government persuaded a number of Maori chiefs to sign a treaty. By the Treaty of Waitangi they were guaranteed 'full, exclusive and undisturbed possession of their properties subject only to the Crown's right of pre-emptive purchase'. When, in 1848, the British Government tried to wriggle out of its treaty obligations, the Chief Justice of New Zealand insisted that abandoning the 'old national principle of colonisation by fair purchase' was a violation of 'established law'. He said Britain had an obligation to honor its promises as a 'matter of national faith'. The British then decided to abide by the treaty guarantees (Barwick, 1980:5).

Failure to recognise Aboriginal ownership

In Australia, the courts continued to uphold the original legal fiction that the land was 'unoccupied' in 1788. This is despite the fact that judges acknowledged, as Justice Murphy did in the Coe case (1979), that there is a wealth of historical material to support the claim that the Aboriginal people had occupied Australia for many thousands of years; that although they were nomadic, the various tribal groups were attached to defined areas of land over which they passed and stayed from time to time in an established pattern; that they had a complex social and political organisation; and that their laws were settled and of great antiquity.

In retrospect, there are many possible factors behind the initial failure of the British Government to recognise Aboriginal ownership. I have discussed the legal background, but the political climate of the time was perhaps more influential in
deciding how to treat the Traditional Owners in practice.

While the British continued to cloak themselves with terra nullius and old arguments about cultural superiority they could not be sustained when you consider that: Batman did make a treaty, acknowledging that those Traditional Owners did own certain land, and they were politically capable of making such agreements. Many North American Indian tribes combined their labor with the land to produce food and were led by clan headsmen, but Treaties were made with them. They had a similar social and political organisation to Indigenous Australians but they were treated differently by the British. The aged old practice of engineering water to create fish traps and food storage systems and the cultivation of traditional vegetation plants were common practice in Indigenous Australia. The history of Indigenous water based technology and agricultural practices is now being rewritten and some sites have since gained World Heritage status (Budj Bim) for their achievements in sustained food production. On reflection the understanding of these worldly achievements by Indigenous Australians, demonstrates that they were equally capable of adapting land management strategies to suit their needs but they chose to do this within their own cultural space. Such sophisticated and long established land management practices that sustained people for so long were either too hard to understand or were lost in the preconceived notions of humanity that Colonisation fostered. Ironically Australia is now taking a deeper look at how Indigenous land management philosophy can assist us in the way forward with declining land and water management problems and environmental degradation—see Evidence for Indigenous Australian Agriculture

The sequential barriers to land justice and treaties remained on the moral conscience of the Australian Government and fair minded Australians for at least two centuries. It was The High Court of Australia that was finally called upon to settle the outstanding issue of terra nullius and prior occupation. Hopes of justice and fair play were raised with the arrival of the historic Mabo (No2) decision in 1992.
The Mabo Decision, 1992

The High Court made one of its most significant decisions that decolonised much of the heavy baggage of the colonial mindset. It abolished the legal fiction of _terra nullius as a barrier to land justice and_ recognised ‘the existence of native title at common law in Australia’. It certainly found that it existed as it always had done under its own law, but the path to achieving and reinstating the oldest and original form of land ownership was the path to be travelled.

Mabo was far reaching in its reasoning of the pre-existing rights that arise from Indigenous occupation. It dismissed old legal and ideological barriers that stood in the way of Indigenous land justice and attempted to bring the law into line with contemporary and human rights values of ‘justice and equality before the law’ (_Mabo_ (No. 2) Brennan J. at 43, 59-60).

It was the past baggage paradigm that Deane and Gaudron JJ. condemned for being ‘the darkest aspect of the history of this nation’. Reflecting on the way the Australian Anglo law had denied Indigenous land justice, in Australia Brennan J. found that it took away Indigenous rights to land, deprived them of their religious, cultural and economic sustenance, and vested the land in the Crown without any right to compensation. It was these events that Brennan J. concluded ‘made the Indigenous inhabitants intruders in their own homes and mendicants for a place to live’. The discriminatory and unjust nature of the law in denying Indigenous land justice and its place in contemporary society was deconstructed by _Mabo_.

Judged by any civil standards, such a law is unjust and the theory that the indigenous inhabitants of a settled colony had no proprietary interest in the land depended on a discriminatory denigration of Indigenous inhabitants, their social organisation and customs. It is imperative in today's world that the common law should neither be nor be seen to be frozen in an age of racial discrimination. The fiction of _terra nullius_ by which the rights and interests of Indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country (_Mabo_ (No. 2) Brennan J. at 29, 40–3).

The Mabo decision was a twofold victory for Indigenous Australians and the land justice struggle. It not only got rid of _terra nullius_ as a barrier to land justice and prior occupation, but it decolonised the imported racial ideology that was used to...
prop up its existence, and to deny Indigenous people of their due entitlements as the Traditional Owners of the soil. After two centuries of dealing with the legal fiction of *terra nullius* Indigenous hopes were raised and it was assumed a more level playing field was established to settle the outstanding question of justice and equality before the law. The reality of Mabo and a Treaty to settle other outstanding injustices were waiting to be fully tested in the courts and at the Government level.

A crucial issue is 'whether Anglo-Australians are willing to abide by their own law's respect for Indigenous title' and the degree of equality that Indigenous title is given (Pearson, 1994a: 179–81). The legal status of Native Title under common law notions of property rights is still very ambiguous. *Mabo* certainly raised hopes, but the barriers to gaining land justice within contemporary politico-legal processes, can be seen in the Yorta Yorta case. The ‘Tide of History’ euphemism was used by Justice Olney as a trope for dispossession and to deny the Yorta Yorta claim for land justice—see *Yorta Yorta Native Title Claim, 1994-2002*. The Sequential Barriers process is ever present in the administration and delivery of justice in the post Mabo era. Moreover, the ‘Tide of History’ was used exclusively by Olney to replace *terra nullius* as a barrier to land justice in the Yorta Yorta case.

While Mabo set the groundwork for land justice the High Court balked at the question of Sovereignty. The Court held that the question of Sovereignty is not justiciable in a domestic court. In other words it did not have the authority to make judgment of any kind on the issue of sovereignty. The justification for not dealing with Sovereignty was based on the decision of the ICJ World Court that Municipal or Domestic courts that are within the jurisdiction of a sovereign entity. Therefore the High Court of Australia argued it cannot adjudicate on Sovereignty.

The avoidance of the High Court to deal with the fundamental question of Sovereignty was quickly responded to by Indigenous activist Michael Mansell who said that the High Court in the *Mabo* decision, gave an inch and took a mile in its overall ruling of Indigenous sovereignty which was not and never has been ceded. The question of sovereignty reverted from the legal to the political process as a fundamental principle still to be resolved.

Prior to Mabo and after the failed Batman Treaty, there were continued attempts to
address the question of a Treaty by Indigenous and non Indigenous people at the National and International level.

The path of Treaty making from those jurisdictions discussed provides a broad framework for bringing the discussion back home to Indigenous Australia and the question of the Government’s response to calls for a Treaty following the Batman failure.

Makaratta: Indigenous Term for Treaty

The concept of a treaty in Australia was revisited in 1979 under the term ‘Makaratta’ meaning a healing process that takes place after conflict has occurred. This time it was a non Aboriginal treaty committee that asked the Australian government to make a treaty with Aboriginal and Torres Strait Island people. A treaty would provide protection for rights to land and cultural identity, and a guarantee of the right to have control of one’s own affairs. The treaty was inspired by those agreements that were negotiated with Indigenous groups in those former common law jurisdictions discussed. The Australian Senate Standing Committee on Constitutional and Legal Affairs in 1983 recommended that a legally binding treaty could be included in the Australian Constitution by a constitutional amendment. Nothing became of this recommendation but the concept of a treaty remained on the political agenda (Canberra Times, 29 June 1982).

In 1998, the symbolism of a Treaty was again visited by the Hawke Labour Government who raised the issue of a Compact between Aboriginal and non Aboriginal peoples.

Against opposition to a Treaty by the conservative Liberal National partly, the Barunga Statement was presented to Hawke at the Burunga Festival in the Northern Territory. In a very symbolic approach to discussions being held with Traditional owners Bob Hawke even got himself painted up as a gesture of cultural solidarity with the Indigenous people.
1. It was at this gathering that Hawke made a commitment to concluding a compact in the form of a Treaty by the year 1990 and he agreed to the following proposals:

2. That there shall be a treaty negotiated between the Aboriginal people and the Government on behalf of all the people of Australia; and

3. That Aboriginal people should decide what it is they want to see in that treaty.

A Treaty was certainly back on the agenda but when it came to how the consultation process would be conducted, it fell over and failed to get off the ground. Ironically Hawke revived the ‘treaty’ proposal in February 1990 during a visit to New Zealand for the 150th anniversary of the signing of the Treaty of Waitangi. Hawke made a commitment that his government would accelerate its efforts to make a treaty with Australia’s Aboriginal populations.

Fine sentiments but the reality is that the Treaty process never got off the ground and was put on hold and replaced by a ‘Council of Aboriginal Reconciliation ‘in 1991. This seemed to be a diversionary political strategy designed to divert attention away from the treaty and that was the end of Bob Hawke’s commitments to a treaty being negotiated between Traditional owners and the Government. Indeed it was the second strike against the Hawke administration in Indigenous Affairs policy commitments. Prior to Barunga Hawke failed to get full support for the ‘Preferred National Land Rights model’ when the Western Australian Government caved into mining pressure and refused to back the national plan. The Broken Promise of National Land Rights, 1985

After Hawke said there would be a Treaty with the Australian Government by 1990, the Indigenous band Yothi Yindi composed a song to raise public awareness so that the Government would be held accountable to its promises. The song was appropriately called ‘Treaty Now’. It quickly grabbed the attention of the popular music charts sending the message of Treaty rights to large audiences across Australia. Indeed it caught the public’s attention and became a number-one hit. It
was sung in a traditional Yolgnu language, bringing home the power of Indigenous culture in music and song as a medium of communication.

The first verse of the song asserts the right to have a Treaty now and rejects the imposition of British law over the oldest and original law of the land—never changing.

‘This land was never given up
This land was never bought and sold
The planting of the union jack
Never changed our law at all.
Treaty yeah, treaty now, treaty yeah, treaty now’.

In May 2001 the Australasian Performing Right Association (APRA), as part of its 75th-anniversary celebrations, named "Treaty" as one of the Top 30 Australian songs of all time. Following its national and international acclaim the song is still heard on media outlets throughout the world (APRA, 2001).

Treaty let’s get it right, 2000

More recent developments in the Chronology of events that kept the Treaty momentum going that gave rise to the title of this paper is the ‘Treaty let’s get it right’ movement of 2000. This came from a Treaty Think Tank set up by ATSIC in 2000 after a decade of the Council of Aboriginal Reconciliations work. The main work of the think tank was to raise awareness and to publish a booklet, and a brochure by the National Treaty Support Group, which included important information on the background of treaty issues and the road ahead. Much of the information compliments the ongoing literature and publications of Treaty matters now being discussed in Victoria and elsewhere (TREATY let’s get it right! 2001).

The Council for Aboriginal Reconciliation in good faith acknowledged the lack of a treaty in its general policy platform suggesting that treaty should at least be discussed in the context of Reconciliation. After a decade of deliberations one would have thought that their suggestions might be taken up again. Nonetheless much of the momentum and the materials presented by the working group are
relevant to the current treaty debate. The momentum shifted focus however after the work of the National Treaty Secretariat supported by ATSIC was put on hold due to the political upheavals of the time. With the abolishment of ATSIC as the elected voice to Parliament, in 2005, the TREATY let’s get it right campaign regained its momentum and continued with its contribution to the Treaty debate at the local, State and Federal level (TREATY let’s get it right!, 2001).

The history of the failure of Australian Governments to redress their Treaty obligations; the betrayals, and the attempts to keep the momentum going before and after the Mabo decision, is a necessary framework for critiquing the political dynamics of the Victorian Government’s Treaty process now in progress.

**Victoria Government’s Treaty: Process & Representation**

![TREATY NOW](image)

After three decades of political struggle, from the Makaratta proposal, the signing of the Burunga statement, and the ‘TREATY let’s get it right’ movement, it is a good time to direct our attention to what’s happening in Victoria. The track record of frustration, unfulfilled plans and promises however, has certainly left Indigenous communities with a deep sense of distrust in government’s capability and commitment to deliver fair and just outcomes. Over two centuries down the track from the failure of the British to adhere to Treaty conventions, the symbolism of a treaty is again being re-asserted. The Victorian Government, the home state of the infamous Batman Treaty, has a Treaty proposal on the table. ‘Treaty, let’s get it right’ and ‘Treaty Now’ are useful metaphors for testing whether or not the Government does get it right at the elementary level. Assessing the general support of the Community and its response to the Treaty proposal is the lynch pin of its success.
Terminology

To help with the extensive terminology used to describe Treaty claimant groups and for the purpose of this paper, the term Traditional Owners is used interchangeably with Linguistic/Territorial groups. The term Clan as a subgroup of the overarching Territorial group is also used by claimants in treaty discussions. This is no definitive position on terminology, but an attempt to provide some clarity on the complexity of imposed structures that one is required to navigate through in the Treaty and other rights based issues.

The Treaty Process, 2016-2019

A Treaty proposal was introduced by the Victorian Government in 2016 at the request of Traditional owner groups. I will now examine the Victorian Government’s attempts to get the Treaty right and the political dynamics that are unfolding in the Treaty process. This will include critiquing the way in which the representation of the potential Treaty holders is being conducted at the ground level to ensure communities are fully represented.

Victoria’s Treaty legislation arose out of a community forum hosted by the Office of Aboriginal Affairs (AAV) in Melbourne in 2016. It was at this meeting that some 500 Aboriginal and Torres Strait Islander people unanimously voted against constitutional recognition and the Recognise campaign, arguing instead for a Treaty and Self Determination. Some including myself argued for ‘Self Determination’ to be the basis on which the Treaty could be formalised. Another question was whether the Treaty proposal was ‘putting the cart before the horse’ with Self Determination being a fundamental precursor to the process (Wahlquist, 2016; Atkinson, 2018, 2019).

It was from the community forum that the Victorian Aboriginal Affairs Minister and Victorian government committed themselves to develop a statewide Treaty process. An Aboriginal Treaty Interim Working Group (Working Group) comprised of representatives from: Victorian Aboriginal Heritage Council, Federation of the Traditional Owner Corporations, and the Koori Youth Council along with
independent First Nations people, was established: “to consult Aboriginal Victorians and to advise the Minister for Aboriginal Affairs on the development of a Treaty” (Ernst & Young, 2016).

The Victorian Traditional Owner Land Justice Group VTOLJG presented a comprehensive ‘Draft Booklet’ on the Treaty and encouraged the formation of inclusive Treaty Circles to keep the Treaty Momentum going (Talk and Walk Treaty © 2016). Working on a voluntary basis outside of Government control, the VTOLJG booklet and submission provided important historic information on past and present history and a broad framework for understanding the concept of a Treaty. It also made recommendations on what should be included in a Victorian Treaty and established a set of principles as a guide for the appointed Working Group (see Victorian Traditional Owner Land Justice Group Submission: “CLANS AND OUR ELDERS BELONG TO COUNTRY AND TREATY” 24 May 2017: 8.13.37-40).

Consultation Process

Towards the end of 2016, the Working Group commissioned accounting and Corporate giant Ernst & Young (EY) to consult with First Nations across Victoria about how to design “a state-wide Aboriginal representative body that the government can negotiate with” (Ernst & Young, 2016). The allocation of substantial funds for the Consultation process ($600,000) presumably out of Treaty funds (of $13 Million) and the commissioning of a non-Indigenous entity in EY was heavily criticised by community members. This process was called to account in a Treaty Circle that was hosted in Collingwood in late 2018. The genuine attempt by the VTOLJG to empower local communities to do the consultations was supposedly knocked back by the Working Group in favor of EY. This must have been a bitter blow for the work of the VTOLJG and their support for the practice of Self Determination at the local level.

EY became involved on October 5, 2016, community consultations were announced on October 15, and began on October 28 in Bendigo. Eight more consultations were then conducted throughout November in Mildura, Swan Hill, Melbourne, Ballarat, Morwell, Warrnambool, Horsham and Bairnsdale (the latter being the final one held
on December 2), and the findings from all of these 6 consultations were reported back at a forum on December 13 (Ernst & Young, 2016).

Even though EY acknowledge that there are between 38,000 and 50,000 Indigenous individuals living across Victoria, they report that only “more than 300 people participated” - a miniscule proportion (less than 1%) of the total population on such an important matter? (Ernst & Young, 2016). It is not stated how many of these people were actually First Nations, nor why the state-wide consultations had to be completed in such a short period of less than 2 months. They also conducted online consultations, with which there was “practically no engagement” (Ernst & Young, 2016). Despite such limited consultation, and minimal representation of the estimated population, EY concludes, “the information gathered during these sessions enables the development of detailed options for representative structures” (2016). Six more face-to-face community consultations were organised at Echuca, Mildura, Portland, Sale, Wodonga and Melbourne in March of 2017 in a second, equally rushed and lowly represented phase of consultation. It is important to consider here the size of Victoria and that First Nations people’s capacity to attend community consultations tens of kilometers from where they live may be quite low. The EY reports themselves also seem rushed, including multiple typos, errors in dates and incomplete graphs and graphics (see Fig. 4 in the 2016 full report and Fig. 1 in the 2017 summary report).

This is not a very good performance indicator and outcome for the credibility of a corporate entity and its duty of care to its client group. For the amount of money invested in the process its returns were very minimal. Adding to the low turnout for the Consultations is the election of members to the Aboriginal Representative Body which turned out to be equally low in support and numbers. The results of the Consultations and Elections invite further analysis.

Consultation Models

The performance of EY contrasts sharply with the successful consultation process that was undertaken by the Koori Heritage Working Group during the reform period of the 1980s. Similar to the Treaty process, this is when Cultural Heritage reforms
were being proposed in Victoria. Aboriginal Cultural Heritage was at the forefront of the Indigenous struggle as a fundamental and inherent right. It is one of the most significant issues for Indigenous communities across Australia, and one that became an integral part of the struggle for rights that were denied by past governments. Indeed the time was ripe for rectification and reform.

It is against this background that the ‘Koori Heritage Working Group’ KHWG emerged with a mandate for change. The KHWG was not selected by Government but was democratically chosen by Victorian Kooris at a Statewide Conference in 1983. The working group went to the people. It indentified the key issues of concern to Koori people in Victoria using the theme ‘Koori Heritage and Self Determination’ to advance the call for reform.

The working group took the initiative following in the path of their ancestors with their own world view and political strategy. It drew on the powerful voices and achievements of past leaders and activists of the early civil and political rights movement that began in Victoria in the 1930s with its origins in the 1880s protests against the segregation laws of the oppressive reserve system. A more cultural and holistic view of heritage than the narrow definition used to advance non-Indigenous interests was used to broaden the definition of Indigenous heritage. It was a mandatory requirement to articulate the traditional cultural values, relationship with land, and those sovereign rights that have never been ceded.

The KHWG strategy was to create a ‘Charter of Heritage Rights’ that would provide the guiding principles for reform and its mandate was to do this in full consultation with local communities. It was a credible democratic process that was supported by the Government and particularly the Attorney General, the late Jim Kennan, who attended many of the community-based consultations and meetings.

The Charter was discussed with local communities throughout the State at the ground level, embracing community organizations, and meetings were held at important Cultural Heritage sites across Victoria and into New South Wales. From these meetings a ‘Charter of Heritage Rights’ was agreed to and developed in full consultation with Communities and Government agencies. The Charter was then
presented to the Government as the ‘guiding principles’ from which the reform measures could be implemented. It was fully supported by the Government and Cabinet of the day under the leadership of the Premier, John Cain and his successor the late Joan Kirner.

The main issues arising from the consultations were that ‘ownership, control, and community empowerment’ should be returned to Kooris, and the ‘definition of heritage broadened’ to reflect Koori heritage cultural values. These reforms were drafted into the ‘Victorian Aboriginal Cultural Heritage Act 1987,’ making Victoria one of the leading States in Heritage reforms that reflected Indigenous Self Determination rights to the ownership, control and management of their Heritage.

This experience would have benefited the Treaty Consultation process as a model that came from the bottom up rather than from the Top down as demonstrated in the current Treaty process. The successful community consultation process and ‘Charter model’ could have been easily applied to the current process. (see ‘Koori Heritage is Self Determination’ for the full context of this historic achievement).

The Treaty Legislation and Representation

The commissioned Treaty consultations however saw Victoria become the first state to pass legislation on a proposed Treaty. The Advancing the Treaty Process with Aboriginal Victorians Act 2018 is described as a “step on the significant journey toward treaty or treaties”, since it does not establish anything concrete in terms of what treaties might look like or how they will come about (“Treaty”). What the Act does do is “enshrine guiding principles for the treaty process”, as well as mandate and enable the establishment of an Aboriginal Representative Body (ARB), and situate it as an equal partner with the Victorian state government to establish “elements to support future treaty negotiations” (“Treaty”). The next phase of the treaty process now underway will be to establish the ARB and structural elements, including “a treaty authority, treaty negotiation framework and a fund to support Aboriginal self-determination” (“Treaty”). A rather incongruous proposition when the Government claims to administer a policy of ‘Self Determination’ as one of its main Indigenous policy platforms. Whether such a policy is the same version as
that promulgated by International and Indigenous Human Rights Conventions is yet to be fully tested.

Debate about the treaty process in Victoria has largely been concerned with the way representation is being structured, not the content of a treaty or treaties per se. The consultation process and the proposed structure of the ARB have been the primary sources of opposition to the treaty process, particularly in regard to grass root and community based representation (Wahlquist, 2018).

The government-initiated Victorian Treaty Advancement Commission published in May 2019 the “Election Rules” for the ARB, which was recently renamed the “First Peoples’ Assembly of Victoria” (the Assembly). It states that the Assembly will total 33 members, of whom 11 will be appointed as Reserved Members by state-recognised Traditional Owner groups, and the remaining 21 will be elected as General Members (“Election Rules”).

Traditional Owner (TO) groups include Native Title holders, Registered Aboriginal Parties and/or those with a Recognition and Settlement Agreement under the TO Settlement Act (“Election Rules”). The key issue that local Indigenous leaders have strongly opposed, is that not every claimant group is guaranteed a seat at the table, and the process of choosing co-opted members of existing Government structures selectively appointed to the Assembly by the Government has caused much tension in the community.

The appointment of the 11 formally recognised nations to the Assembly has thrown a spanner in the works so to speak. Those appointments supposedly have been made by the Government’s Victorian Aboriginal Heritage Council, the members of which have been selectively appointed by the State to head up the Heritage Council (Birrarung Marr Statement of the 38 Nations on Treaty and our Voice, #38 Nations, 2016).

The Heritage Council represents Traditional Owner groups in Cultural Heritage matters and decides which groups are accepted as Registered Aboriginal Parties (RAP) under the Aboriginal Heritage Act. It is not democratically elected nor does it
reflect the rights and interests of the estimated 38 linguistic/territorial groups of Victoria. Moreover, members of the Council are empowered to make decisions on matters relating to heritage jurisdictions for which they don’t have the authority to speak. For instance, the 38 territorial/traditional owners are currently represented by 7 members ‘appointed by the Minister for Aboriginal Affairs’ (see Victorian Aboriginal Heritage Council). The 7 members, according to the VIC.GOV.AU website, claim ancestry from 6 of the 38 groups. This equates to the overwhelming majority of traditional owners not being fully represented and not having a voice on the Council. The extent of this exclusion from Heritage Rights representation is in breach of Cultural Rights conventions and Self Determination principles. ‘Traditional owners must have control of their cultural heritage consistent with their rights and interests’ (Anderson; Hytten; & Land, 2006).

These are not Indigenous chosen structures that reflect broader traditional based rights and protocols. They are the very top down structural arrangements chosen and imposed by the Government on the people. The Heritage Council has come under much criticism from the community in the way it was established which undermined the work of the KHWG for the creation of a Council that reflected the nature and distribution of Traditional Owner groups in Victoria. Most importantly it needed to be democratically elected to fully represent the cultural rights and interests of the Traditional owner groups as laid out under the United Nations Charter on the Rights of Indigenous Peoples to which Australia is a signatory.

The State control over Indigenous Affairs, and select appointments to government structures like the new ARB, was criticised by the Birrarrung Marr Statement of the 38 Nations on Treaty and our Voice. It rejected the underhanded way the 11 formally recognised Nations were chosen and questioned the way the ARB was enacted by the Commissioner. It further argued that if you’re a corporate body or part of a Government structure it gives you more standing than those at the community level who feel marginalised from the process. (Birrarung Marr Statement of the 38 Nations on Treaty and our Voice, #38 Nations.2016). Being Government appointees exempt from the democratic process other candidates have had to follow, begs the question of where their accountability and loyalties may lie. That is, where will their alliances be on crucial Treaty issues? And where will their interest be if a conflict
may occur between Government and community based interests?

The way these matters are being thrust upon the community without proper consultation and approval have caused much dissatisfaction at the State and local level.

Dissatisfaction with Process

Several Yorta Yorta leaders and Elders expressed dissatisfaction with the Victorian treaty process on the basis of a lack of consultation and inclusion. They rightfully expected to be fully informed and included at every step of the way if they were to sign a treaty with the state government. That is not to say that every Yorta Yorta person feels this way. In fact several of the spokespeople who have contributed to the Victorian government's new treaty website *Deadly Questions* are Yorta Yorta. It is notable however that the Yorta Yorta Nation Aboriginal Corporation (YYNAC) as well as turning down their seat on the Treaty structure also raised concerns about the process and called for the bill to be delayed in 2018 (Wahlquist, 2018). The YYNAC also publically supported a Greens amendment to the Treaty bill in 2018, which pushed for all 38 clans in Victoria to be afforded seats on the Assembly (Wahlquist, 2018). Around two dozen Elders from clans across Victoria, forming the inaugural Clan Elders Council, supported the statement read by Boon Wurrung Elder Carolyn Briggs. She stated that the Clan Elders Council believes that “the treaty consultation process so far has been flawed and failed to engage with the Sovereign Clans and First Nations” (The Inaugural Clan Elders Council on Treaty, Victorian Parliament, 14, May, 2019).

The Council demanded that “our sovereignty, and each of the 38 language groups and 300 Clans, must be clearly recognised” and asserted “our right to self determination, and free, prior and informed consent regarding any decisions that affect us” (The Clan Elders Council). The Clan Elders Council, like the YYNAC, do “acknowledge and welcome that the Victorian Government has begun a process for advancing Treaty for all Victorians” (The Clan Elders Council). However, based on historical wrongdoings and betrayal on the part of colonial governments, Victoria must take extreme care in building the trust of all clans and Nations through this
process. This would require extensive and transparent consultations and a genuine grappling with the wide range of Elders’ and First Nations’ concerns.

The other crucial matter for river based people like the Yorta Yorta, and others along the Murray River and elsewhere, is the question of overlapping tribal and State boundaries. This has the potential of disenfranchising Traditional Owners and their rights as beneficiaries of Treaty agreements. Those groups along the Murray, whose names repeat themselves, indicate their long and continued occupation of both sides of the River, as distinct territorial and linguistic groups. Tribal groups like the Yorta Yorta, Barababarapa, Wamba Wamba, Watti Watti and Latji Latji for example, are inherent holders of traditional based rights on both sides of the Murray. Their demographic location is spread across the border towns located along the river. The impost of recent State boundaries has impacted on their sovereign and territorial integrity. The Murray River was declared a political boundary between NSW and Victoria in 1851- a relatively recent event in the Indigenous calendar of prior and continued occupation.

The divisive nature of this issue has been raised in Treaty forums on a number of occasions, but seems to have been put in the too hard basket of cross border politics. Whether the matter will be addressed at the Federal level with overarching Treaty or Treaties remains to be seen. It is however important rights based issue to bring out in the underlying and divisive issues that the Victorian Government and its formal Treaty structures have to deal with.

The “Treaty” section of the Aboriginal Victoria website and the new Deadly Questions website assert that since the Assembly does not negotiate treaty, there is no danger of any clans being excluded as yet. Perhaps in an ideal world this would be a strong assertion, but the reality in Victoria and across Australia is that there is a deep sense of distrust and frustration based on past government wrongs and failings, as alluded to in the Federal Minister for Indigenous Australians communication below. This means that great care must be taken to empower and enable First Nations throughout this process, to engage with grassroots concerns and to ensure that everyone is fully informed, represented and heard. Many feel that the treaty process so far has not adequately done this.
The cultural and political dynamics of the Treaty proposal that we have witnessed unfolding over the past three years are compelling. From all levels of the process one can see that the Treaty proposal is far from reaching full and satisfactory agreement. Achieving a consensus on the nature, content conditions and legal status of the Treaty in accordance with domestic and International frameworks is a huge challenge. The cultural dynamics of the Treaty according to democratic principles and community representation however, are other issues of concern. Moreover, the way selected and appointed representatives have been chosen by the Government against the empowerment of grass root level communities remains problematic. Many including myself see it as another form of divide and rule driven by paternalistic overtures from the past rather than being directed by community aspirations and self determination principles. It also has the potential of creating binary tensions between those chosen on the inside and those marginalised on the outside of the Treaty negotiations.

In following the Treaty debate and participating in some of the Treaty discussions, there are a number of issues that stand out. These are mainly about the Treaty process, representation, and dissatisfaction about the way the Treaty process is being run. That is:

- Local Indigenous communities are concerned that treaty negotiations will not adequately represent their interests.

- Communities are afraid that a committee selectively appointed by the government or a body that is part of the government bureaucracy, will not represent them effectively in a treaty process.

- Attempts to represent Indigenous communities have been based on the assumed existence of national unity and have ignored the autonomy of local tribal and clan groups.

- The impositions of Non-Indigenous consultation and negotiation frameworks lack an appreciation of Indigenous history, social structures, cultural values, and traditional methods of decision making.
• Indigenous women are particularly concerned about their under-representation in terms of gender equality (D’ Souza, 2002). Is there some gender quota built into the rules?

• Cross border issues are divisive and have the potential of disenfranchising traditional owner populations.

• Concern about voting data not being released and a lower level of transparency than the mainstream enjoys in the Electoral Commission elections.

These are genuine concerns that need to be taken on board in the Treaty Process ahead. The irony is that the process has become contradictory to the meaning of a Treaty. As we’ve seen in other jurisdictions, the main object of a Treaty is to first lay down the foundations of the ‘peace terms’ on which a Treaty can be negotiated.

The concerns raised by elders, clan groups and nations across Victoria are about the process and not with the idea of a fair and just treaty itself. Regardless of good intentions and the involvement and leadership offered by Indigenous people, the Victorian treaty process thus far leaves much to be desired. It needs to embrace and include the relevant community based groups, who have had minimal consultation, as indicated in the hasty Consultation process. The perception that concerns about the Victorian treaty process are not being seriously addressed has led to some Traditional Owners deciding to withdraw their support for the way the current Victorian treaty process is being conducted.

Among those who have decided to withdraw is prominent leader and spokesperson for community and Traditional Owner voices, Lidia Thorpe. Lidia critiques the process thus far:

She believes that the process has become one of Government ‘spin over substance’ and argues that the ‘Government is largely working from the top down rather than from community based representation of clans, Nations, and Elders as the traditional governing structures in customary law and cultural matters’. Lidia brings attention to the way that the Government is taking Crown Land out of the
Treaty equation by selling off surplus crown and other public lands (The Guardian, 9 October, 2019). This is a crucial and valid issue to raise in any treaty negotiations with the Crown. As discussed in the principle framework of Treaty making, land is a central tenant of Treaty Agreements. These Agreements 'guaranteed the Traditional owners free and undisturbed rights to their land' and the 'land not ceded or purchased from the Traditional owners by the Crown were reserved for them' (Costo&Henry, 1977:6).

Given that most of the crown land has been alienated by private grants to non-Indigenous land owners and free of compensation to Traditional Owners, there is only a small percentage of crown land left. Taking what's left over out of the Treaty equation and selling if off, undermines the integrity of the process and the very substance of what the content of a Treaty represents. It is a similar deception to the Native Title process and the amount of land that has actually been returned to Traditional Owners under their original and absolute title, and not the lesser subordinate, watered down version of Native Title. Under this pretext the very nature and meaning of a Treaty as discussed in the framework is being pre-empted before it gets to the point of substance and formulation. Land is an absolute and integral part of any Treaty Agreement and the Crown has a mandate and an obligation to honour that principle in good faith and fair play.

While Lidia and other likeminded advocates support the notion of a Treaty, she also calls on the Government for ‘acts of good faith for a fair and just treaty’ by building trust - an essential human value on which negotiations and agreements rest. She also questions whether the Government is genuine about developing meaningful treaties that will restore First Nations people’s rights to land, self determination, economic independence, truth telling and a home for us all. The selling of potential treaty lands and other concerns about the process has become the ‘last straw’ for Lidia, who has decided to withdraw her candidature for the First Peoples Assembly (The Guardian, Wed, 9 October, 2019).
The Path to a Treaty from Here: Timeline

As can be seen from the Timeline, the path to a Treaty is a work in progress facing a long journey ahead of what’s already unfolded. The closing date for the voting process was the 20th October, 2019, and the votes for the successful candidates were counted on the 4 November, 2019.

The election results have been declared, and the results are now published. The outcome of the Consultation process and the elections has produced the following results:

The historic vote for the Treaty proposal has produced a turnout of just 7% of an estimated voter population of 30,000 which means that 93% of the population ‘have stayed away in droves’. In the metropolitan region where up to 10,000 were eligible to vote to elect 9 members, it was a marginally higher vote of 7.8% (The Age, 10 Nov, 2019). Whether the result provides a mandate to represent the majority of abstainers and to negotiate a Treaty is a major issue. Moreover, the appointments of members to the Treaty Assembly, presumably on the advocacy of the discredited
Heritage Council, are in breach of the long tradition and principles of representative democracy.

The dismal outcome of the elections and the extent of absenteeism in the voting process is a disappointing result in many ways. It is probably unprecedented in Australian electoral history and begs the question of whether there could have been a better and more effective process given the lack of Indigenous trust in imposed and hasty voting systems. The 13 Million Dollar Government investments in the consultation and election process for the ‘Treaty Assembly’ is a cause for deeper concern. The main reasons for the lack of support and very low voter outcome identified in the press release is summarised below (The Age, 10 Nov, 2019).

- ‘A lack of trust in Government and of taking part in Government elections’.
- ‘The lower voter turnout points to deeper problems with the process itself’.
- ‘The lack of community engagement done by the Treaty Commission and a lack of faith by the Victorian Aboriginal community in the Treaty process’.
- ‘A lot of people, who support grassroots voices being heard, didn’t participate because they didn’t agree with the process’.
- ‘Legitimacy of the process and the small number who came to the candidate forums is another reason for its poor outcome (The Age, 10 Nov, 2019).

With the substantive Government investment in the process, it is obvious that some deep thinking and evaluation is required in the process and the way forward. Just where the proposed Treaty goes from here, against the results and underlying concerns raised, is unclear. These are questions confronting the elected members and those chosen by the Government for the Assembly, who will hold its first meeting in State Parliament’s upper house Chamber on the 10th December.

Achieving a consensus on the substance and legal status of the proposed Treaty in accordance with Indigenous expectations would be priority matters for the
Assembly to deal with. Regaining the support of the overwhelming Indigenous population to their entitlements as Treaty beneficiaries is an absolute necessity for the continuity of the Treaty process.

This brings the historic analysis of the Treaty paper to a conclusion. The following summary will endeavor to draw together the key issues confronting the Treaty process and the Path to an agreeable Treaty outcome by all parties.

**Summary**

In the long and continued struggle for basic Indigenous rights, it is true to say that there is much unfinished business to be dealt with in Australia. A timely and relevant call for the representation of grass root level voices is now being advocated by Indigenous leaders at the National level. The track record of past government failures, has been called to account. Its history of more than a century of imposed laws and policies has been challenged, and Governments have been called upon to start ‘listening to community’ voices (The Age, 30th October, 2019).

Fine sentiments that certainly reinforce the issues inherent in the first step of the Victorian Treaty process and its journey through the problems it has faced. Listening to and acting upon community voices is a potent reminder for the Government and the Treaty Commission’s response to the deflating election outcome.

There is a long legacy of Government betrayal of Treaty and Land Rights promises. The Batman Treaty, Makaratta, and the Barunga fiascos have left us with a long trail of broken promises. It is a legacy that National and State Governments have to deal with in the preparation of past failures, and in the way a genuine, honest and binding Treaty with Traditional Owners can be secured (see Background paper on Treaties, 2019).

While there is general support for the idea of a Treaty and the Victorian Government's attempts to redress the failure of Treaties in the past, it is clear that
there remains a ‘history of mistrust’ about whether a proper Treaty sanctioned by the Indigenous community will be delivered (The Age, 10 Nov, 2019).

The Treaty process in Victoria is about the ‘the power imbalances inherent within treaty negotiations, arising from Indigenous peoples’ ‘entrenched marginalisation and vulnerability to the political interests of the settler state’ (Jayasekera, 2018:1). Knowing that the Victorian Government’s attempts to redress the Treaty issue have the benefit of hindsight, and successful consultation models in their favor, it is imperative that they do get it right. The Government has every opportunity to do that. There are many case studies to draw upon in current claims for Treaties and to support local needs and aspirations. The recognition of North American Indigenous and Maori land ownership are precedents that can be drawn upon to add weight to the current claim. Justice and fair play are often seen to be done but Australia remains the only ‘British settler state that has not concluded treaties with its Indigenous population as a basis for coexistence’. (Jayasekera, 2018: 1). The other inherent rights that must not be overlooked in the Treaty making process are: Sovereignty, Self Determination, Land justice, Reparation for past wrongs and the Truth Telling process advocated by Indigenous leaders and Reconciliation Australia (Reconciliation Australia, 10 May, 2018).

‘Treaty let’s get it right’ and ‘Treaty Now’ are nice symbolic gestures that give hope and meaning to the Treaty struggle. The credibility of the process and its results, however, is a matter for the general Victorian Indigenous population to ponder at this stage.

Given the nature and extent of the Treaty process in Victoria, the paper will remain a work in progress as the next phase of the Treaty making process navigates its path. Elections have closed the votes have been counted and the ‘First Peoples Assembly’ is about to begin the huge task ahead.
Thanking You

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**Koori Heritage Working Group Consultation Process: Koori Heritage is Self Determination**


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