

## Victoria Government's Treaty: Process & Representation



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 (This is the Victorian section of a larger paper on ['Treaty: Getting it Right for a Treaty Now' 2019](#)).

### 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 identified 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. (Birrarrung 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:**

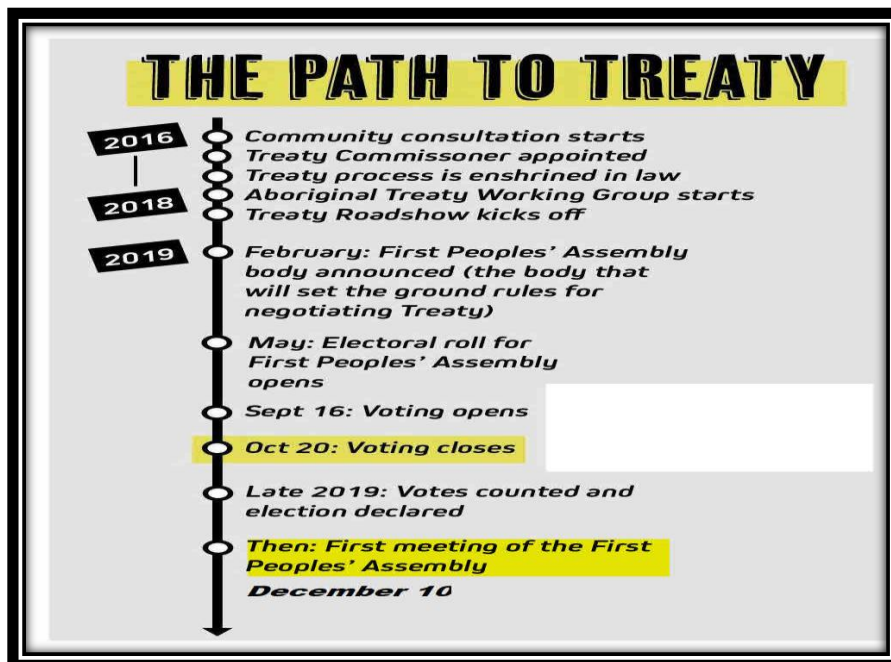
**She believes that the process has become one of Government 'spin over substance' and argues that the 'Government is largely working from the top down rather than from community based representation of clans, Nations, and Elders as the traditional governing structures in customary law and cultural matters'. 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 it 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 20<sup>th</sup> 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 10<sup>th</sup> 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

**Dr Wayne Atkinson Yorta Yorta Elder**  
**Senior Fellow**  
**School of Social and Political Science**  
**University of Melbourne**

## Bibliography:

"About Us | Reconciliation Australia". *Reconciliation Australia*, 2017, <https://www.reconciliation.org.au/about-us/#our-history>

Agreements With Traditional Owners. *Forests and Reserves*, 2019, <https://www.forestsandreserves.vic.gov.au/joint-management/agreements-withtraditional-owners>.

Anderson, B; Hytten, F; Land, C. "Aboriginal Heritage Bill" [2006] IndigLawB 13; (2006) 6(17) Indigenous Law Bulletin 16.

Atkinson, W.R. [Not One Iota: Reflections on the Yorta Yorta Native Title Claim](#), 1994-2000, in Indigenous Law Bulletin, February – March Vol 5, Issue 6. 2001.

Atkinson, W.R. Yorta Yorta Traditional Owner and Participant in Treaty Forums, Melbourne, 2017-2019.

Australia Adopts UN Indigenous Declaration, 2019. <https://www.abc.net.au/news/2009-04-03/aust-adopts-un-indigenous-declaration/1640444>

Barwick, D. 'Making a treaty - the North American experience', paper presented to ANZAAS Conference, Adelaide, May 1980. p.3.

Barwick, D. Mapping the past: An atlas of Victorian clans 1835-1904: Part 1. *Aboriginal History*, 1984, 100-131.

Boyce, J, 1835: *The Founding of Melbourne and conquest of Australia*, Book launch, St Kilda Town Hall, 24 March, 2019.

Broome, R. 1994, *Aboriginal Australians*, 2<sup>nd</sup> edn, Allen and Unwin, Sydney. p.32.

Brunton.P. ed 1998, *The Endeavour Journal of Joseph Banks – The Australian Journey*, Angus and Robertson, Sydney.p.97.

"Deadly Questions". *Deadly questions*. Vic.Gov.Au, 2019. <https://deadlyquestions.vic.gov.au/the-champions>.  
"The Referendum Council". *Referendumcouncil.org.au*, 2019, <https://www.referendumcouncil.org.au/council.html>.

"Treaty". *www.Vic.Gov.Au*, 2019, <https://w.www.vic.gov.au/aboriginalvictoria/treaty.html>.

Alford, Katrina. "White-washing away native title rights: the Yorta Yorta land claim. and the'tide of history'." *ARENA journal* 13 (1999): 67.

Begg, Morgan, and Simon Breheny. "Treaty." *Institute of Public Affairs Review: A Quarterly Review of Politics and Public Affairs*, The 68.4 (2016): 16.

Birrarung Marr Statement of the 38 Nations on Treaty and our Voice, #38 Nations, with Map of Aboriginal Languages of Victoria, 2016.

Bradford, Gillian. "Howard Plans Constitutional Recognition of Aborigines". *ABC News*, 2007, <http://www.abc.net.au/pm/content/2007/s2057317.htm>.

Brennan, Bridget. "Indigenous Leaders Enraged As Advisory Board Referendum Is Rejected By Malcolm Turnbull", *ABC News*, 27 Oct 2018.

[www.abc.net.au/news/2017-10-27/indigenous-leaders-enraged-by-pmsreferendum-rejection/9090762](http://www.abc.net.au/news/2017-10-27/indigenous-leaders-enraged-by-pmsreferendum-rejection/9090762).

Brennan, Bridget. "Recognise Campaign Ends After Making 'Significant Contribution'. *ABC News*, 2017, <https://www.abc.net.au/news/2017-08-11/recognise-campaign-wound-up/8797540>.

Cannon, M. 1993, *Black Land White Land*, Minerva, Melbourne. pp.12-14,104.

Chartier, C. (ed.), *Principles of law and their applications to indigenous peoples within Canada*, Indian Studies Miss., Univ. of Regina, Saskatchewan. p.20.

Christie, M. *Aborigines in Colonial Victoria, 1835-86*, Sydney University Press, pp.68-69,79,24-52.

Cohen, F. S.. *The legal conscience*, Yale University Press, New Haven, 1960, p.304.

Cole, K. 1984, *The Aborigines of Victoria*, Keith Cole Publications, Bendigo. p.250.

Coles, G. J., 'The international significance of a treaty'. *Identity* 4, 2, January 1981, p.32

Costo, R. and Henry, J.. *Indian treaties: two centuries of dishonor*, American Indian Reader, the Indian Historian Press, San Francisco, 1977. p.6.

Crawford, James. "The Aboriginal Legal Heritage: Aboriginal Public Law and the Treaty Proposal"(1989)." *ALJ* 63: 392.

D'Souza, C. A Treaty : What is it All About?" [2002] *Indig Law Bulletin* 67; (2002) 5(21) *Indigenous Law Bulletin* 4

*Election Rules*. 1st ed., Victorian Treaty Advancement Commission, 2019, <https://www.firstpeoplesvic.org/wp-content/uploads/2019/05/First-Peoples-Assembly-of-Victoria-Election-Rules-v1.1.pdf>.

Ernst & Young. *Aboriginal Community Consultations On The Design Of A Representative Body*. Ernst & Young, 2016. Accessed 29 May 2019.

Finley, Julie. "The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–1981." *Australian Historical Studies* 42.3 (2011): 372-389.

Frost, A., 'New South Wales as 'Terra nullius': the British denial of Aboriginal land rights'. *Historical Studies*

19, 77, Oct. 1981, p.513.

Gardiner-Garden, J. (ed.) 1994, *Mabo Papers*, Parliamentary Research Service Subject Collection no. 1, AGPS, Canberra, p.5.

Havemann, P. (ed.) 1999, *Indigenous Peoples' Rights in Australia, Canada and New Zealand*, Oxford University Press, Melbourne. pp. 13-17.

ICPR for images 'Treaty Now' and 'Path to Treaty' duly acknowledged.

Jayasekera, A. The Value of Treaty Making with Indigenous Peoples in Australia, 3 International Law Journal, 2018.p.1.

<http://classic.austlii.edu.au/au/journals/PerIntLawJI/2018/5.html>

Kenny, R. (2008). Tricks or treats? A case for Kulin knowing in Batman's treaty. *History Australia*, 5(2), 38-1.

Koori Heritage Working Group Consultation Process: [Koori Heritage is Self Determination](#)'

Makaratta, *Canberra Times*, 29 June 1982.

Mansell, M. 1992, 'The Court Gives An Inch But Takes A Mile', *Aboriginal Law Bulletin*, vol. 2, no. 57, p.6. [www.law.unsw.edu.au/centres.dtp](http://www.law.unsw.edu.au/centres.dtp)

Marks, Kathy. "Trick or treaty: Will states redress founding flaw?." *Griffith REVIEW* 60 (2018): 157.

Moreton-Robinson, Aileen M. "The possessive logic of patriarchal white sovereignty: The High Court and the Yorta Yorta decision." *Borderlands e-journal* 3.2 (2004).

Opekokew, D. (ed). The first nations: Indian government and the Canadian Confederation, Federation of Saskatchewan Indians, 1980. pp9,50.

Ortiz. R. (ed.). *The great Sioux nation: sitting in judgment on America*, American Indian Treaty Council and International Indian Treaty Council, Moon Books, 1977.

Pearson, N. 1994a, 'From Remnant Title to Social Justice', in *Make a Better Offer*, eds M. Goot & T. Rowse, Pluto Press, Sydney, p. 179.

Preferred National Aboriginal Land Rights Model, 1985: [http://www.mabonativetitle.com/lr\\_30.shtm](http://www.mabonativetitle.com/lr_30.shtm)

Pittock, A.B., 'Aborigines and land rights', in F.S. Stevens (ed.), *Racism: the Australian experience*, Vol. 2. 1977. P.190.

Reynolds, H. 1987, *The Law of the Land*, Penguin Books, Ringwood, Victoria. pp.1,31-35,87,81-101.

Roussel. R. (ed.). *Navajo stories of the long walk*, Navajo Community College Press, Tsaile, Arizona, 1973.

[Secret Instructions](#) to Capt James Cook: National Library, Australia.

Sovereign First Nations TREATY COMMISSION: THE TREATY NEGOTIATOR AND REPRESENTATIVE BODY, Published, 2016. <http://www.landjustice.com.au>

Short, Damien. "When sorry isn't good enough: Official remembrance and reconciliation in Australia." *Memory Studies* 5.3 (2012): 293-304.

Thorpe, Lidia. Victoria has chosen spin over substance in its Indigenous treaty whitewash: The Guardian Newspaper, Wed, 9 October, 2019.

Turnbull, C. 1974, *Black War: The Extermination of the Tasmanian Aborigines*, Sun Books, Victoria. P.98.

The Age, Historic Vote, but only 7 per cent turned out for Aboriginal Poll, 10 November, 2019.

The Age, Consultation on Indigenous Voice, 30 October, 2019.

The Clan Elders Council. "Statement On Treaty, Sovereignty And Our Rights". *The Australian Greens*, 2018, <https://greens.org.au/vic/news/media-release/statementtreaty-sovereignty-and-our-rights>.

*The Killing Times*: <https://www.theguardian.com/australia-news/ng-interactive/2019/mar/04/massacre-map-australia-the-killing-times-frontier-wars>

'[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.

TREATY let's get it right! National Treaty Secretariat, Aboriginal and Torres Strait Islander Commission, Woden ACT, May, 2001. [www.treatynow.org](http://www.treatynow.org)

Reconciliation Australia: Truth-telling Central to Reconciliation Process, May 10, 2018.

<https://www.reconciliation.org.au/truth-telling-central-to-reconciliation-process/>

[Victorian Traditional Owner Land Justice Group Submission](#) : "CLANS AND OUR ELDERS BELONG TO COUNTRY AND TREATY" 24 May 2017: 8.13.37-40).

Wahlquist, Calla. "Indigenous Greens MP Lidia Thorpe Says She May Oppose Treaty Legislation". *The Guardian Australia*, 2018, <https://www.theguardian.com/australia-news/2018/may/22/indigenous-greens-mp-lidia-thorpe-says-she-may-oppose-treaty-legislation>.

Wahlquist, Calla. "Indigenous Leaders Praise Victoria's Commitment To Talk About Treaty". *The Guardian Australia*, 2016, <https://www.theguardian.com/australianews/2016/mar/03/indigenous-leaders-praise-victorias-commitment-to-talk-about-treaty>.

The Age, 30 October, 2019.

United Nations Declarations:

[Declaration on the Rights of Indigenous Peoples](#)

[Declaration on the right of Self Determination](#)

[Universal Declaration of Human Rights](#)

## **Legal Sources:**

*Aboriginal Cultural Heritage, Act, 1987 (Vic).*

*Aboriginal Cultural Heritage, Act, 2006 (Vic).*

*The Advancing the Treaty Process with Aboriginal Victorians Act, 2018 (VIC).*

*Mabo v Queensland* [1992] HCA CLR 1 QdR 78.

*Mabo v. State of Queensland (No. 2)* [1992] 107 HCA ALR 1.

*Mary Yarmirr & Ors v the Northern Territory of Australia & Ors* [1999] 771 FCA 112.

*Mason v Tritton*, [1994] 84 LGERA 292; (1994) 34 NSWLR 572.

*Milirrpum v Nabalco Pty Ltd* [1971] 17 FLR 141.

*Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 (18 December 1998), [Federal Court](#).

*Worchester v Georgia* [1832] 31 US 515.