

TAKING STOCK OF INDIGENOUS-STATE TREATY-MAKING IN AUSTRALIA: OPPORTUNITIES AND CHALLENGES

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Aspirations for an Indigenous treaty or treaties in Australia must confront a challenging landscape. How can we retrofit a substantive treaty-making process on a legal and political system that has not been designed to engage meaningfully with Aboriginal and Torres Strait Islander peoples? Talking treaty more than two hundred years after first contact is difficult, but many jurisdictions are exploring this conundrum right now. This article provides an update on the Indigenous-State treaty processes underway in Australia. It then examines five key issues that these processes are currently grappling with.

I INTRODUCTION

Our Elders fought for Treaty for years. Now we are Elders and we have the opportunity to help realise their dreams. As we move forward, we are truly standing on the shoulders of giants. We feel their support and we will not let them down. We must make this happen.¹

There isn't a roadmap, there isn't a template. We're starting from scratch.²

For the first time in Australian history, a majority of Australian governments have committed to starting a conversation about treaty with First Nations peoples. This is a significant and historic moment. Treaties are accepted around the world as a way of resolving differences between Indigenous peoples and those who colonised their land. They were struck in North America and Aotearoa New Zealand and

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1 First Peoples' Assembly of Victoria, *Annual Report to Parliament 2020* (Report, 2020) 1 ('*Report to Parliament 2020*').

2 Lorena Allam, 'Victoria a Step Closer to Indigenous Treaty with Creation of First Peoples' Assembly', *The Guardian* (online, 11 April 2019) <<https://www.theguardian.com/australia-news/2019/apr/11/victoria-a-step-closer-to-indigenous-treaty-with-creation-of-first-peoples-assembly>>, quoting Victoria's Treaty Advancement Commissioner, Jill Gallagher.

continue to be negotiated in Canada.³ Australia is an outlier. No formal treaty with Aboriginal and Torres Strait Islander peoples has ever been recognised.⁴

The two statements above highlight one of the major challenges for Australian treaty processes. Treaties are of fundamental importance for First Nations peoples and the Australian State. Many First Nations people have long argued that the absence of a negotiated agreement that recognises their sovereignty and sets out ‘mutually agreed terms for our relationship with the Australian Government’,⁵ leaves the legal basis of the nation ‘shaky’.⁶ It has also helped create a legal framework that fails to recognise First Nations peoples’ right to self-determination.⁷ Treaties are formal agreements that define the status and rights of Indigenous peoples and outline a framework for addressing past injustices and building new relationships based on self-determination, justice, and respect. However, without a history of negotiations or a language to describe treaty-making,⁸ governments, First Nations people and the broader Australian community have little familiarity with major elements of treaty. A host of fundamental questions, such as what a treaty might contain or what a proper negotiation process might look like, remain unclear.

First Nations communities remain undaunted. Working in partnership with governments across the country, they are designing novel public law institutions to support and facilitate treaty-making. In Victoria, First Nations ‘lore, law and cultural authority’ is informing the structure and responsibilities of key architecture.⁹ In Queensland, the principles of a formally non-binding international legal instrument – the *United Nations Declaration on the Rights of Indigenous Peoples* (‘UNDRIP’)¹⁰ – are identified as the guiding force for the administration of treaty legislation and treaty institutions.¹¹ In the Northern Territory (‘NT’), the Government has agreed – in legislation – that First Nations peoples ‘never ceded sovereignty of their lands, seas and waters’.¹²

3 George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) ch 6 (‘Treaty’).

4 Cf Harry Hobbs and George Williams, ‘The Noongar Settlement: Australia’s First Treaty’ (2018) 40(1) *Sydney Law Review* 1 (‘The Noongar Settlement’).

5 Patrick Dodson, ‘Navigating a Path Towards Meaningful Change and Recognition’ in Megan Davis and Marcia Langton (eds), *It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 180, 181.

6 Michael Dodson, ‘Sovereignty’ (2002) 4 *Balayi* 13, 18.

7 Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (Federation Press, 2003) 8; Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021) ch 2 <<https://doi.org/10.5040/9781509940172>> (‘Indigenous Aspirations’).

8 Note of course that there is an extensive history of agreement-making between First Nations and governments in Australia. Agreements such as those concerning land rights, resource benefit-sharing, and joint-management of parks and reserves, do not constitute treaties but they do help establish a political and legal landscape within which treaty-making may occur: see generally, Marcia Langton et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006).

9 *Treaty Authority and Other Treaty Elements Act 2022* (Vic) preamble (‘Treaty Authority Act’); *Treaty Authority Agreement: First Peoples’ Assembly of Victoria and the State of Victoria*, signed 6 June 2022, cl 1.3 (‘Treaty Authority Agreement’).

10 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) (‘UNDRIP’).

11 *Path to Treaty Act 2023* (Qld) s 6 (‘Path to Treaty Act’).

12 *Treaty Commissioner Act 2020* (NT) app cl 6(c) (‘Treaty Commissioner Act’).

These significant developments deserve considered scholarly attention. The most comprehensive overviews of the state and territory treaty processes, however, were published in 2019¹³ and 2020.¹⁴ While a number of scholars working in law and other disciplines have examined specific aspects of particular treaty processes or the nature of treaty relationships in Australia since then,¹⁵ no broad summary of the current state of play across the nation exists. This is problematic for two reasons. First, considerable developments have occurred over the last few years. Some jurisdictions have formally committed to pursuing truth-telling and treaty negotiations since 2020, while the process in others has stalled or faced significant challenges. At the same time, some jurisdictions have made slow but steady progress towards building the institutions necessary to conduct equitable negotiations in the 21st century. These steps may offer lessons for other jurisdictions already engaged in or contemplating embarking upon a treaty process with Indigenous peoples, both in Australia and overseas.

Second, the absence of any clear and comprehensive contemporary overview inhibits the capacity of governments, Indigenous communities and non-Indigenous Australians to understand these developments. Because the states and territories have led the push towards treaty-making, there is no online clearinghouse or summary document that outlines key issues, elements and steps in each process. Australians interested in learning more about what is happening within their state or territory and across the country are required to navigate a raft of departmental websites that describe their work in different language and levels of detail. In view of the foundational significance of these processes for Australia and its relationship with Aboriginal and Torres Strait Islander peoples, it is vital that a clear and simple outline is provided. This article provides that outline.

The article is divided into two substantive parts. In Part II, I provide an update on the treaty processes across the country. I examine the steps taken in every Australian jurisdiction, focusing on developments since 2020. This background illustrates the vitality and creativity of treaty processes around the country. It also reveals major challenges that will need to be managed if these processes are to

13 Harry Hobbs and George Williams, 'Treaty-Making in the Australian Federation' (2019) 43(1) *Melbourne University Law Review* 178.

14 Williams and Hobbs, *Treaty* (n 3) ch 8.

15 See, eg, Bertus De Villiers, 'Chasing the Dream: Self-Determination on a Non-territorial Basis for the Noongar Traditional Owners in the South West of Australia' (2020) 27(1) *International Journal on Minority and Group Rights* 171 <<https://doi.org/10.1163/15718115-02702003>>; Dominic O'Sullivan, 'Treaties and Re-setting the Colonial Relationship: Lessons for Australia from the Treaty of Waitangi' (2021) 21(6) *Ethnicities* 1070 <<https://doi.org/10.1177/1468796821999863>>; Asmi Wood, 'Treaty Making (*Makarrata*) and an "Invisible" People: Seeking a Just Peace after "Conflict"' in Kelli Te Maihāroa, Michael Lialiga and Heather Devere (eds), *Decolonising Peace and Conflict Studies through Indigenous Research* (Palgrave Macmillan, 2022) 231 <https://doi.org/10.1007/978-981-16-6779-4_13>; Sarah Maddison and Anya Thomas, 'Treaty as a Pathway to Indigenous Controlled Policy: Making Space, Partnering, and Honouring New Relationships' in Nikki Moodie and Sarah Maddison (eds), *Public Policy and Indigenous Futures* (Springer, 2023) 111 <https://doi.org/10.1007/978-981-19-9319-0_7>; Sarah Maddison, Julia Hurst and Archie Thomas, 'The Truth Will Set You Free? The Promises and Pitfalls of Truth-Telling for Indigenous Emancipation' (2023) 11(2) *Social Inclusion* 212 <<https://doi.org/10.17645/si.v11i2.6491>>.

result in meaningful and effective settlements.¹⁶ In Part III, I examine several of the more difficult issues with which these processes are grappling. I divide them into five categories: (A) information issues relating to a lack of knowledge on treaty; (B) political challenges concerning the need to ensure broad support for the process; (C) implementation problems relating to the requirement that Indigenous Australians lead treaty; (D) legal questions on the role of international law; and (E) a practical problem relating to our federal system.

One further challenge is important to note. In the 2017 Uluru Statement from the Heart, Aboriginal and Torres Strait Islander peoples called for a constitutional First Nations Voice, and a legislated Makarrata Commission to supervise agreement-making and truth-telling. In October 2023, a referendum to enshrine an Aboriginal and Torres Strait Islander Voice in the Constitution was heavily defeated.¹⁷ A treaty process does not require constitutional change. Nevertheless, the scale of the referendum defeat has placed considerably more pressure on these processes. It is not just that political support has been withdrawn in some jurisdictions and is faltering in others. It is also that these processes have attained greater prominence as a mechanism for advancing Indigenous Australians' hopes and aspirations. Some close observers worry they will not be able to meet increased expectations.¹⁸

II AN UPDATE ON TREATY PROCESSES

Seven states and territories and the Commonwealth have formally committed to exploring or pursuing a treaty process with First Nations peoples. The only government that is not engaged in treaty is Western Australia ('WA'). As I demonstrate here, however, a formal commitment does not necessarily indicate an effective process free from challenges and difficulties. Modern treaty-making is complex and technical. Governments may not comprehend the enormity of the task before them, nor what a treaty relationship means in practice. It takes time for the state to build its own capacity. It also takes time for First Nations communities to reflect on their interests and priorities and choose whether and how to engage. It requires widespread and deep consultations that empower First Nations peoples to not just understand but to lead the process. Adopting a model or framework to structure negotiations and building novel public law institutions to facilitate equitable talks is also challenging. In this part, I examine the steps undertaken in

16 As one reviewer noted, I acknowledge my framing positions the challenges as instrumental issues that can be worked through in good faith rather than as emerging from distinct ontological plains.

17 Adrian Beaumont, 'Voice to Parliament Referendum Has Been Heavily Defeated Nationally and in All States', *The Conversation* (online, 14 October 2023) <<https://theconversation.com/voice-to-parliament-referendum-has-been-heavily-defeated-nationally-and-in-all-states-213156>>.

18 See, eg, Michael Dillon, 'Indigenous Policy's Inflection Point: What Does the Referendum Result Mean for First Nations Policymaking?', *Inside Story* (online, 16 October 2023) <<https://insidestory.org.au/indigenous-policy-s-inflection-point/>>; Michelle Grattan, 'Grattan on Friday: Anthony Albanese Had Good Motives but His Referendum Has Done Much Harm', *The Conversation* (online, 19 October 2023) <<https://theconversation.com/grattan-on-friday-anthony-albanese-had-good-motives-but-his-referendum-has-done-much-harm-215996>>.

each jurisdiction since 2020. Where relevant, I begin with a short background to bring readers up to speed.

A Victoria

The Victorian treaty process has moved slowly but deliberately from its inception in early 2016. It has also adapted to accommodate the need for Aboriginal communities to prepare themselves to talk treaty with the Victorian Government, and for the government to understand what a treaty relationship with First Nations peoples entails. Conscious of power imbalances, the effects of colonisation on traditional authority structures and the need to develop institutions that are effective in contemporary society, Aboriginal Victorians favoured a measured and deliberate process. Rather than immediately enter treaty talks, they first sought to develop and design an appropriate body that could represent them when engaging with the State.¹⁹ The process thus evolved into three distinct phases. Those phases are:

- Phase One: Establishing an Aboriginal Representative Body.
- Phase Two: Developing a Treaty Framework.
- Phase Three: Negotiating Treaties.²⁰

Phase One ran between 2016 and December 2019. It included two processes of First Nations consultations led by an Aboriginal Treaty Working Group and the Victorian Treaty Advancement Commissioner, alongside other opportunities for Aboriginal Victorians to develop and refine the proposed representative body. It also included a broader community education campaign, called ‘Deadly Questions’. In June 2018, the process was given firm legal grounding with the passage of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (*‘Treaty Act’*). The *Treaty Act* established a legislative basis for negotiating a treaty with Aboriginal people in the State and required that the government recognise an Aboriginal designed representative body. This body – named the First Peoples’ Assembly of Victoria – is responsible for administering a self-determination fund to support Aboriginal Victorians in treaty negotiations, and for working with government to ‘establish the entities, rules and resource base necessary to facilitate future treaty negotiations’.²¹ Phase One culminated in December 2019, when elected members of the First Peoples’ Assembly held their inaugural meeting in the Victorian Parliament’s Upper House Chamber.²²

19 See, eg, Victorian Treaty Advancement Commission, *Treaty Statewide Gathering* (Melbourne Cricket Ground, 25 September 2018).

20 ‘The Victorian Treaty Process: Three Phases Overview’, *First Peoples: State Relations* (Web Page, 1 November 2021) <<https://www.firstpeoplesrelations.vic.gov.au/advancing-victorian-treaty-process-annual-report-2020-21/victorian-treaty-process-three-phases>>.

21 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) Preamble (*‘Treaty Act’*). In 2022, an amendment to the *Treaty Act* (n 21) clarified that the First Peoples’ Assembly may be a party to treaty negotiations: see *Treaty Authority Act* (n 9), inserting *Treaty Act* (n 21) s 34A.

22 Calla Wahlquist, “‘We are Turning this Room Black’: Inaugural First Peoples’ Assembly of Victoria Start Path to Treaty”, *The Guardian* (online, 10 December 2019) <<https://www.theguardian.com/australia-news/2019/dec/10/we-are-turning-this-room-black-inaugural-first-peoples-assembly-of-victoria-start-path-to-treaty>>. Note, however, that the process of colonisation has caused some complexities in the make-up of the Assembly, which consists of 22 seats for members elected in an individual capacity to represent five regions, and 11 seats reserved for Traditional Owner groups formally recognised by the

The second phase has concentrated on building the key institutions necessary to support modern treaty negotiations. Reflecting Indigenous peoples' right to self-determination and the principle of co-design, the *Treaty Act* required the First Peoples' Assembly and the Victorian Government to 'work together to establish elements necessary to support future treaty negotiations'.²³ Five key elements have been adopted: a truth-telling commission; a dispute resolution process to guide the relationship between the parties; an independent Treaty Authority to oversee and facilitate negotiations; a Treaty Negotiation Framework setting out rules and processes; and a Self-Determination Fund to finance Aboriginal Victorians' negotiations.

The process has been led by the First Peoples' Assembly. Following their election in 2019, members of the Assembly have engaged with their electorates in informal and formal meetings to understand the views and aspirations of Aboriginal Victorians. These conversations have been carried to and discussed at regular Assembly meetings and inform discussions between the First Peoples' Assembly executive and the State Government. A necessarily iterative and reflexive dialogic process means both parties need to be flexible to meet community aspirations in service of building a relationship based on equality and mutual respect. One example of this flexibility is the development of the Yoorrook Justice Commission.

Truth-telling was not initially identified as an element of the treaty process; it emerged organically out of community conversations as a 'member-led resolution'.²⁴ In June 2020, the First Peoples' Assembly called on the Victorian Government to 'establish an independent Truth Commission or inquiry to formally recognise historic wrongs, and past and ongoing injustices as a result of colonisation'.²⁵ The Government supported the move. Working in partnership, the Assembly and Victorian Government considered the commission's mandate and its design and legal basis. After several months of negotiations, in March 2021, the Victorian Government announced the establishment of the Yoorrook Justice Commission, Australia's first ever formal truth-telling commission.²⁶

The Yoorrook Justice Commission has been invested with the powers of a Royal Commission.²⁷ It has a broad mandate. The Commission is empowered to 'establish an official public record', 'develop a shared understanding' of 'First

State (10 of which are occupied). For concerns, see Sarah Maddison, Julia Hurst, and Dale Wandin, 'The Mess of Colonialism, the Complexity of Treaty' in Harry Hobbs, Alison Whittaker, and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 179. The Assembly has adopted a process that allows Traditional Owner groups without formal State recognition to apply directly for a reserved seat: First Peoples' Assembly of Victoria, *Additional Pathways to Recognition: Guidelines for Applicant Groups* (April 2022) <<https://www.firstpeoplesvic.org/wp-content/uploads/2022/05/fpav-additional-pathways-to-recognition-guidelines-for-applicants-FA.pdf>>.

23 *Treaty Act* (n 21) s 1(d).

24 *Report to Parliament 2020* (n 1) 20.

25 Joseph Dunstan, 'Victorian First Peoples' Assembly Calls for Truth Commission on Path to Treaties with Aboriginal Nations', *ABC News* (online, 18 June 2020) <<https://www.abc.net.au/news/2020-06-18/victorian-aboriginal-treaty-body-calls-for-truth-commission/12361496>>.

26 Darby Ingram, 'Victoria Launches Country's First Truth-Telling Commission', *National Indigenous Times* (online, 10 March 2021) <<https://nit.com.au/victoria-launches-countrys-first-truth-telling-commission/>>.

27 Victoria, *Victoria Government Gazette*, No S 217, 14 May 2021, 1.

Peoples' experiences of [s]ystemic [i]njustice', and 'help build the foundations for a new relationship' between Aboriginal and non-Aboriginal Victorians.²⁸ Comprehensive terms of reference allow detailed focus on the interconnections between past and ongoing contemporary harm. In this sense, the Commission understands that the process of truth-telling is 'a bridge', intended to 'draw history into the present'.²⁹ This mandate also reflects the fact that the Commission has been framed as a complementary mechanism that will support and promote the advancement of the treaty process. The life stories and experiences told to the Yoorrook Justice Commission are expected to 'shape Victoria's conversation around Treaty-making, as well as the national conversation across Australia',³⁰ while its recommendations are likely to identify matters that may form part of treaty negotiations.³¹ The connection between the Commission and the treaty process is vital. Given the Commission does not have the power to implement its recommendations nor order reparations,³² its success depends upon the ability 'to tell a broader story that can inform and support the treaty process'.³³

It is too early to assess the impact of the Yoorrook Justice Commission. Hearings were delayed and postponed several times due to COVID-19, placing pressure on commissioners and staff.³⁴ While the Commission published an interim report in June 2022 highlighting emerging themes and Elders' experiences of colonisation,³⁵ it is not clear if Yoorrook is cutting through in the community or even in the State Government. In March 2023, the Victorian Government apologised to the Commission for failing to produce documents or respond to questions within deadlines. These 'serious compliance concerns' have forced the cancellation of scheduled hearings,³⁶ further weakening the Commission's institutional and

28 Ibid 2.

29 Courtney Jung, 'Canada and the Legacy of the Indian Residential Schools: Transitional Justice for Indigenous People in a Nontransitional Society' in Paige Arthur (ed), *Identities in Transition: Challenges for Transitional Justice in Divided Societies* (Cambridge University Press, 2011) 217, 231 <<https://doi.org/10.1017/CBO9780511976858.008>>.

30 First Peoples Assembly of Victoria, 'Tyerri Yoo-rrook' (*Seed of Truth*): Report to the Yoo-rrook Justice Commission from the First Peoples' Assembly of Victoria (Report, June 2021) 33.

31 See also Harry Hobbs, 'Unfinished Business? The Victorian Yoo-rrook Justice Commission and Truth-Telling in Australia' (Seminar Paper, Australia and New Zealand School of Government, 3 March 2022) 7 <<https://opus.lib.uts.edu.au/bitstream/10453/158770/2/Hobbs%20%282022%29%20-%20Yoo-rrook%20Justice%20Commission%20Case.pdf>>.

32 Dani Larkin et al, 'Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States' (2022) 41(1) *University of Queensland Law Journal* 35, 56–7 <<https://doi.org/10.38127/uqlj.v41i1.6353>>.

33 Shireen Morris and Harry Hobbs, 'Imagining a Makarrata Commission' (2022) 48(3) *Monash University Law Review* 19, 39 <<https://doi.org/10.2139/ssrn.4129559>>.

34 Jack Latimore, 'Yoorrook Commission Loses a Third Committee Member in Six Months', *The Age* (online, 15 June 2022) <<https://www.theage.com.au/politics/victoria/yoorrook-commission-loses-a-third-committee-member-in-six-months-20220615-p5att1.html>>.

35 Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, June 2022) ('*Yoorrook with Purpose Interim Report*').

36 Kate Ashton, 'Victorian Government Apologies to Yoorrook Justice Commission Amid Delays to Indigenous Truth-Telling Inquiry', *ABC News* (online, 28 March 2023) <<https://www.abc.net.au/news/2023-03-28/yoorrook-justice-commission-delays-truth-telling-inquiry/102151474>>.

community presence. Nevertheless, in August 2023, the Commission released a key report into Victoria's child protection and criminal justice systems.³⁷

In the meantime, the Assembly and Victorian Government continued to develop the treaty framework, with formal negotiations commencing in August 2020.³⁸ Talks moved quickly; in February 2021, an interim dispute resolution process was signed committing the parties to engage 'in good faith, on an equal playing field and honouring Aboriginal ways of doing business'.³⁹ The same month, a second community education campaign, 'Deadly and Proud', designed to build awareness and support for treaty was launched.⁴⁰ In April 2021, the Assembly and State reached agreement on conduct protocols to give practical application to the guiding principles outlined in the *Treaty Act* and to 'lay the foundations for a renewed and mature relationship' with First Nations peoples in the State.⁴¹ In May 2021, discussions on the Treaty Negotiation Framework and Treaty Authority began. The Assembly outlined its preliminary views on the framework in October 2021, declaring it would pursue both a State-wide treaty to cover topics relevant to all First Nations peoples, and Traditional Owner treaties negotiated at a nation-to-nation level.⁴² The following month, the Assembly released a Discussion Paper seeking community feedback on the proposed Treaty Authority.⁴³ The Assembly and State reached final agreement on the Treaty Authority in June 2022.

The Treaty Authority is to act as an impartial umpire. Its role is to oversee negotiations, resolve disputes and ensure a fair process as far as possible. To do this effectively, the 'umpire' cannot simply be a creature of the State; it must be imbued with and reflect the culture and values of both parties to the negotiations.⁴⁴ The design of the Authority thus illustrates the need to develop creative and innovative public law institutions to support and facilitate treaty-making. Reflecting its responsibility, the Treaty Authority is independent of both the Victorian Parliament and Government. While it is publicly accountable to the people of Victoria, it does not report to the Minister. The Authority is also culturally accountable to First Nations people. As Assembly co-chair and Nira illim bulluk man Marcus Stewart explained, the Authority 'will be guided by Aboriginal lore, law and cultural

37 Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems* (Report, August 2023).

38 'Pathway to Treaty', *First Peoples: State Relations* (Web Page) <<https://www.firstpeoplesrelations.vic.gov.au/treaty-process>>.

39 First Peoples' Assembly of Victoria (Facebook, 8 February 2021, 4:00pm AEDT) <<https://www.facebook.com/firstpeoplesvic/posts/926217151456887/>>.

40 Gabrielle Williams, 'Deadly and Proud on Our Path to Treaty, Truth and Justice' (Media Release, 8 February 2021) <<https://www.premier.vic.gov.au/deadly-and-proud-our-path-treaty-truth-and-justice>>.

41 'Pathway to Treaty' (n 38).

42 First Peoples' Assembly of Victoria, *Annual Report 2021* (Report, 2021) 16. This model shares similarities with the Umbrella Agreement in Yukon Territory, Canada: *Umbrella Final Agreement between the Government of Canada, the Council for Yukon Indians and the Government of the Yukon* (signed and entered into force 29 May 1993) ch 2; *Yukon First Nations Land Claims Settlement Act*, SC 1994, c 34; *An Act Approving Yukon Land Claim Final Agreements*, RSY 2002, c 240.

43 First Peoples' Assembly of Victoria, 'Treaty Authority' (Discussion Paper, November 2021).

44 See discussion in Julie Jai, 'Bargains Made in Bad Times: How Principles from Modern Treaties Can Reinvigorate Historic Treaties' in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017) 105, 143–4.

authority that has been practised on these lands for countless generations'.⁴⁵ These values include 'First Peoples' sovereignty, Country, and self-determination'.⁴⁶

Administrative elements bolster its independence. The Authority will be comprised of between five and seven independent members, all of whom are First Nations people.⁴⁷ The Authority is guaranteed long-term public funding which it can control and manage. The *Treaty Authority and Other Treaty Elements Act 2022* (Vic) ('*Treaty Authority Act*') appropriates resources from the State's Consolidated Fund each financial year from 2022–23 onwards to pay for the Treaty Authority's costs, including remuneration for its members and staff. The *Treaty Authority Act* also specifies annual amounts, that are not to be exceeded, including \$20.3 million annually from the 2025–26 financial year.⁴⁸ Such funding is critical to ensure that the Authority can perform its functions. The *Treaty Authority Act* was passed by the Victorian Parliament in August 2022.

The remaining two elements in the treaty architecture were finalised in October 2022. That month, the Assembly and Victorian Government jointly established the Treaty Negotiation Framework and the Self-Determination Fund. The Negotiation Framework is a ground-breaking agreement. It concisely explains the rationale for treaty and sets out the minimum standards and ground rules all parties must abide by during negotiation. It also outlines the procedure for State-wide and Traditional Owner treaties, the scope and subject matter of negotiations, how disputes that might arise will be resolved, and the mechanisms to implement and enforce treaties. Significantly, as part of the framework, the State has agreed that 'there are no matters that cannot or must not be agreed to in the course of treaty negotiations'.⁴⁹ The framework also sets out a series of negotiation standards that have been developed against the background of a history of poor conduct by the State and an ongoing power imbalance. These standards ensure that the negotiation process will occur in a culturally appropriate forum, include mechanisms to address imbalance of power, and recognise Aboriginal 'Lore, Law and Cultural Authority', among other elements.⁵⁰ These standards are legally enforceable.⁵¹

45 Melissa Castan, Kate Galloway and Scott Walker, 'A New Treaty Authority between First Peoples and the Victorian Government Is a Vital Step Towards Treaty', *The Conversation* (online, 16 June 2022) <<https://theconversation.com/a-new-treaty-authority-between-first-peoples-and-the-victorian-government-is-a-vital-step-towards-a-treaty-184739>>.

46 *Treaty Authority Agreement* (n 9) cl 17.

47 Ibid cl 5. Inaugural members of the Treaty Authority were announced in December 2023 and include Petah Atkinson, Thelma Austin, Jihad Clark, Andrew Jackomos, and Duen White: 'A Treaty Authority Grounded in Our Culture', *First Peoples' Assembly of Victoria* (Web Page) <<https://www.firstpeoplesvic.org/treaty/treaty-authority/>>.

48 *Treaty Authority Act* (n 9) s 16(2).

49 *Treaty Negotiation Framework*, First Peoples' Assembly of Victoria–State of Victoria (signed and entered into force 20 October 2022) cl 25(1) <<https://content.vic.gov.au/sites/default/files/2022-10/Treaty-Negotiation-Framework.pdf>> ('*Treaty Negotiation Framework*'). Though note that constitutional limits will preclude some elements from any exclusively State treaty: Hobbs and Williams, 'Treaty-Making in the Australian Federation' (n 13).

50 *Treaty Negotiation Framework* (n 49) cl 24(a)(v).

51 Ibid cl 24.1(b); *Treaty Act* (n 21) s 34.

The Self-Determination Fund Agreement also represents a significant achievement. The Fund is intended to ensure First Nations peoples have equal standing with the State in negotiations, by providing financial resources, independent from the State, that empower First Nations peoples ‘to build capacity, wealth and prosperity’.⁵² As an initial funding allocation, the Victorian Government has agreed to provide ‘not less than \$65 million’ over the first three financial years.⁵³ It has also agreed that this ‘represents only partial funding’ and that further funding will be provided subject to negotiation.⁵⁴ Although this additional funding has not been set out in advance, it demonstrates a shared understanding among the parties that long-term independent resourcing is necessary for an effective treaty process.⁵⁵

The formalisation of the Treaty Negotiation Framework and Self-Determination Fund represented the conclusion of the second phase in Victoria’s treaty process. Phase Three commenced with elections of the second Assembly, which were conducted between May and June 2023. Several years of preliminary work will now be tested, as the Assembly begins the first formal treaty negotiations on this continent with the Victorian Government. Nevertheless, as new Assembly co-chair and Gunditjmarra man Reuben Berg notes, there is ‘no finish line’; negotiations will be an ongoing process.⁵⁶

B The Northern Territory

The NT treaty process commenced in 2018. Marked initially by a series of positive steps, the process has recently run into complications that illustrate the complexity of modern treaty-making. In June 2018, Chief Minister Michael Gunner signed the Barunga Agreement with the Territory’s four Aboriginal Land Councils. The non-legally binding memorandum of understanding pledged the parties to work towards a treaty.⁵⁷ The following year, Emeritus Professor Mick Dodson was appointed Treaty Commissioner, and Ursula Raymond (part-time) Deputy Commissioner. In May 2020, the NT Parliament enacted the *Treaty Commissioner Act 2020* (NT), putting the process on a legislative footing.⁵⁸ The Act implemented the Barunga Agreement by establishing the Treaty Commissioner role as a statutory appointment, detailed the functions and powers of the Commissioner, and outlined administrative issues relating to that appointment.

52 *Self-Determination Fund Agreement: First Peoples’ Assembly of Victoria and the State of Victoria*, signed 20 October 2022, cl 1.2 (‘*Self-Determination Fund Agreement*’).

53 *Ibid* cls 7.1–7.2.

54 *Ibid* cl 7.2.

55 Cf the situation in British Columbia, where 80% of funding to First Nations communities was initially considered an advance on the financial component of any settlement: Douglas Eyford, *A New Direction: Advancing Aboriginal and Treaty Rights* (Report, 20 February 2015) 61.

56 Jack Latimore, ‘Victorian First Peoples’ Assembly Wants Decision Powers within Four Years’, *The Age* (online, 26 July 2023) <<https://www.theage.com.au/politics/victoria/victorian-first-peoples-assembly-wants-decision-powers-within-four-years-20230724-p5dqqk.html>>.

57 *Barunga Agreement*, Aboriginal Land Councils–Northern Territory (signed and entered into force 8 June 2018).

58 *Treaty Commissioner Act* (n 12).

The Commission first undertook preliminary consultations with organisations and communities across the Territory. Professor Dodson and Ms Raymond held talks with more than 45 Aboriginal organisations, relied on the NT Aboriginal Interpreter Service to translate factsheets into 16 First Nations languages, appeared regularly on radio and published several newsletters.⁵⁹ These initial conversations formed the basis for a comprehensive Discussion Paper released in June 2020. The paper also drew on Professor Dodson's extensive international experience and the specific legal context of the NT, before proposing a framework and negotiation model for a NT treaty process.⁶⁰ A complementary paper modelling an NT truth telling commission was released in February 2021.⁶¹ These discussion papers informed 'an extensive, Territory-wide community consultation process with First Nations Territorians',⁶² in urban, remote and very remote areas, that ran until October 2021.

Notwithstanding this steady and impressive work, challenges soon emerged. In June 2021, Professor Dodson resigned.⁶³ Despite assurances from the NT Government that the process was on track, no replacement was appointed until December 2021,⁶⁴ when Wiridi man Tony McAvoy SC was made Acting Treaty Commissioner.⁶⁵ McAvoy commenced in January 2022 on a part-time basis. Nevertheless, he succeeded in delivering a comprehensive final report to the NT Government in March 2022.⁶⁶

The final report was released to the public in June 2022. It is a significant document that engages seriously with the complications of negotiating a modern treaty in the NT. It notes that three key themes were reiterated in consultations across the Territory:

1. Aboriginal people must make their own decisions about Treaty, and should be empowered to negotiate Treaty on their own terms.
2. Aboriginal people see Treaty as a means through which to right past wrongs and reaffirm human rights that have been historically ignored and overridden.

59 Northern Territory Treaty Commission, *Interim Report of the Northern Territory Treaty Commissioner: Stage One* (Report, March 2020) 3–4. See, eg, Northern Territory Treaty Commission, 'Commissioner's Update No 1' (Media Release, 1 May 2019) <https://treatynt.com.au/_data/assets/pdf_file/0007/684412/tc-update-1.pdf>.

60 Northern Territory Treaty Commission, 'Treaty Discussion Paper' (Discussion Paper, 30 June 2020).

61 Northern Territory Treaty Commission, *Towards Truth Telling* (Report, 12 February 2021).

62 Northern Territory Treaty Commission, 'Treaty Discussion Paper' (n 60) 8.

63 'NT Treaty Commissioner Mick Dodson Resigns Following Verbal Abuse Allegation', *ABC News* (online, 11 June 2021) <<https://www.abc.net.au/news/2021-06-11/nt-treaty-commissioner-mick-dodson-resigns/100209394>>.

64 Matt Garrick, 'Barrister Tony McAvoy SC Sworn in as the Northern Territory's Acting Treaty Commissioner', *ABC News* (online, 8 December 2021) <<https://www.abc.net.au/news/2021-12-08/nt-new-treaty-commissioner-tony-mcavoy/100681550>>.

65 Under the *Treaty Commissioner Act* (n 12), the term of appointment for the Commissioner was three years. Given the Final Report had to be delivered within 18 months following the tabling of the Discussion Paper, a three-year term was not feasible. An Acting Treaty Commissioner could only serve for a maximum of six months. This legislative requirement may have caused the delay in Tony McAvoy's appointment.

66 Northern Territory Treaty Commission, *Final Report* (Report, 29 June 2022) ('*Northern Territory Treaty Commission Final Report*').

3. Communities have been let down by past and current government approaches, and transformational change is needed in the way Aboriginal people govern themselves and support by the NT and Local government.⁶⁷

Announcing that '[t]he time for action has arrived',⁶⁸ the report recommended a permanent, independent Treaty and Truth Commission be established to facilitate the next steps in the process.⁶⁹ It also proposed a model similar to Victoria, consisting of a Territory-wide agreement outlining broad parameters, minimum standards and key principles, and a series of individual treaties with First Nations or coalitions of First Nations. The report made clear that the aim of treaty was 'self-government, economic independence and reparations'.⁷⁰ This would be achieved via a staged process of reforms, involving the transformation of local government in the NT as a step on the path to substantive Aboriginal self-government.⁷¹ The report also detailed a clear implementation plan, imploring the NT Government to develop a sustainable funding model and hold a First Nations Forum to progress a treaty and truth-telling process.⁷² As this suggests, negotiations would only commence following the establishment of the right infrastructure.

The NT Government welcomed the report's release. The Minister for Treaty and Local Decision Making, Selena Uibo, noted it was clear there was 'significant support for treaties' across the Territory.⁷³ However, something changed. On 29 December 2022 (during the Christmas-New Year period), the NT Government quietly released its official response in a statement on the Office of Aboriginal Affairs website. Declaring that 'no consensus' existed on the appropriate treaty framework, the NT Government determined to reopen the process. The independent NT Treaty Commission would be abolished, and a Treaty Unit formed within the Office of Aboriginal Affairs to run an 18-month to 2-year process of consultations to 'test' whether Aboriginal Territorians agree with the report's recommendations.⁷⁴ At the same time, the NT Government confirmed that it would progress a truth-telling process and provide more details in due course.⁷⁵

67 Ibid 24.

68 Ibid 6.

69 Ibid 9.

70 Jesse Thompson, 'Landmark Treaty Report Recommends First Nation Government System for Indigenous Territorians', *ABC News* (online, 29 June 2022) <<https://www.abc.net.au/news/2022-06-29/nt-treaty-report-released-by-commissioner/101192202>>.

71 *Northern Territory Treaty Commission Final Report* (n 66) 36.

72 Ibid 9.

73 Amos Aikman, 'Treaty Risking a Territory of Micro-states', *The Australian* (online, 29 June 2022) <<https://www.theaustralian.com.au/nation/treaty-risking-a-territory-of-microstates/news-story/62c92b71ef03021863ba21cb83f75ecf>>.

74 'NT Government Response to NT Treaty Commission's Final Report', *Northern Territory Government Office of Aboriginal Affairs* (Web Page, 29 December 2022) <<https://aboriginalaffairs.nt.gov.au/our-priorities/treaty/nt-government-response-to-treaty-commissions-final-report>> ('Response to NT Treaty Commission's Final Report'). The Northern Territory Treaty Commission recommended that a Treaty and Truth Commission be established to provide advice, consult with and deliver feedback to communities on the path thus travelled, and '[maintain] ... momentum': see *Northern Territory Treaty Commission Final Report* (n 66) 54.

75 'Response to NT Treaty Commission's Final Report' (n 74).

The national referendum may have delayed any announcement. More than a year later, in January 2024, Aboriginal Affairs Minister, Chansey Paech, declared that the Territory Government would hold two treaty symposiums in April 2024 with the aim of delivering a ‘pathway forward’.⁷⁶ Many have expressed cynicism. For instance, Ms Raymond noted that: ‘There’s been no movement that I’m aware of, of them implementing any of the recommendations we made or furthering the aspirations of Aboriginal and Torres Strait Islander people in the Northern Territory regarding a treaty.’⁷⁷ At the same time, the NT Government has refused to release documents detailing the reasons for the closure of the independent Treaty Commission.⁷⁸

C Queensland

The Queensland treaty process commenced in 2019. During NAIDOC Week, Deputy Premier Jackie Trad announced that the State would begin a conversation about a pathway to treaty with Aboriginal and Torres Strait Islander peoples and committed the Queensland Government to ‘building a reframed relationship that acknowledges, embraces and celebrates the humanity of Indigenous Australians’.⁷⁹ Similar to Victoria, the process in Queensland has evolved into a staggered program, consisting of six phases. Those phases are:

- Phase One: Starting the Conversation.
- Phase Two: Advancing the Path to Treaty.
- Phase Three: Preparing for Establishment.
- Phase Four: Establishment.
- Phase Five: Advancing Treaty-Making.
- Phase Six: Treaty Negotiations.⁸⁰

Phase One centred on community consultation with the aim of assessing whether the State should embark on a treaty process. In July 2019, the Queensland Government established a Treaty Working Group comprised of Indigenous Queenslanders to hold public consultations with Indigenous and non-Indigenous communities across the State, and an Eminent Panel of Indigenous and non-Indigenous leaders to provide advice on what a treaty might look like, including timing, process and next steps.⁸¹ In February 2020, the Eminent Panel provided their advice, as well as submitted the

76 Matt Garrick, ‘NT Government to Revive Plans for Treaty, Six Years After It Was First Promised by Territory Labor’, *ABC News* (online, 19 January 2024) <<https://www.abc.net.au/news/2024-01-19/nt-government-revive-plans-treaty-voice-referendum/103364638>>.

77 Ibid.

78 Ibid.

79 Department of Aboriginal and Torres Strait Islander Partnerships (Qld), ‘Statement of Commitment’ (July 2019) <<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/treaty-statement-commitment-july-2019.pdf>>.

80 Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (Qld), *Treaty Advancement Committee Report* (Report, October 2021) 8 (‘*Queensland Treaty Advancement Committee Report*’); Interim Truth and Treaty Body, Submission No 21 to Community Support and Services Parliamentary Committee, Parliament of Queensland, *Path to Treaty Bill 2023* (2023) 6.

81 Note concerns over the breadth and depth of consultation: see below Part III(A).

report of the Treaty Working Group, to the Queensland Government.⁸² A few weeks later, the COVID-19 pandemic struck Queensland.

Conscious that the Government's focus necessarily must shift to responding to the public health emergency, the Eminent Panel prepared supplementary advice in May 2020. The Eminent Panel reiterated their central recommendation that 'Queensland should proceed on a Path to Treaty with the ultimate aim of reaching a treaty or treaties with the First Nations of Queensland'. The Eminent Panel also restated its position that legislative and institutional arrangements 'to auspice the Path to Treaty' should be developed.⁸³ This included an independent First Nations Treaty Institute to support Indigenous communities and a First Nations Treaty Future Fund to provide secure resourcing. However, the Eminent Panel acknowledged that the pandemic would affect timing. It no longer expected the Queensland Government to progress treaty legislation prior to the October 2020 State election. Rather, it called on the Queensland Government to make a 'Statement of Commitment' detailing its plans to continue the Path to Treaty in the next Parliament.⁸⁴ In August 2020, the Government issued a Treaty Statement of Commitment and accepted all the recommendations of the Eminent Panel in full or in principle.⁸⁵ This marked the culmination of Phase One.

COVID-19 and the State election 'resulted in a hiatus in the treaty process'.⁸⁶ It was not until February 2021, when the Queensland Government appointed a Treaty Advancement Committee, that the process resumed. The Treaty Advancement Committee consulted widely (albeit sometimes via online platforms due to the public health emergency) and further developed and refined the Eminent Panel's recommendations. Its October 2021 final report endorsed the 'basic framework and institutional arrangements' recommended by the Eminent Panel but proposed a staggered truth-telling and healing inquiry be 'undertaken separately from the First Nations Treaty Institute',⁸⁷ to support the process more effectively – an approach also adopted in Victoria. During the Treaty Advancement Committee's consultations, the Queensland Government made a significant financial commitment. The 2021–22 Budget established a \$300 million Path to Treaty Fund,⁸⁸ the returns of which

82 Treaty Working Group (Qld), *Report from the Treaty Working Group on Queensland's Path to Treaty* (Report, February 2020); Letter from Eminent Panel (Qld) to Jackie Trad, 3 February 2020 <<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/treaty-eminent-panel-february-2020.pdf>> ('Jackie Trad Letter').

83 Letter from Eminent Panel (Qld) to Craig Crawford, 29 May 2020, 2 <<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/treaty-eminent-panel-may-2020.pdf>>.

84 Ibid 3.

85 Queensland Government, 'Treaty Statement of Commitment and Response to Recommendations of the Eminent Panel' (August 2020) <<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/treaty-statement-commitment-august-2020.pdf>>.

86 *Queensland Treaty Advancement Committee Report* (n 80) 2. The October State election was a potential inflection point for the treaty process as the Liberal National opposition announced they would abandon the process if they secured government: Sarah Elks, 'Fears for Indigenous Treaty if LNP Wins Election', *The Australian* (online, 8 December 2019) <<https://www.theaustralian.com.au/nation/fears-for-indigenous-treaty-if-lnp-wins-election/news-story/b5392378562f7e68c66be83763583d27>>.

87 *Queensland Treaty Advancement Committee Report* (n 80) 3.

88 Queensland Treasury, *Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships* (Service Delivery Statement, 2021) 2 <<https://web.archive.org/>

would finance the planned First Nations Treaty Institute. These developments concluded Phase Two.

Further delays followed, but the Government eventually adopted the report. In August 2022, in a public announcement on the Speakers Green at the Queensland Parliament, Premier Annastacia Palaszczuk announced her Government accepted all 22 of the Committee's recommendations, either in full or in principle.⁸⁹ Phase Three thus commenced with the creation of an Independent Interim Truth and Treaty Body ('ITTb'). The ITTB comprises 10 Indigenous and non-Indigenous members. Its role is to design and deliver local truth-telling activities with public institutions of memory and story, work with a new Path to Treaty Office within the public service to co-design the First Nations Treaty Institute, undertake research, and report to the relevant minister on progress.⁹⁰ It will remain in existence until the First Nations Treaty Institute is established. In February 2023, after 'a participatory approach to legislative design in which the ITTB members were treated as equal collaborators',⁹¹ the Path to Treaty Bill 2023 (Qld) ('Path to Treaty Bill') was introduced into the Queensland Parliament.⁹²

The passage of the *Path to Treaty Act 2023* (Qld) ('*Path to Treaty Act*') marked the beginning of Phase Four. The Act further illustrates the creativity in development and design of treaty institutions around the country. Despite their grounding in Australian law, legislation and key architecture is being devised in ways that more clearly reflect the values and interests of First Nations peoples. The Act establishes two institutions: a First Nation Treaty Institute and a Truth-telling and Healing Inquiry. It also clarifies that the Act will be administered in accordance with First Nations peoples' right to self-determination, and free prior and informed consent, Aboriginal law, Torres Strait Islander Ailan Kastom (the traditions and beliefs that Torres Strait Islander peoples follow), and the rights in the *UNDRIP*.⁹³

The Treaty Institute is intended to empower and support First Nations people prepare for and participate in treaty negotiations. As part of this role, its primary task will be to develop 'in consultation with the State' a treaty-making framework,⁹⁴ and build the capacity of First Nations communities to become 'treaty ready'. To

web/20220219012235/https://budget.qld.gov.au/files/Budget_2021-22_SDS_Department_of_Seniors_Disability_Services_and_Aboriginal_and_Torres_Strait_Islander_Partnerships.pdf>.

89 Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (Qld), 'Treaty: Queensland's Path to Treaty Commitment' (August 2022) <<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/treaty-commitment-statement.pdf>>; Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships (Qld), 'Queensland Government Response to the Treaty Advancement Committee Report' (August 2022) <<https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/ptt-response-tac-report.pdf>>.

90 Interim Truth and Treaty Body (n 80) 7.

91 Ibid.

92 Annastacia Palaszczuk, 'Premier's Speech: Path to Treaty' (Media Statement, 15 February 2023) <<https://statements.qld.gov.au/statements/97179>>.

93 *Path to Treaty Act* (n 11) s 6.

94 Ibid s 13(1)(a).

do this effectively, the Institute will be an independent statutory authority.⁹⁵ It will not represent Queensland, and the members of its governing body – the Treaty Institute Council – will not be subject to directions by the Minister. Rather they will be required to ‘act independently and in the public interest, having particular regard to the interests of Aboriginal peoples and Torres Strait Islander peoples.’⁹⁶

The proposed Truth-telling and Healing Inquiry is similar in function to the Yoorrook Justice Commission but differs in design. The Inquiry will be responsible for examining, documenting, researching and providing advice on the ‘individual, familial, cultural and societal impacts and effects of colonisation on Aboriginal peoples and Torres Strait Islander peoples’.⁹⁷ Rather than adopt the form of a ‘highly legalistic’ Royal Commission ‘far removed from First Nations cultural practice’, however, Queensland proposes to adopt a more ‘flexible format and basic operating style’.⁹⁸ The ITTB explains that this approach was modelled on the challenges the Yoorrook Justice Commission has experienced in adapting the Royal Commission model to operate in a culturally appropriate manner.⁹⁹

The Inquiry will need to observe natural justice but will not be bound by the rules of evidence. It will conduct truth-telling sessions or hearings ‘in a culturally appropriate manner having regard to’ Aboriginal law and tradition and Torres Strait Islander law and Ailan Kastom, as well as in a manner that ‘recognises the stress and psychological trauma that may be experienced by a person in giving oral testimony or making a submission to the session or hearing’.¹⁰⁰ This approach is intended to ensure the Inquiry will ‘be tailored to individual circumstances making it conducive to everyone sharing their stories of the hidden, and often destructive consequences of colonisation’.¹⁰¹ Reflecting this vision, individual participation or engagement with the Inquiry will be voluntary,¹⁰² except when it comes to the Queensland Government. The Inquiry will have the power to compel government and executive officers to appear and produce documents.¹⁰³ Following passage of the Act, the ITTB undertook further community consultation on the design of both institutions and delivered its advice to the Minister in August 2023.¹⁰⁴ In April 2024, members of the Treaty Institute Council and Truth-telling and Healing Inquiry were announced.¹⁰⁵

95 Ibid ss 10–11.

96 Ibid s 18.

97 Ibid s 66.

98 Interim Truth and Treaty Body (n 80) 13.

99 Ibid; *Yoorrook with Purpose Interim Report* (n 35) 15.

100 *Path to Treaty Act* (n 11) s 72(1)(d).

101 Interim Truth and Treaty Body (n 80) 13.

102 *Path to Treaty Act* (n 11) s 78.

103 Ibid ss 79–81.

104 Leeanne Enoch, ‘Interim Truth and Treaty Body Advice Received for Path to Treaty Next Steps’ (Media Statement, 7 August 2023) <<https://statements.qld.gov.au/statements/98405>>.

105 ‘ITTB Welcomes Appointment of First Nations Treaty Institute Council and Truth-Telling and Healing Inquiry Members’, *Truth and Treaty Queensland* (Web Page, 26 April 2024) <<https://www.truthandtreatyqld.org.au/about/news-media/ittb-welcomes-appointment-first-nations-treaty-institute-council-and-truth-telling>>.

D South Australia

South Australia ('SA') was one of the first jurisdictions to commit to treaty in December 2016. The process moved quickly. In February 2018, the SA Government reached preliminary agreement with the Narungga Nation and the Ngarrindjeri Regional Authority committing both parties to enter treaty negotiations.¹⁰⁶ However, the process was struck by several challenges. Many Aboriginal communities expressed anxiety that the SA Government was 'moving too fast' and expressed their wish that it 'be slowed down so that Aboriginal people can properly digest what is being proposed and the principles behind the proposition'.¹⁰⁷ It was also unclear what exactly the State meant by 'treaty'. Some participants worried that the government was more interested in negotiating a service-delivery agreement rather than developing a nation-to-nation partnership.¹⁰⁸ The SA Government also did not develop legislation to formalise or entrench the process, leaving it vulnerable to shifts in political support. In June 2018, following a State election, the SA treaty process was abandoned by the incoming Liberal government.¹⁰⁹

Given the division between the two major parties, treaty stalled for several years. It was not until March 2022, when the Labor Party returned to power, that treaty returned to the political agenda. On election night, incoming Premier Peter Malinauskas committed his government to 'delivering on a state based voice treaty and truth for the Aboriginal people of our state'.¹¹⁰ Respecting the sequencing of the Uluru Statement from the Heart, the SA Government prioritised Voice.¹¹¹ In the 2022–23 Budget, the Government provided \$2.1 million to implement a Voice to the SA Parliament.¹¹² In July 2022, the SA Government appointed Dale Agius, a senior leader with cultural connections to Kurna, Narungga, Ngadjuri and Ngarrindjeri language groups, as the inaugural Commissioner for First Nations Voice to Parliament. Agius was empowered to speak with First Nations people living in SA to understand their views on how a Voice could represent their interests, and work with government to assist in the development and drafting of legislation.

106 Lucy Kingston, 'SA Government Signs Buthera Agreement with Narungga Nation', *South Australian Native Title Services* (Web Page, 17 February 2018) <<https://www.nativetitlesa.org/sa-government-signs-buthera-agreement-with-narungga-nation/>>; *Negotiating a Treaty between the Ngarrindjeri People and the State of South Australia*, signed 16 February 2018.

107 Roger Thomas, Office of the Treaty Commissioner (SA), *Talking Treaty: Summary of Engagements and Next Steps* (Report, July 2017) 8 <<https://apo.org.au/sites/default/files/resource-files/2017-07/apo-nid186286.pdf>>.

108 See Daryle Rigney et al, 'Treating Treaty as a Technology for Indigenous Nation Building' in Diane Smith et al (eds), *Developing Governance and Governing Development: International Case Studies of Indigenous Futures* (Rowman and Littlefield Publishers, 2021) 119.

109 Calla Wahlquist, 'South Australia Halts Indigenous Treaty Talks as Premier Says He Has "Other Priorities"', *The Guardian* (online, 30 April 2018) <<https://www.theguardian.com/australia-news/2018/apr/30/south-australia-halts-indigenous-treaty-talks-as-premier-says-he-has-other-priorities>> ('SA Halts Indigenous Treaty Talks').

110 Peter Malinauskas, 'The Liberal Party Are Not Our Enemies' (Speech, 19 March 2022) <<https://speakola.com/political/peter-malinauskas-election-night-victory-speech-2022>>.

111 See generally Harry Hobbs, 'Treaty-Making Gathers Pace', *Inside Story* (online, 17 March 2023) <<https://insidestory.org.au/treaty-making-gathers-pace/>>.

112 Department of Treasury and Finance (SA), *State Budget: 2022–23* (Budget Paper No 1, 2022) <<https://www.statebudget.sa.gov.au/our-budget/supporting-communities>>.

The Commissioner met with more than 650 people at over 30 workshops across two rounds of consultations between August 2022 and January 2023. A Draft Bill was developed following the first round of engagement sessions, which focused conversation in the second round.¹¹³

In March 2023, the *First Nations Voice Act 2023* (SA) was passed by the SA Parliament. The Act establishes a First Nations Voice and provides \$10 million to support its establishment and operation. The model adopts a layered, federal structure. The State is divided into six regions, each of which elects its own Local Voice (with a gender balance).¹¹⁴ Members are responsible for engaging and working with local government, the public sector and other organisations, and informing a State-wide First Nations Voice about matters of interest to their region.¹¹⁵ The State Voice will be comprised of a male and female presiding member of each Local Voice.¹¹⁶ It is empowered to address the SA Parliament on specific Bills of interest to First Nations people, make an annual address to the Parliament, provide reports to the Parliament, and speak with Ministers and public service heads.¹¹⁷ To facilitate these functions, the Clerk of the Legislative Council and House of Assembly are required to give notice to the Voice of the introduction of a Bill relevant to the Voice.¹¹⁸ The Voice is also guaranteed at least two meetings with Cabinet each year.¹¹⁹

The Voice has significant powers providing Aboriginal people in SA with a real opportunity to influence the design and development of law and policy that affects them. This is complemented by an amendment to the SA Constitution recognising the ‘importance of listening to the voices of First Nations people if there is to be a fair and truthful relationship between the First Nations and non-First Nations of South Australia’.¹²⁰ Elections for the Voice were held on 16 March 2024.

113 Commissioner for First Nations Voice to the South Australian Parliament, *Engagement Report: August to October 2022* (Report, 2022) <https://www.agd.sa.gov.au/first-nations-voice/commissioner-for-first-nations-voice/FNV-Engagement-Report_v3.3-web.pdf> (*‘First Engagement Report’*); Commissioner for First Nations Voice to the South Australian Parliament, *Second Engagement Note: November 2022 to January 2023* (Report, 2023) <<https://www.agd.sa.gov.au/first-nations-voice/commissioner-for-first-nations-voice/FNV-Engagement-Report-Stage-2.pdf>> (*‘Second Engagement Note’*). On changes in design following the second round of consultations, see Laurel Fox and Graeme Orr, ‘The Voice as Politics’ (2023) 34(2) *Public Law Review* 129, 136.

114 *First Nations Voice Act 2023* (SA) ss 9(4), 10(1) (*‘First Nations Voice Act’*). See also at sch 1 cl 4.

115 *Ibid* s 15.

116 *Ibid* ss 24–5.

117 *Ibid* ss 28, 38, 40, 41, 45–6.

118 *Ibid* s 39.

119 *Ibid* s 43. The model appears similar in key respects to the national Aboriginal and Torres Strait Islander Voice as proposed in the Marcia Langton and Tom Calma report: National Indigenous Australians Agency, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (Report, 12 July 2021). See further Fox and Orr (n 113); Anna Olijnyk and Cornelia Koch, ‘South Australia’s First Nations Voice’, *AUSPUBLAW* (Blog Post, 21 July 2023) <<https://www.auspublaw.org/blog/2023/7/south-australias-first-nations-voice>>.

120 *Constitution Act 1934* (SA) s 3(1). See also at s 3(2), inserted by *First Nations Voice Act* (n 114) sch 2 pt 2, which provides:

The Parliament acknowledges that the voice of First Nations people has not always been heard in Parliament, and intends that, through the *First Nations Voice Act 2023*, that voice will be heard, and will make a unique and irreplaceable contribution to South Australia that benefits all South Australians.

Despite these positive developments concerns have been raised over the Voice's representative model and its relationship with existing Indigenous organisations. In January 2023, a delegation of Ngarrindjeri expressed concern to Attorney-General and Minister for Aboriginal Affairs Kyam Maher, noting that the regional boundaries are not representative of individual Aboriginal nations within the State. Only one of the six regions (for the APY Lands) maps onto cultural and community boundaries. While the APY Lands may elect members for their nation, other Aboriginal nations within the State are not afforded this same recognition. Rather, individuals will be directly elected from a wider First Nations community inhibiting their cultural authority and legitimacy.¹²¹ As they explained, this model marked a shift from the earlier treaty process that was explicitly directed to nation-based treaties. SA Native Title Services has made similar criticism.¹²² These complications suggest future challenges for the revived treaty process.

E Tasmania

A treaty process is also underway in Tasmania. In 2018, the Tasmanian Labor opposition promised to hold treaty talks if they secured government at the upcoming State election. The Liberal Party, which was returned to power, did not make a similar promise. Over the last few years, however, the Tasmanian Government has changed its position. Although the process remains in an early stage, it appears that pressure from other jurisdictions has propelled action in Tasmania.¹²³

In June 2021 the Tasmanian Government appointed former Governor Kate Warner and law professor Tim McCormack to consult with the Aboriginal community 'in an effort to find a path to reconciliation and a treaty'.¹²⁴ After four months and over 100 meetings with more than 420 people, the *Pathway to Truth-Telling and Treaty* report was delivered in November 2021.¹²⁵ The report made 24 recommendations, including two concerning the 'vexed question of Aboriginality' in the State.¹²⁶ The major recommendations called on the government to establish a Truth-Telling Commission, comprised of a majority of Tasmanian Aboriginal

121 *Second Engagement Note* (n 113) 9. A similar problem has confronted the Victorian First Peoples' Assembly. These concerns may have contributed to the very low electoral turnout: 'SA First Nations Voice Election Results Show Low Turnout, but Candidate Urges "Give Us a Chance"', *ABC News* (online, 29 March 2024) <<https://www.abc.net.au/news/2024-03-29/sa-voice-to-parliament-voter-turnout/103649148>>.

122 Jason Katsaras, "'Going Backwards": SA Native Title Bodies Raise Voice Concerns', *InDaily* (online, 20 January 2023) <<https://indaily.com.au/news/2023/01/20/native-title-holders-raise-concerns-about-sa-voice-to-parliament/>>. Note, of course, that native title bodies are not necessarily the peak or representative body for Aboriginal nations and so may not serve as the most appropriate institution as a representative polity.

123 Hobbs and Williams, 'Treaty-Making in the Australian Federation' (n 13) 232 (arguing that States already embarking upon a treaty process may build political pressure on recalcitrant States to do likewise).

124 Lucy Shannon, 'Tasmanian Government Commits to Time Frame for Truth-Telling, Treaty Talks with Indigenous Community', *ABC News* (online, 23 June 2021) <<https://www.abc.net.au/news/2021-06-23/tasmanian-aboriginal-truth-telling-treaty-discussions/100235634>>.

125 Kate Warner, Tim McCormack and Fauve Kurnadi, *Pathway to Truth-Telling and Treaty: Report to Premier Peter Gutwein* (Report, November 2021).

126 *Ibid* 62 (Recommendations 8–9).

people and employing flexible and culturally appropriate procedures,¹²⁷ and a legislated Treaty and Truth-Telling Framework Act to formalise the process.¹²⁸ As an interim measure, the report called on government to establish an Aboriginal Consultative Body to engage with whole-of-government policy relevant to Aboriginal people.¹²⁹ Premier Gutwein tabled the report the same month that he received it. In announcing that the government would consider its recommendations, the Premier, Peter Gutwein, noted:

The report opens a door that we can walk through, if we wish, but to do so we must choose to do that together ... I acknowledge that this will not be an easy journey that we are embarking upon. However, this is a journey we need to go on together, and I believe it is a journey Tasmania is ready for.¹³⁰

The Tasmanian Government responded formally in March 2022. Premier Gutwein acknowledged a range of views existed within the Tasmanian Aboriginal community but stated his confidence that there was ‘broad support’ to pursue treaty and truth-telling.¹³¹ In the 2022–23 budget, the Tasmanian Government allocated up to \$500,000 to support the creation of an Aboriginal Advisory body to work with government to co-design a truth-telling and treaty process. It also adopted the interim recommendation; ‘establish[ing] an Aboriginal Affairs, whole of Government Division within’ the Department of Premier and Cabinet, that would be comprised of ‘the Office of Aboriginal Affairs and Aboriginal Heritage Tasmania, as well as staff from other Departments, such as Health and Education’.¹³²

Events have moved slowly since. In April 2022, Premier Gutwein unexpectedly resigned and was replaced by his Deputy Premier, Jeremy Rockliff. The new Premier reiterated the Tasmanian Government’s commitment to truth-telling and treaty,¹³³ but no official or public announcements have been made. In November 2022, in response to a question in Parliament, Premier Rockliff advised that he had invited Tasmanian Aboriginal organisations to nominate for membership of an Aboriginal Advisory group earlier that year.¹³⁴ In December 2022, the six members of the group were named,¹³⁵ and in February 2023 it held its inaugural meeting. As a first step, the group declared it would ‘seek community consultation

127 Ibid 38 (Recommendations 1–3).

128 Ibid 45 (Recommendation 5).

129 Ibid 46 (Recommendation 7).

130 Tasmania, *Parliamentary Debates*, House of Assembly, 25 November 2021, 44–5.

131 Peter Gutwein, ‘Next Steps on Pathway to Truth-Telling and Treaty’ (Media Release, 1 March 2022) <https://www.premier.tas.gov.au/site_resources_2015/additional_releases/next_steps_on_pathway_to_truth-telling_and_treaty>.

132 Ibid.

133 Ethan James, ‘New Tas Premier Pledges Courage, Integrity’, *Canberra Times* (online, 8 April 2022) <<https://www.canberratimes.com.au/story/7691764/new-tas-premier-pledges-courage-integrity/>>.

134 Tasmania, *Parliamentary Debates*, House of Assembly, 24 November 2022, 15.

135 Roger Jaensch, ‘Advisory Group to Guide Process for Truth-Telling and Treaty’ (Media Release, 2 December 2022) <https://www.premier.tas.gov.au/site_resources_2015/additional_releases/advisory-group-to-guide-process-for-truth-telling-and-treaty>.

on a prospective pathway to truth-telling and treaty'.¹³⁶ Those consultations are ongoing. No timetable has been provided.¹³⁷

F The Australian Capital Territory

Treaty talks in the Australian Capital Territory ('ACT') have been complicated by a longstanding government decision. In May 2002, the Territory Government announced a policy to recognise the Ngunnawal people as the traditional custodians of the Canberra region,¹³⁸ despite the fact several distinct family groups claim connections.¹³⁹ This policy has caused significant angst within Aboriginal communities in the ACT.¹⁴⁰ It has also had consequential effects for the initial stages of the treaty process.

The ACT Government first declared it was open to talking treaty in 2018.¹⁴¹ This commitment was followed by a series of discussions with Ngunnawal peoples and members of the wider Indigenous community through the Aboriginal and Torres Strait Islander Elected Body. In the 2021–22 budget, the ACT Government provided \$463,000 as part of a 10-year \$20 million commitment to develop a Healing and Reconciliation Fund.¹⁴² Supporting treaty was identified as a key priority, and part of the initial funding was earmarked to 'facilitate a conversation ... about what treaty means in the ACT and what a treaty process will look like'.¹⁴³

136 Callan Morse, 'Tasmanian Government Aboriginal Advisory Group's Inaugural Meeting Questioned by Community Delegation', *National Indigenous Times* (online, 9 February 2023) <<https://nit.com.au/09-02-2023/4932/tasmanian-aboriginal-advisory-groups-inaugural-meeting-questioned-by-community-elected-delegation>>.

137 Tasmania, *Parliamentary Debates*, House of Assembly, 22 June 2023, 75 (Simon Wood); Tasmania, *Parliamentary Debates*, House of Assembly, 31 May 2023, 83 (Roger Jaensch).

138 'ACT Indigenous Protocol', *ACT Government* (Web Page) <<https://www.act.gov.au/community/aboriginal-and-torres-strait-islander-peoples/indigenous-protocols-in-the-act>>.

139 Ann Jackson-Nakano, *The Kamberri: A History of Aboriginal Families in the ACT and Surrounds* (Aboriginal History Inc, 2001); Natalie Kwok, *Considering Traditional Aboriginal Affiliations in the ACT Region* (Draft Report, January 2013) <http://www.cmd.act.gov.au/_data/assets/pdf_file/0020/442316/Draft-report_redacted.pdf>.

140 In 2009, Ellen Mundy alleged this policy unlawfully discriminated against the Ngarigu: *Mundy and Chief Minister (ACT) (Discrimination)* [2011] ACAT 86. A similar claim was lodged by Paul and Leah House in 2022 on behalf of the Ngambri: *House v Chief Minister of the Australian Capital Territory* [2022] ACTSC 317 ('House'). See discussion in Ed Wensing and Paul Girrawah House, Submission No 281 to Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework* (30 June 2023) 3–7; Ed Wensing, 'Unfinished Business: Truth-Telling about Aboriginal Land Rights and Native Title in the ACT' (Discussion Paper, The Australian Institute, March 2021) 7–8 <<https://australiainstitute.org.au/wp-content/uploads/2021/03/P1053-Unfinished-Business-in-the-ACT-Wensing-2021.pdf>>.

141 Nakari Thorpe, "'Real Outcomes" Needed for Clan Groups to Support Any ACT Treaty Process', *National Indigenous Television* (online, 25 June 2018) <<https://www.sbs.com.au/nitv/article/real-outcomes-needed-for-clan-groups-to-support-any-act-treaty-process/3nqi0heem>>.

142 ACT Government, *Budget 2021–22* (Budget Outlook, October 2021) 152 <https://www.treasury.act.gov.au/_data/assets/pdf_file/0008/1870136/2021-22-ACT-Budget-Outlook.pdf>; ACT Government, 'Budget 2021–22: Aboriginal and Torres Strait Islander Budget Statement' (2021) 1 <https://www.treasury.act.gov.au/_data/assets/pdf_file/0003/1870284/2021-22-Aboriginal-and-Torres-Strait-Islander-Budget-Statement.pdf>.

143 Jasper Lindell, 'Funding for First Indigenous Treaty Process in ACT Budget', *Canberra Times* (online, 7 February 2021) <<https://www.canberratimes.com.au/story/7115029/funding-for-first-indigenous-treaty->

Aboriginal and Torres Strait Islander Affairs Minister, Rachel Stephen-Smith, explained that: ‘Ultimately, what a Treaty might look like in the ACT and how we get there is a process that must be led by Traditional Owners and those who have a connection to the lands within the ACT.’¹⁴⁴

In June 2022, the report into those conversations was released. It recommended that an ACT Treaty process consist of three elements: reparations, to compensate Nggunawal Traditional Owners and establish a Nggunawal Future Fund; participation, to initiate Truth-Telling and other Treaty-related programs for the wider Indigenous community in the ACT; and representation, to establish an Indigenous Voice to the ACT Legislative Assembly.¹⁴⁵ The report also outlined a ten-step process for a Nggunawal treaty.¹⁴⁶ The report provides several important but politically challenging recommendations. It recommends that a ‘pay the rent’ levy should be placed on all ACT properties to build a legacy fund for Nggunawal people,¹⁴⁷ that Nggunawal Elders should be provided with ‘a one-off payment commensurate with the wealth of the average aged-person in the ACT’ to “kickstart” a Nggunawal family wealth-generating process’,¹⁴⁸ and that Nggunawal people should be provided with two observer seats in the ACT Legislative Assembly.¹⁴⁹

However, the report also made clear that many First Nations peoples were not supportive. Indeed, the consultations were hampered by an inadequate engagement process stemming from the government’s 2002 policy – funding was only provided to meet with Nggunawal people and did not extend to engaging with other First Nations peoples in the ACT.¹⁵⁰ It also appears that not all Nggunawal people chose to take part in the process. The report acknowledged this limitation in a disclaimer:

Although Nggunawal families represented on UNEC [United Nggunawal Elders Council] and who attended workshops were involved in the preliminary consultations which generated this report, there has been considerable and vocal opposition from those not engaged in the process about the validity of this work.¹⁵¹

Minister Stephen-Smith apologised on behalf of the ACT Government in July 2022. She accepted that ‘the report’s content and assertions will cause distress for some community members’, particularly those who ‘were not consulted or engaged in this early process’. She noted further that ‘this process did not engage as broadly as we had intended’ and acknowledged a general feeling that ‘the ACT government was rushing into a Treaty process without facilitating the healing

process-in-act-budget/>.

144 Rachel Stephen-Smith, ‘Close the Gap Day Opportunity to Mark Treaty Progress’ (Media Release, 17 March 2022) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/rachel-stephen-smith-mla-media-releases/2022/close-the-gap-day-opportunity-to-mark-treaty-progress>.

145 Karabena Consulting, *Implementation Pathways to Achieve Nggunawal, First Nations Peoples and Australian Capital Territory Government Treaties* (Report, June 2022) 2.

146 Ibid 6–8.

147 Ibid 2.

148 Ibid.

149 Ibid 9.

150 Ibid 11.

151 Ibid 1.

and deep conversations that will be required'.¹⁵² Although noting that the ACT Government will consider the report's recommendations, no formal response has yet been given.

The treaty process appears to have stalled as First Nations people adopt a different focus. In June 2022, a group of Ngannawal Traditional Owners announced their intention to lodge a native title claim in the ACT – the first for more than 20 years.¹⁵³ The following month, the Ngambri people filed a claim in the ACT Supreme Court, alleging that the 2002 Indigenous Protocol of recognising only the Ngannawal as the Traditional Custodians of the ACT breaches section 27(2) of the *Human Rights Act 2004* (ACT) because it denied their right to maintain, control, protect and develop their connection to the Canberra region.¹⁵⁴

Supportive of Indigenous self-determination, the ACT Government reached a settlement a week before the hearing date.¹⁵⁵ The Government apologised to the Ngambri people for the 'hurt and distress' caused by the government's 2002 Indigenous Protocol, and declared that they would review their policy.¹⁵⁶ Minister Stephen-Smith explained that she hoped this decision would allow the parties to 'move forward together' on a path to treaty.¹⁵⁷ Although little progress has been made on treaty, the process has opened space for a broader discussion on longstanding issues of concern for Aboriginal peoples in the Territory. These developments suggest that a genuine commitment to a renewed relationship can lead to positive outcomes even in the absence of a finalised settlement. Nevertheless, the situation remains delicate.

152 Rachel Stephen-Smith, 'Statement: Receipt of Karabena Consulting Report "Implementation Pathways to Achieve Ngannawal, First Nations Peoples and Australian Capital Territory Government Treaties"' (Media Release, 7 July 2022) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/rachel-stephen-smith-mla-media-releases/2022/statement-receipt-of-karabena-consulting-report-implementation-pathways-to-achieve-ngannawal-first-nations-peoples-and-australian-capital-territory-government-treaties>.

153 Lottie Twyford, 'Traditional Owners to Lodge First Native Title Claim in 25 Years Over ACT', *Riotact* (online, 4 June 2022) <<https://the-riotact.com/traditional-owners-to-lodge-first-native-title-claim-in-25-years-over-act/564203>>; Wensing (n 140) 12–13.

154 *House* (n 140); Jasper Lindell, 'Ngambri Custodians Take ACT to Supreme Court under Human Rights Laws for Failing to Recognise them as Traditional Owners', *Canberra Times* (online, 31 July 2022) <<https://www.canberratimes.com.au/story/7840480/irrefutable-evidence-of-our-ancestry-ngambri-custodians-take-act-to-court/>>.

155 *Deed of Settlement and Release between Paul Girrawah House and Leah House and the Australian Capital Territory* (April 2023). See further Andrew Barr, Shane Rattenbury and Rachel Stephen-Smith, 'Statement Regarding Supreme Court Matter' (Media Release, 27 April 2023) <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2023/statement-regarding-supreme-court-matter>; Tayla Ayers and Claire Carton, 'The Indigenous Right to Self-Determination: *House & House v the Australian Capital Territory*' (2023) 268 *Ethos* 20.

156 Barr, Rattenbury and Stephen-Smith (n 155).

157 Charlotte Gore, 'ACT Government Apologises to Canberra's Ngambri People for Failing to Recognise Them as Traditional Custodians', *ABC News* (online, 27 April 2023) <<https://www.abc.net.au/news/2023-04-27/act-government-apologises-to-ngambri-over-indigenous-protocol/102274536>>.

G New South Wales

New South Wales ('NSW') is the latest State to commit to exploring a treaty process, though it is still in its very early stages. The Liberal-National government in office from 2011 to 2023 consistently refused to countenance treaty. In the lead up to the 2023 State election, Premier Dominic Perrottet declared his support for the referendum on an Aboriginal and Torres Strait Islander Voice,¹⁵⁸ but the Coalition ruled out a state-based Voice or treaty process.¹⁵⁹ In contrast, the Labor Opposition pledged \$5 million towards a year-long consultation with Aboriginal communities to determine if treaty is desired, and, if so, what it should look like.¹⁶⁰ The Labor Party was successful at the March 2023 State election and allocated funding for this in its 2023–24 budget.¹⁶¹ Over the course of 2023, the NSW Government commenced preliminary work with peak representative First Nations bodies to design and establish a three-member independent treaty commission that will lead consultations with First Nations communities across the State.¹⁶² Work has been slowed by the failed referendum. Nevertheless, it is expected that the consultation process will be announced soon.

H Western Australia

The WA Government has not made any formal commitment to treaty. In fact, it stands apart as the only Labor government – and indeed, the only Australian government – not formally engaged in a treaty process. It is also the only Labor Party not to support treaty in its policy platform. The closest the 2022 Labor Platform comes to supporting treaty is through an opaque reference to acknowledging 'the role of Indigenous people as the original owners of this land and the unique role indigenous [sic] people play in making policy decisions about the future',¹⁶³ and in committing the party to encouraging 'Indigenous self-management and economic self-sufficiency'.¹⁶⁴ Nevertheless, the WA Government has negotiated two comprehensive native title claims over the last few years. The Noongar and Yamatji Settlements are sometimes likened to a 'lower-case t treaty',¹⁶⁵ in view of

158 National Cabinet, 'Statement of Intent' (3 February 2023) <<https://federation.gov.au/sites/default/files/media/2023-02/statement-of-intent-signed.pdf>>.

159 Tamsin Rose, "'Not on the Agenda": NSW Minister Rules Out State Treaty with First Nations People', *The Guardian* (online, 9 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/09/ben-franklin-nsw-minister-state-treaty-first-nations-people>>.

160 Rani Hayman, 'NSW Labor Commits to Treaty Consultations with Indigenous Community if Elected in March', *ABC News* (online, 21 January 2023) <<https://www.abc.net.au/news/2023-01-21/nsw-labor-to-start-treaty-talks-indigenous-community-if-elected/101879496>>.

161 'Our Plan for NSW', *NSW Budget 2023–24* (Web Page) <<https://www.budget.nsw.gov.au/2023-24/budget-papers/overview#budget-highlights>>.

162 NSW Labor, *Pathway to Treaty in NSW* (May 2022) 13. The author of this article was involved in the development of this policy statement.

163 WA Labor, *WA Labor Platform 2022* (2021) cl 14 <https://walabor.org.au/media/24uh3gj3/2021_wa_labor_platform.pdf>.

164 Ibid cl 181.

165 Hobbs and Williams, 'The Noongar Settlement' (n 4); John Ferguson, 'New States of Play on Treaty', *The Australian* (online, 22 July 2019) <<https://www.theaustralian.com.au/inquirer/victoria-sets-the-pace-on-new-era-of-indigenous-treaties/news-story/e49f641471c20ffb7b9f121c1c83239e>>.

the size and scope of the agreements. However, while they are significant, they were not negotiated via a formal treaty process and therefore do not cover the full range of issues one would expect of a treaty.

I Commonwealth

On election night in May 2022, the Albanese Labor Government announced its commitment to implementing the Uluru Statement from the Heart ‘in full’.¹⁶⁶ Over the course of 2022 and 2023, its attention was focused on the referendum for an Aboriginal and Torres Strait Islander Voice. Nevertheless, it simultaneously commenced preliminary work on the development and design of a national treaty process.¹⁶⁷ In October 2022, the Government provided \$5.8 million to the National Indigenous Australians Agency to consider the structure of a Makarrata Commission.¹⁶⁸ The failure of the referendum, however, casts considerable doubt on the prospect of a national treaty process for at least the remainder of this term of government.¹⁶⁹

III KEY ISSUES TO BE CONSIDERED

Aboriginal and Torres Strait Islander peoples have called for treaty or treaties for generations.¹⁷⁰ Several Australian states and territories have made significant progress over the last few years, but many challenges exist. In this Part, I explore five key issues that these processes will need to manage to ensure their stability. I examine how a lack of knowledge about treaty and an absence of institutional architecture to facilitate treaty makes modern negotiations more challenging. I also consider the difficulty governments face in maintaining the support of Indigenous and non-Indigenous Australians for these processes, and the need to step back and allow First Nations peoples to lead the process. I conclude by examining two emerging issues. I consider the role international law is playing in shaping and guiding modern treaty-making in Australia and reflect on how these state and territory treaty processes could integrate with a national Makarrata Commission.

166 ‘Read Incoming Prime Minister Anthony Albanese’s Full Speech after Labor Wins Federal Election’, *ABC News* (online, 22 May 2022) <<https://www.abc.net.au/news/2022-05-22/anthony-albanese-acceptance-speech-full-transcript/101088736>>.

167 ‘Uluru Statement from the Heart’, *National Indigenous Australians Agency* (Web Page) <<https://web.archive.org/web/20230305225320/https://www.niaa.gov.au/indigenous-affairs/uluru-statement-heart>>.

168 Tom McLroy, ‘Indigenous Treaty on the Agenda before Voice Vote’, *Australian Financial Review* (online, 21 February 2023) <<https://www.afr.com/politics/federal/indigenous-treaty-on-the-agenda-before-voice-vote-20230221-p5cm6w>>. Though note that reports suggest the National Indigenous Australians Agency has not moved beyond research and discussion with state governments: Josh Butler, ‘Makarrata Commission Has So Far Spent Barely Half the \$900,000 Allocated by Labor, Documents Show’, *The Guardian* (online, 1 September 2023) <<https://www.theguardian.com/australia-news/2023/sep/01/makarrata-commission-has-so-far-spent-barely-half-the-900000-allocated-by-labor-documents-show>>.

169 Cf Courtney Gould, ‘“We’re in a War”: Lidia Thorpe’s Next Steps Revealed as Referendum Fails’, *The Australian* (online, 15 October 2023) <<https://www.theaustralian.com.au/breaking-news/were-in-a-war-lidia-thorpes-next-steps-revealed-as-referendum-fails/news-story/66723a30b8dcf10609ac08201978bffe>>.

170 Williams and Hobbs, *Treaty* (n 3) ch 2.

A Information: A Lack of Knowledge about Treaty

One major challenge to the current treaty processes is the historical absence of treaty. That no treaties were ever formally signed in Australia makes navigating modern processes more challenging. It means jurisdictions need to design entirely novel public law institutions and mechanisms that reflect the values and interests of both parties to facilitate fair negotiations and promote constructive relationships. More fundamentally, it means the concept of what a treaty is or involves remains vague for many people.¹⁷¹ Indeed, without an architecture to facilitate negotiations or a language to describe treaty relationships, many Australians, including governments, are unclear what a treaty would mean.¹⁷² Without meaningfully addressing this information gap, treaty-making will not be possible.

As has been outlined elsewhere, international law sets a clear standard for what makes an agreement a treaty.¹⁷³ Modern treaties are formal instruments reached through a process of respectful negotiation in which both sides accept a series of obligations and responsibilities. They provide redress for past injustices in the form of financial compensation, return of land and formal recognition of historic wrongs. They also acknowledge that Indigenous peoples were prior owners and occupiers of the land and, as such, retain a right to self-government. As an exercise of that right, modern treaties recognise or create structures of culturally appropriate governance and establish means of decision-making and control. Treaties are more than service-delivery agreements and provide more than symbolic recognition. At the same time, while modern treaties are agreements between distinct political communities, they gain their legal force through enactment in domestic legislation and are subject to the law of the state.¹⁷⁴

Ambiguity on this central point is unlikely to work in favour of First Nations peoples. A lack of clarity over what a treaty is or contains creates space for political opposition to derail treaty processes. There is a long history in Australia of prominent political actors campaigning against treaty on the basis that it would be divisive and could even lead to the break-up of the nation.¹⁷⁵ Former Prime Ministers John Howard and Tony Abbott, for instance, have argued respectively

171 Tom Clark, Ravi de Costa and Sarah Maddison, “‘The Treaty’s Going to Give the Recognition That This Wasn’t Right’: Optimism and Pessimism in Non-Indigenous Attitudes to Treaties in Australia’ (2019) 40(6) *Journal of Intercultural Studies* 665 <<https://doi.org/10.1080/07256868.2019.1675615>>.

172 Inaugural Northern Territory Treaty Commissioner Mick Dodson highlighted this challenge when noting that neither First Nations nor Australian governments are ‘close to being “treaty ready”’: Mick Dodson, ‘We Dare to Hope: Treaty-Making in Australia’ in Harry Hobbs, Alison Whittaker, and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 203, 218. See further Donna (Odegaard) Robb, ‘Treaty Justice or Injustice: From a Larrakia Woman’s Perspective’ (2002) 5(21) *Indigenous Law Bulletin* 11, 11.

173 This account has been drawn from Hobbs and Williams, ‘The Noongar Settlement’ (n 4) 7–14; Hobbs, ‘Treaty-Making Gathers Pace’ (n 111).

174 Harry Hobbs and Stephen Young, ‘Modern Treaty Making and the Limits of the Law’ (2021) 71(2) *University of Toronto Law Journal* 234 <<https://doi.org/10.3138/utlj-2019-0131>>.

175 See generally Harry Hobbs, ‘The New Right and Aboriginal Rights in the High Court of Australia’ (2023) 51(1) *Federal Law Review* 129 <<https://doi.org/10.1177/0067205X221146333>>.

that ‘a nation ... does not make a treaty with itself’¹⁷⁶ and that ‘a treaty is something that two nations make with each other’.¹⁷⁷ More recently, former federal Labor Opposition leader Mark Latham has suggested that an Indigenous treaty might mean ‘[e]xtra land claims on private property’, and the formation of ‘an Orwellian Truth Commission’.¹⁷⁸ These are political claims that bear little resemblance to reality. However, without clear community understanding on the key elements of treaty, they may find fertile soil to propagate.

Uncertainty can also create space for governments to claim that they are already engaged in treaty-like processes.¹⁷⁹ Governments might contend, for example, that existing arrangements in relation to matters like native title, heritage protection and land rights are sufficient, or that renewed strategies to engage with First Nations communities meet the standards for modern treaty-making.¹⁸⁰ While policies aimed at transferring program and service delivery to First Nations communities are important in ensuring services better reflect Indigenous peoples’ aspirations, they are not treaties. Already concerns have been raised on this point. Many saw the initial SA process as a vehicle for the government to push service delivery onto Aboriginal nations. First Nations communities warned the SA Treaty Commissioner in 2017 that ‘[t]he use of the word “Treaty” rather than “agreement” is very important to Aboriginal South Australians and brings with it increased expectations about what will be delivered by the government’.¹⁸¹ Similar complaints have been heard in the NT and Queensland.

Participants in these processes recognise this challenge. In Victoria, for instance, the First Peoples’ Assembly hosted more than 360 community events and had more than 23,000 conversations with community about treaty in 2022.¹⁸² The Victorian Government has also launched two public education campaigns aimed at building community awareness, understanding and support for the treaty process. While it is too early to assess the effectiveness of the second campaign, independent research suggests that the Deadly Questions program achieved modest success: 51% of surveyed Victorians agreed or strongly agreed that ‘the “State Government should formalise new relationships with Aboriginal Victorians”, an increase of seven per

176 Interview with John Howard, Prime Minister of Australia (John Laws, Radio Interview, 29 May 2000) <<https://pmtranscripts.pmc.gov.au/release/transcript-22788>>.

177 Tom McLroy, ‘Tony Abbott and John Howard Warn against a Treaty with Indigenous Australians’, *The Sydney Morning Herald* (online, 8 September 2016) <<https://www.smh.com.au/politics/federal/tony-abbott-and-john-howard-warn-against-a-treaty-with-indigenous-australians-20160908-grbc5x.html>>. See also Andrew Bragg, *Buraadja: The Liberal Case for National Reconciliation* (Kapunda Press, 2021) 174.

178 @RealMarkLatham (Mark Latham) (X, 27 January 2023, 7:43am AEST) <<https://twitter.com/RealMarkLatham/status/1618711230952386561>>.

179 Hobbs, ‘Treaty-Making Gathers Pace’ (n 111).

180 In New South Wales, for instance, the former Perrottet Coalition Government dismissed the push for treaty-making by arguing that the Closing the Gap framework ensured the government remained accountable to Indigenous Australians: Michael McGowan, ‘Dominic Perrottet Gives Strongest Endorsement Yet of Indigenous Voice but Says “We Don’t Need a Treaty”’, *The Guardian* (online, 20 March 2023) <<https://www.theguardian.com/australia-news/2023/mar/20/dominic-perrottet-nsw-premier-indigenous-voice-to-parliament-treaty-state-election-2023>>.

181 Thomas (n 107) 8.

182 First Peoples’ Assembly of Victoria, *Treaty for Victoria* (Annual Report, 2022) 12.

cent from before the campaign'.¹⁸³ Building public understanding is critical to the successes of treaty.

Nevertheless, in many jurisdictions initial consultations appear to have been broad but shallow, raising questions about the depth of community understanding. In Queensland, for instance, the Eminent Panel and Treaty Working Group travelled to 24 towns and communities and met 'more than 1,000' Indigenous and non-Indigenous Queenslanders. But with a population of nearly 5.2 million people, including 240,000 First Nations peoples,¹⁸⁴ it should not be surprising if many Queenslanders have little knowledge about the process. This appears to be the case. Social research conducted in November and December 2022 found 'a low level of awareness of both truth telling and Path to Treaty across the community and, as such, hesitancy to engage with the treaty process'.¹⁸⁵ In 2023, the Local Government Association of Queensland succinctly remarked, '[o]ne of the biggest challenges is a lot of people (public and local government) don't know what the Treaty is and where it has come from'.¹⁸⁶

The same challenge recurs across the federation. In Tasmania, the initial four-month process engaged with 'more than' 420 people,¹⁸⁷ while in SA the Commissioner for First Nations Voice met with more than 650 people.¹⁸⁸ These are not significant numbers. In contrast, the early stages of the Victorian treaty process engaged around 7,500 Aboriginal Victorians.¹⁸⁹ Consultations in the NT were more comprehensive than Tasmania and SA, but they also experienced difficulties. The Treaty Commissioner flew around 21,000 km and drove more than 4,000 km across the Territory to meet communities. Nevertheless, varying levels of pre-meeting support and existing knowledge about treaties alongside community-specific circumstances, meant some consultations were more successful than others. While the Commission received a 'warm welcome' in all communities, attendance varied considerably; some consultations were very fruitful, but 'zero' people attended one event.¹⁹⁰ COVID-19 made community engagement more challenging, but anxiety about the breadth and depth of community support for the Treaty Commission's

183 Department of Premier and Cabinet (Vic), *Advancing the Victorian Treaty Process: Annual Report and Plan 2018–19* (Report, 2019) 18 <<https://content.vic.gov.au/sites/default/files/2019-09/Advancing-the-Victorian-Treaty-Process-Annual-Report-and-Plan-2018-19.pdf>>.

184 Explanatory Notes, *Path to Treaty Bill 2023* (Qld) 12.

185 Katie Roe and Jaxom McCreadie-Roe, *Path to Treaty Market and Social Research: 2023 Report Summary* (Report, March 2023) 3.

186 Statement of Reservation from Stephen Bennett to Community Support and Services Committee, Parliament of Queensland, 20 April 2023, 3, quoted in Community Support and Services Committee, Parliament of Queensland, *Path to Treaty Bill 2023* (Report No 30, 2023) 76 <<https://documents.parliament.qld.gov.au/tp/2023/5723T538-2F1D.pdf>>.

187 Warner, McCormack and Kurnadi (n 125) 24.

188 *First Engagement Report* (n 113) 37; *Second Engagement Note* (n 113) 7.

189 'Background', *First Peoples: State Relations* (Web Page, 1 June 2017) <<https://www.firstpeoplesrelations.vic.gov.au/aboriginal-community-consultations-design-representative-body-summary-report/background>>.

190 *Northern Territory Treaty Commission Final Report* (n 66) 21.

proposed model was identified by the NT Government as a justification for setting-aside the report.¹⁹¹

Governments also need to develop their understanding of treaty. This includes resourcing processes effectively. The NT Treaty Commission received only \$1.4 million in 2019 and 2020.¹⁹² It facilitated an extensive, territory-wide consultation with fewer than five full-time equivalent positions. Unlike in Victoria, the NT Government did not invest in community education or awareness programs, essentially leaving the Commission to operate on its own. Limited support impacted the Commission's ability to engage with Aboriginal Territorians. In this light, the government's decision to abandon the report appears more problematic.

Members of the First Peoples Assembly have noted that building government capacity has been vital for the Victorian process. One element of this work has been the increase of First Nations people working in the First Peoples–State Relations group (located within the Victorian Department of Premier and Cabinet).¹⁹³ Some Australian universities have begun to offer short courses and graduate programs on treaty-making tailored to public servants.¹⁹⁴ Other programs overseas have attracted public servants working in this area.¹⁹⁵ These steps are positive but are largely centred on the passion and enterprise of individual staff. The reform necessary to negotiate and embed treaty-relationships requires a structural adjustment within government and the public sector.

B Political: The Need to Maintain Community Support

A second key challenge facing Australian treaty processes is a political one. Without legal and political institutional underpinnings to support treaty-making, governments may walk away from the process at any point. How can community support be maintained to drive both parties to the negotiating table? A deliberate and deliberative approach that works in stages, like that underway in Victoria and Queensland, can help.¹⁹⁶ In Victoria, public education campaigns have increased awareness and support across the community, and politicians have taken notice. After voting against the *Treaty Act* and opposing the treaty process at the 2018 State election, the Liberal opposition changed their position. In June 2022, the Victorian Liberals and Nationals voted in favour of the Treaty Authority and Other Treaty Elements Bill 2022 (Vic). Shadow Minister for Indigenous Affairs, Peter Walsh,

191 'Response to NT Treaty Commission's Final Report' (n 74).

192 Department of Treasury and Finance (NT), *Agency Budget Statements* (Budget Paper No 3, May 2019) 19 <https://treasury.nt.gov.au/_data/assets/pdf_file/0010/946693/2019-20-BP3-book.pdf>.

193 Personal Correspondence with a Member of the First Peoples' Assembly of Victoria. On the tensions faced by First Nations public servants, see Elizabeth Ganter, *Reluctant Representatives: Blackfella Bureaucrats Speak in Australia's North* (Australian National University Press, 2017).

194 See, eg, 'Indigenous Treaties and Future Relations', *University of Melbourne Handbook* (Web Page, 2022) <<https://handbook.unimelb.edu.au/2022/subjects/arts90034>>; 'Professional Certificate in Treaty', *University of Melbourne Study* (Web Page) <<https://study.unimelb.edu.au/find/courses/graduate/professional-certificate-in-treaty/>>.

195 See, eg, 'Indigenous Peoples Law and Policy', *University of Arizona* (Web Page) <<https://law.arizona.edu/programs/indigenous-peoples-law-policy>>.

196 Williams and Hobbs, *Treaty* (n 3) 330–2.

explained: ‘The Liberals and Nationals are committed to advancing the treaty process in Victoria in a way that supports self-determination and reconciliation while strengthening community and connection to Country.’¹⁹⁷

A similar process has occurred in Queensland. After initially proposing to abandon treaty prior to the 2020 State election,¹⁹⁸ the Queensland Liberal-National Party supported the government’s Path to Treaty Bill. Bipartisanship is important. Major structural reforms to the framework of governance in Australia are almost never achieved without a broad base of political support. Other jurisdictions engaged in treaty processes should also seek bipartisan support to ensure security.¹⁹⁹

The failed referendum casts a shadow over these developments. The scale of the defeat in Queensland, for example, where more than 68% of voters rejected the proposed amendment,²⁰⁰ puts the State’s treaty process in real jeopardy. Indeed, less than one week after the referendum, Opposition Leader David Crisafulli announced the Liberal-National Party was withdrawing its support for treaty and would repeal the *Path to Treaty Act* if successful at the 2024 state election.²⁰¹ The Victorian Liberal-National Party also withdrew its support,²⁰² while the NSW Premier sought to pause the process in that state, declaring that the NSW Government would not move beyond ‘consultation and planning’ until after the next election in 2027.²⁰³

At the same time, the support of First Nations communities cannot be assumed. While this may be a particular concern during negotiations, especially if proposed settlement outcomes do not accord with First Nations aspirations, the process can experience challenges during earlier stages. For example, the same month the Queensland government tabled the Path to Treaty Bill in Parliament, it introduced legislation to override the *Human Rights Act 2019* (Qld), making breach of bail

197 Sumeyya Ilanbey, ‘Opposition Backs Next Step to Treaty with Indigenous Voice’, *The Age* (online, 21 June 2022) <<https://www.theage.com.au/politics/victoria/opposition-backs-next-step-to-treaty-with-indigenous-victorians-20220621-p5avdl.html>>.

198 Elks (n 86).

199 On the non-Indigenous party to treaty, see Cheryl Saunders, ‘Treaty-Making in Australia: The Non-Indigenous Party’ in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 43.

200 Beaumont (n 17).

201 Patrick Staveley, ‘“Will Only Create Further Division”: David Crisafulli Reverses Decision to Support Treaty Following Failure of Voice Referendum’, *Sky News* (online, 19 October 2023) <<https://www.skynews.com.au/australia-news/voice-to-parliament/will-only-create-further-division-david-crisafulli-reverses-decision-to-support-treaty-following-failure-of-voice-referendum/news-story/031c127824ea531a22dc3d33ad3e92a8>>. This was not unexpected. The Opposition Leader had already faced internal revolt over his support for the Path to Treaty: Rachel Riga, ‘Internal Division between Queensland LNP Members over “Path to Treaty” Legislation Expected to Boil Over at Party’s State Convention’, *ABC News* (online, 8 July 2023) <<https://www.abc.net.au/news/2023-07-08/qld-path-to-treaty-lnp-crisafulli-peter-dutton-party-conference/102571422>>.

202 Benita Kolovos and Adeshola Ore, ‘Treaty Could Make People “Feel More Divided”, Victorian Opposition Leader Says, as Coalition Withdraws Support’, *The Guardian* (online, 22 January 2024) <<https://www.theguardian.com/australia-news/2024/jan/22/victoria-opposition-drops-support-for-indigenous-treaty>>.

203 Tamsin Rose, ‘NSW Treaty Will Not Progress Beyond Consultation until After Election, Chris Minns Says’, *The Guardian* (online, 23 October 2023) <<https://www.theguardian.com/australia-news/2023/oct/23/nsw-treaty-indigenous-will-not-progress-until-after-state-election-chris-minns>>.

an offence for children²⁰⁴ – despite evidence that this will disproportionately affect First Nations people. The Queensland Aboriginal and Torres Strait Islander Child Protection Peak noted succinctly, '[t]his seems directly at odds with the Queensland government's intention to cultivate a new relationship with First Nations peoples as part of the Path to Treaty'.²⁰⁵ Similar concerns have been raised in the NT. Yingiya Guyula, the independent member for Arnhem Land, was scathing of the government's decision to abolish the Treaty Commission. He explained 'it's the same old story': 'My people have always been saying they are ready for a long long time and the Commissioner listened to that ... But the government was not and is still not ready for treaty'.²⁰⁶ The following month, Guyula again expressed his concern that governments 'wipe their hands and walk away from real change'.²⁰⁷

Whether and how governments can prepare themselves to engage fairly and constructively in treaty processes they commit to will go a long way to determining their success. Two points can be noted here. First, governments must match their commitment with appropriate, long-term resourcing. First Nations communities will need financial support to prepare themselves for and participate in negotiations. Institutions and processes to facilitate treaty, such as independent treaty commissions or authorities, will also need to be resourced adequately. Failure to resource institutions and communities appropriately will severely impede the effectiveness of any treaty process. Indeed, insufficient funding has been a recurring criticism of the British Columbia treaty process,²⁰⁸ and is a major cause of delay.²⁰⁹ In NSW, inadequate funding is responsible for the 'more than 38,000' Aboriginal land claims that remain undetermined. As the Audit Office of NSW found in 2022, the failure to establish the necessary resources to deliver land claim processes is a breach of the 'requirements and intent of the *Aboriginal Land Rights Act 1983* (NSW)'.²¹⁰ Inadequate resourcing will not just derail treaty processes but further drive cynicism and distrust within Indigenous communities.

Queensland and Victoria have made significant initial funding commitments. As noted above, the Queensland government has allocated \$300 million to establish a Path to Treaty Fund, the earnings of which will finance the treaty process. Queensland Investment Corporation expects the Pathway to Treaty Fund

204 *Strengthening Community Safety Act 2023* (Qld) s 5, amending *Bail Act 1980* (Qld) s 29.

205 Kate McKenna and Rachel Riga, 'Youth Justice Overhaul "Directly at Odds" with Path to Treaty and Closing the Gap, Queensland Government Warned', *ABC News* (online, 28 February 2023) <<https://www.abc.net.au/news/2023-02-28/youth-justice-overhaul-at-odds-with-path-to-treaty-government/102030544>>.

206 Jane Bardon, 'Northern Territory Indigenous Leader Yingiya Guyula Angered by Government's Decision to Close NT Treaty Commission', *ABC News* (online, 20 January 2023) <<https://www.abc.net.au/news/2023-01-20/nt-treaty-commission-closed-indigenous-leaders-angry/101875986>>.

207 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 16 February 2023, 12.

208 See British Columbia Treaty Commission, *Second Annual Report 1994–1995* (Report, 1995) 15, 21. Eyford (n 55) 61.

209 James Lornie, *Final Report with Recommendations Regarding the Possibility of Accelerating Negotiations with Common Table First Nations That Are in the BC Treaty Process, and Any Steps Required* (Report, 30 November 2011) 29.

210 Audit Office of New South Wales, *Facilitating and Administering Aboriginal Land Claim Processes* (Report No 365, 28 April 2022) 2 <<https://www.audit.nsw.gov.au/sites/default/files/documents/Facilitating%20and%20administering%20Aboriginal%20land%20claim%20processes.pdf>>.

will generate a minimum annual return of 6.5%, meaning that the process will receive around \$19.5 million per year.²¹¹ Victoria has also established long-term financing. Legislation guarantees the Treaty Authority around \$20 million from the Consolidated Funds for several financial years,²¹² while the Self-Determination Fund has been established with an initial \$65 million investment.²¹³ These moves are positive and reflect the strong commitment of each government.²¹⁴ However, this funding will not cover the resources needed for First Nations communities when negotiations commence, let alone fund truth-telling and healing, family and community engagement, state education and compensation packages.

Governments can also demonstrate their commitment to a refreshed relationship by pursuing complementary legal reforms alongside the treaty process. For instance, in 2021, the Victorian Government committed to abolishing public intoxication laws in favour of a health-led response.²¹⁵ Although decriminalisation of public drunkenness was a recommendation of the 1991 *Royal Commission into Aboriginal Deaths in Custody*,²¹⁶ it attracted renewed attention following the death of Yorta Yorta woman Ms Day, who had been arrested and taken into custody for being intoxicated on a train.²¹⁷ The Victorian Government's decision was welcomed by Aboriginal Victorians, but similar longstanding reforms are available and can be adopted as a show of good faith by governments. Aunty Geraldine Atkinson, Co-chair of the First Peoples' Assembly identified another issue:

We don't want excuses when it comes to reforms like raising the age of criminal responsibility, we need urgent action so no more ten year old children are thrown into prison. For two years, the Council of Attorneys-General having [sic] been sitting on their report recommending they raise the age to 14. It's just not good enough.²¹⁸

The Victorian Government is listening. In April 2023, it announced it would raise the minimum age of criminal responsibility to 14 years old by 2027.²¹⁹ Implementing these and similar reforms can build First Nations support.

211 Interim Truth and Treaty Body (n 80) 17.

212 *Treaty Authority Act* (n 9) s 16(2).

213 *Self-Determination Fund Agreement* (n 52) cl 7.1.

214 Cf the funding commitment of the Northern Territory Government: see above n 192.

215 *Summary Offences Amendment (Decriminalisation of Public Drunkenness) Act 2021* (Vic).

216 *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) vol 5, Recommendations 79–82 <<https://www.austlii.edu.au/au/other/IndigLRes/rciadic/>>.

217 David Estcourt, 'Government Firm on Public Drunkenness Reforms Despite Police Union Outrage', *The Age* (online, 17 January 2023) <<https://www.theage.com.au/national/victoria/government-firm-on-public-drunkenness-reforms-despite-police-union-outrage-20230117-p5cd20.html>>.

218 'Victoria's Truth-Telling Commission to Hear Why First Peoples Need the Power to Implement Solutions Crafted by First Peoples', *First Peoples' Assembly of Victoria* (online, 13 December 2022) <<https://www.firstpeoplesvic.org/news/victorias-truth-telling-commission-to-hear-why-first-peoples-need-the-power-to-implement-solutions-crafted-by-first-peoples/>>.

219 Jaclyn Symes, 'Keeping Young People out of the Criminal Justice System' (Media Release, 26 April 2023) <<https://www.premier.vic.gov.au/keeping-young-people-out-criminal-justice-system>>.

C Implementation: First Nations Peoples Must Lead the Process

All governments agree that a treaty process must be led by First Nations peoples. In each jurisdiction, the process has commenced with community consultation on the threshold question of whether a treaty should be pursued and, if so, what that process should look like.²²⁰ This approach is consistent with international law. The *UNDRIP* provides that governments must obtain the free, prior and informed consent of Indigenous peoples before enacting legislation and policy that affects them.²²¹ It is also consistent with the National Agreement on Closing the Gap, under which all governments have committed to ‘a future where policy making that impacts on the lives of Aboriginal and Torres Strait Islander people is done in full and genuine partnership’.²²² Empowering First Nations peoples to lead the process can help overcome pervasive feelings of cynicism and distrust of government and build support for the process.

One challenge for governments is that a First Nations-led process introduces some uncertainty. Governments may express (publicly or behind closed doors) concern over the content or model that emerges from community. Governments will need to manage the politics of any report, but they should avoid imposing guardrails on community consultations. A treaty process is more likely to succeed with a facilitative and flexible government. The Victorian government, for instance, has recognised that treaty will necessarily be a dynamic process that reflects the concerns and focus of Aboriginal Victorians.²²³ In the ACT, concerns expressed by First Nations peoples over the consultation process has led the government to pause treaty.²²⁴ This is appropriate.

Flexibility can conflict with political imperatives. In circumstances where a treaty process does not have bipartisan support, governments need to plan carefully to build public support and formalise the process through legislation in advance of an election.²²⁵ This might not be possible if First Nations communities require more time than initially planned to understand the process and reach broad agreement on ways forward. Without protecting treaty processes in legislation, however, treaty will remain vulnerable to changes of government. Treaty was abandoned in SA following the election of the Liberal Government in 2018.²²⁶

220 See, eg, ‘Treaty with First Nations People’, Chris Minns (Web Page) <<https://web.archive.org/web/20230320033216/https://www.chrisminns.com.au/treaty>>.

221 *UNDRIP* (n 10) art 19. While the Declaration is formally non-binding, many of its provisions, including those relating to consultation, do impose legal obligations at international law: James Anaya, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, UN Doc A/HRC/12/34 (15 July 2009) 12–15 [38]–[42] (‘*Promotion and Protection of All Human Rights*’).

222 Closing the Gap, *National Agreement on Closing the Gap* (July 2020) 4 [18] <<https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>>.

223 Gabrielle Williams, ‘First People’s Assembly Set Tone on Landmark Treaty Bill’ (Media Release, 22 June 2022) <<https://www.premier.vic.gov.au/first-peoples-assembly-set-tone-landmark-treaty-bill>>.

224 Stephen-Smith (n 152).

225 Williams and Hobbs, *Treaty* (n 3) 330–2.

226 Wahlquist, ‘SA Halts Indigenous Treaty Talks’ (n 109).

A government's desire to move quickly may not be connected to an election. Governments have numerous priorities and limited capacity to execute multiple significant reforms simultaneously. While Victoria took three years to develop the First Peoples' Assembly, SA moved far more rapidly in seeking to establish a First Nations Voice within 12 months of securing government.²²⁷ Some First Nations peoples have expressed their concern 'with the speed of the reform process'.²²⁸ The Commissioner for First Nations Voice acknowledged these issues, explaining:

There were concerns the engagement approach has not allowed for deeper co-design or for Aboriginal and Torres Strait Islander people to fully inform the model, and there was insufficient time for some organisations and communities to provide a full response.²²⁹

It remains to be seen whether these concerns will persist once the Voice is operational. It is important to remember that the success of these institutions is related to the degree to which their design reflects the views of First Nations communities.²³⁰ A rushed process can hobble Voice or treaty from the beginning.

This points to a related challenge. It is not just that First Nations peoples must lead consultations and ensure broad support exists for the concept and model of treaty-making; institutions and processes to facilitate treaty need to be designed in partnership to ensure they do not simply reflect the values and interests of the state. The major issue here is that power imbalances cannot be wished away. As domestic agreements, treaties must be consistent with Australian law. The state will always have the power to set the framework and content of treaty. Nevertheless, this does not prevent experiments in innovative public law institutions that can reduce disparities. Victoria and Queensland have both adapted their ordinary processes of developing draft legislation. In each State, relevant treaty bills have been drafted in collaboration with First Nations representatives. While these co-design processes were limited in important respects, First Nations representatives enjoyed an 'influential role in shaping' the final bill.²³¹

Empowering First Nations peoples to lead does not mean that a treaty process will obtain unanimous support. Indeed, it can raise latent tensions within communities. For instance, in Tasmania the treaty process has accentuated longstanding concerns over Aboriginal identity.

227 *First Nations Voice Act* (n 114).

228 *Second Engagement Note* (n 113) 8. Similar concerns were raised in the initial 2017 treaty process: Thomas (n 107) 8.

229 *Second Engagement Note* (n 113) 8.

230 Hobbs, *Indigenous Aspirations* (n 7) 105–11.

231 Interim Truth and Treaty Body (n 80) 8–9; Jill Gallagher, 'The Work of the Victorian Treaty Advancement Commission to Bring us Closer to Treaties in Victoria' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 220, 224. Similarly, a constitutionally enshrined Aboriginal and Torres Strait Islander Voice was intended to support and collaborate with the federal government in the design of a national Makarrata Commission: Megan Davis, 'A First Nations Voice to Parliament: Our Plea to Be Heard', *ABC Religion and Ethics* (online, 27 May 2022) <<https://www.abc.net.au/religion/megan-davis-voice-to-parliament-our-plea-to-be-heard/11300474>>; Morris and Hobbs (n 33) 45.

Aboriginality is generally determined via a three-part test. The test combines elements of genealogical descent as well as self- and community-identification and is reflective of an understanding of Aboriginality as a political rather than a racial construct. It holds that a person is Aboriginal if they are a descendent of an Aboriginal or Torres Strait Islander person, subjectively identify as such and are recognised by their community as being Indigenous.²³² Although this test has attracted criticism within Indigenous communities for the ways that it ‘suppresses Indigenous epistemologies, enforces unworkable constructs of authenticity, is unpredictable, is prescribed by governments, and is imperfect’,²³³ it is generally adopted by Aboriginal community organisations and decision-making bodies in practice.²³⁴ Yet, the test can pose evidentiary burdens. Colonial massacres and dispossession, as well as more contemporary practices of assimilation and child removal, have alienated many Aboriginal people from their country and kin. As a result, archival records documenting genealogical lineage may be missing or non-existent, while cultural deprivation may preclude broad community recognition.

For many years, Tasmania required documentary evidence before the government would accept a person is Aboriginal and eligible for certain services. The policy caused division and rancour among those who self-identified as Aboriginal but were unable to provide that evidence. In 2016, as part of the Tasmanian Government’s promise to ‘reset the relationship’ with the Aboriginal community, Premier Will Hodgman relaxed this requirement, explaining that the condition has ‘proven to be selective, it excludes rather than includes many Aboriginal Tasmanians’.²³⁵ The decision to no longer require documentary evidence was welcomed by many, but provoked unease among others. The Tasmanian Aboriginal Centre (‘TAC’), established by Heather Sculthorpe and Michael Mansell in the 1970s, argued that the new policy would lead to the Aboriginal community becoming ‘swamped by white people’.²³⁶

This division is visible in the early stages of the State’s treaty process. The TAC declined an invitation to join the Tasmanian Government’s Aboriginal Advisory Group and instead elected their own 11-member delegation, called *tuylupa tunapri*, to represent the Palawa community in the treaty process.²³⁷ Rodney Gibbins, the

232 *Commonwealth v Tasmania* (1983) 158 CLR 1, 274 (Deane J); *Shaw v Wolf* (1998) 83 FCR 113.

However, note discussion in *Love v Commonwealth* (2020) 270 CLR 152 and *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [No 2] (2021) 287 FCR 109, 177–180 [334]–[346] (Mortimer J) as to whether this is the most appropriate test.

233 Alison Whittaker, ‘White Law, Blak Arbiters, Grey Legal Subjects: Deep Colonisation’s Role and Impact in Defining Aboriginality at Law’ (2017) 20(1) *Australian Indigenous Law Review* 4, 27.

234 *Ibid* 26, citing Gordon Chalmers, ‘Indigenous as “Not-Indigenous” as “Us”? A Dissident Insider’s Views on Pushing the Bounds for What Constitutes “Our Mob”’ (2014) 17(2) *Australian Indigenous Law Review* 47, 50.

235 Rosemary Bolger, ‘Tasmanian Aboriginality Test Changes Proposed by Premier Will Hodgman’, *ABC News* (online, 21 January 2016) <<https://www.abc.net.au/news/2016-01-21/changes-to-tasmanian-aboriginality-test-premier-will-hodgman/7105758>>.

236 ‘Aboriginality Test Changes Will “Swamp the Community with White People”, Tasmanian Aboriginal Centre Fears’, *ABC News* (online, 22 January 2016) <<https://www.abc.net.au/news/2016-01-22/concerns-for-tasmanian-aboriginality-test-changes/7106664>>.

237 Callan Morse, ‘Mixed Responses to Tasmanian Government’s Aboriginal Advisory Group to Progress Truth-Telling and Treaty’, *National Indigenous Times* (online, 2 December 2022) <<https://nit.com.au/02-12-2022/4427/mixed-responses-to-tasmanian-governments-six-member-aboriginal-advisory->

Chair of tuiyupa tunapri, criticised the Government's Aboriginal Advisory Group in an address to the Royal Society of Tasmania:

This committee does not have the support or respect of the palawa community as it has been government chosen and not community elected. And there are no guarantees that all these people are indeed Palawa. Jaensch's [Roger Jaensch, the Minister for Aboriginal Affairs] group can be considered as nothing more than a government prop, manipulated to undermine or bypass the Palawa people's voice.²³⁸

The Aboriginal Advisory Group has invited tuiyupa tunapri to meet and discuss their concerns.²³⁹ At the time of writing, no response has been provided, but tuiyupa tunapri have drafted their own Treaty Bill.²⁴⁰ Issues surrounding Aboriginal identity and relationship to country will likely remain a recurrent challenge for Australian treaty processes.²⁴¹

D Legal: The Role of International Law

Modern treaties differ from those negotiated in colonial periods in several respects. One important distinction is that while historic treaties signed in North America and Aotearoa New Zealand were international agreements,²⁴² modern treaties will be subject to Australian law.²⁴³ This reflects the reality that although these agreements were between independent nations, they have subsequently been domesticated.²⁴⁴ A key question is the degree to which international law or international legal principles will nonetheless shape or influence treaty-making.²⁴⁵

group-to-progress-truth-telling-and-treaty>; Callan Morse, 'Tasmanian Government Holds Historic Meeting with Aboriginal Corporations, with One Notable Absentee', *National Indigenous Times* (online, 3 August 2022) <<https://nit.com.au/03-08-2022/3579/tasmanian-government-holds-historic-meeting-with-aboriginal-corporations-with-one-notable-absentee>>.

238 Rodney Gibbins, 'Treaty and Truth-Telling: The Next Steps for Tasmania' (Palawa Lecture, Royal Society of Tasmania, 4 December 2022) <<https://rst.org.au/notes-rodney-gibbins-talk-dec2022/>>.

239 Tasmania, *Parliamentary Debates*, House of Assembly, 30 March 2023, 46 (Roger Jaensch).

240 Lutruwita Treaty Bill 2023 (Tas) <<https://web.archive.org/web/20240322235538/https://tacinc.com.au/wp-content/uploads/2023/02/DRAFT-LUTRUWITA-TREATY-BILL-2023-151222.pdf>>.

241 In the Australian Capital Territory, see Karabena Consulting (n 145); Paul Girrawah House, 'Action to Stop Blatant Discrimination Against the Ngambri' (Media Release, 29 July 2022); *House* (n 140).

242 Miguel Alfonso Martinez, Special Rapporteur, *Studies on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) 14 [110]; Willem van Genugten and Federico Lenzerini, 'Legal Implementation and International Cooperation and Assistance' in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 539, 554.

243 Note that the Yorta Yorta have so far declined to take part in the Victorian Treaty process on this basis: Yorta Yorta Council of Elders, 'Trick or Treaty?' (Press Release, 2019) <<https://yynac.com.au/press-release-trick-or-treaty/>>. Other First Nations may follow: Hobbs and Williams, 'The Noongar Settlement' (n 4) 229.

244 But see *UNDRIP* (n 10) art 37; Hobbs and Young (n 174). For Indigenous peoples' approaches to treaty-making, see Robert A Williams Jr, *Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800* (Oxford University Press, 1997) <<https://doi.org/10.1093/oso/9780195065916.001.0001>>. Of course, the historic treaties signed between Indigenous peoples and colonial powers in North America and Aotearoa New Zealand, for example, do not lose their status as international instruments simply because the state considers them domesticated because one party cannot unilaterally opt out of a treaty.

245 See discussion in A J Wood, 'Establishing a Neutral Legal Framework for Treaty in Australia' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 76.

Treaties ‘are the basis for a strengthened partnership’²⁴⁶ between Indigenous peoples and the state. As the Expert Mechanism on the Rights of Indigenous Peoples has explained, a renewed relationship based on justice and self-determination is ‘consistent’ with the *UNDRIP*.²⁴⁷ Australian treaty processes identify a renewed relationship as a primary goal. In Victoria, a treaty is seen as forming a relationship ‘of equal partnership, founded on mutual respect and a commitment to justice and equality for Aboriginal Victorians’.²⁴⁸ In the NT, treaty is seen as offering the potential to ground ‘lasting reconciliation between the First Nations of the Territory and other citizens with the object of achieving a united Northern Territory’.²⁴⁹ The Queensland *Path to Treaty Act* adopts similar language. The preamble notes the ‘foundation for a respectful and mutually beneficial relationship’ between First Nations communities and the state requires a process ‘to hear the voices of Aboriginal and Torres Strait Islander peoples’, to ‘help heal the trauma’ of colonisation, and to ‘build a new future’ through treaties.²⁵⁰

These statements suggest treaty process are consistent with international law but not that they are being shaped by international law. This accords with a study of the early stages of the Victorian treaty process, which found that while engagement with the *UNDRIP* is ‘inconsistent’, the values and principles underlying the *UNDRIP* were ‘clearly playing a role’ in the government’s approach.²⁵¹ In the intervening years, however, international law has become more prominent. The Victorian Treaty Negotiation Framework, developed in partnership with the First Peoples’ Assembly of Victoria and the Victorian Government is explicit, stating: ‘Treaty-making aims to build a new relationship between the State and First Peoples based upon realising rights defined by the *UNDRIP*’.²⁵² The Queensland *Path to Treaty Act* also ensures that ‘the principles’ of the *UNDRIP* will govern and guide the treaty process.²⁵³

Australian processes appear to be moving towards the approach in Canada which embeds *UNDRIP* into treaty processes. In British Columbia, the British Columbia Treaty Commission facilitates treaty negotiations and resolves disputes that arise between First Nations and the provincial and federal governments, acting as an independent umpire. In 2018, its mandate was extended to include supporting the implementation of the United Nations Declaration,²⁵⁴ suggesting that the *UNDRIP* would guide negotiations and settlements. In 2019, the three parties reached agreement on a new policy for treaty negotiations. The policy endorses the *UNDRIP*

246 Human Rights Council, *Treaties, Agreements and other Constructive Arrangements, including Peace Accords and Reconciliation Initiatives, and Their Constitutional Recognition: Study of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/51/50 (28 July 2022) 4 [14].

247 Ibid.

248 *Treaty Act* (n 21) Preamble.

249 *Treaty Commissioner Act* (n 12).

250 *Path to Treaty Act* (n 11) Preamble.

251 Harry Hobbs, ‘Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia’ (2019) 23(1–2) *International Journal of Human Rights* 174, 183 <<https://doi.org/10.1080/13642987.2018.1562918>>.

252 *Treaty Negotiation Framework* (n 49) 6.

253 *Path to Treaty Act* (n 11) s 6.

254 ‘Mandate’, *British Columbia Treaty Commission* (Web Page) <<https://www.bctreaty.ca/mandate>>.

‘as a foundation of the British Columbia treaty negotiations framework’, provides that negotiations will be ‘guided’ by the Declaration and confirms that treaties will ‘provide for the implementation’ of the *UNDRIP*.²⁵⁵ Similarly, in 2023, the Canadian government adopted a revised treaty policy framework that recognises the *UNDRIP* ‘is an authoritative interpretive source for Canadian law’, ‘informs the implementation of modern treaties’ and constitutes ‘minimum standards’.²⁵⁶ While no Australian government has been as explicit as this, the Victorian and Queensland models indicate an increasing acceptance of the *UNDRIP*.

In November 2023, the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs released its report into the application of the *UNDRIP* in Australia.²⁵⁷ The inquiry was originally prompted by developments in Canada. The *United Nations Declaration on the Rights of Indigenous Peoples Act 2021* (Can) establishes a legal framework aimed at aligning Canadian law with the *UNDRIP*. The Act requires the federal government, in consultation with Indigenous peoples, develop and implement an action plan to achieve the objectives of the Declaration, and table an annual report on progress. The action plan must include measures to address injustices, promote mutual respect and understanding, and ensure accountability for meeting its implementation targets.²⁵⁸ The federal law builds upon the efforts of British Columbia. In 2019, the province passed the *Declaration on the Rights of Indigenous Peoples Act*, BC 2019. The provincial Act is similar in scope. It requires the government bring provincial laws into alignment with the *UNDRIP*, develop and implement an action plan to do so, and report regularly to the legislature on progress.²⁵⁹ The Act also empowers the government to enter ‘decision-making agreements’ with Indigenous governments to allow them to exercise statutory decision-making authority.²⁶⁰ Given that Indigenous-State treaties in Australia must be consistent with Australian law, a similar Commonwealth Act that requires Australian laws be consistent with the *UNDRIP* would have flow on effects for state and territory treaties.

The *UNDRIP* is formally a soft-law instrument. However, as the Special Rapporteur on the Rights of Indigenous Peoples has noted, this is ‘an incomplete and potentially misleading characterization’.²⁶¹ It is incomplete because many of its provisions do not create new rights but apply general human rights principles

255 Canada, British Columbia and First Nations Summit, *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (endorsed on 4 September 2019) 8, 16, 18 <<https://www.rcaanc-cirnac.gc.ca/eng/1567636002269/1567636037453>>.

256 Government of Canada, *Canada’s Collaborative Modern Treaty Implementation Policy* (2023) [3.7].

257 Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Inquiry into the UN Declaration on the Rights of Indigenous Peoples* (Report, November 2023) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/RB000083/toc_pdf/InquiryintotheapplicationoftheUnitedNationsDeclarationontheRightsofIndigenousPeoplesinAustralia.pdf>.

258 *United Nations Declaration on the Rights of Indigenous Peoples Act*, RSC 2021, c 14, ss 5–7.

259 *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, C-44, ss 3–5.

260 *Ibid* s 7.

261 James Anaya, Special Rapporteur, *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, UN Doc A/68/317 (14 August 2013) 16 [61].

to the distinctive position of Indigenous peoples.²⁶² It is misleading because the more important question is whether the *UNDRIP* is proving effective in changing state behaviour. As the developments in Canada, Queensland and Victoria suggest, States are increasingly conscious they must ‘take their *UNDRIP* promises to Indigenous peoples seriously’.²⁶³ These moves also demonstrate the value of First Nations peoples’ articulating their aspirations in the language of the *UNDRIP*.²⁶⁴ The *UNDRIP* sets a standard for treaty negotiations and settlement outcomes. Even if modern treaties are subject to state law, international law will play a significant role in Australian treaty-making.

E Federalism: Relationship with A Future Commonwealth Process

The constitutional distribution of legislative power in Australia means that the federal government will need to be involved in treaty processes.²⁶⁵ Simply put, there are some issues over which state and territory governments cannot negotiate. The failed Voice referendum will likely lead the government to postpone the development of a Makarrata Commission.²⁶⁶ It will not, however, eliminate the need for a Commonwealth process. One issue to navigate is how existing state and territory processes will integrate with a future national treaty commission or process.

Given the focus on a Voice referendum, there has been little scholarly attention on this question.²⁶⁷ However, state and territory treaty processes have been following the national debate. In Queensland, the Eminent Panel recommended that the State’s Path to Treaty ‘should be informed by the national leadership contained in the Uluru Statement from the Heart’,²⁶⁸ while the Treaty Advancement Committee recommended the process remain ‘sufficiently agile to align with the national leadership contained in the Uluru process’, if and when a proposed Makarrata Commission emerged.²⁶⁹ Similarly, in distancing themselves from the final report of the Treaty Commission, the NT Government explained that additional consultations on a proposed treaty-making framework ‘is likely to be influenced by developments nationally, namely the Commonwealth’s own treaty agenda’.²⁷⁰

262 Nigel Bankes, ‘Implementing UNDRIP: An Analysis of British Columbia’s Declaration on the Rights of Indigenous Peoples Act’ (2021) 53(4) *UBC Law Review* 971, 972; Anaya, *Promotion and Protection of All Human Rights* (n 221) 12–15 [38]–[42].

263 Van Genugten and Lenzerini (n 242) 540.

264 Claire Charters, ‘Use It or Lose It: The Value of Using the Declaration on the Rights of Indigenous Peoples in Maori Legal and Political Claims’ in Andrew Erueti (ed), *International Indigenous Rights in Aotearoa New Zealand* (Victoria University Press, 2017) 137, 151. See, eg, Federation of Victorian Traditional Owner Corporations, ‘UNDRIP and Enshrining Aboriginal Rights’ (Discussion Paper No 3, 2020) <<https://apo.org.au/sites/default/files/resource-files/2021-02/apo-nid311229.pdf>>.

265 Hobbs and Williams, ‘The Noongar Settlement’ (n 4) 227–30.

266 Narelle Bedford, ‘The Aftermath: What if the Voice Referendum Does Not Succeed?’ (2023) 34(2) *Public Law Review* 156; Hobbs, ‘Treaty-Making Gathers Pace’ (n 111).

267 Cf Morris and Hobbs (n 33) 43–4.

268 Jackie Trad Letter (n 82) 2.

269 *Queensland Treaty Advancement Committee Report* (n 80) 2.

270 ‘Response to NT Treaty Commission’s Final Report’ (n 74). As noted above, preliminary work on the design of a Makarrata Commission may be underway within the National Indigenous Australians Agency.

Nevertheless, challenges can be identified. As this article has demonstrated, treaty processes are at various stages of development across the federation making integration difficult. It is not just that institutions have been established in Victoria and not NSW (for example), but that the Victorian Government has had almost eight years to comprehend what a treaty relationship means and prepare itself for treaty. Now that the Treaty Negotiation Framework has been set up and treaty institutions have been legislated, Victoria will likely move much faster than other jurisdictions and potentially agree to more far-reaching settlement outcomes. However, a variable approach to negotiation and settlement outcomes will weaken support for treaty and damage its legitimacy. This is particularly problematic for First Nations communities whose country straddles state or territory boundaries.²⁷¹

The simplest way to resolve this problem is for National Cabinet to agree on a set of minimum standards. Notwithstanding the referendum result, the current political cycle presents an opportunity to progress an integrated national treaty process. The Australian Labor Party holds government in every jurisdiction except Tasmania, and every jurisdiction, except WA, has signalled they are open to or engaged in a conversation about treaty. It is not clear how long this political landscape will persist. Commonwealth, state and territory Ministers responsible for Indigenous Affairs and Treaty should meet and seek agreement to commence preliminary work on how a Commonwealth treaty process could relate to state and territory processes. These conversations should be informed by First Nations peoples and their representative institutions.

This may be optimistic. For the reasons outlined in this paper, national minimum standards will likely tend towards the lowest common denominator and fail to meet the meaningful reform inherent to modern treaties. In circumstances where serious questions exist over Commonwealth appetite and the efficacy of several other processes, this is a real risk.

In the absence of Commonwealth involvement, attention shifts back towards the subnational level.²⁷² While one might imagine that momentum will dissipate here too, it is worth remembering that the states and territories commenced their own treaty processes because they were ‘not convinced that you can wait for a national process that has never ever delivered in relation to righting these wrongs’.²⁷³ Many Australians will continue to support treaty regardless of the referendum. In these circumstances, supporters must rely on laboratory federalism.²⁷⁴

IV CONCLUSION

Australian governments have long dismissed Aboriginal and Torres Strait Islander peoples’ calls for a treaty or treaties. Over the last few years, however, a remarkable transition has occurred. Every Australian jurisdiction, except one,

271 Hobbs and Williams, ‘The Noongar Settlement’ (n 4) 221–3.

272 Larkin et al (n 32).

273 Victoria, *Parliamentary Debates*, Legislative Council, 21 June 2018, 2893–4 (Gavin Jennings).

274 Hobbs and Williams, ‘Treaty-Making in the Australian Federation’ (n 13) 220–1.

has committed to talking treaty with First Nations peoples. In this paper, I have provided an outline and update on each process. In doing so, I have demonstrated that modern treaty-making – particularly in a country without a history of treaty or of recognising the collective rights of Indigenous peoples – is challenging. Not every process is moving smoothly. But the slow, steady, and deliberate work in places like Victoria reveals that a renewed relationship may be possible.

Resolving the issues identified in this paper will not guarantee meaningful and effective settlements. As Metropolitan Local Aboriginal Land Council Chief Executive Nathan Moran has noted, '[w]e hear a lot of promises that don't translate to actuals'.²⁷⁵ When negotiations commence more challenges will arise.

It is likely that some First Nations communities will choose not to take part in treaty negotiations. Questions over whether negotiations are genuinely equitable, including whether the state should be under a political or legal obligation to negotiate in good faith will also be asked. Others will wonder whether modern treaties are worth the effort when colonial-era treaties were routinely broken. Perhaps the most difficult question is one that cannot yet be answered. In a nation built on the idea of terra nullius, will an Australian government recognise First Nations peoples' sovereignty has not been ceded and will Australian law recognise Indigenous self-government? This is not just a question as to whether and how land and governance can be equitably shared on this continent, but a more fundamental question of whether an Australian treaty can liberate Aboriginal and Torres Strait Islander nations from colonial relations, or whether it is merely 'an advanced form of control, manipulation, and assimilation'.²⁷⁶ We should hope for the former. And we should aim high.

275 Alexi Demetriadi, 'NSW Budget: Indigenous Leaders Say "Time for Action, Not Talk" on Treaty', *The Australian* (online, 21 September 2023) <<https://www.theaustralian.com.au/nation/indigenous/nsw-budget-indigenous-leaders-say-time-for-action-not-talk-on-treaty/news-story/358ee31644408f9298ad914e43544c9c>>.

276 Taiaiake Alfred, *Peace, Power, Righteousness: An Indigenous Manifesto* (Oxford University Press, 1999) 119; Maurice Agale, 'Necrology: List of Recently Dead People' (2002) 5(21) *Indigenous Law Bulletin* 12, 12 (positing that '[c]ould the treaty be the final act of assimilation brought about not by the government, but our own leaders and proponents of the treaty?').