

Bill Brief

Parliamentary Library and Information Service

Research Note | ISSN: 2204-4779 (Print) 2204-4787 (Online)

No. 4 | July, 2022

Treaty Authority and Other Treaty Elements Bill 2022

Caleb Triscari



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Executive Summary

The Treaty Authority and Other Matters Bill 2022 ('Treaty Authority Bill') looks to establish an authority empowered to facilitate future treaty negotiations between the State of Victoria and Aboriginal parties (the Treaty Authority). The Authority will be given appropriate legal powers similar to that of a body corporate.

The Treaty Authority Bill has been introduced by the Victorian Government as part of its intent to negotiate and enter a treaty with the state's First Peoples. Further, the authority's establishment is required in accordance with Part 4 of the Advancing the Treaty Process with Aboriginal Victorians Act 2018 ('Treaty Act').

If established, the Treaty Authority will also administer the treaty negotiation framework, which is yet to be created, and carry out research in support of treaty negotiations and the framework.

The Treaty Authority Bill has been commended by the First Peoples' Assembly of Victoria, the Aboriginal Representative Body established and appointed by the Victorian Government to act as the sole representative for Aboriginal Victorians. The Liberal-National Coalition has also announced it will support the Bill in Parliament, with only one Liberal MP crossing the floor in the Legislative Assembly to vote against it. All crossbenchers in the Legislative Assembly supported the Bill.

The proposed legislation follows numerous rounds of consultation with Aboriginal Victorians regarding the functions and purpose of the proposed authority. Similar models from overseas were also taken into consideration.

The Victorian Government first initiated the treaty process in 2016, and over the course of six years has also established the Yoorrook Justice Commission, Aboriginal Working Group, Aboriginal Community Assembly and the Victorian Treaty Advancement Commission. All these entities, except Yoorrook, have been dissolved after serving their purpose.

This Bill Brief provides a summary of the proposed Treaty Authority and its functions, the lead-up to its establishment, and responses from the Victorian Government, opposition, crossbenchers and other stakeholders. It also provides background information on treaty and truth-telling processes currently underway in other Australian jurisdictions.

Australia is the only Commonwealth country to have never signed a treaty with its First Peoples (Williams, 2014). While the Hawke Government's response to the 1988 Barunga Statement signalled intent to negotiate a treaty, this did not eventuate.

Introduction

The Treaty Authority Bill was introduced in the Legislative Assembly by the Minister for Aboriginal Affairs, the Hon. Gabrielle Williams, on 7 June 2022. In a ministerial reshuffle, Ms Williams has since become the Minister for Treaty and First Peoples (Andrews, 2022).

The Treaty Authority Bill is the first of its kind in any Australian jurisdiction. While other states and territories are in various stages of treaty and truth-telling, no jurisdiction has reached the point of establishing a body to facilitate treaty negotiations. The proposed authority was described by the Minister in a media release as ‘a nation-leading institution without precedent, drawing on international best practice but adapted for Victoria to ensure Aboriginal lore, law and cultural authority are observed and upheld’ (Williams, 2022a).

A key principle of Victoria’s treaty and truth-telling processes has been self-determination, which is generally accepted to mean the freedom to pursue economic, social and cultural development and the right to be treated respectfully (Attorney-General’s Department website). The importance of self-determination is also affirmed in the United Nations Declaration on the Rights of Indigenous Peoples, which Australia endorsed in 2009.

Second reading speech

In her second reading speech on 8 June 2022, the Minister detailed the functions of the proposed Treaty Authority, including its capacity to ‘oversee and facilitate treaty negotiations and administer the treaty negotiation framework, to ensure negotiations proceed in accordance with the guiding principles for the treaty process and the rules and processes set out in the framework’.

Ms Williams highlighted the ‘unique’ model the proposed Treaty Authority is built on, explaining that:

The State and Assembly have developed a unique Treaty Authority model as an independent unincorporated body, with the necessary powers and capacities to operate effectively. This novel legal form will provide independence from all parties to ensure public trust and integrity in the treaty process, while being publicly accountable to all Victorians and culturally accountable to First Peoples.

The Minister also explained that the Treaty Authority will be guided ‘by the distinct cultural rights of First Peoples and is consistent with the principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples’.

Background

In 2016, the Victorian Government first confirmed its intent to negotiate and establish a treaty with the state's First Peoples (Victorian Government, 2021a). The Aboriginal Treaty Working Group was established in July 2016 to facilitate consultation regarding a treaty. Members of the working group comprised traditional owners from throughout Victoria, including Elders, younger Aboriginal Victorians and Aboriginal community-controlled organisations.

The Victorian Treaty Advancement Commission was established in December 2017 and launched the following month to maintain momentum of the treaty process and assist in setting up the Aboriginal Representative Body (Victorian Government, 2021b). The office of the Victorian Treaty Advancement Commissioner was held by Jill Gallagher AO.

In late 2017, an Aboriginal Community Assembly was convened of 31 Aboriginal Victorians to address any outstanding questions related to the Aboriginal Representative Body's design.

The *Final Report on the Design of the Aboriginal Representative Body*, handed down in 2018, provided recommendations on how the body should function, including:

- The Aboriginal Representative Body should develop a framework to underpin treaty negotiations,
- Any Aboriginal person living in Victoria should be eligible to vote in elections for the Aboriginal Representative Body,
- The Aboriginal Representative Body should comprise 30 members,
- The Aboriginal Representative Body must be independent of government and controlled by the community.

Every recommendation from the Community Assembly in its final report was accepted by the Treaty Working Group.

Eventually, the First Peoples' Assembly of Victoria was established under the *Advancing the Treaty Process with Aboriginal Victorians Act 2018*. It was subsequently appointed by the then Minister for Aboriginal Affairs, the Hon. Gavin Jennings, as the Aboriginal Representative Body. Elections were held between September and October 2019, with the results declared in November 2019. The inaugural meeting of the First Peoples' Assembly was held at Parliament House on 10 December 2019 (Wahlquist, 2019).

The Treaty Act also legislated a self-determination fund with the purpose of providing an independent financial resource that 'empowers traditional owners and Aboriginal Victorians to build capacity, wealth and prosperity'. This fund would be administered by the Aboriginal Representative Body.

In June 2020, the First Peoples' Assembly passed a resolution recognising that truth-telling was an essential component of the treaty process and requesting the Victorian Government to establish a formal truth-telling process. In March 2021, the Victorian Government and First Peoples' Assembly announced the establishment of the Yoorrook Justice Commission (Ilanbey and Sakkal, 2021). The letters patent were signed by Governor Linda Dessau AC on 12 May 2021, establishing Yoorrook as a royal commission with terms of reference. The Commission comprised Professor Eleanor Bourke AM as chair, with Dr Wayne Atkinson, Sue-Anne Hunter, Distinguished Professor Maggie Walter and Professor the Hon. Kevin Bell AM QC as commissioners.

A final report from Yoorrook is due in June 2024, however, in their interim report from June 2022, the Commission has requested the deadline be extended by two years to June 2026 (Yoorrook Justice Commission, 2022).

The Bill

First and foremost, the Treaty Authority Bill seeks to establish an entity that will facilitate treaty negotiations between the State and Aboriginal parties. The proposed Authority will also administer the treaty negotiation framework, which is a set of rules that will guide how future treaties are negotiated (First Peoples' Assembly of Victoria, 2022), and aim to resolve disputes between parties during the treaty process.

In performing its duties, the Treaty Authority will be culturally accountable to First Peoples and uphold Aboriginal Lore, Law and Cultural Authority. It will also aim to develop and follow practices that respect Indigenous Data Sovereignty, a concept that can be defined as 'the right of Indigenous peoples to govern the collection, ownership and application of data about Indigenous communities, peoples, lands, and resources' (AIATSIS, 2019).

Composition

According to an agreement signed in June 2022 between the First Peoples' Assembly and the Victorian Government, the Treaty Authority will comprise between five and seven members. These members will carry out the functions and duties of the Treaty Authority.

Members of the Treaty Authority will be appointed by a five-person panel established by the First Peoples' Assembly and the Victorian Government. The panel will comprise of at least four Aboriginal or Torres Strait Islander peoples.

The proposed Treaty Authority has some unique legal and operational features, which the Government claims are necessary to achieve its intended purpose. Notably, the Treaty Authority would be an independent unincorporated entity with the powers of a body corporate, including the capacity to own property, employ staff, sue and be sued, and enter into agreements.

The Minister said the Treaty Authority was modelled on similar examples from Canada and New Zealand. The British Columbia Treaty Commission, as law lecturer Harry Hobbs (Kolovos and Ore, 2022) points out, facilitates the negotiation of treaties between Canadian governments and First Nations groups (BCTC, 2022). In New Zealand, the Waitangi Tribunal makes recommendations on claims brought by Māori pertaining to breaches of the Treaty of Waitangi, while the Office for Māori Crown Relations (Te Arawhiti) negotiates the settlement of historical Treaty of Waitangi claims.

Funding

The Treaty Authority Bill would also appropriate funds to the Authority until at least the 2025 - 2026 financial year. The purpose of guaranteeing funds upfront was to ensure the Treaty Authority can operate in the long-term (Castan et al., 2022).

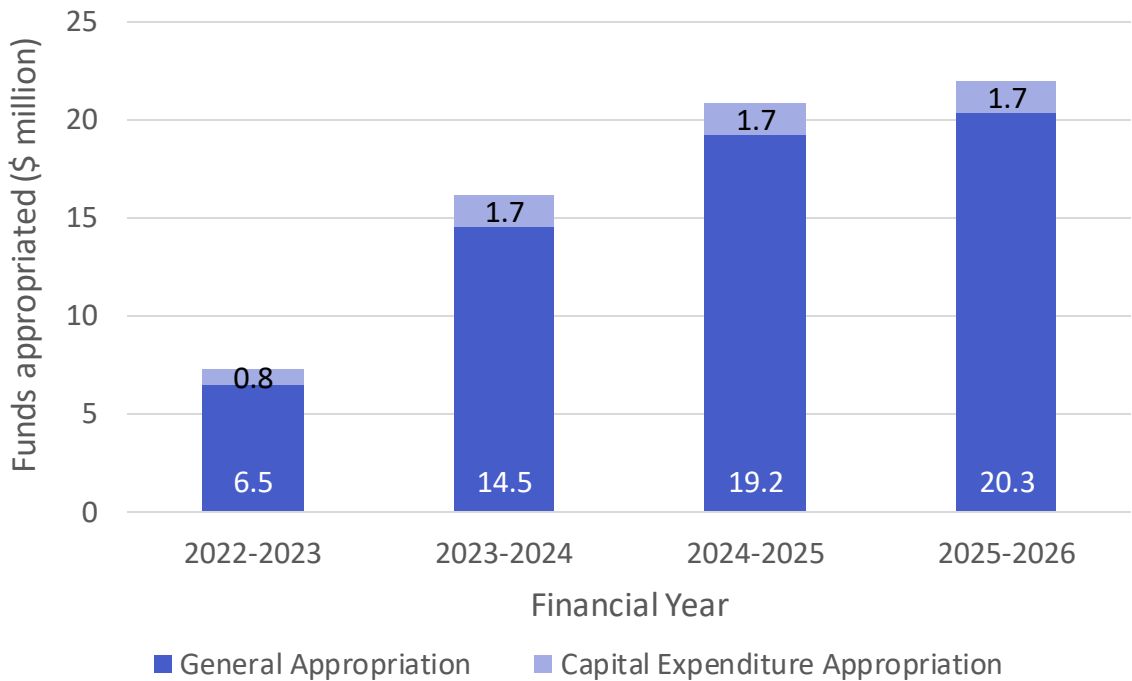


Figure 1: Proposed appropriations to the Treaty Authority

Amendments to the Treaty Act

The Treaty Authority Bill also makes the following amendments to the Treaty Act:

- It allows the Aboriginal Representative Body (the First Peoples' Assembly of Victoria) to administer the self-determination fund through a wholly owned company,
- It specifies that the Aboriginal Representative Body is not prevented from being a party to treaty negotiations,
- It specifies the amendments to the Treaty Act, mentioned above, will be repealed on the first anniversary of the Treaty Authority Bill's commencement. However, repealing the amendments will not affect the operations currently underway.

Responses

First Peoples' Assembly of Victoria

As the Aboriginal Representative Body recognised and established by the Victorian Government, the First Peoples' Assembly is in support of the Treaty Authority Bill. Assembly co-chair Marcus Stewart, a Nira illim bulluk man of the Taungurung Nation, addressed Parliament on 22 June 2022 and described the Bill as 'a critical step forward in the treaty journey' (2022, p. 2514).

The Liberal-National Opposition

The Liberal-National Coalition confirmed it would support the Treaty Authority Bill on 21 June 2022. In a media release, the Shadow Minister for Aboriginal Affairs, the Hon. Peter Walsh (2022), said the Coalition is 'committed to advancing the treaty process in Victoria in a way that supports self-determination and reconciliation while strengthening community and connection to country'.

However, Liberal MP Tim Smith said he would cross the floor to vote against the Bill, describing it as 'woke tokenism' (Kolovos, 2022).

The Greens

Speaking in the Assembly on 22 June 2022, Greens MP Sam Hibbins commended the Bill and reiterated the party's support of a treaty.

However, Mr Hibbins also listed some concerns 'regarding the implementation of the tenets of the agreement', such as the financial barriers for some Aboriginal nations not aligned with the First Peoples' Assembly to participate in the treaty process (2022, p. 2536).

...There are many nations that have been excluded from the First Peoples' Assembly for years, and whilst there has been progress made to provide an avenue for representation, there remain significant concerns and barriers to their involvement. There are some nations without the direct secretariat funding needed to take the necessary steps to work through the administrative processes.

Some of the funds from the nation-building package for non-registered Aboriginal party nations have not necessarily flowed through to reach these communities who are in desperate need of resources. This really goes to the importance of ensuring that within the act there is fairness and equality for all parties and traditional owners. Put simply, we cannot have a process that undermines the treaty process.

Other Crossbenchers

All crossbenchers in the Legislative Assembly voted in favour of the second and third readings of the Treaty Authority Bill (Victorian Legislative Assembly, 2022b, p. 5).

In particular, the Independent Member for Shepparton, Suzanna Sheed, commended the Bill during a speech in Parliament on 22 June 2022, saying that 'it is just so important that we are here today talking about treaty, about walking side by side with the Aboriginal people of our community, because it is really saying we acknowledge that this journey has been so hard and so painful, and that so many people have been lost in so many ways along the way' (2022, pp. 2554-2556).

Other jurisdictions

Victoria is the only jurisdiction in Australia to proceed with legislation establishing any kind of treaty negotiation authority. However, other state and territory governments have commenced early steps in their respective treaty and truth-telling processes.

Furthermore, one of the Australian Labor Party's 2022 federal election policies was to accept the *Uluru Statement from the Heart* (2017) in full, which includes a request for a treaty and truth-telling (or Makarrata) commission. On the night of the Federal Election of the 21 May 2022, newly elected Prime Minister, the Hon. Anthony Albanese, opened his speech with a commitment to the Uluru Statement from the Heart (ABC, 2022).

Northern Territory

The Northern Territory Government and the four statutory land councils formed the Barunga Agreement in 2018, marking the first step towards a treaty in the territory.

Four years later, the *Final Report from the Northern Territory Treaty Commission* (2022) made several recommendations including:

1. The establishment of a First Nations Forum through which Aboriginal Territorians can endorse a Treaty model and decide how First Nations should be represented in Treaty negotiations,
2. The development of a treaty process that would allow negotiations of multiple treaties between the Northern Territory Government and First Nations groups,
3. The expansion of the Treaty Commission into a Treaty and Truth Commission,
4. The establishment of an Aboriginal Ombudsman and development of an Office of Treaty-Making to assist in treaty facilitation.

Western Australia

The South West Native Title Settlement, a native title claim agreed to by the WA Government and the Noongar people in 2015, has previously been described as 'Australia's first treaty' based on its form and content as a land use agreement (Hobbs and Williams, 2018).

Following the settlement, the WA Parliament passed the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016*, which acknowledges the Noongar peoples as the traditional owners of the lands in southwest WA.

In 2018, the former Minister for Aboriginal Affairs, Ben Wyatt, said he was hoping to commence treaty discussions once the South West Native Title Settlement was finalised (Hirini, 2018). To date, there has been no firm indication from the WA Government that it wishes to commence a treaty or truth-telling process.

Queensland

Queensland Labor's state conference in 2017 agreed to a document which proposed the formalisation of a treaty negotiation process. In 2019, the Queensland Government published a Statement of Commitment to a reframed relationship with the state's First Peoples, based on principles of self-determination, locally led decision-making and empowerment, among others (DATSIP, 2019).

In February 2020, a report from the state's Eminent Panel and Treaty Working Group made the following recommendations:

- The creation of a First Nations Treaty Institute to advise and facilitate the development of a treaty-making framework, and lead a process of truth-telling,
- The establishment of a First Nations Treaty Future Fund to ensure financial viability of the treaty process on a long-term basis.

In February 2021, the Queensland Government appointed its Treaty Advancement Committee. The committee was tasked with building on the work of the earlier Treaty Working Group and advising the government on next steps.

The committee handed down its report in October 2021, however it is yet to be released by the Queensland Government as of June 2022 (McKenna, 2022).

South Australia

The South Australian Government was previously negotiating treaties with multiple Aboriginal groups including the Ngarrindjeri, Narungga and Adnyamathanha communities. The government had also appointed a Treaty Commissioner, Roger Thomas, whose role involved undertaking consultation on a treaty framework and facilitating discussions for a potential treaty process between the government and Aboriginal communities.

However, following the election of a SA Liberal government in 2018, incoming Premier Steven Marshall decided not to proceed with treaty negotiations, instead choosing to focus on 'continuing our discussions with Aboriginal communities about the implementation of our Aboriginal affairs policy' (ABC, 2018).

Following the Labor Party's win at the South Australian state election in March 2022, Attorney-General, Kyam Maher, (2022) announced the appointment of Kurna, Narungga, Ngadjuri and Ngarrindjeri man, Dale Agius, as the state's first Commissioner for First Nations Voice. The role will 'help lead the Government's consultation with Aboriginal groups and lay the foundations for state-based implementation of the *Uluru Statement from the Heart*'.

Tasmania

In 2021, the *Pathway to Truth-Telling and Treaty Report* was tabled in the Tasmanian Parliament. The report made recommendations for a truth-telling commission which offers flexibility around where it sits and how it conducts hearings and story-telling sessions. The report also recommended that the treaty process does not wait for the completion of the truth-telling process (Warner et al., 2021).

In March 2022, former Premier, Peter Gutwein, announced the establishment of an Aboriginal Advisory body to work with the state government to establish both a truth-telling process and treaty process in Tasmania (Gutwein, 2022).

Australian Capital Territory

The ACT Government is in the early days of its treaty process. In February 2021, the ACT Government allocated \$317,000 to start conversations with the Ngunnawal people around what a treaty would look like in the territory. Part of the funding would also go toward developing a governance structure and administration of a \$20 million healing and reconciliation fund (Lindell, 2021a).

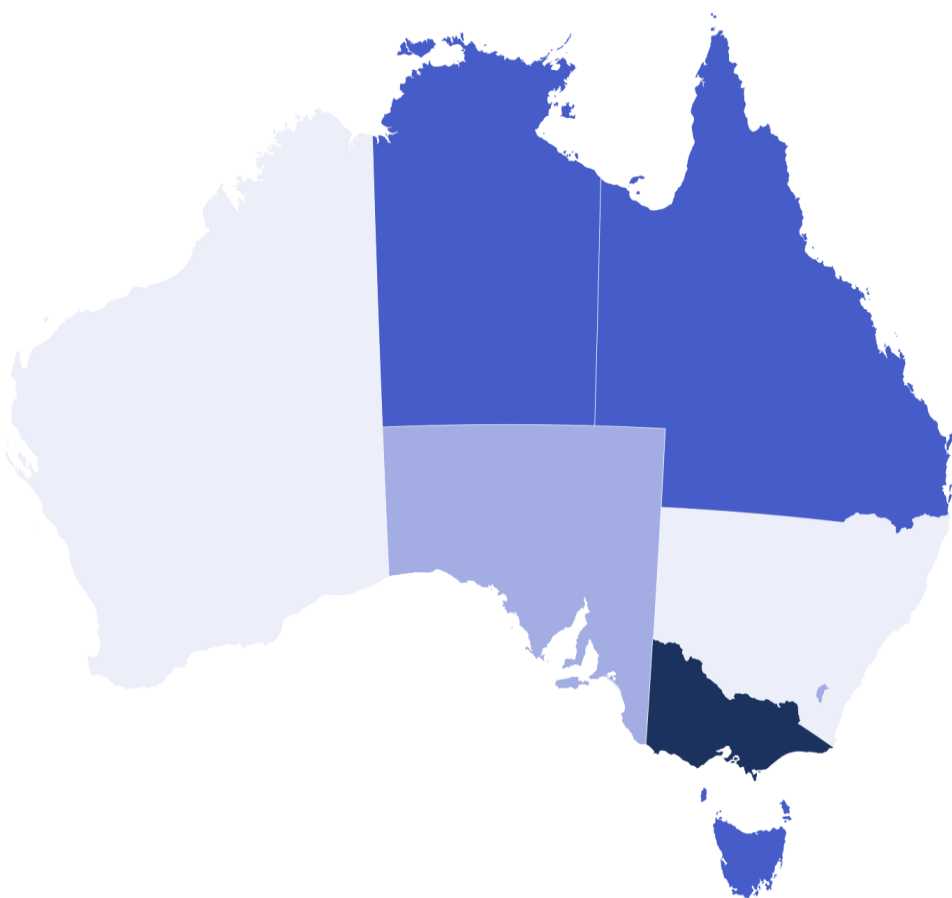
In May 2021, the ACT Government stated they were ‘resolutely committed to advancing the Uluru Statement from the Heart - voice, treaty and truth’ (Lindell, 2021b). This included a federal First Nations Voice to Parliament.

In March 2022, the ACT Government appointed Professor Kerry Arabena to facilitate preliminary talks around how a treaty would affect the territory’s traditional owners (Stephen-Smith, 2022).

New South Wales

The New South Wales Government has not expressed any interest into commencing treaty discussions. In 2019, former state Minister for Aboriginal Affairs, Sarah Mitchell, said ‘for us as a Coalition, we have made it pretty clear that we think discussions and considerations around treaty should happen at a federal level and that’s something that we’ve been quite open about’ (Fryer, 2019).

■ No process underway ■ Early discussions ■ Recommendations issued ■ Legislation proposed or passed



Map: Caleb Triscari • Created with Datawrapper

Figure 2: Treaty and truth-telling processes in Australian jurisdictions. NB: The Commonwealth Government is currently in early discussions.

References

Relevant legislation

Victoria

Advancing the Treaty Process with Aboriginal Victorians Act 2018

- *Charter of Human Rights and Responsibilities Act 2006*

Other jurisdictions

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- *United Nations Declaration on the Rights of Indigenous Peoples*

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Suggested citation

Triscari, C. (2022) *Treaty Authority and Other Treaty Elements Bill 2022*, Parliamentary Library and Information Service. Melbourne, Parliament of Victoria.

Acknowledgements

The Parliament of Victoria Library acknowledges the Traditional Owners of the lands across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander Elders past and present, and we value Aboriginal and Torres Strait Islander history, culture and knowledge.

The author would like to thank Marianne Aroozoo, Anwyn Hocking and Debra Reeves for their assistance in preparing this paper.



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Parliament House, Spring Street, East Melbourne 3002
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