



Pathway to Treaty in New South Wales

On these, their lands of the First Peoples
It is with profound respect to acknowledge
the Spirits of Elders past, today's Elders and emerging leaders
To the East, West, North and South
surrounded by the great oceans, seas, rivers, creeks and streams
Under the Southern Stars in the celestial heavens, always and
forever acknowledging that they continue to be the custodians,
and having nurtured these lands for over sixty thousand years
they are and forever will be the oldest continuous culture on
Mother Earth.

On these lands of the First Peoples

NSW Pathway to Treaty Consultative Committee

The NSW Shadow Minister for Aboriginal Affairs and Treaty established the NSW Pathway to Treaty Consultative Committee. Elders from the NSW Aboriginal community, Traditional Owners, members of the stolen generation, members of the legislature, academics, political scientists, experts and other stakeholders were invited to actively participate on the committee and provide input into this document. They were invited to share their personal experience, insight and wisdom.

The Shadow Minister invited the committee members on a journey to listen and discuss the pathway that will lead New South Wales towards a treaty with the First Peoples and their nations in New South Wales. They were invited to consider issues relating the following.

- Heritage, justice, health and education in the context of treaty.
- Processes to identify the appropriate model for a treaty.
- Identify who else might be strategically engaged along this journey.
- Procedures that a future NSW Labor government would take to treaty negotiations, including listening to Aboriginal communities across New South Wales and drawing on best practices and models being applied across other jurisdictions.

Aboriginal people will have the leading role to determine whatever process takes shape. Any final decision on the treaty process will require significant input from stakeholders across New South Wales including elders, peak bodies and local groups.

Summary

A NSW Labor government will implement specific policies recognising that all Australians are entitled to equal rights, opportunities and responsibilities according to their aspirations.

First Nations communities have a unique status as the original owners and custodians of the lands and waters on the continent and have the right to exercise their distinctive cultures, languages, beliefs and traditions.

Land and water are the cultural, spiritual and economic basis of Aboriginal communities.

A NSW Labor government will implement policies relating to reconciliation, improving the lives of First Nations communities in areas such as education, environmental health, economic development, building community resilience, Aboriginal housing and infrastructure, a strong voice for Aboriginal communities and protecting indigenous heritage.

NSW Labor will also commence a discussion about treaty with First Nations people in the State because it is the right thing to do. Treaty will improve the lives of First Nations peoples in the State, help to build a more secure and reconciled New South Wales, and provide the building blocks for a new relationship of self-determination with First Nations peoples that underpins social and economic progress.

First Nations peoples must lead the conversation about treaty. For this reason, a NSW Labor government will commit to the principle of treaty rather than the detail.

Several Aboriginal community-controlled organisations exist across the state. While these organisations have strong connections with and are accountable to First Nations communities it is necessary to establish a separate and independent treaty authority. This approach has been adopted by each Australian treaty process and was adopted by British Columbia in Canada.

A NSW Labor government will commence a discussion about treaty with First Nations people in the State because it is the right thing to do. Treaty will improve the lives of First Nations peoples in the State, help to build a more secure and reconciled New South Wales, and provide the building blocks for a new relationship of self-determination with First Nations peoples that underpins social and economic progress. It will also meet the long-held aspirations of NSW First Nations peoples and communities.

Treaty will not undermine existing Aboriginal rights and interests in NSW. The treaty commission will explore ways to ensure that treaty or treaties can extend and complement existing rights and interests, in line with Aboriginal community wishes.

The treaty commission will deliver a public report to the NSW Minister for Aboriginal Affairs and Treaty outlining the views that emerge from the consultation process.

A NSW Labor government will commit to progressing the views of NSW First Nations peoples. NSW Labor Conference has committed to the principles of the *Uluru Statement from the Heart*. A NSW Labor government will action this commitment by pursuing a First Nations voice, treaty-making and truth-telling within the State.

Introduction

...I think the most important point on this one is for Australians to get used to the idea of treaty. It's well established in many other first world nations with a colonial history. It's not a scary thing. It's an agreement.¹

A Treaty is within our grasp, but 'Treaty' is just the heading of the document, the fine print will not be taken lightly by government and should [not] be taken lightly by us either. Those words, when finalised will affect all generations yet to come. Our sovereignty, and our very survival, may well hang in the balance.²

A NSW Labor government will initiate a treaty process because it is the right thing to do. It also meets a long-held aspiration of First Nations communities in NSW.

The government of the Commonwealth of Australia has given no indication that it is prepared to negotiate a treaty. NSW does not have to wait for the Commonwealth government. NSW does, however, have to consider ways to protect its treaty process from potential Commonwealth interference.

NSW has the constitutional and legal authority to commence a treaty process. Australia is a federation and NSW has jurisdiction over a wide range of matters relevant to treaty-making with First Nations communities, such as education, water, and housing, among others.

This document outlines the reasons why it is legally and politically appropriate for a NSW Labor government to take the lead in pursuing treaty. As it makes clear, however, a NSW Labor government will only pursue treaty if First Nations communities in NSW support the process of treaty.

NSW Labor Conference has committed to the principles of the *Uluru Statement from the Heart*. As part of that commitment, a NSW Labor government will initiate a conversation about treaty with First Nations communities whose traditional lands are within the borders of the state. This policy document outlines why treaty is important, and how a NSW Labor government will commence the initial stages of a treaty process.

Treaty can be about completing us. This is our unfinished business. It is about finally and truly expunging the stain of terra nullius – the belief that this was an empty land free for the taking.

Drawing on the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the document highlights that treaty must be led by First Nations communities. As a first step, a NSW Labor government will provide time and resources for First Nations communities to discuss their views and aspirations on treaty.

Several Australian State and Territory governments have committed to pursuing treaty. This means a NSW Labor government can learn from the steps taken in those jurisdictions. The document outlines the different approaches adopted thus far in each State and Territory. It also distils lessons from these processes. With those lessons in mind, the document concludes by outlining an appropriate starting point for a NSW Labor government. It recommends the creation of an independent treaty commission comprised of NSW First Nations peoples to lead conversations with First Nations communities across the state.

In concert and while exploring the pathway with Aboriginal communities to treaty, NSW Labor will undertake a review of all legislation, policies, guidelines, procedures and practices to redress the disparity experienced by the First Peoples of NSW. The review will be led in partnership with NSW Aboriginal communities and develop a strategy to incorporate the political, environmental, social and cultural position of the First Peoples of NSW into all current public policy methodology and future public policy development.

What is a treaty?

Treaties are accepted around the world as a means of resolving differences between Indigenous peoples and those who have colonised their lands. They have been struck in the United States and New Zealand and are still being negotiated in Canada today. In contrast, no formal treaty has ever been signed between Aboriginal and Torres Strait Islander peoples and the British or Australian governments. Since 2016, however, several State and Territory governments in Australia have committed to exploring the idea of negotiating a treaty or treaties with First Nations communities within their jurisdiction.

The fact that no treaties have ever been signed in Australia presents challenges. It means that the concept of what a treaty is or involves remains vague for many people, including government.³ A key element of any treaty process is building institutional knowledge as well as community awareness of and support for treaty.

It will take time, but it will happen.

This is because a treaty is different from other kinds of agreements. There are many examples of contracts or agreements between First Nations communities and the NSW government. For example, there are agreements relating to land rights, co-management, and resource benefit-sharing, among others. One of the most significant forms of agreement are Aboriginal Land Agreements under the Aboriginal Land Rights Act 1983 (NSW). These agreements can secure important outcomes for First Nations communities, but they are not treaties.

A treaty recognises that First Nations peoples' sovereignty was never ceded and restores and re-empowers First Nations communities with decision-making power and control that realises a form of self-determination. For this reason, a treaty is a special kind of agreement. As the Supreme Court of Canada has explained, a treaty is not an ordinary legal contract. It is a 'nation to nation' agreement that sets out 'solemn promises'.⁴ It is an agreement 'whose nature is sacred'.⁵

Treaties must be consistent with international human rights instruments concerning Indigenous peoples.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) provides a framework to guide both the process of treaty negotiations and the content of treaty settlements.⁶

The treaty processes in Canada and the standards set out in the UNDRIP illuminate three key conditions that differentiate a treaty from other agreements. A treaty must satisfy these three conditions.⁷

A treaty acknowledges that Aboriginal peoples owned and occupied the land now claimed by the state. It recognises further that the state is responsible for the deep injustices done to First Nations peoples and commits through treaty to making amends for this history. It is through this acknowledgement that the state promises, in the words of the Supreme Court of Canada, to reconcile 'the pre-existence of aboriginal societies with the sovereignty of the Crown'.⁸

A treaty is a political agreement that must be reached by a fair negotiation process. A fair negotiation is one conducted in good faith and in a manner respectful of each participant's standing as equal political communities. Negotiation is an appropriate process for resolving disputes between Indigenous peoples and the state. It allows for flexibility, builds trust, and can produce agreements supported by all parties. That said, securing a fair process will be difficult.

The state must commit to addressing this power dynamic in order to achieve good faith negotiations.

A treaty must contain more than symbolic recognition. It must recognise that First Nations peoples never ceded their sovereignty. It must also establish outcomes including some form of decision-making and control that amounts to a form of self-determination. What that form looks like will differ according to the aspirations and capacity of individual First Nations. Those aspirations and capacity will also change over time.

Treaty will become a mechanism for the evolution of the relationship between the state and First Nations polities.

Recognising a right to self-determination is founded upon empirical research in the United States and Canada that demonstrates that self-determination is a necessary condition for successful political and economic development. A treaty is not just an ordinary legal agreement. It is an instrument that is designed to improve the lives of First Nations communities and to secure the foundations for a just relationship between Indigenous peoples and the State.

A treaty will also contain agreements on a range of matters. This might include agreed financial compensation, return of land, formal recognition of historic wrongs through truth-telling, and symbolic gestures of reconciliation, such as state apologies. It could also include specific matters of importance to each party, including terms related to housing, water rights, and education, among others.

Aboriginal Land Agreements under the Aboriginal Land Rights Act 1983 (NSW) can already deal with some of these matters, particularly around return of land and financial compensation. Others matters, however, including recognising a right to self-determination, do not currently form part of these agreements. This means that Treaty in NSW will go beyond existing Aboriginal Land Agreements. It also means that, where in place, those agreements could serve as effective and valuable starting points for treaty to build upon.

Acknowledging the past

New South Wales is the premier state of the Commonwealth of Australia.

For over 230 years, executive and legislative action has contributed to the systemic inequality faced by the First Nations Peoples in NSW. Many of the First Nations Peoples in New South Wales have communicated the need for a treaty that recognises their sovereignty, self-determination, customary law, and land rights. It is time that these rights are enshrined within the legal framework of this the Premier State of New South Wales.

It was on the lands of the Gweagal people at Kamay that the original failure by the British government to recognise First Nations peoples' sovereignty was made.

In April 1770 Lieutenant James Cook made landfall on the lands of the Gweagal people at Kamay. He did not ask permission to land. Neither did he seek the consent of the people who had cared for the country for over 60,000 years, when he later claimed possession of the eastern half of the continent for King George III.

In January 1788, that original failure was repeated when Commander Arthur Philip and the First Fleet arrived on the lands of the Gadigal people at what became Port Jackson. Philip also did not ask permission to land. Neither did he ask permission to stay. The colony of New South Wales now known as the State of New South Wales created by the Constitution of Australia has never sought to treat with the original owners of this land. The failure was repeated across the continent.

The failure established a legal and political framework that does not adequately recognise or protect the rights and interests of First Nations peoples.

A NSW Labor government will open a discussion about treaty with First Nations peoples in the State because it is the right thing to do. It will improve the lives of First Nations peoples in the State, help to build a more secure and reconciled New South Wales, and provide the building blocks for a new relationship that underpins social and economic progress. In the words of Yawuru man and Senator Patrick Dodson, a treaty can:

acknowledge the dispossession that occurred and establish a settlement process to redress and resolve historical grievances. It could also provide a framework to recognise our unique rights and cultures as Indigenous people and set out mutually agreed terms for our relationship with the Australian government.⁹

Treaty is a long-held aspiration of First Nations peoples in the State. For many years, Aboriginal communities in NSW have called on governments to recognise their rights and commence a formal process of agreement-making. In the 1950s and 60s, powerful activists like Faith Bandler and Chicka Dixon led the campaign to change the Australian Constitution. The 1967 referendum was the most successful referendum in Australian history, securing over 90% of the national vote.

Widely regarded as a vote for equal rights, the referendum gave the Commonwealth Parliament the power to make laws with respect to Aboriginal and Torres Strait Islander peoples and repealed the discriminatory section 127 of the Constitution.

The 1967 referendum removed discrimination, but it did not lead to the recognition of Indigenous peoples rights to land or self-determination. Once again, formidable NSW Aboriginal activists led the charge throughout the 1970s.

In 1971, the Northern Territory Supreme Court ruled that native title was not part of Australian law.¹⁰ First Nations communities were outraged, but Prime Minister William McMahon rejected demands to pass a law to recognise Aboriginal peoples' rights to land. In response, four young men from Redfern – Michael Anderson, Billy Craigie, Bertie Williams, and Tony Coorey – drove to Canberra and established the Aboriginal Tent Embassy in front of Parliament House. Serving as a potent symbol of unextinguished Indigenous sovereignty, the Tent Embassy called for land rights, compensation, and a treaty.¹¹

NSW First Nations communities continued to push for treaty and land rights throughout the 1970s and 1980s. In 1977, over 200 Aboriginal community representatives and individuals met at the Black Theatre in Redfern to discuss land rights.

The Conference led to the establishment of the first state-wide community land rights organisation. The non-statutory NSW Aboriginal Land Council was integral in driving the passage of the NSW Aboriginal Land Rights Act in 1983. During the Second Reading Speech, Frank Walker, the Minister for Aboriginal Affairs, connected the purpose of the bill to treaty, noting that the premise of the Bill:

Rejects the approach of our forebears who denied Aboriginal ownership and failed to follow the example of the United States of America, New Zealand and Canada by entering into treaties with the original inhabitants.¹²

Despite this recognition, the Act did not facilitate nor lead to the negotiation of treaties.

Calls for a formal treaty or treaties have increased in recent years. In the 2017 *Uluru Statement from the Heart*, First Nations delegates from across the continent called for a First Nations Voice and a

Makarrata Commission to supervise a process of agreement-making and truth telling.¹³

NSW First Nations communities played a key role in the development of the Uluru Statement, and since 2017 have pushed the NSW government to implement the Uluru Statement proposals at a state level. In 2017, the NSW Aboriginal Land Council called on both sides of politics in NSW to progress the signing of a treaty. NSW ALC Chair Roy Ah-See explained that treaty can improve the relationship between First Nations and government in NSW as well as improve the lives of First Nations peoples:

The process towards a Treaty ... represents a chance to heal the past and build on the constructive relationship between the NSW Aboriginal Land Council and government. A Treaty is a practical way for New South Wales to deepen Aboriginal participation in the economy and the broader community.¹⁴

In 2018, a coalition of the seven largest Aboriginal organisations, including NSW ALC, Link-Up and AbSec marched on the NSW Parliament, calling for a Makarrata.¹⁵

It is time that the NSW government listen to First Nations communities.

Over the years, countless government and parliamentary inquiries have recognised the need for legal and political reform to support First Nations Peoples in NSW. A small selection of these inquiries includes the following:

- 1986 report into the Recognition of Aboriginal Customary Laws.
- 1991 Royal Commission into Aboriginal Deaths in Custody.
- 1998 Bringing Them Home Report.
- 2006 Inquiry into Stolen Wages.

Many recommendations from these and other inquiries remain outstanding.

It is time that the NSW government listen to First Nations communities.

If done correctly, treaty in NSW will legitimate institutions of Australian governance within the state by enacting and affirming the self-determination of First Nations Peoples.

Many First Nations peoples do not recognise Australian law or government as legitimate. To put it simply, the notion that the British government could obtain sovereignty over the continent by simple assertion is unconvincing.

As Yawuru man and former Northern Territory Treaty Commissioner, Mick Dodson puts it: in the absence of any treaty '[t]he sovereign pillars of the Australian state are arguably, at the very least, a little legally shaky'.¹⁶

States and Territories across Australia have reached this same conclusion. Victoria, the Northern Territory and Queensland have all formally committed to treaty processes. In March 2022, the Tasmanian Liberal government also announced that it would establish an Aboriginal Advisory body to work with government to establish a truth-telling and treaty process in the state. Other governments might soon follow.

In circumstances where the Commonwealth government has decided not to pursue treaties, a NSW treaty process is critical. As Members of Parliament in Victoria have rhetorically questioned:

Why would we wait for someone else to do it?

Why would we as Victorians shirk that responsibility and not have our own people looked after? Why would we not lead the nation?¹⁷

... [W]e are not convinced that you can wait for a national process that has never ever delivered in relation to righting these wrongs ...¹⁸

A NSW treaty or framework of treaties could also lead to innovative settlements that secure important outcomes for the First Nations communities who sign them. They could also benefit non-Indigenous people within the State. As Northern Territory Chief Minister Michael Gunner has remarked:

It is right we lead this process because it is decent, because we are alive to Aboriginal culture like no other jurisdiction, but also because it is smart. Treaty – reconciliation, healing, empowerment – is fundamentally good for every Territorian.¹⁹

NSW Labor supports the *Uluru Statement from the Heart*, including a constitutionally enshrined First Nations voice and a Makarrata Commission to supervise agreement making and truth-telling about history.²⁰ A NSW Labor government will action this commitment by pursuing a First Nations voice, treaty-making and truth-telling within the State.

Commonwealth Parliament could abrogate NSW Treaty

Treaty is good for NSW First Nations communities and good for NSW.

The Commonwealth government has explained that it considers Indigenous treaties a matter for the States and Territories.²¹ However, the Commonwealth Parliament will play an important role in a NSW treaty process.

The allocation of legislative power under the Australian Constitution leaves a NSW treaty vulnerable to federal legislative override. Under s 51(xxvi) and s 109, the Commonwealth Parliament could abrogate the terms of a NSW treaty.

Similarly, Commonwealth legislation could be an impediment for certain terms of any NSW treaty. This could weaken support for a treaty process among both First Nations communities and non-Indigenous peoples in the state.

The only way to legally protect a NSW treaty is by changing the Australian Constitution. One approach is to amend the race power in s 51(xxvi) to ensure that the Australian Parliament cannot pass laws that discriminate adversely against Aboriginal peoples. This approach was recommended by the 2012 Expert Panel on Constitutional Recognition of Indigenous Australians.

Another approach is to insert a provision protecting treaty rights, as is the case in Canada. Sections 35 (1) of the Canadian Constitution states that "the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and observed".

In the absence of constitutional change at the Commonwealth level, a NSW treaty can only be protected via political means. Ensuring that treaty has bipartisan support will enhance the likelihood

that it endures. A constitutional First Nations Voice, as called for in the Uluru Statement from the Heart, may also help protect the terms of any NSW treaty. So too might a law implementing the UNDRIP.

A NSW Labor government will seek to engage with the Commonwealth government throughout the treaty process in an effort to avoid these complications.

NSW Labor to negotiate treaties with First Nations communities

Treaty in NSW is a moral and legal imperative. It will be pursued to address the unfinished business in this state.

There are several legal and political reasons why a NSW Labor government will pursue treaty talks.

The allocation of responsibilities within the Australian federation demonstrates that states will be central to any treaty settlement. Under the Australian Constitution, the states possess considerable legal authority over issues relating to Aboriginal peoples.

The NSW Parliament has responsibility for many issues of concern for First Nations peoples including health, education and housing. Similarly, the terms of a treaty might include provisions relating to service delivery. As these are primarily state functions, NSW should lead negotiations. Without this, a treaty might lack the capacity to have a meaningful impact upon key state services of great importance to First Nation communities.

Authority over land points to a second key factor for a NSW Labor government to pursue treaty. Return of land will be a critical element of any treaty between the State government and First Nations communities. Significantly, most land that might form part of any agreement is governed by NSW legislation – not Commonwealth legislation.

A NSW treaty process must also deal with the significant backlog of unresolved Aboriginal land claims awaiting determination under the Aboriginal Land Rights Act. In 2020, there was an estimated 37,000 unresolved claims.²²

A treaty in NSW might be more flexible than a Commonwealth treaty. Unlike the Commonwealth

Constitution, the Constitution Act (NSW) allows room for innovative settlements that meet the specific views and aspirations of First Nations communities.

It is also politically appropriate for a NSW Labor government to pursue treaty. Treaties in NSW can reflect distinctions between diverse First Nations communities and empower disparate Indigenous nations to reach agreement on specific areas of concern to them. It also allows those Indigenous nations to exercise different forms of self-determination, depending on their capacity and goals. For instance, some First Nations might seek greater recognition and protection of their fishing rights where other First Nations might wish to negotiate specific terms concerning cultural flows.

A treaty in NSW can place more pressure on other governments, including the Commonwealth government, to engage with First Nations legitimate rights and interests. A successful NSW process could build on work in other Australian jurisdictions elsewhere to encourage developments across Australia and even catalyse federal engagement. This is apparent in other areas, including in relation to human rights protection in Australia.

The Human Rights Act 2004 (ACT) and Charter of Human Rights and Responsibilities 2006 (Vic) were key instruments that catalysed the Rudd Government's 2008 National Human Rights Consultation

Treaty to be led by NSW First Nations communities

It is legally and politically appropriate for a NSW Labor government to commence treaty discussions within the state. Any treaty process, however, must be led by and guided by First Nations communities themselves. This is consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Article 43 of the UNDRIP reminds us that the Declaration constitutes the 'minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world'.²³

The Declaration is not a bargaining chip. A treaty must meet its standards.

The Declaration provides a valuable framework to guide the process and substance of treaty negotiations. Two key rights are especially relevant to the early stages of treaty making: self-determination and the right to free, prior and informed consent.

All stages of the treaty process must be guided by self-determination. The right to self-determination is guaranteed by Articles 3 and 4 of the UNDRIP. First Nations communities in NSW must be provided with time and resources to assess whether they desire a treaty process, and if so, what that treaty process might look like. First Nations communities might also require resources to build and develop their capacity to be able to consider these questions. As an initial step, the NSW Labor government will provide adequate time and resources for First Nations peoples to lead a consultation process that ascertains the views and aspirations of First Nations communities in the state. The shape and nature of the consultation process is a question for First Nations peoples themselves.

Alongside the right to self-determination is the right to free, prior and informed consent. Article 19 of the UNDRIP provides:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Free, prior and informed consent is a complex right subject to diverse interpretations.²⁴ At its core, the right to free, prior and informed consent requires that consultations between governments and Indigenous peoples will be 'undertaken in good faith' with representatives freely chosen by Indigenous peoples through their own representative structures.

It implies 'no coercion, intimidation or manipulation', and requires sufficient time and information to be provided to Indigenous peoples before decisions are taken.²⁵ It also means that Indigenous peoples' customary modes of decision-making must be respected, and that time and resources might be required to rebuild and develop the capacity to engage with these conversations.

The right to free, prior and informed consent will be of particular importance during negotiations. Because of the state's greater power and resources there is a real danger that negotiations could be inequitable. Establishing institutions and processes to protect and promote free, prior and informed consent is vital to ensuring that treaty processes succeed.

Those institutions and processes will be set up prior to negotiations commencing. Once again, this will take time. It is vital to get the process right.

Approaches to treaty consultation

Initial consultations have operated in various ways in the different states and territories. In South Australia and the Northern Territory, consultations have been led by a single Treaty Commissioner with a small secretariat staff. In contrast, consultations have been led by a larger Treaty Working Group in Victoria and Queensland. In each case, the Treaty Working Group has been comprised solely of First Nations peoples. In Queensland, the Treaty Working Group presented a report to a separate Eminent Panel composed of both Indigenous and non-Indigenous Queenslanders. That Eminent Panel provided advice and recommendations to government.

Consultations in each State and Territory have followed a two-stage process. In the first stage the Treaty Commissioner or Treaty Working Group has asked First Nations peoples high-level questions around support for a treaty process (do you want a treaty? what should be part of a treaty? what principles are important in framing negotiations? etc.) and presents a report outlining a framework to move forward. In the second stage, First Nations peoples' support for this framework is assessed. Notwithstanding these similarities, the timeline and extent of consultations has differed.

This section provides a brief overview of the initial approaches in each State and Territory. It is followed by eight key lessons that can be drawn from these approaches.

Victoria

Initial negotiations in Victoria revealed the desire among First Nations for a state-wide representative body through which they could speak directly to government. The treaty process has evolved into a three-phase process.

Those initial consultations were led by an Aboriginal Treaty Working Group. The Working Group was comprised of Aboriginal people with a balance between male and female representatives. It was not clan-based but was instead comprised of representatives from Traditional Owners groups, state-wide Aboriginal community organisations and members appointed in their individual capacity by the Minister for Aboriginal Affairs. The Working Group consulted with Aboriginal Victorians across the State, exploring their views on treaty and reporting back to the Minister for Aboriginal Affairs.

Northern Territory

In April 2018, the four Aboriginal Land Councils and the Northern Territory government agreed to establish a working group to develop a Memorandum of Understanding about how a treaty between the government and the NT's Aboriginal people will progress.

The Memorandum of Understanding was signed in June 2018. It envisaged a two-stage consultation process led by a single Treaty Commissioner. It also included several non-legally binding principles to guide the treaty process.

Queensland

The Queensland Labor government initially adopted treaty as part of their policy platform in 2016, committing to commence negotiations 'within the next term of Parliament'.²⁶ The 2017 platform provided greater detail. The government would 'establish [and] authorise a Treaty Working Group within the next term of Parliament to begin negotiations'.²⁷

In 2019 the process began. The government established a bipartisan Eminent Panel of Indigenous and non-Indigenous leaders and a Treaty Working Group to advise on treaty process.

South Australia

In December 2016, the SA Labor government announced its support for a treaty process. The government set aside \$4.4 million over 5 years to

appoint an Independent Commissioner for Treaty, establish the Treaty Commissioner's Office within the Department of State Development (with a team of three), and provide Aboriginal nations with governance training and other support to facilitate their participation in treaty negotiations.

Tasmania

In June 2021, the Tasmanian government appointed former Governor Kate Warner and UTAS Law School Dean Tim McCormack to consult Aboriginal Territorians on treaty. The primary objective of these consultations was to learn from Tasmanian Aboriginal people their thoughts on and aspirations for treaty, truth-telling and reconciliation and to identify possible pathways towards these goals. After four months and more than 100 meetings, a report was delivered in November 2021. It recommended Tasmania establish a truth-telling commission and commit to a treaty process, among other things.

In March 2022, the Premier announced that his government 'will establish an Aboriginal Advisory body that can, through co-design, work with the Government to establish' a truth-telling process and a treaty process.²⁸ The government has allocated up to \$500,000 to support this process.

It will also establish an Aboriginal Affairs, whole of Government Division within the Department of Premier and Cabinet, comprising the Office of Aboriginal Affairs and Aboriginal Heritage Tasmania, as well as staff from other Departments, such as Health and Education.

Australian Capital Territory

In February 2018, the ACT Government declared that it was open to talking treaty. In the 2021-22 Budget the government provided \$317,000 to facilitate a conversation with Traditional Owners about what treaty means in the ACT and what a treaty process will look like. In March 2022, Professor Kerry Arabena was appointed to facilitate those preliminary talks.²⁹

Principal considerations from treaty processes across the continent

Astonishingly and disappointingly, NSW is not leading other states and territories. It does mean, however, that NSW can learn lessons from ongoing treaty processes across the continent.

Important to work in stages

Treaty will take time and effort. A sequenced process can build and sustain the necessary community support to ensure negotiations lead to meaningful and effective settlements.

NSW Aboriginal community to lead the process

This is consistent with the principles in the United Nations Declaration on the Rights of Indigenous Peoples

Support of Aboriginal community is non-negotiable

It is likely that individual First Nations might engage on their own terms and at their own pace. It is vital that time and resources are provided to ensure this can occur. This includes providing resources where necessary to allow First Nations communities to develop the capacity to engage with these issues.

The scope and content of consultations are questions for an appropriately constituted treaty commission. The commission might choose to partner with NSW ALC and other community-controlled organisations to reach the community. Consultations might also be divided into two rounds.

The first round of consultations could focus on basics: what does a treaty look like to you? Do you want a treaty? How could treaty be negotiated today? Who will be at the table?

The second round of consultations could elaborate on key issues that emerge from the first round. This could also aim at developing ideas around key treaty institutions/processes.

Treaty institutions and processes are to be independent of government

Consultation must be genuine. This will take time; it cannot be rushed. The process in South Australia and Queensland has been criticised as moving too quickly.

Consultation must be undertaken at arm's length from government

The treaty negotiation framework will be designed in partnership with State and Aboriginal peoples. This might require government changing its ordinary process of doing business.

Community awareness is vital

Treaty is about building relationships between Indigenous and non-Indigenous people in the state. The non-Indigenous community must be stakeholders in Treaty.

An education campaign to promote treaty and explain reasons for treaty will be valuable in building non-Indigenous support. NSW can learn lessons from Victoria's 'Deadly Questions' community education campaign.

Truth is essential for Treaty

The NSW Aboriginal community might desire a comprehensive truth telling process.

Truth-telling can complement treaty process by further building out justification for treaty and informing treaty settlements.

If desired, truth-telling should be integrated within a treaty process to ensure it is sustainable and leads to structural reform.

Legislation

Legislation to safeguard and support the process and to clarify the role and responsibilities of all participants is vital.

The process will take a decade or more. Legislation can ensure continuity and promote a clear understanding on both sides.

It is best if the treaty process is bipartisan. The abandoned negotiations in South Australia illustrate the challenge if treaty is not supported by both major parties. Opposition, however, will not be used to delay or frustrate the process. First Nations communities have waited long enough.

Commonwealth government

The Commonwealth government could abrogate the terms of any NSW treaty. In the absence of constitutional change, a NSW treaty can only be protected via legislation or by a State-Commonwealth agreement.

A NSW Labor government will engage with the Commonwealth government throughout the treaty process in an effort to avoid these complications.

Other complications may arise due to a change of government. The existing Commonwealth government has dismissed calls for a Makarrata Commission. A future Commonwealth government may choose to engage in treaty talks. A NSW treaty process would need to be flexible so that it can evolve and adapt to changing policy at a national level.

Schedule of NSW Labor commitments to Treaty

A NSW Labor government will implement specific policies recognising that all Australians are entitled to equal rights, opportunities and responsibilities according to their aspirations.

A NSW Labor government will implement policies relating to reconciliation, improving the lives of First Nations communities in areas such as education, environmental health, economic development, building community resilience, Aboriginal housing and infrastructure, a strong voice for Aboriginal communities and protecting indigenous heritage.

The NSW Labor Conference is committed to the principles of the *Uluru Statement from the Heart*. A NSW Labor government will action this commitment by pursuing a First Nations voice, treaty-making and truth-telling within the State.

A NSW Labor government will commit to the principle of treaty rather than the detail. This includes taking the necessary policy and legislative measures to safeguard and support the process.

A NSW Labor government will commence a discussion about treaty with First Nations people in the State because it is the right thing to do. Treaty will improve the lives of First Nations peoples in the State, help to build a more secure and reconciled

New South Wales, and provide the building blocks for a new relationship of self-determination with First Nations peoples that underpins social and economic progress. It will also meet the long-held aspirations of NSW First Nations peoples and communities.

A NSW Labor government will establish an independent treaty commission to lead the first steps of the path to treaty in the state. The treaty commission will be led by three NSW First Nations people. The structure, composition and responsibilities of the treaty commission will be developed in consultation with peak representative First Nations bodies to ensure it is community led. The treaty commission will be empowered to develop and undertake an open and inclusive consultation process with First Nations communities and their representative organisations across the State. This process is consistent with a NSW Labor government's support for the United Nations Declaration on the Rights of Indigenous Peoples. The consultation process will determine support for treaty in NSW and next steps.

A NSW Labor government will commit to progressing the views of NSW First Nations peoples.

A NSW Labor government will undertake a review of all legislation, policies, guidelines, procedures and practices to redress the disparity experienced by the First Peoples of NSW.

Artwork

Cover page: The artwork on the cover of this document is *Colours of Country* and is produced with the kind permission by the artist Wendy Pawley from the Kamilaroi - Gomeroi, Gamilaraay people of Narrabri NSW. The meaning of Narrabri / Nurraburai is "Place of Forked Waters". Wendy's mother (the late) Mrs Noeleen Saunders (nee Trindall) was a widely known respected Traditional Owner of Narrabri and surrounding areas. Wendy paints her "Mother's Country" predominantly the ancient spectacular rugged mountains of The Nandewar Ranges Ninghdoo, Kaputah, Yulludunida and Yulludanda that rise majestically above the Namoi Valley. The range is the remnants of an eroded basaltic shield volcano that formed about 18 million years ago, the volcanic plug in Gamilaraay language is called Ninghdoo / Nungadhun (pronounced locally as Ningy-doo). The Mount Kaputah area is included in Mount Kaputah National Park.

Page 1: "On these, their lands, their lands, of the First Peoples" Acknowledgement. All rights reserved. Alexander Weilsmann

Endnotes

- ¹ Linda Burney on ABC Radio National, Drive (Jonathan Green, 3 June 2019) <<https://www.lindaburney.com.au/media-releases/2019/8/2/transcript-radio-interview-abc-rn-drive-monday-3-june-2019>>.
- ² Luke Pearson, 'Can a Treaty Shift the Racist Ideology that Plagues Indigenous Affairs? I Hope So', *IndigenousX*, 20 March 2016 <<https://indigenousx.com.au/can-a-treaty-shift-the-racist-ideology-that-plagues-indigenous-affairs-i-hope-so/>>.
- ³ 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* 665-680
- ⁴ *R v Badger* [1996] 1 SCR 771, 811.
- ⁵ *R v Sioui* [1990] 1 SCR 1025, 1063.
- ⁶ Note that in the 46th Parliament, Senator Lidia Thorpe introduced a Bill aimed at implementing the United Nations Declaration on the Rights of Indigenous Peoples into Australian law. The Bill will lapse at the dissolution of the Parliament.
- ⁷ Drawn from Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 4-14. See further Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016).
- ⁸ *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1124.
- ⁹ 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.
- ¹⁰ *Milirrpum v Nabalco* (1971) 17 FLR 141.
- ¹¹ See Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2014); George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 35.
- ¹² Cited in New South Wales Aboriginal Land Council, 'Our History' <<https://alc.org.au/our-history/>>.
- ¹³ Uluru Statement from the Heart, 26 May 2017 <<https://ulurustatement.org/the-statement/>>.
- ¹⁴ NSWALC, 'Land Rights Peak Calls for Treaty with Aboriginal People' (Media Release, 27 September 2017) <<https://alc.org.au/newsroom/media-releases/land-rights-peak-calls-for-treaty-with-aboriginal-peoples-in-nsw/>>.
- ¹⁵ Lorena Allam, 'March for Makarrata: NSW Aboriginal Groups Unite to Demand a "New Agenda"', *Guardian Australia*, 9 August 2018 <<https://www.theguardian.com/australia-news/2018/aug/09/march-for-makarrata-nsw-aboriginal-groups-unite-to-demand-a-new-agenda>>.
- ¹⁶ 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, 209.
- ¹⁷ Victoria, *Parliamentary Debates, Legislative Assembly*, 6 June 2018, 1801 (Paul Edbrooke).
- ¹⁸ Victoria, *Parliamentary Debates, Legislative Council*, 21 June 2018, 2893–4 (Gavin Jennings).
- ¹⁹ Lorena Allam, 'Historic Northern Territory treaty agreement means "the old way is finished"', *Guardian Australia*, 9 June 2018 <<https://www.theguardian.com/australia-news/2018/jun/09/historic-northern-territory-treaty-agreement-means-the-old-way-is-finished>>.
- ²⁰ NSW Labor Party Platform 2018, Policy 7.2.
- ²¹ Commonwealth, *Parliamentary Debates, Senate*, 11 September 2019, 1978 (Senator Jonathon Duniam).
- ²² Lorena Allam, "A National Disgrace": 37,000 Aboriginal Land Claims Left Languishing by NSW', *Guardian Australia*, 10 July 2020 <<https://www.theguardian.com/australia-news/2020/jul/10/a-national-disgrace-37000-aboriginal-land-claims-left-languishing-by-nsw>>.
- ²³ UNDRIP art 43
- ²⁴ See, generally, Cathal Doyle, *Indigenous Peoples, Title to Territory, Rights and Resources: The Transformative Role of Free Prior and Informed Consent* (Routledge, 2015); Stephen Young, *Indigenous Peoples, Consent and Rights: Troubling Subjects* (Routledge, 2020).
- ²⁵ Permanent Forum on Indigenous Issues, Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, 4th sess, Agenda Item 4, UN Doc E/C.19/2005/3 (17–19 January 2005) 12 [46].
- ²⁶ Queensland Labor, 'Queensland State Policy Platform 2016' (State Conference of the Queensland Branch of the Australian Labor Party, 29–30 October 2016) 93 [8.190].
- ²⁷ Queensland Labor, 'Putting Queenslanders First: State Platform 2017' (State Conference of the Queensland Branch of the Australian Labor Party, 28–9 July 2017) 118 [8.243].
- ²⁸ 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>.
- ²⁹ 'Facilitator for Indigenous Treaty Appointed', *Canberra Weekly*, 17 March 2022 <<https://canberraweekly.com.au/facilitator-for-indigenous-treaty-appointed/>>.