Advancing the Treaty Process with Aboriginal Victorians Bill 2018

Treaty Series

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Other products in the Treaty Series at the time of publication include:

Quick Guide: Treaty discussions in Australia: an overview
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Introduction

The Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (‘Advancing the Treaty Bill’) was introduced in the Legislative Assembly by the Minister for Aboriginal Affairs, Natalie Hutchins, on 7 March 2018. It is the result of a complex series of historical events and decisions which arguably began when Australia was first colonised. The scope of this paper does not allow for an in-depth analysis of the timeline of that history. Instead, this paper aims to contextualise the Treaty Advancement Bill. It does this by:

1. Explaining certain provisions of the Advancing the Treaty Bill in more detail
2. Providing a timeline of recent events in Victoria which have led to the Advancing the Treaty Bill being brought to the House.

Treaties

Legal scholars have argued that a treaty between a government and an Indigenous group must recognise the Indigenous group as a ‘distinct political community’, rather than a particular minority group of the existing society. This means acknowledging that members of the Indigenous group are ‘collectively united by identity’. Often, this is expressed when members of the group observe traditional laws and customs. A treaty is also a negotiated political agreement. Within the agreement, the Indigenous entity should be free to select representatives through ‘their own representative structures’. The agreement should outline responsibilities to which the parties are bound in the future.

The purposes of a treaty could include the provision of practical rights and compensation, initiation of a process of reconciliation between Indigenous groups and government in relation to historical grievances, and establishment of certain forms of self-determination for Indigenous groups. According to the Harvard Project on American Indian Economic Development, which has conducted in-depth research on tribal governance in the United States of America for over 30 years, self-determination is crucial in redressing entrenched disadvantage. The Harvard Project found as a result of its research that when ‘Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers’.

As no treaties were signed in Australia on first contact between the Crown and Aboriginal and Torres Strait Islander peoples, some commentators believe that modern treaties would be disruptive in Australia. Critics of treaty-making often argue that modern treaties would divide Australia into two

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1 Advancing the Treaty Process with Aboriginal Victorians Bill 2018.
5 ibid.
6 ibid.
Some constitutional law experts, however, do not believe that the lack of historical treaties is an impediment to modern treaty-making. Nor do such experts believe that Australia would be divided into two nations by modern treaties. Other countries which do have treaties in place, such as Canada, the United States and New Zealand have not faced this kind of division.

Meanwhile, and in line with the Harvard project above, some Aboriginal leaders have argued that a lack of self-determination has fractured Aboriginal communities:

We’re always going to be living in two worlds because sometimes the world we live in doesn’t match up with the cultural context but that’s the reality.

In Victoria, Members of Parliament have acknowledged that:

- Aboriginal and Torres Strait Islanders endured ‘catastrophic outcomes’ as a result of European settlement.
- The ‘recognition of these injustices’ is important.
- Indigenous communities continue to face extreme disadvantage in comparison to the broader community.

However, bi-partisan government initiatives to address these systemic issues, such as the ‘Closing the Gap’ campaign, have been largely unsuccessful. In that light, recent Aboriginal-led calls for treaty have centred on empowering Aboriginal communities. These calls refer to self-determination for Aboriginal and Torres Strait Islander communities as vital to achieving that goal.

There are a wide range of viewpoints on the idea of a treaty or treaties, and on whether they are necessary or would be successful in Victoria and Australia more broadly. Regardless of those views, at this point in time both major parties support the notion of partnership between the Victorian Government and Aboriginal communities. The ultimate goal of that partnership is to achieve reconciliation and justice for Aboriginal communities.

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9 ibid; A. Bolt (2018) ‘Victoria gets apartheid’, Herald Sun, 28 March: as is made clear below, Bolt mischaracterises the Aboriginal Representative Body as a ‘separate race-based Parliament’. Comparing the Aboriginal Representative Body to apartheid demonstrates a fundamental misunderstanding of the Advancing the Treaty Bill.


12 M. Harding in J. Crothers (2017), ‘Treaty: Why do Victoria’s Aboriginal people want one and what difference will it make?’ ABC, 8 September.


16 Department of Premier and Cabinet, ‘Closing the Gap’, DPM, Australian Government website.


18 ibid.


20 ibid.
such a partnership is through a treaty or treaties between the Victorian State Government and Aboriginal Victorians.²¹

The Advancing the Treaty Bill, if passed, would enshrine this process in law. Therefore, understanding the Bill itself and the development of the treaty process to date will assist in comprehending how treaties could eventually be formed.

This Bill Brief forms part of a series of research products by the Parliamentary Library related to treaty and treaty-making processes.

²¹ Something which is also, at the time of writing, underway in South Australia.
The Bill

The Treaty Advancement Bill was introduced to Parliament on 7 March 2018. The Bill is considered to be the first government draft legislation in Australia to attempt to legislate a treaty process with Aboriginal Australians. It is also notable in terms of parliamentary procedure. While the scope of this explainer does not permit an in-depth analysis of procedural issues around the Bill, it is worth highlighting a government motion which was moved and passed in relation to the second reading of the Bill. Notably, the motion allowed for the Treaty Commissioner and five members of the Aboriginal Treaty Working Group onto the floor of the House, and allowed those visitors to address the House in English and Aboriginal languages directly after the second reading of the Bill. Following those addresses, the motion allowed the Premier, the Leader of the Opposition, a representative of the Greens and independent members to make responses if they wished. Procedurally, this is likely something which had never before occurred in the House and the Opposition drew attention to this in a response to the motion.

Beyond those procedural events, the long title of the Bill aims to advance the treaty process by providing for the establishment of the Aboriginal Representative Body (‘the Body’). The Body is then tasked with establishing, by agreement with the state:

- the Treaty Authority
- the treaty negotiation framework
- the self-determination fund.

Preamble

The preamble to the Bill is important in that it outlines the context for what the treaty process means to the Victorian Government. Notably, the preamble states that Aboriginal Victorians maintain that their sovereignty was never ceded. The issue of whether Aboriginal sovereignty was ceded during the colonisation of Victoria and how that issue might impact on contemporary Victoria is controversial.

It is not clear from the wording of the preamble as to the Victorian Government’s stance on the sovereignty issue. Irrespective of the sovereignty issue, the Victorian Government is now committed to advancing self-determination and moving towards reconciliation in the form of treaty.

The preamble also emphasises principles such as partnership and good faith as central components of the treaty process. The preamble places these principles within the current moment in time, stating

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23 ibid.
25 Advancing the Treaty Process with Aboriginal Victorians Bill 2018, Long Title.
27 ibid, Preamble.
28 ibid.
29 ibid.
that the contents of a future treaty or treaties are unknown. The Bill aims to enshrine the treaty process in law, so that it can progress and so that treaty or treaties happen in the future.\textsuperscript{30}

In its concluding remarks, the preamble states:

The injustices of the past cannot be undone. The State is pursuing treaty because it is the right thing to do. Victoria needs a treaty or treaties that are reciprocal, and that through truth and justice provide far reaching benefits for Aboriginal Victorians. For traditional owners, Aboriginal children, elders, and stolen people; for a society that all Victorians can all be proud of; treaty will be for all Aboriginal Victorians. In the spirit of reconciliation, treaty will be for all Victorians.

With this Act Aboriginal Victorians and the State join hands to take the first step on the pathway towards treaty.\textsuperscript{31}

**Purposes**

There are four key purposes to the legislation. These are:

1. To advance the treaty process between Aboriginal Victorians and the state.
2. To establish that the Aboriginal Representative Body will be the sole representative of Aboriginal Victorians, as recognised by the state, for the purpose of establishing the framework necessary to support future treaty negotiations.
3. To enshrine principles of the treaty process.
4. To require that the Aboriginal Representative Body and the state work together to establish elements necessary to support future treaty negotiations.\textsuperscript{32}

The purposes do not concern the eventual parties to a treaty or treaties. In the context of the preamble this is important, in that the preamble refers to traditional owners who maintain their sovereignty was never ceded. This means that the Bill allows for a future in which entities other than the Aboriginal Representative Body can negotiate a treaty or treaties. The role of the Aboriginal Representative Body at this stage is confined to developing the framework by which the process will progress. The Body is not concerned with the eventual content or character of a treaty or treaties.

**Definitions and administrative matters**

The definition of the Aboriginal Representative Body is notable in that it is the entity declared by the Minister to be so.\textsuperscript{33} While the preamble speaks to partnership in the eventual treaty negotiations, the definition of the Aboriginal Representative Body confirms that at this stage in the process, the Minister is legally responsible for defining the entity with which it will negotiate the treaty process.\textsuperscript{34} However, despite the Bill providing for this Ministerial oversight and control, the Minister must act on the recommendation of the Victorian Treaty Advancement Commissioner.\textsuperscript{35} In that sense, and as is clear in the timeline of events below, the Commissioner’s role is important to the process moving forward, just as the Working Group was important to the process up to this point.\textsuperscript{36}

\textsuperscript{30} ibid.
\textsuperscript{31} Advancing the Treaty Process with Aboriginal Victorians Bill 2018, Preamble.
\textsuperscript{32} ibid, cl 1.
\textsuperscript{33} ibid, cl 3.
\textsuperscript{34} ibid.
\textsuperscript{35} ibid, cl 10(1). In turn, the Treaty Advancement Commissioner is appointed by the Governor in Council under cl 3.
\textsuperscript{36} For more information on the Working Group and the Commissioner, see below at pp. 17–20, 21–22.
The Bill does not affect rights deriving from the *Aboriginal Heritage Act 2006*, the *Conservation, Forests and Lands Act 1987* or the *Traditional Owner Settlement Act 2010*. Nor does it affect other rights of Aboriginal Victorians under any other Acts or laws, including native title rights or interests.

**The Aboriginal Representative Body**

As outlined in the purposes, the Aboriginal Representative Body is the sole representative of Aboriginal Victorians ‘for the purpose of establishing elements necessary to support future treaty negotiations’.

To that end, the state must formally recognise the Aboriginal Representative Body for that purpose.

The function of the Body is broad in that it exists to represent the diversity of Aboriginal Victorians and to progress the treaty process. In fulfilling that function, the Body must work with Aboriginal Victorians and must respect the multiple cultures of Aboriginal Victorians. The implication of ‘cultures’ is that the Body has the scope to represent Aboriginal Victorians on the basis of clans, Nation, family groups, language groups, or other political entities with which Aboriginal Victorians seek to identify.

This is significant in relation to issues around elections and representation within the Aboriginal Representative Body. It is difficult to speculate on what form the voting system could eventually take, given that further detail on the electoral model of the Aboriginal Representative Body is yet to be developed. In its current form, as recommended by the Working Group (see below at p. 22), the electoral model is based on proportionality to total Aboriginal Victorian population, as opposed to being based around clan, Nation or family groups within Aboriginal communities.

Significantly, the legislation introduces a timeline on when the declaration of the Aboriginal Representative Body must be made. The date specified is 1 July 2019. However, the timeline is flexible. If by that date the Minister has not made a declaration, then a plan must be made to ensure that a declaration is made in a ‘timely’ way. The plan must be comprehensive.

While the Minister must act on the Commissioner’s advice in declaring the validity of the Aboriginal Representative Body, the revocation of such an order can be made by the Minister independently, so long as the revocation is subject to considerations listed in the Act. One reason the Minister may make a revocation order is if the Body commits misconduct. Misconduct is very broadly defined as conduct ‘at a systemic level’ which brings the Body into disrepute.

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38 ibid, cls 4(b), 5.
39 ibid, cl 8(1).
40 ibid, cl 8(2).
41 ibid, cl 9(1).
42 ibid, cl 9(2).
44 ibid, cl 12(1).
45 ibid, cl 12(1).
46 ibid, cl 12(2).
47 ibid, cls 13, 14.
48 ibid.
49 ibid, cl 3.
Guiding principles

The guiding principles bind participants to the treaty making process. Those participants include:

- The Aboriginal Representative Body
- The state
- The Treaty Authority
- Any person, group or body participating in future treaty negotiations.\(^{50}\)

The principles are listed below and are explained in further detail in the Bill:

- Self-determination and empowerment
- Fairness and equality
- Partnership and good faith
- Mutual benefit and sustainability
- Transparency and accountability.\(^{51}\)

Treaty Authority

The Bill envisages a Treaty Authority which will administer future treaty negotiations, including: the treaty negotiation framework; the dispute resolution processes; and which will also provide research to support negotiations.\(^{52}\) The Treaty Authority will be established by agreement between the Aboriginal Representative Body and the state.\(^{53}\) There is no deadline on the establishment of the Treaty Authority. In her second reading of the Bill, the Minister for Aboriginal Affairs, the Hon Natalie Hutchins, stated that the Treaty Authority should act as an ‘independent ‘umpire’ of the treaty negotiation process’.\(^{54}\)

Treaty negotiation framework

Following the establishment of the Treaty Authority, the Aboriginal Representative Body and the state must agree on the treaty negotiation framework.\(^{55}\) The framework is bound by certain matters contained within the Bill.\(^{56}\) However, those matters do not limit the potential parties to a treaty or treaties in the future. In that sense, the framework can be read as an administrative section of the Bill, as opposed to a substantive statement on what form treaties might eventually take.

Self-determination fund

The Aboriginal Representative Body and the state must also agree to establish a self-determination fund.\(^{57}\) The purpose of the fund is to ensure Aboriginal Victorians have ‘equal standing with the state in treaty negotiations’.\(^{58}\) Notably, while the Bill does outline several purposes of the self-determination fund,\(^{59}\) there is scope for additional purposes to be added or varied by agreement between the Aboriginal Representative Body and the state.\(^{60}\) Significantly, and in line with the independence of the

\(^{50}\) Ibid, cl 19(3).
\(^{51}\) Ibid, cls 21–25.
\(^{52}\) Ibid, cl 27.
\(^{53}\) Ibid, cl 26.
\(^{55}\) Advancing the Treaty Process with Aboriginal Victorians Bill 2018, cl 29.
\(^{56}\) Ibid, cl 30.
\(^{57}\) Ibid, cl 34.
\(^{58}\) Ibid, cl 35(1)(a).
\(^{59}\) Ibid, cl 35.
\(^{60}\) Ibid, cl 35(2)(3).
Aboriginal Representative Body, the Body will be responsible for administering the self-determination fund.\(^{61}\)

**Dispute resolution**
The Bill also requires that the state and the Body create a dispute resolution process.\(^{62}\) This process will be used to determine the way in which disputes between the state and the Body are resolved.\(^{63}\) The dispute resolution process must be culturally appropriate and it must specify time periods for dispute resolution, including the ability to extend those time periods.\(^{64}\)

**Minister’s annual report**
Finally, the Bill requires that the Minister prepare a comprehensive annual report which must set out the work of the state which has been made in advancing the treaty process.\(^{65}\) Similarly, the Aboriginal Representative Body must prepare a comprehensive annual report.\(^{66}\) The reports must be presented to the Parliament.\(^{67}\)

**Scrutiny of Acts and Regulations Committee**
At the time of writing, the Scrutiny of Acts and Regulations Committee (SARC) has reported on the Bill.\(^{68}\) SARC has identified that some clauses in the Bill require clarification from the Minister regarding their compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (‘the Charter’). Specifically, the SARC report states:

> The Statement of Compatibility does not consider whether the cultural rights of Aboriginal persons may be limited by preventing Aboriginal persons from choosing who represents them. The choice of representatives may be an expression of cultural identity or it could be considered to be a cultural practice. Because certain representatives carry authority within Aboriginal culture, such as elders, allowing those elders to represent the community in establishing the treaty process may allow the expression of that cultural identity and respect that cultural practice.

> The Statement of Compatibility does not consider whether clause 8 limits the cultural rights of Aboriginal persons, nor whether the limit is reasonable, given the extent to which the Bill otherwise promotes and respects Aboriginal cultural rights.\(^{69}\)

The issue is that clause 8 could restrict the cultural rights of Aboriginal Victorians by mandating that Aboriginal Victorians be represented by the Aboriginal Representative Body in the treaty process. This issue is not addressed in the Statement of Compatibility. As such, SARC will write to the Minister seeking further information on clause 8 and whether there is a limitation on the right for Aboriginal Victorians to self-determination in selecting their representative body—which could amount to a cultural right or practice—and if so, whether the limitation is reasonable.\(^{70}\) SARC also identifies issues arising under clauses 21, 22 and 24, which would confer benefits to Aboriginal persons which are not

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\(^{61}\) Ibid, cl 36.
\(^{62}\) Ibid, cl 37.
\(^{63}\) Ibid, cl 38.
\(^{64}\) Ibid, cl 39.
\(^{65}\) Ibid, cl 40(1).
\(^{66}\) Ibid, cl 41.
\(^{67}\) Ibid, cl 43.
\(^{69}\) Ibid, p. 4.
\(^{70}\) Ibid, p. 5.
provided to other Victorians. SARC foresees that these clauses are potentially justifiable, but is seeking clarification from the Minister in the absence of such statements in the Statement of Compatibility. At the time of writing, the Minister had not yet responded.

71 Ibid.
72 Ibid, p. 6.
Development of the Bill

The timeline in which the Victorian Government has progressed the Bill has been complex and has consisted of many components. Consultation between the Government and Aboriginal Victorians has taken several forms during the development of the Bill. Some of the main forms of consultation have been through community forums in regional and metropolitan Victoria. Over approximately two years, these forums (discussed in detail below) led to the establishment of an Aboriginal Treaty Working Group, the Community Assembly and the Aboriginal Treaty Advancement Commissioner. Despite being a complex process, consistent key themes have emerged. These themes highlight the desire by government to consult with Aboriginal Victorians on the correct way to proceed—a process which has been criticised by stakeholders, see below—and a desire by Aboriginal Victorians to be heard and to lead the process to the greatest extent possible.

In December 2015, the Victorian Government announced its intention to hold a forum between government agencies, Traditional Owners, Registered Aboriginal Parties, Aboriginal community organisations, peak bodies and other representative groups, along with the Minister for Aboriginal Affairs. This announcement was made in the context of recently acknowledged failures in improving on ‘Closing the Gap’ targets, in turn announced earlier in 2015, which alluded to self-determination as a possibility for the Government agenda. The initiative was framed around the idea of working to achieve self-determination for Aboriginal Victorians. The statement also announced an intention to hold a Victorian Government Ministerial Forum, which would include attendees from Aboriginal peak bodies and state-wide service delivery agencies.

This Bill Brief uses this government announcement as a starting point for the timeline towards the Advancing the Treaty Bill, while being mindful that wider calls for treaty have emanated from Aboriginal Australian groups and leaders for decades (see the Parliamentary Library’s publication: Treaty discussions in Australia: an overview, for a discussion of the broader call for treaty in Australia).

The Self-Determination forum
The forum between the Victorian Government and Aboriginal community ‘representatives’ was held on 3 February 2016. It was an ‘open forum’ which was streamed live from its location at Federation Square in Melbourne, and was attended by more than the 100 in-person attendees. The purpose of the forum was for the Government to formally receive responses from the ‘Aboriginal community’ on self-determination and constitutional recognition.

76 ibid.
77 Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘Aboriginal Treaty Committee’, AIATSIS website.
80 While ‘Aboriginal community’ is often used to describe Aboriginal people, it is important to note that people who identify as Aboriginal Victorians cannot be seen as one entity who share a single ‘community’.

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76 ibid.
77 Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘Aboriginal Treaty Committee’, AIATSIS website.
80 While ‘Aboriginal community’ is often used to describe Aboriginal people, it is important to note that people who identify as Aboriginal Victorians cannot be seen as one entity who share a single ‘community’.
One of the outcomes of the February 2016 forum was a call from the Aboriginal community for treaty or treaties. While the Government agreed to participate in negotiations, there was not (and is not, at the time of writing) a state-wide Aboriginal representative body with whom the Government sees that
it can negotiate. As above, the Bill attempts to establish such a Body. The Treaty process has therefore been primarily concerned since the outset with the question of who should represent Aboriginal communities, and how. The process of managing the question of representation has changed over time, as is shown in detail below.

Regional forums and the second state-wide forum

Following the open forum held in February 2016, the Victorian Government released a statement in March 2016 on self-determination, which notes that the process for self-determination ‘has to start with Aboriginal Victorians’. The statement released the dates of a further five community forums, which were held over April-May 2016 in Shepparton, Mildura, Bairnsdale and Horsham. The aims of the forums were to discuss with Aboriginal communities:

- what form successful self-determination might take
- fundamental principles of a treaty
- the links between constitutional recognition and Treaty
- the creation of an Aboriginal group which is representative of Aboriginal communities

Following the four regional forums, a state-wide forum was held in Melbourne on National Sorry Day, over 26–27 May 2016. The state-wide forum built on the regional forums, and again confirmed self-determination as a key component in treaty-making. The forum was an opportunity to hear new information, but also to report on the key ideas of the regional forums.

In an address at the May open forum, Richard Frankland estimated that across all four forums, 400 people attended in person. It is unclear as to whether these 400 people represented the views of themselves as individuals, of their communities, of their clans or nations, or of other interests, though some attendees did explicitly state who they represented. This is notable as there are approximately 50,000 Aboriginal and/or Torres Strait Islander identifying people in Victoria. Some critics of the treaty process have questioned whether there has been sufficient engagement across the fora with representatives of the nation or clan groups within which they argue Aboriginal decision-making powers should reside. While the fora occurred before the Advancing the Treaty Bill was drafted, attendance and representation at the fora is an important issue in light of SARC’s review of the Bill.

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84 ibid.
Particularly, Alert Digest No. 5 of 2018 states that representation is an issue which could be relevant to the compatibility of the Bill with rights deriving under the Charter (see p. 11 above).  

With that criticism of the processes around representation in mind, however, and at the time of writing, the Treaty Commissioner has stated that the intention for ongoing community consultations is to travel to and consult with every Aboriginal community in Victoria (see pp. 21–22 below).  

One of the key ideas from the regional fora and the state-wide forum was about establishing an inclusive Aboriginal representative structure, possibly operating through an election process, which would then carry the authority to interact with the Victorian Government. Views were also expressed that even using the word ‘nation’ is fraught in that it is not an Aboriginal concept and so should not be used by Aboriginal communities. Conversely, others argued that using the term ‘First Nation’ is critical to successful self-determination, because it can be linked to Aboriginal languages and clan groups.

The detailed outcomes of each of the consultations can be found on the Aboriginal Victoria website.

Some of the key ideas raised across the meetings centred on:

- giving a voice to Aboriginal communities
- placing young leaders at the centre of self-determination
- creating a binding and lasting treaty document which would tell the truth about the past, and which would create a future for communities, controlled by communities.

In that sense, one of the most resounding key messages from many of those who attended the meetings was that the treaty should be about resources and information, and that the process should be controlled by Aboriginal communities.

A summary of the second state-wide forum held in Melbourne and written by the Victorian Government states:

**Key messages emerging from the forum**

- Achieving self-determination requires a commitment to work together. The self-determination agenda will be informed by strong input from, and negotiation with, the Aboriginal community.
- Aboriginal representation should be inclusive and reflect the Victorian Aboriginal community’s diversity.
- Communication should be open and transparent so everyone knows and understands the processes and actions.
- The Aboriginal community should be resourced to engage in negotiations in an informed and equal way.

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91 Richard Frankland, ‘01 05 Handover Ceremony: Richard Frankland’, op. cit.
96 Ibid.
• Domestic and international examples (e.g. Canada, New Zealand) will be considered during this process.
• Bipartisan support is crucial and should be sought out.\(^{97}\)

Some communities also sought to emphasise that colonisation is not an historical event, but a process which is still ongoing and which impacts on Aboriginal communities in everyday life.\(^{98}\) This notion is reflected in ‘Closing the Gap’ statistics, discussed by the government in the lead up to the treaty process.\(^{99}\) As a result, for those communities, Treaty was about a process of reconciling the past as an optimistic statement towards self-determination in the future.\(^{100}\) Attendees at the forums saw that a possible way to improve the lives of Aboriginal Victorians would be to allow Aboriginal communities to build structures around Aboriginal ways of knowing and doing, based on Aboriginal law as observed by clan groups and community models.\(^{101}\)

A further key message raised during the forum is one that was also raised during the community consultations: the idea that the process should be controlled by Aboriginal communities.\(^{102}\) Finally, there were great differences in attendees’ perceptions of the treaty process generally. These views ranged across a spectrum of extreme distrust towards government and towards the process—particularly in light of Australian history and what those attendees saw as the severe lack of financial support to manage a process of self-determination—towards views which were supportive of the process as the best opportunity offered to Aboriginal Australians for Treaty so far.\(^{103}\)

Aboriginal Treaty Interim Working Group: ‘Phase 1 Consultations’

The main outcome of the regional forums held from April–May 2016 was the establishment of the Treaty Interim Working Group in July 2016.\(^{104}\) The purposes of the Working Group were to advise on the process for ‘treaty, guidance on community engagement and examining options for a permanent Victorian Aboriginal representative body’.\(^{105}\)

The Working Group comprised of 16 people in total. Two representatives were each nominated by the following groups: the Victorian Aboriginal Heritage Council, the Victorian Traditional Owners Land Justice Group, the Federation of Victorian Traditional Owner Corporations, the Koorie Youth Council and the Aboriginal Community Controlled Organisation representatives.\(^{106}\) The remaining six people were appointed by the Minister for Aboriginal Affairs.\(^{107}\)

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\(^{101}\) ibid.

\(^{102}\) ibid.


\(^{106}\) ibid.

\(^{107}\) ibid.
Since its establishment, the Aboriginal Treaty Working Group (formerly the Aboriginal Treaty Interim Working Group) now comprises eight members selected by all of the original Aboriginal bodies aside from the Victorian Traditional Owners Land Justice Group, and four appointed by the Minister.\(^\text{108}\) The two original members from the Victorian Traditional Owners Land Justice Group, Lidia Thorpe and Gary Murray, left the group. Lidia Thorpe later stated that as the Minister for Aboriginal Affairs had appointed members, in her view the group did not allow for true self-determination because the process was not being led by the communities which the process was purported to represent.\(^\text{109}\) A further three of the original members have also now left the group.

While the Working Group’s Terms of Reference allow for up to six Minister-appointed members,\(^\text{110}\) the Minister has since reduced her appointed Working Group members to four people—with one of the originally appointed members, Jill Gallagher AO, later named by the Minister as Victorian Treaty Advancement Commissioner (discussed below).\(^\text{111}\) In total, the group now comprises 12 members.\(^\text{112}\)

One of the early activities of the Working Group was to meet with the Premier in August 2016, to brief him on the treaty process and strategy up to that point in time, and on steps moving forward.\(^\text{113}\) Part of that strategy was a plan to undertake ten workshops from October to November 2016 in different areas of Victoria.\(^\text{114}\) These workshops are referred to as the ‘Phase 1 Consultations’.\(^\text{115}\)

The aim of the consultations was to investigate options for self-determination in Victoria and to report those discussions to the December Aboriginal Victoria Forum which was held in Melbourne in December 2016.\(^\text{116}\) The outcomes of the Phase 1 Consultations were also recorded in a document which is dated December 2016, but which was only made publicly available at the April 2017 consultations (see below).\(^\text{117}\)

**Working Group: ‘Phase 2 Consultations’**

More consultations were held between the Working Group and Aboriginal communities in March 2017. In this round, the focus was on consulting communities on the possible form of an Aboriginal representative structure, which would be empowered to deal directly with government in Treaty negotiations.\(^\text{118}\) Elements of representation which were discussed were methods of voting, candidates and electorates—the idea being that the Aboriginal representative body would be democratically elected.

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\(^{113}\) Aboriginal Victoria, ‘Aboriginal Victoria Forum: 13 December 2016’, Aboriginal Victoria website, see video link at 1:00:00.

\(^{114}\) For the outcomes reports of these consultations, see: Aboriginal Victoria, ‘Treaty and Aboriginal representation consultations: July–December 2016’, Aboriginal Victoria website.


Another idea regarded the legal structure of the Aboriginal representative body. In the Working Group’s report on this round of consultations, the legal structure recommended for the representative body is the Company Limited by Guarantee. The report records that this model meets the most criteria in a series of ideals to which the Aboriginal representative body should, according to the Working Group, aspire.

In April 2017, another forum was held in Melbourne. Again, the forum’s purpose was to recap the process to date and to outline future plans. Like others, the forum was live-streamed and can be viewed online.

After the forum, the Minister for Aboriginal Affairs announced that $28.5 million would be allocated to support treaty negotiations over the four financial years from 2017–18 as part of the 2017-18 state budget. Some of the purposes of this money would be to develop an Aboriginal representative body, as well as to develop a self-determination plan. Specifically, $5.4 million would be allocated to a fund which would help to remove Aboriginal organisation-owned properties, so that such properties could be unencumbered and able to be used more effectively by the communities which own them.

Following the April forum, the Working Group wrote an open letter which explained its role in more detail. One of the key ideas expressed in the letter is around that of representation of Aboriginal communities within both the treaty process and within the eventual treaty, or treaties. The Working Group also acknowledged that it would have been helpful had the report on the October–November 2016 workshops and consultations been available prior to the April 2017 forum.

The Minister for Aboriginal Affairs also published an open letter following the April 2017 forum. In her letter, the Minister indicated that instead of regional meetings, the treaty process would move towards a representative assembly that would work on the creation of a representative body, which could then deal directly with government. The Minister also stated that in order to achieve this, the intention of the Government would be to finance the process.

In the Working Group’s report on this round of consultations, feedback was similar to that of earlier rounds. Again, there was significant variance in views as to the viability and legitimacy of the process, ranging from extremely distrustful approaches, to those who saw the process as a positive opportunity. Overwhelmingly, communities across Victoria stressed that any representative body should be elected, and that it should represent all Aboriginal Victorians in some way. Within that idea was the message that Aboriginal tribes, clans or nations, or language groups, should be represented

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120 ibid.
123 ibid.
124 ibid.
126 ibid.
127 ibid.
129 ibid.
on the body, and that those groups should be defined according to Aboriginal communities, as opposed to definitions used by the Victorian Government.\textsuperscript{131} Other messages were:

- the need to include a cross section of generations within the Aboriginal representative body\textsuperscript{132}
- that the Aboriginal representative body must be independent—financially and politically—so that the body and the Treaty process can survive changes in Victorian politics\textsuperscript{133}

**Aboriginal Community Assembly**

Following the Phase 2 Consultations, the Aboriginal Community Assembly (‘the Assembly’) was created to further consult with communities on the entity structure, representation and governance of the Aboriginal representative body. These issues were explained in greater detail in a Pre-reading Handbook and in several factsheets, which aimed to empower communities to engage with the Assembly during consultations.\textsuperscript{134} Members of the Assembly were selected after a round of open applications held in September–October 2017, which were open to all Aboriginal Victorians over the age of 18.\textsuperscript{135} A subsequent report by the Working Group (discussed below) describes the selection process of the Assembly members:

Strategic guidance on the purpose and structure of the Community Assembly was provided by the Working Group’s Community Assembly sub-group, as well as by the full Working Group. Members of the Community Assembly were chosen through an Expression of Interest process that was open to all Aboriginal Victorians. The Expression of Interest process was endorsed by the Working Group and managed by EY [Ernst & Young], with guidance from Karen Millward, Uncle Kevin Coombs and Uncle Richard Frankland. This was to ensure that the selection process was independent of the Working Group and Government.\textsuperscript{136}

In December 2017, the Assembly made 12 recommendations to the Working Group, based on specific points under its terms of reference.\textsuperscript{137} The recommendations are the result of six days of consultations which the Assembly held across November and December 2017. In addition to the above mandatory recommendations, two other key recommendations emerge from the report:

- Our overarching recommendation is that there be continuing engagement with the Aboriginal Community similar to the Community Assembly process to maintain momentum on this journey.
- We recommend that common or contested words and phrases are defined to reflect their meaning and intent in the context of establishing the Representative Body. These should be defined by the Victorian Treaty Advancement Commissioner.\textsuperscript{138}

\textsuperscript{131} ibid.
\textsuperscript{132} ibid.
\textsuperscript{138} ibid, p. 5.
As the Assembly’s recommendations were submitted to the Working Group, the recommendations are discussed below in the context of the Final Report of the Working Group (see pp. 21–22 below).

Aboriginal Treaty Advancement Commission

The Victorian Treaty Advancement Commission (the Commission) was established in January 2018. The function of the Commission is to enact the outcomes of the Aboriginal Community Assembly and to establish the Aboriginal Representative Body. Part of the terms of reference of the Commission are in:

- establishing the Aboriginal Representative Body
- maintaining momentum of the treaty process
- consulting Aboriginal Victorians
- providing research and advice on the treaty process
- communicating progress on treaty to Aboriginal and non-Aboriginal Victorians.

Figure 2. The role of the Victorian Treaty Advancement Commissioner, February 2016–2018

![Role of the Victorian Treaty Advancement Commissioner]


The Commission will cease to exist once the Aboriginal Representative Body is formed. At the time of writing, this has not yet occurred and the Commission’s work is ongoing. Another aim of the Commission is to strengthen the independence of Aboriginal Victorian communities from the Victorian Government in advancing the Treaty process. Part of this independence is in creating a legally

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140 ibid.

independent, ‘fully elected’ and financed entity, with which the government can negotiate the framework by which future treaty or treaties will be agreed.¹⁴²

The Treaty Advancement Commissioner has recently stated that further consultation with all Aboriginal Victorians is vital to establishing a viable representative body.¹⁴³ At the time of writing, the model proposed is ‘Treaty Roadtrips’.¹⁴⁴ These Roadtrips will travel to regions and speak with Aboriginal people, Traditional Owners, Aboriginal organisations, local governments and non-Aboriginal people (to educate non-Aboriginal people on the process).¹⁴⁵

Final report of the Working Group
In March 2018, the Working Group made its final report which was delivered to the Victorian Treaty Advancement Commission. Since that time, the Working Group continues to exist, but does so in an advisory capacity to the Commission.¹⁴⁶ The final report combines the work of the two years from 2016 to the beginning of 2018, and responds to the Community Assembly’s recommendations.

In its response to the 12 recommendations, the Working Group’s final report adopts seven, accepts four in principle and marks one as requiring further consideration by the Commission.

The two extra recommendations made by the Community Assembly and set out above were accepted, to be implemented by the Commission.

Notably, the Working Group recommends a proportionate representative voting system in turn recommended by the Community Assembly.¹⁴⁷ The system envisages voting regions, each allocated seats on the Aboriginal Representative Body proportionate to the Aboriginal population in the region.¹⁴⁸ The Working Group also reiteracted:

...that the Aboriginal Representative Body will represent all Aboriginal Victorians in the development of the treaty negotiation framework. The Aboriginal Representative Body will not negotiate treaty or treaties for Country. Therefore, the voting regions recommended by the Community Assembly are simply for the purpose of electing the Aboriginal Representative Body. They are not treaty regions.

The Working Group notes that VTAC [Victorian Treaty Advancement Commission] and the Aboriginal Representative Body should promote nominations which reflect the diversity of the Aboriginal Victorian community. This should be achieved through outreach and engagement programs. This will ensure the members of the Aboriginal Representative Body are self-determined by the votes of Aboriginal Victorian electors.

These statements are coherent with other statements made in the report, which reiterate that as the Aboriginal Representative Body is representative of all Aboriginal Victorians, it cannot be the sole representative of Country in Treaty negotiations—its primary role will be in developing a treaty

¹⁴² ibid.
¹⁴³ ibid, 38:00–47:31.
¹⁴⁴ ibid, 44:17–45:39.
¹⁴⁵ ibid.
¹⁴⁷ ibid, p. 8–9.
¹⁴⁸ ibid, p. 14.
negotiation framework.\textsuperscript{149} However, the Working Group also notes that the Aboriginal Representative Body will be well placed to progress Aboriginal self-determination generally.\textsuperscript{150}

The Working Group also endorsed the recommendation that the Aboriginal Representative Body entity be a Company Limited by Guarantee.\textsuperscript{151}

The report makes a number of statements about the process to come, some of which has occurred with the introduction of the Advancing the Treaty Bill. Those future steps are:

- ongoing community engagement, to be undertaken by the Commission
- treaty legislation—already introduced, at the time of writing, in March 2018
- the establishment of the Aboriginal Representative Body
- the development of the treaty negotiation framework
- the establishment of the independent Treaty Authority, which will administer the treaty negotiation process (in whatever form that takes, based on the work of the Aboriginal Representative Body and in partnership with the Victorian Government).\textsuperscript{152}

Finally, in March 2018, the Advancing the Treaty Bill was introduced to Parliament.\textsuperscript{153}

\textsuperscript{149} Ibid, p. 8.
\textsuperscript{150} Ibid, p. 20.
\textsuperscript{151} Ibid, p. 21.
\textsuperscript{152} Ibid, p. 26–27.
\textsuperscript{153} Advancing the Treaty Process with Aboriginal Victorians Bill 2018.
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