



TREATY FACT SHEET

ABORIGINAL VICTORIA

These fact sheets have been prepared to support conversations with the community about self-determination. Nothing contained in these fact sheets should be taken as legal advice or a statement of policy or intent by the Victorian Government.

A TREATY CAN ADDRESS ANY AND ALL OF THE FOLLOWING PURPOSES:

To recognise past wrongs and make apology for those wrongs.

To recognise Indigenous land rights and sovereignty.

To recognise Indigenous self-government within a state.

To exchange land rights for financial and other benefits.

To create a new relationship or partnership for an ongoing dialogue.

PURPOSES

A treaty can contain statements of principle, guidelines for future relationships, reparations for past injustices, and guarantees and promises about Indigenous land, sovereignty and identity. It can combine elements of existing historic and modern treaties, and can talk about the past as well as make commitments for the future.

1 What is a treaty?

A 'treaty' is an agreement between states, nations or governments, and can include an agreement between Indigenous peoples and governments. Treaties made between Indigenous peoples and governments are not international agreements in the way that treaties between countries are, but they are still documents of considerable legal and moral force.

The Victorian Government and Aboriginal people must first agree on the purpose of a treaty before deciding if and how to make one, and what it should contain. Since there is no history of treaty-making in Australia, Victorians have a unique opportunity to craft their own treaty suited to their needs and desires, and their own concepts of justice.

There are two main limitations on treaties in Victoria:

1. The parties must agree on what is necessary and just.
2. As a state within the Commonwealth, the Victorian Government can only agree to what is within its own constitutional powers.

2 What types of treaties and agreements already exist?

HISTORIC TREATIES

The British and colonial governments made many treaties with Indigenous peoples in Canada (up to 1920), New Zealand (in 1840) and the United States (up to 1871). These documents recognised that Indigenous peoples existed before the British Crown asserted its sovereignty over their territory and that they had property rights to their traditional lands. Often, Indigenous peoples ceded rights to part of their land in return for financial and other benefits, such as annual money payments and services, and the protection of Indigenous hunting and fishing rights. Some historic treaties also contained a promise to recognise some form of Indigenous self-government.

MODERN TREATIES AND OTHER FORMS OF AGREEMENT

Modern treaties and treaty-like agreements have been made in the following countries—including Australia. Since the 1970s the Canadian federal and provincial governments have been making comprehensive land agreements with First Nations without historic treaties. The US federal government continues to make 'nation-to-nation' agreements with recognised Indian tribes.

In New Zealand the principles of the Treaty of Waitangi apply to most aspects of the relationship between the government and Maori. Treaty principles must be considered in the development of policy and legislation, and the principles also guide the interpretation of statutes. The New Zealand government has committed to settling historic and contemporary claims about the breach of Treaty principles.

SIX STAGES OF THE BRITISH COLUMBIA TREATY PROCESS

1

Who are the people and what is their representative body?

2

Is the representative body ready to negotiate?

3

What are the issues for negotiation?

4

What are the new rights and responsibilities for each issue?

5

Technical and legal matters are clarified and the treaty is signed

6

The treaty becomes law and is implemented into the future

In Australia there is no history of treaty-making, but there is one of making agreements that cover some of the same ground as treaties in other countries. In addition to the many agreements made under the Commonwealth's *Native Title Act 1993*, several states have made agreements with Aboriginal and Torres Strait Islanders on specific issues like land management. In South Australia, for example, the *Kungun Ngarrindjeri Yunnan Agreement 2009* between the South Australian government and the Ngarrindjeri Regional Authority to establish a relationship of recognition and consultation (for more examples www.atns.net.au/).

In Victoria the *Traditional Owner Settlement Act 2010* provides a framework for resolution of native title and compensation claims, plus a package of broader benefits, via direct negotiation between the Government and Traditional Owner groups. Any future agreements in Victoria would need to take into account any existing agreements.

3 Who makes a treaty?

Aboriginal people will need to decide (i) who will sign on to the treaty and (ii) how they will be represented in the treaty-making process. Once a treaty has been written, representatives will have to take the treaty back to Indigenous people to get their final approval.

All treaties have at least one Indigenous party and at least one government party, but it is possible to have multiple parties to a single treaty. Aboriginal Victorians can negotiate through national or regional representative bodies, through the representatives of their nation, Traditional Owner group, community, people, or through another collective form. Governmental parties may include state governments, or both the state and federal governments. Other entities (such as local governments) are usually not party to the treaty, but may be part of specific agreements that come out of a treaty. For more information, see the Representative Structures factsheet.

4 How do you make a treaty?

Parties negotiate and agree on the text of the treaty. In the last decade, the Victorian Government and Aboriginal people have developed practices and institutions for agreement-making, including agreements under with the *Native Title Act 1993* (Cth) and *Traditional Owners Settlement Act 2010* (Vic). These could provide a starting point for a treaty process that could work in Victoria. The negotiation process may be informal or structured. Most treaty-making processes have three main stages.

First, parties must agree on how the process will proceed and on the principles that will guide them in their negotiations. The parties must decide whether negotiations should be open and flexible, or more formal with rules and principles. In general, a more formal process has more certainty but less flexibility.

Second, parties must negotiate a treaty within this process. Successful negotiations require sustained political commitment and adequate financial support over a period of years. Treaties are often negotiated in stages, starting with a broad framework and then moving on to a more detailed document. Some matters are quickly agreed on, but others can be very difficult and even impossible to resolve. It is important that the parties agree in advance on how to deal with deadlocks.

Third, parties must now manage their relationship within the new treaty framework. They will be accountable to their communities and to each other, and must resolve any disputes through the agreed process.

RECOGNISING INDIGENOUS SOVEREIGNTY

Canada has recognised an inherent right to self-government for First Nations since 1996. The US has recognised the right of 'self-determination' for Indian tribes since 1975. New Zealand has recognised that the Treaty of Waitangi guarantees to Maori chiefs their powers of chieftainship (rangatiratanga) and protects their rights to their lands, fisheries, forests and treasures (taonga).

The Australian Constitution divides sovereign authority between the Commonwealth and state governments. While only the Commonwealth can make international treaties, state governments like Victoria can make a treaty with Aboriginal Victorians. A treaty may recognise that Aboriginal Victorians share some of the sovereignty exercised by the Victorian government.

5 What does a treaty say and do?

A treaty is an agreement that can say and do anything that the parties agree on within their respective powers. Aboriginal Victorians will need to decide what they want from a treaty keeping in mind the limitations on the Victorian Government.

(I) RECOGNITION AND RECONCILIATION

Treaties can provide for recognition and reconciliation between Aboriginal Victorians and federal and state governments. Symbolic forms of recognition can include an acknowledgement of historic Indigenous sovereignty, sacred sites, place names, recognition of historic wrongs, official apologies, and statements about how the relationship should evolve in the future. Practical forms can include the recognition of on-going Indigenous self-government, land rights, language rights, law-making powers, financial compensation or land grants, and other resource rights, such as rights to use and protect traditional land, as well as financing (including special tax arrangements) to fund these rights and responsibilities. Both forms of recognition are important.

(II) SELF-GOVERNMENT AND SOVEREIGNTY

A treaty can consider whether Aboriginal Victorians will manage some things by themselves, or in co-operation with federal and state governments. The challenge is to decide which party is best placed to manage specific responsibilities. In Canada, New Zealand and the United States, self-governing Indigenous peoples often have jurisdiction over matters like minor violations of civil and criminal law, family law, local forests and fisheries, natural resource management, sacred sites, language and culture.

The meaning of 'sovereignty' is contested. Countries are sovereign in international law and as a consequence are entitled to make decisions about domestic affairs without interference from other countries or international entities. However, treaties between Indigenous peoples and governments in Canada, New Zealand and the United States all recognise and give effect to the idea of shared sovereignty with Indigenous peoples in different ways.

(III) LAND AND RESOURCES

Treaties can provide for the recognition of Aboriginal Victorians' rights to land, responsibility for land, and authority to manage land and resources.

There is a vast wealth of experience in land and resource management in Australia and abroad. In Victoria this experience includes the native title settlement processes under the *Traditional Owner Settlement Act 2010* (Vic). There are more comprehensive agreements, like the Kungun Ngarrindjeri Yunnan Agreement, elsewhere in Australia.

(IV) MANAGING THE RELATIONSHIP

Choosing to make a treaty will change the relationship between Aboriginal people and the Victorian Government. All parties have rights and responsibilities in this on-going relationship. They are also accountable to themselves and their members. Any disputes should be resolved through an agreed process.

REFERENCES

Agreements, Treaties and Negotiated Settlements Project <<http://www.atns.net.au>>.

British Columbia Treaty Commission <<http://www.bctreaty.net>>.

Gudmundur Alfredsson, 'Indigenous Peoples, Treaties with' in *Max Planck Encyclopedia of International Law* (Oxford: Oxford University Press, 2015) <<http://opil.ouplaw.com/view/10.1093/law/epil/9780199231690/law-9780199231690-e827?rskey=EYFD4M&result=2&prd=EPIL>>.

Office of Treaty Settlements (NZ), 'Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown' <<https://www.govt.nz/assets/Documents/Red-Book-Healing-the-past-building-a-future.pdf>>.