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Treaty-Making in Australia and Considerations for Canada

By: Robert Hamilton and Harry Hobbs

Matter Commented On: *Victoria's Statewide Treaty and Statewide Treaty Bill 2025*

Indigenous peoples in Australia have long sought to establish treaty relationships with the state. While important advocacy efforts such as the 1988 [Barunga Statement](#) and the final report of the [Council for Aboriginal Reconciliation](#) in 2000 failed to lead to negotiations at the national level, a statewide treaty was recently signed in the state of Victoria. The first formal Indigenous treaty ever negotiated in Australian history, the Victorian Statewide Treaty is a novel model of treaty that is worth considering closely in Canada, particularly as Indigenous peoples and federal, provincial, and territorial governments continue to look for productive ways to implement historic and modern treaty promises and craft novel forms of agreement. Creative thinking is required to take steps to meet the Crown's constitutional obligations to diligently implement treaty promises, proactively assess and manage cumulative impacts on Aboriginal and treaty rights, meaningfully implement modern treaty and self-government agreements, and satisfy its obligations under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*. Recent discussions about the relationship between treaty rights and a secession referendum in Alberta (which one of us discussed [here](#)) also illustrate the importance of thinking creatively about the relationship between Indigenous self-determination, treaty rights, and other democratic state process and institutions. This blog summarizes Victoria's Statewide Treaty and the proposed bill that will implement it.

Getting to the Statewide Treaty

The Victorian treaty process emerged during the latest period of national debate on constitutional recognition of Aboriginal and Torres Strait Islander peoples, which ultimately concluded in a [failed referendum in October 2023](#). After several stalled attempts to develop a proposal to take to a referendum, First Peoples in Victoria demanded that the State government engage in its own political and legal reform: deriding the national process as a “[distraction](#)”, they called for a treaty. To many peoples surprise, the State government reacted positively, agreeing in early 2016 to sit down and talk treaty.

Across almost a decade, the process evolved into a three-phased approach ultimately driven by the priorities of First Peoples in the State. Those priorities centred on a challenging reality. Unlike Canada, no treaties had ever been negotiated on the Australian continent, and the Australian Constitution does not contain any protection or even recognition of the rights and interests of Indigenous peoples. In fact, there is [no express mention of Indigenous people in the Constitution](#). Conscious of power imbalances, the effects of colonisation on traditional authority structures, a gap in the understanding of what a treaty relationship entails, and the need to develop institutions that are effective in contemporary society, First Peoples favoured a measured and deliberate

process. Rather than immediately enter treaty talks, they first sought to develop and design an appropriate body that could represent them when engaging with the State.

Phase One, which ran between 2016 and December 2019, thus focused on developing an Aboriginal Representative Body. It concluded with the passage of the [Advancing the Treaty Process with Aboriginal Victorians Act 2018 \(Treaty Act\)](#), which established a legislative basis for negotiating a treaty with First Peoples and required that the government recognise an Aboriginal designed representative body – the [First Peoples’ Assembly of Victoria](#). The *Treaty Act* set out the guiding principles that would structure and govern the treaty process: self-determination and empowerment, fairness and equality, partnership and good faith, mutual benefit and sustainability, and transparency and accountability (*Treaty Act*, ss 22-26).

Phase Two, which ran between January 2020 and October 2024 concentrated on building the key institutions necessary to support modern treaty negotiations. Reflecting the right to self-determination and the principle of co-design, the *Treaty Act* required the First Peoples’ Assembly and the Victorian Government to “work together to establish elements necessary to support future treaty negotiations” (*Treaty Act*, s 1(d)). Five key elements were adopted: a [truth-telling commission](#); a dispute resolution process to guide the relationship between the parties; an independent [Treaty Authority](#) to oversee and facilitate negotiations; a legally enforceable [Treaty Negotiation Framework](#) setting out rules and processes; and a [Self-Determination Fund](#) to finance Aboriginal Victorians’ negotiations.

Phase Three involved the actual treaty negotiations. In contrast to the slow and deliberate approach taken to co-designing treaty architecture, the talks were conducted rapidly. They began in November 2024 and concluded in September 2025. This quick timeframe – under a year – reflects both the steady and patient work of building constructive relations over the previous decade, as well as political complications. There is no constitutional principle that requires the State negotiate with First Peoples, the State Opposition does not support the treaty process, and treaty settlements are not constitutionally protected. The government and First Peoples’ Assembly were thus conscious of reaching agreement in advance of the next election in November 2026, in order to help fortify both the treaty process and any treaty from unilateral amendment or repeal. This is not an idle concern. In both [Queensland](#) and the [Northern Territory](#), newly elected governments withdrew from ongoing treaty processes in 2024 and 2025.

It is worth noting also that the Victorian treaty process is staggered in another way. There are expected to be [two levels of treaty-making](#): Statewide Treaties that cover all First Peoples within Victoria, and Traditional Owner Treaties that will be negotiated between Aboriginal nations and the State. These agreements are expected to cover more contentious matters such as land and governance.

The Statewide Treaty

The shape and contours of the treaty process are visible in Victoria’s finalized [Statewide Treaty](#). Reflecting the foundational work of the Yoorrook Justice Commission, the agreement starts from an account of colonisation’s ongoing harms (*Statewide Treaty* at s 1.1). The State commits to reckon with that history and to build a more just future through a renewed relationship grounded

in self-determination, equal partnership, mutual benefit, transparency, and respect for First Peoples' culture and authority (*Statewide Treaty* at ss 1.4, 1.5, 6). The *Statewide Treaty* frames that relationship around respect, trust, accountability, and integrity, while laying foundations for ongoing Treaty-making (*Statewide Treaty* at preamble). Critically, the [Statewide Treaty Bill 2025 \(2025 Bill\)](#) also creates institutions to carry this work forward, most notably Gellung Warl, a representative and deliberative body designed to advance First Peoples' collective decision-making and hold government to account (*2025 Bill*, at s 10).

The term Gellung Warl ("gullungwarl" meaning "tip of the spear" in Gunaikurnai language) refers to the self-determined, representative, and deliberative body established in the *2025 Bill* (*2025 Bill* at s 10). Establishing the Gellung Warl is one of the main purposes of the *2025 Bill*. Gellung Warl is intended to 'play a central part in the democratic life of' Victoria (*Statewide Treaty*, s 5). It is intended:

- i) to exercise decision-making powers by representing First Peoples in Victoria and making decisions in relation to First Peoples in Victoria;
- ii) to represent First Peoples in Statewide Treaty negotiations with the State, including undertaking ongoing Statewide Treaty negotiations;
- iii) to provide for ongoing truth-telling and healing;
- iv) to advise the Parliament and the State government in relation to matters that affect First Peoples; and
- v) to hold the State government to account in relation to its commitments to, and the impact of its actions on, First Peoples. (*2025 Bill* at s 1)

The further objects of Gellung Warl are:

- a) to deliver improved and enduring outcomes for First Peoples;
- b) to be led by democratically elected representatives of First Peoples in a self-determining and deliberative way to enable First Peoples to freely determine their political status, pursue their economic, social and cultural development and make decisions about their own futures;
- c) to form an enduring part of the democratic landscape of Victoria;
- d) to respect Aboriginal Lore, Law and Cultural Authority and meet its cultural obligations and responsibilities as determined by First Peoples;
- e) to be generative and flexible with the capacity to evolve over time;
- f) to be transparent and accountable in carrying out its functions and powers;
- g) to operate with integrity and be subject to appropriate oversight including by State integrity agencies such as IBAC and the Ombudsman; and
- h) to undertake any charitable work or charitable purposes. (*2025 Bill* at s 9)

The establishment of Gellung Warl gives effect to the first *Statewide Treaty* and advances the inherent rights and self-determination of First Peoples. It is the central institutional outcome of the *Statewide Treaty* and *Statewide Treaty Bill* and will have three arms:

- The First Peoples' Assembly of Victoria: The pre-existing representative body which played a central role in negotiating the Treaty and will be the central decision-making

arm of Gellung Warl. Previously the Assembly's role was limited to negotiating treaty. Now its mandate and term have been extended.

- Nginma Ngainga Wara: An independent oversight and accountability mechanism.
- Nyerna Yoorrook Telkuna: An ongoing, non-judicial, and self-determined truth-telling mechanism. (*2025 Bill* at s 10(2))

Gellung Warl is a corporate body with legal personhood and the capacity to sue and be sued and to hold and dispose of property. Initially, Gellung Warl will consist only of the First Peoples' Assembly until members of the other two arms are appointed. The Assembly as the political voice, the Nginma Ngainga Wara is the watchdog, and the Nyerna Yoorrook Telkuna is healing and truth-telling mechanism

1) The First Peoples' Assembly of Victoria: The Central Political Institution within Gellung Warl

The *2025 Bill* establishes the First Peoples' Assembly of Victoria as the central political and decision-making institution within Gellung Warl (*2025 Bill*, ss 16-17). The Assembly is a self-determined, democratically elected, and enduring institution for the political representation of First Peoples. The Assembly exercises responsibility for the overall architecture of Gellung Warl, including making rules and appointing members to the other constituent arms: Nginma Ngainga Wara and Nyerna Yoorrook Telkuna. The Assembly exercises extensive functions of negotiation, governance, and advocacy. The body represents First Peoples in ongoing *Statewide Treaty* negotiations and also has broader authority to “represent First Peoples and make decisions in relation to First Peoples”, “advocate for the interests of First Peoples”, “to make representations to ... the Parliament and State government in relation to matters that affect First Peoples”, and “engage in activities relating to capacity building in First Peoples' communities”, among others (*2025 Bill*, s 18).

The Assembly can make certain statutory appointments under other Acts, such as appointing members to the Victorian Aboriginal Heritage Council (*2025 Bill*, s 232). The Assembly develops and implements the Community Governance and Answerability Framework (Larbargirrar gnuurtak tulkuuk) which includes answerability principles, a Community Engagement Charter, Community Vision (Ngarrakeetoong Martongakeeyt), and a Strategic Plan (*2025 Bill*, ss 159-164).

The Assembly is accountable to First Peoples owing to its democratic nature and its cultural obligations and responsibilities. The Assembly's powers enable Gellung Warl to deliver improved and enduring outcomes for First Peoples, and its structure incorporates representation that reflects Aboriginal Lore, Law, and Cultural Authority, along with the responsibilities of Traditional Owners to Country (*2025 Bill*, s 54). The Assembly comprises both elected and appointed members (*Treaty Bill*, schedule 2). General elections occur at least every four years on a fixed schedule. Traditional Owner groups appoint reserved members. The total number of members must not exceed eighty. Members hold office for the period the electoral rules specify, which must not exceed four years (*2025 Bill*, schedule 2).

The *2025 Bill* also seeks to develop a number of “relational practices” between the State and First Peoples. The Assembly is empowered to inform the Parliament and State government and hold the government to account. The Assembly presents an annual address to a joint sitting of the Legislative Council and Legislative Assembly (*2025 Bill*, s 64). The Assembly must receive notification when the state government introduces Bills, and its positions can inform the preparation of a Statement of Treaty compatibility regarding how proposed legislation affects First Peoples (*2025 Bill*, s 66). The Assembly participates in Representation Meetings (mandatory meetings held at least twice yearly) with the Cabinet to make representations on matters affecting First Peoples. The Assembly may request an annual Engagement Hearing to question Ministers, Secretaries (Department Heads), and the Chief Commissioner of Police on priorities, operations, expenditure, and budget as they affect First Peoples. Secretaries and the Chief Commissioner of Police must meet with the Assembly at least twice a year to provide briefings and answer questions, including sessions intended to inform annual State government budget priorities. The Assembly can make written submissions and ask questions of Ministers, authorities, and State-funded service providers on its own initiative. Ministers must respond in writing within sixty days (*2025 Bill*, ss 69-73).

The Assembly is not provided with extensive decision-making powers. At present, it will be limited to making decisions relating to how First Peoples’ organisations in Victoria provide certificates evidencing that a person is accepted as an Aboriginal or Torres Strait Islander person by the Aboriginal or Torres Strait Islander community. However, both parties have agreed that Gellung Warl will be “generative and will continue to evolve” (*2025 Bill*, s 30(c)), as further Statewide Treaties are negotiated. It is thus expected that the Assembly’s decision-making power will develop over time.

2) Nginma Ngainga Wara: Independent Accountability Mechanism

The *2025 Bill* establishes Nginma Ngainga Wara (from the Wadi Wadi language, pronounced "Ng-in-ma Ng-eye-nga Wa-ra", meaning “you will do”) as a constituent arm of Gellung Warl. The Nginma Ngainga Wara is an independent oversight and accountability mechanism for the State's performance concerning First Peoples. The First Peoples' Assembly appoints two or three eligible persons as Nginma Ngainga Wara members (*Treaty Bill*, s 100).

The Nginma Ngainga Wara has three identified purposes: “(a) to evaluate and monitor the actions and performance of State government towards achieving State government outcomes directed to First Peoples; (b) to evaluate and monitor the actions and performance of State government towards implementing the recommendations of the Yoorrook Justice Commission; and (c) to recommend to the First Peoples' Assembly practical and feasible measures to improve outcomes for First Peoples” (*Treaty Bill*, s 93).

Nginma Ngainga Wara has eight functions outlined in the *2025 Bill*: ongoing monitoring of the impacts of State government performance and actions on First Peoples, monitoring the implementation of Yoorrook Justice Commission recommendations, conducting research, and conducting inquiries, and providing information to the First Peoples' Assembly and to Nyerna Yoorrook Telkuna to inform the performance of their functions, among others (*2025 Bill*, s 94).

Nginma Ngainga Wara may make recommendations or propose solutions aimed at:

- (a) ensuring law, policy or practice is in line with evidence-based best practice; and
- (b) removing defects, systemic racism, discrimination and bias in law, policy or practice; and
- (c) strengthening law, policy or practice; and
- (d) simplifying law, policy or practice; and
- (e) adopting new or more effective methods of practice for developing and administering the law and dispensing justice or implementing policy. (*2025 Bill*, s 96)

The First Peoples' Assembly may direct Nginma Ngainga Wara to conduct an inquiry on these matters. Nginma Ngainga Wara must conduct the inquiry unless certain exceptions apply. In short, the body has a range of functions and purposes related to its oversight and accountability role, allowing it to comment on the effectiveness of state actions, identify shortcomings, and make substantive recommendations concerning law and policy.

3) Nyerna Yoorrook Telkuna: Truth-Telling Mechanism

The Nyerna Yoorrook Telkuna (pronounced “nyern-ah yoo-rrook terl-kuun-ah” and meaning “to sit, to listen, to hear, to remember” (Nyerna), “to truth” (Yoorrook) and “to cure, to heal” (Telkuna) in the Wamba Wamba/Wemba Wemba language) provides an ongoing, self-determined, non-judicial mechanism for truth-telling across Victoria (*2025 Bill*, part 10). Nyerna Yoorrook Telkuna is made up of three persons appointed by the First Peoples' Assembly. The body pursues three interconnected purposes: facilitating truth-telling about historical events and their continuing impacts, supporting healing for First Peoples, and fostering healing between First Peoples and the broader community.

The Nyerna Yoorrook Telkuna promotes ongoing truth-telling about historical events, including their continuing impacts, and advances healing and reconciliation. The body receives and collects truth-telling information, including place-specific information collected on Country, and conducts research. It also supplies information to the First Peoples' Assembly and Nginma Ngainga Wara to inform their respective functions and powers. The body exercises no coercive powers and cannot impose penalties for non-compliance. The establishment of Nyerna Yoorrook Telkuna implements a Yoorrook Justice Commission recommendation to create an ongoing truth-telling body that continues taking First Peoples' testimony and building the public record. (*2025 Bill*, part 10).

Other Treaty Provisions

The *Statewide Treaty* also outlines several goals and state obligations in addition to the establishment of Gellung Warl and outside the *Treaty Bill*. These include:

- the inclusion of Truth-telling in the Victorian Curriculum, including a commitment to use the Yoorrook Justice Commission Official Public Record as a resource to support the

implementation of truth-telling in the Victorian Curriculum (*Statewide Treaty*, Schedule B3, at 23).

- the development of cultural competency in the public service, including a commitment by the State to develop a model performance goal for the public service body when implementing Treaty principles (*Statewide Treaty*, Schedule B3, at 24).
- provisions concerning place naming, in particular to specify Gellung Warl as a 'naming authority' for specified geographic features, such as National and State parks, waterways, and waterfalls on State-controlled land (*Statewide Treaty*, Schedule B4, at 25); and, the development of a First People's Infrastructure Fund, operated by Gellung Warl.

The Treaty Framework and the *United Nations Declaration on the Rights of Indigenous Peoples*

The Treaty framework explicitly engages with and affirms the *UNDRIP*, particularly concerning the right to self-determination. The Treaty and the *2025 Bill* recognize *UNDRIP* as a foundational text that recognizes and affirms the inherent rights of First Peoples. The *Statewide Treaty* affirms that the inherent rights of First Peoples, including the right to self-determination, are not granted by the State but flow from First Peoples' own laws, cultures, and connection to Country. The Treaty notes that *UNDRIP* recognizes that the inherent rights of Indigenous peoples derive from their political, economic, and social structures, cultures, spiritual traditions, histories, and philosophies. *UNDRIP* recognizes the collective right of Indigenous peoples to decide their political status and freely pursue their economic, social and cultural development and supports the right of Indigenous peoples to autonomy in matters relating to their internal and local affairs. The establishment of Gellung Warl is explicitly designed to embody and advance the right to self-determination of First Peoples to make collective political decisions in a manner reflective of this.

Interpretive provisions strengthen the role of *UNDRIP* in the interpretation of the Treaty itself. The *Statewide Treaty* specifies that the document should be interpreted by reference to *UNDRIP*, except to the extent of any inconsistency with the Treaty Process Act, *Statewide Treaty Act*, and applicable laws of the State and the Commonwealth. The State must also conduct the Treaty process in a manner consistent with *UNDRIP* principles (*Statewide Treaty*, Schedule A7).

Further Questions

The *Statewide Treaty* and *Statewide Treaty Bill* represent a landmark moment for Victoria and Australia. As the first formal treaty negotiated between First Peoples and the State, the parties see the agreement as marking “the dawn of a new era in Victoria – an era of Treaty-making that begins here but will carry forward for generations” (*Statewide Treaty*, s 5). However, a number of questions remain. Here we note just two.

First, will the Treaty survive a change of government? The next State election will be held in November 2026. The State Opposition has declared it will withdraw from the treaty process if it secures government. There is no law that would prevent them from doing so. As noted above, the

Australian Constitution does not protect (or even mention) the rights of Indigenous peoples, and there is no equivalent to the Canadian principle of the Honour of the Crown that might constrain the State's discretion. The treaty process has been driven by democratic politics rather than the courts, but if the political winds shift, that support could falter. The success – or otherwise – of the treaty process in Victoria might thus turn on the result of that poll.

Second, will First Peoples support the Treaty? If the agreement looks modest to a Canadian audience, that might be because it is. Rather than recognise or empower self-governance across a range of fields, the Victorian treaty is institutional. It establishes key architecture that aims to bring First Peoples into the forums where decisions about them are made, but it does little more than this. This may reflect the political realities discussed above, or the fact that this is the first time an Australian government has negotiated treaties. It will take time for these changes to be embedded and bring about substantive legal and political changes, and further steps to be taken. To this end, the parties have committed to future treaties.

Reflections for Canada

Crown-Indigenous relations in Canada encompass a diverse range of agreements - historic and modern treaties, self-government agreements, varieties of reconciliation and co-management agreements, and impact-benefit and revenue sharing agreements. This multiplicity reflects the variety of needs and varied circumstances to which these agreements respond. In addition to the over two dozen modern treaties and self-government agreements that have been signed, there are countless numbers of agreements smaller in size or scope. In British Columbia, for example, the [Nenqay Deni Accord](#) between the province and the Tsilhqot'in Nation laid out a framework to implement the Tsilhqot'in right of Aboriginal title through ongoing negotiations and on the basis of eight "pillars of reconciliation." This shows how a negotiated architecture can translate court-recognized title into formal decision-making. Likewise, the [Tahltan consent-based decision-making framework](#), based on BC's *UNDRIP* implementation framework (see *Declaration on the Rights of Indigenous Peoples Act*, SBC 2019, c 44, s.7) shows how regulatory frameworks can be aligned with Indigenous laws and values, creating predictable project pathways while respecting the requirement to obtain free, prior, and informed consent.

There is a need to continue to craft novel agreements to address outstanding and emerging issues around Aboriginal title, develop processes to manage cumulative impacts to aboriginal and treaty rights, and to fulfil the Crown's duty to diligently implement treaty promises especially with increasing political pressure for faster natural resource development. The Supreme Court of British Columbia's recent decision in *Cowichan Tribes v Canada (Attorney General)*, 2025 BCSC 1490, for example, requires the province of BC to negotiate with the Cowichan and holders of fee simple interests in the areas over which Cowichan title was recognized to achieve an outcome consistent with the honour of the Crown and reconciliation (Cowichan, para 3642, 3691-3697). Similarly, in *Wolastoqey Nations v New Brunswick and Canada, et al.*, 2024 NBKB 203, the New Brunswick Court of King's Bench held that, were a declaration of Aboriginal title to be made to lands held in fee simple, "a constitutional declaration of Aboriginal title will trigger reconciliatory action on the part of the Crown and the Plaintiffs, as [the duty to negotiate] is now recognized as a *legal* duty, not just a moral one on the part of the Crown" (*Wolastoqey*, at para 178). Against that backdrop, Victoria's *Statewide Treaty* provides a model to learn from. Its core contribution is institutional: a

phased, co-designed architecture that centres Indigenous representation, establishes ongoing forums for negotiation and accountability, and embeds truth-telling as part of public governance. These features may offer useful points of comparison.

They may also be useful in the ongoing project to implement UNDRIP in Canada. The extant UNDRIP implementation legislation in Canada (that is, the Federal, BC, and NWT UNDRIP Acts) rely in part on a consistency-based model of implementation – they create a statutory obligation to take “all measures necessary” to ensure that their laws are consistent with the UNDRIP (for comment, see [here](#) and [here](#)). This will, over time, require the co-development of legislation aimed at aligning Canadian laws with the Declaration and the development of statutory regimes that meaningfully give effect to the rights outlined therein. The Tahltan agreement mentioned above is a product of one such regime. There are also several action items outlined in the Federal government’s UNDRIP [Action Plan](#) which might draw on the Victorian Treaty for some inspiration. For example, the government has committed to establishing “an independent Indigenous rights monitoring, oversight, recourse or remedy mechanism or mechanisms to provide Indigenous peoples with access to and prompt decision through just and fair procedures for dispute and conflict resolution and effective remedies for infringements/violations of their individual and collective rights.” (*Action Plan*, ch.1 art.19). The government commits to “honourably implement historic and modern treaties, self-government arrangements, agreements and constructive arrangements (*Action Plan*, ch.1 art.25) and to:

Work with Indigenous partners to ensure co-development of legislation, policies, programs, regulations and services furthers the right of Indigenous peoples to self determination, led by priorities and strategies determined and developed by Indigenous peoples, and that co-development processes result in initiatives that comply with Indigenous rights and advance Indigenous priorities. This includes advancing concrete measures co-developed under the permanent bilateral mechanisms process such as the Inuit Nunangat Policy and distinctions-based co-development principles. (*Action Plan*, ch 1 art 67)

In these and many other areas, the Crown and Indigenous nations need to think creatively about how to structure their relationships in productive ways. While the Victoria Treaty is a product of its specific context, it does have keys features of co-development, transparency, and accountability, grounded in Indigenous culture and values, that may be useful for consideration in Canada.

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