

Pathways to Treaty: Restoring the Reconciliation Roadmaps Ten Years on from CAR

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1. Introduction

Since early 2009 Reconciliation Victoria and ANTaR Victoria have maintained a combined working group on the issues of treaty between Aboriginal and non-Aboriginal Australians.² The working group is seeking to support an informed conversation about the concept of treaty and to extend the understanding of practical approaches through consideration of the possible model of a national treaty framework and local and regional agreements. This model is being examined with particular reference to its potential operation in the Victorian context and particularly in association with the role of local government authorities in the formation of local agreements.

The working group recognises a long-standing debate and investigation of treaty and that there are critiques of the idea.³ Without addressing this debate here, the working group starts from the position that a just base and identity for the Australian nation require the full-hearted examination of the prospect of treaty.

We utilise the work of the University of NSW Treaty Project in the book *TREATY*⁴ as a starting point for considering a model of a national treaty framework and local or regional agreements. We see this model as an alternative to a single national or two-nation approach, having merit in:

- defusing the intensity of the idea of a major national agreement, though the framework would necessitate important agreement at that level with necessary supporting elements;
- having a grounded and practical dynamic through the local focus; and
- enabling examination in the Victorian context where we are practically engaged, as being quite different from say NT, without claiming generalisability (although we hope to assist in developing general forms).

We follow the Treaty Project in utilising the term “treaty....to mean political agreements involving Indigenous peoples and governments that have a binding legal effect”, while recognising other terms might be used. In practice we focus extensively on agreement and agreement-making at the local level, where the core characteristics of treaty are reflected. These characteristics are seen to include:

- an agreement between parties
- a binding long-term commitment

¹ This paper is based on a panel presentation to the National Indigenous Policy and Dialogue Conference in Sydney in November 2010

² The term “Aboriginal” is used throughout to refer to Aboriginal people and Torres Strait Islander people

³ A recent critique being contained in Ch 8 *On Feeling Reconciled* of Peter Sutton, *The Politics of Suffering*, Melbourne University Press, 2009

⁴ Sean Brennan, Larissa Behrendt, Lisa Strelein, George Williams, *TREATY*, Federation Press, 2005

- a status outside the control of particular governments, supported by law
- being properly resourced and monitored
- having a capacity for review and extension through agreed processes

In this paper, we:

- examine the context for supporting consideration of treaty at this time, with particular reference to the recommendations of the Council for Aboriginal Reconciliation
- consider the status of the underlying principle of self-determination
- outline the possible components of a national treaty framework – local/regional agreements model
- examine more closely how planning and agreement-making at the local government level might be oriented towards this model
- identify possible ways in which the consideration of treaty, and this model in particular, might be encouraged.

We conclude that there is a need to promote a strong discourse about a model of this nature, and that in the Victorian context the reconciliation movement should develop its skills and focus on agreement-making particularly at the local and regional levels.

2. Context

2000 – 2010 – 2020?

The idea of treaty has been sustained over many decades through the persistent calls of members of the Aboriginal community, the consideration of the Makarrata concept through the National Aboriginal Conference and the work of the Australian Treaty Committee and the Senate Committee in the 1980s⁵, to more recent activities of the Black GST around the 2006 Commonwealth Games and the 2020 Summit.

We emphasise the last decade and the next as being critical for the reconciliation movement.

2010 was the tenth anniversary of

- Corroboree 2000 (May 27)
- Sydney Bridge Walk (May 28)
- Cathy Freeman Gold (Sept 25)
- Yothu Yindi sings Treaty (Oct 1)
- Melbourne Reconciliation Walk (Dec 3)
- Council for Aboriginal Reconciliation Final Report (Dec 7)

The work of the Council for Aboriginal Reconciliation⁶ needs to be returned to and recognised, including particularly *The Declaration Towards Reconciliation*, & *The Roadmap Towards Reconciliation*, which included national strategies for:

⁵ See the AIATSIS collection at <http://www1.aiatsis.gov.au/exhibitions/treaty/contents.htm> for documents from the 1980s and earlier

⁶ See <http://www.austlii.edu.au/au/other/IndigLRes/car/pubs.html#resource>

- sustaining the reconciliation process
- promoting recognition of Aboriginal and Torres Strait Islander rights
- overcoming disadvantage
- economic independence

and its final report, *Reconciliation: Australia's Challenge*, with its six recommendations (highlighting added):

1. COAG to implement & monitor national framework to overcome disadvantage
2. Support/strategies for *The Declaration Towards Reconciliation and The Roadmap Towards Reconciliation* by all governments
3. change the Constitution to recognise the First Peoples in a new preamble, remove the 'race powers' (Section 25) and introduce constitutional protections against racial discrimination
4. commitments from all sectors of society to affirm the declaration, action the roadmap, provide resources for reconciliation,
5. each government and parliament to **recognize that its land and waters were settled without treaty and negotiate a process to achieve these agreements/treaties** in order to protect Aboriginal and Torres Strait Islander peoples political, legal, cultural and economic position in society and
6. enact legislation for a process towards **agreement/ treaty** to resolve unfinished business of reconciliation

Significant steps have been taken on these recommendations with the initiation of the Close the Gap campaign and the current constitution review.⁷ However Recommendations 5 and 6 remain without significant attention.

In the present, there are identifiable opportunities for consideration of these issues through the National Congress of Australia's First Peoples and the review of the constitution, and related developments such as the Traditional Owner Settlement Bill (Victoria) and the *Agreements, Treaties & Negotiated Settlements* project at the University of Melbourne.

Can we form a new vision for this decade – a pathway to treaty, or at least to its strong underpinning, by 2020? We think so.

⁷ See ANTaR publication *Are we there yet? Ten years from the Decade of Reconciliation: A Reconciliation Progress Report* (November 2010) http://www.antar.org.au/are_we_there_yet

3. Self-determination

We acknowledge the principle of self-determination for Aboriginal people as a cornerstone of treaty development. It is a principle whose status has suffered through the critique of its attempted implementation by delegating the management of communities in the context and forms of non-Aboriginal society without the necessary resources. We consider that a renewed concept of "practical self-determination" is underpinned by:

- recognition of sovereignty, acknowledging that traditional owners and custodians of the land and waters have never ceded their sovereign rights
- recognition that Aboriginal peoples have been forcibly removed from their traditional lands but are still 'peoples', as defined by international human rights conventions
- the development of community controlled organisations and agencies; and
- ensuring that communities and community controlled organisations are resourced and allowed to act as equal partners

The recent consultation conducted by the Victorian Equal Opportunity and Human Rights Commission with Victoria's Aboriginal community about the right to self-determination, with a view to possible inclusion in the Charter of Human Rights and Responsibilities, provides much texture for this concept within a broad agreement that self-determination referred to 'the ability to have control over one's destiny'.⁸

4. National treaty framework – local/regional agreement model

In the past decade an approach to treaty based on local and regional agreements in a national treaty framework has been more formally proposed, rather than a focus on a single top-level national treaty.

Views of a "national treaty framework – local/regional agreements" model can be found in the publication from the ATSIC Treaty Think Thank, *Treaty: Let's get it right!* (in particular the contribution *Unfinished Business: A Shadow Across Our Relationships* by Mick Dodson)⁹.

They are further developed in the UNSW Treaty Project publication *TREATY* (pp 132-134) which summarises a possible approach as:

One option would be to work towards a single national treaty for Australia. However, even when expressed as a national issue, calls for a treaty generally also include a commitment to regional and local decision-making. The desire for a national treaty as well as for community-based decision-making might be met by establishing a national framework treaty that facilitates further agreement-making.

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http://www.humanrightscommission.vic.gov.au/index.php?option=com_k2&view=item&id=1347:talking-rights-consulting-with-victorias-indigenous-community-about-self-determination-and-the-charter-mar-2011&Itemid=690

⁹ *Treaty: let's get it right!*, ATSIC/AIATSIS, 2003

Patrick Dodson made an important contribution to this idea in his 1999 Vincent Lingiari lecture¹⁰. Under this approach, a national treaty could establish the framework within which treaties at the local or regional level could be negotiated.

The Treaty Project sees the components of a national treaty framework possibly including:

- Statement of recognition & acknowledgment
- Supporting framework for negotiation
- Implementation framework
- Legal protection

with further detail of these components extending to:

Supporting framework for negotiation

- policies & structures for more specific treaty-making
- content
- standards and benchmarks for recognition
- rights of indigenous people underpinning process
- supporting funding mechanisms
- responsibility for oversight of negotiations
- settlement of disputes
- role, if any, of courts

Implementation framework

- Structures to support and secure implementation of agreements
- Standards for treatment of negotiated treaty rights in relation to further actions of government

Legal Protection for other treaties and agreements reached in accordance with this

- Must have “hallmarks of a treaty”
- Developed and determined jointly by the state and by Indigenous peoples
- Contain substantive provisions beyond mere platitudes
- Be binding on governments and other persons

The possible components of local or regional agreements may include:

- Setting: Recognition and acknowledgement; Principles and purpose
- Governance: Jurisdiction & authority; Indigenous governance
- Content: Land and economic settlements; Policy and program design (land and resource management, health, protection of cultural heritage, employment, education); Program and service delivery
- Other Agreements: including cessation of claims
- Implementation: including monitoring

¹⁰ <http://www.austlii.edu.au/au/other/IndigLRes/car/1999/2708.html>

6. Possible phases in Victorian Local Government Authorities

Increasing attention is being given in Victoria to the role of Local Government Authorities (LGAs) in establishing plans and agreement in association with Aboriginal communities; Reconciliation Victoria currently has a government-funded project on local government and reconciliation. It is pertinent to consider how this activity might be placed in a context of local and regional agreements within a possible national treaty framework, recognising that LGAs may be the primary interface for many agreements – singly or in regional groups - although not having all the necessary powers of service provision and commitment.

We observe that there may be identifiable phases of development toward a treaty environment, as the table below suggests:

	1.	2.	3.	4.	5.
PHASE	Engagement in reconciliation activities but no firm commitments	Plan of activities developed within responsibilities of Council staff	Plan of activities developed as part of general Council planning process	Council Plan recognises a binding agreement to a range of actions	Form of local treaty structure or agreement in a national treaty framework
Nature of Agreement	None	Identified document drawn on by Council	Acknowledged as relevant document and actions imbedded in Council Plan	Recognised as a parallel document to the Council Plan with detailed responsibilities drawn into the Plan; maybe MoU	Agreement has separate legal status, to which Council is a party. May be based on Aboriginal traditional land boundaries, include other Councils, levels of government.
Nature of ongoing Steering/Monitoring structure	Probably none	Essentially a reference group for Council staff member/s	Advisory Committee to Council or possibly a Standing Committee	Strong Advisory Committee to Council, Standing Committee, or other	A body outside Council structures, including Aboriginal community representatives, probably other levels of government
Characteristic	Piecemeal reconciliation activities identified by Council staff or non-Aboriginal community	Activities within the position descriptions of Council staff, limited community engagement	Council commitment, based on consultation with Aboriginal community	Negotiated agreement with joint commitments of Aboriginal and non-Aboriginal community	Long-term negotiated agreements

These phases might each take a reasonable period to establish and implement, possibly fitting to a review process in a Council cycle, with an associated Council Plan, of four years or longer. Moving from Phases 1 or 2 to 4, to a position to consider a more formal agreement structure, might therefore be an eight-year process.

From examination of websites in 2009, we could plot the status of Victorian LGAs against these phases. Of the 79 LGAs

- about half appeared to be at most at Phase 1, with many having no overt reconciliation activities;
- about a quarter were in stages of developing plans which might be considered Phase 2;
- most of the remaining quarter may be considered to be at least in Phase 3, having well-established approaches to reconciliation action plans or similar, some having these in place for over a decade with several reviews, or being engaged in regional bodies such as the Inter Council Aboriginal Consultative Committee.

A body of experience exists to be drawn on to support LGAs in the earlier stages of engagement in these phases. However, from the point of view of agreement-making in a treaty framework, the key phases are 4 and 5 where there appear to be significant issues in moving into these phases and limited, although pertinent, experience.¹¹

Phase 4 suggests a step of establishing an agreement with a status not solely contingent on the Council Plan, though the content is acknowledged within the Plan. It is a substantial agreement, with content covering areas of LGA service and including advocacy to other levels, but it is still clearly within the powers and control of Council.

Phase 5, entering into a long-term binding agreement, appears to require a different format to agreements within the cycle and control of a Council Plan. Entering into longer-term agreements may be beyond the powers of LGAs. If the agreement is based on traditional boundaries it will very likely include multiple LGAs, and its content (e.g., education, housing) require the engagement of other levels of government, though the LGAs may be the primary on-the-ground interface.

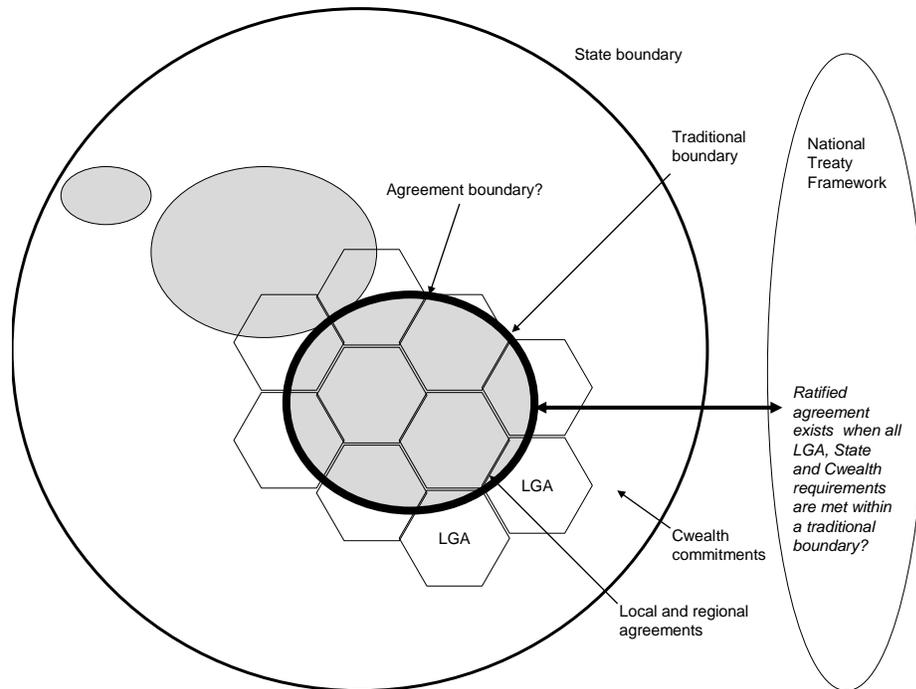
Consideration of parties to such an agreement will therefore raise questions such as:

- Just a single local government authority?, other regional councils in the local Aboriginal country?, other levels of government?
- Who and how in the Aboriginal community? Would this differ for different components of agreements (e.g., traditional owners for land and cultural heritage issues, other community organisations for service-related issues?)

¹¹ We note that the recent development of trademarked Reconciliation Action Plans by Reconciliation Australia, with its organisation-centric approach, might take an LGA into Phase 2 or 3, but is unlikely to provide the orientation to agreement-making processes required in Phases 4 and 5.

There may be a need for facilitators of this process beyond the staff of LGAs. This facilitation and the necessary format could be supported through a national treaty framework, or a state-level implementation approach.

The following schematic is a representation of the national treaty framework – local/regional agreements model interpreted with LGAs as core components:



We are not aware of any examples of this level of agreement-making in the Victorian or broader Australian context. There are, however, examples of components in Victoria such as:

- the Inter Council Aboriginal Consultative Committee, in which eight LGAs in southern Melbourne have formed a partnership with the Aboriginal community¹²
- the Shepparton COAG trial, based on a Compact between the three levels of government and Aboriginal community representatives¹³
- the Memorandum of Understanding approach initiated by the Shire of Glenelg in 2003 which has evolved to a recent Aboriginal Partnership Agreement¹⁴

¹² <http://www.icacc.org.au/>

¹³ See an evaluation of the trial at http://www.fahcsia.gov.au/sa/indigenous/pubs/evaluation/coag_trial_site_reports/vic_coag_trial/Pages/default.aspx

¹⁴ http://www.glenelg.vic.gov.au/Page/page.asp?Page_Id=2760&h=1

- the formal structure of the Darebin Aboriginal and Torres Strait Islander Community Council

These initiatives have, however, had mixed success; their experience needs better understanding.

7. Continuing the journey ...

Proceeding down a pathway to a strong base for treaty by 2020 requires a range of actions including:

- A new federal dialogue or project, which might be encouraged by national ANTaR and Reconciliation Australia
 - How to progress a national/state/local agreement/treaty framework?
 - What kind of national leadership, state representation, local engagement?
- Within Victoria, a focus on agreement-making at the local and regional levels which might be encouraged by Reconciliation Victoria and ANTaR Victoria through local groups, links to local government, and engagement with state government
- Engagement with the opportunities arising from the establishment of the National Congress of Australia's First Peoples and the constitution review
- Perhaps an annual conference or thread within a conference to maintain this dialogue