Australian National University

February 2024

First Nations Portfolio
+61 2 6125 0092
firstnations@anu.edu.au

Treaty Literature Review

First Nations Portfolio

Australian National University

Prepared by FNP Research Assistant Elias Deprez

February 2024

A note to the reader

The First Nations Portfolio (FNP) at the Australian National University (ANU) aims to make a leading contribution to a more constructive relationship between First Nations peoples and the Australian nation state. Engaging in understanding the question of treaty-making in Australia is an important aspect of this aim.

When we began this review, we sought to examine the current status and findings of research on treaties. Prime Minister Albanese (2022) committed his government to implement the Uluru Statement from the Heart (hereafter Uluru Statement) "in full" on election night, which was momentous for the nation. Progressing First Nations interests through the pathway mapped out in the Uluru Statement: Voice, Treaty, Truth, was beginning to look like a serious possibility. Through our initial focus in this literature review, we sought to understand what negotiating a treaty might mean in that context and, in light of developments at the state and territory level, what the research said about treaty in Australia. When the referendum on the Aboriginal and Torres Strait Islander Voice failed on 14th October 2023, the FNP shared the disappointment of many in Australia – and nowhere was that disappointment felt more acutely than amongst First Nations people. As a result, we felt our work on treaties was more necessary than ever. Community discussions on the nature and possibilities offered by treaties had been amplified during the referendum campaign. These conversations have continued in the aftermath of the failure of the referendum. This literature review shows that First Nations peoples have called on Australian governments and others to engage on the question of treaty since the early days of colonisation. We believe that those calls will continue until their aspirations are met fairly and respectfully by governments, and the wider Australian society.

The FNP created this literature review to serve as a preparatory document for participants of the invitation-only Treaty Research Webinar, co-hosted by ANU FNP and the ANU College of Law, which took place on 21 February 2024. The event brought together researchers and First Nations representatives working on state and territory treaty processes ('treaty practitioners') to explore a possible research agenda that would be most beneficial to practitioners and to advancing substantive treaty-making in Australia. A summary report of the Webinar complements this literature review, highlighting themes and issues for further research attention.

Through this literature review and hosting the Webinar, FNP seeks to encourage further research into treaties between First Nations peoples and governments in Australia. FNP hopes this literature review will encourage the exploration of opportunities to conduct research that is useful for First Nations peoples who are seeking to negotiate treaties with Australian governments. FNP is committed to supporting that goal and we hope that further research will

encourage dialogue and assist in addressing challenging and complex issues that stand in the way of advancing effective treaty-making in Australia.

Notes on terminology

First Nations peoples, Indigenous peoples

We acknowledge that while the term '**First Nations peoples**' is not a universally adopted term for the First Peoples of Australia, it is used in this literature review in recognition of the continuing sovereignty of First Peoples over the lands and waters of what is now known as Australia. Our decision to use 'First Nations' is also reflective of the increased usage and popularity of the term in academic literature, the political sphere and at grassroots levels.

When referring to a First Nations person, where possible we reference that person's Nation, People, and/or community. This is to respectfully recognise that for First Nations people, one's knowledge is inextricably linked to one's identity, and that identity is more appropriately described at the level of one's Nation, People and/or community.

When discussing the international context, we use the term '**Indigenous**' as it is a category recognised in international law that can be used for the Indigenous peoples of the world, including in New Zealand, Canada and the United States – jurisdictions explored variously throughout this literature review. We acknowledge that the term 'First Nations' only refers to some Indigenous peoples in Canada and is not used to refer to Māori.

Place names

Aotearoa is the term used for 'New Zealand' in Māori language today. **Aotearoa** is used throughout this work, except where referring to government, parliament and courts, as they are non-Māori institutions.

'Lutruwita' is the term used for Tasmania in palawa kani (the reconstructed First Nations language of Tasmania) today. Although it is intended to refer to the main island of Tasmania, '**Lutruwita/Tasmania**' is used throughout this work to refer to the state of Tasmania, to reflect its increasing adoption in media and by First Nations advocates. Tasmania is used where referring to government or parliament. No known First Nations terms exist to refer to the whole of any other state or territory in Australia.

Although some First Nations in Canada and the US refer to the continent of North America as Turtle Island, here we have chosen to use **Canada** when referring to Indigenous Canadians. The name Turtle Island is not used by all Indigenous peoples of Canada, and we also seek to refer to experiences and practices emerging from the treaty processes specific to the nation-state of

Canada. At times we refer to North America to encompass both Canada and the US, but research on Canada forms the bulk of our focus from this region.

Treaties

It remains unclear what form treaties could take at the national level in Australia. An important question is what would truly encapsulate the diverse aspirations of First Nations peoples with respect to treaties? Would a single national treaty between the Commonwealth and all First Nations peoples of Australia be most appropriate? Or would multiple treaties between the Commonwealth and each First Nation (or strategic regional alliances of First Nations)? Or would a single national framework setting the standard for treaties to be negotiated at the regional level (state/territory/local) be most effective and appropriate? In this literature review, we use the plural '**treaties**' to encompass all of these possibilities, as a single answer does not emerge from the literature.

Settler-colonialism and settler states

In this literature review, we refer to the nations of Australia, New Zealand, Canada, and the US as **settler-colonial nations** or **settler states**. The term settler-colonialism originates in scholarly writings by Australian historian Patrick Wolfe, who sought to identify and understand the distinctive nature of colonisation in places like Australia. Wolfe (2006, p. 388) describes settler-colonialism as a form of colonialism where the colonisers "come to stay". Extractive colonialism, by comparison, describes where a colony provides cheap or free labour and resources to be sent back to European centres (Tuck & Yang 2012; Wolfe 2006). Settler-colonialism is different because settler-colonisers seek land as the end goal. Wolfe (1998, p. 3) argues that colonisers seek to establish a new European society on Indigenous lands, claiming lands and resources and, in doing so, their societies are "premised on the elimination of the native societies". Settler-colonialism is ongoing in Australia. Wolfe (1998, p. 2) described it as "a structure not an event". Similar perspectives have been shared by First Nations people in Australia. To highlight the ongoing effects of settler-colonial structures in Australia, First Nations artist, Ziggy Ramo, in his song 'Little Things' with Paul Kelly (2021), describes First Nations deaths in police custody as "the casualties of a war that never ended". Yawuru lawyer and scholar, Michael Dodson (2006, p. 117) argues that: "There has been no peace treaty therefore; technically a state of war still exists." It follows, then, that treaties could offer an end to the ongoing war of **settler-colonialism** in Australia.

Acknowledgements

I would like to thank Thomas Snowdon for providing an in-depth review of this literature review. Thank you also to Brian Stacey and Suzanne O'Neill for providing vital feedback. A big thank you to Dr Siobhan McDonnell and Emeritus Professor John Taylor for providing in-depth reviews of an earlier version of this work. Thanks also to the Policy and Research Team at FNP and Dr Harry Hobbs for providing some guidance on an earlier version. I would also like to acknowledge the team who put their time, thought and effort into creating this work in the first place: Brian Stacey, Associate Professor Elise Klein and Dr Siobhan McDonnell.

Contents

A note to the reader 2

Notes on terminology 4

Acknowledgements 6

Contents 7

1. Introduction 11

1.1 Structure 12

SECTION A: Defining treaty 14

2. The legal definition of a treaty 14

2.1 Recognition as polities 14

2.1.1 Peoplehood 14

2.1.2 Sovereignty 15

2.2 Settlement of claims: perspectives from Canada and Aotearoa 22

2.2.1 Treaties as relationships and responsibilities 22

2.2.2. Indigenous sovereignty upheld by treaties 24

2.2.3 Settlers seeking *final* settlements: cession of lands and extinguishment of sovereignty through treaties 26

2.2.4 First Nations peoples in Australia also seek treaties for setting the terms of the relationship with non-First Nations people 29

2.3 Contested definitions 30

SECTION B: Treaties between First Nations peoples and Australian governments 32

3. Historical overview 32

3.1 Nineteenth-century agreements 32

3.2 Twentieth-century calls for treaties from First Nations representative bodies and some non-First Nations leaders 36

3.3 1990s-2010s: Reconciliation and constitutional recognition 38

4. Status of treaty negotiations in Australia (current as of January 2024) 41

4.1 Early lessons from Victoria 41

4.1.1 The process thus far 41

4.1.2 Themes from the emerging academic literature 42

4.1.3 First Nations choosing not to participate 43

4.2 Queensland's Path to Treaty 45

4.2.1 The process thus far 45

4.2.2 Misunderstandings and misinterpretations 45

4.3 Other states and territories 48

4.3.1 South Australia 48

4.3.2 Northern Territory 48

4.3.3 Lutruwita/Tasmania 49

4.3.4 Australian Capital Territory 50

4.3.5 New South Wales 50

4.3.6 Western Australia 50

4.4 Makarrata Commission 51

SECTION C: Making treaties 53

5. Reasons First Nations peoples seek to negotiate treaties 53

5.1 Treaties can uphold rights 53

5.2 Power-sharing arrangements under treaties 55

5.3 Reparations and compensation can be negotiated in treaties 57

5.4 Why treaties should sometimes *not* be sought 62

6. The processes and structures that can enable treaty-making 64

6.1. Legal structures 64

6.1.1 Federalism 64

6.1.2 Constitutional or legislative entrenchment 66

6.2 Nation-(re)building 68

6.3 British Columbia's modern treaty-making process 70

6.4 Negotiating in good faith 71

7. Representation: First Nations parties 72

7.1 First Nations representative bodies in negotiations 72

7.2 Representing other perspectives 74

SECTION D: The non-First Nations party to treaties 76

8. Truth-telling 76

8.1 Truth-telling creates support for treaties 76

8.2. Attitudes towards First Nations peoples and treaties 79

9. The role of the public service in negotiating and implementing treaties 82

9.1 Australian Public Service 82

9.1.1 Australia's state and territory public services 84

9.2 The role of the public service in other English-speaking settler states 86

9.2.1 Aotearoa 86

9.2.2 Canada 88

10. Conclusion.....91

Reference List.....95

1. Introduction

Across the British colonial empire and its former colonies, treaties have been an important means of establishing and maintaining relationships between settler-colonial states and Indigenous peoples (Langton, Tehan & Palmer 2004). Among the lands colonised by the British, Australia is the notable exception. In Aotearoa, Canada and the US, treaties were negotiated with Indigenous peoples centuries ago (and Canada commenced an ongoing process of modern treaty-making in the 1970s). Although treaties have been a longstanding aspiration of First Nations peoples in Australia, none have ever been formally negotiated between the state and First Nations peoples (Williams & Hobbs 2020, p. xv). It is, undoubtedly, a topic of “unfinished business” in Australia (Dodson, M 2003; Dodson, P 2000). Some have suggested that the historical absence of any treaty is of such foundational significance that it raises questions about the legitimacy of the sovereignty of the Australian nation state (Dodson, M 2006; Hobbs & Jones 2022; Lavery 2019, 2022). In recent years, momentum has been building for treaties in Australia, particularly at the state and territory level. The commitment of the Albanese Labor Government in 2022 to implement the Uluru Statement from the Heart, a manifesto formed from nation-wide consultations with First Nations peoples which called for a constitutionally enshrined Voice to Parliament and a Makarrata Commission to supervise truth-telling and agreement-making, generated new momentum at a national level. The word 'treaty' does not appear in the Uluru Statement – instead, it uses the terms "Makarrata" and "agreement-making" (*The Uluru Statement from the Heart* 2017). However, the resounding catchcry of 'Voice, Treaty, Truth' in response to the Uluru Statement clarifies that treaties encapsulate this desire. Legal scholars, Megan Davis and George Williams (2021, p. 93) explain also that in relation to the Uluru Statement, "the term 'agreement-making' is interchangeable with 'treaty'".

The defeat of the referendum on the ‘Aboriginal and Torres Strait Islander Voice to Parliament’ on 14 October 2023 appears to have slowed some of the momentum for treaties. In response to the referendum’s defeat, Yiman and Bidjara anthropologist and First Nations leader, Marcia Langton, declared “reconciliation is dead” (as quoted in ABC News 2023), indicating the frustration felt by First Nations leaders. Although the debate in the lead up to the referendum demonstrated significant levels of support for treaties from First Nations people, following the referendum result, at the state and territory level, some government and opposition leaders have expressed intent to walk back on their previous support for treaties. In Queensland, the Liberal-National Party Opposition soon after the referendum pledged to repeal the State’s Path to Treaty legislation despite having supported its passage five months earlier; to which the Queensland Labor Government suggested that bipartisan support was needed to proceed with treaties (Gillespie 2023). Such political developments, and the mood of the nation following the

referendum, leave serious questions about the likelihood of the Australian Government continuing their commitments related to treaty-making, despite its earlier commitment to a Makarrata Commission.

In spite of this political climate, First Nations people will likely continue to call for advancing treaties, as they have done for decades (Butler 2023b). Research, education and evidence-based policy development can inform public debate and address complex and entrenched barriers to treaties, as well as help to chart new, creative paths to agreements that provide for a more constructive relationship between First Nations peoples and the Australian nation state.

This review was conducted to examine the literature on treaties in Australia to date, and to identify the gaps. Treaties have been a topic of research since First Nations peoples began calling for them on a national level, since at least the late 1970s. The times where calls for treaties have been loudest in the national public debate – the late 1980s, the early 2000s, and since the publication of the Uluru Statement from the Heart in 2017 (see Section B, Chapter 3) – have also been the times where academic research into treaties has been most prolific. The majority of academic literature on treaties has been completed by legal scholars, although some works have also been contributed from other disciplines, including anthropology, Indigenous studies, political science, history, public policy, media studies, theology, education, and various multidisciplinary approaches[1]. Much of the research to date draws upon the experiences of Indigenous peoples in North America and Aotearoa to provide useful guidance, but particularly to warn against practices which have not been fruitful, and sometimes have been harmful, towards Indigenous peoples in those settler-colonial nations.

1.1 Structure

This literature review is divided into four sections: A) Defining treaty; B) Treaties between First Nations peoples and Australian governments; C) Making treaties, and; D) The non-First Nations party to treaties. In Section A, we explore the complex debates in the predominantly legal literature over what a treaty is, noting that the chosen definition of treaties will determine whether or not they are achieved in Australia. We also look beyond the legal scholarship to the perspectives of Indigenous scholars in Canada and Aotearoa who conceive of treaties through the lens of relationships. Section B provides an account of the history of treaties between First Nations peoples and Australian governments. Chapter 3 examines historical agreements that have been labelled as treaties, as well as the history of First Nations peoples and some settler Australians calling for treaties to be negotiated. Chapter 4 provides an overview of treaty talks

[1] See for example, Fredericks 2022, Deagon 2022, Rigney L-I 2003.

between the state and territory governments and First Nations peoples in their jurisdictions. Victoria in particular is looked at in some detail, as the furthest progressed in their journey to treaties, with formal negotiations due to commence in 2024.

Section C focuses on some of the issues pertaining to the making of treaties. Chapter 5 explores three reasons that First Nations peoples seek to negotiate treaties with Australian governments, including providing protection for Indigenous rights, creating power-sharing arrangements, and the provision of reparations and compensation. Chapter 6 analyses some of the structures and processes that may be used to negotiate and implement treaties. The structure of Australia as a federation is examined through the possibility of including First Nations as another level of government, as is the possibility of protecting treaties through the Constitution or domestic legislation. The process of nation-(re)building for First Nations is also explored, as well as lessons learned through the British Columbia modern treaty-making process in Canada. Then, in Chapter 7, we examine the issue of how First Nations parties to treaties may be represented during negotiations. In particular, this draws upon the experiences of the First Peoples' Assembly of Victoria.

Section D then brings into focus the non-First Nations party to treaties. Chapter 8 examines the essential role of truth-telling in treaty-making, and the influence that the attitudes of settler Australians towards First Nations peoples can have on the possibility of treaty-making in Australia. Chapter 9 then probes the role of the public service in the negotiation and implementation of treaties. International perspectives and government reports are examined for recommendations as to how to prevent the public service from being a barrier to treaties in Australia. We then conclude the literature review with a summary of the findings, with a particular view to what further research is necessary to address the problems faced by those seeking to advance treaties in Australia.

SECTION A: Defining treaty

2. The legal definition of a treaty

How treaties are defined is essential to determining whether or not they are achieved in Australia. The book *Treaty* is the most comprehensive work on treaties in Australia to date. In the first edition of *Treaty*, legal scholars Brennan et al. (2005, p. 3) describe treaties as "political agreements involving Indigenous peoples and governments that have a binding legal effect". The three key elements of such agreements are listed as acknowledgement, negotiation, and outcomes (rights, obligations, opportunities) (Brennan et al. 2005, p. 3). In the second edition of *Treaty*, legal scholars Williams and Hobbs (2020, p. 2) update the definition of treaties to "a means of resolving differences between Indigenous peoples and those who have colonised their lands". The three key elements are also updated, having regard to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). They are listed as "recognition as polities", negotiation, and "settlement of claims" (Williams & Hobbs 2020, p. 7). In this section, recognition as polities and settlement of claims are explored in greater detail. Negotiation is later explored in Section D with a focus on the non-Indigenous party, with special regard to the Australian public service and its role in treaty-making.

2.1 Recognition as polities

2.1.1 Peoplehood

The recognition of First Nations in Australia as distinct polities has been raised by some as an important aspect of treaty-making. Hobbs (2019, pp. 176-177) describes a polity as “a political community differentiated from and different to other citizens of the state… Indigenous peoples are not merely an ethnic or cultural minority group, but a distinct society whose relationship to the state must be mediated in a dialogic fashion.” First Nations peoples are distinct from other Australians because they are “prior self-governing communities” with deep connections to, and custodianship of, their traditional land and sea territories (Hobbs 2019, p. 176; Smith, Diane 2021, p. 111). Accordingly, First Nations peoples can assert distinctive rights as Indigenous peoples. Hobbs (2018, pp. 177, 188) argues that Australian citizenship is not inclusive of “Indigenous peoplehood”, and suggests treaties could provide the “ideal mechanism” through which to recognise this distinct peoplehood. Langton, Tehan and Palmer (2004, p. 21) suggest that the negotiations required in the determination of native title in Australia forced governments “to

treat Aboriginal people… as peoples". Despite the existence of native title, due to the absence of historical treaties in Australia, Australian governments generally do not engage with First Nations peoples as polities. Treaties would recognise First Nations peoples as polities. Rigney, Bell and Vivian (2021, p. 22) suggest that the recognition of First Nations as polities is essential to being a party to a treaty. Recognising First Nations peoples as distinct polities is both the starting point, and a goal, of treaty-making.

In Australia, recognition of and engagement with First Nations peoples as polities by the settler-colonial state has been limited and is fraught in many ways. Some academics argue that Australian governments seek to deny the existence of First Nations peoplehood or polities. For example, Hobbs and Williams (2018, p. 7) suggest that in Australia, "governments have preferred to conceive Indigenous peoples as cultural or ethnic minorities within a larger undifferentiated political community". In doing so, governments attempt to "eras[e] their status as a polity and robbing their calls of political force" (Hobbs & Williams 2018, p. 8). By conceiving of First Nations peoples as a cultural/ethnic minority, rather than a distinct polity with political claims, Australian governments attempt to quash the political and legal questions that the existence of Indigenous polities raise within the settler-colonial state. Political scholar Elizabeth Strakosch (2019, p. 120) argues that the Australian Government "targets Indigenous political difference by attempting to deny, destroy or absorb it". Attempts to obscure difference demonstrate an attempt to assimilate or domesticate First Nations peoplehood into the settler-colonial state. Strakosch (2019, p. 120) argues settler-colonial governments attempt to assimilate First Nations political difference so that "settler sovereignty can finally become what it already claims to be – completed, unified, authoritative, universal and neutral." As settler-colonialism is a structure, not an event, settler-colonial governments and societies continually evolve methods of dispossession. Diminishing First Nations peoples' claims to Indigenous peoplehood continues to dispossess First Nations peoples of their lands. Dispossession is "a 'perpetual' project that continues as Indigenous people continue to assert sovereign authority" (Strakosch 2019, p. 120). It is this sovereign authority that gets to the heart of what, for many, treaties are about.

2.1.2 Sovereignty

First Nations sovereignty

The recognition of Indigenous peoplehood is linked to concepts of sovereignty and authority. Many academics and First Nations leaders have argued that First Nations sovereignty must be recognised in treaties. Brennan (2005a, p. 127) describes treaties as fundamentally "a mutual

recognition of authority". For First Nations peoples, however, sovereignty arises from the unique relationships they possess to Country. In the Uluru Statement from the Heart, sovereignty is described as:

> "*a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty*." (emphasis in original text, *The Uluru Statement from the Heart* 2017).

The spiritual relationship to ancestors and Country is the basis of sovereignty. Country is all-encompassing: all aspects of Country have relationships to one another, including "humans, more-than-humans and all that is tangible and non-tangible" (Bawaka Country et al. 2016, p. 456). For example, Tanganekald, Meintagk and Boandik legal scholar Irene Watson (2009, p. 41) describes land as "a relation: a mother, father, grandmother, grandfather". These types of relationships make First Nations people inseparable from Country. This is informed by the ancestors and law:

> "It is our home because it is who we are; it is home to our songs and laws that lie in the land; it is our relative… Our ancestors are alive in the land." Watson (2009, p. 40)

It is through this relationship to Country that First Nations peoples articulate their sovereignty. Ngarrindjeri academic, Daryle Rigney, explains that for citizens of the Ngarrindjeri Nation, they have sovereignty *as* Country:

> "For Ngarrindjeri people, we are being land through our being body: land and waters, body, spirit are all connected. That is, we don't see ourselves as separate and distinct from Country; we *are* Country: we speak *as* Country." (emphasis in original text, Rigney, D, Bell & Vivian 2021, p. 34).

First Nations people, therefore, have authority for Country, and can speak for Country, because they *are* Country, and thus speak *as* – not for – Country. Gunditjmara man and community leader Damein Bell rejects sovereignty as a "European framework"; his community uses the term 'Gunditjmara People' over terms like nation (Rigney, D, Bell & Vivian 2021, p. 37). Both Bell and Rigney's discussions are rooted in their connections to Country. Both suggest that settler Australia should negotiate a treaty with Country *itself*: "'a treaty with Country is a treaty with us'" (Rigney, D, Bell & Vivian 2021, pp. 32, 34). What this may look like in practice is unclear, but this raises important questions as to how First Nations peoples may be approaching major concepts

underlying treaties, such as sovereignty, differently from non-Indigenous governments and people.

From the perspective of a western system of law, First Nations sovereignty is derived from their status of prior, self-governing societies or nations. Hobbs and Williams (2018, p. 7) explain that First Nations are polities in Australia because of their "long history of operating as a distinct society, with a unique economic, religious and spiritual relationship to their land". This sovereignty in international law can be recognised as a "sub-state unit" (Hobbs & Williams 2018, p. 7). The recognition of Indigenous sovereignty within a settler-colonial context is provided for in UNDRIP. Indigenous peoples are recognised to "have multiple nested or overlapping nationalities" (Hobbs & Williams 2018, p. 8). Strelein (2021, p. 96) warns against conflating statehood with sovereignty, as First Nations sovereignty can co-exist domestically and internationally with Australia's internationally-recognised statehood. As such, Strelein (2021, p. 93) has suggested that contrary to fears held by some First Nations peoples, state- and territory-based treaties in Australia cannot extinguish Indigenous sovereignty, as treaties are platforms upon which First Nations peoples can "assert their sovereignty rather than concede their sovereignty". First Nations sovereignty in Australia is congruent with international law. However, whether First Nations peoples should negotiate treaties on this understanding – that is, as international treaties under the Vienna Convention, or as domestic arrangements, is a topic of debate in the literature.

The debate over domestic or international treaties

There are a wide range of perspectives on whether treaties between First Nations peoples and Australian governments should be negotiated as international or domestic treaties. Domestic treaties are matters of Australian domestic law, generally understood to uphold the sovereignty of the Australian nation-state in international law, whilst having the potential to recognise the co-existing sovereignty and self-determination rights of First Nations peoples to their Country. Modern treaties, such as those negotiated in British Columbia, are domestic treaties. The state- and territory-based treaty processes commencing in Australia now (examined further in Section B Chapter 4) also come under the category of domestic treaties. As the only treaty option currently on the table with any Australian government, much of the literature has explored treaties in Australia through this domestic treaty lens (see for example: Hobbs 2024; Hobbs & Larkin 2022; Maddison, Hurst & Wandin 2021; Williams & Hobbs 2020). However, domestic treaties have been criticised for their vulnerability to unpredictable domestic politics (Wood 2021). In South Australia, for example, an early attempt at treaties in 2016, which involved preliminary negotiations with Ngarrindjeri and Narungga peoples, was abandoned with a change of government in 2018 (Morris & Hobbs 2023, p. 15). The process was not without criticism before it was abandoned. A letter from the Ngarrindjeri representative to the SA Government's head

negotiator likened the treaty process in SA to "a *service based agreement*", labelling it an "improper" use of the term treaty (as cited in Rigney, D et al. 2021, p. 130). Following another change of government in 2022, the process recommenced (Ilanbey 2022; Smith, Douglas 2022). Domestic treaties appear vulnerable to changes in domestic politics.

Beyond the unpredictable nature of domestic politics and limitations in Australian domestic law, international law has been proposed as a chance for a more equitable negotiating process. Torres Strait Islander legal scholar Asmi Wood (2022a, p. 233) has argued that First Nations peoples in Australia can draw on UN instruments to frame the development of treaties at the international level, which could help to achieve a more equitable outcome. This would be particularly useful to overcome the inherent power disparities between the settler-colonial state and its wealth of resources in legal matters. Most academics writing on treaty reference these power disparities when analysing the often disappointing implementation of both domestic and international treaties in other settler-colonies, such as Aotearoa, Canada and the US. In recent years, the modern, domestic treaty-making processes underway in Canada have been studied. Young and Hobbs (2021, p. 178) argue that the underwhelming outcomes of these modern treaties is likely because "working within the state-based legal status quo can perpetuate settler-colonialism". Wood and Gardiner (2021, p. 77) similarly refer to these experiences to argue the utility of negotiating treaties at the international level – reducing the ability of politicians to abandon or weaken treaties during times of more racist political climates. Others have also argued that an international status to treaties could have other benefits such as a stronger protection of treaties and a stronger basis for demanding reparations (Mansell 1989; Treaty 88 Campaign 1988; Wood 2021, 2022a; Wood & Gardiner 2021). Negotiating treaties in Australia as international treaties may be more effective, but would also require the Australian Government's commitment.

However, international law also has limitations for carrying out treaties between First Nations peoples and Australian governments. Strelein (2021, p. 89) argues that international law has a bias towards nation-states. The UN system's inherent bias towards *existing* recognised states means, according to Strelein (2021, p. 89), that "Indigenous peoples are expected to explore and exhaust all domestic legal (usually limited to judicial) means to resolve their claims before taking their claims to the United Nations". As Strelein (2021, p. 89) suggests that "international recognition and statehood" is unlikely to eventuate for First Nations peoples in Australia, it is then concluded that international law may have limitations in delivering justice through treaties for First Nations peoples. International law may not, in practice, provide much more of an independent, neutral negotiation space than domestic law could. Watson (2012, p. 14) has suggested, however, that an "international independent mechanism" could be established to facilitate equitable treaty negotiations. Offering a compromise between domestic and international treaties, Palawa activist and lawyer Mansell (2016, p. 153) suggests that treaties

could be negotiated domestically, then registered internationally with the UN for an additional layer of accountability. Yawuru man Michael Dodson (2006) discusses the benefits of domestic or international negotiations, but does not advocate for one over the other. Evidently there is a wide range of perspectives in the academic literature as to the limitations and opportunities of negotiating treaties under domestic legal systems and politics, compared to international law. Different concepts of sovereignty can also influence the ways in which these limitations and opportunities are viewed.

Settler Australian sovereignty

Many legal scholars have suggested that a treaty process to deal with the question of sovereignty would benefit Australia as a nation due to unresolved questions over the legitimacy of the Australian settler-colonial state. Some Australian legal experts have pointed to the illegality of the British settlement of Australia, including according to British imperial law at the time of invasion, and the ambiguity of Australia's sovereign status as a result of this illegality. McKenna, B and Wardle (2019) argue that the illegality of Australian settlement has been covered up over centuries through a re-writing of history and creations of fictions through legal instruments and political discourse. Early colonial court cases recognised First Nations sovereignty, but later the narrative of terra nullius would prevail (McKenna, B & Wardle 2019, p. 38). McKenna, B and Wardle (2019, pp. 57-58) argue that British sovereignty was created through legal fictions and re-writing history, because British colonial authorities sought to "legally authoris[e]" massacres of First Nations peoples, including in 1928 as Australia – no longer a British colony – enacted its "last State-sanctioned massacre" in Coniston, Northern Territory. Evidently, the issue of sovereignty does not exist only in a legal theoretical sphere but has real world implications.

Determining sovereignty is ultimately about power. Treaties between First Nations peoples and governments could create new power-sharing arrangements in answer to the question of conflicting claims to sovereignty. First Nations sovereignty has not disappeared despite British and Australian claims over the lands and waters of what is now Australia. This is supported by a multitude of academic works (see for example: Brennan, Gunn & Williams 2004, p. 313; Hobbs & Williams 2020, p. 223; Larkin et al. 2022, p. 47; McKenna, B & Wardle 2019, p. 56; Wood 2022a, p. 244), as well as continued campaigning by First Nations people (as reflected in State of Queensland et al. 2021, pp. 5, 9; Yoorrook Justice Commission 2022, p. 74) – in particular the catchcry 'sovereignty was never ceded'. As many First Nations individuals have articulated, it is their unique relationships to Country that mean their "sovereignty is by its very nature ceaseless"

(McKenna, B & Wardle 2019, p. 56). If sovereignty remains with First Nations peoples, then First Nations peoples remain entitled to exercise power over their domains[2].

Many academics have argued that the way in which the Australian state (initially as Great Britain) gained sovereignty in Australia opens many questions. Given that sovereignty was never ceded by First Nations peoples, Yawuru lawyer and scholar Michael Dodson, M (2006, p. 118) argues that the foundations of the nation-state's sovereignty in Australia are "at the very least, a little legally shaky". Similarly, lawyer and scholar Daniel (Lavery 2019, p. 267; 2022, p. 530) argues that the acquisition of sovereignty by the British and Australians, is founded upon a colonialist, imperialist legal narrative of "backwardness" which was never valid in international law. Similar to Dodson's argument, (Lavery 2019, p. 266) suggests the acknowledgement of this narrative as false, as in major High Court cases such as Mabo 1992, leaves an "unsatisfactory and fragile state for Australian jurisprudence" to be in. Hobbs and Jones (2022, p. 135) have also argued that the "dubious nature of the British acquisition of sovereignty" in Australia leaves "both the constitutive legitimacy of the state, and its exercise of authority over First Nations people, open to question." (Hobbs 2019, p. 175). From a legal perspective, the exercise of British-Australian sovereignty in Australia stands upon weak foundations.

Treaties are sometimes proposed as a method for dealing with these outstanding legal questions. Treaties have been suggested by many academics as the pages upon which the terms of continuing co-sovereignty can be articulated and agreed upon (see for example: Cronin 2003; Davis 2006; Dodson, M 2006; Dodson, M & McNamee 2008; Maddison, Hurst & Wandin 2021; Mansell 2002; Rigney, L-I 2003; Shaw 2002; Short 2012; State of Queensland et al. 2021; Warner, McCormack & Kurnadi 2021; Watson 2012). Treaties could thus also put the Australian nation-state on more solid ground. Mansell (2002) suggests that treaties could afford the Australian state an opportunity to legitimate its assertion of sovereignty – noting that it cannot do so without acknowledging the continuing sovereignty held by First Nations peoples. Strelein and Burbidge (2019, p. 18) suggest that this reveals a different power dynamic than often considered by Australian governments: "In entering into treaties, Indigenous peoples are in fact offering some level of legitimacy to the state that is often underestimated". Other academic voices have instead suggested that treaties could be the place where governments and First Nations 'agree to disagree' on the matter of sovereignty and move forward from there (Brennan, Gunn & Williams 2004; Davis 2016). An outlier perspective appears to be that of Euahlayi man and scholar Bhiamie

[2] This is supported by the right to self-determination, expressed in articles 3-5 of UNDRIP (United Nations 2007, pp. 8-9). See also *Final Report* (Northern Territory Treaty Commission 2022, pp. 29-35).

Williamson (2021), who suggests sovereignty will likely need to be given up in agreements with governments. Williamson questions whether any agreement would be worthy of this concession. Evidently, sovereignty remains a contentious issue, but it is vital to the nature of treaties.

2.2 Settlement of claims: perspectives from Canada and Aotearoa

According to Williams and Hobbs' definition, 'settlement of claims' is one of the three key elements that make a treaty. The settlement of claims has proved to be a major point of contention in historical and modern treaties between Indigenous peoples and settler-colonial governments in other English-speaking settler-colonies. Indigenous peoples in these countries - particularly Aotearoa and Canada - have often shared frustrations at the disconnect between their view of treaties as ongoing relationships, and settler views of treaties as final settlements.

2.2.1 Treaties as relationships and responsibilities

In Canada, Indigenous peoples generally view treaties through the lens of maintaining ongoing relationships and responsibilities. Treaties were and remain integral for Indigenous peoples' relationships with the world around them. Michi Saagiig Nishnaabeg scholar, Leanne Betasamosake Simpson (2008), explains that pre-colonisation, treaties were made between Indigenous nations. In addition, Simpson (2008, p. 33) describes Nishnaabeg people's relationships with animal species as bound by "treaty making with animal nations". This is because treaties require the maintenance of ongoing relationships and a sense of responsibility for one another – including maintaining sustainable populations. Simpson argues that these same principles informed the Indigenous peoples who signed treaties in the early days of Canadian colonisation:

> "In traditional Indigenous diplomacy, treaties are not about the cession of land but rather a commitment to stand with one another, a responsibility to take care of shared lands, and an appreciation of one another's well-being." (Simpson, LB 2013, p. 5)

Simpson (2013, p. 7) also argues these concepts remain relevant for those Indigenous peoples negotiating modern treaties today. For Indigenous peoples in Canada, treaties denote continuing relationships and responsibilities between the parties to treaties. Treaties are thus foundational to Indigenous expectations for their relationships with the newcomers, or settler societies.

Similar expectations of treaties as relationships are reflected across other parts of Canada and in Aotearoa as well. In Canada, both Nisga'a and Mal-nulth people have described treaties as a "marriage" relationship between two parties (Blackburn 2007, p. 627; Northern Territory Treaty Commission 2022, p. 70). That is, they view treaty agreements like marriage certificates upon which both parties agree to a respectful future together, working together. Te Tiriti o Waitangi is

the te reo Māori[3] version of the treaty signed between most rangatira[4] and the British colonial administration. Te Tiriti was and is regarded by Māori as the basis for the "proper and just constitutional relationship" which should have been established in Aotearoa between Māori and Pākehā (non-Māori, usually British/Europeans and their descendants) at the time of its signing (Jackson 2010, p. 329; Potter & Jackson 2018). Many Māori today continue to advocate for the honouring of Te Tiriti as the best way forward for the Indigenous-settler relationship in Aotearoa. Similarly, in Australia, settler legal scholar and theologian Alex Deagon (2022, p. 759) argues that "there must be a deeper "relational ethic" between indigenous and non-indigenous peoples to undergird the [treaty] process, including equity, peace, friendship and mutual respect." Strelein and Burbidge (2019, p. 16) have also warned that Australian governments must not approach treaties as divorces, emphasising that "co-existence rather than cession is key". Australian governments should expect to negotiate agreements with similar intentions of ongoing, 'marriage'-like arrangements, rather than with a divorce mentality.

Language

Through changing the language used to describe settlers, non-Indigenous people can be reminded of their obligations to honour the relationships treaties [set up]. In Canada, the slogan 'we are all treaty people' has been used to remind settler-Canadians that they are also party to treaties. The slogan's origins have been attributed to various speakers, including Ojibwa-Cree woman Muriel Lee and Blackfoot leader Frank Weasel Head (Chambers 2012, p. 36). 'We are all treaty people' has been publicly used by a Governor-General (Kaye 2010, p. 355), The University of Toronto(University of Toronto n.d.), and individual academics (Professor Roger Epp quoted in Truth and Reconciliation Commission of Canada 2015, p. 210). This phrase is used to remind settlers in Canada that they have responsibilities to honour treaties and also to remind them that they benefit from the existence and maintenance of these treaties. However, the slogan has been critiqued as typically accompanying "top-down" decolonisation efforts, and even that it may give "a false sense of equally shared benefits between Indigenous Peoples and settlers" (McKenzie-Jones 2019). Regardless, exchanging the term 'settler' for 'treaty people' reminds non-Indigenous Canadians of their obligations to treaties.

In Aotearoa, usage of the term 'tangata tiriti' has similar connotations, reminding non-Māori of their obligations to Te Tiriti as people living in Aotearoa. Māori people are 'tangata whenua' (the people of the land), while those who have settled in Aotearoa after Māori, and their descendants, are 'tangata tiriti', or 'the people of the treaty' (Inspiring Communities 2023, p. 2). The term centralises Te Tiriti and the relationship Māori expected it to establish, reminding non- Māori that

[3] Māori language
[4] Māori chiefs

the fundamental reason they have settled in Aotearoa is because of Te Tiriti. Notably, it does not refer to the English language version, the Treaty of Waitangi, which, discussed in the next section, has a significantly different meaning. Lincoln Dam, an academic of biculturalism, multiculturalism and Te Tiriti relations suggests that the term implies meaningful action from the tangata tiriti party. Dam (2023, p. 215) argues that is not merely an ethnic identifier: "Tangata tiriti is not a passive identity. Rather, it is a relational orientation that invokes ethical-political responsibilities." Similar to 'we are all treaty people', tangata tiriti frames treaties as relationships, and can be used to remind the non-Indigenous settler population of their own obligations to fulfil treaties with Indigenous peoples. Both terms reinforce the importance of treaties as relationships between peoples.

2.2.2. Indigenous sovereignty upheld by treaties

Treaties as an adoption ceremony

To Indigenous peoples, treaties are documents that recognise and uphold their sovereignty. For example, treaties have been conceptualised by Cree people as an 'adoption', where their sovereignty is upheld and the settlers agree to live by their laws by becoming their relatives. Cree writer and lawyer Harold Johnson (2007, p. 13) describes this in his book *Two Families: Treaties and Government*, as he writes on behalf of Cree people to all non-Indigenous people on Cree land:

> "When your family came here and asked to live with us on this territory, we agreed. We adopted you in a ceremony that your family and mine call treaty. In Cree law, the treaties were adoptions of one nation by another. At Treaty No. 6 the Cree adopted the Queen and her children. We became relatives. My Elders advise that I should call you my cousin, *Kiciwamanawak*, and respect your right to be here.
>
> You are my relative under the law of my people…"

Through signing a treaty, Johnson explains, Cree people adopted settler Canadians into Cree society. They did not cede their sovereignty, but rather agreed for the newcomers to live on parts of their land. These newcomers were required to do so in accordance with Cree law, as the Cree people remained the sovereigns with their unique relationship to their lands. Johnson (2007) explains how the Cree people expected the newcomers to follow Cree law:

> "When your family arrived here, *Kiciwamanawak*, we expected that you would join the families already here, and, in time, learn to live like us… We thought that maybe, if you

> watched how we lived, you might learn how to live in balance in this territory. The treaties that gave your family the right to occupy this territory were also an opportunity for you to learn how to live in this territory."

Simpson suggests that Nishnaabeg people hold a similar conceptualisation of a treaty as an "adoption ceremony" (Simpson, LB 2008, p. 30). Through conceptualising treaties as adoption ceremonies, Indigenous peoples retain their sovereignty, and settlers have signed on to live by the existing laws of those sovereign Indigenous peoples.

Tiriti devolves kāwanatanga, not rangatiratanga

Māori sovereignty is also upheld by Te Tiriti o Waitangi, although not in the English language version, the Treaty of Waitangi. The English language version is written as a cession of sovereignty, which Māori leaders have consistently stated they never agreed to (Mutu 2010). Māori (Ngāti Kahu, Te Rarawa, Ngāti Whātua) academic and leader Margaret Mutu (2019, p. 6) argues that Te Tiriti must be understood in the context of its predecessor, He Whakaputanga (a Declaration of Independence). Five years before Te Tiriti, He Whakaputanga declared the rangatiratanga ("absolute power and authority") or sovereignty of rangatira over the lands across Aotearoa, and declares Māori "would never give law-making powers to anyone else" (Mutu 2019, pp. 6-7). Five years later, Mutu argues, Te Tiriti reaffirms He Whakaputanga and rangatiratanga, but devolves kāwanatanga (governance) to the Queen of England for the "lawlessness" of her subjects, for whom rangatira sought to relieve themselves of responsibility (Mutu 2019, p. 6). Te Tiriti in te reo Māori does not cede rangatiratanga. Instead, it is an agreement in which the Queen is held responsible for her own people and Māori maintain control of their own affairs, which include their people, lands and resources. Te Tiriti has been described by Māori (Whakatōhea) academic Ranginui Walker as "the charter for New Zealand's first immigration policy" (as quoted in Dam 2023, p. 214). Pākehā settlers were immigrants to Māori lands which remain under Māori control. Te Tiriti devolves kāwanatanga to the British (now enacted through the Government of New Zealand), not rangatiratanga, and thus upholds Māori sovereignty.

Ongoing co-sovereignty

Although discussions of treaties are in their early days across Australia, sovereignty remains a popular topic. In particular, treaties are viewed as documents upon which to settle conflicting claims of sovereignty. Many sources indicate that First Nations will seek for Australian governments to recognise their "ongoing sovereignty" (see for example: Dodson, M & McNamee 2008; Morris & Hobbs 2023; Watson 2012, p. 12). In doing so, their relationships will need to be recalibrated to formally make room for First Nations exercising their sovereignty alongside the Commonwealth and state and territory governments. For example, Ngarrindjeri citizen Daryle

Rigney, Gunditjmara man Damein Bell, and settler academic Alison Vivian argue that treaties will require the “reconceptualization of relations between Indigenous and non-Indigenous Australia… to that of co-sovereigns with shared and overlapping jurisdiction”. Similarly, Mansell (2002, pp. 87-88) suggests the purpose of a treaty is to map out the political relationship between First Nations and settler-colonial governments, [mapping out] how “sovereignty is to be shared and exercised”. Sovereignty will likely be an essential aspect of negotiating treaties in Australia. But will Australian settler-colonial governments and people understand settlement of claims to mean recognising this ‘ongoing sovereignty’, or will they seek a formal settlement to cede First Nations sovereignty?

2.2.3 Settlers seeking *final* settlements: cession of lands and extinguishment of sovereignty through treaties

A major critique of treaties from Indigenous peoples in other settler-colonies has been that settlers engage in treaty-making – historically, and in modern treaties too – because they seek to extinguish Indigenous sovereignty and cede Indigenous lands. Many have argued settler-colonial governments do not view treaties as a basis for relationships, but rather as contracts through which to gain land. Mohawk scholar Audra Simpson (2017, p. 28) explains that settlers bastardised treaties and did not share the same intent: settlers were "converting treaties from Indigenous understandings of forms of relationship (often called 'renewal') to contracts and land cessions." Evidence of these approaches towards treaties can be found in the Canadian Government in the 1980s. A 1982 constitutional amendment recognised ‘Aboriginal and treaty rights’, but also led to the government pursuing the “consensual” extinguishment of Aboriginal title (which it had previously done through legislation without consent) (McNeil 2001, p. 301). Recognising the rights of Indigenous peoples in Canada went hand-in-hand with forging a new method of extinguishing their land and sovereignty claims. Audra Simpson (2017, pp. 20, 28) calls this "the trickery of 'consent'" or "the ruse of consent" – would any Indigenous nation ever actually *consent* to having their land taken? Instead, she suggests, there are "conditions of force and violence that beget 'consent'" (Simpson, A 2017, p. 20). Despite claims of protecting Aboriginal and treaty rights, treaties have been used by settler-colonial governments to gain land and diminish Indigenous rights.

In fact, it has been argued by some Indigenous Canadian academics that the very purpose of treaties for the settler-colonial state is often to extinguish native title or sovereignty. Such critiques suggest treaties are tools of settler-colonisation, as they enable extinguishment and cession. Leanne Betasamosake Simpson (2013, p. 6) notes that Indigenous nations are often still

required to surrender Aboriginal title and rights as part of modern treaties. Yellowknives Dene First Nation scholar Glen Coulthard (2014a, p. 74) also argues that "[t]he reason the Crown agreed to get into the land-claims business in the first place was to extinguish the broad and undefined rights and title claims of First Nations in exchange for a limited set of rights and benefits set out in the text of the agreement." These scholars argue that settler-colonial governments use treaties to further cement their power and guarantee access to land; a completely different approach to the relationships of responsibility or being adopted into existing societies.

Perhaps in response to such criticism over decades of negotiating modern treaties, the British Columbia Government has evolved its treaty process to explicitly rule out extinguishing sovereignty and title. On the British Columbia Treaty Commission's website, there is a question posed: "Do modern treaties extinguish Indigenous rights and title?", with the explicit answer "No modern treaties do not extinguish Indigenous rights and title." (British Columbia Treaty Commission 2023) The supporting evidence for this statement is provided through an agreement and a policy. The *Principals' Accord on Transforming Treaty Negotiations*, signed in 2018, states that the governments of Canada, British Columbia, and the First Nations Summit (a First Nations representative forum in British Columbia), (2018, p. 2) all: "Agree that extinguishment and surrender of rights, in form or result, do not have any place in modern-day Crown Indigenous relations, treaty negotiation mandates, treaties or other agreements." A year later, a similar statement was presented in a new policy across the same governments and representative body: the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia*. This policy requires that treaties and other agreements "do not extinguish the rights" of Indigenous Nations, and that such agreements continue to evolve with the "ongoing process of reconciliation of preexisting Indigenous sovereignty with assumed Crown sovereignty." (Minister for Crown-Indigenous Relations - Canada, Minister of Indigenous Relations and Reconciliation - British Columbia & First Nations Summit Task Group 2019, p. 2). Given that nearly two decades earlier, the British Columbia Treaty Commission was criticised for being "seriously impeded by an attitude to treaty making underpinned by notions of claims extinguishment and 'final agreements'" (McGlade 2003a, p. 135), it appears the BC and Canadian governments' approaches to treaties have undergone major changes. However, whether these changes have translated into distinctly different outcomes for the Indigenous peoples negotiating or implementing treaties with these governments, requires further research. Certainly, the decisions of the Supreme Court in Canada suggest that governments are permitted to infringe upon Aboriginal and treaty rights if it "can be justified", requiring only consultation (McNeil 2022, p. 148). Consent, as required in UNDRIP, can be bypassed if affected Indigenous peoples are consulted and the Government can justify the infringement to itself. Also, some treaty rights are restricted to those who live on reserve (Peters 2006), which may suggest governments pursue treaties to seek certainty about

who owns what land. Although the language of extinguishing rights and sovereignty may no longer be used, it remains to be seen whether the practice of governments has changed sufficiently to lead to better outcomes for Indigenous peoples who have treaties with Canadian governments.

In Aotearoa, Mutu has similarly argued that the treaty claims settlement process of the Waitangi Tribunal seeks to extinguish Māori claims to sovereignty over land, sea and resources. Established in 1975, the Waitangi Tribunal is a “standing commission of inquiry” which is tasked with making recommendations or determinations on claims of breaches of the Treaty of Waitangi (Waitangi Tribunal 2023). However, Mutu (2019, p. 5) suggests that the settlement process was envisioned to extinguish Māori claims and ultimately "entrench colonisation". This is clear when looking at New Zealand Government actions since the Tribunal's creation: successive parliaments have reduced the Tribunal's power over government, and governments have also sought to extinguish rights to fisheries, foreshores and seabeds, as well as extinguish some claims entirely (Mutu 2019). Despite Te Tiriti being conceived of as a “partnership” between Māori and the Crown, it has been argued that governments remain focussed on “finality” rather than the terms of an ongoing relationship (McGlade 2003a, p. 135). Similar to the views expressed by Canadian Indigenous academics, Mutu argues that the New Zealand Government uses Te Tiriti and the Waitangi Tribunal to extinguish Māori claims over land. Mutu (2019, p. 12) interviewed Waitangi claimants and found that they are subject to "divide and rule tactics" that cause conflict and division among Māori communities, and that they often sign claim agreements “under duress”. Diverging significantly from Māori understandings of Te Tiriti, the settler-colonial government does not appear to approach grievances from the Treaty as a way to establish or repair relationships.

Indigenous perspectives on treaties have often not been included within settler-colonial approaches to treaties. Such differences are summarised clearly by Leanne Betasamosake Simpson (2013, p. 7):

> "Even in a modern context, treaties are a storied political relationship, consolidating sacred bonds between peoples. They are not about the cession of land or the surrender of Aboriginal title, nor do they assimilate Indigenous law into Canadian law. They are not a bill of sale. They are not a policy discussion. Whether the treaty-making process is historic or contemporary, treaties are not termination agreements."

These perspectives are not reflected in the experiences explored above in Aotearoa and Canada. Governments have often, and sometimes still do, seek to cede land or to surrender Indigenous rights. As explored above, many governments still often do not approach treaties as a ‘storied

political relationship, consolidating sacred bonds between peoples'. In Australia, will First Nations approaches to treaties also be founded in managing ongoing relationships? And if so, will this approach be understood and shared by settler governments and people? Or will they seek to extinguish sovereignty, or to prioritise establishing finality over land ownership.

2.2.4 First Nations peoples in Australia also seek treaties for setting the terms of the relationship with non-First Nations people

Thus far, it does appear that many First Nations people perceive of treaties as a framework for new, ongoing relationships with Australian governments and Australian settler-society. Noongar legal scholar and activist, Hannah McGlade (2003a, p. 135), has argued that in Australia, treaties must be about relationships: Australians must view treaties as part of the "ongoing and developing nature of Indigenous and non-Indigenous relations". Settler scholar, Sarah Maddison (2017, p. 12), has argued that "[m]any Aboriginal and Torres Strait Islander people continue to see a treaty or treaties as offering the possibility for a new framework in the settler colonial political relationship." These accounts indicate that First Nations peoples in Australia, like Indigenous peoples in Canada and Māori in Aotearoa, view treaties through the lens of relationships. In particular, they seek *ongoing* relationships. The new Co-Chair of the First Peoples' Assembly of Victoria, Gunditjmara man Rueben Berg, describes treaty as a "journey" (as quoted in First People's Assembly of Victoria 2023). Treaty is not about signing a final document; rather it is sought to create a new framework for relationships between First Nations peoples and settler-Australians. Davis (2016) describes treaties as "[a]n agreement to disagree. A practical decision to work together". Even where parties may disagree on some matters, Davis conceptualises treaties as a working relationship for parties to move forwards together. Drawing on the work of the Northern Territory Treaty Commission and especially the experiences of Indigenous Canadians in the province of British Columbia, Dodson (2021a, p. 418) argues "We should regard treaty as a marriage and not a divorce". These early indications suggest many First Nations people in Australia are interested in treaties for the possibility of establishing a new meaningful relationship with settler-colonial governments and the wider Australian public.

2.3 Contested definitions

The Noongar Settlement

The above sections 2.1 and 2.2 were derived from two ('recognition as polities' and 'settlement of claims') of the three parts to the definition of treaties articulated in the second edition of *Treaty* (Williams & Hobbs 2020, p. 7). This definition is useful, but it is not universally supported. This is particularly evident in the debate surrounding the Noongar settlement. Hobbs and Williams (2018, p. 1) used these three criteria to label the 'Noongar settlement' (the South West Native Title Settlement between Noongar people and the WA Government) as "Australia's first treaty". Under the Noongar settlement, some land is returned and the relationship between Noongar people and the state government is redefined through providing 12 years' funding for Noongar institutions of decision-making and control, that Hobbs and Williams (2018, p. 32) describe as "at least a limited form of self-government". As they argue these criteria fulfil the requirements of a treaty, Hobbs and Williams (2018) concluded the settlement is in fact Australia's first treaty. This position appears to be supported by the South West Aboriginal Land and Sea Council (n.d.), who, on their website reference Hobbs and Williams' paper. However, the website does not suggest whether community sentiment appears to share their conclusion.

In the academic world, whether the Noongar settlement is a treaty has become quite the debate. McGlade (2017, p. 210) writes as a Noongar person and legal academic that the Noongar settlement "falls quite short of what Treaty should actually mean for Noongar people". McGlade (2017, p. 192) argues the settlement should not be labelled a treaty as it was not unanimous, "principally as it involved the surrender and extinguishment of the native title and ancestral rights that Noongar people have". Notably, these are the warnings heeded from Aotearoa and Canada about settler governments engaging with treaties. Other First Nations and settler scholars have also shared their opinions on the positioning of the Noongar settlement as a treaty. Palawa activist and lawyer Michael Mansell (2016, p. 123) argues the Noongar settlement is not a treaty because it "does not include empowerment or independent long-term funding or deal with Aboriginal sovereignty". Rigney, Bell and Vivian (2021, p. 20) argue that "[c]onsent is a foundational requirement for a valid agreement" following the UNDRIP standard of 'free, prior and informed consent' (FPIC) – and the Noongar people did not consent to, and did not knowingly, negotiate a treaty. That is, the Noongar settlement was not negotiated as a treaty, and thus cannot be labelled a treaty. Settler scholar Bertus de Villiers (2022) argues that whether a treaty is defined as an international agreement or domestic would influence whether the Noongar settlement constitutes a treaty. The debate surrounding the Noongar settlement and it being labelled a treaty illustrates how essential it will be to have an agreed definition of a treaty. Although, Murri academic Bronwyn Fredericks (2022, p. 7) argues that, regardless of whether it

is seen as a treaty or not, the WA Government “has best succeeded in translating talk into action”. This debate highlights the importance of First Nations and settler government negotiating parties coming to an agreement over what constitutes a treaty.

Makarrata

The definitions attributed to Makarrata can also lead to some confusion as to the purpose of treaties. The term 'Makarrata' was gifted by Yolŋu Elders to the government-established representative body for First Nations from 1973-1985, the National Aboriginal Conference (NAC), as a way of continuing treaty talks after treaties were initially rejected by the government (Hiatt 1987, p. 140). Hiatt (1987) suggests Makarrata means reparations are required, both sides must accept the settlement is final and the conflict has ended, and the two parties must be united by this. However, some years later, Yolŋu Elders expressed regret over sharing the “inappropriate” term, saying its meaning was too close to “pay-back” or “revenge” and did not always signify the end of a conflict (Hiatt 1987, p. 140). Despite some disagreement over the term’s original meaning in Yolŋu matha (Yolŋu languages), Makarrata is used widely today, including in the Uluru Statement from the Heart. It is commonly understood in the treaty context to mean “coming together after a struggle” (*The Uluru Statement from the Heart* 2017; Hiatt 1987, p. 140). It continues to be adopted by many as a way of advocating for treaties whilst avoiding the more politically charged term 'treaty’ (Davis 2006, p. 127). Agreeing on a definition of both Makarrata and treaty will be an important step in ensuring First Nations peoples and Australian governments are on the same page as to what the purpose of negotiating treaties is for each party.

SECTION B: Treaties between First Nations peoples and Australian governments

3. Historical overview

3.1 Nineteenth-century agreements

Treaty negotiated between First Nations peoples and British Crown in Lutruwita/Tasmania

Langton and Palmer (2004) argue that providing a historical perspective to treaty-making and agreement-making, including demonstrating previous examples of treaties, is important to discussing treaties today.

It is a common perception that treaties were never negotiated, nor even considered, in Australia. However, some academics have argued to the contrary. Historian Saliha Belmessous (2014, p. 186), in a short history of treaty-making in Australia, declares that "recent scholarship has helped to revise this" account of Australian history. Belmessous (2014, p. 186) suggests treaties were in fact "a serious legal possibility" in Australia at times, especially in response to "strong doubts about the legitimacy and legality of British title" held by "high-ranked officials, parliamentarians, publicists, or settlers". Belmessous (2014, p. 187) argues treaties were considered in New South Wales and Victoria, and in response to especially severe frontier violence, also in Western Australia and Lutruwita/Tasmania.

Historian Henry Reynolds published a groundbreaking book on the early colonial period in Lutruwita/Tasmania, in which he argues that a treaty was likely negotiated and agreed to. From around 1830 to 1834, British colonial official George Augustus Robinson travelled across Lutruwita/Tasmania to negotiate a war settlement with First Nations peoples. Reynolds (2004, p. 159) argues that after this period of negotiation, First Nations peoples held a "[c]entral… belief that there had been an agreement or treaty that left them with a legacy of political rights." To support this assertion, Reynolds (2004, p. 5) presents evidence that First Nations people voluntarily relocated to Wybalenna on Flinders Island, with the understanding that it was a temporary move as part of a post-war peace settlement made with Robinson. Historians Curthoys and Mitchell (2011, p. 186) argue a similar case:

> "Certainly, the surviving Oyster Bay and Big River peoples, when they famously walked into the capital city of Hobart with Robinson's party in 1832, seemed to regard themselves not as prisoners but as free agents. They met confidently with the lieutenant governor before boarding a ship for Bass Strait, understanding, as the local newspaper, the Colonial Times, put it, "that they were to be sent to a place where there is plenty of kangaroo and no work.""

Curthoys and Mitchell argue that First Nations people had made an agreement or treaty with the British Crown – or at least, that is what Robinson had agreed with them. Reynolds, Curthoys and Mitchell's arguments appears to be supported by a petition signed by eight First Nations leaders. Written to Queen Victoria in 1847, the signatories describe themselves as "the free Aborigines" and add their complaint that the British had not upheld their end of "an agreement which we have not lost from our minds since and we have made our part of it good"(as quoted in Reynolds 2004, p. 8). This appears to be a direct reference to a treaty or agreement made with Robinson.

Differing interpretations of two statements written by Governor Arthur in letters during the 1830s highlight the complex questions surrounding this possible historic treaty. The 1832 sentence reads: "it was a fatal error in the first settlement of Van Diemen's Land that a treaty was not entered into with the natives"; and in 1835, Arthur also wrote that it was "a great oversight that a treaty was not, at that time, made with the natives and such compensation given to the chiefs as they would have deemed a fair equivalent for what they surrendered"(as quoted in Reynolds 2021, p. 30). These statements are typically interpreted as Arthur expressing regret over having never negotiated a treaty in Lutruwita/Tasmania. For example, historian Michael Roe (1998, p. 610) argues Reynolds' proposition that a treaty was agreed with First Nations is "disprove[d]" by Governor Arthur's statement. However, both statements could also be interpreted as Arthur expressing regret over not having *earlier* made a treaty, having waited until after much of the devastation of the Black War: Arthur perhaps expresses regret that treaties were not made 'in the first settlement', and 'at that time'. Legal academic Neil Andrews (1996, p. 213) was more supportive of Reynolds' work, suggesting it was more likely a treaty was negotiated given due consideration to the "consistent practice of the British crown overseas". Both Reynolds (2004) and lawyer Desmond Sweeney (1995, p. 5) have argued that Robinson did almost certainly have the authority to make treaties with the First Nations peoples in Tasmania on behalf of the Crown, and that even if he did not, that "the Crown was aware" of the promises he was making to First Nations people on the Crown's behalf. This suggests the possible treaty in Tasmania was in fact supported by the Crown, and increasing the likelihood that an agreement was reached between First Nations and Robinson. Whilst this history is not well understood, it demonstrates at least the possibility of a treaty already having been negotiated and agreed to between some First Nations and the British colonies.

Agreements labelled 'treaties', but not negotiated with the British Crown or Australian governments

Two other agreements have at times been labelled treaties, although neither involved the British Crown's authority and so have no legitimacy in the eyes of the Australian state. In 1835, what became known as the 'Batman Treaty' was signed by three settlers and representatives of the Kulin Nation, who were described by the settlers as Chiefs (Clark, T, de Costa & Maddison 2019, p. 668; Langton 2001, pp. 19-20). This agreement set out the terms for sale of Kulin land. However, neither the Kulin Nation nor British Crown today recognise the agreement as a valid treaty (Langton 2001, p. 19). Many have expressed doubt as to whether this was a genuine agreement: for example, Clark, T, de Costa and Maddison (2019, p. 668) describe the agreement as "allegedly agreed to by the Kulin". Historian Bain (Attwood 2015, p. 58), in a comprehensive study of the Batman Treaty, suggests it was "a piece of paper [the Kulin people] probably never saw, let alone signed". There appears to be a consensus that, to some degree, the agreement arose from a "mutual incomprehension… and a coincidence of ritual" (Kenny 2008). Many cite the similarities between symbolic actions in the Wurundjeri tanderrum ceremony and the English ritual of enfeoffment – both pertaining to land usage, with the former granting temporary access to the land, and the latter a feudal deed through which land ownership could be exchanged (see for example: Attwood & Doyle 2015; Barwick 1984; Kenny 2008). Kenny (2008, p. 38.37) argues the Kulin leaders likely had been warned about the white men from others, and so "may have hoped to reach some accommodation… beyond the normal understanding of a *tanderrum*". Regardless of whether the Kulin did agree to anything resembling a treaty, no Australian government recognises this agreement treaty.

Much later in the century, the Debney Peace agreement was reached in the Channel Country in Queensland. Describing a "five-day peace ceremony", the Debney Peace was an oral agreement made among the families of First Nations and settlers living across the Channel Country region, on the violent Queensland frontier in 1889 (Griffiths 2022, p. 154). The Debney Peace agreement was labelled a treaty by Mithaka Elder Betty Gorringe when she participated in the Queensland Government's treaty public consultations in late 2019. In response to the government representative explaining that no treaty was made with First Nations peoples in the state when Queensland was first "settled", Gorringe said "We already had a treaty: the Debney Peace." (Gorringe, quoted in Griffiths 2022, p. 154). Historian Tom Griffiths (2022, p. 165) argues that although the Debney Peace "was not explicitly about sovereignty", it did create "an unadvertised peace in an undeclared war". This demonstrates the importance of the definition attributed to treaty in the context of First Nations-settler relations in Australia. Although the Batman Treaty and the Debney Peace agreement are not formally recognised as treaties, are disputed, and did

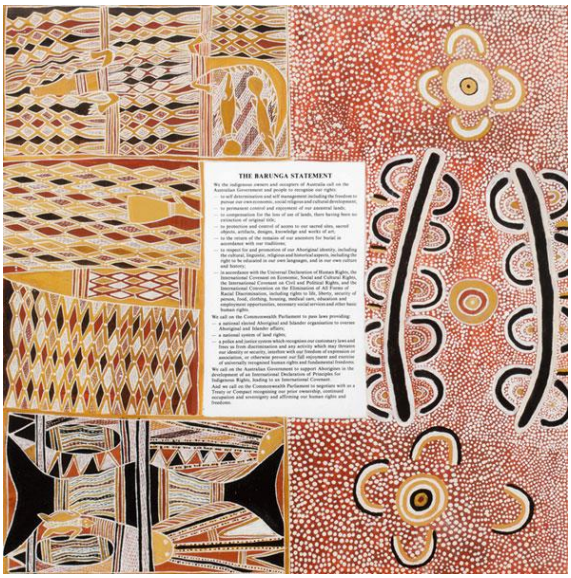
not have a British Crown representative, they do both represent precedent for agreement-making in Australia.

3.2 Twentieth-century calls for treaties from First Nations representative bodies and some non-First Nations leaders

Pressure from First Nations peoples for treaties began to appear in Australian national politics from the 1970s. Calls for a national treaty appear from *at least* 1972 with the Larrakia Petition. In 1979, the National Aboriginal Conference called for a treaty following national consultations – although from around 1980 they began to use the term Makarrata. In response, the non-Indigenous group 'Aboriginal Treaty Committee' (ATC), headed by H.C. Coombs, who had recently been the Chancellor of the ANU, published their book '*It's coming yet...*': *An Aboriginal Treaty within Australia between Australians* to mobilise public support for a treaty (Harris 1979). In it, the ATC called for a treaty to recognise and restore rights to land, protect languages and cultures, compensate for loss of lands and assert the right to self-governance through Indigenous organisations.

In the early 1980s under Prime Minister Malcolm Fraser, the Senate Standing Committee on Constitutional and Legal Affairs began an inquiry into a national treaty, compact or makarrata. In a book advocating for reconciliation from the Liberal Party's perspective, Senator Andrew Bragg (2021, p. 63) suggested that Fraser's "government remained open-minded about a makarrata, as long as it wasn't a treaty – which it believed carried international connotations". Evidently, the debate over the domestic or international nature of treaties between Australian governments and First Nations peoples began at least half a century ago.

However, in 1983, the Senate Committee rejected the possibility of a treaty on the conviction that Aboriginal sovereignty no longer existed (The Parliament of the Commonwealth of Australia 1983). This is of course contrary to what many First Nations peoples say about sovereignty. Instead, the Committee recommended a 'compact': an agreement to manage the consequences of having usurped Aboriginal sovereignty (The Parliament of the Commonwealth of Australia 1983, p. 50). It was not until 1987 that support for such agreement-making was met explicitly by Prime Minister Bob Hawke, who spoke of both 'treaty' and 'compact'. He suggested it was important for non-Aboriginal people to "understand these things... so that we can have a sense of togetherness and a proper perspective" in the lead up to the



bicentenary in 1988 (as quoted in Hiatt 1987). Then, in 1988 the Barunga Statement (pictured) called for a treaty. The final sentence reads: "And we call on the Commonwealth Parliament to negotiate with us a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom" (*The Barunga Statement*). In 1988 Hawke signed the Barunga Statement and promised a treaty. Yet he was unable to gain the support of his Government and ultimately failed to implement one (Langton 2001, p. 23).

In 1991, the band Yothu Yindi released the popular single *Treaty*, which brought calls for treaties to a wider audience. The song is praised by many academics for its political power:

> "Yolngu members also expressed sovereignty through their song 'Treaty'" (McKenna, B & Wardle 2019, p. 63);
>
> "when Hawke's promise of a Treaty had all but faded from public consciousness, Yothu Yindi intervened" (Corn 2010, p. 97);
>
> "a protest song rivalled by no other in Australia's history." (Fredericks & Bradfield 2021, p. 43)

Murri academic Bronwyn Fredericks (2022, p. 6) explains the song was a response to Hawke's 'talk' over action - "All those talking politicians" – arguing that "Indigenous peoples are well-accustomed to superficial political rhetoric". This perspective is shared by writer and band member, Yunupingu, in an interview:

> "1988 was when Prime Minister Hawke came to Barunga and, at that Barunga Festival, he made a statement. He said there shall be a Treaty between Aboriginal Australia and white Australia. Everyone was really excited about it. 'Ah yeah, finally there'll be a Treaty.' Further down the track – 1988, 1989, 1990 – that's when I started to get suspicious about this Treaty. There was no action being taken. So I teamed up with Paul Kelly, Peter Garret and Bart Willoughby, a few Australian musicians, and we wrote the song 'Treaty'. It's a reflection on the Australian government at that time, and the Australian people for that matter. When is the Treaty? What is the Treaty? How is it going to take form, and in what shape will a Treaty come into being in Australia? We wrote that song 'Treaty' as a reminder to us all." (as quoted in Corn 2010, p. 98)

Treaty thus expresses the disappointment felt by many First Nations people when it became clear that the promise of treaty would not be fulfilled, but it is a strikingly powerful song which continues the call for treaties in Australia. The song topped the charts in Australia – the first pop

song written by a First Nations artist to do so – and this popularity and reach made a significant impact (Corn 2010; Fredericks 2022; Fredericks & Bradfield 2021).

3.3 1990s-2010s: Reconciliation and constitutional recognition

First Nations representative bodies calling for treaties

Regardless of the song *Treaty*'s popularity, governments, particularly the Commonwealth, decided to push for a reconciliation agenda instead. Davis (2014, p. 60) describes this as a "political compromise" following Hawke's failure to deliver on a treaty. Reconciliation was advocated for by the Hawke and Keating governments as a necessary precursor to build non-Indigenous support for treaties (Short 2012, p. 294). This resulted in the establishment of the Council for Aboriginal Reconciliation (CAR) in 1991. In 2000, to conclude the Decade of Reconciliation, CAR, led first by Patrick Dodson and later Evelyn Scott, concluded that a treaty was necessary (Council for Aboriginal Reconciliation 2000). Yawuru man Patrick Dodson (2023) explains how reconciliation was sold to the CAR team:

> "Our remit was to cultivate a new relationship with First Peoples through a decade-long education program and, by the anniversary of Federation in 2001, to have laid the ground for a more fertile reception of a treaty."

At the time, Langton (2001, p. 23) argued that the work of the CAR "created a fundamental change in the terms of the debate". Yet at the level of the federal government, the situation had become more hostile than before the decade began. At the Corroboree 2000 Reconciliation Conference, Prime Minister John Howard chose not to issue a national apology and compensation for the Stolen Generations, and rejected the 'Draft Document of Reconciliation' (Langton 2001, p. 23). In response, Howard was booed, heckled, and many in the audience turned their backs on him (Davis 2006, p. 130; Northern Territory Treaty Commission 2022, p. 137).

The Aboriginal and Torres Strait Islander Commission (ATSIC) (1990-2005), following in the footsteps of the National Aboriginal Conference (NAC) (1976-1985), also worked on treaties. Throughout its existence, ATSIC continued the nation-wide treaty consultations that the NAC had begun previously. In 2001, ATSIC launched its Treaty campaign, promoting public discussion and debate around treaties (Clark, G 2001). However, many of the materials produced by ATSIC during this time have disappeared or are not publicly available (L Strelein, personal communication, 19 September 2023). Morris and Hobbs (2023, p. 6) claim that it was "ATSIC's agitation for treaty [that] led the Howard Government to marginalise the Commission" and later abolish it. They also

suggest that the lack of constitutional protection for ATSIC as a First Nations Voice, meant First Nations voices were “effectively sidelined” and the campaign for treaty was thus “derailed” (Morris & Hobbs 2023, p. 6). Davis and Williams (2021, pp. 87-88) have more recently linked the need for a Voice to treaties, arguing that a Voice will put First Nations peoples in a stronger position in treaty negotiations.

Academics and politicians respond to calls for treaties

In the years from 2002-2006, following CAR and ATSIC’s recommendations and campaigns for treaties, a plethora of academic articles and books were published on treaties in Australia. Some notable collaborative collections include *Treaty*: *Let’s Get it Right!* (McGlade 2003b), *Honour Among Nations?: Treaties and Agreements with Indigenous People* (Langton et al. 2004), *Treaty* (1st ed) (Brennan et al. 2005) and *What Good Condition?* (Read, Meyers & Reece 2006). Many book chapters and articles from this period are referenced in this literature review. The Australian Research Council Linkage Project ‘ATNS’ (Agreements, Treaties and Negotiated Settlements) ran projects focused on agreements and treaties from 2002-05 and 2006-09. Most notably, an extensive database of peer-reviewed and other publications on treaties is available on the ATNS website which remains accessible today. However, the website has only been sparingly updated since the late 2000s, including a 2019-2020 update thanks to a partnership with the University of Melbourne, National Native Title Council and Indigenous Data Network.

The consultative work of government-established First Nations bodies like the NAC, CAR, and ATSIC, as well as the works of First Nations academics and leaders, demonstrate that treaties have had strong and constant support from many First Nations people. Yet, despite continued calls for treaties from First Nations leaders and key First Nations organisations, it appears that for politicians, reconciliation became a favoured *alternative to* treaties, instead of a movement to build support *for* treaties. Decades of government-led focus on reconciliation and constitutional recognition have been criticised for refocusing political attention away from discussions of treaties. For example, in 2016, Patrick Dodson (pp. 180-181) stated that despite treaties having "long been the preferred option" for First Nations peoples, the only option the government would put on the table was constitutional recognition. Reconciliation has been subject to significant critique over the past few decades. For example, Davis (2006, p. 128) identifies the creation of a "false dichotomy… between practical and symbolic reconciliation" as a redirection away from treaties. ‘Symbolic’ reconciliation, described by conservative politicians in the Howard era as recognition of First Nations rights, and treaties, was dismissed by such politicians in favour of 'practical' reconciliation – like increasing First Nations participation and employment in the mainstream economy (Behrendt 2002, p. 22; Davis 2006, p. 128). Despite consistent support for treaties from First Nations peoples, many politicians continued to dismiss their calls.

Treaties as reconciliation

There has been some critique over the place of reconciliation in Australia, precisely because of the lack of treaties. Māori (Ngāpuhi, Ngati Manu) political scientist Ann Sullivan (2016) finds that in Aotearoa as well as Canada, a reconciliation agenda is pursued to address the dishonouring of treaties. No such pre-existing treaty relationship exists in Australia (at least any recognised by Australian governments), so the question may be posed, what is being reconciled? Kabi Kabi and Gurang Gurang Pastor Ray Minniecon has explored a similar question. When church representatives approached him wanting to engage in reconciliation, Minniecon responded, “we never had a relationship in the first place, so reconciliation is the wrong word” (Minniecon & Riches 2019, p. 95). Constitutional recognition has also been met with apathy from some First Nations peoples. Maddison (2017, p. 12) suggests that community consultations with First Nations peoples demonstrated little interest in recognition, and some were even concerned constitutional recognition might "undermine" treaties. The Uluru Statement from the Heart emerged in 2017 from extensive First Nations-led 'dialogues' (consultation and debate) on constitutional recognition (Davis & Williams 2021). These discussions confirmed that treaties remain a priority for First Nations peoples in Australia.

The Uluru Statement’s call for a Makarrata Commission to be established to supervise agreement-making has reinvigorated the treaty space in academia. Few works were published on treaties in Australia from 2006 until the release of the Uluru Statement in 2017. Since then, there has been a proliferation of journal articles and some books published about treaties, with a particular focus on the legal aspects. Particularly notable and prolific authors writing about treaties, during the period of 2002-2006 and since the Uluru Statement, include Yiman and Bidjara academic Marcia Langton, Cobble Cobble legal scholar Megan Davis, Torres Strait Islander legal scholar Asmi Wood, Yawuru legal scholar Mick Dodson, Gamilaroi/Eualeyai legal scholar Larissa Behrendt, Palawa activist and lawyer Michael Mansell, Noongar academic and lawyer Hannah McGlade, and settler legal scholars George Williams, Harry Hobbs, Sean Brennan, and Lisa Strelein.

4. Status of treaty negotiations in Australia (current as of January 2024)

Treaty-making is gaining momentum in some states and territories. In this section, we detail the state of treaty processes being explored across the nation.

4.1 Early lessons from Victoria

Victoria is the furthest advanced on the path to treaties, and thus it can provide examples of structures for other states and territories embarking on a path to treaties. Some academic works have discussed the Victorian treaty process thus far (see: Gallagher 2021; Hobbs 2019; Hobbs & Williams 2020; Maddison, Hurst & Wandin 2021; Williams & Hobbs 2020; Wood 2022a). However, the bulk of information on the Victorian process is found in non-academic literature, in reports and other materials published by the State of Victoria and the First Peoples' Assembly of Victoria (see for example: First Peoples' Assembly of Victoria 2022b; State of Victoria 2021; Yoorrook Justice Commission 2022).

4.1.1 The process thus far

Beginning with the Victorian Government's commitment to talks of treaties in early 2016, the first phase involved the appointment of Gunditjmara elder Aunty Jill Gallagher (2021) as Treaty Advancement Commissioner in 2018, tasked with creating the conditions to establish an Aboriginal representative body in 2018-2019 – the First Peoples' Assembly of Victoria. The second phase included passing legislation for a Treaty Authority (an "independent umpire") which will sit outside of state authority and bureaucracy, and will "concede some of the State's power" (First Peoples' Assembly of Victoria 2022b). A Self-Determination Fund was also established to "support First Peoples to have equal standing with the State" during negotiations, and also acts as an independent fund for economic development (First People's Assembly of Victoria & State of Victoria 2022). The first $35 million in funding from the Victorian Government has been received in mid-2023 (First Peoples' Assembly of Victoria 2023).

During this second phase, an unplanned development was the creation of the Yoorrook Justice Commission. The need for truth-telling emerged as a priority for First Nations peoples in Victoria during community conversations about the treaty process (Hobbs 2024, p. 6). The Yoorrook

Justice Commission was established in 2021 as “Australia’s first ever formal truth-telling commission”, notably developed “in partnership” with the Victorian Government (Hobbs 2024, p. 6). The work of the Yoorrook Justice Commission is expected to be influential in the matters negotiated for treaties; as they have stated in no uncertain terms, "without truth there could be no treaty" (Yoorrook Justice Commission 2022, p. 2). As a Royal Commission, Yoorrook has the power to compel government and individuals to provide evidence. In late March 2023, a directions hearing was called stating that the Victorian Government had failed to comply with orders to produce evidence thus far (Yoorrook Justice Commission 2023b). Although the Victorian Government did later comply, this highlights the difficulties faced by First Nations peoples even when working in partnership with governments on their own commitments.

The second phase was concluded in late 2022 with an agreement on the Treaty Negotiation Framework reached between the Assembly and the Victorian Government (First Peoples' Assembly of Victoria 2022c). Elections in the Assembly took place from May to June in 2023, and those elected will be responsible for negotiating treaties with the Victorian Government (Dunstan 2023; First People's Assembly of Victoria 2023). Treaty negotiations, phase three, are now due to commence in early 2024 (Butler, Murphy & Karp 2023).

4.1.2 Themes from the emerging academic literature

Some academic articles and chapters have emerged sharing experiences from and analysing the nation-leading process in Victoria (Gallagher 2021; Maddison, Hurst & Wandin 2021; Rigney, D et al. 2021). Early community engagement under the leadership of Aunty Jill Gallagher (2021) as Treaty Advancement Commissioner resulted in the following priorities for a treaty: truth-telling, compensation/reparations, reducing child removal rates, and building capacity and sustainable funding for community organisations. Gallagher’s reflections on the relationship between the Victorian Government and First Nations during this process is expanded on in Section D; Chapter 9.1. Reflecting on a disconnect in the definitions attributed to treaties by First Nations and Australian governments, Maddison, Hurst and Wandin (2021) warn that the Victorian Government has still not acknowledged that Victorian First Nations never ceded their sovereignty, which they argue demonstrates the potential for a treaty to be assimilationist rather than recognise co-sovereignty. Evidently, the definition of a treaty and whether it includes a recognition of co-sovereignty is already an issue in the state treaties being discussed. Another key issue emerging in the literature about the treaty process in Victoria is that of representation, which is explored in greater detail in Section 7.

4.1.3 First Nations choosing not to participate

The Yorta Yorta Nation chose not to appoint a representative to the Assembly, as was their right as state-recognised Traditional Owners of Victoria. The Yorta Yorta Council of Elders released a statement suggesting the state treaty process was "farcical", and would attempt to "erode our authority and provide a fast track toward the disempowerment of the Sovereign Yorta Yorta Nation and its People" (Yorta Yorta Nation Aboriginal Corporation 2019). Native Title lawyer and settler scholar Lisa Strelein (2021, p. 96) was later engaged by the Council of Elders and concludes in a journal article that whether the Yorta Yorta people choose to "pursue their aspirations through a treaty" or through other means, their sovereignty is not diminished by doing so. However, compromise is unavoidable in a treaty-making process. Strelein (2021, p. 82) argues that First Nations peoples must consider "whether the compromise is one that can be accommodated and is consistent with [their] principles and aspirations". In particular, Strelein (2021, p. 93) recommends not making the following concessions under *any* agreements:

- "no agreements that surrender inherent rights, sovereignty or territory or rights under any law
- no reconciliation without reparations
- no full and final settlement
- no transfer of authority without financial arrangements."

Strelein (2021, p. 81) argues that "entering into a treaty is a recognition by, and a gift from, Indigenous peoples to the state, not the other way around." This marks a departure from the framing of treaties in Victoria, which has been criticised by Yorta Yorta elders for the "emphasis on reconciliation as the primary rationale" (Strelein 2021, p. 91), which may explain their choice to not participate formally as a Nation in the Victorian Treaty process.

Other participating nations and individuals have strategically withdrawn, or threatened to withdraw, their participation and support for the process. The Djab Wurrung Embassy began a campaign, 'No Trees, No Treaty', in response to the Victorian Government's plan to, and later carrying out, the destruction of sacred trees to make way for a highway (Hobbs 2020, p. 29). The name of the campaign demonstrates that whilst the government may be pursuing treaties with First Nations peoples in Victoria, this intent is inconsistent with other policies. In addition, it demonstrates that support for treaties from First Nations peoples is not guaranteed, especially if the government's actions appear contradictory to First Nations peoples' expectations of

treaties. In fact, Djab Wurrung woman Sissy Eileen Austin stepped down as Member of the First Peoples' Assembly as a result of the Directions tree being felled (Groch 2020).

4.2 Queensland's Path to Treaty

4.2.1 The process thus far

Notable progress was being made in Queensland, where a 'Path to Treaty' bill was passed in May 2023 to begin the process of preparing for a treaty or treaties. Beginning with an initial statement of commitment from the Queensland Government in 2019, an Eminent Panel and a Treaty Working Group carried out public consultations, particularly with Aboriginal and Torres Strait Islander communities (Queensland Government 2023). A Treaty Advancement Committee, compromising Aboriginal, Torres Strait Islander and non-Indigenous Queenslanders, handed over their recommendations in a report to government in October 2021. Recommendations include the separation of the truth-telling and healing process from the treaty process; the establishment of an independent First Nations Treaty Institute, which will provide support for First Nations involved in negotiations; and the establishment of a Path to Treaty Office within government, who will prepare the government for negotiations and inform Queenslanders about treaty (State of Queensland et al. 2021). There was a near year-long delay in releasing the government's response to the recommendations, which led to criticism, including by one of the Committee's members, Jackie Huggins (McKenna, K 2022). In August 2022, the Queensland Government released its response to the report, announcing its intent to pursue treaties. In May 2023, the Path to Treaty Act 2023 legislated a Truth Telling and Healing Inquiry and First Nations Treaty Institute as outcomes of this extensive process (Riga 2023). The Act has been praised by Hobbs (2024, p. 13) for illustrating “creativity” in legislation to better reflect First Nations values and interests, with the inclusions of the rights in UNDRIP, including self-determination and free prior and informed consent (FPIC), and Aboriginal law and Torres Strait Islander Ailan Kastom. The Interim Truth and Treaty Body has been established in the meantime to “design and deliver local truth-telling activities within public institutions”, as well as work with the public service on co-designing the First Nations Treaty Institute (Hobbs 2024, p. 13). The Act had bipartisan support at the time, but the opposition Liberal National Party withdrew its support in the wake of the referendum, and in response the Labor Government announced it was unlikely to go forth without bipartisan support (Gillespie 2023).

4.2.2 Misunderstandings and misinterpretations

The responses from the Queensland Labor Government and the LNP Opposition to recommendations in a report on treaties highlight possible areas of disjuncture in what First Nations peoples expect from treaties. The Queensland Government accepted most

recommendations from the Treaty Advancement Committee's report. However, it rejected a proposed acknowledgement of *continuing* sovereignty, replacing it with a recognition of First Nations *rights* (State of Queensland 2022, p. 2). This could be interpreted as a rejection of the continuing sovereignty of First Nations peoples in Queensland. However, on its website, the newly established Interim Truth and Treaty Body (n.d.) does include "respect for sovereignty" on its list of what a treaty could include. It is thus unclear whether the government is stating its rejection to any claims to sovereignty.

In addition, rather than accepting the recommendation to follow First Nations representative mechanisms and structures, the government says it will seek policy advice (State of Queensland 2022, p. 4). This similarly appears to reject First Nations decision-making structures in favour of the advice of government's own employees. Finally, rather than funding a First Nations Treaty Institute in four-year funding blocks and allowing the Institute to do its own financial administration, the government says it will allocate funds each year (subject to Queensland Treasury's review of funding performance and operation) (State of Queensland 2022, p. 8). Notably, this takes some of the governing power and financial security out of the Institute, as these were the reasons the funding was structured this way by the report.

These three points – potentially rejecting sovereignty, favouring policy advice over the governance of First Nations peoples, and keeping funding centralised within the government's powers – signal that the way the state government envisions treaties may be at odds with First Nations expectations of treaty processes. An even stronger contrast is found in the state LNP's position on treaties. Although all LNP members supported the Path to Treaty Act earlier in the year, in June 2023 their leader provided caveats to his support for treaties. Crisafulli stated he would "rule out… compensation, reparations, sovereignty, right of veto" (Messenger 2023). As explored previously, recognition of their continuing sovereignty is likely a key issue on which First Nations peoples will not compromise. Former Premier Palaszczuk recently suggested she didn't believe reparations would be included in their state treaty, which contradicted statements made previously by Craig Crawford as Minister for Aboriginal and Torres Strait Islander Partnerships (Gillespie 2023).

More implicit misunderstandings and misinterpretations of treaties is also found in government policies. Echoing the experiences of the Djab Wurrung with their 'No Trees, No Treaty' campaign, is the major overhaul of the youth justice system that was introduced just a week after the Path to Treaty Act in February 2023. The government's actions have been critiqued by the Queensland Aboriginal and Torres Strait Islander Child Protection Peak for the lack of consultation (due to the disproportionately greater effect of these reforms on First Nations young people), which appears to contrast with the ideas behind the Path to Treaty (McKenna, K & Riga 2023).

4.3 Other states and territories

4.3.1 South Australia

In South Australia, the government committed to a treaty consultation process in 2016 – the first Australian state to do so. This was followed by the Ngarrindjeri and Narungga nations both beginning treaty discussions with the state government in 2017 and 2018. Soon, many communities expressed frustrations that the SA Government seemed to have a different idea of what treaty meant, and was progressing too quickly for First Nations peoples to have time to process and respond appropriately to what was on offer (Hobbs 2024, p. 14). Both Ngarrindjeri and Narungga signed separate agreements on a path to treaties in early 2018, but the Marshall Liberal Government, elected later that year, abandoned the treaty process (Ilanbey 2022; Smith, Douglas 2022).

However, it has now been revived with the Labor Government returned to power in 2022. Following consultations with First Nations peoples in the state, the government is firstly pursuing a state-based Voice as the first step in 'Voice, Treaty and Truth' (Torre 2022). The Government's 'Engagement Report' explains:

> "It is hoped that by enshrining a Voice to Parliament first, Treaty and Truth can occur on a more equal footing between First Nations people and the government (at all levels) by being included at the front, rather than at the end of the process." (Agius 2022, p. 10)

Treaty discussions in South Australia are thus envisioned to be re-commencing with a Voice (with elections scheduled for March 2024), as the first step in the treaty process. Although, there has been some criticism about the regional boundaries used for the Voice's representative model, as it differs significantly from the nation-based approach the original process used in 2016-2018 (Hobbs 2024, p. 16). Following the defeat of the referendum for the national Voice to Parliament, the South Australian Government re-committed to its state-based Voice, Treaty, Truth process (Agius 2022).

4.3.2 Northern Territory

The Northern Territory's treaty journey began in 2018 when the Barunga Agreement was signed between the Northern Territory Government and the four Land Councils. The Barunga Agreement set out a path towards treaties in the NT and led to the creation of the Northern Territory Treaty Commission, which was headed by Yawuru leader Professor Mick Dodson. Both the interim *Treaty*

Discussion Paper published in 2020 and the *Final Report* handed down under the leadership of the Acting Treaty Commissioner, Tony McAvoy SC, conducted community consultations as well as desk-based research. Community consultations found "strong Aboriginal interest in treaty" (Northern Territory Treaty Commission 2020, p. 7). The *Final Report* provides a proposed Framework for proceeding with treaties and more broadly details recommendations on how treaties should be advanced in the NT, including the negotiation of a territory-wide treaty and multiple treaties between individual First Nations or coalitions of Nations, the establishment of a First Nations Forum to decide a model for treaties in the NT, and developing a process for First Nations communities to transition to the status of First Nation Government after some time.

In late December 2022, though, the NT Government responded to the report by abolishing the independent Treaty Commission, in favour of conducting its own consultations with First Nations peoples (Perera 2023). The move was criticised as a delaying tactic – duplicating the work of the independent Treaty Commission, "to 'test' whether Aboriginal Territorians agree with the report's recommendations" with greater government control over the process (Bardon 2023; Hobbs 2024, p. 11) – as well as for "quietly" making the announcement during the Christmas-New Year period (Hobbs 2024). After over a year's silence, in early 2024, the NT Government announced it would be continuing with the treaty process. This is widely understood to be related to the upcoming NT election, although Minister for Aboriginal Affairs and Treaty, Chansey Paech, suggested that mainstreaming messaging for communities during the Voice referendum was the reason for the delay on treaty (Brissenden 2024; Garrick 2024).

4.3.3 Lutruwita/Tasmania

Some initial, albeit markedly slow, progress on treaties has been made in Lutruwita/Tasmania. The Tasmanian Government commissioned a report on treaty, truth-telling and reconciliation, which conducted extensive consultations across Lutruwita/Tasmania (Warner, McCormack & Kurnadi 2021). The report recommended establishing a Truth-Telling Commission to create an official record of Lutruwita/Tasmania's history, especially to set the record straight, "quashing the extinction myth and recording and explaining the resilience and survival of the Aboriginal people" (Warner, McCormack & Kurnadi 2021, p. 8). Other recommendations included greater public education, making numerous changes to law, policy and education, and in particular to pursue treaties with First Nations peoples. Progress following the release of this report has been slow. An Aboriginal Advisory Group was set up by the government to guide the treaty process in 2022, but little public information can be found since this announcement (Jaensch 2022; Lohberger 2023). The Tasmanian Aboriginal Centre and the associated 'tuylupa tunapri' palawa

community delegation have also argued that community members lost trust in the government process, as government were neglecting to listen to "the community voice" (Lohberger 2023; Morse 2022).

4.3.4 Australian Capital Territory

Interest in treaties was expressed by the Australian Capital Territory Government, but little progress has been made to date. Consultations had commenced in 2022, but the government was criticised for not consulting broadly enough (Lindell 2022). During those consultations, concern was expressed about the government rushing into treaties "without facilitating the healing and deep conversations that will be required", and the government appears to be exploring other avenues through which to do so - namely, the Healing and Reconciliation Fund (Stephen-Smith 2022). There is also a contentious question over *who* the government would be negotiating treaties with – noting that the ACT Government was taken to court in 2022 and recently formally apologised to the Ngambri people for having solely recognised the Ngunnawal people as Traditional Custodians of the ACT region since the early 2000s (Barr, Rattenbury & Stephen-Smith 2023).

4.3.5 New South Wales

In New South Wales, no process had begun under the previous Liberal government. The new Labor government elected in March 2023 allocated $5 million in the 2023-24 budget to begin "a 12-month consultation process" on treaties with First Nations peoples (NSW Government 2023). In October 2023, Premier Minns said he was still committed to starting NSW on the path to treaties, but would first need to "go back and speak to First Nations leaders" in light of the referendum results (as quoted in Kolovos et al. 2023).

4.3.6 Western Australia

No interest in treaty talks has been indicated by the Western Australian Government to date. However, as noted previously, the Noongar Settlement has been hailed by some as a treaty.

4.4 Makarrata Commission

Despite the progress made in some Australian state and territories towards starting a process to negotiate treaties, little attention has been paid towards what a Makarrata Commission could look like. A key component of *The Uluru Statement from the Heart* 2017)'s proposal to the Australian people and governments, a Makarrata Commission is proposed to oversee agreement-making (treaties) and truth-telling. However, "negligible research" has been conducted on what a Makarrata Commission would look like (Morris & Hobbs 2023). What powers and functions might a Makarrata Commission have? Who would resource it and how would it be staffed? What exactly would its role be in treaty-making? Prior to the referendum's outcome, the Australian Government committed $5.8 million for preliminary work on a Makarrata Commission, although the 2022-2023 budget was significantly underspent prior to the referendum, with just over half of the allocated year's funds (approximately $466,700 of $900,000) having been used (Butler 2023a). It is unclear what progress has been made as a result of that spending.

To fill the gap, settler legal scholars Shireen Morris and Harry Hobbs (Morris & Hobbs 2023) published an article, 'Imagining a Makarrata Commission', where they discuss a possible model for the national institution, drawing on reports from the Regional Dialogues leading to the Uluru Statement from the Heart, as well as existing agreement-making and truth-telling processes and international examples from Aotearoa and British Columbia, Canada. Morris and Hobbs (2023, pp. 37-38) propose that a Makarrata Commission should be informed by "shared 'Makarrata principles'", inspired by the "high-level agreed principles" of the Treaty of Waitangi that inform the work of the Waitangi Tribunal in Aotearoa. They also suggest that truth-telling and agreement-making should be a "flexible two-stage process"; with truth-telling being the first stage, the second stage (agreement-making) can commence before the first is completed (Morris & Hobbs 2023, pp. 39-40). A First Nation or regional alliance of First Nations could apply to the Makarrata Commission on the basis of past injustices, who would, subject to verification of their claim, commence with localised and regional truth-telling – possibly producing "an account of the 'truth' for the public and historical record", and any recommendations about how to heal the relationship (Morris & Hobbs 2023, pp. 40-41). Out of this, the Makarrata Commission may recommend the parties embark upon agreement-making to negotiate their relationship going forward. Once agreed, the Makarrata Commission may still have a role to play in monitoring the implementation of the agreement (Morris & Hobbs 2023, p. 42). As for the composition of the Commission itself, Morris and Hobbs proposed experts in First Nations affairs, Australian history, anthropologists, First Nations Elders, diplomats, or judges; split evenly between First Nations and non-First Nations Australians, on a 5-year term, with staggered appointments (Morris & Hobbs 2023, pp. 44-45). Morris and Hobbs (2023, p. 2) provide an excellent start to the conversation on

a Makarrata Commission, but emphasise that it must be in line with the principles of FPIC and self-determination; the way forward must ultimately be decided by First Nations peoples. This is an area requiring significantly more research.

SECTION C: Making treaties

5. Reasons First Nations peoples seek to negotiate treaties

Why do many First Nations people in Australia support treaties? Why do many First Nations peoples seek to negotiate treaties with state and territory governments, and support calls for a treaty or treaties at a national level? In his oft-cited Wentworth Lecture 'Beyond the Mourning Gate – Dealing with Unfinished Business', Patrick Dodson (2000, p. 19) argues that treaties can enable First Nations peoples to negotiate on a number of core issues that matter to them, such as: "political representation; reparations and compensation; regional agreements; Indigenous regional self-government; cultural and intellectual property rights; recognition of customary law; an economic base." In this chapter, many of these critical issues are discussed, especially through a rights-based approach to treaties, power-sharing arrangements, and reparations and compensation. Finally, arguments against seeking treaties will be explored.

5.1 Treaties can uphold rights

Many academics believe that the human rights of Indigenous peoples can be better protected through treaties (see for example: Behrendt 2002; Behrendt 2003; Davis & Williams 2021; Phillips et al. 2003; Warner, McCormack & Kurnadi 2021; Wood & Gardiner 2021). Treaties are thus sometimes understood as avenues through which to formalise recognition of and implement Indigenous rights. Hobbs (2019) suggests a rights-based approach could use the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) as a framework through which to inform the contents of treaties. In reports exploring the possibility for state- or territory-based treaties in Victoria, Lutruwita/Tasmania, and the Northern Territory the UNDRIP has been referenced as forming the "minimum standards" for treaty negotiations (First Peoples' Assembly of Victoria 2022b; Northern Territory Treaty Commission 2022; Warner, McCormack & Kurnadi 2021). Some rights that have been suggested include cultural heritage and intellectual property rights (Quiggan & Janke 2003), rights to language and education through self-determination (Rigney, L-I 2003), and sea and water rights (Behrendt 2003; Executive Committee of the National Aboriginal Conference 1982; Warner, McCormack & Kurnadi 2021). Treaties have also been suggested as documents upon which to secure protections for human rights which affect

Indigenous peoples – such as the right to freedom from discrimination (*The Barunga Statement* 1988; Behrendt 2003). Evidently, a rights-based approach to treaties, or using treaties to uphold Indigenous rights and human rights, has plenty of support.

However, others warn against a focus on equality rights, rather than on the specific human rights of Indigenous peoples. Mansell (2003) argues against enshrining citizenship-type rights in treaties – that is, focusing on gaining equal rights to non-First Nations Australians. Mansell (2003) argues that an equal rights approach, rather than focusing on protecting the unique human rights of Indigenous peoples, could lead to assimilation, rather than the conditions that would enable self-determined futures. A focus on formal equality with non-First Nations Australians could undermine these unique rights and interests of First Nations peoples. Māori (Te Rarawa, Ngāti Kahu) academic Dominic O'Sullivan (2021) shares a major lesson for Australia from Māori experiences: that the benefits of treaties lie in their transformative potential. O'Sullivan (2021) suggests that treaties must go beyond settling the past and guaranteeing equality; they should recognise the political standing of each party, and thus distribute political authority to First Nations peoples over their own affairs. The human rights of Indigenous peoples can be afforded greater protection through treaties, although they must be recognised as unique to First Nations peoples, rather than through the lens of equality with non-First Nations Australians.

5.2 Power-sharing arrangements under treaties

Arrangements to formally share power between Indigenous peoples and settler-colonial governments are core business of treaty negotiations. Formal power sharing arrangements may take a variety of forms in Australia. Self-determination will be essential to determining what this may look like for each First Nation or region (*The Barunga Statement* 1988; Northern Territory Treaty Commission 2022; Treaty 88 Campaign 1988). Some First Nations people have advocated for some local or regional self-government for First Nations peoples to be agreed upon as part of treaties (see: Beertwah, Beediyar & Kudagin 2002; Dodson, P 2000). The Northern Territory Treaty Commission (2022)'s consultations across the territory reached the same conclusion, with its recommendations including advocating for local forms of self-government. In Victoria, where they are soon to begin negotiating treaties with the state government, local decision-making powers have been flagged as one of the major reasons for negotiating treaties. In a statement to fellow First Nations people in Victoria, the First Peoples' Assembly of Victoria described treaties as the opportunity for "a meaningful and wholesale transfer of decision-making powers back into Aboriginal hands. Mob making decisions about mob for mob"; and stated that "negotiating Treaties will put decision-making power directly into the hands of Aboriginal communities at a local level" (First Peoples' Assembly of Victoria 2023). Australian governments will likely be asked to recognise First Nations community-based decision-making, or to formally devolve decision-making powers as part of a treaty and in recognition of First Nations sovereignty.

However, some academics have warned of the possibility of governments misinterpreting power-sharing as service delivery agreements. Writing from the North American context, Stephen Cornell (2002, p. 9) argues that treaties must not be focused on service delivery or "operational administration"; that they *must* recognise the "genuine decision-making power" of the Indigenous party. Darryl Cronin (2003) argues that in Australia, treaties can offer the opportunity to redirect government away from the service delivery approach, towards recognising First Nations autonomy and authority. However, Asmi Wood and Christie Gardiner (2021) have warned that First Nations peoples should "be wary" that governments may seek to reduce treaties to "a mere mechanism for service delivery". They argue that treaties should be "visionary", and can give First Nations peoples "substantive control over [their own] affairs" without necessitating "political independence" from the Australian nation-state (Wood & Gardiner 2021, pp. 76, 65). Evidently, Australian governments must be prepared to negotiate to devolve some of their power over First Nations peoples lives in any negotiations they undertake. Conversely, First Nations peoples should be alert to settler-colonial governments who may seek to limit treaties to the negotiation of delivering services for First Nations peoples, rather than devolving the decision-making powers to First Nations peoples.

These warnings from academics are not unreasonable or baseless. Experiences in Canada and Aotearoa of modern treaties and of Waitangi Tribunal claims processes indicate that there is more positive rhetoric than action. In Canada, Yellowknives Dene political science scholar Glen Coulthard (2014b) identified a move from the settler state and society towards a 'politics of recognition'. Coulthard argues that recognition politics enables state-led symbolism and rhetoric, and accommodates Indigenous claims as identity politics, rather than addressing structural issues like land, economic development or self-government. Coulthard (2007, p. 437) states "the contemporary politics of recognition promises to reproduce the very configurations of colonial power that Indigenous demands for recognition have historically sought to transcend". For example, governments use the land-claims process to depoliticise self-determination and domesticate Indigenous nationhood when they refer to Indigenous rights as just "cultural rights" (Coulthard 2014a, p. 75). Similarly, Māori (Waikato-Tainui, Ngāti Korokī Kahukura) legal scholar Linda Te Aho (2010, p. 123) suggests that "widespread dissatisfaction among Māori over the painstakingly slow progress towards fulfilling the promise of the Treaty demonstrates that any advantage is more rhetoric than real". The move towards rhetoric and recognition in treaties or land claims processes have not resulted in major improvements for Indigenous peoples in Canada and Aotearoa. Thus, Australian governments seeking to negotiate treaties with First Nations must be aware and vigilant that their negotiations do not reduce treaties to mere rhetoric, such as diminishing treaties into service delivery agreements.

5.3 Reparations and compensation can be negotiated in treaties

Reparations in treaties

Some authors explicitly call for reparations or compensation within treaties, although not much detail has been suggested into what exactly this might look like (see for example: Altman 2002; Appleby & Davis 2018; Dodson, M 2003, 2006; Dodson, P 2000; Executive Committee of the National Aboriginal Conference 1982; Gallagher 2021; Harris 1979; Hiatt 1987; Maddison 2022; Tatz 1983). In the 1980s the term 'compensation' was chosen over reparations by the Senate report (The Parliament of the Commonwealth of Australia 1983), the Barunga Statement (*The Barunga Statement* 1988) and Treaty 88 campaign (1988). The Northern Territory and Lutruwita/Tasmania treaty reports conclude that reparations must be a part of their treaties (Northern Territory Treaty Commission 2022; Warner, McCormack & Kurnadi 2021). The NAC's Makarrata demands of 1981, as published in the Senate report (The Parliament of the Commonwealth of Australia 1983), called for a guaranteed share of national income (5% of annual GNP for 195 years, as well as various tax exemptions), although others have articulated similar funding not as reparations per se, but as a sustainable source of funding for self-governance (Mansell 2016; Phillips et al. 2003; Tatz 1983). Patrick Dodson (2000, p. 19) in his Wentworth Lecture, listed "reparations and compensation" and an "economic base" in his list of core principles for treaties. Reparations and compensation could provide an economic base from which First Nations people can begin to rebuild their wealth. Economic self-determination is increasingly being recognised as an important contributor in the First Nations policy space, spearheaded by the FNP. More recently, Lisa Strelein and Belinda Burbidge (2019) have been very clear that reparations "must be included" in any treaty. As to what this compensation could look like, Strelein (2021, p. 93) suggests that in the context of the Yorta Yorta considering negotiating with the Victorian Government, reparations would be "impossible to quantify and compensate", but instead "what can be quantified is what might be required to restore Yorta Yorta to a position of cultural and political sustainability". Strelein's inspiration is drawn from the Noongar settlement, in which funds were allocated towards self-determined objectives for the Noongar Nation. Evidently, reparations and compensation in treaties is an area requiring significant further academic research, as no major exploratory work has been done on it to date.

Existing work on reparations and compensation in Australia

Outside of the discussion of treaties, some academic research has been conducted on reparations and compensation for the Stolen Generations and the 'stolen wages'. The UN's 'Van Boven/Bassiouni principles', outline five key components to the reparations victims of gross violations of international human rights should receive: "acknowledgement and apology;

guarantees against repetition; measures of restitution; measures of rehabilitation; and monetary compensation." (Cunneen 2005, p. 65; Northern Territory Treaty Commission 2022, p. 42). The 1997 *Bringing Them Home* report recommended that reparations be made to members of the Stolen Generations, highlighting an apology and monetary compensation as priorities (Brennan, Bosnjak & Williams 2003, p. 123). Following the National Apology delivered in 2008, the Australian Government faced criticism for not following up with monetary compensation, arguing a lack of money was a lack of commitment to the words spoken (Nettheim & McRae 2009, p. 621). In the early 2000s, a comparison of litigation brought against governments for the practice of forcibly removing Indigenous children from their families and communities in Australia and Canada revealed that only the Canadian cases had seen some successes (Buti 2002, p. 31). Some limited compensation schemes have been established in the last two decades, but it has been suggested that in Australia, the actions of politicians and government to the Stolen Generations did not match the reconciliation efforts from the Australian public (Gunstone 2016, p. 310). 'Stolen wages' refers to the widespread non- or under-payment of wages to First Nations people, in particular forcing wages to be paid into government managed trust accounts, which were mis-managed and not able to be accessed by First Nations people (Gunstone 2016). Successive governments over decades continued to avoid granting First Nations people access to the money (Brennan & Craven 2006). In the 21st century, some state governments set up compensation schemes for those affected, but it is estimated that there remains hundreds of millions of dollars still owing (Gunstone 2016). The work on reparations for the Stolen Generations and stolen wages (especially regarding what is still owed) may be important to consider in discussions of reparations accompanying treaties.

Reparations for colonisation as a whole, outside of treaty discussions, has been explored to a minor extent in Australia. The idea of reparations for colonisation was first explored in Australia in the 1830s by settlers who saw (and participated in) the destruction caused by colonisation on First Nations peoples; however, this was largely motivated by the impression that it might reduce resistance from the First Nations peoples settler-colonisers sought to have greater control over (O'Brien 2011). In the 1970s, under the Whitlam Government, the Woodward Royal Commission into land rights in the Northern Territory recommended establishing a fund to compensate for past loss of lands – incorporating cultural and economic needs (Nettheim & McRae 2009, p. 205). A report on native title in 2005 from the then Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, argued that compensation was due for dispossession: "Compensation for failing to make treaties, for the historical taking of land… without agreement or payment", in line with human rights principles and the norms of international law (as quoted in Nettheim & McRae 2009, p. 215). In this report, compensation was framed as "both a symbolic and practical act of reconciliation" (as quoted in Nettheim & McRae 2009, p. 215). Criminologist Chris Cunneen

(2005, p. 78) suggests reparations is "the next stage in responding to historical injustices in Australia". More broadly, academic Maria Giannacopoulos (2017, p. 33) has described the great debt Australia owes to First Nations peoples as “Australia’s sovereign debt crisis”. Giannacopoulos (2021, p. 57) argues Australia has a “foundational debt, incurred through frontier violence, dispossessing land removals and the imposition of a British legal and political order”. Giannacopoulos (2021, p. 57) also argues this debt will continue to accrue until Australia begins to compensate First Nations peoples for the historical and contemporary violence through which settler-colonialism makes claims to First Nations land. Overall, however, the discussion on reparations has been somewhat limited in Australia.

Despite this, recent legal cases indicate avenues for compensation through the courts for past wrongs against First Nations people may be expanding. The Timber Creek compensation case (Northern Territory v Griffiths [2019]) was the first time the High Court assessed compensation for the extinguishment of Native Title rights and interests. The Court found that compensation was due to claimants for their economic loss, and significantly, the non-economic (cultural) cost of extinguishing their Native Title over the area (Dews 2021; Young 2020). In 2023, a judgement was handed down in the Federal Court, in relation to the case *Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia.* The Court found that the constitutional “’just terms’ guarantee” for the compulsory acquisition of property by the Commonwealth in the Northern Territory would apply to the extinguishment of native title (Isdale 2023, p. 174) The Commonwealth appealed the Federal Court decision, with the matter expected to be heard in August 2024 (Dick 2023). The Federal Court decision opens up the possibility that compensation could be payable to First Nations for the failure by the Commonwealth to provide “just terms” compensation in some circumstances.

Political climate for reparations

Experiences from overseas indicates that the larger scale of harms may make reparations more politically difficult to pursue. Cunneen (2005, p. 79) argues this to be the case in the US, where Japanese-Americans interned during WWII have been provided reparations, but the same has not been done for slavery. For interned Japanese-Americans, there was a limited number of people affected for a clear period of time; whereas the victims of slavery are a much greater number and have been affected over a much longer period of time. In a major study of reparations in the US, political science academic Thomas Craemer (2015, p. 653) found that public opposition to reparations is reduced when specific connections to slavery are illustrated for providers and recipients. This highlights the important role of truth-telling and history education. Most importantly, though, Craemer (2015, p. 653) finds that the “political will”, rather than legal obstacles, is the greatest barrier to reparations – especially using the example of Haiti’s

significant independence debt to France, which continued to be paid over multiple generations. Meanwhile, in the English-speaking settler-colonies, Māori (Ngā Ruahinerangi, Ngāti Ruanui, Ati Hau) legal professor Andrew Erueti (2016) finds that only Aotearoa has committed to reparations to Māori people, through the Waitangi Tribunal. Instead, in Australia and Canada, Erueti (2016, p. 109) argues there is only "a collection of scattered agreements that can never cohere into a compelling story about reparations." Indeed, compensation only exists in "incremental 'pockets'" across Australian law, as in the cases of the Stolen Generations and the stolen wages (Hocking & Stephenson 2008, p. 521). Any reparations in Australia may also need to take into account political and legal reforms – especially noting the criticism of Erueti (2016, p. 101) who argues that, although the Waitangi Tribunal is a process of reparations, it still fails at "restoring indigenous political institutions". The large scale of harm caused by ongoing settler-colonialism in Australia may inherently make reparations more politically difficult – but no less important – to negotiate.

Discussions of reparations in Australia should also bear in mind the global movement for reparations for slavery. African American author and journalist Ta-Nehisi Coates wrote a renowned article 'The Case for Reparations' in 2014, in which he illustrates the links between the legacy of slavery and racist government policies and wider discrimination, and the average lower socio-economic status of African Americans compared to white-Americans. Coates (2014) describes the "plunder" of African slaves and their descendants as fundamental to America's wealth. It has been estimated that the value of historical slave labour provided to the US would be worth around $5.9 to $14.2 trillion in 2009 US dollars (Craemer 2015, p. 653). Australia is also implicated in these discussions. For example, some Australian universities benefitted financially from the legacy of slavery. Following the abolition of slavery in Britain, ex-slave owners were financially compensated by the British Government, and a significant portion of this wealth was invested in settler-colonies like Australia (Barnes 2022). Some funds were directly donated to major Australian universities (Barnes 2022). Australia was also a major participant in the labour trade of Pasifika people (Pacific Islanders) who were 'blackbirded' – that is, "transported through coercion, kidnapping or trickery" – to work on the cane fields in Queensland (Stead 2019, p. 134). Their descendants, Australian South Sea Islanders, as well as Pasifika people living on their home islands today, continue to fight for this history to be told. In 1886, legislation was introduced to compensate the *employers* of Pasifika people who returned to their home islands (Queensland Government 2021). Thus, reparations in Australia could be considered not only for the ongoing colonisation of the First Nations peoples of Australia, but also within the context of global discussions on reparations for slavery and blackbirding.

There are evidently many gaps in the literature on reparations and compensation in the context of Australia. In particular, work will need to be done on reparations and compensation in relation to treaties.

5.4 Why treaties should sometimes *not* be sought

Although this chapter has focused on the arguments as to why treaties *should* be negotiated between First Nations and Australian governments, there are some who argue against seeking treaties. In academic publications, support for treaties is generally strong – although there is usually a caveat detailing the failings of historical treaties in similar jurisdictions like the US, Canada and Aotearoa (see for example, many chapters of Langton et al. 2004). For example, Murri academic Bronwyn Fredericks (2022, p. 10) finds that in English-speaking settler-colonies, treaties are often called on when they have been breached. Fredericks suggested a Voice could provide a difference to treaties in Australia, by ensuring a treaty is able to *prevent* acts of discrimination, rather than only respond to acts contravening treaties. Academic Helen Ware (2023) suggests that the failings of treaties in other jurisdictions suggests treaties cannot be relied upon as the only solution. Behrendt (2002, p. 25) similarly provides the caveat that some treaties in Canada have not been enforced or are generally inadequate, but argues that they have still benefitted Indigenous peoples – particularly with establishing self-government and protecting hunting and fishing rights. These indicative examples demonstrate that although academics are not arguing against seeking treaties, they do caution against treaties as a panacea for dealing with the ongoing consequences of settler-colonialism.

In non-peer reviewed literature, some have argued against treaties. In 2002, the Indigenous Law Bulletin published a special issue featuring short pieces written from the personal perspectives of a range of First Nations and non-First Nations Australians (mostly non-academic professionals and students) on treaties (Indigenous Law Centre 2002). Some of these articles argued against treaties, including those written by First Nations people – but their arguments mostly lay with the perception that Australia is not yet ready for a treaty. Some argued a treaty should not be pursued because it would not be *possible* or the government could not be trusted to act in good faith, rather than that it would not be an ideal avenue through which to formalise the relationship between First Nations and other Australians.

In a non-peer reviewed article, Euahlayi scholar Bhiamie Williamson (2021) argues against seeking treaties. Williamson argues that First Nations peoples will be forced to cede their sovereignty in treaties, based on the experiences of those treaty nations in the US and Canada. Williamson (2021) questions whether any agreement would ever be worthy of such a concession, when "knowing and asserting that we never willingly gave up our lands or sovereignty has always provided strength in the struggle". After decades of the treaty movement, Williamson (2021) also critiques that there is no "common, defined and accepted narrative" of what treaties should be for First Nations peoples in Australia.

6. The processes and structures that can enable treaty-making

6.1. Legal structures

6.1.1 Federalism

A number of academics have argued that Australian federalism is compatible with and can effectively support treaty-making with First Nations peoples. Langton, Tehan and Palmer (2004), Dodson (2006) and McMillan (2016), for example, suggest that Australia's federal system enables the recognition of Indigenous sovereignty *within* the state of Australia. That is, within the Australian political system, sovereignty can be shared or co-exist. Legal scholar Dylan Lino (2022, pp. 14, 15-16) has argued that the Australian Constitution itself is "a treaty between different political communities who agreed to unite in a single overarching association while maintaining their own autonomy and distinctness," and thus First Nations sovereignty is "fundamentally consistent with Australia's history of federalism". That is, as part of treaty settlements, First Nations representative bodies could be another component of Australia's federation, comprised of national, state and territory governments, and, as a creation of state and territory legislation, local governments with municipal and other local responsibilities. Deagon (2022, pp. 758, 747) similarly asserts that federalism – which he argues has "clear theological foundations" and thus shares Christian principles – is a "pluralist notion of authority" which would allow for the sharing of power across Australian jurisdictions with First Nations, as it currently does across the governments sharing various powers and responsibilities. Rather than requiring a total rewriting of Australia's political and legal systems, expressions of First Nations sovereignty and self-determination, as possibly negotiated through treaties, can be accommodated within Australia's federal system of government.

Federalist ideas also appear in the widespread support amongst many First Nations academics in the early 2000s for a national framework for regional agreements. Many envisioned a national treaty that would act as an overarching framework through which regional agreements or treaties could be negotiated (see for example: Behrendt 2002, 2003, 2018; Brennan 2005b; Clark, G 2002; Dodson, M 2003; Dodson, M 2021b; Dodson, P 2000, 2016; Langton 2001; Phillips et al. 2003). The dominant view was that the regional level (state or local governments, or particular regions) is the real forum through which change can and should be negotiated. A national treaty is thus suggested to set out the minimum standards for regional agreements to later be negotiated. The

outlier is Mansell (2002, 2003, 2016), who has consistently advocated for a single national treaty, to ensure that some are not afforded more or less than others.

What would inclusion in the Australian federation mean for First Nations people? Lino (2017, p. 23) argues that federalism enables "Indigenous collective autonomy with an ongoing Indigenous settler-constitutional relationship". That is, First Nations people can have autonomy over their own communities ("self-rule" – in whatever form that may take), as well as a recognised right to "shared rule" alongside states and territories, but ultimately "subject to federal supremacy" (Lino 2017, p. 19). Some academics have looked to North America for guidance as to what federalism that gives expression to First Nations autonomy in a settler-colonial state may look like. Wiradjuri legal scholar Mark McMillan (2016, p. 15) argues that the Iroquois Confederacy of Nations informed the creation of the US as a federation, including its inclusion of Indigenous peoples as 'First Nations' within that federation. McMillan (2016, p. 15) contends that Australia adopted similar ideas in conceptualising its federation, but neglected the application to First Nations peoples. The theory of 'treaty federalism' in North American scholarship suggests that the treaties signed in 18th-19th centuries in North America between Indigenous peoples and settler-colonisers provide "an ongoing federal constitutional relationship" by recognising the political authority of Indigenous institutions and the sharing of power between Indigenous peoples and settlers (Lino 2017, p. 11). However, it is unclear whether any Australian states and territories are contemplating a form of shared rule with First Nations people in their jurisdictions.

The Northern Territory Treaty Commission's Final Report called for First Nations self-government as a top priority of the treaty process. It suggests the Northern Territory Government should enable the establishment of First Nations Governments through the following steps:

1. "Through the Treaty process, enable the statutory recognition of First Nations by the [Northern Territory Government] through legislation.
2. Through the Treaty process, facilitate the establishment of representative First Nation Governments to govern for First Nations at local or regional level and to provide the platform from which to negotiate with government.
3. Support First Nation Governments as local government structures in the first instance and, over time, support them to gradually take on more responsibility and ultimately become an independent sphere of government." (Northern Territory Treaty Commission 2022, p. 37)

First Nations self-government can be facilitated by the Northern Territory Government through legislation, facilitating government at the local level, and finally by supporting First Nations Governments to developing beyond only local government matters to having more responsibility

and becoming governments with expanded jurisdiction. Do state and territory governments embarking on treaty processes comprehend that treaties will require them to devolve power to First Nations, including possibly to First Nations Governments? As explored in Chapter 4.2, the Queensland Government was seeking to negotiate a treaty but rejected the proposal to acknowledge *continuing* sovereignty, and in South Australia, the process was criticised for more closely resembling a service delivery agreement than a treaty agreeing to share power. Differing understandings of what treaties substantively mean may result in Australian governments taking a view of federalism that limits opportunities for meaningful power-sharing with First Nations.

6.1.2 Constitutional or legislative entrenchment

A major debate in the literature is whether treaties should be protected in the Australian Constitution or in national legislation. Michael Dodson (2003, 2006) summarises the pros and cons of either approach: legislation is easier to achieve (no referendum required), but it is also easier to dismantle; inversely, the Constitution can provide greater protection (not subject to the whims of the government of the day), but would require a lengthy process to achieve a successful referendum. Much of the literature that addresses this point directly argues that national treaties should be protected in the Constitution (see for example: Behrendt 2003; Langton 2001; Saunders 2021; Tatz 1983; The Parliament of the Commonwealth of Australia 1983; Treaty 88 Campaign 1988; Wood & Gardiner 2021). However, all these works were published prior to the failure of the Voice Referendum in late 2023. In the wake of what was a very difficult time for many First Nations people – a group of unidentified First Nations leaders said the referendum "unleashed a tsunami of racism" (AAP 2023) – would these authors still support another referendum for constitutional protection of treaties today? And what should constitutional protection of treaties look like?

The literature references positive and negative lessons garnered from international experiences to improve what is proposed in Australia. When British Parliament granted Canada full control over its own Constitution in 1982, a number of amendments were made, including section 35(1) which recognised and affirmed 'Aboriginal and treaty rights' (Government of Canada 2018, p. 9). Behrendt (2002, p. 26) argues that Canada's constitutional protection of Aboriginal and treaty rights, alongside the Canadian Bill of Rights, could be adopted in Australia to protect First Nations rights. Although, it should be noted that constitutional reform in Canada is a simpler prospect than in Australia, and infringing on Aboriginal and treaty rights is still permitted under certain circumstances set out by the Supreme Court of Canada (Behrendt 2002, p. 26). In Aotearoa, the Treaty of Waitangi (the English language version) forms part of the constitutional

foundations of the nation. Langton, Tehan and Palmer (2004, p. 11) note that "the Crown's right to govern was dependent upon it meeting its obligations to Māori people", as set out in the Treaty. Thus, the Treaty of Waitangi has become a key consideration in government decision-making as the Treaty became increasingly recognised for its role in the New Zealand's constitutional arrangements (Hickford 2018, p. 158; Stephens 2018, pp. 191-192). Recent developments following the election of a new government in Aotearoa demonstrate the key role of the Treaty in the constitutional arrangements, as the coalition government proposes new legislation to review the Treaty's principles (Vowles 2024). These insights help frame discussions of constitutional protection of treaties in Australia, although given the uniqueness of Australia's constitutional system, cannot be directly applied to the Australian context.

6.2 Nation-(re)building

Some authors have suggested that "regardless of the outcome" (Davis 2006, p. 127), the process of negotiating treaties will be valuable in itself. In particular, this is due to the 'nation-(re)building' it would promote within First Nations (Hobbs 2020, p. 27). Significant research into 'nation building' has been undertaken in North America since the late 1980s by the Harvard Project on American Indian Economic Development (now the Harvard Project on Indigenous Governance and Development, henceforth referred to as the 'Harvard Project') and the Native Nations Institute at the University of Arizona. This research demonstrates that Indigenous nations who prioritise asserting their sovereignty, and focusing on their institutional capacity to exercise that sovereignty, are able to create sustainable economic development for their nation (Cornell & Kalt 2007, p. 11). In fact, Cornell (2002) says that "[a]fter years of research, we have yet to find a single case of an American Indian nation demonstrating sustained, positive economic performance in which somebody other than the Indian nation itself is making the major decisions about resource allocations, project funding, development strategy, governmental organisation and related matters." To improve the economic conditions of Indigenous nations, they must control the decision-making. Cornell (2002, p. 10) directly linked treaties to nation-building work by stating that "treaty-making is potentially a nation-building enterprise", noting the experiences of Canadian First Nations. Treaty-making can be a way through which First Nations peoples can re-build their nations and reclaim and assert their governing authority.

In Australia, nation-building has been adapted into 'nation-(re)building'. The Jumbunna Institute for Indigenous Education and Research at the University of Technology Sydney has collaborated on projects with the Harvard Project and the Native Nations Institute since 2009, especially with researchers Miriam Jorgensen and Stephen Cornell (Native Nations Institute 2024). What might nation-(re)building look like for the First Nations of Australia? At the Jumbunna Institute, Daryle Rigney and Alison Vivian, among others, have led work including workshops on nation-(re)building for First Nations, and academic research which resulted in two co-authored chapters talking about the process of nation-(re)building for the Ngarrindjeri Nation and the Gunditjmara People (see Rigney, D, Bell & Vivian 2021; Rigney, D et al. 2021). They use treaties (preparing for and negotiating them) as tools for nation-(re)building, as many of issues a nation should resolve for treaties (such as decision-making structures, representation, etc.) are the same used in nation-building. Bell describes the process of nation-(re)building as such:

> "[W]e have done a lot to assert ourselves as the Gunditjmara People: we defined the borders of our Country; we defined who and what we are as Gunditjmara people; we defined the world that we want to live in; and we have returned to healing our Country through the restoration of Lake Condah. We achieved these things through building up

> our relationship programs, respecting the role of our Elders and our knowledge holders as collective leadership. That collective leadership needed to come forward because we have a long list of things to do. Once we had identified our aspirations such as restoring Lake Condah, and obtaining national and world heritage listing for the Budj Bim cultural landscape, we began to build up our knowledge, our capacity and our own understanding of how we are with that Country and community, how we are more broadly with the broader community. That's where we are today." (Rigney, D, Bell & Vivian 2021, p. 30)

As corroborated by Cornell in North America in the early 2000s, treaties can be a useful tool for nation-(re)building for First Nations, regardless of the outcomes of treaties.

6.3 British Columbia's modern treaty-making process

In recent decades, the modern treaty-making process underway in the province of British Columbia, Canada, has been referenced by those considering treaties in Australia. For example, the Northern Territory Treaty Commission conducted significant research on the British Columbia experiences, which inspired the process put forth in the Treaty Commission's final report (Dodson, M 2021b; Northern Territory Treaty Commission 2022). The province's 'Incremental Treaty Agreements' (The Ministry of Indigenous Relations and Reconciliation n.d.) also served as inspiration for Behrendt (2003, p. 28)'s suggestion of "progressive treaty making". That is, to combat the long period of time negotiations take, as each issue is agreed upon it is ratified and implemented from that date. Each part will ultimately make up a final treaty, but this gives First Nations peoples greater flexibility and allows them to see the benefits as soon as possible, rather than having to wait a decade or longer for the more difficult issues to be negotiated.

However, the modern treaties in British Columbia do not only serve as positive inspiration – there are many critiques of the British Columbia modern treaty process, which serve as lessons of what to avoid in Australia. For instance, modern treaties have often been underwhelming for Indigenous peoples in British Columbia – the processes are slow and underfunded, and usually only small amounts of land are transferred back to Indigenous peoples (Young & Hobbs 2021). However, over the past three decades, the process has improved in some important ways. For example, treaties no longer require First Nations to agree to the extinguishment of their Aboriginal title, and governments now approach treaties as a way of reconciling Indigenous sovereignty, rather than extinguishing it (Morris & Hobbs 2023, p. 33). The UNDRIP in particular has been used successfully by Indigenous peoples in Canada as a legitimating document to "enhance their negotiating power", although Hobbs (2019, p. 185) warns that governments can similarly use the language of the UNDRIP to take back some control of the process. The Canadian experience also suggests that negotiations will be the most difficult stage (Hobbs 2019, p. 184). These lessons from Canada can be useful for both First Nations peoples and governments in Australia on what to do and what not to do in designing modern treaty-making processes.

6.4 Negotiating in good faith

Finally, many authors have expressed the need for negotiations to be conducted in good faith. In particular, legal scholars have studied various court rulings internationally which require the state to act in good faith with Indigenous peoples in regards to treaties. In Aotearoa, the New Zealand Courts have ruled since the late 1980s that negotiation over the Treaty of Waitangi must be conducted "with the utmost good faith" (as quoted in Brennan, Gunn & Williams 2004, p. 343; Hobbs & Williams 2018, p. 9; Wood 2022a, pp. 255-256). Wood (2022a, p. 253) argues that the "Canadian Courts arguably reinforced the [Vienna Convention on the Law of Treaties] norm that a state should not act treacherously or in bad faith in entering into treaty". Evidently, there is some legal basis for calling for negotiations to be conducted in good faith. However, Wood (2022a, p. 246) warns that although it might be a "normal requirement" to negotiate in good faith, "history has shown us that it is not always followed in practice". The argument that negotiations should be conducted in 'good faith' has been referenced by numerous authors (see for example: Dodson, M 2006; Dodson, M & McNamee 2008; First Peoples' Assembly of Victoria 2022b; Hobbs & Williams 2018; Williams & Hobbs 2020), demonstrating the importance this holds. All appear to be addressing the idea that Australian Government negotiators may come to negotiations with bad faith, rather than the First Nations negotiators. Beyond a purely legal argument, there is certainly a moral argument for the state to engage negotiations in good faith. Hobbs (2018, p. 187) calls for the Australian Government and non-Indigenous Australians to come to treaties with a "spirit of equal partnership". Deagon describes the importance of "mutual respect" and a "relational ethic" between First Nations and non-First Nations people, to the success of treaties in Australia.

7. Representation: First Nations parties

7.1 First Nations representative bodies in negotiations

Who will be party to treaties with Australian governments? Both Behrendt (2003, p. 25) and Taylor (2003) expected First Nations identities would become more contentious due to the perceived benefits to be reaped from treaties. Taylor (2003) does not provide a simple answer or solution for this complex issue, but argues strongly that First Nations peoples should be the adjudicators of Indigeneity, steering clear of DNA testing and non-Indigenous court systems and legislation. Mansell (2016, p. 152), however, has suggested that the issue of who represents First Nations is less contentious than it may appear – it is not an issue of representation, he argues, but rather how cultural protocols are followed. It is unclear whether existing representative bodies, such as native title Prescribed Bodies Corporate (PBCs), would have the cultural and political authority to negotiate treaties.

Only a few suggestions have been explored in the literature for the creation of new representative bodies specifically for negotiating treaties. Behrendt (2003) proposes state and national conventions to elect representatives, to enable grassroots participation. Hobbs (2019) suggests using Indigenous representative structures for a representative body, such as what became the First Peoples' Assembly of Victoria. The nation-building work explored in Section 6.2 may assist individual nations with their internal culturally-appropriate representative structures. Dodson's Wentworth Lecture was particularly influential in the early 2000s (referenced in Behrendt 2003; Clark, G 2002; Langton 2001; McGlade 2003a). Dodson (2000) suggests 20 prominent Aboriginal dignitaries are appointed by ATSIC (which was later abolished in 2005), and the government nominates 20 dignitaries for the non-Indigenous side. All 40 would draft a treaty. Then, each side nominates representatives to negotiate the draft treaty. This would be overseen by High Court Judges and ex-Prime Ministers to represent the non-Indigenous side, and the same number of senior Aboriginal representatives. Dodson (2000) also adds a fully independent Treaty Commission with sufficient resourcing. There have been few other comprehensive visions as to how the representative body/bodies could be composed.

In Victoria, the composition of representative bodies for negotiations has already emerged as an issue. The First Peoples' Assembly has reserved seats for Traditional Owners, although initially these only included the 11 Traditional Owner groups recognised by native title or by the Victorian Government (Maddison, Hurst & Wandin 2021, p. 189). Relying on settler-colonial government processes of determining who is a Traditional Owner (often requiring lengthy and involved processes) has been criticised for prioritising settler decision-making over a self-determined

alternative (see Maddison, Hurst & Wandin 2021). In 2022, the First Peoples' Assembly of Victoria introduced a new pathway to recognition as Traditional Owners outside of government processes (First People's Assembly of Victoria 2022). There are also general seats, for which any Aboriginal and Torres Strait Islander person who resides in Victoria and/or is a Traditional Owner of Country in Victoria is eligible to stand. This was designed to give representation to “people living off their Traditional Country, members of the Stolen Generations, people who have never known their Country, and Traditional Owners of Country in Victoria who may now live interstate or overseas” (Gallagher 2021, p. 228; Maddison, Hurst & Wandin 2021, p. 190). However, this has created controversy, especially in an urban environment: the Melbourne metropolitan area has 9 general seats, only one of which is held by a Wurundjeri person (Maddison, Hurst & Wandin 2021, p. 190). Maddison, Hurst and Wandin (2021, p. 190) argue that although the general seats may be inclusive for those whose relationships to Country have been disrupted by colonisation, it is "clearly at odds with important Indigenous protocols about speaking on/for Country that is not your own" (Maddison, Hurst & Wandin 2021, p. 190). However, Gallagher (2021) suggests compromises on cultural protocols had to be made, juggling the consequences of colonialism with the day-to-day realities of starting this new process. This illuminates the tension between following cultural protocols and dealing with the complex realities of First Nations structures impacted by colonisation. Wandin also states that permission was not sought to host the First Peoples' Assembly on Wurundjeri land (Maddison, Hurst & Wandin 2021, p. 195). Whether the First Peoples' Assembly is truly representative has also been a subject of focus: only around 7% of eligible voters voted in the first elections (Maddison, Hurst & Wandin 2021, p. 192). The turnout did improve during the second elections in 2023: around 4,200 people voted, more than double the numbers at the first elections (Dexter & Latimore 2023). Despite the evident difficulties of representation thus far in Victoria, it should be noted that the first iteration of the First Peoples' Assembly was not responsible for doing treaty negotiations, but for designing, negotiating, and establishing the mechanisms that will be used in future treaty negotiations. Those elected in upcoming mid-2023 elections will form the second iteration of the Assembly and will be responsible for commencing treaty negotiations.

7.2 Representing other perspectives

There may also need to be a greater Torres Strait Islander perspective provided on national treaties – there are only a few Torres Strait Islander authors that were identified in the work that led to this literature review (Loban 2002; Mabo 2006; Nakata 2003; Nakata & Windsor 2002; Wood 2021, 2022a, 2022b; Wood & Gardiner 2021). Most appear to engage a pan-Indigenous identity in the national debate – perhaps due to envisioning state/local treaties as a more appropriate forum through which to negotiate a distinct position, although this remains unclear. The 'Torres Strait Treaty', which includes some recognition of traditional cultural and economic activities, is already active in the region (Loban 2002). However, Torres Strait Islander people are not a party to the agreement, which is between two internationally-recognised nations: Australia and Papua New Guinea (Loban 2002). Michael Dodson (2006, p. 118) suggests that the existence of the Torres Strait Regional Authority (TSRA) demonstrates First Nations people having a "co-existing sovereign responsibility over certain matters". However, whether the power the TSRA has can be called sovereignty is questionable, given its activities are mostly restricted to administering programs (see description of TSRA's role: Torres Strait Regional Authority n.d.).

An article written by representatives from the National Indigenous Youth Movement of Australia (NIYMA) in 2003 (Phillips et al.) provides a youth perspective that is otherwise missing in the literature. The disproportionately high removal rates of First Nations children and youth incarceration are well-documented (Yoorrook Justice Commission 2022, p. 35). NIYMA draw on a story about renewal shared by an Elder to inform their perspective. NIYMA advocate for a treaty that provides an inspiring vision for the future for all young people, especially young Indigenous people (Phillips et al. 2003, p. 108). They describe experiencing "isolation" and a "sense of hopelessness" as young Indigenous people (Phillips et al. 2003, p. 110). They suggest that a treaty cannot be just political or legal, but must also engage the *spiritual* aspect of Indigenous sovereignty. Many years later, the Uluru Statement would also reference sovereignty as "*a spiritual notion*" (*The Uluru Statement from the Heart* 2017). "A treaty must act as a document to inspire young Indigenous people into believing they have a worthwhile future." (Phillips et al. 2003, p. 114). Apart from the contributions of this article, no other youth-focused articles were found. First Peoples' Assembly of Victoria (2022a, pp. 25, 31) has also identified age as an important factor to take into account; there is the Elders' Voice within the Assembly, and the Assembly has also engaged in youth outreach as well.

Beertwah, Beediyar and Kudagin (2002) share a female perspective on treaties. They describe the impact of colonisation on their decision-making roles and their ability to fulfil their duties as Noongar women. Colonial legacies such as anthropologists viewing men as landowners, meant they were less able to protect women's sacred sites and as such felt their spirituality being

eroded quicker than men, feeling silenced and excluded. They suggest a treaty's reformist agenda could include setting higher standards for government social services, better accountability for government, a new approach/alternative to incarceration, and increased local governance (such as through clan-based structures or pooling family/clan resources). The authors describe the ultimate goal of treaty and self-determination as being "able to hand down these cultural values to my children and grandchildren without compromise" (Beertwah, Beediyar & Kudagin 2002, p. 53). Apart from the contributions of this article, no other gender-specific approaches to treaties in Australia could be found.

SECTION D: The non-First Nations party to treaties

8. Truth-telling

8.1 Truth-telling creates support for treaties

The literature overwhelmingly agrees that truth-telling will be very important to treaties. The Uluru Statement (*The Uluru Statement from the Heart* 2017) calls for the establishment of a Makarrata Commission from which treaty-making and truth-telling will emerge, highlighting the importance of the relationship between these two elements. Many sources suggest that truth-telling is *necessary* for optimal outcomes from treaties (see for example: Appleby & Davis 2018; Davis & Williams 2021; Warner, McCormack & Kurnadi 2021; Yoorrook Justice Commission 2022). Many have argued that the greater understanding of the history and the scale of damage caused by colonisation, the greater appetite there will be from non-Indigenous Australians for treaties and other reparative measures (Craemer 2015, p. 653; Davis & Williams 2021; Ebony Institute 2020, p. 45; Phillips et al. 2003, pp. 111-112; Wood 2021; 2022b, p. 85; Yoorrook Justice Commission 2022, p. 19). That is, that the success of truth-telling initiatives will consequently inform the contents and extent of treaties. As such, government-commissioned community consultation and reports in both Lutruwita/Tasmania and Queensland resulted in recommendations that truth-telling and treaty preparations and negotiations should be conducted concurrently to ensure neither process is delayed, although both suggest separate bodies to ensure both processes are equally valued (State of Queensland et al. 2021, p. 28; Warner, McCormack & Kurnadi 2021, p. 10). The Lutruwita/Tasmanian community consultation reported that that truth-telling would in fact be one of the most important aspects of the process, noting the importance of "quashing the extinction myth" (Warner, McCormack & Kurnadi 2021, p. 37). Truth-telling is widely accepted as vital to any treaty-making in Australia, to ensure settlers approach treaties with a wider understanding of what First Nations peoples' claims are.

More broadly, truth-telling is generally argued as necessary in Australia to transform the relationships between First Nations peoples and governments, as well as with non-Indigenous people. Cronin (2021, p. 213) argues that truth-telling about our history is "fundamental" to transforming the relationship between First Nations peoples and non-Indigenous Australians. Truth-telling about Australian history must include acknowledging the impacts and injustices of colonisation, problematising and rejecting terra nullius ideas and other colonial ways of thinking that remain ingrained in power dynamics, all of which will help us move towards what Cronin

(2021, p. 213) terms "a postcolonial relationship". It is partly for this reason that the Ebony Institute (2020, p. 45) *Truth, Justice & Healing Project* paper 'Hear My Heart' suggests that the order agreed upon at Uluru (Voice, Treaty, Truth) should be reconsidered, with truth-telling first instead, arguing that a Voice and treaties were out of reach in the more hostile political climate of 2020. Given that treaties are often framed to be about changing the relationship between First Nations peoples and settler Australians, many have argued that truth-telling is vital to settler Australians gaining an understanding of why many First Nations peoples seek treaties.

Established as a key component of Victoria's treaty-making process, the Yoorrook Justice Commission is a ground-breaking formal truth-telling body. It is the first ever First Nations-led Royal Commission in Australia, created through the First Peoples' Assembly of Victoria, comprising four First Nations Victorians and one settler Victorian (Yoorrook Justice Commission 2022, p. 3). The sole settler Commissioner, Professor The Hon Kevin Bell QC, has described Yoorrook as a way of promoting support for treaties, aiming to "promote truth, understanding and transformation" (Bell 2022, p. 12). Yoorrook draws upon international legal principles such as those derived from UNDRIP, and transitional justice, in ways that address local contemporary priorities (Bell 2022). As a Royal Commission, Yoorrook has the power to compel government and individuals to provide evidence. In late March, a directions hearing was called stating that the Victorian Government had failed to comply with orders to produce evidence thus far (Yoorrook Justice Commission 2023b). The evidence was produced some weeks after this hearing (Yoorrook Justice Commission 2023a), but the delay demonstrates that the Victorian Government failed to fulfil its duty to the truth-telling inquiry, a key element of the treaty process they committed to.

At the national scale, the Canadian Truth and Reconciliation Commission (TRC) is referenced by multiple sources in demonstrating the correlation between truth-telling and the transformation of relationships. Established in 2008 as part of a settlement agreement brought about by a class action from survivors of Indian Residential Schools, the TRC worked to document Canada's history and the ongoing legacy of colonisation (Cronin 2021, pp. 185-186). A major aim of the TRC was to contribute to renewing the relationships between Indigenous peoples and the Crown, which it did through truth-telling events held all over Canada, including large national and regional events, to raise awareness (Cronin 2021, p. 186). The Ebony Institute (2020, p. 45) uses Canada's TRC as an example demonstrating that truth-telling about the nation's history creates greater support for change: "when the public are fully educated as to the truth, they are more likely to support the need for treaty, voice and social policy services and reform". Settler academic Helen Ware (2023, p. 59) studied the TRC and its applicability to Australia, and finds that the purpose behind the TRC – 'reconciliation' – is often not deemed appropriate for truth-telling in Australia, where truth-telling is instead often viewed through the lens of 'justice'. However, Davis (2021) argues that too often in Australia, ambitions for "truth-telling and justice"

are often watered down to just “truth-telling”. Davis (2021) suggests “it has been a Sisyphean task for any Indigenous nation to push past the truth-telling to see justice implemented.” Other national truth commissions have also been explored in relation to possible truth-telling inquiries in Australia – for example, South Africa’s Truth and Reconciliation Commission (see for example: Northern Territory Treaty Commission 2021; Ware 2023), and Timor-Leste’s Commission for Reception, Truth and Reconciliation (Northern Territory Treaty Commission 2021). To transform the relationship between First Nations people in Australia and settler government and society, truth-telling will undoubtedly be an essential component, although there are a range of perspectives on how truth-telling should be pursued in Australia.

8.2. Attitudes towards First Nations peoples and treaties

Research on the attitudes of non-Indigenous Australians towards First Nations people and Australia's history will be vital to any truth-telling process. Governments have often invoked non-Indigenous people's resistance to treaties as their reason to not pursue them – whether that was the reality of public opinion or not (Clark, T, de Costa & Maddison 2019). In the late 1980s – early 1990s, the Hawke and Keating governments suggested postponing treaty talks, with a focus on fostering non-Indigenous support for treaties first (Short 2012, p. 294). Some years prior, Judith Wright (1985, p. 106), member of the Aboriginal Treaty Committee, argued that the "attitudes and prejudices – and apathy" of non-Indigenous Australians were the major barrier to support for treaties. More recently, legal academic Cheryl Saunders (2021) similarly suggested that engaging the public would increase support for treaties. Others have also noted the fragility of public support for matters concerning First Nations peoples as they constitute a small minority of the general population. Davis (2006, p. 130; 2014, p. 58); Wood (2022a, p. 239) have both identified that creating long-lasting change, like negotiating and implementing treaties, can also be difficult when a change of public opinion in the majority population can lead to a change in government and/or transform the political climate, never guaranteeing the long-term success of political justice. In fact, in the late 1990s, conservative politicians met with First Nations leaders to explore the possibility of supporting negotiations for treaties. Describing these discussions, Yawuru man and ANU First Nations Portfolio Vice-President Peter Yu (2018) said the conservatives had "a serious motivation of self-preservation" due to the political climate at the time, but even after the perceived political danger had passed, "the dialogue continued for a couple of years in a genuine exploration… about negotiating a Treaty". Thus, further research is required as to what are non-Indigenous Australians' attitudes towards treaties.

There is one recent in-depth study that analysed non-Indigenous perspectives on treaties, from Clark, de Costa and Maddison (2019). Focus groups were conducted in 2017 on the state treaty processes that had recently commenced at that time in Victoria and South Australia. The researchers concluded that non-Indigenous people at this time lacked the knowledge necessary to form opinions on treaties: they had "barely started to think through" what a treaty might mean to them (Clark, T, de Costa & Maddison 2019, p. 678). However, they also suggest that the more local a treaty is (at the level of region, state, or territory), the more important local non-Indigenous people will be to a treaty (Clark, T, de Costa & Maddison 2019, p. 677). However with limited research into non-Indigenous people's attitudes towards treaties, insights are limited.

More research has been conducted on non-Indigenous attitudes towards the Uluru Statement, rather than specifically on treaties (see for example: Ch'ng et al. 2022; Deagon 2022; Gray & Sanders 2015; Parkinson, Franco-Guillén & de Laile 2022). An ANU Poll conducted by Gray and

Sanders in March 2015 explored attitudes towards First Nations issues more broadly. The poll revealed that there was a general understanding amongst Australians that First Nations peoples experience injustice and have higher levels of disadvantage than other Australians - and that a majority of Australians believed this was primarily caused by attitudes of other Australians and government policies (Gray & Sanders 2015, pp. 1, 11). Although the poll did not address treaties, it revealed that there is a broad support base for reform, such as land rights and constitutional recognition (Gray & Sanders 2015, p. 1). Further research is still required into how subsections of the non-Indigenous population's attitudes to treaties and understanding of First Nations affairs may differ from that of the mainstream Anglo non-Indigenous population – such as ethnic minorities (Ch'ng et al. 2022) and faith groups (Deagon 2022). The role the media has to play in influencing the debate on treaties should not be understated either (Ch'ng et al. 2022; Fredericks 2022; Fredericks & Bradfield 2021; Thomas, Jakubowicz & Norman 2021). Despite media coverage of First Nations affairs, some have argued that the Australian non-Indigenous public remains mostly ill-informed about the status of First Nations rights. Watson (2012, p. 13), for example, suggests that:

> "Public perception is largely based on the misconception that *Mabo* (*No. 2)* and *Native Title* legislation provided land rights, that reconciliation provides social justice, and the Rudd Government's utterance of 'sorry' healed a long history of assimilation and our attempted genocide. But native title is not land rights, reconciliation provides for no concrete shift in embedded colonial power relationships, and 'sorry' has not ended state interventionist policies which are assimilationist in their effect. Australian law does not provide for Aboriginal rights recognition or even human rights protection."

Watson (2012, p. 13) argues that it is this lack of understanding that resulted in discussions of treaties in Australia being "almost non-existent". That was, of course, until the publication of the Uluru Statement, and in particular the debate generated during the Voice referendum in 2023.

Despite the failure of the Voice referendum, recent data indicates that there remains significant support for reform from non-Indigenous Australians. In the ANU Centre for Social Research and Methods' post-referendum study, Biddle et al. (2023, pp. iii, viii) found that the majority of Australians, including 76% of those who voted 'no' in the referendum, remain supportive of First Nations people having a say in matters that affect them – rather the model proposed during the referendum was not the correct one. Cronin (2021) argues that to change the relationship between First Nations peoples and the state, the attitudes of non-Indigenous people will need to change. This is because non-Indigenous attitudes are informed by a "master narrative" which remains rooted in colonising and assimilation (Cronin 2021, p. xviii). Truth-telling will result in non-Indigenous people having to "confront" the truth and lies about Australian colonisation, reflecting

and listening, which can change attitudes from those informed by colonising, towards encouraging a genuinely postcolonial relationship" (Cronin 2021, pp. 32, 213). Treaty may be the pathway towards this postcolonial relationship.

9. The role of the public service in negotiating and implementing treaties

9.1 Australian Public Service

A significant barrier to achieving meaningful treaties in Australia will likely be the lack of capacity in the public sector, particularly in institutions such as the Australian Public Service (APS), to reflect the worldviews and aspirations of First Nations peoples. There is a growing academic critique of the machinery of government and the power of policy in Australia over First Nations people's lives. In recent years, governments have begun to recognise their failings to First Nations people. The presence of "institutional racism" in government organisations is acknowledged in the National Agreement on Closing the Gap (National Agreement), signed by the Coalition of Aboriginal and Torres Strait Islander Peak Organisations and Australian Governments (2020, p. 11). One element of this institutionalised racism is the experience of racism towards First Nations employees and other First Nations individuals who work closely with the systems of government (Bargallie 2021; Cronin 2021; Ganter 2016; Gilbert 1973). On the other hand, Strakosch (2019, p. 120) argues that public policy is a tool used by governments to "deny, destroy or absorb… Indigenous political difference". Priority Reform 3 of the National Agreement commits governments to transforming their organisations, particularly "systemic and structural transformation to ensure government mainstream institutions and agencies are free of institutionalised racism and promote cultural safety" (Coalition of Aboriginal and Torres Strait Islander Peak Organisations & Australian Governments 2020, p. 12). Tackling these problems within their organisations are "essential requirements that are the responsibility of governments" (Coalition of Aboriginal and Torres Strait Islander Peak Organisations & Australian Governments 2020, p. 12). Evidently, governments have begun to formally recognise their lack of capacity in First Nations affairs.

There are few sources of academic literature addressing the role of the public service in changing the relationship under treaties in Australian. Yet it is an area requiring much attention if treaties are to be both negotiated and implemented properly. Despite Australian governments recognising the existence of 'institutionalised racism' in their organisations, and signing onto an agreement that commits them to 'systemic and structural transformation', the Productivity Commission (2023, p. 2)'s 'Review of the National Agreement on Closing the Gap: Draft Report' found that progress had mostly "been weak and reflects a business-as-usual approach". Of particular note, the Productivity Commission (2023, p. 2) also suggested that:

> “Current implementation raises questions about whether governments have fully grasped the scale of change required to their systems, operations and ways of working to deliver the unprecedented shift they have committed to.”

Thus, there is strong evidence that if treaties are sought to transform the relationship between First Nations peoples and Australian governments, Australian governments likely do not comprehend the extent to which they will be required to change.

First Nations scholar Darryl Cronin in his book *Trapped by History: The Indigenous-State Relationship in Australia* (2021) argues that the public service’s relationship with First Nations peoples is still informed by a terra nullius mentality. Cronin argues that the frameworks through which public servants operate are still informed by colonial thinking, and this is the "stumbling block" to any real political justice (Cronin 2021, p. 2). In order to change the relationship between Indigenous peoples and the state, truth-telling is required, as this will play a major role in our ability to "change the master narrative" of terra nullius (Cronin 2021, pp. xviii, 32). Cronin (2021, pp. xv-xvi) notes:

> "While Australia is often referred to as a postcolonial state, it is hardly so because there has never been a transformative moment in which the nation has restructured its relationship with Indigenous people to recognise Indigenous political difference. Governmental policy in Australia continues to frame Indigenous people as a 'political problem' that needs to be eliminated because Indigenous political difference challenges colonial sovereignty."

The Northern Territory Treaty Commission (2022, p. 48) similarly recognises the need for major reform in its *Final Report*: the public sector and public service will need to "[c]onstantly reinforce and support formal change". Hobbs (2019, p. 182) identified that the public service in Australia does not pay sufficient attention to UNDRIP. O’Faircheallaigh (2018, p. 181) identified that the public service and bureaucracy perpetrate the view that "white knowledge, organisation and modes of operating [are] inherently superior to Indigenous ones".

The public service, as an instrument of the state and its institutions, will be expected to devolve power as part of treaties. Yet the public service was identified as a major roadblock in doing so as early as 2003 (Cronin) and 2005 (Brennan) in the literature. Since this time, the majority of works addressing the issue of the public service and government relationship with First Nations in the context of treaty discussions, have been published in the last eight years. Davis (2016) identifies Indigenous policy and its prioritisation of public servants’ opinions over those of Indigenous Australians as being damaging: "the control from Canberra is oppressive". O’Faircheallaigh (2018) similarly identifies the role of state bureaucracy and the public service in perpetrating ideas of

white superiority in knowledge and organisation, over Indigenous versions. Hobbs (2019, p. 184) identifies that UNDRIP missing from public service and government dialogues is a major risk, as the Canadian experience demonstrates the negotiations are the "most difficult" part of the process, and could see the government's supportive dialogue thus far, change. Strakosch (2019, p. 115) predominantly focuses on how the settler-colonial state's Indigenous policy in Australia has been in many cases the "frontline of colonisation". In referring to treaties, policies and legislation, she suggests they are "mechanisms to entrench settler colonial authority" (Strakosch 2019). Williams and Hobbs (2020, p. 99), however, suggest that treaties could offer ways to change this relationship between governments and First Nations – especially through recognised decision-making, and "engaging on a government-to-government basis". Cronin offers a compelling lens through which to view the government's relationship with First Nations: that of the terra nullius doctrine. Although Cronin (2021, pp. xiii, 2) does not refer to treaties specifically, his book does provide evidence for the argument that the terra nullius narrative is "ingrained" in our public institutions and thus that the public service is likely to be a barrier to treaties being achieved.

9.1.1 Australia's state and territory public services

The Northern Territory Treaty Commission and a Queensland MP have already, in the early, consultative stages of treaty discussions in their jurisdictions, identified the public service as needing significant preparation before negotiating treaties. Lessons learned from the British Columbia experience show that the public service "at best underestimated and at worst dismissed" the work required to get ready for negotiations (Northern Territory Treaty Commission 2022, p. 70). The NT Treaty Commission identified that the NT public service will need to systematically transform itself. This is especially notable in the aspect of a power-sharing arrangement: devolving power is "something that the public service has struggled with", so public servants must "change the way they work" to be able to negotiate and implement treaties (Dodson, M 2021b, p. 217). Similarly, when the Queensland Government committed to a 'Path to Treaty', the Minister for Aboriginal and Torres Strait Islander Partnerships Craig Crawford stated: "We need to make significant changes to how we work with First Nations for [treaties] to happen" (Riga 2022). Some representatives of the government and its public service are already recognising that in order to negotiate and implement treaties, governments will have to change the way they work with First Nations peoples.

In Victoria, where they are preparing to negotiate treaties in 2024, both the government and First Nations representatives have recognised the need for the public service to change the way

it operates. Writing about her experience as the former Treaty Advancement Commissioner, Aunty Jill Gallagher (2021, p. 226) suggested the public service had to change its way of operating: because "government will always struggle to relinquish control". The legislation for treaty was "developed in partnership" with First Nations peoples (totally rare), and the Treaty Advancement Commission had an MOU with the government to ensure they could maintain their independence even when relying on public service resources (Gallagher 2021, pp. 224, 226). A few years later, with the First Peoples' Assembly of Victoria now set up, a Victorian Government report identified that they would need to change the way they are "thinking and operating internally", requiring "systemic and structural transformation" in order to engage self-determination (State of Victoria 2021, p. 20). To do so, they have a Self-Determination Reform Framework, as part of the Victorian Aboriginal Affairs Framework. To fulfil this framework, departments report each year, reflecting on their progress (State of Victoria 2021, p. 20). In addition, a 'State Treaty Partner Protocol' was agreed to with the First Peoples' Assembly of Victoria, which acknowledges the intergeneration trauma due to the State's historical poor conduct and commits the State to building a better relationship (State of Victoria 2021, p. 20). Interdepartmental treaty networks were established for ongoing guidance and a Treaty Interdepartmental Committee was established with senior representatives from departments (State of Victoria 2021, p. 21). The Department of Premier and Cabinet also now hosts a 'First Peoples – State Relations' group who are responsible for "building ongoing, just and respectful relationships between self-determining First Peoples and the State", as well as being the Government lead in future treaty negotiations between the State of Victoria and First Nations (State of Victoria 2023). Evidently, the Victorian Government has already begun to engage with critiques of its relationships with First Nations peoples, and is in the process of attempting to change this relationship.

9.2 The role of the public service in other English-speaking settler states

A review of the academic literature and government reports from Aotearoa and Canada about the public service and treaties offers lessons to Australia about how to transform the relationship between governments and First Nations.

The United States

Negligible research was found about the public service relationship with treaties in the US. More broadly, though, the relationship between the US Government and Native Nations is defined by a nation-to-nation relationship, as many Native Nations are recognised as state-like and have had some of the powers of states devolved to them. This is a reflection of key developments that have occurred in the US, which includes formal acknowledgement of the "residual sovereignty of Native Nations as 'domestic dependant nations'" (McRae et al. 2009) The autonomy of Native Nations in the US is therefore far more significant than that of First Nations in Australia. Reforms such as the *Indian Self Determination and Education Assistance Act 1975* and the *Tribal Self-Governance Act 1994* have been important enablers of this autonomy. Native Nations now control over 50% of the delivery and administration of federal services to Indigenous people, including in relation to education, housing, and healthcare (Borrows 2017, p. 3). There are also a range of laws pertaining to natural resource and environmental management that have put decision-making back in the hands of Native Nations. For example, both the *Clean Air Act* and *Clean Water Act* set out that "tribes shall be treated as states under these laws" (Anderson et al. 2010, p. 157). Despite these important developments, due to the lack of focus on the US public service and its relationship to treaties with Native Nations, the academic and non-academic literature from Aotearoa and Canada are more useful for Australia in understanding how to transform the relationship between the public service, government and Indigenous peoples.

9.2.1 Aotearoa

In Aotearoa, academic works published in the 2010s suggest that the reason for the poor relationship between the public service and Māori is because Te Tiriti o Waitangi was not being honoured. Although the public service had previously ignored Te Tiriti in order to alienate Māori land rights, today they remain inextricably linked, as many argue that Te Tiriti grants the public service (and government) its legitimacy (Goza, Came & Emery-Whittington 2022; Piripi 2013). However, Tawhai and Gray-Sharp (2013) argue that government rarely makes policy that honours

Te Tiriti. This is especially evident in Mutu (2018)'s interviews with Waitangi Tribunal claimants and negotiators, who said that public servants would misrepresent facts and bully them into closing settlements.

In 2018, the New Zealand Government demonstrated an appetite for change, creating Te Arawhiti (The Office for Māori Crown Relations) to facilitate a future post-Te Tiriti settlement relationship. The Te Arawhiti website provides many resources for public servants and their organisations, including the Māori Crown Relations (MCR) framework. The MCR framework guides public servants through why and how to build capability to work with Māori, noting that a "significant culture change across the public service" will be required (Te Arawhiti 2022d, p. 2). Guides produced by Te Arawhiti tell public servants of the importance of engaging Māori early and building a relationship (see for example: Te Arawhiti 2022a, 2022b, 2022c; Te Arawhiti 2022d, 2022e). Te Arawhiti also provides an engagement framework outlining the differences between collaboration (partnership), co-design (joint decision-making), and empowering Māori (to implement their own decisions) (Te Arawhiti 2022a). Fulfilling Te Tiriti obligations underline all of Te Arawhiti's guides and frameworks for public servants. It should be noted, however, that Te Arawhiti itself has been accused of "casual racism" and a lack of "cultural safety", with one of the highest staff turnover rates in the New Zealand Public Service (Hurihanganui 2021). The Northern Territory Treaty Commission (2022, p. 15) used Te Arawhiti as inspiration in its proposal for an 'Office of First Nations Treaty-Making' (OTM), located within the NT Government and tasked with meeting the government's commitment to treaties. The Commission's report says the OTM must have "substantive capacity to improve government and public service competence and to prepare for and appropriately lead the NT Government in treaty negotiations" (Northern Territory Treaty Commission 2022, p. 47). Although no direct links could be found through government reports, it appears the 'First Peoples – State Relations' group in Victoria's Department of Premier and Cabinet is envisioned to fulfil a similar role to that modelled by Te Arawhiti.

In 2020, the New Zealand Government passed new legislation under the *Public Service Act* which appears to have had a major impact. Section 14 specifically addresses the role of the public service in supporting the Crown's relationship with Māori under Te Tiriti (New Zealand Parliament 2020). The Act requires the public service to "better engage with Māori and understand Māori perspectives." (Simmons-Donaldson 2020, p. 3), marking the first time the public service has been legislated to uphold Te Tiriti obligations (Marshall 2021, p. 22). Interestingly, this legislation may result in the public service being "even more proactive about Treaty obligations than the government" of the day might like them to be (Marshall 2021, p. 23). Many Māori academics and representatives of Māori organisations have given positive reports about the Act. In interviews, many noted a positive, genuine move beyond attempting to close settlements, and instead honouring the *ongoing* nature of the relationship Te Tiriti delineates (Billington 2022). Although,

the public service remains a difficult place to make change: in a journal for public servants it is described that "[g]overnment agencies exist within a self-contained worldview that unconsciously requires all others to operate on its terms." (Billington 2022, p. 9). One possible explanation could be the underrepresentation of Māori staff at the senior leadership level of the public service (Goza, Came & Emery-Whittington 2022; Tuuta 2021). The heritage sector is noted as having been far more successful in meeting Te Tiriti responsibilities than other public sectors, due to legislation and requirements to work with Māori – such as the Māori Heritage Council (Simmons-Donaldson 2020, p. 4). Could the Act extend this success to the rest of the New Zealand Public Service? Interestingly, Queensland's state parliament has also recently adopted a law, *Public Sector Act 2022*, which draws inspiration directly from the New Zealand Public Service Act 2020 (Productivity Commission 2023, pp. 76-77). Queensland's Act also requires public servants to transform their relationships with First Nations peoples. Where treaties may fit into this relationship remains to be seen.

9.2.2 Canada

In Canada, the historic and modern treaties between federal and provincial/territorial governments and Indigenous peoples is at least rhetorically important to governments. The terminology used by governments reflects the importance of treaties to their relationship with Indigenous peoples: historic treaties are described as "fundamental", and modern treaties are described as "the foundation of new, progressive relationships" (Government of Canada 2010, 2011). The current approach to Crown-Indigenous relations is described as "enduring intergovernmental relationships between treaty partners" (Government of Canada 2015). Constitutional protections for Indigenous rights and UNDRIP also inform Crown-Indigenous relations. For example, in 2018, the Government of Canada set out principles for its relationships with Indigenous peoples, which were predominantly informed by section 35 of the Canadian Constitution, wherein Aboriginal and treaty rights are recognised and affirmed, and UNDRIP. These principles use the terms 'government-to-government' and 'nation-to-nation' to recognise Indigenous self-government as an essential element of Canadian "cooperative federalism" (Government of Canada 2018, p. 9). The provincial government of British Columbia also uses the term 'government-to-government' to describe treaty relationships (Government of British Columbia n.d., p. 3). Thus treaties are foundational to the way settler-led governments engage with the Indigenous peoples in Canada.

Despite this rhetoric, however, some Indigenous peoples in Canada contend that the public service often blocks this relationship transformation. Many have argued that governments and

their public service get in their own way when attempting to change their relationship with Indigenous peoples (Alfred 2001; Freeman 2014; Nadasdy 2014). Similar insights were found in community discussions too (see for example: British Columbia Treaty Commission 2006; Come 2007). Political scientist Martin Papillon (2020, p. 396) agrees, asserting that state institutions are "highly resistant to change", and so only incremental or adaptive – not transformative – changes have been made thus far. Despite government rhetoric of cooperative federalism, Papillon (2020, p. 409) argues that the Canadian state views treaties instead as "legal transactions aimed at securing access to the land". Government rhetoric on transforming their relationships with Indigenous peoples and the role of treaties may not reflect the reality of their approaches to these relationships.

Like in Australia, public servants in Canada are expected to carry out the government's reconciliation agenda, but this looks very different between the two countries. In Canada, the term 'reconciliation' understood as honouring historic treaties and creating modern treaties. For example, the Government of British Columbia describes treaties as "acts of reconciliation" (Government of British Columbia n.d.). The important role of public servants in reconciliation was identified in 2015 by the Truth and Reconciliation Commission of Canada. In their 'calls to action', number 57 recommends "*Professional development and training for public servants*" Truth and Reconciliation Commission of Canada (2015, p. 7). In particular, they noted the importance of education and training in Indigenous history, UNDRIP, treaties and rights, and inter-cultural competency. A Public Inquiry Commission in Quebec found that training should be "ongoing and recurrent", and in collaboration with the local Indigenous nation/s with whom employees would be interacting (Viens 2019, p. 251). An adult education scholar suggests creating public service schools to respond to the TRC's call to action #57 (Weiler 2017), whilst The Institute of Public Administration of Canada (2017) recommends higher education requirements for those who work directly with Indigenous people. In order to progress reconciliation through historic and modern treaties, public servants must be better educated.

Others have argued that the responsibility of public servants in transforming the relationship goes beyond education, though: they must put their hearts into reconciliation. Settler scholars Lachance and Rose (2020) interviewed First Nations participants in a health collaboration and found that the real issue lay with the attitudes of individuals/organisations of the public service, rather than a lack of skills. Participants suggested that for public servants to willingly collaborate with First Nations Peoples, they "must *believe* in the Treaty relationship" (Lachance & Rose 2020, p. 655). The nature of the relationship must change "from working *for* to working *with* First Nations" (Lachance & Rose 2020, p. 655). The Institute of Public Administration of Canada (2017, p. 13) similarly suggests that "the "real" test of reconciliation is in the thousands of daily interactions between Indigenous peoples and non-Indigenous public administrators and

officials". Although education remains important to improving skills for public servants working with Indigenous peoples, ultimately, they must understand their work on a deeper level.

The Province of British Columbia has taken some steps towards transforming the public service's relationship to First Nations peoples. A *Shared Priorities Framework* was signed between the Government of British Columbia and the Alliance of BC Modern Treaty Nations, which includes the goal of making organisational and policy changes to the public service (British Columbia Treaty Commission 2022). The Framework also notes that public servants must understand treaty rights and obligations, given they will be the ones enforcing them. Evidently, some Canadian governments have identified that the public service is an important factor in the relationships with Indigenous peoples.

10. Conclusion

This review of the literature has found that, although a reasonable amount of academic work has been produced on treaties in Australia over the decades since the NAC first called for treaties in 1979, there are still considerable gaps in the academic literature.

Section A discussed what a treaty is, as the chosen definition of treaties will determine whether or not they are achieved in Australia – as highlighted with the example of the Noongar Settlement. The literature on defining treaties is dominated by legal scholars, who have focused on the legal concepts of peoplehood and sovereignty. Whether treaties should be negotiated in the domestic sphere or as international treaties is another topic of debate to which many scholars have contributed, with a wide range of conclusions reached. However, looking beyond legal scholarship, the perspectives of Indigenous scholars from Canada and Aotearoa have highlighted the disjuncture between their communities' understandings of treaties as documents outlining the rules for their ongoing relationship with the newcomers, and the settler-colonial governments and people who have often perceived these same documents as final settlements in which Indigenous peoples cede lands and rights. The wide range of perspectives presented in the literature suggests that defining treaty will be an essential task for any Australian governments and First Nations peoples seeking to negotiate treaties, to ensure all parties to any treaty have the same understandings and expectations of treaties.

Section B provided an account of the history of First Nations peoples and settler people seeking treaties with each other in Australia. Chapter 3 provided a discussion on three agreements in Australia that have been labelled as treaties by some. It was concluded that only the Lutruwita/Tasmania example could possibly have been labelled a treaty between First Nations peoples and the British Crown – although the evidence as to its existence is contested. Then, an overview of the history of First Nations people campaigning for treaties in the 20th-21st centuries was provided. This history revealed treaty as a longstanding aspiration for First Nations people; whilst support for treaties amongst non-First Nations people waxed and waned over time.

Chapter 4 provided an overview of treaty talks between First Nations peoples and each of the states and territories of Australia. Following six years of deliberate work by the Treaty Advancement Commissioner, the First Peoples' Assembly of Victoria and the Victorian Government, treaty negotiations are due to begin in Victoria in 2024. As the furthest progressed platform for negotiating treaties between First Nations peoples and government in Australia, Victoria demonstrates a possible pathway to treaties for other states and territories. Victoria's path to treaties has begun to be covered in depth by academics, but significant gaps exist in the academic literature. Some areas that could benefit from further research include the choice of

the Victorian Government not to acknowledge that First Nations peoples have never ceded their sovereignty; why some First Nations choose not to participate in treaties; and – as expanded upon in Chapter 7 – the issue of representing First Nations parties. Although Queensland's process looks like it has lost critical political support, the responses of the Queensland Government to the treaty process thus far highlight the possibility of clashing over key principles of treaties – particularly on the issue of recognising ongoing sovereignty and devolving governance and financial powers to First Nations peoples. An overview of each of the other states and territories of Australia was also provided. Some similar issues to those explored in Victoria and Queensland have also emerged out of other states and territories. In particular, the vulnerability of state and territory treaty processes to political change was highlighted. Finally, one possible model for the proposed platform for agreement-making and truth-telling, the Makarrata Commission, was examined. Although some useful suggestions arose from the literature, limited research on the question of a Makarrata Commission has been completed to date. As a key proposal of the Uluru Statement and a commitment of the Albanese Government, this could be a priority area of research.

Section C explored three issues in the making of treaties: the purpose of negotiating treaties, the process and structures that can be used to facilitate negotiating treaties, and the issue of representation for First Nations parties to treaties. Chapter 5 provided a discussion of three of the reasons that First Nations peoples have sought to negotiate treaties with Australian governments. Protections for the unique human rights of Indigenous peoples was often covered in the 2000s literature. Power-sharing arrangements have been explored in some state and territory reports on treaties, but academic research could provide more contributions in this space. For example, how can treaties ensure that Australian governments devolve power to First Nations without neglecting their ongoing responsibilities to First Nations peoples? How might power be shared amongst First Nations and governments in Australia? Further research is required into this complex but essential topic. Also in Chapter 5, the discussion on reparations and compensation was drawn from a wide range of sources due to the extremely limited pool of academic literature on reparations as part of treaties in Australia. As most of this limited literature concludes that reparations must be included as part of treaties, this is an area requiring further investigation.

Chapter 6 explored possible structures and processes which could be used to negotiate treaties. In particular, the literature identified Australia's federal system as an avenue through which power can be formally shared with First Nations, by including First Nations governments as another level to the federal structure. Much of the earlier literature had suggested that treaties should be protected in the Constitution, rather than domestic legislation. However, this is an area that may require renewed consideration following the disappointment of the recent failed Voice

referendum. The literature also reveals that nation-(re)building – the internal work within First Nations to improve their institutional capacity to assert and exercise their sovereignty – is important for First Nations preparing to negotiate treaties and to exercise related responsibilities. The British Columbia modern treaty-making process was also noted for its significant contribution to the literature on treaties, providing both positive and negative examples (especially through the changes made to the process over time) of what treaty-making processes could look like. Finally, it was also noted that it appears critical that all parties approach treaties in good faith. International experiences have demonstrated the importance of this approach.

Chapter 7 examined the issue of representation for the First Nations parties to any treaties. Who can and should represent First Nations peoples in treaty negotiations is another area that could benefit from updated research, as many suggestions from earlier literature refer to representative bodies that have since been disbanded by government (such as the NAC or ATSIC). Some representative arrangements have emerged out of the First Peoples' Assembly, although the limited critical literature has demonstrated the tension between being faithful to First Nations cultural governance systems and the realities of colonisation's disruptions to these structures (such as the needs of the Stolen Generations and urban diasporic populations). Very little literature was found on how intersectionalities, such as gender and age, impact on representation and needs out of treaties, suggesting the matter of representation may be another key area of future research.

Section D then explored how to engage the non-First Nations party to treaties. Chapter 8 focused on truth-telling and the attitudes of the general public towards treaties. The literature consistently revealed that settler Australians are more inclined to agree with treaty-making when they have a greater understanding of the historical and contemporary injustices faced by First Nations peoples. In line with these findings, First Nations peoples consulted in government reports, as well as First Nations academics, have called for truth-telling to be commenced alongside any treaty negotiations. This chapter concludes that truth-telling is essential to the success of treaty-making.

Chapter 9 focused on the public service's role in treaty-making and implementation. As the organisations that would have key and broad responsibilities in any treaty negotiation and implementation by government, the public service has been identified in literature from Aotearoa and Canada, and some state and territory government-commissioned reports on treaties in Australia, as a key player that is often under-prepared for treaty negotiations. Recommendations identified in the literature to better prepare public servants included upskilling or mandating

training for public servants, or the introduction legislation mandating the inclusion of Indigenous perspectives in the work of the public service.

This literature review has identified numerous areas requiring further attention of scholars. Some research areas would benefit from an update in the wake of political developments over the past few decades. Other areas that may require further investigation have emerged from recent developments in Australia – the ongoing, abandoned, and restarted processes in the states and territories. It is hoped that further research will encourage more dialogue and assist those facing the complex issues standing in the way of advancing effective treaty-making in Australia.

Reference List

AAP 2023, *'Shameful act': Indigenous Yes leaders break silence over Voice referendum result*, <https://www.sbs.com.au/news/article/indigenous-yes-leaders-break-silence-over-referendum/inldxkxgb>.

ABC News 2023, *Voice to Parliament advocate Thomas Mayo calls out 'disgusting' No campaign as Linda Burney promises 'it is not the end of reconciliation'*, 14 October, <https://www.abc.net.au/news/2023-10-14/voice-to-parliament-yes-campaign-reacts-to-defeat/102977664>.

Agius, D 2022, *Commissioner for First Nations Voice to the South Australian Parliament: Engagement Report*, <https://www.agd.sa.gov.au/first-nations-voice/resources>.

Albanese, A 2022, *Read incoming prime minister Anthony Albanese's full speech after Labor wins federal election*, 22 May, <https://www.abc.net.au/news/2022-05-22/anthony-albanese-acceptance-speech-full-transcript/101088736>.

Alfred, T 2001, 'Deconstructing the British Columbia Treaty process', *Balayi: Culture, Law and Colonialism*, vol. no. 3, pp. 37-65.

Altman, J 2002, 'The political economy of a treaty: opportunities and challenges for enhancing economic development for Indigenous Australians', *The Drawing Board: An Australian Review of Public Affairs*, vol. 3, no. 2, pp. 65-81.

Anderson, RT, Berger, B, Frickey, PP & Krakoff, S 2010, *American Indian Law: Cases and Commentary*, 2nd edn, American Casebook Series, West Publishing, St Paul.

Andrews, N 1996, 'Reviews: Fate of a Free People by Henry Reynolds', *Aboriginal history*, vol. 20, pp. 211-215.

Appleby, G & Davis, M 2018, 'The Uluru Statement and the promises of truth', *Australian Historical Studies*, vol. 49, no. 4, pp. 501-509.

Attwood, B 2015, *Possession: Batman's Treaty and the Matter of History*, Melbourne University Publishing, Melbourne.

Attwood, B & Doyle, H 2015, *Possession: Batman's Treaty and the Matter of History*, Melbourne University Publishing, Melbourne.

Bardon, J 2023, *Northern Territory Indigenous leader Yingiya Guyula angered by government's decision to close NT Treaty Commission*, 20 January, <https://www.abc.net.au/news/2023-01-20/nt-treaty-commission-closed-indigneous-leaders-angry/101875986>.

Bargallie, D 2021, *Unmasking the Racial Contract: Indigenous Voices on Racism in the Australian Public Service*, Aboriginal Studies Press, Canberra.

Barnes, J 2022, 'Australian universities and Atlantic slavery', *History Australia*, vol., pp. 1-23.

Barr, A, Rattenbury, S & Stephen-Smith, R 2023, *Statement regarding Supreme Court matter*, <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2023/statement-regarding-supreme-court-matter>.

The Barunga Statement 1988, <https://aiatsis.gov.au/explore/barunga-statement>.

Barwick, DE 1984, 'Mapping the past: an atlas of Victorian clans 1835-1904: Part 1', *Aboriginal history*, vol. 8, no. 1/2, pp. 100-131.

Bawaka Country, Wright, S, Suchet-Pearson, S, Lloyd, K, Burarrwanga, L, Ganambarr, R, Ganambarr-Stubbs, M, Ganambarr, B, Maymuru, D & Sweeney, J 2016, 'Co-becoming Bawaka: Towards a relational understanding of place/space', *Progress in human geography*, vol. 40, no. 4, pp. 455-475.

Beertwah, K, Beediyar, K & Kudagin, W 2002, 'Old lore, new law: a Noongar woman's perspective on the Treaty process', *Balayi: Culture, Law and Colonialism*, vol. 4, pp. 53-58.

Behrendt, L 2002, 'The link between rights and a Treaty "practical reconciliation"', *Balayi: Culture, Law and Colonialism*, vol. 4, pp. 21-27.

Behrendt, L 2003, 'Practical steps towards a treaty: structures, challenges and the need for flexibility', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 18-29.

Behrendt, L 2018, 'Unfinished Business', in L Behrendt, C Cunneen, T Libesman & N Watson (eds), *Aboriginal and Torres Strait Islander Legal Relations*, 2nd edn, Oxford University Press, Docklands, Victoria, pp. 283-319.

Bell, K 2022, *Aspects of the changing face of Indigenous rights in Australia*, SSRN, <https://ssrn.com/abstract=4182248>.

Belmessous, S 2014, 'The tradition of treaty making in Australian history', in S Belmessous (ed.), *Empire by Treaty: Negotiating European Expansion, 1600-1900*, Oxford University Press, New York, pp. 186-213.

Biddle, N, Gray, M, McAllister, I & Qvortrup, M 2023, *Detailed analysis of the 2023 Voice to Parliament Referendum and related social and political attitudes*, Australian National University, <https://csrm.cass.anu.edu.au/research/publications/detailed-analysis-2023-voice-parliament-referendum-and-related-social-and>.

Billington, C 2022, 'Māori crown relationships: Working with iwi in ways that enhance capability', *Public Sector*, vol. 45, no. 2, pp. 9-10.

Blackburn, C 2007, 'Producing legitimacy: reconciliation and the negotiation of aboriginal rights in Canada', *The Journal of the Royal Anthropological Institute*, vol. 13, no. 3, pp. 621-638.

Borrows, J 2017, *Policy Paper: Implementing Indigenous Self-Determination through Legislation in Canada*, <https://www.afn.ca/wp-content/uploads/2018/09/2017-04-20-Implementing-Indigenous-self-determination-through-policy-legislation.pdf>.

Bragg, A 2021, *Buraadja: The Liberal Case for National Reconciliation*, Kapunda Press, Redland Bay, QLD.

Brennan, S 2005a, 'Could a treaty make a practical difference in people's lives?: the question of health and well-being [This Issues Paper first published in December (2004) as part of the Treaty Project at the Gilbert + Tobin Centre of Public Law at UNSW.]', *Balayi: Culture, Law and Colonialism*, vol. 7, pp. 126-138.

Brennan, S 2005b, 'Why "treaty" and why this project? [This Issues Paper first published in January (2003) as part of the Treaty Project at the Gilbert + Tobin Centre of Public Law at UNSW, in partnership with Jumbunna Indigenous House of Learning and The Australian Institute of Aboriginal and Torres Strait Islander Studies.]', *Balayi: Culture, Law and Colonialism*, vol. 7, pp. 97-104.

Brennan, S, Behrendt, L, Strelein, L & Williams, G 2005, *Treaty*, 1st edn, Federation Press, Annandale, N.S.W.

Brennan, S, Bosnjak, V & Williams, G 2003, 'Rights-based reconciliation needs renewed action from Canberra: the importance of responsibility and rights in reconciliation', *Alternative Law Journal*, vol. 28, no. 3, pp. 122-126.

Brennan, S & Craven, Z 2006, 'Government management of Aboriginal Trust money in New South Wales: 'Eventually they get it all…'', *Australian indigenous law reporter*, vol. 10, no. 4, pp. 90-92.

Brennan, S, Gunn, B & Williams, G 2004, 'Sovereignty and its relevance to treaty-making between Indigenous peoples and Australian governments', *Sydney Law Review*, vol. 26, pp. 307-352.

Brissenden, N 2024, *Treaty talks emerge from ashes of referendum failure*, 28 January, <https://nit.com.au/28-01-2024/9502/treaty-talks-emerge-from-ashes-of-referendum-failure>.

British Columbia Treaty Commission 2006, *Treaty Commission Annual Report 2006*, <https://www.bctreaty.ca/annual-reports>.

British Columbia Treaty Commission 2022, *Shared Priorities Framework*, <https://alpha.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-

with-first-nations/first-nations-negotiations/first-nations-in-treaty-process/shared-priorities-framework>.

British Columbia Treaty Commission 2023, *Do Modern Treaties Extinguish Indigenous Rights and Title?*, viewed 25 January, <https://bctreaty.ca/2023/02/21/do-modern-treaties-extinguish-indigenous-rights-and-title/>.

Buti, A 2002, 'The removal of Aboriginal children: Canada and Australia compared', *University of Western Sydney law review*, vol. no. 6, pp. 25-37.

Butler, J 2023a, *Makarrata commission has so far spent barely half the $900,000 allocated by Labor, documents show*, 1 September, <https://www.theguardian.com/australia-news/2023/sep/01/makarrata-commission-has-so-far-spent-barely-half-the-900000-allocated-by-labor-documents-show>.

Butler, J 2023b, 'Referendum defeat 'embarrassing' for Australia but Indigenous voice still needed, Thomas Mayo says', *The Guardian Australia*, 24 October.

Butler, J, Murphy, K & Karp, P 2023, *Cabinet to consider interim listening mechanism after resounding no vote on voice*, 16 October, <https://www.theguardian.com/australia-news/2023/oct/16/cabinet-to-consider-interim-listening-mechanism-after-resounding-no-vote-on-voice>.

Ch'ng, HY, Aslam, K, Nguyen, H & Smith, B 2022, 'Asian Australian media representation of First Nations sovereignty and constitutional change', *Australian Journalism Review*, vol. 44, no. 2, pp. 191-209.

Chambers, C 2012, '"We are all treaty people": The contemporary countenance of Canadian curriculum studies', in N Ng-A-Fook & J Rottmann (eds), *Reconsidering Canadian Curriculum Studies: Provoking Historical, Present, and Future Perspectives*, Palgrave Macmillan, New York, pp. 23-38.

Clark, G 2001, 'Launch of ATSIC treaty documents', *Balayi: Culture, Law and Colonialism*, vol. 2, pp. 187-192.

Clark, G 2002, 'From here to Treaty', *Balayi: Culture, Law and Colonialism*, vol. 4, pp. 3-11.

Clark, T, de Costa, R & Maddison, S 2019, ''The treaty's going to give the recognition that this wasn't right': Optimism and pessimism in non-Indigenous attitudes to treaties in Australia', *Journal of Intercultural Studies*, vol. 40, no. 6, pp. 665-680.

Coalition of Aboriginal and Torres Strait Islander Peak Organisations & Australian Governments 2020, *National Agreement on Closing the Gap*, <https://www.closingthegap.gov.au/sites/default/files/files/national-agreement-ctg.pdf>.

Coates, T-N 2014, 'The Case for Reparations', *The Atlantic*, <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>.

Come, MC 2007, 'Preparing for The Day After Treaty', in *Preparing for The Day After Treaty: A conference for First Nations*, Vancouver, British Columbia, <https://www.bctreaty.ca/forum/preparing-day-after-treaty>.

Corn, A 2010, 'Land, song, constitution: exploring expressions of ancestral agency, intercultural diplomacy and family legacy in the music of Yothu Yindi with Mandawuy Yunupiŋu', *Popular Music*, vol. 29, no. 1, pp. 81-102.

Cornell, S 2002, 'Nation-building and the treaty process', *Indigenous law bulletin*, vol. 5, no. 17, pp. 7-10.

Cornell, S & Kalt, JP 2007, 'Two Approaches to the Development of Native Nations: One Works, the Other Doesn't', in M Jorgensen (ed.), *Rebuilding Native Nations: Strategies for Governance and Development*, The University of Arizona Press, Tucson, pp. 3-33.

Coulthard, GS 2007, 'Subjects of empire: Indigenous peoples and the 'politics of recognition' in Canada', *Contemporary political theory*, vol. 6, no. 4, pp. 437-460.

Coulthard, GS 2014a, 'From Wards of the State to Subjects of Recognition?: Marx, Indigenous Peoples, and the Politics of Dispossession in Denendeh', in A Simpson & A Smith (eds), *Theorizing Native Studies*, Duke University Press, New York, USA, pp. 56-98.

Coulthard, GS 2014b, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition*, Indigenous Americas, University of Minnesota Press, Minneapolis.

Council for Aboriginal Reconciliation 2000, *Final Report of the Council for Aboriginal Reconciliation*, viewed 20 July, <https://www8.austlii.edu.au/au/orgs/car/finalreport/contents.htm>.

Craemer, T 2015, 'Estimating slavery reparations: present value comparisons of historical multigenerational reparations policies', *Social science quarterly*, vol. 96, no. 2, pp. 639-655.

Cronin, D 2003, 'Indigenous disadvantage, Indigenous governance and the notion of a treaty in Australia: an Indigenous perspective', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 151-165.

Cronin, D 2021, *Trapped by History: The Indigenous-State Relationship in Australia*, Indigenous Nations and Collaborative Futures., Rowman & Littlefield Publishers, London.

Cunneen, C 2005, 'Colonialism and historical injustice: reparations for Indigenous peoples', *Social semiotics*, vol. 15, no. 1, pp. 59-80.

Curthoys, A & Mitchell, J 2011, ''Bring this paper to the good governor': Aboriginal petitioning in Britain's Australian colonies', in S Belmessous (ed.), *Native Claims : Indigenous Law Against*

Empire, 1500-1920, Oxford University Press, Incorporated, New York, UNITED STATES, <http://ebookcentral.proquest.com/lib/anu/detail.action?docID=829379>.

Dam, L 2023, 'Be(com)ing an Asian tangata tiriti', *Kōtuitui: New Zealand Journal of Social Sciences Online*, vol. 18, no. 3, pp. 213-232.

Davis, M 2006, 'Treaty, yeah? The utility of a treaty to advancing reconciliation in Australia', *Alternative Law Journal*, vol. 31, no. 3, pp. 127-136.

Davis, M 2014, 'Australia's reconciliation process in its international context: recognition and the health & wellbeing of Australia's Aboriginal and Torres Strait Islander Peoples', *Australian Indigenous Law Review*, vol. 18, no. 2, pp. 56-66.

Davis, M 2016, 'Seeking a settlement', *The Monthly*, no. July 2016, <https://www.themonthly.com.au/issue/2016/july/1467295200/megan-davis/seeking-settlement#mtr>.

Davis, M 2021, 'The truth about truth-telling', *The Monthly*, no. December 2021 - January 2022, <https://www.themonthly.com.au/issue/2021/december/megan-davis/truth-about-truth-telling>.

Davis, M & Williams, G 2021, *Everything You Need to Know about the Uluru Statement from the Heart*, NewSouth Publishing, Sydney.

de Villiers, B 2022, 'Breaking New Ground for Indigenous Non-territorial, Cultural Self-Government: The Noongar Settlement in Australia', in B de Villiers (ed.), *Navigating the Unknown: Essays on Selected Case Studies about the Rights of Minorities*, BRILL, Boston, USA, pp. 138-162.

Deagon, A 2022, 'Reconciliation and Recognition: A Christian Approach to Indigenous Australians and Constitutional Change', *Political Theology*, vol. 23, no. 8, pp. 739-767.

Dews, T 2021, ''Mabo' and the valuation vibe: Substantive equality in the timber creek compensation case', *The Sydney law review*, vol. 43, no. 3, pp. 391-410.

Dexter, R & Latimore, J 2023, *Meet the freshly elected people who 'will get treaty done' in Victoria*, 18 June, <https://www.theage.com.au/politics/victoria/meet-the-freshly-elected-people-who-will-get-treaty-done-in-victoria-20230616-p5dh6s.html>.

Dick, S 2023, *High Court to hear Commonwealth challenge to $700m Arnhem Land compensation claim*, 13 November, <https://www.abc.net.au/news/2023-11-13/high-court-to-hear-challenge-to-arnhem-land-compensation-claim/103097382>.

Dodson, M 2003, 'Unfinished business: A shadow across our relationships', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 30-40.

Dodson, M 2006, 'What is a treaty?', in P Read, G Meyers & B Reece (eds), *What Good Condition?*, Reflections on an Australian Aboriginal Treaty 1986-2006, ANU Press, pp. 105-122.

Dodson, M 2021a, 'Speech: A treaty is a marriage not a divorce: Treaty-making in Australia', *Australian Bar Review*, vol. 50, no. 3, pp. 418-426.

Dodson, M 2021b, 'We dare to hope: treaty-making in Australia', in H Hobbs, A Whittaker & L Coombes (eds), *Treaty-Making: 250 Years Later*, The Federation Press, Alexandria, NSW, pp. 203-219.

Dodson, M & McNamee, R 2008, 'Recognition of the Indigenous people of Australia and their rights', in E Johnston, M Hinton & D Rigney (eds), *Indigenous Australians and the Law*, 2nd edn, Routledge-Cavendish, London, pp. 251-264.

Dodson, P 2000, 'Beyond the mourning gate - dealing with unfinished business', in *The Wentworth Lecture*, Panther Publishing, Canberra, <https://aiatsis.gov.au/sites/default/files/research_pub/2000-wentworth-dodson-patrick-mourning-gate-unfinished-business.pdf>.

Dodson, P 2016, 'Navigating a path towards meaningful change and recognition', in M Davis & M Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform*, Melbourne University Press, Carlton, Victoria.

Dodson, P 2023, 'A firelight stick on the hill', *The Monthly*, no. July, <https://www.themonthly.com.au/issue/2023/july/patrick-dodson/firelight-stick-hill#mtr>.

Dunstan, J 2023, *Victorian traditional owners prepare for historic statewide treaty negotiations*, 27 July, <https://www.abc.net.au/news/2023-07-27/victoria-treaty-negotiations-government-first-peoples-assembly/102646798>.

Ebony Institute 2020, *'Hear My Heart' Discussion Paper*, Ebony Aboriginal and Torres Strait Islander Institute, <https://ebonyinstitute.com.au/our-projects/>.

Erueti, A 2016, 'Reparations for indigenous peoples in Canada, New Zealand and Australia', in D Short & C Lennox (eds), *Handbook of Indigenous Peoples' Rights*, 1 edn, Routledge, London, pp. 101-110.

Executive Committee of the National Aboriginal Conference 1982, 'NAC Newsletter March 1982', no. 6.

First People's Assembly of Victoria 2022, *Additional Pathways to Recognition*, viewed 10 January, <https://www.firstpeoplesvic.org/news/additional-pathways-to-recognition/>.

First People's Assembly of Victoria 2023, *Assembly Elections 2023*, <https://www.firstpeoplesvic.org/news/preview-timeline-for-2023-treaty-elections/>.

First People's Assembly of Victoria & State of Victoria 2022, *Self-Determination Fund Agreement*, <https://www.firstpeoplesrelations.vic.gov.au/self-determination-fund-agreement>.

First Peoples' Assembly of Victoria 2022a, *Annual Report*, <https://www.firstpeoplesvic.org/news/annual-report-details-major-progress-towards-treaty/>.

First Peoples' Assembly of Victoria 2022b, *A Path to Treaty: Treaty Information Pack*, vol. 2022, <https://www.firstpeoplesvic.org/reports-resources/assembly-treaty-info-pack/>.

First Peoples' Assembly of Victoria 2022c, *Stage set for Treaty-making in Victoria*, 20 October, <https://www.firstpeoplesvic.org/news/historic-agreement-reached-stage-set-for-treaty-making-in-victoria/>.

First Peoples' Assembly of Victoria 2023, *Strong. Resilient. Deadly.*, 14 October, <https://www.firstpeoplesvic.org/news/strong-resilient-deadly/>.

First Peoples' Assembly of Victoria 2023, 'Directors appointed and funding arrives for ground-breaking Self Determination Fund', *News*, 26 June, viewed <https://www.firstpeoplesvic.org/news/directors-appointed-and-funding-arrives-for-ground-breaking-self-determination-fund/>.

Fredericks, B 2022, 'Why I 'still' hear it on the radio and I 'still' see it on the television: Treaty and the Uluru Statement from the Heart', *Journal of Australian Indigenous Issues*, vol. 25, no. 1-2, pp. 3-21.

Fredericks, B & Bradfield, A 2021, ''Seeking to be heard': The role of social and online media in advocating for the Uluru Statement from the Heart and constitutional reform in Australia', *Journal of Alternative & Community Media*, vol. 6, no. 1, pp. 29-54.

Freeman, V 2014, 'In Defence of Reconciliation', *Canadian Journal of Law & Jurisprudence*, vol. 27, no. 1, pp. 213-223.

Gallagher, J 2021, 'The work of the Victorian Treaty Advancement Commission to bring us closer to Treaties in Victoria', in H Hobbs, A Whittaker & L Coombes (eds), *Treaty-Making: 250 Years Later*, The Federation Press, Alexandria, NSW, pp. 220-240.

Ganter, E 2016, *Reluctant Representatives : Blackfella bureaucrats speak in Australia's north*, CAEPR Research Monograph Series, ANU Press, Canberra.

Garrick, M 2024, *NT government to revive plans for treaty, six years after it was first promised by Territory Labor*, 19 January, <https://www.abc.net.au/news/2024-01-19/nt-government-revive-plans-treaty-voice-referendum/103364638>.

Giannacopoulos, M 2017, 'Sovereign debt crises, referendums and the changing face of colonial power', *Continuum*, vol. 31, no. 1, pp. 33-42.

Giannacopoulos, M 2021, 'The Colonial Debtscape', in S Perera & J Pugliese (eds), *Mapping Deathscapes: Digital Geographies of Racial and Border Violence*, Routledge, New York, pp. 46-61.

Gilbert, K 1973, *Because A White Man'll Never Do It*, Angus and Robertson, Sydney.

Gillespie, E 2023, *Queensland treaty appears doomed as Annastacia Palaszczuk makes it contingent on LNP support*, 19 October, <https://www.theguardian.com/australia-news/2023/oct/19/queensland-treaty-qld-premier-annastacia-palaszczuk-lnp-backflip-indigenous-first-nations-truth-telling>.

Government of British Columbia n.d., *Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples*, <https://alpha.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship/about-the-ten-principles>.

Government of Canada 2010, *The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

Government of Canada 2011, *Instituting a Federal Framework for the Management of Modern Treaties (Implementation Management Framework)*, <https://www.rcaanc-cirnac.gc.ca/eng/1306241376318/1542727535309>.

Government of Canada 2015, *Statement of Principles on the Federal Approach to Modern Treaty Implementation*, <https://www.rcaanc-cirnac.gc.ca/eng/1436288286602/1539696550968>.

Government of Canada 2018, *Principles: Respecting the Government of Canada's Relationship with Indigenous Peoples*, <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>.

Goza, M, Came, H & Emery-Whittington, I 2022, 'A Critical Tiriti Analysis of the recruitment and performance review processes of public sector chief executives in Aotearoa', *Australian and New Zealand Journal of Public Health*, vol. 46, no. 1, pp. 52-55.

Gray, M & Sanders, W 2015, *Australian Public Opinion on Indigenous Issues: Injustice, Disadvantage and Support for Recognition*, The Australian National University, , <https://csrm.cass.anu.edu.au/research/publications/indigenous-issues-injustice-disadvantage-and-support-recognition>.

Griffiths, T 2022, 'But we already had a treaty!: Returning to the Debney peace', *Griffith Review*, vol. no. 76, pp. 154-169.

Groch, S 2020, *What do these sacred trees tell us about Aboriginal heritage in Australia?*, 31 October, <https://www.smh.com.au/national/what-do-these-sacred-trees-tell-us-about-aboriginal-heritage-in-australia-20201030-p56a0g.html>.

Gunstone, A 2016, 'Reconciliation, reparations and rights: Indigenous Australians and the stolen generations', in D Short & C Lennox (eds), *Handbook of Indigenous Peoples' Rights*, 1 edn, Routledge, London, pp. 301-312.

Harris, S 1979, *'It's coming yet...': An Aboriginal Treaty Within Australia Between Australians*, Aboriginal Treaty Committee, Canberra.

Hiatt, LR 1987, 'Treaty, compact, makarrata . . . ?', *Oceania*, vol. 58, no. 2, pp. 140-144.

Hickford, M 2018, 'Reflecting on the Treaty of Waitangi and its constitutional dimensions: a case for a research agenda', in M Hickford & C Jones (eds), *Indigenous Peoples and the State : International Perspectives on the Treaty of Waitangi*, Routledge, Abingdon, pp. 140-165.

Hobbs, H 2018, 'Constitutional recognition and reform: developing an inclusive Australian citizenship through treaty', *Australian Journal of Political Science*, vol. 53, no. 2, pp. 176-194.

Hobbs, H 2019, 'Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia', *The international journal of human rights*, vol. 23, no. 1-2, pp. 174-192.

Hobbs, H 2020, 'A Queensland treaty: Current steps and potential challenges', *Alternative Law Journal*, vol. 45, no. 1, pp. 25-30.

Hobbs, H 2024, 'Taking stock of Indigenous-state treaty-making in Australia: opportunities and challenges', *University of New South Wales Law Journal,*, vol. 47, no. 2, p. forthcoming.

Hobbs, H & Jones, BT 2022, 'Egalitarian nationhoods: a political theory in defence of the voice to parliament in the Uluru Statement from the Heart', *Australian Journal of Political Science*, vol. 57, no. 2, pp. 129-144.

Hobbs, H & Larkin, D 2022, *Making up for lost time? First Peoples-State Treaty-Making in Victoria*, Australia and New Zealand School of Government, Canberra.

Hobbs, H & Williams, G 2018, 'The Noongar settlement: Australia's first treaty', *The Sydney law review*, vol. 40, no. 1, pp. 1-38.

Hobbs, H & Williams, G 2020, 'Treaty-making in the Australian federation', *Melbourne University Law Review*, vol. 43, no. 1, pp. 178-232.

Hocking, BA & Stephenson, M 2008, 'Why the persistent absence of a foundational principle? Indigenous Australians, proprietary and family reparations', in F Lenzerini (ed.), *Reparations For Indigenous Peoples*, Oxford University Press, Oxford, pp. 477-522.

Hurihanganui, TA 2021, *Former staff accuse Te Arawhiti of racism*, 28 July, <https://www.rnz.co.nz/news/national/447855/former-staff-accuse-te-arawhiti-of-racism>.

Ilanbey, S 2022, *Labor secures stunning election win in South Australia, Marshall concedes*, 19 March, <https://www.theage.com.au/politics/victoria/very-tough-very-close-very-long-night-sa-s-labor-opposition-cautiously-optimistic-20220319-p5a64m.html>.

Indigenous Law Centre 2002, *November/December 2002*, <https://www.ilc.unsw.edu.au/publications/ilb/novemberdecember-2002-volume-5-issue-21>.

Inspiring Communities 2023, *Working with Tangata Whenua*, <https://inspiringcommunities.org.nz/ic_resource/working-with-tangata-whenua/>.

Interim Truth and Treaty Body n.d., *Treaty*, viewed 2 November, <https://www.truthandtreatyqld.org.au/treaty>.

Isdale, W 2023, 'Yunupingu on behalf of the Gumatj Clan or Estate Group v Commonwealth of Australia', *Australian environment review*, vol. 37, no. 9, pp. 174-176.

Jackson, M 2010, 'Constitutional transformation', in M Mulholland & V Tawhai (eds), *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, Huia Publishers, Wellington, pp. 325-336.

Jaensch, R 2022, *Advisory group to guide process for Truth-telling and Treaty*, 2 December, <https://www.premier.tas.gov.au/site_resources_2015/additional_releases/advisory-group-to-guide-process-for-truth-telling-and-treaty>.

Johnson, H 2007, *Two families: treaties and government*, 1 edn, Purich Pub, Saskatoon [Saskachewan].

Kaye, FW 2010, *We Are All Treaty People: Prairie Essays*, WESTERN HISTORY ASSOC, LOGAN, 0043-3810.

Kenny, R 2008, 'Tricks or treats? A case for Kulin knowing in Batman's Treaty', *History Australia*, vol. 5, no. 2, pp. 38.31-38.14.

Kolovos, B, Rose, T, Shepherd, T & Messenger, A 2023, *Australian states to push ahead with voice and treaty processes in absence of federal body*, 16 October, <https://www.theguardian.com/australia-news/2023/oct/16/australian-states-to-push-ahead-with-voice-and-treaty-processes-in-absence-of-federal-body>.

Lachance, N & Rose, T 2020, 'From colonization to reconciliation: Increasing the collaborative capacity of public servants', *Canadian Public Administration*, vol. 63, no. 4, pp. 640-659.

Langton, M 2001, 'Dominion and dishonour: A treaty between our nations?', *Postcolonial Studies*, vol. 4, no. 1, pp. 13-26.

Langton, M, Tehan, M & Palmer, L 2004, 'Introduction', in M Langton, M Tehan, L Palmer & K Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton, pp. 1-28.

Langton, M, Tehan, M, Palmer, L & Shain, K (eds) 2004, *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Carlton.

Larkin, D, Hobbs, H, Lino, D & Maguire, A 2022, 'Aboriginal and Torres Strait Islander peoples, law reform and the return of the states', *University of Queensland law journal*, vol. 41, no. 1, pp. 35-58.

Lavery, D 2019, 'No Decorous Veil: The continuing reliance on an enlarged Terra Nullius notion in Mabo [No 2]', *Melbourne University Law Review*, vol. 43, no. 1, pp. 233-268.

Lavery, D 2022, 'Renovating the Orthodox Theory of Australian Territorial Sovereignty', *UNSW Law Journal*, vol. 45, no. 2, pp. 499-530.

Lindell, J 2022, *Rachel Stephen-Smith apologises for First Nations treaty consultation 'hurt', says govt won't rush process*, 7 July, <https://www.canberratimes.com.au/story/7810400/minister-apologises-for-first-nations-treaty-consultation-hurt/>.

Lino, D 2017, 'Towards Indigenous-settler federalism', *Public Law Review*, vol. 28, no. 2, pp. 118-137.

Lino, D 2022, 'Are Indigenous rights inconsistent with Australian political traditions?', in *Paul Bourke Lecture*, University of Queensland, 28 April.

Loban, H 2002, 'Reflections on a treaty from a Torres Strait Islander lawyer', *Indigenous law bulletin*, vol. 5, no. 21, p. 22.

Lohberger, L 2023, *Tasmania says it is committed to truth and treaty, but how is it progressing?*, 29 May, <https://www.abc.net.au/news/2023-05-29/tasmanian-progress-towards-aboriginal-treaty-explained/102403316>.

Mabo, E, Jr. 2006, 'A treaty for whom? Indigenous jurisdictions and the treaty sideshow', in P Read, G Meyers & B Reece (eds), *What Good Condition? Reflections on an Australian Aboriginal Treaty 1986-2006*, ANU Press, pp. 99-104.

Maddison, S 2017, 'Recognise what? The limitations of settler colonial constitutional reform', *Australian Journal of Political Science*, vol. 52, no. 1, pp. 3-18.

Maddison, S 2022, 'Agonistic reconciliation: inclusion, decolonisation and the need for radical innovation', *Third World Quarterly*, vol. 43, no. 6, pp. 1307-1323.

Maddison, S, Hurst, J & Wandin, D 2021, 'The mess of colonialism, the complexity of treaty', in H Hobbs, A Whittaker & L Coombes (eds), *Treaty-Making: 250 Years Later*, The Federation Press, Alexandria, NSW, pp. 179-202.

Mansell, M 1989, 'Treaty proposal: Aboriginal sovereignty', *Aboriginal law bulletin*, vol. 2, no. 37, pp. 4-6.

Mansell, M 2002, 'Finding the foundation for a treaty with the indigenous peoples of Australia', *Balayi: Culture, Law and Colonialism*, vol. 4, pp. 83-89.

Mansell, M 2003, 'Citizenship, assimilation and a treaty', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 5-17.

Mansell, M 2016, *Treaty and Statehood: Aboriginal Self-Determination*, The Federation Press, Sydney.

Marshall, A 2021, 'Reliance of constitutional principles on employment relationships in the public service', LLB(Hons) thesis, Victoria University of Wellington - Te Herena Waka, Wellington, <https://ir.wgtn.ac.nz/bitstream/handle/123456789/18132/paper_access.pdf?sequence=1&isAllowed=y>.

McGlade, H 2003a, 'Native Title, 'tides of history' and our continuing claims for justice - sovereignty, self determination and treaty', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 118-136.

McGlade, H (ed.) 2003b, *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, viewed 2022/07/26, <https://search.informit.org/doi/10.3316/informit.0855754338

https://search.informit.org/doi/full/10.3316/informit.0855754338>.

McGlade, H 2017, 'The McGlade Case: A Noongar History of Land, Social Justice and Activism', *The Australian feminist law journal*, vol. 43, no. 2, pp. 185-210.

McKenna, B & Wardle, B 2019, 'Usurping Indigenous sovereignty through everchanging legal fictions', *Griffith Law Review*, vol. 28, no. 1, pp. 37-69.

McKenna, K 2022, 'Frustration over delays to 'long overdue' release of Queensland report into treaty with First Nations peoples', *ABC News*, vol.

McKenna, K & Riga, R 2023, *Youth justice overhaul 'directly at odds' with Path to Treaty and Closing the Gap, Queensland government warned*, 28 February, <https://www.abc.net.au/news/2023-02-28/youth-justice-overhaul-at-odds-with-path-to-treaty-government/102030544>.

McKenzie-Jones, P 2019, *What does 'We are all treaty people' mean, and who speaks for Indigenous students on campus?*, 30 August, <https://theconversation.com/what-does-we-are-all-treaty-people-mean-and-who-speaks-for-indigenous-students-on-campus-119060>.

McMillan, M 2016, 'Is Federalism being undermined in the current surge to 'recognise' Indigenous Australians in (and into) the Commonwealth Constitution?', *Indigenous law bulletin*, vol. 8, no. 25, pp. 15-19.

McNeil, K 2001, 'Extinguishment of Aboriginal title in Canada: Treaties, legislation, and judicial discretion', *Ottawa law review*, vol. 33, no. 2, pp. 301-346.

McNeil, K 2022, 'Has constitutionalizing Aboriginal and treaty rights made a difference?', *BC studies*, vol. 212, no. Winter, pp. 137-232.

McRae, H, Nettheim, G, Anthony, T, Beacroft, L, Brennan, S, Davis, M & Janke, T 2009, *Indigenous Legal Materials: Commentary and Materials*, 4th edn, Thomson Reuters, Sydney.

Messenger, A 2023, *Queensland LNP leader accused of bowing to party's 'far right' in qualifying his support for treaty*, 14 July, <https://www.theguardian.com/australia-news/2023/jul/14/queensland-lnp-leader-david-crisafulli-far-right-accusations>.

Minister for Crown-Indigenous Relations - Canada, Minister of Indigenous Relations and Reconciliation - British Columbia & First Nations Summit Task Group 2018, *Principals' Accord*, <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/principals_accord_signed_dec_1_2018.pdf>.

Minister for Crown-Indigenous Relations - Canada, Minister of Indigenous Relations and Reconciliation - British Columbia & First Nations Summit Task Group 2019, *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia*, <https://bctreaty.ca/wp-content/uploads/2016/08/RecognitionandReconciliationofRightsPolicyforTreatyNegotiations.pdf>.

Minniecon, R & Riches, T 2019, 'Interview with Pastor Ray Minniecon', *Australasian Pentecostal Studies*, vol. 20, pp. 86-99.

Morris, S & Hobbs, H 2023, 'Imagining a Makarrata Commission', *Monash University Law Review*, vol. 48, no. 3, p. (advance).

Morse, C 2022, *Tasmanian government holds historic meeting with Aboriginal corporations, with one notable absentee*, 3 August, <https://nit.com.au/03-08-2022/3579/tasmanian-government-holds-historic-meeting-with-aboriginal-corporations-with-one-notable-absentee>.

Mutu, M 2010, 'Constitutional intentions: the Treaty of Waitangi texts', in M Mulholland & V Tawhai (eds), *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, Huia Publishers, Wellington, pp. 13-40.

Mutu, M 2018, 'Behind the smoke and mirrors of the Treaty of Waitangi claims settlement process in New Zealand: no prospect for justice and reconciliation for Māori without constitutional transformation', *Journal of global ethics*, vol. 14, no. 2, pp. 208-221.

Mutu, M 2019, ''To honour the treaty, we must first settle colonisation' (Moana Jackson 2015): the long road from colonial devastation to balance, peace and harmony', *Journal of the Royal Society of New Zealand*, vol. 49, no. sup1, pp. 4-18.

Nadasdy, P 2014, *Hunters and Bureaucrats: Power, Knowledge, and Aboriginal-State Relations in the Southwest Yukon*, UBC Press, Vancouver.

Nakata, M 2003, 'Treaty and the self-determination agendas of Torres Strait Islanders: A common struggle', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 166-184.

Nakata, M & Windsor, R 2002, 'Locating the constituting elements of justice in our everyday discourse', *Balayi: Culture, Law and Colonialism*, vol. 4, pp. 45-51.

Native Nations Institute 2024, *About Us*, viewed 17 January, <https://nni.arizona.edu/about-us>.

Nettheim, G & McRae, H 2009, *Indigenous Legal Issues: Commentary & Materials*, Thomson Reuters (Professional) Australia Pty Limited, Sydney, Australia, <http://ebookcentral.proquest.com/lib/anu/detail.action?docID=4802978>.

New Zealand Parliament 2020, *Public Service Act*, <https://www.legislation.govt.nz/act/public/2020/0040/latest/LMS356875.html>.

2019.

Northern Territory Treaty Commission 2020, *Treaty Discussion Paper*, <https://treatynt.com.au/news/2020/treaty-discussion-paper>.

Northern Territory Treaty Commission 2021, *Towards Truth Telling*, <https://treatynt.com.au/news/2021/publication-towards-truth-telling>.

Northern Territory Treaty Commission 2022, *Final Report*, <https://treatynt.com.au/__data/assets/pdf_file/0005/1117238/treaty-commission-final-report-2022.pdf>.

NSW Government 2023, *NSW Budget 2023-2024*, <https://www.budget.nsw.gov.au/system/files/budget-2023-09/2023-24_Overview_Accessible.pdf>.

O'Brien, A 2011, 'Humanitarianism and reparation in colonial Australia', *Journal of Colonialism and Colonial History*, vol. 12, no. 2.

O'Sullivan, D 2021, 'Treaties and re-setting the colonial relationship: Lessons for Australia from the Treaty of Waitangi', *Ethnicities*, vol. 21, no. 6, pp. 1070-1092.

O'Faircheallaigh, C 2018, 'Lost opportunities: prospects for a treaty', *Griffith Review*, vol. no. 60, pp. 180-190.

Papillon, M 2020, 'Nation to nation? Canadian federalism and Indigenous multi-level governance', in H Bakvis & G Skogstad (eds), *Canadian Federalism: Performance, Effectiveness, and Legitimacy*, 4th edn, University of Toronto Press, Toronto, pp. 395-426.

Parkinson, J, Franco-Guillén, N & de Laile, S 2022, 'Did Australia listen to Indigenous people on constitutional recognition? A big data analysis', *Australian Journal of Political Science*, vol. 57, no. 1, pp. 17-40.

Perera, A 2023, *Aboriginal Affairs Minister Selena Uibo defends NT government decision to abolish independent Treaty Commission*, ABC News, 9 February, <https://www.abc.net.au/news/2023-02-09/nt-treaty-commission-selena-uibo-defends-government-decisions/101951056>.

Peters, EJ 2006, '"[W]e do not lose our treaty rights outside the... reserve": challenging the scales of social service provision for First Nations women in Canadian cities', *GeoJournal*, vol. 65, no. 4, pp. 315-327.

Phillips, G, Timothy, G, Coates, D, More, S & Yettica-Paulson, M 2003, 'A story of emergence: NIYMA's view on a treaty', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 107-117.

Piripi, H 2013, 'Te Tiriti o Waitangi and the New Zealand Public Sector', in V Tawhai & K Gray-Sharp (eds), *Always Speaking: The Treaty of Waitangi and Public Policy*, Huia (NZ) Ltd, Wellington, pp. 208-221.

Potter, H & Jackson, M 2018, 'Constitutional transformation and the Matike Mai project: a kōrero with Moana Jackson', *Economic and Social Research Aotearoa*, vol. 8, no. April, pp. 1-10.

Productivity Commission 2023, *Review of the National Agreement on Closing the Gap: Draft Report*, Australian Government, <https://www.pc.gov.au/inquiries/completed/closing-the-gap-review/draft>.

Queensland Government 2021, *Research Guide to records about Australian South Sea Islander peoples at Queensland State Archives*, <https://www.publications.qld.gov.au/ckan-publications-attachments-prod/resources/790e15f6-2de7-4361-a515-afd9beab44f0/research-guide-to-australian-south-sea-islander-records.pdf?ETag=ac605aaeada5b8213db2fad7b87a17fb>.

Queensland Government 2023, *Queensland's Path to Treaty*, viewed 13 March, <https://www.qld.gov.au/firstnations/treaty/queensland-path-to-treaty/about>.

Quiggan, R & Janke, T 2003, 'How do we treat our treasures? Indigenous heritage rights in a treaty', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 53-71.

Ramo, Z & Kelly, P 2021, *Little Things*, <https://open.spotify.com/album/4OqEyHXPRx4vWaxt0v6Z64?si=U73bkHwsT6SfiEOznKrjKw>.

Read, P, Meyers, G & Reece, B (eds) 2006, *What Good Condition? Reflections on an Australian Aboriginal Treaty 1986-2006*, Aboriginal History Monographs, ANU Press.

Reynolds, H 2004, *Fate of a Free People*, 2nd edn, Penguin Books, Camberwell VIC, Australia.

Reynolds, H 2021, *Truth-Telling: History, Sovereignty and the Uluru Statement*, 1 edn, University of New South Wales Press, Chicago.

Riga, R 2022, *Queensland government to include truth-telling inquiry for First Nations peoples as part of Path to Treaty*, 16 August, 16 August, <https://www.abc.net.au/news/2022-08-16/qld-indigenous-voice-path-to-treaty-truth-telling-parliament/101334848>.

Riga, R 2023, *Path to Treaty bill introduced to Queensland parliament. What does it mean?*, 22 February, <https://www.abc.net.au/news/2023-02-22/qld-treaty-truth-telling-inquiry-queensland-parliament/102008708>.

Rigney, D, Bell, D & Vivian, A 2021, 'Talking treaty: A conversation on how Indigenous nations can become Treaty ready', in *Treaty-Making: 250 Years Later*, The Federation Press, Alexandria, NSW, pp. 17-42.

Rigney, D, Bignall, S, Vivian, A, Hemming, S, Berg, S & Bell, D 2021, 'Treating treaty as a technology for Indigenous nation-building', in D Smith, A Delaney, A Wighton & S Cornell (eds), *Developing Governance and Governing Development: International Case Studies of Indigenous Futures*, Rowman & Littlefield, Maryland USA, pp. 119-139.

Rigney, L-I 2003, 'Indigenous education, languages and treaty: The redefinition of a new relationship with Australia', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 72-87.

Roe, M 1998, 'Book Reviews: Henry Reynolds, Fate of a Free People', *Law and History Review*, vol. 16, no. 3, pp. 608-610.

Saunders, C 2021, 'Treaty-Making in Australia: the non-Indigenous party', in H Hobbs, A Whittaker & L Coombes (eds), *Treaty-Making: 250 Years Later*, The Federation Press, Alexandria, NSW, pp. 43-60.

Shaw, G 2002, 'Native title, sovereignty and treaty: do they mix', *Balayi: Culture, Law and Colonialism*, vol. 4, pp. 63-71.

Short, D 2012, 'When sorry isn't good enough: Official remembrance and reconciliation in Australia', *Memory studies*, vol. 5, no. 3, pp. 293-304.

Simmons-Donaldson, L 2020, 'Resetting the Crown's relationship with mana whenua', *Public Sector*, vol. 43, no. 4, pp. 3-5.

Simpson, A 2017, 'The ruse of consent and the anatomy of 'refusal': cases from indigenous North America and Australia', *Postcolonial Studies*, vol. 20, no. 1, pp. 18-33.

Simpson, LB 2008, 'Looking after Gdoo-naaganinaa: Precolonial Nishnaabeg diplomatic and treaty relationships', *Wicazo sa review*, vol. 23, no. 2, pp. 29-42.

Simpson, LB 2013, 'Politics based on justice, diplomacy based on love', *Briarpatch*, vol. 42, no. May/June, pp. 5-7.

Smith, D 2021, 'Thematic Introduction: Concepts, Issues and Trends', in D Smith, A Delaney, A Wighton & S Cornell (eds), *Developing Governance and Governing Development: International Case Studies of Indigenous Futures*, Rowman & Littlefield, Maryland USA, pp. 109-118.

Smith, D 2022, *What SA's new govt wants to achieve in Aboriginal affairs*, 23 March, <https://www.sbs.com.au/nitv/article/what-sas-new-govt-wants-to-achieve-in-aboriginal-affairs/he86hybpq>.

South West Aboriginal Land and Sea Council n.d., *About the Settlement Agreement*, viewed 20 December, <https://www.noongar.org.au/about-settlement-agreement>.

State of Queensland 2022, *Queensland Government Response to the Treaty Advancement Committee Report*, <https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/ptt-response-tac-report.pdf>.

State of Queensland, Huggins, J, Gooda, M, Lavarch, M, Bourne, J & Atkinson, S 2021, *Treaty Advancement Committee Report*, <https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/work/atsip/reform-tracks-treaty/path-treaty/treaty-advancement-committee-report.pdf>.

State of Victoria 2021, *Advancing the Victorian Treaty Process: Annual Report 2020-21*, vol. 2022, State of Victoria, Melbourne, <https://www.firstpeoplesrelations.vic.gov.au/sites/default/files/2022-06/2022%20Reupload%20DPC_TreatyAnnualReport2021_WEB%20%281%29.pdf>.

State of Victoria 2023, *About First Peoples - State Relations*, viewed 7 January, <https://www.firstpeoplesrelations.vic.gov.au/about-first-peoples-state-relations>.

Stead, V 2019, 'Money trees, development dreams and colonial legacies in contemporary Pasifika horticultural labour', in V Stead & J Altman (eds), *Labour Lines and Colonial Power: Indigenous and Pacific Islander Labour Mobility in Australia*, ANU Press, Canberra, pp. 133-157.

Stephen-Smith, R 2022, *Statement: Receipt of Karabena Consulting Report "Implementation Pathways to achieve Ngunnawal, First Nations Peoples and Australian Capital Territory Government Treaties"*, 7 July, <https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/rachel-stephen-smith-mla-media-releases/2022/statement-receipt-of-karabena-consulting-report-implementation-pathways-to-achieve-ngunnawal,-first-nations-peoples-and-australian-capital-territory-government-treaties>.

Stephens, M 2018, ''He rangi ta Matawhaiti, he rangi ta Matawhanui': looking towards 2040', in M Hickford & C Jones (eds), *Indigenous Peoples and the State : International Perspectives on the Treaty of Waitangi*, Routledge, Abingdon, pp. 186-195.

Strakosch, E 2019, 'The technical is political: settler colonialism and the Australian Indigenous policy system', *Australian Journal of Political Science*, vol. 54, no. 1, pp. 114-130.

Strelein, L 2021, 'Agreement without compromise: Maintaining the integrity of Indigenous sovereignty in negotiations with governments', *Australian Aboriginal Studies (Canberra)*, vol. no. 2, pp. 81-101.

Strelein, L & Burbidge, B 2019, 'Treaty and sovereignty in Australia', *Native Title Newsletter*, vol. no. 2, pp. 16-18.

Sullivan, A 2016, 'The politics of reconciliation in New Zealand', *Political Science*, vol. 68, no. 2, pp. 124-142.

Sweeney, D 1995, 'Broken Promises: the Crown's Fiduciary Duty To Aboriginal Peoples', *Aboriginal Law Bulletin 4*, vol. 3, no. 75, pp. 4-7.

Tatz, C 1983, 'Aborigines and the age of atonement', *The Australian Quarterly*, vol. 55, no. 3, pp. 291-306.

Tawhai, V & Gray-Sharp, K 2013, 'Introduction', in V Tawhai & K Gray-Sharp (eds), *Always Speaking: The Treaty of Waitangi and Public Policy*, Huia (NZ) Ltd, Wellington, pp. 10-16.

Taylor, L 2003, ''Who's your mob?' - the politics of Aboriginal identity and the implications for a treaty', in Aboriginal and Torres Strait Islander Commission & Australian Institute of Aboriginal and Torres Strait Islander Studies (eds), *Treaty: Let's Get it Right!*, Aboriginal Studies Press, Canberra, pp. 88-106.

Te Aho, L 2010, 'Judicial creativity', in M Mulholland & V Tawhai (eds), *Weeping Waters: The Treaty of Waitangi and Constitutional Change*, Huia Publishers, Wellington, pp. 109-126.

Te Arawhiti 2022a, *Building closer partnerships with Māori*, <https://www.tearawhiti.govt.nz/tools-and-resources/building-closer-partnerships-with-maori/>.

Te Arawhiti 2022b, *Crown engagement with Māori*, <https://www.tearawhiti.govt.nz/tools-and-resources/crown-engagement-with-maori/>.

Te Arawhiti 2022c, *Guidelines for engagement with Māori*, <https://www.tearawhiti.govt.nz/tools-and-resources/crown-engagement-with-maori/>.

Te Arawhiti 2022d, *Māori Crown relations capability framework for the public service*, <https://www.tearawhiti.govt.nz/tools-and-resources/public-sector-capability/>.

Te Arawhiti 2022e, *Providing for the Treaty of Waitangi in legislation and supporting policy design*, <https://www.tearawhiti.govt.nz/tools-and-resources/contemporary-treaty-of-waitangi-issues/>.

The Institute of Public Administration of Canada 2017, *Public Service Action for Reconciliation: Plan, Educate, Engage*, Toronto, Canada, <https://www.ipac.ca/iPAC_EN/News/NYOD_Final_Report.aspx>.

The Ministry of Indigenous Relations and Reconciliation n.d., *Incremental Treaty Agreements*, viewed 6 December, <https://www2.gov.bc.ca/gov/content/environment/natural-resource-stewardship/consulting-with-first-nations/first-nations-negotiations/incremental-treaty-agreements>.

The Parliament of the Commonwealth of Australia 1983, *Two Hundred Years Later...: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or 'Makarrata' Between the Commonwealth and Aboriginal People*, Australian Government Publishing Service, Canberra.

Thomas, A, Jakubowicz, A & Norman, H 2021, 'Making Black stories matter: Understanding media narratives on Treaty and Aboriginal aspirations', in H Hobbs, A Whittaker & L Coombes (eds), *Treaty-Making: 250 Years Later*, The Federation Press, Alexandria, NSW, pp. 61-75.

Torre, G 2022, *Treaty a key goal for South Australia's first Aboriginal Attorney General*, 8 April, <https://nit.com.au/08-04-2022/2930/treaty-a-key-goal-for-south-australias-first-aboriginal-attorney-general>.

Torres Strait Regional Authority n.d., *The TSRA*, viewed 27 March, <https://www.tsra.gov.au/the-tsra>.

Treaty 88 Campaign 1988, 'Aboriginal sovereignty — never ceded', *Australian Historical Studies*, vol. 23, no. 91, pp. 1-2.

Truth and Reconciliation Commission of Canada 2015, *Canada's Residential Schools: Reconciliation: The Final Report of the Truth and Reconciliation Commission of Canada*, Winnipeg, Manitoba, <https://nctr.ca/records/reports/>.

Tuck, E & Yang, KW 2012, 'Decolonization is not a metaphor', *Decolonization: Indigeneity, Education & Society*, vol. 1, no. 1, pp. 1-40.

Tuuta, J-L 2021, '"Kāore o ngā moemoea, don't dream it's over": Is the constitutional dream of embedding Te Tiriti o Waitangi into its framework in Aotearoa over?', LLM research essay thesis, Te Herenga Waka: Victoria University of Wellington, Wellington, <https://ir.wgtn.ac.nz/bitstream/handle/123456789/18133/paper_access.pdf?sequence=1>.

The Uluru Statement from the Heart 2017, <https://ulurustatement.org/the-statement/view-the-statement/>.

United Nations 2007, *United Nations Declaration on the Rights of Indigenous Peoples*, United Nations, Washington, DC, <https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2018/11/UNDRIP_E_web.pdf>.

University of Toronto n.d., *We Are All Treaty People*, Ontario Institute for Studies in Education, viewed 25 October, <https://www.oise.utoronto.ca/abed101/we-are-all-treaty-people/>.

Viens, J 2019, *Public Inquiry Commission on relations between Indigenous Peoples and certain public services in Québec: listening, reconciliation and progress*, <https://www.cerp.gouv.qc.ca/index.php?id=2&L=1>.

Vowles, J 2024, 'The idea of 'sovereignty' is central to the Treaty debate – why is it so hard to define?', *The Conversation*, 31 January.

Waitangi Tribunal 2023, *About the Waitangi Tribunal*, viewed 31 October, <https://www.waitangitribunal.govt.nz/about/>.

Ware, H 2023, 'Lessons in Truth and Reconciliation for Australia from Overseas', *Social Alternatives*, vol. 42, no. 1, pp. 55-62.

Warner, K, McCormack, T & Kurnadi, F 2021, *Pathway to Truth-Telling and Treaty: Report to Premier Peter Gutwein*, vol. 2022, Department of Premier and Cabinet, Tasmanian Government, <https://www.dpac.tas.gov.au/__data/assets/pdf_file/0029/162668/Pathway_to_Truth-Telling_and_Treaty_251121.pdf>.

Watson, I 2009, 'Sovereign spaces, Caring for Country, and the homeless position of Aboriginal peoples', *South Atlantic Quarterly*, vol. 108, no. 1.

Watson, I 2012, 'The future is our past: we once were sovereign and we still are', *Indigenous law bulletin*, vol. 8, no. 3, pp. 12-15.

Weiler, M 2017, 'Public Servant Schools in Canada: A Concept for Reconciliation', *Canadian journal for the study of adult education*, vol. 29, no. 2, pp. 1-20.

Williams, G & Hobbs, H 2020, *Treaty*, 2 edn, The Federation Press, Alexandria.

Williamson, B 2021, 'Treaty: all ship, no cargo', *ARENA*, <https://arena.org.au/treaty-all-ship-no-cargo/>.

Wolfe, P 1998, *Settler Colonialism: The Politics and Poetics of an Ethnographic Event*, Bloomsbury Publishing Plc, London.

Wolfe, P 2006, 'Settler colonialism and the elimination of the native', *Journal of Genocide Research*, vol. 8, no. 4, pp. 387-409.

Wood, A 2021, 'Establishing a neutral legal framework for Treaty in Australia', in H Hobbs, A Whittaker & L Coombes (eds), *Treaty-Making: 250 Years Later*, Federation Press, Alexandria, NSW, pp. 76-101.

Wood, A 2022a, 'Treaty making (Makarrata) and an 'invisible' people: seeking a just peace after 'conflict'', in K Te Maihāroa, M Ligaliga & H Devere (eds), *Decolonising Peace and Conflict Studies through Indigenous Research*, Palgrave Macmillan, Singapore, pp. 231-268.

Wood, A 2022b, 'Voice, treaty, truth: can we get to an affirmative 91.4 percent again?', *The Law Society Journal,*, vol. July 2022, pp. 78-85.

Wood, A & Gardiner, C 2021, 'Identifying a legal framework for a treaty between Australia's First Peoples and the state', in D Smith, A Delaney, A Wighton & S Cornell (eds), *Developing Governance and Governing Development: International Case Studies of Indigenous Futures*, Rowman & Littlefield, Maryland USA, pp. 63-84.

Wright, J 1985, *We Call for a Treaty*, Fontana, Sydney.

Yoorrook Justice Commission 2022, *Yoorrook with Purpose: Interim Report*, viewed 27 July, <https://yoorrookjusticecommission.org.au/wp-content/uploads/2022/06/Yoorrook-Justice-Commission-Interim-Report.pdf>.

Yoorrook Justice Commission 2023a, *Public hearings: 27 April - 15 May 2023*, viewed 10 January, <https://yoorrookjusticecommission.org.au/public-hearing/hearings-27-april-15-may-2023/>.

Yoorrook Justice Commission 2023b, *Yoorrook calls hearing regarding government non-compliance*, 24 March, <https://yoorrookjusticecommission.org.au/individual-articles/yoorrook-calls-hearing-regarding-government-non-compliance/>.

Yorta Yorta Nation Aboriginal Corporation 2019, *A Statement from The Yorta Yorta Council of Elders*, 19 June,

<https://www.facebook.com/YYNAC/posts/pfbid0ANiXLTnqvWXkWVfifcLdBPdW7DDfnYJfzh5aCeraFnmdso8kuaWoM8qL6riK8Jidl?__tn__=%2CO*F>.

Young, S 2020, 'Computing compensation for extinguishing native title in Australia', *The New Zealand law journal*, vol. no. May 2020, pp. 153-157.

Young, S & Hobbs, H 2021, 'Treaty-making: critical reflections on critiques from abroad', in H Hobbs, A Whittaker & L Coombes (eds), *Treaty-Making: 250 Years Later*, The Federation Press, Alexandria, NSW, pp. 156-178.

Yu, P 2018, *2018 ANU Reconciliation Lecture: Reconciliation, Treaty Making and Nation Building*, Australian National University, <https://www.youtube.com/watch?v=yx1kNkmNlVg>.