ENVIRONMENTAL JUSTICE AUSTRALIA

Legalwise Water Symposium

The expanding and evolving rule of law in water management: the emergence of treaty-making in Victoria

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Introduction

1. Australia is conspicuous among former British colonial states for the absence of treaties and treaty-making with colonized first peoples.

2. There are no doubt various reasons for this historical contingency though surely the imperial and colonial desire for untrammelled occupation and use of the continent was prominent. The rise of legal, political, cultural and social mythologies on the basis of such imperial strategy has profound and lasting effect. The legal doctrine of *terra nullius* was pivotal. But it sat alongside the mythologies of the 'dying race' and peaceful settlement.

3. Treaty-making is a response to a foundational story of the Australian state: the untenable lie of white settlement and occupation, committed virtuously and without opposition, and without the need or contingency of an interlocutor to effect 'settlement'.

4. Certain Australian jurisdictions are looking to treaty-making to overcome what is untenable. Aboriginal leaders have posed the treaty mechanism as a response for much longer. Treaty-making remains a core proposition for Aboriginal peoples, reflected for example in the *Uluru Statement from the Heart*.

Treaty in Victoria

5. Among Australian jurisdictions Victoria has progressed furthest on the treaty question.[1] In early 2016, the Victorian Government announced it would commence discussions with Aboriginal communities in Victoria in order to conclude a treaty.[2] The commitment to treaty was then accompanied by two years of consultations and discussions on a treaty-making process and its steps.

6. This process culminated in passage of the principal legislation governing treaty in Victoria, the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ('Treaty Process Act').

The Treaty Process Act

7. The Treaty Process Act is a framework law, establishing principles, structures and mechanisms for treaty-making. Developments under the Act unfolded quite rapidly in 2022.

[1] Other jurisdictions have commenced discussion on treaty, including the Northern Territory, Queensland, the ACT and Tasmania. The Commonwealth Parliament considered the question of treaty with Aboriginal peoples in the late 1970s.

[2] Fitzsimons 'Victorian Government to begin talks with First Nations on Australia's first Indigenous treaty' The Age, 26 February 2016, https://www.firstpeoplesrelations.vic.gov.au/treaty-process. Victorian Government First Peoples-State Relations 'Pathway to Treaty', https://www.firstpeoplesrelations.vic.gov.au/treaty-process.

Political support is arguably strong given resounding re-election of the incumbent ALP Government in Victoria in November 2022.

8. Institutionally, the Act provides for:

    a. Recognition the State's main interlocutor in treaty-making, the Aboriginal Representative Body.[3] This body now takes the form of the elected First Peoples Assembly of Victoria, a company limited by guarantee with statutory support.

    b. A Treaty Authority,[4] being a body established by agreement between the State and the Assembly and recognised under the Act as the entity solely responsible for facilitating and administering treaty negotiations. The relevant agreement was executed in June 2022. Enabling legislation supporting the Treaty Authority received Royal Assent in August 2022.

    c. A Self-Determination Fund,[5] being a fund agreed[6] between the State of the Assembly available to support Aboriginal participation on 'equal standing'[7] with the State in negotiations and as a resource for capacity building and empowerment generally. The Self-Determination Fund is controlled solely by the Assembly.

9. The Act provides for a 'treaty negotiation framework', to be agreed by the State and the Assembly, subsequent to the Treaty Authority's establishment.[8] The Treaty Negotiation Framework forms the detailed negotiation rules and parameters for the Treaty process. Agreement on the Framework was concluded in October 2022.[9]

10. The Act provides for a scheme of 'guiding principles' governing the operation of the treaty process. These principles are:

    a. Self-determination and empowerment of Traditional Owners and Aboriginal Victorians;

    b. Fairness and equality

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[3] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Part 2
[4] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Part 4
[5] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Part 6
[6] *Self-determination Fund Agreement*, as agreed between First Peoples' Assembly and the State of Victoria, https://www.firstpeoplesrelations.vic.gov.au/self-determination-fund-agreement
[7] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), subs 36(1)(a)
[8] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Part 5
[9] *Treaty Negotiation Framework*, as agreed between the State of Victoria and the First Peoples' Assembly 20 October 2022, https://www.firstpeoplesrelations.vic.gov.au/sites/default/files/2022-10/Treaty-Negotiation-Framework.pdf

c. Partnership and good faith

d. Mutual benefit and sustainability

e. Transparency and accountability.

11. The Guiding Principles mandate the conduct of parties to the treaty process.

12. The 'parties to the treaty process' are:

    a. The Assembly

    b. The State

    c. The Treaty Authority

    d. Any person, group or body participating in future treaty negotiations.

13. A significant starting point is that the State and other parties are bound to act in accordance with the Guiding Principles. Those Guiding Principles govern both procedural and substantive matters going forward.

14. Procedural matters, such as good faith conduct and promotion of equality and fairness, may be of considerable importance in light of disparities in size, scope and resources available to the State and to Aboriginal parties.

15. Substantively, the Act commits treaty parties to certain high-level outcomes, such as a process that 'provides material, social, economic and cultural benefits for Traditional Owners and Aboriginal Victorians'.[10]

16. Finally, reference should be made to the Preamble to the Act, which has interpretive value. Instruments prepared for treaty-making under the Act also include preambular text. The Act's Preamble provides expression of the policy basis on which the Parliament is constructing this process. The themes of justice and righting historic wrongs are prominent. The State expressly 'recognises the important of the treaty process proceeding in a manner that is consistent with the principles articulated in the UN Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent.'

[10] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), subs 25(2)

The Treaty Negotiation Framework

17. The Treaty Negotiation Framework is a detailed document but there are certain key propositions I draw your attention to:

    a. Treaty-making contemplates by State-wide and localised treaties;

    b. The Guiding Principle of self-determination and empowerment is identified as the 'central principle for treaty-making…'[11]

    c. Traditional Owners with existing recognition under Aboriginal statutes may automatically participate in treaty negotiations; any other Traditional Owner group may (through a delegation) participate in negotiations where minimum standards are met.[12]

    d. The State must itself make preparations for treaty negotiations including identifying appropriate delegations that meet minimum standards for participation.

    e. Minimum standards for participants include preparedness *inter alia* to conduct negotiations in relation to 'land and waters'. Localised (Traditional Owner) treaty negotiations must include discussion of:

        i. traditional relationships with relevant land and waters and

        ii. protecting land and waters and cultural heritage.[13]

    f. There may not be any excluded subject-matter in treaty negotiations.[14] 'Land and water justice' is subject-matter expressly contemplated for negotiation.[15]

    g. Treaty negotiations will operate by way of three sources of law:

        i. Statute (being the Treaty Process Act itself);

[11] Treaty Negotiation Framework, cl 2.5, p 8
[12] Treaty Negotiation Framework, Part B
[13] Treaty Negotiation Framework, cl 25.4(b)-(c)
[14] Treaty Negotiation Framework, cl 25
[15] Treaty Negotiation Framework, cl 25.2(e)(iii)(L).

ii. International law (specifically the UN Declaration on the Rights of Indigenous Peoples, which forms an imperative reference for treaty-making[16]);

iii. Aboriginal Lore, Law and Cultural Authority, being the 'a body of authority that informs First Peoples' relationships, ways of doing business and governance structures'[17] and rules concerning Eldership and authority to 'speak for Country'.[18] Recognition of Aboriginal Lore, Law and Cultural Authority is part of required 'negotiation standards'.[19]

h. Once agreed, treaty is enforceable under arrangements set within the Treaty Negotiation Framework or, ultimately, in the Supreme Court.

i. The Treaty Negotiation Framework provides no timeframes or time limitations for the operation of treaty or treaties.

The dynamic legal and policy context for treaty-making over water management

18. How will treaty-making apply to water management?

19. Given the very real innovations of the treaty-making process, its potential to affect water management and governance in Victoria is significant. As text accompanying the Treaty Negotiation Framework states: 'Treaty-making aims to build a new relationship between the State and First Peoples based upon realising rights defined by the UNDRIP.'[20]

20. This 'new relationship' is intended both to be on terms 'tangibly improving' the lives of Aboriginal peoples and future generations and 'enhance the laws' of Victoria and have 'positive impacts for all of Victorian society.'[21]

21. I have no particular insight into treaty discussions concerning water. I restrict my observations and opinions to what is in the public domain. The most developed policy work to date from the State lies in its 2022 *Water is Life* document, which may anticipate responses of the State. I would note however the State's agreed position under the Treaty Negotiation Framework to

[16] Treaty Negotiation Framework, cl 38(c). The concept of self-determination aligns closely with UNDRIP. UNDRIP is a source of recognition of 'inherent rights': see Treaty Negotiation Framework, cl 3.1-3.2. The explanatory text at cl 2 provides that

> Treaty-making aims to build a new relationship between the State and First Peoples based upon realising rights defined by UNDRIP.

[17] Treaty Negotiation Framework, cl 2.7(a)
[18] Treaty Negotiation Framework, cl 2.7(c)
[19] Treaty Negotiation Framework, 24.1(v)
[20] Treaty Negotiation Framework, cl 2
[21] Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic), Preamble.

'directing [its Negotiators] to participate in negotiations with an open mind, thinking beyond existing policies and practices…' [22]

22. Victorian Aboriginal communities have engaged in debates and struggles around water management for a long time. This is unsurprising given the widespread presence of wetlands and waterways across what is now Victoria prior to colonization and, notwithstanding clearance and genocidal practices, continued connection of Aboriginal communities to this Country.

23. At the same time, it is notorious that Aboriginal peoples control a very small fraction of formal water rights, the legal instrument crucial to real influence and control over water management.

24. A non-exhaustive list of key legal and policy interventions relevant to the treaty issue include:

    a. Native title, Settlement Act and joint management arrangements

    b. Recently concluded Victoria water policy, *Water is Life*, also termed the 'Aboriginal water access roadmap'[23]

    c. The cultural flows model and related developments (including Aboriginal water-holders)

    d. Statutory and policy schema recognising bicultural governance of river and wetland landscapes.

Native title and Settlement Act

25. In Victoria, native title determinations and/or Settlement Act arrangements have been made over substantial areas of Victoria. Generally, these do not directly touch on rights and interests in water. A form of statutory water right operating under the Settlement Act (by way of a natural resource agreement) does exist. One such right is held by Dja Dja Wurrung in central Victoria. Elsewhere, determined or negotiated interests in streams or freshwater

[22] Treaty Negotiation Framework, cl 24.2(e)
[23] DELWP *Water is Life: Traditional Owner Access to Water Roadmap* (2022), https://www.water.vic.gov.au/__data/assets/pdf_file/0035/599390/Water-is-Life-Section-A-Victorian-Government-Policy.pdf ('Water is Life')

wetlands are limited to interests in land absent interests in water.[24] Other joint management arrangements also function under public lands legislation.[25]

Water is Life Roadmap

26. The Aboriginal water roadmap covers a broad agenda of water justice. Key actions include proposed small transfers of water rights (in Gippsland, SW Victoria and the Goulburn-Murray), closer involvement of Aboriginal peoples in management of water institutions, anticipated agreement-making over environmental water entitlements, intended recognition of TOs as water-holders and public land managers, and recognition of waters as 'living entities' for which TOs 'speak'.

27. The Roadmap contains two distinct parts: Victorian government policy and 'Nation Statements' from each Aboriginal community. The latter are reflective of desired water policy directions and actions. Generally, in each case, Traditional Owner positions are linked to water as intrinsic to the totality and health of Country, to repair and restoration of Country, and to Aboriginal agency and authority in water management.

Cultural flows

28. The influence of the cultural flows concept is evident in the issue of water rights transfers in the Roadmap,[26] the prospect of joint water management (for example environmental holdings), reform of water landscape management,[27] and emergent institutional reform (specifically forms of Aboriginal water-holder arrangements). This influence extends to the desire for water-holdings not to be confined strictly to pre-existing legal categories, such as consumptive versus non-consumptive categories, but designed to fit more flexible Traditional Owner objectives with commercial and non-commercial characteristics.

Bicultural governance of rivers and wetlands

29. The 'recognition space' evolving since *Mabo (No 2)* now includes in Victoria the specific device of statutory recognition of waterways and landscapes as 'living entities', an approach

[24] See eg *Clark v Victoria* [2005] FCA 1795, which was the first native title determination in Victoria (by consent) and determined native title in the bed, banks and adjacent lands of the Wimmera River and its terminal lakes but not in waters. That is despite the fact that native title rights included rights intrinsically connected to water, such as (non-exclusive) right to fish. See also the Barkandji determination in NSW: *Barkandji Traditional Owners #8 v A-G of NSW* [2015] FCA 604.
[25] See eg Yorta Yorta Traditional Owner Land Management Agreement (2010) and Joint Management Plan for the Barmah National Park (2020).
[26] See influence of cultural flows in this document at *Water is Life*, 22-24
[27] FoVTOC *Victorian Traditional Owner Cultural Landscapes Strategy* (2021), https://www.fvtoc.com.au/cultural-landscapes

intended to accommodate a bicultural approach to management. The exemplary legislation is the *Yarra River Protection (wilip-gin Birrarung murron) Act 2017* (Vic). In practice, this approach to recognition influences water and land-use *planning*, rather than any vesting of rights or duties. Traditional Owner bodies are intended to function in a manner comparable to representatives ('voices').

30. Pluralistic, or bicultural, approaches to governance of land and waters is emerging as a theme in State-Traditional Owner relationships, enabled through a range of statutory schemes and policy tools, such as the Budj Bim Cultural Landscape in south-west Victoria.

Themes in Victorian Traditional Owner demands for water justice

31. As public material indicates, Victoria Traditional Owner aspirations for water vary on a country-by-country basis. That is to be expected. Cultural lore-law, institutional capacity, and the historic effects of river regulation vary across the State. It is reflected in the *Water is Life* Nation Statements. At the same time, common themes, aspirations and demands are evident across all Aboriginal Nations in Victoria. Similarly, extensive collaborative and joint work has occurred across leaderships and communities, such as evidenced through MLDRIN and the Federation of Victorian Traditional Owner Corporations.[28] Extensive academic research into Aboriginal water agenda is also available.

32. Propositions and ambitions for Aboriginal water management discernible from these sources include:

    a. Aboriginal Traditional Owners assertion of inherent rights to water intrinsic to connections and obligations to Country and community. Inherent rights attach to the unique situation of Traditional Owners as 'first peoples' with defining laws and customs. These rights link to assertions of sovereignty.[29] Such inherent rights also ground the model of self-determination, with which concepts of sovereignty are closely associated.[30]

    b. The Crown's primary right to control water may be contested.

[28] See eg FoVTOC *Victoria Traditional Owner Water Policy Framework* (2014); O'Donnell et al *Cultural Water for Cultural Economies* (2021); FoVTOC *Response to Draft Water is Life Traditional Owner Access to Water Roadmap* (2022)
[29] See Brennan et al *Treaty* (Federation Press, 2005), Ch 4. The Victorian Parliament acknowledges the assertions of Aboriginal sovereignty: *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic), Preamble.
[30] Brennan et al *Treaty*, 74

c. Traditional Owner connections to water are economic, social, linguistic, cultural, institutional, and spiritual. These foundations are 'relational', including totemic relationships, and they are tied to lore-law and cultural authority (including authority to 'speak' for certain places). Waters, like all Country, are invested with meaning and bear qualities of living, ancestral beings.

d. Water management is not neatly confined to consumptive and other uses. Capacity to manage water for commercial outcomes is actively contemplated alongside other outcomes such as repair and health of waters and landscapes.

e. Traditional owner models resist the sharp legal distinction of land and water. Emerging concepts of cultural landscapes[31] reflect new paradigms that may drive water law within a wider context and 'new relationship'.

f. Pluralistic models of water management are identified or in formation. Those models include intersection of Traditional Owner ambitions with enabling (or constraining) water regulation. Similarly, institutional reforms are considered, including in planning and in water-holding. Unevenness in capacity and engagement with the State can be significant, a factor that the treaty process is intended to respond to.

g. Traditional Owner planning and resource management interventions proceed from culturally derived models (such as Country plans, cultural assessments or cultural values mapping) and aim to effect UNDRIP-type principles of influence and consent at policy, regulatory and operational levels.[32]

33. In venturing a high-level summary, the position emerging may be said to be an alternative water management model, based on restoration of Country closely linked to community and culture,[33] economic opportunities, institutional innovation, and a genuine say in water management and governance.[34]

The relevance and application of treaty

34. Treaty marks a shift in resource management and governance. That has proved true in other jurisdictions progressing treaty, such as New Zealand and Canada. Treaty will not be, and it is

[31] VFoTOC *Victorian Traditional Owner Cultural Landscapes Strategy* (2021).
[32] See eg Djaara Nation Statement in DELWP *Water is Life: Traditional Owner Access to Water Roadmap – Section B Traditional Owner Nation Statements* (2022), 112-135
[33] See also Walker *South Australian Royal Commission into the Murray Darling Basin: Final Report* (2019), 500
[34] See O'Donnell et al *Cultural water for cultural economies* (University of Melbourne, 2021), https://law.unimelb.edu.au/__data/assets/pdf_file/0008/3628637/Final-Water-REPORT-spreads.pdf

not intended to be, evolution of an ancillary 'engagement' or 'consultation' with Aboriginal people over resource management. It is a shift in relationships.

35. By definition, treaty is political or 'constitutional'. As Professor Mark McMillan and his colleagues have expressed it, treaty is inherently about public obligations, powers and conduct of the parties, different *sources* of those obligations, powers and conduct, and their meeting.[35] Treaties function between polities.[36] In Victoria, this has been given Parliamentary expression.

36. Treaty assumes and formalises plural legal regimes, each invoking different sources of law and authority.[37] It is a relationship of jurisdictional actors. That proposition is important for water resources management. Pluralistic regimes are not only about codifying or requiring engagement with Traditional Owner but positive integration of Aboriginal jurisdiction into water management and regulation. The functioning of Traditional Owner terminology, lore, imperatives and agency in water planning, regulation, and operations may well become more prominent and integrated into decision-making. With the emergence of parallel concepts such as cultural landscapes, it is foreseeable that water law adapts and accommodates itself further to culturally derived, placed-based planning and governance.

37. Identifying specific legal or policy mechanisms enabling pluralistic models of water management is necessarily speculative, but some propositions might be advanced on greater power-sharing or influence over water, such as:

    a. Strategic or opportunistic redistribution of water rights;

    b. Development of Aboriginal water institutions;

    c. Reform of water rights models operating under water statutes;

    d. Mandates for cultural assessments in water planning, transfers, infrastructure or operational decisions;

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[35] McMillan et al 'Obligations of conduct: public law – treaty advice' (2020) 44 *Melbourne University Law Review* 2 1

[36] Having regard the size of the treaty parties involved, Aboriginal Victorians number around 66,000 according to the 2021 census. By comparison to recognized States and other polities in the Oceanic region (Pacific), Aboriginal Victorians collectively are larger in number than 12 out of 25 political communities: Wikipedia 'List of Oceanian countries by population', https://en.wikipedia.org/wiki/List_of_Oceanian_countries_by_population.

[37] Given the significance of UNDRIP as a source of influence on the Treaty Process Act, including the prominence of the self-determination concept in the latter (derived from the former), see Hobbs and Williams 'The Noongar Settlement: Australia's first treaty' (2018) 40 Sydney Law Review 1 1, 6: '…UNDRIP envisages and endorses a pluralised account of the State, where sovereignties are dispersed among multiple polities.'

e. Strengthened referral and/or approval roles for Aboriginal water authorities in relation to cultural landscapes.

38. Each of these mechanisms is generally consistent with, or reflects, policy directions identified by the Victorian Government, Traditional Owners or under international instruments (such as UNDRIP, the Biodiversity or Ramsar Conventions).

39. Finally, treaty is negotiated. Those negotiations are now structured according to specific rules and expectations. Binding treaty principles apply to the conduct of the State and State instrumentalities relating to land and water.

40. Principles and 'additional negotiation standards' applying to the State are intended to implement a *fair* negotiation process. In New Zealand and Canada this has been taken to imposed fiduciary type obligations on government. That language is not used in Victoria but there are analogies, such as requirements to address imbalances in bargaining power, 'ensuring fairness' in progressing the treaty process and 'mak[ing] decisions that promote equality for traditional owners and Aboriginal Victorians.' The obligation to 'work together in good faith to advance the treaty process' is also notable.

41. Treaty process is not intended to paralyse the workings of government but there are a new conditions on the operation of government. In New Zealand this has been described as negotiations proceeding 'in a spirit of partnership with the mutual goal of enhancing the status of the other party and the quality of the relationship'.[38]

42. These conditions do affect decision-making concerning water in Victoria. Where government takes decisions that compromise or unreasonably constrain the bargaining position of Traditional Owners in relation to aspirations for water and cultural landscapes those actions are potentially problematic. Government should be mindful of substantially altering the 'facts on the ground' in advance of negotiation, in a manner that evidences an unwillingness to listen or an unwillingness to compromise.

43. At what point do government actions prejudice negotiations and impede fair dealings? Cultures of listening and compromise are often starkly different as between government agencies and Traditional Owners. The former will need to learn to bend to the latter. And that is merely in order to progress toward treaty. Treaty itself may well produce something very different to the current norms and practices of water management, including different distributions of power and objectives. Where 'new relationships' end up is unknown. But we

[38] Waitangi Tribunal *Te Whanau O Waipareira Report* (1998), 234, cited in Hobbs and Williams 'The Noongar settlement', 9

are already embarking on ‘new relationships’ for water management and for many other matters.