

'SO MUCH AT STAKE: FORGING A TREATY WITH AUTHORITY AND RESPECT' BY SARAH MADDISON AND DALE WANDIN , Sarah Maddison And Dale Wandin, published in [Australian Book Review](#) (ABR) , [August 2019, no. 413](#)

Australia remains alone among the settler colonies for its lack of treaties with First Nations. This is despite the fact that Aboriginal and Torres Strait Islander peoples in Australia have been calling for a treaty for decades – since at least the 1970s and then more forcefully during the Treaty '88 Campaign. When Bob Hawke received the Barunga Statement in 1988 and committed the nation to a treaty, it seemed the battle was won. Two years later, Hawke reneged on his promise and instead gave us ten years of reconciliation, intended to prepare non-Indigenous Australians to negotiate more just relationships. Even that was not to be. By the end of the decade of reconciliation, John Howard had derailed the process and 'treaty' had become a political dirty word.

In 2012, calls for treaty were revived during an unfocused campaign for Indigenous 'recognition' in the Australian Constitution. The government-funded Recognise campaign argued that the population should embrace recognition, though no model or referendum question was ever agreed. As discontent with the campaign grew, many Aboriginal and Torres Strait Islander people argued that recognition in a colonial constitution amounted to little more than another form of assimilation. Treaty re-emerged as a more desirable alternative, notably in the 2017 *Uluru Statement from the Heart* and its call for a Makarrata Commission to supervise a process of agreement-making and truth-telling between governments and First Nations.

As these issues swirled at the national level, sub-national jurisdictions started to get on with the job of treaty. In February 2016, Victoria announced that it would embark on a state-level treaty process, closely followed by South Australia later that year (that process was abandoned following a change of government in 2018). The Northern Territory has recently appointed Mick Dodson as Treaty Commissioner in that jurisdiction. With three and half years of continuous work to consider, it is Victoria's emergent process that is the one to watch.

We write this piece from very different perspectives and positions in relation to the Victorian treaty process. For Sarah Maddison, a non-Indigenous settler academic, the issues we outline here are intellectually challenging and speak to her interest in justice. For Dale Wandin, however, every single aspect of the treaty process in Victoria is deeply personal. As a Wurundjeri man, so much is at stake: family and community relationships, the right to practise and sustain his culture, and the economic future of his people on their own territories. By bringing these perspectives together, we hope to make clear the complexities and sensitivities that threaten to trip this process up.

The state of Victoria is, by necessity, working without any kind of roadmap towards the successful negotiation of future treaties. There is no formula, there is no timeline; there is only consultation, design, response, and iteration. This is inevitably messy and complex and leaves some stakeholders feeling enfranchised while others feel ignored. Navigating this complexity is an unenviable task.

Since the Victorian treaty process was announced in 2016, almost all the energy has gone into developing the 'right' (i.e. culturally appropriate and legitimate) representative structures on the Indigenous side of the relationship. This work has proceeded through a government-appointed Treaty Working Group, growing into a Community Assembly, and eventually to the January 2018 creation of the Treaty Advancement Commission and the appointment of Gundijtmara woman Jill Gallagher as Treaty Advancement Commissioner.

In July 2018 the *Advancing the Treaty Process with Aboriginal Victorians Bill* passed in the Victorian parliament – the first legislation of its kind in Australia and an effort to protect the treaty process from a potential change of government in the November 2018 state election. The bill established the

basis for creating the Aboriginal representative body that will work with the Victorian government to shape the framework for treaty negotiations. This body, since named the First People's Assembly of Victoria, will design the architecture for the treaty process, including a treaty negotiation framework that will set out 'ground rules' for treaty, including what is on and off the negotiating table and who can negotiate; a treaty authority that will act as an 'independent umpire' in the negotiation process; and a self-determination fund intended to support Aboriginal communities to be on an 'even playing field' with the state when treaties are eventually negotiated.

To be clear about the role of the Assembly: it will never be involved in actually negotiating treaties; rather, its task is to put in place the key frameworks and structures that will guide what will likely be several decades of negotiations with traditional owner groups around the state.

Yet the fraught environment into which the Assembly proposals were born tells us much about the complexity involved in trying to assemble lawful relations between Indigenous peoples and settlers so many years after Indigenous territories were invaded and colonised. More than two hundred years of dispossession and harmful policy mean there is a high level of mistrust among Aboriginal people in Victoria about any process agreed by government. Specifically, there is concern that treaty negotiations could be assimilationist if they do not respect Indigenous cultural protocols. Drawing from Dale's experience, we can group these complexities around three core issues.

The first set of issues concerns the degree of pragmatism brought to the process and the degree to which this bumps up against Aboriginal cultural protocols and identities. Jill Gallagher has been explicit about the challenges of trying to navigate this tension:

Before colonisation, we had traditional ways of doing business. There was no need for a statewide Representative Body. Colonisation has changed this. We now need a way to talk Treaty with the state ... Our unique situation needs a unique response. We have to make a body that fits our unique culture, history and traditions. But it must also represent us in the modern world.

Here, Gallagher is flagging the need to make Indigenous cultural protocols about organisation, hierarchy, and decision-making intelligible to non-Indigenous peoples and governments. This pragmatism explains some of the features of the model as it has emerged.

The Assembly is proposed as a democratic, unifying 'voice' for all Aboriginal people in Victoria in the next phase of the Treaty process. It will comprise thirty-three representatives, all Victorian Traditional Owners, with twelve reserved seats – one for each 'formally recognised' Traditional Owner group – and twenty-one general seats open to all Victorians Traditional Owners. The newly created and independent-from-government electoral roll is open to all Aboriginal and Torres Strait Islander people residing in Victoria. There will also be an Elder's voice in a form yet to be determined.

All of this is proving hugely contentious, most particularly because the pragmatism of the proposed Assembly runs directly into a second set of concerns – those to do with who has standing and legitimacy in Aboriginal politics. A direct challenge to the Assembly model has come from a group of Aboriginal advocates and activists who are concerned that the model does not, according to spokesperson Gunnai-Kurnai Gunditjmara woman Lidia Thorpe, 'reflect our culture or show due respect to all the Clans and Nations across the state'. By prioritising reserved seats for Traditional Owner groups already recognised through legislative mechanisms such as Native Title or the *Victorian Traditional Owner Settlement Act* (2010), the model, critics like Thorpe claim, values settler modes of recognition over traditional cultural authority. This group proposes an alternative

body made up of seventy-six representatives, two from each of the surviving thirty-eight Clans or Nations in Victoria.

Critics are also concerned that the electoral roll being created to elect the Assembly representatives is open to all Aboriginal and Torres Strait Islander people residing in Victoria (for three of the last five years). The pragmatism of this decision, which is intended to ensure that all Indigenous people in Victoria are included in some way, contradicts Aboriginal protocols about speaking on or for someone else's Country. This concern has been amplified by the creation of electoral regions based on total Aboriginal and Torres Strait Islander population. This means that Dale's community, whose territory occupies the majority of the Melbourne electoral region and will have nine elected representatives (plus the one reserved for Wurundjeri), and which is already a tiny minority on their own territory, will likely also be outnumbered by elected representatives from other traditional owner groups.

The Assembly model was announced in April 2019, and elections were originally scheduled for this July. Community anxiety about the tensions between pragmatism, culture, and standing have, however, brought the process into further tension with questions concerning time. Around the continent, Aboriginal and Torres Strait Islander peoples often express their frustrations with being asked to engage with processes according to a settler political timeline. In the Victorian treaty process, this pressure is coming from a desire to protect the process at the next state election in 2022. Despite the Andrews government's thumping win in 2018, there is concern that a possible change of government at the next election could see the process dumped, as it was in South Australia. The pressure is on to get the Assembly up and running, and the architecture in place, before this becomes a genuine possibility.

For many Aboriginal people in Victoria, however, this timeline is secondary to the need to ensure that the process and model have cultural integrity and authority. Once the Assembly elections were announced, it was quickly clear that there was not enough time to adequately engage with communities, explore their anxieties, and encourage participation through either nomination or enrolment. Recognising these concerns, the Treaty Advancement Commission announced a new timeline in June, with elections now scheduled for September this year.

At this point in time, it is impossible to predict the success or failure of treaty in Victoria. This is a bold attempt to respond to a claim that has been central to Aboriginal and Torres Strait Islander aspirations over many decades, but for Aboriginal people in Victoria, the fear of assimilation hiding in the acts of treaty is creating high levels of anxiety and concern. While treaty would be a landmark accomplishment, this can never occur at the expense of protocol, culture, and respect. It seems the current process has not done enough to put those fears to rest.

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