# OBLIGATIONS OF CONDUCT: PUBLIC LAW — TREATY ADVICE

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*This article reports on advice given to the Department of Premier and Cabinet on the public law obligations of the State of Victoria regarding the entering into of treaty relations between the Aboriginal Peoples and people of Victoria. It makes visible and explicit the obligations that the State of Victoria has taken up in the* Advancing the Treaty Process with Aboriginal Victorians Act 2018 *(Vic) and considers how they might be understood as a matter of Indigenous and non-Indigenous public law.*

## CONTENTS



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## I Introduction

How might a state take up its public obligations and conduct itself well in relation to Indigenous laws and peoples? Treaty has been a long held requirement of Aboriginal peoples in Australia.

The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ('*Treaty Process Act*') makes explicit that as a sovereign entity, the State of Victoria has taken up the obligation to understand the relationship that a treaty might offer.[1] As a consequence, in collaboration with Aboriginal people in Victoria, from 2018, the State of Victoria began to develop a contemporary account of its own responsibilities. This included serious consideration of how to listen to, and act on, what Aboriginal people declare to be of critical importance to them. Following the *Treaty Process Act*, the Department of Premier and Cabinet sought advice on matters of constitutional law, State public law, and Indigenous community and nation. For the first time, it sought this advice from senior Indigenous legal scholars in Australian universities, and on the topic of its own obligations to law. By virtue of who was invited to give the advice, the State of Victoria has recognised that its own public obligations could be acknowledged according to more than one law and more than one jurisprudence. At the centre of such advice giving is an awareness of the quality of the formal and substantive relationships of law that might be established through entering treaty relations. In this respect the advice belongs to a long tradition of transnational engagement with the conduct of lawful (as opposed to lawless) relations.[2]

[1] *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) Preamble ('*Treaty Process Act*').

[2] See, eg, Carwyn Jones, *New Treaty, New Tradition: Reconciling New Zealand and Māori Law* (UBC Press, 2016).

As a Wiradjuri man, scholar and jurisprudent, Mark McMillan was one of those invited to present the State with advice. The advice was written in July 2018, and with the obligations that attach to the office of Indigenous jurisprudent and legal scholar (as opposed to an advocate or bureaucrat). In undertaking this task, Mark worked with long-term collaborators (non-Indigenous lawyers, jurisprudents and historians) to exemplify the practices of the conduct of lawful relations. This advice is written in collaboration with David Foster, Ann Genovese, Shaun McVeigh and Maureen Tehan, who have brought to the task their own experiences of law, and of the conduct of lawful relations, within Victoria and elsewhere.

Advising the State of Victoria on its public law obligations necessarily meant bringing concerns with Aboriginal sovereignty to bear on the understanding of lawful and legal responsibilities. Our framing and source for these responsibilities draws on plural sources of authority and practices of law. Many of these responsibilities that relate to the practices of scholarship, diplomacy and civic life are shared by the advice writers; we note, however, that they are addressed differently by Indigenous and non-Indigenous scholars.

The text that follows begins with a preamble explaining the office of Indigenous jurisprudent written by Mark McMillan. The text then turns to present the advice that we have given to the Department of Premier and Cabinet of the State of Victoria. The writing of an advice to government is an established legal genre. It has its own conventions and style of presentation. These establish a range of questions which join law to conduct and, perhaps, policy. The advice presented here has stayed within the limits of this genre. However, because it is an advice to government written from the office of Indigenous jurisprudent, based within a university, it is necessary to make visible how such an office carries responsibilities for more than one law and more than one form of knowledge. It also takes as its starting point the fact that the State of Victoria is already bound to the authority of both non-Indigenous and Indigenous law and jurisprudence.[3] The current treaty engagements represent a deepening and, perhaps, a transformation of relations. The preamble addresses these questions and positions the advice. Further, although this article was written as a legal advice addressed to government, we acknowledge that its re-production here, to the readers of a law journal, required some small changes. We have added several footnotes and slightly altered the form of the advice by removing some of the summaries and changing some of the

[3] See, eg, *Traditional Owner Settlement Act 2010* (Vic) ('*TOSA*').

headings to sustain narrative continuity. We have also added a short note at the end to emphasise and draw out the sense of collaboration involved in the conduct of lawful relations. This is of course an aspect of the legal conclusions, but also a reflection of the experience of its writers, working together to produce the advice.

## II Preamble: Office of Indigenous Jurisprudent and Legal Scholar

Undertaking the work of giving academic advice to the State of Victoria ('State') requires that I identify my standpoint. I am a Wiradjuri citizen and therefore a person of law. I am also a trained lawyer and legal scholar in the Western tradition. It is the combining of these two existences that provides the proper basis for offering to you a possible praxis that any treaty-making framework offers to us *all* as Victorians.

At the centre of the existences of two laws and traditions of legal thought is a framework that authorises the rights and responsibilities of people and gives shape to their aspirations. This is true of both Aboriginal and Anglo-Australian law and legal thought. This advice is required to place Treaty within the complex environments where these systems of law are continually operating. In that operation, the systems are both independent of each other and yet dependent on each other for function and efficacy. It is this requirement for the forms of law to work effectively that is the focal point that I address as a Wiradjuri person of law. The questions are: how do these existences of law relate to each other, and be in relation with each other? Put another way: how do the State and Traditional Owners and Aboriginal people of Victoria conduct these law relations?

This advice brings to bear the obligations and possibilities of Traditional Owners and Aboriginal people of Victoria and the State to conduct such lawful relations as a response to, and requirement of, the 1992 decision in *Mabo v Queensland [No 2]* ('*Mabo [No 2]*')[4] — as a matter of public law.

As a Wiradjuri jurisprudent, I take up the central responsibility to ensure that there is articulation and evidence of the ongoing encounter in the everyday between multiple systems of law. I take up the responsibility for articulating that Traditional Owners and Aboriginal Victorians have had some 70,000 years of conducting lawful relations between sovereign entities; that such experience and conduct is brought to bear and properly framed

[4] (1992) 175 CLR 1 ('*Mabo [No 2]*').

within the Treaty environment that the State has recently constructed in the present; that Traditional Owners of Victoria have since time immemorial engaged with their own and distinctive public law.

Bringing into relation concepts, practices and traditions of Aboriginal public law with the concepts, practices and traditions of public law in Anglo-Australian legal discourse will make visible and available the conduct of lawful relationships that is both the hope and obligation of law itself. Such illumination of hope and obligation of treaties between Traditional Owners and Aboriginal peoples of Victoria and the people of Victoria through the State will make visible and available the conduct of relations as an activity of the everyday for *all* Victorians.

The three questions from the Department of Premier and Cabinet to which this advice was directed are as follows:

1 What are the options for the legal form a treaty (or treaties) could take? What is the most appropriate and effective option?;

2 What matters should a treaty (or treaties) cover? In answering this you should consider any potential constitutional limitations for a state-based treaty; and

3 How should a Treaty Authority be established as the independent body responsible for overseeing and facilitating treaty negotiations? Regard should be had to international best practice.

## III Advice

This advice is presented from within the office of jurisprudent and the university (and as such differs from a legal advice given from the law office). It has taken as its central concern the deepening of the account of public obligation and relationship found within the public law of Victoria. We have drawn out the following points of orientation to assist in developing the mode, manner and substance of treaty- and agreement-making and to help articulate the quality of lawful relations that might emerge through such activities.

Our advice is shaped by the following commitments to public law and treaty.

1 The Aboriginal peoples of Australia and the Pacific have a long tradition of agreement-making, mutual obligation and the conduct of lawful relations.[5] This tradition was in place before British colonial occupation and settlement and has continued since 1788.[6] By deciding to enter a treaty or treaties with the Traditional Owners and Aboriginal people of Victoria, the State joins this tradition of treaty- and agreement-making. It has also, in other settings, already joined and made many agreements with Traditional Owners and Aboriginal Victorians.[7]

2 Entering into treaty relations and agreements brings with it a range of obligations and commitments for the State, Traditional Owners, Aboriginal people and the people of Victoria. The *Treaty Process Act* recognises and acknowledges a number of existing and new obligations. However, it does not exhaust the obligations of public law. For the State, entering a treaty or treaties will involve the continuing consideration of what it means for it to take responsibility for its own laws in relation to Aboriginal people and their laws, customs and culture.[8]

3 The point of departure and engagement for entering treaty relations within the State is the acknowledgement of the lawful authority of the parties to the agreement or agreements.[9] However this is understood, the State has chosen and accepted the obligation to embark on a process that acknowledges Anglo-Australian and Aboriginal sources of authority in the government of Victoria. These sources of authority are acknowledged and engaged both within the public law of Victoria and between states, nations and peoples. Their relationship is yet to be determined, although the treaty process is one aspect of doing this. However, it is already acknowledged that any such agreement will be framed in relation with and through the polities and modes of governance of Traditional Owners and Aboriginal Victorians.[10]

[5] See, eg, Sean Brennan et al, *Treaty* (Federation Press, 2005).

[6] See, eg, ibid 12.

[7] See *Aboriginal Heritage Act 2006* (Vic) ('*Aboriginal Heritage Act*'); *Aboriginal Lands Act 1970* (Vic); *TOSA* (n 3).

[8] See Marcia Langton, 'Dominion and Dishonour: A Treaty between Our Nations?' (2001) 4(1) *Postcolonial Studies: Culture, Politics, Economy* 13, 15–19.

[9] See Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 5–8.

[10] See, eg, *Treaty Process Act* (n 1) s 22.

4 In entering treaty relations, the State has accepted obligations to act in good faith for the furtherance of the treaty process.[11] In this it continues to work with its public obligation to find forms of public law worthy of the polity of the State and adequate to the task of engaging both Aboriginal and Anglo-Australian authority and lawful existence.

5 The purpose of a treaty or treaties between Traditional Owners and Aboriginal Victorians and the State is to bring accounts of law, custom and culture into relation. As a matter of public law it will also involve bringing accounts of public law into relation with what it means to live life as a Victorian. Public law has two aspects: one relating to the basic commitments of a state or nation, and the other relating to government. For the State to enter into a treaty or treaties with Traditional Owners and Aboriginal people of Victoria will affect both aspects of public law.

a) The first aspect is political in the sense that it is concerned with the way in which the polity expresses its understanding of itself. It can provide a pattern of engagement that can build relationship. Sometimes such concerns are left behind in the preambles to the documents of public law. Here, these concerns should establish the pattern of lives lived in relations of authority. A treaty can provide a pattern or method of how to do so with justice and fairness.

b) The substantive concerns of what a state government should do by way of good government are traditionally understood in terms of duties and rights and in terms of public provision. These concerns already engage both Traditional Owners and Aboriginal Victorians and the State. These relations concern government and governance, public and social provisioning, and education and knowledge. The challenge for the State is to recast these concerns as part of a relationship.

c) In doing this, the State is beginning a long overdue process of bringing its public law into relation with the public law of the Traditional Owners of Victoria.

[11] For a recent judicial discussion of good faith in the context of negotiations, see *Widjabul Wia-Bal v A-G (NSW)* (2020) 376 ALR 204, 214–16 [39]–[45] (Reeves, Jagot and Mortimer JJ) ('*Widjabul*'). For a reformulation of good faith obligated to more than one law, see Sarah Morales, '(Re)Defining "Good Faith" through *Snuw'uyulh*' in John Borrows and Michael Coyle (eds), *The Right Relationship: Reimagining the Implementation of Historical Treaties* (University of Toronto Press, 2017) 277.

The advice is presented first in terms of a discussion of public obligations that may shape treaty-making between the State and Traditional Owners and Aboriginal people, and then in terms of a response to the specific questions asked. In responding to the form and aspiration of the *Treaty Process Act*, the commitments made by the State are substantial and it will be a challenge to live up to the guiding principles for the treaty process and what follows. Our advice is that the State must continue to know and take responsibility for its law and the conduct of lawful relations. It must offer some substantive account of itself and what it wishes to achieve in entering a treaty relationship. Without this, it is unlikely that two or more ways of understanding governance and conduct will be brought into meaningful relation.[12]

The advice is given in the knowledge that the State has also sought advice about the constitutional and international law elements of the treaty process, and that public law, as conceived and used here, presents few, if any, limitations on the power of the State.[13]

## IV Welcoming the Obligation

### A *What Might Be Meant by 'Public Law'?*

The questions to be considered in this advice are based on the relationship between legislative power and inherited obligations and purposes embedded in general law — the common law and prerogative powers. Stated positively, public law addresses the offices, responsibilities, jurisdictions, duties, privileges and rights associated with the conduct of life in public — both as a matter of civil (public) authority and of the other institutions and orderings. More formally, the advice addresses the sources of authority and resources of argument that should be used to draw out the obligations stated in the *Treaty Process Act*.

It is important to think about public law in relation to the State's involvement in terms of the positive obligations it has taken up in the *Treaty Process Act* as part of being a responsible government, and not simply in terms of the constraint or curtailment of powers to act.[14] By enacting the *Treaty Process Act*

[12] This concern might be better understood in terms of plural authorities and jurisdictions than a more general sociological concern with legal pluralism.

[13] The breadth of the State's constitutional powers should be noted: see *Constitution Act 1975* (Vic) s 16; Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 209–20.

[14] 'Responsible government' is one of several key terms developed in an absence of lawful relations between colonial governments and First Nations: see Ann Curthoys and Jessie Mitchell, *Taking Liberty: Indigenous Rights and Settler Self-Government in Colonial Australia,*

the State has entered into and acknowledged a complex relationship requiring new forms of conduct and, possibly, new ways of thinking about public law. This advice explores what kind of work a broadly conceived public law, with its care for office, authority, public duty and patrimony, has to do to acknowledge the presence of an Aboriginal law in the public law of Victoria. This may mean considering what an Aboriginal public law may look like. Whilst it is usual to divide public law between elements that create authority and those engaged with government, both elements can be framed in terms of conduct and, here specifically, the conduct of lawful relations with the Traditional Owners and Aboriginal people of Victoria.

We take as the starting point for the State entering into treaty relations with Aboriginal peoples the fact that Aboriginal peoples, in varied ways, are members of nations with their own law, sovereign relationships, languages and jurisdiction. The *Treaty Process Act* further makes clear that the State has not (and acknowledges it has not) always addressed this with clarity in many contemporary projects concerned with lawful conduct of relations between states and nations.[15] Although this advice is presented as advice to the State about Anglo-Australian law, it has benefited from the guidance offered by Indigenous jurisprudents. These Indigenous jurisprudents reiterate the technical and legal necessity for using a range of different methodological approaches and collaborations to make those relations of authority and engagements visible.[16]

In order to reflect this focus and to show publicly how the State is engaging with the conduct of lawful relations, the advice examines the public obligations of the State with respect to the ways that treaties can help to establish the conduct of lawful relations. The importance of naming current negotiations as being in pursuit of 'treaty' cannot be underestimated: the word carries a long state, national and international history.[17] To name something 'treaty' is to enter a series of public commitments that relate to the relationship between

*1830–1890* (Cambridge University Press, 2018) 235–52, 269–87. Treaty relations will, no doubt, change how the responsibility of government is understood.

[15] *Treaty Process Act* (n 1) Preamble.

[16] See, eg, CF Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2011); Larissa Behrendt, 'Aboriginal Sovereignty: A Practical Roadmap' in Julie Evans et al (eds), *Sovereignty: Frontiers of Possibility* (University of Hawai'i Press, 2013) 163.

[17] See Michael Mansell, *Treaty and Statehood: Aboriginal Self-Determination* (Federation Press, 2016) 97–154.

polities.[18] There is a technical and legal necessity to use a language that makes visible the State's commitment to such a relationship.[19]

Those ideas of relationship and meeting with another law, and the need to look for technical and legal ways for the State to express its commitment in this regard, are already embedded in the *Treaty Process Act*, notably in pt 3 which sets out the guiding principles for the Treaty process. This advice explores how these ideas, so central to treaty, are also embedded in our jurisprudence and experience. It draws out what this might mean for thinking with and about public law.

### B *The Obligation Is Not New*

How does the State work within its own law to pursue its obligations to meet (relate) well with another law? This is the question foregrounded by the *Treaty Process Act*, and the answer must ultimately be forward-looking and ongoing, focusing on conduct and relationship. However, it is crucial to appreciate that the relationship is not created by the *Treaty Process Act*, that the question is not a new one, and that the State's public law obligations concerning its conduct towards and relationship with Aboriginal Victorians pre-date the *Treaty Process Act*.[20]

The relationship between Aboriginal peoples of Victoria and Europeans is long-standing. The history of this relationship is an account of many laws meeting and interrelating, and it is here that sources and resources for the State's public law obligations can be found. *Mabo [No 2]* is crucial in understanding this history. Justice Brennan famously stated that the view that Australia could be treated as 'desert uninhabited' country and its Aboriginal people taken to be without laws[21] could not be supported,[22] and that 'the antecedent rights and interests in land possessed by the [I]ndigenous inhabitants of the territory survived the change in sovereignty'.[23] Native title, his Honour went on, 'has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the

[18] See ibid 99.

[19] While such technical language of State law emphasises the responsibilities of the State, it certainly does not exhaust the language of responsibility in the conduct of the State.

[20] See generally Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004).

[21] *Mabo [No 2]* (n 4) 36.

[22] Ibid 39–42.

[23] Ibid 57.

[I]ndigenous inhabitants of a territory'.[24] Justice Gummow in *Wik Peoples v Queensland* ('*Wik*') observed that the High Court in *Mabo [No 2]* 'declared the content of the common law upon a particular view which now was taken of past historical events'.[25]

Professor Marcia Langton has argued that with this altered historical view comes more than continuation of native title: if native title survived annexation, then by the same logic Aboriginal jurisdiction — or as Langton puts it, 'Aboriginal government under the full body of Aboriginal customary laws' — must have also survived.[26] By acknowledging in the *Treaty Process Act* the laws practised by Aboriginal Victorians, the importance of self-determination, and that the partnership between the State and Aboriginal Victorians in the treaty process is an *equal* one, the State embraces engagement with those laws.

In so doing it accepts the challenge of finding appropriate 'meeting places of laws'[27] where the authority of laws and legal traditions can be brought into relation. From within Anglo-Australian law, the status and quality of such meetings is still a matter of dispute; that the encounters have taken place, often with terrible results, is not in dispute.[28] The State has entered into a process of revitalising what such meetings can mean.[29]

Associate Professor Sean Brennan has referred to terra nullius as 'not so much official British policy in Australia as a mindset. It operated as a background assumption'.[30] However, especially in the early years after the initial meeting of laws, it was not a uniform mentality. The Supreme Court of New South Wales in 1829 decided *R v Ballard*[31] 'based on a recognition of a plurality of laws on the Australian continent', giving 'unambiguous support for

[24] Ibid 58.

[25] (1996) 187 CLR 1, 179 ('*Wik*').

[26] Langton (n 8) 15.

[27] See Shaunnagh Dorsett and Shaun McVeigh, 'Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking' (2012) 36(2) *Melbourne University Law Review* 470.

[28] See generally ibid.

[29] For a recent overview, see 'Colonial Frontier Massacres in Australia, 1788–1930', *The Centre for 21st Century Humanities, The University of Newcastle* (Database) <https://c21ch.newcastle.edu.au/colonialmassacres>, archived at <https://perma.cc/W35S-VZ8D>.

[30] Sean Brennan, 'Native Title and the Treaty Debate: What's the Connection?' (Treaty Project Issues Paper No 3, Gilbert + Tobin Centre of Public Law, The University of New South Wales, May 2004) 2.

[31] (Supreme Court of New South Wales, Forbes CJ and Dowling J, 13 June 1829) ('*Ballard*'), published in Bruce Kercher, '*R v Ballard*, *R v Murrell* and *R v Bonjon*' (1998) 3(3) *Australian Indigenous Law Reporter* 410, 412–14 ('*Ballard*, *Murrell* and *Bonjon*').

Aboriginal legal autonomy'.[32] Justice Willis, sitting in Melbourne, concluded in *R v Bonjon* ('*Bonjon*') that Aboriginal Victorians governed themselves by their own laws, and that in the absence of a 'treaty subjecting the Aborigines of this colony to the English colonial law … [they] cannot be considered Foreigners in a Kingdom which is their own'.[33] The terra nullius mindset that later gained purchase was not always ingrained — especially so, perhaps, in the Port Phillip District, given *Bonjon* was decided after the assertion of common law jurisdiction in *R v Murrell* ('*Murrell*').[34]

Professors Shaunnagh Dorsett and Shaun McVeigh argue that '[t]he failure of the Court in *Murrell* to continue to deny common law jurisdiction over matters inter se did not end the plurality of laws. It simply changed the terms of jurisdictional engagement.'[35] The State, by acknowledging in the *Treaty Process Act* the laws practised by Aboriginal Victorians and seeking equal partnership in the treaty process, embraces this characterisation of later developments. It alters the terms of jurisdictional engagement. The State, as a matter of good conduct and public duty in the treaty process, has chosen to 're-negotiate or revisit the fundamental settlement between peoples' without seeing '[s]overeignty in the statist external sense of the word … as an impediment'.[36] Brennan, Associate Professor Brenda Gunn and Professor George Williams suggest that public law puts few, if any, constraints on the treaty outcomes that can be reached.[37] The State has committed to approaching the treaty process with this mindset of opportunity, rather than constraint.

It follows from this commitment, and the related commitment to find a meeting place of law and to address its historic obligations, that when the State thinks about its conduct in its relations with Aboriginal Victorians, it must have regard to its office, obligation and responsibility — how it must conduct itself well given these considerations, which are founded historically and confirmed and articulated in the *Treaty Process Act*.

[32] Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7, 9 ('Recognition').

[33] (Supreme Court of New South Wales, Willis J, 16 September 1841) ('*Bonjon*'), quoted in Kercher, '*Ballard*, *Murrell* and *Bonjon*' (n 31) 425.

[34] (1836) 1 Legge 72, 73 (Burton J) ('*Murrell*'). See also Kercher, 'Recognition' (n 32).

[35] Dorsett and McVeigh (n 27) 477.

[36] Sean Brennan, Brenda Gunn and George Williams, '"Sovereignty" and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 351.

[37] Ibid 352.

The *Treaty Process Act* eloquently expresses the State's commitment to an attempt to find a formal mechanism to enter a particular kind of relationship (that of treaty) with Aboriginal Victorians.[38] In it, the State makes commitments about its conduct (for example, that it must at all times act in accordance with the guiding principles in ss 22–6);[39] about the potential subject matter of a treaty or treaties;[40] and about processes of negotiation and treaty-making.[41] It undertakes to work in the treaty process collaboratively,[42] fairly,[43] in good faith[44] and transparently.[45]

These commitments about conduct are directed at the relationship between the State and Aboriginal Victorians, whether those Aboriginal Victorians are members of the Aboriginal Representative Body or other persons, bodies and groups. They require the State to consider open-mindedly the obligations of a State in negotiating towards a treaty or treaties.

That these are obligations in pursuit of *treaty*, rather than simply 'agreement', must be emphasised. The State enters into all manner of agreements, including, of course, with Aboriginal Victorians. Clearly, labelling something a 'treaty' is not in itself enough; 'what really counts is the content of the agreement and the quality of the relationship it helps establish and consolidate'.[46] However, by naming the potential agreement or agreements 'treaty' the State has already said something about the quality of the relationship it seeks with Aboriginal Victorians. There is an important expressive element to the commitment to *treaty*. Treaty is future-focused, and directed to a changing environment; it is concerned with conduct and relationships, more than with rights and interests.[47] It acknowledges the authority of Traditional Owners and Aboriginal Victorians to engage the State about how — to use the words of the Preamble to the *Treaty Process Act* — they '[practise] their laws,

[38] *Treaty Process Act* (n 1) Preamble.

[39] Ibid s 21.

[40] Ibid s 30(3).

[41] Ibid s 31.

[42] Ibid Preamble.

[43] Ibid s 23.

[44] Ibid s 24.

[45] Ibid s 26. All these terms, we are arguing, should carry substantive commitments of conduct and action. They should also be considered terms of reciprocal relationship.

[46] Brennan et al, *Treaty* (n 5) 3.

[47] See Mansell (n 17) 105–6.

customs and languages, and [nurture] Country through their spiritual, cultural, material and economic connections to land, water and resources'.[48]

## V The Conduct of the State

If the State is to be clear about its responsibilities in the treaty process, and able to express effectively the obligations it has taken up and to consider what these obligations mean in terms of its conduct, it needs a language of public law with which it can address, and carry along, *all* Victorians (not only Aboriginal Victorians, or those Aboriginal Victorians with whom the State is negotiating). Insight into that language and how it can be deepened to match the State's obligations can be gained by reading the *Treaty Process Act* alongside public law traditions.

The emphasis in the Preamble on relationship — in references to 'work[ing] together', 'walk[ing] alongside', 'work[ing] in partnership', 'tak[ing] each step forward on the pathway toward treaty together', 'work[ing] collaboratively and always in good faith' — prompts the State to focus on its commitments about its behaviour in the treaty process. The further articulation of these commitments in pt 3, 'Guiding principles for the treaty process', provides a framework through which to consider the language of public law in this context. Part 3 speaks of 'self-determination', 'empowerment', 'fairness', 'equality', 'advancing', 'benefit', 'transparency', 'honesty', 'integrity'.[49] How should the State conceive of its conduct in pursuing the guiding principles in pt 3, in acting consistently with the values this language articulates?

One way in which the State could begin to deepen its understanding of this language would be to closely examine each of these words and phrases in turn. This advice, however, takes a different approach: it looks at the ideas of 'good faith' and 'office' as general representations of the State's commitment to revitalise its obligations.

A useful way to begin is by considering the administrative law concept of 'office'. In *R v Anderson; Ex parte Ipec-Air Pty Ltd*, Kitto J, in language which continues to be quoted by the High Court,[50] stated that an office holder must exercise a statutory discretion

[48] *Treaty Process Act* (n 1) Preamble.

[49] Ibid ss 22–6.

[50] See, eg, *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 30 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ); *Plaintiff M96A/2016 v Commonwealth* (2017) 261 CLR 582, 599 [38] (Gageler J).

> according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest [person], competent to discharge the duties of [their] office, ought to confine [themselves].[51]

More recently, in *Minister for Immigration and Citizenship v Li*, Hayne, Kiefel and Bell JJ explained that when something is done by an office holder according to a discretion, 'it is to be done according to the rules of reason and justice. … It is to be legal and regular, not arbitrary, vague and fanciful.'[52]

These public law ideas about elements of good conduct in the context of an office holder exercising a discretion can help to give content to the language of 'good faith' to which the State has committed itself in s 24(1) (concerning the process generally) and s 29(2) (concerning its work with the Treaty Authority) of the *Treaty Process Act*. 'Good faith' — comprising in this public law setting ideas of reason, justice, honesty and duty — should guide the State's conduct, including how it comprehends the language in the guiding principles. This is not to suggest that the cases are directly applicable. However, they assist in the important task of assisting the State to understand its commitments in public law terms. To view 'good faith' through a private law lens[53] is to misread the State's obligations and risk narrowing its sense of its obligations by using inapposite ideas premised on negotiation in a commercial contractual setting and developed in adversarial litigation.

To do this would be an error because the setting for treaty negotiation is, as the language of the *Treaty Process Act* makes clear, very far from commercial contractual or adversarial. 'Treaty' is about creating relations between nations and people. Treaty negotiation must therefore respect participants' 'equality of standing' and acknowledge Aboriginal polities.[54] Expressing through conduct such respect and acknowledgment requires that the State finds an 'appropriate meeting place of laws'.[55] This is an especially complex

[51] (1965) 113 CLR 177, 189, citing *Sharp v Wakefield* [1891] AC 173, 179 (Lord Halsbury LC) ('*Sharp*').

[52] (2013) 249 CLR 332, 363 [65], citing *Sharp* (n 51) 179.

[53] See *Widjabul* (n 11) 214–16 [39]–[45] (Reeves, Jagot and Mortimer JJ). See also Justice Susan Kiefel, 'Good Faith in Contractual Performance' (Background Paper, Judicial Colloquium, September 2015).

[54] Hobbs and Williams (n 9) 8, quoting Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press, 2014) 102.

[55] Dorsett and McVeigh (n 27) 471. For critical discussion in this context of the jurisprudence about s 223 of the *Native Title Act 1993* (Cth), see Noel Pearson, 'Land Is Susceptible of Ownership' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with*

task in this treaty-making context because the conduct of the State in public office cannot simply be directed at another State, dealt with as a matter of international law. The legislation acknowledges this situation by providing for an Aboriginal Representative Body and Treaty Authority, envisaging the creation of entities in relation to which the State can begin to fulfil its obligations.[56] The resources it can use to understand these obligations, and to consider how it should conduct itself in relationship both with these entities and with Aboriginal Victorians in the treaty process generally, are varied.

Traditions of diplomacy are one resource. Treaty negotiations in Western idioms are traditionally the province of diplomats and advisors.[57] The quality and practice of diplomacy is shaped by many different traditions. At the centre of diplomatic and jurisprudential traditions lies a concern with negotiation and mediation. The relationship between what is honourable and what is useful still shadows contemporary common law jurisprudence and diplomacy. One tradition would make the role of the diplomat one of mediation in the name of the honourable. In this tradition, diplomacy is the expression of the high moral values of the peacemaker, human rights and the law of nations. Another tradition would make the diplomat and negotiator the useful agent of the state subject to the existing laws between states (nations). A third tradition turns our attention away from the authority of the state and of existing law and instead focuses on the honour of the diplomat and negotiators who carry a responsibility for law and the creation of lawful relations into their negotiation. At the centre of these concerns is the understanding of the relationship between civility and barbarity. The virtue of the state is justness (and not liberality alone) and a certain kind of honesty and responsibility (and not duplicity in the name of securing success).[58]

*Indigenous People* (Melbourne University Press, 2004) 83; Dorsett and McVeigh (n 27) 479–92.

[56] *Treaty Process Act* (n 1) pts 2, 4.

[57] Recall that, historically, Europeans have entered treaties with many different political entities. Entities considered sovereign in Europe have included towns, duchies, religious orders and provinces: Marcia Langton and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 34, 36–7, citing Miguel Alfonso Martínez, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations: First Progress Report*, Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN Doc E/CN.4/Sub.2/1992/32 (25 August 1992) [146].

[58] See generally Timothy Hampton, *Fictions of Embassy: Literature and Diplomacy in Early Modern Europe* (Cornell University Press, 2009).

Attention can also be given, for example, to the ongoing struggle to formulate the relationship between the State and Traditional Owners and Aboriginal peoples of Victoria in the early nineteenth century, seen for instance in the judgment in Willis J, the resident judge of the Supreme Court of New South Wales in Melbourne from 1841–3, in *Bonjon*.[59] Emeritus Professor Bruce Kercher characterises *Bonjon* as, 'in effect … a forerunner of the High Court's 1992 [*Mabo [No 2]*] decision'.[60] Crucially, Willis J conceived of Aboriginal *polities*, with their own laws, meeting with British law.[61] This is not only a repudiation of the terra nullius mindset; it is also a powerful expression of the sort of public law language from which the State can now draw.

There are also contemporary resources: take, for example, the expression of meeting of laws in the *Aboriginal Heritage Act 2006* (Vic).[62] By incorporating and giving decisive importance to the phrase 'Aboriginal tradition' in the definitions of 'sacred', 'secret', and 'traditional owners' — where 'Aboriginal tradition' is itself defined to mean 'the body of traditions, observances, customs and beliefs of Aboriginal people generally or of a particular community or group of Aboriginal people', and 'any such traditions, knowledge, observances, customs or beliefs relating to particular persons, areas, objects or relationships'[63] — that Act can operate and be given meaning only by working with Aboriginal tradition. Similarly, the definition of 'Aboriginal place' is given content by what Aboriginal people hold to be of 'cultural heritage significance'.[64] Public museums taking custodianship of Aboriginal remains have also been active in expressing their obligations through conduct, emphasising, for example, the importance of '[t]he creation of genuine relationships of recognition and reciprocity between traditional custodians and museums and galleries'.[65] In a sense, this existing practice of these institutions is a form of diplomacy and negotiation.

[59] *Bonjon* (n 33), published in Kercher, '*Ballard*, *Murrell* and *Bonjon*' (n 31) 417–25.

[60] Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 11.

[61] *Bonjon* (n 33), published in Kercher, '*Ballard*, *Murrell* and *Bonjon*' (n 31) 421–2.

[62] See also *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

[63] *Aboriginal Heritage Act* (n 7) ss 4(1) (definitions of 'sacred', 'secret', 'traditional owner'), 7.

[64] Ibid s 5(1).

[65] Museums Australia, *Continuous Cultures, Ongoing Responsibilities: Principles and Guidelines for Australian Museums Working with Aboriginal and Torres Strait Islander Cultural Heritage* (Principles and Guidelines, February 2005) 7. See also Shaun McVeigh, 'Law As (More or Less) Itself: On Some Not Very Reflective Elements of Law' (2014) 4(1) *UC Irvine Law Review* 471, 487–8.

The approach taken by these public institutions, as well as ideas drawn from traditions of public law, from Victoria's history and from the realm of diplomacy, can help the State craft 'a sufficiently meaningful account of jurisdiction, conduct, and experience to sustain the lawful relations required in the meeting of laws'.[66]

## VI Treaty: Relationship

What, then, is the quality of the relationship with Aboriginal Victorians to be developed by the State through its conduct, in pursuit of its obligations both as a matter of history and under the *Treaty Process Act*? What does it mean to facilitate treaty negotiations, and how does this bear on the form of the Treaty Authority?

The *Treaty Process Act* is in some respects a training in, and report on, conduct. The challenge for the State is to continue to develop a culture of relationship adequate to the tasks of sustaining a treaty. In doing this as it shapes the Treaty Authority and treaty process, it is important for the State to appreciate that many of the elements of treaty relations have been present in agreements already made between the State and Aboriginal Victorians (and between other governments in Australia and Aboriginal Australians).

### A *Australia*

Although in Australia no treaty documents or treaty proposals have been officially recognised, elements of treaty are present in the varied agreements entered into between Australian governments and Aboriginal entities. Importantly, some such agreements 'have effected mutual recognition of the respective jurisdictions of the Indigenous and settler parties, with the express purpose of constituting jural, political and economic relationships'.[67] Brennan et al have suggested that 'unless governments accept Indigenous groups as "polities", peoples with rights and with the authority and capacity to make binding agreements, there is no way forward down the treaty path'.[68] This acceptance is, of course, apparent in the *Treaty Process Act*, both in its provisions about the Aboriginal Representative Body and more broadly in its

[66] McVeigh (n 65) 490.

[67] Langton and Palmer (n 57) 48–9.

[68] Brennan et al, *Treaty* (n 5) 6.

concern for, and acknowledgment of, Traditional Owners.[69] Yet it has also already occurred in agreements in a number of contexts, both in Victoria and elsewhere in Australia. Taking note of these agreements, and how in negotiating them Aboriginal people are inevitably engaged based on their own law and jurisdiction (especially in the native title context, because of the importance of law and custom), can assist the State to conceive of the treaty relationship to which it has committed in the *Treaty Process Act* in public law terms.[70]

An illuminating example is the *Western Cape Communities Co-Existence Agreement* ('Agreement'), formed in 2001 between the Rio Tinto subsidiary Comalco, Indigenous peoples of Cape York (11 traditional owner groups and four Aboriginal community councils), and the Queensland government.[71] In its concern with ongoing conduct and relationships, that wide-ranging agreement incorporates treaty elements. It

> recognises traditional ownership and provides support for Rio Tinto activities in return for land use. It provides a range of benefits including employment, training, cultural heritage and site protection, cultural awareness, support for ranger programs and educational bursaries, relinquishment of land, and a royalty stream to charitable trusts for community benefit purposes.[72]

Further, at the signing of the Agreement, Comalco's Acting Chief Executive apologised for the fact that it had taken more than 40 years to 'face up to [the] unfinished business',[73] and a formal written apology was delivered from Premier Peter Beattie to the people of the Mapoon Aboriginal Mission (located in the area covered by the Agreement) for government actions between 1950 and 1963.[74]

[69] See *Treaty Process Act* (n 1) ss 5, 7, pt 2.

[70] For an older survey of negotiated agreements in Australia, see Jo Fox, 'History of Negotiated Agreements in Australia' (2005) 7 *Balayi: Culture, Law and Colonialism* 41.

[71] See Bruce Harvey, 'Rio Tinto's Agreement Making in Australia in a Context of Globalisation' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 237. Another important agreement entered into by Rio Tinto is the Argyle Diamond Mine Participation Agreement with the Traditional Owners of the Argyle diamond mine, the Gija and Miriuwung people: *Argyle Diamond Mine Participation Agreement: Indigenous Land Use Agreement*, signed September 2004.

[72] 'Western Cape Communities Co-Existence Agreement', *Western Cape Communities Trust* (Web Page) <http://www.westerncape.com.au/welcome/our-agreement/>, archived at <https://perma.cc/JYC5-KZUP>.

[73] Rio Tinto, *Why Agreements Matter* (Resource Guide, March 2016) 68.

[74] Anti-Discrimination Commission Queensland, *Aboriginal People in Queensland: A Brief Human Rights History* (Anti-Discrimination Commission Queensland, 2017) 16.

Another important recent agreement is the Noongar Settlement ('Settlement') in Western Australia.[75] That Settlement comprised 'the full and final resolution of all native title claims in the south west of Western Australia, … in exchange for a comprehensive settlement package';[76] the State compensated the Noongar people 'for the loss, surrender, diminution, impairment and other effects' on their native title rights and interests.[77] The Settlement also, though, establishes governance institutions, and proposes to develop initiatives to improve employment and socio-economic opportunities for the Noongar people.[78] Dr Shireen Morris suggests that the Settlement demonstrates the potential for native title settlements to 'include cultural redress, an accounting of history and formal apologies, in addition to land and financial compensation',[79] and it has also been argued that the Noongar Settlement 'shows some of the potential that already exists' for structuring the relationship between the State and Indigenous peoples.[80]

Indeed, in Western Australian Parliament, the Settlement was described as 'a classic treaty; it is a coming together between two nations to agree upon certain things'.[81] Whether or not one accepts this contention — and this advice does not suggest that this is what a treaty in our context should look like — it is clear that, at a minimum, the Settlement 'recognises the Noongar as both traditional owners of the land and as a distinct polity, differentiated

[75] See, eg, *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA); *Land Administration (South West Native Title Settlement) Act 2016* (WA) ('*Land Administration Act*'); *Wagyl Kaip and Southern Noongar Indigenous Land Use Agreement*, signed 8 June 2015.

[76] Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier).

[77] *Land Administration Act* (n 75) Preamble para 3.

[78] Department of Premier and Cabinet (WA), 'South West Native Title Settlement', *Western Australian Government* (Web Page, 4 August 2020) <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement>.

[79] Shireen Morris, 'Lessons from New Zealand: Towards a Better Working Relationship between Indigenous Peoples and the State' (2014) 18(2) *Australian Indigenous Law Review* 67, 80.

[80] Sean Brennan et al, 'The Idea of Native Title as a Vehicle for Change and Indigenous Empowerment' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 2, 4–5. See generally Stuart Bradfield, 'Settling Native Title: Pursuing a Comprehensive Regional Agreement in South West Australia' in Marcia Langton et al (eds), *Settling with Indigenous People: Modern Treaty and Agreement-Making* (Federation Press, 2006) 207.

[81] Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Leader of the Opposition).

from other Western Australians',[82] and given equality of standing in negotiations.[83]

The idea of the State engaging with Aboriginal people as a distinct polity (or polities) is not new in Victoria, either. Bodies such as the Council for Aboriginal Rights and the Victorian Aborigines' Advancement League were at the centre of the 1960s debate about the future of the Lake Tyers Aboriginal reserve.[84] Following pressure from activists and the community, the State gazetted Lake Tyers as a permanent reserve in 1965, and in 1971 land was handed unconditionally to the Lake Tyers Aboriginal Trust under the *Aboriginal Lands Act 1970* (Vic).[85]

The *Traditional Owner Settlement Act 2010* (Vic) ('*TOSA*') is another example: it establishes a system whereby the State deals with 'traditional owner groups', defined by reference to (among other things) 'Aboriginal traditional and cultural associations with the land'.[86] As with the *Aboriginal Heritage Act 2006* (Vic),[87] the Act can operate only by working with Aboriginal tradition. The process provided for by *TOSA* includes acknowledgment of past injustice and recognition that the Indigenous peoples are the traditional owners of the land; it allows a portion of Crown land to be transferred as freehold or Aboriginal title, with land use and access rights granted over wider areas, and for Traditional Owners to jointly manage additional parks or reserves, with the State committing to fund Indigenous-run bodies working in their communities' interests.[88] Here, again, the State treats Aboriginal Victorians as a polity.

These examples are important because they demonstrate that many elements of treaty are not new to how the State thinks of its public obligations. It is not novel for the State to deal with an Aboriginal entity exercising its own authority, in circumstances which take us, no matter the language of an agreement itself, outside the realm of purely private law. These agreements give insight because they are more than private contractual negotiations.

[82] Hobbs and Williams (n 54) 35.

[83] Ibid. Hobbs and Williams note that the Noongar lead negotiator, Glen Kelly, insisted on 'nation to nation' dialogue.

[84] See Sue Taffe, 'Fighting for Lake Tyers' (2010) 85 (May) *La Trobe Journal* 157.

[85] See ibid.

[86] *TOSA* (n 3) s 3 (definition of 'traditional owner group').

[87] See above Part V.

[88] See Hobbs and Williams (n 54) 28–9.

This insight, combined with the obvious but crucial point that in Australia, 'internal sovereignty [(or authority)] may be divided'[89] and 'is divided, for example, between State and Federal parliaments under the *Australian Constitution*',[90] suggests that much of what might constitute a treaty can be accommodated within existing public law ideas and language.[91]

There are, nonetheless, aspects in which treaty differs from what has come before. The most important of these is that which has been noted by David Llewellyn and Associate Professor Maureen Tehan: that the real matter of substance underlying treaty discussions is the development of a just and fair *relationship*.[92] The State must be able to describe the treaty process both as a question of conduct, and in terms of the *substance* of that relationship.

### B *International Practice of Treaty Relations*

We turn briefly, then, to the sorts of relationship imagined in other treaty negotiations and processes in broadly comparable settings. In these settings we see a variety of forms of engagement and models of treaty relationship. This variety has the potential to help shape the State's understanding of possible forms of treaty and the Treaty Authority (though, of course, we must recognise the limitations of the use to which international models can be put, given that Victoria is unique).[93]

A crucial insight which emerges from the international experience is that Indigenous peoples dealing with (in the examples which follow) the British Columbia Treaty Commission ('BCTC') or the Waitangi Tribunal have always been required to create and use new legal forms in order to enter into the relationship with the state.[94] The state, on the other hand, is able to work with

[89] *New South Wales v Commonwealth* (1975) 135 CLR 337, 480 (Jacobs J).

[90] David Llewellyn and Maureen Tehan, '"Treaties", "Agreements", "Contracts", and "Commitments": What's in a Name? The Legal Force and Meaning of Different Forms of Agreement Making' (2005) 7 (May) *Balayi: Culture, Law and Colonialism* 6, 7.

[91] See Hobbs and Williams (n 54) 38. See also Dylan Lino, 'Towards Indigenous–Settler Federalism' (2017) 28(2) *Public Law Review* 118.

[92] Llewellyn and Tehan (n 90) 8.

[93] Consider in the United States context, for instance, the implications of the Supreme Court upholding, in 1823, the United States' claims of private purchase of land from Indigenous people, and recognising those Indigenous people as 'the rightful occupants of the soil': *Johnson v M'Intosh* 21 US 543, 574, 604 (Marshall CJ for the Court) (1823).

[94] Take, say, the Crown's strong preference in New Zealand to negotiate Waitangi claims with large natural groupings rather than individual *whānau* and *hapū*: Office of Treaty Settlements, *Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown* (Office of Treaty Settlements, 2018) 39.

legal forms that are part of its own system of law. As part of its obligations to act in good faith, the State must be aware of the consequences of the demands it makes of Traditional Owners and Aboriginal Victorians in asserting protocols, legal forms and legal knowledge that are formed only within the idioms of Anglo-Australian public law.[95]

In other words, the State has an obligation to find ways to avoid or minimise the asymmetry observed in British Columbia and New Zealand. This obligation follows from the State's commitment to bring its public law into relation with the already existing Aboriginal public law — Traditional Owners' and Aboriginal Victorians' long tradition of agreement-making and mutual obligation. If the State is to truly '[walk] alongside'[96] Aboriginal Victorians in a relationship of equality,[97] the treaty process must include forms of Indigenous or Aboriginal law and governance.

### 1 *Institutional Conduct*

Institutional arrangements and conduct lie at the centre of contemporary treaty-making processes. At the very least, institutions provide continuity of time and place for those engaged in the process of creating and sustaining treaty agreements. As Indigenous political philosopher Dr Mary Graham notes, the development of treaty processes for Traditional Owners and Aboriginal peoples starts from within Aboriginal knowledge and governance systems.[98] Institutional arrangements that only address 'Western' forms of treaty-making and management will often be too limited to address forms of dispute and conflict of treaty-making. Victoria must be able to judge clearly its own understanding of negotiation and treaty management.

[95] As with many concerns with Treaty and the construction of State and Indigenous relations, formal engagements must be adequately resourced in recognition that the majority of the intellectual and material labour of engagement has been, and will be, undertaken by Aboriginal people: see Irene Watson, 'Aboriginal Laws and the Sovereignty of *Terra Nullius*' (2002) 1(2) *Borderlands* <https://webarchive.nla.gov.au/awa/20030624015313/http://www.borderlandsejournal.adelaide.edu.au/vol1no2_2002/watson_laws.html>.

[96] *Treaty Process Act* (n 1) Preamble.

[97] Ibid s 23.

[98] See generally Mary Graham, Morgan Brigg and Polly O Walker, 'Conflict Murri Way: Managing through Place and Relatedness' in Morgan Brigg and Roland Bleiker (eds), *Mediating Across Difference: Oceanic and Asian Approaches to Conflict Resolution* (University of Hawai'i Press, 2011) 75.

### 2 *British Columbia*

In contrast to Australia, in Canada, treaties have been made between Indigenous peoples and the Crown since the early period of colonisation,[99] although historically the focus was on 'a relatively straight-forward package of benefits for the First Nation in exchange for extinguishment of its land-based interests within a defined territory'.[100] Other important differences in legal framework between Australia and Canada include the presence of s 35 of the *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*'), which enshrines 'existing aboriginal and treaty rights'; the Crown's obligation to consult and accommodate Indigenous peoples when it contemplates actions or decisions which could affect their s 35 rights;[101] and the existence of the principle that the Crown took subject to existing aboriginal rights in land, to be removed only by treaty with due compensation.[102]

The British Columbia treaty process itself arose after the government of that province proved recalcitrant in dealing with the consequences of the landmark decision in *Calder v Attorney-General (British Columbia)* that Aboriginal title is part of Canadian law.[103] In 1993, the BCTC was established to facilitate the process of negotiations;[104] its role today has been described as

[99] Maureen Tehan, 'The Shadow of the Law and the British Columbia Treaty Process: "[Can] the Unthinkable Become Common Place"?' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 147, 147. See also Mansell (n 17) 145, discussing Canada's *Treaty 8*, signed 21 June 1899. Langton notes, however, that (unlike in the United States) Aboriginal peoples of Canada were not considered sovereign powers, and that later treaties generally involved the surrender of lands in return for particular rights (for example, to hunt and fish, or supplies of monetary payments): Langton (n 8) 17–18.

[100] Richard B Krehbiel, 'Common Visions: Influences of the Nisga'a Final Agreement on Lheidli T'enneh Negotiations in the BC Treaty Process' (2004) 11(3) *International Journal on Minority and Group Rights* 279, 282. For a critical account, see generally Glen Sean Coulthard, *Red Skins, White Masks: Rejecting the Colonial Politics of Recognition* (University of Minnesota Press, 2014).

[101] See generally *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, and see especially at 524–5 [20]–[22] (McLachlin CJ for the Court).

[102] See *Wik* (n 25) 182 (Gummow J).

[103] [1973] SCR 313, 328 (Judson J for Martland, Judson and Ritchie JJ). For more about the background on First Nations land claims and the British Columbia treaty process, see Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (UBC Press, 2005) chs 4–5.

[104] British Columbia Claims Task Force, *The Report of the British Columbia Claims Task Force* (Report, 28 June 1991) 42 [3]. See *British Columbia Treaty Commission Act*, SC 1995, c 45, ss 5(1), 5(3) ('*BCTC Act*'); *British Columbia Treaty Commission Agreement*, signed 21 September 1993.

to do that, as well as to 'allocate negotiation support funding, and provide public education and communication'.[105]

The BCTC is established by joint operation of an Act of the Parliament of Canada,[106] an Act of the Legislature of British Columbia[107] and a resolution of the Summit (that is, 'the body that is established to represent [F]irst [N]ations in British Columbia that agree to participate in the process provided for in the Agreement to facilitate the negotiation of treaties').[108] It is, however, treated as having been established 'by or under an Act of the Legislature of British Columbia'.[109] The BCTC is composed of five commissioners: two appointed by First Nations (by resolution of the Summit), one each by the Federal and Provincial governments, and one by agreement between the three parties.[110]

The treaties completed under the British Columbia process have been characterised as having a number of common elements: a portion of the First Nation's territory is transferred in fee simple for that Nation's exclusive use, and, importantly — for here it differs from the Australian examples — a degree of Aboriginal self-government is recognised: First Nations jurisdiction typically includes 'the administration of justice, family and social services, healthcare, and language and cultural education, though federal and provincial law applies where an inconsistency or conflict arises'.[111] Progress has, however, been slow, and the process has come under substantial criticism.[112] The parties to the British Columbia process have recently recognised that treaty negotiations 'have proven to be complex, lengthy and costly for all parties', and that 'the status quo is not acceptable':[113]

[105] *Multilateral Engagement Process to Improve and Expedite Treaty Negotiations in British Columbia* (Report, 24 May 2016) 18 ('*Multilateral Engagement Process*').

[106] *BCTC Act* (n 104) s 4(1).

[107] *Treaty Commission Act*, RSBC 1996, c 461, s 3(1) ('*Treaty Commission Act*').

[108] *BCTC Act* (n 104) s 2 (definition of 'Summit'); *Treaty Commission Act* (n 107) s 1 (definition of 'Summit'). See also *First Nations Summit* (Web Page) <http://fns.bc.ca/>, archived at <https://perma.cc/6MJA-DB76>.

[109] *BCTC Act* (n 104) s 4(2). See also *Treaty Commission Act* (n 107) s 3(2).

[110] *BCTC Act* (n 104) s 7(1); *Treaty Commission Act* (n 107) s 7.

[111] Hobbs and Williams (n 54) 19. See, eg, the *Maa-nulth First Nations Final Agreement*, signed 9 April 2009.

[112] Jacqueline Lemieux outlines reasons why many in British Columbia have rejected the current approaches: Jacqueline Lemieux, 'Comprehensive Land Claims in British Columbia: A Worthwhile Pursuit?' (2013) 3 (Fall) *Queen's Policy Review* <https://www.queensu.ca/sps/qpr/sites/webpublish.queensu.ca.qprwww/files/files/9%20comprehensive%20land%20claims%20bc.pdf>, archived at <https://perma.cc/Q7J3-PXBE>.

[113] *Multilateral Engagement Process* (n 105) 4.

> Delays in treaty negotiations are common and caused by many factors. For example, negotiators have indicated that limitations and inflexibility in mandates on all sides and frequent delays in the mandating process of the parties impede completion of modern-day treaties. As well, unresolved shared territory and overlap issues are causing delays, particularly at tables closer to completion.[114]

As at March 2018, only eight treaties had been completed under the process.[115]

Further, Professor Nicholas Blomley notes that the lexicon of 'modification' and 'release' (whereby signatories agree to the continuation of a right 'as modified' by the treaty and agree to release the Crown from future claims) is seen by many First Nations as extinguishment by other means.[116] In this regard the Union of British Columbian Indian Chiefs ('UBCIC') has criticised the Crown's desire for 'certainty', observing that '[f]rom Canada's perspective, our Aboriginal Title has to be changed, altered, and defined in a treaty so that it fits with Canadian laws and ideas about Land.'[117] 'The Crown's willingness to negotiate land claims', the UBCIC suggests, 'requires a promise on the part of Indigenous Peoples that they will not fully practice their rights'.[118] Associate Professor Ravi de Costa suggests that the idea of certainty reflects an outdated conception of treaty: it 'implies the end of the encounter rather than its beginning'.[119] Its focus is not where it should be: on ongoing relationship. Further, it reflects the asymmetry that the State is obliged to seek to avoid as it contributes to shaping the treaty process in Victoria.

[114] Ibid 6.

[115] Hobbs and Williams (n 54) 18. See also 'Negotiation Update', *BC Treaty Commission* (Web Page) <http://www.bctreaty.ca/negotiation-update>, archived at <https://perma.cc/3P27-RYS2>. For a detailed critical examination of treaty practice, see generally Carwyn Jones, *New Treaties, New Traditions: Reconciling New Zealand and Māori Law* (Victoria University Press, 2016).

[116] Nicholas Blomley, 'The Ties That Blind: Making Fee Simple in the British Columbia Treaty Process' (2015) 40(2) *Transactions of the Institute of British Geographers* 168, 172.

[117] 'Certainty: Canada's Struggle to Extinguish Aboriginal Title', *Union of British Columbian Indian Chiefs* (Web Page, 1998) <https://www.ubcic.bc.ca/certainty_canada_s_struggle_to_extinguish_aboriginal_title>, archived at <https://perma.cc/HF9X-9T7Y>.

[118] Ibid.

[119] Ravi de Costa, 'National Encounters between Indigenous and Settler Peoples: Some Canadian Lessons' in Peter Read, Gary Meyers and Bob Reece (eds), *What Good Condition? Reflections on an Australian Aboriginal Treaty 1986–2006* (ANU Press, 2006) 15, 22.

### 3 *New Zealand*

The *Treaty of Waitangi* (1840) dominates treaty thinking in New Zealand.[120] That Treaty, signed by William Hobson, Lieutenant-Governor of New South Wales (New Zealand until 1842 being part of New South Wales)[121] and over 500 Māori chiefs, conveyed sovereignty (English text) or *kāwanatanga* (Māori text) to the Crown; stated that Māori retained *rangatiratanga* or 'chieftainship' over their resources and *taonga* for as long as they desired, but yielded to the Crown the right of pre-emption, which gave the Crown the sole right to purchase land from Māori; and guaranteed Māori all the rights and privileges of British citizens.[122] It was long denied legal effect, but has more recently assumed significance in the interpretation of legislation, and is given some effect in specific legislation.[123]

The Waitangi Tribunal operates as a permanent commission of inquiry that makes recommendations about claims brought by Māori relating to Crown actions which breach the promises made in the Treaty.[124] All claims must be registered with the Tribunal, and claimants can then decide whether to have the Tribunal inquire into their claims or proceed to direct negotiation with the Crown.[125] In negotiations, the executive is represented by the Office of Treaty Settlements.[126] Treaty settlements, which take the form of a deed of settlement signed by the claimant group and the Crown, can provide a historical account of the Treaty breaches, with Crown acknowledgment and apology; cultural redress (changing place names, transfer of Crown land, etc); and commercial and financial redress.[127] In *Healing the Past, Building a*

[120] See generally Joe Williams, 'Treaty Making in New Zealand/*Te Hanga Tiriti ki Aotearoa*' in Marcia Langton et al (eds), *Honour among Nations? Treaties and Agreements with Indigenous People* (Melbourne University Press, 2004) 163.

[121] See David V Williams, 'The Annexation of New Zealand to New South Wales in 1840: What of the Treaty of Waitangi?' (1985) 2(2) *Australian Journal of Law and Society* 41.

[122] Office of Treaty Settlements (n 94) 7. See also Langton (n 8) 18–19.

[123] See Paul McHugh, *The Māori Magna Carta: New Zealand and the Treaty of Waitangi* (Oxford University Press, 1991) 63–5.

[124] See generally *Waitaingi Tribunal* (Web Site) <https://www.waitangitribunal.govt.nz/>, archived at <https://perma.cc/3UZB-KUF2>. The Tribunal operates under the *Treaty of Waitangi Act 1975* (NZ) ('*Treaty of Waitangi Act*').

[125] Therese Crocker, 'History and the Treaty of Waitangi Settlement Process' (2014) 18 *Journal of New Zealand Studies* 106, 107. See also *Treaty of Waitangi Act* (n 124) s 6.

[126] Crocker (n 125) 107–8.

[127] Ibid 109–11. See also 'Settling Historical Treaty of Waitangi Claims', *New Zealand Government* (Web Page) <https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/settling-historical-treaty-of-waitangi-claims/>.

*Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown*, a guide published by the Office of Treaty Settlements, it is stated that the overall aims of negotiations are to reach a settlement that 'remove[s] the sense of grievance; is a fair, comprehensive, final and durable settlement of all the historical claims of the claimant group; and provides a foundation for a new and continuing relationship between the Crown and the claimant group, based on the principles of the Treaty of Waitangi'.[128] Deeds of Settlement are generally implemented by legislation,[129] to ensure the finality of the settlement (and, if required, to vest land in a governance entity on behalf of the claimant group).[130]

4 *Public Law and Public Institutions*

This brief survey highlights elements of international experience that might be drawn on by the State in contemplating how it can shape the Treaty process so that it relates effectively to a different polity, on equal terms, in accordance with its historic and *Treaty Process Act* obligations. Such potentially fruitful elements include the practical working-out of jurisdiction and self-government in British Columbia, and the legislating of settlements in New Zealand.

The survey also suggests the importance of *public institutions*. The provision in s 27 of the *Treaty Process Act* for the Treaty Authority's establishment by agreement between the Aboriginal Representative Body and the State draws attention to the BCTC's establishment jointly by government and First Nations (but also to the views of the UBCIC noted above). If the Treaty Authority is to fulfil its functions pursuant to s 28 of the *Treaty Process Act*, it must not be an emanation of the State. Indeed, it must not be conceived of only as an expression of Anglo-Australian law. If a body is to properly facilitate the meeting of two laws, in a way which attempts to, among other things, negotiate the difficulties pointed to by the UBCIC and de Costa, it cannot sit within either of those laws.

Ultimately, Australia's and Victoria's situation, both in terms of history and legal culture and in the type of relationship the *Treaty Process Act* points to, is

[128] Office of Treaty Settlements (n 94) 77.

[129] See 'Legislation: Making the Settlement Law', *New Zealand Government* (Web Page) <https://www.govt.nz/browse/history-culture-and-heritage/treaty-of-waitangi-claims/legislation/>.

[130] See generally 'Agreement Making with Indigenous Peoples: Background Material', *Agreements, Treaties and Negotiated Settlements Project* (Web Page) archived at <https://perma.cc/N5NA-7WYT>.

unique. The *Treaty Process Act*, by stating that nothing in it derogates from any right or expectation of Traditional Owners or Aboriginal Victorians or affects native title rights and interests,[131] evinces the State's open-mindedness about the relationship it is to develop with Aboriginal Victorians as a polity (or polities). The international experience should inspire, but not constrain, treaty thinking in Victoria. Dr David Wishart's suggestion that agreements can oppress later generations of Aboriginal peoples[132] emphasises what is, perhaps, the crucial ultimate point for the State as it considers its conduct in pursuit of its public law obligations: treaty is not simply about rights and interests. It must be built to deal with a changing environment, to include Aboriginal Victorians now and into the future 'within the *civitas* on a voluntary basis, rather than by coercion',[133] centred on the idea of *equal and ongoing relationship between nations*.

## VII Concluding Responses

The Aboriginal peoples of Australia and the Pacific have a long tradition of agreement-making and mutual obligation and the conduct of lawful relations. This tradition was in place before 1788 and continues today. By deciding to enter into a treaty or treaties with the Traditional Owners and Aboriginal people of Victoria, the State joins this tradition of treaty- and agreement-making. Contemporary Treaty also joins the many agreements that the State has already entered into with Traditional Owners and Aboriginal Victorians.

### A *What Are the Options for the Legal Form a Treaty (or Treaties) Could Take? What Is the Most Appropriate and Effective Option?*

The State can only come to a position about possible appropriate and effective options for the legal form of a treaty (or treaties) if it considers its obligations to conduct itself in a certain way as a matter of public law (broadly understood, as discussed above). It should view the issue of legal form as one of possibility and opportunity, rather than solely one of constraint.

However, it should also be aware that *its* view of 'the most appropriate and effective option' has equal weight with the view of the Aboriginal Victorian polity (or polities) with which it deals in the treaty process. The legal form of

[131] *Treaty Process Act* (n 1) ss 5–6.

[132] David A Wishart, 'Contract, Oppression and Agreements with Indigenous Peoples' (2005) 28(3) *University of New South Wales Law Journal* 780, 819–20.

[133] Langton (n 8) 25.

Treaty is not, ultimately, a decision for the State alone. The question here is really, then: what are some options for the legal form of a treaty which might, by agreement after discussion as equals with the Aboriginal Victorian polity (or polities), be identified as appropriate and effective?

The above analysis has pointed to a number of such options, which might involve 'agreement' in various forms (whether or not strictly contractual),[134] legislation,[135] and institutions. Treaty need not resemble a 'constitutional' document (though it may). Nor is Treaty a private relationship, whatever form it takes. In this process the State must be clear about its *obligation* to bring itself into relation with other polities and to ensure that, as the *Treaty Process Act* mandates in its Preamble, '[T]reaty will be for all Victorians'. In doing so any form of agreement must be able to encapsulate the complexity of an agreement between and within polities.

Noting that there is no ideal form, our survey of examples suggests plural treaties and agreements on many matters. A short treaty stating the basis of the relationship may be the most direct means to show the ways in which entering into relations of law with Traditional Owners and Aboriginal Victorians affects the fundamental expression of the commitments of public law. Such a treaty would have to be understandable within both Victorian and Aboriginal public law and modes of governance.

Victoria has already entered into a significant number of agreements with Traditional Owners. The complexity and fragmentary nature of the agreements and, in many cases, their unsatisfactory outcomes suggests that great care should be taken before the State assumes that it can meet the responsibilities of a full and detailed treaty regime. The Treaty process will not be a straightforward 'win–win' engagement. Just and fair relations will require the State accepting obligations that it has not previously acknowledged. The State will have to learn to live well with more than one source of authority. It will also have to take ongoing care of the cultivation of lawful relations between parties. Otherwise those most vulnerable, not the State, will bear the cost of the relationship.

The State should also anticipate that it will not be the only party making treaties. To acknowledge the authority of Traditional Owners and Aboriginal Victorians to enter into a treaty is also to acknowledge that for a very long

[134] See Llewellyn and Tehan (n 90) 8 n 21, observing that, in many circumstances, it is the relationship between parties, not their strict legal rights, that determines compliance with contracts and agreements.

[135] Noting, for example, the Noongar Settlement in Western Australia and the Waitangi process in New Zealand: see above Parts VI(A), VI(B)(3).

period Traditional Owners and Aboriginal Victorians have entered into agreements between themselves.

### B *What Matters Should a Treaty (or Treaties) Cover? In Answering This You Should Consider Any Potential Constitutional Limitations for a State-Based Treaty*

The State has already, in s 30(3) of the *Treaty Process Act*, indicated what it is that a treaty (or treaties) must do. The matters that a treaty (or treaties) should cover to pursue the agenda stated in s 30(3) must (as with Treaty's legal form) be decided only by the State negotiating and agreeing with Aboriginal Victorians as a polity on equal terms. A treaty might encompass apology, monetary payment, the creation of new institutions, the protection of heritage, a framework for Aboriginal Victorian self-determination and much more — this advice cannot be prescriptive about such detail.

What is crucial is that the State, when considering the question, thinks in terms of its public obligation, uses a broad language of public law, and always directs its conduct towards *relationship*.

Our strong advice is to make a commitment of substance. The concerns of s 30(3), for example, could be adopted as the concerns of the State. While it is right and proper that the Treaty process is open, all involved should make substantive commitments. The risk of not expressing a desire for substantive means and ends is that the burden of relationship is placed only on Traditional Owners and Aboriginal Victorians. This would diminish the sorts of commitments to develop a relationship of law that the State is making in entering a treaty process. Many will also feel that after years of agreement-making the State should have an understanding of how it goes about its agreement-making and with what affect and effect. The opportunity of entering into a treaty relation is not to start out as if there were no agreements, but to take responsibility for relationships in a particular way.

### C *How Should a Treaty Authority Be Established as the Independent Body Responsible for Overseeing and Facilitating Treaty Negotiations? Regard Should Be Had to International Best Practice*

The State has a public obligation, based historically and expressed in the *Treaty Process Act*, to ensure that the Treaty Authority is able to oversee and facilitate negotiations in a manner which upholds the equality of negotiating

parties, recognises plural jurisdiction, and creates a *mutual* recognition space in which laws can meet.[136] The existence of this obligation makes clear that a Treaty Authority must not be an emanation of the State, and pt 4 of the *Treaty Process Act* confirms this by stipulating that the Treaty Authority be established by agreement between the Aboriginal Representative Body and the State. Clearly, the Treaty Authority cannot take the form of a statutory authority.

Two distinct options for a Treaty Authority have been canvassed. They are drawn from the experience of the BCTC in British Columbia and the Office of Treaty Settlements in New Zealand. Both of these institutions have merits. However, both are concerned with the settlement of substantive claims made under a treaty. What might be taken from both the British Columbia and New Zealand processes is that the Treaty Authority should be thought of as having an open-ended existence, to match the life of the treaty or treaties. This reflects the acknowledgment of the importance of forms of Indigenous or Aboriginal law and governance to the treaty process. The long-term existence of institutional bodies in British Columbia and New Zealand has also allowed for the development of legal protocols, forms of practice and conceptual schemes to enable lawful relations to develop.

Section 28 of the *Treaty Process Act* might be read as creating an institution concerned only with negotiation. However, insofar as treaties are about building relationships, and building relationships as an aspect of public law, negotiation is a continuing activity. This is so even as the status and understanding of that activity changes. The recommendation of this advice is that the Treaty Authority be established with a long-term existence in mind.

The Treaty Authority is to be created by agreement. It will take on a form that can be addressed both by the State and the Aboriginal Representative Body. To assist in ensuring it does this, the State will have to continue to develop its understanding of the protocols of relationship with Aboriginal knowledge and understanding of land, law and relationship.

## VIII Closing Comment

In publishing this advice for the purposes of scholarship, over a year after the advice was delivered to the State, we would like to offer a closing comment on the obligations of legal scholars and jurisprudents. In much the same way that

[136] See generally Noel Pearson, 'The Concept of Native Title at Common Law' (1997) 5 (March) *Australian Humanities Review* <http://australianhumanitiesreview.org/1997/03/01/the-concept-of-native-title-at-common-law/>.

the State has taken up obligations in relation to the understanding and conduct of lawful relations, so too have universities, and through them, legal scholars in their understanding of the conduct of public life.

The obligations of the university are to uphold public knowledge and public inquiry of Indigenous and non-Indigenous legal knowledge as an aspect of public institutions. Like the obligations of public law, they are substantive and reciprocal. A jurist in pursuit of public inquiry assumes an office with public responsibilities. Among the obligations are those of making visible and meaningful, in different ways, the responsibility and experience of living with law. Some of these duties relate to the careful consideration of the forms, and of the mode and manner of creating and addressing legal scholarship and writing within plural traditions of legal knowledge.[137] In drawing out the ways in which the obligations of public law are shaped by the conduct of sovereign relations, we have emphasised the ways in which treaty relations and public law are held in place by reciprocal and diplomatic relations. We have also noted that not everyone has the same obligation and such obligations are not all met in the same way, even with work based on collaboration. The treaty commitments of the State raise the opportunity of meeting some of these responsibilities. It certainly does not exhaust them.

[137] See, eg, Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 2nd ed, 2012).