**Treaty Making and the UN *Declaration on the Rights of Indigenous Peoples*: Lessons from Emerging Negotiations in Australia**

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Abstract

*No treaties between Aboriginal and Torres Strait Islander peoples and the Australian state have ever been recognised. In recent months however, several states and territories have committed to entering treaty negotiations with the First Nations whose lands they claim. Negotiations are in their preliminary stages and it remains to be seen what eventuates, but these developments are promising. Nonetheless, many challenges exist. In this paper, I explore the initial developments in Victoria, and assess whether and how the United Nations Declaration on the Rights of Indigenous People has influenced the debate thus far. This analysis reveals lessons for all Indigenous peoples seeking to enter treaty negotiations with states across the globe.*

**Keywords**: treaty, UNDRIP, Indigenous peoples, Australia, Aboriginal and Torres Strait Islander people

# Introduction

The United Nations *Declaration on the Rights of Indigenous Peoples* (the ‘UNDRIP’) is ‘the most comprehensive and progressive of international instruments dealing with Indigenous peoples’ rights’.[[1]](#endnote-1) Recognised as a ‘milestone in the re-empowerment of the world’s aboriginal groups’,[[2]](#endnote-2) the Declaration was welcomed as representing ‘the beginning of a new phase in the debate on Indigenous rights.’[[3]](#endnote-3) Reflecting this epochal shift, debate has since moved from identification to implementation. In this vein, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) has recently surveyed UNDRIP’s impact, examining its application by UN treaty bodies, the Human Rights Council’s Universal Periodic Review procedure, regional human rights bodies, domestic courts, and UN agencies. This review reveals that the UNDRIP informs the work of a variety of actors in international and domestic spheres and has influenced legislative and constitutional drafting as well as judicial interpretation, across the globe.[[4]](#endnote-4) While the report makes clear that there is much to be done, it also demonstrates that—ten years after its adoption—the Declaration is increasingly valuable as a political and legal instrument to protect and promote the rights of Indigenous peoples.

Australia has a complicated relationship with the UNDRIP. It was—along with Canada, Aotearoa/New Zealand and the United States—one of only four states to vote against the Declaration in September 2007. While this decision may owe more to Australia’s distinctive approach to settler-state constitutionalism, rather than any objection to international standard-setting on Indigenous rights per se,[[5]](#endnote-5) the decision was greeted by many Aboriginal and Torres Strait Islander people with regret.[[6]](#endnote-6) All four states have since endorsed the UNDRIP, but Australia’s reversal remains qualified by the same objections it expressed in 2007.[[7]](#endnote-7) Nonetheless, despite these qualifications, the Australian state maintains that it is committed to the norms and principles of the Declaration. In 2013, for instance, it informed the UN Permanent Forum on Indigenous Issues that it is working with the Australian Human Rights Commission and the National Congress of Australia’s First Peoples to ‘increase awareness of, and encourage dialogue about, the Declaration in policy development, program implementation and service delivery as a way to embed the Declaration in how business is done.’[[8]](#endnote-8) This is positive, but Australia’s reluctance to wholeheartedly endorse the Declaration augurs challenges.

Australia also has a complicated relationship with the Aboriginal and Torres Strait Islander peoples whose land it claims. In contrast to the situation in Canada, Aotearoa/New Zealand and the United States, no treaty between Aboriginal and Torres Strait Islander peoples and the Australian state has ever been recognised, leaving both the constitutive legitimacy of the state, and its exercise of authority over First Nations people, open to question. The absence of treaties is reproduced in a politico-legal framework that neither constitutionally protects Indigenous rights nor provides for specific mechanisms to promote Indigenous interests in the processes of Australian government. Consequently, Aboriginal and Torres Strait Islander peoples have long fought for recognition of their unique status as prior self-governing nations whose sovereignty has never been ceded, calling for a reconstituted politico-legal structure that empowers them ‘to take *a rightful place* in [their] country’.[[9]](#endnote-9) This struggle has been ongoing for generations but has re-emerged in recent years as part of a decade-long national discussion over ‘recognising’ Aboriginal and Torres Strait Islander people in the Australian Constitution.[[10]](#endnote-10) In 2016, this debate was reinvigorated as several Australian states and territories—Victoria, South Australia, and the Northern Territory—committed to undertake treaty negotiations with First Nations whose traditional lands fall within their boundaries.

This article ties these two complex issues together by exploring the relevance and salience of the UNDRIP to modern treaty negotiations in Australia and across the globe, through a detailed examination of the preliminary stages conducted thus far in Victoria. This issue is important, because all Indigenous peoples must negotiate treaties and other legal arrangements with states to safeguard their interests and embed their aspirations and values in legal forms. The Declaration establishes a ‘framework that states can adopt to underpin their relationship with Indigenous peoples and … guide them in the development of domestic law and policy’.[[11]](#endnote-11) The procedural and substantive rights recognised in the Declaration should therefore inform consultation and negotiation between First Nations and the state. Does this occur in practice, and if not, what consequences might flow?

In exploring this issue, I divide the article into three substantive parts. Part I identifies two key themes relevant to treaty-making that underlie the UNDRIP—self-determination and participation—in order to articulate a standard against which negotiations can be assessed. In Part II, I take an empirical look at the initial stages of treaty negotiations in Victoria, examining whether the Declaration has informed this process. Focus on Victoria is appropriate because although many scholars have analysed modern treaty processes in Canada, no one has yet studied the unprecedented emerging negotiations in Australia. Furthermore, while Canada has recently committed to fully implementing the UNDRIP,[[12]](#endnote-12) Australia’s relationship to the Declaration remains strained; criticism exists over Canada’s approach, but Australia’s engagement with the UNDRIP is more common globally and may present particular challenges in negotiations moving forward.

In a final Part III, I draw on the Victorian material, as well as experiences of modern negotiations in Canada, to identify several lessons for all treaty processes. The UNDRIP is a positive and productive instrument that has the potential to invigorate and strengthen Indigenous advocacy as well as inform the content of any treaty. In the absence of legally enforceable provisions or standards, however, asymmetrical power relations and non-legal forces may negatively impact negotiations. Nonetheless, the Declaration enjoys considerable moral and political force and there is significant value for Indigenous peoples in framing their aspirations in its language. Employing the Declaration in this way may increase pressure on state actors, and enhance the prospect that negotiations lead to a renewed relationship built on mutual trust and respect.

# Articulating a treaty-making standard

As the preeminent instrument on Indigenous rights, the UN Declaration recognises a swathe of procedural and substantive entitlements relevant to protecting and promoting the position of Indigenous peoples. Explicit reference to treaties is minimal, however. Only Article 37 expressly refers to treaties, guaranteeing that Indigenous peoples are entitled to their ‘recognition, observance and enforcement’, though, several preambular paragraphs do consider the value of such agreements as affirming key rights and obligations and representing ‘the basis for a strengthened partnership’. Nevertheless, despite relatively little overt reference, two key themes that underlie the process, purpose, and content of treaties reverberate through the operative clauses of the Declaration: self-determination and participation. It is these values that inhere within the Declaration that create a framework for Indigenous dialogue and political advocacy with states.[[13]](#endnote-13) This section briefly highlights how these principles connect to, and strengthen treaty-making, by establishing a working standard against which negotiations can be assessed.

The Declaration acknowledges that over hundreds of years, many forms of agreements have been concluded between Indigenous peoples and states. Although it considers—correctly—that all such arrangements should be respected,[[14]](#endnote-14) it does not consider what elements are necessary for an agreement to constitute a treaty. Recent Australian scholarship, informed by the UNDRIP and other developments internationally, argues that treaties are a distinct form of agreement that must satisfy three criteria.[[15]](#endnote-15) First, a treaty recognises Indigenous peoples as a polity, distinctive from other citizens of the state, based on their status as prior self-governing communities. Second, a treaty is reached by a fair process of negotiation conducted in good faith and in a manner respectful of each participant’s standing as a polity. Third, a treaty recognises or establishes concrete outcomes, including some form of decision-making and control that amounts to at least a limited form of self-government. The principles that underpin the Declaration are helpful in elucidating these criteria.

A polity is a political community differentiated from and different to other citizens of the state. This first condition therefore requires states to acknowledge and accept that Indigenous peoples are not merely an ethnic or cultural minority group, but a distinct society whose relationship to the state must be mediated in a dialogic fashion. The Declaration recognises and affirms this understanding by emphasising the multiple nested or overlapping nationalities that Indigenous peoples may have.[[16]](#endnote-16) For example, the UNDRIP confirms that Indigenous peoples have the right ‘to a nationality’,[[17]](#endnote-17) as well as the right to ‘belong to an Indigenous community or nation’ determined in accordance with the ‘traditions and customs of the community or nation concerned’.[[18]](#endnote-18) Recognition of Indigenous peoples as a polity clearly entails commitment to Indigenous self-constitution and self-determination.

Participation is most clearly evidenced in the second condition; a treaty must be reached by way of a fair process of negotiation. Although the Declaration affirms this right, it does not clearly articulate a practical standard, indicating simply that states must undertake ‘effective consultation’[[19]](#endnote-19) or ‘consult[] and cooperat[e]’[[20]](#endnote-20) with Indigenous peoples. UN mechanisms and international human rights jurisprudence have, however, elaborated on these provisions, suggesting that consultation should be ‘undertaken in good faith’ through culturally appropriate procedures and with representatives freely chosen by Indigenous peoples through their own representative structures. Indigenous representatives should be afforded sufficient time and information to reach a decision, and the process should entail ‘no coercion, intimidation or manipulation’.[[21]](#endnote-21) This requires a fair, independent, impartial and transparent mechanism to facilitate consultation and alleviate power imbalances.[[22]](#endnote-22) In other words, any fair process of negotiation will safeguard Indigenous rights and mitigate inequities,[[23]](#endnote-23) respecting Indigenous peoples’ authority as self-determining communities.[[24]](#endnote-24)

Reflective of Indigenous nations’ status as self-determining polities who freely participate in negotiations, a treaty must also recognise or establish some form of decision-making and control amounting to at least a limited form of self-government. Self-determination has been identified as the ‘the heart and soul’ of the UNDRIP, constituting the ‘river in which all other rights swim’.[[25]](#endnote-25) Indeed, the Declaration upholds the ‘evolving right of democratic governance at international law’,[[26]](#endnote-26) confirming that self-rule is the ‘oldest aspect of democratic entitlement’[[27]](#endnote-27) entailing a right to determine one’s political destiny ‘in a democratic fashion’.[[28]](#endnote-28) References to self-government and participation in decision-making are replete throughout the instrument. Under Article 3, self-determination is conceived as a right of Indigenous peoples to ‘freely determine their political status and freely pursue their economic, social and cultural development’. Although broadly framed and suggestive of an expansive understanding of sovereignty, this right is conditioned by Article 46(1), which protects the territorial integrity of existing states, and Article 4, which qualifies the right to self-determination to the ‘right to autonomy or self-government’ in relation to ‘internal and local affairs’.

Some Indigenous scholars and activists have critiqued this elaboration of self-determination,[[29]](#endnote-29) contending that it will ‘inevitably reinstate colonial law’.[[30]](#endnote-30) This formulation may be ‘an inherently pragmatic decision’,[[31]](#endnote-31) but it reflects a strong, majority current of Indigenous thinking. Throughout negotiations, Indigenous peoples involved in the drafting frequently asserted that they ‘have no interest in secession’ but desire greater autonomy and decision-making authority in order to ‘finally become part of’ the state.[[32]](#endnote-32) As Megan Davis has explained, the UNDRIP’s underlying values of self-determination, ‘participation, engagement and consultation,’[[33]](#endnote-33) are based on the ‘assumption of interdependence between states and Indigenous peoples’.[[34]](#endnote-34) Such interdependence is, however, grounded on the pre-existing sovereignty of Indigenous nations,[[35]](#endnote-35) who enjoy the right to maintain their distinct institutions,[[36]](#endnote-36) and exercise real governmental authority over certain matters, rather than a relationship between the state and undifferentiated citizens.

As this brief survey demonstrates, the UNDRIP makes only occasional explicit reference to treaty-making, but its underlying themes support and articulate a working standard against which treaties can be assessed. Treaties should accurately recognise Indigenous peoples’ status, negotiations should be conducted in a fair and respectful manner, and they should enable some form of self-government to be exercised. However, obligatory statements as to what is ‘required’ by the UNDRIP may be misleading. As a General Assembly Declaration, the instrument is, at least formally, legally non-binding. Is this a relevant standard to assess treaty negotiations?

Notwithstanding its formal status, the Declaration has always enjoyed a distinctive character. Adopted with overwhelming majority support, some scholars have suggested it carries particular authority.[[37]](#endnote-37) Others have argued, and some courts have accepted, that while the Declaration is a soft-law instrument, many of its provisions, including those on self-determination, political participation and consultation—themes that inhere in treaty-making—reflect hard law norms.[[38]](#endnote-38) Certainly, in UN practice, Declarations are considered ‘formal and solemn’ instruments, restricted to ‘rare occasions when principles of great and lasting importance are being enunciated’ and as such, there is ‘a strong expectation that members of the international community will abide by’ them.[[39]](#endnote-39) The subsequent use and endorsement of the Declaration by a range of international and domestic actors as expounded by EMRIP adds further credence to its legal authority.[[40]](#endnote-40) In any case, however, as Amy Maguire has argued, in practice, what may be more important than whether a rule is hard or soft law is whether it is effective in changing state behaviour.[[41]](#endnote-41) Australia and Canada, two states engaged in modern treaty processes have endorsed the UNDRIP. Is the Declaration influencing their negotiations? The following Part takes an empirical look at the preliminary negotiations in Victoria—the first in Australia.

# Treaty-making in Australia

No treaties were ever signed between representatives of the British Crown or colonial governments and the Aboriginal and Torres Strait Islander peoples of the continent. Treaty has therefore always been a key aspiration of Aboriginal and Torres Strait Islander peoples, though the Australian state has often equivocated. In 1979, the National Aboriginal Conference, a nationally elected Indigenous body advising government, passed a resolution calling for a ‘Makarrata’, a Yolŋu word meaning ‘a coming together after a struggle’.[[42]](#endnote-42) Several years later, in 1983, the Senate Standing Committee on Constitutional and Legal Affairs delivered a report on the concept of a treaty, recommending constitutional change in order to implement a ‘compact’.[[43]](#endnote-43) Five years later, in 1988, Prime Minister Bob Hawke promised to negotiate a treaty to respect and recognise Indigenous sovereignty within three years.[[44]](#endnote-44) The treaty did not eventuate, and was quietly shelved. Calls for treaty by the Council for Aboriginal Reconciliation and the Aboriginal and Torres Strait Commission in the new millennium also fell on deaf ears.[[45]](#endnote-45) Despite these setbacks, Aboriginal and Torres Strait Islander calls for treaty have never abated. Most recently, in the 2017 Uluru Statement from the Heart, around 250 Aboriginal and Torres Strait Islander delegates from across Australia called for the establishment of a Makarrata Commission to ‘supervise a process of agreement-making between governments and First Nations’.[[46]](#endnote-46)

The Federal government dismissed the recommendations arising from the Uluru Statement, but several state and territory governments have responded to these demands. Over the last two years, Victoria,[[47]](#endnote-47) the Northern Territory,[[48]](#endnote-48) and South Australia,[[49]](#endnote-49) officially committed to enter treaty negotiations with Aboriginal peoples. Reflecting the political nature of these agreements, however, the situation is complex and subject to change; in June 2018, for instance, a newly elected South Australian government formally abandoned the treaty process.[[50]](#endnote-50) Despite this step backwards, political leaders in several other states and territories have indicated that they may soon commence negotiations. The Queensland Labor government adopted treaty as part of their policy platform in 2016, and is currently considering how talks might be conducted.[[51]](#endnote-51) Similarly, the New South Wales Labor opposition has promised to hold treaty talks with Aboriginal nations within the state if they win the next election, due in 2019.[[52]](#endnote-52) The Tasmanian Labor Opposition made a similar promise, though it failed to secure election in 2018.[[53]](#endnote-53)

Reflective of the shift in national debate, treaty is not simply the province of Labor governments and parties. In Western Australia, the conservative Liberal government signed the largest and most-comprehensive agreement to settle Aboriginal interests in land in Australian history with the Noongar people in 2015.[[54]](#endnote-54) The agreement involves 30,000 Noongar people and covers around 200,000 km². The total value of the package is about $1.3 billion, and includes agreement on rights, obligations, and opportunities relating to land, resources, governance, finance, and cultural heritage. In exchange for this package, the Noongar people have agreed to surrender all current and future claims relating to historical and contemporary dispossession. Although this agreement was conducted under the framework of the *Native Title Act 1993* (Cth) rather than a specific treaty process, its size and scope reveal that it is Australia’s first de facto, if not de jure, treaty.[[55]](#endnote-55) This fact was recognised at the time by Deputy Western Australia Opposition Leader Roger Cook, who explained in Parliament that, ‘by its very nature, the Noongar agreement is in fact a classic treaty’.[[56]](#endnote-56) However, notwithstanding the significance of the Noongar Settlement and the emerging negotiations in the Northern Territory, this Part will only explore the Victorian process, as it is being conducted under an explicit treaty process and is the most advanced.

## Preliminary negotiations in Victoria

In June 2018, the Victorian Parliament passed Australia’s first treaty bill. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (‘*Treaty Act*’) creates a legislative basis for negotiating a treaty with Aboriginal people in the state. Under the Act, the government must recognise an Aboriginal-designed representative body empowered to determine a treaty negotiation framework and administer a self-determination fund to support Aboriginal Victorians in treaty negotiations. The Act is the culmination of a two-year process of preliminary negotiations initially catalysed by concern that the national debate on ‘recognising’ Indigenous peoples in the Australian *Constitution* would fail to deliver meaningful reform.

The process began in February 2016, when the Victorian government convened a meeting with representatives of Victorian Aboriginal communities to understand what self-determination might mean for their communities. At this meeting, Aboriginal representatives affirmed their support for a treaty.[[57]](#endnote-57) These views were reiterated at the first ever state wide Aboriginal Victoria Forum held on 26-27 May 2016, where 500 participants unanimously agreed to advance self-determination and a treaty by establishing an Aboriginal representative body.[[58]](#endnote-58) The state government responded positively to these demands, establishing an Aboriginal Treaty Working Group to consult with Aboriginal Victorians over the design of an appropriate body to represent them in treaty negotiations, and to advise the Minister for Aboriginal Affairs on progress towards a treaty and ‘the broader self-determination agenda’.[[59]](#endnote-59) The Working Group is composed entirely of Aboriginal people with a balance between male and female representatives. It is not clan-based but is comprised of representatives of Victorian Aboriginal community organisations and members appointed in their individual capacity by the Minister for Aboriginal Affairs.[[60]](#endnote-60)

Consultations were organised by the management consulting company EY to provide structural independence from government. Initial consultations took place at ten locations across Victoria in the second-half of 2016. Participants were asked what representation meant to them and discussed design principles as well as potential roles and functions of a putative Aboriginal representative body.[[61]](#endnote-61) A further six consultations were held in March 2017 to refine the structure and framework of the body. Community members considered who should be eligible to vote and stand for election, as well as how the electorate should be divided.[[62]](#endnote-62) In an effort to ‘allow the community to drive the next steps in the Treaty process’,[[63]](#endnote-63) this latter round of consultations included a series of ‘Treaty Circles’. These community-run conversations were coordinated and supervised by self-nominated individuals who held discussions in their local area, with the aim of ‘ensuring maximum participation by as many members of the Victorian Aboriginal community as possible.’[[64]](#endnote-64) An online ‘Message Stick’ was created to allow those unable to attend a community consultation or Treaty Circle to have their say as well. Approximately 7,500 Aboriginal Victorians were consulted or engaged directly through this process.[[65]](#endnote-65)

The results of these consultations were presented to an Aboriginal Victoria Forum at the end of April 2017. At this meeting, the state government committed to provide $28.5 million to progress the treaty process in the 2017/18 budget.[[66]](#endnote-66) This funding included provision for an Aboriginal Community Assembly to discuss and provide further advice to the Working Group on the design of a representative body, and a Victorian Treaty Advancement Commission (VTAC) to operationalise the outcomes of the Community Assembly. The VTAC has broad responsibilities; it is empowered to guide establishment of the representative body, maintain momentum for treaty, consult with Aboriginal Victorians, provide research and advice on the process, and keep all Victorians informed.[[67]](#endnote-67) Once the representative body is established, the VTAC is to be abolished.

All Aboriginal Victorians aged over 18 years were eligible to apply for membership of the Aboriginal Community Assembly. Three Aboriginal Victorians reviewed the applications, and 33 people were eventually selected with the aim of ensuring accurate demographic representation in the Assembly.[[68]](#endnote-68) In November and December 2017, 31 of these members ‘from across Victoria with a diversity and wealth of cultural knowledge, expertise and experience’ met over six days to deliberate and provide their advice.[[69]](#endnote-69) That same month, Jill Gallagher, a Gunditjmara woman from Western Victoria, was appointed the Victorian Treaty Advancement Commissioner.[[70]](#endnote-70)

The June 2018 Act constitutes the next steps in this process and is an effort to formalise treaty negotiations in advance of the state election in November 2018. The design of the Representative Body is still being considered. Once it has been constituted and recognised by the state government, these two entities will work together to establish a treaty negotiation framework. That framework must accord with several guiding principles set out in the Act: self-determination and empowerment; fairness and equality; partnership and good faith; mutual benefit and sustainability; and, transparency and accountability.[[71]](#endnote-71) The representative body will not negotiate for Aboriginal Victorians but simply assist in developing an appropriate framework. In the meantime, Aboriginal Victorians will need to organise their negotiating position, decide what Treaty means to them, and what form a treaty or treaties should take. The final step will involve negotiations between Aboriginal Victorians and the state. This stage could take many years.

## Is the Declaration informing negotiations?

In acknowledging Indigenous peoplehood and recognising mechanisms for democratic self-rule, treaties are consistent with the UNDRIP’s vision and endorsement of a pluralised account of the state, where sovereignties are dispersed among multiple polities.[[72]](#endnote-72) It is, however, too early to say whether the treaty process in Victoria, let alone the Northern Territory and elsewhere, will be successful. It is also unclear whether state and territory governments are interested in recognising Indigenous self-governance or other rights enshrined in the UNDRIP; simply calling an agreement a ‘treaty’ will not make it so. This section explores the extent to which the Declaration is being used as a framework to guide preliminary negotiations in Victoria.

In answering this question, it is important to begin with a note of caution; this section is based only on publicly available material. I do not have access to internal government policy briefs, cabinet documents, legal advice, or other such material. Equally, I am not privy to information held by Aboriginal groups engaging in the preliminary stages of treaty negotiation. This carries a risk that I may miss critical themes or principles underlying and giving force to practices of negotiation as well as the substantive terms that may be agreed in the future. Nonetheless, assessing the public record of the initial stages of negotiations is valuable. While debate over the legal status of the Declaration is important, its real value lies in its political force. As Claire Charters has argued, articulating aspirations in the language of the Declaration ‘can contribute to state internalisation of its norms’,[[73]](#endnote-73) intensifying its political, if not legal salience. Use of the Declaration in private fora or confidential memoranda necessarily has a more limited impact.

The Victorian government has often made clear its commitment to the UNDRIP, but a close analysis reveals some areas of potential tension going forward. First, the *Treaty Act* specifically refers to the Declaration in its preamble, noting that the State ‘recognises the importance of the treaty process proceeding in a manner that is consistent with’ the Declaration. This reference was, however, absent in the initial Bill presented to Parliament,[[74]](#endnote-74) and the government rejected a proposed amendment to insert an operative clause requiring consistency.[[75]](#endnote-75) Consequently, the Declaration’s norms and values remain aspirational rather than obligatory and there is no mechanism to enforce compliance with its standards. This could give rise to complications in the future, as the preamble to the *Treaty Act* may provide a window on the government’s negotiating position. Indeed, despite the historical absence of any treaty or act ever legitimating British colonisation, the Act merely acknowledges that ‘Victorian traditional owners *maintain* that their sovereignty has never been ceded’.[[76]](#endnote-76) Will recognition of sovereignty be a sticking point? Second, the UNDRIP also does not appear to be playing a key role within the public service, who provide advice to government and will undertake many essential functions once treaty negotiations commence. In fact, the Declaration is cited only once on the Victorian government’s *Aboriginal Victoria* departmental website—under heritage protection rather than the treaty process.[[77]](#endnote-77)

Third, a search of the Victorian Parliamentary Hansard reveals similarly patchy executive consideration of the Declaration within the legislature. Although the Bill was introduced into Parliament on 7 March 2018, the first reference on the floor was not made until almost three weeks later—and not by a member of the government. Rather, reference was made by Gunnai and Gunditjmara woman Lidia Thorpe,[[78]](#endnote-78) the first Aboriginal woman elected to the Parliament and a member of the Greens Party. While the Declaration has been mentioned more frequently since this date, only six government members have specifically cited the Declaration,[[79]](#endnote-79) and often only in response to its invocation by non-government members. The government’s limited engagement with the UNDRIP mirrors the Parliament’s approach before the Bill’s introduction. Prior to this date, the Declaration had only been referred to three times in the current 58th Parliament, all of which were made in 2015, before treaty discussions commenced. Intriguingly, only one of these three references was made to the *Declaration on the Rights of Indigenous Peoples*,[[80]](#endnote-80) with the other two referring to the Declaration *of* the Rights of Indigenous Peoples,[[81]](#endnote-81) suggesting an imperfect awareness of the instrument.

Formal government engagement with the Declaration may be inconsistent but it is clear that the principles, norms, and values underling the instrument are playing a role. In March 2015, Premier Daniel Andrews declared that his government’s approach to Aboriginal affairs would be guided by the principle of self-determination.[[82]](#endnote-82) Narelle Hutchins, the Minister for Aboriginal Affairs, has frequently echoed this statement and explicitly connected it to the Declaration, acknowledging that ‘self-determination is one of the over-arching principles of the *Declaration on the Rights of Indigenous Peoples*.’[[83]](#endnote-83) In the 2017-18 budget the government allocated $68.2 million to improving Indigenous self-determination, including by supporting the treaty process and, ‘looking at ways within government we can embed self-determination for decision-making…for Aboriginal Victorians’.[[84]](#endnote-84) In the 2018-19 budget, a further $9 million was committed to the establishment of the Aboriginal Representative Body.[[85]](#endnote-85) The government’s commitment to Indigenous self-determination extends beyond the treaty process. For instance, important amendments to the *Traditional Owner Settlement Act 2010* (Vic), developed in close consultation with Indigenous people,[[86]](#endnote-86)make it easier for traditional owners to exercise their rights to Crown land and natural resources for cultural, social and economic purposes.[[87]](#endnote-87)

The values and standards underlying the Declaration are identifiable in the processes undertaken so far. Consistent with articles 3 and 4 of the UNDRIP, treaty was initiated entirely by Aboriginal people. Aboriginal Victorians first instigated the push towards a treaty by rejecting the state-sponsored national constitutional recognition process. Rather than ignore this call, or seek to confine it, the government met these aspirations by providing adequate resources for Aboriginal people to conduct consultations across the state on the design of a representative body. When those consultations revealed broader feelings of disempowerment and alienation from political and governmental processes,[[88]](#endnote-88) the government acknowledged that the body could be more than just an entity that negotiates a Treaty but may be capable of playing a longer-term role as a representative voice for the Aboriginal community in the political, economic, social, and cultural life of the State, including perhaps by participating in devising legislative or administrative measures that affect them. At the same time, the government has batted away questions about the content of any treaty, correctly noting that that is an issue for negotiation, after the establishment of a representative body. Reflecting this commitment, the government has made it clear that it envisages the treaty process as meeting obligations under the UNDRIP. In the *Treaty Act*’s Second Reading Speech, Narelle Hutchins explained that the government firmly believes that ‘all stages of the treaty process’ must be guided by Aboriginal self-determination, and that the state perceives itself acting in ‘partnership with Aboriginal Victorians’.[[89]](#endnote-89) Special Minister of State, Gavin Jennings echoed these comments, noting that the guiding principles set out in the Act ‘are more than aspirational’; they ‘crystallise’ the government’s commitment and ‘draw on’ the Declaration.[[90]](#endnote-90)

These comments are positive, and it is important to note that the government has demonstrated a commitment to the UNDRIP by amending its Treaty legislation to incorporate the instrument. However, the government’s more limited broader engagement with the Declaration suggests challenges going forward. Scarce references in Parliament, across the public service, and within the executive, potentially signal that the document itself is not contributing to debate. In the absence of an enforceable standard, it remains to be seen how far Victoria’s rhetorical or political commitment to the UNDRIP and Indigenous self-determination extends once negotiations commence.

Engagement with the Declaration may be inconsistent, but the values that underpin it are clearly playing a role in the Victorian government’s approach to treaty. Significantly, Aboriginal approaches have adopted a similar position; the UNDRIP is not explicitly publicly employed, but the instrument is driving their demands. For example, while Jill Gallagher has noted that the Declaration is a ‘central principle of the Working Group’,[[91]](#endnote-91) it does not appear in any public records of their meetings. Similarly, although some participants in community consultations and members of the Working Group have expressed their views in the language of the Declaration, including Lidia Thorpe who resigned from her position on the Working Group when she felt her cultural integrity was being compromised,[[92]](#endnote-92) the Declaration itself is absent in official reports of the community consultations. This may reflect limited awareness of the UNDRIP, suggesting that it has not permeated within the community. Considering the values and principles expressed at these community consultations, however, it may be more likely that the limited public use of the Declaration is a pragmatic calculation by Aboriginal people to not articulate their claims through this instrument, believing either that it will have little salience with state officials, or that it will spark anxiety within the non-Indigenous community. This pragmatic calculation may be working. Despite some concerns, the process so far has been largely positive. Even if Indigenous people and leaders are not publicly articulating their claims through the Declaration, they are speaking in the language of its values, standards, and principles. Even more importantly, the state has proved receptive to these calls. Should this strategy continue once negotiations commence?

# Treaties and the value of the Declaration

The norms and values underlying the UNDRIP are driving the push towards treaty in Victoria, but in the public sphere, government and Aboriginal invocations of the instrument itself are largely sporadic. Is this a problem? While the preliminary stages of treaty negotiations may be resolved in the absence of the Declaration, this could prove dangerous when negotiations commence. Although the Victorian government assures us it is committed to its values and principles, without more clearly grounding that commitment in clear and enforceable standards and obligations concerning process and outcomes, negotiations may flounder. Even a principled but inchoate understanding of the terms of the Declaration may mean that agreements conducted under the guise of treaty negotiations fail to result in meaningful reform. This Part draws back from the specific Victorian process to identify several challenges that may arise in all modern treaty negotiations conducted in the shadow of the UNDRIP.

First, in the absence of explicit legislative endorsement of the UNDRIP, either by the Victorian government or other relevant state, there is a risk that both the negotiations and content of any treaty may not satisfy the minimum standards recognised in the Declaration. The experience in Canada, where modern treaties have been negotiated since 1973, suggests that the negotiation stage will be the most difficult, and it is easy to imagine that a state’s much vaunted political commitment to Indigenous self-determination may be discarded or at least downgraded during the tumult of negotiation, as it is here where a rhetorical promise to an amorphous concept must be concretised into specific terms. How will state’s respond if, for instance, Aboriginal Victorians insist on powers of self-government consistent with First Nations in Canada, or concomitant to the guarantees in the Declaration, including the right to convene their own law-making bodies?

It is critical to remember that the UNDRIP constitutes the ‘minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world’;[[93]](#endnote-93) the rights expressed therein are not bargaining chips. Without the Declaration acting as an enforceable framework to guide state approaches and policies, there is a real danger that substantive Indigenous rights may not be realised. In Australia, concerns along these lines had been raised even before the South Australian process was abruptly dismantled. In announcing the South Australian government’s commitment to treaty in 2016, the Minister for Aboriginal Affairs and Reconciliation characterised Indigenous self-governance and autonomy only in terms of ‘cultural authority’.[[94]](#endnote-94) While maintaining cultural authority is a critical component of Indigenous peoples’ aspirations, it does not entail the entirety of their self-governance rights. This risk is particularly pronounced where support for the treaty process is divided along partisan lines. Indeed, the failure to expressly ground treaty negotiations in the UNDRIP in South Australia, may have contributed to the new government’s rejection of the process. Similar concerns exist in Victoria, where the Opposition voted against the Treaty bill. State elections in late 2018 therefore loom as the most significant immediate challenge, but longer-term challenges cannot be ignored.

Second, the absence of UNDRIP in public debate may exacerbate First Nations’ unequal bargaining position. Notwithstanding the Victorian government’s positive steps in resourcing community consultations on the design of an Aboriginal Representative Body as well as the body itself, the negotiation stage will be very challenging for Indigenous peoples as they will face a significant disparity in bargaining power. In Australia, this is intensified by the absence of common law fiduciary duties imposed on the Crown in their dealings with Indigenous peoples,[[95]](#endnote-95) which means that there are little constitutional limits preventing the state from undertaking ‘sharp dealings’[[96]](#endnote-96) in their relationship with Indigenous peoples. The UNDRIP can be helpful here. Julie Jai, a former negotiator for the Yukon government, has argued that First Nations in Canada have been able to enhance their negotiating power by using the Declaration as an external standard of legitimacy,[[97]](#endnote-97) holding the state accountable to its standards, articulated in Part II above. Without suggesting that contemporary negotiations in Canada always reach this benchmark, it is clear that agreements reached prior to 2007 were often characterised by considerable political and economic pressure levied on Indigenous nations.[[98]](#endnote-98) Nonetheless, without explicit endorsement by the state, and without First Nations publicly pressuring government, Indigenous peoples may not be able to use the Declaration in this way, placing Indigenous negotiators in a worse position than they might otherwise be.

The UNDRIP may be useful in articulating and pressuring government to stick to a minimum standard in negotiations, but the experience in Canada suggests that conducting debate in the language of the Declaration does not resolve all challenges. Following the election of Justin Trudeau, the federal government committed to legislation that would align government action and policies with the UNDRIP as well as ensure ‘rigorous, full and meaningful’ implementation of all treaties.[[99]](#endnote-99) Several provincial governments, including British Columbia, have followed suit.[[100]](#endnote-100) These governments often expressly link standards and obligations set out in the Declaration to Canada’s historic treaties as well as the modern treaty process. For instance, in 2016, Carolyn Bennett the Minister for Indigenous and Northern Affairs, declared that the Declaration ‘reflects the spirit and intent of our treaties,’ and explained that the state conceives ‘modern treaties and self-government agreements as the ultimate expression of free, prior and informed consent among partners’.[[101]](#endnote-101) Similarly, the British Columbia Treaty Commission has argued that the treaty process in the province is consistent with key principles of the UNDRIP, which ‘breathe[s] life into negotiations’,[[102]](#endnote-102) while the Ministry of Indigenous Relations and Reconciliation seeks to ‘transform the treaty process so it respects…the UNDRIP’.[[103]](#endnote-103)

The modern treaty process in Canada provides a ‘clear pathway’ to forms of self-government arrangements,[[104]](#endnote-104) but invocations of the Declaration in the context of these negotiations has garnered considerable criticism. As many have argued, the ‘setting in which treaties…have been negotiated (since 1973) is not one of cooperative agreement, but a context of asymmetrical power relations’[[105]](#endnote-105) that coerces First Nations into a process that fails to satisfy UNDRIP’s procedural and substantive guarantees. In particular, extreme resource disparities as well as powerful non-Indigenous non-government actors, such as the extractive and pastoral industries, challenge the ability of negotiations to remain free and fair. The boundaries of modern treaty negotiations in Canada are thus policed by the state, with concerns frequently raised over both the ‘narrowness of what governments have been willing to discuss’[[106]](#endnote-106) and the grounding of those negotiations within the context of Canadian law.[[107]](#endnote-107) Drawing these threads together, James Tully contends that the provincial and federal governments consider themselves ‘entering into negotiations with “minorities” within Canada’, presupposing a ‘relationship of subordination and some form of subjection to the Crown’, ‘foreclos[ing] precisely what the negotiations should be about’.[[108]](#endnote-108) Similar challenges have impacted on negotiations in Australia, most seriously in leading to amendments in 1998 that substantially weakened the *Native Title Act 1993* (Cth).

The Canadian experience reveals that express government commitment to the Declaration, rising even to a public *intention* to legislate, does not resolve strains over the process and outcomes of negotiations but shifts debate towards what the UNDRIP requires. Nonetheless, Indigenous peoples should insist that all treaty negotiations remain under the aegis of the Declaration. Structuring negotiations in this way maintains the focus on Indigenous *rights* (notwithstanding dispute over the content of those rights) rather than on lesser agreements, such as contracts or service delivery arrangements. This is particularly important in countries like Australia where governments have historically preferred to minimise the Indigenous rights agenda in favour of a focus on ‘practical’ reconciliation.[[109]](#endnote-109) This preference remains strong. In announcing that the South Australian government would abandon the treaty process, for example, newly-elected Premier Stephen Marshall declared that state-based treaties are ‘expensive gestures’ and committed to reforms aimed at delivering ‘practical’ outcomes.[[110]](#endnote-110)

Finally, treaties between Indigenous peoples and the state are distinct from legal contracts. Treaties are ‘constitutional accords’ that ‘articulate basic terms and conditions of social co-existence’ and ‘establish the constitutional parameters of state power’.[[111]](#endnote-111) Indigenous nations enter into treaties ‘as keepers of a certain place’,[[112]](#endnote-112) and their settlement constitutes ‘a form of political recognition and a measure of the consensual distribution of powers.’[[113]](#endnote-113) In this sense, a treaty is intended to ground an ongoing relationship between Indigenous peoples and the state. In states where dominant conceptions of identity and citizenship operate to deny Indigenous normative distinctiveness,[[114]](#endnote-114) the UNDRIP can help to articulate justifications for both that distinct status and the necessity of a treaty relationship to reconcile the coexisting sovereignty of multiple political communities that share the land.[[115]](#endnote-115) At their highest, the treaty relationship is a symbol of equal partnership, based on ‘mutual recognition, mutual respect, sharing, and mutual responsibility’.[[116]](#endnote-116) Without the UNDRIP framing negotiations, the Nation-to-Nation relationship that a treaty embeds may be dropped or otherwise lose prominence, leaving reconciliation precariously placed. This risk is particularly acute where, for constitutional reasons, negotiations are conducted by a subnational entity rather than the federal government itself.

# Conclusion

Aboriginal and Torres Strait Islander peoples’ agitation for structural reform of Australia’s political and legal system long predates the signing of the UNDRIP in 2007. Nonetheless, the Declaration has the potential to revitalise and strengthen Indigenous advocacy for meaningful reform by acting as a framework to underpin and guide development of law and policy in Australia.[[117]](#endnote-117) The absence of explicit legislative endorsement of the UNDRIP by the Victorian government, and its muted public invocations by Aboriginal Victorians, is therefore concerning. Writing in the aftermath of the General Assembly’s adoption of the Declaration, Megan Davis argued that in order to shift the ground in public debate in Australia, Aboriginal and Torres Strait Islander people ‘need[] to be strategic about adopting a new direction in advocacy for self-determination as underpinned by the UNDRIP.’[[118]](#endnote-118) Davis considered that this new direction should be built on the moral and educative value of the Declaration.[[119]](#endnote-119) Preliminary steps towards treaty in Victoria and elsewhere suggest that some Australian governments are interested in pursuing a new direction. Whether that interest is real largely depends upon whether state actors have internalised the instrument’s norms and values. If they have, then treaty negotiations should result in meaningful substantive reform. If they have not, then negotiations may falter.

Developments in Australia have lessons for all modern treaty negotiations. A state’s rhetorical commitment to the Declaration or ritual public incantation of its terms will not automatically lead to meaningful reform. In the absence of enforceable standards holding the state to account, asymmetrical power relations will affect the process and outcomes of any negotiation. To challenge this, Indigenous peoples must publicly use the UNDRIP and seek to embed its values within state actors. Critically, norm internationalisation will not occur if those advocating for structural reform fail to articulate their aspirations in the language of the Declaration. In the words of Claire Charters, Indigenous peoples should ‘use it’ rather than ‘lose it’.[[120]](#endnote-120)

**Word Count**: 9397 (including endnotes, not including abstract)

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