Northern Territory
Treaty
Commission

Final Report

June 29 2022

ACKNOWLEDGEMENT OF COUNTRY

The office of the NT Treaty Commission is located on the traditional lands of the Larrakia Nation.

We pay our respects to the Larrakia elders past and present and all the Larrakia people and to all Aboriginal First Nations peoples of the Northern Territory.

CONTENTS

EXECUTIVE SUMMARY 6

INTRODUCTION 12

CHAPTER ONE: HISTORICAL BACKGROUND AND CONTEXTUALISATION 13

1.1 - What is a Treaty? 14

1.2 - Key Contextual Considerations 15

National and International Treaty Context 15

The Northern Territory's Historical, Legal and Policy Context 16

Summary: Setting the contextual boundaries of a NT Treaty Making Framework 20

1.3 - Outcomes of Treaty Commission Consultations 21

Methodology 21

Key themes arising from consultation 23

Conclusion – Learnings from Context and Consultation 25

Footnotes 26

CHAPTER TWO:CORE PRINCIPLES FOR TREATY-MAKING IN THE NORTHERN TERRITORY 28

2.1 - A First Nations-based Approach 29

Recommendations 30

2.2 - A Human Rights-based Approach 31

UNDRIP 32

Van Boven Principles 33

Recommendations 34

2.3 - A Self Government-based Approach 35

First Nation Government – A Proposed Model 35

Recommendations 37

Conclusion 37

Footnotes 38

CHAPTER THREE: A TREATY-MAKING FRAMEWORK FOR THE NORTHERN TERRITORY 41

3.1 - A Pathway to Treaty 44

Seeking a Mandate and Endorsing a Negotiating Committee through the First Nations Forum 44

Delivery of a Territory-Wide Agreement 44

Developing a Process for First Nations to Become Treaty-Ready 48

Negotiating Individual Treaties between First Nations and the NT Government 50

Summary – A Pathway to Treaty 52

3.2 - Independent Mechanisms Supporting the Treaty Process 53

Treaty and Truth Commission 53

Aboriginal Ombudsman 54

First Nations Treaty Tribunal 55

3.3 - Legislative Reforms 56

Treaty and Truth Commission Act 2022 56

First Nations Self-Government Act 56

Local Government Act (LGA) Reform 59

Other Possible Legislative Amendments 61

Summary – Legislative Reform Components of the Treaty Making Framework 68

3.4 - Ensuring Treaty Readiness 69

Readiness to Negotiate 69

Readiness to Implement 70

Footnotes 72

CHAPTER FOUR: RESOURCING AND NEXT STEPS 75

4.1 - Resourcing Requirements 76

Funding the TMF 76

Resourcing the compensation component of Treaty negotiations 77

Recommendations 79

4.2 - Steps to Progress Treaty Negotiations over the Next Four Years 80

Immediate Next Steps to Take in 2022 80

2022/2023 Outcomes 80

2023/2024 Outcomes 81

2024/2025 Outcomes 81

2025/2026 Outcomes 81

Footnotes 82

CONCLUSION 83

Executive Summary

The time for action has arrived. After many years of lobbying and advocacy by Aboriginal people in the Northern Territory (NT), the four statutory Land Councils in the NT entered into the landmark Barunga Agreement on 8 June 2018.

The Barunga Agreement set out the fundamentals of a path towards treaty and a new relationship between Aboriginal people, the NT Government and the broader population of the NT. In response to the Barunga Agreement, the *Treaty Commissioner Act 2020* (NT) was passed in the NT Parliament, creating the statutory office of Treaty Commissioner and the Office of the NT Treaty Commissioner. The office of the NT Treaty Commissioner was initially occupied by Professor Mick Dodson AO and as of 8 December 2021, by Acting Treaty Commissioner, Tony McAvoy SC.

The NT Treaty Commissioner has the following functions and powers under section 11 of the *Treaty Commissioner Act 2020*:

- To gauge support in the NT for a treaty between the NT and Aboriginal peoples of the NT.
- To consider what a treaty in the NT should seek to achieve.
- To consider whether there should be one or multiple treaties in the NT.
- To consider what form a treaty should take.
- To consider what outcomes are possible for Aboriginal peoples of the NT under a treaty.
- To research best practice processes to treaty negotiations and consider which process should be used.
- To provide advice on matters related to a treaty between the NT and Aboriginal peoples of the NT.
- To promote awareness of the Treaty Commission's activities among Territorians.
- To perform other functions conferred on the Treaty Commissioner by the Minister.

Considering the functions of the Treaty Commissioner individually, this Report records the fulfilment of those functions as set out below:

a. to gauge support in the NT for a treaty between the NT and Aboriginal peoples of the NT;

The office of the NT Treaty Commission has conducted extensive consultation in the NT with communities, Land Councils and Aboriginal community organisations. This consultation has shown there is clearly significant support in the NT for treaties between the NT Government and First Nations of the NT. Details of this consultation can be found in Section 1.3 of this Report.

b. to consider what a treaty in the NT should seek to achieve;

The Treaty Commission has considered what a treaty or treaties in the NT should seek to achieve, and determined that the fundamental objective of Treaties in the NT is to achieve the highest levels of self determination that each First Nation may conceivably attain. The fulfilment of this objective will result in different outcomes for different First Nations, and will be redefined over time. Ultimately, treaties between First Nations and the NT must be firmly focussed on enabling First Nation self-government; the exercise of decision-making responsibility must be viewed in this context.

In this regard, treaties will facilitate and build upon the promise of self-determination underpinning the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)and the NT Government's Local Decision Making process.

c. to consider whether there should be one or multiple treaties in the NT;

The clear message to the Treaty Commission during consultations has been that there is a need for multiple treaties in the NT securing the sovereign status of each First Nation and facilitating their self-government. However, consultation has also been clear in disclosing that there is a need to, as far as possible, bring all Aboriginal people resident in the NT along

in the treaty process. Just as significantly, international and interstate experience tells us that there must be a transparent and balanced framework within which the individual treaties can be negotiated. In this Report, that framework has been referred to as a Treaty-Making Framework and the broad agreement referred to as the Territory Wide Agreement (TWA). The TWA itself is a form of treaty and should be understood as such. The negotiation of that framework will need to be owned and mandated by the First Nations and, in the end, entered into by a sufficient collective of NT First Nations, the NT Government , if appropriate the Federal Government, and the individual First Nations wanting to engage in treaty negotiations according to that framework. Further information on the proposed Treaty-Making Framework is at Chapter Three of this Report.

d. to consider what form a treaty should take;

The Treaty Commission considers that, ideally, treaties in the NT ought to be tripartite agreements between the First Nations, the NT Government and the Commonwealth Government. Throughout the consultation and report-writing period, the Federal Government had a policy position that First Nations treaties were a matter for the States and Territories. However, the change in Federal Government following the general election on 21 May 2022 has also brought a change in the Federal policy in relation to the Uluru Statement from the Heart, and by extension the role the Federal Government will play in the support for and negotiation of treaties and truth-telling.

Notwithstanding the change in policy, Federal Government participation, in earnest, may take some time and the processes outlined in this Report will need to continue in the expectation of Federal participation, funding and contribution to compensation and reparations.

e. to consider what outcomes are possible for Aboriginal peoples of the NT under a treaty;

The outcomes that are possible for Aboriginal peoples of the NT have been considered and, while the process of settling on a broad range of negotiation topics and minimum outcomes in a TWA is something that only the First Nations can do in negotiation with the NT Government, the following topics emerge from the consultations to date:

- Self-government
- Local and Territory wide recognition and representation for First Nations
- Independent decision making at a local level and participation in the democratic process
- Economic independence
- Reparations

It is important to note that the facilitation of a Territory wide First Nations representative body is also recommended. While much work has been done since May 2017 when the Uluru Statement from the Heart was delivered to the nation to identify how a national voice to parliament could work, little has been done in the NT. There is no doubt that there is a proper place for a representative voice to parliament but there are many options that must be considered to ensure a model that meets the demands of the First Nations of the NT. This issue is discussed in detail in this Report and a mechanism to allow First Nations control over the model has been recommended.

It is also significant that self-government features so prominently as a future goal for First Nations in the NT. This focus on localised governance that reflects traditional decision making, is a uniquely Territory response borne of a very successful land rights regime and lengthy experience in self-governance in community councils prior to the introduction of ‘super shires’ in 2008. The strength of First Nations desire for more direct and localised

government is deep and persistent. It is also very achievable in the non-municipal areas of the NT where almost the entirety of the shire councillors are First Nations people.

f. to research best practice processes to treaty negotiations and consider which process should be used;

Significant volumes of material have been considered to assist in developing recommendations for a treaty-making process in the NT. A great deal of consistency exists between the proposed NT process and the processes being applied in Victoria. This is no coincidence. In both the NT and the State of Victoria great regard has been had to the 'Made-in-British Columbia' treaty process developed and implemented in British Columbia, Canada. However, the process in British Columbia cannot be directly adapted to the Australian circumstances as the First Nations infrastructure that exists within the political landscape in British Columbia, and has existed in some form since the 1800's, is still being developed in this country.

This Report recommends the development of First Nations infrastructure to allow for a TWA to be entered into and for local First Nation recognition and representation, as vehicles for self determination in themselves, and as pre-cursors to self-government and individual First Nation treaties.

g. to provide advice on matters related to a treaty between the NT and Aboriginal peoples of the NT;

The Treaty Commission, through its development of this Report and through submissions to the NT Parliament in relation to the NT Government Local Decision Making policy, has and will continue to provide advice on matters related to a treaty between the Aboriginal peoples of the NT and the NT Government.

h. to promote awareness of the Treaty Commission's activities among Territorians;

The Treaty Commission has engaged in significant activities to promote awareness of its activities. This includes the production and distribution of a discussion paper, individual meetings with organisations and land councils, Ministers and their staffers, departmental officers, maintenance of social media, development and participation in a treaty webinar, radio and mainstream media interviews.

i. to perform other functions conferred on the Treaty Commissioner by the Minister.

The Minister has not conferred any other functions on the Treaty Commissioner to date. However, this Report recommends that the Minster confer some functions on the Acting Treaty Commissioner to facilitate the transition to the next stage of the treaty process.

In delivering this report to the Minister, the Acting Treaty Commissioner has fulfilled the existing statutory functions of the Treaty Commissioner pursuant to the Treaty Commissioner Act 2020.

The Final Report sets out the Treaty Commission's recommendations for a Treaty-Making Framework for the Northern Territory. The Report recommends:

Treaty Commissioner Recommendations

1. The establishment of a First Nations Forum through which Aboriginal Territorians can endorse a Treaty model and decide how First Nations should be represented in Treaty negotiations.
2. The development of a Treaty process that allows for the negotiations of many individual Treaties between the NT Government and First Nations (or coalitions of First Nations). This would include negotiation of:

    a. A Territory-Wide Agreement, which would be negotiated first and would set out the broad scope, minimum standards, key principles and mandatory terms necessary for all subsequent

treaty negotiations in the NT.

b. Negotiation of individual treaties between First Nations (or coalitions of First Nations) and the NT Government.

3. The development of a process for First Nations to gain official recognition as First Nations and transition to a First Nation Government.
4. The development of an Office of Treaty-Making within the NT Government to coordinate NT Government responses to Treaty-making.
5. The extension and expansion of the Treaty Commission to become a Treaty and Truth Commission under new Territory legislation, to progress truth-telling work across the NT and practically support First Nations prior to and during the Treaty negotiation process.
6. The creation of an Aboriginal Ombudsman position to respond to complaints regarding government participation in the Treaty process.
7. The creation of a First Nations Treaty Tribunal to deal with disputes in relation to First Nation membership and boundary, and in relation to Treaty performance.
8. The delivery of significant legislative reform to underpin this work, namely through:

   a. The development of a *Treaty and Truth Commission Act 2022* to act as the legislative basis for negotiating the Territory-Wide Agreement, setting up the Treaty and Truth Commission and recognising First Nations.

   b. The development of a *First Nations Self-Government Act (FNSGA)* to provide the legislative basis for First Nations to seek recognition and transition to First Nation Governments.

   c. Amendment of the *Local Government Act 2019* (LGA) to acknowledge Traditional Owners, confine the LGA to municipal areas as the FNSGA expands, incorporate human rights principles and provide greater decision-making mechanisms for First Nations people in local councils.

9. Ensuring both First Nations and the NT Government take concerted steps to become 'Treaty-ready' and in a position to negotiate and implement treaties on equal footing.

Implementation Recommendations

In response to the Final Report, it is recommended Minister should:

1. Confirm the NT Government support for:
   - the concept of treaties with the First Nations of the NT;
   - the concept of a truth telling commission looking at historical and continuing injustices;
   - the overall direction set out in the Final Treaty Report;
2. Write to the four statutory Land Councils to seek input to the development of:
   - a new Treaty and Truth Commission Act;
   - a draft First Nations Self Government Bill;
3. Confirm support for a First Nations Forum to be held within the following twelve months;
4. Confirm commitment to the repeal and replacement of the *Treaty Commissioner Act 2020 (NT)* with a new Treaty and Truth Commission Act prior the end of the 2022 calendar year;
5. Confirm the budget allocation for the Treaty Commission for 2022/2023 through to 2024/2025
6. Announce the establishment of a Treaty-Making Fund into which funding will be paid to ensure that there are adequate resources to fund the Treaty process.
7. Following the receipt of correspondence from the Minister the four statutory Land Councils should be invited to:

   a. Work with the office of the Parliamentary Counsel to develop a consultation draft of a Treaty and Truth Commission Bill, with APONT more broadly regarding the Bill, and assist in the consideration and passage of the Bill;

b. Work with the Minister's office with a view to holding a First Nations Forum within 12 months;

c. Work with the office of the Parliamentary Counsel to develop a consultation draft of a First Nations Self Government Bill and commence broad consultation on the Bill;

d. Work with the Minister and Government to develop a sustainable funding model to ensure adequate funding for the Treaty and Truth processes.

There are numerous matters about which it is inappropriate for a Treaty Commissioner to express any opinion. To do so would be a departure from the principle of self-determination. However, we are confident that the Treaty-Making Framework set out in this Report provides the articulation of principle, the guidance and the practical measures to give effect to the expressed views of First Nations people in the NT, without interfering with each First Nations right to self-determine.

Introduction

Treaty in the NT is necessary. Aboriginal Territorians' collective history of dispossession is built on racism, violence, massacres, and a lack of humanity held by colonisers towards First Nations' sovereignty and personhood. A Treaty in the NT will go some way to responding to and recognising historical and continuing injustices, and will offer a path forward for First Nations, governments, and the wider community to come together in a way that is defined by equality, respect, reparation and a mutual acknowledgement of the First Nations' inalienable right to self-determination on their land.

Since its commencement in March 2019, the NT Treaty Commission has consulted with Aboriginal people across the NT and conducted research to inform the development of a framework for Treaty negotiations between First Nations Territorians and the NT Government.

The work of the Treaty Commission has previously been outlined in an Interim Report delivered in March 2020 and a detailed Discussion Paper delivered in June 2020. This Final Report builds upon this previous work to deliver the Treaty Commission's commitment to provide recommendations to the NT Government on the development of a framework for future Treaty negotiations. These recommendations are informed by a two-stage consultation process undertaken by the Treaty Commission in 2020 and 2021; a desktop review of national and international Treaty models; and consideration of the NT's unique political, historical and legal context.

The development of a Treaty-Making Framework for the NT is timely. The recent release of the Indigenous Voice Co-Design Final Report, existing commitments under Closing the Gap and the NT *Everyone Together Aboriginal Affairs Strategy*, coupled with work already underway through engagement mechanisms such as Local Decision Making and Empowered Communities, reflects the readiness of both government and community to forge a new path towards meaningful reconciliation and engagement. The Treaty-Making Framework outlined in this report is the preferred model to guide this work. It sets out a model of partnership that ensures First Nations communities are centred and provided with genuine decision-making power.

Chapter One analyses the legal, historical and policy context of the NT to determine key contextual parameters a Treaty-Making Framework must operate within. Learnings from national and international Treaty-making examples are considered to ensure the NT model can incorporate best-practice methods from other contexts. This chapter proceeds to analyse key themes arising from the Treaty Commission's consultation process to ensure the perspectives of First Nations underpin the Treaty-Making Framework.

Chapter Two summarises these key themes and contextual parameters as three core principles that must underpin the development of a Treaty-Making Framework in the NT – that is, any Treaty must take a First Nations-based, human rights-based, and self-government-based approach. Recommendations are put forward as to how these three principles can practically frame the NT's Treaty process. It is posited that, under these principles, the Treaty process will empower First Nations to negotiate with government in a manner that respects and places at the centre their legitimate rights as First Nations and leads to the formal recognition of self-government in the NT.

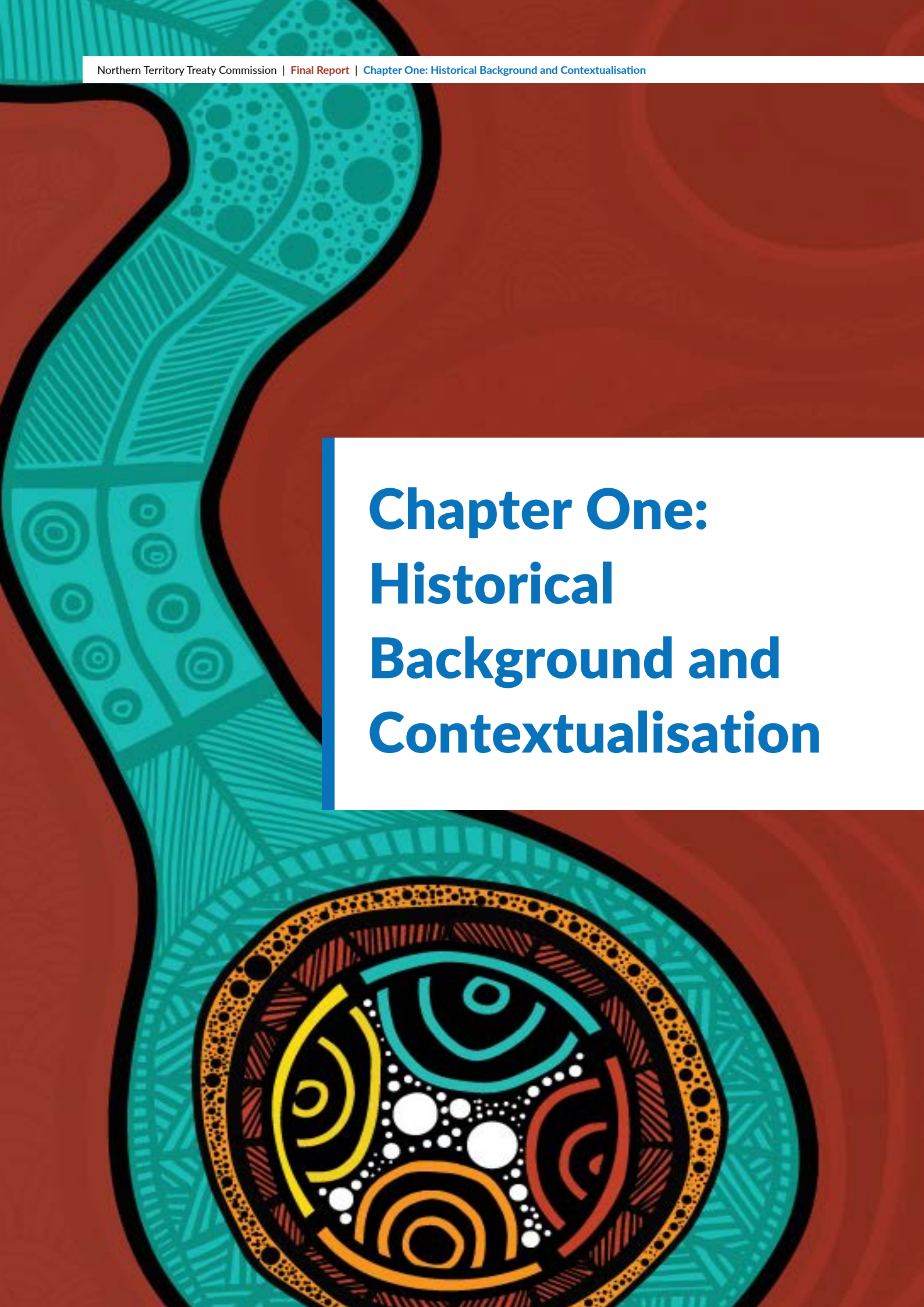
Chapter Three proceeds to set out the Treaty Commission's recommended Treaty-Making Framework for the NT. This Framework operationalises the three core principles outlined in Chapter Two. A Treaty negotiation model is put forward whereby First Nations establish a NT First Nations Representative Body that can negotiate enter a Territory-Wide Agreement with the NT Government that provides the overarching structure and parameters for the negotiation of subsequent Treaties between individual First Nations (or coalitions) and the NT Government.

The Territory-Wide Agreement will also provide protections for all Aboriginal and Torres Strait Islander people in the NT, ensuring that nobody is left behind.

Simultaneous to this process, the Framework recommends a process through which First Nations can move towards self-government. Given the Territory's unique circumstances, the proposed self-government mechanism is seen by the Treaty Commission as the foundation stone for the treaty process. Significant legislative reform is required to practically realise this Framework; these matters are discussed in great detail in the Report.

Chapter Four summarises practical next steps both the NT Government and First Nations communities will need to take in order to implement this Treaty-Making Framework. This includes consideration of the financial resources required to meaningfully realise a Treaty-Making Framework in the NT. Suggested timelines are also included, providing a clear path forward for the commencement of a Treaty process over the next four years.

> *A Treaty in the NT will go some way to responding to and recognising historical and continuing injustices, and will offer a path forward for First Nations, governments, and the wider community to come together in a way that is defined by equality, respect, reparation and a mutual acknowledgement of the First Nations' inalienable right to self-determination on their land.*



Chapter One: Historical Background and Contextualisation

This chapter first outlines what a Treaty is, drawing on national and international examples of Treaty-making. A review of the NT's unique contextual environment then follows, which establishes the broad contextual parameters within which a Treaty process in the NT must operate. The second part of the chapter proceeds to analyse key themes arising from the Treaty Commission's two-stage consultation process, reinforcing the need for the voices and perspectives of First Nations people to underpin all aspects of the Treaty process.

1.1 - What is a Treaty?

A Treaty is a formal, legally binding instrument reached through respectful political negotiation between government and Aboriginal groups in which both sides settle outstanding claims.[1] As a formal agreement that draws on past differences to set out the basis of future dealings, a Treaty enables historical conflicts to be set aside in favour of respectful and harmonious coexistence.

Treaties are made by parties freely negotiating or 'treating' with each other to work out the terms of a mutual agreement. A minimum of two parties are needed to make a Treaty.[2] This Report proposes that the NT Government and First Nation Territorians (either individually or collectively) will be parties to each Treaty. The act of entering into a Treaty represents a profound commitment between people that, once made, cannot be broken or ignored without staining the name of the nation or government that breaks it.[3]

The key difference between Treaties and other Agreements is that Treaties are a political settlement that must lead to some form of self-government. In the context of the NT, a Treaty process must provide First Nations Territorians with legitimate agency, must shift power from government to First Nations, and must honour First Nations' right to genuine self-determination.

As noted in the NT Treaty Commission Interim Report, Aboriginal Territorians have been disenfranchised by the tide of history. Aboriginal peoples' rights have not been formally recognised by past NT governments; and their rights have been adversely impacted by a racist historical portrayal of Aboriginal people as 'uncivilised savages'.[4] This racist notion has underpinned past policy responses to Aboriginal people, and has created a victim narrative that has historically stripped Aboriginal communities of their agency. The Treaty process represents a new chapter for Aboriginal Affairs in the NT in which government and First Nations can create a relationship marked by mutual respect, reconciliation and reparation.

Delivering a Treaty for the NT is the right and moral thing to do.[5] It is a nation-building and strengthening exercise that will create a stronger NT, unified by equality and respect for First Nations people.[6] Given that genuine Aboriginal control and self-determination is linked to better outcomes for Aboriginal people, the delivery of a Treaty is also expected to foster improved outcomes for Aboriginal Territorians.[7] Further, Treaty will address unfinished business and provide justice to Aboriginal Territorians for past wrongs. Consideration of these factors will be explored in greater detail later in this report.

1.2 - Key Contextual Considerations

National and International Treaty Context

Around the world, Treaties are accepted as a way of reaching a negotiated settlement between First Nations peoples and those who have colonised their lands. Treaties have been formed in Aotearoa New Zealand, Canada, Norway, Sweden, Finland, Japan, Greenland and the United States of America.[8]

Along with the NT, Treaty-making processes are now officially on the legislative agendas in Victoria, Queensland, South Australia and Tasmania.[9] South Australia commenced a treaty process in 2016 but it was abandoned with a change of government in 2018[10], and has now been recommenced with a following a further change after the 2022 election. Even though there is no formal treaty process in Western Australia, the $1.3 billion native title settlement (the Settlement) between the Western Australian Government and the Noongar people in the south-west of that State has been hailed by some as the nation's first negotiated Treaty.[11] The Settlement, which covers 200,000km^2 including the capital city of Perth[12], is significant because it is the first agreement between an Australian state government and First Nations people and it is confirmed through binding state legislation. However, the Settlement did not provide for a transfer of power to the Noongar People.

Appendix A outlines national and international examples of Treaty-making that have been drawn upon to understand and contextualise a path forward for Treaty-making in the NT. **Appendix B** considers the Tla'amin Treaty process in British Columbia in further detail.

The Aotearoa New Zealand approach outlined at **Appendix A** provides important insights into the governance structures needs to progress Treaty settlement discussions. The Aotearoa New Zealand experience shows that, in order to have a strong settlement process, there must be an office or agency within government to ensure the government meets its Treaty settlement commitments. In the case of New Zealand, this work is led by Te Arawhiti (the Office for Māori Crown Relations).

Whilst the Aotearoa New Zealand model offers useful insights to assist the NT treaty-making process, the significant contextual differences between the two locations limits the model's overall applicability. In Aotearoa New Zealand, a historical Treaty has been used as a basis against which modern claims are being made for settlement. This is in stark contrast to the NT, where there is no historical Treaty in place and where the process must be one of modern-day negotiation as opposed to claim-making.

The treaty context in British Columbia shares more similarities with the NT context and, as such, has been drawn upon throughout this Report to inform numerous aspects of the proposed NT Treaty-Making Framework. British Columbia did not have a historical treaty and has pursued a modern treaty negotiation process in a similar manner to what is being proposed for the NT.

Key learnings from these Treaty-making processes include:

1. Maintaining and building relationships with neighbouring First Nations is a key success factor in Treaty negotiations.
2. The Treaty process must be supported by formal institutions.
3. There needs to be an equality of standing of negotiating parties.
4. Treaty Commissions must be afforded sufficient powers to hold negotiating parties to account.
5. Treaty processes must aim to build trust with First Nations, and must be adaptive to the changing needs of First Nations communities.
6. Treaty reparations should be grants-based, not loan-based.
7. Treaty-making takes time and should not be rushed.

Whilst national and international Treaty models differ in their size, nature and level of complexity, the common thread is that they are place-based and their construction is a reflection of the aspirations of First Nations people.

The Northern Territory's Historical, Legal and Policy Context

Historical Context

The NT's chequered history in regards to Aboriginal affairs is itself evidence of the need for Treaty. The absence of agreement-making in the NT's past demonstrates a historical lack of respect held by colonisers in relation to First Nations' personhood and sovereignty. It is only by acknowledging the painful and dark aspects of the NT's past that government and First Nations communities can learn and move forward together.

The tide of historical injustices experienced by Aboriginal Territorians provides important context for Treaty-making in the NT. Settlers disregarded First Nations Australians by stealing resources, kidnapping women and interrupting ceremonies. When First Nations responded by spearing colonisers and their cattle, colonisers took this as licence to seek disproportionate reprisals in the form of widespread massacre of Aboriginal people. The first recorded massacre in NT history occurred at Fort Wellington in 1827, when settlers killed approximately thirty Iwaidja men, women and children by cannon.[13] The last recorded massacre of First Nations Australians took place in 1928 at Coniston. These killings occurred over several weeks and began in response to the murder of Fred Brooks, a white man who had allegedly stolen an Aboriginal man's wife. The official death toll was 31, but more accurate estimates range from 62 to 200 deaths.[14] In 2018 – the ninetieth anniversary of the massacre – there were still witnesses alive to remember the horror and devastation. According to Dinny Jampijinpa Nolan,

> *They kept shooting until they ran out of bullets. We heard gunshots and ran to the nearby valleys and hills… Every one of them ran away, even my father and us mob. We all scattered. We were all together on the top of the hill, frightened.*[15]

Testimonies such as this are a stark reminder that historical massacres, and the lack of justice afforded to victims in their aftermath, continue to impact First Nations Territorians. The historical lack of Treaty-making between settlers and First Nations condemned untold numbers of innocent people to violent deaths and fuelled the normalisation of racial violence.

Historian Alan Powell noted that, whilst "some [pastoralists] ruled by the rifle", others approached First Nations engagement using a "bizarre pattern of savage racial conflict and frontier paternalism".[16] Under this paternalistic approach to engagement, government and Christian groups set up institutions and missions that exercised paternal control over the lives of Aboriginal people. The most devastating impact of this paternalism was the forced removal of children – the Stolen Generations. Despite the professed aims of removing children for their own good and putting First Nations into missions for their own protection, these institutions were known to be inhumane and unsanitary, even for the time. In 1907, for example, Dr W. Ramsey Smith argued that the Mud Island Lazaret Leprosarium - commonly known as 'Living Hell' - was "*unsuitable for any being of the human species*".[17]

In 1936, a Department of the Interior employee said that *"I have visited the Half- Caste Home [in Darwin] on a number of occasions and was impressed with the tragedy of the situation and the poor attempt of the Government to meet it"*.[18] In 1951, the superintendent of the Phillip Creek Native

Settlement was imprisoned for sexual assault of the residents, and the Acting District Officer stated that he could 'not find words with which to adequately condemn the past practice of locking the children up in buildings of this character [at the Settlement]'.[19] Survivors of these institutions and their descendants continue to grapple with the trauma of physical, sexual and psychological abuse today.

Despite being associated with the later policy era of assimilation, NT authorities had recommended removal of children from at least 1913, especially of so-called 'half castes'. It was in this year that Chief Protector Walter Baldwin Spencer released his *Preliminary Report on the Aboriginals of the Northern Territory*[20] (the Preliminary Report). Spencer, like many government authorities, rationalised the paternalistic policy of forced removal by portraying First Nations people as naïve, 'stuck in the stone age', and as having the mental capacity of a child. He recommended that 'no half-caste children should be allowed to remain in any native camp, but they should all be withdrawn and placed on stations ... even though it may seem cruel to separate the mother and child, it is better to do so'.[21] However, uncensored slips reveal that these paternalistic practices gave settlers a pretence for exploiting Aboriginal labour.[22] In a separate context, Spencer revealed a truer ulterior motive for removal:

> *...practically all the cattle stations depend on their [Aboriginal] labour and, in fact, could not get on without it, any more than the police constables could. They do work that it would be very difficult to get white men to do and do it not only cheerfully but for a remuneration that, in many cases, makes all the difference at the present time between working the station at a profit or a loss.*[23]

This practice of dismissing Aboriginal humanity whilst simultaneously relying on Aboriginal labour fuelled the NT for decades. For example, in a 1929 NT Government report, Queensland Chief Protector John William Bleakley argued for the need to educate Aboriginal people in order to "enhance their value as machinery" , noting "life in Darwin for many of the white families would be almost impossible without some cheap domestic labour, and the Aboriginal is the only suitable labour of the kind procurable".[25]

Despite facing massacres, exploitation, disease and other weapons of colonisation, Aboriginal Territorians fought back and survived. First Nations' defence of their own sovereignty can be traced back to the first contact, when James Cook shot muskets at First Nations in Australia, prompting two Aboriginal men to throw stones and spears in return.[26] Although some assertions of sovereignty and self-determination have succeeded, non-Aboriginal Australians have often failed to address or understand them – either wilfully or otherwise. A key example of this occurred in 1963, when Yolngu people sent the *Yirrkala Bark Petitions* to Parliament. The signatories expressed concerns about mining leases on Yolngu land and asked that "no arrangements be entered into with any company which will destroy to livelihood and independence of the Yirrkala people.[27] However, five years later, the government granted Nabalco a 42-year mining lease . In 1971, the Yolngu challenged the mine in court only to have their challenge quashed by Justice Blackburn, who ruled that native title did not exist in Australia and, if it had, it would have been extinguished, and even if it had not been extinguished, the claimants had not successfully proven their rights to the land.[29] While this case set in motion the events that led to the *Land Rights Act 1976*, the Yolngu's right to their land had already been disparaged by the legal system.

Aboriginal Territorians' historical experience of massacre, forced removal and exploitation – and their resilience in the face of extreme dispossession

- is inextricably linked to present-day calls for a Treaty. One of the core aims of Treaty is to prevent the ignoring, diluting and impeding of Aboriginal peoples' demands for rights and sovereignty. A Treaty, therefore, sets out an important path forward for Aboriginal people to seek justice for past wrongs, negotiate on equal footing with government, and address the unfinished businesses that colonisation has left in its wake.

Further information relating to the Stolen Generation, including consideration of how the Stolen Generation fits into the Treaty story, is at **Appendix C**.

Legal Context

Legal recognition of First Nations' occupation of Australia, identity, presence and rights are noticeably absent in the Constitution and laws of Australia . As noted by Sarah Joseph and Melissa Castan[31]:

> *The Constitution and laws of Australia have characteristically reflected the denial of Indigenous identity, presence, laws and rights. Past examples include protection laws associated with policies of dispossession, assimilation and child removal, and laws that denied basic civil and political rights such as voting, political participation, citizenship and freedom of movement and association.*

For upwards of 65,000 years, Aboriginal Territorians held exclusive sovereignty over the continent and islands that are now known as Australia. Since 1788, however, laws imposed by colonisers have dominated the relationship between Aboriginal people and their land. This imposed legal relationship has been determined solely by colonisers and, subsequently, has legislated the exclusion and discrimination of Aboriginal people for more than 230 years. Treaty-making in the NT sits against this backdrop. In this context, Treaty negotiations should include consideration of legislative reform that enshrines First Nations rights and self-determination.

The NT's limited legal capacity as a Territory of the Commonwealth has important ramifications for the Treaty-making process. As a Commonwealth Territory, the scope of powers that can be exercised by NT governments is conferred and defined by the Commonwealth under the *Northern Territory (Self Government) Act 1978 (Self Government Act)*. Any NT legislation giving effect to a Treaty must be consistent and comply with that Act and all other Commonwealth laws in operation across the NT, such as the *Aboriginal Land Rights (Northern Territory) Act 1976 (ALRA)*, the *Native Title Act 1993 (NTA)* and the *Racial Discrimination Act 1976 (RDA)*. If the terms of Treaties exceed the powers granted to the NT pursuant to the Self Government Act, or are inconsistent with any Commonwealth legislation, they will have no legal effect.

The Treaty-Making Framework in the NT must also seek to support and build upon the work of the statutory Land Council's while promoting a new and substantial role for First Nations.

The Commonwealth has power to make laws for the NT pursuant to Section 122 of the Constitution. This equips the Commonwealth with legislative power to pass laws to void any Treaty concluded between the NT Government and any of its First Nations, including by amending the Self Government Act to expressly withdraw any power of the NT to conclude Treaties with Territory First Nations, subject to consistency with the RDA.

It is with some degree of fortune that this report has been able to be delivered in the month following the 2022 federal election, which in turn has given new certainty to the Federal Government's role in treaty-making and truth telling. The new Federal Government has expressed its strong support for an Uluru Statement from the Heart, and it component parts of constitutional reform and the

establishment of a Makarrata Commission. It is not unreasonable to expect that there may be support from the Commonwealth, the legal capacity of the NT Government to negotiate Treaties will be less precarious than it was under the previous policy. Ongoing dialogue with, and consideration of avenues of support from, the Commonwealth will be critical to ensure any Treaty realised in the NT and any law passed to support the Treaty process will be consistent Commonwealth engagement and will have meaningful and lasting legal effect.

Policy Context

Treaty-making in the NT strongly aligns with a swathe of existing commitments made by government in the Aboriginal affairs policy space. Both the Commonwealth and NT Government are pursuing a range of initiatives that have direct applicability to Treaty, including:

- Voice
- Closing the Gap
- Local Decision Making
- Empowered Communities
- Uluru Statement from the Heart
- Council of Australian Governments Pilot Projects
- Aboriginal Justice Agreement
- Barkly Regional Deal
- *Everyone Together* Aboriginal Affairs Strategy

The numerous – and at times overlapping – initiatives underway in the NT have caused confusion and consultation fatigue amongst community members. Indeed, Treaty Commission consultations highlighted the "busy and congested" nature of Aboriginal affairs in the NT, and found this policy environment has led to community members feeling a sense of confusion and disappointment. A policy landscape of this complexity also creates the potential for services gaps and a lack of accountability amongst stakeholders.

Despite the abovementioned challenges, the policy landscape in the NT reflects government's commitment to Aboriginal community-led control and decision-making. The Local Decision Making (LDM) policy is a core NT Government policy facilitating a new working relationship between Aboriginal communities and government agencies to support self-determination.[32] Under LDM, NT Government agencies are partnering with Aboriginal communities to assist the transition of government services and programs to community control. This work is in recognition that building, supporting and investing in strong Aboriginal governance is necessary to ensure local people drive local solutions, and that Aboriginal organisations are supported to have control over their own affairs. At the time of writing this report, seven signed LDM Agreements are in various stages of implementation, including[33]:

- Werenbun Homeland LDM Agreement
- Groote Archipelago LDM Agreement
- Yugul Mangi Development Aboriginal Corporation LDM Agreement
- Jawoyn Association Aboriginal Corporation LDM Agreement
- Gurindji Aboriginal Corporation LDM Agreement
- Alice Springs Town Camps Heads of Agreement
- Julalikari Council Aboriginal Corporation LDM Agreement.

Under LDM, the NT Government and communities have already started working differently and engaging in mutually respectful partnership to progress First Nations' self-determination. The clear consistencies between the LDM approach and Treaty provide an optimal environment for progressing Treaty discussions in the NT, and reflects the readiness of parties to come to the negotiating table.

The new Closing the Gap in Partnership initiative, launched in 2021, noted the need to make structural changes in the way government works with Aboriginal and Torres Strait Islander people and ensure communities have a genuine say in the design and delivery of policies, programs and

services that affect them.[34] The then-Chief Minister of the NT, the Hon Michael Gunner MLA, made a similar point in his speech at Barunga Festival in June 2018, noting:

> *I know Aboriginal people make better decisions about how to develop their people, communities and resources in accordance with culture and custom than any bureaucrat in Darwin or Canberra ever could.*[35]

This recognition by both the Commonwealth and NT Government of the importance of Aboriginal-led decision-making reinforces the need for a Treaty process in the NT. An opportunity exists for governments to use Treaty negotiations to guide their community engagement processes under Voice, Closing the Gap and other aforementioned initiatives. Further, the imminent negotiation of a Local and Regional Voice model across the NT creates a greater sense of urgency to rationalise the congested Aboriginal Affairs policy environment and align the implementation of the Local and Regional Voice model with a Treaty-Making Framework for the NT.

Summary: Setting the contextual boundaries of a NT Treaty-Making Framework

The above section has outlined the various contextual underpinnings within which a NT Treaty-Making Framework must exist. Consideration of national and international best-practice examples reinforces the need for any Treaty to be place-based and a reflection of the needs of First Nations communities. In particular, learnings from the British Columbian example reflects the need for First Nations to be at the centre of decision-making at every stage of the Treaty development process.

An analysis of the NT's historical context shows that calls for Treaty are inextricably linked to a long history of First Nations Territorians asserting and fighting for their rights against a backdrop of racism, massacre and dispossession. Any Treaty process must address past wrongs and act as a means through which government and community move forward together in a respectful manner. Ensuring a Treaty incorporates a process of First Nations self-determination will be central to achieving this goal.

The NT's unique legal context as a Territory of the Commonwealth necessitates that the Treaty process complies with Commonwealth legislation, to ensure Treaty negotiations have lasting legal effect. Legislative reform must also be considered as part of Treaty negotiations in recognition that current legal frameworks often do not provide adequate space for First Nations' self-determination.

The crowded Aboriginal Affairs policy environment in the NT will benefit from a Treaty process that provides a structure through which government can meaningfully engage with First Nations Territorians, and First Nations Territorians can meaningfully engage with government. With Local and Regional Voice negotiations set to commence imminently between the three tiers of government and First Nation stakeholders, the delivery of a Treaty-Making Framework to guide this process gains even more urgency.

Ultimately, these contextual considerations show that it is imperative that the Treaty-Making Framework enables First Nations to exercise their sovereignty and pursue their aspirations. Aboriginal people must be empowered to consider what they want from the Treaty process, how they want their future to look, what opportunities they wish to create for future generations, and what powers they want to exercise in relation to their Country. For its part, the NT Government must learn from mistakes of the past and present – it must not control how First Nations choose to represent themselves, nor must it decide the nature of the process. Rather, the role of the NT Government should be one of support for First Nations as and when it is required.

1.3 - Outcomes of Treaty Commission Consultations

Any Treaty-Making Framework must be informed by the goals and aspirations of First Nations communities. This section explores the feedback and priorities set out by community members during the Treaty Commission's two-stage consultation process.

Methodology

The NT Treaty Commission undertook a two-stage consultation process to garner the perspectives and voices of Aboriginal people across the NT.

Stage One

In March 2019, the NT Treaty Commission commenced an introduction, education and awareness-raising program that ultimately led to consultations with more than 45 major Aboriginal representative bodies and organisations across the Territory. These initial consultations were an opportunity to introduce the Treaty Commission team to communities and explain the role of the Treaty Commission and the broader issues regarding Treaties between First Nations and the NT Government. The consultations were very positive and highlighted varying levels of knowledge, awareness and understanding about Treaties.

As part of Stage One consultations, the Treaty Commission presented to a number of local, Territory and Commonwealth government departments and agencies and at numerous conferences, workshops and forums across and outside of the NT, including:

- The NT Public Service Aboriginal Employment Forum
- Aboriginal Leadership and Governance Forum
- National Indigenous Lawyers Conference
- Garran Ovation at the Institute of Public Administration Australia National Conference
- Opening Ceremony at the Barunga Festival
- Garma Festival

Stage One consultation focused on discussion of the following themes:

- What a Treaty is, or could be;
- The role of the Treaty Commission;
- Provision of a brief overview of what is happening in the Treaty space across Australia and overseas, with an emphasis on Victoria, Aotearoa New Zealand and British Columbia;
- Introducing the concept that developing a Treaty or Treaties will take time; and
- Affirming that engagement will be ongoing and it is important to establish an inclusive process that supports respect, good faith, equality of standing and cultural appropriateness across all stages of Treaty development.

Stage Two

Stage Two, a remote consultation program, commenced in October 2020. This consultation round continued the Treaty Commission's awareness-raising work and shared the key concepts put forward in the Treaty Commission Discussion Paper (released on 30 June 2020) with communities.

To reach as many Aboriginal Territorians as possible, the Treaty Commission flew approximately 21,000km and drove more than 4000km. Approximately 1,500 people attended consultations across the Territory and the Treaty Commission received a warm welcome in all communities visited. Community representation differed between locations, with the Treaty Commission reaching 135 community members at one location contrasted with zero attendance at another similarly-sized community.

The number of people who attended community consultations depended on a number of factors including:

- The level of pre-meeting support the Commission received from NT Government and Land Council staff;
- The functionality and cohesion of the community;
- The general level of existing knowledge about treaties and the historic struggle for self-determination;
- Sorry business and other community cultural business;
- The weather;
- School terms; and
- Competing meetings.

In turn, the format of consultation differed depending on:

- Size of the group;
- Age demographic, e.g. a different format for schools;
- People's availability;
- Location (indoors vs outdoors);
- Resources available, e.g. whether or not a screen was available to show a video;
- The level of interest;
- Nature of the group, i.e. a whole of community consultation vs a consultation with an organisation; and
- Cultural authority of the group.

Treaty Young Voices Roadshow

With Aboriginal young people the fastest-growing cohort in the NT, youth engagement at every stage of the Treaty-making was a core facet of the Treaty's consultation process. Youth engagement is particularly pertinent given that Treaty-making is not a fast process; future leaders, therefore, must be party to discussions regarding Treaty to ensure they are informed and included at every stage.

In recognition of the importance of educating, upskilling and informing youth about Treaty-making, the Treaty Commission engaged acclaimed singer and composer Dr Shellie Morris to run the NT Treaty Young Voices Roadshow. In 2021 Dr Morris spent six months listening to the voices of young people across the Territory and supporting them to engage with Treaty through the medium of music and song. As part of the Roadshow, Dr Morris worked with Year 11 and 12 students from Tennant Creek, Alice Springs, Yirrkala, Barunga and Darwin, encouraging them to pen their own music and song reflecting their understanding of Treaty. Five original songs and video clips were created during the Roadshow, communicating young peoples' desire for Treaty in the NT. These songs, which were released between 2 December and 15 December 2021 and are available on the Treaty Commission Facebook page and Instagram[36], included:

- "Truth, Treaty and Sovereignty" – created on Mparntwe by young people from Centralian and Yirara Colleges
- "My Treaty" " – Jurnkkurakuurr/Tennant Creek
- "When I Grow Up" – Taminmin High School, outskirts of Darwin (Larrakia country)
- "Treaty Now" – Yirrkala on Yolngu country in north east Arnhem Land
- "For a Better Future" – Barunga on Jawoyn country

The Roadshow also engaged with parents, carers, schools, language keepers, Elders and local musicians. These stakeholders engaged in the Roadshow by empowering young people to raise their voices and safely ask questions and share knowledge about Treaty.

By using music and song-writing as a tool for exploring youth responses to Treaty, the Treaty Commission was able to artistically harness young peoples' passion and strength and gained insights into youth perspectives on Treaty through an artistic medium.

Key themes arising from consultation

During stage one consultation, communities expressed a strong interest in Treaty and the work of the Treaty Commission, as well as a desire to understand what practical differences a Treaty may be able to make for communities on the ground. There was a strong desire communicated for Treaties at a local level, with an acknowledgement this may also involve a Territory-wide Treaty which sets minimum standards and provides an overarching framework guiding local-level Treaties.

Stage One consultation also unveiled a number of community concerns regarding the longevity of Treaties and concern about what might happen to Treaty negotiations if there is a change of government in the NT. Communities expressed some scepticism as to the value of NT-based Treaties without a national Treaty or Treaties in place, and a keen awareness of the aforementioned Constitutional and legal issues facing the Territory as well as the risks of establishing a Treaty without Commonwealth involvement.

Communities advised of their acceptance that, even if a Treaty-Making Framework is implemented, the negotiation of Treaties will take the time to negotiate based on each community's level of Treaty readiness.

These themes were further reinforced by communities during the Stage Two consultation process. Discussion focused on the following points:

- An overwhelming level of support for Treaties and the self-determination embodied in them.
- A concerted push by Aboriginal Territorians across the NT to have a much greater say in the matters affecting their daily lives, noting that many people felt disempowered.
- Whilst there was some impatience that the Treaty journey will take time, there was a stronger view that it is important to take the time to do things properly and to get it right.
- The importance of homelands and outstations to the futures of Aboriginal people.
- Recognition that Treaty is a complicated topic that is potentially overwhelming for some to absorb fully in a single sitting. The need for an ongoing education and awareness program was stressed in many locations.
- Keen desire for Treaty education to be taught as part of the high school curriculum, especially in remote schools.
- A consensus that there needs to be multiple Treaties: that is, that the Framework must allow for Treaties between each First Nation or a coalition of (eg. Neighbouring) First Nations and the NT Government.
- There is a strong view that current government approaches are not working for Aboriginal people in the NT. There is a keen sense that transformational change is required.
- Displeasure with the structure and role of local government and a need for significant reform, noting that this had nothing to do with the people involved in local government.
- Concern about the risks associated with the Commonwealth government not being involved in the NT Treaty process as well as their Constitutional powers with respect to Territories, resulting in questions about how we best mitigate that risk.
- The importance of water and water management; particularly to Aboriginal people in the Katherine region and further south, and concerns about the quality of drinking water as well as the way in which water allocations for commercial purposes are made.
- The importance of culture and language and a sense that not enough is being done to preserve it. In the Top End, the need for bi-lingual education was reinforced at a number of communities.
- Given the history of colonialism in the NT, a lack of trust in Government(s) generally and their capacity to honour their commitments both in action and spirit.
- The importance of truth telling and the view that there is unfinished business without truth telling.

This came across very strongly. Emotions from past atrocities are still raw and real for many people.

Whilst the above discussion points touch on a range of topics and perspectives, they can be broadly summarised as three key themes that were consistently brought to the Treaty Commission throughout the consultation process:

1. **Aboriginal people must make their own decisions about Treaty, and should be empowered to negotiate Treaty on their own terms.**
2. **Aboriginal people see Treaty as a means through which to right past wrongs and reaffirm human rights that have been historically ignored and overridden.**
3. **Communities have been let down by past and current government approaches, and transformational change is needed in the way Aboriginal people govern themselves and support by the NT and Local government.**

These themes are consistent with feedback received from young people during the Youth Roadshow. As noted by Dr Morris[37]:

> *To visit these communities and elevate the voices of the young people who will be leading our society soon has been such a privilege. These smart, passionate young people have big hopes for the future…Throughout the Roadshow, young people have learnt more about Treaty, the focus on it being driven by First Nations, the focus on-self-governance and to be informed by the UN Declaration on the Rights of Indigenous Peoples.*

Insights from the Young Voices Roadshow

In Alice Springs, Centralian College student Aaliyah Anderson (Yiman/ Gungalu) said:

> *Treaty is so important to have in our lives, we all have to come together, no matter what skin colour or race.*

Expressing similar views, Tyrone Charlie, who hails from Borroloola and is a Year 12 student at Yirara College in Alice Springs, said:

> *We made music about coming together … when you come together it is more powerful, you can get the word out there and everyone will listen.*

Conclusion – Learnings from Context and Consultation

The themes arising from the two stages of Treaty consultation, and the analysis of existing contextual factors, unveil three key principles that must underpin a Treaty-Making Framework in the NT.

A Treaty-Making Framework should:

1. **Follow a First Nations-based approach:** Empower Aboriginal people to make their own decisions about Treaty and negotiate Treaty on their own terms, including:
    a. Acknowledging that the status of First Nations as free self-governing people was totally disregarded throughout the NT's history, and their consent to colonisation of the NT was not sought or considered.
    b. Recognising the standing of First Nations as distinct political communities.
2. **Follow a Human Rights-based approach:** Strive to right past wrongs and reaffirm human rights that have been historically ignored and overridden, including:
    a. Making substantive reparations for material loss and human damage.
3. **Follow a Self-Government-based approach:** Pursue transformational change in the way government approaches working with Aboriginal people, including:
    a. Recognising First Nations' right to self-determination with decision-making and control that amounts to self-government.
    b. Incorporating a clear statement of the equal standing of parties and defined procedural standards for negotiations. Parties must recognise each other and participate in negotiations based on complete equality.
    c. Negotiating in good faith and agreeing to the terms of their future relationship on an equal basis and in mutual political recognition.

Treaty negotiations must also align with Commonwealth legislation and operate within the NT's legal parameters as a Territory of the Commonwealth. Further, the Treaty process must work in tandem with Closing the Gap and Local and Regional Voice to strengthen the overall capacity of First Nations people to make decisions about matters affecting their lives. Considerable care should be taken to avoid the further splintering of regional stakeholder groups through the creation of parallel or competing representative mechanisms.

The following chapter will unpack these three core principles in further detail.

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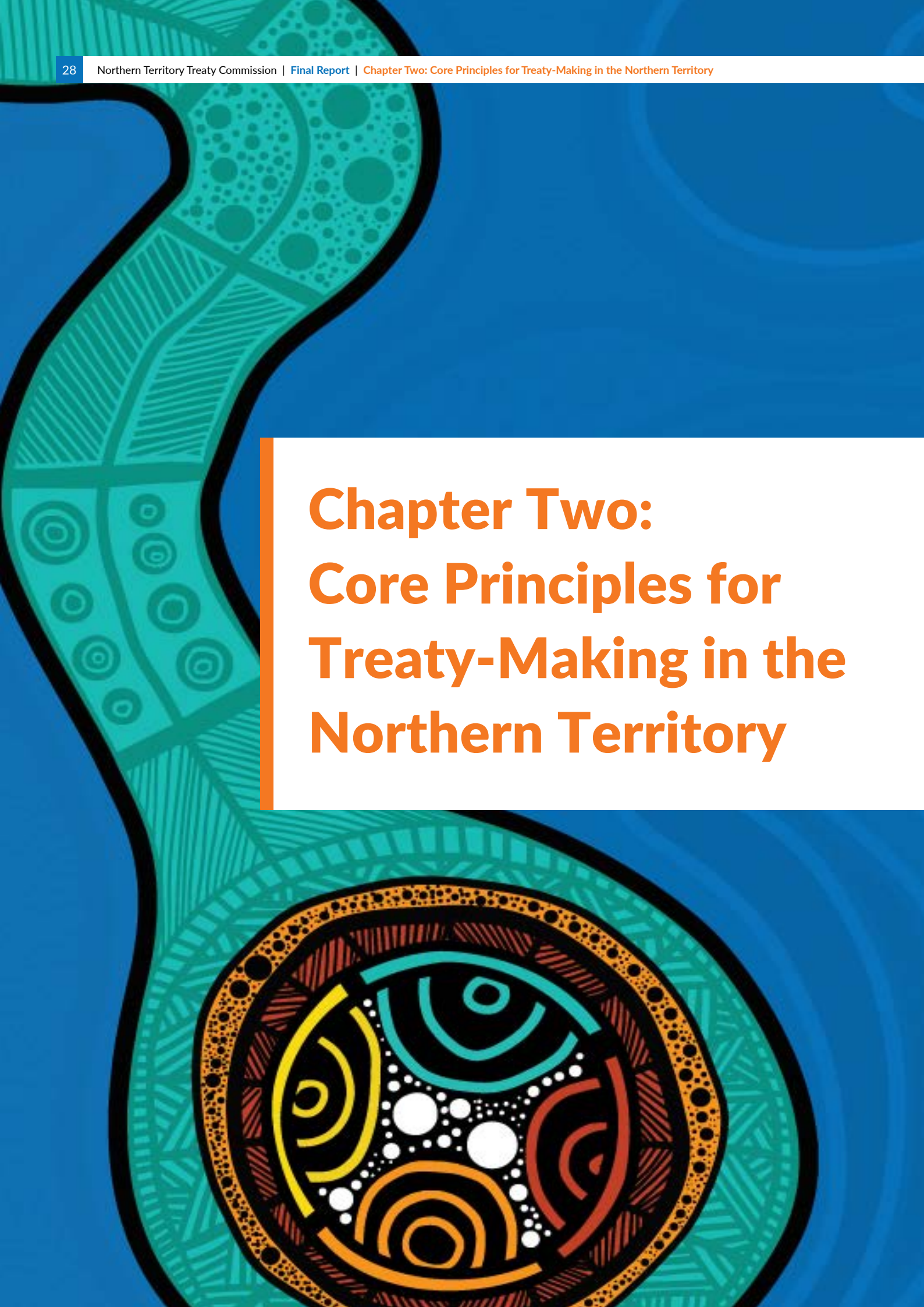
Chapter Two: Core Principles for Treaty-Making in the Northern Territory



Contextual factors and consultation outcomes show that Aboriginal Territorians are Treaty-ready, and have asked for the space, agency and support to define and make Treaties with the NT Government at the local level and on their own terms. First Nation communities have asked for a Treaty process that will right the wrongs of the past and is delivered through a negotiation process that acknowledges First Nations as distinct political communities. In other words, the Treaty process in the NT must take a First Nations-based, human rights-based, and self-government-based approach.

This chapter will unpack each of these core principles, and deliver recommendations detailing a Treaty-Making Framework for the NT.

2.1 - A First Nations-based Approach

Each First Nation must speak for itself, and, therefore, Treaties should be between individual First Nations (or coalitions of First Nations) and the NT Government.

First Nations are Aboriginal Territorians who are distinct from other citizens on the basis of their status as prior, self-governing communities with deep connections to, and custodianship of, their traditional land and sea areas.[38] Other similarly used terms to describe these groups are language groups or tribes.

In the NT, many of these groups have been formally recognised by settler-colonial law as distinct peoples – either as Traditional Owners under the Aboriginal Land Rights system, or as Native Title holders under the Native Title system. Some groups are still in the process of obtaining Traditional Owner or Native Title Holder status. Within most First Nations, there are also smaller, distinct clan groups. Examples of Nations in the NT include the Warlpiri and Arrernte Nations in Central Australia, the Yolngu, Anindilyakwa and Larrakia Nations in the north of the NT, and the Warumungu Nation in the Barkly region. NT First Nations have maintained their ownership of and obligations to their traditional countries. Unique customs, laws, languages and governance systems are in place within each Nation.

It has been made clear that First Nations want to be empowered to negotiate Treaties with the NT Government. Such an approach necessarily means there will be many Treaties across the NT.

Respect for First Nations decision-making

Aboriginal First Nations are distinct political communities who have been self-governing according to their own unique laws and customs for thousands of years. A First Nation-based approach reflects this. A First Nations-based Treaty will recognise and empower First Nations, whether as individual or as coalitions, with authority to be self-governing over a broad range of matters within their traditional land and sea boundaries.

Based on aforementioned feedback received through consultation, the Treaty Commission strongly recommends that Treaties should be between individual or partnering First Nations and the NT Government. Consultations highlighted that, for some Territorians, it will be important for distinct clan groups to also be recognised in the Treaty process.

As such, it is recommended that the Treaty process be flexible and adaptive to different clan interests. In practical terms, this would mean ensuring that:

- Individual clans should have the opportunity to make decisions about their own unique interests and needs on matters affecting them.
- Clans are not overpowered by dominant interests or broader governing structures and processes.
- Where appropriate, clans have an option to veto or otherwise impact decisions made by representative First Nation Governments.

These matters must be discussed and negotiated between and within First Nations as part of the Treaty-Making process.

Respect for First Nations Country and land boundaries

Aboriginal peoples' relationship with their traditional lands and waters are foundational to their economies and systems of governance. The relationship Aboriginal people have with their traditional lands relates to the very essence of Aboriginal culture and collective and personal identity.[39] As noted by inaugural NT Treaty Commissioner, Professor Mick Dodson[40]:

> *(To speak of Country) is to speak of law and culture: of the economic uses to which Country may be put, the Indigenous governance structures that regulate its use and occupation and in many cases of a spiritual relationship that links the past to the present, the dead to the living and the human and non-human worlds.*

A First Nations-based approach to Treaty-making recognises this fundamental truth and supports First Nations to negotiate to reclaim authority to make decisions about Country – including over how it is used and cared for – and about their own internal affairs, how they govern those affairs, and matters within their traditional boundaries. The NT Treaty-making process must recognise these boundaries, and empower First Nations with authority over matters affecting their traditional Country.[41]

Providing space for the creation of First Nations Coalitions

For some First Nations, addressing the above matters will mean taking a collective or regional approach to Treaty negotiations. Nations may decide that they have shared values and culture with their neighbours and, considering remoteness, populations and scale, they can better realise their goals and aspirations if they form coalitions. This coalition-building process can be seen in Canada, where the Ktunaxa Nation used the British Columbia Treaty process to create a new governing system that reflect its own collective sense of self, values and priorities.[42] Four First Nations that share the Ktunaxa culture, language and heritage joined together to form the Ktunaxa Nation, reclaiming their own unique sense of personhood as one coalition.[43] Similar examples of coalition-building can be seen in Canada's Northwest Territories, where another four First Nations – formerly known as Dogrib Indians – have united to form the Tilcho Government.[44]

In a similar manner, Aboriginal Territorians may use the Treaty-making process to reclaim their identity and governing authority through the formation of coalitions based on shared values, aspirations and priorities. The Treaty-making process, therefore, must support First Nations to come to the negotiating table either as individual Nations or as coalitions, in line with community aspirations.

Recommendations

The following is recommended to pursue a First Nations-based approach to Treaty-making in the NT:

1. The Treaty process must allow for the negotiation of many Treaties in the NT, overseen by a broader Territory-Wide Agreement.
2. Parties to Treaties in the NT must be First Nations - or coalitions of First Nations, the NT Government, and the Federal Government where possible and appropriate
3. Treaties and laws supporting the Treaty process must be flexible and enable the expression of clan interests and the formation of First Nations coalitions.
4. Treaties must recognise and respect First Nations' connection to Country.

2.2 - A Human Rights-based Approach

Treaty-making must be consistent with the minimum standards contained in the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) and the Van Boven/Bassiouni Principles (Van Boven Principles) regarding reparations for gross violations of human rights.

Colonial law was imposed on First Nations people without their consent and with violent, disruptive and far-reaching consequences. Treaty Commission consultations found that First Nations Territorians continue to grapple with the lasting impacts of historical atrocities committed against them by colonisers, and communities want this formally acknowledged by the NT Government through the Treaty-making process. Consultations also unveiled community concerns regarding the need for the rights and voices of First Nations to be legally protected in the Treaty-Making process.

Australian law currently does not provide sufficient protections capable of ensuring First Nations' rights and interests are recognised and respected in the NT Treaty process. With the exception of Native Title, Australian common law has been largely ineffective at recognising and asserting the rights of First Nations people. Despite the significant hurt and harm caused to members of the Stolen Generations by policies of forced child removal, cases brought before Australian courts to redress that harm have generally failed to establish liability on behalf of government.[45] Governments have also vehemently defended any question of its liability in these matters. The result has been piecemeal and limited redress of these historical wrongs by parliaments, but no effective general law mechanism to recognise and redress a chapter in Australia's history that is widely condemned as abhorrent, destructive and painful.[46]

Further, decisions of the High Court have established that it may be possible for the Commonwealth Government to use the 'race' power contained at section 51(xxvi) of the Constitution[47] to make laws that 'discriminate against or for the benefit of the people of any race' including First Nations people. The race power has been used to make discriminatory laws that have adversely affected First Nations people.[49]

These examples make clear that there are insufficient protections in Australian law capable of equalising the significant bargaining inequalities between First Nations and the NT Government. As such, consideration must be given to international human rights standards – specifically UNDRIP and the Van Boven Principles – to guide the positive advancement of First Nations' rights under the Treaty process.

The NT does not have the legal capacity to enter into a Treaty recognised under international law, which posits that only Nation-States acting through their national government have the legal capacity to enter into binding Treaties under international. However, human rights instruments of international law remain vitally important to the NT Treaty-making process. The UNDRIP sets out minimum standards for the domestic recognition of Indigenous rights and more generally is a critical guide that should inform government policies affecting First Nations peoples. UNDRIP Articles relating to *self-determination and free, prior and informed consent* are particularly relevant to the scope and contents of Treaty negotiations in the NT. Both the UNDRIP and Van Boven Principles are outlined in greater detail below.

UNDRIP

The UNDRIP was adopted by the United Nations General Assembly in 2007 and is an international human rights framework for recognising "the urgent need to respect and promote the rights of Indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States".[50] It is the most comprehensive and progressive international instrument dealing with Indigenous peoples' rights[51] and includes 46 articles covering all aspects of human rights, as they specifically affect Indigenous peoples. Further information on the background and content of the UNDRIP is at **Appendix D**.

The UNDRIP delineates and defines individual and collective rights of Indigenous peoples[52] accepted as being important under international law. It includes rights to cultural and ceremonial expression, to maintain and strengthen Indigenous identity, language, employment, health and education.[53] It also emphasises the rights of Indigenous peoples to pursue development according to their own needs and aspirations,[54] and contains a right to the 'recognition, observance and enforcement of treaties'.[55] Because it is a unique expression of collective rights for Indigenous peoples as distinct political groups, the UNDRIP gives content to what can be negotiated as part of the NT treaty process. This includes guiding the negotiation and progress of treaties and associated laws and policies.[56] Indeed, the 2018 Barunga Agreement Memorandum of Understanding signed between the Chief Minister and the four Land Councils states that Treaty in the NT

> *"must provide for substantive outcomes and honour the Articles of the United Nations Declaration on the Rights of Indigenous Peoples".*[57]

Rights set out in the UNDRIP are consistent with the broad aspirations for treaty-making in the NT. As former United Nations Special Rapporteur S. James Anaya has expressed, key rights include:

> *The right of Indigenous peoples to exercise self-determination in harmonious co-existence with others, within the states in which they live; the right to maintain and develop their own cultures and religious traditions; the right to continue in possession of traditional lands and resources; the right to determine their own future development; and a host of related rights and correlative state duties. The declaration also affirms that states have a duty to take remedial action where those rights are infringed and a duty to take the affirmative steps necessary to give those rights practical effect.*[58]

Anaya highlights that the UNDRIP provides a new model for Indigenous-state relations that is different from those of the past.[59] Within that new model, 'there is no room for archaic legal doctrines rooted in colonial-era premises of terra nullius or mendicant dependency'.[60] Instead, the UNDRIP empowers Indigenous peoples in colonial states in new ways. Treaties in the NT must aim to achieve this same goal.

The right to self-determination is a key part of the UNDRIP, identified as the 'heart and soul' of the Declaration, constituting 'the river in which all other rights swim'.[61] It is worth noting the particular importance of the right to self-determination for the NT treaty process. Self-determination is about the 'power to exercise power'.[62] It supports empowering First Nations to be self-governing over matters within traditional estates, and to expand their governing authority within the legal boundaries of the Australian federation.[63] It requires governments to step back and equip First Nations with capacity to manage their own affairs, a key element for treaties in the NT.

Articles 3-5 of UNDRIP give useful expression to self-determination in the context of Treaty-making:

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous function.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

These articles must guide the NT Treaty-making process, including negotiations between First Nations and government, and in regards to the scope and content of Treaties and any laws enacted to support Treaty. Rights to self-determination could cover a range of potential responsibilities and functions including, for example, education, health, heritage, land management, planning and development. There may not be a single approach preferred by First Nations, and different rights might apply differently across regions as determined freely by First Nations in accordance with relevant customs, traditions, and priorities.[64] The important point is that UNDRIP rights relating to self-determination provide an internationally accepted reference point for meaningful recognition and empowerment of First Nations peoples, for their expanded authority and for self-government.

A practical approach to ensuring the NT Treaty process reflects the UNDRIP is to establish the UNDRIP as agreed minimum standards for the Treaty process, bearing in mind that any NT laws giving effect to Treaty must be consistent with the Australian Constitution, Commonwealth law and NT law. This would involve:

- Incorporating key UNDRIP articles and preambular principles into supporting legislation underpinning the Treaty-making process.
- In time, fuller and comprehensive incorporation of the UNDRIP as a stand-alone law of the NT could be pursued once the Treaty-making process is underway.

Establishing the UNDRIP rights as minimum standards to the treaty process will mean that self-determination is given meaningful effect in treaties and related laws supporting them. This includes empowering First Nations to rebuild and exercise governing authority and to take control of their own affairs.[65] Embedding rights to self-determination in the treaty process would also mean that any decisions by government related to the treaty process are aligned with First Nations cultural values and worldviews.

Van Boven Principles

The Van Boven Principles set out standards for remedies to gross violations of human rights.[67] The Van Boven Principles set out that there is an obligation on States to 'respect, ensure respect for and implement international human rights law and international humanitarian law'.[68] This obligation includes a duty to prevent violations, to investigate violations, to take appropriate action against violators, and to afford remedies and reparation to victims.[69] Further information on the contents of the Van Boven principles is at **Appendix E**.

The Principles have previously been relied upon in Australia in relation to historic harms perpetrated against Aboriginal and Torres Strait Islander people through policies of forced removal. For example, the recommendations of the Australian Human Rights Commission to the Commonwealth Attorney-General regarding the *Bringing Them Home* report (which followed a national inquiry into the effects of the forcible removal of Aboriginal and Torres Strait Islander children from their families) were structured on the Van Boven Principles. The Commission argued that reparations should, among other things, consist of (1) acknowledgement and apology; (2) guarantees against repetition; (3) measures of restitution; (4) measures of rehabilitation, and; (5) monetary compensation.[70] They were designed to achieve reparation through an interlocking series of measures, far wider than monetary compensation. The measures addressed personal pain and suffering, enduring losses of identity, family connection, language, culture, and access to traditional land. They also included support and services to help restore these losses, in so far as that is possible.

In the NT, it is expected that the Treaty process will have to address a similar range of issues collectively experienced by First Nations. The Van Boven Principles clearly provide a benchmark against which consideration of matters relating to reparations can be measured. In the context of the NT, where the effects of colonisation have been violently disruptive, the Van Boven Principles can inform negotiations in relation to a range of matters that might be considered important to Treaty-making, including truth-telling and the scope and nature of reparations.

In conjunction with the UNDRIP, the Van Boven Principles are an important minimum standard to guide negotiations and deliver reparations that are relevant and proportionate to original violations. These Principles will be particular important to guide truth telling in the Treaty process – noting truth-telling will potentially uncover or highlight previously unknown or ignored truths that will affect the nature and scope of discussions relating to reparations.

Recommendations

Treaty-making is about rebuilding the relationship between government and First Nations peoples on a fairer, more equal footing. Achieving this will require a structured process of negotiations in line with minimum human rights standards as set out in the UNDRIP and Van Boven Principles. Adoption of these standards as the foundation of the Treaty-making process will help offset the existing power imbalance between First Nations and government, improve the bargaining position of First Nations and prevent government from undertaking 'sharp dealings'[71] with First Nations Territorians during negotiations.

In line with the above, it is recommended that:

1. The UNDRIP continue to be recognised as a foundation for the Treaty negotiation process and be embedded and respected in Treaty legislation, policy and supporting instruments.
2. Supporting legislation underpinning the Treaty process should adopt key preambular principles and Articles of the UNDRIP.
3. The NT Treaty-making process pursues a key objective to get agreement between First Nations and government as to the precise form and content of the adoption of UNDRIP principles in NT legislation.
4. The Van Boven Principles, in conjunction with the UNDRIP, provide minimum standards to the consideration of reparations negotiated as part of the Treaty process.

2.3 - A Self Government-based Approach

Treaty in the NT must lead to the formal recognition and empowerment of First Nations self government, in recognition that Aboriginal people have been self-governing over their traditional lands in the NT for thousands of years.

A key difference between Treaties and other forms of settlement is that Treaties must lead to some form of political settlement. Self-government is an important part of realising Aboriginal peoples' inherent right to self-determination as set out in the UNDRIP.[72] This aligns with evidence from North America and Australia that the lives of Aboriginal people improve when they are given meaningful decision-making power over matters affecting their lives.[73]

Australian common law has not recognised any inherent right to Indigenous self-government and, so far, parliaments have not empowered First Nations with meaningful self-government capacity.[74] Even though First Nations have been self-governing over their traditional lands and waters since time immemorial they are not meaningfully recognised in the federal compact and so do not exercise their own authority within Australia's federation. As discussed in the above sections, First Nations peoples have very little entrenched, substantive political power in Australia - a reality expressed in the Uluru Statement from the Heart as the 'torment of our powerlessness'.[75]

There is significant need for Treaties in the NT to substantively address this structural inequity by recognising and empowering First Nations, where they aspire to it, to exercise political authority through their own governments within the NT and as a fuller part of an Australian nation that, at its birth, made no space for them. Transformational change of this nature is vital in the NT if treaties are going to affect a new and more equitable relationship between First Nations and the NT government based on power-sharing.

A self-government-based approach to Treaty-making empowers First Nations as substantive decision-makers. The benefit of this approach is evident in the United States, where First Nations have been recognised as 'domestic dependent nations'[76] under federal law and so operate on a government-to-government level with the federal government. They have been broadly empowered with responsibilities and functions of self-government, including First Nation control over federal government services for First Nations people, and in relation to natural resources and economic development.[77] First Nations also have control in relation to tribally controlled colleges and universities,[78] primary and secondary schools,[79] housing,[80] social assistance,[81] policing,[82] and healthcare.[83]

Research by the Harvard Project on American Indian Economic Development has found that the only policy ever to succeed in combatting reservation poverty in the USA is 'putting genuine decision-making power in Indian hands'.[84] The project findings are clear – other than effective self-government, nothing else has worked.[85] The Harvard Project's research has highlighted that the best examples of self-determination policies are those enabling First Nation communities and their leaders to assert decision-making power to shape and drive development agendas relevant to the actual needs of their communities.[86] The most effective governing institutions are defined by communities and express First Nation political culture.[87] First Nation self-government in the NT should be informed by these important findings.

First Nation Government – A Proposed Model

We propose that the Treaty process will enable the establishment of representative First Nation Governments to assume powers of self-government and represent First Nations in Treaty negotiations. First Nation Governments will, in-line with the UNDRIP minimum standards, have both shared and exclusive jurisdiction over matters within

the boundaries of their traditional land estates. The extent of those powers will, ultimately be determined through Treaties. They will have the power to make their own laws, within an agreed jurisdiction, and subject to agreed legal limitations – some of which may be re-negotiated and changed as part of the treaty-making process. Under the proposed Treaty-Making Framework, First Nations, or where appropriate coalitions of First Nations, will take on self-governing authority gradually, allowing them to build confidence and capacity.

It is proposed that First Nation Governments should first operate within the local government jurisdiction and have the full range of powers currently available to local government. Over time, it is proposed they will take on a wider range of responsibilities transferred, conferred or devolved according to any agreements reached) between them, the NT Government and, hopefully, the Commonwealth. The transfer of power must accord with the capacity, community aspirations, and priorities of the relevant First Nation. Ultimately, First Nation Governments will have a broad range of powers and responsibilities and will be able to exercise their own law-making power, and the Treaties should accommodate the ongoing progression towards greater degrees of self-government over time.

The NT Government can formally recognise First Nation Governments and share jurisdiction with them. Much the same as local government has been created through NT legislation to address challenges at the local level, the Legislative Assembly has ample, if not plenary power to recognise and empower First Nations to be self-governing in relation to a broad range of matters.[88] This power must be exercised in a manner that does not offend the constitutional requirements of the relevant Federal laws. The capacity of the NT to achieve this important innovation must not be limited by the historical failure of law and governments in Australia to provide space for First Nations self-government. The Australian federation is adaptable and can accommodate diverse populations, cultures, identities and loyalties, as well as different tiers of government, shared jurisdiction and various and distinct governing mechanisms into a broad single political system.[89]

The model of self-government being proposed is broadly similar, at least in structure, to Indigenous self-government in Canada. Canada's legal system has recognised and affirmed treaty and self-government rights through section 35(1) of the *Constitution Act 1982*, which provides constitutional status to Indigenous rights and title.[90] The importance of establishing mechanisms for First Nations peoples to govern themselves was highlighted by the Canadian Royal Commission on Aboriginal Peoples in 1996. The Commission advised that:

> *Room must now be made in the Canadian legal and political framework for Aboriginal nations to resume their self-governing status. We see a time when three orders of government will be in place, with Aboriginal governments exercising sovereign powers in their own sphere.*[91]

In recognition of this, the Canadian federal government has explicitly adopted a policy of negotiated self-government for Indigenous peoples on Indigenous lands with respect to a range of matters, including: establishment of governing structures; membership; marriage; adoption and child welfare; education; health; administration of Indigenous laws; land management; housing and licensing.[92]

Under a self-government approach to Treaty, First Nations governing institutions must be legitimate and representative of citizens. Whilst self-government may reflect democratically chosen

representative government, it must allow for cultural nuance in processes and decision-making.

It must also incorporate fair processes that protect and give consideration to various important interests – including those of individual clans, of residents within First Nations' boundaries, and of partnering First Nations.

Undoubtedly, in some areas where there are shared values, aspirations and priorities, First Nation Governments will operate as regional governments, incorporating multiple nations. Although this must be determined according to negotiations within and between First Nations across the Territory, particularly in remote areas where there are small populations, a collective or regional approach to self-government as part of the treaty process will help to address limitations that may exist in relation to scale and critical mass.

Self-government will be limited in key areas. First Nation Governments will not, for example, be able to exercise powers that are fundamentally in conflict with Australian law because they will in effect be subsidiary governments given power from the NT's already limited jurisdiction. They will have to operate within the legal boundaries of Australia's federal system and so would exist subject to the paramountcy of the settler, sovereign law of the Australian State.[93] They would, however, be able to exercise broad jurisdiction conferred to them by the NT, and potentially Commonwealth, governments.

Self-government is ultimately about improving the lives of Aboriginal Territorians by enabling First Nations to enjoy their right to self-determination within the legal limits of the Australian federation. It is about realising aspirations of greater shared jurisdiction between settler governments and First Nations, and, in some areas, for First Nation Governments to have exclusive responsibilities over specific internal matters, for example, such as cultural heritage, identity, citizenship, language, Indigenous law, natural resource management and environmental protection. The scope of First Nation self-government will be subject to treaty negotiations and should not be seen as limited by traditional intergovernmental arrangements that have excluded First Nations voices.

Recommendations

To enable First Nations to establish their own governments which will ultimately have their own agreed jurisdiction and law-making power, the following is recommended:

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

Conclusion

This chapter has drawn upon learnings from the Treaty consultation process, national and international examples of Treaty-making, and consideration of the NT's unique social, historical and political context to define three core principles underpinning Treaty in the NT. A Treaty-Making Framework in the NT must centre First Nations voices; must be legislatively underpinned by UNDRIP and the Van Boven Principles; and must enable the establishment of First Nation Governments to negotiate Treaty and assume powers of self-government.

Chapter 2 Footnotes

38. Diane Smith, 'Thematic Introduction: Concepts, Issues and Trends' in *Developing Governance and Governing Development - International Case Studies of Indigenous Futures*, Diane Smith, Alice Wighton, Stephen Cornell and Adam Vai Delaney (Rowan & Litchfield 2021), 111.
39. Daryle Rigney, Simone Bignall, Alison Vivian, Steve Hemming, Shaun Berg and Damien Bell, 'Treating Treaty as a Technology for Indigenous Nation-Building', in in *Developing Governance and Governing Development - International Case Studies of Indigenous Futures*, Diane Smith, Alice Wighton, Stephen Cornell and Adam Vai Delaney (Rowan & Litchfield 2021), 134.
40. Michael Dodson and Diana McCarthy, 'Communal land and the amendments to the Aboriginal Land Rights Act (NT)' (Research Discussion Paper No 19, Native Title Research Unit, 2006) 18.
41. The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) publishes a Map of Indigenous Australia that may prove a useful guide to identifying individual First Nations in the NT. This map seeks to represent all language, social and nation groups across Australia. Whilst it is not a definitive statement on the makeup of the NT's First Nations, and some information represented therein is contested by landowners, it is an informative guide that may help guide the identification of, and engagement with, First Nations communities regarding Treaty. This Map is available at https://aiatsis.gov.au/explore/map-indigenous-australia. Surveyed land claim boundaries also provide a generally accurate representation of land boundaries, and may be used in conjunction with the AIATSIS Map of Indigenous Australia to inform the Treaty-making process.
42. Stephen Cornell, 'Processes of native nationhood: The Indigenous politics of self-government', *Special Feature: Tourism in Indigenous Communities: Challenges and Opportunities*, 6, 4 (2015):9.
43. Ibid, 10.
44. Ibid.
45. See *Cubillo and Gunner v The Commonwealth* (2000) FCA 1084; 103 FCR 1. Other notable decisions that followed similar reasoning include *Williams v The Minister of Aboriginal Land Rights Act* (2000) NSWCA 255; *Johnson v Department of Community Services* (2000) 5 AILR 49; *Collard v State of Western Australia* (2013) WASC 455; *Kruger v The Commonwealth* (1997) 190 CLR 1. Only in South Australia v Lampard Trevorrow (2010) 106 SASR 331 has there been a successful determination by an Australian court in relation to a Stolen Generations claim. It is worth noting that at the time of writing there is a Stolen Generations Class Action against the NT on foot. As well, in 2021 the Commonwealth established the Territories Stolen Generations Redress Scheme for Stolen Generations survivors who were removed as children from their family or community in the Northern Territory or the Australian Capital Territory prior to self-government, or the Jervis Bay Territory.
46. In contrast, in Canada in litigation relating to the Indian Residential School Scheme, which was similar to Australia's Stolen Generation, Canadian courts interpreted key common law principles more broadly, including in relation to limitations periods, rules of vicarious liability to support IRSS type claims, and the expansion of fiduciary duties in relation to claims of loss of culture which benefitted findings supporting First Nations applicants. Ultimately, this contributed to a wave of claims before the courts which led to the Indian Residential School Settlement Agreement (IRSSA) in 2007, a comprehensive reparative response. See *Bazley v Currie* (1999) 2 SCR 534; *Bonaparte v Canada* (2003) 2 CNLR 43; Graeme Mew and Adrian Lomaga, 'Abusive Limits: M.(K.) v. M.(H.) and A Comparison of the Limitation Periods for Sexual Assault' (2009) 35(2) The Advocate's Quarterly, 137; Mayo Moran, 'The Role of Reparative Justice in Responding to the Legacy of Indian Residential Schools' (2014) 64(4) *University of Toronto Law Journal*; Julie Cassidy, '*Cubillo and Gunner v The Commonwealth*: A Denial of the Stolen Generation?' (2003) 12(1) Griffith Law Review.
47. The constitutional 'race' power at s.51 (xxvi) gives the Commonwealth power to make laws with respect to the 'people of any race for whom it is deemed necessary to make special laws'.
48. Robert French, 'The Race Power: A Constitutional Chimera' in *Australian Constitutional Landmarks*, H. P. Lee and George Winterton, (Cambridge University Press, 2003) 180; see also Sarah Pritchard, 'The 'Race' Power in Section 51(xxvi) of the Constitution' Australian Indigenous Law Review, 15, 2 (2011).
49. See *Kartinyeri v Commonwealth* (1998) HCA 22; 195 CLR 337; see also Robert French, n 33.
50. 143 states voted in favour and four voted against (Australia, Canada, New Zealand and United States), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Columbia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).
51. Harry Hobbs, 'Treaty making and the UN Declaration on the Rights of Indigenous Peoples: lessons from emerging negotiations in Australia', *The International Journal of Human Rights*, 23, 1-2 (2019): 174.
52. S. James Anaya, 'The UN Declaration on the Rights of Indigenous Peoples: How Far We've Come and the Road Ahead', 27, 12.
53. Ibid.
54. Ibid.
55. Article 37 of the UNDRIP states: that Indigenous peoples have the right to recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect

such treaties, agreements and other constructive arrangements.

56. See Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations *Declaration on the Rights of Indigenous Peoples*', Melbourne Journal of International Law, 9,2 (2008): 439, 465.
57. *Treaty Commissioner Act 2020*, appendix, 14.
58. S. James Anaya, 'The UN Declaration on the Rights of Indigenous Peoples: How Far We've Come and the Road Ahead', n 27, 23.
59. Ibid.
60. Ibid.
61. Michael Dodson, cited in Craig Scott, 'Indigenous Self-Determination and Decolonisation of the International Imagination: A Plea', Human Rights Quarterly, 18 (1996): 814; see Harry Hobbs, n 36, 177.
62. Diane Smith, n 2, 6.
63. See Larissa Behrendt, 'Self-Determination and Indigenous Policy: The Rights Framework and Practical Outcomes', *Journal of Indigenous Policy*, 1, (2002): 43, 45.
64. See Asmi Wood, 'Self-Determination Under International Law and Some Possibilities for Australia's Indigenous Peoples', *Indigenous Self-Determination in Australia: Histories and Historiography* (ANU Press 1965-Present, 2020): 269 – 270.
65. S. James Anaya, 'The UN Declaration on the Rights of Indigenous Peoples: How Far We've Come and the Road Ahead', 27, 25.
66. Ibid.
67. Marten Zwanenburg, 'The van Boven/Bassiouni Principles: An Appraisal' *Netherlands Quarterly of Human Rights*, 24, 4 (2006): 648.
68. Van Boven Principles, Section I.
69. Ibid, Section II.
70. Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, 1997, 244/524, https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf.
71. *R v Badger* (1996) 1 SCR 771, 794 [41] (La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ); cited in Harry Hobbs, n 36.
72. See UNDRIP Articles 3 – 5.
73. See S. Cornell and J. P. Kalt, 'Two approaches to the development of Native nations: One works, the other doesn't' in *Rebuilding Native Nations: Strategies for Governance and Development*, M. Jorgensen, (University of Arizona, 2007) 3 – 33; J. Hunt and D. Smith, 'Understanding and engaging with Indigenous governance', *Journal of Australian Indigenous Issues*, 14, 2-3 (2011): 30 – 53; Sarah Maddison, *Colonial Fantasy Why Australia Can't Solve Black Problems* (Allen & Unwin, 2019).
74. It is worth noting that the *Aboriginal Councils and Associations Act* 1976 (Cth) ('ACAA') sought to provide mechanisms for Aboriginal community governance.
75. 'Uluru Statement from the Heart', *The Uluru Statement*, <https://ulurustatement.org/the-statement>.
76. *Cherokee Nation v State of Georgia* (1831) 5 Peters 1 (USSC); Worcester v Georgia (1832) 6 Peters 515 (USSC).

77. Robert Anderson, Bethany Berger, Philip Frickey and Sarah Krakoff (eds), *American Indian Law: Cases and Commentary* (St Paul, West Publishing, 2010) 155; John Borrows, 'Implementing Indigenous Self-Determination Through Legislation in Canada' (Policy Paper, April 20, 2017) 2.

78. *Tribally Controlled Colleges and Universities Assistance Act*, 25 U.S.C. 1801.

79. *Indian Education Act*, 25 U.S.C. 2601-2651.

80. *Native American Housing Assistance Self-Determination Act*, 25 U.S.C. 4101.

81. Programs include: Temporary Assistance for Needy Families, Food Stamps, Child Support Enforcement. See Nell Jessup Newton, Felix Cohen and Robert Anderson, *Cohen's Handbook of Federal Indian Law* (LexisNexis, 2005) 1400-1402.

82. *Indian Law Enforcement Reform Act*, 25 U.S.C. 2801-2809.

83. *Indian Health Care Act*, U.S.C. 1613-1682; *Indian Alcoholism and Substance Abuse Prevention and Treatment Act*, 25 U.S.C. 2401-2478.

84. Stephen Cornell, 'The importance and power of indigenous self-governance: Evidence from the United States' (Paper to Indigenous Governance Conference, Canberra, 3-5 April 2002); see also Martin Mowbray, 'Localising Responsibility: The Application of The Harvard Project on American Indian Economic Development to Australia', *Australian Journal of Social Issues*, 41, 1 (2006):91.

85. Stephen Cornell and Joseph P. Kalt, 'Alaska native self-government and service delivery: What works?' (Joint Occasional Papers on Native Affairs, Native Nations Institute for Leadership, Management and Policy at the University of Arizona and the Harvard Project on American Indian Economic Development, at Harvard University), January 2003; for further commentary see Martin Mowbray, n 121.

86. Daryle Rigney, Simone Bignall, Steve Hemming, 'Negotiating Indigenous Modernity: Kungan Ngarrindjeri Yunnan – Listen to Ngarrindjeri speak', *Alternative*, 11,4 (2015): 343.

87. S. Cornell and J. P. Kalt, 'Two approaches to the development of Native nations: One works, the other doesn't', 98, 30; see also Daryle Rigney, Simone Bignall, Steve Hemming, n 123, 343.

88. The ability of Australian structures to accommodate distinct orders of authority is evidenced through existing Local Government arrangements. Local Government is not mentioned in the Constitution and the Commonwealth has no independent relations with them. Local Governments have no independent powers of their own- rather, in legal terms, they are creations of State and Territory jurisdictions and are conferred powers under State and Territory legislation to confront modern governance challenges at the local level. Across Australia, local government jurisdiction has expanded beyond a range of traditionally narrow functions and now generally includes a broader range of responsibilities, including health services, traineeships, and general support services. The scope of local government power is not limited to these functions and can be expanded within the limits of the NT's jurisdiction under the constraints of the *Self-Government Act*. In a similar fashion, the NT Legislative Assembly has capacity to recognise and empower First Nation Governments with broad responsibilities and powers, subject to legal limits created by the Constitution and by matters of inconsistency. Further information on these matters can be found at Alison Vivian, Miriam Jorgenson, Alexander Reilly, Mark McMillan, Cosima McRae and John McMinn, 'Indigenous Self-Government in the Australian Federation', *Australian Indigenous Law Review*, 20, (2017): 233; and Australian Local Government Association, *Pre-Budget Submission 2021-2022* (Submission to the Commonwealth Government, 2021) 12.

89. See Martin Papillon, 'Adapting Federalism: Indigenous Governance in Canada and the United States' (2012) 42 *Publius: The Journal of Federalism*, 292; David C Hawkes, 'Indigenous Peoples: Self-government and Intergovernmental Relations', *International Social Science Journal*, 53 (2001): 154; Alison Vivian, Miriam Jorgensen, Alexander Reilly, Mark McMillan, Cosima McRae and John McMinn, 230.

90. Section 35(1) does not confer any new, substantive rights. It gives Constitutional status to Indigenous rights that already exist, or which can be proven in future to exist. It puts the burden on Indigenous peoples to prove that the rights they claim against the Crown do already exist. The legal test for this is set out by the Supreme Court in *Van der Peet* (1996) 2 SCR 507. The Court held that only activities and practices that Indigenous people engaged in prior to contact with Europeans (although pre-contact practices and activities can have evolved since pre-contact times), and which remain a distinctive part of the culture, are capable of recognition as Indigenous rights. See Richard Stacey, 'The Dilemma of Indigenous Self-Government in Canada: Indigenous Rights and Canadian Federalism' (2018) 46 *Federal Law Review* 670.

91. *Royal Commission on Aboriginal Peoples* (Canada, Final Report, October 1996) 240.

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

93 *Coe v The Commonwealth* (1979) 53 ALJR 403 (Gibbs J) at 128 – 129; *Walker v NSW* (1993) 182 CLR 45 (Mason CJ) at 49-50; *Wik Peoples v Queensland* (1996) 187 CLR 1 (Kirby J) at 214; Yorta Yorta v Vic (2002) 214 CLR 422 at 443.

Chapter Three: A Treaty-Making Framework for the Northern Territory

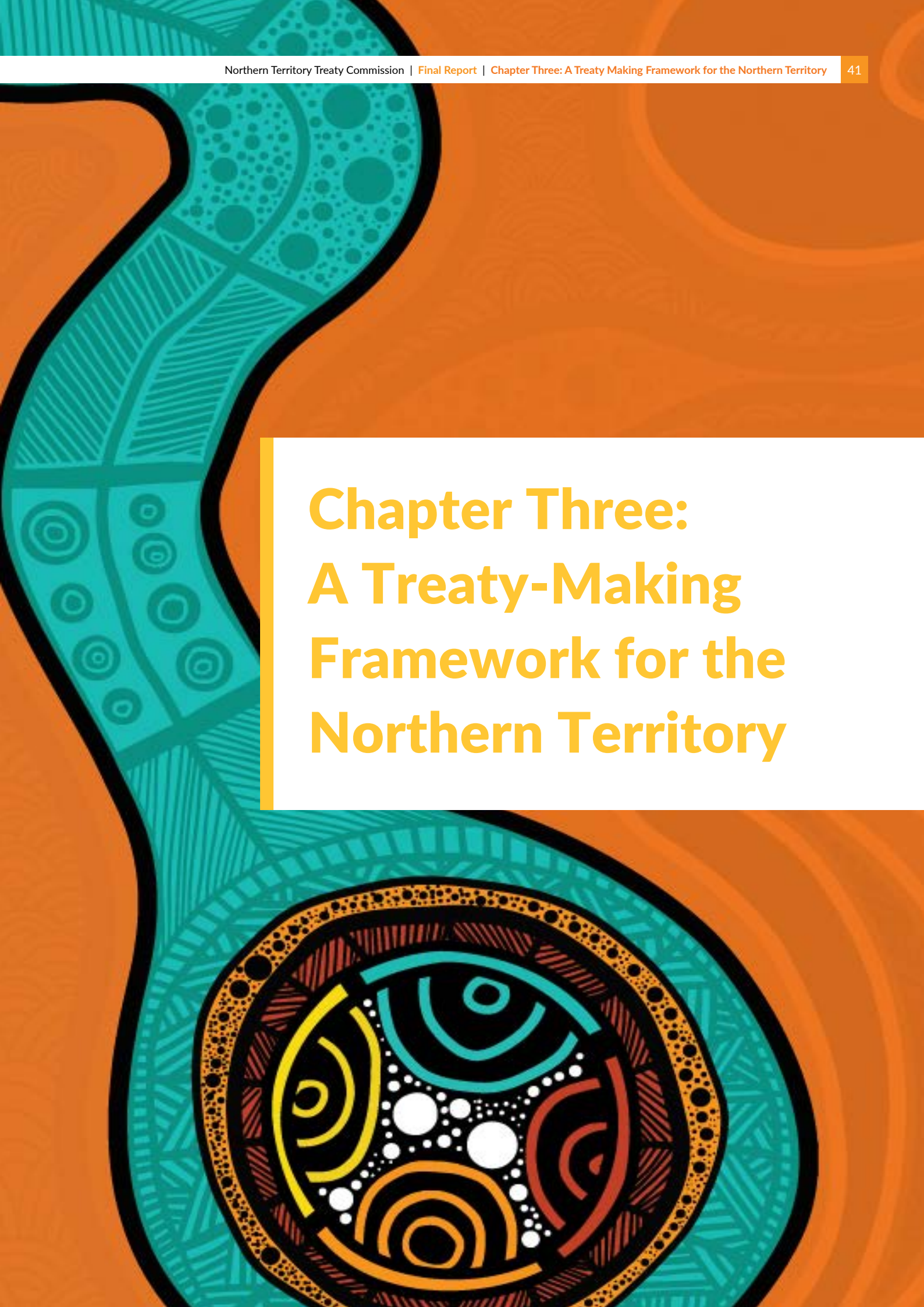
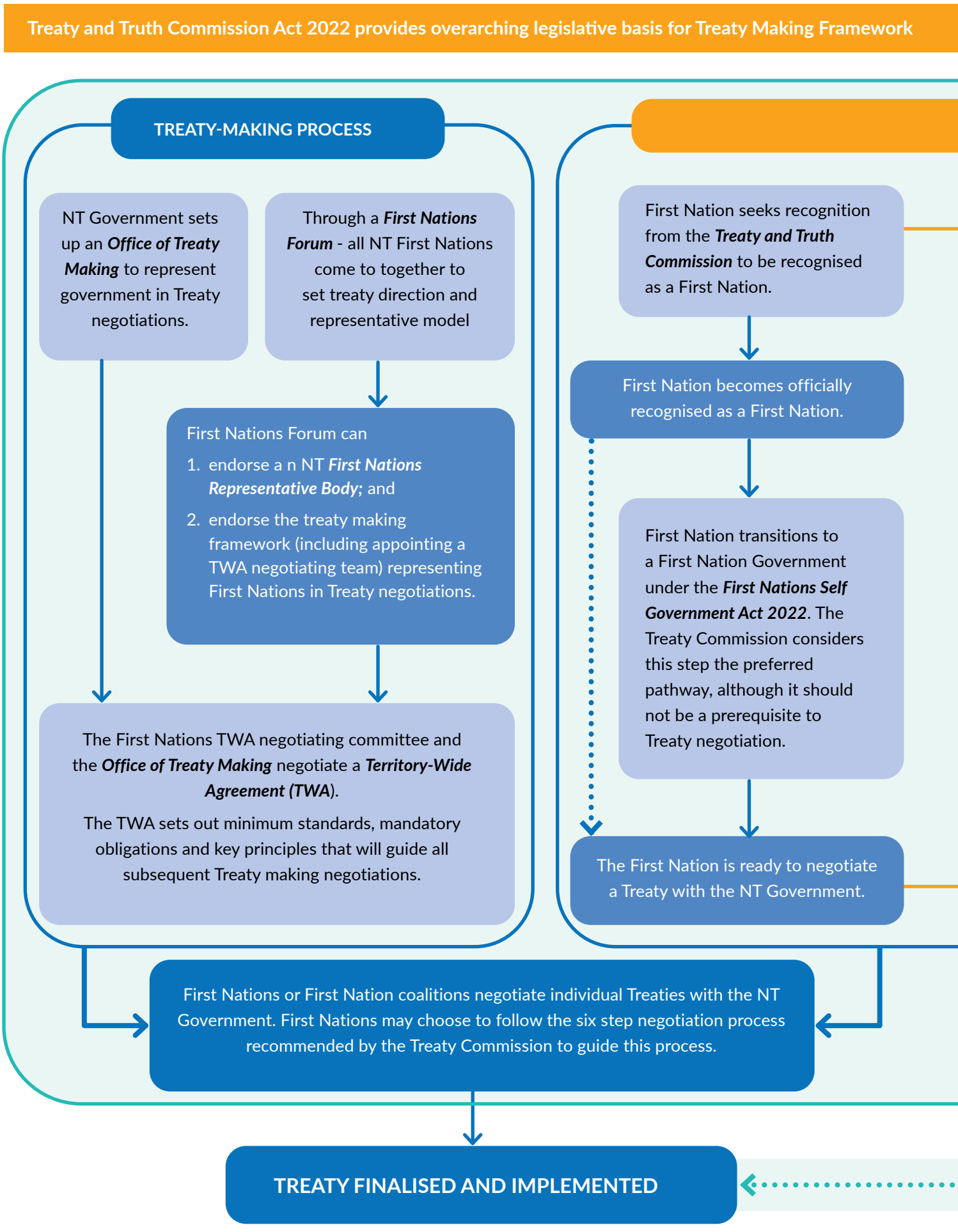


Diagram A: The Treaty-Making Framework



FIRST NATION SELF GOVERNMENT PROCESS

The ***First Nation Self Government Act 2022*** (enables the transition to First Nation self government in non municipal areas.

Amendments to the ***Local Government Act 2019*** support the FNSGA and provide greater opportunity for First Nations decision making in municipal areas

Treaty and Truth Commission is set up to support the Treaty negotiation process. The Commission has two functions:

1. **Truth Telling** – Recording the stories of historical and current injustices to ensure the Treaty process is informed by mistakes of the past.
2. **Treaty Support** – Supporting:
    - the establishment of the First Nations Forum
    - First Nations to move towards self-government
    - The Territory-Wide Agreement process
    - Treaty negotiation processes
    - Dispute resolution
    - Capacity-building

During Treaty implementation, dispute resolution is managed by an ***Aboriginal Ombudsman*** and a ***NT Treaty Tribunal***.

The previous chapter set out core principles that must underpin Treaty negotiations in the NT. This chapter sets out a process by which these principles can be practically operationalised through a pathway to Treaty that is supported by independent mechanisms and targeted legislative reform.

The below chapter describes each component of the model in detail.

3.1 - A Pathway to Treaty

The first step to any Treaty negotiation is ensuring Aboriginal Territorians provide a mandate to commence Treaty negotiations in the NT. It is proposed that this mandate is sought from a First Nations Forum.

Seeking a Mandate and Endorsing a Negotiating Committee through the First Nations Forum

It is proposed that a First Nations Forum would act as a mechanism through which Aboriginal Territorians can endorse a Treaty model and decide how First Nations should be represented politically, including the negotiation of a Territory-Wide Agreement. Membership of the Forum may comprise, but is not limited to, members of the Land Councils, Aboriginal Peak Organisations NT, and suitable First Nations local representative bodies, such as Larrakia Nation Aboriginal Corporation, Lhere Artepe Aboriginal Corporation, and other First Nations representative bodies from across the NT. Appropriate local and regional representation would be sought to ensure the Forum is genuinely representative.

The Forum would act as the primary endorsement body in regards to:

- Endorsing the proposed Treaty-Making Framework at **Diagram A.**
- Deciding upon, and endorsing, the creation, membership, functions and form of a *First Nations Representative Body for the NT*
- Deciding upon, and endorsing, a negotiating committee to represent First Nations in negotiation of a Territory-Wide Agreement with the NT Government and, possibly the Federal Government (noting this may or may not be the *First Nations Representative Body*)

First Nations Representative Body

A First Nations Representative Body (the Representative Body) would be a body tasked with engagement with the Legislative Assembly in relation to laws and policies affecting the rights of Aboriginal Territorians. The Representative Body could be established or endorsed by NT legislation which could confer upon it delegated functions and powers.

This Representative Body could take many forms - deciding on the preferred form of representation is a matter for endorsement by the *First Nations Forum*. In the context of Treaty, it may be the case that the Representative Body (or a sub-committee) is chosen as the preferred negotiator to represent First Nations in Territory-wide Agreement negotiations with the Governments. Again, this would be a decision for the First Nations Forum.

Delivery of a Territory-Wide Agreement

Once the First Nations Forum has endorsed the Treaty-Making Framework and agreed upon a First Nations negotiating committee, the next step will be for the First Nations of the NT and the NT Government to negotiate a *Territory-Wide Agreement* (TWA).

As noted in Chapter Two, the NT Treaty process must allow for the negotiation of many individual Treaties between NT Government and First Nations (or coalitions of First Nations). In order to establish the 'rules of the game' for these individual Treaties, it is proposed that the NT Government and the

agreed First Nations negotiating committee first sign a TWA.

The TWA will be a critical platform from which all subsequent treaty negotiations will occur. It will act as an overarching agreement between the NT Government and First Nations from across the Territory, establishing the broad scope and contents, minimum standards and expectations, key principles and processes, and mandatory terms and obligations necessary for any subsequent Treaty-making in the NT. Far from a symbolic gesture, the TWA will provide a baseline that holds Treaty parties to account and ensures all future Treaty processes are First Nations-based, human rights-based, and self-government-based.

The structure and content of a TWA would not diminish the sovereignty, self-determination or interests of any individual First Nation. Rather, the TWA will support First Nations to enter into a Treaty process that upholds their rights and interests.[94] Further, the existence of a TWA would strengthen the First Nations' negotiating capacity by enabling a process of collective bargaining in relation to the broad policy issues that are understood to be impediments or, on the other hand, essential, to First Nations self-determination. First Nations would be able to draw on the shared positions and common priorities outlined in the TWA to improve their bargaining position and exercise significant political authority throughout the negotiation of individual Treaties.

The Commission view is that the TWA or appropriate parts thereof could be legislated by amendment to the proposed Treaty and Truth Commission Act and would have legal effect once executed. Properly realised, the TWA would carry significant weight as a collective position of First Nations and the NT Government regarding the acceptable minimum standards for NT treaty negotiation. It would therefore deliver and signal a degree of political and moral certainty that is generally not achieved through normal Parliamentary legislative processes.

It is vital that any TWA that is concluded is capable of leading to a systematic transfer of power from government to First Nations. If a proposed TWA is not capable of eventually delivering the substantive outcomes that are material to modern treaties, it should not be endorsed.

Suggested TWA Structure

The idea of negotiating a TWA comes from other contexts where 'Framework Agreements' and 'Umbrella Agreements' have been used to guide Treaty negotiations. The difference between these two forms of agreement can be seen in the following examples:

Yukon Umbrella Final Agreement – The Yukon Umbrella Final Agreement negotiation process began in 1973 and was ultimately signed in 1990 by the Council of Yukon First Nations, the Government of Canada and the Yukon Territorial Government.[95] It is an overarching political agreement that provides a framework under which each of the 14 Yukon First Nations could negotiate a settlement agreement.[96] The Yukon Umbrella Final Agreement contains 28 Chapters substantively addressing a wide-range of matters, including eligibility and enrolment; rights relating to land, including management, development and land-use planning; heritage; natural resources; financial compensation; taxation; economic management; self-government, and; dispute resolution. The Yukon Umbrella Final Agreement is not itself legally binding, but is given legal effect when contained in individual First Nation Treaties.

Victoria Framework Agreements– The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) includes provisions to develop a negotiation framework that sets an agenda for Treaty negotiations across the State. This Treaty negotiation framework will act as the broad rules governing all subsequent negotiations across the State. Section 33 of the Act states that treaty negotiations 'must

not commence before the treaty negotiation framework is agreed to'. Section 34 requires that treaty negotiations 'be conducted in accordance with the treaty negotiation framework', a point that highlights the importance of the framework to shaping the negotiation process State-wide. The Victorian negotiation framework will not set out in detail every matter that might be contemplated in the course of negotiations. It will, however, establish key minimum rules and broad standards and expectations to govern the process. The fact that it must be agreed to by the Aboriginal Representative Body (the body responsible for representing Traditional Owners and Aboriginal Victorians) and the State only after the Treaty and Truth Commission 'umpire' has been established means that it will carry political significance. Part 3 of the Victorian Act sets out 'guiding principles' for the Treaty process, including matters relating to First Nations' right to self-determination, ensuring fairness and equality in the Treaty process; requirements for parties to work together in good faith; advance a Treaty process that provides material benefit for Traditional Owners and Aboriginal Victorians and promoted reconciliation, and for parties to act with transparency and accountability.

As can be seen from the above examples, an Umbrella Agreement is a comprehensive political agreement that forms the substantive basis of all individual First Nation Treaties. Fuller, more specific rights and interests are negotiated in subsequent Treaty processes on top of those established by the Umbrella Agreement. In contrast, a Framework Agreement is simpler and more general in nature. It is not a comprehensive agreement but rather is a general, simple agreement that commits parties to further negotiations to address substantive matters.

Whether the NT TWA takes the form of an Umbrella Agreement or Framework Agreement is ultimately dependent on the outcomes of negotiations between the NT Government and the First Nations negotiating committee. However, the Treaty Commission proposes a Framework Agreement as the preferred model. This approach recognises that, whilst an overarching TWA is required to guide Treaty negotiations, the detailed aspects of individual Treaties will likely differ markedly between First Nations groups and are, therefore, a matter to be dealt with through individual Treaty negotiations.

Suggested TWA Contents

Treaties between First Nations and the governments of States or Territories founded on Aboriginal dispossession must function to correct historical injustices and settle a new relationship for the future. The contents of a TWA should therefore reflect these important functions and set a baseline for First Nations to negotiate a new relationship with government through a First Nations-based, human rights-based and self-government-based approach.

The TWA could include:

- Acknowledgement that the First Nations of the NT have never ceded their sovereignty;
- Acknowledgement that the colonisation of the NT occurred without consent or any regard to the status of First Nations as free self-governing peoples;
- A statement of the equal standing of the parties as well as recognition of the standing of First Nations as distinct political communities;
- Recognition of First Nations' right to self-determination, including commitment to empower First Nations with substantive decision-making and control that amounts to self-government over traditional estates, where that is sought;
- Commitment to provide substantive reparations for material loss and human damage;
- Agreement that parties will negotiate any and all subsequent agreements with each other in good faith, and that the terms of their future relationship will be on a basis of equality and

mutual political recognition;

- Clearly defined key principles and procedural standards for negotiation. The parties must recognise each other and participate in negotiations based on complete equality;
- Agreement in relation to processes for dispute resolution, including mediation and arbitration;
- Commitment that all rights, interests, immunities, obligations, and processes materially reflect, as a minimum, the standards contained in the UNDRIP, and where relevant, those set out in the Van Boven Principles;
- A formal, comprehensive apology for past wrongs. Such an apology is proof of good faith and, on the occasion of striking a new relationship for the future, a comprehensive apology for past wrongs is of great significance. The formulation of the scope and terms of the apology should be participatory in nature;
- Provisions relating to outcomes that are important to all First Nations people across the NT This could include general agreement relating to citizenship; culture, language and heritage, including sacred site protection; natural resource and environmental management and protection; education; health; housing; justice, corrections and child protection; economic development; financial relationships with government; business and employment; land-use planning and other matters relating to land, including transfers, appropriation and general land-use, as well as rights and interests relating to native title, the Aboriginal Land Rights Act, Town Camps, parks and reserves, pastoral leases; hunting, fishing and other matters; and
- Protections for the rights of all First Nations people resident and visiting the NT. This might include guarantees of recognition as a First Nation person, access to services, programs and supports, and membership of community. In this way, First Nations people who have been disconnected from their First Nation (through Stolen Generations or other means) or belong to First Nations outside the NT are cared for and their presence and contributions valued and secured

Key TWA Negotiators

The TWA must fairly and legitimately reflect the interests and priorities of First Nations across the NT. The First Nations negotiating committee endorsed by the First Nations Forum will be involved as a principal negotiator and will represent First Nations in TWA negotiations.

Experiences in Aotearoa New Zealand has shown that Government must also be adequately represented in negotiations and must be capable of negotiating in a capacity that reflects the solemnity, transformational ambition, and importance of the treaty-process. Drawing on the Te Arawhiti (Office for Māori Crown Relations),[97] it is proposed that the *Office of First Nations Treaty-Making* (OTM) be established to act as the lead NT Government negotiator in Treaty processes. It is critical that the OTM be established with substantive capacity to improve government and public service competence and to prepare for and appropriately lead the NT Government in treaty negotiations.

The OTM will be a stand-alone Statutory Authority or NT Government departmental body. The OTM's primary role will be to coordinate all NT Government responses to Treaty-making and, once Treaties are settled, will ensure implementation is done in good faith. It is envisaged this work would include:

- Leading government Treaty negotiations under direction of the Minister responsible for Treaty negotiations;
- Ensuring the government meets all its Treaty commitments to the process and implementation and does so in good faith and in a timely manner;
- Negotiating funding with other governments;
- Developing engagement, co-design and partnerships that ensure agencies create the best solutions across social, environmental, cultural and economic development;
- Ensuring the public sector can work with First nations in a respectful and culturally competent

manner, including:

- Developing and using formal competency frameworks assessing and accrediting capacity;
- Constantly reinforce and support formal change management across the NT public service;
- Identifying existing legislation that may be inconsistent with the Treaty path and taking steps to resolve these inconsistencies; and
- Ensuring that public sector agencies' engagement with First Nations is meaningful and always in line with agreed Treaty negotiating principles.

Summary: Delivery of a TWA

In order to commence negotiation of a TWA under this proposal First Nations will need to have collectively endorsed the proposed Treaty-Making Framework, and have agreed on a First Nations negotiating committee. It would be preferable from the Commission's view that there be some agreement as to the Representative Body and that this body is established to oversee the process, but only the First Nations can decide that matter.

The overarching contents, minimum standards, resourcing and expectations of Treaty-making in the NT will have been agreed between First Nations and the government or governments through the delivery of a TWA.

Developing a Process for First Nations to Become Treaty-Ready

The previous section of this Report sets of the groundwork for Treaty negotiations with individual or coalition First Nations. However, while that work is being carried out First Nations must be supported to gain official recognition as First Nations and transition to a First Nation Government.

Diagram B outlines a proposed pathway to First Nations self-government. It is envisaged this process will occur simultaneously to the First Nations Forum and TWA negotiations outlined in the previous section:

Diagram B

Step 1: First Nation nominates itself for recognition as a *First Nation under the Treaty and Truth Commission Act 2022*

↓

Step 2: First Nation becomes officially recognised as a First Nation.

↓

Step 3 (First Nation engages in nation building and treaty readiness work (including transitions to a First Nation Government under the *First Nations Self-Government Act* where offered and accepted)

↓

Step 4: At this stage, the First Nation is now ready to negotiate a Treaty with the NT Government.

The key legislative instruments underpinning this model – namely, the T*reaty and Truth Commission Act 2022* and the *First Nations Self-Government Act* – will be discussed in Section 3.3 of this Report.

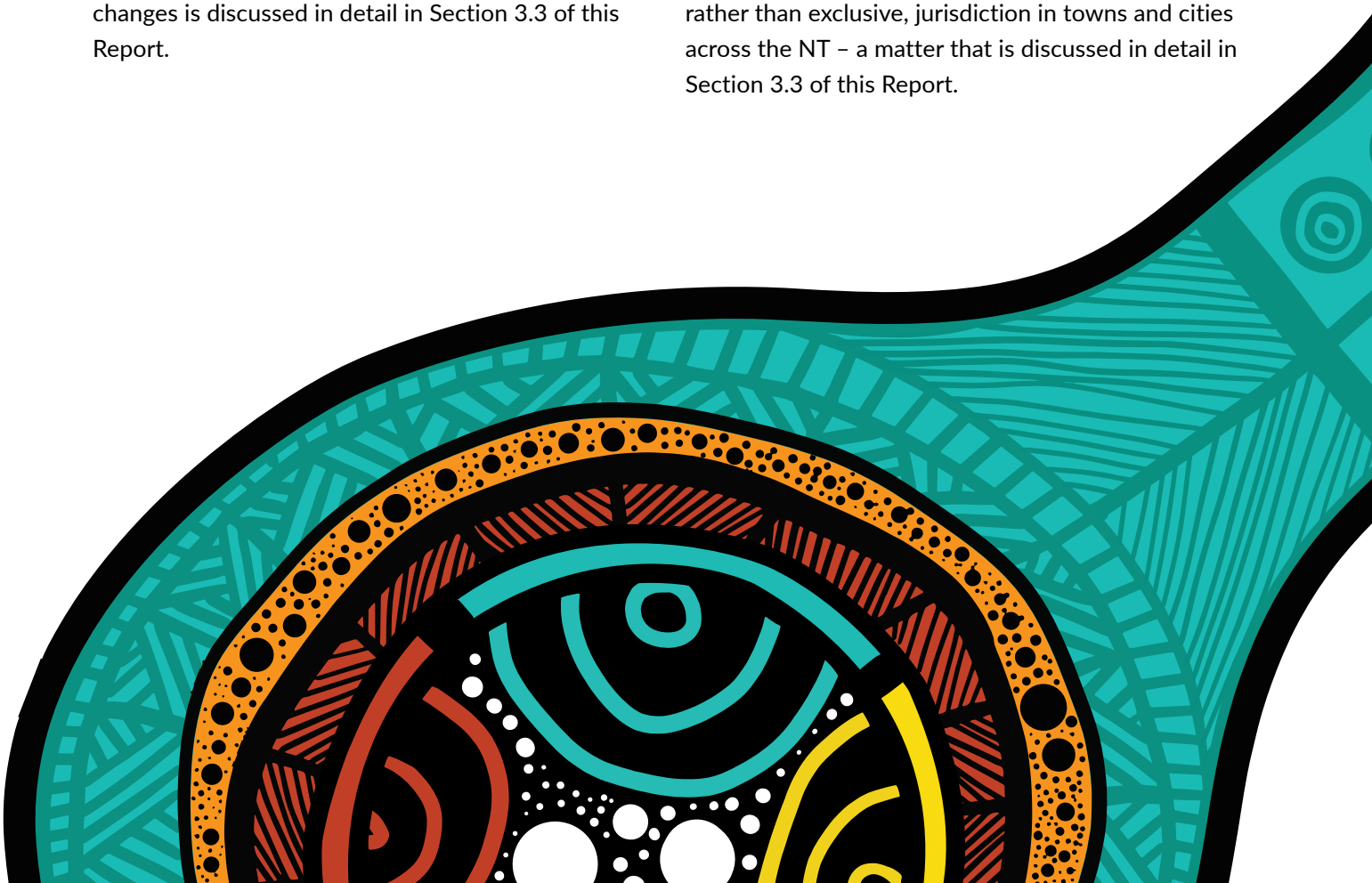
Section 2.3 of this Report proposed a model of self-government whereby once a First Nation Government has been registered pursuant to processes set out in the *First Nations Self-Government Act*, it should become a local government authority for its traditional estate. It is envisaged this system of First Nations self-government would develop alongside Treaty negotiations and would involve the transformation of the local government system, principally in non-municipal areas. Precisely how this important goal is realised should be determined as part of negotiations for a TWA, at the *First Nations Forum*, and by consultations and negotiations conducted as part of the work of the *Treaty and Truth Commission*.[98] However, a proposed two-stage model is outlined for consideration below.

Stage 1 – Pre-Treaty

First Nation Governments are established as local government authorities in all non-municipal areas of the NT (i.e. all areas of the NT except Darwin, Palmerston, Litchfield, Katherine, Tennant Creek and Alice Springs). First Nation Governments would operate in the local government jurisdiction in these non-municipal areas according to the proposed *First Nation Self-Government Act*, which would support the gradual expansion of First Nation governing authority and would replace the current *Local Government Act 2019* (LGA) in non-municipal areas only. Depending on negotiations, we propose that Stage 1 should also involve amending the LGA so that it progressively reduces its areas of operation with the view that it would eventually only have operative effect in municipal areas. The LGA would also make provision to recognise and confer specific functions and powers upon First Nations people, empowering them with a greater say in municipal governance including, potentially, through reserved seats. The legislative reform required to enact these changes is discussed in detail in Section 3.3 of this Report.

Stage 2 – Post-Treaty

This stage would occur at the conclusion of First Nation Treaties. It would involve expanding the jurisdiction of First Nation Governments to include, subject to treaty negotiations, autonomous law-making power, such as that exercised in British Columbia (**Appendix A** provides an overview of the British Columbia model). First Nation Governments' law-making power would be limited by the Constitution, the general law, and NT and Commonwealth laws. It is proposed that this stage would result in service transfers and the devolution of NT Government responsibilities to First Nation Governments. These matters would be negotiated by First Nation Governments as their capacity and competence expands. Because of the unique considerations in municipal and non-municipal areas, the jurisdiction and powers of First Nation Governments will ultimately be different in municipal and non-municipal areas. This matter will be subject to negotiation but will likely mean that First Nation Governments exercise greater shared, rather than exclusive, jurisdiction in towns and cities across the NT – a matter that is discussed in detail in Section 3.3 of this Report.

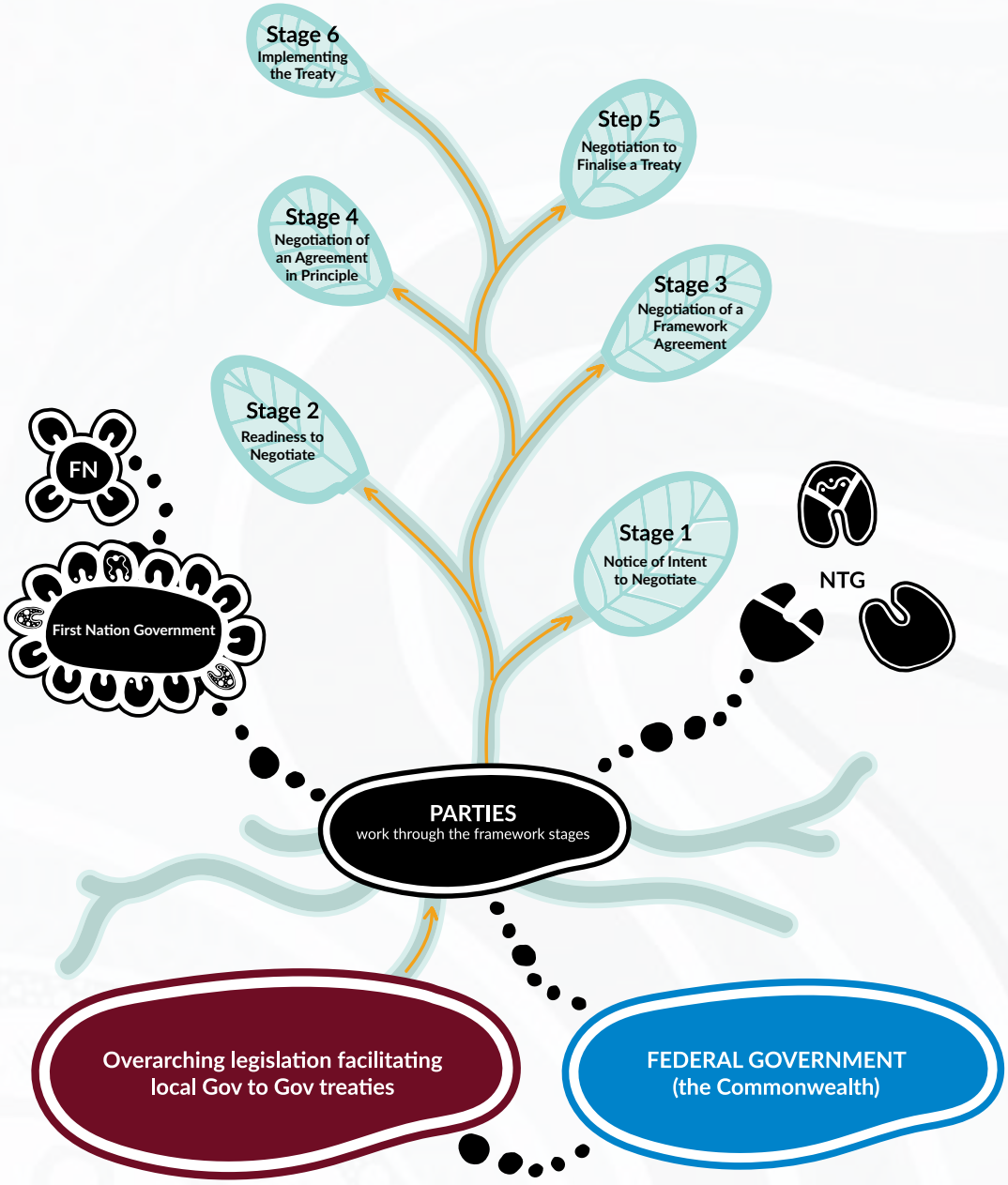


Negotiating Individual Treaties between First Nations and the NT Government

At this stage, it is expected that the NT Government has set up the OTM as its lead negotiating body. The TWA is in place and is providing overarching guidance to Treaty negotiations. First Nation Governments have followed a pathway to self-government and are ready to negotiate a Treaty on the government-to-government footing with NT Government and the Federal Government.

The following six-step process is proposed to guide Treaty negotiations between First Nation Governments and the NT Government. This draws heavily on the British Columbia Treaty Commission process, outlined at **Appendix A**.

Diagram C: NT Treaty Negotiating Model



Step 1: Notice of Intent to Negotiate (NIN) submitted by the First Nation

This step is a pre-requisite to a First Nation Government beginning a treaty negotiation. The purpose of this step is to:

- formalise the First Nation Government's intentions
- describe those intentions, including plans to progress along the negotiation steps.

A NIN may be submitted to the Treaty and Truth Commission (see Section 3.2 of this Report) at any time after a First Nation Government gains legal status.

Step 2: Readiness to Negotiate

This is the first step within a treaty negotiation and an assessment of both parties' readiness will be made by the Treaty and Truth Commission. The Treaty and Truth Commission will create a checklist of matters that need to be demonstrated by both the NT Government and the First Nation Government. Adherence to this process will determine when negotiations can progress to step 3. There must be equality of standing between the parties in the negotiating process.

Step 3: Negotiation of a Framework Agreement

The framework agreement is the 'table of contents' of the treaty. During this step, the parties need to agree on the subjects of negotiation. While there are likely to be some compulsory inclusions in all treaties particularly arising from the TWA, nothing should be off the table unless agreed.

As aforementioned, it is anticipated that the TWA could form the basis of individual Treaties' Framework Agreements. First Nations could then negotiate more specific terms or standards according to their local or regional priorities.

Step 4: Negotiation of an Agreement in Principle

Substantive treaty negotiations begin and the parties discuss the elements in their Framework Agreement in detail. The goal in this process is to reach agreement on each topic that will form the basis of the Treaty. The Agreement in Principle also lays the groundwork for implementing the Treaty. Based on international experience, this is one of the most time intensive steps and can take many years.

The TWA, and the First Nation Government transition model discussed previously, may help to inform negotiations at this step. However, it is highly likely that issues will arise have broad implications that should be negotiated on a Territory-wide basis. In such circumstances it may be necessary to review and amend the TWA.

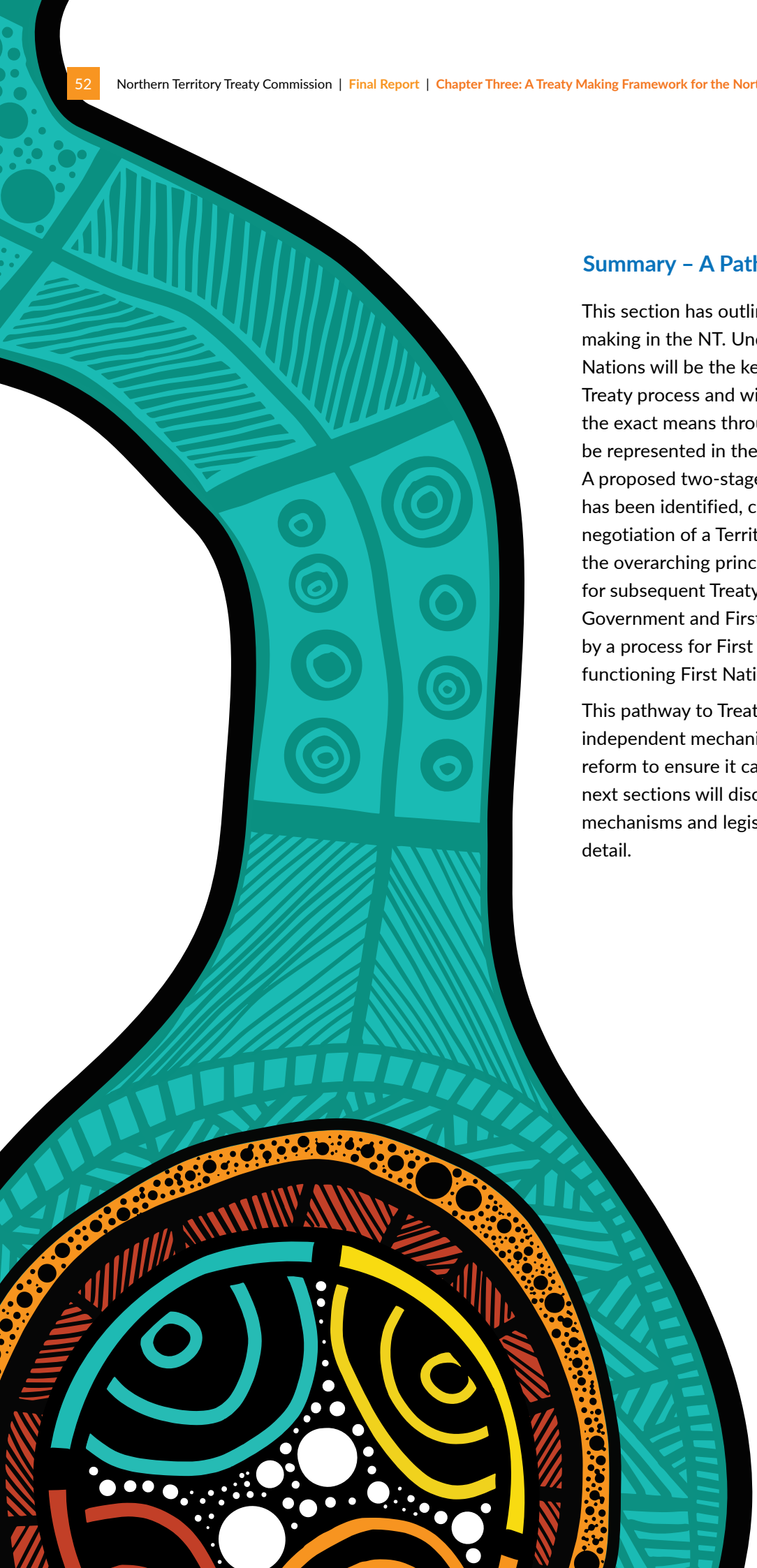
Step 5: Negotiation to Finalise a Treaty

The parties attempt to resolve all technical and legal issues so that the Treaty can be ratified and signed by the parties. Other key considerations include timing, funding, and each party's responsibilities under the treaty. This step concludes when a First Nation's citizens vote on, and approve, the Treaty.

A successful vote should require more than a majority. For example, in British Columbia, 50% plus-one, of all those on the list of eligible voters must vote to ratify both the Final Agreement and the Constitution. This is a higher standard than ratification by a majority vote who vote on the day and so enhances the mandate.

Step 6: Implementing the Treaty

As each Treaty will be unique, implementing it will also be unique and have differing timeframes and milestones. The national and international Treaty-making examples discussed in Chapter One show that implementation is likely to take some time.



Summary – A Pathway to Treaty

This section has outlined a path forward for Treaty-making in the NT. Under this proposed model, First Nations will be the key endorser at all stages of the Treaty process and will have the space to decide the exact means through which they would like to be represented in the Treaty negotiation process. A proposed two-stage model to Treaty formation has been identified, characterised by the initial negotiation of a Territory-Wide Agreement to guide the overarching principles and minimum standards for subsequent Treaty negotiations between the NT Government and First Nations. This is underpinned by a process for First Nations to transition to a functioning First Nation Government.

This pathway to Treaty requires the support of independent mechanisms and targeted legislative reform to ensure it can be fully realised. The next sections will discuss these independent mechanisms and legislative reforms in greater detail.

3.2 - Independent Mechanisms Supporting the Treaty Process

First Nations will require support at every stage of the proposed Treaty process to ensure they are resourced and empowered to fully engage. It is proposed that this support is provided through the creation of three independent mechanisms – a Treaty and Truth Commission to provide support prior to Treaty and during the Treaty negotiation stages; and an Aboriginal Ombudsman and NT Treaty Tribunal to provide dispute resolution support post-Treaty development.

Treaty and Truth Commission

The Treaty and Truth Commission (TTC) will be a Statutory Authority created by the *Treaty and Truth Commission Act 2022* and expanded by amendments inserted into that act upon the execution of the TWA. It is intended the TTC act as an independent broker providing concerted support to First Nations people at every stage before and during Treaty negotiations, and generally driving the process forward.

Whilst contained under one statutory body, the TTC will serve two distinct functions:

1. ***Truth-Telling:*** The TTC will ensure the early collection and preservation of evidence important to truth-telling across the NT, and develop truth-telling resources to support the Treaty process. This may include, but is not limited to:
   - Recording evidence of past injustice from the older generation, including the Stolen Generation
   - Conducting ongoing education and awareness programs, including through school curricula

   This truth-telling work is an imperative step in the overarching Treaty process. As noted in the Barunga Agreement, "successful co-existence between all Territorians (must start) with… hearing about, acknowledging and understanding the consequences of the Northern Territory's history".[99]

   The TTC will provide the appropriate spaces for Aboriginal people to record what has happened to them, ensure Treaty processes recognise the impact of historical injustice on members of the Stolen Generation, and will ensure Treaty negotiators collectively confront the past injustices and move forward in Treaty negotiations in a manner that is informed by the mistakes of the past.

   In the Treaty Commission's report *Towards Truth Telling*, it was argued that a NT Truth Commission need not wait for treaty negotiations to commence and should start whenever practical.[100] Indeed, truth telling should lay the foundations for treaty making, and truths should not be negotiated as other parts of a treaty may be.[101]
2. ***Treaty Support:*** The TTC will also play an invaluable role in practically supporting First Nations prior to and during the Treaty negotiation process. This work may include, but is not limited to:
   - Supporting the establishment of the *First Nations Forum;*
   - Supporting First Nations to apply for formal recognition as First Nations;
   - Developing the criteria and delivering the developmental needs to transition to a First Nation Government under the *First Nations Self-Government Act;*
   - Determining, in partnership with First Nations, when a First Nation is ready to a) transition into a First Nation Government; and b) take on expanded powers of self-government that may be negotiated during treaty negotiations;
   - Proactively assisting First Nation Governments to form, and providing capacity-building support;
   - Facilitating relationships between existing Regional Councils and First Nation Governments when responsibilities are being transferred;
   - Formal acceptance of a First Nation's 'Notice of Intent to Transform', once all legislated criteria have been met;

- Supporting parties to move through each step in the six-step Treaty negotiation process;
- Supporting the First Nations negotiating committee to negotiate the TWA, and ensuring the TWA is developed according to accepted standards;
- Maintaining the momentum for treaty making and facilitating effective project management of negotiations;
- Up until the point a Treaty is signed, facilitating dispute resolution either between the parties, or between First Nation Governments, and mediating where necessary; and
- Making and managing grants to First Nations for:
    i. Capacity building for First Nations to enable them to form and become treaty ready, including in conjunction with third party tertiary institutions providing nation-building and governance support to First Nations engaging in the treaty process
    ii. Costs of running a treaty negotiation on an equality of standing basis
    iii. A mediation process between or within First Nations where there are disputes.

It is proposed that the TTC would have five Aboriginal Commissioners. Three Commissioners would be nominated by Land Councils, one would be nominated by the NT Government and one would be nominated by Aboriginal Peak Organisations NT (APONT). These five Commissioners would elect a full-time Chair, with the remaining four being engaged on a part-time basis. Initial Commissioner appointments would be staggered to lower the risk of wholesale turnover of staff.

To preserve the integrity of the Treaty-Making Framework and to retain the trust of First Nations, it is important that the independence of the TTC from the NT Government is legislated, preserved, and respected. The TTC will be an independent body and represent First Nations interests to the NT Government Minister responsible for progressing Treaties. To avoid actual, or perceived, conflicts of interest, the Minister responsible for the TTC must not be the same as the Minister responsible for the OTM.

Importantly, the TTC will not have a role in implementing Treaties, nor will it be involved in dispute resolution beyond the point at which a Treaty is signed. Dispute resolution post-Treaty negotiations will be managed by the dispute resolution clauses in the Treaty (which ought to include mediation), complaint to an *Aboriginal Ombudsman* or complaint to a *First Nations Treaty Tribunal*.

Aboriginal Ombudsman

Amendment to the Ombudsman Act is suggested to facilitate the creation of an Aboriginal Ombudsman position. It is envisaged the Aboriginal Ombudsman would be expressly responsible for responding to complaints regarding government participation in the Treaty process, but also have a role in receiving and considering any other complaints particularly relating to First Nations people and the government

First Nations will not be required to raise a matter with the Aboriginal Ombudsman prior to progressing it to the First Nations Treaty Tribunal. However, the Aboriginal Ombudsman will provide an alternative, potentially less costly avenue to resolving disputes.

The approach in NSW offers a blueprint for standing up an Aboriginal Ombudsman in the NT. In NSW, the Deputy Ombudsman (Aboriginal Programs) leads the Aboriginal Programs Branch and monitors and assesses prescribed Aboriginal programs under the NSW Ombudsman Act.[102] The Deputy Ombudsman (Aboriginal Programs) also engages with stakeholders to promote improvements in the delivery of services and programs to Aboriginal people and communities,[103] including monitoring whether the NSW Government is delivering on its

commitments to[104]:

- Advancing the dialogue on healing with Aboriginal communities;
- Aboriginal Language and Culture Nests;
- Local Decision Making;
- Aboriginal Economic Prosperity Framework (a statewide initiative containing targets for government commitments relating to jobs and employment, education and skills, and economic agency);
- Solution Brokerage (enables engagement with NSW Government agencies to identify and implement practical solutions to significant issues for Aboriginal communities);
- Opportunity Hubs providing mentoring and education and training pathways in schools; and
- Connected Communities program (establishes schools as service hubs and promotes school-community partnership approaches to improve Aboriginal education outcomes).

The creation of an Aboriginal Ombudsman position will be important to ensuring a fair and equal Treaty process. International treaty negotiation experiences, as well as domestic experiences negotiating Aboriginal Land Use Agreements with government, has shown that government parties have not always behaved in good faith when negotiating with First Nations. Whilst it is envisaged that many Treaty disputes would likely be resolved through more informal dispute resolution processes, it is important that the First Nations negotiating committee is supported by a formal oversight mechanism to deal with complaints and disputes.

Serious disputes may require a response beyond the scope of an Aboriginal Ombudsman. It is envisaged these matters would progress to a *First Nations Treaty Tribunal*, described in detail below.

First Nations Treaty Tribunal

The First Nations Treaty Tribunal will deal with disputes:

- at any time, in relation to First Nation membership and boundary; and
- after Treaties are executed, in relation to Treaty performance.

Whilst it is envisaged Treaties will include clauses that encourage dispute resolution through informal talks and, where necessary, through formal mediation, parties to the Treaty will be able to apply to the Treaty Tribunal when no resolution can be found. As an independent body, the Tribunal will have powers to:

- Conciliate and arbitrate disputes between parties during Treaty implementation or post-Treaty implementation[105];
- Make findings of fact;
- Make recommendations for dispute resolution; and
- Make determinative findings.

3.3 - Legislative Reforms

Significant legislative reform will be necessary to ensure the Treaty-Making Framework set out in this Report has appropriate legislative authority.

The following section explores these considerations in detail and sets out a proposed means by which to enshrine Treaty-making into the NT's legislative landscape, defined by the following three key legislative changes:

- Introduction of a *Treaty and Truth Commission Act 2022;*
- Introduction of a *First Nations Self-Government Act*; and
- Amendment of the *Local Government Act 2019*.

Consideration of additional amendments to a swathe of Commonwealth legislation should also be considered as a means to safeguarding Treaty negotiations by ensuring they fit within the NT's legislative parameters as a Territory of the Commonwealth.

Treaty and Truth Commission Act 2022

The *Treaty and Truth Commission Act 2022* (TTC Act) will be the overarching legislation underpinning the majority of the Treaty-making components outlined in this Report. It will act as the legislative basis for three key Treaty processes – negotiating a TWA, setting up a TTC, and recognising First Nations.

Firstly, the TTC Act will provide the legislative basis through which a TWA can be negotiated. Baseline negotiation rules should be set out in the TTC Act, with the intention that these matters will be expanded upon as part of the process of developing the TWA. The TTC Act will establish minimum standards that govern:

- The manner in which negotiations will be conducted, including what behaviours and strategies are acceptable;
- The content and scope of matters that will be subject to TWA Treaty negotiations; and
- Compliance and recourse for parties that depart from agreed negotiation standards.

Secondly, the TTC Act will contain specific provisions setting up a TTC and empowering this body to facilitate a truth-telling process in the NT. All processes, functions and responsibilities of the TTC would be detailed in the TTC Act.

Finally, the TTC Act will provide the legislative space for First Nations to be formally recognised in NT law. An appendix to the TTC Act will include a list of all formally recognised First Nations in the NT. First Nations, with the support of the TTC, will apply to be formally listed as a First Nation in the TTC Act – a necessary precursor to being considered eligible to begin Treaty negotiations with the NT Government.

It is also envisaged the TTC would adopt key preambular principles and Articles of the UNDRIP important to its scope and function, including incorporation of Articles 3-5 (relating to self-determination) and Article 19 (relating to free, prior and informed consent).

First Nations Self-Government Act

Diagram B (see Section 3.1) showed a proposed path for First Nations to become First Nation Governments prior to engaging in Treaty negotiations with the NT Government. The *First Nations Self-Government Act* (FNSGA) provides the legislative underpinning enabling this to occur in non-municipal areas. It is envisaged this legislation would be developed by the TTC.

The FNSGA will set out the process and criteria that First Nations will need to meet in order to achieve official legal status as a First Nation Government. This criteria may include:

- Establishing a formal working governing body with a formal Constitution
- Establishing an agreed process for determining citizenship, noting that it will be up to each First Nation to determine its own method of conferring citizenship and different First Nations may select different methods. This process should include consideration of minority groups, including resident non-Traditional Owners and individuals impacted by the Stolen Generation

- Ensuring that land tenure is secure and not subject to substantive disputes
- Ensuring the First Nation borders are generally settled and not subject to substantive disputes

Side agreements between First Nations, clan groups or other parties that address the above issues may be used in conjunction with the FNSGA to support a First Nation's request to transition to a First Nation Government.

The scope of authority of each First Nation Government would also be set out in the FNSGA. In particular, the FNSGA would provide the legislative basis through which First Nation Governments could be established as local government authorities. A FNSGA would empower and encourage First Nation Governments to take on responsibilities for setting regional policy and controlling service delivery within estate boundaries according to the priorities and aspirations of First Nations peoples. Importantly, the FNSGA would not mandate a self-government process. Rather, it would provide the legislative underpinning for First Nations to take on self-government responsibility gradually in line with their developing capacity and confidence.

A FNSGA would respect cultural geographies, empower customary decision-making and representation processes and provide sufficient scale to make sure service delivery and administration are sustainable. Because a FNSGA would principally seek to empower the expanded governing authority of First Nations, it would be generally flexible and adaptive to community needs and should be compatible with First Nations customs that are considered important and relevant to First Nations groups. For example, a FNSGA should recognise and give effect to customary modes of decision-making, representation and electoral boundaries. In particular, a FNSGA should clearly recognise First Nations peoples' traditional relationship to lands and waters across the NT; the harm caused by the dispossession of them, including the disruption of First Nation governance; and the need to respect and promote the inherent rights of First Nations peoples, including rights to practise their own customs and to govern themselves according to relevant institutions within traditional estates. The ALRA already provides a strong foundation for the recognition of these interests in relation to rights conferred by traditional ownership, pursuant to section 3 of the Act, as well as providing for customary decision-making in relation to consent for matters affecting Aboriginal land, pursuant to section 77A. Governance structures and processes considered by a FNSGA can build on these important foundations.

As well as being informed by ALRA, it will be important that a FNSGA is directly informed by international human rights standards contained in the UNDRIP and other relevant Commonwealth laws impacting non-municipal areas, including the NTA. It is envisaged the FNSGA would also incorporate key preambular principles and Articles set out in the UNDRIP that relate to First Nations self-government, including:

- Articles 3-5 relating to self-determination;
- Article 18 relating to decision-making;
- Article 19 relating to free, prior and informed consent;
- Article 20 relating to the maintenance and development of political, economic and social institutions; and
- Article 31 relating to the maintenance and protection of cultural heritage, traditional knowledge and traditional cultural expressions.

Structures must be flexible and adaptive to the aspirations and priorities of different nations and different regions because there will not be a single, strict blueprint suited to all peoples across the Territory. Space must be made for structures and processes to be adapted to local and regional needs and priorities. Population demographics will inform these structures and processes. In some non-municipal areas, where there are significant non-traditional owner interests or demographics, there may be specific rules for the election and

representation of resident Aboriginal people who are non-traditional owners or other people with historical or residential relationships to a particular area. This would allow these groups to have a voice in local and regional governance. Because it addresses similar matters, the ALRA may provide a useful cue to mechanisms that account for non-traditional owner interests. These arrangements should be developed by and with First Nations peoples according to local and regional priorities, ensuring consistency with relevant Commonwealth laws.[106]

The FNSGA would formally recognise First Nation Governments as regional governing authorities with the full range of powers currently enjoyed by local government. It would therefore be designed to support the gradual expansion of First Nation governing authority and would replace the *Local Government Act 2019* (LGA) in non-municipal areas where a First Nation Government has been registered. Over time, as more and more First Nation Governments are registered across the NT, it is envisaged the FNSGA would expand to operate over all non-municipal areas in the NT. These areas generally comprise Aboriginal land subject to the ALRA, pastoral leases, Community Living Areas (CLAs) excised from pastoral leases, parks, reserves and other freehold tenure as well as areas subject to Native Title. It would take a regional approach to non-municipal government, an important consideration to overcome issues of scale and service delivery. Importantly, the FNSGA would ensure there are effective mechanisms within the structure of First Nation Governments to ensure substantive decision-making at the local level in communities.

Developing and implementing an effective FNSGA such as that suggested will require meaningful consultation, negotiation and engagement with First Nations people and their representative organisations. It is vital that a FNSGA is reflective of the broad needs and interests of First Nations peoples but is also flexible and adaptable to the strengths and limitations or particular issues in different areas. Negotiations to reach a TWA and the First Nations Forum will provide an important opportunity for this. It is expected the TWA would contain agreement in relation to self-government and so could endorse the proposed FNSGA being implemented as part of that Agreement.

As a broad summary, it is envisaged the FNSGA should:

1. Be directly informed by the UNDRIP. The Act should incorporate preambular statements and key rights that might be especially important to its scope, processes, functions and powers, including, Articles 3-5, Articles 18-20 and Article 31
2. Be consistent with and seek to reflect relevant ALRA concepts and provisions, including the recognition of traditional ownership (s3), customary decision-making (s77A), free, prior and informed consent and the consideration of non-traditional owner interests
3. Reflect First Nations customary boundaries and support a First Nations-based approach. This would include the recognition of coalitions of nations in regional partnership, and relevant provision for unique clan-related interests within individual or partnering nations
4. Be informed by, and compatible with, Aboriginal custom and law, enabling customary modes of decision-making, representation and electoral arrangements
5. Be flexible, adaptive, and responsive to community strengths and capacities[107]
6. Include processes for resolving disputes and settling issues
7. Protect Aboriginal cultural information and intellectual property
8. Provide a minimum standard for service delivery and the transfer of assets, which could be delivered to First Nation Governments according to an agreed schedule. In relation to service transfers to First Nation Governments, this would include commitments that First Nation Governments would not be left worse-off than they were before the FNSGA

9. Reflect a balance between local and regional governance, decision-making and administration. There must be capacity for local areas to meaningfully influence regional First Nation Government decision-making. To better realise economies of scale, in relation to administration, where appropriate back-end administrative services may operate at the regional level, or, if necessary, at an even a larger, multi-regional level. Decision-making and governance would be balanced between local and regional levels. This would ensure efficiency, reduce overlap, and improve coordination
10. Exempt First Nation Governments from NT and Commonwealth government procurement requirements, and
11. Provide all tax concessions available to not-for-profit Aboriginal organisations.

In relation to First Nation Governments, the FNSGA should empower them:

1. As local government bodies for the purposes of all Commonwealth and NT Government funding programs.
2. With capacity to levy rates as local government does, including from pastoral leases and mining tenements. These rates should be set at mandatory minimums equal or similar to rates in QLD and WA or be set (within agreed limits) by First Nation Governments. They are currently nominal and are subject to Ministerial discretion – this should not be the case.
3. To provide existing local government functions, as well as the capacity for fuller functions, powers and responsibilities which would be devolved to First Nation Governments over time according to negotiation and agreement with government. These might include, for example, powers over land-use planning, education, health, environmental management, and cultural heritage and sacred site protection.
4. As legal entities capable of entering into contracts and holding and disposing of property.
5. With control over funding allocations, economic development as well as the power to enter into agreements with all tiers of government as well as third parties.[108]
6. With capacity for monitoring, control, and coordination of service delivery.[109]
7. To run businesses.

Local Government Act (LGA) Reform

In municipal areas, such as Darwin, Palmerston, Litchfield, Katherine, Tennant Creek, and Alice Springs, population demographics, settler history, and land tenure issues are different to those in non-municipal areas. We suggest it would therefore not be appropriate for a FNSGA to replace the LGA in these areas. Compared to non-municipal areas in the Territory, where Aboriginal people represent about 85% per cent of the population,[110] populations in municipal areas represent post-colonial society more generally. This means there are various perspectives and interests to consider in relation to governance arrangements. Land tenure in NT towns and cities is also more fragmented than in non-municipal areas, and the ALRA also does not have effect over town or city areas. These matters influence the capacity of a FNSGA to meaningfully operate in municipal areas.

In order to empower First Nations in municipal areas, it is proposed that amendments be made to the LGA to compliment the treaty process and the FNSGA. Four broad amendments are proposed:

1. Acknowledge Traditional Custodians in the LGA
2. Confine the LGA to municipal areas (i.e. Areas in which the FNSGA is not operational)
3. Entrench within the LGA mechanisms providing greater decision-making and representation for First Nations people
4. Incorporating UNDRIP Principles into the LGA

Acknowledging Traditional Custodians

The LGA should be amended to acknowledge Aboriginal peoples as the traditional custodians of the lands and waters on which towns and cities have been developed and recognise the enduring and important obligations Aboriginal people have

to those areas. This should also include recognition that the development of towns and cities has impacted Aboriginal people and their relationships to their traditional Countries, including authority and responsibility for governance and decision-making.

Confining the LGA to Municipal Areas

The LGA could be amended so that it is confined to Darwin, Palmerston, Katherine, Tennant Creek and Alice Springs. This would be an evolving process that would occur over time as more First Nation Governments are recognised under the FNSGA. Each time a First Nation Government is recognised under the FNSGA and replaces the local government body in that particular area, the First Nation Government's geographical area would be removed from the LGA. Over time, the intention would be for the FNSGA to move to cover the entire non-municipal NT and the LGA be confined to municipal locations.

Some First Nation Governments may have traditional estates that include both municipal and non-municipal areas. In this case, there would be scope for interaction between the two models. Although they would have more responsibilities in non-municipal areas, the First Nation Government could, as governing entities representing First Nations, enter into agreements with municipal councils to share jurisdiction and responsibilities for matters in towns and cities where it is important for the First Nation Government to have a greater role.

Entrenching Greater Decision-Making Powers for First Nations in Municipal Areas

Whilst they will not be covered by the FNSGA, it is imperative that First Nations in municipal areas are provided with greater decision-making and representative capacity on local government matters. Amendments to the LGA is required to effect this change.

Representative First Nation seats on municipal councils should be added to the LGA to ensure First Nations have equal decision-making ability. These positions should be paid and have full voting rights on a range of matters relevant to First Nations people. In particular, any discussions on matters relating to the use and enjoyment of land should include mechanisms for First Nations people to influence decision-making. Treaty Commissioner Professor Mick Dodson made clear the fundamental needs for First Nations people to lead decision-making on land matters: "'everything about Aboriginal society is inextricably interwoven with, and connected to, the land. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land... removed from our lands, we are literally removed from ourselves".[111]

First Nations representation on municipal councils could take a number of potential forms. Potential options include:

- Obligations to establish MOUs with First Nation Governments (where appropriate), as mechanisms to formally acknowledge the important relationship Aboriginal people have to lands on which towns and cities have been developed. MOUs could relate to a range of matters in different areas, would have minimum terms and standards informed by the UNDRIP and by a process of good faith negotiation with First Nations peoples. They could also establish clear and legally binding commitments to partnership. MOUs between First Nation Governments and town and city councils would require giving consideration to and involving important existing traditional owner organisations including Lhere Artepe and Larrakia Nation.
- Establish First Nation Government committees. First Nation citizens with appropriate authority (possibly First Nation Government representatives) could be appointed to positions as expert advisors and would sit on committees related to matters determined through negotiation to be of special importance to relevant First Nations. Negotiations for a TWA and further consultations could determine

the matters triggering committee engagement, where appointed First Nations people would have voting power. The Act could set out penalties for failing to engage committees. First Nation Governments could have power to call committee meetings in limited circumstances to set the agenda, or call for a vote on a particular matter. Fundamental to this would be NT Government investing in educating and supporting, where necessary, First Nations about their obligations, powers, and responsibilities under new Act. Such support could be provided through the Treaty and Truth Commission.

- Establish an Office of First Nations in municipal local governments responsible for building cultural capacity and competence of local government. Such an office could be connected to the Office of Treaty-Making at the Territory level. It could also do specialised community development work educating and running programs related to First Nations local issues. Positions would be paid and could involve a small team collaborating with local organisations.
- Create obligations for local governments to establish First Nations wards or reserved seats in municipal areas. Alternatively, this may be achieved by empowering town or city councils to establish these mechanisms, although this option is not preferred. Eligibility for elected representatives of these wards or reserved seats should be for First Nation citizens, and potentially, if it is preferred through a process of negotiation with First Nations, also for Indigenous people resident in a town or city. Only Indigenous people would be able to vote to elect representatives being elected through wards or reserved seats. Wards or reserved seats would not be proportionate to the population but established to recognise the need for municipal council decision-making to represent the unique interests of First Nation peoples in towns and cities. Wards or reserved seats would require gender parity in representation. Any mechanism of this nature would have to be consistent with the *Racial Discrimination Act 1975* (Cth).

Whilst the voices of Traditional Owners must be centred in these amendments, it may be appropriate to also allow for the representation of non-Traditional Owner Aboriginal people who are resident in municipal areas. Such an approach recognises that municipal areas are important service hubs for Aboriginal people from nations near and far, and these perspectives of resident Aboriginal people should therefore also be considered.

Importantly, LGA amendments will need to be considered in a place-based manner. In some municipal areas there may already be strong Aboriginal representation in local government structures, and so such a mechanism may be considered unnecessary or inappropriate.

Incorporate UNDRIP Principles

An opportunity exists to Recognise the importance of the UNDRIP in informing the roles, powers, functions and responsibilities of First Nations people in relation to municipal local government. Such an approach could include the incorporation of UNDRIP preambular statements and key articles into the LGA, for example those relating to self-determination (Articles 3 – 5), into the LGA to support provisions seeking to empower Aboriginal people.

Further insights into the local government landscape in the NT, and its intersection with Treaty, is available at **Appendix F**.

Other Possible Legislative Amendments

Chapter One outlined the need for any Treaty process to work within the legislative parameters of the NT's position as a Territory of the Commonwealth; and noted the need to align the Treaty-Making Framework with Commonwealth legislation. This section provides practical suggestions for engaging the Commonwealth and seeking changes to Commonwealth legislation to facilitate the delivery of a Treaty in the NT.

Commonwealth laws apply in the Territory and bind the courts, judges and people of the Territory, because the Territory forms 'part of the Commonwealth'[112] for the purposes of covering clause 5 of the Constitution. Law making power given to the NT Legislative Assembly by the *Northern Territory Self Government Act 1978* is subordinate to Commonwealth law-making power,[114] which means Territory laws cannot, except in circumstances where they are authorised by Commonwealth laws, expressly or impliedly limit the operation of Commonwealth law.[115]

Aboriginal Land Rights Act (Northern Territory) Act 1976 (ALRA)

Under the ALRA half of the Northern Territory is now Aboriginal land.[116] The ALRA was designed to support and give legislative effect to goals of self-determination that sought to

> *restore to the Aboriginal people of Australia their lost power of self-determination in economic, social, and political affairs.*[117]

In its original form, it sought to compensate Traditional Owners for their losses under colonisation as well as to 'support and protect traditional governance structures by privileging traditional ownership and a tenure designed to reflect Indigenous ways of holding and administering land'.[118] By successfully claiming their traditional land areas back as inalienable freehold title, the ALRA provides Aboriginal Traditional Owners some security and decision-making power in matters affecting Aboriginal land, including economic development and other land uses. The Act was designed so that Aboriginal people are consulted about the use of Aboriginal land; that Aboriginal communities have as much autonomy as possible in running their own affairs, and that they should be free to follow traditional decision-making methods.[119] Although significant reforms to the ALRA since 2004 have generally affected a shift in decision-making power away from traditional owners and towards government,[120] for example, the Commonwealth Government's 2007 NTNER[121] which included unilateral Commonwealth Government intervention in relation to Aboriginal land,[122] the ALRA remains a bedrock of Aboriginal empowerment and decision-making in matters related to land in the NT. It is the most extensive land rights legislation in Australia[123] and is particularly important in a treaty context because it 'attempts to accommodate customary rights of ownership and use of land within a western legal framework'.[124] In this way, the ALRA is a 'uniquely powerful' piece of legislation[125] because it marries complex philosophies of traditional Aboriginal law and culture with Anglo-Australian institutions and administrative procedures.[126] It recognises and protects traditional owners' spiritual relationship with land and provides rights in relation to the exclusive enjoyment of the land, including those related to traditional customs.[127] Because it supports self-determination, informed consent, and the operation of Aboriginal custom and law, the ALRA is closely aligned with key principles underpinning the proposed Treaty model.

As a Commonwealth law, the ALRA creates legal challenges to the exercise of NT government power in relation to Aboriginal land. The NT Legislative Assembly therefore cannot make laws impacting Aboriginal land that are inconsistent with or repugnant to the ALRA. NT Governments also cannot exercise powers conferred by NT laws in a manner inconsistent with or repugnant to the ALRA (or other laws of the Commonwealth).[128] Where this occurs, NT laws, to the extent of any inconsistency, will be invalid for lack of power and the Commonwealth law will prevail.[129]

Sections 73 and 74 of ALRA give space for the NT Legislative Assembly to make laws impacting Aboriginal land. Section 74 permits the general concurrent operation of NT laws relating to Aboriginal land, and states that the ALRA 'does not affect the application to Aboriginal land of a law of the NT to the extent that that law is capable of operating concurrently'.[130] NT laws giving effect

to treaties, or supporting the treaty process, and relevant provisions of those laws, will therefore be valid in relation to Aboriginal land so long as they do not, materially impair, detract, or qualify the rights, obligations, powers, privileges, and immunities created by the ALRA.[131]

Section 73 of the ALRA provides for complementary NT laws over Aboriginal land in relation to matters such as sacred site protection;[132] entry and access to Aboriginal land;[133] the protection, conservation and management of wildlife;[134] and laws regulating the entry of persons into, or controlling fishing or other activities in waters adjoining, Aboriginal land.[135] In the context of treaties, section 73 means NT legislation could give First Nation Governments powers to manage their own sacred sites or to take responsibility for conserving and protecting wildlife. Of course, as with section 74 mentioned above, laws made pursuant to section 73 in relation to Aboriginal land will only have effect if they can be read to operate concurrently with the ALRA, and any other relevant Commonwealth laws, for example, the Environment Protection and Biodiversity Conservation Act 1999 (Cth). It is also worth noting that the ALRA provides the NT with capacity, subject to ministerial approval, to confer limited functions upon Land Councils.[136] With the support of Land Councils and First Nations Territorians, functions could be conferred upon Land Councils to complement the NT treaty process.

So long as the limitations created by the provisions of the ALRA are observed, it creates no material impediment to the negotiation and execution of treaties between the NT Government and any of its First Nations. In fact, the ALRA can play an important role in informing NT treaty legislation and should be seen as a legal platform for treaties, not a barrier to them.

ALRA as a platform for NT Treaties

Although the property interests held by the ALRA's Land Trusts are equivalent to full-ownership and are expressed in terms of Anglo-Australian property law, they found their origins 'in the common spiritual affiliations and spiritual responsibilities of the titleholders'.[137] The ALRA has therefore operated as a legislative bridge between Aboriginal and Anglo-Australian law for nearly 50 years. In 1976 Central Land Council Chair Wenten Rubuntja said that the ALRA was 'your law and my law standing as one. Two different, different laws standing as one'.[138] Treaties must also reflect this important notion. Treaties and related supporting legislation must operate as legal bridges between settler-colonial government and First Nations. They must recognise and enable Aboriginal worldviews, customs, laws, and aspirations and they must affect a substantive transfer of power from government to First Nations in line with aspirations for Aboriginal self-determination and self-government so that jurisdiction across the Territory is more equitably shared. A meaningful treaty process requires the NT Government to recognise and support these important tenets.

NT Governments have generally failed to use the ALRA as a legal footing to better empower Aboriginal peoples. For example, the LGA, which operates over the entire land mass of the NT, including in non-municipal areas where large areas of land are Aboriginal land and where First Nations people comprise up to about 85%, contains no reference to traditional owners or customary modes of decision-making. An opportunity exists to turn this trend around as part of Treaty negotiations, and use ALRA as a platform to help inform and strengthen Treaty discussions.

Potential key elements of ALRA that may be useful in informing the Treaty process in the NT include:

1. ***Culturally Legitimate Decision-Making***- Section 77A of the ALRA enables traditional owners to make decisions and to provide their consent in accordance with customary decision-making practices. There is potential to draw on this drafting to inform the draft of the FNSGA, ensuring that Aboriginal people have adequate basis in legislation to make decisions about the

form and structure of First Nation Governments. This also aligns with rights regarding self-determination, self-government and informed consent as outlined in the UNDRIP.

2. ***Traditional Ownership*** - Beneficiaries of rights and interests under the ALRA are traditional owners who have 'spiritual affiliations' to land. Under ALRA, Land Councils ascertain the wishes of Traditional Owners and instruct the relevant Land Trust to act accordingly. The Treaty process could look to the definitions of Traditional Ownership outlined under ALRA to inform the drafting of a TWA that empowers First Nations with the power to make decisions about their own land.
3. ***Informed Consent*** – Under ALRA, no action can generally be taken in relation to Aboriginal land without the informed consent of Traditional Owners.[139] Treaties and relevant support Treaty legislation – including the TTC Act and FNSGA – must also contain provisions protecting informed consent, and may be informed by ALRA in the manner in which this is drafted.
4. ***Non-Traditional Owner Interests*** - Aboriginal people who are not Traditional Owners, but will be affected by the use of Aboriginal land, have a right to be consulted under ALRA.[140] In relation to self-government and decision-making, and authoritative and representative structures First Nations might want to pursue, the potential roles and interests of people resident within First Nation boundaries who are not traditional owners will be an important consideration. The significance of this matter will vary across the Territory and will ultimately be subject to negotiations in relation to the unique interests and priorities of First Nations. While it will be important to ensure the interests of minority groups are looked after, the ALRA provides a framework that could frame discussions on the matter.

It is important to note that ALRA will have important implications for First Nation Governments when they are attempting to make decisions about the use of Aboriginal land. To gain interests in Aboriginal land, First Nation Governments would first have to enter into section 19 lease agreements with Land Trusts. Recent reforms to the ALRA that have expanded leasing provisions have created opportunities for community-controlled entities to gain interests in Aboriginal land. If supported by Land Councils and First Nations involved in the treaty-process, similar complementary amendments to the ALRA could be made to empower First Nation Governments with leasing and licensing opportunities, which would support the expansion of First Nation governance pursued through the treaty-process.

As Land Trusts cannot exercise their functions in relation to land 'except in accordance with a direction given to it by the Land Council for the area',[141] Land Councils would play a role in facilitating any leasing agreements between Land Trusts and First Nation Governments.[142] Agreement-making of this nature between First Nation Governments and Land Trusts could take various forms, depending on the priorities and aspirations of Aboriginal people across the Territory, and depending on the evolution of the treaty process.

Township Leasing Arrangements

Some townships on Aboriginal land are not controlled by traditional owners because they have been leased to the Commonwealth. The power to make decisions about land within these township areas has, in most cases, been taken over by the Commonwealth (subject to the terms and conditions of relevant leases), acting through the Executive Director of Township Leasing (EDTL).

Long-term lease interests held by the EDTL over townships on Aboriginal land could impact treaties and related aspirations by affecting the capacity for First Nation Governments to make decisions about land that is subject to township leases. Generally, the township leasing model has reformed the governance arrangements for land use decision-making in remote communities and has implemented a model of governance under which decision-making is centralised to a Commonwealth

entity and local Aboriginal authority is contained. Recent amendments enabling community-controlled entities to hold Township leases could inform further changes that enable future agreement-making between Land Trusts and First Nation Governments empowered through the treaty process.

Because Traditional Owners are not the ultimate decision-makers for land matters in leased townships, the potential role and authority of First Nation Governments could be limited. If First Nations involved in the treaty process establish their own governments and want their governments to exercise jurisdiction and decision-making over townships, they may have to do so by agreement with the EDTL. Alternatively, depending on the aspirations of First Nations, they might negotiate with the Commonwealth to have long-term township leases varied or terminated, so that interests over land revert to traditional owners. The Commonwealth could also amend the ALRA to change the role of the EDTL to better favour the autonomy of traditional owners, particularly in relation to First Nation Governments and the treaty process.

Although treaties might not be realised for some time, barriers to empowering First Nations, such as through enabling First Nation self-government, should be identified, and dismantled by targeted law reform. There is time to do this between now and when the first treaties are likely to be negotiated. If First Nations are concerned about the EDTL's effect on their autonomy, the Commonwealth will need to step in to support them.

Native Title Act 1993 (Cth) (NTA)

It is important that NT legislation related to the treaty process does not include provisions inconsistent with the NTA. The NTA's preambular explanations endorse the granting of real agency to First Nations, such as to justify not only the recognition of native title rights and interests but also to potentially supporting the negotiation and conclusion of treaties recognising and asserting native title. It is likely that the NTA would support treaty-making in the NT as a means of settling, recognising, and asserting native title.

Native title has been recognised over about 26% of land and waters in the NT.[143] About 25% of NT land area is subject to non-exclusive native title, conferring limited rights compared to exclusive possession native title, which is akin to freehold ownership and has been determined over just 1% of the NT.[144] A further 4% is currently subject to claim applications.[145] Native title is regulated by the NTA, which, as a Commonwealth law, is paramount over any NT laws. At a general level of Commonwealth public policy, native title aligns with our proposed model for NT treaty-making because it recognises inherent, pre-existing, and continuing rights of First Nations people.[146] In doing so, it highlights First Nations' laws and customs as vital and colonisation and colonial expansion as the cause of disruption to Indigenous governance and land dispossession across Australia.

The NTA sets out a system through which First Nations peoples can seek recognition of their native title rights. It also contains structures and processes for the administration, future use and development of native title land, including rules about consent and negotiation with native title holders, and rules about extinguishment of native title. Under the NTA, it is the 'traditional laws and customs'[147] of First Nations people that 'constitute the basis upon which native title can be recognised, and which provide the content of native title rights and interests that are determined'. These rights are varied and can be diverse. Exclusive native title, even though it is not recognised as a form of tenure, resembles freehold ownership in its exclusivity 'but remains consistent with the traditional laws and customs that gave rise to it'.[149] Meanwhile, non-exclusive native title rights are more limited and have been described as a 'bundle of rights'[150] which can include rights to hunt and fish, collect food, conduct ceremonies, and maintain and protect places of cultural importance in relation to land and sea areas.[151] These rights co-

exist with other rights and interests in those areas.[152] Since most native title in the NT is non-exclusive, Aboriginal people generally have limited native title rights in relation to their lands and seas.

NT legislation giving effect to treaties, or supporting the treaty process, will be effective over areas regulated by the NTA so long as it operates harmoniously with NTA provisions.[153] Given the NTA's scope and content and the potential substance of laws supporting the treaty process, it is unlikely that treaties or other supporting NT legislation would be inconsistent with the NTA. Similarly, it is unlikely that NT treaties or supporting laws will contradict NTA provisions. To the contrary, the preambular explanations contained in the NTA strongly endorse the grant of real agency to First Nations, such as to justify not only the recognition of native title rights and interests, but also to support indirectly, the negotiation and conclusion of treaties recognising and asserting native title.[154] In particular, the preamble to the NTA sets out that the Act 'reflects the entitlement of the Indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands.'[155] It also states that Aboriginal and Torres Strait Islanders must 'receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire'.[156]

The native title system also gives First Nations engaged in treaty negotiations opportunities to settle, recognise, and assert native title through treaty negotiations. Native title may therefore be an important part of negotiations between First Nations and the NT Government and include addressing compensation for extinguishment.

First Nations Self-Government and Native Title

Although the NTA provides Traditional Owner groups with capacity to have their native title rights formally recognised and protected by Anglo-Australian law, it does not equip Aboriginal peoples with substantive self-governing capacity. In this respect, the native title system limits the authority Aboriginal peoples can exercise over their traditional lands. The need for more extensive recognition of self-government as part of treaties is in part a response to the failing of the native title system (and Anglo-Australian law more generally) to recognise rights of First Nations peoples to exercise substantive self-governing authority.

First Nation Governments that we have proposed as a means of empowering First Nations self-government will have to operate in the context of and in a manner consistent with the NTA. It follows that, depending on treaty negotiations and First Nation Territorians' aspirations, First Nation Governments may have to enter into agreements with native title holders in relation to proposed activities or make decisions over land areas subject to native title.

For example, in some instances First Nation Governments may enter into Indigenous Land Use Agreement(s) (ILUAs) with native title holders pursuant to Division 3 of Part 2 of the NTA, which provides for agreement-making about matters concerning native title rights and interests in relation to land areas.[157] These agreements would be binding and establish terms and conditions setting out what rights First Nation Governments would have in those areas where native title land has not been extinguished. It is likely that agreements would respect and support ongoing native title interests and clear terms in relation to non-extinguishment. ILUAs could also form part of more extensive negotiations with the NT Government, in a similar way to how they have been used to address native title rights and interests in south-west Western Australia.

These types of agreements, pursued through the treaty-process, would seek to align and enhance First Nation rights, responsibilities, and powers in relation to traditional estates as well as deal with other matters that may be considered relevant to decision-making and use of land and sea areas subject to native title. They would therefore provide

opportunities to build on the important platform created by native title. As with the ALRA, First Nations may consider it appropriate that there be NTA reform to support and more fully empower them during treaty-making and to give greater effect to treaties. The NTA's evolution during treaty-making should be supported where it leads to fuller empowerment of First Nations peoples.

Other lessons from Native Title and ALRA

The experience of native title in Australia since Mabo (No 2) provides some other important lessons for NT treaty-making. Although native title has provided for the legal recognition of First Nations rights relating to lands and waters, neither the courts, nor parliaments in Australia have empowered Aboriginal peoples, who have common law rights to native title, with substantive self-governing authority over traditional land or sea areas. Native title, and the ALRA, are the strongest examples of legal protections of First Nations peoples' rights to traditional land and sea areas, but they confer only limited rights and powers in relation to governance.

Treaties and legislation supporting the treaty process must build on, but go further than, rights and powers set out in the ALRA and conferred under native title. Undoubtedly, the platform established by the ALRA and the NTA is important for NT treaty-making for many reasons. Both systems have required Aboriginal peoples in the NT to act collectively and according to settler laws and administrative processes to achieve legal recognition of their rights. Although in many ways problematic, an outcome of land rights and native title systems has been that many Aboriginal peoples have a broad familiarity with organising governance and collective decision-making according to complex and often burdensome legislative requirements. Aboriginal peoples have had to organise and act collectively to navigate settler legal institutions and processes. It means that the legally essential aspects of treaty-making, including negotiating processes, will not be foreign to many Aboriginal Territorians and their representative organisations.

Lessons from the native title system (and from the ALRA) can be used to structure the treaty process in ways that are fair and equitable for First Nations peoples, and that do not position them at a systemic disadvantage by relying on settler legal processes to determine the scope and substance of rights that are entrenched in treaties. For example, the native title system puts significant evidentiary burdens on native title claimants, which makes asserting native title rights problematic for many First Nations peoples. Native title requires claimants show that they are 'members of an identifiable society bound by a normative system of law and custom, and that this society is the same normative society that existed at the time of colonisation'.[158] Claimants therefore must prove, according to institutions of settler-colonial law, that the traditional laws and customs that give life to native title are rooted in a pre-colonial state. That despite the violently disruptive effects of colonisation, there has been, as Professor Jon Altman and Dr Francis Markham explain, 'continuity of customs and traditions and uninterrupted connection to claimed lands and waters going back to the assertion of sovereignty by the British Crown, whenever this occurred after 1788, as settler colonialism spread across the continent'.[159] It is Australian statute law and judicial decisions that decide whether claims pass this high threshold and which First Nations people will have rights to lands and waters legally recognised.[160] For some, the evidentiary burden is insurmountable.[161] For the Yorta Yorta people in Victoria, the result of this approach was the High Court's determination that 'the tide of history' had 'washed away' their native title.[162]

Native title therefore pushes First Nations people into what has been criticised as an 'authenticity test' to assert what are often limited rights for traditional estates.[163] Such limitations are a key reason the Noongar people in the south-west of Western Australia supported the South West Native Title Settlement outside of the native title process.[164] Not

only does the evidentiary burden create a significant hurdle to the recognition of native title, it can also cause significant stress for First Nations people addressing native title, including who can claim it, and what outcomes it might provide.[165] Matters of ancestry, historical land associations and personal connections to Country are often contested in native title claims.[166] These contests can be very challenging for participants because they question acceptable degrees of identity in relation to the claim group and the area subject to the native title claim.

These lessons are important to the context of treaty-making in the NT. Treaty negotiations will also require First Nation parties to address important and potentially challenging internal matters, including territorial boundaries, citizenship, standing, and representation and decision-making. Unlike the native title system, which is designed and arbitrated according to settler law and institutions, treaty negotiations can confront these issues according to First Nation priorities and aspirations, in accordance with instruments of international law, such as the UNDRIP. Article 33 of the UNDRIP states that:

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

There is no doubting that these matters may be challenging, but they are vital and must not be subject to unilateral settler government decisions. They must be designed by and with First Nations, and subject to fair and equitable negotiations between First Nation Territorians and the NT Government, including firstly through a TWA. Treaties can complement the native title system by expanding opportunities for First Nation governance over traditional land estates, as well as providing important opportunities for further recognition, settlement and negotiation of native title interests.

Summary – Legislative Reform Components of the Treaty-Making Framework

Concerted legislative reform is needed to provide a basis in legislation for Treaty negotiations. The TWA, TTC and broad parameters for Treaty negotiation are suggested to be set out under the TTC Act.

Simultaneously, legislative amendment must be pursued to enable the establishment and implementation of First Nation Governments across the Territory, in recognition of the need for any Treaty process to be self-government based. This section has proposed that a FNSGA may be introduced to provide legislative basis for the creation of First Nation Governments in non-municipal areas. Further, it is proposed that amendments are made to the LGA to align with the FNSGA and to improve decision-making mechanisms for Aboriginal people in municipal areas.

Consideration must also be given to a plethora of Commonwealth legislation, to ensure that any Treaty-making process aligns with Commonwealth legislation and is pursued within the parameters of the NT's legal position as a Territory of the Commonwealth. In particular, ALRA and Native Title provide a strong basis in Commonwealth legislation to guide the development of a Treaty process that is in line with existing Commonwealth legislation. Ongoing reflection of, and potential amendments to, these and other pieces of Commonwealth legislation has been briefly touched on here and may form part of ongoing negotiations under a broader Treaty-Making Framework.

3.4 - Ensuring Treaty Readiness

Throughout the Treaty process, concerted effort must be taken to ensure both government and First Nations are moving closer to becoming 'Treaty-ready'. There are two aspects to Treaty readiness: readiness to negotiate and readiness to implement.

Whilst the importance of Treaty readiness has been touched on throughout this report, special consideration is given to it here to ensure it is at the forefront of any Treaty preparations.

Readiness to Negotiate

The process by which First Nations can become formally recognised, transition to a First Nation Government and become ready to negotiate has been previously outlined at Section 3.1 of this Report. First Nations will require capacity-building support from the TTC in order to achieve 'equality of standing' and enable good faith negotiations with the NT Government. Ideally, First Nations would have within their own citizenry people who could lead or assist their Treaty negotiating team with legal, financial or commercial qualifications and experience. In the long term, treaty negotiation skills will have to be developed as part of the nation building process. Development of nation building and treaty competency could start by ensuring that Treaty studies are part of the school curricula and then investing in targeted programs to increase the numbers of First Nations lawyers, accountants and business owners. In the short term, such skills and may have to be acquired from external experts.

Nation building skills and competency ought to be delivered in the community. In this regard, external education providers will be very important. While the TTC may be able to provide some assistance, it is considered best delivered by specialist education institutions.

The NT Government must also take concerted steps to become ready to negotiate. To be Treaty-ready, a government must demonstrate reconciliation, partnership and a desire for a new relationship with community. In the NT we are currently a long way from achieving any of these aspirations.

As such, if the NT Government is to move from where it is now to achieving genuine reconciliation, a progressive partnership or a new relationship, it will need to adopt new ways of thinking, new approaches and new attitudes. Achieving this change – particularly change of the magnitude required – will not be easy, but it will be necessary.

The NT Government will need to not only understand, but also embody in its negotiating style, the notion that treaties are nation-building exercises where the desired outcome is everyone being better off and that negotiations can lead to winners and winners rather than winners and losers. The six-step negotiation process outlined in this Report – that is, negotiation that is based on consultation and adopted in good faith with freely chosen representatives through First Nations representative structures – will be a significant change in approach for the NT Government. In order to become ready to negotiate, the NT Government must therefore make a concerted and systemic effort to reposition the culture and service delivery style of its public service. This effort will need to skilfully create a synergy from many complementary initiatives including:

- structured training;
- ongoing staff development;
- new recruitment practices – including increasing Indigenous staffing numbers;
- competency systems and assessment;
- ongoing reinforcement;
- incentives;
- rewards;
- consequences for aberrant behaviour; and
- accountability at all levels – particularly at CEO level.

There must also be an acceptance from the NT Government that even though treaty negotiations can be tough, the negotiations are only the beginning of a much longer process. Substantive outcomes will only be achieved if the NT Government commits to fulfilling its commitments in the spirt of the negotiation and adequately resourcing and supporting First Nation Governments.

Readiness to Implement

Ensuring the NT Government is Ready to Implement

In order for the NT Government to be able to implement its obligations under any treaty in the spirit in which it has been negotiated, it will be necessary that the cultural change described above is embedded in its public service. That change management work needs to start as early as possible and involves reinforcement that negotiating the treaty was only part of the journey and that the real work starts with implementation.

Additionally, it will be necessary to ensure that the NT Government is ready and willing to implement the treaty in good faith. Experience from Canada has indicated that the amount of preparation required by public services is often at best underestimated and at worst dismissed:

Canadian Carol Blackburn said:

> *a treaty is a marriage, not a divorce*[1]

Continuing this metaphor, when discussing implementation of their treaty in British Columbia, Maa-nulth leaders identified the first years of the "new relationship" under their modern treaty explicitly as being similar to a divorce rather than a marriage.

For example:

> *The Federal Government treated this Treaty less like a new relationship and more like a divorce paper. 'Don't want anything to do with you any more. It's not our problem. Here's some money, go away.' That sounds like a divorce to me.*[1]

A number of Maa-nulth leaders noted that

> *recognising that treaties are in fact new relationships, rather than severance agreements*

is important.

Another leader expressed their frustration at the lack of buy in from the provincial and federal governments as follows:

> *The Treaty is not a contract where you're battling to do the least you can to fulfil the terms. You have to do the most you can to fulfil the relationship. It's a long term, enduring constitutional relationship. And changing the mindset in the Federal government is something that we're working on and continue to need to work on.*[1]

Maa-nulth leaders have also expressed concern about the lack of federal and provincial governments' knowledge of their treaty, the treaty process and

> *A lot of departments weren't of the view that they actually had responsibilities or weren't aware of their responsibilities.*[1]

In line with learnings from the Maa-nulth experience in Canada, it is important that the following points are recognised:

- The fundamental principle that treaties are about a new relationship between the NT Government and First Nation Governments must become core business for the NT Government. Long-term change management approaches will need to be implemented so that this changed understanding of the new core business becomes business as usual;
- Negotiation is only the start of the treaty journey. From the outset, a focus on effective implementation will be critical if substantive outcomes are to be achieved; and
- Whole-of-government communication on treaty obligations and accountability for all departments will be critical to successful treaty implementation.

A key part of this change management approach for the NT Government will be to develop a sophisticated capability framework for the NT public service. The Māori Crown Relations Capability Framework, developed by the Te Arawhiti to support cultural change across the New Zealand public service, offers an excellent starting point for a similar approach in the NT.

Māori Crown Relations Capability Framework

This Framework aims to support public sector change by positioning the public service to support the Māori Crown relationship, enabling government to consistently meet its obligations under the Treaty of Waitangi, and achieving a uniquely New Zealand public service that is able to best serve all New Zealanders.

The Framework is made up of the following components:

- An Individual Capability Component (ICC) which explains in detail the competencies required at each of three capability levels (Comfortable, Confident, and Capable) across 11 competency areas, with the following as 6 key focus areas:
  - Understanding racial equity and institutional racism
  - New Zealand history and the Treaty of Waitangi
  - Worldview knowledge
  - Tikanga/kawa (Māori custom – how things are done)
  - Te reo Māori (language)
  - Engagement with Māori

It is the aim that all public servants will reach the "comfortable" level for the 6 core competencies.

- An Organisational Capability Component (OCC) which explains in detail the competencies required at each of three capability levels (Comfortable, Confident, and Capable) across 6 areas that cover in detail governance; relationship with Māori; structural factors; workforce capability; environment; and policy and services.
- A survey to enable agencies to assess current staff confidence levels and identify training and development priorities.

Ensuring First Nations are Ready to Implement

The pathway to First Nation self-government set out in this Treaty-Making Framework provides an opportunity for First Nation Governments to gain experience and confidence in governing prior to a Treaty being implemented. This is to ensure First Nations are supported to become ready to implement a Treaty when the time comes.

The path to First Nation self-government provides for an unlimited number of progression points for First Nation Governments to take on progressive responsibility of local government services. The foundation of this is the suite of responsibilities that current local governments are responsible for under the *Local Government Act (NT) 2019* (LGA). Additional functions beyond those outlined in the LGA would be negotiated between the First Nation Government and the NT Government, and would likely look very different for different First Nations. This staged process will allow for the progressive expansion of First Nation Government activities and governing capacity in line with their aspirations and confidence levels. Whilst achieving First Nation self-government is not a prerequisite to engaging in a Treaty process, it is the preferred model. This is to ensure that by the time Treaty negotiations are finalised, the First Nation Government would have been engaged in self-government for some time and as such would be in a position to accept additional responsibilities as negotiated under a Treaty.

Chapter 3 Footnotes

94. George Williams and Harry Hobbs, *Treaty* (The Federation Press, 2nd ed, 2020) 187.
95. See, Benjamin J. Richardson, Donna Craig and Ben Boer, *Regional Agreements for Indigenous Lands and Cultures in Canada* (Discussion Paper, North Australian Research Unit, Australian National University, 1995) 59.
96. George Williams and Harry Hobbs, 187.
97. For further information on Te Arawhiti, see Section 1.2 and at **Appendix A** of this Report.
98. The Treaty and Truth Commission is discussed in detail in Section 3.2 of this Report.
99. *The Barunga Agreement* (n 2) 9.
100. Northern Territory Treaty Commission, *Towards Truth Telling*, (2021): 7.
101. Ibid 12.
102. Ombudsman New South Wales, *Our Executive*, https://www.ombo.nsw.gov.au/what-we-do/our-office/our-structure/our-executive#executive-team.
103. Ombudsman New South Wales, *Our Executive*, https://www.ombo.nsw.gov.au/what-we-do/our-office/our-structure/our-executive#executive-team.
104. Ombudsman New South Wales, *Our Work with Aboriginal Communities*, https://www.ombo.nsw.gov.au/what-we-do/Information-and-resources-for-Aboriginal-communities/our-work-with-Aboriginal-communities.
105. The Treaty Tribunal will not have powers to arbitrate disputes between parties during the Treaty negotiation phase. During this phase, negotiations will be led by the OTM and TTC, as outlined above.
106. Including, for example, the ALRA and the *Racial Discrimination Act 1975* (Cth).
107. This point has been made elsewhere in relation to the Northern Territory. See Alex Reilly, Larissa Behrendt, Ruth McCausland and Mark McMillan, 'The Promise of Regional Governance for Aboriginal and Torres Strait Islander Communities' in *Ngiya: Talk the Law*, 1 (2007).
108. These points have been made by the Central Land Council, 'Evidence to Senate Select Committee on the Administration of Indigenous Affairs', *Proof Committee Hansard* (24 August 2004) 67. See also Alex Reilly, Larissa Behrendt, Ruth McCausland and Mark McMillan, 132.
109. Central Land Council, 'Evidence to Senate Select Committee on the Administration of Indigenous Affairs', n 98; Alex Reilly, Larissa Behrendt, Ruth McCausland and Mark McMillan, 96.

110. *Nettle J, Love v The Commonwealth*; *Thoms v The Commonwealth* (2020) HCA 3; 94 ALRJ 198 at 276, citing Michael Dodson, 'Land Rights and Social Justice', in Yunupingu (ed), *Our Land Is Our Life: Land Rights – Past, Present and Future* (University of Queensland Press, 1997) 41.

112. *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 (Brennan, Deane and Toohey JJ) at 274; *Kruger v The Commonwealth* (1997) 190 CLR 1 (Gummow J) at 163.

113. Anne Twomey, 'Inconsistency Between Commonwealth and Territory Laws', *Federal Law Review*, 42 (2014): 422.

114. Mark Leeming, *Resolving Conflicts of Laws* (The Federation Press, 2011) 231.

115. See *Commissioner for Housing v Ganas* (2003) 175 FLR 337; 150 ACTR 1 (Crispin J) at 12 – 14; see also ibid, 239.

116. Central Land Council, *The Land Rights Act Made Simple*, https://www.clc.org.au/the-alra/

117. Gough Whitlam, 'Aboriginals and Society' Press Statement No. 74, 6 April 1973; for commentary see also Laura Rademaker and Tim Rowse, 'How shall we write the history of self-determination in Australia?' in Laura Rademaker and Time Rowse (eds) *Indigenous Self-Determination in Australia* (ANU, 2020) 1 – 31.

118. Michael Dodson and Diana McCarthy, 'Communal land and the amendments to the Aboriginal Land Rights Act (NT)' (Research Discussion Paper No 19, Native Title Research Unit, 2006) 8.

119. *Aboriginal Land Rights Commission* (Second Report, April 1974) 9 – 11.

120. Heather McRae, Garth Nettheim, Thalia Anthony, Laura Beacroft, Sean Brennan, Megan Davis and Terri Janke (eds), *Indigenous Legal Issues* (4th ed) (Thompson Reuters, 2009) 224.

121. *Northern Territory National Emergency Response Act* 2007, (NTNER)

122. For commentary on how the NTNER affected a transfer of decision-making power away from traditional owners and towards government, see *Wurridjal v The Commonwealth* (2009) 237 CLR 3090; Sean Brennan, '*Wurridjal v The Commonwealth*: The Northern Territory Intervention and Just Terms for the Acquisition of Property' (2009) 33 *Melbourne University Law Review*; Leon Terrill, 'The Days of the Failed Collective: Communal Ownership, Individual Ownership and Township Leasing in Aboriginal Communities in the Northern Territory' (2009) 32(3) *University of New South Wales* Law Journal; Ibid, Chapter 5.

123. For commentary see Michael Dodson and Diana McCarthy, n 7.

124. Jon Altman, Craig Linkhorn and Jennifer Clarke, assisted by Bill Fogarty and Kali Napier, *Land rights and development reform in remote Australia* (Oxfam Australia, 2005) 5.

125. Michael Dodson, quoted in Heather McRae, Garth Nettheim, Thalia Anthony, Laura Beacroft, Sean Brennan, Megan Davis and Terri Janke, n 9, 223.

126. Justice John Toohey, *Seven Years On. Report by Mr Justice Toohey to the Minister for Aboriginal Affairs on the Aboriginal Land Rights (Northern Territory) Act 1976 and Related Matters* (AGPS, 1984) para 880.

127. See ALRA s3(1).

128. *Attorney-General (NT) v Hand* (1989) 25 FCR 345 (Lockhart J) at 366-367.

129. Anne Twomey, 'Inconsistency Between Commonwealth and Territory Laws', *Federal Law Review*, 42 (2014): 422.

130. ALRA s74.

131. See *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258; see also *Commonwealth v Australian Capital Territory (Same Sex Marriage Case)* (2013) 250 CLR 441 (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) at 468.

132. ALRA s73(1)(a).

133. ALRA s73(1)(b).

134. ALRA s73(1)(c).

135. ALRA s73(1)(d).

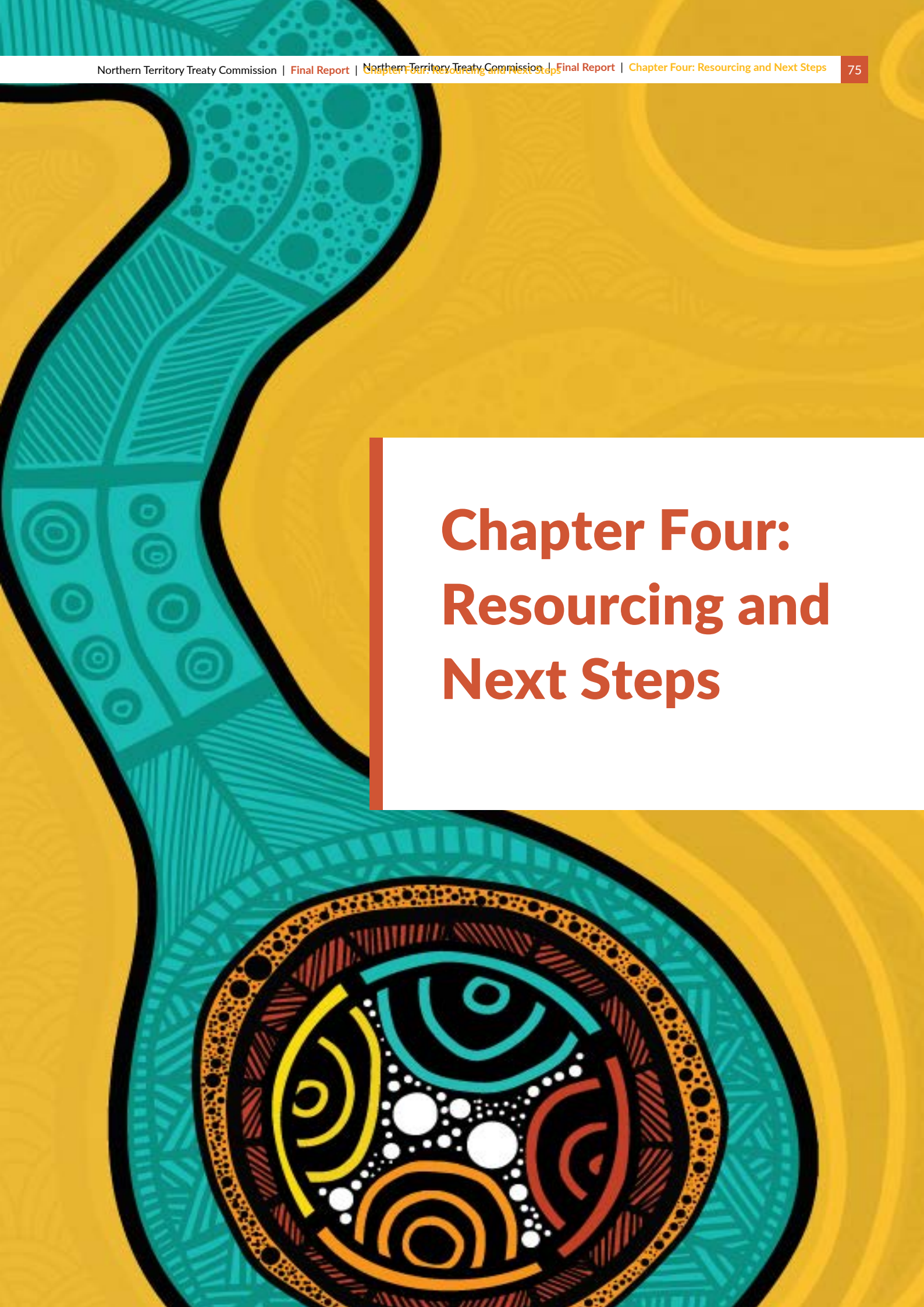
136. See ALRA s23(2). An example of the application of NT conferral of functions upon Land Councils is contained at s25AO of the *Territory Parks and Wildlife Conservation Act* (NT)

137. Sean Brennan, '*Wurridjal v The Commonwealth*: The Northern Territory Intervention and Just Terms for the Acquisition of Property', 978.

138. See P McEvoy and P Lyon (eds), *The Land is Always Alive – The Story of the Central Land Council* (Central Land Council, 1994) 12.

139. See, for example, ALRA ss. 19, 23, 42.
140. See, for example, ss. 19, 23, ALRA.
141. ALRA s5(2)(a).
142. The Land Council can then only direct action when it is satisfied that traditional owners understand and consent to the proposed action (and any other Aboriginal group has been consulted and has had adequate opportunity to express its views); ALRA s23(3).
143. National Native Title Tribunal, *Native Title Determinations and Claimant Applications* (Map, 21 October 2021).
144. National Native Title Tribunal, *Native Title Determinations* (Map, 21 October 2021).
145. National Native Title Tribunal, *Native Title Determinations and Claimant Applications*, n 55.
146. Lisa Strelein, 'Conceptualising Native Title' (2001) 23(1) *The Sydney Law Review*, 123.
147. See NTA s 223.
148. Michael Dodson and Diana McCarthy, n 7, 13.
149. Ibid, 14.
150. *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58; 214 CLR 422 (Callinan J) at 186; for commentary see Lisa Strelein, n 58, 102; Michael Dodson and Diana McCarthy, n 7, 14.
151. Queensland Government, 'About native title', *Native Title*, <https://www.qld.gov.au/firstnations/environment-land-use-native-title/native-title/about-native-title>.
152. Ivan Ingram, 'Indigenous Governance and Native Title in Australia' in *Developing Governance and Governing Development*, Diane Smith, Alice Wighton, Stephen Cornell and Adam Vai Delaney (eds), (Rowman & Littlefield, 2021), 33.
153. Section 8 of the NTA states that the NTA is not intended to affect the operation of Territory laws that can operate alongside the NTA.
154. Bret Walker, 'Legal context of a Northern Territory Treaty' (Opinion provided to the Northern Territory Treaty Commission, 2020) 19.
155. NTA, Preamble.
156. Ibid.
157. For body corporate agreements see s24BB; for area agreements see s24CB.
158. Michael Dodson and Diana McCarthy, n 7, 14.
159. Jon Altman and Francis Markham, 'Burgeoning Indigenous Land Ownership: Diverse Values and Strategic Potentialities' in *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds) (The Federation Press, 2015) 130.
160. Ibid, 139.
161. Michael Dodson and Diana McCarthy, n 7, 14.
162. Katie Glaskin, cited in ibid, 14; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at 123.
163. See Daryle Rigney, Damien Bell and Alison Vivian, 'Talking Treaty: A Conversation on how Indigenous Nations can become Treaty Ready' in T*reaty-Making: 250 Years Later*, Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), (The Federation Press, 2021) 35; Bret Walker, 'The Legal Shortcomings of Native Title' in *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), (The Federation Press, 2015) 15; Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (Cassell, 1999).
164. See Glen Kelly and Stuart Bradfield, 'Negotiating a Noongar Native Title Settlement' in *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), (The Federation Press, 2015).
165. For commentary see David Trigger, 'Ancestry and Rights to Country: The Politics of Social Inclusion in Native Title Negotiations' in *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?*, Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds) (The Federation Press, 2015).
166. See ibid, 199 – 201; Larissa Behrendt and Loretta Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (Federation Press, 2008) 27 – 29.

Northern Territory Treaty Commission | Final Report | Chapter Four: Resourcing and Next Steps



Chapter Four: Resourcing and Next Steps

Chapter Three set out a proposed Treaty-Making Framework for the NT. The success or failure of this Framework will depend on a range of factors including timeliness, resources and political will in the NT and federally. This chapter will lay out the various steps that must be taken to achieve a mandated, sustainable and robust process that will lead to the entry into treaties of which all parties can be proud.

4.1 - Resourcing Requirements

Although not yet quantified, the costs associated with Treaties will be significant. This will include costs associated with First Nations forming, First Nation Governments negotiating treaties, and monetary compensation for historical injustices. These costs should be seen as an investment in the future of the NT that will provide significant dividends in the future – indeed, a more prosperous Aboriginal NT built on resourced First Nations self-government will mean a more prosperous NT for everyone.

Government will need to provide sufficient resourcing to the Treaty process to ensure all parties have the capacity and financial means through which to fully engage in and negotiate Treaties; and to ensure First Nations receive adequate cash reparations. It is envisaged this resourcing will flow through a Treaty Making Fund (TMF).

The Treaty Commission proposes that Government develop a TMF to resource the various components comprising the Treaty-Making Framework. This could take the form of either a single fund or series of sub-funds, and will perform the following functions:

- **Pre-Treaty (Calls for funding anticipated to commence from 2024)**
  - Provide grants to First Nations to navigate the self-government process and support their official formation
  - Provide funding to mediate disputes between First Nations
- During Treaty Negotiation (Calls for funding anticipated to commence from 2027)
  - Provide grants to First Nations to negotiate Treaties
- Post-Treaty (Calls for funding anticipated to commence from 2035)
  - Provide grants to support ongoing First Nation Government operational costs
  - Administer the delivery of cash compensations as specified in Treaty Agreements

Importantly, it is envisaged that the TMF provide grants – as opposed to loans – to First Nations. This would ensure First Nations are burdened by debt caused by the long game of Treaty negotiations.

Funding the TMF

The source and amount of funds directed into the TMF is likely to be the greatest challenge in the setting up of the fund. In line with expectations set out in the Van Boven Principles, governments entering into Treaties are expected to provide financial compensation as part of reparations for historical injustices. The bulk, if not the entirety, of TMF funds should therefore be sourced from government.

The *Northern Territory (Self-Government) Act 1978* (Cth) contains an indemnity from the Commonwealth in favour of the NT Government in respect of any acts done, or omitted to be done, by the Commonwealth between 1911 and 1 July 1978.[167] This period of Commonwealth control of the NT was characterised by a multitude of injustices perpetrated upon First Nations Territorians; as such, the Commonwealth should commit to reparation by making a significant contribution to the TMF. The NT Government should also make significant contribution to the TMF in recognition of historical wrongs and the ongoing impacts of colonisation on Aboriginal

Territorians. The exact contributions made by the Commonwealth and NT Governments will be a matter for negotiation between the noting, noting the starting point of these discussions should be the indemnity.

An example of shared Treaty contributions can be seen in the British Columbia model of Treaty negotiation support funding (NSF). Under this model, the Canadian Government provides 90% of the contribution, with the balance paid by the provincial government. In 2020/21, the total funding provided through the NSF was CA$31 million, supporting 31 First Nations who were either finalising their negotiations or actively negotiating during that period.[168] The Australian National Disability Insurance Scheme (NDIS) offers a similar precedent. Under NDIS, funding obligations are shared between the Commonwealth and state and territory governments, with the Commonwealth expected to carry about 50% of all costs.[169]

In setting up a TMF to meet future obligations, it will be important to quantify – as best as possible - what those obligations will be and when they will be incurred. It will also be important to set out the potential returns that can be earned on any investment between the start of the fund and the timing of payment obligations.

Quantifying the funding needs for most of the TMF's functions should be relatively straightforward. Costs will be estimated based on the number of First Nations groups, the likely cost of each step in the Treaty-making process and the expected inflation over the period in which costs will be incurred. Quantifying the compensation component will be far more difficult.

As part of the Treaty negotiation process, it is envisaged First Nation Governments will seek monetary compensation as reparation for historical injustices. Whilst this is related to (and would be administered through) the TMF, government should not use TMF funding for compensation claims – rather, separate funds should be set aside in anticipation of the significant reparations that will likely flow from Treaty negotiations. The exact amount of funding required to meet this compensation request will be difficult to quantify but must be consistent with the Van Boven principles.

At this time, no Australian jurisdiction has formally acknowledged a likely amount for the compensatory component of Treaty. The two most analogous case studies as the South West Native Title Settlement in Western Australia (the Noongar Settlement) and the Timber Creek compensation case in the NT (the Timber Creek case). International examples from Aotearoa New Zealand and British Columbia also provide useful insights. These national and international compensation scheme examples are discusses in detail at **Appendix G**.

Resourcing the compensation component of Treaty negotiations

To fund the NT TMF and compensation fund, the Commonwealth and NT Governments will either have to redirect money from consolidated revenue accounts or another existing source. They could also raise an additional amount as a new tax or levy for the purpose of meeting its obligations to the Treaty-Making Fund. Consolidated revenue is the typical source of comparable funds in Australia such as the Aboriginal and Torres Strait Islander Land and Sea Future Fund, Queensland Treaty Fund, and Noongar Boodja Trust. The two main sources of revenue for the NT Government are Commonwealth revenue (GST, untied and tied grants) and own-source revenue (mainly taxes and mineral royalties). Commonwealth revenue represents 70% of total revenue to the NT Government.[170] Compared to eastern states and Western Australia, the challenge for the NT Government is it has a relatively small population base for generating revenues such as pay roll tax, lower land values for generating stamp duty and no land tax. With an estimated 30% of the NT population identifying as Aboriginal Australian, sourcing contributions through existing taxes is like 'robbing Peter to pay Paul'. Mining royalty equivalents[171] are already applied towards the Aboriginal Benefits Account (ABA) and some of this will soon be directed to the NT Aboriginal Investment Corporation and is therefore unlikely to be an acceptable source of funding for the Treaty-Making Fund.

In the current fiscal environment, with long-lasting impacts of the Commonwealth Government's COVID-19 economic stimulus, it may be more fruitful to identify and implement an innovative income source, such as:

- ***Creation of a Development Levy***

  In 2019, the NT Government convened a Territory Economic Reconstruction Commission (TERC) to provide advice on the key strategies, approaches, and actions to support its goal of building a $40 billion economy by 2030. With the increased flow of private sector investment into the NT over the next decade and beyond, one option to fund the NT Government's contribution to the Treaty-Making Fund could be a development levy. This levy could resemble the New South Wales Portable Long Service payment scheme levy or the 0.5% Medicare levy increase that was directed to the Disability Care Australia Fund (DCAF) to fund the NDIS. This could generate a sizeable amount over an extended period of time and could be structured and managed in a way that matches the timing of compensatory payment obligations from the TMF. A levy of 1% on each NT-based project valued at $1 million or more could generate tens of millions of dollars over time.

- ***Establishment of a Land Bank***

  The establishment a land bank that could be a way to satisfy compensatory claims and/or be used to fund the TMF. This could be similar to the Treaty Settlements Land Bank established in Aotearoa New Zealand. In the NT context, the relevant land could be surplus Commonwealth and NT-owned assets and over time could even be extended to Crown pastoral leases.

- ***Formal Resource-Sharing Arrangements***

  Other alternative assets that have been used in Aotearoa New Zealand to partially meet government contributions to commercial redress have included the transfer of fishing quota,[172] forestry land[173] and radio spectrum.[174] In Canada, formal resource sharing arrangements are also a common aspect of modern treaties.

  After an appropriate amount has been determined, the TMF could either deliver the full compensation amount 'up front' via a lump sum contribution or the funding could be continuously 'drip fed' into the fund over a sustained period. There are advantages to both funding approaches as set out in *Table 2*.

Table 2: Advantages of funding approaches

'UP-FRONT' LUMP SUM	'DRIP-FED' CONTRIBUTIONS
Ability to be invested and accrue interest/ generate revenue immediately	Less immediate financial impact on Government and its ability to meet other obligations
Reduced risk that changes in Government/ policy lead to reduced contributions over time[175]	Possibility of a greater contribution over time (i.e. more may be affordable in the long term than the short term)
Known minimum sum (or fixed fiscal envelope) enables clear parameters to be set for the negotiation process and ensuring that First Nations who negotiate their treaty later in the process are not worse off than those who participate in the first negotiations	Contributions can be timed to meet the funding needs Enables the creation of a new revenue stream i.e. a development levy

A third option would be a hybrid of both, with an upfront capital contribution to fund the key short-term objectives of the TMF and an ongoing development or investment-style levy to create ongoing contributions.

Recommendations

The above considerations are a matter for the Commonwealth and NT Governments to explore during the development of the TMF. To assist in this decision-making, a number of case studies of existing funds has been developed at **Appendix H**. Drawing upon applicable learnings from these case studies, the Treaty Commission proposes a number of recommendations for the establishment of a TMF:

1. **Actuarial assistance will be necessary**

   An actuary should be engaged to work out the size of the likely future funding needs for each of the five initiatives. Likely factors to consider will be:

   - the number of First Nations in the NT
   - the relative size and complexity of those groups
   - where they are situated (i.e. are they remote, regional or metropolitan based)
   - the relative impacts of colonisation on those groups, and
   - the economic loss that they have suffered.

2. **The TMF should have a mixed funding source**

   While the initial contributions or corpus are most likely to be sourced from Territory and/or Commonwealth consolidated revenue accounts, raising revenue from an innovative source (a levy or similar) could be an alternative. Setting up a sizeable corpus over the first decade, as is the case for the Noongar Future Fund, may strike a balance between the competing demands placed on governments and the need to create a substantial, and secure, Treaty-Making Fund.

3. **The TMF should be a single fund with multiple sub-funds**

   Given the range of purposes for the Treaty-Making Fund, administration could be simpler if there is a single fund with two or more sub-funds. This could then allocate funds to meet the five initiatives. It could also create a mix of investments and timeframes to match the demands on the fund. For example, funds that are likely to be drawn down in the next three to five years can be invested in asset classes that are quickly realised as cash. Funds that are earmarked for compensatory payments and may not be made for another decade can be invested in differ ways.

   Sub-funds may also be more transparent if there are multiple funding sources, such as the NT Government's ongoing First Nation Government costs and the Commonwealth Government's compensations.

4. **Land banking should be considered a viable mechanism for compensation**

   Land banking should be considered as a viable compensation which could reduce calls on the Treaty-Making Fund. Surplus Commonwealth Government assets in the NT could be included in the scheme, along with assets that the NT Government no longer needs. Another potential land asset to include would be the freehold interest in Crown pastoral leases (subject to the existing leases).

5. **The TMF should have a co-governance model**

   The Treaty-Making Fund could be established as one of the special purpose public asset funds. It could be managed by the Future Fund Board of Guardians and Future Fund Management Agency. Its investment mandate would be co-created by Aboriginal representatives, both governments and the future TTC. Over time, this could transition to be a self-determined approach to governance. The TTC would then be able to make calls on the Treaty-Making Fund for agreed purposes, with regular public disclosure of how those funds are used.

4.2 - Steps to Progress Treaty Negotiations over the Next Four Years

The following section is intended to provide a practical roadmap for both government and community to approach the Treaty process. It will set out the immediate actions that are required, and the outcomes that should be achieved, over the next four years to progress Treaty negotiations in the NT.

Immediate Next Steps to Take in 2022

Once this Final Report is formally delivered to the Minister for Treaty and Local Decision Making by the Acting Treaty Commissioner, it must be tabled in Parliament and released to the public within 21 days. It is expected that at the time of tabling the Final Report, the Minister would provide a response. Some of the recommendations have impacts for other Ministers and government agencies and a response to these matters may therefore take some period of months. Under no circumstances should the Minister take longer than three months from the tabling of the Report to provide a formal response.

In response to the Final Report, the Minister should:

- **ACTION ONE:** Confirm the NT Government support for:
  - the concept of treaties with the First Nations of the NT;
  - the concept of a truth telling commission looking at historical and continuing injustices;
  - the overall direction set out in the Final Treaty Report;
- **ACTION TWO:** Write to the four statutory Land Councils to seek input to the development of:
  - a new Treaty and Truth Commission Act;
  - a draft First Nations Self Government Bill;
- **ACTION THREE:** Confirm support for a First Nations Forum to be held within the following twelve months;
- **ACTION FOUR:** Confirm commitment to the repeal and replacement of the Treaty Commissioner Act 2020 (NT) with a new TTC prior the end of the 2022 calendar year;
- **ACTION FIVE:** Confirm the budget allocation for the Treaty Commission for 2022/2023 through to 2024/2025
- **ACTION SIX:** Announce the establishment of a TMF into which funding will be paid to ensure that there are adequate resources to fund the Treaty process.
- **ACTION SEVEN:** Following the receipt of correspondence from the Minister the four statutory Land Councils should be invited to:
  - Work with the Office of the Parliamentary Counsel to develop a consultation draft of a Treaty and Truth Commission Bill, with APONT more broadly regarding the Bill, and assist in the consideration and passage of the Bill;
  - Work with the Minister's office with a view to holding a First Nations Forum within 12 months;
  - Work with the Office of the Parliamentary Counsel to develop a consultation draft of a First Nations Self Government Bill and commence broad consultation on the Bill;
  - Work with the Minister and Government to develop a sustainable funding model to ensure adequate funding for the Treaty and Truth processes.

Beyond these immediate steps, concerted effort needs to be made over the coming years to establish the underlying processes and mechanisms for a Treaty process. Key outcomes for the next four years are outlined below and should be used to inform effort and timelines.

2022/2023 Outcomes

At the conclusion of the 2022/2023 financial year, the following outcomes must have been achieved:

1. The Treaty and Truth Commission must have been established with all positions filled;
2. The inaugural First Nations Forum has been held and, subject to the recommendations of

the forum, actions commenced regarding the establishment of First Nations Representative Body;

3. First Nations who have applied for recognition as a First Nation have been assessed and determinations made where possible;
4. Truth telling process has been established and priority evidence is being collected;
5. Negotiations have commenced for a TWA which will provide a framework for the negotiation of First Nations treaties in the NT;
6. Establishment of Office of Treaty-Making within NTG, and government commences community education program in collaboration with Treaty and Truth Commission;
7. A Treaty-Making Fund, with an adequate and secure source of funding, has been established;
8. First Nations nation building and governance training are underway, preferably in partnership with third party providers;
9. First Nations Self-Government Bill, and consequential amendment Bills are introduced and pass through the NT Parliament.

2023/2024 Outcomes

At the conclusion of the 2023/2024 financial year, the following outcomes must have been achieved:

1. Negotiations regarding a TWA must have continued;
2. 2nd First Nations Forum, or equivalent is held;
3. First Nations Representative Body is established;
4. Truth Telling process must continue operations;
5. First Nations have been assisted to apply and become recognised First Nations;
6. First Nations Self-Government Act must have commenced and recognised First Nations must have commenced preparation for transition to First Nation Government;
7. First Nations nation building and governance training must continue to be provided.

2024/2025 Outcomes

At the conclusion of the 2024/2025 financial year, the following outcomes must have been achieved:

1. A TWA ought to be concluded;
2. The preparation and passage of such legislation as will underpin the process agreed to in the TWA;
3. 3rd First Nations Forum or equivalent is held;
4. First Nations Representative Body continues operation;
5. Truth-telling process will move into broader phase aimed at completing all terms of reference.
6. Some First Nations have transitioned to First Nation Governments while others are in progress of transition;
7. First Nations continue to be assisted apply for and become recognised First Nations;
8. First Nations nation building and governance training must continue to be provided.

2025/2026 Outcomes

At the conclusion of the 2025/2026 financial year, the following outcomes must have been achieved:

1. The TWA is being performed;
2. Recognised First Nations or groups of First Nations have issued Notice of Intention to Negotiate (Stage 1 in the six stage treaty negotiation process);
3. 4th First Nations Forum or equivalent is held;
4. First Nations Representative Body continues operation;
5. Truth-telling process continues in broader phase addressing all terms of reference.
6. More First Nations have transitioned to First Nation Governments while others are in progress of transition;
7. First Nations continue to be assisted apply for and become recognised First Nations;
8. First Nations nation building and governance training must continue to be provided.

Chapter 4 Footnotes

167. From 1863 to 1911 the South Australian government administered the NT.

168. British Colombia Treaty Commission, *2021 Annual Report*, 2021. https://www.bctreaty.ca/annual-reports.

169. The NDIS is established as an insurance scheme, with the Commonwealth and States and Territories entitled to seek reimbursement for a proportion of the costs that are incurred in providing the funding/ services to their constituents. This split reflects, in part, the respective funding model for services prior to the NDIS, and each State and Territory has negotiated its own funding agreement with the Commonwealth. See Tarek Dale and Luke Buckmaster. *Funding the National Disability Insurance Scheme – Budget Review 2015-16 Index*, 2015, https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/BudgetReview201516/NDIS.

170. Northern Territory Government, 2021-22 Budget Papers,2022, https://budget.nt.gov.au/budget-papers/where-does-the-territory-governments-revenue-come-from.

171. Amounts equal to the amounts of any royalties received by the Commonwealth or the Northern Territory in respect of a mining interest in Aboriginal land.

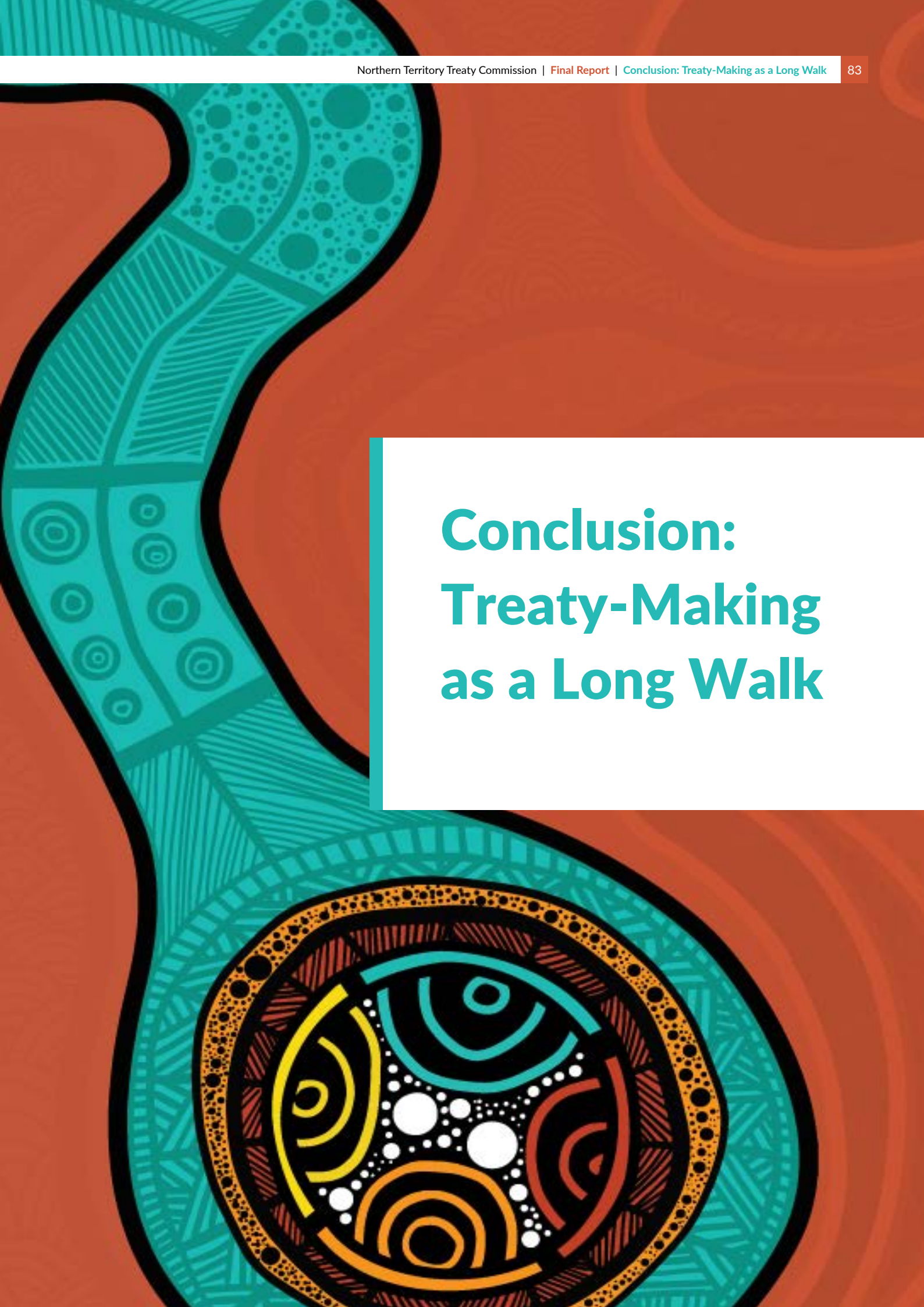
172. *Māori Fisheries Act 2004* (NZ) allocates 20% of all new fishing quota to Māori fisheries, in addition to the quota allocated through earlier settlement processes.

173. *Central North Island Forests Land Collective Settlement Act 2008* (NZ).

174. For example, the allocation of 5G spectrum in 2019. See, https://www.beehive.govt.nz/release/government-enables-early-access-5g-spectrum.

175. Example being the Canadian Government indefinitely suspending treaty annuity payments due to the COVID-19 pandemic. See: https://www.sac-isc.gc.ca/eng/1100100032294/1581869772685.

176. Sub-sections 12(3) and (4) *Treaty Commissioner Act 2020* (NT)



Conclusion: Treaty-Making as a Long Walk

This Report has set out a clear framework for the NT to approach Treaty-making, underpinned by both the NT's unique historical and policy context and learnings from the Treaty Commission's sustained consultation with First Nation communities. Care has been taken to ensure that the Treaty-Making Framework works within the boundaries of the NT's limited legal capacity as a Territory of the Commonwealth.

The complexity of this Treaty-Making Framework reflects the complexity of the task at hand. This Report has proposed two simultaneous processes that must occur prior to individual Treaties being negotiated – one process to negotiate a TWA, and one process to enable First Nations to move towards self-government. A six-step negotiation pathway informs Treaty negotiations between the NT Government and individual or coalition First Nations. Three independent mechanisms – a TTC, an Aboriginal Ombudsman and a First Nations Treaty Tribunal – provide the appropriate infrastructure to ensure First Nations are resourced and supported at every stage of the Treaty process. Significant legislative reform – namely, through the introduction of the Treaty and Truth Commission Act and the First Nations Self-Government Act, and reforms to the Local Government Act – provide legislative backing to the Framework. These processes, mechanisms and legislative reforms work together to create a Framework for a First Nations-based, human rights-based and self-government-based Treaty.

Treaty-making will take a long time. Usually, implementation will occur at least a decade after the start date of negotiations. It is therefore important to consider how to make negotiations as fast as possible - without compromising their effectiveness - while ensuring that First Nations find the process itself rewarding. In other words, Treaty-making should not just be about the destination: the journey should confer benefits on First Nations too. The Framework set out in this Report has been created in a way so as to reduce the risk of negotiation fatigue and ensure the entire process is empowering for First Nations people. The Framework achieves this by:

- **Bringing constituents along for the ride**

  Several generations may be involved in the Treaty process as it progresses over time. Education programs delivered by the TTC will ensure young people gain an understanding of the importance of Treaty at a young age, which they will then draw upon in the future when they step into leadership roles negotiating or implementing Treaties.

- **Ensuring the NT Government and First Nations are Treaty-Ready**

  Treaty-making will impact many, if not most, NT Government departments. The development of a sophisticated capability framework for the NT public service, as outlined in the Framework, will be imperative for ensuring the NT Government is ready to engage in Treaty negotiations.

  First Nations must also be supported to engage in Treaty negotiations on equal footing with government. The path to self-government outlined in the Framework offers a clear means through which First Nations can progressively build their governing capacity prior to starting the Treaty negotiation process.

  Ensuring that First Nation Governments are able to be established early in the process provides a strong buffer against lengthy and delayed negotiations.

- **Providing adequate funding and resources to First Nations at every stage of the Treaty process**

  Ensuring the Treaty process is adequately resourced is imperative to fully realising Treaty in the NT. Government grant funding delivered through the TMF will help First Nations fully participate throughout the Treaty negotiation process.

- **Collaborating with First Nations from the beginning of the process**

  The voices of First Nations people will be centred at every stage of the Treaty process. The First Nations Forum will give the mandate for continued Treaty negotiation, and will decide upon a Representative Body to reflect the interests of First Nations people. Further, the TTC provides a mechanism through which First Nations can engage with neighbouring First Nations (for example, through forming coalitions) from the moment they enter the process.

- **Creating effective and efficient dispute resolution processes**

  Disputes between First Nations could disrupt the Treaty process and potentially add years to negotiation timelines. The TTC will efficiently resolve disputes during the pre-Treaty stage and during negotiations. Once a Treaty has been signed, dispute resolutions will be handled by the Aboriginal Ombudsman and the First Nations Treaty Tribunal.

- **Incorporating minimum standards into the negotiation principles**

  It is important that First Nations are supported to negotiate with government on an equal footing. If there is a power imbalance, First Nations may feel distrustful of the process and the intentions of government which, in turn, may slow negotiations. The TWA mitigates this risk by setting out minimum standards that must be adhered to in order to ensure equal and respectful negotiation.

- **Identifying legislation that will impede Treaty-making**

  Existing Commonwealth and NT laws will impact upon Treaty-making in the NT. In light of this, the Treaty-Making Framework includes a proposal for significant legislative reform and specifically addresses the need for governments to ensure existing pieces of legislation do not weaken, slow or prevent implementation of Treaties in the NT.

This Report is a timely call to action for government and communities. By agreeing to progress Treaty discussions in line with this Treaty Making Framework, parties have the opportunity to acknowledge past injustice and move forward in a partnership defined by self-determination, equality and respect – a historic opportunity for Aboriginal affairs in the NT.

Appendices

Appendix A: National and International Examples of Treaty-Making 87

Appendix B: Tla'amin Process Case Study 111

Appendix C: Stolen Generations 134

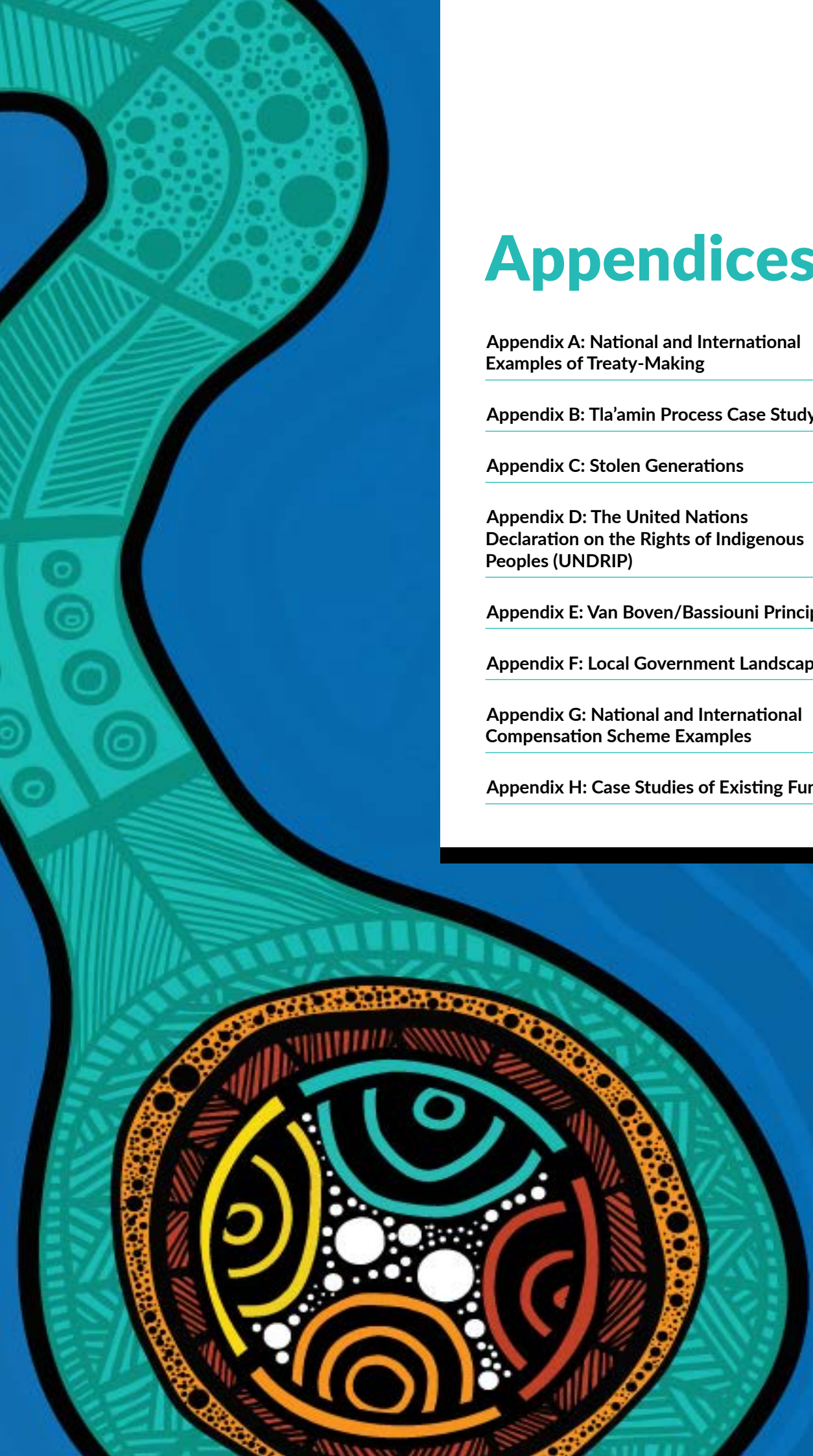
Appendix D: The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) 145

Appendix E: Van Boven/Bassiouni Principles 149

Appendix F: Local Government Landscape 151

Appendix G: National and International Compensation Scheme Examples 161

Appendix H: Case Studies of Existing Funds 165



Appendix A: National and International Examples of Treaty-Making

The following appendix outlines various national and international examples of Treaty-making which have informed the development of the NT Treaty-Making Framework. Particular focus is given to the model underway in British Columbia, noting this model has particularly informed the contents of the Treaty Commission Final Report.

Treaty progress in other States and Territories

Victoria, Australia

In 2016, after deciding to pursue a treaty process, the Victorian Government held consultations and forums across the state. These led to the formation of the Victorian Treaty Advancement Commission (VTAC) in January 2018. While VTAC had several roles, its key role was to establish an Aboriginal Representative Body, now known as the First People's Assembly of Victoria (from here on referred to as the Assembly). Gunditjmara woman from western Victoria, Jill Gallagher AO, was appointed as the Victorian Treaty Advancement Commissioner and fulfilled the role for the Commission's duration. The Assembly met for the first time in November 2019. The VTAC was then dissolved and the baton handed to the Assembly to continue the process.

Victorian Treaty Legislation

Victoria's treaty process was formalised with the Advancing the Treaty Process with Aboriginal Victorians Act 2018 (the Act) in June 2018.

Part 3 of the Act details the following guiding principles for the Victorian Treaty process. These are instructive for the NTs Treaty-Making Framework and the proposed treaties enabling legislation.

Self-determination and empowerment

(1) Traditional owners and Aboriginal Victorians have the right to self-determination .

(2) Traditional owners and Aboriginal Victorians are empowered to freely determine their participation in the treaty process and, to this end, their form of representation in the treaty process.

Fairness and equality

(1) The parties to the treaty process must ensure fairness between parties as they work together to advance the treaty process.

(2) The parties to the treaty process must make decisions that promote equality for traditional owners and Aboriginal Victorians.

Partnership and good faith

(1) The parties to the treaty process must work together in good faith to advance the treaty process.

(2) If any disputes arise in advancing the treaty process, the parties to the treaty process must resolve those disputes as soon as possible after they arise.

Mutual benefit and sustainability

(1) The parties to the treaty process must commit to a treaty process that, in an ongoing and sustainable manner, provides material social, economic and cultural benefits for traditional owners and Aboriginal Victorians.

(2) The parties to the treaty process must commit to advancing the treaty process in a manner that promotes reconciliation and celebration of cultures of traditional owners and Aboriginal Victorians and, in doing so, provides benefits to the whole of the Victorian community.

Transparency and accountability

The parties to the treaty process must act with honesty and integrity and must be accountable for their shared commitment to self-determination and to the treaty process.

Elements to a Treaty

The Act requires the Assembly and the Victorian State Government to work together to establish three elements to support future treaty negotiations:

1. A Treaty Authority;
2. A Treaty Negotiation Framework; and
3. A Self Determination Fund

Treaty Authority

Part 4 of the Act deals with the Treaty Authority and Section 27 requires the Assembly and the Victorian Government to work together to establish a Treaty Authority by agreement. Section 28 details the functions of the Treaty Authority:

Functions of the Treaty Authority

(1) The Treaty Authority, once established, has the following functions—

(a) Facilitating and overseeing treaty negotiations;

(b) Administering the treaty negotiation framework;

(c) Providing for resolution of disputes in treaty negotiations in accordance with the treaty negotiation framework;

(d) Carrying out research to support treaty negotiations and the administration of the treaty negotiation framework.

(2) In establishing the Treaty Authority, the Aboriginal Representative Body and the State may include any additional functions to those specified in subsection (1).

(3) In the performance of its functions the Treaty Authority is not subject to the direction or control of the Minister.

Section 29(2) requires the Victorian Government to work with the Treaty Authority in good faith.

Treaty Negotiation Framework

Part 5 of the Act requires that a treaty-making framework be established, describes its purposes and details other administrative requirements.The Act States that:

(1) The Aboriginal Representative Body and the State must work together to establish the treaty negotiation framework by agreement.

(2) The Aboriginal Representative Body and the State must not agree to the treaty negotiation framework before the Treaty Authority is established.

(3) The Aboriginal Representative Body and the State must ensure that the treaty negotiation framework provides for the negotiation of a treaty or treaties that—

(a) recognise historic wrongs; and

(b) address ongoing injustices; and

(c) help heal wounds of the past; and

(d) support reconciliation; and

(e) bring pride to Victorians; and

(f) have positive impacts for Victoria; and

(g) promote the fundamental human rights of Aboriginal peoples, including the right to self-determination; and

(h) acknowledge the importance of culture to Aboriginal identity; and

(i) enhance the laws of Victoria.

Content of the treaty negotiation framework

In Victoria, the treaty negotiation framework must include the following matters—

(a) the process for negotiating a treaty or treaties;

(b) the process for formalising agreement to a treaty or treaties;

(c) minimum standards with which a party must comply in order to enter into treaty negotiations;

(d) a schedule setting out the matters (if any) that cannot or must not be agreed to in the course of treaty negotiations;

(e) the process for the resolution of disputes arising in the course of treaty negotiations;

(f) the mechanisms for enforcing a treaty or treaties;

(g) reporting requirements in relation to a treaty or treaties.

(2) The treaty negotiation framework must be consistent with the functions of the Treaty

Authority specified in section 28.

(3) In establishing the treaty negotiation framework by agreement, the Aboriginal Representative Body and the State may include additional matters to those specified in subsections (1) and (2).

In Victoria, the Aboriginal Representative Body and the State may vary the treaty negotiation framework by agreement. Treaty negotiations must not commence before the treaty negotiation framework is agreed to. Treaty negotiations must be conducted in accordance with the treaty negotiation framework.

Self-Determination Fund

Part 6 of the Act requires establishing a self-determination fund to be administered by the Assembly and details the fund's purposes.

The self-determination fund has the following purposes—

(a) supporting traditional owners and Aboriginal Victorians to have equal standing with the State in treaty negotiations;

(b) providing a financial resource, independent from the State, that empowers traditional owners and Aboriginal Victorians to build capacity, wealth and prosperity.

In establishing the self-determination fund, the Aboriginal Representative Body and the State may include purposes additional to those specified above by agreement.

The Aboriginal Representative Body must administer the self-determination fund.

The Assembly

To reinforce its independence from government, the Assembly is a company limited by guarantee. The Assembly currently comprises 31 seats: 21 determined through popular voting and 10 reserved for formally recognised Traditional Owner groups. The Act allows the number of recognised Traditional Owner groups on the Assembly to increase if more are established.

The VTAC helped create an Aboriginal electoral roll to elect the 21 elected Assembly members and voting in the first election occurred between 16 September 2019 and 20 October 2019. Aboriginal people aged 16+ were eligible to enrol in the election and votes could be cast either online, by post or in person at polling booths.

Low enrolment levels and low voter turnout led to only 7% of eligible Aboriginal Victorians casting votes for the 21 elected seats.

The Assembly met for the first time on 10 November 2019. Two of its recent achievements are particularly noteworthy. First, the Assembly partnered with the Victorian Government to begin a truth telling inquiry in Victoria. Announced in March 2021, the inquiry will be run by the Yoo-rrook Justice Commission (Yoo-rrook), with a budget of $58M. Yoo-rrook has been created as a Royal Commission and is independent of the Victorian Government. The Commission's letters patent (the legal document signed by the governor) was executed in May 2021. This was a significant step in the Victorian treaty process as 'there can be no treaty without truth'.[1]

The Assembly presented the Tyerri Yoo-rook report (meaning "seed of the truth" in Wemba Wemba/ Wamba Wamba) to Yoo-rrook in to guide its truth telling work.

Second, the Commission has established an interim Elders Voice 'to provide cultural advice, wisdom and oversight from Elders across Victoria to the work of the Assembly.'[2] Respected Elders and Assembly members Aunty Charmaine Clarke and Uncle Andrew Gardiner were appointed as the interim Elders' Voice Co-Chairs in July 2021. The Assembly's media release advises that the interim Elders' Voice will build the foundations for the Permanent Elders' Voice by consulting with the community and with Elders across the state. The interim Elders' Voice will make sure that the permanent Elders' Voice and the Victorian Treaty process reflects the priorities of Elders in Victoria.[3]

The Assembly's website notes that the permanent Elders' Voice will give Victorian Aboriginal Elders opportunities to exercise their cultural authority and experience to strengthen Victoria's progress towards treaties by providing guidance, wisdom and cultural oversight to the work of the Assembly.[4]

Queensland, Australia

In 2019, the Queensland Government released a Statement of Commitment to reframe its relationship with Aboriginal and Torres Strait Islander peoples. An Eminent Panel comprising both First Nations and non-First Nations Queenslanders was formed to lead and report on the way forward to treaty in August 2019. The Eminent Panel was Co-Chaired by Bidjara/Birri Gubba Juru woman Dr Jackie Huggins AM and Emeritus Professor Michael Lavarch AO.

In 2019, a Treaty Working Group (TWG), directed by the Eminent Panel consulted across Queensland and reported to the Eminent Panel in February 2020 to inform their advice to the Government.

The report was informed by wide-ranging engagement activities involving both First Nations people and non-Indigenous Queenslanders. The engagement revealed that there was significant support for a treaty. The three major themes that emerged were:

1. **Inclusion**: This is a conversation for all Queenslanders including Indigenous and non-Indigenous people.
2. **Reconciliation**: Truth-telling and healing are an important part of this process.
3. **Capability**: We need to invest in the capability of people to be treaty-ready.

After considering the TWG's report, the Eminent Panel finished its initial report in February 2020, and followed this with another report covering supplementary advice and recommendations in May 2020.

The Eminent Panel's revised recommendations were:

1.1 That the Queensland Government proceed on a Path to Treaty with the ultimate aim of reaching a treaty or treaties with the First Nations of Queensland.

1.2 That the Path to Treaty be conducted using a rights based approach consistent with both the Human Rights Act 2019 (Qld) and the United Nations Declaration on the Rights of Indigenous Peoples.

1.3 That, in order to progress the Path to Treaty, the Queensland Government will make a Treaty Statement of Commitment to express the Government's intention to further lasting reconciliation with First Nations through the actions detailed in the recommendations below involving:

1.3.1 the establishment of the First Nations Treaty Institute as an independent body to lead the Path to Treaty process;

1.3.2 the facilitation of a process of truth telling and healing;

1.3.3 the building of capacity for First Nations to actively participate in the treaty process;

1.3.4 deepening the understanding and engagement of the wider Queensland community in the Path to Treaty;

1.3.5 the adequate resourcing of these actions through the establishment of a First Nations Treaty Future Fund and;

1.3.6 the placing before Parliament a Bill to further the Path to Treaty, establish the First Nations Treaty Institute and the First Nations Treaty Future Fund

The Eminent Panel made the following recommendations with respect to implementation:

- The Queensland Government provide a sustainable and guaranteed financial basis for the Path to Treaty process to proceed; and
- A First Nations Treaty Future Fund (Fund) be established into which will be credited annual appropriations for a minimum of 10 years commencing at the earliest practical opportunity.

The Queensland Government responded to the Eminent Panel's recommendations with a Treaty Statement of Commitment. This statement either wholly accepted, or accepted in principle, all of the Eminent Panel's recommendations. Importantly, the statement affirmed the Queensland Government's commitment to both a treaty-making process with First Nations' peoples in Queensland and to exploring ways to establish an independent body through legislation to lead the Path to Treaty process, including a truth-telling and healing process.

In February 2021, the Queensland Government announced it had formed the Treaty Advancement Committee, Co-Chaired by Dr Jackie Huggins AM and Ghungalu man Mr Mick Gooda. Building on the work of the Eminent Panel, the committee's role was to advise government on the next steps. Its report, delivered in October 2021 is currently being considered by government.

In June 2021, the Queensland Government announced that it is establishing a $300M Path to Treaty fund. The returns from the fund will be used to progress Queensland's Path to Treaty and support the Queensland Government's response to the Treaty Advancement Committee report.

Tasmania, Australia

Professor Emerita Kate Warner AC and Professor Tim McCormack were appointed to consult with Tasmanian First Nations and to deliver a report to the premier with recommendations on a proposed way towards reconciliation, and to give the view of the Tasmanian Aboriginal people on a truth telling process and on what a pathway to Treaty would consist of.

The Pathway to Truth-Telling and Treaty report[5] was released in November 2021 following four months of consultations and more than 100 meetings. Consultations and recommendations includes:

- Truth-telling, including possible format, purpose and content;
- Treaty, including readiness for treaty, identity of parties, possible models, purpose, content and legal status;
- Identity and lateral violence (violence directed at peers rather than adversaries);
- Land and sea, including the return, protection and management of land and waterways, and cultural fisheries;
- Cultural heritage and practices;
- Education and capacity building;
- Language, particularly language retrieval;
- History, including colonisation, dispossession, assimilation and government policies;
- Intergenerational trauma, including the past, present and future impacts of colonisation and dispossession on Tasmanian Aboriginal people; and
- question of Aboriginality; and
- The UN Declaration on the Right of Indigenous Peoples (UNDRIP), endorsed by Australia in 2009, provides an influential guide for the minimum standards for treaty negotiations with themes of self-determination, participation in decision-making and respect for protection of culture.[6]

It is the NT Treaty Commission's understanding that the Tasmanian government is currently considering the report's recommendations.

Australian Capital Territory

In February 2021 the ACT government committed funding to support Aboriginal custodians progress a Treaty process for the ACT as part of its commitment to Closing the Gap on Indigenous disadvantage. This funding will 'facilitate a conversation with the traditional owners about what treaty means in the ACT and what a treaty process will look like'.[7] No further details are available.

International best practice

British Columbia, Canada

History

The Province of British Columbia is located on the west coast of Canada, between the Pacific Ocean and the Rocky Mountains. With a population of 5.1 million, it is the third most populous Canadian province.[8] Estimates suggest that 300,000 to 400,000 First Nations peoples lived in British Columbia prior to colonisation.[9]

Like the Northern Territory, British Columbia was colonised much later than its surrounding areas, leading to a unique set of circumstances that continue today. While first contact in the province occurred in 1772, Britain only created the Colony of Vancouver Island in 1849.[10] A separate mainland colony was established in 1858 and the two colonies were joined to become British Columbia in 1866.[11] For a long time, the main immigrants to the colony were fur traders; the colony was effectively run by the Hudson's Bay Company, then a fur trading business.[12] By 1852 approximately 500 British subjects had settled in Vancouver Island, and only thirty of them had attempted to acquire land.[13]

The delayed arrival of colonisers meant that BC First Nations kept their political, spiritual and cultural lives relatively intact, but also that few treaties were signed.[14] Between 1850 and 1854, James Douglas concluded fourteen treaties with First Nations on Vancouver Island.[15] Douglas was Chief Factor (the highest-ranked official) for the Hudson's Bay Company and became the Governor of Vancouver Island in 1851.[16] The treaties he negotiated are now known as the 'Douglas treaties'. We would not recognise these treaties as just or adequate today. First Nations received blankets in exchange for the vast majority of their traditional lands, and the text of the treaties states that 'the land itself, with these small exceptions, becomes the entire property of the white people for ever'.[17] In other words, the treaties were not a fair deal.

After these negotiations, Douglas signed no further treaties. One reason was that he believed in equality based on assimilation.[18] Douglas thought that First Nations would initially be content with small reserves modelled on European villages and that later, with careful guidance from missionaries, Indigenous people would grow to be like the colonisers, purchase their own plots of land, no longer identify according to their traditional tribes and fully assimilate into the white population. According to Douglas' worldview, there would therefore be no need for treaties, especially ones which acknowledged Aboriginal title over vast tracts of land.[19] But after Douglas' retirement in 1864, Indigenous people were barred from purchasing property, meaning even the policy's paternalistic notions of equality no longer held water.[20] Around the same time, one third of the province's Indigenous population died during a smallpox epidemic.[21]

British Columbia colonisers saw themselves as inhabiting a vast, empty land, much like the fiction of terra nullius here in Australia. They considered First Nations' claims to the land to be false, self-serving and an attempt to copy their own ideas of property.[22] Yet the surrounding colonies continued to conclude treaties and create much larger reserves for First Nations. This was in accordance with the Royal Proclamation of 1763, which stipulated that only the Crown – not individual settlers – could purchase First Nations' land, and that all unceded land had Aboriginal title.[23] In 1871, British Columbia became part of Canada, and federal authorities assumed that the new province had been negotiating treaties in a similar way.[24]

Five years later, several federal laws were combined to create the *Indian Act* (1876).[25] This legislation dramatically altered First Nations' lives and governance, and continues to do so today. Much like Douglas' policy, the *Indian Act* was underpinned by the false assumption that Indigenous peoples would and should desire to emulate the white population. The *Indian Act* created the concept of 'Indian status'. 'Status Indians' could live on reserves but could

not vote; enfranchisement meant becoming 'non-status'.[26] Status was accorded based on membership of an 'Indian band', often a much smaller unit than pre-existing First Nations.[27] Established forms of governance were replaced by the chief and council structure, which forbade women's participation until 1951.[28] Indeed, women's Indian status was tied to their husbands; if they married outside their band, they either lost their status or had it transferred to their husband's band.[29] Men could also lose their status if they fought in wars, graduated university or worked off-reserve.[30] Canadian authorities believed that Indigenous people would be eager to assimilate and become enfranchised, failing to recognise the cultural connections cultivated on reserves, as well as the ways in which 'Indian status', despite its many restrictions, signified a special relationship between First Nations Canadians and the Crown.[31]

The *Indian Act* became stricter over the decades. In 1884, the 'potlatch' was banned. Potlatches are important political, social and cultural ceremonies that involve wealth redistribution among one or several First Nations. To Canadian authorities, this process appeared incompatible with their own brand of individualised capitalism.[32] Additionally, they found potlatches threatening, as they allowed Indigenous peoples to organise politically among themselves.[33] Defying the potlatch prohibition could lead to a jail sentence between two and six months in length.[34] Subsequent restrictions extended the ban to other ceremonies.[35] In 1927, in the midst of a groundswell of Indigenous political activity, the Indian Act was changed again to forbid First Nations peoples from hiring lawyers. This effectively prohibited any land claims.[36] By this stage, the Act's restrictions were so tight that most non-Christian Indigenous gatherings were not allowed.[37] Other amendments mandated Indigenous children's attendance at residential schools, which separated children from their families and cultures and involved widespread physical, psychological and sexual abuse.[38] But the Indian Act could not totally quash First Nations' ways of life; traditional celebrations, cultural teachings and political agitation continued to be conducted underground.[39]

After the Douglas Treaties in the 1850s, the government concluded only one other set of treaties in British Columbia, before the *Indian Act* made this impossible in 1927. Arguably, British Columbia was pursuing a policy at this time that was the antithesis of treaty making, by reducing the acreages of reserve lands to benefit non-Indigenous farmers and enacting laws so that these changes no longer required the consent of First Nations.[40] In 1898, the Beaver First Nation demanded a treaty by creating a protest blockade which impeded gold rush travel.[41] The Treaty 8 agreements were already being negotiated just outside British Columbia, and the Beaver and seven other BC First Nations were allowed to join and therefore become part of the Treaty 8 Nations.[42] The overall Treaty 8 process ended in 1915, aside from some small changes several decades later.[43] More generally, Canada stopped negotiating treaties with First Nations in 1923, with the aforementioned 1927 Indian Act amendment putting a firm end to land claims for several decades.[44]

The Douglas Treaties and Treaty 8, along with any other treaty signed in Canada prior to 1921, are known as 'historic treaties'. The treaties currently under negotiation, by contrast, are called 'modern treaties'.

By 1951, Canadian authorities no longer felt threatened by the political might of First Nations, including those in British Columbia.[45] They did, however, feel international pressure to improve their Indigenous policies, after the events of World War II caused the world to consider the effects of racist practices.[46] As a result, the Indian Act was modified. Potlatches and political organisation were allowed once more, and women could now vote and run in band council elections.[47] The government also became less reliant on residential schools, although the last of these would not shut until 1996.[48]

But these changes did not herald an end to assimilative practices, as events in the 1960s would demonstrate. 1960 marked the year that Status Indians became allowed to vote in federal elections (they had been allowed to vote in British Columbia elections since 1949).[49] However, this decade also signified the start of the 'Sixties Scoop', a time in which a disproportionately high number

of Indigenous children were placed in out-of-home care, usually with non-Indigenous carers.[50] As with Australia's Stolen Generations, children were removed not because they were mistreated but because their parents had little money or did not conform to Western living styles.[51] While the Sixties Scoop is generally considered to have ended in the 1980s, Indigenous children are still overrepresented in out-of-home care in Canada.[52]

With the amendments to the *Indian Act*, First Nations could openly organise and advocate for treaties once more. Many Indigenous political organisations were created around this time, often in opposition to one another.[53] In general, however, these organisations agreed that all British Columbia First Nations should negotiate one collective treaty and land claim with the provincial and federal governments.[54] The Nisga'a Nation proved an outlier, deciding to pursue a treaty separately to other First Nations. In the late 1960s, the Nisga'a began legal action, claiming that their Aboriginal title had never been extinguished.[55] In 1973, the Supreme Court of Canada found that the Nisga'a had held title prior to colonisation, but split evenly on whether they continued to do so.[56] Despite the ambiguous ruling, the Nisga'a case pushed the federal government to re-open land claims across Canada. The Nisga'a began negotiating their own treaty in 1976.[57]

Despite the Nisga'a's successful court action, they would not conclude their treaty for several decades, nor would other BC First Nations be given a real opportunity to begin treaty making for some time yet. Initially, the federal government would only negotiate one claim per province at a time, meaning all other Nations had to wait until the Nisga'a claim was settled.[58] A greater impediment came from the British Columbia government, who continued to claim that Aboriginal title no longer existed in their province.[59] This was despite the fact that the Canadian Constitution was updated in 1982 to state that 'the existing aboriginal and treaty rights of aboriginal peoples of Canada are hereby recognized and affirmed.'[60] Throughout the 1980s, many British Columbia First Nations and tribal councils organised protests and political meetings which gained popular support.[61] A further series of protests in 1990 prompted the provincial government, who had already been softening its stance in relation to land claims, to finally take decisive action.[62] In that year, the British Columbia Government joined the Nisga'a treaty negotiations.[63] Additionally, the federal and provincial governments and First Nations leaders set up a task force to investigate a process to settle modern treaties.[64] The British Columbia Treaty Commission and its corresponding treaty process were born from this task force's report.

The British Columbia Treaty Commission

The British Columbia Treaty Commission (BCTC) was established in 1992.[65] The BCTC is an independent, tripartite statutory body.[66] It does not negotiate treaties itself, but instead facilitates the process of treaty making, allocates funding to First Nations (based on a 90/10 split between the federal and provincial governments) and runs education programs.[67]

The three Principals of the process are the Government of Canada, the Government of British Columbia and the First Nations Summit.[68] The Principals correspond to the three parties in any given treaty negotiation: the two settler governments and the relevant First Nation government.[69]

There are four Commissioners (two elected by the First Nations Summit and one each appointed by the federal and provincial governments) plus one Chief Commissioner who is appointed on a three-year term by agreement of the Principals.[70] Commissioners do not represent the Principals who appoint them, but instead act independently. Decisions require the support of one appointee of each of the Principals.[71] According to the BCTC's 2021 report, the Commissioners are currently supported by ten additional staff.[72] The Commission's operating costs are funded by the federal and provincial governments in a 60/40 split.[73]

The three parties undertake a six-stage process together as part of the negotiations:

1. **Statement of Intent to Negotiate:** The First Nation submits a Statement of Intent (SOI) to begin treaty negotiations. The SOI is quite

brief, covering the area and people represented in the claim, the body in charge of the claim, proof of the mandate given to this body by the people represented and an indication of any overlapping territories with other First Nations.

2. **Readiness to Negotiate:** Within 45 days of accepting the SOI, the Treaty Commission must organise a meeting of the three parties to the treaty. During this meeting, the parties demonstrate their 'readiness'. The parties must have, inter alia, a mandate, an effective means of consulting relevant interests and adequate resources including a trained negotiator. Parties also begin general discussions at this stage and exchange information.
3. **Negotiation of a Framework Agreement:** The Framework Agreement is akin to the 'contents page' of the treaty – it involves the subjects that are up for discussion and the timeframes in which negotiations should occur.
4. **Negotiation of an Agreement-in-Principle:** According to the BCTC, this stage is 'where substantive treaty negotiations begin.' The three parties reach a set of agreements that form the basis of the treaty itself.
5. **Negotiation to Finalise a Treaty:** At this stage, the three parties create a Final Agreement (that is, a treaty) that deals with each subject in detail. The Agreement covers legal and technical issues, as well as funding and other logistical concerns. The First Nation takes the treaty to a vote, and if successful it is signed, ratified and legislated.
6. **Implementation of the Treaty:** The terms of the treaty are enacted and the process is complete.[74]

Currently, there are 39 First Nations actively participating in the treaty process, or who have completed negotiations. This figure equates to 72 Indian Act bands, or 36 per cent of all bands in British Columbia.[75] However, a total of 65 First Nations (that is, 109 bands representing 54.5 per cent of all BC bands) have participated in the process at some stage, meaning 26 First Nations have suspended negotiations.[76] The reasons for this are explored in more detail below.

So far, three treaties have been implemented under the BCTC process, with a further two concluded but not implemented. The three treaties cover seven First Nations:

1. The **Tsawwassen First Nation**, located near metro Vancouver, began implementation in 2009. It has 500 citizens.[77]
2. The **Maa-Nulth First Nations**, five First Nations who concluded a treaty collectively, began implementation in 2011. The five Nations are: the Huu ay aht First Nations (735 citizens), the Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nation (585 citizens), the Toquaht Nation (155 citizens), the Uchucklesaht Tribe (230 citizens), and the Yuułu ił ath Government (675 citizens). The Nations are located on the west coast of Vancouver Island.[78]
3. The **Tla'amin Nation**, with 1,165 citizens, located ninety minutes from Vancouver in the Powell River area, began implementation in 2016.[79]

The **Yale First Nation** initialled a Final Agreement in 2010, but could not resolve its overlapping claims issues with other First Nations. Although the treaty received Royal Assent in 2013, it still has not been implemented.[80] The **Lheidli T'enneh First Nation** voted to reject the first iteration of their Final Agreement in 2007, then also voted not to accept an updated version in 2018.[81] The **Nisga'a** negotiations continued outside of the BCTC process, with the Nisga'a Final Agreement executed in 1998 and implemented in 2000.[82]

In recent years, the BC treaty process has experienced a major overhaul. First, in 2018, Canada stopped issuing repayable loans as part of the treaty process; now, all funding is non-refundable and contribution only.[83] The following year, the federal government announced that it would forgive all pre-existing treaty loans.[84] The Treaty Commission's mandate was also extended: now, part of its role is to ensure that treaties are negotiated in line with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Canadian Truth and Reconciliation Commission's 94 Calls to Action and the *Principles Respecting the Government of Canada's Relationship with Indigenous Peoples*.[85] In 2018, the Principals signed an Accord to transform

treaty negotiations.[86] In 2019, the Accord was followed by the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia*. According to this policy, modern treaties:

a. *are grounded in the recognition of the rights of Participating Indigenous Nations;*
b. *reconcile pre-existing Indigenous sovereignty with assumed Crown sovereignty;*
c. *do not extinguish the rights, including title of Participating Indigenous Nations, in form or result; and*
d. *are able to evolve over time based on the co-existence of Crown and Indigenous governments and the ongoing process of reconciliation of pre-existing Indigenous sovereignty with assumed Crown sovereignty.*[87]

The policy also promised that negotiating mandates would not be 'one size fits all' and that negotiations were not limited to pre-existing federal or provincial mandates.[88] As detailed below, these provisions aimed to address an ongoing issue with inflexible mandates in the treaty process.

Criticisms – and Learnings - from the British Columbia

The BC treaty model has evolved significantly since the Treaty Commission was established 30 years ago. These positive changes have been in response to issues that have arisen during negotiations which, in turn, have clear links to the colonial history of British Columbia outlined above. The following examines some of the criticisms of the BCTC process in order to learn from them.

Many First Nations remain distrustful of British Columbia's intentions, especially after centuries of denial of their Aboriginal title. This is made particularly clear in debates over extinguishment in the treaty process. When the BCTC agreement was signed in 1992, Chief Joe Mathias stated 'negotiations in our view will not be based on that tired old notion of extinguishment. We will not tolerate the extinguishment of our collective Aboriginal rights.'[101] Despite this assertion, First Nations still feared that their rights, especially their rights to their traditional lands, would be extinguished upon signing a treaty. In 2015, in an article unsuccessfully calling for a 'no' vote to the Northern Secwepemc Agreement-in-Principle (AIP), Julian Brave NoiseCat asserted that 'certainty' (a word often used to spruik BC treaties) really meant 'the extinguishment of any indigenous claims to lands, rights and sovereignty, present and future.'[102] Indeed, this concern continues despite the 2019 *Recognition and Reconciliation of Rights Policy* explicitly acknowledging that extinguishment has no place in treaty negotiations.[103]

Some First Nations felt trapped in the treaty process or completely unwilling to pursue it due to the (now scrapped) loan policy. Until 2018, First Nations' treaty funding was a combination of loans and what we would call grants, with loans representing up to 80 per cent of the figure.[104] Earlier estimates had suggested that treaties would take far less time to conclude (discussed below), meaning that these loans were not planned for adequately and at times ballooned to figures in the millions, eclipsing the capital transfer (compensation) payment component of the treaty settlement.[105] Indeed, by March 2019, outstanding BC treaty debt had accumulated to $551.9 million CAD, with the federal government allocating $1.4 billion CAD to loan forgiveness and repayment (including in other provinces).[106] While it is likely some First Nations never entered the treaty process due to the loans, the issue has meant others have either felt compelled to conclude treaties despite misgivings (discussed in Tla'amin case study) or even stall the process in order to not begin repayments.[107] In the words of Mary-Ann Enevoldsen, both former Chief of the Homalco Nation and former Treaty Commissioner, the loans 'gave fuel to people who opposed our efforts and it left a negative cloud over the treaty process … The elimination of [loans] has removed this cloud and demonstrates that the government of Canada is serious about reconciliation.'[108] This is a critical lesson for the NT that has also been raised in written submissions in response to the Discussion Paper. Funding to First Nations to conduct negotiations must not be repayable.

The architects of the BC treaty process warned that treaties would take time, but even they massively underestimated just how many years would be

required. When negotiations began in 1993, those involved assumed that all treaties would be concluded by 2000.[109] In reality, the first treaty was not implemented until 2011.[110] In 2001, the BCTC conceded that 'looking back today, the Treaty Commission believes not that the process was too slow, but that it tried to accomplish too much, too soon … What has become clear is that treaty negotiations were, and are, simply too complex for speedy solutions.'[111] The problems of slow pace and loans were compounded by issues with government mandates. For some time, the federal government negotiators had no fisheries mandate, grinding several negotiation tables to a halt.[112] Among the First Nations who dealt with this problem were the Tla'amin, whose experience is discussed in greater detail in the following section. In 2016, then Federal Indigenous Affairs Minister, Carolyn Bennett, admitted that some mandates had been 'cookie cutter' in their approach and did not allow for flexibility or specificity.[113] It is for this reason that the 2019 policy explicitly mentions the importance of adaptable mandates as part of its series of reforms.

Other challenges of the BC treaty process are less easy to solve through new policies. One major issue facing First Nations who negotiate treaties is claim overlap with other groups. More than 100 per cent of British Columbia has been marked as traditional lands in Statements of Intent, meaning overlaps are very common.[114] In the 2019 policy, the Principals agreed that this issue was still best worked out between First Nations, with as little outside intervention as possible.[115] Yet the case of the Yale First Nation's unimplemented treaty (discussed above), as well as court cases against the Tsawwassen treaty relating to claim areas, indicate that these are regular problems caused by colonisation that evade simple solutions.[116]

As the treaty process transforms in response to the 2019 policy, we will be able to witness improvements that benefit First Nations. This year's BCTC report highlighted several new ways of concluding treaties, many of which did not involve rigidly following the six-stage process.[117] Perhaps the greatest challenge of all to the BC process was the amount of time it took to address the criticisms outlined here, many of which were first articulated two decades ago or more.[118] According to Bennett, 'we're dealing with the cynicism that's rightfully there of 150-plus years of broken promises.'[119] Learning from the BC experience, creating an adaptive process and being cognisant of the need to build trust will all be key to the future of treaty in the NT.

Learnings from the above examples can be summarised as follows:

a. *Treaties must be grounded in the recognition of the rights of Participating Indigenous Nations;*
b. *Treaties must reconcile pre-existing Indigenous sovereignty with assumed Crown sovereignty;*
c. *Treaties must not extinguish the rights, including title of Participating Indigenous Nations, in form or result; and*
d. *Treaties must evolve over time based on the co-existence of Crown and Indigenous governments and the ongoing process of reconciliation.*[120]

Socioeconomic impacts of modern Canadian treaties

Tracking the socioeconomic impacts of modern Canadian treaties is a difficult exercise. Most BC treaties were concluded very recently, so measuring their long-term effects is not yet possible. It also can be hard to untangle First Nations' income or wellbeing rates from factors unrelated to treaty (such as economic downtown in a surrounding area). However, the available data reveals that BC treaties have led to positive outcomes not just for First Nations, but for their surrounding communities. In what follows, we detail some general findings as well as some specific benefits experienced by First Nations that have negotiated modern treaties.

There is evidence across Canada that modern treaties improve community outcomes. In 2013, the Strategic Research Directorate of Crown–Indigenous Relations and Northern Affairs Canada released a paper concerning community wellbeing in both historic (implemented before 1923) and modern (implemented since 1975) treaty nations.

The study covered the period between 1981 and 2006 and found that:

1. All treaty nations (modern and historic) improved their education levels, especially in terms of high school completion
2. Modern treaty nations improved their levels of community wellbeing (as per the Community Wellbeing Index) at twice the rate of historic treaty nations
3. First Nations currently negotiating treaties had an overall higher community wellbeing score than historic treaty Nations, indicating that the treaty negotiations process itself accrues benefits to the community
4. Housing conditions (measured both in quality and quantity) improved significantly for modern treaty nations
5. The gap in labour force activity and income between modern treaty nations and non-Indigenous communities narrowed by half.

Modern treaty nations also improved in wellbeing at a rate similar to non-Indigenous communities between 2001 and 2006, whereas growth slowed for their historic treaty counterparts.[121]

There are few studies that examine the impact of BC treaties (as opposed to all modern Canadian treaties), but those that exist also indicate positive change. Besides the Nisga'a agreement, for which negotiations commenced prior to the start of the British Columbia Treaty Commission process, BC First Nations have only been implementing treaties since 2009. This means that we do not yet have sufficient data to assess the long-term effects of these treaties. However, two articles by Krishna and Ravi Pendakur provide evidence that these treaties, which involve a more holistic and comprehensive negotiation than historic agreements, have had a positive economic impact on First Nations.

Pendakur and Pendakur find that Canadian treaties that involve both a self-government agreement (SGA) and a comprehensive land claim agreement (CLCA) lead to higher incomes in First Nations households.[122] This includes several BC treaties.[123] Other types of agreement do not have the same effects. Indeed, under standalone land claims, non-Aboriginal residents see a significantly greater increase in their household incomes than their First Nations neighbours.[124] Pendakur and Pendakur also note that First Nations' income gains are mostly caused by increases in labour income (wages or similar), *not* in transfer income (subsidies and other government payments), indicating that modern treaties may also improve employment conditions.[125] In their second, more recent article, Pendakur and Pendakur demonstrate that combined SGAs and CLCAs lead to decreases in income inequality, and average increases of $11,000 CAD in household income.[126] Overall, then, the evidence points to gains in both household income and income equality in modern treaty First Nations, including those from BC.

The Tsawwassen First Nation, located in the Greater Vancouver area with a population of approximately 500, began implementing their treaty in 2009 and have already experienced numerous socioeconomic successes.[127] Prior to treaty implementation, the Tsawwassen were unable to benefit from the financial success of the area around them. As Valerie Cross Blackett testified at a forum on treaty and economic self-sufficiency:

> *In the early nineties … I saw growth in the surrounding Tsawwassen and Ladner areas. The coal port expansion, BC Ferries, George Massey Tunnel, town houses in Ladner and Tsawwassen, row houses in Ladner, Trenant Square Mall with more and more businesses … expanded City Hall, improved recreation centres, golf courses, the list goes on. Yet we were denied water for our development … They [the neighbouring council] wanted to control Tsawwassen; they wanted to manage our affairs. We had no power, no authority over our own affairs and no opportunity. It was simple; no water, no development. There was no economic opportunity for our people.*[128]

Treaty afforded the Tsawwassen the power to make their own decisions and investments, without having to wait for approval from the government via the *Indian Act*. Additionally, the Tsawwassen treaty allowed the First Nation to join the board of Metro Vancouver, leading to easier water access for developments.[129] As a result, the Tsawwassen First Nation was finally able to benefit from the economic growth of their area. In 2015, the Tsawwassen opened a $27 million CAD sustainable

sewage treatment plant.[130] According to then Chief Bryce Williams, this was 'key to opening the gates to our developments: industrial, commercial, and residential. Without it we wouldn't have been able to move forward to success.'[131]

With the wastewater plant in place, the Tsawwassen were able to develop several major economic projects. These included Tsawwassen Mills and Tsawwassen Commons, two large-scale shopping centres which were completed in 2016 and 2017 respectively.[132] The Tsawwassen Mills project involved the largest ever real estate deal in British Columbian history yet did not require the Tsawwassen to sell their land, which was instead rented on a 99-year lease.[133] The deal is also the largest non-resource agreement signed by a BC First Nation.[134] Estimates suggest that the Mills and Commons created around 4,500 jobs during construction and another 3,000 retail jobs once completed.[135] The First Nation has since constructed the Tsawwassen Gateway Logistics Park, including the Tsawwassen Container Examination Facility for inspections of incoming shipments.[136] This project involved the creation of around 2,500 jobs: 1,000 in construction and a further 1,500 in shipment and supply.[137] There is also an Amazon Fulfilment Centre in this area, which has generated another 800 jobs.[138] Finally, the Tsawwassen have developed numerous residential properties on their lands, both for members and others.[139] Again, these housing developments have involved thousands of new jobs.[140]

These projects have led to several economic benefits, both for the Tsawwassen and the broader community. In 2012, the BC Treaty Commission reported that Tsawwassen Treaty Settlement Lands had already risen in value from $66.7 million CAD in 2007 to $340 million CAD that year.[141] According to the Canadian Broadcasting Corporation, Tsawwassen property value grew by 45 per cent in 2018, the largest increase for that year in BC.[142] As Chief Williams indicated in 2017, the First Nation's industrial and commercial interests represent about $485 million of annual employment income: 'there are more jobs than Tsawwassen members by far, so this creates jobs for the region and provides a boost into the regional economy. It's major employment for the region.'[143] A 2019 Tsawwassen publication indicated that the unemployment rate within the First Nation had dropped by twenty per cent between 2011 and 2016.[144]

The Tsawwassen have made sure to invest their new finances in programs and services that will improve social outcomes and benefit their community. For instance, Tsawwassen Mills contains artwork by local artists, creating jobs but additionally strengthening and displaying Tsawwassen culture.[145] The First Nation has doubled its annual spending on education since 2010, and saw a large increase in post-secondary applications in 2011, due to a 'renewed interest and optimism in the future'.[146] According to then Chief Kim Baird, this interest is symptomatic of the fact that 'our members don't just want jobs—they want good jobs, ones that require a higher level of skill and that involve training and education development.'[147] The First Nation also began offering Hul'qumi'num language classes in 2013.[148] They have otherwise used their finances to improve the community's infrastructure, spending $100 million on new roads and sewer and water pipes.[149] The positive social impacts of the treaty can also be seen in changes among Tsawwassen youth. Between 2014 and 2019, no youths were charged with a criminal offence.[150] Additionally, Chief Williams believes that the treaty has 'sparked involvement', especially from young people: 'it seems to me more people want to be involved in governance, being able to have a say for the people. People have grown together in certain areas, and the community has grown together.'[151]

As with other Canadian First Nations, some evidence suggests that the Tsawwassen benefitted not only from the signing of the treaty, but the capacity building that occurs during the negotiations process. In the 2013 report cited earlier, Tsawwassen recorded the extremely high score of 89 out of 100 on the Community Wellbeing Index. This score was recorded in 2006, three years before treaty implementation.[152]

The Nisga'a First Nation, located in the Nass Valley, western BC, has approximately 5,500 members and has also experienced positive socioeconomic

impacts since signing their treaty in 1998.[153] The First Nation recorded growth in their Education, Labour Force Activity and overall Community Wellbeing scores during treaty negotiations and just after implementation. This was despite declines in surrounding communities in the latter two scores in the same period, including declines in Labour Force activity among non-Indigenous populations.[154] Studies also indicate that Nisga'a citizens trust their local government more than a comparable, non-treaty First Nation, and that they believe their health services have improved since treaty implementation began.[155] Finally, the 2016 Census demonstrated that Nisga'a members aged between 25 and 34 had higher levels of educational attainment than their older counterparts, potentially representing greater access to education post-treaty implementation.[156]

The 2011 Maa-nulth treaty has brought similar financial and social benefits to communities. This treaty was collectively signed by a set of five Vancouver Island First Nations with a cumulative membership of approximately 2,400 people.[157] Several of these nations have upgraded their sewer systems, water treatment facilities, internet access, community housing and roads.[158] Two of the five nations have adopted living wage policies; one of these, the Huu-ay-aht, pay approximately $7 CAD per hour more than the BC minimum wage rate.[159] The Huu-ay-aht have attributed this change to treaty: according to Councillor Tom Mexsis Happynook, the policy 'shows how the treaty gives us the ability to chart our own future.'[160] The Toquaht First Nation has been able to strengthen its culture, building a totem pole and also holding its first potlatch (an important political, cultural and social ceremony) on its territory in more than thirty years in 2017.[161] Similarly, the Yuułuʔiłʔatḥ First Nation has established a daycare centre and summer programs for young children which involve culture and language teaching.[162] As with the Tsawwassen, the Maa-nulth treaty has allowed its members to be part of their region's economic successes: according to Huu-ay-aht councillor John Jack, 'we saw that it was only by accessing the wealth generated on our lands [that] we would be able to dig ourselves out of the underdevelopment created by colonisation.' [163]

Ultimately, whilst it is early days, we can see that a number of First Nations have accrued socioeconomic benefits by becoming self-determining through treaty.

Aotearoa New Zealand

Overview of Treaty of Waitangi

The *Treaty of Waitangi* is roughly one page long; contains only three articles; and there were English and Māori versions of the Treaty that differ. The following explanations of the three articles have been provided by New Zealand's Office for Māori Crown Relations:

- Article One: the government gained the right to govern. (NB. The interpretation of this Article is debated. It is contested whether the Crown's right to govern applied to all people in New Zealand or to the British subjects only.)
- Article Two: the Crown promised that Māori will have the right to make decisions over resources and taonga which they wish to retain.
- Article Three: the Crown promised that its obligations to New Zealand citizens are owed equally to Māori.

Since the Treaty was signed in 1840, Māori have raised many grievances with the crown that the Treaty was not being upheld. The Treaty of Waitangi Act 1975 (the Act) established the Waitangi Tribunal and provided a legal process by which Māori Treaty claims can be investigated. In exercising the functions and for the purposes of the *Treaty of Waitangi Act* 1975, the Waitangi Tribunal has exclusive authority to determine the meaning and effect of the Treaty and can decide on issues raised by the differences between Māori and English texts of the Treaty. Māori have lodged more than 2,500 claims with the Tribunal and over 80 settlements have now been reached, many covering multiple claims.[164]

The *Treaty of Waitangi* is widely considered to be a part of Aotearoa's unwritten constitution. Due to the differences in the English and te reo Māori versions, many references are made to the Treaty's principles. These principles, including

partnership, protection and participation, continue to be developed by the Waitangi Tribunal and the Courts. The constitutional importance of the Treaty of Waitangi is illustrated by the inclusion of the Treaty and its principles in legislation, case law and Waitangi Tribunal findings. However, settlement agreements are legislated. Apart from orders for the resumption of state owned enterprise land, the Waitangi Tribunal's recommendations are not binding on the Crown however they may guide Crown actions and policies.

Systems and processes

Aotearoa New Zealand crown negotiating principles

Good Faith: The negotiating process is to be conducted in good faith, based on mutual trust and co-operation towards a common goal.

Restoration of Relationship: The strengthening of the relationship between the Crown and Māori is an integral part of the settlement process and will be reflected in any settlement. The settlement of historical grievances also needs to be understood within the context of wider government policies that are aimed at restoring and developing the Treaty relationship.

Just Redress: Redress should relate fundamentally to the nature and extent of breaches suffered, with existing settlements being used as benchmarks for future settlements where appropriate. The relativity clauses in the Waikato-Tainui and Ngāi Tahu settlements will continue to be honoured, but such clauses will not be included in future settlements. As the first two major iwi to settle, Waikato-Tainui and Ngāi Tahu played an important role in helping the country take initial steps towards settling long-standing grievances about the Crown's historical breaches of the *Treaty of Waitangi*.

Waikato-Tainui and Ngāi Tahu took a risk in settling early. It was the Crown's assessment that neither Waikato-Tainui nor Ngāi Tahu would have signed their agreements without the Crown addressing the risk that their settlements would become out of step with future settlements.

Fairness between Claims: There needs to be consistency in the treatment of claimant groups. In particular, 'like should be treated as like' so that similar claims receive a similar level of financial and commercial redress. This fairness is essential to ensure settlements are durable.

Transparency: First, it is important that claimant groups have sufficient information to enable them to understand the basis on which claims are settled. Secondly, there is a need to promote greater public understanding of the Treaty and the settlement process.

Government-Negotiated: The Treaty settlement process is necessarily one of negotiation between claimant groups and the government. They are the only two parties who can, by agreement, achieve durable, fair and final settlements. The government's negotiation with claimant groups ensures delivery of the agreed settlement and minimises costs to all parties.

Aotearoa New Zealand settlement process

All claims need to be registered with the Waitangi Tribunal before the Tribunal can begin an inquiry or the Crown can start negotiating with a claimant group. However, once a claim is registered, a claimant group can seek negotiations with the Crown straight away or may choose instead to have their claims heard by the Tribunal before entering negotiations.[165]

Te Arawhiti (the Office for Māori Crown Relations) is the New Zealand Crown agency responsible for leading settlement negotiations, implementation and ensuring the Crown meets it Treaty settlement commitments. Te Arawhiti also has responsibility for processing applications under the *Marine and Coastal (Takutai Moana) Act 2011* and more broadly supporting the Māori Crown relationship by strengthening public sector capability and engagement, monitoring the health of the Māori Crown relationship, providing advice and leadership on contemporary Treaty issues and brokering Māori-Crown partnerships. Te Arawhiti was established on 1 January 2019, and incorporated the Office of Treaty Settlements and the Post Settlement Commitments Unit and created the Māori Crown Relations team. Te Arawhiti's purpose is to support the Crown to act fairly as a Treaty partner. Two of Te Arawhiti's key operational responsibilities are:

- Completing treaty settlements with willing and able groups; and
- Ensuring the Crown meets its Treaty settlement commitments.

Importantly, though, two of Te Arawhiti's other responsibilities clearly demonstrate the New Zealand government's commitment to a true partnership – an approach that greatly enhances the prospects of successful implementation and reduces the prospects of disputes:

- Ensuring public sector capability is strengthened; and
- Ensuring the engagement of public sector agencies with Māori is meaningful.

There are four key stages in a treaty settlement. Each settlement needs to provide:

- An historical account, Crown acknowledgement of Treaty breaches and apology
- Financial redress
- Commercial redress
- Cultural redress (for example, the return of lands of special significance, arrangements to provide a role for Māori in the governance of resources and place name changes).

The negotiation process is quite similar to the British Columbia model:

Step 1: Preparing claims for negotiation[166]

- Agreement by the Crown and the claimant group to negotiate. This involves the Crown accepting that there is a well-founded grievance, and the claimant group meeting the Crown's preference for negotiating with large natural groupings.
- The mandate of the claimant group representatives (including agreement on the claims to be negotiated) is conferred by the claimant group and then recognised by the Crown. The mandated representatives may conduct the negotiations themselves, or appoint negotiators to do so.
- Processes are put in place for mandated representatives to consult with claimant group members on settlement issues and develop a register of members (continues up to ratification).

Step 2: Pre-Negotiations

- Terms of Negotiation are developed and signed, setting out the basis upon which negotiations will take place.
- Relevant Ministers approve the funding available to mandated representatives on behalf of the claimant group as a contribution to the cost of negotiations.
- The claimant group identify the areas or sites and Crown assets in which they are interested in seeking redress and the types of redress they think are appropriate in relation to those sites or areas.

Step 3: Negotiations

- Formal negotiations begin. This involves the mandated representatives continuing to consult with members of the claimant group on settlement issues and, where relevant, seek their views on a governance structure for managing settlements assets.
- After sufficient progress in negotiations, the Minister for *Treaty of Waitangi* Negotiations sends a letter to the mandated representatives outlining parameters of the Crown offer, including quantum (the total monetary value of the financial and commercial redress to be provided by the Crown).
- Alternatively, the Crown and mandated representatives can seek a more formal

agreement. This is known as an Agreement in Principle. An Agreement in Principle outlines the nature and scope of all settlement redress agreed as the basis for the final Deed of Settlement. An Agreement in Principle is non-binding on the Crown and the claimant group.

- Usually (and certainly when requested to do so), the Minister presents an outline of the Agreement in Principle to claimant group members, including kuia and kaumātua, several weeks before it is signed.

Once the Agreement in Principle has been signed by the Crown and mandated representatives, then:

- Work begins on the detail of a draft Deed of Settlement. The remaining issues are usually matters of detail and implementation. The Deed of Settlement is the final Crown offer to the claimant group for the settlement of their historical grievances and will reflect the agreements made in the Agreement in Principle
- Where relevant, the mandated representatives continue to seek the claimant group's views on a governance structure for managing settlement assets
- The claimant group's mandated representatives continue to update the register of claimant group members
- Mandated representatives approve and initial a complete Deed of Settlement (initialling indicates to the wider claimant group that their mandated representatives believe the Crown's final officer should be accepted)
- The Crown reviews the proposed governance entity to ensure it is representative, accountable and transparent.

Step 4: Ratification and Implementation

- The mandated representatives engage in an extensive communication process on the initialled Deed of Settlement and (if not done later) the proposed governance entity by, for example, publishing summary information and holding communication hui.
- The mandated representatives hold a postal ballot of claimant group members on the initialled Deed of Settlement.
- The mandated representatives will also hold a postal ballot of claimant group members on the proposed governance entity at this point or at a later date.
- if sufficient majority of claimant group members has ratified the settlement, their mandated representatives, as authorised through the ratification process, sign the Deed of Settlement, which is binding and subject only to the establishment of the governance entity and the passage of legislation to give effect to the settlement.
- Once the governance entity is ratified by the claimant group and established, the Crown introduces enacting legislation for the settlement.
- Following the legislation, both the Crown and claimants implement the agreements in the Deed, including the transfer of settlement assets and cultural redress.

Example - Ngāi Tahu settlement

The Ngāi Tahu Settlement is a practical example of a settlement negotiated under the four stage process.

Ngāi Tahu are the largest Māori iwi (tribe) on the South Island of New Zealand. Ngāi Tahu *takiwā* – territory is the largest in New Zealand and extends from *Te Parinui o Whiti* (White Bluffs, southeast of Blenheim), Mount Mahanga and Kahurangi Point in the north, down to Rakiura (Stewart Island) in the south. Ngāi Tahu population is in the order of 55,000 with roughly 49% living on country and 51% living off-country, including about 1,200 overseas.

As early as 1849, Ngāi Tahu raised concerns with Crown dealings following The *Treaty of Waitangi*. Over the next 150 years, Ngāi Tahu protested the Crown's broken promises, including Crown ownership of *pounamu* (greenstone, a resource of great spiritual value to Māori) and the Crown's failure to provide schools and hospitals. Iwi also protested over the low prices paid for land (a fraction of a penny per acre), unclear boundaries of the purchased lands, the loss of *mahinga kai* (traditional food and other natural resources and the places where they are found), and the leasing to settlers in perpetuity of reserved lands without iwi consent. In 1986, Ngāi Tahu lodged claims with

the Waitangi Tribunal. This was the first large claim that the Tribunal heard under its modern power to investigate grievances going back to 1840, the date The *Treaty of Waitangi* was signed.

The agreement was given the effect of law in the *Ngāi Tahu Settlement Act 1998* – **12 years after the initial claim was lodged**. The terms include:

An unreserved apology from the Crown

Ngāi Tahu regarded an apology as the first step towards healing.

Cultural Redress

- The transfer of specified river and lake beds and other culturally significant land and the opportunity to purchase other significant land within their area of interest.
- Vest and gift back of Aoraki / Mt Cook (significant mountain).
- *Pounamu*: the New Zealand Crown agreed to return ownership of the natural resource *pounamu* (greenstone), effected through the *Ngāi Tahu (Pounamu Vesting) Act 1997*.
- *Mahinga Kai*: includes management of customary fisheries and taonga (high cultural value) species management.
- Coastal areas: provide Ngāi Tahu with a preferential right to purchase Authorisations (pursuant to section 161 of the Resource Management Act) to coastal areas within their area of interest.

Economic and Financial Redress

- Untied payment of NZ$170M (plus interest of $25M).
- Deferred Selection Properties: Ngāi Tahu iwi could buy, at its own discretion, certain Crown assets to a total value of NZ$250M, within twelve months of assent to the settlement legislation.
- Right of First Refusal: the settlement included a permanent right of first refusal to a defined range of assets, Ngāi Tahu have the first opportunity to buy Crown assets, if or when, the Crown decides to sell them.
- Relativity Mechanism: Treaty settlements for Waikato-Tainui and Ngāi Tahu include a relativity mechanism to ensure the value of their individual settlements maintain their relative size compared with the total value of all Treaty settlements. Both iwi can make a request for payment every 5 years to ensure the real value of their settlements remain at 17% (Waikato-Tainui) and 16.1% (Ngāi Tahu) of the total. To date, approximately $290M and almost $300M has been paid to Waikato-Tainui and Ngāi Tahu respectively in relativity mechanism payments.

The Ngāi Tahu settlement has allowed the iwi to establish a sound platform for its economic independence, with interests in fishing, tourism, property and a diversified equity portfolio. The Ngāi Tahu Annual Report for 2020/21 shows a Group Surplus for the year of NZ$189M and Net Assets/ Total Equity of NZ$1.71 billion.

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Appendix B: Tla'amin Process Case Study

> *Our challenge as Tla'amin people will be to connect what is relevant and what will work in a modern society from our knowledge of traditional governance.*
>
> ***Siemthlut Michelle Washington***[1]

The following appendix provides an in-depth overview of the Tla'amin experience of Treaty-making in British Columbia. A number of key learnings can be drawn from the experiences of the Tla'amin Nation that can be used to inform and strengthen treaty-making in the NT.

The Tla'amin Nation prior to treaty making

The Tla'amin Nation (formerly the Sliammon Indian Band) is located in the Powell River area, ninety minutes from Vancouver. The Tla'amin are one of many groups within the umbrella of the Coast Salish people. The Nation's traditional territory covers approximately 400 square kilometres, stretching along British Columbia's Sunshine Coast and across the Strait of Georgia, and including multiple islands.[2] There are approximately 1,165 members of the Tla'amin nation today with the majority living in the main village site at Sliammon. The demographic is predominantly young and rapidly growing: over 60% of community members are under 40. However, up to 20,000 people lived in villages and accessed seasonal sites across this area 300 years ago, prior to its colonisation.[3]

Having occupied their lands since time immemorial, the Tla'amin have a rich history both pre- and post-colonisation. Archaeological surveys have discovered the remains of villages dated from 4,000 to 10,000 years old.[4] The Tla'amin also had several traditional diplomatic and governmental structures, some of which they have reintroduced as part of the treaty process. For instance, the Tla'amin traditionally had a 'headman' (known as a *hegus*) of each family, who would meet with the other 'headmen' daily to discuss community matters.[5] The other members of the family still had a voice in the community, as part of a process called *sijitus*, discussed in further detail below.[6]

The Tla'amin both contested and adapted to invasion from first contact onwards. On 2 July 1792, the first officially recorded contact occurred when crews from the ships Chatham and Discovery met Tla'amin peoples on the shores of Harwood Island.[7] Prior to this period, the Tla'amin, Klahoose and Homalco peoples were a single group; settler intervention drove them to operate separately.[8] During the mid-eighteenth century, the Tla'amin traded furs for guns with passing ships.[9] From 1862, a smallpox epidemic devastated the Coast Salish peoples; at least one in three died.[10] In approximately 1870, missionaries arrived in the Tla'amin area.[11]

It was around this time that the Tla'amin developed a new system of governance, involving a hereditary chief and delegates called 'watchmen'. The watchmen were akin to the police, in that they disciplined members who had done wrong. However, they also provided care and support to the community, checking in at elders' homes and providing them with supplies, as well as arranging marriages and baptisms among members.[12]

The *Indian Act* of 1876 lay the foundations for many of the assimilative practices to which the Tla'amin were subject until very recently. This Act created Indian reserves and bands (legal entities that grouped First Nations peoples together under a Chief and Council, often replacing pre-existing political structures).[13] Later changes to the Act banned gatherings of First Nations peoples. The Act also controlled who was and was not a 'status Indian'. Many people, especially women who married

'non-Indians' and men who worked off reserve or fought in wars, gained the right to vote but lost their Indian Status and also their connections to culture in the process.[14] Three years after the creation of the Act, the Government divided Tla'amin lands into six reserves, representing only a fraction of the Nation's original territory.[15] One of the Tla'amin's most important sites, Tees Kwat, did not remain part of their lands. Instead, this area became the Powell River community. In 1909, the Powell River Paper Company took over the site, after its earlier approval for log driving and rafting.[16]

From the outset, Tla'amin fought these changes on several fronts. In 1878, the Tla'amin – along with the Klahoose – protested by seizing logs cut for timber close to their settlement.[17] They also regularly corresponded with the Indian Reserve Commissioner, who later resigned in protest of the poor treatment of Tla'amin and neighbouring groups.[18]

Throughout the twentieth century, the Tla'amin peoples continued to experience and fight against the Government's assimilative practices. These practices included forcibly sending Tla'amin children to residential schools and to certain areas of their reserves; imposing Christianity and Christian names upon the people; enforcing a curfew; and the removal of Indian Status of those that left the reserve in search of work.[19] As before, Tla'amin protested every step of the way – by writing letters, arranging meetings, holding traditional ceremonies in secret, and remaining in forbidden areas.[20]

The Tla'amin story is one of perseverance in the face of extreme challenge. As the Tla'amin continued to experience adversity – including their main village site burning down in 1918, and the further reduction of their lands – they also took opportunities, establishing logging and fishing interests and creating multiple business relationships, even prior to treaty negotiation.[21]

Prior structures and economic development

From the 1950s onward, the Canadian Government gave Indian bands more powers to manage their own affairs.[22] In addition, the Federal Government reversed several discriminatory laws; for instance, they removed the ban on traditional gatherings from the Indian Act and allowed women to vote in band council elections.[23] Despite these improvements, the Tla'amin continued to experience injustice. In 1952, the Government dammed the Theodosia River without the Tla'amin's permission, destroying their salmon runs.[24] Segregation still occurred in Powell River.[25] Although the Tla'amin developed their community and businesses throughout the twentieth century, it was clear that under the *Indian Act*, many of their problems would remain.

As with other First Nations operating under the *Indian Act*, the Tla'amin, prior to concluding their treaty, had a Band Council, including a Chief, with elections every two years. This system began in 1929, and did not cohere with Tla'amin tradition.[26]

The Tla'amin people developed multiple economic projects prior to treaty making. A *Globe and Mail* article from 1982 listed the Tla'amin as one First Nation that had successfully developed several economic ventures, including real estate, a fish hatchery, logging and herring and oyster farming. Then Chief, Joe Mitchell, described these prospects as 'all little things, but they're all moving'.[27]

Entering the treaty process

The Tla'amin, operating as the Sliammon Indian Band, were one of the first groups to enter the treaty process, completing Stage 1 by signing a Statement of Intent (SOI) on 20 May 1994. The Statement of Intent is a one-and-a-half page document which outlines, in question and answer format, the area of the claim and who the claim may affect. The Tla'amin SOI mentions overlapping potential claimants (the K'omoks, Khaloose, Homalco, Qualicum and Sechelt Indian Bands) as well as the membership of the Sliammon Indian Band (then 750 people). The SOI also refers to the Band's establishment through the legislation of the Indian Act, which dictates who belongs to the Official Band List (that is, who is a member of the Band).[28]

The Tla'amin also created two distinct bodies to aid in their journey toward self-government. In 1995,

the Tla'amin established the Sliammon Development Corporation (now known as Tla'amin Management Services) to oversee their economic interests.[29] The Tla'amin also formed the Sliammon Treaty Society, which organised multiple committees, departments and groups to attend to various aspects of treaty making. The Society's board involved seven members; five elected by the community and two derived from the Chief and Council.[30] The Sliammon Treaty Society disbanded in March 2017, nearly a year after Stage 6 begun.[31]

In 1996, the Tla'amin Nation completed both Stages 2 and 3, first proving their readiness to negotiate on 10 January, then signing a Framework Agreement on 27 May.[32] As part of Stage 2, all three parties (the Sliammon Indian Band, Canada and British Columbia) signed an Openness Protocol, which specified the information to be available to the public, and how this would be disseminated.[33] Stage 3 of the Framework Agreement is the 'contents page' of a treaty, setting out constraints and potential topics of negotiation. The Tla'amin Framework Agreement set a deadline for creating an Agreement-in-Principle (AIP) within 24 to 36 months of the Framework Agreement signing, and listed the following as 'substantive issues for negotiation':

- Jurisdiction
- Governance
- Lands including parks, protected areas, and land use planning
- Land selection and tenure
- Natural Resources including water, forests, fish, sub-surface, and wildlife
- Environmental issues
- Resource revenues
- Eligibility and enrolment
- Approval and ratification
- Economic development
- Culture and heritage
- Access
- Taxation
- Financial component of the settlement
- Fiscal arrangements
- Dispute resolution
- Third party and public interests
- Certainty
- Implementation
- Amendment procedures
- Intergovernmental relations.'[34]

Despite this deadline, the negotiators did not initial the first iteration of the Agreement-in-Principle until 24 February 2001, nearly five years later. Reasons for this delay include changes in the negotiator representing the province and an earlier failed negotiation of the AIP.[35] In the meantime, the Tla'amin developed their internal governance and created new and positive relationships with other parties.

Tla'amin growth

A 1999 survey indicated that the Tla'amin were enthusiastic about self-governance, but unsure of their ability to implement it. 69.7% of people wanted Tla'amin to be self-governing, with the majority of the rest voting 'unsure'. However, only 30.3% felt Tla'amin were ready for self-government, with 29.4% feeling they were not ready, and 40.4% feeling unsure.[36] Siemthlut Michelle Washington, a researcher for the Sliammon Treaty Society, reported in 2004 that further surveys 'show that Sliammon people fear their own ability to govern themselves, especially in areas involving money and asset management, accountability and fairness, and in ensuring that there will be future benefits to the children and people of Sliammon.'[37] Despite the Tla'amin's earlier successful business ventures, the Nation saw a need for greater treaty readiness.

In 2000, the Sliammon Development Corporation purchased the Lund Hotel and Marina and its surrounding businesses, in partnership with Powell River businessman Dave Formosa (with this partnership later continuing and strengthening, as Formosa became Mayor of Powell River).[38]

The Tla'amin Nation also undertook capacity building in several forms. For instance, the Treaty Society commissioned a Geographic Information

System (GIS) mapping project in 2000. This project not only allowed the Tla'amin to map their traditional territory and co-ordinate environmental use and protection, but also to train in GIS mapping for future planning and development.[39] Other capacity building would later take place in the form of Treaty Related Measures and Interim Measures, as discussed below.

A disappointing offer

On 28 January 2000, BC and Canada made the Tla'amin an offer to form the basis of an Agreement-in-Principle. The Tla'amin were dismayed – the governments had offered them less than one per cent of their traditional lands.[40] The deal would also include $16.75 million Canadian dollars. Given the fact that this deal would have ended the Nation's tax-exempt status and extinguished any further claims they may have, the Tla'amin decided it was not enough.[41] Then chief, Denise Smith, argued that 'the offer is incomplete and is not acceptable to the Sliammon people,' and 'does not come close to providing for the future of our people.'[42]

The Tla'amin made a counter-offer to this deal, which led to the first AIP, initialled on 24 February 2001.[43] The AIP was certainly better than the first government offer. The monetary figure increased to $24.1 million CAD, and the land on offer from 5,369 hectares to 6,907 hectares (with 1,907 of these being Tla'amin reserve lands).[44] The Tla'amin would have the power to obtain up to 3000 more hectares, but would not have the unlimited ability to add to their lands.[45] They would also have the right to self-government, to create their own constitution and to have lawmaking powers.[46] After the offer but before the ratification vote, the provincial Ministry of Forests allotted timber licences within potential Treaty Settlement Lands. The Tla'amin refused to hold their vote until the government revoked the licences.[47] In the end, the Tla'amin voted against the AIP on 21 November 2001, with the vote to reject the agreement winning by a margin of one per cent.[48]

All three sets of negotiators went back to the drawing board and asked themselves how they could improve the offer. A land protection agreement also placed 5000 hectares of land 'on hold' as potential Treaty Settlement Land.[49] On the Tla'amin end, a renewed focus on traditional forms of governance came into play. More specifically, the Tla'amin decided to revive the concept of *sijitus*.

Sijitus

Sijitus involves extended families choosing a spokesperson who advocates for their needs. This spokesperson meets with other spokespeople, who together make recommendations to the Tla'amin Council and Boards.[50] According to Washington, *sijitus* allows Tla'amin to 'move out of the current crisis management system to which we have all become so accustomed'.[51] *Sijitus* combines both traditional and modern elements: 'leaders in the family are chosen … based on their talents and strengths, not whether they are the oldest male … In this way we retain democracy, equality, and transparency while maintaining our core values and principles.'[52]

A report concerning the failed AIP vote recommended *sijitus*, especially since some of the community members who voted against the AIP wanted a 'general community advisory group'.[53] The *sijitus* body meets for four hours monthly, and writes recommendations for the chief from each of their meetings. They also report on their meetings to their families, who then provide input and suggestions for them to take to the following meeting.[54] The Council and Boards must provide quarterly reports regarding their implementation of *sijitus* recommendations.[55] By 2004, the sijitus process had representation from forty per cent of Tla'amin families.[56]

Sijitus builds capacity, provides a voice for all Tla'amin members, makes governance processes more transparent, focuses work on bettering the lot of the Tla'amin (as opposed to demonstrating growth to governments and companies) and represents a return to tradition.[57] Within the first few months of *sijitus*, the community saw results that reflected the goal of greater political participation and transparency. The Council began to make their minutes public, hold open sessions,

and provide a newsletter.[58]

Repairing relationships

At the same time as the Tla'amin instituted *sijitus* and considered what they might want in a new AIP, they also massively strengthened their relationship with their neighbour, the City of Powell River, and their overarching regional district, qathet (formerly known as Powell River Regional District). Until 2001, the Tla'amin reserves and the City of Powell River had been 'parallel solitudes'.[59] Despite their close proximity – and isolation from the other parts of British Columbia – there was little cooperation between the First Nation and the City.

Everything changed when the City of Powell River began to build a sea walk in 2002. The City did not consult with the Tla'amin, and destroyed and damaged Tla'amin petroglyphs and shell middens during construction. When the Tla'amin alerted the City of Powell River, the City apologised and handed the project to the Tla'amin. The First Nation and the City then acquired more funding for the project and employed both Tla'amin and Powell River workers to complete it. The Tla'amin were thus able to protect their cultural sites, create employment for their members and begin a long and cooperative partnership with Powell River.[60]

The sea walk project led to several other successful joint initiatives. The 2003 *Community Accord* recognised the Tla'amin right to self-governance and that they were the first inhabitants of the land.[61] The two parties agreed to meet regularly, to 'explore and initiate activities designed to facilitate economic diversification, to protect cultural heritage resources, to promote community growth, to increase investment and to generate employment.'[62] The following year, the parties signed two protocol agreements: the *Protocol Agreement on Culture, Heritage and Economic Development* and, with the qathet Regional District, the *Protocol Agreement for Communication and Cooperation*.[63]

These agreements gave the Tla'amin a much greater voice and presence in the Powell River region. For example, the Tla'amin now have input on development permits, re-zoning and subdivision applications, and other land use decisions in Powell River. A Tla'amin representative is part of Powell River's community plan steering committee, and both parties have intergovernmental coordinators. The two parties now share infrastructure, including library services and fire protection.[64] The Tla'amin and Powell River also collaborated culturally: street signs now include Tla'amin names, the City installed a Tla'amin welcome pole and flies the Tla'amin flag next to their own, and the Tla'amin gifted names to the city leaders and the regional district.[65] In 2011, Powell River public buses began to terminate in Tla'amin village, as opposed to four kilometres away. This change meant that Tla'amin citizens could travel more safely and easily and is illustrative of the many strong links between the communities.[66] Finally, in 2018 (two years into treaty implementation), the City designated two parcels of land as Treaty Settlement Lands, paving the way for Tla'amin use. This was a first for British Columbia.[67]

The two parties later joined as business partners. In 2006, Tla'amin Management Services, Powell River and Catalyst Paper Corporation formed the PRSC Limited Partnership; in 2012, Catalyst exited the joint venture. PRSC had ownership of several hundred hectares of land from the paper mill operated by Catalyst.[68] As mentioned earlier, the paper mill had long functioned as a symbol of Tla'amin dispossession, as it sat on a particularly important area for Tla'amin, Tees Kwat. While PRSC sold several parcels of land and planned land developments, Powell River community members often criticised the venture for a lack of transparency. The PRSC dissolved in 2018.[69] While the venture itself was ultimately unsuccessful, the Tla'amin still maintain a strong relationship with the City of Powell River, and retained 245.6 acres of land, valued at $2.17 million CAD, after the PRSC's dissolution.[70] In 2019, the City and the First Nation again joined together to develop plans to expand the Powell River airport, which sits adjacent to Tla'amin lands.[71]

The Tla'amin also developed a relationship with the Regional District to which they and the City of Powell River belong. The District had been named Powell River Regional District, but changed its

name to qathet in 2018. Tla'amin elders had gifted this name, which means 'working together', to the District.[72] Prior to this, the relationship between the District and the Nation had evolved similarly to that between the Tla'amin and Powell River. This relationship also began with a conflict between the two parties – in 2007, qathet and the Tla'amin had a disagreement concerning treaty land selection. As a reconciliatory measure, qathet funded a *Land Use Harmonisation Initiative* to encourage collaboration between the Regional District and the Tla'amin.[73] The two parties have since developed several initiatives together, most of which also involve the City of Powell River. These initiatives include several plans covering regional transport, emergencies, trails, recreation and social planning, as well as a Sustainability Charter and a flood mapping initiative.[74] Finally, the Treaty Commission and the Real Estate Foundation of BC funded a joint planning pilot project for the Tla'amin, Powell River and qathet in 2004. This allowed the Tla'amin to develop their 2007 *Comprehensive Community Plan* and led to the publication of a First Nations guide to intergovernmental collaboration.[75]

A New Agreement-in-Principle (AIP)

The Tla'amin voted sixty-two per cent in favour of a new AIP on 4 October 2003. This AIP included 7,907 hectares of land, an additional forest tenure and a payment of $26 million CAD.[76] Signing the AIP meant the Tla'amin were now in place to negotiate and ratify a Final Agreement. The Tla'amin readied themselves, developed their relationships and pursued other avenues to effect change.

Treaty Related Measures (TRMs), Interim Measures (IMs) and other capacity building

From 2001 onwards, the Tla'amin participated in several Treaty Related Measures (TRMs) and other Interim Measures (IMs). The negotiation of TRMs (a specific type of IM) occurs between the three parties to the treaty, whereas other IMs can be organised away from the treaty negotiating table (that is, not all three parties need to be involved). All IMs help the First Nation prepare for the Final Agreement. BC and Canada fund TRMs, which must have links to the topics under negotiation for the treaty. First Nations can apply for TRMs once they have a Framework Agreement in place, although they can only negotiate some specific TRMs in the following stage (that is, once they have an AIP).[77] The Tla'amin's TRMs and IMs included:

1. Tourism IM (2001) – training for twelve Tla'amin students in hospitality, IT and heritage interpretation at Malaspina University College, as well as placements at Lund Hotel (with many students later hired by the hotel)[78]
2. Okeover TRM (2002) – designed to monitor the water quality of the Okeover Inlet[79]
3. Theodosia TRM (2002) – a project to rehabilitate salmon populations and water flow in the Theodosia Watershed[80]
4. Land and Resource Management Plan TRM (2003) – to create a plan to guide Tla'amin decision-making concerning the use of their Treaty Settlement Lands[81]
5. Mechanisms for Dialogue on Land Use Planning and Park Management (2003) – with the aim of giving Tla'amin a greater voice in decision-making outside their lands, this TRM involved creating a co-management system of Crown Lands between BC and Tla'amin[82]
6. Chinook Monitoring Program TRM (2003) – involving a logbook system for fishers to monitor the levels of Chinook salmon, to ensure an appropriate allocation of salmon in the Final Agreement[83]
7. Joint Fish Committee TRM (2003) – to research fisheries management, policies and procedures, in order to inform the fisheries provisions of the Final Agreement[84]
8. Forestry TRM (2003) – this TRM involved four reports: the Skills and Capacity Assessment, the Forest Practices Report (including research into Tla'amin traditional management), the Forestry Strategic Plan and the Timber Supply Analysis of Treaty Settlement Lands[85]
9. Forest access IM (2006) – allowing the Tla'amin economic access to forests and forestry revenue sharing, through an agreement with British Columbia.[86]

Through these measures, the Tla'amin built capacity, engaged in environmental stewardship and collaborated with surrounding First Nations, municipalities, government departments and organisations. Many of the TRMs and the IMs involved job training and internships for Tla'amin members and contributed to Tla'amin economic development.

The Tla'amin also engaged in capacity building and developed partnerships through other initiatives during the treaty process. For instance, in 2007, the Tla'amin signed an Impact Benefit Agreement with Plutonic Power, who built two hydroelectric plants on Tla'amin lands. The Agreement involved annual payments to Tla'amin, as well as job and job training opportunities.[87] The hydroelectric site began operating in 2016.[88]

Negotiating with the neighbours

The BC Treaty process involves concluding Shared Territory Agreements with neighbouring First Nations. As previously mentioned, the Tla'amin listed several potential overlapping claimant groups in their SOI, and indeed had previously been one First Nation with the Klahoose and Homalco peoples. However, after four years of consultations, Canada and BC found that none of the overlap groups felt the Tla'amin treaty provisions impinged on their rights and/or title.[89]

The Tla'amin began negotiating Shared Territory Agreements very early in the process, signing their first with the Sechelt in 1995.[90] According to Tla'amin Chief Negotiator Roy Francis, 'We knew this work was important and that it needed to be done. It's about relationship building with your neighbours. Acknowledging our traditional ways, our unwritten protocols. It's about getting permission and giving permission to hunt and gather and fostering ongoing cooperation and collaboration to share.'[91]

The Tla'amin Treaty Society used their Traditional Use Study as a guide to determine their borders with other First Nations. In meetings, the Tla'amin and other First Nations discussed their overlap areas, what these areas were used for and dispute resolution regarding the areas. Some of the more detailed agreements also specified harvesting and fishing rights, responsibilities towards set areas of land, and which areas each group could choose as Treaty Settlement Lands.[92]

The Tla'amin signed their final Shared Territory Agreement in 2008 with the K'omoks First Nation. The two First Nations conducted a special ceremony in the Tla'amin Salish Centre, with then Chief of the K'omoks, Ernie Hardy, saying 'Long before anybody else was here, our peoples coexisted and shared the resources in a sustainable manner.'[93] Hardy's statement encapsulates the relationships that the Tla'amin has and has had with its neighbouring First Nations. These have largely been peaceful and well defined, and the Tla'amin were keen to keep it this way. The Yale First Nation have been unable to implement their treaty because they were unable to come to an agreement with their neighbouring groups about land usage and rights.[94] It is clear, then, that the Tla'amin's cooperative relationships with their neighbours have been key to their treaty success.

The Tla'amin also developed relationships with other First Nations, through which they leveraged better treaty outcomes together. In 1999, the Tla'amin joined with six other bands to create the First Nations Treaty Negotiation Alliance. The Alliance has held meetings with BC and Canada regarding land and resources objectives in order to create better conditions for negotiating and signing treaties.[95] In 2004, the Tla'amin joined with the Lheidli T'enneh and the Tsawwassen to negotiate certain sections of their treaties together, sitting opposite BC and Canada at the negotiation table. With the Lheidli T'enneh, the Tla'amin covered tax and fiscal terms; with the Tsawwassen, the Tla'amin negotiated governance provisions.[96]

Legal battles and further treaty developments

Just as the Tla'amin were not afraid to renegotiate inadequate AIPs, so too were they willing to pursue legal action during the treaty process. Some of the Tla'amin's legal battles concerned problems they were unable to address through treaty; others were related to the treaty itself.

The Tla'amin have used the law to force action on issues concerning their land. In 2007, the Tla'amin went to the British Columbian Supreme Court to fight the approval of geoduck (clam) farms in their traditional waters. The Tla'amin argued that certain harvesting agreements could 'jeopardise' the treaty process; according to then Chief Walter Paul, 'this flies in the face of the discussions we're having'.[97] Paul noted that the Ministry of Agriculture had announced the farms were approved after 'consultation' with the Tla'amin; in reality, this had entailed a handful of letters to which the Tla'amin had replied voicing strong objections.[98] In court, the Tla'amin received an offer for their own geoduck tenure, a financial settlement and protection of other parts of their territory, but were unable to stop the Underwater Harvesters Associations' farms.[99] In a similar example, in 2008 the Tla'amin filed a lawsuit against a Merrill and Ring Timberlands and the provincial and federal governments over a 1995 landslide. The Tla'amin alleged that the landslide occurred because British Columbia had not properly decommissioned a nearby road, and that the governments and the company had not provided adequate clean-up afterwards.[100] Further, the governments had awarded compensation to nearby landholders but not the Tla'amin, despite the extensive damage to their reserve lands. The British Columbian government declared that treaty negotiations could not continue while a lawsuit was pending, forcing the Tla'amin to drop the case.[101]

As the treaty process progressed, the Tla'amin made six specific claims against the Government of Canada. In Canada, specific claims for First Nations groups' concern historical losses and are settled either through negotiation or by the Specific Claims Tribunal. Specific claims generally concern illegal land sales, breaches of government obligation or breaches of the terms of a historical treaty.[102] The Tla'amin's claims covered six land areas, including Klahanie (a real estate project on Tla'amin lands) and Tees Kwat (as mentioned earlier, an important site to Tla'amin over which a paper mill was built). In 2009, Canada rejected the Tla'amin's specific claim that Tees Kwat should have formed part of the Tla'amin's reserve lands when they were created in 1879.[103] However, in 2019 – three years after their treaty was implemented – the Canadian Government awarded the Tla'amin Nation $22.8 million CAD in compensation for undervaluing 40-year presold Klahanie leases in 1972, thereby losing decades of revenue for the Tla'amin.[104] The Tla'amin voted to accept the government's offer, having previously rejected 2016 offer of $14 million CAD.[105] The Tla'amin Legislative Assembly approved a distribution of $7,500 CAD for each eligible citizen of the Nation on 30 January 2020.[106]

In October 2009, the Tla'amin voted 55 per cent in favour of the adoption of their new Constitution, a major step toward treaty implementation. While then Chief Clint Williams celebrated the vote, he also denounced Canada's inaction regarding the Tla'amin treaty: 'This vote is a clear message to Canada … Tla'amin people are prepared to take the next step toward a brighter future for Tla'amin and all Canadians. But our patience has its limits. If Canada is sincere in its spoken commitment to reconciliation, it will not impose any more delays on the Tla'amin people.'[107] By the time of the vote, the Final Agreement was almost complete. However, provisions concerning fisheries were still missing, as the Department of Fisheries and Oceans refused to negotiate while the Cohen Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River took place.[108] Meanwhile, the Tla'amin continued to borrow money from the government to keep their treaty office open; at this point, they had borrowed approximately $10 million CAD.[109] The Tla'amin were supposed to repay this money from their treaty financial settlement (the government forgave all loans in 2019).[110] While the Tla'amin had pressing political and financial reasons to finalise their treaty, Canada approached the issue with little haste or consideration for the First Nation's position.

In 2011, the Tla'amin again found themselves asking the Canadian Government to co-operate. The Tla'amin, Canada and British Columbia had concluded a 'handshake agreement' concerning the treaty in June 2010, with all three parties to internally review the Final Agreement afterwards.[111] In March 2011, Chief Williams again called on Canada to uphold its end of the deal, lamenting

that 'we've had nothing but silence from Ottawa': 'We call on Mr. Harper [then Prime Minister] to show some leadership on this file and move it forward on an expeditious basis.'[112] Unfortunately, the MP for the Sunshine Coast, John Weston, proved actively hostile to the Tla'amin's calls for action. When the Tla'amin met with Weston to ask for help, he explained that he felt treaties were 'unconstitutional'.[113] According to Roy Francis, Weston's position 'completely undermines the notion of tripartite negotiations.'[114]

Others spoke out in favour of the Tla'amin. Then Mayor of Powell River, Stewart Alsgard, stated: 'We are terribly disappointed and frankly perplexed at the unnecessary delay in proceeding with this treaty. The Sliammon people are our friends, our neighbours and partners. We have worked hard to nurture this relationship, which is so critical to the economic development and future prosperity of our region.'[115] As part of the Tla'amin's 2011 efforts to move ahead with treaty, the Mayor and the Chief travelled together to Ottawa to confront the Federal Government.[116] Earlier, the then Chief Commissioner of BC Treaty, Sophie Pierre, had demanded that the government continue with negotiations despite the Cohen Inquiry: 'We need some accountability here from the federal government … They are really big on demanding accountability from First Nations, but that shoe goes on both feet.'[117] In mid-2011, the Tla'amin threatened to initiate bad faith litigation against the Federal Government.[118] But in October, Canada finally completed their review; journalists argued that the continued pressure from the Tla'amin and their allies had forced the government's hand.[119]

A dramatic final vote

The Tla'amin needed to conduct a final vote to decide whether to implement their treaty. By this time, many Tla'amin members felt distrustful of the treaty process. The governments' slow pace in dealing with the Tla'amin had contributed to a feeling of inequality in the negotiations, as had the loans process and the fact that the land package represented only a small percentage of traditional Tla'amin territory. The Tla'amin's debt to the governments was mounting, and to some the gains were not worth the cost. British Columbia and Canada had – as in other treaty negotiations – heavily used the language of 'certainty' regarding economic development and nation-to-nation relationships. But 'certainty' seemed to imply extinguishment and an interest in making government-business partnerships easier, as opposed to developing and strengthening an ongoing relationship between the government and the Tla'amin Nation.

These concerns came to a head as the Tla'amin cast their votes concerning the Final Agreement on 16 June 2012. Voting took place in several locations, including major off-reserve cities.[120] At the Salish Centre on the Tla'amin reserves, a group called the Protectors of Sliammon Sovereignty created a blockade, barring people from entering and voting.[121] As an abstention counted as a 'no' vote, supporters of the treaty were worried about the impact this protest would have on the final tally.[122] Approximately 250 people were blocked from voting. The blockade remained in place for several days, preventing Sliammon Treaty Society employees from accessing their offices.[123]

The protestors released a statement outlining their concerns with the voting process. First, they alleged that 'many of the Sliammon people enrolled under DURESS' and that if 'treaty should pass, the many band buildings and services that were meant for our forefathers, our children, grandchildren, the Sliammon people, would not serve us.'[124] But they also argued that outsiders had been allowed to enrol: they alleged that people with 'no actual blood ties to Sliammon' and other non-members who were 'employees, spouses and good friends of people in the Sliammon band membership' had been allowed to vote.[125] They had yet more concerns about voting, as they noted reports of voter exclusion, particularly of people who 'have strong familial ties to Sliammon but belong to another band.'[126] They also argued that voter identification processes hadn't been used at the polling place in Tacoma, Washington.[127]

The protestors also felt that the Treaty Society and the governments did not have their best interests at heart. They argued that in the Final Agreement,

'we currently have no water rights, no fishing rights and this is permanent. If a right is not outlined in our Treaty it is not a right. This final document is unchanging, un-evolving.'[128] This was despite specific chapters in the Final Agreement addressing water and fishing rights.[129] Perhaps the protest group alleged this because they were not aware of the exact specifications of the Final Agreement; after all, they also noted that the Treaty Society had not made the constitution by-laws available to them. One protestor, Tracy Timothy, had been involved in negotiations earlier as a band councillor. He noted that he witnessed the federal and provincial governments reject the Tla'amin's proposals again and again: 'It was all voted down … Everything was no.' He also felt that they were 'negotiating my aboriginal right away.'[130]

The protestors viewed the Treaty Society as fiscally irresponsible, inexperienced and corrupt: they claimed that the Society had organised boat cruises to 'wine and dine' potential voters, and noted that the band council had been in remedial management since 2011 due to serious debts.[131] The spokesperson of the Protectors of Sliammon Sovereignty, Brandon Peters, accused the Society of offering $15,000 payments to voters over 65 if the 'yes' vote succeeded.[132] The Chief denied the allegations, and the BC Minister for Aboriginal Relations and Reconciliation, Mary Polak, in turn accused the protestors of duplicating names on their petition, which they claimed covered approximately 240 people.[133]

The Sliammon Council filed an injunction against the protestors, who unsuccessfully appealed this decision.[134] The vote went ahead on July 10, with 318 votes in favour, 235 against, 1 spoiled ballot and 61 abstentions.[135] The Tla'amin had approved their Final Agreement, albeit by a very narrow margin. The protest group vowed to fight the result, but a series of court decisions in 2013 rejected their appeals.[136]

The protest blockade spoke to the ongoing divisions and distrust in Tla'amin society, many of which existed because of government foot-dragging. Protestor Kevin Blaney noted that the treaty process 'has divided this community in a way that I think there's going to be a great deal of time before that healing begins, where people can come back to the circle and start to talk about what the issues really are, what they have been for a long, long time.'[137] Chief Williams, in reflecting on the blockade, also pointed to community tensions: 'There were family members disowning each other and there were grandparents not wanting to speak to their grandchildren. There was some real animosity around this.'[138]

An end and a beginning

After the Tla'amin vote, British Columbia and Canada both introduced legislation to ratify the Final Agreement. The British Columbian legislation received Royal Assent on 14 March 2013; the Canadian legislation followed over a year later, on 19 June 2014.[139] The Final Agreement came into effect on 5 April 2016.[140]

Aware of the imminent approval of the federal government, the Tla'amin held a treaty signing ceremony on 15 March 2014. Canada had asked the Tla'amin to hold this event in Ottawa, but the Tla'amin insisted on gathering at Tees Kwat, their original village area that had become Powell River.[141] Several government dignitaries, representatives from the Treaty Commission and the First Nations Summit, and members of neighbouring nations and other modern treaty nations attended.[142] On 11 April, a Tla'amin delegation travelled to Ottawa to celebrate the Canadian Government signing of the Final Agreement.[143]

Fortunately, the signing coincided with a change in financial circumstances for the Tla'amin, who had been in debt for some time. After their 2013 audit, the Federal Government rated Tla'amin 'low risk' and released withheld funding from Crown-Indigenous Relations (a government department) and Canada Mortgage and Housing Corporation.[144] Around this time, the Tla'amin also received certification from the First Nations Financial Management Board. According to the Tla'amin newsletter, *Nehmotl*, 'It is a very big accomplishment for our community, and a huge relief to know our financial management standards have been raised in a very good way; and that our financial future is in good hands.'[145] Finally,

in July 2014, the Tla'amin met their audit reporting deadline for the first time ever. According to a *Nehmotl* article, only twenty of Canada's six hundred First Nations had achieved this.[146] After some quite serious financial struggles, the Tla'amin were in a much better position to embark on self-government.

The Tla'amin had now signed their Final Agreement, but there was a lot of work left to do in the two years between ratification and Effective Date. In early 2013, the Tla'amin established a Joint Steering Committee, which included administrative staff and representatives from Chief and Council and the Sliammon Treaty Society Board of Directors. The Steering Committee created three working groups, tackling lands and resources, finance and governance. The membership of these groups included not only senior Tla'amin staff and officials, but community members and non-Tla'amin specialist advisors. These groups met every two weeks to develop 26 laws for the Nation.[147] The groups tried to involve the community as much as possible, but they were often met with a lack of enthusiasm. When the community voted on minor amendments to their Constitution in May 2015, only 23% of enrolled voters participated.[148] The groups found their community information sessions were rarely attended, so they created less formal mechanisms to inform the public of their work, including house visits and smaller meetings.[149] There was high attendance when the Nation held a Community Day in August 2015, with many off-reserve members travelling there to participate.[150] Members were also given the opportunity to suggest and vote on the name for the trust established from treaty funds. They chose 'qamɛs ʔəms tala', translating to 'our money is put away'.[151]

The Tla'amin also expanded their Treaty Settlement Lands prior to effective date, thanks in part to their ongoing relationship to the City of Powell River. The Tla'amin's business partner, mayor Dave Formosa, transferred his part-ownership of the Lund Hotel to the Tla'amin.[152] Additionally, Scouts Canada donated approximately 30 hectares of land in Lund to the Nation.[153] The Tla'amin held a special ceremony to thank Scouts Canada for their gift.[154]

As the clock struck midnight and 5 April 2016 began, the Tla'amin symbolically burned the *Indian Act* outside their new Governance House. The new Hegus (the term replacing 'Chief') Clint Williams described it as 'such a powerful event, as we were putting this part of our history behind us, I could feel and see the sense of pride and hope in the faces of our people as they participated in the evening.'[155] A few days later, the Tla'amin unveiled three totem poles and three welcome poles in front of their (then unfinished) Governance House. The celebrations continued later that day in Powell River, with government ministers and many other First Nations Chiefs in attendance, as well as a large number of Tla'amin and Powell River residents.[156] The Tla'amin were finally free from the *Indian Act* and were a truly self-governing First Nation.

Lessons learned

Through examining the Tla'amin treaty experience, we can reflect on what we do and do not want to replicate in the Northern Territory, and how our treaty negotiation process needs to be different.

1. The process of establishing First Nations and therefore their ability to lodge a Statement of Intent to Negotiate will be potentially more complex in the NT than in BC and is likely to take longer

While British Columbia and the Northern Territory share similar histories of colonisation, the *Indian Act* meant the Tla'amin begun treaty negotiations in a different position to many NT First Nations. The Act forcibly organised the Tla'amin – as well as other Canadian First Nations – into a 'band'. Members can only be part of one band, with elections for the Band Chief and Council occurring every other year. Councils are then responsible for their band's administration and governance. Although band councils hold significant responsibility, the Minister of Crown-Indigenous Relations has final say over their resolutions.[157]

Canada imposed the band system on Tla'amin and other First Nations to assimilate them into Western forms of social organisation and to quash traditional political structures. Indeed, as described above, the Tla'amin had developed their own sophisticated forms of governance prior to colonisation. The band system also means that, in most cases, Canadian First Nations peoples must choose a band to which they will belong, rather than acknowledging their links to multiple nations.[158] While the Tla'amin people were excited to divorce themselves from the strictures of the *Indian Act*, the band system did mean they already had enrolment structures in place when they began the treaty process. They also had recent experience managing their own affairs (albeit with significant restrictions). In the Northern Territory, First Nations will have to make decisions about their composition and enrolment prior to beginning the treaty process. This may be made both easier and more complicated by the prior existence of Land Trusts, Native Title Prescribed Body Corporates and other organisations. While the NT Treaty Commission recommends that enrolment frameworks are made flexible for First Nations, submitting a Statement of Intent may be more time-consuming than in the Tla'amin case.

2. Maintaining and rebuilding relationships with Neighbouring First Nations is a key success factor

The Tla'amin are, in some ways, an anomaly – they are one of only seven groups in British Columbia to have completed the treaty process.[159] Despite their treaty taking effect in 2016, they are also the most recent First Nation to implement a Final Agreement. The Tla'amin's success was due, in part, to their productive relationships with their neighbours. As discussed, the Tla'amin signed agreements with surrounding First Nations; since Effective Date, they have reviewed these agreements to check that they are still functioning well for both parties.[160] Other First Nations have had their treaty-making grind to a halt due to disagreements in this area; most famously, the Yale First Nation voted to implement their treaty but were unable to come to an agreement with their neighbours concerning land use. In addition to deciding on their membership, NT First Nations will also have to deal with potential overlapping claimant groups throughout (and indeed after) the treaty process. The Tla'amin's positive relationships with neighbouring nations stretched back centuries; not everyone will share this position. Continuous negotiations with surrounding First Nations will be essential to treaty success for most, if not all, parties in the NT process.

3. The support of other stakeholders and institutions is important

As we have seen, the Tla'amin also shared (and continue to share) strong connections with the City of Powell River and the qathet Regional District. In the end, local government support proved crucial to Tla'amin success, as did local councillors' genuine desire to engage in reconciliation. While the Tla'amin-Powell River-qathet relationship is by no means perfect, it is at the very least not hostile and predicated on good faith negotiations. This contrasts with aspects of the Northern Territory experience, where the Territory Government has traditionally fought land claims, and where local councils have, at times, ignored the needs of their First Nations constituents. While developing good relationships is an important part of the treaty process, this should not be solely the responsibility of First Nations. Governments – federal, territory and local – also have to come to the table. For this reason, the NT Treaty Commission recommends a formal change management program to combat institutional racism and to embed the treaty negotiation principles and ethos in the NT Public Service. Similar measures may be needed elsewhere.

4. There needs to be an equality of standing of negotiating parties

The First Nation party negotiating the treaty needs to be provided with adequate funds to negotiate. It also needs to have sound governance in place. Further, negotiations need to be held in genuine good faith, and the negotiating ethos needs to be based on win/win negotiations that are nation building.

The Tla'amin case also reveals how government inaction and rigidity can seriously impede the treaty process. Arguably, the Canadian Government's foot-dragging not only contributed to the Tla'amin's (fortunately waived) debt of $12 million CAD, but also to the heightened community tensions that manifested in the 2012 vote blockade and subsequent court cases.[161]The massive debt incurred in negotiating a treaty trapped the Tla'amin in negotiations as it simultaneously engendered their disillusionment with the process. Coupled with a government emphasis on 'certainty', the Tla'amin – particularly the protestors – often felt the playing field was completely uneven.

The NT Treaty Commission is proposing the creation of a Treaty Making Fund that provides grants rather than loans to First Nations, so that First Nations are not burdened by debt caused by the long game of treaty negotiations. There are other ways to alleviate structural inequalities in negotiations, too, such as paying First Nations and government negotiators the same wage, negotiating on country and/or in language, providing adequate training and resources for First Nations participants and ensuring government negotiators are competent, respectful and have decision-making authority.

5. The Treaty Commission needs the teeth to make all negotiating parties accountable

The Tla'amin experience of negotiation delays could have also been ameliorated if the BC Treaty Commission itself had stronger powers. As the Tla'amin waited for Canada to initial their treaty, Jerry Lampert, then Government of Canada appointed Commissioner, bemoaned negotiators who seemed to be 'constantly going back to Ottawa for mandates', adding that this system 'plays against the idea that we're in a real negotiation.'[162] Similarly, then BC Treaty Commissioner Sophie Pierre questioned 'when are we going to start seeing a return on … investment?', after nineteen years of the Commission's existence and half a billion dollars spent by First Nations. Despite these Commissioners' frustrations, they could not force Canada (or British Columbia) into action. As a result, we recommend that the Office of First Nations Treaty Making be given significant powers to keep all parties accountable and to minimise foot-dragging. Part of the Office's role could be to help all parties set and maintain negotiating principles, and to penalise the parties when they intentionally disregard these. These minimum principles

would be outlined in the overarching treaty enabling legislation, reinforced (and even exceeded) at the beginning of negotiations and could involve establishing an equality of standing (through the actions outlined in the above paragraph), ensuring that rights are not extinguished and keeping focus on the nation-building aspects of treaty-making (as opposed to those favouring 'certainty').

6. The "long game" nature of Treaty negotiations gives rise to risks that need to be mitigated.

Non treaty related initiatives as well as general citizenship entitlements should not be deferred during negotiations. The Tla'amin process was long, taking twenty-two years total and thus involving multiple generations. While some of the delays – particularly from the federal government – could have been avoided, NT First Nations should anticipate treaty-making taking at least a decade and probably longer. Initially, the British Columbia Treaty Commission, the provincial and federal governments and BC First Nations thought treaty negotiations would occur over a much shorter stretch of time.[164] Now, some First Nations have embraced the long game by implementing a 'stepping stone' approach, in which they develop shared mandates and smaller agreements during negotiations.[165] The Tla'amin, similarly, used their Treaty Related Measures and other Interim Measures to work on policies and agreements throughout the process and to create sound self-government structures informed by both research and traditional teachings. But treaty fatigue still set in, and certain Tla'amin members felt locked out of negotiations. *Sijitus* certainly helped community members play a role, but the protestors at the blockade continued to feel excluded. If negotiating a treaty takes several decades, then it is imperative that everyone in the community is brought along for the ride. Young people will need training in treaty negotiations and there will need to be mechanisms to allow everyone to participate, or at least to be kept updated. The NT Treaty Commission recommends the introduction of Treaty Studies into the school curriculum, so young people can prepare for their roles in the process.

The following table shows the length of time taken to complete each of the six negotiating stages:

STAGE	ACTIVITY	SIGN OFF DATE	DURATION
1	Statement of Intent to Negotiate	20 May 1994	
2	Readiness to Negotiate	10 Jan 1996	1.8 years
3	Framework Agreement	27 May 1996	0.4 years
4	Agreement in Principle	6 Dec 2003	7 years
5	Final Agreement signed	15 March 2014	11 years
6	Final Agreement Date of effect	5 April 2016	2 years

The reasons for the drawn-out stages 4 and 5 are detailed above and are instructive should the NT follow this path.

Conclusion

The Tla'amin have benefitted greatly from their treaty, but it did not solve all their problems. In 2020, a Powell River grocery store denied entry to Tla'amin members, citing a COVID-19 shelter-in-place order applying to the First Nation's lands. However, this order still allowed the Tla'amin to access essential services. The incident mirrored several others across British Columbia, where Indigenous Canadians were erroneously denied entry to public locations. Evidently, signing a treaty does not prevent racism from occurring. Additionally, the Tla'amin legally were not able to negotiate all their concerns within the treaty framework, meaning they relied on the specific claims process and other legal avenues to address certain issues. Treaty-making is an important mechanism for transforming the relationship between First Nations and others, but it cannot be the only one. As then Chief Clint Williams stated after the Tla'amin voted yes, 'Not everything is perfect … [But] it's up to us to build this government with the tools treaty provides us.'[167]

Finally, the Tla'amin example proves that First Nations' teachings can and should have a place in contemporary political decision-making. Under the terms of the United Nations Declaration on the Rights of Indigenous Peoples and in the spirit of genuine self-determination, it is imperative that First Nations decide what self-governance looks like for them; the NT treaty process should not involve a 'one-size-fits-all' imposition of certain political structures. The Tla'amin successfully used *sijitus* to engage the community in the treaty process. They created the position of *hegus*, modelled after their traditional 'headmen', as leader of their Nation post-Effective Date. Overall, the Tla'amin insisted that their *taow* (teachings) underpin their Final Agreement and their self-government arrangements. In this sense, the Tla'amin rose to the challenge Siemthlut Michelle Washington identified in the opening quote of this paper: 'to connect what is relevant and what will work in a modern society from our knowledge of traditional governance.'[168]

By developing a Final Agreement unique and specific to their *taow*, the Tla'amin became, once more, a truly self-determining people.

The Tla'amin Final Agreement is an example of a treaty negotiated using the British Columbia Treaty Commission's six stage model and an understanding of its contents provides guidance as to the sorts of things that could be negotiated in Northern Territory treaties. Negotiations formally commenced in 1994 and the Final Agreement came into effect on 5 April 2016, a span of twenty two years.

Key elements of the Final Agreement (the Treaty) include:

Land

Because the British Columbian treaty process is a response to Aboriginal Title claims, land is a critical component of all settlements. In rounded terms, the land settlement package negotiated by the Tla'amin consists of 8,323 hectares of land comprising 1,917 hectares of former reserves and 6,405 hectares of former provincial Crown Land and a small commercial parcel of 0.97 hectares. In total the land package represents around 2.6% of the Tla'amin's traditional territory. Tla'amin Nation also own two other parcels as private land owners but do not have law-making authority over these parcels.

The treaty includes different ways through which Tla'amin Nation may add to treaty settlement land in the future. One of these involves the purchase of land by the Tla'amin Nation or a Tla'amin Citizen whereby if certain conditions outlined in the treaty are met, the land may become Tla'amin Lands. Crown land parcels totalling 1,212 hectares have been identified, which if purchased by the Tla'amin Nation, could become treaty settlement land.

Under the agreement all highways remain Crown land. Reasonable public access is authorised in designated areas on Tla'amin lands, as is access for certain law enforcement, emergency response and public utility installation activities.

Significantly, clause 67 of Chapter 3 of the agreement states: '*The Tla'amin Nation owns Sub-surface Resources on or under Tla'amin Lands*.' This allows the Tla'amin Nation opportunity to negotiate new models of economic self-determination.

Financial Settlement

The Final Agreement provides the Tla'amin Nation with:

- CAD$33.9M to be disbursed in annual payments of CAD$3.8M over ten years. It should be noted that these payments incorporated an obligation to pay back over the same period the loans taken to negotiate the treaty – approximately CAD$1.1M per annum. However, that obligation was removed in 2019 and the loan amounts paid have been returned.
- CAD$738,895 per year over 50 years as part of a resource revenue sharing arrangement
- CAD$7.9M for Economic Development
- CAD$285,585 for Fishing Vessels
- CAD$1.4M to increase Tla'amin participation in the British Canadian commercial fishing industry.

Service Delivery Agreement

Under an agreed Service Delivery Agreement annual grants from the governments of Canada and British Columbia support the delivery of agreed Tla'amin Nation programmes and services to citizens and residents, in addition to funding supporting treaty implementation activities in areas such as:

- Community and environmental health
- Social and community services
- Education and schooling
- Fisheries monitoring
- Physical works

The agreement is to be renegotiated every five years. The current agreement includes:

- One-off federal funding of approximately CAD$4.7M to, amongst other things, set up the Tla'amin Government
- Federal funding of approximately CAD$9M per year for the first five years
- British Columbia funding of approximately CAD$446,000 per year for the first five years.

The Tla'amin Nation will also contribute to the funding of agreed-upon programs and services from its self-generated revenue.

Tla'amin citizens will continue to be able to access mainstream British Columbian programmes and services provided by the governments of Canada or British Columbia that are not included in the scope of the agreement.

Self-Government

The Tla'amin Treaty defines the self-government powers of the Tla'amin Nation and how they intersect with the wider government powers of Canada and British Columbia. In broad terms, the Tla'amin First Nation holds power to decide on the exercise of its Treaty rights and self-government procedures.

Chapter 15, "Governance" outlines general governance procedures including the mandatory inclusions in its Constitution, the Tla'amin Nation's right to self-government and its authority to make laws that apply on their lands in areas such as:

- Adoption
- Child custody
- Child Protection Services
- Aboriginal Healers
- Family and social services
- Child care
- Language and culture education
- Education
- Citizenship
- Public works and related services
- Alcohol Control
- Marriages
- Emergency preparedness
- Business regulation
- Public order, peace and safety
- Buildings and structures
- Public works and related services
- Administration, management and operation of the Tla'amin

- Government

Residents on Tla'amin Lands, who are not Tla'amin Citizens, may participate in the decision-making processes of a Tla'amin public institution, such as a school or health board, if the activities of that institution directly and significantly affect them.

Federal and provincial laws apply on Tla'amin lands. Where the Tla'amin has coinciding law-making authority, the Treaty sets out which law prevails in the event of any conflict. However, in exclusively internal matters, Tla'amin laws have priority over federal and provincial laws. These matters include Tla'amin citizenship; language; culture and cultural heritage sites and; the governance of Tla'amin lands and assets.

Natural Resources

Forest Resources

The Tla'amin Nation owns and has authority to manage all timber and forest resources on Tla'amin Lands. The Tla'amin Government is responsible for the control of insects, diseases, invasive plants and animals on Tla'amin Lands which may affect the health of forest resources on those lands. However, provincial (i.e. state or territory) law with respect to the protection of resources from wildfire and for wildfire prevention and control applies to Tla'amin Lands. Under a side agreement, Tla'amin Nation will receive a total of 78,000 cubic metres of allowable annual cut from provincial Crown land, which includes 28,000 cubic metres per year under British Columbia Timber Sales. In addition, Tla'amin Nation received $350,000 to acquire additional annual cut on a willing seller, willing buyer basis.

Wildlife and Migratory Birds

Tla'amin Citizens have the right to harvest wildlife and migratory birds for food, social and ceremonial purposes within a restricted harvest area. This right is limited by measures necessary for conservation, public health or public safety. The Tla'amin Government can make laws to regulate the harvest of wildlife and migratory birds by Tla'amin Citizens. However, Federal and provincial laws on the use and possession of firearms continue to apply. The Tla'amin Government will allow reasonable access to non-members to hunt on Tla'amin Lands in accordance with federal and provincial law and with Tla'amin laws respecting access to those lands. Tla'amin Citizens may trade and barter wildlife, wildlife parts, migratory birds and migratory bird parts among themselves and with other Aboriginal people of Canada. Tla'amin Citizens may sell migratory birds and bird parts, wildlife and wildlife parts, and meat and furs, where such sale is permitted under federal, provincial and Tla'amin Nation law.

Elk Allocation

Tla'amin Nation receives an allocation for Roosevelt elk of 50 percent of the total allowable harvest within three harvest areas.

Plant Gathering

Tla'amin Citizens have the right to gather plants for food, social and ceremonial purposes on provincial Crown land within the Tla'amin Plant Gathering Area. This right is limited by measures necessary for conservation, public health or public safety.

Fisheries

The Tla'amin Nation has a treaty right to harvest fish and aquatic plants for domestic purposes within the Tla'amin Fishing Areas. Harvesting of fish and aquatic plants must be done in accordance with harvest documents issued by the relevant Federal and BC Minister. Tla'amin's fishing rights are limited by measures necessary for conservation, public health or public safety. Tla'amin Citizens have the right to trade and barter fish and aquatic plants harvested under its food, social and ceremonial fishing right among Tla'amin members and with other Aboriginal people of Canada.

Domestic Fishery Allocations

Tla'amin Nation has allocations for sockeye, coho, chum, chinook and pink salmon; groundfish, including rockfish and lingcod; herring, prawn, crab, red sea urchin and sea cucumber. The treaty leaves some species non-allocated (e.g., bivalves) and sets out a process to establish, at the request of Tla'amin Nation, Canada or British Columbia, allocations for those non-allocated species.

Commercial Fisheries

Tla'amin Nation participation in the commercial fishery is fully integrated with the general commercial fishery framework. Conditions of licences issued by the Minister of Fisheries and Oceans Canada to Tla'amin are the same as conditions applicable to licences of the general commercial fishery. Tla'amin commercial fisheries are not conducted under a harvest agreement. Access to the commercial fishery is obtained from existing capacity within the commercial fishery. A halibut commercial fishing licence and a prawn commercial fishing licence held by Tla'amin Nation under the Allocation Transfer Program has been issued to Tla'amin Nation as commercial licences, containing the conditions of licences within their respective categories. Tla'amin Nation also received a total of $1.4 million to acquire additional capacity in the commercial fishery.

Water

British Columbia has established a water of 11,225 cubic decameters of water per year for domestic, agricultural and industrial uses. This covers surface waters only and further negotiation and agreement would be required for groundwater use.

Existing third-party water licences on streams that are subject to Tla'amin Nation water reservations are not affected by the water reservation and retain their existing priority date. BC has established hydro power reservations to enable Tla'amin to investigate the suitability for hydro power purposes.

Culture and Heritage

The Tla'amin Nation has the right to practice Tla'amin culture and to use Tla'amin language and make laws in relation to:

- The preservation, promotion and development of Tla'amin culture and language
- The establishment, conservation, protection and management of heritage sites, including public access to those sites
- Cremation or internment of human remains found on Tla'amin lands or returned to the Tla'amin Nation.

There are also provisions relating to the holding and/or repatriation of Tla'amin artefacts by a number of museums as well as the naming, renaming or adding of place names to reflect Tla'amin culture.

Taxation

The treaty gives the Tla'amin government certain taxation powers. The powers are not exclusive and operate concurrently with the taxation authority of the Canadian and British Columbian governments. While taxes are yet to be imposed by the Tla'amin Nation, in other First Nations Treaties, Canada has vacated some of its tax room – that is, has agreed not impose a portion of its taxes – to allow the First Nation to impose sales or personal income taxes, harmonised with the taxes vacated by the government.

Under an agreement with the government of British Columbia, and separate to the Treaty, the Tla'amin government will collect real property taxes applicable to Tla'amin citizens and non- members living on Tla'amin lands. The Tla'amin government is responsible for providing local services to all residents on Tla'amin lands and must apply property taxes equally to all residents whether citizens or not.

Dispute Resolution

Dispute resolution procedures are included in the agreement. In most cases the treaty parties expect simple informal talks will resolve disagreements. If that is not possible, there are three clear stages of resolution. The first, is formal discussions; the second involves, structured efforts at dispute resolution assisted by a neutral party without power to resolve the dispute, other than through the parties' agreement; and thirdly, formal arbitration or court proceedings, where a resolution is decided by an arbitrator or court. The separate stages of dispute resolution procedures do not prevent any party from opting for arbitration or going straight to court at any time.

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Appendix C: Stolen Generations

Where do the Stolen Generations fit into the NT Treaty story?

This story's right, this story's true,
I would not tell lies to you,
Like the promises they did not keep,
And how they fenced us in like sheep,
Said to us come take our hand,
Sent us to the mission land,
Taught us to read, to write and pray,
Then they took the children away…
Snatched from their mother's breast
Said this is for the best
Took them away. [1]

In 1994, the United Nations International Year of the Family, over 600 Aboriginal people who are known as the Stolen Generations of the Northern Territory came together, along with their descendants, and met en masse for the first time under the trees and in the open-air gymnasium at Kormilda College in Darwin. The Stolen Generations were

> *'…removed and institutionalised as children through government policy. Many attended with other family members, who have also been affected by the impact of those policies. It was a reunion of ex-residents and gave an opportunity for family members to meet, in one case for the first time in fifty years.*[2] *Then Federal Aboriginal and Torres Strait Islander Affairs Minister Robert Tickner also attended and '…by the time [he]…left Darwin, the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families was informally in progress.'*[3]

This was the first acknowledgment of the Northern Territory Stolen Generations and their history and provided a sense of 'hope' that the Australian Government would finally *see them*.

Special guests included singer/composer Archie Roach who was also taken from his family in Framlingham, Victoria, and whose song '*Took the children away*' became the national anthem for all the Stolen Generations and Aboriginal people across Australia.[4]

Recommendations from the conference included:

1. Full access to official documentation e.g. birth certificates, free access to Commonwealth archives, personal information, appropriate resources for research
2. Fund mental loss and damages suffered…denied human and cultural rights, provide resources to enable legal action.
3. Keeping places – a multi-purpose cultural centre in Darwin to tell their history
4. Rights to Land- sovereignty, constitutional change, collaborate with [Land Councils] to assist Stolen Generations and their descendants to access information and access to country, amend the Native Title Act to include those people who were dispossessed of their Native Title Rights by governments; the Indigenous land Corporation commit funds to displaced people wherever they reside.
5. Future and Social Justice – endorsed and supported a Bill of Rights; Indigenous rights to ensure Indigenous children are not removed from their families, communities and culture; promotion of cultural heritage; that proposed

racial vilification legislation included '...the derogatory terms "half-castes", "full blood" and "quarter caste".

6. Proposed Social Justice Package – called on the former Aboriginal and Torres Strait Islander Commission (ATSIC)[5], the Council for Aboriginal Reconciliation, and the Australian Government to *'ensure that the rights of our people who were forcibly removed for their families, land and cultural heritage...be central to the Social Justice Package...'* in response to the Mabo High Court decision.[6]

The welfare and the policeman

Said you've got to understand

We'll give them what you can't give

Teach them how to really live.

Teach them how to live they said

Humiliated them instead

Taught them that and taught them this

And others taught them prejudice.

You took the children away

The children away

Breaking their mothers heart

Tearing us all apart

Took them away [7]

The following is a snapshot of the major events that led to, and following, The *Going Home Conference*, albeit some have come too slowly and too late for the many Stolen Generations peoples' who have passed.

1992 - In December Labor Prime Minister Paul Keating delivered his powerful *Redfern Speech* at the launch of the 1993 International Year of the World's Indigenous People in Sydney's Redfern Park. It was the first time a sitting Prime Minister was brave enough to acknowledge these truths, despite decades of Aboriginal and Torres Strait Islander people raising these same issues repeatedly, only for it to fall on deaf government ears.

Here is an extract of what Keating said:

...in truth, we cannot confidently say that we have succeeded as we would

like to have succeeded if we have not managed to extend opportunity and

care, dignity and hope to the indigenous people of Australia - the Aboriginal

and Torres Strait Island people. ...

... the starting point might be to recognise that the problem

starts with us non-Aboriginal Australians.

It begins, I think, with that act of recognition.

Recognition that it was we who did the dispossessing.

We took the traditional lands and smashed the traditional way of life.

We brought the diseases. The alcohol.

We committed the murders.

We took the children from their mothers.

We practised discrimination and exclusion.

It was our ignorance and our prejudice.

And our failure to imagine these things being done to us.

With some noble exceptions, we failed to make the most basic human response

and enter into their hearts and minds.

We failed to ask - how would I feel if this were done to me?

As a consequence, we failed to see that what we were doing degraded all of us.[8]

1995-1997 - The National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families conducted by the Australian Human Rights Commission was commissioned by Prime Minister Paul Keating, who appointed Sir Ronald Wilson and Mick Dodson to lead it. Included in their 54 recommendations in the *Bringing Them Home Report* was that all *'Australian Parliaments, police force, churches and others...*

acknowledge the responsibility of their predecessors for the laws, policies and practices of forcible removal… .[9] Most importantly, though, were recommendations that reparations be paid to those who were forcibly removed from the parents and communities and placed in institutions.[10] The heads of damage included:[11]

1. Racial discrimination.
2. Arbitrary deprivation of liberty.
3. Pain and suffering.
4. Abuse, including physical, sexual and emotional abuse.
5. Disruption of family life.
6. Loss of cultural rights and fulfilment.
7. Loss of native title rights.
8. Labour exploitation.
9. Economic loss.
10. Loss of opportunities.

The Inquiry also called for the Council of Australian Governments to establish a joint National Compensation Board, and that Stolen Generations claimants be entitled to a minimum lump sum payment from the National Compensation Fund.[12] Sadly, not one State, Territory or the Australian government implemented any of these specific recommendations. It would take an Australian Government 24-years before it announced a commitment of

> *'…$378.6 million for a financial and wellbeing redress scheme for living Stolen Generations members who were removed as children from their families in the Northern Territory…'* [13]

However, perhaps the cruellest blow for all surviving Stolen Generations people, their descendants, and all Indigenous people was the response from Prime Minister John Howard when he addressed the Reconciliation Convention after the tabling of the *Going Home Report*:

> *Personally I feel deep sorrow for those of my fellow Australians who suffered injustices under the practices of past generations towards indigenous people.*
>
> *Equally I am sorry for the hurt and trauma many here today may continue to feel as a consequence of those practices…*
>
> *In facing the realities of the past, however, we must not join those who would portray Australia's history since 1788 as little more than a disgraceful record of imperialism, exploitation and racism.*
>
> *Such a portrayal is a gross distortion and deliberately neglects the overall story of great*
>
> *Australian achievement that is there in our history to be told, and such an approach*
>
> *will be repudiated by the overwhelming majority of Australians who are proud of what*
>
> *this country has achieved although inevitably acknowledging the blemishes in its past*
>
> *history. Australians of this generation should not be required to accept guilt and blame for past actions over which they had no control.* [14]

John Howard was booed and many in the Convention audience stood and turned their backs on him. Despite making his own personal apology, the Prime Minister was heavily criticised for not apologising on behalf of all Australians.[15] The response from Mick Dodson[16], co-Commissioner of the *Bringing Them Home Report* told a different story:

> *How much indignity, Mr Howard?*
>
> *How much loss?*
>
> *The story in my hand is the saddest of all stories. It is the story of children taken from their mothers and fathers and families. It is the story of mothers and fathers and families who lost the most precious thing in their lives – their children.*
>
> *…nothing could have prepared me for the days I spent with my co-commissioners listening as people spoke the truth of their lives for the first time: of being taken from their mothers at three weeks of age; of mothers waiting a lifetime to see their babies' faces again. They came before this Inquiry, and they told us of being sent to institutions 'for their own good' – institutions without the loving arms of aunties and grandmas, but rather cat-o-nine tails and porridge with weevils and frightening adults who came into your room at night.*

They recalled being told that their parents had given them away because they did not love them. And they told me what it was like to be taught to hate Aborigines and then turn that hate against your own history, your own mother and yourself. Some told me that they had tried to go home – but no one was alive any more.

We cannot turn away from what this nation did to Aboriginal and Torres Strait Islander children. We cannot refuse to listen to people who have for so long held their pain in silence. We cannot ignore the atrocities that have happened in our own life times and in our own country. This report demands our nation's compassion. It also demands justice. Five or six generations of Aboriginal and Torres Strait Islander people were affected by removal. We are talking about up to one hundred thousand Australians.

And this from Sir Ronald Wilson, co-Commissioner, Bringing Them Home Report.

Let me speak personally. I have been changed by my exposure to the stories of my fellow Australians, Australians for whom I have now unbounded respect because of their courage, their dignity, their suffering and through it all their generosity of spirit….

I knew very little about the stolen children when I took up this inquiry, but as I heard more and more I recognised that the suffering has gone so deep and is still being felt today that the stolen children issue and its healing by a full hearted response from all Australians is fundamental to the success of the reconciliation process.

The laws and policies of non-Indigenous Australia divided the nation. Our denial of that truth, our continued denial of that truth holds the division in place and without our sincere and frank acknowledgment, without a willingness to say we are sorry and to implement that sorrow in deeds, coupled with a longing for reconciliation, we can not find freedom from the shackles of a divided and deeply wounded nation. It is in the national interest that we do so, it's in the interest of all individual Australians that we do so.

1997 – The first High Court action by members of the NT Stolen Generations[19] consisted of nine plaintiffs - Alec Kruger, Hilda Muir, Connie Cole, Peter Hansen, Kim Hill, George Ernest Bray, Janet Zita Wallace and Marjorie Foster. They challenged the authority of the 1918 Ordinance which enabled their removal from their families when they were small children, between 1925 and 1944. The ninth plaintiff was Rosie Napangardi McClary whose claim was based on her daughter being removed from her. Sadly they were unsuccessful, the High Court found that the removal of Aboriginal children under the 1918 Ordinance was valid and did not breach their claimed constitutional rights.[20]

1998 - The Sorry Book campaign was a grassroots movement in response to the Australian Government's refusal to formally apologise, as well as not responding to the *1997 Bringing Them Home Report*. One thousand Sorry Books were distributed throughout Australia and provided everyday Australians the freedom to express their support for the Stolen Generations of Australia. The Sorry Books, signed by ordinary Australians, were presented to delegates from the Indigenous community during gatherings and ceremonies on the first National Sorry Day on 26 May 1998. Over 500 of the Sorry Books are now held by AIATSIS and listed on the UNESCO Australian Memory of the World register.[21]

2000 –

(a) The Federal Court action by Lorna Cubillo and Peter Gunner whose case against the Australian Government for their being *forcibly removed from their families by employees of the Commonwealth Government was unsuccessful. They argued '…that their removal and detention cost them the loss of their Aboriginality, their culture and their family. The court said that damages may be awarded for cultural loss that a part-Aboriginal person has suffered, [1499]. However, any award would be very modest, as the applicants had failed to take all reasonable steps to mitigate their losses by promptly reuniting with their Aboriginal communities in adult life, [1522]–[1524].*[23]

(b) 26 May, Walk for Reconciliation – more than 250,000 Australians walk across Sydney

Harbour Bridge. The word *Sorry* is written across the clear blue sky by a light aircraft. Sir William Deane, Governor-General, 2000:

All of us who are convinced of the rightness and urgency of the cause of Aboriginal reconciliation will be most effective and most persuasive if we have the strength and the wisdom to speak more quietly, more tolerantly and more constructively to our fellow Australians who are yet to be convinced.[24]

2008 - the historic National Apology to the Stolen Generations of Australia was the first item of business of the newly elected Prime Minister Kevin Rudd, [25]

The time has now come for the nation to turn a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.

We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians.

We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.

For the pain, suffering and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.

To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.

We the Parliament of Australia respectfully request that this apology be received in the spirit in which it is offered as part of the healing of the nation.

For the future we take heart; resolving that this new page in the history of our great continent can now be written.

We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians.

A future where this Parliament resolves that the injustices of the past must never, never happen again.

2013 – On the site of the former Kahlin Compound and Kahlin Half Caste Home, at Myilly Point in Darwin, its former residents and their descendants marked the 100th anniversary of its establishment and to celebrate the

'...strength and resilience of those who grew up and lived at Kahlin.' [26]

It was very special event that included a performance by special guests Archie Roach, One Mob Dancers, and the Tiwi people/dancers.

My mother was a resident of Kahlin Compound, as was my Auntie, both having been forcibly removed by a policeman, taken 100s of miles overland on horseback,...and put on the train to Darwin...we estimate to have been in 1930. Three of my uncles were later removed to Garden Point...

My father was a resident of the Bungalow, though he was somewhat luckier...because his mother also worked there, so at least they had contact everyday as he was growing up...

Having lived directly with the consequences of the institutionalization of my parents...I know the damage that was done to the multitude of families throughout the Northern Territory. In essence, the former residents of Kahlin were denied their birthright. They each had the right to be raised by their own families and within their own communities, knowing their own language, country and their culture and having a strong sense of themselves...

...we found out in 1978 that our grandmother was still alive and where she was living...we travelled by car from Alice Springs to Tanumbrini Station and found her. It was a memorable meeting, with tears all around but with great happiness, we had finally met our grandmother. We then made arrangements for mum to meet her...in Darwin...It was the first time they had seen each other in 49 years. [27]

The Aboriginal residents of Kahlin Compound were also used as Darwin's domestic and manual labour, with menial or no wages.

The lubras did the sweeping and they washed up the dishes and they did the ironing and the washing…. they were wonderful women."

And:

"…The natives are localised, and educated in a compound, and they make excellent servants. No white women need work in Port Darwin, unless from choice. [28]

2018

(a) Compensation to the Stolen Generations are outlined in recommendations 3, 4, 14-18 of the *Bringing Them Home Report*[29] and includes family members who suffered as a result of their removal, communities which suffered, and descendants of those forcibly removed. A federal election is looming and the Leader of the Australian Labor Party announces he *will establish a compensation scheme for survivors of Stolen Generations in Commonwealth jurisdictions*,[30] namely the Northern Territory, the Australian Capital Territory and the Jervis Bay Territory. Describing it as a '*…overdue act of justice*' Bill Shorten MP says that Labor Government will pay up $75 000 to Stolen Generations *survivors* as well as one-off payments of $7 000 towards their funeral, and establish a $10 million National Healing Fund. It is 21-years since the *Bringing Them Home Report*, and ten-years since Labor Prime Minister Kevin Rudd formally apologised to the Stolen Generations.

(b) In response to this announcement Shine Lawyers commence a class action against the Commonwealth on behalf of the Northern Territory Stolen Generations. The criteria to join this action is that

- You must be Aboriginal and/or Torres Strait Islander
- You or your family were forcibly removed before 30 June 1978
- You or your family resided in the Northern Territory at the time of removal.

(c) The National Redress Scheme for Institutional Child Sexual Abuse is a recommendation of the *Royal Commission into Institutional Responses to Child Sexual Abuse*.[31] Recommendations includes ensuring that the redress scheme is widely advertised, and that specific communication strategies be employed to reach '*…people who might be more difficult to reach, including Aboriginal and Torres Strait Islander communities*'.[32] So this scheme is not just specifically for Indigenous people.

2021 – The Territories Stolen Generations Redress Scheme is announced by the Australian Government with the commitment of $378.6 million towards the financial and wellbeing for *living Stolen Generations members*. Borrowed straight from the Labor Party's playbook, the Scheme is aimed specifically at the Stolen Generations from the Northern Territory, the Australian Capital Territory, and the Jervis Bay Territory in New South Wales[33] and eligible applicants will receive:

- A one-off payment of $75,000 in recognition of the harm caused by forced removal.
- A one-off healing assistance payment of $7,000 in recognition that the action to facilitate healing will be specific to each individual.
- The opportunity, if they choose, for each survivor to confidentially tell their story about the impact of their removal to a senior official within government, have it acknowledged and receive a face-to-face or written apology for their removal and resulting trauma.

This scheme opened on 1 March 2022 and will run until June 2026, and eligible applicants *would be*

- Aboriginal and/or Torres Strait Islander people,
- under the age of 18 years at the time they were removed from their family by government bodies (including the police), churches/missions and/or welfare bodies, and in circumstances where their Indigeneity was a factor in their removal, and removed whilst living in the Northern Territory… prior to self-government.[34]

Extract from the Treaty Discussion Paper 2020 [35]

Extermination was never the policy of British or Australian Governments. But they certainly anticipated the gradual '*withering away*' of First Nations, with the idea remaining current

well into the twentieth century; along with the notion of *'smoothing the pillow of a dying race'*. But bureaucrats' attention shifted to what they considered the real problem, the growing number of 'half- castes'.

The *Northern Territory Aborigines Act 1910* (SA) placed Aboriginal people under the near absolute control of the Chief Protector of Aboriginals, who held power '*to confine any Aboriginal or half-caste child*' to a reserve or Aboriginal institution. This paternalistic control over First Nations' lives, marriage, employment and possessions was extended by the Commonwealth *Northern Territory Aboriginals Ordinance 1911 Act*. After 1918, a new Ordinance placed further restrictions on relationships between Aboriginal women and non-Aboriginal men in an attempt to curb the growing 'half-caste' population. It also made all police 'Protectors'.

The determination of First Nations' degree of Aboriginality was at the discretion of the Chief Protector and so began the brutal policy era that is now described as *The Stolen Generations*. 'Protectors' took Aboriginal children deemed 'half-castes', without the consent of their parents and families, and put them in institutions, such as the 'Bungalow' and Jay Creek institutions in Central Australia; the Kahlin Compound and the Retta Dixon Home in Darwin; and the Bathurst Island, Croker Island and Groote Eylandt Missions, off the coast of the Top End. Critical parts of early Commonwealth Ordinances continued in force until they were repealed and subsumed under the general *Welfare Ordinance 1953*, which introduced the Register of Wards, known derisively as the 'Stud Book'. This was removed with the introduction of *The Social Welfare Ordinance 1964*.

> *An examination of legislation of the Commonwealth and the several States reveals a dichotomy based on 'blood' by which those having Aboriginal or other 'coloured' blood or strains of blood were singled out for special legislative treatment. Aborigines and 'half- castes', in particular, were subject to increasing refinement as legislative subjects in the several jurisdictions. A bewildering array of legal definitions led to inconsistent legal treatment and arbitrary, unpredictable, and capricious administrative treatment…*
>
> *[In] 700 separate pieces of legislation dealing specifically with Aborigines or Aboriginal matters – or other seemingly non-Aboriginal matters – no less than 67 identifiable classifications, descriptions, or definitions have been used from the time of European settlement to the present.*[36]

Stolen Generation and implications for treaty recognition

There are some difficult legacies and intergenerational issues arising from this history and significant consequences from generations of children being taken away that we need to address in as sensitive and caring a manner as possible in our treaty discussions.

As noted, the Northern Territory treaty process was initiated by the Barunga Agreement, 2018 (Appendix 8.1). The agreement is described as: *'A Memorandum of Understanding to provide for the Development of a Framework for Negotiating a Treaty with the First Nations of the Northern Territory of Australia.'*

The Agreement's *Principles Guiding the Treaty Consultation Process* speaks in similar terms of any potential treaty being with the First Nations of the Territory:

1. It is envisaged that should a Treaty ultimately be negotiated, it will be the foundation of lasting reconciliation between the First Nations of the Territory and other citizens with the object of achieving a united Northern Territory.

It would appear to be the clear intention of the Barunga Agreement that the framework for negotiations is to facilitate a treaty, or treaties, between the Northern Territory Government and Territory First Nations. Accordingly, only Aboriginal people, considered in their capacity as members of a First Nation, would qualify to negotiate a treaty.

The implication of this is that other Aboriginal people in the Territory, not recognised as members of a First Nation, have no collective standing to enter into a treaty with the Northern Territory

Government. Members of the Stolen Generation in the Territory – who have not been able to trace their family origins or have not been accepted as members of a First Nation – would appear to be disenfranchised in the Northern Territory treaty process. The situation of the Stolen Generations is another dimension of injustice arising from the policy of forced child removals and separation from family and country and this needs to be addressed in the truth-telling process. Although, there may be a way forward to achieve potential resolution of this injustice.

The Barunga Agreement also provides for the establishment of an Independent Treaty Commissioner to assist in the development of a negotiating framework. The first task defined for the Commissioner is not limited to consultations with members of First Nations. It is expressed far more broadly as:

1. *Consultation with all Aboriginal people and their representative bodies in the Northern Territory about their support for a Treaty and on a suitable framework to further Treaty negotiations with the NTG*

The inclusiveness of this consultation task is reinforced in the *Treaty Commissioner Act 2020*. Section 10 (1) (a) states the Commissioner's first statutory function is:

(a) to gauge support in the Territory for a treaty between the Territory and Aboriginal peoples of the Territory

Under the Act the consultation function is not defined in terms of 'a treaty between the Territory and Territory First Nations.' Section 10(1)(a) speaks in enlarged terms of '*a treaty between the Territory and Aboriginal peoples of the Territory*.'

Section 10(2) (a) states the Commissioner's first statutory power is:

(a) to consult with the Territory Aboriginal Land Councils, the Aboriginal peoples of the Territory and areas adjacent to the Territory and Territorians in general;

The power of the Commissioner is clearly directed to consultations with '*the Aboriginal peoples of the Territory*' in execution of the Commissioner's function to gauge support for '*a treaty between the Territory and Aboriginal peoples of the Territory*.'

In these circumstances it appears that in performing his functions and exercising his powers in accord with the Act, the Treaty Commissioner should consult broadly as to the form of a treaty or treaties, what outcomes are achievable for Aboriginal peoples – including the potential for Aboriginal peoples who are not formally members of a Territory First Nation to enter into a treaty. And, to gauge support for their standing to do so within any proposed negotiation framework.

Section 10(1) (g) of the Act expressly tasks the Commissioner:

(g) to provide advice on matters related to a treaty between the Territory and Aboriginal peoples of the Territory;

The Stolen Generations issue is clearly a 'related matter.'

When the position of Stolen Generations who have not found their people is considered by members of First Nations, I'm sure they will respond with understanding and empathy. These are our people whose loss was not their fault, and we know their loss is felt very deeply. They were taken from their families, land, language and culture against their will. Some still remain completely dispossessed. The issues that are important to the Stolen Generations regarding their removal from their families and their disconnection from their culture, clans and country are still as relevant today as they were when they were first stolen. The issues they want addressed are still as relevant today as when they were cast aside by the institutions that stole them, once they became adults and were trying to figure out where they belonged.

'That's Lily's daughter…' she hears.

'Lily…I could hear Lily over and over,' she will recall.

'You mob know my mother, Lily?' she asks.

'Uwa,' they reply. Yes.

'What your name?' they ask.

She tells them, 'Lois O'Donoghue.'

One of the women shakes her head: 'Your name Lowitja.'

One sweet day all the children came back

The children come back

The children come back

Back where their hearts grow strong

Back where they all belong

The children came back

Said the children come back

The children come back

Back where they understand

Back to their mother's land

The children come back

Back to their mother

Back to their father

Back to their sister

Back to their brother

Back to their people

Back to their land

All the children come back

The children come back

The children come back

Yes I came back.

Footnotes

1. Archibald William Roach, *Took the Children Away*, Lyrics © BMG Rights Management, Lyrics Licensed & Provided by Lyric Find.
2. *The long road home…*, Karu Aboriginal Child Care Agency 1996, pp2-3. NB *Kormilda College was 'founded in 1967 by the Anglican and Uniting Churches as a hostel for students from remote communities; it is now a private school, Haileybury Rendall School*. Living Black: S18 Ep8 – Kormilda College, Dale Laughton, NITV, http://www.sbs.com.au/livingblack Living Black: S18 Ep8 - Kormilda College | SBS On Demand
3. Rosie Baird, '*The long road home: Karu Link-up, the NT Stolen Generations and the campaign for the National Inquiry*', in '*Remember Me, Commemorating the Tenth Anniversary of the Bringing Them Home Report*', Secretariat of National Aboriginal and Islander Child Care Inc, September 2007 (SNAICC), www.snaicc.asn.au
4. Ibid. n 1
5. ATSIC was established by the Bob Hawke Labor Government under the *Aboriginal and Torres Strait Islander Commission Act 1989* (the ATSIC Act). It was dissolved in 2005 by the John Howard conservative government.
6. Ibid n, 2. Pp 27-28.
7. Ibid n 1, Archibald William Roach, *Took the Children Away*, Lyrics © BMG Rights Management, Lyrics Licensed & Provided by Lyric Find.
8. Extract: Paul Keating, Prime Minister of Australia Redfern Speech (Year for the World's Indigenous People) – Delivered in Redfern Park, 10 December 1992, Reprinted by Australians for Native Title and Reconciliation: ANTaR. https://antar.org.au/sites/default/files/paul_keating_speech_transcript.pdf. Paul Keating Speech Transcript (antar.org.au)
9. Bringing Them Home Report: Recommendations, 5A, 5B and 6. https://bth.humanrights.gov.au/the-report/report-recommendations
10. Ibid. Recommendations 3, 14-18.
11. Ibid. Recommendation 14.
12. Ibid. Recommendations 15 and 18.
13. The Hon Scott Morrison, MP, Prime Minister and The Hon. Ken Wyatt AM MP, Minister for Indigenous Australians, '*Stolen Generations Redress Scheme*' media release 5 August 2021, Australian Government, Department of the Prime Minister and Cabinet. Stolen Generations Redress Scheme | Ministers Media Centre (pmc.gov.au), https://ministers.pmc.gov.au/wyatt/2021/stolen-generations-redress-scheme.

14. John Howard, Opening Address to the Reconciliation Convention, Transcript of the Prime Minister The Hon John Howard MP Opening Address to the Australian Reconciliation Convention – Melbourne in PM Transcripts: Transcripts from the Prime Ministers of Australia, 26 May 1997. https://pmtranscripts.pmc.gov.au/release/transcript-10361. Transcript 10361 | PM Transcripts (pmc.gov.au)
15. Ibid No 7, Chapter 2. Social Justice Report 1998 : Chapter 2: Non-Indigenous Community Responses | Australian Human Rights Commission
16. Mick Dodson is an Indigenous Barrister and academic, and was Professor of Law at the Australian National University, prior to his role in the Bringing Them Home Inquiry, and prior to becoming the inaugural N.T. Treaty Commissioner. He was Australian of the Year in 2009.
17. Mick Dodson, Human Rights and Equal Opportunity Commission 1997 http://www.hreoc.gov.au/speeches/social_justice/stolen_generation_launch.html
18. Ibid. Sir Ronald Wilson, then President of the Human Rights and Equal Opportunity Commission, speech to the Australian Reconciliation Convention, 27 May 1997
19. *Alec Kruger & Ors v The Commonwealth of Australia: George Ernest Bray & Ors v The Commonwealth of Australia*, [1997] HCA 27,
20. Ibid.
21. https://aiatsis.gov.au/explore/sorry-books;
22. https://humanrights.gov.au/our-work/social-justice-report-1998-appendix-2-selected-inventory-apologies-and-national-sorry-day
23. *Cubillo v Commonwealth* p[2000] FCA 1084
24. Pam O'Connor, O'Connor, Pam --- "History on trial: Cubillo and Gunner v The Commonwealth of Australia" [2001] AltLawJl 7; (2001) 26(1) Alternative Law Journal 27 (austlii.edu.au)
25. Sir William Deane, Walk for Reconciliation 2000 in National Museum of Australia, Defining Moments, https://www.na.gov.au/defining-moments/resources/walk-for-reconciliation, Walk for reconciliation | National Museum of Australia (nma.gov.au)
26. Prime Minister Kevin Rudd MP, Extract *Apology to Australia's Indigenous Peoples Speech*, House of Representatives, Commonwealth of Australia, 13 February 2008
27. Kahlin Compound and Kahlin Half Caste Home 100 Year Commemorative Events, 3rd-5th August 2013. Northern Territory Stolen Generations Aboriginal Corporation, 2014, p.2.
28. Ibid. Patricia Turner speech pp. 24-25
29. Ibid, p.10
30. Ibid. n 7
31. Bill Shorten MP, *Labor will establish Stolen Generations Compensation Scheme*, 12 February 2017
32. Recommendations 1-99 *Redress and civil litigation report recommendations* (2015) in *Final Report Recommendations, Royal Commission into Institutional Responses to Child Sexual Abuse*, Commonwealth of Australia, p.73
33. Ibid. p 83
34. Ibid. n 11
35. Ibid.
36. Northern Territory Treaty Commission, Treaty Discussion Paper, June 30 2020, pp 24
37. The Legal Classification of Race in Australia, John McCorquodale
38. Stuart Rintoul, Lowitja, Allen & Unwin 2021, p 143.
39. Ibid n 1, Archibald William Roach, *Took the Children Away*, Lyrics © BMG Rights Management, Lyrics Licensed & Provided by Lyric Find.

Appendix D: The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The United Nations Declaration on the Rights of Indigenous Peoples was adopted by the United Nations General Assembly in 2007. It is an international human rights framework for recognising 'the urgent need to respect and promote the rights of Indigenous peoples affirmed in treaties, agreements, and other constructive arrangements with States'. Australia formally endorsed the UNDRIP in 2009 after initially voting against it with Canada, New Zealand and the USA in 2007. It is the most comprehensive and progressive international instrument dealing with Indigenous peoples' rights and includes 46 articles covering all aspects of human rights, as they specifically affect Indigenous peoples. Its articles address:

- Self-determination
- Identity
- Religion
- Language
- Health
- Education
- Community
- Land and resources.

The UNDRIP constitutes the 'minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world'. It is an expression of generally accepted human rights standards applied to an Indigenous context and considering the communal nature of many of those rights.

The UNDRIP's 'golden thread' is the right to free, prior and informed consent on matters affecting Indigenous peoples, explicitly set out at Article 19:

> ***Article 19***
> States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Why is the UNDRIP important?

The UNDRIP delineates and defines individual and collective rights of Indigenous peoples accepted as being important under international law. It includes rights to cultural and ceremonial expression, to maintain and strengthen Indigenous identity, language, employment, health and education, and more. It also emphasises the rights of Indigenous peoples to pursue development according to their own needs and aspirations, and contains a right to the 'recognition, observance and enforcement of treaties'. Because it is a unique expression of collective rights for Indigenous peoples as distinct political groups, the UNDRIP gives content to what can be negotiated as part of the NT treaty process. This includes guiding the negotiation and progress of treaties and associated laws and policies.

The first step to acknowledging the role of the UNDRIP to NT treaties was made in the 2018 Barunga Agreement MOU signed between the Chief Minister on behalf of the NT Government and the four Land Councils. Principle 8 of the MOU scheduled to the Treaty Commissioner Act 2020 comes under the heading 'Principles Guiding the Treaty Consultation Process', and states that 'the Treaty must provide for substantive outcomes and honour the Articles of the United Nations Declaration on the Rights of Indigenous Peoples'. It is an acknowledgement of the important relationship between the UNDRIP and the treaty-process in the Territory.

The rights contained in the UNDRIP have significant weight because they generally reflect well-established rights that exist at international law in a variety of instruments. For example, rights to self-determination are generally considered to include articles 3-15 of the UNDRIP, and are well-established in international law, set out in Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Many have argued, and it has been accepted by some courts, that although the Declaration is a non-binding instrument, many of its provisions (and themes fundamental to treaty-making) reflect binding, hard-law norms, including those on self-determination, political participation and consultation (including free, prior and informed consent). ,

The UNDRIP is therefore a non-binding, influential and aspirational statement and also an instrument that reflects established and binding rules of customary international law. It should be seen as an increasingly robust legal instrument that provides an unavoidable parameter of reference for treaty-making in the Northern Territory.

The influence of the UNDRIP is increasing across the world. The Declaration has been used to guide the development of new legislation and inform new laws regulating consultations with Indigenous peoples, for example in several Latin American countries. Bolivia was the first country in the world to adopt UNDRIP into its domestic law, giving binding force to the whole Declaration in 2007. The Declaration is also becoming part of the evolving contemporary relationship between Canada's First Nations and Canadian governments. Canada is doing this by incorporating the Declaration on provincial and federal levels, making UNDRIP standards a key legal consideration in relation to its laws. In 2019, the Canadian province of British Columbia passed specific legislation (Bill 41) to incorporate the Declaration:

> The Declaration on the Rights of Indigenous Peoples Act (DRIPA) requires the BC government, among other things, to take all necessary measures to make sure provincial laws are consistent with UNDRIP, and to establish an action plan to measure and report on progress. More recently, Canada's federal legislature passed a similar law which has national effect: the United Nations Declaration on the Rights of Indigenous Peoples Act. The federal UNDRIP Act in Canada affirms that the Declaration applies in Canadian law and provides a framework for the Canadian Government's implementation of the UNDRIP.

In 2019, the UNDRIP was also endorsed as a foundation of the British Columbia treaty negotiations framework. The British Columbia Treaty Commission has argued that the British Columbia treaty process is consistent with key principles of the UNDRIP, which 'breathe[s] life into negotiations'. The challenge for the NT is to make sure to embrace the UNDRIP as a fundamental part of the treaty-process, respecting, in the spirit of and commitment to treaties, that there are important Indigenous rights, well accepted under international law, that are foundational and from which there

Footnotes

1. 143 states voted in favour and four voted against (Australia, Canada, New Zealand and United States), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Columbia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).
2. Harry Hobbs, n 36, 174.
3. UNDRIP Art. 43.
4. Free, prior and informed consent is also relevant to articles 10; 11(2); 28(1); and 29(2).
5. S. James Anaya, 'The UN Declaration on the Rights of Indigenous Peoples: How Far We've Come and the Road Ahead', n 27, 12.
6. Ibid.
7. Ibid.
8. Article 37 of the UNDRIP states: that (1) Indigenous peoples have the right to recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
9. See Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' (2008) 9 *Melbourne Journal of International Law*, 439, 465.
10. *Treaty Commissioner Act 2020*, appendix, 14.
11. See Asmi Wood, 'Self-Determination Under International Law and Some Possibilities for Australia's Indigenous Peoples', n 28, 269 – 293.
12. See S. James Anaya, 'The Emergence of Customary International Law Concerning the Rights of Indigenous Peoples' (2005) 12 *Law and Anthropology*, 127; Asmi Wood, 'Establishing a Neutral Legal Framework for Treaty in Australia', n 29; Javaid Rehman, 'Between the Devil and the Deep Blue Sea: Indigenous Peoples as Pawns in the US "War on Terror" and the Jihad of Osama Bin Laden', in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011) 561; James Anaya, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development*, UN Doc A/HRC/12/34 (July 15, 2009) 12 – 15; Harry Hobbs, n 36, 178; Stephen J Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' (2007) 206 *Third World Resurgence* 15; Asmi Wood, 'Self-Determination Under International Law and Some Possibilities for Australia's Indigenous Peoples', n 28, 282.
13. For example, in Australia, The Parliamentary Joint Committee on Human Rights commented in 2013 that "the declaration ... is considered to represent customary international law binding on Australia in many, though not all, respects". For example, rights to self-determination as set out in the UNDRIP are considered to be customary international law, and thus, no derogation is possible from the right to self-determination. See Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Stronger Futures in the Northern Territory Act 2012* and *related Legislation* (2013) quoted in Patrick Wall, 'Case Note: The High Court of Australia's Approach to the Interpretation of International Law and its Use of International Legal Materials In *Maloney v The Queen* (2013) HCA 28' (2014) 15 *Melbourne Journal of International Law 6*.
14. Megan Davis, 'To bind or not to bind: the United Nations Declaration on the Rights of Indigenous People five years on' (2012) 19 Australian International Law Journal 19. See also Sylvanus Gbendazhi Barnabas, 'The Legal Status of the United Nations Declaration on the Rights of Indigenous Peoples (2007) in Contemporary International Human Rights Law' (2017) 6 *International Human Rights Law Review*, 243.
15. Felipe Gómez Isa, 'The UNDRIP: an increasingly robust legal parameter' (2019) 23(1-2) *The International Journal of Human Rights*, 7.
16. S. James Anaya, 'The UN Declaration on the Rights of Indigenous Peoples: How Far We've Come and the Road Ahead', n 27, 23.
17. Federico Lenzerini, 'Implementaion of the UNDRIP around the world: achievements and future perspectives. The outcome of the work of the ILA Committee on the Implementation of the Rights of Indigenous Peoples' (2019) 23 *The International Journal of Human Rights*, 57.
18. See Diane Smith, n 2, 4.
19. See s 4.
20. *Government of Canada, Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (British Columbia, First Nations Summit, Canada, 4 September 2019) < https://www.rcaanc-cirnac.gc.ca/eng/1567636002269/1567636037453>.
21. Harry Hobbs, n 34, 185.
22. For example, there is a well-established argument that rights contained in the UNDRIP, for example, the right to self-determination, represent peremptory norms of general international law from which no derogation is permitted.

Appendix E: Van Boven/Bassiouni Principles

The van Boven Principles originate from a study by Professor Theo van Boven on the right to restitution, compensation, and rehabilitation for victims of gross violations of human rights and fundamental freedoms. In 1996 he submitted the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. The Principles and Guidelines were adopted by consensus in 2005 by the United Nations General Assembly.

The van Boven Principles set out that there is an obligation on States to 'respect, ensure respect for and implement international human rights law and international humanitarian law'.[1] This obligation includes a duty to prevent violations, to investigate violations, to take appropriate action against violators, and to afford remedies and reparation to victims.[2] Section I of the Principles provides more detail on remedies and sets out that States have obligations to provide for victims 'adequate, effective, prompt, and appropriate remedies, including reparation'. Section VII further provides that remedies include the victim's right to (a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; and (c) access to relevant information concerning violations and reparations mechanisms.[3]

In relation to treaty-making, First Nations peoples grappling with the consequences of various forms of State intervention in their lives have a right to a remedy. The van Boven Principles highlight reparations as a category of remedy far broader than simple monetary compensation. They state that:

(15) ...Reparation should be proportional to the gravity of the violations and the harm suffered. In accordance with its domestic laws and international legal obligations, a State shall provide reparation to victims for acts or omissions which can be attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law.
...

(18) ... victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, as laid out in principles 19 to 23, which include the following forms: **restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.**[4]

Footnotes

1. Van Boven Principles, Section I.
2. Ibid, Section II.
3. Ibid, ss I, VII.

Appendix F:
Local Government Landscape

To properly understand the full extent of the transformation to the current local government system we are proposing, it is necessary to understand both the history and the current state of local government in the NT.

Local government is referred to as the 'third tier' of government in Australia's federal system, although it is not mentioned in the Constitution and the Commonwealth government has no independent relations with them.[1] Local governments have no independent powers of their own.[2] In the NT, powers and functions are conferred upon them via the *Local Government Act 2019* (LGA), which is a Northern Territory law made pursuant to the *Northern Territory (Self-Government) Act 1978* (Cth) ('Self-Government Act'). The *Self-Government Act* gives the Northern Territory Legislative Assembly plenary power to make laws for the 'peace, order and good governance of the Territory',[3] including laws that create and confer powers upon a system of local government. Local government functions have historically related to things such as waste collection and disposal; maintenance and upgrades of access roads; internal community roads; footpaths and drainage; street lighting; limited town planning; cemetery management; library services and the maintenance and upgrade of parks and open spaces.[4]

The scope of local government power is not limited to these functions and can be expanded within the limits of the Northern Territory's jurisdiction within the constraints of the Self-Government Act. In many cases, local governments perform wider functions, for example related to health service provision, traineeships and general support services.[5] As a creation of NT law, local government is also limited by the Constitution and matters of inconsistent with Commonwealth laws.[6] As a consequence, Territory laws about local government must be consistent with all current and future Commonwealth laws.

For example, and particularly related to non-municipal areas, the LGA must operate within the statutory context of the ALRA, a Commonwealth law that protects and recognises the rights and interests of Aboriginal traditional owners of land in matters of land access, use, planning and management.[7] The ALRA has significant bearing on the potential for reform to the Territory's local government system (for further discussion regarding the intersection of ALRA with treaties in the NT, see section 3(j)). Local government cannot exercise powers or functions inconsistent with the ALRA, or with any other Commonwealth law. Despite its significant presence in remote areas and its unique recognition of customary rights and interests of traditional owners, the ALRA has generally not been used by Territory Governments to shape, or directly inform, the LGA. The result has been a system that has failed to recognise traditional owners or unique First Nations interests.

History of Local Government in the NT

Local government is a product of history. It is a British-informed institution of local, organised decision-making. It shares an identity with colonial and then State, Territory and Commonwealth governments, which are based on non-Indigenous historical theories, ideas, and philosophies.[8] In settler jurisdictions, local government has resulted in widespread exclusion of First Nations peoples from decision-making.[9] Aboriginal and Torres Strait Islander people have generally not had a say in how systems of local government were developed, nor in the way land has been used and developed in towns, cities and regions. Land has been legally alienated from First Nations' control, divided for pastoral, industrial, residential or commercial purposes and then developed. Overall, it has occurred with little reference to First Nations' interests. At times, in various places, First Nations people have even been explicitly excluded from entering municipal boundaries.[10]

Historically, the focus of local government in the NT was driven by municipal councils in urban areas and smaller, community councils in remote

areas. The community council model focused on remote communities being in control of decisions relating to the local government jurisdiction. This was influenced by policy aims of self-determination in the Whitlam era,[11] reflected in the land rights movement in the 1970s and the prevailing view that 'Aboriginal communities should have as much autonomy as possible in running their own affairs'.[12] Various governance mechanisms sought to achieve this end, including provision under the Aboriginal Council and Associations Act 1976 (Cth) ('ACAA') – established to complement the ALRA – for remote Aboriginal communities to incorporate as Aboriginal Councils capable of carrying out local government-type essential services.[13] Although eventually limited in its effect, the ACAA provided a potentially flexible and adaptive mechanism for First Nations governance. It was heralded as a way of recognising cultural differences and creating legal bodies to bridge Aboriginal and non-Aboriginal societies.[14]

The NT's first Local Government Act in 1978, offered local government incorporation to smaller urban centres and to remote communities and generally provided for flexible schemes of 'community government'.[15] It set up Community Government Councils, which were intended for small urban settlements and outlying areas, including remote Aboriginal communities.[16] It also provided for Association Councils, which were incorporated under either the Northern Territory Associations and Incorporation Act or the ACAA, capable of carrying out local government functions. Although it sought to provide a framework for flexible community governance, this system had weaknesses. Critics have argued that because it provided local government with functions and powers on Aboriginal land, the NT LGA was in conflict with the interests of traditional owners and rights and powers established under the ALRA.[17] Observers have also suggested that the broad promises of self-determination, which underpinned the design of policies such as the ACAA and of the LGA 1978, never created the capacity for First Nations people to run their own affairs.[18] The Royal Commission into Aboriginal Deaths in Custody in 1991 (RCIADIC)[19] also addressed these issues, saying that policies of self-determination in this period failed because Aboriginal people were given a degree of control over their own affairs but not the tools to ensure this led to successful outcomes.[20]

Mainstreaming and Regionalising Local Government

The shift in local government away from community control and towards the current, more centralised, regional model, reflects changes in policy at the Commonwealth level, starting with the Howard government in 1996. From 1996, the Commonwealth dismantled policies underpinned by self-determination because it saw the broad program as a failure, although this was not the view of many researchers in this area.[21] Instead, it focused on programs of limited Indigenous 'self-management'.[22] In 2002, the Commonwealth explicitly rejected the principle of self-determination and committed itself only to 'the principle of Indigenous people having opportunities to exercise control over aspects of their affairs'.[23] This approach focused on 'practical reconciliation' and 'closing the gap'. While these agendas aimed to improve socio-economic indicators, they neglected the importance of First Nations communities having power to design and control policies affecting their lives.

Critics of these approaches argue that they had the effect of undermining First Nations peoples' claims to self-determination because they eroded the capacity of Aboriginal people to make decisions.[24] Policies in this period rejected supporting actions which would entrench additional, special or different rights for First Nations people.[25] They denied the settler nation's obligation to redress past injustices[26] with reparative policies, and they failed to give First Nations peoples the ability to exercise and enjoy their right to self-determination. Policies in this period focused on mainstreaming Aboriginal and Torres Strait Islander services and decision-making mechanisms into broader structures of neoliberal policy.[27] At the Commonwealth level, this is evident in policies such as amendments to the Native Title Act 1993 (Cth) (NTA) following the *Wik Peoples v Queensland*[28] decision; amendments to the ALRA; the dismantling of the Aboriginal and Torres Strait

Islander Commission (ATSIC) in 2005 and in the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER) which was continued under the *Stronger Futures in the Northern Territory Act 2012* (Cth). The NTNER measures included, among other things, changes to the ALRA system of Aboriginal land title in the NT including revoking the permit system in relation to roads and townships and by empowering the Commonwealth, through the Executive Director of Township Leasing, with capacity to hold long-term leases over Aboriginal land.[29]

Local Government Amalgamation in the NT

Local government amalgamation was pursued as a policy setting in the NT from the late 1990s. It reflected a trend in Australia and New Zealand to amalgamate local governments to improve efficiency and to create economies of scale.[30] In the NT the plan was to create amalgamated, larger, regional councils (or authorities) to replace the many small and not well-connected community councils.[31] The idea was first established in 1999 under the NT's Reform and Development Agenda (RADA), which sought to amalgamate the existing 65 local governing bodies[32] into about '20 larger and more sustainable' councils, ideally representing and delivering services to around 2,000 people.[33] It was driven by the view that the local government system was too decentralised and that there were too many remote area councils in the territory beset by inefficiencies because of low populations. Minister for local government at the time, Loraine Braham, argued that councils with a population of less than 2,000 people encounter 'greater difficulties in maintaining adequate levels of administration and service delivery over the longer term'.[34]

The subsequent 2003 NT policy, Building Stronger Regions, Stronger Futures (BSRSF), also pursued amalgamation. It too was driven by a perceived failing of local government councils in the NT. Then Government Minister John Ah Kit said that these failings included 'institutional incapacity, ineffective service delivery, fraud and corruption by staff and leaders, a high turnover of key non-Indigenous staff' and a 'historical legacy of poor governance'.[35] It was argued that many small and isolated community councils did not have the population size, economies of scale, resources, administrative systems, personnel or management expertise to meet their service delivery obligations,[36] and that local government should therefore be regionalised.

Regional authority structures under the new model were intended to have 'the authority, economies of scale, and legislative force to carry a full range of functions available under the then LGA'.[37] The authorities would have the power to negotiate with Territory and Commonwealth governments and other statutory authorities to create outcome-focused regional agreements.[38] They were intended to carry functions outside of the traditional local government jurisdiction. Regional authorities were to be able to undertake regional decision-making to determine priorities, establish service delivery policies and allocate resources. They would also provide for decision-making structures that met the needs of the communities to be governed. Where applicable they would incorporate strong relationships with cultural decision-making arrangements, and particularly with traditional owners.[39] The program was supposed to be designed and implemented in collaboration with community councils and their leaders,[40] and so aimed to incorporate First Nations decision-making in the reformed, regional structures.

The BSRSF policy framework appears an attempt to correct deficiencies in two ways. The first was to improve operational and governance failings and inefficiencies of the existing local government framework. The second was to recognise the need to incorporate First Nations decision-making structures into that framework and to provide communities with greater autonomy in relation to service delivery. The BSRSF policy was supposed to emphasise flexibility of structures and timeframes and develop culturally based representative and electoral arrangements.[41] Not only are these aspirations relevant to a proposed FNSGA, but there is also significant conceptual crossover. Despite the clear merit in the BSRSF approach, the policy, as it was originally designed, was never implemented.

BSRSF in West Arnhem Land boundaries

A key strength of the BSRSF policy was its intention to engage with First Nations peoples and to provide an expanded system of local government that was culturally relevant and capable of empowering regional areas with broader control over matters affecting peoples' lives. Preliminary work on the policy included engaging with First Nations communities in a process of design which was aligned with cultural protocols and considerations. These engagements considered regional authority boundaries reflecting First Nations traditional land boundaries.[42] As Dr Diane Smith's research highlights, during the development of the BSRSF policy, First Nations leaders in West Arnhem organised to pursue the idea of a regional authority, which was to be called the West Central Arnhem Regional Authority (WCARA). Its design was intended to reflect the aspirations of Aboriginal people in the West Arnhem region.[43]

Leaders established the WCARA Interim Council to develop the idea. They saw creating the WCARA as an opportunity to achieve greater authority and control for Bininj (local Aboriginal people) over things that mattered to them. It would also reflect their own territorial boundaries and exercise greater influence over government funding and service delivery in the region.[44] The WCARA Interim Council reached decisions about the proposed WCARA's governance and organisational structure, administrative arrangements, business planning and service delivery roles.[45] Leaders spent a lot of time developing a culturally based constitution and a ward system for voting that was based on a Bininj cultural geography.[46] First Nations leaders proposed that their regional authority would service 25,000 square km of inalienable freehold Aboriginal land under the ALRA.[47] The proposed boundaries for this area were determined by Bininj people based on 'dense layers of traditional land-owning relationships and networks'.[48] These boundaries were relevant and important to that area and to proposed roles and functions under the developing BSRSF policy framework.

In 2007, the NT Government pushed to include Maningrida and Jabiru in the new regional structure. This had the effect of extending the region beyond the boundaries of Aboriginal owned land. Dr Smith highlights that including Jabiru meant that Aboriginal leaders would have to accommodate a non-Indigenous township, its residents and elected representatives and its different cultural values and priorities.[49] The change departed from the design of the West Central Arnhem Regional Authority model because it asserted that the NTG would impose its own boundaries with little regard to the wishes of the communities that the new structure was supposed to represent. Ultimately, the NTG imposed its own boundaries and ideas of governance, despite the wishes and cultural protocols of local First Nations people,[50] to hasten the process of regionalisation.[51]

Despite significant work by WCARA Interim Council, and the development of systems and rules that were culturally appropriate and relevant to Bininj people, the NT Government took control of decision-making and pushed its own agenda for local government reform. The WCARA Interim Council's constitution and culturally appropriate system of ward representation were thrown out.[52] Although substantial work was done in the development of the policy with remote First Nations communities, the BSRSF policy was abandoned in 2007 in favour of the current, amalgamated system of local government.

In her research on the development of the BSRSF policy, Dr Diane Smith highlights that abandoning or ignoring First Nations peoples' input into the design of local government policy was driven 'by ideological dissatisfaction and implementation difficulties experienced by government bureaucrats in trying to accommodate Aboriginal ideas about 'regions' and representation for local government, and their consensus modes of decision-making about these matters'.[53] Decision-making took time and required internal negotiation and sensitive facilitation. These issues challenged the capacity, commitment and resources of both the NT and Commonwealth Governments,[54] and led to the imposing a model that plainly did not reflect the unique interests and

aspirations of First Nations communities. The NTG ultimately made regionalisation mandatory and subject to government-imposed deadlines.[55] Any formal recognition of culturally based processes for determining local government regions were ignored, as was the potential for using First Nations governance systems and traditional land boundaries as the basis for the new local government model.[56]

The result has been a system of local government that is generally not relevant to First Nations peoples. Had the model being developed in West Arnhem been supported by government and similar models appropriately adapted for different areas given prominence across the Territory, the context of considering options for self-government as part of the treaty process may be very different. There may have been an effective platform on which more far-reaching governance arrangements could be set up, empowering First Nations as decision-makers and reflecting First Nation priorities and worldviews. A key lesson we can take from the West Arnhem experience is that government needs to empower First Nations peoples as decision-makers. Government needs to be willing, open and committed to changing the status quo and to giving up control and responsibility to First Nations peoples.[57]

The 'Shire Model' – Local Government Act 2008 (NT)

The 2008 LGA amalgamated 51 community government councils in remote Aboriginal communities, plus the Jabiru Town and Tenant Creek Shire councils, into eight new regional shire councils. A ninth Regional Council, the West Daly Regional Council, was established in 2014, de-amalgamated from the original Victoria/Daly Shire Council. Alice Springs, Darwin, Palmerston, Litchfield, and Katherine became the only 5 municipal councils.[58] The Shire Model expanded the jurisdiction of local government to cover the whole land mass of the NT, rather than the 10% previously covered.[59] It sought to address inefficiencies the NTG identified in the previous local government system and to create economies of scale in local government service delivery. The Minister for Local Government at the time said that it was 'evident from research undertaken on the sustainability of local government in other jurisdictions that a shire of less than 5,000 people would struggle to be sustainable in the long term'.[60] The amalgamation was strongly resisted.[61] And, by centralising decision-making over large regional areas, it limited local area decision-making. Where the BSRSF policy aimed at engaging First Nations peoples in developing about 20 regional authority structures, the shire model imposed a single top-down[62] system of local government over large areas of land which was not culturally relevant, and which was far too focused on regionalisation. It has left First Nations Territorians in remote areas with inadequate capacity to make decisions about matters affecting their lives, and is not an adequate footing on which to develop and to realise First Nation self-government as part of the treaty process.

First Nations communities across the NT have generally experienced the Shire Model as an undermining of community control.[63] It is an example of a mainstreaming, 'one size fits all' approach,[64] that is 'too big'[65] and ignores the aspirations of First Nations Territorians, and particularly those in remote and very remote areas. The Central Land Council has argued that most Aboriginal people in the (CLC) region viewed local government amalgamation as an attempt by the NTG to increase its influence and control over Aboriginal communities. They also saw it as a way to undermine the ALRA and hold back the development of more far-reaching Aboriginal governance options.[66] Also, the aims of the Shire Model to improve efficiency and achieve economies of scale by sharing assets and equipment across communities, although important considerations, were optimistic.[67]

During our consultations, many people recalled their despair when convoys of local vehicles and heavy machinery left the community never to return. One Central Australian community said that under the pre-shire model, council trucks were used to collect firewood for old people during the harsh winters, but the shire reforms stopped this practice, deeming it an inappropriate use of council resources.

Although most remote areas have elected representatives at the now Regional Council level, effective decision-making power has been centralised and moved away from communities. The effect of this has been that the local government system in non-municipal areas does not balance regional needs with local needs. Most Territorians affected by the current local government system's failings are Aboriginal people living in remote areas. Our consultations found that Aboriginal people were very unhappy with the current local government model. Many people we spoke to see it as ineffective and not in line with their interests or needs. The LGA does not take into account the evidence that effective governing institutions must have the support of the people they govern.[68]

The only mechanisms in the legislation for remote community decision-making have been 'local boards' (Part 5.1) and 'local authorities' (Part 5.1A) which were, at best, limited to advisory and consultation functions. Community governance mechanisms under this law have not been a good replacement for the abolished system of community councils.[69]

The 2019 reforms – solutions or more of the same?

The NTG is aware of these shortcomings. Its 2019 LGA reforms sought to address the 2008 LGA's deficit in remote-area decision-making. Local boards were abandoned, and local authorities were given more 'prominence in the legislation'.[70] The 2019 LGA aimed to create 'measures to strengthen local decision making by improving working relationships amongst councils, local authorities and their communities'.[71] It also tried to make changes that were 'responsive to stakeholder and public feedback from the (extensive) consultation[s]'.[72] Despite this, the only real change to local authorities in the 2019 Act is an obligation on Council, to seek advice and recommendations from local authorities in matters relating to (i) budget; (ii) priorities for expenditure; (iii) service delivery; (iv) regional plans; (v) strategic directions (s81). These changes do not give remote communities decision-making power in their local government jurisdiction. This is because local authorities (1) must comply with guidelines of the minister, and (2) a local authority is subject to control and direction by the council (s79). The changes merely provide obligations for consultation.

Although some positive changes have been made, including the repeal of local boards,[73] the reforms have not created a mechanism for First Nations communities to have meaningful decision-making power. They also do not provide for governance systems, boundaries, representative structures, or powers and functions that recognise and empower traditional owner interests, or general First Nation interests. Apart from a reference to harmonising laws, there is no meaningful provision for traditional owner interests as set out in the ALRA. There is no formal obligation to recognise important and internationally accepted human rights to self-determination as set out in the UNDRIP. In remote areas of the NT, where local governments are subject extensively to Aboriginal land, and where First Nations people represent up to around 85% of the population,[74] we argue that there needs to be a system of governance designed by First Nations peoples that recognises and reflects UNDRIP and ALRA rights and obligations.

A clear and consistent message from our consultations across the NT is that First Nations peoples in remote areas want greater decision-making control over matters affecting their lives, and that they are unhappy with the design and operation of local government.

The balance between regional and local interests in the current system of local government does not support remote communities. In the context of treaty-making in the NT, government cannot continue to exclude Aboriginal people from meaningful decision-making power. The overwhelming evidence is that measurable outcomes improve when First Nations people have meaningful control over matters affecting their lives.[75] The 2019 Act does not reflect this because it does not put substantive decision-making power in the hands of local communities as important parts of a regional governance model. The NTG appears to have been limited by a narrow view that local government in remote areas should not empower effective community decision-making or be designed

to support First Nations' needs, worldviews and aspirations. Instead, it has been limited by a traditional and historical understanding of the responsibilities and powers of local government. In this way, it has missed the opportunity to organise local government to effectively empower First Nations' autonomy. We believe that a transformational approach to local government, particularly in remote areas, can support First Nations aspirations for self-government. This can only be realised through innovative, comprehensive, and targeted reform.

Footnotes

1. Alison Vivian, Miriam Jorgenson, Alexander Reilly, Mark McMillan, Cosima McRae and John McMinn, 'Indigenous Self-Government in the Australian Federation' (2017) (20) *Australian Indigenous Law Review*, 233.
2. Ibid.
3. Section 6, *Northern Territory (Self-Government) Act 1978* (Cth).
4. Local government services differ across Australia. These functions are not a comprehensive of all local government functions. See Michael Limerick, Robyn Morris and Melissa Sutton, 'Local Government Service Delivery to Remote Indigenous Communities' (Report for Australian Centre of Excellence for Local Government, May 2012) 9.
5. Australian Local Government Association, *Pre-Budget Submission 2021-2022* (Submission to the Commonwealth Government, 2021) 12.
6. Section 109 of The Constitution states that 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'. A similar rule of 'repugnancy' applies in relation to the Northern Territory. The law-making power conferred by self-government legislation in the Northern Territory is subordinate to Commonwealth law-making power. Where a Territory law is inconsistent with a Commonwealth law, the Territory law will be inoperative for lack of power. See *Attorney General (NT) v Hand (1989)* 25 FCR 345 at 366 – 367 (Lockhart J).
7. Diane Smith, 'Culture of Governance and the Governance of Culture' in Janet Hunt, Diane Smith, Stephanie Garling and Will Sanders (eds) *Contested Governance* (Australian National University, 2008) 81.
8. Mitchell Dean, *Governmentality* (London Sage, 1999) 9.
9. Annie Sarah Elizabeth Te One, 'Mana Whenua, Mātaawaka, and Local Government—An Examination of Relationships Between Māori and Local Government in Wellington and the Hutt Valley' (PhD Thesis, Australian National University, 2018) 14.
10. Various early laws in Australia restricted the movement of First Nations people, including in urban areas. The *Aboriginals Ordinance 1911* (Cth) established at section 9 that the Administrator could, by proclamation published in the Gazette, declare any place to be a prohibited area. The Ordinance stated (at section 9(2)) that it was unlawful 'for any Aboriginal or half-caste to be or remain within any prohibited area, unless with the express permission of a Protector or police officer'. Section 9(4) gave any police officer or Protector power to remove at any time 'any Aboriginal or half-caste' person from prohibited areas. Laws colloquially called 'dog licenses', also provided, in various jurisdictions, Certificates of Exemption, which empowered government officers to declare that a person was 'not an Aboriginal' for the purposes of restrictions of movement. See, for example, *Aboriginals Ordinance 1953* (Cth), section 3; *Aborigines Act Amendment Act 1939* (SA), section 11, and; *Aborigines Protection Act 1909* (NSW). For commentary see Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) Chapter 9.
11. The Whitlam Government established 'self-determination' as a key policy agenda. Its aim was to 'restore to the Aboriginal people of Australia their lost power of self-determination in economic, social and political affairs.' See Gough Whitlam, 'Aboriginals and Society' Press Statement No. 74, 6 April 1973; for commentary see also Laura Rademaker and Tim Rowse, 'How shall we write the history of self-determination in Australia?' in Laura Rademaker and Time Rowse (eds) *Indigenous Self-Determination in Australia* (ANU, 2020) 1 – 31.
12. *Aboriginal Land Rights Commission* (Second Report, April1974) 11.

13. This was provided at Pt III s11(3). For commentary see David Dalrymple, 'The Forgotten Option: Part III of the Aboriginal Councils and Associations Act 1976' (1988) 2(32) *Aboriginal Law Bulletin*. The ACAA was replaced by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Aboriginal Councils were abolished under this new legislation.

14. Commonwealth, Parliamentary Debates, House of Representatives, 17 November 1976, 2778, Ian Viner. See for discussion Heather McRae, Garth Nettheim, Thalia Anthony, Laura Beacroft, Sean Brennan, Megan Davis and Terri Janke (eds), *Indigenous Legal Issues* (4th ed) (Thompson Reuters, 2009) 173.

15. Will Sanders, 'After Reserves and Missions' in Laura Rademaker and Tim Rowse (eds) *Indigenous Self Determination in Australia* (ANU, 2020) 128.

16. Will Sanders, 'Thinking About Indigenous Community Governance', *Discussion Paper No. 262* (ANU, 2004) 3.

17. For example, there was a view, particularly among the Land Councils, that community government provisions, when applied to Aboriginal land were potentially in conflict with their responsibilities to traditional owners under the ALRA. Critics of the community government provisions considered them an attempt by the Northern Territory government to subvert the Commonwealth's Aboriginal land rights regime. See Will Sanders, 'Thinking About Indigenous Community Governance', n 20, 4; Jackie Wolfe, *That Community Government Mob: Local Government in Small Northern Territory Communities* (ANU, 1989).

18. Gary Foley, 'The Australian Labor Party and the Native Title Act' in Aileen Moreton-Robinson (eds) *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007) 125.

19. Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report (1991)* 39 – 40.

20. Ibid.

21. See for example, Noel Person, 'On the Human Right to Misery, Mass Incarceration and Early Death', (2001) Quadrant (December) 9; John Altman, 'Sustainable Development Options on Aboriginal Land: The Hybrid Economy in the Twenty-First Century' (CAEPR Discussion Paper No 226/2001, Centre for Aboriginal Economic Policy Research, Australian National University); Rosemary Neill, White Out. *How Politics is Killing Black Australia* (Allen and Unwin, 2002); Peter Sutton, 'The Politics of Suffering: Indigenous Policy in Australia Since the 1970s' (2001) 11(2) *Anthropological Forum*.

22. Michael Dodson and Sarah Pritchard, 'recent developments in Indigenous Policy: The Abandonment of Self-Determination' (1998) 4(15) *Indigenous Law Bulletin 4*.

23. Commonwealth of Australia, *Commonwealth Government Response to the Council of Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge (2002)* 10.

24. Kiera Ladner 'Proceed with Caution: Reflections on Resurgence and Reconciliation' in Michael Asch, John Borrows and James Tully (eds) *Resurgence and Reconciliation: Indigenous-Settler Relations and Earth Teachings* (University of Toronto Press, 2018) 250.

25. Commonwealth of Australia, *Commonwealth Government Response to the Council of Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge* (2002) 1, 17.

26. Heather McRae, Garth Nettheim, Thalia Anthony, Laura Beacroft, Sean Brennan, Megan Davis and Terri Janke, n 18, 55.

27. Melissa Lovell, 'Languages of Neoliberal Critique: The Production of Coercive Government in the Northern Territory Intervention' in John Uhr and Ryan Walter (eds) *Studies in Australian Political Rhetoric* (ANU, 2014) 223; see also Laura Rademaker and Tim Rowse, (eds) *Indigenous Self Determination in Australia* (ANU, 2020) 21.

28. (1996) HCA 40; 187 CLR 1 ('Wik').

29. See Part IIA of the ALRA.

30. Andrew Butt, Annette Kroen, Wendy Steele and Stephanie Dühr, *Local government co-ordination: metropolitan governance in twenty-first century Australia* (Final Report No 352, March 2021) 20 – 47.

31. Central Land Council, Submission to the *'Options for Regional Governance in the Northern Territory'* consultation process (June 2013) 5.

32. These included 6 municipal councils, 31 community government councils incorporated under NT legislation, and 28 association councils constituted under Commonwealth legislation. Approximately 80 per cent of these councils were situated on Aboriginal land subject to the ALRA. Diane Smith, 'Culture of Governance and the Governance of Culture', n 8, 81.

33. Ibid.

34. Will Sanders, 'Regionalism That Respects Localism: The Anmatjere Community Government Council and Beyond' in Janet Hunt, Diane Smith, Stephanie Garling and Will Sanders (eds) *Contested Governance* (ANU, 2008) 287.

35. John Ah Kit, 'Ministerial statement', delivered as Minister assisting the NT Chief Minister on Indigenous Affairs, 7 March 2002, Northern Territory Parliament, Darwin, cited in Diane Smith, 'Culture of Governance and the Governance of Culture', n 8, 82.

36. Diane Smith, 'Culture of Governance and the Governance of Culture', n 8, 82.

37. Northern Territory Department of Community Development, Sport and Cultural Affairs, *Building Stronger Regions, Stronger futures Northern Territory* (2003) 11.

38. Ibid; Central Land Council, Submission to the *'Options for Regional Governance in the Northern Territory'* consultation process, n 38, 7.

39. Diane Smith, 'Culture of Governance and the Governance of Culture', n 8, 82.

40. Ibid, 81.

41. Ibid, 82.

42. See ibid, 84.

43. Diane Smith, 'Networked governance: Issues of process, policy and power in a West Arnhem Land regional initiative' (2007) 1, *Ngiya: Talk the Law*, 25.

44. Diane Smith, 'Culture of Governance and the Governance of Culture', n 8, 86.
45. Ibid, 88.
46. Ibid, 89.
47. Ibid, 86.
48. Ibid, 94.
49. Ibid, 91.
50. Ibid, 93.
51. Ibid, 103.
52. Ibid, 92.
53. Ibid, 83.
54. Ibid.
55. Ibid.
56. Ibid.
57. Ilan Katz, Jan Idle and Wendy Jopson, *'OCHRE Local Decision Making Accords: Three Rivers Regional Assembly* (SPRC Report 08/19, 2018) Social Policy Research Centre, UNSW Sydney, 32.
58. Michael Limerick, Robyn Morris and Melissa Sutton, n 5, 11.
59. Central Land Council, *Submission to the 'Options for Regional Governance in the Northern Territory' consultation process*, n 38, 9; Will Sanders, 'Changing Scale, Mixing Interests: Generational Change in Northern Territory Local Government' (2012) 47 (3) *Australian Journal of Political Science*, 473.
60. Will Sanders, 'Regionalism That Respects Localism: The Anmatjere Community Government Council and Beyond', n 41, 300.
61. See Central Land Council, *Submission to the 'Options for Regional Governance in the Northern Territory' consultation process*, n 38.
62. Will Sanders, 'Changing Scale, Mixing Interests: Generational Change in Northern Territory Local Government', n 66, 483.
63. Central Land Council, Submission to the *'Options for Regional Governance in the Northern Territory' consultation process*, n 38, 12.
64. Diane Smith, 'Culture of Governance and the Governance of Culture', n 8, 84.
65. Will Sanders, 'Changing Scale, Mixing Interests: Generational Change in Northern Territory Local Government', n 66, 488.
66. Central Land Council, Submission to the *'Options for Regional Governance in the Northern Territory' consultation process*, n 38, 5.
67. Michael Limerick, Robyn Morris and Melissa Sutton, n 5, 12.
68. Stephen Cornell, 'The importance and power of indigenous self-governance: Evidence from the United States' (Paper to Indigenous Governance Conference, Canberra, 3-5 April 2002); see also Martin Mowbray, 'Localising Responsibility: The Application of The Harvard Project on American Indian Economic Development to Australia' (2006) 41(1) *Australian Journal of Social Issues*, 91.
69. See Michael Limerick, Robyn Morris and Melissa Sutton, n 5, 20.
70. Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 September 2019 (Gerald McCarthy, Minister for Local Government, Housing and Community Development).
71. Ibid.
72. Ibid.
73. Research conducted across numerous Central Australian communities by the Central Land Council in 2010 found that community members disengaged from the local boards structures partly due to the 'limited scope of local government functions'. The CLC's research highlighted a 'very poor story of community engagement in community governance processes under the imposed Shire model'. Key to this failing was that local boards were primarily consultative groups – with no decision-making or financial delegation. These boards were 'less representative, had less authority, less decision-making power and less capacity to resolve community issues than the previous community councils'. See Central Land Council, Submission to the *'Options for Regional Governance in the Northern Territory' consultation process*, n 38. For further commentary see also Will Sanders, 'Losing localism, constraining councillors: why the Northern Territory super shires are Struggling' (2013) 34(4) *Policy Studies*, 482.
74. For example, 2016 census data highlights that the Aboriginal and Torres Strait Islander population in the Central Desert and MacDonnell Shires is 86 per cent of the overall population. In Roper Gulf and West Arnhem it is between 80 – 85 per cent. More generally, outside the Greater Darwin region Aboriginal and Torres Strait Islander people make up an estimated 78.3 per cent of the resident population of the Northern Territory. See Australian Bureau of Statistics, *Region Summary: Central Desert* (Web page, 2016) https://dbr.abs.gov.au/region.html?lyr=lga&rgn=70620; Australian Bureau of Statistics, Region Summary: MacDonnell (Web page, 2016) < https://dbr.abs.gov.au/region.html?lyr=lga&rgn=72330>; Australian Bureau of Statistics, Australian Bureau of Statistics, *Census of Population and Housing – Counts of Aboriginal and Torres Strait Islander Australians* (Web page, 2016) < https://www.abs.gov.au/statistics/people/aboriginal-and-torres-strait-islander-peoples/census-population-and-housing-counts-aboriginal-and-torres-strait-islander-australians/latest-release>.
75. Sarah Maddison, n 12, xxiii.

Appendix G: National and International Compensation Scheme Examples

Australian Examples

The Timber Creek case considered the criteria for assessing compensation after extinguishment of native title by compulsory acquisition of land under the *Native Title Act 1993* (Cth). They also considered the scope of 'just terms' compensation provided under the Act. The approach taken in that case was to compensate the Ngaliwurru and Nungali peoples for past losses of native title brought about through incremental acts of the Northern Territory Government in the 1980s and 1990s. The High Court of Australia determined that the Ngaliwurru and Nungali peoples were entitled to be compensated on 'just terms' for the extinguishment of native title since 31 October 1975 (when the *Racial Discrimination Act 1975* (Cth) commenced). The approach to determining what amounted to 'just' involved:

- An amount to compensate for the loss of the economic value of the native title rights, which involved a comparison between freehold title and the particular native title rights that had been affected. In this case, the Ngaliwurru and Nungali peoples had non-exclusive native title rights, and the High Court of Australia determined the value as being worth 50% of the freehold land value.
- An amount of interest to reflect the loss of the value of money over time, calculated as simple interest at the rate prescribed by the Federal court practice note (4% above the cash rate published by the Reserve Bank for the relevant period).
- An amount for the cultural and spiritual loss occasioned by the loss of the native title rights.[1]
- The final award of damages in the Timber Creek case was $2,530,520 for all three components described above, including the non-exclusive native title rights over a 1.27 square kilometre parcel of land.
- In the Noongar Settlement, the package of benefits negotiated included almost $800 million in cash and the transfer of land. It also included the development of frameworks to assist Noongar businesses and improve government service delivery and joint management arrangements of National Parks and the South West Conservation Estate. It is estimated that the Noongar Settlement will affect 30,000 Noongar people. This settlement is significantly less than the original compensation claim lodged on behalf of the Noongar people of $290 billion in 2019 which their lawyers at the time said was based on the Timber Creek case methodology.[2]

Both the Timber Creek case and the Noongar Settlement were borne from Native Title claims and are therefore limited in their direct applicability to the Treaty process. However, compensation pathways set out in these two cases provide a useful background to inform NT Treaty compensation discussions.

Aotearoa New Zealand

NT Treaty compensation discussions may also draw on learnings from the compensation approach taken in Aotearoa New Zealand. Treaty of Waitangi Settlements include a commercial redress component that the claimant group receives in cash. This sum recognizes the impact that the New Zealand Government's breaches of the Treaty of Waitangi have had on the potential economic development of the claimant group concerned. The New Zealand Government expressly acknowledges that it is not providing full compensation based on a calculation of total losses to the claimant. Reasons for this include the passage of time, the effects of various causes on the current economic status of the claimant group, and the benefits that European settlement has brought to Māori. Instead, the stated purpose of the financial redress is to contribute to re-establishing of an economic base for the relevant claimant group as a platform for future development.[3] The concept of a 'fiscal envelope' of $1 billion was initially established to meet all Treaty settlements in the early 1990s. This was heavily criticised[4] and scrapped within five years after the negotiation of the first few settlements. The New Zealand Government's policy was modified in 2000 and continues to apply today. It states:

- redress should relate to the nature of the breaches suffered
- different claimant groups should be treated consistently, so that similar claims receive similar redress

- while maintaining a fiscally prudent approach, each claim is treated on its merits and does not have to be fitted under a predetermined fiscal cap.

In deciding how much to offer, the New Zealand Government advises that its main consideration is the amount of land lost by the claimant group through Treaty of Waitangi breaches, the relative seriousness of the breaches involved, and the benchmarks set by existing settlements for similar grievances. Other factors include the size of the claimant group today, whether there are overlapping claims and any other 'special factors' that affect the claim.

British Columbia

In contrast to Aotearoa New Zealand, the funding approach in modern treaty negotiations in British Colombia has focused on resourcing First Nations for the negotiation process. It also focuses on creating a new relationship between the treaty parties that recognises rights, respect, cooperation and partnership. The *Comprehensive Land Claim Settlement Acts* which are negotiated with each First Nation support them to set up 'implementing bodies' which then perform the agreed functions and plans. The implementing bodies get funding based on the negotiated plan for an initial period (typically 10 years). This funding is based on workloads and is not compensatory. Funding for administering the treaty negotiations process and the cash settlement costs is covered by the provincial (British Colombia) and federal (Canadian) governments. The federal government is responsible for 72% of the total cost of treaties and the provincial government is responsible for the balance,[5] although the proportions differ for the various expenses. For example, the federal government bears 60% of the British Columbia Treaty Commission's operating budget and 90% of the Treaty negotiation support funding (NSF).

Before 2018, this funding arrangement consisted of part loan (up to 80%) and part grant. The Canadian Government has since moved to a 100% grants-based model and are eliminating existing debts and reimbursing repayments made by First Nations.

The NSF is administered by the British Columbia Treaty Commission (BCTC). The BCTC allocates NSF to First Nations based on the work plan agreed on by the Government of Canada, BC Government and the First Nation. It is also based on the First Nations' own work plan and budget that is submitted to, and approved by, the BCTC.[6]

The BCTC allocation is bound by the terms and conditions of a contribution agreement signed between the Government of Canada, BC Government and the BCTC and includes Allocation Criteria and Funding Guidelines. The BCTC then enters into a funding agreement with the First Nation, which includes a schedule of payments. The Government of Canada makes sure the contribution amount is at the minimum level needed to achieve the proposed project goals and the results expected by the recipient. It also makes sure that the funding amount does not exceed the maximum total government assistance specified in the terms and conditions.[7]

The Government of Canada has a formalised mandating process for implementing comprehensive land claim agreements. The mandating process sets out the maximum amounts to be paid to each recipient.[8] Note again that treaties and agreements today can evolve and do not seek to achieve full and final settlement. They are drafted to be adaptable, renewable and changeable over time.

The maximum amounts payable every year to First Nations Canada-wide are shown in Table 1 below. These are based on the size of the community or communities that are negotiating, whether they are urban or remote, and the stage that the relevant negotiations have reached.[9]

Table 1: Maximum amounts payable ($M) per annum to First Nations in Canada

AGGREGATION	RECOGNITION OF RIGHTS DISCUSSIONS		SELF-GOVERNMENT		COMPREHENSIVE CLAIMS AND TREATIES	
	Urban	Remote*	Urban	Remote**	Urban	Remote**
Indigenous communities (typically under 1500*)	0.25	0.3	0.35	0.4	1.5	1.7
Indigenous communities (typically over 1500*)	0.55	0.65	1.0	1.2	1.7	2.0
Indigenous groups representing multiple communities	1.0	1.2	2.0	2.3	3.5	4.0
Large organisations on a Treaty / Regional / Provincial scale	1.75	2.0	2.5	3.0	4.0	4.6

* Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC) determine the most appropriate source for the population figures depending on the Indigenous group which has responsibility for such statistics.

** Maximums are higher to allow for travel costs in remote regions.

Footnotes

1. Richard Abraham and William Isdale, 2019. *Timber Creek: the most significant native title decision since Mabo*, Minter Ellison website, 20 March 2019, https://www.minterellison.com/articles/timber-creek.
2. Emma Young, 2019. 'Noongars' $290 billion compo claim will transform Indigenous Australia: lawyer', *Sydney Morning Herald*, 30 November 2019. https://www.smh.com.au/national/noongars-290-billion-compo-claim-will-transform-indigenous-australia-lawyer-20191130-p53fm8.html.
3. Office of Treaty Settlements, New Zealand Government, 2018. Healing the past, building a future – A Guide to Treaty of Waitangi Claims and Negotiations with the Crown, https://www.govt.nz/assets/Documents/OTS/The-Red-Book/The-Red-Book.pdf.
4. See Martin Fisher, 2017. 'Binding Remedies: The Ngāi Tahu Treaty Settlement negotiations in a post-Haronga context', (2017) 27 *New Zealand Universities Law Review*, 505.
5. BC Treaty Commission, Financial Issues, https://www.bctreaty.ca/financial-issues.
6. Government of Canada, Contributions to Support the Negotiation and Implementation of Treaties, Claims and Self-Government Agreements or Initiatives, https://www.rcaanc-cirnac.gc.ca/eng/1386360760450/1615724488357.
7. Ibid.
8. Ibid, the maximum amounts are not publicly available.
9. Ibid.

Appendix H:
Case Studies of Existing Funds

The following case study of existing funds that have attributes that may be applicable in establishing the Treaty Making Fund.

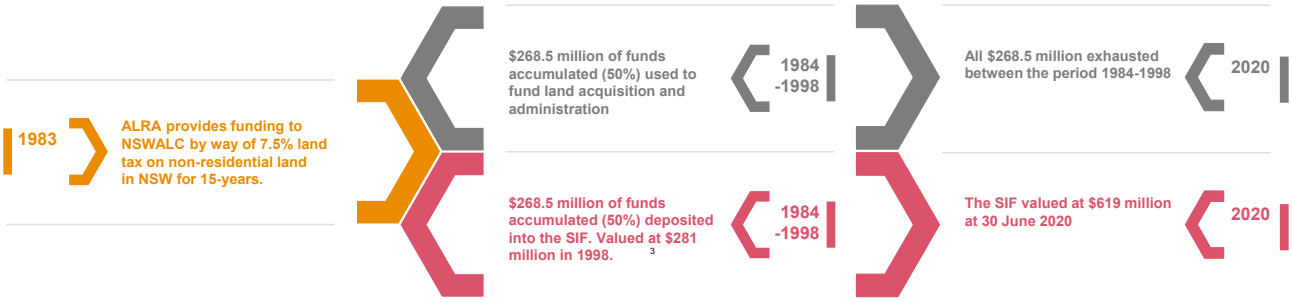
1.1.1 NSWALC Statutory Investment Fund

The NSW Aboriginal Land Council (NSWALC) was set up as a statutory corporation with the passage of the *Aboriginal Land Rights Act 1983* (NSW) (NSWALRA). NSWALC is the largest member-based Aboriginal organisation in New South Wales. The NSWLRA enables claims on limited classes of Crown Land and provides the Statutory Investment Fund (SIF) for economic development, the purchase of land on the open market, and the costs of running NSWALC and its network of 120 Local Aboriginal Land Councils (LALCs).

Funding purpose and source

NSWALC was resourced for 15 years (1984 – 1998) with an annual amount equal to 7.5% of land tax on non-residential NSW land. The total funds generated were $537 million. Of this amount, 50% ($268.5m) was made available for land acquisition and administration, and 50% was deposited into the SIF to build a capital fund ongoing funding in the future.

Figure 1: Resourcing of NSWALC and the SIF (1983 – 2020)



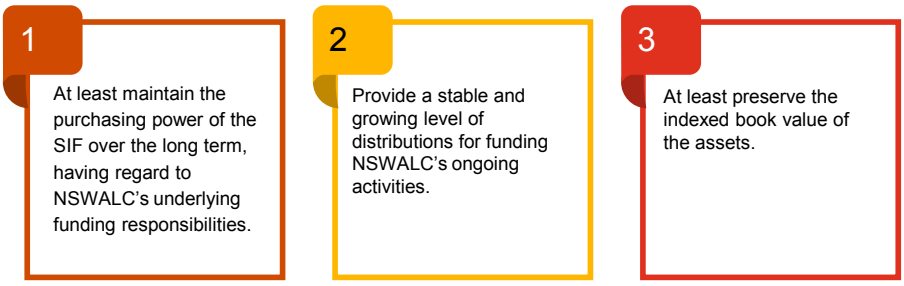
Today, LALCs are funded by yearly grants of $150,145 each for administrative costs. For the year ended 30 June 2020, this totalled $17.239 million or 39% of the drawdown of $44.29 million from the SIF.[1]

The NSWLRA limits spending from the SIF to the realised income and interest from investment, less inflation, and NSWALC has a statutory obligation to maintain the SIF's capital value of at least $485,340,000.[2]

Investment approach

The SIF compensates future generations, and prudent financial management is essential to maintain its growth.

Figure 2: SIF Investment Mission



The real return and downside risk objectives adopted for managing the SIF are to:

- invest so as to have a greater than 66% probability of achieving a return objective of the Consumer Price Index plus 4% over 10-year rolling periods
- limit the probability of a negative return in any given year to less than 20%.

Investment decisions are made by the Investment Committee (see below) and NSWALC in a way that is consistent with these objectives.[3]

Governance

Investment decisions are reached through the combined advice of the external asset consultant, NSWALC's executive, its Investment Committee and investment consultant. NSWALC's Investment Committee is made up of two pro-bono independent members (including the chairperson) and two NSWALC members.

Performance

On 30 June 2020, the SIF was valued at $619 million. The investment portfolio provided a 7.5% against a benchmark of 5.9% for the 10 years ended 30 June 2020.[4]

Key concepts that could apply to the Northern Territory

- *A corpus that is built up over time*
- *Investment mandate that is determined collaboratively by Aboriginal people and independent experts*

1.1.2. Noongar Future Fund

The Noongar Boodja Trust (NBT) is a perpetual trust created in response to the South West Native Title Settlement, an agreement between the Western Australian Government and Noongar Traditional Owners of the Ballardong, Gnaala Karla Booja, South West Boojarah, Wagyl Kaip and Southern Noongar, Whadjuk and Yued groups.

Purpose and source

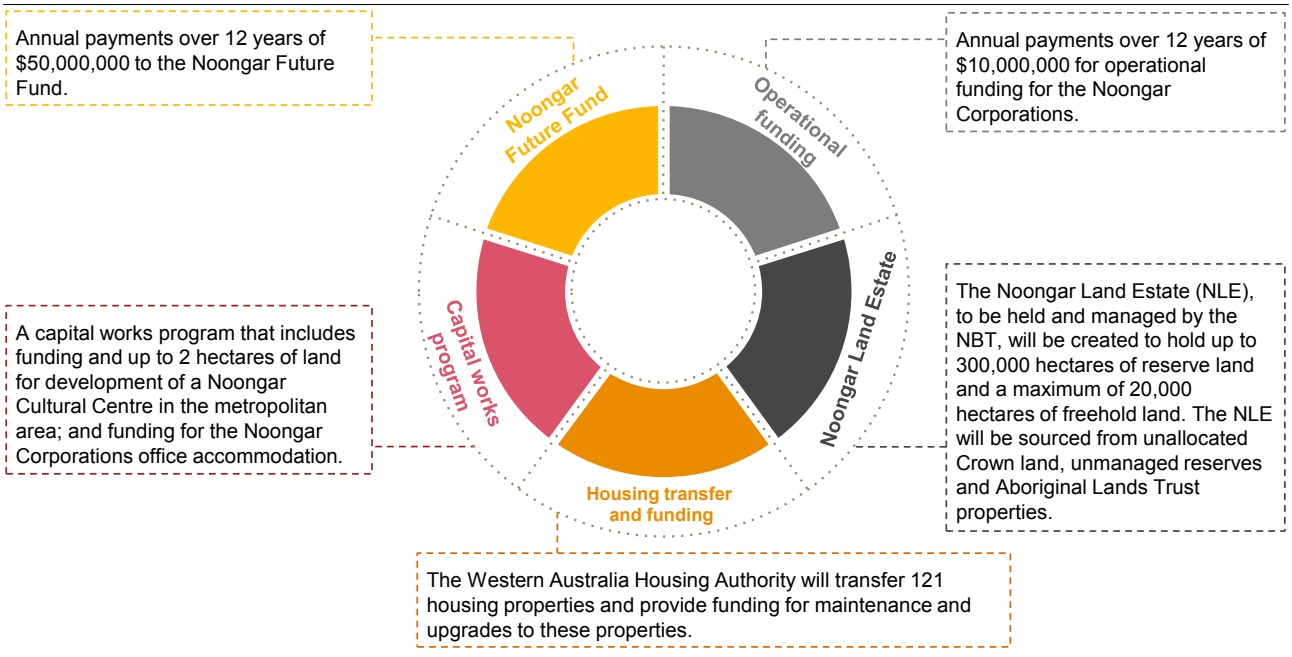
The Settlement resolved the Noongar native title claims in exchange for a package of social and economic benefits. Starting February 2021, the Western Australian Government agreed to contribute a range of assets to the NBT (Figure 2). This included establishing the Noongar Future Fund (one of five sub-funds of the NBT) through a series of 12 annual payments of $50 million.

The general purpose of the Noongar Future Fund is:

> *"...to grow the capital of the Noongar Future Fund to achieve and then maintain a sustainable capital value (Future Fund Capital Base) in order that the income of the Noongar Future Fund may be applied towards the Trust Purpose, in perpetuity..."*[5]

The Trust purpose is to give money, property or benefits to eligible Noongar entities.

Figure 2: Assets to be transferred from WA Government to Noongar Boodja Trust



Investment approach

The NBT will receive, hold and manage all benefits and assets arising from the Settlement. Investment decisions about NBT assets are made by the trustee who is advised by both Noongar and independent directors through ways detailed in the Trust Deed.

The NBT, and therefore the Noongar Future Fund, is managed by an independent professional Trustee. Perpetual Trustee Company Limited (Perpetual) is the initial NBT Trustee. Perpetual was chosen through a formal tender process developed between the WA Government and the South West Aboriginal Land and Sea Council (SWALSC).

For the first 12 years following its establishment on 25 February 2021, all income of the Noongar Future Fund must remain in the Noongar Future Fund and cannot be distributed other than for covering the Trustee's reasonable costs or with the consent of the Noongar Advisory Company, the Noongar Relationship Committee, the Investment Committee and the Western Australian Government. After 12 years, money can be distributed from the Noongar Future Fund for Noongar operations or special projects but the Trustee is generally required to maintain the Future Fund Capital Base at all times.[6]

The Future Fund Capital Base is calculated as being 90% of the total value of the Future Fund as at 25 February 2033, adjusted annually in line with consumer price index movements.[7]

The NBT Trust Deed also sets out a number of investment principles, including the requirement that the Noongar Future Fund has an appropriate asset mix that reflects the long-term goals of the Noongar Future Fund. The principles also set out a process for establishing and amending the investment policy. The Investment Committee then appoints investment managers and monitors performance.[8]

Governance

To ensure the NBT's long-term accountability is in line with the Noongar peoples' expectations and future aspirations, five entities have been set up, each with their own clearly defined role and set of objectives. They are:

Noongar Advisory Company: Is made up of two nominated Noongar directors, two independent directors, one state nominee, and one NBT nominee. The company will consult with the Trustee on:

- managing its relationship with and liaison with the Noongar people, the Noongar Corporations Committee, the Central Services Corporation, and the Regional Corporations
- fostering mutual respect and cooperation between the Trustee, the Noongar people, the Central Services Corporation, and the Regional Corporations
- the Trustee's fulfilment of the NBT purpose and terms of the Trust Deed generally.

Perpetual is needed to build the Noongar Advisory Company's capacity during the 12 years of operation with the aim of the Noongar Advisory Company becoming the future Trustee.

Noongar Relationship Committee: Comprises up to 17 members, including all representatives from the Noongar Corporations Committee, and three directors of the Noongar Advisory Company (the Trustee nominee director, one independent director, and one expert representative from the Noongar community). The Relationship Committee will review the Trustee's obligations to the Noongar Corporations under the Trust Deed. The Trustee is required to consult with the Noongar Relationship Committee on matters relating to the NBT, including but not limited to access to the Noongar Future Fund.

Nominations Committee: Comprises six members, one Trustee representative, one Noongar Relationship Committee nominee, two Noongar people with relevant director and board member experience, and two independent people with relevant director and board member experience. The Nominations Committee

manage the selection process for board and committee positions, and support the appointment of the directors of the Noongar Corporations. The six members cannot be on any other committees or boards within the Noongar Corporations or the NBT.

Investment Committee: Comprises one Trustee nominated representative to act as Chair, two representatives with a minimum of five years' relevant experience and expertise nominated by the Noongar Corporations Committee, and four independent members nominated by the Trustee on the recommendations of the Nominations Committee including: two members with a minimum five years' experience and expertise in property transaction, and two members with a minimum five years' experience and expertise in fund management greater than $500 million.

As noted above, the Investment Committee is required to work with the Noongar Corporations Committee, the Noongar Advisory Company, and the Western Australian Government on investment matters and develop the Investment Policy. The Investment Committee also appoints qualified, independent Investment Managers.

Noongar Corporations Committee: Comprises of the Chair and Chief Executive Officer of each of the six Noongar Regional Corporations and the Central Services Corporation, the Corporations Committee provides a forum for all of the Noongar Corporations to come together to discuss matters of mutual interest. The Trustee must consult the Corporations Committee on matters relating to the Trust including the Investment Policy and nominations to the Investment Committee.[9]

Performance

Too early to determine.

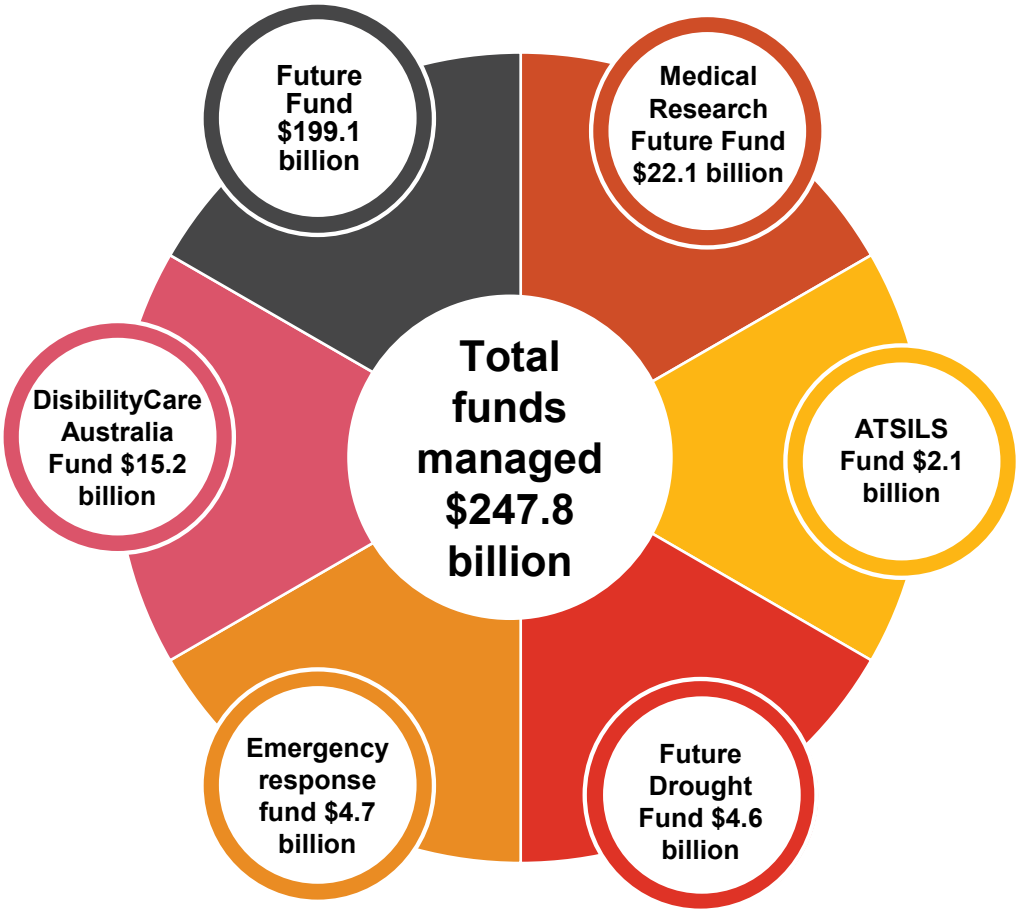
Key concepts that could apply to the Northern Territory

- *Contribution of a range of assets to be used to meet redress obligations*
- *Investment Policy and Investment Principles formed jointly by Government, Aboriginal people and independent experts*
- *Process to transfer governance (in the form of the Trustee) from independent expert to Noongar people over time*
- *Building of corpus over time with limitations on spending capital base and income until pre-determined threshold is met.*

1.1.3 Future Fund

The Future Fund is Australia's sovereign wealth fund managed by the Future Fund Management Agency (the FF Management Agency) under the Future Fund Board of Guardians (the FF Board). Set up in 2006 to strengthen the Australian Government's long-term financial position, the agency invests the assets of special purpose public asset funds: the Future Fund, the Medical Research Future Fund, the Aboriginal and Torres Strait Islander Land and Sea Future Fund, the Future Drought Fund, the Emergency Response Fund and the Disability Care Australia Fund. Total funds under management currently sits at $247.8 billion.[10]

Figure 3: Funds managed by the Future Fund Management Agency at a glance (30 September 2021)



Funding purpose and source

The Future Fund is separate to the other five special purpose public asset funds. It was set up with contributions of $60.5 billion from a combination of budget surpluses, proceeds from the sale of the Commonwealth Government's holding of Telstra, and the transfer of remaining Telstra shares. The responsible ministers can make other credits to the Future Fund so long as the additional amounts do not result in the balance of the Future Fund exceeding the Target Asset Level ($215.1 billion for the 2021-22 financial year).[11]

The Future Fund is an intergenerational sovereign wealth fund that discharges unfunded superannuation liabilities, but it is not a superannuation fund.

Investment approach

The Investment Mandate for the Future Fund is to achieve an average annual return of at least the Consumer Price Index (CPI) plus 4.0% to 5.0% per annum over the long term, with an "acceptable" but not excessive level of risk.[12]

While law allows drawdowns from 1 July 2020, the Government announced in the 2017-18 budget that it will not make withdrawals until at least 2026-27. When withdrawals are made, this will help the Commonwealth Government meet its obligations for unfunded superannuation liabilities that will become payable when the ageing population is likely to put pressure on the Commonwealth Government's finances.[13]

Governance

The FF Board and FF Management Agency work independently and tailor the management of not only the Future Fund but all special purpose public asset funds that it invests for, to their unique investment mandate. Each fund has an investment mandate determined by the Commonwealth Government under legislation.

Performance

The FF Management Agency has added over $136 billion to the value of the Future Fund since inception, more than tripling the original contribution from Commonwealth Government, and reaching $196.8 billion in value as of 30 June 2021. On 30 June 2021 the Future Fund achieved its highest ever annual return of 22.2% and a 10-year return of 10.1% per annum, exceeding its target of 6.1% per annum.[14]

Key concepts that could apply to the Northern Territory

- *FF Board and FF Management Agency as investment manager*
- *Transfer of 'novel' assets (i.e. Telstra shares) to create corpus.*

1.1.4 Aboriginal and Torres Strait Islander Land and Sea Future Fund

The Aboriginal and Torres Strait Islander Land and Sea Future Fund (ATSILSF Fund) was set up on 1 February 2019 under the *Aboriginal and Torres Strait Islander Land and Sea Future Fund Act 2018* (Cth).

Purpose and source

The fund supports the making of annual and discretionary additional payments to the Indigenous Land and Sea Corporation (ILSC). The ILSC is a statutory entity that was established to support Aboriginal and Torres Strait Islander peoples to acquire land, water and water-related rights so as to attach economic, environmental, social and cultural benefits.

Investment approach

The $2.008 billion fund was transferred by the Commonwealth Government as a lump sum. The current investment mandate determined by the responsible ministers required the FF Board and FF Management Agency to adopt a benchmark return of CPI plus 2 - 3% per annum, net of investment fees over the long term. Quarterly portfolio updates are provided to the ILSC and the minister.[15]

Governance

The ATSILSF Fund is a closed fund[16] managed by the agency pursuant to an investment mandate that is set by the responsible ministers. The responsible minister can made credits to the Aboriginal and Torres Strait Islander Land and Sea Future Fund Special Account, and that account can be debited for two main purposes. The first is to transfer an annual amount to the ILSC to fund its acquisition and divestment activities and to transfer discretionary additional payments to the ILSC. No discretionary additional payments have been made since the start of the fund.

Performance

From its inception on 1 October 2019, the ATSILSF Fund gained a diversified portfolio through a co-mingled arrangement alongside the Medical Research Future Fund. As shown below, the ATSILSF Fund returns have exceeded its target benchmarks:

- October 2019 – 30 June 21: Return (6.9% pa) vs. target return1 (3.7% per annum),[17]
- 2020-21 financial year: Return (13.9% pa) vs. target return (5.8% per annum).[18]

On 30 June 2021, the ATSILSF Fund was valued at $2.2 billion. It has generated returns of $275 million and paid out $165 million to the ILSC.

Key concepts that could apply to the Northern Territory

- *Investment mandate that allows for regular distributions and stable returns in the long-term*
- *Multiple purposes for distributions out of a single fund.*

1.1.5 NDIS and Disability Care Australia Fund

The NDIS is a scheme of the Commonwealth Government that funds costs associated with disability. It was legislated for in 2013 through the *National Disability Insurance Scheme 2013* (Cth) and is Australia's first national scheme for the 4.3 million Australians with disabilities. The NDIS adopts an insurance – based approach, informed by actuarial analysis, to the provision and funding of supports for people with disability.[19] The analysis has been revised at intervals since inception.

Purpose and source

The DisabilityCare Australia Fund (DCAF) was set up on 1 July 2014 by the *DisabilityCare Australia Fund Act 2013* (Cth) (DCAF Act). The DCAF's purpose is to enhance the Commonwealth's ability to reimburse State and Territory and Commonwealth governments for NDIS expenditure. The NDIS must provide:

- Sufficient funding for the National Disability Insurance Agency (NDIA) to take a lifetime approach to participant needs and support requirements
- Predictable funding that gives people with existing or future disabilities (and their families) certainty that they will receive reasonable and necessary supports over their lifetime
- Incentives for the NDIA to efficiently and effectively operate the NDIS, and
- Incentives for governments to take a collaborative approach to mainstream interfaces.[20]

The treasurer determines what amounts are to be credited to the DCAF on an annual basis. Credits to the DCAF are funded from the Medicare Levy increase of half a % point, from 1.5 to 2% which took effect from 1 July 2014.[21] In the first three years following its establishment, no funds were withdrawn. Withdrawals have subsequently increased ($5.689 billion in 2020-21), and each of the State and Territory governments are subject to a negotiated cap based on 2011 population data.[22]

Investment approach

The investment mandate for the DCAF, given by the treasurer and finance minister in 2014, is for the DCAF to be invested in a way that minimises the probability of capital losses over a 12-month horizon. It also has a benchmark return on the DCAF of the Australian three-month bank bill swap rate plus 0.3% per annum, calculated on a rolling 12-month basis (net of fees). [23]

Any investment approach needs to ensure that there is an amount of money available to reimburse the State, Territory and Commonwealth governments from the DCAF multiple times each financial year.

Governance

The DCAF is one of the discrete funds managed by the FF Board and the FF Management Agency, in accordance with the investment mandate.

Performance

Since its start in 2014, the DCAF has had $27.814 billion transferred into it via the Medicare Levy. A total of $13.765 billion has been paid out to NDIS recipients. The balance, on 30 September 2021, was $15.485 billion, and nominal annual returns ranged from 0.4% per annum to 2.6% per annum.

Key concepts that could apply to the Northern Territory

- *Investment mandate that allows for regular distributions and stable returns in the long-term*
- *FF Board and FF Management Agency as investment manager*
- *Use of additional levy to meet the future undetermined liability*

1.1.6 NSW Portable Long Service payment scheme

Before 1975, many construction industry workers were unable to qualify for a leave entitlement under the Long Service Leave Act 1955 (NSW) as they did not remain with the same employer for a long enough period. The portable long service scheme changed this and in 2005 the *Northern Territory Government established its similar NT Build scheme*.

Purpose and source

The NSW scheme enables workers across building, construction and contract cleaning industries to receive long service benefits. The scheme is funded by two distinct industry specific levies.

Building and Construction Industry: The New South Wales Parliament created a levy on building and construction works costing $25,000 and above (inclusive of GST). The current levy rate is 0.35% of the works' value.

The building applicant, or the person for whom the work is being done, is liable to pay the long service levy. Where the building work is being done on behalf of the Crown, the contractor is liable to pay the levy. The levy is paid into a fund administered by the Long Service Corporation (LSC). From this fund the LSC makes long service payments to building and construction workers.

If the cost of the work exceeds $10 million (inclusive of GST) or takes more than 12 months to complete, or the obligation to pay the levy as a lump sum is unduly onerous, a levy payer may be eligible to pay the levy by instalments.

Contract Cleaning Industry: The *Contract Cleaning Industry (Portable Long Service Leave Scheme) Act 2010* (NSW) requires employers to lodge quarterly returns for cleaning employees each year. Levies are calculated at 1% of the ordinary wages of cleaning employees. Prior to 1 July 2021, the levy rate was 1.7%.

Investment approach

LSC invests its funds in the "Long Term Growth" LSC Investment Fund administered by NSW Treasury Corporation (TCorp) using external managers under contract to TCorp and the Treasury Banking System. These investments totalled $1.781.5 billion as of 30 June 2020.[24]

Governance

The LSC is a separate statutory authority and part of the NSW Department of Customer Service (DCS). It administers the relevant Acts to provide portable long service payments to building and construction and contract cleaning workers in NSW. The *Long Service Corporation Act 2010* (NSW) defines how the LSC and the long service schemes it administers are managed.

As of 30 June 2020, LSC provides portable long service schemes to 443,543 workers and 36,363 employers in the building and construction industry and 81,706 workers and 893 employers in the contract cleaning industry.[25]

Performance

In the 2019-20 financial year, the LSC Investment Fund return of 3% was below the budgeted 6% but outperformed industry benchmarks in the wake of COVID-19 market conditions. The fund is now valued at nearly $1.8 billion. For the 2019-20 financial year, over 14,600 claims worth a total of $115.7 million were paid to workers and employers.[26]

Key concepts that could apply to the Northern Territory

- *Novel sector-based levies to meet the future undetermined liability, largely passed on to end user.*

1.1.7 Treaty Settlements Landbank (Aotearoa New Zealand)

As part of developing a policy framework for the settlement of historical Treaty claims in Aotearoa New Zealand, the Crown developed the Treaty Settlements Landbank to ensure Crown assets are protected if they may later be needed for use in Treaty settlements.

Purpose and source

When Crown-owned land is declared surplus, it is publicly advertised and any Māori who has made a Treaty claim in the area may apply to have the land protected and placed in the Treaty Settlements Landbank.

If the Crown agrees to protect the property that has become surplus, Toitū Te Whenua (Land Information New Zealand or LINZ) will buy it at market value from the department or agency selling the property and hold it in a Treaty settlement landbank. In total there are 15 regional landbank areas that cover New Zealand.

Property protected in regional landbanks is not held for any particular claimant group, even though it may have been protected on the basis of one group's application. Properties that are not land banked are released and sold on the open market. Landbank properties can be used as either cultural or commercial redress in a Treaty settlement. Claimants do not have to accept land banked property as part of their settlement.

Criteria for land banked properties include:

- the applicants have given sufficient reasons to show the significance of the site to them
- there is a strong enough justification for meeting the costs of holding the property
- there is room within the financial limit. If the limit has been reached yet the property is of such significance, an exception should be made, and the property should be protected.

Investment approach

Each regional landbank has a financial limit on the total value of property that can be protected for each region. This does not apply in Raupatu Areas (land confiscated by the Crown). These financial limits are reviewed annually and can be adjusted.

Governance

The Te Arawhiti (Office for Māori Crown Relations) and Toitū Te Whenua work together on the Treaty Settlements Land bank and the Māori Protection Mechanism.

Te Arawhiti manages the process for adding surplus Crown-owned land to the Landbank. This is called the Māori Protection Mechanism. The Crown is responsible for protecting any wahi tapu, or other significant Māori sites, that are on surplus Crown-owned land. This is done separately to the Māori Protection Mechanism.

Toitū Te Whenua maintains and manages properties until the Treaty Settlement is completed. In some situations, this includes renting out properties and maintaining the property.

Performance

There are more than 900 properties in the Landbank, including former prisons, hospitals, schools and houses.[27] Ngāti Whātua Ōrākei is an example of a Māori group who were able to acquire surplus Crown land in the form of disused railway lands, and develop it into a commercial office park and asset worth over $500 million. It now generates regular income that is reinvested in its members.[28]

Key concepts that could apply to the Northern Territory

- *Land banking to be used as part of any treaty cash compensation, at the discretion of the relevant First Nation.*

Footnotes

1. New South Wales Aboriginal Land Council, Annual Report 2019-2020, Volume One, https://alc.org.au/wp-content/uploads/2021/01/2019-20-Annual-Report-of-the-Aboriginal-Land-Council-Volume-One.pdf.
2. Ibid.
3. New South Wales Aboriginal Land Council, *Annual Report 2019-2020*, Volume Two, https://alc.org.au/wp-content/uploads/2021/01/2019-20-Annual-Report-of-the-Aboriginal-Land-Council-Volume-Two.pdf.
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