Quick Guide

Treaty discussions in Australia: an overview

*Treaty series*

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Other research products in the Treaty Series at the time of publication include:

Bill Brief: Advancing the Treaty Process with Aboriginal Victorians Bill 2018
Introduction

Despite significant pressure to do so throughout Australia’s recent history, no treaty has ever been negotiated between an Aboriginal and/or Torres Strait Islander clan or nation and an Australian government at any level. At the time of publication, however, treaty negotiations have commenced in South Australia, and development of a treaty framework is underway in the Northern Territory. The Victorian Government introduced the Advancing the Treaty Process with Aboriginal Victorians Bill 2018 on 7 March 2018 and, if passed, this would constitute the first legislation in Australia to address treaty with Indigenous Australians.

Other agreements and settlements which could become part of a future treaty have, however, been developed in areas such as land and water rights and management, access to natural resources, and protection of cultural heritage. These existing agreements would need to be taken into consideration during any future negotiation of treaty.

This Quick Guide provides:

- a broad overview of some of the most significant historical initiatives, events and policies aimed towards negotiating a treaty or treaty-like agreement with Aboriginal and Torres Strait Islanders that have occurred at the Commonwealth level; and
- a summary of recent developments towards treaty at the state and territory level.

This Quick Guide forms part of a series of research products by the Parliamentary Library related to treaty and treaty-making processes.

Timeline of Commonwealth treaty discussions

This section provides a brief background of calls for treaty in Australia in recent years, focused on events at the federal level. Certain events relating to discussion around the recognition of Aboriginal and Torres Strait Islanders in the Australian Constitution are also included in this section. Recognition is relevant to the treaty debate as the two have been intrinsically linked in recent years. This can be seen in the Uluru Statement from the Heart, which was put forward in May 2017 and is discussed in more detail below. Further, a core component of any treaty process with Indigenous Australians is formal government acknowledgment of Indigenous Australians having prior possession of the land now claimed by the state. This is necessary to provide a legitimisation for treaty. This could include recognition of distinct identities and connections to traditional land, waters and natural resources, and acknowledgment of historical injustices and wrongdoing to facilitate the reconciliation process initiated by a treaty.

The following historical timeline is not intended to be comprehensive, and is provided to facilitate further reading.

The post-referendum period

Following the 1967 referendum, where Australians successfully voted to alter the Constitution to allow the Commonwealth to legislate for Aboriginal peoples and to include them in the national census, significant pressure emerged from many areas regarding the negotiation of a legally binding and formal

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1 For example, the Traditional Owner Settlement Act 2010 (Vic) provides a framework for the negotiated settlement of claims to traditional lands and waters between the Victorian Government and Victorian Traditional Owner groups.
agreement or treaty between the Australian Government and Indigenous Australians. While calls for treaty had existed in various forms throughout Australian history, it was after the referendum that they became more pronounced.³

In 1972, an Aboriginal Tent Embassy was established in the forecourt of the former federal Parliament House in Canberra, as a symbol of continued Aboriginal sovereignty and the need for improved land rights. In the same year, the Larrakia Petition sought negotiation with Aboriginal groups on land rights and self-determination. This petition was coordinated by the Larrakia people of the Darwin area and addressed to the Queen, containing over 1,000 signatures.³

In 1977 the National Aboriginal Conference (NAC) was established by the federal Fraser Government in order to facilitate the expression of Indigenous Australian voices. It consisted of initially 35, and later 36, elected representatives, and acted largely in an advisory capacity to the Commonwealth Government.⁴ The Second National Conference passed a resolution requesting a Treaty of Commitment be negotiated between the Commonwealth Government and Aboriginal nations. The NAC chose a name for the requested agreement—Makarrata—and canvassed views of its members as to the potential form and content.⁵ This initiative was broadly supported by the Prime Minister, Malcolm Fraser, and the Minister for Aboriginal Affairs, Fred Chaney, and the Senate subsequently referred the feasibility of the issue to its Standing Committee on Legal and Constitutional Affairs for inquiry and report. The Minister for Aboriginal Affairs confirmed his views regarding a potential treaty in the Senate:

...the concern which is felt by some Australians that the concept of a treaty involves the recognition, in some way, of two nations is a concern that the Government would wish to put to rest. The Government’s approach to the treaty or the makarrata ... is this: We are not looking at two nations; we are looking at how the Australian nation properly deals with the situation of its Aboriginal people. If we can arrive at arrangements between the national government and the Aboriginal people of Australia which are consensual in nature and which represent the views of the Aboriginal citizens of this country as to what is appropriate, I believe we will have advanced.⁶

Also in 1979, the independent Aboriginal Treaty Committee, made up of non-Indigenous Australians, was established to promote the idea of treaty, and it produced related research and resources until its abolition in 1983.⁷

The Senate Standing Committee on Legal and Constitutional Affairs’ report into the possibility of a treaty was tabled in 1983.⁸ The committee recommended constitutional amendment as the preferred option for future action in this space. However, with the advent of an Australian Labor Party government in 1983 under Prime Minister Bob Hawke, federal politics saw a shift in policy around

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⁵ See, Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘National Aboriginal Conference’, accessed online 1 May 2018; and Fenley (2011) op. cit.
⁷ Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘Aboriginal Treaty Committee’, accessed online 1 May 2018.
⁸ Senate Legal and Constitutional References Committee (1983) Two hundred years later..., inquiry report, Canberra, Parliament of Australia.
Aboriginal and Torres Strait Islander rights and self-determination towards a national land rights legislative regime and the emergence of discussion around ‘reconciliation’.

The Aboriginal Sovereign Treaty ‘88 Campaign sought a renewal of the national treaty discussion at the time of the 1988 bicentennial of British colonisation. The campaign included significant protest of the ongoing socio-economic disadvantages facing Aboriginal and Torres Strait Islanders, and sought recognition of Indigenous Australians as the first Australians with ongoing sovereignty over traditional land and waters.9

The Barunga Statement was presented to Prime Minister Hawke in 1988 at the Barunga Festival in the Northern Territory. This Statement called for treaty, a compensatory scheme for the loss of traditional lands, national land rights legislation, action against discrimination, self-determination and the protection of human rights. The Prime Minister stated the Commonwealth Government’s intention to negotiate a treaty during the life of the Parliament; however, this did not eventuate.10

Treaty after native title

During the 1990s, political discussion in this area focused largely on land rights, particularly in response to the Mabo cases confirming native title rights to land and waters and the subsequent passage of the Native Title Act 1993 (Cth).11 The Indigenous affairs policy of the Hawke Government also focused on the concept of reconciliation, including the establishment of a formal national reconciliation process. This resulted in the formation of the Council for Aboriginal Reconciliation (CAR), a cross-industry group with a majority of Indigenous Australian members, who were appointed to promote reconciliation initiatives and to encourage broader understanding of Aboriginal culture, history and continuing socio-economic disadvantage. The Aboriginal and Torres Strait Islander Commission (ATSIC) was established in 1995 following the abolishment of the NAC. ATSIC was comprised of a national representative arm and an executive arm, and its role included advising the federal government on policy and funding matters.

The Hawke Labor Government was defeated at the 1996 federal election, with the advent of a Liberal-National Coalition Government under Prime Minister John Howard. In 1999, a referendum aimed at establishing a republic and inserting a preamble into the Australian Constitution that—among other statements—would partially recognise Aboriginal and Torres Strait Islanders as the nation’s first peoples, was defeated at the polls.12

In May 2000, the CAR organised Corroboree 2000 for National Reconciliation Week, at which a number of speakers, including the Chairman of ATSIC and Chairperson of the Australian Institute of Aboriginal and Torres Strait Islander Studies, called for treaty. The CAR released a report in December of that year which recommended that each Australian government and parliament recognise that its lands were settled ‘without treaty or consent’ and to negotiate a process through which this might be achieved. It further recommended that the Commonwealth Parliament legislate to ‘put in place a process which

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9 Brennan et. al. (2005) op. cit., p. 15.
10 Australian Institute of Aboriginal and Torres Strait Islander Studies, ‘Barunga Statement’, accessed online 1 May 2018.
11 Native Title Act 1993 (Cth).
will unite all Australians by way of an agreement, or treaty, through which unresolved issues of reconciliation can be resolved’. 13

The Commonwealth Government under Prime Minister Howard rejected recommendations for treaty, as well as other proposals towards constitutional reform and recognition of land and other rights for Indigenous Australians, in favour of an approach of ‘practical reconciliation’ that would be less ‘divisive’. 14 This approach turned towards countering disadvantage of Aboriginal and Torres Strait Islander peoples in sectors such as health, education, employment and housing. The Senate Legal and Constitutional References Committee tabled an inquiry report in 2003 that concluded that the national reconciliation process was now ‘off track’ and that momentum was ‘being lost’. 15 In 2005, the ATSIC was abolished, and their functions transferred to mainstream government departments. 16

In November 2007, despite earlier statements, Prime Minister Howard indicated as an election commitment his intention to bring about a referendum to recognise Indigenous Australians in the Constitution. 17 The Liberal Party subsequently lost government in the 2007 election.

Also in 2007, the Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the United Nations General Assembly. 18 Among the rights enshrined in this document, Article 3 guarantees Indigenous peoples the right to self-determination in freely determining their political status and freely pursuing economic, social and cultural development; and Article 4 guarantees the right to autonomy or self-government in internal affairs, and financing for these autonomous functions. Australia endorsed the UNDRIP in 2009.

An Expert Panel on Constitutional Recognition of Indigenous Australians was appointed by Prime Minister Julia Gillard in 2010, co-chaired by Patrick Dodson and Mark Leibler. 19 The Expert Panel was tasked with considering ‘possible options for constitutional change to give effect to indigenous constitutional recognition, including advice as to the level of support from indigenous people and the broader community for these options’. 20 The Expert Panel undertook extensive national consultation and community engagement activities, including public meetings, individual discussions with experts and stakeholders, presentations, quantitative and qualitative research commissioned by Newspoll and a formal submissions process. The final report of the Expert Panel was released in January 2012. 21 It is comprehensive and considers Australia’s historical narrative, comparative international jurisdictions, potential forms of constitutional recognition, the Constitution’s ‘race’ provisions, racial...

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14 Brennan et. al. (2005) op. cit., p. 16, 22–3.
non-discrimination, governance and political participation, agreement-making, sovereignty, approaches to a referendum, and a draft Bill.

The Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 was introduced on 28 November 2012 in the House of Representatives in response to the Expert Panel’s report. The Bill passed both houses of parliament and received Royal Assent on 27 March 2013 as the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013. The Act provided for recognition of Aboriginal and Torres Strait Islander peoples as the first occupiers of the Australian continent and islands, and their continuing relationship with their traditional land and waters. It further provided that the Minister must initiate a review into public support for a referendum on constitutional recognition of Aboriginal and Torres Strait Islander peoples.

On the same day as the introduction of the above Bill, the Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples was established to inquire into ‘steps that can be taken to progress towards a successful referendum on Indigenous Constitutional Recognition’. Following the dissolution of the 43rd Parliament and federal election on 27 August 2013, the committee was re-established at the beginning of the 44th Parliament under a new Liberal Government. Like the Expert Panel, the committee undertook wide consultation on issues and possibilities regarding constitutional recognition and presented its final report to the Commonwealth Parliament on 25 June 2015. Among its recommendations were that ‘a referendum be held on the matter of recognising Aboriginal and Torres Strait Islander peoples in the Australian Constitution’, at a time ‘when it has the highest chance of success’. Comments, concerns and aspirations of various individuals and groups towards treaty arose during the inquiry process, including comments that constitutional recognition could be the first step in a process towards treaty.

The Referendum Council was then established on 7 December 2015 by Prime Minister Malcolm Turnbull and Leader of the Opposition Bill Shorten. It was tasked to advise on a path towards constitutional recognition of Aboriginal and Torres Strait Islander Peoples.

Following a series of consultative regional dialogues organised by the Referendum Council, the Uluru Statement from the Heart was made at the First Nations National Constitutional Convention in May 2017. During the Convention, a number of delegates walked out on discussions around the development of a common position statement on constitutional amendment and other proposals, citing concerns of a loss of sovereignty and the lack of a guarantee on a forward treaty process. Despite this, the landmark statement saw the unanimous agreement of over 250 delegates, who

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22 Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012 (Cth).
23 Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth). The Act ceased to have effect on 28 March 2018.
24 ibid., s 3.
25 ibid., s 4.
26 See the completed inquiry’s website at: https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/2015_Constitutional_Recognition_of_Abo riginal_and_Torres_Strait_Islander_Peoples.
28 ibid., Chapter 7: Future aspirations for sovereignty and treaty.
29 ibid., para. 713, comments made by Ms Dierdre Robertson, Co-Convenor of the Shepparton Region Reconciliation Group.
30 See the Referendum Council’s website at: https://www.referendumcouncil.org.au.
described it as calling for ‘voice, treaty and truth-telling’. Specifically, it called for the establishment of a First Nations Voice enshrined in the Constitution; and a Makarrata Commission to ‘supervise a process of agreement-making between governments and First Nations and truth-telling about our history’.\footnote{33}

Commentary on the proposals from Members of Parliament, Indigenous Australian leaders and other commentators has been diverse, with general broad support for the principles enshrined in the Uluru Statement, and some criticism of the prospect and implications of substantial constitutional change.\footnote{34} Some legal commentators have noted that the Uluru Statement contains relatively modest proposals, particularly in comparison to the established mechanisms in Canada and New Zealand.\footnote{35}

The Referendum Council released its final report regarding the regional dialogues, its findings and conclusions on 30 June 2017.\footnote{36}

The mechanisms put forward by the Uluru Statement and the Referendum Council’s final report were later dismissed by the Australian Government after they failed to gain Cabinet approval. The Prime Minister stated that the suggestion of an Indigenous voice to Parliament was neither ‘desirable or capable of winning acceptance at referendum’,\footnote{37} and instead suggested a return to constitutional recognition as an alternative proposal.\footnote{38}

Another Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples was appointed in March 2018. It will inquire into matters requiring constitutional change as well as ‘potential complementary legislative measures’, considering the Uluru Statement from the Heart; recommendations of the Referendum Council in 2017; recommendations of the 2015 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples and the 2012 Expert Panel on Constitutional Recognition of Indigenous Australians.\footnote{39} It is further requested to consider the advancement of self-determination of Indigenous peoples in Australia more broadly. The committee is expected to table an interim report by 30 July 2018, and a final report by 29 November 2018.

**States and territories: current developments**

**South Australia**

The South Australian Government has entered treaty negotiations with a number of Indigenous Australian groups, including the Ngarrindjeri, Narungga and Adnyamathanha communities. The Government originally announced its intent to commence treaty discussions on 14 December 2016, and appointed Dr Roger Thomas as Treaty Commissioner in February 2017 for an initial term of three

\footnote{33}{National Constitutional Convention (2017) op. cit.}
\footnote{35}{K. Gover (2018) ‘Uluru Statement from the Heart at Melbourne Law School’, University of Melbourne, panel discussion, 9 April; and H. Hobbs (2017) ‘Why the government was wrong to reject an Indigenous ‘Voice to Parliament’, The Conversation, 30 October.}
\footnote{36}{Referendum Council (2017) Final Report of the Referendum Council, 30 June, Commonwealth of Australia.}
\footnote{37}{M. Turnbull, Prime Minister (2017) Response to Referendum Council’s report on Constitutional Recognition, media release, 26 October.}
\footnote{39}{See the inquiry website at: www.aph.gov.au/constitutionalrecognition.}
years, which was the first appointment of a Treaty Commissioner in any Australian state or territory.\textsuperscript{40} The mandate of the Treaty Commissioner includes undertaking broad consultation on a framework for treaty; providing advice to the Minister for Aboriginal Affairs and Reconciliation on such a framework; and facilitating discussion for a potential treaty process between the South Australian Government and Aboriginal communities. The Treaty Commissioner’s Office was established within the Department of State Development and the South Australian Government allocated $4.4 million over five years to support the development of these processes.\textsuperscript{41}

The Treaty Commissioner undertook consultation processes across the state between April and July 2017 with members of Aboriginal communities to ascertain ‘views and aspirations’ of Aboriginal people in South Australia in terms of a treaty,\textsuperscript{42} meeting with over 600 people in person and receiving over 280 written submissions and responses to online surveys.\textsuperscript{43} The Commissioner provided the South Australian Government with the resulting report of these consultations, \textit{Talking Treaty}, in July 2017. This report summarised the views put forward by Aboriginal people during the consultation process, and recommended a framework to allow the initiation of formal treaty negotiations. A number of themes emerged during the discussions: the potential treaty process; historical and existing agreements and policies; truth and redress; social issues; economic empowerment; autonomy and decision-making; and representation.\textsuperscript{44} The final report acknowledged that there were some Aboriginal communities yet to be consulted, and that some groups had formed separate internal treaty working groups. While the final report provided information on general communication methods for targeting groups to participate in the consultation process, including through peak Aboriginal bodies, it did not provide further information on which specific ‘targeted Aboriginal stakeholders’ were contacted to participate, how these stakeholders were selected, what methods were employed to ensure that all Aboriginal communities were informed and able to participate, or which communities were unable or unwilling to participate.\textsuperscript{45} Despite this, the process was open and all Aboriginal community members were able to participate should they have chosen to do so.

In line with the final report’s proposed framework, Indigenous Australian groups were subsequently invited to apply to participate in a treaty-making process. The Ngarrindjeri, Narungga and Adnyamathanha communities were selected by the newly established Aboriginal Treaty Advisory Committee, on advice to the Minister for Aboriginal Affairs and Reconciliation, to be the first to engage in treaty discussions. In submitting an expression of interest, groups were required to meet eligibility criteria laid out in the final report, which involved providing information on:

- specific treaty aspirations;
- how the group is organised and established;
- who the group or nation represents and how membership is established;
- mapped or written boundaries and potential boundary issues;
- proof of authority to negotiate treaty on behalf of the group;
- an indication of how diverse views would be incorporated; and

\textsuperscript{43} Thomas (2017) op. cit., p. 2.
\textsuperscript{44} ibid., p. 2.
\textsuperscript{45} ibid., pp. 4–7.
an outline of the group’s cultural framework.\textsuperscript{46}

The South Australian Government and the Narungga Nation Aboriginal Corporation signed the ‘Buthera Agreement’ on 19 February 2018, which established the foundations for negotiation of a treaty, and included provisions for capacity-building and social service strategies.\textsuperscript{47} The negotiation stages of the Buthera Agreement had attracted criticism from members of the Narungga community for inadequate consultation, three of whom sought an injunction from the Supreme Court to prevent a final determination from being made under the existing circumstances.\textsuperscript{48}

The Labor Party lost the 2018 state election in March, and it is unclear whether the treaty negotiations currently underway will continue under the new Liberal Government.\textsuperscript{49} Premier Stephen Marshall announced at the end of April that they would be ‘paused’ while the Treaty Commissioner completed a report on what has been learned through the process to date, confirming that treaty negotiations were not a priority for his government.\textsuperscript{50} Premier Marshall has previously indicated that his party would not support treaty processes in South Australia.\textsuperscript{51}

**Northern Territory**

Following the 2016 Northern Territory elections, the incoming Chief Minister, Michael Gunner, announced his government’s intention to advance treaty discussions by establishing a cabinet sub-committee named ‘Aboriginal Voice – Shared Future’.\textsuperscript{52} The subcommittee’s stated mandate is to deliver local decision-making capabilities, including in relation to housing, local government, education, youth justice and community safety; ensure the adequacy of land and water rights mechanisms in delivering economic and social empowerment; and progress public discussion on a treaty with Indigenous Australians.

The Northern Territory Government has indicated its intention to work closely with the four NT land councils to further develop the ongoing treaty process.\textsuperscript{53} The Government and the land councils have approved the establishment of a working group to develop a Memorandum of Understanding (MOU), which will address negotiation principles, consultation processes and a forward roadmap. The MOU is due to be presented for signature at the Barunga Festival in June 2018.\textsuperscript{54}

\textsuperscript{46} ibid., p. 16.

\textsuperscript{47} Department of State Development (2018) *Historic Buthera Agreement a significant step towards Treaty*, media release, 19 February.


\textsuperscript{50} R. Puddy (2018) ‘South Australia’s treaty negotiations on hold while Premier considers their future’, *ABC News*, 30 April.


\textsuperscript{54} Northern Land Council (2018) *Land Councils and Northern Territory agree on an MoU for Treaty*, media release, 5 April.
Western Australia

In 2015 the Western Australian Liberal National Government successfully concluded negotiations with the Noongar people in relation to a longstanding native title claim.\(^55\) The South West Native Title Settlement package is comprehensive and includes a number of new elements not seen in other native title settlements,\(^56\) including passage by the Parliament of Western Australia of the Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA), which recognises the Noongar peoples as the ‘traditional owners of lands in the south-west of the State’.\(^57\) While not framed as a treaty settlement, two legal experts have argued that the South West Native Title Settlement with the Noongar peoples constitutes Australia’s first treaty on the basis of its form and content.\(^58\) They further argue that this settlement could provide a roadmap for similar processes in the future, and that it proves that Australia’s legal system is capable of incorporating treaty-like agreements.\(^59\)

At the March 2017 election in Western Australia, the Labor Party won government. The Minister for Aboriginal Affairs, Ben Wyatt, indicated in September of the same year that he was open to the idea of a treaty with Traditional Owners in the Pilbara region, or other options such as language group-specific treaties. However, these preliminary statements have not been followed by any further government announcements at the time of writing.\(^60\)

Other states

Ahead of the state election in 2017 the Tasmanian Labor Opposition announced its commitment to a ‘statewide conversation, a proper dialogue’ on treaty, and the establishment of an ‘Aboriginal caucus’ within the party, should the Labor Party win government.\(^61\) The incumbent Liberal Government subsequently won a second term at the 2018 election.

NSW Labor has announced its intention to establish a treaty process if it wins government at the 2019 election.\(^62\) The New South Wales Aboriginal Land Council places the negotiation of a treaty as one of its key priorities within the next five years,\(^63\) and has called on both major parties in NSW to progress treaty discussions.\(^64\)

Queensland Labor’s State Platform for 2017 includes the formalisation of ‘a process to negotiate treaties between First Nations peoples within the next term of government, in part or whole’ as one of its key priorities in government.\(^65\) This document was agreed at its state conference in July 2017. As part of this policy, Labor stated its intention to establish a Treaty Working Group to begin negotiations within the next term of parliament, who would advise the Queensland Government on treaty processes and timelines, community engagement and representation, and options for a permanent representative body for Aboriginal Queenslanders. The State Platform also sets out that the Treaty Working Group would comprise at least 50 per cent women and include nominees from Traditional

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\(^{55}\) The Noongar peoples voted in favour of the six authorised ILUAs forming the native title settlement.

\(^{56}\) See Department of the Premier and Cabinet (2018) ‘South West Native Title Settlement’, Government of Western Australia website, accessed online 24 April 2018.

\(^{57}\) Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA), long title.


\(^{59}\) ibid.


\(^{63}\) New South Wales Aboriginal Land Council (2018) Strategic Plan 2018–2022, Parramatta, NSWALC.

\(^{64}\) New South Wales Aboriginal Land Council (2017) Land Rights peak calls for Treaty with Aboriginal peoples in NSW, media release, 27 September.

Owner Corporations, the Queensland Indigenous Youth Parliament and Aboriginal Controlled Community Organisations, as well as ministerial appointees. The incumbent Labor Government subsequently won a second term at the Queensland election on 25 November 2017; however, no further announcements have yet been made regarding the treaty process.

In the Australian Capital Territory, neither major party has made any announcements regarding potential treaties in recent years.
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