THE ROLE OF PARLIAMENT IN INDIGENOUS–STATE AGREEMENT-MAKING

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Parliaments play a more significant role in Indigenous–State agreement-making than often acknowledged. While much attention focuses on the executive, which drives processes and negotiates settlements, Parliament is not merely a bystander. It can both actively support treaty-making and undermine processes. This article presents a typology of the roles Parliament may play before examining three case studies: British Columbia, Aotearoa New Zealand, and Victoria. In British Columbia, a parliamentary convention fosters collaboration in implementing treaties. In Aotearoa New Zealand, a long-standing political consensus on the meaning of Te Tiriti o Waitangi recently held in the face of intense contestation. In Victoria, treaty-making is nascent and politically volatile. While Parliament has played a constructive role thus far, its future is unsettled. The article contends that parliaments should see themselves as partners in reconciliation, shaping and sustaining the legal and political foundations of Indigenous–State relationships.

I INTRODUCTION

The role of Parliament in Indigenous–State agreement-making is often sidelined or obscured. Attention is instead focused on the executive. This is understandable. As political agreements reached between communities, treaty processes are reliant on a supportive and sympathetic government that determines to prioritise pursuing negotiated settlements with First Peoples, alongside or in the place of a host of other priorities. It is the executive that chooses to develop a policy to guide treaty talks and that leads those negotiations. It is the executive, led by the Premier, the Prime Minister, and sometimes even the sovereign,[1] that signs the deed of settlement.

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1 The *Waikato Raupatu Claims Settlement Act 1995* (NZ) was personally signed by Queen Elizabeth II.

Without the concerted commitment of the executive, treaties, agreements, and other constructive arrangements will not proceed.

On the account set out above, Parliament's role is marginal, reduced to simply enacting legislation to give legal effect to an agreement. In this article, I argue that the role of Parliament is more significant and complex than this description would suggest. At a basic level, Parliament can play both constructive and disruptive roles in Indigenous–State agreement-making.[2] On the supportive side of the ledger, it can drive treaty processes by providing a rationale and justification to pursue agreement-making. It can structure treaty processes by establishing institutions that frame and facilitate negotiations between the State and First Peoples. And it can serve an implementation role by examining, scrutinising, and passing legislation designed to give the agreement legal effect. But Parliament can also act as a spoiler. Parliament may undermine treaty processes by delaying or frustrating the passage of legislation, by inflaming community apprehensions, and even by seeking to unwind negotiated agreements.

This article explores the roles that Parliament may play by examining three jurisdictions engaged in processes of modern agreement-making with Indigenous communities: British Columbia, Aotearoa New Zealand, and Victoria. The practice of agreement-making differs in each jurisdiction, reflecting distinct legal, political, and historical settings. In British Columbia, the provincial and federal governments engage in tripartite negotiations with First Peoples to identify and define continuing rights and obligations. These modern treaties are a continuation of historic practices of agreement-making between the Crown and First Peoples but are negotiated with communities who did not sign earlier agreements. In Aotearoa New Zealand, negotiations are structured by an existing treaty relationship. Treaty settlements emerge out of allegations the Crown failed to uphold its obligations under a historic treaty: *Te Tiriti o Waitangi* (the *Treaty of Waitangi*). Agreement-making is grounded in different premises, but in both British Columbia and Aotearoa New Zealand, constitutional principles structure the relationship between the Crown and First Peoples, imposing an obligation on government to engage.[3]

Victoria differs again. When the treaty process commenced in 2016, no formal treaty with Aboriginal and Torres Strait Islander peoples had ever been negotiated in Australia. The historical absence of treaty has left the moral and legal basis of the nation 'a little legally shaky'.[4] It has also helped establish a legal framework that makes it difficult to articulate a constitutional relationship between First Peoples

2 Parliament can also play constructive and disruptive roles in recognising and protecting the rights of Indigenous peoples through legislation: John Borrows, *Freedom and Indigenous Constitutionalism* (University of Toronto Press, 2016) ch 5; Naiomi S Walqwan Metallic, 'Aboriginal Rights, Legislative Reconciliation and Constitutionalism' (2023) 27(2) *Review of Constitutional Studies* 1.

3 *Haida Nation v British Columbia (Minister of Forests)* [2004] 3 SCR 511, 524 [20] (McLachlin CJ for the Court) ('*Haida Nation*'); *New Zealand Maori Council v A-G (NZ)* [1987] 1 NZLR 641 ('*Maori Council*'). For analysis, see Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339.

4 Mick Dodson, 'We Dare to Hope: Treaty-Making in Australia' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 203, 209.

and the Australian State.[5] In the absence of both historic treaties and foundational principles to structure a distinctive relationship, the Victorian treaty process was planted and tended in virgin soil. Treaty-making has been driven by democratic politics but the absence of moral or legal guardrails leaves the process especially vulnerable to shifts in political – and parliamentary – support.

These distinctions shape the paths available in each jurisdiction and must be borne in mind in any analysis. Nevertheless, British Columbia, Aotearoa New Zealand, and Victoria form appropriate case studies to examine the roles played by Parliament for two key reasons. First, each jurisdiction conceives agreement-making with Indigenous communities as a mechanism to (re)establish constructive and mutually supportive relationships on principles of partnership, mutual trust, and respect.[6] This shared foundation allows for comparison across both new agreements in Canada and Australia, and settlements of historical grievances in Aotearoa New Zealand. Second, the background consensus on treaty relationships differs across jurisdiction. Consensus may have stabilised in British Columbia, but the attempted passage of the Principles of the Treaty of Waitangi Bill indicates some uncertainty in Aotearoa New Zealand, while in Victoria, treaty-making remains highly charged. These differences place more emphasis on the role of Parliament, and its capacity to support or undermine agreement-making.

This article is divided into five substantive parts. In Part II, I provide an illustrative typology that identifies the various roles open to Parliament. As I have noted, Parliament may play a constructive or disruptive approach. Its attitude may also evolve and adapt over time, reflective of both growing consensus or rupture. In Part III, I examine the case of British Columbia, outlining how a parliamentary convention has crystallised, seeing Parliament act as collaborative partner in governance. Rather than seeking to unwind and amend the substance of an agreement or gratuitously frustrate its passage, Parliament limits itself to technical amendments to the implementation Bill that better reflect the purpose or object of the agreement. In this manner, Parliament holds the executive to account by seeking information on and appraising the legal effect of the agreement, and ensuring the Bill meets principles of legislative quality.

In Part IV, I turn to Aotearoa New Zealand. A similar convention emerged at the turn of the century, which has since governed the role of Parliament in debating and implementing negotiated agreements to settle historical grievances. As in Canada, this convention reflects a growing maturity over the concept and practice of agreement-making within the State and a recognition that Parliament should play a constructive role in these processes. In fact, as I will demonstrate, in both jurisdictions, Parliament understands Indigenous–Crown agreements as

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5 Cheryl Saunders, 'The Constitutional Status of Indigenous Australians', *Verfassungsblog* (Blog Post, 28 February 2020) <https://verfassungsblog.de/the-constitutional-status-of-indigenous-australians/>. See also *Love v Commonwealth* (2020) 270 CLR 152, 221–2 [178] (Keane J).

6 'Principles Respecting the Government of Canada's Relationship with Indigenous Peoples', *Department of Justice Canada* (Web Page, 23 July 2025) <https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html>; Office of Treaty Settlements, 'Healing the Past, Building a Future: A Guide to *Treaty of Waitangi* Claims and Negotiations with the Crown' (Guide, June 2018) ('Healing the Past'); *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) Preamble ('*Treaty Act*').

analogous to international treaties, shaping its own institutional role in debating legislation to implement such agreements. In 2024, however, cracks emerged within this consensus. In November, Parliament began debate on the Principles of the Treaty of Waitangi Bill 2024. Intended to 'fundamentally redefine the meaning and effect' of *Te Tiriti o Waitangi*,[7] the Bill attracted significant and fierce debate. Although the Bill was not aimed at threatening the settlements process and was eventually defeated, its introduction suggests the status of Māori people within the State remains contested.

In Part V, I explore the process undertaken in Victoria. Treaty negotiations between the Victorian Government and First Peoples' Assembly of Victoria commenced in November 2024.[8] Talks moved quickly. In September 2025, the parties announced they had reached agreement on the first formal treaty in Australian history.[9] The following month, the Statewide Treaty Bill 2025 (Vic) sailed through the State Parliament.[10] In examining the Victorian experience, my focus is on the slow and steady work of the legislature developing and establishing the institutions and processes to support treaty-making, but I also consider Parliament's role during debate on the Bill to implement the agreement. I argue that the Victorian Parliament has been guided by a similar approach to that of its comparators. The legislature understands its primary role is as a partner – to assist, support, and channel the executive – in the difficult and challenging work of realising the first formal treaty in Australian history. As we move into the next stage of treaty-making,[11] this approach may come under strain. The Opposition has withdrawn its support for treaty,[12] and the very concept of treaty remains controversial.[13] What is the role of Parliament in circumstances where there is no consensus on the value of treaty?

In Part VI, I draw the experiences of these three case studies together to argue that Parliament should play a constructive role in Indigenous–State agreement-making. My argument is built on five justifications: analogy, comparative practice, ethical

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7 Carwyn Jones, 'Made-Up Principles: How the Principles of the Treaty of Waitangi Bill Disenfranchise Established Rights of Māori', *Verfassungsblog* (Blog Post, 27 November 2024) <https://verfassungsblog.de/made-up-principles/>.

8 See, eg, Nate Woodall and Joseph Dunstan, 'Victorian Treaty Talks Begin, in Historic First for Aboriginal People and Australian Governments', *ABC News* (online, 21 November 2024) <https://www.abc.net.au/news/2024-11-21/vic-treaty-aboriginal-indigenous-negotiations-jacinta-allan/104629870>.

9 *Statewide Treaty*, First Peoples' Assembly of Victoria Ltd–Victoria, signed 13 November 2025 (entered into force 12 December 2025); Victoria, *Parliamentary Debates*, Legislative Assembly, 9 September 2025, 3493 (Jacinta Allan, Premier).

10 Victoria, Legislative Council, *Minutes of the Proceedings No 139*, 30 October 2025, 8–9.

11 The *Statewide Treaty* (n 9) explicitly provides that treaty-making is a 'journey' that 'will continue, through further Statewide Treaties and Traditional Owner Treaties': at cl 1.1.

12 Benita Kolovos and Adeshola Ore, 'Treaty Could Make People "Feel More Divided", Victorian Opposition Leader Says, as Coalition Withdraws Support', *The Guardian* (online, 22 January 2024) <https://www.theguardian.com/australia-news/2024/jan/22/victoria-opposition-drops-support-for-indigenous-treaty>.

13 Stephanie Boltje, 'Treaty Now or Never? Concerns Treaties Will Become "Political Football" as Aboriginal Advocates across the Country Call for Action', *ABC News* (online, 10 February 2024) <https://www.abc.net.au/news/2024-02-10/where-the-calls-for-indigenous-treaty-sit-post-voice-referendum/103442492>.

commitments, an appreciation of the broad range of parliamentary responsibilities and obligations, and Indigenous peoples' right to self-determination. These disparate arguments are linked together by a deeper understanding of the role of Parliament in this space. As the central representative forum of a polity, Parliament is invested with an important leadership role on potentially divisive issues. It should conduct and channel debate on these questions with the goal of informing the community in a way that helps them understand and appreciate treaty-making, rather than with an eye to exacerbating or aggravating anxieties. Although the immediate focus of this article is on the role of the Victorian legislature in that State's ongoing treaty process, my argument is relevant for all parliaments in jurisdictions engaged in agreement-making processes. These institutions should be guided by a vision that sees themselves as a partner in a project of reconciliation and constitutional governance.[14] In Part VII, I conclude.

II A TYPOLOGY OF APPROACHES

The executive plays a major role in Indigenous–State agreement-making processes, but this does not mean that Parliament's contribution is immaterial. Parliament can improve the likelihood that negotiations succeed, and meaningful agreements are reached, by working in a collaborative and constructive manner with government. It can drive processes by providing a public basis and legitimating foundation for treaties. It can structure processes by legislating to establish institutions through which negotiations will take place. It can also implement treaties by giving these settlements legal effect. At the same time, Parliament can undermine treaty processes in several ways. It can delay and frustrate the passage of key legislation, it can inflame anxiety over the legal effect of agreements, and it can attempt to unravel the difficult compromises reached by the parties. In this Part, I provide an illustrative outline of these roles. In the following Parts, I develop my account by detailed examination of the role Parliament played in practice across three jurisdictions.

I begin with a note of qualification. My typology focuses on Parliament as an institution, differentiating the collective decisions of Parliament from the individual expressions or actions of its members. Parliament exists to allow the airing and debate of diverse views and interests, while at the same time providing a means of attaining a collective decision against the backdrop of continuing disagreement.[15] Institutional design and parliamentary processes facilitate this separation between debate and decision: for instance, consideration of a Bill is conducted in several distinct stages, which often include smaller, dedicated committees, and many (though not all) legislatures are split into two separate houses. This is to say that while members may act in a manner that supports or detracts from agreement-

14 For a similar argument in the context of rights protection in the United Kingdom, see Aileen Kavanagh, *The Collaborative Constitution* (Cambridge University Press, 2023).

15 I thank Jeremy Webber for this point and helpful framing.

making processes, perhaps because of obligations they hold to their party, this article is focused on the expressions, actions, and decisions of Parliament.

The first constructive role that Parliament may play is to drive treaty processes forward by providing a rationale and justification for agreement-making. Parliament is a forum for the diverse interests of citizens to be heard and ventilated. Through parliamentary debates, committee processes, and the hearing of petitions, Parliament expresses the views of the community. In doing so, the legislature implicitly performs educative and legitimating functions. It informs the community, provides reassurance, and enhances 'satisfaction with or acquiescence in the policies and programs of the … government'.[16]

Making a public case for treaty can build community support. In debate on the *Nisga'a Treaty* in the Legislative Assembly of British Columbia, for example, members of the government sought to explain the purpose of the Bill in a clear and accessible manner. In moving the second reading of the Bill to implement the agreement, Minister for Aboriginal Affairs Dale Lovick stated simply that the key purpose underlying the treaty was 'reconciliation'.[17] He continued, '[t]he reason we have to talk about reconciliation is that British Columbia – uniquely in Canada, I would point out – did not make treaties with first nations, despite the fact that the law of the day – our law – said that we should do so'.[18]

The treaty process was not simply a matter of government policy; it was required by law, would produce economic benefits, and fulfil a moral commitment owed by the province.[19] A similar theme runs through parliamentary debate over the Treaty of Waitangi Bill in Aotearoa New Zealand. When introducing the Bill to establish the Waitangi Tribunal, Maitu Rata MP declared simply that '[t]he Bill is primarily aimed at satisfying honour',[20] and promoting 'a greater awareness of the meaning of the *Treaty of Waitangi* as a symbol which embraces all New Zealand citizens and which would strengthen the contract of mutual respect and understanding'.[21] Agreement-making processes that flow from the Tribunal's inquiries fulfil this purpose. In these examples, parliamentarians drive treaty processes forward by informing the community of the rationale for treaty, and the benefits that will accrue from agreement-making. Institutional rules and processes governing debate and consideration facilitate such activity.

Parliament can also structure and channel agreement-making processes by establishing or empowering institutions to facilitate productive negotiations. This role is critical to the effectiveness of treaty processes. It is well recognised that parties are more likely to view an agreement as just and abide by a settlement

16 Robert A Packenham, 'Legislatures and Political Development' in Allan Kornberg and Lloyd D Musolf (eds), *Legislatures in Developmental Perspective* (Duke University Press, 1970) 521, 530. See also Walter Bagehot, *The English Constitution* (2nd ed, 1873) 119.

17 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-3, vol 12, No 15 (1 December 1998) 10818 (Dale Lovick).

18 Ibid.

19 Ibid 10819.

20 (8 November 1974) 395 NZPD 5725.

21 Ibid 5726.

if they regard the process that led to its outcome as fair.[22] Given deeply unequal power relationships between Indigenous peoples and the State it is vital that treaty architecture inhibits the State's capacity to act in bad faith and strengthens the bargaining position of Indigenous communities.

Structuring can involve establishing co-designed and co-led institutions. The British Columbia Treaty Commission ('BCTC'), for instance, facilitates negotiations in the province. Reflecting its function as an impartial umpire, it comprises representatives from the federal and provincial governments and First Nations communities.[23] Parliament can also play a channelling or structuring role by giving legal effect to negotiation standards. In Victoria, the *Treaty Negotiation Framework* outlines how the First Peoples Assembly and the state government will conduct themselves during treaty talks. The framework seeks to 'recognise and address the imbalance of power' between the State and First Peoples. It provides that negotiations should 'foster fairness, trust and good faith', be 'inclusive', and 'occur in a safe, supportive and culturally appropriate forum', while also recognising 'Aboriginal Lore, Law and Cultural Authority'.[24] Although the framework is a contract, it has been developed in consequence of legal requirements under section 30(1) of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ('*Treaty Act*') and is legally enforceable by virtue of section 34 of that Act.[25] An independent Treaty Authority that oversees compliance with the negotiation framework has also been established.[26]

These institutions and processes provide First Peoples with confidence that the treaty process will be fair. They also constitute an effort by Parliament to communicate, to explain to the Victorian community that treaty-making is both important and necessary. In this sense, the passage of a Bill supports the pedagogical role identified above. Indeed, as the Supreme Court of Canada has recently noted, legislation, even more than parliamentary debate, may 'help to inculcate new attitudes or approaches that will further promote a culture of respect for and reconciliation with Indigenous peoples'.[27]

The third major constructive role that Parliament can play in Indigenous–State agreement-making is by implementing settlements. Modern treaties, agreements, and other constructive arrangements reached between Indigenous communities and governments usually take the legal form of contracts between the executive and an Indigenous organisation. Once an agreement is reached, the parties must

22 Cecilia Albin, 'The Role of Fairness in Negotiation' (1993) 9(3) *Negotiation Journal* 223. In the context of Indigenous–State negotiations, see Steven J Haberfeld, *Power Balance: Increasing Leverage in Negotiations with Federal and State Governments* (University of Oklahoma Press, 2022).

23 *British Columbia Treaty Commission Act*, SC 1995, c 45; *Treaty Commission Act*, RSBC 1996, c 461.

24 *Treaty Negotiation Framework*, First Peoples' Assembly of Victoria Ltd–Victoria (signed and entered into force 20 October 2022) cls 24.1(a)(i)–(v).

25 Ibid cl 24.1(b); *Treaty Act* (n 6) s 34.

26 *Treaty Authority and Other Treaty Elements Act 2022* (Vic); *Treaty Act* (n 6) s 28.

27 *Reference re An Act respecting First Nations, Inuit and Métis Children, Youth and Families*, 2024 SCC 5 [81] (Wagner CJ, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ).

determine whether their arrangement should obtain statutory authorisation.[28] Statutory authorisation carries advantages. It has the effect of binding third parties, precludes challenges to the compact, and prevents the executive from relying on the doctrine of necessity to avoid carrying out its obligations.[29] When it comes to treaties – instruments that possess a fundamental or constitutional character[30] – legislation also demonstrates both public and political support, enhancing the durability of the agreement.[31] Enacting a Bill to implement an agreement can thus help build a rationale and justification for future and further agreements.

Legislative enactment may also carry emotional and cathartic effects for Indigenous peoples, encouraging opportunities for healing and dialogue across communities. For generations, Parliament served as the site where legislation denying the status and rights of Indigenous peoples was debated (very often without their presence) and made into law. The simple act of passing a Bill that seeks to repair that injustice can reclaim the institution of Parliament and deepen efforts towards reconciliation. In one famous example, when the Bill to implement the *Nisga'a Treaty* was finally ratified in Ottawa, Nisga'a representatives in the public gallery launched into a rendition of the Canadian national anthem.[32] Similar events have occurred in Australia. When the Noongar (Koorah, Nitja, Boordahawan) (Past, Present, Future) Recognition Bill was introduced into the Parliament of Western Australia, Noongar elder Elizabeth Hayden described her feelings to reporters:

> My heart is weeping with joy. … We live with hope because we've been knocked from pillar to post for generations. We've always lived in hope that we would get to a point of being acknowledged as the first people of this nation. … The past is past, but we need to move forward to a better future.[33]

In Westminster parliamentary systems, the government holds a working majority in the lower house. There is no guarantee, however, that a broad consensus on a specific treaty, let alone the value of treaty-making more generally,

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28 In Victoria, see *Treaty Negotiation Framework* (n 24) cl 25.3(a). For discussion on this point, see Harry Hobbs, 'The Four Dimensions of Indigenous-State Treaties' (2026) 37 *Public Law Review* (forthcoming) ('The Four Dimensions').

29 Enid Campbell, 'Legislative Approval of Government Contracts' (1972) 46(5) *Australian Law Journal* 217, 218. See also Nicholas Seddon, *Government Contracts: Federal, State and Local* (Federation Press, 7th ed, 2023) ch 5. See also discussion in Sébastien Grammond, 'Aboriginal Treaties and Canadian Law' (1994) 20(1) *Queen's Law Journal* 57.

30 Harry Hobbs and Alice Taylor, 'Quasi-Constitutionality and Indigenous-State Treaties in Australia' (2025) 49(3) *Melbourne University Law Review* (forthcoming); Hobbs, 'The Four Dimensions' (n 28).

31 Cheryl Saunders, 'Treaty-Making in Australia: The Non-Indigenous Party' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Treaty-Making: 250 Years Later* (Federation Press, 2021) 43.

32 Christina Godlewska and Jeremy Webber, 'The *Calder* Decision, Aboriginal Title, Treaties, and the Nisga'a' in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the Calder Case, and the Future of Indigenous Rights* (University of British Columbia Press, 2007) 1, 9 <https://doi.org/10.59962/9780774855433-002>.

33 Australian Associated Press, 'WA Introduces Bill Recognising Noongar People as Traditional Land Owners', *The Guardian* (online, 14 October 2015) <www.theguardian.com/australia-news/2015/oct/14/wa-introduces-bill-recognising-noongar-people-as-traditional-land-owners>.

will hold across the assembly.[34] Uncertainty may be more pronounced in bicameral jurisdictions like Victoria, or mixed-member proportional systems like Aotearoa New Zealand's, where a governing party will likely need to rely on the support of other parties. Even in unicameral systems such as British Columbia, however, Parliament will not necessarily act in a constructive manner.

Parliament may attempt to undermine agreement-making processes in several ways. First, as I have noted, legislation is necessary to establish, empower, and fund key institutions that support and facilitate agreement-making processes, as well as to give an agreement force of law. Parliament may undermine treaty by delaying or frustrating passage of those Bills. This need not be intentional. In Canada, a Bill to recognise First Nations jurisdiction over water and impose national standards for safe drinking water on First Nations lands was set aside following the prorogation of Parliament as a result of Prime Minister Justin Trudeau's resignation.[35] A more drastic example comes from the United States, where an intramural dispute within Congress over the appropriation of public monies for treaty settlements was ultimately responsible for the termination of treaty-making with Native American nations.[36] Following several years of impasse in which the House of Representatives refused to pass laws to fund treaty settlements, Congress eventually enacted the *Indian Appropriations Act 1871* which prohibited the government from making treaties.[37] The legislature did not only undermine treaty-making but ended it.

Parliament might also attempt to inflame community anxieties. A treaty or agreement will recognise specific rights held by an Indigenous community that are distinct to those held by non-members. Parliamentarians may seek to build on latent concerns held by some members of the non-Indigenous community that such an arrangement is unfair or inequitable. These arguments have been well ventilated in all three jurisdictions.[38] Similar arguments revolve around concerns that negotiations are 'secret', and that the government is therefore seeking to ram through a deal that is not in the best interests of the whole community.[39] While often led by individual members, Parliament as an institution can also inflame anxieties. In British Columbia, for instance, a Select Standing Committee endorsed

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34 This is especially the case if the government allows a free vote on a Bill to implement a treaty, as was intended for the *Nisga'a Final Agreement Act*, RSBC 1999, c 2: see J Rick Ponting, *The Nisga'a Treaty: Polling Dynamics and Political Communication in Comparative Context* (University of Toronto Press, 2009).

35 Karyn Pugliese and Angel Moore, 'Federal Legislation on First Nations Water Dead after Trudeau Prorogues Parliament', *APTN News* (online, 7 January 2025) <https://www.aptnnews.ca/national-news/federal-legislation-on-first-nations-water-dead-after-trudeau-prorogues-parliament/>.

36 Francis Paul Prucha, *American Indian Treaties: The History of a Political Anomaly* (University of California Press, 1994) 295–310 <https://doi.org/10.1525/9780520919167>.

37 25 USC § 71 (1988).

38 See, eg, British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-3, vol 12, No 18 (3 December 1998) 10889 (Jeremy Dalton). They have also appeared in Aotearoa New Zealand and Victoria: see 'Tribunal Must Go', *Hobson's Pledge* (Web Page) <https://www.hobsonspledge.nz/why_the_waitangi_tribunal_must_go>; Victoria, *Parliamentary Debates*, Legislative Council, 16 August 2022, 2709–11 (Beverly McArthur).

39 See, eg, British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-3, vol 12, No 16 (1 December 1998) 10850 (Daniel Jarvis); Victoria, *Parliamentary Debates*, Legislative Council, 28 October 2025, 4174 (Wendy Lovell).

these apprehensions in 2002. The Committee unanimously recommended 16 questions for a referendum on principles to guide the province's position on treaty negotiations,[40] many of which were framed around concerns over 'affordability' and the idea that First Nations may obtain special rights beyond those of other British Columbians.[41]

A third method that Parliament may adopt to undermine treaty-making is by seeking to unwind negotiated agreements. Parliament may unilaterally amend certain provisions within an agreement, or repeal entirely legislation that facilitates negotiations or gives an agreement legal force. These steps are drastic. They are not only profoundly dismissive of First Nations communities and inconsistent with international law,[42] but reflect a failure on behalf of the State to uphold ethical and moral commitments to Indigenous peoples. The most alarming case comes from the United States, where the termination era from the 1940s to 1960s saw Congress unilaterally revoke historic treaties and terminate the federal status of more than 100 Native American tribes.[43] More recently, in 2024 the Queensland Parliament passed legislation to repeal its treaty process and abolish the Truth Telling and Healing Inquiry. Perhaps reflective of the shame that Parliament may have felt in disregarding 'years of community consultation and First Nations-led processes that led to the Inquiry',[44] the Bill repealing the treaty process was 'sneakily and disrespectfully'[45] hidden within the Brisbane Olympic and Paralympic Games Arrangements and Other Legislation Bill 2024.[46] The Bill was introduced and passed in a single day.

This typology outlines six major roles that Parliament could play in relation to Indigenous–State agreement-making. The examples are intended to be illustrative rather than comprehensive. It is also not intended to suggest that Parliament is marked by stasis; its approach can adapt and evolve over time, reflecting shifts in political, legal, and cultural consensus on the value of treaty-making. In the following three Parts, I deepen our understanding of the role of Parliament by examining its operation in practice in British Columbia, Aotearoa New Zealand,

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40 Select Standing Committee on Aboriginal Affairs, Legislative Assembly of British Columbia, *Revitalizing the Provincial Approach to Treaty Negotiations: Recommendations for a Referendum on Negotiating Principles* (Report, 30 November 2001) 8–9. Note that the Select Committee was comprised entirely of government members, as the Opposition declined the invitation to nominate a member to sit on the committee: at 3.

41 Ibid 9. See, eg, Question 11, 'Province-wide standards of resource management and envionrmental protection will continue to apply'; Question 13, 'Affordability should be a key factor in determining the amount of land provided in treaty settlements'; and Question 15, 'The existing tax exemptions for Aboriginal people will be phased out'.

42 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 37(1) ('*UNDRIP*').

43 See 18 USC § 1162 (2010); 25 USC §§ 1321–6 (1968); 28 USC § 1360 (1984); Indians, HR Con Res 108, 83rd Congress, 67 Stat B132 (1953).

44 Truth-Telling and Healing Inquiry, 'Final Statement from the Truth-Telling and Healing Inquiry', (Final Statement, 29 November 2024) <https://www.truth-telling-qld.com.au/final-statement-truth-telling-and-healing-inquiry>.

45 Queensland, *Parliamentary Debates*, Legislative Assembly, 28 November 2024, 157 (Leeanne Enoch).

46 *Brisbane Olympic and Paralympic Games Arrangements and Other Legislation Amendment Act 2024* (Qld) pt 3, repealing *Path to Treaty Act 2023* (Qld).

and Victoria. These case studies also reveal that as an institution, Parliament can influence the factors that support or undermine agreement-making processes.

III BRITISH COLUMBIA

Treaty-making in Canada can be divided into several eras.[47] For our purposes, a simple division between agreements struck pre-1973 and post-1973 is appropriate. From the earliest days of contact between Europeans and First Nations, the British and later Canadian Crown negotiated hundreds of agreements.[48] In 1923, following the conclusion of the Williams Treaties in Central Ontario, the Crown refused to enter into more settlements. However, vast areas of the country, including most of the western province of British Columbia, had never been subject to treaty. In the landmark 1973 decision of *Calder v British Columbia (Attorney-General)* ('*Calder*'), the Supreme Court confirmed that Aboriginal title existed,[49] and may have survived colonisation.[50] In the aftermath of *Calder*, the federal government announced it would commence a modern era of treaty-making.

Historic and modern treaty-making practices differ considerably. Historic treaties often were negotiated in a few days without the benefit of legal advice.[51] They generally comprised 'lofty'[52] promises articulated in a 'lean and often vague vocabulary'.[53] Modern agreements, in contrast, are the product of intense negotiations conducted over many years.[54] Reflecting a more technical and involved process, the final instrument is a 'detailed'[55] and 'comprehensive lawyerly document'.[56] The role played by Parliament also differs. Whereas historic agreements struck between the Crown and First Nations were not validated or implemented by legislation, modern treaties obtain statutory authorisation. In this section, I demonstrate how a

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47 See generally JR Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press, 2009); Janna Promislow, 'Treaties in History and Law' (2014) 47(3) *UBC Law Review* 1085.

48 The Canadian Government recognises 70 treaties between the Crown and Indigenous nations negotiated between 1701 and 1923: 'About Treaties', *Crown-Indigenous Relations and Northern Affairs Canada* (Web Page, 26 June 2024) <https://www.rcaanc-cirnac.gc.ca/eng/1100100028574/1529354437231>. However, the number of treaties is likely much higher because the government may wrongly deny agreements negotiated with Indigenous nations reach the status of 'treaty'. For example, in *R v Montour*, 2023 QCCS 4154, the Quebec Superior Court held that the *Covenant Chain* was a treaty, despite arguments by federal and provincial lawyers that it was not: at [884]–[1052] (Bourque JSC).

49 [1973] SCR 313, 328–9 (Martland, Judson and Ritchie JJ), 394 (Hall J for Hall, Spence and Laskin JJ).

50 Ibid 401 (Hall J for Hall, Spence and Laskin JJ).

51 *Ontario (Attorney-General) v Restoule*, 2024 SCC 27, [76] (Jamal J for the Court) ('*Restoule*').

52 *Beckman v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103, 119–20 [12] (Binnie J for McLachlin CJ, Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ) ('*Beckman*').

53 *R v Morris* [2006] 2 SCR 915, 927 [18] (Deschamps and Abella JJ for Binnie, Deschamps, Abella and Charron JJ).

54 See, eg, *Campbell v British Columbia (Attorney-General)*, 2000 BCSC 1123, [6] (Williamson J).

55 *First Nation of Nacho Nyak Dun v Yukon* [2017] 2 SCR 576, 593–4 [36] (Karakatsanis J for the Court) ('*Nacho Nyak Dun*'), quoting *Beckman* (n 52) 119–20 [12] (Binnie J for McLachlin CJ, Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ).

56 *Beckman* (n 52) 137 [58] (Binnie J for McLachlin CJ, Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ).

particularly rancorous and hostile debate over the implementation of the *Nisga'a Treaty* in the late 1990s prompted a reconceptualisation of the role of Parliament in Indigenous–State treaty making.

A The *Nisga'a Final Agreement*

The allocation of constitutional authority in Canada means that modern agreements require both the federal and provincial governments at the table. However, authorities in British Columbia ignored the uncertainty provoked by *Calder*, and it was not until the early 1990s that the province determined to join negotiations. After several years of talks, the *Nisga'a Treaty* – the first modern agreement in British Columbia – was reached between the three parties in 1998.

Nevertheless, many within the province remained opposed to treaty-making. Over the course of the decade, as negotiations proceeded, a 'chorus of disapproval'[57] bubbled to the surface; opponents worried the *Nisga'a Treaty* would violate human rights and entrench a 'racially based government'.[58] Opposition continued to build after a Bill to implement the treaty was introduced in the Legislative Assembly of British Columbia on 30 November 1998. In an address to the Assembly on 2 December, Nisga'a First Nation Chief Joseph Gosnell implored members not to '[play] politics with the aspirations of aboriginal peoples'.[59] However, the Bill to implement the treaty would receive a cool welcome. Opponents did not have the numbers to reject the Bill but, led by the conservative British Columbia Liberal Opposition leader Gordon Campbell, they relied on parliamentary processes to delay and frustrate its passage.

The second reading of the Bill was conducted over nine sitting days.[60] On 13 January 1999, it was referred to a Committee of the Whole House for consideration in detail. When calling the Committee the following day, chair William Hartley MLA made a short statement noting the 'unique nature of the bill', which contained the *Nisga'a Final Agreement* as a schedule. Likening the Bill to the *Irish Free State (Constitution) Act 1922*, 13 Geo 5 sess 2, c 1, the *British North America Act 1949*, 12, 13 & 14 Geo 6, c 22, and the *Canada Act 1982* (UK), Hartley explained that the Bill imposed a distinct role and responsibility on the Assembly:

> It's a Crown prerogative to make agreements. The role of parliament is to debate, accept, reject or amend the bill, but subject to technical amendments, it cannot

57 Ravi de Costa, 'National Encounters between Indigenous and Settler Peoples: Some Canadian Lessons' in Peter Read, Gary Meyers and Bob Reece (eds), *What Good Condition? Reflections on an Australian Aboriginal Treaty 1986–2006* (ANU E Press, 2006) 15, 24 <https://doi.org/10.22459/WGC.12.2006.02>. See also Ponting (n 34).

58 Robert Matas and Craig McInnes, 'Critics of *Nisga'a Treaty* Call for Vote: Cost of BC Deal Jumps to $488-Million', *The Globe and Mail* (Toronto, 23 July 1998) A1; Craig McInnes, 'Nisga'a Deal is Apartheid: Reform MP', *The Globe and Mail* (Toronto, 24 July 1998) A6. See also John Borrows, 'Re-living the Present: Title, Treaties, and the Trickster in British Columbia' [1998] (120) *BC Studies* 99.

59 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-3, vol 12, No 17 (2 December 1998) 10861.

60 Dates and hours recorded in this article have been calculated by reference to the British Columbia Hansard. An index to parliamentary debate on the *Nisga'a Treaty* is available at 'The *Nisga'a Treaty*', *Legislative Assembly of British Columbia* (Web Page) <https://www.leg.bc.ca/hansard-content/Index/36th3rd/NisFAAct.htm>.

> amend the agreement. … In the case at hand, the Chair will not accept amendments to the schedule, other than purely technical amendments to ensure that the schedule contains the correct text. The Chair will not accept amendments to sections of the bill which have the effect of amending the schedule but will accept amendments to sections of the bill that are relevant and otherwise in order.[61]

Unable to unwind the agreement, opponents nonetheless sought to undermine it. Consideration in detail eventually stretched across 23 sitting days and over '120 hours of debate, more than any bill in the history of the province'.[62] Accusing the opposition of filibustering,[63] the government ultimately relied on its majority to close debate and force a vote on the Bill before many of the chapters of the treaty had been considered.[64] The opposition rallied against the 'menacing, autocratic, undemocratic assault on this place'[65] but were unable to prevent the Bill's passage.

Similar contentious events played out in Ottawa. The Bill to give effect to the *Nisga'a Final Agreement* was introduced in the House of Commons on 21 October 1999. After several days of tense discussion, a motion to limit the second reading debate was passed on 1 November 1999, and the Bill was referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development.[66] The Committee conducted 27 hearings in Ottawa and British Columbia and recommended the Bill pass without amendment.[67] Nonetheless, critics again sought to delay, frustrate, and even unravel the agreement. The conservative Reform Party introduced 471 amendments to the Bill, some of which would have had the effect of gutting the treaty and others to make apparent grammatical corrections. An offer to withdraw the proposed amendments in exchange for a promise by the government to hold a referendum on the treaty in British Columbia,[68] was dismissed as 'blackmail'.[69] The Commons spent a protracted 42 hours and 25 minutes in continuous session holding separate roll call votes rejecting each proposed amendment.[70] The Bill was finally passed on 13 December 1999 and introduced in the Senate the following day.

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61 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-3, vol 13, No 3 (14 January 1999) 11075.

62 Paul Willcocks, 'BC Government Pulls Plug on Debate of *Nisga'a Treaty*: Opposition Enraged after Decision Forces Passage of Bill Today', *The Globe and Mail* (Toronto, 22 April 1999) A2; British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-3, vol 14, No 11 (21 April 1999) 11928 (Glen Clark, Premier).

63 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-3, vol 14, No 11 (21 April 1999) 11929 (Glen Clark, Premier).

64 *Votes and Proceedings of the Legislative Assembly of British Columbia*, 36-3, No 161 (21 April 1999).

65 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-3, vol 14, No 11 (21 April 1999) 11930 (Gordon Campbell).

66 *House of Commons Debates*, 36-2, vol 136, No 15 (1 November 1999) 897–8.

67 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 38-3, vol 25, No 3 (22 November 2007) 9425 (Scott Fraser).

68 *House of Commons Debates*, 36-2, vol 136, No 36 (7 December 1999) 2281 (Preston Manning, Leader of the Opposition Reform Party).

69 Ibid 2282 (Herb Gray, Deputy Prime Minister).

70 Ibid 2313–680; 'Reform's Filibuster Over', *CBC News* (online, 9 December 1999) <https://www.cbc.ca/news/canada/reform-s-filibuster-over-1.194648>; Christopher McKee, *Treaty Talks in British Columbia: Building a New Relationship* (UBC Press, 3rd ed, 2009) 97.

Senate consideration was also marked by obstruction and delay. The Standing Senate Committee on Aboriginal Peoples held hearings between 16 February 2000 and 23 March 2000. On 29 March, the Committee released its report recommending the Bill be passed without amendment. During the third reading, however, several bad faith amendments were again proposed to the Bill. One such amendment proposed the following:

> That Section 3 of the Bill be amended by adding the word 'not' following the word 'is'.
>
> The amended Section 3 will therefore read:
>
> '3. The *Nisga'a Final Agreement* is not a treaty and a land claims agreement within the meaning of Sections 25 and 35 of the *Constitution Act, 1982*.'[71]

Neither this amendment, nor any others, were adopted. The Bill was passed on 13 April 2000. It received royal assent the same day.

The acrimonious public and parliamentary debate surrounding the passage of the legislation to implement the *Nisga'a Treaty* was unfortunate. A moment of excitement and joy for the *Nisga'a* First Nation and a celebration of their strength and resilience was tempered by combative and belligerent scenes in the Legislative Assembly and the Parliament at Ottawa. Although the existence of a parliamentary rule preventing major amendments preserved the text of the agreement, opponents acted in a destructive manner, seeking to derail passage of the Bill and the implementation of the *Nisga'a Treaty*. A large minority of parliamentarians did not consider that the character of the Bill as implementing an agreement between political communities necessitated a different role. The Parliament as an institution may have ultimately acted in a constructive manner, but the quality of the debate nonetheless served to inflame anxiety and apprehensions throughout the community.

B A New Approach

It was not until the second half of 2007 that the Legislative Assembly of British Columbia had another opportunity to consider a Bill to implement a modern treaty. This time the approach adopted differed significantly. The Legislature's experience debating the *Nisga'a Treaty* likely influenced this change, but legal and political factors also played an important role. Two points are worth noting briefly.

First, jurisprudence underlying the treaty process evolved substantially during this period. In 2004, the Supreme Court of Canada held unanimously that the Crown has a legal duty to consult with Aboriginal peoples and accommodate their interests.[72] The honour of the Crown, the Court explained, requires government 'acting honourably, to participate in processes of negotiation'.[73] Negotiations were no longer merely one policy option open to a government, but a legal obligation on the Crown.

Political dynamics had also shifted. Bills to implement the *Tsawwassen* and *Maa-nulth* treaties were introduced into the Assembly on 15 October and 21

71 *Debates of the Senate*, 36-2, vol 138, No 49 (13 April 2000) 1144.

72 *Haida Nation* (n 3); *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)* [2004] 3 SCR 550.

73 *Haida Nation* (n 3) 525 (McLachlin CJ for the Court).

November 2007 respectively. Both treaties had been negotiated by the conservative Liberal government (who secured election in 2001), and who had virulently opposed the *Nisga'a Treaty* when in Opposition. The Liberal government had even forced through a province-wide referendum on treaty negotiating principles in 2002, designed to undermine the treaty process. Since then, however, to the surprise of many British Columbians, the government had '"[done] a complete 180" on First Nations policy'[74] and endorsed treaty-making.[75] The current Opposition, the New Democratic Party ('NDP'), supported the treaty process and confirmed they would vote in favour of both Bills. As such, the treaty process and the treaties themselves commanded almost unanimous support across the Assembly.

These political dynamics meant that parliamentary debate would necessarily be conducted in a different register. The Opposition largely contained itself to criticising the government for its earlier behaviour, accusing it of stalling the treaty process and acting cynically during the contemporary negotiations. At the same time, however, the Opposition recognised that although the treaty 'would have looked a lot different' if they had led negotiations, the agreement was not with the Liberal party, but British Columbia.[76] The Legislative Assembly thus saw itself as a partner in a joint project of reconciliation.

Government members dismissed criticism but did acknowledge that the First Nations signatories did not obtain the perfect deal. Praising the Tsawwassen and Maa-nulth First Nations for their determination, resilience, and pragmatism, members also reflected on the development of their own understanding of treaties. Premier Gordon Campbell, who had led the attacks against the *Nisga'a Treaty*, noted that he 'learned a lot since [his] days as opposition leader' and acknowledged that he had 'not always been correct in [his] views'.[77] Campbell continued: 'Mr. Speaker, I can tell you this today. The *Nisga'a [T]reaty* has not divided us from one another as I had once feared. It has helped bring us together. It has helped build a better future for the Nisga'a First Nation, and that's something we should all applaud.'[78] Statements like these signalled a new cooperative approach to modern treaty-making.

The emerging convention was especially visible following the second reading debate. On 29 October 2007, the Tsawwassen Bill was considered in detail by a Committee of the Whole House. The Chair of the Assembly reminded members of the unique role the Parliament plays when considering an Indigenous–Crown treaty. Liberal MLA Katherine Whittred explained:

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74 Joel Fetzer, 'The Politics of British Columbia's 2002 Aboriginal Treaty Negotiations Referendum: Democratic Governance or Electoral Strategy?' (2016) 48(2) *Canadian Ethnic Studies* 157, 163 <https://doi.org/10.1353/ces.2016.0018>, citing a First Nations Treaty Negotiator.

75 For discussion, see Harry Hobbs, 'Anticipating and Weathering Challenges to Modern Treaties in Australia' (2024) 35(4) *Public Law Review* 318, 330 ('Weathering Challenges').

76 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 38-3, vol 22, No 8 (17 October 2007) 8586 (David Chudnovsky).

77 Ibid 8589.

78 Ibid.

> This Bill, like the Nisga'a bill of 1999, is intended to approve the final agreement which is attached as a schedule, and to enact ancillary legislation to conform with various aspects of the agreement.
>
> It is a Crown prerogative to make agreements. The role of Parliament is to debate, accept, reject or amend the Bill but, subject to technical amendments, it cannot amend the Agreement. In the case at hand, the Chair will not accept amendments to the Schedule other than purely technical amendments to ensure the Schedule contains the correct text. The Chair will not accept amendments to sections of the Bill which have the effect of amending the Schedule, but will accept amendments to sections of the Bill that are relevant and otherwise in order.[79]

This time, members followed protocol. Reviewing the Hansard reveals that the debate was conducted in a spirit of genuine constructive engagement. Indeed, Liberal MLA Bill Bennett remarked that the conversation was 'not really a debate' but 'a discussion'.[80] Members asked questions of the government with the aim of understanding the provisions of the agreement, how the treaty would be implemented, and how it would crystallise a new relationship between the province and First Nations. While members did not always refrain from criticising their political opponents, there were no attempts to introduce amendments to unwind provisions of the agreement or alter the compromise struck by the parties.

The Assembly understood its responsibility in a particular way. Its role was to inform itself of the Bill, draw attention to key provisions, and raise concerns constituents might have about the agreement. NDP MLA Scott Fraser made this point clear during debate, noting that while his party would support the treaty, 'as the official opposition, it is our right and our role to raise important questions. So we will stand in the Legislature and give voice to your concerns'.[81] Voicing concerns did not extend, however, to proposing amendments that would alter the agreement. Members accepted amendments were not appropriate as it would necessarily impinge on the exercise of First Nations' self-determination and complicate the difficult compromises made in the course of negotiations between governments. Parliament's role was to support that project by ensuring the Bill gave proper effect to the co-determined agreement.

The cooperative and constructive approach owed much to the almost unanimous support for the treaty within the Assembly. Yet, it is nonetheless significant in helping to develop and ground a new convention far removed from the approach taken several years earlier. Indeed, the same approach was adopted the following month in consideration of the Bill to implement the *Maa-nulth Final Agreement*. One upshot of the new approach is that parliamentary debate was conducted far more expeditiously. Whereas more than 120 hours of debate was dedicated to the Nisga'a Bill, the Assembly took only 42 hours and 14 minutes to approve the Tsawwassen Bill 63 votes to 4, and a total of 12 hours and 9 minutes to approve the Maa-nulth Bill 63 votes to 2.

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79 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 38-3, vol 23, No 7 (29 October 2007) 8894–5; British Columbia, *Journals of the Legislative Assembly*, 38-3, vol 143 (29 October 2007) 135.

80 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 38-3, vol 22, No 6 (16 October 2007) 8574.

81 Ibid 8562.

Ottawa appears to have taken its lead from British Columbia. A Bill to implement the *Tsawwassen Treaty* was introduced to the House of Commons on 6 December 2007 and entered the second reading stage on 15 May 2008.[82] It received a total of 3 hours and 15 minutes debate before being referred to the Standing Committee on Aboriginal Affairs and Northern Development. The Committee heard from seven witnesses and finalised its report within 90 minutes,[83] recommending passage without amendment. The third reading stage proceeded a little differently. One member of the governing party proposed nine motions deleting various clauses of the treaty to 'address and highlight key flaws'.[84] Derided as 'emasculating'[85] and 'gut[ting]'[86] the treaty,[87] the motions were negatived without a formal division after only 95 minutes of debate.[88] The following day the Bill was deemed read a third time and passed without further debate.[89] The Bill moved through the Senate just as quickly, and received royal assent on 26 June 2008. Notwithstanding the attempts of some members, Parliament as an institution acted promptly and constructively.

The *Maa-nulth Treaty* proceeded even more expeditiously. In debate on the Bill to give effect to the treaty, one federal representative noted: '[A]ll four parties have agreed to pass this bill quickly and move it through the legislative process as soon as possible to enable the Maa-nulth First Nations and their communities to live together and organize their territory so that they can be masters in their own house'.[90]

The Bill was introduced into the House of Commons on 15 June 2009. The following day, after a representative from each party delivered a speech in support of the treaty, it was 'deemed read a second time, deemed referred to a committee of the whole, deemed reported without amendment, deemed concurred in at report stage and deemed read a third time and passed'.[91] No questions were asked and the entire process lasted just over 30 minutes. Passage took a little longer in the Senate, but no scrutiny is apparent. On 17 June 2009, the Bill was referred to the Senate Standing Committee on Indigenous Peoples. The Committee reported on 18 June recommending passage without amendment. The Bill passed its third reading and received royal assent the same day.[92]

In the years since, the parliamentary convention that members refrain from proposing and debating amendments has crystallised. Consider for example the

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82 *House of Commons Debates*, 39-2, vol 142, No 32 (6 December 2007) 1791.

83 'AANO Committee Meeting: Minutes of Proceedings', *House of Commons Canada* (Minutes of Proceedings, 4 June 2008) <https://www.ourcommons.ca/DocumentViewer/en/39-2/AANO/meeting-32/minutes>. This was part of the House of Commons Standing Committee on Aboriginal Affairs and Northern Development's *Inquiry into Bill C-34, An Act to Give Effect to the Tsawwassen First Nation Final Agreement*.

84 *House of Commons Debates*, 39-2, vol 142, No 113 (16 June 2008) 7005 (John Cummins).

85 Ibid 7007 (Larry Bagnell).

86 Ibid 7013 (Todd Russell).

87 Ibid 7007 (Larry Bagnell).

88 Ibid 7017.

89 *House of Commons Debates*, 39-2, vol 142, No 114 (16 June 2008) 7092; *Journals of the House of Commons of Canada*, 39-2, No 114 (17 June 2008) 1005.

90 *House of Commons Debates*, 40-2, vol 144, No 76 (16 June 2009) 4644 (Marc Lemay).

91 Ibid 4647.

92 *Debates of the Senate*, 40-2, vol 146, No 48 (18 June 2009) 1241, 1252–3.

role of the parliament in implementing the *Tla'amin Treaty* in 2013. The Bill was introduced into the Legislative Assembly of British Columbia on 14 February 2013, and its second reading debate lasted less than an hour the following day.[93] On 5 March, the Committee of the Whole examined the Bill. Once again, the procedure followed was calm and respectful, with members inviting the government to explain and clarify aspects of the Bill and agreement to better inform the Assembly of the settlement made between the province and the Tla'amin First Nation. One question posed by NDP MLA Scott Fraser to Ida Chong, the Minister of Aboriginal Relations and Reconciliation of British Columbia, reveals the spirit in which the discussion was carried out:

> Just so that there is no confusion for those that may be watching or reading from afar… The section of the *Local Government Act* being repealed here in the treaty might cause some confusion. I just ask the minister to explain what's actually being said here so that nobody thinks the *Local Government Act* is being changed through a treaty process in any way that could be seen as a threat.[94]

As this suggests, the more limited time spent on debate did not mean that the legislature abdicated its responsibilities. Rather, it understood its role and purpose to support and channel the joint project of reconciliation. No amendments were made or proposed, and the Bill was passed after just over three hours of debate.[95]

An even more truncated process occurred at the federal level. The Bill was introduced into the House of Commons on 28 April 2014. Relying on the practice of 'unanimous consent',[96] the Bill passed all three stages – and was conveyed to the Senate – in less than five minutes.[97] Passage was just as rapid in the Upper House. Hansard does not record any debate on the Bill in the Senate Chamber.[98] Although the Bill was referred to the Standing Senate Committee on Aboriginal Peoples for consideration, its minutes of proceedings document that the entire examination took fewer than two hours. Most of this time was spent on opening statements from representatives of the parties; clause by clause consideration of the Bill was completed in four minutes.[99] The Bill was read a third time and passed on 11 June, following three short speeches in favour.[100]

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93 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 39-5, vol 41, No 6 (18 February 2013) 12851–8.

94 British Columbia, Official Report of *Debates of the Legislative Assembly (Hansard)*, 39-5, vol 43, No 6 (5 March 2013) 13324.

95 Ibid 13307–24.

96 Marc Bosc and André Gagnon (eds), *House of Commons Procedure and Practice* (3rd ed, 2017) ch 12 <https://www.ourcommons.ca/procedure/procedure-and-practice-3/index-e.html>.

97 *House of Commons Debates*, 41-2, vol 147, No 75 (28 April 2014) 4602–3; *Journals of the House of Commons of Canada*, 41-2, No 75 (28 April 2014) 841.

98 The second reading speech was moved on 13 May 2014 and debate immediately adjourned: *Debates of the Senate*, 41-2, vol 149, No 59 (13 May 2014) 1533–4. The speech in reply was made on 3 June 2014, and the Bill immediately referred to the Standing Senate Committee on Aboriginal Peoples: *Debates of the Senate*, 41-2, vol 149, No 65 (3 June 2014) 1676–7.

99 'C-34: *An Act to Give Effect to the Tla'amin Final Agreement and to Make Consequential Amendments to Other Acts*', *Parliament of Canada* (Web Page) <https://www.parl.ca/legisinfo/en/bill/41-2/c-34>.

100 *Debates of the Senate*, 41-2, vol 149, No 69 (11 June 2014) 1778–9.

IV AOTEAROA NEW ZEALAND

In Aotearoa, the relationship between Māori and the State is regulated by the 1840 *Te Tiriti o Waitangi*. There are two very different versions of the agreement.[101] The English language version provides Māori signatories ceded 'absolutely and without reservation all the rights and powers of Sovereignty' while retaining the 'full exclusive and undisturbed possession of their Lands and Estates'.[102] Under te reo Māori version, by contrast, Māori signatories ceded *kawanatanga* (governorship) to the British Crown, while being promised their *tino rangatiratanga* (full authority) over their land, people, and treasure would remain undisturbed.[103]

Contemporary scholarship has found that Māori signatories to the Treaty did not cede their sovereignty,[104] and that the treaty's principal drafters accepted this position.[105] Nevertheless, the constitutional and legal status of the instrument remains uncertain. For many years, the Crown acted as if the treaty imposed no obligations on them. In 1975, however, responding to increasing public pressure, the government established a permanent commission of inquiry to investigate alleged breaches of the treaty.[106] As I demonstrate here, a similar convention that sees Parliament adopt a constructive and supportive approach to redressing grievances has developed in Aotearoa New Zealand. Recent developments, however, suggest a broad consensus may be under pressure.

A The Treaty Settlements Process

The Waitangi Tribunal is charged with inquiring into and making recommendations in relation to Māori claims that they have been prejudicially affected by legislation or Crown action inconsistent with the principles of *Te Tiriti o Waitangi*. For many claims, the Tribunal recommends the state enter negotiations toward a treaty settlement with the relevant iwi (Māori tribe). The aim of these negotiations is to settle alleged breaches of the treaty in a manner consistent with the spirit of the Tribunal's recommendations and 're-establish Crown-Māori relations'.[107] The report from the Waitangi Tribunal's inquiry will usually play an important role in negotiations between the group and the state but 'the purpose of a settlement is to reflect the interests of the parties concerned, and who freely enter

101 Or indeed, two separate agreements: Margaret Mutu, 'Constitutional Intentions: The Treaty Texts' in Malcolm Mulholland and Veronica Tawhai (eds), *Weeping Waters: The Treaty of Waitangi and Constitutional Change* (Huia, 2010) 11.

102 *Treaty of Waitangi* (1840) arts 1, 2.

103 *Te Tiriti o Waitangi* (1840) arts 2, 3.

104 Waitangi Tribunal, *He Whakapuytanga me te Tiriti: The Declaration and the Treaty* (Wai 1040, 2014) 526–7.

105 Ned Fletcher, *The English Text of the Treaty of Waitangi* (Bridget Williams Books, 2022) <https://doi.org/10.7810/9781990046537>.

106 *Treaty of Waitangi Act 1975* (NZ).

107 Oxford University Press, *Max Planck Encyclopedia of Public International Law* (online at 22 October 2025) 'Waitangi Tribunal' [12].

into those settlements'[108] and not necessarily to directly implement the Tribunal's recommendations. Once a settlement is reached, legislation is prepared to give effect to the agreement.

Parliament has the authority to alter or amend any Bill introduced into the House. It also has the democratic responsibility to scrutinise legislation proposed by government. As Kirsty Gover has noted, however, 'the passage and debate of Treaty settlement legislation' is marked by 'restraint'.[109] A political convention resting on the intersection of standing orders and speakers' rulings has developed that recognises treaty settlement legislation should be subject to distinct arrangements akin to the scrutiny and examination of legislation implementing international treaties.[110]

There are two elements of this convention. First, Parliament may only issue amendments that are consistent with the principles and objects of the Bill. This reflects the rule relating to relevance. As Douglas Kidd, Speaker of the House of Representatives, ruled in 1997, 'a bill can be amended only in ways that are relevant. It cannot be turned into something that it is not, and did not start out as'.[111] Given the purpose of treaty settlement legislation is to give effect to a deed of settlement, amendments must be consistent with the agreement. Second, because the settlement was reached in negotiation between the Crown and iwi, Parliament has accepted it may not amend settlement terms unless the parties agree.[112] In examining treaty settlement legislation, then, Parliament's role is much reduced, effectively limited to determining whether and in what form the settlement should be given legal effect.[113]

This convention appears to have first emerged in 1998. When examining the Ngāi Tahu Claims Settlement Bill, the Māori Affairs Committee explained that they sought advice on several points:

> During our consideration the issue of the scope of the bill, and our power to make amendments to it, arose. In this context we invited the Minister in charge of the bill, Hon D A M Graham, to discuss with us policy issues related to the settlement and the scope of potential amendments. We also canvassed issues related to the settlement and the settlement process with Te Rūnanga o Ngāi Tahu. Finally, we sought and received detailed procedural advice from the Clerk of the House on the scope of the bill and our ability to recommend amendments to the bill.
>
> …

108 Te Kāwanatanga o Aotearoa, *The Section 8I Report: A Report on the Progress Made in the Implementation of Recommendations Made to the Crown by the Waitangi Tribunal* (Annual Report, December 2018) 5, 79–84.

109 Kirsty Gover, 'The Politics of Descent: Adoption, Discrimination and Legal Pluralism in the Treaty Claims Settlement Process' [2011] (2) *New Zealand Law Review* 261, 289 ('Politics of Descent'). See also 'Healing the Past' (n 6) 73.

110 Mary Harris and David Wilson (eds), *McGee: Parliamentary Practice in New Zealand* (Oratia Books, 4th ed, 2017) 374, 376.

111 House of Representatives, New Zealand Parliament, 'Speakers' Rulings: As at 2020' (Speakers' Rulings, November 2020) 122. See also Standing Orders of the House of Representatives 2023, SO 300(1).

112 Harris and Wilson (n 110) 376.

113 Marcus Ganley, 'The Role of New Zealand Parliament in the *Treaty of Waitangi* Settlement Process' (Conference Paper, Australasian Political Studies Association Annual Conference, 24 September 2001) 12.

> We accept that it is Parliament's task to determine whether to give effect to the settlement that has been agreed between two parties, but not to substitute a different settlement. It is also Parliament's task to evaluate whether the provisions in the bill do give proper effect to the negotiated settlement. In this way, it is within our power to recommend amendments that will ensure that the bill's provisions work in a technical sense and that all necessary provisions are included, or changed to correct errors of fact or law.[114]

This practice did not command unanimous support. The following year, Rana Waitai MP released a minority report on the Ngāti Tūrangitukua Claims Settlement Bill outlining his frustration with the constraints placed on the select committee inquiry process. It is worth quoting his concerns at length:

> In the earlier case dealing with the settlement of the Ngāi Tahu claims, I formed certain impressions of the processes involved as they touched upon the select committee role. Not the least of impressions was my sense of discomfort with a process that involved the endorsement, or total dismissal, of a Waitangi claim settlement, notwithstanding that the process contains aspects that would not survive passage through a normal select committee stage.
>
> In the case of this bill the select committee again found itself in the situation where we were required to accept a settlement allegedly negotiated between the Crown and iwi (in this case hapu), or reject it, save that minor amendments were permitted where defined by the OTS [Office of Treaty Settlements] as not contrary to the settlement.
>
> The situation where a select committee is placed in a 'take it or leave it' position, which is in effect what occurs in the settlement process, is, without being too precious about it, a matter of revulsion to myself. Indeed I felt sufficiently dismayed with the Ngai Tahu bill that I voted against every clause.[115]

Notwithstanding Rana Waitai's disquiet, subsequent practice has seen the convention crystallise. In 2002, the Māori Affairs Committee examined the Ngati Ruanui Claims Settlement Bill. The Committee reported that when conducting its examination it was

> mindful of the constraints placed on us by the rules relating to the consideration of legislation to confirm agreements, such as settlements of Treaty grievances and international agreements. These mean that neither a select committee nor the committee of the whole House can substantively amend such bills in a manner that is not acceptable to the parties to the deed or treaty being implemented. We are also constrained by the 'scope' rule. Bills that implement international treaties or deeds of settlement of claims under the *Treaty of Waitangi* have a particularly narrow scope. Any amendments recommended must be consistent with the treaty or deed concerned.[116]

This language does not appear to be used in more recent reports though the practice has not changed.[117] The Māori Affairs Committee conducts hearings, accepts written and oral submissions, and proposes minor amendments to the House – which

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114 Ngāi Tahu Claims Settlement Bill 1998 (111-2) (select committee report) iii.

115 Ngāti Tūrangitukua Claims Settlement Bill 1999 (303-2) (select committee report) ix.

116 Ngati Ruanui Claims Settlement Bill 2002 (215-2) (select committee report) 1–2 (citations omitted). See also Gover, 'Politics of Descent' (n 109) 289; Harris and Wilson (n 110) 376.

117 See, eg, Ngāti Tara Tokanui Claims Settlement Bill 2023 (177-2) (select committee report) 2; Ngāti Paoa Claims Settlement Bill 2024 (215-2) (select committee report) 2; Ngāti Hei Claims Settlement Bill 2024 (218-2) (select committee report) 2; Whakatōhea Claims Settlement Bill 2024 (select committee report) (261-2) 2.

are accepted. It examines the consistency of treaty settlement Bills with principles of legislative quality, rather than seek to reopen or replace the agreement that was reached. Parliament is a joint partner in the broader project of settling grievances and renewing constructive relations between the Crown and Māori.

B The Treaty Principles Bill

Recent developments emphasise the important role Parliament can play in supporting treaty relationships. *Te Tiriti o Waitangi* is binding on the New Zealand Government at international law,[118] but is only legally enforceable in domestic law to the extent that it is incorporated in New Zealand legislation.[119] Acknowledging the material differences between the English and te reo Māori versions, legislation incorporates the treaty by reference to its 'principles' rather than its text. Section 4 of the *Crown Minerals Act 1991* (NZ), for instance, provides that people exercising functions and powers under the Act 'shall have regard to the principles of the *Treaty of Waitangi* (*Te Tiriti o Waitangi*)'.

Nicola Wheen and Janine Hayward note that these clauses have been 'an important catalyst for advances in the Treaty relationship'.[120] Drawing on these formulations, the judiciary and Waitangi Tribunal have developed a series of principles that guide the relationship between Māori and the Crown. These principles were first articulated in the 1987 case of *New Zealand Maori Council v Attorney-General (NZ)*, when the Court of Appeal considered that the language of 'treaty principles' refers to at least three core concepts, 'partnership', 'active protection', and 'redress'.[121] Over the years, these concepts have been considered and elaborated in an evolutionary manner by both the courts and tribunal.

In November 2024, the Coalition Government introduced the Principles of the Treaty of Waitangi Bill into the Parliament.[122] The Bill did not seek to affect the settlements process discussed above but would nonetheless radically alter the treaty relationship by moving away from notions of partnership between peoples. It proposed to replace the settled jurisprudence with 'three newly imagined principles'[123] that the Ministry of Justice believed rely 'on a novel reading of the Treaty/te Tiriti that is not supported by the available evidence'.[124] Those new principles would have been:

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118 Matthew S R Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2008) 231.

119 *Hoani Te Heuheu Tukino v Aotea District Maori Land Board* [1941] AC 308; *Ngati Apa Ki Te Waipounamu Trust v A-G (NZ)* [2003] 1 NZLR 779.

120 Nicola R Wheen and Janine Hayward, 'Treaty Principles Clauses: Past, Present and Future' in Metiria Stanton Turei, Nicola Wheen and Janine Hayward (eds), *Te Tiriti o Waitangi Relationships: People, Politics and Law* (Bridget William Books, 2024) 42, 42, quoting Office for Māori Crown Relations, 'Providing for the *Treaty of Waitangi* in Legislation and Supporting Policy Design: Questions for Policy-Makers' (Guidance, March 2022) 2.

121 *Maori Council* (n 3) 664–5 (Cooke P).

122 The Bill was introduced by the ACT Party. The National Party had committed to supporting the Bill to the Committee stage as part of an agreement to form a coalition and secure government.

123 Jones (n 7).

124 Office of the Associate Minister of Justice, 'Policy Approvals for Progressing a Treaty Principles Bill' (Cabinet Paper, 10 September 2024) 10 [55] <https://www.beehive.govt.nz/sites/default/files/2024-09/20240910%20-%20Cab%20paper%20Redacted.pdf>.

Principle 1

The Executive Government of New Zealand has full power to govern, and the Parliament of New Zealand has full power to make laws, –
(a) in the best interests of everyone; and
(b) in accordance with the rule of law and the maintenance of a free and democratic society.

Principle 2

(1) The Crown recognises, and will respect and protect, the rights that hapū and iwi Māori had under the *Treaty of Waitangi*/*te Tiriti o Waitangi* at the time they signed it.
(2) However, if those rights differ from the rights of everyone, **subclause (1)** applies only if those rights are agreed in the settlement of a historical treaty claim under the *Treaty of Waitangi Act 1975*.

Principle 3

(1) Everyone is equal before the law
(2) Everyone is entitled, without discrimination, to, –
(a) The equal protection and equal benefit of the law; and
(b) The equal enjoyment of the same fundamental human rights.[125]

The Waitangi Tribunal found that the Bill would revoke the promises guaranteed to Māori in the treaty.[126]

The Bill received vociferous opposition outside Parliament. Between 10 and 19 November 2024, more than 60,000 New Zealanders took part in the Hīkoi mō te Tiriti (March for the Treaty). Stretching across nine days, the hīkoi culminated in the largest protest outside the Parliament in the country's history.[127] Public protest was matched in other areas. The Justice Select Committee received over 300,000 submissions from the public on the Bill, dramatically surpassing the previous record which sat at just over 100,000.[128]

Significantly, the scale of opposition was influenced by several members of Parliament. As the Bill was introduced into the chamber on 14 November, Te Pāti Māori MP Hana-Rawhiti Maipi-Clarke ripped a copy in half and led a haka. The striking protest delayed parliamentary proceedings and became viral. Within a few days it had been viewed more than 700 million times.[129] While the Bill was not expected to progress past the committee stage, the actions by Maipi-Clarke MP and her parliamentary colleagues demonstrates how Parliament can support treaty relationships by undermining efforts from those within the executive to destabilise them. Indeed, the strength of opposition – inside and outside parliament – led Prime

125 Principles of the Treaty of Waitangi Bill 2024 (94-1) cl 6.
126 Waitangi Tribunal, *Ngā Mātāpono: The Principles* (Wai 3300, 2024) 81.
127 Joel MacManus, 'Was the Hīkoi New Zealand's Largest-Ever Protest?', *The Spinoff* (online, 20 November 2024) <https://thespinoff.co.nz/atea/20-11-2024/was-the-hikoi-new-zealands-largest-ever-protest>.
128 'Frequently Asked Questions: Principles of the Treaty of Waitangi Bill', *New Zealand Parliament* (Web Page, 11 April 2025) <https://www.parliament.nz/en/pb/sc/select-committee-news-archive/frequently-asked-questions-principles-of-the-treaty-of-waitangi-bill/#howmany>.
129 NZ Herald, 'Hana-Rāwhiti Maipi-Clarke and the Haka That's Been Seen 700 Million Times by a Worldwide Audience', *The New Zealand Herald* (online, 19 November 2024) <https://www.nzherald.co.nz/kahu/hana-rawhiti-maipi-clarke-and-the-haka-thats-been-seen-700-million-times-by-a-worldwide-audience/ZPF64PBCKBHBVOB7RISOBZVIPA/>.

Minister Christopher Luxon to commit to abandoning the Bill.[130] In April 2025, following a damning parliamentary committee report,[131] the Bill was defeated 112 votes to 11.[132]

V VICTORIA

The constructive and collaborative approach that characterises the role of Parliament in Indigenous–State agreement-making in Canada and Aotearoa New Zealand is also evident in the early stages of treaty-making in Victoria. In November 2025 the first *Statewide Treaty* was signed – and implementing legislation came into force. However, the parties conceive this as an initial, foundational, and iterative agreement that to followed by future Statewide and Traditional Owner Treaties.[133]

Notwithstanding recent parliamentary debate on the Statewide Treaty Bill, much attention has focused on the role played by the executive in the treaty process. While the process has undoubtedly been driven by a committed government,[134] that government has sought to work in partnership with First Peoples and Parliament. In this Part, I outline the steps taken by the Victorian Legislature and argue that it has acted consistently with a vision of itself as a critical partner in a collaborative endeavour aimed at achieving reconciliation.

The Victorian Parliament has played three critical supportive roles in the treaty process. First, it facilitated and structured progress by enacting legislation to support negotiations. Second, in debating, examining, and passing these Bills, the Parliament demonstrated and helped to generate public and political support for treaty. Third, the passage of legislation in a staggered manner ensured that an uncertain treaty process was marked by a degree of certainty, both during government terms and in advance of State elections. Parliament conceived its role as one of shared responsibility: it exercised its constitutional functions in a manner that informed and educated the community, and protected and reinforced the treaty process. Each point will be outlined in turn.

First, treaty negotiations are structured by rules and institutions established by the Parliament. The *Treaty Act* provides a legislative basis and framework for treaty. The Act enshrines guiding principles for the treaty process.[135] It also provides a mechanism for the State to recognise an Aboriginal designed representative body

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130 Anneke Smith, 'Treaty Referendum Ruled Out under Luxon's Watch', *Scoop* (online, 24 January 2025) <https://www.scoop.co.nz/stories/PO2501/S00066/treaty-referendum-ruled-out-under-luxons-watch.htm>.

131 Justice Committee, New Zealand House of Representatives, *Principles of the Treaty of Waitangi Bill 94-1: And Two Related Petitions* (Parliamentary Report, April 2025).

132 House of Representatives, New Zealand Parliament, 'Journals of the House of Representatives of New Zealand: Fifty-Fourth Parliament' (House of Representatives Journal No 25.8, 10 April 2025) 629. On the wider ramifications of the Bill, see Yasmin Olsen, 'The Principles of the Treaty of Waitangi Bill' (2025) 36(1) *Public Law Review* 17.

133 *Statewide Treaty* (n 9) cl 14(a).

134 George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) 255.

135 *Treaty Act* (n 6) s 1(c).

– the First Peoples' Assembly of Victoria – which is responsible for working with the State in partnership to establish the necessary elements to support future treaty negotiations.[136] Over the years, five elements have been developed:[137] a truth-telling commission; a dispute resolution process to guide the relationship between the parties; an independent Treaty Authority to oversee and facilitate negotiations; a *Treaty Negotiation Framework* setting out rules and processes; and a Self-Determination Fund to finance Aboriginal Victorians' negotiations.

These institutions were not all established by the Victorian Parliament. The Yoorrook Justice Commission was created via Letters Patent,[138] and the First Peoples' Assembly is a public company registered under the *Corporations Act 2001* (Cth). However, legislation not only guides the development of the treaty architecture but provides a public source for its legitimacy. Legislation passed by the Victorian Parliament also interacts with these institutions in different ways. For instance, the Yoorrook Justice Commission was established under the auspices of the *Inquiries Act 2014* (Vic),[139] while the First Peoples' Assembly of Victoria has powers and functions conferred on it by virtue of its recognition as the 'Aboriginal Representative Body' under the *Treaty Act*.[140] Furthermore, as noted above, the *Treaty Act* required the development of a *Treaty Negotiation Framework* and ensures it is legally enforceable. In this way, the Parliament has played a more significant role than is first recognised. In debating and enacting legislation to empower treaty negotiations, the Parliament has served as a partner in a joint project aimed at 'embarking on a renewed and mature relationship' between Aboriginal Victorians and the State, and at 'promoting reconciliation between Aboriginal and non-Aboriginal Victorians'.[141]

Second, Parliament has played a crucial role demonstrating and generating public and political support for treaty. This has occurred in several ways. Most directly, the passage of successive Bills facilitating treaty across multiple terms of government demonstrates community consensus for the process. Smooth passage of appropriation Bills funding executive-led public education campaigns has also supported efforts to build community awareness and understanding of the process.

More subtly, the practice of parliamentary debate has also been important in generating political consensus and driving the process forward. Legislative debate has served a pedagogical and legitimating function as members have risen to

136 Ibid ss 1(b), (d).

137 For discussion of these elements, see Harry Hobbs, 'Taking Stock of Indigenous-State Treaty-Making in Australia: Opportunities and Challenges' (2024) 47(2) *University of New South Wales Law Journal* 548, 552–7 <https://doi.org/10.53637/SREA8485> ('Taking Stock').

138 Victoria, *Victoria Government Gazette*, No S 217, 14 May 2021, 1–7.

139 *Inquiries Act 2014* (Vic) pt 2. Note that this legal avenue was adopted as a compromise. The First Peoples' Assembly preferred a bespoke commission of inquiry which would have required a new legislative foundation. However, political timeframes and a desire to see 'truth-telling up and running' as quickly as possible meant that the Act was relied upon, alongside an agreement with the executive that the process would be adapted: Evidence to Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, Thornbury, 15 October 2024, 2 (Marcus Stewart, former Co-Chair of the First Peoples' Assembly of Victoria).

140 *Treaty Act* (n 6) pt 2.

141 Ibid Preamble.

reflect on their education and growing understanding of the effect of colonisation on First Peoples in Victoria. Second reading speeches are replete with statements acknowledging the historical relationship between Indigenous and non-Indigenous Victorians is 'not a happy' one, and committing to build new relationships based on respect and justice.[142] These statements help to build a parliamentary culture that engages seriously with Indigenous aspirations. A similar process is occurring within the executive through the public hearings of the Yoorrook Justice Commission. Statements and testimony from senior leaders, including the Premier, are 'consolidating government commitment to treaty'.[143]

It may have also influenced parliamentary discourse. In many cases, members opposed to the treaty process or the notion of treaty itself, have been careful to frame their criticism narrowly or cushion their opposition by reaching out to First Peoples in the State. For instance, in debate on the Statewide Treaty Bill 2025 (Vic), Melina Bath, the Shadow Minister for Aboriginal Affairs, began by extending her 'goodwill and good wishes' to the 'many' First Peoples across the community 'who are going to be rejoicing at the end of this week',[144] but nonetheless confirmed her reservations would lead her party to repeal the Bill if elected to government in 2026. Similarly, Liberal MLC Trung Luu acknowledged the debate on the Treaty Bill 'may cause some anxieties in the Indigenous community', and reminded his colleagues to 'be mindful' when conducting themselves in the chamber.[145] Not all members followed this approach. One long-standing MLC decried the Treaty 'as legislated virtue signalling by the self-appointed moral elite', the 'patronising, smug and sanctimonious'.[146] A review of the Hansard reveals that comments like these were rare.

Parliament has adapted its ordinary processes to support its role as partner in a joint project of reconciliation. In 2018, 2022 and 2025 during debate on treaty Bills, the Legislative Assembly suspended its standing and sessional orders to invite several Aboriginal Victorians to attend and address the House while wearing traditional and ceremonial clothes.[147] Gabrielle Williams, the Minister for Aboriginal Affairs, noted that this privilege is 'typically reserve[d] [for] only the most special of occasions'.[148] In addressing the House, Aunty Geraldine Atkinson, Co-Chair of the First Peoples Assembly concisely articulated the rationale for treaty, explaining 'I want treaty to restore the ability of my people to make the decisions that affect our communities, our culture and our country – the ability to

142 See, eg, Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 1779 (Tim Richardson); Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2022, 2529 (Tim Bull).

143 Hobbs, 'Weathering Challenges' (n 75) 341.

144 Victoria, *Parliamentary Debates*, Legislative Council, 28 October 2025, 4120 (Melina Bath).

145 Ibid 4183 (Trung Luu).

146 Ibid 4186 (Bev McArthur).

147 Victoria, *Parliamentary Debates*, Legislative Assembly, 28 March 2018, 872–4; Victoria, *Parliamentary Debates*, Legislative Assembly, 9 June 2022, 2325–7 (Gabrielle Williams); Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2022, 2511–15; Victoria, *Parliamentary Debates*, Legislative Assembly, 14 October 2025, 3804–8.

148 Victoria, *Parliamentary Debates*, Legislative Assembly, 9 June 2022, 2326.

do things our way'.[149] Aunty Geraldine concluded by calling on all members of the House to support the Bill:

> In passing this bill the members of this Parliament have an opportunity to facilitate the creation of the first permanent peace architecture for treaty making. This is a positive step, and I believe it is a step best taken together with all of us. What a message that will send for everyone to see: a consensus vote, all sides of politics coming together to get us closer to treaty in Victoria.[150]

This parliamentary culture is producing tangible results. Recognising the Advancing the Treaty Process with Aboriginal Victorians Bill was 'nationally significant',[151] government members remarked of their hope that it would be met 'not so much [with] debate but … a thorough discussion of the issues and the concerns in relation to the advancing the treaty process'.[152] These hopes were largely realised. Although the Opposition had committed to voting against the Bill – arguing that treaty should be led by the Commonwealth – members did not seek to derail or frustrate passage. Rather, they invited the government to 'provide a little more detail' on consultation processes to engage Aboriginal and non-Aboriginal Victorians in the treaty process,[153] and otherwise explain the need for treaty. Perhaps the Opposition was convinced. Despite voting against the *Treaty Act* and opposing the process at the 2018 State election, the Opposition subsequently met Aunty Geraldine's request and supported the Treaty Authority and Other Treaty Elements Bill 2022. Shadow Minister for Indigenous affairs, Peter Walsh explained: 'The Liberals and Nationals are committed to advancing the treaty process in Victoria in a way that supports self-determination and reconciliation while strengthening community and connection to Country'.[154]

Following the defeat of the Voice referendum, the Opposition has returned to its original position and declared that it would withdraw from the treaty process.[155] This reassessment owes more to national factors than matters internal to the Victorian treaty process. It is also inconsistent with the emerging understanding that Parliament serve as a constructive partner in the project of reconciliation.

The third key role Parliament has played is as guarantor of the treaty process. In circumstances where treaty-making is driven by democratic politics, which can fluctuate, legislation has been passed in advance of State elections to provide parties with a measure of security and certainty. This not only ensures negotiations are conducted under clear rules and procedures, but that all parties are conscious of outside constraints, including political timeframes. In this manner, Parliament serves as a partner to the government and the First Peoples' Assembly

149 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2022, 2513.
150 Ibid.
151 Victoria, *Parliamentary Debates*, Legislative Assembly, 5 June 2018, 1685 (Jacinta Allan).
152 Ibid 1686 (Anthony Carbines).
153 Victoria, *Parliamentary Debates*, Legislative Assembly, 7 June 2018, 1924–5 (Tim Bull).
154 Sumeyya Ilanbey, 'Opposition Backs Next Step to Treaty with Indigenous Victorians', *The Age* (online, 21 June 2022) <https://www.theage.com.au/politics/victoria/opposition-backs-next-step-to-treaty-with-indigenous-victorians-20220621-p5avdl.html>.
155 Kolovos and Ore (n 12).

in a collaborative exercise. It continued to serve as a partner when it enacted the *Statewide Treaty Act 2025* (Vic) in October 2025.

The Victorian treaty process has been buttressed and guided by a constructive and supportive Parliament. Legislation has not only established the institutional architecture for negotiations – and given the agreement legal force – but has also served instrumental purposes by providing a public source of legitimacy, consolidating public support, and instilling a measure of certainty and security. As I have noted, however, the absence of bipartisanship means that the future of treaty-making in Victoria is uncertain. In the following Part, I draw together the experiences from the three case studies to argue that parliaments generally, and the Victorian Parliament in particular, should continue to play a constructive role in the State's treaty process.

VI THE CASE FOR A CONSTRUCTIVE PARLIAMENT

The case studies explored above reveal the diverse ways Parliament can support or undermine agreement-making processes in practice. As I have noted, Parliament can provide a rationale for and defence of negotiations and agreements, structure talks, and implement legislation to give legal effect to settlements. At the same time, parliamentarians – and Parliament itself – can also introduce unnecessary and gratuitous delay, seek to inflame anxieties, or even attempt to unwind hard won agreements. While the course followed by a legislature is shaped by a range of factors beyond the scope of this article, including history, law, and public and political discourse, it is important to emphasise that Parliament is not a small vessel rocking listlessly on great waves. Parliament has the capacity to influence the success or otherwise of treaty processes.

Parliament should act constructively. Treaties and agreements may be subject to considerable debate and disagreement. That debate should be conducted in accordance with a certain spirit. A rich vein of philosophical work has underscored how public and institutional failures to take the views and interests of marginalised people seriously can cause further harms.[156] A Parliament that chooses to undermine or obstruct agreement-making with Indigenous communities not only threatens efforts towards reconciliation but signifies its disdain for the attempts of Indigenous nations to secure recognition of their rights and status. Where that disdain emanates from the central representative institution of the polity, at least two consequences will flow. Most directly, many Indigenous peoples will be deeply hurt by this experience. More diffusely, the quality of our political system,

156 Jill Stauffer, *Ethical Loneliness: The Injustice of Not Being Heard* (Columbia University Press, 2015); Mary Scudder, *Beyond Empathy and Inclusion: The Challenge of Listening in Democratic Deliberation* (Oxford University Press, 2020). In the Australian Indigenous context, see Gabrielle Appleby and Eddie Synot, 'A First Nations Voice: Institutionalising Political Listening' (2020) 48(4) *Federal Law Review* 529 <https://doi.org/10.1177/0067205X20955068>; Poppy de Souza and Tanja Dreher, 'Dwelling in Discomfort: On the Conditions of Listening in Settler Colonial Australia' (2021) 20(2) *Borderlands Journal* 30.

including its capacity to facilitate genuine listening across and between diverse communities will also be greatly damaged.[157] A constructive Parliament need not necessarily always enact legislation to implement a treaty, but in providing a rationale for and channelling and structuring negotiations, it demonstrates its commitment to sincere and careful listening. In doing so, Parliament demonstrates its commitment to working in partnership to build a renewed relationship between the State and Indigenous communities. Beyond resort to a deep form of listening, five distinct though related arguments justify a constructive approach.

The first argument is by analogy. In Canada and Aotearoa New Zealand, Parliament approaches a Bill to implement an Indigenous–Crown agreement as if it were a Bill to implement an *international* agreement. Modern Indigenous–State treaties are not international treaties within the meaning of the *Vienna Convention on the Law of Treaties*,[158] but they are also not ordinary contracts. In a series of careful decisions over many years, the Supreme Court of Canada has drawn on the special character of agreements negotiated between the State and distinct nations and communities whose connection to country precedes the state by thousands of years, to characterise such agreements as sui generis instruments.[159] Even if these instruments are not international, they remain inter-communal covenants marking a 'nation-to-nation alliance'.[160] That character informs the role of Parliament.

A constructive approach does not demand that Parliament legislate to give effect to a Bill. Rather, it merely requires that Parliament act in a manner consistent with its approach when considering Bills to implement international agreements. In dualist systems like Australia, international treaties ratified by the Commonwealth have no effect in domestic law until and unless legislation incorporates the agreement.[161] While Parliament may debate the Bill introduced in the House by questioning whether it meets the object and purpose of the treaty and assessing its impact on existing legislation, it cannot amend the multilateral or bilateral instrument itself. Parliament's well accepted role is to act in a constructive manner by scrutinising and reviewing the treaty and determining whether it should pass legislation to give it legal effect in Australian law.[162] It may choose not to pass such legislation, but it does not seek to undermine the treaty or attempt to unilaterally renegotiate the agreement long after the text of the instrument has been accepted by the parties.

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157 Scudder (n 156) ch 1.

158 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a).

159 *R v Sioui* [1990] 1 SCR 1025, 1038 (Lamer J for the Court); *Restoule* (n 51) [96], [103] (Jamal J for the Court).

160 *Restoule* (n 51) [13] (Jamal J for the Court). See also Hobbs, 'The Four Dimensions' (n 28).

161 *Tajjour v New South Wales* (2014) 254 CLR 508, 554 [48] (French CJ); *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 303–5 (Gummow J). On the role of Parliament here, see Joanna Harrington, 'Scrutiny and Approval: The Role for Westminster-Style Parliaments in Treaty-Making' (2006) 55(1) *International and Comparative Law Quarterly* 121 <https://doi.org/10.1093/iclq/lei069>.

162 On the unique committee process, see 'Joint Standing Committee on Treaties: Role of the Committee', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/Role_of_the_Committee>.

The second argument draws on comparative practice. As we have seen, Parliaments in British Columbia and Aotearoa New Zealand – two jurisdictions with extensive practices of agreement-making with Indigenous communities – have adopted a constructive approach because it produces positive outcomes. A supportive approach respects the institutional responsibility of each branch of government. Government appreciates that treaty processes negotiated confidentially require broad community understanding and support for their effective implementation. Parliament exercises its constitutionally mandated accountability functions in a unique manner that recognises the common goal shared by both institutions: that the negotiated compromise reached by an Indigenous community and the executive on behalf of the State should be understood by the public and consideration conducted with respect. Accountability is thus directed at ensuring the Bill fulfils the purpose of the treaty or treaty settlement, and that the Parliament (and thereby the community at large) is informed of the agreement and its effect. The executive respects this restrained and collaborative approach, amending the Bill in accordance with relevant committee recommendations.

Canada and Aotearoa New Zealand have also found that a supportive approach furthers the shared goal of reconciliation. As the Supreme Court of Canada has often remarked, reconciliation is most likely to be achieved 'through negotiated settlements, with good faith and give and take on all sides'.[163] This not only 'often demands judicial forbearance' to allow 'space for the parties to govern together and work out their differences' but also parliamentary restraint when considering Bills to implement these negotiated agreements[164]. Agreement-making is a collaborative endeavour. Parliament and the executive must work together in a spirit of partnership to ensure the shared aspirations of Indigenous nations and the State – the desire for a renewed relationship built on trust and mutual respect – are engaged with seriously.

The third argument draws on ethical commitments. In circumstances where Parliament has established a process through which Indigenous nations can seek redress for historical and contemporary grievances and establish a framework for right relations with the State, Parliament bears a moral and ethical obligation to ensure that process is not unilaterally abandoned. Subsequent efforts to unwind or frustrate a treaty process or finalised agreement not only break trust with Indigenous nations but should be seen as acts of disrespect, inconsistent with a relationship based on mutual support and reconciliation. Where that disrespect is led by government as in Aotearoa New Zealand, Parliament should stand firm to ensure promises made are promises kept. It is for this reason that the decision by the Queensland Parliament to repeal legislation and abolish a truth telling inquiry in 2024, was widely condemned. Inquiry chair Joshua Creamer considered the action 'hugely disrespectful', noting:

> There is a lot of suffering, a lot of pain, a lot of hurt … To cease that in the very early stages of our work is a significant step back on the road to reconciliation for the

163 *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1123 [186] (Lamer CJ for Lamer CJ, Cory and Major JJ).

164 *Nacho Nyak Dun* (n 55) 583 [4] (Karakatsanis J for the Court).

> Aboriginal and Torres Strait Islander community. I am really genuinely concerned about the trauma of this decision.[165]

The action was particularly concerning given the Path to Treaty Bill had been passed only 18 months earlier 88 votes to 4. During that debate then Opposition Leader David Crisafulli expressed his hope that the Bill could provide 'the catalyst for true accountability of government'.[166] Less than two years later, Premier Crisafulli led a government that relied on an urgency motion to push through the Bill abandoning the process in one sitting day.[167] The Queensland Parliament may be unicameral, but government members were not bound to support this action or the way it was carried out. The Queensland Parliament, as an institution, acted dishonourably.

The fourth argument rests on the broad nature of parliamentary responsibilities. Adopting a constructive approach to Indigenous–State agreement-making does not minimise Parliament's role nor is it inconsistent with its constitutional and democratic obligations. Indeed, as I have noted above, a constructive Parliament continues to exercise careful oversight over the process, assessing whether and how a Bill to implement an agreement will affect existing law. But Parliament has a wide range of responsibilities, one of which is to inform and educate the community. As we have seen in Canada and Aotearoa New Zealand, the Victorian Parliament could play a critical educative and communitive role when considering Bills to implement future Statewide or Traditional Owner Treaties. Through constructive and engaged parliamentary debate, the legislature could inform the community and socialise understanding over the key aspects and contours of the Bill. In exercising its scrutiny functions, it could also improve the Bill by ensuring it fulfils the spirit of the agreement and has no unintended consequences.

These are significant and necessary functions. I have noted elsewhere that the constitutional framework in Australia places greater pressure on the need to build community ownership over an Indigenous–State treaty.[168] Parliamentary committees are often effective vehicles for promoting public awareness. While the Statewide Treaty Bill 2025 (Vic) was not examined by a committee, future treaty Bills could be referred to the Legislative Assembly's Legal and Social Issues Committee, or a Joint Select Committee, for examination. Scrutiny could be framed in a particular manner. As one part of a joint project of governance and reconciliation, the Committee could conceive its responsibility as providing an opportunity for the Victorian public, both Indigenous and non-Indigenous, to familiarise themselves with the treaty and voice their thoughts on process. Consistent with the approach elsewhere, the Committee could issue recommendations that promote community education and further the aims of the treaty rather than unpick or challenge its

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165 Kate Hassett, '"No Interest in Listening" QLD Ends Truth-Telling & Healing Inquiry, Repealing Path To Treaty', *Marie Claire* (online, 2 December 2024) <https://www.marieclaire.com.au/news/queensland-treaty-truth-telling-david-crisafulli-lnp/>.

166 Queensland, *Parliamentary Debates*, Legislative Assembly, 9 May 2023, 1262 (David Crisafulli).

167 The failure of the Voice referendum gave political cover to the government to abandon the treaty process, but Crisafulli had been under pressure within his own party well before the referendum: Hobbs, 'Taking Stock' (n 137) 548, 577 n 201.

168 Hobbs, 'Weathering Challenges' (n 75).

basis. This might be particularly helpful in circumstances where it is not clear whether all Victorians understand or are even aware of a treaty or how it could affect their lives.[169]

In drawing attention to difficulties or problems that might emerge, Parliament can also improve the likelihood that the treaty process is supported by all Victorians. In British Columbia, the Select Standing Committee on Aboriginal Affairs conducted a comprehensive inquiry into the draft *Nisga'a Agreement-in-Principle* in 1997.[170] Although negotiations had begun in 1993, and an Agreement in Principle reflects an advanced stage of talks, the Committee heard that people across the province found the *Nisga'a Treaty* 'complex and difficult to understand' and were 'largely unaware of how treaty negotiations work and what role various parties have within that process'.[171] The report also found that opportunities for community involvement were limited. The government had established mechanisms to allow interested observers to meet with negotiators and others involved in the process, but the general view was that such meetings were inadequate and could not prevent the feeling that decisions were being made without understanding how they would affect local non-Aboriginal communities.[172] Concluding that the lack of awareness was 'a problem in both aboriginal and non-aboriginal communities',[173] the Committee issued a series of recommendations to the provincial government and the BCTC aimed at building community ownership of the process.

Recommendations focused on developing and supporting community-based education programs and new school curricula, information-sharing networks, and improving public access to treaty process discussions.[174] On this last point, the Committee recommended that negotiations should be held in communities that will be directly affected by the treaty, and that meetings between negotiators, ministry staff, members of advisory committees, and Aboriginal and non-Aboriginal people should also be conducted within communities.[175]

Prior to the release of the Statewide Treaty in September 2025, the negotiating parties had committed to keeping Victorians informed of the progress of their talks. A Joint Statement on Treaty Negotiations released in January 2025 declared that the parties will regularly issue statements 'to keep Victorians updated'.[176] This is a good start, but more will be needed in the future. Only five Joint Statements were

169 A point made by the Shadow Minister for Aboriginal Affairs during debate: Victoria, *Parliamentary Debates*, Legislative Council, 28 October 2025, 22–3 (Melina Bath).

170 Select Standing Committee on Aboriginal Affairs, Legislative Assembly of British Columbia, *Towards Reconciliation: Nisga'a Agreement-in-Principle and British Columbia Treaty Process* (First Report, July 1997) (copy on file with author) ('*Towards Reconciliation*'); British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 36-1, vol 2, No 17 (8 August 1996) 1667.

171 *Towards Reconciliation* (n 170).

172 Ibid.

173 Ibid.

174 Ibid.

175 Ibid.

176 Natalie Hutchins, Ngarra Murray and Rueben Berg, 'Joint Statement on Treaty Negotiations' (Joint Statement, Victoria State Government and First Peoples' Assembly of Victoria, 13 January 2025).

provided across the life of the (admittedly quick) negotiations.[177] Further, limited to general outlines of the subject matter and content discussed, these press releases offered little clarity on the process or substance of the negotiations for those not following closely.

Drawing on the experience in British Columbia, in future treaty talks parties could consider holding public meetings where members of the negotiating teams outline the discussion in broad terms and respond to questions from ordinary Victorians. More formalised processes could also be established. Recognising that 'public confidence in the negotiation process [was] essential for successful agreements', British Columbia developed treaty negotiation advisory committees which ensured third party interests were considered, and invited observers to negotiations.[178]

The Select Standing Committee's report should be examined closely in Victoria. It emphasises the need for the First Peoples' Assembly and state government to develop mechanisms that allow Victorians to engage with treaty and gain a greater sense of ownership over the process. It also demonstrates that a constructive Parliament is not an inactive one: critique is necessary to enhance agreement-making processes.

The fifth justification is based on the rights of Indigenous peoples. I consider this justification last not because it is least important but because it imposes an additional obligation on Parliament. In my view, Parliament can respect Indigenous peoples' right to self-determination not simply by supporting the process but by endorsing agreements negotiated with the State that Indigenous nations have ratified. This more onerous obligation arises only when and if an Indigenous community has itself endorsed a treaty.

Described as 'the river in which all other rights swim',[179] the right to self-determination is guaranteed in common article 1 of the *International Covenant on Civil and Political Rights*,[180] and the *International Covenant on Economic, Social and Cultural Rights*,[181] as well as article 3 of the *United Nations Declaration on the Rights of Indigenous Peoples*.[182] At its core, self-determination is 'the right to make decisions'.[183] For Indigenous nations, a modern treaty or treaty settlement involves many difficult decisions. These instruments are not only legally complex and technical but require careful and challenging compromises on behalf of the Indigenous signatories. Although modern treaties and treaty settlements

177 Joint Statements were released on 13 January, 21 March, 18 June, 4 July, and 15 August. See Victoria, First Peoples – State Relations, 'Treaty Negotiation Updates' <https://www.firstpeoplesrelations.vic.gov.au/treaty-negotiation-updates>.

178 McKee (n 70) 40.

179 Craig Scott, 'Indigenous Self-Determination and Decolonization of the International Imagination: A Plea' (1996) 18(4) *Human Rights Quarterly* 814, 814 <https://doi.org/10.1353/hrq.1996.0049>.

180 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 1.

181 *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 1.

182 *UNDRIP* (n 42) art 3.

183 Human Rights and Equal Opportunity Commission, *Aboriginal and Torres Strait Islander Social Justice Commission* (First Report, 1993) 41.

are intended to 'further the objective of reconciliation' by, among other things, 'creating the legal basis to foster a positive long-term relationship' between Indigenous and non-Indigenous parties,[184] talks occur under structural constraints. Ultimately, government 'defines the parameters for negotiation',[185] and Indigenous parties must determine whether to enter the process, and then identify and obtain innovative settlement terms that meet their aspirations within that envelope.

Perhaps the most significant limitation concerns restitution of land. Land restitution supports the cultural and spiritual needs of Indigenous communities, delivers justice for past wrongs, and provides for the establishment of an economic base.[186] In both Canada and Aotearoa New Zealand, however, the quantum of land transferred through modern treaties and treaty settlements has been underwhelming. Under their modern treaties, Yukon First Nations surrendered their Aboriginal rights in almost 484,000km^2 in exchange for defined treaty rights and settlement land consisting of 41,595km^2,[187] just over 11% of their country.[188] In Aotearoa New Zealand, government policy has, at times, operated to prevent the return of culturally significant mountains and mountain ranges, with these natural features instead 'gifted to the nation'.[189] Similar challenges present themselves in native title settlements in Australia. Indigenous nations that negotiate and ratify these agreements make hard choices and their members must grapple with difficult questions – does treaty-making 'carry forward the colonial imperative of thinning [their] connection to [their] lands, [their] ways of living on and maintaining them'?[190]

Where a treaty is finalised and ratified by an Indigenous nation, Parliament should carefully consider its role. As David Chudnovsky, NDP member for Vancouver-Kensington, remarked in debate on the Bill to implement the *Tsawwassen Treaty*:

> [E]ven though we on this side would have done this deal very differently, and even though I accept many of the concerns and the criticisms, I am acutely aware that the treaty is a test of our will and our morality. If we were to reject the treaty now, it would be another broken promise. It would be another betrayal. It would be just another example of the way first nations have been treated since their lands were

184 *Beckman* (n 52) 119 [10] (Binnie J for McLachlin CJ, Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ).

185 Linda Te Aho, 'The "False Generosity" of Treaty Settlements: Innovation and Contortion' in Andrew Erueti (ed), *International Indigenous Rights in Aotearoa New Zealand* (Te Herenga Waka University Press, 2017) 99, 103.

186 Christopher Alcantara, 'To Treaty or Not to Treaty? Aboriginal Peoples and Comprehensive Land Claims Negotiations in Canada' (2008) 38(2) *Publius* 343, 353 <https://doi.org/10.1093/publius/pjm036>.

187 *Beckman* (n 52) 118 [9] (Binnie J for McLachlin CJ, Binnie, Fish, Abella, Charron, Rothstein and Cromwell JJ). See also Frank Duerden, 'Land Allocation in Comprehensive Land Claim Agreements: The Case of the Yukon Land Claim' (1996) 16(4) *Applied Geography* 279 <https://doi.org/10.1016/0143-6228(96)00015-X>.

188 Though note that First Nations retained substantial shared rights over larger portions of their traditional territory.

189 Te Aho (n 185) 108, citing *Ngāi Tahu Claims Settlement Act 1998* (NZ) ss 15–16.

190 Johnny Mack, 'Turning Sideways: Intimate Critique and the Regeneration of Tradition' (2024) 28(2) *Review of Constitutional Studies* 241, 257. In Australia, see Hannah McGlade, 'The *McGlade* Case: A Noongar History of Land, Social Justice and Activism' (2017) 43(2) *Australian Feminist Law Journal* 185 <https://doi.org/10.1080/13200968.2017.1400371>.

> invaded, stolen and occupied. In short, to reject the treaty now would be another chapter in the sordid history of colonialism.[191]

For Parliament to reject a treaty or agreement negotiated with the State and ratified by an Indigenous nation would be to demonstrate a failure to listen.[192]

VII CONCLUSION

Parliament plays a more significant role in Indigenous–State agreement-making than is often assumed. While the executive leads negotiations and ultimately signs any settlement, Parliament is not merely a passive actor: it can both support and undermine treaty processes. In this article, I have provided a typology outlining the various constructive and obstructive roles available to Parliament. I have then examined in detail the approaches taken in British Columbia, Aotearoa New Zealand, and Victoria to further illuminate how Parliament may operate in practice.

In British Columbia and Aotearoa New Zealand, a broad consensus on the value of treaty relationships has helped to orient Parliament. In these jurisdictions, Parliament acts constructively and collaboratively, supporting the process of agreement-making. Parliament informs itself of the agreement, socialises its terms within the community, and assesses the legal consequences that will flow from statutory authorisation. It does not unnecessarily delay, frustrate, or undermine treaty-making. The Victorian Parliament has adopted a similar approach in the early stages of treaty-making. As broad parliamentary consensus ruptures, however, this vision may come under threat.

The approach adopted by Parliament in each jurisdiction also tells us something about the nature of treaty-making and treaty settlements. These instruments are different in character from both an 'ordinary common law contract'[193] and 'the proverbial *Dog Act*'.[194] Treaties are solemn promises by diverse political communities to reconcile competing claims though dialogue and mutual agreement. In establishing a framework for addressing past injustices and building new relationships based on justice and mutual respect, treaties are foundational instruments of basic importance to the polity.[195] This unique and distinctive character requires Parliament to modify its basic combative – and partisan – posture. As Richard Riordan, Liberal MLA for Polwarth, noted during debate on the Treaty Authority Bill in June 2022, 'for the opportunity to get this right, to really faithfully and dutifully right the wrongs of the past, we have to have all sides

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191 British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 38-3, vol 22, No 8 (17 October 2007) 8587.

192 Stauffer (n 156).

193 *Nunavut Tunngavik Inc v Canada (Attorney-General)* (2009) 457 AR 320, 323 [6] (Charbonneau, Watson and Slatter JJA).

194 Jeffrey Goldsworthy, 'The "Principle in *Ranasinghe*": A Reply to HP Lee' (1992) 15(2) *University of New South Wales Law Journal* 540, 543; *McCawley v The King* (1920) 28 CLR 106, 116 (Birkenhead LC for the Court).

195 See also Hobbs and Taylor (n 30); Hobbs, 'The Four Dimensions' (n 28).

of politics together. We have to have all sides of the house prepared to speak to and work on this process'.[196]

Parliaments should see themselves as active partners in reconciliation. Their engagement is crucial to shaping and sustaining fair, durable, and legally sound agreements between Indigenous communities and the State. This understanding can help build a precedent in Victoria and other jurisdictions newly engaged in or contemplating Indigenous–State treaty and agreement-making processes.

196 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2022, 2525.