



FEDERATION OF VICTORIAN TRADITIONAL OWNER CORPORATIONS

DISCUSSION PAPER 1

# UNDERSTANDING THE LANDSCAPE: THE FOUNDATIONS AND SCOPE OF A VICTORIAN TREATY



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**A NOTE ON LANGUAGE CONVENTIONS:** Within the Federation paper series, there are various terms used to refer to the two parties engaged in treaty making: First Peoples and settlers. The terms 'First Peoples', 'First Nations', 'Indigenous' and 'Aboriginal and Torres Strait Islander' may be used interchangeably throughout the papers, particularly when referring to the broader Australian context.

When focusing on Victoria, the terms 'Aboriginal people' or 'Aboriginal Victorians' are commonly used to refer to the diaspora of First Peoples living in Victoria, inclusive of Aboriginal people from across Australia and those with genealogical ties and/or connection to Country in Victoria. Traditional Owner is used to denote the latter, a person connected to Country and belonging to an Aboriginal group in the regions now known as Victoria.

The Federation uses the terms 'settler' and 'non-Indigenous' for any individual or group of people who came to Australia at any time after the first invasion in 1788. Settlers are the dominant majority in Victoria and in treaty conversations will be represented by elected and appointed government staff whom are yet to be decided. Treaty-making presents an opportunity for an agreement between representatives of Australian settlers and those of First Peoples in Victoria.



# PURPOSE

**This paper is the first in a series of discussion papers presented by the Federation of Victorian Traditional Owner Corporations (the Federation).**

These papers do not purport to represent the firm or fixed positions of the Federation, rather, they seek to contribute to the thinking around treaty making in Victoria by presenting a potential treaty model, which can be further explored, critiqued and refined. It is hoped that these papers may focus discussions and provide a starting point to begin the process of building consensus among Victorian Aboriginal people and Traditional Owner communities, as to their aims and objectives in the treaty process.

## SIX DISCUSSION PAPERS

PAPER 1	Understanding the landscape: the foundations and scope of a Victorian treaty
PAPER 2	Sovereignty in the Victorian context
PAPER 3	Enshrining Aboriginal rights
PAPER 4	Aboriginal control of Aboriginal affairs: an Aboriginal parliament and public service
PAPER 5	A framework for Traditional Owner treaties: lessons from the Settlement Act
PAPER 6	A comprehensive treaty model for Victoria

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# BACKGROUND

**On 3 July 2018, the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Treaty Act), was assented into law, marking the first time an Australian parliament has enacted legislation contemplating a treaty with Australia's first peoples.<sup>1</sup>**

The Treaty Act sets out the process to establish the foundations for substantive treaty negotiations. Under the current stage, the Victorian Treaty Advancement Commission (**Commission**) is tasked with devising the structure and form of the First Peoples Assembly of Victoria (**Assembly**).<sup>2</sup>

Once established, the Assembly's role is to negotiate directly with government to create the structures under which all future treaty negotiations will occur. The Treaty Act specifies these structures, as:

- a treaty negotiation framework (**Framework**) setting out the process for negotiation, including (among other matters) how agreements are formalised, minimum standards parties must meet to enter negotiations, the potential prohibition of certain matters being included in a treaty, and enforcement mechanisms;<sup>3</sup>
- a Treaty Authority, to facilitate and oversee negotiations, to administer the Framework, as well as resolve disputes, and carry out research;<sup>4</sup>
- a self-determination fund to support Traditional Owners and Aboriginal Victorians to have equal standing in negotiations, and provide financial resources to build capacity, wealth and prosperity;<sup>5</sup> and
- a dispute resolution process.<sup>6</sup>

From the experience of navigating other agreement making processes, it is the Federation's view that the Framework is the most critical of the structures to be developed by the Assembly, as it will establish the scope, and the limitations, for all future treaties. To successfully design the Framework, it is necessary for Traditional Owners and Aboriginal Victorians to start to conceptualise the treaty, or treaties they want to achieve, and this paper hopes to commence, and contribute, to that process.

# EXECUTIVE SUMMARY

**This paper is organised in three sections, with each building on the other to explore how the current state of Aboriginal affairs might be incorporated and expanded in a proposed model for the Victorian treaty.**

The three parts are:

**PART 1:** The current landscape in Aboriginal affairs;

**PART 2:** A discussion of the Framework; and

**PART 3:** The exploration of a potential treaty model.

**Part 1 begins with an overview of the current landscape of Aboriginal affairs, made up of Aboriginal and Traditional Owner organisations, interest groups, laws and policies.**

We suggest this is an appropriate starting point in the design of the Framework, providing a base from which it may be possible to conceive of what a treaty or treaties could be, and what they may contain. To be clear, we do not suggest that an examination of the current confines of Aboriginal affairs is sufficient to address the entirety of issues to be raised and resolved by treaty. On the contrary, we see such an examination as likely to highlight only the minimum content that will need to be covered and addressed.

The primary focus of the review in Part 1 is to consider Aboriginal organisations or bodies currently representing Aboriginal interests, or afforded a level of recognition by the State, in three broad categories:

- **Aboriginal Community Controlled Organisations (ACCOS):** operate to deliver specific services (e.g. health, legal, language, etc.), in which membership is dependent on Aboriginality, and perhaps residency within a specified region, but not citizenship of any particular Traditional Owner Group;
- **Traditional Owner Groups:** being those traditional groups and bodies (however described, be they nations, peoples or clans) who assert sovereignty over their traditional lands, and may or may not have a corporate form for the purpose of asserting and exercising traditional rights to Country;

- **Consultative Bodies:** being various bodies and committees established by government for the purposes of consultation, partnership and / or co-design in constructing policy or legislation, such bodies being local and regionalised (as in the case of the Local Aboriginal Networks) or convened for high level projects (such as the Aboriginal Treaty Working Group, or the Aboriginal Executive Council), or targeted to specific government/community agreements (such as the Aboriginal Justice Forum).

Finally, Part 1 also starts to consider how each of these groups, their roles, governance and responsibilities could fall within the ambit of treaty, and be considered in the design of the Framework.

**Part 2 of the paper will explore the concept of the Framework itself.**

The Federation will seek to counter the current language around the Framework as an administrative and neutral task and suggest it is in fact critical to all future treaties, and in substance appears, for all relevant purposes, to almost take on the character of a treaty in its own right.

This section includes an examination of the requirements for the Framework set out in the Treaty Act and practical examples of frameworks utilised in negotiations between government and Indigenous peoples in both Victoria and British Columbia. This will show that any framework used to facilitate negotiations will inevitably be a moment of limitation and narrowing of issues between the parties. Accordingly, any assessment of the Framework as a straightforward task, free of wider political implications, is flawed, and an overly simplistic rendering of the Assembly's role in negotiating the Framework.

On that basis, we assert that the Assembly should acknowledge its role as commencing substantive treaty negotiations with the State, and following agreement of the Framework, could consider seeking the endorsement of Traditional Owners to have the Framework enshrined as the first direct and enforceable Victorian treaty.<sup>7</sup> This would allow for immediate and real change in relations between Aboriginal Victorians and the State, and could also provide a negotiated framework for further treaties between the State and individual Traditional Owner groups.

**In Part 3 of this paper we will put forward a proposal as to how a Framework could be developed to incorporate and advance the aspirations of all Aboriginal Victorians, and include the various ACCOs, Traditional Owner groups and Consultative Bodies.**

This part of the paper will consider whether this is best achieved by the creation of a state-wide democratic representative body which, for the purposes of this paper, we refer to as the Treaty Representative Body or TRB.

We come to this proposal on the basis of several assumptions, arising from our own consultations and review of treaty literature, as to what Aboriginal Victorians and Traditional Owners will likely seek to obtain through the treaty process, namely that they will aspire to:

- achieve recognition of their sovereignty;
- take control of Aboriginal affairs in Victoria;
- enshrine Aboriginal rights as established in various international instruments; and
- create localised treaties with individual Traditional Owner groups.

While there are a number of organisations among the existing ACCOs, Traditional Owner groups, and Consultative Bodies that could advance individual components of these aims, it would seem that ultimately the creation of a centralised Aboriginal body is necessary to ensure they are achieved in full.

This is because a centralised body could exercise sovereign power, and engage its own bureaucracy to implement its policy at a state-wide level, achieving an impact far exceeding that available to any existing or localised body. It could also act in a powerful representative role in the Victorian political sphere, and would be large enough to act as an effective counter to State power, and effectively advocate for all Aboriginal Victorians and Traditional Owners.

Part 3 also covers the relationship between the TRB and Traditional Owner groups in the proposed Framework. This envisages the TRB overseeing a further framework in which Traditional Owner groups directly enter into individual treaties with the State to have their own sovereignty recognised at the local level.

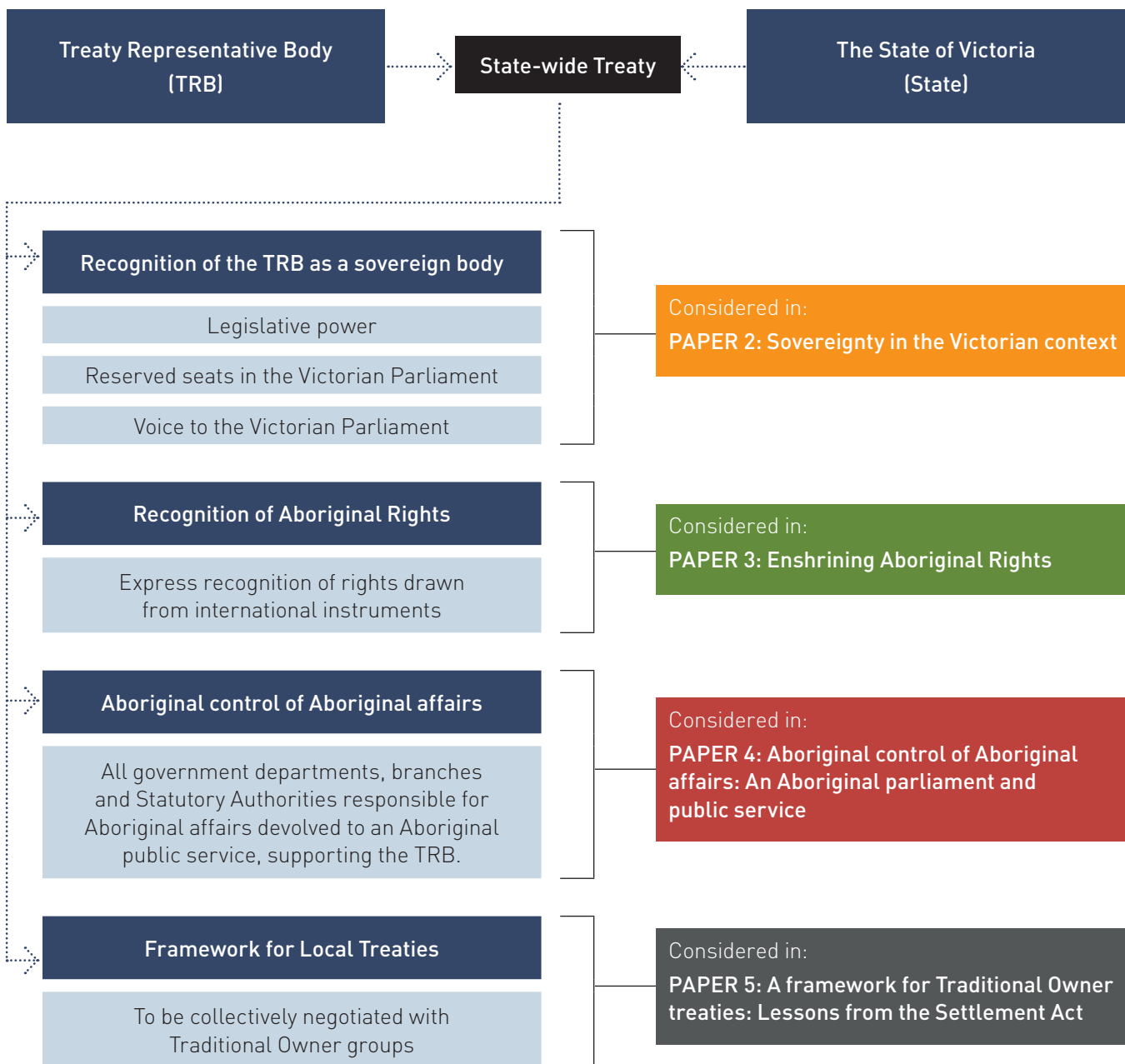
### Further Papers

A full examination of the detail of the entirety of the potential structure is beyond the scope of this paper, and individual components and issues will be explored in future papers. At Figure 1.1 is a diagram setting out the features of the full potential model and an indication of which Federation discussion paper will consider each component or issue.

In conclusion, we reiterate that this model is not put forward as final, or even complete, but simply as a starting point for discussion. It is likely that the Federation's position and recommendations will evolve with the subsequent papers and this will be reflected in future discussions. However, our primary concern, which is unlikely to change, is that the Assembly cannot develop the Framework in isolation, or conceived of as simply an administrative task. This is because the Framework will naturally have to anticipate the type of treaty or treaties it hopes to produce. Accordingly, the Assembly will need to have a firm view of what it is setting out to achieve before undertaking this important task.

We hope that this paper, and our future papers, will assist the Assembly, and all Aboriginal Victorians, in undertaking this vital work.

Figure 1.1: Overview of proposed model







# PART 1

## THE CURRENT LANDSCAPE IN ABORIGINAL AFFAIRS

1.1. SERVICE BODIES

1.2. TRADITIONAL OWNER GROUPS

1.3. CONSULTATIVE BODIES

# PART 1

## THE CURRENT LANDSCAPE IN ABORIGINAL AFFAIRS

Since invasion, which in the Victorian context largely commenced in the 1830s, Aboriginal people have organised in various ways to try to oppose the impacts of colonisation, and to maintain law and culture in the face of systemic racism, and overt attempts to dismantle their societies.

The manner and form of this organisation has necessarily responded to the political and social realities of the day, as well as the particular needs of the Aboriginal community. We suggest this is observable from the initial agreement making that occurred upon contact, to subsequent violent resistance, and through to the activism and diplomacy during and after the demise of the mission system. This is also evident in the modern context, perhaps first arising in the 1970s, in struggles for independent health and legal services, efforts to recover culture and language, and in the battles for land rights, that continue to this day.

This long history of struggle leaves a deep legacy, and in the current day, a complex landscape of Aboriginal interests, organisations, and representation in Victoria. These bodies have negotiated, advocated, and clashed with governments over many decades, and won various concessions, rights and forms of legal recognition. Indeed, since 2004, Aboriginal people are now recognised (however symbolically) in the foundational laws of the State of Victoria.<sup>8</sup> Cultural heritage rights are offered some protection through the *Aboriginal Heritage Act 2006* (Vic), (**Heritage Act**), and traditional rights and interests in land are recognised (we would argue imperfectly) through the *Native Title Act 1993* (**NTA**) and *Traditional Owner Settlement Act 2010* (**Settlement Act**).

In many forums, Aboriginal people also have a voice in policy development through Consultative Bodies brought together by government, and routinely contribute to policy development in key areas such as health, law, land reform, education, family violence and child protection.

As already stated, we suggest this broad spectrum of organisations can broadly be categorised as (1.1) ACCOs; (1.2) Traditional Owner groups; and (1.3) Consultative Bodies. We now turn to examine each in greater detail.

### 1.1. SERVICE BODIES

It is important to note that while Traditional Owner groups have their genesis before contact, being the Aboriginal nations that possessed Victoria before colonisation, it is only in the last few decades that they have begun to re-emerge as a primary focus of identity and representation.

This is because, until the decision in *Mabo v Queensland (No 2)*<sup>9</sup> (**Mabo**) and the introduction of the NTA in 1993, the State worked exclusively, intentionally or otherwise, to disenfranchise traditional methods of organisation and representation. Indeed, the very project of colonisation rested on the wilful blindness of *terra nullius*, and official disregard and suppression of pre-existing Aboriginal political and legal structures.

It was this refusal of the State to recognise traditional polities, combined with the violence of colonisation, which forced Aboriginal people to reorganise. Finding unity in their common fate of dispossession, exclusion, and landless poverty, they tended to adopt pan-Aboriginal models of representation.

#### 1.1.1 Rise of Aboriginal Community Controlled Organisations (ACCOs)

This pan-Aboriginal approach is perhaps first evident in the foundation of the Aborigines Advancement League (**AAL**) in 1932.<sup>10</sup> Seen by many as the “mother” of all modern ACCOs,<sup>11</sup> it began as a fierce advocate, and almost sole voice, for Aboriginal political and legal rights in Victoria.

By the 1960s, Aboriginal activists were achieving real and significant victories. This is perhaps most celebrated by reference to the successful 1967 referendum, but that same year also saw the enactment of the *Aboriginal Affairs Act 1967* (Vic).

This legislation ended 108 years of oppressive control of Aboriginal people by the Aboriginal Protection Board<sup>12</sup>, and the end of official assimilation policy.<sup>13</sup> Now with more ability to “manage their destiny than at any time since the 1840s,”<sup>14</sup> and amidst a burgeoning national Land Rights movement, the 1970s saw an explosion in the establishment of ACCOs.<sup>15</sup> This period was a “political and cultural renaissance”<sup>16</sup> that saw the Aboriginal community effectively organise to directly address the practical problems of a colonised people, with a focus on areas such as health, legal assistance, land justice, housing and employment.

Over time, services were the most prominent Aboriginal controlled spaces and have become a focal point for community organisation. They provided a place to gather and “evolved into important sites where Aboriginal relationships solidified, and where the processes fundamental to the creation of community were sustained.”<sup>17</sup>

Most of the ACCOs operating in Victoria today have their genesis in this period. They continue to provide strong advocacy and essential services to Aboriginal people “which were inadequately provided for them by the mainstream.”<sup>18</sup> Today there are dozens of ACCOs, large and small, operating locally or across the State. For the purposes of this paper, it is not necessary or possible to provide a comprehensive review of them all. At **Appendix 1** there is a table listing some of the more prominent ACCOs operating in the Victorian landscape, along with a brief summary of their roles and activities.

### 1.1.2 Governance of Services Bodies / ACCOs

Given the vast array of ACCOs, it is natural that their governance and legal structures will vary. However, it is possible to make some generalisations regarding the structure and political organisation of these ACCOs. For instance, many ACCOs will be incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)* (**CATSI Act**). This is Commonwealth legislation that allows Aboriginal and Torres Strait Islander groups to form corporations, and was designed to provide a more flexible legal structure suitable for the needs of Indigenous people.<sup>19</sup> Otherwise organisations may be unincorporated associations, or companies limited by guarantee.

Regardless of the legal form, the internal governance is likely to be that which is common to community organisations operating throughout Australia. That is, the ACCO will have (or aspire to have) a wide membership of community members with a special

interest in their service area. Membership will be restricted to Aboriginal and/or Torres Strait Islander peoples, but will not require citizenship of any particular Traditional Owner group.

The membership of the ACCO will be responsible for electing a board, who in turn appoint a Chief Executive Officer (**CEO**). The CEO will be responsible for all staff, and for ensuring the provision of the relevant services to the Aboriginal and/or Torres Strait Islander community.

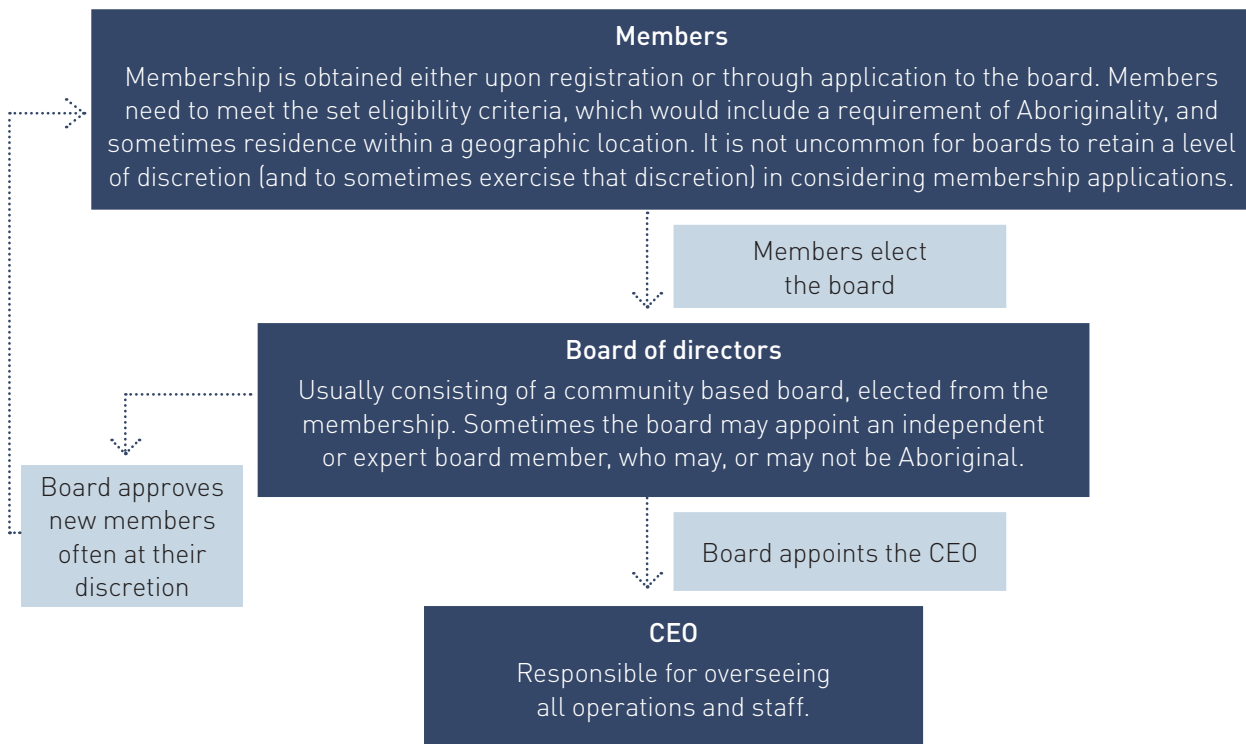
We have attempted to set out this common structure in the *Figure 1.2* on the following page.

## 1.2 TRADITIONAL OWNER GROUPS

While ACCOs have rightly been viewed as the vanguard of the Aboriginal rights movement in Victoria, and historically acknowledged as representing the voice of the Aboriginal community, the post-Mabo era has seen other forms of political representation re-emerge. This is in part because prior to Mabo the State had refused to recognise pre-invasion political structures, but following that historic victory, the State’s position was inversed. Indeed, it is now through the lens of pre-invasion structures that the State primarily recognises Aboriginal rights, and as we will discuss below, it is Traditional Owner groups that are increasingly viewed as the most legitimate form of political representation.

For instance, before Mabo, under the *Aboriginal Lands Act 1970* (Vic), the Victorian Government made a first attempt at land rights legislation with the hand back of rights in the former Framlingham and Lake Tyers missions. However under this legislation, rights did not flow from traditional ownership, but by being an Aboriginal person and resident of the mission during a very specific period, that is between January 1968 and October 1970.<sup>20</sup> This led to protest from Traditional Owners who did not meet the criteria,<sup>21</sup> but the legislation was clear in that residence, and not traditional law, was to be valued.<sup>22</sup> However, following Mabo and the introduction of the NTA, this was no longer sufficient to claim rights in land. Now the State would require detailed proof of ancestry and traditional law and custom before rights could be recognised. Indeed, under the NTA the State would demand not only evidence of descent and pre-invasion ownership, but as Aboriginal people would soon find out, a perverse kind of purity, first established in the Victorian case of *Yorta Yorta v Victoria*<sup>23</sup> (**Yorta Yorta Decision**).

Figure 1.2. ACCO organisational chart



The Yorta Yorta Decision was the first time the elements required to prove the existence of native title, as set out in section 223 of the NTA, were examined in detail by the High Court. These elements include (among other matters) a requirement for an applicant to show that under traditional law and custom they have rights to land; and by that law and custom, a connection to the land. The High Court found that to meet these elements it was necessary to show “traditional connection” to the land has been maintained substantially uninterrupted since contact.<sup>24</sup> In the south-eastern Australian states, and Victoria in particular, where colonial policy had explicitly required forced removal from Country, either by the threat of violence, or actual violence, this appeared to be an insurmountable hurdle.

As was stated in a later case, a “claimant group that has been dispossessed of much of its traditional lands and thereby precluded from exercising many of its traditional rights will obviously have great difficulty in showing that its rights and customs are the same as those exercised at [the time of contact].”<sup>25</sup>

Where connection has been broken, the native title rights are considered extinguished, washed away by the so-called “tide of history.”<sup>26</sup> It does not matter that connection was broken against peoples’ will, as a result of colonial violence, or government policy. Once connection is broken, native title rights are extinguished, and cannot be revived.

These findings led many to believe that native title would be impossible to recognise in highly settled areas<sup>27</sup> such as Victoria. However, over time the approach of the Courts and the State has evolved, which in some cases has permitted issues of traditional connection to be negotiated and agreed, allowing the Federal Court to make determinations by consent. The first consent determination occurred in Victoria in 2005 when the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia, and Jupagulk Peoples achieved native title recognition, proving that Victorian Traditional Owners could overcome the hurdle of connection. They were followed by the Gunditjmara in 2007, the Gunaikurnai in 2010, and the Gunditjmara and Eastern Maar over a joint area in 2011.

In total, there are now four positive native title consent determinations in Victoria. In our view, this is conclusive evidence that Traditional Owners in this State have been able to maintain traditional connections to Country, despite the violence and dispossession of colonisation, and even when measured against the onerous standards set by the High Court in the Yorta Yorta Decision. Unhappily, and notwithstanding the findings in that case, it is likely that the Yorta Yorta would be able to achieve a consent determination if they were pursuing their rights in the modern native title context.

### 1.2.1 Methods of formal recognition

In response to the ongoing activism of Traditional Owners and the obvious injustice of the Yorta Yorta Decision, the Victorian Parliament passed legislation to create other avenues of formal recognition for Traditional Owner groups. As such, there are currently three methods of so-called formal recognition available in Victoria:

- **Cultural Heritage under the Victorian Heritage Act:** A Traditional Owner group can apply to the Victorian Aboriginal Heritage Council (VAHC) to become a Registered Aboriginal Party (RAP) under the Heritage Act, which provides them a role in managing Aboriginal heritage;
- **Native Title determination under the Commonwealth NTA:** A Traditional Owner group can file a native title claim in the Federal Court under the NTA, and seek a determination from the court as to whether its native title rights still exist; and / or
- **Traditional Owner Settlement under the Victorian Settlement Act:** In an alternative to the NTA process, unique to Victoria, a Traditional Owner group can negotiate a settlement agreement under the Settlement Act, which provides formal recognition and rights and interests in land which are comparable to (and in some cases exceed) rights achievable under the NTA, along with a financial package. In addition, and as a point of difference from the NTA, it does not require evidence of a continuous connection to Country, in effect acknowledging the effect of colonial policy on Victorian Traditional Owners.

Each form of recognition above involves some acknowledgment by the State, or the Federal Court, that the group are the Traditional Owners for a distinct area of land, and meet a certain threshold of representative governance.

However, importantly, each legislative regime conveys very different rights and responsibilities upon the

groups. For instance, the Heritage Act simply provides a role in the oversight of Aboriginal cultural heritage. Where that heritage may be impacted by works or development by third parties, the Heritage Act sets out a process whereby destruction or harm can be avoided, or minimised, through the creation of a Cultural Heritage Management Plan.

On the other hand, the NTA and the agreements reached under the Settlement Act will recognise and enliven rights and interests in land itself. These rights include the right to access land for traditional purposes, such as hunting, gathering and the carrying out of ceremony. Where these rights are likely to be impacted by government or third party development, they will give rise to further rights, such as the right to be consulted, to negotiate an agreement, or to compensation. Unfortunately, these rights will rarely extend to Traditional Owners being given the opportunity to prevent works to which they do not consent.<sup>28</sup>

Recognition under the Heritage Act (and registration as RAP) is probably the most accessible form of formal recognition in Victoria.

When appointing a RAP, the VAHC will have regard to its own guidelines, being the *Registered Aboriginal Parties: Guidelines for Applicants (Guidelines)*, in addition to any requirements set out in the Heritage Act. An entity wishing to become a RAP for an area must demonstrate how the entity members are connected to that Country or hold historical or contemporary interest in Aboriginal cultural heritage relating to the area, and expertise in managing and protecting Aboriginal cultural heritage in that area.<sup>29</sup> The Guidelines also require consideration of whether the RAP is inclusive of all Traditional Owners for that Country, and whether there are appropriate and inclusive governance practices implemented.<sup>30</sup>

However, the Guidelines for the appointment of RAPs have evolved over time and inclusiveness has not always been a prominent consideration. Thus, not all RAPs are inclusive of all the Traditional Owners, and this has been observed in statements and decisions of the VAHC.<sup>31</sup>

If a Traditional Owner group has a native title determination for an area or has entered into a recognition agreement under the Settlement Act, the VAHC must register the group as a RAP over the settlement area.<sup>32</sup> On the other hand, if a group is registered as a RAP first, they do not automatically gain any benefit towards recognition under the NTA or the Settlement Act.

As discussed above, there are four groups recognised to hold native rights in Victoria (which also means they are automatically RAPs under the Heritage Act for the area for which they hold those rights):

- Barengi Gadjin Land Council Aboriginal Corporation;
- Gunditj Mirring Traditional Owners Aboriginal Corporation;
- Gunaikurnai Land and Waters Aboriginal Corporation (**GLaWAC**); and
- Eastern Maar Aboriginal Corporation.

There are currently three groups with Settlement Act agreements (also resulting in automatic appointment as a RAP for the relevant area). This includes GLaWAC, which is unique in having both a native title and Settlement Act outcome. The other two are:

- Dja Dja Wurrung Clans Aboriginal Corporation; and
- Taungurung Land and Waters Council Aboriginal Corporation.<sup>33</sup>

Finally, there are five groups that only have recognition under the Heritage Act as RAPs, being:

- Bunurong Land Council Aboriginal Corporation;
- Wathaurung Aboriginal Corporation (trading as Wadawurrung);
- Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation;
- Yorta Yorta Nation Aboriginal Corporation; and
- First People of the Millewa-Mallee Aboriginal Corporation.

At **Appendix 2** is a table further summarising the recognition status of each of the groups above.

## 1.2.2 Governance of recognised Traditional Owner groups

At this stage it is important to expressly acknowledge the distinction between a Traditional Owner group and their corporate representatives.

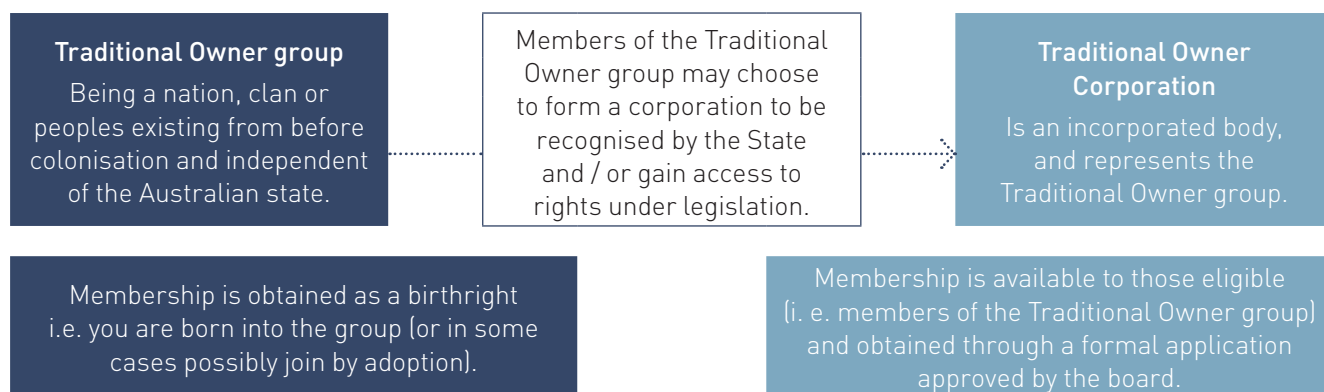
To be clear, a Traditional Owner group exists independent of State recognition. It is the nation, clan or peoples that exercised sovereignty over these lands prior to colonisation. However, each statutory regime discussed above requires the Traditional Owner group to establish, or nominate, a corporation to represent their interests. It is then this corporate representative that holds the rights, or carries out the relevant statutory obligations.

As such, while the Traditional Owner group and its corporate representative are often spoken of as interchangeable, they are in fact distinct entities, as shown in Figure 1.3.

However, quite commonly, the Traditional Owner group may also find the corporation a useful vehicle for decision making. The requirement for the group to design a rule book, and to think through the models of representation they wish to adopt (for instance reserved board positions for all family groups) means that power is exercised transparently, and requirements for minutes, resolutions and other formalities, give comfort that due process has been observed.

As such, while a corporation is a western legal construct, Traditional Owner corporations are designed by Traditional Owners, and therefore usually the design will be culturally informed,

Figure 1.3 Relationship between Traditional Owner groups and corporations





particularly with respect to norms and practices as they relate to decision making. Accordingly, a decision by a Traditional Owner corporation will be legally binding, but may also be culturally binding between all Traditional Owners. In such circumstances, the corporation may be viewed as the bridge between the legal and traditional systems, as Traditional Owners continue to navigate these two worlds.

The most popular form of incorporation for Traditional Owners is as an “Aboriginal Corporation” under the CATSI Act. Of the currently recognised Traditional Owner groups, all are incorporated in this manner. This reflects an almost universal preference by both State and Federal legislators for the CATSI Act corporate structure, which is often required to be adopted before rights or recognition is forthcoming.

For instance, the NTA and the *Native Title (Prescribed Bodies Corporate) Regulations 1999*, require any corporation intended to hold native title rights to be incorporated under the CATSI Act. In 2016 the Heritage Act<sup>34</sup> was amended so as to require all RAPs to transition to a CATSI Act structure. Only the Settlement Act does not expressly require a CATSI Act corporation,<sup>35</sup> although interestingly all groups with a Settlement Act outcome are incorporated under this legislation.

All Traditional Owner corporations include a membership criteria requiring citizenship of the relevant Traditional Owner group. The members are responsible for electing the board. This may be done through various methods as some groups adopt structures that are informed by their cultural logic,

while others choose more conventional corporate structures. If the corporation has access to adequate resources to employ staff, the board will appoint a CEO, who will be responsible for all operations and employees.

Depending on the type of formal recognition obtained by the Traditional Owner corporation, it may have some statutory obligation to be accountable to the Traditional Owner group on certain matters. For instance, native title rights, and rights under Settlement Act agreements, are held on behalf, and for the benefit of, all native title holders / Traditional Owners. However, under the Heritage Act there is no direct accountability to Traditional Owners for a corporation operating as a RAP, as to how it exercises its rights, or meets its obligations under the legislation.

We have attempted to further set out these differences in Figure 1.4.

### 1.2.3 Groups without formal recognition

There are currently eleven groups with formal recognition in Victoria. This does not, quite obviously, represent all relevant Traditional Owner groups in the state, and there are many groups yet to obtain a status under the Heritage Act, NTA or Settlement Act.

There are many reasons why a Traditional Owner group may not have obtained formal recognition, including a lack of resources, internal division, or a philosophical or political opposition to seeking the recognition of the settler State.

Figure 1.4 Relationship between legislation and Traditional Owner group

Act	Aboriginal Heritage Act 2006 (Vic)	Native Title Act 1993 (Cth)	Traditional Owner Settlement Act 2010 (Vic)
Title of appointed corporation	Registered Aboriginal Party (RAP)	Registered Native Title Body Corporate (RNTBC or PBC)	Traditional Owner Group Entity (TOGE)
Role	Advisory body for Aboriginal cultural heritage matters	Holds native title rights and interests.	Holds rights under various settlement agreements
Accountability to members and / or Traditional Owner Group	No direct accountability mechanisms in the legislation, and members would need to rely on corporate processes, such as AGMs.	Native title rights held on trust for all native title holders.	Rights held on behalf of, and legal duty to act for the benefit of, the whole Traditional Owner group.

Of these reasons, and speaking anecdotally, it would seem that a lack of resources is the principal reason why a Traditional Owner group may not have formal recognition. All of the recognition systems discussed above present a type of threshold that the Traditional Owner group must be able to meet. These thresholds will include a detailed articulation of their traditional society, culture, and modern governance structures. The burden is placed on the Traditional Owner group to collect materials, analyse historical documents, engage in community strengthening and present a coherent picture to the relevant governing body to either approve, or reject. For many Traditional Owner groups, the lack of resources, and high barriers to entry, restrict them from engaging in a formal recognition processes.

Lack of formal recognition can be disenfranchising, as can be seen in the representational structure underpinning the Assembly, which only reserves seats for formally recognised Traditional Owners groups.<sup>36</sup> However, it would seem likely, if not inevitable, that a process of thresholds will continue to operate in the treaty space. This is because, firstly, the State will require a level of certainty as to the composition of the group that it is negotiating with, and secondly, it is foreshadowed in section 31(1)(c) of the Treaty Act, which requires the Framework to include “minimum standards with which a party must comply in order to enter into treaty negotiations.”<sup>37</sup>

Accordingly, the Framework will need to unrecognised Traditional Owner groups and, we would suggest, provide a clear pathway to recognition for the purposes of treaty, and as discussed below, the potential to access certain rights before formal recognition is forthcoming.

We would also argue that a threshold process can, in the right circumstances, be beneficial for a Traditional Owner group, as it may allow them space to more closely and explicitly define their membership, Country, and governance structures. As such, if a process of thresholds is to be incorporated into the Framework, we would advocate that it emphasise these positive attributes.

One pathway for this to occur would be to de-emphasise the need to settle boundaries with neighbouring groups, which has been a feature of all three recognition systems discussed above. As each recognition system gives rise to rights over a geographical area, and in one way or another, is designed to facilitate third parties intending to develop the land, there is a need (largely on behalf of the State) for the relevant area to be tightly and accurately defined. This is to provide all parties (but particularly

non-Aboriginal parties) certainty as to where the rights begin and end.

However, we would argue that in the context of treaty no such need arises, at least in the initial stages. In negotiating a treaty, the State only requires certainty that it is negotiating with a defined polity, and it is not necessary to know the exact geographic dimensions over which that polity has authority. Given that the requirement to resolve boundaries has been a major impediment to the resolution of applications for formal recognition, and a significant source of dispute between Traditional Owner groups, it would be advantageous for the Framework to dispense with this necessity, as much as is practicable, and allow unrecognised Traditional Owner groups a more efficient path to representation in the treaty process.

## 1.3 CONSULTATIVE BODIES

In recent years the State has put considerable effort into establishing partnership structures to ensure that Aboriginal voices are heard in policy development and implementation and to allow for co-design. Rather than rely on existing ACCO and Traditional Owner groups, the State has often sought to develop its own specific consultative groups (although in practice these groups often call on individuals or existing expertise within ACCOs or Traditional Owner structures). Below we seek to provide an overview of current Consultative Bodies.

### 1.3.1 Consultation and partnership structures

There are many avenues and frameworks through which the State may seek to consult or partner with Aboriginal Victorians. For the purposes of this paper we will address three:

1.3.2: Local Aboriginal Networks (LANs);

1.3.3: Strategy specific partnership agreements and plans; and

1.3.4: Project specific Consultative Bodies.

### 1.3.2 Local Aboriginal Networks (LANs)

LANs have been established since 2007 and operate as generalised consultative bodies, open for all Aboriginal community members to attend and contribute and be a voice for their community. The LANs are the largest government enabled Aboriginal network operating in Victoria, and their purpose is to connect, prioritise, implement and evaluate with other local community partners and stakeholders.<sup>38</sup>



There are currently 39 LANs across Victoria, supported by 12 Aboriginal Community Development Brokers. Given their localised nature, individual LANs may focus on different policy areas, however according to their most recent Five Year Plan, their priority areas are: Strengthening Culture, Economic Participation, Support for Young People, Building a Stronger LAN, Community Planning and Partnerships, and Working with Local Government.

The LAN program objectives are to:

- Provide a voice for local Aboriginal communities;
- Be a mechanism to identify community aspirations through community planning;
- Provide a means to work together to implement plans in partnership with a range of stakeholders (partnerships include all levels of government, business, philanthropy and the extended community); and
- Connect services and individuals to enable greater coordination of community engagement, participation, collaboration and implementation of programs.

### 1.3.3 Strategy specific partnership agreements and plans

Since 2015, the State has committed to a policy of self-determination<sup>39</sup> across Aboriginal affairs. This has led to increased focus in Aboriginal community involvement in departmental strategies and policy development. Accordingly, the State now seeks to produce “community led and culturally responsive initiatives and strategies”<sup>40</sup> in areas such as health, education, family violence and justice.

When strategic plans are developed, they will involve widespread consultation, and often involve principles of co-design. Such plans are often then styled as “partnerships” with the Aboriginal community. Examples of which would include the:

- Marrung Aboriginal Education Plan (2016-2026); and
- Korin Korin Balit-Djak: Aboriginal Health, Wellbeing and Safety and Strategic Plan (2017-2027).

Sometimes this language is taken further, and the documents are presented as “agreements” and entered into in the style of a contract, executed by relevant government ministers and on behalf of various ACCOs. Examples include the:

- Wungurilwil Gaggapduir: Aboriginal Children and Families Agreement and Strategic Action Plan: Aboriginal Children and Families Agreement; and

- Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement – Phase 4.

Notwithstanding the particular style adopted, these documents remain government policies, and are not legally enforceable. Nevertheless, the language reflects what appears to be a genuine intention on behalf of the State to involve Aboriginal people in its decision making, and to provide mechanisms by which they can be held to account. For instance, each of these plans creates their own internal governance structure and inbuilt accountability mechanisms, which will include consultative bodies to monitor and evaluate implementation, including in some cases the ability to direct changes to policy. These bodies are usually comprised of board members or representatives from the relevant ACCOs.

A more comprehensive analysis of strategy specific partnerships and plans, and their various aims and structures, can be seen at **Appendix 3**.

### 1.3.4 Project specific Consultative Bodies

Finally, the State may convene a consultative body on an ad hoc, or as needed basis, to assist with the development of a particular project, or policy. Some examples include the:

- **Aboriginal Executive Council:** established by the State in 2017 to provide advice on whole of government reforms to embed Aboriginal self-determination. It is made of representatives from state-wide ACCOs and peak-bodies;<sup>41</sup> and
- **Aboriginal Treaty Working Group:** established in 2016 to consult with Aboriginal communities to develop options for the Assembly, it was the principal adviser to government on the Treaty Act, and continued to advise the Commission on the development of the Assembly. It is made up of many prominent Aboriginal Victorians nominated by ACCOs or other Aboriginal groups, and includes individuals appointed directly by the Minister for Aboriginal Affairs.

One criticism of project specific consultative bodies, partly arising from their ad hoc nature and the need for them to be established quickly, is that they are established by the State, with appointments made directly by government. However, this is true to some extent, for all Consultative Bodies, other than LANs, which are open to all.

### 1.3.5 Analysis of State consultation and partnership structures

What is clear from a review of the State's consultation and partnership structures is a lack of any cohesive framework, or overarching structure which seeks to explain how the various components work as a whole.

This is important, as there is clear and evident overlap with different forums being consulted on the same subject matter and policy areas. With nothing in the public domain to explain how the State prioritises the advice it receives, or resolves competing or disparate views between consultative forums, there is a lack of transparency, and a risk that the State may be privileging certain voices over others.

It is perhaps a by-product of a developing policy space, without a centralised driving force, that over time various processes will evolve without regard for neighbouring or pre-existing processes. This can of course result in undue pressure on the resources and capacity of Aboriginal organisations that are forced to participate in multiple government forums, a longstanding and well known problem in Aboriginal affairs.<sup>42</sup>

Presumably the treaty process provides an opportunity to rationalise these structures. The State should be credited with recent moves to document its consultation processes and accountability measures in various plans and community agreements. While imperfect, they do suggest initial attempts to shift decision-making from State bureaucracies to Aboriginal controlled structures.

There is of course an inherent tension between policies of consultation and those of self-determination. While consultation is often put forward by governments as an indication of their progressive intent, it is ultimately inconsistent with the principle of self-determination.

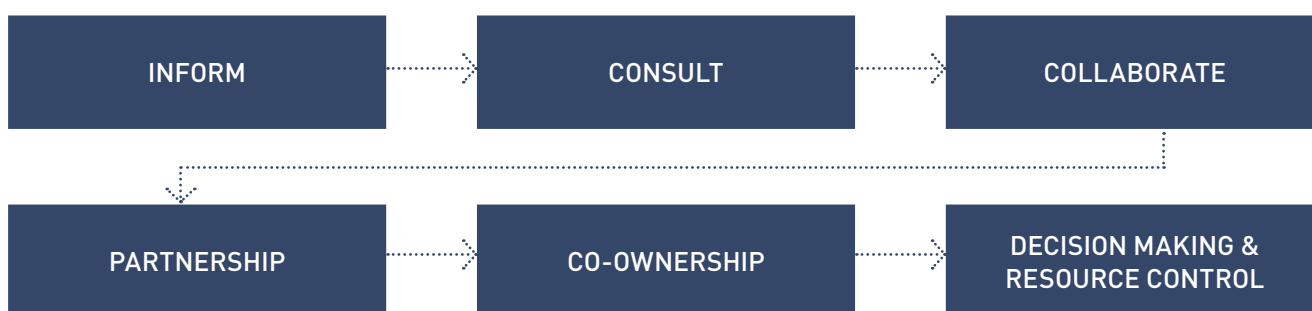
This is because government always retains the ability to accept or ignore the advice it receives, and generally is able to select the parties with whom it chooses to consult.

There are indications that the State is grappling with these issues, even if it is yet to resolve them. For instance, the State has recently issued an updated *Victorian Aboriginal Affairs Framework (VAAF)*, the purpose of which is to provide a whole-of-government approach for working with Aboriginal Victorians, organisations and the wider community.<sup>43</sup> The VAAF commits the State to progressing Aboriginal self-determination and establishes "a continuum that leads to Aboriginal self-determination"<sup>44</sup> against which it is easy to measure the government's progress. A copy of the continuum is set out in Figure 1.5, which perhaps makes clear the evolving language of the State, in particular its adoption of partnerships and self-styled agreement making.

However, notwithstanding the State's efforts in the area, it is clear that its progression along the self-determination spectrum remains in the early stages, and will vary across government departments.

It would seem clear that treaty will be an important mechanism in advancing this process, and if the State remains true to the aims it sets out in the VAAF, will provide an opportunity for actual partnership, co-ownership and ultimately the transfer of decision making and resource control. For instance, a treaty which recognises Aboriginal sovereignty would provide an opportunity for agreements reached with "community" to be enshrined as legal, enforceable, and binding agreements with a body such as the TRB.

Figure 1.5 Continuum towards Aboriginal self-determination<sup>45</sup>





## PART 2

# HOW TO APPROACH THE FRAMEWORK

- 2.1 WHAT IS THE FRAMEWORK?
- 2.2 DEVELOPING THE FRAMEWORK IS  
NOT AN ADMINISTRATIVE PROCESS
- 2.3 THE FRAMEWORK IS A TREATY
- 2.4 ACHIEVING A MANDATE

# PART 2

## HOW TO APPROACH THE FRAMEWORK

Part 1 of this paper is presented as an overview of the current political life of Aboriginal Victorians, as they interact with the State. We suggest this provides a useful first consideration of the potential scope of the Framework, which lays the groundwork for all future treaties.

However, before turning to consider how the breadth of Aboriginal political activity may be practically incorporated into a treaty structure, we will first turn to examine the concept of the Framework itself.

### 2.1 WHAT IS THE FRAMEWORK?

The Treaty Act makes clear that the Framework is to be developed through negotiation between the State and the Assembly.<sup>46</sup> However, the Treaty Act does not provide much precision as to exactly what the Framework should include, how it should be structured, or expected to operate.

The relevant sections dealing with the content of the Framework are limited to sections 30(3) and 31 of the Treaty Act. These only provide baseline requirements and broad guidance for the negotiating parties. For instance, section 30(3) provides aspirational, and high level language, stating that the Framework must “*recognise historic wrongs... help heal wounds of the past... bring pride to Victorians*” and so on. Section 31 is more direct, but still broad. Although it is titled “[c]ontent of the treaty negotiation framework,” it only provides some basic requirements for the Framework, such as it must establish processes, mechanisms and minimum standards, but does not dictate the content of these items. Section 31(1) requires the Framework to include:

- (a) the process for negotiating a treaty or treaties;
- (b) the process for formalising agreement to a treaty or treaties;
- (c) minimum standards with which a party must comply in order to enter into treaty negotiations;
- (d) a schedule setting out the matters (if any) that cannot or must not be agreed to in the course of treaty negotiations;
- (e) the process for the resolution of disputes arising in the course of treaty negotiations;

- (f) the mechanisms for enforcing a treaty or treaties;
- (g) reporting requirements in relation to a treaty or treaties.

Accordingly, the Treaty Act is far from prescriptive, and appears designed to allow the parties a wide scope to negotiate what makes up the content of the Framework.

Given the Treaty Act’s lack of prescription, it would seem useful to consider examples of frameworks that have been developed in other negotiation processes with Indigenous peoples. Two relevant points of reference would be: the framework underpinning the Settlement Act in Victoria, and the framing of negotiations in the British Columbian treaty process, through both the “The Report of the British Columbia Claims Task Force, 28 June 1991” (**Task Force Report**), which sought to establish a province wide approach, and the individual “Framework Agreements” negotiated at the commencement of each negotiation with a First Nation.

#### 2.1.1 The Settlement Act framework

The Settlement Act is a framework for the settling of native title claims.<sup>47</sup> The legislation stipulates a series of contractual agreements that together make up the framework and deal with: (i) the formal recognition of Traditional Owners; (ii) the transfer of land; (iii) establishment of joint-management of national parks; (iv) Traditional Owner rights in respect of development and use of Crown land; (v) funding; and (vi) Traditional Owner rights to natural resources.

Any Traditional Owner group entering into a settlement is required to enter these agreements, which become the basis for their on-going legal rights. Given that these agreements deal with land across the state, and interact with various regulatory regimes, the framework implicitly insists on uniformity among

Traditional Owner groups so that the State may continue to operate a cohesive system of land management. Of course, the by-product of uniformity is rigidity, and a highly structured and frequently inflexible negotiation framework.

From the outset, this creates a clear delineation between what is negotiable, and what is not, in any individual Traditional Owner group negotiation. What this means in practice is that by the time a Traditional Owner group is at the negotiation table, they may find the extent of their rights as already set, either by the terms of the Settlement Act, or the negotiated positions established by other Traditional Owner groups in previous settlement agreements. Around these positions policy has already been written, or implemented, and there is little incentive for government departments to alter these positions, or leverage for an individual Traditional Owner group to get them to do so. Even if the State is willing to entertain a change, it will require the coalescing of perhaps several government departments, and maybe legislative change, with either process taking months if not several years. The result is a rigid framework, in which the unwieldy bulk of the State cannot accommodate the variations in culture and interests between groups, and the framework in effect becomes the mould into which all Settlement Agreements are shaped.

### 2.1.2 British Columbian Task Force Report and Framework Agreements

To look further afield, the modern treaty making process in British Columbia was largely designed by the B.C. Claims Task Force, established in 1990 by representatives of First Nations, the Canadian Federal government, and the British Columbian government. The Task Force's role was to investigate how modern treaty negotiations might be carried out, and what they should cover, and in 1991 they released the Task Force Report setting out their findings. In an attempt to establish the scope and processes of modern treaties, the development of the Task Force Report mirrors very closely the role of the Assembly in developing the Framework.

The approach taken by Task Force Report is very different from the prescriptive nature of processes under the Settlement Act. For instance, it does not proscribe the agreements to be entered into by force of legislation. Indeed, it does not any particular or specific type of legislative reform, and instead simply makes 19

very broad recommendations as to what it suggests are potential areas of significance for negotiations. These are matters such as self-government, financial compensation, and rights over land, sea and natural resources. Even these, it makes clear to point out, are "offered for guidance only," and the second of its nineteen recommendations states:

*"Each of the parties be at liberty to introduce any issue at the negotiation table which it views as significant..."*

British Columbia Claims Task Force, 'Report of the British Columbia Claims Task Force' (28 June 1991) 11 <<http://fns.bc.ca/our-resources/the-report-of-the-british-columbia-claims-task->.force0>

It is clear that the Task Force Report is at pains to avoid limiting the scope of treaty negotiations. However, it is more prescriptive as to the process of negotiations. Here, it recommended the six stage process which went onto be adopted and to bind all future parties.

Stage 3 of the British Columbian treaty making process requires the negotiation of this is often described as developing a "table of contents"<sup>48</sup> of what will be in a final treaty agreement. The Framework Agreement occurs early in the process, and is the first substantive task of the negotiations. The intention is to capture all items that will be negotiated at the outset. This could potentially be limiting because BC treaty negotiations, much like Settlement Act or NTA negotiations, take many years to resolve, and experience has shown that during this period policy or common law, not to mention Traditional Owner expectations and demands, will change and develop.

Notwithstanding these concerns, the approach in British Columbia seems to be superior to the Settlement Act in at least one respect, in that it provides negotiating groups with more agency. This is because rather than limitations being set at the State level, and being uniformly applied to all groups, in British Columbia they are broadly defined, and expressly non-compulsory across the province. Only later, and by direct negotiation with the individual First Nation, is the scope of negotiations set and agreed. This allows the issues to be dealt with openly at the beginning of the process, and freely agreed by the parties. No doubt the British Columbian government faces the same issues as the State of Victoria, and would prefer a uniform system of rights across their territory so as to allow for ease of compliance and enforcement. This may mean that, in practice, Framework Agreements begin to develop a formulaic quality. Nevertheless, it would seem to encourage a greater level of transparency to require these issues to be negotiated each time the State begins talks with Traditional Owners.

However, what is clear is that settling a Framework Agreement is a moment of limitation where the permissible issues between the parties begin to be narrowed.

Ultimately then, it seems the Framework under the Treaty Act is expected to do the same. Whether it establishes a detailed structure of agreement making as with the Settlement Act, a list of issues as in a British Columbian Framework Agreement, or adopts some other method to “frame” treaty, it will be an act of limitation, and therefore a crossroads for the treaty process in Victoria.

## 2.2 DEVELOPING THE FRAMEWORK IS NOT AN ADMINISTRATIVE PROCESS

The Treaty Act centres the Framework as the only component of the process that is explicitly required to be resolved before substantive treaty negotiations can begin.<sup>49</sup> Much of the commentary surrounding the development of the Framework suggests it is an administrative and largely neutral process, which is “not concerned with the eventual content or character of a treaty or treaties.”<sup>50</sup> Indeed, the Commission has also stated clearly its view that the Assembly “will not negotiate treaty.”<sup>51</sup>

This is true in a technical sense, as the Treaty Act expressly states that negotiations cannot commence until the Framework is established.<sup>52</sup> However, it is also a simplistic rendering of the Assembly’s role. This is because the Framework will naturally have to anticipate the type of treaty or treaties it hopes to produce. Furthermore, the Treaty Act acknowledges this reality in section 31(d), stating that the Framework must include:

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

As such the Treaty Act expressly imbeds an expectation that the Framework can provide explicit limitations on what can be negotiated, and requires the parties to turn their minds to this question. However, even if not expressly prohibiting agreement on some issues, it would seem unavoidable that a Framework will provide some limitations on future negotiations. For instance, it is inevitable that the Framework will need to answer the unresolved question, who will the treaty be with? Will it be a single treaty, between a centralised Aboriginal body and the State? Or multiple

treaties between various Traditional Owner groups and the State? Or (as this paper considers) will it be some combination of both?

Accordingly, we take the view that to answer these questions, and to reach agreement on them with the State, is to begin the process of negotiation. We also take the view that to assess the development of the Framework as simply administrative, is incorrect, and potentially misleading. We suggest the development of the Framework is the commencement of substantive treaty negotiations, and it is incumbent on the parties to treat the process as such.

From the process in British Columbia, and the structures embedded in the Settlement Act, it is clear that the establishment of any framework is always a moment of narrowing the issues, and inevitably shapes the “content or character” of the final outcome.

In fact, we go further to suggest that it is difficult, and perhaps a falsity, to attempt to draw a distinction between the Framework and the final treaty or treaties produced. This is because the Framework will, at the very least, embed a structure of representation that all future treaties will need to follow.

Accordingly, we suggest that, particularly if the Framework follows the prescriptive modelling of the Settlement Act, it becomes difficult to say what is appropriately content of the Framework, and what should be content of the treaty/treaties. The distinction between the two becomes blurred, and it is hard to specify where the Assembly should feel empowered to bind future treaty negotiators, and where it should leave flexibility, less it impinge on the authority of other sovereign groups.

As such, we say the distinction is largely an illusion. Once it is accepted that the Assembly will bind future treaty negotiators, we suggest that the Framework takes on a different character, and is more correctly categorised as something approaching an overarching treaty document.

We therefore suggest, that rather than trying to navigate around this complexity, the Assembly should acknowledge its role, and accept that it is not negotiating an administrative Framework. It is instead negotiating something more akin to the first treaty with the State. As such, the Assembly could consider seeking to formally adopt the Framework as an initial and overarching state-wide treaty, with specific regard to embedding appropriate checks and balances, and ensuring accountability to Aboriginal Victorians and Traditional Owners.



## 2.3 THE FRAMEWORK AS ANALOGOUS TO A TREATY

There are a number of advantages in starting to conceive of the Framework as in fact something close to a treaty. Firstly, depending on the approach of the parties and limiting nature of the Framework, it may be the proper characterisation of what is in fact occurring. Secondly, it is achievable to resolve a treaty / Framework within the current, or perhaps the next, election cycle, ensuring that this particular political moment is seized, capitalised upon, and enshrined. Finally, it will imbue the agreement with the appropriate significance of what is agreed, and increase the difficulty for a future hostile government to abandon the process. With respect to this last point, we note that the current Treaty Act is largely silent on the manner by which the Framework is to be enacted; simply stating that it is to be “agreed” between the State and the Assembly.<sup>53</sup>

Accordingly, it is not clear how the Framework will be recorded, or how it would bind the State. One possibility is that it may be given the force of legislation, but of course this is vulnerable to repeal by a later government. It could also be recorded in a legally binding contract, but it is easy to foresee that such a contract could be frustrated if a future government was a reluctant party.

However, if the Framework was to be entered into as a treaty, it would be Australia’s first treaty with its Indigenous peoples, and carry significance beyond that available to a mere framework. This would provide greater certainty that the pathway for meaningful resolution had been set, and could not be diverted simply on the whim of changing political currents.

## 2.4 ACHIEVING A MANDATE

Finally, we acknowledge that the idea of the Assembly explicitly negotiating a treaty is contrary to section 33 of the Treaty Act. There is also difficulty in that the Assembly is not itself a sovereign body, and therefore cannot purport to bind other sovereigns (particularly, we would suggest, Traditional Owner groups without formal recognition, and therefore with no representation within the Assembly). However, as we set out below, there is perhaps a clear process that can ensure compliance with the legislation. In any event, the legal framing of the task does not change its character, and in our view the Framework is, in essence, closer to a treaty (in fact if not in law) than it is to an administrative process or policy task.

However, compliance with settler legislation is only one concern. What should be of more concern to the Assembly, is ensuring that it has a mandate from Aboriginal Victorians and Traditional Owners to pursue this path.

It is perhaps an inadvertent flaw in the treaty process to-date that Aboriginal Victorians are yet to be given the political space to determine the basic methods of representation they want to adopt to undertake treaty making. As such, the first time this opportunity will arise is through the Assembly, at the very same time it is required to negotiate and settle these issues of representation with the State through the Framework.

However, there are methods by which this could be rectified. As we will address in detail in the next section, it may be advantageous to create a state-wide body, being the TRB. To both comply with existing legislation, and obtain the mandate of Aboriginal Victorians, we would suggest that the Assembly and the State negotiate a Framework that is itself an in-principal treaty. This would be adopted by the State as legislation, upon which the Assembly would dissolve. In its place, the TRB would be established, and along with an election of delegates, a referendum of Aboriginal Victorians (or of Victorian Traditional Owner groups) could be carried out, seeking their endorsement of the in-principal treaty.

Assuming the Treaty is endorsed, it would then be entered into between the State and the TRB, being the first treaty established in Australia.

We now turn to consider in more detail what the Framework (and / or treaty) may look like.



## PART 3

# SCOPE OF THE TREATY FRAMEWORK

3.1. WHY SHOULD A TRB BE ESTABLISHED?

3.2. FRAMEWORK FOR STATE-WIDE TREATY AND LOCAL

3.3. CONTENT OF THE FRAMEWORK OR STATE-WIDE  
TREATY TREATIES



# PART 3

## SCOPE OF THE TREATY FRAMEWORK

This section will detail a Framework that incorporates all parts of Aboriginal political life in Victoria, which for the purposes of this paper, we have described as encapsulated in ACCOs, Traditional Owner groups and Consultative Bodies.

To be clear, we do not suggest that this formulation of Aboriginal affairs is sufficient to address the entirety of issues raised by treaty. We assert that what treaty offers is an entirely new lens through which to explore Aboriginal and settler relations, which is that of equal sovereign entities entering freely and willingly into agreement. As such our model will attempt to look beyond the limitations of current conceptions of Aboriginal affairs, and try to engage with concepts of sovereignty and methods of enshrining human rights as measured against international standards.

As a starting point, we suggest that this breadth of aspirations will not be covered by any existing organisation or structure, and requires the creation of a new and democratically elected state-wide body, which we have titled the TRB. In this part, we will first set out the reasoning underpinning this view (3.1). We will then turn to look at a possible Framework (or treaty), at both a state and localised level (3.2), before finally turning to examine the potential content of a State-wide treaty (3.3).

### 3.1 WHY SHOULD THE TRB BE ESTABLISHED?

As set out in the Introduction, one of the assumptions behind our proposal is that Aboriginal Victorians and Traditional Owners will want to take control of Aboriginal affairs. If this is the case, and given that so much of Aboriginal affairs is administered by the Victorian public service, it would seem apparent that a replacement bureaucracy needs to be established. This bureaucracy will, in turn, need to be answerable to Aboriginal Victorians and Traditional Owners, perhaps in the same way that existing bureaucracies are answerable to parliament, and ultimately to the electorate.

A proposal of this scale has the potential to significantly disrupt the way Aboriginal organisations currently operate and impact on the delivery of services to the Aboriginal community. Accordingly, any treaty model should make all reasonable efforts to avoid, or seek to minimise, disruption to any systems of self-determination or Aboriginal control that are currently working. Indeed, where existing systems are successful, they should be preserved, protected and promoted. For instance, with respect to ACCOs, it is foreseeable that the community will want their continued operation, with their rich histories, and deep knowledge of the communities they serve. While the funding and governance of these bodies is currently overseen by the members of each organisation, it is provided by various government departments who are able to exert a level of control through funding arrangements. It may be that this government role could be shifted, and brought under democratic Aboriginal control.

This transition would thus include the handing of some governance oversight of ACCOs to a democratic body (or bodies). We reach this view, and the view that existing entities are unsuitable for a number of reasons, including that:

- existing ACCOs are centred around the provision of services, and while their Aboriginal members have historically used ACCOs to act collectively, such organisations do not have broad representative responsibilities beyond their members and service area;
- Consultative Bodies are also not representative as they are appointed directly by government, and largely consist of content experts on a particular policy area; and
- Traditional Owner groups do serve a representative function, and may also be attractive for the administration they could provide at a local level, however:
  - membership is restricted based on descent and identity;

- there is nothing to indicate that Traditional Owner groups would welcome or aspire to this role; and;
- it would be more efficient and effective to consolidate resources, rather than reproduce multiple systems across the State.

It is envisaged that the TRB could play a vital representative role in the political sphere, advocating for all Aboriginal Victorians and Traditional Owners, and be, so far as is possible, an effective counter to the unrestrained power of the State.

In addition to replacing the government bureaucratic functions that support ACCOs, the TRB could play a similar role with respect to Consultative Bodies. As an elected body, it would have substantial political credibility, and a representative function in support of Consultative Bodies would seem a natural position for the TRB to occupy, and would provide further authority to any Consultative Bodies under its governance. For instance, it would seem necessary for the LANs to fall within the authority of the TRB, as a useful tool to inform the TRBs operations and activities, and ensure that it is receiving community feedback, and amplifying that voice to government.

Naturally the roles and powers that the TRB may take on would need to be carefully negotiated, and staged, so as to ensure that ACCOs and Consultative Bodies are not disadvantaged, and are able to keep delivering services with no reduction in standards or capacity.

### 3.2 FRAMEWORK FOR STATE-WIDE TREATY AND LOCAL TREATIES

Notwithstanding the powerful role the TRB could play at the State level, it is our view that a State-wide treaty would be insufficient to meet the demands of Traditional Owner groups for recognition of their individual ownership and sovereignty over their traditional lands.

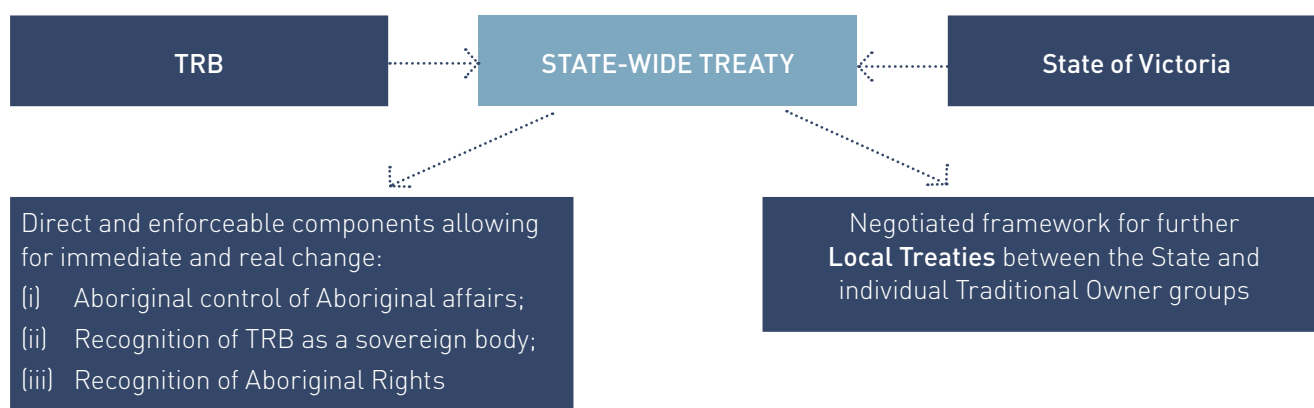
For this reason, our model proposes that the TRB and the State should aim to adopt the Framework as an over-arching state-wide treaty (**State-wide Treaty**), but also include a further framework for treaties directly between the State and individual Traditional Owner groups (**Local Treaties**).

In our view the content of the State-wide Treaty should be:

- a direct and enforceable treaty, allowing for immediate and real change in relations between Aboriginal Victorians and the State;
- provide a framework for further treaties between the State and individual Traditional Owner groups; and
- importantly, recognise the sovereignty of the TRB, as a confederation of Traditional Owner Nations.

With respect to this last point, it is clear that the development of the Framework will require a decision as to where Aboriginal sovereignty resides. This is because, by definition, a treaty is an agreement between two or more sovereign bodies. Surveying the political landscape, it is clear that the only bodies for consideration are the ACCOs, Traditional Owner groups or Consultative Bodies.

Figure 1.6 State-wide and Local Treaties



Of these, only Traditional Owner groups have been organically formed as political entities independent of, and prior to, colonisation. As such, they would seem to have the only credible claim to pre-existing and continuing sovereignty. However, as sovereign bodies, they could freely choose to enter a federation, much as the Australian colonies joined the Commonwealth, to bind together to meet their common issues, and capitalise on common opportunities. We suggest that the TRB could be such a body.

This structure would allow all Aboriginal Victorians to see immediate benefit from entry into the agreement, while also recognising the individual sovereignty of Traditional Owner groups, and allowing them the time to plan appropriate measures to seek on behalf of their people.

It also attempts to strike a balance between advancing the interests all Aboriginal people at the State level, with the recognition of localised sovereignty, and the re-establishment of the traditional Aboriginal nations of Victoria.

### 3.3 CONTENT OF THE FRAMEWORK OR STATE-WIDE TREATY

We now turn to consider some of the material that could be considered for inclusion in a Framework or State-wide Treaty. A full examination of the detail of our proposed structure is beyond the scope of this paper, and individual components will be the focus of future papers. Please refer to figure 1.1 which sets out an overview of the model, and indicates the future papers in which individual components will be examined (which is also indicated in the paragraphs below).

This paper suggests that a Framework or State-wide Treaty could include the following (3.3.1-3.3.4):

#### 3.3.1 Recognition of the TRB as a sovereign body

The TRB could be established as an elected and sovereign body, with that sovereignty demonstrated and expressed by one or all of the following:

- the ability to directly legislate, as is available to first nations in British Columbia, with a focus on matters directly relating to Aboriginal people in the State of Victoria, such as in the portfolios of health, justice, the environment, and cultural heritage;
- the reservation of parliamentary seats, as occurs in New Zealand, with Aboriginal parliamentarians elected from the TRB; and / or

- drawing from the Statement from the Heart,<sup>54</sup> the establishment of the TRB as a voice to the Victorian parliament, on all matters that may affect Aboriginal Victorians.

A full examination of options around sovereignty will be in **Paper 2: Sovereignty in the Victorian context.**

#### 3.3.2 Recognition of certain Aboriginal rights pertaining to all Aboriginal Victorians

The State will adopt, by force of the treaty and in its own legislation, international standards of Aboriginal rights. These could be drawn from the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**), and other international agreements and protocols. Some examples may include (without limitation):

- A right to self-determination;
- A right to free prior and informed consent;
- A right to practice and revitalise cultural traditions and customs; and
- A right to maintain and strengthen distinct political, legal, economic, social and cultural institutions.

A full examination of this proposal will be in **Paper 3: Enshrining Aboriginal Rights.**

#### 3.3.3 Aboriginal control of Aboriginal affairs: establishing the TRB

The TRB could be established to represent all Aboriginal interests from across the State.

As set out in our introduction, the structure of the Assembly stands as a ready-made model for how this may be achieved. However, we do not suggest that this model be adopted without question. Firstly, once the Assembly is established there may be obvious and reasonable proposals for reform. Secondly, there are already identifiable issues with the representative model, being the exclusion of Traditional Owner groups without formal recognition.

While the Assembly is designed only as a temporary body, and as such, may not have capacity to formulate processes for recognition, the same is not true of the proposed TRB. Accordingly, it will need to have clear and well-resourced pathways for the participation of all Traditional Owner groups.

Once established, we would suggest that the internal organisation of the TRB could draw from parliamentary models of governance. The main features of this would be:

- i. an Executive Cabinet (elected from and by TRB delegates);
- ii. Chair and Deputy Chair (elected by the Executive Cabinet); and
- iii. a CEO with responsibility for operations (employed by the Executive Cabinet).

The relationships between political and administrative arms of the TRB could be based in Westminster tradition, so that the CEO would be roughly equivalent to a Secretary in the public service. That is, he or she would serve the Executive Cabinet, and provide them with frank and fearless advice, but ultimately retain a level of independence and non-partisanship.

The operations overseen by the CEO would, in short, be those operations now overseen by all government departments, branches, and Statutory Authorities which currently administer Aboriginal affairs in Victoria.

This would be an Aboriginal public service, with appropriate assurances of on-going funding. With the public service responsibilities transferred, so political power would follow, and the State government Aboriginal Affairs portfolio would be abolished, with that minister replaced by leadership from the TRB. In taking on the character of the public service, although it would have some responsibility for overseeing certain activities of ACCOs, Traditional Owner groups and Consultative Bodies, it would not be able to interfere with the internal workings of these bodies. Further, this would naturally need to be a staged and carefully negotiated process, to ensure there is no disruption in service provision.

This component of the model is discussed further in **Paper 4: Aboriginal control of Aboriginal affairs: an Aboriginal parliament and public service.**

### 3.3.4 Agreement as to a framework for Local Treaties

A framework for Local Treaties would need to be agreed in conjunction with Traditional Owner groups. The framework would set out a flexible process for the negotiation of Local Treaties to be entered into directly between the State and Traditional Owner groups.

Taking from the openness of the Task Force Report in the British Columbian process, we would suggest this should not constrain a Traditional Owner group, unless they voluntarily adopt the framework as their starting point, and the State should commit to being open to negotiation with groups that do not adopt the framework.

A full examination of this proposal will be in **Paper 5: A framework for Traditional Owner treaties: Lessons from the Settlement Act.**

## WHERE TO NEXT?

The Assembly will be established in the next couple of months, and it is anticipated that in the following 12 months the major components of the Framework may be negotiated and settled. .

As we hope this paper has shown, the development of the Framework will not be an administrative or neutral task. It will instead imbed the modes of representation, the structure and form, and the limitations and boundaries of all future treaties made in Victoria. Accordingly, it is imperative that Aboriginal Victorians and Traditional Owners begin work to conceptualise the type of treaty or treaties they want, to ensure the Assembly enters negotiations fully prepared for the task.

In our view, this necessitates that concrete examples now be put forward for discussion, so that the debate can move from the abstract and rhetorical, to the real and practical. As such, the model proposed in this paper is put forward in that spirit.

It ultimately falls to all Aboriginal Victorians and Traditional Owners to set the path for treaty. We hope this paper, and the future papers in this series, provide a meaningful contribution to this process.



# APPENDICES

## **APPENDIX 1**

SUMMARY OF PROMINENT VICTORIAN SERVICES BODIES

## **APPENDIX 2**

FORMALLY RECOGNISED TRADITIONAL OWNER CORPORATIONS

## **APPENDIX 3**

STRATEGY SPECIFIC CONSULTATIVE BODIES

# APPENDIX 1

## SUMMARY OF PROMINENT VICTORIAN SERVICES BODIES

### HEALTH

#### Victorian Aboriginal Community Controlled Health Organisation (VACCHO)

<https://www.vaccho.org.au/>

VACCHO is the peak body for Aboriginal Community Controlled Health Organisations (**ACCHOs**) in Victoria and was established in 1996.<sup>55</sup>

VACCHO's own membership base is comprised of 27 Victorian ACCHOs.<sup>56</sup>

VACCHO's primary aim is to provide culturally appropriate, adequately resourced and community based health care facilities for every Aboriginal community<sup>57</sup> They work to achieve this aim through five main strategic areas: Educational Services, Workforce Development, Policy and Advocacy, Projects and Research and Consultancy Services.

#### Victorian Aboriginal Community Controlled Health Organisation (VACCHO)

<https://www.vaahs.org.au/>

Victorian Aboriginal Health Service (**VAHS**) is another significant ACCO in Victoria and a member of VACCHO. As it is based in Melbourne, it is the largest, and one of the oldest ACCHOs.

VAHS works to provide medical services to the Aboriginal community including a medical clinic, dental services, family counselling, women's and children's services, preventative health care and a men's health service.<sup>58</sup>

They also have a number of community programs that support clients living at home who are elderly, live with a disability or suffer from a chronic health condition.<sup>59</sup> These programs are funded by the Commonwealth and Victorian Governments and aim to support independent living, health and wellbeing.<sup>60</sup>

#### Other ACCHOs

There are various other ACCHOs operating throughout Victoria, providing similar services to VAHS. These include:

- Mallee District Aboriginal Services;
- Kirrae Health Services;
- Lakes Entrance Aboriginal Health Association; and
- Dhauwurd Wurrung Elderly and Community Health Service.

## LEGAL

### Victorian Aboriginal Legal Service (VALS)

<https://vals.org.au/>

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled organisation in 1973 to address the overrepresentation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.<sup>61</sup>

VALS relies on grants from the Commonwealth Government, as well as public donations to fund the organisation and services it provides.<sup>62</sup> VALS provides various legal services including referrals, advice/information, duty work or case work assistance in criminal, family and civil law matters.<sup>63</sup>

They also offer legal education to Aboriginal communities on their legal rights, as well as services to assist those assimilating back into the community post-prison release.<sup>64</sup> In addition, VALS advocates more broadly for Aboriginal and Torres Strait Islander rights within the legal system.<sup>65</sup>

### Djirra

<https://djirra.org.au/>

Djirra was established in 2002 and is a family-central ACCO that focuses on providing support services to Aboriginal and Torres Strait Islander peoples who experience family violence.<sup>66</sup>

Among the services they provide are early intervention programs, policy advocacy and law reform work, as well as cultural and legal support systems.<sup>67</sup>

Djirra also organise a number of cultural and wellbeing workshops including Aboriginal women's network groups, culturally safe spaces for young Aboriginal women to discuss any issues and cultural strength workshops.<sup>68</sup>

## HOUSING

### Aboriginal Housing Victoria (AHV)

<http://ahvic.org.au/>

Aboriginal Housing Victoria (AHV) is a community housing organisation that aims to provide secure, affordable and culturally appropriate housing for Aboriginal Victorians.<sup>69</sup> AHV works to sustain long term tenancies with the help of support staff who conduct property management, links to local support services and community resources.<sup>70</sup>

The AHV owns 1,555 properties throughout Victoria that provides housing for Aboriginal and Torres Strait Islanders in Victoria.<sup>71</sup>

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## GENERAL

### Aborigines Advancement League (AAL)

[http://aal.org.au/HOME/HOME\\_01.html#](http://aal.org.au/HOME/HOME_01.html#)

The Aborigines Advancement League was established in 1932 and founded by William Cooper. Other founding members were Shadrach James, Kaleb Morgan, Pastor Doug Nicholls, Eric Onus and William Onus.<sup>72</sup>

The aims of the organisation are to initiate programs that improve the social, economic and cultural advancement of the Aboriginal and Torres Strait Islander peoples in Victoria and to promote self-determination and self-sufficiency.<sup>73</sup>

This organisation provides services such as aged care hostels, education programs, family support, funeral assistance fund and local neighbourhood and community services.<sup>74</sup>

### Victorian Aboriginal Community Services Association Ltd (VACSAL)

<http://www.vacsal.org.au/>

VACSAL was established in 1984 and provides community services (including a Homeless Outreach Program) for Aboriginal Victorians and advises the Victorian Government on a number of issues impacting Aboriginal people.<sup>75</sup>

VACSAL facilitates Aboriginal youth support services as part of the Bert Williams Centre, including a variety of community activities, Youth Justice services and Early School Leavers assistance.<sup>76</sup> In addition, VACSAL have delivered Indigenous Cultural Awareness Training.<sup>77</sup>

VACSAL also has a number of programs that aim to address the needs of Aboriginal males, including the Indigenous Men's Resource and Advisory Service which supports existing regional men's services and engages mentors and ambassadors to these groups.<sup>78</sup>

### Victorian Aboriginal Child Care Agency (VACCA)

<https://www.vacca.org>

The Victorian Aboriginal Child Care Agency (**VACCA**) was established in 1976 in response to the removal of Aboriginal children from their families and eventual institutionalisation.<sup>79</sup> VACCA's primary purpose is to repair the fragmentation of Aboriginal families and prevent the removal of Aboriginal children from their families, community and culture.<sup>80</sup> VACCA offers a number of programs in response to this issue, such as the Aboriginal Family Restorations program that provides home based support and education programs for families finding it difficult to safely care for their children,<sup>81</sup> and short term support for families in Child Protection to prevent the breakup of families.<sup>82</sup> For Aboriginal children on Children's Court orders, the Nugel program provides cultural planning, case management and support for families and children by providing assistance with decision making processes.<sup>83</sup>

For children who cannot live with their families, VACCA provides culturally safe foster care, therapeutic support, cultural support and therapeutic residential care.<sup>84</sup> In addition, post care programs assist young Aboriginal people transition to independent living and connect with their culture and community.<sup>85</sup>

VACCA also supports a number of programs for Aboriginal people who have come into contact with the justice system. VACCA also facilitates the Koorie Women's Diversion which offers services such as case management and support, referrals to resources to other forms of assistance to prevent further contact with the justice system.<sup>86</sup>



## Co-ops

There are a number of local cooperative (Co-Op) ACCOs that represent regional communities and work to directly address their needs. Many of these local Co-Ops are members of peak Victorian ACCOs, and act as representatives of their communities within these organisations.

The following is an outline of a number of local Co-Op ACCOS in Victoria:

Victorian local Co-Op ACCOS	
Ballarat and District Aboriginal Co-op (BADAC)	<a href="https://www.badac.net.au/">https://www.badac.net.au/</a>
Goolum Goolum Aboriginal Co-operative	<a href="http://www.goolumgoolum.org.au/">http://www.goolumgoolum.org.au/</a>
Dangenong and District Aboriginies Co-operative Limited	<a href="http://ddacl.org.au/">http://ddacl.org.au/</a>
Gunditjmara Aboriginal Cooperative	<a href="http://gunditjmara.org.au/?page_id=5">http://gunditjmara.org.au/?page_id=5</a>
Winda-Mara Aboriginal Corporation	<a href="https://www.windamara.com.au/about">https://www.windamara.com.au/about</a>
Wathaurong Aboriginal Co-operative	<a href="http://www.wathaurong.org.au/">http://www.wathaurong.org.au/</a>
Rumbalara Aboriginal Co-operative Ltd	<a href="https://www.rumbalara.org.au/">https://www.rumbalara.org.au/</a>
Ramahyuck District Aboriginal Corporation	<a href="https://www.ramahyuck.org/">https://www.ramahyuck.org/</a>
Murray Valley Aboriginal Co-operative	<a href="https://www.mvac.org.au/">https://www.mvac.org.au/</a>

## APPENDIX 2

### FORMALLY RECOGNISED TRADITIONAL OWNER CORPORATIONS

GROUP	REGISTERED ABORIGINAL PARTY UNDER HERITAGE ACT	SETTLEMENT ACT AGREEMENT	NTA DETERMINATION
Barengi Gadjin Land Council Aboriginal Corporation	✓	In negotiations	✓
Bunurong Land Council Aboriginal Corporation	✓	–	–
Dja Dja Wurrung Clans Aboriginal Corporation	✓	✓	–
Eastern Maar Aboriginal Corporation	✓	In negotiations	✓ & a further claim before the Federal Court
First People of the Millewa-Mallee Aboriginal Corporation	✓	Currently completing thresholds prior to negotiations	Claim before the Federal Court
Gunaikurnai Land and Waters Aboriginal Corporation	✓	✓	✓ & a further claim before the Federal Court
Gunditj Mirring Traditional Owners Aboriginal Corporation	✓	In negotiations	✓
Taungurung Land and Waters Council Aboriginal Corporation	✓	Pending ILUA registration	–
Wathaurung Aboriginal Corporation (trading as Wadawurrung)	✓	–	–
Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation	✓	Currently completing thresholds prior to negotiations	–
Yorta Yorta Nation Aboriginal Corporation	✓	–	Native title found to be extinguished

# APPENDIX 3

## STRATEGY SPECIFIC CONSULTATIVE BODIES

### STRATEGY SPECIFIC CONSULTATIVE BODIES

#### Marrung: Aboriginal Education Plan (2016-2026) (DET)

The aim is to improve Victorian understanding of Koorie culture and history, community engagement and learning and development of Indigenous students.<sup>87</sup>

An accountability framework has been established in which a Marrung Governance Committee will report to the Education State Board. The committee will be co-chaired by the Department's Secretary and VAEAI and include representatives from VACCA, VACCHO, Department's senior Executive and relevant government agencies and stakeholders.<sup>88</sup>

The department will collect data and give a report of progress at an annual ministerial Roundtable, which consists of:<sup>89</sup>

- Local Aboriginal Education Consultative Groups (LAECG's);
- Koorie Education roundtables (chaired by VAEAI, community members, local Koorie organisations);
- Regional Partnership Forums (co-chaired by DET and VAEAI, includes DET regions, LAECGs and service providers);
- Marrung Governance Committee; and
- Education State Board (chaired by DET Secretary, includes Deputy Secretaries, Regional Directors, CEO VCAA).

There are 32 Chairs of LAECGs around Victoria and they sit on the VAEAI Representative Council. The Chairs are elected by the local communities.<sup>90</sup> LAECG members must be VAEAI financial members.<sup>91</sup>

VAEAI representative council also includes 10 people from the Executive Committee and 8 Specialist Representatives.<sup>92</sup> The representative council elects the Executive Committee members and the Specialist Representatives at the VAEAI Annual General Meeting.<sup>93</sup>

#### Korin Korin Balit-Djak: Aboriginal Health, Wellbeing and Safety Strategic Plan (2017-2027) (DHHS)

Korin Korin Balit-Djak aims to improve community leadership, prioritise Aboriginal culture and community, create a system reform across the health and human services sectors, foster safe, secure and strong families and individuals and healthy Aboriginal communities.<sup>94</sup>

The Department of Health and Human Services will work together with Aboriginal community groups. The plan has been guided by an Expert Panel that is composed of 'a mixture of community, government, service delivery and academic experience'.<sup>95</sup> Every 3 years, the plan is to be updated and reviewed to make sure there has been progress.<sup>96</sup>

The DHHS has referenced the Loddon Mallee Aboriginal Reference Group as a model for a representative Aboriginal group.<sup>97</sup> LMARG is an elected group that consists of:<sup>98</sup>

- Mallee District Aboriginal Services (currently has 7 board members; board members are nominated by a member of the company; elected at general meeting);<sup>99</sup>
- The Njernda Aboriginal Corporation in Echuca (currently has 7 elected board of directors; director must be an indigenous person and appointed by the corporation);<sup>100</sup>
- The Murray Valley Aboriginal Co-operative in Robinvale (currently has 7 board members)<sup>101</sup>; and
- The Bendigo and District Aboriginal Co-operative in Bendigo (currently has 7 board members, elected by members of the co-operative, all are Indigenous).<sup>102</sup>

### Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement (DHHS)

Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement and Strategic Action Plan is designed to address the 'over-representation of Aboriginal children and young people in the child protection and out-of-home care systems'.<sup>103</sup>

The parties to the agreement are Victorian Aboriginal communities, family and children (represented by the Victorian Aboriginal Children and Young People's Alliance and the Victorian Aboriginal Child Care Agency), the child and family services sector (represented by the Centre for Excellence in Child and Family Welfare Inc) and the Victorian Government (represented and coordinated by the Department of Health and Human Services).<sup>104</sup>

A departmental Aboriginal governance and accountability framework will be established along with performance measures.<sup>105</sup> Progress will be reviewed and a summary will be included in the department's annual report tabled in parliament.<sup>106</sup>

All parties will share several roles and responsibilities (including embedding actions into their respective plans, implementing the agreement, monitoring progress, supporting the collection and analysis of data, providing advice on issues, reviewing and updating the agreement among other responsibilities).<sup>107</sup>

The government is responsible for supporting reforms to meet the objections, transitioning authority and responsibilities to Aboriginal organisations, providing funding and service agreements and promoting cultural awareness and safety.<sup>108</sup>

The child and family sector is responsible for working with Aboriginal organisations, implementing government policy on transferring authority to Aboriginal organisations and promoting cultural awareness and safety.<sup>109</sup>

### Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families (FSV, DHHS)

The plan was written by the Indigenous Family Violence Partnership Forum, which is composed of Indigenous community representatives, Indigenous organisations and senior representatives from the government.<sup>110</sup> The aim is to address family violence and support Indigenous culture and communities.<sup>111</sup>

Victorian Indigenous communities select Regional Action Group members (typically Elders, community leaders, other members of Indigenous communities, Indigenous organisations and Indigenous service providers).<sup>112</sup> The Regional Action Groups represent these communities in the Partnership Forum.<sup>113</sup>

### Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement – Phase 4 (DJCS)

The Agreement is intended to close the gap in the rate Aboriginal and non-Aboriginal people who have been entered into the criminal justice system.<sup>114</sup>

The Agreement was created by the Aboriginal Justice Caucus, which is made up of Aboriginal community members of the Aboriginal Justice Forum and senior representatives of the Justice, Health and Human Services and Education departments.<sup>115</sup> The Forum also included nine Regional Aboriginal Justice Advisory Committee (RAJAC) chairs, representatives from Aboriginal community organisations and peak bodies.<sup>116</sup> RAJACs include at least 7 Indigenous members and various government officials.<sup>117</sup>

The Agreement will be monitored and evaluated to ensure that there is transparency, accountability and improvement.<sup>118</sup>

## FOOTNOTES

- 1 Minister for Aboriginal Affairs (Vic), 'Historic Treaty Legislation Passes in Victoria' (Media Release, 21 June 2018) <<https://www.premier.vic.gov.au/historic-treaty-legislation-passes-in-victoria/>>.
- 2 The Assembly is referred to as the Aboriginal Representative Body in the Treaty Act. The Commissioner announced the new title of the Assembly on 13 February 2019.
- 3 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 31.
- 4 Ibid s 28.
- 5 Ibid s 36.
- 6 Ibid s 38.
- 7 We also contend that this can occur while maintaining compliance with the section 33 of the Treaty Act (which requires that the Framework be agreed before treaty negotiations commence), and set out our proposed process at Part 2.4: Achieving a mandate.

## PART 1 - FOOTNOTES

- 8 See *Constitution Act 1975* (Vic) s 1A.
- 9 [1992] HCA 23 - 175 CLR 1.
- 10 *Initially the Australian Aborigines Advancement League, it was reconstituted in its modern form in 1957*.
- 11 Aborigines Advancement League, *A Victorian Aboriginal Tradition* (2003/2004) <[http://aal.org.au/HOME/HOME\\_01.html](http://aal.org.au/HOME/HOME_01.html)>.
- 12 Later renamed the Aboriginal Welfare Board.
- 13 Richard Broome, *Aboriginal Victorians: A history since 1800* (Allen & Unwin, 2005) 341.
- 14 Ibid 340.
- 15 Michael Hemingway, *The Long Journey: Colonialism, Community-Control & Indigenous Autonomy*, Victorian Aboriginal Community Controlled Health Organisation (PhD Thesis, 2007) 23 <<http://www.vaccho.org.au/assets/01-RESOURCES/HISTORY-VACCHO.pdf>>.
- 16 Broome, above n 13, 340.
- 17 Hemingway, above n 15, 23.
- 18 Broome, above n 13, 340.
- 19 Views on the effectiveness of CATSI Act corporations to serve the needs of ATSI people vary, however, some features they have which are not available to corporations established under the general law include: a requirement that a majority of directors and members must be ATSI, traditional ownership and / or ancestry can be set as a membership criteria, and CATSI Act corporations also have increased financial transparency obligations.
- 20 *Aboriginal Lands Act 1970* (Vic) s 3(1)(a)
- 21 Broome, above n 13, 346.
- 22 Later attempts at land rights in Victoria did attempt to reference the underlying moral force behind the legislation, for instance, the preamble to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth), which notes that residents are "considered" to be "the inheritors in title from Aboriginals who owned, occupied, used and enjoyed the land since time immemorial." In effect this legislation, without making any enquiries,

- simply deemed the existing residents as Traditional Owners. So even while referencing prior traditional ownership, the legislation would exclude people with rights under traditional law who did not currently reside on the land.
- 23 [2002] HCA 58; 214 CLR 422; 194 ALR 538; 77 ALJR 356 (12 December 2002).
- 24 *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [129].
- 25 *Risk v Northern Territory of Australia* [2007] FCAFC 46 at [104].
- 26 *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606 at [129].
- 27 National Native Title Tribunal, *25 Years Of Native Title Recognition* (National Native Title Tribunal, Commonwealth of Australia 2017) <<http://www.nntt.gov.au/Documents/Key%20native%20title%20cases.pdf>>.
- 28 There are some exceptions under standard Settlement Act agreements, which will give Traditional Owners the right to veto the sale of Crown Land, or the carrying out of substantial commercial development of Crown Land.
- 29 *Aboriginal Heritage Act 2006* (Vic) s 150.
- 30 *Aboriginal Victoria, Registered Aboriginal Parties: Guidelines for Applicants* (2019) <<https://www.vic.gov.au/aboriginalvictoria/heritage/heritage-tools-and-publications/guides-forms-and-practice-notes-for-aboriginal-heritage-management.html#K>>.
- 31 Victorian Aboriginal Heritage Council, *Martang Registered as RAP* (13 September 2007) <<https://www.aboriginalheritagecouncil.vic.gov.au/martang-pty-ltd>>.
- 32 *Aboriginal Heritage Act 2006* (Vic) ss 151(2), [2A].
- 33 At the time of writing recognition is pending registration of the associated Indigenous Land Use Agreement (ILUA).
- 34 *Aboriginal Heritage Amendment Act 2016* (Vic).
- 35 Settlement Act, section 3, definition of "Traditional Owner Group Entity."
- 36 Victorian Treaty Advancement Commission, *First Peoples' Assembly* (5 April 2019) <<https://www.facebook.com/victoriatreatyadvancement/videos/381084162731471/>>.
- 37 *Advancing the Treaty Process with Aboriginal Victorians 2018* (Vic) s 31(1)(c).
- 38 Aboriginal Victoria (Department of Premier and Cabinet), *Victorian LAN Five Year Plan 2016-2026* (March 2016) <[https://www.vic.gov.au/system/user\\_files/Documents/av/Victorian\\_LAN\\_Five\\_Year\\_Plan.pdf](https://www.vic.gov.au/system/user_files/Documents/av/Victorian_LAN_Five_Year_Plan.pdf)>.
- 39 State of Victoria (Department of Education and Training), *Marrung Aboriginal Education Plan 2016-2026* (July 2016), 5 <[https://www.education.vic.gov.au/Documents/about/programs/aboriginal/Marrung\\_Aboriginal\\_Education\\_Plan\\_2016-2026.pdf](https://www.education.vic.gov.au/Documents/about/programs/aboriginal/Marrung_Aboriginal_Education_Plan_2016-2026.pdf)>.
- 40 Aboriginal Victoria (Department of Premier and Cabinet), *Victorian Aboriginal Affairs Framework 2018-2023* (September 2018) Aboriginal Victoria Policy, 18 <[https://www.vic.gov.au/system/user\\_files/Documents/av/VAAF%20FINAL.pdf](https://www.vic.gov.au/system/user_files/Documents/av/VAAF%20FINAL.pdf)>.
- 41 Including the Federation.
- 42 Janet Hunt, 'Engaging with Indigenous Australia— exploring the conditions for effective relationships with Aboriginal

- and Torres Strait Islander communities' (Issue Paper No 5, Closing the Gap Clearing House, October 2013) <<https://www.aihw.gov.au/getmedia/7d54eac8-4c95-4de1-91bb-0d6b1cf348e2/ctgc-ip05.pdf.aspx?inline=true>>.
- 43 Aboriginal Victoria, above n 38, 10.
- 44 Ibid 23.
- 45 Ibid.

## PART 2 - FOOTNOTES

- 46 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 30(1).
- 47 See Explanatory Memorandum for *Traditional Owner Settlement Bill 2010* (Vic) 1 <<http://www.landjustice.com.au/document/Traditional-Owner-Settlement-Bill-2010-Memo.pdf>>.
- 48 BC Treaty Commission, *Six Stages* [2019] <<http://www.bctreaty.ca/six-stages>>.
- 49 See section 32, however also note s 30(2) which requires the Treaty Authority to be established before the Framework is agreed to.
- 50 Michael Graham, Alice Petrie, 'Advancing the Treaty Process with Aboriginal Victorians Bill 2018' (Treaty Series No. 5, Parliamentary Library & Information Service, May 2018) 5 <<https://www.parliament.vic.gov.au/publications/research-papers/send/36-research-papers/13861-advancing-the-treaty-process-with-aboriginal-victorians-bill-2018>>.
- 51 Victorian Treaty Advancement Commission, *First Peoples' Assembly of Victoria* (2019) <<http://victoriatreatyadvancement.org.au/first-peoples-assembly-victoria>>.
- 52 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) s 33.
- 53 Treaty Act, section 33.

## APPENDIX 1 - FOOTNOTES

- 54 *Uluru Statement from the Heart* [26 May 2017] <<https://www.1voiceuluru.org/>>.
- 55 Victorian Aboriginal Community Controlled Health Organisation Inc., *About Us* <<https://www.vaccho.org.au/about-us/>>.
- 56 Victorian Aboriginal Community Controlled Health Organisation Inc., *VACCHO News: News and Media* <<https://www.vaccho.org.au/news-media/>>.
- 57 Victorian Aboriginal Community Controlled Health Organisation Inc. *Walk with us towards a brighter future for Aboriginal Victorians: Working with Communities to enhance the health and wellbeing of Aboriginal Victorians* (2018) <<https://www.vaccho.org.au/assets/01-RESOURCES/TOPIC-AREA/CORPORATE/2018/VACCHO-STATE-ELECTION-2018-WEB.pdf>>.
- 58 Victorian Aboriginal Health Service <<https://www.vahs.org.au/>>.
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## APPENDIX 3 - FOOTNOTES