FEDERATION OF VICTORIAN TRADITIONAL OWNER CORPORATIONS

DISCUSSION PAPER 4

ABORIGINAL CONTROL OF ABORIGINAL AFFAIRS: AN ABORIGINAL PARLIAMENT AND PUBLIC SERVICE

Federation of Victorian Traditional Owner Corporations

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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 fourth 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	UNDRIP and enshrining Aboriginal rights
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EXECUTIVE SUMMARY

The central basis of self-determination is that Aboriginal people should have control of their own affairs. This straightforward claim, in one way or another, is at the heart of all Aboriginal activism. For decades it has driven Aboriginal people around the country to organise politically.

Whether as Land Councils, Prescribed Bodies Corporates, action groups, committees, and so on, all have sought to exert greater control over their traditional Country and their own lives. In return, governments both State and Federal, have deflected this drive into consultation, co-design, partnership, joint management, and on and on. However, such measures will never satisfy what is, at its core, a claim for self-determination by a distinct polity, asserting its own sovereignty.

The negotiation of a treaty differs from previous attempts to accommodate Aboriginal and Traditional Owners claims. Firstly, it implicitly recognises Aboriginal people and Traditional Owners as forming a distinct political entity (or entities) with whom the State can reach political settlement. Secondly, the focus of such settlement is not confined to specific demands, such as rights to land or natural resources, or the ability to influence criminal justice, health or education policy. Instead, treaty is all encompassing. In this way, and for essentially the first time, the State will face the demands from Aboriginal people in their totality, and accordingly must reckon with calls not to recognise, or merely include within the halls of power, but to hand over control.

The purpose of this paper is to examine how this may be effectively and practically achieved in the context of the treaty process now underway in Victoria, and as established by the *Advancing the Treaty Process with Aboriginal Victorians Act 2018*. In doing so we will draw on the treaty model as established in other papers in this series.

PROPOSED TREATY MODEL

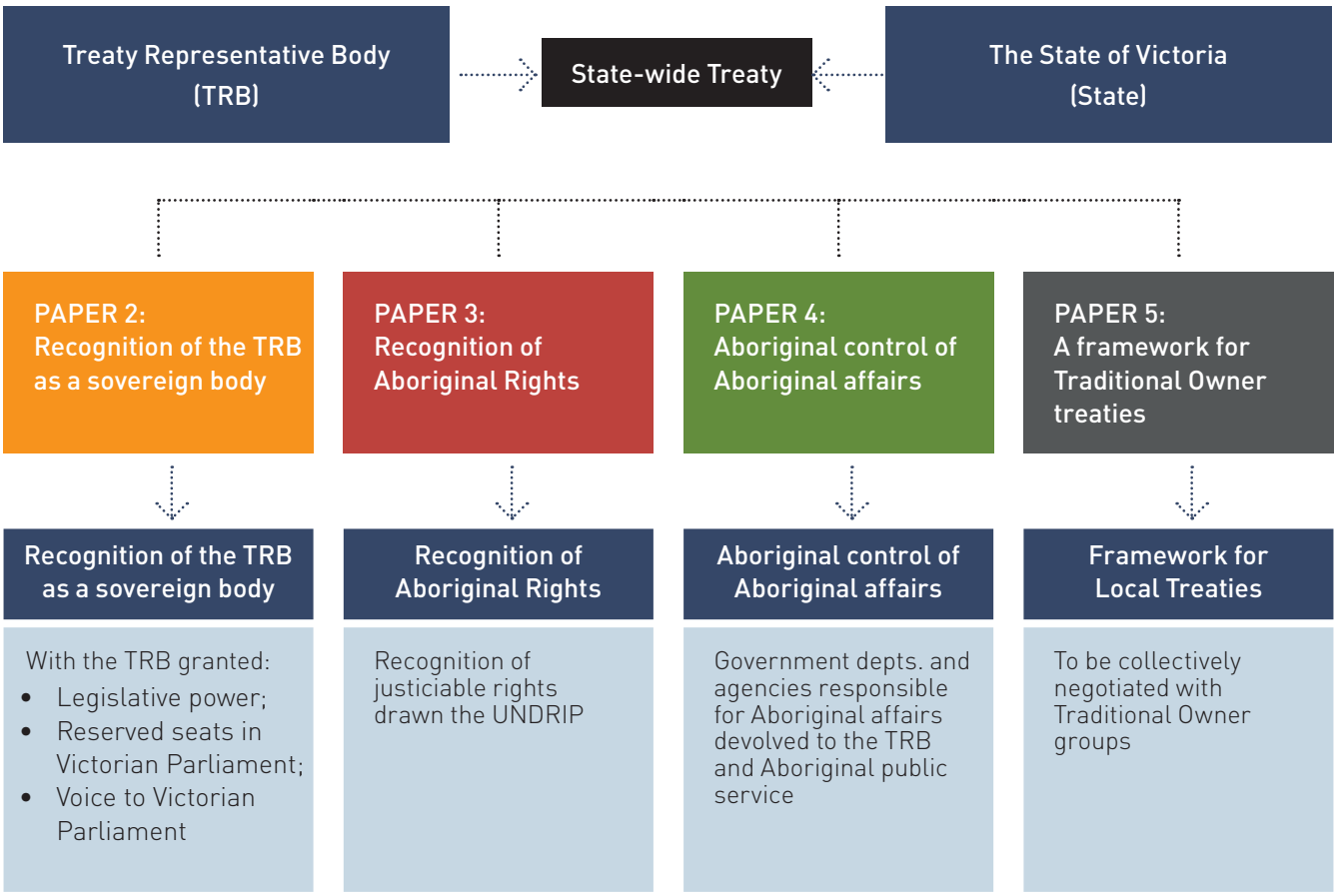
In the first discussion paper in this series, we examined the idea of establishing both State-wide Treaties and Local Treaties.[1] We also envisioned a centralised body representing all Traditional Owners in Victoria, known as the Treaty Representative Body (or **TRB**). The TRB, if established, could enter directly into the State-wide Treaty with the State of Victoria, and this agreement would deal with state level issues, protecting and advancing the rights and interests of Traditional Owners and Aboriginal people across Victoria. It could also include a framework for further Local Treaties, entered into directly between the State and individual Traditional Owner groups.

Since the publication of our first paper, the First Peoples' Assembly of Victoria (**Assembly**) has formally adopted the concept of seeking both a state-wide and local treaties.[2] While much of the detail remains to be worked out, the concept of a State-wide treaty would seem to also imply the necessity of a body like the TRB, representing all Traditional Owner interests from across the State. *(Figure 1: Overview of proposed model)*.

The central premise of this paper is that once established, the TRB could take on the role of an Aboriginal parliament for Victoria, supported by its own public service. In our second discussion paper,[3] we conceived of the TRB as a confederation of Traditional Owner groups throughout Victoria, which as a collective of sovereign entities, would adopt their sovereign nature in respect to certain matters.

The State-wide Treaty would recognise the TRB's status as embodying the collective sovereignty of Traditional Owner groups, and could do so by empowering the TRB to enact its own legislation, take up seats in, or be a voice to, the Victorian parliament. It could also devolve control from various government departments and agencies to the TRB and their support staff, conceived as an Aboriginal public service.

Figure 1. Overview of proposed model



OUTLINE OF PAPER

This paper will primarily focus on the way the TRB could be empowered to enact its own legislation, and take administrative control of Aboriginal affairs. In doing so, it will examine several central questions, such as what powers should be sought for an Aboriginal parliament, how would these powers operate in practice, and how could such a body be supported to implement its legislation and policy? In addressing these issues, this paper is organised into five parts.

In Part 1: Aboriginal interactions with the State, we will evaluate where Aboriginal interests and State power interact to identify possible areas where an Aboriginal Parliament may want to take up legislative or other powers.

In doing so, we approach the issue in two ways, firstly looking at those areas where Aboriginal people are suffer difficulty or face disadvantage as a result of colonisation, and secondly looking at the State policy developed in response to these issues.

In order to explore State policy, it is necessary to examine the 'six domains' or policy areas that the State identifies as linking all current State strategies and plans in Aboriginal affairs. These are set out in the Victorian Aboriginal Affairs Framework 2018 – 2023 (**VAAF**) as: (i) Children, Family & Home; (ii) Learning and Skills; (iii) Opportunity & Prosperity; (iv) Health & Wellbeing; (v) Justice & Safety; and (6) Culture & Country.[4] Adopting these as a lens through which to comprehensively view the Aboriginal policy space, we suggest they provide a starting point to consider the method and process by which power and resources for these areas may be handed over to Aboriginal control.

In Part 2: The experience in Canada, we look to the various approaches adopted by the federal government in Canada to indigenous self-governance.

Wherever indigenous self-governance has been enacted, the process is inevitably shaped by the local history of colonisation, and the existing settler legal structures with which indigenous bodies must contend and share power. With this in mind, this paper will examine approaches adopted in Canada, as the jurisdiction which most closely resembles our own in terms of culture, law, colonial history and importantly, ongoing attempts to facilitate indigenous self-government.

One substantial difference between Australia and Canada, is that its constitution recognises and protects the right to indigenous self-government.[5] This has required the Canadian government to adopt a range of responses to establishing self-government regimes that meet the needs of diverse indigenous cultures, across a large and sporadically settled nation. This ranges from very remote areas with majority indigenous populations, to less remote areas where First Nations hold a significant land base, to largely urbanised and landless populations.

This paper will examine these varied Canadian approaches, noting that while examples of indigenous self-governance are most frequently to be found in remote areas, or rooted in an indigenous land base, the Canadian government has recently entered into agreements with several Métis Nations[6] that do not have these features, and are dispersed, urbanised, and often landless. While self-governance arrangements for the Métis are yet to be fully developed, it seems clear that current Canadian policy will look to establish institutional arrangements, and the handing over of services and authority that allow for self-governance,[7] not tied to a geographical location, but based in citizenship of an indigenous polity.

Indigenous self-governance in Victoria will need to contend with similar issues to those faced by the Métis Nations, and design systems allowing for a highly colonised and populated region. This paper argues that the approach of the Métis contains lessons for a proposed TRB, which under our model would leave land rights to individual Traditional Owner groups, and seek instead to provide governance at a state wide and institutional level, dealing with issues of concern to all Aboriginal people, regardless of Traditional Owner status.

We then turn to Part 3: Constitutional limitations, to look expressly at constitutional and legal constraints, and examine the particular local colonial history and legal framework that will shape Aboriginal self-governance in Victoria.

This is principally an examination of federalism in Australia, and the balance of powers between the State and Commonwealth governments. In circumstances where the Commonwealth is not a party to Treaty negotiations, and where constitutional change at the federal level is both difficult, and unlikely in the short term, there will be limitations on what powers the State can convey to an Aboriginal Parliament, and restrictions on the manner in which it can do so. As a result, this paper will argue that the proposed TRB will need to have its authority delegated by the Victorian Parliament, meaning that it will need to share authority and power in a similar manner to that seen in the international sphere.

In Part 4: Defining the scope of the TRB, we look more closely at the purpose of the TRB and how this may inform the areas over which it should seek power, and what type of powers it should seek.

In looking at the proposed jurisdiction of the TRB, we return to the 'six domains' in the VAAF as a starting point to consider the different areas, or potential portfolios, where the TRB could exercise power. The first 5 of these domains are clear areas of interest to all Aboriginal people, and areas where significant Aboriginal advocacy, policy development and service delivery is already occurring, and for which governance could be wholly transferred to a democratic Aboriginal institution like the TRB. The sixth of these six domains, Culture and Country, requires a discussion as to a proposed division of power between the TRB and individual Traditional Owner groups. This paper will argue that individual Traditional Owner groups should exercise their own sovereign rights over Country, in accordance with individually negotiated Local Treaties, but would nevertheless benefit from collective representation in the TRB.

With the scope of jurisdiction established, this part will then look at the different types of power the TRB may wish to exercise. This would include the power to make legislation within the six domain areas, establishing the TRB as Australia's first Aboriginal Parliament. However, not every problem has a legislative solution, and the TRB will also require the ability to make administrative decisions, design and implement policy,

and carry out its administrative functions. Indeed, this work, to be led by an Aboriginal public service, may often prove more transformative than mere legislation, and be more vital to the practice of self-determination. Further, this paper will argue, as a space less inhibited by legal and constitutional constraints, the TRB will have greater independence within this sphere to better determine and control the affairs of its community.

Finally, in Part 5: Proposed legislative governance model, we put forward a potential structure for the making of legislation within the six domains.

This structure envisages two core components:

(i) that the TRB will have the power to make or amend legislation for Aboriginal Victorians within the six domains; and

(ii) the TRB and the Victorian Parliament will have a reciprocal voice, each to the other.

In making legislation, there would be 3 categories, depending on whether the legislation was concerned with:

Category 1: only matters internal to the Aboriginal and Traditional Owner community;

Category 2: how the State interacts with Victorian Aboriginal people; or

Category 3: matters that may impact on non-indigenous people or interests.

With respect to the Category 1 and Category 2, the TRB would have complete authority to make legislation. However the difference would be around the application of the 'voice', so that for Category 1 issues, the Victorian Parliament would have a right to express its view, and for Category 2 issues, the TRB would have a duty to consult with, and consider the views of the Victorian Parliament.

With respect to Category 3, where the legislation may directly impact on the interest or rights of Victorian citizens, it is considered appropriate that the Victorian Parliament have a more substantial role, and any such legislation would need to be passed by both the TRB and the Victorian Parliament.

The above sets out how matters would be dealt with within the 'six domains,' where the TRB would have significant authority and control. While this is designed to give the TRB jurisdiction over the central concerns of the Aboriginal community, it is clear that they may also possess interests outside of these areas. For this reason, on all matters outside the 'six domains' it is proposed that the TRB would have a 'voice' to the Victorian Parliament. As can be seen from the above, the Victorian Parliament would likewise have a voice into the TRB in its areas of legislative responsibilities, meaning that the right is reciprocal, and would ensure an ongoing dialogue between the two parliaments, and the ability to navigate a shared future for all Victorians.

What is clear in considering the issues outlined in this paper, is that the design of an Aboriginal Parliament is politically and legally complex. In particular, the interplay between the federal and state constitutions requires careful and specialised attention, and it is by no means assured that all positions put forward are without some constitutional risk. Notwithstanding that complexity, and the further work to be done, this paper asserts that the establishment of an Aboriginal parliament and public serve is achievable, and securely based in the experience and practice of other settler nations. Indeed, by learning and developing on their experience, it remains open to the parties to develop structures and systems that imbed Aboriginal self-determination, and lead the world in creating, recognising and empowering indigenous self-governance.

PART 1

ABORIGINAL INTERACTIONS WITH THE STATE

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In trying to determine what powers the TRB should have, and in what areas it should seek to exercise control, it is first useful to consider where Aboriginal people and the State come into contact, the results of this contact, and how, or if, authority should be removed from the State in this area, and devolved to Aboriginal people themselves through the TRB.

In making these assessments, we will approach the issue in two ways. Firstly, we will try and identify the needs of the Aboriginal community, and those areas where colonisation has created suffering and disadvantage, which continues to be contributed to by State action or inaction. On this there is unfortunately ample evidence from which to draw. The recent development of the Yoo-rrok Justice Commission, established to conduct a truth-telling inquiry into the colonisation of Victoria, will likely produce a comprehensive analysis which will more directly inform these questions. However, without the benefit of the Commission's findings we will examine the issue through the (admittedly less forensic) lens of the Closing the Gap targets.

Secondly, we will look at how the State operates in these spaces, and how it produces and develops its own polices in Aboriginal affairs, so that we can later attempt to identify appropriate points where control and decision making may be transferred. This is done through an examination of the VAAF, which is the overarching strategic framework through which the State maps out and monitors its Aboriginal affairs policy, and efforts to support the national Closing the Gap agenda.

IDENTIFYING THE DAMAGE OF COLONISATION: CLOSING THE GAP TARGETS

There are a number of startling statistics which show that the State, whether by its actions or neglect, is failing its Aboriginal citizens. In recent years such statistics have been prominent in the development of Aboriginal policy, most clearly expressed in the Commonwealth 'Closing the Gap' strategy. In this formation, it is the statistics that are given foremost emphasis, and then sought to be rectified by targeted government policy.

For instance in 2007, the Council of Australian Governments (**COAG**) set measurable targets to track and assess developments in the overall health and wellbeing of Aboriginal and Torres Strait Islanders. In 2008, COAG approved the National Indigenous Reform Agreement, which set out six Closing the Gap targets, with a seventh target added in 2014, each of which is set out Figure 1.1.

Figure 1.1 Closing the Gap Targets (2007 – 2019)[8]

	Target	Date to be achieved	Status
1.	Halve the gap in child mortality rates	2018	Not met
2.	Halve the gap in reading, writing and numeracy achievements for children	2018	Not met
3.	Close the gap between Indigenous and non-Indigenous school attendance	2018	Not met
4.	Halve the gap in employment outcomes between Indigenous and non-Indigenous Australians within a decade	2018	Not met
5.	95 per cent of Indigenous four year olds enrolled in early childhood education	2025	On track
6.	Halve the gap for Indigenous students in Year 12 attainment	2020	On track
7.	Close the gap in life expectancy	2031	Not on track

While each target specified is objectively important, the focus was developed without significant partnership from Aboriginal and Torres Strait Islander peoples and with limited input from state and territory governments.[9] The subsequent Closing the Gap strategy has been criticised as adopting a 'deficit' approach that focused on 'gaps' identified by government and the bureaucracy, rather than focusing on the pre-existing strengths within the community, like functional and effective Aboriginal Community Controlled Organisations, as well as culture and connection to country.[10] This leads to a process whereby resources are not directed to areas and programs that are already working, but only to problem areas identified as most pressing by those outside, and with little knowledge, of the community.

The outcome of this approach is perhaps best seen in the results, as evident from Figure 1.1. Notably, by 2017 the Commonwealth announced a 'refresh' of Closing the Gap, and has negotiated directly with the Coalition of Aboriginal and Torres Strait Islander Peak Organisations to develop a more strength based approach. This resulted in a formal agreement in 2019 that commits to a further sixteen socio-economic targets.[11] These targets are set out in full at **Appendix A**, and as can be seen, they address a wide range of areas where Aboriginal people face disadvantage, including education and health outcomes, incarceration, child removals, family violence, suicide rates, recognition of rights over lands and waters, and language revitalisation.

This revised and more fulsome lists of targets, and the statistics underpinning them, start to make clear those areas where the consequences of colonisation are most acute, and where government services have either failed, or have actively damaged Aboriginal people.

VICTORIAN ABORIGINAL AFFAIRS FRAMEWORK 2018 – 2023

While the Closing the Gap strategy is a Commonwealth initiative that sets targets and policy direction, it is largely at the State level that policy is actually designed and implemented. Furthermore, this policy is developed by the various Victorian Government departments and agencies with responsibility for the relevant subject area. Since at least 2016, when the Andrews government adopted self-determination as the guiding principle in Aboriginal affairs,[12] these polices have been developed with various bodies and committees made up of Aboriginal people, established by government for the purposes of consultation, partnership and / or co-design (**Consultative Bodies**). Some examples of policies, plans or strategies developed in this way, along with the relevant government department and Consultative Body are set out at Figure 2.1.

Figure 2.1 Example policies, plans or strategies

Policy, plan or strategy	Department or agency	Aboriginal Consultative Body
Marrung: Aboriginal Education Plan (2016-2026)	Department of Education and Training	Marrung Governance Committee
Korin Korin Balit-Djak: Aboriginal Health, Wellbeing and Safety Strategic Plan (2017-2027)	Department of Health & Human Services	Aboriginal community groups
Wungurilwil Gapgapduir: Aboriginal Children and Families Agreement	Department of Health & Human Services	Victorian Aboriginal Children & Young People's Alliance the Victorian Aboriginal Child Care Agency
Dhelk Dja: Safe Our Way – Strong Culture, Strong Peoples, Strong Families	Department of Health & Human Services	Indigenous Family Violence Partnership Forum
Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement – Phase 4	Department of Justice & Community services	Aboriginal Justice Forum

While these policies seek to respond to Close the Gap targets, and to embed elements of self-determination, because they have been developed by different departments, there are differences in approach and emphasis. This is a gap the VAAF is trying to fill. Rather than replacing or redirecting these existing strategies, the role of the VAAF is to provide an overarching, whole-of-government framework to link this work together.[13] This makes the VAAF a useful document, in trying to understand both how the State is interacting and developing policy with and for Aboriginal people, and also how it conceives of this project as a cohesive whole.

In examining the breadth of Aboriginal affairs, the VAAF seek to link the various policies and strategies of the State by establishing 'six domains' which cover:

(i) Children, Family & Home;

(ii) Learning and Skills;

(iii) Opportunity & Prosperity;

(iv) Health & Wellbeing;

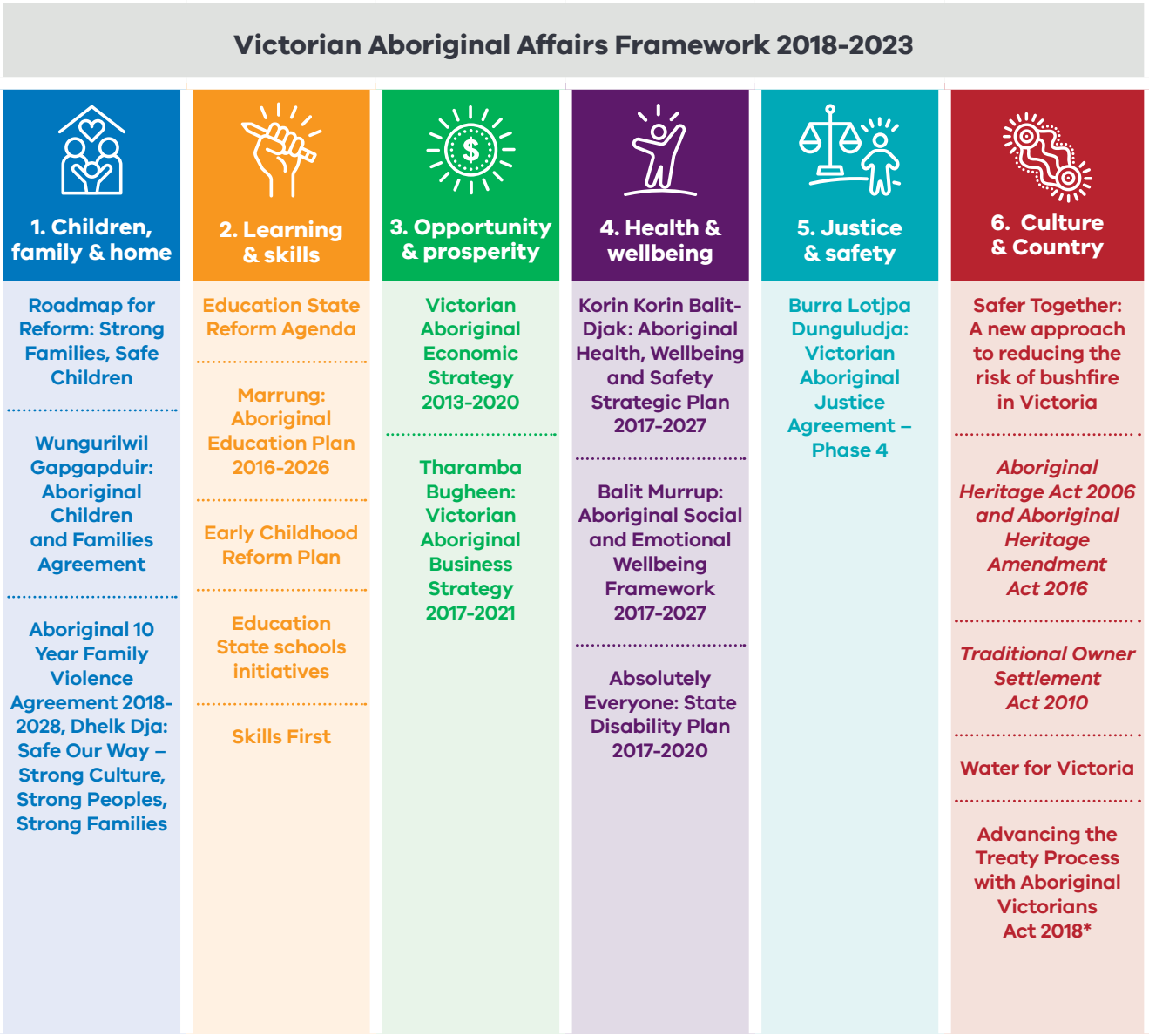
(v) Justice & Safety; and

(6) Culture & Country.

The relationship between each domain, and the relevant strategy, can be seen in the extract from the VAAF at Figure 2.2.

While each of the existing strategies has its own detailed goals and specific targets related to individual areas, the VAAF includes a further twenty broad and aspirational goals against each domain area (see **Appendix B**). Each of these goals is further underpinned by four 'self-determination enablers' which the State asserts to have been identified through community consultations.[14]

Figure 2.2 The VAAF's relationship to existing strategies[15]



*The Advancing the Treaty Process with Aboriginal Victorians Act 2018 relates to all domain areas.

The 'self-determination enablers' identified in the VAAF as described as follows:

- Prioritise culture;
- Address trauma and support healing;
- Address racism and promote cultural safety; and
- Transfer power and resources to communities.

This last point makes clear that the State recognises the final goal of its self-determination policy as the handover of power and resources in each of the six domains to Aboriginal people. Indeed, the VAAF directly states this aspiration:

> (t)here is a continuum that leads to Aboriginal self-determination, ranging from informing community through to transferring decision-making control. We acknowledge that different policies, initiatives and strategies across government are at different stages of advancing self-determination. In our journey towards making Aboriginal self-determination a reality, government should continue to strive towards transferring decision-making control to Aboriginal peoples and community on the matters that affect their lives.[16]

The method by which the State will continue its 'journey towards making Aboriginal self-determination a reality' is not set out in the VAAF, and properly so, as it is not governments to determine. However it would seem apparent that Treaty, and we would propose the TRB, would be the most effective vehicle for doing so.

On that basis, we suggest the six domains presented in the VAAF are a useful method through which to view the relevant subject matter over which the TRB may wish to take on power and control. It also allows us to see the first tentative steps taken by government, as well as the very significant work done by Aboriginal people and Traditional Owners within Consultative Bodies, to set the path to true self-determination.

PART 2

THE EXPERIENCE IN CANADA

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As we have seen, in recent years the State has made efforts to include Aboriginal voices in policy development through the various Consultative Bodies. While this has allowed Aboriginal input into policy dealing with land rights, health, education and the justice system, it remains largely at the level of consultation, and done through the goodwill of the State rather than securely based on recognised rights.

Further, nowhere within operational State policy is the right of Aboriginal people to decide and implement these matters for themselves fully recognised. This is in contrast to other settler nations, where Indigenous peoples have been given varying rights of self-government through their own representative bodies.

These international systems of self-governance, and the scope of powers and authority they provided to indigenous people, differ from nation to nation, and reflect their individual histories of colonisation, and the peculiarities of the systems of law in which they are established. However they do tend to share certain features.

Firstly, these systems generally operate within some form of constitutional recognition or protection of indigenous rights,[17] an attribute notably absent from the Australian landscape. Secondly, they all have some level of oversight or intrusion on their affairs by the settler nation.[18] This would seem in many ways unavoidable, not least of all because despite being self-governing structures, they are none the less required to be integrated into the larger national system of laws. In this way it would not be feasible, or practical, for them to operate without complimenting and co-operating with wider structures. Finally, almost without exception, examples from the international sphere are located in remote regions where there is an expanse of unsettled land, and the indigenous people are a majority or significant proportion of the population, or where the indigenous polity has a significant land base. In this way, whatever level of autonomy they are granted, the opportunities for conflict with wider power structures are limited, and the settler nation risks little in allowing elements of self-government.

In this section, we will focus on one of these international systems, being the approach of the federal Government of Canada. Canada is often examined as a model for treaty reform in Australia, as their settler culture, legal and political structures bare the most resemblance to our own. For instance, Canada's federal political system is similar to that established in Australia, in that governmental powers are distributed between the federal government, and provincial or territorial governments (equivalent to our states and territories). As in Australia, legislative power is shared between the federal and provincial or territorial governments and derives directly from the Canadian Constitution.

Also like Australia, Canada was colonised relatively recently, and has a large land mass consisting of both highly populated areas heavily impacted by colonisation, and remote regions that are less impacted. This has led to a diverse range of approaches to indigenous self-government. Indeed, almost all features seen within the wider international sphere can be found somewhere within Canada, which throughout its provinces and territories has adopted a range of systems; from simple advisory bodies, to almost complete sovereign powers over a defined geographical area, to the creation of entirely new political jurisdictions within the federal framework of the nation state.

Canada also presents a developing exception to the norm of remoteness, and the limiting of jurisdiction to a defined land base. This is the current negotiations between the Canadian Government and Métis Nations, who are seeking to negotiate self-governance without a significant land base, and instead are seeking institutional arrangements to provide them with control over the policy areas that affect the lives of their citizens. This we suggest is analogous to the position of the TRB, which will operate in a structure whereby issues relating to land, culture and local decision making are left to individual Traditional Owner groups, while the TRB focuses on those issues affecting all Aboriginal Victorians.

SELF-GOVERNMENT POLICY GUIDE

As in Australia, where several states and the Northern Territory are now pursuing separate pathways to treaty, so have the provinces and territories in Canada adopted differing approaches to treaty making and self-government arrangements. However, in a significant difference to Australia, section 35 of the Canadian Constitution[19] recognises and affirms 'existing aboriginal and treaty rights.' In August 1995, through the release of document known as the *Self-Government Policy Guide,* the federal Canadian government formally acknowledged that section 35 recognises the Aboriginal people of Canada (defined to mean the First Nations, Inuit and Métis peoples) have an inherent right of self-government.[20]

So that it may be usefully applied across different provincial and territorial systems, and also the different cultures and aspirations of First Nations, Inuit and Métis groups, the Self-Government Policy Guide adopts a broad approach to concepts of self-government. The policy declares that the Canadian Government is generally open to all manner of proposals, provided there is agreement among all parties, including the relevant province or territory. However, despite this openness, the Self-Government Policy Guide does provide some limitations, for instance:

> Aboriginal governments and institutions exercising the inherent right of self-government will operate within the framework of the Canadian Constitution. Aboriginal jurisdictions and authorities should, therefore, work in harmony with jurisdictions that are exercised by other governments... The inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states. On the contrary, implementation of self-government should enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society.[21]

In this way, while the Canadian Government will negotiate self-governance over a wide array of matters, it rules out: '(i) powers related to Canadian sovereignty, defence and external relations; and (ii) other national interest powers.'[22] The term 'other national interest powers' includes things like management of the national economy and banking and financial matters, national law and order and substantive criminal law, health and safety, among other things.[23]

In addition to these specified limitations around subject matter, the Self-Government Policy Guide proposes different approaches for different areas of Canada, which can be considered in three broad streams:[24]

(i) (**Public Government**) in the remote north, and where there is a significant majority indigenous population, the Government of Canada may establish a separate territory recognised as part of, and within, the Canadian federal system, overseen by a 'public government' representing all people within the territory;

(ii) (**Jurisdiction over Land Base**) in the more populous south, and where the group holds a significant land base, the Canadian Government may agree to allow a group to establish their own government with jurisdiction over certain matters within that land base; and

(iii) (**Institutional Arrangements**) where the group does not possess a land base, the Canadian Government is open to the agreement of institutional arrangements to allow the group to control and influence the important decisions that affect their lives.

PUBLIC GOVERNMENT

An example of a public government approach is the creation of the Nunavut territory. Located in one of the world's most remote and least populated regions,[25] it was created as a territory of Canada pursuant to the *Nunavut Act (1993)* (**the Nunavut Act**). The territory of Nunavut has the same status as other territories within the Canadian system, and the same ability to make and pass law. It was created in response to the desire of the Inuit people to express their aspirations for self-government.[26] As they comprise 83.6% of the population,[27] it was thought better to govern as a territory of Canada, rather than as a separate indigenous government limited to their own land base.

Public Government Case Study: Nunavut

The Nunavut Act created Nunavut's institutions of public government, including the Nunavut Legislature, which consists of the Legislative Assembly and the Commissioner of Nunavut.[28]

The legislative process in Nunavut is similar to the parliamentary process adopted in all Canadian legislatures. In order to pass into law, a Bill must pass through a first and second reading, referral to a standing committee, referral to the Committee of the Whole, before a third reading and vote within the Legislative Assembly.

The Nunavut Legislature has legislative authority to make laws in relation to a broad range of topics, including the administration of justice, healthcare, taxation, property and civil rights, education, municipal government, language and intergovernmental agreements.[29] While the Nunavut Legislature has authority to enact laws in relation to these subject areas, this authority derives from an Act of the Canadian Parliament. Therefore, it remains liable to change according to any amendments made to the Nunavut Act by the Canadian Government.

A Bill is only passed into law upon receiving assent from the Commissioner of Nunavut.[30] The Commissioner is appointed by, and officially represents, the federal government within Nunavut.[31]

JURISDICTION OVER LAND BASE

The more common form of indigenous self-governance within Canada is the granting of limited jurisdiction over a groups own land base. An example would include the 'Self-Government Agreements' entered into with First Nations in the Yukon, or treaties negotiated through the modern treaty process in British Columbia.

First Nations self-government is underpinned by several key principles. First, self-government must be exercised within the parameters of the Canadian Constitution, and First Nations people maintain their status as citizens of Canada and their relevant province or territory. Second, particular general laws continue to apply to First Nation governments in the same manner as they do to other Canadian governments. That is, the Charter of Rights and Freedoms and the Criminal Code of Canada continue to operate alongside First Nations self-government. Third, most treaty laws will only apply to treaty citizens. However, there are some limited exceptions to this. For example, laws related to zoning and transportation apply more broadly to all residents on treaty lands. Fundamentally, however, First Nations laws must work in harmony with federal and provincial laws. Finally, First Nations are required to consult with local residents about any decisions that will directly affect them.[32]

Jurisdiction over Land Base Case Study: Yukon

Yukon is a territory of northwest Canada. In 1993 the Government of Canada, the Government of Yukon and the Council of Yukon First Nations signed an 'Umbrella Agreement' establishing an overarching framework under which negotiations for individual 'Final Agreements' are conducted.[33] Final Agreements are entered into with individual First Nations, and are constitutionally protected modern treaties under section 35 of the Canadian Constitution.[34] All individual Final Agreements contain both the provisions of the Umbrella Agreement and specific clauses pertaining to the particular circumstances of the individual First Nation.[35] They cover substantive issues such as heritage, fish, wildlife, natural resources, water, forestry, taxation, financial compensation, economic development and land management.[36]

In addition, Yukon First Nations can negotiate Self-Government Agreements. Through these agreements, Yukon First Nations are able to negotiate for a range of governing powers, rights and responsibilities, including those related to law-making, programs and service delivery, the appointment of representatives to various governmental bodies, and taxation.[37] Yukon Nations may also negotiate to assume responsibility for the design, delivery and administration of policy areas such as tribal justice, education, health and social services, and employment opportunities.[38] Finally, provision is made for financial transfer arrangements, pursuant to which funding is provided for Yukon First Nations' institutions and programs.[39]

INSTITUTIONAL ARRANGEMENTS

As a result of colonisation, some indigenous groups within Canada do not possess a significant land base over which to seek jurisdiction, and the exercise of self-government. Of these, the most prominent are the Métis, descendants of First Nations people and early European settlers, they developed into a new Indigenous peoples, with their traditional homelands extending through Ontario, British Columbia, the Northwest Territories and the northern United States.[40]

In the modern era, while colonisation has left them without a substantial land base, their recognition in the Canadian Constitution ensures the have an inherent right to self-government.[41] However, enacting such a right divorced from a physical jurisdiction has proven complex. While the Self-Governance Policy Guide, released over 25 years ago, makes clear the openness of the Canadian Government to establishing self-governance for groups without a specific land base, it did little to conceive of what this might look like in practice, noting only that:

...negotiations may consider a variety of approaches to self-government off a land base including:

- forms of public government;
- devolution of programs and services;
- the development of institutions providing services; and
- arrangements in those subject matters where it is feasible to exercise authority in the absence of a land base.[42]

However there have been recent developments in this area, with the Métis Governments of Ontario, Saskatchewan, and Alberta each signing *Métis Government Recognition and Self-Government Agreements* with the federal Canadian government.[43]

Institutional Arrangements Case Study: Métis Nation of Ontario

On 27 June 2019, the Métis Nation of Ontario entered into a Self-Government Agreement with the Government of Canada. The agreement does not immediately deliver self-government, but provides a pathway through which the Métis Nation can be officially recognised, the agreement ratified by its citizens, and jurisdiction taken up over a series of core internal self-government areas, including (but not limited to) determining its own citizenship, leadership and operations.

Once recognition and internal jurisdiction is established, the agreement also sets out a process for the negotiation and recognition of additional areas over which the Métis Government may have jurisdiction, including (but not limited to): Language; Culture; Heritage; Education; Housing; Child and Family Services; Administration of Justice; Health Services; Economic Development; Environment; and Veterans' Affairs. In addition, negotiations may occur on the role of the Métis Government in relation to: Water; Wildlife; Fishing; Forests; Land Management; Environmental Assessment; National Parks; and any other matters agreed to by the Parties, including Taxation.

Exactly what the exercise of this jurisdiction will look like in practice is not yet determined. However, drawing from the Self-Government Policy Guide it would seem likely to involve the devolution of programs and services; the development of institutions providing services; and other arrangements where it is feasible to exercise authority in the absence of a land base.[44]

The Self-Government Agreement also makes clear some of the outer limits of future Métis self-government. For instance, Métis Nation citizens will continue to hold the ordinary rights of Canadian citizens, including the right to vote, and the protection of human rights legislation. In addition Métis jurisdiction will also have those universal limitations set out in the Self-Government Policy Guide, excluding '(i) powers related to Canadian sovereignty, defence and external relations; and (ii) other national interest powers.'[45] In particular, criminal law, labour relations, shipping, intellectual property, banking, trade and commerce, and national security (among others matters) are expressly excluded in the Self-Government Agreement from falling within Métis jurisdiction.

LESSONS FROM CANADA, AND CHALLENGES FOR VICTORIA

Almost all international examples of indigenous self-governance are concerned with geographical areas that are not highly settled, are remote or rural, and have vast expanses of land that have not been claimed or utilised by settlers. In addition, systems that grant legislative powers have to grapple with how to integrate with wider systems of law and governmental power.

In Canada, these issues have been addressed in a number of ways. In the case of Nunavut, a remote area with a significant Inuit majority, it has been solved through embracing Inuit rights within the federal Canadian system, and allowing the creation of a separate and new territory. In more settled areas, jurisdiction has been granted over the indigenous land base, with the understanding that particular Canadian and provincial laws continue to apply, and cannot be altered.

More recently, in entering formal negotiations and agreements with the Métis, Canada has begun to explore self-government for it's more urban and landless indigenous populations. This has particular relevance for Victoria, a highly settled and populated state, without a centralised Aboriginal population. Indeed many Traditional Owner groups in Victoria find themselves effectively landless within the Australian legal system, with at best a hope to achieve rights of access and use over a dwindling Crown land estate.

Further, to the extent such rights to land exist, they are held by localised Traditional Owner groups, and cannot be thought of as within the purview of any state-wide body, such as the TRB. In that sense, if the TRB is not to be concerned with land rights, its similarities to the position of much of the population represented by Métis governments becomes clearer. The type of self-government to be pursued by the TRB, much like those Métis without a land base, will be focused on taking control of the issues that affect all Aboriginal people in Victoria, regardless of Traditional Owner status. While negotiations with the Métis are in their infancy, and do not yet provide a clear guide about how this may practically occur, what is evident is an openness by the Canadian government to address these issues, and to recognise the right to self-government not tied to a geographical location, but based in citizenship of an indigenous polity.

PART 3

CONSTITUTIONAL LIMITATIONS

PART 3
CONSTITUTIONAL LIMITATIONS

As the international examples illustrate, treaty and indigenous self-government arrangements are influenced by local colonial history, and limited by existing legal frameworks. This of course will be no less true for the Victorian Treaty process. Indeed, limitations are likely to be increased in circumstances where negotiations are proceeding solely with the State, and without the involvement of the Commonwealth, and without the possibility of Constitutional change to protect or recognise treaty and self-government rights.

As we have discussed previously, there is nothing in the Australian Constitution that states the Commonwealth has the sole right to deal with matters related to internal Aboriginal sovereignty.[46] On that basis, it remains open for a State to enter into a treaty or treaties with Aboriginal nations within its own State boundaries. Of course, while there is nothing to prohibit such agreements, nor is there anything to facilitate them. This means that in pursuing Treaty, the State and the Assembly enter somewhat uncharted waters. They will need to careful navigate the terms of the Australian Constitution, and ensure they do not extend beyond it limits, as a failure to do so could see any agreement struck down as invalid by the courts.

In this section we begin to sketch out these limitations. The complexity of the issue, and the constraints of this paper, mean that a full analysis is not possible, and no doubt further specialised work will need to be done. However, we provide an initial exploration of the complex balancing of power that is established in the Constitution, and which emerged from a bargain struck between six individual and independent colonies, and which may now, over a century later, impact Aboriginal Victorians in their struggle for self-determination.

THE AUSTRALIAN CONSTITUTION

The colonisation of Australia began in New South Wales in 1788, and by the middle of the next century six independent and self-governing colonies had been established; New South Wales, Victoria, Tasmania, Queensland, South Australia and Western Australia.

While the laws of Britain applied in each of these colonies, colonial parliaments had almost unfettered power to make their own laws, provided they were not inconsistent with any law of the British Parliament.[47]

However, from at least the 1860s it became increasingly clear these colonies held common interests, and shared common dangers, and a movement began to federate the colonies into a single nation. The resulting Australian Constitution, commencing on 1 January 1901, reflects a history whereby the colonies carefully negotiated what powers they would handed over to the new federal government, and what they would retain. As such, the Australian Constitution divides law-making powers between the State and federal governments, as either:

- exclusive powers held only by the Commonwealth;
- concurrent powers held jointly by the States and Commonwealth; and
- residual powers (i.e. anything else not mentioned) which continue to be held by the States.[48]

The division of these powers is spread throughout the body of the Constitution. For instance, Section 51 is the main section setting out the powers of the Commonwealth, and includes a mix of both exclusive and concurrent powers. A list of the exclusive and concurrent powers set out in the Constitution is at Figure 3.1.

As can be seen, the Commonwealth is granted exclusive legislative powers over things such as acquiring property for a Commonwealth public purpose, matters relating to its own public service,[49] and making laws about customs and excise duties.[50] Also reserved to the Commonwealth is the right to raise military forces,[51] and to coin money.[52]

All other powers listed in the Constitution, such as powers to make laws about interstate trade and commerce, taxation, postal and telephone services, marriage and divorce, are held concurrently with each of the States, meaning the States could also make laws on these matters. Of course, in the modern era the Commonwealth operates almost exclusive in many of these areas. This is because of Section 109 of the Constitution, which states that where there

are concurrent powers and a Commonwealth law is inconsistent with a State law, the Commonwealth law will prevail to the extent of the inconsistency. In effect, this means that if the Commonwealth chooses to make laws over areas where there are concurrent powers, it can exclude and override any State law. Finally, residual power refers to any areas where the Commonwealth is not specifically granted law making power, and that power continues to reside with the States.[53] This includes things like law and order, housing, transport, public health and social welfare issues.[54]

This division of powers can be complex, and there have been many disputes between the States and the Commonwealth as to where power properly resides.[55] These constitutional issues are decided by the High Court, which has generally interpreted the Commonwealth's powers under the Constitution broadly, enabling the Commonwealth to extend its reach into areas previously thought of as solely reserved for States.[56]

Figure 3.1 Exclusive and Concurrent Powers under the Australian Constitution

EXCLUSIVE POWERS of the Federal Parliament	CONCURRENT POWERS shared by the Federal, State and Territory parliaments
Section 51 • defence • payments to citizens incl. pensions and medicare • foreign policy • national census • currency • lighthouses, lightships, beacons and buoys • copyright • citizenship	**Education** • federal – universities • state and territory - schools, teachers, education
Section 52 • the national capital • federal public service	**Environment** • federal – obligations under international treaties • state and territory - protection of the natural environment, approvals for new developments waste disposal etc
Sections 86 and 90 • collection of customs – taxes-on imported goods	**Health** • federal – payments to doctors and for pharmaceuticals • state and territory - hospitals
Sections 114 and 115 • Defence and currency exclusive powers of the federal parliament	**Marriage and Divorce** • federal – who can get married • state and territory - marriage registrations
Section 122 • Federal Parliament can make laws for territories, including their representation to the federal Parliament	**Overseas Trade** • federal – ratifies international trade agreements for the whole of Australia • state and territory - ratifies international trade agreements for the that state or territory
	Taxation • federal – taxes on income and company profits • state and territory – collects stamp duty, payroll tax and other smaller taxes

Section 109: Both the Federal and State Parliaments can make laws in the same area when they have 'concurrent powers.' If the laws conflict the feral law overrides the state law to the extent of the inconsistency.

Residual Power: If a power is not listed in the Constitution, it is an area for which the states are responsible. Things like schools, hospitals, roads & railways, public transport, electricity & water supply, mining, agriculture, forests, consumer affairs, police, prisons and ambulance services

An example of the unexpected extension of Commonwealth power into the operations of the States is provided by the High Court decision in *Commonwealth v Tasmania (1983) 158 CLR 1,* more commonly referred to as the Tasmanian Dams Case. In this case the High Court allowed the Commonwealth to stop a large hydro-electric dam from being constructed in Tasmania. It was generally considered, and the Tasmanian government argued, that the Commonwealth did not have powers over either the making of dams, or the production of electricity. However, the High Court ruled that section 51(xxix) of the Constitution, the power to make laws about 'external affairs', gave the Commonwealth the ability to legislate to implement international treaty obligations, in this case the World Heritage Convention. On that basis, the Commonwealth was able to legislate and stop the construction of the dam.[57] As this case shows, it is not possible to narrowly conceive of the powers of the Commonwealth, and how they might interfere in what is otherwise thought of as the domain of the States.

THE VICTORIAN CONSTITUTION

While the powers of the Commonwealth are set out in the Australian Constitution, the powers of the States are not. Instead, through section 106 of the Australian Constitution, the colonial constitutions at the time the Commonwealth was established were preserved, and became State constitutions, meaning they retained their residual powers (sometimes called 'plenary power'). Section 106 also allows States to amend their own constitutions in accordance with their own laws.

In Victoria, the state's constitution is an Act of the Parliament of Victoria, known as the *Constitution Act 1975* (Vic) (**Victorian Constitution**). Subject only to the Australian Constitution, the Victorian Constitution empowers the Victorian Parliament 'to make laws in and for Victoria in all cases whatsoever.'[58] This means that the Victorian Parliament can create law with respect to any matter except:

- those areas where the Commonwealth has exclusive powers; and
- where they share concurrent powers with the Commonwealth, and the proposed law would be inconsistent with the Commonwealth law.

CONSTITUTIONAL ISSUES AND THE TRB

In Paper 2 of this series we examined the potential for the TRB to exercise sovereign powers. We suggested that the TRB could:

(i) operate as a **Aboriginal / Traditional Owner parliament**;

(ii) act as a **voice to the Victorian parliament**, on all matters that may affect Aboriginal Victorians; and/or

(iii) select members to take up **reserved seats in the Victorian parliament**.[59]

It is useful to consider the different constitutional constraints on each of these proposals to help illuminate the complexity of these issues. For instance, taking account of the Australian Constitution, it would seem there is no impediment to the Victorian Parliament implementing either of the proposals to (ii) establish a voice to parliament; or (iii) provide reserved seats in parliament. This is because the Australian Constitution does not, pursuant to section 106, restrict how State Parliaments manage their own internal affairs. That is, the Victorian Parliament can design its own law making process, including the arrangements of its own lower house and upper house.

However, while the Australian Constitution provides no barrier, the Victorian Constitution would still need to be navigated. The last substantial changes to the Victorian Constitution were made in 2003 (**2003 Reforms**).[60] These reforms introduced, among other matters, fixed-four year terms, the election of the Legislative Council by proportional representation, and removal of the Legislative Council's power to block a supply bill (the budget).[61] However, importantly for our purposes, the 2003 Reforms also made changes about how the Victorian Constitution could be changed going forward.

Under this new process certain provisions are 'entrenched' and can only be amended through a specified process, depending on the provision which is sought to be changed. The process applied will either be (i) an absolute majority in both houses of Parliament; (ii) a three-fifths majority in both houses of Parliament; or (iii) a referendum of all Victorian voters.[62]

A change in the number of members of the Legislative Assembly or Legislative Council, or a change in the manner by which they are elected, is one of the provision which requires approval by a majority of Victorians at a referendum.[63] Therefore, the provision of reserved seats in parliament to Traditional Owners would trigger a state-wide referendum.

However, the creation of a voice to parliament, provided it was to only have advisory status, without the power to overturn or veto legislation, would appear to be more straightforward. Rather than a legal constraint on the power of Parliament, this would be an additional step in the process of law making. Accordingly, it could probably be achieved through a minor amendment of the Victorian Constitution, or through new specific legislation, in either case only requiring an absolute majority in both the Legislative Assembly and Legislative Council.

HOW MIGHT AN ABORIGINAL PARLIAMENT BE ESTABLISHED?

The creation of the TRB as its own legislative body, in effect as an Aboriginal Parliament, has deeper complexities. The Australian Constitution produces a comprehensive framework for Australian nationhood and sovereignty. Section 5 of the Australian Constitution mandates that it is:

> binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State...

As a comprehensive framework, its coverage is complete, and there is no room for the establishment or recognition of another sovereign within its borders, except by its own terms. On this, the Australian Constitution allows a process for the creation and acceptance of new states,[64] but this is not a power available to the Victorian Parliament, and is (very) unlikely to be extended to Victorian Traditional Owners by the current Commonwealth government.

On that basis, how might the Victorian Parliament establish and recognise an Aboriginal Parliament?

While the State is not capable of creating an entity that has equal standing with itself, it is able to delegate many of its powers and functions, including legislative functions. Indeed it is not uncommon for the State to delegate administrative functions to a statutory authority. One example is the Aboriginal Heritage Council, which is empowered to make administrative decisions, such as whether to approve applications for Registered Aboriginal Party status. While the delegation of legislative functions is less common, it is clear that it is within the States power, as is evident from the *Local Government Act 2020*, which provides at section 71:

> A Council may make local laws for or with respect to any act, matter or thing in respect of which the Council has a function or power under this Act or any other Act.

Indeed, local government is recognised in the Victorian Constitution as:

> a distinct and essential tier of government consisting of democratically elected Councils having the functions and powers that the Parliament considers are necessary to ensure the peace, order and good government of each municipal district.[65]

However, one drawback of this approach is that, because the Aboriginal Parliament would be created by an Act of the Victorian Parliament, it would bring a level of oversight from the Victorian Parliament, with the potential for later amendment or even repeal. As we have seen, some level of oversight is not uncommon in the international sphere, where indigenous groups, equally constrained by their colonial histories and existing legal frameworks, are forced into power sharing arrangements with settler governments. However, other jurisdictions, such as Canada, also provide constitutional protection for treaties, and the inherent right of self-government. Without similar protections, any Victorian arrangements will remain vulnerable.

PART 4

DEFINING THE SCOPE OF THE TRB

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Before beginning to explore the mechanics of how an Aboriginal Parliament and public service may be established, it is important to examine some base line questions. That is, before deciding the form of this proposed institution, we need to more closely examine its purpose.

Put most broadly, the TRB is of course established to facilitate and achieve self-determination for Traditional Owners and Aboriginal Victorians. However how does it achieve this aim, and what specific powers, and type of powers are required?

While there may well be the temptation to seek wide and expansive power for the TRB, this has it dangers and its drawbacks. For instance, it could drive negotiations into stalemate, or it could overextend the TRB, setting it up to fail and disappoint the hopes of its constituents. Native American author Robert Allen Warrior has addressed these questions, noting that the exercise of sovereignty does not require control over all details of government, rather the point is to take control of those areas for which Traditional Owners want control, and that will improve the lives of their community.[66]

OVER WHAT AREAS SHOULD THE TRB SEEK POWERS?

In the model proposed for Treaty, the TRB would not operate in isolation. That is, it would be required to divide power with individual Traditional Owner groups, who would exercise their own sovereign rights over Country, in accordance with individually negotiated Local Treaties.

Accordingly, in considering the areas over which the TRB may exercise power, it is necessary to contemplate what is appropriately dealt with at a State wide level, and what should be respectfully reserved for individual groups. This requires careful balance, and will need to be carefully negotiated. One perhaps fairly obvious distinction, is that the TRB should be focused on those issues that affect all Aboriginal Victorians, regardless of Traditional Owner status, or where they live within Victoria. To the extent the TRB has involvement in Traditional Owner issues, it should be limited only to advocating for the collective interest, as directly informed by Traditional Owner groups.

The six domains identified in the VAAF provide a starting point through which to consider these issues. Of these, only the sixth, Culture and Country, sits squarely with the ambit of Traditional Owner groups. While Traditional Owner groups may, depending on their individual aspirations, wish to pursue interests in a particular domain, these are nevertheless areas that clearly impact all Aboriginal people across the State. In addition, these spaces are also already occupied by ACCOs and Consultative Bodies, who are dedicated or specialised to these areas.

Accordingly, the TRB could take on a co-ordinating role in the six domain areas, and incorporate and empower both interested Traditional Owner groups, and existing specialists and experts, to lead and self-determine in these policy areas. Traditional Owner groups would be strengthened by operating collectively, and existing expert bodies would have increased authority by being placed within a democratic Aboriginal structure, with the force of treaty rights behind them. For both groups, instead of simply lobbying government, they would

Figure 4.1 The six domains

move into a position of being able to directly implement their policy solutions.

While the TRB could effectively take control, setting and implementing policy in the first 5 of the six domains, it would need to play a different role with respect to Culture and Country. This will be explored in detail in our next paper,[67] however in short it would be a co-ordinating role, using its collective power to advance the interests of Traditional Owner groups.

DIFFERENT TYPES OF POWERS THAT THE TRB COULD SEEK

While the ability to pass legislation is important, and a significant marker of sovereignty, it will likely only be a small component of the TRBs ability to take control of Aboriginal affairs, and drive self-determination. This is because the power of the State does not rest solely in its ability to pass laws, but in the whole machinery of government that allows it to implement and direct policy outcomes. In this way, power needs to be seen in its broader context. To this end, below we explore different types of State power, described as:

(i) Legislative power;

(ii) Administrative decision making;

(iii) Policy design; and

(iv) Administrative functions.

The table at Figure 4.2 sets out a definition of each type of power listed above, and provides relevant examples of how they operate.

As we have discussed, the operation of the Australian Constitution and the Victorian Constitution will likely place restraints on the legislative power that can be handed to the TRB, and require a level of ongoing oversight from the Victorian parliament. However, in the other areas, such as administrative decision-making, policy design and the exercise of administrative functions, the TRB should be able to operate with less constraints.

As should be clear, even without open ended legislative powers, the TRB would have considerable scope to set the agenda, and service its constituents. Further, it may not always be legislative power that is the most appropriate to achieve its aims, and with policy and administration in Aboriginal hands, it can be made culturally appropriate and responsive, and produce better outcomes.

While the TRB may operate in these areas independently and without the oversight of the State, questions remain about how these functions may be integrated with wider systems of law. As we have seen in Canada, the Self-Government Policy Guide requires that citizens of indigenous governments also retain their rights as Canadian citizens, and many Canadian laws, such as the *Canadian Charter of Rights and Freedoms* and much of the criminal law, continue to operate alongside indigenous self-government.

Figure 4.2 Different types of government power

Power	Definition	Example
Legislative power	The power to make law	The Victorian Parliament currently makes law in accordance with the Victorian Constitution and the Australian Constitution. If legislative powers were granted to TRB it may, for example, pass legislation on issues affecting the Aboriginal community, for instance, to protect Aboriginal cultural heritage, or to support Aboriginal families and child rearing.
Administrative Decisions	The power to make decisions under legislation	Legislation often sets up processes, and delegates the power to make decisions about those processes to a statutory body. An example would be the *Aboriginal Heritage Act 2006* (**Heritage Act**) which allows for applications to become a Registered Aboriginal Party (**RAP**). The Heritage Act delegates decisions about these applications to Aboriginal Heritage Council.
Policy Design	The power to develop and approve policies	Government departments are tasked with designing prescriptive strategies to implement the aims of the State. For examples of current government policies, see *Figure 2.1 – Example policies, plans or strategies*.
Administrative functions	The power to carry out the functions associated with the routine operation of government	This includes all day-to-day activity necessary to implement legislation, administrative decision making and policy. If the TRB passes legislation on cultural heritage, it will need staff to oversee and implement that legislation and associated policy.

While ultimately a matter for negotiations, it will need to be determined if similar arrangements will be in place for the TRB. For instance, in carrying out its administrative functions, will the TRB generally be subject to the laws of Victoria? It is likely that much of this will generally be unobjectionable, although there will be exceptions. For example, it would seem likely that the TRB would seek to offer its citizens the protection of the *Charter of Human Rights and Responsibilities Act 2006*. However, it may question the appropriateness of imposing stamp duty on the purchase of land under the *Duties Act 2000*, given that this land was first stolen from its citizens.

In addition, when government exercises administrative decision making powers, those subject to the decision have the right to have it reviewed in the courts. The court will seek to ensure that that the decision was made on a proper legal basis, without bias and taking into account all relevant matters. Indeed, this is a process that Traditional Owners have made use of in the past, particularly when falling into dispute around decisions made by the State (and sometimes the Aboriginal Heritage Council, acting as the State's delegate) involving the formal recognition of Traditional Owner groups, and their boundaries.[68]

The right for judicial review is a foundational principle of democracy, and should remain available to Aboriginal citizens when their legislative body makes decisions that affect them. However, although it is beyond the scope of this paper, a question remains as to whether the TRB should submit to the jurisdiction of Victorian Courts, or establish its own judicial branch to sit alongside its legislative branch.[69]

PART 5

PROPOSED LEGISLATIVE GOVERNANCE MODEL

PART 5
PROPOSED LEGISLATIVE GOVERNANCE MODEL

On the basis of the above, this paper proposes a governance model that provides for:

- an Aboriginal Parliament, that within the six domains, and limited to Aboriginal affairs, will have:
  - the power to make legislation;
  - the power to appoint administrative decision makers under its own legislation;
  - sole responsibility for policy design;
  - sole responsibility for administrative functions; and
- A reciprocal voice between the Aboriginal Parliament and the Victorian Parliament, so that:
  - outside of the six domains, the Aboriginal Parliament will have voice to the Victorian Parliament, on any matter that may impact Aboriginal Victorians; and
  - within the six domains, the Victorian Parliament will have a voice to the Aboriginal Parliament, on any matter that may impact Victorians.

Taking the six domains as a starting point, the TRB could take control over each area through a staged process, commencing with the transfer of ministerial and departmental responsibility and resources.

With the TRB operating as a parliament, each of the domains can be thought of as a separate portfolio area. Around these the TRB could begin to develop internal departments, with each headed by a member of the TRB executive, their role equivalent to that of the current minister (**TRB Minister**).

Thereafter, for a defined period, of perhaps twelve or twenty four months, the Victorian Minister and TRB Minister would engage in co-governance over all issues related to Aboriginal affairs, and they would jointly approve all decisions for their relevant policy area. However, their central purpose in this period would be to facilitate the transfer of resources to the TRB, and establish an Aboriginal public service, so that the TRB could take up sole responsibility.

Upon the completion of the transfer of resources, it would be the TRB Minister who held sole responsibility, and beneath them would sit a functioning department, capable of producing all policy design and administrative functions. At this time, and with a new level of experience, the TRB could take up legislative powers with respect to the relevant domain.

APPROACH TO LEGISLATIVE AND POLICY REFORM

With access to necessary resources, and a deeper level of experience in the operations and complexity of the portfolio, the TRB will be well placed to begin a process of comprehensive reform. What this reform may look like in particular detail is unknown, and at this stage need not be pre-empted. However, one potential method that may provide an overview of how the process may unfold, is through undertaking a review of both the legislation and underlying policy that is currently in each domain area. The domains, along with examples of the most relevant legislation and policy currently in operation is set out at Figure 5.1.

By reviewing legislation and policy in this way, it should be possible to identify those areas that are not serving Aboriginal people. There may be issues within the legislation, or they may be only within the current policy. This should help identify where reform is required. For instance, if the principal issue is one of policy, its design and implementation is entirely within the control of the TRB, and can be progressed immediately and without outside interference. However, if the problem arises from the legislation, which is inhibiting the creation of effective policy, the TRB can institute a legislative reform response. This may be the creation of an entirely new piece of legislation, or could instead simply seek to amend the offending sections of Victorian legislation, as it applies to Aboriginal people. In any event, the enactment of legislation is to be a more complex process, and one that will likely invite the interest of the Victorian Parliament.

Figure 5.1 The six domains Related legislation and policy

	Children, family and home	Learning and Skills	Opportunity and Prosperity	Health and Wellbeing	Justice and Safety	Culture and Country
LEGISLATION	• *Children, Youth and Families Act 2005* • *Family Violence Protection Act 2008* • *Child Wellbeing and Safety Act 2005* • *Commission for Children and Young People Act 2005*	• *Education and Training Reform Act 2006* • *Victorian Children Services Act 1996*	• *Equal Opportunity Act 2010* • *Occupational Health and Safety Act 2004*	• *Public Health and Wellbeing Act 2008* • *Medical Treatment Act 1988* • *Health Services Act 1988* • *Health Records Act 2001*	• *Crimes Act 1958* • *Bail Act 1977* • *Corrections Act 1977* • *Criminal Procedure Act 2009* • *Crimes (Criminal Trials Act)* • *Crimes (Mental impairment and unfairness to be tried) Act 1997*	• *Traditional Owner Settlement Act 2010* • *Aboriginal Heritage Act 2006* • *Advancing the Treaty Process with Aboriginal Victorians Act 2018*
ASSOCIATED POLICIES	• Dhelk Dja: Safe Our Way – Strong Peoples, Strong Families Family Violence Agreement • Wungurilwil Gapgapduir: aboriginal Children and families agreement	• Marrung: Aboriginal Education Plan 2016–2026	• Victorian Aboriginal Economic Strategy 2013–2020 • Tharamba Bugheen: Victorian Aboriginal Business Strategy 2017–2021, 2017	• Korin Korin Balit Djak Aboriginal Health, wellbeing and safety strategic plan 2017–2027 • Balit murrup: Aboriginal social emotional wellbeing framework	• *Burra latjpa Dunguludja: Victorian Aboriginal Justice Agreement – Phase 4*	• First Principles Review • Taking Control of Our Heritage Recommendations for self determined reform of the Aboriginal Heritage Act 2006

LEGISLATIVE POWER AND A VOICE BETWEEN PARLIAMENTS

In considering the powers of the TRB in both making its own legislation, and responding to that of the Victorian parliament, it is envisaged that both parties possess areas of complete independence, and then a middle ground in which the parties must engage in dialogue. That is, as well as their individual areas of sovereign power, each parliament would have a voice to the other on issues that may impact their respective citizenry.

MAKING LEGISLATION WITH THE SIX DOMAINS

As we have discussed, in all international examples, indigenous self-governance must accommodate some oversight or involvement of settler political institutions, and it would seem inevitable this will also be a feature of any Victorian model. However, the method of oversight will need to be negotiated, and a balance found that both respects the independence and sovereignty of the Aboriginal Parliament as well as any constitutional limitations.

One way to conceive of such a balance, is to develop a scale of decision making that seeks to take into account the concerns of each party, and then negotiate a range of processes that reflect the interests of both parties. For instance, where legislation only effects matters internal to the Aboriginal or Traditional Owner community, the State does not have a direct interest, and the TRB should be able to act with largely unfettered independence. However, where the actions or legislation of the TRB may impact on non-Aboriginal Victorians, the State may be entitled to greater involvement.

On that basis, proposed TRB legislation could be categorised as:

Category 1: Internal to the Aboriginal and Traditional Owner community;

Category 2: Relating to how the State interacts with Victorian Aboriginal people; or

Category 3: Impacting on non-indigenous people or interests.

Of course, it is foreseeable there could be disagreement as to the correct categorisation of any individual piece of legislation, and there would need to be a process for determining the correct category before the more substantive process of enacting the legislation commenced.

Figure 5.2 sets out each potential category of legislation, along with a proposed associated process.

Figure 5.2 Categories of potential TRB legislation, and the associated process

Initial process of negotiation to determine the appropriate category.		
CATEGORY 1 Internal to the Aboriginal community	**CATEGORY 2** Relating to how the State interacts with Aboriginal people	**CATEGORY 3** Will impact on non-indigenous people or interest
Complete authority to pass legislation, with the Victorian Parliament possessing a right to express its view.	Complete authority to pass legislation, with an obligation to consult with the Victorian Parliament.	Legislation needs to be passed by both the TRB and the Victorian Parliament. The TRB has the right to introduce independent bills to the Victorian parliament.
Example: Legislation empowering the TRB to: • formally recognise Traditional Owner groups, allowing them to commence Settlement Act or Local Treaty negotiations; • settle boundary and other disputes between groups.	*Example:* Legislation to: • Change the way bail laws apply to Aboriginal youth; or • Change the way child protection laws apply to Aboriginal families.	*Example:* Legislation to: • Require mandatory cultural heritage clearance on all development involving earth disturbance; • Traditional Owner rights to veto any developments on Crown lands.

Once proposed legislation was categorised, the process for resolving it would be clear. However, determining the category may not always be straightforward. For instance, TRB legislation empowering it to determine and settle issues of Traditional Ownership would seem prima facie to be a matter internal to the Aboriginal and Traditional Owner community. However, the State may view itself as having an interest, on the basis that it, along with private and corporate interests, will likely need to enter into agreements with any such defined group, and requires a level of certainty that the group is legitimately and correctly formulated. Otherwise, there may be a perceived level of risk as to the validity of any subsequent contracts, and a disincentive to dealing with such groups, and investing on their lands. While these issues can no doubt be negotiated and workable solutions found, it does make clear that it may not be possible to avoid State involvement at various stages of the process. Ultimately, this would seem to be a necessity of maintaining a relationship between the two parliaments, and each will require a 'voice' to the other.

A VOICE TO PARLIAMENT OUTSIDE THE SIX DOMAINS

While the six domains provide a useful lens which through to view areas of concern to the Aboriginal and Traditional Owner communities, it is far from clear that they are comprehensive in representing all facets of Aboriginal life.

Accordingly, in addition to its legislative power within the six domains, the TRB should also have the right to act as a voice to parliament on any issues of concern to Aboriginal people. As can be seen from Figure 5.2, the Victorian Parliament would possess the same right with the respect to TRB legislation, and so in that respect, the right is reciprocal between the two parliaments. In this way, while each body would have its own independent area of operation, they would also be forced into ongoing dialogue, and together, to mediate a future for all Victorians.

The concept of the voice may also be a method through which the role of the TRB could be integrated within the wider systems of Victorian law. For instance, while much of the general law of Victoria would continue to apply to both the TRB as an entity, and its constituents as individuals, the voice would provide a method through which they provide a level of consent to these arrangements.

To work effectively, this would mean that the TRB was entitled to have the Victorian Parliament consider its view on any new legislation that may impact on Aboriginal Victorians, but would equally have the opportunity with respect to existing legislation.

CONCLUSION

CONCLUSION

The ultimate act of self-determination is for a people to enact, through their own democratic institutions, the laws that govern and control their lives. Throughout the world there are indigenous groups that have achieved this, with greater or lesser amount of oversight from the dominant settler institutions. However these international examples usually have the advantage of being remote, or with access to their own significant land base. In this way, it is open to the settler nation to make concessions to indigenous sovereignty, without the political risk of impacting settler society.

Aboriginal people and Traditional Owners in Victoria face a very different set of circumstances. Here Aboriginal people are often dispersed from their traditional lands, and the majority are located in cities like Melbourne or other major centres. With only some exceptions, there are not centralised populations of Aboriginal people, or easily identifiable areas that could be solely governed under Aboriginal sovereign status. To the extent these areas do exist, they rightfully fall within the sovereignty of the Traditional Owners, and could not be appropriately governed by a body like the TRB.

However, there exists an important sphere of political decision making that sits above the local, and directly effects all Aboriginal people. This is, of course, the operation of the State, overseen by the Victorian Parliament. At this level of decision making, the interests of Aboriginal people and Traditional Owners are significantly aligned, while at the same time it is difficult and unlikely that any individual Traditional Owner group could routinely access, let alone reliably influence, processes and outcomes which by their nature are designed to apply universally across the State.

This is a gap that the TRB should seek to fill. It could operate as a forum through which Traditional Owner groups can exercise sovereign rights in areas that they could not do so acting individually. The exercise of these sovereign rights should certainly include the ability to determine the laws that govern them, as those laws produce unique impacts on the Aboriginal community. However, as discussed throughout this paper, the establishment of legislative power is not without complications, and likely cannot be provided completely independent of, or equal to, the power of the Victorian Parliament.

In addition, it is clear that legislative powers alone are not enough to achieve the aim of self-determination. While any analysis of an Aboriginal Parliament must be concerned with the breadth and scope of its legislative powers, it is important to keep in mind the overall purpose of establishing the TRB, which is to advance self-determination and to provide Aboriginal people control of their own affairs. As such, legislative power alone is not the full picture, and the TRB will also need the ability to implement any legislative program, to develop underlying policy, and to carry out that work on the ground. On that basis, while the powers of the TRB should include a legislative element, equally important is the transfer of resources, and the creation of an Aboriginal public service.

Accordingly then, while important, a singular focus on legislative power is not sufficient if the TRB is to achieve its full aims, and it is necessary to examine the full suite of powers and resources that will be required. Furthermore, an understanding of where power is required, and why, will be an important tool for negotiations, so it is clear where concessions may be made, without undermining the overall aims of the project.

This paper has put forward a potential model about how a balance between legislative and other power may be addressed, however it is far from a definitive model. In addition, the ideas put forward need to be tested against both detailed constitutional legal advice, and its ability to meet the aspirations of the Aboriginal and Traditional Owner communities. It is hoped that this model, combined with the development of Local Treaties, makes clear that while all models will have flaws and weaknesses, it is possible to achieve the fundamental elements of self-governance, despite the potential constraint of a dispersed Aboriginal community, living with and among the settler population. Indeed, it remains open for Victoria to lead the way, not nationally, but internationally, in achieving a balanced and just governance between the first peoples, and the settlers that now call these lands home.

APPENDIX A
CLOSING THE GAP TARGETS - 2019

	Target	Date to be achieved
1.	Close the Gap in life expectancy within a generation	2031
2.	Increase the proportion of Aboriginal and Torres Strait Islander babies with healthy birthweight to 91%	2031
3.	Increase the proportion of Aboriginal and Torres Strait Islander children enrolled in Year Before Schooling early childhood education to 95%	2025
4.	Increase the proportion of Aboriginal and Torres Strait Islander children assessed as developmentally on track in all five domains of the Australian Early Development Census (AEDC) to 55%	2031
5.	Increase the proportion of Aboriginal and Torres Strait people (aged 20-24) attaining year 12 of equivalent qualification to 96%	2031
6.	Increase the proportion of Aboriginal and Torres Strait Islander people aged 25-24 years who have completed a tertiary qualification (Certificate III and above) to 70%	2031
7.	Increase the proportion of Aboriginal and Torres Strait Islander youth (15-24 years) who are in employment, education or training to 67%	2031
8.	Increase the proportion of Aboriginal and Torres Strait Islander people aged 25-64 who are employed to 62%	2031
9.	Increase the proportion of Aboriginal and Torres Strait Islander people living in approximately sized (not overcrowded) housing to 88%	2031
10.	Reduce the rate of Aboriginal and Torres Strait Islander adults in incarceration by at least 15%	2031
11.	Reduce the rate of Aboriginal and Torres Strait Islander young people (10-17) in detention by at least 30%	2031
12.	Reduce the rate of over-representation of Aboriginal and Torres Strait Islander children in out-of-homecare by 45%	2031
13.	A significant and sustained reduction in violence and abuse against Aboriginal and Torres Strait Islander women and children towards 0	2031
14.	Significant and sustained reduction in suicide of Aboriginal and Torres Strait Islander people towards 0	2031
15.	A 15% increase in Australia's landmass subject to Aboriginal and Torres Strait Islander people's legal rights or interests. By 2030, a 15% increase in areas covered by Aboriginal and Torres Strait Islander people's legal rights or interests in the sea.	2031
16.	A sustained increase in the number and strength of Aboriginal and Torres Strait Islander languages being spoken	2031

APPENDIX B
VAAF GOALS

Domains	Goals
Children, family and home	Aboriginal children are born healthy and thrive Aboriginal children are raised by Aboriginal families Aboriginal families and households thrive
Learning and Skills	Aboriginal children thrive in early years Aboriginal learners excel at school Aboriginal learners are engaged at school Aboriginal learners achieve their full potential after school
Opportunity and Prosperity	Aboriginal workers achieve wealth equality Strong Aboriginal workforce participation, in all sectors and at all levels Aboriginal income potential is realised
Health and Wellbeing	Aboriginal Victorians enjoy health and longevity Aboriginal Victorians access the services they need Health and community services are culturally safe and responsive Aboriginal Victorians enjoy social and emotional wellbeing
Justice and Safety	Aboriginal overrepresentation in the justice system is eliminated Aboriginal Victorians have access to safe and effective justice services Aboriginal Victorians feel safe and connected
Culture and Country	Aboriginal land, water and cultural rights are realised Aboriginal culture and language are supported and celebrated Racism is eliminated

FOOTNOTES

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8 Commonwealth, Closing the Gap Report 2020, 11.

9 James Haughton, *'Closing the Gap'* Parliamentary Library Briefing Book: Key issues for the 46th Parliament, Commonwealth Parliamentary Library, 2019.

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20 Minister of Indian Affairs, above n 7, 3.

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43 Above n 6.

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45 Minister of Indian Affairs, above n 7, 7.

46 Federation of Victorian Traditional Owner Corporations, above n 3, 8.

47 *Australian Constitutions Act 1850* (UK) and later, Colonial Laws Validity Act 1865 (UK).

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49 *Australian Constitution,* s 51.

50 Ibid s 91.

51 Ibid s 114.

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54 Sharon Scully, *'Does the Commonwealth have constitutional power to take over the administration of public hospitals?'* Parliamentary Library, Research Paper no. 36 2008-09, 2009.

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60 *Constitution (Parliamentary Reform) Act 2003.*

61 Ibid, Part 2.

62 *Victorian Constitution,* s 18.

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64 *Australian Constitution,* Chapter VI.

65 *Victorian Constitution,* s 74A.

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