FEDERATION OF VICTORIAN TRADITIONAL OWNER CORPORATIONS

DISCUSSION PAPER 2

# **SOVEREIGNTY** IN THE VICTORIAN CONTEXT

Federation of
Victorian Traditional
Owner Corporations


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DISCLAIMER: This paper is not legal advice, and is intended only to provide commentary and general information. This paper should not be relied upon as legal advice

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 second 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

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|---|---|
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# EXECUTIVE SUMMARY

**On 26 January each year, Australia commemorates the first sustained invasion of Aboriginal lands. Prior to this incursion, traditional Aboriginal nations were the sovereign rulers of these lands for over 60,000 years. The sovereignty held by these peoples was never ceded to the new arrivals. Nor did these settlers seek to resolve questions of sovereignty through negotiation of a treaty. Instead, such questions were pushed aside, and the false narrative of *terra nullius* adopted to cover over the violence and dispossession of colonisation.**

Such beginnings have left a long moral shadow over the legitimacy of the nation, and all settler institutions. Consistent, and in recent years, growing demands from Aboriginal and Torres Strait Islanders for recognition of their sovereignty remain an unresolved question in the psyche of the nation.

The treaty process now established in Victoria under the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (**Treaty Act**), provides a unique opportunity for this problem to be directly addressed for the first time.

Questions of sovereignty are implicit in discussions about treaty, which are generally defined as agreements between sovereign entities. However, sovereignty is a complex term, and political rhetoric can often further obscure its exact meaning. While many Aboriginal people forcefully demand recognition of their sovereignty, there does not appear to be any consensus on how this should occur and be realised in the present day.

This paper will seek to address these issues, particularly examining the concept of sovereignty, how it has been addressed in Australia, as well as internationally, and how it may be embedded and recognised through the Victorian treaty process.

To do so, this paper is divided into five parts:

Part 1: What is sovereignty?

Part 2: How has sovereignty been dealt with in Australia?

Part 3: How has sovereignty been dealt with in other settler nations?

Part 4: Is the Indigenous concept of sovereignty the same as the Western concept?

Part 5: How could Aboriginal sovereignty be exercised in Victoria?

**Part 1 will examine the Western concept of sovereignty, and look at its history evolving out of the rule of kings, to the ultimate supremacy of parliament.**

The concept of sovereignty has been described as fluid,[1] and 'notoriously difficult of definition.'[2] It can mean different things depending on how the term is used, and in which context. Particularly among Indigenous peoples, there is a diverse understanding as to the meaning and significance of the term.

However, as currently exercised by Australian parliaments, courts and other institutions, the concept is directly derived from the European, and in particular British tradition. In this part we will briefly examine the development of the concept of sovereignty as it relates to Australia and Victoria in particular.

**Part 2 of the paper will then look at how claims of Indigenous sovereignty have been dealt with, or more accurately, avoided by Australian courts.**

This part will review the past case law on the subject, and the consistent view among Australian courts that they are unable to examine questions of sovereignty because they are not permitted to call into question the very authority that created them. Indeed, to do so would mean questioning the legitimacy of their own power.

Accordingly, this paper will suggest that sovereignty has to be understood as a political concept, and not as a legal one. It should follow that any path to the recognition of sovereignty is not to be found through the courts, but through negotiation and the political process.

**Part 3 will look at international examples in Canada, New Zealand, the United States and Scandinavia where political responses to questions of sovereignty have been attempted.**

This part will acknowledge that nation states often face significant political barriers to recognising separate sovereign entities within their borders. However, we will show how several colonial nations have nevertheless recognised or transferred elements of sovereign power to their Indigenous peoples.

This paper will argue that there is often reluctance to expressly acknowledge the transfer of sovereign powers, and instead the transfer occurs under another name. Notwithstanding the terminology used, we will argue that an expression of Indigenous sovereignty is still the result. While all such arrangements operate imperfectly, they do allow for greater self-determination, and even self-government, beyond any such structures currently in place in Australia, and may be useful to consider in the Victorian context.

**Part 4 will look at how concepts of Indigenous sovereignty differ from those in the Western tradition.**

This paper will argue that conceptions of Indigenous sovereignty in Aboriginal thought, and uses of the term in Aboriginal political discourse, are more nuanced than in the Western tradition, and contain spiritual and cultural, as well as political elements.

We will also consider the implications of asserting sovereignty, and whether it is necessary to have these claims recognised by the State, or whether the inherent nature of the claim means that it is best enacted by the actual operation of sovereign powers.

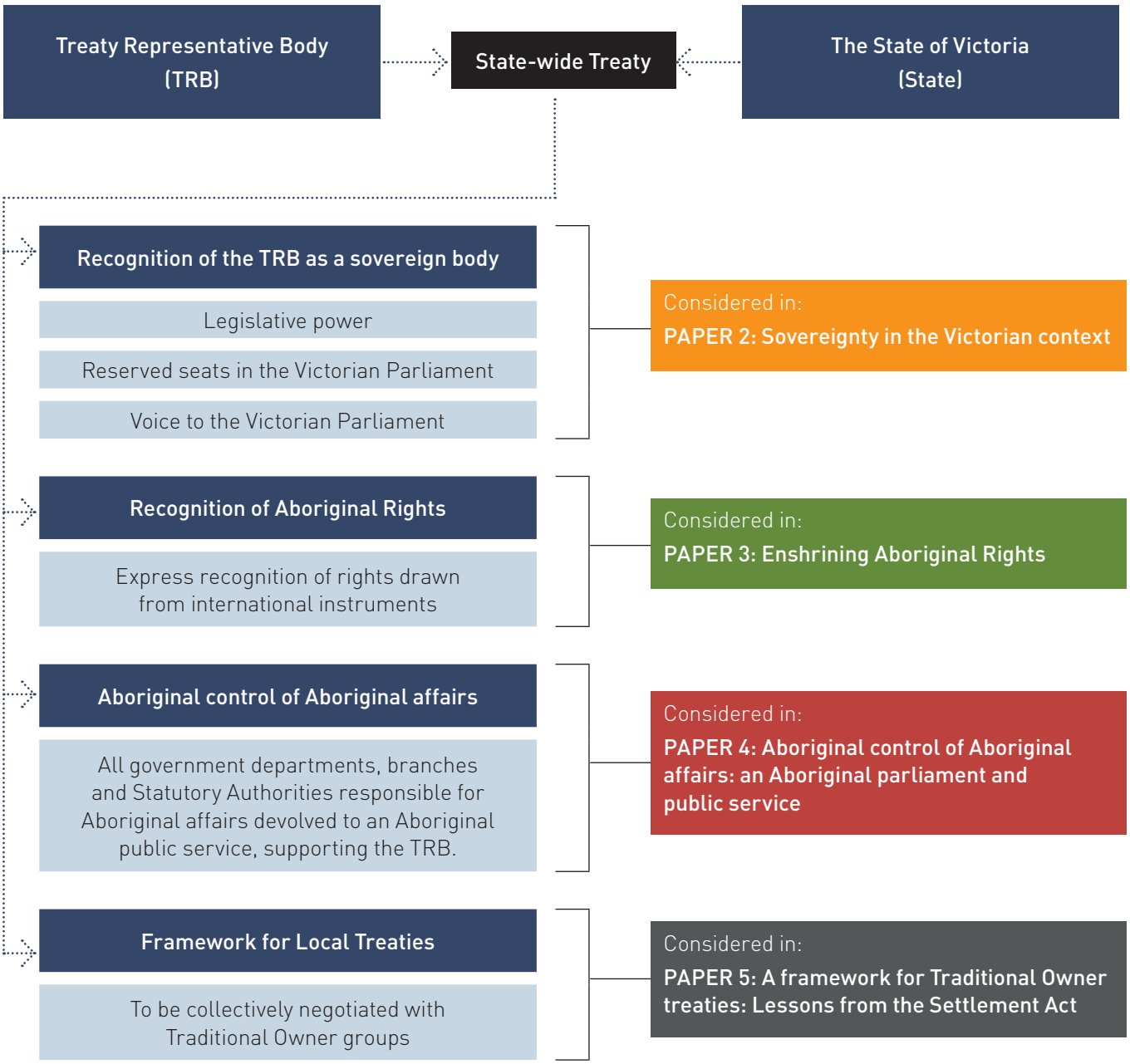
**Finally, in Part 5, we turn to look at the Victorian experience and how sovereignty may be practically exercised by Aboriginal people in this State.**

Drawing on Paper 1: *Understanding the landscape: the foundations and scope of a Victorian treaty,* we will revisit the potential treaty model outlined in that paper.

This model envisages the creation of a state-wide democratic representative body, referred to as the **Treaty Representative Body** or **TRB**, which could enter a direct treaty with the State, which would provide for the transfer of sovereign powers to be exercised by the TRB, and also include a framework for further, localised treaties directly between the State and individual Traditional Owner groups.

A diagram setting out the features of this model, and an indication of which discussion paper in this series will consider each component, is at Figure 1.1. This paper will explore the possibilities for sovereignty to be exercised by both the TRB and individual Traditional Owner groups within the framework of this model.

Figure 1.1: Overview of proposed model[3]



# PART 1

# WHAT IS SOVEREIGNTY?

## 1.1 HISTORY OF SOVEREIGNTY

## 1.2 AUSTRALIAN SOVEREIGNTY

# PART 1
# WHAT IS SOVEREIGNTY?

**Put simply, sovereignty is about power and authority to govern,[4] or more broadly, the 'supreme authority' over a particular territory.[5] Supreme authority is where there is no higher authority to which to answer. For instance, in contemporary international law, sovereignty refers to the basic legal status of a state that is not subject, within its territorial jurisdiction, to the government of any foreign state or to any foreign law.[6]**

Sovereignty also implicitly contains claims about legitimacy. That is, it will often seek to legitimise power and to base it in something moral or implied to be the natural order. This is particularly relevant in discussions of Aboriginal sovereignty, where the transfer of sovereignty is disputed, and there is a deep sense of grievance that 'legitimate political and legal authority—or "sovereignty"—was never properly secured over the Australian landmass'.[7]

One way to better understand these components of sovereignty, being its claims to both power and legitimacy, is to look at it in action, and to examine who has it and how it is used. In the modern Australian context, sovereignty is expressed through state institutions, including parliaments, courts, police and defence forces, which are further backed by a bureaucracy capable of implementing polices, and enforcing laws.[8]

## 1.1 HISTORY OF SOVEREIGNTY

The type of sovereignty held by the Australian governmental and legal system has developed over a long period of time. In Australia, as with all settler culture, law and political institutions, much of our understanding of sovereignty comes out of the European tradition, and in particular its history and development within Britain.

In this tradition, sovereignty was historically held by the king (or sometimes queen), who exercised more or less unfettered power over all of their lands and peoples. Indeed, this person was titled 'the sovereign' and it is from this term that the word 'sovereignty' derives.

During this period, the sovereign's power was generally thought to be absolute, and was the source from which all other authority, such as the power held by individuals such as lords and nobles, or by institutions such as courts, was derived. Further embedded within this form of sovereignty was a moral claim to legitimacy, the so-called 'divine right of kings'. This doctrine held that the king or queen were made sovereign by the will of God, and therefore their entitlement to rule was the natural order, and could not be questioned.

However, as material conditions changed within Europe, the nobility underpinning the monarchy began to grow in wealth and power. They began to demand recognition of basic rights, firstly and most famously in the Magna Carta signed by King John of England in 1215. They later formed parliaments, at first to advise and later to direct the sovereign. By the middle of the 1600s the parliament and the king were engaged in civil war, leading to the beheading of King Charles I of England who had defied the will of the parliament. This was a dramatic and violent shift of sovereignty to the parliament, and although the monarchy was later restored, the ascension of parliament was secured. From this time on, the monarch's hold on sovereignty was largely symbolic, and by 1689 the 'Bill of Rights' was established, which further made clear that "the Parliament of England is that supreme and absolute power, which gives life and motion to the English government."[9]

Accordingly, the position in Britain today is known as 'parliamentary sovereignty', meaning the parliament has supremacy over all other institutions, and so may make and unmake any law, and is not bound by any written law.

## 1.2 AUSTRALIAN SOVEREIGNTY

While this is broadly the tradition inherited in Australia, we did not adopt parliamentary sovereignty in the same form as in Britain. This is because, unlike Britain, Australia has a written constitution. This means that "the idea of Parliamentary Sovereignty must be understood in the context of the rigid limits and boundaries imposed by the federal Constitution, and to some extent by the State Constitutions as well."[10]

These rigid limits divide sovereign authority between the Commonwealth and State governments. This is done principally through Section 51 of the Constitution, which lists the particular subjects on which the Commonwealth parliament can make laws. Anything not listed, is left to be dealt with by the State parliaments.

While the content of Section 51 is wide, it clearly tends to reflect those things necessary to maintain a coherent nation, for instance it deals with: (vi) naval and military defence, (i) interstate trade and commerce, (xii) currency, (xix) naturalisation and (xxvii) immigration. Section 51(xxix) contains the 'external affairs' power, meaning that it falls to the Commonwealth to conduct all dealings with foreign nations, and would prevent any State, such as Victoria, from entering a treaty with a foreign power.

However, there is nothing in the constitution that retains the right for the Commonwealth to solely deal with matters related to internal Aboriginal sovereignty. As such, there is theoretically nothing that should prohibit a State from entering into treaties with an Aboriginal nation within its own State boundaries.

Indeed, it was previously the case that the Commonwealth was unable make any laws about the 'aboriginal race'. This is because prior to 1967, Section 51(xxvi) of the constitution allowed the Commonwealth to make laws for:

> the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws (emphasis added).

This provision completely excluded the Commonwealth from Aboriginal affairs. In 1967 the words, "other than the Aboriginal race" were removed, thereby opening up the possibility that the Commonwealth could make such laws.

However, the State also retains the right to make such laws. Where both the State and the Commonwealth have the right to make laws over the same subject it is known as 'concurrent legislative power'.

Of course, this opens the possibility that the State and Commonwealth could make laws on the same subject, that say different things. The Constitution resolves any tension that may arise from conflicting laws through Section 109, the 'supremacy clause', which gives Commonwealth laws precedence.

As noted above, concepts of 'parliamentary sovereignty' also contain implicit claims to the legitimacy of power. Rather than seeking legitimacy in religion, as previous forms of sovereignty had done, modern forms rely on 'popular' sovereignty, which asserts that democratic principles, and the will of the people, establish the basis on which the parliament has the right to rule.

This concept has found favour in Australian courts, who have noted on several occasions that parliaments, both State and Federal, exercise their powers subject to the constitution, which can only be changed by the people through a referendum under Section 128.[11] As such, it is in the Australian people that our national sovereignty is found.

As we will see below, Australian courts have never directly addressed the concept of Aboriginal sovereignty. Indeed, the High Court has relied on the democratic nature of Australia's institution as a means by which to avoid examining claims of Aboriginal sovereignty:

> [M]embers of the High Court have developed the idea of popular sovereignty in seeking to identify the source of authority for Australia's constitutional framework... The court can have its say on Indigenous sovereignty. Nevertheless, section 128 of the Constitution ultimately puts the terms of the Australian settlement into the hands of politicians and people.[12]

# PART 2

# HOW HAS INDIGENOUS SOVEREIGNTY BEEN DEALT WITH IN AUSTRALIA?

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# HOW HAS INDIGENOUS SOVEREIGNTY BEEN DEALT WITH IN AUSTRALIA?

**The question of Aboriginal sovereignty has been raised in Australian courts on several occasions. However, it is not a question the courts can fully answer. This is because of a longstanding principle that where a sovereign acquires new territory, the action cannot be challenged or controlled by courts that sit below that sovereign.[13]**

The logic behind this principle is quite clear. Because Australian courts are themselves set up under the power of Australian sovereignty, they cannot call the validity of that sovereignty into question. To do so would call into question their own legitimacy and powers.[14]

Nevertheless, the notion of a pre-existing Aboriginal sovereignty has been an issue that has arisen in several different circumstances, often shedding light on the moral and perhaps logical inconsistences that reside in Australian claims to nationhood. Below we look at some examples of where the issue has been considered in Australian courts.

## 2.1 SOVEREIGNTY: THE LAW OF NATIONS

Aboriginal sovereignty was first raised before the High Court in the case of *Coe v Commonwealth of Australia and Another* (1979).[15] In this case, Paul Coe, a Wiradjuri man from NSW, attempted to sue the Commonwealth of Australia and the Government of the United Kingdom on the basis that sovereignty, possession, and occupation by the British Crown were wrongly proclaimed at the time of colonisation.

Coe argued that the Crown had obtained the land by settlement on the falsehood of *terra nullius*, whereas in actual fact the lands were taken by conquest, which dispossessed the Aboriginal Nation(s) of their rights and interests without a bilateral treaty, lawful compensation and/or international intervention.[16]

Ultimately the High Court decided it could not hear the claim. Justice Jacob said:

> These are not matters of municipal [domestic or internal] law but of the law of nations and are not…[able to be considered]…in a court exercising jurisdiction under that sovereignty which is sought to be challenged.[17]

Accordingly, it is outside the court's jurisdiction to question the validity of the very sovereignty that has enabled the court to be established.

## 2.2 MABO AND THE END OF TERRA NULLIUS

The issue came up again in the decision of *Mabo v Queensland (No 2)* [1992] HCA 23 (**Mabo No. 2**). However, in this case the applicants did not seek to argue that settler sovereignty in Australia was improperly acquired or invalid. Instead, they merely claimed that some Indigenous rights to land had survived the transfer of sovereignty.

Justice Brennan cited,[18] with approval of Justice Gibbs in the Sea and Submerged Lands Case:

> The acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.[19]

Justice Brennan went on to find that:

> Although the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.[20]

So although the court could not examine the validity of Australian sovereignty, or recognise any Aboriginal sovereignty, it could look at the effect of the assertion of British sovereignty over Australian lands. Of course what this means in practice, is that Australian sovereignty is simply assumed to be valid.

Having assumed that Australian sovereignty is valid, the court then proceeded to consider what this meant for the rights of the original inhabitants. Justice Brennan stated that what rights survive "in a newly-acquired territory depends on the manner of its acquisition by the Crown".[21]

The long held view of the common law was that sovereignty over new territory could be acquired by "...conquest, cession, and occupation of territory that was terra nullius."[22] The Court dismissed the previously held notion of *terra nullius*, but did not go so far as to say sovereignty was acquired by conquest. Instead it found a middle ground, whereby Australia was said to not be settled, but inhabited. Upon settlement the English common law became the law of Australia, however "it was to be presumed that the new sovereign had respected the pre-existing rights and interests in the land".[23]

On this basis the court was able to find that native title rights had survived the acquisition of sovereignty, and could be recognised in Australian law.

## 2.3 COE STRIKES AGAIN

Following the rejection of *terra nullius*, Isabel Coe (who is the sister of Paul Coe, who brought the original case) made a further application to the High Court in *Coe v Commonwealth* (1993) ALR 193 (**Coe No. 2**). The appellant in Coe No. 2 claimed to sue on behalf of the Wiradjuri tribe as a 'sovereign nation of people', or in the alternative, as a domestic dependent nation, entitled to self-government and full rights over traditional lands. The matter was again heard by Chief Justice Mason who noted:

> Mabo (No. 2) is entirely at odds with the notion that sovereignty averse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are a 'domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law. [24]

## 2.4 SOVEREIGNTY AS A POLITICAL AND NOT A LEGAL CONCEPT

From the above we suggest it is clear that sovereignty should not be thought of as a legal issue, but rather as a political issue. If anything, sovereignty deals with the laws between nations, and Aboriginal people cannot have their sovereignty declared or validated in the courts of another sovereign power.

As such, the way for a people to establish sovereignty is either to assert and establish it for themselves through force or arms (which is the way Australian sovereignty was established), or through a process of political negotiation and treaty in which the sovereignty of both parties is recognised and respected.

We now turn to look at some international examples, where this has been attempted.

# PART 3

# HOW HAS SOVEREIGNTY BEEN DEALT WITH IN OTHER SETTLER NATIONS?

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**We now turn to look at other settler nations where attempts have been made to address Indigenous claims to sovereignty through political negotiation, and in some cases through treaties.**

In particular, we will look at the United States, Canada, and Aotearoa/New Zealand. We will also examine the position of the Sámi people of Scandinavia, whose traditional lands are spread across Sweden, Norway, Finland and Russia.

With the exception of the United States, none of these settler nations have expressly recognised the sovereignty of their Indigenous peoples.[25] However, they have created agreements and institutions that allow for some level of self-determination and self-government, so that while perhaps not officially acknowledged, there is in practice an element of limited sovereignty in operation.

While the courts in the United States recognise the sovereignty of many Native American nations over their reserved lands,[26] the government has also at various times violated this sovereignty, and "in turn eroded and re-asserted the importance of tribal sovereignty".[27]

## 3.1 BRITISH COLUMBIA, CANADA

> We are decolonizing through accommodation of our differences — not assimilation.[28]

Canada does not recognise the sovereignty of its First Nations, however in the province of British Columbia (**BC**), a modern treaty process does allow for limited self-government, and for the First Nations to make laws on particular subjects within their tribal boundaries.

### 3.1.1 History of treaty making in BC

Treaties in Canada date back to the time when Europeans first began to colonise the east coast of Canada. There was a significant era of treaty making during the initial British expansion, starting in about 1764 and ending in 1867 when the confederation of the Canadian nation first occurred. These treaties are often referred to in Canada as 'historic treaties'.

Very few historic treaties were signed in BC,[29] which is on the west coast of Canada, and was colonised later in the country's history. Of the treaties that were entered into, they were essentially exchanging cash, clothing and blankets for lands, and did not recognise First Nations as sovereign entities, or meaningfully attempt to resolve an ongoing relationship between the parties.[30] Furthermore, as with almost all historic treaties with Indigenous peoples around the world, these agreements have been controversial, with questions raised as to the First Nations' understanding of the terms, and later breaches by white settlers.

### 3.1.2 Aboriginal Title

The fact that only small portions of BC were covered by treaties led to ongoing claims by First Nations that they continued to hold rights to lands not covered by a treaty. This position was validated in the 1973 decision of *Calder v Attorney-General of British Columbia* [1973] SCR 313.

In this decision the Supreme Court of Canada dismissed the Canadian government's assertion that 'Aboriginal Title' was long extinguished and established the continuing presence of Aboriginal property rights.[31]

Aboriginal Title is in many ways similar to native title in Australia, and much like Mabo No.2, this case caused much uncertainty for the BC government. A series of critical land rights cases followed, which propelled the Aboriginal land rights movement and pressured the BC government to engage with First Nations.[32]

### 3.1.3 Modern Treaties

It was not until the 1990s that the BC government responded by establishing the modern *British Columbia Treaty Process* (**BCTP**). Under the BCTP, treaties are entered into as tripartite agreements between the First Nation, British Columbia (provincial government) and Canada (federal government).

The treaties generally contain provisions which are not dissimilar to things available to Victorian Traditional Owners under the *Traditional Owner Settlement Act 2010* (**Settlement Act**), that is they allow for:

- a cash settlement;
- the transfer of Crown land;
- rights to hunt, fish, gather etc.;
- some rights with respect to development and natural resources; and
- cultural promotion.[33]

However, agreements under the BCTP go one step further, and convey upon the First Nation a limited right of self-governance.

### 3.1.4 Self-Government

There is no template for what self-governance could look like under a treaty, as the content will be negotiated between the parties, however the BC Treaty Commission suggest:

> Self-government provisions may include education, language, culture, police services, health care, social services, housing, property rights, child welfare, and other provisions agreed to by the three parties. A First Nation implementing a modern treaty will be self-governing and will have a constitution and law-making authority over treaty land and provisions of public services.[34]

In addition, the design of self-government will be guided by the following principles:

- Self-government must be exercised within the existing Canadian Constitution and Aboriginal Peoples remain subject to Canadian and BC law. However, they can exercise a level of jurisdiction and authority;
- The Canadian Charter of Human Rights and the Criminal Code of Canada continue to apply;
- First Nations may legislate on areas pertaining to treaty land and provision of public service, such as health care, education and social services;
- Some local laws like zoning and transportation will apply to all residents on treaty lands, but the majority of treaty laws will apply only to treaty citizens; and
- First Nations are required to consult with local residents on decisions that will directly affect them.[35]

### 3.1.5 CASE STUDY TSAWWASSEN FIRST NATION

The Tsawwassen First Nation entered into a treaty in 2007. Under the treaty a Legislative Assembly was established with a structure that included a Chief and 12 elected Legislators.

Through this Legislative Assembly the Tsawwassen have passed 29 laws which deal with public services.[36] If the Legislative Assembly wants to pass any law relevant to health, education or social services, it must be agreed upon by the BC and Canadian governments before it can be made into law.[37]

These restrictions have attracted some criticism that First Nations' self-government rights are subordinate to the Canadian State. Other commentators have considered this to be consistent with modern treaties premised on the overarching sovereignty of the State.[38]

The State transferred freehold ownership of 434 hectares of Crown land and 290 hectares of Indian reserve lands under the treaty. The treaty also provides some rights (but not ownership) over a further 279,600 hectares of traditional Tsawwassen territory.[39]

Tsawwassen have control over planning and development laws on their freehold land, and can issue penalties for violations of their law.[40] Under the Tsawwassen Land Act passed by the Legislative Assembly, Tsawwassen lands cannot be sold to a non-member. However, lands maybe leased and developed in accordance with the *Tsawwassen Land Use Planning and Development Act*.

Relying on their own legislation, the Tsawwassen First Nation zoned some of their land for development as a shopping mall (Tsawwassen Mills), and a housing development, in which housing is available for purchase by non-members. Accordingly, they have been able to use self-government to create meaningful economic development for their members, while always retaining control over every part of the process.

While the Tsawwassen treaty does not expressly recognise their sovereignty, it has allowed the Tsawwassen First Nation to act like a sovereign people.

## 3.2 AOTEAROA/NEW ZEALAND

Whereas the BC example shows how Traditional Owners can form their own self-governance models, in New Zealand the focus has been on integrating Traditional Owner governance within State governance structures.

Like Canada, New Zealand does not directly acknowledge the sovereignty of the Māori people. However, despite a right under the Treaty of Waitangi to *rangatiratanga*, or autonomy and self-government, there is concern that this is not fully preserved in the modern claims process.

### History of the Treaty of Waitangi

The Treaty of Waitangi was signed in 1840, and was comprised of a version written in English and a version in Māori, each containing a preamble and three articles pertaining to the authority of the British Crown, Māori property rights, and a guarantee to all Māori the same rights as British citizens.

However, the two versions are not direct translations, with the most notable discrepancy relating to the terms used regarding Crown authority; the English version states that the Māori signatories cede 'sovereignty', while the Māori version instead uses the word *kāwanatanga*, meaning 'governance'.

Additionally, despite the fact that the second article specifies that the Māori retain "exclusive and undisturbed possession" of their lands until they choose to sell to the Crown, in the decades following the signing of the Treaty the Crown pressured Māori groups (Iwi) to sell and in some cases forcibly confiscated territories.[41] The modern claims process was established in 1975 under the Waitangi Tribunal, and is designed to examine and remedy these historical breaches of the Treaty.

### 3.2.1 Claims process under the Waitangi Tribunal

Under the claims process Iwi can bring claims against the Crown for breaches of the Treaty of Waitangi.

The Waitangi Tribunal operates as an interpreter of the Treaty and "ombudsman of the claims settlement process,"[42] making recommendations to the government in regards to compensation. The government then decides whether or not to settle a claim.[43]

Settlements generally contain provisions relating to:

- land;
- financial compensation;
- changed official place names;
- a formal Crown apology for breaches of the Treaty; and
- recognition of the group's cultural associations with various sites.[44]

The Waitangi Tribunal considers claims by individuals, usually on behalf of groups, issues a report about each claim and the evidence provided in the inquiry, and may make recommendations. If the government decides to settle a claim, the Office of Treaty Settlements negotiates with the claimants on behalf of the Crown. Once claimants and the Crown agree on the terms of a settlement, they sign a deed and the Crown passes legislation to give effect to it and to remove the tribunal's ability to inquire further into this claim.[45] The Waitangi Tribunal gives weight to the Māori version of the Treaty, as this is the version signed by the majority of Māori chiefs in 1840.[46]

The problems associated with the claims process largely derive from the fact that settlements hinge on the Tribunal's interpretation of the Treaty, which is brief, in some places contradictory, and most likely was signed by Māori chiefs who were largely unfamiliar with the written language.[47]

Furthermore, the Tribunal uses an 'informal' review process that lacks the authority to impose binding decisions, with ultimate negotiation power resting with the government.[48]

### 3.2.2 Claims process does not enshrine self-government

Some commentators and Māori groups have also taken issue with the Tribunal's interpretation of the Treaty – for example, the He Maunga Rongo Report commissioned by the Tribunal found that an underlying factor in all Treaty breaches was the Crown's failure to take into account the Māori right under the Treaty to *rangatiratanga*, or autonomy and self-government.[49]

However, the Tribunal simultaneously held that Crown action that interferes with these rights might be justified in certain circumstances because of the Crown's overriding responsibility to govern in the interest of all New Zealanders. Accordingly, there may be a "presumption" that the Crown should not legislate contrary to Māori interests guaranteed as Treaty rights, but this presumption can be displaced in particular situations.[50]

### 3.2.3 Seats in parliament

In addition to the Waitangi Tribunal, the Māori have achieved other means of asserting influence in the New Zealand government.

In 1867, the New Zealand Parliament passed an Act to allow four seats of the House of Representatives to be reserved Māori seats.[51] Eligible voters were either Māori or held 50 percent Māori lineage. Representatives were chosen from four electorates and could only be selected from the pool of eligible voters.[52]

Initially, Māori with over 50 percent Māori lineage could only vote for Māori electorates; however, after 1975 this was changed to allow all Māori to be able to vote in either the Māori or general electorate.[53] In 1993, a new law was passed to change the number of Māori electorates according to the size of the Māori population.[54] In short, this means if the population of Māori voters increases, so does the number of reserved Māori seats in the House of Representatives. As at 2018, there were seven reserved Māori seats out of a total of 120.

Whilst allowing reserved Indigenous seats in parliament as far back as 1867 can be viewed as progressive, the Māori electorate system has not come without challenges. Granting of Māori seats does not, in and of itself, grant Māori equal political treatment.[55] There were often 'electoral anomalies' or disparity in the quality of electoral administration, often leading to disenfranchisement of Māori voters.[56] Further, there is no 'test' for proving Māori ancestry – to enrol in the Māori electorate, voters need only assert a Māori lineage with no proof required.[57]

## 3.3 NAVAJO, UNITED STATES OF AMERICA

From 1778 to 1871, the United States federal government entered into more than 500 treaties with Native American nations. These treaties were commonly reached as a means to end violent hostilities between the relevant tribe and United States government. As the colonial expansion in the United States came to end, the making of treaties became less frequent and permanently ceased in the early twentieth century.

However, in more recent times Native American tribes have been able to obtain federal recognition, and through the use of Presidential Executive Orders, tribes have obtained treaty-like rights, including recognition of their sovereignty.

There are many Native American Nations who have achieved forms of sovereignty, and for the purposes of this discussion paper we have chosen to concentrate on the Navajo Nation's experience with sovereignty and self-rule.

### 3.3.1 History of the Treaty of Bosque Redondo

The Treaty of Bosque Redondo 1868 between the Navajo and the United States was drafted in the wake of the Long Walk of the Navajo (1864-1868) and established the Navajo as a sovereign nation "outside the basic structure of the Constitution".[58] The Navajo Nation has a distinct geographical boundary over which it exerts jurisdiction – this has expanded over the last century and a half as more territory has been added.

At the time of entering the Treaty, the agreement documented several commitments between the government and the Navajo, including compromises on the part of the Navajo to stop all raiding, remain on their reservation and send their children to school. In exchange, the government would allow them to return to their reservation over which they would retain sovereignty, and promised to provide farming equipment and supplies.

### 3.3.2 Present day

In the present day, the most significant element of this Treaty is the recognition of limited sovereignty. The Navajo Nation has status as a 'domestic dependant nation'[59] and is protected by federal legislation that includes provisions that:

- a government-to-government relationship exists between the United States and each Indian tribe;
- the United States has a trust responsibility to each tribal government that includes the protection of the sovereignty of each tribal government; and
- Indian tribes possess the inherent authority to establish their own form of government.[60]

The Navajo Nation does not have a constitution and is not subject to the United States constitution.[61] The Navajo have rejected drafting their own constitution, with some Navajo arguing that by doing so they do not limit their powers by defining their scope.[62]

The Navajo government has powers over taxation and gaming as well as divisions relating to community development, economic development, public safety/policing, health, social services, and natural resources.[63] They have also formed a 'Navajo Nation

Council', which is the legislative branch of the Navajo Nation and holds powers to make laws over the same public issues.[64] The Navajo Nation Council consists of 24 delegates.

While the signing of the Treaty delegated felony (i.e. more serious) criminal jurisdiction over to the federal courts, the Navajo maintain their own criminal code and police force, along with their own jail and corrections department. In the last 50 years, Navajo courts have developed a civil jurisdiction and tribal courts have grown considerably.[65] This has led to some 'court shopping', with parties choosing to instigate proceedings in either State or Tribal courts depending on which jurisdiction will be more favourable to them.[66] Nonetheless, there have been instances where Arizonan Courts have upheld the authority of Navajo Tribal Courts in instances where state and Tribal law clash.[67]

#### Domestic Dependant Nation

The claimed sovereignty of the Navajo Nation is compromised by the fact that Congress has plenary power over the Nation, meaning they ultimately retain some powers to make laws that affect the Nation, and the nation remains subject to federal law.[68]

The position of the Tribal Nations as domestic sovereigns that are dependent on the United States government is a source of contention. Many tribes perceive themselves as on equal footing with the federal government and other foreign nations, yet their position in United States law as a domestic dependant nation means they remain subject to the overarching relationship with the United States.[69]

## 3.4 SÁMI PEOPLE OF SCANDINAVIA

The Sámi are the Indigenous people who are the original inhabitants of the arctic region of modern Scandinavia and Russia, a geographical area termed Sápmi.

Traditionally they were a semi-nomadic culture centred around reindeer husbandry, however this tradition is less practiced today, with only ten percent of Sámi earning a living from the reindeer industry.[70] The total Sámi population is estimated to be over 75,000, with the majority living in Norway.[71]

There are nine surviving Sámi languages spoken across the Sápmi territory, all of which are considered by UNESCO to be endangered. The Sámi have been subject to discrimination and forced assimilation throughout history, particularly under the policy of Lappmarken (land acquisitions) in 17th century Sweden and 'Norwegianisation' in Norway during the 19th century. During the 20th century, Norway enforced a particularly vehement policy of assimilation in restricting Sámi cultural practices and language.[72]

### 3.4.1 Sámi Parliaments

There are recognised Sámi Parliaments operating in Sweden, Norway and Finland, with varying degrees of self-determination and administrative power.

Rather than being established by treaty, each of these parliaments was established by an act of the relevant Swedish, Norwegian or Finnish parliaments. Naturally this means they are subordinate to these parliaments and not recognised as sovereign. Further, their powers are largely limited to cultural matters.

For instance in Finland, Sámi have self-government only in the spheres of language and culture.[73] The Finnish Government is required to negotiate with the Sámi Parliament regarding all important decisions that may directly or indirectly affect the Sámi's status as Indigenous people.[74] However, some commentators have noted that because there are no comprehensive formal structures between the Sámi Parliament and Finnish Government, there is limited practical action taken to ensure government entities negotiate with the Sámi on relevant decisions.

The Swedish Sámi Parliament is empowered currently to deal with matters concerning hunting and fishing, reindeer herding, and Sámi language and culture, although there are calls for greater autonomy.[75]

The Norwegian Sámi Parliament has similar powers as well as overseeing the protection of Sámi cultural heritage sites.[76] Furthermore, there have been moves to transfer areas of Northern Norway back into the collective ownership of Sámi people in recent years.[77]

In Russia, the Kola Sámi Assembly was established in 2010 by the Sámi people of the Kola Peninsula, modelled off the Sámi Parliaments in the Nordic countries, however it has not been recognised by the Russian government.[78] Sweden, Norway and Finland voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples in September 2007, while Russia abstained.[79]

### 3.4.2 Self-determination for the Sámi people

Self-determination for Sámi people faces several key obstacles. Firstly, there are significant difficulties involved in the multi-national aspect of Sámi territory. There are three Sámi representative assemblies in the area that is termed Sápmi, whereas the claim for self-determination could be interpreted as a demand that there be only one such body.[80] The potential for establishing a unified Sámi Parliament is limited by the existing national borders and differing national policies.[81]

There has been an attempt to establish multinational approaches to Sámi rights, including most recently the Nordic Sámi Convention negotiations, which concluded in January 2017. The Convention includes a total of 46 articles, all of which include Nordic joint approaches to safeguard and strengthen Sámi rights. The convention includes provisions related to self-determination, non-discrimination, Sámi governance (including Sámi parliaments and their relationship to the state), rights to land, water and livelihoods, languages, education and culture. The agreement has been criticised by legal experts and Sámi organisations and is currently being considered by the three Sámi parliaments and the governments of Finland, Norway and Sweden. The Sámi parliaments of the three countries and the national parliaments will have to give their consent to the convention before it can enter into force.[82]

# PART 4

# IS THE INDIGENOUS CONCEPT OF SOVEREIGNTY THE SAME AS THE WESTERN CONCEPT?

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**Sovereignty in the European tradition is very much about power and authority, how it is held and able to be used and legitimised. However, many Indigenous people, in both Australia and internationally, have expressed more nuanced conceptions of sovereignty that are political but perhaps also spiritual and cultural.**

Just as there is no absolute consensus on the term in the European tradition, there also does not appear to be a single meaning within Aboriginal understanding and advocacy around the term.

For instance, Brennan suggests that Aboriginal people "use the word in different contexts to convey different ideas."[83] As such, Aboriginal people may use the term to demand that their authority and power over land be recognised, but may also use it as a broader statement of liberation, or "as a catchphrase for Indigenous peoples expressing their vision for the future".[84]

## 4.1 INDIGENOUS CONCEPTIONS

Indeed, there is perhaps a danger in seeking to define Aboriginal concepts of sovereignty within the confines of modern Australian democracy, which are inherently foreign and limiting. As the academic Gerald Taiaiake Alfred (a member of the Kanien'kehá:ka Nation from Quebec, Canada), has argued, Western conceptions of sovereignty obscure "indigenous concepts of political relations – rooted in notions of freedom, respect and autonomy."[85] He further argued that the:

> [C]hallenge for indigenous peoples in building appropriate post-colonial governing systems is to disconnect the notion of sovereignty from its western, legal roots and to transform it. It is all too often taken for granted that what Indigenous peoples are seeking in recognition of their nationhood is at its core the same as that which countries like Canada and the United States possess.[86]

In Australia, a recent attempt was made to define sovereignty in the Uluru Statement from the Heart. This poetic and ambitious attempt displays much nuance and departure from Western concepts, without conceding any political power. It states:

> Our Aboriginal and Torres Strait Islander tribes were the first *sovereign* Nations of the Australian continent and its adjacent islands, and possessed it under our own laws and customs. This our ancestors did, according to the reckoning of our culture, from the Creation, according to the common law from 'time immemorial', and according to science more than 60,000 years ago.
>
> This *sovereignty* is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one-day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of *sovereignty*. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.[87]

This concept of sovereignty is not fixated on maintaining authority and control over territory. Instead it is rooted in culture and history, and therefore cannot be broken merely by the loss of authority, as it would be under the Western construct.

## 4.2 PRACTICAL SOVEREIGNTY

As we have seen in the international examples, with exception of the United States, no settler colonial nation expressly recognises the sovereignty of their Indigenous peoples. Nevertheless, Indigenous nations within these countries, particularly in BC, are able to exercise some limited sovereign powers.

In these circumstances, it must be asked whether or not it matters if the settler State expressly recognises sovereignty or not?

As argued by Professor Irene Watson, a woman of the Tanganekald, Meintangk Boandik First Nations, Aboriginal sovereignty is inherent and "First Nations' status as sovereign and independent peoples cannot be given to us by the colonial states."[88]

On this understanding, the attitude of the settler State is irrelevant, and recognised or not, Aboriginal sovereignty is asserted and, as shown by the BC example, can be put into practice.

# PART 5

# HOW COULD ABORIGINAL SOVEREIGNTY BE EXERCISED IN VICTORIA?

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**In Paper 1: *Understanding the landscape: the foundations and scope of a Victorian treaty,* we set out a potential treaty model for Victoria. This model envisages the creation of a state-wide democratic representative body (the Treaty Representative Body or TRB) which would represent Aboriginal interests at the State level.**

The TRB would, as a confederation of Traditional Owner groups, be a sovereign body in its own right, and capable of entering directly into a State-wide treaty with the State.

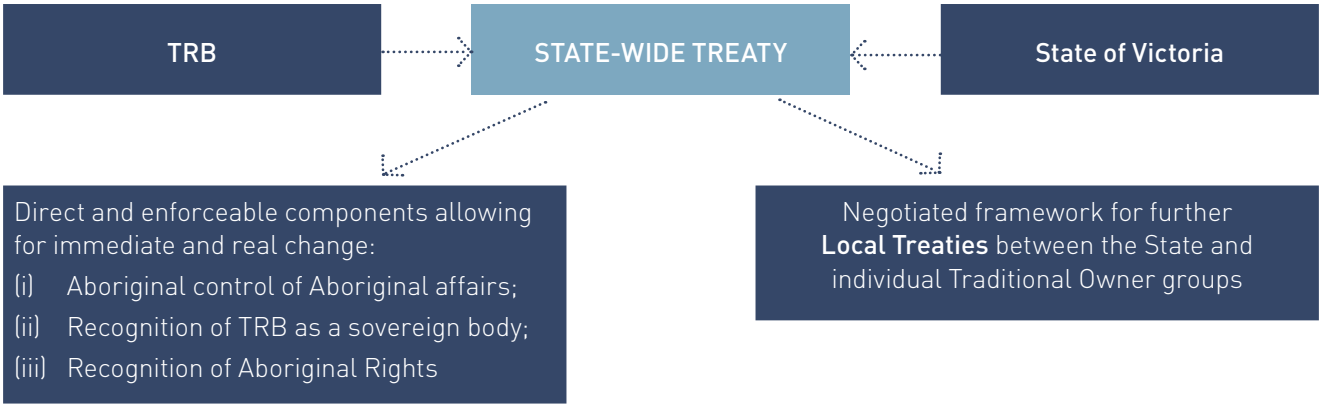
This State-wide treaty would immediately provide for the transfer of some sovereign powers to be exercised by the TRB.

The State-wide treaty would also include a framework for further, localised treaties directly between the State and individual Traditional Owner groups. A diagram setting out the features of this model is at Figure 1.2

In the following sections, we explore what this division of Traditional Owner sovereignty might look like in practice. In particular, we look at what sovereign powers might be granted to the TRB, and what might be retained by individual Traditional Owner groups.

This structure would allow all Aboriginal Victorians to see immediate benefit from entry into the agreement, while also recognising the individual sovereignty of Traditional Owner groups, and allowing them the time to plan appropriate measures to seek on behalf of their people. It also attempts to strike a balance between advancing the interests of all Aboriginal people at the State level, with the recognition of localised sovereignty, and the re-assertion of the traditional Aboriginal nations of Victoria.

Figure 1.2 State-wide and Local Treaties



## 5.1 THE TRB AS A SOVEREIGN BODY

This section considers how the TRB would be established as a sovereign body.

In Paper 1 we identified Traditional Owner groups as the relevant Aboriginal sovereign bodies in Victoria. The groups, whether described as nations, clans or native title holders, are the continuation of the First Nations that existed and were sovereign in Victoria prior to colonisation. As such, we suggest that they have a legitimate claim to pre-existing and continuing sovereignty.

As individual sovereign bodies, it is with these groups that ultimate traditional authority over their respective territories resides. However, it is not uncommon for smaller sovereign entities to voluntarily form a larger sovereign entity, and bind together to meet their common problems, and to take advantage of opportunities that a larger scale provides. For instance, this is essentially what occurred with the Australian colonies, who joined together at Federation to form the Commonwealth. It is also the story of the United States, which began as thirteen separate colonies, who joined together to form a nation that operates under a single constitution, but where individual states retain a lot of power and independence.

Of course we acknowledge that the joining of groups in this way is a big political undertaking. It would take an enormous amount of trust and good will for Traditional Owner groups to commit to this project. However, it is also clear that confederations of these kinds are not unknown within Aboriginal society. For instance, the Kulin Nation is a well-known confederation of five Traditional Owner groups, that prior to colonisation aligned at a higher level of governance to meet their common threats, and to strengthen their common interests.

As such, the TRB could be a contemporary equivalent.

## 5.2 COMMON PROBLEMS, COMMON INTERESTS

Surveying Victoria, it is clear that people of all Traditional Owner nations face many of the problems of colonisation in common. Issues related to health, employment and over-representation in prisons effect every mob throughout the State. It would seem clear that there would be much benefit in trying to address these problems together, and that the resources and scope of solutions available to united Traditional Owner groups far exceeds what any group could achieve on its own.

It would also seem clear that the opportunities for individual Traditional Owner groups to exercise real and significant sovereign powers may be limited in Victoria.

While in BC individual nations are able to enter into treaties directly with the Provincial and Federal Governments, and then exercise a degree of self-government, this is largely possible because there is still so much unsettled land. In the United States, those areas in which Native American nations have their sovereignty recognised are mostly in the remote south west, and cover areas over which there are historical native reserves.

Victoria would not seem to present the same opportunities. The closet equivalent would be the old missions, such as Coranderrk, Framlingham, Lake Condah and Lake Tyers, among others. While certainly sovereignty could (and should) be sought over these areas, they are generally not large enough to provide an economic base, are not available to all Traditional Owner groups, and are no longer home to the majority of the Aboriginal population.

As such, this paper asserts that there are much greater advantages to take on sovereign powers at two levels, that is through the creation of a sovereign TRB, and also at the local level through Traditional Owner groups.

## 5.3 WHAT SOVEREIGN POWERS COULD BE EXERCISED BY THE TRB?

In our view, a State-wide Treaty should be a direct and enforceable treaty, allowing for immediate and real change in relations between Aboriginal Victorians and the State.

This would provide a framework for further treaties between the State and individual Traditional Owner groups; and importantly, recognise the sovereignty of the TRB, as a confederation of Traditional Owner Nations.

Below we examine three potential ways the TRB could exercise sovereign powers. The TRB could:

- operate as a **Traditional Owner parliament**;
- drawing from the Uluru Statement from the Heart,[89] act as a **voice to the Victorian parliament**, on all matters that may affect Aboriginal Victorians; and/or
- select members to take up **reserved seats in the Victorian parliament**.

Although these options are presented independently it would also be possible, and perhaps preferable in some cases, to have them operating in combination, as is further discussed below.

### 5.3.1 Traditional Owner Parliament

As we have seen, there are several examples of Indigenous parliaments, or legislative bodies, in the international sphere. While the concept may sound strange, even startling, to non-Indigenous Australians, it has a strong international precedent, as such bodies are operating, and have long histories, across Scandinavia and in BC and the United States.

The TRB, as proposed in our model, bears some resemblance to Sámi Parliaments in Scandinavia, in that it would be representative of a wider people, rather than an individual Indigenous land owning group. By contrast, the legislative bodies that exist in BC and the United States, for instance the Tsawwassen and the Navajo, represent only their individual groups or nations. Also, these groups have jurisdiction over a limited geographical area, being the remnants of their traditional lands, while the Sámi have jurisdiction not over land, but particular subject matter.

Likewise, it is envisaged that the TRB would not have jurisdiction over land (which would be left to individual Traditional Owner groups) and would instead have dedicated policy areas.

We suggest that deciding what these dedicated policy areas should be will be a focus point of debate and negotiation.

Sámi Parliaments consider policy areas including language, cultural heritage, hunting and fishing. That is, the scope appears limited to cultural matters and traditional activities. While important, we suggest that these are too constrained, and fail to allow for the full realisation of self-determination.

In BC, self-government structures can legislate on a variety of issues relating to public services such as health care, education and social services. Likewise, the Navajo Nation Council and Navajo government pass and implement laws on a variety of issues from social services, health, policing, natural resources and so on.

These policy areas are clearly those that reflect the issues that are routinely impacting, and often negatively effecting the lives of Aboriginal people, and would be appropriate subject matter for the TRB. We would suggest that the TRB should have the power to legislate with respect to:

- Aboriginal languages and cultural heritage;
- Regulating and enshrining traditional Aboriginal hunting and fishing practices;
- Health care, as provided through Aboriginal Health Services;
- Education, as it affects Aboriginal students;
- Social services, and particularly with respect to Aboriginal child removals;
- Criminal justice as it affects Aboriginal victims and offenders, and with respect to the extension of the Koori Court;
- Policing, and the treatment of Aboriginal people detained or arrested by the police.

Naturally the above is not exhaustive, and there could be much debate as to what areas are appropriate to fall within the jurisdiction of the TRB. For Aboriginal people, there may well be the temptation to expand the areas in which the TRB could exercise power. However, this paper would caution against the taking of such responsibility without careful thought and planning. Indeed, there are many areas where it may not be desirable for the TRB to exercise the powers of the sovereign. As Native American author Robert Allen Warrior stated:

> The struggle for sovereignty is not a struggle to be free from influence of anything outside of ourselves, but a process of asserting the power we possess as communities and individuals to make decisions that affect our lives.[90]

That is, exercising sovereignty does not necessarily mean having full control over all details of government, such as currency, policing, postage, and so on. Rather, the point is to exercise the sovereign powers for which Traditional Owners *want* to hold dominion, and that will improve the lives of Aboriginal people.

There are other important and practical considerations in respect to the TRB operating as a legislative body. For instance, would its laws only apply to Aboriginal organisations and citizens, or could they be binding on the wider population? If the TRB passed legislation similar to the existing *Aboriginal Heritage Act 2006* (Vic), could it require property developers to undertake cultural surveys, and could it fine or prosecute them if they failed to do so?

The introduction of a new legislative body into a well-established political system like Victoria would be a large scale and complex reform. It would likely be resisted by some self-interested sectors of society. However, with some creativity and good will, such complexities and resistance could be overcome.

One possible solution would be for the TRB and the Victorian parliament to share sovereignty on particular issues. This is the process adopted for the Legislative Assembly of the Tsawwassen, who are able to make laws with regards to health, education or social services, but must obtain the agreement of BC and Canadian governments before the law becomes enforceable.[91] Where there is a contentious policy issue, or one that may affect non-Aboriginal society or industry, this may be a useful approach to protect the interest of all parties.

### 5.3.2 Voice to Parliament

The Uluru Statement from the Heart established the concept of a 'Voice to Parliament.' The Voice has been described as a constitutionally enshrined Aboriginal and Torres Strait Islander body which would provide non-binding advice on legal and policy matters which would affect Aboriginal and Torres Strait Islander peoples.

In the report prepared by the Referendum Council,[92] there is flexibility on what the Voice could look like, however its status as a non-binding 'advisory-only' body remains central, and it would not have any kind of 'veto power' on legislation.

However, this is not to suggest it would be devoid of power, and it could operate as a strong advocate, and moral force upon government, to put forward the views and aspirations of Aboriginal people. Indeed, it would appear that fear of this 'soft power' is why it has been resisted at the federal level, and deemed (inaccurately) by some conservative politicians as a third chamber of parliament.

The TRB could adopt a similar role at the State level, and have entrenched powers requiring the government to seek its view on any legislative matter that may affect Aboriginal people. In our view, this is not as preferable as the TRB holding those powers itself as a Traditional Owner parliament, but would still be a useful policy tool.

It may also be that aspects of the Voice could be incorporated into a Traditional Owner parliament model, with the TRB having the right, in any policy area where it does not have direct jurisdiction, or shared sovereignty, to be able to make comment on impending legislation.

### 5.3.3 Reserved seats in the Victorian Parliament

For over a hundred years New Zealand has had reserved seats for Māori in its parliament, and a similar model could be adopted for Victoria. This would ensure Traditional Owner representation in Victorian Parliament, which at the time of writing, holds no Aboriginal or Torres Strait Islander representatives.

The Māori reserved seat system changes the number of Māori electorates according to the size of the Māori population. According to 2016 Census data, there were around 47,788 self-identifying Aboriginal and Torres Islander peoples in Victoria out of a population of around 5,926,624, or around 0.8 percent. It may be therefore difficult to assign reserved seats according to the Victorian Aboriginal and Torres Strait Islander population.

There is also the possibility that many Aboriginal Victorians may prefer to assert their vote through the general electoral roll. In New Zealand, 52 percent of Māori voted on the Māori roll while the rest voted in the general electoral roll.

A possible point of difference with the New Zealand model could be to have the reserved seats filled from among the membership of the TRB. In this way, the people holding reserved seats would be both a member of the Victorian parliament and the TRB simultaneously.

It could be that these people are required to exercise their vote in the parliament, as decided through a vote of the TRB. In this way, the TRB would have direct input into the decisions of the Victorian parliament.

Nonetheless, it would seem that reserved seats may not carry much power within the wider parliament. Unless those in reserved seats align with a mainstream political party, they may be delegated to 'independent' status which may only hold sway during a minority government, but otherwise may not have a large influence over Parliament. If a member in a reserved seat chose to align itself with a mainstream political party, whilst they may be able to broach Traditional Owner issues from their electorates in party meetings, they may be pressured nonetheless to 'toe the party line' on issues.

What sovereign powers could be exercised by individual Traditional Owner groups?

The model set out in Paper 1 calls for a State-wide treaty that would firstly establish the role of the TRB, and secondly, set out a framework for localised treaties with individual Traditional Owner groups (**Local Treaties**).

A later paper in this series, Paper 5: *A framework for Traditional Owner treaties: lessons from the Settlement Act,* will deal with these questions in greater detail. However, for completeness it is worth briefly examining how sovereignty may be exercised at the local level.

Firstly, we suggest that it is important that the framework for the Local Treaties embed a flexible approach, that does not impose a fixed model on Traditional Owner groups. In this regard, much can be learned from the BC treaty process around designing self-government. While in BC it is understood that self-government may generally include jurisdiction over such policy areas as education, language, culture, police services, health care, and so on, there is no template that First Nations are required to follow.[93] Instead, they can prioritise the areas in which they want to take control, and draw down rights as it suits them.

We suggest that a similar approach should be taken to the framework around Local Treaties. It should set out broad areas of negotiation that Traditional Owner groups can approach as they have the capacity to deal with them. This will require ongoing negotiation, and recognition that the signing of a Local Treaty is not an end, but a beginning.

Also important, but beyond the scope of this paper, will be the interplay between Local Treaties and rights available, or agreements already in place, under the Settlement Act or *Native Title Act 1993* (Cth). While there is some discussion of these matters below, this will be dealt with in greater detail in Paper 5.

We now turn to briefly examine two examples of how Traditional Owner groups could exercise sovereignty on Country:

- Sovereignty over **missions, national parks and crown lands**; and
- Integration with **local government responsibilities and services**.

### 5.3.4 Sovereignty over missions, national parks and crown lands

As we have already discussed, the highly settled nature of Victoria makes many of the legal structures associated with BC and the United States treaties less practical. In Victoria there is seldom available the expanses of land, or the local populations, that would facilitate internal sovereign nations in the same way that they are active in BC or Arizona.

However, this is not universally true. Some Victorian Traditional Owner groups continue to occupy former missions on their traditional lands. In every case these areas are now handed back to the Aboriginal occupants through various land rights schemes, and held as freehold (although inalienable) property.[94]

As such, if desired by Traditional Owners, these areas would seem to be appropriate places in which to exercise sovereign power, and where unfettered control of planning, land and environmental laws could be handed over. As shown by the Tsawwassen example of property development, or the Navajo investment in gaming, control of such laws separate and free from the surrounding jurisdiction can be a powerful tool for economic development.

National Parks would be another land mass in which sovereignty could potentially be exercised. Currently under Settlement Act processes, there is the ability for Traditional Owner groups to jointly manage the parks, through a Traditional Owner majority joint management board. A Local Treaty could replace joint management with sovereign control, with Traditional Owners free to establish all policies and uses of the park in accordance with their own tradition, and to charge appropriate fees to the public to ensure care for the park was properly and sustainably funded.

Lastly, throughout the state there are various parcels of vacant Crown land. These are currently managed by approximately 1,200 'Committees of Management' appointed under the *Crown Land (Reserves) Act 1978* (Vic).[95] Committees of Management are often local councils, or maybe a Water Authority, or even a local community group. Their role is to oversee management and maintenance of the land, as well as authorise any works or activities on the land, with the power to grant licences, leases and permits.

It could be that over time Traditional Owner nations take on this role, are funded to ensure land is properly and sustainably maintained, and in this way are able to excise control over large areas of their traditional lands.

### 5.3.5 Integration with local government responsibilities and services

Traditional Owner nations could interact with local government in much the same way as the TRB is proposed to interact with the State government. That is, they could:

- form a separate legislative body, with jurisdiction over certain policy areas;
- operate as a 'voice' to local government on all matters that may affect the interests of the nation; and/or
- have reserved seats on local councils.

As with the proposal to establish a Traditional Owner parliament, if Traditional Owner nations were to exercise jurisdiction on some local issues, it would take careful negotiation with both the State government and local councils.

Also, local government areas in Victoria tend to be smaller than Traditional Owner nations, meaning that a Traditional Owner nation may have between six to twelve local councils within its boundaries. This would mean interacting with numerous different entities, and would require significant resources if, for instance, a Traditional Owner was to sit on each governing body.

# CONCLUSION

**As this paper has shown, sovereignty is a complex concept within the Western tradition, and that complexity is only increased when it is applied in a cross-cultural context.**

While the circumstances of Australia's settlement clearly raise both moral issues, as well as apparent legal inconsistency with respect to the transfer of sovereignty from the First Nations to the modern Australian state, the High Court has made clear that this is a question beyond its jurisdiction. Accordingly, there is no legal forum where Aboriginal people can be heard or seek a remedy on this issue.

As a result, if Aboriginal and Torres Strait Islander peoples want to seek to exercise their sovereignty they must seek a political settlement in the form of a treaty. Victorian Traditional Owners are now uniquely positioned to pursue this aim, and have many international examples on which to draw. These processes, implemented in similar Western cultures, and in many cases fellow Commonwealth nations, have as much to teach by their weaknesses, as by their strengths. With these as a guide, we are confident that Victoria can exceed all prior international attempts to reach settlements between colonised and coloniser. Indeed, Victoria could provide rights and recognition of Indigenous sovereignty, that will act as a standard, not only to other Australian states and territories, but for Indigenous peoples around the globe.

As in all things, the groundwork has been laid by the Elders, who never let the light of sovereignty die. In recent days, those activists who have driven the Uluru Statement from the Heart have again tilled the soil, but for the moment only in Victoria is the ground fertile to take the next step, and for the first time reach a lasting and just accord with an Australian government. We hope this paper assists in setting out some pathways for this to occur.

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