FEDERATION OF VICTORIAN TRADITIONAL OWNER CORPORATIONS

DISCUSSION PAPER 6

A COMPREHENSIVE TREATY MODEL FOR VICTORIA

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 sixth 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
PAPER 4	Aboriginal control of Aboriginal affairs: an Aboriginal parliament and public service
PAPER 5	A framework for Traditional Owner treaties: lessons from the Settlement Act
PAPER 6	A comprehensive treaty model for Victoria

CONTENTS

BACKGROUND

On 3 July 2018, the Victorian parliament passed into law the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Treaty Act), becoming the first Australian parliament to enact legislation facilitating treaty-making with Australia's First Peoples.[1]

Since that time, the Federation of Victorian Traditional Owner Corporations (**Federation**) has developed a series of five discussion papers, each examining the intersection of treaty with longstanding Traditional Owner aspirations. This paper is the sixth and final paper in this series and hopes to draw and build on the work of previous papers, to present a proposal for a comprehensive treaty model for Victoria.

During the period in which the papers have been developed, the discussion around Treaty has advanced considerably. This has principally been driven by the establishment of the First Peoples Assembly of Victoria (**Assembly**), and the commencement of negotiations under the Treaty Act. Indeed, many of the positions put forward in the series of papers produced by the Federation are now under formal consideration as part of ongoing negotiations.

This includes:

- the proposal to establish a state-wide democratic Aboriginal body (referred to in these papers as the Treaty Representative Body or **TRB**), that has meaningful decision-making powers;[2]
- the adoption of a framework that includes both a State-wide Treaty, to cover state-wide matters, and Local Treaties, through which Traditional Owners can negotiate local treaties to reflect their individual needs and priorities.

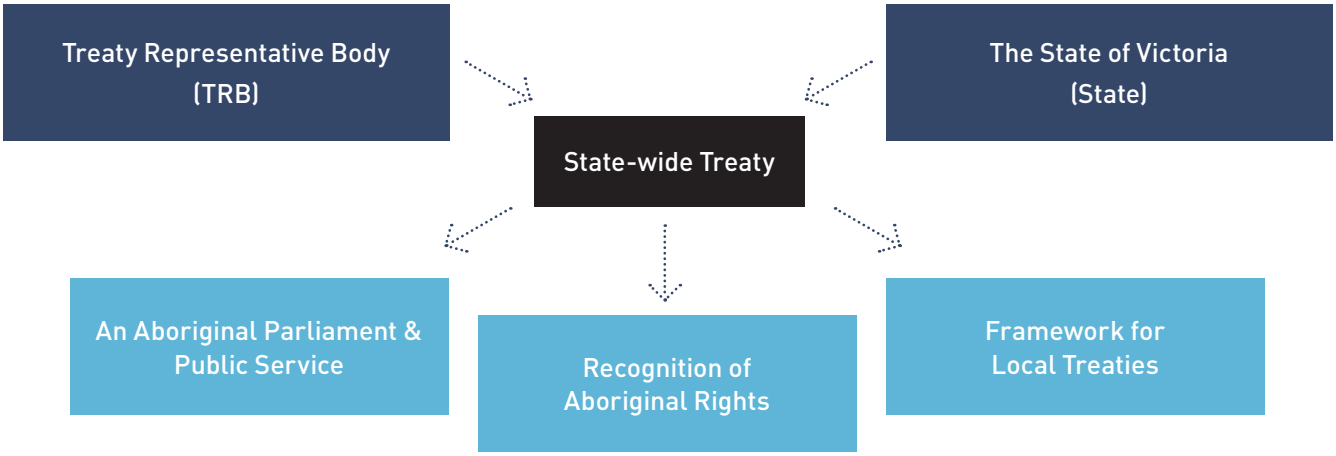
This paper argues that it is the State-wide Treaty that will provide the foundation for a comprehensive treaty model. As such, this paper will revisit papers 1-5 in this series to examine what we suggest are the three fundamental elements of a treaty model for Victoria:

(i) an Aboriginal parliament and public service;

(ii) the entrenchment of Aboriginal rights; and

(iii) a framework for Local Treaties.

Figure 1. Three pillars of a State-wide treaty



PART 1

AN ABORIGINAL PARLIAMENT AND PUBLIC SERVICE

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The Assembly has recently endorsed for consideration the concept of 'a permanent representative body with meaningful decision-making powers.'[3] This paper argues in favour of such a body, referred to here as the TRB, suggesting that it could take the form of an expression of Aboriginal sovereignty. This body would be established as an Aboriginal Parliament, with the power to make legislation on matters relevant to Aboriginal people, as well as be provided the resources to develop and implement policy in support of its legislative aims.

THE TRB AS A SOVEREIGN BODY

As was argued in Paper 1, Traditional Owner groups are the relevant Aboriginal sovereign bodies in Victoria. Whether described as nations, clans or native title holders, they are each the continuation of sovereign First Nations in Victoria prior to colonisation.

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.

This is the role the TRB could play. As a confederation of Traditional Owner groups, it would be conferred and possess sovereignty limited to State-wide matters. However, the question remains as to how such sovereignty may be recognised and exercised in practice. This series of papers has suggested that there are three potential ways this could be achieved. That is, the TRB could (i) operate as a Traditional Owner parliament; (ii) act as a voice to the Victorian parliament on all matters that may affect Aboriginal Victorians; and (iii) select members to take up reserved seats in the Victorian parliament.

While all of these options are individually desirable, it is suggested that in combination they will provide the most benefit. However, if the aim is to assert sovereignty, and reclaim Aboriginal control and self-determination, the establishment of an Aboriginal parliament, alongside the operation of a voice function, could prove the most effective option.

To that end, this paper proposes a governance model that provides for:

- an Aboriginal Parliament, with the power to make legislation over select matters of interest or impacting on Aboriginal people, and the resources to develop policy and carry out administrative functions in support of its legislative aims; and
- A reciprocal voice between the Aboriginal Parliament and the Victorian Parliament, so that:
  - outside its areas of legislative power, the Aboriginal Parliament will have a voice to the Victorian Parliament, on any matter that may impact Aboriginal Victorians; and
  - within the legislative power of the Aboriginal Parliament, the Victorian Parliament will have a voice to the Aboriginal Parliament, on any matter that may impact Victorians.

WHAT AREAS SHOULD AN ABORIGINAL PARLIAMENT HAVE LEGISLATIVE POWER OVER?

In designing an appropriate model for Victoria, one of the central questions to address is what powers should be sought for an Aboriginal parliament, and how might these powers operate in practice.

Examining those areas where Aboriginal people and interests are currently interacting with or being impacted by State power is an appropriate starting point. As the overarching, whole-of-government framework used to link together the various government policies and strategies in the Aboriginal space, the Victorian Aboriginal Affairs Framework 2018 – 2023 (**VAAF**) is useful for identifying such areas as it concisely maps out government activity in the Aboriginal policy space.

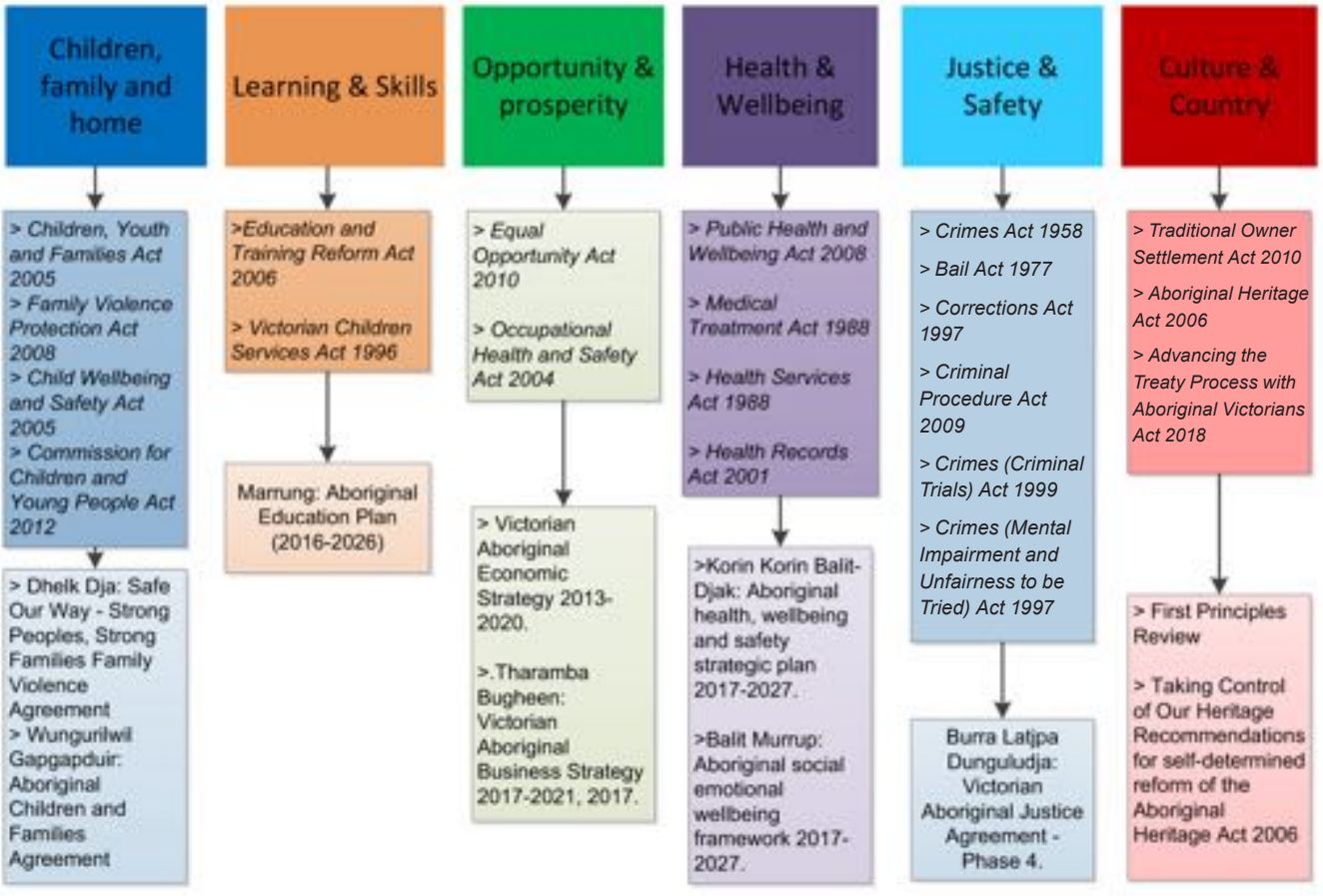
In doing so, it identifies 'six domains' or policy areas that link all current State strategies and policy activity. These domains are identified as (i) Children, Family & Home; (ii) Learning and Skills; (iii) Opportunity & Prosperity; (iv) Health & Wellbeing; (v) Justice & Safety; and (6) Culture & Country.

These six domains 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. Through a staged process, the TRB could take responsibly over each area, 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, the TRB Minister would hold 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. The domains, along with examples of the most relevant legislation and policy currently in operation is set out at **Figure 2**.

Figure 2. The six domains of the VAAF: Related legislation and policy



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, with 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 WITHIN THE SIX DOMAINS

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 and depth 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 3** sets out each potential category of legislation, along with a proposed associated process.

Figure 3. 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. 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.	Complete authority to pass legislation, with an obligation to consult with the Victorian Parliament. Example: Legislation to: • change the way bail laws apply to Aboriginal youth; or • change the way child protection laws apply to Aboriginal families.	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 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 require 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 3, 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, 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 would be 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.

PART 2

RECOGNITION OF ABORIGINAL RIGHTS

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The past few decades have seen the rights of Indigenous people increasingly recognised in international human rights law. The most prominent instrument recognising such rights, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), was adopted by the General Assembly in 2007 by an overwhelming vote of 143 nations in favour, with only four against.[4] Subsequently each of the four opposing nations, Australia, Canada, New Zealand and the United States, have changed their position and now also endorse the declaration.

Despite this strong and now almost universal support, the terms of the UNDRIP have not, with a recent exception in Canada, been adopted into domestic law. As United Nations declarations are not legally binding on a nation-state, they will have no legal effect unless directly adopted within the domestic legal system. This means that signatories, including Australia, are free to ignore the terms of the declaration internally, while still espousing support in international forums.

HOW COULD UNDRIP BE ENSHRINED IN VICTORIAN LAW THROUGH THE TREATY PROCESS?

Informed by international examples, there are three principal methods through which the UNDRIP could be enshrined in Victoria:

- **Embedding UNDRIP principles into Treaty negotiation processes and protocols**

  This proposal draws on two developments in the Canadian Province of British Columbia (**BC**), which saw the UNDRIP made central to the treaty making process within that jurisdiction. This refers to, firstly, a policy adopted in which the UNDRIP was established 'as a foundation of the British Columbia treaty negotiations,'[5] and a second reform, in which the mandate of the BC Treaty Commission was extended 'to include supporting the implementation of the UN Declaration.'[6]

  Embedded in this way, the UNDRIP is likely to inform all policy and procedure associated with the negotiation, implementation, and operation of treaties in that jurisdiction.

  Accordingly, this paper puts forward a similar proposal that UNDRIP principles be embedded into the central structures to be designed and negotiated under the Treaty Act, in particular the Treaty Negotiation Framework (**Framework**) and the Treaty Authority.

  This could be done by including within the Framework a negotiation protocol based on the UNDRIP principles. Further these principles, along with an objective of implementation, could be included in the foundational documents of the Treaty Authority. Much like the BC Treaty Commission, the intention of the Treaty Authority appears to be that of a neutral facilitator – or umpire – during negotiations between Traditional Owners and the State.

- **Enacting legislation affirming the application of the UNDRIP**

  This proposal also draws on recent developments in BC, in particular legislation enacted in November 2019 known as the *Declaration on the Rights of Indigenous Peoples Act* (**DRIP Act**).

  This legislation affirms the application of the UNDRIP to the laws of BC,[7] and requires that 'the government must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration'[8] and also requires an action plan to achieve the objectives of the UNDRIP.[9]

  This paper suggests that Victoria adopt similar legislation that will not only review and amend current legislation that is inconsistent with UNDRIP, but will also examine proposed legislation for compatibility, in a process similar to that required under the *Charter of Human Rights and Responsibilities Act 2006* (**Human Rights Charter**). Like the Humans Right Charter, this legislation

could also require all public authorities, such as State and local government departments, to act consistently with UNDRIP when making decisions, developing policy and providing services.

- **Including UNDRIP rights as enforceable and justiciable rights within treaties**

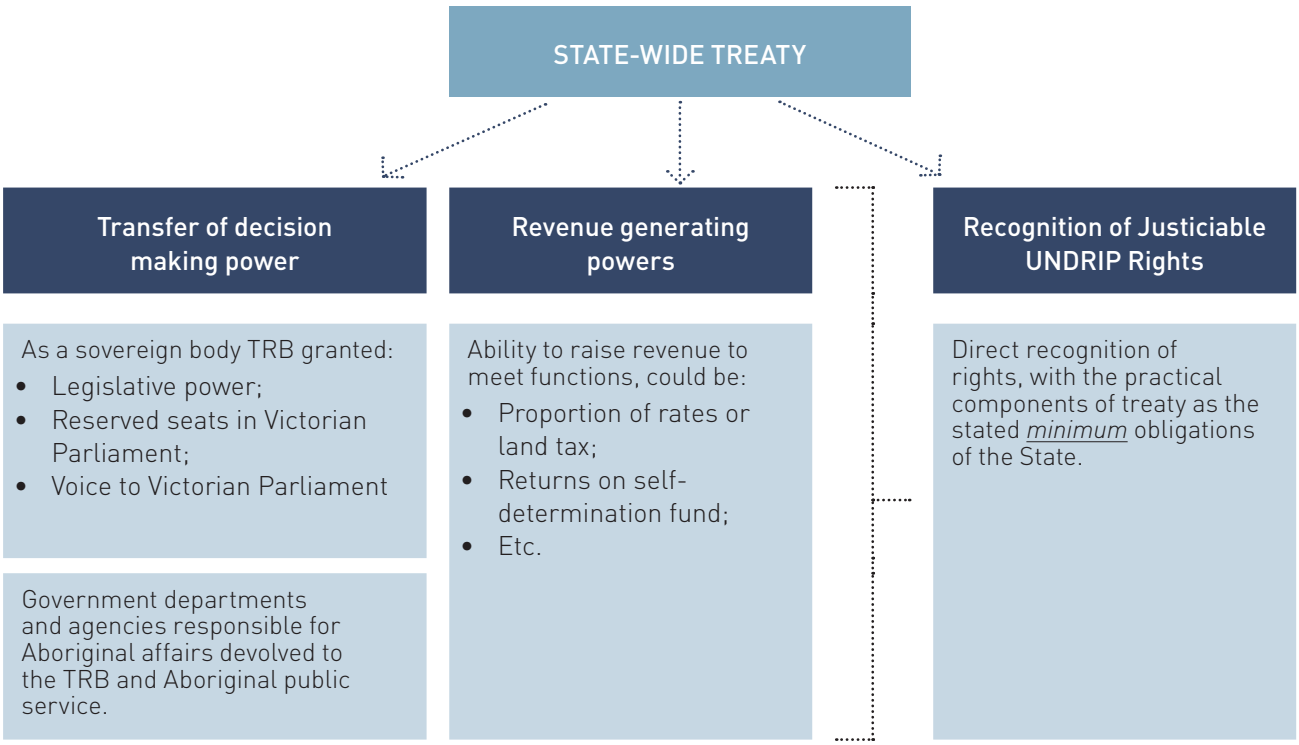
  The final proposal considered by this paper is not drawn from any direct international example, and is, as far as we can ascertain, untried anywhere in the world. This proposal would see the inclusion of UNDRIP rights as justiciable rights within treaties, placing a positive obligation upon the State to ensure the realisation of such rights, and where the State failed to do so, would allow a court to make an order forcing the State to take appropriate action.

  We suggest that the principal reason this has not yet occurred in other jurisdictions is because nowhere else has a treaty process come into being following the creation of the UNDRIP. However, as the preeminent representation of international standards for Indigenous rights, it is natural that it should now be considered for adoption in this way.

While having rights recognised as justiciable may certainly provide benefits and opportunities, there are also potential risks to be mitigated. Of particular concern to Traditional Owners is the potential risk that allowing rights to be interpreted by the courts could see rights developed in ways contrary to Indigenous understandings, or may even mean that rights are watered down over time.[10]

In response, we propose that UNDRIP rights are recognised as justiciable rights, but within the wider context of the practical and self-determining measures contained within Treaty. As shown in **Figure 4**, the Treaty terms (particularly those that transfer decision making and revenue generating power) should be recognised as the minimum obligations of the State in ensuring the realisation of UNDRIP rights. In this way, Treaty will provide a base level standard, but there will still be the potential for positive development of rights through the courts.

Figure 4. Treaty building blocks as minimum rights obligations

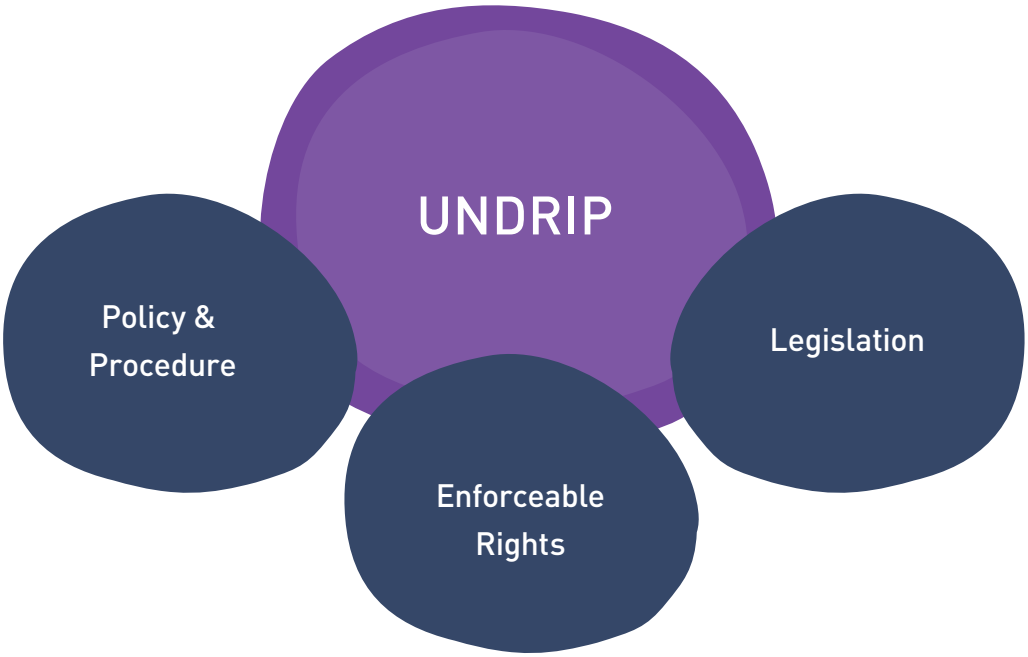


The three proposals outlined above could be introduced individually, however this paper suggests it would be beneficial to enact them collectively. This is because each proposal addresses a different subject area:

- Embedding UNDRIP in Treaty negotiation **processes and protocols** deals with policy and procedure;
- Legislation affirming the application of UNDRIP addresses **current and future legislation**; and
- Recognition as enforceable and justiciable rights provides for **positive and practical implementation**.

Together, they provide a complementary system for the enactment of UNDRIP which, in our view, provides a solid and established legal underpinning that will be threaded through all aspects of Treaty, and the future governance of this State. The adoption of all three proposals will provide the operation of Treaty with a logical and legally consistent substructure, and a sound basis for the future, as well as a developing relationship between the State and the various traditional sovereigns within Victoria.

Figure 5. UNDRIP underpinning Policy, Legislation and Rights



PART 3

A FRAMEWORK FOR LOCAL TREATIES

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Whereas a state-wide Treaty provides the opportunity for recognition of sovereign rights and the implementation of self-determination at a state level, it will not satisfy the longstanding calls of individual First Nations for comprehensive Treaty making on Country. For this reason, the making of Local Treaties with individual Traditional Owner groups will be fundamental to any Victorian Treaty model.

Traditional Owners and the State have previously negotiated a framework for the making of comprehensive land settlements through the *Traditional Owner Settlement Act 2010* (**Settlement Act**). Presented as a reimagining of native title for Victoria, and a forward thinking break with the constraints of the *Native Title Act 1993* (**NTA**), this legislation and the associated framework provides some guide to the practical implementation and navigation of the same hurdles and problems that the reform envisaged by the Treaty Act will inevitably face.

Now, more than 10 years on, the direct experience of the Settlement Act provides an immediate history from which to draw on when developing a local treaty framework. Below, this paper proposes a process for how Local Treaties might be negotiated, and how they may overcome issues identified in the Settlement Act framework.

WHAT CAN BE LEARNED FROM THE SETTLEMENT ACT?

The Settlement Act was developed in the wake of the decision in *Yorta Yorta v Victoria*[11] (**Yorta Yorta decision**), and the finding that a loss of continuous connection to Country could extinguish native title rights. While this proved a hurdle to the recognition of rights in highly settled parts of Australia, the Settlement Act was Victoria's commitment to dispense with legalistic and combative responses to Traditional Owner claims through native title litigation and engage in comprehensive agreement making through negotiation. It also promised to produce speedy and efficient resolution of claims, and an opportunity for the State and Traditional Owner groups to meet and negotiate a shared future.

Ten years on from this historic reform there have been some useful achievements. However, there have also been some disappointments. This paper suggests that the there are two central issues arising from Settlement Act implementation which need to be addressed in any Local Treaty framework:

- With only three agreements reached in 10 years, the Settlement Act has not resulted in a more efficient system of claim resolution than that available under the NTA; and
- The Settlement Act relies on a framework that is inherently rigid and is at times unable to flexibly respond to either individual Traditional Owner group aspirations, or current developments in native title law.

The failure to efficiently resolve claims has a number of negative effects on the process as a whole. Firstly, it undermines confidence within Traditional Owner groups that the process can deliver meaningful outcomes, or act as a mechanism to recognise their rights and overcome historic injustice. Secondly, the slow roll out means that Settlement Act rights are only established in particular pockets of Victoria, where agreement has been reached. This means that government departments, operating across the State, only interact with the agreements intermittently, often failing to build comprehensive systems, or to sufficiently change their internal cultures to respond, or to respect and comply with new processes. Despite the initial ambition of this substantial reform, the lack of outcomes means that the potential of the rights available under the Settlement Act have not been fully realised.

CREATING A MORE EFFICIENT PROCESS

Settlement Act processes create a multitude of pressures on Traditional Owners, at both the individual and group level. Such pressures are not unique to the Settlement Act, and are equally if not more evident in processes under the NTA, and indeed in all post-colonial land justice schemes. The development of any Local Treaty framework needs to understand and minimise these pressures wherever possible.

There are at least two methods that could be adopted to reduce the highly pressurised nature of negotiations:

- Firstly, by the State not insisting that agreements be 'full and final', which requires Traditional Owner groups to forgo further rights to NTA claims with respect to the agreement area, and to accept that all liability for native title compensation has been met;
- Secondly, by allowing for greater flexibility around the negotiation of boundaries and group composition, which currently require groups to come to final and often immovable positions on the extent of their Country, and issues of self and cultural identity.

Rather than seeking finality, the aim should be to achieve progress, and establish certainty through ongoing and respectful relationships. However, where flexibility cannot produce an outcome, the process should develop wider options for dispute resolution.

While the Settlement Act framework places considerable emphasis on discussion, mediation and agreement making in resolving disputes, it does not directly provide any path to arbitrated outcomes. In practice, this often means that where a dispute is intractable, Traditional Owners are forced into the Federal Court, and are made reliant on the NTA, the very process which the Settlement Act was established to avoid.

While culturally appropriate forms of mediation should remain the central process for dispute resolution, the Treaty process presents an opportunity, unique in Australian history, for Traditional Owners to self-determine their own tribunal structure. This could potentially be located within the Treaty Authority, to be established pursuant to section 28 of the Treaty Act. Rather than focusing on the legal intricacy of the NTA, this tribunal would conduct the factual enquiries relevant to resolving Traditional Owner disputes, with all sides provided a fair allocation of resources. It could also be designed to properly reflect cultural understandings, appointing a panel of Elders as decision-makers. While it is hoped that this cultural credibility would imbue such a body with authority within the Aboriginal community, it could also be designed to complement other legal processes and available legal avenues, so as to narrow issues and streamline proceedings, in the event parallel proceedings are commenced under the NTA, or through the State courts.

A LOCAL TREATY FRAMEWORK

Turning to the question of what Local Treaties should contain, it is suggested that Local Treaties will likely consist of two components:

- **A compensation and rights component**, not dissimilar to, but presumably in excess of what is available under Settlement Act agreements; and
- **A political component**, that recognises the Traditional Owner group as a political community, entitled to engage in some form of self-government.

COMPENSATION AND RIGHTS COMPONENT

Accepting that, at a broad level, there is likely to be a high degree of commonality among the aspirations of Traditional Owner groups with respect to the compensation and rights component, and perhaps an immobile requirement from the State to establish universal land management systems, as well as provide equal treatment to Traditional Owner groups across Victoria, it is proposed that a 'Minimum Rights Package' be collectively negotiated by all Traditional Owner groups. These negotiations could perhaps be facilitated by the TRB or Assembly, and result in a package modelled, but improving on, current Settlement Act outcomes.

This approach would result in a number of benefits, in that Traditional Owners could likely achieve better outcomes through collective negotiation by leveraging off the State's requirement for a universal approach. It may also help overcome, or at least reduce, the power imbalance inherent in negotiations with the State, and increase the capacity of all Traditional Owner groups through the pooling of resources.

It is also envisaged that the Minimum Rights Package would be immediately available to any group upon them meeting the determined negotiation thresholds, and as it would be in excess of current outcomes,

would further encourage the efficient resolution of claims. This quick roll out of the package would see it apply across most of Victoria, requiring both systemic and cultural change within government departments. Traditional Owner groups could also maintain a collective body to oversee implementation, and with the ability to re-negotiate aspects of the package, ensuring greater flexibility within the framework, and greater accountability of government through constant and consistent monitoring.

Once a Traditional Owner group has implemented the Minimum Rights Package, it would be in possession of a significant financial base, and have experience in complex interactions with government, and the exercise of its rights, over a wide policy landscape. This would place each group in a stronger and more informed position to negotiate the political component, and therefore enter into a Local Treaty with government.

A POLITICAL COMPONENT

Following implementation of the 'Minimum Package' a group could move to the second stage and negotiate a Local Treaty. This component would seek to institutionalise the right of each group to independently exercise some form of self-government on Country. However, whereas previously outcomes have been standardised between groups, the content of any final Treaty should be left open and not prescribed, respecting the individual sovereignty of each group.

In other words, in this stage the State would be required to abandon standardised solutions and engage with each Traditional Owner group on a sovereign-to-sovereign basis.

While there should be no limitations on what could finally be negotiated, we foresee that, as localised sovereigns, Traditional Owner groups would need to engage with regional and localised settler governance, in particular Local Government.

To this extent, it may be that Traditional Owner groups could mirror the TRB's exercise of sovereign power at the State level, in that they could:

- Take on Local Government functions, and make laws and regulation in place of Local Governments;
- Have reserved seats within Local Government; and / or
- Act as a voice to Local Governments.

While the above may act as markers to indicate where Local Treaties could possibly be developed, we consider them far from definitive. Indeed, this paper argues that the state-wide implementation of the Minimum Rights Package will likely bring to light further opportunities and avenues for Traditional Owner sovereignty to be fully realised, and we would caution against trying to fully define or limit that concept until such a time as Traditional Owners are fully and properly resourced, and have experience with implementing a comprehensive rights regime.

Figure 6. A potential 'Minimum Rights' package

CONCLUSION

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It is hoped that the model of treaty put forward in this paper, and the wider series, has produced an outline of what treaty could entail, and what it could potentially deliver to Aboriginal Victorians and Traditional Owners.

The Journey embarked upon, indeed now well underway, presents a once in a generation opportunity for Aboriginal people and Victorian settlers to reimagine their co-existence in this State.

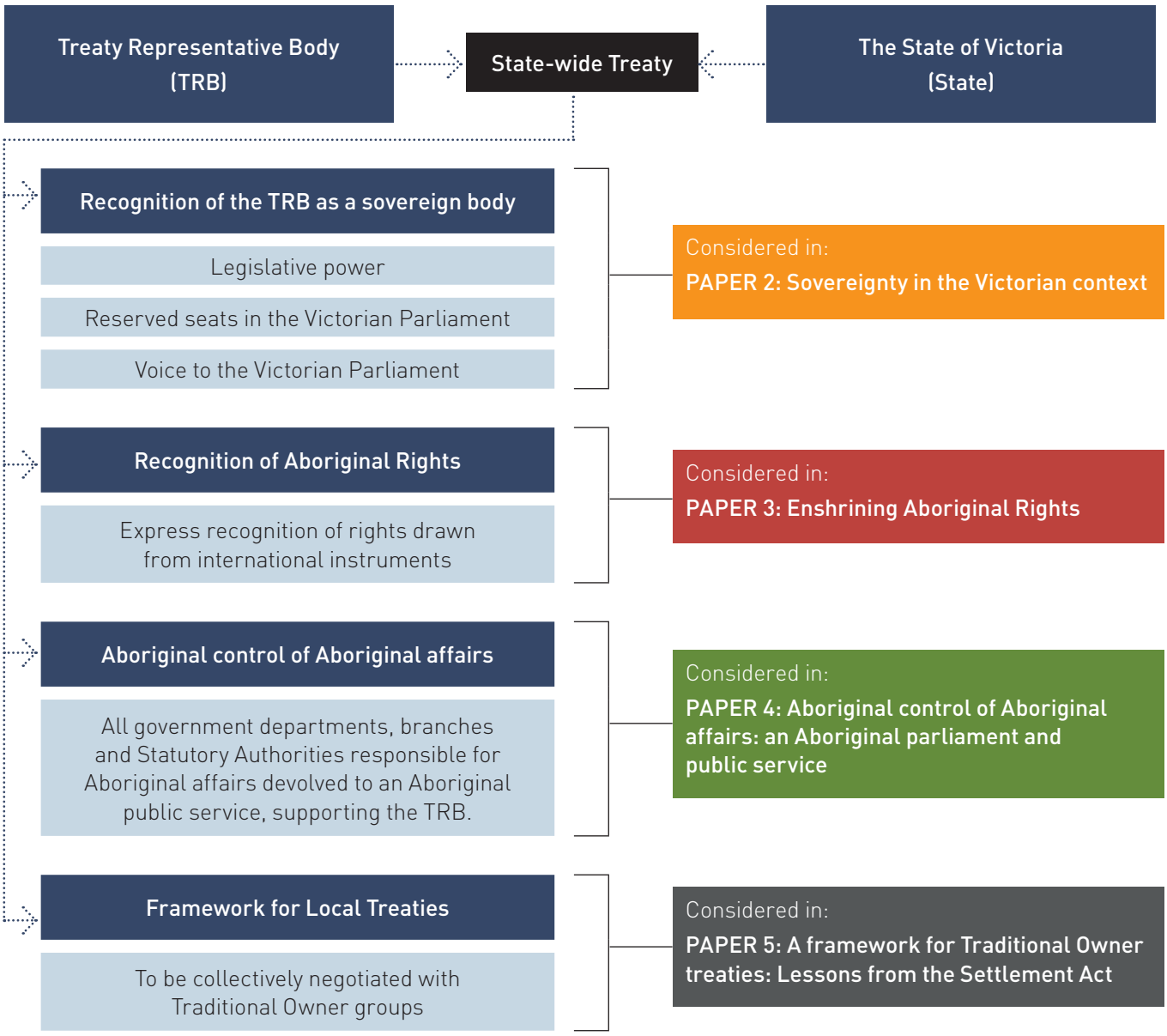
For both parties, the stakes are high, and the path ahead uncertain. However, at its core Treaty must deliver certain fundamental change if it is to live up not only to the rhetoric, but also the expectations of Traditional Owners and Aboriginal Victorians. Through this paper we argue these baseline elements are:

- An Aboriginal parliament, capable of making legislation on matters relevant to Aboriginal people, with the resources to develop and implement policy in support of its legislative aims.
- The affirmation of the UNDRIP into the law of Victoria, with the power to enforce these rights through the courts.
- A strong framework for Local Treaties that delivers efficient outcomes and respects the ultimate sovereignty of Traditional Owner groups.

These are the issues and structures we have explored through five papers, and which are fundamental to the comprehensive treaty model, as shown in **Figure 7**.

It ultimately falls to all Aboriginal Victorians and Traditional Owners to set the path for Treaty. We hope this series of papers has sparked discussion and provided a meaningful contribution to this process.

Figure 7. Overview of proposed model



FOOTNOTES

1. Minister for Aboriginal Affairs (Vic), 'Historic Treaty Legislation Passes in Victoria' (Media Release, 21 June 2018) <https://www.premier.vic.gov.au/historic-treaty-legislation-passes-in-victoria/>.
2. First Peoples Assembly of Victoria 'Big steps taken on the path to Treaty in Victoria' (Media Release, 22 October 2021) <https://www.firstpeoplesvic.org/media/big-steps-taken-on-the-path-to-treaty-in-victoria/>.
3. Ibid.
4. There were also eleven abstentions. Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 *Australian International Law Journal* 17, 27.
5. Government of Canada, *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia* (British Columbia, First Nations Summit, Canada, 4 September 2019) <https://www.rcaanc-cirnac.gc.ca/eng/1567636002269/1567636037453>.
6. British Columbia Treaty Commission, *Discussion Paper for Panel Discussion On Implementation Mechanisms For Indigenous Rights And Agreements With States* (18th United Nations Permanent Forum On Indigenous Issues, 23 April 2019).
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