

**Submission on the additional forms of recognition for the purposes of a reserved seat in the First Peoples' Assembly of Victoria
26 October 2020**

On 19 June 2020, the First Peoples' Assembly of Victoria (**Assembly**) passed a resolution requiring the development of “*additional criteria for a group to meet the definition of Traditional Owner Group in clause 65.1 of the Constitution, such criteria to be consistent with the Advancing the Treaty with Aboriginal Victorians Act 2016*” (**Additional Criteria Resolution**).

The task of designing this additional criteria has fallen to the Cultural Governance Committee, who will bring a proposal back to the Assembly for approval. Once this new criteria is in place, the board of the Assembly is to allow those groups meeting the new terms to appoint a Reserved Member, in accordance with clause 9.2 of the Assembly's constitution.

This submission is in response to the Additional Criteria Resolution, and the *Discussion Paper* and *Supporting Analysis Paper* expounding on the issue, and published on the Assembly's website in or about September 2020. (**Background Papers**).

The Federation commends the Assembly, and the work of the Cultural Governance Committee in particular, in pursuing this important issue. The Federation views Traditional Owner representation as a priority issue, and necessary requirement for the development of a fair and just Treaty process. We note that the Federation previously made submissions¹ on this issue to the Victorian Treaty Advancement Commission, and raised our concerns about the exclusion of Traditional Owner groups without recognition under any existing legislative regimes. Accordingly, we are gratified that this issue is now being addressed, and we are hopeful of a speedy resolution so that Traditional Owner voices from across Victoria can be heard during this crucial phase of the Treaty process.

Scope of Additional Criteria Resolution

This submission is limited to responding to the Additional Criteria Resolution, as written. Notably, the resolution requires the new criteria to be consistent with the *Advancing the Treaty with Aboriginal Victorians Act 2016* (**Treaty Act**), which in turn seeks to preserve the existing rights and expectations of Traditional Owner groups with recognition under an existing legislative framework.² Furthermore, the Background Papers state:

The Assembly would need to ensure that a new model sits alongside existing models of Assembly membership, including reserved membership for formally recognised Traditional Owner groups and elected general Members. This ensures that the existing rights of current Members are maintained.

On that basis, we understand that the Cultural Governance Committee is not examining or revisiting current forms of reserved membership and Traditional Owner representation, including alternative representative models. As such, this submission does not address such alternative models in detail. In the event the Cultural

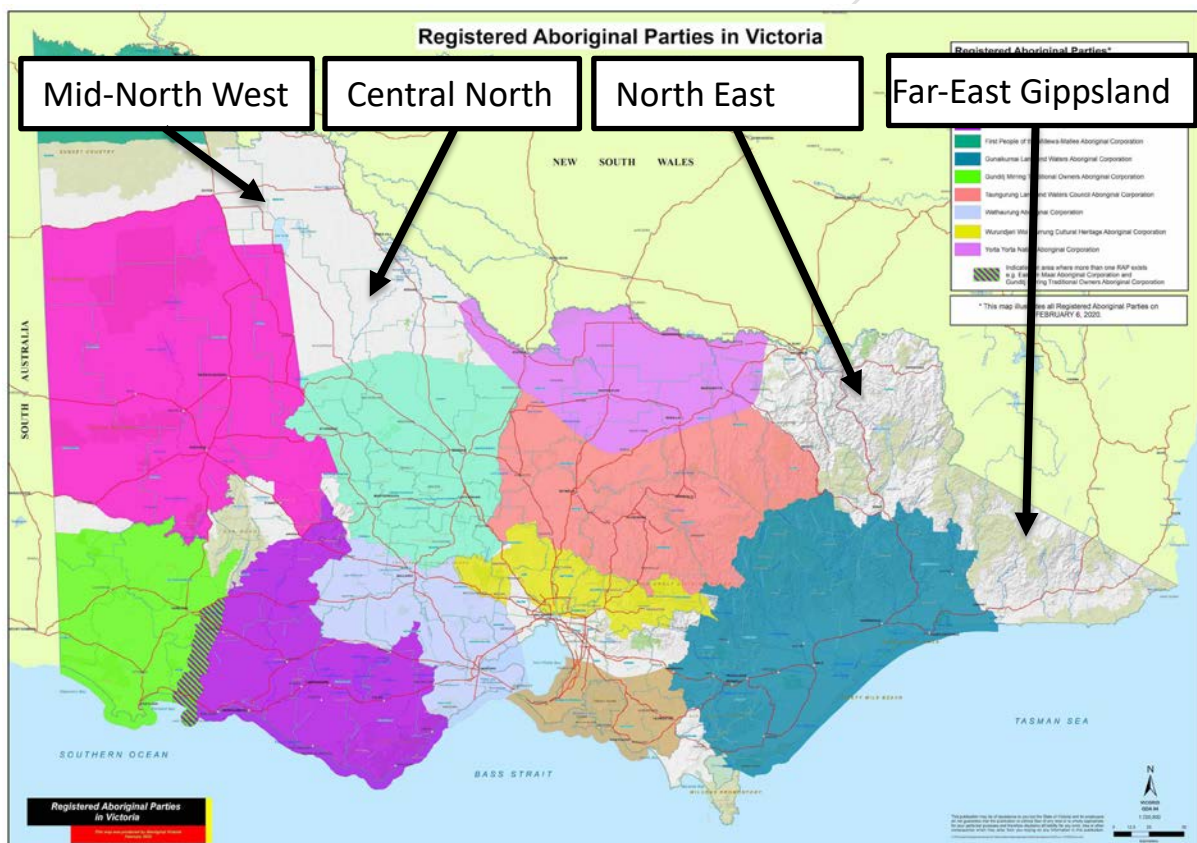
¹ Federation Submission on the proposed Aboriginal Representative Body model, 16 November 2018 (a copy is available upon request)

² See sections 5, 6 and 7 Treaty Act

Governance Committee does consider these issues, we say it is outside the scope of the Additional Criteria Resolution, and that an additional Assembly resolution would be required. In addition, we would expect the Assembly to comply with principles of free, prior and informed consent, which would require wide spread consultation, and an opportunity to make further submissions.

On the basis of the above, this submission is limited to a consideration of those areas within Victoria that currently do not have a Traditional Owner group recognised under any exiting legislation. At *Figure 1* is a map produced by the Victorian Aboriginal Heritage Council (**VAHC**) showing each Registered Aboriginal Party (**RAP**) within Victoria, with each recognised area highlighted in a different colour. As we discuss below, the current RAPs directly correspond to those groups that are currently eligible to appoint a Reserved Member. We have further marked up this map to show (in very general terms) those areas without recognition under existing legislation. These include the: (i) Mid-North West; (ii) Central North; (iii) North East; and (iii) Far-East Gippsland. In this submission these areas will be collectively referred to as the **Areas without formal recognition**.

Figure 1: VAHC Registered Aboriginal Parties Map – marked to show Areas without formal recognition



Executive Summary

This submission aims to provide a detailed consideration of how additional representation can be provided to Traditional Owners who assert connection to the Areas without formal recognition. In doing so it also seeks to identify a series of critical factors that the Cultural Governance Committee should take into account throughout this process.

First among these, is that negotiations with the State have already commenced, and therefore the Assembly will need to act quickly if the additional Reserved Members are to have any meaningful say in the design of the Treaty structures under the Treaty Act. The negotiation of these structures will largely be resolved in the next 12 to 24 months. As many Traditional Owner groups can attest, it would be very difficult, and in fact very unlikely, for a group to start and complete any existing formal recognition process within that timeframe. Notwithstanding this experience, the Additional Criteria Resolution does not just contemplate the resolution of an application, but instead the design and implementation of an entirely new process, and then having an unknown number of recognition applications researched, prepared, submitted and resolved (**New Recognition Process**).

For this reason, we do not consider the implementation of a New Recognition Process to be a feasible method to achieve greater Traditional Owner representation, within a timeframe that will have any meaningful effect. As such, we instead recommend that the Assembly:

- i. adopt an interim process, that will allow Traditional Owners in the Areas without formal recognition to meet, and immediately select representatives to be appointed as interim Reserved Members; and
- ii. commit to an ongoing process of obtaining formal recognition for each Traditional Owner group in any Area without formal recognition, with the aim of resolving this issue in the next two years, hopefully to coincide with the commencement of formal Treaty negotiations.

However, with respect to the ongoing process of formal recognition, we recommend against the Assembly adopting a New Recognition Process to sit alongside those already available under existing legislation. Instead we recommend the Assembly rely on existing recognition processes, while also ensuring that the groups without formal recognition have adequate resources to ensure these processes are expedited.

We take this view for a number of reasons, including that the design, implementation and operation of a New Recognition Process will place a significant strain on the Assembly's resources, and likely divert it from its central purpose of achieving a just Treaty process for Victoria.

The Background Papers take the view that the Assembly can simply adopt "General Principles" or "Specific Criteria" as a basis for groups making an application, and then presumably assess, approve or reject them in an orderly manner. However, in our view recognition processes are never so straightforward, are often highly contested and likely to generate conflict and controversy.

In our view, the approach in the Background Papers does not address what is the central challenge for all recognition processes in Victoria, which is to: (i) ensure that the correct Traditional Owners are identified; (ii)

deal with disputes around that identification; and (iii) ensure the group is structured in a way that is both culturally correct, and compatible with legal requirements.

This is not a straightforward process in a region as heavily and brutally colonised as Victoria. Indeed, these challenges have seen recognition processes become the subject of significant and often bitter dispute, in many cases leading to protracted legal battles and ongoing community conflict. Should the Assembly now adopt its own New Recognition Process, it will place itself at the centre of these disputes, and be called upon to adjudicate and resolve questions of Traditional Ownership. This is not an enviable position, and has the potential to alienate the Assembly from parts of the Traditional Owner community, at the very moment it is attempting to build consensus for its wider and historic purpose of building a Treaty process.

Furthermore, we note that this is not the last time that the Assembly will have an opportunity to consider Traditional Owner representation, as it will soon need to turn its mind to section 31(1)(c) of the Treaty Act, which requires that the Treaty Framework determine the “*minimum standards with which a party must comply in order to enter into treaty negotiations*” (**Treaty Thresholds**). In our view, this is a more appropriate time to attempt to finally resolve Traditional Owner representation issues, and will have the added benefit that interim Reserved Members, from Areas without formal recognition, will have an opportunity to contribute.

For these reasons it is our recommendation that, in committing to an ongoing process of formal recognition for these areas, the Assembly rely on existing forms of recognition. The Assembly could take an active role in ensuring that groups in the Areas without formal recognition are adequately resourced to pursue these outcomes, and indeed the State has already provided some funding for this purpose through the Nation Building Support Package. Given there is some level of dissatisfaction in these existing processes, and in the various parties funded to assist Traditional Owners in this area, the Assembly could consider asserting for itself some kind of oversight role, through which it is able to monitor and comment on the processes.

Notwithstanding the above, we recognise that the Cultural Governance Committee may not share our views, and may still wish to proceed with the design and implementation of a New Recognition Process. To that end this submission will also make some recommendations as to how that process might operate, including how it might interact with the Treaty Thresholds.

As such, this submission is divided into three parts.

- **Background:** providing some consideration of current arrangements and criticisms of the current model.
- **Recommendation 1:** Adoption of an interim method, and reliance on existing recognition processes; and
- **Recommendation 2:** Adoption of an interim method, and a New Recognition Process.

Part 1: Background

In order for our recommendations to be considered in context, we think it useful to provide some background and discussion of the current approaches taken to Traditional Owner representation within the Assembly.

Eligibility to appoint a Reserved Member

The Assembly's governance model consists of twenty-one "General Members", elected by Aboriginal Victorians from five regions around the State,³ and eleven "Reserved Members" who are directly appointed by Traditional Owners groups.⁴

To be eligible to appoint a Reserved Member, a group must fall within the definition of "Traditional Owner group" as set out in clause 65.1 of the *Constitution of the First Peoples' Assembly of Victoria Limited* (**Constitution**). This definition includes any group that is recognised under the following legislation⁵:

- (i) *Aboriginal Heritage Act 2006* (Vic) (**Heritage Act**): A Traditional Owner group can apply to the VAHC to become a RAP under the Heritage Act, which provides them a role in managing Aboriginal heritage within their appointed area;
- (ii) *Native Title Act 1993* (Cth) (**NTA**): A Traditional Owner group can file a native title claim in the Federal Court under the NTA, and seek a determination from the court as to whether their native title rights still exist. A positive finding by the Court, obtained following a public hearing or after having obtained the consent of the State, will result in native title rights been recognised (**Positive NTA determination**);
- (iii) *Traditional Owner Settlement Act 2010* (Vic) (**Settlement Act**): In an alternative to the NTA process, unique to Victoria, a Traditional Owner group can negotiate a Recognition and Settlement agreement (**Settlement Agreement**), which provides formal recognition and rights and interests in land which are comparable to (and in some cases exceed) rights achievable under the NTA, along with a financial package.

³ Clause 5.1, Assembly Constitution

⁴ Clause 4.1, Assembly Constitution

⁵ In addition to three pieces of legalisation listed above, the definition at clause 65.1 includes a fourth category of Traditional Owner group, being "*another group meeting the criteria adopted by a Super Majority Resolution of the Assembly Chamber.*" The Cultural Governance Committee is currently going through the process of designing this additional criteria to be adopted by the Assembly.

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

RAP status is the most common form of recognition

Although the definition of “Traditional Owner group” is built around three separate pieces of legislation, practically speaking it is the Heritage Act that provides the baseline for achieving eligibility to appoint a Reserved Member. This is because recognition under the Heritage Act, and registration as a RAP, is a generally more accessible form of recognition, and has less stringent requirements, than either the NTA or Settlement Act. Of course, as we will discuss below, this does not mean achieving RAP registration is a simple or straightforward process, just that it is generally less drawn out than the others. This means that the usual process when a Traditional Owner group decides to pursue formal recognition, is that it will pursue RAP registration first, before moving on to other processes under the NTA or Settlement Act.⁶

Process of expanding the definition of Traditional Owner group

As stated above, to become eligible to appoint a Reserved Member, a group must fall within the definition of “Traditional Owner group” as set out in clause 65.1 of the Constitution. Also as stated, this definition includes any group that is recognised under the Heritage Act, NTA or Settlement Act.

However, the definition at clause 65.1 also includes a fourth category of Traditional Owner group, being:

“another group meeting the criteria adopted by a Super Majority Resolution of the Assembly Chamber.”

The Cultural Governance Committee is currently going through the process of designing this additional criteria, which, to be adopted, must be passed by a resolution supported by 75% the Assembly members.

Criticism of the Reserved Member model

The Reserved Member model has been subject to criticism for its failure to provide representation for all Traditional Owners across the State. This criticism seems to come from two main positions:

1. **Excludes the Areas without formal recognition:** That a reliance on existing forms of legislative recognition excludes Traditional Owner groups without formal recognition; and
2. **Clan based model:** That currently recognised Traditional Owner groups have been wrongly formulated, and need to be restructured, often proposing to move to a “clan based” model of representation.

⁶ It is also worth noting that even if a group did not take this path, and instead obtained a Positive NTA determination or Settlement Agreement first, they would then also achieve RAP registration. This is because once a Traditional Owner group has a Positive NTA determination or has entered into a Settlement Agreement, the VAHC must register the group as a RAP: *Aboriginal Heritage Act 2006* (Vic) ss 151(2), (2A).



The Federation asserts that the exclusion of Areas without formal recognition is a clear weakness in the current Reserved Seat model, and should be addressed as a matter of priority by the Assembly. As stated in our 2018 Submissions:

... many groups, although yet to achieve formal recognition, are still operating on a cohesive basis and within their own cultural authority... We also recognise that such recognition should not, in an ideal world, determine the right of the group to participate directly in the [Assembly].

Accordingly, by now pursuing additional paths to recognition for the Areas without formal recognition, the Assembly only strengthen the Treaty process, and its credibility in seeking a just resolution between the first nations of Victoria and its colonisers.

With respect to the aforementioned Clan based model, we note our comments above that we understand it to be outside the scope of these submissions and the Additional Criteria Resolution. In any event, we note that such constructions of Traditional Ownership, in effect, call for the radical deconstruction of existing forms of recognition, including for the deconstruction of existing Traditional Owner groups who are currently eligible to appoint a Reserved Member. There is nothing to suggest that such a proposition has widespread support. Indeed, such claims do not appear to come from within recognised Traditional Owner groups, whose members do not assert they are unrepresented in this process.

Accordingly, we say that any proposal to undermine currently existing structures is not supported by Traditional Owners, and in any event has not been subject to a process of seeking the free, prior and informed consent of Traditional Owners. On that basis we suggest that the Cultural Governance Committee cannot, and should not, entertain such proposals. To the extent it intends to do so, we would request the opportunity to make further submissions.

Recommendation 1: Adoption of an interim method, and reliance on existing recognition processes

Below we set out the Federation's first recommendation as to how the Assembly and the Cultural Governance Committee should proceed with ensuring Traditional Owner groups without formal recognition are able to appoint Reserved Members. This Recommendation is set out in four sections:

- 1.1 Underlying factors taken into account;**
- 1.2 Outline of the proposed process;**
- 1.3 How to structure the Interim method:**
 - (a) Settling the areas to select an interim Reserved Member;
 - (b) Conduct of meetings to appoint Reserved Members; and
- 1.4 Recognition processes following an Interim Method appointment.**

1.1 Underlying factors taken into account

This recommendations take into account a number of underlying factors which are discussed in greater detail below. These factors include that:

- i. Negotiations on the Treaty structures required under the Treaty Act have commenced, and it is important to get representatives from the Areas without formal recognition appointed as soon as possible, so that they may make a meaningful contribution to the Treaty process;
- ii. there are inherent delays in the Assembly both designing and implementing a New Recognition Process, and further delays in the Assembly assisting groups to apply through this process and then be assessed against the additional criteria;
- iii. the design, implementation and operation of a New Recognition Process will place a significant strain on the Assembly's resources, and likely divert it from current timelines and other important work, such as designing the Treaty structures and a Truth and Justice process; and

1.2 Outline of the proposed process

Taking into account each of the factors listed above, we recommend that:

- i. The Assembly adopts an interim appointment method to immediately appoint Reserved Members for the Areas without formal recognition. This method would operate by calling a meeting of all Traditional Owners for a specified area, and asking them to appoint a Reserved Member at the meeting (**Interim Method**).

- ii. These Reserved Members would be known as **Interim Reserved Members**, and would serve: (A) until the current term of the Assembly ends, at which time the Interim Method of appointment could be repeated; or (B) until the Traditional Owner group achieves recognition under an existing legislative regime, most likely to be the Heritage Act.
- iii. The Assembly could also approach the State to ensure that Traditional Owner groups in the Areas without formal recognition are immediately resourced to pursue recognition, and that in all available ways, their pathway to recognition is fast tracked (noting that funding has already been provided for this purpose through the Nation Building Package).

We suggest that this approach addresses all of the critical factors set out above. It quickly establishes representatives for the Areas without formal recognition, while also allowing a more thorough and comprehensive recognition process to be carried out in tandem. It also avoids the Assembly becoming bogged down in the intricacies of a New Recognition Process, and potentially becoming diverted from its main role. This process would also ensure that all Traditional Owner groups are ultimately recognised under the same processes, meaning there will be no difference between groups when it comes to settling the Treaty Thresholds (discussed further below).

However, we recognise that the above approach is not perfect. For instance we recognise at least two clear drawbacks:

- i. All current forms of legislative recognition have not been self-determined, are not supported by all Traditional Owners, and have a history of causing disputes and dissatisfaction among Traditional Owner groups; and
- ii. The Traditional Owner groups in the Areas without formal recognition may themselves not support these forms of recognition.

To respond to this, we would suggest that after adopting the Interim Method, the Assembly could consult with the Traditional Owner groups in the Areas without formal recognition. In the event that one or more of them objected to pursuing a current form of legislative recognition, the Assembly could negotiate with them a separate form of recognition to meet their individual needs.

1.3 How to structure the Interim method

To establish the Interim Method we suggest there are two central issues that need to be resolved:

- i. Settling the areas to select an Interim Reserved Member; and
- ii. Determining how meetings to appoint an Interim Reserved Member should be conducted.

We provide our recommendations with respect to these two issues below.

1.3.1 Settling the areas to select an Interim Reserved Member

Firstly, it is important to keep in mind that this will be an interim arrangement, while more detailed research and consultations are carried out as part of a formal recognition process, and so it is not necessary to completely finalise all issues at this stage. Any positions reached can be later refined and changed as the groups proceed through recognition processes.

However, the aim should still be, as much as is possible, to agree areas that broadly correspond to the cultural groupings in the Areas without formal recognition.

As set out at *Figure 1*, the Areas without formal recognition can be separated into four broad geographical areas: i) Mid-North West; (ii) Central North; (iii) North East; and (iii) Far-East Gippsland.

These areas should, in our view, broadly correspond to cultural groupings, however further work and consultation should be done to confirm if this is the case. Some of these areas have been previously subject to detailed research by *First Nations Legal & Research Services (FNLRs)*, and some have even previously been subject to claims under the NTA. Accordingly, following consultation with the Traditional Owners, and a review of existing research, it should be possible to determine if the creation of four seats is sufficient to represent these areas, or if some other configuration is to be preferred.

One issue that should *not* be addressed in establishing these areas, is the defining of boundaries between groups in Areas without formal recognition. The goal is to identify Traditional Owner groups or nations that should be represented and have their voice heard in the Treaty process, and have them included in the process as quickly as possible. Accordingly an understanding of exact boundaries is unnecessary, and can be resolved through later processes. By avoiding this issue, the process should also largely be able to avoid creating disputes between neighbouring groups.

Finally the best way to progress this issue, would be for the Assembly to commission a report by an expert anthropologist, to have them consult with Traditional Owners, and give their views as to the appropriate areas, groupings, and even Apical Ancestors to be relied upon. It would seem clear the FNLRs researchers are best placed to do this, having the access to the networks to carry out consultations, as well as extensive existing research, which will allow the task to be completed much quicker than by any other potential consultant. Noting that some Traditional Owners may take issue with FNLRs leading this work, it would also be appropriate to have the report peer reviewed by an independent expert in the field.

1.3.2 Conduct of meetings to appoint Interim Reserved Members under the Interim Method

We have suggested that the Interim Method could operate through the calling of a meeting of all Traditional Owners for a relevant area, who then appoint an Interim Reserved Member. These meetings could be conducted in the same manner as an “Authorisation Meeting” under the NTA.

At **Attachment 1** is a factsheet prepared by the National Native Title Tribunal on Authorisation Meetings, and how the NTA requires they be carried out. In *Figure 2* below we describe how the process of an Authorisation Meeting may be adapted for the appointment of an Interim Reserved Member.

Figure 2 – Authorisation Meeting processes adapted for the appointment of an Interim Reserved Member

For an Interim Reserved Member to be appointed under the Interim Method, the Assembly board must be satisfied that:

- a. all reasonable efforts have been made to ensure that all persons who are Traditional Owners in relation to the relevant area have been identified; and
- b. all of the persons identified have authorised the appointment of the Interim Reserved Member.

At the meeting appointing the Interim Reserved Member, the decision must be made in accordance with:

- a. the traditional laws and customs of the Traditional Owners; or
- b. any decision-making process agreed to and adopted by the Traditional Owners present at the meeting.

In order to meet Authorisation Meeting requirements, it is not necessary to exhaustively identify every single Traditional Owner, but all reasonable efforts must be made. This is usually satisfied by relying on the research of an anthropologist (who in turn, usually relies on the community networks within the group) as well as by publically advertising the meeting.

Likewise, although it states "all of the persons identified" must authorise the appointment, this does not require absolute consensus. Instead it requires that all Traditional Owners are allowed to *participate in the process* of decision making, and having participated, whether they personally endorse the appointment or not, they are considered to have authorised it.

These meetings are usually carried out by the Native Title Representative Body appointed in each state (in Victoria, this is FNLRS). In conducting the meeting, they will ensure that only Traditional Owners are permitted to enter. Following the meeting they may also provide a certification that all of the above conditions have been complied with.

FNLRS could be engaged to carry out this role in these meetings, or it could be done by staff of the Assembly. In any event, a certification could be provided to the board of the Assembly, confirming the meeting was carried out properly, and in accordance with the rules.

Under the NTA, once a certification and application for registration is received, there is an objection period of 3 months. During this time Traditional Owners can object, but only on the basis that the meeting was incorrectly carried out. A similar process could operate here, but presumably for a period shorter than 3 months. The Assembly could consider any objections in writing. If it considered the objection to be baseless, it could proceed with the appointment, or if it formed the view there were irregularities, it could arrange for the meeting to be held again.

1.4 Recognition processes following an Interim Method appointment

Following the appointment of an Interim Reserved Member through the Interim Method, work could continue with the Traditional Owner group to secure their recognition under existing legislative processes.

As mentioned above, the State has already provided funding for this purpose through the Nation Building Support Package. This package consists of funding over two years, including:

- funding of \$1.020 million over two years to FNLRS, to undertake research, conduct meetings and provide advice to Traditional Owner groups currently without formal recognition;
- an amount of \$4.335 million, known as the Nation-building Resource Pool, which allows Traditional Owner groups to apply for grants to assist with nation-building and treaty readiness activities (with \$280,000 is allocated to each Area without formal recognition);
- the employment of four Engagement Officers, one each for the Mid-North West, Central North, North East and Far East Gippsland, to support Traditional Owner groups access to the Nation Building Support Package and other supports; and
- an amount of \$881,000 over two years for the Federation to administer the Nation-building Resource Pool, and to carry out Treaty readiness and nation-building activities in response to priorities identified by Traditional Owner groups.

In addition to the above, the State has dedicated \$3 million over four years to the 'Strong Roots for Our Futures' program. This program is run by Aboriginal Victoria's Traditional Owner Programs team, and is also dedicated to supporting Traditional Owner groups without formal recognition in the Mid-North West, Central North, North East and Far East Gippsland regions.

Accordingly, there is already substantial funding in place, and programs scheduled to assist Traditional Owner groups in Areas without formal recognition. The Assembly could act to ensure that these resources are properly and efficiently used to complement its own processes, including the Interim Method. Indeed, it would seem appropriate for the Assembly to seek regular reports on the use of these funds, or to seek to involve itself in the governance structures around the use of these funds.

Recommendation 2: Adoption of an interim method, and a New Recognition Process

In the event the Assembly rejects Recommendation 1, it will presumably want to establish a New Recognition Process. Accordingly, we now turn our attention to how such a process might operate.

For the reasons set out in Recommendation 1, we still suggest that the Interim Method be adopted, to allow Traditional Owner voices from the Areas without formal recognition to be heard immediately, and while the New Recognition Process is still being implemented.

Given that we have already provided detailed submissions with respect to the Interim Method, this recommendation will focus on how a New Recognition Process could operate. It is set out in two sections:

2.1 General Principles or Specific Criteria?

- (a) Reserved Members and Treaty Thresholds
- (b) Constraints around Treaty Thresholds
- (c) What are the risks if the New Recognition Process and Treaty Thresholds do not align?

2.2 What should a Specific Criteria model include?

- (a) Requirements to be appointed as a RAP
- (b) A New Recognition Process

2.1 “General Principles” or “Specific Criteria”?

In the Background Papers there is discussion that the Assembly may adopt “**General Principles**” or “**Specific Criteria**” as the basis on which a group may become eligible to appoint a Reserved Member.

A General Principles model is said to “*be based on key principles such as self-determination, inclusivity, equity and strengthening rights,*” while a Specific Criteria model would include a detailed “*set of thresholds and requirements*” including in “*areas such as legal, governance, accountability, dispute resolution processes, membership, minimum number of members, general or specific Country descriptions...*” and so on.

In order to resolve which is the more appropriate model, it is necessary to consider the process in its full context. In our view, this includes the fact the Assembly will soon be called upon to determine the Treaty Thresholds.

(a) Reserved Members and Treaty Thresholds

On 19 June 2020, the same day that the Additional Criteria Resolution was passed, the Assembly passed a resolution to pursue a Treaty model that included both a state-wide Treaty, and local Treaties with individual Traditional Owner groups (**Local Treaties**).

While the Assembly is yet to further develop this resolution, it would seem intuitive that the Traditional Owner groups that are eligible to appoint a Reserved Member, will be the same groups that will negotiate and enter into Local Treaties.

As such, while the Cultural Governance Committee is designing the additional criteria, it needs to keep in mind that the Assembly will soon need to turn its mind to the Treaty Thresholds, which will establish the standards to be met before a Traditional Owner group can enter into Local Treaty negotiations.

Accordingly, the Assembly is faced with two distinct, but related tasks. That is, determining:

- i. which Traditional Owner groups are able to appoint a Reserved Member; and
- ii. which Traditional Owner groups are able to enter into negotiations for a Local Treaty.

For that reason, it is worth considering what the Treaty Thresholds may be, and what constraints the Assembly may face in negotiating them with the State.

(b) Constraints around Treaty Thresholds

There would seem to be little legal constraint on the Assembly in developing a new criteria for the definition of Traditional Owner group. This is because, ultimately, it is a definition in its own Constitution, which can be set and defined however the Assembly might decide.

Unfortunately, the same freedom is unlikely to be available in the development of the Treaty Thresholds. Firstly because this process needs to be negotiated with the State, and secondly because both parties are likely to want to resolve potential uncertainties that arise because of the NTA.

The NTA is Commonwealth legislation, and therefore cannot be overridden, or avoided by the State. The NTA provides a process through which native title rights may be recognised by the Federal Court.

In our view there are 3 principal risks in adopting Treaty Thresholds that do not align with the native title processes: (i) the possibility of a separate native title claim; (ii) the potential to undermine pre-existing agreements with native title holders; and (iii) it may potentially be contrary to the Treaty Act.

i. Possibility of a separate native title claim

If the State and a Traditional Owner group were to enter into a Treaty that did not also contain an Indigenous Land Use Agreement (ILUA), there is a risk that a separate Traditional Owner group, or sub-group, could commence a native title claim.

It would seem unlikely that any such native title claim would be successful. Firstly, because any Treaty Threshold agreed to by the Assembly would presumably require sufficient investigation into establishing the correct Traditional Owner group as party to the Treaty. Secondly, the State would presumably oppose the claim, and a litigated determination has never been successful in Victoria.

As such, it would seem the real risk of a native title claim in an area covered by a Treaty would be that the applicants may pass the Registration Test, and gain access to the Right to Negotiate. This right would presumably conflict with rights established under the Treaty, leading to significant legal uncertainty. This would likely not

only impact Traditional Owners, but also the State and any third party wishing to operate on Crown land. As a result, this is a risk likely to be of significant concern to the State.

Furthermore, a separate native title claim is likely to lead to long and extended litigation, diverting resources and causing conflict and distress within the Traditional Owner community.

ii. Potential to undermine existing agreements

The State is a party to several Settlement Act agreements / ILUAs in Victoria, and in the process of negotiating more. If the Treaty Thresholds did not align with the recognition structures underpinning these agreements, then the inverse problem to that stated above could occur. That is, separate or sub-groups could apply for Treaties in areas already covered by ILUAs.

Even if the State was minded to facilitate this, it would require the consent of each Traditional Owner party to these agreements, which would seem unlikely to be forthcoming. In any event, it may also be contrary to the Treaty Act.

iii. Potentially contrary to the Treaty Act

Section 5(2) of the Treaty Act states:

“The provisions of this Act must be interpreted in a way that does not prejudice or reduce rights or expectations of traditional owners or Aboriginal Victorians established by or existing under any other Act or law.”

Section 5(1) makes explicitly clear that this includes the Settlement Act. Section 6(2) repeats these protections in almost identical language with the respect to the Native Title Act.

Other provisions of the Treaty Act (in particular Part 3) set out the principles that must guide negotiations, and section 30 requires the negotiation of the framework for future Treaty negotiations, including the Treaty Thresholds.

Reading these sections together, there is, in our opinion, a question of whether the Treaty Act would permit the parties to negotiate an outcome with respect to Treaty Thresholds that may prejudice or reduce the rights of Traditional Owners under the Settlement Act or Native Title Act.

The question is whether section 5 and 6 requires Part 3 and section 30, to be read as implying a duty not to negotiate terms that may prejudice pre-existing rights, or is more limited in its application. This is a complex question of statutory interpretation, and beyond the scope of this submission. In any event, we consider it an area of legal uncertainty that should be resolved if Treaty Threshold were to depart from the requirement for an ILUA.

On the basis of the above, we conclude that:

- i. there are risks to both the State and Traditional Owner groups in adopting Treaty Thresholds that do not take account of processes under the NTA;
- ii. even if Traditional Owners were willing to accept these risks, it is unclear if the State would do so;

- iii. as a result, it would seem likely that Treaty Thresholds will be informed by processes under the NTA; and
- iv. while these issues do not relate directly to the Additional Criteria Resolution, and the admittance of new Reserved Members, there is a connection between the two, including risks if access to eligibility to appoint a Reserved Member and the Treaty Thresholds do not align.

(c) What are the risks if the New Recognition Process and Treaty Thresholds do not align?

If the New Recognition Process and the Treaty Thresholds do not align, the situation may arise where a Traditional Owner group is able to appoint a Reserved Member, but does not qualify to negotiate a Local Treaty. This may well lead to dispute, both within the Assembly, and with Traditional Owner groups trying to formulate themselves to meet changing thresholds.

So, while there is no direct legal requirement that these processes align, it is our recommendation that it is highly preferable that they do, so far as is possible.

However, we recognise that absolute alignment, so that a Reserved Member is immediately able to negotiate a Local Treaty, may not be possible to achieve in the current timeframes set by the Assembly. To the extent that the processes do not, the relationship between the two must be clearly explained from the outset.

2.2 What should a Specific Criteria model include?

In order for the New Recognition Process and the Treaty Thresholds to align, it would seem clear that a Specific Criteria model is required.

Given that obtaining appointment as a RAP is the current baseline, or minimum requirement, to gain eligibility to appoint a Reserved Member, we consider it a useful starting point in examining how a New Recognition Process may be designed, to either compliment or vary existing standards.

(a) Requirements to be appointed as a RAP

This first thing to note, is that as with other forms of recognition under legislative schemes, there is a requirement to form a corporation. Section 150(2) of the Heritage Act requires an applicant for registration to be a corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). Therefore, unless the group has a pre-existing corporate body, this will be the first step in the process.

Secondly, the Heritage Act provides more than one pathway to recognition.

For instance, where an entity has a Positive NTA determination or Settlement Agreement, they will automatically be appointed as a RAP, and are not required to provide further evidence.⁷ Outside of these direct appointments,

⁷ *Aboriginal Heritage Act 2006* (Vic) ss 151(2), (2A).

the Heritage Act requires an applicant to demonstrate how the members of the group are connected to the area, or hold historical or contemporary interest in Aboriginal cultural heritage relating to the area.⁸

While this requirement does not necessarily require that the applicant assert Traditional Ownership, there does not appear to be any example of a RAP appointment being made, other than to a group that claims they are the relevant Traditional Owners. That is, in such applications, it appears as though applicants rely on section 151(3)(c) of the Heritage Act, and assert it is “*a body representing the traditional owners of the area to which the application relates.*”

In assessing if this is the case, VAHC will have regard to the requirements set out in the Heritage Act, but also its own guidelines, being the *Registered Aboriginal Parties: Guidelines for Applicants (Guidelines)*.⁹ These Guidelines suggest the applicant should provide evidence around a range of matters as to the Traditional Owner status of the group. An extract from the Guidelines, showing the list of issues on which evidence is requested, and which the VAHC presumably takes into consideration, is set out at *Figure 3*.

Figure 3: Extract from the Guidelines, “Section 4, Body Representing Traditional Owners, Types of Information”

“The type of information (documents or other sources) that should be included to assist the Council in assessing applications include:

- *A **description of the Traditional Owner group** that the application is intended to represent;*
- *Names of **Apical Ancestors** from whom the members of the group are descended, including evidence that the named Ancestors originate from this Country;*
- *Details about **how each** of the applicant **corporation members is connected** to the named Apical Ancestors and/or Traditional Owner group;*
- *Evidence that demonstrates that the corporation has **consulted widely with descendants** of named Apical Ancestors and the outcomes of these consultations;*
- *Evidence that the applicant has **resolved group composition and boundary disputes** with neighbouring Traditional Owner groups prior to lodging the application;*
- *Evidence of member’s **ongoing relationship with Country**, for example through living on, visiting, or caring for Country.”*

⁸ *Aboriginal Heritage Act 2006* (Vic) s 150.

⁹ Aboriginal Victoria, *Guidelines for Registered Aboriginal Party Applicants* (June 2020) <https://www.aboriginalheritagecouncil.vic.gov.au/sites/default/files/2020-06/Guidelines%20for%20RAP%20Applicants_June%202020.pdf>

Clearly these requirements are not always straightforward. Creating a description of the Traditional Owner group that is agreed upon by all members can be a difficult task, often requiring several years of research, and investigation into the historical and oral record. The same is true of ensuring a comprehensive and agreed list of Apical Ancestors, which may need to be settled internally, but also with neighbouring groups who may also have a relationship with the ancestor. In addition, a requirement to resolve boundary disputes is also a significant barrier, for several reasons. Firstly, the concrete defining of borders does not always align with Aboriginal culture, where reciprocal rights around boundaries are common place. Secondly, it requires the applicant's neighbour to be as focused and determined as the applicant, in resolving what is often a sensitive cultural and political matter for both groups.

In addition to the above matters, the VAHC will also take into account whether the applicant is inclusive. This is an enquiry into whether any family groups or individual Traditional Owners are excluded from participation in the corporation, and therefore unable to exercise their rights. An extract from the Guidelines, showing evidence VAHC requests in order to assess inclusivity is set out at *Figure 4*, below.

Figure 4: Extract from the Guidelines, "Section 4, Body Representing Traditional Owners, Types of Information"

"The Council encourages applicants to include in their [application] evidence of:

- the applicant's efforts to ensure that it is inclusive and encouraging of all Traditional Owners for the application area becoming members of the applicant corporation;*
- the outcomes achieved through negotiation and agreement making processes to resolve issues that (amongst other things) inhibit them from achieving formal recognition of their traditional connections; and*
- the applicant's efforts to establish a fair, inclusive and effective system of Cultural Heritage management on their Country. Information that may also support an application in this regard includes a membership list and supporting letters or documentation from Traditional Owners of the application area."*

(b) A New Recognition Process

Taking into account the above, we now turn to consider what a New Recognition Process may look like. To this end, we think there are two things that need to be established:

- i. The standards that applicants need to meet; and
- ii. The process through which applications will be assessed and resolved.

With respect to establishing a standard or threshold for applicants, we do not believe that there is any need to wildly depart from existing standards, which more or less examine the same subject matter. Indeed, we view the guidelines developed by the VAHC, and set out in Figure 3 and Figure 4, as a good starting point. These cover all of the relevant considerations, and are set out in straightforward and plain language. However, we also think it may be possible to relax some aspects which are not as relevant in this context. As such, we would suggest:

- i. **No requirements around incorporation:** While having a corporate body can be useful for lots of reasons, and may ultimately be needed to meet Treaty Thresholds, there is no reason why this needs to be a requirement at this stage, where the main purpose is to identify the Traditional Owner group that should have a voice in the Treaty process.
- ii. **No requirements to have finalised boundaries:** There will need to be some requirement that a majority of the area claimed is not formally recognised as belonging to other Traditional Owner groups. However there should be no requirement that boundaries are finalised.

Taking these matters into account, at Figure 5 we set out standards, along with the evidence to be provided, which we says should be a sufficient basis for an applicant to be recognised as a Traditional Owner group.

The final issue to consider is one of process, and how applications will be assessed and resolved. Clause 9.2 of the Assembly Constitution makes clear that it is the board that is responsible for admitting new Reserved Members. However the board may wish to implement various procedures that will make its job easier, and remove political consideration from the process. To this end, we would recommend establishing a panel of experts, consisting of:

- i. A majority of independent Traditional Owners, who should be well respected, not members of the Assembly, or have any direct connection or conflict with the applicants;
- ii. An independent anthropologist, historian and lawyer.

The role of this independent panel would be to review applications. They could seek more information when necessary, meet with applicants when required, and try to facilitate discussion between any rival applications.

Having assessed the application, they would have the power to either deny the application, or to recommend it to the board. This recommendation would be carried out by the panel providing a certification to the board that they believe the group meets all of the necessary criteria, should be recognised as a Traditional Owner group, and their Reserved Member appointed.

Figure 5 – Standards and evidence for applicants under the New Recognition Process

In order to apply meet the criteria of a Traditional Owner group, the applicant must reasonably satisfy the board of the Assembly of the following:

- **Traditional Ownership:** The applicant must satisfy the board that they are (or represent) the Traditional Owners for the claimed area, under their own traditional laws and customs.
- **Organisational Inclusivity:** The applicant must satisfy the board that they are arranged, or operate, under rules that allow all members of their group to participate.
- **Capacity:** The applicant would ultimately be capable of obtaining recognition under the Heritage Act, Settlement Act, or NTA, if it so chose, and if provided sufficient time and resources.
- **Traditional Owner support:** The applicant must satisfy the board that they are have the support of their members to make the application.
- **Claimed Area:** The applicant must provide details of their traditional lands, the majority of which must not overlap with lands claimed by another Traditional Owner group.

In order to satisfy the board of the above matters, the applicant must provide:

(Traditional ownership)

- A description of the Traditional Owner group;
- Names of all Apical Ancestors from whom the members of the group are descended, including evidence that the named Ancestors originate from the relevant area;
- Details about how each member of the group is connected to the named Apical Ancestors and/or Traditional Owner group;
- Evidence that the composition of the group is resolved, or largely resolved.

(Organisational Inclusivity)

- Details about the organisation and governance of the group, so that:

- if the applicant is a corporation, a copy of the Rule Book, constitution, and any other relevant document; and
- if the applicant is not incorporated, a copy of any written rules, or other governance procedures around the making of decisions, conduct of meetings, and communication with members;

(Traditional Owner support)

- Evidence that demonstrates that there has been wide consultation with descendants of named Apical Ancestors, and that a majority of descendants support the application;

(Claimed Area)

- A map of the area claimed by the group that displays:
 - the extent of Country claimed by the applicant;
 - any areas where this overlaps with land claimed by another Traditional Owner group.
- Evidence of member's ongoing relationship with Country, for example through living on, visiting, or caring for Country.