

Background Paper

Approaches to Treaty
and Roles and Opportunities
for Local Government

ANTAR



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Introduction

The Aboriginal and Torres Strait Islander peoples of Australia have long campaigned for structural reform of Australia's institutional framework to protect their rights¹, including recognition within the nation's founding document, the Australian Constitution.²

Calls for a Treaty or Treaties in Australia are not new.³ It is no coincidence that over the past 80 years, Aboriginal and Torres Strait Islander peoples have been pressing the case for a treaty or treaties to resolve the 'unfinished business' of past legacies and realigning of relationships between Aboriginal and Torres Strait Islander peoples and governments, including over land.⁴

Since late 2016, the First Nations community of Victoria and the Victorian Government have been actively pursuing a path towards treaty-making. Of the five jurisdictions in Australia that have now either committed to, or are actively exploring treaty processes with Aboriginal and Torres Strait Islander peoples, Victoria is by far the most advanced.

The Federation of Victorian Traditional Owner Corporations (FVTOC) has been playing a key role in leading thinking around Treaty, and has produced a very helpful series of Discussion Papers seeking to describe potential Treaty outcomes in real and practical terms. While the series of six Discussion Papers

¹Larkin, D., Hobbs, H. Lino, D. and Maguire, A. 'Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States', *University of Queensland Law Journal*, Vol 41(1) (2022): 35.

²Lino, D. (2018) *Constitutional recognition. First peoples and the Australian settler state*. Annandale, NSW: The Federation Press.

³ Wensing, E. (2019) [*Land justice for indigenous Australians: How can two systems of land ownership, use and tenure coexist with mutual respect based on equity and justice?*](#) PhD Thesis, The Australian National University.

⁴ Dodson, M. (2003) 'Unfinished Business: A shadow across our relationships', in *Treaty. Let's get it right! A collection of essays from ATSIC's treaty think tank and authors commissioned by AIATSIS on treaty issues*, AIATSIS and ATSIC, Aboriginal Studies Press, Canberra, (2003): 31; and Dodson, P. 'Beyond the mourning gate: Dealing with unfinished business. 2000 Wentworth Lecture', in R. Tonkinson (ed) (2015) *The Wentworth Lectures. Honouring fifty years of Australian Indigenous Studies*, AIATSIS, Canberra, (2000): 192.

are primarily designed to contribute to the discussion among Traditional Owners, and within the First Peoples Assembly of Victoria (Assembly) established as the democratic and representative body to lead negotiations on behalf of all First Nations Victorians, they also make a valuable contribution to the wider public discussion about treaties between colonial governments and First Nations peoples generally.

In what follows, we'll explore an overview of the nature of the Traditional Owner Corporations in Victoria, FVTOC's role in the Treaty process currently underway, and an overview of the six Discussion Papers produced by FVTOC. We will then highlight the roles and opportunities for local government in Victoria as well as in other States and Territories around Australia.

It is worth noting that while Treaty is often discussed in terms of State or Territory policy, and perhaps as national and constitutional reform, it will be experienced and implemented by Traditional Owners at the local level, and local government will play a vital and central role in its ultimate success or failure.

Background to Traditional Owner Corporations in Victoria

In Victoria, Traditional Owner corporations are the primary vehicle through which traditional groups and bodies (however described, be they nations, peoples or clans) have organised for the purpose of asserting and exercising traditional rights to Country. The FVTOC is the peak body representing the interests of these corporate entities and their underlying Traditional Owner groups. The following information is drawn from [FVTOC's submission on the proposed Aboriginal Representative Body model in 2018](#).⁵

⁵ Federation of Victorian Traditional Owner Corporations, [Submission on the proposed Aboriginal Representative Body model](#), 16 November 2018.

In Victoria there are three legislative regimes through which traditional groups are able to access rights to Country. These are:

- *Native Title Act 1993* (Cth)
- *Traditional Owner Settlement Act 2010* (Vic)
- *Aboriginal Heritage Act 2006* (Vic).

There is some similarity between each of these legislative regimes, in that they all involve acknowledgment by the State that the group are the Traditional Owners for a distinct area of land, and meet a certain threshold of representative governance. Indeed, having satisfied the legislative criteria, groups are referred to as ‘formally recognised,’ a status that continues to have relevance in the Treaty space as this recognition entitles a group to a reserved seat within the First Peoples Assembly of Victoria. However, it is important to acknowledge that the recognition afforded under each of these statutes is not the principal aim or purpose of the legislation. Instead, recognition is largely a by-product of the group gaining access to certain rights, each of which bring different roles, functions and accountabilities to be met by the recognised group.

One additional area of similarity is that each piece of legislation requires that the Traditional Owner group to establish, or nominate, a corporation to represent their interests. In practice, this is done through the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). The corporation established or nominated is then appointed under the relevant legislation. The different titles, roles and accountabilities of the different corporations are shown below in Figure 1.

The distinction between the legislative regimes is that the threshold of evidence and internal representation is to some extent aligned to the strength of the rights conveyed. While the *Native Title Act 1993* (Cth) and the *Traditional Owner Settlement Act 2010* (Vic) both recognise and enliven rights and interests in land, the *Aboriginal Heritage Act 2006* (Vic) simply provides a role in the management of Aboriginal cultural heritage.

Act	Traditional Owner Settlement Act 2010 (Vic)	Native Title Act 1993 (Cth)	Aboriginal Heritage Act 2006 (Vic)
Title of appointed corporation	Traditional Owner Group Entity (TOGE)	Registered Native Title Body Corporate (RNTBC or PBC)	Registered Aboriginal Party (RAP)
Role	To be the representative entity for the Traditional Owner group and manage their settlement agreements	To be the representative entity for the Native Title holders and manage their native title rights and interests	To be the representative and advisory body for Aboriginal cultural heritage matters
Accountability	Duty to act for the benefit of the whole Traditional Owner group (the ILUA that forms part of a settlement package requires the TOGE to confirm that benefits are held on behalf of the whole Traditional Owner group; this is also confirmed in the standard First Nations Legal and Research Services TOGE appointment resolutions)	Duty to act for the benefit of all native title holders (section 56 of the NTA – the court may determine that a PBC holds native title on trust for native title holders)	Required to be inclusive of the whole Traditional Owner group and have inclusive governance practices implemented (section 151(3) of the Heritage Act)

Figure 1: Methods of formal recognition of Aboriginal land-related rights in Victoria and titles, roles and accountabilities of the different corporations. Source: FVTOC, 2018.

FVTOC’s role in Treaty in Victoria

While the Assembly is recognized by the State as the body carrying out negotiations on behalf of Aboriginal Victorians, FVTOC is a pre-existing peak body that aspires to be a thought-leader in efforts for reform around First Nations land rights and associated issues in Victoria. In 2018, FVTOC was engaged to support the work of the Victorian Treaty Advancement Commission (VTAC) - the precursor to the Assembly - by holding meetings to engage, inform and empower Victorian Traditional Owners to progress ‘Treaty readiness’ among all Traditional Owner groups (whether or not they are ‘formally recognised’), through a series of Talking Treaty meetings.⁶

As an outcome of the engagement meetings, it became evident that it was necessary to produce a series of discussion papers to explore different themes

⁶ Federation of Victorian Traditional Owner Corporations, “[Treaty Engagement](#)”, *Final Report* (2019)

and possibilities. The first paper was released in 2019, and the sixth paper was released in March 2022. The titles of the six discussion papers are shown below:

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

Figure 2: FVTOC Treaty Discussion Papers and their Titles. Source: FVTOC Treaty Discussion Paper 4.

The purpose of the Discussion Papers is to contribute to the thinking around Treaty-making in Victoria by presenting a potential Treaty model based in practical and real terms, which can then be further explored, critiqued and refined.

The Papers begin by providing a broad overview of Aboriginal affairs in Victoria, and then delve into detail around areas central to the development of Treaty. These include examining concepts of sovereignty, the impact and recognition of international human rights standards, the establishing of Aboriginal institutions to take control of Aboriginal affairs, and issues of, and related to, native title and how they may be incorporated or resolved through the Treaty project. The final paper in the series seeks to draw this work together to present a proposal for a comprehensive Treaty model for Victoria, as can be seen in Figure 3.

However, rather than advocating for the direct adoption of this proposed model, the papers are more aimed at providing a starting point to begin the process of discussion, debate and building consensus among the Victorian Aboriginal and Traditional Owner communities, and to help clarify their aims and objectives in the Treaty process. While the papers are intended to provide informed commentary and general information, they are not legal advice and do

not represent the position of FVTOC or the Victorian Government that provided funding for their research and preparation. A summary of each paper is outlined below.

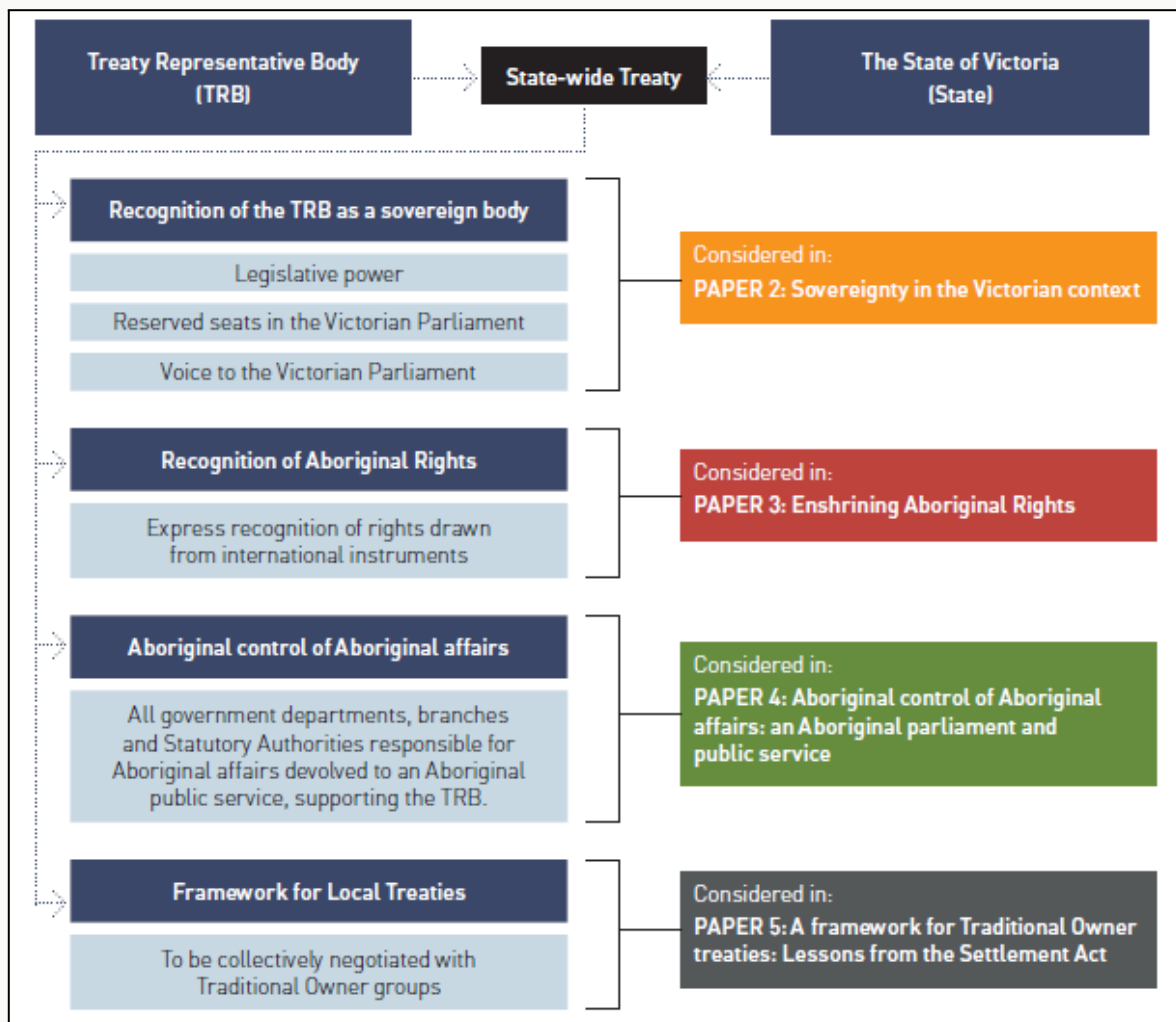


Figure 3: FVTOC’s Comprehensive Treaty Model for Victoria. Source: FVTOC Treaty Discussion Paper 6 (2022:18).

Discussion Paper 1

Understanding the Landscape: the Foundations and Scope of a Victorian Treaty

The first paper in the series seeks to examine the current landscape of First Nations affairs in Victoria. It takes a broad sweep of Aboriginal organisations currently representing Aboriginal interests, including:

- (i) Traditional Owner corporations;
- (ii) Aboriginal Community Controlled Organisations (ACCOs) providing services in areas of health, law, education and family and child welfare and land reform arising from the civil rights struggles of the 1970s; and
- (iii) the various advisory and consultative bodies that have arisen in the modern era, seeking to inform the development of government policy in the context of co-design and self-determination.⁷

Treaty Discussion Paper 1 explores the recognition each is provided by the State, as well as how each of these groups - including their roles, governance and responsibilities - falls within the ambit of a Treaty, and may be accommodated in the design of a Treaty negotiation framework.

In understanding the development of Treaty processes in Victoria, it is essential to understand the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic). This legislation governs current processes, and importantly, the development of a Treaty Negotiation Framework (Framework) which will establish the boundaries of all future negotiations.

This paper explores this legislation and examines practical examples of similar frameworks utilised in negotiations between government and First Nations peoples, as established in the modern Treaty processes of British Columbia, and in Victoria's own *Traditional Owner Settlement Act 2010* (Vic).

The paper ultimately argues that the process of establishing the Framework is not 'an administrative and neutral task', but rather must be viewed as 'critical to all future treaties' and 'for all relevant purposes ... takes on the character of a Treaty in its own right'. Further, it argues that such a process may 'allow for immediate and real change in relations between Aboriginal Victorians and the State' and would also provide a basis for later treaties to be negotiated between the State and individual Traditional Owner groups.

⁷ Federation of Victorian Traditional Owner Corporations, "Understanding the Landscape: The Foundations and Scope of a Victorian Treaty", [Treaty Discussion Paper 1](#) (2019)

Also suggested in this paper is the concept of establishing both a Statewide Treaty, and localised Traditional Owner treaties, in a model that appears to have been adopted by the First Peoples Assembly of Victoria. Whereas the Statewide Treaty would seek to incorporate and advance the aspirations of all Aboriginal Victorians (including those of the various Traditional Owner groups, ACCOs, and consultative bodies), local or Traditional Owner treaties would establish the political sovereignty of regional groups on their traditional lands.

The paper also envisages a body like, or similar to, the Assembly continuing to operate and providing representation at a State level (referred to in the paper as the Treaty Representative Body or TRB), while also overseeing a framework for local Traditional Owner groups to directly enter into individual treaties with the State, and have their rights for self-governance and sovereignty recognised at the local level.

Discussion Paper 2

Sovereignty in the Victorian context

Treaty Discussion Paper 2 seeks to engage more closely with a concept central to Treaty-making with First Nations groups: political sovereignty and the right to self-government.⁸

The paper begins with an examination of the Western concept of sovereignty and its historical evolution through the United Kingdom, which was ultimately bestowed to Australia and to Victoria as a state within the federation. It then looks at how claims of First Nations sovereignty have been dealt with, or more accurately avoided, by Australian courts in decisions such as *Mabo v Queensland (No 2)* [1992] HCA 23. In particular, it highlights the Court's successful attempt to centre First Nations rights within the confines of property law, as opposed to a political claim against an invading power.

⁸ Federation of Victorian Traditional Owner Corporations, "Sovereignty in the Victorian context", [Treaty Discussion Paper 2](#) (2020)

Ultimately the paper concludes that, given the reluctance or inability of Australian courts to engage with such questions, sovereignty has to be understood as a political concept, and not as a legal one. As a result, any path to resolving the full breadth of First Nations claims within Australia will not be found through the courts, but rather through negotiation and the political process.

The paper then examines international examples in Canada, New Zealand, the United States and Scandinavia where political responses to questions of sovereignty have been attempted. While the question of sovereignty is not typically addressed in express terms, several colonial nations have nevertheless recognised or transferred elements of sovereign power to First Nations peoples, allowing for greater self-determination and even self-government. The paper also considers how concepts of First Nations sovereignty differ from, and are more nuanced than, those in the Western tradition, and argues that State recognition of First Nations sovereignty is perhaps not necessary in circumstances where the inherent nature of the claim means it is best realised by the actual operation of sovereign powers.

Finally, the paper puts forward a proposal as to how sovereignty may be practically exercised by Aboriginal people in Victoria, suggesting this could primarily be achieved through a permanent State-wide representative body (referred to as the Treaty Representative Body or TRB) operating as an Aboriginal or Traditional Owner parliament. This concept is further developed in later papers in the series.

Discussion Paper 3

UN Declaration on the Rights of Indigenous Peoples and Enshrining Aboriginal Rights

Treaty Discussion Paper 3 explores the United Nations *Declaration on the Rights of Indigenous Peoples*, its initial development and its basic terms.⁹ It also examines how UNDRIP operates in international law, and why it is not legally binding on nations even once they have formally endorsed its terms.¹⁰ In order to have effect within the domestic law of a nation, it must be implemented locally, and the Paper explores recent efforts in countries such as New Zealand and Canada to bring it into effect, either in practical terms or through specific legislation.

Ultimately this paper canvasses three methods by which UNDRIP could be enshrined in Victoria, including:

- i) embedding UNDRIP principles into Treaty negotiation processes and protocols;
- ii) enacting legislation affirming the application of UNDRIP; and
- iii) including UNDRIP rights as enforceable and justiciable rights within treaties.

The paper concludes that while each proposal could be introduced individually, there is greater benefit in enacting them collectively. This is because each proposal addresses a different subject area; the first being policy and procedure, secondly current and future legislation, and finally positive and practical enforcement through the courts. The paper also concludes that adopting all three proposals will provide the Treaty regime with a logical and legally consistent basis for future relationships between the State and the various traditional sovereigns within Victoria.

⁹United Nations [Declaration on the Rights of Indigenous Peoples General Assembly Resolution 61/295](#) (2007)

¹⁰Federation of Victorian Traditional Owner Corporations, "UNDRIP and enshrining Aboriginal Rights", [Treaty Discussion Paper 3](#)(2020)

Discussion Paper 4

Aboriginal control of Aboriginal affairs: an Aboriginal Parliament and public service

Treaty Discussion Paper 4 focuses on the way a statewide representative body (referred to as the Treaty Representative Body or TRB) could be empowered to enact its own legislation and take administrative control of Aboriginal Affairs.¹¹

The paper commences with an examination of current interactions between the State and Aboriginal Victorians through the lens of the Victorian Aboriginal Affairs Framework (VAAF).¹² Since at least 2016, the Andrews government has adopted self-determination as the guiding principle in developing Aboriginal affairs policy. The role of the VAAF is to document the existing strategies developed across a range of departments, and provide an overarching, whole-of-government framework to link this work together. The VAAF does this by establishing 'six domains' in which the State is currently active. This makes for a useful tool in trying to understand current interactions between the State and Aboriginal people, and a starting point to consider the method and process by which power and resources for these areas may be handed over to Aboriginal control.

Figure 4 below shows each of the 'six domains' along with the legislation that underpins them, a possible starting point for considering where a statewide representative body may want to take up legislative and policy control.

¹¹ Federation of Victorian Traditional Owner Corporations, "Aboriginal Control of Aboriginal Affairs: An Aboriginal Parliament and Public Service", [Treaty Discussion Paper 4](#) (2021)

¹² "[Victorian Aboriginal Affairs Framework 2018-2023](#)", State of Victoria (2018).

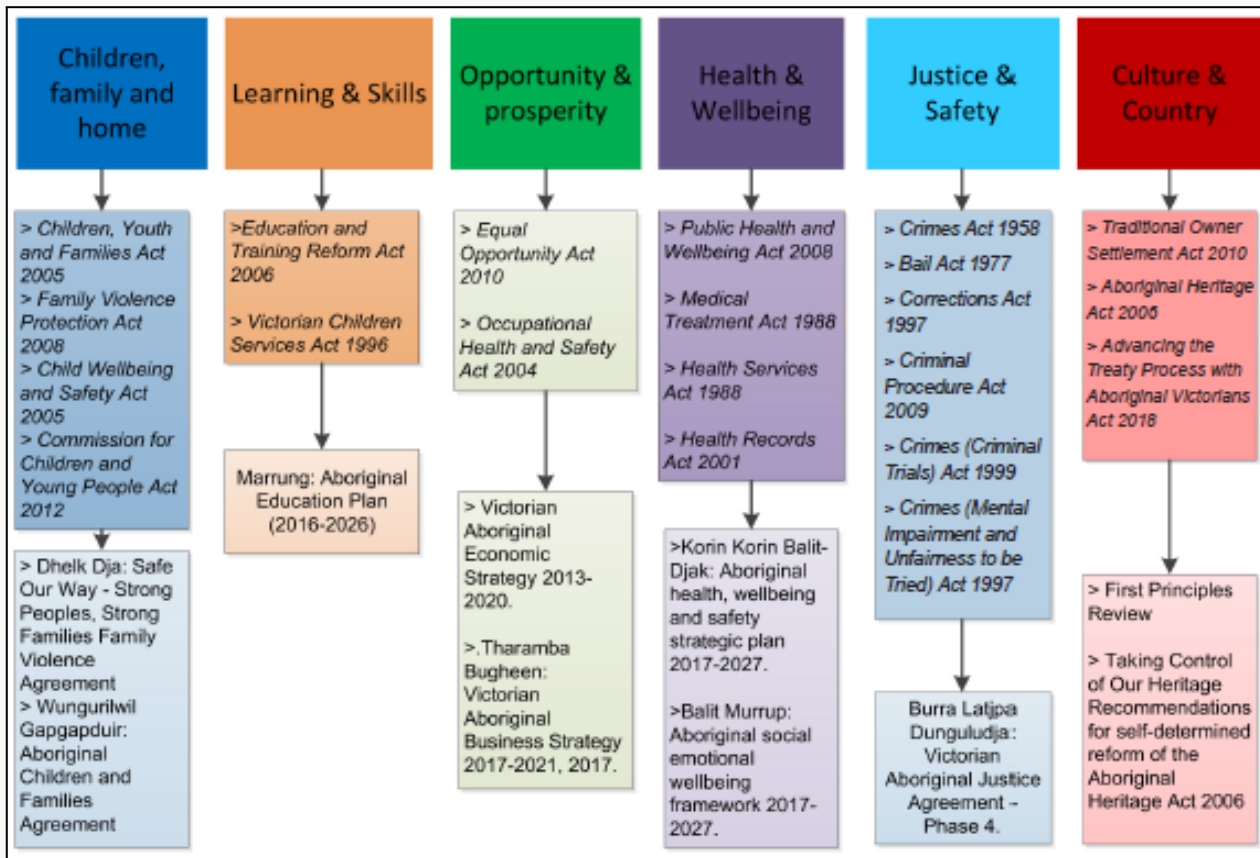


Figure 4: The Six Domains and related legislation and policy in Victoria. Source: FVTOC Treaty Discussion Paper 6 (2022:6).

Since the publication of FVTOC’s first Treaty Discussion Paper, the First Peoples’ Assembly of Victoria has formally adopted the concept of seeking both a State-wide and local treaties. While much of the detail remains to be worked out, the concept of a State-wide Treaty would seem to also imply the necessity of a body like the TRB, representing all Traditional Owner interests from across the State. An overview of the proposed model is shown in Figure 5.

Once established, the TRB could take on the role of an Aboriginal parliament for Victoria, supported by its own public service. In the second discussion paper, FVTOC conceived of the TRB as a confederation of Traditional Owner groups throughout Victoria, which as a collective of sovereign entities, would adopt their sovereign nature in respect to certain matters. The State-wide Treaty would recognise the TRB’s status as embodying the collective sovereignty of Traditional Owner groups, and could do so by empowering the TRB to enact its own legislation, take up seats in, or be a voice to, the Victorian parliament. It

could also devolve control from various government departments and agencies to the TRB and their support staff, conceived as an Aboriginal public service.¹³

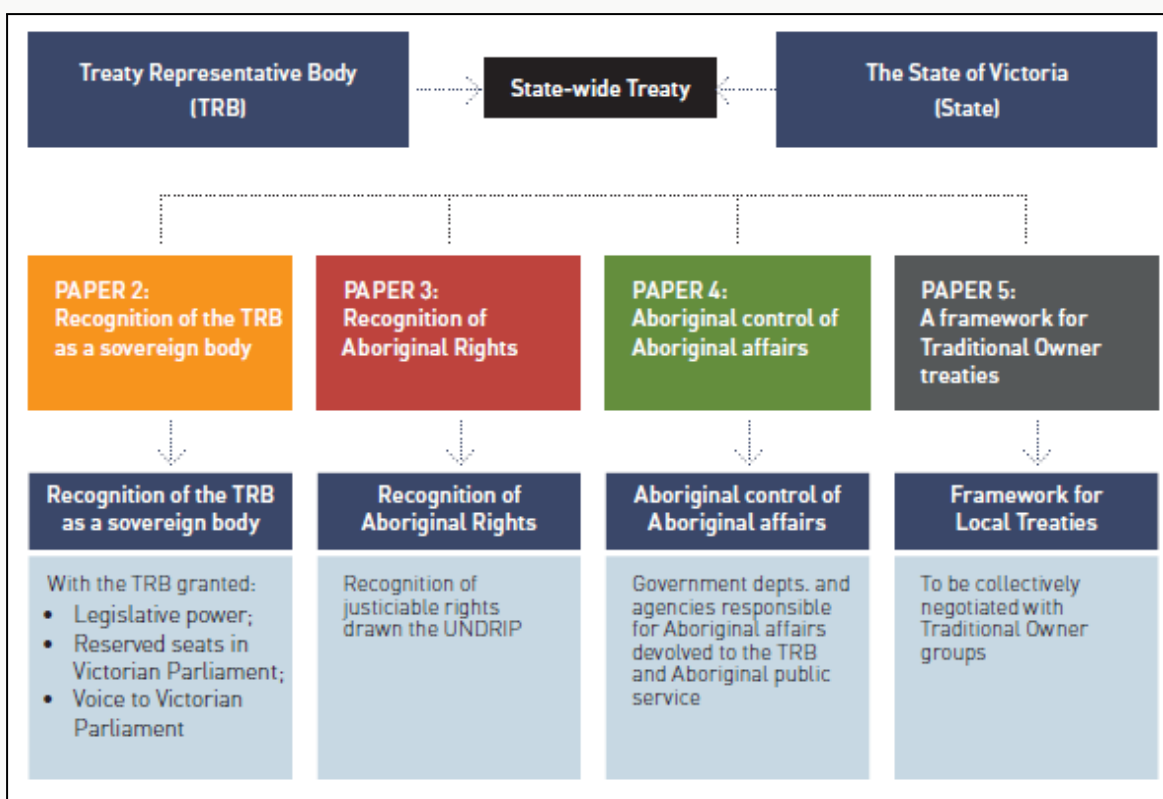


Figure 5: Overview of proposed model. Source: FVTOC Treaty Discussion Paper 4 (2021a:4)

In Part 2 of Treaty Discussion Paper 4, the conversation turns to the experience in Canada, considered a useful comparator due to cultural, legal and historical similarities, but also the variety of approaches adopted across the country to facilitate First Nations peoples self-government.

The paper acknowledges that the most examples of First Nations peoples self-governance are found in remote areas, or rooted in a large indigenous land base. However, the Canadian government has recently entered into agreements with several Métis Nations that do not have these features, and are largely a scattered, urbanised, and often landless community. While yet to be fully developed, it seems clear that current Canadian policy will look to establish institutional arrangements, and the handing over of services and authority that allow for self-governance, not tied to a geographical location, but based in citizenship of a First Nations peoples polity. First Nations peoples

¹³ Federation of Victorian Traditional Owner Corporations, "Aboriginal Control of Aboriginal Affairs: An Aboriginal Parliament and Public Service", [Treaty Discussion Paper 4](#) (2021): 3.

self-governance in Victoria will need to contend with similar issues to those faced by the Métis Nations, and design systems allowing for a highly colonised and populated region.

However, there is one substantial difference between Australian and Canadian legal systems. The Canadian constitution recognises and protects the right to First Nations peoples self-government, whereas the Australian constitution barely mentions, and provides no recognition of, Aboriginal or Torres Strait Islander peoples. The paper turns to examine the effect of these constitutional limitations, arguing that as the Commonwealth seems unlikely to be a party, and constitutional change is far from assured, the authority of any Traditional Owner parliament will need to be delegated by the Victorian Parliament. While this should still allow such a parliament to functionally operate, it may also leave it vulnerable to interference or even abolition by a future hostile government.

Finally, the paper attempts to define the scope of a potential Traditional Owner parliament (or TRB), and in what areas it may or should seek power, and what type of powers it should seek. In doing so the paper sets out a proposed legislative governance model and puts forward a potential structure for the making of legislation within the six domains established in the VAAF. The structure envisages two core components:

- that the TRB will have the power to make or amend legislation for Aboriginal Victorians within the six domains; and
- the TRB and the Victorian Parliament will have a reciprocal voice, each to the other with:
 - i. The TRB having a voice to the Victorian Parliament on issues impacting Aboriginal and Torres Strait Islander peoples in areas outside the six domains; and
 - ii. The Victorian Parliament having a voice to the TRB on all issues within the six domains over which the TRB has legislative control.

In further exploration of how such a governance mode may operate, the paper suggests there could be three categories of legislation, depending on whether the legislation was concerned with:

- i. Category 1: only matters internal to the Aboriginal and Traditional Owner community;
- ii. Category 2: how the State interacts with Victorian Aboriginal people; and
- iii. Category 3: matters that may impact on non-Indigenous peoples or interests.

The interaction between these categories is shown in Figure 6 below.

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
<p>Complete authority to pass legislation, with the Victorian Parliament possessing a right to express its view.</p> <p>Example: Legislation empowering the TRB to:</p> <ul style="list-style-type: none"> formally recognise Traditional Owner groups, allowing them to commence Settlement Act or Local Treaty negotiations; settle boundary and other disputes between groups. 	<p>Complete authority to pass legislation, with an obligation to consult with the Victorian Parliament.</p> <p>Example: Legislation to:</p> <ul style="list-style-type: none"> change the way bail laws apply to Aboriginal youth; or change the way child protection laws apply to Aboriginal families. 	<p>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.</p> <p>Example: Legislation to:</p> <ul style="list-style-type: none"> require mandatory cultural heritage clearance on all development involving earth disturbance; Traditional Owner rights to veto any developments on Crown lands.

Figure 6: Categories of potential TRB legislation, and the associated process. Source: FVTOC Treaty Discussion Paper (2002:7).

While the TRB would have complete authority to make legislation with respect to both the Category 1 and Category 2, there would be a difference in the application of the ‘voice.’ For Category 1 legislation, the Victorian Parliament would have a right to express its view. For Category 2 legislation, the TRB would have a duty to consult with, and consider the views of the Victorian Parliament.

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

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

Discussion Paper 5

A Framework for Traditional Owner Treaties: Lessons from the Settlement Act

Treaty Discussion Paper 5 begins by exploring the inadequacies of the native title system under the Commonwealth *Native Title Act 1993* (Cth), the origins of the *Traditional Owner Settlement Act 2010* (Vic) (the Settlement Act) in the wake of the High Court's negative determination of the Yorta Yorta Peoples' native title claim, and examining the standard content of an agreement under the Settlement Act, along with some of its deficiencies.¹⁴

¹⁴ Federation of Victorian Traditional Owner Corporations, "A Framework for Traditional Owner Treaties: Lessons from the Settlement Act", [Treaty Discussion Paper 5](#) (2021)

The paper ultimately concludes that the Settlement Act has not resulted in a more efficient system of claim resolution compared to the *Native Title Act 1993* (Cth) and that it relies on an inherently rigid framework which is unable to respond to individual Traditional Owner group aspirations, or with flexibility to developments under the *Native Title Act 1993* (Cth).

Recognizing that some uniformity across agreements may be unavoidable, the paper presents a framework for Local Treaties that seeks to overcome issues identified with Settlement Act processes, and also strike a balance between the State's need for a cohesive land management system, and the right of individual Traditional Owner groups to assert their sovereignty and achieve meaningful self-determination. This would involve attempting to reduce the highly pressurised nature of negotiations, principally by reducing emphasis on the finality of agreements, and instead seek to engage in incremental agreement making, and the building of long term relationships.

As for what Local Treaties should contain, it is suggested they will likely consist of two components:

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

This could be addressed in two stages:

- Stage One: 'Minimum Rights Package' – a standard package could be collectively negotiated by all Traditional Owner groups, facilitated by the TRB or Assembly, producing a package modelled, but improving on, the current Settlement Act outcomes (Figure 7). Upon completing a threshold process that sought to define and legally recognise the essential features of the group, the local Traditional Owner group would immediately be provided recognition of their rights and a substantial financial package. The proposed content of the Minimum Rights Package is shown in the figure below.

- Stage Two: Local Treaty Negotiations - After a period of implementing the Minimum Rights Package, and at a time of their choosing, the Traditional Owner group could commence negotiations with the State for a Local Treaty to recognise their sovereignty on Country. The aim of this stage would be to institutionalise the right to Traditional Owner Group to exercise a form of self-government on Country.

While there should be no limitations on what could finally be negotiated in a Local Treaty, 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, the final details are far from definitive. Indeed, the 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 cautions 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 7: A potential 'Minimum Rights' package. Source: FVTOC Treaty Discussion Paper 6 (2022:16)

Discussion Paper 6

A Comprehensive Treaty Model for Victoria

Treaty Discussion Paper 6, the final paper in the series, seeks to draw together the work of previous papers into a comprehensive Treaty model for Victoria.¹⁵ A lot of water has passed under the bridge since the Federation began preparing this series of papers in 2019, and many of the positions put forward in the papers are now under formal consideration as part of the ongoing negotiations.

For instance, the concept of establishing both a Statewide Treaty and localized Traditional Owner treaties, first raised in Treaty Discussion Paper 1, has been adopted by the Assembly.¹⁶ Further, in October 2021, the First Peoples Assembly of Victoria endorsed for consideration the concept of 'a permanent representative body with meaningful decision-making powers'.¹⁷ The Discussion Papers produced by FVTOC have argued in favour of such a body and suggested that it could take the form of an expression of First Nations peoples sovereignty, established as a Parliament.

It will be interesting to see what continuing impact these papers may have on the direction of Treaty negotiations in Victoria.

¹⁵Federation of Victorian Traditional Owner Corporations, "A Comprehensive Treaty Model for Victoria". [Treaty Discussion Paper 6](#) (2022)

¹⁶"[Big steps taken on the path to Treaty in Victoria](#)", (FPAV) First Peoples Assembly of Victoria, (undated).

¹⁷Ibid.

As is noted in the sixth and final Treaty Discussion Paper, the journey toward treaty in Victoria is now well underway, and presents a once in a generation opportunity for Aboriginal people and Victorian settlers to reimagine their co-existence. These papers set out one potential model for this new relationship, and what it could potentially deliver to Aboriginal Victorians and Traditional Owners.

The baseline elements of the proposal, shown in Figure 8, include:

- 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.

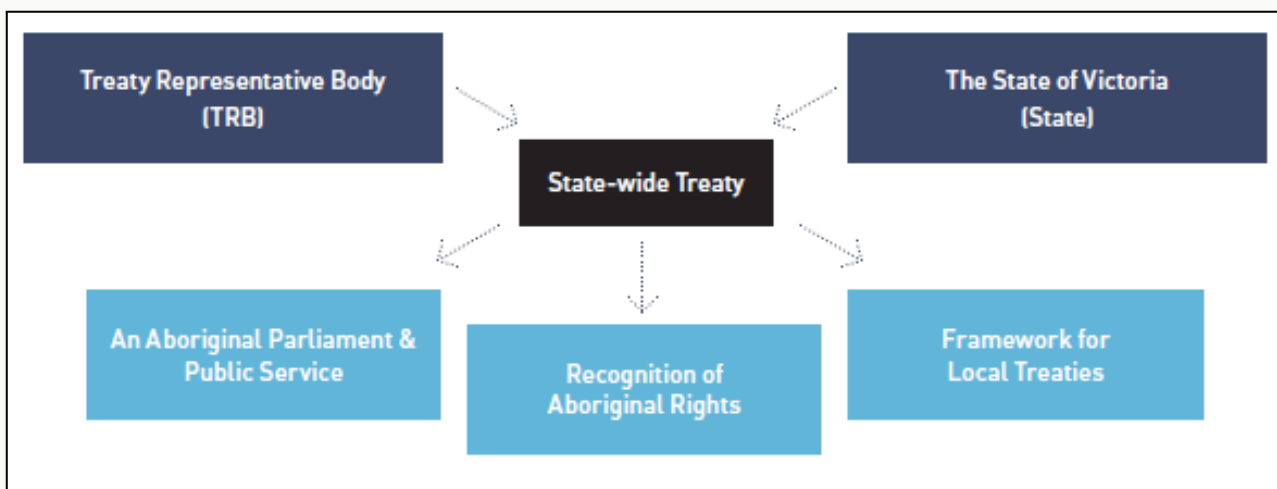


Figure 8: Three pillars of a State-wide Treaty. Source: FVTOC Discussion Paper 6 (2022:3)

Victorian Aboriginal and Local Government Strategy 2021-2026

In March 2022, the Victorian Government released its Victorian Aboriginal and Local Government (VALG) Strategy 2021-2026.¹⁸ This Strategy is a practical guide for local governments across Victoria which helps embed the voices and priorities of Aboriginal communities at a local level.

The VALG Strategy was informed by a strong consultation process of 20 months with guidance from a Steering Committee consisting of stakeholder organisations, local government representatives and members of the Aboriginal community, in addition to consultations with Traditional Owner groups, local governments, and peak bodies.

The Strategy was developed to support alignment of the Local Government sector with the VAAF 2018-2023,¹⁹ the Victorian treaty process,²⁰ the Victorian Closing the Gap Implementation Plan,²¹ and the work of the Yoorrook Justice Commission.²²

The VALG Strategy recommends actions for Local Governments, the Victorian Government and Aboriginal communities to progress Aboriginal self-determination and reconciliation, and acknowledges the four enablers needed to achieve self-determination, set out in the Victorian Government's Self-Determination Reform Framework.²³

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

¹⁸State of Victoria, [Ministerial Good Practice Guideline and General Guidance for Councils Engaging with Aboriginal Victorians](#), Local Government Victoria, Department of Department of Jobs, Precincts and Region (2022)

¹⁹"[Victorian Aboriginal Affairs Framework 2018-2023](#)", State of Victoria.

²⁰"[Treaty process. Find out about Victoria's nation-leading treaty process](#)", State of Victoria, (undated).

²¹State of Victoria, [The Victorian Closing the Gap Implementation Plan](#) (2021)

²²"[Yoorrook Justice Commission website](#)", Yoorrook Justice Commission, (undated).

²³State of Victoria, [Victorian Government Self-Determination Reform Framework](#) (2019)

The VALG Strategy acknowledges that self-determination matters because self-determination is a fundamental human right, and that Aboriginal Victorians have been striving since colonisation for the right to make their own decisions about matters affecting their lives. Significant cultural shifts must be made in the way Aboriginal leadership is perceived, and in the way Aboriginal knowledge systems and expertise is valued, respected, and invested in.

Relationships are strengthened when governments genuinely and respectfully engage with and listen to Aboriginal people, and when Aboriginal people have leadership opportunities and pathways to self-determination.

Figure 9 below shows how the principles, policies, and practices of self-determination can be embedded through acknowledgement, trust and shared power; agreed policy frameworks; and place-based solutions and decision making.

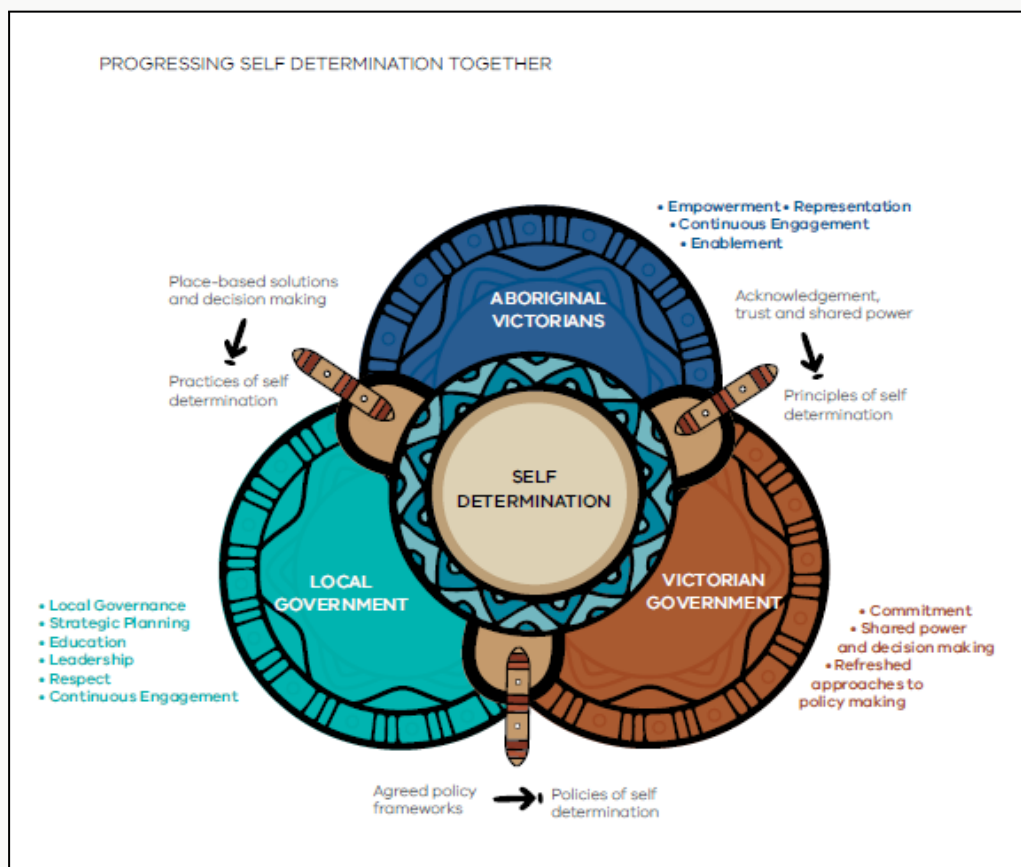


Figure 9: Progressing Self Determination Together Source: Victorian Aboriginal and Local Government Strategy 2021-2026. State of Victoria, 2022a:12.

The VALG Strategy also includes a clear framework for shared decision-making processes and actions for Aboriginal Victorians working together with local government based on mutual control, shared power, and decision making, fairness, respect, and trust. The VALG Strategy is centred on seven strategic pillars, as detailed in Figure 10 below. Each strategic pillar has a clear outcome statement about what is required to succeed, with discrete actions along the pathway to stronger partnerships under the subheadings of Understand, Embrace and Embed. Each action also has an identified lead agency or entity.



Figure 10: Seven Strategic Pillars and their Outcomes. Source: Victorian Aboriginal and Local Government Strategy 2021-2026. State of Victoria, 2022:17-18.

Aboriginal Victorians and local government working together

The VALG Strategy also acknowledges that Aboriginal Victorians and local governments must work together because First Nations peoples have deep and continuing connections to Country on which Aboriginal communities and councils co-exist.

First Nations peoples also have long standing commitments to their communities and cultures, and local governments are well-placed to work in partnership with First Nations peoples to improve:

- employment and economic development
- health and wellbeing (including maternal and early childhood health)
- recognition and respect for individuals and communities
- civic participation
- land use planning and land management
- environmental protection
- reconciliation
- service delivery and access for Aboriginal people
- governance
- protection of homelands and cultural heritage.

Taking a Country-based approach

The VALG Strategy notes that several different boundaries apply across Victoria under different statutes and administrative arrangements. Traditional Owner groups' connections to Country do not align with state borders or local

government area boundaries. Dealing with multiple jurisdictions and municipalities can create complications for Traditional Owners and councils, lengthen processes and strain resources.

To support sustainable engagement and uphold self-determination principles, the VALG Strategy encourages a Country-based approach. This means Aboriginal Victorians determine the engagement, informed by Country boundaries, rather than local government boundaries. Adopting a Country-based approach can simplify relationships and avoid adding to tensions between different groups of Traditional Owner groups where they exist.

Good Practice Guides to Engagement

Through the development of the VALG Strategy, Traditional Owners and Aboriginal Community Controlled Organisations (ACCOs) expressed the view they would appreciate additional support and knowledge of local government planning processes and the opportunities for their input. Local governments said they would benefit from further information on communicating with Traditional Owners, ACCOs, and the broader Aboriginal community.

In response, a Ministerial Good Practice Guideline and General Guidance for Councils Engaging with Aboriginal Victorians were developed in consultation with the VALGS Steering Committee.²⁴

The purpose of the Guideline is to assist local governments when engaging with Traditional Owners, Aboriginal Organisations and Community by providing a step-by-step guide for councils on how to identify, engage and build connections with, and develop mutually beneficial relationships. The Guideline requires councils to take reasonable steps to give effect to the engagement principles contained within the Guideline when seeking advice and guidance from Traditional Owners about developing and maintaining their community engagement policy under the *Local Government Act 2020* (Vic).

²⁴State of Victoria, [Ministerial Good Practice Guideline](#).

The General Guidance is a covering explanatory document for the Guideline, providing background information to local governments on the different Traditional Owner groups and ACCOs in the community, and context about the Victorian Government's current Aboriginal Partnerships policies and programs.

A special website, titled Maggolee,²⁵ has been developed by Reconciliation Victoria, supports engagement and partnerships between local governments and Aboriginal communities in Victoria. It is a place where local governments can share best practice and engage with content and resources to strengthen capacity and relationships with First Nations peoples in Victoria. The Maggolee website contains useful information on a wide range of topics, including: Cultural safety; Equitable outcomes; Statewide matters; Ensuring accountability; and Addressing historical injustices.²⁶ The content on Maggolee is culturally cleared with the relevant knowledge holders and organisations before it is placed on the website,²⁷ and the website's content will continue to evolve in collaboration with ACCOs and local councils in Victoria.

Treaty Authority and Treaty Negotiation Framework

In June 2022, the Victorian Government and the First Peoples Assembly of Victoria (FPAV) as the Aboriginal Representative Body in Victoria signed an Agreement to establish an independent Treaty Authority to oversee Treaty negotiations and help resolve disputes.²⁸

The First Peoples' Assembly of Victoria and the Victorian Government have also reached a landmark agreement on a framework that will enable Traditional Owners of Country to negotiate Treaties across the state, and for the Assembly

²⁵"[Maggolee](#)", Reconciliation Victoria, August 10, 2023.

²⁶Ibid.

²⁷Ibid.

²⁸First Peoples Assembly of Victoria [Treaty Authority Agreement](#) (2022)

– as the democratic voice for Aboriginal and Torres Strait Islander people in Victoria – to negotiate a state-wide Treaty to deliver structural reform.²⁹

The Treaty Authority and Other Treaty Elements Act 2022 (Vic) establishes the Treaty Authority as a necessary element of Victoria’s Treaty process to support future Treaty negotiations.³⁰ The Treaty Authority’s role is to be independent from government and to oversee and facilitate Treaty negotiations and to make sure that the process for negotiating Treaties follows the ground rules in the Treaty Negotiation Framework.

The new Treaty Authority will be the first of its kind in Australia, placing First Peoples’ culture at the heart of its practices. The Treaty Authority will:

- be guided by Aboriginal Lore, Law and Authority
- uphold human rights
- have rules to ensure good governance and decision making
- have rules to ensure the conduct of Treaty Authority members, and
- report on operations and Treaty negotiation processes.³¹

The most pertinent provision in the Treaty Negotiation Framework is Article 25 which states that “There are no matters that cannot be agreed in the course of Treaty negotiations.”³² This provision means that there are no restrictions on what can be brought to the table for negotiation.

²⁹First Peoples Assembly of Victoria [Treaty Negotiation Framework between the First Peoples Assembly of Victoria and the State of Victoria](#) (2022)

³⁰Victorian Legislation. (2022) [Treaty Authority and Other Treaty Elements Bill 2022](#) & also Victorian Legislation. (2022) [Treaty Authority and Other Treaty Elements Bill 2022 Explanatory Memorandum](#).

³¹ First Peoples Assembly of Victoria [A Path to Treaty. Treaty Information Kit](#) (2022): 40.

³² First Peoples Assembly of Victoria [Treaty Negotiation Framework between the First Peoples Assembly of Victoria and the State of Victoria](#) (2022): 40.

Roles and opportunities for local government in Victoria

In recent years local governments in Victoria have been forging closer ties with the Traditional Owners of the lands falling within their municipal boundaries. In part, this has been driven by obligations for the protection of cultural heritage under the *Aboriginal Heritage Act 2006* (Vic), and rights to consultation around Crown land use and development under the *Native Title Act 1993* (Cth) or the *Traditional Owner Settlement Act 2010* (Vic).

However perhaps more frequently, these relationships have been driven by acts of goodwill on behalf of local governments, and generosity of spirit on behalf of Traditional Owners, who both seek mutually beneficial and respectful relationships, and increasingly seeking to record agreed understandings in Memorandums of Understanding that go beyond mere legal compliance.

These trends are likely to intensify if the proposal set out in the Discussion Papers, or something similar, is adopted in the Treaty process. Particularly likely to occur over the next few years is the:

- (i) Expansion of Traditional Owner rights around the development or use of Crown land.

A standard agreement under the *Traditional Owner Settlement Act 2010* (Vic) includes a 'Land Use Activity Agreement' requiring Crown land managers to consult with, seek the consent of, and sometimes compensate Traditional Owners when carrying out certain works on Crown land.

An agreement of this type would seem likely to be included in any 'Minimum Rights Package' which under the FVTOC model would be rolled out quickly across the State. Local governments will have to adjust internal processes to meet these new obligations.

- (ii) Direct and binding agreements between Traditional Owner groups and local governments.

Perhaps more impactful is the Assembly's policy of pursuing both a State-wide treaty, but also individual 'Traditional Owner' or 'local' treaties. These local agreements would seem destined to impact upon local governments and may even see them as parties to treaties agreements. This would be a beneficial development, because rather than having State-wide agreements simply imposed, it would allow local governments to sit directly at the table with Traditional Owners and develop shared ways of moving forward.

Conclusion

While the exact progress in this space, and its impact on local government is at this time unknowable, it is clear that Treaty processes are gathering momentum, not only in Victoria, but also beyond.

Six states and territories have now formally commenced efforts to negotiate treaties. Three have indicated they are willing to consider treaties at the Aboriginal language group or regional level, based on affiliations between clans or native title determinations that have established connections to Country. This is the path that South Australia was pursuing before the change in government in 2018. What stands out here is that the states and territories have embarked on Treaty developments without the involvement of the Commonwealth.

Negotiations between state and territory governments and First Nations peoples need to reflect and embrace the interests and potential contributions of the more than 500 local governments established and supervised under state and Northern Territory laws. Across the Northern Territory, northern Western Australia, northern Queensland and the Torres Strait, a substantial number of those local governments are primarily Aboriginal or Torres Strait Islander.

Local governments can make a decisive contribution to local and regional outcomes and they can have a direct impact on reconciling their communities with the original owners of the lands they now inhabit through their place-based functions and close connections with communities. Because of their place-based responsibilities, local governments are often seen as being 'closest to the people': they are therefore in a unique position to implement some structural and systemic reforms that central governments cannot, and to reconfigure relationships at a local and regional scale, bridging gaps in culture and governance, advancing mutual respect and ensuring just outcomes. This can include meaningful consultations on matters that affect First Nations peoples, ensuring their representation in all relevant forums and governance bodies, and entering into place-based protocols and agreements on matters of mutual concern. Such initiatives can be particularly valuable in metropolitan areas and regional cities where most of Australia's First Nations peoples live.³³

There is also scope for a 'leadership from below' or 'building block' role for local and regional action led by local government. Many municipalities have a solid track record of reaching agreements under the reconciliation agenda and native title legislation. With respect to truth-telling, local governments are often rich repositories of histories which can be re-told in partnership with Aboriginal and Torres Strait Islander communities, especially with native title holder groups where they have been determined or have active claims in train, thus rebuilding relationships. This could be a really important starting point for regional treaties. The most significant challenge for local governments is understanding the opportunities and becoming involved from the outset and for the long term.³⁴

There are many different ways of addressing the longstanding lack of recognition of First Nations peoples' prior ownership and occupation of the lands that comprise Australia, but history shows that such measures cannot be imposed, they must be negotiated. The challenge is for treaty negotiations to

³³ Ed Wensing, "[Indigenous peoples' human rights, self-determination and local governance – Part 1](#)," *Commonwealth Journal of Local Governance*, no. 24 (2021a): 98-123.

³⁴ Ed Wensing. (2021c) [Closing the Gap: roles for local government](#), SGS Economics and Planning and LGiU Australia.

be based on parity between the parties, mutual respect and justice, rather than on exploitation and domination by one or other party.³⁵

Local governments across Australia would be well advised to keep informed as this space develops.

³⁵ Ed Wensing, "[Indigenous peoples' human rights, self-determination and local governance – Part 2](#)," *Commonwealth Journal of Local Governance*. No. 25 (2021b): 133-160.

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**ANTAR is proud to acknowledge and pay our respects
to First Nations Peoples as the traditional owners
of the lands on which we work across the continent.**