



11 May 2018

Ms. Lidia Thorpe
Member for Northcote
404 High Street
Northcote VIC 3070

Dear Lidia,

Proposed Amendments to the *Advancing the Treaty Process with Aboriginal Victorians Bill 2018*

Thank you for providing and inviting feedback on your proposed amendments to the *Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Treaty Bill)*.

As you know, the Federation of Victorian Traditional Owner Corporations (**FVTOC**) is the peak body for Traditional Owner Corporations in Victoria, and our membership is recognised, either through the *Native Title Act 1993 (Cth) (NTA)*, the *Traditional Owner Settlement Act 2010 (Vic) (Settlement Act)*, or the *Victorian Aboriginal Heritage Act 2006 (Vic)*, as the Traditional Owners throughout of the State of Victoria.

Traditional Owner Corporations are the primary vehicle through which traditional groups and bodies (however described, be they nations, peoples, clans or families) have organised for the purpose of asserting and exercising traditional rights to country, and accordingly, we welcome this opportunity to respond to this proposal of the Victorian Greens.

Below we seek to reply with our general concerns as to the amendments overall. We also **enclose** a position paper, responding to each individual proposed amendment.

The 'Sovereign Clan' model is not universally supported

The Victorian Greens should not proceed on the assumption that the model of Traditional Owner representation, as set out in the proposed amendments, is supported, settled, or agreed, within the Traditional Owner community of Victoria.

In our view, the proposed amendments represent a highly partisan position within the Aboriginal community which, to our knowledge, is not supported or endorsed by any group, other than perhaps the Victorian Traditional Owners Land Justice Group (**VTOLJG**).

VTOLJG (or perhaps some of its members) have long sought to elevate “Clans” as the principal framework through which Traditional Owners are represented in Victoria. However this position is often viewed by Traditional Owner Corporations as divisive, and as undermining the consensus of nationhood they attempt to embody and represent.

All Traditional Owner Corporations acknowledge the importance and centrality of their clans to their identity, but have chosen to organise politically at the higher level of Nation, language group, or peoples. Traditional Owner Corporations have spent years, often decades, building this consensus among their mobs, and it is the basis upon which they have won hard fought recognition and rights from the State.

However, the amendments put forward by the Victorian Greens seek to undermine these structures. In our view the amendments invite the State to investigate and verify the workings of the Clans, would require Traditional Owner groups to, yet again, prove the legitimacy of their structures to the State, and ultimately disempower, delay and divide Traditional Owners.

Accordingly, we cannot support any such amendments.

Victorian Greens are inserting themselves into a Traditional Owner debate

Notwithstanding our misgivings above, the VTOLJG are of course free to pursue and advocate for this model.

However, what is not appropriate in our view, is for the Victorian Greens to align themselves with the interests and views of a particular Aboriginal group, to the exclusion of others, and to attempt to use their political power to force a model of representation onto all Aboriginal people.

What the Victorian Greens appear to be doing by these amendments, is inserting themselves into a debate within the Traditional Owner community, and picking a side.

Furthermore, you are seeking to advance the views of a particular group without conducting widespread consultations, and in circumstances where there is no evidence to suggest this model has the support of the majority, or even a substantial number, of Traditional Owners in Victoria.

While you have previously (and not without some justification) criticised the Treaty process to date, including the formation of the Working Group and the Aboriginal Community Assembly, the process envisaged by your amendments commits the same faults, only more so. On our reading of the amendments, you are simply seeking to enforce your will on all Traditional Owners regardless of their views.

We wish to make clear that the Victorian Greens do not have a mandate from Aboriginal Victorians, and that what you risk is jeopardising perhaps the greatest opportunity for real self-determination we will see in our lifetimes.

This is particularly concerning because, even if accepted in whole, it is difficult to perceive what advantage or benefit the amendments would provide, other than entrenching a framework of representation that is not universally supported.

Amendments are contrary to UNDRIP

Further to the above, we are also concerned that the amendments fail to comply with the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.

In particular we point out the following:

(a) Article 18: Right to determine our own political structures

The Treaty Bill requires a consultation process before settling on a representative model for the purposes of Treaty.

By contrast, the Victorian Greens' amendments insist upon a form of representation before widespread consultations have been allowed to occur.

Article 18 of the UNDRIP states:

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Accordingly, Traditional Owners have the right to determine their own political structures and representation. Your amendments would see these structures dictated to Traditional Owners by legislation of the State, without the opportunity for consultation.

(b) Article 19: Requirement of free, prior and informed consent

The Victorian Greens' proposed legislative amendments have been released without any meaningful consultation as to their content, and there has been no cooperation with Traditional Owner representative structures in their development.

Accordingly, if the Government was to adopt your amendments, the State would be in breach of Article 19 of the UNDRIP, which states:

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

We note that these amendments have been developed and released even before the gathering of the Clans Elders Council, scheduled to occur on 14 May 2018, which is presumably the forum through which you seek to gain Traditional Owner endorsement.

We have concerns about the legitimacy of any claim (if indeed such a claim is made) that the Clans Elders Council represents the Traditional Owners of Victoria. Of course, FVTOC respects and acknowledges the authority and importance of Elders in our society. We are pleased that a forum is being established which aims to allow Elders to meet and discuss these issues, and FVTOC has contributed some funding to assist with the cost of the gathering. However, the Clans Elders Council is a new group, that has not yet convened its first meeting, and we have no information as to who sits on the council, how its members are appointed, what its rules of operation are, and what

Clans it is meant to represent. On that basis, we think it pre-mature to enshrine this group into legislation.

It is our assumption (and we are happy to be corrected) that members of the Clans Elders Council are either self-selecting, or appointed by the VTOLJG, or directly by the Victorian Greens. As such, we do not have any confidence that this group is able to fulfil the requirements of the UNDRIP in ensuring that Aboriginal people have freely determined their own representational or political structure and provided their free prior and informed consent to your amendments.

On that basis, we would be interested to understand if the Victorian Greens suggest that the consent of the Clans Elders Council is, in your view, sufficient to obtain the free prior and informed consent of Traditional Owners to these amendments for the purposes of UNDRIP.

If the Victorian Greens do not consider consultation with the Clans Elders Council alone sufficient, we would be interested to understand how you propose to obtain the free prior and informed consent of Traditional Owners.

Suggested alternative approach

We view your current proposal as attempting to dictate, or enforce, a particular view as to Traditional Owner representation, not through Traditional Owner structures, but through the power of the coloniser State.

However, if Traditional Owners support your view, this is not necessary, and the same outcome could be achieved through the consultation process to be undertaken by the Commissioner.

In our view, this is more culturally appropriate. If the VTOLJG, the Elders Clan Council, or any other Aboriginal person or body wish to pursue a particular framework of representation, they should do so within the Traditional Owner community, and not through the unilateral intervention of a political party, or through the parliament of the coloniser.

The Treaty Working Group, and the Aboriginal Community Assembly, have put forward an initial model of the Aboriginal Representative Body (**ARB**), for the purposes of consultation.

Whether this model is ultimately supported or not will depend on the outcome of the consultation process carried out by the Commissioner.

If the Victorian Greens do not support this model, we suggest that rather than try to legislate it out of existence, you should put up an alternative "Clan based" model, and request that the Commissioner include it in her consultations. You should then seek to have this model endorsed by Traditional Owners following comprehensive state-wide consultations.

If you are concerned about the integrity of the consultation process, you could propose measures to strengthen the process and increase its transparency (such as your proposal to have the Commissioner work in partnership with a representative body of elders).

The FVTOC would be supportive of a plurality of models being considered, or measures to ensure the success of the consultation process; however, we cannot in good conscience support the imposition of your proposed model without first obtaining the free, prior, and informed consent of Traditional Owners.

Please see **enclosed** our position paper responding to each of your individual proposed amendments in detail.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Marcus Stewart', with a stylized flourish at the end.

Marcus Stewart
Chief Executive Officer

*Cc: The Hon Natalie Hutchins MP, Minister for Aboriginal Affairs
Tim Bull MP, Shadow Minister for Aboriginal Affairs
Samantha Ratnam MP
Nina Springle MP
Sue Pennicuik MP
Samantha Dunn MP
Ellen Sandell MP
Sam Hibbins MP
Huong Truong MP
Adam Bandt MP
Senator Richard Di Natale MP*



Federation of
Victorian Traditional
Owner Corporations

Position Paper on the proposed amendments to the Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Treaty Bill).

Please note that we do not support the replacement of the term “Aboriginal Victorians” with “Clans” or “Sovereign Clans” for the reasons set out in our correspondence.

All comments below, whether supportive or critical of the proposed amendment, are on the proviso that the term “Aboriginal Victorians” is reinserted, or alternatively, that the term “Traditional Owners” is used instead.

Amendment 1:

Adding to the preamble the following statement:

“The State of Victoria recognises that the Clans have never ceded sovereignty over the land now known as Victoria.

The State of Victoria dismisses the historical claim of terra nullius upon which colonisation of this land proceeded without a treaty.”

FVTOC position:

We do not support the addition of this statement.

The question of the existence of Aboriginal sovereignty in Victoria is one of international law, and not reliant on the opinion of the Victorian Government. We question the value in Traditional Owners seeking the validation of Government on this point.

Also, the preamble already makes reference to sovereignty, stating:

“Victorian traditional owners maintain that their sovereignty has never been ceded, and Aboriginal Victorians have long called for treaty.”

We think this is the better position. Traditional Owners assert their sovereignty. The State has acknowledged that assertion, and is willing to enter into negotiations to resolve it.

With respect to dismissing “*the historical claim of terra nullius*” this concept was settled, and discarded, with *Mabo v Queensland (No 2) [1992] HCA 23*, and no longer has any place in the law of Australia.

Amendment 2:

Replacing the language of 'Aboriginal Victorians' with 'Sovereign Clans' throughout the bill, so it says that Clans are party to the negotiations and the key stakeholders with which all negotiation must take place.

FVTOC position:

We do not support this amendment.

We view this amendment as an attempt to impose a system of representation on Traditional Owners without their free, prior, and informed consent. Furthermore, it undermines the existing representational structures of Traditional Owner groups, established over decades of struggle, and is contrary to the requirements of the UNDRIP.

Amendment 3:

Adding that this Act does not affect sovereignty, by inserting the following:

"A treaty between the State and a Sovereign Clan is not an act of cession by the Sovereign Clan and does not diminish or displace the sovereign status that the Sovereign Clan asserts."

FVTOC position:

We do not support this amendment.

Again, we state that the question of our sovereignty is not determined by any statement, opinion, or law of the State of Victoria, but by our ownership of these lands, and the existence of our law, since time immemorial.

Traditional Owners will enter negotiations as sovereign powers, and do not require the validation of the State of Victoria to do so.

Amendment 4:

Adding definitions of Treaty, Sovereign Clans and Clan Elders Council.

We will examine each of the proposed definitions individually:

Amendment 4(a):

Meaning of treaty:

“ (1) A treaty is a legally binding agreement that is negotiated in good faith between the State and a Sovereign Clan and agreed to with the Sovereign Clan's free, prior and informed consent.

- (2) A treaty must—

- (a) address and resolve past and present injustices; and*
- (b) provide resources to the Sovereign Clan; and*
- (c) provide culturally appropriate powers of decision-making to the Sovereign Clan; and*
- (d) ensure control of the Sovereign Clan's own affairs rests with the Sovereign Clan; and*
- (e) support peace.*

- (3) More than one of the Sovereign Clans may together enter into a treaty with the State.

- (4) Nothing in this Act prevents the Sovereign Clans from entering into any agreement with the State that is not a treaty.”

FVTOC position:

We do not support this amendment.

As we think this definition demonstrates, trying to define the term now, before widespread consultations have occurred, and before negotiations have begun, is in fact limiting of what may be achieved through this process.

The above definition is generic, does not capture the concept of a treaty as an agreement between equal sovereigns, and could almost equally be applied to an agreement under the Settlement Act.

We would prefer to rely on international law definitions of treaty, which provide ample scope for negotiation, rather than be tied by Government to the limited framework set out above.

Amendment 4(b):

Meaning of Sovereign Clans:

“First Nations, Traditional Owner Groups or extended family groups that have—

(a) a historic connection to a specific territory of land that is wholly or partly in the area now known as Victoria; and

(b) shared Ancestors and Descendants, language, cultural heritage, beliefs, traditions or customary law;”

FVTOC position:

We do not support this amendment, for reasons already explained.

In addition, we think this particular definition is flawed for a number of reasons:

1. It does not make clear what a “Sovereign Clan” actually is, as it seems to encompass everything from a nation, to a traditional owner group, to a family group, with no distinction between these entities.
2. This makes the model messy and confusing, and there is no clarity as to when a group should be considered to hold sovereignty. Under this model, a nation of four thousand people may hold the same sovereignty as a nuclear family of four. This would seem unworkable.
3. The definition relies heavily on the terms “First Nations” and “Traditional Owner Groups,” but these terms are not defined. This is despite the terms “Traditional Owner” and “Traditional Owner Group” having several legal, and legislative defined meanings around the country. With these terms undefined we are not sure the definition has any meaningful function.
4. The definition uses the term “*historic connection*,” which is problematic for at least two reasons:
 - a. This is likely to be interpreted by a Court as connection as required under the NTA, which has well developed jurisprudence on the issue, starting with the decision in *Yorta Yorta v Victoria HCA 58, (2002) 214 CLR 422*. As you would be aware, this set a standard of connection which is almost impossible for Traditional Owners in Victoria to meet.
 - b. The other alternative is that by using the term “*historic connection*” as opposed to “*traditional connection*” it might be that traditional ownership is dispensed with, and the relevant test is historic residence. This would be contrary to the NTA, the Settlement Act, and potentially the UNDRIP.

Amendment 4(c):

Meaning of Clan Elders Council:

“a body that—

*(a) consists of a gathering of Elders from the Sovereign Clans that choose to participate;
and*

(b) exists for the purpose of providing advice and advocacy on advancing the treaty process;”.

FVTOC position:

We do not support this amendment.

This definition is reliant on the definition of Sovereign Clans, which as already stated is flawed and not functional.

Amendment 5:

Adding the Clan Elders Council as a Party that the Commissioner works in partnership with to develop her recommendations on the Aboriginal Representative Body.

FVTOC position:

We cannot support this amendment on the basis that the definitions underpinning it are flawed.

We also note that the Clan Elders Council has not convened its first meeting, or established its rules of governance or operation, and it is not clear how its members will be appointed. As such, it is pre-mature to enshrine this group within the legislation.

However, notwithstanding the above, we are open to a proposal that the Commissioner works with a representative group, to ensure the effectiveness and transparency of the process.

Amendment 6:

Adding that only representatives of the Sovereign Clans can sit on the Aboriginal Representative Body and that each Sovereign Clan must self-determine who represents them on the Aboriginal Representative Body. This is a major change from the Government’s proposed approach of holding democratic elections based on one person, one vote representation across Victoria.

FVTOC position:

We do not support this amendment, for reasons already stated.

In our view, if this amendment is adopted, it will result in the Victorian parliament dictating through legislation who is eligible to sit on the ARB, rather than it being something decided by Traditional Owners, through consultation, and our own structures.

Amendment 7:

Adding the United Nations Declaration on the Rights of Indigenous Peoples as an overarching guiding principle, and adding the process must occur with the 'free, prior and informed consent' of Sovereign Clans when decisions affect them as another guiding principle point.

FVTOC position:

We support this amendment in principle.

However, we note that the UNDRIP already includes the requirement of free, prior, and informed consent, and if adopted as the guiding principle will bring this requirement into Treaty Bill processes. As such, we are unclear as to the benefit of adding a further requirement for free, prior and informed consent, which has language that departs from UNDRIP requirements. We suggest that this may cause confusion as between the two obligations, and it would be preferable to simply rely on the UNDRIP in its entirety.

Amendment 8:

Specifying that the self-determination fund, in addition to allowing Clans to negotiate on equal footing with the state, should also:

- *be used to allow further cultural mapping of the Sovereign Clans genealogy*
- *for a process of truth telling about the true history of Victoria'*
- *and funding must begin no later than the 2018/19 financial year, providing adequate resources to achieve its functions.*

FVTOC position:

We do not support this amendment, for the following reasons:

- (a) The proposed use of funds for cultural mapping of Sovereign Clans highlights a further problem with the model, in that reimagining the representational structures of Traditional Owners down to the Clan level would require significant amounts of research, which the State would require before entering into negotiations. Based on the native title experience, this process could take many years, and would be very expensive. Alternatively, if existing representational structures were utilised, these funds could immediately be put towards efforts for realising self-determination.

- (b) While we believe the proposal for a process of truth telling is an excellent idea, it first needs to be subject to consultations, and endorsed by Traditional Owners before being enshrined in legislation. Also, it would more naturally fit in the treaty framework, and not in legislation setting out a process to establish the ARB.
- (c) We think requiring funding in the 2018/2019 financial year sets an end date to consultations, which we think is inappropriate. A better position would be a requirement to ensure the ARB is funded from the date of its establishment.

Amendment 9:

Specifying that the Treaty Authority, which will oversee the treaty negotiations, must be independent from all negotiating parties and free of conflicts of interest.

FVTOC position:

We support this amendment in principle, although we do not consider it pressing, as the Treaty Authority is to be established by the agreement of the State and the ARB. It is difficult to imagine the ARB agreeing to a Treaty Authority that did not have independence enshrined in its charter.

We would also suggest caution with respect to the adoption of language that the authority must be *“independent from all negotiating parties and free of conflicts of interest.”*

It is likely, and in fact desirable, that the Treaty Authority will employ members of the Victorian Aboriginal community, as well as have them on its governing board. Typically these people will also be Traditional Owners.

The adoption of the language above may prohibit the involvement of Traditional Owners in the Treaty Authority. As such, it would be preferable to simply adopt a system for declaring and managing conflicts of interest, as exists in any public entity or authority. Again, this may be best done by the ARB when the Treaty Authority is being established, instead of in this legislation, which is principally about setting out a process to establish the ARB.