TLAWC Submission in relation to specific issues arising out of the hearings

Introduction

This submission is prepared by Taungurung Land and Waters Council (**TLaWC**). TLaWC was registered on 16 July 2009 as the Registered Aboriginal Party that represents the interests of the Taungurung people. TLaWC is the corporate representative and 'face' of the Taungurung people and serves to uphold their interests with respect to culture and country.

The Taungurung people are the traditional owners of a wide area of land and waters in central Victoria, around the Goulburn River and beyond. As Kulin peoples, the Taungurung are guided by Bunjil (the Wedge-tailed Eagle), their creator. The Taungurung believe that Bunjil made men from bark, and women from mud. It is a belief that fundamentally binds Taungurung People to their country which, with all its tangible and intangible elements, is governed by Bunjil's Law. Imprinted on the land are the Dreaming stories, totemic relationships, songs, ceremonies and ancestral spirits which give it life and immense value. This ongoing connection to country is what gives purpose to Taungurung people and sits at the heart of all TLaWC's business.

This submission addresses some particular issues which have arisen in the course of the Yoorrook Commissions hearings into injustice against First Peoples related to land, sky and waters.

First, we make some comments about difficulties TLaWC face with implementation of our existing Land Use Activity Agreement.

Second, we make some comments about HVP Plantations and their lack of engagement with TLaWC and other First Peoples.

1. Implementation of our existing Land Use Activity Agreement

First Nations Land and Research Services (**FNLRS**) gave evidence on Tuesday 16 April 2024 during which the evidence of Will Crawford of FNLRS referenced various challenges First Peoples had experienced in negotiations with the parties regarding Land Use Activity Agreements' (**LUAA**) classification disputes, failure to provide notification of planned land use activities and insufficient resourcing of clients to do this work. We write to acknowledge that TLAWC has and continues to experience such difficulties and accordingly, we write to provide examples of these challenges.

TLAWC's Experiences Negotiating with the State, Local Government and Other Parties regarding Land Use Activities

Lack of Notifications of Activities

There are 2 main concerns which TLAWC has experienced regarding LUAA notifications.

Firstly, we are concerned that there is a lack of awareness and training of the LUAA processes and requirements given to staff of government departments, local governments and other proponents for the use of public land. This potentially leads to a failure to notify TLAWC of new projects where there are land use activities that trigger the LUAA.

TLaWC regularly conduct audits of local government websites to discover reports of new works and projects which local governments are undertaking on public land. On many occasions, we have then contacted the local government to advise them of their responsibilities under the LUAA and request notifications. TLaWC estimate that this occurred more than 20 times last year. Further, TLaWC notes that it has limited resources and hence are not able to regularly conduct these works audits to ensure Taungurung rights are being understood and complied with. When TLaWC conducts a works audit, it is conducted with the limited information available, such as that published on the council's website.

In relation to the Local Government areas on Taungurung Country, we appear to have variable levels of understanding, and compliance with the LUAA. Taungurung Country includes 15 council areas which have legal obligations under the Taungurung Recognition and Settlement Agreement area. Some council areas demonstrate high levels of compliance and actively work with TLAWC. Others are clearly non-compliant.

Secondly, TLaWC is concerned that the failure to issue land use notifications may be the result of poor categorisation assessments of land use activities made by relevant staff. It appears even where staff are aware of the LUAA, they often lack the skills and ability to properly categorise LUAA activities and make the distinction between routine, advisory and negotiation activities. This may be another reason for the low number of notifications by some local councils and government departments.

Possible remedies

A pragmatic remedy is for TLAWC be adequately resourced to make a categorisation determination for all land use activities and, prior to the proponent making a categorisation determination. This remedy would be consistent with the State Governments commitment to self-determination (Government's commitment to self-determination) and would enable TLaWC to apply Taungurung agreed rights as intended. This remedy would provide an early resolution of these issues and also provide greater awareness of the LUAA and its application and requirements.

Another remedy is for TLAWC to be funded to provide regular training to government departments, local government and proponents on the LUAA application and requirements. This would achieve ancillary benefits of strengthening working relationships between TLAWC and these staff as well as building greater capacity and understanding of the LUAA more broadly.

Disputes re Categorisation of Activities

It appears to TLaWC that many proponents seek to downplay or under-estimate the impact of their works in an attempt to avoid their negotiation and subsequent compensation obligations to the Taungurung Nation.

Under the LUAA, no compensation/community benefits or negotiation costs are payable for Advisory or Routine activities. TLAWC LUAA staff spend the majority of their time in disputes

regarding projects that proponents choose to classify as advisory rather than the truer categorisation of a negotiation activity.

One of the reasons government proponents cite for their dispute of categorisations is that the government proponent has not budgeted for community benefits. Accordingly, they often state these community benefits will break their budget.

[redacted]

Process for Dispute Resolution re Categorisation of Activities

The dispute resolution process provided in TLaWC's LUAA is very time consuming, involved, costly and ultimately in our view unworkable and unsustainable.

[redacted]

[redacted]

[redacted]

The drafting of the LUAA and its categorisation provisions are often open to multiple interpretations. This in turn makes dispute resolution difficult.

Lack of Resourcing for Processing Applications and Dispute Resolution

The Taungurung LUAA has an allocation of 0.6 FTE under the funding terms of the Taungurung Recognition and Settlement Agreement. This 0.6 FTE allocation is intended to process many hundreds of Land use activities and works on Public Land on Taungurung Country. The LUAA Team is dealing with various State agencies, 15 local government councils and approximately 7 Water Authorities. The Taungurung LUAA incorporates about 200 exploration and mining licences on Taungurung Country.

Although the Taungurung RSA provides funding for 0.6 FTE, TLaWC currently employs 4 full time staff to engage in the activities resulting from Taungurung's legal rights stipulated within the Taungurung LUAA. A small part of the funds required to employ the 4 FTE are recovered from negotiation cost provisions in negotiation A and B agreements. However, many parts of-TLaWC's LUAA Team's work are not funded. Dispute resolution regarding classification is not funded, nor is the time required for liaison and process discussion with stakeholders and education of proponents and responsible people/agencies.

In the 2023 financial year, the TLAWC LUAA Team recovered only $45,700 in Reasonable Negotiation costs from processing Negotiation activities and $77,500 from mining licences. The total cost of the TLAWC LUAA team is in excess of $300,000.

Another resourcing consideration is the incredible power difference between the proponents, the State and TLaWC. The limited resourcing currently available to TLaWC to conduct its core work, the unfunded dispute resolution, education and liaison work, leaves TLaWC at a distinct disadvantage compared to the proponents and the State.

The creation of an independent referral body to conduct the classification of proposed land use activities in the event of a dispute may overcome some of the above concerns.

Further, the State should consider introducing financial penalty clauses or payments for government bodies which fail to comply with the LUAA. This would lead to greater compliance by parties. Currently, the Taungurung LUAA has no 'stick' or penalty for non-compliance with the Taungurung LUAA as it is implied that State agencies and other responsible parties will act in good faith with respect to the Taungurung Nations legal rights.

TLAWC Comments on the Taungurung LUAA

TLaWC's first concerns is that various government departments' interpretation and implementation of the LUAA results in the minimisation of Taungurung rights and entitlements. Further, the imbalance of power and poor resourcing of TLaWC gives the State and the proponents the leading hand in all negotiations and limits the scope of the intended benefits of the LUAA. This approach to the Taungurung LUAA ensures that the Taungurung Nation cannot be

self-determining and empowered in its rights, which is inconsistent with State Government commitments to enable the Self-Determination of Traditional Owners.

The issuing of the notifications including the classification of land use activity by the responsible person, place TLAWC on the back foot. Should TLaWC disagree with the classification there are limited avenues to contest this, and those avenues are unfunded, extremely costly and time consuming. Further, the responsible person is often in a position of conflict of interest when deciding on the classification of the land use activity. Thus, TLAWC feels it is in an unfairly disadvantaged negotiating position.

[redacted]

Finally, TLAWC notes that rights over water are not included in the LUAA. Taungurung people see water as-an essential element to the health of its people, and country, rather than just a commodity to be traded.

2. HVP Plantations

On Tuesday 16 April 2024 the Hon. Steve Dimopoulos MP gave evidence about the privatisation of timber plantation land that later passed to ownership of HVP Plantations.

Taungurung Country includes a large area of HVP plantations on Taungurung country, and the Minister's comments raised some issues of considerable concern.

First, TLaWC query whether the making of the *Victorian Plantations Corporation Act 1993* was an invalid act within the meaning of the *Native Title Act 1993,* and therefore whether the exclusive rights granted under it are invalid to the extent that they affect native title (in accordance with NTA s24OA).

TLaWC note that *Victorian Plantations Corporation Act 1993* Sections 1–3 came into operation on 8 June 1993, but that the remaining operative provisions of the Act, that affected Taungurung rights to Taungurung land, came into operation on 1 July 1993. The making of legislation *on or after 1 July 1993* is a future act within the meaning of NTA s233. Whether or not legislation is *made* at the time that it comes into operation is an open question of law. If the making of the *Victorian Plantations Corporation Act 1993* was a future act we are not able to see any basis for its validity within the NTA. The evidence of the Hon. Steve Dimopoulos MP seems to confirm that the State at the time was not interested in compliance with the NTA.

TLaWC asserts that a comprehensive review of the circumstances that led to the privatisation of timber plantation land now held by HVP Plantations be conducted. If there is a question over validity of the tenure then HVP should be required to negotiate ILUAs with affected First Nations to validate any invalid grants.

Separately TLaWC are concerned that HVP through its accreditation under the international Forest Stewardship Council (FSC), is falsely representing to the world that it has the Taungurung Nations free, prior and informed consent to conduct forestry operations on Taungurung country.

HVP's accreditation by the FSC was first issued in 2004 and is currently valid through to 2029. The accreditation has significant commercial value as it means HVP can sell its harvested timber at a premium.

HVP's accreditation documents are available on the FSC website, which has a searchable database.

The FSC standard Version 4 (which applied until recent years but which has since been replaced by Version 5) contains a requirement to recognise and respect indigenous rights, which states:

> Principle #3: Indigenous peoples' rights
>
> The legal and customary rights of indigenous peoples to own, use and manage their lands, territories, and resources shall be recognized and respected.
>
> 3.1 Indigenous peoples shall control forest management on their lands and territories unless they delegate control with free and informed consent to other agencies.
>
> 3.2 Forest management shall not threaten or diminish, either directly or indirectly, the resources or tenure rights of indigenous peoples.
>
> 3.3 Sites of special cultural, ecological, economic or religious significance to indigenous peoples shall be clearly identified in cooperation with such peoples, and recognized and protected by forest managers.
>
> 3.4 Indigenous peoples shall be compensated for the application of their traditional knowledge regarding the use of forest species or management systems in forest operations. This compensation shall be formally agreed upon with their free and informed consent before forest operations commence.

The FSC standard Version 5, which now applies, is more prescriptive:

> P3 The Organization shall identify and uphold Indigenous Peoples' legal and customary rights of ownership, use and management of land, territories and resources affected by management activities.
>
> C3.01 The Organization shall identify the Indigenous Peoples that exist within the Management Unit or those that are affected by management activities. The Organization shall then, through engagement with these Indigenous Peoples, identify their rights of tenure, their rights of access to and use of forest resources and ecosystem services, their customary rights and legal rights and obligations, that apply within the Management Unit. The Organization shall also identify areas where these rights are contested.

> C3.02 The Organization shall recognize and uphold the legal and customary rights of Indigenous Peoples to maintain control over management activities within or related to the Management Unit to the extent necessary to protect their rights, resources and lands and territories. Delegation by Indigenous Peoples of control over management activities to third parties requires Free, Prior and Informed Consent.

> C3.03 In the event of delegation of control over management activities, a binding agreement between The Organization and the Indigenous Peoples shall be concluded through Free, Prior and Informed Consent. The agreement shall define its duration, provisions for renegotiation, renewal, termination, economic conditions and other terms and conditions. The agreement shall make provision for monitoring by Indigenous Peoples of The Organization's compliance with its terms and conditions.

> C3.04 The Organization shall recognize and uphold the rights, customs and culture of Indigenous Peoples as defined in the United Nations Declaration on the Rights of Indigenous Peoples (2007) and ILO Convention 169 (1989).

As recently as 10 Jan 2024, HVP's operations in Victoria were certified to comply with these criteria. As far as TLaWC is aware HVP has never had any meaningful engagement with TLaWC, or the Taungurung people, and relies on its belief that native title is extinguished over its operations to support its ongoing accreditation.

For example, it's certification report for 2019, assessed under FSC standard Version 4, states that it complies with Principle 3.1 because:

> There are currently no live Native Title claims affecting HVP land; nor formal agreements with Indigenous groups or peoples relevant to the FME's operations. The FME's Corporate Legal Officer and regional staff monitor Native Title and other claim processes. HVP engages with Indigenous stakeholders – including inviting Indigenous peoples and Registered Aboriginal Parties to be involved in forest management planning and operations. This Criterion is met.

The view of Minister Dimopoulos was that the dealings with HVP were emotionally distressing but that they were something that happened in the 1990s, under a different government. However, it seems to us that HVP is continuing to rely on the State's regulatory regime (but on a false basis) to say that it has free, prior and informed consent of indigenous people, and thereby qualifies for FSC certification. The certification is of significant commercial value to HVP and possibly the State.

HVP's representation (by way of its FSC certification) that it has the Taungurung Nations free, prior and informed consent to operate on Taungurung country is wrong. In the context of the evidence given by Minister Dimopoulos, it is offensive. TLaWC requests the State commit to properly investigating the conduct of HVP and take immediate steps to rectify any illegal or false representations that are being made. HVP should reconsider as a matter of urgency the way that it engages with First Peoples in Victoria.