Land and water rights of Traditional Owners in Victoria

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Executive summary

This research paper provides an overview of the key mechanisms by which Aboriginal and Torres Strait Islanders can exercise their rights to lands and waters in Victoria. In particular, it provides:

- an overview of the historical context, structure and processes of the *Traditional Owner Settlement Act 2010* (Vic) (TOS Act);
- discussion of the experiences of Traditional Owner corporations who have concluded settlement agreements with the Victorian Government under the TOS Act;
- an overview of native title and the processes of the *Native Title Act 1993* (Cth) (NTA);
- a summary of other key mechanisms that enable rights to land and water; and
- analysis of how the recognition and exercise of land and water rights might change in the future.

The TOS Act was enacted in Victoria as an alternative to the native title regime, and is currently the most expansive means by which Traditional Owners can gain rights to country and settle native title claims in Victoria. It is a comprehensive, non-litigated claims process that can provide a package of agreements and rights, including recognition as the Traditional Owners of country; funding; and use, access and management of natural resources. As the TOS Act provides the largest scope for recognition of various rights, it receives primary consideration in this paper (see Chapter 2).

The core focus of this consideration is discussion of the experiences of the Traditional Owner corporations who have negotiated a TOS Act settlement agreement: Gunaikurnai Land and Waters Aboriginal Corporation and Dja Dja Wurrung Clans Aboriginal Corporation. In conducting this research, the author met with representatives of the corporations to hear their experiences of the negotiation processes, and of the practical outcomes following settlement. Some of the common themes that are discussed relate to the potential of TOS Act settlements; the negotiation process; funding and resources; relationships with government and the future Victorian treaty processes. At the time of publication, a number of Traditional Owner groups were negotiating TOS Act settlements. These groups were not contacted in order to respect the confidentiality of the negotiations process (see Chapter 3).

Native title was the first major legal mechanism for recognising the existing rights of Aboriginal and Torres Strait Islanders to their country. It was first recognised in the *Mabo No. 2* decision, before being codified by the NTA. Native title is the recognition of existing title, as opposed to the grant of a new title or set of rights. While the TOS Act provides broader scope for recognition of various rights, Traditional Owners can still elect to make claims under the NTA (see Chapter 4).

Alongside the TOS Act and NTA, there are many other ways in which Victorian Traditional Owners can exercise rights to country. This include approaches aimed at protecting cultural heritage, enabling joint management of natural resources, and facilitating Traditional Owner participation in the development of policy. These mechanisms create a complex system of interwoven rights and structures that can be difficult to navigate for Traditional Owners, government agencies, private bodies and the broader public (see Chapter 5).

There are many possibilities for the further reform of native title and alternative settlement processes. The future treaty processes in Victoria are one factor that have significant potential to disrupt the ways in which land and water rights are recognised and effected. Other factors for consideration include the transition into the post-determination and post-settlement phase; economic development of traditional lands; compensation for extinguishment or impairment of native title; and possibilities regarding water (see Chapter 6).
1. Introduction

This paper discusses some of the key mechanisms in Victoria by which Aboriginal Victorians can exercise their rights to country. There is no overarching regime that gives effect to these rights, and together the mechanisms provide a basis for Traditional Owner groups to achieve self-determination and economic independence.¹ However, the confluence of laws and policies is complex, and can be difficult to navigate for Traditional Owner groups, government, private bodies and the broader public.

This paper first considers the *Traditional Owner Settlement Act 2010* (Vic) (TOS Act), which receives the primary focus as it is often seen as the preferable process by which Traditional Owners can achieve legally enforceable recognition by the Crown of their rights to country. The core focus of this discussion is the experiences of Traditional Owner corporations who have negotiated a TOS Act settlement agreement: Gunaikurnai Land and Waters Aboriginal Corporation and Dja Dja Wurrung Clans Aboriginal Corporation. In conducting this research, the author met with representatives of the respective corporations to explore firsthand experiences of the negotiation processes, and the practical outcomes that have resulted from the settlements. The purpose of this discussion is to highlight that in line with the original intentions of the TOS Act—to advance reconciliation and provide recognition of Traditional Owner rights around access, ownership, and management of traditional lands—it is important to explore the experiences of Traditional Owners in order to examine whether these aims have been achieved.²

At the time of publication, a number of Traditional Owner groups were at various stages of negotiating a TOS Act settlement:

- Taungurung;
- Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples (the Wotjobaluk Peoples);
- Eastern Maar; and
- Gunditjmara.³

In addition, at the time of publication, the First Peoples of the Millewa-Mallee had entered the threshold evaluation stage of the TOS Act settlement process.⁴

These groups were not contacted in order to respect the confidentiality of the negotiations process.

Following consideration of the TOS Act and Traditional Owner experiences of TOS Act settlements, this paper will briefly discuss native title and the *Native Title Act 1993* (Cth) (NTA), and then other mechanisms for recognition of land and water rights. Finally, it will consider how the recognition and exercise of land and water rights may change in the future.

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² See *Traditional Owner Settlement Act 2010* (Vic), s 1.


Rights to lands and waters

The current mechanisms aimed at recognising Traditional Owner land and water rights are the result of a long history of land rights activism in Australia, depicted in Figure 1.\(^5\)

Although the land rights movement is not the focus of this paper, it is important to note what it brought to public attention: recognition that prior to colonisation, Australia was inhabited by Aboriginal and Torres Strait Islander peoples, each with their own laws and cultures that were inherently connected to traditional country.\(^6\) Government recognition of the rights of Traditional Owners to their traditional lands and waters seeks to address the historic dispossession of country that occurred as a result of colonisation.

Importantly, however, the current legislative regimes aimed at recognising and providing for these rights are based on Australian law principles. Aboriginal and Torres Strait Islander concepts of rights to land and water are inherently different to the way that the Australian legal system constitutes these rights. In particular, Aboriginal and Torres Strait Islander concepts of country are intrinsically connected to traditional laws, culture and identity.\(^7\) The interdependence of land and identity for Traditional Owners means that notions of land and water rights are inherently linked to aspirations for broader self-determination on country.

One of the key challenges of developing a comprehensive and broadly accepted system of recognition of Aboriginal and Torres Strait Islander rights to land and water has been the difficulty of harmonising these two fundamentally different concepts of land ownership and use.

This is important to keep in mind while considering the current legislative and other mechanisms in place, as it helps to contextualise some of the ways that Traditional Owners have responded to them.

Legislation and land rights

Prior to the NTA, Victoria did not have a formal land claims regime for Aboriginal persons who asserted to be the Traditional Owners of land and waters in Victoria. A number of ad hoc Acts were instead passed in the latter half of the 20th century which provided for Victorian Crown land to be granted to...
Aboriginal trusts and corporations. The passing of these Acts occurred alongside the national land rights movement discussed above.

Following the Mabo cases in Queensland, the NTA was enacted to enshrine the common law concept of ‘native title’. Native title is the recognition of rights and interests of Aboriginal or Torres Strait Islander peoples in relation to their traditional lands or waters, where their traditional laws and customs are linked to those lands and waters. The NTA was the first major legal mechanism for recognition of the existing rights of Aboriginal and Torres Strait Islanders to country. Almost two decades after its enactment, Victoria established its own alternative claims process through the TOS Act.

**Current approaches**

The mechanisms by which land and water rights are managed, regulated and recognised today are targeted at achieving broader outcomes than just returns of Crown land. The TOS Act and NTA provide the most comprehensive means for Traditional Owner groups to retain rights to country in Victoria; however, there are a variety of other approaches. As noted, the confluence of regimes is complex. Sometimes, legislative schemes overlap and can create contradictory sets of rights that are recognised differently by different bodies. For example, the interaction between the *Aboriginal Heritage Act 2006* (Vic) (Aboriginal Heritage Act) and the TOS Act is one where claims to country can be made separately under both Acts. This, in turn, can lead to disputes over who is the ‘right person for country’. State-based mechanisms are also interwoven with federal initiatives and programs, creating further complexity.

It is important to note that invariably, claims and management processes are only available in relation to public land, not to privately owned land.

**Existing agreements**

The state of Victoria has entered into agreements with five Traditional Owner groups to give effect to their rights to land and water. Two of these agreements were made under the TOS Act, and the others are related to native title determinations. The agreements are the:

- Gunaikurnai Recognition and Settlement Agreement;
- Yorta Yorta Agreements;
- Wimmera Settlement Agreement;
- Gunditjmara Settlement Agreement; and
- Dja Dja Wurrung Recognition and Settlement Agreement.

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5 For more information on the land rights movement in Australia, see National Native Title Tribunal (2017) ‘25 years of native title recognition’, NNTT.
7 ibid.
8 *Aboriginal Lands Act 1970* (Vic); *Aboriginal Lands (Aborigines’ Advancement League) (Watt Street, Northcote) Act 1982* (Vic); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Land (Northcote Land) Act 1989* (Vic); *Aboriginal Lands Act 1991* (Vic); *Aboriginal Land (Manatunga Land) Act 1992* (Vic).
10 *Native Title Act 1993* (Cth), s 223.
11 However, the Aboriginal Heritage Council is required to give priority, when determining applications, to native title holders or applicants with a TOS Act agreement. See *Aboriginal Heritage Act 2006* (Vic), s 151.
Figure 2 provides a timeline of these settlements together with Victorian native title determinations.

**Figure 2. Timeline of determinations of native title and agreements with Traditional Owners in Victoria**

2. Traditional Owner Settlement Act 2010

The TOS Act was introduced in Victoria as an alternative to the lengthy processes of the native title regime, and is currently the most expansive means by which Traditional Owners can gain rights to country and settle native title claims in Victoria. It is a comprehensive, non-litigated claims process that can provide a package of agreements and rights, including recognition as the Traditional Owners of country, funding, and use and management of natural resources.

The outcomes that are available under a TOS Act settlement are contextualised by a broader movement towards achieving Traditional Owner self-determination. The Victorian Government has confirmed that self-determination and partnership are the foundations of the TOS Act. This context is particularly relevant to keep in mind while considering the outcomes that have resulted from TOS Act settlements.

Background

The first native title claim in Victoria was made on behalf of the Yorta Yorta people in 1994. The case was significant in that it clarified aspects of native title law in geographical areas that had seen high levels of colonial settlement. In the Federal Court judgement, Olney J determined that colonisation had significantly altered the ways in which Yorta Yorta acknowledged its traditional laws and customs. In turn, this meant that native title could not be found to still exist. The decision was upheld by the High Court of Australia in 2002.

This judgment represents a key point in Australian history. It established a limited scope for the evolution over time of traditional laws and customs, despite the inherent effect that colonisation would have had on any claimant group’s adherence to their traditional laws and customs. This burden would disproportionately affect claimants in areas that were subject to large-scale colonisation, such as Melbourne, and Victoria more broadly. In addition to this high evidentiary burden was the NTA’s inherent administrative burden: the mediation or litigation processes, which in some cases have taken more than a decade. These clear difficulties for future native title claims led to calls by a number of groups for an alternative settlement process.

In the following years, two positive determinations of native title were made, both negotiated out of court: the 2005 determination for the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk peoples of the Wimmera, and the 2007 determination for the Gunditjmara. These provided some reassurance that it was possible to affirm the existence of native title in settled areas. Despite this,

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16 Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58.
17 The Wimmera claim was resolved in 10 years, and the Gunditjmara claim in 11 years.
Impetus was growing for an alternative process that would be more expedient and could produce more holistic outcomes for Traditional Owners.

Between 2005 and 2008, representatives of a number of Traditional Owner groups lobbied the Victorian Government for improved land justice, the resolution of historic grievances and the creation of an alternative settlement process for the resolution of native title claims. In response, the Victorian Government established a Steering Committee to consider a potential settlement framework. The Committee’s final report in December 2008 noted that native title in its current state was ‘proving too cumbersome, complex, costly and litigious and was delivering only ad hoc and limited outcomes’. The report advocated the establishment of a negotiations-based approach to settling claims, which would reduce financial costs, reduce the time taken to finalise claims, provide better outcomes for Traditional Owners and improve the working relationships between the Victorian Government and Traditional Owners. The framework contained in the subsequent Traditional Owner Settlement Bill 2010 (Vic) was based largely on these recommendations.

At the time the Bill was introduced, 14 Victorian native title claims were registered and pending under the NTA, most of which had been lodged approximately 10 years earlier. The TOS Act came into operation on 23 September 2010.

Existing TOS Act settlements

There are currently two existing TOS Act settlements. The Gunaikurnai settlement was made on 22 October 2010, only a month after the passage of the bill, and included a determination of native title by the Federal Court. This settled two native title claims dating back to 1997.

Along with being the first TOS Act settlement, the Gunaikurnai settlement is unique in the short timeframe in which the agreement was negotiated. The Gunaikurnai native title claim had initially been subject to dispute in relation to who the right claimant group for the country was. Substantial mediation efforts between 1999 and 2007 were unsuccessful in resolving the dispute, which resulted in an early evidence hearing being held to allow both groups to put forward evidence regarding group composition and membership. The hearing was unsuccessful in finding a resolution, and led to a trial process that eventually dismissed the counter-claim in May 2010. These events were key in bringing representatives of the Victorian Government to a negotiation process. During the time when the parties were preparing for trial, the Gunaikurnai were involved in negotiations with the Victorian Government regarding a potential settlement outcome. At the early evidence hearing, the state’s counsel stated that they considered the Gunaikurnai claim to be the more inclusive and thus the most suitable claimant group with which to enter into negotiations.

An in-principle agreement was notified to the Federal Court in May 2010. The Gunaikurnai had set a deadline for the finalisation of a settlement, prior to the state election in November 2010. The TOS Act

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21 Ibid.
22 Ibid., p. 1.
23 Traditional Owner Settlement Bill 2010 (Vic).
was simultaneously being developed, and factored informally into the negotiations in terms of potential inclusions within the final settlement.\(^\text{27}\)

The second settlement was the Dja Dja Wurrung settlement, which was executed by the parties at a ceremony in Bendigo on 28 March 2013.\(^\text{28}\) This agreement represents the first comprehensive settlement in that it includes all possible agreements contemplated by the Act (these agreements are discussed in more detail below). It also finalises four native title claims lodged in the Federal Court between 1998 and 2000.\(^\text{29}\) At the time of publication, the settlement package was undergoing its five-year initial outcomes review, required under section 11 of the agreement.\(^\text{30}\)

As mentioned, at the time of publication there were a number of TOS Act recognition and settlement agreements underway, at various stages of the settlement process.\(^\text{31}\)

**Settlement process**

The TOS Act facilitates agreements between a Traditional Owner group and the Crown (the Victorian Government). The overarching agreement is called a Recognition and Settlement Agreement (RSA).

The community who has decided to enter into negotiations may comprise many family groups or clans, consisting of hundreds of people in total. In dealing with the Victorian Government, the community is represented by a Traditional Owner Group Entity (TOGE), which must be a corporation, a company or a body corporate.\(^\text{32}\) For example, the TOGE of the Gunaikurnai people is the Gunaikurnai Land and Waters Aboriginal Corporation, which represents more than 600 Traditional Owners.\(^\text{33}\)

Again, agreements can only be entered into in relation to public land.\(^\text{34}\) There are a variety of rights that can be recognised under RSAs. Some of the rights to land include accessing, enjoying, using, taking resources, and conducting cultural and spiritual activities.\(^\text{35}\) Notably, there is no specific reference in the TOS Act to rights to water or water management. Nor is there specific reference to exclusive rights on the land, or rights to management of resources on the land—though management rights are able to be negotiated, as discussed below.

In agreeing to a settlement, Traditional Owner groups must agree to not make any future applications for a determination of native title, or for compensation.

There are two stages of the negotiation of an RSA (see Figure 3):

- **Stage one**—*threshold negotiations*; and
- **Stage two**—*settlement negotiations*.

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\(^{27}\) K. O’Bryan (2011) op. cit., p. 9.


\(^{29}\) ibid., p. 7.

\(^{30}\) Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic) between Dja Dja Wurrung Clans Aboriginal Corporation and The State of Victoria (28 March 2013), s 11.2.

\(^{31}\) The groups in negotiations at the time of publication were Taungurung; Wotjobaluk, Jadawadjali, Wergaia and Jupagulk Peoples (the Wotjobaluk Peoples); Eastern Maar; and Gunditjmarra. The First Peoples of the Millewa-Mallee were at the threshold evaluation stage of the settlement process.

\(^{32}\) *Traditional Owner Settlement Act 2010* (Vic), s 3 (definition of ‘traditional owner group entity’).

\(^{33}\) See the Gunaikurnai Land and Waters Aboriginal Corporation website.

\(^{34}\) *Traditional Owner Settlement Act 2010* (Vic), s 4.

\(^{35}\) *Traditional Owner Settlement Act 2010* (Vic), s 9(1).
Figure 3. Stages of a TOS Act negotiation process

Throughout both stages of the process there are a number of key actors. The Department of Justice and Regulation leads negotiations on behalf of the Victorian Government. In practice, this responsibility is exercised by its Native Title Unit. In order to negotiate specific outcomes, the Native Title Unit works with other government departments which can include the Department of Environment, Land, Water and Planning; Department of Premier and Cabinet; Department of Treasury and Finance; and Department of Economic Development, Transport, Jobs and Resources. These other departments are usually not present during negotiations.

Preparing and lodging a claim is very resource intensive. The native title service provider offers a service to assist claimants in both stages, if required. In Victoria, this is the First Nations Legal and Research Services (FNLRS). Before providing assistance to groups, FNLRS undertakes an assessment of the potential strength of a claim under the TOS Act. Once satisfied, FNLRS can provide assistance to a Traditional Owner group in meeting the requirements of both stages of the settlement process. This could include research around historical and anthropological grounding for claims, assistance in preparing threshold statements, legal support to facilitate the governance and incorporation of a TOGE and assistance in the development of a strategic plan that underpins the group’s negotiation priorities. When first meeting with Traditional Owner groups, FNLRS can discuss the outcomes and possibilities of both the NTA and TOS Act.

Threshold negotiations

In order to begin negotiating an RSA, the state must be satisfied that the Traditional Owner group seeking to enter negotiations is the ‘right’ group for the land being claimed. While traditionally owned lands often do not have stark territorial boundaries, this process of threshold negotiations ensures that settlements do not proceed unless other Traditional Owners have the chance to comment on the validity of the claim to the land. Given its importance, the threshold negotiations process can be extensive.

The TOS Act does not specify the details of the application process for Traditional Owner groups seeking a settlement. Nor does it establish a legal test for determining the Traditional Owners of a particular geographic area. The process for meeting certain thresholds (in terms of proving connection to a particular area, and proving readiness to begin negotiation) has therefore been left to government departmental policy. The current policy has largely been developed by the Native Title Unit, with input from other stakeholders. This policy is outlined in the Threshold Guidelines for Victorian traditional owner groups seeking a settlement under the Traditional Owner Settlement Act 2010 (the Threshold Guidelines), which are aimed at providing assistance to Traditional Owner groups seeking to enter into a TOS Act settlement. In August 2017, the Attorney-General announced a review of the threshold negotiations process. The review aims to understand how this process is understood, how it has been used, its results and failures, and whether it is achieving its intended outcomes. At the time of publication, no further information regarding the progress of this review was available.

36 Previously Native Title Services Victoria. See, First Nations Legal and Research Services.
39 These stakeholders include the FNLRS, Victorian Traditional Owner Land Justice Group, Victorian Aboriginal Heritage Council, Right People for Country Project Manager and the Office of Aboriginal Affairs Victoria.
40 Department of Justice and Regulation (2013) op. cit.
In order to initiate the settlement process, a Traditional Owner group must prepare a threshold statement which is provided to the Native Title Unit for assessment. A threshold statement contains two parts:

- **Part A**—‘right’ traditional owner group for country; and
- **Part B**—readiness to negotiate.

Generally, **Part A** is about determining that the claimant group is the right group for country. This requires the Traditional Owner group to prove a traditional and cultural connection to the land being claimed, as well as details on its geographic boundaries, members and decision-making procedures. The TOS Act threshold of proving connection to land requires a similar proof of linkage to the original owners of the land as that of the NTA. This has the potential to make a successful claim difficult for Traditional Owners inhabiting heavily settled areas. At the time of writing, no TOS Act settlement has been negotiated on country in metropolitan areas.

Once Part A has been evaluated to meet the necessary requirements, the ‘threshold notification’ stage begins. The Native Title Unit gives notice to Traditional Owner communities in Victoria that a threshold statement has been lodged. The communities then have the opportunity to respond to the claim.

Where boundary issues arise, Aboriginal Victoria’s ‘Right People for Country’ program can assist Traditional Owner groups in reaching agreement on the extent of country, as well as on group composition and membership. This program is open to groups seeking outcomes under the NTA, TOS Act and Aboriginal Heritage Act. In 2012, the Dja Dja Wurrung, Wadawurrung and Taungurung peoples were supported by the program to negotiate boundary agreements by reviewing research and maps and then ‘walking country’.

**Part B** aims to ensure that the Traditional Owner group is ready to negotiate a settlement package. This requires that the TOGE has been established, and that it has the capacity and authority to negotiate on behalf of the community. It also requires that the Traditional Owner group has a strategic plan in place, which articulates the cultural vision of the group. The strategic plan can include goals outside of the TOS Act settlement process, including potential agreements with other stakeholders, such as government at the local or federal level. However, the Threshold Guidelines set out that the framework for what is on offer is established by both the TOS Act and the precedent of what has been granted under other settlements, and that any aspirations ‘need to be informed by this context, and by robust planning, rather than being an abstract wish list’.

While not a formal part of the process, some strategic principles might also be articulated in a ‘country plan’ or ‘whole of country plan’. Country plans reflect Traditional Owners’ vision and aspirations for the future, and are becoming increasingly important in feeding into settlement processes. However,

43 Ibid., p. 233.
46 ‘Walking country’ involves representatives from different Traditional Owner groups walking together through bordering areas to mutually agree on boundaries. See, Aboriginal Victoria (date unknown) *Walking Country to reach a boundary agreement*, Melbourne, Victorian Government, p. 1.
47 Department of Justice and Regulation (2013) op. cit., p. 55.
the Traditional Owner groups the author spoke with reported a disconnect between the views of Traditional Owners and those of the Victorian Government regarding the role and importance of Country Plans.49 This is discussed further below.

After the threshold negotiations are complete, stage two of the process can begin between the state and the Traditional Owner group.

**Settlement negotiations**

The in-depth process of settlement negotiations is set out in Figure 4 below. During this process, Traditional Owner groups are encouraged to raise any potential outcome they would like to negotiate through the TOS Act. However, there are a number of factors that prevent desired outcomes forming part of an eventual settlement. These barriers can include government funding restraints, changes in departmental policy, and a complex regulatory environment. With regard to the latter, Victorian Government negotiators work through relevant legislation in detail in order to achieve the necessary legislative exemptions.

**Figure 4. Elements of the negotiation process**

![Settlement negotiations diagram](Image)


**Agreements within the recognition and settlement agreement**

The overarching RSA serves to recognise the Traditional Owner group and their rights to the public land which is subject to the settlement.50 The RSA may include other agreements that provide for specific outcomes. There are four such agreements:

- funding agreement;
- land agreement;
- land use activity agreement (LUAA); and
- natural resource agreement (NRA).

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49 Author discussion with members of Dja Dja Wurrung Clans Aboriginal Corporation and the Gunaikurnai Land and Waters Aboriginal Corporation, July 2018.

50 *Traditional Owner Settlement Act 2010* (Vic), s 9.
By way of example, the Dja Dja Wurrung RSA includes a recognition statement which acknowledges historical injustices carried out by the state, and recognises Dja Dja Wurrung as the Traditional Owners of their country. The RSA also includes other elements negotiated outside of the TOS Act, but which the Victorian Government nevertheless agreed to, such as rules around acknowledgments and welcomes to country and a local government engagement strategy. It then sets out the other agreements contained within the RSA, as listed above.

The four optional agreements within an RSA are briefly explained below, and include examples of how they have been incorporated in the two existing RSAs. This section provides context for the discussion of Traditional Owner experiences with the TOS Act settlement process.

**Funding agreement**

The purpose of a funding agreement is to provide financial assistance to a TOGE to give effect to the RSA. Funding agreements are intended to provide a mechanism for supporting the ongoing sustainability of TOGEs.

Within a funding agreement, funds may be separated and granted over a certain timeframe. The Gunaikurnai settlement, for example, included $12 million in funding arrangements to support the initial operations of the TOGE and for other purposes. Ten million dollars of this was placed in trust, with the interest intended to fund future operations of the corporation. Within the Dja Dja Wurrung settlement, $8.25 million was allocated to give effect to the agreement. This included $5 million to be held in trust; $3.25 million to be granted to the corporation over three years for ‘economic development purposes’, and an additional $900,000 via a Grant Funding Agreement to support the corporation’s ‘corporate capacity’ and to employ staff. While these amounts may sound sizeable, the financial costs of setting up a TOGE, employing staff, complying with regulatory requirements, implementing the settlement and meeting community expectations can be extensive. The Traditional Owner corporations that we spoke with reported a number of issues regarding funding, in terms of both the initial resources that were provided to the corporations and the funding aimed at assisting their ongoing sustainability. This is discussed further below.

**Land agreement**

A land agreement can provide grants of land either in fee simple, or in ‘Aboriginal title’ (a new form of title established under the TOS Act), to any part of the land under negotiation.

A grant of Aboriginal title prevents the Traditional Owner group from selling, transferring, disposing of, encumbering, and leasing or licencing the land. It is made on the condition that the TOGE has agreed to contract with the state for a right to occupy, use, control and manage the land. Similarly, the state is unable to sell, transfer, dispose of, or deal with any other interest in the land, and can only grant a lease or licence in limited circumstances. These conditions preventing transfer of rights in the land must be recorded by the Registrar as a caveat on the title.

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52 Traditional Owner Settlement Act 2010 (Vic), s 78(1).
54 Recognition and Settlement Agreement under the Traditional Owner Settlement Act 2010 (Vic) between Dja Dja Wurrung Clans Aboriginal Corporation and The State of Victoria (28 March 2013), s 5.1.
55 Fee simple is a type of land ownership that grants the greatest rights, without restrictions on the transfer of ownership. It is also known as freehold title. Most privately owned land in Australia is held in fee simple.
56 Traditional Owner Settlement Act 2010 (Vic), s 12(1)–(3).
57 Traditional Owner Settlement Act 2010 (Vic), s 19(2)[a]–(b).
58 Traditional Owner Settlement Act 2010 (Vic), ss 19(2)[c], 20.
59 Traditional Owner Settlement Act 2010 (Vic), ss 24, 25.
For the transfer of land in Aboriginal title, a Traditional Owner group must enter into a Traditional Owner Land Management Agreement (TOLMA) under the *Conservation, Forests and Lands Act 1987* (Vic). TOLMAs facilitate the joint management of an agreed area by a board, and are discussed further in the ‘joint management’ section below.

Both the Gunaikurnai and Dja Dja Wurrung settlements included grants of land. The Gunaikurnai settlement included the transfer of 10 national parks and reserves in Aboriginal title. The Dja Dja Wurrung settlement included the transfer of six parks and reserves in Aboriginal title, to be managed by the Dja Dja Wurrung-majority Dhelkunya Dja Land Management Board, as well as the grant of two freehold properties.

**Land use activity agreement**

An LUAA provides certain governance rights to Traditional Owners over activities that take place on public land within their settlement. As an LUAA gives a Traditional Owner group some control over what activities take place on their country, and how they occur, it is arguably the most significant agreement available under the TOS Act.

The LUAA regime is intended to be a simplified equivalent of the ‘future acts’ regime contained in the NTA (described further in Chapter 4). At the time of publication, there is only one LUAA on the Victorian Government’s Register of Land Use Activity Agreements, relating to the Dja Dja Wurrung settlement.

An LUAA must list the specific land use activities under the agreement, which are separated into different categories. Each category of activity has rules around the way activities are able to proceed.

**Routine activities** are seen to have little or no impact on the exercise of Traditional Owner rights. An LUAA cannot specify any requirements in relation to the performance of routine activities. Routine activities in the Dja Dja Wurrung LUAA, by way of example, include the ‘erection and maintenance of fences, gates and signage’.

**Advisory activities** are seen to have only limited impact on the exercise of Traditional Owner rights. In order to proceed with an advisory activity, the TOGE must be notified of the activity before it proceeds. Most land use activities fall within this category. For example, under the Dja Dja Wurrung LUAA, advisory activities include public land authorisation for a grazing or stock licence, or commercial leases for less than 10 years.
Negotiation or agreement activities are seen to have a significant impact on the exercise of Traditional Owner rights, and are therefore subject to a negotiation process before they proceed. Under the Dja Dja Wurrung LUAA, negotiation activities include major public works such as the construction of new roads, railways or infrastructure; and agreement activities include the grant of land in fee simple (which would effectively extinguish native title). The person seeking to undertake the negotiation or agreement activity must notify and negotiate in good faith with the TOGE in order to do the activity. The parties must also consider whether any conditions are to be imposed on the activity, including whether any ‘community benefits’ are to be provided to the TOGE.

The activity can go ahead when the agreement is reached and the decision maker is notified of the agreement. If no agreement is reached, then matters can be referred to the Victorian Civil and Administrative Tribunal for determination of forward action, including whether the activity will proceed and under what conditions. However, an agreement activity cannot be referred.

Natural resource agreement
The final agreement is the NRA. The NRA can be made in order to enable members of a Traditional Owner group to access, occupy and use certain public land in the agreement, as well as the natural resources on that land. Natural resources, as defined within the Act, include land, vegetation, animals, water, stones and earth; but do not include gold, silver, metals or minerals.

The negotiation of an NRA can allow a Traditional Owner group to conduct certain activities on their traditional lands, such as hunting, fishing, camping, or the extraction of flora and forest produce, without having to seek prior permission, obtain permits or pay fees. However, limitations may be placed on these activities and where they can be undertaken. Specific activities are negotiated for inclusion within the NRA.

The access and use can be for traditional purposes and for limited commercial purposes. In terms of commercial purposes, the only permitted natural resources that can be used are vegetation (other than timber), and stones, earth and similar materials. Again, there is no capacity for commercial taking of water or for commercial water management under an NRA. This is important in considering how Traditional Owners are able to use country for economic development.

At the time of the Dja Dja Wurrung settlement, the TOS Act provided for ‘Authorisation Orders’, which have since been repealed and substituted. Authorisation Orders were made in conjunction with an NRA, and provided for similar rights to the current scheme. For the Dja Dja Wurrung settlement, the activities are hunting, taking flora and fauna, collecting forest produce, camping in certain areas, and taking and using water from natural sources.

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71 Department of Justice (2012) op. cit., p. 4.
72 Land Use Activity Agreement between Dja Dja Wurrung Clans Aboriginal Corporation and the State of Victoria (28 March 2013), Schedule 3: Land Use Activities.
73 Traditional Owner Settlement Act 2010 (Vic), s 49(1).
74 A community benefit is ‘an economic, cultural or social benefit provided to a traditional owner group entity’. See, Traditional Owner Settlement Act 2010 (Vic), ss 40(1), 40(4), 40A.
75 Traditional Owner Settlement Act 2010 (Vic), s 49(1).
76 Traditional Owner Settlement Act 2010 (Vic), ss 54-5.
77 Traditional Owner Settlement Act 2010 (Vic), s 40(4).
78 Traditional Owner Settlement Act 2010 (Vic), s 79: definition of ‘natural resources’.
79 Traditional Owner Settlement Act 2010 (Vic), s 82.
80 Traditional Owner Settlement Act 2010 (Vic), s 84(b).
81 Traditional Owner Settlement Act 2010 (Vic), s 84; and s 79: definition of ‘natural resources’, subs (b)(i) & (iv).
82 See, as passed, Traditional Owner Settlement Act 2010 (Vic), pt 6 div 3.
3. Traditional Owner experiences

This section aims to highlight the experiences of Victorian Traditional Owners with the TOS Act settlement process. In conducting research for this paper, members of the Parliamentary Library’s Research and Inquiries team met with representatives of the two Traditional Owner corporations that have finalised a settlement through the TOS Act: Gunaikurnai Land and Waters Aboriginal Corporation and Dja Dja Wurrung Clans Aboriginal Corporation. The below discussion addresses a selection of the experiences shared during these meetings. It does not aim to be representative of the views or experiences of all members of the corporations’ Traditional Owner communities.

These two corporations were contacted as they represent the only groups to have finalised a settlement with the Victorian Government under the TOS Act. They were therefore able to discuss their experiences both during the process and the subsequent outcomes following settlement.

At the time of publication, a number of Traditional Owner groups were negotiating a TOS Act settlement: Taungurung; Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples (the Wotjobaluk Peoples); Eastern Maar; and Gunditjmara. In addition, the First Peoples of the Millewa-Mallee had entered the threshold evaluation stage of the TOS Act settlement process. These groups were not contacted in order to respect the confidentiality of the negotiations process.

**TOS Act settlements**

The representatives that we met with spoke about the aspirations of their communities. They emphasised what their communities saw as most important: addressing the dispossession created by colonisation, and the devastating and ongoing effects that this has had on their people. In this context, the vision for their communities centred around self-determination, communal healing and the reinvigoration of cultural practices, customs and places. In working with the Victorian Government to achieve these critical outcomes, they emphasised the importance of being equal actors, being fully integrated in all aspects of the negotiation and implementation process, and being able to interact with the process in their own way, not in the way stipulated by the state.

In this respect, there are broad views on the efficacy of the Traditional Owner settlement scheme as a whole. Representatives from both corporations emphasised that the legislation and the existing framework have good potential for providing recognition and practical outcomes to Traditional Owner communities. The official recognition by the state of past injustices and a group’s essential connection to country, as an existing element of the RSA, is one aspect that was emphasised as critically important to communities.

However, both groups communicated that the Victorian Government and Traditional Owner communities seeking to negotiate a settlement continue to have differing ideas of what a settlement agreement would mean, particularly in terms of cultural healing and practical outcomes. Following the lengthy native title processes that many community members had experienced prior to the TOS Act, there were high expectations that the TOS Act would resolve existing grievances with the NTA scheme. While the representatives highlighted that the TOS Act outcomes were considered to be better than those available solely under the NTA, they reported a general sense of disappointment within their communities regarding the process and what had been gained in the end. It was emphasised that the cost to the community could not be quantified—the hopes of many community members had rested with this process, and some who had fought for recognition for many years passed away before a final settlement occurred. The representatives considered that this did not seem to be understood by some actors within government.

One group emphasised that broader communal healing was needed in order to mitigate this disappointment and the continuing effects of dispossession on their community. They noted that while communities are funded to come together to discuss matters instrumental to the TOS Act, they are
lacking opportunities to come together to heal as a group. Settlement areas can be extensive, and one Traditional Owner group (for the purposes of the TOS Act, as a number of groups may come together to form a settlement) may be made up of many clans and family groups. Due to distance, the breadth of the community and a variety of other factors, it can be very difficult to get a whole community together on country. This group considered that there could be better understanding and support from both local and state government in this respect.

Regarding particular elements of the TOS Act settlement framework, one group discussed the future possibilities of the LUAA scheme. They noted that it could be improved by reclassifying certain activities in order to reduce the resource strain on Traditional Owner corporations and communities. One suggestion was to remove routine activities altogether, and to reclassify some advisory activities into negotiation activities. This would mean that a Traditional Owner group would not have to continuously monitor very low impact activities, particularly ones that occur frequently across a large geographic area (such as community club events). It was also suggested that the LUAA’s community benefits formula could be revised to assist corporations to better fulfil their obligations—particularly in light of the 2017 Timber Creek decision,\(^4\) which related to the equation of compensation for impairment or extinguishment of native title (discussed further below).

Joint management was also raised by both groups as having good potential for positive community outcomes, particularly in terms of encouraging public engagement, recognition, cultural understanding and economic development. However, it was acknowledged that there were still ways that this system could be improved to provide greater management rights to Traditional Owners.

There are also community frustrations over the limited ability to secure broader water rights and entitlements than those that are already available to members of the public.

Both groups noted that the number and complexity of overlapping regulatory regimes in relation to Traditional Owner rights results in broad confusion amongst government, community and the general public. This, in turn, affects how different groups interact with Traditional Owners, and how the Traditional Owner community is able to practically use the rights provided for in their settlements. For example, businesses planning activities on traditionally owned land may be unaware of the relationship between the TOS Act’s LUAA regime, the NTA’s future acts regime, and cultural heritage permits and plans under the Aboriginal Heritage Act.

**Negotiation process**

In terms of the negotiation process, both groups were critical of a lack of transparency around what was ‘on the table’. They acknowledged that as theirs were only the first two settlements to occur, settlement processes may become more streamlined and more transparent regarding the range of available outcomes as further agreements are negotiated. The Federation of Victorian Traditional Owner Corporations, for example, is instrumental in organising discussions between groups that have achieved a settlement and those that are yet to begin negotiations, in order to facilitate awareness of what can be expected once groups reach the negotiation table. However, this kind of open discussion is not facilitated by government actors.

One group noted the stress faced by staff of Traditional Owner corporations in bearing the expectations of their whole communities while negotiating with the Victorian Government. They also noted the difficulty in helping their community understand the complexity of the process, and effectively communicating progress at each stage of negotiations.

\(^4\) *Northern Territory of Australia v Griffiths* [2017] FCAFC 106. At the time of publication, this matter is being heard on appeal by the High Court.
Further, the disconnect between the state and Traditional Owner groups regarding aims and expectations was again emphasised by both groups. The expectations of community members largely related to addressing dispossession, providing for future community cohesion and the reinvigoration of culture. This can partly be shown in the Country Plans. Country Plans, while not an official part of the settlement process, are seen to be of central importance to Traditional Owner groups in setting out their aspirations, and are broadly seen as the starting point for all outcomes to flow from. However, in both statute and policy, the Country Plans remain largely a document for the communities, and are not incorporated into formal TOS Act processes.

Resources
TOS Act agreements are fundamentally unique, depending on what each specific Traditional Owner group needs to achieve their community’s aspirations for country. The resources required by each group to implement the agreements are, therefore, also varied. Regardless of these individual requirements, both groups we spoke with emphasised that there were issues in terms of the initial resources provided to Traditional Owner corporations, and in the funding provided to assist with their ongoing sustainability.

Regarding initial resources, both groups emphasised that there were high expectations regarding the corporation’s ability to get up and running within a very short space of time, from both government and their own community. This created a significant resource burden in carrying out requisite regulatory compliance and setting up strong fiscal processes, while also being accountable to and caring for their broader community. They noted that it took time to set up the minimum standards to be able to deal with the state and that further assistance would help with this process. Such assistance could include investment in the early stages of negotiations to assist corporations to establish themselves. They also noted an emphasis from government on supporting ‘capacity-building’, without any discussion with the corporation of the circumstances of each group, and their particular strengths and weaknesses. They suggested that an individualised discussion should be built into the negotiation process, or left to the corporation to ascertain where additional capacity is required.

In terms of ongoing sustainability, both groups stated that there were serious funding issues that placed huge pressure on the corporations, and that the funding provided in settlement agreements had been minimal. While additional ad hoc funding has been provided in certain circumstances, they noted that there were significant difficulties in ensuring the corporation would continue to be able to sustain itself year to year. Both groups have established active and financially successful commercial arms: Gunaikurnai Enterprise and Dja Dja Wurrung Enterprises (Djandak). They suggested that both local and state government could be more proactively engaged with these enterprises through government procurement processes. This could assist each corporation’s financial strength and their own internal capacity-building processes. One group also suggested that a fee-for-service approach should be adopted for future meetings with government departments and agencies, due to the pressure placed on the small numbers of corporation staff.

One further issue raised related to resourcing communications between the Traditional Owner corporation and their broader community. The representatives we spoke with highlighted the diverse views, needs and expectations of their community members, and that communication between the corporation and the Traditional Owner community was a challenge that the current process does not address. They emphasised that setting up strong communications networks takes time, must be properly resourced, and cannot be rushed.

Relationships with government
One of the common themes articulated by the representatives that we spoke with was the lack of a holistic whole-of-government understanding about the TOS Act, from negotiation to implementation. They stated that this was particularly the case for agencies that may not have been directly involved
in negotiations, but interact with Traditional Owner groups on a daily basis and have responsibilities in implementing or working with settlement agreements. They further noted that there was both inter- and intra-departmental difficulties, and that they may receive differing responses from staff within the same area of an agency. A lack of cultural awareness was also reported. The representatives highlighted that training across all levels of government in both the mechanisms of the TOS Act, as well as in cultural awareness, was very important.

One of the positive messages that was communicated was the importance of Traditional Owner groups being able to contribute to policy development in conjunction with government departments, outside of the relationships stipulated by the TOS Act and other statutory frameworks. One example of this is Traditional Owner input into the Water for Victoria plan.

In relation to local government, representatives from both groups highlighted significant issues in terms of a general lack of understanding and engagement with the TOS Act settlement processes. Local government relationships can be particularly complex due to the number of local government areas (LGAs) within settlement areas—for example, Dja Dja Wurrung have 11 LGAs to work with. In rural and regional areas, these relationships can be particularly important, in terms of support for employment, business and tourism. Both groups highlighted that it is very important to find practical ways to engage local government from the beginning of the negotiation process, in order to establish strong relationships and understanding of TOS Act settlements. It was suggested that frameworks for coordinated bodies could be set up so that corporations do not have to initiate relationships with each individual LGA. Further, there could be stronger emphasis on inclusion of Traditional Owner enterprises in local procurement processes.

Treaty

Both groups stated that their communities had high hopes in the future treaty process to meet the gaps in what the TOS Act has been able to provide. They noted that it will be important to consider how existing Traditional Owner corporations will be able to be involved with the treaty process, and how treaty will link to the existing settlement agreements.
4. Native title

While the TOS Act is seen as the most comprehensive and expeditious means of settling native title claims in Victoria, the NTA is still an important mechanism with which Traditional Owner groups can have their rights recognised. At the time of publication, there were four applications for geographical areas within Victoria registered on the National Native Title Tribunal’s Register of Native Title Claims.85

As discussed, the NTA was enacted to codify the common law concept of native title.86 The modern native title process is the result of extensive consultation with Indigenous leaders and organisations, state and territory governments and mining and pastoral industry stakeholders.87 Since its introduction, the NTA has been amended many times.

The NTA differs from the TOS Act in that the NTA recognises existing native title, as opposed to granting new title or a ‘new’ set of rights. The NTA process also differs in that it is mostly rights-based. This is in contrast to the broader outcomes available to Traditional Owner groups under the TOS Act.

How is native title determined?

Native title is determined through a decision made by the Federal Court or the High Court. The National Native Title Tribunal (NNTT), established under the NTA, aids the determination process.

Native title can either be litigated or determined by consent (where an agreement is reached following mediation between parties). Following the litigated Yorta Yorta claim, all native title determinations in Victoria have been determined by consent. While consent is a non-adversarial process, it is still hugely time intensive. Most claims take approximately 10 years from lodgement to determination.

For the Traditional Owner groups we spoke with, a native title determination was seen as being a meaningful legal, political and symbolic process.88 An NTA determination provides recognition by the Crown that country was managed by the Traditional Owner group prior to colonisation, and that some of those rights to custodianship continue today.

Application

An application for a native title determination is made by a claimant or a non-claimant by filing it in the Federal Court. A claimant application is one made by a group of people who declare that they hold specific rights and interests in an area on the basis of their traditional laws or customs. A non-claimant application is one made by a person holding a ‘non-native title interest’ in an area, such as the Commonwealth or a state government, or a person or organisation with a lease or license on Crown

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85 See National Native Title Tribunal (date unknown) ‘Register of Native Title Claims’, NNTT website, accessed 19 September 2018.
86 Native Title Act 1993 (Cth), s 223 defines native title as ‘the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
(c) the rights and interests are recognised by the common law of Australia.’
87 National Native Title Tribunal (2017) op. cit., p. 2.
88 For further discussion, see Chapter 3: Traditional Owner experiences.
land in the area.\textsuperscript{89} Non-claimant applications cannot be made in areas where the existence of native title has been determined.

Applications can also be made for a revised determination, in order to revoke or vary an approved native title determination. Alternatively, an application can be made for compensation. These are made by a claim group who are seeking compensation for acts that have ‘extinguished or impaired the native title rights and interests of the group’.\textsuperscript{90} The 2017 Timber Creek decision\textsuperscript{91} was the first case to consider how to calculate the requisite amount of compensation (discussed further below).

Claimants can obtain assistance from the native title service provider in their area. As discussed, in Victoria, this is the FNLRS. Assistance can also be provided by the Native Title Registrar or NNTT staff.

Claims undergo a three month public notification period, in order to ensure that any persons with an interest in the claim area are given opportunity to join as parties to the claim.\textsuperscript{92}

\textbf{Registration test}

After an application has been filed, it must meet standards imposed by the NTA and which are tested by the Native Title Registrar.\textsuperscript{93} The goal of the test is to ensure that the correct claimant is applying for the determination on their own country, and that the claim is viable on that basis. Some of the key conditions include:

- a factual basis for the claim;
- a physical connection with the area;
- that the native title being claimed has not been extinguished; and
- that there are no overlapping claim groups.\textsuperscript{94}

Once these conditions have been met, applications are then registered on the Register of Native Title Claims, which is maintained by the NNTT.\textsuperscript{95} If conditions are not met, applicants can apply for review in the Federal Court or for reconsideration by the NNTT.

\textbf{Future acts}

Once registered, applicants have certain procedural rights and benefits. These include rights in relation to future acts, which are proposed future developments in the relevant area that affect native title rights and interests. Depending on the act, procedural rights could include the right to comment, be consulted, object or negotiate. The right to negotiate is generally applied to significant activities such as mining, or gas and petroleum exploration or extraction.\textsuperscript{96} In order for a future act that affects native title to be valid, certain prescribed conditions must be met. This includes the registration of an Indigenous Land Use Agreement (ILUA), which is a voluntary and legally binding document between native title holders and other groups about the access, use and management of land or waters.

\textsuperscript{89} National Native Title Tribunal (date unknown) ‘Types of native title claims’, NNTT website, accessed 19 September 2018.
\textsuperscript{90} ibid.
\textsuperscript{91} Northern Territory of Australia v Griffiths [2017] FCAFC 106. At the time of publication, this matter is being heard on appeal by the High Court.
\textsuperscript{92} National Native Title Tribunal (date unknown) ‘Notification’, NNTT website, accessed 19 September 2018.
\textsuperscript{93} There are 12 conditions, see: Native Title Act 1993 (Cth), s 190B–C.
\textsuperscript{94} See, Native Title Act 1993 (Cth), s 190B–C.
\textsuperscript{95} National Native Title Tribunal (date unknown) ‘National Native Title Register’, NNTT website, accessed 19 September 2018.
\textsuperscript{96} Australian Institute of Aboriginal and Torres Strait Islander Studies (2016) Native title information handbook: National, Canberra, AIATSIS, p. 28.
The rights of Traditional Owner groups available under the future acts regime are different to those available under the TOS Act’s LUAA regime. For example, it is possible to include a right to veto for certain activities under a LUAA, which is not available under the NTA. However, the breadth of activities on which Traditional Owner groups may be able to advise or negotiate under an LUAA, can place a high administrative burden on the relevant TOGE.

Determination
In making a determination on a registered application, the court decides whether or not native title exists in any part of the claim area. It must further decide who holds the native title and rights; the nature and extent of the rights and interests; the relationship between the native title and any other rights and interests; and whether the native title is exclusive or non-exclusive.97

Following a successful determination, native title groups must nominate a prescribed body corporate to hold in trust, or manage as an agent, their native title.98 The prescribed body corporate is required to be registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth), and added to the National Native Title Register. They are then referred to as a registered native title body corporate.

Federal Court determinations of native title can be appealed first to the Full Court of the Federal Court, and then to the High Court.

Native title determinations in Victoria
Traditional Owners can choose to pursue a native title determination instead of a TOS Act settlement. Groups can also negotiate a TOS Act settlement following a positive determination of native title in order to gain the full breadth of outcomes available. However, groups cannot go about this in the opposite way: once a TOS Act settlement has been finalised, no further applications for a determination of native title or for compensation can be made.

Since the TOS Act was passed, there have been two positive determinations of native title in Victoria, in 2010 and 2011. Of these determinations, Gunaikurnai has finalised a TOS Act settlement, and Eastern Maar were in the process of negotiating an RSA at the time of publication.99 Gunditjmarra and the Wimmera groups have both negotiated separate native title settlement agreements with the Victorian Government, as their determinations were made prior to the TOS Act.100 See Figure 2, in Chapter 1 of this paper, for a timeline of Victorian native title determinations in conjunction with settlement agreements.

98 Native Title Act 1993 (Cth), ss 55–7.
5. Other mechanisms

Other mechanisms for recognising rights to land and water in Victoria include approaches aimed at protecting cultural heritage, enabling joint management of natural resources, and facilitating Traditional Owner participation in the development of policy.

Cultural heritage

The Aboriginal Heritage Act, together with the Aboriginal Heritage Regulations 2018,101 established a regime for the protection and management of Aboriginal cultural heritage and intangible heritage in Victoria. The purposes of the Aboriginal Heritage Act include promotion of respect for Aboriginal cultural heritage, and:

... [the strengthening of] the ongoing right to maintain the distinctive spiritual, cultural, material and economic relationship of traditional owners with the land and waters and other resources with which they have a connection under traditional laws and customs.102

Equal weight is given in the Act to land and waters.103

Under this scheme, groups can register to be a Registered Aboriginal Party (RAP), which is classified as an organisation that can make decisions on the protection of Aboriginal cultural heritage in an identified area.104

During the threshold negotiations stage of a TOS Act settlement process, the Native Title Unit encourages groups to consider seeking appointment as a RAP, if they have not yet done so. They consider that the Aboriginal Heritage Act’s requirement to establish a corporation will be beneficial in the evaluation of a Part B threshold statement and later negotiations.105 This is because the corporation will have established a number of administrative and management functions, such as the preparation of operational and business plans, prior to commencing the TOS Act settlement process. Further, a RAP must be considered by the Aboriginal Heritage Council to be representative of their Traditional Owner community, and groups must provide information on their relationship to the land and how they intend to consider the interests of all Indigenous peoples in the area.106 This can assist TOS Act processes of proving connection to country.

The Aboriginal Heritage Act further interacts with the NTA and TOS Act in relation to the ways that RAPs are registered. If a party applying to become a RAP has a TOS Act settlement or native title determination, the Aboriginal Heritage Council must approve the group as the RAP for that area. Once granted, no further group can then be registered for the same area (unless they are a registered native title holder for that area). This means that a RAP without a native title determination or TOS Act settlement could have their RAP status revoked, if another group that does have a determination or settlement for that area later applies to be a RAP.107

The Heritage Council’s consideration of who the right group for the particular country is, separate to the consideration undertaken as part of NTA or TOS Act settlement processes, means that there is

101 Aboriginal Heritage Regulations 2018. These regulations replaced the Aboriginal Heritage Regulations 2007.
102 Aboriginal Heritage Act 2006, s 1.
103 Aboriginal Heritage Act 2006, s 5.
104 For further detail on specific responsibilities of a RAP, see, Aboriginal Heritage Act 2006, s 148.
105 Department of Justice and Regulation (2013) op. cit., p. 49.
potential for overlap in determinations. For example, the Heritage Council could potentially make one decision regarding the correct group for a particular area, which could later be revoked during a TOS Act settlement process. In these circumstances the Right People for Country program can assist; however, the regulatory overlap adds confusion to the process.

Joint management

Joint management refers to a formal partnership between Traditional Owner groups and the Victorian Government which promotes knowledge sharing around the management of national parks or other protected areas. It was largely introduced in Victoria with the passage of the Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009 (Vic). Among the changes introduced by this legislation were amendments to the Conservation, Forests and Lands Act 1987 (Vic) to establish Traditional Owner Land Management Agreements (TOLMAs). TOLMAs facilitate the joint management of an agreed area by a Traditional Owner Land Management Board.

A TOLMA can be included in a TOS Act settlement in conjunction with a grant of Aboriginal title. In these circumstances, the Traditional Owner Land Management Board can make a joint management plan that provides a basis for how the coordination of joint management will take place. A joint management plan is intended to facilitate Traditional Owner aspirations for the land, and in order to ensure that this occurs, a majority of members of the Traditional Owner Land Management Board are nominated by the TOGE. Critically, however, the day-to-day management and operations responsibilities in an area subject to a joint management plan are retained by Parks Victoria and the Department of Environment, Land, Water and Planning. The first joint management plan, between Gunaikurnai and the Victorian Government, was launched on 1 September 2018.

A joint management plan has the potential to include water. However, even if included in such a plan, the Water Act 1989 (Vic) (Water Act) does not require decision-makers (who are operating under the Water Act) to implement joint management plans. This is in contrast with amendments to other Victorian Acts which require that management of land subject to a joint management plan must not be inconsistent with that plan: including the Crown Land (Reserves) Act 1978 (Vic), Forests Act 1958 (Vic), Land Act 1958 (Vic), National Parks Act 1975 (Vic) and Wildlife Act 1975 (Vic). This is the only omission of this kind, and one legal academic has argued that this represents ‘an intention that

108 ibid.
112 Conservation, Forests and Lands Act 1987 (Vic), pt 8A div 5A.
115 Water Act 1989 (Vic).
117 ibid, p. 591. See Crown Land (Reserves) Act 1978 (Vic), s 20A; Forests Act 1958 (Vic), s 57A; Land Act 1958 (Vic), s 4C; National Parks Act 1975 (Vic), s 16B; and Wildlife Act 1975 (Vic), s 18B.
legislative recognition of Traditional Owner participation in water management was to be kept to a minimum’. 119

Water

Both the NTA and the TOS Act have been criticised for their inadequacy in providing for Traditional Owner participation in water management. 120 For example, water is contained under the definition of ‘land’ in the NTA, rather than being considered a separate resource in its own right. The NTA’s future acts regime also provides for limited Traditional Owner input on activities relating to water. 121 Native title holders have the right to be notified of, and to comment on, activities affecting water management; however, they are not able to negotiate in relation to the activity. The non-extinguishment principle does apply, however, and so compensation is payable in the case that a water management activity impacts on native title rights. 122

Within the TOS Act, rights in water are governed by an NRA. The taking of water is permitted for traditional purposes, but not for commercial purposes. 123 However, the Water Act confers similar rights to take water on the general public, and so this distinction in the TOS Act is purely symbolic. 124 Similar to the NTA’s future acts regime, some rights to water management are also governed by LUAAs. In the case of land use activities involving water management, some activities may be able to be negotiated in relation to how the activity will proceed, although not whether the activity can proceed. Water management activities may also, however, be classified as ‘routine’ or ‘advisory’ activities, which would provide Traditional Owners with even less rights in relation to the activity.

Further, in terms of joint management in the form of Aboriginal title under the TOS Act, water is not necessarily included in joint management plans. Instead, it must be raised for additional inclusion. 125 Even where water is included, it can lead to fragmented management of the water source. For example, a plan may apply to water that is situated within a national park, but not the part of the same water body that flows outside that park. 126

Due to the limited potential in relation to water management under the NTA and TOS Act, Traditional Owners have sought to have input elsewhere. Victoria developed its water management and sustainability strategy, Water for Victoria, in 2016. Water for Victoria creates a number of new policy initiatives in collaboration with Traditional Owners in Victoria. Recognition and management of Aboriginal values in water are provided for under Chapter 6 of the plan, which also aims to facilitate greater Aboriginal participation in existing planning and management frameworks. 127 The plan acknowledges the limited involvement Traditional Owners have previously had in water management in Victoria, and the importance of water as a connection to culture and identity. 128

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121 Native Title Act 1993, s 3(b).
122 Native Title Act 1993, s 24HA(4)(5).
123 Traditional Owner Settlement Act 2010, s 79.
126 Ibid., p. 590.
128 Ibid., p. 100.
An integral part of this plan is the Aboriginal Water Program. It is aimed at facilitating a whole-of-state approach to incorporating the values and expertise of Traditional Owners and other Aboriginal Victorians into water management.\textsuperscript{129} The program will fund a number of local projects (through the Aboriginal Development Grants), such as the ‘Towards Cultural Flows’ project on the Glenelg River. This particular project examines the environmental flows and significance of the waterway, in a project partnership between the Gunditjmirring, Barengi Gadjin and Glenelg Hopkins Catchment Management Authority.\textsuperscript{130}

An Aboriginal Water Commissioner was appointed in November 2017 to the Victorian Environmental Water Holder to provide further understanding of traditional ecological water knowledge and values.\textsuperscript{131}

The Water and Catchment Legislation Amendment Bill 2017 (Vic), which was introduced in the Legislative Assembly on 31 October 2017, seeks to implement a number of Water for Victoria initiatives. Among these is an amendment to the Water Act aimed at ensuring that Aboriginal cultural values are considered in the management of waterways.\textsuperscript{132} A further amendment seeks to ‘include specified Aboriginal parties in water resource planning and the development and review of strategies’.\textsuperscript{133} The Bill further proposes to amend the Catchment and Land Protection Act 1994 (Vic) to ‘include specified Aboriginal parties in the preparation of certain catchment strategies and special area plans’ and incorporate cultural and ecological knowledge of land and water management.\textsuperscript{134} At the time of publication, this Bill was before the Legislative Council.

The Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 (Vic) also provides an important acknowledgment of Aboriginal values in river management and protection. The Act, which was passed in November 2017, treats the Yarra River as one living entity to be protected and recognises the important contribution of Traditional Owners to the health of the waterway.\textsuperscript{135} It does this largely through the creation of the Birrarung Council, a statutory and independent advisory body with a minimum of two Traditional Owner representatives. It also provides for the development of a strategic plan identifying key areas for protection. This Act enshrined important symbolic consideration of Aboriginal water and cultural values in the management of the Yarra River, and assisted in shifting contemporary debate around how we understand and contemplate the management of natural resources. However, the Birrarung Council is solely advisory.\textsuperscript{136}

\textsuperscript{129} ibid., p. 102.
\textsuperscript{131} L. Neville, Minister for Water (2017) ‘New Commissioner to Recognise Aboriginal Water Values’, media release, 16 November.
\textsuperscript{132} Water and Catchment Legislation Amendment Bill 2017 (Vic), cl 4.
\textsuperscript{133} Water and Catchment Legislation Amendment Bill 2017 (Vic), cl 1(a)(i) and (iii).
\textsuperscript{134} Water and Catchment Legislation Amendment Bill 2017 (Vic), cl 1(b)(ii)–(iii).
\textsuperscript{136} ibid.
6. Going forward

There are many possibilities for the further reform of native title and alternative settlement processes. This section will provide a broad overview of some of the key areas that have attracted attention in this space in recent years, and which have overarching impacts for Victoria.

The future Victorian treaty processes have significant potential to disrupt the ways in which land and water rights are recognised and effected. It remains to be seen how existing settlements will fit into a wider treaty framework. Some Traditional Owner groups have voiced their hopes for treaty to fill the gaps in expected outcomes from negotiated TOS Act settlements, and provide for greater access and management of their traditional lands and waters.

In terms of national context, upcoming issues for the native title regime have flow-on effects for Victoria. The Australian Government has stated that the resolution of existing native title claims is a key priority in order to ‘enable native title holders to unlock the economic development opportunities that accompany the recognition of native title, and to provide certainty for all actors in the native title system’. 137

At the time of publication, the federal Attorney-General’s Department was undertaking a review of potential reform of the NTA. An options paper was released and included recommendations from the 2015 Australian Law Reform Commission (ALRC) review of the NTA; 138 a Council of Australian Governments inquiry into land administration and use; 139 and a technical review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006. 140 An exposure draft native title amendment bill is scheduled to be released in late 2018. 141 Some of the areas suggested for reform in the options paper include alternative agreement-making processes, and the streamlining of existing agreement-making; as well as streamlining the claims resolution and process.

As more claims are finalised, the transition into the post-determination and post-settlement phase means that focus turns largely to the effectiveness of outcomes provided by the schemes. 142 One major focus at both the state and federal level is on the ways in which Traditional Owner corporations are able to achieve financial independence in order to support their communities, care for traditional lands and waters, and protect tangible and intangible cultural heritage. It is important to note that economic development, in this context, does not necessarily refer solely to increasing financial wealth, but also to the broader social implications that increase wellbeing. 143 A recent Council of Australian Governments inquiry into Indigenous land administration and use found that:

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142 At the time of publication, 435 determinations of native title have been made. 361 of these recognise the existence of native title in all or part of the determination area, and 74 of these determine that native title does not exist. Further, at the time of publication, there were 296 pending claims of native title. See National Native Title Tribunal (date unknown) ‘Statistics’, NNNT website, accessed 19 September 2018.
Indigenous land administration systems are in a period of transition from a focus on recognition of rights to the use of rights for economic development. There is potential to improve the efficiency and flexibility of these systems as they transition. All governments have a role in supporting this transition.\textsuperscript{144}

The report further highlighted a number of priorities for governments in supporting the transitional phase:

- gaining efficiencies and improving effectiveness in the process of recognising rights
- supporting bankable interests in land
- improving the process for doing business on Indigenous land and land subject to native title
- investing in the building blocks of land administration, and
- building capable and accountable land holding and representative bodies.\textsuperscript{145}

One of the central barriers to Traditional Owner groups achieving economic self-determination is the limited ways in which Traditional Owner groups can use natural resources for commercial purposes. In this regard, the 2015 ALRC review made a number of recommendations towards future legislative reform of the NTA. One recommendation targeted the nature of rights, in order to reflect that a native title right ‘can be exercised for any purpose (including commercial purposes)’.\textsuperscript{146} The natural resources that can be used for commercial purposes are slightly broader under the TOS Act than those under the NTA; however, they still require negotiation on a case-by-case basis. As noted, water is unable to be used for commercial purposes.

Another issue relates to the initial funding provided to Traditional Owner corporations to assist them to become self-sustaining. As discussed earlier in this paper, Traditional Owner corporations consider they could have been better supported earlier in the process, which would have prevented high administrative burden and resource drain. While there are additional ad hoc grants made outside of the settlement process, such as the Aboriginal Community Infrastructure Program that provides funding to Aboriginal corporations for the purposes of improving community infrastructure,\textsuperscript{147} these are unlikely to provide corporations with the requisite tools to become self-sustaining. From the stakeholder engagement undertaken for this project, the Traditional Owner corporations recommended more proactive inclusion of Traditional Owner enterprises by local and state government procurement processes.

Further, as discussed, there is also strong support for better integration of local governments before, during and following settlement processes. Local governments have a close day-to-day working relationship with Traditional Owner corporations, and areas subject to settlement are also often geographically expansive. For example, the agreement area for the Dja Dja Wurrung settlement covers 11 different LGAs. Establishing working relationships with each individual LGA can place a resource strain on Traditional Owner corporations. Provision of better support to local governments around the nature and purposes of TOS Act agreements, and the role local government can play, can strengthen overall settlement outcomes.

Another key issue regarding native title relates to compensation, largely as a result of the August 2017 decision of the Full Federal Court in the Timber Creek decision.\textsuperscript{148} This decision considered a number of major factors with regard to compensation in the case of extinguishment or impairment of native

\textsuperscript{144} Department of the Prime Minister and Cabinet (2016) ‘COAG Investigation into Indigenous Land Administration and Use’, DPMC website, accessed 19 September 2018.
\textsuperscript{145} ibid.
\textsuperscript{148} Northern Territory of Australia v Griffiths [2017] FCAFC 106. At the time of publication, this matter is being heard on appeal by the High Court.
title, including the economic value of the extinguishment, the interest on that value, and non-economic value relating to loss of intangible cultural heritage. This case is significant in that it provides judicial precedent in determining compensation, which is likely to have ongoing implications across Australia. This is particularly relevant for further successful compensation claims, and the appropriation of funds for their payment. The Australian National University’s Centre for Aboriginal Economic Policy Research considers that one course of action for state and territory governments in this respect is to consider implementing alternative settlement processes, such as those introduced by Victoria’s TOS Act.

With regard to water, both the NTA and TOS Act provide limited means for recognising the role of Traditional Owners in facilitating management of water resources. Further, the rights available under these legislative schemes to take and use water are similar to those available to members of the general public. Members of Traditional Owner communities who have been involved in TOS Act processes have voiced their frustration at the limited capacity for negotiation in this area. One legal academic has suggested that legislative reform in this space could start with smaller amendments, such as inclusion in the Water Act that management of areas (governed by the Water Act) not be inconsistent with any joint management plans in place for that area. If passed, the Water and Catchment Legislation Amendment Bill 2017 could provide statutory protection for some of the initiatives contained in the Water for Victoria strategic plan.

As more settlements under the TOS Act are finalised, the process could potentially become more efficient, transparent and effective. The Victorian Government’s review of the threshold process of negotiations, that was underway at the time of publication, is one example of where efforts are being made to streamline processes.

150 Dillon (2017) op. cit., p. 10.
152 Author discussion with members of Dja Dja Wurrung Clans Aboriginal Corporation and the GunaiKurnai Land and Waters Aboriginal Corporation, July 2018.
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