FEDERATION OF VICTORIAN TRADITIONAL OWNER CORPORATIONS

DISCUSSION PAPER 5

A FRAMEWORK FOR TRADITIONAL OWNER TREATIES: LESSONS FROM THE SETTLEMENT ACT

Federation of Victorian Traditional Owner Corporations

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Federation of Victorian Traditional Owner Corporations, 2021 *A framework for Traditional Owner treaties: lessons from the Settlement Act*, Melbourne, Victoria.

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A NOTE ON LANGUAGE CONVENTIONS: Within the Federation paper series, there are various terms used to refer to the two parties engaged in treaty making: First Peoples and settlers. The terms 'First Peoples', 'First Nations', 'Indigenous' and 'Aboriginal and Torres Strait Islander' may be used interchangeably throughout the papers, particularly when referring to the broader Australian context.

When focusing on Victoria, the terms 'Aboriginal people' or 'Aboriginal Victorians' are commonly used to refer to the diaspora of First Peoples living in Victoria, inclusive of Aboriginal people from across Australia and those with genealogical ties and/or connection to Country in Victoria. Traditional Owner is used to denote the latter, a person connected to Country and belonging to an Aboriginal group in the regions now known as Victoria.

The Federation uses the terms 'settler' and 'non-Indigenous' for any individual or group of people who came to Australia at any time after the first invasion in 1788. Settlers are the dominant majority in Victoria and in treaty conversations will be represented by elected and appointed government staff whom are yet to be decided. Treaty-making presents an opportunity for an agreement between representatives of Australian settlers and those of First Peoples in Victoria.

PURPOSE

This paper is the fifth in a series of discussion papers presented by the Federation of Victorian Traditional Owner Corporations (the Federation).

These papers do not purport to represent the firm or fixed positions of the Federation, rather, they seek to contribute to the thinking around treaty making in Victoria by presenting a potential treaty model, which can be further explored, critiqued and refined. It is hoped that these papers may focus discussions and provide a starting point to begin the process of building consensus among Victorian Aboriginal people and Traditional Owner communities, as to their aims and objectives in the treaty process.

SIX DISCUSSION PAPERS

PAPER 1	Understanding the landscape: the foundations and scope of a Victorian treaty
PAPER 2	Sovereignty in the Victorian context
PAPER 3	UNDRIP and enshrining Aboriginal rights
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EXECUTIVE SUMMARY

In July 2018, Victoria became the first Australian state to enact legislation to facilitate the making of treaties with its Aboriginal citizens and Traditional Owners. While the passing of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Treaty Act) was rightly hailed as a significant and historical milestone,[1] it was not the first time Victoria led the nation in a ground breaking response to colonial dispossession.

A decade earlier, a steering committee, consisting of Victorian Traditional Owners and representatives of the Victorian Government, formed to undertake the 'Development of a Victorian Native Title Settlement Framework.' Providing its landmark report in December 2008 (**Steering Committee Report**),[2] it laid the groundwork for what would ultimately become the *Traditional Owner Settlement Act 2010* (**Settlement Act**).

This legislation was presented as a reimagining of native title for Victoria, and a progressive and forward thinking break with the constraints of the *Native Title Act 1993* (**NTA**). Expressly designed to overcome the inadequacies and injustices of native title, it also sought to provide speedy and efficient resolution of native title claims.[3]

Now, more than 10 years on, the direct experience of this reform provides an immediate history from which to draw in developing a local treaty regime. It provides a view to the practical implementation and navigation of the same hurdles and problems that the reform envisaged by the Treaty Act will inevitably face.

Furthermore, the Settlement Act in many ways mirrors treaty processes and outcomes in international jurisdictions, appearing particularly influenced by the modern treaty process in British Columbia. This can be seen from the authorising requirements leading up to negotiations,[4] to the similar recognition and rights provided under both regimes, including rights to access and manage land, and to take and use natural resources.[5] On that basis, the Settlement Act provides an example, squarely positioned within this jurisdiction, and involving many of the same parties, engaging in extended negotiations on detailed, complex, and at times contested rights.

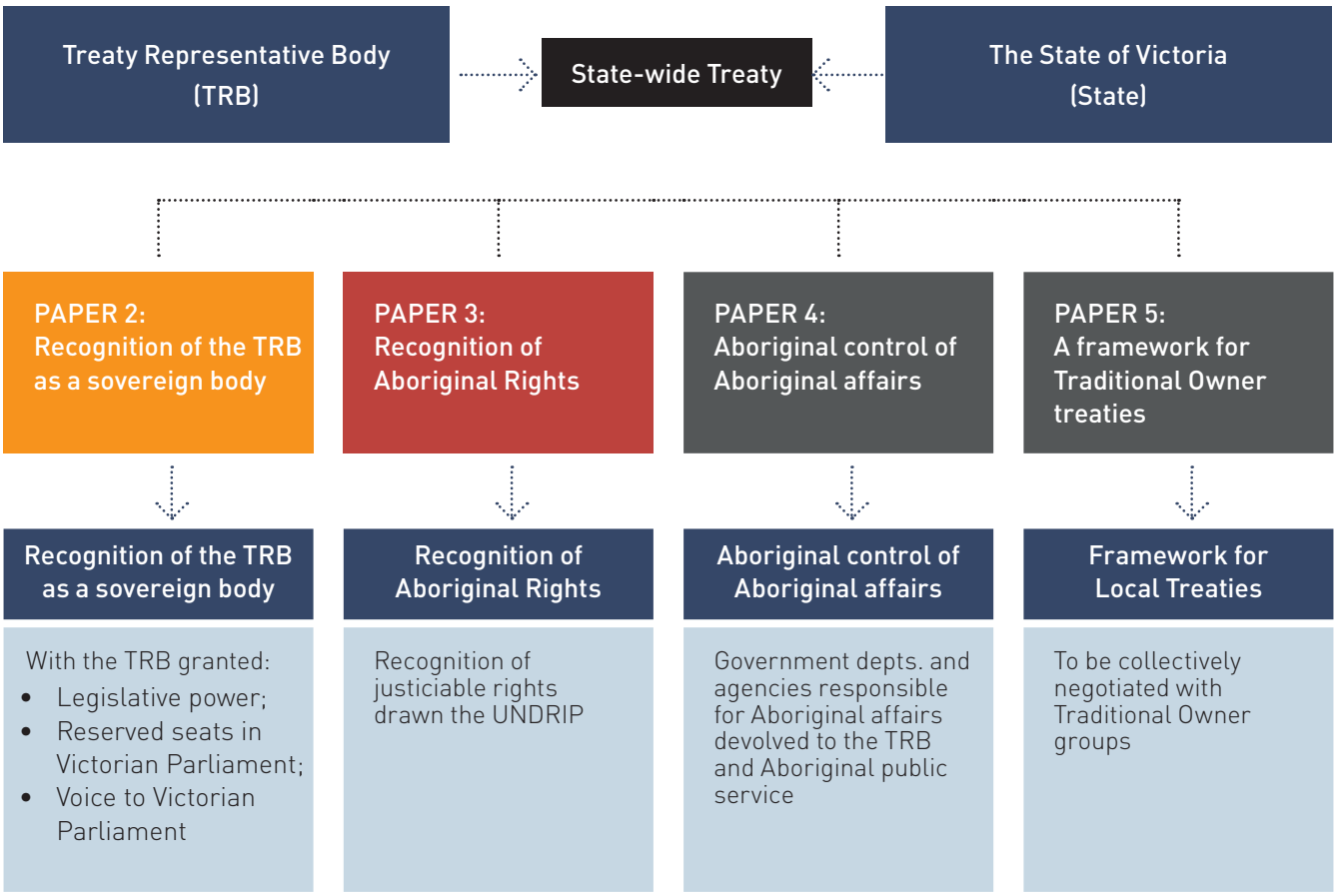
However, comparisons between the Settlement Act and international treaty regimes can only go so far. While there are similarities, the Settlement Act ultimately conceives of Traditional Owners as only holding some limited and defined rights in land, shadowing and at times directly interacting with native title law. Despite the rhetoric which sometimes accompanies Settlement Act processes, this amounts to something akin to a kind of minor property right, drawing traditional law and custom within, but subservient to, the dominant system of western property law. By contrast, and what separates the Settlement Act from processes in British Columbia, and treaty regimes around the world, is that a treaty inherently recognises the Indigenous party as a distinct political community, with its own sovereignty and right to a form of self-government.

To that extent, while the Settlement Act has much to teach, from both its successes and failures, there is at heart an inherent conceptual difference with the project undertaken through the Treaty Act. Mindful of this, the purpose of this paper is to examine the 10 year history of the Settlement Act, being a close yet imperfect equivalent to a local treaty framework, and to assess what useful lessons can be drawn to inform Treaty Act negotiations. In so doing we will draw on the proposed State-wide treaty model as established in other papers in this series, and as set out at **Figure 1**.

PROPOSED TREATY MODEL

In the first discussion paper in this series, we examined the idea of establishing both a State-wide Treaty, and Local Treaties (alternatively referred to as Traditional Owner Treaties).[6] We also envisioned a centralised body representing all Traditional Owners in Victoria, referred to in this series of papers as the Treaty Representative Body (or **TRB**).

Figure 1. Overview of proposed structure and content of a State-wide treaty



The TRB, if established, could enter directly into the State-wide Treaty with the State of Victoria, and this agreement would deal with state level issues, protecting and advancing the rights and interests of Traditional Owners and Aboriginal people across Victoria. It could also include a framework for further Local Treaties, entered into directly between the State and individual Traditional Owner groups.

Since the publication of our first paper, the First Peoples' Assembly of Victoria (**Assembly**) has formally adopted the concept of seeking both a State-wide and Local Treaties.[7] While much of the detail remains to be worked out, there would seem to be a natural correlation between Settlement Act agreements and Local Treaties, as both are intended to be negotiated directly between the State and Traditional Owners, and to convey and recognise rights over a defined area consisting of traditional Country.

OUTLINE OF PAPER

This paper begins by exploring the origins of the Settlement Act, arising out of the inadequacies and injustices of the NTA, before turning to examine the standard content of a Settlement Act agreement.

The paper will also seek to evaluate the Settlement Act against its original aspirations, as well as its ability to provide efficient, fair and just outcomes for Traditional Owner groups.

Finally, drawing on the conclusions reached, it will seek to put forward a proposal for how a Local Treaty framework may be developed, seeking to address some of the failings of the Settlement Act, and building a structure on which the individual sovereignty of each Traditional Owner group can be recognised and respected. In doing so this paper is divided into 4 parts.

In 'Part 1: The limitations of the NTA: Developing the Settlement Act' we begin by considering *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (Mabo No. 2), the development of the NTA, and the application by the High Court of requirements of continuous connection, as established in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (Yorta Yorta decision).

This decision, requiring native title applicants to prove they have inherited rights from a society that existed before the colonisation of their lands, and that those rights have continued to be exercised substantially uninterrupted ever since,[8] effectively legitimised colonial violence and forced removals from Country. In states such as Victoria, where colonial policy was explicitly designed to remove people from their lands, this finding led many to believe that recognition of native title would be beyond the reach of Traditional Owner groups in Victoria.[9]

The fact that now, 28 years after the NTA was passed into legislation, there have only been four positive consent determinations across Victoria, suggests that significant barriers remain for many groups.

The Settlement Act set out to address this injustice, principally by shifting focus from issues of connection, and instead seeking to identify the 'right people for country' with the capacity to 'meaningfully enter into agreement-making under the [Settlement Act] Framework.'[10] The legislation was also designed to align with NTA outcomes, so that where a positive NTA determination has been made, the State will enter into agreement with the recognised native title holders. However where the native title status has not being determined, or even where native title has been found to be extinguished, the State will enter into negotiations, and into agreements providing rights equivalent to (and sometimes in excess of) those available to native title holders.

'Part 2: Content of a Settlement Act agreement' looks at the framework that arose out of the Steering Committee report in 2008, in an attempt to standardise, and to respond and build on native title outcomes of the time, through comprehensive agreement making.

With this framework now imbedded in the Settlement Act, the legislation provides and limits much of the structure and form that ultimately makes up the content of agreements. It does this through prescribing several of the individual agreements that together form the 'settlement package.' The first of these is the Recognition and Settlement Agreement (**RSA**),[11] which may recognise the rights of the Traditional Owner group in relation to a number of matters, including the enjoyment of culture and identity, and the maintenance of a distinctive spiritual, material and economic relationship with the land and its natural resources. In addition, it may recognise rights to: (i) access; (ii) camp on; (iii) use and enjoy; (iv) take natural resources from; (v) conduct cultural activities on; and (vi) protect areas of importance on, the land.[12]

The RSA can also include sub-agreements, each of which is also prescribed in the Settlement Act, including a Land Agreement,[13] Land Use Activity Agreement (**LUAA**)[14] Funding Agreement,[15] and Natural Resource Agreements (**NRA**)[16]. The legislation prescribes much of the content of these agreements, and defines their scope. Where the legislation is silent, the State has negotiated a series of pro forma agreements, known as the 'templates' (**Template Agreements**), which set out all relevant terms.

This highly structured framework is complex, but in essence has two broad components:

- **a financial component**: providing funds and assets (including land) to the Traditional Owner group for various purposes; and
- **a Traditional Owner rights component**: whereby the various rights held by Traditional Owners in Crown land are recognised and made operational, broadly reflecting, and sometimes exceeding, rights available under the NTA.

In 'Part 3: Evaluating the Settlement Act' this paper will seek to assess the 10 year history of the Settlement Act, against both its original aspirations, and its wider ability to provide a 'fair and just alternative to native title.

Ultimately this paper argues that the Settlement Act has not delivered on much of its early promise. While a forward thinking and practical policy approach at its inception, a rigid framework means universal policy prescriptions often frustrate Traditional Owner groups, who desire individual consideration of their aspirations, and perceive that a complex web of legislation and pro-forma agreements, are unable to respond promptly to advances in other jurisdictions, or in native title case law.

While recognising that there have been achievements, by seeking to formally standardise outcomes in a framework that could be applied universally, and often despite the efforts of the parties, the legislative scheme has left little space for innovation within individual negotiations. Of course, the trade off in seeking to advance a state-wide settlement scheme, is that standardisation and uniformity is an inevitable, and to some extent, unavoidable result.

Further assessment of the Settlement Act must also address, that with only three agreements reached in over 10 years, it displays a rate of progress that is not better, or at the very least equivalent, to that achieved under the notoriously slow NTA. Much like the NTA, the Settlement Act sees groups spend years locked into processes around recognition and negotiation, despite the fact that most of the outcomes in an RSA are pre-set, baked in to a legislative framework and inflexible policy settings.

While the reasons for delay in settlement negotiations are complex, much of it may be attributed to the inability of the Settlement Act to resolve, and its propensity to promote, intra and inter-Traditional Owner group disputes. While such disputes are an established feature of NTA processes, and indeed all post-colonial land reform systems around the world, the Settlement Act is solely dedicated to non-adversarial approaches, which may be ill-suited to resolve what are often seemingly intractable disputes. This inevitably prolongs such disputes, and therefore prolongs the associated trauma and distress the non-adversarial processes were initially designed to minimise or avoid. Whereas most forms of mediation are balanced by an ongoing or potential court process, which compels the parties into active negotiations, the Settlement Act provides no direct judicial oversight. This means that, after several years, if resolution processes through the Settlement Act prove unsuccessful, the parties are ultimately forced to rely on the Federal Court and the NTA. That is, much of the process needs to be re-litigated in a new forum.

Finally, in 'Part 4: A framework for Local Treaties', this paper proposes a process for how Local Treaties might be negotiated, and what they may contain so as to overcome issues identified in this paper, allowing individual Traditional Owner groups to assert their sovereignty and achieve meaningful self-determination.

The central issues, as identified in this paper, are that the Settlement Act:

- has not resulted in a more efficient system of claim resolution as compared to the NTA; and
- relies on a framework that is inherently rigid, and unable to respond to individual Traditional Owner group aspirations, or with flexibility to NTA developments.

The failure to efficiently resolve claims has a number of negative effects on the process as a whole. Firstly, it undermines confidence within Traditional Owner groups that the process can deliver meaningful outcomes, or act as a mechanism to recognise their rights and overcome historic injustice. Secondly, the slow roll out means that Settlement Act rights are only established in particular pockets of Victoria, where agreement has been reached. This means that government departments, operating across the State, only interact with the agreements intermittently, often failing to build comprehensive systems, or to sufficiently change their internal cultures to respond, or to respect and comply with new processes.
The lack of outcomes also means that, despite the initial ambition of this substantial reform, there is surprisingly little understanding or knowledge within government, but also the wider Traditional Owner community, as to what the Settlement Act is, and how it works.

All of this means that the potential of the rights available under the Settlement Act have not been fully realised. To avoid this issue within the negotiation of Local Treaties, this paper argues that:

- The process should attempt to reduce the highly pressurised nature of negotiations: firstly by no longer insisting on 'full and final' settlements, which require Traditional Owner groups, to forgo further NTA claims with respect to the agreement area, and to accept that all liability for native title compensation has been met, and secondly, by allowing for greater flexibility around the negotiation of boundaries and group composition, which currently require groups to come to final and often immovable positions on the extent of their Country, and issues of self and cultural identity. Rather than seeking finality, the aim should be to achieve progress, and establish certainty through ongoing and respectful relationships.
- Where flexibility cannot produce an outcome, the process should develop wider options for dispute resolution, including culturally appropriate forms of mediation, but also arbitration through a self-determined tribunal structure. This could potentially be located within the Treaty Authority, to be established pursuant to section 28 of the Treaty Act, and rather than focusing on the legal intricacy of the NTA, this tribunal would conduct the factual enquiries required to resolve Traditional Owner disputes, with all sides provided a fair allocation of resources.

Turning to the question of what Local Treaties should contain, it is suggested that Local Treaties will likely consist of two components:

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

Accepting that, at a broad level, there is likely to be a high degree of commonality among the aspirations of Traditional Owner groups with respect to the compensation and rights component, and perhaps an immobile requirement from the State to establish universal land management systems, as well as provide equal treatment to Traditional Owner groups across Victoria, it is proposed that a 'Minimum Rights Package' be collectively negotiated by all Traditional Owner groups. These negotiations could perhaps be facilitated by the TRB or Assembly, and result in a package modelled, but improving on, current Settlement Act outcomes.

This approach would result in a number of benefits, in that:

- Traditional Owners could likely achieve better outcomes through collective negotiation, and leveraging off of the State's requirement for a universal approach.
- It may help overcome, or at least reduce, the power imbalance inherent in negotiations with the State, and increase the capacity of all Traditional Owner groups through the pooling of resources.
- The Minimum Rights Package would be immediately available to any group upon them meeting the determined negotiation thresholds, and as it would be in excess of current outcomes, would further encourage the efficient resolution of claims.
- The quick roll out of the package would see it apply across most of Victoria, requiring both systemic and cultural change within government departments.
- Traditional Owner groups could maintain a collective body to oversee implementation, and with the ability to re-negotiate aspects of the package, ensuring greater flexibility within the framework, and greater accountability of government through constant and consistent monitoring.

Once a Traditional Owner group has implemented the Minimum Rights Package, it would be in possession of a significant financial base, and have experience in complex interactions with government, and the exercise of its rights, over a wide policy landscape. This would place each group in a stronger and more informed position to negotiate the political component, and therefore enter into a Local Treaty with government.

While this component would seek to institutionalise the right of each group to independently exercise some form of self-government on Country, the content of any final agreement should be left open, respecting the individual sovereignty of each group. In other words, in this stage the State would be required to abandon standardised solutions, and engage with each Traditional Owner group on a sovereign-to sovereign basis.

While there should be no limitations on what could finally be negotiated, we foresee that, as localised sovereigns, Traditional Owner groups would need to engage with regional and localised settler governance, in particular Local Government.

To this extent, it may be that Traditional Owner groups could mirror the TRB's exercise of sovereign power at the State level, in that they could:

- Take on Local Government functions, and make laws and regulation in place of Local Governments;
- Have reserved seats within Local Government; and / or
- Act as a voice to Local Governments.

While the above may act as markers to indicate where Local Treaties could possibly be developed, we consider them far from definitive. Indeed, this paper argues that the state-wide implementation of the Minimum Rights Package will likely bring to light further opportunities and avenues for Traditional Owner sovereignty to be fully realised, and we would caution against trying to fully define or limit that concept until such a time as Traditional Owners are fully and properly resourced, and have experience with implementing a comprehensive rights regime.

PART 1

THE LIMITATIONS OF THE NTA AND THE DEVELOPMENT OF THE SETTLEMENT ACT

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The decision in Mabo No. 2 was a legal, political and cultural turning point in Australia, setting out a new common law principle 'that the traditional rights and interests of indigenous people to their country may be, in appropriate circumstances, recognised as legally enforceable.'[17]

Exactly what 'appropriate circumstances' would facilitate native title recognition, outside of those proven by the Meriam people of the Murray Islands, was not immediately clear. However it was apparent from the outset that native title would more likely favour Traditional Owners in areas which had not been subject to extensive colonisation. This is because native title rights, as established in Mabo No. 2, are inherently vulnerable to extinguishment. For instance, if the Crown grants rights to land which are inconsistent with the continued exercise of native title rights (such as granting freehold and certain types of leasehold to a settler), than the native title rights will not survive.[18] Additionally, because native title arises out of traditional law and custom, the foundations of native title recognition will collapse unless the 'traditional connexion with the land has been substantially maintained.'[19] Once connection to the land is broken, the rights are extinguished, and incapable of recognition in Australian courts.[20]

What followed the Mabo No. 2 decision was a period of intense national debate and political negotiation to establish a statutory regime for the recognition of native title, ultimately resulting in the Commonwealth enacting the NTA. This legislation directly enacted the conception of native title set out in Mabo No. 2,[21] and did not seek to strengthen its fragility. Indeed, the preamble to the NTA states:

> It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests...[22]

What is clear, is that the two central points of vulnerability in native title rights, that is, they are extinguished on the grant of inconsistent rights to settlers, or upon the severance of traditional connection to land, accurately describe the core elements of colonisation, and effectively grant those actions legitimacy and legal certainty.

However, despite this frailty, at the time the NTA was introduced there remained some uncertainty as to how the courts would apply the legislation. It was hoped, that in applying the legislative requirements around traditional connection, the common law could provide flexibility in recognising and allowing the adaptation of traditional culture since contact. It would take another decade of litigation, and the findings of the High Court in the Yorta Yorta Decision, until these questions were addressed.

TESTING CONNECTION

The definition of native title rights in the NTA, as adapted from Mabo No. 2,[23] is contained in section 223:

(1) The expression native title or native title rights and interests means 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;

(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.

In Victoria, the Yorta Yorta were the first Traditional Owner group to actively pursue native title court proceedings. It would be in their case that the High Court would provide the 'seminal decision on 'connection' and provided the framework for the criteria required to satisfy s 223.'[24]

The claim was lodged in February 1994, and was the first claim to be heard by the Federal Court following the enactment of the NTA.[25] From the outset, it was actively opposed by the Kennett Government, who engaged in eight years of litigation and spent many millions of dollars fighting any recognition of native title rights.[26] In ultimately finding against the Yorta Yorta, and exploring both the concepts of 'tradition' in subsection 223(1)(a), and 'connection' contained in subsection 223(1)(b), the High Court stated:

> [46] ... in the context of the [NTA], "traditional" carries with it two other elements in its meaning. First, it conveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.
>
> [47] Secondly, and no less importantly, the reference to rights or interests in land or waters being *possessed* under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty. If that normative system has not existed throughout that period, the rights and interests which owe their existence to that system will have ceased to exist. And any later attempt to revive adherence to the tenets of that former system cannot and will not reconstitute the traditional laws and customs out of which rights and interests must spring if they are to fall within the definition of native title.[27]

In other words, section 223 of the NTA requires native title applicants to prove that their rights arise from a society that existed before colonisation, that this society has continued to exist, and has been substantially uninterrupted since contact.[28] In the south-eastern Australian states, and Victoria in particular, where colonial policy had explicitly required forced removal from Country, either by the threat of violence, or actual violence, this appeared an insurmountable hurdle for Victorian Traditional Owners.

Where connection has been broken, the native title rights are considered extinguished, washed away by the so-called 'tide of history.'[29] It does not matter that connection was broken against peoples' will, as a result of colonial violence or government policy. Once connection is broken, native title rights are extinguished, and cannot be revived.

This decision led many to believe that native title would be impossible to recognise in highly settled areas such as Victoria.[30] However, over time the approach of the courts and the State has evolved. Indeed, in recent case law the Federal Court has highlighted the State's obligation to act as a model litigant, which requires more than merely acting in good faith, but to seek the efficient resolution of NTA applications. This would include a requirement that the State not actively resist cogent claims.[31] State governments are now encouraged to reach agreement with native title applicants. Rather than push matters to trial and have the court determine if native title rights exist, the court has indicated that states should assess claims with a view to reaching reasonable agreement with the applicants, following which the court can make what is known as a 'consent determination':

> ... there is no requirement that an applicant prove on the balance of probabilities each of the matters in s 223 of the NTA before it may be appropriate for the Court to make an order in or consistent with the terms of an agreement. Necessarily, it follows that there is no requirement that an applicant prove to the State on the balance of probabilities each of the matters in s 223 of the NTA before an agreement is reached between them recognising native title rights and interests.
>
> It is also apparent from the authorities that the Court recognises that the State party is effectively the guardian of all of the interests of its people in a native title claim. It should go without saying that the people to whom the State owes a duty include the Aboriginal people who are the claimants. Thus it would be wrong for the State to conceive of its role as merely a gatekeeper through which cogent claims may ultimately be permitted to pass if the claim is one that comes to be supported by so much material that, in all probability, the claim would succeed before the Court if litigated; in particular, ensuring prima facie cogent claims are resolved by agreement in a timely and fair manner, at a reasonable and proportionate cost to claimant groups, is an important part of the public interest the State is intended to protect and promote.[32]

With the election of the Bracks government in 1999, and continued by the subsequent Brumby government, the State of Victoria abandoned its litigious response to native title claims, as was adopted in the Yorta Yorta case.[33] This new approach saw the State more open to negotiating and agreeing issues of traditional connection, allowing the Federal Court to make determinations by consent. The first consent determination occurred in Victoria in 2005 when the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia, and Jupagulk Peoples achieved native title recognition, proving that Victorian Traditional Owners could overcome the hurdle of connection. They were followed by the Gunditjmara in 2007, the Gunaikurnai in 2010, and the Gunditjmara and Eastern Maar over a joint area in 2011.

In total, there are now four positive native title consent determinations in Victoria. This appears to be conclusive evidence that Traditional Owners in this State have been able to maintain traditional connections to Country, despite the violence and dispossession of colonisation. In addition, many Traditional Owner groups can provide convincing and persuasive evidence of this fact, to a standard that should compel the State to consent to recognition of their rights through the NTA. Indeed, and notwithstanding the findings of the High Court, it is likely that the Yorta Yorta would be able to achieve a consent determination if they were pursuing their rights in the modern native title context.

DEVELOPMENT OF THE SETTLEMENT ACT

In the early 2000s, as the dust of the Yorta Yorta decision settled, it was clear that the resolution of the legal claim had in fact resolved very little. Victorian Traditional Owners could not be deterred and continued to advocate for their rights. As political opposition to native title softened, there was an appetite for an alternative approach; one that would address the claims of those most impacted by colonisation, and most susceptible to a finding of a loss of connection. As one of the principal claimants in the Yorta Yorta case, Dr Wayne Atkinson, pointed out as early as 2001:

> Unless the barriers to land justice in the Yorta Yorta case are removed, the rhetoric of Mabo No. 2 and the principles of law on which we pinned our hopes will remain elusive. [34]

In February 2005, delegates from Traditional Owner groups from around Victoria issued a statement calling for 'a comprehensive land justice settlement' in which '(p)roof of native title is not a precondition to the recognition of the rights of Traditional Owners in land and natural resources.'[35] Commencing an extended advocacy campaign, these delegates established the Victorian Traditional Owners Land Justice Group (**VTOLJR**),[36] and in March 2008, the Victorian Government announced the formation of a steering committee for the 'Development of a Victorian Native Title Settlement Framework'. The committee was to be chaired by Professor Mick Dodson, and comprised of representatives from VTOLJG, the Victorian native title service provider (then called Native Title Services Victoria) and senior departmental officers from the Departments of Justice, Sustainability and Environment and Planning and Community Development. The aim of the committee was to develop a framework that 'provides for out of court settlement packages that allow Traditional Owners to settle their land claim directly with the State outside the Federal Court process.' While Traditional Owners could still pursue native title through the courts if they wished, this alternative system would seek to address various limitations of the NTA regime.[39]

The committee ultimately produced the Steering Committee Report, which guided the design of what would become the Settlement Act. This new legislation would seek to address the two major issues of the NTA as applied in Victoria:

(i) the prior extinguishment of native title upon the grant of inconsistent rights to settlers; and

(ii) the extinguishment of rights upon a loss of connection.

ADDRESSING PRIOR EXTINGUISHMENT

At the core of colonisation is the occupation of lands by an alien sovereign, which then grants interests in the land to its subjects. This occurred throughout Australia, but with particular speed and intensity in the south-eastern states, the colonisation of Victoria being described as 'one of the fastest land occupations in the history of empires'.[40] With grants of freehold or leasehold interests to settlers and pastoralists occurring over much of the Victorian land mass at one time or another, it is today estimated that two thirds of Victoria is held as private property.[41]

The impact of these grants on native title rights, often referred to as 'prior extinguishment', was first expressed in Mabo No. 2:

> 'A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title.'[42]

As a starting point, this means that a native title claim can only be lodged over Crown land, as it is immediately clear that native title will have been extinguished over any private property. From there, the State will examine, parcel by parcel, all Crown land within the claim area, in a process known as 'tenure analysis.' Through this process they examine all historical land records trying to identify any previous grants capable of extinguishing native title.[43] Although land may be Crown land today, such analysis can routinely uncover previous grants, dating back decades, or even to the colonial era, and each such a discovery is fatal to native title. Once such a grant is discovered, either the relevant parcel will be removed from the native title claim, or the Court will make a finding that native title rights have been extinguished.

As a result, while approximately one third of Victoria is Crown land,[44] and notionally available for claim under the NTA, the completion of tenure analysis may result in many Traditional Owner groups finding a further dwindling of the land base over which their rights may be recognised. Tenure analysis is also a significant expense for the State, and a long process that may delay resolution of a claim by many years.

In addressing this issue, the Settlement Act adopts a simple and effective approach, in essence overlooking the effect of any historical grants. This operates through the RSA, entered into by the State and the relevant Traditional Owner group. The RSA is a contract that recognises Traditional Owner rights that are equivalent (or sometimes in excess) of the usual rights recognised under the NTA, and it does so over all current Crown land parcels. Under Settlement Act processes, tenure analysis is avoided, and there is no examination of historical acts of extinguishment. As long as land falls within the current Crown land estate, Traditional Owners will have their rights over the land recognised.[45] Part 2 of this paper further explores the content of these rights, however multiple benefits are already self-evident, for instance, this approach extends Traditional Owner rights over a significantly larger land mass than would be available under the NTA, and also avoids the expense and delay associated with tenure analysis and native title court proceedings.

ADDRESSING TRADITIONAL CONNECTION

While the Settlement Act developed a flexible approach to prior extinguishment, it was also designed to move away from the rigid connection requirements established in the Yorta Yorta decision. Instead of insisting on evidence of a traditional society largely unaffected by colonisation, the focus is on identifying the 'right people for country' who have negotiation capacity to 'meaningfully enter into agreement-making under the Framework.'[46]

The Steering Committee agreed this was to be assessed through a 'Threshold Process' built around 7 principles emphasising streamlining, collaboration, respect, Traditional Owner expertise, and acknowledging that there may be differing views about who are the correct Traditional Owners.[47] The Steering Committee Report also:

> ... acknowledges that the decision about whether a Traditional Owner group meets the threshold requirements of 'right people for country' and 'negotiation capacity' ultimately rests with the State.

This approach gives considerable decision making power to the State, and sits uncomfortably with broader assertions of self-determination. In doing so, the Settlement Act departs from the modern treaty process in British Columbia, which assigns this role to the BC Treaty Commission, an independent third party, created specifically to help facilitate negotiations. However, in an Australian context, it is perhaps no worse than what occurs in negotiations for a consent determination under the NTA. In those circumstances, it is the State that ultimately needs to be satisfied that the evidence supports a native title outcome, and whether, in its view, the requirements of section 223 of the NTA have been sufficiently met. By contrast, the Settlement Act allows the State a wider set of criteria to consider. For instance, the State may enter into agreements where native title has not been resolved by the courts, or even where a court has determined native title to be extinguished. That is, traditional ownership (right people for country) and capacity for negotiation is the determinative factor, rather than the existence of native title rights.

This greater flexibility for agreement making is established by section 4 of the Settlement Act, empowering the Minister, on behalf of the State, to enter into an agreement with a Traditional Owner Group Entity (TOGE), being an Aboriginal corporation which has been appointed to represent the interests of a 'traditional owner group.'[48]

The Settlement Act defines a 'traditional owner group' based on traditional and cultural association, however it also takes account of the native title status of the group, as follows:[49]

Native Title status:	Traditional Owner Group capable of entering a Settlement Act agreement:
A court has found that native title continues to exist:	the native title holders.
No court finding as to whether or not native title exists:	a group of Aboriginal persons capable of entering and registering an Indigenous Land Use Agreement (**ILUA**) under the NTA.
A court has found that native title does not continue to exist:	a group of persons recognised by the Attorney-General (by notice published in the Government Gazette) as the traditional owners of the land, based on Aboriginal traditional and cultural associations with the land.

In this way the Settlement Act is intended to work in harmony with the NTA, but also not be bound by its rigidity. Where a group has already been determined to hold native title rights, they will be the relevant group for Settlement Act purposes. Where native title has been extinguished, the State can nevertheless enter into a comprehensive agreement with the Traditional Owners. In the more common middle position, where a native title claim is yet to be brought, or is yet to be resolved, the Settlement Act can achieve cohesion with the NTA through reliance on an Indigenous Land Use Agreement (**ILUA**). An ILUA is a type of agreement under the NTA which may be entered into by a native title group and other people, organisations or governments. An ILUA may be entered into even where there has been no determination of native title by the Federal Court. Instead the ILUA goes through a separate authorisation and registration process overseen by the National Native Title Tribunal (**Tribunal**), and once registered binds all native title holders. The ILUA will contain an undertaking, binding on native title holders that no further native title applications, either for the recognition of rights or payment of compensation will be brought, effectively resolving all native title issues within the agreement area.

PART 2

THE CONTENT OF A SETTLEMENT ACT AGREEMENT

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As we have seen, the Settlement Act was developed as an alternative to the NTA, principally designed to overcome the barriers for achieving a positive NTA determination in the heavily colonised landmass of Victoria. However, with those barriers seemingly overcome, the content of a Settlement Act agreement was still to be worked out.

Accordingly, the State and Traditional Owners set out to design the shape and content of a Settlement Act agreement. In doing so, they established the framework as first set out in the Steering Committee Report of 2008. Indeed, much of what is achievable today through a Settlement Act agreement is contained in, and often limited by, this 13 year old framework. At the time of its design, the Steering Committee was directly responding to the advocacy of VTOLJG , and guided by the standard outcomes reached in NTA consent determinations around the nation. As Premier Brumby stated in his second reading speech, before parliament voted on the Settlement Act in 2010:

> The Native Title Act itself left the question of what constituted native title rights and interests to each native title group to define in accordance with their law and custom.
>
> Yet determinations over the last 17 years have recognised interests which are remarkably similar in form -- for example, rights to fish, hunt and gather, to camp, to use and enjoy land, to conduct cultural and spiritual activities, to protect places of significance.[50]

As such, the Settlement Act sought to formally standardise these outcomes in a framework that could be applied universally across the State, to all Traditional Owners, regardless of their likely treatment under the NTA. On that basis, to properly understand the content of a Settlement Act agreement, it is first necessary to look at standard NTA outcomes.

WHAT IS INCLUDED IN A STANDARD NTA CONSENT DETERMINATION?

While the various Australian states and territories negotiate NTA consent determinations on a case by case basis, overtime they have nevertheless developed a general level of standardisation. To some extent this was no doubt inevitable, as throughout the country the parties to these agreements are dealing with the same legal rights, and the make-up of the parties themselves, being governments and Indigenous claimants, means that they often have similar interests and aspirations as their interstate counter-parts.

The most basic component of a consent determination is the recognition that the group continues to hold native title rights in land. However, it will also give rise to certain statutory protections available through the NTA, and the opportunity for the group to negotiate a wider set of outcomes, including the payment of compensation for past acts of extinguishment.

Below we will further explore the three components of (i) recognition of rights; (ii) statutory protections – the Future Acts regime; and (iii) negotiation of wider outcomes. A high level overview is also presented at **Figure 2**.

(i) **Recognition of Rights**: At the core of a native title consent determination is the recognition that the group continues to hold native title rights in land, being rights that arise from a pre-contact society, have survived the process of colonisation, and are capable of recognition in Australian law today.

Importantly, native title does not confer ownership of land, and instead has been expressed as containing a 'bundle of rights'.[51] Exactly which rights fall within the 'bundle' will be determined by the traditional activities of the group. This will usually include things like the right to hunt, fish, gather, camp and enjoy the land. More recently courts have found that where claimants can demonstrate ongoing engagement in commercial use of these rights, for instance with respect to a trade in fish, commercial rights can also be recognised.[52]

Once the rights are determined, all native title holders have the right to access the relevant land and waters to carry out the activities associated with the recognised rights. However these rights are 'non-exclusive' and co-exist alongside other non-indigenous property rights, meaning native title holders have no rights to prevent others accessing the land or waters.[53]

(ii) **Statutory Protections – the Future Acts Regime**: The NTA provides some limited procedural protection of native title rights through a process known as the Future Act regime. Under this process, where certain activities may impact or extinguish rights, native title holders and claimants are provided the right to comment or be consulted on the activity. More significant or extinguishing acts will also enliven the Right to Negotiate, which requires the State or Territory, the proponent of the activity, and the native title holders to negotiate in good faith with the aim of obtaining the consent of the native title party. The NTA does not permit the native title holders to reject or simply veto the proposal, but may allow them to agree some rules around how the activity will occur, and potentially receive some compensation for the impact on their rights.

If agreement cannot be reached within six months of good faith negotiations, any of the parties can apply to the Tribunal for mediation or determination of the matter. While the Tribunal has the power to determine whether or not the activity can proceed, it has been criticised as favouring 'the interests of resource developers ahead of those of native title parties.'[54] It is argued that in practice governments and proponents have little to fear if native title parties attempt to oppose future acts before the Tribunal.[55]

(iii) **Negotiating wider outcomes:** While a consent determination could just be limited to the recognition of rights, and access to the Future Acts regime, it is increasingly common in the modern context for the group to negotiate a range of further outcomes, or so called 'comprehensive agreements'. This type of agreement making is coming to increasing prominence under the NTA regime, particularly in Western Australia. See for example the Ngarluma and Yindjibarndi Burrup Agreement reached in 2003, the Miriuwung and Gajerrong Ord Global Agreement, reached in 2005, the Noongar Agreement reach in 2015, and more recently the Yamatji Nation Agreement reached in 2019.

As with most native title agreements, comprehensive agreements will be recorded in an ILUA, and as we will explore further in Part 3, are becoming increasingly sophisticated and far-reaching arrangements. The types of things often reflected in these deals include:

- The hand back of parcels of freehold land, to be used for commercial or cultural purposes;
- The hand back of National Parks, which are then leased back to the State (with rent payable) and jointly managed with Traditional Owners;
- Heritage protection provisions, and / or funding for the preservation or promotion of culture; and
- Economic development funds, to create employment and generate wealth for Traditional Owners.

As we will discuss further below, a developing area of native title is the issue of compensation payable for past acts of extinguishment. Native title holders have been entitled to compensation since the enactment of the NTA, which provides that compensation is payable 'for any loss, diminution, impairment or other effect … on their native title rights and interests.'[56] However, it was not until the recent decision of *Northern Territory v Griffiths* [2019] HCA 7 (**Timber Creek decision**) that the High Court clarified the basis on how such compensation should be calculated.

Before the Timber Creek decision, and despite there being no clear or agreed method for calculation, it has been common for agreements around native title consent determinations to include financial payments, negotiated on a case by case basis. While clearly native title parties entering into these agreements had no way of knowing if the compensation received was commensurate with their full legal rights, it was generally considered preferable to take the deal, rather than incur the delay, and face the risk of a court decision. Within the agreements themselves, these funds will often be described as economic development funds, or as assisting the group to access and exercise their newly recognised rights. However, the ILUA will also express that the funds satisfy any future right to NTA compensation over the claim area, and are paid in full and final settlement of any liability.

WHAT IS INCLUDED IN A STANDARD SETTLEMENT ACT AGREEMENT?

Having considered in broad terms the standard NTA outcomes, and the landscape to which the Steering Committee was responding, it is possible to explore and better understand the framework that they ultimately designed.

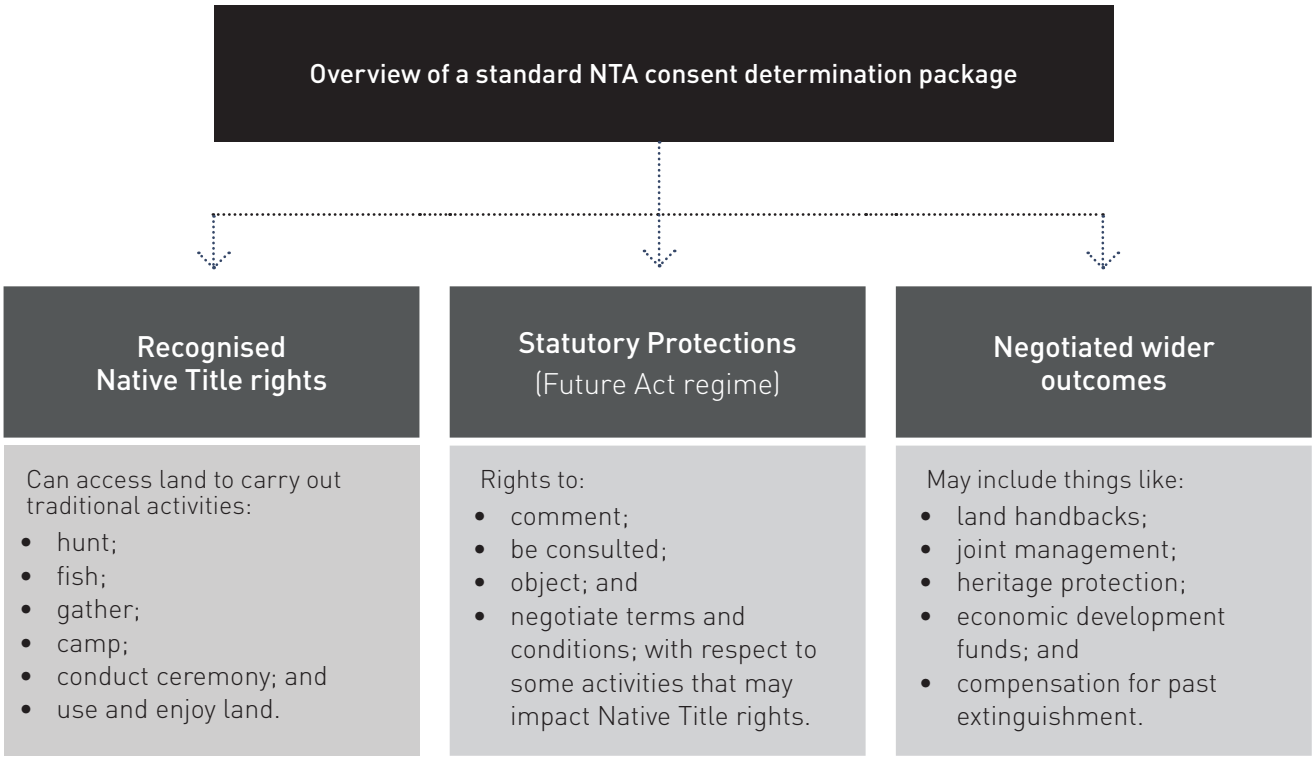
This is done below, firstly through an overview of the components of a settlement package, before turning to look at the agreement architecture, and the role of the more significant agreements.

OVERVIEW: TWO BROAD COMPONENTS OF FUNDING AND RIGHTS

While a Settlement Act package has many moving parts, it can perhaps best be understood as containing two broad components:

- **a financial component:** providing funds and assets (including land) to the Traditional Owner group for various purposes; and
- **a Traditional Owner rights component:** whereby the various rights held by Traditional Owners in Crown land are recognised and made operational, such rights broadly reflecting, and sometimes exceeding, the rights available to native title holders under the NTA.

Figure 2. High-level overview of rights under a typical positive NTA determination:



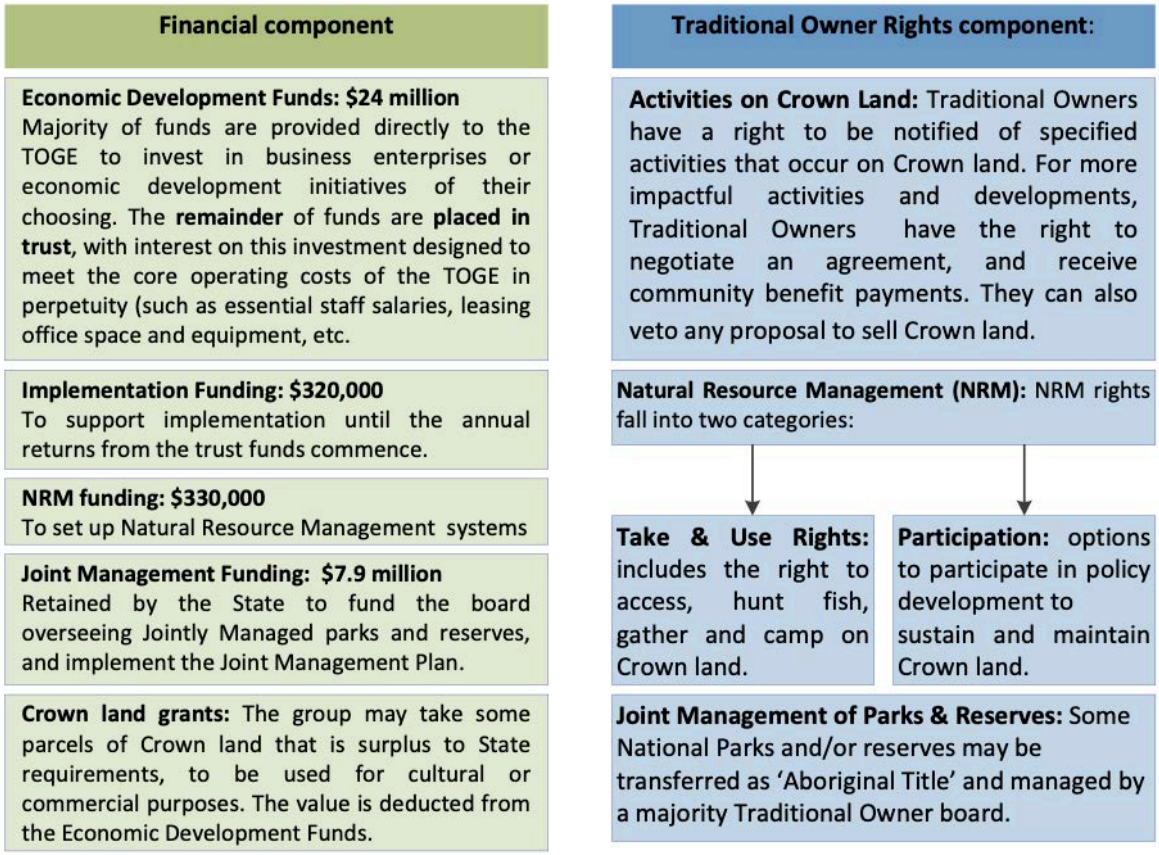
A high-level summary of the content of both the financial component and the Traditional Owner rights component is at **Figure 3**.

This remains the basic package, negotiated between the State and the VTOLJG in 2008. However it should be noted that the monetary figures quoted in Figure 3 pre-date the Timber Creek decision, and for that reason are considered out of date. This by itself is illustrative of a larger issue, that while frameworks are useful, and perhaps necessary, they can become static and fixed in time, requiring substantial effort to shift and change.

It seems clear that what was achieved with the Settlement Act framework in 2008 was a well-considered, and at the time, wide ranging and beneficial package, as compared to outcomes in other jurisdictions that had preceded it (indeed, some elements still exceed what could reasonably be expected by native title holders in other jurisdictions). However, time does not stand still, and difficulty arises when native title law advances are not captured by the current framework, or it otherwise fails to evolve in line with Traditional Owner aspirations. The Victorian government has shown a willingness to examine these issues, and also provided some clear and linear advances through each of the three Settlement Agreements it has entered into. However, while a clear advantage of a comprehensive framework is that the full spectrum of policy positions are disclosed, and able to be viewed holistically, an inevitable drawback is that, as opposed to individual agreement making, every negotiation point raised by Traditional Owners immediately raises state-wide implications. To address more comprehensive change, the State committed to the 'First Principles Review' in 2018, its purpose being to undertake a more holistic appraisal of the framework. While such efforts are welcome, it also represents the first comprehensive re-examination of the framework since the legislation was enacted. As this was a particularly active period for developments in native title, this perhaps reveals potential risks in viewing a framework of this nature as fixed, as opposed to a living structure that requires ongoing oversight and realignment.

We will explore these issues in greater detail in Part 3, however it should also be noted that while it is useful for the moment to compare the Settlement Act as against the NTA outcomes in other states and territories, this will no longer be an appropriate benchmark as Victoria moves into the treaty space.

Figure 3. Two broad components of an RSA settlement package.[57]



AGREEMENT STRUCTURE

At the centre of the settlement package is the RSA, through which the State formally recognises the Traditional Owners as the owners of the area under traditional law and custom, and acknowledges the historical injustices committed through colonisation. Beyond this, the RSA operates as an umbrella agreement, encapsulating a series of sub-agreements, each of which recognise or convey rights, funds or otherwise deal with a specific area of the settlement package.

A flowchart setting out the architecture and basic role and content of each sub-agreement is contained in **Figure 4**. All of these agreements are pre-drafted, and approved Template Agreements, the intention being that they will provide the same rights to all Traditional Owner groups, and contribute to a comprehensive and universal rights and land management regime across the state.

Two of the most important sub-agreements are the NRA and LUAA.

The NRA replicates the rights component of a positive NTA determination, recognising rights 'to access public land within the agreement area to hunt, fish, camp, and gather natural resources.'[58]

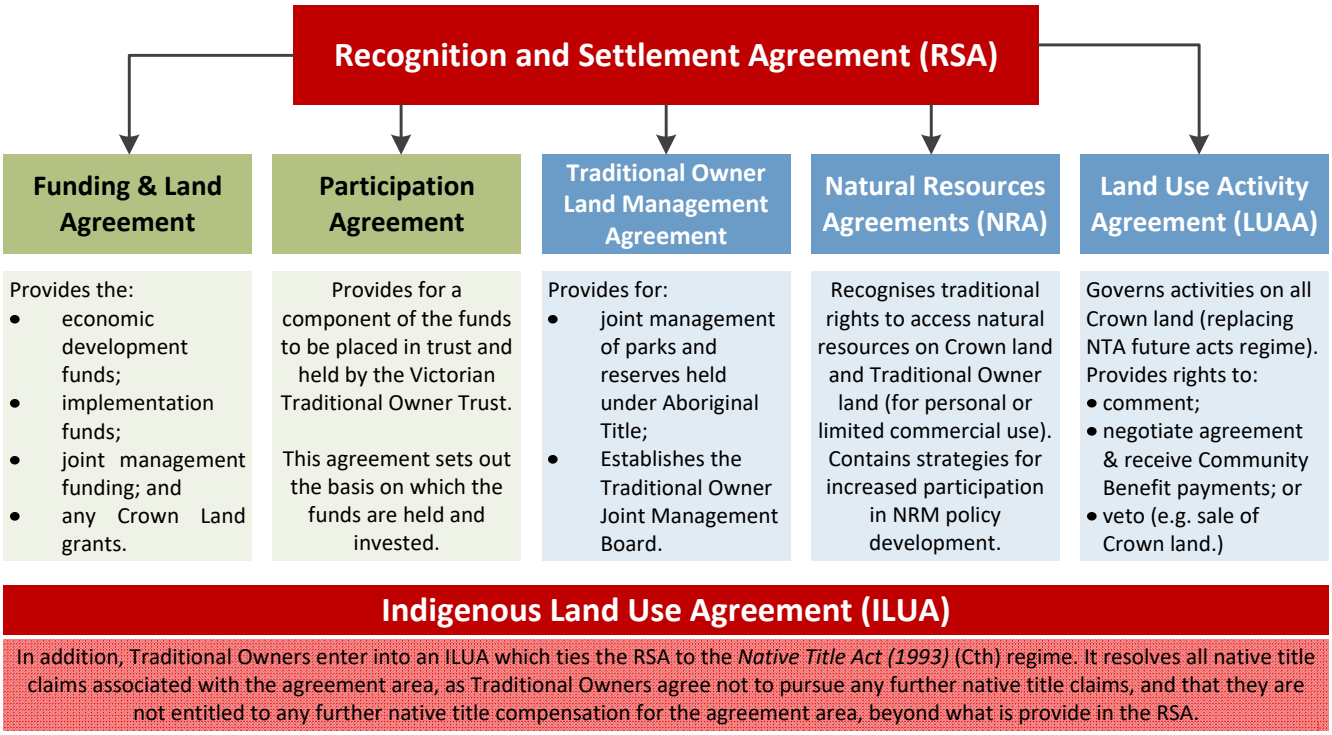
The LUAA replaces the Future Act regime under the NTA, and governs 'Land Use Activities' on all public land. The term Land Use Activity is defined in the Settlement Act to include:

- the grant, amendment or variation of leases, licences, or permits for commercial or community purposes;
- the grant, amendment or variation of mineral, oil or gas authorisations, such as exploration licences, petroleum licences, mining leases, and so on;
- the clearing, controlled burning or carrying out of works;
- selling public land, or granting, amending or varying reservations; and
- the publishing of various management or work plans, including Timber Release Plans and Fisheries Authorizations.[59]

Section 27 of the Settlement Act establishes 5 categorises of Land Use Activity (i) Routine; (ii) Advisory; (iii) Negotiation Class A; (iv) Negotiation Class B; and (v) Agreement activities.[59]

It is the role of the LUAA to then specify which particular Land Use Activity fits into which category, with each category attracting a different level of procedural rights. This ranges from providing no rights

Figure 4. The Template Agreements' - Agreement structure of the Settlement Package:



at all (routine), to a right to receive notice (advisory), the right to negotiate an agreement and receive compensation (negotiation class A or B) and finally the right to veto (agreement). The general approach is that the higher the impact on Traditional Owner rights, the higher the category and the accompanying rights. The defined categories and rights are also set out at **Figure 5**.

How a particular Land Use Activity is categorised is not up for negotiation in an individual Settlement Act negotiation, as this has been pre-set by the legislation or within the LUAA template. With the intention that one day LUAAs may blanket Victoria, the State has a strong interest in maintaining a universal and cohesive land management regime. The State also has an ethical interest in providing equal treatment as between Traditional Owner groups, as it would be inappropriate to negotiate different standards of rights between groups, further reinforcing the need for uniformity.

Finally, a key element of most RSAs will be an ILUA, which as discussed above is a type of agreement under the NTA, which may be entered into by a native title group and other people, organisations or governments, and once registered with the Tribunal becomes binding on all native title holders.

Under an RSA, the template ILUA will apply the 'non-extinguishment principle' meaning that no native title rights are extinguished. While it is a common misconception that entry into an RSA and registration of an ILUA will extinguish native title rights, this is not correct. Native Title rights pre-date European settlement, and in some circumstances continue to exist to this day. When a native title claim is lodged, the Federal Court undertakes an inquiry and makes a determination about whether the rights continue to exist or not. In entering an RSA, Traditional Owners agree not to pursue such an inquiry, and instead to rely on the rights as set out in the RSA. Any underlying native title rights however, remain undisturbed, even though they have not been activated by a court process.

However, by including an undertaking from native title holders not to pursue any further native title claims, and that the group agrees to forgo any entitlement to native title compensation in exchange for the rights and funds provided by the settlement, the RSA resolves all outstanding native title claims for the agreement area, without impacting any native title rights and interests that may persist.

Figure 5. What are the categories of Land Use Activity?

Routine	Advisory	Negotiation A	Negotiation B	Agreement
No obligation to notify.	Obligation to provide notice and allow 28 days for comment.	Obligation to negotiate an agreement.	Obligation to negotiate an agreement.	Traditional Owners must consent for the activity to go ahead.
		If parties fall into dispute VCAT can decided if the project goes ahead and set payments and conditions.	If parties fall into dispute VCAT does not have the power to stop the project but may set payments and conditions.	

PART 3

EVALUATING THE SETTLEMENT ACT

PART 3
EVALUATING THE SETTLEMENT ACT

The Settlement Act has been in place for over 10 years, and although it was progressive, and indeed nation-leading legislation at the time of its introduction, there have been problems and delays with its implementation, suggesting it has not met its initial promise as an efficient and 'fair and just alternative to native title.'

Below, this paper argues that, while a forward thinking policy at its inception, the Settlement Act has not delivered in several important ways:

1. It has not resulted in a more efficient system of claim resolution;
2. It relies on a framework that is not subject to ongoing review, and is often rigid in its application; and
3. This rigidity can frustrate Traditional Owner groups, who view the complex interaction of legislation and Template Agreements as inflexible, and as failing to keep pace with modern comprehensive agreements in other jurisdictions, as well as developing native title case law.

Notwithstanding these issues, it is important to acknowledge that the Settlement Act has also achieved some worthwhile outcomes in a complex policy and political environment. As with any substantial reform, the results are nuanced. Those groups that have achieved a Settlement Act outcome have established an economic base, and have a role in overseeing natural resource policy and the development of Crown land on their Country. These groups routinely exercise rights to access and manage greater areas of Country than would ever be available through an NTA claim. While these outcomes do not always operate perfectly, and implementation issues abound, it is nevertheless a clear improvement on the Victorian landscape immediately following the Yorta Yorta decision.

Further, the Settlement Act, along with recognition processes under the *Aboriginal Heritage Act 2006* (Vic) (**Heritage Act**), has spurred significant efforts to empower Traditional Owners to organise and reclaim Country. This has resulted in much research and debate about internal governance, the incorporation of group structures, the settling or progression of agreement on group composition, boundary discussions, and other issues related to Traditional Owner status. While these efforts have not being universally successful, it seems inevitable that Local Treaties will directly engage these same problems, and can build on work already done, hopefully guided to avoid the mistakes of past processes. As such, it may be that the ultimate legacy of the Settlement Act, is that it has laid the groundwork for decolonisation in Victoria through Treaty processes.

1. INEFFICIENT CLAIM RESOLUTION

The NTA has long been criticised for lengthy delays in resolving claims. The *Mabo* litigation, facing the significant hurdle of first creating native title law in Australia, took 10 years to resolve.[60] However, the enactment of the NTA did not radically improve timeframes. Between 1994 and 2011, the Tribunal reported the average time taken to reach a consent determination was six years and three months. The average time for a determination after litigation was seven years.[61] These figures record the time from the filing of the claim until its resolution by the court, and so underestimate the effort of the native title group, missing entirely the several years of organising and research typically required before a claim can be filed. It also does not take into account the common occurrence of claims being withdrawn, amended, consolidated and re-lodged.[62] While in recent years the focused efforts and targeted case management of the Federal Court is working to reduce timeframes,[63] it remains in the eyes of some critics a 'complex, excessively legalistic and mean-spirited regime' resulting in 'extraordinary cost and delays'.[64]

The Settlement Act by contrast, was intended to be straight forward, and driven by goodwill negotiation between the parties. The process encouraged Traditional Owner groups to forgo the adversarial approach of an NTA claim, and avoid the filing of proceedings in the Federal Court.[65] Instead, where the State and Traditional Owners were in disagreement, it would be resolved through discussion and mediation.

The same was true for intra and inter-Traditional Owner group disputes, be it over boundaries with neighbouring groups, or the internal composition of the group, including the inclusion of ancestors to define group membership.[66]

For that reason, it is somewhat disappointing that more than a decade from enactment of the legislation, only three agreements have been reached. Of these, two were already well advanced native title claims, with the first so advanced that entry into the RSA coincided with the Federal Court making an NTA consent determination. This was issued in favour of the Gunaikurnai people in 2010, resolving a native title claim first lodged in 1998.[67] The second agreement, entered into with the Dja Dja Wurrung people, was preceded by a 15 year native title claim. Also filed in the Federal Court in 1998, the group agreed to withdraw this claim upon entering into an RSA in 2013.[68] The third and most recent agreement was the first to proceed without a parallel native title claim, and therefore without the involvement of the Federal Court. Nevertheless, the agreement reached between the State and the Taungurung in 2018[69] involved at least 5 years of negotiations, and 15 years of research.[70] Following the scheme of the Settlement Act, this agreement avoided NTA processes through the Federal Court or Tribunal until after agreement was reached. It was only at this stage that it was required to register an ILUA to ensure alignment with the NTA. This process saw the re-emergence of underlying Traditional Owner disputes, with some Traditional Owners seeking judicial review of the Tribunal decision to accept and register the ILUA. With the court recently finding in favour of the dissenting Traditional Owners,[71] the agreement remains unregistered almost three years after it was first signed. However, it should be noted that the role of the court in reviewing the registration of an ILUA is not to hear and examine all relevant evidence so as to determine who holds native title rights, but to examine the procedural steps leading to registration. In that sense, the late entry of the Federal Court has not resolved the underlying dispute, meaning the matter is likely to be entangled in yet further litigation.

The above is perhaps illustrative as to why the Settlement Act, designed to resolve claims efficiently, now appears at risk of being outpaced by the notoriously slow NTA. That is, it fails to adequately address the prevalence of disputes created by post-colonial land reform, a phenomenon observed in post-colonial societies around the world.

However, while the issue is inadequately addressed by the legislative scheme, it is clear that it was an issue identified by the drafters of the framework, stating in the Steering Committee Report:

> There is limited support, and incentives, for resolving intra and inter-Indigenous disputes over group composition and boundaries. These disputes can be complex and seemingly intractable, and stand in the way of the resolution of native title.

The response of the Steering Committee to this problem was to 'establish a transparent, respectful and non-adversarial process to identify the 'right people for country''. This resulted in the eponymously named 'Right People for Country Project' (**RPfC**), designed to provide 'mediation and agreement making protocols.' With the benefit of hindsight, the weight placed on this single program to resolve 'seemingly intractable' disputes appears excessively optimistic. This optimism is perhaps particularly evident in the adoption by the Steering Committee of 'a 5–10 year strategy for the implementation of the Framework.' Of course this timeframe is now exceeded, with the likelihood of full implementation still distant.

While the centring of mediation as the sole approach to dispute resolution is of questionable efficiency, the approach, and the methods of specific programs such as RPfC, are of themselves admirable and well intentioned. The aim of such work is to avoid or minimise intra and inter community trauma, otherwise so observable in NTA processes. It also seeks to be 'Indigenous led' and 'consistent with principles of empowering the community in decision-making and self-determination.' However, there is a counter-argument, that the prolonged mediation of disputes that are in fact intractable, will only prolong the dispute and the associated trauma. If a dispute cannot be resolved by negotiation, what is needed is a fair hearing, followed by a workable resolution, which can hopefully give way to the re-establishment of functional relationships and healing within the community.

Put another way, the approach of programs like RPfC has a clear and important place, but there also needs to be a release valve for when disputes cannot be successfully mediated. The Settlement Act regime offers no such release valve, with the parties ultimately left to rely on the NTA and the Federal Court if the dispute cannot otherwise be resolved. This means that by the time such disputes reach this forum, they have only been lengthened, along with the pain and distress they cause.

Further, the lack of process for final arbitration of disputes also reduces incentive for settlement. Mediation is most likely to be effective where the parties face the imminent possibility of an adverse outcome, with the uncertainty of a court decision encouraging compromise. While this would be a feature of any court ordered mediation, it is not a feature of mediation based in Settlement Act processes, as there is no direct judicial oversight. This is problematic, because to advance Settlement Act negotiations a Traditional Owner Group must first settle its internal group composition, and also attempt to settle boundaries with Traditional Owner neighbours. In instances of group composition disputes, they generally arise from differences of deeply held convictions of personal identity, a position from which compromise becomes difficult. The same is true with respect to boundaries, but this is compounded by the fact that only the group seeking an RSA is positioned to receive any benefit from a resolution, and therefore is the only group motivated to negotiate. This is because the second group is often not pursuing an RSA or NTA claim at the time of the boundary negotiations, and is primarily focused on other unrelated matters of its own. As such, not being principally concerned with the boundary issue, the second group gains nothing from resolving the dispute. Further, in the give and take of a moving boundary, it will be required to relinquish claims to some areas of Country, with no foreseeable benefit as a result.

This brings us to another barrier to efficient resolution of claims, and one entirely within the control of the State, which is the State's insistence that each settlement be 'full and final.' That is, each RSA is meant to resolve, once and for all, any native title issues within the defined agreement area. This requires firstly the establishment of hard borders with neighbouring Traditional Owner groups, and secondly an undertaking in the ILUA that no future NTA claims, whether as to rights or the payment of compensation, will be made.

The State's reasoning on this issue is completely rational from a settler nation-state perspective. Its clear aim, apart from any altruistic motive, is to resolve legal uncertainty, creating a stable environment to allow risk-free public development, and attract commercial investment. It does not want to invest significant tax-payer resources, only to be left with a permeable resolution, and imprecision as to legal rights.

While the State's position is perhaps attractive at a surface level, it ultimately leads to false economy. The insistence on full and final solutions, the drawing of immovable 'lines on maps', and the waiving of all future NTA rights, all serve to only heighten Traditional Owner anxiety. It dissuades them from endorsing an agreement that, while perhaps deficient or uncertain in some respects, also claims to wipe clean all historical wrongs, and simultaneously bind all future generations. While this apprehension is keenly felt within the group, it can also infect neighbours who are often not as well resourced. Neighbouring groups may see their own self-definition and identity brought into question; not through their own actions, but those of their neighbours. As has been argued elsewhere:

> Group membership and tribal boundaries are fluid and changing and have always been fluid and changing. As Lee J pointed out in Ward v Western Australia, '[e]xigencies of the Aboriginal way of life neither required, nor facilitated, establishment of precise boundaries for territories occupied by Aboriginal societies'. If one was to imagine two adjacent tribal groups to be represented by two overlapping circles, given intermarriage, the area of overlap would at some points in time be predominantly Jurruru and at other points in time, predominantly Innawonga. In addition, as Reilly explains, Indigenous boundaries reflect a relationship to the ground, and therefore shift as that relationship changes. However, … …[u]nder the native title claims process as it is currently conceived, there is no room for contesting the spatial dimensions of native title … Once on the map, Indigenous relationships to land are reduced to a form that law can read and assess in its own terms. In the past, membership and boundaries were not something that was quantified and set in stone. Yet under the system of native title they are required to be reduced to such a material form.[72]

The Settlement Act regime follows the NTA in reducing traditional law and custom 'to a form that [western] law can read and assess in its own terms.' This has entrenched an environment ripe for intra and inter-Traditional Owner dispute, and it is a significant feature, and blockage, to the resolution of disputes in Victoria. If further evidence of such dispute is necessary, it can be found in the volume of litigation generated by decisions around Traditional Ownership within Victoria. Apart from outcomes under the NTA or the Settlement Act, the other major piece of legislation providing an element of 'recognition' is the Heritage Act.

Providing a slightly lesser threshold for recognition it has had more success in producing outcomes, with a total of 11 groups appointed as a Registered Aboriginal Party (RAP). A quick review of Federal and Supreme Court decisions shows that of these 11, only 3 groups have not been the subject of some judicial determination concerning Traditional Ownership status.[73] Of course, this only records those matters that are so intractable they result in litigation. If the search is widened to include the reasons for decision in making RAP appointments, as published by the Aboriginal Heritage Council, it is revealed that each application encountered some alleged overlap, or outright dispute as to the claim.[74]

While this is the common experience of native title around the country, and of land reform in all post-colonial societies around the world, it becomes clear that no Traditional Owner group in Victoria enjoys all of its claims to Country, uncontested by other groups. What this further makes clear is that establishing a fair, just, and culturally credible path to the resolution of these disputes, so far not achieved by the NTA or the Settlement Act, will be an urgent and necessary task in building a successful framework for Local Treaties. Part 4 of this paper explores some suggestions for how this might be done, with those comments prefaced only by the fact that there is no perfect solution, or process that can successfully evade the pain and trauma inflicted by colonisation.

2. THE SETTLEMENT ACT FRAMEWORK IS RIGID AND INFLEXIBLE

When the Settlement Act framework was designed in 2008, it was responding to and building on the standard of NTA outcomes at the time, and perhaps seeking to reflect broader trends within native title towards 'comprehensive agreement making'.[75] In doing so, it sought to formally standardise outcomes that could be applied universally across the State, to all Traditional Owners, regardless of their likely treatment under the NTA.

As identified in Paper 1 of this series, given that Settlement Act agreements are intended to apply to land across the state, and interact with various regulatory regimes, there is implicit insistence on uniformity among Traditional Owner groups, so that the State may continue to operate a cohesive system of land management.

The State also, quite rightly, seeks to deal with Traditional Owner groups equally across the State, in recognition that it should not negotiate different standards of rights between groups, further reinforcing the need for uniformity.

However, the by-product of uniformity is rigidity, and a highly structured and frequently inflexible negotiation framework. From the outset, this creates a clear delineation between what is negotiable, and what is not, in any individual Traditional Owner group negotiation.[76]

In practice, this means that by the time a Traditional Owner group is at the negotiation table, they may find the extent of their rights as already set, either by the terms of the Settlement Act, or the negotiated positions established by other Traditional Owner groups, as represented in the Template Agreements. Around these positions policy has already been written, or implemented, and there is little incentive for government departments to alter these positions, or leverage for an individual Traditional Owner group to get them to do so. Even if the State is willing to entertain a change, it will require the coalescing of perhaps several government departments, and maybe legislative change, with either process taking months if not several years. The result is a rigid framework, in which the unwieldy bulk of the State cannot accommodate the varying interests between groups, and the framework in effect becomes the mould into which all Settlement Agreements are shaped.[77]

However, it should also be acknowledged that there have been some useful attempts to amend and improve the framework, principally the *Traditional Owner Settlement Amendment Act 2016* (Vic) (**Amendment Act**) and, the First Principles Review mentioned above. The Amendment Act overhauled Traditional Owner rights to access natural resources through the NRA,[78] introduced enforcement provisions with respect to LUAA breaches,[79] and opened the door to limited commercial rights,[80] along with other matters. The more recent First Principles Review was established, principally to respond to the Timber Creek decision, but also a raft of other changes sought by Traditional Owner groups.[81] At the time of writing, this review is yet to conclude, and its outcomes are unknown.

While these are welcome efforts, it is also noteworthy that they are in some sense reactive, and have occurred in response to Traditional Owner advocacy. This is because the Settlement Act framework provides no standing mechanism for comprehensive reviews, or ability for fixed positions to be re-examined.[82]

This means that the only forum in which issues within the standardised framework can be raised, is within individual Traditional Owner group negotiations, where there is little leverage to achieve change.

This inflexibility also ensures that the framework, and ultimately the rights delivered to Traditional Owners, cannot easily shift with the changing tide of native title law. Below we examine two examples: (i) the recognition of commercial rights; and (ii) the payment of compensation. We will also briefly examine outcomes of comprehensive agreement making in Western Australia, which operates without an overarching policy commitment, and argue that Settlement Act outcomes are not keeping pace with these modern comprehensive agreements.

(i) **Recognition of Commercial rights:** As Aboriginal people have always maintained, and history makes clear, pre-contact societies in Australia engaged in complex and sophisticated methods of trade, and an economy that traversed the entire continent.[83] Whereas native title has typically recognised rights based on traditional activities, such as hunting, fishing, camping, and so on, it has struggled to reflect or recognise wider rights that may be attributable to, or arise from, a more complex and accomplished society than is typically acknowledged by long standing racist and colonial narratives.

However, in 2013, three years after the introduction of the Settlement Act, the decision in *Akiba v Commonwealth of Australia* [2013] HCA 33 (**Akiba**) was hailed as a potential turning point.[84] In this decision, Justice Finn at trial, and later the High Court, accepted that native title rights and interests may extend to rights of a commercial nature, in this case being commercial fishing in the Torres Strait.

Furthermore, this decision:

> resisted astomising native title rights, as... [a] so-called 'bundle of rights'. Rather, it conceptualised native title as an underlying title, distinct from, and supporting the exercise of, incidents of title — e.g, to access, exclude, fish, sell, etc. — as found on the evidence.

On that basis, it was found at trial that Traditional Owners enjoyed a broad right to 'access and take resources of the sea for any purpose.' The potential for native title to convey commercially useful rights was hugely important, and welcomed as a 'reawakening of the promise of 'Mabo (No. 2)' with the ability to empower native title holders, and drive economic development.

However, now 8 years after this decision, the rigidity of the Settlement Act framework means Victorian Traditional Owners are effectively cut off from this development, if they choose to utilise the Settlement Act regime. This is because, while the Settlement Act purports on its face to permit the use of traditional rights for some (limited) commercial purposes, the reality is that the framework ultimately prohibits it, in any meaningful sense.

To understand how this occurs, it is necessary to undertake a detailed examination of both the legislation, and the Template Agreements. In short, section 84 of the Settlement Act allows Traditional Owners to take and use 'natural resources' for two purposes. The term 'natural resources' includes: (i) **Vegetation**, meaning all flora and forest produce, other than timber resources; (ii) **Animals**, meaning all fauna, including fish; (iii) **Water** that is in, on or under the land; and (iv) **Stone**, meaning gravel, sand, clay, earth, etc., but excluding precious metals.[85]

The two purposes for which Traditional Owners are permitted to use these natural resources are:

(i) traditional purposes (meaning for personal, domestic or non-commercial needs); and

(ii) with respect **only** to Vegetation and Stone 'commercial purposes that are consistent with the purpose for which the land is managed, if the [NRA] so provides.'

On that basis, Animals and Water are completely excluded, and prohibited from commercial use within the terms of the framework. Indeed, it is not even a matter that could be usefully raised in negotiations, as seeking access to these rights, including the specific rights recognised in Akiba, would require legislative change, seemingly beyond the influence of any individual Traditional Owner group engaged in Settlement Act negotiations.

Further, and despite its apparent authorisation in the legislation, commercial use of Water and Stone is also effectively prohibited. This is because section 84 only permits commercial use of these resources 'if the [NRA] so provides.' The current NRA template provides that a Traditional Owner may only use Vegetation and Stone for commercial purposes if:

> The quantity of Vegetation or Stone is no more than the quantity that the [Traditional Owner] would take for Non-Commercial Purposes.

Clearly a right to use a commodity for commercial purposes, but only at non-commercial quantities, is not a functional or meaningful right. Unfortunately, this is not the only example within the Settlement Act framework, where the initial appearance of rights being conveyed is undercut in the fine print. For instance, section 9(1)(f) of the Settlement Act appears to recognise a right to take Water, however this is limited in two ways. Firstly, by section 84 in the manner explained above, and secondly by clause 6.2(c) of the NRA template, which requires that Traditional Owners:

> 'take or use Water from a waterway or bore in accordance with s8A of the *Water Act 1989* (Vic)'.

This provision in turn applies s(8)1 of the ***Water Act 1989***, which allows ***any person*** a right to take water, free of charge, for that person's domestic stock and use from a waterway or bore to which that person has legal access.

That is, the legislation designed to recognise the rights of Traditional Owners, rights which arise by virtue of their occupation of these lands since time immemorial, ultimately provides the same rights to water enjoyed by every Victorian, and nothing more. Indeed, it purports to provide rights they already possess as citizens of the State of Victoria.

Again, this is an issue that could only be addressed through amendment to legislation, specifically the *Water Act 1989*. In circumstances where the recognition of Aboriginal water rights has long been a focus for Traditional Owners,[86] and are increasingly coming into focus as an urgent issue,[87] the Settlement Act regime stands unable to respond, other than through the commencement of a significant legislative reform program.

(ii) **Payment of compensation:** In 2019, the High Court handed down what is widely considered to be the most important native title judgment since Mabo (No. 2).[88] This is of course the previously mentioned Timber Creek decision, where for the first time the High Court assessed compensation for the extinguishment of native title rights and interests.

The case was brought on behalf of the Ngaliwurru and Nungali Peoples, 'for the loss of native title rights over an area of 127 hectares in and around the town of Timber Creek', about 600 km south of Darwin, Northern Territory.[89] Various acts by the NT government between 1980 and 1996, including 'the construction of various public works in the town, together with the grant of leases and freehold titles' led to the extinguishment of native title rights.[90]

The High Court found that compensation for extinguishment should be calculated on the basis set out below (with the amounts awarded in parentheses):

- 50% of the freehold value of the land ($320,250);
- Interest payable from the date of the act, which will ordinarily be simple interest, but may in some cases be compound interest (simple interest amounting to $910,100); and
- An amount for the cultural and spiritual loss to be assessed by considering what the Australian community would regard as "appropriate, fair or just"[91] (an amount of $1.3 million, upholding the amount awarded in the courts below).

This decision was a watershed moment in native title law. While previously native title compensation has been negotiated on a case-by-case basis, with no guidance as to the financial value of the rights involved, and with native title holders often holding very little leverage, it represents a significant and potentially empowering development.

However it also creates a challenge for comprehensive agreement making, which generally relies on the parties taking a broad view of the totality of rights and interests in order to reach a sweeping and conclusive settlement. This is evident within Settlement Act processes through the rejection of detailed tenure analysis. While slow and costly, this process provides specificity as to what native title rights persist, and where extinguishment has occurred and is potentially compensable. Prior to the Timber Creek decision, and without guidance as to the real financial value, it was reasonable and practical to avoid this process and reach financial settlements based on broad and expansive principles.

This was the approach taken by the Steering Committee in designing the framework in 2008, who adopted 3 core principles on compensation:

- all entitlement to compensation under the NTA is to be fully and finally settled as part of an RSA;
- the total settlement package should represent a fair alternative to native title related compensation; and
- compensation arising from future events is to be addressed in the LUAA which secures 'community benefits' for Traditional Owners

where their rights and interests are to be significantly affected by high impact land use activities.

The second of these principles adopts the subjective and slippery measure of 'fairness' in assessing the settlement package against NTA outcomes. However the Timber Creek decision has provided an arguably more objective method of assessment, and it is foreseeable that Traditional Owners will want to undertake such an assessment before entering into a settlement, particularly if the State insists such a settlement is 'full and final'. Further, while Timber Creek may offer objectivity, like much arising from native title law, it also appears somewhat arbitrary, and would not measure well against any assessment of 'fairness.' For instance, the conventional legal understanding of entitlement to native title compensation, is that it arises because unilateral extinguishment of native title is racially discriminatory, and therefore in breach of the *Racial Discrimination Act 1975* (**RDA**).[92] However, reliance on the RDA as the source of compensation rights, means that extinguishment that occurred before that legislation was enacted, on 31 October 1975, is not compensable, the racist acts of governments before that date being perfectly legal. The impact of this in states like Victoria, where colonisation had done much of its work before the enactment of the RDA, means that just compensation may still be out of reach (more on this below).

Of course the framework was not designed to consider these events, and will require significant reform in order to respond adequately to the complexity created by the Timber Creek decision. In response, and prior even to the final judgement of the High Court, then Attorney-General Martin Pakula committed to the 'First Principles Review' in October 2018, to examine and report on these, and other issues impacting Settlement Act outcomes. This work is being undertaken by the Attorney-General's department, working in co-operation with a committee of Traditional Owners from around the state. This was reported in *The Age*, to the government's credit, as an 'embrace of the Timber Creek decision [putting] the state at odds with Queensland, Western Australia and South Australia, who were "interveners" or interested parties in the case, supporting the NT and Federal governments' position'[93] and seeking reduced compensation amounts.

With the First Principles Review yet to report on its findings, it is unclear how the State will seek to resolve the inherent tensions between comprehensive agreement making, and the implications of the Timber Creek decision. What is clear is that significant reform is required to realign the system to accord with advances in native title law.

3. SETTLEMENT ACT OUTCOMES NOT KEEPING PACE WITH MODERN COMPREHENSIVE AGREEMENTS

A comprehensive native title agreement is generally understood to be an agreement that settles:

> 'matters such as land access and use, as well as providing various rights including rights to engage in cultural activities, to take resources and to protect places of importance…[and may] … also include transfer of freehold title and extensive compensation packages.'[94]

In recent years Western Australia has led the nation in reaching comprehensive agreements, with several high profile examples. However, this paper will briefly focus only on two, being the Noongar Agreement reached in 2015, and the more recent Yamatji Nation Agreement reached in 2019.

While agreements reached under the Settlement Act are also 'comprehensive agreements', in that they seek to achieve a sweeping and conclusive settlement with Traditional Owners, they differ from inter-state equivalents in that the Victorian agreements are entered into through an overarching state-wide framework. In Western Australia however, there is no legislation shaping the agreements, or any public or disclosed policy structure through which the content of these agreements are pre-determined. This gives the appearance that they have been individually negotiated, through 'a political negotiation respectful of each party's equality of standing.'[95] Of course, the counter-position is that any State government must operate on the basis of consistent policy positions, and while a framework may seemingly lock in those positions, it also ensures they are disclosed.

In any event, the Noongar Agreement and the Yamatji Nation Agreement in many ways resemble the outcomes under the Settlement Act framework. For instance, as with Settlement Act outcomes, they also contain elements of recognition, acknowledgment of

past injustices, rights to land and natural resources, joint management of national parks, as well as the transfer of funds and land. However, where they significantly differ from the Victorian agreements, is with respect to scope and scale.

The differences as to scale are immediately apparent, with the Noongar Agreement consisting of a package valued at $1.3 billion[96] and the transfer of 320,000 hectares of Crown land.[97] The Yamatji Nation Agreement has been valued at $442 million, exclusive of the 134,000 hectares of Crown land to be transferred as managed reserve, and the 14,500 hectares to be transferred as freehold or conditional freehold.[98] While much of this may seek to be explained by differences in population and available land mass, further comparison indicates a lack of parity with Victorian outcomes. For instance, with an estimated Noongar population of 30,000,[99] and Yamitji population of 9,000, taken collectively these groups do not meet the Aboriginal Victorian population of approximately 48,000 people.[101] While admittedly such calculations engage some speculation, on current funding and compensation models, even if fully implemented so as to cover Victoria, it appears as though the accumulative outcomes under the Settlement Act would not approach these figures.

Beyond this, the Western Australian agreements display a wider scope, providing for:

- **Housing:** the Noongar Agreement provides for the development of a housing program, while the Yamatji Nation Agreement will see the transfer of housing properties and development of partnership opportunities.
- **Economic Development:** Both agreements include structured economic and community developments initiatives, with the Noongar Agreement committing to the development of a tailored framework to assist Noongar businesses and improve Government service delivery to the Noongar community. The Yamatji Nation Agreement will see the establishment of a Business Development Unit within the Traditional Owner corporation to provide business evaluation and incubation support for Yamatji Nation businesses. The Yamatji will also receive commercial and industrial land parcels within the Agreement area.
- **Capital Works Program:** The Noongar will receive funding to contribute to the establishment of a Noongar Cultural Centre and office space for Noongar Corporations, and up to two hectares of land towards the development of a Noongar Cultural Centre.
- **Water:** The Yamatji Nation Agreement will see the creation of a strategic Aboriginal Water Reserve consisting of 25 GL per year for use or trade. It will also fund investigations of viable water resources across the Agreement area, and fund a monitor training program to produce qualified Yamatji Nation water monitors.

These initiatives are not included in the standardised Settlement Act framework. Of course it remains open for Traditional Owners to attempt to negotiate individual arrangements outside the framework, however the commitment to a State-wide comprehensive land justice program naturally ensures that every decision raises State-wide implications, and Victoria is yet to see individualised outcomes in Settlement Act agreements that match the scale of those above. However, while critiquing the Victorian framework, it is also important to acknowledge the ambition of the Victorian approach, which it seems poised to repeat in treaty, which is to provide State-wide outcomes for every Traditional Owner group, regardless of their status under the NTA. In taking on the substantial task of developing State-wide solutions, it is perhaps inevitable that those solutions appear less agile than other States, who are not committed to considering the rights of all Traditional Owners, but instead only rights relative to a group's ability to fit within certain confines of the NTA. The Victorian approach also ensures a dependable parity of outcome, which is not assured for groups negotiating outside a structured framework. This can perhaps be seen in the different treatment of native title rights as between the Noongar and the Yamatji. Whereas the Yamatji received recognition of their rights through a Federal Court consent determination,[102] the Noongar where required to surrender, and agree to the extinguishment, of their native title rights, as a condition of the agreement.[103] This is potentially explained because of the likely treatment each group could reasonably expect under the NTA. Yamitji Country is in the remote Pilbara, less impacted by colonisation, and therefore presumably the group can more easily meet the requirements of s 223 of the NTA. However, the Noongar are located in the southern, more populous region, with their traditional lands including the city of Perth. As was explained above, the Settlement Act is designed to avoid impact on any underlying native title rights, and does not require extinguishment as a condition of reaching agreement. In this way, the framework ensures that all Victorian Traditional Owners, including those that may have impediments to meeting native title requirements, are not put in the position of having to make difficult, and potentially divisive compromise.

PART 4

A FRAMEWORK FOR LOCAL TREATIES

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The Assembly has indicated its intention to pursue a framework for both a State-wide Treaty, and for Local Treaties. While the detail and structure of these agreements are yet to be determined, it seems clear that Local Treaties will entail agreement making between the State and individual Traditional Owner groups.

The Settlement Act provides a useful precedent for this type of agreement making in Victoria, providing an example of how negotiations may be conducted, the potential legal structure of the agreements, and even many of the rights that may ultimately be in play. However a Settlement Act agreement is not a treaty, failing to recognise the Traditional Owner group as a political community, or provide for any ability to self-govern.

Below we put forward a proposal for a Local Treaty framework that seeks to benefit from 10 years' experience of Settlement Act implementation. This proposal seeks to respond to Part 3 of this paper, and the two critical areas it is suggested the Settlement Act has failed to deliver, in that it:

(i) has not resulted in a more efficient system of claim resolution; and

(ii) relies on a framework that is often static, unable to respond with flexibility, or keep pace with NTA developments.

A MORE EFFICIENT SYSTEM OF CLAIM RESOLUTION

The inability, or delay, in resolving claims has a compounding impact on the overall Settlement Act process. The lack of momentum engenders a loss of faith in the process by the Traditional Owner community, and stagnates internal efforts at reform within government departments. In order to overcome these problems, a Local Treaty framework will need to ensure progress and the regular delivery of outcomes to Traditional Owner groups.

Below we put forward two proposals to increase efficiency in achieving outcomes, the first designed to reduce the pressure and anxiety inherent in Traditional Owner and State negotiations, and the second to provide clear pathways for the resolution of inter and intra-Traditional Owner disputes.

(i) **No insistence on finality:** A common thread running through the methodology in each proposal discussed below, is a shift in focus from demanding finality, and instead pursuing progress and certainty. This is the suggestion that the State dispense with its position of seeking 'full and final' settlements. While the State may perceive this as taking on a higher risk profile (this perception is discussed further below), the purpose is to reduce the risk burden currently carried by Traditional Owner groups, and essentially lower the stakes of the often fraught and difficult decisions they are required to make.

This would entail abandoning full and final requirements in agreements wherever possible. This would be applied to compensation, but also to those components that Traditional Owners are primarily required to agree among themselves, such as traditional boundaries, and potentially even elements of group composition and the inclusion of ancestors. That is, the aim of this process should not be finality, but instead progress. While perhaps counterintuitive, such an approach is likely to lead to more certainty in the long run, because through reducing the pressure placed on Traditional Owner groups, it may be possible to reach more, and arguably more stable, agreements with those groups.

The alternative, pushing to achieve absolute legal resolution, is ultimately counterproductive. It raises the anxiety and distrust of groups with a long history of betrayal in its dealings with government, and creates an environment of perceived winners and losers, with Traditional Owners pitted in competition against each other over issues of recognition and identity.

It is also, we suggest, a consequence of viewing Traditional Owners as somehow akin to holders of a property right, with a potential legal claim against the State. This conception reduces the relationship with the State to a legal dispute, which can be 'settled'. Such a settlement being designed to allow more or less ordinary relations to resume, altered just enough to satisfy any underlying legal obligations.

This position is no longer tenable in the context of treaty. When the Traditional Owner group is viewed, not as a holder of an infringed property right, but as a political community operating under its own sovereignty, the focus must shift to an ongoing, perpetual and nation-to-nation relationship.

This approach is reflected in modern treaty processes in British Columbia, where one option utilised to create stability, but not final resolution, is an 'Incremental Treaty Agreement.' These are legally-binding pre-treaty agreements that allow the parties to move forward on select and discrete issues, and provides both parties 'with economic benefits from land and resources prior to signing a final agreement'.[104] While not a replacement for a treaty, Interim Treaty Agreements can 'build trust among the parties, create incentives to reach further milestones and provide increased certainty over land and resources.'[105]

This is reflective of a broader view within the British Columbia treaty process that '(t)reaties are not final in the sense that they are meant to signify an ongoing relationship between the parties.'[106] In this sense certainty is preferred to finality, with the understanding that certainty can continue, despite underlying change, provided events develop in predictable ways. The British Columbian process takes the view that:

> In all types of negotiations, certainty can be achieved without finality. The challenge is to develop predictable procedures for dealing with issues without extinguishing or impairing those aboriginal rights not specifically dealt with in a treaty... What certainty really means is "predictability"—the familiarity that develops from a history of working together. Through interim measures agreements, aboriginal and non-aboriginal communities can start building mutually beneficial governance arrangements, business relationships, land management processes and other cooperative relationships.[107]

A similar approach could be adopted in the Victorian treaty process. That is, agreement making with the State, but also agreements between Traditional Owner groups, could take an incremental approach that does not insist on finally resolving all issues. This could be particularly useful in dealing with native title compensation. What the advent of the Timber Creek decision makes clear, is that both the quantity and accessibility of data, as well as the likelihood that the common law will continue to develop, mean it is difficult to immediately determine the extent of the State's liability with any precision. In such circumstances, it is difficult, if not improper, to ask Traditional Owners to enter an agreement that provides for full and final settlement, when the amount of the actual liability is unknown. Therefore, a sensible interim position, is for the State to make a payment based around agreed principles, and set on broad estimates, without insisting this payment free the State from further liability. This will provide Traditional Owners comfort, that while circumstances may remain uncertain, they have not finally forgone any legal entitlement.

Any risk perceived to be taken up by the State through this, or similar proposals dispensing with finality, such as impeding its ability to efficiently undertake public development works, or foster stability for commercial development, can be mediated by the creation of a predictable process, and certainty as to obligations. To the extent that obligations under the NTA, such as compensation, are not fully and finally settled, the State is not exposed to new risk as it already carries that potential liability, but has at least partially reduced it through the provision of some compensation and rights. From the other side of negotiations, Traditional Owners can have confidence that they have not signed away the entitlement of future generations, or given up on a claim to some area of Country excluded from the final agreement.

Another example of where abandoning finality would encourage greater progress, is with respect to the agreement of boundaries between Traditional Owner groups. Under current Settlement Act processes, entry into an RSA requires the determination of a hard boundary, demarcating where the Traditional Owner group's rights and interests begin, and where they end. As stated above, this does not necessarily accord with traditional understandings, and can be the cause of much friction within, and between Traditional Owner groups.

One way to address this, is that rather than determining a single area, the traditional Country could be described as comprising of:

- a **core area**, being an area of uncontested Country, wholly within the ownership and control of a single Traditional Owner group; and
- a **buffer area**, being an area where the exact boundary is in dispute, or where there are acknowledged overlapping rights.

The purpose of establishing a buffer area would be to allow the parties to move forward, in circumstances where neither is required to relinquish claims to Country, and where both may jointly enjoy rights, such as rights of access and use of natural resources, and the ability to protect the environment and cultural heritage.

It may be that over time the groups are able to come to a final resolution as to the placement of the boundary, or they may agree to continue the exercise of joint rights. In any event, the inability to immediately resolve the issue would not be a barrier to the wider enjoyment and exercise of their rights to Country. This process would ensure that Traditional Owners can have greater confidence that the recognition of a neighbour is not a zero sum outcome, because recognising one group is not the disenfranchisement of another.

(ii) **Wider options for dispute resolution:** In Part 1, we discussed the 'Threshold Process' through which a Traditional Owner group is required to prove that they are: (i) the 'right people for country'; and (ii) possess the requisite 'negotiation capacity.' As stated, these elements must be proved to the satisfaction of the State, who holds the ultimate decision making power.

Of course this sits uncomfortably with the concept of self-determination, and also potentially gives rise to issues of transparency, as the State is a party to negotiations, and may therefore be perceived to hold an interest in the outcome. This issue appears to have been addressed in the Treaty Act, through the creation of the Treaty Authority. While the body is yet to be designed, it appears envisaged as playing a similar role to the BC Treaty Commission within the modern treaty process in British Columbia.

Pursuant to section 28 of the Treaty Act, the Treaty Authority is to be established to:

- facilitate and oversee treaty negotiations;
- administer the treaty negotiation framework;
- provide for resolution of disputes in treaty negotiations in accordance with the treaty negotiation framework; and
- carry out research to support treaty negotiations and the administration of the treaty negotiation framework.

From the above, it is clear that the Treaty Authority will play a significant role in dispute resolution processes as between the State and Traditional Owner groups, but may also play a role in inter and intra Traditional Owner group disputes.

While this may, and likely will, include culturally appropriate mediation services, such as those currently provided by the RPfC, it could also serve as an arbitrator of disputes. That is, it could be utilised to undertake factual enquiries as to whether a Traditional Owner group meets the required thresholds.

This could take the form of a tribunal, relatively informal in nature, but also applying a disclosed and clear legal methodology to arrive at findings of fact. This process would also necessarily require a distribution of resources between the parties, so that all participants could access historical, anthropological and legal advice.

Whereas the 'Threshold Process' is largely conducted on the papers, with information and research submitted to the State for assessment, and with legal representatives often placing strict controls on its dissemination, this process would take place in an open forum, subject only to appropriate constraints on dealing with culturally sensitive material.

This process would be distinct from the perhaps comparable enquiries made through a native title claim, because it would ultimately not be concerned with the requirements of s 223 of the NTA, but rather would focus on whatever factual questions Traditional Owners reasonably require to be answered to resolve an intra or inter-Traditional Owner community dispute. That is, it could be directly and solely focused on the issues that concern Traditional Owners, rather than the peculiarities and technicalities of the NTA.

This would include things like:

- the location of boundaries and questions as to the extent of Country; and
- issues of group composition including the appropriate inclusion of ancestors, and questions as to the potential inclusion or alleged exclusion of particular family groups.

While it is not suggested that efforts at culturally appropriate mediation should be abandoned, indeed it is hoped they will remain the primary form of dispute resolution, the ability to send matters to arbitration can act as a release valve for disputes that are truly intractable. In addition, the ability for the parties to force a matter to decision, will hopefully strengthen and encourage mediation efforts.

The design of the Treaty Authority, in exercising its tribunal function as between Traditional Owners, should be left to the TRB or Assembly, to ensure the process is self-determined and culturally credible. However, it is foreseeable that the decision makers should be drawn from a pool of Elders, with equal gender representation, and checks to ensure conflicts of interest do not arise. It would also be beneficial to include among this group a former judge of the Federal or High Court. The purpose of their inclusion is, firstly to ensure that basic (but perhaps not formal) rules of evidence are complied with, and secondly, to provide confidence in the process in the event that a decision is not accepted by one of the parties. It would seem clear that such a process would hold no authority under the Commonwealth NTA scheme, and a dissatisfied party would remain free to pursue native title proceedings in the Federal Court. While this Court would remain unbound by the decision of the Treaty Authority, and would be free to make its own findings of fact, the assurance of a rigorous and fair process having already occurred, under the oversight of an eminent judicial officer, would likely carry considerable weight in future processes.[108] The self-determined nature of the process, along with central role of respected and knowledgeable Elders, will hopefully also inspire confidence in the Traditional Owner community.

Another point of difference is that Treaty Authority tribunal decisions would be made on the best available evidence at the time. That is, if significant and material information later comes to light, an application could be brought back to the Treaty Authority tribunal to vary the decision.

This openness would hopefully reduce anxiety around decisions, and give all parties comfort that their view is not finally excluded, and that their rights (whatever they perceive those rights to be) are not extinguished or erased.

However, once a decision was made in this fashion, it would allow the groups to progress. This could include entering into negotiations with the State, or receiving a Minimum Rights Package under the Local Treaty framework. Once agreement was reached (including in any ILUA), the role of the Treaty Authority tribunal could be embedded in the agreed terms, ensuring the position of all parties is preserved.

PRODUCING A FLEXIBLE LOCAL TREATY FRAMEWORK

In considering what content should form a Local Treaty, it is worth considering that Settlement Act outcomes to some extent already mirror treaty outcomes in other countries, particularly under the modern treaty process in British Columbia. For instance, both processes result in agreements that acknowledge past injustices, and recognise the Indigenous peoples as the Traditional Owners of the land. In addition, both transfer small portions of Crown land, provide rights to access take and use natural resources, joint management over national parks and reserves,[109] and rights to be consulted and to protect Crown land that is to be developed by forestry, mining and other industry.[110]

However, what separates the Settlement Act from the treaty process in British Columbia is the ability to engage in some level of self-government. Indeed, the essential feature of a treaty, and what makes it distinct from other forms of agreement making between Indigenous peoples and the State, is that it recognises the Indigenous peoples as a distinct political community, with 'an inherent right to some level of sovereignty or self-government.'[111] This is not achieved by, nor is it an aspiration of Settlement Act agreements, nor would we argue, any other comprehensive native title agreements reached in Australia to date.

Accordingly, it would seem likely that any Local Treaty will need to incorporate both rights that are similar to those achieved through the Settlement Act, and a distinct new element providing some ability for self-government.

However, there remains some uncertainty with conceiving as to how Traditional Owner sovereignty may be operationalised at the local level. It should also be acknowledged that this may mean different things to different groups. In addition, there is a high level of variance in the capacity and capability of Traditional Owner groups. Many groups have well established corporate structures, access to funding and assets and a broad staffing profile. Many others do not have these supports. However, even groups that are robustly established, and who have experience navigating complex recognition processes,[112] are generally acting at (and often above) capacity. As such, all Traditional Owner groups will face resourcing issues, and a significant power imbalance in negotiations.

On that basis, it is proposed that a Local Treaty framework could consist of two stages:

- **Stage One – Minimum Rights Package:** Upon completing a threshold process, the Traditional Owner group is immediately provided recognition of their rights and a substantial financial package.
- **Stage Two – Local Treaty Negotiation:** After a period of implementing the Minimum Rights Package, and at a time of their choosing, the Traditional Owner group will commence negotiations with the State for a Local Treaty to recognise their sovereignty on Country.

We look at each stage in detail below.

(i) **Minimum Rights Package:** It is proposed that the Minimum Rights Package would be negotiated collectively by all Victorian Traditional Owner groups, co-ordinated through the TRB or Assembly. The package would take the rights and payments made under an RSA as a starting point and a minimum. However, it is envisaged that the Minimum Rights Package would need to be a significant improvement on, and correct deficiencies in, what is currently available under the Settlement Act. Importantly, although it would require formal legal agreement between the State and a Traditional Owner group, acceptance of the Minimum Rights Package would not be equivalent to entry into a treaty. It would, in essence, be an interim agreement similar, although wider in scope, to the Incremental Measure Agreements utilised in British Columbia. That is, its purpose would be to allow immediate recognition of the minimum entitlements of the Traditional Owner group, establish a base from which they could build for future treaty negotiations, and provide ongoing certainty between the parties.]

The package would include things like:

- **Compensation:** A significant compensation payment, which reflects or is informed by the Timber Creek decision, resulting in payments well in excess of amounts previously provided under the Settlement Act. These amounts could be treated as compensation put towards any NTA liability, however if it was later found that the NTA liability exceeded the amount provided, further funds would need to be paid.
- **Land hand backs:** The Traditional Owner groups should be able to select various parcels of Crown land (whether or not the land is currently utilised by the State) to be returned to them as freehold land, to be collectively owned.
- **Rights over public land**: Free, prior and informed consent over the use and development of all Crown land, with the ability to negotiate agreements when consent is given, and the ability to veto activities contrary to Traditional Owner interests or cultural values (i.e. logging, fracking, mining, sale of Crown land). Where consent is granted Traditional Owners should be adequately compensated. Compensation should also be paid for activities carried out by the State before the agreement, for example, the granting of long-term leases on Crown land, and exploration, mining or production activities.
- **Rights to natural resources:** Traditional Owners will have the right to access, take and use all natural resources on Country for personal use, and collectively be able to access, take and use all natural resources for commercial use.
- **Control of natural resource management policy:** Traditional Owners will have the right to contribute to, approve, or develop all State policy regarding natural resource management.
- **Sole management of national parks and other Crown lands:** Traditional Owners will have the right to become the sole managers of National Parks and other Crown land, and be able to design and implement their own policies to care for Country. Where the State seeks to utilise such land for public use, it may be leased back at market rates.

- **Economic development / procurement contracts:** The State will work with the Traditional Owner group to actively identify economic development opportunities and investments for compensation funds, including through the provision of procurement contracts for the supply of goods and services to government.
- **Operational funding:** The Traditional Owner group will be provided adequate recurring and guaranteed funding to operate and meet all of its obligations under the Minimum Rights Package, wherever the State incurs a benefit from the groups work, including for the contribution, design and implementation of natural resource management policy, and the sole management of National Parks and other Crown lands.

The content of the Minimum Rights Package would be immediately available to any Traditional Owner group who completes a threshold process overseen by the Treaty Authority.[113] Upon completing that process, they could enter into an RSA-style agreement, and immediately begin implementing the Minimum Rights Package. This initial investment and grant of rights would ensure that Traditional Owner groups are immediately able to self-determine their own future, and preserve the cultural integrity of Country. It would also allow the State to demonstrate real progress and commitment in the Treaty space.

This proposal would also have additional positive impacts:

- It could be immediately available to all groups who have completed the Settlement Act threshold process, including groups with NTA determinations, Settlement Act agreements, and those currently in negotiations, equating to in excess of 50% of Victoria;
- It could quickly be made available to the remainder of Traditional Owner groups, with dedicated research, mediation and arbitration resources assisting them through threshold processes, and provide a significant incentive to actively engage with the process;
- The quick roll out, and extensive coverage of the State, would ensure that fundamental shifts occur within government to accommodate new processes and widespread recognition of rights;
- The uniformity of rights would also provide the State and industry with certainty around processes and obligations; and
- In addition, Traditional Owner groups would collectively be implementing the same structure of rights, meaning they could together actively police and ensure that rights are respected and State obligations are met in full.

Through the above, all Traditional Owner groups would gain financial independence and a level of self-sufficiency, prior to entering into Stage Two Local Treaty Negotiations. This would mean that they are negotiating from a position of greater strength. They would also gain invaluable experience in the practicalities and difficulties of implementing a complex and wide ranging agreement, and insight as to their own aspirations and objectives, which they could seek to realise through a Local Treaty.

While the Minimum Rights Package would to some extent be inherently inflexible, in that individual Traditional Owner groups could not negotiate (significant) deviations from its structure, the structure itself would be self-determined, and could be subject to ongoing review and monitoring. This could be overseen by the collective of Traditional Owner groups, represented or facilitated the through the TRB or Assembly. This ability to collectively negotiate changes or improvements on a continuing basis, should provide a more responsive and adaptive package, whereby the shared experience of implementation can help guide the State and Traditional Owner groups, to ensure that the full potential of the package is realised.

(ii) **Local Treaty Negotiations:** This second stage would involve negotiations for political recognition, and on that basis would ultimately take the form of a treaty, formally establishing a nation-to nation relationship between the State the Traditional Owner group.

The aim of this stage would be to institutionalise the right of the Traditional Owner group to exercise a form of self-government on Country. However, it should be acknowledged that attempting to fully anticipate the mechanics of how this may be achieved is difficult, and advocating for universally applied outcomes risks infringing on the sovereignty of individual Traditional Owner groups.

At this stage it is hoped that, with Traditional Owner groups empowered through the Minimum Rights Package, the State will abandon standardised solutions, and engage with each Traditional Owner group on a sovereign-to-sovereign basis.

On that basis, it is suggested that the content of any final Local Treaty be left open, and undefined by any framework.

However, while declining to prescribe outcomes, it is nevertheless useful to offer some speculation as to the opportunities that may be available, if only to provide a completed picture. In this spirit, while there should be no limitations on what could finally be negotiated, it is possible to foresee that sovereignty at the local level would be concerned with more local issues, and will entail engagement with regional and localised settler governance, such as Local Government.

As already stated, this could mirror the proposal put forward in 'Paper 2: Sovereignty in the Victorian context' as a potential pathway for the TRB to exercise of sovereign power at the State level. That is, Traditional Owner groups could:

- take on Local Government functions, and make laws and regulation in place of Local Governments;
- have reserved seats within Local Government; and / or
- act as a voice to Local Governments.

Depending on the interest of the particular group, they could also seek to take control of the localised government services provided by the Department of Environment, Land, Water and Planning, Parks Victoria, or regional water and catchment management authorities.

In addition, it may also be possible to tax users of Country, and apply the income to power and fund the Traditional Owner group. This could include receiving a percentage of council rates, or a percentage of income from gate fees from snow fields, camping sites or other local attractions or infrastructure.

While all of these remain possibilities, they should not be considered in any way definitive. Indeed, it would seem clear that the state-wide implementation of the Minimum Rights Package will likely bring to light further opportunities and avenues for Traditional Owner sovereignty to be fully realised, and caution should be exercised against attempts to fully define or limit that concept until such a time as Traditional Owners are fully and properly resourced, and have experience with implementing a comprehensive rights regime.

FOOTNOTES

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3 Ibid.

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12 Settlement Act, s9.

13 Settlement Act, s12.

14 Settlement Act, s30.

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19 Ibid [66] (Brennan J).

20 Ibid.

21 *Western Australia v Ward* (2002) 213 CLR 1, [16].

22 NTA, Preamble. The preamble goes onto state that 'a special fund needs to be established to assist them to acquire land.' The NTA was intended to be one of three components to address historical dispossession, the others being a land fund and a social justice package. The land fund was arguably only partially implemented, and the social justice package was never provided (see Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report 2013' (Australian Human Rights Commission) 82–3).

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25 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [1] – [4].

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27 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, [46] – [47].

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41 Department of Environment, Land Water and Planning, 'Crown land in Victoria (Overview): Good Governance Fact Sheet No. 12', Victorian Government, Melbourne, < https://www.delwp.vic.gov.au/__data/assets/pdf_file/0028/527950/11.-Crown-land-in-Victoria-Overview.pdf>.

42 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, [81] (Brennan J).

43 Victoria, *Parliamentary Debates*, above n 33, (John Brumby, Premier).

44 Department of Environment, Land Water and Planning, above n 42.

45 Settlement Act, s 11. See section 9 for the types of rights that are recognised.

46 Steering Committee, above n 2, 67.

47 Ibid, 81.

48 Settlement Act, s 3.

49 Ibid.

50 Victoria, *Parliamentary Debates*, above n 33, (John Brumby, Premier).

51 *Western Australia v Ward* (2002) 213 CLR 1 [95].

52 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33.

53 This paper focuses on 'non-exclusive native title rights' meaning that the native title rights co-exists with other rights in the land, for instance the right of a pastoralist to use land for grazing may operate alongside native title rights. In some remote areas, untouched by colonial intrusion, there may be a finding of 'exclusive native title' which allows rights holders to possess, occupy and use the area to the exclusion of all others, in a manner that is comparable to freehold ownership *(Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 [213]). This paper does not consider exclusive native rights, as all native title consent determinations in Victoria have so far recognised only non-exclusive native title rights, and therefore the concept is considered of limited relevance in the Victorian context.

54 T Corbett & C O'Faircheallaigh, 'Unmasking the Politics of Native Title: The National Native
Title Tribunal's Application of the NTA's Arbitration Provisions' (2006) 33 UWAL Rev 153, 160.

55 Ibid, 172.

56 NTA, s 51(1).

57 Figures and other details are taken from the most recent RSA negotiated by the State with the Taungurung. Further details are available here: <https://www.justice.vic.gov.au/your-rights/native-title/taungurung-recognition-and-settlement-agreement>.

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66 Ibid, 17.

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69 The author acknowledges that he was previously employed by First Nations Legal and Research Services, and was the solicitor acting for the Taungurung in their negotiations with the State, and in the early stages of the subsequent judicial review (see *Gardiner v Attorney-General* [2020] VSC 2).

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73 See: *Atkinson v State of Victoria* [2013] FCA 1460 (17 December 2013), 10; *Booth on behalf of the Gunaikurnai People Claim Group v State of Victoria (No 3)* [2020] FCA 1143 (11 August 2020); *Briggs v Aboriginal Heritage Council* [2019] VSC 25 (12 February 2019); *Gardiner v Taungurung Land and Waters Council* [2021] FCA 80 (9 February 2021); *Gunaikurnai Land and Waters Aboriginal Corporation v Aboriginal Heritage Council* [2016] VSC 569 (28 September 2016); *Lovett on behalf of the Gunditjmara People v State of Victoria (No 5)* [2011] FCA 932 (27 July 2011), 5; *Mullett on behalf of the Gunai/Kurnai People v State of Victoria* [2010] FCA 1144 (22 October 2010); and *Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.

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