



Victorian Government
Solicitor's Office

Victorian Traditional Owners Trust Participation Agreement

between

The State of Victoria

and

**Barengi Gadjin Land Council Aboriginal Corporation
RNTBC ICN 4395 for and on behalf of the Wotjobaluk,
Jaadwa, Jadawadjali, Wergaia and Jupagulk People**

and

Trustee of the Victorian Traditional Owners Trust

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Date **2022**

The State of Victoria

(State)

and

**Barengi Gadjin Land Council Aboriginal Corporation RNTBC
Indigenous Corporation Number ICN 4395** for and on behalf of the
Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk People

(Corporation)

and

Victorian Traditional Owners Funds Limited ACN 153 198 7891

(Trustee)

Background

- A. The WJJWJ People have appointed the Corporation as the Traditional Owner Group Entity to represent them in relation to the land and waters which are the subject of the RSA for the purposes of the Act.
- B. The State and the Corporation have entered into the RSA and other agreements referred to in the RSA pursuant to the Act.
- C. The State has provided for the establishment of trusts to hold and invest funds paid by the State pursuant to the RSA and other recognition and settlement agreements to be applied for Charitable Purposes for the benefit of Traditional Owners on the terms of the Trust Deed.
- D. The Minister has approved the terms of the Trust Deed pursuant to section 78(2) of the Act.
- E. The Corporation as the Traditional Owner Group Entity for the WJJWJ People has requested the Trustee to establish a Trust with respect to the WJJWJ People on the terms set out in the Trust Deed.
- F. The State has agreed to be a Contributor to the Trust with respect to the WJJWJ People on the terms of this Agreement.

The parties agree

1. Definitions and Interpretation

1.1 Definitions

In this Agreement:

Act means the *Traditional Owner Settlement Act 2010* (Vic).

Agreement means this Participation Agreement.

Business Day means a day that is not a Saturday, Sunday or public holiday in Melbourne, Victoria.

Consent Determination means the determination in *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795.

Distribution means a distribution made to the Corporation by the Trustee from the Trust Fund.

Financial Year means the period from the date of this Agreement to the following 30 June and then each period of 12 months ending on 30 June in each year.

Minimum Annual Funding Amount means the amount set out in Schedule 2.

Recognition and Settlement Agreement or **RSA** means the recognition and settlement agreement entered into by the Corporation and the State under section 4 of the Act dated on or about the date of this Agreement.

Settlement Sum means the amounts payable by the State under clause 6.2(c) of the Recognition and Settlement Agreement.

Traditional Owner Group means the WJJWJ People.

Trust Deed means the deed dated 3 October 2011 establishing the Victorian Traditional Owners Trust as amended on 25 September 2018.

WJJWJ People has the same meaning as in the Recognition and Settlement Agreement.

1.2 Interpretation

In this agreement, unless the context otherwise requires:

- (a) reference to any person includes a reference to that person's personal representatives, successors and transferees (whether by assignment, novation or otherwise pursuant to law);
- (b) a reference to any group includes a reference to the members of the group from time to time;
- (c) a reference to any legislation or legislative provision includes any statutory modification or re-enactment of, or legislative provision substituted for, and any subordinate legislation issued under, that legislation or legislative provision;
- (d) the meaning of general words is not to be limited by the meaning of accompanying specific words;
- (e) the singular includes the plural and vice versa;
- (f) a reference to an individual or person includes a company, corporation, partnership, firm, joint venture, association (whether incorporated or not), body, authority, trust, state or government and vice versa;

- (g) a reference to a clause, sub-clause, schedule or attachment is to a clause, sub-clause, schedule or attachment of or to this Agreement;
- (h) the schedules form part of this Agreement;
- (i) the recitals form part of this Agreement;
- (j) a reference to any agreement, arrangement, understanding, document, deed or protocol is to that agreement, arrangement, understanding, document, deed or protocol (and, where applicable, any provisions of any of them) as amended, novated, supplemented or replaced from time to time;
- (k) where an expression is defined, another part of speech or grammatical form of that expression has a corresponding meaning; and
- (l) an agreement, representation or warranty on the part of or in favour of two or more persons binds or is for the benefit of them jointly and severally.

2. Commencement

This Agreement commences on the same date the Recognition and Settlement Agreement commences.

3. Purpose

The purpose of this Agreement is to facilitate the preservation and prudent investment of the Settlement Sum until it is applied under the Trust Deed for the Charitable Purposes with respect to the WJJWJ People.

4. Nominations for purposes of Traditional Owners Trust Deed

The Corporation is nominated as the Traditional Owner Group Entity for the Trust established by entry into this Agreement and the WJJWJ People are the Traditional Owner Group associated with it.

5. Payment of Settlement Sum to Trust

- (a) The Corporation directs the State to pay the Settlement Sum to the Trustee as an addition to the Trust Fund to be held on the terms of the Trust Deed on a separate trust for the benefit of the WJJWJ People.
- (b) The State agrees to pay the Settlement Sum to the Trustee to be held on the terms of the Trust Deed on a separate trust for the benefit of the WJJWJ People.
- (c) The Trustee:
 - (i) accepts the Settlement Sum to be held on the terms of the Trust Deed on a separate trust for the benefit of the WJJWJ People; and
 - (ii) recognises the Corporation as the Traditional Owner Group Entity for the Trust under the Trust Deed.

6. Corporation to be bound by Trust Deed

- (a) Within five Business Days of the commencement of this Agreement, the State will provide a fully executed copy of the Agreement to the Trustee as required for the establishment of a separate trust under clause 4.1(a) of the Trust Deed.
- (b) The Corporation as the Traditional Owner Group Entity hereby applies to the Trustee to establish a separate trust as set out in the Trust Deed.
- (c) The Corporation as the Traditional Owner Group Entity agrees to be bound by those provisions of the Trust Deed that impose an obligation on the Corporation.

7. Obligations of Corporation

- (a) The Corporation must act in its capacity as the Traditional Owner Group Entity under the Trust Deed in a manner which is transparent, fair and representative of all the members of the Traditional Owner Group.
- (b) The Corporation must ensure that its rules are transparent, fair and representative of all members of the Traditional Owner Group.
- (c) The Corporation must, at the request of the Trustee:
 - (i) provide all information, records and documents as may be reasonably requested by the Trustee from time to time and work co-operatively and in good faith with the Trustee to endeavour to resolve any issues that may arise from time to time in the performance of this Agreement and in relation to the relevant Trust;
 - (ii) where the Corporation is not a Registered Charity:
 - (A) provide to the Trustee, prior to a Distribution, such information as the Trustee reasonably requests regarding the intended use of the Distribution for the purposes of the Trustee satisfying itself that the Distribution will be used for Charitable Purposes;
 - (B) provide to the Trustee, within 30 days after the end of each relevant Financial Year, or at such other time as the Trustee determines, a certificate by a Chartered Accountant stating the amount of Distributions spent, or committed to be spent; and
 - (C) report to the Trustee as the Trustee requests, either within 12 months of a Distribution, or no later than 20 Business Days after the end of each Financial Year in which the Corporation was not a Registered Charity, detailing the outcomes of the relevant Distribution, or of the Distributions made during the immediately preceding Financial Year, and comparing those outcomes with the relevant objectives.

- (d) Where the Corporation is a Registered Charity, the Corporation must notify the Trustee as soon as practicable after becoming aware that circumstances have arisen that may cause it to cease to be a Registered Charity, and within 5 Business Days of it ceasing to be a Registered Charity.

8. Obligations of Trustee

- (a) The Trustee must copy the State, as Contributor, with all reports provided to the Traditional Owner Group Entity under clause 4.2(f), Part 9 and clause 13.4 of the Trust Deed for the period that the Minimum Annual Funding Amount is paid.
- (b) The Trustee must notify and consult with the State if:
 - (i) the Trustee proposes to amend the Trust Deed; or
 - (ii) the Trustee is notified that the status of a Trust as a tax concession charity or deductible gift recipient is subject to review or revoked by the Commissioner of Taxation under the Tax Law.

9. Trust Distributions

9.1 Distributions

- (a) The parties agree that the Settlement Sum will be distributed in accordance with Schedule 4.
- (b) The parties acknowledge that the Trust Deed requires the Trustee:
 - (i) in relation to Item 1 of Schedule 4, and subject to certain matters specified in clause 7.1 of the Trust Deed, to pay the Corporation in each Financial Year the Minimum Annual Funding Amount for application exclusively for Charitable Purposes;
 - (ii) if the Corporation so requests, to distribute income and/or capital of the Trust to the extent that, in the opinion of the Trustee, such distribution will not or is not likely to adversely affect the:
 - (A) continued eligibility of the Trust to maintain its endorsement as an exempt entity under the Tax Law;
 - (B) Trustee's ability to satisfy the Minimum Annual Funding Amount for the balance of the period specified in this Agreement;
 - (C) likelihood of a target amount of capital being available at the end of a period agreed with the Corporation (unless such target amount is varied by agreement between the Trustee and the Corporation prior to the Trustee acting on the relevant request); and
 - (iii) to distribute income and/or capital of the Trust to the extent that, in the opinion of the Trustee, a failure to make such distribution would or might adversely affect the continued eligibility of the Trust to maintain its endorsement as an exempt entity under the Tax Law.

- (c) The Trustee will notify the Corporation as soon as practicable after receiving a request from the Corporation under clause 9.1(b)(ii) if the Trustee considers that any of the matters referred to in paragraph 9.1(b)(ii) exists, and will consult with the Corporation with a view to assisting the Corporation to prepare and make a request that in the Trustee's opinion will not give rise to any such matter.

9.2 Investment Policy

- (a) The Trustee must develop an Investment Policy specific to the separate trust established for the benefit of the WJJWJ People under the Trust Deed.
- (b) Subject to clauses 9.2(c) and 9.2(d), the Trustee may at any time review the Investment Policy having regard, without limitation, to the matters set out in item (b) of Schedule 3 and may, if the Trustee considers it appropriate or necessary, amend the Investment Policy.
- (c) The Trustee must consult with, and seek recommendations from, the Corporation prior to the preparation of, or the making of any substantive amendment to, an Investment Policy. The Trustee must have regard to any recommendations made by the Corporation in developing or amending the Investment Policy. Such consultation must include seeking the views of the Corporation as to:
 - (i) a target amount of capital it wishes to have available after such period of years agreed by the Corporation and the Trustee;
 - (ii) the required Minimum Annual Funding Amount; and
 - (iii) its tolerance for risk.
- (d) The Trustee will, prior to developing or amending an Investment Policy, provide the Corporation with:
 - (i) details of the matters on which it seeks the views of the Corporation;
 - (ii) any information that the Trustee considers is needed by the Corporation for it to properly consider such matters; and
 - (iii) a reasonable timeframe within which the Trustee requires the Corporation to respond with its views.
- (e) The Corporation will use its reasonable endeavours to provide its views to the Trustee by no later than the last day of the timeframe provided to the Corporation by the Trustee, and acknowledges that the Trustee may proceed to develop or to amend the Investment Policy without having regard to the Corporation's views if these are not provided to the Trustee by that day.
- (f) The Corporation acknowledges that the Trust Deed provides that notwithstanding such consultation and the receipt of such recommendations, the Trustee remains responsible for the investment of the Trust Fund in what the Trustee considers to be the best interests of the WJJWJ People.

10. Resignation of Corporation

The Corporation may resign as the Traditional Owner Group Entity for the Trust by not less than 30 days' notice in writing to the Trustee and the State.

11. Replacement of Corporation

- (a) If:
- (i) the Corporation resigns as the Traditional Owner Group Entity; or
 - (ii) the Traditional Owner Group revokes its appointment of the Corporation as the Traditional Owner Group Entity; or
 - (iii) the Corporation goes into liquidation, or a receiver and manager or mortgagee's or chargee's agent is appointed, or the Corporation becomes subject to any form of insolvency administration or arrangement,

the State must liaise with the Traditional Owner Group as soon as possible to facilitate the appointment of a new Traditional Owner Group Entity.

- (b) The State must notify the Trustee in writing within 7 days of the State being satisfied that a new Traditional Owner Group Entity has been validly appointed by the Traditional Owner Group.
- (c) The Trustee is entitled to accept a notification by the State as conclusive evidence that the new Traditional Owner Group Entity has been duly appointed by the Traditional Owner Group.
- (d) The Corporation will do all things that the State or the Trustee reasonably requires it to do to ensure that any entity that succeeds the Corporation as the Traditional Owner Group Entity becomes bound by and has the benefit of this Agreement and the Trust Deed.

12. Notices and general

- (a) The parties' contact details are set out in Schedule 1. A party may change its contact details from time to time by notice in writing to the other parties.
- (b) This Agreement is governed by and construed in accordance with the law of Victoria.
- (c) The terms and conditions of this Agreement apply to the full extent that they are capable of operating concurrently with applicable laws. If the whole or any part of a provision of this Agreement is void, unenforceable or illegal, it is severed. The remainder of this Agreement has full force and effect. This clause has no effect if the severance alters the basic nature of this Agreement or is contrary to public policy.
- (d) This Agreement may consist of several counterparts. They make one original instrument.

13. Review

- (a) The parties agree that this Agreement will be reviewed as part of:
 - (i) the initial outcomes review under clause 12.2 of the RSA; and
 - (ii) a periodic outcomes review under clause 12.3 of the RSA.
- (b) The terms of those clauses apply to the relevant review of this Agreement, with necessary adjustments.

14. Variation

- (a) This Agreement may only be varied by the Parties by agreement in writing.
- (b) Without derogating from clause 14(a), the Parties may vary any deadlines in this Agreement by an exchange of letters.

15. GST

- (a) An amount payable under this Agreement by a party to the other party, in respect of a supply which is a taxable supply, represents the GST exclusive value of the supply.
- (b) The party who receives a taxable supply under this Agreement from the Supplier must, upon receipt of a tax invoice from the Supplier, pay GST to the Supplier in addition to the GST exclusive value for the supply.
- (c) Any penalty or interest payable as a result of late payment of any GST payable under this Agreement is payable by the party who causes the late payment.
- (d) In this clause, expressions set out in italics have the meaning given to those expressions in *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

Signing page

Executed as an agreement.

**Signed by the Honourable Jaclyn Symes
MP, Attorney General** for and on behalf of
the State of Victoria in the presence of:



Signature of witness

I confirm that all of the requirements of section 12 of the
Electronic Transactions (Victoria) Act 2000 have been
met.

Ken Macpherson

Name of witness (*please print*)

25/10/2022

Date:



Jaclyn Symes

**Executed by Barengi Gadjin Land Council
Aboriginal Corporation RNTBC (ICN 4395)**
in accordance with section 99-5 of the
*Corporations (Aboriginal and Torres Strait
Islander) Act 2006* (Cth)

Signature of director

Name of director (*printed*)

Date:

Signature of director

Name of director (*printed*)

Date:

The seal of Victorian Traditional Owners Funds Limited (ACN 153 198 791) is affixed in accordance with its Constitution in the presence of:

Signature of director

Signature of director / company secretary

Name of director (*please print*)

Name of director / company secretary (*please print*)

Schedule 1 Contact Details

1. State Representative (as at the execution date of this Agreement)

Name/Position	Contact Details
Dean Cowie Executive Director	Level 24, 121 Exhibition Street Melbourne Vic 3000

2. Corporation Representative (as at the execution date of this Agreement)

Name/Position	Contact Details
Charee Smith and Darren Griffin Interim Co-Executive Officers Barengi Gadjin Land Council Aboriginal Corporation RNTBC	PO Box 1255 Horsham Vic 3402

3. Trustee Representative (as at the execution date of this Agreement)

Name/Position	Contact Details
Chairperson	12-14 Leveson Street NORTH MELBOURNE VIC 3501

Schedule 2 Minimum Annual Funding Amount

The Minimum Annual Funding Amount is [REDACTED] per annum, adjusted for inflation in accordance with the Trust Deed.

The Minimum Annual Funding Amount will be reviewed after five years from the date of this Agreement, or at a date otherwise agreed by the parties in writing, and may be amended as agreed following that review.

Schedule 3 Matters covered in developing or changing an Investment Policy

- (a) Matters to be covered in an Investment Policy:
- (i) The investment objective for the Trust.
 - (ii) The risk-return profile for the Trust.
 - (iii) The need for specific asset allocation benchmarks and rebalancing rules.
 - (iv) Whether any particular investment or class of investment is to be excluded.
 - (v) Whether investments are to be confined to particular asset class or classes.
 - (vi) Whether particular investments are to be made.
 - (vii) Whether an investment can be made if it would result in more than a specified percentage of the funds standing to the credit of the Trust being exposed to a single asset, and any other diversity considerations.
 - (viii) Whether the Trustee is to take into account social, environmental or other specified considerations in making an investment consideration.
- (b) Matters to be taken into account by the Trustee in considering changes to an Investment Policy:
- (i) Whether the economic environment or any other circumstance has changed so as to make any aspect of the Investment Policy no longer appropriate.
 - (ii) Whether or not the application of the Investment Policy has given rise to satisfactory returns.
 - (iii) The views of the Corporation.

Schedule 4 Distribution of Settlement Sum

The Trustee will distribute the Settlement Sum as follows:

Item No.	Amount	Purpose and conditions
1.	██████████	<p>Core operations funds</p> <p>(a) To be held in the Trust Fund and distributed in accordance with the Trust Deed as the Minimum Annual Funding Amount.</p> <p>(b) Any of these funds remaining after 20 years may be distributed to the Corporation at the Corporation's request in accordance with the process in item 2 of this Schedule 4.</p>
2.	██████████	<p>Economic Development Funds</p> <p>(a) The Economic Development Funds can in whole or part be distributed to the Corporation by the Trustee only in accordance with the procedure in this item 2 of Schedule 4.</p> <p>(b) Any distribution of Economic Development Funds to the Corporation must be in accordance with a written business plan that sets out:</p> <ul style="list-style-type: none"> (i) the amount of the Economic Development Funds that will be the subject of the business plan (Distribution Amount); (ii) how the Distribution Amount is proposed to be expended; (iii) an analysis of the projected return on investment of the Distribution Amount, the level of financial risk of the business plan, and the nature of non-financial risks and benefits that may flow from the business plan; (iv) how the business plan will meet the charitable purposes of the Corporation's objectives; and (v) how it is anticipated that any returns on the Distribution Amount will be managed and used. <p>(c) A business plan must be:</p> <ul style="list-style-type: none"> (i) approved by special resolution at a general meeting of the Corporation held in accordance with the Corporation's rule book (including by providing details of the business plan and Distribution Amount in the notice of general meeting at which the business plan is sought to be approved); and

Item No.	Amount	Purpose and conditions
		<p>(ii) authorised by at least three quarters of identified family groups (as that term is defined in the Corporation's rule book) that have a director on the Corporation board.</p> <p>(d) Evidence of the approval and authorisation required under paragraph (c) can be provided to the Trustee by document, certified as true and correct by a majority of directors of the Corporation's board, detailing:</p> <p>(i) the approved Distribution Amount;</p> <p>(ii) the date on which the relevant general meeting of the Corporation occurred;</p> <p>(iii) the terms of the special resolution passed and how the resolution was passed;</p> <p>(iv) details of the business plan provided in the general meeting notice and any other consultation conducted with the identified family groups; and</p> <p>(v) which family groups have authorised the business plan and which have not.</p> <p>(e) On receipt of the document certified in accordance with paragraph (d), the Trustee may release from the Economic Development Funds to the Corporation the approved Distribution Amount.</p>