NATIVE TITLE SETTLEMENT FRAMEWORK

LAND USE ACTIVITY REGIME POLICY

1. INTRODUCTION

The Land Use Activity Regime (LUAR) is a simplified alternative to the future acts regime of the *Native Title Act 1993* (NTA). The objective of the LUAR is to establish a process whereby land use activities on Public Land[1] may proceed whilst accommodating third party interests and respecting the Traditional Owner (TO) rights attached to the Public Land.

Key characteristics of the LUAR include that:

- land use activities, as defined in the *Traditional Owner Settlement Act 2010* (TOSA) which are carried out on or affect Public Land, will be included in the Land Use Activity Agreement (LUAA);
- all Public Land claimed by a TO group will be included in the LUAA unless it is excluded by agreement according to previously established criteria (such as the presence of existing infrastructure);
- land use activities will be divided into four categories being Routine, Advisory, Negotiation and Agreement;
- community benefits will be negotiated for Negotiation and Agreement Activities; and
- non-extinguishment principle will apply to all activities, unless otherwise agreed.

This paper describes the Government's policy for the LUAR. It will support and inform the operation of the LUAR under Part 4 of the TOSA and will be used as a basis for the negotiation of LUAAs.

2. INDIVIDUAL AGREEMENTS

Under the TOSA, the State and a Traditional Owner Group Entity (TO group) will negotiate a Recognition and Settlement Agreement (RSA). A LUAA is a sub-agreement of the RSA. A LUAA template has been developed that will form the basis of an individual LUAA and that will provide for consistency across the State.

Any alterations to the categorisation of activities in the LUAA that are agreed following a review, due to changes in legislation, technology and the priorities of the State and TO groups should, as much as possible, be adopted simultaneously to all other individual LUAAs to maintain standardisation and consistency of the LUAR across the State. Periodic reviews of individual LUAAs would take place as part of any wider RSA review. LUAAs are able to be varied with the consent of the TO group and the State. Variations to standard conditions that may apply to industry should not be done without the agreement of industry.

3. RELATIONSHIP OF LUAR UNDER THE FRAMEWORK TO ILUA UNDER NTA

The LUAR is independent from, and separate to, the NTA. However, a LUAA will be accompanied by a registered Indigenous Land Use Agreement (ILUA) under the NTA. In respect of activities post-settlement, the ILUA's purpose is to enable a consensual "contracting out" of the NTA future act regime. The ILUA will consist of the consent of all native title holders, as well as all persons who may hold native title, to all future activities, for native title purposes. ILUAs are binding on all such persons, even where they may not be a

1 As defined in section 3 of the *Traditional Owner Settlement Act 2010*.

party to the agreement. In return, the ILUA will reference the State's commitment to maintain and comply with the LUAA. The TOSA will ensure compliance with a LUAA under State law. Once the ILUA is registered, the difference between land on which native title does/may exist and land where it is known to be extinguished, becomes irrelevant, thus removing incentives for parties to seek determinations of native title, and removing the need for expensive and time-consuming historical tenure analysis.

4. LAND THAT CAN BE INCLUDED IN A LUAA

All Public Land within the area proposed to be covered by an RSA will be included in the LUAA. This includes Crown land reserved from sale under provisions of the *Crown Land (Reserves) Act 1978* as well as land under the *National Parks Act 1975*; *Forests Act 1958*; *Land Act 1958*; *Wildlife Act 1975; Alpine Resorts Act 1983*. It does not include land vested in Government agencies such as the Director of Transport, Director of Housing, Minister for Education or statutory authorities such as water corporations and local councils - the LUAR does not apply to land that is held in freehold title (fee simple) by the State.

However, some areas of, and interests over, Public Land can be excluded from the operation of the LUAA on certain agreed grounds, at the time of entering into a LUAA. If excluded, there are no procedural rights to TOs for activities on those parcels, or in relation to those interests. The criteria for exclusion are summarised below.

4.1. Exclusions due to existing infrastructure

Land where infrastructure[2] has the effect of excluding or restricting public access is to be excluded from a LUAA. This includes land that is necessary for, or incidental to, the operation of the infrastructure, as well as an extension or refurbishment of that infrastructure. To be clear, roads, railways and tramways (and their respective reservations), and public recreation facilities are excluded.

If the infrastructure is demolished, the land will be included in a LUAA, unless it is demolished to enable the replacement or refurbishment for the same purpose. Whether or not land is excluded on the basis of existing infrastructure will need to be considered at the time of an activity proposal which may give an Advisory right or higher. Minor existing public works will not be excluded from a LUAA.

4.2. Exclusive possession interests

Existing exclusive possession interests will be excluded from a LUAA for the duration of those interests. The land over which the interests are held is not excluded. Exclusive possession interests apply to leases and other binding contracts. The timber allocation order (with respect to the right to harvest and sell timber) is also excluded from the LUAR, as the State has a perpetual right to harvest timber on State forest. To be clear, the activities that are authorised under an exclusive possession interest, such as under a lease, are not to be subject to a LUAA.

4.3. Planned future use

Public Land set aside for an identified future use but not yet developed, other than 'paper' water races and 'paper' road reserves[3], may be excluded by agreement from a LUAA. The future use would not be subject to the procedural requirements of a LUAA. Criteria (e.g. whether a contract has been let, whether the use has been funded, if there

[2] For the purposes of the LUAR, infrastructure is defined as any specified public work, other building or man-made structure or work that has changed the natural condition or topography of the land.

[3] A 'paper' water race or 'paper' road reserve refers to an area of land that has been reserved for the purpose of constructing a water race or road, but where the water race or road has not yet been constructed.

are Government approved recommendations of the Victorian Environmental Assessment Council or its predecessors) will be considered by Department of Justice as part of its processes for assessing the basis for exclusion and negotiating the exclusion with TO groups.

In particular, land that has been purchased or compulsorily acquired by the Government for a specific identified purpose (other than for parks and conservation reasons) will be identified as a planned future use and excluded from the operation of a LUAA. Such land will remain excluded even if it is later declared surplus and sold, as TOs will have already been compensated for its alienation as part of the settlement package. If it is not sold, it may be included in the LUAA by variation to a LUAA.

4.4. Additional Exclusions

- Crown land leases in the Alpine Reports, and the activities that are undertaken pursuant to those leases.
- Activities or classes of activity (as agreed) that are consistent with a joint management plan for jointly managed land.
- Activities that are undertaken pursuant to an existing authorisation (e.g. Crown land lease, mining licence), or pursuant to an authorisation that has been carried out in accordance with the requirements of a LUAA.
- Cemetery Reserves to the extent that they are being used as a cemetery. This will be addressed as an exclusion due to existing infrastructure.
- Any other land that the State at the time of entering into a LUAA, wishes to exclude from the operation of the LUAA and on which agreement is reached to exclude that land.

5. CULTURAL HERITAGE

The *Aboriginal Heritage Act 2006* (AHA) is the primary vehicle through which TOs are involved in the management of Aboriginal cultural heritage. TO groups that enter into an RSA will be appointed as the Registered Aboriginal Party for the agreement area. The procedural rights under a LUAA and the management of AHA matters will be complementary and there will be no duplication. TO groups may raise cultural heritage matters as part of a response or negotiation under a LUAA. However, any issues raised would be resolved through the mechanisms under the AHA. Further detail on the interaction of the AHA and the LUAR is provided in Appendix 2.

6. TRADITIONAL OWNER RIGHTS AND THE NON-EXTINGUISHMENT PRINCIPLE

TO rights are defined in the TOSA and will be recognised in an RSA. TO rights are not rights that are taken to have any greater effect than is consistent with Victorian law. They are recognised in relation to land that is the subject of an RSA. The impact of land use activities on TO rights can be considered as per the requirements of the TOSA (e.g. section 56(b)) and as conferred by instruments under the TOSA or other legislation (e.g. a natural resource authorisation under Part 6 of the TOSA).

Public Land where native title rights and interests may have previously been extinguished under the NTA can be included in a LUAA. TO rights recognised in an RSA will not be extinguished by land use activities unless there is the pre-agreement of the TO group. The LUAA will identify the class of activity that would require extinguishment of TO rights (to the extent that any exists) and hence require pre-agreement by the TOs to surrender any native title to the State.

7. CATEGORIES AND PROCEDURAL RIGHTS

There are four categories for land use activities and their accompanying procedural rights. These categories are Routine, Advisory, Negotiation and Agreement. See Appendix 1 for the full list of activities.

7.1. Routine Activities

Routine Activities are land use activities which: have little or no impact on land use; do not limit exercise of TO rights; are of limited concern to TOs; and result in there being little benefit in applying notification or consultative procedures.

Notification to TOs will not be required in order for a Routine Activity to proceed. Examples of Routine Activities include the issuing of unused road licences, erecting signage, fencing and maintenance works.

Earth resource exploration, prospecting or retention licences will be also be categorised as a Routine Activity where the proponent agrees to comply with standard conditions that will be based on the existing ILUAs. These conditions will be included in the LUAA Template. If a variation to the conditions is contemplated for an individual LUAA, the State must consult with the relevant earth resources industry prior to entering into that LUAA.

Emergency activities to protect people, property or the environment will also be treated similarly to Routine Activities, being exempt altogether from the requirements of a LUAA.

7.2. Advisory Activities

Advisory Activities are land use activities which do not require the consent of TOs but will require consultation with TOs before the activities may proceed. They are activities that have little impact on land use; have little impact on exercise of TO rights; have merit in applying notification and consultation procedures; TOs have a significant interest in knowing about the nature and timing of the proposed activity; and consultation could result in meaningful amendment to the nature and timing of the proposed activity.

Examples of Advisory Activities include construction of new minor works such a toilet block or picnic facilities, licences for forest produce and management plans prepared for an area of Public Land.

Non-emergency fire prevention works including prescribed burning, creation of non-emergency fire breaks, regeneration and associated works following fire will be Advisory Activities.

Decision makers / public land managers must comply with the notification and consultation obligations for Advisory Activities, which will be set out in Ministerial directions, to be issued under section 34 of the TOSA.

7.3. Negotiation Activities

Negotiation Activities are those which: have a significant impact on land use; TOs have a significant interest in; and TO rights are significantly affected. An activity cannot be categorised as a Negotiation or Agreement Activity unless it is a ‘significant land use activity’ or a ‘limited land use activity’. A limited land use activity cannot be a Negotiation Class A or Agreement activity.

These activities require negotiation between a proponent (termed a 'responsible person' under the TOSA) and a TO group to secure agreement, including the consent of TOs, prior to being able to proceed. Good faith in negotiation is required from both parties. The proponent (see section 9.1) must notify the TO group of intent to undertake a relevant activity, which triggers statutory timeframes for negotiation. If agreement is reached, the agreement must also set out the form and amount of Community Benefits to be provided by the proponent, to which the consent is subject (see section 9).

The negotiations may concern any matter the parties consider appropriate, but must have regard to the nature of the proposed activity and its impact on TO rights. For land use activities that require a statutory authorisation, where agreement is reached, the proponent and the TO group entity must provide the relevant decision maker with a copy of the agreement.

7.3.1. Victorian Civil and Administrative Tribunal

If negotiations between the proponent and the TOs do not result in agreement within six months, then either party may apply to the Victorian Civil and Administrative Tribunal (VCAT) for a determination. If both parties agree, they may jointly seek a determination of VCAT at any time.

The nature of the determination depends on whether the proposed activity is a Class A or Class B Negotiation Activity.

For Class A Negotiation Activities VCAT may determine that either the activity may proceed, with or without conditions, or may not proceed. For Class B Negotiation Activities, VCAT may only determine whether the activity may proceed, with or without conditions. It may not determine that the activity may not proceed. Any conditions determined by VCAT have affect as if they were terms of a contract between the TO group and the responsible person.

In addition, for both Class A and Class B Negotiation Activities, VCAT may determine whether a proponent must make a Community Benefit payment and if so, then the amount of that payment.

If VCAT is satisfied that a land use activity will not substantially impact on the rights of a TO group, VCAT must determine that the activity may proceed.

In its role in relation to Negotiation Activities, VCAT is to hear matters in accordance with its usual procedures, including options for compulsory mediation. However, in determining matters under the LUAR, VCAT is to be constituted with a member or members with appropriate knowledge of and experience in Aboriginal culture and land use.

7.3.2. Class A Negotiation Activities

Class A Negotiation Activities include earth resource or infrastructure authorisations, other than those that are for the purposes of exploration, prospecting or retention where proponents choose to accept pre-negotiated conditions.

Class A Negotiation Activities also include the issuing of new commercial leases on Crown land that are for a term of over 10 years and up to and including 21 years (excluding major public works and utilities and Public Private Partnerships).

7.3.3. Class B Negotiation Activities

Class B Negotiation Activities include 'major public works'. Major public works are a subset of 'specified public works' which is defined in the TOSA. It can include the construction and use of works and projects, or the grant of any lease, licence, permit or other authority for works or projects physical works and land developments, where the activity is for a public purpose. Infrastructure undertaken by private utilities that can use freehold land without consent is also included in this category.

Other Class B Negotiation Activities are community purpose Crown land leases over 21 years, commercial Crown land licences and permits for more than ten years, agricultural leases covering 40 hectares or more and new Timber Release Plans.

7.3.4. Ministerial Intervention

The Minister will be empowered to take various steps in relation to Class A and B Negotiation Activities. Firstly, the Minister may request VCAT to report to him or her where VCAT does not make a determination within six months of an application being made to VCAT. VCAT must report on why a determination has not been made, and when the determination is likely to proceed.

Secondly, the Minister may request that VCAT make an urgent determination, where the Minister considers the matter urgent. The Minister may not make such a request earlier than four months from the notice date, and may not request a determination to be made any earlier than six months from the notice date. If a determination is not made by the date so notified to VCAT, then the Minister may make a determination on the same terms that VCAT may.

Thirdly, where VCAT has made a determination, the Minister may override that determination with his or her own determination, where the Minister considers it to be in the interests of the State to do so. The Minister must advise the TO group entity, the proponent and the decision maker of the Minister's intention to make such a determination and they must be afforded procedural fairness (i.e. a right to make a submission and to comment on the submission of the other party). The Minister must make such an overriding determination within two months of VCAT's determination, and if she or he does not do so within this timeframe, then VCAT's determination comes into effect.

7.4. Agreement Activities

Agreement Activities are activities with the greatest impact on TO rights and accordingly provide TOs with the highest level of procedural rights. Agreement Activities are the grant of land in fee simple (i.e. sale of Crown land / unused roads) for private purposes, the issuing of new commercial Crown land leases (excluding public works and utilities and Public Private Partnerships) that are for a term of over 21 years and major works or land clearing for commercial purposes (where a lease, licence or permit is not required, and excluding public works). Agreement Activities may result in the land being permanently removed from a LUAA.

Agreement Activities require agreement to be reached between the proponent / responsible person and the TO group, including the consent of the TO group to the activity proceeding, any conditions to which that consent is subject, and the form and

amount of Community Benefits to which the consent is subject. Identical with Negotiation Activities, the proponent must notify the TO group of an intent to undertake the activity. However, unlike Negotiation Activities, where agreement cannot be secured, VCAT may not be called upon to make a determination, nor may a Minister make a determination about whether the activity may proceed or not.

8. PRINCIPLES AND CRITERIA GUIDING CATEGORISATION OF ACTIVITIES

The following principles and criteria have been used to guide the categorisation of land use activities:

- The level of impact on TOs' ability to exercise their rights;
- Whether the activity is for public good and benefit to general community;
- That there should be no less procedural rights for TOs under the Framework as under NTA or other Commonwealth legislation;
- That there is a need to ensure commercial certainty;
- That the State must retain the right to ensure projects of vital importance proceed; and
- Practical considerations and administrative efficiencies.

8.1. Crown land leases, licences and permits

A Crown land lease, licence or permit refers to an authorisation issued under the key public land legislation (namely the *National Parks Act 1975; Forests Act 1958; Crown Land (Reserves) Act 1978;* and *Land Act 1958*). A lease generally confers exclusive rights, while a licence or permit is generally non-exclusive.

Leases, licences, permits are categorised on the basis of their scale, size and value, as well as whether they are for public, commercial or non-commercial purposes. Accordingly, long-term commercial Crown land leases are afforded greater procedural rights, than long-term community purpose Crown land leases, while licences and permits are generally classified as Advisory or Routine because they confer non-exclusive rights.

In consideration of the level of impact on TO rights, only agricultural leases that are 40 hectares or more will be categorised as Negotiation B. An agricultural lease that is for less than 40 hectares is a 'specified agricultural lease' and cannot be categorised as a Negotiation or Agreement activity. Consistent with the NTA, agricultural leases include leases for plantations and for aquaculture.

In placing long-term commercial Crown land leases (over 21 years) into the Agreement category the Government and TOs both signify their intent to enter into good faith discussions at the very early, conceptual stage of potential projects, prior to negotiation with any potential external investors. Broad assessment criteria will be developed to guide TOs and the State to assess potential long-term lease developments.

The transfer or renewal (where there is a right to renew) of leases, licences and permits is a Routine activity. Where there is not a right to renewal, a reissuing will be treated as a new lease, licence or permit. The LUAAs may include an anti-avoidance measure so that lease, licence or permit terms or areas are not disaggregated so as to avoid particular procedural rights under the LUAR.

8.2. Clearing of land and carrying out of works

TOs have a significant interest in activities that require the clearing of land and construction of works, especially those that involve earth moving. The LUAR recognises this by requiring public land managers (termed 'decision makers' in the TOSA) to ensure that works or land clearing proposals that are categorised as a Negotiation or Agreement Activity do not proceed until agreement has been reached with the TO group (or, in the case of Negotiation Activities, a determination has been issued by VCAT or the Minister).

9. COMMUNITY BENEFITS

Community Benefits are compensation entitlements arising from future events. Community Benefits should also provide incentives to each party to come to agreement. Activities for which Community Benefits apply are Negotiation and Agreement Activities. Community Benefits are subject to negotiation between a TO group and a proponent and may include:

- Economic development benefits such as cash, training and employment;
- Cultural development benefits such as language courses and cultural centres; and
- Social development benefits such as assistance with existing education programs.

Community Benefits are not intended as a substitute for the provision of mainstream services to citizens by government that are available to all Victorians nor specific services generally available to Aboriginal people.

In addition, VCAT may determine that a Community Benefit payment be made, and the amount of that payment, as outlined in section 7.3.1. This section (9) concerns Community Benefits that are negotiated between a TO group and a proponent.

9.1. Responsibility for Community Benefits

For the purposes of this policy, Community Benefits has been separated into two aspects:

- In-kind development benefits that are flexible and aimed at ensuring adequate incentives for parties to come to agreement;
- Monetary benefits that are based on the market value of the land (or dividend in the case of timber), and / or reference to the value of the land use activity.

The proponent (responsible person) will be required to negotiate any in-kind development benefits. The State as proponent will prioritise the provision of in-kind benefits that support its strategic objectives for addressing disadvantage; and develop guidelines for its agencies, to facilitate and structure negotiations, which may include templates and benchmarks.

The State is the proponent / responsible person for sale of Crown land. The State may be a proponent or a joint proponent for major public works. VicForests is the proponent for a new Timber Release Plan. The applicant (including a private utility) is the proponent for a Crown land lease, licence or permit although the State may nominate itself as the proponent if the Crown land lease, licence or permit is of state significance. The applicant is the proponent for earth resources activities.

The State will provide TOs with a proportion of net market value / market rental and, where applicable, profit based benefits that it receives for the sale of Crown land; and public land authorisations (leases, licences and permits). The State will continue its

existing practice of considering discounts to the rental for a lease, licence or permit that is for a community purpose.

For earth resources activities, the proponent will be responsible for negotiation and provision of community benefits.

9.2. Quantum of Community Benefits

The State will develop a formula for assessing the dollar value of monetary Community Benefits, which may be included in the LUAAs. The formula will cap the State's liability for Community Benefits. The formula will not apply to earth resources activities, or to other activities where the State is not a proponent, or is not issuing a Crown land lease, licence or permit.

The formula will provide:

- A proportion of the unimproved net market value of the land (or dividend in the case of native timber harvested from State forest), or a proportion of the Crown land lease, licence or permit market rental (whichever is applicable). This proportion will be higher for Agreement activities than Negotiation activities
- A proportion of the turnover of commercial activities where this is incorporated into a commercial Crown land lease rental
- Solatium at 10%
- Reimbursement of reasonable expenses related to the proposal (e.g. negotiation).

Parties may, by agreement, provide an agreed monetary quantum of Community Benefits in in-kind terms. TOs may not seek additional monetary community benefits from a third party, for activities where the formula applies.

9.3. Equity

As approximately 90% (by value) of Crown land sales in Victoria occur in metropolitan Melbourne, some TO groups may receive substantially more Community Benefits than other TO groups. However, TO groups in areas with lower land values are likely to have access and rights in relation to more land than would be the case with TO groups in metropolitan areas. Accordingly, an approach to equity will need to consider access to land, size of settlement packages, procedural fairness, and the potential income from Community Benefits. The State will determine an approach to equity that considers parity of outcomes of RSAs for and between TO groups, and other criteria such as population size, number of TOs and geographical area.

10. REGISTRATION AND COMPLIANCE

The Minister will establish a public register of agreements. Each LUAA will include a clear plan and details of the categorisation of activities and applicable procedural rights. A registrar will be appointed to maintain the land use activity register.

The decision maker / public land manager must comply with the notification obligations for Advisory Activities, which will be set out in Ministerial directions. In the case of Negotiation and Agreement Activities, decision-makers / public land mangers must be satisfied that the negotiation process is completed before authorising a land use activity. They will require written notification of agreement between the TO group and proponent; or a VCAT order making a final determination; or a copy of the Ministerial determination.

ILUAs will include compliance and dispute resolution procedures, and agreements to provide Community Benefits will be enforceable through the courts as they will constitute a legally binding contract. An earth resources authorisation that is for the purposes of exploration, prospecting or retention will include the standard conditions, including that the proponent will provide Community Benefits, where accepted by the proponent in accordance with a LUAA. This will enable the relevant decision maker to revoke the authorisation in the event of non-compliance.

11. IMPLICATIONS

The implementation of the LUAR and the requirements to negotiate Community Benefits will inevitably impact on Government and industry, as well as TO groups. The implications for TOs of the LUAR are expected to be positive, as it will provide TOs with access to a range of benefits and enable them to protect their rights. There will be costs to TOs arising from the negotiation process, but these can be offset through the reimbursement of expenses associated with a proposal by a proponent. Further, the sustainable funding model will enable TO groups to dedicate resources to the exercise of their responsibilities under a LUAA.

The environmental and social implications of the LUAR will be positive, in particular:

- The rights of TOs will be protected.
- TOs will be empowered to negotiate social, cultural and economic development benefits, which may include increased employment and business development, as well as health and education assistance.
- Environmental impacts of land use activities will be considered as part of normal procedures.
- TOs may have additional interests in minimising the environmental impacts of land use activities.

The following provides a summary of implications to Government and industry (as third party proponents). More detailed assessments of costs will be undertaken as part of the development of each settlement package. A more detailed assessment at this stage is not possible due to the confidential, negotiated and uncertain nature and quantity of agreements.

11.1. Implications for Government

The Government will be responsible for costs associated with providing Community Benefits where it is the activity proponent and instituting shared rights over Crown land. In particular, the Government will be subject to costs associated with:

- Sharing revenue associated with the sale of Crown land;
- Sharing market rental income from applicable long-term Crown land leases, licences and permits;
- Providing a proportion of the dividend of commercial native timber harvested from State forest;
- Building Community Benefits into the costs of major public works and some other projects that require the clearing of land; and
- Negotiation costs.

There is potential for some of these costs to be partially balanced by a possible increase in Crown land sales and by savings generated by settling native title claims outside of the court process. In offering settlements to Native Title claims, the

Government is acknowledging that it does not have exclusive rights over a significant portion of Crown land. The Government also recognises that TOs are entitled to compensation for certain future acts.

There may also be an initial increase in administrative costs associated with the implementation of the LUAR. However, a sustainable funding model is being developed, and the LUAR will provide a simplified alternative to the NTA's future acts regime, so administration should occur within existing resources.

There may also be an impact on some volunteer Committees of Management (delegated land managers), who may be required to ensure that certain leases that they issue have received the negotiated consent of TO groups. However, initial assessment of impacts suggests that very few of these Committees issue leases that would be subject to negotiation (currently less than 20). Only the Minister can issue leases that are for longer than 21 years.

11.2. Implications for industry

Community Benefits are intended to incentivise activity proponents to minimise impacts on TO rights. However, it is important that such costs do not distort the market or act as a disincentive to investment and/or appropriate development of Crown land. The LUAR will replace the procedures and liabilities under the NTA's future acts regime and so there should be minimal impact on most industries.

There will be some areas of land and certain activities that will be subject to the negotiation of Community Benefits, which were not covered by the future acts regime. This will increase equity and improve certainty for industry about suitable locations for development, and their obligations under the LUAR. Proponents will be able to negotiate agreements that do not threaten the viability of their proposed investments. Negotiations must occur in 'good faith' and if agreement cannot be reached, VCAT can mediate and / or adjudicate.

Particular examples of where industry proponents may need to negotiate with TO groups include:

- Where an applicable long-term Crown land lease, licence or permit is sought, proponents may be required to negotiate and provide in-kind development benefits (e.g. employment opportunities).
- During the development of plans for earth resources activities, proponents will be required to negotiate terms and conditions and Community Benefits which may include reference to market value and profit and / or in-kind opportunities.
- Joint proponents for major public works, and proponents who are private utilities, may be required to negotiate in-kind benefits associated with a particular project, however Government would, in issuing a lease or vesting land, assume responsibility for monetary benefits based on the market value of the land.

APPENDIX 1: LAND USE ACTIVITY REGIME TABLE

Category	Descriptor and activities	Summary of procedural rights
Routine	Activities which: • have little or no impact on land use • do not limit exercise of TO rights • are of limited concern to TOs • there is little benefit in applying notification or consultative procedures. Activities should include: • A Public Land Authorisation that is for a: o Unused road licence o Transfer of an existing authorisation; regardless of term or duration, or whether it is for a commercial purpose; or,: o a new licence or permit for 10 years or less. • Maintenance and other low impact works that include: o Erection and maintenance of fences, gates and signage o Maintenance of minor public works and other infrastructure o Maintenance of grounds, roads and tracks (e.g. weed control, grass cutting) o Refurbishment or extension of existing infrastructure for the same purpose. • An earth resource exploration, prospecting or retention licence, where the exploration is to be carried out in accordance with the conditions set out in a Schedule to a LUAA.	No procedural rights apply.
Advisory	Activities which: • have little impact on land use • have little impact on exercise of TO rights • there is merit in applying notification and consultation procedures • TOs have a significant interest in knowing about the nature and timing of proposed activity • consultation could result in meaningful amendment to the nature and timing of the proposed activity. Activities should include: • A Public Land Authorisation that is a: o Lease, licence or permit for a minor public works o Bee farming range licence (apiary) o Grazing or stock licence o Licence for forest produce (e.g. tree ferns, leaves, flowers, sleepers, eucalyptus oil, seed, posts, poles and timber) o Licence for extractive materials (e.g. gravel, limestone, sand, salt etc.) o Permit for recreation events (e.g. car rallies, rave parties, rogaining/ orienteering, mountain biking etc.) o Agricultural lease covering less than 40 hectares, including leases for plantations	Notification in a form agreed with TOs. Consultation with TOs prior to proceeding.

Category	Descriptor and activities	Summary of procedural rights
	and aquaculture (specified agricultural lease) regardless of the term or duration, or whether it is for a commercial purpose; or a: o Community purpose licence or permit for more than 10 years o Community purpose lease for 21 years or less o Commercial lease for 10 years or less. excluding those associated with a major public work or those listed as a Routine activity. • An Earth Resources Or Infrastructure Authorisation (s 28 (b)) that is: o Issued under the *Mineral Resource (Sustainable Development) Act 1990* for the purposes of extracting stone from an existing reserve set aside for that purpose, or from a reserve recommended for that purpose by the Victorian Environmental Assessment Council or its predecessors and approved by Government o A pre-licence survey under Part 4 Division 2 of the *Pipelines Act 2005* for a proposed pipeline that is for the purposes of the establishment, use or operation of any specified public works (see s 27, limited Land Use Activity (b)). • A Management Plan or Working Plan that is prepared under the: o *Fisheries Act 1995* o *National Parks Act 1975* o *Wildlife Act 1975.* • A change in the status of land, including the reservation of land, the revocation of the reservation of land, or the change in the boundary of land that is reserved, under the *Crown Land (Reserves) Act 1978*. • A land management activity that is the: o Planned controlled burning of the land o Regeneration works and associated activities o Rehabilitation of vegetation, or a river, creek or stream o Destruction of rabbit warrens. • Construction of infrastructure that is for a public purpose (other than for major public works), or that does not require a public land authorisation, that is, or is similar to, a: o Fish ladder o Sport or recreation facility (unless earth moving is required) o Walking track o Other track (where there is an existing footprint) o Road improvement (from one class to another) o Car park o Pump, bore or other works on a waterway	

Category		Descriptor and activities	Summary of procedural rights
		o Lighting of public places o Jetty or wharf o Tide gauge o Navigation marker or other navigational facility o Weather station or tower o Storage shed o Toilet block o Picnic facility o a low impact facility as in the *Telecommunications (Low Impact Facilities) Determination 1997* (Cth). o A work undertaken in an Alpine Resort o Other minor public work. • A change or modification to an approved Timber Release Plan.	
Negotiation		Activities which: • Have a significant impact on land use • TOs have a significant interest in • TO rights are significantly affected • Will result in community benefits for TOs.	Require the consent of TOs through good faith negotiations in order to proceed. If negotiations fail, VCAT can assess the matter.
	Sub-part A	• An Earth Resource Or Infrastructure Authorisation: o That allows for the mining, extraction, injection, utilisation, treatment or processing of an earth resource above, on or below the surface of the land, for the purposes of commercial development and production of an earth resource; or o For the purposes of exploration or prospecting for an earth resource, if the exploration or retention is not to be carried out in accordance with the conditions for carrying out such exploration that is set out in a Schedule to a LUAA. • A Public Land Authorisation that is a: o Commercial lease for more than 10 years and up to and including 21 years excluding those associated with a major public works and those specifically listed as Advisory or Routine activities. • A joint process that includes at least one negotiation activity, Class A, and no negotiation activity Class B, or agreement activity.	VCAT can determine if the activity can proceed (with or without conditions) or not proceed. VCAT deals with matters by condition, rather than declining the activity to proceed.
	Sub-part B	• Major public works, and associated activities, including: o the construction of new vehicular roads, tracks, railways and bridges where there is no existing footprint o the construction of public recreation or sport facilities where earthmoving is required o the construction of new educational, health or emergency service facilities, or similar o a project that involves the alienation of Crown land by the granting of an estate in	VCAT can determine terms and conditions of activity.

Category	Descriptor and activities	Summary of procedural rights
	fee simple that is for a public purpose o a specified public work that requires a commercial lease for more than 10 years o a project that has been declared to be a major project, declared project or similar according to legislation, or has otherwise been enabled through an Act of Parliament o the construction of infrastructure through a public-private partnership o any other works carried out by, or on behalf of, the Crown that will require the exclusion of the public for effective operation. Excluding a public work undertaken in an Alpine Resort. Note: Major public works may also be infrastructure undertaken by a Utility, and may be multiple activities that are conducted under a joint process. • A Specified Public Work undertaken by a Utility, including: o An electricity transmission or distribution facility o A gas transmission or distribution facility; o A cable, antenna, tower or other communications facility o A pipeline or other water supply or reticulation facility o A drainage facility, or a levee or device for the management of water flows o An irrigation channel or other irrigation facility o A sewerage facility, other than a treatment facility. Excluding low impact facilities as in the *Telecommunications (Low Impact Facilities) Determination 1997* (Cth). Note: Infrastructure undertaken by a Utility may require a Public Land Authorisation(s), alienation of land through the grant of an estate in fee simple, and are major public works. • A new Timber Release Plan. • A Public Land Authorisation that is a: o Commercial licence or permit for more than 10 years o Community purpose lease for more than 21 years o An agricultural lease covering 40 hectares or more excluding those specifically listed as a Routine or Advisory activity. • A joint process that includes at least one negotiation activity, Class B and no agreement activity.	
Agreement	Activities which: • Have significant impact on TO rights including extinguishment of rights • Would not be able to be done by the State on freehold land without consent of owner	Consent of TO group must be obtained prior to activity proceeding

Category	Descriptor and activities	Summary of procedural rights
	• Will result in community benefits for TOs. Activities should be: • The grant of an estate in fee simple (other than for major public works). • A Public Land Authorisation that is a commercial lease for more than 21 years, excluding those associated with a major public works and those specifically listed as a Negotiation, Advisory or Routine activity. • Major works and/or clearing of land for commercial purposes, where a lease, licence or permit is not required, and excluding major public works.	

APPENDIX 2: CULTURAL HERITAGE AND THE LUAR

Protecting and managing Aboriginal heritage sites, artefacts and human remains are fundamental aspirations of Traditional Owner (TO) groups. In Victoria, the *Aboriginal Heritage Act 2006* (AHA) is the primary vehicle through which TOs are involved in the management of Aboriginal cultural heritage (as defined in that Act). The Traditional Owner Settlement Act (TOSA) will ensure that TO groups that enter into agreements may choose to be appointed as the Registered Aboriginal Party (RAP) for that agreement area by the Victorian Aboriginal Heritage Council.

In the TOSA and the LUAA template, there must be no duplication in respect of TO groups' management of AHA matters and the procedural rights afforded under a LUAA, but processes should be complementary. This is consistent with core principle #16(d) "creating an efficient, cost effective, consistent and certain regime".

The parties may, by agreement, address matters relating to Aboriginal cultural heritage through negotiations regarding a land use activity. However:

- Nothing under this agreement alters the circumstances in which a cultural heritage permit (CHP) or cultural heritage management plan (CHMP) is required under the AHA.

- Where the parties make an agreement for the protection and management of Aboriginal cultural heritage this should include an additional clause that these provisions expire if and when a CHMP for the activity is approved, unless where the parties agree and there is no inconsistency with the CHMP.

- Where a matter comes before VCAT concerning Aboriginal cultural heritage, VCAT will only consider it under the AHA. In any matters referred to VCAT under the LUAR, VCAT will not take into account Aboriginal cultural heritage and will not impose conditions about Aboriginal cultural heritage.

- An approved CHMP under the AHA or a CHP granted under the AHA after a RAP did not object to its grant under 39(1)(a) conclusively addresses cultural heritage matters for the area to which they apply. For clarity, an "approved CHMP" includes any approved CHMP regardless of whether or not the TO group entity was the RAP for that CHMP at the time it was approved.

Where an activity is before VCAT under the TOSA, and the same activity is before VCAT under the AHA, VCAT should be able to hear these matters concurrently. In any case, VCAT should not to impose conditions relating to the protection and management of Aboriginal cultural heritage on agreements under the LUAA.

Where earth resource exploration activities are categorised as a Routine activity, the conditions may not address matters that will be subject to the AHA.

It is also anticipated that a Funding Agreement (another sub-agreement of an RSA) will be negotiated, which will, among other items, assist TO groups' aspirations to manage Aboriginal heritage projects by establishing enterprises to provide cultural heritage services.