First Principles Review
of
the Traditional Owner Settlement Act 2010

Joint report of the First Principles Review Committee
and
the Executive Policy Owners Forum

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PART 1

Introduction

The former Attorney-General, the Hon Jill Hennessy, launched the First Principles Review (**Review**) on 14 February 2020, for the purpose of reviewing the rights, interests and financial payments available to Traditional Owners under the Traditional Owner Settlement Act 2010 (Vic) (**Settlement Act**). The Review has sought to comprehensively examine the content of Settlement Act agreements, including their associated bundle of rights and financial benefits, for the first time since the commencement of the legislation.

The Review is timely, as the Settlement Act has been in operation for over ten years, resulting in three finalised agreements, and other Traditional Owner groups in active negotiations with the State. As a result, increasing areas of Victoria are becoming subject to binding legal agreements recognising Traditional Owner rights. In addition, the Review has occurred against a changing landscape in both Victoria and across Australia, not least because of the Victorian government's recent commitment to Treaty and the Yoo-rrook Justice Commission, but also because of the government's commitment to self-determination as a human right.[1] More broadly, there have been substantial advances in the law associated with the *Native Title Act 1993* (Cth) (NTA), including the recognition of commercial rights in *Akiba v Commonwealth of Australia* [2013] HCA 3, and the establishment of a methodology for calculating native compensation in *NT v Mr Griffiths (deceased) and Jones* [2019] HCA 7 (**Timber Creek decision**).

Structure of this report

This report documents the issues considered by the Review and provides various recommendations to the Attorney-General for both legislative and policy change. A summary of the full list of recommendations can be found at **Appendix 1.** In accordance with the Terms of Reference (discussed further below and included at **Appendix 2**), recommendations are identified as either:

a) Joint Recommendations, where the parties to the Review reached agreement on the proposal; or

b) Individual Recommendations, where agreement could not be reached.

In this **Part 1** of the Report we provide background on the Settlement Act, the standard content of an RSA, and the background and structure of the Review, along with a timeline of relevant events.

Part 2 of the Report contains the Executive Summary, exploring some of the difficulties faced, along with some of the key achievements of the Review.

Part 3 of the Report examines financial payments made under an RSA and provides recommendations as to the appropriate response to the Timber Creek decision and its findings as to the calculation of compensation for the extinguishment of native title rights.

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[1] Victorian Aboriginal Affairs Framework 2018 – 2023, p 12.

Part 4 of the Report outlines the rights and interests available under the Settlement Act, sets out the changes requested by Traditional Owners in relation to the agreement templates, and records the recommendations made in relation to each of these.

One of the central recommendations of this Report is to establish an ongoing Settlement Act forum to review both emerging Traditional Owner issues, and those issues left without final resolution in this Review (**proposed Settlement Act forum**). **Part 5** of the Report sets out those matters recommended for referral to the proposed Settlement Act forum.

Finally, **Part 6** of the Report reflects on the conduct of the Review, the number of meetings held, the particular barriers presented by the Covid-19 pandemic, media interest, as well as proposed interactions with Victoria's Treaty process, and possible referral of issues to ongoing negotiations with the First Peoples' Assembly of Victoria.

A glossary of terms at **Appendix 3** sets out brief explanations of the key terms used in this report.

What is the Settlement Act?

The Settlement Act is an alternative to the NTA and is unique to Victoria. It was developed in response to the strong, ongoing advocacy of Traditional Owners, specifically, the Victorian Traditional Owner Land Justice Group (**VTOLJG**), to address the limitations of the NTA in heavily colonised areas of the country.

Under the Settlement Act, only the right Traditional Owner group for an area can negotiate with the State. Once the group is sufficiently identified, the State and the Traditional Owner group may enter into substantive negotiations for a Recognition and Settlement Agreement (**RSA**) in accordance with the Settlement Act. The Traditional Owner rights recognised in such RSAs are the focus of this Review.

What is in an RSA?

The Settlement Act is designed to resolve native title claims and to address land justice issues. Accordingly, an RSA will address a wide range of land-related matters.

One of the central functions of an RSA is to provide formal recognition from the State that the Traditional Owners are, in fact, the owners of the area under traditional law and custom, and to acknowledge the historical injustices committed through colonisation. The RSA and associated agreements (or what is also called the Settlement Package) may be thought of as containing two broad components:

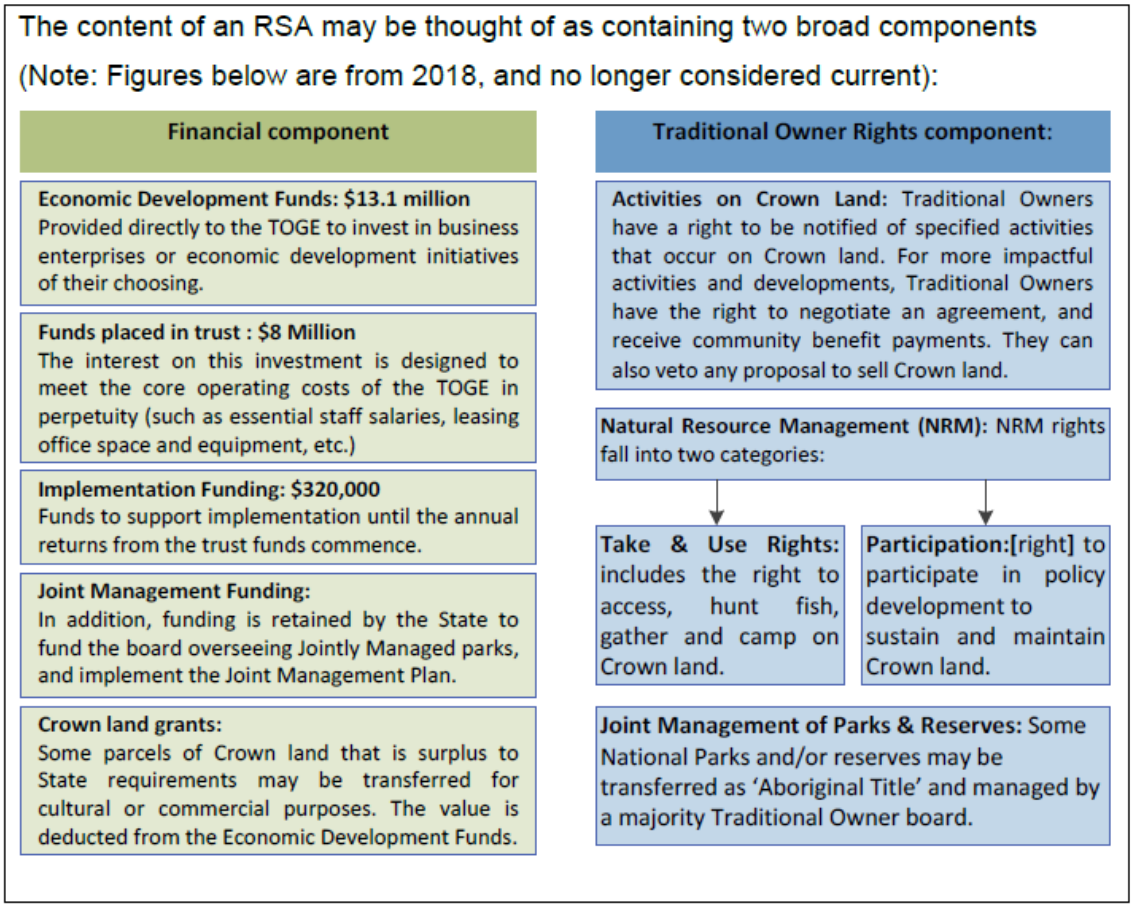
a) a financial component, providing funds and land to the Traditional Owner group for various purposes (see further detail under the subheading 'Payments made under an RSA', below); and

b) 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. The content of these rights was negotiated between the State and the VTOLJG and recorded in the

‘Report of the Steering Committee for the development of a Victorian Native Title Settlement Framework, December 2008’.

A high-level summary of the content of both the financial component and the Traditional Owner rights component is at **Figure 1**.

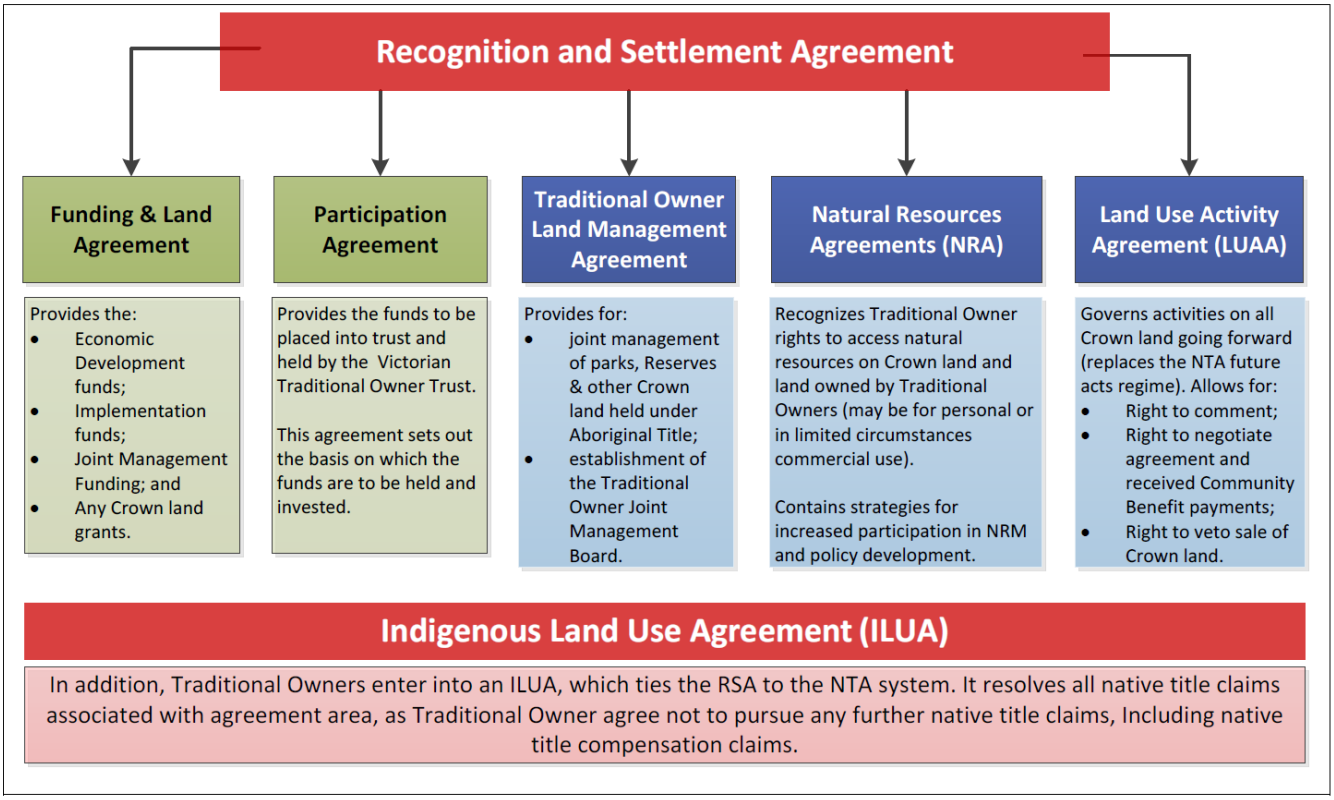
Figure 1 Summary of the content of an example ‘Settlement Package’ under an RSA.



A Settlement Package, such as that set out at **Figure 1**, is recorded within a series of legal agreements, each giving effect to various parts of the package. The agreement structure is set out at **Figure 2**, showing each agreement, and providing a high-level summary of its contents. An RSA is underpinned by these agreements, which are based on standard templates.

The Traditional Owner group is required to nominate a corporate body to enter into the RSA. This corporation, known as a Traditional Owner Group Entity (**TOGE**), is the legal vehicle used to hold Traditional Owner rights and funds on behalf of the group.

Figure 2. 'The templates' - Agreement structure of the Settlement Package



A key element of most RSAs is an Indigenous Land Use Agreement (**ILUA**), which 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 registration process with the National Native Title Tribunal, and once registered binds all native title holders. The ILUA applies the non-extinguishment principle to ensure that native title rights are not extinguished. As part of an ILUA, Traditional Owners agree not to pursue any further native title claims or proceedings. The ILUA also states that the Traditional Owner group is foregoing its entitlement to native title compensation in exchange for the funds and rights in the Settlement Package. In this way the RSA resolves all outstanding native title claims for the agreement area, without disturbing underlying native title rights and interests.[2]

Background to the Review

In 2016 in response to advocacy by Traditional Owners the Settlement Act was amended to enhance the natural resources component and include enforcement order powers for the

[2] 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 will undertake an inquiry and make 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. The native title rights however remain undisturbed, even though they have not been activated by a court process.

Victorian Civil and Administrative Tribunal (**VCAT)** on application by Traditional Owners. The template agreements required amendment to give effect to the enhanced legislative rights and fix known implementation issues.

In 2018 the Federation of Victorian Traditional Owner Corporations (**Federation**) formed the Template Review Committee, which was made up of representatives of all Traditional Owner groups currently in Settlement Act negotiations with the State. The purpose of this committee was to review the Land Use Activity Agreement (**LUAA**) and Natural Resource Agreement (**NRA**) templates in light of the 2016 amendments. It also assessed whether changes could be negotiated to better reflect the inherent rights, as well as the aspirations, of Traditional Owner groups. The committee also began to grapple with the implications of the Timber Creek decision, which at that time was still making its way through appellate courts.

The Template Review Committee produced a report to government (**Appendix 4**) which agreed to implement those changes related to the 2016 Amendment Act. However, it was apparent to both the Template Review Committee and the State that further work would be required to achieve desired outcomes, including new legislation, and to respond to the anticipated changes to native title compensation. Accordingly, the State undertook to establish the Review.

Parties to the Review

The Review was conducted as a partnership between Traditional Owners and the State, operating through the First Principles Review Committee (**FPRC**) and the Executive Policy Owners Forum (**EPOF**).

First Principles Review Committee (FPRC)

The Template Review Committee guided the formation and initial structure and governance of the FPRC, and in October 2019 commenced an Expression of Interest process, calling for any interested Victorian Traditional Owner to join the committee. The FPRC is comprised of Victorian Traditional Owners and individuals who work for Traditional Owner corporations. Secretariat support and advice was provided by the Federation, Legal and Policy Team.

The FPRC wishes to make clear that it is not empowered to make any decisions on behalf of Traditional Owner Groups and respects the individual sovereignty of Traditional Owner groups to speak for their own Country, and to self-determine their own futures. As such, the FPRC has made clear at each stage throughout this process that:

a) it does not represent any Traditional Owner groups in Victoria;

b) it is not authorised to make any agreements or decisions on behalf of any Traditional Owner group; and

c) its role in this review is limited to making recommendations to the State about improving starting positions in Settlement Act negotiations, which individual Traditional Owner groups are free to accept or reject at their complete discretion.

Executive Policy Owners Forum (EPOF)

Government was represented in the Review by the EPOF, comprised of senior executives from all relevant departments and agencies and was chaired by the Deputy Secretary, Aboriginal Justice, Department of Justice and Community Safety (**DJCS**).

Senior public servants (Deputy Secretaries or equivalents) from all relevant agencies were asked to join the EPOF, and membership included executives from:

i. the Department of Premier and Cabinet;
ii. the Department of Treasury and Finance;
iii. the Department of Environment, Land, Water and Planning (**DELWP**);
iv. Parks Victoria;
v. the Department of Transport;
vi. the Department of Jobs, Precincts and Regions (**DJPR**); and
vii. the Victorian Fisheries Authority.

Secretariat support was provided by the Land Justice Unit (formerly Native Title Unit), DJCS.

A full list of EPOF members can be found at **Appendix 5**.

Terms of Reference

A draft Terms of Reference for the Review was produced by the Template Review Committee in 2018. In 2019, the Terms of Reference was revised by the newly formed FPRC, with input from First Nations Legal and Research Services; the Victorian Government Solicitor's Office, and State agencies that use Crown land or natural resources or promote its use by industry and agencies.

Cabinet endorsed the Terms of Reference in October 2019 (**Appendix 2**). As set out in the Terms of Reference, the First Principles Review is:

primarily concerned with issues that relate to principles and legislation that underpin, and mandate the content of the template Agreements and the State's settlement policy.

Through the Terms of Reference the State committed to partner with Traditional Owners through the FPRC, and to undertake the Review based on certain rights and principles, including the:

a) principle of self-determination;
b) right to free, prior and informed consent;
c) rights contained in the Charter of Human Rights and Responsibilities Act 2006 (Vic); and
d) United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**).

Further, the State has committed and agreed through the Terms of Reference that:

a) Any Traditional Owner group that has already entered into settlements with the State under the Settlement Act or NTA will be able to benefit from, and update and vary their agreements to reflect improved new standards, policies and processes developed through the Review, if they chose to do so.
b) All Traditional Owner groups remain free to negotiate and make decisions on any aspect of Settlement Act negotiations, in accordance with their own decision-making principles. As such, the State acknowledges that the Review is not a substitute for negotiations with individual Traditional Owner groups.

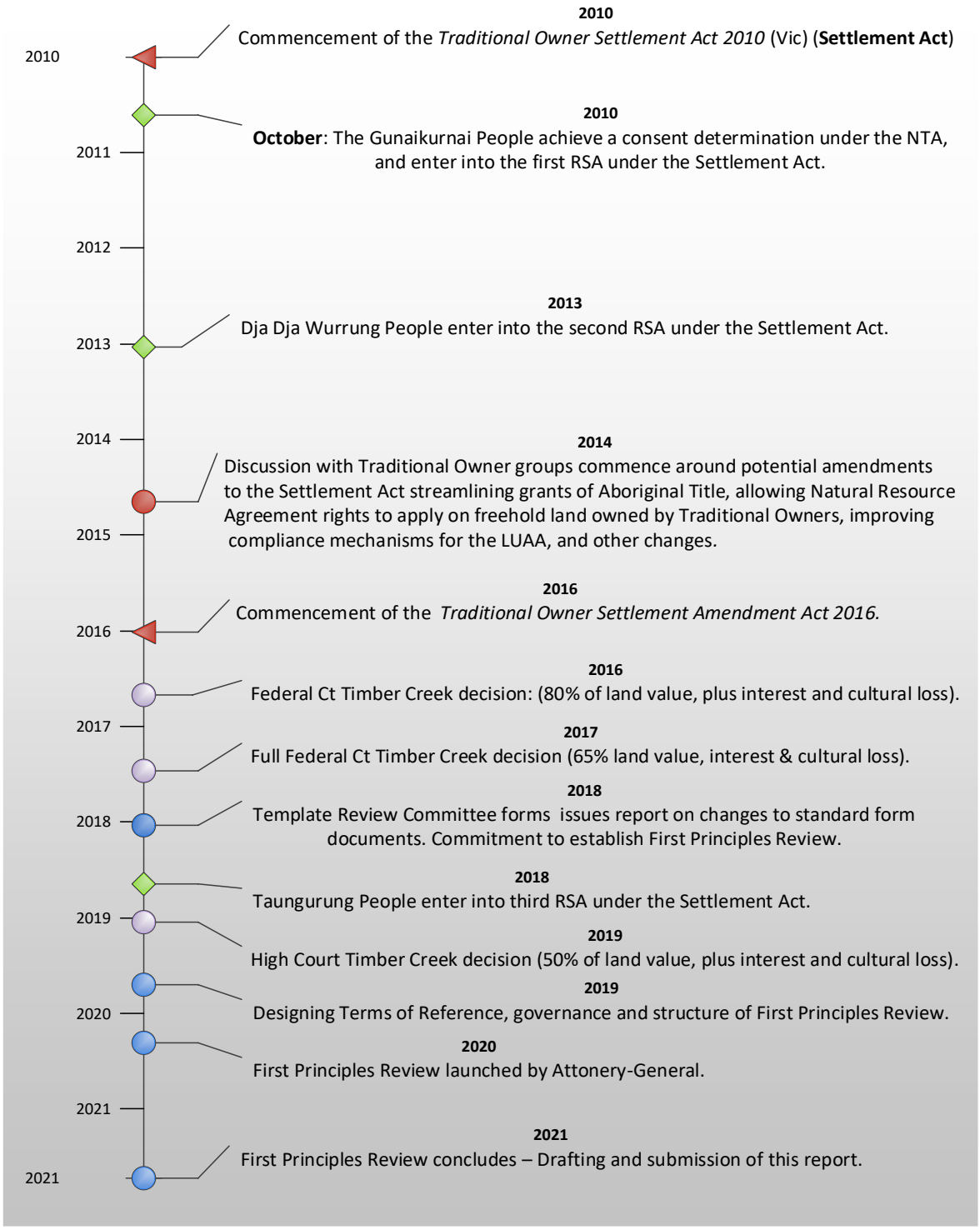
c) The Review will have reference to developments in Australian native title law and practice, and will draw on the experience of prior settlements, and other developments across the policy spectrum.

d) In conducting the Review, Traditional Owner groups can meet directly with responsible senior officials including, where necessary and relevant, Ministers, Secretaries and Deputy-Secretaries from relevant government departments in relation to any matter associated with the Review.

Timeline of relevant events

At **Figure 3** is a timeline setting out events that have occurred from the commencement of the Settlement Act, and which may have some impact upon, or relevance to, the Review.

Figure 3. Timeline of relevant events



PART 2

Executive Summary

The Review was largely concerned with two broad concerns. The first was attempting to develop a response to the Timber Creek decision and exploring methods by which principles of native title

compensation could be incorporated within the Settlement Act framework. The second was examining the Traditional Owner rights recognised under a Settlement Agreement, to assess if the level and extent of those rights was set appropriately.

Compensation

The Timber Creek decision provides a method to calculate compensation for the extinguishment of native title rights. Compensation will consist of payments for:

a) **Economic loss**: being 50% of the freehold value of the land;

b) **Interest**: payable from the date of the act;

c) **Cultural loss**: for the spiritual hurt arising from the loss of Country.

While the Timber Creek decision is a significant development in native title law, it poses some challenges for the Settlement Act framework. In large part, this is because the Timber Creek decision was decided in the context of the NTA, and therefore adopts the processes of that legislation, including a requirement to identify individual acts of extinguishment, with compensation assessed on the basis of a case by case, lot by lot, examination. Under an NTA claim, this is done through a detailed process of tenure analysis, where the history of each lot across the claim area is examined back to first contact, in an attempt to identify acts of extinguishment.

However, the Settlement Act was developed as an alternative to the NTA, and one of its principal achievements was to dispense with processes that are not appropriate for Victoria, or do not serve the interests of Victorians or Victorian Traditional Owners.

In doing so, the Settlement Act aims to reach comprehensive agreements between the State and Traditional Owner groups, agreements which are expansive and all-encompassing in nature. Rather than investigating the minutia of each individual rights breach that occurred across the settlement area, outcomes are currently assessed against a set of broad compensation principles, with a focus on issues of both fairness and sustainable resourcing. Rather than undertaking a time and resource intensive tenure analysis, in an attempt to find the extinguishment of Traditional Owner rights, the Settlement Act simply acknowledges and recognises Traditional Owner rights over the entire Crown land estate, dispensing with the need for the intricate collection of data.

The challenge before the Review, was to consider a method that takes account of the principles in the Timber Creek decision, while not adopting some of the more taxing and inequitable processes associated with the NTA.

An additional challenge lay with the concept of ‘cultural loss’, as the Timber Creek decision does not provide a quantitative method by which it can be calculated. Instead, cultural loss is to be assessed through an examination of the spiritual relationship between Indigenous peoples and their Country, following which the Court is to apply a ‘social judgement’[3] seeking “to translate the spiritual hurt from compensable acts into compensation”.[4]

[3] *Northern Territory v Griffiths* [2019] HCA 7, 237.

[4] Ibid, 155.

How this subjective and intricate process may be applied to calculating the Settlement Sum under a comprehensive agreement is a difficult and complex problem. Equally difficult is how it may be incorporated into compensation payments for future impacts arising from the ongoing use and development of Crown land, currently addressed through standardised formulae in Schedule 7 of the LUAA.

Faced with these challenges, the Review first sought to articulate and agree underlying principles, to help shape and build further discussion between the parties. The principles considered are now recorded in this Report as **Recommendations 1 to 10.**

Of these ten recommendations, five are agreed as Joint Recommendations, and five are put forward as Individual Recommendations of the FPRC, perhaps illustrating that reaching agreement on these complicated issues was not always straightforward.

Nevertheless, some significant agreement was reached on important issues.

For instance, **Recommendation 1** re-considers the State's current compensation principles, which assess whether a settlement proposal offers 'an attractive and fair alternative' to settling claims through the NTA. Recommendation 1 reframes this position, and the parties now agree that proposed settlements should instead be measured against an overall assessment of what is fair and just, evaluated against a criteria that assesses whether the settlement promotes self-determination, meets or exceeds rights and compensation available through the NTA, and complies with, and in practice implements, UNDRIP as it relates to land justice.

Additionally, **Recommendation 3** formally recognises that Traditional Owners should receive compensation informed by the principles of the Timber Creek decision, as well as, and separate to, ongoing operational funding for the cost of establishing, implementing, and operating Settlement Act agreements. The recognition of this important distinction makes clear that a Settlement Act agreement both compensates Traditional Owners for past losses, and builds a potential pathway for a shared future, to the benefit of Traditional Owners, and all Victorians.

Following the development of underlying principles, the FPRC developed a proposed process for the calculating of Settlement Sum compensation under the Settlement Act framework, known as the 'Draft Compensation Model' (**Appendix 6**). The attempt of developing the mechanics of this process, or indeed any detailed discussion of the issue, makes clear that independent advice, as well as data as to the extent of extinguishment throughout Victoria, is required. As this was not available to the Review the parties have sought to identify with some precision what is needed, and have developed and endorsed a Terms of Reference for instructing experts (**Appendix 7**) and Terms of Reference for an interim scoping study to assess available State data (**Appendix 8**).

While the Review has not finally resolved the many issues associated with articulating the principles of the Timber Creek decision within a comprehensive agreement framework, it is hoped that the recommendations provided, and the further research to be commissioned, will provide the building blocks towards a final, mutually agreeable position.

Finally, and in recognition that while this work is ongoing, the current compensation settings do not meet the standard set by the Timber Creek decision, the parties agreed on Interim Community Benefits Formulas (**Appendix 9**), to replace the formulas contained in Schedule 7 of the LUAA, until such a time as a final resolution is achieved.

Traditional Owner Rights

Under the Settlement Act the State agrees to recognise certain rights which Traditional Owners consider inherent. These rights are similar, and sometimes in excess, of the rights native title holders may have recognised through a positive non-exclusive NTA determination, including things like the right to access land for traditional purposes, to take and use natural resources, and to have a say, or in some circumstances negotiate an agreement, when the further development or use of the land will impact upon those rights.

The rights are set out in the Settlement Act, and further articulated and made operational through a series of template agreements. This report provides a total of 22 recommendations (**Recommendations 13 to 35**) dealing with Traditional Owner rights, which range from suggested amendments to the template agreements or the Settlement Act, to the adoption of new processes or practices around the exercise of such rights.

A number of these 22 Recommendations relate to issues first raised by the Template Review Committee in 2018, and the FPRC has some concerns about the timeliness of the proposed reforms (discussed below in 'FPRC comments'). Nevertheless, these recommendations, if adopted, will deliver some welcome changes, and provide further and appropriate recognition of Traditional Owner rights over Country.

Some of the key achievements set out in this section of the Report, where the EPOF and the FPRC were able to reach agreement and provide a Joint Recommendation, are listed below:

- **Recommendation 15**: provides that no restrictions should be placed upon Traditional Owners right to take and use natural resources, for non-commercial purposes, without their free, prior and informed consent, in accordance with the principles set out in the UNDRIP.
- **Recommendation 18(a)**: that the Settlement Act and the NRA template be amended to allow for the negotiation of commercial use of animals (other than fish), a provision already in place with respect to the commercial use of vegetation and stone.
- **Recommendation 20**: that the State should formally acknowledge that Settlement Agreements do not provide sufficient recognition of Traditional Owner rights and interests in water, and that this should be pursued as a reform priority.
- **Recommendation 27**: that should the State-wide ban on on-shore fracking ever be lifted, it only be allowed to occur on Country with the consent of Traditional Owners.
- **Recommendation 28**: that the Settlement Act be amended, so as to allow the LUAA to apply within the boundaries of alpine resorts.
- **Recommendation 30(a)**: that the Settlement Act and C*onservation, Forests and Lands Act (1987)* be amended in order to allow for the grant of Aboriginal title and joint management arrangements over land within the boundaries of a State Game Reserve.

In addition, **Recommendation 35** provides a jointly endorsed position in support of establishing an ongoing Settlement Act Forum, comprised of both Traditional Owners and State representatives, to build on the work of the First Principles Review. It is hoped that this Forum will finalise those issues not resolved in the current Review, both with respect to Traditional Owner rights and Compensation, as well as be able to deal with issues as they emerge.

FPRC addendum to Executive Summary

While the FPRC is grateful for the work of all EPOF members, and the commitment shown by the Attorney-General in implementing the Review, the FPRC remains of the view that the pace of reform around Settlement Act processes is too slow, and at times unambitious.

The FPRC wishes to make clear that these comments are provided, not to diminish the real advances achieved from this review, but in a spirit of reflection, to improve the joint undertaking of Traditional Owners and the State, as they work towards the implementation of self-determination in Victoria. Furthermore, these comments are particularly directed to the recognition of Traditional Owner rights, and the 22 recommendations made in Part 4 of this Report.

With respect to these 22 Recommendations, it is notable that 13 address issues that were first formally raised by the Template Review Committee in 2018. That is, these are longstanding issues for which the State has been on notice for at least three years, although in some cases longer as they have been raised previously by Traditional Owners in other forums. Despite this, much of the Review was expended on EPOF coming to internal final positions on these issues. While the inner workings of the EPOF are unknown to the FPRC, at several points during the Review there were long delays while EPOF considered positions put forward by the FPRC. Presumably this time was spent in internal debate, and while it is understood that whole-of-government decision making is complex, viewed externally from the position of the FPRC, an excessive amount of time was spent on issues long articulated by Traditional Owners, and for which it was assumed EPOF members would be well versed, and ready to propose alternatives. Indeed, it is notable that some departments sought to amend recommendations, and add last minute conditions, up to and during the final drafting of the report, when there was no time for further discussion or debate.

While these comments do not detract from the achievements of the Review, we nevertheless wish to record some examples of what the FPRC perceive as slowness to engage or act, or reluctance to engage in anything other than limited and overly cautious reform. Such examples, drawn from issues first raised in 2018, are set out below:

- **Recommendation 18(a) and (b):** The NRA template currently provides a process for Traditional Owners to negotiate with the State to utilise their Traditional Owner rights for the commercial use of vegetation and stone. Any decision or agreement to use Traditional Owner rights in this way, must be guided by the sustainability principles, and the proposal must be consistent with the purposes for which the land is managed. However, the Settlement Act currently prohibits any such negotiation with respect to the commercial use of water and animals.

  The recommendation put forward by the FPRC sought to remove the prohibitions on water and animals, so that negotiation would be permitted for the commercial use of all natural resources. EPOF supported lifting the prohibition only with respect to animals, but excluded fish. It did not support any lifting of the prohibition with respect to water. It is notable that this recommendation did not seek to convey commercial rights, only the ability to enter into negotiations with respect to such rights.

- **Recommendations 22, 23, 24, and 25:** The FPRC sought to elevate the LUAA category, and thereby increase Traditional Owner rights, with respect to the grant of various commercial and non-commercial leases, licence and permits.

While the recommendation was jointly endorsed, EPOF support is conditional upon a phased approach to implementation, so that this change will only come into effect for the majority of leases, licences and permits, in an estimated three to five years. This means that the changes may occur as late as 2026, eight years after first being raised by Traditional Owners.

- **Recommendation 26:** The recommendation put forward by FPRC sought to re-categorise 'Major Public Works' in the LUAA from a Negotiation (Class B) activity, to a Negotiation (Class A) activity. The only difference between these two categories are the powers provided to VCAT in the event of a dispute. With respect to (Class A), VCAT has the power to determine if the 'works may or may not proceed.' With respect to (Class B), the VCAT has no such power, and may only set conditions on how the works will proceed.

  First raised in 2018, EPOF confirmed by correspondence dated 14 July 2020, that it agreed to the recommendation, subject to the views of a single department which was yet to provide its position. No further comments from this department were received, and the FPRC proceeded on the assumption the recommendation was jointly endorsed, until 23 September 2021. On this date, EPOF informed FPRC it had withdrawn its support until such time as the Settlement Act could be amended to provide 'clear guidance on the factors VCAT may take into account in its decision making, and the grounds upon which VCAT may decide that work cannot proceed.' On that basis, EPOF now recommends the re-categorisation not occur for a further period of three to five years. This is despite the fact that:

  - no such guiding principles are in place for other existing Negotiation (Class A) activities, in which case VCAT is presumably trusted to apply ordinary legal principles;
  - Section 54(2) of the Settlement Act already provides that unless VCAT is satisfied that the activity would 'substantially impact' on Traditional Owner rights, they *must* allow the activity to proceed, which already seems to apply a very high standard; and
  - this request was first put in 2018, allowing a period of at least three years during which any guiding principles thought necessary could have been proposed and agreed upon.

- **Recommendation 35:** The recommendation put forward by FPRC sought to deal with several ongoing issues raised by the Template Review Committee. These were (i) avoidance of LUAA obligations by the government departments, agencies and other public land managers; (ii) dispute resolution; (iii) review mechanisms contained within the RSA; (iv) compliance with RSA obligations more generally; and (v) communication to government departments, agencies, and other public land manages about their obligations under the RSA and LUAA.

  The recommendation suggests that, in the first instance, the State appoint an independent lawyer to provide centralised advice to departments, agencies and other public land managers, so that legal advice is readily accessible, and the advice is consistent among those interacting with Settlement Act obligations. Additionally, it is sought that a penalty regime of some kind is initiated for departments, agencies and other public land managers that fail to comply with the LUAA. The recommendation also suggests longer term reforms, such as the establishment of an independent body or office to oversee implementation and disputes, but concedes this could be deferred to the proposed Settlement Act Forum.

This recommendation was not endorsed by EPOF, who requires more time to consider the proposal, and suggests no action other than referral of all issues to the proposed Settlement Act forum. Accordingly, no progress has been made on these issues as a result of this Review.

- Finally, the FPRC note that the above does not take into account other issues raised in 2018, for which this Report provides no recommendations, such as:
    - the renegotiation of Schedule 4 of the LUAA, which contains the standard terms and conditions with respect to the grant of leases licence and permits for mineral, oil and gas exploration and production;
    - Traditional Owner concerns with the standard 'Participation Strategies', meant to enable Traditional Owner participation and employment in the management of natural resources; and
    - the failure of the LUAA to provide sufficient procedural rights or compensation in relation to timber harvesting due to its reliance on the gazettal of Timber Release Plans, a process not utilised by Vicforests for several years.

The FPRC posits that the reasons for delay, as well as at times overly cautious reform, are multi-faceted. However, one reason may be, that faced with numerous complex issues, and a broad terms of reference, there was simply too much to do, and too little time. This arises because outside of a formal review process, reform of any sought is difficult to achieve, leading to the accumulation of unresolved issues. Indeed, the difficulty in achieving changes within individual Traditional Owner group negotiations was the driving force behind the Template Review Committee, this Review, and now the proposed Settlement Act forum. As we hope our comments above illustrate, achieving timely and even modest reform remains difficult even within a collective process. Indeed, many of the issues first raised in 2018, are now referred, in whole or in part, to their third review process.

It is hoped that the establishment of an ongoing forum will lessen these concerns, and allow for the thorough examination of both longstanding issues, and the ability to address problems as they emerge.

The FPRC also acknowledges that the State has, for many years, being pursuing reform on multiple fronts, including the *Joint Management Implementation Project*, *Victorian Aboriginal and Local Government Action Plan*, *Victorian Traditional Owner Cultural Fire Strategy* and *Aboriginal Access to Water Roadmap*. The State is also separately considering components of the Settlement Act, through independent reviews of the Gunai Kurnai and Dja Dja Wurrung Settlement Agreements. In addition to this, Traditional Owners have developed, and continue to advocate for their own policy proposals such as the *Native Food and Botanicals Strategy* and the *Cultural Landscapes Strategy.*

Traditional Owners have contributed to this policy development in many forums, and collectively this work, along with the recommendations in the report, represents their aspirations for the further realisation of their inherent rights. Currently, and while meaningful recognition through Treaty still remains distant, reaching agreement through the Settlement Act is the sole method by which these aspirations can be advanced and achieved. On that basis, it remains important that the State not defer the legitimate reforms sought by Traditional Owners, and recognise that while the Settlement Act retains it central position in advancing the rights of Traditional Owners, the State must honour the work we have done together, both in this Review and other forums.

Finally, the FPRC wish to reiterate that the above should not detract from the progress that was made during the course of this Review, and to acknowledge that in committing to open consideration and dialogue of these issues, the State is seeking to begin a journey towards self-determination, for which it is to be commended and encouraged.

PART 3

Compensation

On 13 March 2019, the High Court of Australia handed down the Timber Creek decision, and for the first time provided a method to calculate compensation for the extinguishment of native title rights.

The right to compensation for impacts on native title rights has existed since the introduction of the NTA; however, the High Court has not considered it until now. This considerable delay can be attributed to a range of reasons, not least of which include the many delays and hurdles that native title holders face in achieving resolution of their claims.

In this case, Mr A. Griffiths (deceased) and Lorraine Jones brought proceedings on behalf of the Ngaliwurru and Nungali Peoples, for the loss of their native title rights over an area of 127 hectares in and around Timber Creek, a remote community about 600km south of Darwin. In short, the High Court found that compensation for extinguishment should be calculated on the basis set out below (with the amounts awarded in parentheses):

a) 50% of the freehold value of the land ($320,250);

b) Interest payable from the date of the act, which will ordinarily be simple interest, but may in some cases maybe compound interest (simple interest amounting to $910,100); and

c) An amount for the cultural and spiritual loss to be assessed by considering "what the Australian community" would regard as "appropriate, fair or just" (an amount of $1.3 million, upholding the amount awarded in the courts below).

While the Timber Creek decision is a significant advance in native title law, it should be noted that it only applies to extinguishment acts taking place after 31 October 1975. This is the date of commencement of the Racial Discrimination Act 1975 (Cth) (RDA), prior to which it is conventionally understood that the extinguishment of people's rights on the basis of race was legal, and non-compensable. We note this conventional understanding of how the RDA interacts with native title compensation is currently under challenge before the courts.[5]

Payments made under an RSA

The Settlement Act and standard form templates pre-date the Timber Creek decision, and accordingly do not reflect the findings in the decision. On that basis, payments made under Settlement Act agreements are not expressed as being compensation, even though they have a compensatory effect, and act as consideration for Traditional Owners agreeing to bring no further claims under the NTA.

Payments made under Settlement Act agreements fall into two categories:

a) Various payments, funds or land parcels made available at the commencement of the RSA, as set out in Figure 1 under the heading 'Financial Component' (**Settlement Sum**).

[5] *Galarrwuy Yunupingu (on behalf of the Gumatj clan or estate group) v Commonwealth & anor* NTD43/2019.

b) Payments made to Traditional Owners when development or use of Crown land occurs, and which interferes with or extinguishes Traditional Owner rights. These payments are calculated in accordance with the 'Community Benefits Formulae' contained in Schedule 7 of the Land Use Activity Agreement (LUAA) and are analogous to payments made under the future acts regime under the NTA (**Community Benefits**).

Pre-dating the Timber Creek decision, the quantum of the above payments are not calculated in accordance with native title compensation principles. Instead the Settlement Sum is based on the State's "Resourcing Traditional Owner Settlement Act Agreements, dated May 2019" (**Resourcing Policy**), and the formulas underpinning Community Benefit payments were developed by the State in 2012.

The Resourcing Policy

The Resourcing Policy examines what is required for a TOGE to be "*sustainably funded to deliver a TOS Act settlement's benefits to members*."

The FPRC and EPOF have differing views as to the impact and effect of the Resourcing Policy:

- The FPRC believes the Resourcing Policy makes clear that the Settlement Sum is designed to be, and in fact must be, utilised in full by the corporation to service the operation of the RSA. In other words, the payments received under the agreement can in practice not be used for any purpose other than implementing the agreements, with little or no scope for wider Traditional Owner aspirations or self-determination.
- The EPOF notes that the Resourcing Policy contains generic modelling about corporation revenue requirements. Corporations retain discretion in how they spend their revenue. The Settlement Sum is clearly designed to be retained in real terms (indexed for inflation) forever, and its investment returns to be used for both core operations and to deliver improved economic, cultural and social outcomes into the future.

FPRC comments

The Resourcing Policy considers that a TOGE may adopt either a 'core' or 'optimal' staffing profile.

A 'core' staffing profile includes only 4 positions: (i) CEO; (ii) Admin assistant; (iii) Cultural Heritage Officer; and (iv) Executive Officer. An 'optimal' staffing profile includes an additional 4 roles: (i) Business Development Manager; (ii) Compliance Officer; (iii) an officer to oversee the LUAA; and (iv) an officer to oversee the NRA.

The FPRC disputes that officers to oversee compliance, the LUAA and the NRA are 'optimal' and instead, at the levels suggested by the Resourcing Policy, do not meet the most basic requirements for the minimal functioning of the RSA. In any event, the costs of an 'optimal' staffing profile, plus related admin costs, is estimated as $1.1 million annually. As such, this is the amount of annual income assessed as necessary for the corporation to operate sustainably.[6]

[6] The Resourcing Policy was developed without the input of Traditional Owners, or their relevant corporations. As such, the FPRC is not satisfied that the policy accurately reflects the costs likely to be incurred by a TOGE.

In order to achieve an annual income of $1.1 million, the Resourcing Policy concludes:

- Settlements should provide $21,000,000 (with $8 million in trust, and $13 million provided as cash); and
- If the entirety of this amount is invested, there is an estimated return of approximately $840,000.

While this does not achieve the required $1.1 million, to make up the shortfall, the Resourcing Policy includes a further $260,000 of annual funding provided to TOGEs to provide separate functions under the *Aboriginal Heritage Act 2006* (Vic).

The EPOF states that a TOGE is under no obligation to use its funds in accordance with the Resourcing Policy. While this may be technically true based on the wording of the agreement, the FPRC asserts that:

i. The RSA imposes obligations on both the State and the TOGE for implementation of the agreement, noting that all relevant State agencies, and State corporations have access to flexible and regular resources to meet their obligations, while TOGE's are expected to agree to one off lump sum payment to meet their ongoing and expanding obligations;

ii. If a TOGE does not engage staff into each of the roles contemplated by the Resourcing Policy (both those listed as 'core' and 'optimal'), it is clear that the RSA would fail and be unable to function as intended; and

iii. The Resourcing Policy significantly underestimates the required level of resourcing to ensure the minimum TOGE obligations arising under the RSA are able to be met.

This also highlights a significant conceptual difference between Traditional Owners and the State. The State appears to view the RSA as simply recognising rights, which provides Traditional Owners certain opportunities, such as the opportunity to comment or negotiate an agreement with respect to works on Crown land, or to contribute to the development of natural resources policy. While the RSA provides these legal openings, it does not provide resources to exercise the minimum recognised rights (or to meet obligations), and assumes Traditional Owners should make an assessment, within the limits of their resources, and prioritise which rights they would like to exercise.

Conversely, Traditional Owners consider that they are custodians of the land under traditional law and custom and are culturally obligated to care for Country. This means the view that a TOGE should prioritise some rights, and forgo others, does not work in the full factual context. It is FPRC's view that if TOGEs are provided a range of rights, but only the resources to exercise some of them, the full aspirations of the agreement can only ever be partially realised.

A current example of the inadequacy of the State's understanding of the current resourcing model has been provided by Taungurung Land and Waters Council (**TLaWC**). TLaWC have undertaken an assessment of their rights and obligations arising under the Taungurung RSA and have identified at least 230 actual and implied obligations for TLaWC in implementing the Taungurung RSA. TLaWC is required to engage through the LUAA notification process with over 18 different State agencies (including 2 different regions and 5 districts within DELWP alone), State Authorities and State Corporations, 11 Local Governments and currently over 20 Mining Companies, in assessing notifications and ensuring compliance with the Settlement Act and

LUAA requirements. Between August 2020 and 30 June 2021, TLaWC received over 150 LUAA notifications for Advisory and Negotiation issues with over a third of the notifications subject to ongoing discussions around the appropriate categorisation of the activities notified. All activity is being directed by the State with no current scope for exploration and implementation of Taungurung aspirations and cultural obligations through the LUAA process. The notion that an 'optimal staffing profile' allowing for 'an officer to *oversee* the LUAA' is arguably disrespectful to TOGE's and shows no genuine understanding of the scale of the obligations and volume of work required by TOGE's to meet State agencies expectations of the LUAA process. That the NRA officer is also listed as an 'optimal' and not 'core' position, again fails to respect or appreciate the huge volume of work required by this officer to address the most basic of the remit under the NRA, noting that for each project provided to the TOGE there is generally an entire team of staff within the relevant State agency progressing the project. Parity in resourcing for TOGE's with resourcing of the agency teams progressing NRA projects should be a minimum requirement.

The LUAA and NRA are the agreements in which Traditional Owners receive the vast bulk of their rights under an RSA. Without appropriate resourcing Traditional Owners are unable to exercise or access these rights or meet their obligations. Accordingly, to suggest the corporation has discretion in relation to these roles misrepresents the true position.

The FPRC acknowledge the State's position that the Resourcing Policy is out of date, and that if the recommendations of this review are implemented, it will have a confined role in determining payments made to Traditional Owners. However, in the event the recommendations of this review are not implemented, it seems likely that an updated version of the Resourcing Policy will be applied to future settlements. In those circumstances, the FPRC wishes to record the faults in its design, including its failure to comply with wider State compensation principles, in neither advancing the right of self-determination nor empowering economic, cultural and social development.

EPOF Comments

The quantum of the Settlement Sum is not calculated in accordance with NTA tenure-based compensation provisions. Instead, it is arrived at by negotiation. To determine its negotiation position, the State uses its 2018 principles that the Settlement Act should:

- Offer an attractive and fair alternative to settling claims through the NTA;
- Advance the right of self-determination by empowering a Traditional Owner group to determine its own form of economic, cultural and social development;
- Enable the achievement of Traditional Owner corporation sustainability;
- Achieve equity or appropriate parity between groups;
- Encourage the optimal use of Crown land;
- Consider the broader benefits available under the TOS Act framework; and
- Consider the financial impact on the State.

To assist with the corporation sustainability principle, the State developed the Resourcing Policy. The Resourcing Policy notes that the Settlement Sum is arrived at by negotiation and is based in large part on sufficient cash or land ($21.8 million using 2018 investment rates) being used to generate approximately $840,000 per annum, ongoing. Combined with existing ongoing RAP

program funding for core operations, the Resourcing Policy estimated that a corporation which is a RAP and has an RSA may require about $1.1 million (indexed for inflation) revenue. The Policy's investment return estimates and quantum amounts are updated regularly, based on independent advice, prior to new offers being made to a Traditional Owner group.

The Resourcing Policy anticipates the Settlement Sum maintaining its real value in perpetuity. This achieves the sustainability purpose of the policy. Consistent with the self-determination principle, corporations determine how to spend the investment earnings derived from the Settlement Sum. The RSA template or Settlement Act do not compel corporations to spend their Settlement Sum investment earnings in accordance with the Resourcing Policy or solely on RSA-related business. The Resourcing Policy assumes corporations with RSAs will require core funding to meet their Traditional Owner community's expectations and may want to spend additional income on NRA and LUAA officers or economic development officers or similar to enhance benefits for their members from the agreements.

The Settlement Sum annual revenue is not the sole revenue available to corporations with RSAs. The RSA template includes approximately $330,000 per annum (indexed for inflation) amount paid to corporations for natural resource management purposes. In addition, agencies doing activities under the LUAA that require the consent of the corporation must pay the corporation's reasonable negotiation costs (the 'Reasonable Costs' Regulations, 2017). Costs associated with joint management of Aboriginal title land is also funded separately through the RSA.

In commencing the First Principles Review, EPOF acknowledged that the Resourcing Policy was out of date based on changes in market investment conditions, the actual implementation experience of corporations and their feedback received. This feedback included that it may require amendment to better reflect the self-determination principle, such as removing the policy to invest a certain proportion of the Settlement Sum in the Victorian Traditional Owners Trust (**VTOT**). If the recommendations of this review are adopted, the Resourcing Policy should be re-purposed to meet the operational requirements payment component of Settlement Act funding. If it continues to have a similar purpose as it does now, it should be updated based on corporation experience and feedback.

Issues raised

The Template Review Committee first requested that the State's principles for calculating the Settlement Sum and Community Benefits be reviewed in light of the Timber Creek judgment.

However, applying the principles of the Timber Creek decision to a holistic regime as represented in the Settlement Act is not a simple or straightforward process. Particularly difficult is the incorporation of the concept of 'cultural loss' into a standardised and universal process such as that established by the LUAA. This is because the calculation of this component, seeking to compensate for spiritual and cultural damage, has been approached by the courts as a complex, but ultimately 'intuitive' process.[7]

For this reason, the Review approached the issue in the following way:

a) (**Principles underpinning the calculation of payments**) The parties attempted to agree on 10 principles put forward by the FPRC which would underpin any agreed approach to

[7] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [302]

calculating payments in accordance with the principles established in the Timber Creek decision. The parties achieved some success in this regard.

b) (**Compensation Model and Expert Terms of Reference**) The parties attempted to agree the basic structure for a potential compensation model, and to identify complex issues, or areas of disagreement, to be referred to an expert or experts, to aid further discussion. The parties made significant progress on developing a draft model, including advancing a draft terms of reference for potential expert advice. The FPRC puts the results of this work forward as an Individual Recommendation. The EPOF endorses further exploration of the Model but considers that additional information is required.

c) (**Interim Community Benefits Formulae**) The parties attempted to agree adjustment of the Community Benefits Formulae which are contained in Schedule 7 of the LUAA on an interim basis, until a final position could be reached. The parties were successful on reaching a temporary without prejudice position.

Each of these issues is further described below.

Principles underpinning the calculation of payments

Set out below are the ten principles developed by the FPRC to underpin the basis on which the Settlement Sum and Community Benefits should be calculated.

Principle 1: Settlements should be based on the principle that they represent a fair and just settlement	
Joint or Individual Recommendation	This is a joint recommendation.
RECOMMENDATION 1	Settlement Act agreements should represent a fair and just settlement for Traditional Owners, as assessed against the listed criteria below.

Joint Comments

The States compensation principles currently require that a settlement proposal 'offer an attractive and fair alternative' to settling claims through the NTA. However, the NTA is not, by itself, the measure for the suitability of an offer of settlement, and should instead be measured against an overall assessment of what is fair and just, as defined in the criteria below:

a) The offer complies with, and in practice implements, the UNDRIP as it relates to land justice.

b) The offer meets or exceeds the rights and compensation that would otherwise be available if the Traditional Owner group obtained a positive determination of native title.

c) The offer is consistent with the principles of self-determination, and promotes the self-determination of the Traditional Owner group, and provides sufficient resources to allow the Traditional Owner group to:

   i. exercise all of the rights obtained through the agreement; and

   ii. build an economic base that allows them to improve the lives of their members.

Principle 1: Settlements should be based on the principle that they represent a fair and just settlement
d) During the course of negotiations, the Traditional Owner group has had an adequate opportunity to advance its individual aims and aspirations, which have been considered by the State in good faith, and: i. the Traditional Owners have had the opportunity to speak directly to decision makers (being Cabinet or government ministers, and any departments or agencies identified by the Traditional Owner group) to put forward their position, and the State's negotiation team will facilitate meetings with, and ensure the active participation of such decision makers in negotiations; ii. the State has been transparent about the lines of decision making, and any issues that may preclude them from accommodating the request; and iii. if the State is unable to accommodate the request, the decision maker will meet with the Traditional Group, and provided its reasons in writing, in a timely manner, and where possible, offered alternatives and / or a commitment to continue to work towards the aim or aspiration. **EPOF comments** The EPOF considers that, additional to the joint comments above, that the 'fair and just' principle should also encompass a concept of parity and equity between groups. EPOF notes that parity and equity are already State settlement principles.

Principle 2: The calculation of compensation should not be limited to activities occurring post-1975	
Joint or Individual Recommendation	This is an individual recommendation of the FPRC and is not supported by the EPOF.
RECOMMENDATION 2	Calculation of compensation should not be limited to activities occurring post-1975.
FPRC Comments A majority of four out of seven judges in *Mabo and Others v Queensland (no. 2)* (1992) 175 CLR 1 decided that there is no compensation payable under the common law of Australia for the extinguishment of native title. Although Mabo was not directly concerned with issues of compensation, this has led to the conventional legal understanding that native title compensation is not available for acts that occurred before 31 October 1975, this being the date when the *Racial Discrimination Act 1975* (Cth) (**RDA**) became law, and only then did acts of extinguishment or impairment of native title became unlawful racial discrimination.[8] However all aspects of this question have not yet being directly determined, and this issue is currently the subject of Federal Court proceedings.[9]	

[8] Sean Brennan, 'Timber Creek and Australia's Second Chance to Grasp the Opportunity of Mabo' on AUSPUBLAW (03 April 2019).

[9] *Galarrwuy Yunupingu (On Behalf Of The Gumatj Clan Or Estate Group) V Commonwealth Of Australia & Anor)* No: NTD43/2019.

Principle 2: The calculation of compensation should not be limited to activities occurring post-1975
The FPRC believe that limiting the availability of compensation until after the enactment of the RDA is entirely arbitrary, inequitable, and unjust, and recommend that it should be abandoned by the State. The colonisation of Victoria and the dispossession of Aboriginal people from their lands largely took place prior to 1975, and while the State continues to rely on this arbitrary date to shield itself from liability for admittedly racially discriminatory acts, it fails to fully address the injustices done to the First Peoples of Victoria. **EPOF Comments** The EPOF is unable to support Principle 2 in the current Review. This is because one of EPOF's key mandates in this Review is to respond to the Timber Creek decision. That decision did not consider or change the law as understood by EPOF to be established by the High Court in *Mabo*. EPOF understands and acknowledges the justice principle at stake and therefore recommends that the issue be referred to the Minister for Aboriginal Affairs for potential progression through the Treaty process, which has a wider mandate than this Review. Additionally, it is foreseeable that compensation for loss or impairment of rights as a result of actions prior to 1975 might form part of future Treaty negotiations. Should consideration via the Treaty process recommend that pre-1975 compensation be addressed via the TOS Act, EPOF suggests that this recommendation may be further considered by the proposed Settlement Act forum.

Principle 3: That money paid under a Settlement Act agreement is compensation, and should be treated as such	
Joint or Individual Recommendation	This is a joint recommendation.
RECOMMENDATION 3	The Review recommends that money paid under a Settlement Act agreement should include: a) Compensation, being payment for loss of rights with no conditions governing its purpose; b) On-going operational funding for dedicated purposes to support corporations to meet the cost of establishing and operating settlements, including, to participate in natural resource management and joint management; and c) Commitment of on-going funding for departments to meet the cost of establishing and operating components of the settlements.
Joint Comments The Settlement Sum paid under a Settlement Act agreement should be recognised as compensation for the historical extinguishment and impairment of native title rights.	

Principle 3: That money paid under a Settlement Act agreement is compensation, and should be treated as such
A Settlement Act agreement recognises rights that Traditional Owners already hold. The agreement sets out the agreed method by which the State and Traditional Owners will interact around these pre-existing rights. Had Traditional Owners been properly compensated at the time rights were extinguished, they would have had the opportunity to build intergenerational wealth, and to overcome historical exclusion from economic participation. Compensation paid under the Settlement Act should be viewed in this light, as an attempt to return Traditional Owners to a position of financial security and prosperity. To this end, (i) compensation should be paid to Traditional Owners for the historical loss of rights; and (ii) separate and recurring funding should be provided for the operational needs of TOGEs, including but not limited to funds to participate in State processes of land and water management, policy and strategy development. Additionally, Traditional Owners should have options in relation to compensation funding, including but not limited to: payments directly to the TOGE, funding paid into the VTOT, or economic development land. Operational funding should be considered separately and negotiated based on the anticipated costs of the Corporation. Finally, the successful implementation of a Settlement Act agreement also depends on government departments being able to actively engage with TOGEs and being able to adapt their systems and processes to reflect the rights of Traditional Owners. Without dedicated funding for this purpose, it will not be possible for the State to meet its contractual obligations, or for Settlement Act agreements to be fully realised. Accordingly, such funding should be assured. **FPRC Comments** The current Resourcing Policy requires what should be compensation to be used to service the agreement. Rather than compensating Traditional Owner loss, funds are required to be used to access pre-existing rights. In addition, the State receives direct benefit from the agreement, through an efficient and legally valid land management regime, and access to Indigenous knowledge to develop effective and responsible natural resource conservation and management practices. Provided that the anticipated operational costs of TOGEs are accurately and realistically assessed, this recommendation recognises and remedies this issue, and for that reason is wholly endorsed by the FPRC.

Principle 4: A Settlement Agreement is not full and final	
Joint or individual recommendation	This is an individual recommendation of the FPRC and is not supported by the EPOF.
RECOMMENDATION 4	Settlement Act agreements should not be full and final in respect of native title compensation, and instead a method should be adopted to allow for compensation to be increased if developments in the common law would otherwise so entitle Traditional Owners.

Principle 4: A Settlement Agreement is not full and final

FPRC Comments

Currently a Settlement Act agreement provides full and final settlement of native title for the agreement area. The State is freed from any and all future liability for native title compensation,[10] and the Traditional Owner group agrees not to bring any further native title proceedings.[11]

Notwithstanding the contractual position, the State's current policy is to re-open negotiations with Traditional Owner groups, when or if it becomes apparent that original settlement terms were insufficient. Adoption of this recommendation would simply formalise this position. Because Traditional Owners have been required to forgo their underlying rights, these negotiations have to date been conducted on a goodwill basis. Adoption of this recommendation would ensure negotiations proceeded on a framework of legal rights and reduce disparity in the bargaining position of the parties.

While the Timber Creek decision has resolved or clarified some central issues around the calculation of native title compensation, other issues remain unresolved. As such, there is an environment of uncertainty, which is not conducive to full and final settlement.

Furthermore, a requirement of 'full and final' settlement is appropriate for the end of a dispute, but not for the beginning of a new relationship of partnership and trust. In those circumstances it is not justifiable to require one party to completely relinquish all legal rights, and to become completely reliant on the goodwill of the other party.

Traditional Owners are anxious about the finality of resolving their claims, particularly where settlements are imperfect and may not meet community expectations. Dispensing with a 'full and final' requirement with respect to compensation presents minimal risk to the State, however the comfort provided to Traditional Owners is substantial. Knowing that some legal rights are retained will make achieving settlements easier and more efficient. It will also assist in agreeing an overall method of compensation, as it is a less fraught task if Traditional Owners are able to address any unforeseen issues at a later date.

EPOF Comments

The EPOF is unable to support this principle and recommendation. The aim of an out-of-court settlement policy should be to provide full justice, and the end of Native Title Act litigation. The EPOF considers it is possible to ensure Victoria's Settlement Act keeps up with developments in Australian law, and proposes an alternative recommendation as follows:

a) The proposed Settlement Act forum is to consider amendments to the Settlement Act to guide what VCAT takes into account, such as whether 56(d) of the Settlement Act "reasonableness of any offer … as to … community benefits" clearly includes taking into account developments in Australian native title law.

b) The proposed Settlement Act forum is to work on an independent process to establish if a Settlement Sum based on the Compensation Model is no longer just and fair due to significant developments in Australian law and an uplift payment is required. If

[10] See clause 9 of the Indigenous Land Use Agreement, which forms part of the suite of agreements making up a settlement package.

[11] Ibid. See clause 16.

Principle 4: A Settlement Agreement is not full and final
independently recommended, the State must negotiate in good faith the amount of uplift payment to be made. c) Traditional Owners currently have the option to not use the Formulas and instead seek VCAT determination of the amount of community benefits payments. This appears to meet the Traditional Owners position that they have recourse to an independent decision-maker. To further meet the Traditional Owners' position, recommendation (a) is a review of the Settlement Act to ensure VCAT takes into account developments in Australian law when making its determinations. Recommendation (b) would extend the Settlement Act agreement's mandatory review clause to ensure that Settlement Sum payments can be uplifted due to significant developments in Australian law. EPOF notes that the government may consider the compensation model alongside compensation that may be available under Victoria's treaty process.

Principle 5: Compensation should be paid for both extinguishment and impairment of native title rights	
Joint or Individual Recommendation	This is an individual recommendation of the FPRC and is not supported by the EPOF.
RECOMMENDATION 5	Compensation for historical impairment (along with extinguishment) of native title rights should form part of the Settlement Sum. Compensation for historical impairment should be calculated: a) on the basis of newly negotiated Community Benefits formulas, applied retrospectively, where the activity would be compensated in accordance with a Land Use Activity Agreement (**LUAA**) following settlement; and b) on the basis of individual negotiation, where the activity would not be compensated under the LUAA, but has otherwise had, or continues to have, a significant impact on the ability of Traditional Owners to exercise Traditional Owner Rights over, or in relation, to the relevant land.

FPRC Comments

This Recommendation builds on Principle 3, which advocates for the Settlement Sum to be calculated as compensation under the NTA, calculated in accordance with an agreed method, informed by the Timber Creek decision.

Whereas the Timber Creek decision was only concerned with compensation for acts of extinguishment of native title, Principle 5 seeks to ensure the calculation method adopted for the Settlement Act also incorporates compensation for historical impairment of native title rights, noting that both extinguishment and impairment are compensable under the NTA.

In doing so, it is first necessary to define the term 'historical impairment' and exactly what is to be compensated. The State already has a longstanding position on the appropriate compensation amounts for certain acts impairing native title rights. In the language of the Settlement Act, these are called Land Use Activities, and are compensated by the application

Principle 5: Compensation should be paid for both extinguishment and impairment of native title rights
of the Community Benefits Formulae contained in the LUAA. However, the FPRC recommends that, in the historical context, it is necessary to expand this definition to include other significant impacts on native title rights. This is broadly designed to capture not only intentional acts, but also negligent acts, such as the contamination of land and waterways. Accordingly, the recommendation is that historical impairment should be calculated as follows. Where the historical act: a) would, if it had occurred post-settlement, be compensated under the LUAA, it should be compensated in accordance with the re-negotiated Community Benefit Formulas, applied retrospectively; b) would not be compensated under a LUAA, but has had, or continues to have, a significant impact on the ability of Traditional Owners to exercise Traditional Owner Rights over, or in relation, to the relevant land, be compensated as negotiated; and c) interest and payment for cultural loss should also be applied. **EPOF Comments** The EPOF is broadly in support of this principle, as it is consistent with compensation provisions in the NTA, and consistent with community benefits payments being made in relation to activities that impair rather than end Traditional Owner rights. However, EPOF does not support the Recommendation as stated because it considers further information and analysis is required about the records of historical land use activities, and the practicality of including all activities in a Calculation Method. EPOF recommends that this is a matter that should be referred to the expert commission.

Principle 6: Interest should be calculated as compound interest	
Joint or Individual Recommendation	This is an individual recommendation of the FPRC and is not supported by the EPOF.
RECOMMENDATION 6	Compensation should include interest on all compensable acts, calculated as compound interest.
FPRC Comments The Timber Creek decision has not provided a final or clear basis for the calculation of interest on compensable acts under the NTA. While the claimants in that matter where awarded simple interest, the majority judgment made clear that compound interest could be awarded in some circumstances, such as 'if the evidence established that, upon earlier payment of the compensation, the Claim Group would have put the compensation to work at a profit, or perhaps used it to defray costs of doing business.'[12] While the claimant group in the Timber Creek decision had a history of distributing compensation funds directly to claim group members, this is not, and has never been, a	

[12] Timber Creek decision at [133].

Principle 6: Interest should be calculated as compound interest
common practice in Victoria. Indeed, there is no example of which the FPRC is aware where this has occurred, and in each case where a substantial compensation or other payment has been received it has been put to work at a profit or used to meet the costs of group business. In these circumstances, it would seem clear that many groups could readily prove a commercial and financial history that would likely entitle them to compound interest. Where a group could not so prove, it would likely be because they have never received compensation for their loss of rights, and they should not be penalized for the State's delay in resolving native title compensation. Further, Justice Mansfield, hearing the Timber Creek decisions at first instance, made clear that (i) a claim group should not be disadvantaged by a lack of evidence from periods when they did not receive compensation; and (ii) it may be possible to infer from contemporary evidence of commercial activity, that such activity would have occurred at an earlier time, if the group was given the opportunity.[13] While the EPOF recommends that the assessment methodology be developed to accommodate both simple and compound interest calculations, and it be individually negotiated with Traditional Owner groups, this is not supported because: (i) the law on this issue is still in development, and any process of assessment will be uninformed by settled case law; (ii) it will likely be weighted against those groups who have not previously received compensation, meaning they will be further penalized for the failure of the State to compensate them in the past; and (iii) the assessment would be time consuming, potentially require extensive evidence, and lead to an increase in delay and costs. On that basis the universal application of compound interest is to be preferred as it avoids these issues. Calculation on this basis is also simple and efficient, and achieves equity between groups that have, and have not, previously received the benefit of native title compensation. Finally, given EPOF's rejection of Principle 4, the interest calculated may be full and final, meaning that the principles contained in the Timber Creek decision should be implemented at their highest to offset any risk that the settlement package is later revealed as deficient. **EPOF Comments** EPOF does not support this recommendation as there is limited case precedent either in the Timber Creek decision or elsewhere to support its wholesale adoption in Victoria. Instead, EPOF recommends that the Calculation Model to be developed should be able to accommodate both simple and compound interest calculations. This would leave it as an issue to be negotiated by a Traditional Owner group and used in later consideration if developments in Australian law promote a change in approach for groups, as per EPOF's proposed recommendation in principle 4.

Principle 7: The State will need to resolve data issues, and promote data sovereignty	
Joint or Individual Recommendation	Joint recommendation.

[13] *Griffiths v Northern Territory of Australia (No 3)* [2016] FCA 900 at [272-275]. Neither the Full Federal Court nor the High Court contradicted Justice Mansfield on this issue.

Principle 7: The State will need to resolve data issues, and promote data sovereignty	
RECOMMENDATION 7	Expert advice should be sought with respect to data issues, and the promotion of data sovereignty within the compensation process.
Joint Comments Any assessment of compensation will require examination of data recording historical acts of extinguishment and impairment. However, all of this data is held by the State and largely inaccessible to Traditional Owners. In addition, there are known flaws and inaccuracies within existing data. Accordingly, the FPRC put forward Principle 7, on the basis that to establish a functional and transparent compensation process, it will be necessary to rectify known issues with the data, and to allow equal access to Traditional Owners. EPOF acknowledges these issues and proposes that through an expert commission to determine an efficient methodology for resolving issues with respect to data, to which the FPRC agreed.	

Principle 8: Where any issues arise around the availability or accuracy of data, it should be resolved with a presumption in favour of Traditional Owners	
Joint or Individual Recommendation	Joint Recommendation.
RECOMMENDATION 8	Where any issues arise around the availability or accuracy of data, it should be resolved with a presumption in favour of Traditional Owners.
Joint Comments This recommendation builds on Principle 7, advocating that where data cannot be rectified, or data cannot be located, as a result of a deficiency in the State's record keeping, there should be a presumption in favour of Traditional Owner interests. The parties agree that the underlying issue can be addressed on the same basis as Principle 7, through an expert commission to determine an efficient methodology for resolving issues with respect to data.	

Principle 9: Compensation should also take into account activities carried out by the Commonwealth	
Joint or Individual Recommendation	Joint recommendation.
RECOMMENDATION 9	The State should work with Traditional Owners to advocate for the Commonwealth to (i) meet any native title compensation liabilities it may have; and (ii) contribute to the State's native title liability, in accordance with previous commitments.
FPRC Comments	

Principle 9: Compensation should also take into account activities carried out by the Commonwealth
Historically and currently, various significant parcels of land around Victoria are owned by or have otherwise been impacted by the Commonwealth. Given that they are not a party to a Settlement Agreement, and not subject to its terms, Traditional Owners receive no compensation or rights in relation to these activities. The State should commit to working with Victorian Traditional Owners to ensure that the Commonwealth pays any direct liability it may have in the area covered by the Settlement Agreement and recognises Traditional Owner rights and interest over any lands it currently holds. Furthermore, the Commonwealth has previously agreed to contribute to settlement amounts but has not made any contributions in recent years. The State and Traditional Owners should work together to ensure that the Commonwealth meets any native title compensation liabilities it may have.

Principle 10: Moratorium on Crown land sales where Traditional Owners are without rights	
Joint or Individual Recommendation	This is an individual recommendation of the FPRC and is not supported by the EPOF.
RECOMMENDATION 10	That a moratorium on all Crown land sales be initiated in all areas where the Traditional Owner groups do not have rights to either provide or withhold consent to the sale.

FPRC Comments

Protections are in place around the sale, lease or transfer of Crown land for both Traditional Owner groups with a Settlement Agreement, and those groups that are in active negotiations with the State. While these groups are required to consent to such activities, this also gives them access to other procedural rights which allows the group to be confident that they are being properly compensated. This includes things like the ability to interrogate valuations, and to do basic due diligence, such as ensuring the sale is an arm's-length transaction.

However, many groups around Victoria are years away from entering negotiations, let alone finalising a Settlement Agreement. In the meantime, they are left wholly without rights, and Country can be diminished without their consent, or even their knowledge. Accordingly, the State should agree to cease granting leases, selling or otherwise transferring Crown land in those areas where Traditional Owners are yet to enter negotiations, and do not yet have access to procedural rights around sales.

EPOF Comments

The EPOF considers Principle 10 as beyond the terms of reference of the Review and instead recommends that the issue be referred to the Minister for Aboriginal Affairs for potential progression through the Treaty process.

Compensation Model and Expert Terms of Reference

Background	While discussing the various principles underpinning the approach to calculating compensation, and noting the complexity of the issues, the parties began to discuss the potential for an expert or experts to develop a methodology for assessing the likely parameters for a compensation award. The parties subsequently formulated draft terms of reference for the potential expert/s, which are focused in particular on methodologies for calculating cultural loss and the resolution of issues around data analysis and assessment. Together with the Terms of Reference (**Appendix 2**), the FPRC and EPOF began to define the broad mechanics of a compensation process and the components on which the parties could, and could not, reach agreement. This led to the development of the Draft Compensation Model (**Appendix 6**). The Compensation Model sets out a process for the calculation of compensation, which would form the Settlement Sum under a Settlement Act agreement. It is envisaged that it would apply following the renegotiation of the Community Benefits formulae contained in Schedule 7 of the LUAA, so that those formulae are consistent with the principles of the Timber Creek decision. In summary, the Compensation Model would operate as follows: a) (**Community Benefits Formulae**) The principal method by which new standards would be embedded into the compensation model would be through the re-negotiation of the Community Benefits formulae, following receipt of expert advice, to be sought in accordance with the Expert Terms of Reference. b) (**Settlement Sum**) Once final Community Benefits formulae are agreed, the Settlement Sum would be calculated by applying the LUAA to the agreement area from 31 October 1975[14] to the date a Settlement Act agreement is entered into, with the Settlement Sum being the total payment due for all historical Land Use Activities[15] (**Retrospective LUAA Method**). c) (**Minimum Settlement Sum**) If the application of the Retrospective LUAA Method would result in the Settlement Sum falling below a specified minimum amount, the

[14] As the EPOF does not endorse Principle 2 (to examine compensation prior to the enactment of the RDA) the FPRC agreed to progress the compensation model on this basis for the purposes of facilitating further discussion. The FPRC continues to assert that compensation prior to the enactment of the RDA must be assessed and paid.

[15] The Compensation Model also allows for the different treatment of Historical Land Use Activities, as opposed to current Land Use Activities, in some respects. These differences are (i) the calculation of interest for historic acts; (ii) acts of contamination or environmental degradation that in practice extinguish or impair rights, will be treated as historical Land Use Activities.

	quantum of which is to be agreed, the State will pay the specified minimum amount.
Joint or individual recommendation	Individual recommendations.
RECOMMENDATION 11	**FPRC recommendation** *The FPRC endorses and recommends the Compensation Model and the Expert Terms of Reference, until such time as negotiations with respect to pre-RDA liability can be progressed.* **EPOF recommendation** *EPOF endorses the Expert Terms of Reference and further exploration of the Compensation Model; however, it considers that additional information is required, including in relation to:* • *the comprehensiveness and reliability of data to be relied upon in the application of a retrospective LUAA;* • *the feasibility of including Land Use Activities such as major public works and public land authorisations in such a model (for which the data availability is currently unknown).* *The State is enquiring into these issues through a Scoping Study, the terms of reference for which are set out at **Appendix 8**.* *EPOF suggests that further exploration of the Compensation Model should have regard to compensation being considered through Victoria's treaty process, noting the work of the expert should be informed and align with progress in the treaty process.*

Interim Community Benefits Formulae

Background	Compensation was the most complex and pressing issue considered by the Review. Extensive discussion was held over several meetings and via exchange of correspondence. While a final and definitive joint recommendation could not be reached, the parties agreed that an interim Community Benefits formulae be put in place while the issue is resolved, so as to lessen the impact of any delay on Traditional Owner groups.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 12	*The parties jointly recommend that the interim Community Benefits formulae (**Appendix 9**) be adopted*

Condition	**EPOF comments**

	EPOF supports the Interim Community Benefits Formulae (ICBF) as it provides an appropriate interim response to the Timber Creek decision and enables Traditional Owners to receive increased community benefits, though EPOF notes the ICBF are likely to have significant financial and budgetary impacts on major projects/public works and delegated land managers' retained revenues state-wide. State agencies should not be adversely financially impacted for undertaking essential public works on Country, for example: fire tracks, walking/rail trails, water retardation basins, etc. For a retrospective change to the community benefits regime, this must be accompanied by additional funding, particularly for existing initiatives. The recommendations are best understood as a macro economic reform and need to be accompanied by an enabling revenue model that is able to match the scale of this reform. Such a model would provide an avenue to address significant cost impacts for providers of essential services (and their customers) and decrease risks to essential service delivery. Essential services often need to be delivered in specific locations, owing to natural landscape features, and there is potential for significant cost escalations arising from increased community benefits that need to be built into revenue models agreed across all relevant portfolios. In addition, as part of Government's consideration of the First Principles Review recommendations, EPOF should seek Government approval of: i. 'no net loss of retained revenue' principle for land managers to ensure that land continues to be well managed for future generations ii. 'factoring Community Benefits liabilities for major public works/ projects' principle into State Budget project funding allocations. iii. implementing transitional financial arrangements for major public works with approved budgets impacted by the interim Community Benefits formulae. **FPRC comments** The FPRC does not support the condition put forward by EPOF, noting: • The first time this condition was raised was in the final drafting of this report, during late September 2021. • It is not appropriate to make the payment of compensation to Traditional Owners conditional upon Cabinet also agreeing to reimburse those currently deriving income from land, originally stolen from Traditional Owners.

	• The level of compensation should be determined by an assessment of the impact on Traditional Owner rights, and an application of the principles in the Timber Creek decision. EPOF produced and offered, the formulae in Appendix 9, presumably having formed the view they represented fair and just compensation (at least on an interim basis). • EPOF now seeks to withhold this appropriate compensation unless some internal financial accounting occurs to ensure its member departments and agencies are not impacted. This is an internal State matter, and the payment of appropriate compensation to Traditional Owners should not be dependent on its resolution. Finally, the only 'retained revenue' likely to be impacted by the Interim Community Benefit Formulas are rents and fees paid in respect to leases, licences, and permits over Crown land (defined as 'Public Land Authorisations'). However, the condition put forward by EPOF does not just apply to Public Land Authorisations, but if not met, would see the withdrawal of EPOF support for all of the Interim Community Benefits Formulas, including those covering Major Public Works, the sale of Crown land, and major commercial works. At the very least, the condition should only be made applicable to Public Land Authorisations.

PART 4

Traditional Owner rights

Aboriginal people have occupied what today is known as Victoria since time immemorial. Prior to colonisation they possessed these lands under their own sovereign political systems and systems of law. In *Mabo and Others v Queensland (no. 2) (1992) 175 CLR 1*, the High Court recognised that, in some circumstances, these systems of laws survive, and can be recognised in Australian law as what we know as native title rights. Notwithstanding this limited recognition, and the inability of the western legal system to recognise in full the rights of First Peoples, Traditional Owner groups continue to assert their rights to their traditional lands.

Under the Settlement Act the State agrees to recognise certain rights which Traditional Owners consider inherent. Within the RSA these rights are recognised and set out in the templates, primarily through the LUAA and NRA. Below, we look at each of the relevant templates, and set out the recommendations made.

Recognition and Settlement Agreement

The RSA is the overarching agreement that recognises a Traditional Owner group as the owners of the agreement area under Aboriginal law and custom, acknowledges certain Traditional Owner rights over public land, and includes a number of practical mechanisms to assist with implementation of the Settlement Package.[16]

Inclusion of Traditional Owners in the Whole of Government approach to recycling/utilising public land and assets

Background	When a government department or agency no longer requires public land, the Department of Treasury and Finance will give notice to Victorian Government agencies, local government and the Commonwealth Government of the surplus land. All other Victorian Government agencies, local government and the Commonwealth Government will have a period of 60 days from the date of notification by the Department of Treasury and Finance in which to submit an expression of interest to acquire the surplus land for a public or community purpose, before it is declared surplus and sold on the open market (**First Right of Refusal Process**). During the course of the Review, EPOF suggested the Review consider government processes such as the First Right of Refusal Process and consider ways in which Traditional Owner interests are considered in these processes.

[16] This section sets out only one issue relating to the RSA and discussed in the Review. Note that other issues relating to the RSA are included under their own subheading, 'Other Recommendations, below.

Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 13	*Traditional Owner Corporations (including Registered Aboriginal Parties) should be part of the First Right of Refusal process. At minimum, Corporations should be notified of proposed surplus public land and have the option to purchase this land under full or restricted title, before it goes to public auction. The ways in which this recommendation can be given effect are to be further explored in the proposed Settlement Act forum, including options:* • *to ensure that the holding entity is the entity representing the Traditional Owner group, and if that status changes, there be provision for transfer to another entity, recognised as representing the relevant Traditional Owner group; and* • *for land and assets to be handed back to Traditional Owners, meaning they are transferred for only nominal or peppercorn consideration.*
Unresolved issues	None.

Natural Resource Agreement

The NRA is one of the agreements that can be negotiated as part of a Settlement Package under the Settlement Act. This agreement recognises Traditional Owner rights to carry out agreed activities, including to take and use natural resources on public land, consistent with agreed sustainability principles. The NRA also commits the State and Traditional Owner group to work together in partnership to develop strategies for Traditional Owners' participation and employment in natural resource management in the NRA area.

A range of issues relating to the NRA was raised and considered by the Review. A brief description of each issue is set out below, along with the joint or individual recommendation that was made.

Sustainability principles

Background	This issue was first raised by the Template Review Committee in 2018 and is concerned with requirements in the NRA for Traditional Owner Corporations and their members to 'comply' with the Sustainability Principles in accessing natural resources, while the State is not bound by the same obligation.
Request	The FPRC requested that the Sustainability Principles apply equally to the State and Traditional Owners.

Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 14	*That the term 'comply with' be removed from item 4.1 of Schedule 1 of the Natural Resource Agreement template where this refers to the Sustainability Principles and replaced with the term 'give proper consideration to'.*
Unresolved issues	None. EPOF notes that principles of sustainability have broad application to both parties to the agreement.

Restrictions on access to flora

Background	This issue was first raised by the Template Review Committee in 2018 and is concerned with item 5.1 of Schedule 1 of the NRA which prohibits Traditional Owners from taking any reserved trees or protected or threatened flora. This restriction is imposed on the inherent rights of Traditional Owners without their free, prior or informed consent.
Request	Traditional Owners have requested that no restrictions on the taking of flora apply to Traditional Owners without their free, prior and informed consent. This would be the same process as currently applies to animals.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 15	*That prohibitions on taking protected or threatened flora should not apply to Traditional Owners without their consent.* *That the Natural Resource Agreement template be amended so that any such prohibitions are removed from the template and are instead assessed and negotiated in accordance with the UNDRIP principle of free prior and informed consent, through the Partnership Forum.*
Unresolved issues	None.

Collection of firewood

Background	First raised by the Template Review Committee in 2018, there was confusion as to the rights of Traditional Owners to collect firewood under the NRA template, both inside and outside Firewood Collection Areas.
Request	Traditional Owners are currently subject to the same firewood collection rules as other members of the public when accessing

	firewood in designated Firewood Collection Areas. Traditional Owners have requested that no limits be placed on their collection of firewood in designated Firewood Collection Areas, and the terms of the NRA generally be clarified around firewood collection.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 16	*Item 5.3 of Schedule 1 in the NRA template should be removed in order to facilitate greater Traditional Owner access to firewood, by allowing for the cutting down of trees or branches (outside firewood collection areas) for this purpose.* *The lifting of this restriction would create greater consistency between firewood and other vegetation in the Natural Resource Agreement template.* *EPOF notes that natural resource legislation and regulations would also need to be reviewed and amended if necessary to give effect to the proposed policy change.* *The parties agree that items 5.4 and 5.5 of Schedule 1 only regulate collection of firewood within a Firewood Collection Area, and outside such areas, Traditional Owners may collect firewood as an Agreed Activity, and in accordance with the relevant clauses in the NRA template, including the Public Land conditions in Schedule 1 of the NRA. The NRA should be amended so this position is more clearly stated.*
Unresolved issues	None.

Definition of Traditional Purposes

Background	This issue was first raised by the Template Review Committee in 2018 and is concerned with section 79 of the Settlement Act. This section defines the term 'traditional purposes' in a way that excludes commercial purposes.
Request	Aboriginal tradition included economic and commercial activity, so to define 'traditional purposes' as distinct from, and not including 'commercial purposes', reflects an inaccurate understanding of Aboriginal tradition. Accordingly, the FPRC requests an accurate definition.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 17	*The term 'traditional purposes' in Section 79 of the TOS Act should be replaced with 'non-commercial purposes' but retain the same definition.*

	The FPRC and EPOF note that this is an interim measure until the Traditional Owner rights to use natural resources for commercial purposes is recognised.
Unresolved issues	The FPRC notes that recognition of Traditional Owners' inherent right to use natural resources for commercial purposes is not sufficiently established in the Settlement Act and remains unresolved.

Commercial use of animals and water

Background	First raised by the Template Review Committee in 2018, this issue is concerned with section 84(b) of the Settlement Act, which states that an NRA: • may allow for the commercial use of vegetation (including flora and forest produce) and stone; and • cannot allow the commercial use of animals and water. With respect to the commercial use of vegetation and stone, while permitted, under the Settlement Act and current NRA template, it may only occur: • if it is consistent with the purpose for which the land is managed (section 84(b), Item 3.2, Sch 1 NRA); and • the quantity is no more than the quantity needed for 'Non-Commercial Purposes' (Item 3.2(a), Sch 1 NRA). If a Traditional Owner wanted to take commercial quantities to use for a commercial purpose, this would have to be separately negotiated (Clause 10.2(f)(iv) NRA).
Request	Traditional Owners have requested that section 84(b) of the Settlement Act be amended to accommodate the commercial use of animals and water.
Joint or individual recommendation	Joint and individual recommendations.
RECOMMENDATION 18	**(a) Joint recommendation** *That the Settlement Act and the NRA template be amended so as to accommodate the commercial use of animals (other than fish) to create parity with the provisions providing for commercial use of vegetation, stone etc.* **(b) Individual FPRC recommendation** *That the Settlement Act and the NRA template be amended so as to also accommodate the commercial use of water and animals (including fish).*

	Note: The two recommendations are the same, except the joint recommendation excludes water and fish. The individual FPRC recommendation would include water and fish.
Unresolved issues	**FPRC Comments** While the Settlement Act and NRA purport to permit commercial use of Traditional Owner rights with respect to natural resources, a close reading of the legislation and NRA template makes clear that this is not the case. For instance, item 3.2 Schedule 1, purports to allow commercial use of vegetation and stone. However, the quantity is limited to that permitted for 'Non-Commercial Purposes.' On that basis, the clause does not provide commercial rights as they would ordinarily be understood. Instead, it provides no rights beyond the ability for an individual Traditional Owner to perhaps engage in a micro enterprise, unlikely to derive income to meet even their personal needs. Should a Traditional Owner wish to rely on their traditional rights for a functional commercial purpose, they would need to separately negotiate that use through the Partnership Forum and require the consent of the State. (Clause 10.2(f)(iv) and 10.4(d)(i) NRA) This decision would be guided by the sustainability principles (which do not apply to non-indigenous people negotiating with the State for the commercial use of natural resources). This is the current position with respect to vegetation and stone. The adoption of the FPRC individual recommendation would mean this restricted and limited position would also apply to water and animals. In other words, the FPRC request was conservative and the exclusion of water and fish is a not reasonable exclusion. In doing so, it does not so much prevent Traditional Owners exercising commercial rights over these resources, but instead prohibits even any negotiation or discussion about doing so. The FPRC is disappointed and disagrees with this exclusion, particularly in circumstances where native title commercial rights continue to be explored through the courts. Nevertheless, the FPRC has endorsed the Joint Recommendation in the hope that at least some minor and limited change can be achieved. **EPOF Comments** EPOF supports amending the Settlement Act and the NRA template to enable the commercial use of animals (other than fish), subject to the existing NRA restrictions on the commercial use of natural resources.

	Given the restrictions and management arrangements that apply to commercial fishing and aquaculture, the commercial use of fish was not included in the joint recommendation on this issue. Commercial water rights are being progressed through the Aboriginal Access to Water Roadmap being undertaken by DELWP. EPOF notes that unless a commercial quantity is negotiated for a specific animal(s), Traditional Owners' commercial use of animals will be limited to the quantity that can be taken for 'non-commercial purposes. However, Traditional Owner's commercial use of specific animals can be negotiated on a case-by-case basis, as part of their settlement agreement, or in their NRA Partnership Forum. The water entitlement framework does not have provision for the State to provide 'as of right' access to water for commercial uses for Traditional Owner Groups within the NRA template. However, the State agrees with FPRC that the matters outlined above are important to progress.

Extending existing rights to take natural resources from private land

Background	During the course of the Review EPOF put forward a suggestion that rights under the NRA could be extended to freehold land, with the landowner's consent.
Request	The Traditional Owner Land Natural Resource Agreement (**TOLNRA**) provides for Traditional Owners to undertake 'agreed activities on freehold land owned by the Traditional Owner Corporation or individual Traditional Owners, subject to landowner permission. However, these rights cannot currently be extended to other types of freehold land, even with landowner consent.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 19	*That the RSA and TOLNRA templates be amended so that 'agreed activities' (as defined in clause 1.1 of the TOLNRA) can be exercised on freehold land within the outer boundaries of a Recognition and Settlement Agreement, subject to a landowner's permission.*
Unresolved issues	The FPRC made additional proposals relating to this matter, which will be explored through the proposed Settlement Act forum. These include consideration of whether consent by a landowner to the exercise of 'agreed activities' would:

	• run with the land, through a covenant or similar mechanism; or • is intended to bind only the current landowner and expire upon sale or transfer of the land.

Water rights

Background	The Settlement Act and Settlement Act Agreements provide no rights to Traditional Owners with respect to water, other than those already available to the general public. The Traditional Owner right to water is included in section 9 of the Settlement Act, which recognises a right to take 'natural resources' including water. However, section 84 of the Settlement Act limits the use of water to Traditional Purposes, which means the purposes providing for: • any personal or domestic needs of the members of the Traditional Owner group; or • any non-commercial needs of the members of the Traditional Owner group. Further, clause 6.2(c) of the NRA, requires that Traditional Owners 'take or use Water from a waterway or bore in accordance with s8A of the *Water Act 1989 (Vic)*'. Section 8A provides the same rights available to the general public, that any person has a right to take water, free of charge, for that person's domestic stock and use from a waterway or bore to which a person has access.
Request	The FPRC considers the current arrangements with respect to water rights to be both inadequate and inappropriate.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 20	*The EPOF and FPRC agree the State should acknowledge that Settlement Agreements do not provide sufficient recognition of Traditional Owner rights and interests in water. The EPOF and FPRC recommend that substantive reform be pursued as a priority in the proposed Settlement Act forum.*
Unresolved issues	The Review did not consider water rights in any detail, and the recommendation above, while acknowledging the significance of the issue, does not provide any resolution. These issues will be examined more closely through the proposed Settlement Act forum. However, the State will engage with individual Traditional Owner Groups, at the time of and/or post-settlement, to explore potential

	opportunities for Traditional Owner access to commercial water in their respective catchment(s) and to negotiate individual access agreements, outside the Settlement Act framework, as necessary.

Additions to 'Natural Resources' for the purpose of a Natural Resource Agreement

Background	The definition of 'Natural Resources' in section 79 of the Settlement Act excludes gold, silver, metal or minerals.
Request	Traditional Owners have requested that these resources be added to the definition of 'Natural Resources' in the Settlement Act.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 21	*DJPR commits to developing a policy to offer Miner's Right permits to members of Traditional Owner Corporations under the* Mineral Resources Sustainable Development Act 1990*. This would be a temporary solution designed to address the exclusion of gold, silver, metal and minerals in the definition of 'natural resources' in the Settlement Act. EPOF recommends that options for legislative change be explored through the proposed Settlement Act forum.*
Unresolved issues	None, except for those matters to be further considered by the proposed Settlement Act forum.

Land Use Activity Agreement

The Land Use Activity Regime (**LUAR**) is established by the Settlement Act and the LUAA and is a simplified alternative to the future acts regime under the NTA. The objective of the LUAR is to establish a process whereby Land Use Activities, as that term is defined in section 28 of the Settlement Act, may occur whilst respecting Traditional Owner rights attached to Public Land.

A range of issues relating to the LUAA was raised and considered by the Review. A brief description of each issue is set out below, along with the joint or individual recommendation that was made.

Community benefits formulae

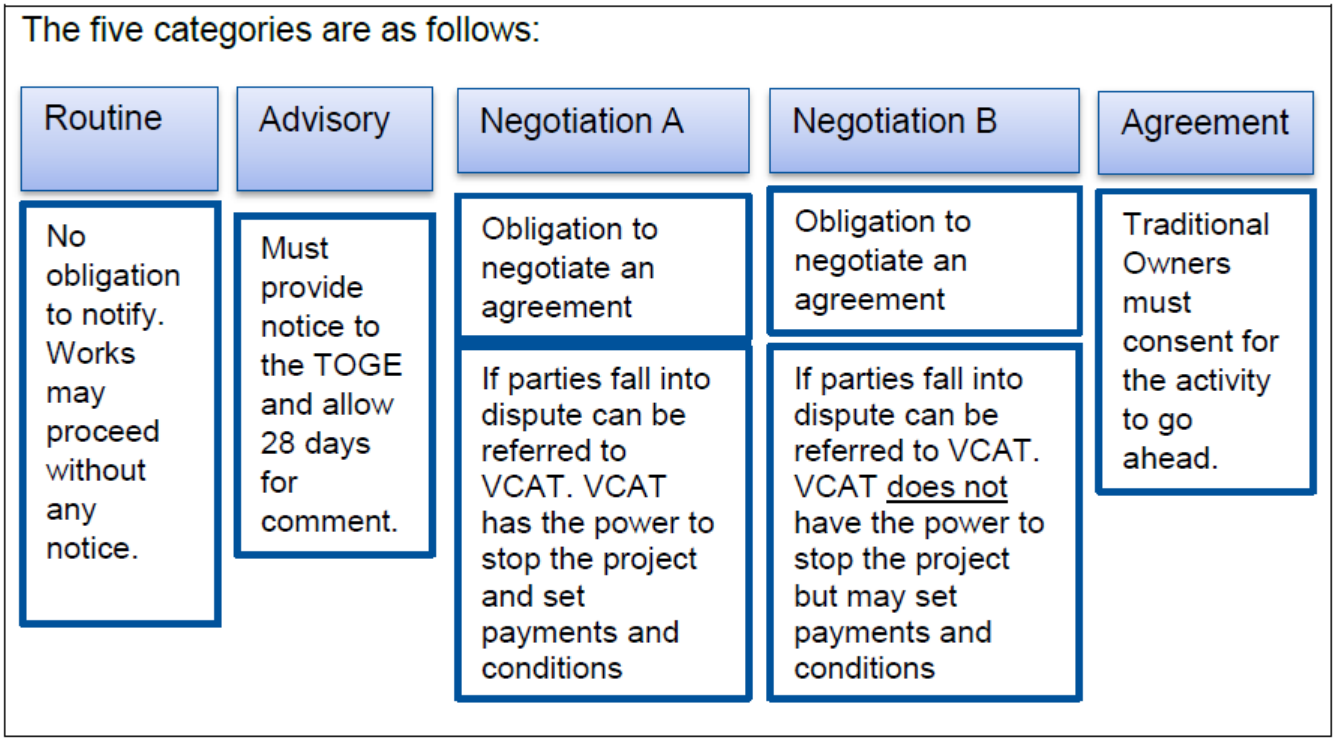
Community Benefits are payments for Significant Land Use Activities impacting on Traditional Owner rights where an RSA is in place. Although these payments are calculated in accordance with the Community Benefits Formulae in Schedule 7 of the LUAA, for the purposes of this report, they are dealt with in Part 3: Compensation.

Categorisation of land use activities

Part 4 of the Settlement Act deals with Land Use Activities. Five different categories of Land Use Activity are defined, each intended to reflect the differential impact of Land Use Activities on Traditional Owner rights. Each category gives rise to a different level of Traditional Owner control over the activity (see **Figure 4**).

The FPRC requested that the several existing categorisations of activities be modified to provide a higher level of rights for Traditional Owners overall.

Figure 4. Five categories of Land Use Activity



Leases, Permits and Licences

The granting of leases, permits and licences over public land are Land Use Activities captured by the Settlement Act and the LUAA.

The LUAA categorises these activities based on (i) the length of the term; and (ii) whether they are granted for a Community Purpose or a Commercial Purpose.

The current categories are set out below, along with recommended changes. In addition, the recommendations are proposed to be implemented either in accordance with:

(a) **Timeframe One**: within 3-6 months following endorsement by Cabinet; or

(b) **Timeframe Two**: in a phased approach estimated to take 3-5 years, to enable time for any necessary legislative change, and the development of a new system and new processes

to manage the high volume. The elevation of leases and licenses to Negotiation or Agreement activities will have administrative, operational and financial impacts for Traditional Owners Corporations, lessees, licensees, permit holders and state agencies. Timeframe 2 will enable the State to reengineer the existing procedures and systems to automate and streamline LUAA processing, to adequately resource and empower Traditional Owner Corporations and to minimise administrative delays for all LUAA parties.

1.1.1 Community Purpose Permits and Licences

Current categories	• Below 10 years: Routine • Above 10 years: Advisory • Above 21 years: Advisory
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 22	*To be implemented in accordance with Timeframe 1:* • *Above 21 years: Negotiation Class A, with a condition that no Community Benefits are payable.* *To be implemented in accordance with Timeframe 2:* • *All Community purpose permits and licences: to be categorised as Negotiation Class A with a condition that no Community Benefits are payable.*
Unresolved issues	The FPRC notes that this change was first raised in 2018. The FPRC is disappointed that even if this recommendation is accepted, changes for the majority of community purpose permits and licences (those with a term below 21 years) will not occur for a further 3 to 5 years.

1.1.2 Community Purpose Leases

Current categories	Below 21 years: Advisory Above 21 years: Negotiation Class B
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 23	*To be implemented in accordance with Timeframe 1:* • *Above 21 years: Negotiation Class A* *To be implemented in accordance with Timeframe 2:* • *All Community purpose permits and licences: to be categorised as Negotiation Class A*
Unresolved issues	The FPRC notes that this change was first raised in 2018. The FRPC is disappointed that even if this recommendation is accepted, changes for the majority of community purpose leases (those with a term below 21 years) will not occur for a further 3 to 5 years.

1.1.3 Commercial Purpose Permits and Licences

Current categories	Below 10 years: Routine Above 10 years: Negotiation Class B (*NB: this categorisation is subject to the exceptions in item 2.4 of Schedule 3 of the LUAA template*).
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 24	*To be implemented in accordance with Timeframe 1:* • *Above 10 years: Negotiation Class A, not including a licence under Division 2 of Part 5 of the Water Act 1989 to construct any works on a waterway or a bore (**"works (Water Act) licences"**).* *To be implemented in accordance with Timeframe 2:* • *All Commercial purpose permits and licences: to be categorised as Negotiation Class A, including works (Water Act) licences as defined in section 27 of the TOS Act.*
Unresolved issues	The FPRC notes that this change was first raised in 2018. The FPRC is disappointed that even if this recommendation is accepted, changes for the majority of commercial purpose permits and licences (those with a term below 10 years) will not occur for a further 3 to 5 years.

1.1.4 Commercial Purpose Leases

Current categories	Below 10 years: Advisory Above 10 years and up to 21 years: Negotiation Class A Above 21 years: Agreement
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 25	*To be implemented in accordance with Timeframe 1:* • *Above 10 years: Agreement* *To be implemented in accordance with Timeframe 2:* • *Below 10 years: Agreement*
Unresolved issues	The FPRC notes that this change was first raised in 2018. The FPRC is disappointed that even if this recommendation is accepted, changes for the majority of commercial purpose leases (those with a term below 10 years) will not occur for a further 3 to 5 years.

Major Public Works

Background	Major Public Works are defined at clause 1.1 of the LUAA. In broad terms a Major Public Work involves the clearing or carrying out of works on land of a significant scale for a public purpose, and may involve the construction of infrastructure, road works, and activities having a similar impact on the Agreement Land and Traditional Owner rights. Major Public Works are currently categorised a Negotiation (Class B), while many other significant activities are categorised as Negotiation (Class A). The only difference between Negotiation Class A and B is the powers provided to VCAT in the event of a dispute. With respect to Class A, VCAT has the power to determine if the 'works may or may not proceed.'[17] With respect to Class B, VCAT has no such power, and may only set conditions on how the works will proceed.[18]
Request	The Template Review Committee first requested in 2018 that Major Public Works be re-categorised as negotiation (Class A). It was argued that in addition to a more just recognition of Traditional Owner rights over Country, this change will create an administrative efficiency as it will retire the category of Negotiation Class B. This reduces the total number of categories from five to four, simplifying the process, making it easier to understand and comply with.
Current category	Negotiation Class B
Joint or individual recommendation	Individual recommendation.
RECOMMENDATION 26	**FPRC recommendation** *That Major Public Works are categorised as Negotiation (Class A) activities in the template LUAA.* **EPOF recommendation** *That the proposed re-categorisation of Major Public Works from Negotiation B to Negotiation A take effect after provisions have been included in the TOS Act to provide clear guidance on the factors VCAT may take into account in its decision making, and the grounds upon which VCAT may decide that a Major Public Work does not proceed. The proposed recategorisation will therefore take place in accordance with Timeframe 2.*

[17] Section 54(1)(a) Settlement Act

[18] Section 55(1)(b) Settlement Act

Unresolved issues	FPRC comments
	The FPRC is disappointed that this recommendation, understood to have been committed to by EPOF, and jointly endorsed since at least 14 July 2020, has only in the final drafting of this report not being adopted by the EPOF. FPRC further note that while EPOF calls for further work to develop principles 'to provide clear guidance' to VCAT: • no such principles are in place for other existing Negotiation A activities; and • this request was first put in 2018, and there has been a period of at least 3 years during which principles could have been proposed and agreed upon.

Hydraulic fracturing[19]

Background	In 2017, a state-wide ban on onshore hydraulic fracturing (fracking) for petroleum (including oil and gas) development was enacted through the *Resources Amendment Legislation (Fracking Ban) Act 2017*, which amended the *Petroleum Act 1998* and the *Mineral Resources (Sustainable Development) Act 1990*. This ban was also entrenched in the Victorian Constitution under the *Constitution Amendment (Fracking Ban Act 2021*. Authorisations that are prerequisites for fracking (were it lawful) are currently categorised as either Routine (if the standard conditions in Schedule 4 of the LUAA are adopted) or Negotiation Class A, under the LUAA.
Request	Despite the ban and entrenchment, the FPRC have requested that fracking be prohibited outright or be categorised as an Agreement activity under the LUAA. Offshore fracking is not yet operational in Victoria, is not covered by the state-wide ban and entrenchment, and therefore is also not captured by the above recommendation to elevate the activity to an Agreement activity.
Current category	Routine / Negotiation Class A.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 27	*That:* • *each activity described in subsections 99(a), (b) and (c) of the Constitution Act 1975 (Vic) be categorised as an Agreement activity under the LUAA; and*

[19] In this report, hydraulic fracturing ('fracking') refers to the method of petroleum (including oil and gas) development that is currently banned in the onshore area of Victoria, and the subject of the *Resources Amendment Legislation (Fracking Ban) Act 2017*.

	• *the issue of offshore fracking be referred to the proposed Settlement Act forum.*
Unresolved issues	None, except for those matters to be further considered by the proposed Settlement Act forum.

Exemption of land in Alpine Resorts

Background	Section 11(1)(a) of the Settlement Act excludes alpine resorts from the definition of Public Land, and Section 32(3A) prohibits a LUAA from specifying any activity within an alpine resort as a negotiation or agreement activity.
Request	The FPRC requested that land with alpine resorts be included in the LUAR.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 28	*That the LUAR should not treat differently land that is within the boundaries of an alpine resort, which will require the repeal of section 32(3A) of the Settlement Act.*
Unresolved issues	None.

Capture of existing Public Land Authorisations (PLAs) upon renewal

Background	Upon entering into a Settlement Act agreement, many leases, licences, permits (PLAs) may already be in operation within the Agreement area. These may be long term interests and have automatic rights of renewal. Under current arrangements Traditional Owners receive no procedural rights or Community Benefits from these interests on their traditional lands.
Issue	The FPRC requested that the First Principles review explore implementing Traditional Owner rights to the renewal of leases, licences or permits that would otherwise be excluded from the LUAA. EPOF responded with 3 options: • **Option A: Commence ongoing payment** Upon entry into a Settlement Act agreement, the State will pay Community Benefits for PLAs that are in effect as at the time of settlement, from monies otherwise being paid to consolidated revenue. • **Option B: Lump sum payment to Traditional Owners from estimated PLA income**

	Prior to entry into a Settlement Act agreement, the State will estimate the total amount of future revenue it expects to receive from PLAs and upon settlement pay this as a lump sum. This option would require a financial impact assessment to be undertaken by the State in order to adequately calculate the projected lump sum amount. Accordingly, this option would need to be explored further in the proposed Settlement Act forum. • ***Plus Procedural Rights for both Options A and B*** In addition to the provision of community benefits, both Options A and B propose that PLA renewals be categorised as advisory land use activities in the LUAA. • **Option C: Refer this issue to the proposed Settlement Act Forum** While Option B requires a specific proposal be referred to the proposed Settlement Act forum, Option C proposes that this issue be referred in its entirety to allow for: a) a broader review of exclusions from the LUAA; b) an examination of whether other exempt PLAs should generate Community Benefits payments and be categorised to allow procedural rights; an exploration of revenue sharing for PLAs in existence at the time of settlement. For example, the proposed Settlement Act forum could consider whether PLA revenue sharing should be extended to include public land with existing community and/or commercial infrastructure at the time of settlement.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 29	*That Option A, as set above, should be implemented as an interim measure, while the issue be referred to the proposed Settlement Act forum, in accordance with Option C, for final resolution.*
Unresolved issues	The FPRC notes that this issue will require an audit of existing Public Land Authorisations, which should be undertaken in preparation for the proposed Settlement Act forum.

Land Agreement

A land agreement provides for grants of land in freehold title for cultural or economic purposes, or as ‘Aboriginal title’ (a form of title established under section 19 of the Settlement Act) to be jointly managed in partnership with the State.

Broaden the category of Crown land eligible to be granted as Aboriginal Title (i.e. State Game Reserves)

Background	The Settlement Act and *Conservation, Forests and Lands Act (1987)* exclude land in a State Game Reserve from the definition of public land over which Aboriginal title can be granted and over which joint management arrangements can operate.
Request	Traditional Owners have argued that it should be possible to grant Aboriginal title and to have joint management arrangements over land in a State Game Reserve.
Joint or individual recommendation	Joint and individual recommendations.
RECOMMENDATION 30	**(a) Joint Recommendation** *That the Settlement Act and Conservation, Forests and Lands Act (1987) be amended in order to allow for the grant of Aboriginal title and joint management arrangements over land within the boundaries of a State Game Reserve.* **(b) FPRC Individual Recommendation** *The amendments to the Settlement Act and the Conservation, Forests and Lands Act 1987 (Vic) should go further than providing for joint management and should also allow for sole management of State Game Reserves.*
Unresolved issues	Whilst EPOF agreed to a resolution to include State Game Reserves in the definition of public land over which Aboriginal title can be granted, the FPRC stated that this did not fully capture Traditional Owner aspirations. EPOF notes that DELWP, Parks Victoria and DJPR are currently progressing co-management pilots with Traditional Owner corporations in State Game Reserves under the Traditional Owner Game Management Strategy.

Expand the categories of Crown land eligible for transfer for economic purposes

Background	There is no policy supporting the freehold transfer of Crown land with current commercial purposes and public value.
Request	Traditional Owners (and DELWP) have suggested exploring the categories of Crown land eligible for freehold transfer and other mechanisms for greater Traditional Owner rights and involvement in Crown land management (such as actively used Crown land/Crown land with assets, i.e. racecourses, golf courses, other commercial sites).

Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 31	*That the Settlement Act and other relevant legislation be reviewed and amended to allow for transfers of Crown land with existing commercial leases to Traditional Owner corporations, along with a commitment to develop a supplementary policy to support the change. This proposed legislative change and policy development should be progressed by the proposed Settlement Act forum.*

Definition of emergency activities

Background	Section 39 of the Settlement Act stipulates that nothing in a LUAA is to be taken to prevent or impose any requirements on the carrying out of any activity in an emergency for the purpose of protecting property or life or for the purposes of protecting the environment. Under clause 7(c) of the LUAA, if the State carries out an activity pursuant to section 39, it is required to inform the TOGE as soon as is practicable. Neither the Settlement Act nor LUAA provides a definition of the term 'emergency.'
Issue	Traditional Owners have requested that the Settlement Act and LUAA be amended to include a definition of 'emergency' and an assessment of whether such activities are reasonable or excessive be carried out.
Joint or individual recommendation	Joint and individual recommendations.
RECOMMENDATION 32	**a. Joint EPOF and FPRC recommendation** *That the Settlement Act be amended to include the following definition of the term 'emergency':* *'emergency' has the same meaning as in Section 3 of the Emergency Management Act 2013 (Vic)'* *That clause 7(c) of the template LUAA be amended to strengthen engagement with Traditional Owners following the carrying out of an emergency activity by the State, by incorporating the following:* *"In an emergency situation where the State carries out a Land Use Activity as permitted by s 39 of the Act, the State will inform and, upon request, meet with the Corporation as soon as is practicable.* **b. Individual FPRC recommendation**

	That clause 7(c) of the template LUAA be amended to strengthen engagement with Traditional Owners following the carrying out of an emergency activity by the State, by incorporating the following: *"In an emergency situation where the State carries out a Land Use Activity as permitted by s 39 of the Act, the State will:* *(i) provide any Community Benefit Payment owing with respect to the activity; and* *(ii) undertake rehabilitation works, as reasonably requested by the Corporation.*
Unresolved issues	Traditional Owners are seeking for the State to pay community benefits and undertake rehabilitation works for activities that occur in an emergency.

Other recommendations

The proposed Settlement Act forum

Background	The conduct of the Review made clear that there are wide areas of potentially beneficial reform with respect to the operation of Settlement Act agreements, much of which was beyond the scope of this Review. In addition, many issues presented complexities that were unable to be resolved in within the timeframe of the Review.
Request	The FPRC and EPOF jointly propose that outstanding Review issues be resolved via an ongoing Settlement Act forum, which could also broker solutions to emerging issues under the Act.
Joint or individual recommendation	Joint recommendation.
RECOMMENDATION 33	*That a Traditional Owner Settlement Act Forum, comprised of both Traditional Owners and State representatives, be established to build on the work of the First Principles Review. It is intended that the new Settlement Act forum will finalise those issues not resolved in the current Review, as well as work towards solutions for emerging issues under the Settlement Act. The First Peoples – State Relations group will need to work closely with the new Settlement Act forum to ensure its work aligns with treaty progress, including through engagement with the First Peoples' Assembly of Victoria.*
Unresolved issues	The governance, structure and terms of reference of the proposed Settlement Act forum need to be developed over the coming months, including ensuring the forum's alignment with Victoria's treaty process and the First Peoples' Assembly of Victoria to avoid

	duplication, and consideration of the potential to streamline these processes.

terCrown water frontages

Background	**FPRC comments**: This issue did not form part of the original terms of reference for the Review. However, during the course of the Review the Victorian Government announced its proposal to enact the *Parks and Crown Land Amendment Act 2020* (Amendment Act), which would allow camping and the lighting of campfires on all licenced Crown water frontages. Traditional Owners across the State voiced concerns about the impact this would have on Aboriginal cultural heritage, given that 95 per cent of cultural heritage listed places occur within one kilometre of a waterway. On 28 September 2020, the FPRC wrote to EPOF requesting that the issue of Crown water frontages and Traditional Owner management be reviewed under the First Principles Review. On 11 November 2020, the EPOF wrote to the FPRC recommending that the issue be referred to the proposed Settlement Act forum. On 2 December 2020, the FPRC, unsatisfied with the response from EPOF, elevated the issue and wrote to Ministers Gabrielle Williams, Melissa Horne, and Lily D'Ambrosio, raising concerns over the Amendment Act, and the likely detrimental impacts on Aboriginal cultural heritage, the environment and Traditional Owner rights and interests. The FPRC requested an urgent meeting to discuss the Amendment Act, the corresponding regulations and how the State would ensure the protection of Aboriginal cultural heritage and Traditional Owner rights and interests. A meeting was scheduled with the Ministers for 27 January 2021. However, the meeting was cancelled "due to unforeseen diary matters" and was required to be rescheduled to a later date. The FPRC were not provided with alternate dates and once again had to actively advocate for their concerns to be heard and a meeting with the Ministers to be scheduled. On 31 March 2021, nearly four months after the initial meeting request was made, the FPRC met with Ministers Melissa Horne and Lily D'Ambrosio. The FPRC made a number of written requests (see below). On 14 April 2021, having received no response to the requests, the FPRC wrote to the Ministers again requesting the State urgently advise how it intended to proceed with the issue. On 4 June 2021, three months after the meeting with the Ministers and nine months after the issue was first raised by the FPRC, a

	meeting was held between DELWP, DPC and the VFA to discuss how to proceed and resolve the issue. At the meeting it was agreed that the corresponding regulations would be re-drafted to ensure that heritage assessment was undertaken by Traditional Owners before camping was allowed on Crown water frontages. The State made this conditional on the affected Traditional Owner groups agreeing to a heritage assessment process and 'clearing' a number of sites before the regulations were enacted on 1 September 2021. On 22 June 2021, the affected Traditional Owner groups were provided a draft heritage assessment process. This provided Traditional Owners around two months to settle a heritage assessment process and 'clear' sites. As the issue was referred to the affected Traditional Owner groups the FPRC did not have oversight of the issue from that date.
Request	The FPRC made a number of requests in relation to cultural mapping/Reading Country, including that: a. Crown water frontages remain closed to camping and campfires until comprehensive cultural mapping of the relevant areas has been undertaken; b. Cultural mapping is to be resourced by the State, and will examine both tangible and intangible heritage, undertaken through a process determined by Traditional Owner groups in the manner they think necessary to protect their cultural heritage; and c. Where cultural mapping reveals area of high cultural value, these areas will not be opened to camping and campfires without Traditional Owner consent, and the Traditional Owner group will be provided a first right of refusal to manage the area. The FPRC also sought commitments from the State for resourcing and enforcement, and for Traditional Owners to be actively involved in the development of regulations, legislation and policy going forward.
Joint or individual recommendation	Individual recommendation.
RECOMMENDATION 34	**FPRC recommendation** *That FPRC's requests, as stated in its correspondence of 31 March 2021, be implemented in full. The FPRC also recommends the State undertake an internal review to ascertain how this legislation was able to be developed without Traditional Owner consultation and free, prior and informed consent, or consideration of potential impacts on Aboriginal cultural heritage or Traditional Owner rights*

	and interests. The FPRC recommends that this internal review be tabled along with a status update at the proposed Settlement Act Forum and be provided to Traditional Owner groups for their consideration. *The FPRC also supports the EPOF recommendation below and requests ongoing Traditional Owner oversight of the matter.* **EPOF recommendation** *That DELWP work together with the affected Traditional Owner groups, the Department of Premier and Cabinet and the Victorian Fisheries Authority to discuss a way forward with an approach that includes an assessment of Crown water frontage sites for Aboriginal cultural heritage values.*
Unresolved issues	**FPRC additional comments** This issue identifies a broader issue around the State failing to consult and cooperate in good faith with Traditional Owners to obtain their free, prior, and informed consent prior to the approval of issues that affect them. Free, prior, and informed consent is a human right norm grounded in the right to self-determination and the right to be free from racial discrimination, rights which are recognised by the State. Free, prior, informed consent is more than consultation. The State has an obligation to obtain consent as the objective of consultation. The FPRC first raised the issue in September 2020. It was not until June 2021, nine months after the issue was raised, that the State engaged Traditional Owners with the objective to resolve the issue. The affected Traditional Owner groups then had to work to resolve the issue within the States' two-month timeframe. The imposition of the timeframe is a clear failure to meet the standard required of 'prior'. 'Prior' in the context of free, prior and informed consent implies that consent is to be sought sufficiently in advance of any authorisation or commencement of acts and respect is shown to the requirements of Traditional Owner internal consultation processes. Arguably, the standard of 'free' and 'informed' were not met either. However, the FPRC concede that the breach of these standards is less objectively clear. Regardless of which individual standards were breached, the right to free, prior and informed consent was not upheld in this instance. Therefore, neither was the right to self-determination. While the State has made changes to the corresponding regulations and a Traditional Owner heritage assessment process has been devised no measures have been put in place to provide Traditional

	Owners and Aboriginal Victorians certainty that their free, prior and informed consent will be sought on matters that affect them and that their right to self-determination will not be breached again. As noted above, the FPRC has not had direct oversight of this matter since late June 2021 and does not have clarity around the current status of the matter. **EPOF additional comments** DELWP is working with Traditional Owner Corporations and Aboriginal Heritage Victoria to undertake extensive cultural heritage mapping along Crown water frontages, to inform any future joint recommendations on sites that are suitable for public camping.

LUAA Avoidance / Dispute Resolution / Review mechanisms / Compliance / Communication

Background	In 2018 the Template Review Committee sought resolution of several issues: (i) LUAA avoidance by government agencies and other developers of Crown lands; (ii) dispute resolution around Land Use Activities; (ii) RSA review mechanisms; (iii) State compliance with RSAs; and (iv) communication of RSA obligations. These issues span more than one template and are therefore considered separately here. In April 2021, the FPRC requested that EPOF consider these issues together, and put forward a proposal aimed at collectively addressing these issues.
Request	The FPRC is of the view that there are systemic issues surrounding the operation of the LUAA that require both immediate and longer-term substantive reform. Accordingly, the FPRC proposed that, in the short term, the State engage an independent lawyer to centralise the legal advice received by departments dealing with the RSA, and through the proposed Settlement Act forum develop an independent office or body to oversee the implementation of Settlement Act agreements.
Joint or individual recommendation	Individual recommendation.
RECOMMENDATION 35	FPRC recommends that as an outcome of this review: (a) the State appoints an independent lawyer to provide advice to the State and local governments on LUAA matters, and

	will initiate a penalty regime for failure to comply with the LUAA; and (b) the State agrees to establish an independent office or body to oversee the implementation of Settlement Act agreements (and other agreements between Traditional Owners and the State) to oversee not just disputes and compliance, but also ongoing review and implementation. This role would be something akin to an ombudsman, with exact nature of its role and enforcement powers to be determined through the proposed Settlement Act forum.
Unresolved issues	**EPOF comments** EPOF recognises that LUAA avoidance, dispute resolution, review mechanisms and compliance are complex issues requiring extensive engagement and discussion between Traditional Owners and the State. EPOF is open to further exploration of the FPRC's proposal but wishes to understand all the elements of that proposal and their workability in greater detail, including how these compare favourably to the existing dispute resolution provisions in the TOS Act. EPOF recommends that these issues be pursued in good faith through the proposed Settlement Act forum. EPOF also suggests that consideration of these issues should have regard to elements required under the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* to support future treaty negotiations, such as: • the functions of the Treaty Authority, which will facilitate and oversee treaty negotiations and provide for the resolution of disputes; and • the treaty negotiation framework, which must include mechanisms for enforcing a treaty and reporting requirements in relation to a treaty or treaties. **FPRC comments** The FPRC notes that these issues have been of concern to Traditional Owner groups operating under an RSA for many years and were directly raised by the Template Review Committee in 2018. EPOF is well aware of the ongoing inadequacies of the current dispute resolution process under the Settlement Act, and these issues could be addressed immediately by adoption of the FPRC recommendation. The FRPC is disappointed these issues were not able to be resolved, or in any way progressed, as part of this review.

PART 5

Unresolved issues proposed for referral to the proposed Settlement Act Forum

There was a number of issues raised as part of the Review that did not result in any recommendations, either because the Review ran short of time to consider them in any detail, or because they were particularly complex and could not be resolved before the finalisation of this report. Additionally, the parties jointly recommended that some issues examined in this Review required a lengthier period of detailed consideration. These issues are proposed for further consideration via a Settlement Act Forum.

The background as well as an articulation of each of unexamined issue is outlined below, with each recommended to form part of the work of the proposed Settlement Act forum.

Timber release plans/timber harvesting

Background	In the LUAA, procedural rights and compensation in relation to timber harvesting are triggered by the gazettal of a new Timber Release Plan (**TRP**), or the modification of an existing TRP. The gazettal of a new TRP is categorised as a Negotiation Class B activity. The modification of an existing TRP is categorised as an advisory activity. Formula C of the Community Benefits formulae stipulates that compensation for timber harvesting is payable from the annual VicForests dividend.
Issue	In practice, new TRPs are not published. Rather, existing TRPS are amended, with the consequence that only lower level, 'advisory' Traditional Owner rights are triggered, rather than the full range of rights and compensation accorded by Negotiation Class B. Additionally, VicForests has not been required by the Treasurer to pay a dividend to the State and is unlikely to be in a position to be able to do so. Therefore, Traditional Owners are unable to exercise their procedural rights or receive the compensation they are entitled to under the current categorisation in the LUAA. EPOF notes that Forest Policy is continuing to work with VicForests on a solution to the issues raised by the FPRC. FPRC notes its view that there is an incorrect assumption that TRPs are VicForests' only obligations under the LUAA. The activities under the TRP should also be assessed for impact on Traditional Owner land and rights.

Renegotiation of Schedule 4, LUAA

Background	Schedule 4 of the LUAA sets out the standard terms and conditions (including payment terms) with respect to Earth Resource or Infrastructure Authorisations, defined to mean: • exploration licences, prospecting licences and retention licences granted under the *Mineral Resources (Sustainable Development) Act 1990* (Vic); • exploration permits and retention leases granted under the *Petroleum Act 1998* (Vic), *Geothermal Energy Resources Act 2005* (Vic), or *Greenhouse Gas Geological Sequestration Act 2008* (Vic); • special access authorisations and special drilling authorisations granted under the *Petroleum Act 1998* (Vic); • greenhouse gas assessment permits, greenhouse gas holding leases, petroleum exploration permits and petroleum retention leases granted under the *Offshore Petroleum and Greenhouse Gas Storage Act 2010* (Vic); and • any other authorisation granted under the above Acts for the purpose of exploration. If a proponent accepts the standard terms and conditions, the grant of their authorisation is treated as a Routine activity under the LUAA. If they do not accept, then separate terms and conditions may be negotiation as a Negotiation (Class A) activity.
Issue	In 2018 the Template Review Committee sought to renegotiate Schedule 4, to ensure it was in keeping with the terms and conditions achieved in NTA agreements across Australia. In August 2019, the State invited the Federation of Victorian Traditional Owner Corporations, as a representative body for Traditional Owner groups, to participate in the renegotiation of the Schedule 4 conditions and rates with earth resource industry representatives. It was proposed that the renegotiation take place in as part of the First Principles Review. The FPRC has approved parts of a redrafted Schedule 4 and looks forward to progressing its negotiation in the proposed Settlement Act forum. The EPOF agrees that Schedule 4 conditions be reviewed, and associated rates be adjusted to align with compensation potentially available under *Native Title Act 1993* (Cth) agreements across Australia**.** These proposed changes should be negotiated with the Minerals Council of Australia and relevant industry stakeholders. Work has begun towards the redrafting of Schedule 4, and it is

	intended this work will be further progressed in the proposed Settlement Act forum. The FPRC acknowledges that work has commenced within the Department of Jobs, Precincts and Regions (DJPR) on the following issues. The FPRC proposes these issues be considered by the proposed Settlement Act Forum: • the process for monitoring and enforcing payments to Traditional Owner corporations under Schedule 4, including: • the potential for fees and other payments owed under schedule 4 to be collected by the Department of Jobs, Precincts and Regions, as part of their ongoing management and regulation of the relevant Earth Resource or Infrastructure Authorisation (at the election of the Traditional Owner corporations); • consequences for licence holders if they do not pay fees or other payments owing under schedule 4; • online access for Traditional Owner groups to all relevant information about exploration and mining activities on Country • examining Traditional Owner rights to Earth Resource or Infrastructure Authorisations granted prior to the Settlement Act agreement, or otherwise excluded from the LUAA.

Participation strategies

Background	The Settlement Act provides that an NRA can contain strategies to enable Traditional Owner participation and employment in the management of natural resources.
Issue	The Template Review Committee stated that current strategies were not working and requested that the participation strategies and procurement method proposed by Dja Dja Wurrung be mandated with clear deliverables and outcomes.

Other unresolved issues recommended by the Review for referral to the proposed Settlement Act Forum

Issue	Where raised in this report
Commissioning an expert or experts to advise on compensation issues	Recommendation 11 (p. 36)

Negotiation of final community benefits formulae and the calculation model	Recommendation 11 (p. 36)
Hydraulic fracturing (fracking)	Recommendation 27 (p. 53)
Further consideration of the resolution relating to the extension of existing rights to take natural resources from private land as outlined in Part 4 of this report.	n/a
Water rights	Recommendation 20 (p. 47)
Inclusion of Traditional Owners in the Whole of Government approach to recycling/utilising public land and assets	n/a
Whether a Traditional Owner Group Entity (TOGE) should act as the Traditional Owner Land Management Board for jointly or solely managed land	n/a
Inclusion of freehold land held by State owned entities in the LUAA to allow for future compensation (changing the definition of 'public land')	n/a
Review of the Threshold Guidelines	n/a
Whether Traditional Owner rights and interests can be assigned, or undertaken with, people who are not members of a TOGE	n/a
Overseeing the legislative reform and implementation of the Review report recommendations (subject to Cabinet approval)	n/a
The provision of funding / resourcing for Traditional Owner groups	n/a

Parallel negotiations and reviews

Several other reviews and negotiations occurred in parallel with the First Principles Review. FPRC and EPOF agreed that any outcomes of these processes, where relevant to the Terms of Reference of the Review, should be referred to the proposed Settlement Act forum for further discussion and consideration. These parallel processes included:

- Findings of the Joint Management Implementation Project
- Findings of the LUAA audit
- Dja Dja Wurrung Initial Outcomes Review/renegotiations

At the time of finalising this report, none of these parallel processes has concluded. However, the Review proposes that those engaging in the negotiations on this issue report to the proposed Settlement Act Forum on their progress.

PART 6

Conduct of the Review

The Review was conducted from its launch in February 2020 at Parliament House, until its conclusion upon the submission of this report to the Attorney-General, the Honourable Jaclyn Symes, in November 2021.

The Review was faced with an ambitious Terms of Reference, being the first comprehensive review of the Settlement Act framework since the introduction of the legislation in 2010. While the scope of work was broad, the Review faced other challenges with emergence of the Covid-19 virus in early 2020. This required the Review to adapt, abandoning the intention to engage through in person negotiations, to an on-line setting.

Despite these challenges, the Review nevertheless made progress as against the Terms of Reference, and the membership of both the FPRC and EPOF persisted in the discussion of complex and sometimes difficult content, to produce the outcomes set out in this report.

Formation of the FPRC & EPOF

In 2018, the Federation facilitated a series of workshops with the Template Review Committee, consisting of Traditional Owners from groups across Victoria in active negotiations with the Victorian government under the Settlement Act. The purpose of these workshops was to review the standard settlement agreements offered by the State. While some of those recommendations were implemented, others required legislative or policy changes leading to the Victorian government to commit to the First Principles Review.

On recommendation from the Template Review Committee, the Federation facilitated an open and inclusive EOI process to allow individual Traditional Owners to nominate for membership of the FPRC.

This process was advertised through the Federation social media presence and community networks, resulting in wide representation from across Victoria. All Traditional Owners who expressed an interest in joining were accepted as members of the FPRC. In addition, a number of Traditional Owners expressed an interest not in joining the committee, but in being kept abreast of its work, and were provided with all committee correspondence, minutes, briefing notes and other documents as they were prepared, as well as access to an on-line repository of all FPRC material.

Following the formal establishment of the FPRC, it developed and adopted its own governance rules, including requirements as to quorum, and engagement processes. At this time the FPRC also decided to allow Traditional Owner corporations to directly appoint members, to allow for greater representation, and to ensure the Review took into account the views and experience of those entities that will ultimately negotiate and implement Settlement Act agreements. Throughout the above processes, and during the Review, the Federation acted as an advisor and facilitator to the FPRC and acted on the instructions of the FPRC.

Throughout the course of the Review the FPRC was consistently clear that its role was to make recommendations to the Attorney-General about a starting point in negotiations between the government and any individual Traditional Owner group. The FPRC does not represent, nor have

any mandate from, Traditional Owner groups in Victoria, and is not authorised to make decisions or agreements on behalf of any Traditional Owner group.

However, consisting of senior Traditional Owners, along with management and board members from Traditional Owner corporations, it has been uniquely placed to review components of Settlement Act agreements, and to reflect upon the wider goals and aspirations of Traditional Owners across the state.

The Victorian government was represented in the Review by an Executive Policy Owners' Forum, including Deputy Secretaries or other executives of the multiple departments and agencies responsible for advising the government on, and otherwise administering, the TOS Act. Executives were recruited via direct invitation from the Deputy Secretary, Aboriginal Justice, Department of Justice and Community Safety, who also acted as the EPOF Chair. The work of the executives was supported by advisors from across each of the Review's policy areas. Advisors progressed the underlying policy work for each Review issue by drafting and providing feedback on policy and position papers, and by providing advice to executive members. Secretariat support was provided by the Land Justice Unit, Department of Justice and Community Safety.

Launch of the Review

On 14 February 2020, the Review was officially launched by the then Attorney-General, the Hon. Jill Hennessy, at the inaugural joint meeting of the EPOF and the FPRC at Parliament House. The Hon Natalie Hutchins, Parliamentary Secretary for Treaty, was also in attendance.

At the launch, the then Attorney-General noted the State's commitment to improving the settlement framework and addressing the implications of the Timber Creek decision, noting that:

This review will make sure Victorian law is up to date, to ensure we continue to lead the country on self-determination and as a demonstration of our commitment to the Treaty.

A spokesperson for FPRC noted that:

That's a lot of work to be done but we're hopeful this review will deliver a fairer deal for Traditional Owner's rights and interests.

INSIGHT PAGE 31 · GOOD WEEKEND · SPORT PAGE 50

SATURDAY AGE.

$4.40 February 15, 2020 · INDEPENDENT. ALWAYS.

LEGISLATION Multimillion-dollar settlements

State flags new native title deal for spiritual loss

EXCLUSIVE

Noel Towell
State political editor

Victorian Aboriginal clans could be in line for legal settlements worth millions of dollars for the loss of cultural and spiritual rights as the state Labor government embarks on a shake-up of native title laws.

Attorney-General Jill Hennessy says a review of the state's Traditional Owner Settlement Act could open the way for decisions such as the Timber Creek case, where the High Court awarded $2.5 million last year to a group of traditional owners in the Northern Territory in part for the loss of spiritual connection to their land.

Spiritual and cultural connections to the land have been a flashpoint in the bitter legal dispute over the tree-felling along the Western Highway.

Victoria says its settlement act is a unique piece of legislation that seeks to plug gaps in the federal Native Title Act and has already resulted in three major agreements with the Gunaikurnai people of Gippsland, the Dja Dja Wurrung people in the mid-north of the state and the Taungurung people from

Continued Page 10

COMMENT

'Until now, your Australianness depended on whether you were a citizen.'

PETER HARTCHER
PAGE 38

'It feels like everyone's a zombie, thinking 'what is going to happen next?''

Raymond Capaldi

Culinary city at risk of 'los

Chip Le Grand
Gemima Cody

Raymond Capaldi remembers a time when Melbourne was, plate for plate, the world's most vibrant and creative culinary city.

It was 20 years ago and the Scottish-born Capaldi, already a globetrotting chef of international acclaim, could have worked anywhere. That he came here said as much about the rude health of Melbourne's restaurant scene as Capaldi's desire to introduce a new audience to his gastronomic talents.

Not long after he arrived, he took on a teenage apprentice named George Calombaris.

Today, Capaldi no longer works in restaurants. His kitchen is in an industrial precinct in Bulleen, where he cooks pies for a living. He misses the restaurant scene but fears what it is becoming, with

OPIOID CRISIS

Senior Liberal calls to push out C

The launch was covered on the front page of the *Age* newspaper (**Appendix 10**), which reported the establishment of Review as representing:

> Victoria's 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.

Conduct of the Review

The Review was conducted through meetings, both between the FPRC and EPOF, and in camera meetings of each committee or forum, where policy positions were formulated, considered or approved. Due to the complexity of the material, positions were frequently expressed in writing through the exchange of correspondence.

Meetings

Meetings were held between February 2020 and November 2021, as captured in the table below.

Prior to March 2020, meetings generally took place in person. However, after the declaration of a State of Emergency due to the COVID-19 pandemic, all meetings occurred either via teleconference or videoconferencing.

The Federation worked with FPRC members to assist in setting up remote conferencing facilities to ensure the greatest number of FPRC members had access to the required technology and software and could therefore attend or contribute to any scheduled meetings.

Additionally, the Federation undertook consultations with Traditional Owners outside of formal FPRC meetings on an ongoing basis. These consultations have been essential in ensuring members were kept up to date.

Meeting type	Number of meetings
FPRC (in camera)	22
FPRC (in camera catch-up / information session)	12
FPRC (subcommittee)	8
EPOF (in camera)	6
FPRC / EPOF	4
Advisor (between the Federation and the Land Justice Unit, DJCS)	32

Barriers

Since March 2020, the Review has been working within the challenges of the COVID-19 global pandemic.

Many of the FPRC members hold important positions in their communities and have taken leadership roles in responding to the impacts of the pandemic on their communities. Despite this added responsibility and workload, the FPRC has continued to adapt meeting practices and procedures to progress the work of the FPR and to ensure wide representation in participation in those meetings. This approach has been relatively successful. Since the start of the pandemic, the FPR has held its meetings via videoconferencing platforms.

PART 7

EPOF's position on Treaty and the First Peoples Assembly of Victoria

In response to ongoing calls from Aboriginal Victorians, the Victorian Government committed to pursuing treaty in May 2016. The State's commitment to treaty is formalised in the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (**Treaty Act**), the first piece of treaty-related legislation in Australia's history.

Victoria is currently in Phase 2 of a three-phase process towards treaty.

The first phase of Victoria's treaty process focused on community engagement and the design and establishment of the First Peoples' Assembly of Victoria (**Assembly**), the first democratically elected representative body for Traditional Owners of country and Aboriginal Victorians in the state's history.

The Assembly is comprised of 31 Victorian Traditional Owners, with 21 members elected by Aboriginal Victorians across five voting regions and 10 members appointed by formally recognised Traditional Owner groups.

The treaty process is now in the second phase which commenced with the establishment of the Assembly in December 2019. During this phase, the Assembly is working in partnership with the Victorian Government to establish the elements required to support future treaty negotiations:

- a Treaty Authority, as an independent third party to oversee negotiations
- the treaty negotiation framework, setting out the rules and process for future treaty negotiations
- a self-determination fund, to provide Aboriginal Victorians with an independent financial resource during the treaty process
- a dispute resolution process, to resolve disputes arising while working together to establish these treaty elements.

The third and final phase of the treaty process will commence with the agreement and establishment of the treaty elements. Phase three will involve treaty negotiations between the State and Aboriginal negotiating parties.

Interaction between the Review and the treaty process

The Settlement Act provides for the recognition of Traditional Owner rights in relation to land, waters and natural resources. The Review has sought to examine the content of Settlement Act agreements, to ensure they continue to represent a fair and just settlement for Traditional Owners in light of substantial advances in native title law. Victoria's treaty process will also seek to deliver Traditional Owners' aspirations, including in relation to land, waters and natural resources, as well as their broader self-determination aspirations.

While treaty has progressed in parallel to the Review, there are significant intersections between these processes and close engagement has been maintained to ensure that the views of Traditional Owners are considered comprehensively through each of these processes. Through the Review, the EPOF has identified issues that it considers fall outside of the scope of this Review, and that may be more appropriately addressed through referral to the Minister for Aboriginal Affairs and Assembly for consideration through treaty.

These issues are:

- **Recommendation 2**: compensation payable to Traditional Owners for activities occurring before 31 October 1975, and the enactment of the RDA;
- **Recommendation 4**: a settlement agreement should not be full and final in respect of native title compensation;
- **Recommendation 10**: the proposal for a moratorium on Crown land sales in those areas where Traditional Owners do not have any procedural rights with respect to the sales;
- **Recommendation 11**: the Compensation Model and Expert Terms of Reference to assess compensation formulas;
- **Recommendation 33**: the Traditional Owner Settlement Act Forum be established to build upon the work of the First Principles Review; and
- **Recommendation 35**: consideration of LUAA avoidance, dispute resolution, review mechanisms, compliance and communication.

Following the submission of this Report to the Attorney-General it is proposed that these issues be brought to the attention of the Co-Chairs of the Assembly, and the Minister for Aboriginal Affairs, along with a copy of this Report for their consideration.

Implementation of the Review's recommendations will require ongoing work and review to ensure alignment with the Victorian treaty process, including engagement with the First People's Assembly of Victoria. Alignment is particularly essential in matters relating to compensation formulas, the work plan and any recommendations of the expert, and the operation of the Traditional Owner Settlement Act forum.

Issues referred to the treaty process to be dealt with in a reasonable timeframe

While EPOF asserts that Recommendation 2 and Recommendation 10 are more appropriately addressed through referral to the Minister for Aboriginal Affairs and First Peoples' Assembly, the FPRC has expressed some concern that if this occurs, these issues may not be progressed within a reasonable timeframe, given the width of issues to be addressed in that process.

For that reason, the FPRC continues to advocate for the acceptance of the recommendations and does not agree that these matters should be further delayed by referral to another process. However, in the event that they are referred, makes the recommendation set out below:

Joint or Individual Recommendation	This is an individual recommendation.
RECOMMENDATION 36	That where any issue raised in this report is referred to the Minister for Aboriginal Affairs (**Minister**), the Assembly, or

	otherwise sought to be progressed through the Treaty process, that: • Those matters should be raised with the Assembly and the Minister in writing, and they should both be provided a copy of this report in full; and • Unless the Assembly confirms that they intend to actively negotiate and pursue each issue within 12 months of receiving notice in writing, the issue will be automatically referred to the proposed Settlement Act forum to be further progressed.
Unresolved issues	EPOF recognises the significance of these issues to the FPRC and the importance of resolving them. EPOF is also mindful, however, that the Settlement Act Forum will ultimately derive its authority and take its overall direction from governance structures developed through the treaty process.

Next steps

The Attorney-General is to provide a response to the FPRC regarding the Review recommendations within 3 months of being provided with the final Review report. The Attorney-General will take the report to Cabinet for consideration.

The Attorney-General will provide a statement of reasons in the event that any aspect of the Final Review report is not adopted.

Appendix 1: Summary of the full list of recommendations

Recommendation number	Terms of Recommendation	Page reference	Joint or Individual Recommendation
Compensation Recommendations			
Recommendation 1	Settlement Act agreements should represent a fair and just settlement for Traditional Owners, as assessed against the listed criteria.	27	Joint
Recommendation 2	Calculation of compensation should not be limited to activities occurring post-1975.	28	Individual (FPRC)
Recommendation 3	Money paid under a Settlement Act agreement should include: Compensation, being payment for loss of rights with no conditions governing its purpose; On-going operational funding for dedicated purposes to support corporations to meet the cost of establishing and operating settlements, including, to participate in natural resource management and joint management; and Commitment of on-going funding for departments to meet the cost of establishing and operating components of the settlements.	29	Joint
Recommendation 4	Settlement Act agreements should not be full and final in respect of native title compensation, and instead a method should be adopted to allow for compensation to be increased if developments in the common law would otherwise so entitle Traditional Owners.	30	Individual (FPRC)
Recommendation 5	Compensation for historical impairment (along with extinguishment) of native title rights should form part of the Settlement Sum. Compensation for historical impairment should be calculated: on the basis of newly negotiated Community Benefits formulas, applied retrospectively, where the activity would be compensated in accordance with a Land Use Activity Agreement (LUAA) following settlement; and	32	Individual (FPRC)

	on the basis of individual negotiation, where the activity would not be compensated under the LUAA, but has otherwise had, or continues to have, a significant impact on the ability of Traditional Owners to exercise Traditional Owner Rights over, or in relation, to the relevant land.		
Recommendation 6	Compensation should include interest on all compensable acts, calculated as compound interest.	33	Individual (FPRC)
Recommendation 7	Expert advice should be sought with respect to data issues, and the promotion of data sovereignty within the compensation process.	34	Joint
Recommendation 8	Where any issues arise around the availability or accuracy of data, it should be resolved with a presumption in favour of Traditional Owners.	35	Joint
Recommendation 9	The State should work with Traditional Owners to advocate for the Commonwealth to (i) meet any native title compensation liabilities it may have; and (ii) contribute to the State's native title liability, in accordance with previous commitments.	35	Joint
Recommendation 10	That a moratorium on all Crown land sales be initiated in all areas where the Traditional Owner groups do not have rights to either provide or withhold consent to the sale.	36	Individual (FPRC)
Recommendation 11	FPRC recommendation: The FPRC endorses and recommends the Compensation Model and the Expert Terms of Reference, until such time as negotiations with respect to pre-RDA liability can be progressed. EPOF recommendation: The EPOF endorses the Expert Terms of Reference and further exploration of the Compensation Model; however, it considers that additional information is required, including in relation to: the comprehensiveness and reliability of data to be relied upon in the application of a retrospective LUAA; the feasibility of including Land Use Activities such as major public works and public land authorisations in such a model (for which the data availability is currently unknown). The EPOF suggests that further exploration of the Compensation Model should have regard to compensation being considered through Victoria's	36	Individual (as indicated)

	treaty process, noting the work of the expert should be informed and align with progress in the treaty process.		
Recommendation 12	The Interim Community Benefits Formula (Appendix 9) should be adopted on an interim without prejudice basis. EPOF notes the significant financial and budgetary impacts of the Interim Community Benefits Formulae and considers that the recommendation needs to be accompanied by an enabling revenue model to address the significant cost impacts on providers of essential services. As part of government's consideration of the First Principles Review recommendations, EPOF will be seeking: a 'no net loss of retained revenue' principle for land managers; that Community Benefits liabilities be factored into State Budget funding allocations; and that transitional arrangements be implemented for major public works with approved budgets impacted by the proposed Interim Community Benefits Formulae.	38	Joint
Recommendation 13	That Traditional Owner Corporations (including Registered Aboriginal Parties) should be part of the First Right of Refusal process. At minimum, Corporations should be notified of proposed surplus public land and have the option to purchase this land under full or restricted title, before it goes to public auction. The ways in which this recommendation can be given effect are to be further explored in the Settlement Act forum, including looking at options for processes to ensure assets are held by entities representing all Traditional Owners.	40	Joint
Recommendation 14	That the term 'comply with' be removed from item 4.1 of Schedule 1 of the Natural Resource Agreement template where this refers to the Sustainability Principles and replaced with the term 'give proper consideration to'.	41	Joint
Recommendation 15	That prohibitions on taking protected or threatened flora should not apply to Traditional Owners without their consent. That the Natural Resource Agreement template be amended so that any such prohibitions are removed from the template and are instead assessed and negotiated in accordance with the UNDRIP principle of free prior and informed consent, through the Partnership Forum.	42	Joint

Recommendation 16	Item 5.3 of Schedule 1 in the NRA template should be removed in order to facilitate greater Traditional Owner access to firewood, by allowing for the cutting down of trees or branches (outside firewood collection areas) for this purpose. The lifting of this restriction would create greater consistency between firewood and other vegetation in the Natural Resource Agreement template. It is EPOFs view that other natural resource legislation and regulations would also need to be reviewed to ensure it supported the proposed policy change. The parties agree that items 5.4 and 5.5 of Schedule 1 only regulate collection of firewood within a Firewood Collection Area, and outside such areas, Traditional Owners may collect firewood as an Agreed Activity, and in accordance with the relevant clauses in the NRA template, including the Public Land conditions in Schedule 1 of the NRA. The NRA should be amended so this position is more clearly stated.	42	Joint
Recommendation 17	The term 'traditional purposes' in Section 79 of the TOS Act should be replaced with 'non-commercial purposes' but retain the same definition. The FPRC and EPOF note that this is an interim measure until the Traditional Owner rights to use natural resources for commercial purposes is recognised.	43	Joint
Recommendation 18	a) That the Settlement Act and the NRA template be amended so as to accommodate the commercial use of animals (other than fish) to create parity with the provisions providing for commercial use of vegetation and stone. b) That the Settlement Act and the NRA template be amended so as to also accommodate the commercial use of water and animals (including fish).	44	Joint Individual (FPRC)
Recommendation 19	That the Settlement Act and TOLNRA template be amended so that 'agreed activities' can be exercised on freehold land within the outer boundaries of a Recognition and Settlement Agreement, subject to a landowner's permission.	46	Joint
Recommendation 20	The EPOF and FPRC agree the State should acknowledge that Settlement Agreements do not provide sufficient recognition of Traditional Owner rights	47	Joint

	and interests in water. The EPOF and FPRC recommend that substantive reform be pursued as a priority in the proposed Settlement Act forum.		
Recommendation 21	DJPR commits to developing a policy to offer Miner's Right permits to members of Traditional Owner Corporations under the *Mineral Resources Sustainable Development Act 1990*. This would be a temporary solution designed to address the exclusion of gold, silver, metal and minerals in the definition of 'natural resources' in the Settlement Act. EPOF recommends that options for legislative change be explored through the proposed Settlement Act forum.	48	Joint
Recommendation 22	Community Purpose Permits and Licences be re-categorised as Negotiation Class A, with a condition that no Community Benefits are payable, this change occurring for permits and licences: • with a term above 21 years, in accordance with Timeframe 1;[20] and • all other Community purpose permits and licences, in accordance with Timeframe 2.[21]	50	Joint
Recommendation 23	Community Purpose Leases to be re-categorised as Negotiation Class A, this change occurring for leases: • with a term above 21 years, in accordance with Timeframe 1; and • all other Community Purpose Permits and Licences, in accordance with Timeframe 2.	50	Joint
Recommendation 24	Commercial Permits and Licences to be re-categorised as Negotiation Class A, this change occurring for permits and licences: • with a term above 10 years (not including water licences) in accordance with Timeframe 1; and • all other Commercial Purpose Permits and Licences, including works (Water Act) licences as defined in s 27 of the TOS Act.	51	Joint

[20] **Timeframe One** means within 3-6 months following endorsement by Cabinet.

[21] **Timeframe Two** means a phased approach estimated to take 3-5 years.

Recommendation 25	Commercial Purposes Leases to be re-categorised as Agreement activities, the change occurring for leases: • with a term above 10 years, in accordance with Timeframe 1; and • all other Commercial Purposes Leases, in accordance with Timeframe 2.	51	Joint
Recommendation 26	Major Public Works: **FPRC recommendation** That Major Public Works are categorised as Negotiation (Class A) activities in the template LUAA. **EPOF recommendation** That the proposed re-categorisation of Major Public Works from Negotiation B to Negotiation A take effect after provisions have been included in the TOS Act to provide clear guidance on the factors VCAT may take into account in its decision making, and the grounds upon which VCAT may decide that a Major Public Work does not proceed. The proposed recategorisation will therefore take place in accordance with Timeframe 2.	52	Individual (as indicated)
Recommendation 27	That: • each activity described in subsections 99(a), (b) and (c) of the Constitution Act 1975 (Vic) be categorised as Agreement activities under the LUAA; and • the issue of offshore fracking be referred to the proposed Settlement Act forum.	53	Joint
Recommendation 28	That the Land Use Activity Regime should not treat differently land that is within the boundaries of an alpine resort, which will require the repeal of section 32(3A) of the Settlement Act.	54	Joint
Recommendation 29	That with respect to the capture of existing Public Land Authorisations upon renewal, Option A should be implemented as an interim measure, while the issue be referred to the proposed Settlement Act forum, in accordance with Option C, for final resolution. The detail of each relevant option is as follows:	54	Joint

	• Option A: Commence ongoing payment: Upon entry into a Settlement Act agreement, the State will starting paying Community Benefits for PLAs that are in effect as at the time of settlement, from monies otherwise being paid to consolidated revenue, plus where any right of renewal for these PLA's is exercised, it will be categorised as an Advisory activity under the LUAA. • Option C: Refer this issue to the proposed Settlement Act Forum: While Option B requires a specific proposal be referred to the proposed Settlement Act forum, Option C proposes that this issue be referred in its entirety to allow for: ○ a broader review of exclusions from the LUAA; ○ an examination of whether other exempt PLAs should generate Community Benefits payments and be categorised to allow procedural rights; ○ an exploration of revenue sharing for PLAs in existence at the time of settlement. For example, the proposed Settlement Act forum could consider whether PLA revenue sharing should be extended to include public land with existing community and/or commercial infrastructure at the time of settlement.		
Recommendation 30	a) That the Settlement Act and *Conservation, Forests and Lands Act (1987)* be amended in order to allow for the grant of Aboriginal title and joint management arrangements over land within the boundaries of a State Game Reserve. b) The amendments to the Settlement Act and the *Conservation, Forests and Lands Act 1987* (Vic) should go further than providing for joint management and should also allow for sole management of State Game Reserves.	56	Joint Individual (FPRC)
Recommendation 31	That the Settlement Act and other relevant legislation be reviewed and amended to allow for transfers of Crown land with existing commercial leases to Traditional Owner corporations, along with a commitment to develop a	56	Joint

	supplementary policy to support the change. This proposed legislative change and policy development should be progressed by the Settlement Act forum.		
Recommendation 32	**Joint EPOF and FPRC recommendation** That the Settlement Act be amended to include the following definition of the term 'emergency': 'emergency' has the same meaning as in Section 3 of the Emergency Management Act 2013 (Vic)'. That clause 7(c) of the template LUAA be amended to strengthen engagement with Traditional Owners following the carrying out of an emergency activity by the State, by incorporating the following: "In an emergency situation where the State carries out a Land Use Activity as permitted by s 39 of the Act, the State will inform and, upon request, meet with the Corporation as soon as is practicable. **Individual FPRC recommendation** That clause 7(c) of the template LUAA be amended to strengthen engagement with Traditional Owners following the carrying out of an emergency activity by the State, by incorporating the following: "In an emergency situation where the State carries out a Land Use Activity as permitted by s 39 of the Act, the State will: a) provide any Community Benefit Payment owing with respect to the activity; and b) undertake rehabilitation works, as reasonably requested by the Corporation.	57	(a) Joint (b) Individual (FPRC)
Other recommendations			
Recommendation 33	That a Traditional Owner Settlement Act Forum, comprised of both Traditional Owners and State representatives, be established to build on the work of the First Principles Review. It is intended that the new Settlement Act forum will finalise those issues not resolved in the current Review, as well as work towards solutions for emerging issues under the Settlement Act. The First Peoples – State Relations group will need to work closely with the new	58	Joint

	Settlement Act forum to ensure its work aligns with treaty progress, including through engagement with the First Peoples' Assembly of Victoria.		
Recommendation 34	With respect to Crown Water Frontages: **FPRC Recommendation** The FPRC recommend that its requests, as stated in its correspondence of 31 March 2021, be implemented in full. The FPRC also recommends the State undertake an internal review to ascertain how this legislation was able to be developed without Traditional Owner consultation and free, prior and informed consent, or consideration of potential impacts on Aboriginal cultural heritage or Traditional Owner rights and interests. The FPRC recommend that this internal review be tabled along with a status update at the proposed Settlement Act Forum and provided to Traditional Owner groups for their consideration. The FPRC also support the EPOF recommendation below and request ongoing Traditional Owner oversight of the matter. **EPOF Recommendation** That DELWP work together with the effected Traditional Owner groups, the Department of Premier and Cabinet and the Victorian Fisheries Authority to discuss a way forward with an approach that includes an assessment of Crown water frontage sites for Aboriginal cultural heritage values.	58	Individual
Recommendation 35	FPRC recommends that as an outcome of this review: the State appoints an independent lawyer to provide advice to the State and local governments on LUAA matters, and will initiate a penalty regime for failure to comply with the LUAA; and the State agrees to establish an independent office or body to oversee the implementation of Settlement Act agreements (and other agreements between Traditional Owners and the State) to oversee not just disputes and compliance, but also ongoing review and implementation. This role would be something akin to an ombudsman, with exact nature of its role and enforcement powers to be determined through the proposed Settlement Act forum.	62	Individual

Treaty and the First Peoples Assembly			
Recommendation 36	The FPRC recommends that where any issue raised in this report is referred to the Minister for Aboriginal Affairs (Minister), the Assembly, or otherwise sought to be progressed through the Treaty process, that: a) Those matters should be raised with the Assembly and the Minister in writing, and they should both be provided a copy of this report in full; and b) Unless the Assembly confirms that they intend to actively negotiate and pursue each issue within 12 months of receiving notice in writing, the issue will be automatically referred to the proposed Settlement Act forum to be further progressed.	73	Individual

Appendix 2: Terms of Reference: First Principles Review

Background to the First Principles Review

The 2016 amendments to the *Traditional Owner Settlement Act 2010* (TOS Act), and the experience of implementing the first natural resource agreement (NRA) and land use activity agreement (LUAA) necessitated a review of these template agreements (**Template Review**). Through the Template Review, it became apparent that (i) the LUAA and NRA could not accommodate certain aspirations of Traditional Owner groups; and (ii) the issues being raised by Traditional Owner groups required a discussion about the fundamental underpinnings of the templates and the TOS Act framework; and (iii) the issues and potential solutions being raised by Traditional Owner groups were beyond the time-frame and scope of the then Template Review. Accordingly, the State undertook to conduct a further review to address the outstanding matters (**First Principles Review**), in partnership with all participating Traditional Owner groups.

Description of the First Principles Review

The First Principles Review will be primarily concerned with issues that relate to principles and legislation that underpin, and mandate the content of the template Agreements and the State's settlement policy.

Principles guiding the First Principles Review

The State will adopt a whole-of-government approach and will partner with Traditional Owners in the First Principles Review, through the 'First Principles Review Committee'. The parties to the Review will be the State and the First Principles Review Committee. The parties will undertake the review in good faith and will adhere to the agreed terms of reference and timeframes. Traditional Owner groups who have already entered into settlements with the State under the Act will be able to benefit from, and update their agreements to reflect, new standards, policies and processes developed through the First Principles Review.

The First Principles Review will:

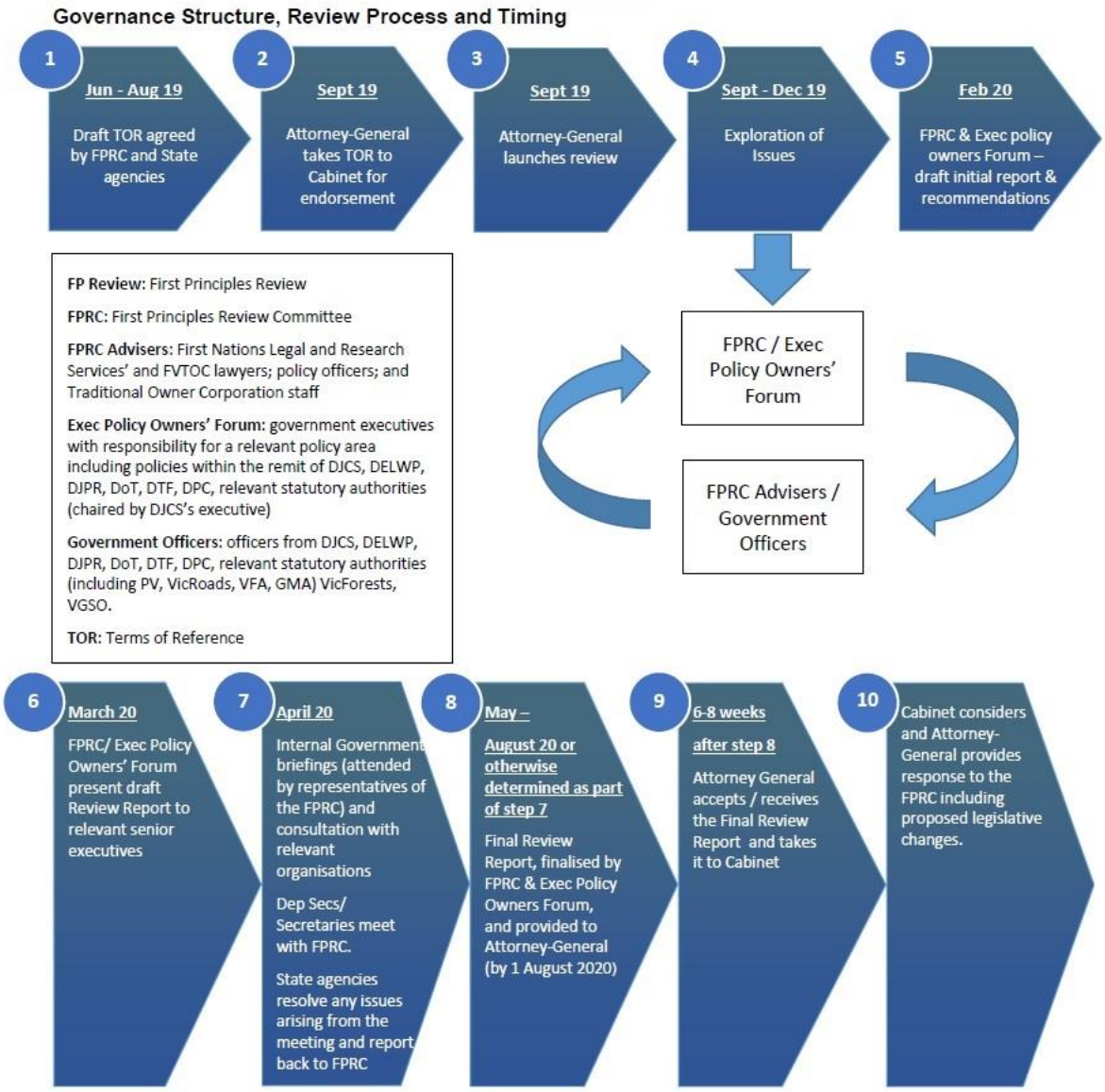
i. be conducted as a partnership between the State and all participating Traditional Owner groups as represented by the First Principles Review Committee;

ii. both in its process and in its outcomes, uphold the principle of self-determination;

iii. have reference to developments in Australian native title law and practice, and will draw on the experience of prior settlements, and other developments across the policy spectrum;

iv. comply with the right to free prior and informed consent, and also adhere to the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the United Nations Declaration on the Rights of Indigenous Peoples; and

v. allow for, and the State will ensure, that Traditional Owner groups meet directly with responsible senior officials, including, where necessary and relevant, s, Secretaries and Deputy-Secretaries, from relevant government departments in relation to any matter associated with the First Principles Review.



Roles during Step 4: the exploration of issues to be considered in the First Principles Review

Government Officers and FPRC Advisers

a) Take instructions on any concerns, aspirations or aims of the FPRC and Exec Policy Owners' Forum;

b) Share any concerns, aspirations or aims with FPRC advisers and Government Officers and the FPRC and Exec Policy Owners' Forum;

c) Bring those instructions and information to regular and scheduled meetings between the FPRC advisers and Government Officers, at which responses, strategies or amendments, with respect to both policy and legislation, can be developed;

d) Establish timelines for decision making, including setting reasonable deadlines for responses on established issues; and

e) Propose responses, strategies, or amendments (relating to policy or legislation) to the FPRC and Exec Policy Owners' Forum for consideration, refinement and decision.

FPRC and Exec Policy Owners' Forum

a) Confirm the appropriate FPRC Advisers and Government Officers, and facilitate their engagement in the Review;

b) Instruct the FPRC Advisers and Government Officers;

c) Receive regular briefings on the work of the FPRC Advisers and Government Officers;

d) Properly inform themselves about current policy and legislative provisions the subject of the Review, so as to provide useful and timely instructions to the FPRC Advisers and Government Officers;

e) Make decisions in a transparent and timely manner;

f) Attend decision making meetings of the FPRC Advisers and Government Officers; and

g) Agree the final version of the report, to be provided to the Attorney-General.

Timing

In the event that the final report is not ready to be presented to the Attorney-General by 1 August 2020, then the Exec Policy Owners' Forum Chair and FPRC:

a) Will meet, and discuss the reason for the delay;

b) The party responsible for the delay must explain the cause, and provide a plan for how it will be addressed; and

c) may resolve to extend the date.

The requirement to provide any reports under this Review does not prohibit any agreed changes, amendments, additions to legislation, practices, policy or procedure from being immediately adopted and implemented during the course of the Review. This Review will also not inhibit the progress, resolution or implementation resulting from any other concurrent reviews (without the consent of the parties to the relevant review). All parties to the Review commit to carrying out their duties and providing responses in a reasonable and timely fashion, and will meet agreed timelines, or in the event timelines cannot be met, will immediately provide reasons, and updates as to progress in overcoming the delay.

Communication

Records of all meetings between the FPRC and Exec Policy Owners' Forum and the FPRC Advisers and Government Officers will be maintained, and available to all parties to the Review.

Costs

The State will meet the reasonable costs of holding meetings between the FPRC and Exec Policy Owners' Forum and the FPRC Advisers and Government Officers, secretariat services and report production. The State will consider and respond to a request for funding from the FVTOC to assist the FPRC to participate in the Review.

Ordinary parliamentary processes apply, and Traditional Owners not bound

Nothing in these Terms of Reference is to be taken to detract from ordinary parliamentary processes, or the primacy of Cabinet in determining its legislative agenda. The Attorney-General is to provide a response to the FPRC regarding the Review recommendations within 3 months of being provided with the final Review report. The Attorney-General will provide a statement of reasons in the event that any aspect of the Final Review report is not adopted. The First Principles Review, its recommendations and any subsequent action taken in response to the Review, will be included in templates that represent Government policy. The State's expectation is that the revised templates will form the content of the agreements to be offered to a Traditional Owner group in negotiations under the TOS Act. A Traditional Owner group remains free to negotiate and make decisions on any aspect of the settlement negotiations, in accordance with their own decision-making principles.

Evaluation

Following the Attorney-General's response to the Final Review Report, the FPRC will conduct an evaluation of the review report and process, and at the FPRC's discretion may provide it the chair of the Exec Policy Forum.

Scope

The First Principles Review will consider the issues below:

Natural Resource Agreement and Traditional Owner Land Natural Resource Agreement
The Review will examine the policy and legislative underpinnings of the NRA template, including but not limited to those issues related to: • The application of the sustainability principles • The restrictions on access to flora and fauna (including how these relate to self-determination principles, and the principle of free, prior and informed consent) • The collection of firewood • The TOS Act definition of 'traditional purposes' • The commercial use of natural resources • The participation strategies (including the procurement policy)
Land Use Activity Agreement
The Review will examine the policy and legislative underpinnings of the LUAA template, including but not limited to those issues related to: • The Community Benefits formulae, in light of the *Timber Creek* High Court Judgment (including payment of cultural loss and solatium) • The categorisation of land use activities (in the LUAA template and the TOS Act) • Avoiding LUAA requirements by amendments to regulations and by-laws, or other means; • The capture of existing Public Land Authorisations upon renewal; • The treatment of Hydraulic Fracturing (fracking) • The treatment of Alpine resort land

- Outcomes from Schedule 4 and other negotiations between Traditional Owner groups and industry bodies
- The treatment of Timber Release plans/ timber harvesting
- The adoption of a dispute resolution process with respect to the categorisation of Land Use Activities, valuations and other matters.

Recognition and Settlement Agreement

The Review will examine other aspects of the RSA (in addition to the NRA and LUAA), including but not limited to issues related to:

- Review mechanisms
- Communication regarding the settlement and the obligations and compliance requirements associated with individual agreements (to Traditional Owners, the general public and State officers)
- Compliance with obligations
- Enforcement of compliance
- Funding Agreement
- Implications of *Timber Creek* with respect to negotiation of settlement packages
- The State's principles for Settlement Offers (including resources allocated to achieve the objectives of the RSA)
- The Review can incorporate as recommendations any findings of the Joint Management
- Implementation Project where these are applicable to the template agreements or state-wide policy.

Taking into account the findings on the above issues, the Review will make appropriate recommendations to the Attorney-General (relating to policy or legislative amendment) to ensure that the TOS Act continues to be effective and capable of meeting the aspirations of Traditional Owner Groups for agreements under the TOS Act to be just, to foster self-determination, and to uphold and comply with human rights, including United Nations Declaration on the Rights of Indigenous Peoples. If the FPRC and Executive Policy Owners' Forum agree that additional matters should be considered as part of the Review, approval to amend the TOR will be sought.

Appendix 3: Glossary of terms and acronyms used in the report

Term	Definition
Aboriginal Title	Means a grant of freehold title of the kind described in section 19 of the *Traditional Owner Settlement Act 2010*. Some further detail is provided on pages 55-56 of the Report.
Community Benefits	Means the payments made to TOGEs under the LUAA in compensation for activities on Crown land that have a significant impact on the land or on Traditional Owner rights. Some further detail is provided on pages 22-23 and 48 onwards of the Report.
Community Benefits Formulae	Means the formulae used to calculate Community Benefits as described in Schedule 7 of the LUAA.
Cultural loss	Means the cultural loss and associated hurt, suffering, and emotional harm caused by the extinguishment or impairment of native title rights, which can be compensated in the context of the Timber Creek decision.
DELWP	Department of Environment, Land, Water and Planning.
Determination	In the context of this report, determination means a determination of the Federal Court as to whether or not native title rights exist in an area of land resolving native title claims under the NTA.
DJCS	Department of Justice and Community Safety.
DJPR	Department of Jobs, Precincts and Regions.
EPOF	Means the Executive Policy Owners Forum, comprised of senior executives from all relevant departments and agencies, which was chaired by the Deputy Secretary, Aboriginal Justice, Department of Justice and Community Safety (DJCS). Some further detail is provided on pages 11-12 of the Report.
Expert commission / Expert consultant	Refers to the expert or experts that are expected to advise on how the principles contained in the Timber Creek decision should apply to the compensation model. This will include addressing questions of both economic and cultural loss, and the examination of State records. The Terms of Reference for an Expert to Advise on Compensation Matters is set out at Appendix 7.
Extinguishment	Means the permanent loss of native title rights.

Federation	Means the Federation of Victorian Traditional Owner Corporations, a statewide body that convenes Traditional Owners and advocates for their rights. The Federation facilitated the Template Review in 2018 and the First Principles Review.
First Right of Refusal	Refers to the government process of selling surplus public land. some further detail is provided on page 40 of the Report.
FPRC	Means the First Principles Review Committee comprised of Victorian Traditional Owners and individuals who work for Traditional Owner corporations. The role of the FPRC is limited to making recommendations about improving starting positions in Settlement Act negotiations, which individual Traditional Owner groups are free to accept or reject at their complete discretion. The FPRC does not represent, nor is it authorised to make decisions on behalf of, any Traditional Owner group.
ILUA	Means Indigenous Land Use Agreement, entered into under the NTA which binds all native title holders. Some further detail is provided on page 10 of the Report.
Interim Community Benefits Formulae	An agreed adjustment of the Community Benefits Formulae contained in Schedule 7 of the LUAA on an interim basis until a final position can be reached. Further detail is provided on pages 38-39 of the Report.
Joint Management	Means an arrangement with the State to jointly manage agreed national parks, conservation reserves and other State land with a Traditional Owner group.
LUAA	Means Land Use Activity Agreement. A LUAA allows Traditional Owners to comment on or consent to certain activities on public land and is included as part of the settlement package, as negotiated under the Settlement Act.
LUAR	Means Land Use Activity Regime. The LUAR is established by the Settlement Act and the LUAA and is a simplified alternative to the future acts regime under the NTA. Some further detail is provided on page 48 onwards of the Report.
NRA	Means Natural Resource Agreement. Some further detail is provided on page 41 onwards of the Report.
NTA	Means *Native Title Act 1993* (Cth).
Participation Strategies	Means strategies developed between the State and a Traditional Owner group, and recorded in the RSA, setting out ways of engaging with State agencies and departments with respect to natural resource management.

Partnership Forum	Means a meeting between the State and Traditional Owner group of the kind described in the NRA, at which all issues relating to natural resources can be raised and discussed between the parties.
Public Land	Has the same meaning as in the *Traditional Owner Settlement Act 2010* (Vic), defined to mean: (a) land under the *Crown Land (Reserves) Act 1978*, other than land in any alpine resort; (b) land in any park within the meaning of the *National Parks Act 1975;* (c) reserved forest within the meaning of the *Forests Act 1958*; (d) unreserved Crown land under the *Land Act 1958*; (e) land in any Nature Reserve or State Wildlife Reserve, within the meaning of the *Wildlife Act 1975*, other than land in a State Game Reserve (within the meaning of that Act).
RDA	Means the *Racial Discrimination Act 1975* (Cth), enacted by the Commonwealth Parliament, and coming into force on 31 October 1975.
Resourcing Policy	means what is required for a TOGE to be "sustainably funded to deliver a TOS Act settlement's benefits to members". Some further detail is provided on page 23 onwards of the Report.
Review	Means the First Principles Review.
RSA	Means Recognition and Settlement Agreement. Some further detail is provided on page 8 onwards of the Report.
Settlement Act	Means the *Traditional Owner Settlement Act 2010* (Vic). Further detail is provided on page 8 onwards of the Report.
Settlement Act forum	Means the proposed ongoing forum for continuing to review and progress issues Victorian Traditional Owners have identified with the Settlement Act. Further detail is provided on page 58 onwards of the Report.
Settlement Package	Means the RSA and associated agreements, the outcome of negotiation under the Settlement Act. Further detail is provided at page 8 onwards of the Report.
Settlement Sum	Means the financial component of a Settlement Act agreement. Some further detail is provided on page 14 onwards of the Report.

Threshold Guidelines	Means guidelines developed by the State, with input from key stakeholders, including the VTOLJG, for Traditional Owner groups who are seeking a settlement under the *Traditional Owner Settlement Act 2010* (Vic). The use of the Threshold Guidelines is currently on hold.
Timber Creek decision	Means the decision of the High Court of Australia in *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples [No 2]* [2019] HCA 19.
TLaWC	Means Taungurung Land and Waters Council
TOGE	Means Traditional Owner Group Entity, the corporate entity nominated to enter into the RSA and the legal vehicle used to hold Traditional Owner rights and funds on behalf of the Traditional Owner group.
TOLNRA	Means Traditional Owner Land Natural Resource Agreement. Further detail can be found on page 46 of the Report.
TOS Act	Means the *Traditional Owner Settlement Act 2010* (Vic). Further detail is provided on page 8 onwards of the Report. The TOS Act is also referred to in this Report as the Settlement Act.
Treaty Act	means the *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).
UNDRIP	Means the United Nations Declaration on the Rights of Indigenous Peoples.
VCAT	Means Victorian Civil and Administrative Tribunal.
VTOLJG	Means the Victorian Traditional Owner Land Justice Group. Some further detail is provided on page 5 of the Report.
VTOT	Means the Victorian Traditional Owners Trust.

Appendix 4: Report of the Template Review Committee Workshop, December 2018

First Nations Legal & Research Services

WITHOUT PREJUDICE

APPENDIX A

Report from Traditional Owner Template Review Committee

Template Workshop: 2-3 July 2018

The Traditional Owner Template Review Committee (the **Committee**) seeks various amendments to the standard documentation to be used in the forthcoming round of settlements under the *Traditional Owner Settlement Act 2010* (**Settlement Act**). The Committee has also identified a number of other aspirations for the settlement process which may take longer to implement, but for which it now seeks the commitment of the State.

Each of these matters is set out below.

General Principles

The Committee identified the following general principles which should apply to the ongoing development of the LUAA, NRA and settlement framework as a whole, and requests that the State commit to these principles:

1. Traditional Owners are to be allowed access, and to speak directly, with any person or body that is responsible for making decisions, or otherwise shaping government policy, about any matter that will impact upon the LUAA, NRA or their traditional rights more generally; and

2. The LUAA, NRA, and the settlement framework more generally, should keep pace with advances in native law and practice, to ensure that the Settlement Act remains both an attractive, and a progressive alternative to native title outcomes.

Immediate amendments to the LUAA

The following amendments are requested to be made or incorporated into the standard template LUAA for all current negotiations.

The Committee requests that:

Community Benefits

1. The State adopt the Community Benefit formulas put forward by First Nations Legal and Research Services, as a minimum, and the State should consider further increases so that

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Traditional Owners are justly compensated for the deprivation of their rights, which will most often occur without the State obtaining their free, prior and informed consent.

2. Solatium should be paid in addition to any economic loss incurred, and should be paid on a case by case basis following an assessment of the pain and suffering inflicted, with no arbitrary cap.

Categorisation of Land Use Activities

3. Any petroleum exploration or production involving the use of hydraulic fracturing (commonly referred to as 'fracking') should, at the election of the Traditional Owner Group, be either prohibited outright, or be categorised as an Agreement Activity.

4. That the Land Use Activities below be amended in accordance with the following table:

Land Use Activity	Current LUAA category	New LUAA category	Comment
Public Land Authorisations			
Community Purpose Permits and Licences	• Term below 10 years: Routine. • Term above 10 years: Advisory.	Negotiation (Class A) with a condition that no Community Benefits are payable.	There was concern that Traditional Owners get little or no say into the carrying out of activities for Community Purposes, even though such activities may impact Traditional Owner rights to the same or greater extent than an activity carried out for commercial reasons. There is no desire to derive Community Benefits from these activities; however Traditional Owners request they be included in the approval of such activities.
Community Purpose Leases (regardless the length of term)	• Term below 21 years: Advisory. • Term above 21 years: Negotiation (Class B).	Negotiation (Class A)	A long term lease will deprive Traditional Owners of their rights to Country, notwithstanding the purpose of the lease. Accordingly, Traditional Owners should have the right to negotiate with respect to such activities.

			We note the State's comments that Traditional Owners will benefit along with the rest of the community, when a Community Purpose lease is granted. However, unlike the rest of the community, Traditional Owners are also are giving something up for the grant to occur, and accordingly should be free to assess the activity, and negotiate an appropriate agreement.
Commercial Purpose Permits and Licences	• Term below 10 years: Advisory • Term above 10 years: Negotiation (Class B).	Negotiation (Class A)	Any Public Land Authorisation permitting commercial activity on Crown land or National Park should, at a minimum, be categorised as a Negotiation (Class A) activity.
Commercial Purpose Lease	• Term below 10 years: Advisory. • Term above 10 years, below 21 years: Negotiation (Class A). • Term above 21 years: Agreement.	Agreement.	It is Traditional Owners view that commercial activity should not occur on their land, without their agreement.
Timber Release Plans	Negotiation (Class A)	Agreement.	It is Traditional Owners view that commercial activity should not occur on their land, without their agreement.

Earth Resource and Infrastructure Authorisations			
Exploration and prospecting licences to which Schedule 4 applies	Routine	Advisory	Where an explorer or prospector accepts the terms of Schedule 4, there should be an obligation for Traditional Owners to be notified. Although this is currently the practice as carried out by the relevant department, it should also be an obligation under the agreement.
Works on land			
Works on the seabed, including sand bypassing and dredging.	Routine	Advisory	These works are not mere maintenance, but can result in a significant and permanent change to the natural environment. Accordingly Traditional Owners should be notified when they occur.
Major Public Works	Negotiation (Class B)	Negotiation (Class A)	Traditional Owners should have the right to challenge whether a Major Public Work proceeds on their Country.

Other changes to the LUAA

The following changes are sought, which may require amendment to the LUAA documents, or general changes in policy and implementation. Where these cannot be immediately adopted, the Committee requests that the State make an ongoing commitment to their implementation.

The Committee requests that:

Communication

5. Better and more accessible explanatory material is prepared with respect to the LUAA, for use by Traditional Owners, the general public, and State officers. This could take the form of the State funding development of a new User Manual, which reflects the new version of the settled document, and the development of an online platform for both determining

categories of Land Use Activities, and issuing notifications. It would be expected that this material be developed in consultation with the Committee.

Compliance

6. The State needs to ensure better compliance with LUUA processes, which should be achieved by:

    a. Providing greater funding directly to Traditional Owner to monitor and enforce LUAA provisions;

    b. Providing greater training and education to State and Local Government officers;

    c. Investigating alternate enforcement regimes and remedies for breaches, including new regulations and the issuing of fines; and

    d. With respect to Schedule 4 exploration and prospecting licences, making compliance a condition of the licence, breach of which will result in cancellation of the licence.

Policy

7. Where a limited number of licences may be granted for a particular commercial activity (for instance within a National Park) a certain number should be withheld, and allocated to Traditional Owners.

Immediate amendments to the NRA

The following amendments are requested to be made or incorporated into the standard template NRA for all current negotiations.

The Committee requests that:

Take and Use of Resources

1. The Sustainability Principles apply equally to both parties, including the issuing of permits or authorities by the State to the general public to take natural resources.

2. The prohibitions on taking protected or threatened flora or fauna should not apply to Traditional Owners without their consent. Traditional Owners are not responsible for the vulnerable state of these resources, and the State should not unilaterally infringe on their traditional rights to access them. On or before the commencement of the NRA, the State should meet with Traditional Owners, and provide evidence as to why these species should be added to Agreed Lists with conditions restricting their take and use. In this manner

Traditional Owners could adopt these conditions, on the basis of their own free prior and informed consent. Such an approach is necessary to establish a relationship of equal trust and partnership.

3. The definition of "Traditional Use" within the NRA should be amended so as to include commercial uses, pending legislative change to the Settlement Act adopting the same changes to this definition.

4. The NRA needs to be clear that Traditional Owners have the ability to negotiate commercial use over and above personal or domestic quantities, and should set out a process for doing so.

Implementation and review

5. The State adopts stronger implementation and review provisions including:

    a. The introduction of an independent process of review to assess whether the State and other land managers are meeting objectives under the NRA;

    b. clear and objective deliverables in the participation strategies; and

    c. repercussions and consequences for non-compliance with the participation strategies and procurement policy.

6. In addition, the State's obligations within the participation strategies and procurement policy should be mandated with clear deliverables and outcomes, for instances requirements to meet set objectives by certain deadlines, rather than aspirational open-ended obligations to use best endeavours or take reasonable steps. This would enable the parties (and any independent reviewer) to track performance and better assess whether outcomes of agreements are being achieved.

Procurement

7. Adopt the procurement method put forward by Dja Dja Wurrung, which would allocate a specific dollar amount for Natural Resource Management spend within the region each financial year, which must be allocated to, and through, the relevant Traditional Owner Group Entity.

First Nations Legal & Research Services

Other changes to the NRA

The following changes are sought, which may require amendment to the NRA documents, or general changes in policy and implementation. Where these cannot be immediately adopted, the Committee requests that the State make an ongoing commitment to their implementation.

The Committee requests that:

8. An explanatory document be developed that clearly sets out what rights the NRA delivers in addition to rights already held or available to the general public.

9. Adequate resources be allocated to the State, land managers and Local Governments in order to achieve objectives of the NRA.

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Appendix 5: List of members of the Executive Policy Owners Forum (EPOF) 2019-2021

Justin Mohamed	Deputy Secretary, Aboriginal Justice, Department of Justice and Community Safety
Josh Smith (Chair)	Deputy Secretary, Aboriginal Justice, Department of Justice and Community Safety
Jana Stewart (Chair)	Acting Deputy Secretary, Aboriginal Justice, Department of Justice and Community Safety
Helen Vaughan	Deputy Secretary, Water and Catchments, Department of Environment, Land, Water and Planning
Kylie White	Deputy Secretary, Energy, Environment and Climate Change, Department of Environment, Land, Water and Planning
Anita Curnow	Executive Director, Policy and Planning, Department of Environment, Land, Water and Planning
Georgie Foster	Executive Director, Policy and Planning, Department of Environment, Land, Water and Planning
Christine Ferguson	Acting Deputy Secretary, Forests, Fire and Regions, Department of Land, Water and Planning
Terry Garwood	Deputy Secretary, Local Infrastructure, Department of Environment, Land, Water and Planning
Mark Rodrigues	Executive Director, Environment and Climate Change, Department of Environment, Land, Water and Planning
Sonia Parisi	Director, Environmental Policy and Community Partnerships, Department of Environment, Land, Water and Planning
Matthew Jackson	CEO, Parks Victoria
Teresa Fels	Executive Director, Service Delivery and Reform, Department of Treasury and Finance
Matt Donoghue	Director, Service and Delivery Reform, Department of Treasury and Finance
Craig Vukman	Director, Service Delivery and Reform Group, Department of Treasury and Finance
Rachel Green	Acting Director, Service Delivery and Reform Group, Department of Treasury and Finance
Elda Colagrande	Senior Economist, Service Delivery and Reform, Department of Treasury and Finance
John Krbaleski	Head of Resources, Department of Jobs, Precincts and Regions
Nathan Lambert	Executive Director, Forestry and Game, Department of Jobs, Precincts and Regions

Dallas D'Silva	Director, Policy, Licensing, Management and Science, Victorian Fisheries Authority
Craig Ingram	Manager, Projects and Stakeholder Management, Victorian Fisheries Authority
Scott Lawrence	Manager, Fisheries Policy, Victorian Fisheries Authority
Robyn Seymour	Deputy Secretary, Network Planning, Department of Transport
Megan Bourke-O'Neill	Deputy Secretary Policy and Innovation, Department of Transport
Praveen Reddy	Executive Director, Freight Victoria, Department of Transport
Jamie Driscoll	Deputy Secretary, Budget and Finance. Department of Treasury and Finance
Alexandra Krummel	Director, First Peoples – State Relations, Department of Premier and Cabinet
Shen Narayanasamy	Lead Negotiator, First People – State Relations, Department of Premier and Cabinet
Maddy Fox	Assistant Director, Policy, Communication and Coordination, First Peoples-State Relations Department of Premier and Cabinet

Appendix 6: Draft Compensation Model

Background

The State of Victoria (the **State**), in collaboration with the First Principles Review Committee (the **Committee**), are currently undertaking the First Principles Review (the **Review**).

The Review is set up to examine the legislative and policy underpinnings of settlement offers made by the State to Traditional Owners under the *Traditional Owner Settlement Act 2010* (Vic) (the **Settlement Act**).

As part of the Review, the Committee and the State are examining the calculation of compensation amounts paid under Settlement Act agreements in light of the decision of *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones* [2019] HCA 7 (**Timber Creek decision**).

The purpose of this document is for the State and the Committee to record areas where they have reached agreement about the calculation of compensation, and also where they have not reached agreement and intend to instruct an expert or experts for further advice.

This document should be read in conjunction with the Expert Terms of Reference (Appendix 7).

Current compensation position

The Settlement Act is an alternative recognition and compensation process to the *Native Title Act 1993* (Cth) (**NTA**).

Currently, upon entering into a Settlement Act agreement, Traditional Owners:

a) receive a lump sum payment (the **Settlement Sum**) in the form of a Trust payment and funding paid directly to their nominated Traditional Owner Corporation;[22] and

b) are entitled to receive 'Community Benefits' through a process which replaces the future act regime under the NTA, and which are calculated using various formulas (**Formulas**), as set out in Schedule 7 of the Land Use Activity Agreement (**LUAA**).[23]

The Settlement Sum is not calculated in accordance with NTA compensation entitlements, but is instead calculated on the basis of attempting to resource the Traditional Owner Corporation to undertake its contractual and statutory duties under the Settlement Act agreements, which in part facilitate the cultural and economic development and enhance the participation of Traditional Owners in public land management.

While not expressly acknowledged as compensation, the Settlement Sum and Community Benefits nevertheless have a compensatory legal effect, as in return for receiving these (along with other) benefits, Traditional Owners must accept the settlement as full and final satisfaction for any native title compensation they may otherwise be entitled to receive.

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[22] Traditional Owners can also receive a component of the Settlement Sum in the form of grants of freehold title (with or without conditions), the value of which is deducted from any lump sum monetary amount.

[23] In addition to the Settlement Sum and an entitlement to Community Benefits, the RSA also enables the recognition of Traditional Owner rights and interests, and laying the foundation for reconciliation and partnership between the parties, which is to their mutual benefit.

New Compensation Model

The Parties acknowledge and confirm that the new compensation model will be formulated in accordance with the following Redesign Standards:

a) Since at least the passage of the NTA, Traditional Owners have been entitled to compensation for the loss or impairment of their native title rights;

b) The Timber Creek decision establishes guidance and principles for the calculation of native title compensation, and binds parties and the Federal Court in calculating compensation under the NTA;

c) The enactment of the Settlement Act was based in part on the view that the NTA does not provide fair and just outcomes for Traditional Owners in Victoria;

d) Victoria's commitment to self-determination, UNDRIP, the Victorian Aboriginal Affairs framework, and its obligations under the Charter Act, require it to do more than simply meet its legal obligations under the NTA;

e) Victoria's approach of settling native title claims out-of-court should continue in accordance with the Redesign Standards set out a) to d) above.

Applying the Redesign Standards

In order to design a new compensation model in accordance with the Redesign Standards the FPRC recommends that:

a) (**Formulas**) The principal method by which the Redesign Standards will be embedded in a new compensation model is through re-negotiation of the Formulas, following receipt of expert advice, to be sought in accordance with the Expert Terms of Reference;

b) (**Settlement Sum**) Once improved Formulas are agreed following independent review, the Settlement Sum will be calculated by applying the LUAA to the agreement area as set out in paragraph 13 –15 (**Retrospective LUAA Method**); and

c) (**Minimum Settlement Sum**) If the application of the Retrospective LUAA Method would result in the Settlement Sum falling below a specified minimum amount, the quantum of which is to be agreed, the State will pay the specified minimum amount.

The baseline of the Minimum Settlement Sum is adopted to ensure a standard of equity for groups that suffered extensive colonisation before 31 October 1975 and the enactment of the *Racial Discrimination Act 1975* (Cth).

Retrospective LUAA Method

Upon the resolution of new Formulas through the proposed Settlement Act Forum, the Settlement Sum for a Traditional Owner Group will be calculated by applying the LUAA to the agreement area as from 31 October 1975[24] to the date a Settlement Act agreement is entered into, and will

[24] The State has declined to examine compensation prior to the enactment of the Racial Discrimination Act 1975 as part of the Review and intends to deal with this issue through Treaty negotiations. The Committee agrees to an examination limited to the RDA Period only for the purposes of this compensation model and continues to assert that compensation prior to the RDA Period must be assessed and paid.

apply to all Land Use Activities during that period (**Historical Land Use Activities**) that the parties agree to use in the calculation.

In applying the Retrospective LUAA Method, the assessment of Historical Land Use Activities will be treated differently than other Land Use Activities, in at least two ways:

a) interest will be payable on Historical Land Use Activities, calculated from the date the activity occurred until the date payment is made (the rate and form of interest to be agreed); and

b) acts of contamination or environmental degradation that in practice extinguish or impair the ability of Traditional Owners to exercise their rights on the land will be Historical Land Use Activities.

Following the application of the Retrospective LUAA Method, the total payment due for all Historical Land Use Activities will be the Settlement Sum (provided it exceeds the agreed specified minimum amount).

Examination of State Records

The application of the Retrospective LUAA Method will require access to, and analysis of, significant amounts of data held by the State, and the parties will need to develop a fair, accurate and efficient method of reviewing data.

The State and the Committee are open to examining processes that avoid exhaustive examination of Historical Land Use Activities. Exhaustive examination of State records often occurs under the NTA, in a process known as tenure analysis. Through this process the State will exhaustively analyse the tenure of each parcel of Crown land within the claim area to establish if native title rights are extinguished. This can take many years and cost the State several million dollars to complete. In addition to the State's cost and time, Traditional Owner Groups' negotiation teams must also review the State's analysis and conclusions and negotiate resolution of complex legal technicalities. Funding would need to be sourced by the State to provide this work.

On that basis, an exhaustive review of all Historical Land Use Activities may not be beneficial to either the State or individual Traditional Owner groups, and expert advice will be sought to as to the most appropriate methodology or statistical modelling that may be adopted.

Appendix 7: Terms of Reference for an expert to advise on compensation matters

Background

1. This document should be read in conjunction with the Compensation Model, which sets out a process for the calculation of compensation and identifies areas for potential expert advice.
2. This document sets out the agreed Terms of Reference to be provided to the relevant expert(s).
3. Terms defined in the Compensation Model have the same meaning in this document.

Formulas

4. The expert is asked to advise how the principles contained in the Timber Creek decision should apply to inform the Formulas. This will include addressing the following:

    a) (**Economic loss**): Consider whether 'unimproved market value' is the appropriate measurement to define land value in this context? What are the principles that should be applied or used in carrying out valuations of land for a compensatory purpose? For instance, should reserves, covenants, restrictions on sale, leasing or mortgaging, and the impact of roads or other structures be disregarded?

    b) (**Interest**): Presuming that interest will be paid on each Historical Land Use Activity from the date of the act, to the date of payment, and taking into account all relevant case law, what type of interest is appropriate in circumstances where the Traditional Owner group:

        i) Has received compensation or other funds in the past or has not received compensation or other funds in the past;

        ii) Where the group has a history of receiving compensation or other funds, whether it has distributed the principal, or the interest, to group members, OR whether the group has a history of investing the principal and the interest, OR has applied the principal or the interest to a commercial enterprise that is profitable to the same degree as reinvestment of earnings over time

        iii) Has any other relevant circumstances that ought to be taken into account to consider the appropriate type of interest to apply in Victoria

    c) (**Cultural loss**) Taking into account all relevant discussion on the subject of cultural loss in the Timber Creek decision, what basis or methods are appropriate to use for arriving at cultural loss amounts for each compensable acts or the cumulative impact of compensable acts? Please investigate the appropriateness of the following methods, and consider any other method that the expert arrives at independently:

        i) a pre-determined flat rate for all compensable acts, based on the UMV of the impacted land;

        ii) a negotiated sum or rate, on a case by case basis, based on examining the impact of each compensable act;

iii) a hybrid model of (a) a pre-determined flat rate in general areas; and (b) a negotiated sum or rate in areas of high cultural significance.

d) Please investigate whether the method of arriving at a cultural loss amount should be different, based on any significant factual circumstances relating to the act including:
    i) Whether the act impaired rather than extinguished native title, and the degree of impairment
    ii) Whether the act caused consequential contamination or environmental degradation
    iii) Whether the act proceeded, following consultation with Traditional Owners where genuine opportunities existed for Traditional Owners to minimise cultural loss or otherwise mitigate cultural loss through non-financial means
    iv) Whether the act was consented to by Traditional Owners
    v) Whether the application of the non-extinguishment principle to acts that would otherwise extinguish native title has any effect
    vi) Any other factual circumstances the expert arrives at independently

Having reference to the Compensation Model, please provide views on how the analysis in paragraphs 4a to 4d above should inform the design of the permanent Formulas and inform the Calculation Method of the Settlement Sum.

Examination of State Records

5. The application of the Retrospective LUAA Method relies on a review of the State's records to identify Historical Land Use Activities.
6. An exhaustive review of the State's records may not be preferable because:
    a) it will be time and cost prohibitive;
    b) records are likely to be incomplete or inaccurate.
7. Accordingly, the expert is asked to provide advice on the status of State records, including:
    a) What records does the State currently hold that would be useful for this process?
    b) Are there any difficulties in locating, collating or releasing this information?
    c) Is the information incomplete or inaccurate in any respects?
8. What time and cost-effective methods are there for reviewing this material, for example:
    a) by electronic means;
    b) by using sampling techniques, and adopting methods of statistical analysis to create estimates; or
    c) by some other means or method.
9. Once a Historic Land Use Activity is identified, what method or processes should be adopted to provide the historical value of the land that was subject to the act?

10. Examining each method explored at paragraph 8, and also the valuation task explored through paragraph 9, what is the likely average:

    a) time for completion;

    b) cost; and

    c) expected level of accuracy;

for a Traditional Owner group. Compare this against the same metrics for a full and exhaustive analysis of the relevant material.

Appendix 8: Terms of Reference for an interim scoping commission on compensation issues

Background

As part of the First Principles Review of the Traditional Owner Settlement Act, the parties to the Review are examining the calculation of compensation amounts paid under Settlement Act agreements in light of the decision of *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones* [2019] HCA 7 (**Timber Creek decision**).

The First Principles Review Committee (the Traditional Owner party to the Review) has recommended that a new compensation model be developed based on compensation for historical land use activities, plus interest payable. The proposed model will require access to, and analysis of, significant amounts of historical data.

This interim scoping commission, which forms part of a broader commission investigating the development of a new compensation model, is expected to assist with understanding the comprehensiveness and reliability of data to be utilised in any such model. The expert is asked to broadly address the feasibility of including land use activities such as major public works and public land authorisations in such a model (for which the data availability is currently unknown).

Procurement for the interim scoping commission is currently underway.

Brief

The expert is asked to:

a) Investigate what sources of information are available for each of the following State government activities from 1975 to June 2021 that occurred on public land and waters:

- public works
- public land authorisations
- earth resource authorisations

b) conduct interviews with relevant regional government offices (including but not limited to the Department of Environment, Land, Water and Planning; the Department of Treasury and Finance and the Department of Jobs, Precincts and Regions) that may hold historical public land information.

c) investigate, and conduct interviews with, any other potential holders of historical land use information, such as the Public Records Office Victoria.

d) investigate, and conduct interviews with, the Valuer General's Office regarding historical public land valuation information.

d) report on the accessibility and usability of each source of information.

e) report on the usefulness of each source of information for the purpose of identifying historic land uses, historic land values, and the impact of activities on Traditional Owner Rights (as in section 9 of the TOS Act).

Appendix 9: Proposed Interim Community Benefits Formulae

1. The Community Benefits (**CB**) Formulae in Schedule 7 of a Land Use Activity Agreement (**LUAA**) determine the payment for certain land use activities impacting on Traditional Owner rights. The CB Formulae have an economic and cultural loss component.
2. Since 2018 Traditional Owner groups have advocated for more substantial changes to the CB Formulae in line with the Timber Creek judgments. In 2019 Cabinet noted that reaching a resolution of the CB Formulae in light of the Timber Creek judgment was a priority for the First Principles Review (**the Review**).
3. While the Review has not reached a final position with regards to the CB Formulae, it is anticipated in its final report to recommend that the formulae set out below replace those in Schedule 7 of the LUAA on an interim basis, until a final position can be reached.
4. The Review's final report is anticipated to recommend a process to reach a final position that includes:
    a. Traditional Owner and State representatives jointly commissioning an expert or experts into providing options for how to arrive at cultural loss payments using formulae
    b. The commission will deliver an **Expert Report** which will be the subject of further development and negotiation of final formulae by State and Traditional Owner representatives
    c. A proposal or options on final formulae will be presented to Cabinet for adoption as the final formulae.
    d. Once final formulae are adopted by Cabinet, any further payment owing for activities undertaken in the interim period would be made to the relevant Traditional Owner corporations.
5. The structure of Formula C below (relating to VicForests' timber harvesting) is no longer fit for purpose due to changed circumstances and requires re-design. For that reason, an interim position is not achievable. Compensation for VicForests' timber harvesting activities will be the subject of recommendations in the Review report.
6. The table below is proposed as the replacement Schedule 7 in LUAAs.

Formula A	Formula A applies to Commercial Leases for more than 10 and up to and including 21 years; Major Public Works (where a Lease, Licence or Permit applies); Commercial Licences and Commercial Permits for more than 10 years; Agriculture Leases covering 40 hectares or more (including leases for plantations and aquaculture), and Community Purpose Leases for more than 21 years.
	Community Benefits (CB) payment = a flat rate of 60% of Rental Received (RR)*, but will be no less than $200 per annum. The State retains the remaining 40% of RR, pending outcome of the Expert Report and final Community Benefits formulae.

	On the Adjustment Date, the State will retrospectively apply the final Community Benefits formulae to any activity undertaken since the Variation Date, adjust the rental payment for future years and pay any rental owed for the interim period. GST will be added to all payments. The Corporation will be entitled to reimbursement of reasonable negotiation costs, as prescribed by regulation, and provided for under s 52 of the Act. **Public Works (where a Lease applies) and Commercial Leases will be at market value as determined by the issuing authority, based on the market valuation as specified in Valuer-General's valuation report. For Community Purpose Leases discounted below the market value, the Community Benefits will be based on the discounted rate actually paid. A discount may be applied on account of the community purpose of the Lease at the discretion of the issuing authority. Rental is determined by the issuing authority, and under certain circumstances (e.g. times of hardship due to drought etc), the issuing authority may reduce or exempt the rental payable in any particular year. That is, the Community Benefits will be based on the actual rental payments received by the issuing authority in each year.*
Formula B	Formula B applies to Major Public Works where a Lease, Licence or Permit does not apply.
	CB payment = 60% percent of UMV*, but will be no less than $1300 On the Adjustment Date, the State will retrospectively apply the final + Community Benefits formulae to any activity undertaken since the Variation Date and make any further payment owed for the interim period. GST will be added to all payments. The Corporation will be entitled to reimbursement of reasonable negotiation costs, as prescribed by regulation, and provided for under s 52 of the Act. **UMV means Unimproved Market Value, which is the market value less the value of physical or structural improvements as specified in Valuer-General's valuation report (or otherwise agreed by both parties).*
Formula C	Formula C Not Used
Formula D	Formula D applies to the sale of Crown land.

	CB payment = 60% percent of UNMV but will be no less than $1300. The State retains the remaining 40% of UNMV, pending outcome of the Expert Report and final Community Benefits formulae. On the Adjustment Date, the State will retrospectively apply the final Community Benefits formulae to any activity undertaken since the Variation Date, and make any further payment owed for the interim period. GST will be added to all payments. The Corporation will be entitled to reimbursement of reasonable negotiation costs, as prescribed by regulation, and provided for under s 52 of the Act. UNMV means Unimproved Net Market Value, being the Sale price, less financial value of third part interest(s)* less the Market value of Improvements** *Value, most likely expressed as a percentage of market value, of third party interests as specified in Valuer-General's valuation report (or as otherwise agreed by both parties). Examples of third parties that might have an interest in Crown land include local councils, non-state tenants, and community or not-for-profit organisations. **Value, expressed in dollar terms, of physical or structural improvements, i.e. buildings, as specified in Valuer-General's valuation report (or as otherwise agreed by both parties).
Formula E	Formula E applies to Commercial Leases of more than 21 years.
	CB payment = a flat rate of 60% of Rental Received(RR)*, but will be no less than $200 per annum. The State retains the remaining 40% of RR, pending outcome of the Expert Report and final Community Benefits formulae. On the Adjustment Date, the State will retrospectively apply the final Community Benefits formulae to any activity undertaken since the Variation Date, adjust the rental payment for future years and pay any rental owed for the interim period. GST will be added to all payments. The Corporation will be entitled to reimbursement of reasonable negotiation costs, as prescribed by regulation, and provided for under s 52 of the Act. **Rental received: for Commercial Leases this will be at market value as determined by the issuing authority, based on the market valuation as specified in Valuer-General's valuation report. Under certain circumstances (e.g. times of hardship due to drought etc),*

	the issuing authority may reduce or exempt the rental payable in any particular year. That is, the Community Benefits will be based on the actual rental payments received by the issuing authority in each year.
Formula F	Formula F applies to Major Works and/or clearing of land for Commercial Purposes (where a Public Land Authorisation is not required, and excluding Major Public Works).
	CB payment = 60% percent of UMV* but will be no less than $1300 On the Adjustment Date, the State will retrospectively apply the final Community Benefits formulae to any activity undertaken since the Variation Date, and make any further payment owed for the interim period. GST will be added to all payments. The Corporation will be entitled to reimbursement of reasonable negotiation costs, as prescribed by regulation, and provided for under s 52 of the Act. **UMV means market value less the value of physical or structural improvements, i.e. buildings, as specified in Valuer-General's valuation report (or as otherwise agreed by both parties).*

Appendix 10: Media Release

Noel Towell, ‘State flags new native title deal for spiritual and cultural loss’, The Age, 14 February 2020

THE AGE

This was published 1 year ago

State flags new native title deal for 'spiritual and cultural loss'

By Noel Towell

February 14, 2020 — 11.40pm

The state government has already reached settlement with the Gunaikurnai, Dja Dja Warrung and Taungurung peoples. JUSTIN MCMANUS

Victorian Aboriginal clans could be in line for future legal settlements worth millions of dollars for the loss of cultural and spiritual rights as the state Labor government embarks on a shake-up of native title laws.

Attorney-General Jill Hennessy says a review of the state's Traditional Owner Settlement Act could open the way for decisions such as the Timber Creek case, where the High Court awarded

$2.5 million last year to a group of traditional owners in the Northern Territory in part for the loss of spiritual connection their land.

Spiritual and cultural connections to the land have been a flashpoint in the bitter legal dispute over the tree-felling along the Western Highway.

Victoria says its settlement act is a unique piece of legislation that seeks to plug gaps in the Federal Native Title Act and has already seen three major agreements reached: with the Gunaikurnai people of Gippsland: the Dja Dja Wurrung people in the mid-north of the state and the Taungurung people from around central Victoria.

But Ms Hennessy says she wants to know if indigenous Victorians are getting the best value from native title and if there are "bureaucratic barriers" preventing them from getting the full potential benefits.

The Andrews government says it is also leading the nation in its work to secure a treaty with Victoria's first peoples, but the process got off to a halting start last year when less than 8 per cent of the 30,000 Victorians eligible to vote for the First Treaty Assembly turned out for the election.

Launching the "first principles review", Ms Hennessy cited the 2019 Timber Creek case where Ngaliwurru and Nungali native title holders won $2.5 million in compensation from the Northern Territory government, which had built roads through the Aboriginal lands in the '80s and '90s, in part for the loss of spiritual and cultural rights.

The court's decision came despite the opposition of the territory and federal governments who told the court the $1.3 million for non-economic loss was manifestly excessive.

Victoria's embrace of the Timber Creek decision puts 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.

The three existing Victorian agreements cover more than six million hectares of the state and include the transfer of 25 parks and reserves as Aboriginal title to the three traditional owner corporations, to be jointly managed by the traditional owner corporations and the State.

Talks are now well underway with five other traditional owner groups about more agreements and Ms Hennessy's office told *The Age* on Friday that $4 million had already been allocated in "pre-settlement funding" under current laws and that the government wanted more deals completed "promptly and fairly".

The "first principles review" will be conducted by the Attorney-General's department in co-operation with a committee of traditional owners from around the state, as Ms Hennessy says the state's native title regime can do more for its indigenous residents.

"We are the only state to have worked with traditional owners on a comprehensive alternative to the Native Title Act – and this review will continue that strong collaboration," Ms Hennessy said.

"This review will make sure Victorian law is up to date, to ensure we continue to lead the country on self-determination and as a demonstration of our commitment to the Treaty process."

A spokesperson for the committee members said the review was a chance for indigenous Victorians to get a fairer deal from the native title process.

"There's a lot of hard work to be done, but we're hopeful this review will deliver a fairer deal for Traditional Owners' rights and interests," the spokesperson said.

Noel Towell

Noel Towell is Economics Editor for The Age