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TREATY AND NATIVE TITLE DEVELOPMENTS IN VICTORIA: IMPLICATIONS FOR LAND PLANNING AND MANAGEMENT

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Acknowledgment of Country

We acknowledge Aboriginal and Torres Strait Islander people across of Australia.

We recognise Aboriginal and Torres Strait Islander Peoples as the Traditional Owners, Custodians and Lore Keepers of one of the World's oldest continuing cultures, and we respect your enduring stewardship of Australia's lands and waters.

We acknowledge that your lands and waters were taken from you without your free, prior and informed consent, without a treaty and without compensation, and that these matters are yet to be resolved, amicably and without prejudice.

We pay our respects to all Traditional Owners, Custodians and Lore Keepers who have come before us and who have lived in harmony with this land and waters for tens of thousands of years. We pay our respects to Elders past and present who carry that ancient knowledge and share it graciously with us, and continue that legacy into the future.

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OFFICES IN CANBERRA, HOBART, MELBOURNE, AND SYDNEY ON THE COUNTRY OF THE NGAMBRI/NGUNNAWAL/NGARIGO, MUWININA/PALAWA, WURUNDJERI, AND GADIGAL PEOPLES.

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Executive summary

In December 2025, the State of Victoria and the First Peoples' Assembly of Victoria signed Australia's first Statewide Treaty. This was no mean feat such a long time after 'first contact' when treaties between Indigenous peoples and the world's various empires were driven by the exigencies of their desire to establish new territories.

Victoria's Statewide Treaty is a sub-national treaty made possible by the fact that, when the Australian federation was formed in 1901, Australia's new Constitution distributed power between a central national government and the six States. The Commonwealth was not involved in Victoria's Statewide Treaty because the States retained sovereignty over their own internal affairs at Federation. While the development of a Statewide Treaty represents a very significant milestone in relations between Indigenous peoples and the State, its success will hinge on whether it can weather the storms about what happens when such agreements have been reached.

This paper's aim is to develop a deeper understanding of the links between the treaty processes that have been underway in Victoria for almost the past decade and recent native title claims over the most populous parts of Victoria, and to highlight some of the challenges for land planning and management arising from these developments. This paper therefore explores the details of Australia's first Statewide Treaty, recent developments in relation to native title claims in Victoria and the implications for land planning and management in Victoria.

This paper begins with an overview of the characteristics of the Statewide Treaty (Part 1) followed by an explanation of why Victoria is able to develop a Statewide Treaty independently of the Commonwealth (Part 2), a discussion of the objects and principles of the Statewide Treaty, the new bodies established by the Statewide Treaty and the *Statewide Treaty Act 2025* (Vic) (Part 3), an exploration of the key messages in the statewide treaty and the key provisions for ensuring there are longer term systemic changes in the way Victoria is governed as a consequence of signing of the Statewide Treaty (Part 4), and why the Yoorrook Justice Commission's findings are so important in this context (Part 5).

The paper then turns to the current state of play with respect to native title matters in Victoria, beginning with an overview of the legacy of the High Court of Australia's decision in *Yorta Yorta Peoples v Victoria* in 2002, the actions the Victorian government took in response, the three current native title claims over the most populous parts of Victoria, the difference between registered and unregistered native title claims, the risk of invalidity of future acts if the correct procedures are not followed, the current review of the future act provisions in the *Native Title Act 1993* (Cth) by the Australian Law Reform Commission, and how the courts are easing the burden of proof for native title claims (Part 6). The connections between Treaty and native title are examined, noting that the backdrop to the native title claims has changed due to the development of the Statewide Treaty and the very real opportunity for local Traditional owner group treaties (Part 7).

The Victorian government's recent changes to the *Planning and Environment Act 1987* (Vic) also included some new provisions requiring greater consultation with native title holders, Registered Aboriginal Parties and Traditional Owners. Prior to these amendments, there were no provisions requiring consultation with native title holders and only with Traditional Owners if the

planning decision affected land that may be subject to an agreement under the *Traditional owner Settlement Act* (2010). These new provisions are compared with similar provisions in the Queensland's and the Australian Capital Territory's planning statutes (Part 8).

While a clear indication of what the practical outcomes of treaty and native title might look like on the ground are not yet clear, the case for greater parity between Aboriginal peoples' world views and knowledges and Western approaches to land use planning and management are explored (Part 9). Questions about the differences between consultation and engagement are explored, including how to build relationships based on trust and mutual respect (Part 10).

The paper concludes with a discussion about adopting a precautionary approach to these matters while the legislative and policy contexts continue to evolve.

The paper also includes several Appendices with additional supporting factual information on the various topics discussed.

Notes about terminology

The term **‘Traditional Owner’** came into common usage in the mid-1970s following the passage of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), which established mechanisms through which Aboriginal people could claim unalienated Crown Land in the Northern Territory on the basis that they are the ‘traditional Aboriginal owners’ of the land.

The term ‘traditional owners of indigenous people’s land’ is defined in s.368(4)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The scope of ‘Indigenous held land’ is defined in s.4B of the *Aboriginal and Torres Strait Islander Act 2005* (Cth) to include an interest in land that is held by an Aboriginal or Torres Strait Islander corporation or an Aboriginal person or a Torres Strait Islander.

The term ‘Traditional Owner’ has also been replicated, in full or in part, in other statutes in some of the other jurisdictions around Australia.

While the term ‘Traditional Owner’ holds particular meaning in some legal contexts, it is used in this paper to recognise the ongoing connections to, and responsibilities for, Country and culture of the Aboriginal peoples of Victoria, unless indicated otherwise.

The terms **‘First Peoples’** and **‘First Nations’** are used interchangeably and are terms which recognise the international law status and the ongoing unceded sovereignties of the World’s Indigenous Peoples. There is a growing preference by Aboriginal and Torres Strait Islander Peoples to be referred to as First Peoples or First Nations as a more encompassing term and which also acknowledges their diversity. In the context of the Treaty developments in Victoria, the Aboriginal peoples of Victoria expressed their preference for the term ‘First Peoples’.

The term **‘Indigenous’** has evolved through international law and acknowledges a particular relationship of Aboriginal and Torres Strait Islander people to the territory from which they originate. Generally, the term ‘Indigenous peoples’ refers to the diverse international community of Indigenous peoples, whose distinct identity and rights are recognised in international law (i.e. the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN, 2007)), unless otherwise specified. It is acknowledged that different organisations and sources use varying terminology—for example, government bodies such as the National Indigenous Australians Agency (NIAA) use the term Indigenous or First Nations as it is deemed a catch-all term. We note use of these terms is not without contention and acknowledge that some Aboriginal and/or Torres Strait Islander people do not like being referred to as Indigenous or First Nations.

In this paper, the term Aboriginal and Torres Strait Islander peoples is respectfully used to recognise the diversity and strength of Aboriginal and Torres Strait Islander peoples and communities. We acknowledge that when working with specific Aboriginal or Torres Strait Islander communities or language groups, it is appropriate to seek guidance from those with the relevant cultural authority about the respectful and appropriate name and language protocols for the group or community.



01

Treaty: A negotiated
agreement

1. Treaty: A negotiated agreement

A treaty is a negotiated agreement entered into voluntarily between two or more polities (Hobbs and Williams, 2018) and ‘reached through a fair process of negotiation between equals’ (Hobbs, 2024:321). Treaties have long been a feature of the colonial landscape in other common law countries such as Canada, Aotearoa New Zealand and the United States of America. However, international experience also shows that treaties are not exclusively creatures of international law, they can also be entered into between domestic partners (Harris, 2023:112).

Modern treaties between First Peoples and their colonisers are a particular type of treaty because they convey the significance and distinctive standing of an agreement between First Peoples and the governments of States or Territories founded on the land and resources of free First Peoples/First Nations (Northern Territory Treaty Commission, 2020:9).

In Australia, formal treaties of the kind used in the other common law countries have not been part of our political landscape, and that’s why the significance of the first Statewide Treaty in Victoria should not be underestimated.

Professor Megan Davis (2025a) believes the Statewide Treaty in Victoria was ‘hard work’ because the traditional treaties with Indigenous peoples in the other common law countries were ‘first contact’ agreements with the Crown and were driven by particular exigencies of the desire to establish new territories and land interests.

Negotiating a treaty so long after first contact is no mean feat, a phenomenal achievement given Victoria needed to have (and had) ‘near perfect political conditions over the past almost-a-decade’ to achieve this outcome (Davis, 2025a).

Davis (2025a) summarises the basic characteristics of Australia’s first statewide treaty as follows:

1. It is a subnational treaty via a state parliament. It is state recognition via legislation. The Commonwealth was not involved.
2. It sits within the framework of the State. It's a subnational treaty or subnational negotiated agreement and it has status by way of an Act of State Parliament. It does not sit outside the Parliamentary framework.
3. It is consistent with the United Nations *Declaration on the Rights of Indigenous Peoples* (UN, 2007) which recognises Indigenous rights as sitting under the framework of the state. The right to self-determination in that normative UNDRIP framework is subjugated to the State. But that’s not a negative. It's pragmatic.¹
4. *Larbagirrar gnuurtak tulkuuk* principles: Two-way accountability. This was foundational for the federal voice too. Community want those who represent them to be accountable. Meaning if you purport to represent community, physically come back to community and communicate the outcomes, conversations etc. The First Peoples’ Assembly of

¹ Hobbs (2024:318) maintains that the durability of a modern treaty in the Australian context is subject to a paradox: giving legal effect to the promises in such treaties requires legislation which allows one party to unilaterally revise or revoke the settlement. As discussed below, Markham believes the Treaty could have been given greater protection by an amendment to Victoria’s Constitution.

Victoria is key here because direct election is different to representation via corporate boards.

5. It's modern, pragmatic and suited to Australia's political temperament, and that plays out in the guardrails in the legislation. For example, the relevant Minister has 60 days or longer to respond to representations from the First Peoples' Assembly but the failure of the Minister to consider this does not create any legal right or civil cause of action.
6. Like the proposed federal Voice to Parliament, the First Peoples' Assembly can be consulted on laws and policies affecting First Peoples, and it can also proactively put things on the table about matters of interest to First Peoples. It is not limited to Parliament, it also applies to the Executive.
7. The key factor in state recognition processes is balancing the equation of the *recognisor* and the *recognised*. The Victorian Treaty seems to be an exemplary negotiated agreement because the "recognisor", the elected government, did not have to low ball because of bipartisanship (there's no constitutional right to a professional political party). The favourable dynamics of a weak Opposition meant that it got a smooth, guaranteed passage through the houses of parliament (Davis, 2025a).

What is clear is that the Statewide Treaty and the *Statewide Treaty Act 2025 (Vic)* are intended to provide a new foundation between First Peoples in Victoria and the State of Victoria, from which further Statewide treaties or local treaties can be developed. They are also a strong foundation for structural and systemic change in relations between First Peoples and the Crown (Victoria) as explained in later parts of this paper.

Davis (2025b) also argues that timing is everything in politics, because 'In a different parliament, in a different time, things may have looked different.' However, the Treaty is a contract signed between the First Peoples' Assembly as an incorporated entity (a company limited by guarantee) with the State (Victoria). The *Statewide Treaty Act 2025 (Vic)* is a manifestation of the Treaty that was signed on 13 November 2025. If the Act is repealed (which it could be by the next government or by a subsequent Parliament) (Secombe, 2024), the contract remains in place (Davis, 2025b).

Harris (2023:114) argues that real and immediate benefit can be derived from an amendment to the Victorian Constitution which could state that, 'where possible, legislation must be interpreted in accordance with the Treaty principles'. Harris (2023:114) suggests that the Constitutional provision could also state that 'in cases of ambiguity, legislation should also be interpreted consistently with the UN *Declaration on the Rights of Indigenous Peoples*'.

Markham (see Davis, 2025b) maintains that it is not difficult to include minimal provisions in the Victorian Constitution without a referendum (Parliament of Victoria, undated)² and has expressed disappointment that this level of protection appears not to have been considered for inclusion in the *Statewide Treaty Act 2025 (Vic)*.

Cubillo (2025:7) maintains that the failure of the Constitutional Referendum at the federal level in 2023 revealed 'the persistence of a colonial mindset in which Indigenous presence is celebrated symbolically but denied substantively.' For over two centuries, First Peoples have

² Most amendments to Victoria's Constitution can be passed by simple majority of the Parliament of Victoria with a Bill to amend the *Constitution Act 1975 (Vic)* and without a referendum. (Parliament of Victoria, undated).

had to endure and survive within the colonial system. Cubillo (2025:7) argues that it is time to move beyond the silence, beyond tokenism and beyond survival by ‘reckoning with the truth, remembering history, acknowledging sovereignty and embedding Indigenous law and voices as foundational to the Australian polity’ and ‘only then can transformation begin.’

Arguably, this is what Victoria ventured to do with embarking on a Path to Treaty in 2016 (Wensing and Kelly, 2024:63).

While the negotiations between the First Peoples Assembly of Victoria and the Victorian government represent a significant milestone in relations between the Aboriginal peoples of Victoria and the state, Hobbs (2024:318) notes that the success of modern treaties hinges on weathering the storms about what happens when agreements have been reached. Hobbs (2024:320) maintains that a treaty between Indigenous nations and the state is different from ordinary legal instruments because of the relational nature between the two parties. It must be based on a high degree of mutual trust and recognition and on an ‘exchange of solemn promises, now and into the future’ (Hobbs, 2024:320).

Hobbs also maintains there is an underlying paradox: in order to give the treaty legal effect, legislation is required which ‘allows one party [the state] to unilaterally revise or revoke the settlement’ (Hobbs, 2024:320). This paradox cannot be resolved in the Australian context because modern treaty negotiations operate within the legal order of the State and obtain their force through legislation enacted by the Parliament. Hobbs (2024, 318) argues that greater attention must therefore be paid to ensuring the treaty’s durability in the longer term (Hobbs, 2024:318). In Victoria’s case, this remains the ultimate test of its success, especially since the Liberal Opposition has stated that it intends to repeal the legislation if and when they get back into government (Secombe, 2024). The durability of the Victorian treaty process can be achieved by conferring delegated law-making power over prescribed areas on the First Peoples’ Assembly, and an inclusive and open public education and awareness campaign that builds community ownership over the treaty process (Hobbs, 2024:343).

The background of the slide is a close-up photograph of green leaves and branches, slightly out of focus, creating a natural and serene atmosphere. The leaves are various shades of green, from light to dark, and the branches are thin and brownish.

02

Treaty: State vs
Commonwealth
powers

2. Treaty: State vs Commonwealth powers

Statewide treaties are possible in Australia's federation because it was the six States that came together to form the Federation in 1901. The Australian Constitution establishes a federal system of government that distributes powers between the Commonwealth (the central government) and the six States. The Constitution confers the power to make laws for the Commonwealth on the Parliament of Australia. However, its powers are limited to the matters for which it has exclusive powers in S.52 and other parts of the Constitution and the matters for which it shares with the States listed in S.51 (Commonwealth of Australia, 2023).³

Under the federal system, the six former colonies became the six States of Australia. Before federation, each State had its own Constitution. The Australian Constitution expressly guarantees the continuing existence of the States' Constitutions. Hence, State Parliaments can pass laws on a wider range of matters than the Commonwealth Parliament, and for this reason, areas such as land administration, land use planning and environmental regulation and protection are regulated primarily by the States and not the Commonwealth. However, the States are bound by the Australian Constitution (S.109) and the State Constitutions must be read subject to the Australian Constitution (Ss.106 and 107) (Commonwealth of Australia, 2023).

As Professor Maureen Tehan (2010:119) rightly observes:

'The Australian Constitution distributes power between the parliaments of the States and the Commonwealth by the enumeration of Commonwealth powers, giving the states residual powers but permitting the states to exercise power concurrently with the Commonwealth parliament, provided there is no conflict, or that the Constitution does not vest the powers exclusively in the Commonwealth parliament'.⁴

This raises two important points.

First, when the Federation was formed in 1901, the States did not rescind their exclusive responsibility for land administration and management, including property services, which the States generally delegated to local government or created state level instrumentalities to provide (i.e. local roads, power and water) (Wensing, 2015). This meant that most matters affecting the lives of Aboriginal people remained largely in State hands (except for the Northern Territory after South Australia handed it over to the Commonwealth in 1911) (Gardiner-Garden 1999:5 and 7).

Second, when the Federation was formed in 1901, the States did not rescind their responsibility for Aboriginal Affairs. When S.51(xxvi) of the Australian Constitution was amended in 1967, the amendments enabled the Commonwealth to accept wider, but not exclusive responsibility for Aboriginal affairs (Wensing, 2015). As Gardiner-Garden (1997:11) notes:

³ The matters over which the Commonwealth has exclusive power include defence, external affairs, interstate and international trade, taxation, immigration, bankruptcy, and interstate industrial conciliation and arbitration.

⁴ *Commonwealth of Australia Constitution Act 1900* (UK); Proclamation uniting the people of New South Wales, Victoria, South Australia, Queensland, Tasmania and Western Australia in a Federal Commonwealth: 1900 No. 722. Ss.51,106-108, 109 in particular.

'It is significant, moreover, that the referendum had not given the Commonwealth Government exclusive responsibility for Aboriginal Affairs, or even any explicit responsibility in the area. Had such responsibility been sought, it would almost certainly have been opposed by the State Governments. It had simply cleared the way for some form of Commonwealth involvement in an area which had hitherto been the sole, and would hereafter remain primarily, the responsibility of the states.'

As a consequence of the 1967 amendments to Australia's Constitution, the responsibility for Aboriginal and Torres Strait Islander Affairs became a shared or concurrent power with the States, subject to s.109 of the Australian Constitution, which provides that, in the event of a conflict, Commonwealth law prevails (Wensing, 2015).

There is nothing in the Australian Constitution to prevent the States from signing a Treaty with First Peoples in their jurisdictions (Harris, 2023:112). Which is why Victoria has been able to do so, independently of the Commonwealth.

This path is also open to each of the other States. Whether it is open to the two mainland Territories (NT and ACT) remains an open question because by virtue of s.122 of the Constitution, the Commonwealth retains ultimate responsibility for governing the Territories, even though it granted them a form of self-government in 1978 and 1989, respectively.

The NT Treaty Commission (2020:49) noted that there is no constitutional barrier to the Commonwealth playing a positive role by passing a law or laws supporting a treaty process in a Territory, but s.122 of the Constitution means that the Commonwealth can overrule any treaty enacted in legislation by a Territory Legislative Assembly. As Brett Walker SC put it in his Legal Opinion to the NT Treaty Commissioner, the possibility of direct rule by the Commonwealth 'remains as a constant means by which legislative action under the system of self-government for the Northern Territory, ..., can be completely nullified by subsequent and contrary Commonwealth legislation' (Walker, 2020:6). The same applies to the ACT (Wensing, 2021a:54-55).⁵

⁵ Several precedents already exist, including the enactment of legislation by the Commonwealth Parliament to override the NT's *Rights of the Terminally Ill Act 1995* (NT) (euthanasia laws) by amending the *Northern Territory (Self-Government) Act 1978* (Cth).

A close-up photograph of a branch with several white, fluffy flowers and green buds. The flowers have a dense, spherical structure of fine white filaments. The buds are small and round, clustered together. The background is softly blurred, showing more of the same plant and some green leaves.

03

*The Statewide
Treaty Act 2025 (Vic)*

3. The *Statewide Treaty Act 2025 (Vic)*

The *Statewide Treaty Act 2025 (Vic)* gives effect to the first Statewide Treaty between the First Peoples of Victoria and the State of Victoria, and to the recognition and restoration of the inherent rights of the First Peoples in Victoria. It also includes provisions for further statewide treaties and treaties at the Traditional Owner group level in Victoria.

For the first time, a State has listened to and acted upon what the Aboriginal peoples of Victoria asked of Premier Daniel Andrews when he met with them in Shepparton shortly after he was elected in 2016. The Aboriginal peoples of Victoria asked for a Treaty and for self-determination to be the driving principle. In large part, the *Statewide Treaty Act 2025 (Vic)* and the first Statewide Treaty deliver on the promises the Premier made after the 2016 meeting.

The Victorian Government has been on the path to Treaty for nearly a decade, and strong foundations have been laid. Specific legislation has been passed three times, policies have been developed, and commitments have been made across every level of government. The *Statewide Treaty Act 2025 (Vic)* is an important step along the Path to Treaty to give effect to several actions.⁶ And there are many more steps yet to come.

The Preambles to both the Act and the Treaty acknowledge the wrongs of the past and set aspirations for the future. They are reproduced in full in **Appendices A and D**, respectively. Both are well worth reading, even if you don't read anything else.

The *Statewide Treaty Act 2025 (Vic)* is over 240 pages in length and includes several provisions. The Parts and Schedules in the Act are listed in **Appendix B**. The *Statewide Treaty Act 2025 (Vic)* should be read in conjunction with the two earlier statutes that led to it, including the *Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)* and the *Treaty Authority and Other Treaty Elements Act 2022 (Vic)*.

The *Statewide Treaty Act 2025 (Vic)* demonstrates the State of Victoria's commitment not to repeat past injustices and to address the ongoing consequences of colonisation. The Act also aims to achieve improved and enduring outcomes for First Peoples and a better future that is just, fair and equitable for First Peoples and for all Victorians.

Combined, the three statutes are ambitious. They are also groundbreaking and transformational, changing Victoria's democratic fabric to ensure First Peoples decide First Peoples' issues. A remarkable development in the quest for reconciliation between First Peoples and the state.

⁶ Watch this video for more information on the Path to Treaty: <https://www.treatyvictoria.vic.gov.au/path-treaty>

3.1 Objects and Principles of the *Statewide Treaty Act 2025 (Vic)*

The objects of the *Statewide Treaty Act 2025 (Vic)* are to:

- (a) give effect to the first Statewide Treaty; and
- (b) provide foundations for ongoing Statewide Treaty-making between Gellung Warl and the State, including to negotiate further functions and powers of Gellung Warl over time; and
- (c) advance the inherent rights and self-determination of First Peoples; and
- (d) address the unacceptable disadvantage inflicted on First Peoples by the historic wrongs and ongoing injustices of colonisation and ensure the equal enjoyment of human rights and fundamental freedoms by First Peoples.

The following principles underpin the Act:

- (a) Gellung Warl established under this Act has evolved from the critical successes of the First Peoples' Assembly of Victoria and now sits at the centre of the Treaty relationship; and
- (b) Gellung Warl has been designed by and for First Peoples based on broad engagement with First Peoples in Victoria and—
 - (i) it is inclusive and representative of all First Peoples; and
 - (ii) its structure of representation reflects Aboriginal Lore, Law and Cultural Authority and the responsibilities of Traditional Owners to Country and to all peoples who are on Country; and
- (c) Gellung Warl is an ongoing feature of the democratic and political fabric of Victoria; and
- (d) Statewide Treaty-making is an ongoing relationship in accordance with the Treaty Negotiation Framework⁷ and involves ongoing negotiations and agreement between the State and Gellung Warl; and
- (e) Statewide Treaty-making imposes mutual obligations on Gellung Warl and the State to create and uphold co-operative arrangements to ensure laws and practices in Victoria benefit and create a better future for all Victorians; and
- (f) ongoing Statewide Treaty-making includes the negotiation of the ongoing transfer of decision-making, rule-making, advisory and other powers and functions from the State government to Gellung Warl.

The Act also includes good faith obligations between the parties in the course of performing their functions or exercising their powers under this Act (S.6). The powers conferred on the three entities created under this or any other Act (discussed below) do not have coercive powers, and penalties cannot be imposed for non-compliance (S.8).

⁷ Made in accordance with Part 5 of the *Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)*.

3.2 New Bodies Established

The *Statewide Treaty Act 2025* (the Act) establishes a new entity, Gellung Warl, which will evolve from Victoria's successful First Peoples' Assembly. The term 'Gullung-Warl' is from Gunaikurnai language.

Gellung Warl will comprise three parts:

1. The first part is the First Peoples' Assembly, consisting of democratically elected members. It will inform Parliament and the Victorian Government on matters that affect First Peoples and make decisions about specific matters that impact First Peoples.
2. The second part is Nginma Ngainga Wara as a constituent arm of Gellung Warl. Nginma Ngainga Wara will ensure accountability for the State's commitments to First Peoples. It will implement the commitment under the 2020 National Agreement on Closing the Gap to establish an independent accountability mechanism and improve outcomes. It will evaluate and monitor how effective the Victorian Government is in achieving better outcomes for First Peoples, and it will be led by members appointed by the First Peoples' Assembly. Nginma Ngainga Wara acquits Victoria's commitment under the 2020 National Agreement on Closing the Gap to create an independent accountability mechanism to provide concrete solutions and recommendations to improve outcomes for First Peoples. Victoria is the first jurisdiction in Australia to acquit this commitment under the 2020 National Agreement on Closing the Gap.
3. The third part is Nyerna Yoorrook Telkuna, a Wamba Wemba word, pronounced Nyern-ah Yoo-rrook Terl-kun-ah. It will continue the truth-telling and healing journey started by the Yoorrook Justice Commission. Its role will be to establish truth-telling in local communities about Aboriginal peoples' local history, and to support ongoing education, healing and reconciliation. It will be led by three members, appointed by the First Peoples' Assembly, who are broadly reflective of the diversity of the experiences and views of First Peoples and other Victorians (State of Victoria, 2025a).

The creation of Gellung Warl reflects a commitment by the State and the First Peoples of Victoria, as signatories to the *Statewide Treaty*, to the existence of an accountable, democratically elected and culturally strong representative of First Peoples that forms an enduring part of the democratic landscape of Victoria.

By establishing Gellung Warl as a special measure to ensure the equal enjoyment of human rights and fundamental freedoms by First Peoples and to promote and uphold the unique and inherent right of First Peoples to self-determine their own futures, the *Statewide Treaty Act 2025* (Vic) is intended to achieve true, substantive equality in the enjoyment of all human rights, including the right to participate in government.

In this way, the Act reflects and gives effect to the rights and principles enshrined in the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP) (UN, 2007). This statute is among a small number of State-level statutes that include a specific reference to UNDRIP.⁸

⁸ The *Human Rights Act 2004* (ACT), the *Human Rights Act 2019* (Qld) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) all include reference to international human rights law, thereby to some degree enshrine it into Australian law in those jurisdictions. The *Human Rights Act 2004* (ACT) includes a footnote to s.27(2) which includes a specific reference to two Articles in the UN *Declaration on the Rights of Indigenous*

And in doing so, the Preamble to the Act states that:

'The State recognises the importance of the Statewide Treaty, and future Treaties, proceeding in a manner that is consistent with the principles articulated in UNDRIP, including self-determination and free prior and informed consent. By continuing to consult and cooperate in good faith, the State will endeavour to take each step forward in the Treaty era together with Traditional Owners of Country in Victoria and First Peoples.'

What is notable is that '**First Peoples**' is defined in the *Statewide Treaty Act 2025 (Vic)* to include both Traditional Owners and Aboriginal peoples and Torres Strait Islanders living in Victoria (s.4). This means the Treaty applies to both groups without discrimination.

The term 'Traditional Owner' in relation to an area in Victoria has the same meaning as it has in the *Aboriginal Heritage Act 2006 (Vic)*. See **Appendix C** for details.

For the purposes of the *Statewide Treaty Act 2025 (Vic)*, the term 'Traditional Owner group' in Victoria means one of the following:

- (a) in relation to an area of land which is subject to a determination that native title exists—a registered native title body corporate within the meaning of the *Native Title Act 1993 (Cth)*; or
- (b) in relation to land that is the subject of a recognition and settlement agreement within the meaning of the *Traditional Owner Settlement Act 2010 (Vic)*—a Traditional Owner group entity within the meaning of that Act that has entered into the recognition and settlement agreement; or
- (c) in relation to an area which is registered under the *Aboriginal Heritage Act 2006 (Vic)*—a registered Aboriginal party within the meaning of that Act; or
- (d) an entity specified in the electoral rules (under the *Statewide Treaty Act 2025 (Vic)*) to be a Traditional Owner group.⁹

There will be some land and water¹⁰ related matters for which the State will want to deal only with the Traditional Owners. There will undoubtedly be other matters for which the State will need to deal with Traditional Owners and First Peoples of Victoria. The Treaty and the Treaty Negotiating Framework (First Peoples' Assembly and State Government of Victoria, 2022) provide the basis for working through these distinctions and for working through treaty negotiations at any level.

The Preamble to the *Statewide Treaty Act 2025 (Vic)* concludes with the following statement:

With this Act, it is acknowledged with pride that future generations of Victorian children will grow up in a State shaped by Treaty, truth and justice. Treaty imposes mutual obligations on Gellung Warl and the State of Victoria to create and uphold co-operative arrangements to ensure laws and practices in Victoria benefit and create a better future for all Victorians.

Peoples. While this is commendable, the Declaration comes as a whole and must be read in full. Governments and third parties are not at liberty to pick and choose which Articles they will apply or ignore.

⁹ Note: Land includes land covered with water—see S.38 of the *Interpretation of Legislation Act 1984 (Vic)*.

¹⁰ First Peoples' water rights and interests are outside the scope of this paper as they are not regulated under land use planning statutes. See Lindsay, 2023 for a discussion of the rule of law in water management in the context of Treaty-making in Victoria.

The overall intention of this legislation is to change the course of Victoria's history. To overcome the injustices of colonisation and to create a better future for all Victorians and a better relationship between the First Peoples of Victoria and the wider Victorian community by ensuring First Peoples decide First Peoples' issues. It is indeed transformational.

3.3 Delivering Reconciliation, Implementing Practical Reforms and Accountability

The *Statewide Treaty Act 2025* (Vic) empowers the First Peoples' Assembly within Gellung Warl to make rules, guidelines and standards about issues that directly affect First Peoples (State of Victoria, 2025b). These include:

- Making rules regarding the 'acceptance by community' aspect of Confirmation of Aboriginality.
- Appoint the existing First Peoples' representatives to the Heritage Council and Aboriginal Heritage Council.
- Make non-binding guidelines for the trading and sharing of First Peoples' existing water entitlements with other First Peoples.
- Make guidelines regarding First Peoples' cultural safety, including for specific activities, industries or sectors.
- Make its own internal rules, including regarding structure, governance and operations.

Gellung Warl will be able to use its powers and functions to action important, practical reforms set out in the Treaty (State of Victoria, 2025b). These reforms include:

- Use the Yoorrook Justice Commission's Official Public Record as a curriculum resource to support the implementation of truth-telling in schools.
- Participate in place-naming of specific geographic features, including waterways and National and State parks, to increase opportunities for the use of traditional or language place names.
- Establish a First Peoples Infrastructure Fund to refurbish or build new Aboriginal community infrastructure.
- Deliver Aboriginal events and awards, such as NAIDOC week events and the Victorian Aboriginal Honour Roll.

Gellung Warl will operate as an ongoing democratic, representative and deliberative body for First Peoples in Victoria. It will lead to a renewed relationship with the State created by the Treaty. Working with the State, it will use its functions and powers to action Statewide Treaty reforms – the practical outcomes set out in the Statewide Treaty.

While operating independently from government, Gellung Warl is subject to Parliamentary sovereignty. The operations of Gellung Warl will not impact on the Victorian Parliament's ability to make laws, and it will not impact on the Victorian Government's ability to govern for all Victorians.

The *Statewide Treaty Act 2025* (Vic) establishes Gellung Warl and structures the three key instruments of self-determination while also putting in place the appropriate procedures to ensure accountability to the Parliament and the people of Victoria. Gellung Warl is subject to the same oversight bodies as other independent agencies, including the Victorian Auditor-

General's Office (VAGO), the Independent Broad-based Anti-corruption Commission (IBAC), the Victorian Ombudsman and the *Charter of Human Rights and Responsibilities (Act 2006)*.

The *Statewide Treaty Act 2025 (Vic)* does not change the Victorian or Commonwealth Constitution. It does not establish a 'third chamber of Parliament' in the legislative chamber or house of Victoria's Parliament. And it does not change tax laws or provide individual financial 'reparations'. Gellung Warl does not have the power to veto policy or legislation (State of Victoria, 2025b).

Any suggestions to the contrary are wrong and should be dismissed.



04

Victoria's first
Statewide Treaty

4. Victoria's first Statewide Treaty

4.1 Key Messages in the Statewide Treaty

'Treaty is an opportunity to come to grips with the history we share – and create a better and fairer future together' (Victoria's Treaty, 2025).

As stated earlier, the **Preamble** to the Treaty acknowledges the wrongs of the past and sets aspirations for the future, not just for First Peoples, but also for all Victorians. The Preamble is reproduced in full in **Appendix D**.

The Statewide Treaty is a beautifully written document with several key messages. The Parliament and the people of Victoria are engaged by the Treaty because the Parliament has been involved in enacting the key statutes, including the *Statewide Treaty Act 2025* (Vic) which gives the first Statewide Treaty a legal foundation and because the Treaty itself is made in the name of all Victorians.

The key message in the Treaty is expressly articulated by the following statements:

'Treaty is one of the most important steps Victoria has ever taken – a renewed and enduring relationship between First Peoples and the State, grounded in the inherent right of First Peoples to self-determination. It affirms the distinctive status of First Peoples, born of their connection to these lands, waters, skies and stars of this continent, including the Country now called Victoria. These rights are inherent, not granted by the State, and flow from First Peoples' own laws, cultures, and connection to Country, as recognised in the UNDRIP (United Nations Declaration on the Rights of Indigenous Peoples).

At its heart, Treaty is about healing and making a real, practical difference for First Peoples and for the Country that has carried their footsteps since time began. It reaches into the wounds left by colonisation, seeking to stitch what was torn apart: culture, identity, and the deep connection to this place that has never truly been broken.' (Victoria's Treaty, 2025:13)

Most importantly, the Treaty aims to make sweeping changes to the lives of Victorians by ensuring that First Peoples are making decisions about matters affecting First Peoples.

The Treaty does not take away anyone's rights. This Treaty is about ensuring that all Victorians have access to the same opportunities and is aimed at building a better future for all.

The Statewide Treaty is 34 pages in length and includes a Preamble, two Parts and three Schedules, totalling 62 pages (First Peoples' Assembly of Victoria and State of Victoria, 2025). The structure of the Statewide Treaty is set out in **Appendix E**.

4.2 Schedule C: The Minimum Content Guidelines

This is where the Treaty has traction in practical relational terms. Parts 7 and 8 of the *Statewide Treaty Act 2025* (Vic) include provisions for addresses and reports to Parliament and for making representations and advice to the State government. Most of what follows is drawn from the Explanatory Memorandum for the Bill and cross-checked against the final version of the Act as passed by Parliament.

The objects of Part 7 of the Act are to:

- Empower the First Peoples' Assembly to inform the Parliament on the effect of proposed legislation on First Peoples to support more effective laws as they relate to First Peoples and to address the significant disadvantage of First Peoples.
- To support self-determined and better outcomes for First Peoples, benefitting the Victorian community as a whole.
- To establish advisory and relational practices between Parliament and the First Peoples' Assembly that supports the broader relationship established under Statewide Treaty-making (S.63) (emphasis added).

The objects of Part 8 of the Act are to:

- Empower the First Peoples' Assembly to inform the State government and State-funded service providers on matters affecting First Peoples to address the significant disadvantage of First Peoples, to support self-determined and better outcomes for First Peoples.
- Support the development of more effective laws and policies as they relate to First Peoples.
- Establish advisory and relational practices between the State government and the First Peoples' Assembly that support the broader relationship established under Statewide Treaty-making.

The provisions in Parts 7 and 8 are therefore intended to establish a constructive and cooperative relationship between the Parliament and the First Peoples' Assembly, and the State government and the First Peoples' Assembly on any matters affecting First Peoples in Victoria.

Furthermore, the provisions in Parts 7 and 8 are intended to become normative by embedding the advice and information function of the First Peoples' Assembly into standard Parliamentary procedure and embedding the representation function of the First Peoples' Assembly into the standard law and policymaking practices of government. This is meant to break the cycle of excluding First Peoples from decision-making that affects First Peoples' lives and wellbeing. Parts 7 and 8 of the Act are intended to dramatically change the way Parliament and the government of the day operate when making decisions about matters affecting First Peoples.

The provisions in Part 8 of the Act that have caught my eye as having the most traction in terms of behavioural change by the State bureaucracy are ss.86 to 89, which give effect to how some of these interactions will occur.

S.86 requires each Secretary of a Department and the Chief Commissioner of Police to meet with the First Peoples' Assembly to—brief the First Peoples' Assembly about matters relating to responsibilities of the Department, or relating to the responsibilities of the Chief Commissioner of Police, that are of interest to First Peoples; and allow the First Peoples' Assembly to ask

questions about matters relating to the responsibilities of the Department, or the responsibilities of the Chief Commissioner of Police, that are of interest to First Peoples.

S.87 requires that these briefing meetings be conducted in accordance with any procedures agreed between the Secretary to the Department of Premier and Cabinet and the First Peoples' Assembly. Their timing is not specified, other than that it occurs at a time which enables the First Peoples' Assembly to inform the annual State government budget priorities.

S.88 requires each Secretary and the Chief Commissioner of Police to develop written guidelines for any matters specified in the Statewide Treaty and for matters relating to consultation with the First Peoples' Assembly. The minimum content for the guidelines is set out in Schedule C to the first Statewide Treaty and includes seven pages of detail.

S.88(1) of the *Statewide Treaty Act 2025 (Vic)* requires that each Secretary must develop, in consultation with the First Peoples' Assembly of Victoria, written guidelines for:

- i) any matters specified in the Statewide Treaty
- ii) the manner of consultation with the First Peoples' Assembly of Victoria during the development of any legislative proposal, statutory rule (not including a court rule) or policy that is specifically directed to First Peoples.

S.88(2) of the *Statewide Treaty Act 2025 (Vic)* applies similar provisions to the Chief Commissioner of Police.

The Parties acknowledge in accordance with S.88(3) of the *Statewide Treaty Act 2025 (Vic)* that a failure to develop guidelines or to comply with the guidelines does not, of itself, affect the validity or operation of any Act or statutory instrument, or the validity of any act or decision, or provide grounds for review of any act or decision.

The Parties acknowledge that each Secretary (or the Chief Commissioner of Police) will include matters in the guidelines only to the extent relevant to the Department to which the guidelines relate (or to Victoria Police), as the case may be.

A note at the foot of S.88 also refers to the new public sector Treaty principles that are established in S.8A of the *Public Administration Act 2004 (Vic)* through amendments to that Act made by Ss.284 and 285 of the *Statewide Treaty Act 2025 (Vic)*. These provisions are designed to complement the guidelines required by this clause by requiring public service and special body heads to establish processes that support the development of a culturally capable workforce and recognise and support the role of these bodies in relation to Treaty and ongoing truth-telling.

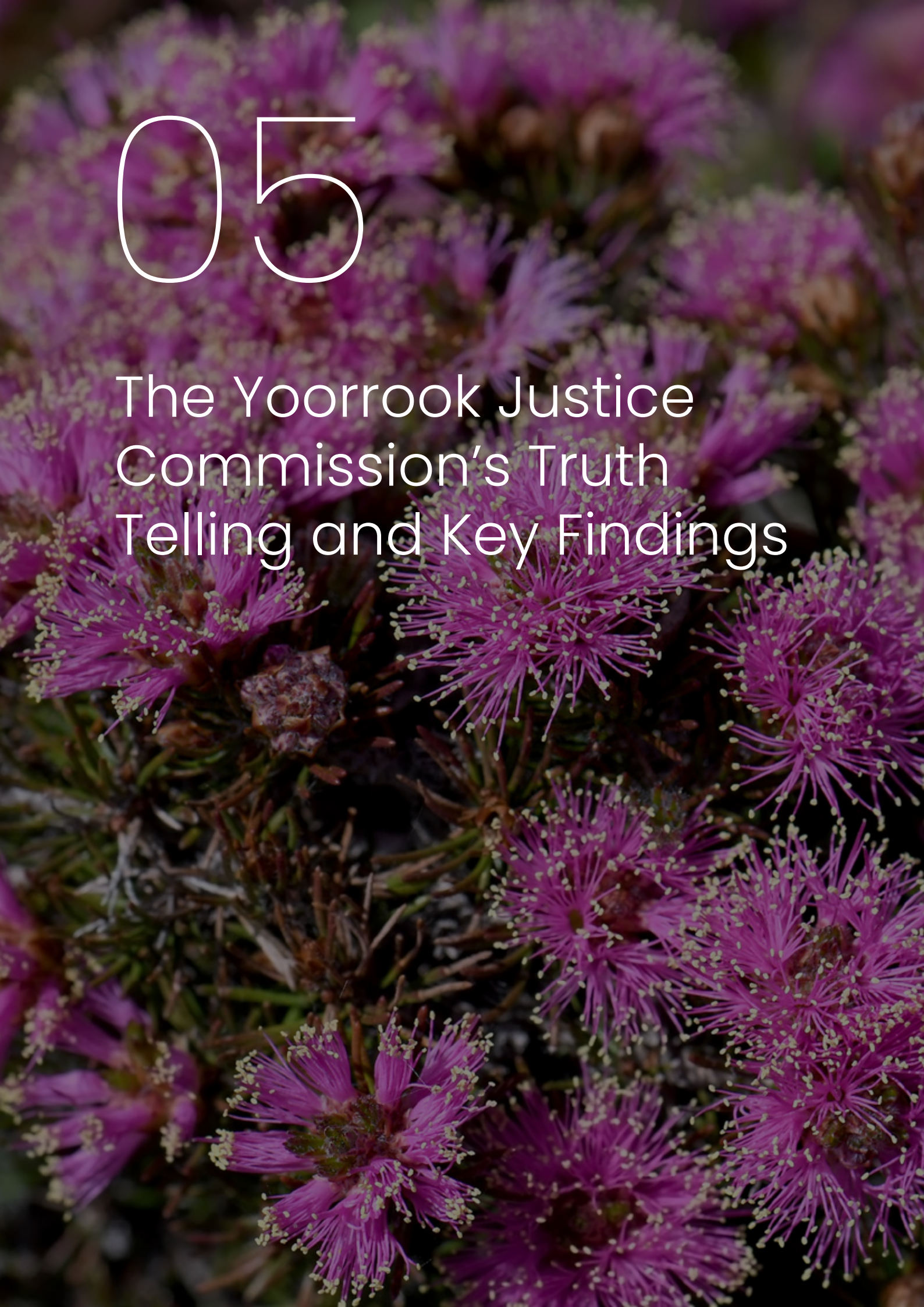
The matters discussed above are just some of the detailed ways in which the Treaty provisions are backed by specific provisions in the *Statewide Treaty Act 2025 (Vic)*. And these provisions apply to all Departments, authorities, and State-funded service providers that provide services to or administering programs used by First Peoples, whether under contract or otherwise.

What is notable from a land planning and management perspective is that these provisions apply to the departments of state involved in land use planning and management, the environmental protection agencies and agencies involved in administering or managing Crown land.

What will be worth watching is how various departments and agencies develop their responses to the requirements for constructive engagement mentioned earlier.

05

The Yoorrook Justice Commission's Truth Telling and Key Findings



5. The Yoorrook Justice Commission’s Truth Telling and Key Findings

The following text is reproduced from the Yoorrook Justice Commission’s website (2025a).

The Yoorrook Justice Commission was established in 2021. Yoorrook’s mandate was broad and far-reaching, including reporting on the historical and ongoing systemic injustice experienced by First Peoples in Victoria in all areas of life since colonisation. Following four years of inquiry; over 1,350 submissions; evidence from more than 250 witnesses across sixty-five hearing days, as well as sixty-seven roundtables and yarning circles, the Commission has completed its work.

Yoorrook has delivered three interim reports that examine and identify the causes and consequences of systemic injustice in detail: Yoorrook with Purpose (2022), Yoorrook for Justice (2023) and Yoorrook for Transformation (2025).

Across this extensive body of work, Yoorrook has consistently found that the injustices faced by First Peoples in Victoria today flow directly from colonisation. Following invasion, successive colonial and Victorian governments have enacted laws, adopted policies and engaged in practices that dispossessed and removed First Peoples from their lands and waters and denied equitable access to social services and resources.

All major political parties, whether in government or in opposition, have perpetuated and compounded the trauma, injustice and suffering of First Peoples. All have a responsibility to work towards agreed outcomes to ensure the existing trauma, injustice and suffering is not further exacerbated or prolonged.

Yoorrook’s findings are not the result of evidence from First Peoples alone. Over the course of its inquiry, Yoorrook received evidence from First Peoples including Elders, Traditional Owners and Community-Controlled Organisations. But the Commission also received evidence from the Premier, ministers, public servants, historians, healthcare workers, educators, other service providers, religious leaders, descendants and everyday Victorians. The consistent and overwhelming theme of this evidence is that the legacy of colonisation is still manifest in every aspect of life—including the current-day overrepresentation of First Peoples in the criminal justice and child protection systems, and in the inequitable outcomes in health and wellbeing, housing, employment, education, economic and political life. First Peoples have demonstrated that with secure access to their lands, waters and resources, they are better able to provide for the social, economic and cultural needs of their community than government or industry.

Yoorrook’s key findings draw from the conclusions presented in the Commission’s existing reports, but are limited in number in order to highlight the key events in Victoria’s colonial history that underpin the systemic injustice facing First Peoples in Victoria today.

Commissioners Walter, Hunter and North did not approve of the inclusion of the key findings in the final report. Commissioners recommend the reader view the findings in their totality in Yoorrook for Justice (2023) and Yoorrook for Transformation (2025b). (Yoorrook Justice Commission, 2023, 2025b respectively).

The Yoorrook Justice Commission has amassed a wealth of evidence about the impacts of colonisation on the Aboriginal peoples of Victoria. Its Final Reports comprise several volumes, which can be accessed from this link: <https://www.yoorrook.org.au/reports-and-recommendations>

The Yoorrook Justice Commission's key findings are as follows:

1. The land now known as Victoria was not 'discovered' by the British Crown or 'Founded' by settlers.
2. The sovereignty of First Peoples in Victoria has never been ceded and continues to exist.
3. The initial occupation of the land now known as Victoria by European settlers from 1834 onwards was illegal, rapid and largely uncontrolled (Yoorrook Justice Commission, 2025b).
4. The taking of Country and resources was violent as First Peoples were displaced and massacred by European settlers in the pursuit of their land and waters.
5. Laws and Policies of the British and colonial governments were used to authorise the confiscation, theft, use and damage of lands and waters belonging to First Peoples without their consent
6. The protection acts and other related colonial laws and policies deliberately disrupted First Peoples' connections with their traditional lands and water and each other and by today's standards, a number of these actions would amount to genocidal acts.
7. Victorian First Peoples have demonstrated remarkable resilience in maintaining their identity, connection to Country and one another.
8. None of the wealth generated from the land and waters of First Peoples in the period since colonisation in Victoria has been directly shared with Traditional Owners.
9. Colonisation is not only a historic event but a process that continues to affect First Peoples in Victoria Today.
10. First Peoples in Victoria have a fundamental right to self-determination and a right to redress for the harms caused by colonisation.

Professor Marcia Langton (2025) asserts that the truth of colonisation has finally been revealed. The State of Victoria was established on the stolen lands of its First Peoples, without their consent and without a treaty. And they have never been compensated for their losses. Truths that can no longer be denied.



06

Recent Native Title Claims in Victoria

6. Recent Native Title Claims in Victoria

6.1 The legacy of the High Court of Australia's decision in *Yorta Yorta for Victoria*

Before discussing the three native title claims over the most populous parts of Victoria, it is important to set the following discussion in the broader native title context

First, native title is an existing, inherent right. It is not a grant or right that is created by government. Nor is it dependent upon the government for its existence. Native title is the recognition in Australian law that the Aboriginal and Torres Strait Islander peoples had, and still have, a system of law and custom relating to land that existed prior to the colonisation of Australia by the British (Wensing, 2025a:231).

Second, in December 2002, the High Court of Australia handed down its decision in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58. In that matter, the High Court dismissed an appeal by the native title claimants against a trial finding that, for the Yorta Yorta People, native title rights and interests could not be recognised because they had ceased to acknowledge their laws and customs in the period since the assertion of sovereignty by the Crown. In *Yorta Yorta v Victoria*, the High Court emphasised an 'inextricable link between a society and its laws and customs' and held that the existence of some form of society is essential (Bartlett, 2023:184, 185). The majority Justices, Gleeson CJ, Gummow and Hayne JJ, stated that 'if there is no society which acknowledges and observes them, it ceases to be useful, even meaningful, to speak of them as a body of laws and customs acknowledged and observed, or productive of existing rights or interests, whether in relation to land or waters or otherwise.'¹¹

For the Yorta Yorta People, the decision was 'a severe body-blow' and one which was felt by other Indigenous claimants throughout Australia (Lavery, 2003:4) as it highlighted the risks associated with seeking Native Title. The decision also ruled out native title as a process for engaging with Yorta Yorta and many other Indigenous groups in similar situations. The Victorian Government then realised it did not have a formal process for engaging with Traditional Owners and responded in a number of different ways.

Specifically in relation to the Yorta Yorta People, the State of Victoria and Yorta Yorta Nations Aboriginal Corporation (YYNAC) signed a landmark cooperative land management agreement in June 2004 which recognised the right of the Yorta Yorta People to retain their identity and intellectual property and their role in management decision making within the Designated Areas relating to the protection, maintenance and sustainability of cultural and environmental values (YYNAC, 2004).

In 2006, the Victorian government passed the *Aboriginal Heritage Act 2006* (Vic) to provide more effective protection of Aboriginal cultural heritage and broaden Aboriginal community involvement in decision-making arrangements. The legislation replaced out-dated legislation and established a mechanism for appointing Registered Aboriginal Parties (RAPs) with responsibility for protecting and maintaining Aboriginal places and objects of cultural heritage

¹¹ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58, Gleeson CJ, Gummow and Hayne JJ at 50.

significance within their areas through approving cultural heritage management plans, advising on heritage permits, entering into heritage agreements and negotiating the repatriation of Aboriginal human remains and cultural artefacts.

In 2008, a steering committee consisting of Victorian Traditional Owners and representatives of the Victorian government was formed to undertake the ‘Development of a Victorian Native Title Settlement Framework’. The Steering Committee’s Final Report set out the parameters of a Victorian Native Title Settlement Framework for out-of-court settlement packages that allow Traditional Owner groups to settle native title claims directly with the State outside the Federal Court process (Steering Committee, 2008). A key objective in developing the Framework was to ensure a streamlined and expedited approach to settling native title claims through interest-based negotiations for equitable outcomes and meeting the aspirations of both Traditional Owners and the State. The Steering Committee’s Final Report, therefore, laid the groundwork for the *Traditional Owner Settlement Act 2010* (Vic).

The Victorian *Traditional Owner Settlement Act 2010* (the Act) provides for an out-of-court settlement of native title. The Act allows the Victorian Government to recognise Traditional Owners and certain rights in Crown land. In return for entering into a settlement, Traditional Owners must agree to withdraw any native title claim, pursuant to the *Native Title Act 1993* (Cth), and not to make any future native title claims. While the *Traditional Owner Settlement Act 2010* (Vic) was regarded as progressive, and indeed nation-leading legislation at the time of its introduction, there have been problems and delays with its implementation, and it has not delivered in several important ways (FVTOC, 2021:22).

As a consequence of these actions, there are currently three methods for formal recognition as Traditional Owners in Victoria, as discussed in **Appendix F**.

6.2 Native title determinations and active claims in Victoria

There are already 10 native title determinations in Victoria:

- Three determinations where the Federal Court of Australia determined that native title exists in the entire determination area.
- Four determinations in which native title exists in parts of the determination area.
- Three determinations where native title does not exist, including the *Yorta Yorta* claim, which was determined by the High Court of Australia in 2002.¹²

There are currently eight active native title claims in Victoria. Together, they cover a large proportion of the State. The following discussion focuses on the following three native title claims over the most populated parts of the State:

- Wadawurrung Native Title claim over Geelong and Ballarat and surrounds.
- Wurundjeri Native Title Claim over Melbourne and surrounds.
- Boonwurrung Native Title Claim over Melbourne and surrounds.

A map showing the outer boundaries of each of the claim areas is included in **Appendix G**. The local government areas that are partly or wholly within each of the claim areas are listed in **Appendix H**. What is significant about these three claims is that they cover the most populated

¹² The details can be found by searching the Register of Native Title on the National Native Title Tribunal’s (NNTT) website: <https://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-National-Native-Title-Register.aspx>

parts of Victoria, including the whole of Melbourne, Geelong and Ballarat and Wilson's Promontory even though large areas are excluded from the claims because native title has been extinguished by valid past acts¹³ under the *Native Title Act 1993* (Cth).

The maps in **Appendix G** show there is a degree of overlap between adjoining claims. This is very common between adjoining claims, as notions of 'fixed' or 'hard' boundaries between claim groups are a 'western' concept that has little credence in Aboriginal law and custom. The degree of overlap or 'exclusivity' between the claimant groups is a matter for them to resolve and for the Federal Court of Australia to adjudicate based on the evidence they present to the Court. Langton (2025) notes that 'the assertion of ancient rights is a challenge that illustrates the complex legacy of colonial disruption and calls for both traditional and modern laws to resolve.' A greater understanding of the need for parity between two different land ownership systems is long overdue (see Part 9).

It is important to understand that, within the external boundaries of each claim, there are many internal areas that are excluded. For example, unqualified grants of an estate in fee simple (prior to 1 Jan 1994), public works as defined in S.253 of the *Native Title Act 1993* (Cth), existing dedicated public roads, and any area already subject to a native title determination, are all explicitly excluded from the claim and are not affected by native title. The details of what is included and what is excluded in each of the claims can be found on the Register of Native Title Applications held by the National Native Title Tribunal.

Wensing and Porter (2015) examined the extent of native title claims over Australia's capital cities and a selection of regional centres in 2015 and found there was a high attrition rate through withdrawal, discontinuation, dismissal or rejection and that the likelihood of a successful native title claim over our capital cities and major regional centres was very slim because of the extent of dispossession and alienation that had occurred since first settlement or occupation by the British. The high rates of attrition are principally due to several factors. Including:

- the high level of evidentiary requirements for native title claimants to show proof of historical connection and demonstrated continuity of their law and custom despite the disruptions caused by colonisation and urbanisation;
- the cost/benefit of pursuing a claim may not be not worth it given the extent of historical 'extinguishment' that has occurred within the proposed claim area; and/or
- the extent of overlaps and disputation between neighbouring Traditional Owner groups because they have been living together and sharing Country for many generations (Wensing and Porter, 2015).

What is included in each of the claims is Crown lands (depending on their tenure history), national parks, conservation reserves, rivers, creeks, coastal foreshores, waterways and marine waters that remain under government control and which thread through Melbourne's urban fabric and the fabric of Victoria's regional towns and villages.

One of the many things that native title claimants are trying to do is to reassert their presence inside the cadastral grid of dispossession that came with the development of cities and regional

¹³ A past act is an act that took place over an area where native title existed before 1 July 1993 and consisted of the making, amendment or repeal of legislation, or any other act that took place before 1 January 1994, over an area where native title existed and was invalid due to the existence of native title (s228 *Native Title Act 1993* (Cth)).

centres (Wensing and Porter, 2015). Langton (2025) maintains that these claims have already ‘forced a reckoning with the foundations of colonial settlement and the persistence of Indigenous law in Australia’s urban heartland.’

The final outcomes of these claims will depend on the negotiations between the claimants and the state (and other third parties, where necessary), as most native title determinations are being resolved by consent rather than by contest.

In spatial terms, the final outcome of a native title determination will include a defined external boundary. Within that boundary there will be areas subject to native title rights and interests, and the registered native title holders have substantive rights and procedural rights.

For areas subject to exclusive possession, native title is typically defined as the rights to possession, occupation, use, control and enjoyment of the area to the exclusion of all others.

For areas subject to non-exclusive possession, native title rights and interests which have been recognised include, but are not limited to, the rights to:

- maintain places of importance and areas of significance to the native title holders under their traditional laws and customs and protect those places and areas from physical harm
- use the area for hunting or ceremony
- camp on the area, and for that purpose, erect temporary shelters on the area
- to access, to remain in and to use the area
- be buried and bury native title holders within the area
- access take resources for any purpose resources in the area/ for personal, domestic and non-commercial communal purposes
- conduct ceremonies on the area
- teach on the area the physical and spiritual attributes of the area, and
- light fires on the area for domestic purposes including cooking but not for the purposes of hunting or clearing vegetation (Smith, 2026).

Registered native title holders and registered native title claimants are also entitled to certain procedural rights under the *Native Title Act 1993* (Cth) for future acts¹⁴ that will affect their native title rights and interests. Future acts can be dealt with through a registered Indigenous land use agreement (ILUA) negotiated by the parties. It is important to note unless the *Native Title Act 1993* (Cth) provides otherwise, a future act is invalid to the extent that it affects native title (S 24AO) (see part 6.4 below and **Appendix I** for more details).

In many native title determinations, there will also be other areas where native title rights and interests will be deemed to no longer exist due to past extinguishing events.

Cadastrally, a native title area will look very much like a piece of Swiss cheese with lots of big holes. In other words, the holes represent the areas where native title has already been

¹⁴ A future act is an act in relation to land or waters that either:

- consists of the making, amendment or repeal of legislation and takes place after 1 July 1993; or
 - is any other act that takes place after 1 January 1994;
- and
- is not a past act nor an intermediate period act; and
 - either validly or invalidly affects native title.

To be a future act the act must affect native title. That is, the act must either validly or invalidly occur in an area where native title exists, and it must affect native title in that area (S 233(1) of the *Native Title Act 1993* (Cth)).

extinguished by valid past acts, most commonly through the granting of freehold title or the construction of public works. However, that does not diminish the fact that within the overall claim area, a positive determination by the Federal Court involves recognition of the native title holders' status as the Aboriginal people of the area within their claim boundary. What that means in terms of how that recognition might play out in areas where native title has been extinguished or deemed to no longer exist, is a matter for discussion with third parties, including the state government, local government and other stakeholders.

6.3 The difference between Registered and Unregistered native title claims

When a native title claim is lodged in the Federal Court, a “registration test” is applied. The Registration Test assesses whether the application:

- meets the formal requirements of the *Native Title Act 1993* (Cth); and
- demonstrates a reasonable basis for the claimed connection.

If successful, the claim is registered, which gives the claimants access to certain procedural rights for future acts (proposed activities or developments that may affect native title) while the claim is being determined.

Table 1 shows when the three native title claims encompassing Melbourne, Geelong, Ballarat and Wilson’s Promontory were lodged and whether they have been Registered. **Table 1** shows that the Wadawurrung native title claim and the Wurundjeri Woi-Wurrung native title claim have been accepted for registration under the *Native Title Act 1993* (Cth) and the date the registration came into effect.

Table 1 also shows that the Boonwurrung claim was not accepted for registration. This does not mean the claim cannot proceed. It means that the native title claimants are not entitled to the future act processes unless and until the Federal Court makes a positive determination of their claim in the future (i.e. recognising that native title rights exist).

Claim Name	Date Filed	Status
Boonwurrung People	29 May 2020	Not accepted for registration
Wadawurrung	26 October 2022	Registered from 24 July 2023
Wurundjeri Woi-Wurrung People	30 October 2025	Registered from 29 January 2026

Table 1: Current Status of three native title claims in Victoria

Source: NNTT Registers at 1 February 2026.

The fact that a native title claim has been registered means that the claim is more likely to be settled by consent rather than contested with the state, largely because the veracity of the claim has already passed a significant hurdle. Furthermore, the Joint Working Group on Indigenous Land Settlements (2009) states that governments are ‘committed to work proactively in their jurisdictions to resolve native title through non-technical and flexible approaches’

Based on current practice, consent determinations often include one or more ILUAs between the parties as to how the parties will work together to recognise and protect the native title

rights and interests in locations where it continues to exist and arrangements for land management where there are Traditional Owners but native title is not recognised (e.g. the South West Settlement in Western Australia¹⁵). It is important to note that while ILUAs must be about native title matters for them to be registered under the *Native Title Act 1993* (Cth), they can also be about other related matters.

It should also be noted, however, that consent determinations and the negotiation of ILUAs can take a long time. These matters cannot be rushed, even when the parties are working together in good faith, because many complex matters need to be carefully worked through.

6.4 The risk of invalidity and the consequences

Ascertaining whether a future act process applies in any particular circumstances requires specialist advice. Not applying the correct processes may result in the future act being invalid in so far as native title is concerned.

If a future act proceeds without complying with the relevant due processes in the *Native Title Act 1993* (Cth) and native title rights and interests are impaired, diminished or extinguished in some way, the proponent may seek remedy via the Federal Court of Australia. In serious cases the proponent of the future act could be sued for damages and the Court may award compensation for the diminution, impairment or extinguishment of native title rights and interests.¹⁶ Noting that the compensation liability dates from 31 October 1975, when the *Racial Discrimination Act 1975* (Cth) came into effect, but that the Commonwealth's liability in the case of the Northern Territory and the ACT may go as far back as 1911 given the outcomes of *Commonwealth of Australia v Yunupingu* [2025] HCA 6 in March 2025 (Brennan, 2025).

While there may be some risks, it is always best practice to develop a respectful working relationship with native title claimants and Traditional Owners based on trust and mutual respect, rather than finding out after the event that native title rights and interests have been affected and the due processes were not complied with. The nature of the different procedural rights for different types of future acts is explained in more detail in **Appendix I**. The risks are largely confined to instances where there are competing native title claimants (prior to a determination) and/or interests.

It is important to reach out for independent professional advice before taking any action in areas where native title has been determined to exist (or may exist before a determination has been made by the Federal Court) to ascertain whether an action or activity is or may be a future act that will entail certain procedural rights for registered native title holders or registered claimants.

6.5 ALRC Review of the Future Acts Regime in the *Native Title Act 1993* (Cth)

In June 2024, the federal Attorney General requested the Australian Law Reform Commission (ALRC) to undertake an inquiry into the future acts regime in the *Native Title Act 1993* (Cth). The Terms of Reference for this review require the ALRC to consider a number of matters, including the current operation of the future acts regime in the Act; the opportunity for the native title

¹⁵ For details see: <https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/south-west-native-title-settlement> and <https://www.noongar.org.au/about-settlement-agreement>

¹⁶ For an excellent summary of the landmark compensation case *Northern Territory v Griffiths* [2019] HCA 7, see Geddes and McLachlan, 2023:37-42.

system to contribute significantly to social, cultural environmental and economic outcomes for First Peoples, businesses, organisations and communities; the importance of the future acts regime being appropriately designed for Australia's current and future social and economic development, in a way that respects the rights and interests of native title holders (ALRC, 2024a).

The Terms of Reference also require the ALRC to consider the Australian Government's agreement in principle with Recommendation 4 of the former Joint Standing Committee on Northern Australia in its report, "A Way Forward", released in October 2021 (ALRC, 2024a).

Recommendation 4 stated as follows:

The Committee recommends that the Australian Government review the Native Title Act 1993 with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime. This review should address:

- *the current operation of the future act regime and other relevant parts of the Act including s31 (right to negotiate), s66B (replacement of the applicant) and Part 6 (the operation of the NNTT)*
- *developing standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UN Convention of the Rights of Indigenous People (UNDRIP)*
- *'gag clauses' and clauses restricting Aboriginal and Torres Strait Islander peoples access to Commonwealth heritage protections should be prohibited*
- *making explicit the authority and responsibilities of PBCs and Representative bodies in relation to cultural heritage. (Parliament of the Commonwealth of Australia).*

In response to this recommendation, the Australian Government stated:

"The Australian Government is considering the most appropriate mechanism or mechanisms to review the native title issues identified in Recommendation 4. Some aspects of Recommendation 4, particularly the latter two dot points, are dependent on the future cultural heritage protection model and may be more appropriately dealt with in cultural heritage legislation rather than the Native Title Act 1993 (Cth). These matters are being considered through the co-design process which is currently being undertaken in partnership between the Australian Government and the First Nations Heritage Protection Alliance, as discussed in the 'Overarching approach' section." (DCCEEW, 2022:10).

In May 2025, the ALRC released a Discussion Paper (ALRC< 2025) responding to what the ALRC had heard following the release of an Issues Paper in November 2024 (ALRC, 2024b). Many consultees and submissions suggested improvements to the future acts regime in its existing form. Some of these suggested reforms are considered in the Discussion Paper. Others suggested a more drastic overhaul.

The options outlined in the Discussion Paper present a principled package of reforms that would address systemic as well as practical deficiencies in the current future acts regime. The suggested reforms aim to reform the structure and the substance of the future acts regime and to create a regime that can operate fairly and effectively to further the objectives of the *Native*

Title Act 1993 (Cth). If implemented, they would address problems in the future acts regime at both systemic and practical levels (ALRC, 2025).

The suggested reforms maintain several key features of the current future acts regime, including: the centrality of agreement-making; procedural rights afforded to native title parties and corresponding obligations of government parties or proponents, including a right to negotiate; the application of the non-extinguishment principle to future acts, with the exception of compulsory acquisition or surrender of native title by agreement; and compensation for future acts (ALRC, 2025).

Some of the key changes discussed include: a new pathway to future acts validity — presently referred to as ‘Native Title Management Plans’ (NTMPs) — which would operate alongside ILUAs and the generally applicable statutory procedures; reforms aimed at improving the efficacy, equality, and fairness of agreement-making processes; replacing some of the existing categories of future acts with an impact-based model for determining procedural requirements; and improved resourcing for Prescribed Bodies Corporate (‘PBCs’) (ALRC, 2025).

The ALRC (2025) maintains that while the potential reforms are presented as a package that would best be implemented together, they are not all interdependent. For example, reforms to the existing procedural requirements could be implemented in the absence of NTMPs. Similarly, NTMPs could be introduced without implementing an impact-based model for determining procedural requirements.

The deadline for the ALRC’s final report was initially November 2025, but this has been extended to 31 March 2026. While the matter of whether land use planning decisions amount to future acts under the *Native Title Act 1993* (Cth) was discussed with the ALRC, we will have to wait and see if this is clarified in the ALRC’s final report.

The ALRC advised on its website on 2 April 2026 that the Final Report of the [Review of the Future Acts Regime](#) was submitted to the Commonwealth Attorney-General, the Hon Michelle Rowland MP. The Australian Government will now consider the report, and must table it within 15 sitting days, at which point it will be made available to the public.

6.6 The Courts are easing the burden of proving native title

In April 2025, the High Court of Australia delivered its judgement in *Stuart v South Australia* and the Federal Court delivered its judgement in *Malone on behalf of the Western Kangoolu People v State of Queensland (No 6)*. And in December 2025, the Full Court of the Federal Court of Australia delivered its judgement in *Blucher on behalf of the Gaangalu Nation People v State of Queensland*.

In each of these cases, the Court was making judgements about the interpretation of S.223(1) of the *Native Title Act 1993* (Cth) and the existence of native title.

S.223(1) of the *Native Title Act 1993* (Cth) describes the expression of native title or native title rights and interests as meaning the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders;
- and

- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

Stuart v South Australia was an appeal to the High Court by the Arabana people who had been unsuccessful in their native title claim over a small area of approximately 150 km² in the vicinity of the township of Oodnadatta in South Australia. In this case, the principal issue was whether the primary judge correctly construed and applied the definition of "native title" in S.223(1) and whether "connection" with land or waters for purposes of s 223(1)(b) must be established by physical acts of acknowledgment or observance. The High Court said 'two enquiries are required by s 223(1): first, identification of the traditional laws and customs and the identification of the rights and interests possessed under those traditional laws and customs and, second, identifying the connection with land or waters by those laws and customs.' [Para 19]. And that the questions presented by the definition of native title in para (a) and (b) of S.223(1) should be on the *present* possession of native title rights and interests and the *present* connection of claimants with the land and waters in question (emphasis in original [Par 20]).

In *Malone on behalf of the Western Kangoulu People v State of Queensland (No 6)*. The Federal Court heard and determined separate questions relating to connection of the Western Kangoulu Peoples' application for a determination of native title over an area of land and waters centred around the town of Emerald in the Queensland Central Highlands. The Court found that subject to any question of extinguishment, the Western Kangoulu People possess the native title rights and interests in the claim area. According to Hughston (2025:4), this decision is important because 'it is only the second successful contested connection hearing on the mainland of the Eastern States' and 'for its elucidation of both the meaning and the use of the vexed word "society" in native title litigation.' This judgment therefore contains a clear and concise statement of the requirements of S.223(1)(a) and (b) of the *Native Title Act 1993 (Cth)* (Hughston, 2025:5).

Blucher on behalf of the Gaangalu Nation People v State of Queensland was an appeal against a negative native title determination (and related findings) over approximately 25,506 km² of land and waters broadly west and south-west of Rockhampton in Central Queensland. There were many points of contention with the primary judge's determination, primarily relating to the interpretation of s.223(1) of the *Native Title Act 1993 (Cth)*, including:

- Whether the primary judge, having found the appellant held rights at sovereignty over a large part of the claim area, erred in failing to find they did not have such rights in the remainder of the claim area.
- Whether the appellant continues to hold rights and interests under the relevant traditional laws and customs in the disputed area.
- Whether the appellant established maintenance of connection by the normative system they acknowledge and observe.
- Whether the primary judge erred in finding certain alleged apical ancestors were not Gaangalu.
- Whether the primary judge erred in exercising discretion to make a negative determination.
- Whether the primary judge erred by failing to consider whether the Gaangalu had continued to exist as a society.

- Whether the primary judge incorrectly understood Gaangalu to assert only the existence of a regional society of which they were a member.

Given this was a unanimous Full Federal Court decision, it may authoritatively dispatch the ‘society’ concept that arose from the High Court of Australia’s decision in *Yorta Yorta* in 2002.¹⁷ The decision will have broader application in three respects:

1. In relation to the normative laws and customs of the claim group, the Judges discouraged an emphasis on the concept of “society” rather than on the claim group’s relevant laws and customs [Paras 69,93 and 95].
2. In relation to loss and adaptation of the laws and customs of the claim group, the Judges emphasised that proving native title does not involve examining what culture may have been impacted/lost and then balancing that against what remains [Para 96].
3. In relation to connection, the Judges stated the requirement is that it be assessed against the present laws and customs [Para 181] and that it does not require current or regular physical use because ‘a spiritual connection can be sufficient’ [Para 183].

Hughston (2025) and the subsequent Blucher decision (December 2025) both point to a significant easing of the burden of proving native title. These are important developments that may make the determination of the claims over significant parts of Victoria easier for the claimants to prove.

¹⁷ I am grateful to John Southalan, for discussion expanding my thinking on this point.

A close-up photograph of a cluster of pink flowers with green buds. The flowers are in various stages of bloom, with some showing yellow stamens. The background is dark and out of focus.

07

Connections between
Treaty and Native Title
in Victoria

7. Connections between Treaty and Native Title in Victoria

Langton (2025) notes that with the recent Statewide Treaty, the backdrop to native title claims in Victoria has changed. As a consequence, Traditional Owners are now presented with the opportunity of developing a ‘dual track strategy’ of pursuing their native title claims through the Federal Court of Australia at the same time as negotiating a local Treaty with the State. Langton (2025) maintains this ‘speaks to both pragmatic calculation and deeper frustrations with the limitations of state-based processes.’

The three active native title claims over the most populous parts of Victoria, discussed above, show the potential for a broader shift among the Traditional Owner groups. That is, pursuing recognition of their native title rights and interests through federal legislation, before entering into individual Traditional Owner group treaty negotiations through state legislation. If their native title claims are successful, the native title holders (Traditional Owner group) will be consolidating their legal position (under Commonwealth law) and establishing clear foundations for future negotiations with the Victorian state government (Langton, 2025).

While Treaty negotiations are likely to yield some settlements and shape ongoing relationships, a positive native title determination under the *Native Title Act 1993* (Cth) provides a legal ‘bed-rock’ for recognition and a basis for negotiating outcomes to address the long-term impacts of colonisation. As Langton (2025) observes: ‘Rather than viewing Treaty and native title as competing pathways, the Wurundjeri demonstrate how these mechanisms can work in tandem to strengthen Indigenous legal positions and create multiple avenues for rights recognition.’

Wyatt (2026) maintains that because the *Native Title Act 1993* (Cth) has become embedded in state government management of land use, ownership and management of natural resources, it has enabled Traditional Owners to negotiate agreements regarding the use of their traditional country. Wyatt (2026) also maintains that the issues and relationships between First Peoples and the state can only be resolved with a broad political consensus. While that political consensus might have been damaged throughout the Voice campaign, opposition to native title has waned over time as governments and industry have come to realise the benefits of dealing with legally empowered Traditional Owners with cultural authority (Wyatt, 2026).

Wyatt (2026) believes the issue that looms largest for Australia is the outstanding compensation liability for impacts on native title rights and interests, and that Australia needs to find a way to resolve these liabilities outside of the court processes.

However, there are genuine concerns about the veracity of the native title system which have persisted since the early years of the native title era and are re-emerging. Depending on the circumstances, many Aboriginal people will not benefit from the native title system, as the *Yorta Yorta* case and many other native title cases clearly demonstrate (McLean, 2020).

Several anthropologists have long warned against the structuring of native title claims and determinations on the oversimplification of complex traditional structures and kinship relationships that continue to perpetuate ‘a convenient myth that there were and are discrete language-named tribes’ with control over discrete areas of land and waters (Sutton, 2001, 2012; Smith, 2000; Kwok, 2013 and Kwok, 2018 cited in McLean, 2020:217, 220). McLean (2020: 212) maintains that the native title system ‘has been tempered to accommodate the demands of non-Indigenous political, legal and economic structures to have simply defined groups and

consequent corporate identities' (i.e. the Prescribed Bodies Corporate (PBC), which he also asserts are 'nothing more than a modern version of the system of king plates of old'.

McLean (2020:218) believes the native title system should have evolved with 'a more nuanced understanding of the intertwined nature of traditional reciprocities, interdependencies and responsibilities of local groups to each other' and a better appreciation of the fact that 'each local group is dependent on multiple others to maintain both land and society in a fully vital condition.'

At the time McLean was writing, the momentum for treaty processes was well underway in several States and the two Territories, and he was hoping that a more progressive approach would be adopted. McLean (2020:213) also advocated for amendments to both the system of legal recognition of native title and the corporate system of PBCs to enable recognition by the Australian legal and political system of Aboriginal peoples' traditional laws and customs without the loss of their intrinsic and inherent community complexity.

Synot (2025) believes the native title system is bedrocked on two fundamental inequalities. First, 'it requires connection to Country that automatically creates a distinction between those that can prove connection and those that have otherwise been "washed away by the tide of history" as Brennan J found in *Mabo (No. 2)*' (Synot, 2025). Second, 'by way of its operation and basis in the common law, native title is structured around a hierarchy of unequal property rights and interests under the doctrine of tenure where its value is understood against competing interests of which it always loses out' (Synot, 2025).

While the High Court of Australia's decision in *Mabo (No. 2)* represented a promise of being able to overcome the racism and dispossession that underwrote the development of Australia, the native title system still formalises the result of 'that racist exclusion and dispossession as the threshold of recognition itself' (Synot, 2025). Which is why native title claims in our capital cities and regional centres are hard-pressed to have fruitful outcomes for all Aboriginal peoples with ongoing cultural and/or historical connections to those areas (Wensing and Porter, 2015).

Perhaps the underlying challenge is about the recognition of Aboriginal peoples' sovereignty as expressed by Jonas (2002, cited in Poelina et al, 2024). Jonas (2002) argued that Aboriginal sovereignty should not be seen as a threat to State sovereignty but rather as being interrelated with State sovereignty and as something of mutual benefit. Until this distinction is understood in the broader community, it will continue to face political and legal dead ends on the road to treaty (Jonas, 2002). However, like native title rights and interests and self-determination, Aboriginal sovereignty cannot be given by governments; it is something which Aboriginal people must 'claim, define and exercise' (Jonas, 2002, cited in Poelina et al, 2024).

The opportunity for amicable resolution of these matters is now more possible than ever, in Victoria at least, because of the juxtaposition of the treaty and native title processes. Of course, what the treaty and native title processes might yield in practical terms on the ground in Victoria remains to be seen and whether it can be tailored to also include all Aboriginal people with ongoing connections to and responsibilities for Country in towns and cities where the extinguishment of native title rather than recognition is particularly spatially intense.

Given the strategic connections between local Traditional Owner Treaties and native title determinations in Victoria, there is a strong possibility of some significant changes in land planning and management decision-making may well eventuate, especially in relation to Crown lands, National Parks and conservation reserves.

08

Recent changes to
the *Planning and
Environment Act 1987*
(Vic)

8. Recent changes to the *Planning and Environment Act 1987* (Vic)

As Wensing and Kelly (2024:54) observed up until these latest amendments to the P&E Act, the Act was relatively silent on direct engagement with Aboriginal rights and interests in land other than in relation to land that is subject to a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic) or specific provisions in the Victorian Planning Provisions (VPPs) that provide a relatively robust framework for ensuring Aboriginal heritage is considered in planning assessment processes.

In September 2023, the Victorian Government released *Victoria's Housing Statement* (State of Victoria 2023). The Statement was aimed at reforming Victoria's planning system to boost housing supply throughout the state; clearing the backlog of planning permits waiting to be approved and standardising rules to ensure decisions are made faster; and giving builders, buyers and renovators certainty about how long approvals will take and a clear pathway to resolve issues quickly if those timeframes aren't met (State of Victoria, 2023:9).

To date the reforms have included enacting the *Consumer and Planning Legislation Amendment (Housing Statement Reform) Act 2025* (Vic); amendments relating to planning panels; amendments relating to the Victorian Civil and Administrative Tribunal (VCAT), and a review of the *Planning and Environment Act 1987* (Vic) (P&E Act) to establish and clarify timeframes for decisions, and other planning reforms. The full suite of reforms has looked at the roles and responsibilities of everyone involved in the Victorian planning system, including councils, the Minister for Planning, and the Department of Transport and Planning.¹⁸

The other planning reforms have included substantial amendments to the Victorian Planning Schemes, aimed at streamlining planning approval pathways and introducing new zoning and overlay controls to enable increased housing densities in certain precincts and activity centres. There have also been other legislative amendments via the *Consumer and Planning Legislation Amendment (Housing Statement Reform) Act 2025* (Vic) to streamline planning permit decision-making and procedures before the Planning Panels Victoria and the Victorian Civil and Administrative Tribunal (VCAT) (King Wood Malleson (KWM), 2025).

In December 2025, the Victorian Parliament passed the *Planning Amendment (Better Decisions Made Faster) Bill 2025* (Vic) to implement reforms to the *Planning and Environment Act 1987* (Vic) (P&E Act). At the time of writing, the Bill has been passed by the Legislative Council but has yet to be given Royal Assent before it will come into effect.

The Bill makes several amendments to the P&E Act and consequential amendments to the *Land Acquisition and Compensation Act 1986* (Vic) and the *Subordinate Legislation Act 1994* (Vic). The amendments are aimed at implementing the Victorian government's policy objectives in its 2023 Housing Statement (State of Victoria, 2023), which includes support for the construction of 800,000 homes in Victoria over the next decade through a range of planning and land-use reforms.

¹⁸ An overview of the overall reforms can be found here: <https://www.planning.vic.gov.au/guides-and-resources/legislation-regulation-and-fees/updating-the-planning-and-environment-act>

This paper makes no judgment on the veracity of the reforms, other than in relation to the provisions in the Bill relating to native title holders, Traditional Owners and Registered Aboriginal Parties.

It is worth noting that prior to these amendments to the P&E Act made through the *Planning Amendment (Better Decisions Made Faster) Bill 2025* (Vic), native title holders and Registered Aboriginal Parties were not mentioned in the P&E Act. And there were only two significant references to Traditional Owner in the P&E Act as it related to the *Traditional Owner Settlement Act 2010* (Vic).

As I have stated elsewhere (Wensing, 2025b), the only trigger in the P&E Act in Victoria for Traditional Owners was in relation to Crown lands, as follows:

“... if the Crown land is subject to a Traditional Owner Recognition and Settlement Agreement (RSA) under the Traditional Owner Settlement Act 2010 (Vic), ... the State’s alternative to the Native Title Act 1993 (Cth) in Victoria. That trigger exists because the definition of ‘owner’ in the planning statute had to be amended to include the traditional owner group entity within the meaning of the Traditional Owner Settlement Act 2010 (Vic). While the change to the definition of ‘owner’ was a consequential necessity, the implication in the planning context is that where the State has struck an RSA with the relevant traditional owner group entity under the Traditional Owner Settlement Act 2010 (Vic), their rights and interests in the RSA with the State will be triggered under the planning statute if they will be affected by a Development Application (DA) under the planning statute. But in all other contexts, the Planning and Environment Act 1987 (Vic) is silent on the recognition and protection of Aboriginal and Torres Strait Islander peoples’ rights and interests” (Wensing, 2025b:6).

That situation has now changed.

The *Planning Amendment (Better Decisions Made Faster) Bill 2025* (Vic) amends the objectives of S.4(1) of the P&E Act to include the following:

- (c) *to recognise, protect and promote the rights, interests and values of traditional owners and respect their ongoing cultural, spiritual and custodial relationship to country, including land, sky and waters.*

S.4(2) of the P&E Act is also amended to insert the following:

- (3) *The objectives in subsections (1) and (2) are not set out in order of importance and are to be balanced against each other.*

In other words, none of the objectives are to be seen as having any more weight than any other, and that they are to be ‘balanced against each other’.

It appears that the insertion of the objective in s.4(1)(c) of the P&E Act seeks to mirror what Queensland and the ACT have done in amending their planning statutes to include better recognition of Aboriginal and Torres Strait Islander peoples’ rights and interests in their planning statutes.

In 2016, the Queensland government enacted a new *Planning Act 2016* (Qld) which requires any entity performing a planning function under the Act to perform their functions in a way that advances the purposes of the Act, which includes, among other things, ‘*valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition*’ (S.5(2)(d))

(Wensing 2018:172; Wensing, 2025b:9). The *Planning Act 2016* (Qld) is silent on how this provision can be implemented.

Following the enactment of the *Planning Act 2016* (Qld), the Queensland Government released two guidance documents in 2019 on how they see S.5(2)(d) being applied (Queensland Government 2019a and 2019b). While the Guidance notes contain some helpful advice, they state that S.5(2)(d) only applies where native title and/or Aboriginal or Torres Strait Islander cultural heritage are present. However, the *Planning Act 2016* (Qld) does not restrict the application of S.5(2)(d) to situations where native title and cultural heritage may exist or are present. The Guidance notes are not consistent with the *Planning Act 2016* (Qld) and are misleading (Wensing, 2025b:12).

In 2023, the Australian Capital Territory government enacted a new *Planning Act 2023* (ACT), which states that *‘the knowledge, culture and tradition of, and cultural and spiritual connections held by, the traditional custodians of the land’* are *‘integral to achieving the object of this Act’* (S.7(3)). But no further guidance is provided in the *Planning Act 2023* (ACT) on how that objective might be achieved.

The *Planning Act 2023* (ACT) also includes a provision whereby a land management practice which is undertaken in accordance with Aboriginal tradition and prescribed by regulation, is exempt from requiring development approval under s.145 of the *Planning Act 2023* (ACT). Under S.145(3) of the Act *‘Aboriginal tradition means the customs, rituals, institutions, beliefs or general way of life of the traditional custodians¹⁹ of the land.’* This latter provision is as it should be.

As I have stated elsewhere (Wensing, 2025b:11), the provisions in both the Queensland and Australian Capital Territory planning statutes are pertinent to Aboriginal peoples’ knowledge, culture and tradition and their cultural and spiritual connections to, and responsibility for, Country. The provisions in the Queensland *Planning Act* place an onus on all entities performing a planning function under the Act to show how they are valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition in the planning functions they perform under that Act. The provisions in the ACT statute fall well short of placing an onus on any entity performing a planning function under the Act to show how they are *‘valuing, promoting or protecting Aboriginal knowledge culture and tradition’*.

Similarly, the new provision in S.4(1)(c) of the P&E Act in Victoria falls well short of the similar provisions in S.5 of the *Planning Act 2016* (Qld), even though some of the wording or intent in the P&E Act is somewhat similar to the wording in both the Queensland and Australian Capital Territory *Planning Acts*.

But, like the Queensland and Australian Capital Territory planning statutes, the P&E Act remains silent on exactly how *‘the rights, interests and values of traditional owners’* can be *‘recognised, protected and promoted’*, and how *‘their ongoing cultural, spiritual and custodial relationship to country, including land, sky and waters’* can be *‘respected’*. This is discussed in more detail below.

What is remarkable about other changes to the P&E Act is the inclusion of ‘native title holder’, ‘Registered Aboriginal Party’ and ‘Traditional Owner group’ in specific provisions of the Act,

¹⁹ Noting that the term ‘traditional custodian’ is not defined in any Australian law.

ostensibly ensuring, for the first time, that they are directly consulted on proposed amendments to planning schemes.

The Bill amends S.3(1) of the P&E Act to include the following definitions:

- ‘*native title holder*’ has the meaning given by S.224 of the *Native Title Act 1993* of the Commonwealth
- ‘*registered Aboriginal party*’ has the meaning given by S.4(1) of the *Aboriginal Heritage Act 2006* (Vic)
- ‘*traditional owner group entity*’ has the meaning given by S.3 of the *Traditional Owner Settlement Act 2010* (Vic).

The nature of these three entities reflects the three ways in which Aboriginal people can gain formal recognition in Victoria (see **Appendix F** for more details).

The Bill amends the P&E Act to provide that native title holders, Registered Aboriginal Parties, and Traditional Owner group entities are notified of, and may participate in, strategic planning and planning permit application processes.

Relevant extracts from the Bill’s Explanatory Memorandum on the new provisions relating to native title holders, Registered Aboriginal Parties and Traditional Owner entities are reproduced in **Appendix J**. In particular:

- new S.18A relating to who a planning authority must consult in relation to low-impact amendments
- amended S.19 sets out the notice requirements for the preparation of an amendment to a planning scheme
- amended S.47 provides for the form of application permits
- new S.48AA provides that an applicant must give notice to a Registered Aboriginal Party for a prescribed area and sets out the details regarding traditional owner notices
- new S.48AAB provides that a Registered Aboriginal Party may provide their response to the applicant and the responsible authority
- amended S.60 sets out what matters must be considered by a responsible authority in deciding permit applications. Including any response to a traditional owner notice received under S.48AAB
- amended S.96C requires a planning authority to give notice of its preparation of an amendment to a planning scheme and notice of an application being considered concurrently with the amendment.

In the Victorian Government’s Statement of Compatibility with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in the Victorian Parliament, the Government states that, by specifically providing for First Peoples to be notified of, and participate in, planning scheme amendment processes, the Bill may engage the right to equality in S.8(3) of the Charter. The Victorian government is also of the view that these provisions constitute a special measure under S.8(4) of the Charter because they promote the rights of First Peoples under S.19(2) of the Charter (Victoria, Parliamentary Debates, 2025: 4824).

The Bill uses the term ‘traditional owner notice’ which is defined in S.3(1) of the principal Act as the meaning given by S.48AA. S.48AA states that before making an application for a permit, an

applicant must give notice to a Registered Aboriginal Party for a prescribed area (a Traditional Owner notice) if the land to which the application applies is in a prescribed area, and the application for a permit is of a prescribed class.

A Traditional Owner notice must be given no less than the prescribed time before the date the application for the permit is made, and must include the contact details of the applicant, the responsible authority to whom the application will be made, and a statement that the Registered Aboriginal Party may (if there is no approved cultural heritage management plan) indicate whether the Registered Aboriginal Party believes an approved cultural heritage management plan is required; and make any other comment on the application and any other prescribed information. In this section, the term "approved cultural heritage management plan" has the same meaning as in S.4(1) of the *Aboriginal Heritage Act 2006* (Vic).

It is noteworthy that the new S.48AAB provides that a Registered Aboriginal Party that is given a Traditional Owner notice may provide their response to the applicant and the responsible authority, and that if a Registered Aboriginal Party does not provide a response, it does not mean that the Registered Aboriginal Party consents to the approval of the application. This provision makes it clear that if a Registered Aboriginal Party does not respond to a Traditional Owner notice, it cannot be assumed that they support the proposed planning scheme amendment or the accompanying application for amendment of the planning scheme. This provision is as it should be.

This is the first time in Australian planning law that native title holders, Registered Aboriginal Parties and Traditional Owner group entities have been included in the specific provisions relating to the preparation and amendment of planning schemes and in planning permit application processes.

While these new provisions are commendable, they raise some important questions:

- Were First Peoples (in particular, native title holders, Registered Aboriginal Party entities and Traditional Owner entities) consulted about these proposed changes to the P&E Act?
- What was their response? Did they support the changes? Is that how they wanted the Act to be amended?
- Will the native title holders, Registered Aboriginal Party entities and Traditional Owner entities be appropriately trained in understanding the P&E Act and adequately resourced to participate effectively in these planning processes?
- How are the provisions requiring consultation with native title holders, Registered Aboriginal Parties and Traditional Owner entities in the amended P&E Act related to the objective in S.4(1)(c) of the P&E Act?

What is not clear in the Act or in the Explanatory Memorandum, is the extent to which the new objective in S.4(1)(c) of the amended Act '*to recognise, protect and promote recognise, protect and promote the rights, interests and values of traditional owners and respect their ongoing cultural, spiritual and custodial relationship to country, including land, sky and waters*,' should form the basis for decision making in the processes where there are references to native title holders, Registered Aboriginal Party entities or Traditional Owner entities.

The risk is that the amended Act provides prospects for '*recognising, protecting and promoting the rights, interests and values of traditional owners and respect their ongoing cultural, spiritual*

and custodial relationship to country, including land, sky and waters', but there are no provisions in the amended Act to ensure that the outcomes of the various planning processes will in fact be able to deliver on this promise.

If native title holders, Registered Aboriginal Parties and/or Traditional Owner entities can't see any direct connection between being involved in the development or amendment of planning schemes and the issuing of permits resulting in the recognition, protection and promotion of their rights and interests, then they are unlikely to respond with much enthusiasm. Their interest and engagement will wane over time.

What benefits these new provisions might deliver for native title holders, Registered Aboriginal Parties and Traditional Owner entities consistent with the new objective in S.4(1)(c) of the P&E Act remains to be seen.

In the meantime, it is assumed that the Ministerial Good Practice Guidelines for Engaging with Aboriginal Victorians (MGPGs) under S.87 of the *Local Government Act 2020* (Vic) will be updated to accommodate the new provisions in the P&E for engagement with native title holders, registered Aboriginal parties and traditional owner entities (Wensing and Kelly, 2024:55, 72).

A close-up photograph of a plant with several upright stems. The stems are covered in small, fuzzy, yellow and brown flower heads. The background is dark and out of focus. The text '09' is overlaid in the top left corner.

09

The need for parity

9. The need for parity

While we do not yet have a clear indication of what the outcomes of Treaty and native title determinations and the recent changes to the P&E Act may mean in practical terms for land planning and management on the ground, we cannot ignore the fact that in Victoria, these processes are underway and are inextricably inter-linked.

In the case of Victoria, the Yoorrook Justice Commission found that Victoria has an appalling history of dispossession and denial of its original peoples, who owned and occupied these lands for thousands of years before white settlers arrived (Yoorrook Justice Commission, 2025a).

To paint a simple picture, prior to English intrusion in 1788, Aboriginal and Torres Strait Islander peoples owned, possessed, and enjoyed *all* of Australia, including its adjacent islands and waters. By 1965, they owned none of it and were excluded from most of it (Wensing, 2019:68-69). During this period, Aboriginal and Torres Strait Islander populations were decimated. What were healthy populations spanning many thousands were reduced to mere hundreds, or less. In southern Victoria, Aboriginal groups were reduced to a very small number of survivors (Attwood, 2009; Boyce, 2013; Wensing and Williamson, 2025:217). This erasure of Aboriginal populations on the mainland of Australia resulted in the radical transformation of Australia's land and waterscapes (Yoorrook Justice Commission, 2025a). It is incumbent upon all of us to come to terms with this reality.

The Yoorrook Justice Commission (2025c:125) in its Third Interim Report (Volume 2) concluded that the entire wealth of the State of Victoria comes from the theft of First Peoples' lands, waters and resources and that Aboriginal people were excluded from its economy, could not own land and were systematically denied education and employment. The Yoorrook Justice Commission noted that the State, churches and private landowners have all profited and continue to profit from the atrocities of dispossession. This has resulted in persistent economic disadvantage and intergenerational poverty.

In relation to the three dominant churches in Victoria, the Yoorrook Justice Commission found that the Catholic, Anglican and Uniting Churches currently own about 677 hectares of land across Victoria and that in the last 10-15 years they have benefited to the tune of hundreds of millions of dollars through the sale of church or parish lands. Despite hearing how the Churches have benefitted from First Peoples' stolen lands, none of those who appeared before the Commission on behalf of the churches had active plans to notify or consult with Traditional Owners in respect of the sale of church or parish lands (Yoorrook Justice Commission, 2025c, 126-129).

Consequently, the Commission made the following recommendations:

Recommendation 18:

The Victorian Government must amend the State Aid to Religion Abolition Act 1871 (Vic) to introduce a mechanism for case-by-case consideration and approval of proposed land sales, which includes consideration of:

- a. *Whether relevant Traditional Owners have been consulted in respect of the sale;*
- and*

- b. *Whether it is proposed that a portion of the proceeds from the sale be shared with the Traditional Owners of that land.*

Recommendation 19

Consistent with their commitments to First Peoples, Churches should identify, as a priority, opportunities within the State of Victoria to:

- a. *Return land acquired for little or no consideration, or reserved by the Crown or Governor for Church purposes, to Traditional Owners of that land; and*
- b. *Share a portion of proceeds from the future sale of land of the nature described in (a) with Traditional Owners of that land (irrespective of whether it is subject to the State Aid to Religion Abolition Act 1871 (Vic)) (Yoorrook Justice Commission, 2025c:135).*

To date, this recommendation has not been acted upon.

The Aboriginal and Torres Strait Islander peoples of Australia have for several decades, and perhaps always, been openly stating the need to sit down and negotiate issues of sovereignty, self-determination and land rights through a treaty or treaties in a civil and peaceful way (Australian Institute of Aboriginal and Torres Strait Islander Studies 1988, 2003; Wensing 2019:107; Williams and Hobbs 2020, Wensing, 2021b:99). As discussed above, Victoria now has a statewide Treaty in place with the necessary architecture for further Traditional Owner group level treaties. These developments present First Peoples, the State and third parties with the opportunity to explore the possibilities for parity between two different approaches to land planning and management and for the integration of First Peoples' knowledges and connections to Country in land planning and management systems with their free, prior and informed consent (Australian Human Rights Commission, 2011:151).

SGS Economics and Planning's research into Aboriginal and Torres Strait Islander engagement in the Australian Government's National Environmental Science Program (NESP) found that as Traditional Owners of their Country, Aboriginal and Torres Strait Islander people cannot ignore their custodial responsibilities of caring for Country because it is deeply embedded in their law, lore and culture (Wensing and Callinan, 2020). As Langton and Corn (2023:36) elaborate, 'Keeping law is about more than just following rules – it is a way of living that honours the sacred relationships Indigenous people hold with their ancestors and their homelands.'

From an ethical perspective, a critical re-imagining is required. By teasing out the spaces between two different systems of relationships to land and its resources, it is possible to develop a more coherent policy framework for coexistence based on parity, mutual respect and understanding, and for reciprocity and justice (Wensing, 2019:5-6, 309-361).

The first step is to shift our patterns of thought and the way we conceive our relationships with place (Wensing and Williamson, 2025:226). The story begins by acknowledging and accepting that First Peoples have ongoing connections to, and responsibilities for Country under their law and custom. Thomas (2025:192) maintains that 'In building relationships with non-Aboriginal society, many Aboriginal people wish to see non-Aboriginal society adopt ways of operating on the Australian continent that have served us for millennia and remain the key to a positive future'.

A shift is required from an extractive relationship with land and resources to a reciprocal relationship where Indigenous sovereignty and cultural knowledge are not added as

afterthoughts, but rather are recognised as central pillars of sustainability and justice (Kennedy and O'Donnell, 2026:7). And where Country 'can be restored to its rightful place as a living, storied and sovereign entity' (Kennedy and O'Donnell, 2026:4). In an urban policy context, this is explored in more detail in Davidson et al (2024) and in Wensing and Kelly (2024).

A just integration of Aboriginal (and Torres Strait Islander) peoples' customary rights in land planning and management is possible. What follows is drawn from a conference presentation by Wensing and Small to the 10th International Urban Planning and Environment Association Symposium at the University of Sydney in July 2012, and a recent book chapter by Wensing and Williamson (Wensing and Small, 2012; Wensing and Williamson, 2025:226).

Native title is considered to have been extinguished by governments, whereas customary title is not something for Western governments to decide if it has been extinguished or not.

Along with my colleagues, I have argued that Western law exists below customary law and must respect it, except in cases where it might cause significant conflicts with the Western evaluation of the common good. Those conflicts can be interpreted quite widely to include the national economic good as an aspect of the common good, but with a prudential limit as to how far land use control can intrude on customary law priorities. The further the limit is pushed by Western planners, the less defensible it becomes. What this means in practice is that where customary ownership is established, there should be minimal intrusion by Western planners (Wensing and Small, 2012; Wensing and Williamson, 2025:226).

On the flip side, where customary title is considered to have been extinguished by the Crown's sovereign acts, such as the grant of freehold title, there is a strong argument for the recognition of a residual customary right pertaining to land use planning and the approval of additional land use rights. This follows from the conceptualisation of planning in positive terms as the granting of land use rights that were previously withheld from freehold and were therefore the reason that freeholders were not able to exercise the usual right of ownership, which is the power to choose the highest and best use as they might perceive it to be (Wensing and Williamson, 2026:226).

Spiller (2022) argues that under planning laws that operate throughout Australia, the Crown always retains ownership of development rights on land. They don't automatically attach to freehold or most other forms of land title granted across Australia. Rather, they must be secured through the planning system, and the Crown may give or withhold development permission at its absolute discretion. Spiller (2022) also maintains that land may be zoned for certain purposes and development types, and that it may be traded privately in anticipation of development rights foreshadowed by these plans. But, until a permit is issued, no compensable right exists. The Crown may also change the planning rules at any time, again at its absolute discretion (Spiller, 2022).

If the Crown has not alienated certain property development rights, Spiller (2022) argues that, as a logical consequence of the High Court of Australia's decision in *Mabo (No. 2)*, these rights default to their original owners, or, at the very least, the original owners have a clear claim to co-sovereignty over those rights. Spiller (2022) also maintains that every time a development approval is issued, and the associated uplift in land value is captured by governments, or far more commonly by private land holders, one could say that the injustice embedded in *Terra Nullius* (land belonging to no one) is given fresh voice.

Spiller (2002) maintains that not much would change if the custodianship of development rights by First Peoples were factored into planning systems. Spiller notes that development rights are usually capitalised as an uplift in residual land value after the proponent has allowed for all costs, including their requirement for profit and risk. So long as enough of the residual land value is shared with the holders of development sites to maintain their incentive to sell the land to bona fide developers, we should, in principle, get the same quantum and composition of investment in city building that we would otherwise have seen under current arrangements (Spiller, 2022).

Furthermore, Spiller (2022) maintains that the distributional effects would be enormous because the capitalised value of development rights captured by private landholders and traders as windfalls would be shared with First Peoples. This would be somewhat similar to the Lease Variation Charge (LCV) in the ACT's leasehold system, which seeks to capture a fair proportion of the uplift in land value arising from the transfer of new development rights.

As Wensing and Small (2012) and Wensing and Williamson (2025) have argued, where freehold has extinguished most customary rights, the right to grant the highest and best land use that has been withheld via the mechanism of land use planning ought to be conferred on the customary owners. Given the state's role in regulating for the common good, this would suggest a dual right of regulation, split between the customary owners and the state represented by planners from various levels of government. Land use planning is exercised in practice as a power of restraint applied to lesser title holders; it acts as a right of veto exercised by the state against lesser title holders, i.e. freeholders. Wensing and Small (2012: 11) argue that it is possible to include customary owners in this framework and to extend to them a comparable right of veto.

Wensing and Williamson (2025:227) argue that the right to refuse an innovation in land use to a freehold title holder would take nothing from that landholder that is currently privately owned. A freehold landholder possesses a bundle of rights to land, including a regime of land use rights set via particular planning and environmental management controls that apply or are in effect at a particular point in time. Changes in circumstances, such as population growth or infrastructure development, may suggest a higher potential use, but until that is permitted by the planning system, such a higher use is merely a potential possibility and not part of the bundle of rights enjoyed by the freehold landholder. Hence, there is no obligation for permission to be forthcoming, nor can any harm result unless it can be shown that a particular landholder has been treated inconsistently compared to others. Zoning regimes routinely bind land to lower uses than landholders may have anticipated and consist of no more than the state's decision not to gratuitously grant additional land-use rights to particular landholders. For these reasons, the inclusion of customary owners in land use planning and decision-making processes is consistent with the operation of the planning system as well as an expression of the natural relationship between customary and Western law (Spiller, 2022).

The significance of including customary owners in this way would be considerable. It would respect their inalienable connection to the land in a meaningful way by returning to them one of the natural rights of genuine ownership, that is, the right to determine the use of a thing. It would fit well within the hierarchy of land rights first identified in *Mabo (No. 2)* while not disturbing the rights of existing freehold landholders. The practice of undisturbed exclusive occupation that is more focal to Western people would not be threatened, along with the convention of freehold title itself (Wensing and Williamson, 2025:227).

Wensing and Small (2012:12) conclude that by allowing Indigenous Australians (as the traditional owners of the land) to have the right of veto in land use planning, no right is being removed from Western freehold landholders. Indigenous Australians have a considerable tradition of caring for the land with a long-term view and a long history as prudent stewards of their land and waters, which suggests that their exercise of such powers would be prudent and in the interests of the community, especially in the longer term (Wensing and Small, 2012:12). Their perspectives can only add to the quality of planning decisions (Wensing and Williamson, 2025:228).

Arguably, First Peoples' rights, interests, knowledges, values, needs and aspirations should always be taken into consideration in land planning and management decision-making if we are to move away from continuing to aggravate the wrongs of the past and toward a better future for all.

As Wensing and Williamson (2025:232) conclude 'The recognition of Indigenous Australian's underlying ownership of Australia under their law and custom is not intended to supplant or eliminate the state, but rather to reinstate the right of Indigenous Australians to determine what happens on their ancestral lands and to share in its productive benefits.'

10

Engagement and
consultation are not
the same



10. Engagement and consultation are not the same

Too often, engagement is seen as consultation and as a one-way street of taking information from First Peoples. That is, not walking together to restore trust and reciprocity. Without reciprocity, it ‘is just another form of colonisation’ and ‘violence wrapped in policy’ (Baart, 2025a). Baart (2025a) asserts that ‘true engagement means involving community before the first decision is made, letting go of power and control, and being prepared to be shaped, changed, and redirected’.

Engagement is different from consultation and, importantly, includes building relationships based on trust from which mutual respect and integrity can flow (Wensing, 2025d:107).

Effective engagement with First Peoples works best in a framework that respects their governance and decision-making arrangements, their capacity to engage, and supports their development aspirations (Hunt, 2013), consistent with the principles of self-determination and free, prior and informed consent in the UN *Declaration on the Rights of Indigenous Peoples* (UN, 2007) and the principles of Indigenous Data Governance and Sovereignty (Wensing, 2025d:76-78).

Engaging effectively and successfully with First Peoples requires:

- an appreciation of the historical, social, cultural and political complexity of their specific context
- active participation from the earliest stage of defining the problem to be solved and defining aspirations, through to implementing the program and evaluating the results
- long-term relationships of trust, respect and honesty, as well as accessible and ongoing communication and clarity about roles and responsibilities
- genuine efforts to share power, including through negotiated agreements
- clarity about the purpose of and scale for engagement and appropriate timeframes
- attention to strengthening governance and capacity with good leadership, and
- negotiation of clear and agreed outcomes and indicators of success with monitoring and evaluation processes that meet each party’s needs (Hunt, 2013).

The development of respectful and trusting relationships is paramount to success (Wensing and Callinan, 2020:133). This takes time, people with the right skills and approaches, and good communication and leadership by all parties. Other essential considerations include ‘clarity about processes, roles and responsibilities, mutually agreed outcomes, the steps to achieve them and a willingness to share responsibility for progress’ (Hunt, 2013:33).

The notion of co-design and co-production presents opportunities for a deeper form of engagement (Alderton-Johnson, 2024). Co-design and co-production involve a distinctive form of commitment to collaboration between key parties, working as partners from inception through design, analysis, production and to delivery of mutually useful and useable outputs (Holmes, 2011:21). However, such approaches to engagement are not without their challenges—including the need for leadership, mutual respect, and trusting relationships; a willingness to share power; reshaping accountabilities and aligning organisational structures;

an organisational culture that supports such ways of working; and better evaluation of what works (Holmes, 2011:22–26; Hunt, 2013:6).

Baart (2025b) maintains that walking together is not a linear process, but rather ‘a constellation of behaviours’ – including changing habits, sharing power, and transforming the way First Peoples, governments and others work together rather than in isolation – and occurring in such a way that each behaviour strengthens the other. Walking together includes:

- Deep listening before solutioning — resisting the rush to fix what we haven’t taken time to understand.
- Building capability, not dependency — shifting from doing ‘for’ communities to creating the conditions for communities to lead.
- Sharing decision-making, not just knowledge and stories — because a voice without power is still marginalisation.
- Creating cultural safety intentionally — not by accident, not by assumption, but through deliberate practice.
- Designing for repair, not perfection — because relationships, not outputs, determine impact.
- Making the invisible patterns visible — naming what sits beneath the surface: bias, fear, avoidance, cultural load, fragility, silence (Baart, 2025b).

Over almost three decades of experience working with First Peoples all over Australia, I have learnt that the following factors are key to effective engagement:

- understand the history of the people and/or community
- get to know the local and regional context and the circumstances and conditions of the people and/or community
- know the proper channels for making contact with the people and/or community
- identify who the key players are and their roles in the community
- identify the people with rights and interests in a place, especially those with cultural authority to speak for Country
- also identify other First Peoples with connections to a place and those from surrounding areas
- don’t be afraid to ask questions and listen carefully to what you are being told
- respect local decision-making structures and/or processes
- establish a baseline understanding of the community’s cultural law, customary rights and beliefs and their cultural and intellectual property and data sovereignty requirements
- conduct an analysis and mapping exercise, where possible, together with the subject community, to identify the participants and potential beneficiaries
- identify any other stakeholders who may need to be informed or involved, and clarify any decision-making role they may or may not have
- find out whether permission may also be required from other organisations or governments

- always respect the fact that you are dealing with other people’s knowledge
- always adhere to local protocols (Wensing, 2025b:106).

The Engagement Institute (undated) has produced a useful resource on principles and guidelines for engaging with Aboriginal and Torres Strait Islander communities.

A large, dense bush of bright yellow flowers, possibly a Mimulus or similar species, fills most of the frame. The flowers are small and numerous, creating a textured, golden appearance. The background is a clear, solid blue sky. The overall lighting is bright, suggesting a sunny day.

11

Conclusion: A
precautionary
approach

11. Conclusion: A precautionary approach

At this point in time, it is difficult to make any specific recommendations with respect to how land planning and management in Victoria needs to change as a consequence of the Statewide Treaty, native title outcomes and legislative reforms. That's more a matter for First Peoples, the State and other third parties to work on, and especially in the context of any further Statewide or local Traditional Owner group treaties.

At the very least, a precautionary approach is required. As follows:

- Stay tuned to Treaty and native title developments in Victoria.
- For any land planning and management projects in Victoria, identify the relevant Traditional Owner Corporation(s) (TOCs) for your area of interest/relevance. Not all parts of Victoria have a TOC. Where there isn't one, it may be necessary to seek advice from First Nations Legal and Research Services (the appointed Native Title Service Provider for Victoria) as to who the Traditional Owners may be for a particular area of land or waters.
- Be familiar with the relevant TOC's corporate plans and their on-Country documents. These documents are usually available on the TOC's website. Some TOCs have more resources than others and have their key documents publicly available online. Developing an understanding of the content of these documents will assist in better understanding the nature of First Peoples' rights and interests and their connections to and responsibilities for Country.
- Learn about their history and community. Get to know the local and regional context and the circumstances and conditions of the people/community. Find out the proper channels for making contact, identify who the key players are, who has the right to speak for Country. Identify other people with connections to the area. Make contact with the right people and don't be afraid to ask questions.
- Be on the lookout for collaborative opportunities with First Peoples and for walking together to develop a better understanding of each other's world views and values.
- Land planning and management in urban areas will always involve First Peoples' ongoing connections to and responsibilities for Country. While Aboriginal cultural heritage considerations are mandatory in almost all contexts²⁰ It is now necessary to take a much wider view. For example, how planning can consider First Peoples' characteristics of Country, cultural landscapes, influence First Peoples' rights, interests, knowledges, values, needs and aspirations, and economic development opportunities (Dalheim, 2023:91, 351, 361, 406). Asking about places of cultural heritage significance may only comprise small pieces of their overall connections to and responsibilities for Country.

Engagement with First Peoples must prioritise self-determination and cultural safety to ensure meaningful participation and equitable outcomes. Such engagement must therefore involve reciprocity with two-way learning, respect for the rights and regulations of the host community and accountability for outcomes (Chilisa, 2020:5). This requires significant investment of time

²⁰ See for example, *Wadawurrung Traditional Owners Aboriginal Corporation v Greater Geelong CC & Others* [2022] VCAT 482.

and resources, but is nonetheless crucial for building trust, fostering collaboration, and achieving genuine advancements and positive outcomes for all concerned.

For other jurisdictions, it is important to understand that the underlying circumstances with respect to treaty and native title are not the same as in Victoria. Nevertheless, it is still important to get to know the Traditional Owner group or groups, and to be familiar with their on-Country documents (where they are publicly available) for the area of interest.

Perhaps Justice Owen of the Supreme Court of Western Australia made a very pertinent observation very early in the native title era: While evidence would still be sought from anthropologists and the significance of their evidence would still be given due regard, ‘the best evidence lies in the hearts and minds of the people most intimately connected to aboriginal [sic] culture, namely the aboriginal people themselves’ (*Ejai v Commonwealth*, page 9).

On a final note, it is important to understand that there are two distinct systems of law and custom in Australia, those of the Aboriginal and Torres Strait Islander peoples, and those brought to Australia by the British colonisers in 1788 (Reynolds, 1992:7; Wensing and Sheehan, 1997:1),²¹ On any measure of justice, they should be seen as being at least equal in status and value. In fact, many prominent Aboriginal and Torres Strait Islander people from opposite ends of Australia have said that they want parity between the two distinct systems of law and custom relating to land and waters. As evidenced by the following statement from David Mowaljarlai, an Elder of the Ngarinyin peoples in Western Australia: ‘*There are two laws. Our covenant and white man’s covenant, and we want these two to be recognised ... We are saying that we want them to be equal.*’ This is but one of many such statements by Indigenous Australians (Wensing, 2019:1).

With the present circumstances in Victoria, there is a very real opportunity to realign land planning and management systems to explore possibilities for commensurability and constructive alignment based on parity, mutual respect, and justice.

²¹ It is acknowledged that neither of the two systems of laws and customs are of a unitary nature. There are many clans, tribes or groups or nations of Aboriginal and Torres Strait Islander peoples in Australia, each with their own distinct laws and customs. The Australian nation is a federation of six States and two Territories. Each with their own distinct laws and customs, and land title peculiarities.

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Appendix A: *Statewide Treaty Act 2025 (Vic)*: Preamble

Preamble

The State of Victoria acknowledges the unique status of First Peoples and their unceded connection to Country, history, cultures and enduring strength.

The Parliament of Victoria, in accordance with S.1A of the **Constitution Act 1975**, recognises First Peoples of Victoria, as the original custodians of the land on which the colony of Victoria was established—

- (a) have a unique status as the descendants of Australia's first people; and
- (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and
- (c) have made a unique and irreplaceable contribution to the identity and wellbeing of Victoria.

The Traditional Owners of Country in Victoria have a unique role in their ongoing custodianship of, and connection to, Country and have authority to speak for Country.

First Peoples and Traditional Owners of Country in Victoria maintain that their sovereignty has never been ceded.

The historic wrongs and ongoing injustice of colonisation have resulted in unacceptable levels of discrimination, disadvantage and intergenerational trauma for First Peoples. These acts of injustice must not continue or be repeated.

The State of Victoria commits to not repeating past injustices.

Past and existing laws have not been able to fully recognise the inherent rights of First Peoples or address disadvantage and trauma.

It is acknowledged that since colonisation Traditional Owners of Country in Victoria have fought for and won back some of the rights and status they hold under Aboriginal Lore and Law. These rights have been shaped by First Peoples' Ancestors and are a foundational pillar in the ongoing journey to self-determination.

This Act builds on the ***Advancing the Treaty Process with Aboriginal Victorians Act 2018*** and the ***Treaty Authority and Other Treaty Elements Act 2022*** and is the product of negotiations on the first Statewide Treaty between First Peoples in Victoria and the State, as well as the journey to Treaty that preceded it.

To rectify the consequences of past injustices, this Act gives effect to the first Statewide Treaty to enact special measures for securing advancement and protection of First Peoples. It recognises and restores the inherent rights of First Peoples in Victoria, including the right to self-determination, and acknowledges First Peoples' unique status and connection to Victoria's land and waters.

This Act also builds on the pivotal work of the Yoorrook Justice Commission and acknowledges the importance of ongoing truth-telling.

This Act creates a renewed relationship between First Peoples and the State of Victoria to bring about improved and enduring outcomes for First Peoples and a more just and prosperous future for First Peoples.

To ensure First Peoples' equal enjoyment of human rights and fundamental freedoms, Gellung Warl embodies and advances the right to self-determination of First Peoples to come together politically and make collective decisions. As such, Gellung Warl represents the diversity of First Peoples, being Traditional Owners of Country in Victoria and First Peoples living in the lands and waters now known as Victoria.

The first Statewide Treaty, along with future Treaties, will deliver practical outcomes for First Peoples to promote social cohesion, reconciliation and address disadvantage for the benefit of all Victorians. Future Treaties will continue to advance and restore the inherent rights of First Peoples and honour First Peoples' Ancestors and Elders.

The State recognises the importance of this Statewide Treaty and future Treaties proceeding in a manner that is consistent with the principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples, including free prior and informed consent. By continuing to consult and cooperate in good faith, the State will endeavour to take each step forward in the Treaty era together with Traditional Owners of Country in Victoria and First Peoples.

With this Act, it is acknowledged with pride that future generations of Victorian children will grow up in a State shaped by Treaty, truth and justice. Treaty imposes mutual obligations on Gellung Warl and the State of Victoria to create and uphold co-operative arrangements to ensure laws and practices in Victoria benefit and create a better future for all Victorians.

The full statute can be found here:

<https://www.legislation.vic.gov.au/in-force/acts/statewide-treaty-act-2025/001>

Appendix B: *Statewide Treaty Act 2025* (Vic): Parts and Schedules

The long title for the Bill for this Act was:

"A Bill for an Act to establish a First Peoples' representative and deliberative body named Gellung Warl, to amend the **Advancing the Treaty Process with Aboriginal Victorians Act 2018** and the **Treaty Authority and Other Treaty Elements Act 2022**, to consequentially amend other Acts and for other purposes."

The **Statewide Treaty Act 2025** was assented to on 13 November 2025 and comes into operation as follows:

- Ss.1–8, 190–200, 229 on 14 November 2025: S.3(1).
- Ss.9–189, 201–228, 230–299 on 1 May 2026: S.3(2).

The Parts and Schedules in the *Statewide Treaty Act 2025* (Vic) are listed below. Each Part contains several Divisions and some Sub-Divisions, totalling 246 pages.

Part 1—Preliminary

Part 2—Gellung Warl

Part 3—The First Peoples' Assembly of Victoria

Part 4—Powers to make substantive rules and internal rules

Part 5—First Peoples' Assembly guidelines and standards and statutory appointments

Part 6—Election of general members and appointment of reserved members

Part 7—Addresses and reports to Parliament

Part 8—Representations and advice to State government

Part 9—Nginma Ngainga Wara

Part 10—Nyerna Yoorrook Telkuna

Part 11—Information sharing and confidentiality

Part 12—Financial and annual reporting

Part 13—Standards of Conduct

Part 14—Larbargirrar gnuurtak tulkuuk (community answerability)

Part 15—Complaints

Part 16—Dissolution of First Peoples' Assembly and election and appointment

Part 17—Procedure for amending this Act

Part 18—Transitional provisions—transitional elections

Part 19—General transitional provisions

Part 20—Consequential amendment of the Advancing the Treaty Process with Aboriginal Victorians Act 2018 and the Treaty Authority and Other Treaty Elements Act 2022

Part 21—Amendment of other Acts

Schedule 1—Content and subject matter of internal rules other than electoral rules

Schedule 2—Content and subject matter of electoral rules

Schedule 3—Content and subject matter for First Peoples' Assembly guidelines and standards

Schedule 4—Persons or bodies to whom Nginma Ngainga Wara may refer matters

The full statute can be found here:

<https://www.legislation.vic.gov.au/in-force/acts/statewide-treaty-act-2025/001>

Appendix C: Definition of the term ‘Traditional Owner’ in Victoria

The term ‘Traditional owners’ is defined in s.7 of the *Aboriginal Heritage Act 2006* (Vic) as follows:

7 Traditional owners

- (1) For the purposes of this Act, a person is a traditional owner of an area if—
 - (a) the person is an Aboriginal person with particular knowledge about traditions, observances, customs or beliefs associated with the area; and
 - (b) the person—
 - (i) has responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area; or
 - (ii) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for significant Aboriginal places located in, or significant Aboriginal objects originating from, the area.
- (2) For the purposes of this Act, a person is a traditional owner of Aboriginal ancestral remains if the person is an Aboriginal person who—
 - (a) has responsibility under Aboriginal tradition for the remains; and
 - (b) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for the remains.
- (3) For the purposes of this Act, a person is a traditional owner of a secret or sacred object if the person is an Aboriginal person who—
 - (a) has responsibility under Aboriginal tradition for the object; and
 - (b) is a member of a family or clan group that is recognised as having responsibility under Aboriginal tradition for the object.

The term ‘Traditional owner group’ is defined in s.3 of the *Traditional Owner Settlement Act 2010* (Vic) as follows:

- ‘**traditional owner group** in relation to an area of public land, means—
- (a) a group of Aboriginal persons who may authorise (within the meaning in section 251A of the Native Title Act) the making of an indigenous land use agreement with the Minister, on behalf of the State—
 - (i) for the purposes of the settlement of any application of a kind listed in the Table to section 61 of the Native Title Act or in which the group agrees not to make an application of that kind; and
 - (ii) that is capable of being registered under section 24CK or 24CL of the Native Title Act; or
 - (b) if there are native title holders (within the meaning of the Native Title Act) in relation to the area, the native title holders; or

- (c) in any other case, a group of persons who are recognised by the Attorney-General, by notice published in the Government Gazette as the traditional owners of the land, based on Aboriginal traditional and cultural associations with the land;’

And:

‘traditional owner group entity, in relation to an area of public land, means—

- (a) a corporation within the meaning of the Corporations (Aboriginal and Torres Strait Islander) Act 2006 of the Commonwealth; or
- (b) a company limited by guarantee that is registered under the Corporations Act; or
- (c) a body corporate—
that a traditional owner group for the area of public land has appointed to represent them in relation to that area, for the purposes of this Act;’

And:

‘traditional owner rights, in relation to a recognition and settlement agreement, means the traditional owner rights recognised in the agreement;’

Appendix D: Victoria's first Statewide Treaty: Preamble

Preamble

The place we now call Victoria holds the oldest living cultures on Earth – a truth that belongs to all Victorians and a legacy to uphold with pride. Victoria today is shared by many cultures, each adding to the richness of its story. One of Victoria's greatest strengths is its courage to face the truth – to listen with open hearts, and to move forward with honesty.

Yet the relationship between First Peoples and the State of Victoria has been profoundly shaped by colonisation and its enduring harm. Our shared history bears the weight of injustice, dispossession, disruption of Country and acts that sought to erase First Peoples and silence cultures. The Yoorrook Justice Commission revealed how deeply this pain and trauma runs – and how it continues to shape lives, families, and communities today.

We stand together committed to a better future – one that is just, fair, and equitable, and honours the rightful place of First Peoples.

Treaty is how we make that future possible.

This Statewide Treaty marks a moment of truth and courage. It brings together the First Peoples of these lands and waters – through the First Peoples' Assembly of Victoria – and the State of Victoria on behalf of all Victorians, to forge a renewed and enduring relationship built on respect, trust, accountability and integrity. It invites every Victorian – no matter their background or how long they've called this place home – to be part of a shared future grounded in justice, understanding and unity.

This Statewide Treaty honours the unbroken relationship of First Peoples to Country, and to Aboriginal Lore, Law and Cultural Authority. These obligations have been carried faithfully since the first sunrise. The ancient stories of these lands, waters, skies and stars still speak to those willing to listen – and the more we come to know them, the better we can care for Country together.

Treaty is an opportunity to listen, to learn, and to affirm the rightful place of First Peoples as decision-makers of their own futures, on their own Country. It recognises the need for meaningful change – enabling self-determination to flourish, for the good of all.

The First Peoples' Assembly of Victoria, as the elected representative body for First Peoples, carries forward the collective strength of First Peoples' communities and nations. The Elders and Ancestors who came before us lit the fires that guide First Peoples still – this Treaty for the generations affirms the enduring presence and rights of First Peoples – a flame that will never be extinguished.

The State of Victoria enters this Treaty to reckon with the past, to create lasting change, and to build a stronger, fairer future for everyone lucky enough to find belonging in this land. This is a place of ideas and energy – a state alive with culture, creativity, and difference – where people come not just to live, but to belong. It is only in a place like this, bold enough to face hard truths and generous enough to imagine something better, that the words of this Treaty could be scribed.

This Statewide Treaty marks a new beginning – an invitation to walk forward together, guided by truth, integrity and determination.

Through Treaty, we build a better future for all.

The full version of the Treaty can be found here: <https://www.treatyvictoria.vic.gov.au/victorias-statewide-treaty>

Appendix E: Victoria's first Statewide Treaty: Structure

The Statewide Treaty is structured as follows:

Part One of the Treaty sets out:

- Victoria's history and the path to Treaty
- Who First Peoples are today
- Aboriginal Lore, Law and Cultural Authority
- Who the State of Victoria is today
- Beginning of a Treaty era, and
- Commitment to a renewed relationship between Gellung Warl and the State of Victoria.

Part Two of the Treaty sets out:

- Outcomes of Statewide Treaty negotiations
- Aboriginal Lore, Law and Cultural Authority and Gellung Warl
- Nginma Ngainga Wara and Nyerna Yoorrook Telkuna
- Apology
- Statewide Treaty reforms
- Data sharing
- Resourcing
- Further Statewide Treaties
- Interaction between Statewide Treaty and Traditional Owner Treaties
- The Statewide Treaty Act, and
- Procedural and administrative matters.

Schedule A sets out the following Procedural and Administrative matters:

- Dispute resolution
- Reporting and review
- Commencement and operation
- Implementation
- Variation and amendment
- Definitions
- Interpretation

Schedule B sets out the Immediate Statewide treaty Reforms, including:

- Physical and other recognition of Victoria as a Treaty State, including agreeing protocols in relation to the function of Gellung Warl to participate in the ceremonial life of the State, and for the use of the Aboriginal and Torres Strait Islander flags, and other physical markers of Treaty
- Inclusion of truth-telling in the Victorian Curriculum
- Victorian public sector Treaty principles regarding a culturally capable workforce, including to support understanding of this Statewide Treaty
- Place naming of specified geographical features, to increase opportunities for the use of traditional or language place names
- A First Peoples' Infrastructure Fund
- First Peoples' programs and events, including the Victorian Aboriginal Honour Roll.

Schedule C sets out the Minimum Content for Guidelines. This is where the Treaty will have immediate traction with land planning and management. The details are discussed in 2.3 below.

The Artwork Stories discusses the artwork that adorns the Treaty document. The artwork includes five segments for each of the following parts of Victoria: Metro, North-East, North-West, South-West and South-East.

The full version of the Treaty can be found here:

<https://www.treatyvictoria.vic.gov.au/victorias-statewide-treaty>

Appendix F: Three methods for recognition of Aboriginal Traditional Owners in Victoria

Three Options for Recognition

In Victoria, there are currently three different processes for Aboriginal groups to become formally recognised as Traditional Owners of Country (**Figure 1** below). Traditional Owners seeking formal recognition can pursue any or all of these processes.

The Three processes are:

- Registered Aboriginal Party (RAP) under the *Aboriginal Heritage Act 2006* (Vic);
- Native title determination under the *Native Title Act 1993* (Cth); and
- Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic) (Aboriginal Victoria, 2019).

FIGURE F1: Three Processes for formal Traditional Owner Recognition in Victoria



Source: <https://content.vic.gov.au/sites/default/files/2019-10/Traditional-Owner-Formal-Recognition-in-Victoria.pdf>

Specific outcomes that may arise from each of the three formal recognition processes are set out below.

Formally recognised groups under any of these three schemes have rights and responsibilities as recognised Traditional Owners of Country. This means that they are entitled to certain procedural rights when their rights and responsibilities may be affected by the actions of third parties, including local governments, businesses, community organisations and private individuals.

Registered Aboriginal Party

Registered Aboriginal Parties have cultural heritage responsibilities under the *Aboriginal Heritage Act 2006* (Vic). These include the evaluation of cultural heritage management plans and decisions about cultural heritage permit applications.

RAPs also: provide advice to government and to the Victorian Aboriginal Heritage Council about Aboriginal places and objects; negotiate the return of Aboriginal cultural heritage and Ancestral Remains; participate in cultural heritage agreements, protection declarations and intangible heritage processes; consult with sponsors and heritage advisors; undertake cultural heritage assessments and engage in compliance and enforcement activities.

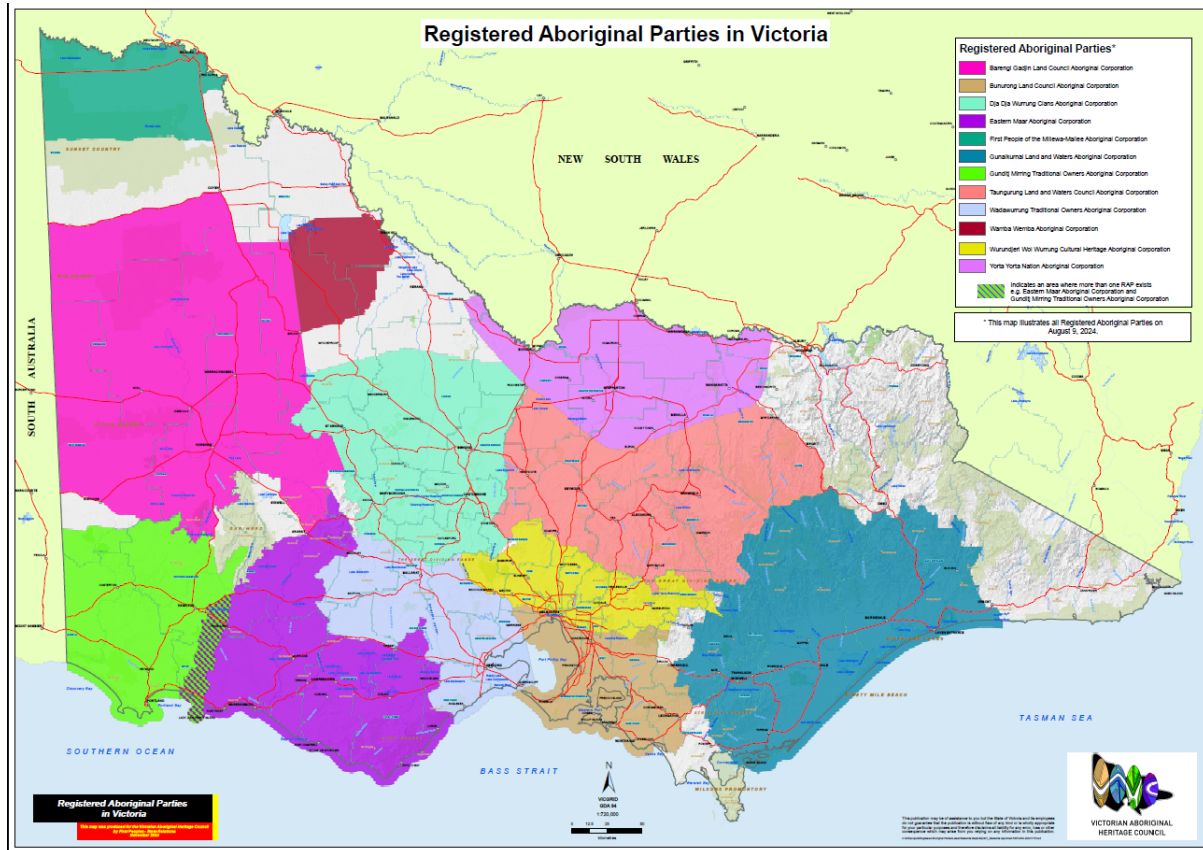
There are currently 12 Registered Aboriginal Parties (RAPs), covering 77.5% of Victoria (see **Figure 2** below).

- [Barengi Gadjin Land Council Aboriginal Corporation](#)
- [Bunurong Land Council Aboriginal Corporation](#)
- [Dja Dja Wurrung Clans Aboriginal Corporation](#)
- [Eastern Maar Aboriginal Corporation](#)
- [First People of the Millewa Mallee Aboriginal Corporation](#)
- [Gunaikurnai Land and Waters Aboriginal Corporation](#)
- [Gunditj Mirring Traditional Owners Aboriginal Corporation](#)
- [Taungurung Land and Waters Council Aboriginal Corporation](#)
- [Wadawurrung Traditional Owners Aboriginal Corporation](#)
- [Wamba Wemba Aboriginal Corporation](#)
- [Wurundjeri Woi Wurrung Cultural Heritage Aboriginal Corporation](#)
- [Yorta Yorta Nation Aboriginal Corporation](#)

More details of each of the RAPs and an online map can be accessed here:

<https://www.aboriginalheritagecouncil.vic.gov.au/victoria-registered-aboriginal-parties>.

Figure F2: Registered Aboriginal Parties in Victoria



Source: https://www.aboriginalheritagecouncil.vic.gov.au/sites/default/files/2024-12/AVj2421_Statewide-Appointed-RAPs-RM-20241115.pdf

Native Title Determinations

A positive native title determination involves recognition by the Federal or High Court of Australia that a groups’ rights continue from before European colonisation to the present day. It also lists the native title rights determined; for example, to camp, hunt, fish, gather food, and teach law and custom on Country. Native title holders and registered native title claimants have rights under the Future Acts regime (such as the right to comment on or negotiate agreements) in relation to activities on Country that affect native title rights and interests.

Five agreements between the State and Traditional Owner groups have arisen out of, or complemented native title determinations. The five agreements at 25 March 2025 are:²²

- Gunaikurnai Settlement Agreement
- Yorta Yorta Co-operative Management Agreement
- Wimmera Settlement Agreement
- Gunditjmara Settlement Agreement
- Djia Dja Warrung Recognition and Settlement Agreement
- Gunditjmara and Eastern Maar – Joint native title area for the land and waters between the Shaw and Eumeralla Rivers from Deen Maar (including Yambuk) to Lake Linlithgow.

²² <https://www.forestsandreserves.vic.gov.au/land-management/what-we-do/agreements-with-traditional-owners>

- Taungurung Land and Waters Council (TLAWC) Recognition and Settlement Agreement (RSA) with the State of Victoria.

It should also be noted that there are 60 Indigenous Land Use Agreements for Victoria on the National Native Title Tribunals Register of ILUAs.²³

Recognition and Settlement Agreement

The *Traditional Owner Settlement Act 2010 (Vic)* allows the government and traditional owner groups to make agreements that recognise traditional owners' relationship to land and provide them with certain rights on Crown land. The *Traditional Owner Settlement Act 2010 (Vic)* provides a framework for the State and a Traditional Owner group to agree to a comprehensive settlement package in lieu of progressing with a native title claim under the *Native Title Act 1993 (Cth)*. The settlement package can include:

- A Recognition and Settlement Agreement (RSA) recognising the named Traditional Owner group and their traditional rights over Country.
- A joint Recognition Statement that acknowledges the depth of the Traditional Owner group's relationships to Country and their survival, as well as the disruptions and harms of European colonisation, and that also commits the State and the group to a mutual partnership going forward.
- A binding Indigenous Land Use Agreement that 'settles' all native title claims and opts into the *Traditional Owner Settlement Act 2010 (Vic)*. A Settlement Agreement does not extinguish native title rights and interests but involves an agreement to exercise similar rights and interests under this agreement, and not under the native title regime.
- A Land Agreement providing land transfers and grants of Aboriginal title.
- A Land Use Activity Agreement (LUAA) providing rights for Traditional Owner groups to be consulted on, compensated for and to consent to certain activities on public land within their Country.
- A Natural Resource Agreement (NRA) providing rights to use certain natural resources, including for commercial purposes, and participate in natural resource management.
- A Funding Agreement, providing payments into the Victorian Traditional Owners Trust and/or payments to the Traditional Owner Group Entity.
- A Traditional Owner Land Management Agreement (TOLMA), regarding joint management of parks and reserves granted as Aboriginal title.
- Compensation that may be owed by the State for extinguishment.

There are currently four Recognition and Settlement Agreements under the *Traditional Owner Settlement Act 2010 (Vic)* in place in Victoria and one under negotiation. They are:

- Gunaikurnai RSA which commenced on 22 October 2010 (<https://www.firstpeoplesrelations.vic.gov.au/gunaikurnai-recognition-and-settlement-agreement>)

²³ <https://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-Register-of-Indigenous-Land-Use-Agreements.aspx>

- Dja Dja Warrung Clans Aboriginal Corporation (DDWCAC) RSA which commenced on 24 October 2013. (<https://www.firstpeoplesrelations.vic.gov.au/dja-dja-wurrung-recognition-and-settlement-agreement>).
- Taungurung Land and Waters Council Aboriginal Corporation (TLaWCAC) RSA which commenced on 26 October 2018. (<https://www.firstpeoplesrelations.vic.gov.au/taungurung-recognition-and-settlement-agreement>).
- The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples RSA which was signed on 25 October 2022 <https://www.firstpeoplesrelations.vic.gov.au/wotjobaluk-jaadwa-jadawadjali-wergaia-and-jupagulk-people-wotjobaluk-nations-recognition-settlement-agreement>).
- Proposed Eastern Maar traditional owner group RSA (<https://www.firstpeoplesrelations.vic.gov.au/proposed-eastern-maar-recognition-and-settlement-agreement>).

(Current at 12 February 2026.)

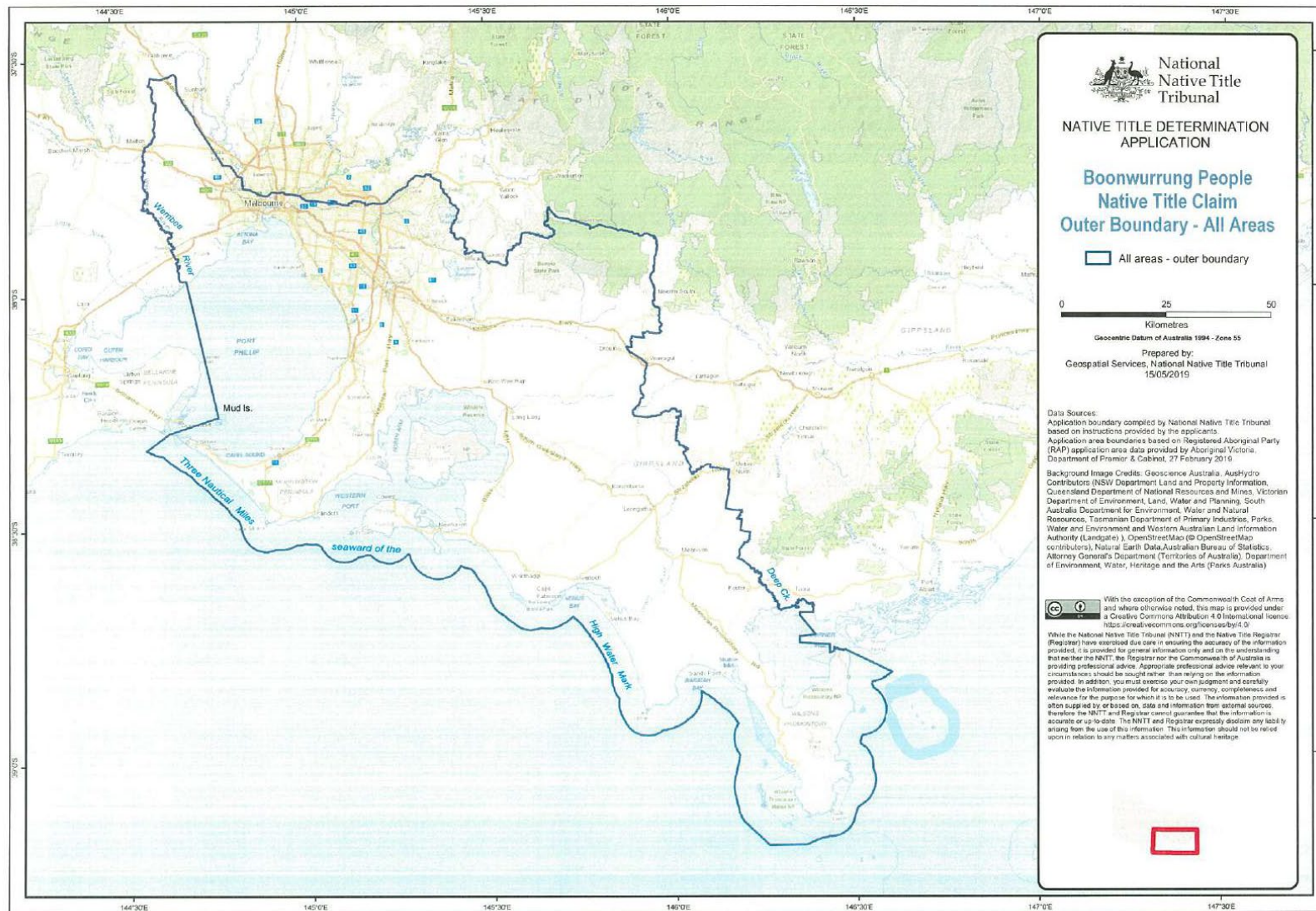
Appendix G: Maps of the external boundaries of native title claims over Melbourne and Geelong

The outer boundaries of the claim area are shown in blue on the attached maps.

The maps can be found in the relevant Extracts from Schedule of Native Title Applications (SNTA) held by the Registrar of Native Title on the National Native Title Tribunal's website for each of the following native title claims:

- Carolyn Maria Briggs & Anor on behalf of the Boonwurrung People and State of Victoria (Boonwurrung People). NNTT number: VC2020/001.
- Patrick Fagan & Ors on behalf of the Wadawurrung Native Title Claim and State of Victoria & Ors (Wadawurrung). NNTT number: VC2022/002.
- Perry James Wandin & Ors on behalf of the Wurundjeri Woi-Wurrung People and State of Victoria & Ors (Wurundjeri Woi-Wurrung People). NNTT number: VC2025/002.

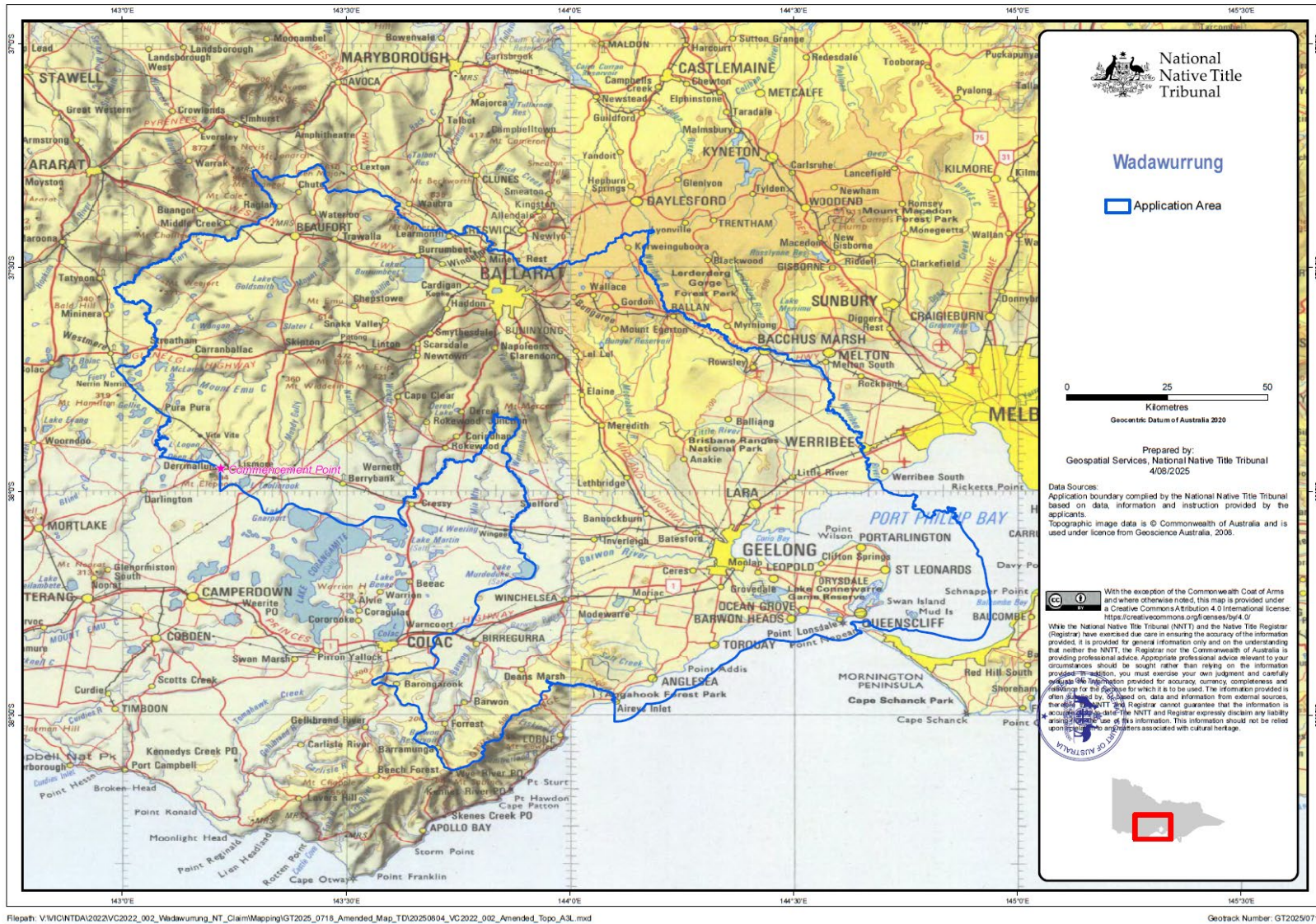
Boonwurrung Native Title Claim over Melbourne and Surrounds



Filepath: P:\GEO_INFO\Products\VIC\NTDA\Proposed\Proposed_Boonwurrung\Mapping\GT2019_064120190509_Proposed_Boonwurrung_all_areas_outer_boundary_A3L.mxd

Geotrack Number: GT20190641

Wadawurrung Native Title claim over Geelong and Ballarat and surrounds



Wurundjeri Native Title Claim over Melbourne and surrounds

Schedule Extract attachment: VID1466/2025 (VC2025/002), Attachment C - Authorised Claim Area, Page 1 of 1, A3, 30/10/2025



Appendix H: Local Government areas affected by each of the three Native Title claims

Wurundjeri SNTAExtract_VC2025_002	Wadawurrung SNTAExtract_VC2022_002	Boonwurrung SNTAExtract_VC2020_001
Banyule City Baw Baw Shire Bayside City Boroondara City Brimbank City Cardinia Shire Casey City Darebin City Frankston City Glen Eira City Greater Dandenong City Hepburn Shire Hobsons Bay City Hume City Kingston City Knox City Lake Mountain Alpine Resort (Unincorporated) Macedon Ranges Shire Manningham City Maribyrnong City Maroondah City Melbourne City Mitchell Shire, Monash City Moonee Valley City Moorabool Shire, Murrindindi Shire Nillumbik Shire Port Phillip City Stonnington City Whitehorse City Whittlesea City Wyndham City Yarra City Yarra Ranges Shire Melton City Merri-Bek City	Ararat Rural City Ballarat City Colac Otway Shire Corangamite Shire Golden Plains Shire Greater Geelong City Hepburn Shire Melton City Moorabool Shire Moyne Shire Pyrenees Shire Queenscliffe Borough Surf Coast Shire Wyndham City	Bayside City Frankston City Hobsons Bay City Kingston City Melbourne City Mornington Peninsula Shire Port Phillip City Wyndham City

Appendix I: Procedural rights under the *Native Title Act 1993* (Cth)

It is important to understand that the terms ‘native title holder’ and ‘native title claimant’ are mutually exclusive. There can never be a native title holder for an area and native title claimant for the same particular area at the same time, because the Federal Court of Australia can only make one native title determination for any particular area.

I.1 Procedural rights for Registered Native Title Claimants or Registered Native Title Holders

This Appendix explains the procedural rights for registered native title holders or registered native title claimants for future acts that affect native title. Acts that do not affect native title are not future acts, and therefore Division 3 of the *Native Title Act 1993* (Cth) does not apply.

A future act is an act in relation to land or waters that either:

- consists of the making, amendment or repeal of legislation and takes place after 1 July 1993; or
 - is any other act that takes place after 1 January 1994;
- and
- is not a past act nor an intermediate period act; and
 - either validly or invalidly affects native title.

To be a future act, the act or activity must affect native title. That is, the act must either validly or invalidly occur in an area where native title exists or may exist and it must affect native title in that area. For example, native title may exist in relation to unallocated Crown land or a National Park, even where there are no native title holders or registered native title claimants.

An act affects native title if it extinguishes native title rights and interests or impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise.

The term ‘affect’ is defined in s.227 of the *Native Title Act 1993* (Cth). All acts can affect or be affected by native title. An act ‘affects’ native title if it extinguishes native title rights and interests. An act also affects native title if it impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise.

Registered native title claimants and native title holders are entitled to the procedural rights for acts which may affect native title within the claim area or within a determination area that native title exists in the area concerned, either partly or wholly.

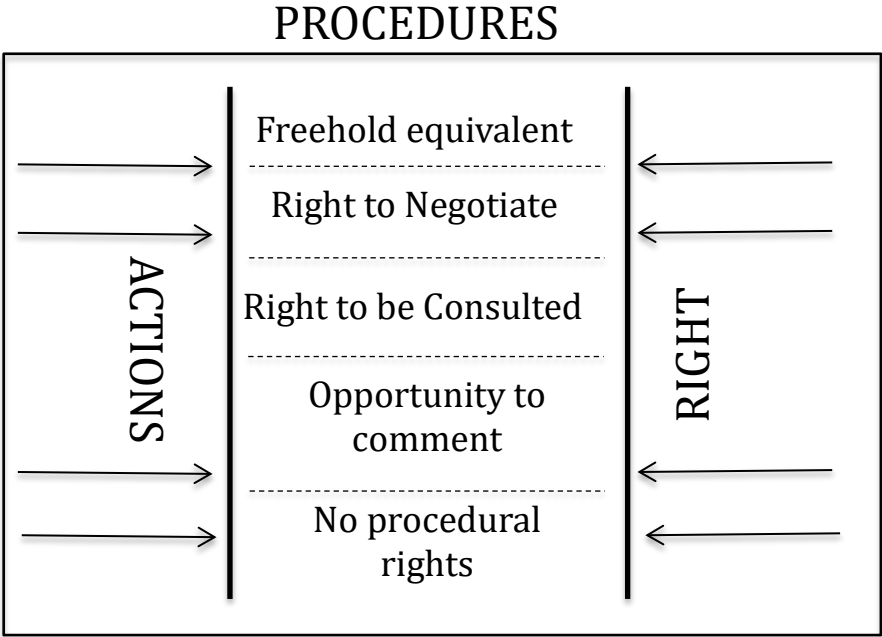
Most planning and environmental management systems have a hierarchy of procedural rights extending from no procedural rights at the bottom of the scale to full freehold equivalent rights at the top of the scale, as shown in **Figure D1**. The procedural rights may include notification of the details and the opportunity to comment, the right to be consulted or the right to negotiate. The nature of the procedural right depends on the nature of the proposed future act.

In the *Native Title Act 1993* (Cth) there are 12 different types of future acts which attract the full spectrum of procedural rights mentioned above. The different types of future acts and the relevant procedural rights are set out in **Table D1** below. It must be noted that the future act **must** be dealt

with under the first provision that applies to it, even if a later provision is also relevant (S 24AB), and that unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title (S 24AO).

At the top of the hierarchy of future acts in the *Native Title Act 1993* (Cth) is Indigenous land use agreements or ILUAs.

Figure I.1: Hierarchy of procedural rights in conventional land use planning systems



Source: Wensing and Macmillan 1999

For details of how the Right to Negotiate operates, see Subdivision P (ss.25-44).

Table I.1: Type of Future Acts and Procedural Rights

Overview (Subdivision 24AA)
<p>Basically, Division 3 of the <i>Native Title Act 1993</i> (Cth) provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of this Division, and invalid if not.</p> <p>Validity under Indigenous Land Use Agreements (ILUAs)</p> <p>A future act will be valid if the parties to certain agreements (called indigenous land use agreements—see Subdivisions B, C and D) consent to it being done and, at the time it is done, details of the agreement are on the Register of Indigenous Land Use Agreements. An indigenous land use agreement, details of which are on the Register, may also validate a future act (other than an intermediate period act) that has already been invalidly done.</p> <p>Other bases for validity</p> <p>A future act will also be valid to the extent covered by any of the following:</p> <ul style="list-style-type: none"> (a) section 24FA (future acts where procedures indicate absence of native title); (b) section 24GB (acts permitting primary production on non-exclusive agricultural or pastoral leases); (c) section 24GD (acts permitting off-farm activities directly connected to primary production activities); (d) section 24GE (granting rights to third parties etc. on non-exclusive agricultural or pastoral leases); (e) section 24HA (management of water and airspace); (f) section 24IA (acts involving renewals and extensions etc. of acts); (fa) section 24JAA (public housing etc.); (g) section 24JA (acts involving reservations, leases etc.); (h) section 24KA (acts involving facilities for services to the public); (i) section 24LA (low impact future acts); (j) section 24MD (acts that pass the freehold test—but see subsection (5)); (k) section 24NA (acts affecting offshore places). <p>Right to negotiate</p> <p>In the case of certain acts covered by section 24IC (permissible lease etc. renewals) or section 24MD (acts that pass the freehold test), for the acts to be valid it is also necessary to satisfy the requirements of Subdivision P (which provides a “right to negotiate”).</p> <p>Extinguishment/non-extinguishment; procedural rights and compensation</p> <p>This Division provides that, in general, valid future acts are subject to the non-extinguishment principle. The Division also deals with procedural rights and compensation for the acts.</p> <p>Activities etc. prevail over native title</p>

<p>To avoid doubt, section 44H provides that a valid lease, licence, permit or authority, and any activity done under it, prevail over any native title rights and interests and their exercise.</p> <p><i>Statutory access rights</i></p> <p>This Division confers access rights in respect of non-exclusive agricultural and non-exclusive pastoral leases on certain persons covered by registered native title claims (Subdivision Q).</p>	
Future act category and Subdivisions of the NTA 1993 (Cth)	Procedural rights of registered native title holders/claimants
1. Indigenous Land Use Agreements (ILUA). (Subdivisions 24B, 24C, 24D and 24E) (S24BA-24EC in particular)	Does the proponent of a future act want to enter into an ILUA to validate a future act instead of using the other processes under the Act? Where relevant, ILUAs may provide for future act(s) to be done, or the surrender of native title, or to validate future acts that have already been done invalidly. In some circumstances it may not be possible to use an ILUA. For example, where there are competing claimants and there may not be sufficient time to negotiate an ILUA where the different claimant communities cannot agree on the carrying out of a future act.
2. Non-claimant applications. (Subdivision 24F) (unopposed)	Does the proponent of a future act want to lodge a non-claimant application in the Federal Court to find out whether or not native title exists in a particular area over which it has a non-native title interest? If no potential native title holders respond within a prescribed period there is automatic s24FA protection for future acts. If potential native title holders make a claim within the relevant period which is subsequently registered then the proponent may be able to negotiate an agreement or will have to use other relevant future act processes. Note: This process has no utility where there already are registered native title claimants for the area or if there is a determination that native title exists for the area.
3. Primary production and diversification and off-farm activities directly connected to primary production. (Subdivision 24G)	The opportunity to comment applies. The upgrade of a pastoral lease to freehold requires a compulsory acquisition, which attracts the right to negotiate. Note: Local governments generally do not carry out or authorise these kinds of activities.
4. Management of water and airspace. (Subdivision 24H)	Does the future act involve the regulation or management of water and airspace? If so, the opportunity to comment applies.
5. Renewals and extensions of leases and licences and grants of titles under pre-23 December 1996 agreements or commitments. (Subdivision 24I)	Does the future act authorise the renewal or extension of leases and licences that arise from agreements or commitments made on or before 23 December 1996? If so, the opportunity to comment applies. Note: in limited circumstances, the right to negotiate may apply (s24ID(4) in relation to mining).
6. Provision of public housing and other public facilities (such as public health, education, police, emergency facilities, staff housing and related infrastructure) being provided for Aboriginal or Torres Strait Islander people living in or in the vicinity of the area (Subdivision 24JAA)	Does the future act involve the provision of public housing and other public facilities (such as public health, education, police, emergency facilities, staff housing and related infrastructure) being provided for Aboriginal or Torres Strait Islander people living in or in the vicinity of the area? If so, the opportunity to comment applies.

(this provision only operates for twenty years from 2009).	
7. Use of reserved land. Activities and dealings regarding pre-23 December 1996 reserve land consistent with purpose and leases to statutory authorities. (Subdivision 24JA)	In the case of land reserved, proclaimed, dedicated, or conferred by some permission or authority for particular purposes on or before 23 December 1996, is the proponent involved in authorising or undertaking activities on the land that are consistent with the purposes for which it was reserved, proclaimed, dedicated, or conferred? If so, the opportunity to comment may apply.
8. Facilities for services to the public. (Subdivision 24K)	The <i>Native Title Act 1993</i> (Cth) specifies what constitutes a ‘facility for services to the public’. Does the proposed activity constitute a facility for services to the public? If so, the same procedural rights apply as an ordinary title holder would be entitled to. If over a pastoral lease, then the same rights as pastoral lessees. Note: This provision does not apply if the future act is or requires the compulsory acquisition of native title rights and interests.
9. Low impact future acts. (Subdivision 24L)	There are no procedural rights. Note: This provision applies only if the act is of low impact and takes place before and does not continue after a determination is made that native title exists in a particular area.
10. Acts that pass the freehold test. (Subdivision 24M)	This includes legislative acts (such as the making, amendment or repeal of legislation), non-legislative acts (such as the grant of a mining lease over land subject to native title but would also be able to be granted if the native title holders held ordinary title), and only onshore places (for offshore, see S24N). S24MD treatment of acts that pass the freehold test. Freehold test: if act could have been done had the native title holders instead had freehold and if legislation is in place to protect areas of Indigenous significance: <ul style="list-style-type: none"> • the right to negotiate may apply; • the right to be consulted may apply; or • ordinary title rights apply. Note: The <i>Native Title Act 1993</i> (Cth) specifies a number of circumstances where the freehold test applies. Refer to the Act for details.
11. Acts affecting offshore places. (Subdivision 24N)	Procedural rights for native title holders are the same as if they hold non-native title rights, that is, ordinary title rights. Note: Local governments generally do not carry out or authorise these kinds of activities.
12. Future acts invalid unless otherwise provided. (Subdivision 24O)	<i>‘Unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title.’</i>

(Source: NNTT 2009 and updated by Dr Ed Wensing, 2026)

I.2. The role of Indigenous Land Use Agreements (ILUAs)

An Indigenous land use agreement (ILUA) is a voluntary agreement made under the *Native Title Act 1993* (Cth) between people who hold, or claim to hold, native title in an area and other people who have, or wish to gain, an interest in that area. They are negotiated agreements, and when registered they are binding on all persons who hold or may hold native title for the area covered by the agreement (NNTT, 2011).

An ILUA allows people to negotiate flexible, pragmatic agreements to suit their particular circumstances without having to resort to litigation or relying on the other processes for dealing with future acts within the *Native Title Act 1993* (Cth).

An ILUA can be negotiated over areas where native title has, or has yet, to be determined to exist. They can be part of a native title determination, or settled separately from a native title claim. ILUAs may be made about any native title matters the parties want to have an agreement about, as well as other associated issues. For example, ILUAs can be made on the following matters:

- native title holders agreeing to a future development
- how native title coexists with the rights of other people
- access to an area
- extinguishment of native title rights and interests
- compensation for the loss or impairment of native title rights and interests
- creating a protocol for dealing with Aboriginal or Torres Strait Islander cultural heritage matters (which is different from native title and is governed by separate state, territory and Commonwealth heritage protection legislation and not under the Native Title Act) and/or
- providing economic and social benefits for Aboriginal and Torres Strait Islander people and communities.

Before embarking on the development of an ILUA, first consider whether an ILUA is the best way of resolving a native title matter (in particular, if it will only cover a particular future act). An ILUA must deal with native title matters. If the agreement is not going to deal with native title matters, then an ILUA is not appropriate.

The advantage of an ILUA is its flexibility—it can be tailored to meet the needs of the parties involved and their particular land use matters. By making agreements, native title holders or claimants may gain benefits such as recognition of their native title rights and interests, employment opportunities and/or compensation. Other parties to the agreement may be able to proceed with new uses or development of their land for other purposes.

Appendix J: Extracts from the Explanatory Memorandum for the *Planning Amendment (Better Decisions Made Faster) Bill 2025 (Vic)*.

The following is selected extracts from the Explanatory Memorandum for the Planning Amendment (Better Decisions Made Faster) Bill 2025 which contain provision including ‘native title holder’, ‘traditional owner group’ and ‘registered Aboriginal party’. These terms are underlined where they occur in this extract.

General

The *Planning Amendment (Better Decisions Made Faster) Bill 2025* amends the **Planning and Environment Act 1987**, makes consequential amendments to the **Land Acquisition and Compensation Act 1986** and the **Subordinate Legislation Act 1994** and for other purposes.

Clause Notes

Part 1—Preliminary

Clause 1 sets out the main purposes of the Bill, which are to amend the **Planning and Environment Act 1987** and to make consequential amendments to the **Land Acquisition and Compensation Act 1986**, the **Subordinate Legislation Act 1994** and other Acts.

The Bill amends the **Planning and Environment Act 1987**—

...

- to provide for traditional owners to be notified of, and then participate in, strategic planning and planning permit applications processes;

Clause 30 inserts new section 18A of the Planning and Environment **Act 1987** to provide who a planning authority must consult in relation to a low-impact amendment. The planning authority must consult in the prescribed manner and set a date for comments on the amendment to be provided to the planning authority, which must be not less than one month after the date on which the planning authority first gave details of the amendment to the person or body concerned.

[N.B. The Bill states that for a low-impact amendment, a planning authority must consult, among others, any native title holders, any traditional owner group entity, and any registered Aboriginal party.]

Clause 31 amends section 19 of the **Planning and Environment Act 1987** which sets out the notice requirements for the preparation of an amendment to a planning scheme.

Subclause (1) inserts new section 19(1)(ba) to provide for giving notice to—

- any native title holders for the whole or part of the area that may be affected by the amendment; and
- any traditional owner group entity appointed for the whole or part of the area that may be affected by the amendment, being a group that is a party to a recognition and settlement agreement; and
- any registered Aboriginal party for the whole or part of the area that may be affected by the amendment.

Subclause (2) inserts new section 19(1D) to provide that if the Minister has included a condition referred to in section 16G(4)(c) requiring a council to follow the approved public engagement plan, notice under section 19(1)(a) or (1B) must be in accordance with the approved public engagement plan for the amendment.

Subclause (3) substitutes section 19(2) to provide that a planning authority must publish a notice of any amendment it prepares by publishing the notice in a newspaper generally circulating in the area to which the amendment applies, or on the planning authority's Internet site.

Subclause (4) inserts section 19(8) to provide that the section does not apply to a low-impact amendment.

Clause 78 amends section 47 of the **Planning and Environment Act 1987** which provides for the form of applications for permits. Clause 78 adds in the new requirements for an application to specify the type of permit application—a type 1 application, type 2 application or type 3 application and if a traditional owner notice has been given to a registered Aboriginal party, to include a copy of the notice and any responses received from the registered Aboriginal party. The requirement for a copy of the covenant if the land is burdened by a registered restrictive covenant to be included in all circumstances has been removed. Instead, if the application is for a permit to allow the removal or variation of a registered restrictive covenant, the application is to be accompanied by a copy of the covenant and information clearly identifying each allotment or lot benefited by the

covenant and any other information that is required by the regulations.

Clause 79 inserts new sections 48AA and 48AAB of the **Planning and Environment Act 1987** to set out the process for traditional owner notices.

New section 48AA provides that before making an application for a permit, an applicant must give notice to a registered Aboriginal party for a prescribed area (a ***traditional owner notice***) if the land to which the application applies is in the prescribed area and the application for a permit is of a prescribed class. The new section requires that a traditional owner notice must be given no less than the prescribed time before the date the application for the permit is made. New section 48AA also provides for what a traditional owner notice must include and includes a definition of ***approved cultural heritage management plan***.

New section 48AAB provides that a registered Aboriginal party who is given a traditional owner notice may provide their response to the applicant and the responsible authority. If a registered Aboriginal party does not provide a response to a traditional owner notice it does not mean that the registered Aboriginal party consents to the approval of the application.

Clause 80 amends section 48A of the **Planning and Environment Act 1987** to align references to section 47 with the amendments made under clause 78 of the Bill.

Clause 81 amends section 48D of the **Planning and Environment Act 1987** to align references to section 47 with the amendments made under clause 78 of the Bill. Section 48D is being inserted by the **Consumer and Planning Legislation Amendment (Housing Statement Reform) Act 2025** and will commence on 25 November 2025.

Clause 145 amends section 96C of the **Planning and Environment Act 1987**, which requires a planning authority to give notice of its preparation of an amendment to a planning scheme and notice of an application being considered concurrently with the amendment. Clause 145 provides that notice must additionally be given to—

- any native title holders for the whole or part of the area that may be affected by the amendment or application; and
- any traditional owner group entity appointed for the whole or part of the area that may be affected by the amendment or application, being a group that is a party to a recognition and settlement agreement; and
- any registered Aboriginal party for the whole or part of the area that may be affected by the amendment or application; and
- any person or body that the planning scheme specifies as a referral authority for the application; and
- to the owners (except persons entitled to be registered under the **Transfer of Land Act 1958** as proprietor of an estate in fee simple) and occupiers of land benefited by a registered restrictive covenant, if the amendment or the permit would allow the removal or variation of the covenant.