

## WHAT IS SETTLEMENT UNDER VICTORIA'S SETTLEMENT ACT?

The *Traditional Owner Settlement Act 2010* (Vic) (the **Settlement Act**) provides an avenue to recognise Traditional Owner rights in Victoria.

It is an alternative system to the process for recognition in the *Native Title Act 1993* (Cth) (the **Native Title Act**) and it has been in place since 2010.

The Yorta Yorta High Court decision demonstrated the difficulty for Victorian Traditional Owners to achieve native title outcomes. Whilst the Eastern Maar, the Gunditjmara, the Wotjobaluk, Jawda, Jadwa-Jali Jupagulk and Wergaia Peoples and the Gunaikurnai Peoples have since achieved native title through consent with the State of Victoria (the **State**), this has taken a lot of time and research and there have been lots of findings of areas where native title no longer exists.

The Settlement Act tries to overcome some of these disadvantages. It allows the State to make agreements with Traditional Owners that recognise their Traditional Owner rights and grant certain other rights over public land, as well as providing for a range of other benefits. The rights recognised under a settlement are broadly similar to the rights recognised under a native title determination, although the benefits are more comprehensive.

It is possible for a group to seek both a native title determination and a settlement with the State.



## WHAT CAN A SETTLEMENT OFFER TRADITIONAL OWNERS?

Under the Settlement Act, Traditional Owners sit down and negotiate a settlement with the State, rather than go through a Court process. This settlement with the State results in a “Recognition and Settlement Agreement” or **RSA**.

A settlement does not require a native title determination under the Native Title Act. A settlement does not extinguish native title rights and interests but involves an agreement to recognise and exercise broadly similar rights and interests under the settlement framework, rather than the native title regime.

A settlement involves the State and the Traditional Owner Group Entity (**TOGE**) that represents the Traditional Owner group, making agreements that involve:

- formally recognising the Traditional Owners of the land;
- rights of access to and use of natural resources on Crown land and waters, including rights to camp, hunt, fish, gather food and resources, including for commercial purposes, teach law and customs, and participate in natural resource management;
- the transfer of land in freehold title to the Traditional Owners for cultural or economic purposes;
- joint management of some national parks and reserves granted as Aboriginal title to manage in partnership with the State;
- funding for economic development and support for the corporation as the TOGE, to manage the obligations under the RSA and assist becoming economically self-sufficient;
- rights for Traditional Owners in relation to certain use and development of Crown land including to be consulted, to negotiate and, in limited circumstances, to veto activities, and for community benefits (or compensation).

In practice, a settlement involves several agreements or contracts relating to the matters above.

The key elements of a settlement include:

- **Indigenous Land Use Agreement (ILUA)**  
Settle all native title claims and opt into the Settlement Act alternative framework
- **Recognition and Settlement Agreement (RSA)**  
Recognition of the Traditional Owner group and their Traditional Owner rights over Country

- **Land and Land Management Agreement**  
Grants of land in freehold title and/or of Aboriginal title over national parks and reserves to be jointly managed with the State Government
- **Land Use Activity Agreement (LUAA)**  
Procedural rights to comment on, negotiate for and consent to certain activities on most public land within their Country, some requiring community benefit payments
- **Natural Resource Agreement**  
Recognition of Traditional Owners’ rights to take and use certain natural resources in their Country and participate in the management of land, waters and natural resources
- **Funding Agreement**  
Funding for Traditional Owner corporation to manage their settlement obligations and undertake economic development for financial self-sufficiency

Some advantages of the settlement process:

- Traditional Owners still need to show descent from an ancestor, but not necessarily continuous connection to Country since the start of colonisation.
- It applies to all public land in the settlement area, even where native title has been extinguished (with some exceptions, including where public works have been constructed). This means that Traditional Owners will get to have more of a say over more Country than under native title.
- A settlement provides a broad range of benefits and outcomes whereas a successful native title determination is only guaranteed to recognise native title rights – it does not necessarily come with funding to do anything with those rights.
- A settlement should come with a comprehensive financial package, providing an opportunity for Traditional Owners to start an economic enterprise, plan for the future, and build on traditional rights for the benefit of the whole mob.
- A key feature of the simplified LUAA process is the right to veto Crown land sales i.e. the group can say no and the sale cannot go ahead.



## WHAT MAY TRADITIONAL OWNERS NEED TO GIVE IN EXCHANGE FOR A SETTLEMENT OUTCOME?

The Settlement Act framework is underpinned by an ILUA that resolves the native title issues in the agreement area and is required to ensure that the settlement is legally valid under the Native Title Act.

The ILUA means that:

- the Traditional Owner group cannot seek any native title or compensation claims in the future;
- any government grants of title in the past are validated and the Native Title Act future act process is replaced by the LUAA; and
- where the sale of Crown land is negotiated under the LUAA, there is an agreement to surrender native title at that time (if it exists).



## Alternative Regime

The expectation of the State is that a settlement will resolve native title issues in the agreement area. At present, the State's expectation is that groups will agree to, and record in an ILUA to:

- not pursue a native title determination or compensation through the Federal Court;
- withdraw any native title claim they have under the Native Title Act; and
- agree to not make any future claim (including a claim for compensation).

This position is currently being challenged by Traditional Owners. In some circumstances the State may agree to a native title determination as well as settlement.

## Compensation

The State currently requires Traditional Owners to agree that the total package of money and land outcomes provided by a settlement is full and final settlement of native title compensation. This is a complex and important consideration for Traditional Owners.

For example, native title compensation means compensation for the extinguishment or impairment of native title since October 1975 when the *Racial Discrimination Act 1975* (Cth) commenced. Since the Timber Creek High Court case on native title compensation in March 2019, the State Government has agreed to review the amount of compensation paid to Traditional Owners in some circumstances.

TOGEs are appointed as a Registered Aboriginal Party (RAP) under the *Aboriginal Heritage Act 2006* (Vic) for the settlement area. TOGEs also have a reserved seat on the First Peoples' Assembly of Victoria, the elected voice for Aboriginal people and communities in future Treaty discussions.

## HOW IS A SETTLEMENT REACHED?

Prior to beginning the settlement process, key things a Traditional Owner group must do are:

1. participate in research processes to show the basis of the group, area and association to a proposed agreement area;
2. determine group membership/composition and the boundaries of the settlement area;
3. agree about boundaries with neighbours; and
4. settle whole of group decision making processes.

Previously, the State had a set of Threshold Guidelines under which there were two stages to the settlement process. The use of the Threshold Guidelines is currently on hold, pending resolution of matters raised in recent litigation.

Ultimately, groups must satisfy the State that they are the right people for an area of Country, before commencing negotiations for a settlement package. The State is currently working with Traditional Owner groups and First Nations to advise processes for entering into negotiations with the State for a settlement under the Settlement Act.

Once the State is satisfied that a Traditional Owner group has met all the requirements of the threshold process, the Attorney-General makes a decision to enter into negotiations with the group to work out what the settlement will include. The Traditional Owner negotiating team and the State Government negotiation team will lead the negotiations, with legal and research support provided by First Nations Legal and Research Services and/or other services the Traditional Owner groups choose to engage.

Members of the Traditional Owner negotiating team are appointed by the full group to represent the group and the TOGE in the settlement negotiations. The negotiating team might be the directors of the corporation, or a subcommittee of directors, but this is not required. The negotiating team is accountable to the full group and can keep the full group updated of developments in the negotiations. The authority of the negotiating team should be clear, including when the team needs to check back with the full group for their information, understanding and endorsement of decisions. This is where the group's decision-making processes, including the relationship between the full group, the negotiation team and the corporation, described in the Threshold Statement are particularly relevant.

The State negotiation team will be led by the Land Justice Unit in the Department of Justice and Community Safety.

Once negotiations are complete, the full group of Traditional Owners can agree to or reject the settlement at an authorisation meeting, and the TOGE and the State may sign the agreements. The full group may also direct the negotiating team to seek changes to the agreements.

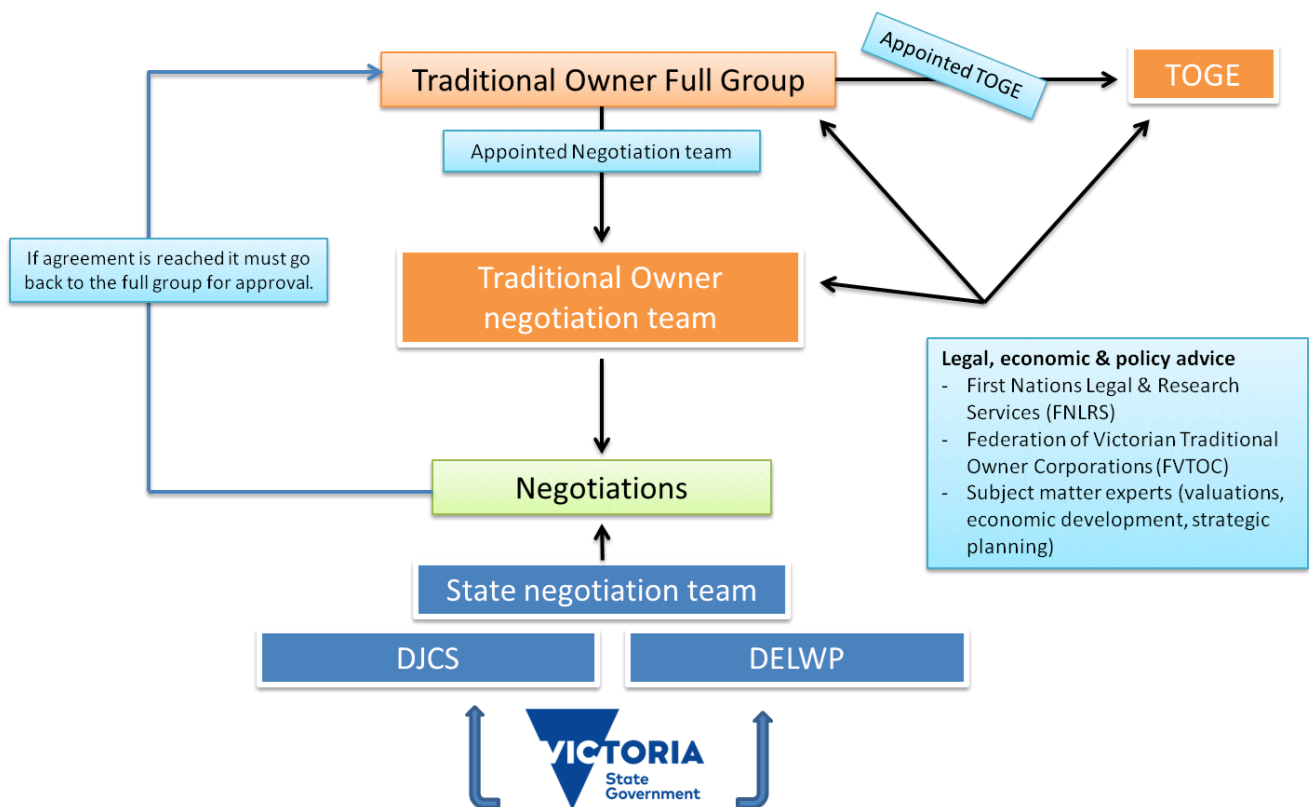
The final step is the certification and registration of the ILUA that comes with the settlement. An application to register the ILUA is made to the National Native Title Tribunal. This may also involve the Traditional Owner group discontinuing any native title or compensation claims in the Federal Court of Australia.

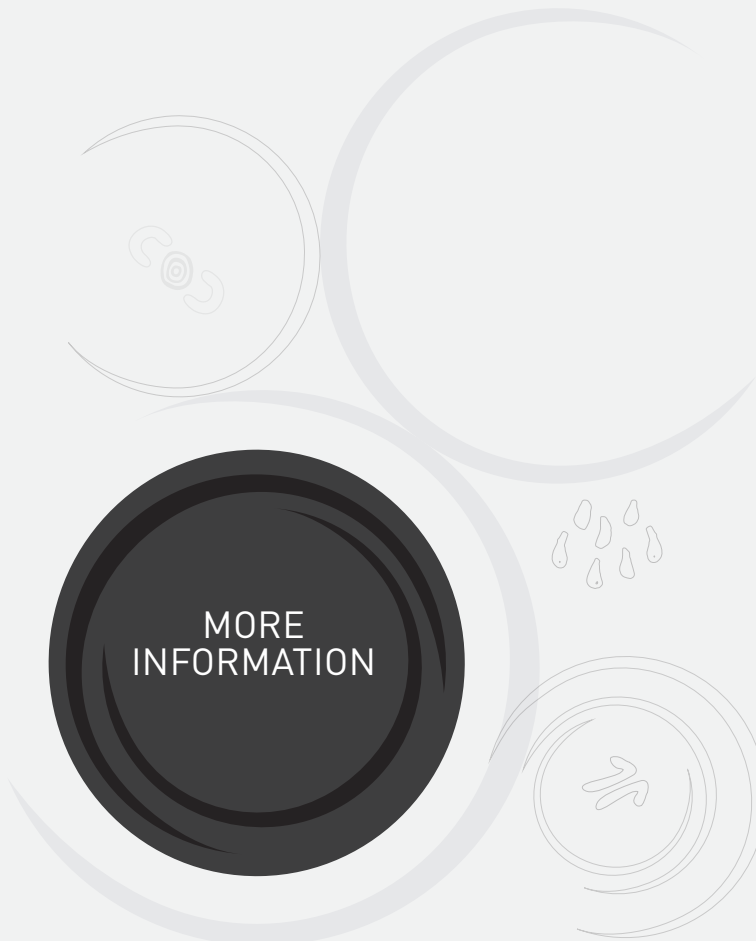
Once the ILUA is registered and settlement agreements signed, the agreements come into force and implementation commences.

This diagram below describes the basic process for negotiation of a settlement:

## HOW ARE TRADITIONAL OWNER RIGHTS MANAGED UNDER A SETTLEMENT?

Traditional Owner rights that are recognised by a settlement are managed by the TOGE, the corporation appointed by the Traditional Owner group to represent them as part of the threshold process. The TOGE manages and implements the numerous other benefits and agreements agreed as part of the settlement. All Traditional Owners for the area are allowed to be members. Members elect the Directors at the Annual General Meeting. Directors are responsible for day to day business of the TOGE, including overseeing the operation of the LUAA.





For more information about the Settlement Act and the settlement process, visit the

**Victorian Department of Justice and Community Safety**

[www.justice.vic.gov.au/your-rights/native-title/traditional-owner-settlement-act-2010](http://www.justice.vic.gov.au/your-rights/native-title/traditional-owner-settlement-act-2010)

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A **Glossary of Terms** used in this document can be found at [www.fnlrs.com.au/formal-recognition-resources](http://www.fnlrs.com.au/formal-recognition-resources)

The purpose of this information sheet is to provide an overview of the three types of formal recognition available to Traditional Owners of Country in Victoria. It is intended to provide an overview of what you can expect the process to involve, understanding that the process will be different for each group. This information sheet is not legal advice and should not be relied upon as legal advice.

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