

REPORT OF THE STEERING COMMITTEE FOR THE DEVELOPMENT OF A VICTORIAN NATIVE TITLE SETTLEMENT FRAMEWORK

DECEMBER 2008



DEPARTMENT
OF JUSTICE





Department of Justice

STEERING COMMITTEE FOR THE DEVELOPMENT OF A
VICTORIAN NATIVE TITLE SETTLEMENT FRAMEWORK

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Dear Ministers

On behalf of the Steering Committee for the Development of a Victorian Native Title Settlement Framework, I present this report to you based on our deliberations between March and December 2008.

During this period, the Steering Committee met on seven occasions and considered the reports prepared by a number of working groups established to progress the key elements of the Framework. The negotiations have been conducted in good faith and have progressed in a constructive and positive manner.

Our terms of reference were to negotiate the key elements of an alternative way to resolve native title in Victoria. This has been achieved through the development of a range of core principles that provide the parameters for individual negotiations under the Framework. The Steering Committee has also considered the process for agreement making under the Framework that includes a proposal for the development of a five to ten year claims resolution strategic plan that, if adequately resourced, would see native title matters largely resolved in this state by 2020.

With this in mind, we recommend that the Victorian Government:

- adopts the proposed Framework and the core principles that would underpin negotiations under the Framework as presented in this report;

- progresses within the next twelve months the necessary legislative reforms to enshrine the Framework and to give effect to the benefits provided for under Individual Framework Agreements;
- ensures that there are adequate resources available to:
 - implement the Framework at the statewide level,
 - negotiate Individual Framework Agreements,
 - provide sustainable funding to Traditional Owner corporate entities to fulfil their obligations under Individual Framework Agreements, and
 - implement agreements at the local level to ensure the success of the innovative policies and programs provided for under the Framework and ensure agreements are durable and long lasting;
- adopts an implementation plan and continues to develop the Framework in collaboration with the Victorian Traditional Owner Land Justice Group and Native Title Services Victoria; and
- in parallel with the implementation of the Framework, develops a policy for the freestanding statutory recognition of Traditional Owner customary, non-commercial use of and access to natural resources, which would apply to all Traditional Owner groups independent of an Individual Framework Agreement, in line with other Australian jurisdictions.

The Steering Committee's report is a highly innovative piece of public policy that has the capacity to deliver real outcomes to Traditional Owners. We are certain that implementing the Framework will deliver better and just outcomes to Traditional Owners and greater certainty and finality to the State.

It provides opportunities for economic development and creates a sound base for self-determination that will strengthen our culture and our communities. If adopted, the Framework has the potential to make a significant contribution to reconciliation and to addressing the inequalities and disadvantage experienced by Aboriginal people in Victoria.

It also has the potential to influence other jurisdictions in adopting flexible and less technical approaches to the resolution of native title. In this way the policy supports the Commonwealth Government's policy agenda for native title and addressing Indigenous disadvantage.

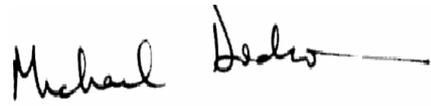
Representatives from the Commonwealth have attended every meeting of the Steering Committee as observers and I have welcomed their contribution and insights. The Commonwealth has everything to gain from supporting Victoria's approach and would be well placed to provide financial assistance to support agreement making under the Framework.

The collaborative approach adopted by all parties, and their well-considered compromises in this proposal, has built strong working relationships that bode well for the further development, implementation and negotiation of agreements under the Framework, should the Government choose to adopt our proposal.

The process for developing the Framework has been well designed and I believe that the outcomes are consistent with the Victorian Charter of Human Rights and Responsibilities and international human rights standards such as the United Nations Declaration on the Rights of Indigenous Peoples.

I would like to thank all those who contributed to the work of the Steering Committee and participated in such an open and positive manner.

Yours sincerely

A handwritten signature in black ink that reads "Michael Dodson" followed by a horizontal line.

Prof. Mick Dodson
Chair

Aspirations of members of the Steering Committee

“That the State and Traditional Owners come to an agreement on the Framework that is fair and just and delivers land justice to all Kooris in the State.”

“I hope that the Framework allows native title to be resolved far more readily.”

“I hope that the Framework delivers a process to resolve native title within a reasonable timeframe... I would like to think that my children will not have to deal with this issue.”

“My experience with native title is that it goes around in circles ...my aspiration is that the Framework resolves a number of issues that have gone around in circles.”

“Native title and land justice are a part of the Government’s Victorian Indigenous Affairs Framework. Resolution of these issues should bring lasting benefits to Traditional Owners.”

“The Victorian Traditional Owner Land Justice Group has been lobbying and negotiating with Government for three years for the Framework. I would like to see an outcome.”

“I have been involved in land rights for many years. I want a streamlined process and recognition of our traditional homelands and spiritual homelands. The Framework should have a far reaching effect for our future generations.”

“The Framework should make it easier to deal with native title for Aboriginal people and the wider community.”

“It has been a long campaign for land justice... and there are a lot of issues involved in native title. We want a good Framework that is acceptable to Traditional Owners and allows for good agreements. This will provide a good outcome for Government as well.”

“The Framework should spread good will and not put fear into the wider community.”

“We have worked really hard in the public sector for two and a half years to get politicians and public servants on the same page. Now we want outcomes.”



Steering Committee members with the Attorney General following their final meeting, 15 December 2008: top row from left: Chris Marshall, Graham Atkinson, Neil Robertson; next row from left: Mick Harding, (Rob Hulls – Attorney General), Ian Hamm; next row from left: Mick Dodson, Sandra Onus, Len Clarke; bottom row from left: Judy Backhouse, Jenny Samms, Bobby Nicholls

List of acronyms

AHA	<i>Aboriginal Heritage Act 2006 (Vic)</i>
BOM	Board of Management
COAG	Council of Australian Governments
CP	core principle
DOJ	Department of Justice
DPC	Department of Premier and Cabinet
DPCD	Department of Planning and Community Development
DPI	Department of Primary Industries
DSE	Department of Sustainability and Environment
DTF	Department of Treasury and Finance
IFA	Individual Framework Agreement
ILUA	Indigenous Land Use Agreement
IMA	Indigenous Management Agreement
JMP	Joint Management Plan
LUAR	Land Use Activity Regime
LJG	Victorian Traditional Owner Land Justice Group
NTA	<i>Native Title Act 1993 (Cth)</i>
NNTT	National Native Title Tribunal
NRMA	Natural Resource Management Agreement
NRMCB	Natural Resource Management Collaborative Body
NTSV	Native Title Services Victoria
PV	Parks Victoria
RAP	Registered Aboriginal Party
TO	Traditional Owner
VAHC	Victorian Aboriginal Heritage Council
VCAT	Victorian Civil and Administrative Tribunal

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Executive summary

About this report

This report sets 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.

The Framework provides for the State's own formal recognition of Victorian Traditional Owner groups alongside a raft of benefits to Traditional Owners in return for their agreement to withdraw their native title claim and/or agree not to lodge a claim into the future. Benefits for Traditional Owner groups will be tailored to local circumstances and range from access to land and natural resources through to measures for the recognition and strengthening of culture.

A key objective in developing the Framework is to ensure a streamlined and expedited approach to settling native title claims through interest based negotiations which are equitable in outcomes and meet the aspirations of both Traditional Owners and the State.

There are many benefits in settling native title claims out of court. Pursuing a negotiated agreement will reduce transaction costs for all parties and will mean more settlements will be reached and implemented sooner. A less litigious approach also forms the basis of stronger working relationships between the State and Traditional Owners that allows for the ongoing management of Crown lands in a manner that provides better outcomes for Traditional Owners and the community, support for economic development, greater self-sufficiency and opportunities for future generations.

Steering Committee for the Development of a Victorian Native Title Settlement Framework

In March 2008, the Victorian Government announced the establishment of the Steering Committee for the Development of a Victorian Native Title Settlement Framework, chaired by Professor Michael Dodson.

The Steering Committee comprised representatives of the Victorian Traditional Owners Land Justice Group, the Victorian native title service provider (Native Title Services Victoria (NTSV)), and senior departmental officers from the Departments of Justice, Sustainability and Environment, and Planning and Community Development.

The Steering Committee was required to provide a draft Framework to the Victorian Government and the Victorian Traditional Owner Land Justice Group for their consideration in the second half of 2008. This report is a result of the deliberations of the Steering Committee.

Key focus areas

The Steering Committee was asked to negotiate the key elements of an alternative way to resolve native title in Victoria. The Steering Committee's Terms of Reference are at Appendix 2.

Specifically, the Steering Committee were asked to focus on:

- entry points for negotiations;
- threshold requirements; and
- contents of settlements including:

- recognition,
- access to land,
- speaking for country,
- access to natural resources,
- strengthening culture, and
- claims resolution.

The Steering Committee’s recommendations are expressed in the report as ‘core principles’. The recommendations are summarised here.

Implementing the Framework (Chapter 1)

Action Area	Recommendation
<p>Framework Implementation Plan</p> <p>Objective: To ensure key tasks required to establish the Framework occur in a timely and collaborative manner.</p>	<p>That a <i>Framework Implementation Plan</i> be developed collaboratively between the LJG, NTSV and relevant State agencies, to set out and monitor all actions required for the Framework to commence, including legislative reform, development of agreement templates, and communications with Traditional Owners and other stakeholders.</p>
<p>Claims Resolution Strategic Plan</p> <p>Objective: To ensure the Framework is rolled out in a coordinated, strategic manner across the State, in partnership with Traditional Owners.</p>	<p>That the State, LJG and NTSV develop a <i>Claims Resolution Strategic Plan</i>, in consultation with other stakeholders including the Victorian Aboriginal Heritage Council, the National Native Title Tribunal, the Federal Court and Commonwealth funding agencies.</p> <p>The plan would facilitate inter-agency collaboration to maximise the best use of resources and take into consideration the lead times needed for Traditional Owner groups to prepare for entry into Framework negotiations.</p>
<p>Future review and evaluation of the Framework policy</p> <p>Objective: To ensure successful implementation of the Framework through ongoing evaluation and review.</p>	<p>That the State undertakes ongoing, robust and independent evaluation of the overall Framework (a full review of the Framework as a whole at the end of five years or following the execution of the first five Individual Framework Agreements), informed by evaluation of Individual Framework Agreements.</p>
<p>Support for resolving intra- and inter-Indigenous disputes</p> <p>Objective: To provide support for the resolution of inter- and intra-Indigenous disputes that may stand in the way of agreement making under the Framework.</p>	<p>That a ‘Right People for Country’ project, facilitated by Government but led by Traditional Owners, be developed to assist in resolving intra- and inter-Indigenous disputes over such issues as group composition and boundaries.</p>

Key Elements of Individual Framework Agreements (Chapter 2)

Action Area	Recommendation
<p>Access to land</p> <p>Objective: To increase Traditional Owner access to their traditional lands.</p>	<p>Core Principles address:</p> <ul style="list-style-type: none"> ▪ joint management as a means to benefit Traditional Owners and the community, as well as to conserve and protect natural and cultural values; ▪ flexible land tenure options, including: <ul style="list-style-type: none"> - Crown land transferred in perpetuity and jointly managed, - joint management without transfer, or - freehold land transfers; ▪ ongoing management of agreed Crown land through Indigenous Management Agreements and subsequent Joint Management Plans; and ▪ protection of existing third party interests and continued public access.
<p>A land use activity regime (or alternative future acts regime)</p> <p>Objective: To establish a clearer and simpler regime for the use and development of Crown lands that protects and respects Victorian Traditional Owner’s rights and interests.</p>	<p>Core Principles address:</p> <ul style="list-style-type: none"> ▪ the establishment of a land use activity regime that enables land activities to proceed on Crown land, which accommodates third party interests as well as Traditional Owners’ coexisting rights and interests; ▪ coverage that includes all Crown land in an individual agreement area unless excluded by agreement; ▪ a simplified system for categorising land use activities into ‘routine’, ‘advisory’, ‘negotiation’ and ‘agreement’ activities; ▪ the provision of ‘community benefits’ by agreement as compensation for land use activities with significant or high impacts on Traditional Owner rights and interests; and ▪ a proposed process for dispute resolution and arbitration (Victorian Civil and Administrative Tribunal).
<p>Access to and use of natural resources</p> <p>Objective: To increase Victorian Traditional Owner access to, and sustainable use of, natural resources.</p>	<p>Core Principles address:</p> <ul style="list-style-type: none"> ▪ statutory recognition of non-commercial customary use and access; ▪ increased opportunities for participation in commercial use; ▪ protection of existing third party interests; ▪ increased participation of Traditional Owner groups in natural resource management, including on advisory bodies;

Action Area	Recommendation
	<ul style="list-style-type: none"> ▪ development of Natural Resource Management Agreements (under Individual Framework Agreements) that prescribe area-specific arrangements for increased Traditional Owner access to and use of natural resources; and ▪ development of a Natural Resource Management Collaborative Body with representatives from relevant State agencies and Traditional Owner corporate entities that provides a statewide forum for natural resource management issues relevant to Traditional Owner interests and activities.
<p>Measures for recognition and strengthening culture</p> <p>Objective: To recognise and strengthen Victorian Traditional Owner cultures and identities.</p>	<p>Core principles address the development of a package of measures that recognise and strengthen culture, which can be tailored, through individual Framework negotiations, to meet local conditions and group-specific aspirations.</p> <p>Suggested measures include protocols for public events, a recognition statement, cultural centres, keeping places, signage on roads, Indigenous place naming, interpretive information development, cultural awareness projects and a Local Government engagement strategy.</p>
<p>Alignment with cultural heritage processes</p> <p>Objective: To align the recognition of Victorian Traditional Owners under the Framework, and the benefits that flow from that recognition, with the management of Aboriginal cultural heritage in Victoria under the <i>Aboriginal Heritage Act 2006</i>.</p>	<p>Core principles address:</p> <ul style="list-style-type: none"> ▪ consequential amendment of the <i>Aboriginal Heritage Act 2006</i> (Vic) in order to treat Traditional Owner groups recognised under the Framework in a manner equivalent to native title holders; ▪ development of a mechanism for the sharing of connection material between the State, the native title service provider and the Aboriginal Heritage Council as it relates to the Framework, cultural heritage and native title processes; and ▪ a definition of ‘Traditional Owner group’ as may be required for Victorian legislation and policy development.
<p>Claims resolution</p> <p>Objective: To provide the parameters for claims negotiations and their resolution through a negotiation protocol and through addressing compensation, sustainable</p>	<p>Core principles address a negotiation protocol that captures the intent and spirit of negotiations, including:</p> <ul style="list-style-type: none"> ▪ the good faith nature of negotiations; ▪ identified and agreed timeframes; ▪ parity and consistency of outcomes; ▪ identification of key performance benchmarks; ▪ the free, prior and informed consent of Traditional Owner groups entering into agreements; and

Action Area	Recommendation
<p>funding and certainty and finality.</p>	<ul style="list-style-type: none"> ▪ Government policies and programs to complement, support and preserve the contents of Individual Framework Agreements reached. <p>Core principles in relation to compensation include:</p> <ul style="list-style-type: none"> ▪ all entitlements to compensation under the <i>Native Title Act 1993</i> to be settled as part of any Individual Framework Agreement; ▪ a total Framework package settlement, as negotiated by the parties, to represent a fair alternative to native title related compensation; and ▪ compensation arising from future events to be addressed by negotiation of a Land Use Activity Agreement (as a part of an Individual Framework Agreement) which secures ‘community benefits’ for Traditional Owners where their rights and interests are to be significantly affected by high impact land use activities. <p>Core principles regarding the sustainability of funding include:</p> <ul style="list-style-type: none"> ▪ sustainable funding of Traditional Owner corporations in order to meet obligations arising from Individual Framework Agreements, including for future generations; ▪ a funding allocation for Traditional Owner corporations for discretionary economic development and cultural purposes, including asset and resource acquisition, with inter-generational benefits; ▪ facilitation of complementary State, Commonwealth and private sector program investment; and ▪ recognition of the need for the continued capacity building of State agencies, as well as Traditional Owner corporations, to ensure high standards of agreement implementation. <p>Core principles addressing the certainty and finality of settlements include:</p> <ul style="list-style-type: none"> ▪ the certainty of post-agreement obligations and entitlements for both the State and Traditional Owner groups; ▪ a commitment to the ‘non-extinguishment principle’; ▪ resolution of claims through a binding agreement such as an Indigenous Land Use Agreement

	<p>registered in accordance with the <i>Native Title Act 1993</i>; and</p> <ul style="list-style-type: none"> ▪ agreements to include a binding commitment on the part of a Traditional Owner group to withdraw any existing claims and to not make future claims over the agreement area.
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Process for Making Agreements under the Framework (Chapter 3)

Action Area	Recommendation
<p>Agreement-making process design</p> <p>Objective: To establish a clear and effective process for the negotiation and implementation of agreements.</p>	<p>The Steering Committee proposes a simple, four staged process for the negotiation and implementation of Individual Framework Agreements. The process design includes:</p> <ul style="list-style-type: none"> ▪ an upfront negotiation plan, ▪ collaborative and innovative approaches, ▪ engagement with key stakeholders, ▪ clearly identified and agreed timeframes, and ▪ ongoing evaluation and monitoring.
<p>Threshold requirements</p> <p>Objective: To establish a transparent, respectful and non-adversarial process to identify the ‘right people for country.’</p>	<p>The Steering Committee acknowledges that the State, as well as the wider community, expects that Traditional Owner groups seeking agreements under the Framework are inclusive, are the right people for country and have the negotiation capacity to meaningfully enter into enduring agreements.</p> <p>The State has reviewed its guidelines on connection and has developed core principles for a new approach to threshold requirements specific to the Framework context.</p> <p>The State now proposes a proactive, innovative approach to assisting with the resolution of threshold issues that may arise in the Framework context, such as boundary and group composition disputes.</p>

Introduction

Background

In February 2005, a representative group of Victorian Traditional Owners provided a statement of land justice principles to the Attorney-General and the Minister for Aboriginal Affairs. Six months later, constituted as the Victorian Traditional Owner Land Justice Group (LJG), the group wrote to the Premier of Victoria asking for talks to resolve historic grievances. Native title as it was applied in Victoria was proving too cumbersome, complex, costly and litigious and was delivering only ad hoc and limited outcomes. Transaction costs far outweighed benefits flowing to Traditional Owners. It was clear that Victorian Traditional Owners' aspirations were not being adequately addressed through the native title system.

The Premier asked the Attorney-General, the Minister for the Environment and the Minister for Aboriginal Affairs to meet with Traditional Owners to explore an alternative way forward.

At the subsequent meetings with the Attorney-General and the Ministers, there was broad agreement that a better process for resolving native title and land justice in Victoria needed to be explored. In September 2006 the Government received a proposal from the LJG in the form of a discussion paper *Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Owner Land Justice Group*.

Establishment of the Steering Committee for the Development of a Victorian Native Title Settlement Framework

In March 2008, the Victorian Government announced the establishment of the Steering Committee for the Development of a Victorian Native Title Settlement Framework, to be chaired by Professor Michael Dodson.

The Steering Committee has comprised representatives of the Victorian Traditional Owner Land Justice Group (LJG), the Victorian native title service provider (Native Title Services Victoria, or NTSV), and senior departmental officers from the Departments of Justice, Sustainability and Environment and Planning and Community Development¹.

The Terms of Reference for the Steering Committee² decreed that negotiations would focus on:

- entry points for negotiations;
- threshold requirements; and
- contents of settlements including:
 - recognition,
 - access to land,
 - speaking for country,
 - access to natural resources,
 - strengthening culture, and
 - claims resolution.

¹ A list of the members of the Steering Committee is at Appendix 1.

² The Terms of Reference for the Steering Committee is at Appendix 2.

Introduction

The Steering Committee held its first meeting on 31 March 2008 where it agreed on a work plan that would take it through until December 2008. The work of the Steering Committee was supported by a number of working groups comprising officers from relevant departments (Department of Premier and Cabinet, Department of Treasury and Finance, Department of Justice, Department Sustainability and Environment, Department of Primary Industries, Department of Planning and Community Development), the LJG's legal representative and representatives from NTSV. The working groups were responsible for negotiating the policies and the core principles that underpin the key elements of the Framework.

The Steering Committee was required to provide a draft Victorian Framework to the Victorian Government and to the Victorian Traditional Owner Land Justice Group for their consideration in the second half of 2008. This report is the result of the deliberations of the Steering Committee, fulfilling this requirement.

The objectives of an alternative native title settlement framework

The Victorian Native Title Settlement Framework provides for out of court settlement packages that allow Traditional Owners to settle their land claim directly with the State outside the Federal Court process.

The Framework offers a new pathway to the resolution of native title in Victoria. The Framework provides a package of non-native title benefits to Traditional Owners in return for their agreement to withdraw their claim and/or agree not to lodge a claim into the future.

Traditional Owners will still be able to pursue native title through the courts if they wish. The Framework allows Traditional Owner groups to pursue a native title determination and an Individual Framework Agreement or an Individual Framework Agreement alone.

A summary of the Traditional Owners' objectives for the Framework, consistent with the Victorian Traditional Owner Land Justice Group's 2006 discussion paper *Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Owner Land Justice Group* include:

- cementing a greater range and level of outcomes in the State's approach to land settlements than has been achieved in the past in Victoria through a greater investment in outcomes rather than process – e.g. transfer of land title, natural resource benefit sharing, commercial rights, cultural heritage management, recurrent funding and support;
- certainty of outcomes through clear enforceability and benchmarks or other clarity around the parameters of the negotiated outcomes;
- an expedited process – including benchmarks about timeframes and nature of tasks;
- intergenerational equity – as a principle, 'no surrender of native title' nor requirement for *Native Title Act 1993* (Cwlth) (NTA) determinations that native title does not exist, and review mechanisms should be built into settlement agreements;
- respect for autonomy of each group – each group retains the right to negotiate its own settlement and ensuring free, prior and informed consent, with support available to achieve this;
- building community harmony and community capital – pre-agreement support should be provided to groups (whether funded by the Commonwealth or State) to resolve any disputed boundaries and group composition issues, and in addition, resources to

establish Traditional Owner corporations in an economically sustainable manner (finances, skills, specialists, education, planning tools, community building, etc.);

- create wealth for Traditional Owner communities – through economic development opportunities, including a natural resource acquisition fund, a share of State mining or land tax revenues, and fostering partnerships with the private sector; and
- redress for past dispossession - beyond the limited scope of the NTA, but also addressing NTA compensation.

The State's objectives for the Framework consistent with the State's discussion paper *Towards a Victorian Native Title Framework* include:

- securing a streamlined and expedited approach to settling native title claims through negotiations which are equitable in outcomes and meets the aspirations of Traditional Owners and the State;
- increasing the proportion of Indigenous people with access to their traditional lands in Victoria, and to this end, identifying potential components of settlements and the requirements for entering negotiations;
- building stronger partnerships with Indigenous Victorians, resolving long-standing land grievances, strengthening communities and cultural identity, increasing economic and social opportunities and delivering on key Victorian Government policies;
- protecting community and environmental interests and ensuring agreements have positive flow-on benefits for all Victorians; and
- providing the State with finality and certainty through the resolution of claims - as such, the State expects resolution to include finalisation of the claim through a binding agreement (such as a registered Indigenous Land Use Agreement, or ILUA, under the NTA) and, if also sought, a consent determination, as relating to native title over the claim area.

There are many benefits in settling native title matters out of court. Pursuing a negotiated agreement will reduce transaction costs for all parties and will mean more settlements are reached and implemented sooner. A less litigious approach also forms the basis of stronger working relationships between the State and Traditional Owners that allow for the ongoing management of Crown lands in a manner that provides better outcomes for Traditional Owners and the community, support for economic development, greater self-sufficiency and opportunities for future generations.

Current situation and the need for a new approach

There have been three determinations of native title in Victoria, two by consent (Wimmera 2005, Gunditjmarra 2007) and one via litigation (Yorta Yorta 2002) in the 15 years since the passage of the NTA. The two consent determinations are non-exclusive determinations and have various benefits set out in ILUAs between the State and Traditional Owners.

Currently, eleven Victorian claims are under mediation. Most of these were lodged eight to ten years ago, and the Federal Court is increasingly applying pressure on the parties to secure their resolution. A significant constraint on projections for future native title resolution is that there is no certainty about the number of claims likely to be made.

Currently, approximately 45 per cent of Crown land in Victoria is under claim and the geographical extent of any new claims is not known.

Introduction

There are substantial costs associated with the claims process to date, both in terms of the complexity and onerous nature of procedures, and of the extremely slow movement towards any results.

These costs impact on the parties involved both in financial terms and in the imposition of uncertainty and future risk. Furthermore, the issue of native title compensation is yet to be fully prosecuted through the courts and is likely to require a different set of legal proofs to those involved in establishing native title rights and interests. If not resolved by agreement, this issue could become subject to protracted and costly litigation.

Due to the fact that settlements to date have largely been developed on a stand alone basis, there is currently no overarching whole of government policy framework. For example, Traditional Owners have highlighted what they see as present policy ambiguity and resultant confusion concerning their rights to non-commercial access to and use of various forms of natural resources.

The lack of a settled policy framework also has implications for the capacity of State negotiators to negotiate meaningfully and with authority and the situation risks disparities between settlement outcomes.

The lack of a coordinated policy framework across and between governments also contributes to a disjunction between settlement agreements and the potential opportunities they afford to advance other related government strategic priorities and programs (at both Commonwealth and State levels) aimed at addressing Indigenous disadvantage and enhancing economic development.

The current approach has also suffered from the lack of a timely and systematic approach to the implementation of native title settlement agreements made to date, resulting in considerable process driven delays. The current restricted five yearly funding agreement approaches to supporting Traditional Owner corporations to meet their obligations under agreements is seen as offering very limited certainty and also detracts from the ability to secure durable agreements. This issue has also been highlighted by recognition of the sustained investment required to build governance capacity for Traditional Owner corporations and State agency staff to meet their obligations and responsibilities under agreements.

Commonwealth directions for native title policy

The Commonwealth's direction for native title policy is to adopt flexible and less technical approaches to native title that achieve outcomes that address Indigenous disadvantage and contribute to the COAG's *Closing the Gap* agenda.

Since coming to office, the Rudd Government has made a number of significant policy statements on native title reform. Following the National Apology to the Stolen Generations, the Federal Attorney-General's speech at the February 2008 Negotiating Native Title Forum outlined the Australian Government's vision for improving the native title system with a strong focus on greater flexibility in the interpretation of the NTA and on alternative settlements.

This speech was followed by the Minister for Families, Housing, Community Services and Indigenous Affairs Mabo lecture in May that announced the Australian Government's intentions to review native title policy settings to ensure greater economic benefits flow to Traditional Owners.

At the recent Native Title Ministers Meeting held in Perth in July 2008, Native Title Ministers agreed that a flexible and non-technical approach to native title was needed throughout Australia. Ministers also agreed that the backlog of native title claims and the time estimated to resolve them using current approaches are unacceptable.

The Commonwealth has established a Joint Working Group on Indigenous Land Settlements to develop innovative policy options for progressing broader and/or regional land settlements. The aim of the Joint Working Group is to develop strategies, guidelines and principles that encourage flexible, quicker resolution of Indigenous land claims.

Through the work of the Steering Committee, Victoria is well advanced in developing innovative native title policy that has the potential to deliver quicker resolution and greater benefits to Traditional Owners. If adopted by the State, the Framework will provide a model for the Commonwealth and other jurisdictions in developing flexible and non-technical approaches to the resolution of native title.

Chapter 1: Implementing the Victorian Native Title Settlement Framework – critical success factors

The success of this proposed policy requires a joint vision between the Victorian Government and Traditional Owner groups with clear targets, ongoing engagement and open communication, and a sound evidence base for evaluation and review. It will be critical to the success of the Framework that a strategic approach is adopted to determine how and when the Framework will be implemented.

To ensure that the Framework is rolled out in partnership with Traditional Owner groups in a coordinated and strategic way, the Steering Committee has developed core principles that underpin the development of:

- a Framework Implementation Plan;
- a Claims Resolution Strategic Plan;
- a future review and evaluation of Framework policy;
- support for resolving intra and inter-Indigenous disputes; and
- a Communications and Consultation Strategy.

Framework Implementation Plan

Assuming the Government adopts the Framework, it is proposed that a Framework Implementation Plan be developed in consultation with the Victorian Traditional Owners Land Justice Group (LJG), the native title service provider for Victoria (Native Title Services Victoria, or NTSV) and other stakeholders, as appropriate.

This plan would include:

- setting out all the actions required before the Framework can commence;
- a schedule for amended or new legislation;
- template agreements and contracts;
- ongoing communications strategy with Traditional Owners and stakeholders; and
- the development of an evaluation strategy.

To this end, the following core principles have been developed to underpin the development of the implementation plan. A preliminary draft implementation plan³ to assist this process has also been prepared by the State in collaboration with the LJG and NTSV.

Core principle #1: Development of a Framework Implementation Plan

A Framework Implementation Plan will be developed collaboratively with the Victorian Traditional Owners Land Justice Group and Native Title Services Victoria and in consultation other stakeholders including relevant State agencies, as appropriate. This plan will set out all the actions required for the Framework to commence, including:

- a) identifying timelines for legislative reform⁴;

³ The draft Implementation Plan is at Appendix 3.

⁴ A preliminary view of legislative amendments required by the Framework is at Appendix 4.

- b) developing template negotiation plans, template Indigenous Land Use Agreements and template contracts;
- c) pursuing communications with Traditional Owner groups and other stakeholders; and
- d) setting indicative timeframes for Individual Framework Agreement negotiations (Claims Resolution Strategic Plan).

Claims Resolution Strategic Plan

A Claims Resolution Strategic Plan would underpin the staged regional roll-out of agreement making under the Framework.

The Plan would be a 5-10 year strategy for the implementation of the Framework and would be negotiated with key stakeholder groups once Cabinet has considered the Framework proposal.

Decisions by the State and stakeholders about the order in which regions would be engaged would entail consideration of a range of factors, including stakeholder views on the readiness of different Traditional Owner groups to negotiate.

A strategic and planned approach will allow Traditional Owner groups adequate lead-time to resolve boundary and/or group composition issues before entering into negotiations. It will also allow the State to prioritise negotiations with those groups that are ready to enter into negotiations under the Framework and to allocate resources.

Core principle #2: Development of an agreed Claims Resolution Strategic Plan

That an agreed Claims Resolution Strategic Plan be developed by the State, the Victorian Traditional Owners Land Justice Group and Native Title Services Victoria (as native title service provider for Victoria), in consultation with other bodies such as the Victorian Aboriginal Heritage Council, the National Native Title Tribunal, the Federal Court and Commonwealth funding agencies.

The plan will be kept under constant review.

Future review and evaluation of the Framework policy

The Steering Committee recommends ongoing and robust evaluation of both the overall Framework and the Individual Framework Agreements.

The core principles that apply to the review of Individual Framework Agreements are outlined in the ‘Stage 4: Going forward’ section of Chapter 3⁵.

The review of the Framework arrangements will need to ensure that the assessment of outcomes being achieved under the Individual Framework Agreements directly inform the review of the Framework as a whole.

Core principle #3: Ongoing evaluation approach

- a) Results from the review of Individual Framework Agreements (both process⁶ and outcomes reviews⁷) should directly inform ongoing monitoring of the overall Framework itself, which may need to be refined as a result;

⁵ Refer core principle # 56: Ongoing evaluation approach.

⁶ Refer core principle # 56(a) - Process Review of an Individual Framework Agreement.

⁷ Refer core principle # 56(b) - Outcomes Review of an Individual Framework Agreement.

- b) At the end of five years or following execution of five Individual Framework Agreements (whichever comes first) the Framework should be subject to a full process and outcomes review; and
- c) Consistent with the review of Individual Framework Agreements, the review of the Framework policy will be independently undertaken by a person(s) agreed to by the State and the Victorian Traditional Owners Land Justice Group and Native Title Services Victoria.

Support for resolving intra and inter-Indigenous disputes

There is limited support, and incentives, for resolving intra and inter-Indigenous disputes over group composition and boundaries. These disputes can be complex and seemingly intractable, and stand in the way of the resolution of native title.

Given the State's objective is to achieve a quicker resolution of native title under the Framework, then it has a role to play in supporting structured and concerted efforts to resolve disputes. Support for resolving intra and inter-Indigenous disputes and to promote agreements between Traditional Owner groups will expedite agreements under the Framework.

To this end, the Steering Committee has considered a proposal for the *Right People for Country Project* with the objective of resolving boundary disputes in order to clearly define Traditional Owner boundaries and pursue native title settlements under the Framework.

The Victorian Aboriginal Heritage Council (VAHC) has already developed a process that gives priority to supporting groups to identify their own boundaries and to prioritise decisions relating to 'core country'. The *Right People for Country Project* would seek to complement this approach.

The project would provide mediation where there are overlaps and put in place agreement making protocols (or Memoranda of Understanding) between Traditional Owner groups to enable agreement between them.

The project would be an Indigenous led process based on the principle that recognition by other Aboriginal people is an integral element of establishing recognised traditional ownership. It is also consistent with principles of empowering the community in decision-making and self determination. It would be a non-litigious process, supported by adequate research, whereby the aim would be to seek agreement based on the knowledge and consent of all parties.

Core principle #4: Right People for Country Project

That a project committee comprising the State, the Victorian Aboriginal Heritage Council, the Victorian Traditional Owners Land Justice Group and Native Title Services Victoria be established to develop and implement the *Right People for Country Project* and that this committee be led by the Victorian Aboriginal Heritage Council and commence as soon as possible.

The project would be an Indigenous-led process funded and facilitated by the Victorian Government but led by Traditional Owners, including the Victorian Aboriginal Heritage Council in collaboration with the Victorian Traditional Owners Land Justice Group.

In implementing the project, the conventional protections of mediation should be adopted, such as ensuring confidentiality for all parties.

Communications and consultation strategy

The Terms of Reference for the Steering Committee included a requirement to consult with relevant stakeholders. To this end, the Steering Committee prepared a Communications and Consultation Strategy with the objective of ensuring that:

- the Traditional Owner community are fully engaged in the development of the Framework and understand the nature of proposals under consideration and the Steering Committee process, recognising that this is fundamental to the success of the Framework; and
- the views of third parties with a valid interest in the Framework are taken into consideration prior to the Framework proposal being submitted to Government for its consideration.

The Steering Committee requested that any consultation strategy consider consultation processes with Traditional Owners as a first priority.

The LJG is the key vehicle for consulting with Victorian Traditional Owners. The LJG has a membership of 18 Traditional Owners with representation from a clear majority of Victoria's Traditional Owner groups. The LJG meets on a regular basis.

While the Traditional Owner representatives on the Steering Committee have been nominated to represent the LJG in the Framework negotiations, they still have an obligation to report back to the LJG on developments and seek their final endorsement of the Steering Committee report. The LJG's views on this report will be taken into consideration when the proposal is presented to Government in the first quarter of 2009.

Respecting the confidentiality of the Steering Committee negotiations, it was agreed that consultation with the LJG include the provision of a short summary of the key decisions made at each Steering Committee meeting for distribution to the LJG. In addition, each of the 18 LJG members has received a copy of this report and a summary that was prepared by NTSV and the Land Justice Group negotiating team, to assist their consideration of the Framework proposal.

Between November 2008 and January 2009 the Chair and Secretariat met with a selected number of critical third party stakeholders to provide an overview of the key elements of the Framework package and to explain the process for the Government's consideration of the Steering Committee's report over the next period (see Appendix 5 for further details).

In the event of Government's positive consideration of the Framework proposal, it is anticipated that the State and the LJG might make a joint public announcement. Further communications with Traditional Owner groups and other stakeholders following such an announcement, such as through community information sessions, are a part of the proposed Framework Implementation Plan to be developed by the State in collaboration with LJG and NTSV⁸.

⁸ Refer core principle #1: Development of the Framework Implementation Plan.

Chapter 2: Key elements of Individual Framework Agreements

Introduction

This chapter sets out the key elements that will be available in the negotiation of an Individual Framework Agreement. Each of the six elements, or components, of settlement was considered by a Steering Committee working group. Each working group collaboratively came up with core principles to guide individual negotiations under the Framework. The core principles were in turn, endorsed by the Steering Committee.

The six elements available to Individual Framework Agreements are:

- access to land
- the Land Use Activity Regime
- access to and use of natural resources
- measures for recognition and strengthening culture
- alignment with cultural heritage processes
- claims resolution.

2.1 Access to land – transfer, handback and joint management

Background

The key objective of the access to land component of an Individual Framework Agreement is to increase Traditional Owner's access to land. Under the Framework, increased Traditional Owner access to land will be achieved through:

- transfers of land to Traditional Owner groups (with or without conditions);
- handback of Crown land in perpetuity under joint management; and
- joint management where the State retains control of the land.

The term 'handback and joint management' refers to the return of title to traditional lands to a Traditional Owner group contingent on their agreement to jointly manage the lands with the State for a particular purpose (e.g. as a national park) in perpetuity.

Different models of handback (leaseback) and joint management are in existence throughout Australia and have been working successfully since the late 1970's. The model for handback and joint management endorsed by the Steering Committee is derived from a thorough analysis of best practice around the country while taking into account Victoria's unique circumstances.

The Steering Committee recognises that handback and joint management, a policy option that has to date not been available in Victoria, is an effective vehicle to resolve issues of native title and land justice, Aboriginal aspirations for cultural recognition and economic development and to ensure innovation and excellence in the management of Indigenous and Crown land.

Some of the many benefits of joint management include:

- the opportunity to apply Aboriginal knowledge to land and resource management and the recognition of the value of such knowledge and custom;

- the ability for Traditional Owner groups to maintain cultural practices, knowledge and heritage and explain and interpret their culture to visitors;
- the enhanced visitor experience of learning about Aboriginal culture, knowledge and custom;
- the development of stronger partnerships in conservation, thereby strengthening and publicising the conservation agenda and providing a better information base for land and resource management;
- providing the opportunity for a sustainable economic base for Traditional Owners through Indigenous employment and training, first right of refusal for the contracting of services and commercial development; and
- building the capacity of both the State and Traditional Owner groups.

Fundamental to achieving innovation and excellence in joint management is the establishment and maintenance of effective relationships built on trust and mutual respect. Best practice shows that considerable resources and commitment are also required to negotiate and sustain successful joint management arrangements and these require a long-term commitment and investment by Government.

The best practice and innovative features of the Victorian model for handback and joint management include:

- dispensing with a fixed term ‘leaseback’ in favour of a highly conditional transfer of land in perpetuity, under joint management - this allows the same level of security for both parties with a level of flexibility not present in the more legalistic leaseback arrangements;
- joint management arrangements can apply to all Crown land (regardless of tenure) and the extent of application will be according to set criteria and agreed by both parties;
- the Board of Management is the mechanism for shared decision-making - one Board of Management for all areas under joint management in an Individual Framework Agreement area will allow for cost efficiencies, practicalities, mentoring, skills transfer and the building up of expertise;
- the gradual expansion of Traditional Owner management responsibilities over time as capacity grows, with in-built strategies to increase capacity and review performance; and
- joint management arrangements to be enshrined in legislation to ensure certainty for all parties and transparency for the wider community.

Overall objective of joint management

Joint management will be based on an equitable partnership that will provide innovation and excellence in the management of Crown land (i.e. best practice).

The overall purpose of joint management is to benefit both the Traditional Owners and the wider community through recognising Indigenous culture and knowledge, providing quality experiences, public education and by conserving, protecting and enhancing natural and cultural values.

The Steering Committee recommends:

Core principle #5: Overall objective of joint management

The objective of joint management of agreed Crown land is to establish an equitable partnership between the State and Traditional Owner groups to ensure innovation and excellence in joint management, and for the following purposes:

- a) benefiting the community needs of all Victorians and visitors for public education and enjoyment through quality experiences, services and information;
- b) benefiting the Traditional Owners of the land by recognising, valuing, promoting and incorporating Indigenous culture, knowledge, skills and decision-making processes;
- c) conserving, protecting and enhancing natural and cultural values;
- d) enjoying widespread community support; and
- e) ensuring the wellbeing of country and the wellbeing of people.

Achieving the objective of joint management

Fundamental to achieving effective joint management is the establishment and maintenance of effective relationships built on trust and mutual respect.

Core principle #6: Achieving the objective of joint management

The above objective is to be achieved by the sustainable management of agreed Crown land in accordance with the following principles:

- a) recognising, respecting, and incorporating Aboriginal culture, use, knowledge and decision-making processes;
- b) utilising the combined land, coastal, forest and marine management skills and expertise of both joint management partners;
- c) providing educational, recreational and quality experiences;
- d) conserving, protecting and enhancing natural and cultural values;
- e) recognising and addressing the need for institutional support and capacity building of the joint management partners and, where applicable, the need for the gradual increase of joint management responsibilities by Traditional Owner groups over time;
- f) involving continuing statutory responsibilities and functions of Ministers with respect to agreed Crown land and natural resources;
- g) protecting existing third party interests; and
- h) managing agreed Crown land may include joint management for areas of land outside existing Crown land.

Indigenous Management Agreements

In order to give effect to the above mentioned core principles #5 and #6, the Steering Committee chose a two-step process involving the initial agreement on an Indigenous Management Agreement (IMA), followed by development of, and agreement on, the Joint Management Plan (JMP).

This approach has been adopted with a view to ensuring certain binding conditions concluded under the IMA are recorded on the title and therefore bind the grantees (e.g. the transferred

land will remain a national park in perpetuity). It also reflects recognition of the long lead times required to complete a detailed JMP and of Traditional Owner concerns that any subsequent title transfers could take many years to complete if transfer was contingent on the finalisation of the JMP.

Where it is agreed by the parties that the Crown land involved will transfer to the ownership of the Traditional Owner group, the Board of Management would be established upon finalisation of the agreement over the transfer of land.

Core principle #7: Indigenous Management Agreements

An Indigenous Management Agreement is a statutory agreement between the State and Traditional Owners about the management of agreed Crown land that must be entered into before the land can be transferred and/or joint management commences. It will be recorded on the land title, and is binding on the grantees (i.e. the Traditional Owners) and everyone with an interest in the land.

The State would generally continue to manage the lands on a day-to-day basis under the agreed Indigenous Management Agreement. Roles and responsibilities would change as per agreement under the Indigenous Management Agreement.

Where the land is to be transferred to Traditional Owners, the Indigenous Management Agreement must include a statement that the land will be managed for a specific purpose (e.g. as a national park) in perpetuity.

This approach would aim to ensure that the State and Traditional Owner group are satisfied that both the need for certainty and the on-going planning and joint management responsibilities of the Board of Management are adequately addressed.

In an Indigenous Management Agreement, the State and the Traditional Owners agree on:

- a) the responsibilities of the Ministers responsible for Crown land (or other statutory land managers) and the Traditional Owner group;
- b) how the land is to be managed (including notification/consent requirements for various categories of activities as agreed);
- c) the interim arrangements for management of the land before the approval of the Joint Management Plan;
- d) that the public, Traditional Owners and relevant State authorities will all have access to and use of the land;
- e) details of the process for developing a Joint Management Plan for the land;
- f) how authorised and adjacent interests will be protected and managed and how future interests in the land will be created and managed;
- g) how the capacities and skills of the Traditional Owner group will be developed to jointly manage the lands (with a view to Traditional Owner group increasing responsibilities under the joint management arrangements over time);
- h) rights of use and access to natural resources (including hunting and camping);
- i) Indigenous employment targets;
- j) commercial activities (including first right of refusal for contract services);
- k) funding commitments by relevant State agencies;

- l) establishment and role and responsibilities of the Board of Management;
- m) implementation and review; and
- n) dispute resolution.

The Indigenous Management Agreement would be negotiated between the State and the Traditional Owners and require Ministerial consent.

Following agreement on the Indigenous Management Agreement, the State and the Traditional Owner group would then move to jointly develop the Joint Management Plan consistent with the provisions already agreed under the Indigenous Management Agreement.

Core principle #8: Joint Management Plans

Joint Management Plans are created to identify the overall agreed management arrangements that will apply to agreed Crown land between a Traditional Owner group and the State.

These plans will address how the land is to be managed sustainably by addressing issues such as:

- a) strategies for natural values and cultural values conservation (including heritage protection);
- b) strategies for visitors;
- c) strategies for authorised and adjacent uses (including third party interests);
- d) strategies for community awareness and involvement;
- e) strategies for recognition of traditional knowledge and customs;
- f) strategies for implementing targets for Indigenous employment and training;
- g) strategies for rights of use and access to natural resources (including hunting and camping);
- h) strategies for how the Traditional Owners capacity will be developed to jointly manage the lands;
- i) plan implementation;
- j) strategies for providing operational support to the Board of Management;
- k) strategies for managing commercial activities; and
- l) strategies for managing fire.

These plans will:

- i. be developed jointly by the relevant State authority (e.g. Parks Victoria) and the Traditional Owner group;
- ii. be subject to public consultation and comment;
- iii. require Ministerial consent, and
- iv. where relevant, be tabled in the Parliament.

Review of the Joint Management Plan is to be jointly undertaken every 10 years.

Mutually agreed independent review to measure the achievement of agreed performance outcomes and goals of joint management and the Board of Management, and to increase the management role of the Traditional Owner group, will occur every 5 years, or as agreed.

Tenure and land tenure transfers

In individual negotiations, the following core principles enable the State and Traditional Owner group to identify which Crown land parcels joint management might apply to, the policy criteria that will be applied by the State in assessing and determining those Crown land parcels available for joint management, changes in tenure required and what types of tenure would apply.

The non-extinguishment principle⁹ would apply to any lands involved, except where specifically agreed between the State and Traditional Owners.

Core principle #9: Tenure and land tenure transfers

- a) Joint management agreements can apply to lands within an Individual Framework Agreement area, including Crown land, marine parks and Indigenous owned lands. The extent of application would be decided by agreement.
- b) Land subject to joint management can include either land agreed for transfer to traditional ownership, or land where ownership is retained by the State. Other land may also be transferred to Traditional Owners that is not subject to joint management. The extent of title transfers would be decided by agreement.
- c) Where the parties agree to transfers of land to be made to a Traditional Owner group:
 - i. this could occur by a freehold grant on the basis that the land will remain subject to joint management and specific conditions relating to its future use (e.g. the transferred land would continue to operate as a national park in perpetuity);
 - ii. the parties could agree to transfer land to a Traditional Owner group that is not subject to joint management, with or without conditions;
 - iii. where the State decides to retain ownership of the land under joint management with a Traditional Owner group, the joint management agreement would be in perpetuity, unless otherwise agreed; and
 - iv. land transfers that are subject to joint management will be conditional on an appropriate Indigenous Land Use Agreement and Indigenous Management Agreement having been finalised between the State and a Traditional Owner group, and approved by the Minister. In the meantime, an interim approach (as provided for under the Indigenous Management Agreement) will apply to the management of the lands involved whilst the new Joint Management Plan is developed in a cooperative manner.
- d) All State funded improvements and infrastructure (e.g. park visitor facilities, staff accommodation and improvements) will remain the responsibility of the State, unless otherwise agreed to by the parties.
- e) Any joint management agreement, or grant of land subject to joint management, would be subject to the non-extinguishment principle under the *Native Title Act 1993*.

⁹ The non-extinguishment principle (defined in s.238 of the NTA), means that where an act affects native title rights and interests in relation to the lands and waters concerned, the native title is nevertheless not extinguished. The native title continues to exist in its entirety but is limited in its effect while the act is being done or is in place. If the act is removed, or ceases to operate, then the native title rights and interests have their full effect again.

Extinguishment could only occur when specifically agreed to by both the State and the Traditional Owner group.

- f) A corporate entity representing a Traditional Owner group will be the grantee and/or represent the Traditional Owner group for the purpose of joint management agreements.
- g) The State will apply the following policy criteria in assessing and determining the Crown land available for joint management and changes in tenure:
 - i. Decisions will be made on the basis of a balanced and detailed consideration of a number of issues, not just restricted to native title considerations.
 - ii. These considerations will include (where relevant):
 - the purposes for which the land has been set aside;
 - its appropriateness for joint management;
 - traditional attachment and heritage;
 - the benefits derived from resolving existing and potential native title claims;
 - conservation and environmental values;
 - existing government assets and required future investment;
 - the level of community support;
 - the potential for joint management to advance other related Government policy commitments (e.g. increased Indigenous employment and economic development, enhanced education and enjoyment of parks by the community);
 - the manner in which joint management can enhance future visitor use and enjoyment of the area; and
 - existing third party interests.

Continued access, entry and use of lands

Public and third party use and access will continue in a manner consistent with the Indigenous Management Agreement and Joint Management Plan. Existing third party interests will be guaranteed. Traditional Owner rights and interests will be guaranteed and addressed through the Indigenous Management Agreement and Joint Management Plan.

Core principle #10: Continued access, entry and use of lands

Land will continue to be available for public and third parties access and use consistent with the Indigenous Management Agreement and the Joint Management Plan between the State and Traditional Owners.

The exercise of native title rights or analogous rights to access, entry and use of natural resources and other benefits would be subject to the agreed Joint Management Plan, which can, by agreement, place conditions on these rights for the purposes of the good management of the land.

Core principle #11: Indigenous Land Use Agreements

Indigenous Land Use Agreements will authorise future acts undertaken in accordance with the Indigenous Management Agreements and Joint Management Plans.

They will also guarantee that any native title rights and interests will not be exercised inconsistent with the Indigenous Land Use Agreement.

Indigenous Land Use Agreements will record the agreed native title benefits and/or compensation for relevant acts that shall provide a final settlement of all compensation in respect to all past and future acts undertaken in accordance with Joint Management Plans.

Governance

For the purposes of economic scale, practicality and functionality, the Steering Committee recommends that one Board of Management be established over each Individual Framework Agreement area to cover a potential series of Indigenous Management Agreements and Joint Management Plans.

Core principle #12: Governance

A single Board of Management would be created in respect to each Individual Framework Agreement area comprising a majority of Traditional Owners and the balance of relevant State agencies, all to be appointed following nominations to the Minister. The Traditional Owner corporate entity covering the agreement area would nominate (and be able to seek replacement) of the Traditional Owner representatives on the Board of Management. The Board of Management would undertake functions consistent with those agreed in the Indigenous Management Agreement/s and Joint Management Plan/s, within the boundaries of the relevant agreement area. The Board of Management would have a capacity to second additional non-voting experts to assist its work where required.

The State will provide a funding commitment to build the governance capacity of the Board of Management members and the operating costs of the Board of Management (broadly consistent with current practice).

Government funding and revenue income

The Steering Committee notes that ongoing resources will be required to ensure the success of joint management arrangements over time, the meaningful participation of Traditional Owners and the durability of settlements. A preferred mechanism for supporting this is suggested below.

Core principle #13: Government funding and revenue income

For the life of the agreement, following negotiation with the Board of Management, the State will provide annually budgeted core operational and capital monies towards supporting joint management activities (including full Traditional Owner group and State participation in the development of Joint Management Plans and the capacity development of both parties); operation of the jointly managed lands and in relation to specific initiatives, following negotiation with the Board of Management.

All other revenue income referable to joint management will be held in trust by the relevant State authority for expenditure towards supporting the costs of joint management, to be approved by the Board of Management.

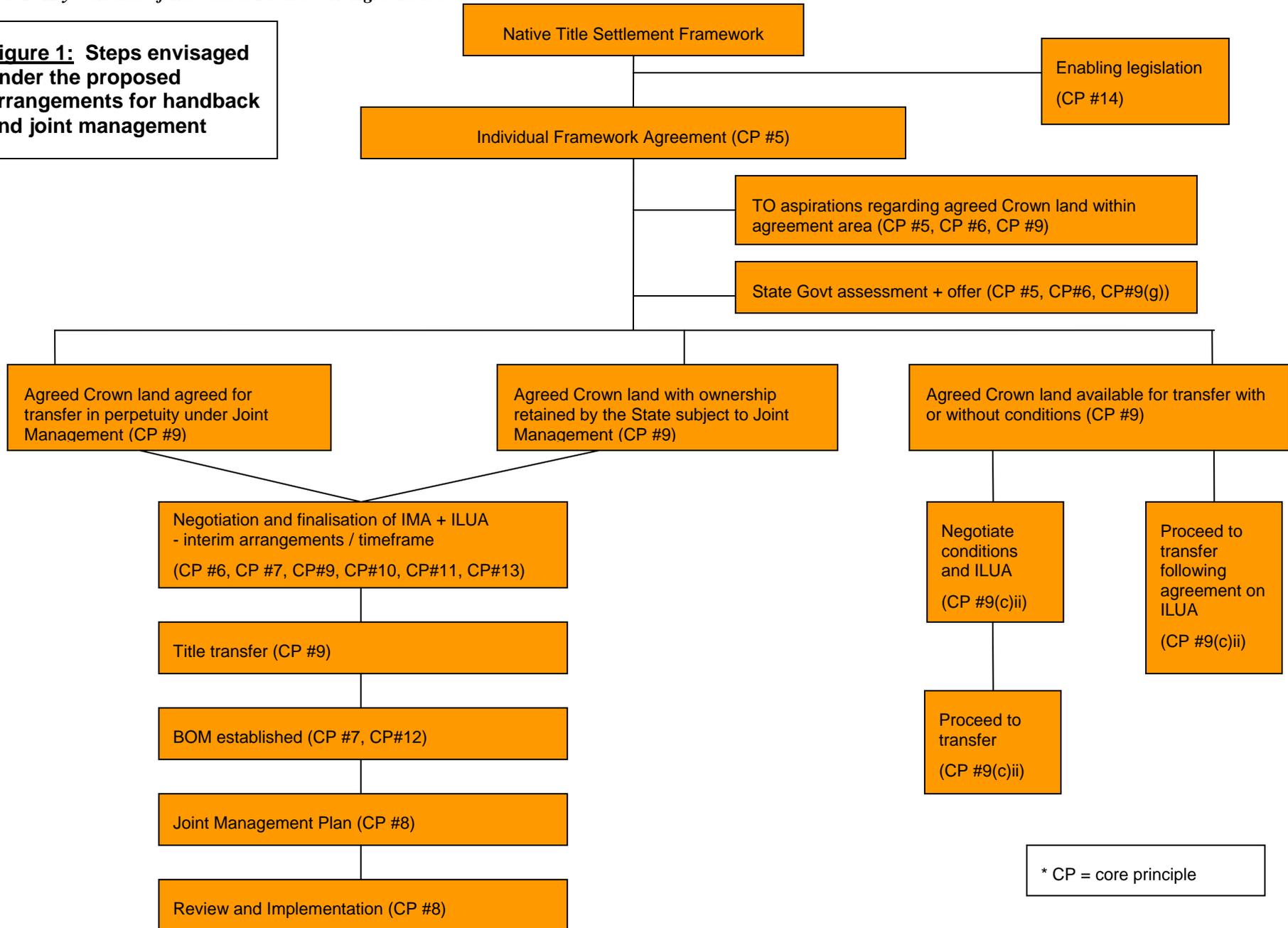
Legislative support

The Steering Committee notes that new or amended legislation will be required to authorise joint management arrangements and that, subject to Government approval of the Framework, an appropriate legislative program will be required.

Core principle #14: Legislative support

Specific legislation and/or amendment to existing legislation will authorise joint management agreements between the State and Traditional Owners, the grant of lands (subject to joint management conditions on continued use and/or with transfer in perpetuity), and address dispute resolution, in order to provide certainty, equity and transparency.

Figure 1: Steps envisaged under the proposed arrangements for handback and joint management



* CP = core principle

2.2 The Land Use Activity Regime – an alternative future acts/consultation regime

Background

The key objective of the alternative future act component of an Individual Framework Agreement is to allow developments on Crown land to proceed while respecting Traditional Owners' rights and interests. The concept of 'land use activity' replaces the 'future act' language of the NTA to focus on the nature of the activity and Traditional Owner aspirations rather than the status of an activity under the NTA.

Victoria has negotiated limited variations on the NTA future act regime in past settlements. Those settlements also obligate the State to negotiate an alternative regime in the future. Other States and Territories have not attempted to adopt a comprehensive alternative regime covering all Traditional Owner land. However, the Steering Committee has considered the many examples of parcel-specific alternative regimes in existence in other jurisdictions as well as the current practice of dealing with future acts in Victoria to arrive at this model.

The Steering Committee recommends that the Land Use Activity Regime (LUAR) only apply once an Individual Framework Agreement is in force. Until then, the NTA future act regime will continue.

The key benefits of adopting a comprehensive alternative future act regime as a component of Individual Framework Agreements include:

- simplified definitions of land use activities and, saving time and expense for all parties;
- more certain and less technical identification of what land is covered by the regime, reducing time and legal expense for all parties;
- meaningful procedural rights allowing for greater participation by Traditional Owners in State decisions concerning land;
- flexibility to vary consultation procedures to minimise administration costs and suit the circumstances of individual Traditional Owner groups;
- increasing Traditional Owners' opportunities to become involved in economic development and gain benefits from their rights and interests in land; and
- ensuring that any benefits provided are used to build the Traditional Owner group's economic and cultural base and provide for future generations.

The Steering Committee recommends:

Core principle #15: Overall objective of the Land Use Activity Regime

The objective of the Land Use Activity Regime is to establish a process whereby land use activities on Crown land may proceed whilst accommodating third party interests and respecting the Traditional Owner rights and interests attached to the Crown land.

Core principle #16: Achieving the objective of the Land Use Activity Regime

The above objective is to be achieved by the adoption of an effective Land Use Activity Regime in accordance with the following principles:

- a) recognition that Traditional Owner group rights and interests attach to all Crown lands agreed to be included in an Individual Framework Agreement;

- b) allowing Traditional Owner groups to speak for country in regard to land use activities;
- c) providing Traditional Owner groups with information, benefits and consideration commensurate with the impact of the land use activity on Traditional Owner group rights and interests;
- d) creating an efficient, cost effective, consistent and certain regime;
- e) recognising, respecting and incorporating Traditional Owner culture, use and knowledge into the land use activity process;
- f) conserving, protecting and enhancing Traditional Owner group rights and interests in the land use activity process;
- g) recognising and addressing the need for institutional support and capacity building of both Traditional Owner groups and the State in the land use activity process; and
- h) the impact of a land use activity on Traditional Owner group rights and interests on Crown land will be treated equitably with the impact of a similar activity on private rights on freehold land.

Definition of key terms

Four key terms are used throughout this section:

- Land Use Activity Regime – the regime describes and includes all aspects of the alternative future act regime, from the legislation and policy that underpins it, through to its operation in the future, activity by activity
- Land Use Activity Agreement Template – the template is the generic or pro-forma document to be developed between the State and Traditional Owner representatives before use in an Individual Framework Agreement
- Land Use Activity Agreement – this is the component of the Individual Framework Agreement between the State and a Traditional Owner group that will apply over the land included in the agreement. The template will be used as the basis for this document.
- Individual Framework Agreement – this is the settlement package as a whole between the State and a given Traditional Owner group.

Core principle #17: Land Use Activity Agreements

A Land Use Activity Agreement is one component of the Individual Framework Agreement between the State and a Traditional Owner group setting out the terms and conditions under which land use activities can proceed over the areas of Crown land covered in an Individual Framework Agreement.

In the Land Use Activity Agreement:

- a) land use activity categorisations will be informed by the Land Use Activity Template and finalised by negotiation with individual Traditional Owner groups and be subject to periodic review to take into account changes to legislation and technology and changes in priorities over time of the State and Traditional Owners;
- b) as much as possible, Land Use Activity Agreements should be standard and consistent across the State.

Land to be included in the Land Use Activity Regime

The Steering Committee considers that the LUAR should be based on the principle that Traditional Owner group interests are held in all Crown land. Under the NTA, coverage is based on an analysis of tenure history to determine whether native title may or may not exist. This is an arbitrary, technical, and costly process. As a result, the Steering Committee recommends that the starting point for negotiations is that all Crown land parcels claimed are potentially available for inclusion in the Land Use Activity Agreement. However, there will be certain Crown land parcels that can be excluded by agreement of the parties.

Core principle #18: Coverage

All Crown land parcels within a claim area are included in the Land Use Activity Agreement unless they are excluded by agreement of the parties.

The parties will use the following criteria in considering parcels to exclude from coverage from the Land Use Activity Agreement:

- a) where Traditional Owner group rights and interests cannot be exercised because of existing infrastructure or because of existing exclusive possession interests;
- b) where Traditional Owner group rights and interests are dealt with through joint management;
- c) where parcels are proposed for future use where Traditional Owner group rights and interests cannot be exercised; and
- d) where the parties, for other reasons, agree that the parcels should be excluded.

Land use activity categories

The four categories of land use activity set out below form the basis of the Land Use Activity Template. The Steering Committee has agreed upon core principles to guide the development of the template, and has received considerable advice on the placement of known land use activities within each category. In the time available to it, the Steering Committee felt it was not in a position to make comprehensive recommendations about the placement of all activities. This work can be concluded during the development of the template.

Core principle #19: Routine Activities

Each Land Use Activity Agreement should identify land use activities – called Routine Activities - which are routine, agreed activities that can proceed on Crown land without procedure.

Routine Activities include exploration where there is compliance with a pro-forma agreement or licence conditions which provide Traditional Owner groups with ‘community benefits’.

Core principle #20: Advisory Activities

Each Land Use Activity Agreement should identify land use activities – called Advisory Activities - which will require consultation before they may proceed on Crown land.

Where notification or consultation is part of an existing statutory process for other parties, and provides as much or more than the procedural rights of the Land Use Activity Regime, there should be no duplication.

Core principle #21: Negotiation Activities

Each Land Use Activity Agreement should identify land use activities – called Negotiation Activities - which require the consent of a Traditional Owner group before they can proceed. The agreement should record the following:

- a) the proposed content of the Negotiation Activity Part A and Part B;
- b) the identity of an independent body to adjudicate on Negotiation Activities when consent has not been successfully negotiated;
- c) the criteria to be applied by the independent body when adjudicating on a Negotiation Activity;
- d) the requirement that relevant parties identified in the Land Use Activity Template must demonstrate that they have negotiated in good faith with a Traditional Owner group before the matter is adjudicated by the independent body;
- e) the requirement that if the matter goes before an independent body for adjudication, the independent body will:
 - i. for Part A Negotiation Activities (e.g. mining), adjudicate as to whether the land use activity should be undertaken or not, and if so, the terms and conditions that would apply. The independent body will have regard to the nature of the proposed project, the financial circumstances and any other relevant matter; and
 - ii. for Part B Negotiation Activities (e.g. major public works), adjudicate as to the terms and conditions under which the land use activity would proceed. The independent body will have regard to the nature of the proposed project, the financial circumstances and any other relevant matter.

Core principle #22: Agreement Activities

Each Land Use Activity Agreement should identify land use activities – called Agreement Activities - which require the consent of the relevant Traditional Owner group before the land use activity can proceed (whereas if consent is not given the activity does not proceed).

Core principle #23: The categorisation of activities

The Land Use Activity Template should:

- a) include criteria to clearly guide the identification of activities for each category, as well as a comprehensive but non-exclusive list of those activities;
- b) include in the list any Crown leases and licences and
 - i. separately identify those as major or minor, according to their scale, size and value; and
 - ii. separately identify those as private or public, or commercial or non-commercial, according to their purpose;
- c) identify appropriate placement in either the Advisory, Negotiation (Part A or B) or Agreement categories of the different types of Crown leases and licences described above;
- d) include a grandfather clause for existing licences and leases that excludes those licences and leases from the procedural rights of the Land Use Activity Regime;

- e) include agreed tools for the efficient execution of procedural rights for the Advisory Activity category where the activity requires regular and large numbers of renewals of particular types of Crown licences and leases;
- f) ensure that in the Advisory Activity category, where notification or consultation is part of an existing statutory process for other parties, and provides as much or more than the procedural rights of the Land Use Activity Regime, there should be no duplication of procedure; and
- g) ensure that in the Negotiation Activity category, where statutory procedural rights for activities already exist, the Land Use Activity Regime should replicate the same procedural rights for Traditional Owner groups.

Non-extinguishment principle

The Steering Committee has been mindful that one of the fundamental principles of the NTA is the protection of native title rights and interests. Under the NTA, the non-extinguishment principle applies to most future acts, allowing for suspension of rights and interests while the future act exists, and revival of those rights and interests when the act ceases to exist. The Steering Committee recommends that the Land Use Activity Regime includes the application of the non-extinguishment principle to all activities under the Regime, but also allows for the possibility of extinguishment by agreement between the parties.

Core principle #24: Non-extinguishment principle

A land use activity will not extinguish Traditional Owner rights and interests. Extinguishment can only occur when specifically agreed to by both the State and the Traditional Owner group.

Compensation

The future act regime under the NTA provides for rights of compensation for some future acts where native title rights and interests are affected. The NTA attempts to balance allowing certain acts to proceed, with or without procedural rights, with an entitlement to compensation. Compensation is payable either through a court determination or by agreement in an Indigenous Land Use Agreement (ILUA). No concluded court cases exist, and no example of a comprehensive alternative compensation model has been developed in Australia. There is a great deal of uncertainty for both parties in how the Courts will deal with the nature and quantum of NTA compensation in the future. In its deliberations, the Steering Committee has been able to consider the range of ways in which different jurisdictions have dealt with compensation for future acts.

The Steering Committee acknowledges the significance of this issue for both the State and Traditional Owners. It recognises that both parties have policies that favour agreement making rather than litigation. The Steering Committee therefore recommends that, in the spirit of cooperation and compromise, the Government accepts the core principles set out below to provide a basis for the development of a 'community benefits' component of the LUAR template, which provides certainty and preserves entitlements.

Core principle #25: Compensation

Any and all compensation under the *Native Title Act 1993* (Cwlth) and *Land Titles Validation Act 1994* (Vic) for activities occurring after an Individual Framework Agreement is in force will be finally dealt with by that agreement.

Negotiation of community benefits shall occur for Negotiation and Agreement categories of land use activity before the activity proceeds.

The purposes of providing community benefits include: reasonable protection of Traditional Owner groups' rights and interests; reasonable levels of consideration and compensation for the impact on Traditional Owner group rights and interests; and allowing developments on Crown land to proceed.

The Land Use Activity Agreement Template should include the provision of negotiation of community benefits and incorporate the following principles:

- a) Traditional Owner groups should receive no less than freehold owners receive when their rights and interests are affected by comparable land use activities;
- b) the equivalent of existing Victorian legal mechanisms (e.g. *Land Acquisition and Compensation Act 1986* (Vic), *Mineral Resources (Sustainable Development) Act 1990* (Vic)) should be used wherever possible to set out procedural rights;
- c) the nature of the proposed land use activity - particularly if it has a public benefit as opposed to a private benefit, or if it is a profit making or not-for-profit project - is taken into account when assessing the nature and value of any community benefits provided;
- d) the adoption of the non-extinguishment principle in the Land Use Activity Regime acts to lessen the impact of certain land use activities on Traditional Owner group rights and interests;
- e) the non-exclusive nature of Traditional Owner group rights and interests in Crown land (i.e. co-existing with the State) is taken into account when assessing the nature and value of any community benefits provided;
- f) the Land Use Activity Agreement Template can include agreement on formula to be used in assessing the dollar value of community benefits for any future land use activity;
- g) the State will prioritise the provision of community benefit offers that are consistent with its strategic objectives for addressing disadvantage and with a view to provide long-term benefits for future generations of Traditional Owner groups;
- h) the community benefits outcomes for similar land use activities should be broadly equitable for Traditional Owner groups across the State;
- i) community benefits are not intended as a substitute for the provision of mainstream services to citizens by government that are available to all Victorians nor specific services generally available to Aboriginal people;
- j) where third party proponents and the State are actively involved in the negotiation of community benefits, the parties should negotiate at the same time for reasons of efficiency, minimising costs and increasing opportunities for a range of benefits;
- k) the timeframe for negotiations will be of short and certain duration, with provision for appeal to an independent arbitral body;
- l) the independent arbitral body can determine disputes about the entitlement for community benefits and the equitable nature and value of community benefits; and
- m) the negotiation process should not act unnecessarily to cause delay or prevent proposed land use activities on Crown land from proceeding.

Independent body

The Steering Committee considers that an independent body is required to undertake a dispute resolution service and determination function as part of the Land Use Activity Regime. The independent body would determine certain matters when the parties to a negotiation are not able to reach agreement within the time provided. The Steering Committee has considered the role the National Native Title Tribunal plays under the NTA, and a range of alternative options for Victoria. The Steering Committee recommends that the Victorian Civil and Administrative Tribunal (VCAT) be the independent body.

Core principle #26: Independent body

The Victorian Civil and Administrative Tribunal (VCAT) should be given jurisdiction to perform the functions of the independent body under the Land Use Activity Regime for Negotiation Activities.

For Negotiation Activities that involve mining or petroleum tenements, VCAT should operate in a manner analogous to the National Native Title Tribunal under the ‘right to negotiate’ provisions in the *Native Title Act 1993*, namely:

- a) VCAT must not make a determination if it is satisfied that the State or proponent party did not negotiate in good faith with the Traditional Owner group;
- b) VCAT have the power to permit the grant of the tenement (with or without conditions) or decline to permit the grant;
- c) in making its decision, VCAT have regard to the view of relevant Traditional Owner groups, the impact of the proposed tenement on Traditional Owner group rights and interests, the impact of the proposed tenement on the environment, the economic impact of the undertaking related to the proposed tenements, and whether any offer made by the State or proponent is fair and reasonable; and
- d) determine the quantum of community benefits payable.

For all other Negotiation Activities, VCAT should:

- e) determine reasonable and relevant conditions for the activity;
- f) determine the quantum of community benefits payable;
- g) have the jurisdiction to resolve disputes about coverage under the Land Use Activity Regime (e.g. whether an activity is an Advisory or Negotiation Activity); and
- h) when performing its functions for the Land Use Activity Regime, be constituted by a panel which includes persons with experience of Aboriginal culture and land use (compare with s. 2A of *Victorian Civil Administrative Tribunal Act 1998* (Vic)).

Government funding

The Steering Committee notes that ongoing resources will be required to ensure the success of the Land Use Activity Regime over time and to enable State agencies and Traditional Owner corporate entities to properly carry out their responsibilities.

Core principle #27: Government funding

In order to achieve the objectives of the Land Use Activity Regime, resources will be required for both State agencies and Traditional Owner corporate entities to properly carry out their responsibilities under the Land Use Activity Regime.

In this context, an Individual Framework Agreement should address State funding for Traditional Owner corporate entities to achieve this objective.

Legislative support

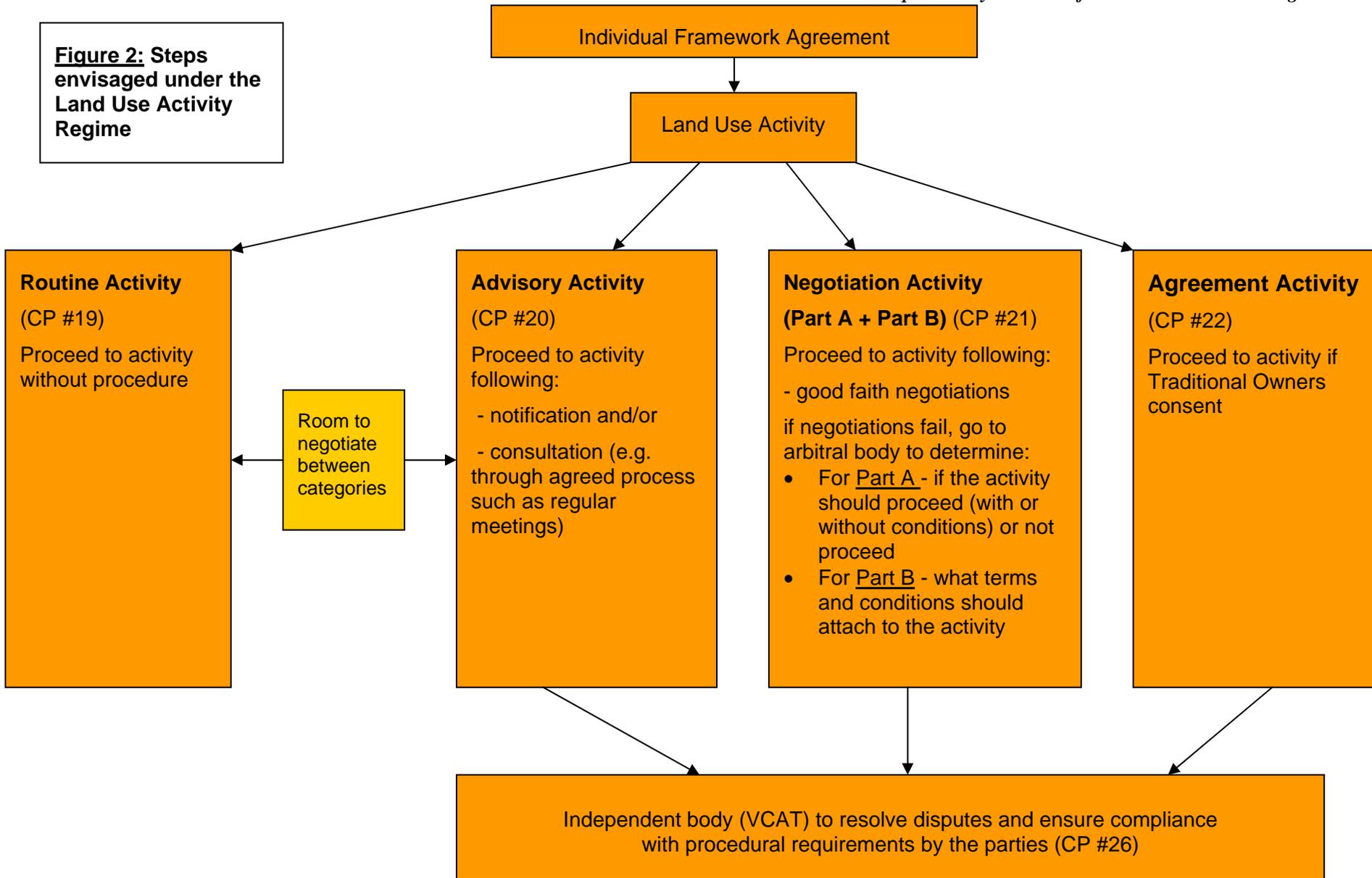
The Steering Committee notes that new legislation will be required to implement the Land Use Activity Regime and that, subject to Government approval of the Framework, an appropriate legislative program will be required.

In addition, the Steering Committee recommends that a Land Use Activity Agreement Template be developed by the State, the LJV and NTSV (using the core principles approved above) prior to applying the Land Use Activity Regime in the negotiation of an Individual Framework Agreement.

Core principle #28: Legislative support

Specific Victorian legislation will be required to authorise the Land Use Activity Regime.

Figure 2: Steps envisaged under the Land Use Activity Regime



2.3 Access to and use of natural resources

Background

Traditional Owner groups assert unique rights based on traditional law and custom of access to and use of natural resources in Victoria. These claimed rights are both non-commercial and commercial in character. The development of an appropriate regime for the accommodation of Traditional Owner group access to and use of natural resources is an essential part of a successful Framework. Consistent with the overall objectives of the Framework, economic development opportunities for Traditional Owner groups have also been addressed through the core principles recommended by the Steering Committee for inclusion in this element of the Framework.

The State's overarching policy imperative in this field is ensuring sustainable management and use of natural resources for current and future generations. The impact of the Indigenous population of Victoria (of which Traditional Owners are a subset) on natural resource use and sustainability is small in proportion to the total population of the State. In 2001, Indigenous people comprised 0.6% (or 27,800) of the total population of Victoria¹⁰.

In identifying possible options, the Steering Committee reviewed approaches and best practice in other States and Territories and overseas, while considering the particular circumstances of Victoria. Although Indigenous rights of access to and use of natural resources essentially share the same basic features throughout Australia, the extent of their accommodation in regulatory regimes varies across different state and territory jurisdictions. A comparative analysis shows that Victoria currently has the lowest levels of accommodation of Indigenous rights to access and use natural resources (both in legislative and policy terms). The Steering Committee has sought to remedy this imbalance through its recommendations.

In identifying possible options, the Steering Committee also considered the views and aspirations of Traditional Owner groups in relation to natural resources (as expressed in the LJG discussion paper¹¹ and through the LJG participation in the Steering Committee process). Issues canvassed include:

- the impacts of the loss of access to and use of natural resources arising from historical dispossession of Traditional Owners, including loss of economic benefits and opportunities arising from commercial exploitation of resources;
- statutory recognition of Traditional Owner rights to access and use natural resources for their personal, domestic or non-commercial communal needs and to conduct various traditional activities on Crown lands for the purposes of exercising these rights;
- effective participation by Traditional Owner groups in the management of natural resources; and
- creation of economic development opportunities for Traditional Owner groups from the commercial use of natural resources.

¹⁰ As at 30 June 2001: *Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 1991 to 2009*, Australian Bureau of Statistics, Australian Bureau of Statistics, 2004. (<http://www.abs.gov.au/AUSSTATS/abs@.nsf/ProductsbyReleaseDate/4EF9B192CB67360CCA256F1B0082C453?OpenDocument>)

¹¹ See the Victorian Traditional Owner Land Justice Group discussion paper, 2006, *Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Owner Land Justice Group*.

Options arising from the accommodation of Traditional Owner group access to and use of natural resources in Victoria fall into two major categories:

- access and use for the purpose of satisfying Traditional Owners' personal, domestic or non-commercial communal needs (e.g. hunting, fishing or collecting resources for making artefacts and crafts); and
- commercial use and access through opportunities that are consistent with the sustainability of natural resource management and the protection of existing third party interests (e.g. promotion of economic opportunities arising from commercial resource industries in an Individual Framework Agreement area, access to carbon-sequestration schemes and facilitation of commercial access to resources).

Overall objective of improved Traditional Owner access to, use and management of natural resources

The key objective of the natural resources component of an Individual Framework Agreement are to improve Traditional Owner access to and use of natural resources (including traditional activities such as camping and ceremonies), increase their involvement in natural resource management and align the State regulatory regime with recognition of Traditional Owner rights of access to and use of natural resources.

These objectives will be achieved through the commitments made in Natural Resource Management Agreements (NRMAs) with Traditional Owner corporate entities and a state wide Natural Resource Management Consultative Body (NRMCB) as a forum for engagement between Traditional Owner corporate entities and State agencies on natural resource policy issues. The parameters for the content of NRMAs and the operation of the NRMCB are outlined in core principle #34 below.

This section of the Framework is therefore designed to both build on existing, and where practicable, establish new mechanisms to enhance Traditional Owners access to and use of natural resources by recognising and respecting Traditional Owner rights, knowledge, tradition and customs in natural resource management.

The Steering Committee recommends:

Core principle #29: Overall objective of improved Traditional Owner access to, use and involvement in management of natural resources

The objective of improved access to, use and management of natural resources by Traditional Owner groups will be achieved by building on existing, and establishing new, mechanisms that both recognise Traditional Owner groups' rights to access and use natural resources and strengthen relationships between Traditional Owner groups and the State, consistent with the following principles:

- a) recognising the rights of Traditional Owner groups to access and use natural resources, as unique participants within the State regulatory regime for natural resource management;
- b) establishing an equitable and collaborative partnership between Traditional Owner groups and State agencies in natural resource management (including reciprocal sharing of knowledge, information and expertise in this area);
- c) incorporating Traditional Owner group interests and values in natural resource management decision-making;

- d) benefiting Traditional Owner groups and the wider community by recognising, valuing, promoting and incorporating Traditional Owner groups' cultural values, knowledge, skills and decision-making processes in natural resource management;
- e) mutual commitment to the overarching principle of sustainability in natural resource management with the aim of ensuring sustainable access and use for future generations.
- f) conserving, protecting and enhancing natural and cultural values;
- g) providing statutory recognition of Traditional Owner group non-commercial customary access to and use of natural resources;
- h) improving the general wellbeing of Traditional Owner communities through improved access to and use of natural resources, including by greater participation in commercial and economic opportunities;
- i) promoting public awareness of and support for, Traditional Owner group access to and use of natural resources;
- j) adoption of a common statewide approach with flexibility to accommodate the local or regional needs of different Traditional Owner groups; and
- k) protecting existing third party interests.

Core principle #30: Achieving the objective of improved Traditional Owner access to and use of natural resources

The above objective is to be achieved through measures based on the following principles:

- a) recognising, respecting, and incorporating Traditional Owner groups' cultural values, views, use, knowledge and decision-making processes;
- b) utilising the combined natural resource management skills and expertise of both the State and Traditional Owner groups;
- c) sustainable use of natural resources that ensures access and use for future generations;
- d) conserving, protecting and enhancing natural and cultural values;
- e) establishing accessible, transparent and practical arrangements and mechanisms that allow for improved access to and use of natural resources by Traditional Owner groups;
- f) ensuring Traditional Owner group participation in natural resource management with representation (in a culturally informed manner) on natural resource management and advisory bodies and by adopting a statutory requirement for consultation with Traditional Owner groups on natural resource use¹²;
- g) requiring formal State consideration of impacts of natural resource decision-making on Traditional Owner groups' access to and use of natural resources¹³;

¹² For example, representation on advisory committees for wildlife possession and trade, game-hunting and interactions between wildlife and humans. Other existing advisory bodies include, for example, Fisheries Co-Management Council under the *Fisheries Act 1995*, Victorian Catchment Management Council and specific Catchment Management Authorities under the *Catchment and Land Protection Act 1994*, National Parks Advisory Council, Regional Coastal Boards under the *Coastal Management Act 1995*, water planning, etc

¹³ For example, natural resources such as fisheries, water, firewood, ochre, eastern and western grey kangaroos, etc. Examples of existing processes include the development by DSE of the Victorian Coastal Strategy under the

- h) promoting other benefits to Traditional Owner groups arising from natural resource management, including employment, training, business and economic development opportunities;
- i) recognising and addressing the need for institutional support and capacity building of the State and Traditional Owner groups and, where applicable, the need for the gradual increase in Traditional Owner group participation in natural resource management over time (see core principle #34);
- j) involving continuing statutory responsibilities and functions of Ministers with respect to natural resources; and
- k) protecting existing third party interests.

Increased Traditional Owner participation in the management of natural resources

A key objective is to ensure that Traditional Owner groups have increased opportunities to participate in natural resource management processes and have a greater capacity to access these opportunities. Opportunities for Traditional Owner group participation in management in affiliated industries should also be explored.

Another objective is to ensure decision making in relation to wider access to, use and management of natural resources that has the potential to impact on Traditional Owner group access and use of those natural resources takes into account Traditional Owner views and interests. This is reflected in core principle #31(b). The parties have agreed that this principle would apply at the macro-level.

Core principle #31: Increased Traditional Owner participation in the management of natural resources

Increased participation of Traditional Owner groups in the management of natural resources will be achieved by adopting measures based on the following principles:

- a) establishing direct Traditional Owner group representation (in a culturally informed manner) on natural resource management bodies and advisory committees;
- b) a statutory requirement to consult, liaise and consider the views of Traditional Owner groups in the State's strategic decision-making and advisory processes in relation to natural resource management;
- c) establishing an equitable and collaborative partnership between a Traditional Owner group and State agencies in relation to natural resource management (including reciprocal sharing of knowledge, scientific information and expertise) within an Individual Framework Agreement area;
- d) requiring formal State consideration of impacts of natural resource decision-making on Traditional Owner groups' access to and use of natural resources;
- e) ensuring legislation facilitates the delivery of opportunities for Traditional Owner involvement in the management of natural resources (including the contribution of Traditional Owner knowledge to natural resource management);
- f) developing more effective consultation processes and strategies to enhance the engagement of Traditional Owner groups in natural resource management activities,

including increasing the integration of Traditional Owner knowledge in natural resource management and through establishing more effective State/Traditional Owner group engagement through relevant resource user forums; and

- g) building the cultural awareness, and developing Indigenous engagement skills, of non-Indigenous natural resource managers.

Statutory recognition of customary non-commercial Traditional Owner group use and access

Throughout the Steering Committee process, the State confirmed its commitment to the improved recognition of the non-commercial component of Traditional Owner group access to and use of natural resources in Victoria, including access and use for the low impact purposes of making crafts and artefacts.

Core principle #32: Recognition of customary non-commercial Traditional Owner use and access

Non-commercial Traditional Owner access to and use of natural resources should be recognised in the following ways:

- a) statutory recognition of non-commercial access to and use of natural resources by Traditional Owner groups (including water, non-mineral ‘stone’ and resources for craft/artefacts for sale, medicinal, ceremonial and subsistence/domestic food purposes) with the waiver of licences and permits and/or associated fees^{14 15};
- b) statutory recognition of the right to access and conduct activities in relation to natural resources (including a cultural or spiritual activity, hunting, gathering, fishing, camping, drawing water from a waterway for domestic purposes, ceremonies, including exclusive access to specific geographical areas for agreed periods) on Crown land and waters;
- c) Fisheries Victoria and Traditional Owner groups to work together to define customary non-commercial fishing in the Victorian context;
- d) amendment of the *Fisheries Act 1995 (Vic)* (and associated relevant regulations) to recognise customary non-commercial fishing as a unique sector separate to recreational fishing, and subsequent management plans to acknowledge Traditional Owner groups and consider the customary non-commercial fishing sector in the context of that fishery;

¹⁴ In relation to any statutory recognition of non-commercial use of and access to water by Traditional Owners no licences, permits or fees would apply.

¹⁵ Examples from five other jurisdictions: Western Australia’s *Wildlife Conservation Act 1950* permits Aboriginal people to hunt and gather on Crown land (but not Parks, etc) for food, cultural, ceremonial or therapeutic purposes. Tasmania’s *Living Marine Resources Management Act 1995* recognises non-commercial “Aboriginal activity” in the sea and its resources, including the making of artefacts for sale. New South Wales’ *Fisheries Management Act 1994* exempts Aboriginal people who are part of a native title claim or a local land council from paying for a recreational fishing licence. South Australia’s *Fisheries Management Act 2007* recognises “Aboriginal Traditional fishing” for “personal, domestic or non-commercial, communal needs, including spiritual and educational needs, and using fish and other natural marine and freshwater products according to relevant aboriginal custom”. Queensland’s *Fisheries Act 1994* provides (s. 14) that subject to express regulation or inclusion in a management plan (developed “after cooperating with” Aborigines and Islanders), Aborigines and Torres Strait Islanders “...may take, use and keep fisheries resources according to their traditions”.

- e) the Natural Resource Management Frameworks (including plans) to incorporate recognition of Traditional Owner groups and accommodate non-commercial use of and access to natural resources (see also core principle 32 (b) above);
- f) development of natural resource management policy to explicitly consider any implications on Traditional Owner group non-commercial use and access, alongside that of other natural resource users; and
- g) the Office of Water (and its delivery partners e.g. Water Corporations, Catchment Management Authorities and other statutory authorities) to give greater consideration to Traditional Owner groups' interests in developing and implementing water resource management actions (e.g. environmental watering to improve the ecology of rivers and wetlands, the development of annual watering plans, bulk entitlement consultations and water requirements for areas of particular cultural significance).

The question of the timing of statutory recognition of Traditional Owner group rights to non-commercial use of and access to natural resources was also considered by the Steering Committee.

The LJG and NTSV recommend the creation of a free-standing Victorian statutory right for Traditional Owner groups to take natural resources for their personal, domestic or non-commercial communal needs. The LJG and NTSV have clearly and consistently expressed the need for a statutory right at the state level to recognise and protect Traditional Owner resource use, without reference to native title, in a way that ensures Traditional Owner group rights are not 'regulated out of existence'. The 'free-standing' nature of the right means that it would not be contingent on an Individual Framework Agreement being reached. Appropriate conditions would need to ensure that the right was properly exercised and undertaken in a sustainable way.

The benefits offered by this freestanding statutory right would include:

- certainty – Traditional Owner groups would be assured that their rights would be protected in the context of a non-native title settlement, and Traditional Owner groups and the State would not need to address the uncertain and potentially onerous application of s. 211 under the NTA;
- recognition and respect – the legislative provision of such rights would acknowledge the unique and distinct rights of Traditional Owner groups to natural resource use;
- improved management – a clear mandate for reasonable limitations would ensure greater management oversight than is presently the case under s. 211 of the NTA;
- implementing best practice – all the other states and the Northern Territory provide for the non-commercial use of natural resources by Traditional Owners, and Victoria is presently lagging in this respect; and
- goodwill – the provision of a statutory right to use resources would provide a moderate benefit to Traditional Owner groups whose opportunities for negotiation with the State concerning an Individual Framework Agreement may have to wait for a number of years in to the future (given the lead times some Traditional Owner groups may need for preparing for entering Framework negotiations).

The State acknowledges that developing a policy for such free-standing recognition would bring Victoria in-line with other jurisdictions.

The Steering Committee recommends that the State progress the issue of freestanding statutory recognition of Traditional Owner customary non-commercial use of and access to

natural resources in collaboration with the LJJ and NTSV and in parallel with the implementation of the Framework. The right would be intended to apply to members of all Victorian Traditional Owner groups, independent of whether any Individual Framework Agreements have been reached or not.

Steering Committee endorsed the following principles to inform the State's development of such a policy:

- The Framework should provide a statutory right for Traditional Owners to take natural resources for their personal, domestic or non-commercial communal needs.
- As part of the statutory right, natural resource managers should be permitted to impose reasonable and relevant conditions to ensure that the right is exercised for the purposes specified.
- The statutory right should provide for Traditional Owner access to a resource unless a resource is closed to consumptive use in order to ensure sustainability (save for research, environmental protection, public health or public safety purposes).
- Each Individual Framework Agreement should be able to make more specific provision for the exercise of the statutory right, in the form of a Natural Resource Management Agreement (it being expected that more detailed agreement will result in more flexible management and use arrangements).
- For an area of the State where there is no Individual Framework Agreement (and so no agreement-based identification of a Traditional Owner group), State enforcement agencies will collaborate with Traditional Owner groups and organisations to put in place practical arrangements that ensure persons other than members of Traditional Owner groups do not purport to use the right. The collaborative arrangements will be consistent with existing convention – descent, self-identification, community acceptance (compare identification of an Aboriginal place under the *Aboriginal Heritage Act 2006* (Vic)).

Increased Traditional Owner group participation in the commercial use of natural resources

The State recognises that the increased participation of Traditional Owner groups in the commercial use of natural resources has significant potential to provide long-term economic and employment benefits.

The State will encourage opportunities for commercial partnerships between Traditional Owner groups and private natural resource enterprises and investors (e.g. as contemplated in the *National Indigenous Forestry Strategy*, May 2005).

Consistent with existing government policy approaches (e.g. the Government's additional criteria for awarding contracts for legal services which require compliance with proclaimed policies; i.e. the Victorian Bar equality of opportunity model briefing policy, the model litigant guidelines and the pro bono guidelines) the State will actively engage with Traditional Owner groups and local resource industries consistent with Individual Framework Agreements to lift Traditional Owner participation in respect to the commercial exploitation of natural resources.

Core principle #33: Increased Traditional Owner group participation in the commercial use of natural resources

Increased Traditional Owner group participation in the commercial use of natural resources will be progressed by adopting the following principles:

- a) Once Individual Framework Agreements are in place, the State will actively encourage natural resource industries operating in the agreement area to promote Traditional Owner group economic development, employment and enterprise opportunities, including, for example, by way of additional assessment criteria for the granting and renewal of authorities, with greater demands placed on larger operations.
- b) The State supports the establishment of natural resource industry-specific representative groups, or the augmentation of existing relevant groups, to progress participation and represent the interests of Traditional Owner groups in commercial natural resource industries;
- c) The State will provide access to Traditional Owner groups to participate in and benefit from carbon sequestration schemes on Indigenous-owned land and Crown land and waters (e.g. as a result of reforestation, restoration of wetlands, maintenance of natural vegetation as a 'carbon sink' and fire management regimes which reduce carbon emissions).
- d) The State will work collaboratively with Traditional Owner groups and natural resource industries to identify and develop commercial opportunities in Individual Framework Agreement areas in line with Traditional Owner group aspirations and interests, including identifying opportunities for participation and facilitating skills development, training and capacity building.
- e) The State will establish Traditional Owner group natural resource employment, training and business development strategies as components of the State's commitment to the overall Indigenous Economic Development Strategy.
- f) The State will facilitate increased Traditional Owner group participation in commercial use of natural resources, including through implementing the Victorian Aquaculture Strategy to actively support commercial aquaculture ventures by Traditional Owner groups, and through other existing strategies, including the Indigenous Fishing Strategy.
- g) If opportunities arise to exploit new resources, or where other resources are to be managed by new allocations (e.g. aquaculture or carbon sequestration), Traditional Owner groups will be explicitly considered in the initial allocation of access rights in Individual Framework Agreement areas.

Effective implementation of strategies for improving Traditional Owner access to and use of natural resources

The effective implementation of strategies for improving Traditional Owner access to and use of natural resources will be considered as part of the negotiation of an Individual Framework Agreement. Natural Resource Management Agreements (NRMAs) will be agreed to by the State and a Traditional Owner group and form part of an Individual Framework Agreement. NRMAs will identify clear strategies, actions, targets and timeframes.

Establishment of a Natural Resource Management Collaborative Body (NRMCB) is recommended, to provide a statewide forum for the engagement of relevant State agencies and Traditional Owner corporate entities in natural resource management policy issues.

Core principle #34: Effective implementation of core principles for improving Traditional Owner access to and use of natural resources

- a) Commitments on access to and use of natural resources between the State and Traditional Owner groups will be captured in Natural Resource Management Agreements (NRMAs) that form part of an Individual Framework Agreement including (where appropriate):
 - i. development of strategies for increased participation and capacity building (where appropriate) in the management of natural resources;
 - ii. development of strategies to ensure the sustainable use of natural resources;
 - iii. establishment of governance and operational compliance arrangements between the Traditional Owner corporate entity and relevant State agencies for the purposes of managing natural resources, including the ongoing, collaborative relationships that arise from NRMAs;
 - iv. obligations for consultation and exchange of information between the parties including a protocol for engagement;
 - v. development of education and awareness raising programs and activities (with a particular emphasis on youth);
 - vi. development of strategies for the increased participation in the commercial use of natural resources;
 - vii. Traditional Owner employment targets and training in natural resource management;
 - viii. identify the parties' responsibilities (including any compliance/ enforcement issues); and
 - ix. how the above strategies for the improved access to and use of natural resources will be achieved, including action plans with key performance indicators, timeframes, review provisions and benchmarks to be met prior to further expansion of an NRMA.
- b) Establish a Natural Resource Management Collaborative Body with representatives from relevant State agencies and Traditional Owner corporate entities to provide a central statewide forum for information exchange on natural resource management issues, including those issues relevant to Individual Framework Agreements.

Funding

The Steering Committee notes that ongoing resources will be required to ensure improvement of Traditional Owner group access to and use of natural resources over time. This will include funding for both Government agencies and Traditional Owner corporate entities in order to implement new initiatives in relation to improved access to and use of natural resources under the Framework (e.g. capacity building and additional officers).

Core principle #35: Funding

- a) In order to achieve the objective of improving Traditional Owner group access to and use of natural resources, funding will be required for both State agencies and Traditional Owner corporate entities to implement strategies to improve Traditional Owner access to and use of natural resources under the Framework.

- b) The State and Traditional Owner groups will work together to maximise opportunities within the private and non-government sectors for collaboration and funding in the natural resource sector.

Legislative support

The Steering Committee notes that new or amended legislation will be required to authorise the various mechanisms and arrangements to improve Traditional Owner group access to and use of natural resources and that, subject to Government approval of the Framework, a program of legislative reform will be required.

Core principle #36: Legislative support

Specific legislation and/or amendment to existing legislation will be required to authorise the various mechanisms and arrangements that improve Traditional Owner group access to and use of natural resources.

2.4 Measures for recognition and strengthening culture

Background

The Framework seeks to recognise, build and strengthen Traditional Owner group cultural identity in Victoria. The Framework as a whole will give recognition to Victorian Traditional Owners as groups with unique and distinct rights and interests. At the local level, Traditional Owner groups making Individual Framework Agreements will be able to negotiate benefits that enable them to build and strengthen their culture. The Framework offers a range of suggested measures that can be adapted to suit the aspirations of particular Traditional Owner groups and their local circumstances.

It is important to note that other elements of the Framework will also support cultural awareness and the preservation of culture; for example, the joint management of state and national parks, the Land Use Activity Regime and access to and use of natural resources.

It is proposed that measures for recognition and for strengthening culture also be reviewed as part of the review provisions built into Individual Framework Agreements (see core principle #56 in Chapter 3), allowing opportunities for a Traditional Owner group to build on initial proposals agreed to as part of a settlement. This is consistent with the approach adopted for Joint Management Plans.

Framework measures that recognise and strengthen culture

Measures for the recognition of a Traditional Owner group and for strengthening culture will form a key element of Individual Framework Agreements, and are likely to vary from area to area, depending on particular Traditional Owner aspirations.

The Steering Committee recommends:

Core principle #37: Measures for recognition and strengthening culture

Measures for recognition and strengthening culture within Individual Framework Agreements should be underpinned by the following core principles.

That the measures:

- a) are informed by the priorities of the Traditional Owner group;
- b) ensure widespread recognition that the Traditional Owner group are the traditional custodians of the agreed area;
- c) ensure protection of Aboriginal cultural heritage;
- d) ensure broad community awareness of Aboriginal culture, customs, language and spirituality; and
- e) advance the recognition of the Traditional Owner group and provide the foundation for ongoing strategies to strengthen culture (post-settlement).

The Steering Committee has developed a list of suggestions to inform group-specific negotiations (but without intending to limit such negotiations in any way).

Public recognition

The State would commit to publicly recognising a Traditional Owner group as the ‘right people for country’, as a result of Individual Framework Agreement negotiations being completed. This could include a commitment to notification:

- in the local press;

- to local agencies (e.g. Local Government and community agencies); and
- to other Government departments (both State and Commonwealth).

Group specific negotiations may identify other measures of public recognition that could be considered on their merits on a case-by-case basis.

Recognition statement

A ‘Recognition Statement’ that formally recognises a Traditional Owner group, their ancestors, history and connection to the land, and their responsibilities as Traditional Owners to maintain and protect their culture and their country, is suggested at Appendix 6.

This statement is recommended primarily as a preamble to the Framework as a whole but could also be used as a template for Individual Framework Agreements, where variations could reflect the experiences of particular Traditional Owner groups and be subject to their specific aspirations.

The purpose of the statement is to recognise that Traditional Owner groups:

- are the original owners of the land and waters in their agreement area;
- have a unique status in their agreement area;
- have a spiritual, social, cultural, historical and economic relationship with their agreement area;
- are the right people to speak for country in their agreement area;
- use their traditional land and waters for cultural purposes; and
- have been dispossessed from their traditional lands.

Protocols at public events (Welcomes to Country)

A ‘welcome to country’ is conducted by a representative of the local Traditional Owner group, who welcomes those in attendance to their country. Where Traditional Owner representatives are not available to give a welcome to country, conventional practice is for the hosts to acknowledge the Traditional Owners of the land and their elders past and present.

The public notification process would include a protocol for welcomes to country. The protocol will endorse the Traditional Owner corporate entity as the appropriate body to deliver the welcome and would provide information on the corporate entity and contact details.

Cultural centres and keeping places

Cultural centres and keeping places are an important way for Traditional Owner groups to strengthen, protect and promote their cultures within their own community and provide a place for community focus and to get together. They also provide public access points for the broader community to learn about, and appreciate Aboriginal culture.

Individual Framework Agreements could provide for Traditional Owner groups to establish, permanently own and maintain cultural centres and keeping places, subject to the aspirations and priorities of the group.

Local government engagement strategy

Local governments have a key role to play in promoting the widespread recognition of Traditional Owner groups as the traditional custodians of the region. Some local governments do already have strategies in place for such recognition.

As part of the negotiations under the Framework, and subject to the aspirations of particular Traditional Owner groups, the State could facilitate a conversation between the Traditional Owner group and local government(s) to develop an engagement strategy.

The strategy would identify measures for the recognition and strengthening of culture to be implemented jointly with local government as part of the implementation of an Individual Framework Agreement. A strategy could include measures to:

- recognise the Traditional Owners of the areas within a municipality;
- foster ongoing consultation with Traditional Owner groups;
- include Traditional Owner group representation on local government-convened committees;
- provide for protection of cultural heritage;
- educate the broader community about Aboriginal culture, customs, language and spirituality;
- support for the development of cultural awareness strategies and projects (such as local histories; language preservation projects; monuments etc); and
- promote greater use of Indigenous place names where the Local Government is the naming authority.

Signage on roads indicating traditional country and Indigenous place names

Under the *Geographic Place Names Act 1998* (Vic), naming proposals can be made to various place-naming authorities (e.g. local government, Vic Roads, Department of Education and Training). After consideration of the proposal and public consultation, the naming-authority makes a decision on the proposal and if supported, recommends the proposal to the Registrar of Geographic Names. The Registrar then assesses the proposal, against the *Guidelines for Geographic Place Names of Victoria*. If the proposal is acceptable, the Registrar then legally assigns the name (by gazettal) and places the name on the Victorian Register of Geographic Names.

The guidelines state: “the use of traditional Indigenous names is encouraged and preferred for unnamed features, subject to agreement from the relevant Traditional Owner communities.” As such, the State is already supporting greater use of Indigenous place names in Victoria. The State would commit to support place name proposals and signage on roads as this pertains to Individual Framework Agreements.

This would be further developed as part of the local government engagement strategy.

Cultural Awareness projects

The State would consider funding specific project proposals for cultural awareness projects that support a greater acknowledgement of Aboriginal history at the local level and where these projects address the Traditional Owner group’s aspirations regarding the recognition of their ancestors and culture; for example, educational resources and cultural awareness tools, language preservation projects, local histories and public monuments.

Funding support for projects such as the erection of monuments, signage, and recording and promoting local languages are best considered on a case-by-case basis as part of Individual Framework Agreement negotiations. They would also be considered as part of the local government engagement strategy and review mechanisms.

Interpretive information

As part of the negotiations under the Framework, and subject to the aspirations of the Traditional Owner group, the State will consider offering resources for the development of interpretive information for use by a wide range of public authorities.

The stories, history and folklore of Traditional Owners are a common feature of much interpretive information presented in a variety of local settings – whether by Local Government, land management agencies or the tourism sector. The option for a particular Traditional Owner group to gather, edit and present this information for local stakeholders would enhance the reliability of interpretive information and the accountability of its contents to the Traditional Owners that it concerns.

Individual Framework Agreements could provide:

- arrangements for the preparation of interpretive information for a Traditional Owner group;
- protocols concerning the access to, and use of, the interpretive information.

2.5 Alignment with cultural heritage processes

Background

Cultural heritage and native title are inextricably linked. The Steering Committee seeks alignment of native title processes under the Framework with the State's management of Aboriginal cultural heritage under the Victorian *Aboriginal Heritage Act 2006* (Vic) (AHA). Both processes involve identification of who are the 'right people for country'.

Legislative amendment to the *Aboriginal Heritage Act 2006* (Vic)

The AHA gives primacy to Aboriginal people with traditional or familial links to country, as being best placed to manage Aboriginal cultural heritage places and objects in Victoria. Currently the AHA gives particular priority to native title holders recognised under the NTA. The Framework, as an alternative means of recognition of native title, needs to dovetail with this regime. This can occur through minor amendment to the AHA.

The Steering Committee recommends:

Core principle #38: Legislative amendments to the Aboriginal Heritage Act 2006

That a Traditional Owner group which has entered into an agreement with the State under the Framework be treated in the same way as a registered native title holder under the Aboriginal Heritage Act 2006.

The AHA establishes the Victorian Aboriginal Heritage Council (VAHC), which is made up of 11 members appointed by the Minister for Aboriginal Affairs, who must be resident in Victoria and have demonstrated traditional or family links to an area in Victoria. One of the VAHC's key roles is to appoint Registered Aboriginal Parties (RAPs), being the organisations recognised as having statutory cultural heritage decision making responsibilities over designated areas.

Core principle #38 would ensure that RAPs appointed by the VAHC are, wherever possible, the same groups that the State recognises as Traditional Owner groups under the Framework. Sections 151(2) and 156(3) of the AHA are the relevant provisions requiring amendment.

Further amendments to the AHA could be considered that would complement Framework processes, including extending the statutory timeframes for a decision on an application for registration as a RAP. However, the main purpose of the AHA is to provide for the protection of Aboriginal cultural heritage and to appoint Aboriginal groups to undertake this role in a timely and expedient way. To meet this objective, VAHC has adopted a strategic goal of ensuring coverage of the State with RAPs that are competent, sustainable and well regarded within the next two years.

As such, it is likely that the appointment of RAPs will (in most cases) precede settlements under the Framework. However, the above amendments to the AHA will allow for an adjustment of RAP appointments (and boundaries) if required.

The AHA is not subject to review until May 2012. Adopting early amendments to the AHA will be considered in the context of the legislative requirements for the implementation of the overall Framework.

Sharing connection material

There is a clear overlap between the information required to determine RAP status and to meet the threshold criteria for an agreement under the Framework.¹⁶ The Steering Committee recommends the sharing of connection material between the VAHC, the State and NTSV, with the aim of reducing the administrative burden on all parties. However, in order to share connection material, a mechanism would need to be put in place that would provide adequate protection to all parties. Any such mechanism would need to take into consideration various statutory requirements (e.g. the VAHC's decision-making timeframes and Freedom of Information) and the issue of client confidentiality.

The Steering Committee recommends that the following core principles inform further investigation by Government of a mechanism for the sharing of connection material:

Core principle #39: Sharing of connection material

That the sharing of connection material is desirable if it:

- a) results in streamlined and simplified processes and reduces the burden placed on all parties, most notably Traditional Owner groups, in preparing and assessing connection material;
- b) is in the best interests of Traditional Owner groups and does not compromise client privilege or pose a risk to native title claimants if connection issues are not resolved in native title negotiations and go on to a litigated outcome; and
- c) assists the Victorian Aboriginal Heritage and the Victorian Government to make the best possible decisions about who are the right people for country.

Definition of 'Traditional Owner group'

A definition of 'Traditional Owner group' may be required for legislative amendments that enable implementation of the Framework, as well as in broader policy considerations.

Core principle #40: Definition of 'Traditional Owner group'

The definition of the term 'Traditional Owner group' should be underpinned by the following core principles that address cultural association and relatedness:

- a) a Traditional Owner group has a shared cultural association with an area under 'Aboriginal tradition' (as defined in the *Aboriginal Heritage Act 2006*); and
- b) each Traditional Owner group is made up of members related [not merely by biological connection] to each other in accordance with the practices, customs and traditions of the group.

¹⁶ Refer to Appendix 7 – Meeting Threshold Requirements.

2.6 Claims resolution

Background

Agreements made under the Framework should represent a fair bargain for both a Traditional Owner group and the State. This section of the report provides a series of core principles to underpin a coherent and practicable approach to resolving native title issues in Victoria, in relation to the following:

- a negotiation protocol, incorporating fairness and equity;
- native title compensation and compensation entitlements arising from future events;
- sustainable funding of Traditional Owner corporations under Individual Framework Agreements;
- finality, certainty and durability/sustainability; and
- how the Framework process will interact with the NTA process, including the registration of ILUAs.

Negotiation protocol

Steering Committee considered and endorsed a set of proposed core principles regarding a negotiation protocol to be jointly adopted by the State and each Traditional Owner group engaged with the Framework. The core principles seek to capture both the intent and the spirit in which the negotiation of Individual Framework Agreements will be conducted, as well as ensuring common standards and parity across the negotiations with different groups and in the agreements reached.

Core Principle #41: Negotiation Protocol, incorporating fairness and equity

- a) Negotiations will be conducted in good faith by all the parties within identified and agreed timeframes.
- b) Negotiations are about people and will be conducted with mutual respect. They will also aim to establish long term, meaningful and collaborative working relationships that build the capacity of both parties (both in the negotiation phase and in subsequent agreement implementation).
- c) Negotiated outcomes should deliver inter-generational benefits for Traditional Owners and the wider Victorian community and should include consideration of economic, social and environmental impacts.
- d) Commitments made by both parties under agreements should be practicable, achievable and measurable.
- e) Agreements should be a fair bargain for all the parties and represent value for money.
- f) The benefits delivered under Individual Framework Agreements will improve on the status quo (i.e. the three previous settlement agreements already completed in Victoria).

- g) The guiding principle will be to achieve parity in outcomes of Individual Framework Agreements both for, and between, Traditional Owner groups, while acknowledging settlement components will differ according to location, and the total package of benefits will be impacted on by other criteria, including population size, number of Traditional Owner groups (in the event of a settlement with multiple groups) and geographical area.
- h) Agreements will acknowledge past injustices and identify clear pathways to the future.
- i) Agreements should identify key benchmarks for performance by both Traditional Owner groups and the State.
- j) Agreements should be only entered into with the free, prior and informed consent of the Traditional Owner group.
- k) Both the State and Traditional Owner groups will require adequate resourcing and support prior to undertaking negotiations.
- l) State Government policies and programs will operate in a manner which serves to complement, support and preserve the contents of Individual Framework Agreements concluded under Framework.

Compensation

Steering Committee developed core principles to underpin the resolution of native title compensation under the Framework. They identified the relevant elements of the total proposed Framework package, which, when combined, constitute NTA-related compensation.

There are two categories of compensation:

- an entitlement arising from events prior to an Individual Framework Agreement coming into force; and
- an entitlement arising from events after an Individual Framework Agreement has come into force.

The following core principles are intended to act as the parameters of negotiation for Individual Framework Agreements in respect of compensation. The overall approach is made in the interests of providing certainty of outcomes for Traditional Owner groups (in respect of NTA compensation entitlements) and to the State (regarding its financial exposure to those statutory compensation entitlements). The approach developed by the Steering Committee has been made in the spirit of reaching negotiated, rather than litigated, settlements of compensation entitlements.

Core principle #42: Overall approach to Native Title Act Compensation

The overall approach is that all entitlements to compensation under the NTA are dealt with as part of any Individual Framework Agreement.

Core principle #43: Fair alternative to Native Title Act compensation

The contents of the settlement package as a whole, as agreed in negotiations by the parties, will represent a fair alternative to compensation entitlements under the *Native Title Act 1993*.

Both parties should agree that the settlement package will address any compensation that may have been payable by the State if the Traditional Owner group had pursued compensation entitlements under the *Native Title Act 1993* for events prior to the agreement coming into force.

Core principle #44: Addressing compensation entitlements arising from future events

Compensation entitlements arising from future events will be addressed by the negotiation in each Individual Framework Agreement of a Land Use Activity Agreement which is based on securing ‘community benefits’ for a Traditional Owner group when their rights and interests in Crown land are significantly affected by a high impact land use activity (after the agreement comes into force)¹⁷.

Sustainable funding

The Steering Committee has endorsed the principle that Individual Framework Agreements negotiated under the Framework should be in perpetuity. By definition, this will require provision by the State of ongoing funding support for Traditional Owner corporations to meet their obligations under Individual Framework Agreements.

There are a number of shortcomings with existing funding arrangements that undermine the long-term viability of agreements. In the context of the State wanting agreements that are in perpetuity, status quo arrangements are not acceptable.

Steering Committee identified a set of core principles to provide sustainable resourcing to Traditional Owner groups (corporations) to meet their obligations under the proposed Individual Framework Agreements and to take up potential opportunities for cultural pursuits and economic development (including resource acquisition).

It also identifies the need for the State to allocate resources in order to meet its obligations under Individual Framework Agreements.

Current funding models

Current funding models for individual settlements are ‘grants for services’ contracts for a maximum of five years and are based on budgets for Traditional Owner corporate entities to manage new obligations and undertake capital works projects. Any extended or new funding agreement is dependent on the parties reaching agreement and funding in the first instance is only guaranteed for an initial five year period. The State retains accountability for and control over the release of funds and the performance of Traditional Owner corporate entities.

The most recent settlement agreement was concluded with the Guditjmarra people in 2007, and involved a transfer of funds over five years from the State to the prescribed

¹⁷ Refer section 2.2 in this chapter.

body corporate (under the NTA), the Gunditj Mirring Traditional Owners Aboriginal Corporation. This is in contrast to the two earlier settlement agreements in which a large proportion of funds were tied to specified purposes, and disbursed to Traditional Owner groups by State Government departments.

Under earlier settlement agreements in Victoria, significant portions of agreed sums were not transferred wholesale to Traditional Owner groups, but have instead been managed by the State, drawn down from departmental budgets at the discretion of departmental officers.

A key cost of the current approach is that it generates considerable uncertainty and is a barrier to making sustainable decisions about the future. This affects both Traditional Owner groups and the State. State investment in native title resolution can be thought of as purchasing finality and certainty, and funding options should be considered in terms of how far it reduces uncertainty about native title outcomes.

Sustainable settlement funding options

In considering a potential funding model, it will be necessary to examine issues such as:

- minimising administrative complexity and risk,
- ensuring accountability by Traditional Owner corporations and the State,
- parity between Traditional Owner corporations, and
- appropriate tax treatment.

The structure of settlement funds is clearly significant in shaping a Traditional Owner group's capacity to develop its own structures and economic base. Moving towards Individual Framework Agreements, it will be vital to establish a sustainable settlement funding model which meets the requirements of all parties.

The solution developed now must serve not only the present generation of Traditional Owner groups, but must provide security for future generations of Traditional Owners to meet responsibilities under perpetual settlement agreements.

Current policy approaches to 'closing the gap' in life outcomes between Indigenous and non-Indigenous Australians emphasise the important links between institutional capacity and self-determination, and a key factor in this is the building of governance capacity. Funding structures need to support the development of institutional and governance capacity within Traditional Owner groups and entities, which in turn underpins autonomy.

Finally, the chosen structure should be sustainable from the perspective of the State – that is, it should facilitate the management of risks from unforeseen costs. Appropriate management of future risk and liability is the responsibility of the Victorian Government, which is accountable to the State's taxpayers.

Therefore, any structure of funding settlement payments should be assessed against:

- security for current and future generations of Traditional Owners to meet their responsibilities under perpetual settlement agreements;

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- opportunities it affords to build financial management and decision-making capacity in Traditional Owner groups;
- its ability to provide such accountability in a transparent way;
- the extent to which funding model options are aligned with other State Government policy principles and programs, and the potential role of the Commonwealth;
- future risk and liability of the State; and
- long term viability and flexibility, should circumstances change in decades to come.

International and interstate examples of funding models

For the purposes of considering the sustainable funding of Framework agreements, it is useful to examine a range of practices related to funding in other jurisdictions, both national and international.

Northern Territory

For the Northern Territory, an Aboriginal Benefits Trust Account was established in 1978 under part 6 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cwlth). This fund is now known as the Aboriginals Benefit Account. This act requires that an amount equal to the royalties paid to the Northern Territory or the Commonwealth from mining on Aboriginal land be paid into the account. Payments out of the account are made by the responsible Minister for:

- the operational costs of Northern Territory land councils;
- payments to royalty associations of Aboriginal groups in the Northern Territory affected by mining;
- payments to Aboriginal people living in the Northern Territory on the recommendation of the Account Advisory Committee;
- meeting the cost of administering the account; and
- making payments for the acquisition and administration of township leases under s. 19A of the Act.

On 30 June 2008, the amount invested in the investment portfolio account was approximately \$190m. In 2007-08, the Aboriginal Benefits Account expended approximately \$76m, whilst receiving income in the same year of just over \$83m.¹⁸

New South Wales

When it was first enacted, the *Aboriginal Land Rights Act 1983* (NSW) directed 7.5% of State land tax revenue for a period of 15 years to an investment fund and to meeting the costs of the land council system established by that act. At the end of the period on 31 December 1998, the balance of the investment fund was approximately \$485m. The

¹⁸ Refer Department of Families, Housing, Community Services and Indigenous Affairs Annual Report 2007-08, appendix 10.

capital value of this amount is required to be maintained (under s. 150) and the investment income is used to fund the land council system including authorised expenditures such as land acquisition.

International

Typical practice for the settlement of historical claims in New Zealand – claims about, amongst other things, past violations of the 1840 Treaty of Waitangi – includes the provision of financial, commercial and cultural redress. In monetary terms, this includes the payment of a sum to Māori claimants as a settlement amount. Control of such funds passes to the recipients in the typical way for damages paid in litigation.

An example is the Ngāti Mutunga Deed of Settlement signed on 31 July 2005 and the accompanying *Ngāti Mutunga Claims Settlement Act 2006* (NZ). Under the settlement for Ngāti Mutunga, financial and commercial redress to the amount of \$14.9m was paid, \$14.6m of which was paid as a ‘cash settlement amount’.

A United States example of the establishment of a capital fund for Indigenous claim settlement purposes is the *Maine Indian Claims Settlement Act 1980* (US). This Act was part of a settlement package for Indian claims to 60% of the State of Maine commenced in 1972. The Act established two trust funds for the Passamaquoddy Tribe and the Penobscot Nation – the Maine Indian Claims Settlement Fund with a capital sum of \$27m and the Maine Indian Claims Land Acquisition Fund with a capital sum of \$54.5m. The funds are held in trust by the Secretary of the Interior. The interest of the settlement fund is paid in equal annual shares to the Passamaquoddy Tribe and the Penobscot Nation with no restriction other than that, in each case, the interest on \$1m must be spent for the benefit of elders over 60 years of age. The Secretary may expend the principal or interest of the land acquisition fund for the purpose of acquiring land or natural resources.

The Nisga’a Final Agreement settled the comprehensive land claim of the Nisga’a to lands in the northwest of British Columbia, Canada. It entered into force in May 2000 with the passage of enabling legislation by the parliaments of Canada and British Columbia. Amongst other things, the agreement established the Nisga’a Lisims Government with the powers of a municipality and many delegated functions from the Federal and Provincial Governments. In addition to funds gathered in administering its assets and exercising its taxation powers, the Nisga’a Lisims Government will receive a capital transfer of \$196m over 15 years.

Analysis

Key issues arising from the examples above include:

- who controls the funds—in some cases the funds are held in trust, in others by Indigenous entities while decision making responsibility varies for the different funding mechanisms described;
- the purpose for which funds can be used—whether the funds can be used at the absolute discretion of the person by whom they are held or whether they must be directed to a particular purpose;

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- whether funds serve as a public function or are part of a legal settlement—the Northern Territory and New South Wales examples above do not directly relate to any legal settlement while the other examples considered do.

Core principle #45: Sustainable funding of Traditional Owner corporations under Individual Framework Agreements

The provision of State Government funding of Traditional Owner corporations under Individual Framework Agreements should be consistent with the following core principles, whereby funding will:

- a) cover the range of activities that will be required to be undertaken by a Traditional Owner corporation to sustainably meet its obligations under an Individual Framework Agreement for the term of the agreement, whilst ensuring effective and sustainable governance;
- b) consist of two components:
 - i. a non-discretionary allocation to be applied to meeting the obligations of the Traditional Owner corporation under the agreement; and
 - ii. an allocation at the discretion of the Traditional Owner corporation which can be applied for economic development and cultural purposes (including asset and resource acquisition);
- c) secure outcomes for future Traditional Owner generations to meet their obligations under Individual Framework Agreements;
- d) contribute towards ensuring certainty about native title outcomes;
- e) manage risks of unforeseen costs;
- f) contribute to the State Government’s Victorian Indigenous Affairs Framework strategic actions aimed at improving economic development;
- g) build Traditional Owner group financial management and decision making capacity, and contribute to providing an economic base (including via resource acquisition);
- h) facilitate complementary State, Commonwealth and private program investments;
- i) represent an attractive financial investment; and
- j) ensure accountability to the Traditional Owner group and the State by streamlined annual reporting against agreed and measurable outcomes.

Core principle # 46: Other funding commitments under Individual Framework Agreements

Funding will be required to support the negotiation and to implement Individual Framework Agreements to meet commitments made under those agreements.

Finality, certainty and durability/sustainability

There needs to be a common understanding reached between the State and Traditional Owner groups over application of terms such as finality, certainty and durability/sustainability under agreements reached.

For its part, the State has made it clear that its preference is for finality and certainty through the resolution of claims. As such, the State would expect resolution to include finalisation of the claim through a binding agreement (such as an Indigenous Land Use Agreement, or ILUA, registered under the NTA) and, if also sought, a consent determination relating to native title over the claim area.

NTSV and LJG have argued that finality, certainty and sustainability/durability are most likely to be provided through agreements that include benchmarks, are enforceable, are a result of good process and backed up by legislative reform and adequate funding. Similarly, the State has pointed to the need for robust negotiation processes, and clearly understood, transparent, enforceable contracts.

Durability/sustainability will be obtained through settlement packages that provide for future as well as present generations of Traditional Owners, result in stronger relationships, build capacity and where outcomes for people are real and measurable. These factors in turn would act as a disincentive for Traditional Owner groups to revisit native title and land justice issues in the future.

With these issues in mind, the following core principles seek to strike a fair balance between both the State's and Traditional Owners' aspirations.

Core principle #47: Certainty, finality and compensation

Certainty/finality will be determined at the level of Individual Framework Agreements by negotiation, with the informed consent of Traditional Owner groups.

Claims finality

- a) Certainty and finality means certainty about post-agreement obligations and entitlements for both State and Traditional Owner groups through honouring the terms and conditions set out under the Individual Framework Agreements.
- b) This includes a commitment by the State to the non-extinguishment principle applying to all land dealings under Individual Framework Agreements, unless by specific agreement between the parties.
- c) Once an Individual Framework Agreement is executed, the Traditional Owner group will not make further native title claims over the agreement area, and where relevant, will withdraw existing claims. This agreement will be conditional upon the benefits of the Individual Framework Agreement for Traditional Owner Groups not being withdrawn or diminished.
- d) In the event that a claim is lodged contrary to the provisions provided for in the ILUA, the State would take appropriate action which may include the suspension of funding under the agreement.

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- e) Other circumstances would need to be consistent with s. 13(5) of the NTA (change of circumstances or interests of justice) where a revised native title determination application is required.

Compensation finality

- f) Provisions addressing post-agreement compensation under the proposed Land Use Activity Regime, and the sum total of the other Traditional Owner group benefits under the Individual Framework Agreement will constitute a full and final settlement of native title compensation.
- g) The value of benefits determined under Individual Framework Agreement will be in addition to any normal citizen entitlements (i.e. the cost of basic services) and any specific entitlements generally available to Aboriginal people.
- h) Once an Individual Framework Agreement is executed, a Traditional Owner group will not make further native title compensation claims, and where relevant, withdraw existing claims. This agreement will be conditional upon the benefits of the Individual Framework Agreement for Traditional Owner groups not being withdrawn or diminished.

How the Framework process will interact with the Native Title Act process

The negotiation of Individual Framework Agreements will interact with and may complement, as well as diverge from, the claim processes under the NTA, depending on the circumstances.

The table below describes the most likely range of situations under which Framework negotiations may occur, including where there is an interaction with native title claims:

Situation	Outcome
A Traditional Owner group seeks an Individual Framework Agreement, without having made, or making, a native title claim.	Individual Framework Agreement finalised. No native title determination.
A Traditional Owner group has a native title claim on foot, but seeks an Individual Framework Agreement as an alternative to the determination of native title, and the native title claim is withdrawn once an Individual Framework Agreement is finalised.	Individual Framework Agreement finalised. No native title determination.
A Traditional Owner group has a native title claim on foot and continues to seek a native title determination over certain area(s) (for example, where the group considers that a consent determination is viable due to strong connection evidence	Individual Framework Agreement finalised. Native title consent determination made over agreed area(s).

and in the absence of extinguishment), but it is complemented by an Individual Framework Agreement over a wider area.	
A Traditional Owner group that has not yet made a native title claim seeks an Individual Framework Agreement that encompasses a consent determination over identified area(s).	Individual Framework agreement finalised. Native title consent determination made over agreed area(s).
A Traditional Owner group has had a NTA resolution of their claim and would like to negotiate an Individual Framework Agreement.	Native title determination unaffected. Individual Framework Agreement finalised (applies to three existing settlements).

Indigenous Land Use Agreement registration requirements under the *Native Title Act 1993*

It is envisaged that securing registration of an Individual Framework Agreement (or components thereof) as an Indigenous Land Use Agreement (ILUA) under the NTA will in most circumstances be able to deliver the finality and certainty that the State is seeking, including in regard to native title related compensation. This is because a registered ILUA binds ‘all native title holders’ as parties to the agreement. As set out in the NTA, ILUAs can cover a broad range of matters, but must be ‘native title related’. They can cover such matters as grants of freehold or any other interests, compensation and the relationship between native title and other rights and interests.

The requirements for registering an Indigenous Land Use Agreements under the NTA would need to be accommodated. Key requirements include:

- demonstrating that all reasonable efforts have been made to identify persons who hold or may hold native title; and
- demonstrating that the agreement is authorised by those people.

The State’s preference is for NTSV to certify ILUA applications, consistent with NTSV’s certification functions under s. 203BE(5) of the NTA (amongst its other functions) as the native title service provider for Victoria. This means that the State would be asking NTSV to certify as to their opinion that the requirements described above have been met (provided they can reach that opinion).

There may be some circumstances where ILUAs have limited applicability, such as where there is a negative determination of native title. Other types of binding contracts may need to be considered.

Further, the State will need to establish a mechanism under state legislation that binds Traditional Owner groups to Individual Framework Agreements where they may not be native title holders, in a manner that is analogous to the way native title holders are bound by ILUAs under s. 24EA of the NTA.

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Core principle #48: Registration of Indigenous Land Use Agreements

Consistent with the principle of delivering greater certainty for all the parties, all ILUAs would ideally be certified by NTSV, as the native title service provider for Victoria under the NTA.

It is agreed, however, that NTSV will only be expected to certify ILUAs where it is fully satisfied that the conditions necessary for this function to be carried out have been met. NTSV will therefore need to treat all requests for certification on a case-by-case basis.

Core principle #49: State mechanism for binding Traditional Owner groups to Individual Framework Agreements

The State will establish a legislative mechanism that binds Traditional Owners to Individual Framework Agreements in a manner that complements, and is analogous to, s. 24EA of the NTA.

Chapter 3: The process for making agreements under the Framework

Background

This chapter explores a process for the making of Individual Framework Agreements between the State and Traditional Owner groups, as well as mechanisms to ensure proper implementation of those agreements.

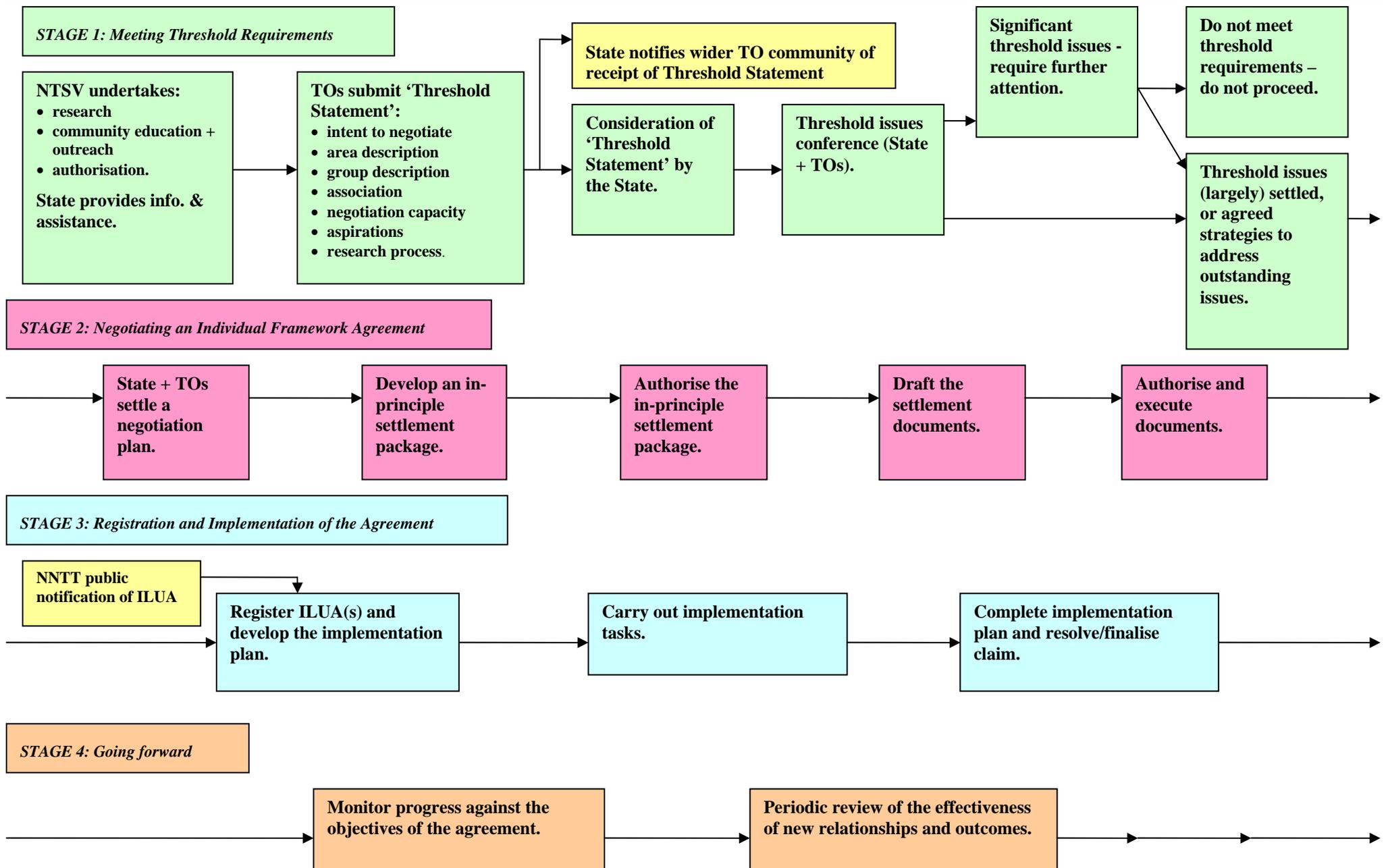
The Steering Committee has had regard to ‘lessons learnt’ from the native title settlements made to date. These lessons include:

- the need for greater clarity over of the roles and responsibilities of State agencies, NTSV, the LJG and Traditional Owner corporations, both in the negotiation and implementation phases of Individual Framework Agreements;
- the need for up front agreement on a negotiation plan prior to negotiations commencing in detail;
- the importance of securing agreement to a detailed implementation plan as an integral part of each Individual Framework Agreement, with the plan making the agreement subject to regular reporting and joint evaluation through agreed mechanisms involving representatives of the State and Traditional Owner groups;
- the necessity that both the State and Traditional Owner groups have sufficient capacity to implement their obligations under agreements.

These lessons have informed the staged process for entering and carrying through the negotiation of Individual Framework Agreements and their implementation, as proposed here. The process as a whole is summarised in Figure 3.

The Steering Committee seeks ‘best practice’ arrangements for entry into negotiations under the Framework by Traditional Owner groups and in the staged negotiation and implementation of Individual Framework Agreements. Collaboration and innovation are critical features of the process design. This is a significant departure from past approaches which have tended to be adversarial and reactive.

Figure 3: Process overview for entry, negotiation and implementation of an Individual Framework Agreement



Stage One: Meeting Threshold Requirements

The objective of threshold requirements is that the State establishes that it is dealing with the ‘right people for country’ who have the ‘negotiation capacity’ to meaningfully enter into agreement-making under the Framework. This is important not only for the State, but also for Traditional Owners themselves and the wider community, both Indigenous and non-Indigenous. It brings credibility to the Framework negotiations and their outcomes.

The Steering Committee acknowledges that the decision about whether a Traditional Owner group meets the threshold requirements of ‘right people for country’ and ‘negotiation capacity’ ultimately rests with the State. At the same time, the Steering Committee notes that previous requirements regarding ‘connection material’ in the context of native title proceedings have been onerous.

During the course of the Steering Committee process, the Native Title Unit in the Department of Justice sought to develop a fresh approach to threshold requirements for entry of Traditional Owner groups into Framework negotiations. The State undertook this task in consultation with NTSV and the LJG, and produced the document *Meeting Threshold Requirements*¹⁹ which was presented to the Steering Committee.

The Steering Committee has agreed with the core principles and overall approach proposed by the State for identifying the ‘right people for country’ and their ‘negotiation capacity’ and that the State should continue to work collaboratively with NTSV, the LJG and the VAHC to ensure a shared understanding of the requirements and the application of these requirements.

The Steering Committee has also considered the issue of threshold requirements in the circumstances of Traditional Owner groups who have already reached native title settlements who may wish to pursue Framework agreements, as well as groups who have existing claims on foot that are substantially progressed.

The Steering Committee recommends:

Core principle #50: Threshold requirements

- a) Where Traditional Owner groups with existing settlements seek to enter negotiations under the Framework, on the basis the group has largely the same composition and asserts interests over the same area as in the existing settlement, they will be deemed as having met the Stage 1 threshold test.
- b) Where a Traditional Owner group has an existing native title claim on foot and wishes to negotiate an Individual Framework Agreement (and substantial progress has already been made in areas relevant to meeting threshold requirements), the State and the Traditional Owner group will seek to fast track the Stage 1 threshold process.

In relation to the lead-up phase of research that Traditional owner groups and their representatives are likely to need to undertake to meet threshold requirements, the Steering Committee recommends:

Core principle #51: Access to records

The State will engage with relevant bodies and agencies to facilitate timely Traditional Owner group access to relevant records (e.g. State records, library and museum collections) relevant to pursuing Individual Framework Agreements.

¹⁹ The State of Victoria’s ‘Meeting Threshold Requirements’ paper is at Appendix 7.

Stage Two: Negotiating an Individual Framework Agreement

Once a Traditional Owner group has satisfied the State with regard to threshold requirements, the negotiation of an Individual Framework Agreement will commence with the settling of a 'Negotiation Plan'.

Core principle #52: Negotiation Plan

- a) The Stage 2 negotiations for Individual Framework Agreements will proceed only once a Traditional Owner group has satisfied the State in relation to the Stage 1 threshold requirements.
- b) Negotiations will be conducted consistent with the Negotiation Protocol²⁰ and performance indicators against the protocol will be jointly agreed.
- c) Each proposed Individual Framework Agreement negotiation will be preceded by agreement on a Negotiation Plan between the State and a Traditional Owner group. These plans will establish agreed timeframes (meeting schedules and agendas), identify resource requirements, roles and responsibilities of the respective parties, identify relevant stakeholders (including third parties) and serve as an ongoing management tool. Detailed tenure history searches will generally not be undertaken, except over areas of land that Traditional Owners and the State have agreed will be the subject of a consent determination (associated timing implications will be reflected in the timetabling of the settlement). Where negotiations include claims lodged under the NTA, the Negotiation Plan will form the basis for reporting to the Federal Court.

The Steering Committee acknowledges that there may be some Traditional Owner groups who would wish to pursue a consent determination of native title (possibly over key or core areas) alongside a Framework agreement over a wider area.

Core principle #53: Consent determinations and Individual Framework Agreement negotiations

Where Traditional Owner groups are seeking consent determinations as part of an Individual Framework Agreement negotiation, the State and Traditional Owner group will:

- a) seek agreement about the mechanisms that will be used to progress the issue of a consent determination consistent with the Framework negotiations; and
- b) seek to develop joint reports (as relevant) to the Federal Court as to the progress of negotiations that may result in the withdrawal of claims or a consent determination.

Once an Individual Framework Agreement is made (including being authorised by both parties), the next step is for the parties to seek registration of the agreement as an ILUA under the NTA (unless agreements other than ILUAs, such as other types of contracts, are contemplated). The parties make an application for registration of the ILUA to the Native Title Registrar of the National Native Title Tribunal (NNTT). The Registrar's consideration includes a three month public notification period. While the parties await the Registrar's decision on registration, it is an opportune time to plan the implementation of the Individual Framework Agreement.

²⁰ Refer core principle #41: Negotiation Protocol, incorporating fairness and equity.

Stage Three: Implementation

The Steering Committee stresses the high importance of developing mechanisms, arrangements and practices that ensure effective implementation of Individual Framework Agreements.

Core principle #54: Implementation of Individual Framework Agreements

- a) The State and Traditional Owners will seek an effective transition from agreement-negotiation to agreement-implementation, with specific allocation of necessary human and financial resources and provision for transitional arrangements, where necessary.
- b) Each Individual Framework Agreement will contain an agreed Implementation Plan, that will identify all deliverables within identified timeframes and against key performance outcomes (including the ongoing collection of data to measure these), and be consistent with the core principles addressing the sustainable funding of Individual Framework Agreements²¹.
- c) The vehicles for Individual Framework Agreements will be Indigenous Land Use Agreements (Area Agreements or Body Corporate Agreements) and statutory and other contracts, consistent with the content of the agreement and the circumstances in relation to the legal status of native title.
- d) For the purposes of simplicity and completeness, Individual Framework Agreements will be a single document comprising a number of components, wherever possible.

Stage Four: Going forward

The Steering Committee notes the significance of the new relationships that Individual Framework Agreements will be establishing between Traditional Owners groups and State agencies.

Core principle #55: New relationships

The State and Traditional Owners acknowledge that Individual Framework Agreements establish and embody new relationships between one another and are in perpetuity. The perpetual character of new relationships arising from agreements will be reflected in the core business and governance of State agencies and Traditional Owner corporate entities.

The Steering Committee is of the view that close monitoring from the outset of the implementation and the outcomes of agreement-making is critical to overall success. This is supported by evidence gained from the recent review of the Yorta Yorta agreement.

Ongoing and robust evaluation of both the overall Framework and the Individual Framework Agreements is proposed. The review arrangements will need to ensure that the assessment of outcomes being achieved under the Individual Framework Agreements directly inform the review of the Framework as a whole. Reviews should be conducted on a rolling basis and should not in any way be construed or utilised as an avenue for placing either negotiations or implementation of agreements on hold. Nor is the evaluation process intended to allow for renegotiation of the content of agreements.

²¹ Refer core principle #45: Sustainable funding of Traditional Owner corporations under Individual Framework Agreements + core principle #46: Other funding commitments under Individual Framework Agreements.

Core principle #56: Ongoing evaluation approach

- a) At 12 months following the registration of the ILUA, an initial Process Review of how the Individual Framework Agreement structures and processes are being implemented consistent with the agreed implementation plan²². The objective of this review is to rectify implementation problems that could otherwise put the agreement at risk.
- b) At 24 months (or by agreement) after the registration of the ILUA, an Outcomes Review will examine the impact, benefits and outputs being delivered as a result of the Individual Framework Agreement.
- c) The Individual Framework Agreement reviews will be independently undertaken by a person(s) agreed to by both the State and the Traditional Owner corporation.
- d) The costs of the Individual Framework reviews would be borne by the State, including the participation of Traditional Owner group.
- e) Reviews will not result in the overall diminution of benefits to a Traditional Owner group.
- f) Further review of Individual Framework Agreements will occur every subsequent 3 years, or otherwise by agreement.
- g) Other circumstances where a review might be warranted include where a ‘review event’ occurs (i.e. any new case law in the High or Federal Courts, or any new State or Commonwealth law, regulation, policy or practice).
- h) Changes to Individual Framework Agreements will only be made with the parties’ agreement.

The Steering Committee acknowledges that disputes may arise from time to time, following the making of an Individual Framework Agreement. With a view to ensuring easy and inexpensive access to dispute or issue resolution that might arise once Individual Framework Agreements are entered into, it is proposed that the most logical and accessible mechanism for dispute resolution is the Victorian Civil and Administrative Tribunal (VCAT). Established under State legislation, VCAT is an independent institution, lead by a Justice of the Supreme Court. It is regarded as a flexible, economical and efficient dispute resolution tribunal that is empowered with a wide variety of procedures to determine matters before it.

Core principle #57: Dispute and issues mediation

Indigenous Land Use Agreements and Individual Framework Agreements struck under the Framework will provide for dispute(s) or issue(s) arising under the agreements that are unable to be satisfactorily be resolved by the parties, to be referred to the Victorian Civil and Administrative Tribunal for:

- a) mediation;
- b) the making of a recommendation; or
- c) arbitration.

²² Refer core principle #54: Implementation of Individual Framework Agreements.

Appendices

Appendix 1: Steering Committee membership

Chair:

Professor Michael Dodson

Representatives of the Victorian Traditional Owner Land Justice Group:

Graham Atkinson

Len Clarke

Robert Nicholls

Sandra Onus

Albert Mullett

Mick Harding (proxy)

Representative of Native Title Services Victoria:

Chris Marshall, Chief Executive Officer

Representatives of the State of Victoria:

Neil Robertson, Acting Executive Director, Legal and Equity Division, Department of Justice

Judy Backhouse, Executive Project Director, Department of Sustainability and Environment

Jennifer Samms, Executive Director, Secretariat to Ministerial Taskforce on Aboriginal Affairs, Department of Planning and Community Development

Ian Hamm, Deputy Director, Aboriginal Affairs Victoria, Department of Planning and Community Development

STEERING COMMITTEE FOR THE DEVELOPMENT OF A VICTORIAN NATIVE TITLE SETTLEMENT FRAMEWORK TERMS OF REFERENCE

The Victorian Government and the Victorian Traditional Owners Land Justice Group have agreed to develop jointly a draft Victorian Native Title Settlement Framework. A Steering Committee comprised of State and Traditional Owner representatives is established to oversight and guide the process.

The Steering Committee is chaired by Professor Michael Dodson and is comprised of:

- 5 representatives of the Victorian Traditional Owners Land Justice Group and the CEO, Native Title Services Victoria (NTSV)
- Executive Director, Legal and Equity Division, Department of Justice
- Executive Director, Public Land Division, Department of Sustainability and Environment
- Executive Director, Secretariat to Ministerial Taskforce on Aboriginal Affairs, Department of Planning and Community Development
- Deputy Director, Aboriginal Affairs Victoria, Department of Planning and Community Development

The Steering Committee will be serviced and supported by an officer of the Department of Justice.

The Steering Committee has the following Terms of Reference:

1. To oversight and guide the development of a Victorian Native Title Settlement Framework ('the Victorian Framework').
2. To establish a work program that examines and determines the key elements of the Victorian Framework with priority given to:
 - Entry points for negotiations
 - Threshold requirements
 - Contents of Settlements:
 - Recognition
 - Access to land
 - Speaking for country
 - Access to natural resources
 - Strengthening culture
 - Claims resolution
3. To consult with relevant stakeholders in the development of the Victorian Framework.
4. To report on these Terms of Reference to the Attorney-General, Minister for Aboriginal Affairs, the Minister for the Environment and Climate Change and the Victorian Traditional Owners Land Justice Group each quarter from the date of establishment of the Steering Committee.

5. To provide a draft Victorian Framework to the Victorian Government and the Traditional Owners Land Justice Group for their consideration in the second half of 2008.

Agreed Procedures and Processes

The Role of the Chair

The Chair is Professor Michael Dodson whose role will be to act as facilitator and mediator to the work of the Committee.

Decision Making

Decision making by the Committee will be by consensus.

Discussions will be confidential.

The report on the draft Victorian Framework will reflect the key decisions made by the Committee.

Timing of Steering Committee Meetings

The frequency and timing of meetings will be determined by the agreed work program but should be at least every 6 weeks unless otherwise agreed.

Media

Media statements to be authorised by the Attorney-General and the Victorian Traditional Owners Land Justice Group Co-Chairs.

Resourcing

Costs associated with the Steering Committee will be shared between the Victorian Government and NTSV.

Appendix 3: Draft Implementation Plan

Table 1: Tasks that can proceed prior to a Government decision on the Framework

	Task	Lead / Coordinating agency	Other agencies	Comments
1.	Right People for Country Project (arising from WG4)	VAHC/AAV	DOJ NTSV/LJG	Preparatory work on this project can proceed with or without a Cabinet decision on the Framework as it is relevant to cultural heritage and formal native title processes. New funding would be required to implement.
2.	Protocol for sharing connection material (arising from WG4)	DOJ	VAHC/AAV NTSV/LJG	This project should proceed with or without a Cabinet decision on the Framework as it would assist the RAP process and formal native title processes.
3.	Framework template development including: IMAs; JMPs; NRMAs; Negotiation Plans etc (arising from WG5)	DOJ	NTSV/LJG DSE DPI	Further work can proceed prior to Government's decision, and would become a priority if there is a positive Cabinet decision.
4.	Preparatory work in relation to the Natural Resource Management Collaborative Body (arising from WG3)	DOJ	DSE DPI NTSV/LJG	Examine governance arrangements, composition and role and responsibilities of the NRMCB
5.	Further development of Victorian Aquaculture Strategy and the Indigenous Fishing Strategy (arising from WG3)	DPI	NTSV/LJG DSE; DOJ; DPCD	Has the potential to be progressed as part of the Victorian Indigenous Economic Development strategy.
6.	Freestanding statutory right for Traditional Owner non-commercial, customary access	DOJ	DSE DPI	Steering Committee recommends that this project proceed in parallel with the development of the Framework, bringing

	and use of natural resources (arising from WG3)		NTSV/LJG	Victoria in line with other jurisdictions. Further policy development needs to occur before Government endorses a freestanding statutory right.
7.	Communication Strategy and Stakeholder Consultation (Stage 1) – LJG members	LJG / NTSV	DOJ	Confidential consultations with LJG members in the period between the final Steering Committee meeting and the State’s consideration of the Steering Committee report in the first quarter of 2009.

Table 2: Tasks that should not proceed prior to a Government decision on the Framework

8.	Assignment of activities to LUAR categories and development of Land Use Activity Agreement Template (arising from WG2)	DSE	DOJ DPI NTSV/LJG	Further “in-house” research can continue prior to a Government decision on the Framework however a bulk of the work, particularly as it relates to the template, should occur post-Government decision.
9.	Develop Claims Resolution Strategic Plan (arising from WG5)	DOJ	NTSV/LJG VAHC, NNTT, Fed Crt, Clth agencies	No merit in negotiating the Claims Resolution Strategic Plan unless Government has committed to the roll-out of the Framework over the next 5-10 years.
10.	Legislative Amendments (arising from WG5)	DOJ	NTSV/LJG WOG	As above, there is no merit in pursuing a legislative reform program for the Framework unless Government has made a commitment to adopt the Framework.
11.	Communication Strategy and Stakeholder Consultation (Stage 2) – Develop policy statement including LJG sign-off	DOJ	NTSV/LJG WOG	Pending the outcome of the Government’s decision on the Framework, it is anticipated that the State will make a public policy announcement. This will involve the development of a comprehensive communications strategy including a series of community information sessions.
12.	Sustainable Funding models (arising from WG5)	DOJ	NTSV/LJG WOG	Analysis of potential funding models to date will be taken into consideration once Government has made a decision on the Framework proposal.

Appendix 4: Preliminary view of legislative amendments required by the Framework

Access to land

- Amendment to the *National Parks Act 1975* (Vic), *Forests Act 1958* (Vic), *Crown Land (Reserves) Act 1978* (Vic) to enable joint management of agreed Crown land
- A legislative mechanism to enshrine a form of Aboriginal freehold and joint management tools (e.g. Indigenous Management Agreements and Joint Management Plans)

The Land Use Activity Regime

- New legislation required to give effect to the Land Use Activity Regime (LUAR).
- A legislative mechanism to give powers to the Victorian Civil and Administrative Tribunal (VCAT) to become the independent body under the LUAR.
- Amendment to the *Mineral Resources (Sustainable Development) Act 1990* (Vic) and *Petroleum Act 1998* (Vic).
- Possible amendments to the *Land Act 1958* (Vic), *Crown Land (Reserves) Act 1978* (Vic) and *Planning and Environment Act 1989* (Vic).

Access to and use of natural resources

- Amendment to the *National Parks Act 1975* (Vic), *Catchment and Land Protection Act 1994* (Vic), *Fisheries Act 1995* (Vic), *Coastal Management Act 1995* (Vic), *Conservation, Land and Forests Act 1987* (Vic) to enable Traditional Owner representation on natural resource management bodies and advisory committees.
- Amendment to the *Wildlife Act 1975* (Vic), *Fauna and Flora Guarantee Act 1988* (Vic), *National Parks Act 1975* (Vic), *Fisheries Act 1995* (Vic) to provide a statutory requirement for consultation with Traditional Owners on natural resource use.
- Amendment to the *Wildlife Act 1975* (Vic), *Fauna and Flora Guarantee Act 1988* (Vic), *National Parks Act 1975* (Vic), *Land Act 1958* (Vic), *Crown Land (Reserves) Act 1978* (Vic), *Fisheries Act 1995* (Vic), *Water Act 1989* (Vic), *Forests Act 1958* (Vic), *Extractive Industries Development Act 1995* (Vic) to provide a statutory right for Traditional Owners non-commercial, customary access to and use of natural resources.
- Amendment to the *Forestry Rights Act 1996* (Vic) to allow for carbon sequestration opportunities.
- Amendment to the *Fisheries Act 1995* (Vic) and associated relevant regulations to recognise Indigenous customary non-commercial fishing as a unique sector.

Alignment with the cultural heritage regime

- A consequential amendment to the *Aboriginal Heritage Act 2006 (Vic)* to ensure Traditional Owner groups with Individual Framework Agreements are treated in a manner analogous to native title holders under the AHA.

Claims resolution

- Inclusion of the definition of “Traditional Owner” in legislation.
- A legislative mechanism to give effect to the sustainable funding model.
- Statutory recognition for Individual Framework Agreements and a legislative mechanism that binds Traditional Owners to Individual Framework Agreements in a manner that complements, and is analogous to, s. 24EA of the *Native Title Act 1993 (Clth)*.
- A legislative mechanism to give powers to VCAT to mediate and arbitrate over disputes under Individual Framework Agreement.

Appendix 5: Summary of stakeholder consultations and communications

A Stakeholder and Communications Strategy was endorsed by the Steering Committee in July 2008. The strategy identified consultation with Traditional Owners as a high priority, recognising that sharing information on the development of the Framework with the Victorian Traditional Owner Land Justice Group (LJG) and the wider community of Victorian Traditional Owners is critical to Traditional Owner acceptance of the Framework and therefore its success overall. The LJG was identified as the key vehicle for communication with the wider Traditional Owner community, with LJG representatives on the Steering Committee reporting back to the LJG's regular meetings.

Measures to ensure that this reporting back to the LJG was sensitive to the confidentiality of the Framework negotiations included that:

- documents prepared for distribution to the LJG were kept to a minimum (and in the case of the final draft report, were numbered and given individually-named watermarks); and
- all documents were marked 'draft'.

Information dissemination to the broader Victorian Traditional Owner community has included the following measures:

- The LJG and Native Title Services Victoria (NTSV) prepared a series of fact sheets to circulate to all native title claimants in Victoria, with information also available on the LJG's website www.landjustice.com.au.
- A short summary of each Steering Committee meeting was drafted jointly by NTSV and the State, and circulated to the LJG.
- The LJG invited all Traditional Owners to provide the LJG with comments on its 2006 paper '*Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Owner Land Justice Group*' as a way of collecting input without breaching confidentiality.
- Regular newsletters were distributed by the LJG/NTSV to all native title claimants in Victoria.
- LJG issues were a regular agenda item on NTSV claimant group meeting agendas.

The Stakeholder and Communications Strategy also considered communication with third parties. Between November 2008 and January 2009 the Steering Committee's Chair and Secretariat held a series of stakeholder briefings with a limited number of stakeholder groups.

Given the time constraints, only third party stakeholders who had expressed particular interest in the Framework and/or had demonstrated a valid interest in native title matters in the past were included. These briefings were jointly prepared by the Department of Justice (DOJ) and NTSV, with the approval of the Chair, and set out the general direction of the Steering Committee's recommendations, being sensitive to the confidential nature of the work of the Steering Committee. Preliminary views on the Framework generally were sought.

The third party stakeholders who were consulted were:

- Minerals Council of Australia (Victorian Division)
- Victorian Farmers Federation
- conservation groups
- Reconciliation Victoria and Australians for Native Title and Reconciliation
- Victorian Equal Opportunities and Human Rights Commission
- National Native Title Tribunal
- Local Government (Municipal Association of Victoria and the Victorian Local Governance Association).

The groups who attended briefings were widely supportive, recognising the opportunities the Framework presented in their respective areas of interest. They all indicated interest in the outcomes of Cabinet's deliberations on the Framework.

The Department of Justice (Native Title Unit) also conducted a briefing in August with Tourism Victoria, under the direction of the Steering Committee which considered that tourism was particularly relevant to the economic development opportunities the Framework would seek to promote. Two Victorian Government policies were identified as being of particular relevance: *Victoria's Aboriginal Tourism Development Plan 2006-09*, and the *Nature Based Tourism Strategy 2008-2012*, as reported back to the Steering Committee.

Appendix 6: Recognition statement

Aboriginal peoples have lived for more than a thousand generations in the part of Australia now known as Victoria. They maintained complex societies with many languages, kinship systems, laws, politics and spiritualities. They enjoyed close spiritual connections with their country, developing sustainable economic practices in relationship with their lands, waters and natural resources. The nourishing terrains of this State, which formed the basis of Aboriginal existence and identity, were owned and managed according to traditional laws and customs. The Aboriginal nations of this State had a special relationship with their world, and it held great meaning to them.

The arrival of Europeans in Victoria marked a rupture in the spiritual, political and economic order of the Aboriginal nations. Along with colonisation came the loss of ancestral lands and grave threats to traditional culture.

But today, Aboriginal Victorians proudly survive. The Constitution of Victoria recognises that they make a unique and irreplaceable contribution to the identity and well-being of this State.

In a constructive step towards reconciliation, representatives of the Traditional Owners and the State have come together in good faith to find better ways to right the wrongs of the past.

This Framework will provide for local agreements to be negotiated between the State and Traditional Owner groups, providing Aboriginal Victorians with the opportunity to shape their futures. Through these agreements, aspirations for native title and land justice can be addressed, Aboriginal cultures can be recognised, and the rights and well-being of future generations may be secured.

The future must be founded on relationships of mutual respect and meaningful partnerships between Aboriginal and non-Aboriginal Victorians. A renewed respect for Aboriginal cultures and worldviews will necessarily begin with a recognition of connections to country and a commitment to strengthening Traditional Owner communities around those connections.

We now commit ourselves to that future.

Appendix 7: Meeting threshold requirements

The Victorian Government's guidelines for entry of Traditional owner groups into Framework negotiations

Purpose

Meeting threshold requirements will be the first stage of negotiations under the Framework. As such, this paper describes the processes for meeting these requirements. The paper provides:

- a statement clarifying the **objective** of threshold requirements;
- a set of **core principles** for the State's approach to threshold requirements; and
- description of a **staged, collaborative process to reach agreement on threshold issues** between the State and a Traditional Owner group that allows threshold requirements to be addressed.

Objective of the threshold requirements

The objective of the threshold requirements is for the State to know that it is dealing with the 'right people for country' who have the 'negotiation capacity' to meaningfully enter into agreement-making under the Framework.

The task is to develop a process that meets this objective, noting that the decision about who the 'right people for country' are, and whether they can demonstrate sufficient 'negotiation capacity', ultimately rests with the State of Victoria.

In addition, the process for addressing threshold requirements should be a principled one, given that the Framework is about redressing 'land injustice'. The State has developed seven core principles for how it will approach the demonstration of threshold requirements.

Core principles

The State has developed seven core principles for meeting this objective. These principles describe how the State will approach the demonstration of threshold requirements:

- a) The State of Victoria seeks streamlined and simple processes that reduce the administrative burden on all parties.
- b) The State of Victoria commits to a collaborative, non-adversarial, transparent and consistent approach to establishing threshold criteria.
- c) The State of Victoria seeks to treat Traditional Owner groups and their claims for recognition, including supporting material, with respect and care.
- d) The State of Victoria acknowledges the expertise of Traditional Owners in understanding past and present systems and elements of Aboriginal law and custom.
- e) The State of Victoria acknowledges that there may be differing views among Traditional Owners about who are the 'right people for country' and the extent of groups' countries, and that there are mechanisms for settling territorial disputes.

- f) The State of Victoria respects the time and resources that Traditional Owner groups may need to work through and ‘settle’ issues of ‘right people for country’.
- g) The State of Victoria will not prejudice groups seeking engagement under the Framework who simultaneously seek recognition of their ‘native title’ by the courts under the *Native Title Act 1993* (Cth) (NTA).

Staged and collaborative process for threshold negotiations

The following sets out the process for the first stage of Framework negotiations which focuses on Traditional Owner groups meeting the threshold issues of ‘right people for country’ and ‘negotiation capacity’. In its design, it attempts to uphold the core principles described above. An overview of the process is captured in the flow chart at Figure A.

Lead-up

Prior to the lodging of a Threshold Statement considerable lead-up work will be required, including:

- community education and outreach
- research in support of the ‘connection’ of Traditional Owner groups to their country
- developing the negotiation capacity of the group, including the authorisation of negotiators.

As it relates to the Traditional Owner community as a whole, NTSV would carry out this work²³. In doing so, it would be acting in its capacity as the native title service provider in Victoria, with statutory facilitation and assistance functions (see s.203BB of the NTA) in relation to the making of Indigenous Land Use Agreements (ILUAs) and other native title related agreements, for the benefit of all native title holders or persons who may hold native title in a given area or region. NTSV may also act as the representative for particular Traditional Owner groups in individual Framework negotiations, including in this lead-up phase.

The State can also offer assistance during this phase, through for example:

- provision of community information sessions giving general information about the Framework process and what is required in the Threshold Statement (by the State)
- an identification of information on the public record relating to the Traditional Owner group and their area of interest (perhaps via the research bibliography reports prepared by the National Native Title Tribunal (NNTT)²⁴)
- assistance with access to State records and museum and library collections, including in Victoria and interstate
- assistance with mapping (also possibly via the NNTT).

²³ Noting that NTSV’s operations are subject to strategic, operational and funding constraints.

²⁴ The NNTT Research Unit has on numerous occasions prepared reports identifying the bulk of material on the public record in relation to a particular native title claim group and the area claimed, on occasions including copies of all such material, in the context of native title claim mediation. The State or Traditional Owner groups themselves may be able to request such reports as assistance under the Native Title Act in relation to the making of ILUAs.

Traditional Owner Group makes a Threshold Statement

A Traditional Owner group seeking an agreement under the Framework should provide a written ‘Threshold Statement’ to the Attorney-General. The Threshold Statement must contain the following components:

- a) a letter of intent to negotiate;
- b) a description of the Traditional Owner group;
- c) a description of the area of association;
- d) a statement regarding the association of the Traditional Owner group to the area;
- e) an overview of the research process;
- f) a statement regarding the negotiation capacity of the Traditional Owner group; and
- g) a statement of aspirations.

A Traditional Owner group must make a Threshold Statement to the State if they wish to pursue a settlement under the Framework, regardless of whether or not they have also applied for Registered Aboriginal Party (RAP) status under the *Aboriginal Heritage Act 2006* (Vic) (AHA) or have lodged a native title claim under the NTA.

a) *Letter of intent to negotiate*

The letter of intent to negotiate should clearly state the Traditional Owner group’s intent to enter into negotiations with the State under the Framework. This intent should be demonstrable, such as by reference to a resolution made at a meeting of the group.

b) *Description of the Traditional Owner group*

The Traditional Owner group should provide a group description that contains a group name.

The group description should explain the factors that combine to define membership in a way that is understandable to persons outside the group. It should include reference to named apical ancestors, and a skeletal genealogy²⁵. An exhaustive list of individual names of current members will not be required. The description may assert that the group themselves determines membership, but should also describe the factors that form the basis for decision-making by the group about whether a particular person is a member of the group or not.

The description should be inclusive of all persons who make up the Traditional Owner group seeking an agreement under the Framework.

The State of Victoria seeks to reach settlements at the ‘group’ level and will not make agreements at the level of sub-groups (for example, with individual families).

It should be noted that the requirements for registration of ILUAs (area agreements) under the NTA include demonstrating that all reasonable efforts have been made (either by a certifying representative body or native title services provider, or by the

²⁵ The skeletal genealogy identifies the descent of a single contemporary Traditional Owner from one of the named apical ancestors. The State assumes that more detailed and comprehensive genealogies would be part of the broader research undertaken during the lead-up to making a Threshold Statement, and expects this would be outlined in the overview of the research process at e).

applicants themselves) to identify all persons who hold or may hold native title in relation to the area covered by the agreement.²⁶

c) *Description of the area*

The Traditional Owner group should provide a description of the external boundary of the area over which they assert traditional ownership. They should also provide a map depicting that external boundary.

The current position is that the negotiations under the Framework may only relate to areas under the State's jurisdiction. In relation to sea claims, this means the area can only extend to three nautical miles offshore. It also means that areas of Commonwealth land may not be included.

The Traditional Owner group should identify as far as possible the full extent of their traditional country, given that the Framework negotiations are about reaching a full and final agreement with a given Traditional Owner group. It is envisaged that the State would discuss extent of country issues with a Traditional Owner group and their representative in the lead-up phase, prior to a Threshold Statement being lodged.

Some flexibility regarding the extent of country may be necessary, i.e. the area described in the Threshold Statement may be subject to negotiation and some amendment in the early stages of the process. This is consistent with the core principles e) and f) and also possible issues with ILUA registration regarding areas of shared country.

d) *Statement of association*

The statement of association should provide information regarding the unique association of the Traditional Owner group with their 'country', based in the group's distinct Aboriginal tradition.

As a guide, the statement may address the following topics:

- knowledge of the extent of country;
- responsibilities for caring for country – for example, participation in conservation management, performing welcomes to country;
- contemporary responsibilities for the management of cultural heritage (including RAP status under the AHA);
- access to and visitation of the area, including for spiritual and community activities;
- use of natural resources in the area, such as fishing, hunting, camping, conservation and for medicinal purposes;
- transmission of knowledge to others, including younger generations of the group; and
- knowledge of any shared areas of country with other Traditional Owner groups within the external boundary of the area described in c) above.

²⁶ This issue will require consideration on a case by case basis, especially where Framework negotiations are in relation to areas of shared country. One possibility may be that separate ILUA agreements are made in relation to shared areas.

e) ***Research process overview***

The Traditional Owner group should have conducted research that supports their statement of association – that is, that demonstrates that the Traditional Owners are the ‘right people for country’. The State does not need to receive a detailed research report at the point that the Threshold Statement is presented to the State, but needs to know that this research has been undertaken and can be accessed at a later stage if required, subject to appropriate confidentiality requirements. The Threshold Statement should therefore include an overview of the research process undertaken.

f) ***Statement of negotiation capacity***

This statement should address the following:

i. ***Negotiation protocols and authorisation:***

That the Traditional Owner group has appointed representatives for negotiations and the representatives have been authorised to negotiate on behalf of the group, and processes are in place to provide for feedback and instructions between the representatives and the group.

ii. ***Appropriate representation and resources***

That the Traditional Owner group has appropriate representation or access to legal advice to ensure informed consent²⁷, and has the resources to effectively participate in negotiations.

g) ***Statement of aspirations***

This statement is an opportunity for the Traditional Owner group to voice their aspirations, as agreed by the group at the point in time that the Threshold Statement is provided to the State. This statement does not bind the Traditional Owner group in any way. It may assist the process by indicating the nature of what the Traditional Owner group are seeking and might include particular aims or areas/topics of interest, with reference to the ‘menu’ of options that the Framework provides.

Traditional Owner groups should state whether their aspirations include the pursuit of a native title determination, and if so, to broadly describe the areas over which a determination is sought.

Meeting to receive the Threshold Statement

The State will meet with the Traditional Owner group to formally receive their Threshold Statement. This is also an opportunity for the State to provide information directly to the group about the process ahead.

State notifies wider Traditional Owner community of receipt of the Threshold Statement

The State will notify the broader Traditional Owner community that a Threshold Statement has been received, consisting at minimum of a public notice made in State, local and Indigenous newspapers, which provides:

- the name of the Traditional Owner group;
- a description of the proposed settlement area; and

²⁷ Under Commonwealth funding arrangements, Native Title Services Victoria is the native title services provider for Victoria.

- a point of contact within the State for further information.

The purpose of the notification is for the State to satisfy itself that the claim is inclusive of all Traditional Owner interests in the area. The notice may draw out Traditional Owner persons with issues about the make-up or inclusiveness of the group, or with the extent of the country, including from neighbouring Traditional Owner groups. Depending on the nature of any queries made, the State may refer any persons who contact them to the representative of the Traditional Owner group, and/or the native title service provider.

The State may also refer any issues of sufficient concern for discussion at the threshold issues conference, proposed for later in the process.

Where the Traditional Owner group is not represented by Native Title Services Victoria (NTSV), the State will also notify NTSV, as the native title service provider for Victoria, that a Threshold Statement has been received.

Consideration by the State of the Threshold Statement

The State will evaluate the Threshold Statement against the two key threshold issues of ‘right people for country’ and ‘negotiation capacity’. The State acknowledges that previous requirements and processes regarding ‘connection material’ in the context of native title proceedings have been onerous.

The evaluation will:

- be research-based;
- aim to satisfy the State of the robustness of the Threshold Statement regarding questions of ‘right people for country’ and ‘negotiation capacity’; and
- will consider each Threshold Statement on a case-by-case basis.

The State will consider the issues of group inclusiveness, whether there are any overlapping, competing claims by other Traditional Owner groups, and the concurrence of views with neighbouring Traditional Owner groups. To this end, the State will consider, amongst other matters, whether there are any:

- native title claims or ILUAs made under the NTA,
- appointment of RAPs under the AHA, or
- existing Threshold Statements or Framework negotiations underway with the State.

See also the discussion of ‘*What are significant issues?*’ below.

Depending on whether an arrangement for the exchange of material has been made, the State may be able to consider material presented in a current RAP application. It will also seek the views of the VAHC. It may also choose to consider other information on the public record, such as registration test decisions under the NTA.

The State will prepare a written response to the Threshold Statement and provide it to the Traditional Owner group via their representative. The written response should:

- a) confirm if the Threshold Statement covers the State’s threshold requirements;
- b) if required, identify any gaps in information or material, or other evidentiary issues, in the Threshold Statement, that the State would like the Traditional Owner group (or representative) to address; and

- c) if required, identify any significant threshold issues that need further attention, such as overlapping (competing) claim issues, group cohesion and composition issues, or apparent lack of negotiating capacity.

As expressed by core principle b) above, the State will seek collaborative resolution of any issues/questions/disagreements identified by the State through ongoing dialogue with the appropriate Traditional Owner representative, and via the processes that follow.

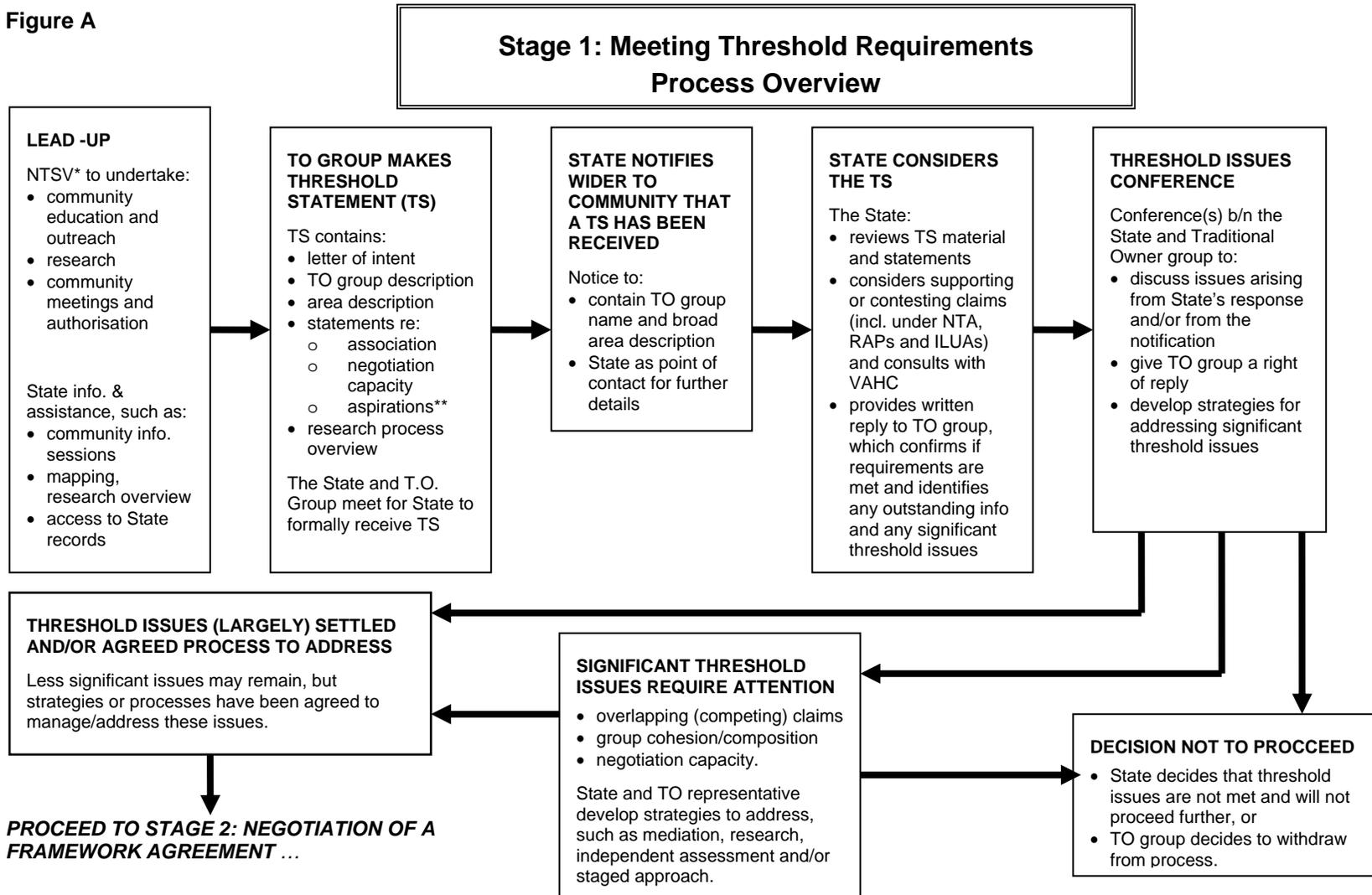
Threshold issues conference with the Traditional Owner group

After the State has provided a response to the Threshold Statement to the Traditional Owner group, the State will seek to meet with the group.

The aims of the threshold issues conference/s are:

- a) to discuss any issues arising from the State's written response;
- b) to discuss any issues emerging from the notification of the Threshold Statement;
- c) to provide an opportunity for a 'right of reply' for the representatives of the Traditional Owner group in relation to the State's written response;
- d) to develop strategies for addressing any significant threshold issues.

Figure A



* NTSV would be acting in its capacity as the native title service provider in Victoria, carrying out statutory facilitation and assistance functions (see s.203BB of the NTA) in relation to the making of Indigenous Land Use Agreements and other native title related agreements, for the benefit of all native title holders or persons who may hold native title in a given area or region (including Traditional Owners).

** The statement of aspirations, which is non-binding, should include a statement of whether or not the aspirations include pursuit of a native title determination application, and if so, over what area.

What are significant issues?

It is not possible to fully delineate all issues that may arise, nor to draw clear, fixed lines between more and less significant issues. The preparation of Threshold Statements by Traditional Owner groups and their representatives and the evaluation of these statements by the State necessarily involve qualitative as well as quantitative judgements. The following attempts to set out a range of factors that may arise, and is not exhaustive.

Significant overlaps

Overlaps may be expressed in relation to the area description and/or the group composition, and the two factors may interrelate, requiring consideration of both.

In terms of ‘area’, an overlap may be considered a more significant issue where the area of overlap is substantial, either in terms of size and/or as a percentage of the total territory claimed.

In terms of ‘group composition’, overlaps may be more significant where a substantially distinct association is asserted by another group that does not recognise the association of the Traditional Owner group under consideration.

The State will seek, however, to accommodate situations where neighbouring Traditional Owner groups assert shared interests over substantial areas or sites (shared country) in a way that acknowledges respective interests. Provided the groups provide a sound basis (as part of their statements of association, for example), the State can acknowledge the rights and interests of both groups over common areas.

Even where there are contesting and substantially overlapping (in area) claims, it may be that the issue is more substantially one of group composition; for example, where one group asserts that it is inclusive of another group that claims the same area and that contests the first group’s claim (in this example, the issue becomes less significant if the two groups can agree to proceed with negotiations on the basis that the second group is included, and would also be assisted where the groups agree to a process for resolving the group composition issues).

Significant group composition issues

These might include disagreement about the exclusion or inclusion of particular individuals, families, clans or other sub-groupings. The issues are more significant where supported by evidence put to the State of the relatedness, or not, of sub-groups to the Traditional Owner group and/or common or distinct cultural association, or lack thereof. Group process issues might also be relevant to group composition, such as the opportunities made available to sub-groups to voice their views.

Significant negotiation capacity issues

These might include:

- the absence of authority or authorisation of negotiators;
- the absence of fair decision-making processes;
- no legal representation;
- no mechanisms in place for keeping Traditional Owner group members informed of negotiations.

Strategies for addressing significant issues

Strategies for addressing significant threshold issues, which would be considered on a strictly case-by-case basis, might include, for example,:

- mediation;
- additional research or an independent assessment of material;
- conferences of experts, such as collaborative discussion of the material between ‘experts’ from the State and from NTSV, or otherwise nominated by the Traditional Owner group; and
- a staged approach to the negotiation of settlement options within shared or disputed areas.

The State aims to reach a position where it can decide whether or not the Traditional Owner group has (largely) met the threshold requirements, and/or clear processes for dealing with remaining issues have been agreed to. It is on this basis that the State would proceed to the next stage of the negotiation process.

However, the State may also decide not to proceed on the basis that threshold issues have not been met sufficiently and/or are impeded by disputes that are considered intractable. It is hoped that such situations would be rare, in part on the basis that the strategic planning for the roll out of the Framework would also seek to identify, at a broad level, the readiness of groups to engage under the Framework, and to give groups appropriate lead time to do the necessary ground work for commencing engagement with the Framework.

Appendix 8: Glossary of terms

authorisation	The process whereby a person or persons is given the permission or authority to act on behalf of the Traditional Owner group, such as in the context of proposed Framework negotiations. It also has a more specific meaning under the NTA; namely, in relation to giving permission to applicants to make a claimant or a compensation application under the NTA on behalf of a native title claim group, or for an Indigenous Land Use Agreement (Area Agreement only) to be entered into on behalf of all persons identified as being persons who hold, or may hold, native title.
certification	The process by which the relevant native title representative body or native title service provider for an area can certify that authorisation requirements under the NTA have been met.
claimant application	An application made in the Federal Court by Aboriginal or Torres Strait Islander people under the NTA for a determination that native title exists in a particular area of land and/or waters. It is also sometimes referred to as a 'native title claim' or a 'native title determination application'.
connection material	'Connection' in a native title context is the relationship between an Aboriginal or Torres Strait Islander people and the land and waters over which they assert native title rights and interests, or traditional ownership. 'Connection material' is material that supports or substantiates that connection, such as anthropological, ethnographical and linguistic research and documentation, genealogies and oral evidence and statements.
compensation application	An application made in the Federal Court by Aboriginal or Torres Strait Islander people under the NTA seeking compensation for the loss or impairment of their native title rights and interests.
Crown land	Broadly speaking, Crown land is land that is not held under private ownership. It may be affected by rights and interests that the Crown (a government) has granted under legislation, such as a lease, a licence, a reservation or a mining tenement. It may also be affected by native title rights and interests.
determination of native title	A decision of the Federal Court or High Court (or other recognised body) that native title either exists or does not exist in relation to a particular area of land and/or waters. A 'consent determination' is where the parties to the native title application agree that native title exists, whereas a 'litigated determination' is where the court holds a trial in order to come to a determination.
extinguishment	The 'extinguishment' of native title is the ending of the effect of, or capacity to exercise and enjoy, native title rights and interests, in a legal sense. This may be by way of a government passing laws or granting or creating other rights and interests that are inconsistent with the exercise and enjoyment of the native title or through compulsory acquisition. Native title can be extinguished either in its entirety or in part (such as only particular rights or interests). Generally speaking, once extinguished, native title rights and interests cannot revive at a later point in time, even if the extinguishing act ceases, although some exceptions exist.

future act

Under the NTA, a future act is an activity or act that takes place, or is proposed, from 1 January 1994 onwards that validly affects, or will affect, any native title that may be held over the area subject to the future act. Examples include the passing of legislation, the granting of a licence, lease or permit or creation of other rights and interests, or the compulsory acquisition of native title by a government.

Indigenous Management Agreement

A statutory agreement between the State and a Traditional Owner group as a component of an Individual Framework Agreement about the joint management of agreed areas of Crown land, proposed under the Framework as being necessary before land can be transferred in perpetuity and joint management entered into (see 2.1 of Chapter 2 and core principle #7). They are proposed to be binding on grantees and interest-holders, and to be recorded on the land title.

Indigenous Land Use Agreement

A voluntary agreement about the use and management of an area of land or waters where native title exists or might exist, made between native title group/s and others who use, access or manage the land or waters, as set out under the NTA. If registered under the NTA, an ILUA is legally binding not only on the parties to the agreement, but also on all native title holders for the area.

Individual Framework Agreement

An overarching agreement reached between the State and a Traditional Owner group in regard to a particular area (or a 'country') under the proposed Framework. Individual Framework Agreements will consist of various components, drawn down from the Framework as a whole and tailored to specific circumstances.

Joint Management Plan

A management plan agreed between the State and a Traditional Owner group as a component of an Individual Framework Agreement, which identifies agreed management arrangements for the joint management of Crown land (see 2.1 of Chapter 2 and core principle #8).

Land Use Activity Agreement

An agreement between the State and a Traditional Owner group as a component of an Individual Framework Agreement, which sets out the terms and conditions under which land use activities can proceed over areas of Crown land covered by the agreement (see 2.2 of Chapter 2 and core principle #17).

Land Use Activity Regime

A regime proposed under the Framework for managing how future land use activities will take place within Crown land areas subject to Individual Framework Agreements, in a manner that takes into account Traditional Owner groups' rights and interests and aspirations as well as third party interests. It is proposed that the regime replaces the future act processes under the NTA in areas subject to an Individual Framework Agreement (see 2.2 of Chapter 2 and core principles #15-16).

native title The communal, group or individual rights and interests of Aboriginal peoples and Torres Strait Islanders in relation to land and waters, possessed under traditional law and custom, by which those people have a connection with an area, which is recognised under Australian law.

Natural Resource Management Agreement

An agreement between the State and a Traditional Owner group as a component of an Individual Framework Agreement, regarding access to and use of natural resources (see 2.3 of Chapter 2, and core principle #34).

non-extinguishment principle

As set out in the NTA, it provides for an act or activity that might under other circumstances wholly or partly extinguish native title, to not have that effect. Rather, the native title rights and interests are suspended while the act or activity is in effect or takes place.

native title service provider

A body that is funded by the Commonwealth to perform some or all of the functions of a Representative Aboriginal or Torres Strait Islander Body (or ‘representative body’) under the NTA. Functions include assisting and facilitating native title claimants, certifying claimant applications and certain types of ILUAs, resolving intra-indigenous disputes, agreement making and ensuring that notices given under the NTA are brought to the attention of relevant Aboriginal or Torres Strait Islander people. NTSV is the recognised native title service provider for Victoria.

procedural right

A right, on the part of Traditional Owners or native title claimants or holders, to be involved in a decision-making process, such as a right to be notified, to be consulted, to comment or to object, or a right to negotiate. Specific procedural rights for native title claimants and holders are set out in relation to different sorts of future acts under the NTA.

registered Aboriginal party

A body registered under the Victorian *Aboriginal Heritage Act 2006*, which performs certain statutory functions regarding the management of Aboriginal heritage in a particular area of the state.

threshold requirements

The State’s requirements that Traditional Owner groups must satisfy in the first stage of the agreement-making process proposed under the Framework, in order to commence Framework negotiations proper. The requirements go to the issues of ‘right people for country’ and negotiation capacity (see Chapter 3 and Appendix 7).