



## Royal Commission into Aboriginal Deaths in Custody Recommendation

### 336. Unalienated Crown land and the rights of Aboriginal owners

That unalienated Crown land granted on the basis of cultural, historical and/or traditional association of Aboriginal people should be granted under inalienable freehold title and should carry with it the right of the Aboriginal owners to, *inter alia*:

- a) Determine who may enter the land and the terms of such entry; and
- b) Control the impact of development on the land in so far as such development may threaten the cultural and/or social values of the Aboriginal owners and their communities.<sup>1</sup>

<b>Background<sup>2</sup></b>	The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) demonstrated the importance of Aboriginal and Torres Strait Islander peoples maintaining self-determination over land granted based on cultural and traditional association. The Commission emphasised that land title needs to recognise 'land rights' as a legitimate need. Despite some transfers of unalienated Crown land, significant efforts were required to enhance land rights for Aboriginal and Torres Strait Islander peoples.
<b>Intent</b>	Grant unalienated Crown land to Aboriginal people under inalienable freehold title, with rights to control land access and the impact of development that may threaten Aboriginal cultural or social values.
<b>Responsibility</b>	The Commonwealth and all state and territory governments.
<b>Key contact</b>	Land Justice, First Peoples State Relations, Department of Premier and Cabinet (DPC).
<b>Key Action Taken</b>	
<b>2005 Review<sup>3</sup></b>	<p>The Department of Justice and Department of Sustainability and Environment assessed Recommendation 336 as <b>partially implemented</b>.</p> <p><b>Department of Sustainability and Environment <sup>4</sup></b></p> <p>Crown Land Management advised that Aboriginal Affairs Victoria, together with the Department of Sustainability and Environment (DSE), the Department of Justice, the Department of Treasury and Finance and DPC, were developing a policy framework for addressing the land aspirations of Aboriginal people. At the time, it remained uncertain whether legislative reform would be required to implement the framework.</p> <p>Following the enactment of the <i>Native Title Act 1993</i>, DSE were involved in negotiations with claimant groups to mediate the resolution of native title claims. Those negotiations included</p>

<sup>1</sup> *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 1991) vol 5, 53-54 ('RCIADIC').

<sup>2</sup> *Ibid* vol 5, 48-49.

<sup>3</sup> Aboriginal Justice Forum (Vic), Department of Justice (Vic), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody* (Review Report, October 2005) vol 1, 313-314 ('2005 Review').

<sup>4</sup> *Ibid* vol 1, 311-313.

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the granting of Crown land in freehold title in the resolution of one claim, and it was anticipated that, in some instances, land that was of significance to the Native Title group may also result in the transfer of land in fee simple. Existing legislation such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* and the *Archaeological and Aboriginal Relics Preservation Act 1972* supported Aboriginal communities by protecting Aboriginal cultural heritage on both Crown and freehold land across Victoria.

### Implementation of the Indigenous Partnership Strategy

This Strategy aimed to improve Aboriginal wellbeing by building partnerships that supported Aboriginal aspirations relating to land, culture, heritage, family, and community. It provided the foundation for the Addressing Dispossession policy framework and sought to improve how the department engaged with Aboriginal communities through initiatives focused on cultural awareness, community partnerships, capacity building, cultural heritage and land management, employment, economic development, communication, and developing community profiles.

The Strategy for Aboriginal Managed Lands in Victoria examined Aboriginal-owned and managed land across the state, identifying land under Aboriginal control and documenting landholders' priorities, aspirations, and challenges in developing and managing their land.

The Indigenous Land Management Framework Discussion Paper, developed as part of the Aboriginal Land and Resource Development Strategy, aimed to guide government policy in supporting Aboriginal people's land and resource management goals and aspirations.

The transfer of Crown land to Aboriginal communities required native title issues to be resolved and, in some cases, legislative changes to address the interests of other stakeholders. Although the Victorian Aboriginal Justice Agreement recognised land as essential to cultural identity, survival, self-management, and economic development, it did not contain specific initiatives to address these land-related aspirations. Such initiatives were part of other policy frameworks.

### **Department of Justice**

The Native Title Unit advised that:

Part (a) did not relate to applications for native title determinations lodged in the Federal Court covering areas of land in Victoria as inalienable freehold may not relate to a native title right or interest in land.

The Government was developing an Aboriginal Land and Resource Development Strategy that recognised Aboriginal dispossession and proposed the restoration of land to native title applicant groups through claim settlements.

Part (b) may be reflected in native title rights and interests if proven.

### **Review Team**

The Review Team observed that government responses to recommendations 334–338 identified very few initiatives addressing these issues. They noted that several departments were working together to develop a joint strategy integrating land and resource management, land acquisition, native title, and cultural heritage policy to provide a framework for addressing the land aspirations of Aboriginal people.

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### 2018 Review<sup>5</sup>

#### Commonwealth Government

The Commonwealth helped negotiate long-term leases over land held by Aboriginal and Torres Strait Islander peoples, allowing the government to maintain overall control while traditional owners kept underlying ownership. The government argued that township leases managed by community entities would strengthen local empowerment.

At the time of this review, about 40 percent of Australia had been returned to Aboriginal and Torres Strait Islander interests under native title and state and territory land schemes, with another 35–40 percent potentially claimable. Section 47B of the *Native Title Act* can also allow past extinguishment of native title to be ignored for unused Crown land in some cases.

#### Victorian Government

Deloitte concluded that Recommendation 336 had been **fully implemented** in Victoria through the transfer of suitable public land to Aboriginal communities based on historical or cultural connections, alongside protections for Aboriginal heritage and cultural sites under the *Mineral Resources Development Act 1990* (Vic).

### Since then

#### Department of Premier and Cabinet

In their 2023 response to this recommendation, the Land Justice Unit noted:

The *Traditional Owner Settlement Act 2010* (Vic) (TOSA) enables the Victorian Government to transfer Crown land of cultural significance under inalienable freehold title inter alia to Traditional Owner Corporations. The Natural Resource Agreement (a sub agreement under TOSA) provides a framework for Traditional Owners management of natural resources within their Agreement Area. Additionally, The Traditional Owner Land Natural Resource Agreement extends the operation of the Natural Resource Agreement to freehold land that is owned by the Traditional Owner Corporation or by a member of the Traditional Owner group.

## Evidence of impact

### Authorising Document

#### *Traditional Owner Settlement Act 2010*<sup>6</sup>

This Act provides for an out-of-court settlement of native title. The Act allows the Victorian Government to recognise traditional owners and certain rights in Crown land.<sup>7</sup>

#### Traditional Owner Rights<sup>8</sup>

Under the Settlement Act, the State recognises certain inherent rights of Traditional Owners that are similar to, and sometimes in excess, of the rights native title holders may have recognised through a positive non-exclusive determination under the *Native Title Act*. These include access to land for traditional purposes, to take and use natural resources, and

<sup>5</sup> Deloitte Access Economics, Department of Prime Minister and Cabinet, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Report, August 2018) 691-2 ('2018 Review').

<sup>6</sup> First Peoples – State Relations, 'Traditional Owners Settlement Act', *First Peoples State Relations*, 28 March 2024) <<https://www.firstpeoplesrelations.vic.gov.au/traditional-owner-settlement-act-2010>> ('Traditional Owners Settlement Act').

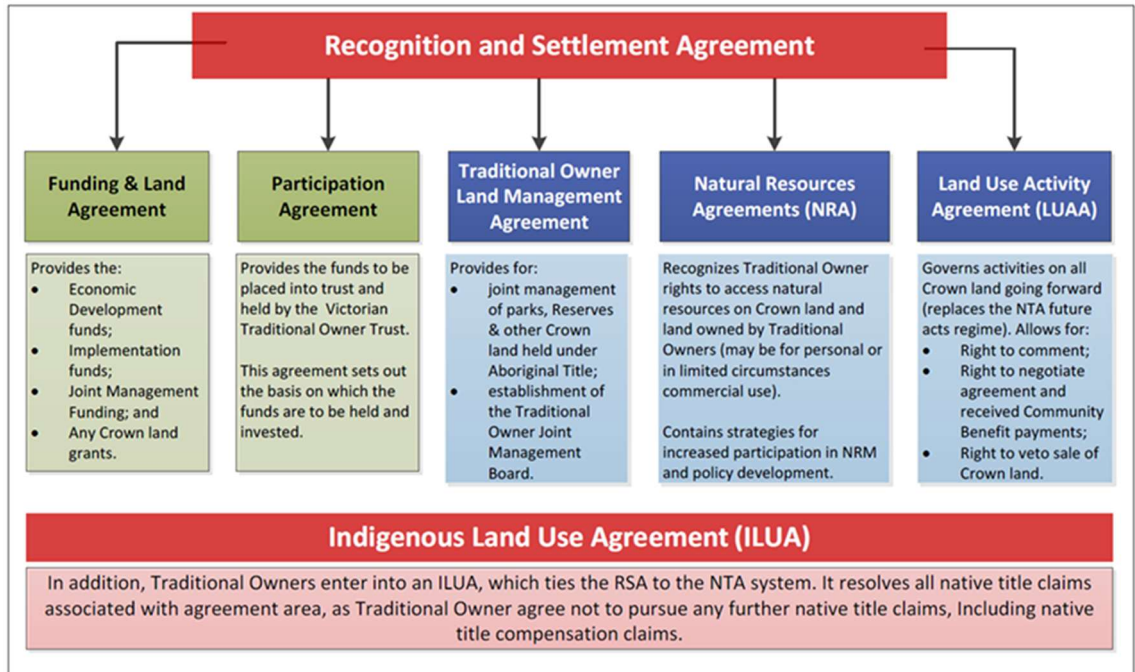
<sup>7</sup> Ibid.

<sup>8</sup> First Principles Review Committee and Executive Policy Owners Forum, *First Principles Review of the Traditional Owner Settlement Act 2010* (15 March 2024) ('First Principles Review of the Traditional Owner Settlement Act 2010').

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participation or negotiation in land-use decisions affecting those rights. These rights are defined in the Act and implemented through standard template agreements.

A Settlement Package is implemented through a set of linked legal agreements, each covering different parts of the arrangement. They form the Recognition and Settlement Agreement and are based on standard templates that collectively give effect to the package.



#### Land Use Activities<sup>9</sup>

Part 4 of the Act establishes five categories of Land Use Activities, each reflecting different impacts on Traditional Owner rights and providing varying levels of Traditional Owner control.

The five categories are as follows:

Routine	Advisory	Negotiation A	Negotiation B	Agreement
No obligation to notify. Works may proceed without any notice.	Must provide notice to the TOGE and allow 28 days for comment.	Obligation to negotiate an agreement  If parties fall into dispute can be referred to VCAT. VCAT has the power to stop the project and set payments and conditions	Obligation to negotiate an agreement  If parties fall into dispute can be referred to VCAT. VCAT <u>does not</u> have the power to stop the project but may set payments and conditions	Traditional Owners must consent for the activity to go ahead.

<sup>9</sup> Ibid 50.

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	<p><u>Land Agreement</u></p> <p>A land agreement provides for grants of land in freehold title for cultural or economic purposes, or as ‘Aboriginal title’ (a form of title established under section 19 of the Act) to be jointly managed in partnership with the State.</p>
<p><b>Outputs</b></p>	<p>The TOSA allows for the transfer of Crown land to Traditional Owner Corporations under inalienable freehold title. Under the TOSA, the State recognises certain inherent rights of Traditional Owners that are similar to, and sometimes in excess, of the rights native title holders may have recognised through a positive non-exclusive determination under the <i>Native Title Act</i>. These include access to land for traditional purposes, to take and use natural resources, and participation or negotiation in land-use decisions affecting those rights. These rights are defined in the Act and implemented through standard template agreements.</p>
<p><b>Outcomes</b></p>	<p><b>First Principles Review of the <i>Traditional Owners Settlement Act 2010</i><sup>10</sup></b></p> <p>The First Principles Review raised concerns with Natural Resource Agreement requirements for Traditional Owner Corporations to ‘comply’ with sustainability principles, arguing that this undermined self-determination associated with inalienable land title. The review recommended replacing the term ‘comply with’ with ‘give proper consideration to.’ It also highlighted additional restrictions on Traditional Owners, including limits on collecting flora, native plants and firewood, and prohibitions on the commercial use of animals and water, noting that the State was not subject to the same obligations.</p> <p>The TOSA establishes five categories of Land Use Activities, each reflecting different impacts on Traditional Owner rights and providing varying levels of Traditional Owner control, with Traditional Owners advocating for stronger rights across these activity categories.</p> <p>There is no policy supporting the freehold transfer of Crown land with current commercial purposes and public value.</p> <p><b>Victorian Government Aboriginal Affairs Report 2024<sup>11</sup></b></p> <p>Information is published annually in the <a href="#">Victorian Aboriginal Affairs Framework Data Dashboard</a>. As of 30 June 2024, there were four Recognition and Settlement Agreements under TOSA covering about 96,210 km<sup>2</sup> of Victoria, including 34,920 km<sup>2</sup> of Crown land and waters, with no new agreements begun since 2022-23. (There was approximately 8 million hectares<sup>12</sup> of land still reserved by the Crown in Victoria based on government figures.)</p> <p>Under the <i>Native Title Act 1993</i>, native title has been recognised over 16,629 km<sup>2</sup> of Crown land and waters, including the 2024 Federal Court determination for the Eastern Maar People that added 289.2 km<sup>2</sup> to the area where their native title exists. This was the second consecutive year of growth in native title coverage in Victoria following more than a decade without expansion since 2012–13.</p>

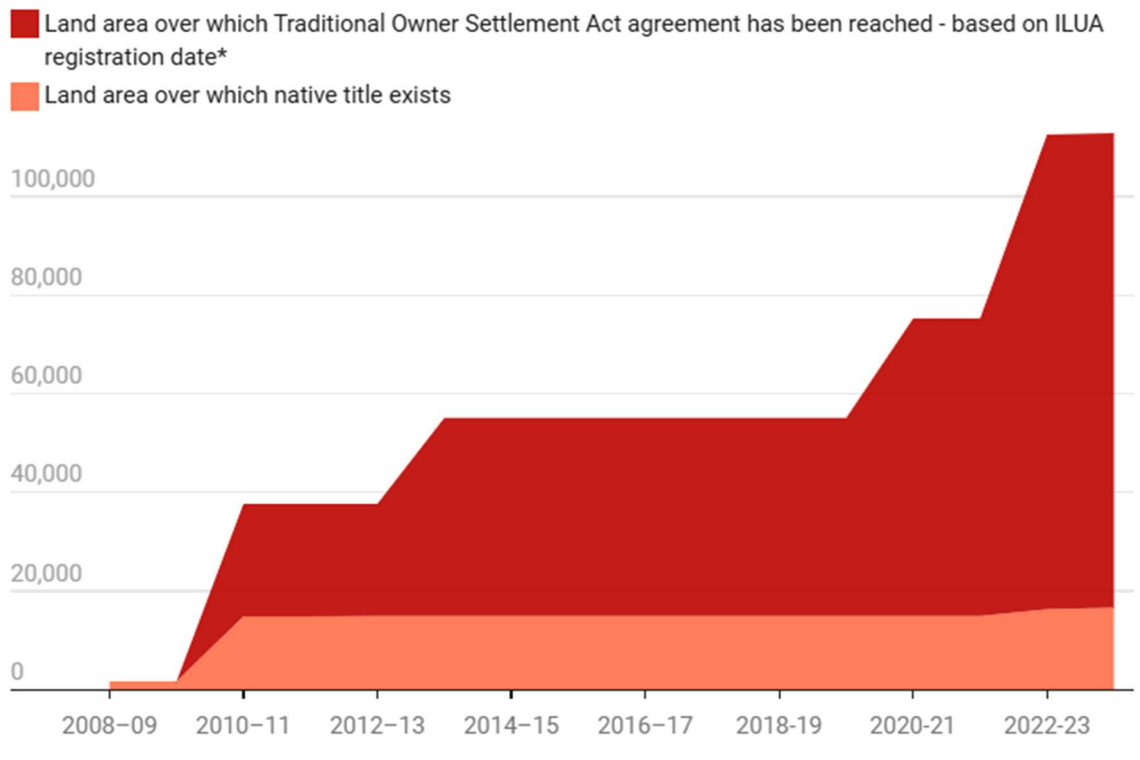
<sup>10</sup> Ibid.

<sup>11</sup> First Peoples – State Relations (Vic), Victorian State Government, *Victorian Government Aboriginal Affairs Report 2024* (Report, 2025) ('Victorian Government Aboriginal Affairs Report 2024').

<sup>12</sup> Department of Energy Environment and Climate Action, *Crown Land in Victoria (Overview)* (Good Governance Fact Sheet No 12, ('Crown Land in Victoria (Overview)').

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Area of Crown land with native title determinations and/or Recognition and Settlement Agreements, Victoria, 2008-09 to 2023-24



Source: Department of Premier and Cabinet and National Native Title Tribunal<sup>13</sup>

#### Community Views

#### Federation of Victorian Traditional Owner Corporations

*As Aboriginal people have always maintained, and history makes clear, pre-contact societies in Australia engaged in complex and sophisticated methods of trade, and an economy that traversed the entire continent. Whereas native title has typically recognised rights based on traditional activities, such as hunting, fishing, camping, and so on, it has struggled to reflect or recognise wider rights that may be attributable to, or arise from, a more complex and accomplished society than is typically acknowledged by long standing racist and colonial narratives.<sup>14</sup>*

#### First Principles Review Committee<sup>15</sup>

*The First Principles Review Committee (FPRC) remains of the view that the pace of reform around Settlement Act processes is too slow, and at times unambitious. The FPRC wishes to make clear that these comments are provided, not to diminish the real advances achieved from this review, but in a spirit of reflection, to improve the joint undertaking of Traditional Owners and the State, as they work towards the implementation of self-*

<sup>13</sup> Victorian Government Aboriginal Affairs Report 2024.

<sup>14</sup> Federation of Victorian Traditional Owner Corporations, Victorian State Government, *A Framework for Traditional Owner Treaties: Lessons from the Settlement Act* (2021) 26 ('A Framework for Traditional Owner Treaties: Lessons from the Settlement Act').

<sup>15</sup> *First Principles Review of the Traditional Owner Settlement Act 2010*, 18. The FPRC was comprised of Victorian Traditional Owners and individuals who worked for Traditional Owner corporations. Secretariat support and advice was provided by the Federation of Victorian Traditional Owner Corporations.

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*determination in Victoria. Furthermore, these comments are particularly directed to the recognition of Traditional Owner rights, and the 22 recommendations made in Part 4 of this Report. With respect to these 22 Recommendations, it is notable that 13 address issues that were first formally raised by the Template Review Committee in 2018. That is, these are longstanding issues for which the State has been on notice for at least three years, although in some cases longer as they have been raised previously by Traditional Owners in other forums.*

*It remains important that the State not defer the legitimate reforms sought by Traditional Owners and recognise that while the Settlement Act retains its central position in advancing the rights of Traditional Owners, the State must honour the work we have done together, both in this Review and other forums.*

### Related recommendations

#### First Principles Review<sup>16</sup>

##### **Recommendation 1**

Settlement Act agreements should represent a fair and just settlement for Traditional Owners, as assessed against the listed criteria.

##### **Recommendation 3**

The Review recommends that money paid under a Settlement Act agreement should include:

- a) Compensation, being payment for loss of rights with no conditions governing its purpose;
- b) On-going operational funding for dedicated purposes to support corporations to meet the cost of establishing and operating settlements, including, to participate in natural resource management and joint management; and
- c) Commitment of on-going funding for departments to meet the cost of establishing and operating components of the settlements.

##### **Recommendation 10**

That a moratorium on all Crown land sales be initiated in all areas where the Traditional Owner groups do not have rights to either provide or withhold consent to the sale.

##### **Recommendation 13**

Traditional Owner Corporations (including Registered Aboriginal Parties) should be part of the First Right of Refusal process. At minimum, Corporations should be notified of proposed surplus public land and have the option to purchase this land under full or restricted title, before it goes to public auction. The ways in which this recommendation can be given effect are to be further explored in the proposed Settlement Act forum, including options:

- to ensure that the holding entity is the entity representing the Traditional Owner group, and if that status changes, there be provision for transfer to another entity, recognised as representing the relevant Traditional Owner group; and
- for land and assets to be handed back to Traditional Owners, meaning they are transferred for only nominal or peppercorn consideration.

<sup>16</sup> Ibid.

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### **Recommendation 14**

That the term 'comply with' be removed from item 4.1 of Schedule 1 of the Natural Resource Agreement template where this refers to the Sustainability Principles and replaced with the term 'give proper consideration to'.

### **Recommendation 15**

That prohibitions on taking protected or threatened flora should not apply to Traditional Owners without their consent. That the Natural Resource Agreement template be amended so that any such prohibitions are removed from the template and are instead assessed and negotiated in accordance with the UNDRIP principle of free prior and informed consent, through the Partnership Forum.

### **Recommendation 16**

Item 5.3 of Schedule 1 in the NRA template should be removed in order to facilitate greater Traditional Owner access to firewood, by allowing for the cutting down of trees or branches (outside firewood collection areas) for this purpose.

The lifting of this restriction would create greater consistency between firewood and other vegetation in the Natural Resource Agreement template.

The Executive Policy Owners Forum (EPOF) notes that natural resource legislation and regulations would also need to be reviewed and amended if necessary to give effect to the proposed policy change. The parties agree that items 5.4 and 5.5 of Schedule 1 only regulate collection of firewood within a Firewood Collection Area, and outside such areas, Traditional Owners may collect firewood as an Agreed Activity, and in accordance with the relevant clauses in the NRA template, including the Public Land conditions in Schedule 1 of the NRA. The NRA should be amended so this position is more clearly stated.

### **Recommendation 18**

a) That the Settlement Act and the NRA template be amended so as to accommodate the commercial use of animals (other than fish) to create parity with the provisions providing for commercial use of vegetation, stone etc. (*Joint recommendation*)

b) That the Settlement Act and the NRA template be amended so as to also accommodate the commercial use of water and animals (including fish). (*FPRC recommendation*)

### **Recommendation 19**

That the RSA and TOLNRA templates be amended so that 'agreed activities' (as defined in clause 1.1 of the TOLNRA) can be exercised on freehold land within the outer boundaries of a Recognition and Settlement Agreement, subject to a landowner's permission.

### **Recommendation 20**

The EPOF and FPRC agree the State should acknowledge that Settlement Agreements do not provide sufficient recognition of Traditional Owner rights and interests in water. The EPOF and FPRC recommend that substantive reform be pursued as a priority in the proposed Settlement Act forum.

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### Recommendation 21

The Department of Jobs, Precincts and Regions commits to developing a policy to offer Miner's Right permits to members of Traditional Owner Corporations under the *Mineral Resources Sustainable Development Act 1990*. This would be a temporary solution designed to address the exclusion of gold, silver, metal and minerals in the definition of 'natural resources' in the Settlement Act. EPOF recommends that options for legislative change be explored through the proposed Settlement Act forum.

### Recommendation 30

a) That the Settlement Act and *Conservation, Forests and Lands Act (1987)* (Vic) be amended in order to allow for the grant of Aboriginal title and joint management arrangements over land within the boundaries of a State Game Reserve. (*Joint recommendation*)

b) The amendments to the Settlement Act and the *Conservation, Forests and Lands Act 1987* (Vic) should go further than providing for joint management and should also allow for sole management of State Game Reserves. (*FPRC recommendation*)

### Recommendation 31

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

### 2005 Review<sup>17</sup>

### Recommendation 24

- That the Victorian Government continue to implement and monitor recommendations 334 to 338 in relation to processes for restoring, granting and purchasing land in respect of reporting as priority to the proposed statewide Aboriginal representative body.
- That DSE, Department for Victorian Communities (AAV) and Department of Justice (Native Title Unit), report to the Aboriginal Justice Forum on progress with the development of the Indigenous Partnership Strategy associated with the Addressing Dispossession Policy Framework and on arrangements for involvement of Aboriginal communities in the development of plans and strategies for addressing their land needs.
- That the Victorian Government consider legislative amendments to the *Native Title Act 1993* to allow for options other than the transfer of unalienated land to Aboriginal communities.

<sup>17</sup> 2005 Review, vol 1, 40.

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### Assessment Summary<sup>18</sup>

The intent of Recommendation 336 was to ensure that unalienated Crown land is granted to Aboriginal people under inalienable freehold title, supporting full self-determination in land ownership.

The Victorian Government cited the *Traditional Owner Settlement Act 2010* (TOSA) and Traditional Owner Land Natural Resource Agreements as addressing this recommendation. However, the First Principles Review of TOSA found that TOSA imposes restrictions that undermine inalienable freehold title, such as limiting the collection of flora and the commercial use of animals and waters.

We also highlighted the many restrictions in the land rights gained under TOSA.

*Under the Traditional Owner Settlement Act, if we wanted to collect firewood, there's still restrictions on what we can do with that firewood.* (John Gorton, Chairperson, Grampians RAJAC)

Progress in land return has been limited, with only 50,672 square kilometres of land transferred since the Act's inception, compared to 8 million hectares of Crown land in Victoria.

Traditional Owner groups have reported an increased workload and emotional responsibility.

*The TOSA has increased the workload and responsibility of Aboriginal people, Traditional Owner groups, and RAP [Registered Aboriginal Party] groups to advocate and get things across the line, while being inadequately resourced to do so.* (Ebony Hickey, Chairperson, Barwon Southwest RAJAC and member of Eastern Maar Aboriginal Corporation)

In addition, the process of land area recognition and mapping, inherent in negotiations under TOSA, is itself an act of ongoing colonisation.

*Land area recognition and the mapping of such land is further ongoing colonisation... it's a separatist practice of extracting land from the State but also extracting land from one another. The continuous sense of connection and understanding is different in the way that we see the connection between land and Country, a connection that is continuously disrupted by these sorts of processes.* (Ebony Hickey)

Traditional Owner groups are required to take on the responsibility of assessing land offered through the process, including undertaking liability assessments and monitoring the suitability of land, work that adds to the burden already placed on under-resourced Traditional Owner groups.

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<sup>18</sup> Meeting with Aboriginal Justice Caucus Working Group (Project Team, Meeting, 13 June 2024) ('Working Group Meeting (13 June 2024)'); Meeting with Aboriginal Justice Caucus (Project Team, In Person, 17 July 2024) ('AJC Meeting (17 July 2024)').

## Assessment of RCIADIC Recommendation 336

Is the intent of the recommendation accurately described?

Yes  No

Does the action taken align with the intent of the recommendation?

0 – No action taken

1 – Action taken is of little relevance to the intent of the recommendation

2 – Action taken partially aligns with the intent of the recommendation

3 – Action taken fully aligns with the intent of the recommendation

0.5

(Score out of 3)

Is there evidence of the desired impact or outcome/s?

0 – No evidence

1 – Evidence of output rather than outcome

2 – Some evidence action contributed to outcome/s

3 – Clear link between action and impact or outcome/s

0

(Score out of 3)

How relevant is the recommendation in the current context?

0 – No relevance – refers to practices, agencies or laws that no longer exist

1 – Low – some relevance, but most aspects of the recommendation no longer apply

2 – Moderate – remains relevant, but some aspects of recommendation no longer apply

3 – High – entirely relevant to current context

3

(Score out of 3)

Does full implementation have the potential to reduce incarceration, increase safety in custody and/or progress Aboriginal self-determination?

0 – No potential to improve Aboriginal justice outcomes

1 – Low – potential to improve Aboriginal justice outcomes, but none of the three identified

2 – Moderate – potential to progress one or two of the outcomes identified

3 – High – potential to reduce incarceration AND increase safety in custody AND self-determination

2

(Score out of 3)

### Potential actions for further work

Implement all the recommendations from the First Principles Review of the Traditional Owner Settlement Act.

## High priority for further work

### Relevance and potential impact

		Low (0-2)	Moderate (3-4)	High (5-6)
Extent of action taken and evidence of outcomes	High (5-6)			
	Moderate (3-4)			
	Low (0-2)			Rec 336

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