



## Royal Commission into Aboriginal Deaths in Custody Recommendation

### 337. Meeting the land needs of Aboriginal people

*That governments recognise that where appropriate unalienated crown land is unavailable to be claimed on grounds of cultural, historical or traditional association with the land or where, due to the processes of the history of colonisation, Aboriginal people are no longer able to, nor seek to, make claims to particular areas of unalienated crown land on the basis of cultural, historical or traditional association there remain land needs of Aboriginal people which should be met by governments. These needs should be accommodated by a process which:*

- a) Enables Aboriginal communities or groups to obtain secure title to unalienated crown land or to purchase land for social, recreational and community purposes (including the obtaining of additional land in circumstances in which an Aboriginal community is on Aboriginal land but where the area of that land is established as being too small to accommodate the community);*
- b) Enables Aboriginal communities or groups to obtain secure title to land so as to improve the environmental circumstances in which they live;*
- c) Provides adequate funding in order that land may be purchased on the open market in pursuance of the needs identified in paragraphs (a) and (b); and*

*Where pastoral land is held on lease from the Crown, permits Aboriginal communities traditionally or historically associated with the land to have priority when leases come up for renewal.<sup>1</sup>*

<b>Background<sup>2</sup></b>	The Royal Commission into Aboriginal Deaths in Custody (RCIADIC) emphasised that the processes of colonisation led to the loss of Aboriginal people's knowledge of the land, traditional stories, and practices. RCIADIC highlighted that this makes claiming land titles based on historical or cultural ties an unfeasible process. Therefore, processes for claiming land titles should be flexible and accommodating to the various sentimental ties and needs relating to the land.
<b>Intent</b>	Ensure there are alternative and flexible processes to gaining land title when it is unavailable based on cultural or historical ties.
<b>Responsibility</b>	The Commonwealth and all state and territory governments.
<b>Key contact</b>	Treaty Negotiations and Strategy, First Peoples State Relations, Department of Premier and Cabinet (DPC).

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

<sup>2</sup> Ibid vol 5, 49.

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### Key Action Taken

#### 2005 Review<sup>3</sup>

The Department of Justice assessed all parts of Recommendation 337 as **partially implemented** whereas the Department of Sustainability and Environment assessed part (d) as no longer relevant to Victoria.

#### **Department of Sustainability and Environment**

Crown Land Management advised that Aboriginal Affairs Victoria, in conjunction with the Departments of Sustainability and Environment, Justice, Treasury and Finance and Premier and Cabinet were developing a policy framework for Government approval for addressing the land aspirations of Aboriginal people.

There were seven Indigenous Land Use Agreements registered in Victoria. They mainly related to developments on Crown land although one involved the grant of freehold title as part of the settlement of a native title claim. Negotiated native title outcomes, in some instances, could result in the transfer of land of significance to the Native Title Group in fee simple.

#### Indigenous Partnership Strategy

This strategy was designed to improve Aboriginal wellbeing through the development of partnerships to achieve Aboriginal aspirations for land, culture, heritage, family and community. It formed the basis for the development of the Aboriginal Land and Resource Development Strategy policy framework.

#### Indigenous Land Corporation

The Indigenous Land Corporation was an independent Commonwealth statutory authority, established in 1995. Since 1997 it had purchased 24 properties, approximately 3,900 ha, in Victoria.

#### **Department of Justice**

The Native Title Unit advised that this did not relate to applications for determinations of native title lodged in the Federal court covering areas of land in Victoria.

The Government had a policy direction for Aboriginal Land and Resource Development Strategy in Victoria. The policy initiative was the responsibility of AAV in partnership with the Department of Sustainability and Environment. In dealing with native title, policy in Victoria noted the dispossession of Aboriginal people and proposed the restoration of land to native title applicant groups as part of settlement of claims. One claim had a settlement package including restoration of some Crown land (2002).

However, there were implementation difficulties in that there was relatively little vacant Crown land in Victoria. Native title applicant groups did not necessarily represent all groups of Aboriginal people seeking restoration of land.

#### **Review Team**

The Review Team noted that according to the government responses to recommendations 334 to 338 there were very few initiatives identified that addressed these issues. They also

<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, 314 ('2005 Review').

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	<p>noted that Aboriginal Affairs Victoria were developing a joint strategy with the department of Justice and Sustainability and Environment, linking land and resource management, land acquisition, native title and cultural heritage and policy to provide a framework for addressing the land aspirations of Aboriginal people.</p>
<p><b>2018 Review<sup>4</sup></b></p>	<p><b>Commonwealth Government</b></p> <p>The Commonwealth enacted the <i>Native Title Act 1993</i>, and the <i>Native Title Act Amendment 1998</i>, which contributed to the implementation of this recommendation. However, the determination of native title under this legislation was complex and involved a long timeframe.</p> <p>Where unalienated Crown land was unavailable, the Commonwealth provided financial support towards land purchase for Aboriginal and Torres Strait Islander peoples on the open market. In the 1990s, this function was implemented by the Aboriginal and Torres Strait Islander Commission and the Indigenous Land Corporation (ILC). The ILC was established to assist Aboriginal and Torres Strait Islander people to acquire and manage land under mainstream title.</p> <p><b>Victorian Government</b></p> <p>Deloitte concluded that Recommendation 337 was <b>fully implemented</b> in Victoria through the Capital Projects Program and the Victorian <i>Traditional Owner Settlement Act 2010</i> (TOSA).</p> <p>The Capital Projects Program provided funding for the acquisition of land for a variety of purposes, including for reasons of significance to Aboriginal people. Crown land and properties were also leased to Aboriginal and Torres Strait Islander organisations.</p> <p>In relation to part a) of this recommendation, Victoria’s TOSA provided for agreements which enabled Traditional Owner groups to obtain secure title to unalienated crown land for cultural or economic purposes.</p> <p>Relevant to part b) of this recommendation, the Act provided for funding agreements for economic development opportunities as determined by the group.</p> <p>For part c) of this recommendation, settlements under the Act included funding to enable the Traditional Owner corporation to meet its settlement obligations and provide 'seed capital' to enable economic development opportunities, including the purchase of land. In addition, Traditional Owner corporations received ongoing compensation for high-impact activities that may have had an impact on their recognised rights.</p> <p>Part d) of this recommendation was not directly relevant to Victoria as Victoria had negligible pastoral lease land.</p>
<p><b>Since then</b></p>	<p><b>Treaty Negotiations and Strategy, First Peoples State Relations, DPC</b></p> <p>Per the requirements of the <i>Advancing the Treaty Process with Aboriginal Victorians Act 2018</i>, the Victorian Government and the First Peoples’ Assembly of Victoria have agreed to and established a process for negotiating Treaties between First Peoples and the State of Victoria.</p>

<sup>4</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) 694-695 ('2018 Review').

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The Treaty Negotiation Framework (TNF) provides a framework for the negotiation of Treaties, including a statewide Treaty between the State and the First Peoples Representative Body, and Traditional Owner Treaties between the State and Traditional Owner groups over specific land and waters.

Both statewide and Traditional Owner Treaties will involve negotiations in relation to land and water justice (25.3(e)(iii)) and other land related matters listed as potential subject matters, including cultural heritage, economic and community development, environmental management, funding and revenue raising, and housing. Traditional Owner Treaty negotiations may also involve (25.4), protecting land and water and cultural heritage, culture and language, and economic sustainability and empowerment.

Agreements reached through Treaty negotiations will address land needs of Aboriginal peoples, which may include the creation of processes and arrangements to the effect of Recommendation 337. These or similar outcomes may also be achieved through alternative agreed mechanisms.

### Evidence of impact

#### Authorising Document

#### **The Treaty Negotiation Framework<sup>5</sup>**

This framework sets out the principles that will guide Treaty-making in Victoria and provides Traditional Owner groups with the ability to choose their own pathways and timelines for negotiating Treaties that reflect their priorities and aspirations.

It explains the criteria and standards that groups need to meet if they want to enter Treaty negotiations and how they can be supported – with resourcing from the Self-Determination Fund and guidance from the Treaty Authority – to enter negotiations on more equal footing with the Government.<sup>6</sup>

#### Outputs

The First Peoples State Relations have stated they have established a process for negotiating Treaties through the Treaty Negotiation Framework. Agreements reached through Treaty negotiations will address land needs of Aboriginal people which may include the creation of land title processes relating to this recommendation.

#### Outcomes

#### **ABC NEWS (2023)<sup>7</sup> and First Peoples State Relations (2024)<sup>8</sup> - Eastern Maar traditional owners' land rights formally recognised at Warrnambool**

ABC News reported on the celebratory win of the Eastern Maar people gaining native title over southern-western Victoria, including the coastline of the Great Ocean Road and sections of the Great Otway National Park. The report highlighted that the Eastern Maar people had been

<sup>5</sup> First Peoples' Assembly of Victoria and State of Victoria, *Treaty Negotiation Framework* (20 October 2022) ('Treaty Negotiation Framework').

<sup>6</sup> Ibid.

<sup>7</sup> Emily Bissland, 'Eastern Maar Traditional Owners' Land Rights Formally Recognised at Warrnambool', *ABC News* (online, 28 Mar 2023) <<https://www.abc.net.au/news/2023-03-28/eastern-maar-native-title-formal-determination-warrnambool/102153426>>.

<sup>8</sup> First Peoples – State Relations (Vic), *Proposed Eastern Maar Recognition and Settlement Agreement* (22 January 2024) ('Proposed Eastern Maar Recognition and Settlement Agreement').

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petitioning for this title since 2012 and had found gathering the required proof challenging due to the processes of colonisation, which saw their people forcibly removed from the land and placed into missions. The title acknowledges the rights of the Eastern Maar people to access and use the land, as well as their right to be consulted on proposed developments.

In addition, the First Peoples State Relations asserted that the Eastern Maar people originally tried to pursue this under TOSA, indicating that the frameworks of both the *Native Title Act* and TOSA have not met the land needs of the Eastern Maar people. They have now agreed to negotiate a Recognition and Settlement Agreement with the State under TOSA. The Eastern Maar people submitted evidence to meet the State's requirements in 2015 and the agreement to commence negotiations was not announced till 2017. The information on this agreement was last updated in 2024, and no new updates have been announced since.

### **National Indigenous Times - Truth and Treaty: Victoria continues progress towards reconciliation (2024)<sup>9</sup>**

The National Indigenous Times discussed their hope for Treaty to provide more land justice outcomes for Traditional Owners that have not been met through TOSA. The paper stated that 'far too many other decisions impacting Aboriginal people's lives continue to be made without them.'<sup>10</sup> It also was reported that only four Victorian Recognition and Settlement Agreements have been signed under the Act since 2010.

However, the paper recognised that TOSA has had greater ability than the *Native Title Act* to grant land title claims based on other factors that lie outside traditional laws and customs. The *Native Title Act* provided limited opportunity to leverage social and economic opportunities which is crucial to improving Aboriginal health and wellbeing.

### **Community Views**

#### **Matthew Burns, CEO, Taungurung Land and Waters Council**

*Taungurung people (Traditional Owners) hold enduring rights, inherent obligations and lore that apply to Country that existed prior to the colonisation of our lands.*<sup>11</sup>

## **Related recommendations**

### **2005 Review<sup>12</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;

The Department of Sustainability and Environment, Department for Victorian Communities (Aboriginal Affairs Victoria) and the Department of Justice (Native Title Unit), report to the Aboriginal Justice Forum on progress with the development of the Indigenous Partnership

<sup>9</sup> Natalie Hutchins, 'Truth and Treaty: Victoria Continues Progress Towards Reconciliation', *National Indigenous Times* (online, 29 March 2024) <<https://nit.com.au/29-03-2024/10544/truth-and-treaty-victoria-continues-progress-towards-reconciliation>>.

<sup>10</sup> Ibid.

<sup>11</sup> Dechlan Brennan, 'Vic Traditional Owners Seek Dispensation to Prevent Land Acquisitions, Fund to Back Land Councils' Recommendations', *National Indigenous Times* (online, 18 January 2024) <<https://nit.com.au/18-01-2024/9360/victorian-tos-look-for-dispensation-to-prevent-land-acquisitions-fund-to-help-support-recommendations-put-forward-by-land-councils>>.

<sup>12</sup> 2005 Review, vol 1, 327.

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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* in order to allow for options other than the transfer of unalienated land to Aboriginal communities.

### Assessment Summary<sup>13</sup>

The intent of Recommendation 337 was to ensure there are alternative and flexible processes for gaining land title when it is unavailable due to cultural or historical ties.

The Treaty Negotiation Framework was developed to guide treaty negotiations. Both statewide and Traditional Owner Treaties will address land and water justice, which may include the development of processes and arrangements relevant to Recommendation 337.

Actions taken to date do not fulfil the intent of Recommendation 337, as the outcomes of treaty negotiations remain uncertain and may take many years to occur. Existing legislative frameworks, such as the *Traditional Owners Settlement Act* (TOSA), are also insufficient at enabling Aboriginal communities to secure title to unalienated Crown land or to access funding for land acquisition for social, recreational, or community purposes.

This is exemplified by the native title determination for the Eastern Maar people, whose lands cover southwestern Victoria, including the Great Ocean Road. Initially, the Eastern Maar sought land title through TOSA before pursuing native title. They encountered significant challenges in proving connection to Country, largely due to the impacts of colonisation. The Eastern Maar have been petitioning for land title since 2012 and only recently entered negotiations for a Recognition and Settlement Agreement under TOSA. Although the necessary evidence was submitted in 2015 and approval was announced in 2017, no further updates on the agreement have been provided.

We raised concerns about relying solely on treaty negotiations to address this recommendation, questioning whether such an approach would deliver improved land justice for Traditional Owners.

*You know, it's saying a lot about what could happen if treaty happens, but it doesn't say anything if it doesn't. What happens then?* (Kooramyee Cooper, Chairperson, Western Metropolitan RAJAC)

Therefore, there is a clear need to strengthen existing legislative provisions for Traditional Owners to pursue land title rights while treaty negotiations are underway.

<sup>13</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 337

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

0.5

(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

No actions identified.

## 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 337

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