Threshold Guidelines
for Victorian traditional owner groups seeking a settlement under the
*Traditional Owner Settlement Act 2010*

Department of Justice & Regulation
The message stick and boomerang on the front cover of this report are the work of Gunaikurnai Elder, Uncle Albert Mullet. These items were presented by the Gunaikurnai People to the State of Victoria in October 2010 on the occasion of reaching the first Recognition and Settlement Agreement under Victoria’s Traditional Owner Settlement Act 2010.
Aboriginal peoples have lived for more than a thousand generations in this State. They maintained complex societies with many languages, kinship systems, laws, polities and spiritualities. They enjoyed a close spiritual connection with their country and developed sustainable economic practices for their lands, waters and natural resources. Land formed the basis of their existence and identity and was owned and managed according to traditional laws and customs. They had a special relationship with their lands, which held great meaning to them.

The arrival of Europeans in this State ruptured the spiritual, political and economic order of the Aboriginal peoples. They faced the loss of their ancestral land and grave threats to their culture, but the Aboriginal peoples have survived.

The Constitution Act 1975 now recognises the unique status of the Aboriginal peoples as descendants of Australia’s first peoples. It recognises that Aboriginal peoples have made a unique and irreplaceable contribution to the identity and well-being of this State.

It is now expedient, as a means of reconciliation, to provide for agreements to be negotiated between the State and traditional owner groups to enable Aboriginal cultures to be recognised, in particular the recognition of the special relationship of Aboriginal peoples with their land, to recognise traditional owner rights and for rights to be conferred on identified traditional owner groups.

Preamble to the *Traditional Owner Settlement Act 2010*
Please note: These guidelines are for general information purposes only. They are not a substitute for legal advice.
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1. Introduction

These guidelines provide information about preliminary or threshold matters that traditional owner groups need to prepare for and address, should they wish to pursue a recognition and settlement agreement with the State of Victoria under the Traditional Owner Settlement Act 2010.

The Traditional Owner Settlement Act is Victoria’s approach to settling native title claims in Victoria. It provides for meaningful recognition of distinct Victorian traditional owner groups with abiding relationships to, and interests in, their traditional country and its natural resources.

The Traditional Owner Settlement Act provides a framework for the state and a traditional owner group to agree to a comprehensive settlement that may include:

- an overarching **Recognition and Settlement Agreement** which recognises the named traditional owner group and their traditional owner rights over certain public lands;
- a **Land Agreement**, regarding land transfers and grants of Aboriginal title;
- a Land Use Activity Agreement, regarding procedures for future use of public land that take account of traditional owner interests;
- a **Natural Resource Agreement**, regarding use of natural resources and traditional owner group participation in natural resource management;
- a **Funding Agreement**, regarding payments into the Victorian Traditional Owners Trust and/or payments for economic development and other purposes;
- an **Indigenous Land Use Agreement**, that must be registered under the Native Title Act 1993, which binds all native title holders to the agreement and validates future acts; and
- a **Traditional Owner Land Management Agreement**, regarding joint management of certain parks and reserves.

The settlement includes agreement from the traditional owner group to withdraw any existing native title determination applications or compensation applications, and to not file further such applications in the future. This voluntary ‘opting out’ of native title or compensation determinations by a traditional owner group is in exchange for the comprehensive settlement package.

Before commencing negotiations about the content of these settlement agreements, the State seeks satisfaction on a number of threshold matters. In summary, the key thresholds that traditional owner groups must satisfy are that they:
• comprise the ‘right’ traditional owner group for an area appropriate for settlement, on the basis of a ‘cultural and traditional association’ to the area as Aboriginal traditional owners; and
• are ready to negotiate a settlement package that binds all persons who may hold native title for the proposed settlement area.

A traditional owner group seeking settlement negotiations must prepare a ‘threshold statement’ and present it to the Native Title Unit in the Department of Justice & Regulation. ¹ A threshold statement contains two key parts:

Part A: ‘right’ traditional owner group and country; and
Part B: negotiation readiness.

It is envisaged that these two parts will most usually be prepared and provided consecutively. They may, however, be provided at the same point in time where a traditional owner group chooses to do so.

These guidelines set out the State’s expectations regarding the structure and content of a threshold statement, as well as the processes by which the state, via the Native Title Unit in the Department of Justice & Regulation, can be expected to consider and respond to threshold statements.
2. Context and objectives

Why guidelines?

Unlike the *Native Title Act* 1993 (Cth), the Traditional Owner Settlement Act does not of itself set out an application process for traditional owner groups who seek a recognition and settlement agreement. Nor does it provide a legal test for establishing who the traditional owners for a given area are. This is because the Traditional Owner Settlement Act forms a framework for voluntary, out-of-court agreement-making, as an alternative to the court processes and technical requirements that may lead to native title determinations.\(^2\)

Traditional ownership in Victoria

The 2011 Census recorded the indigenous resident population of Victoria at just over 47,000.\(^3\) This figure includes those who identify as traditional owners of lands within Victoria, as well as other Aboriginal and Torres Strait Islander residents who may assert links to other parts of Australia. Victorian traditional owners typically identify themselves as members of one or more of a number of distinct language and territorially-based groups or nations.\(^4\) Some traditional owners also identify with smaller clan or family groupings within larger language groups. Not all Victorian Aboriginal people identify as traditional owners of Victorian lands or elsewhere, for a variety of reasons.

Significant traditional owner communities are located in and around Melbourne and regional centres including Shepparton, Portland, Warrnambool, Mildura, Swan Hill and Bairnsdale. Small Aboriginal communities that include some traditional owners also live on Aboriginal-owned land at Lake Tyers and Framlingham.\(^5\)

Aboriginal Victorians have a long and proud history of continuing to seek recognition of their distinctive cultural, spiritual and material relationships to Victoria’s lands and waters since European settlement. This is despite the very rapid early expansion of European settlement from 1835 onwards and the subsequent policies of successive governments that, until the 1960s, controlled where Aboriginal people could live and work, whether on or off missions and reserves, that were often located outside the traditional country of residents.

Highlights of State-based recognition of traditional owners in Victoria include the 2004 amendments to Victoria’s Constitution Act, the passage of the *Aboriginal Heritage Act 2006* and the recognition of Aboriginal cultural rights in the *Charter of Human Rights and Responsibilities Act 2006*. 
**Purposes of the Traditional Owner Settlement Act 2010**

The preamble to the Traditional Owner Settlement Act states that the legislation provides for:

“agreements to be negotiated between the State and traditional owner groups to enable Aboriginal cultures to be recognised, in particular the recognition of the special relationship of Aboriginal peoples with their land, to recognise traditional owner rights and for rights to be conferred on identified traditional owner groups.”

These guidelines set out a process for the ‘identification of traditional owner groups’ – or establishing the ‘right people for country’ – as a matter of negotiation and agreement between the state and a traditional owner group.

The purposes at section 1 of the Traditional Owner Settlement Act also include:

“… to recognise traditional owner groups based on their traditional and cultural associations to certain land in Victoria …” [emphasis added].

The guidelines address what is broadly intended, from the State’s perspective, by ‘traditional and cultural association’.

In addition, there is a further set of questions around whether the group is ‘ready to negotiate’ a settlement of the nature contemplated by the suite of agreements offered by the Traditional Owner Settlement Act. Settlement agreements are not agreements about recognition alone – they provide for:

“the making of agreements between the State and traditional owner groups –

(i) to recognise traditional owner rights and confer rights on traditional owner groups as to access to or ownership or management of certain public land; and

(ii) as to decision making rights and other rights that may be exercised in relation to the use and developments of the land or natural resources on the land … [from subsection 1(a), Traditional Owner Settlement Act].”

**Objectives of threshold guidelines**

The objectives of the threshold guidelines are:

1. to set out a process for how traditional owner groups can seek entry into negotiations with the State towards a settlement under the Traditional Owner Settlement Act, via lodgement of a threshold statement;

2. to set out the threshold matters that traditional owner groups and their representatives need to consider and address in preparing a threshold statement to present to the State; and

3. to set out a clear process for how the State will consider a threshold statement it receives and the steps that may lead to agreement that threshold requirements have been met.
Who is the audience for these guidelines?
The audience for these guidelines is, in the first instance, the traditional owner groups who seek settlements together with the native title service provider for Victoria, Native Title Services Victoria Ltd (NTSV), in its statutory role of assisting Aboriginal people to prepare for and reach native title-related agreements.7

Other stakeholders in native title and traditional owner settlement processes and outcomes may also take an interest in some parts of these guidelines. This includes Victorian land management and natural resource agencies, cultural heritage agencies, peak industry or other bodies involved in native title or land use matters in Victoria, and federal agencies with responsibilities for native title processes and outcomes.

Who do the guidelines apply to?
The guidelines apply to traditional owner groups who wish to seek a settlement under the Traditional Owner Settlement Act. This includes:

• traditional owner groups who already have a native title application8 on foot before the Federal Court;
• traditional owner groups who do not have any native title applications before the Federal Court but who may consider making such applications in future; and
• traditional owner groups who already have a native title determination made by the Federal Court, who wish to seek some or all of the agreements offered by the Traditional Owner Settlement Act.9

Having either a native title application on foot before the Federal Court, or having been determined as native title holders, are not pre-conditions to seeking settlement negotiations.

For the last of the three categories above – traditional owner groups who have already secured a native title determination for the area over which they seek a settlement – it may not be necessary to provide a full threshold statement addressing all elements of the Part A and B thresholds. This is because some threshold matters will have already been addressed through previous native title processes, such as the provision of a native title connection report and establishment of a prescribed body corporate. The extent to which such groups will need to address particular threshold matters will need to be considered on a case by case basis, in consultation with the State.

Settlements are native title outcomes
There is a direct and important relationship between settlements under the Traditional Owner Settlement Act and the possibilities available under the Commonwealth’s Native Title Act 1993. The link to the Native Title Act is that the settlement package must record the traditional owner group’s agreement to not continue to pursue any existing
native title and compensation applications filed in the Federal Court, nor to pursue fresh applications into the future. This is recorded in an indigenous land use agreement that must meet registration requirements and be registered under the Native Title Act.\textsuperscript{10} Once registered, the agreement binds any persons who (may) hold native title to the area (the traditional owners) to that agreement.\textsuperscript{11} Therefore, the Native Title Act provisions regarding the registration of indigenous land use agreements are of importance to the processes leading to settlements under the Traditional Owner Settlement Act.

The package of agreements able to be negotiated between the State and a traditional owner group under the Traditional Owner Settlement Act is a ‘native title outcome’ because of the way it ‘settles’ any current and all future claims. However, it is a ‘native title outcome’ that does not involve a native title or compensation determination by the Federal Court.\textsuperscript{12}

**Registration of an indigenous land use agreement**

As discussed above, a registered indigenous land use agreement is a key element of settlements made under the Traditional Owner Settlement Act. It is the indigenous land use agreement that binds the members of a traditional owner group to the agreement to not make future native title determination or compensation applications. In addition, the traditional owner group agrees by way of the indigenous land use agreement to opt out of the ‘future act’ process under the Native Title Act in relation to any native title that may exist; this process is replaced by the land use activity agreement made under the Traditional Owner Settlement Act.

A Register of Indigenous Land Use Agreements is maintained by the National Native Title Tribunal’s Registrar under the Native Title Act. This Registrar considers applications for registration and makes decisions about whether registration requirements are met.

Registration requirements include, amongst a range of matters, that all ‘reasonable efforts’ have been made to identify ‘all persons who hold or may hold native title’ for the agreement area, and that ‘all of the persons so identified have authorised the making of the agreement’.\textsuperscript{13} The registration application must set out that this is the case. This may be by way of the native title service provider ‘certifying’ that this is so, or by a statement to the effect that requirements have been met. In either case a statement must also be provided setting out the grounds on which the Registrar should be satisfied that requirements are met.

Where NTSV represents and assists a traditional owner group, the State expects that NTSV will certify the requisite application for registration of the indigenous land use agreement.
Links to Aboriginal cultural heritage management

The recognition of traditional owner groups under the Traditional Owner Settlement Act is also designed to complement the system of Aboriginal participation, via registered Aboriginal parties, in the management of cultural heritage under Victoria’s Aboriginal Heritage Act 2006. The Aboriginal Heritage Act requires the Victorian Aboriginal Heritage Council, in its appointment of registered Aboriginal parties, to consider, amongst other matters, whether the applicant is a body that represents persons with ‘traditional or familial links’ to an area.\(^\text{14}\) The council also has policies in place that give priority to applications from bodies that represent the traditional owners of a given area.\(^\text{15}\) The published decisions of the council regarding registered Aboriginal party applications have also considered the capacity of a party to represent all traditional owner interests for an area - i.e. their inclusiveness.\(^\text{16}\)

The processes for the management and protection of Aboriginal cultural heritage are distinct from settlement outcomes and are separately legislated under the Aboriginal Heritage Act. This Act provides for automatic registration for a traditional owner group entity that has a recognition and settlement agreement under the Traditional Owner Settlement Act, should they apply to be a registered Aboriginal party. This same status also applies to applicants who are holders of native title in accordance with the Native Title Act. Traditional owners have expressed the view on many occasions that cultural heritage is, in their worldview, inextricably linked with the rights of traditional owners to protect and care for their country in native title terms – they are ‘two sides of the same coin’.\(^\text{17}\)

Development of the guidelines

These guidelines were developed by the Native Title Unit in the Department of Justice with input from key Victorian stakeholders, including the native title service provider for Victoria (NTSV), the Victorian Traditional Owner Land Justice Group (an unincorporated peak body for Victorian traditional owners\(^\text{18}\)), the Victorian Aboriginal Heritage Council\(^\text{19}\) and its secretariat, the Right People for Country Project Manager and the Office of Aboriginal Affairs Victoria. These stakeholders participated in a series of workshops held over five days between May and August in 2011, which explored key threshold issues and possible processes.\(^\text{20}\) In early 2013 the Department of Justice ran a six week public comment process on a set of draft guidelines. Following some redrafting as a result of the submissions received, the threshold guidelines were then published in September 2013. A 2015 updated reprint has now been issued by the Department of Justice & Regulation.
Threshold processes are Stage One in a two stage process

Addressing threshold requirements forms only one stage in a larger agreement-making process that may lead to a settlement being reached between a traditional owner group and the Victorian Government under the Traditional Owner Settlement Act. Consideration of threshold issues by the State forms a first stage of engagement and negotiation between a traditional owner group and the State. These guidelines concern themselves with this first stage of threshold negotiations, to the point where the State confirms whether or not thresholds are considered to be met.

Figure 1 on page 26 depicts the larger process of which the threshold negotiations are a part. The larger process begins with the preparation and lead-up to the lodgement of a threshold statement. Following resolution of threshold matters, a second negotiation stage takes place that may lead to agreement about, and execution of, a settlement.

This part of the guidelines describes expected ‘processes’ regarding the threshold negotiation stage, including:

• the preparation and lodgement of a threshold statement – in two parts, usually lodged consecutively – including discussion of the respective agency/stakeholder roles and responsibilities and sources of assistance in this lead-up phase;
• the evaluation of the threshold statement by the Native Title Unit in the Department of Justice & Regulation;
• strategies for addressing outstanding issues identified by the Native Title Unit;
• steps for notifying the wider traditional owner community in Victoria that a Part A threshold statement has been received, and which seek traditional owner submissions on whether the group seeking a settlement is appropriate for the area proposed; and
• the confirmation by the State that threshold requirements are met, or not.

Guidelines about the expected content of the threshold statement appear separately in Parts 4 and 5 of this document.
The threshold statement

Who may lodge a threshold statement?

Traditional owner groups seeking a settlement under the Traditional Owner Settlement Act are required to provide the Native Title Unit in the Department of Justice & Regulation with a threshold statement. The threshold statement reflects the agreed and collective views, aspirations and intentions of the group membership as a whole, and the basis upon which traditional ownership is being asserted. As indicated by the guidelines on ‘content’ in Parts 4 and 5 of this document, the statement needs to be endorsed by the whole traditional owner group, and the means of that endorsement – that is, the full group decision-making – also needs to be described.

A threshold statement lodged by a single family group, or a sub-group of a wider traditional owner group, will not meet the threshold requirements in terms of an inclusive group description (as discussed on pages 33-34). The group description must include all the traditional owners for the area.

A traditional owner group that lodges a threshold statement may be the same as a native title claimant group with a native title determination and/or compensation application currently on foot in the Federal Court. Traditional owner groups that do not already have a native title determination application on foot, may choose to lodge a threshold statement without making a native title application to the Federal Court.

Confidentiality

A traditional owner group may request that parts of their threshold statement be treated as confidential, but will need to provide grounds for such treatment. The grounds will be considered by the Native Title Unit, and confidentiality undertakings may be entered into if deemed appropriate.

The threshold statements will also be subject to:

- the Information Privacy Act 2000 (Vic) which regulates the collection, use and disclosure of ‘personal information’; and
- the Freedom of Information Act 1982 (Vic) which regulates disclosure of documents and records of communication, largely in terms of the public interest in disclosure or non-disclosure.

Without prejudice

All threshold material received by the State and the content of all threshold negotiations conducted with the State, will be taken to be ‘without prejudice’ with respect to any concurrent or future proceedings regarding applications for determinations of native title or for compensation.
Collaboration: roles and responsibilities in the lead-up phase

The lead-up to a traditional owner group making a threshold statement involves considerable preparation, including research, community education and outreach, the building of group decision-making processes, mapping, agreement-making with neighbouring traditional owner groups about boundaries, appointment of a traditional owner group entity, including developing its constitution, and strategic planning.

A variety of stakeholders will be involved in these different tasks, as discussed here. The preparation of high quality threshold statements will rely on the collaboration and co-operation of various stakeholders, including sharing of information and ideas and the shared prioritisation of matters.

The Native Title Unit will generally seek to align its priorities with those of the native title service provider, Native Title Services Victoria Ltd (NTSV), when making decisions about which traditional owner groups to give priority to, given the finite resources of both the native title service provider and the State.

Role of the native title service provider

Native Title Services Victoria Ltd (NTSV) is the key organisation that the State expects will assist traditional owner groups in the lead-up phase, as well as during the two stages of negotiations. NTSV is a corporation that performs the functions of a native title service provider under the Native Title Act across Victoria, which includes legal representation of native title claimants in native title proceedings before the Federal Court. Assistance with respect to Traditional Owner Settlement Act processes clearly falls within the functions the Australian Government funds the native title service provider to perform. These functions include facilitation and assistance in relation to the making of indigenous land use agreements and other agreements regarding native title.

Research is a key part of the assistance that the State expects NTSV to be able to provide to traditional owner groups seeking settlement negotiations. As discussed in Part 4 of this document, the State seeks a robust basis or rationale for the traditional owner group and their traditional and cultural association to particular country. This basis draws, albeit not exclusively, on the research findings. The research is expected to include desk-top as well as informant-based research. The State expects that the research expertise held by NTSV staff to support the making of native title claims is able to be fully utilised to support the preparation of Part A of a threshold statement, although with less emphasis on the legal and evidentiary technicalities demanded by native title jurisprudence.
NTSV assistance that builds the readiness of traditional owner groups to engage in Stage Two substantive negotiations – with respect to the Part B thresholds, including governance of the traditional owner group entity and its incorporation, negotiation capacity and strategic planning – is just as important as the Part A research. This includes the legal support to ensure that traditional owner groups are well informed about the contractual elements of settlements and the corporation’s statutory obligations, including, for example, under the Corporations (Aboriginal and Torres Strait Islander) Act 2006.  

Some traditional owner groups may choose to prepare a threshold statement without the assistance of the native title service provider, and may seek alternative sources of support, such as pro bono legal assistance. Wider forms of support other than just legal advice will be needed. While it is a matter for the respective traditional owner group, the State notes the considerable expertise and breadth of assistance traditional owner groups may be foregoing if they choose not to engage the support of the native title service provider.

Tasks for traditional owner groups in the lead-up phase

Traditional owner groups will need to undertake a range of tasks in the lead-up to lodging both parts of a threshold statement, with the support of the native title service provider or alternatives. The wide scope of these tasks is clear when considered against the content that is expected in a threshold statement, which is the subject of Parts 4 and 5 of these guidelines.

In overview, the lead-up tasks for traditional owner groups in relation to Part A of the threshold statement include:

- commissioning and participating in research processes that are used to substantiate the basis of the group and area descriptions and the group’s traditional and cultural association to the proposed agreement area;
- settling whole-of-group decision-making processes;
- settling matters of group membership and the extent of traditional country over which a settlement will be sought; and
- seeking discussions and negotiated agreements with neighbouring traditional owner groups about the extent and boundaries of traditional country and other shared business.

For Part B of the threshold statement, the lead-up tasks for the traditional owner group include:

- appointment of a traditional owner group entity (a corporation) that will enter into the settlement agreements on behalf of the group, including settling a constitution with internal governance rules and seeking registration under the Corporations (Aboriginal and Torres Strait Islander) Act;
- appointment of a negotiating team; and
- development of a strategic plan that underpins the group’s aspirations and negotiation priorities.
The role of the State in the lead-up phase

The State and its agencies also have a role to play in providing support to traditional owner groups and liaising with the native title service provider in the lead-up phase. Avenues of support may include:

- the provision of clear guidelines, policies and processes, and effective communication to traditional owner groups and the native title service provider from the Native Title Unit in the Department of Justice & Regulation (including via these guidelines);
- agreement-making and dispute resolution support to traditional owner groups, on request, to facilitate resolution of matters of group composition and extent of country, as well as agreements with neighbours, as offered by the Right People for Country Program delivered by the Office of Aboriginal Affairs Victoria (discussed below);
- mapping assistance in order to produce maps of the proposed settlement area:
  - the Department of Justice & Regulation has to date requested mapping assistance from the Geospatial Unit of the National Native Title Tribunal (see www.nntt.gov.au);
  - the Office of Aboriginal Affairs Victoria also has mapping capacities, particularly, but not only, in relation to areas for which registered Aboriginal parties have been appointed, or applications made, as well as the mapping of cultural heritage sites, on the Aboriginal Cultural Heritage Register (see http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/aboriginal-cultural-heritage/victorian-aboriginal-heritage-register); and
  - the Department of Environment, Land, Water & Planning holds cadastral and other data on Crown land and may be able to provide some mapping assistance (see www.delwp.vic.gov.au);
- generic capacity building assistance from the Office of Aboriginal Affairs Victoria (OAAV) (see http://dpc.vic.gov.au/index.php/aboriginal-affairs/projects-and-programs), including:
  - training opportunities through the Governance and Sector program which includes a three day introductory workshop, accredited training units and tailored support for organisations;
  - capacity building support delivered by OAAV, including assistance with business and operational planning for registered Aboriginal parties and small grants to applicant RAP organisations; and
- contributions to collaborative or ‘joined-up’ research processes, such as discussions about methodologies and relevant sources and sharing of information (subject to appropriate protocols and consents) between the Native Title Unit in the Department of Justice & Regulation, the Victorian Aboriginal Heritage Council (via its secretariat) and researchers from Native Title Services Victoria.

The Native Title Unit in the Department of Justice & Regulation is the lead agency with respect to settlement negotiations under the Traditional Owner Settlement Act and has a broader role in joining up the efforts of different State agencies in the lead-up phase.
The Native Title Unit itself does not provide funding directly to a particular traditional owner group or corporation prior to Part A thresholds being met – that is, the thresholds about the ‘traditional owner group and country’. This is because of the Native Title Unit’s key role in advising the government on whether a particular traditional owner group has met the Part A threshold requirements. It is important that the Native Title Unit maintains its impartiality, and is not perceived to favour any traditional owner groups over others, before advising the government about whether a particular group has met Part A thresholds.

Other State agencies may be better placed to provide direct assistance to traditional owner groups during the lead-up phase for Part A thresholds, as described above.

Once a group has met Part A thresholds, the Department of Justice & Regulation may be in a position to provide or broker some limited direct support to groups, which may assist them to meet Part B threshold matters. This may be in relation to the traditional owner group entity’s early operations, and its strategic planning. It may include start-up funding, or additional targeted funding, to the traditional owner corporation. The Native Title Unit will be looking to collaborate and coordinate with the native title service provider’s efforts in this area.

Either the Department of Justice & Regulation or Native Title Services Victoria, or the two in partnership, may, for example, be able to broker the support of federal agencies, such as:

- Office of the Registrar of Indigenous Corporations – who may be able to provide information and advice about requirements for corporations seeking registration under the Corporations (Aboriginal and Torres Strait Islander) Act (see www.oric.gov.au);
- Indigenous Business Australia – who may be able to provide business and investment advice and support traditional owner groups seeking to become economically self-sufficient, including strategic governance support (see www.iba.gov.au).

**Right People for Country Program**

The Right People for Country Program is another form of support that may be relevant to some groups in the lead-up phase, particularly for Part A of the threshold statement. The Right People for Country Program is an indigenous-led agreement-making program, hosted by the Office of Aboriginal Affairs Victoria, that supports traditional owner groups to reach agreements about group composition and representation and the extent or boundaries of traditional country. Group composition and extent of country are key issues in Part A of a threshold statement.

The program arose out of the early policy work of scoping an alternative Victorian approach to native title settlement, of which the Traditional Owner Settlement Act is a key response. The program is relevant to traditional owner groups who are preparing threshold statements, as well as preparing applications for registered Aboriginal party status under the *Aboriginal Heritage Act 2006*. 
The Right People for Country Program is overseen by a steering committee that includes representatives/members of the Victorian Aboriginal Heritage Council, the Federation of Victorian Traditional Owner Corporations, the Office of Aboriginal Affairs Victoria, Native Title Services Victoria and the Native Title Unit in the Department of Justice.

Types of support offered to traditional owner groups by the program are tailored to specific circumstances, and may include providing independent facilitators, negotiation skills training and coaching, ‘walking country’ and mapping support, provision of meeting resources and logistical support, documenting of agreements and guidance on best practice agreement making.

The agreements that traditional owners voluntarily reach with the support of the program may form the basis of subsequent engagement with the State, such as through a threshold statement. While the Native Title Unit looks with great interest to such agreements, the agreements remain subject to the State’s consideration.


**Evaluation of the threshold statement**

The Native Title Unit will provide a written evaluation of Parts A and B of the threshold statement to the traditional owner group. As depicted in Figure 1, the Part A statement will usually be evaluated first. Part A thresholds will need to be met, prior to a group being required to provide a Part B statement.

Nevertheless, a traditional owner group may choose to provide Parts A and B of a threshold statement at the same time, where it has confidence that establishing the ‘right’ traditional owner group and its membership is non-contentious, and where the group has the capacity to meet Part B thresholds earlier.

**Information considered**

In assessing both Parts A and B of a threshold statement, the Native Title Unit may also consider any other sources of publicly-available material and information it considers relevant, including (but not only):

- information and material received by the State in the course of native title proceedings, other than if received under the protection of court-convened mediation under the Native Title Act;
- information on the registers maintained under the Native Title Act, including reasons for decision by the Native Title Registrar relating to those registers and associated case law; and
- the publicly available reasons for decisions of the Victorian Aboriginal Heritage Council with respect to applications to become registered Aboriginal parties under the Aboriginal Heritage Act.
Where the Native Title Unit relies upon any sources of information other than the threshold statement, the written evaluation must identify such publicly-available sources. If requested by the traditional owner group, the Native Title Unit will provide copies of such additional material to the group.

**Basis of the evaluation**

In broad terms, the evaluation will:

- consider the threshold statement, and any publicly available information deemed relevant, against the guidelines on the content of the threshold statement set out in Parts 4 and 5 of this document; and

- evaluate the threshold statement with a multi-disciplinary approach relevant to the content of different parts of the threshold statement; for example, matters regarding the historical record will be considered by officers or consultants familiar with that record, and matters of decision-making capacity and appropriate corporate governance will be considered by officers or consultants with skills and experience relevant to Aboriginal community development and governance.

In relation to Part A of the threshold statement, the evaluation will:

i. consider the traditional owner group statement of association in light of the purposes of the Traditional Owner Settlement Act (see section 1 of that act), including “to advance reconciliation and promote good relations between the State and traditional owners and to recognise traditional owner groups based on their traditional and cultural associations to certain land in Victoria”;

ii. assess the robustness of the basis for the group description and the proposed area (the basis is considered to be drawn from both the research findings and the decision-making of the traditional owner group);

iii. consider broadly the size of a traditional owner group and the size of the proposed agreement area with respect to the viability of settlement agreements – for example: Does a small traditional owner group have the human resource capacity to sustain a corporation and meet settlement responsibilities? And is a settlement justifiable in financial terms over a small area of public land?;  

iv. evaluate the research overview provided in the threshold statement in order to establish whether robust professional research has been undertaken to support the threshold statement, including a consideration of the professional expertise of researchers relied upon;

v. consider whether, on the basis of information provided in the threshold statement and any publicly available information, all traditional owners for the proposed settlement area are included in the group description and have had the opportunity to participate in the group’s decision-making about group membership and the extent of country over which a settlement will be sought; and

vi. consider the group description and its decision-making processes in light of the future requirements for registration of an indigenous land use agreement under the Native Title Act (as discussed in Part 2, see page 8).
In relation to Part B of the threshold statement, the evaluation will:

i. consider whether the appointed traditional owner group entity (corporation) is appropriate to represent and bind the members of the traditional owner group for the purposes of a traditional owner settlement;

ii. consider whether the material in the threshold statement clearly sets out the relationship between the full group, the corporation and the negotiation team, including agreement about the points at which the negotiation team must seek the endorsement of the full group, and demonstration of the corporation’s role in representing the full group and distributing the benefits and opportunities of a settlement to the full group membership; and

iii. review the strategic plan provided in Part B of the threshold statement with respect to:
   a. its broad compatibility with the types of agreements possible under the Traditional Owner Settlement Act;
   b. the commitment of the traditional owner group and corporation to seek expert advice and undertake ongoing planning; and
   c. the commitment of the traditional owner group and corporation to achieve employment and economic development outcomes.

**Vexatious or significantly flawed threshold statements**

The State reserves the right to return a Part A and/or Part B threshold statement to a traditional owner group without carrying out a full evaluation or taking any other further action. This approach may be taken where a threshold statement is considered to be vexatious or to be significantly flawed or substantially lacking required information. Where the Native Title Unit takes such a view, the Attorney-General will be advised, and the threshold statement will be returned, with brief reasons set out as to why it will not be assessed further.

**Threshold conferences**

In the usual circumstances where a written evaluation proceeds, the Native Title Unit may convene a ‘threshold conference’ to present the evaluation and provide a forum for discussion, including developing strategies for addressing any significant outstanding issues identified in the evaluation. Such a conference, or a series of conferences, is convened by agreement between the Native Title Unit and the traditional owner group. Threshold conferences may occur following evaluation of Part A and of Part B of a threshold statement.

The Native Title Unit envisages a flexible approach to how these conferences proceed. Traditional owners will be encouraged to participate directly, without the need for high degrees of formality such as legal representation, although traditional owners are welcome to involve legal advisors and other supporting personnel in the process.
Where the evaluation indicates there are no significant outstanding issues, a threshold conference will be a useful forum for discussion of the next steps in the process. Following evaluation of Part A of a threshold statement, next steps would include preparations for proceeding with the threshold notification (discussed below). Following evaluation of Part B of a threshold statement, next steps would involve both parties taking steps to commit to entering Stage Two negotiations.

**Independent facilitator or mediator**
The traditional owner group may request that threshold conferences be convened by an independent facilitator or mediator, and may make suggestions as to who might play such a role. Options for engagement of a facilitator or mediator may include:

- the Native Title Unit and/or Native Title Services Victoria directly engaging a person agreed as acceptable to both parties; or
- seeking the mediation or negotiation assistance of the National Native Title Tribunal or the Federal Court, if appropriate.

**Strategies for addressing outstanding issues**
Strategies for addressing outstanding issues that may be considered in the course of threshold conferences may include the following (which is not an exhaustive list):

- an agreed series of topic-specific threshold conferences undertaken between the State and traditional owner group representatives;
- seeking the assistance of the National Native Title Tribunal or Federal Court to mediate or negotiate specific issues (the assistance of the Federal Court would require that the traditional owner group also has a native title application before the Federal Court);
- seeking the assistance of the Right People for Country Project to assist traditional owners to further negotiate issues about group composition and extent of country;
- additional research, or requests by the Native Title Unit to view the research reports, or parts thereof, that sit behind a threshold statement that a traditional owner group and the native title service provider have prepared;
- seeking an independent assessment of existing research material by an agreed expert;
- conferences of ‘experts’ from the State and from NTSV, or otherwise nominated by the traditional owner group, that seek to narrow areas of disagreement and apply problem-solving approaches;
- devising a staged approach to the negotiation of settlement options for shared or disputed areas; and/or
- seeking independent professional advice from an agreed expert on governance and/or strategic planning matters.

**Threshold notification**
The evaluation of Part A of the threshold statement and the threshold conferences that follow are aimed at arriving at a point where the Native Title Unit forms the view that there are no substantial outstanding Part A threshold issues. However, a further step is to test this with the wider Victorian traditional owner community by a process of notification.
Purpose
The threshold notification will advise Victorian traditional owners that a threshold statement has been received and will invite comment on whether:

i. the traditional owner group seeking settlement is the right traditional owner group for the area;

ii. the group description includes all the traditional owners for the area; and

iii. all members of the group have had a reasonable opportunity to participate in the full group decision-making that has lead to the lodgement of the threshold statement.

The purpose of the threshold notification is, therefore, to provide assurance that if settlement negotiations were to proceed, the State would be negotiating with a traditional owner group appropriate to the proposed settlement area.

The threshold notification increases the transparency of the State’s actions in determining who it agrees to commence settlement negotiations with. Inviting the views of traditional owners acknowledges that, collectively, traditional owners are the keepers of knowledge about traditional owner identity and territory. Recognition of a group by other Victorian traditional owner groups may be an important contributing factor in confirming traditional and cultural association.

The threshold notification also provides opportunities for those who may be affected by decisions regarding the recognition of traditional owners – namely, traditional owners themselves – to give input or comment prior to such decisions being taken.

The threshold notification will also provide assurances to government that the group is made up of all the traditional owners for the area and that all such members of the group have had a reasonable opportunity to participate in the decision-making processes that have lead to the lodgement of the threshold statement. This is because the State seeks to reach settlements with a whole traditional owner group (see also comments on inclusiveness and size of group on pages 33-34). Inclusiveness is also of relevance to future considerations with regard to the registration of the indigenous land use agreement – which must be authorised by ‘all persons who hold or may hold native title’ to the area – as discussed in Part 2 of these guidelines (see page 8).

In-principle approval to proceed with threshold notification
Provided the Native Title Unit forms the view that all Part A threshold matters are largely addressed and no significant issues are outstanding, the Native Title Unit will seek in-principle approval from the Attorney-General to proceed with threshold notification.

The threshold notification will not proceed if substantial Part A threshold issues remain in doubt. Minor issues need not prevent notification from proceeding, particularly where a process for addressing them has been agreed and prospects of resolution are considered high. Examples might include ongoing discussions with neighbouring traditional owner groups over more minor boundary areas.
In addition, threshold notification will not proceed if the State does not intend to commence the Stage Two negotiations, or does not see itself as having a capacity to do so, in the foreseeable future (approximately within 12 months of when the threshold notification period ends, provided all thresholds are met, including Part B thresholds). Should such a scenario arise, the State will communicate its position to the traditional owner group.

Readiness to proceed
Before proceeding with the threshold notification, the Native Title Unit will also consider the readiness of the traditional owner group and the native title service provider. In addition to the information in the threshold statement, further queries may also be made of the traditional owner group and the native title service provider. Measures of readiness to proceed with threshold notification include:

- the state of relations between the traditional owner group and its traditional owner neighbours;
- whether there is a need for information to be provided to the broader local Aboriginal community within the proposed settlement area and the capacity of the traditional owner group and the native title service provider to do so; for example, spreading word that the threshold notification will take place, such as through Local Indigenous Networks, and clarifying the limited effects of a settlement on the broader local Aboriginal community; and
- whether the traditional owner group and/or the native title service provider are prepared for responding to public queries and media attention that the threshold notification process may attract.

The Native Title Unit will use this information to assure itself that proceeding with threshold notification will not generate, or significantly inflame, conflict within the wider Aboriginal community. These actions recognise the need to avoid and minimise any lateral violence or social stress from the threshold notification process, as has sometimes been associated with similar processes in the past. If the State is concerned that proceeding with the threshold notification will cause or exacerbate significant conflict, the Native Title Unit will discuss this with the traditional owner group and the native title service provider (the latter whether or not it represents the group), and explore with them whether further preparation is required or whether further information must be provided to the relevant community first.

Traditional owner group public statement
With confirmation of the State’s in-principle support to proceed with threshold notification, the Native Title Unit will seek to reach agreement with the traditional owner group on the content of a public statement to be available during the threshold notification period, including via the Department of Justice & Regulation website. Appendix 3 sets out the proposed minimum content of the public statement, as an abridged version of the Part A threshold statement. Alternatively, a traditional owner group may agree to make the full Part A threshold statement available to the public during the threshold notification.
Final approval to proceed with threshold notification

The Native Title Unit will seek final approval from the Attorney-General to proceed with the threshold notification. Advice will be provided to the Attorney-General regarding the agreed content of the public statement accompanying notification, the readiness of the traditional owner group to proceed and the broader context in which threshold notification will take place.

Threshold notification process

Appendix 3 sets out guidelines for how the threshold notification process is to be undertaken, including:

- how notice is given (Department of Justice & Regulation website, print media, letters sent to a range of Aboriginal organisations whose membership or clients include traditional owners);
- what is contained in the notice, including the notice period (a minimum of 42 calendar days); and
- how the Native Title Unit will deal with submissions, including providing opportunities for the traditional owner group to comment on adverse submissions that are soundly made and relevant.

Comment sought from the Victorian Aboriginal Heritage Council

As part of the threshold notification, the Native Title Unit will also write to the Victorian Aboriginal Heritage Council and provide a copy of the public statement (referred to above). This provides an opportunity for the council to comment on any overlaps of the proposed settlement area with appointment and application areas for registered Aboriginal parties.

The Native Title Unit will also invite any other comment the Victorian Aboriginal Heritage Council may wish to make, subject to their statutory functions under the Aboriginal Heritage Act, on matters of:

- the basis of the group’s claim to a particular area; and
- the inclusiveness of the group.

This step seeks to draw on the council’s expertise as a traditional owner body that makes decisions in relation to the appointment of registered Aboriginal parties. It also seeks to maximise the alignment between the appointment of registered Aboriginal parties under the Aboriginal Heritage Act and settlements under the Traditional Owner Settlement Act, given the intersecting provisions between these two pieces of legislation (see also the discussion of the links on page 9).
Comment sought from the native title service provider
Where a traditional owner group lodges a threshold statement without the assistance and support of the native title service provider, the Native Title Unit will also write to Native Title Services Victoria during the threshold notification period to advise them of receipt of the threshold statement and to provide a copy of the public statement. Native Title Services Victoria will be invited to comment on the matters listed in the public notice (items i to iii on page 21). This notice is given to Native Title Service Victoria in its capacity as the native title service provider funded under the Native Title Act to perform all the functions of a representative body across Victoria.

Post-notification threshold conferences, if necessary
Where the notification process raises significant threshold issues, the Native Title Unit may convene a threshold conference or conferences, by agreement with the traditional owner group, to provide a forum for discussion and development of strategies for addressing outstanding issues.

Where thresholds are not met
There may be instances where the Native Title Unit forms the view that threshold requirements appear not able to be met, perhaps despite concerted efforts to address outstanding issues. This may arise out of threshold conferences held prior to the decision to proceed with the threshold notification (discussed above), or there may be circumstances where the threshold notification, and any subsequent threshold conferences, raise issues or information not previously identified or understood.

The view that thresholds can not be met may also be formed with respect to Part B thresholds, such as where a group’s corporation is not able to gain registration.

The Native Title Unit will formally advise the traditional owner group where the view is formed that threshold requirements are not able to be met, and will provide a statement of reasons. The Native Title Unit will identify the opportunities for addressing outstanding matters that have been offered, and will also explain the basis of the conclusions reached.

The traditional owner group will be afforded a final opportunity to comment on the Native Title Unit’s conclusions prior to the Native Title Unit advising the Attorney-General that thresholds are not able to be met at that point.

Traditional owner groups who are declined entry into settlement negotiations on the basis of not meeting threshold requirements are able to come back at some future point with an amended threshold statement, should they wish to.
**Confirmation where thresholds are met**

The Native Title Unit will advise the Attorney-General when it is considered that thresholds have been met, both in relation to Part A thresholds and Part B thresholds. As indicated in Figure 1, it is expected that groups will usually meet Part A thresholds before submitting a Part B threshold statement. Advising that Part B thresholds are also met will bring Stage One threshold negotiations to an end.

**Confirmation to proceed to Stage Two negotiations**

On the basis of both Part A and Part B thresholds having been met, the Native Title Unit will seek confirmation of the government’s commitment to proceed with Stage Two negotiations. This may include seeking confirmation of any negotiation parameters the government may set, that are specific to the particular circumstances.

A traditional owner group and its corporation will also need to reconfirm its commitment to proceeding to Stage Two settlement negotiations.

Formal confirmation of the commitment of both parties to proceed to Stage Two negotiations is a significant milestone. The parties may agree to mark this milestone with a joint public event, with celebratory and cross-cultural elements. This is the entry point for Stage Two settlement negotiations.
Preparation of the Threshold Statement

Traditional owner group: seeks support of NTSV; for Part A - takes part in research, settles decision-making, makes key decisions on group composition and extent of country, seeks agreements with neighbouring groups, prepares a statement of association and endorses Part A statement; for Part B - nominates a group entity (corporation), appoints negotiation team, prepares strategic plan and endorses Part B statement.

Native Title Services Victoria (NTSV): considers applications for assistance, seeks consent for and undertakes research and community outreach, presents research findings to group, supports capacity building, facilitates discussion with neighbours, assists with nomination of group entity and strategic planning and prepares threshold statement.

State agencies: provide process info (DJR), mapping assistance (DJR with RPfC and OAAV), agreement-making and capacity building support (RPCI and OAAV) and research cooperation (between DJR, VAHC and NTSV).

STAGE ONE: THRESHOLD NEGOTIATIONS

Evaluation of Part A Threshold Statement (right group and country)
DJR provides a written evaluation of the Part A Threshold Statement against Part 4 of the Threshold Guidelines.
A1. Statement of intent to negotiate
A2. Traditional owner group statement of association to country
A3. Description and basis of traditional owner group
A4. Description and basis of proposed agreement area
A5. Research process overview, chronology and findings
A6. Traditional owner group decision-making

Threshold notification
DJR and the traditional owner group settle the public documents and map.

Thresholds not met
Significantly flawed or vexatious statements are returned to the traditional owner group early on. DJR provides brief reasons for decision not to evaluate further.
OR
DJR considers that, despite best efforts to address outstanding issues, thresholds are not able to be met. DJR provides reasons for decision.

Evaluation of Part B Threshold Statement (negotiation readiness)
DJR provides a written evaluation of the Part B threshold statement against Part 5 of the Threshold Guidelines.
B1. Appointment of traditional owner group entity
B2. Statement of negotiation capacity
B3. Strategic plan
Part B thresholds are met
DJR advises the traditional owner group.

STAGE TWO: SETTLEMENT NEGOTIATIONS

Commitment to proceed to Stage Two negotiations
The government and traditional owner group confirm their mutual commitment to proceed to Stage 2 settlement negotiations, marked by a milestone event.

Settlement negotiations
Negotiations proceed, including:
- negotiation plan and timetable agreed
- agreement-in-principle sought for each element of settlement package
- agreement documents drafted
- agreements authorised by full group
- agreements endorsed by government.

Signing ceremony
Agreement documents executed by Ministers and traditional owner group at a signing ceremony.

ILUA registration
NTSV certifies the ILUA application for registration and makes application to the NNTT. The NNTT runs a 3 month public notice process, and considers any objections received. NNTT makes a registration decision. (If negative, parties must remedy).

Following a positive decision, the NNTT enters the ILUA on the Register of Indigenous Land Use Agreements.
The traditional owner group discontinues native title or compensation claims in the Federal Court (if any).

Settlement agreements come into force
The traditional owner group and the state celebrate the commencement of the settlement agreements in a public ceremony!! Implementation commences.

Acronyms
DJR - Department of Justice & Regulation; DELWP - Department of Environment, Land, Water and Planning; ILUA - indigenous land use agreement; OAAV - Office of Aboriginal Affairs Victoria; NNTT - National Native Title Tribunal; NTSV - Native Title Services Victoria Ltd, the native title service provider for Victoria; RPCI - Right People for Country Project; TOGE - Traditional Owner Group Entity; VAHC - Victorian Aboriginal Heritage Council
Figure 1:
The two stages of negotiation of a Traditional Owner Settlement Agreement

STAGE ONE: THRESHOLD NEGOTIATIONS

- Preparation of the Threshold Statement
- Evaluation of Part A Threshold Statement (right group and country)
- Threshold notification
- Evaluation of Part B Threshold Statement (negotiation readiness)
- Threshold conferences

STAGE TWO: SETTLEMENT NEGOTIATIONS

- ILUA registration
- Settlement negotiations
- Signing ceremony
- Commitment to proceed to Stage Two negotiations
- Settlement agreements come into force
The State seeks assurance that the traditional owner group pursuing a settlement comprises the ‘right’ traditional owner group for an area appropriate for settlement, on the basis of a ‘cultural and traditional association’ to the area as Aboriginal traditional owners.

The types of assistance and support in addressing Part A threshold matters that may be provided to traditional owner groups by the native title service provider, the Native Title Unit in the Department of Justice & Regulation and other State agencies, is discussed in Part 3 (see Collaboration: roles and responsibilities in the lead-up phase, pages 13-17).

The approach that the Native Title Unit will take to the evaluation of Part A of the threshold statement, in particular, is discussed in Part 3 (see pages 17-19).

Part A of the threshold statement contains six items:
A1. Statement of intent to negotiate
A2. Traditional owner group statement of association to country
A3. Description and basis of traditional owner group
A4. Description and basis of proposed agreement area
A5. Research process overview, chronology and findings
A6. Traditional owner group decision-making

The following provides guidelines regarding the content of these different items.

A1. Statement of intent to negotiate

A covering letter that states the traditional owner group seeks to negotiate a recognition and settlement agreement with the State of Victoria under the Traditional Owner Settlement Act 2010.

The covering letter should clearly outline the traditional owner group’s intent to seek a negotiated recognition and settlement agreement, and associated sub-agreements, under the Traditional Owner Settlement Act 2010.

This intent should be demonstrable, such as by reference to a resolution made at a full group meeting.
Intent to negotiate is understood by the State as agreement by the traditional owner group to not simultaneously prosecute any native title determination applications or compensation applications, unless otherwise agreed. Where the traditional owner group have a native title determination application or compensation application before the Federal Court, the State would expect the applicants to seek an adjournment to allow for the settlement processes relevant to the Traditional Owner Settlement Act to proceed.

Where a native title applicant actively seeks a native title determination outcome from the Federal Court, the State would generally not enter settlement negotiations or would cease any that are underway. This is because the Traditional Owner Settlement Act is a comprehensive out-of-court alternative to the recognition, rights and compensation provisions of the Native Title Act.

A2. Traditional owner group statement of association to country

A statement that expresses the collective views of the traditional owner group members regarding their ‘traditional and cultural association’ to the area over which they seek a settlement.

Purpose

The traditional owner group is asked to give expression to its relationship to country through the statement of association. This corresponds to the purpose of the Traditional Owner Settlement Act to:

“advance reconciliation and promote good relations between the State and traditional owners and to recognise traditional owner groups based on their traditional and cultural associations to certain land in Victoria …”

(see s.3 of the Traditional Owner Settlement Act 2010).

The statement of association is intended to give a direct voice to the traditional owner group members themselves, as experts in their own culture, traditions and identity.

The abiding association of members of the traditional owner group to their country is a foundation threshold with practical implications, given that the Traditional Owner Settlement Act establishes an agreement making framework regarding traditional owner access to, and ownership or management of, public land and natural resources. The ‘lived’ association of traditional owner group members to their country will support the sustainable implementation of the on-the-ground agreements offered by the Traditional Owner Settlement Act. A traditional owner group that proceeds to substantive negotiations with the State will need to decide on matters such as prioritisation of joint management sites, establishment of traditional owner land management boards and other forms of participation in public land and natural resource management, including related employment opportunities. These matters assume an active association to country of
at least a core of the group membership. Agreement-making proceeds on the basis of the group holding an active traditional and cultural relationship to country, and not just because they are able to show descent from ancestors (as discussed in relation to the group description below).

It is acknowledged that opportunities for traditional owners to exercise their association to country have been constrained by government policies and practices of the past 180 years. However, the persistence of traditional owners in continuing to seek recognition and to maintain their association to country over this period is also apparent.

Content
The statement should identify the traditional owner group name that the group would wish the wider world to refer to them as. The State is not concerned whether or not a group name has a provenance from the contact period. Group names based on geographic locations or more contemporary usage are also acceptable, provided there is broad consensus about such terminology amongst the group.

The statement should also describe in broad terms the country with which the group has traditional and cultural association, such as by way of large scale geographical features or catchments.

The traditional owner group statement is not a technical statement about group membership or the precise boundaries of the proposed settlement area. Other parts of the threshold statement address these technical matters.

The statement should describe elements of the relationship of the group to their country – that is, their contemporary ‘traditional and cultural association’ to country. This can be by way of statements about the traditional owner group’s worldview and descriptions of sample contemporary practices or activities the group undertakes that show such association. Statements indicating features shared by the group as a whole, may be further augmented by statements made by key individual members of the traditional owner group (who may be de-identified or not, as preferred by the traditional owner group members).

The Native Title Unit understands there may be elements of association that are shared by multiple traditional owner groups; for example, cultural practices shared amongst groups within a common ‘nation’, or perhaps shared over larger scale domains. However, the association of each group will be unique in its reference to particular country.

The following are examples of topics a statement of association may address (to be clear, it is not intended to be an exhaustive list of matters each of which must be addressed):

- key stories or moiety beliefs that express the traditional owner group’s worldview and understanding of country and people;
• responsibilities for caring for country that group members currently take up, when the opportunity arises – for example, working on country in partnership with land and natural resource management agencies, or performing welcomes to country;

• contemporary responsibilities for the management of cultural heritage, including appointment as a ‘registered Aboriginal party’ under the Aboriginal Heritage Act by the Victorian Aboriginal Heritage Council;

• community activities that involve access to the area;

• use of natural resources in the area, such as fishing, hunting, camping and foraging for bush craft materials or for medicinal purposes; and

• transmission of knowledge to others, including how information was passed down to current members, and contemporary efforts to transmit knowledge to younger generations.

Not a legal test
As discussed on page 18, the State will consider and evaluate the statement of association in light of the purposes of the Traditional Owner Settlement Act. The statement of association is not intended to address legal principles, evidentiary standards or other legal technicalities regarding the ‘connection’ of the group, as understood with respect to section 223(1) of the Native Title Act and relevant case law. Nor is the statement intended to provide evidence of the continuity since British settlement of any particular traditional owner rights set out under section 9 of the Traditional Owner Settlement Act.

This means that elements of a statement of association may cover some common ground with matters relevant to the native title ‘connection test’. However, meeting the native title connection test indicated by section 223(1) of the Native Title Act is not the benchmark applied when the State evaluates threshold statements.

What do ‘traditional’ and ‘cultural’ mean?
For the purposes of these guidelines, ‘traditional’ denotes linkages with the past that are actively kept alive by the traditional owner group members. It is not restricted to features or activities understood to be fully continuous with, and identical to, such activities or features in pre-contact Aboriginal society. Linkages with the past would be demonstrated, for example, by including examples of transmission of cultural information between generations, as practised and known today.

While there may be a diversity of views, experiences and knowledge within the membership of a traditional owner group, significant elements of traditional owner relationships to country are also likely to be shared as a cultural group. Shared features relating to the relationships between traditional owners and their country is what is understood by use of the term ‘cultural’ association, such as shared dreaming stories and moiety beliefs. Contemporary association may also be as much shaped by the shared experiences of group members since the commencement of British settlement, as by current understandings of pre-contact life.
Relationship to research
The statement of association authored by the traditional owner group can be seen as distinct from, but complemented by, the findings of expert researchers which are presented in the ‘research process overview, chronology and findings’ section, later in the threshold statement. The expert findings should broadly support the traditional owner group’s statement of association.

A3. Description of the traditional owner group and its basis

A description of all persons who make up the membership of the traditional owner group for the proposed settlement area, described in a manner that can be understood by persons outside the group, and the basis for that description

Purpose
The group description enables the State to understand who it is considering entering negotiations with, and therefore, who may ultimately be recognised by the State as the traditional owner group for a given area. The basis for the group description must provide a sound rationale for why the particular description of the given traditional owner group is right or appropriate.

The question of who is in the group will be of likely interest to other Victorian traditional owners and Aboriginal people. The description of the traditional owner group will be used in the threshold notification process described in Part 3 and Appendix 3 of these guidelines – a process that advises the wider traditional owner community in Victoria of the group that is putting itself forward to seek a settlement with the State.

Inclusiveness and size
Evaluation of the traditional owner group description will consider, amongst other matters, whether the group is likely to be able to meet the requirements for registration of an indigenous land use agreement in terms of being properly inclusive of ‘all persons who may hold native title’. To some extent this issue of whether the group includes ‘all persons who may hold native title’ is a matter for the native title service provider, when it certifies the application for the indigenous land use agreement to be registered later in the process. However, the State also requires satisfaction on the inclusiveness of the group for itself, prior to commencing substantive negotiations. This satisfaction is achieved via evaluation of the inclusiveness of the group description in the threshold statement.

The State seeks a traditional owner group description that includes all traditional owners who make up the group. The description of the traditional owner group must include all the persons who are traditional owners for the proposed settlement area.
The State seeks settlements with a whole traditional owner group. This parallels native title processes, where native title is held by a ‘native title claim group’, which is all the persons who hold the common or group rights comprising the native title.40

A threshold statement lodged on behalf of a sub-group of a wider traditional owner group, such as a family group or clan, will not be accepted.

The size of a traditional owner group, as a whole, will also be of interest to the State. Where traditional owner group membership is small in number, the capacity of the group to run a corporation and meet settlement responsibilities and the viability of settlement agreements may be in doubt. Smaller groups are encouraged to consider ways of creating sustainable settlement groups, such as joining with a neighbouring traditional owner group or groups by way of a federation. This approach also aligns with one of the general principles in decision making on the appointment of registered Aboriginal parties under the Aboriginal Heritage Act adopted by the Victorian Aboriginal Heritage Council that relates to smaller groups.41

Technical description
The State seeks a technical, stand-alone description of the traditional owner group that enables the membership of the group to be understood by persons outside the group, whether by the government of the day, the general public, land and natural resource managers, development proponents or other traditional owners and Aboriginal people. The description may assert that the group themselves determines membership, but if so, the description should 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. This does not require an exhaustive list of individual names of members of the traditional owner group at any point in time.

The description needs to be able to stand alone from the basis for the description that is discussed below.

Combined factors of membership
It is expected that there may be a number of factors that operate in combination to define and describe the group membership. Traditional owner groups may not consider that descent alone, as discussed below, is sufficient to denote membership. The combined factors will need to be agreed by the full group.

In evaluating the description, the State will be looking for coherence, clarity and inclusiveness. The right of traditional owners to determine their own identity is foundational.42 However, the basis of traditional owner group decisions about who is in or out of the group must not be arbitrary or exclude persons who can sustain a sound argument that they should be included, given the significance of the rights being recognised through a settlement, and the opportunities and resources that may flow from settlement agreements.
Factors concerning group membership will need to combine factual underpinnings and clear group decision-making processes. The State also needs to be satisfied that the question of how membership is determined is stable and is consented to by the full group, given that the settlement agreements will be binding into the future.

Factors in decision-making about group membership need to be understood as being distinct from, but also parallel with, the membership rules of the traditional owner group entity that a group must nominate to represent it for the purposes of the Traditional Owner Settlement Act when it secures a settlement (also discussed in Part 5). In some instances a group entity, or corporation, will already be formed at the point of preparing a Part A threshold statement, whereas in other circumstances a group entity may be formed at the point of addressing Part B thresholds. Either way, what must be consistent between the two in the end is the definitional description of eligibility. All the persons who are members of the traditional owner group should be eligible to be members of the group entity in terms of the group definition, although the State accepts that some members of the traditional owner group may choose not to take up membership of the group entity. Definitional characteristics of membership are distinct from administrative considerations and requirements, such as requirements to fill out an application form, age restrictions (to persons over 18 years of age, for example), any rules about good conduct and any other requirements under the relevant corporations law.

Descent
Descent is expected to form a core component – or key determining factor – of group membership. It may be expressed as descent from a named ancestor, often referred to as an ‘apical’ ancestor, from the mid-nineteenth century (1800s). Descent may alternatively be expressed as membership of a family group, and in turn each family group may be related to a particular nineteenth century ancestor. These forms of descent coincide with ‘bloodlines’, also referred to as ‘consanguineal’ descent. According to the views of some, this is the only meaning of the term ‘descent’. To others, descent provides reference points, or is a marker, for the customary passing down of traditional rights across generations.

The State accepts that consanguineal descent may be augmented by cultural adoptions, whereby persons not biologically related are taken in and brought up within a blood-descent family, thereby inheriting the rights shared by other members of that family. Some groups have indicated that persons to whom such cultural adoptions might apply would need to be considered on a case-by-case basis. How a group proposes to deal with such issues needs to be clear, if they are to be included in the group description.

Factors in addition to descent
Other factors that may complement descent in defining traditional owner group membership may be:
• self-identification as a member of the group;
• recognition by other members of a family group or by the wider traditional owner group; and/or
• observance of specified laws and customs, or some level of ‘activation of rights’.  

Activation of rights may be demonstrated by self-identification, or may include demonstrating some interest in the ‘community business’ of the traditional owner group, such as attendance at full group meetings or some participation in cultural events.

Where groups may agree on such additional factors for membership, they need to be carefully defined. Otherwise, the risk is that persons who may meet all other criteria are able to be excluded on the basis of quite subjective, arbitrary or indeterminate factors. Minimum criteria for demonstrating activation of rights may be one way of providing some clarity.

Multiple descent?
The State does not have a fixed view on whether individual traditional owners may come forward as members of multiple traditional owner groups or not, on the basis of descent from different ancestors belonging to various traditional owner groups. As with other issues relating to group membership, the State’s evaluation of threshold statements will need to balance factors of inclusivity with the rights of traditional owner groups to self-define and manage their membership and identity.

In short, whether individuals can be members of multiple traditional owner groups and their corporate entities on the basis of multiple descent is in part a matter for traditional owners to consider and decide upon. Active participation in the community affairs of multiple groups and corporate entities may be difficult for individuals to sustain. Traditional owner groups may devise their own arrangements that balance acknowledgement of multiple descent but limit exercise of decision-making rights across multiple forums. For example, within a given traditional owner group there may be acknowledgement that individuals have links to multiple family groups, but the full traditional owner group agrees to rules whereby individuals may only cast a vote in one of those family groups. Parallel arrangements that acknowledge multiple membership but limit decision-making rights might also be agreed between traditional owner groups.

Basis of the group description
There are two sources for the basis of the traditional owner group description:—(i) the research findings, and (ii) the outcomes of decision-making of the traditional owner group itself.

Each of these two sources for the basis are elaborated on in later sections of the threshold statement. What needs to be presented in this part of the threshold statement, however, is specific identification of the relevant key research findings and the relevant full group decisions that support the description of the group.
A4. Description of proposed agreement area and its basis

A technical description of the external boundary of the proposed agreement area by way of a written description and a map, and the basis for that description.

Purpose

The area description needs to be sufficiently clear that the State is able to proceed with the threshold notification described in Part 3 and Appendix 3 of these guidelines. A map is also required. The basis for the area description must provide a sound rationale for the proposed settlement area as the right or appropriate country for the traditional owner group described earlier.

Ultimately, at the point of reaching a settlement agreement, an external boundary description will be required that can be used by land administrators and be recorded on the Register of Indigenous Land Use Agreements under the Native Title Act, as well as the State’s own Register of Land Use Activity Agreements under the Traditional Owner Settlement Act. The area description provided in the threshold statement is a step along the way.

The traditional owner group should identify as far as possible the fullest extent of their traditional country over which they seek a settlement. Settlements over only a portion of a group’s traditional country are not favoured by the State, particularly if the traditional owner group intends to seek settlement over additional areas later. This is because of the significant resources involved in undertaking settlement negotiations, as well as the full and final nature of recognition and settlement agreements under the Traditional Owner Settlement Act.
Technical area description: external boundary and map

The area description should consist of a precise written description of the external boundary of the proposed agreement area. It should be accompanied by a map.

Assistance with mapping may be sought from the Geospatial Unit in the National Native Title Tribunal. The Native Title Unit may be approached to broker such assistance from the tribunal, or from State agencies (see discussion of mapping assistance in Part 3).

When using geographic features as boundary descriptors, care needs to be taken to ensure that they are specific enough – for example, reference to a river as an external boundary needs to specify the particular bank or the midpoint of the river.

The external boundaries of proposed settlement areas are likely in most cases to be contiguous with, or abutting, areas for which a neighbouring traditional group may assert association. External boundaries should be the subject of discussion between neighbouring traditional owner groups and, wherever possible, be agreed between them. Neighbouring groups should be identified, and the extent of a mutual boundary with a given neighbouring group indicated in the boundary description.

If boundaries not settled between neighbours at the threshold stage

A threshold statement can signal sections of the boundary that are the subject of discussions with neighbouring groups that are still underway. This might be depicted as shaded areas on a map of the external boundary. However, the circumstances of those ongoing discussions will be of interest to the State, including the chronology of efforts to resolve the matter and whether agreed processes are in place to work through remaining issues. The State’s clear policy preference is to proceed with settlements in areas where there is agreement between neighbouring traditional owner groups.

Ultimately, the State may not proceed with settlements in areas subject to overlapping and competing RAP applications, native title claims or threshold statements, or a combination thereof. As also discussed in Part 3, the State will not proceed with the threshold notification if considerable dispute and tension exists between neighbouring groups (see page 22).

On the other hand, there may be circumstances where boundaries between neighbouring traditional owner groups continue to be actively disputed, despite best efforts at dispute resolution, either under the native title service provider’s dispute resolution functions or under the Right People for Country Project administered by the Office of Aboriginal Affairs Victoria. The State will consider such scenarios on a case by case basis. In some circumstances, an appropriate response may be to reduce the settlement area to excise the disputed area. This will need to be considered alongside the policy objective of seeking settlement over the fullest extent of the asserted traditional country of the traditional owner group.
Restricted to public land areas within the State’s jurisdiction

The proposed settlement area must only include areas within the State’s jurisdiction. In coastal areas this means proposed settlement areas can only extend to three nautical miles offshore.

Any land other than public land that falls within the external boundary, including all private freehold, is not covered by the operation of a recognition and settlement agreement reached under the Traditional Owner Settlement Act. This is clear from the purposes of the Traditional Owner Settlement Act at section 1, as well as the definition of public land at section 3 of this act.

Size of area

Where the area over which a settlement is sought is small in overall size, and where the area includes only a relatively small amount of public land, a comprehensive settlement under the Traditional Owner Settlement Act may not be viable or appropriate. As stated above, the State favours settlements over the fullest extent of a traditional owner group’s whole country. As discussed in relation to the description of a traditional owner group above (see pages 33-34), the State seeks settlement agreements with a full traditional owner group and not sub-groups.

Where a full traditional owner group is nevertheless small, with a relatively small traditional territory, groups are encouraged to consider developing federations with neighbouring traditional owner groups, who might together seek a settlement over a combined territory. In such settlements, distinct internal territorial boundaries between the groups that make up the federation may be able to be accommodated. Where known at the point of making a threshold statement, these internal boundaries should be provided as part of the description of the area.

Shared country

The State acknowledges there may be circumstances where neighbouring traditional owner groups mutually assert traditional ownership of shared areas – as distinct from competing claims over the same area. Whether the traditional owner groups assert there is a broadly traditional basis for such shared areas will require further clarification. The practical outcomes on the ground that traditional owner groups might seek in relation to shared country will also need to be clarified.

The Traditional Owner Settlement Act does not specifically provide for the recognition of shared country. If an area is to be shared, the State will require a single traditional owner group entity interface for government and third parties for that area. Alignment with cultural heritage responsibilities is also a consideration with respect to the recognition of shared areas under the Traditional Owner Settlement Act, given the intersecting provisions between this act and the Aboriginal Heritage Act.51
There are two key ways in which shared interests may currently be accommodated:

- a recognition and settlement agreement may be made with a single combined traditional owner group entity that is jointly appointed by more than one traditional owner group for purposes under the Traditional Owner Settlement Act; or
- groups may agree to divide a shared area in terms of their respective statutory recognition and responsibilities (under the Traditional Owner Settlement Act), but may make additional arrangements or agreements amongst themselves such as requirements for consultations over specified matters of mutual interest, that sit alongside the distinct statutory responsibilities for any given part of the shared area.

A third alternative, involving more than one recognition and settlement agreement over the same area, is not considered currently possible under the Traditional Owner Settlement Act, which was not drafted to accommodate such a scenario.

Replicating option i. above across the state for shared areas – whereby multiple smaller shared areas would be recognised via combined corporate entities, alongside recognition of single group entities for “core areas” – is not considered sustainable due to the additional costs and the complexities for traditional owner groups as well as for the State and third parties.

The authorisation requirements for registration of indigenous land use agreements also present particular challenges where distinct but neighbouring groups assert shared traditional ownership over common country. An indigenous land use agreement for a shared area would need to be authorised by both groups prior to applying for registration.

**Basis of the area description**

As with the basis for the description of the traditional owner group discussed earlier, the State considers that there will be two key sources for the basis of the proposed agreement area:– (i) the research findings, and (ii) the outcomes of decision-making of the traditional owner group, including any agreements reached with neighbours.

Each of these two sources for the basis are elaborated on in later sections of the threshold statement. What should be presented in this part of the threshold statement, however, is specific identification of the relevant key research outcomes and the relevant full group decisions that support the description of the proposed settlement area.

The basis needs to address the foundation for the particular boundaries proposed. This should include identification of neighbouring traditional owner groups and the extent of mutual boundaries between traditional owner groups.
A5. Research process overview, chronology and key findings

An overview of the research process and chronology and key research findings relevant to the group description, the area description and the traditional and cultural association of the group to their country.

Purpose
The purpose of the research process overview, chronology and outcomes is to provide assurances to the State that assertions made by the traditional owner group elsewhere in the threshold statement – with respect to the membership or composition of the group, the location of their traditional country and their association to it – are underpinned by robust and broad-ranging historical and anthropological research.

Roles of traditional owners in the research
The research process is expected to engage with the collective expertise of traditional owners regarding traditional owner identity, traditional law and culture, and knowledge of traditional country. Traditional owners are critical informants to the anthropological research, including the preparation of genealogies. Traditional owners are also the recipients of research outcomes. They may also be partners in the design of research.

The statement should include a description of how traditional owners have been involved in the research process.

Process overview and chronology
The process overview and chronology needs to address the specific steps undertaken with respect to a particular group, in chronological form. The process overview and
chronology serves to assure the State as to the thoroughness and objectivity of the research.

Research is expected to be undertaken by professional researchers working with a broad body of both primary and secondary source materials, including genealogical data. This is to be combined with contemporary fieldwork. This ‘ethno-historical research’ is work that the research unit of the native title service provider is able to undertake on behalf of, and with the consent of, the traditional owners involved.

The threshold statement should reference the professional standards of the relevant disciplines, such as professional codes of ethics, and the expertise of the researchers engaged by the traditional owner group and the native title service provider.

A comprehensive research process is expected to:

- generate a bibliography listing all relevant material consulted;
- utilise expert historical and ethnographic interpretation of all relevant material, as applicable to key research findings listed below;
- employ expert anthropological methods for gathering and analysing primary (informant-based) information and data, including choosing informants who reflect the diversity of the group membership in terms of age and gender and family groupings;
- engage with traditional owners in a manner that engenders substantial traditional owner involvement, including consulting broadly with contemporary descendants of apical ancestors, establishing appropriate processes for traditional owners to consent to participate in research as informants, presentation of research outcomes back to traditional owners and providing opportunities for traditional owners to review research methods and findings; and
- adopt an objective approach to research, that is not confined to material that supports or advocates for a given group or groups – for example, regarding the question of extent of country, material relating to neighbouring traditional owner groups should be considered in addition to material relating to the group for whom research is primarily being undertaken.

Key research findings

Key findings of the research need to be drawn out and presented in summary form with regard to the key issues of:

- the membership or composition of the traditional owner group;
- the location of their traditional country and proposed settlement area; and
- their traditional and cultural association to the area.

These elements contribute to the basis for the group description and the basis for the proposed agreement area, and do so in combination with the traditional owner decision-making, as discussed earlier. They also substantiate elements of the statement of association.
The State acknowledges that the ethno-historical research may not provide definitive conclusions. The historical record is sometimes silent or inconclusive as to traditional ownership of country at the time of settlement of Victoria, or since, including with respect to the location of distinct traditional owner territorial boundaries. The historical record may also contain misunderstandings and misinterpretations made by non-Aboriginal observers.

Traditional owner polities in existence at the time of British occupation and settlement have been significantly disrupted through substantial population decline, dispossession and the relocation of Victorian Aboriginal people, including forced co-location of different groups on missions and reserves. Contemporary traditional owner understandings of association to country are also dynamic and will include modern adaptations and variations.

In addition, the informant-based anthropological research may also find that not all members of a particular traditional owner group will necessarily share the same information or knowledge about country. Family groups or individuals may also not necessarily hold a full picture of the whole extent of a group’s country. This diversity of views is unremarkable.

Where research points to unclear or equivocal findings, or a paucity of material in the historical record, it is important that this is made clear. A research outcome that posits a reasonable case based on a balance of evidence, for example, should be distinguished from a more definitive finding. A lack of clarity on a particular matter may itself be a research finding.

The research findings should address each of the following matters:

i. identification of named apical ancestors who lived on, were born on, or were identified with, particular country in the mid nineteenth century (mid 1800s);

ii. broad and repeated references to a particular Aboriginal cultural grouping in historical sources, including as to its territorial location;

iii. matters of group composition, including family group structures and factors that define group membership, as agreed in the present;

iv. a skeletal genealogy that starts with a single member of a family group and works back in time to a named apical ancestor;

v. extent of country, including key landscape features and any conclusions regarding boundaries;

vi. identification of neighbouring traditional owner groups, by cultural name, and the extent of known mutual or shared boundaries;

vii. a broad description of the nature of contemporary (traditional and cultural) association; and

viii. the continuities or linkages with the past of that association, such as intergenerational transmission or ‘passing down’ of knowledge.
A6. Traditional owner group decision-making

A description of the full-group’s decision-making processes, including confirmation that these processes were used to endorse the threshold statement, and a description of any agreements reached with neighbouring traditional owner groups.

Purpose
The State seeks assurances that the group has a stable decision making process in place that is fair and inclusive, is agreed by the group membership and is able to produce decisions reflective of the views and aspirations of that membership. This is so that the State can have confidence that the Stage Two negotiations will be meaningful, and that, ultimately, negotiated agreements and outcomes will be robust and enduring.

The State seeks indicators of fair and stable decision-making within the full group membership. There are a variety of early decisions that a full traditional owner group will need to make in order to prepare and endorse a Part A threshold statement, including with respect to the group description, the extent of country and the statement of association.

Following the State’s acceptance of Part A thresholds, a group will also need to appoint a traditional owner entity (a corporation) to represent it for the purposes of the Traditional Owner Settlement Act. It is this corporation that enters into the settlement with the State on behalf of the full group. The appointment of the corporation is also an important decision of the full group, as discussed in Part 5 of these guidelines.

The traditional owner group needs to settle how it will make the early, foundational decisions behind the Part A threshold statement, before future decision-making is formalised through the traditional owner group entity and its internal governance rules. Appendix 4 lists the types of decisions a traditional owner group may need to make at different points along the two stage negotiation process that leads to a settlement, and it distinguishes these from the decisions required of the corporation.

The State seeks an understanding of the full group’s early decision making processes in order to avoid and minimise scenarios where members of groups challenge negotiated decisions or outcomes later, including forming competing, breakaway groupings.

Fair and stable decision-making is demonstrated by features such as:

- providing all members with the opportunity to participate in decision-making (such as by providing proper notice of meetings to all involved) so that all members consider themselves to be included in, and responsible for, the group’s decisions;
- processes that are designed to maximise opportunities for reaching a consensual or shared position, and that support members to freely make informed decisions;
• clarity and transparency of processes, such as documenting agreed processes and decisions made, and keeping members informed;
• providing recourse for persons adversely affected by decisions, such as dispute resolution and grievance or review processes; and
• group processes that can accommodate and constructively engage with a diversity of member views.

Decision-making as part of the basis of the group and area descriptions
Active decision-making by the traditional owner group is considered a part of the basis for both the group description and the area description, as discussed earlier. The group decision-making will be considered in combination with the key relevant findings of the ethno-historical research, when the basis for the group description and the basis for the area description are each being evaluated.

Despite the possibility of varied views and levels of knowledge amongst the traditional owner group membership (as noted on page 43), a coalescing of views is required for the group to take up the opportunities for recognition and agreement-making offered by the Traditional Owner Settlement Act.

The two sources of information about the group composition and their extent of country – the research findings and the decision-making of the traditional owner group – are expected to intersect and to a large degree support each other. In circumstances where the views of traditional owner groups diverge from the research findings, some explanation of how contemporary traditional owner views have considered those findings but have come to other conclusions will be needed.

There are three parts to the description of traditional owner group decision-making that the threshold statement should address at A6:

Agreed full group decision making processes
The threshold statement needs to contain a description of the decision-making process that the full group has adopted for decisions that need to be made by the full group.

Traditional owner groups need to consider and design decision-making processes that are culturally appropriate to them and that are also fair and inclusive. The State is particularly interested in the inclusiveness of such processes, in that all members are given reasonable opportunities to participate in some manner.

Voting may not necessarily always be the best first option for decision making, but rather a step taken where efforts to reach a consensus have not succeeded. Different voting systems might also be considered, including voting in meetings by show of hands, secret
ballots and tiered decision-making that gives each family group one vote in a full group forum. There may be rules around quorums for decisions; for example, simple majority rule or a higher bar. Such processes are a matter for the group to consider and agree upon.

The way in which group members are given opportunities to participate in decision-making also needs to be set out. For example, if decisions are made by a show of hands at a full group meeting, then the threshold statement should describe processes agreed and undertaken for giving notice to all members of the traditional owner group of such full group meetings.

Groups are also encouraged to develop agreed dispute resolution processes, and to describe these in this part of the threshold statement. They might include processes for the group to consider grievances that group members may make about how or whether an agreed process was followed. They may also set out mechanisms for dispute resolution, such as mediation, and the circumstances under which such avenues can be pursued.

**Endorsement of the threshold statement**

Endorsement of the threshold statement by the full group is an important demonstration of the decision-making capacity of the group. The threshold statement should describe how the content of the threshold statement was endorsed by the full group. A signed letter or report setting out the attendance at the meeting, the breadth of family group representation and the resolutions passed will be required to substantiate endorsement. A narrative about progressive decisions taken over a period of time may also be appropriate. Providing a narrative will give a fuller picture than reporting only on the resolutions made at a single event.

The State suggests that this part of the threshold statement ought to set out the key decision points that a group takes, whether over time or at a single meeting, with regard to:

- the group description, identification of apical ancestors and membership criteria; and
- the external boundaries of the proposed agreement area.

Separating out these key decisions will assist with clarifying the basis for the group and area descriptions (as discussed earlier).

**Agreements with neighbours**

There is an expectation that traditional owner groups seeking settlement negotiations with the state will let neighbouring traditional owner groups know that they are doing so. While in the lead-up to preparing a threshold statement, a traditional owner group should seek their neighbours’ views, and ideally also their agreement, about mutual territorial boundaries. Other matters, such as protocols around certain cultural matters, overlapping group membership or common apical ancestors, may also arise between groups.
The threshold statement should include a description or copy of any agreements reached with neighbouring traditional owner groups regarding agreed territorial boundaries. If agreements have not been reached, then a narrative about approaches that have been made, or discussions that are underway, should be provided.

Any arrangements or aspects of neighbourly cooperation that the State needs to know about because it affects how the State treats with the groups involved, should also be provided. The form of those agreements – such as whether they are recorded through a Memorandum of Understanding or a contract – will be of interest to the State. A narrative about the approaches made to neighbouring groups and the discussions that ensued, will provide a greater understanding than reporting only on a single resolution of each group. Evidence of inter-group agreement with, or approaches to, each of the groups involved is required.

The expectation that traditional owner groups approach their neighbours does not mean that proceeding with settlement negotiations is dependent on a full concurrence of views amongst all neighbouring traditional owner groups. However, where there are distinctly conflicting views, reasonable efforts should be made to seek to resolve or reduce the disagreement before submitting a threshold statement. Either the native title service provider or the Right People for Country Project delivered by the Office of Aboriginal Affairs Victoria\textsuperscript{54} may be able to assist with the resolution of such disputes. Strategies for addressing disputes may also be the subject of threshold conferences between the State and traditional owner groups, as discussed in Part 3.

The State will be less inclined to proceed with the threshold notification described in Part 3 of these guidelines for areas where it is already apparent that country and/or group membership are strongly contested between traditional owners. The matters in dispute and the basis for the differing views will need to be carefully considered.

There is some capacity to proceed with the threshold notification with maps that depict unresolved boundaries between groups as shaded areas, where they are areas subject to ongoing discussions.\textsuperscript{55}

There may be some limited circumstances where the State decides to proceed with the threshold notification, and perhaps also substantive stage two negotiations, despite some opposition from certain groups or individuals. The threshold notification will provide an opportunity for a contesting group to make the details of its position better known to the State.

Where neighbouring traditional owner groups are able to reach agreements about their mutual boundaries, this will give the State greater confidence about the key threshold of establishing the ‘right people’ for a given area.
Checklist for Part A Threshold Statement

A1. Statement of intent to negotiate
- covering letter of intent to negotiate settlement under the Traditional Owner Settlement Act 2010, substantiated by full group decision (assumes any native title claims put on hold, unless otherwise agreed)

A2. Traditional owner group statement of association to country
- collective statement voicing the group’s relationship to country (traditional and cultural association) – contemporary relationships, shared elements/features, with links to the past

A3. Description and basis of traditional owner group
- description:
  - stand alone description of group membership that enables membership to be understood by persons outside group
  - must include the whole traditional owner group and all the traditional owners for the proposed settlement area (not a sub-group or single clan or family group)
  - combined factors which will include descent, and may include self-identification, recognition by other members, observance of law and custom or activation of rights, for example
- basis:
  - identify which key research findings (from A5) and which key traditional owner group decisions (from A6) support the description

A4. Description and basis of proposed agreement area
- description:
  - stand alone written description of external boundaries and map
  - may indicate boundaries that remain subject to discussions with neighbouring groups (eg. as shaded areas)
- basis:
  - identify which key research findings (from A5) and which key traditional owner group decisions (from A6) support the proposed agreement area

A5. Research process overview, chronology and findings
- overview and chronology of robust research process
- key research findings relating to: membership of the traditional owner group (at A3), proposed settlement area (A4) and traditional and cultural association (A2)

A6. Traditional owner group decision-making
- a description of full group decision-making processes adopted
- confirmation that the threshold statement is endorsed by the full group, utilising those decision-making processes
- agreements with neighbours about boundaries and other inter-group arrangements
The State seeks assurance that the traditional owner group is ready to negotiate a comprehensive settlement package that binds all persons who may hold native title for the proposed settlement area.

Part B matters are designed to ensure that the negotiation of a settlement package can commence with a traditional owner group that has strong negotiation capacity and is well-prepared for the important decisions that will need to be made during the Stage Two negotiations.

The Native Title Unit acknowledges that significant effort is involved in traditional owner groups addressing Part B issues. The types of assistance and support regarding these Part B matters that may be provided by the native title service provider (NTSV), the Native Title Unit in the Department of Justice & Regulation and other State agencies are discussed in Part 3 of these guidelines (see Collaboration: roles and responsibilities in the lead-up phase, from page 13).

The Native Title Unit encourages traditional owner groups who are not yet appointed as registered Aboriginal parties under the Aboriginal Heritage Act to consider seeking such appointment before they embark on seeking settlement negotiations. This is because gaining status as a registered Aboriginal party, and carrying out the role and functions that go with that status, provides a good foundation for a traditional owner group and its corporation to take on the wider responsibilities flowing from a settlement under the Traditional Owner Settlement Act.

Under the Aboriginal Heritage Act, a registered Aboriginal party must be a corporate body. A group that is successful with seeking registration under the Aboriginal Heritage Act will have already established a corporation, and one that is considered by the Victorian Aboriginal Heritage Council to be capable of representing traditional owners for an area (Aboriginal persons with ‘traditional or familial links’). The corporation will have settled its membership and internal governance rules in order to become incorporated, and it may have prepared operational and business plans. Even though the corporation’s focus will have been on carrying out cultural heritage management functions, appointment as a registered Aboriginal party indicates generic capacity relevant to the matters which groups must address in Part B of a threshold statement.

The approach the Native Title Unit will take to the evaluation of Part B of the threshold statement, in particular, is discussed in Part 3 of these guidelines (see page 19).
Part B of the threshold statement contains 3 items:

B1. Appointment of the traditional owner group entity
B2. Statement of negotiation capacity
B3. Strategic plan

The following provides guidelines regarding the content of these different items.

**B1. Appointment of a traditional owner group entity**

A statement that verifies and describes the appointment of a traditional owner group entity to represent the full traditional owner group for the purposes of the Traditional Owner Settlement Act.

**Purpose**

The State seeks confirmation that the traditional owner group has appointed a traditional owner group entity (that is, a corporation) to represent it for the purposes of the Traditional Owner Settlement Act.

The appointment of the corporation by the group to represent it for purposes under the Traditional Owner Settlement Act is an important decision that transfers a range of responsibilities from the group to the entity. The State expects that the appointment is by way of the full group decision-making processes agreed by the group, as described in Part A of the threshold statement at A6. It seeks assurance that this agreed process has been used.

Good governance, including transparent and clear decision-making processes and dispute resolution mechanisms, will increase the State’s confidence that a corporation has the structures in place that will allow it to make sustainable decisions.

In addition, the State seeks assurances that the traditional owner group members support the corporation and participate in its processes. This demonstrates that the corporation is appropriate to represent and bind the members of the traditional owner group.

**The role of the corporation**

It is the traditional owner group corporation that enters into the Recognition and Settlement Agreement on behalf of the traditional owner group, and not the group itself. Appendix 4 outlines and compares the different types of decisions that a traditional owner group and its corporation will most likely need to make and coordinate through the different stages of negotiations – that is, both the Stage One threshold negotiations and the Stage Two settlement negotiations.
The corporation will manage the benefits and outcomes of the settlement agreement on behalf of the full group into the future, and be responsible for distributing those opportunities and benefits to the full group membership.

A traditional owner group that is preparing a Part B threshold statement may have already formed a corporation that is broadly appropriate for traditional owner settlement purposes – such as a registered Aboriginal party under the Aboriginal Heritage Act. Where such circumstances exist, a traditional owner group will still need to specifically appoint the corporation for purposes under the Traditional Owner Settlement Act. They may need to make adjustments to the aims and internal governance rules of the corporation to align with settlement purposes. This might include adjustments with respect to the corporation membership eligibility rules to ensure compatibility with the description of the traditional owner group in Part A of the threshold statement.

**Incorporation under the CATSI Act**

Under the s.3 definition of the ‘traditional owner group entity’ in the Traditional Owner Settlement Act, groups must form either a corporation under the **Corporations (Aboriginal and Torres Strait Islander) Act 2006**, or a company limited by guarantee registered under the Corporations Act, or simply a body corporate.

The State favours entities formed under the Corporations (Aboriginal and Torres Strait Islander) Act over the other options. This preference is because the Corporations (Aboriginal and Torres Strait Islander) Act is constructed with indigenous corporate entities in mind and the Registrar under this act is able to provide tailored assistance and support, such as capacity building, governance training and dispute resolution assistance to Aboriginal corporate entities that is not available under the other options.\(^\text{50}\)

The Corporations (Aboriginal and Torres Strait Islander) Act requires corporations to settle a constitution containing, amongst other matters, internal governance rules. The constitution must be passed by 75% of the membership. This legislation also stipulates that internal governance rules must provide for the resolution of disputes internal to the operation of the corporation and must meet record keeping and reporting requirements. The rules must also be “adequate and workable, given the context in which the corporation operates”,\(^\text{50}\) amongst other matters. Therefore, registration of a corporation under the Corporations (Aboriginal and Torres Strait Islander) Act is in itself an indication that certain governance standards have been met.

It is the constitution that sets out eligibility requirements for the membership of the corporation, decision-making processes around membership applications and the cancellation of memberships. Some of the rules are stipulated by the Corporations (Aboriginal and Torres Strait Islander) Act, while others are replaceable, and additional matters may also be added. Corporations have some flexibility to design processes appropriate to their circumstances and preferences. The Native Title Unit is interested to see that the corporation’s rules are broadly compatible, to the extent possible within
the legislative context, with the decision-making the full-group has developed, as presented in A6 of Part A of the threshold statement.

The Native Title Unit notes that amongst the non-replaceable internal governance rules required by the Corporations (Aboriginal and Torres Strait Islander) Act is that directors “may refuse to accept a membership application even if the applicant has applied in writing and complies with all the eligibility requirements”. However, the director must notify the applicant in writing and provide reasons for such a decision. This has some potential to deny access to some of the benefits and opportunities of traditional owner settlements to those refused membership, despite the fact that they meet eligibility requirements. Decisions that deny membership for reasons other than not meeting eligibility requirements should be exceptional and rare. The Native Title Unit suggests that groups develop clear pathways for declined applicants to remedy the reasons for this and re-apply.

Required documents and information
The threshold statement should, at B1, provide the following:

- documentation verifying registration of the traditional owner group entity under the Corporations (Aboriginal and Torres Strait Islander) Act or other legislation, such as entry on a relevant register;
- a copy of the registered constitution or rule book of the group entity; and
- narrative information about the traditional owner group appointing the corporation to represent it for the purposes of the Traditional Owner Settlement Act – including setting out the decision-making process used and the particulars of the decision, such as date, location, notice to members of the meeting, nature of resolutions and level of support.

B2. Statement of negotiation capacity

A statement that addresses the group’s and corporation’s capacity to enter into and carry through future settlement negotiations with the State, including nomination of a negotiating team.

Purpose
The State seeks assurances that the traditional owner group seeking a settlement is capable of entering into intensive negotiations.

This is important because settlements under the Traditional Owner Settlement Act are a bundle of agreements with substantial consequences. Settlements bind all members of the traditional owner group to certain things, including not making native title or compensations claims into the future. What is negotiated will be significant for future generations – they will inherit the traditional owner rights recognised by a settlement. There will be important choices and decisions for a group to make at different stages of the settlement negotiations.
Resources available to the group to support future negotiations

The threshold statement should describe the resources and support available to the traditional owner group, including whether they have been identified as a priority claim group by the native title service provider, NTSV, such as in its annual Operational Plan. If not, then other forms of support and advice secured by the group should be set out. Access to legal advice is considered essential.

It is not compulsory for traditional owner groups to proceed to negotiations with the support and assistance of the native title service provider. Without such support, however, the group’s capacity to negotiate a settlement would face additional challenges in terms of accessing technical expertise and resources. Where a group chooses to proceed without the support of the native title service provider, the Native Title Unit is interested to know whether the traditional owner group has previously sought such assistance, and if assistance was refused, then on what grounds.

Negotiation experience

The traditional owner group is expected to provide a description of any experience it has – either as a group or by key members of the group – in negotiating agreements and arrangements with third parties, including government agencies, developers, local government or the business sector.

For traditional owner groups who are already appointed as registered Aboriginal parties under the Aboriginal Heritage Act, their experience in cultural heritage management matters – such as evaluating cultural heritage management plans, negotiating cultural heritage permits or seeking cultural heritage agreements – are indicators of negotiation capacity and experience.\(^\text{63}\)

The purpose of this section is to encourage groups to reflect on their negotiation skills and experience. It is expected that all groups will have some experience to draw on. However, particularly where negotiation experience is limited, groups are encouraged to consider undertaking negotiation skills training.\(^\text{64}\)

Appointment of a negotiation team

The threshold statement should name the members of the negotiation team appointed by the full-group to represent the group and its corporation in the future negotiations. It should also consider and describe the relationship between the full group, the negotiation team and the corporation, in terms of decision-making processes.

There are a range of matters that traditional owner groups will need to consider in pulling together a negotiation team. Appointing the directors of the corporation, or a subcommittee of directors, to act as the negotiation team may reduce cost and time pressures on the full-group, by streamlining the connections between the corporation and the negotiation team in particular. It may also strengthen the corporation’s capacity...
to implement the negotiated outcomes – the corporation will be ‘on board’ and better understand the commitments it is entering into.

The traditional owner group may also wish to consider how the negotiation team reflects the particular style of decision-making the full group has adopted, such as considerations of how different family groups are represented. The specific knowledge and expertise that different traditional owners may bring to the negotiating table will also be relevant – for example, involving elders with detailed knowledge of the use and management of natural resources may enhance the negotiation of the natural resource agreement. Mixed ages and gender can also bring a range of perspectives to the team, and provide valuable opportunities for transference of skills and knowledge across generations.

Mechanisms for dissemination of information around the group

It is important that the negotiation team, whether made up by directors of the group entity or not, are accountable to the full group and are able to keep the full group abreast of the developments in the negotiations. Communication channels around the group need to be strong and the group’s confidence in the negotiation team needs to be actively maintained. There should be clarity at the outset about the points at which the negotiation team needs to check back with the full group membership for their information, understanding and endorsement of decisions. The processes for disseminating information around the group should be briefly described in the threshold statement.

B3. Strategic plan

An endorsed strategic plan that underpins a vision or statement of aspirations for the traditional owner group entity and that demonstrates ongoing commitment to sound planning.

Purpose

The State seeks assurances that the traditional owner group and its corporation has a vision and aspirations that broadly align with the suite of agreements on offer under the Traditional Owner Settlement Act. This is a key part of the ‘negotiation readiness’ of a traditional owner group.

The Native Title Unit accepts that strategic planning involves significant work for the traditional owner group and its entity. In collaboration with the native title service provider, the Native Title Unit will support and facilitate access to programs and organisations that can assist groups with strategic planning (as also discussed in Part 3, see page 16). A collaborative focus on strategic planning aims to enable groups to enter negotiations from a position of strong negotiation readiness. This will in turn support the State to commit to Stage Two negotiations and develop concrete settlement offers.
Given the range of agreements available under the Traditional Owner Settlement Act – with respect to recognition and cultural strengthening, land transfers, joint management of parks and reserves, future land use, utilisation and management of natural resources, the management of settlement funds and employment and business opportunities – the traditional owner group and its entity has substantial work ahead of it in preparing for and pursuing negotiations across a range of topics.

Groups also need to consider other avenues for achieving or supporting their goals that may be available alongside a settlement under the Traditional Owner Settlement Act, such as agreements and partnerships with other indigenous organisations, industry partners and government agencies, the latter at local, state and federal levels. A strategic plan can identify such opportunities.

Strategic planning enables groups to bring together the bigger picture and the details, and to prioritise and to plan. It provides a ‘staircase’ approach whereby foundational matters are addressed first, with other matters then building upon these.

**Provision of a strategic plan**

The traditional owner group should develop and endorse a strategic plan for the group entity and provide a copy with Part B of their threshold statement. Provision of a plan at this stage is seen as a starting point for the commitment the group makes towards ongoing strategic planning.

The Native Title Unit also considers that groups must be prepared to access independent expert advice and support on governance and financial matters, to inform their strategic planning. This will ensure that choices made in the statement of aspirations are well-informed and on a pathway to viable and sustainable outcomes. Strategic planning in turn provides a framework for seeking and utilising further expert advice during the negotiations, which may include investment, commercial and property advice.

The following are suggested minimum elements of a strategic plan:

i. a vision statement and a statement of aspirations or key goals, setting out in broad terms what the group wants to achieve through a settlement package;

ii. key areas of focus in the immediate or shorter term; and

iii. demonstration of a commitment to ongoing detailed planning, including seeking expert independent advice where appropriate, such as in relation to governance, financial, investment and commercial matters.

The Traditional Owner Settlement Act establishes a framework for what is on offer from the State. This establishes the broad parameters for what is considered realistic and viable in the current context. Settlements reached to date under the Traditional Owner Settlement Act have also established precedents. Aspirations need to be informed by this context, and by robust planning, rather than being an abstract wish list.
These strategic considerations are foundational matters on the ‘staircase’ of maximising the longer-term benefits and outcomes from traditional owner settlement negotiations.

The benefits and outcomes of settlements include building the economic sustainability and independence of recognised traditional owner organisations. This aligns with the aims of the Victorian Aboriginal Economic Strategy currently under development by the government. Amongst other matters, the draft strategy seeks to maximise and enhance economic development outcomes from native title settlements. Building practical, concrete and beneficial outcomes from the processes that recognise traditional owner groups is fundamental to the purposes of Victoria’s Traditional Owner Settlement Act.

**Checklist for Part B Threshold Statement**

**B1. Appointment of the traditional owner group entity**
- registration of the traditional owner group entity (corporation) under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 or other legislation
- copy of the constitution or rule book
- narrative information about the traditional owner group appointing the corporation to represent it for the purposes of the Traditional Owner Settlement Act

**B2. Statement of negotiation capacity**
- resources to support future negotiations, including whether the matter is assisted by the native title service provider
- negotiation experience, including as a registered Aboriginal party under the Aboriginal Heritage Act 2006, and/or negotiation skills training undertaken
- appointment of negotiation team
- description of mechanisms for dissemination of information around the group

**B3. Strategic plan**
- a strategic plan that includes:
  - a vision statement and statement of aspirations or key goals
  - key areas of focus in immediate or shorter term
  - commitment to ongoing planning, including seeking expert independent advice, where appropriate, such as in relation to governance, financial, investment and commercial matters.
Endnotes

1 The Native Title Unit leads native title and traditional owner settlement negotiations on behalf of the State and provides related policy advice to the Attorney-General and the Victorian Government. It is the Attorney-General and the government who make executive decisions on behalf of the State, such as a decision to proceed with settlement negotiations, and a decision to execute settlement agreements.

2 The Traditional Owner Settlement Act was a key response of the Victorian Government to recommendations set out in the Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework, Department of Justice, 2008. The Steering Committee, which brought together State agencies and Victorian traditional owner representatives, operated in 2008 and identified a range of shortcomings in the operation of the native title system for Victoria, under the Commonwealth’s Native Title Act 1993. These included lengthy timeframes and high transaction costs, due to legal technicalities, for only limited outcomes for Victorian traditional owners, that also left uncertainties about the State’s compensation liabilities.


4 In its submission to the Parliamentary Inquiry into the Establishment and Effectiveness of Registered Aboriginal Parties, the Department of Planning and Community Development (Aboriginal Affairs Victoria) estimated that prior to European settlement in Victoria “over thirty different dialect or sub-language groups (or tribes) spoke about eleven distinct languages. Each dialect group contained half a dozen or more clans.”, See submission no.57, page 16.


6 There is not only the question of “right people” in a broad cultural sense, but also a question about “all the right people”, given that a settlement agreement binds all the persons who may collectively hold native title and must be authorised by the full group.

7 See further discussion of this role on page 13.

8 A ‘native title application’ is taken to be, for the purposes of this document, either a native title determination application authorised by a native title claim group, or a compensation application authorised by a compensation claim group, as described in the table at section 61 of the Native Title Act.

9 See the definition of ‘traditional owner group’ under the ‘Glossary of terms’ at Appendix 1 for a summary of the three alternative definitions of ‘traditional owner group’ under section 3 of the Traditional Owner Settlement Act. The group of persons described by the first two dot points above may both fall within paragraph (a) of the section 3 definition of ‘traditional owner group’, subject to being able to register the relevant indigenous land use agreement. The third dot point above coincides with the paragraph (b) option in the section 3 definition of “traditional owner group”, which is where a positive native title determination has been made in relation to that group of persons. The third dot point may also cover the paragraph (c) option in the section 3 definition, which may apply in circumstances where a negative determination of native title exists in relation to the group, but the Attorney-General recognises that group of persons as a traditional owner group by way of a notice in the Government Gazette.

10 In some limited circumstances, such as where native title has been determined by the courts to not exist in a given area due to loss of connection, it is envisaged that an Indigenous Land Use Agreement may not be required as part of the settlement package with respect to agreement to not pursue native title determination and compensation applications.

11 This is understood to be the contractual effect of registered indigenous land use agreements as described under section 24EA of the Native Title Act, which refers to all persons holding native title being bound to a registered agreement, whether or not they were a party to the agreement.

12 In limited circumstances, a settlement may potentially be reached alongside a native title determination. In the case of the Gunaikurnai People of Gippsland, a settlement under the Traditional Owner Settlement Act was reached in October 2010 at the same time as a consent native title determination was made by the Federal Court. This approach was taken due to the transitional circumstances of the Gunaikurnai matter: the native title claim was already well advanced in mediation under the Native Title Act, with extensive resources already expended by all the parties on native title processes, at the time that the Traditional Owner Settlement Act came into operation. However, settlements alongside determinations are not envisaged into the future, due to the high transactional costs and lengthy timeframes involved in determinations; for example, with respect to historical tenure analysis. While traditional owner groups may reserve the right to seek a determination of native title so long as a settlement has not yet been reached, the State will generally not progress settlement negotiations and determination processes simultaneously.

13 See section 203BE(5) of the Native Title Act regarding indigenous land use agreements that are certified by the representative bodies, or for agreements not certified see section 24CG(3)(b).
See section 7 and section 151(3)(c) of the Aboriginal Heritage Act.


See for example, the submission made by Native Title Services Victoria to the 2012 Review of the Aboriginal Heritage Act 2006, which includes the statement on page 1 that: “For Victorian Traditional Owners, culture and connection to country are inextricably linked.” For this and other submissions, plus AAV discussion papers about the review, see www.dpcd.vic.gov.au/aboriginal-aboriginal-cultural-heritage-review-of-the-aboriginal-heritage-act-2006.

The workshop series was designed by a joint working group of officers from the Native Title Unit in the then Department of Justice, from the Victorian Government Solicitors Office and from Native Title Services Victoria Limited. The workshops were facilitated by Toni Bauman, Research Fellow at the Native Title Research Unit in the Australian Institute for Aboriginal and Torres Strait Islander Studies.

Native Title Services Victoria Ltd (NTSV) is funded by the Department of Prime Minister and Cabinet to perform all of the functions of a representative Aboriginal/Torres Strait Islander body in accordance with section 203FE(1)(a) of the Native Title Act. See section 203B of the Native Title Act for the statutory functions and powers of representative bodies.


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See section 7 and section 151(3)(c) of the Aboriginal Heritage Act.


For further information about the Victorian Traditional Owner Land Justice Group, go to www.landjustice.com.au.


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See section 203BB of the Native Title Act with respect to facilitation and assistance functions in particular.

Further information about NTSV, its policies and the services it provides is available at their website at www.ntsv.com.au.

See the discussion of the two key sources for the basis of the group description (page 36) and for the basis of the area description (page 40) in Part 3.

A traditional owner group may already have formed a corporation and been successful in seeking appointment as a registered Aboriginal party under the Aboriginal Heritage Act. The group would nevertheless need to specifically appoint the corporation for TOS Act purposes, and some amendment of the constitution may be necessary to ensure the corporation is appropriate for TOS Act purposes.

This would be requested assistance with the making of an indigenous land use agreement under section 24CF of the Native Title Act (for area type agreements) and under section 24BF (for ‘body corporate’ type agreements).


For example, a pilot project under the Right People for Country Project undertaken in 2012 involved members of neighbouring traditional owner groups “walking” the edges of their traditional country together, in order to better map and agree to a mutual boundary, amongst other benefits.

See section 94L of the Native Title Act. The parties may, however, also agree to disclosure of information, such as for the purpose of being able to be relied upon in the threshold process for TOS Act settlements.

The relevant registers are the Register of Native Title Claims, the National Native Title Register and the Register of Indigenous Land Use Agreements, under Parts 7, 8 and 8A of the Native Title Act, respectively.

See also the discussion in Part 4 on size of group (page 33) and size of area (page 39).

See sections 24CG(3), 24CK and 24CL of the Native Title Act. The body of case law about the authorisation and registration of indigenous land use agreements is also relevant.

Ways of sourcing mediators include seeking permission to access the names on the Federal Court’s Native Title Mediators List, or on the Right People for Country Project’s list of facilitators.

The Attorney-General may in turn seek the views of other Ministers, including the Minister for Aboriginal Affairs.


See, for example, chapter 2 of the Native Title Report 2011, prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner under section 209 of the Native Title Act

See section 132 of the Aboriginal Heritage Act 2006 (Vic).

Certification by the native title service provider is described at section 203BE(5) of the Native Title Act 1993 and involves the provider forming the opinion that all reasonable efforts have been made to ensure that all persons who hold or may hold native title have been identified and have authorised the making of the agreement.

There may be some variation to this in instances where an assertion can be sustained that more than one distinct traditional owner group shares association to a common area or site (see discussion of ‘shared country’ at pages 39-40). A group may choose to make a statement that acknowledges the interests of such other groups, without claiming that the threshold statement is also made on their behalf. However, it is...
the State’s understanding that for an indigenous land use agreement to be registered over such a shared area, all traditional owners with interests in the area would need to be a party to that agreement.

See section 61(1) of the Native Title Act with respect to on whose behalf a claimant native title determination application is made, and see section 225 in relation to what a determination of native title covers.

The sixth principle states: “The Council encourages smaller groups to create sustainable RAP structures by working together to create a single RAP or to develop co-operative arrangements with other Aboriginal organisations” – see: http://www.dpcd.vic.gov.au/__data/assets/word_doc/0013/35500/General_principles_of_RAP_decision_making_8.07.doc

As consistent with the section 19 right under the Charter of Human Rights and Responsibilities Act 2006 in relation to "the enjoyment of the culture and identity of the traditional owner group".

See also later discussion of the basis of the group description being a combination of research findings and traditional owner group decision making.

For example, requirements under the Corporations (Aboriginal and Torres Strait Islander) Act 2006

As discussed in Towards threshold guidelines: A report on the development of threshold guidelines for entry of Victorian traditional owner groups into settlement negotiations under the Traditional Owner Settlement Act 2010’ (Department of Justice, September 2012), descent is currently the predominant feature for defining group membership in existing traditional owner organisations in Victoria, including the prescribed native title bodies corporate currently operating in Victoria – see p.26 and Appendix 6 of that report. The submission that the Victorian Aboriginal Heritage Council made on a draft of the threshold guidelines in May 2013 stated that: “Council stresses … that descent remains critical to any conception of Traditional Ownership”. This was reiterated by verbal feedback from members of the Victorian Traditional Owner Land Justice Group at their meeting of 13 April 2013 attended by officers from the Native Title Unit, Department of Justice.

Parallels might be drawn from the ‘three part test’ of Aboriginality that was first adopted by federal agencies in the 1980s to determine eligibility to specialist services, and has since been tested in a body of administrative case law. The three part test includes descent, together with self-identification and community recognition. The ‘activation of rights’ is another approach being adopted by some traditional owner groups as a group membership criterion additional to descent and cultural adoptions – for example, schedule 3 of the constitution of the Dja Dja Wurrung Clans Aboriginal Corporation, as registered on the Register of Indigenous Corporations on 26 September 2012 – see www.oric.gov.au.


Assistance may be requested as assistance with the making of an Indigenous Land Use Agreement under either section 24CF (with respect to area type agreements) or section 24BF (with respect to body corporate type agreements) of the Native Title Act. See also the NNTT publication ‘Steps to an indigenous land use agreement’ (2006) which includes a section on seeking Tribunal assistance.

Exceptions might include proposed agreement areas where boundaries about state borders or coastal areas.

See section 203BF of the Native Title Act.

See sub section 93-94 of the Traditional Owner Settlement Act and sub section 151(2A) and 156(3A) of the Aboriginal Heritage Act for the intersecting provision of these two acts. Section 153 of the Aboriginal Heritage Act allows for the appointment of more than one body for a particular area, subject to certain considerations. The Victorian Aboriginal Heritage Council have also issued a ‘Fact Sheet for RAP applicants on registration of multiple RAPs for a single area’ available on their website at http://dpc.vic.gov.au/images/documents/Aboriginal_Affairs/Fact-sheet-RAP-applicants-on-registration-of-multiple-RAPs-for-a-single-area.docx.

Traditional owners who participated in the 2011 workshops on threshold guidelines stated a preference for such skeletal genealogies to be produced for each family group within a traditional owner group, for reasons of consistency and even-handedness to all family groups.

See, for example, comments on page 36 that traditional owner groups may make inter-group arrangements that acknowledge individuals may qualify for membership of multiple groups and limit their decision-making rights in multiple forums.

The Right People for Country Program is an indigenous-led dispute resolution and agreement-making project that supports traditional owner groups to reach durable agreements about boundary and group composition issues in the context of native title and cultural heritage, as discussed on page 16.

As discussed on page 38, under the subheading ‘If boundaries not settled between neighbours at the threshold stage’. See section 151(3) (c) of the Aboriginal Heritage Act which requires Council, in making a determination of an application for registration, to consider “whether the applicant is a body representing Aboriginal people with traditional or familial links to the area to which the application relates”, and see section 7 for a definition of “traditional or familial links”.

See the section 3 definition of ‘traditional owner group entity’ under the Traditional Owner Settlement Act, which refers to the traditional owner group appointing such an entity to represent them for the purposes of that Act for an area of public land.

However, the indigenous land use agreement that forms part of a settlement package is signed by the corporation as well as individual representatives of the traditional owner group authorised by the group to do so, as this is appropriate in terms of the nature of a ‘native title party’ to an indigenous land use agreement as defined under the Native Title Act.

This should include the context of the operation of the Traditional Owner Settlement Act, if a corporation is appointed to represent a traditional owner group for the purposes of the Traditional Owner Settlement Act.

See section 144-10 of the Corporations (Aboriginal and Torres Strait Islander) Act.

The benefits and opportunities may be distinct from the traditional owner rights under section 9 of the Traditional Owner Settlement Act, that are recognised in a recognition and settlement agreement. Rights relating to access to natural resources are particularly clear as belonging to traditional owner group members, and are not limited to members of the traditional owner group entity - see the natural resource authorisations under Part 6 of the Traditional Owner Settlement Act.

In a submission made on a draft of these threshold guidelines in May 2013, the Victorian Aboriginal Heritage Council stated that Council does consider that appointment as a registered Aboriginal party “indicates that Council believes that the relevant Traditional Owner organisation does have decision-making and negotiation capacity in the context of cultural heritage management”, and that Council “asks for evidence of an organisation’s membership rules, Operational Plan and its internal procedures and considers this as part of its RAP decision making.”


A traditional owner group’s statement of aspirations or key goals is non-binding on them, and is subject to the Stage Two negotiations.

Appendices

Appendix 1 – Glossary of terms

ethno-historical research
In the context of this document, ethno-historical research refers to the process of analysis of materials relating to the history and ethnography of indigenous peoples of Victoria. This research considers both primary and secondary source materials. Source materials may be held or authored by Victorian traditional owners. They may be produced by non-traditional-owner observers, collectors, commentators and archivists, or authored by anthropologists, historians and other researchers, past and present. Source materials are recognised as existing in a variety of media, including, but never limited to, written text, drawings, maps and printed material, photographs, artefacts and oral history.

indigenous land use agreement
A voluntary agreement about any matter related to native title over a particular area of land where native title exists or might exist, including the use and management of the area, made between persons who hold or may hold native title and others who use, access or manage the area, which can be registered under the Native Title Act 1993. An indigenous land use agreement is binding on all native title holders for an area.

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.

native title determination
A decision of the Federal or High Court of Australia (or other recognised body) that native title either exists or does not exist in relation to an area of land and/or waters. A 'consent determination' is where the parties to the proceedings agree that native title exists, which is supported by a determination by the court. A 'litigated' determination is one where the court holds a trial in order to come to a determination.

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 under the Native Title Act. Functions include, but not only, assisting and facilitating the preparation and making of various types of native title applications, certifying claimant applications and certain types of indigenous land use agreements, providing dispute resolution assistance, providing agreement-making assistance and ensuring that notices given under the Native Title Act are brought to the attention of relevant Aboriginal and Torres Strait Islander people. The native title service provider that operates across Victoria is Native Title Services Victoria Limited.
recognition and settlement agreement

An agreement reached under section 4 of the Traditional Owner Settlement Act 2010, which is between the Attorney-General, on behalf of the State of Victoria, and a traditional owner group entity, regarding an area of public land. A recognition and settlement agreement may include a land agreement, a land use activity agreement, a funding agreement and/or a natural resource agreement. It may also be accompanied by an indigenous land use agreement under the Native Title Act.

registered Aboriginal party

A body registered under the Aboriginal Heritage Act 2006 (Vic) which performs certain statutory functions regarding the management of Aboriginal heritage in a particular area of the State set out in section 148 of that Act.

substantive negotiations

The negotiations that may take place between the State and a traditional owner group entity to settle the contents of a recognition and settlement agreement and its component agreements. These negotiations commence by agreement between the State and the traditional owner group entity, but only once the State considers that thresholds are met and once other matters concerning negotiation-readiness are addressed.

traditional owner group

According to section 3 of the Traditional Owner Settlement Act, a traditional owner group includes three circumstantial options. In summary, the three options are:

(a) a group of Aboriginal persons who may authorise the making of an indigenous land use agreement with the State under the Native Title Act that: (i) settles any native title applications made under the Native Title Act, or is an agreement in which the group agrees not to make any native title applications, and (ii) is able to be registered under the Native Title Act; or

(b) native title holders in relation to the area, under the Native Title Act; or

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

traditional owner group entity

According to section 3 of the Traditional Owner Settlement Act, a traditional owner group entity is a corporation within the meaning of the Corporations (Aboriginal and Torres Strait Islander) Act 2006, or a company limited by guarantee registered under the Corporations Act, or a body corporate, that a traditional owner group appoints to represent them in relation to an area for the purposes of the Traditional Owner Settlement Act.
Appendix 2 – List of legislation

Victorian legislation referenced in these guidelines is as follows:

*Aboriginal Heritage Act 2006*

*Charter of Human Rights and Responsibilities Act 2006*

*Conservation, Forests and Lands Act 1987*

*Co-operatives Act 1996*

*Freedom of Information Act 1982*

*Information Privacy Act 2000*

*Traditional Owner Settlement Act 2010*

Commonwealth legislation referenced in these guidelines is as follows:

*Corporations (Aboriginal and Torres Strait Islander) Act 2006*

*Native Title Act 1993*
Appendix 3 – Procedures for threshold notification

Introduction

1. This document outlines the procedures for threshold notification of the wider Victorian traditional owner community that a threshold statement has been received from a traditional owner group with intent to enter negotiations for a settlement under the Traditional Owner Settlement Act 2010.

2. The threshold notification is carried out by the Native Title Unit in the Department of Justice & Regulation.

Status of procedure


Purpose of threshold notification

4. The purpose of the threshold notification is to:
   a. notify the wider Victorian traditional owner community that the State has received a threshold statement from a traditional owner group seeking a settlement under the TOS Act; and
   b. provide members of Victoria’s traditional owner community with the opportunity to comment on whether:
      i. the traditional owner group seeking settlement is the right traditional owner group for the area;
      ii. the group description includes all the traditional owners for the area; and
      iii. all members of the group have had a reasonable opportunity to participate in the full group decision-making that has led to the lodgement of the threshold statement.

5. This is part of the process of the State satisfying itself that the traditional owner group meets the Part A thresholds, as described in Part 4 of the Threshold Guidelines, to which this document is appended.
6. The threshold notification is intended to reach members of the wider Victorian traditional owner community. This is based on an acknowledgement that:

   a. members of a traditional owner group may not all reside in the area asserted to be their traditional country;

   b. the State seeks settlements with a whole traditional owner group, and therefore all members of a group should have had a reasonable opportunity to participate in the full-group decision-making that has led to the lodgement of the threshold statement; and

   c. recognition by other Victorian traditional owner groups may be an important contributing factor in confirming the group’s traditional and cultural association to the proposed settlement area.

7. Threshold notification of the wider Victorian traditional owner community provides opportunities for traditional owners to comment on the group description and proposed settlement area and the group’s decision-making processes in the following ways:

   a. as it affects their own interests as traditional owners; and

   b. as a means of concurring, or not, with the assertions made in the threshold statement.

8. Consideration of when and whether to proceed to threshold notification is outlined in the broader Threshold Guidelines. The threshold notification follows the evaluation of a threshold statement by the Native Title Unit against Part 4 of the Threshold Guidelines. In summary, threshold notification proceeds where:

   a. the Native Title Unit considers that no significant threshold issues remain outstanding;

   b. the State is capable of commencing Stage Two negotiations within approximately 12 months of the end of the threshold notification period, provided all threshold requirements are met;

   c. a public summary statement has been agreed between the State and the traditional owner group, to be made publicly available during the notice period; and

   d. the Native Title Unit is satisfied of the readiness of the traditional owner group to proceed with threshold notification.

The threshold notification process

9. Where threshold notification proceeds, the Native Title Unit will publish a public notice via its Master Agency Media Service contractor in the following newspapers:

   a. The *Koori Mail* (national fortnightly Indigenous paper); and

   b. Victorian regional newspapers’ circulated in the proposed settlement area.
10. In addition, the Native Title Unit will send the notice to the following organisations, on the basis that they may include traditional owner members or constituents:
   a. any registered Aboriginal parties or applicants under the *Aboriginal Heritage Act 2006* in or adjoining the proposed settlement area;
   b. recognised traditional owner group entities who have a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act*;
   c. any native title prescribed bodies corporate established under the *Native Title Act 1993* for an area within the state of Victoria;
   d. Aboriginal Cooperatives under the *Cooperatives Act 1996 (Vic)* that are located in or around the proposed settlement area; and
   e. Local Indigenous Networks, established by the Office of Aboriginal Affairs Victoria (OAAV) operating in or around the proposed settlement area.

11. The Native Title Unit will post the notice electronically on the Department of Justice & Regulation website.

12. The Native Title Unit will also write to the Victorian Aboriginal Heritage Council to seek their comment, subject to the council’s statutory functions under the *Aboriginal Heritage Act*, on matters of:
   a. overlaps of the proposed settlement area with appointment and application areas for registered Aboriginal parties;
   b. the basis of the group’s claim to a particular area; and
   c. the inclusiveness of the group.

13. Where a traditional owner group has lodged a threshold statement without the assistance and support of Native Title Services Victoria (NTSV), the Native Title Unit will notify NTSV in writing that a threshold statement has been received, and provide a copy of the public statement. NTSV may make comments on the matters listed at paragraph 4.(b) in its capacity as the native title service provider funded to perform all the functions of a representative body across Victoria under section 203FE(1)(a) of the *Native Title Act*.

**The notice**

14. The notice will include the following:
   a. the name and a description of the traditional owner group;
   b. an indicative map of the external boundary of the proposed settlement area;
   c. how to access further information, including the traditional owner group public statement (see below);
d. a statement inviting members of the wider Victorian traditional owner community to make submissions to the Manager of the Native Title Unit, Department of Justice & Regulation, on whether the traditional owner group seeking settlement is the right traditional owner group for the area, includes all the traditional owners for that area, and that all members of the group have had a reasonable opportunity to participate in the full group decision-making that has lead to the lodgement of the threshold statement;

e. a statement that any submissions received may be referred to the traditional owner group and/or NTSV for comment, subject to requirements of the *Information Privacy Act 2000 (Vic)* and *Freedom of Information Act 1982 (Vic)*; and

f. the deadline for receipt by the Manager of the Native Title Unit, Department of Justice & Regulation, of any submissions, being a minimum of 42 calendar days from the date of publication of the notice, but which must not fall on a weekend or public holiday.

The traditional owner group public statement

15. Prior to proceeding with the threshold notification, the Native Title Unit will seek to reach agreement with the traditional owner group about a traditional owner group public statement that is to be available during the threshold notification period, including on the Department of Justice & Regulation website.

16. This public statement should contain the following, at minimum:

   a. a description of the traditional owner group, and a summary of its basis;

   b. a description of the proposed settlement area, and a summary of its basis;

   c. a map of the proposed settlement area that also shows the boundaries of appointment areas for registered Aboriginal parties under the Aboriginal Heritage Act;

   d. a summary of the research process undertaken and its chronology;

   e. a broad description of the full group decision-making processes and how/when the threshold statement was endorsed by the full group;

   f. a contact person or representative for the traditional owner group; and

   g. any other information agreed between the Native Title Unit and the traditional owner group.

17. Alternatively, the traditional owner group may agree to make the full Part A threshold statement publicly available for threshold notification purposes.

Receipt of submissions

18. The Native Title Unit must acknowledge the receipt of all submissions received during the threshold notification period to the persons making the submissions.
19. If submissions are received after the threshold notification period has ended without approval for an extension of time, the Native Title Unit may consider whether it is reasonable to consider such submissions. If other processes that follow from the threshold notification have progressed, the Native Title Unit may consider it impractical to consider such out-of-time submissions, and will advise the persons making the submission.

20. On receipt of submissions during the notification period, the Native Title Unit will consider the content of the submissions and will seek to establish whether the submission was made by a person asserting to be a Victorian traditional owner, or by an organisation representing traditional owners. This may involve making queries of the person or organisation making the submission, if this is not clear from the submission itself.

21. A Victorian traditional owner is taken to mean, in general terms, an Aboriginal person who has traditional and cultural association to an area within Victoria. The Native Title Unit will only need to be reasonably satisfied that the person appears to be a traditional owner.

22. The Native Title Unit must establish whether the content of any submissions received appears to be:
   a. soundly based,
   b. relevant to the matters described at paragraph 4.b) of this procedure, and
   c. adverse to the making of a decision about whether the traditional owner group meets Part A threshold requirements.

23. If the content appears soundly based, relevant and adverse, or if the Native Title Unit considers the basis or relevance or adversity is unclear, the Native Title Unit must provide such submissions to the traditional owner group for their comment, subject to the requirements of the Information Privacy Act and the Freedom of Information Act.

24. Where Native Title Services Victoria is assisting the traditional owner group seeking settlement negotiations, it may provide comment in response to any adverse submissions on behalf of, and by agreement with, that traditional owner group.

25. The threshold notification does not invite comment from persons other than Victorian traditional owners or organisations representing traditional owners. If a submission is received from such other person or organisations, the Native Title Unit will consider whether the information in it appears soundly based, relevant and adverse. If so, or if the Native Title Unit considers the basis or relevance or adversity unclear, the Native Title Unit will provide these submissions to the traditional owner group for their comment, subject to the requirements of the Information Privacy Act and the Freedom of Information Act.
26. The Native Title Unit must allow a reasonable period for the traditional owner group or Native Title Services Victoria to prepare and provide reply comments on adverse submissions forwarded to it.

27. The Native Title Unit must take the reply comments received from the traditional owner group or Native Title Services Victoria into account in reaching a view on whether or not the State can be satisfied that the traditional owner group meets Part A thresholds.

28. If a submission is clearly not soundly made, not relevant and/or not adverse, then the Native Title Unit will not provide a copy to the traditional owner group for their comment.

29. Where a submission is marked ‘confidential’, before reading the submission, the Native Title Unit must first establish with the submitter that the submission is able to be provided to the traditional owner group and/or NTSV for comment, in order for it to be taken into account by the State. Only when the submitter agrees to this, can the Native Title Unit read and consider the submission. This is regardless of whether or not in the end the submission is made available to the traditional owner group and/or NTSV for comment on the basis of the submission being soundly based, relevant and adverse.

30. Where the notification process raises significant threshold issues requiring action by the traditional owner group, the Native Title Unit may convene a threshold conference to provide a forum for discussion and for developing strategies for addressing outstanding issues.

Endnotes for Appendix 3

1 Where settlement areas are adjacent to state borders with South Australia and New South Wales, placing notices in interstate regional newspapers will also be considered.

2 The map of the external boundary of the proposed settlement area may include shaded areas that are subject to active negotiations between neighbouring traditional owner groups.
Appendix 4 – Comparison of key decisions made by the traditional owner group and the corporation

The following table compares the types, or topics, of decisions that the (full) traditional owner group (TOG) may need to make, as against the decisions to be made by the traditional owner group entity or corporation (TOGE), in the course of negotiating a settlement under the Traditional Owner Settlement Act (TOS Act). These are separated out into the two different stages of negotiations. In the Stage One threshold negotiations, decisions made in relation to Part A and Part B thresholds are distinguished.

<table>
<thead>
<tr>
<th>Key Decisions Made During Stage One Threshold Negotiations</th>
</tr>
</thead>
<tbody>
<tr>
<td>In relation to PART A THRESHOLDS:</td>
</tr>
<tr>
<td><strong>Traditional owner group (TOG)</strong></td>
</tr>
<tr>
<td>• Agrees to seek NTSV assistance to prepare threshold statement and take part in research.</td>
</tr>
<tr>
<td>• Agrees about membership of the traditional owner group (group description).</td>
</tr>
<tr>
<td>• Agrees about area (external boundaries) proposed for settlement, including agreements with neighbouring traditional owner groups about common boundaries.</td>
</tr>
<tr>
<td>• Agrees about full-group decision-making processes.</td>
</tr>
<tr>
<td>• Endorses the threshold statement (Parts A and B), including the statement of association.</td>
</tr>
<tr>
<td>• Agrees to the content of the public statement for the threshold notification.</td>
</tr>
<tr>
<td>• Agrees to take actions arising from threshold conferences.</td>
</tr>
<tr>
<td><strong>Traditional owner group entity (TOGE)</strong></td>
</tr>
<tr>
<td>• No decisions.</td>
</tr>
</tbody>
</table>
## Appendix 4 – Comparison of key decisions made by the traditional owner group and the corporation

### In relation to PART B THRESHOLDS:

<table>
<thead>
<tr>
<th>Traditional owner group (TOG)</th>
<th>Traditional owner group entity (TOGE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Appoints the TOGE to represent the TOG for TOS Act purposes.</td>
<td>• Agrees to its own constitution and internal governance rules, in order to seek to become a registered corporation.</td>
</tr>
<tr>
<td>• Endorses the TOGE constitution (by the full group, or else by a group of persons seeking to be members of the corporation being established), including internal governance rules.</td>
<td>• Endorses the strategic plan.</td>
</tr>
<tr>
<td>• Endorses the strategic plan.</td>
<td>• Appoints a negotiation team, if authorised by TOG to do so.</td>
</tr>
<tr>
<td>• Appoints a negotiation team, or authorises the TOGE to do so.</td>
<td></td>
</tr>
</tbody>
</table>

### KEY DECISIONS MADE DURING STAGE TWO SETTLEMENT NEGOTIATIONS

<table>
<thead>
<tr>
<th>Traditional owner group (TOG)</th>
<th>Traditional owner group entity (TOGE)</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Commits to proceed to Stage Two negotiations.</td>
<td>• Commits to proceed to Stage Two negotiations.</td>
</tr>
<tr>
<td>• Endorses ‘agreement-in-principle’ to a settlement package, as negotiated by the negotiation team, either directly or via the TOGE.</td>
<td>• Negotiation team (which may be the directors of the TOGE) reaches agreement with the State regarding a negotiation plan and timetable, followed by ‘agreement in principle’ to a settlement package.</td>
</tr>
<tr>
<td>• Endorses the Recognition and Settlement Agreement and its sub-agreements in full detail, and authorises the TOGE to enter into agreements on behalf of the TOG.</td>
<td>• Enters into the Recognition and Settlement Agreement and its sub-agreements, on behalf of the TOG – TOGE directors sign all agreements, including indigenous land use agreement, at the signing ceremony.</td>
</tr>
<tr>
<td>• Authorises the indigenous land use agreement directly – TOG representatives sign this agreement at the signing ceremony (either registered native title applicants or persons otherwise authorised by the full group to do so).</td>
<td>• The TOGE may enter into agreements or develop partnerships with third parties such as other indigenous organisations, industry partners and government agencies.</td>
</tr>
</tbody>
</table>