



FNLRS

FIRST NATIONS
LEGAL & RESEARCH
SERVICES

FORMAL RECOGNITION
AS TRADITIONAL
OWNERS OF COUNTRY
IN VICTORIA

**What are the
processes to achieve
formal recognition?**

WHAT ARE THE PROCESSES TO ACHIEVE FORMAL RECOGNITION?

In Victoria, there are three different processes for groups to become formally recognised as Traditional Owners of Country. These types of formal recognition provide legal recognition of Traditional Owners under Victorian and Australian law. Traditional Owners seeking formal recognition can pursue any or all of the three.

Native Title

Lodging a **native title claim** under the *Native Title Act 1993* (Cth) for a **determination** and be recognised as **native title holders** represented by a **Prescribed Body Corporate (PBC)**.

Settlement

Negotiating a **settlement** with the Victorian State under the *Traditional Owner Settlement Act 2010* (Vic) and being recognised as a **Traditional Owner Group** represented by a **Traditional Owner Group Entity (TOGE)**.

Registered Aboriginal Party

Appointment of a Corporation as a **Registered Aboriginal Party (RAP)** under the *Victorian Aboriginal Heritage Act 2006* (Vic) to have responsibility for managing Aboriginal cultural heritage for an area.



WHY FORMAL RECOGNITION?

Formal recognition through native title or a negotiated settlement:

- recognises a group as the Traditional Owners of particular land and waters;
- provides Traditional Owners with rights in relation to things that happen on Country that may affect Traditional Owner rights and interests (e.g. rights to be consulted, rights to veto, rights to be compensated for activities on land); and
- allows for a range of benefits, such as transfer of land, rights to protect and manage Country and funding that can support Traditional Owner aspirations.

In addition to these things, formal recognition through appointment as a RAP also:

- confirms Traditional Owners' authority to make decisions about Country, cultural heritage, Aboriginal Ancestral Remains and Secret and/or Sacred Objects;
- provides Traditional Owners with an element of control in relation to things that happen on Country; and
- allows recognised groups to use their rights to build relationships with potential partners or stakeholders (like local governments) and achieve broader benefits.

Each formally recognised Traditional Owner group has a reserved seat on the First Peoples' Assembly of Victoria (the **Assembly**) to be involved in the Treaty process.

REQUIREMENTS FOR ALL TYPES OF FORMAL RECOGNITION

All types of formal recognition require a Traditional Owner group to pass certain legal tests, including describing their traditional society, culture, and governance structures.

In all cases, Traditional Owners need to establish:



Right people

They are inclusive and representative of all Traditional Owners with rights and interests in the area being claimed.



Right Country

Their connection to a defined area of Country.



Structures

Agreed decision-making structures and processes. There is also an appointed Traditional Owner Corporation to act for them and represent the Traditional Owner group.

WHAT ARE THE NATIVE TITLE, SETTLEMENT AND RAP PROCESSES?

Native Title

Native title is the recognition by Australian law of the rights and interests in land and waters held by Aboriginal and Torres Strait Islander peoples under their traditional laws and customs, which existed before the start of colonisation.

Native title was first recognised in Australian law in 1992 in the *Mabo* decision. Since 1993 the *Native Title Act 1993* (Cth) (the **Native Title Act**) has set processes and requirements around native title. Court cases have further decided how the native title system works, and what its limitations are.

Under the Native Title Act, a group can lodge a native title claim in the Federal Court of Australia seeking a determination recognising their native title rights and interests over Crown land and waters within their Country, including seas and onshore waters.

Native title is recognised where the native title claimants can establish their ongoing connection to land and waters, and where the rights have not been extinguished by government action, like the grant of freehold title for private home ownership or public works like hospitals, schools and roads. Native title is a communal title, held by the members of the native title group together. It can include the right to camp, hunt, fish, collect plants, protect sites of cultural significance and conduct ceremony.

Settlement

The *Traditional Owner Settlement Act 2010* (Vic) (the **Settlement Act**) provides another way to recognise Traditional Owner rights in Victoria. It is an alternative system to the Native Title Act that has been in place since 2010.

The Yorta Yorta High Court decision made it harder for Victorian Traditional Owners to achieve native title outcomes in highly colonised areas. Whilst the Eastern Maar, the Gunditjmarra, the Wotjobaluk, Jawda, Jadwa-Jali Jupagulk and Wergaia Peoples and the Gunaikurnai Peoples have since achieved recognition of their native title with the consent of the State of Victoria (the State), this has taken a lot of time and research evidence to achieve and there have been lots of findings of areas where native title no longer exists.

The Settlement Act tries to overcome some of these difficulties. The Settlement Act is a Victorian law that allows the State to negotiate settlements with Traditional Owner groups where the Native Title Act requirements may not be met. It allows the State to make agreements with Traditional Owners that recognise their Traditional Owner rights and grant certain other rights over Crown land and other benefits. The rights recognised under a Settlement Act settlement are broadly similar to the rights recognised under a native title determination.

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

Registered Aboriginal Party (RAP)

A RAP is a Traditional Owner Corporation appointed under the *Victorian Aboriginal Heritage Act 2006* (**Aboriginal Heritage Act**) to manage and protect Aboriginal cultural heritage over an area of Country including coastal and onshore waters. The Aboriginal Heritage Act recognises RAPs as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage and the primary source of advice and knowledge on matters relating to Aboriginal places or objects in the appointed RAP region. RAPs have cultural heritage responsibilities, including to evaluate cultural heritage management plans, make decisions about cultural heritage permit applications and be involved in compliance and enforcement.

Part of the purpose of the Aboriginal Heritage Act is to recognise Traditional Owners as cultural heritage managers, promote the management of Aboriginal cultural heritage, and protect, and conserve Aboriginal cultural heritage in Victoria. Significantly, custodianship of Ancestral Remains and Secret and/or Sacred Objects is recognised by the Act as being held by the Traditional Owners represented by the RAP.

A group of Aboriginal people who are inclusive and representative of the Traditional Owners of the area or have historical or contemporary links to the application area and demonstrated expertise in managing and protecting Aboriginal cultural heritage may obtain RAP recognition. If there is a later native title or settlement recognition for a different group over the same area, the relevant Prescribed Body Corporate (**PBC**) or TOGE will become the RAP.

WHAT ARE THE DIFFERENCES BETWEEN THE THREE TYPES OF FORMAL RECOGNITION?

	Native Title	Settlement	Registered Aboriginal Party
What is the result?	A determination of native title by the Federal Court under the <i>Native Title Act 1993</i> .	Settlement agreements with the State under the <i>Traditional Owner Settlement Act 2010</i> .	Appointment by the Victorian Aboriginal Heritage Council (Council) as a Registered Aboriginal Party under the <i>Aboriginal Heritage Act 2006</i> .
How long does it take?	Each process takes years to complete. The benefit of the native title process is that the Federal Court will set timeframes and hold parties responsible for moving along. In the settlement process, you rely on the State to negotiate in good faith, but delays can occur.		Council has 270 days to determine applications for RAP status. If the Council requests additional information, which they often do, the timer is paused until the information has been received.
What is the process?	<ul style="list-style-type: none"> The group authorise the native title application and appoint the 'Applicant'. File the native title claim using a court form and provide supporting information. The matter is made public, and other parties (e.g. other Traditional Owners asserting interests, people like farmers who have rights in the area) may join. Research information is provided to the State and/or to the Federal Court. Further research work might be required. The rights included in the wording of the determination are agreed and authorised by the native title group. The group confirms the PBC to hold rights and interests for the group). The Judge makes a determination of native title. 	<ul style="list-style-type: none"> Information is provided by the group to the State, including: <ul style="list-style-type: none"> Part A Threshold Statement – a description of the group, Country and research information. Part B Threshold Statement – information about the Corporation that will represent the group and its capacity. Further information may be requested by the State. Limited notification of the proposed negotiations by the State and opportunity for submissions. The State confirms that the thresholds are met and it will negotiate. Negotiation with the State to reach agreements which are authorised by the Traditional Owner group. Agreements are signed and processes followed so they apply. 	<ul style="list-style-type: none"> The group forms a Corporation under the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (CATSI Act)</i> Apply to the Council and provide necessary statements and supporting documents. The matter is made public, and other parties (e.g. other Traditional Owners asserting interests) may respond. The Council may request more information. The Council will make a decision and publish reasons for its decision.

WHAT ARE THE DIFFERENCES BETWEEN THE THREE TYPES OF FORMAL RECOGNITION?

	Native Title	Settlement	Registered Aboriginal Party
What are the evidence requirements?	<p>Demonstrate that:</p> <ul style="list-style-type: none"> the Traditional Owners making the claim hold rights and interests in an area of land and/or waters according to their traditional law and customs. those laws and customs are currently acknowledged and observed in a continuous connection since sovereignty claimed by Britain. rights and interests are capable of being recognised. 	<p>Demonstrate:</p> <ul style="list-style-type: none"> group composition and basis of Traditional Owner group, including inclusivity and size. basis for proposed agreement area (and agreements with neighbours about boundaries). research information about group membership, location and traditional and cultural association to the area. full group decision-making processes. established Corporation to represent the group at the end of the process. 	<p>Demonstrate:</p> <ul style="list-style-type: none"> representation and inclusion of Traditional Owners and ongoing relationship to area claimed, and/or historical or contemporary links to the area claimed. agreed boundaries with neighbouring groups and map of area claimed. established Corporation with expertise in cultural heritage management and organisational sustainability.
What is the standard of proof?	<p>The State and/or the Federal Court assess evidence.</p> <p>Higher standards of evidence are required for native title, especially for a contested claim (a claim where the State doesn't agree) that is decided by the Federal Court. Standards are set by the Native Title Act and case law.</p>	<p>The State assesses evidence against its Threshold Guidelines.</p> <p>The standard of proof required for a settlement is less than that required by the Federal Court in native title matters. E.g. no need to prove that traditional laws and customs are currently acknowledged and observed, in a continuous connection to Country going back to pre-colonisation.</p>	<p>The Council assesses the information provided in the application.</p> <p>Evidence requirements have a cultural heritage focus, and generally lower standards of evidence are required.</p>
Which land or waters does it apply to?	<p>Crown land and waters where native title has not been extinguished.</p>	<p>All public land and waters, even where native title has been extinguished (with some exceptions, including where public works have been constructed).</p>	<p>RAP responsibilities apply to all land and waters in a RAP's appointed area.</p>

WHAT ARE THE DIFFERENCES IN THE POTENTIAL OUTCOMES BETWEEN THE THREE TYPES OF FORMAL RECOGNITION?

Native Title

A positive native title determination recognises, in Australian law, a Traditional Owner group and the groups' pre-existing native title rights and interests in land and waters. This recognition includes the right to access land to hunt, gather and carry out ceremony. Additionally, a group can negotiate other benefits with the State during the native title claim process. Where evidence shows native title has been extinguished, this is also confirmed by the Federal Court.

Settlement

Under a settlement, a Traditional Owner group receives from the State formal recognition of their rights to land which are comparable to (and in some cases exceed) rights achievable under native title. Groups also negotiate to receive parcels of land, a financial package and a range of additional benefits through agreements. There is no consideration about extinguishment of native title rights as a settlement covers all public land in the settlement area.

Registered Aboriginal Party

Under the Aboriginal Heritage Act, RAPs are recognised as the primary guardians, keepers and knowledge holders of Aboriginal cultural heritage, and are given corresponding responsibilities and functions. On appointment, RAPs receive an establishment grant, the right to collect fees for cultural heritage management activities, annual operational funding for certain roles, and are eligible for additional funding to assist with compliance and enforcement.



WHAT ARE THE KEY OUTCOMES OF THE THREE TYPES OF FORMAL RECOGNITION?

This table sets out key outcomes of a native title determination, a settlement and recognition as a RAP, compared with no formal recognition. A tick indicates that an outcome is possible under the relevant Act and the recognition process allows for this outcome. However, the outcomes achieved in a particular process will vary depending on the circumstances, rights asserted and negotiation outcomes.

Potential outcome	No formal recognition	Native Title	Settlement	RAP
Recognition of Traditional Owner/ native title rights		✓	✓	✓
Rights to hunt and take plants and forest produce for personal or domestic non-commercial and communal purposes	(Can apply for permits under standard processes)			✓ (Can apply for permits under standard processes)
Rights to take and use resources for commercial purposes		✓ (If agreed with the State or evidence of historic commercial use provided to the court)	✓ (With some limitations)	✓
Participation in management and protection of land and waters with State	(As part of existing State-wide participation strategies)	(Can be negotiated with the State but is not otherwise part of a determination)	✓	✓
Procedural rights for activities on Crown land, including compensation		✓ (Only where native title is not extinguished under the Future Act regime)	✓ (Under a Land Use Activity Agreement)	✓
Ability to apply for grants of land and/or funding by		✓	✓	✓
Full and final settlement of native title compensation		(Compensation claims may be brought separately to native title claims)	✓ (If agreed by the group)	✓
Joint management of national parks or other Crown land estate		(Can be negotiated with the State but is not usually part of a determination)	✓	✓

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Potential outcome	No formal recognition	Native Title	Settlement	RAP
Corporation funding		✓ (Corporation funding is provided to PBCs by the Commonwealth Government from year to year and is not guaranteed; the funding granted is not usually sufficient to meet all the costs of a Corporation)	✓ (Funding is agreed in negotiations. The State relies on modelling about what is needed to run a corporation)	✓
Aboriginal title to land and ownership by the group of agreed freehold parcels		(Can be negotiated with the State but is not usually part of a determination)	✓	✓
Economic development funding and opportunities		(While not usually part of a determination, these can be obtained post determination by the PBC)	✓	✓
Participation in management and protection of cultural heritage, including ability to enforce		✓	✓	✓
Reserved seat on the First Peoples' Assembly of Victoria		✓	✓	✓

WHAT SERVICES DO FIRST NATIONS LEGAL & RESEARCH SERVICES PROVIDE?

First Nations Legal & Research Services (**First Nations**) works with groups who wish to pursue land justice outcomes in Victoria through formal recognition.

First Nations is the Native Title Service Provider for Victoria. This is a role established by the Native Title Act to provide assistance in relation to native title matters. First Nations is funded by the Commonwealth Government to perform these functions, including to:

- assist Traditional Owners to make native title and compensation applications;
- assist in negotiations, mediations and other processes concerning native title;
- certify applications for native title determinations and for registration of agreements;
- mediate and resolve disputes; and
- notify Traditional Owners of future works proposed on Country.

First Nations also receives funding from the State through the Traditional Owner Nation-building Support Package. More information about the Nation-building Package can be found on our website www.fnllrs.com.au.

First Nations provides a range of services, including:

- Working with groups in response to requests for assistance and in line with First Nations' Guidelines for Assistance to Native Title Groups and Strategic Plan.
- Starting a process by providing people with information about formal recognition processes and working with individuals and families to collect research information.
- Assisting groups to make decisions about progressing formal recognition by providing legal advice and organising group meetings.
- If instructed by a group, preparing the documents, like application forms and research reports, required in the native title, settlement and/or RAP processes.

These services are provided through different areas within First Nations, primarily sitting under the following key roles.



Community Liaison Officers

Community Liaison Officers lead our communication and engagement with Traditional Owners and organise meetings with individuals, family groups and all Traditional Owners for an area (which we call a "full group" or "community" meeting).



Lawyers

Lawyers provide advice on formal recognition options, assist groups to develop formal recognition applications and represent groups in court and negotiation processes. Our lawyers act on instructions from the full group (all those people who hold or may hold native title rights and interests in a particular area of Country in Victoria) or the authorised Applicant in a native title claim, rather than individuals.



Researchers

Researchers consider both ethno-historical (examination of earliest records and material documenting Aboriginal society and connection to Country) and ethnographic (history, story and information from contemporary Aboriginal people who assert rights and interests to the research area) sources. Researchers may be required to obtain information from Traditional Owners regarding their traditional laws and customs; their rights and interests in Country; the extent of their Country and specific sites of significance and genealogical research regarding a Traditional Owner groups' ancestors.

HOW DOES TREATY FIT IN?

The *Advancing the Treaty Process with Aboriginal Victorians Act 2018 (Vic)* sets out guidelines for the establishment of the Treaty process, including the role of the Aboriginal Representative Body and Victorian Government in negotiating a framework for Treaty. The Assembly has been established as the Aboriginal Representative Body to work with the State to prepare for Treaty negotiations, including establishing a Treaty Authority, a Treaty negotiation framework, and a self-determination fund. The Assembly is made up of Traditional Owners, elected by Aboriginal people in Victoria and Victorian Traditional Owners living outside the state.

Each formally recognised Traditional Owner group is entitled to a reserved seat on the Assembly. If a group achieves formal recognition, they will be entitled to a reserved seat at this point. There is also an alternate pathway for a Traditional Owner group to achieve a reserved seat at the Assembly, if they do not have formal recognition.

The Assembly and State are currently preparing for Treaty negotiations.

MORE INFORMATION

For more information about the treaty process including information about reserved seats, visit the

First Peoples' Assembly
www.firstpeoplesvic.org

Further information can be found in the discussion papers on treaty prepared by the

Federation of Victorian Traditional Owner Corporations
www.fvtoc.com.au/treaty/discussion-papers

Yoorrook Justice Commission
yoorrookjusticecommission.org.au

The Yoorrook Justice Commission will investigate historical and ongoing injustices committed against Aboriginal Victorians since colonisation over a 3-year period commencing in 2021. This has been established with the powers of a Royal Commission at the request of the Assembly. More information is available on the Commission's website.

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A **Glossary of Terms** used in this document can be found at www.fnlrs.com.au/formal-recognition-resources

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

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