Loddon-Mallee Housing Action Plan: Etty Street Housing Proposal – Strategic Policy Guide

Prepared for Swan Hill Rural City Council

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SGS Economics & Planning

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SGS Economics and Planning Pty Ltd
ACN 007 437 729
www.sgsep.com.au

Offices in Canberra, Hobart, Melbourne, and Sydney, on Ngambri/Ngunnawal/Ngarigu, muwinina, Wurundjeri, and Gadigal Country.

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Executive summary

Overview

This document is one of four reports on projects which could unlock additional housing supply in the Loddon-Mallee region. The projects were identified during preparation of the Loddon-Mallee Housing Action Plan.

The Etty Street site is in Castlemaine in the Mount Alexander LGA in central Victoria, approximately 132km from Melbourne. The site is State-owned land and includes several Crown land allotments and a portion of the old Castlemaine secondary school site. The project proposes development of the site for social and affordable community housing to address the acute need in the LGA.

This report:

- documents the existing land use and tenure details of the Etty Street site and the broad conceptual plans for social and affordable community housing on the (yet to be determined) 'surplus' land.
- provides an overview of the land release options and delivery models for achieving social and affordable community housing outcomes
- summarises the Victorian Government's land policies and processes for determining whether Crown land may be surplus to requirements and how the State decides to dispose of such land
- identifies how to determine whether Crown land maybe subject Aboriginal Traditional Owner rights or native title rights and interests and includes a step-by-step process for navigating those matters.

Victorian Government Land Management Policies

The Victorian Government has a suite of policies for the acquisition, use, management and disposal of Government land. The key policy documents and their purpose are listed in the table below.

VICTORIAN GOVERNMENT LAND MANAGEMENT POLICIES

Policy	What the Policy does
Victorian Government Land Transactions Policy 2022)	This policy exists to ensure agencies act in accordance with the highest standards of behaviour when undertaking land transactions. It does this by creating a consistent framework for the way agencies across the Victorian government are required to undertake land transactions, including: • a clear set of requirements that agencies must comply with when undertaking land transactions, and

	• establishing the role of VGLM to deliver assurance to the Victorian government and community that agencies are complying with the requirements in the policy.
Victorian Government Land Use Policy and Guidelines. Unlocking public value from government land (land use policy) (2017)	This policy establishes a framework that enables a strategic, whole-of-government approach to land use decision making, with the objective of maximising public land value.
Strategic Crown Land Assessment Policy and Guidelines (SCLA policy) (2016)	This policy sets out the government's responsibilities and obligations when Crown land is declared surplus and requires that the government conduct an assessment to determine whether surplus Crown land can be sold.
Victorian Government Landholding Policy and Guidelines (landholding policy) (2015)	This policy sets out when an agency can purchase and retain land and requires agencies to offer to sell any surplus land to other Victorian government agencies, local councils, or the Commonwealth before it can be sold to the public.

Source: Victorian Government Land Transactions Policy, 2022:05.

A Step-by-Step process for local government

A summary of the step by step process to assist local councils to navigate whether Crown land in Victoria is subject to Aboriginal Traditional Owner rights or native title rights and interests is provided below.

STEPS TO DETERMINING WHETHER CROWN LAND IS SUBJECT TO ABORIGINAL TRADITIONAL OWNER RIGHTS OR NATIVE TITLE RIGHTS AND INTERESTS

STEP	SUMMARY
1	Adopt a precautionary approach.
2	Identify the subject land's legal status.
3	Establish whether subject land is within an area covered by a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic).
4	If not within an area covered by a Recognition and Settlement Agreement, must still ascertain who the relevant Traditional Owner group(s) may be.
5	Conforming with the *Native Title Act 1993* (Cth) or the *Traditional Owner Settlement Act 2010* (Vic).
6	Costs of negotiating with the relevant Traditional Owner group(s).
7	Compensation for loss, diminution, impairment or extinguishment of native title rights and interests.
8	State's Land Management Framework, including the Land Transactions Policy, still applies.
9	Compliance with *Aboriginal Heritage Act 2006* (Vic) still applies.

More detail on these steps is provided in the report. The information in this report is general advice only, and it is advisable for councils to seek independent expert advice on any particular matters.

Our search of the public records shows that the Etty Street site falls within a Recognition and Settlement Agreement and a Land Use Activity Agreement (LUAA) under the *Traditional Owner Settlement Act 2010* (Vic) between the State government and the Dja Dja Wurrung Clans Aboriginal Corporation (DDWCAC). In short, these agreements effectively replace the procedural rights that native title holders would be entitled to under the *Native Title Act 1993* (Cth). The details are discussed in this report.

Summary of 'next steps' for Council

The final chapter discusses the conclusions and recommendations: That Mount Alexander Council:

1. Approaches DET and DWELP requesting they each undertake a SCLA for the specified Allotments in the Etty Street site they currently own and manage.
2. Provides DET and DELWP with copies of the Hansen Partnership Masterplan for the site, requesting the agencies base their SCLA on the Masterplan and Concepts prepared by Hansen Partnership on the feasibility of the site for residential development.
3. Provides DET and DELWP with a copy of this report, as the basis for specifying the Allotments which need to be included in the SCLAs to be undertaken by the respective agencies.
4. Develops a set of objectives for social and affordable housing outcomes for the site, Council's desired land release option(s) and preferred mechanism(s) for the delivery of social and affordable housing outcomes for the site.
5. Discusses the housing proposals for the Etty Street site with DDWCAC to ascertain whether DDWCAC wants to be involved in some way in achieving social and affordable community housing outcomes for local Aboriginal people in this locality.
6. Identifies RHAs that it would be willing to work with and seeks out their willingness to be involved in the development, either with Council support or without Council's direct support.

1. Introduction

1.1 Housing Action Plan and four associated projects

This document is one of four reports on projects which could unlock additional housing supply in the Loddon-Mallee region. The projects were identified during preparation of the Loddon-Mallee Housing Action Plan.

While each report relates to a particular project or issue, the strategic responses and lessons from each provide recommendations that are mostly replicable and scalable to similar issues elsewhere in the region. There are two 'business cases' and two 'strategic policy guides' covering the projects. The business cases are quantitative and focus on the economic case for the housing proposal. The strategic guides address good practice processes and steps.

The projects are:

- Mildura worker housing project – expansion of an existing seasonal worker accommodation facility in regional Victoria (quantitative business case report)
- Etty Street housing site opportunity – a potential social and affordable housing development site with multiple titles, including state-owned and Crown land with associated Aboriginal lands rights implications (strategic policy guide report)
- Buloke worker housing project – understanding the strategic need for key worker housing to support the local community and considering options for key worker housing in Donald, in the Buloke Shire (strategic policy guide report)
- Newbridge Water and Sewerage Infrastructure extension – strategic approach to investing in infrastructure supporting new housing development in a small-town context (quantitative business case report).

All documents draw out and summarises replicable and scalable steps. The reports and especially their included "How to guides", are intended to provide housing practitioners with a toolkit to actively address typical barriers to new housing supply found in regional Victoria.

1.2 This report

The Etty Street project would address the need for social and affordable community housing in the Mount Alexander local government area. It proposes a mixed social and affordable housing development on Crown and state-owned land, including a portion of the old Castlemaine secondary school site, in Etty Street, Castlemaine. The focus of this report is on the process required to release and deploy these public sites for a social and affordable housing development, including in the context of the regional Land Use Agreement with the Dja Dja Wurrung Aboriginal Owner Corporation.

2. Etty Street project

2.1 Context

The Etty Street site is in Castlemaine in the Mount Alexander LGA in central Victoria, approximately 132km from Melbourne. Given its 'peri-urban' status, Mount Alexander's housing market is influenced by its proximity to Metropolitan Melbourne. The population of the LGA is approximately 20,000 people according to the 2021 ABS Census of Population and Housing and has grown by over 2,000 people since the 2016 ABS Census.

The Etty Street project aims to address the need for social and affordable community housing in the LGA on Crown and state-owned land, including a portion of the old Castlemaine secondary school site.

Like many other regional council areas, Mount Alexander has an acute need for social and affordable community housing. Vacancy rates sit at 0.22% which is significantly below the healthy benchmark of 3%.[1] The growth in rental prices has been significant, with rent prices for houses growing by 5% year-on-year for financial year 2021-22 and 8.8% for units.[2] Figure 1 below shows that rising rental prices have put a significant portion of households in rental stress and this problem is pervasive across the Loddon-Mallee group of councils. Without intervention this problem is expected to grow.

Lack of intervention will have a direct impact on the ability of Victoria to perform well economically, as workers will struggle to find housing in the area which dampens business productivity and has a flow-on effect on State GDP. Figure 2 shows the forgone economic output that would occur due to an undersupply of housing for a selection of LGAs in the region based on economic impact research done by SGS. In addition to lower economic performance, undersupply of housing will lead to poorer health and social outcomes as has been shown by the literature.[3] [4] These poorer outcomes cost the State through the public health system and community safety resources.

The provision of land is key to enabling an increase in housing supply more generally and for targeting the provision of social and affordable community housing. In some regional LGAs, selected State Government owned sites may be surplus to requirements and are located such as to be suitable for social and affordable housing. One such site is the Etty Street site in Castlemaine.

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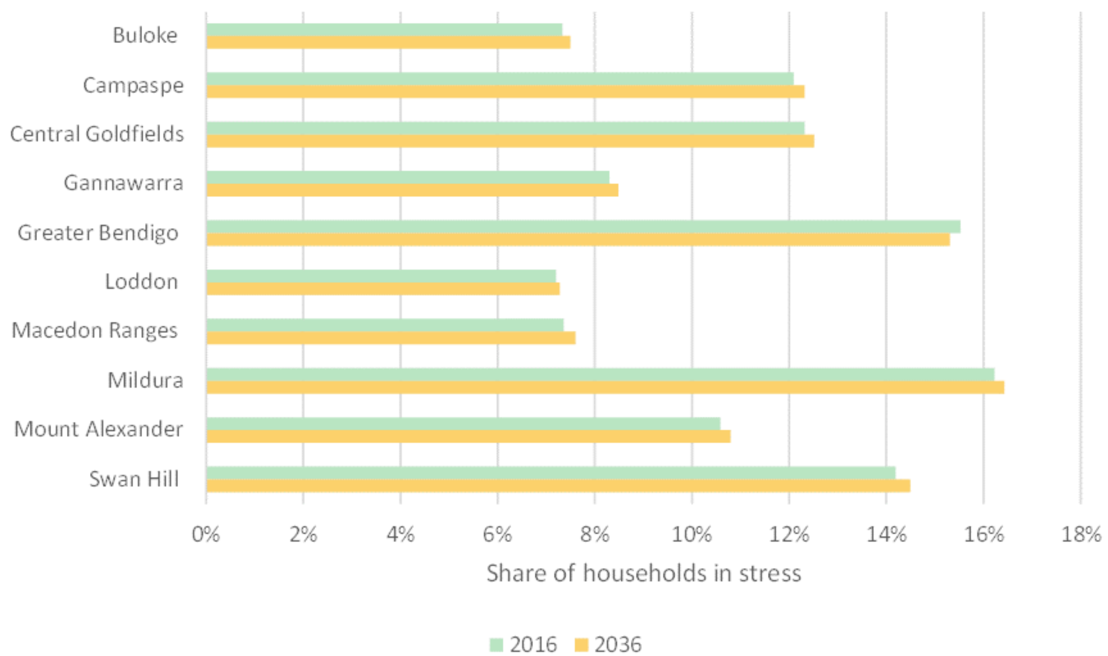
[1] https://www.realestateinvestar.com.au/Property/victoria/mount+alexander

[2] IBID.

[3] Baxter, A.J., Tweed, E.J., Katikireddi, S.V. and Thomson, H., 2019. Effects of Housing First approaches on health and well-being of adults who are homeless or at risk of homelessness: systematic review and meta-analysis of randomised controlled trials. *Journal of Epidemiol Community Health*, 73(5), pp.379-387.

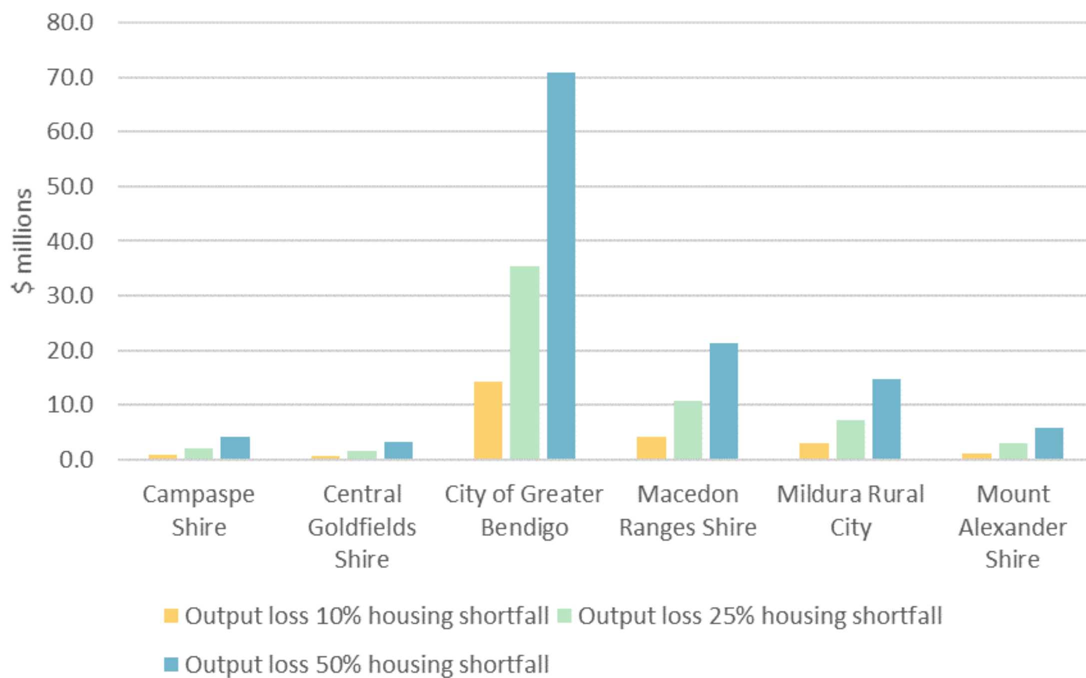
[4] Bentley, R., Baker, E. and Aitken, Z., 2019. The 'double precarity' of employment insecurity and unaffordable housing and its impact on mental health. *Social Science & Medicine*, 225, pp.9-16.

FIGURE 1: SHARE OF HOUSEHOLDS IN RENTAL STRESS BY LGA: 2016 AND 2036



Source: SGS Economics and Planning

FIGURE 2: GRP FOREGONE DUE TO UNDERSUPPLY OF HOUSING



Source: SGS Economics and Planning

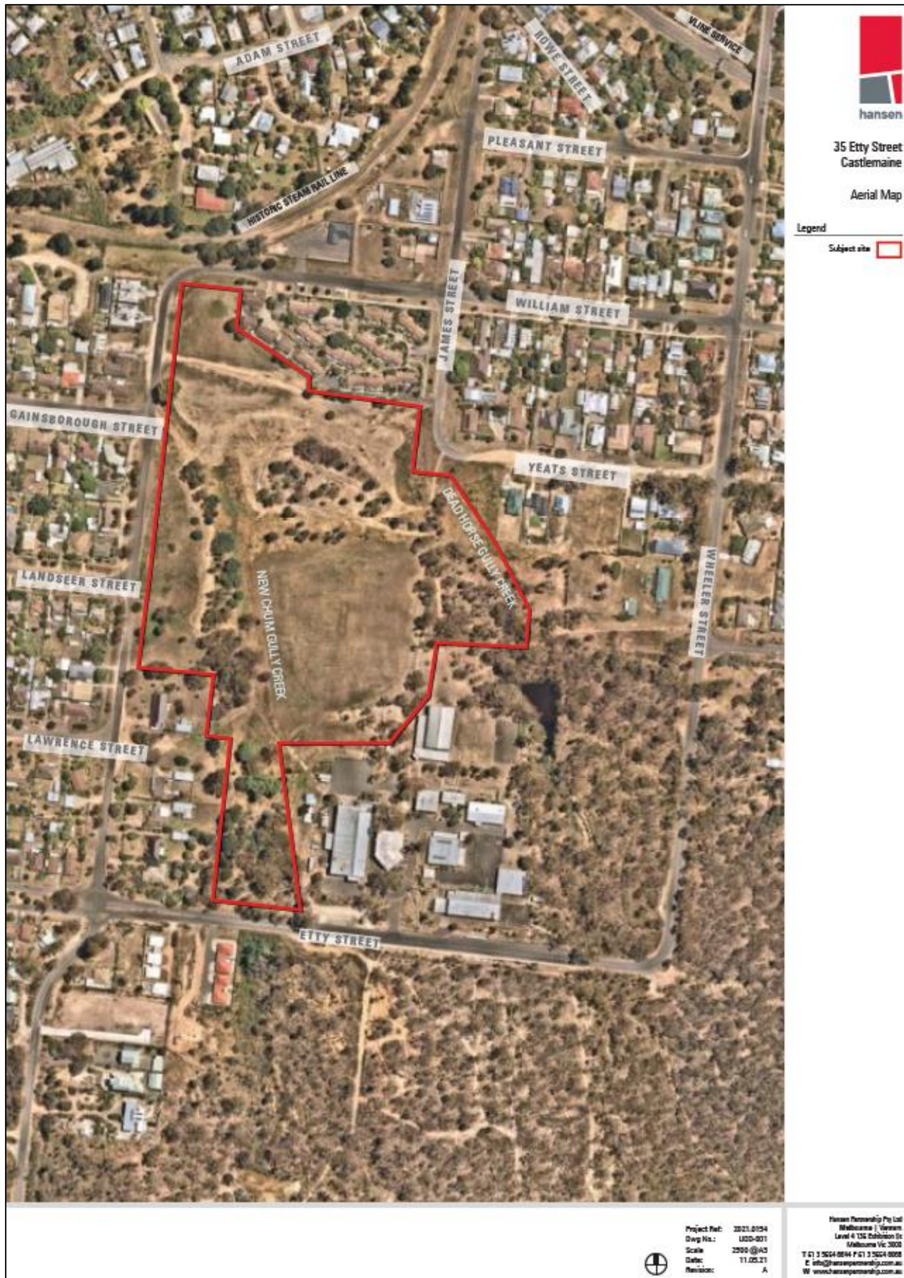
Gaining access to State-owned land can be challenging. The land's current tenure status is important. That is, whether the land is state-owned land for an existing or former public service or facility, or whether it is Crown land for the purposes of a conservation reserve or state or national park, and whether the land can be deemed by the State to surplus to requirements such that it can be disposed of for social and affordable community housing. These matters are explored in this report.

The following guidance aims to provide councils in a similar position to Mount Alexander Council with strategic policy guidance on unlocking State-owned/Crown land for social and affordable community housing. It is important to understand that there are numerous complexities and variables, depending on current land ownership, land tenure history of the site, how social and affordable community housing will be provided and the interplays between various state government stakeholders and prevailing local conditions. If the land is classified as Crown land under specific statutes, then the land in question may also be subject to native title rights and interests under the *Native Title Act 1993* (Cth) or a Recognition and Settlement Agreement area under the *Traditional Owner Settlement Act 2010* (Vic). The information in this strategic policy guide is intended to provide an overall guide to the steps which will need to be taken and the key questions which will need to be addressed if local governments in Victoria are to be successful in engaging with the State about the release of State-owned/Crown land for social and affordable housing in their local communities.

2.2 The subject site

The Etty Street site is located approximately one kilometre south of the Castlemaine town centre. An aerial map of the Etty Street site is shown in Figure 3. The site is bounded by Etty Street in the southern side, the former secondary school site off Etty Street in the south-west corner, Wheeler, Yeats and James Streets on the north-eastern side, William Street on the northern side, and Wilkie Street on the western side.

FIGURE 3: AERIAL MAP OF ETTY STREET SITE

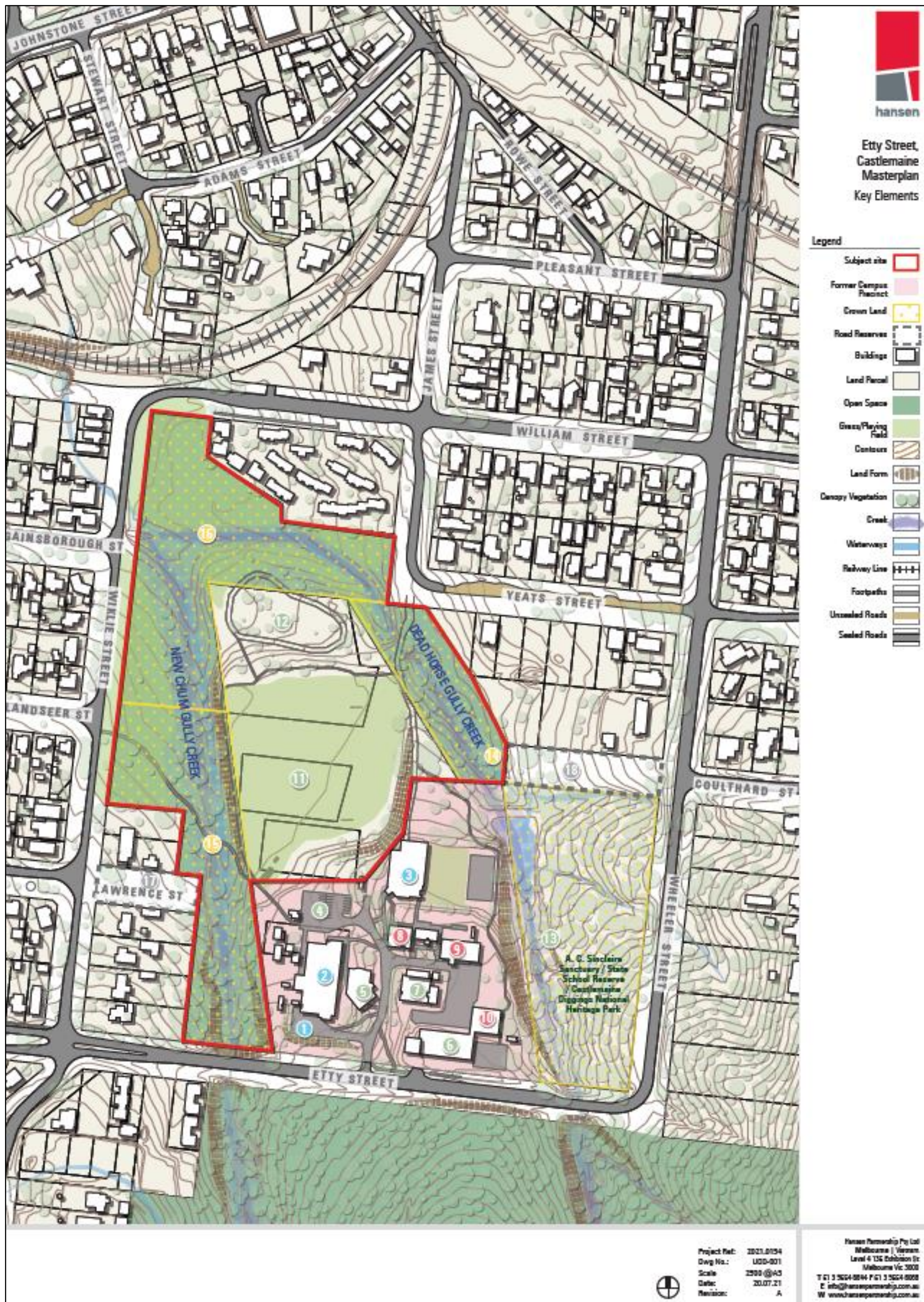


Source: Hansen Partnership, 2021:5.

2.3 Existing land tenure and land use

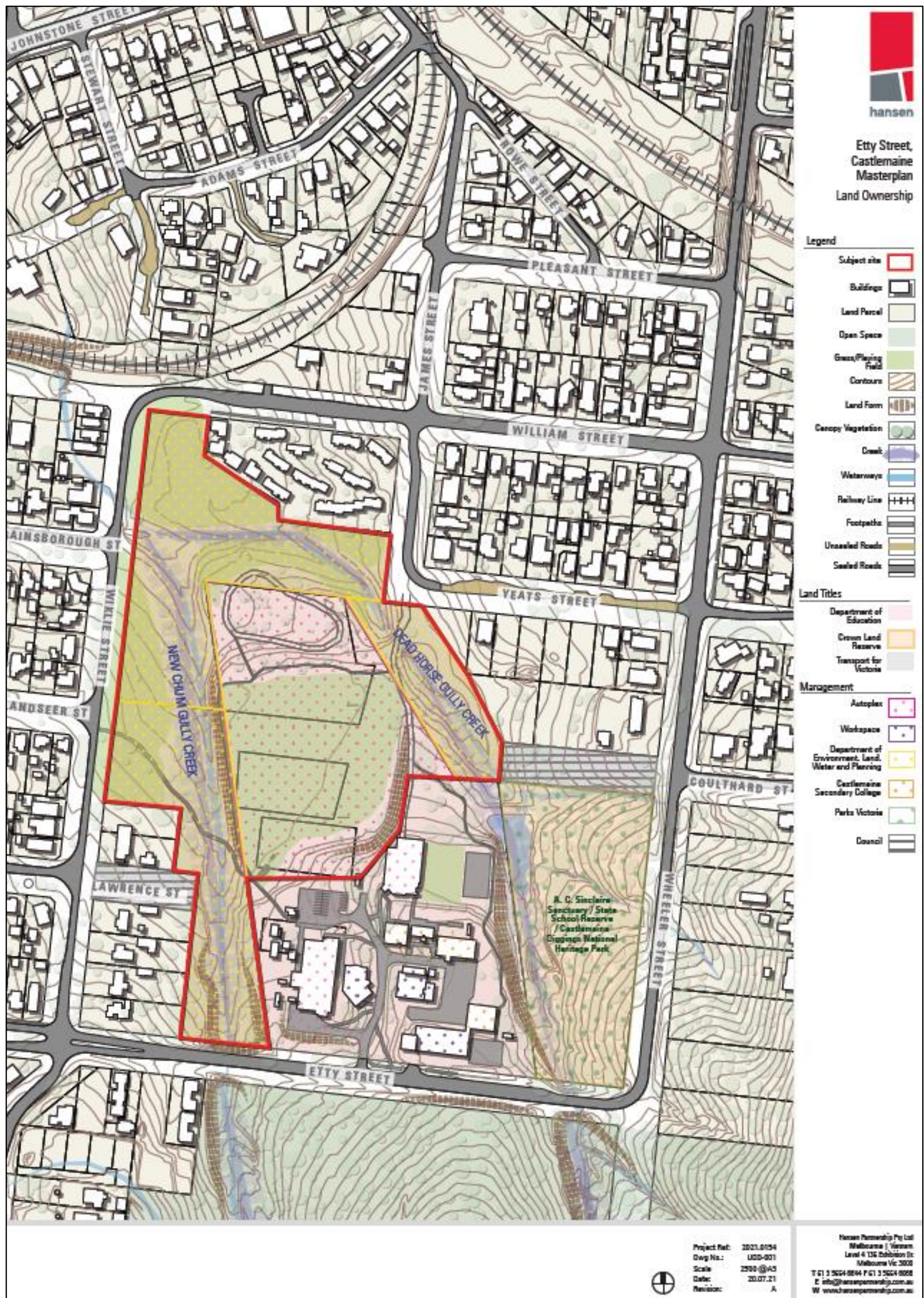
The key land elements of the Etty Street site are shown in **Figure 4**. The existing land ownership is shown in **Figure 5**, with more details in **Table 1**. **Table 1** includes details of the Crown Allotment numbers, land tenure, land owner, existing land uses and tenants, street address and access details for each Allotment.

FIGURE 4: KEY LAND ELEMENTS OF THE ETTY STREET SITE



Source: Hansen Partnership, 2021:13.

FIGURE 5: EXISTING LAND OWNERSHIP OF THE ETTY STREET SITE



Source: Hansen Partnership, 2021:19.

TABLE 1: ETTY STREET SITE: KEY LAND ELEMENTS – EXISTING LAND USE, TENURE, ADDRESS AND ACCESS

(Please note, the numbers and colours in the first column on the left correspond with numbers and colours in **Figure 4** above)

No. (Fig 4)	Allotment and Description	Tenure	Land Owner	Existing land use(s)/Tenants	Address and Access
1	Crown Allotment 2, Section 133?, Township of Castlemaine, Parish of Castlemaine	Crown Land	Minister for Education and Training (DET)	**Former Castlemaine Secondary College Campus – Tech Building** • Currently leased to Autoplex Castlemaine. • Currently Zoned PUZ2.	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south. • Car parking provided in existing car park to the northwest.
2				**Formerly Castlemaine Secondary College Senior Campus – Gymnasium Building** • Currently leased to Autoplex Castlemaine. • Currently Zoned PUZ2.	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south. • Car parking provided in existing car park to the northwest.
3				**Formerly Castlemaine Secondary College Senior Campus - Car Park** • Currently leased to Autoplex Castlemaine. • Currently Zoned PUZ2.	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south.

					• Car parking provided in existing car park to the northwest.
4	Crown Allotment 2, Section 132, Township of Castlemaine, Parish of Castlemaine	Crown Land	Minister for Education and Training (DET)	**Formerly Castlemaine Secondary College Senior Campus – Gravel Carpark** • Currently leased to Autoplex Castlemaine. • Proposed to be utilised by Workspace Australia for car parking. • Currently Zoned PUZ2.	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south. •
5				**Formerly Castlemaine Secondary College Senior Campus – Former Campus Administration Building / Building A (Workspace Australia)** • DET owned building, leased to Council and sub-leased to Workspace Australia. (Building A). • Workspace Australia has a permit application lodged with Council (PA205/2021 for *'use of part of the existing buildings as an Employment Training Centre - business incubators and café,*	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south. • Car parking to be provided along Etty Street (existing gravel car park) and in a new car park to the southeast of the site (PA205/2021).

				associated buildings and works and a reduction in car parking'). • Currently Zoned PUZ2.	
6				**Formerly Castlemaine Secondary College Senior Campus s – Former Campus Science Building / Building B (Workspace Australia)** • Currently leased to Workspace Australia (Building B). • Currently Zoned PUZ2.	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south. • Ca parking to be provided along Etty Street (existing gravel car park) and in a new car park to the southeast of the site (PA205/2021).
7				**Formerly Castlemaine Secondary College Senior Campus – Former Campus Canteen Building / Building C (Workspace Australia)** • Currently leased to Workspace Australia (Building B). • Currently Zoned PUZ2.	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south. • Car parking to be provided along Etty Street (existing gravel car park) and in a new car park to the southeast of the site (PA205/2021).
8	Crown Allotment 2, Section 132, Township of Castlemaine, Parish of Castlemaine **(**	Crown Land	Minister for Education and Training (DET)	**Retained by Castlemaine Secondary College – Former Campus Library Building).** • Currently used by Victorian Curriculum Assessment Authority (VCAL).	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south.

				• Currently Zoned PUZ2.	
9				**Retained by Castlemaine Secondary College – Former Campus Music Building)** • Currently used by Victorian Curriculum Assessment Authority (VCAL). • Currently Zoned PUZ2.	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south.
10				**Retained by Castlemaine Secondary College – Former Campus Art Building.** • Currently used by Victorian Curriculum Assessment Authority (VCAL). • Currently Zoned PUZ2.	35 Etty Street, Castlemaine. • Main entry to the campus from Etty Street to the south.
11	Crown Allotment 3, Section 132, Township of Castlemaine, Parish of Castlemaine.	Fee Simple	Minister for Education and Training (DET)	Formerly Castlemaine Secondary College Senior Campus – **Former Campus Sporting Oval**. • Occasionally used by the Castlemaine Hot Rod Society for car meets. • Used as an informal recreation space by community (dog walkers, walkers, runners, etc.)	• Main entry to the campus from Etty Street to the south. • Car parking provided in the existing car park to the south east.

				• Currently Zoned PUZ2.	
	Crown Allotment 4, Section 132, Township of Castlemaine, Parish of Castlemaine	Fee Simple	Minister for Education and Training (DET)	Formerly Castlemaine Secondary College Senior Campus. Currently Zoned PUZ2.	•
	Crown Allotment 5, Section 131, Township of Castlemaine, Parish of Castlemaine	Fee Simple	Minister for Education and Training (DET)	Formerly Castlemaine Secondary College Senior Campus. Currently Zoned PUZ2.	•
12	Crown Allotment 1, Section 133, Township of Castlemaine, Parish of Castlemaine **(Former Campus Athletics Track)**	Fee Simple	Minister for Education and Training (DET)	Formerly Castlemaine Secondary College Senior Campus – **Former Athletics Track**. • Currently unused.	• Main entry to the campus from Etty Street to the south.
13	A.C. Sinclair Sanctuary / State School Reserve / Castlemaine Diggings National Park	Crown Land	Parks Victoria as Crown Land Administrator	Nature reserve comprising bushland, Dead Horse Gully Creek and pond. • Site also forms part of the Castlemaine Diggings National Heritage Park, which is a protected site on the Victorian Heritage Register (Place ID: 12834) and subject to the Heritage Overlay, Schedule 998 (HO998).	• Bound by Wheeler Street (east) and Etty Street (south).

14	Crown Allotment 19, Section 124, Township of Castlemaine, Parish of Castlemaine	Crown Land	DELWP as Crown Land Administrator	Currently Zoned as PPRZ. • Bushland, with informal walking trail. • Dead Horse Gully Creek runs through this parcel.	• Access through to Campus site via walking track from Coulthard Street. • Dead Hose Gully Creek traverses this site.
15	Crown Allotment 7, Section 132, Township of Castlemaine, Parish of Castlemaine	Crown Land	DELWP as Crown Land Administrator	Currently Zoned as PPRZ. • Bushland, with informal walking trail. • New Chum Gully Creek runs through this parcel.	• Access to Campus site via walking track from Landseer Street. • Dead Hose Gully Creek traverses this site.
16	Crown Allotment 4, Section 134, Township of Castlemaine, Parish of Castlemaine	Crown Land	DELWP as Crown Land Administrator	Currently Zoned as PPRZ. • Public open space, with informal track connecting Yeats and Gainsborough Streets. • Dead Horse Gully Creek and New Chum Gully Creek run through this parcel.	Open frontage to Wilkie Street (west) and partially to William Street (north).
17	Lawrence Street	Road Reserve	Council managed	Road reserve between Wilkie Street and Crown Allotment 7, Section 132.	Access from Wilkie Street.
18	Road Reserve	Road Reserve	Council managed	Road reserve on the northern boundary of the A.C. Sinclaire Reserve.	Access from Wheeler Street.

Sources: Compiled from information in the Hansen Partnership report (2021:10-12), Land Title Searches and information provided by Mount Alexander Council.

- The Allotments zoned PPRZ – Public Park and Recreation Zone;
- The Allotments zoned PUZ2 – Public Use Zone - Education.

Table 1 shows that several parcels are still owned by DET and continue to be used by DET directly, while other parcels are still owned by DET but leased to another party.

In a media release dated 21 November 2019, Mount Alexander Council confirmed that it has leased space from the Department of Education at the Castlemaine Secondary College site under a peppercorn arrangement for 15 years. These arrangements were settled after discussions with the Department of Education over many years. The Media Release also announced that the Mount Alexander Council has signed a lease with Workspace Australia Ltd and Castlemaine Hot Rod Centre to use portions of the site for education and training and the development of a business hub. SGS Economics and Planning has been advised that Workspace Australia has recently received State Government support for the initial redevelopment of buildings it leases from DET. The work is to be completed by August 2023 for Workspace Australia to commence the business incubator operations from the site.

The current Etty Street social and affordable housing development proposal prepared by Hansen Partnership in 2021 does not include any of the existing buildings on the former Secondary College site, it only comprises the land to the north and west of those existing facilities.

The A.C. Sinclair Sanctuary owned by Parks Victoria to the east of the former Secondary College site is a protected site on the Victorian Heritage Register (Place ID: 12834) and subject to the Heritage Overlay, Schedule 998 (HO998), and is also not included in the development site.

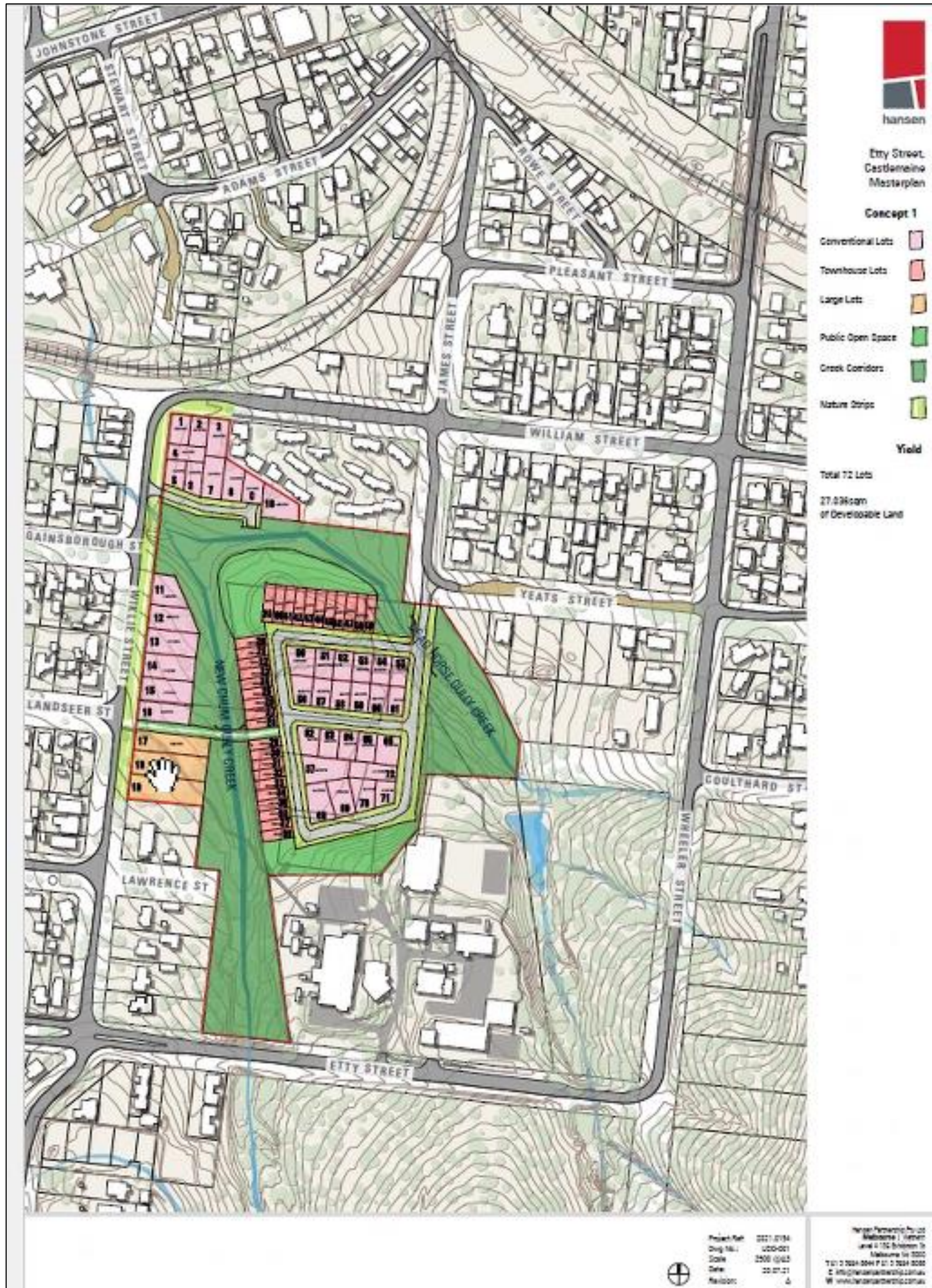
2.4 Hansen Partnership 2021 Concept Plan

Hansen Partnership was commissioned by the Mount Alexander Council in 2021 to prepare a Masterplan for the site and an Issues and Opportunities Discussion Paper about the alternative use of the former Castlemaine Secondary College site.

According to Hansen Partnership, the Etty Street site has the potential to yield approximately 90 lots comprising a mixture of conventional housing and townhouses to be provided as social and affordable community housing.

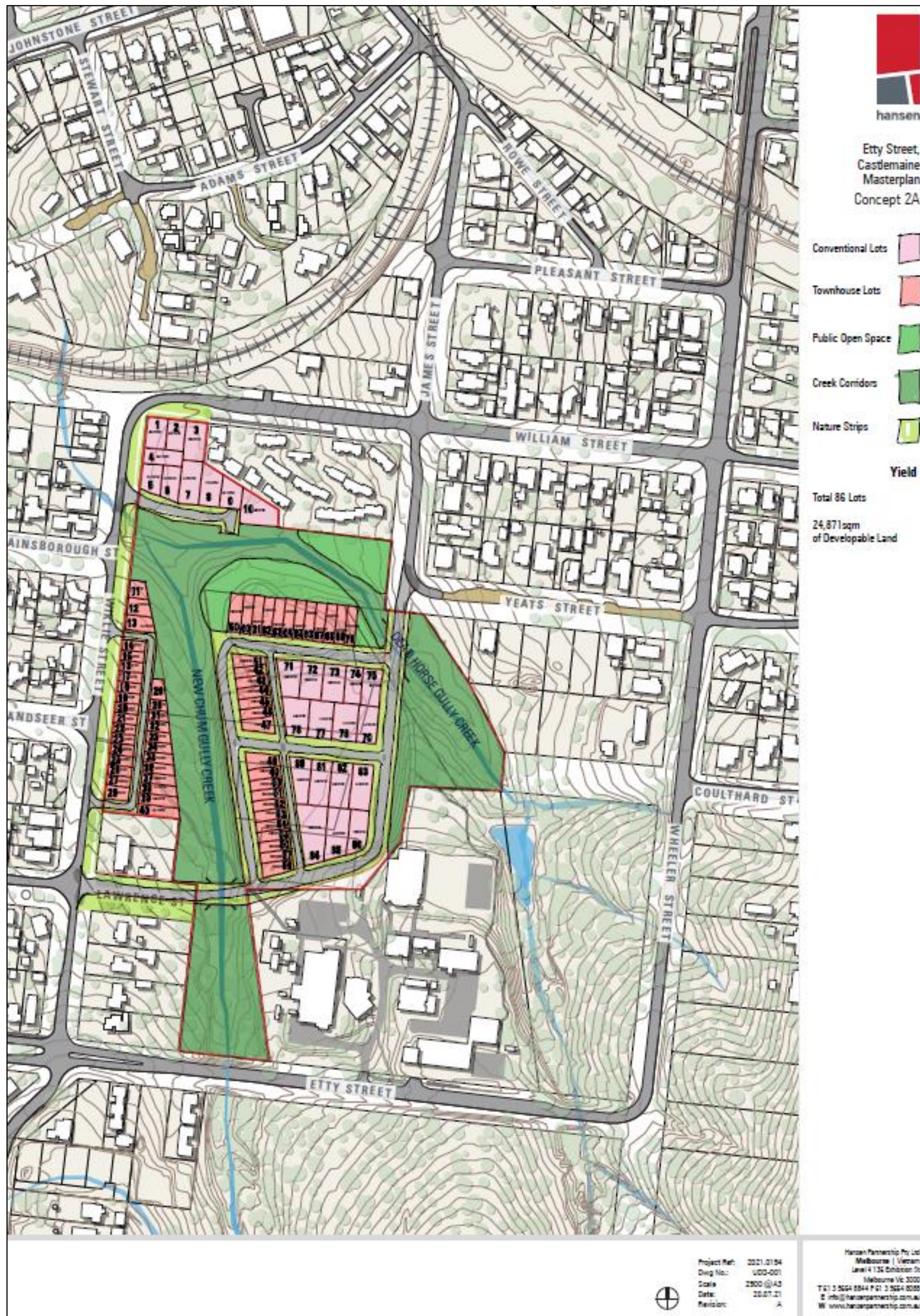
Hansen Partnerships prepared two concepts and they are shown in **Figures 6 and 7.**

FIGURE 6: CONCEPT 1 – ETTY STREET PROJECT CONCEPT PLAN



Source: Hansen Partnership, 2021.

FIGURE 7: CONCEPT 2A – ETTY STREET PROJECT CONCEPT PLAN



Source: Hansen Partnership, 2021.

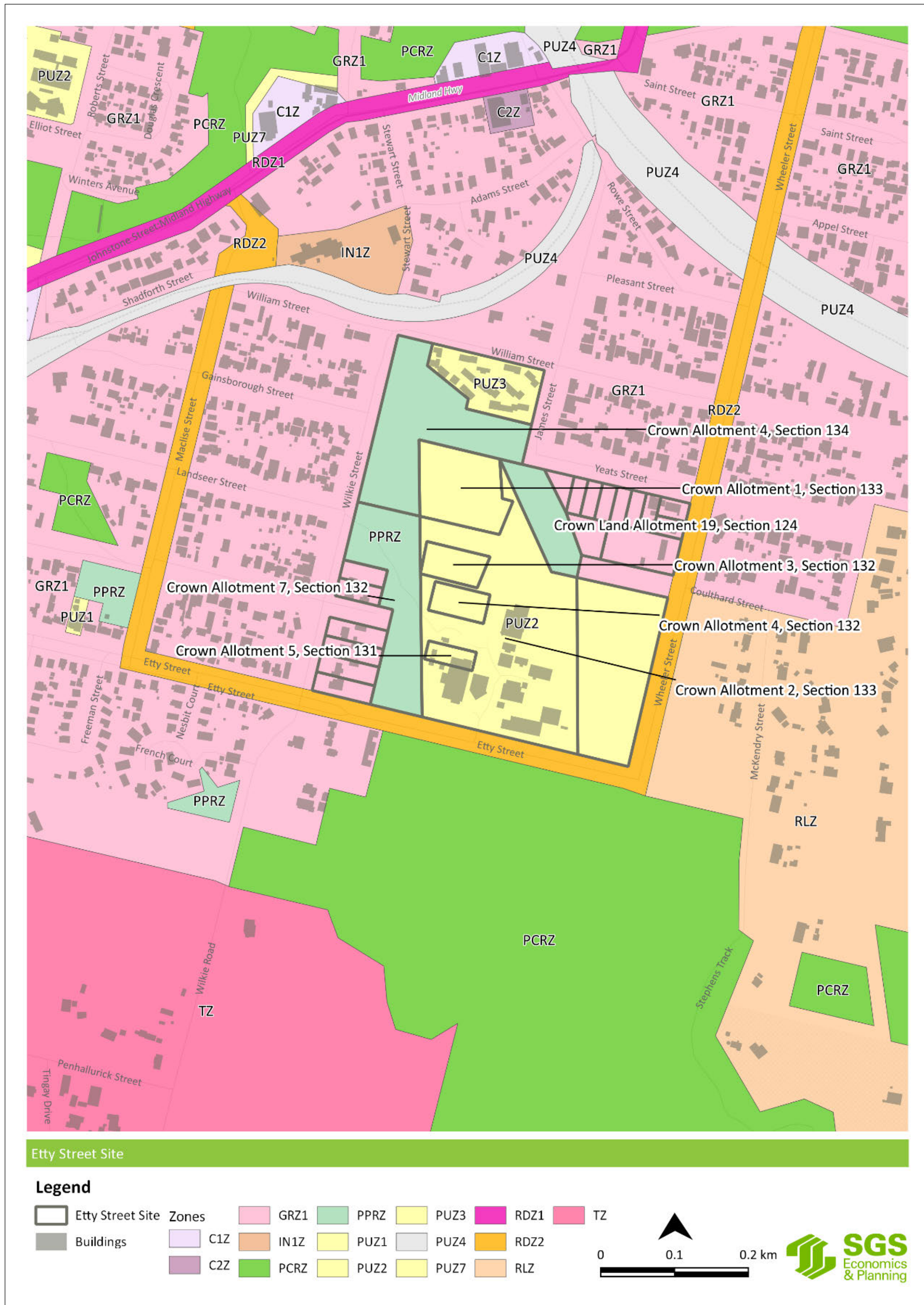
2.5 Land Development Issues

The land tenure analysis above and the concept plans prepared by Hansen Partnership show that only the northern and central parts of the site are mooted for social and affordable community housing development, and that none of the existing buildings on the former Secondary College site will be affected by the proposed development.

The Allotments which will be affected by the proposed social and affordable community housing development are shown in **Figure 8** and **Figure 9**, with more details provided in **Table 2**.

FIGURE 8: ETTY STREET PRECINCT – AFFECTED ALLOTMENT AND SECTION NUMBERS

FIGURE 9: ETTY STREET PRECINCT – CURRENT LAND USE ZONING



Source: Mount Alexander Planning Scheme: [Mount Alexander PS All Ordinance.pdf]

TABLE 2: ETTY STREET SITE: ALLOTMENTS INCLUDED IN THE ETTY STREET DEVELOPMENT ENVELOPE

(Please note, the numbers and colours in the first column on the left correspond with numbers and colours in **Figure 4** above)

No. (Fig 4)	Allotment and Description	Tenure	Land Owner	Existing land use(s)/Tenants	Current Zoning and Portion required for proposed housing development
1	Crown Allotment 2, Section 132, Township of Castlemaine, Parish of Castlemaine	Crown Land	Minister for Education and Training (DET)	Formerly Castlemaine Secondary College Senior Campus.	Currently Zoned PUZ2. The area to the north and west of the existing buildings on this site will be required to assist in compiling a contiguous development site. Some boundary reconfigurations of this Allotment will therefore be required to excise the existing former campus buildings from the portion proposed for housing development.
11	Crown Allotment 3, Section 132, Township of Castlemaine, Parish of Castlemaine **(Former Campus Sporting Oval)**	Fee Simple	Minister for Education and Training (DET)	Formerly Castlemaine Secondary College Senior Campus. • Occasionally used by the Castlemaine Hot Rod Society for car meets. • Used as an informal recreation space by community (dog walkers, walkers, runners, etc.).	Currently Zoned PUZ2. The whole of this Allotment.

12	Crown Allotment 1, Section 133, Township of Castlemaine, Parish of Castlemaine	Fee Simple	Minister for Education and Training (DET	Formerly Castlemaine Secondary College Senior Campus – **Former Athletics Track**. Currently unused.	Currently Zoned PUZ2. The whole of this Allotment.
	Crown Allotment 4, Section 132, Township of Castlemaine, Parish of Castlemaine	Fee Simple	Minister for Education and Training (DET)	Formerly Castlemaine Secondary College Senior Campus.	Currently Zoned PUZ 2. The whole of this Allotment
14	Crown Allotment 19, Section 124, Township of Castlemaine, Parish of Castlemaine	Crown Land	DELWP as Crown Land Administrator	Bushland, with informal walking trail. Dead Horse Gully Creek runs through this parcel.	Currently Zoned PPRZ. A part of the northern portion of this Allotment will be required to provide road access to the proposed housing development on adjoining Allotments.
15	Crown Allotment 7, Section 132, Township of Castlemaine, Parish of Castlemaine	Crown Land	DELWP as Crown Land Administrator	Bushland, with informal walking trail. New Chum Gully Creek runs through this parcel.	Currently Zoned as PPRZ. Parts of this Allotment will be required, but not where the New Chum Gully Creek flows through the site. .
16	Crown Allotment 4, Section 134, Township of Castlemaine, Parish of Castlemaine	Crown Land	DELWP as Crown Land Administrator	Public open space, with informal track connecting Yeats and Gainsborough Streets.	Currently Zoned as PPRZ. Parts of this Allotment, but not where the Dead Horse Gully Creek and New Chum Gully Creek flow through the site.

				Dead Horse Gully Creek and New Chum Gully Creek run through this parcel.	
17	Lawrence Street	Road Reserve	Council managed	Road reserve between Wilkie Street and Crown Allotment 7, Section 132.	Required for road access from Wilkie Street.

Sources: Compiled from information obtained from the Hansen Partnership report (2021:10-12), Land Title Searches, and information provided by Mount Alexander Council.

Figure 9 shows that:

- The Allotments zoned PPRZ means they are zoned as Public Park and Recreation Zone;
- The Allotments zoned PUZ2 means they are zoned as Education.

If these Allotments (or parts thereof) are to be used for housing development, they will need to be rezoned.

On the basis of the analysis above, the following issues require further consideration:

- Options for delivering social and affordable community housing.
- Getting the State government to assess whether the identified Allotments (or parts thereof) are surplus to State requirements and can therefore be disposed of by the State (and specifically for social and/or affordable community housing).
- Generally, Crown land allotments are either subject to native title rights and interests and therefore the requirements for future acts under the *Native Title Act 1993* (Cth) or a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic) and therefore the procedural requirements in a Land Use Activity Agreement (LUAA).

These matters are explored in the following Chapters.

3. Options for Delivering Affordable Housing

The following information is drawn largely from the following resource guide developed to support councils and Registered Housing Agencies to progress the delivery of Affordable Housing:

> Affordable Development Outcomes & Moores (2021) *Options for Delivering and Securing Affordable Housing on Local Government Land; A Guide for Councils and Registered Housing Agencies*, Commissioned by CHIA Vic and MAV with funding support from Homes Victoria. Available from: https://chiavic.com.au/

3.1 Local Government's role in facilitating local affordable housing

Local Governments play a key role in providing good governance for the benefit and wellbeing of their local communities. Councils undertake several roles to achieve their objectives, including as leader and advocate, as responsible authority, and as an investor and manager of community services.

Local governments are not typically engaged in the development, ownership and/or management of housing directly, but they can play an important facilitation role by supporting others. For example, Community Housing Organisations (CHOs) who are mission-driven, not-for-profit organisations that have a dedicated purpose to reduce housing stress and provide housing for lower income households.

CHOs that are registered under the *Housing Act 1983* (Vic) ('the Housing Act') are defined as a 'Registered Housing Agency' and are regulated by the independent Registrar for Housing Agencies. Registered Housing Agencies are structured and experienced in bringing together land, financing and funding; managing the acquisition and development of dwellings; and managing the resulting Affordable Housing tenancies and assets.

There are opportunities for councils and Registered Housing Agencies to work together and to utilise either council-owned land or other publicly owned land to respond to local Affordable Housing need.

3.2 A few words on Terminology

Affordable Housing is defined under the *Planning and Environment Act 1987* (Vic) as ***"housing, including Social Housing, that is appropriate for the housing needs of very low, low, and moderate income households"***.

‘Affordable Housing’ therefore encapsulates a range of housing programs that provide targeted affordability outcomes to households that earn within defined very low to moderate income ranges. Delivery of Affordable Housing requires subsidy to address the gap between household income capacity and market prices.

Social housing is the primary form of Affordable Housing in Victoria, defined in the *Housing Act 1983* (Vic) as public housing and housing owned, controlled or managed by a participating registered agency.

A social housing providers’ primary focus is on providing rental housing to households that meet the Victorian Housing Register (VHR) eligibility requirements

A ‘participating registered agency’ is an organisation that is declared and registered as a Registered Housing Agency (RHA) -either a housing provider or housing association - and is regulated by the Registrar of Housing Agencies. A RHA may also apply income eligibility set out under the *Planning and Environment Act 1987* (Vic) where delivery does not depend on Government funding.

The Community Housing Industry Association (CHIA) and the Municipal Association of Victoria (MAV) have developed a very helpful guide to Options for Delivering and Securing Affordable Housing on Local Government Land. The Guide includes a useful definition of terms around social and affordable housing which are included as Appendix A to this report (Affordable Development Outcomes in partnership with Moores, November 2021).

3.3 Utilising publicly owned land for affordable housing

Access to safe, secure and affordable housing is recognised as a human right[5] and concerns the ability of a person to have somewhere to live that is appropriate. This requires consideration of tenure, affordability, accessibility, location, and cultural adequacy. Affordable Housing is also recognised as essential infrastructure, due to its impact on workforce attraction and retention.

A lack of Affordable Housing has direct and indirect economic and social costs for individuals and the community. It is estimated that, across Australia, more than two-thirds of lower income households in private rental experience rental stress, paying more than 30 per cent of their income on rent. Moderate income households are also, increasingly, finding it difficult to find affordably priced housing.

Affordable housing cannot be realised without the availability of appropriately located and priced land. Publicly owned land (either by the State or by local government) can support delivery of affordable housing due to its spatial and locational qualities, potential for uplift in value, and the ability of a council to play a key facilitation role in making it happen, even though council may not necessarily be the end-provider.

The State government, Registered Housing Agencies and local governments also share several strategic objectives to inform decision-making in relation to the use of publicly owned land for affordable housing, including for example:

- Meeting legal and regulatory requirements

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[5] Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966.

- Maximising public/social outcomes in key localities
- Ensuring organisational and project viability
- Delivering value for public investment
- Placing resident (citizens and tenants) interests at the centre of decision-making
- Regulating management of investment and tenancies
- Mitigating risks, and
- Long-term outcomes and reinvestment of subsidies over time.

Land is a key cost input and can help make a significant difference in terms of housing outcomes for particular income households. Investment and/or subsidy are required to meet the costs of Affordable housing development, as the return from rents, after taking into consideration operating costs, is insufficient to support any, or significant borrowing. This is where land as the most important component of any housing development can play a significant role in reducing the up-front costs.

The delivery of affordable housing therefore requires:

- An assessment and determination of the types of households to be supported and an assessment of their financial capacity and dwelling requirements;
- Subsidy to bridge the gap between market prices and below-market revenue;
- Specialised tenancy management;
- Connection to support services for residents where required; and
- Regulation of subsidy to ensure appropriate use and reinvestment over time (Affordable Housing Outcomes and Moores, 2021:15).

Some of these matters are explored below.

3.1 Key considerations in identifying, releasing and developing publicly-owned land for affordable housing

The release and development of publicly owned land is a complex process that requires the relevant organisations (including the State government, local councils and Registered Housing Agencies) to have the resources, skills and time to assess and make decisions in relation to several matters, including:

- Objectives
- Roles
- Legislative and regulatory requirements;
- Land suitability and development potential;
- Social and economic priorities and value;
- Housing demand, priority household cohorts and their housing and support service requirements;
- Development feasibility;
- Planning requirements and process; and
- Risks, responsibilities and mitigations.

Key issues for consideration are outlined in Table 3.

TABLE 3: KEY CONSIDERATIONS IN IDENTIFYING, RELEASING AND DEVELOPING PUBLICLY-OWNED LAND FOR AFFORDABLE HOUSING

Focus area	Considerations
Objectives	• What are Council's primary objectives in wanting to secure the provision of social and affordable community housing in the local area? • Are there specific tenant or housing outcomes the council wants to achieve? • Are there any Registered Housing Agencies willing to take on a commitment to delivering the same housing objectives?
Roles	• Which organisations (Registered Housing Agencies) are best placed and regulated for this purpose and willing to play that role in the local Council area? • What role is council seeking to play? • How does this align with Council's legislative responsibilities and strategic objectives? • What role can Registered Housing Agencies fulfil?
Legal and Regulatory Requirements	• What legal requirements must be met in the release and development of the land? • Is the land classified as Crown land? Is it subject to native title rights and interests or Aboriginal Traditional Owner interests? Is the land within a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic)? What processes must be followed to ensure the native title holders or Aboriginal Traditional Owners are appropriately involved in the decision making about the future use of the land? • What regulatory requirements must a Housing Agency meet and how do these impact on their ability to support a delivery model or mechanism to secure outcomes?
Land Suitability and Development potential	• What publicly owned land in the LGA is suitable for Affordable Housing? • Where is the land located and what services would residents be able to access? • What criteria determines the shortlist for suitable sites? • What is the site history and is there a risk the land is contaminated? Have site investigations been undertaken? • Are there alternative community uses for the land that also need to be considered? What is the priority use for the council and why? • Are there existing uses on the land and will these need to be replaced? How will any costs of replacement bet met? Does council need to own the replacement asset? How does this use impact on dwelling yield and potential site use for Affordable Housing? • What planning controls apply? Is there a potential for a higher zoning to increase yield? • What is the indicative height, type and number of dwellings that could be built?

Land Release Option	• What processes must be followed to enable the land to be released / disposed of? • What are the legal requirements? • What are the options for release so as to maximise the potential benefits to the community for social and affordable community housing outcomes for the local area? How is the State proposing to release the land? • What are the benefits and disadvantages of different options? What is the preferred option? • Does the State need to retain ownership of the land and why? How is this weighed up against achievement of social outcomes through the delivery of Affordable Housing? • Is this a 'one-off' disposal, or is there potential for a pipeline of sites?
Development and Operational Feasibility	• What is the estimate of site value assuming a highest and best use? • What is the indicative cost of development? Are there demolition or remediation costs? What are the costs of any replacing or including council facilities? • What impact would council priorities in terms of program outcomes, target households, design and/or sustainability have on construction or operating costs? • Would development be feasible if it was delivered as market-priced housing? i.e. would there be sufficient return on land and development (this test helps determine land value and likely financing); • Does the State or council require a financial return on the land? • What are the current and potential funding and financing opportunities that could support construction costs? Who has access to these opportunities and what are the terms and conditions? Does the way the land is provided impact on these options, and is the criteria for funding consistent with the terms of the land release being considered by council? • Does council have other contributions it could potentially make towards development costs?
Risks and Mitigations	• What are the risks for council and for the housing agency and how can these be mitigated?
Decision making process	• Are there external approval processes that are required? How will these be managed and what is the timing? • What governance arrangements might be required to be put in place between the council and Registered Housing Agency? • What consultation processes does council need to undertake to facilitate the use of the land for social and affordable community housing before the release of land can occur? What approval processes does a Registered Housing Agency need to undertake to apply to receive and develop land?
Priority households	• Are there priority households the housing agency or council is seeking to support? • What are the State Government priorities?

	• How does a particular priority emphasis influence the project feasibility? • What are the benefits and disadvantages of setting a specific priority household group?
Terms of Use	• What is a reasonable term of use, taking into consideration the delivery model and mechanism to secure outcomes? • What impact would an 'in perpetuity' objective have on a housing agency capacity to deliver? • How does 'in perpetuity' take into consideration the lifecycle of a dwelling and the change in value over time?
Mechanism to secure contribution/outcome	• Is use of the specific piece of land as Affordable Housing 'in perpetuity' critical, or will council consider allowing a future sale of the land if the investment provided by council was appropriately secured and reinvested in the municipality? • What are the mechanisms for securing a land contribution in an Affordable Housing purpose? • Does council have an existing vehicle or is it considering establishing a special purpose vehicle for the purposes of Affordable Housing? How does this impact on options, process and timing to release land? • What is a reasonable time to require use of a site as Affordable Housing? What factors influence this decision? • What are the potential obligations in relation to the use of land over time?
Reinvestment requirements	• What conditions are reasonable to place on a Housing Agency in relation to reinvestment of the State's or Council's contribution? • How do the requirements (and means of securing) impact on delivery model?

Source: Affordable Development Outcomes and Moores, 2021:85-86.

These matters require careful consideration from the outset, as they will have a bearing on the land release option.

3.2 Land Release Options

There are four land release options that the State can apply to release publicly-owned land for social and affordable community housing outcomes. The four options that could apply are:

1. Gifting of land (including 'air rights' for multi-storey developments);
2. Sale of land at a discount;
3. Leasing of land (either for nil return or at a discount);
4. Joint Venture or Partnership Agreement.

Factors to consider in deciding the land release option include the context, policy drivers, strategic objectives, specific site constraints and opportunities, and the nature of the specific outcomes that the State and local council want to see achieved in a particular locality local government area.

Depending on the desired outcomes in terms of target household types, local circumstances and the configuration of a potential site or sites, it may be desirable to apply a different land release option on different parts of the overall site in order to achieve a range of outcomes.

The guide to options for delivering and securing Affordable Housing advises that each land release option should be assessed against Council's primary objectives for Affordable Housing with reference to the rating system shown in **Figure 10** above (Affordable Development Outcomes and Moores, 2021:22). The objectives may be agreed with the State and potential Registered Housing Agencies prior to making these decisions so as to ensure they are appropriate and achievable in the circumstances.

FIGURE 10: RATING SYSTEM FOR ASSESSING LAND RELEASE OPTIIONS

High	Option rates highly against criteria. i.e. Provides high-level assurance or likelihood criteria will be realised.
Medium	Option rates moderately against criteria. i.e. Provides degree of assurance or likelihood criteria will be realised with some risks.
Low	Option rates low against criteria. i.e. Limited or no assurance or likelihood criteria will be realised and/or considerable risks.

Source: Affordable Development Outcomes and Moores, 2021:22).

While each of the different land release options have their strengths and weaknesses, the primary consideration is that land is a considerable cost input to affordable housing outcomes, and the selected land release option will make a tangible contribution to project feasibility and outcomes.

The objectives for assessing the land release option may include:

- Maximising the number of Affordable Housing outcomes;
- Targeting priority, very low to low income households;
- Foregoing any financial return on the land in question;
- Development and operational feasibility;
- Reinvestment of the land value over an agreed period of time or the life of the dwellings;
- The RHA can meet regulatory requirements and prudentially manage the assets over an agreed term. (Affordable Development Outcomes and Moores, 2021:22).

3.3 Mechanisms for securing delivery of social and affordable community housing outcomes

There are five options for securing the delivery and subsequent management of social and affordable housing outcomes over time. They include:

1. Public housing owned and operated by the State Government;
2. Ownership by a Registered Housing Agency;
3. Legal Agreement, i.e. Section 173 Agreement, Heads of Agreement, right to lease, contract to sale;
4. Placement of assets in a Special Purpose Vehicle (SPV), e.g. Housing Trust;

5. Mortgage instrument.

Factors to consider in deciding the best mechanism for securing the delivery of Affordable Housing outcomes include how the delivery of agreed outcomes will be assured once the land is transferred out of state or local government ownership, and how the value of the public contribution (whether this be publicly-owned land by the State of council or other contributions in cash or kind) can be secured to ensure agreed and appropriate period of use and any reinvestment of the contribution at the end of dwelling life or if the asset is sold.

The guide to options for delivering and securing Affordable Housing advises that each mechanism should be assessed against Council's primary objectives for Affordable Housing with reference to the rating system shown in **Figure 10** above (Affordable Development Outcomes and Moores (2021:22). The objectives may be agreed with the State and potential Registered Housing Agencies prior to making these decisions to ensure they are appropriate and achievable in the circumstances.

While each of the different mechanisms have their strengths and weaknesses, the primary consideration is that the outcomes will have benefits for the community for a long time.

The objectives for assessing the mechanism for the delivery of social and affordable housing outcomes may include:

- The land will be developed for specific Affordable Housing outcomes;
- Development of the site will be for an agreed purpose, term and tenant cohort;
- Development and operational feasibility
- Reinvestment of the value of the Council or the State's contribution to Affordable Housing outcome at the end of an agreed term or dwelling life.
- The RHA can meet the regulatory requirements and prudentially manage the asset over an agreed term (Affordable Development Outcomes and Moores, 2021:57).

While the Guide to *Options for Delivering and Securing Affordable Housing on Local Government Land* developed by the Community Housing Industry Association (CHIA) and the Municipal Association of Victoria (MAV) was written for land owned by local government, it nevertheless provides helpful information about each of the land release options and housing delivery mechanisms (Affordable Development Outcomes and Moores, 2021).

4. Government Land in Victoria

4.1 Context

Government land refers to all land held by the Victorian Government, including by departments and agencies.

The Victorian Government currently holds approximately 8.8 million hectares of land across Victoria, representing almost 40% of the total land area in the state.

Of the total government land in Victoria, approximately:

- 7.7 million hectares is reserved Crown land
- 300,000 hectares is unreserved Crown land
- 200,000 hectares is freehold land
- 600,000 hectares is roads (mix of Crown and freehold land).

About one third of Victoria is classified as Crown land.[6] This comprises about 8 million hectares in over 100,000 parcels of land. Of this land, approximately:

- 50% of Crown land in Victoria is national or state parks
- 39% is State Forest
- 4% is unreserved or Australian Government managed Crown land
- 7% (550,000 hectares) is Crown land reserves.

There are more than 8,000 Crown land reserves in Victoria. They include many public schools, universities and TAFE colleges, public hospitals, mental health and other community services, cemeteries, municipal buildings and land, public roads, government railways, parks, community halls, recreation reserves and racecourses.

4.2 Victorian Government Land Policies

Government land in Victoria is administered under a number of different policies and frameworks, which give various roles and responsibilities to different agencies across government and the laws and policies relating to Government land in Victoria are quite complex. It is important to understand that best practice in this area is constantly evolving, and this report provides a very general guide for local councils as to what is entailed in the Victorian government to decide that a particular Allotment(s) is surplus to requirements and can therefore be disposed of.

Government land is an important asset for all Victorians, because it enables government to provide a wide range of services and facilities, protect environmental and cultural values, and facilitate community and recreational uses. While Government land can be used for public benefit countless

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[6] Crown land is held by the Crown (the King or Queen) in right of the State of Victoria. Crown land can be reserved for a particular public use, or unreserved. Unreserved Crown Land has not been set aside for a particular public use.

times, it can only be sold (by government) once. The Victorian Government's policy about unlocking public value from government land requires any decisions about the land's future use are about ensuring its full public value is maximised, that the needs of current and future generations are considered, and that land use decisions are in line with whole-of-government strategic priorities (Government of Victoria, 2015).

The Victorian Government has a suite of policies for the acquisition, use, management and disposal of Government land. The key policy documents and their purpose are listed in **Table 4**.

TABLE 4: VICTORIAN GOVERNMENT LAND MANAGEMENT POLICIES

Policy	What the Policy does
Victorian Government Land Transactions Policy 2022)	This policy exists to ensure agencies act in accordance with the highest standards of behaviour when undertaking land transactions. It does this by creating a consistent framework for the way agencies across the Victorian government are required to undertake land transactions, including: • a clear set of requirements that agencies must comply with when undertaking land transactions, and • establishing the role of VGLM to deliver assurance to the Victorian government and community that agencies are complying with the requirements in the policy.
Victorian Government Land Use Policy and Guidelines. Unlocking public value from government land (land use policy) (2017)	This policy establishes a framework that enables a strategic, whole-of-government approach to land use decision making, with the objective of maximising public land value.
Strategic Crown Land Assessment Policy and Guidelines (SCLA policy) (2016)	This policy sets out the government's responsibilities and obligations when Crown land is declared surplus and requires that the government conduct an assessment to determine whether surplus Crown land can be sold.
Victorian Government Landholding Policy and Guidelines (landholding policy) (2015)	This policy sets out when an agency can purchase and retain land and requires agencies to offer to sell any surplus land to other Victorian government agencies, local councils, or the Commonwealth before it can be sold to the public.

Source: Victorian Government Land Transactions Policy, 2022:05.

Victorian Government Land Transaction Policy

The primary document is the *Victorian Government Land Transactions Policy* (Government of Victoria, 2022). This policy applies to all State government agencies that undertake land transactions in Victoria. The Policy sets out the basic principles, the policy requirements, exemptions to the policy, how transactions apply, glossary and abbreviations and four Appendices providing additional information.

- Part 1 of the document sets out the basic principles relating to the purpose of the policy and key terms used in the policy.

- Part 2 sets out the Land Transaction requirements, the need for accountability, transparency and the legislation that applies, due diligence requirements, the Victorian Government Land Monitor (VGLM), valuation requirements, land exchange, public sales process, sale of land with a public zone, and conditional sales such as a lease with option to purchase.
- Part 3 deals with exemptions to the policy, how exemptions can be granted, and the how specific exemptions can apply to particular circumstances.
- Part 4 deals with transactions, including sale, purchase, compensation for land acquisition, government to government transactions and leasing.
- Part 5 provides a glossary of terms and abbreviations used in the policy.
- Part 6 includes four Appendices providing additional information.

Victorian Government Land Use Policy and Guidelines

The *Victorian Government's Land Use Policy and Guidelines* (Government of Victoria, 2017) is the key policy document for unlocking public value land from government. The policy document includes five sections

- Section 1 provides an overview of the contents of the policy.
- Section 2 details the principles that should be applied by government agencies when making land use decisions to ensure a public value focussed, whole-of-government approach.
- Section 3 details how Land Use Victoria will apply the public value decision making principles when undertaking Strategic Land Use Assessments.
- Section 4 details how Land Use Victoria will access and provide more accurate information about government land, through regular performance reporting to government and through the development of systems and tools.
- Section 5 details the hierarchy of land-related policies, Land Use Victoria's work plan identification and approval procedures and the roles of various stakeholders.

Victorian Government Strategic Crown Land Assessment Policy and Guidelines

The *Victorian Government Strategic Crown Land Assessment Policy and Guidelines* (SCLA policy) (Government of Victoria, 2016) applies to the assessment of all Crown land identified as surplus to a landholding agency's needs and nominated for a Strategic Crown Land Assessment (SCLA). The Policy details the guidelines for the assessment process, identifying and assessing public land values, protecting public land values, assessing native title and Traditional Owner rights, the land status and management arrangements, and exemptions and responsibilities. An Appendix outlines various means that could protect public land values, the different situations for which each means may be used, and their associated advantages and disadvantages. This details in the Appendix are not exhaustive, and other means of protection may become available or may be developed over time.

Victorian Government Landholding Policy and Guidelines

The Victorian Government Landholding Policy and Guidelines (landholding policy) (Government of Victoria, 2015) details the land holding policy and guidelines that apply to all government agencies and departments in Victoria. The purpose of the policy is to:

(a) ensure that land is only purchased or retained by Victorian Government agencies where State ownership of land:
   (i) contributes directly to current or future service delivery outcomes expected by Government;
   (ii) is central to the core business of agencies as explained in agency corporate plans;
   (iii) is financially beneficial to the State when compared to alternative investment of State funds; or
   (iv) in the case of Crown land, is appropriate on the basis that the protection of public land values make the land unsuitable for divestment;

(b) promote the highest and best use of land by providing the opportunity for the private and community sectors and other government agencies to further unlock the value inherent in the State's land estate; and

(c) require active management of land portfolios across Victorian Government agencies which is essential to the good management of the State's balance sheet. This includes reviewing agency land holdings to justify the basis upon which land continues to be held by the agency, and identifying land that is fully utilised, partially utilised or surplus to the agency's requirements.

4.3 Unlocking public value land from government – the Etty Street Case

The policy documents of most relevance to the Etty Street site are:

- the *Victorian Government Land Use Policy and Guidelines* (Government of Victoria, 2017);
- the *Victorian Government Strategic Crown Land Assessment Policy and Guidelines* (SCLA policy) (Government of Victoria, 2016); and
- the *Victorian Government Land Holding Policy and Guidelines* (Government of Victoria, 2015);

Under the *Victorian Government Land Use Policy and Guidelines* (Government of Victoria, 2017), agencies are required to appreciate that the public land they hold has a value of its own. For example, when government land is used to locate a school it delivers increased value through education outcomes. Likewise, when government land is used for a national park it delivers increased value through recreational, public amenity and environmental outcomes. By applying the public value principles, agencies can seek to identify and facilitate opportunities to deliver increased public value from their land use.

Strategic Land Use Assessments (SLUA) are applied whereby land use options are considered and public value is assessed. A SLUA provides a structured process to gather, analyse and assess the relevant evidence to support good land use decision-making. The aim of a SLUA is to make recommendations to the relevant decision-maker on the preferred options that maximise public value from a whole-of-government perspective. The methodology that Land Use Victoria applies is set out in the *Victorian Government's Land Use Policy and Guidelines* (Government of Victoria, 2017:15),

The Policy document also includes an outline of the roles and responsibilities of departments across the land asset lifecycle from strategy, planning, acquisition and delivery, use and disposal. In relation to disposal of land, the policy states:

The Landholding Policy provides that government agencies must dispose of land if holding the land is not justified under that policy (for example, if the land does not contribute in a cost-effective manner to the current or future service delivery outcomes of the agency). Once an agency has declared land surplus to its service delivery needs, it notifies Land Use Victoria to undertake the First Right of Refusal (FROR) process, which gives other agencies as well as local governments and the Commonwealth the ability to express an interest in acquiring the land. The Landholding Policy provides details about how the FROR process operates. If the FROR process does not result in the land being transferred to another government agency, then the landholding agency (or in some cases the Department of Treasury and Finance) prepares to sell the land on the open market in accordance with the Victorian Government Land Transactions Policy. The Victorian Government Land Monitor oversees the transaction and applies the same requirements as those applied to land acquisition. (Government of Victoria, 2017:17).

Under the *Victorian Government Strategic Crown Land Assessment Policy and Guidelines* (SCLA policy) (Government of Victoria, 2016) A Strategic Crown Land Assessment (SCLA) must be undertaken to enable:

(i) a landholding Minister to consider:
   A. whether land should be alienated from the Crown estate;
   B. whether appropriate protections exist for any public land values if Crown land is to be alienated; and
   C. the implications of and impacts on the rights of traditional owners and / or native title claimants if Crown land is to be alienated;

(ii) the Minister for Environment, Climate Change and Water to undertake statutory responsibilities and satisfy policy obligations regarding the Crown estate.

The purpose of the SCLA Policy is to:

(i) ensure that assessments are undertaken for all Crown land that has been declared surplus to the requirements of a Victorian Government agency by the responsible landholding Minister;

(ii) inform decision making by relevant landholding Ministers and the Minister for Environment, Climate Change and Water on:
   A. public land values of Crown land; and
   B. the protection of public land values;

(iii) determine the status of traditional owner and / or native title rights for Crown land declared surplus to the requirements of a Victorian Government agency.

Under the SCLA Policy, a SCLA is to be submitted to the landholding Minister and the Minister for Environment, Climate Change and Water or their delegates for consideration prior to any decision being taken on alienation of land from or inclusion of land in the Crown estate.

If in the view of the landholding Minister and the Minister for Environment, Climate Change and Water, after considering a SCLA, a parcel of land is suitable for alienation from the Crown estate the land is to be referred to the Minister for Finance for disposal.

A SCLA can only be undertaken by assessors within the Department of Environment, Land, Water and Planning who are suitably qualified to undertake such assessments, or external assessors who have

been evaluated by the Department of Environment, Land, Water and Planning as suitably qualified to undertake such assessments.

Unless otherwise agreed, a SCLA is to be undertaken within 90 days from the day on which the assessment was requested and submitted to the assessor in the required format and funded by the landholding agency.

The SCLA Policy is to be implemented in accordance with the SCLA Guidelines attached to the Policy (Government of Victoria, 2016:1-19).While the SCLA Policy and SCLA Guidelines are administered by the Department of Environment, Land, Water and Planning (DELWP) on behalf of the Minister for Environment, Climate Change and Water, they are to be used for the assessment of public land values and determination of all Crown land declared surplus by an agency.

In relation to the declaration of surplus land, the Guidelines state that:

> *Agencies requesting a SCLA should supply a written declaration that the Crown land to be assessed is surplus to current and future operational requirements with other necessary information as detailed in section 3.1. A SCLA cannot commence without a formal declaration that the land is surplus.*
>
> *Agencies will undertake their own internal processes to assess whether the Crown land they manage is surplus to their operational requirements.*
>
> *For Crown land managed by DELWP, an internal agency level assessment will be used to assess whether Crown land may be surplus. If land is determined to be surplus to DELWP's current and future operational requirements, the Minister for Environment, Climate Change and Water or delegate will consider the results of the agency level assessment and formally declare the land to be either surplus or not surplus to DELWP's requirements.*
>
> *Some Crown land will be determined not to be surplus to agencies' current or future operational requirements, or through the SCLA process as containing significant public land values that require some means of protection into the future. There can also be community, cultural, environmental or strategic considerations that may influence whether or how Crown land could be used for new purposes.*
>
> *In addition to the inherent public land values of assessed Crown land, the Minister for Environment, Climate Change and Water may also consider past and future community use and benefit of the land in determining whether certain land is surplus and able to be alienated, or whether the land should be retained in the Crown estate.* (Government of Victoria, 2016:2)

Under the *Victorian Government Landholding Policy and Guidelines* (Government of Victoria, 2015), upon declaring land surplus to an agency's requirements, Victorian Government agencies must:

(iii) provide notice of 60 days of the agency's intention to dispose of land during which period other State, Commonwealth or local government agencies may express interest in acquiring the land;
(iv) if another government agency expresses interest in acquiring the land, negotiate in good faith to attempt to agree on the terms of sale within 30 days after the close of the notice period; and

(v) if the terms of sale are agreed, transact the sale of the land at a price equal to the current market value of the land as determined by the Valuer-General Victoria.

4.4 The Etty Street circumstances

In accordance with the State Government's land policies discussed above, the Department of Education will be required to undertake a SCLA for the following Allotments:

- Crown Allotment 2, Section 132
- Crown Allotment 3, Section 132
- Crown Allotment 1, Section 133, and
- Crown Allotment 4, Section 132.

The purpose of the SCLA will be to ascertain which Allotments (or parts thereof) are surplus to requirements and which parts of some of the Allotments will need to be retained because the land is continuing to be used for a public benefit.

Once the SCLA has been undertaken and assessed by the DELWP, the land that is deemed to be surplus to requirements will need to be referred to the Treasury for disposal.

Similarly, the DELWP will also need to undertake an SCLA of the following three Allotments:

- Crown Allotment 19, Section 124
- Crown Allotment 7, Section 132, and
- Crown Allotment 4, Section 132.

The purpose of the SCLA will be to ascertain which parts of Allotments are surplus to requirements and which parts may need to be retained as Crown land for drainage and informal public recreation purposes.

Once the SCLA has been completed by DELWP, the land that is deemed surplus to requirements will need to be referred to the Treasury for disposal.

These processes have not yet been initiated for the Etty Street site.

While the decision on the method of disposal will be made by the Treasury, the local Council will have the opportunity to apply for the first right of refusal. It is at this point that Mount Alexander Council should make the case for a method of disposal that will provide the best possible outcomes for the provision of social and affordable community housing.

5. Aboriginal Traditional Owner rights and Native Title rights and interests in Crown land in Victoria

5.1 Recognition of Aboriginal Traditional Owners in Victoria

In Victoria, there are currently three different processes for Aboriginal groups to become formally recognised as Traditional Owners of Country. The Three processes are:

- Registered Aboriginal Party (RAP) under the *Aboriginal Heritage Act 2006* (Vic);
- Native title determination under the *Native Title Act 1993* (Cth); and
- Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic).

Traditional Owners seeking formal recognition can pursue any or all of these processes. Each of these processes has different outcomes for the Traditional Owner groups concerned as well as for third parties, such as local governments.

These three processes have been in place for some time now, and quite a lot of work has been undertaken across Victoria in identifying the Traditional Owner groups and in developing a framework for respectful engagement with Traditional Owner groups. Any engagement with Traditional Owner groups must therefore be cognisant of the wider context, including Treaty developments in Victoria as well as nationally. More details are provided in Appendix B.

It must be noted that regardless of the steps outlined in this report, it will still be necessary to ensure compliance with the *Aboriginal Heritage Act 2006* (Vic).

5.2 Assessing Traditional Owner rights and Native Title rights and interests

Victorian Crown land is subject to compliance with either the Land Use Activity Regime (LUAR) under the *Traditional Owner Settlement Act 2010* (Vic) or the future act regime of the *Native Title Act 1993* (Cth). Assessors completing a SCLA will identify whether native title or traditional owner rights exist over the land. This part of a SCLA is mandatory irrespective of the assessor's final recommendations.

While negotiation of consent from the holders of native title or traditional owner rights, or addressing any other procedural rights relating to native title or traditional owner rights, are outside the scope of a SCLA, the SCLA process is designed to identify whether these matters need to be taken into consideration (Government of Victoria, 2016:10).

The following information is drawn from the Victorian Government Strategic Crown Land Assessment Policy and Guidelines (Government of Victoria, 2016:10).

Traditional owner rights under the *Traditional Owner Settlement Act 2010* (Vic)

First, ascertain whether the land is within an area subject to a Recognition and Settlement Agreement (RSA) and a Land Use Activity Agreement (LUAA) under the *Traditional Owner Settlement Act 2010* (Vic).

Agreements under the *Traditional Owner Settlement Act 2010* (Vic) are made between the State and a traditional owner group and may include a LUAA which replaces the future act regime of the NT Act.

If an Allotment of Crown land is within a Land Use Activity Agreement (LUAA) area, then the LUAA assessment process applies. The LUAA effectively provides alternative processes for specified rights to be extended to traditional owner groups regarding activities proposed to be undertaken on Crown land. The procedural rights extended under the LUAA for proposed activities on Crown Land differ from those under the *Native Title Act 1993* (Cth). It is important to note that different procedural rights may apply to specific types of activities, depending on the specific LUAA that applies to the land in question.

More information about settlement of native title matters under the *Traditional Owner Settlement Act 2010* (Vic) are provided in Appendix C.

Native title rights and interests under the *Native Title Act 1993* (Cth)

If the subject Crown land is not covered by a LUAA, the future act regime under the *Native Title Act 1993* (Cth) applies.

The next step is to evaluate whether native title rights and interests continue to exist over a particular parcel of Crown land.

As part of the SCLA process, it is important to ascertain whether native title rights and interests:

- have been determined to exist by way of Orders in the Federal Court of Australia;
- have been determined not to exist by way of Orders in the Federal Court;
- do not exist because there is primary documentary evidence of an act of the Crown that clearly will have fully extinguished any native title in accordance with the *Native Title Act 1993* (Cth);
- may exist in the absence of identified extinguishment evidence; or
- are subject to a pre-existing right that may allow the sale of the land to proceed without an Indigenous Land Use Agreement (ILUA).

If the land is outside a determination area under the *Native Title Act 1993* (Cth), it is required that an extinguishment assessment be undertaken in accordance with DELWP's Native Title Future Act Assessment Manual.

The findings must be documented in the SCLA report. Copies of the primary documentary evidence that proves extinguishment must be provided with the SCLA report.

Agencies should be aware that even if land is retained in the Crown estate but a change in land status is sought, procedural rights in a LUAA under the *Traditional Owner Settlement Act 2010* (Vic) or the future act regime of the *Native Title Act 1993* (Cth) may apply.

Agencies should also be aware that even if native title rights are assessed as having been extinguished, the status may be reversed in certain circumstances if the land becomes part of a native title determination under section 47B or 47C of the *Native Title Act 1993* (Cth).

More information about the *Native Title At 1993* (Cth) is provided in Appendix D.

5.3 A Step-by-Step process for local government

What follows is a step-by-step process to assist local government councils with navigating whether Crown land in Victoria is subject to Aboriginal Traditional Owner rights or native title rights and interests. This guide is not meant to be exhaustive, but rather to provide general guidance so local government councils have an understanding of the key steps involved.

There is a distinction between Aboriginal Traditional Owners and Native Title holders or registered claimants because a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic) effectively replaces the native title settlement and future act processes under the *Native Title Act 1993* (Cth). Therefore, the term Aboriginal Traditional Owner is applicable in areas where there is a Recognition and Settlement Agreement in place, and the term native title native title holder or registered native title claimant is applicable in areas where a Recognition and Settlement Agreement is yet to be negotiated and native title rights and interests have been determined to exist or may exist and are yet to be determined.

STEP 1: Adopt a precautionary approach. The best approach that a local government council can take is to adopt a precautionary approach, recognising that the Aboriginal peoples of Victoria never ceded their sovereignty and that their rights and interests may still exist. To avoid any risks of inadvertently or otherwise affecting Aboriginal peoples' rights and interests and in the interests of reconciliation and maintaining harmonious relations with the local Aboriginal peoples, engage with the relevant Traditional Owner group(s) in good faith. Adopting a precautionary approach means that council can be inclusive of Aboriginal peoples' rights and interests from the outset and avoid complications by not having engaged with the Aboriginal people to begin with.

STEP 2: Identify the subject land's legal status. It is first necessary to ascertain whether the land in question is:

- unreserved Crown land (managed under the *Land Act 1958* (Vic);
- Crown land temporarily or permanently reserved under the *Crown Land (Reserves) Act 1978*
- (Vic) or other act such as the *National Parks Act 1975* (Vic) or *Forests Act 1958* (Vic);
- a government road or contains a government road, managed under a variety of legislation; or
- freehold land.

If land is reserved the assessment must identify the reserving act, the purpose for which it is reserved, and whether the reservation is permanent or temporary.

It is also important to identify the agency that is holding and managing the Crown land, as the land holding agency is responsible for initiating a request for a SCLA.

If the land is held as Crown land under the *Land Act 1958* (Vic) or the *Crown Land (Reserves) Act 1978* (Vic) then it will be subject to native title rights and interests and may be included within a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic). Go to **STEP 3**.

If the site is not held as Crown land under the two statutes mentioned above, it may be held by a department or agency of the State as Government land. Generally, native title rights and interests have been extinguished on Government land (but not Crown land) by valid past acts under the *Native Title Act 1993* (Cth) and complementary state legislation. Government land is therefore generally not included in a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic). Recognition and Settlement Agreements and Land Use Activity Agreements (LUAA) only apply to land that is classified as Crown land.

If the land is not subject to native title rights and interests under the *Native Title Act 1993* (Cth) and is also not subject to a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic), then no further action in relation to native title or Aboriginal Traditional Owner rights and interests is required (apart from Aboriginal heritage). However, at the very least, this needs to be ascertained by searching the appropriate Registers held by the National Native Title Tribunal and/or the State Government and by engaging with the relevant native title holding group(s) and/or Aboriginal Traditional Owner group(s) and the State Government.

STEP 3: Establish whether the subject land is subject to Aboriginal Traditional Owner rights or native title rights and interests. If the land is held under either the *Land Act 1958* (Vic) or the *Crown Land (Reserves) Act 1978* (Vic), then it will be necessary to check the State's Register of Recognition and Settlement Agreements (RSA) under the *Traditional Owner Settlement Act 2010* (Vic) [https://www.justice.vic.gov.au/your-rights/native-title]:

- If a Recognition and Settlement Agreement is in place, then it will be necessary to engage with the Traditional Owner group entity that signed that Agreement. Go to **Step 5.**
- If a Recognition and Settlement Agreement is not in place, then it will be necessary to ascertain who the formally recognised Aboriginal Traditional Owners are and/or the who native title holders are for the land in question. Go to **STEP 4**.

STEP 4: If the site is not within an area covered by a Recognition and Settlement Agreement, then it will be necessary to ascertain who the Traditional Owners are for the site in question. This can be done in a number of different ways:

- Search the State's Register of Aboriginal Parties (RAPs) under the Aboriginal Heritage Act 2006 (Vic): https://www.aboriginalheritagecouncil.vic.gov.au/victorias-current-registered-aboriginal-parties
- Search the various registers held by the National Native Title Tribunal to ascertain whether a native title determination has been made by the Federal or High Courts of Australia, whether there is a registered native title determination application awaiting

determination, or whether there is a registered Indigenous Land Use Agreement (ILUA) already in place and which applies to the subject land, or any other applications or determinations on the registers held by the National Native Title Tribunal: http://www.nntt.gov.au/searchRegApps/Pages/default.aspx

- Contact First Nations Legal and Research Services and ask them to help council identify the relevant Traditional Owner group(s) may be for the site in question. https://www.fnlrs.com.au/what-we-do

It may be necessary to try all of these options and see what information they yield. In any event, in areas where there are no formally recognised Traditional Owners (shown in yellow and orange in Figure 9 above), it will be necessary to engage with First Nations Legal and Research Services as it is their role to assist third parties with working out who the Traditional Owners and/or native title holders are in any particular locality.

Once the relevant Aboriginal Traditional Owner group(s) or native title holder group(s) have been identified, then they are who council will have to engage with. The procedural rights that Aboriginal Traditional owners and/or native title holders will be entitled to are set out briefly in STEP 5.

STEP 5: The development of Crown land for housing would constitute a future act under the *Native Title Act 1993* (Cth). A future act is an act that affects native title rights and interests. An act 'affects' native title if it extinguishes native title rights and interests or if it impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise (s.227 of the NTA).

It is not the development of the land that affects the native title rights and interests, but rather the conversion of the land from Crown land to another form of land tenure which affects the native title rights and interests by extinguishing them. For a future act to be valid, it must be done in accordance with the future act provisions in Division 3 of Part 2 of the *Native Title Act 1993* (Cth) or in accordance with the provisions in a Land Use Activity Agreement struck under a Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic).

A. If the site is not subject to a Land Use Activity Agreement (LUAA) under the *Traditional Owner Settlement Act 2010* (Vic), then the future act provisions in Division 3, Part 2 of the *Native Title Act 1993* (Cth) will apply if the future act is to be valid in so far as native title is concerned. Validity for a future act can be obtained by either developing an Indigenous Land Use Agreement (ILUA) or complying with the relevant future act process in Division 3, Part 2 of the *Native Title Act 1993* (Cth). More information about the future act provisions in the *Native Title Act 1993* (Cth) is provided in Appendix D.

B. If the site is in an area which is subject to a Recognition and Settlement Agreement, it will be necessary to search the register of LUAAs: Register of Land Use Activity Agreements, Department of Justice and Community Safety Victoria. A Land Use Activity Agreement (LUAA) under the *Traditional Owner Settlement Act 2010* (Vic), effectively replaces the future acts regime in the *Native Title Act 1993* (Cth). The LUAA will instead set out the procedural rights that will apply to activities listed in the LUAA. The LUAA will include a list of activities and will classify the activities into one of four categories

(i.e. routine, advisory, negotiation [Class A or Class B] and agreement activities). Some agreement activities will require the negotiation of an Indigenous Land Use Agreement or ILUA which will then need to be registered in accordance with the registration provisions in the *Native Title Act 1993* (Cth). More information about the Land Use Activity Regime and land Use Activity Agreements (LUAAs) under the *Traditional Owner Settlement Act 2010* (Vic) is provided in Appendix C.

At the very least, the nature of the proposed development must be discussed with the relevant Aboriginal Traditional Owner group entity to ascertain which procedural rights council must comply with.

STEP 6: There will be costs involved in conducting the negotiations under a LUAA. Section 50 of the *Traditional Owner Settlement Act 2010* (Vic) requires a person seeking to undertake a negotiation or agreement activity on land which is subject to an LUAA to reach a further agreement with the Traditional Owner group entity as to whether the activity can proceed. According to section 52(2) of the Act, the reasonable cost of negotiations under a LUAA is to be "...calculated as prescribed by the regulations".

On 29 September 2015, the Governor in Council made the *Traditional Owner Settlement (Negotiation Costs) Regulations 2015* (the Regulations) (External link). The Regulation provides that the Traditional Owner group entity is to calculate the reasonable cost of negotiating by specifying any decision-making costs, professional services costs and travel costs in Form 1 of the Regulations. Download Form 1 of the Traditional Owner Settlement (Negotiation Costs) Regulations 2015.

There will also be costs involved in developing an ILUA under the *Native Title Act 1993* (Cth). However, while a similar costs arrangement as exists under the *Traditional Owner Settlement Act 2010* (Vic) does not apply to ILUAs negotiated under the *Native Title Act 1993* (Cth), it would be good manners to apply the same approach as exists under the Victorian legislation.

STEP 7: The *Native Title Act 1993* (Cth) includes provisions for compensation for the loss, diminution, impairment or extinguishment of native title rights and interests after 31 October 1975. Therefore, there may also be compensation payable for the loss, diminution or extinguishment of native title rights and interests arising from the proposed future act.

The only judicial consideration of compensation for the loss, diminution, impairment or extinguishment of native title is the Timber Creek case in the Northern Territory. (*Northern Territory v Griffiths* (2019) 269 CLR 1). In very simple terms, the High Court of Australia characterised s.51(1) of the *Native Title Act 1993* (Cth) as recognising two aspects of native title rights and interests identified in s.223(1) of the Act as the 'physical or material aspect' (the right to do something in relation to the land), and the 'cultural or spiritual aspect' (the connection with the land). Compensation for the loss, diminution or extinguishment of native title rights and interests therefore involves both of those aspects. The compensation must quantify the economic loss as a result of being deprived of the right to do something in relation to the land

and quantify the non-economic or spiritual loss, diminution or impairment. The Court also included an amount of interest to reflect the loss of the value of money over time.

The matter of compensation for the loss, diminution, impairment or extinguishment of native title rights and interests will need to be negotiated between the Traditional Owner group entity, the Victorian Government and council.

STEP 8: As discussed in Part 3.2 of this report and in STEP 1 above, any dealings by the State with Crown land or Government land will still be subject to the State's Land Transactions Policy Framework. Government land sales, Department of Treasury and Finance Victoria (dtf.vic.gov.au)

STEP 9: Also, regardless of the steps outlined above, it will still be necessary to ensure compliance with the *Aboriginal Heritage Act 2006* (Vic).

The Steps outlined above provide only general advice. It is advisable for council to seek independent expert advice on any particular matters.

6. Housing Development Considerations

Ultimately and subject to the outcomes of the negotiations, the land transaction process and reaching agreements, Mount Alexander Council, the DDWCAC and the State Government might form a common view as to the types of social and affordable community housing outcomes that would be suitable and desirable for the Etty Street site.

Broad issues to be resolved (beyond the design and housing yield and planning issues) would be:

- Whether the land continues to be held in some form of public or communal ownership, or subject to the agreement reached, what continuing stake the DDWCAC might have in the land. Continuing community ownership would minimise the costs of land acquisition and enable the future asset value improvement to be captured for public benefit. On the other hand, Community Housing Providers, where involved, may need an ownership stake for capital raising or other purposes.
- Who will own and deliver the social and affordable community housing on the site and more importantly, who would be retaining the properties? Again, a continuing stake by DDWCAC may be of some relevance here. Determining potential future development and management responsibilities will affect the procurement approaches.
- Understanding the land and asset value (or 'opportunity cost') implications of disposing of or dedicating state-owned land for social and affordable housing projects. It is typical to obtain two valuations: an unrestricted and a restricted valuation of the site. A restricted valuation considers the land value to be conditional in that it will be used only for housing developed and retained by a community housing provider. An unrestricted valuation considers the land value within the private market (thereby not restricted to social and affordable community housing developed and/or owned by a community housing provider). The departments or agencies that currently owns the land needs to be approached to conduct both types of valuations.
- The valuations will enable Council and the State to determine the financial difference between a restricted value reflecting the conditional use of the land to achieve particular social housing outcomes in that location, compared to an unrestricted valuation reflecting the 'highest and best use' for the site for privately owned housing for sale through the open market. The 'difference' is the effective value contribution by the land-owner to the project, were it to be developed for social and affordable housing. Once the land valuations are completed, there will be a clearer picture of the options and implications of the release of the land for social and affordable housing purposes.
- Depending on the LUAA, a decision on whether the land will be transferred directly to a social housing provider or released to the market via a restricted or open tender process will be required.

Subject to the agreement reached with DDWCAC and as implied by the above there is also an opportunity here – if not an obligation - to include the recognised Aboriginal Traditional Owner group entity as part - and potential beneficiaries - of the development. Given the need to integrate the existing Crown Land likely subject to the existing LUAA between the State and DDWCAC and because the site is being considered for social and affordable community housing, the recognised Aboriginal Traditional Owner group entity (in this case DDWCAC) or another local Aboriginal community-controlled organisation may be interested in participating in the development in some way such that local

Aboriginal people will be among the beneficiaries of the proposed development. To that end, and to enable buy-in from the traditional owners, it is advisable that Council and/or the State Government begin communications with DDWCAC as soon as possible. Early engagement with DDWCAC will enable the plans for the site to be tweaked and revised in a way that provides the best outcome for the council, community and Aboriginal people in and around Castlemaine.

7. Conclusions and Recommendations

7.1 Conclusions

This report documents:

- the existing land uses, land tenure details and social and affordable community housing development proposals of the Etty Street site in Castlemaine;
- the broad options for delivering social and affordable housing outcomes on publicly-owned land;
- the Victorian Government's land transaction policies with a particular focus on the policies and processes governing decisions around the disposal of publicly-owned land that is surplus to requirements;
- whether Crown land and Government land may be subject to Aboriginal Traditional owner rights or native title rights and interests, and what the processes are for dealing with such circumstances.

At a glance the whole process appears complicated and the initial temptation may be to abandon the proposition, and put effort into other options for social and affordable housing outcomes. Having analysed the details, it is not really as complex as it looks.

The following dot points seek to simply the next steps.

1. The Etty Street site comprises two categories of publicly-owned land.
    - Government land held by the Minister for Education and Training; and
    - Crown Land held by the DELWP.
2. Several Allotments are owned by the Minister for Education but held by the Department of Education and Training on the Minister's behalf. There are three Allotments held in Fee Simple and therefore not subject to Aboriginal Traditional Owner rights or native title rights and interests. There is one Crown land Allotment held as Government land for public purposes and therefore also may not be subject to Aboriginal Traditional Owner rights or native title rights and interests, although this is a matter that DELWP can provide more information about.
3. Not all of these Allotments are wholly required for the proposed social and affordable community housing proposed for the site. In particular, Lot 2, Section 132 will require some reconfiguration to separate the parts required for public purposes and the parts that can be deemed as surplus to the Department of Education's requirements.
4. Given the work that Mount Alexander Council has done on the site in terms of master planning and land use feasibility of some of the site for housing, it should be possible to approach the Department of Education and Training, if this has not already occurred, and request that the Department initiates a Strategic Crown Land Assessment (SCLA) to ascertain which portions of the various Allotments are still required for public purposes, and which portions could be deemed as surplus to requirements. DET needs to undertake this task in collaboration with DELWP as the Crown Land Administrator for the Victorian Government.

5. Similarly, Mount Alexander Shire should also approach the Department of Environment, Land, Water and Planning (DELWP) and request that the Department initiates a SCLA on the specified portions of Crown land in the Etty Street site to determine which parts of those Allotments can be released for disposal for social and affordable community housing.

6. The SCLA process by both Departments will ascertain whether any of the land held by DET or DELWP will be subject to Aboriginal Traditional Owner rights and/or native title rights and interests.

7. Once the SCLAs are completed, Mount Alexander Council should commence the process of rezoning the land deemed as surplus to its public purpose requirements to residential, bearing in mind that some of the land will need to be zoned as open space for passive or informal recreation, particularly adjacent to the existing creeks running through the site.

8. When the SCLAs have been completed the relevant agencies can declare the land to be surplus to their requirements and the agencies must notify the Land Use Victoria to undertake a First Right of Refusal (FROR) process. The FROR process will give other agencies as well as local governments and the Commonwealth the ability to express an interest in acquiring the land.

9. Land Use Victoria will undertake a filtering process. A site or issue's strategic significance, public value opportunity and Land Use Victoria capacity will inform the level of assessment. There are three levels of assessment, as follows::
   - **Full Strategic Land Use Assessment.** Undertaken on highly significant and complex sites or issues. These assessments are authorised by the Premier, the Special Minister of State or Cabinet, and require a report back to Cabinet.
   - **Basic Strategic Land Use Assessment.** Undertaken on less significant or complex sites or issues. These assessments are authorised by a landholding Minister or Secretary. Land Use Victoria also has a standing authorisation to undertake Basic Strategic Land Use Assessments on surplus land going through the First Right of Refusal (FROR) process where it meets the thresholds outlined in the Victorian Government Land Use Policy and Guidelines (Government of Victoria, 2017:3-4). Where interest is expressed across multiple departments, Land Use Victoria will facilitate a process post-FROR to ensure conversations are had across government departments to determine a future use which delivers public value.
   - **Ongoing advice and assistance.** Provided for low significance and complexity sites or issues. This advice and assistance is provided directly to the landholding agency.

10. It is at this point that Council will need to be prepared with submissions outlining its case for developing the site for social and affordable community housing, consistent with the objectives and outcomes that Council wishes to achieve for this site. This means that Council will have worked through the process outlined in Chapter 3 above and settled on its objectives, the options for release of the land, mechanisms for securing the development and delivery of social and affordable community housing on the site. Council will need a clear decision on whether it bids for the land and then works with a RHA to deliver the outcomes or whether Council will assist a RHA (or more than one RHA, depending on the objectives, outcomes and delivery model) to negotiate a land release arrangement with the State that will deliver the best possible outcomes in terms of well-targeted social and affordable community housing outcomes.

11. If the FROR process does not result in the land being transferred to another government agency, then the landholding agency (or in some cases the Department of Treasury and Finance) prepares to sell the land on the open market in accordance with the Victorian Government Land Transactions Policy. The Victorian Government Land Monitor oversees the transaction and applies the same requirements as those applied to land acquisition.
12. Our analysis of the public record shows that the Crown land Allotments held by DELWP will be subject to Aboriginal Traditional Owner rights given the site is within the area covered by the Recognition and Settlement Agreement between the State government and the Dja Dja Wurrung Clans Aboriginal Corporation (DDWCAC) under the *Traditional Owner Settlement Act 2010* (Vic). Therefore, the proposed activity on the subject Crown land will be deemed a negotiation activity under the LUAA between the State and DDWCAC. There will be costs involved, as per the details discussed in Step 6 in Part 5.3 of Chapter 5 above.
13. Given the subject site in Castlemaine is within the Recognition and Settlement Agreement between the State government and the Dja Dja Wurrung Clans Aboriginal Corporation (DDWCAC) under the *Traditional Owner Settlement Act 2010* (Vic), it is suggested that Mount Alexander Council has a conversation with them about whether they may want to play a role in being a housing provider in this locality, if Council has not already done so.

7.2 Recommendations

In light of the analysis and conclusions reached above, it is recommended that Mount Alexander Council:

1. Approaches DET and DWELP with a request that they both undertake a SCLA for the specified Allotments they currently own and manage.
2. Provides DET and DELWP with copies of the Hansen Partnership Masterplan for the site, requesting the agencies base their SCLA on the Masterplan and Concepts prepared by Hansen Partnership on the feasibility of the site for residential development.
3. Provides DET and DELWP with a copy of this report, as the basis for specifying the Allotments which need to be included in the SCLAs to be undertaken by the respective agencies.
4. Develops a set of objectives for social and affordable housing outcomes for the site, Council's desired land release option(s) and preferred mechanism(s) for the delivery of social and affordable housing outcomes for the site.
5. Has discussions with DDWCAC to ascertain whether DDWCAC wants to be involved in some way in achieving social and affordable community housing outcomes for local Aboriginal people in this locality.
6. Identifies RHAs that it would be willing to work with and seeks out their willingness to be involved, either with Council support or without Council's direct support.

REFERENCES

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Appendix A: Definitions

Affordable Home Ownership	Affordable Housing, where a household that meets defined income eligibility requirements purchases a property at a rate that is affordable for their household, and where a subsidy provided to support the housing outcome is appropriately secured to ensure future repayment and reinvestment.
Affordable Housing	Defined in the Planning and Environment Act 1987 as housing, including social housing, that is appropriate for the housing needs of very low, low and moderate income households.
Affordable Housing Agreement	The parameters agreed between a council and a developer through the planning system to deliver an *Affordable Housing Contribution*.
Affordable Housing Contribution	A contribution made by a landowner or developer towards an Affordable Housing outcome.
Affordable Rental Housing	Housing that is provided at a discount to rent to households that meet the PE Act or Victorian Housing Register income eligibility requirements.
Community Housing	Affordable Housing managed by not-for-profit organisations.
Community Housing Organisations	Not-for-profit organisations that manage Affordable Housing. Community Housing Organisations include but are not limited to Registered Housing Agencies.
Commonwealth Rent Assistance (CRA)	A non-taxable income supplement, payable to people who receive a government support payment and rent in the private rental market or community housing.
Eligible Household	A household that meets the income threshold set out in a Governor in Council Order (for Affordable Housing), or as set by the Director of Housing for the Victorian Housing Register, and that meets any other eligibility requirements (residency, asset threshold).
Housing Act	*Housing Act 1983* (Vic)
LG Act	*Local Government Act 1993* (Vic) and replacement *Local Government Act 2020* (Vic)
PE Act	Victorian *Planning and Environment Act 1987*
Public Housing	Social Housing that is owned and/or managed by the Victorian Government.

Registered Housing Agency	A Community Housing Organisation registered under Part VIII of the *Housing Act 1983* (Vic) and subject to regulation overseen by the Victorian Housing Registrar. Organisations are registered as a Housing Association or a Housing Provider.
Registrar of Housing Agencies	The Registrar of Housing Agencies, supported by the Office of the Housing Registrar, is responsible for regulatory oversight of the community housing sector in Victoria under the *Housing Act 1983* (Vic).
Residual Land Value	A method for calculating the value of development land. This is done by subtracting all costs associated with the development, including profit but excluding the cost of the land from the total value of the development.
Section 173 Agreement	A legally binding agreement between council and a landowner under s.173 of the *Planning and Environment Act 1987* (Vic). The agreement remains with the land, regardless of any change of ownership.
Social Housing	Defined in the Housing Act as *public housing* (owned and managed by the State Government) and housing owned, controlled or managed by a participating registered agency (a *Registered Housing Agency*).
Special Purpose Vehicle	A subsidiary company formed to undertake a specific business purpose or activity, such as Affordable Housing.
Victorian Housing Registrar	The register for households that apply for and are determined to be eligible for *Social Housing* in Victoria.

Source: Affordable Development Outcomes & Moores (2021) *Options for Delivering and Securing Affordable Housing on Local Government Land; A Guide for Councils and Registered Housing Agencies*, Commissioned by CHIA Vic and MAV with funding support from Homes Victoria, www.chiavic.com.au

Appendix B: Recognition of Traditional Owners in Victoria

Recognition of Aboriginal Traditional Owners in Victoria

In Victoria, there are currently three different processes for Aboriginal groups to become formally recognised as Traditional Owners of Country (**Figure B1**). Traditional Owners seeking formal recognition can pursue any or all of these processes.

The Three processes are:

- Registered Aboriginal Party (RAP) under the *Aboriginal Heritage Act 2006* (Vic);
- Native title determination under the *Native Title Act 1993* (Cth); and
- Recognition and Settlement Agreement under the *Traditional Owner Settlement Act 2010* (Vic).

Specific outcomes that may arise from each of the three formal recognition processes are set out below.

Formally recognised groups under any of these three schemes have rights and responsibilities as recognised Traditional Owners of Country. This means that they are entitled to certain procedural rights when their rights and responsibilities may be affected by the actions of third parties, including local governments, businesses, community organisations and private individuals.

FIGURE B1: THREE PROCESSES FOR FORMAL TRADITIONAL OWNER RECOGNITION IN VICTORIA

Source: https://content.vic.gov.au/sites/default/files/2019-10/Traditional-Owner-Formal-Recognition-in-Victoria.pdf

Registered Aboriginal Party

Registered Aboriginal Parties have cultural heritage responsibilities under the Aboriginal Heritage Act 2006. These include the evaluation of cultural heritage management plans and decisions about cultural heritage permit applications.

RAPs also: provide advice to government and to the Victorian Aboriginal Heritage Council about Aboriginal places and objects; negotiate the return of Aboriginal cultural heritage and Ancestral Remains; participate in cultural heritage agreements, protection declarations and intangible heritage processes; consult with sponsors and heritage advisors; undertake cultural heritage assessments and engage in compliance and enforcement activities.

There are currently 11 Registered Aboriginal Parties (RAPs), covering approximately 75% of Victoria. The list of RAPs, including an online map to find a RAP for an area of Victoria, can be accessed here: https://www.aboriginalheritagecouncil.vic.gov.au/victorias-current-registered-aboriginal-parties

Native Title Determination

A positive native title determination involves recognition by the Federal or High Court of Australia that a groups' rights continue from before European colonisation to the present day. It also lists the native title rights determined; for example, to camp, hunt, fish, gather food, and teach law and custom on Country. Native title holders and registered native title claimants have rights under the Future Acts regime (such as the right to comment on or negotiate agreements) in relation to activities on Country that affect native title rights and interests.

Five agreements between the State and Traditional Owner groups have arisen out of, or complemented native title determinations. The five agreements are:[7]

- Gunaikurnai Settlement Agreement
- Yorta Yorta Co-operative Management Agreement
- Wimmera Settlement Agreement
- Gunditjmara Settlement Agreement
- Dja Dja Warrung Recognition and Settlement Agreement

Recognition and Settlement Agreement

The *Traditional Owner Settlement Act 2010* (Vic) allows the government and traditional owner groups to make agreements that recognise traditional owners' relationship to land and provide them with certain rights on Crown land. The *Traditional Owner Settlement Act 2010* (Vic) provides a framework for the State and a Traditional Owner group to agree to a comprehensive settlement package in lieu of progressing with a native title claim under the *Native Title Act 1993* (Cth). The settlement package can include:

- A Recognition and Settlement Agreement (RSA) recognising the named Traditional Owner group and their traditional rights over Country.
- A joint Recognition Statement that acknowledges the depth of the Traditional Owner group's relationships to Country and their survival, as well as the disruptions and harms of European colonisation, and that also commits the State and the group to a mutual partnership going forward.
- A binding Indigenous Land Use Agreement that 'settles' all native title claims and opts into the *Traditional Owner Settlement Act 2010* (Vic). A Settlement Agreement does not extinguish native title rights and interests but involves an agreement to exercise similar rights and interests under this agreement, and not under the native title regime.
- A Land Agreement providing land transfers and grants of Aboriginal title.
- A Land Use Activity Agreement (LUAA) providing rights for Traditional Owner groups to be consulted on, compensated for and to consent to certain activities on public land within their Country.

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[7] https://www.forestsandreserves.vic.gov.au/land-management/what-we-do/agreements-with-traditional-owners

- A Natural Resource Agreement (NRA) providing rights to use certain natural resources, including for commercial purposes, and participate in natural resource management.
- A Funding Agreement, providing payments into the Victorian Traditional Owners Trust and/or payments to the Traditional Owner Group Entity.
- A Traditional Owner Land Management Agreement (TOLMA), regarding joint management of parks and reserves granted as Aboriginal title.
- Compensation that may be owed by the State for extinguishment.

There are currently two Recognition and Settlement Agreements under the *Traditional Owner Settlement Act 2010* (Vic) in place in Victoria. They are:

- Dja Dja Warrung Clans Aboriginal Corporation (DDWCAC) which commenced on 24 October 2013. (https://www.justice.vic.gov.au/your-rights/native-title/dja-dja-wurrung-settlement)
- Taungurung Land and Waters Council Aboriginal Corporation (TLaWCAC), which commenced on 26 October 2018. (https://www.justice.vic.gov.au/your-rights/native-title/taungurung-recognition-and-settlement-agreement).

And two Recognition and Settlement Agreement negotiations are currently under way, with:

- The Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples (https://www.justice.vic.gov.au/your-rights/native-title/proposed-recognition-and-settlement-agreement-with-the-wotjobaluk-jaadwa) and the
- The Eastern Maar traditional owner group (https://www.justice.vic.gov.au/your-rights/native-title/proposed-eastern-maar-recognition-and-settlement-agreement).

Engagement with Traditional Owner Voices in Victoria

As part of its commitment to enabling self-determination, the Victorian Government wanted to engage more effectively with Traditional Owners of areas where there is no formal recognition under the three schemes discussed above.

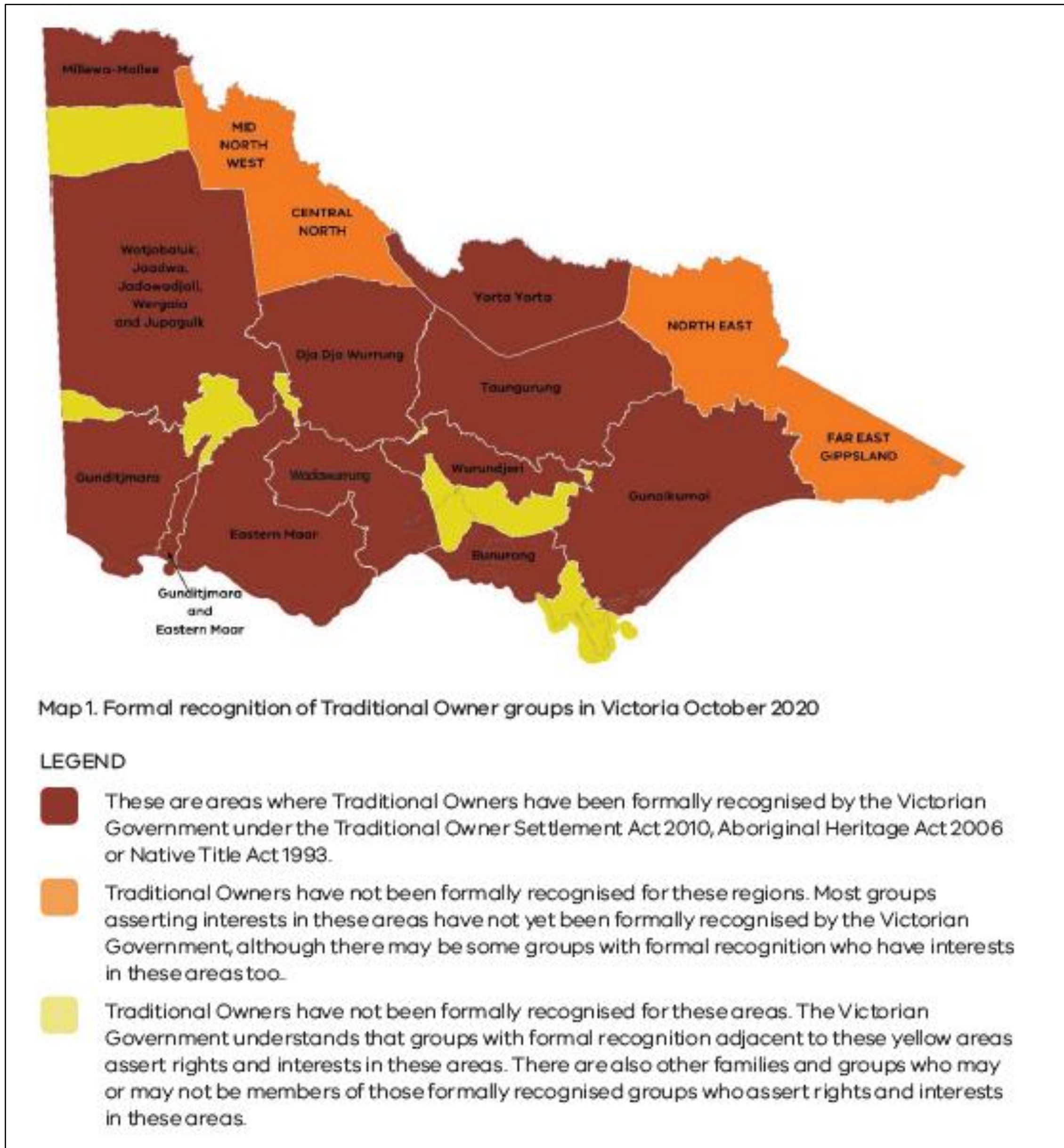
Through the Victorian Government Traditional Owner Engagement Project, a small team of staff at Aboriginal Victoria (Project Team) and an independent Indigenous Facilitator held extensive discussions with Traditional Owners, government staff and non-government bodies between December 2018 - July 2019.

The consultation had a primary focus on Victorian Traditional Owner groups that are not recognised under the Aboriginal Heritage Act 2006, Native Title Act 1993 or Traditional Owner Settlement Act 2010, located in four key regions of the State: Mid North West, Central North, North East and Far East Gippsland (regions). These areas are shown in orange and described in Figure 9 below.

The Project Team also invited feedback from the 11 Traditional Owner groups with formal recognition across Victoria (shown in brown and described in Figure B2), acknowledging that some of these groups may have interests in the four regions and other areas without formal recognition (shown in yellow and described in Figure B2).

Feedback from over 120 Traditional Owners of regions without formal recognition has been published in the report, '"To be heard and for the words to have actions" Traditional Owner voices: Improving government relationships and supporting strong foundations' (Traditional Owner Voices Report).

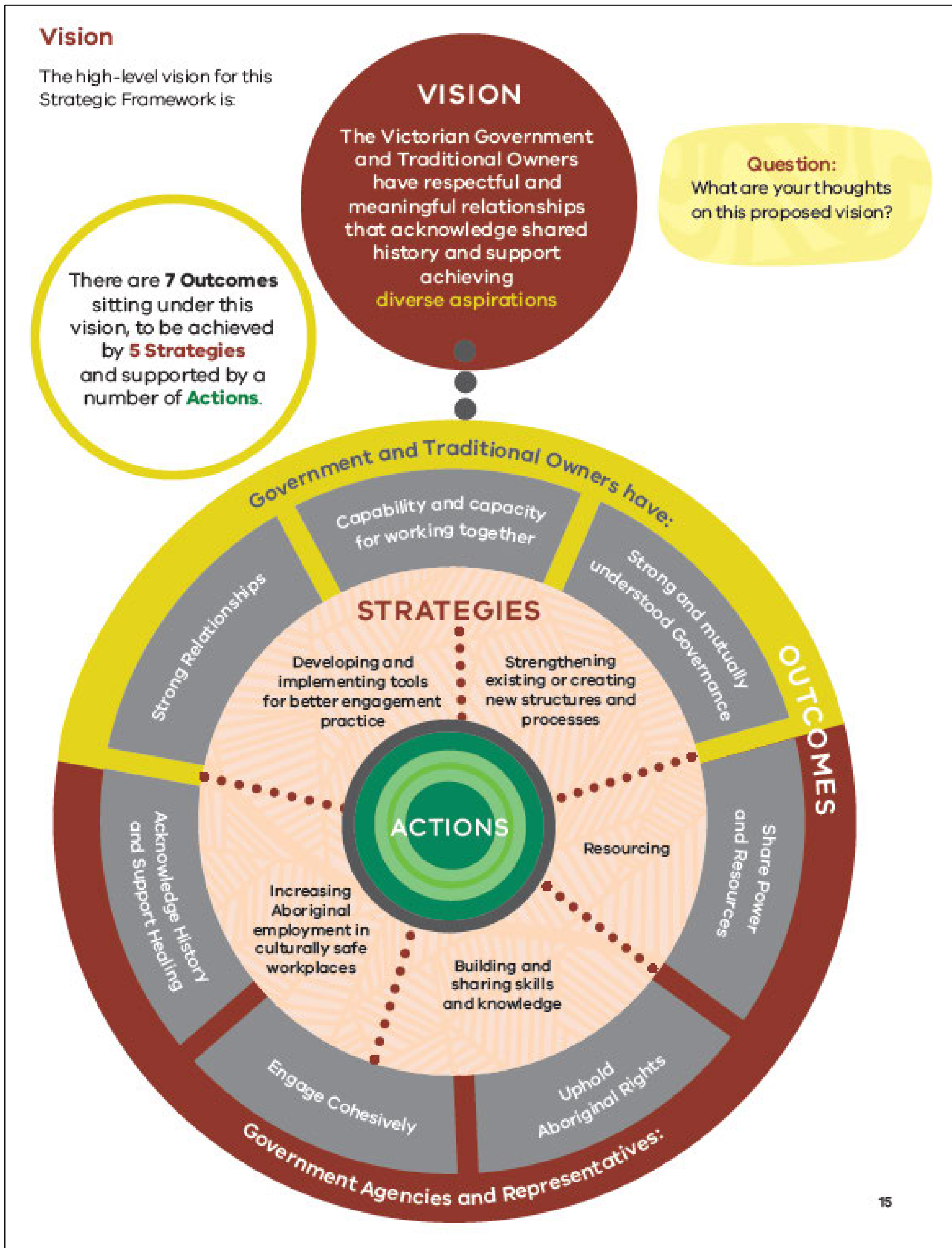
FIGURE B2: FORMAL RECOGNITION OF TRADITIONAL OWNER GROUPS IN VICTORIA, AUGUST 2019



Source: Aboriginal Victoria, *Consultation Draft Strategic Framework for strong relationships and engagement between the Victorian Government and Traditional Owners od areas without formal recognition*. (2020:10)

Following that report, a draft Framework for strong relationships and engagement between the Victorian Government and Traditional Owners of areas without formal recognition (Framework) was developed. The draft Framework (**Figure B3**) envisaged a whole-of-government approach to improve the way in which government engages with Traditional Owners of these areas, to better enable self-determination. The draft Framework has a primary focus on engagement regarding Country, in its fullest sense, but it also has relevance to government activities across domains including health, education, justice, social spheres and land use planning and land and natural resource management.

FIGURE B3: STRATEGIC FRAMEWORK FOR STRONGER RELATIONSHIPS AND ENGAGEMENTBETWEEN THE VICTORIAN GOVERNMENT AND TRADITIONAL OWNERS WITHOUT FORMAL RECOGNITION



Source: Aboriginal Victoria, *Consultation Draft Strategic Framework for strong relationships and engagement between the Victorian Government and Traditional Owners od areas without formal recognition*. (2020:15)

The draft Framework and the Traditional Owner Voices Report identified a need to improve engagement in the areas identified in yellow in **Figure B2**, as well as in the regions. The consultation process sought to develop a better understanding of this need through an open approach and willingness to hear from all families and groups asserting interests in these areas.

A report on the consultations was produced, titled: CONSULTATION REPORT A summary of feedback regarding Draft Strategic Framework for strong relationships and engagement between the Victorian Government and Traditional Owners of areas without formal recognition (Consultation Period: April to July 2020).

Feedback from the Consultations indicated that while there were some clear areas for improvement, there was also general support for the development and finalisation of the Framework among Traditional Owners, government agencies, staff, other bodies and stakeholders. The Traditional Owner groups in the areas without formal recognition expressed some cautious optimism around the direction in which things were heading. The Consultation Report concluded the challenges and opportunities ahead lie not only in revising the framework to account for the feedback from the process, but also in "walking together" to successfully implement the Framework.

Treaty Developments in Victoria

For generations, the Aboriginal and Torres Strait Islander communities and leaders of Australia have been calling for Treaty to acknowledge the sovereignty of First Nations and to improve the lives of First Peoples. Victorian Traditional Owners have been maintaining that their sovereignty has never been ceded and they have been calling for a Treaty process that delivers self-determination for Victoria's First Peoples.

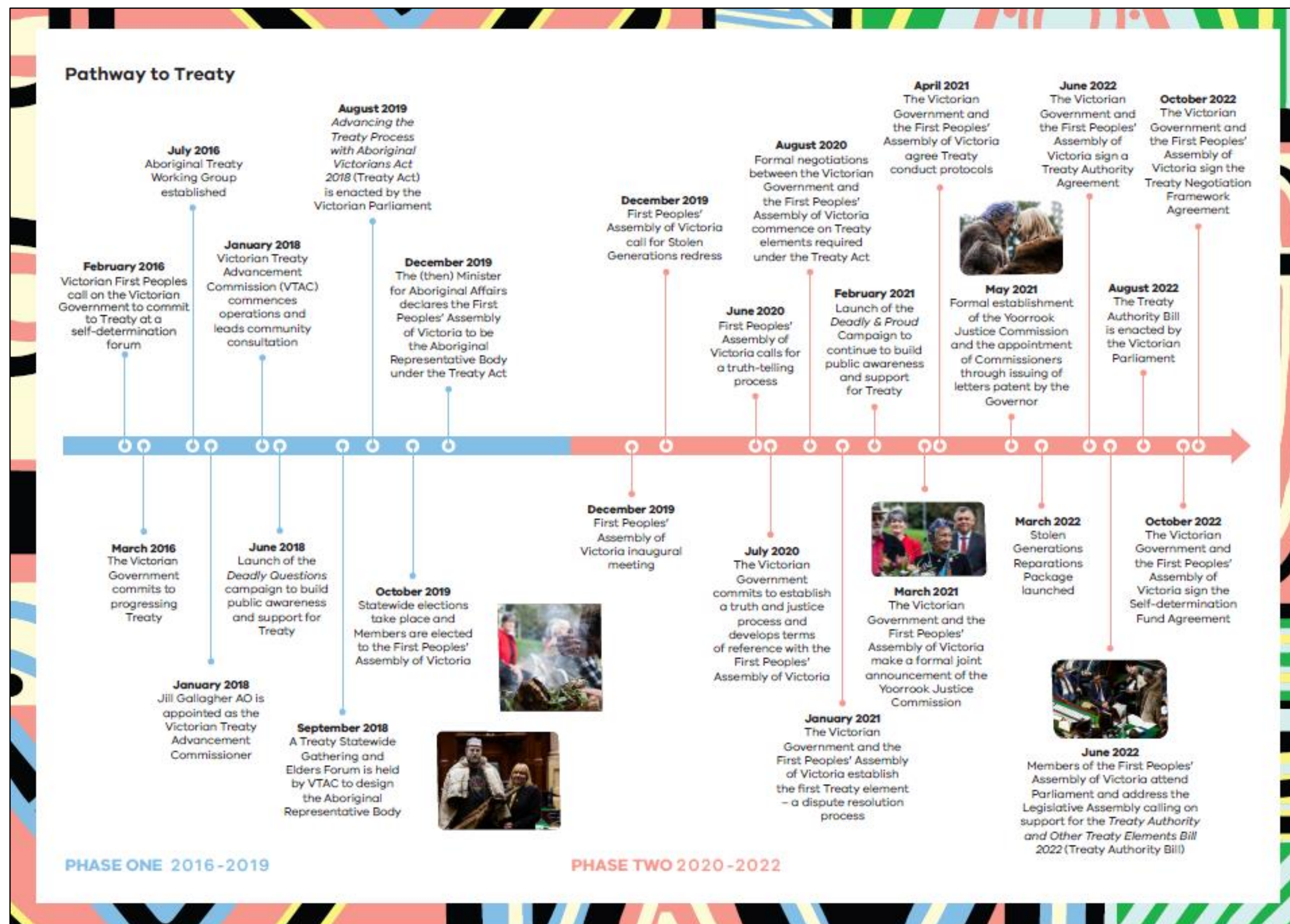
In early 2016, the Victorian Government entered into discussions with the Aboriginal peoples of Victoria, with more than 400 people attending a state-wide forum and hundreds more attending forums across regional Victoria. At the conclusion of these forums, the Victorian Government committed to advancing self-determination for Aboriginal Victorians by establishing a Treaty Interim Working Group.

Since that time, several steps have been taken, as depicted in **Figure B4**, including the following key elements:

- An Aboriginal Treaty Working Group was established (2016)
- The Victorian Treaty Advancement Commission was established under *the Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (Treaty Act), as Australia's first ever Treaty legislation (2018).
- A Statewide election was held to establish the First Peoples' Assembly of Victoria to represent the voice of First Peoples in the Treaty process. (2019)
- A truth and justice commission (the Yoo-Rrook Commission) has been established (2021)
- A Treaty Authority is in the process of being established under the *Treaty Authority and Other Treaty Elements Act 2022* (Vic).

Whether treaty negotiations will extend to matters relating to land, is yet to be determined in the context of such negotiations.

FIGURE B4: PATHWAY TO TREATY – TIMELINE FROM 2016 TO 2022



Source: https://www.firstpeoplesrelations.vic.gov.au/treaty

Appendix C: Settlement of native title under the *Traditional Owner Settlement Act 2010* (Vic)

The Victorian *Traditional Owner Settlement Act 2010* (the Act) provides for an out-of-court settlement of native title. The Act allows the Victorian Government to recognise Traditional Owners and certain rights in Crown land. In return for entering into a settlement, Traditional Owners must agree to withdraw any native title claim, pursuant to the *Native Title Act 1993* (Cth) and not to make any future native title claims.

Legal agreements, under the *Traditional Owner Settlement Act 2010* (Vic) embed Traditional Owners in government decision making and creating system and structural changes in public land and natural resource management. These legal agreements recognise. Traditional Owners' inherent rights and interests in County; their rights to access, own and manage public land; their right to be involved in decision making; and the excise of other rights in the use and development of public land and natural resources.

Settlement package

Under the Act, a settlement package can include:

- a Recognition and Settlement Agreement to recognise a Traditional Owner group and certain traditional owner rights over Crown land;
- a Land Agreement which provides for grants of land in freehold title for cultural or economic purposes, or as Aboriginal title to be jointly managed in partnership with the state;
- a Land Use Activity Agreement (LUAA) which allows Traditional Owners to comment on or consent to certain activities on public land;
- a Funding Agreement to enable traditional owner corporations to manage their obligations and undertake economic development activities;
- a Natural Resource Agreement to recognise Traditional Owners' rights to take and use specific natural resources and provide input into the management of land and natural resources.

Under the Act, the State Government decides whether to enter into a settlement with a particular group. The group must meet the definition of 'traditional owner group' under the Act.

Aboriginal cultural heritage

While the Traditional Owners that enter into a settlement with the State under the *Traditional Owner Settlement Act 2010* (Vic) are the same Traditional Owners that have cultural heritage responsibilities under the *Aboriginal Heritage Act 2006* (Vic), it is important to note that all issues relating to Aboriginal cultural heritage are subject to separate processes under the *Aboriginal Heritage Act 2006* (Vic)

Land Use Activity Regime

The Land Use Activity Regime is a simplified alternative to the future acts[8] regime in the *Native Title Act 1993* (Cth) and a more streamlined approach to procedural rights over activities on Crown land that may affect the rights of Traditional Owners. It provides procedural rights for recognised Traditional Owner groups over certain activities that occur on public land. The objective is to enable these activities to proceed, while accommodating third party interests and respecting the rights of Traditional Owners attached to the public land.

The Land Use Activity Regime is enabled by Part 4 of the *Traditional Owner Settlement Act 2010* (Vic) and is given effect through a Land Use Activity Agreement (LUAA). A LUAA is a sub-agreement of the Recognition and Settlement Agreement. A LUAA can be entered into by the Attorney-General (on behalf of the state) and a Traditional Owner group entity or corporation (on behalf of a Traditional Owner group). A LUAA must be accompanied by an Indigenous Land Use Agreement, which provides for the 'contracting out' of Native Title Act processes.

Land Use Activity Regime Policy

The State's policy and regulations governing the Land Use Activity Regime can be downloaded from the following link: Land Use Activity Regime Policy and Regulations

Under the Land Use Activity Regime:

- land use activities are separated into four categories, whereas there are 10 categories under the future acts regime in the *Native Title Act 1993* (Cth);
- no assessment is required to determine what category an activity falls into (and, consequently, what procedural rights apply to it);
- the procedural rights for an activity are not affected by the tenure of the land;
- there is no need to assess whether or not native title has been extinguished;

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[8] A future act is an act in relation to land or waters that either:

- consists of the making, amendment or repeal of legislation and takes place after 1 July 1993; or
- is any other act that takes place after 1 January 1994;

and

- is not a past act nor an intermediate period act; and
- either validly or invalidly affects native title.

To be a future act the act must affect native title. That is, the act must either validly or invalidly occur in an area where native title exists and it must affect native title in that area. For example, native title may exist in relation to unallocated Crown land or a National Park, even where there are no native title holders or registered native title claimants. An act affects native title if it extinguishes native title rights and interests or impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise (s.233(1) *Native Title Act 1993* (Cth)).

- the Traditional Owners and their representative organisation are clearly identified and resourced to provide responses to notifications and other requests;
- standard terms and conditions are available for low impact earth resource activities (i.e. exploration), removing, in some instances, the need for industry to negotiate;
- the state is responsible for negotiating agreement for the sale of Crown land and for paying community benefits for those sales;
- the state is responsible for the leasing of Crown land and for some land use activities;
- Aboriginal cultural heritage obligations will be dealt with under the *Aboriginal Heritage Act 2006* (Vic), and there will be no duplication or inconsistency;
- parties to a 'negotiation activity' can seek a determination from the Victorian Civil and Administrative Tribunal, and the minister has powers to require a decision by a certain time, or, in some circumstances, to make a determination.

Land Use Activity Agreement (LUAA)

The LUAA effectively replaces the future acts regime outlined in the *Native Title Act 1993* (Cth). The LUAA will set out how public land managers and businesses should negotiate with Traditional Owners about activities that may have a substantial impact on Traditional Owner rights as recognised in a settlement. Each LUAA will specify exactly which activities will trigger its application.

The procedural rights under the Land Use Activity Regime will only apply to those activities that are listed in a LUAA. The LUAA Template provides this list and classifies activities into one of four categories (routine, advisory, negotiation [class A or class B], and agreement activities). The final listing and classification is subject to negotiation.

To be listed in a LUAA, an activity must be defined as a land use activity in section 28 of the *Traditional Owner Settlement Act 2010* (Vic). Some subsets of these land use activities are excluded from the operation of the regime as a matter of policy. These are listed in the LUAA Template, and include:

- commercial Crown land leases in the alpine resorts;
- activities or classes of activities that are consistent with a joint management plan; and
- activities that are undertaken pursuant to an existing authorisation (e.g. Crown land lease, mining licence), or pursuant to an authorisation that has been carried out in accordance with the requirements of a LUAA.

Existing interests will not be affected by a LUAA, for example, an existing Crown land lease, or the state's right to harvest native timber from State Forests.

Activities requiring notifying the Traditional Owners

Activities that have little or no impact on the land and Traditional Owner rights are categorised under a LUAA as 'advisory activities'. Decision-makers or public land managers will need to notify the relevant Traditional Owner group about any advisory activity before it commences, but there is no obligation for them to negotiate.

Advisory activities include applications for:

- licences for forest produce;

- new community leases for 21 years or less;
- new commercial leases for 10 years or less;
- licences for extractive materials (e.g. gravel, limestone, sand or salt);
- new agricultural leases of 40 hectares or less;
- prescribed fire burning and non-emergency fire prevention works;
- regeneration works;
- bee farming licences;
- changes to the status of Crown land;
- construction of sports facilities, car parks, jetties and walking tracks.

Activities requiring negotiation with Traditional Owners

Activities that will substantially change the use of land in which Traditional Owners have a significant interest, or which will impact significantly on Traditional Owner rights, must be negotiated with Traditional Owners. These activities are categorised under a LUAA as 'negotiation activities'.

If an agreement cannot be reached through negotiation, either the Traditional Owner group or the activity's sponsor can appeal to the Victorian Civil and Administrative Tribunal (VCAT). VCAT will then determine if the activity should proceed and, if so, under what conditions.

Negotiation activities include:

- major activities that affect Crown land (such as new gravel reserves declared by a council under a planning scheme);
- new commercial leases for more than 10 but less than 21 years (excluding major public works and public-private partnerships); and
- earth resource or infrastructure authorisations.

There are certain types of negotiation activity that VCAT does not have the authority to stop, but upon which it may place conditions. These activities include new agricultural leases of more than 40 hectares and the construction of:

- major public works that will benefit all Victorians;
- new roads, railway track or bridges;
- major public recreation facilities; and
- infrastructure by private utility companies.

Activities requiring the agreement of Traditional Owners

Some activities that have a significant impact on Traditional Owner rights cannot go ahead without the consent of the Traditional Owner group. These are equivalent to those activities that the state could not do on freehold land without the consent of the owner.

Activities which cannot proceed without the consent of the relevant Traditional Owner group are termed 'agreement activities'. Such activities include:

- the sale of Crown land for private purposes;
- new commercial leases for more than 21 years (excluding major public works and utilities and Public Private Partnerships);

- major works or clearing of land for commercial purposes.

Requirements for notifying a Negotiation or Agreement activity; and for enforcement orders

The Traditional Owner Settlement Regulations 2017 (External link) prescribe the matters which must be addressed by the Responsible Person in notification of a Negotiation land use activity or an Agreement land use activity.

They also specify that an objection to an application for an enforcement order may be made within 15 business days.

Register of Land Use Activity Agreements

The Victorian Government keeps a record of Land Use Activity Agreements: https://www.justice.vic.gov.au/your-rights/native-title/register-of-land-use-activity-agreements

The Register of Land Use Activity Agreements is an online tool to assist activity proponents to understand and meet their Land Use Activity Agreement (LUAA) obligations under the *Traditional Owner Settlement Act 2010* (Vic).

The LUAA Register provides the following information:

- a description of the land to which the agreement applies
- maps of the agreement area
- the date and a copy of the initial registration of the agreement
- the date and a copy of any variations to the agreement.

It is important to make sure that you are using the most updated version of the LUAA.

If assistance is required, please contact the Registrar of the Register of Land Use Activity Agreements, which is a position held by the Director of the Native Title Unit in the Department of Justice and Community Safety. The Registrar can help you to understand the basic contents of the LUAA and, if required, refer your enquiry to other government departments or agencies. The Registrar cannot give legal advice about rights and obligations arising under the LUAA.

Contact details for the registrar:

> Registrar, Register of Land Use Activity Agreements
> Level 24, 121 Exhibition Street
> MELBOURNE VIC 3000
> Tel: 03 8684 7523
> Email: nativetitle@justice.vic.gov.au (External link)

The Register of Land Use Activity Agreements currently comprises the following agreements that commenced on the dates given:

- Land Use Activity Agreement – Dja Dja Wurrung – 25 October 2013

- Land Use Activity Agreement - Taungurung - 11 August 2020

Working out if a proposal is subject to a Land Use Activity Agreement

Each LUAA is published on a public register – the Register of Land Use Activity Agreements. Currently, the Dja Dja Wurrung LUAA and the Taungurung LUAA are the only LUAAs entered on the Register. Key information on the Register includes:

- the area of land to which the agreement applies ('agreement land', as defined in section 27 of the Act);
- the list of land use activities to which the LUAA applies, and their classification;
- contact details for the traditional owner group entity (corporation) for the purpose of notification, consultation or negotiation (as applicable).

The requirements for the negotiation and agreement categories of land use activities are detailed in Division 3 of Part 4 of the Act. The requirements for advisory activities are detailed in ministerial directions.

Ministerial directions as to advisory activities for the Dja Dja Wurrung LUAA were issued by the Attorney-General on 24 October 2013 and are available at Dja Dja Wurrung Land Use Activity Agreement

Appendix D: The *Native Title Act 1993* (Cth)

The High Court of Australia's landmark judgment in *Mabo (No. 2)*

In 1992, the High Court of Australia (HCA) delivered its judgement in the matter of *Eddie Mabo & Ors v The State of Queensland [No. 2]* (1992) 175 CLR1. In this case, the High Court:

(a) rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement; and
(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and
(c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The objects of *the Native Title Act 1993* (Cth)

The Commonwealth subsequently negotiated and enacted the *Native Title Act 1993* (Cth) (NTA). The main objects of this Act are:

(a) to provide for the recognition and protection of native title; and
(b) to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
(c) to establish a mechanism for determining claims to native title; and
(d) to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title. (s.3)

The native title system is not a simple system because it had to deal with over 230 years of neglecting these realities, as well as creating a system for working with native title rights and interests into the future.

Native title is not a grant, it already exists

Native title is not a grant or right that is created by government, nor is it dependent upon the government for its existence. Native title is the recognition in Australian law that the Aboriginal and Torres Strait Islander peoples had, and may still have, a system of law and custom relating to land that existed prior to the colonisation of Australia by the British.

Definition of native title rights and interests

Section 223(1) of the *Native Title Act 1993* (Cth) defines 'native title or native title rights and interests' as the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- the rights and interests are recognised by the common law of Australia.

This provision in the NTA is crucial to the success of any native title determination application.

Where native title may continue to exist

An application for a determination of native title can only be made in areas where native title has not been extinguished. Native title may exist on:

- unallocated (vacant) crown land
- some state forests, national parks and public reserves depending on the effect of state or territory legislation establishing those parks and reserves
- beaches, oceans, seas, reefs, lakes, rivers, creeks, swamps and other inland waters that are not privately owned
- some leases, such as non-exclusive pastoral and agricultural leases, depending on the State or Territory legislation they were issued under, and
- some land held by or for Aboriginal people or Torres Strait Islanders.

As at 17 August 2022, 585 native title determinations have been made, 449 of which have been made by consent between the parties, and 1,422 Indigenous Land Use Agreements (ILUAs) have been entered on the Register of ILUAs.

Generally speaking, full native title rights resembling something like freehold ownership will only be available over some unallocated (vacant) crown land, certain Aboriginal reserves and some pastoral leases held by native title holders. This means that, for most of the areas where native title is successfully claimed, the country will be shared by the native title holders and other people with rights and interests in the same area. This sharing is sometimes called coexistence.

Native title rights and can co-exist with other rights and interests over the same area, but the native title rights cannot interfere with the rights of other interest holders.

Where native title has been extinguished

The Australian legal system does not recognise native title rights and interests in some areas where actions have been taken that extinguish native title. In those areas, native title may be partly or wholly extinguished.

‘Extinguish’ means to permanently not recognise native title rights and interest in an area (s. 237A of the NTA). Except in very limited circumstances, there is no possibility for extinguished rights to be recognised after extinguishment occurs, even if the extinguishing act ceases to have effect.

Native title has been wholly extinguished on areas such as:

- privately owned freehold land (including family homes and privately owned freehold farms)
- pastoral or agricultural leases that grant exclusive possession
- residential, commercial, community purposes and certain other leases, and
- in areas where governments have built roads, airports, railways, schools and other public works on or before 23 December 1996.

These areas cannot be included in a native title determination application and are generally excluded from such applications.

Where extinguishment can be disregarded

There are limited provisions in the NTA for disregarding prior extinguishment of native title. These include:

- Claimant held pastoral leases (s.47)
- Claimant-occupied Aboriginal land or reserve (s.47A)
- Claimant-occupied vacant Crown land (s.47B), and
- A claimant application or revised native title determination application can be made over onshore park area (meaning a national, State or Territory park) that is set aside for the purpose of preserving the natural environment) by agreement with the relevant Commonwealth, State or Territory government (s.47C).

Where native title rights and interests may have been lost

In addition to extinguishment as outlined above, Aboriginal and Torres Strait Islander people’s rights and interests in relation to land and waters may have been lost, as far as Australian law is concerned, in several ways. The Federal Court may decide for a variety of reasons that native title no longer continues to exist for an area. Factors that may influence such a determination include:

- the native title holders ceasing to exist
- the Aboriginal or Torres Strait Islander people ceasing to observe their customary laws and traditions on which their title is based
- loss of continuing connection with an area, or
- the Aboriginal or Torres Strait Islander people surrendering their native title to the Crown, possibly in exchange for other benefits.

Native title is not fixed for all time. The ways in which native title rights and interests are exercised can change and evolve according to traditional laws and customs.

Aboriginal and Torres Strait Islander people may have native title rights to Crown land if they can establish an ongoing customary law connection to the land.

Native title determination applications or claims

Native title determination applications must be made to the Federal Court of Australia. Each claim is assessed by the Federal Court to determine the rights and interests and to identify the rights holders. If the Federal Court determines that native title rights and interests continue to exist in an area, the holders of those rights and interests may be entitled to use or access of the land for a range of activities including for example, to care for Country and to undertake cultural practices. In some cases, they may be entitled to exclusive possession.

Native title rights typically include the right to access land, hunt, gather, take resources for bush medicine and other a wide range of other traditional uses. Where native title is recognised, the native title holders' rights and interests will continue to exist over Crown land for all future generations.

There are also some cases where native title rights have been extinguished by specific government actions, such as conversion of land to freehold, or by the granting of perpetual leases (for example in the Western Division of NSW) or by public works. In most cases, such actions will have permanently extinguished all native title rights and interests.

In other cases, the status of native title rights on Crown land has not yet been determined by the Federal Court of Australia or it may have been determined by agreement between the native title claimants and the State Government (and endorsed by the Federal Court). In such circumstances, the government entity responsible for managing Crown land will have to consider native title rights and interests when making decisions about the use and/or management of that Crown land.

Future activities on land where native title exists or may exist

The other immediate implication arising from the HCA's decision in *Mabo (No. 2)* was how activities could be carried out on land subject to native title rights and interests. Acts or activities affecting native title rights and interests are known as 'future acts' under the *Native Title Act 1993* (Cth). A future act affects native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.[9]

The future act regime was considerably amended in 1998 to include a hierarchy of different procedures for dealing with situations where native title holders are known (by way of an Indigenous land use agreement), or if they are not known (by way of a non-claimant application) and differing procedural rights for various specified types of future acts. The hierarchy of future act provisions, their order of application and the procedural rights of registered native title holders/claimants are shown in **Figure D1**.

Any activities affecting native title rights and interests needs to be carried out in accordance with the relevant future act provisions in the *Native Title Act 1993* (Cth).

The term 'future act' is defined in s.233(1) NTA 1993 (Cth). A future act is an act in relation to land or waters that either:

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[9] S.227 *Native Title Act 1993* (Cth).

- consists of the making, amendment or repeal of legislation and takes place after 1 July 1993; or
- is any other act that takes place after 1 January 1994; and
- is not a past act nor an intermediate period act; and
- either validly or invalidly affects native title.

To be a future act the act must affect native title. That is, the act must either validly or invalidly occur in an area where native title exists and it must affect native title in that area. For example, native title may exist in relation to unallocated Crown land or a National Park, even where there are no native title holders or registered native title claimants. An act affects native title if it extinguishes native title rights and interests or impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise.

The term 'affects' is defined in s.227 NTA 1993 (Cth). All acts can affect or be affected by native title. An act 'affects' native title if it extinguishes native title rights and interests. An act also affects native title if it impairs native title rights and interests because it is wholly or partly inconsistent with their continued existence, enjoyment or exercise.

Some acts that affect native title are classified according to certain dates that correspond with particular High Court judgments or the enactment of native title legislation.

The *Native Title Act 1993* (Cth) sets out a future act hierarchy (**Figure B1**). The hierarchy is shown in the left column, and the attendant procedural rights of registered native title holders or claimants are shown in the right column.

To the extent that a future act is covered by a particular provision in the future act hierarchy in the *Native Title Act 1993* (Cth), it will be made valid by that particular provision and will not be covered by any provisions relating to a category lower in the list. By checking the hierarchy and following the correct processes for the relevant category set out in the *Native Title Act 1993 (Cth)*, third parties can ensure that a proposed future act will be valid in so far as it affects native title rights and interests. It is also relevant to note that where a future act is covered by a registered ILUA, the other procedures for dealing with future acts lower in the hierarchy do not have to be considered.

If a particular future act is not covered by any of the provisions in the future act hierarchy, it can only be validly done by way of an Indigenous Land Use Agreement or ILUA, or in some cases, following compulsory acquisition of the native title rights and interests.

An ILUA is a voluntary agreement made under the *Native Title Act 1993* (Cth) between people who hold, or claim to hold, native title in an area and other people who have, or wish to gain, an interest in that area. An ILUA can be negotiated over areas where native title has been, or has yet to be, determined to exist. They can be part of a native title determination, or they can be settled separately from a native title claim. ILUAs may be made about any native title matters the parties want to have an agreement about, including validation of future acts as well as any other associated issues. They are negotiated agreements, and when registered they are binding on all persons who hold or may hold native title for the area covered by the agreement. For an ILUA to be registered under the *Native Title Act 1993* (Cth), it must deal with native title matters.

The last point in the Table is particularly pertinent. A future act is invalid, unless it is covered by a provision in the Act.

FIGURE D1: FUTURE ACT HIERARCHY IN THE NATIVE TITLE ACT 1993 (CTH)

Future act category and Section of the *NTA 1993* (Cth)	Procedural rights of registered native title holders/claimants
s.24AA(2)	*Basically, this Division provides that, to the extent that a future act affects native title, it will be valid if covered by certain provisions of Division 3, and invalid if not.*
s.24AA(3)	*A future act will be valid if the parties to certain agreements (called indigenous land use agreements—see Subdivisions B, C and D) consent to it being done and, at the time it is done, details of the agreement are on the Register of Indigenous Land Use Agreements. An indigenous land use agreement, details of which are on the Register, may also validate a future act (other than an intermediate period act) that has already been invalidly done.*
1. Indigenous Land Use Agreements (ILUA). (S24BA-24EC)	Does the proponent of a future act want to enter into an ILUA to validate a future act instead of using the other processes under the Act? Where relevant, ILUAs may provide for future act(s) to be done, or the surrender of native title, or to validate future acts that have already been done invalidly. In some circumstances it may not be possible to use an ILUA. For example, where there are competing claimants and there may not be sufficient time to negotiate an ILUA where the different claimant communities cannot agree on the carrying out of a future act.
2. Non-claimant applications. (S24FA) (unopposed)	Does the proponent of a future act want to lodge a non-claimant application in the Federal Court to find out whether or not native title exists in a particular area over which it has a non-native title interest? If no potential native title holders respond within a prescribed period there is automatic s24FA protection for future acts. If potential native title holders make a claim within the relevant period which is subsequently registered then the proponent may be able to negotiate an agreement or will have to use other relevant future act processes. Note: This process has no utility where there already are registered native title claimants for the area or if there is a determination that native title exists for the area.
3. Primary production and diversification and off-farm activities directly connected to	The opportunity to comment applies. The upgrade of a pastoral lease to freehold requires a compulsory acquisition, which attracts the right to negotiate.

primary production. (S24GB and S24GD)	Note: Local governments generally do not carry out or authorise these kinds of activities.
4. Management of water and airspace. (S24HA)	Does the future act involve the regulation or management of water and airspace? If so, the opportunity to comment applies.
5. Renewals and extensions of leases and licences and grants of titles under pre-23 December 1996 agreements or commitments. (S24IA)	Does the future act authorise the renewal or extension of leases and licences that arise from agreements or commitments made on or before 23 December 1996? If so, the opportunity to comment applies. Note: in limited circumstances, the right to negotiate may apply (s24ID(4) in relation to mining.
6. Provision of public housing and other public facilities (such as public health, education, police, emergency facilities, staff housing and related infrastructure) being provided for Aboriginal or Torres Strait Islander people living in or in the vicinity of the area (s.24JAA) (this provision only operates for twenty years from the day on which the *Native Title Amendment Act (No. 1) 2010* (Cth) commenced)	Does the future act involve the provision of public housing and other public facilities (such as public health, education, police, emergency facilities, staff housing and related infrastructure) being provided for Aboriginal or Torres Strait Islander people living in or in the vicinity of the area? If so, the opportunity to comment applies.
7. Use of reserved land. Activities and dealings regarding pre-23 December 1996 reserve land consistent with purpose and leases to statutory authorities. (S24JA)	In the case of land reserved, proclaimed, dedicated, or conferred by some permission or authority for particular purposes on or before 23 December 1996, is the proponent involved in authorising or undertaking activities on the land that are consistent with the purposes for which it was reserved, proclaimed, dedicated, or conferred? If so, the opportunity to comment may apply.
8. Facilities for services to the public. (S24KA)	The *Native Title Act 1993* (Cth) specifies what constitutes a 'facility for services to the public'. Does the proposed activity constitute a facility for services to the public? If so, the same procedural rights apply as an ordinary title holder would be entitled to. If over a pastoral lease, then the same rights as pastoral lessees. Note: This provision does not apply if the future act is or requires the compulsory acquisition of native title rights and interests.
9. Low impact future acts. (S24LA)	There are no procedural rights.

	Note: This provision applies only if the act is of low impact and takes place before and does not continue after a determination is made that native title exists in a particular area.
10. Acts that pass the freehold test. (S24MD)	Freehold test: if act could have been done had the native title holders instead had freehold and if legislation is in place to protect areas of Indigenous significance: • the right to negotiate may apply; • the right to be consulted may apply; or • ordinary title rights apply. Note: The *Native Title Act 1993* (Cth) specifies a number of circumstances where the freehold test applies. Refer to the Act for details.
11. Acts affecting offshore places. (S24NA)	Procedural rights for native title holders are the same as if they hold non-native title rights, that is, ordinary title rights. Note: Local governments generally do not carry out or authorise these kinds of activities.
S24OA	*Unless a provision of this Act provides otherwise, a future act is invalid to the extent that it affects native title.*

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MELBOURNE
Level 14, 222 Exhibition Street
Melbourne VIC 3000
+61 3 8616 0331
sgsvic@sgsep.com.au

CANBERRA
Level 2, 28-36 Ainslie Avenue
Canberra ACT 2601
+61 2 6257 4525
sgsact@sgsep.com.au

HOBART
PO Box 123
Franklin TAS 7113
+61 421 372 940
sgstas@sgsep.com.au

SYDNEY
Suite 2.01/50 Holt Street
Surry Hills NSW 2010
+61 2 8307 0121
sgsnsw@sgsep.com.au