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Technical Paper on the Methods of Establishing Non-Economic Reparations: Addendum to FNLRS Submission to Yoorrook Commission Inquiry into Land, Water and Sky

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Introduction

This paper is provided as an addendum to the First Nations Legal and Research Services (**FNRLS**) submission to the Yoorrook Justice Commission inquiry into Land, Water and Sky. It identifies forms of non-financial redress that can be provided to First Nations for loss of ownership and control of their traditional lands.

Section 1 outlines the principles in the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) that address reparations for loss of ownership and control of lands. Section 2 examines the findings of previous reviews and inquiries into possible forms of non-economic redress for loss of ownership and control of land which are available. Section 3 explores the forms of non-financial compensation provided for in comprehensive native title settlements elsewhere in Australia, and section 4 provides an overview of international examples of non-economic reparation settlement processes in Canada and New Zealand.

We acknowledge that any references to treaty, compensation and reparation processes in other jurisdictions do not constitute an attempt to provide a comprehensive comparative analysis of financial redress in other jurisdictions. These examples are provided as instructive illustrations of similar common law jurisdictions that have progressed economic reparations under treaty and settlement processes.

1 UNDRIP principles that address the negotiation of reparations and redress?

As outlined in detail in the accompanying Technical Paper on the Methods of Calculating Economic Compensation and Reparations, the UNDRIP is a comprehensive international instrument that sets out the rights of indigenous people including their rights to reparation and redress. Article 28 is of the most relevance in relation to redress for loss of ownership and control of traditional lands.

Article 28 can be broken into 3 distinct "obligations" to be imposed in determining reparations for loss of ownership and control of traditional lands according an UNDRIP standard:

(a) in the first instance, reparations are to be in the form of restitution (ie the return of traditional lands to First Nations peoples) (also supported by Articles 8(2) and 11(2) of the UNDRIP);

(b) to the extent restitution is not possible,[1] reparations are to be in the form of just, fair and equitable compensation, including the granting of land equal in quality, size and legal status, or monetary compensation or other appropriate redress; and

[1] At [234] of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya,* African Court on Human and Peoples' Rights, Application No 276/2003 (Ruling date: 4 February 2010) (**Endorois Case**); the Court held "…*when a State is unable, on objective and reasonable grounds, to adopt measures aimed at returning traditional lands and communal resources to indigenous populations, it must surrender alternative lands of equal extension and quality, which will be chosen by agreement with the members of the indigenous peoples, according to their own consultation and decision procedures*". Objective reasonable grounds may include where the land is being used for a public purpose.

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(c) reparations to be adopted are to be decided in light of what is appropriate to effectively restore the wrongs suffered according to the perception of First Nations themselves (also supported by Articles 8(2) and 38 of the UNDRIP).

While financial reparation can be an important element of reparation under UNDRIP Article 28, it is only one of many forms of redress that might be considered in negotiation of holistic redress for loss of ownership and control of traditional lands. This paper points to some of the other forms of redress that might be considered.

2 Findings of previous reviews and inquiries

In Australia it has been long recognised that financial reparations are not always an available, adequate or appropriate remedy for the loss of ownership and control of land by Aboriginal and Torres Strait Islander People.[2] Resolving compensation through non-financial benefits is recognised in principle 8 the *National Guiding Principles for Native Title Compensation Agreement Making,* published by the National Indigenous Australian Agency.[3]

The loss of land ownership and control goes beyond monetary loss, but also involves loss of the ability to exercise, enjoy, and perpetuate traditional laws and customs.[4] It is therefore necessary and appropriate for redress to go beyond financial compensation.

The Australian Federal Government has commissioned and/or procured a number of reviews and inquiries into issues which impact Aboriginal and Torres Strait Islander People in Australia. These reviews and inquiries have had a wide scope. A summary of recommendations identified in various Australian reviews and commissions in relation to redress for loss of ownership and control of land has been set out below and in more detail in the table in Attachment .

2.1 Land grants

A number of reviews and inquiries have identified land grants as a potential form of redress. For instance, the Woodward Royal Commission in 1973 (**Woodward Royal Commission**) was focussed on finding an appropriate way to recognise the traditional rights and interests of Aboriginal and Torres Strait Islander People in and to the land in the Northern Territory. The Woodward Royal Commission noted that "*cash compensation in the pocket of this generation of Aborigines [sic] is no answer to the legitimate land claims of a people with a distinct past who want to maintain their separate identity in the future*".[5] The only appropriate remedy, identified by the Woodward Royal Commission, is

[2] See also Richard Bartlett, *Native Title in Australia* (LexisNexis Butterworths, 4th ed, 2020) 760.

[3] National Indigenous Australian Agency, *National Guiding Principles for Native Title Compensation Agreement Making* (22 November 2021).

[4] Michael Lavarch and Allison Riding, 'A New Way of Compensating: Maintenance of Culture Through Agreement' (Land, Rights Laws: Issues of Native Title Issues Paper No 41, April 1998) 4-5.

[5] *Aboriginal Land Rights Commission* (Second Report, April 1974) 10 [53]-[54] (*Woodward Royal Commission vol 2*). See also *Aboriginal Land Rights Commission* (First Report, July 1973) 26 [153] ('*Woodward Royal Commission vol 1*).

the provision of other land (in combination with finance to enable the land to be used for housing or other economic purposes).[6] Similar points were also raised in:

(a) Royal Commission into Aboriginal Deaths in Custody's report which was published in 1991 (**Royal Commission into Aboriginal Deaths in Custody Report**);[7]

(b) the Aboriginal and Torres Strait Islander Commission's (**ATSIC**) Recognition, Rights and Reform Report which was published in 1995 (**Recognition, Rights and Reform Report**);[8] and

(c) evidence cited in the Australian Human Rights and Equal Opportunity Commission's National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, which was published in 1997 (**Bringing Them Home Report**). [9]

More recently, the Council of Australian Government's Investigation into Indigenous Land Administration and Use Report (which was published in 2015) (**COAG Report**) also expressed support for granting commercially and culturally valuable land to native title prescribed body corporates (**PBCs**) and Aboriginal and Torres Strait Islander owned land holding entities.[10]

The grant of land back to Aboriginal and Torres Strait Islander Peoples is also codified under State and Territory legislation. The *Aboriginal Land Rights Act 1983* (NSW) (**NSW ALRA**) provides for NSW Aboriginal communities to claim Crown land,[11] to compensate for the dispossession of their land,[12] regardless of the existence of recognised native title rights.[13] The *Aboriginal Land Rights (Northern Territory) Act 1976* (NT)[14] (**NT ALRA**), providesd for the automatic vesting of former Aboriginal reserves to Aboriginal land

[6] *Woodward Royal Commission vol 2* (n 21) [55], cited in Bartlett (n 18).

[7] *Royal Commission into Aboriginal Deaths in Custody* (National Report, 1991) vol 5, 49 [37.11], 145 ('*RCIADC Report*')

[8] Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (Final Report, 1995) [4.44] ('*Recognition, Rights and Reform*'), retrieved from 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures', *Indigenous Law Centre – UNSW Law* <https://www.ilc.unsw.edu.au/sites/ilc.unsw.edu.au/files/ATSIC%20Rights%20reform%20and%20recognition%20%282%29_2.pdf>.

[9] Confidential Evidence No 696 to the Australian Human Rights and Equal Opportunity Commission, *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Final Report, 1997) 258 ('Bringing Them Home Report'). See also Confidential Evidence No 146 to the same inquiry; Bringing Them Home Report (n 256) 258.

[10] See Senior Officers Working Group, *Investigation into Indigenous Land Administration and Use* (Report to Council of Australian Governments, December 2015) 29 ('*COAG Investigation*'), cited in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice and Native Title Report 2016* (Report, 16 October 2016) ('*Native Title Report 2016*').

[11] *Aboriginal Land Rights Act 1983* (NSW) s 36(1) ('NSW *ALRA*').

[12] 'Administering the *NSW Aboriginal Land Rights Act 1983:* Land Claims', *Aboriginal Affairs NSW* (Web Page) < https://www.aboriginalaffairs.nsw.gov.au/land-rights/land-claims/>.

[13] LexisNexis, *Local Government Planning and Environment NSW Vol C* (online at 18 October 2023) [510,805], [510.870] ('*Local Government Planning*').

[14] See 'The Aboriginal Land Rights Act', *Central Land Council* (Web Page) < https://www.clc.org.au/the-alra/>.

councils through a trust structure.[15] Part II of the NT ALRA makes provision for land claims over vacant crown land through applications to a land commissioner [16].

The existence of Aboriginal land and the rights associated with Aboriginal land in New South Wales and the Northern Territory is equivalent to freehold land.

One significant advantage of land grants under the NT ALRA, is that the title of land trusts is inalienable and protected for future generations from sale or dispossession by non-Aboriginal interests. Under the NT ALRA, land on land trusts can be leased, subject to consent from Traditional Owners and the provision of reasonable terms[17].

One criticism of the lack of fungibility of the land trust model is that this could present a disincentive to investment in commercial enterprises. However, the use of long term leases under the NT ALRA has largely overcome this risk and for example Arnhem Land has seen the growth of numerous successful Aboriginal and non-Aboriginal ventures on the land trust including operations in commercial tourism[18], Aboriginal owned construction firms[19], an Aboriginal owned and run furniture factory[20], Aboriginal owned supermarkets and community services[21], a commercial aerospace launch facility[22] and other enterprises run by local Aboriginal-owned corporations. [23]

In Victoria the *Traditional Owners Settlement Act 2010* (Vic) (**TOSA**) provides for grant of freehold title (with or without condition) and Aboriginal Title. Aboriginal Title is granted over parks and reserves, but is leased back to the State and managed in accordance with a joint management arrangement. The TOSA also provides for grant of other rights to land, such as commercial leases.

While there is considerable flexibility under the TOSA to confer title to land, it should not be seen as a limit on the kinds of title that can be conferred when it comes to negotiating

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[15] 'The Aboriginal Land Rights Act', *Central Land Council* (Web Page) < https://www.clc.org.au/the-alra/>; The Aboriginal Land Rights Act 1983 (NSW) also provides for the automatic vesting of 4600 ha lands which had vested to the Aboriginal Land Trust upon its enactment, although it also retrospectively validated the arguably unlawful revocation of Aboriginal reserves: *Local Government Planning* (n 31) [510,810], See also [510,010] for background on unlawful revocation of reserves.

[16] *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) Part II ('*NT ALRA*')

[17] Ibid at s 19.

[18] Outback Spirit Tours run commercial tourism operations with resort accommodation facilities 4 location in Arnhem Land which are all subject to leases under NT ALPA (Web Page) <https://www.outbackspirittours.com.au/destinations/arnhem-land/>

[19] Arnhem Land Progress Aboriginal Corporation and the Gumatj Corporation both have Aboriginal owned and run construction companies: Bukamk Constructions, and Delta Reef Gumatj Constructions https://; www.alpa.asn.au/bukmak; and <https://gumatj.com.au/business/companies/>

[20] Arnhem Land Progress Aboriginal Corporation has established a furniture factory at Milingimbi as part of a partnership with Ramvek, a leading commercial interior fit out company (Web Page) <https://manapan.com.au/>

[21] The Arnhem Land Progress Aboriginal Corporation runs a retail stores across the Northern Territory and Queensland and a suite of community services in Arnhem Land (Web Page) <https://www.alpa.asn.au/>

[22] Equatorial Launch Australia has a lease for a commercial rocket launch facility, the Arnhem Space Centre, 30km out of Nhulunbuy (Web Page) <https://ela.space/arnhem-space-centre/>

[23] Several Aboriginal owned and controlled Aboriginal corporations run extensive operations in their respective regions in Arnhem Land including the Gumatj Corporation <https://gumatj.com.au/business/>; the Rirratjingu Aboriginal Corporation <https://www.rirratjingu.com/>; the Arnhem Land Progress Aboriginal Corporation <https://www.alpa.asn.au/>; and Bawinganga Aboriginal Corporation <https://www.bawinanga.com/>. In addition to these corporations, many local ranger groups and art centres operate commercially successful enterprises in Arnhem Land. See for example Buku Larrngay Mulka Centre at Yirrkala <https://yirrkala.com/> ; Gapuwiyak Culture and Arts Centre https://gapuwiyak.com.au/; Maningrida Arts and Culture https://maningrida.com/; Milingimbi Art and Culture Centre https://milingimbiart.com/; and Injalak Arts at Gunbalanya <https://injalak.com/>;

treaties. If First Nations have land aspirations that extend beyond what is available under the TOSA, then forms of title available in other jurisdictions may be usefully considered.

2.2 "Co-extensive rights"/ reviving rights approximating native title

There have been multiple instances of the Commonwealth, State, and Territory Governments attempting to negotiate 'co-extensive rights' over land where native title has been extinguished.

Operationalised 'co-extensive rights' may take the form of a partial revival of extinguished native title rights. For example, governments could negotiate or impose conditions on titles granted within certain areas to allow Aboriginal and Torres Strait Islander Peoples access to land for the use of particular resources,[24] the preservation of traditional stewardship, or site monitoring roles.[25] This has taken form through legislation and the provision of land tenure, and negotiated agreements with Government.

The TOSA already provides for co-extensive rights through the conferral of traditional owner rights. However, the extent of possible conferred rights goes well beyond what is provided for under the TOSA, and may for instance, include commercial rights.

Western Australia has recently announced the introduction of a new form of land tenure, a 'diversification lease'.[26] The intention is that diversification leases will be used over large areas of land where there are multiple uses and activities conducted on the land (such as wind and solar developments, carbon farming and pastoral leases) and multiple stakeholders (such as pastoralists, project developers and native title parties), which can co-exist with each other. Diversification leases will not grant exclusive possession over the land,[27] or extinguish native title.[28] It will be a requirement under a diversification lease to enter into an Indigenous land use agreement (**ILUA**) with the relevant native title party to the land subject to the diversification lease.

Section 47 of the NSW ALRA provides a mechanism for Local Aboriginal Land Councils (**LALCs**) to negotiate with the owner, occupier or person in control of *any* land for a permit to allow Aboriginal and Torres Strait Islander People to access the land for the purposes of hunting, fishing or gathering.[29] If the LALC fails to obtain agreement, s 48 of the NSW ALRA allows the LALC to apply to the NSW Land and Environment Court for an access permit.[30] The ability for the LALC to negotiate is subject to any other Act,[31] and the use of s 48 has been limited.[32]

Other examples of 'co-extensive rights' can be seen in native title settlements agreements. For example, the South West Native Title Settlement (**South West Settlement**) and the Yamatji Nation ILUA in Western Australia contain provisions that

[24] See also *Recognition, Rights and Reform* (n 24) 38 [4.41].

[25] Lavarch and Riding (n 20) 6. See also discussion of the Eastern Gas Pipeline case study in Smith (n 34) 38.

[26] *Land Administration Act 1997* (WA) pt 6A ('*LAA*').

[27] *LAA* (n 38) s 92D.

[28] Diversification Lease Policy Framework (n 39) [2][b]; Diversification Lease (n 41)

[29] NSW *ALRA* (n 29) s 47.

[30] NSW *ALRA* (n 29) s 48(1)(a)-(b)

[31] NSW *ALRA* (n 29) s 47.

[32] *Local Government Planning* (n 31) [511,705].

mandate any mining and petroleum titles granted in the South West Settlement or the Yamatji Nation ILUA area (as the case may be) must contain a condition requiring the title holder to enter into an Aboriginal Heritage Agreement with the relevant Traditional Owner group for that area.[33]

Provision for grant of bespoke commercial and non-commercial 'co-extensive rights' could usefully be incorporated into the Victorian treaty negotiation framework.

2.3 Self-determination

Reviews and inquiries have repeatedly highlighted the importance of the right of self-determination to Aboriginal People. As discussed above, the principle of self-determination sits at the heart of UNDRIP. The legal framework for self-determination can be facilitated by:

- conferral of legal authority to self-govern in relation to discrete areas of law; and
- withdrawal of legal obstacles and impediments to the exercise of traditional law and custom.

The ability to be self-determining is also an issue of resource and capacity. Meaningful self-determination can only be exercised where First Nations have the skill, expertise and financial capability to self-govern.

Examples of inquiries that have recommended facilitation of self-determination include:

- *Royal Commission into Aboriginal Deaths in Custody – National Report* (1991) Chapter 20, 27; and
- *Bringing Them Home Report*, Chapter 26.

The current native title and TOSA regime provides little scope for self-determination, though the principle of self-determination is a foundational element of State policy towards First Nations. Treaty negotiations can promote self-determination if they provide for targeted devolution of power away from government, and give First Nations the resource, capability and power to control and regulate their own affairs.

2.4 Cultural restitution

Cultural restitution, in the form of education and resources, has also been recognised as a potential way to address loss of cultural connection associated with the loss of ownership or control of land.

Cultural restitution as a form of redress was considered in the *Bringing Them Home Report*. Cultural restitution might take the form of funding towards Aboriginal and Torres Strait Islander languages, culture and history resources. However, it is important to note that such programs would need to be in addition to existing programs and services for Aboriginal and Torres Strait Islander People (and should not detract funding and resources from existing programs).[34]

[33] South West Settlement Terms cl 18.1(e) and Yamatji Nation Indigenous Land Use Agreement cl 22.4.

[34] See *Recognition, Rights and Reform* (n 24) 38 [4.37]-[4.38].

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2.5 Royalties, equity partnerships, and profit-sharing arrangements

A number of reviews and inquiries have considered royalties, equity partnerships and profit-sharing arrangements as possible forms of redress.

For example, the Woodward Royal Commission considered the granting of mining royalties and equity interests in projects in the context of Aboriginal Land Councils in the Northern Territory negotiating consent for exploration licences.[35] This led to the establishment of the NT ALRA. The Recognition, Rights and Reform Report also recognised that the payment of royalties or revenue derived from use of land could constitute compensation,[36] and that royalties "*should be an essential element of a compensation package with respect to any communities affected by resource development*".[37]

Royalties from mining are already collected and distributed as part of existing statutory regimes such as the NT ALRA.[38] The NSW ALRA provides that exploration for mining and other natural resources can occur over those lands without the consent of the LALC, which may be subject to conditions such as payments of fees or royalties.[39]

The native title future act process and TOSA land use activity regime in Victoria allow groups to negotiate royalties, equity partnerships and profit-sharing arrangements with development proponents. However, the negotiating leverage of First Nations can be extremely variable, depending on the particular circumstances of the project. If a project has a long lead time then native title or TOSA procedural rights will give a First Nation little bargaining power. If the project is wholly or partly on land where native title has been extinguished, or where land use activity agreement rights do not apply, then a First Nation may have little or no bargaining power. Under the current regime the bargaining leverage of First Nations is not commensurate with the impact of the proposed project on their Country or on their rights and interests.

2.6 Provisions of goods, services and 'in-kind' benefits

Redress might also take the form of goods, services or 'in-kind' benefits. Examples of these forms of redress include:

(a) provision of housing or ownership of revenue-generating property; [40]

(b) provision of land, services or goods;[41] and

(c) provision of training, secondments or staffing capacity-building to PBCs or other relevant entities. [42]

Some examples of in-kind benefits taken from native title settlements are:

[35] *Woodward Royal Commission vol 2* (n 21) 127 [708](x).

[36] *Recognition, Rights and Reform* (n 24) 38 [4.40], [4.42].

[37] *Recognition, Rights and Reform* (n 24) 38 [4.42]. See also Smith (n 34) 29.

[38] See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 63.

[39] *NSW ALRA* (n 29) ss 45(4)-(5). See also s 46 for the mechanism of distribution and collection of the fees.

[40] *Recognition, Rights and Reforms* (n 24) 38-9 [4.44].

[41] See Smith (n 34) 24.

[42] For general discussion on capacity building: see *COAG Investigation* (n 26) 63-4; *Native Title Report 2016* (n 26) 131.

(a) the Yamatji Nation ILUA includes, as part of an 'economic development package',[43] the establishment of a business development unit to support Yamatji owned businesses;[44]

(b) similar business development goals are also expressed in the Noongar Economic Participation Framework, a part of the South West Settlement;[45]

(c) the Tjiwarl Settlement Agreement provides significant support for Tjiwarl businesses and economic opportunities, grant writing and establishes working groups to pursue these goals (see Attachment 2); and

(d) the recent settlement of the Widjabul Wia-bal native title claim required the New South Wales State government to provide capacity building support to the Widjabul Wia-bal People.[46]

We note that these forms of redress are unlikely to wholly compensate Aboriginal and Torres Strait Islander Peoples for loss of ownership and control of land (to the extent that any form of redress could do so). As such, it is recommended that careful consultation be undertaken with Aboriginal and Torres Strait Islander communities before these forms of redress are provided. Consideration should also be given to combining these forms of redress with other forms.

2.7 Employment and supplier quotas

Employment and supplier quotas have been identified as possible ways of strengthening the operation of PBCs in a native title context.[47] While not directly raised in the context of redress for loss of ownership of land, to the extent these mechanisms assist with strengthening PBCs, those mechanisms may indirectly assist in facilitating redress and self-determination.

These mechanisms may be particularly relevant where loss of land ownership or control was brought about by entities that have the capacity to offer employment or contractual opportunities (e.g. government, or mining or pastoral companies).

Although stopping short of providing a quota, the Noongar Economic Participation Framework under the South West Settlement is an example of how employment and supplier arrangements can be used as a means of redress. The framework aims to increase knowledge and skills of the Noongar community in procurement, tendering and contracting as well to increase Noongar participation and representation in employment and broader economy.[48] Key deliverables of the framework includes initial capacity building, followed by:

[43] 'Yamatji Nation Indigenous Land Use Agreement', *Government of Western Australia* (Web Page, 26 November 2021) < https://www.wa.gov.au/organisation/department-of-the-premier-and-cabinet/yamatji-nation-indigenous-land-use-agreement#value-of-settlement-package>.

[44] Yamatji ILUA (n 52) cl 12;

[45] WA Department of Premier and Cabinet, *Noongar Economic Participation Framework* (Fact Sheet) 1 ('*Noongar Economic Framework Factsheet*')

[46] NSW Department of Communities and Justice, 'Historic Native Title Agreement for the Northern Rivers' (Media Release, 19 December 2022) <https://www.dcj.nsw.gov.au/news-and-media/media-releases-archive/2023/historic-native-title-agreement-for-the-northern-rivers.html>.

[47] *COAG Investigation* (n 26) 61.

[48] *Noongar Economic Framework Factsheet* (n 81) 1.

(a) promoting early engagement between Western Australian State Government agencies through Early Tender Advice for all Noongar businesses registered with Tenders WA;

(b) exemption from competitive tendering processes that allows for the direct engagement of a registered Noongar business for works, goods and services procurements valued at less than $150,000 (as outlined in the Engaging Aboriginal Business Policy and Open and Effective Communication Policy);

(c) increasing registration of Noongar businesses on the Tenders WA website; and

(d) providing Noongar representation on tender evaluation panels for Western Australian State Government agencies providing works in the South West Settlement area where appropriate.[49]

While quotas alone are unlikely to adequately address the losses brought about by loss of ownership and control of land, quotas may be appropriate in combination with other forms of redress, such as those identified above.

2.8 Data sovereignty

Data sovereignty as a concept is relatively new[50]. However, the importance of giving to Indigenous people ownership of, and access to, their data has been long recognised. For instance, in the *Bringing Them Home Report* at chapter 16 the Human Rights and Equal Opportunity Commission found that the right of self-determination "requires that Indigenous peoples should be able freely to access information critical to their history and survival as peoples" and that:

> "Indigenous people require personal, family and community information… to assist them to recover from a past marked by gross violations of their human and community rights by governments."

The sensitive nature of the information held and the importance of this information in relation to reserving culture and connection to country emphasises the need for Aboriginal and Torres Strait Islander people to be involved in data storage and ownership.

2.9 Summary of previous reviews and inquiries

We have summarised below a number of reviews and inquiries which have considered non-financial forms of redress in the table in Attachment . We note that some of the reviews and inquiries listed considered issues other than loss of ownership or control of land, such as the Bringing them Home Report. These references have been included where the recommendations are considered appropriate, or able to be adapted, in the context of loss of ownership or control of land.

[49] Noongar Economic Participation Framework 3. The framework's Appendix 1 also provides explanation of Tender WA, the Early Tender Advice, and the Tender Evaluation Panel.

[50] Kukutai, Tahu, and John Taylor. Indigenous data sovereignty: Toward an agenda. Canberra: ANU Press, 2016.

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3 What forms of non-financial compensation are provided for in comprehensive native title settlements elsewhere in Australia?

3.1 Western Australia

(a) South West Native Title Agreement

As briefly noted in above in section 2.2 above, in 2015 six Traditional Owner groups representing the First Nations communities in the South West of Western Australia entered into an agreement with the WA State Government (being the South West Settlement), surrendering native title rights and interests in exchange for a comprehensive settlement package including:

(1) statutory recognition as Traditional Owners of the South West Settlement area;

(2) the creation of a trust (the Noongar Boodja Trust) to hold land, which the Western Australian State Government would transfer up to 300,000 hectares as reserve of leasehold land and up to 20,000 hectares as freehold into;

(3) access to Crown land;

(4) joint management with the Department of Biodiversity Conservation and Attractions (DBCA) of 200,000 square kilometres of land set aside for conservation; and

(5) the transfer of 121 properties to the Noongar Boodja Trust, to be refurbished, developed or repaired for the benefit of the Noongar Community.

(b) Tjiwarl ILUA

As outlined in Attachment 2 below, the Tjiwarl ILUA is a sophisticated and wide-ranging settlement agreement which contains significant non-economic compensation including:

- grant of water licences and joint management;
- creation, joint vesting, and joint management of the Tjiwarl Conservation Estate;
- transfer of lands to Tjiwarl AC;
- ongoing support with making additional applications for funding; and
- creation of working groups to support Tjiwarl businesses and economic opportunities.

(c) Yamatji Nation ILUA

Again, as noted section 2.2 above, the Yamatji Nation ILUA was entered into by the Western Australian State Government and the four Traditional Owner groups representing the First Nations communities near the Geraldton area in the mid-west of Western Australia in 2020. The Yamatji Nation ILUA has broad similarities to the South West Settlement, with:

(1) 134,000 hectares of Crown land to be transferred to the Yamatji Southern Regional Corporation for the benefit of the Traditional Owners as a managed Crown reserve;

(2) 14,500 hectares of Crown land to be transferred as freehold or conditional freehold land;

(3) joint management with the DBCA of 470,000 hectares of conservation estate; and

(4) the creation of a strategic Aboriginal Water Reserve for use or trade.

3.2 Current regime in Victoria

As detailed in the FNLRS Submission to the Yoorrook Justice Commission's Inquiry into Land, Water and Sky, in Victoria, First Nations groups can seek a native title settlement with the State Government under the TOSA. At present, four settlement agreements have been made under the TOSA. Ordinarily a settlement would include an ILUA, registered with the National Native Title Tribunal, and would prohibit the making of further claims, resolving all native title issues for the agreement area.

At a high level, land-related redress measures under these settlement agreements include:

(a) granting of Aboriginal title over lands such as national parks, to be jointly managed with the State;

(b) full transfer of culturally significant freehold property to First Nations groups;

(c) rights for First Nations people to access and use Crown land for traditional purposes, including hunting, fishing and camping in accordance with existing laws and property interests; and

(d) recognition of rights to take and use certain natural resources on Crown land (subject to negotiation with the State).

Significantly, the settlement agreements can include for the provision of funding to build organisational capacity for the first 20 years of the agreement, and procedural rights under a Land Use Activity Agreement approximately commensurate with those available under a Native Title Act consent determination, with the added bonus that the agreement is blind to past native title extinguishment, and rights apply over the entirety of the current Crown land estate.

Under the umbrella of the *Victorian Aboriginal Affairs Framework 2018-2023*[51], Victorian State agencies have assisted with the development of a number of strategies that record First Peoples' aspirations and establish paths to realise them. These include:

- The Victorian Traditional Owner Cultural Fire Strategy[52];
- The Traditional Owner Game Management Strategy[53];
- The Victorian Traditional Owner Cultural Landscapes Strategy[54];

[51] First Peoples- State Relations, *Victorian Aboriginal Affairs Framework 2018-2023 (VAAF)*< https://www.firstpeoplesrelations.vic.gov.au/victorian-aboriginal-affairs-framework-2018-2023>

[52] *The Victorian Traditional Owner Cultural Fire Strategy (Strategy, 2020)* < https://www.ffm.vic.gov.au/fuel-management-report-2018-19/statewide-achievements/cultural-fire-strategyhttps://www.ffm.vic.gov.au/fuel-management-report-2018-19/statewide-achievements/cultural-fire-strategy>

[53] *The Traditional Owner Game Management (Strategy, 2022)*<*https://www.gma.vic.gov.au/__data/assets/pdf_file/0011/655616/Traditional-Owner-Game-Managment-Strategy.pdf*>

[54] *The Victorian Traditional Owner Cultural Landscapes* (Strategy) < https://fvtoc.com.au/sections/landscapes/>

- The Victorian Traditional Owner Native Foods and Botanicals Strategy[55];
- Victorian and Aboriginal Local Government Strategy[56];
- Pupangarli Marnmarnepu 'Owning Our Future' Aboriginal Self-Determination Reform Strategy 2020-2025[57];
- Department of Environment, Land Water and Planning, *Water is Life: Traditional Owner Access to Water Roadmap 2022*[58]; and
- Yuma Yirrambio Invest in Tomorrow Strategy 2022[59].

Many of these strategies contain reference and commitment to non-commercial rights and benefits that can be conferred on First Nations. They therefore form an important part of the architecture of treaty negotiations going forward.

4 International examples of non-economic reparations in Canada and New Zealand

4.1 Canada – Settlements

As outlined in the accompanying Technical Paper on the Methods of Calculating Economic Compensation and Reparations, Canada has adopted the use of treaties with First Nations Peoples as a means of compensating for the loss of ownership and control of traditional lands. Under Canadian law, compensation for First Nations People must be developed with First Nations People.

In Canada, section 35 of the *Constitution Act 1982* recognises the treaty rights of the First Nations peoples of Canada and rights that may be acquired under land claim agreements. Comprehensive land claim settlement agreements between First Nations Groups and the Canadian Government resolve First Nations claims in exchange for non-financial redress including:

(a) land set aside for exclusive First Nations use (known as reserves);

(b) self-government and law-making authority within reserves or specific areas (with such laws operating together with Canadian federal and provincial laws of general application, such as the Criminal Code); and

(c) consultation and participation requirements, wildlife harvesting rights, and participation in land use and land management in specific areas.

The areas of self-government within the settlement area may be very broad including administration of justice, hunting, fishing, conservation, scientific research, housing, town planning and education.

[55] *The Victorian Traditional Owner Native Foods and Botanicals* (Strategy) < https://fvtoc.com.au/sections/native-foods-botanicals>

[56] *Victorian and Aboriginal Local Government (Strategy, 2021)* < https://www.localgovernment.vic.gov.au/our-partnerships/victorian-aboriginal-and-local-government-strategy>

[57] *Pupangarli Marnmarnepu 'Owning Our Future' Aboriginal Self-Determination Reform* (Strategy, 2020-2025) <Pupangarli-Marnmarnepu-Owning-Our-Future-Aboriginal-Self-Determination-Reform-Strategy-2020-2025.pdf (delwp.vic.gov.au)>

[58] Department of Environment, Land Water and Planning, *Water is Life: Traditional Owner Access to Water Roadmap 2022* <https://www.water.vic.gov.au/aboriginal-values/the-aboriginal-water-program>

[59] *Yuma Yirrambio Invest in Tomorrow* (Strategy, 2022) <Yuma-Yirramboi-Invest-in-Tomorrow-Strategy-2022.pdf (djsir.vic.gov.au)>

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There are 25 self-government agreements across Canada and 50 further agreements in negotiation.

By way of example, in the Province of Alberta, there are approximately 5,630 Metis First Nations people who live on eight Metis Settlements, which cover 1.25 million acres (recognised by the Metis Settlements Act which is discussed in more detail in the accompanying Technical Paper on the Method of Calculating Economic Compensation and Reparations). The Metis Settlements General Council holds fee simple interest on all Metis Settlement lands, which means they have full ownership of land with certain limited rights of the Crown. The Co-Management Agreement governs the settlements and includes the below non-financial compensation measures related to settlement lands:

(a) right to negotiate with an oil and gas company development company with a secured mineral lease;

(b) right to negotiate equity participation of up to 25% in any development with the successful bidder on a mineral lease;

(c) opportunity for a 100% Metis Settlement corporation to secure direct purchase from Alberta Energy and Minerals for a mineral lease outside of the public offering process; and

(d) right for a 100% Metis Settlement corporation to bid on public offering mineral leases.

Another example is the recent settlement between the Federal Canadian Government, British Columbia Government and five First Nations groups. Significantly this settlement was finalised after the British Columbia had entered into the *Declaration on the Rights of Indigenous Peoples Act* (2019). The five First Nations groups had signed a land rights treaty in 1899, which promised access to traditional hunting grounds and a right to generate income from traditional lands. However, the Government never abided by this treaty. Settlement of the ongoing dispute occurred in 2023 and redress measures include[60]:

(a) US$600 million in compensation;

(b) transfer of 109,385 acres of Crown land under the settlement to the 3,300 people living in the five First Nations groups;

(c) new protections for wildlife;

(d) halt to logging in old-growth forests; and

(e) limits on the amount of land that new resource extraction projects can disturb.

4.2 Canada – UNDRIP Act and Canadian Action Plan

In June 2021, Canada passed The *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c C-14 (**UNDRIP Act**). The purpose of the UNDRIP Act is to affirm the UNDRIP as applying in Canadian law and to provide a framework for Canada's implementation of the UNDRIP.[61]

[60] British Columbia, 'Five First Nations reach settlement with B.C., federal governments on Treaty Land Entitlement claims' (News Release, April 15 2023) <https://news.gov.bc.ca/releases/2023IRR0019-000539; https://theconversation.com/new-agreements-between-first-nations-and-b-c-government-a-step-toward-fulfilling-canadas-treaty-obligations-203889>

[61] *United Nations Declaration of the Rights of Indigenous Peoples Act* SC 2021, c C-14, ss 4(a)-(b) ('UNDRIP Act')

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The UNDRIP Act requires the Federal Government of Canada, in consultation with the Indigenous people of Canada, to:

- take all measures to ensure the laws of Canada are consistent with the UNDRIP (s 5); and
- develop an action plan to achieve the objectives the UNDRIP and to prepare an annual plan reviewing the implementation of that action plan each year (ss 6 and 7).

The UNDRIP Act sets out the following requirements for an action plan, being:

- measures to address injustices, combat prejudice and eliminate all forms of violence, racism and discrimination, including systemic racism and discrimination, against Indigenous peoples and Indigenous elders, youth, children, women, men, persons with disabilities and gender-diverse persons and two-spirit persons (s 6(2)(a)(i));
- measures to promote mutual respect and understanding as well as good relations, including through human rights education (s 6(2)(a)(ii));
- measures related to monitoring, oversight, recourse or remedy or other accountability measures with respect to the implementation of the UNDRIP (s 6(2)(b)); and
- measures related to monitoring the implementation of the action plan and reviewing and amending the action plan (s 6(3)).

The action plan must be tabled in Parliament and be made available to the public.[62]

A draft action plan and a 'What We Learned' Indigenous consultation result report was released in March 2023. [63] In June 2023, the Government of Canada formalised the 2023-2028 United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan (**Canadian Action Plan**).[64] The Canadian Action Plan includes 181 commitments, divided into categories representing 'shared priorities' and that of First Nations, Inuit, Métis, and Indigenous Modern Treaty Partners, as well as across different thematic areas of the UNDRIP.[65] Each measure also identifies which Government agency/department will implement or take charge of that particular measure.

The 'Shared Priorities' commitments include measures relating to self-determination and participation in decision-making. Examples include:

[62] UNDRIP Act (n 164) ss 6(5)-(6).

[63] The consultation report can be read here: Department of Justice Canada - *Ministère de la Justice Canada*, *What We Learned to Date Report on the Implementation of the* United Nations Declaration on the Rights of Indigenous Peoples Act (Consultation Report, 20 March 2023) <https://www.justice.gc.ca/eng/declaration/wwl-cna/ccp-pcc/pdf/UNDA_WWLR_ENG_FINAL.pdf>.

[64] Department of Justice Canada, 'An Important Step in Upholding the Human Rights of Indigenous People in Canada' (News Release, 21 June 2023) < https://www.canada.ca/en/department-justice/news/2023/06/an-important-step-in-upholding-the-human-rights-of-Indigenous-peoples-in-canada.html>; :The Action Plan", *Government of Canada – Gouvernement du Canada* (Web Page, 20 July 2023) <https://justice.gc.ca/eng/declaration/legislation.html>.

[65] UNDRIP Action Plan (n 168) 20-1.

- to withdraw the Comprehensive Land Claims,[66] and Inherent Rights Policies,[67] and to issue a public statement clarifying the Government' rights recognition approach. The statement will include that the extinguishment of rights is not a policy objective (measure 23); [68]
- to remove and address jointly identified barriers to settlement, and co-develop approaches for the implementation of the right to self-determination through treaties, agreements, and other constructive arrangements, as well as through new policies and legislative mechanisms (measure 24);[69]
- continued support for *"Indigenous Data Sovereignty and Indigenous-led data strategies to help ensure that First Nations, Inuit, and Métis have the sufficient, sustainable data capacity they need to control, manage, protect, and use their data to deliver effective services to their peoples, tell their own stories, participate in federal decision-making processes on matters that impact them, and realize their respective visions for self-determination*." (measure 30);
- commitment to work with Indigenous partners to ensure co-development of legislation, policies, programs, regulations and services further rights of Indigenous peoples to self-determination, led by priorities and strategies determined and developed by Indigenous peoples, and that co-development result in initiatives that comply with Indigenous rights and priorities (measure 67);[70] and
- to deploy necessary efforts to support Indigenous peoples' and communities' right to self-determination on socio-economic issues, including access to post-secondary education, skills training and employment, regardless of where Indigenous peoples reside (measure 102).[71]

They also include measures relating to land, territories and resources, including commitments:

- To work with First Nation, Métis and Inuit communities, governments and organizations to *"(i) enhance the participation of Indigenous peoples in, and (ii) set the measures that could enable them to exercise federal regulatory authority in respect of, projects and matters that are currently regulated by the Canada Energy Regulator*"[72] (Measure 34), as a first step for other departments to potentially set measures to enable Indigenous peoples to exercise regulatory

[66] The Comprehensive Land Claims policy appears to be referring to the policy outlining Government of Canada's approach towards negotiation of comprehensive land claims or treaties with Aboriginal groups and provincial/territorial governments. It has apparently not been updated since 1986, with the exception of an interim policy: Aboriginal Affairs and Northern Development Canada – *Affaires Autochtones et Développment du Nord Canada*, *Renewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing Section 35 Aboriginal Rights* (Interim Policy, September 2014) 6.

[67] The Inherent Rights policy appears to be referring to the policy guiding the Government of Canada's approach to self-government negotiations: 'The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government', *Government of Canada – Gouvernement du Canada* (Web Page, 01 March 2023) <https://www.rcaanc-cirnac.gc.ca/eng/1100100031843/1539869205136>.

[68] UNDRIP Action Plan (n 168) 31.

[69] UNDRIP Action Plan (n 168) 31.

[70] UNDRIP Action Plan (n 168) 41.

[71] UNDRIP Action Plan (n 168) 47.

[72] The Canadian Energy Regulator regulate pipelines and energy development and trade:'Our Responsibilities', *Canada Energy Regulator* - Régie de l'énergie du Canada (Web Page, 21 July 2021) <https://www.cer-rec.gc.ca/en/about/who-we-are-what-we-do/responsibility/index.html>. For a list of its mandates, see also *Canadian Energy Regulator Act* SC 2019, c C-28.

authority in respect of federally regulated natural resource projects.[73] Specific steps proposed include:

- developing regulations to allow Minister of National Resource Canada to enter into arrangements to enable Indigenous governing bodies to be authorised exercise specific powers, duties, and functions under the *Canadian Energy Regulator Act*;
- amending regulations and policies on offshore pipelines to incorporate Indigenous knowledge and strengthen measures to prevent and address impacts to Indigenous rights and interests; and
- developing a systemic model to enhance participation of Indigenous peoples in compliance and oversight and to identify and take measures needed to support Indigenous governing bodies to exercise regulatory authority.[74]

- To enable harvesting by Indigenous peoples within heritage places where barriers remain through co-development of legislative amendments and policy initiatives that respect the rights of Indigenous peoples in s 35 in the Canadian Constitution (Measure 35).[75]
- To develop and implement actions to increase the economic participation of Indigenous peoples and their communities in natural resource development. (Measure 33)[76].

Finally, examples of measures relating to economic, health and social rights and cultural, religious and linguistic rights also bears highlighting:

- building on past work, to advance economic reconciliation through engagement on key aspects of Indigenous economic development, such as initiating discussions on Indigenous-led investment and financial asset management regime, and addressing persistent economic barriers (Measure 74);[77]
- to award a minimum of 5% of total value of all federal contracts to Indigenous businesses (Measure 79);[78]
- implementing a co-developed Urban, Rural and Northern Indigenous Housing Strategy with Indigenous partners (Measure 88);[79]
- continue establishing measures to facilitate the provision of adequate, sustainable and long-term funding for the reclamation, revitalisation, maintenance and strengthening of Indigenous languages through ongoing implementation of the *Indigenous Languages Act* (Measures 92);[80]
- implementing a range of initiatives that will result in economic and employment opportunities in heritage places, including enhanced and sustainable

[73] UNDRIP Action Plan (n 168) 34.

[74] All measures discussed in UNDRIP Action Plan (n 168) 33-4.

[75] UNDRIP Action Plan (n 168) 34.

[76] UNDRIP Action Plan (n 168) 34.

[77] UNDRIP Action Plan (n 168) 43

[78] UNDRIP Action Plan (n 168) 43.

[79] UNDRIP Action Plan (n 168) 44. See also 53 (Measure 11, First Nations Priorities).

[80] UNDRIP Action Plan (n 168) 45. See also 58 (Measure 11, Inuit Priorities).

Indigenous Guardian programs, support for on-the-land language cultural learning, and Indigenous-led place renaming and revitalisation of the stories of heritage places. This will in turn be guided by an advisory group of Indigenous leaders to Parks Canada, the Indigenous Stewardship Circle (Measure 96);[81] and

- work in consultation and cooperation with First Nations, Inuit, and Métis to ensure appropriate measures are in place for Indigenous peoples to maintain, control, protect and develop their cultural heritage, traditional knowledge and cultural expressions, including working to ensure that intellectual property legislative and regulatory framework are consistent with the UNDRIP (Measure 101).[82]

Crucially, the UNDRIP Act is also to be construed as upholding the rights of Canadian Indigenous peoples affirmed under s 35 of the Canadian Constitution, and not abrogating or derogating from them.[83] Some of the measures recommended in the Canadian Action Plan are expressly drafted to be complementary or supportive of s 35 rights,[84] and settlement.[85]

4.3 Canada – British Columbia's DRIPA

Although Canada has now passed the UNIDRIP Act at the federal level, the Province of British Columbia (**BC**) was the first Canadian jurisdiction to enact legislation relating to the UNDRIP. The BC legislature enacted the UNDRIP *on the Rights of Indigenous People Act*, SBC 2019, c 44 (**DRIPA**) on 28 November 2019.[86]

The DRIPA's purpose is to promote the implementation of the UNDRIP into BC law and to mandate the creation of an action plan to promote the objectives of the UNDRIP. The DRIPA itself in section 2 provides that the purposes of the DRIPA are to:

- affirm the application of the UNDRIP to the laws of BC;
- to contribute to the implementation of the UNDRIP; and
- to support the affirmation of, and develop relationships with, Indigenous governing bodies.

The key priorities of the DRIPA are to require the BC government to establish an action plan to achieve the objectives of the UNIDRIP,[87] and to make an annual report on progress towards making the laws of BC consistent with the UNIDRIP.[88]

[81] UNDRIP Action Plan (n 168) 46.

[82] UNDRIP Action Plan (n 168) 46.

[83] UNDRIP Act (n 164) s 3; Canada, *Parliamentary Debates,* House of Commons, 17 February 2021, 1805, 1815 (David Lametti, Second Reading Speech (David Lametti, Minister for Justice and Attorney-General). For discussion of the interpretation and interaction between the UNDRIP and self-government under s 35, see Gray (n 165) 22-3.

[84] See UNDRIP Action Plan (n 168) 32 (Measure 31), 34 (Measure 35), 40 (Measure 65), 63-4 (Measures 1, 3 and 4, Métis Priorities).

[85] See UNDRIP Action Plan (n 168) 31 (Measure 24), 60 (Measure 22, Inuit Priorities).

[86] Legislative Assembly of British Columbia, '2019 – UNIDRIP Legislation Enacted' <https://www.leg.bc.ca/dyl/Pages/2019-UNDRIP-Legislation-Enacted.aspx>.

[87] DRIPA s 4.

[88] DRIPA s 5.

The BC government published their action plan for achieving the objectives of the UNIDRIP (**BC Action Plan**) on 30 March 2022.[89] The UNIDRIP Action Plan contains 89 'actions' for specific commitments and steps which are organised under one of four 'themes'. The four themes are:

- *Self-Determination and Inherent Right of Self-Government*: This theme focuses on allowing Indigenous People to be able to exercise and have full enjoyment of their rights to self-determination and self-government.
- *Title and Rights of Indigenous Peoples*: This theme focuses on allowing Indigenous Peoples to be able to exercise and have full enjoyment of their inherent rights to own, use, develop and control lands and resources withing their territory.
- *Ending Indigenous-specific Racism and Discrimination*: This theme focuses on allowing Indigenous Peoples to be able to fully express and exercise their distinct rights and enjoy living in BC without interferences, oppression or other inequities associated with Indigenous-specific racism and discrimination.
- *Social, Cultural and Economic Well-being*: This theme focuses on allowing Indigenous Peoples to be able to fully enjoy and exercise their distinct rights to control and transmit their cultural heritage and be supported by initiatives that promote community and full participation, with a particular focus on women, youth, Elders, people with disabilities, and 2SLGBTQQIA+ people.

Each action includes a relevant government department or agency which is responsible for implementing that action. None of the actions appear to require a change in the law and most are instead designed to be implemented as changes to policy or approaches to providing services. Actions of particular interest to this review include:

- Action 1.3, which requires the Ministry of Indigenous Relations and Reconciliation to utilise the DRIPA to complete and implement agreements that recognise Indigenous self-government and self-determination; and
- Action 3.14, which assigns the Ministry of Citizens' Services the action of "*Advanc[ing] the collection and use of disaggregated demographic data, guided by a distinctions-based approach to Indigenous data sovereignty and self-determination, including supporting the establishment of a First Nations-governed and mandated regional data governance centre in alignment with the First Nations Data Governance Strategy*".

To aid the implementation of the actions, the DRIPA provides a framework for making agreements between the government and Indigenous peoples.[90]

The BC Action Plan is to be implemented over five years (2022-2027) and is subject to an annual report on progress, which is combined with the annual report referred to above on progress towards making the laws of BC consistent with the UNIDRIP.

[89] British Columbia, 'Declaration Act Action Plan' <https://declaration.gov.bc.ca/declaration-act/declaration-act-action-plan/; https://www2.gov.bc.ca/gov/content/governments/Indigenous-people/new-relationship/united-nations-declaration-on-the-rights-of-Indigenous-peoples/implementation>.

[90] DRIPA ss 6, 7.

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4.4 New Zealand

In New Zealand, the Treaty of Waitangi was signed in 1840 between Maori Chiefs (Traditional Owners) and the British Crown. The Treaty of Waitangi/Te Tiriti o Waitangi has two texts: one in Māori and one in English with some important differences in the wording. For example, in the Māori text Māori gave the British the right of governance, whereas in the English text, Māori ceded 'sovereignty'. In terms of property, in the Māori version of article 2, the treaty promises to uphold the authority that tribes had always had over their lands, whereas In the English text, the Queen guaranteed to Māori the undisturbed possession of their properties, including their lands, forests, and fisheries, for as long as they wished to retain them.[91]

The Waitangi Tribunal was established to determine the meaning and effect of the Treaty based on the claims before it. The Waitangi Tribunal hears claims of allegations that the Crown has breached the Treaty of Waitangi.[92] The Treaty of Waitangi is considered a constitutional document in New Zealand, although its status in law is not settled. Treaty rights can only be enforced in a court of law when a statute explicitly refers to the Treaty.[93]

Deeds of Settlement may include:

(a) financial and commercial redress;

(b) agreed historical accounts;

(c) apologies from the Crown for past injustices;

(d) transfer of lands within the claim area;

(e) transfer of national parks to newly created indigenous-led entities to manage parks with jurisdiction to make conservation management laws[94];

(f) statutory acknowledgment of significant areas;

(g) vesting (in fee simple) of sites of cultural significance;

(h) relationship agreements including protocols for how government agencies will interact and consult with First Nations people and reserving memberships to forums and committees of management for First Nations groups; and

(i) co-governance arrangements with local authorities.

A significant example is the Tūhoe Deed of Settlement with details as follows:[95]

(a) This is a final and comprehensive settlement for all events before 21 September 1992. Tūhoe Traditional Owners can still pursue claims for acts after this date.

[91] "Meaing of the Treaty", Waitangi Tribunal (Web Page) <https://www.waitangitribunal.govt.nz/treaty-of-waitangi/meaning-of-the-treaty/>.

[92] "About the Waitangi Tribunal", Waitangi Tribunal (Web Page) https://www.waitangitribunal.govt.nz/about/>.

[93] "Waitangi Treaty", New Zealand Ministry of Justice (Web Page) <https://www.justice.govt.nz/about/learn-about-the-justice-system/how-the-justice-system-works/the-basis-for-all-law/treaty-of-waitangi/>.

[94] "Ngai Tuhoe Deed of Setttlement Summary", New Zealand Minister of Justice (Web Page) <https://www.govt.nz/browse/history-culture-and-heritage/treaty-settlements/find-a-treaty-settlement/ngai-tuhoe/ngai-tuhoe-deed-of-settlement-summary/>.

[95] Ibid.

(b) Te Urewera to have its own conservation management legislation and exist as a separate legal identity. It will be governed by Tūhoe and Crown nominees to act in the best interests of Te Urewera.

(c) The national park land was vested in a Te Urewera legal identity and protected under new standalone legislation.

(d) NZ$170 million of financial and commercial redress.

(e) Tūhoe to have the opportunity to purchase five Crown owned properties within a deferred selection period after settlement date. All properties would be subject to lease back to the Crown with accompanying rentals.

(f) Tūhoe to have an exclusive right of first refusal over Crown-owned properties located within a specified area for 172 years from settlement date.

(g) Vesting of the fee simple estate (full ownership) of 7 sites of significance in the Tūhoe legal entity.

(h) Area acknowledgement: The deed of settlement includes an acknowledgement of Tūhoe's association with the land within the area of interest.

(i) Tūhoe to have membership on the Rangitaiki River Forum.

(j) Six place names altered as part of the Tūhoe settlement.

(k) Agreed historical accounts, crown acknowledgments and apologies.

(l) Relationship agreements between Tūhoe and the Crown regarding the delivery of government and iwi services to Tūhoe communities including:

(1) a Crown /Tūhoe relationship agreement which provides a foundation for how Tūhoe and the Crown will work together;

(2) a Service Management Plan (SMP) governing relationships with, and the management and delivery of services by, Tūhoe and these Crown agencies and Tūhoe; and

(3) Crown agency relationships agreements setting out protocols on how these government agencies will interact and consult with Tūhoe. The protocols include appointing Te Uru Taumatua as a fisheries advisory committee.

(m) The deed of settlement also provides for Tūhoe, the Museum of New Zealand Te Papa Tongarewa Board and the Department of Internal Affairs to enter into a letter of commitment to facilitate the care, management, access to and use of, and development and revitalisation of Tūhoe taonga (sacred or ‘treasured’ objects).

5 Summary and Observations

Determining reparations and compensation for the loss of social, economic, political, cultural and spiritual values should be a matter for negotiation with First Nations People. It should (and must) be up to the Aboriginal and Torres Strait Island People impacted by the loss of traditional lands to decide whether a financial or non-financial means of

redress (or combination of both) is appropriate. Accordingly, the below observations are made only a guide to assist parties in the Treaty Process.

5.1 UNDRIP principles to inform calculation of non-economic reparations

The following key 3 principles from UNDRIP should inform and guide the consideration of reparations in the negotiation process:

(a) in the first instance, reparations are to be in the form of restitution (i.e. the return of traditional lands to First Nations peoples) (also supported by Articles 8(2) and 11(2) of the UNDRIP);

(b) to the extent restitution is not possible, reparations are to be in the form of just, fair and equitable compensation, including the granting of land equal in quality, size and legal status, or monetary compensation or other appropriate redress; and

(c) reparations to be adopted are to be decided in light of what is appropriate to effectively restore the wrongs suffered according to the perception of First Nations themselves (also supported by Articles 8(2) and 38 of the UNDRIP).

5.2 Important findings and recommendations from earlier Australian reports and inquiries in relation to redress for loss of ownership and control of land

Important guidance is provided by earlier reports and inquiries into Aboriginal affairs, land rights and the redress for loss of ownership and control of land. See Attachment for a summary of some of the key findings.

Some important observations include:

- As outlined above in section 3.1 above, the Woodward Royal Commission identified the provision of land (in combination with finance to enable the land to be used for housing or other economic purposes) as the most effective redress.[96] More recently, the COAG Report also expressed support for granting commercially and culturally valuable land to native title PBCs and Aboriginal and Torres Strait Islander owned land holding entities.
- The principle of self-determination sits at the heart of treaty processes and reparations and redress for past wrongs. Treaty processes should pursue self-determination and look to opportunities to promote self-determination by:
  - conferral of legal authority to self-govern in relation to discrete areas of law; and
  - withdrawal of legal obstacles and impediments to the exercise of traditional law and custom.
- Investment in and support for the creation of self-determined structures to pursue cultural restitution, in the form of education and resources, is another potential way to address loss of cultural connection associated with the loss of ownership or control of land.
- The State should consider adopting land justice regimes and legislation to promote royalties, equity partnerships and profit-sharing arrangements as

[96] *Woodward Royal Commission vol 2* (n 2).

possible forms of redress. The NT ALRA established the Aboriginal Benefit Account and has a requirement for the payment royalties for mining conducted on any land trust[97].

- Redress might also take the form of goods, services or 'in-kind' benefits. Examples of these forms of redress could include:
  - provision of housing or ownership of revenue-generating property;
  - provision of land, services or goods; and
  - provision of training, secondments or staffing capacity-building to PBCs or other relevant entities.

5.3 Government commitment and accountability to UNDRIP-informed self determination processes

As can be seen from the Canadian UNDRIP Act and Canadian Action Plan detailed at section 4 above, self-determination is not something that is finalised with the negotiation of a treaty. It is something that can be promoted before, during and following treaty negotiation. The UNDRIP Act ensures a whole of government commitment and accountability for the Canadian Action Plan. The Canadian UNDRIP Act and Action Plan make provision (and set targets) for many goals to address disadvantage. If the Victorian State were to adopt similar structures alongside and in addition to the Treaty Framework, then the Candian experience would provide a useful reference point.

5.4 Further comparative research is needed into forms of redress in other jurisdictions

FNLRS' preliminary research into the Canadian and New Zealand treaty and settlement processes has revealed many instructive examples of financial and non-financial forms of redress for loss of ownership and control of land.

The analysis of overseas treaties and reparation processes provided in this paper is of a preliminary nature and are illustrative only. We recommend that as part of the Treaty Process, comprehensive comparative analysis should be commissioned and that formal structures be put in place to facilitate engagement with other jurisdictions and relevant UN bodies, both by First Peoples and the State.

[97] NT ALRA (n 16) s 62-64B.

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Attachment 1

Summary of reports and inquiries

#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
1	Aboriginal Land Rights Commission (Second Report, April 1974)	The Woodward Royal Commission was established by the Whitlam Government following the decision in *Milirpum v Nabalco Pty Ltd (1971) 17 FLR 141*, to find an appropriate way to recognise the traditional rights and interests of Aboriginal people in and to land.[98]	Land grants After rejecting cash compensation as an appropriate form of redress,[99] Commissioner Woodward noted that: "…I believe that the only appropriate direct recompense for those who have lost their traditional lands is other land - together with finance to enable that land to be used appropriately, either for housing or some economic purpose."[100] Royalty payments and equity grants One of the recommendations of the Woodward Royal Commission in the context	The report laid the groundwork for the enactment of the NT ALRA.[102]	Both land grants and the provision of royalties or equity arrangements go some of the way to addressing the financial implications of loss of land. However, these mechanisms do not necessarily address the spiritual and cultural loss of Connection to Country associated with loss of ownership or control of land.

[98] Harry Hobbs, 'The Woodward Royal Commission' (Factsheet, ANTaR, 23 November 2022) 1 <https://antar.org.au/wp-content/uploads/2022/11/The-Woodward-Royal-Commission-Factsheet-1.pdf>.

[99] *Woodward Royal Commission vol 2* (n 21) 10 [53].

[100] *Woodward Royal Commission vol 2* (n 21) 10 [55].

[102] Central Land Council, *The Land Rights Act Made Simple* (Brochure) 4-5; 'Aboriginal Land Rights Act', *National Museum of Australia* (Web Page, 8 December 2022) < https://www.nma.gov.au/defining-moments/resources/aboriginal-land-rights-act#:~:text=In%20December%201976%20the%20federal,traditional%20ownership%20could%20be%20proven>.

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
			of minerals and petroleum exploration included potential negotiated payments to Aboriginal peoples and communities for exploration rights, as well as royalty payment or equity interests in a project venture.[101]		We note in particular the comments made in the Woodward Royal Commission that land grants may need to be accompanied by associated financial assistance, to facilitate use or maintenance of the relevant land. In respect of royalty payments and equity arrangements, we note that these mechanisms are dependent on a particular project or business being operational on the relevant land.
2	Royal Commission into Aboriginal Deaths in Custody (National Report, 1991)	The Royal Commission into Aboriginal Deaths in Custody was established by the Hawke Government in 1987 to investigate causes of Aboriginal deaths in custody.	Land grants Commissioner Johnston noted that there was a nexus between inadequate or insufficient land provision to Aboriginal people and behaviours which led to high arrests and detention of Aboriginal people.[103]	According to a 2018 Deloitte report for the Department of Prime Minister and Cabinet, the Commonwealth, states and territories have partially of fully implemented recommendation 337.[106] In Victoria, the recommendation was said to be	We repeat our comments above in respect of land grants.

[101] See *Woodward Royal Commission vol 2* (n21) 127 [708](x).

[103] *RCIADC Report* (n 23 vol 2 498 [19.3.1]. See also 498 [19.3.2].

[106] Deloitte Access Economics, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (Report, August 2018) 694-696 ('Deloitte Report').

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
			The Commissioner recommended that there remained land needs of Aboriginal people which should be met even if 'Aboriginal people are no longer able to, nor seek to, make claims to particular areas of unalienated crown land on the basis of cultural, historical or traditional association' for unalienated Crown lands.[104] The Commissioner then recommended that a process be established to enable Indigenous peoples to secure or otherwise purchase land for 'social, recreational and community purposes' and to 'improve the environmental circumstances in which they live'.[105]	implemented through the Capital Projects Program and the *TOSA*.[107] However, the report expressly notes that it assesses government outputs (ie actions) instead of outcomes (ie impact of these actions) on the RCIADC.[108] For example, the report treated 'mere' enactment of the *Native Title Act* and the *Native Title Amendment Act 1998* as evidence that the Commonwealth has implemented recommendation 337.[109] Overall, the Deloitte report concluded that 78 % of the RCIADC recommendations have been fully implemented as of 2018, with 6% partially implemented.[110] This was characterised as highly questionable by a CAPER report Anthony et al.[111] The report	

[104] *RCIADC Report* (n 23) vol 5 145.

[105] *RCIADC Report* (n 23) vol 5 145-6 recommendations 337(a)-(b). See also vol 5 49 [37.11]

[107] Deloitte Report (n 97) 694.

[108] Deloitte Report (n 97) ix.

[109] Deloitte Report (n 97) 694.

[110] 'Review into Implementation of the Royal Commission into Aboriginal Deaths in Custody', *National Indigenous Australians Agency* (Web Page, 23 October 2018) < https://www.niaa.gov.au/resource-centre/indigenous-affairs/review-implementation-royal-commission-aboriginal-deaths-custody>; Deloitte Report (n 97) ix.

[111] T Anthony et al, '30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented' (Working Paper No 140/2014, Centre for Aboriginal Economic Policy Research, 2021) 1 ('30 Years On').

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
				also casts significant doubts over the Deloitte report's methodology[112] and ultimately noted that very few of the RCIADC recommendations have been implemented.[113]	
3	Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures (Final Report, 1995)	The *Reconditions, Rights and Reform Report* was commissioned by the Commonwealth government, seeking information on further measures that the government could consider to address the dispossession of Aboriginal and Torres Strait Islander people in response to the Mabo decision.	Co-extensive rights In the report, ATSIC observed that it may be possible to have co-extensive rights over land. In particular, the report noted at [3.50] that: *A question that must be faced by modern Australia if it is serious about social justice and reconciliation is whether it was really necessary to extinguish all Aboriginal interests to enable pastoral and agricultural development to proceed.* ATSIC recommended that the Commonwealth conduct a detailed study in conjunction with Indigenous people on the	The report was apparently meant to be a part of a 'social justice' package that is meant to respond to dispossession of First Nations land and waters, together with the *Native Title Act 1993* (Cth) and a land fund.[120] However, according to the Aboriginal and Torres Strait Islander Social Justice Commissioner at that time, this social package never came to fruition.[121]	Co-extensive rights have the benefit of being a "mid-way" option, seeking to minimise the impacts of acts that would otherwise wholly extinguish native title. However, there may be practical difficulties in trying to implement co-extensive rights. There may also be political opposition to this course. In respect of land grants and royalties, we repeat our comments above.

[112] Anthony et al (n 102) 5-6.

[113] See Anthony et al (n 102) 1.

[120] Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008* (Report No 2/2009, 18 February 2009) 46, appendix 3 ('*Native Title Report 2008*').

[121] *Native Title Report 2008* (n 111) 46.

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
			process by which co-extensive rights could be reasserted.[114] Options for co-extensive rights included 'new forms of rights under existing property law' or 'acquisition of special rights through legislation'.[115] The report also contemplated the Commonwealth acquiring rights similar to native title from pastoralists and granting co-extensive rights to Traditional Owners.[116] Royalties, equity, and profit sharing ATSIC noted that compensation for loss of land should include access to revenue derived from use of land.[117] It noted that 'royalties could provide a general form of compensation'.[118] Land grants and provision of goods ATSIC noted that other forms of redress suggested to it included land grants, access to housing, and ownership of revenue-generating property.[119]		

[114] *Recognition, Rights and Reform* (n 24) 26 [3.52]. See also recommendations 11 and 33 of the report: 104, 107.

[115] *Recognition, Rights and Reform* (n 24) 26 [3.52].

[116] *Recognition, Rights and Reform* (n 24) 38 [4.41]

[117] *Recognition, Rights and Reform* (n 24) 38 [4.40].

[118] *Recognition, Rights and Reform* (n 24) 38 [4.42] See also Recommendation 33: 107.

[119] *Recognition, Rights and Reform* (n 24) 38 [4.44].

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
4	Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (Final Report, 1997)	The *Bringing Them Home* report was commissioned to investigate the separation of Aboriginal and Torres Strait Islander children from their families (the Stolen Generation).	Cultural restitution The report highlighted the importance of Indigenous languages in relation to maintaining family relations and continuation of cultures,[122] and of the identity of those forcibly removed.[123] HREOC also noted that recommendations have drawn attention to the need for broader measures of cultural restitution.[124] The HREOC also recommended the expansion of funding for Aboriginal language, culture, and history centres.[125] Land grants The HREOC also noted evidence and submissions that proposed granting of land	While many of the report's recommendations and key principles was initially rejected, the government provided $63 million over four years to various measures, including "culture and language maintenance programs".[127] Later, Prime Minister Kevin Rudd offered a formal apology to the members of the Stolen Generation on 13 February 2018.[128] This acknowledgment and apology for the forcible removal of Aboriginal and Torres Strait Islander children was a key recommendation of the report.[129] Regardless, as of 2017 many of the recommendations remains to be implemented,[130] in what the Healing Foundation described as a "missed opportunity to address trauma in Aboriginal	The provision of cultural restitution grapples directly with the non-economic impact of loss of control and ownership of Country. In respect of land grants, we repeat our comments above.

[122] Bringing Them Home Report (n 25) 258-9.

[123] Bringing Them Home Report (n 25) 259.

[124] Bringing Them Home Report (n 25) 258.

[125] See Bringing Them Home Report (n 25) 260, recommendations 12a-b.

[127] Aboriginal and Torres Strait Islander Healing Foundation, *Bringing Them Home 20 Years On: An Action Plan for Healing* (Report, 22 May 2017) 15 ('*BTH 20 Years On*')

[128] The Stolen Generations', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Web Page) <https://aiatsis.gov.au/explore/stolen-generations#:~:text=The%20report%20contained%2054%20recommendations,and%20Torres%20Strait%20Islander%20children.>

[129] 'The Stolen Generations', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Web Page) <https://aiatsis.gov.au/explore/stolen-generations#:~:text=The%20report%20contained%2054%20recommendations,and%20Torres%20Strait%20Islander%20children.>

[130] BTH 20 Years On (n 118) 15

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
			and housing as restitution for those whose removal had led them to lose their connection to their lands and are now unable to enjoy native title rights.[126]	and Torres Strait Islander communities and to provide a basis for genuine reconciliation in Australia".[131]	
5	Native Title Report 2008 (prepared by the Aboriginal and Torres Strait Islander Social Justice Commissioner) (Report No 2/2009, 18 February 2009)	The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established within the Australian Human Rights Commission to, amongst other things, report annually on the operation of the Native Title Act (see section 209 of the Native Title Act).	Recognition short of native title determination The Commissioner noted that "native title is not producing land justice for the majority of Aboriginal peoples and Torres Strait Islanders" and that there is "a discussion gathering momentum about how traditional ownership can be recognised short of native title determination". The Commissioner went on to consider submissions made by Justice Wilcox and the State of Queensland, which noted the difficulties and delays faced by native title claimants.[132]	We were unable to establish whether this report was directly responded to in our search.	Recognition of rights or connection short of a native title determination may be a form of redress which seeks to acknowledge historical ownership of and connection to land, without claimants needing to go through the native title process, which can be time consuming and costly.
6	Investigation into Indigenous Land	On 10 October 2014, the Council of Australian Governments announced an investigation into Indigenous	Employment and supplier quotas The Senior Working Group noted that employment and supplier quotas would help	We were unable to identify if this investigation was directly followed-up on based on our search.	The options outlined in the Land Use Report are not forms of redress per se, but could potentially be used in

[126] See Bringing Them Home Report (n 25) 258.

[131] BTH 20 Years On (n 118) 25.

[132] *Native Title Report 2008* (n 111) 48-9, particularly the submissions of Justice Wilcox and the State of Queensland.

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
	Administration and Use (Report to Council of Australian Governments, December 2015) ('Land Use Report')	land administration, to enable traditional owners to readily attract private sector investment and finance to develop their own land with new industries and businesses. The Report was drafted by the COAG Senior Working Group, in consultation with the Expert Indigenous Working Group.	support the capacity of Indigenous land holders and representative bodies such as PBCs.[133] The Expert Indigenous Working Group recommended that 'Indigenous businesses are given the opportunity to win contracts to develop infrastructure through appropriate procurement policies', as well as mandatory procurement targets for government procurement.[134] They also recommended that 'incentives and concessions be provided for industry to implement procurement targets and in terms of how effectively they are providing employment and contracting outcomes for Indigenous people'.[135] Provision of services The Senior Working Group noted that 'accessing quality external advice and professional services is key to strengthening the capacity of land holding bodies'.[136] They also noted that the Commonwealth		conjunction with other strategies (e.g. land grants or equity / profit sharing arrangements), to enhance the impact of those strategies.

[133] *COAG Investigation* (n 26) 59, 61.

[134] *COAG Investigation* (n 26) 61-2.

[135] *COAG Investigation* (n 26) 62.

[136] *COAG Investigation* (n 26) 63.

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
			government had already provided training around purchasing professional services.[137] The Expert Indigenous Working Group recommended that the 'provision of advice and management services to Indigenous land holding bodies needs to be regulated and that newly established Indigenous land holding bodies should be supported to develop their capacity and ensure they are able to make good decisions in relation to engagement of staff and consultants'. [138]		
7	*Social Justice and Native Title Report* (Report, 16 October 2016)	This report was presented by the Aboriginal and Torres Strait Islander Social Justice Commissioner, to report on the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples from 1 July 2015 to 30 June 2016.	Provision of Services The Report noted that Aboriginal and Torres Strait Islander peoples required tailored training and investment to support them in running a business, such as business development and financial training for PBC directors.[139] The Report also noted that the Government should consider funding the PBCs to lodge compensation claims, alongside the broader	We were unable to identify if this report was directly responded to based on our search.	Careful consultation should be undertaken with relevant Indigenous communities before these forms of redress are provided. Consideration should also be given to combining these forms of redress with other forms.

[137] *COAG Investigation* (n 26) 63.

[138] *COAG Investigation* (n 26) 64.

[139] *Native Title Report 2016* (n 26) 131.

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#	Review or inquiry	Brief background to the review or inquiry	Forms of non-financial redress identified	Status of recommendations/were recommendations actioned?	FNLRS comment
			simplification of the process as an important priority.[140]		

[140] *Native Title Report 2016* (n 26) 135-6.

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Attachment 2

Outline of non-financial benefits provided in the Tjiwarl ILUA

	Overview	Land and water rights/management
Working groups and committees	Establishes Implementation Committee comprised of representatives from both parties to oversee the ILUA process. Also establishes the following working groups: • Research and Development Working Group; • Economic Empowerment Working Group; • Mining Business Working Group; • Water Working Group; and • Land Estate Working Group.	N/A
Support for additional funding	The State, acting through the Implementation Committee, will provide Tjiwarl AC with ongoing support with Additional Funding Applications including: • identifying any relevant State, Commonwealth or other grant opportunities for Additional Funding; and • upon Tjiwarl AC's request, providing letters of support for Additional Funding Applications where appropriate.	N/A

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	Overview	Land and water rights/management
	The State also agreed to provide appropriate support with Cost Exemption Applications as identified by the Implementation Committee (clause 10.10)	
Support for Tjiwarl businesses and economic opportunities	The State, acting through the Economic Empowerment Working Group, agreed to encourage and provide support for (clause 13): • Tjiwarl People to apply and hold mining tenements. • Tjiwarl businesses to access and identify tendering and procurement opportunities. • Tjiwarl AC to maximise existing and new carbon initiatives. • Tjiwarl AC to maximise commercial sandalwood opportunities.	N/A
Transfer of land ownership	The Tjiwarl Agreement provides for the creation of the Tjiwarl Land Estate through the transfer of lands to Tjiwarl AC without affecting native title rights and interests (clause **Error! Bookmark not defined.**, schedule 6).	The Tjiwarl Agreement distinguishes between First Stage Lands, Second Stage Lands, Cultural Lands and Future Lands. There is a process for Tjiwarl AC to apply for ownership for each type of land. The First Stage Lands are certain Crown land parcels (schedule 6, annexure 3). These will be transferred in fee simple (absolute freehold ownership) to Tjiwarl AC. The State is not obligated to ensure or provide physical access to the land. Further, if the State forms the view that legal access to the land cannot be created, fee simple will be transferred without legal access. Certain lands are also subject to existing easements and infrastructure rights. The other types of land are subjected to complex processes for ongoing identification, selection, approval and handover to Tjiwarl AC. The State will prepare the terms for handover, which may be freehold, leasehold or other forms of tenure that the State decides.

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	Overview	Land and water rights/management
		• Second Stage Lands are unallocated Crown land or unmanaged reserves at the time the Tjiwarl Agreement was made. • Cultural Lands are lands of cultural importance to the Tjiwarl people. • Future Lands are lands that became unallocated Crown land or unmanaged reserves after the Tjiwarl Agreement was made or Secondary Stage Lands which did not receive the required approvals for handover.
Creation of the Tjiwarl Conservation Estate	The Tjiwarl Agreement provides for the creation, joint vesting, and joint management of the Tjiwarl Conservation Estate (clause 17). The State agreed to spend $19.5 million over 10 years to manage the Estate. Further, the Agreement provides for the restoration of exclusive possession native title to the Wanjarri Nature Reserve and parts of the Yeelirrie Lake Mason Reserve (clause **Error! Bookmark not defined.**, schedule 8).	Joint vesting of the Tjiwarl Conservation Estate in Tjiwarl AC and the State. As such, Tjiwarl has rights to co-manage the Estate (certain nature reserves) in collaboration with the State.
Grant of water licences and joint management	The Tjiwarl Agreement provides for grant of water licenses under the *Rights in Water and Irrigation Act 1914* (WA) and creation of a jointly managed water plan (clause **Error! Bookmark not defined.**; schedule 5).	The State will inform Tjiwarl AC about water licences that have been applied for and fall under the Agreement (schedule 5, annexure 3). The State will also give the water licence applicant notice information about this process. Tjiwarl AC and the applicant may then negotiate the conditions of the licence and request the State's assistance if necessary. If the parties reach agreement, then Tjiwarl AC can consent to the grant of the water licence to the applicant with the agreed conditions in place. As such, Tjiwarl AC will not own the tenure. The Tjiwarl Water Plan (schedule 5, annexure 2) provides that Tjiwarl AC and the State will act in partnership to regulate water resources, use and licensing in the Agreement Area in line with Tjiwarl's interests. It does not confer any legal interest over waters to Tjiwarl AC. Water-related tenure will remain with the original holder (subject to any agreed negotiations).