AIATSIS

Comprehensive Settlement: Heads of Agreement

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August 2021

AIATSIS

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DRAFT FOR DISCUSSION

Using this manual

Comprehensive settlement agreements have emerged as a key tool in the negotiation and navigation of Indigenous-state relations in settler colonial countries, including somewhat recently in Australia. While calls for comprehensive-style agreements by Aboriginal and Torres Strait Islander Peoples are not new, the willingness of State and Territory governments and the maturing of negotiations and resulting agreements has developed momentum. In particular, governments have recently endorsed in-principle National Guiding Principles for Native Title Compensation Agreement Making.[1] With the failure of native title to deliver what many had hoped it would, comprehensive settlement agreements have been posited as a new way forward for carving out social, political, economic and cultural spheres of autonomy for Indigenous peoples.[2] Successive Australian governments have resisted labelling such agreements 'treaties', however, some commentators have applied the term to recent comprehensive settlement agreements which they consider meet the description in all but name.[3] Regardless of terminology, such agreements reflect significant changes in the relationship between Indigenous peoples and governments, and are negotiated within a framework which recognises the inherent rights of Aboriginal and Torres Strait Islander peoples.

Calls for comprehensive agreement-making come under the backdrop of an international human rights regime which recognises the fundamental rights of Indigenous peoples to self-determination, to freely determine their political status[4] and to maintain and strengthen their distinct political, legal, economic, social and cultural institutions.[5] The *United Declaration on the Rights of Indigenous Peoples* also articulates the ways in which the rights to self-determination and enjoyment of human rights are to be realised, mandating obligations on States to encode and give effect to those rights. In particular, it specifically recognises treaties and other agreements between states and Indigenous peoples, affirming in art 37 that 'Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States … and to have States honour and respect such treaties, agreements and other constructive arrangements.'

The point at which an agreement becomes 'comprehensive' is not settled. While this makes it somewhat difficult to write a guide to 'comprehensive' settlements, such ambiguity is not ultimately a bad thing. Indeed, the scope of agreements should grow over time as norms evolve for the better.

For the purpose of this guide, we use the term 'comprehensive' to refer to agreements between Indigenous peoples and governments (state, territory or federal) that are broad in subject matter and substantive in benefit. They should operate over a long or indefinite timescale, not inflexibly, but as a baseline. They are restitutive, but also future-focused.

Many of the agreements drawn upon in this guide are not themselves comprehensive. However, they may be helpful when considering content in relation to specific heads of agreement, the combination of a number of which may constitute an agreement which could be considered 'comprehensive'. We draw upon different domestic agreements, but also refer to numerous international examples. In particular, settlements from Canada, the United States and New Zealand. While the experiences of colonisation by Indigenous peoples with different jurisdictions are unique, a comparison allows us to look beyond the habits and restrictions of the native title process and imagine alternative ways of approached shared objectives.

This resource builds upon earlier research conducted by Dr Lisa Strelein, Dr Stuart Bradfield and Senica Madeay in 2005 which helped to inform the negotiation of the Noongar Settlement in Western Australia, as well as a study of regional agreements in 1997-98. It has benefited from extensive research on international settlement agreements complied and generously shared by the National Native Title Council (NNTC) in consultation with whom this resource was prepared. As interest in comprehensive settlement agreements rise and agreements continue to evolve, we consider it timely to provide a comprehensive and up-to-date manual that can be used as a resource in imagining and negotiating other settlements.

In doing so, we recognise that each Indigenous nation is unique, with its own culture, tradition, language, governance structures and aspirations, and that in reflecting this, each settlement agreement is also necessarily unique. This resource is not a template, nor does it purport to suggest what any particular comprehensive agreement should look like. Rather, it is designed to provide some ideas, and inspire more ambitious and creative comprehensive settlement agreements that go further towards the establishment of contemporary nation-to-nation relations, and which are not limited by concessions comfortable and familiar to colonial governments.[6]

A further question is the protection or entrenchment of such agreements.[7] While this resource is primarily directed to *content*, rather than negotiation or entrenchment, we have provided some suggestions around things to consider when it comes to protecting a comprehensive settlement agreement. Such agreements are often lengthy, exhausting and human resource-intensive in the negotiation, and provide a bedrock for the planning for a better future. It is imperative that equal attention be paid to the question of entrenchment as to content, to ensure that hard-won gains are not lost at the turn of government, or public opinion, while, crucially, also preserving the right to re-negotiate on Indigenous terms in future.

Many will have questions and concerns about comprehensive settlement agreements, and the impact that settlement (which inevitably requires compromise) might have on fundamental rights to sovereignty.[8] This resource does not seek to address these complex issues. Rather, it provides a guide in circumstances where transitionary justice measures are pursued, with an understanding that what is agreed to today is never final, but merely a step towards restitution, justice and greater Indigenous self-determination.

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[1] 'National Guiding Principles for Native Title Compensation Agreement Making' (Principles, 15 October 2021).
[2] Australian Law Reform Commission, *Review of the Native Title Act 1993* (Discussion Paper 82, October 2014) 66.
[3] Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 1.
[4] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 3 ('*UNDRIP*').
[5] Ibid art 5.
[6] For previous work on this topic, see Lisa Strelein and Tran Tran, 'Building Indigenous Governance from Native Title: Moving away from Fitting in to Creating a Decolonised Space' (2013) 18(1) *Review of Constitutional Studies* 19.
[7] For a more comprehensive discussion of these issues, see Megan Davis, 'Voice', (Speech), Keynote address to the AIATSIS Summit, 3 June 2021.
[8] As expressed by Tony McAvoy in 'Treaty' (Speech), Keynote address to the AIATSIS Summit, 2 June 2021, 6.

Executive summary

Australia is now home to a wide range of agreements between Indigenous peoples and non-Indigenous entities. These range from Indigenous Land Use Agreements (ILUAs) between native title holders and resource industries to joint management agreements in relation to specific areas of land, to more comprehensive 'government-to-government' agreements that recognise Indigenous jurisdiction over a broad range of matters including land management, governance, education, heritage, culture and employment. Most of the more 'comprehensive' agreements have been concluded relatively recently, making it difficult to assess successes and challenges in the implementation. They are also state-based (as opposed to federal, with the Australian federal government notably absent from settlement negotiations and outcomes), raising concerns about vulnerability to inconsistent federal laws in future. While this has not yet occurred in the context of comprehensive settlement agreements, notable examples include the overturning of state-based marriage equality laws in Australia.[9]

New Zealand agreements emerging from the Waitangi Tribunal process are direct in recognising past wrongs and the need for compensation. They also have innovative negotiation protocols and recognise the need for regional and federal agencies to work with iwi including through ensuring legislative alignment. However, while being careful to address land management, they tend to provide only relatively weak advisory roles for Indigenous parties.

Canadian agreements, both historical and contemporary, are generally comprised of three elements: land settlement, self-government and a financial transfer agreement. Many Canadian agreements also emphasise the transfer of powers to make regulations, though noting that this may not facilitate the realisation of all aspirations, particularly without concomitant devolution of power from the State, the provision of funding and the development of genuine and respectful relationships.

Canadian agreements are protected in the Canadian Constitution, which recognises and affirms 'Aboriginal and treaty rights of the Aboriginal peoples of Canada.'[10] Recognition of Aboriginal title in Canada led to the recognition, by necessary implication, of an inherent right to self-government, similar to the recognition of the continuous observance of a system of law in Australian law.

The US settlement agreements are some of the oldest agreements. They are focused on land, taxation and jurisdiction but are generally silent on cultural programs, language, employment and training, intellectual property and culture and heritage.

Water rights are generally excluded from all jurisdictions (with the exception of the land surrounding water bodies), and there is a reluctance to fully engage with commercial rights. Finally, benefits in many agreements are time-limited without provision for renewal, raising questions about ongoing utility. In New Zealand, agreements include letters of commitment and protocols to assist in the establishment and strengthening of long-term relationships between government and iwi.

Ultimately, a review of the below agreements and comparison of agreements from different jurisdictions illustrates a range of potential strengths and weaknesses. It is hoped that a survey of different examples, together with commentary and links to further information, will be of some benefit in building agreements for the future. Nevertheless, concluding an agreement is in many ways just the beginning. No matter how good the clauses are, it is the implementation and review that will determine its success.

[9] See *The Commonwealth v Australian Capital Territory* [2013] HCA 55.

[10] *Constitution of Canada*, Pt II, art 35(1).

Head of Agreement	Commentary	Content
Procedural elements		
Acknowledgment of Traditional Ownership	An acknowledgement of the status of Traditional Owners as first peoples is an important starting point in developing agreements. The acknowledgement gives the Traditional Owners' account of history and provides the general values of the group as well as how these relate to the settlement area. If possible and appropriate, the historical account and acknowledgment should be written in both English and the language of the group. This is the case in a number of New Zealand settlements (see, eg, *Te Aupouri Claims Settlement Act 2015* (NZ), s 7).	**Historical recognition: Yamatji Nation Indigenous Land Use Agreement, Preamble (a)-(e)** The Yamatji Nation continue their spiritual, emotive and physical connection to the lands and waters from the past, into the future and today and for many thousands of years prior to British colonisation. The lands of the Yamatji Nation were not terra nullius or 'land belonging to no-one' when European settlement occurred. The Yamatji Nation is made up of a number of different identity groups. Yamatji Nation is made up of people who identify as Amangu, Badimia, Naaguja, Nhanaghardi, Nhanda, Mullewa Wadjari, Wajarri, Wattandee, Widi, and Wilunyu. The ancestors of the Yamatji Nation, Old People and spirits, are forever present to protect people, culture and country. The traditional laws and custom of the Yamatji Nation guides its people and Traditional Elders in their cultural responsibilities, obligations and continuing relationships to our country, land and waters, including the seas. ***Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*** **(Cth)** (v) Aboriginals residing on that part of Condah land and other Aboriginals are considered to be the inheritors in title from Aboriginals who owned, occupied, used and enjoyed the land since time immemorial; (vi) that part of Condah land is of spiritual, social, historical, cultural and economic importance to the Kerrup-Jmara Community and to local and other Aboriginals; (vii) it is expedient to acknowledge, recognise and assert the traditional rights of Aboriginals to that part of Condah land and the continuous association they have with the land;
Acknowledgment of wrongdoing	The Crown should account and apologise for all wrongdoing as comprehensively as possible and acknowledge the impact these wrongs have had. While full compensation for past wrongs is not possible, the settlement should contain some element of restitution, and foster the ongoing relationship between the Traditional Owners and the Crown. Many Australia settlement agreements do not apologise for wrongdoings. There are exceptions, e.g. the *Noongar (Korrah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). In New Zealand there is an emphasis on an accounting of history and wrongdoing by the Crown, especially in relation to legal breaches. This statutorily codifies the truth telling process, makes Crown apology more genuine and places the settlement in context. Many of these historical wrongdoings have been specifically prosecuted through the Waitangi Tribunal. In other legal contexts (torts, civil liability, defamation law etc), apologies have been widely noted as an important aspect of the resolution of disputes and a mechanism for achieving justice.	***Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987*** **(Cth)** Whereas the Government of Victoria acknowledges: (a) That: (iv) that part of Condah land has been taken by force from the Kerrup-Jmara Clan without consideration as to compensation under common law or without regard to Kerrup-Jmara Law; **Recognition of liability: Te Aupouri Claims Settlement Act 2015, s 9** (1) The Crown acknowledges it has failed to deal in a satisfactory way with grievances raised by successive generations of Te Aupouri and that recognition of these grievances is long overdue. ... (7) The Crown acknowledges that its failure for more than 40 years to investigate fully and rectify the wrongful inclusion of 460 acres of the Wairahi land adjacent to the Muriwhenua South block deprived Te Aupouri whānau of their kāinga and valuable land and was in breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles. (8) The Crown acknowledges that it breached te Tiriti o Waitangi/the Treaty of Waitangi and its principles when it took Motuopao Island for a lighthouse reserve in 1875, despite having notified the Native Land Court in 1870 that it would not claim this land as surplus. ... the Crown's imposition of a new land tenure system allowed title determination to proceed on the application of individuals. The individualisation of land tenure made Te Aupouri land more susceptible to partition, fragmentation, and alienation and this eroded the traditional tribal structures and land ownership systems of Te Aupouri and was a breach of te Tiriti o Waitangi/the Treaty of Waitangi and its principles
Recitals	The recitals should cover key issues such as who will sign the agreement ('the parties'), previous significant events in the relationship between the parties, key principles which underpin the agreement, the purpose of the agreement, and the way each party will ensure the agreement had been agreed to by the groups they represent ('ratification').	**Yamatji Nation Indigenous Land Use Agreement, Recitals** A. The State and the Native Title Claim Groups ... have negotiated this Indigenous Land Use Agreement under the Native Title Act:

		(a) to evidence the mutual agreement and shared objectives of the State and the Yamatji Nation to work in ongoing partnership; and (b) in anticipation of a Determination of Native Title in respect of the areas the subject of the Yamatji Nation Claim ... H. The Parties intend to register this Agreement as an Indigenous Land Use Agreement on the Register of Indigenous Land Use Agreements under the Native Title Act and that, once registered, this Agreement will bind any holders of native title within the Agreement Area. ... K. This Agreement sets out the terms and conditions that have been reached between the Parties. **Historical Antecedents: Florida Indian (Miccosukee) Land Claims Settlement (1982), s 2** Congress finds and declares that— (1) there is pending before the United States District Court for the Southern District of Florida a lawsuit by the Miccosukee Indian Tribe which involves certain lands within the State of Florida; ... (4) the State of Florida and the Miccosukee Indian Tribe have executed agreements for the purposes of resolving tribal land claims and settling such lawsuit, which agreements require implementing legislation by the Congress of the United States and the Legislature of the State of Florida; and (5) Congress shares with the parties to such agreements a desire to settle such Indian claims in the State of Florida without additional cost to the United States.
Full and final	Many settlement agreements contain a 'full and final' clause to signify that the agreement is intended to settle all liability and that no further compensation will be paid. However, Indigenous parties may wish to exercise caution before agreeing to the inclusion of such a clause as compensation and native title are evolving areas of law. Comprehensive settlements can seek to address issues beyond strict native title compensation. Depending on the scope of benefits, Indigenous partis may restrict full and final settlement statements to discrete withdrawal acts and native title impacts leaving broader historic wrongs for future restitution (for example, the Noongar Settlement). Comprehensive settlement agreements should provide for a right to renegotiate terms if the legal and regulatory framework changes (under the proviso that any renegotiation can only benefit, and not disadvantage, the Indigenous party). Furthermore, the needs of communities may change over time and it should be open to the parties to modify the agreement by consent in the future. This is consistent with practice in other areas of law. For example, the ATO Code of Settlement provides that tax settlements can be reopened in certain circumstances, such as where the ATO subsequently changes its view of the law on which the settlement was based and the change benefits the taxpayer. In Canada, settlements feature a core treaty outlining key aspects of the compensation agreement while annexes to the agreement outline 'commitments to further work'. This shows that although the core terms may be final, the settlement is really just the basis for a long-term dynamic and productive governmental-nation relationship.	**South West Native Title Settlement** A. The Noongar people and the State of Western Australia have reached a full and final settlement of all current and future applications made or to be made by Noongar people under the NT Act for: (a) the determination of Native Title over the settlement area; and (b) the determination of compensation that will be payable by the State, on just terms, to compensate the Noongar people for the loss, surrender, diminution, impairment and other effects on their Native Title Rights and Interests of all acts affecting Native Title that have been done in relation to the Settlement Area ... 13. The Native Title Agreement Group acknowledges and agrees that the Compensation constitutes full and final compensation ***Maine Indian Claims Settlement Act* (1980), s 6(e)(1)** The consent of the United States is hereby given to the State of Maine to amend the Maine Implementing Act with respect to either the Passamaquoddy Tribe or the Penobscot Nation: Provided, That such amendment is made with the agreement of the affected tribe or nation, and that such amendment relates to (A) the enforcement or application of civil, criminal, or regulatory laws of the Passamaquoddy Tribe, the Penobscot Nation, and the State within their respective jurisdictions; (B) the allocation or determination of governmental responsibility of the State and the tribe or nation over specified subject matters or specified geographical areas, or both, including provision for concurrent jurisdiction between the State and the tribe or nation; or (C) the allocation of jurisdiction between tribal courts and State courts. ***Land Administration (South West Native Title Settlement) Act 2016* (WA), s 12** (1) This section applies if a management order is revoked in the circumstances described in the Land Base Strategy clause 4(b). (2) The provision of alternative reserve land or compensation in accordance with the Land Base Strategy clause 4(b) is in addition to any compensation payable under the LAA section 50(3) or 204(1) in respect of the revocation. (3) The LAA section 204(2) does not apply in respect of the revocation.
Non-limitation clause	Parties may wish to consider the inclusion of a 'disclaimer' to the effect that nothing in the agreement constitutes a ceding of sovereignty or a ceding of rights as peoples, including under international law. In Canada, co-developed policy explicitly states that extinguishment and surrendering of rights has no place in modern-day Crown-Indigenous relations, including when negotiating	**Maa-nulth First Nations Final Agreement** 1.16.2 Nothing in this Agreement, nor any action or authority taken, exercised or carried out by Canada or British Columbia in accordance with this Agreement is, or will be interpreted to be, an infringement of a Maa-nulth First Nation Section 35 Right. **Mohegan Nation (Connecticut) Land Claims Settlement, §1775b**

	agreements. See *Principals' Accord on Transforming Treaty Negotiations in British Columbia* cl 5. If necessary, it may be appropriate to acknowledge that the views of the parties differ with respect to certain matters, for example, sovereignty, without this precluding agreement on other areas in the interim.	(1) Aboriginal interests Nothing in this section may be construed to extinguish any aboriginal right, title, interest, or claim to lands or natural resources, to the extent that such right, title, interest, or claim is an excepted interest, as defined under section 1(a) of the State Agreement. **Canadian Comprehensive Funding Agreement 2022-2023 Pro-Forma** 5 Non-Derogation 5.1 Nothing in this Agreement will be construed to diminish, abrogate, derogate from, or prejudice any treaty or Aboriginal rights of [/:Name] and nothing in this Agreement will: a. prejudice whatsoever any applications, negotiations or settlements with respect to land claims or land entitlement between the Crown and [/:Name]; b. prejudice whatsoever the implementation of the inherent right to self-government nor prejudice in any way negotiations with respect to self-government involving [/:Name];
Priority in resolution process	Where possible, settlement negotiations should take place within a policy framework that prioritises Indigenous settlement over other claims to the land. This ensures that the potential benefit of the settlement is not undone by the prior granting of third party interests, such as exploration permits. In Chile, Law No. 20.249 establishes a regime known as 'Espacio Costero Marino de Pueblo Originario' (ECMPO) or Indigenous Coastal Marine Areas. The scheme is similar to native title, but applies only to the exercise of customary rights and interests over the sea. A key feature of the scheme is the suspension of all other applications for use of the coastal area (e.g. applications for industrial fishing licences) until the ECMPO application is determined (art 10). This ensures that priority in future use of the area is given to Indigenous groups.	**Law No. 20.249 (Chile)** Art 10 – Criteria for decisions between incompatible applications In the event that the same area which is the subject of an Indigenous Coastal Marine Area application is also the subject of a request for allocation for other purposes, processing of the other application is suspended until the customary use report prepared by Conadi [National Corporation for Indigenous Development] is released, or until the claim is resolved. In the event that the Conadi report does not verify the customary use claimed and the claim is rejected … the Indigenous community will have a period of three months to appeal. If no appeal is lodged after a period of three months, the request(s) that have been suspended will resume processing. In event that the Conadi report affirms the customary use claimed, the application for an Indigenous Coastal Marine Area is to be preferred. The applicant of the rejected application may be considered as a user in the administration plan [developed by the Indigenous group post-determination] by prior agreement with the Indigenous community.
Future Acts	Comprehensive settlement agreements should consider strengthening the decision-making authority of claimants with respect to future acts, or replacing the future acts process where native title is not recognised or does not exist. This is two-fold, involving (1) giving claimants agency over the design of the regime, including nominating the level of input they would like to have with regards to different activities on the land and (2) putting the approvals process in claimants' hands (rather than considering them as simply one stakeholder among many). Under the *Native Title Act 1993* (Cth) (NTA), native title holder rights with respect to dealings on native title lands fall somewhere along a sliding scale, depending on the nature of the future act. These range from a mere right to be notified to, at its highest, a 'right to negotiate'. Native title holders may not wish to be consulted about all dealings on the land, but should be able to nominate the level and nature of their involvement and the processes to be followed. Where future acts are agreed to, it is important to have procedures in place to ensure compliance, monitoring and ongoing communication with claimants. The NTA allows states and territories to legislate alternatives to the 'right to negotiate' or seek an exemption from the right in certain circumstances (NTA s 43). Historically this provision has been used by states and territories in an attempt to diminish the rights of native title holders (see chapter 5 of the *Native Title Report 2000*). However, it also provides an opportunity to establish more meaningful state-based future acts regimes in consultation with native title holders and in line with international best practice. In Victoria, the state government has a program of negotiating Recognition and Settlement Agreements with groups of Traditional Owners under the *Traditional Owner Settlement Act 2010 (Vic)*. One component of these agreements is a Land Use Activity Agreement (LUAA), which establishes processes that must be followed when various kinds of activities occur on	**Taungurung Land Use Activity Agreement (LUAA)** Schedule 3 1. Purpose of this schedule (a) This Schedule specifies which Land Use Activities subject to this Land Use Activity Agreement are Routine Activities, Advisory Activities, Negotiation (Class A) Activities, Negotiation (Class B) Activities or Agreement Activities. (b) If a Land Use Activity is capable of falling under more than one category in this Schedule 3, a categorisation that provides a higher level of procedural rights to the Corporation takes precedence over a categorisation that provides a lower level of procedural rights to the Corporation. Schedule 4 – Conditions for Earth Resource or Infrastructure Authorisations to be Routine Activities 5. The titleholder acknowledges that it has a duty to consult with the [Taungurung Land and Waters] Corporation throughout the period of their authorisation. 6. The titleholder will keep the Corporation informed about progress of the project works … **Dja Dja Wurrung Land Use Activity Agreement (LUAA)** 2. Community Benefits formula (a) The Parties agree that: (i) If an agreement is made under Division 3 of Part 4 of the Act in relation to a Land Use Activity described in item 1 of this Schedule; and (ii) that agreement provides that Community Benefits are to be provided to the Corporation; Then the State will provide Community Benefits to the Corporation in accordance with the table in item 4 of this Schedule.

	public land within the LUAA area. Unlike the NTA, groups negotiating an LUAA have input into the classification of an activity. There is also a right to say no to agreement activities. Under the NTA, the highest categorisation is the 'right to negotiate' (Div 3, subdiv P). In Canada, authority for developing processes for dealing with heritage rests with the First Nations group, however, this has not been extended to other kinds of future acts.	
Low-Impact Future Acts	Settlement agreements may consider nominating certain activities as 'low-impact' future activities for which the claimant group provides standing or agreed permission. This can reduce the burden on claimant groups to respond to numerous similar proposals. The NTA allows for 'class notification' in some cases, where an agency is aware that it will receive numerous similar applications for a land or resource dealing during a certain period (NTA ss 24GB, 24GD, 24GE, 24HA, 24ID, 24JB). The agency can then provide advance notification of those dealings by way of reference to a class of future acts – e.g. the Great Barrier Reef Marine Park Authority issues a class notification for granting up to 250 permits per year for three years for tourist programs. However, currently there are limited arrangements by which claimants can provide 'standing permission' for certain acts to occur. Designating an activity as a 'routine activity' under a Victorian LUAA provides something of 'standing permission', however, these classifications cannot easily be changed without redrawing the entire settlement agreement. Any provision for standing permission should only be included if sought by the claimant group.	**Dja Dja Wurrung Land Use Activity Agreement (LUAA)** Schedule 3 – Land Use Activities (1) Routine Activities c) Maintenance and other low-impact works … that include: (i) Erection and maintenance and fences, gates and signage (ii) Maintenance of infrastructure (iii) Maintenance of grounds, roads and tracks (e.g. weed control, grass cutting) d) A fisheries authorisation … that is an: (i) Access licence (ii) Aquaculture licence (iii) General permit [Under s 33 of the *Traditional Owner Settlement Act 2010* (Vic), there is no requirement to notify Traditional Owners of activities specified 'routine' in an LUAA]
Invalidity	Provision should be made for the invalidation of acts done pursuant to a compensation agreement if it is found that the agreement was concluded through fraud, undue influence or duress. In the context of Indigenous Land Use Agreements (ILUAs), the *Native Title Amendment Act 2021* (Cth) changed s 24EB of the *NTA* to include: (2A) To avoid doubt, removal of the details of an agreement from the Register of Indigenous Land Use Agreements does not affect the validity of a future act done while the details were on the Register. This amendment was heavily criticised by many Indigenous stakeholders.	**Florida Indian (Seminole) Land Claims Settlement (1987), §1772g** In the event the Settlement Agreement or any part thereof is ever invalidated— (1) the transfers, waivers, releases, relinquishments and any other commitments made by the State, the tribe, or the district in the Settlement Agreement shall no longer be of any force or effect; (2) section 1772c of this title shall be inapplicable as if such section was never enacted with respect to the lands, interests in lands, or natural resources of the tribe and its members; and (3) the approvals of prior transfers and the extinguishment of claims and aboriginal title of the tribe otherwise effected by section 1772c of this title shall be void ab initio.
Conflict of laws	If plurinationalism is contemplated, settlement agreements should provide guidance on negotiating this in practice, particularly where there is a conflict of laws. For a discussion of the challenges of plurinationalism in Bolivia, see 'Plurinationalism as sovereignty: Challenges of Indigenous recognition in Bolivia'.	***Kanesatake Interim Land Base Governance Act 2001* (Canada), s 17** (2) In the event of an inconsistency or conflict between a Kanesatake Mohawk law and any other provincial law, the Kanesatake Mohawk law prevails to the extent of the inconsistency or conflict. (3) In the event of an inconsistency or conflict between a Kanesatake Mohawk law and a federal law, the federal law prevails to the extent of the inconsistency or conflict.
Ratification	It is important that agreements are not rushed, however, once concluded, they should be implemented in a timely fashion. Where significant changes mean that delays are inevitable, consideration should be given to the provision of interim or transitional benefits in the agreement text. Although the Yamatji Nation Southern Regional Agreement was executed in February 2020 (*Taylor on behalf of Yamatji Nation Claim v Western Australia* [2020] FCA 42), benefits did not begin to be implemented until May 2021.	**Framework Agreement between Quebec and the Mohawks of Kahnawake, Agreement Relating to Professional Combat Sports Permits** 26. Quebec agrees to take as quickly as possible, whatever measures are necessary to ensure the implementation of this Agreement. 27. Kahnawake agrees to take, as quickly as possible, whatever measures are necessary to ensure the implementation of this Agreement.
Service provision	Settlements should not cover or infringe on areas of service provision that can be already be expected of state and federal governments. Agreements tend to contain a mixture of service delivery and tangible outcomes. In terms of service provision, Indigenous groups may wish to become service providers themselves, or else provide policy input into the way services and programs are delivered, and then monitor the way they have been delivered. Parties must determine the level of detail to be included in the agreement and what can be left to templates and sub-agreements. In general, the two broad possibilities are that the	**Alaska Native Claims Settlement Act (1971)** No provision in the Act shall replace or diminish any right, privilege or obligations of Natives as citizens of the United States or of Alaska, or relieve, replace, or diminish any obligation of the United States or of Alaska to promote the welfare of Natives as citizens of the United States or of Alaska. **Kluane First Nation Final Agreement** 24.3.1 Government and a Yukon First Nation may negotiate the devolution of programs and services associated with the responsibilities of the Yukon First Nation as agreed in negotiations over matters enumerated in 24.2.1.

	agreement incorporate a commitment to transfer services and responsibilities; or specify how specific services will be financed, benchmarked, and irregularities resolved.	
Sub-Agreements	(See discussion in specific subsections regarding content) Comprehensive agreements may require tripartite agreements with state and local governments in a number of areas including: • Land and water use, planning and development • Natural resource management • Economic development • Heritage • Education and training • Language and culture • Intellectual and cultural property • Health • Housing • Policing, law and order • Social justice • Youth, women and families	**Draft Umbrella Agreement with respect to Canada-Kahnawake Intergovernmental Relations Act, s 11** Sub-agreements will include: (a) a description of the jurisdiction or authority to be exercised by the Kahnawake with respect to a specific subject matter (b) specific rules for resolving conflicts of laws (c) where appropriate, an identification of those *Indian Act* provisions with respect to a subject matter that will no longer apply (d) ratification procedures; and (e) any other matters agreed to by the parties

Financial transfer

Funding consolidation and control	Agreements can facilitate changes in the way Indigenous bodies receive funding from governments. For some time, a number of people have suggested alterations which make Indigenous funding more secure, including shifting from short term grant-style funding towards longer-term block funding, as has been done in Canada. In Canada, the *Collaborative Self-Government Fiscal Policy* of 2019 establishes principles for developing fiscal agreements between Canada and each Indigenous government and ensures self-governing Indigenous governments have sufficient, predictable and sustained funding required to fulfil responsibilities and govern effectively.	**Kluane First Nation Self-Government Agreement** 17.1 During the term of a self-government financial transfer agreement Kluane First Nation and Government shall negotiate the assumption of responsibility by Kluane First Nation for the management, administration and delivery of any program or service within the jurisdiction of Kluane First Nation, whether or not Kluane First Nation has enacted a law respecting such matter. 17.2 Kluane First Nation may notify Government within 90 days after the Effective Date of its priorities for negotiations pursuant to 17.1 for the current fiscal year, and shall notify Government by March 31st of each year of its priorities for negotiations pursuant to 17.1 for the fiscal year beginning April 1st of that year. Within 60 days of receipt of such notification, the parties shall prepare a workplan to address the priorities identified by Kluane First Nation. The workplan shall identity timelines and resources available for negotiations.
Fund establishment	Funding to support the activities of a claim group are a common feature of settlements. However, agreements should avoid minute particularisation of the way in which trust funds may be spent and consider instead a more flexible approach that is adaptable to shifting community priorities. Trusts should also be administered by the communities themselves, or an agent of their choosing.	**Puyallup Tribe of Indians Settlement Act 1989, s 6** Establishes a fund of $24 mil to be distributed to members of the Tribe who will receive a one-time payment at the age of 21 and a permanent trust fund of $22 mil to be administered by the Secretary for housing, elderly needs, burial & cemetery maintenance, education & cultural preservation, supplemental health care, day care, other social services. Provides $500 000 for the development of business enterprises by members of the Tribe. **Connecticut Indian Land Claims Settlement (1983), §1754(b)** No more than $600, 000 to be spent on acquiring private settlement lands in the first two years. Remainder of fund may subsequently be made available to the Tribe, but only following the development of an economic development plan which has to be submitted to the Secretary. If there is no agreement about the use of funds, the Secretary can use it for the benefit of the Tribe. **Maine Indian Claims Settlement Act (1980)** Establishes a settlement fund held in trust for the Passamaquoddy Tribe and Penobscot Nation by the Secretary. Under s 5(2) 'under no circumstances shall any part of the principal of the settlement fund be distributed to either the Passamaquoddy Tribe or the Penobscot Nation, or to any member of either tribe or nation'. Income received from the investment of the principal is to be paid out quarterly.

		‘The Passamaquoddy Tribe and Penobscot Nation annually shall each expend the income from $1,000,000 of their portion of the settlement fund for the benefit of their respective members who are over the age of sixty. A separate fund is established for the acquisition of land.’ **The Noongar Boodja Trust** Comprises several sub-trusts: • Noongar Future Fund (cl 7) • Operations fund (see below) (cl 8) • Special projects fund (cl 9) • Cultural land fund (cl 10) – trustee may accept estate, rights or interests in land and hold and manage land as cultural land under this fund in consultation with the relevant regional corporations (10.2(a)). • Development land fund (cl 11) • Housing Land fund (cl 12) – general purpose is for trustee to hold, manage, invest and develop the housing land in a manner that aims to achieve improved housing outcomes for the Noongar community **South West Native Title Settlement, sch 10 Settlement Terms of ILUA** 5.1 – Future fund payment (a) no later than 60 business days after trust effective date … state will pay trustee 50 million dollars to be deposited into Noongar Future Fund. (b) this payment, on the same terms above, will be paid annually 11 times into Noongar Future Fund 5.2 – Operations fund payment (a) as per the terms of 5.1(a), state will pay 10 million dollars to trustee to deposit into operations fund (will also be paid 11 times annually (5.2(b)).

Land Ownership and Rights

Settlement of native title	The rationale behind native title settlement is to spare both parties from costly judicial processes. However, this should not involve any surrender of substantive rights or, if unavoidable, the return of lands (restitution) or compensation in the form of lands. In Canada, this has been explicitly done through co-developed policy which states that the extinguishment and surrendering of rights has no place in modern day Crown-Indigenous relations, including when negotiating agreements (See *Principals' Accord on Transforming Treaty Negotiations in British Columbia* cl 5; and the *Recognition and Reconciliation of Rights Policy for Treaty Negotiations in British Columbia*).	
Land transfer	Land transfers are common in agreements. Settlement lands usually include forest land and Crown-owned properties. They can include the divestment of lands held on trust for Aboriginal communities to Traditional Owners (see, eg, *ALT Strategic Action Plan 2019-2021 (WA)*), noting, however, that this can create conflict with resident communities and organisations. Unqualified ownership ensures the transfer is meaningful and carries practical benefits rather than merely being symbolic. Fee simple allows for exclusive use of land and capacity to make money on that land, including through leasing etc. Where exclusive possession is not possible, land can be granted in fee simple but subject to certain conditions (e.g. easements, encumbrances) to uphold conflicting interests. Land can be vested in a single Traditional Owner group or jointly in several groups where there is unresolvable overlap.	**South West Native Title Settlement** Under the South West Native Title Settlement, land to be transferred is not identified in the agreement itself. Rather, the agreement establishes a Noongar Land Fund with funding of up to $46, 850, 000 over 10 years which will facilitate the transfer of land from the Crown estate into the Noongar Land Estate. Eligible land is to be identified by the WA government and South West Aboriginal Land and Sea Council (SWALSC) and Noongar Boodja Trust (NBT) and assessed according to a Land Base Strategy by the Department of Mines, Industry Regulation and Safety. SWALSC/NBT will then select parcels and specify tenure preference in consultation with the relevant Noongar Regional Corporation(s). These will be assessed by the WA government and offered to NBT. ‘Annexure J’ on the ‘Land Base Strategy’ does, however, allocate minimum freehold, leasehold and reserve lands to Indigenous claimant groups: a minimum of 20,000ha of freehold land and 300,000ha of leasehold or reserve lands. **Te Uri o Hau Claims Settlement Act 2002, s 117** (1) (a) transfer the fee simple estate in a commercial redress property to Te Uri o Hau governance entity:

	Cash assets can enable the group to purchase Crown-owned properties. Agreements can also consider suspending applications for dealings over land proposed to be included in a settlement package. This may occur until the transfer is concluded and standard fees for land transfer and registration may be waived. It is preferable to specify the lands that will be included in the agreement and the tenure type before concluding the agreement to ensure obligations are met and satisfactory to all parties. US agreements tend to provide for the purchase of the land by the State, to be held on trust for the First Nations group, with strict restrictions on dealings with the land. This is a paternalistic approach that disempowers First Nations communities. Canadian agreements tend to deal comprehensively with the issue of tenure, transferring land in fee simple without conditions and explicitly providing that land may be sold, leased etc. Importantly, the agreements clarify that even if the land is disposed of, it does not cease to be First Nations land other than in limited circumstances. New Zealand provides a guide to the Registrar general on how land transfers with settlements are to be dealt with in regards to their registration, the Registrar's obligations and the provisions settlements need to contain. In East Sepik, Papua New Guinea, the government enacted land legislation specifically to give effect to the protection of land transfers in relation to modern development on customary land. Consider registration of interests under real property legislation, especially the protections associated with indefeasible titles (see *Comparative perspectives on communal lands and individual ownership*). Problems with enforced registration of customary lands have been seen in New Zealand.	(b) sign a memorandum of transfer or other document, or do any other thing to execute such a transfer. (2) In exercising the powers conferred by subsection (1), the Crown is not required to comply with any other enactment that would otherwise regulate or apply to the transfer of a commercial redress property. **Yamatji Nation Indigenous Land Use Agreement** Includes the creation of a Yamatji Land Estate and Yamatji Conservation Estate. The Yamatji Land Estate is created through the transfer of ~134, 000 ha of Crown land as managed reserve, and 14, 500 ha as freehold or conditional freehold. It also comprises the divestment of 8 Aboriginal Lands Trust properties. The Yamatji Conservation Estate comprises ~690, 000 ha including new and existing Conservation and National Parks. All freehold and conditional freehold land will be owned by the Joint Trustees appointed under the Agreement and comprising a licensed trustee and the Yamatji Trustee. All reserves will be managed by Bundi Yamatji Aboriginal Corporation. All land proposed to be included in the Yamatji Land Estate is quarantined from all dealings until 2025. **Tla'amin Final Agreement** 3. On the Effective Date, the Tla'amin Nation owns Tla'amin Lands in fee simple except for those lands identified as the Lund Hotel Parcels. 4. The Tla'amin Nation's fee simple ownership of Tla'amin Lands is not subject to any condition, proviso, restriction, exception or reservation set out in the *Land Act*, or any comparable limitation under Federal or Provincial Law. **Yale First Nation Final Agreement** 12.2.1 On the Effective Date, subject to 12.6.1 and 12.6.2, Yale First Nation owns Yale First Nation Land in fee simple, being the largest estate known in law, and that estate is not subject to any condition, proviso, restriction, exception, or reservation set out in the Land Act or any comparable limitation under Federal or Provincial Law. 12.2.2 In accordance with this Agreement, the Yale First Nation Constitution and any other Yale First Nation Law, Yale First Nation may, without the consent of Canada or British Columbia: a. dispose of the whole of its fee simple interest in any parcel of Yale First Nation Land to any person; and b. from the whole of its fee simple interest, or its interest in any parcel of Yale First Nation Land, create or dispose of any lesser estate or interest to any person, including rights of way and covenants similar to those in sections 218 and 219 of the Land Title Act. 12.2.3 Where Yale First Nation disposes of its fee simple interest in a parcel of Yale First Nation Land, that parcel of land does not cease to be Yale First Nation Land except as provided...
Revocation of overlapping tenures	Consider removing or amending overlapping tenures so that the land transferred returns a greater portion of traditional territory. For example, boundaries for Aboriginal Lands Trust (ALT) leases could be redrawn so that they reflect cultural land holdings. Otherwise, subleasing or other arrangements may be required to align transfers with cultural understandings of tenure. Resolving overlapping tenures will likely require negotiation or compensation of other interest holders, or even laws to revoke or change past grants. This has been done in other contexts. For example, old and agriculturally unproductive land divisions in Malawi led to laws to renew, cancel, or renegotiate existing estate leases in a systematic process to improve performance. In Queensland, where there are overlapping tenures for coal, steam and gas extraction, the holder of the mining lease for coal has right of way in the overlapping area and can establish areas of sole occupancy. Such provisions could be transplanted so that where an overlap occurs of a historic lease on claim lands, claimants have right of way.	**Alaska Native Claims Settlement Act (1971), s 19** Allows any Village Corporation within two years to elect to acquire title to the surface and subsurface estates in any reservation set aside for the use of the natives in said corporation before enactment of this act. **Pueblo de San Ildefonso Claims Settlement (2006)** 5(d)(1) Nothing in this Act affects the location of the boundaries of the Pueblo de San Ildefonso Grant. 13(a) The Pueblo of Santa Clara and the Pueblo may, by agreement, demarcate a boundary between their respective tribal land within Township 20 North, Range 7 East, in Rio Arriba County, New Mexico, and may exchange or otherwise convey land between them in that township.

Right of first refusal	Right of refusal is a supplementary alternative to land transfers. It provides that where Crown land is not available for transfer at the time of settlement, the Traditional Owner group is given the right of first refusal (i.e. first preference to the land) if the Crown elects to sell the land in future. In New Zealand settlements, the right of first refusal has been granted for periods of 50 to 172 years. The land over which the right is given will be defined in the specific Act. Waiving transfer fees and providing First Nations groups with subsidies to act on this right is important to ensure the clause has substance. The right of first refusal has been interpreted through the Australian courts as a clause common in contracts, and has been noted to require careful drafting to ensure the clause operates to provide certainty and protection for the parties: *Octra Nominees Pty Ltd v Chipper* [2007] FCAFC 92. Improper clarity on this issue has seen Maori submissions calling for the New Zealand government to 'honour' this right. Under carbon farming legislation, native title holder consent is required for a project to proceed (ss 28A, 45A). However, this need only be obtained by the end of the first reporting period – or after the project has already commenced.	**Te Rarawa Deed of Settlement** 10.23 Te Rarawa are to have a right of first refusal in relation to a disposal by the Crown of exclusive RFR land. 10.24 The right of first refusal set out in clause 10.23 is to be on the terms set out in part 17 of the legislative matters schedule and, in particular, will apply: 10.24.1 for a term of 172 years from the settlement date; and 10.24.2 only if exclusive RFR land: (a) on the settlement date, is vested in the Crown, or held in fee simple by the Crown or a Crown body; and (b) is not being disposed of in any of the circumstances specified by paragraphs 17.3.3 or 17.10 or 17.12 of the legislative matters schedule.
Public lands/public purpose	Where land cannot be exclusively vested, the settlement can provide for the right to occupy and erect temporary shelters on certain lands during specified, culturally significant periods. This includes the right to enforce this against third parties and restrict public access. These rights to public lands could be in the form of preferential rights of access or preserved rights of access in a similar way to way to non-exclusive native title rights and interests.	**Pubelo de San Ildefonso Claims Settlement (2006), s 8(a)(1)(B)(ii)** Guarantees 'a right of access for … the Pueblo for ceremonial and other cultural purposes.'
Compulsory acquisition of settlement lands	Some US settlement agreements contain provisions which reserve the right of the State to appropriate the lands the subject of the settlement agreement for public purposes. Such a right should be minimised or, at minimum, subject to stringent safeguards comparable to those afforded to holders of fee simple estates to ensure security and continuity for Indigenous groups. At present, conditions precedent for appropriation are not always explicit, creating a great deal of uncertainty and insecurity of tenure. In some cases replacement land must be purchased (e.g. *Maine Indian Claims Settlement Act* (1980) s 5(i)(2)) however, this fails to appreciate the significance of connection to specific parcels of land. In the Australian context, the Australian Human Rights Commission (at p. 42) has summated the concerns of native title holders in relation to exercising property rights. The lack of protection for compensation on just terms for Traditional Owners was also recognised in the *Constitution Alteration (Just Terms) Bill 2010* (Cth).	**Houlton Band of Maliseet Indians Supplementary Claims Settlement Act (1986), s 4(c)(1)** Land acquired and held in trust for the benefit of the Band can only be condemned for public purposes upon terms and conditions agreed upon in writing between the State and the Band. **Florida Indian (Miccosukee) Land Claims Settlement (1982), d 6(c)** The State of Florida, through exercise of the power of eminent domain, may take or diminish any interest granted to the Miccosukee Tribe under the Lease Agreement only for a public purpose and upon payment of just compensation, but such taking or diminution shall not require the approval of Congress or any executive officer of the United States. **Maine Indian Claims Settlement Act (1980), s 5(i)(2)** Trust or restricted land or natural resources within the Passamaquoddy Indian Reservation or the Penobscot Indian Reservation may be condemned for public purposes pursuant to the Maine Implementing Act. If this occurs, land of equal value to be purchased by the public entity which is continuous to the affected Reservation. The Maine Implement Act specifies that 'Prior to any taking of land for public uses … the public entity proposing the taking … shall be required to find that there is no reasonably feasible alternative to the proposed taking' . Public entity to compare cost, technical feasibility and environmental and social impact of available alternatives with the proposed taking. (§ 6205(3)). Houlton Band Trust Land may be taken for public uses in accordance with the laws of the State of Maine to the same extent as privately-owned land (Maine Implementing Act § 6205-A(2). **Yekooche First Nation Agreement-in-Principle** 47. Canada and Yekooche First Nation agree that as a general principle, Yekooche First Nation Lands will not be subject to expropriation, except as set out in this chapter. 48. Notwithstanding paragraph 47, any interest in Yekooche First Nation Lands may be expropriated by and for the use of a Federal Expropriating Authority in accordance with federal legislation and with the consent and by the order of the Governor-in-Council.

		49. The Governor-in-Council may consent to an expropriation of an interest in Yekooche First Nation Lands if the expropriation is justifiable in accordance with paragraph 50 and necessary for a public purpose. 50. For the purposes of paragraph 49, an expropriation is justifiable where the Governor-in-Council is satisfied that the following requirements have been met: a) there is no other reasonably feasible alternative land to expropriate that is not Yekooche First Nation Lands; b) reasonable efforts have been made by the Federal Expropriating Authority to acquire the interest in Yekooche First Nation Lands through agreement with Yekooche First Nation; c) the most limited interest in Yekooche First Nation Lands necessary for the purpose for which the interest in land is sought is expropriated; and d) information relevant to the expropriation, other than documents that would be protected from disclosure under federal legislation, has been provided to Yekooche First Nation.
Access rights	Where sites of cultural significance are 'landlocked' by private property, agreements may seek a guarantee that the owners of that private property be required to grant right of access to Traditional Owners and those they authorise to have access, where access is reasonable and safe. Providing right of access to landlocked sites involves putting conditions on the land title registrar (or equivalent), for the 'easement' of access for relevant Indigenous persons.	**Te Roroa Claims Settlement Act 2008, s 30** (1) The Kawerua owner and any person having the benefit of an encumbrance in relation to Kawerua must permit the permitted persons to have access across Kawerua (right of access) to the landlocked land. (2) The permitted persons may exercise the right of access by vehicle or by foot over a reasonably convenient route specified by the Kawerua owner. permitted persons means— a) the owners of the landlocked land or any part of it; and b) any person authorised by an owner of landlocked land to have access to that landlocked land for any lawful purpose consistent with its status.
Subsurface resources	It is generally accepted at Common Law that subsurface resources, including minerals, vest in the Crown. In relation to native title, see *Western Australia v Ward* (2002) 213 CLR 1, order 7. As a result, negotiations in practice tend to revolve around access disputes. The *Landholders' Right to Refuse (Gas and Coal) Bill 2013* (Cth) sought to introduce a right of landholders to refuse the undertaking of gas and coal mining activities on their land without prior written permission (see 'right to say no' below). The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provides for the payment of mining royalty equivalents in certain circumstances (see, eg, s 64(3)).	**Tla'amin Final Agreement, s 69** As owner of the Subsurface Resources, the Tla'amin Nation has exclusive authority to set, collect and receive fees, rents, royalties and charges other than taxes for the exploration, development, extraction and production of Subsurface Resources. **K'ómoks Final Agreement** 29. K'ómoks will own all Subsurface Resources on or beneath K'ómoks Lands where, prior to the Effective Date, Canada or British Columbia owns the Subsurface Resources. 30. As owner of Subsurface Resources, K'ómoks has the exclusive authority to set, collect and receive any fees, rents, royalties or charges other than taxes, for the exploration, development, extraction and production of those Subsurface Resources. **Yekooche Agreement-in-Principle** 29. Subject to paragraphs 8, 33, and 34, Yekooche First Nation, as owners of Subsurface and Mineral Resources, may set any fees, rents, or other charges before the development and extraction of Subsurface and Mineral Resources, except Natural Gas, Petroleum or Geothermal Resources development and extraction, owned by Yekooche First Nation on Yekooche First Nation Lands. ***Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), s 64** (3) Subject to subsections (3A) and (3B), there must be debited from the Account and paid by the Commonwealth, from time to time, to each Land Council in the area of which a mining interest referred to in subsection 63(1) is situated, or mining operations referred to in subsection 63(4) are being carried on, an amount equal to 30% of any amounts: (a) credited to the Account in accordance with subsection 63(1) in respect of that mining interest; or (b) credited to the Account in accordance with subsection 63(4) in respect of those mining operations; as the case may be.
Water rights	There are multiple options for the recognition of water rights under native title and water planning legislation ranging from specific licenses to a reserve of water. Agreements may consider implementing:	**Florida Indian (Seminole) Land Claims Settlement (1987)** Provides for a compact defining the scope of Seminole water rights and their utilization by the tribe (§1772e). Florida had passed legislation governing use of state waters, but it was unclear how tribal water rights would be

	• Allocations for 'cultural flows', as distinct from consumptive, recreational and environmental pools; • Tradeable Aboriginal water access licences; and • Mechanisms for greater participation in the Australian water market. A range of options, including the above, have been proposed by Virginia Marshall. In Chile, the Indigenous Water Law (*Ley No 19.253 Establece Normas sobre Protección, Fomento y Desarrollo de los Indígenas, y Crea la Corporación Nacional de Desarrollo Indígena 1993*) provides that new water rights cannot be granted over water sources that supply waters owned by Indigenous communities without first guaranteeing normal water supply to affected communities (art 64). Communities will usually need to prove 'ancestral water rights' by way of proof of uninterrupted water use since 1976. Water rights are subject to prior 3rd party rights. Clause 87(b)(ii) of the National Agreement on Closing the Gap has a clear commitment to securing the interests of Aboriginal and Torres Strait Islander Peoples with respect to inland waters. Examples of schemes that have been used in other jurisdictions are contained here and in the water planning section of this document.	affected. Under the Compact, the Tribe regulates its own water use through a newly created tribal water office. The Tribe is required to follow essential aspects of Florida's groundwater management plans and Federal environmental laws, but is not required to obtain permits. It receives an intermediate preference for development. **South West Native Title Settlement, cl 13.5(a)** (a) Before the Deemed Settlement Effective Date or the Settlement Effective Date whichever is earlier, the Minister for Water must make the By-laws to provide for certain customary activities to take place in Public Drinking Water Source Areas. (b) As soon as reasonably practicable after the Trust Effective Date, the Minister for Water must: (i) if the Padbury and Mullalyup water reserve or catchment areas are not required for use as emergency drinking water sources after 2016, seek to have abolished the proclamation of those areas as water reserve or catchment areas; (ii) ensure that the DoW advises the Minister on the possibility of de-proclamation of, or removal of access restrictions from the Deep River Water Reserve (WR), Warren River WR, Scotsdale Brook WR, Donnelly River WR and Kent River WR; and (iii) if there are other Public Drinking Water Source Areas identified in the future that are not needed for public drinking water supply, seek to have abolished the proclamation of any such areas as water reserve or catchment areas so that they are only subject to DPaW legislation and policy (in DPaW managed areas) with respect to customary purposes. **Yamatji Nation Indigenous Land Use Agreement, cl 17.1(b)** The State: • Recognises the spiritual relationship of the Yamatji nation to water and the importance of access to water resources, including for economic development purposes • Agrees that DWER will manage the allocation of water in the Agreement Area to ensure that, from and including the financial year in which conclusive registration occurs, a quantity of 25 gigalitres per year for water resources is reserved for Yamatji use • Agrees that members of Yamatji may access strategic water reserves through water licences
Cultural and tenure mapping	Cultural mapping is the process of researching and documenting the tangible and intangible cultural heritage and traditional knowledge of a peoples within an area. Cultural and tenure mapping could be considered to register interests in the claim area. Its importance internationally has been discussed by Poole. Place naming can form part of cultural and tenure mapping and is an important aspect of cultural redress. In New Zealand settlements, places are either renamed in accordance with their traditional name, or are given a dual name (see also 'Official records' below).	**Alaska Native Claims Settlement Act (1971), s 13** Provides that all withdrawals, selections, and conveyances shall be as shown on current plans of survey or protraction diagrams of the Bureau of Land Management (or the Bureau of State) and shall conform as nearly as possible to the United States Land Survey System.
Right to say no	The right to say no to decisions regarding land and resources within an Indigenous group's jurisdiction can be an effective way to protect Indigenous land rights and autonomy. The right to say no is critical to meet the obligation to provide 'free, prior, and informed consent' (FPIC) (*United Nations Declaration on the Rights of Indigenous Peoples*, art 32(2)), internationally recognised as an essential right of Indigenous persons. A right to say no goes beyond current obligations on states and private actors to 'consult' (as occurs in the context of ILUAs and the right to negotiate under the NTA). Inability to say no has seen the destructions of sites like Juukan George, highlighting the insufficiency of current negotiation regimes. A right to say no clause can specify who holds the right (e.g. peoples residing on the relevant land) and which acts will enliven it. In Australia, Victoria has legislated that the consent is required in order for an agreement activity to proceed, and there is no review by VCAT if an agreement cannot be reached. The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) provides a right to say no to	***Bolivia (Plurinational State Of)'s Constitution of 2009,* art 30** II. … the nations and rural native indigenous peoples enjoy the following rights: … 15. To be consulted by appropriate procedures, in particular through their institutions, each time legislative or administrative measures may be foreseen to affect them. In this framework, the right to prior obligatory consultation by the State with respect to the exploitation of non-renewable natural resources in the territory they inhabit shall be respected and guaranteed, in good faith and upon agreement. **Te Whānau A Apanui Settlement Agreement-in-Principle** 7.17 The deed of settlement and settlement legislation will provide for the hapū to give or decline consent for a resource consent application for any petroleum related activity within a customary marine title area within its rohe moana o te hapū. ***Traditional Owner Settlement Act 2010* (VIC), ss 40** (4) If a provision of a land use activity agreement specifies that the grant of any public land authorisation over any agreement land is an agreement activity, any person who is seeking to be the holder of such an authorisation must reach agreement with the Traditional Owner group entity as to— (a) the granting of the authorisation; and (b) the

	mining and exploration activity, although the Governor-General can override this by making a declaration that the act in question is in the 'national interest'. This triggers a right to negotiate terms and conditions.	conditions to which the agreement to grant the authorisation is subject, including the provision of community benefits, if any. (5) In reaching agreement under subsection (4), regard must be had to the nature of the activity and its impact on the Traditional Owner rights of the Traditional Owner group. (6) The person seeking the authorisation is not entitled to the grant of the authorisation unless the person has complied with subsection (4). ***Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)** s 40 An exploration licence must not be granted to a person in respect of Aboriginal land (including Aboriginal land in a conservation zone) unless: (a) the Land Council for the area in which the land is situated gives consent under subsection 42(1) to the grant of the licence; or (b) the Governor-General has, by Proclamation, declared that the national interest requires that the licence be granted; and the Land Council and the person have entered into an agreement under this Part as to the terms and conditions to which the grant of the licence will be subject. s 42 (1) Where the Governor-General has, under paragraph 40(b), issued a Proclamation relating to the grant of an exploration licence to a person in respect of Aboriginal land, the person (in this section called the applicant) and the relevant Land Council must, within the negotiating period, try to agree upon the terms and conditions to which the grant will be subject. (2) The Land Council shall not agree upon the terms and conditions unless: (a) it has, as far as practicable, consulted the traditional Aboriginal owners (if any) of the land concerning the terms and conditions and it is satisfied that they understand the nature and purpose of the terms and conditions and, as a group, consent to them; (b) it has, as far as practicable, consulted any other Aboriginal community or group that may be affected by the grant of the licence concerning the terms and conditions and it is satisfied that the community or group has had an adequate opportunity to express its views to the Land Council; and (c) it is satisfied that the terms and conditions are reasonable. s 48C (1) The *Atomic Energy Act 1953* or any other Act authorising mining for minerals does not apply in relation to Aboriginal land so as to authorise a person to enter or remain, or do any act, on the land unless: (a) the Governor-General has, by Proclamation, declared that both the Minister and the Land Council for the area in which the land is situated have consented to the application of that Act in relation to entry on that land; or (b) the Governor-General has, by Proclamation, declared that the national interest requires the application of that Act in relation to entry on that land.

Trade and commercial rights

Trade rights	Some settlement agreements explicitly recognise the right to trade and/or commercial development of natural resources on the land. In Australia, native title rights and interests tend to be limited to 'personal, domestic and non-commercial communal purposes'. This stemmed from the decision in *Commonwealth v Yarmirr* [1999] FCA 1668 in which the Court	**Puyallup Tribe of Indians Settlement Act 1989, s 8(b)** Congress recognises the right of the Tribe to engage in foreign trade, notwithstanding certain treaty provisions. **Maa-nulth First Nations Final Agreement**

	suggested that commercial rights were incompatible with non-exclusive native title. In *Akiba v Cth* (2013) 250 CLR 209, however, the High Court recognised a right to take 'for any purpose' resources in the native title area. This has been followed in a number of subsequent cases as well as consent determinations, and has led to a broader acceptance of commercial rights in the native title context. Under the *Traditional Owner Settlement Act 2010* (Vic), agreed activities can be carried out for traditional purposes or commercial purposes where consistent with the purpose for which the land is managed, if this is provided for in the specific agreement between the Traditional Owner group and the State (s 84). Some commercial rights are provided for in agreements under the Act to date, but tend to be limited. Cultural-commercial fishing is still underprotected despite its importance to many communities. Some States and Territories have policies in place to support commercial fishing by Aboriginal and Torres Strait Islander people, however, these have been subject to criticism.	6.2.4 Commercial fishing opportunities are provided to the Maa-nulth First Nations through licences issued to the Maa-nulth First Nations in accordance with the Maa-nulth Harvest Agreement negotiated in accordance with 10.2.1. 10.1.4 Each Maa-nulth First Nation has the right to Trade and Barter among themselves, or with other aboriginal people of Canada, any Fish and Aquatic Plants harvested under its Maa-nulth First Nation Fishing Right. A Maa-nulth First Nation may not Dispose of its right to Trade and Barter. **Taungurung Traditional Owner Land Natural Resource Agreement, sch 1** 2. Agreed Activities for Non-Commercial Purposes A Member may carry out any Agreed Activities for Non-Commercial Purposes. 3. Agreed Activities for commercial purposes 3.1 A Member may carry out Agreed Activities with respect to Vegetation (including Protected Flora) or Stone for commercial purposes provided that the Member only takes Grasstree, Grasstree fronds and regulated tree ferns in accordance with the conditions of trading relating to valid tags under the *Flora and Guarantee (Taking, Trading in, Keeping, Moving and Processing Protected Flora) Order 2004*. **Dja Dja Wurrung Recognition and Settlement Agreement, Draft Forest Authorisation** Pursuant to s 84 of the *Traditional Owner Settlement Act 2010*, members of the Dja Dja Wurrung are authorised to carrying out the following activities in relation to forest produce, for traditional purposes or commercial purposes, in so far as authorised by this Order, and subject to the terms and conditions: • Collection of eucalyptus leaves, including oil distilled from any species of eucalypt • Collection of firewood • Collection of forest produce from the forest floor • Removal of bark from trees for traditional purposes • Collection of seed and/or seed capsules • Collection of grass tree or grass tree fronds • Collection of wattle or tea tree products • Collection of native honey and beeswax • Collection of stone, gravel, limestone, lime, salt, sand, loam, clay or brick-earth provided that these activities are authorised under the *Flora and Fauna Guarantee Act 1988* (Vic) and do not impact upon any taxa or communities listed as threatened on Schedule 2 or under s 10 of the *Flora and Fauna Guarantee Act 1988* (Vic). Exercising the rights conferred under this Authorisation Order must be in accordance with State and Commonwealth laws. ... 14. Forest produce collection is not permitted from leased areas or areas licensed for commercial purposes where collection would directly compete with the licence or lease activity.

Land management

Land management	Traditional Owner groups may wish for governance or co-governance of public conservation lands, reserves and waters. This may be aided by establishing and funding a specific Indigenous-led conservation board mandated to manage a particular area. To be properly co-operative, management bodies should have substantive, rather than mere advisory, powers. Joint management has economic, environmental, and socio-cultural benefit for the Indigenous community and non-Indigenous populations alike. New Zealand has enacted a range of joint management programs. Those with limited success are generally characterised by a lack of resources to the iwi group to participate or	**Ngati Kahu Agreement-in-Principle** 4.9 Settlement legislation will establish a co-governance arrangement over Te Oneroa a Tohe by establishing a statutory board that has an equal number of members appointed by Te Hiku iwi and by the Crown. The Crown members may include representatives of (a) Northland Regional Council (which has primary responsibility under the Resource Management Act 1991 for the sustainable management of the coastal marine area); and (b) the Far North District Council; and is chaired by a representative of Te Hiku iwi on a rotating basis. ... 4.12 The board will develop a management plan for the areas within Te Oneroa a Tohe identified in the map ... being (a) the foreshore and seabed; and (b) the marginal strips adjacent to the beach management areas; and [various conservation areas]; and ensure the beach management areas are managed in accordance with the

	tokenistic consultation. This shows proper joint management needs capacity building, mandated roles, and grassroots consultation.	management plan … Te Hiku iwi may wish to add further adjoining Te Hiku iwi land to the beach management area. This land will be managed in accordance with the management plan. This will be negotiated between agreement in principle and deed of settlement. 4.14 It is envisaged the board will be responsible for key management decisions affecting the beach management areas if key management decisions are transferred or delegated to the board subject to clause 4.20. However, the board will be guided by and act consistent with the existing statutory and regulatory frameworks; **Yamatji Nation Indigenous Land Use Agreement, cl 20** The parties agree to set up a Yamatji Conservation Estate which means the State will manage certain land together with the regional entity under joint management. The State will also provide funding for joint management and the creation of ranger positions.
Land and marine area use planning	Settlements may consider prioritisation of claimant input into land and marine area use planning. Top-down approaches to planning tend to marginalise communities. Where there are multiple stakeholder perspectives in planning decisions, decisions are more likely to be sustainable and supported. Land use planning has been extensively discussed in the Australian context. Marine area use planning has been less discussed, however, Indigenous peoples see land and sea as inextricable, and coastal communities have strong connections to, and knowledge of, their marine waters. Similar arrangements that apply to land use planning could be applied over coastal areas. Indigenous Protected Areas (IPAs) are a highly successful model of Indigenous land and sea management with benefits for both people and the environment. Traditionally limited to land, they are now expanding to marine and coastal areas also. Settlements could consider implementing similar arrangements, along with sustainable funding to support them.	**Te Aupouri Deed Of Settlement** 9.8 Each of the following protocols must, by or on the settlement date, be signed and issued to Te Runanga Nui trustees by the responsible Minister: the fisheries protocol; the culture and heritage protocol; and the protocol with the Minister of Energy and Resources. 9.9 A protocol sets out how the Crown will interact with Te Runanga Nui trustees with regard to the matters specified in it. 9.10 Each protocol will be: in the form in the documents schedule; and issued under, and subject to, the terms provided by part 9 of the legislative matters schedule. 9.11 A failure by the Crown to comply with a protocol is not a breach of this deed
Water planning	Water planning and allocation should prioritise native title rights, values and voices. The need for Indigenous involvement in water planning is a matter of human rights: *Native Title Report 2008*, Chapter 6. Indigenous decision-making in the water allocation process currently varies between water systems. Nowhere, however, is it done particularly well. For example, under the Intergovernmental Agreement on a National Water Initiative, planning processes are simply required to ensure 'the inclusion of Indigenous representation … *wherever possible*' (emphasis added) and 'take into account … the possible existence of native title rights to water … following the recognition of native title rights'. This is inadequate because consideration is discretionary and, where given, treated as a mere accommodation of Indigenous rights and interests which should instead be prioritised. Advances have been made in some areas which could serve as an example. In the Tiwi Islands, for example, the Northern Territory government and Tiwi Land Council engaged in a formal freshwater allocation planning process which incorporated Indigenous water management knowledge.	**Lheidli T'enneh Treaty** 18. The Lheidli T'enneh Government may participate in water planning processes in the same manner as local governments and other First Nations for: a) the Upper Fraser River Watershed; and b) any tributary of the Fraser River within the Upper Fraser River Watershed. 19. In respect of the management of water within the Upper Fraser River Watershed, the Lheidli T'enneh Government and Canada or British Columbia may negotiate agreements to: a) define respective roles and responsibilities of the Parties; b) coordinate activities related to: (i) flood response and public safety; (ii) protection of water quality; (iii) water conservation; etc. 20. If a watershed within the Upper Fraser River Watershed has been identified as requiring a water management plan under paragraph 19.c, the Lheidli T'enneh Government and Canada or British Columbia may negotiate agreements in respect of: a) water management objectives; b) a process for the timely and effective development of a plan, including the respective roles of the Parties; and c) the method for approval of the plan and its implementation.
Infrastructure	Infrastructure has been largely linked to specific development agreements but not considered more broadly such as the building and maintenance of cultural centres, offices, schools, houses or private roads that could benefit a community. This may increase the utility of any compensation by allowing Indigenous communities to manage and govern themselves, increasing the sustainability of the compensation.	**Ngati Kahu Agreement-in-Principle** Ministry of Education is willing to explore the option of providing education sites for transfer and leaseback. **Yamatji Nation Indigenous Land Use Agreement** State agrees to:

	For example, in Yimbin, the building of a shed tank (a structure for catching rainwater) enabled community to live on Country and therefore develop a ranger team and joint management over traditional lands in the Central Desert. In New Zealand, financial support is provided to purchase schools and office properties held by government departments.	• Provide funding to trustee of charitable trust on behalf of Yamatji for facilities at Lucky Bay and ongoing management of this area to value of 3.7 mill over 5 yrs through agreement 'tourism project agreement' between regional entity and MWDC • Provide funding to trustee on behalf of Yamatji for infrastructure upgrades in car park/viewing area pf pink lake and future management of area to value of 5.45 mill over 10 years.
Land Rehabilitation	Where land or seas have been degraded, consideration should be given to the provision of funds or programs for its rehabilitation and restoration. There is a strong correlation between environmental improvement and Indigenous-led land rehabilitation programs, such as Indigenous Protected Areas and ranger programs. For example, the Adnyamathanha people successfully restored pastorally stripped land within the Nantawarrina IPA and Li-Anthawirriyarra Sea Rangers in the Gulf of Carpentaria utilised old and new technologies to eradicate feral cats on West Island. Commonly, land rehabilitation (at least in the Australian context) includes activities such as removal of invasive species, feral species and fire management.	**Mohegan Nation (Connecticut) Land Claims Settlement (1994), § 1775e** Provides for ratification of Town Agreement concerning the de-contamination of nuclear waste from Mohegan Tribal Reservations. **Puyallup Tribe of Indians Settlement Act 1989 (1989), s 4(b)** Contamination audits and clean-up of settlement lands shall be carried out in accordance with the settlement agreement and document 1 of the Technical Documents. (2) The Tribe shall not be liable for the clean-up costs or in any other manner for contamination. **Yamatji Nation Indigenous Land Use Agreement, cl 17.4(a)(2 – 3)** Restoration Project Agreement means the project agreement set out in Schedule 5 for purposes of funding a joint State and Yamatji Nation program to identify, restore and protect water cultural sites. Subject to conclusive registration, the State will provide up to $311,840 over five years to the Regional Entity in accordance with the restoration project.
Fisheries Rights	Fisheries rights in compensation have two aspects: codifying pre-existing customary fishing rights, and facilitating the means for Traditional Owners to have a say in marine resource management, planning and decision making. In codifying customary fishing rights, commercial rights should be considered (see 'trade and commercial rights' above). Trade of sea recourses has been found to be a pre and post colonisation practice of many coastal and freshwater communities. Further, capacity support for existing Indigenous-led fishing operations, and aiding the establishment of more like enterprises, is an important means to promote cultural practice and community economic independence. Providing for customary fishing rights can also include the right to occupy land close to waterways to facilitate access to fishing and resource gathering. Agreements may consider waiving entry and registration fees for fishing or moving away from licencing and quota systems for Indigenous fishers altogether, which can perpetuate a power imbalance in resource management of water country. For example, some New Zealand settlement agreements include a right of first refusal (see above) of resources, including fishing quotas, but this has resulted in considerable conflict and prosecutions in the past. Granting fishing rights must go alongside work with the enforcers of marine regulations so that there is greater understanding of cultural practice. Providing for Indigenous input into fisheries management can involve appointing an Indigenous-led committee which advises the relevant governmental bodies on fishing management or providing a space for Indigenous representatives on a pre-existing committee. Traditional Owners should be able to provide input at all levels of marine decision-making, if desired. Consideration should be given to co-management of sea resources which is stronger than a mere advisory role. For example, the joint management over land and waters that has been established with Traditional Owners over the protected areas in the Cape York Peninsula, North Stradbroke Island and Moreton Bay regions. Other inspiration can be seen in the development of Sea Country Plans across Australia, which provide a basis for new relationships which aligns First Nations with fishing interests, the different jurisdictions (state and Commonwealth) and the different sectors which have a role or impact on marine resources.	**Ngāti Tūwharetoa Claims Settlement Act 2018, s 204** (4) Despite anything to the contrary in these regulations, a person who has the prior written authority of Te Kotahitanga o Ngāti Tūwharetoa may for cultural purposes— a) take trout from a designated raceway at the Tongariro National Trout Centre at any time; and b) have that trout in his or her possession. (5) In subclause (4),— cultural purposes— a) includes significant Ngāti Tūwharetoa hui, tangi, and other occasions; but b) does not include any commercial purpose **Te Uri o Hau Claims Settlement Act 2002, s 99** (1) The Minister is to be treated as having consented under section 60(1) of the Fisheries Act 1996 or section 28W(3) of the Fisheries Act 1983, as the case may be, to Te Uri o Hau governance entity owning excess shellfish quota. **Te Rarawa Deed of Settlement, s 143** (1) The Minister must, not later than the settlement date, appoint the trustees to be an advisory committee under section 21(1) of the Ministry of Agriculture and Fisheries (Restructuring) Act 1995. (2) The purpose of the Te Rarawa fisheries advisory committee is to advise the Minister on the utilisation of fish, aquatic life, and seaweed managed under the Fisheries Act 1996, while also ensuring the sustainability of those resources in the fisheries protocol area. (3) The Minister must consider any advice given by the Te Rarawa fisheries advisory committee. (4) In considering any advice, the Minister must recognise and provide for the customary, non-commercial interests of Te Rarawa. **Maa-Nulth First Nations Final Agreement** 10.1.1 Each Maa-nulth First Nation has the right to harvest, in accordance with this Agreement, Fish and Aquatic Plants for Domestic Purposes in the Domestic Fishing Area. 10.1.2 Each Maa-nulth First Nation Fishing Right is limited by measures necessary for conservation, public health or public safety. 10.1.3 A Maa-nulth First Nation may not Dispose of its Maa-nulth First Nation Fishing Right.

	See also the Narungga Nation Traditional Fishing Agreement.	10.1.4 Each Maa-nulth First Nation has the right to Trade and Barter among themselves, or with other aboriginal people of Canada, any Fish and Aquatic Plants harvested under its Maa-nulth First Nation Fishing Right. A Maa-nulth First Nation may not Dispose of its right to Trade and Barter. 10.1.5 A Maa-nulth First Nation right to Trade and Barter in accordance with 10.1.4 may be exercised by a Maa-nulth-aht of that Maa-nulth First Nation except as otherwise provided in a Maa-nulth First Nation Law of the applicable Maa-nulth First Nation Government made under 10.1.41c.

Heritage and cultural information

Heritage management and control

Agreements have traditionally affirmed existing heritage legislation without exploring the potential to create additional contractual protections or bridge gaps in consultation and decision making.

Recent events such as the destruction of culturally significant caves at Juukan Gorge highlight the inadequacies of existing legislation. Settlement agreements may consider strengthening Indigenous heritage management procedures in line with relevant principles of the *United Nations Declaration on the Rights of Indigenous Peoples*, including the right to Free, Prior and Informed Consent (FPIC). Other relevant provisions include arts 11, 12, 13, 18, 19 and 31.

The Heritage Chairs of Australia and New Zealand have developed best practice standards in Indigenous Cultural Heritage Management and Legislation that are a useful starting point in developing agreement-specific heritage management and control provisions. For a discussion of these principles in the Australian context, see the NNTC's submission regarding the *Consultation Draft Aboriginal Cultural Heritage Bill 2020* (WA).

Settlement agreements can supplement legislation-based heritage management and control regimes in the absence of legislative reform. For example, the Yamatji and Noongar Settlement Agreements include Standard Heritage Agreements which must be entered into by the relevant parties when undertaking activities (Yamatji) or conducting Aboriginal Heritage Surveys (Noongar) in the Settlement Area.

Indigenous cultural heritage management systems should cover both tangible and intangible cultural heritage.

Maa-Nulth First Nations Final Agreement
20.6.1 Each Maa-nulth First Nation Government may develop processes, comparable to British Columbia processes, to manage Heritage Sites on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation in order to preserve Maa-nulth First Nation and other heritage values associated with those sites.

20.6.2 Before the Effective Date, British Columbia and the Maa-nulth First Nations will endeavour to agree on a list of key sites of cultural and historic significance outside Maa-nulth First Nation Lands to be protected through provincial heritage site designation or through other measures agreed to by British Columbia and the Maa-nulth First Nations.

20.6.3 If, before the Effective Date, British Columbia and the Maa-nulth First Nations agree in writing on a list of key sites to be protected through provincial heritage site designation or through other measures agreed to in accordance with 20.6.2, on the Effective Date this Agreement is deemed to be amended by adding such list as an Appendix.

K'ómoks Agreement-In-Principle
3. K'ómoks may make laws applicable on K'ómoks Lands in relation to:
   a. the preservation, promotion and development of K'ómoks culture and languages;
   b. the conservation, protection and management of K'ómoks Artifacts owned by K'ómoks;
   c. the establishment, conservation, protection and management of Heritage Sites, including public access to those sites; and
   d. the cremation or interment of Archaeological Human Remains found on K'ómoks Lands or returned to K'ómoks.
4. K'ómoks Law under subparagraph 3.c will:
   a. establish standards and processes for the conservation and protection of Heritage Sites; and
   b. ensure the Minister is provided with information related to:
      i. location of Heritage Sites; and
      ii. any materials recovered from Heritage Sites.
5. Information provided by K'ómoks to British Columbia under subparagraph 4.b will not be subject to public disclosure without K'ómoks's prior written consent.
6. If K'ómoks makes a law under paragraph 3.c, British Columbia's standards and permitting processes for heritage inspections, heritage investigations and the alteration of Heritage Sites will not apply to K'ómoks Lands.

South West Native Title Settlement, ILUA Settlement Clauses, sch 10
18.1(c) The State and the Government Parties agree that they will, when conducting Aboriginal Heritage Surveys in an Agreement Area (and when required), enter into a Noongar Standard Heritage Agreement (NSHA) with SWALSC on behalf of the relevant Native Title Agreement Group or, following an assignment under clause 8 of the relevant Agreement, with the relevant Regional Corporation.
18.2(a) [Creates the Noongar Heritage Partnership Agreement].

Creation of a heritage body	Consider the establishment of permanent positions for cultural heritage advisors and/or heritage bodies to oversee cultural heritage management.	**Yamatji Nation Indigenous Land Use Agreement** 22. This Agreement provides for the recognition, protection and preservation of Aboriginal Heritage and culture in the Agreement Area through: • the collaborative management of Yamatji heritage and cultural materials and records; • delivery of the Aboriginal Water Sites Restoration Project that identifies, restores and protects water based cultural sites; and • the transfer of $100,000 to the Regional Entity to fund a cultural heritage advisor engaged by the Regional Entity starting from 1 July 2021, to advise on the management and curation of Yamatji heritage and cultural materials in accordance with the Working Groups set up. 22.2 The parties acknowledge that the protection of Aboriginal Heritage under this Agreement includes (but is not limited to) the establishment of three working groups for the collaborative management and shared responsibilities in relation to: (a) the management of State archives; and (b) the management and curation of Yamatji heritage and cultural materials. (c) funding a range of initiatives for the management of Aboriginal Heritage; (d) funding for a cultural heritage advisor and for the acquisition of cultural record management software; (e) delivery of a project that identifies, restores and protects water based cultural sites; and (f) the implementation of Aboriginal Heritage Agreements for government and private proponents 22.4(a) The parties agree that if the state intends to undertake any activity within the agreement area, it must enter into Aboriginal Heritage agreements with the regional entity in form of a Standard Heritage Agreement
Return of cultural heritage materials	Settlements may include cultural redress funds to assist the claimant group to pursue the return of culturally significant materials. They may also establish partnerships with agencies that manage cultural artefacts so that there is Indigenous input into the care, residence, management, access and use of traditional heritage.	**Maa-Nulth First Nations Final Agreement** 20.1.1 The Parties recognize the integral role of the Maa-nulth First Nation Artifacts of each Maa-nulth First Nation in the continuation of that Maa-nulth First Nation's culture, values and traditions, whether those artefacts are held by: • that Maa-nulth First Nation; • a Maa-nulth First Nation Corporation of that Maa-nulth First Nation; • a Maa-nulth First Nation Public Institution established by the applicable Maa-nulth First Nation Government; • a Maa-nulth-aht of that Maa-nulth First Nation; • the Parks Canada Agency; • the Canadian Museum of Civilization; or • the Royal British Columbia Museum. 20.2.2 The Canadian Museum of Civilization will transfer to the applicable Maa-nulth First Nation without condition all its legal interests in, and possession of, the Maa-nulth First Nation Artifacts listed in Part 1 of the applicable Appendix S: ... 20.2.16 Custodial agreements will: a) respect Maa-nulth First Nation Law and practices relating to Maa-nulth First Nation Artifacts; and b) comply with Federal Law or Provincial Law and the statutory mandate of the Canadian Museum of Civilization. And may include; c) conditions of maintenance, storage and handling of the Maa-nulth First Nation Artifacts; d) conditions of access to and use, including study, display and reproduction, of the Maa-nulth First Nation Artifacts and associated records by the public, researchers and scholars; e) provisions for incorporating new information into catalogue records and displays of the Maa-nulth First Nation Artifacts; and f) provisions for enhancing public knowledge about the Maa-nulth First Nations through the participation of the Maa-nulth-aht in public programs and activities at the Canadian Museum of Civilization. **Tsawwassen First Nation Final Agreement**

		11. After the Effective Date, if a Tsawwassen Artifact comes into the permanent possession or under the control of the Royal British Columbia Museum, Tsawwassen First Nation and the Royal British Columbia Museum may negotiate a custodial arrangement for the Tsawwassen Artifact. 12. Tsawwassen First Nation and the Royal British Columbia Museum may negotiate and attempt to reach agreement on arrangements outside this Agreement in respect of cultural artifacts in the possession of either Tsawwassen First Nation or the Royal British Columbia Museum, in accordance with their respective policies and procedures. 13. On the Effective Date, British Columbia will pay to Tsawwassen First Nation one million dollars ($1,000,000) to establish a Cultural Purposes Fund. 14. Tsawwassen First Nation owns a Tsawwassen Artifact discovered, after the Effective Date, on Tsawwassen Lands in an archaeological context. 15. If a Tsawwassen Artifact, discovered off Tsawwassen Lands, comes into the permanent possession or under the control of Canada, Canada may lend or transfer that Tsawwassen Artifact to Tsawwassen First Nation in accordance with an agreement negotiated between Tsawwassen First Nation and Canada. 16. At the request of Tsawwassen First Nation, the Royal British Columbia Museum will share, in accordance with Federal and Provincial Law, any information it has about Tsawwassen Artifacts or Tsawwassen Archaeological Human Remains in other public collections in Canada. 17. At the request of Tsawwassen First Nation, Canada will use reasonable efforts to facilitate access by Tsawwassen First Nation to Tsawwassen Artifacts or Archaeological Human Remains of Tsawwassen ancestry that are held in Canadian public collections. **Te Aupouri Deed Of Settlement** 9.17 By the settlement date, the Minister for Treaty of Waitangi Negotiations will write to the following museums, introducing Te Runanga Nui trustees and inviting each museum to enter into a relationship with Te Aupouri.
Intellectual property	Intellectual property law is currently insufficient to adequately protect Indigenous cultural and intellectual property (ICIP), and falls short of international standards set out in instruments including the *Convention for the Safeguarding of the Intangible Cultural Recognition*. For example, copyright in photographs are generally held by the photographer, rather than the subject. In Victoria, amendments were introduced to the *Aboriginal Heritage Act 2006 (Vic)* in 2016 which created a regime for the protection of Aboriginal intangible cultural heritage (part 5A). This regime relies on registration of particular intangible heritage which enlivens protection provisions. In particular, usage cannot be made of Aboriginal intangible cultural heritage without entering into a formal Aboriginal Intangible Heritage Agreement with the relevant Traditional Owners. Such agreements can be broad and may cover management and protection of intangible heritage, compensation for use, research and publication. The Act creates significant penalties for the knowing use of registered Aboriginal intangible heritage for commercial purposes without consent. Agreements may wish to explicitly set out the cultural and intellectual property of the claimant group and develop a process for addressing questions of provenance (and original cultural ownership) of historical materials. One way of doing this is through the use of traditional knowledge labels. Intellectual property has also been asserted through cultural mapping (such as in the Noongar agreement). In Canada, some agreements explicitly vest ownership of cultural materials in the claimant group.	**Maa-Nulth First Nations Final Agreement** 20.1.2 Each Maa-nulth First Nation owns Maa-nulth First Nation Artifacts discovered within a Heritage Site on its Maa-nulth First Nation Lands after the Effective Date, unless another person establishes ownership of that artifact.
Official records	The settlement agreement may consider providing for the reintroduction and use of Indigenous place names. These steps are already being made in Australia in non-legal areas.	**Maa-Nulth First Nations Final Agreement** 20.7.4 At the request of a Maa-nulth First Nation, British Columbia will record names in the Nuu-chah-nulth language and historic background information about place names submitted by that Maa-nulth First Nation for

	Parties may wish to agree upon changes to ensure that official personal records reflect cultural identities and realities. In the Torres Strait, for example, the *Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Act* 2020 (Qld) was introduced to provide legal recognition of Ailan Kastom child rearing practices. This ensures children can obtain official identify documents, such as birth certificates and drivers' licences, that reflect their lived identity.	inclusion in the British Columbia geographic names database for the geographic features that are described in this Agreement, in accordance with Provincial Law, policy and procedures. **Te Uri o Hau Claims Settlement Act 2002, ss 114-116** 114 Changes of place names on official maps (1) Each place name in column 1 of Schedule 14 is changed to the corresponding name in column 2 of that schedule. (2) New place names are set out in column 2 of Schedule 14. (3) The changes made by subsections (1) and (2) are to be treated as made— a) with the approval of the New Zealand Geographic Board; and b) in accordance with the New Zealand Geographic Board Act 1946. 115 Change of name of certain reserves (1) The name of the Maungaturoto scenic reserve is changed to Pukeareinga scenic reserve. (2) The name of the Tapora Government Purpose (Wildlife Management) Reserve is changed to Manukapua Government Purpose (Wildlife Management) Reserve. (3) The changes of name made by this section are deemed to have been made pursuant to section 16(10) of the Reserves Act 1977. 116 Changes to official signs and publications The Crown must incorporate the changes made by sections 114 and 115 to official signs, publications, and records when those signs, publications, and records become due, in the ordinary course, for replacement, updating, or reprinting. **Yamatji Nation Indigenous Land Use Agreement, cl 19.3** The State agrees: a) that the naming of places is an important means of recognising the status, relationship and connection of the Yamatji Nation to their traditional land and waters; b) to consult with the Regional Entity where reasonably possible, through the Government Partnership Committee, prior to deciding any new names of places within the Agreement Area, including by inviting the Regional Entity to propose, in writing to the State, any names for such places; and c) the Government Partnership Committee is an ideal forum to facilitate engagement between the Regional Entity, the Geographic Names Committee and local government authorities to progress proposed changes following the Settlement. **Ngati Kahu Agreement-in-Principle Deed** 4.24 The Crown will (1) explore the possibility of place name changes in relation to Te Oneroa a TShe (2) after the settlement date, install interpretative signs at key access points along Te Oneroa a Tohe, acknowledging the cultural and historical importance of Te Oneroa a Tohe to Te Hiku iwi; and (3) support the raising of pouwhenua (carved posts) at Waipapakauri to commemorate historic events across Te Oneroa a Tohe. The Crown and Te Hiku may consider other locations for raising additional pouwhenua following this agreement in principle and in consultation with other interested parties.

Social development

Social wellbeing	Social development and wellbeing programs may form part of a compensation agreement in order to improve the social circumstances of the specific group and wider local community. These should be self-determined, whether by vesting control over content and administration (together with funding support) in Traditional Owner bodies, or by explicit agreement that service delivery be executed by government within parameters mutually agreed to. One of the earliest comprehensive settlement agreements in Australia, the Ord Final Agreement, allocated $11, 195, 000 in funding over four years through the 'Ord	**Te Hiku Social Development and Wellbeing Acccord** 8.4 The parties to the Social Accord, being Ministers of the Crown and leaders of the iwi of Ngai Takoto, Te Aupouri, Te Rarawa, Ngati Kurt and Ngati Kahu, will meet annually on a date and at a venue that is convenient for all parties. The Ministers of the Crown are likely to be the Minister of Social Development, the Minister of Housing, the Minister of Education and the Minister of Health. 8.5 The intent of the annual meeting will be to – 8.5.1 set objectives for better outcomes for Te Hiku whanau, hapu and iwi; and 8.5.2 confirm priority areas for iwi and Crown to work together to achieve the agreed objectives; and

	Enhancement Scheme' to implement the recommendations of the Aboriginal Social and Economic Impact Assessment Report. This delivered funding to social and economic development programs and family and community services, among other things. Existing social development programs for Aboriginal and Torres Strait Islander people are often limited by onerous bureaucratic requirements for accessing funding, especially long-term secure funding.	8.5.3 agree the means by which the parties will work together to achieve those objectives; and 8.5.4 monitor whether the desired outcomes have been achieved and continually review objectives for their relevance, 8.6 The expectation is that Ministers will direct departments, as appropriate, to deliver on the agreed objectives. **Seneca Nation (New York) Land Claims Settlement (3 November 1990)** Provides that funds are to be paid into an account of the Seneca Nation and disbursed by Seneca Nation in accordance with a plan approved by the Council of the Seneca Nation to promote the economic and community development of the Seneca Nation. Other funds are to be paid in cash to be managed and used by the Nation to further specific objectives of the Nation and its members, as determined by the Nation in accordance with the Constitution and laws of the Nation (§1774d). **Annexure T of South West Native Title Settlement – Community Development Framework** Establishes a community development framework to improve sustainable social and economic outcomes for the Noongar community, strengthen culture, language, traditional knowledge and values, improve economic independence, leadership and governance, and increase capacity for service providers to work more effectively in partnership with Noongar people. • Priorities to be reviewed 5 years after settlement. Delivery of framework to be done through programs, collaboration and engagement activities designed by the Noongar community and delivered by the Regional Corporations and Central Services Corporation.
Healthcare	Agreements could consider dedicated funding for Aboriginal Community-Controlled Health Services (ACCHSs). Colonisation, racism and dispossession have had significant and ongoing impacts on the health of Aboriginal and Torres Strait Islander people. ACCHSs significantly contribute to Indigenous health outcomes by ensuring healthcare is culturally appropriate and holistic, providing employment and training and strengthening Indigenous governance. Healthcare arrangements should reflect the needs of the community and can include things such as on-Country dialysis services or a maternity clinic. This can reduce the need for claimants to travel off Country (and away from culture, kinship and support networks) for routine healthcare, often for lengthy periods and sometimes indefinitely. A mobile dialysis truck in South Australia which allowed patients to have dialysis on Country had enormous benefits for the social and emotional wellbeing of patients and communities.	**Tla'amin Final Agreement** 86. The Tla'amin Nation may make laws in relation to health services on Tla'amin Lands: a. for Tla'amin Citizens; or b. provided by a Tla'amin Institution 89. At the request of any Party, the Parties will negotiate and attempt to reach agreement for the delivery and administration by a Tla'amin Institution of federal and provincial health services and programs for individuals residing on Tla'amin Lands. **Maa-nulth First Nations Final Agreement** 13.22.1 Each Maa-nulth First Nation Government may make laws in respect of health services provided by that Maa-nulth First Nation Government or its Maa-nulth First Nation Public Institutions on the Maa-nulth First Nation Lands of the applicable Maa-nulth First Nation. 13.22.2 Maa-nulth First Nation Law under 13.22.1 will take into account the protection, improvement and promotion of public and individual health and safety
Child protection	Communities may wish for autonomy or increased community influence over child protection services and procedures. Kinship relations in Aboriginal communities are not captured by non-Aboriginal family units. Agreements should seek recognition of the broadly accepted precept that Aboriginal children have a right to know their family and culture. Child protection interventions should be performed according to culturally sensitive procedures and in consultation and collaboration with services run by and for Aboriginal people. This can be facilitated through agreements by providing, for example, the establishment of community-run services to manage and govern child protection. Lakidjeka Aboriginal Child Specialist Advice and Support Service is an intermediary service working between the Department of Human Services (Victoria) and Indigenous communities. The department is required to consult Lakidjeka and Lakidjeka staff attend home visits and take primary responsibility for finding out-of-home placements in accordance with the Aboriginal Child Placement Principle. Agreements might also include funding or programs for prevention and early support.	**Nisga'a Final Agreement, Ch 11** 89. Nisga'a Lisims Government may make laws in respect of child and family services on Nisga'a Lands, provided that those laws include standards comparable to provincial standards intended to ensure the safety and well-being of children and families. 94. Nisga'a Government has standing in any judicial proceedings in which custody of a Nisga'a child is in dispute, and the court will consider any evidence and representations in respect of Nisga'a laws and customs in addition to any other matters it is required by law to consider. 96. Nisga'a Lisims Government may make laws in respect of the adoption of Nisga'a children, provided that those laws: a. expressly provide that the best interests of the child be the paramount consideration in determining whether an adoption will take place; and b. require Nisga'a Lisims Government to provide British Columbia and Canada with records of all adoptions occurring under Nisga'a laws. **Tla'amin Final Agreement** 73. The Tla'amin Nation may make laws in relation to Child Protection Services on Tla'amin Lands for: a. Children of Tla'amin Families;

	In the United States, the *Indian Child Welfare Act 1978* gives exclusive jurisdiction to Native American tribunals in child custody proceedings relating to Native American children (25 USC 1911).	75. Where the Tla'amin Nation makes laws under paragraph 73, the Tla'amin Nation will: a. develop operational and practice standards intended to ensure the Safety and Well-Being of Children; b. participate in, or establish systems compatible with, British Columbia's information management systems concerning Children in Need of Protection and Children in Care; c. allow for mutual sharing of information with British Columbia concerning Children in Need of Protection and Children in Care; and d. establish and maintain a system for the management, storage and disposal of Child Protection Services records and the safeguarding of personal Child Protection Services information. 76. Notwithstanding any laws made under paragraph 73, where there is an emergency in which a Child on Tla'amin Lands is a Child in Need of Protection, British Columbia may act to protect the Child if: a. the Tla'amin Nation has the authority to respond, but has not responded or is unable to respond in a timely manner; or b. the Tla'amin Nation does not have the authority to respond. 78. Tla'amin Law under paragraph 73 prevails to the extent of a Conflict with Federal or Provincial Law.

Education and language

Schooling and education	Communities may wish to have jurisdiction and authority on Indigenous lands in relation to education, including the following: • preschool and early childhood development • kindergarten to grade 12 • post-secondary education and skills training • job preparation, career and technical education • adult education. A majority of the Canadian Agreements provide exclusive jurisdiction over various levels of education from Kindergarten to tertiary, particularly in relation to language and culture. Jurisdiction over education ensures that education is culturally appropriate and responsive to the needs of Indigenous communities. It can also facilitate mother-tongue-medium (MTM) education, the importance of which has been highlighted by the United Nations. Many Indigenous students live in urban areas and attend mainstream schools. Hence, jurisdiction over education is just one element of a comprehensive approach to education. Settlement agreements could also consider guaranteeing Indigenous input into mainstream curriculum. Input can go towards content and/or ways of evaluating knowledge and educational attainment. For example, the *Alaska Standards for Culturally Responsive Schools* provide alternative measures by which to evaluate knowledge and educational attainment. Indicators include 'students are able to … gather oral and written history information from the local community', 'identify and utilize appropriate sources of cultural knowledge to find solutions to everyday problems' and 'understand the ecology and geography of the bioregion they inhabit'. Settlement agreements could include more specific indicators particular to the claimant group.	**Tla'amin Final Agreement (2014) (Canada)** Language and Culture Education 101. The Tla'amin Nation may make laws in relation to Tla'amin language and culture education provided by a Tla'amin Institution on Tla'amin Lands for: a. the certification and accreditation of teachers for Tla'amin language and Tla'amin culture; and b. the development and teaching of Tla'amin language and Tla'amin culture curriculum. 102. Tla'amin Law under paragraph 101 prevails to the extent of a Conflict with Federal or Provincial Law. Kindergarten to Grade 12 Education 103. The Tla'amin Nation may make laws in relation to kindergarten to grade 12 education on Tla'amin Lands: a. for Tla'amin Citizens; or b. provided by a Tla'amin Institution. 104. Tla'amin Law under paragraph 103 will: a. establish curriculum, examination and other standards that permit transfers of students between school systems in British Columbia at a similar level of achievement and permit admission of students to the provincial post-secondary education systems; and b. provide for certification and accreditation of teachers by a Tla'amin Institution or body recognized by British Columbia, in accordance with standards comparable to standards applicable to individuals who teach in public or provincially-funded independent schools in British Columbia. … Post-Secondary Education 111. The Tla'amin Nation may make laws in relation to post-secondary education provided by a Tla'amin Institution on Tla'amin Lands, including: a. the establishment of post-secondary institutions that have the ability to grant degrees, diplomas or certificates; b. the determination of the curriculum for post-secondary institutions established by the Tla'amin Nation; and c. the provision for and coordination of all adult education programs. 112. Federal or Provincial Law prevails to the extent of a Conflict with Tla'amin Law under paragraph 111. **Maine Indian Claims Settlement Act (1980)** The Passamaquoddy Tribe and Penobscot Nation are authorized to create tribal school committees to operate under the laws of the State applicable to school administrative units and replace the committees that were operating previously (Maine Implementing Act § 6214).
Cultural teaching and language revitalisation	Supply of cultural materials and funding for language programs can be a key feature of alternative settlements to support language revitalisation. Cultural teaching and language revitalisation in Australia is currently largely carried out by community organisations with ad-hoc and limited funding from multiple sources. For example, the Indigenous Language and Arts program is a government initiative which provides some funding for language projects, but on a competitive and once-off basis. There are only 20 government-funded	**Waitaha Deed of Settlement** 5.22 The Crown must pay the trustees on the settlement date $3,000,000. 5.23 The money paid to the trustees under clause 5.22, and all interest on, or gains made with, that money after its payment to the trustees, is to be an educational endowment fund (the Hakaraia Educational Endowment Fund) 5.24 The trustees must –

	community-led Indigenous Language Centres in Australia, despite at least 123 languages in use or being revitalised in Australia today (see the National Indigenous Languages Report, 2020). PBCs often aspire to language and/or cultural teaching, but lack specialised funding to do so. Settlement agreements provide a mechanism by which stable and ongoing funding can be provided for cultural and language activities. Settlement agreements may also establish scholarship funds for specified purposes.	5.24.1 apply the Hakaraia Educational Endowment Fund in accordance with a policy from time to time approved by an annual general meeting of members of Waitaha for the use of the fund for the education of members of Waitaha;

Governance

Governance charter	Consider a broad statement committing to the principles of self-governance in accordance with art 4 of the *United Nations Declaration on the Rights of Indigenous Peoples*, backed by specific details on mechanism, scope and funding. Canada broadly recognises the existing rights of Indigenous peoples in art 35 of the *Canadian Charter of Rights and Freedoms* under the *Constitution Act, 1982*. It has a comprehensive policy on Indigenous self-governance, outlined in the *Inherent Right Policy* of 1995. Several types of self-government agreements are available, including as part of a comprehensive land claims settlement and as a standalone agreement. They address: the structure and accountability of Aboriginal governments, their lawmaking powers, financial arrangements and their responsibilities for providing programs and services to their members. New Zealand agreements provide for the establishment of a post-settlement governance entity, but their authority is generally limited to managing compensation assets. Elsewhere, agreements tend to establish co-governance bodies for the management of specific natural resources (e.g. mountains, lakes). It is important to ensure agreements are specific as to practical application, scope and the rights of Indigenous groups and individuals. Agreements should also allow for flexibility and change in governance structures over time as they develop and new needs arise. In the Australian context, governments should consider amendments to the CATSI Act to ensure it allows for governance structures that reflect traditional governance structures (e.g. Elders' Councils). This could be done by including a separate chapter or division in the Act dealing specifically with PBCs and offering more governance flexibility.	**Yamatji Nation Indigenous Land Use Agreement** 9.1 Yamatji Nation Governance Structure (a) The Parties agree that in commitment to the Yamatji Nation's self-governance aspirations, and the Yamatji Nation vision set out in the Joint Governance Principles, the Yamatji Nation must establish and maintain a governance structure (Yamatji Nation Governance Structure) to hold and administer the Compensation under this Agreement. (b) The Yamatji Nation Governance Structure for the purpose of this Agreement must comprise the following corporate entities, at a minimum: (1) a Regional Entity; (2) an Aboriginal Corporation; (3) an Economic Arm; (4) a Yamatji Trustee Company; and (5) a Charitable Trust 9.3 Joint Governance Principles and Governance Framework (a) The Parties have agreed a set of governance principles and a structural framework in Schedule 2, from within which the Yamatji Nation will self-govern their land and benefits comprising the Compensation. **Federal Aroostook Band of Micmacs Settlement Act 1991** The band may organise for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act. The Band shall file with the Secretary a copy of its organic governing document and any amendments thereto (s 7) **Yale Final Agreement** 3.1.1 The parties acknowledge that the self-government and governance for Yale First Nation will be achieved through the exercise of the Section 35 Rights of Yale First Nation set out in this Agreement. 3.1.2 Yale First Nation Government, as provided for under the Yale First Nation Constitution and this Agreement, is the government of Yale First Nation. **Kanesatake Interim Land Base Governance Act** Kanesatake will not exercise jurisdiction as set out in section 21 prior to the adoption of a land governance code that will provide for good governance by the Mohawk Council of Kanesatake over Kanesatake Mohawk Lands...
Group membership or enrolment	Agreements should make clear who is covered by the agreement. Group membership in Australia has been largely determined by the structure of native title claims and PBCs or governance arrangements under, for example, the *Traditional Owner Settlement Act 2010* (Vic) in Victoria. Membership is not constrained by citizenship, at least in a migration context: *Love v Commonwealth; Thoms v Commonwealth* [2020] HCA 3.	**South West Native Title Settlement, sch 2** The Native Title Agreement Group comprises those Noongar People who are: (a) the descendants of one or more of the persons listed below: (specified list of 32 people) (b) persons who have been adopted according to Noongar laws and customs by any of the persons listed in paragraph (a) or their descendants;

	In America, some settlements contain enrolment provisions that support the recognition of the relevant claim group. Governance bodies in the native title context (i.e. PBCs) can impose additional membership criteria. Previously, they also had a discretion as to whether to admit members. Following amendments introduced by the *Native Title Legislation Amendment Act 2021* (Cth), however, PBCs are no longer able to refuse membership to applicants who meet the eligibility criteria. A PBC's eligibility requirements for membership must also provide for all the common law holders of native title to be represented, directly or indirectly.	(c) the descendants of the persons specified in paragraph (b); (d) persons who are recognised by other members of the Native Title Agreement Group as belonging to the Native Title Agreement Group through possessing substantial knowledge of Noongar laws and customs in relation to the Agreement Area; and (e) other persons who are the descendants of an apical ancestor not listed in paragraph (a): (i) where through further research it is apparent that the apical ancestor should have been included in the list in paragraph (a); and (ii) who are accepted by other members of the Native Title Agreement Group as belonging to the Native Title Agreement Group. **Narungga Nation Traditional Fishing Agreement** 8. The persons who undertake fishing activities under this agreement are those living Aboriginal people who identify as Narungga and are recognised by the other Native Title Holders under Narungga traditional laws and customs as having rights and interests in the Native Title area as described in Schedule 2. It is not intended that persons, Aboriginal or otherwise, who have no connection to Narungga country be able to fish under this agreement.
Community or tribal courts	Parties may wish to consider the establishment or formalisation of recognised community courts that can make a recommendation for sentencing or assist in the determination of land disputes. Sections 15AB(1)(b), 16A(2A) and 16AA of the Crimes Act 1914 (Cth) currently provide that courts cannot take customary law into account in bail and sentencing decisions. While they do not entirely extinguish consideration of local Aboriginal law in sentencing, they have deterred courts from doing so. These provisions are seen as offensive, disrespectful and discriminatory and should be repealed. The Northern Territory Law Reform Committee has recently released a report on the recognition of local aboriginal laws in sentencing and bail. It recommends, among other things, resuming operation of Community Courts in consultation with Aboriginal communities (recommendation 7) and amending the *Sentencing Act 1995* (NT) to give judges power to make orders giving effect to local Aboriginal law during sentencing so long as it is not inconsistent with other laws (recommendation 6). In addition to providing input into, or making, sentencing decisions, communities may wish to have ownership over law enforcement. § 6210 of the *Maine Indian Claims Settlement Act* (1980), for example, gives the Passamaquoddy Tribal Court, Penobscot Nation Tribal Court and Houlton Band of Maliseet Indians Tribal Court exclusive jurisdiction over certain criminal offences, juvenile crimes, civil actions between tribes, Indian child custody proceedings and domestic relations matters and allows them to appoint their own law enforcement officers. This promotes better engagement with, and respect for, the justice system. In some cases legal plurality is adopted, for example, the *Mohegan Nation (Connecticut) Land Claims Settlement* (1994) provides that 'the assumption of criminal jurisdiction by the State … shall not affect the concurrent jurisdiction of the Mohegan Tribe over matters concerning such criminal offenses' (§1775d(b)(1)). It is unclear how this has worked in practice.	**Magistrate's Court of Victoria** Koori Court Everyone is encouraged to take part in a sentencing conversation by having a yarn and avoid using legal language. Aboriginal Elders or respected persons may give cultural advice to help the magistrate make a judgment that: • is culturally appropriate • helps reduce the likelihood of reoffending. ***Local Court Act (Solomon Islands),* s 12** (1) Notwithstanding anything contained in this Act or in any other law, no local court shall have jurisdiction to hear and determine any customary land dispute unless it is satisfied that— (a) the parties to the dispute had referred the dispute to the chiefs; (b) all traditional means of solving the dispute have been exhausted; and (c) no decision wholly acceptable to both parties has been made by the chiefs in connection with the dispute. **Mura Badulgal (Torres Strait Islanders) Corporation RNTBC Rule Book, r 19** If an intra-Island land dispute cannot be resolved by mediation, the directors must convene the Council of Elders to resolve the dispute. The Council of Elders is not governed by the rules of evidence, and may be advised by a lawyer but shall make their own decision by majority vote. The Council of Elders must give its decision in writing to the parties and determine any dispute within 2 months [paraphrased]. **Mohegan Nation (Connecticut) Land Claims Settlement (1994), §1775d(b)(1)** The assumption of criminal jurisdiction by the State pursuant to subsection (a) of this section shall not affect the concurrent jurisdiction of the Mohegan Tribe over matters concerning such criminal offenses. **Maine Indian Claims Settlement Act (1980), § 6210** Passamaquoddy Tribal Court, Penobscot Nation Tribal Court and Houlton Band of Maliseet Indians Tribal Court to exercise exclusive jurisdiction over: • Certain criminal offences • Juvenile crimes • Civil actions between tribes • Indian child custody proceedings • Domestic relations matters

		The Tribes may also appoint their own Law Enforcement Officers who have exclusive authority to enforce ordinances made by the Tribe within the Indian territory as well as the criminal, juvenile, civil and domestic relations laws discussed above.
Legislative authority	Agreements may provide for autonomy to make regulations in respect of the settlement area including, for example: • Administration of justice • Hunting, fishing and other taking of resources • Scientific research • Conservation • Child welfare • Housing • Town planning and zoning • Education • Property and succession In US settlements, legislative authority is generally granted in relation to fishing and hunting. However, in some cases this right is restricted in some way, for example, the Wampanoag Tribal Council of Gay Head is empowered to regulate hunting on settlement lands but only if done other than with firearms or crossbow (*Massachusetts Indian Land Claims Settlement* (1987) §1771g). Similarly, hunting regulations passed by the Narragansett Nation must conform to minimum safety and conservation standards in consultation with State officials (*Rhode Island Indian Claims Settlement Act* (1978) s 7(a)). In Canada, law-making powers vested in First Nations tend to be broader and have included: regulating public access to lands, traffic, transport and parking, regulation and control of actions and imposition of sanctions for violation of laws. In Australia, some Aboriginal communities are empowered to make and enforce by-laws with respect to their land. For example, the *Aboriginal Land Grant (Jervis Bay Territory) By-Laws 2016 (Cth)* are promulgated by the Wreck Bay Aboriginal Community Council. In Western Australia this is done under the authority of s 7 of the *Aboriginal Communities Act 1979 (WA)*. Authority is limited to areas such as the regulation of admission of people and traffic; regulation for control of traffic; regulations governing noise, use or supply of alcohol and other substances, firearms and other weapons, litter and rubbish dumping. Consider facilitating broader legislative authority. Comprehensive settlement agreements which offer only limited legislative authority may not meet the standard for self-governance and can in some ways impose a foreign legal system by requiring laws to be drafted in technical language etc. This in turn can undermine traditional law. Reception of the *Aboriginal Communities Act 1979* (WA) has therefore been mixed. Authority exercised through kinship structures and/or Elders Councils should also be recognised and supported.	**Maine Indian Claims Settlement Act (1980), § 6207(1)** Passamaquoddy Tribe and Penobscot Nation each have exclusive authority to enact ordinances regarding hunting, trapping or other taking of wildlife and fish. **Maine Indian Claims Settlement Act (1980), § 6207** The Maine Indian Tribal-State Commission established under the settlement agreement has authority to promulgate fishing rules and regulations within the territory. Fish taken lawfully within the Indian territory may be transported within the state. **Massachusetts Indian Land Claims Settlement (1987), §1771g** The Wampanoag Tribal Council of Gay Head, Inc. shall have the authority, after consultation with appropriate State and local officials, to regulate any hunting by Indians on the settlement lands that is conducted by means other than firearms or crossbow to the extent provided in, and subject to the conditions and limitations set forth in, the Settlement Agreement (§1771c(a)(1)(B)). Otherwise State Law applies. **K'ómoks Settlement Agreement** 22. K'ómoks may, for the purpose of monitoring and regulating public access to K'ómoks Public Lands, require persons other than K'ómoks Members to obtain a permit or licence. 1. K'ómoks may make laws with respect to traffic, transportation and parking on K'ómoks Roads to the same extent as municipal governments have authority to make laws with respect to traffic, transportation and parking in municipalities in British Columbia. 133. K'ómoks may make laws in relation to the regulation, control or prohibition of any actions, activities or undertakings on K'ómoks Lands that constitute, or may constitute, a nuisance, a trespass, a danger to public health, or a threat to public order, peace or safety. 144. K'ómoks Law may provide for the imposition of sanctions, including fines Administrative Penalties, community service, restitution and imprisonment, for the violation of K'ómoks Law. 148. K'ómoks is responsible for the enforcement of K'ómoks Laws. **Tla'amin Final Agreement** 115. The Tla'amin Nation may make laws in relation to the prohibition of, and the terms and conditions for, the sale, exchange, possession, manufacture or consumption of liquor on Tla'amin Lands. 135. The Tla'amin Nation may make laws in relation to the regulation, licensing and prohibition of businesses on Tla'amin Lands including the imposition of licence fees or other fees. **Lheidli T'enneh Treaty** 21. The Lheidli T'enneh Government may make Laws on the following matters: a) persons who may harvest Fish under the Final Agreement; b) allocation of the Harvest Level to Lheidli T'enneh Citizens; c) distribution of the Fish harvested under the Final Agreement to Lheidli T'enneh Citizens; and d) other fisheries matters as agreed to by the Parties. ***Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth), s 15** (1) The Kerrup-Jmara Elders Aboriginal Corporation may make by-laws, not inconsistent with any law of the Commonwealth or the State of Victoria, for or with respect to: (a) economic enterprise on the Condah land;

(b) cultural activities on the Condah land;
(c) the management, access, conservation, fire protection, development and use of the Condah land;
(d) the declaration of sacred or significant sites or other areas of significance to Aboriginal people on the Condah land;
(e) the activities to be permitted on the Condah land or any part of it;
(f) protection and conservation of flora or fauna found on the Condah land;
(g) in relation to the Condah land, the cutting, removal and sale of timber, the granting of revocable licences and the payment of royalties for timber to the Corporation;
(h) hunting, shooting and fishing on the Condah land;
(i) ...
(j) control of visitors in, and charging fees (to be paid to the Corporation) for entrance to, the Condah land;
(k) the regulation and control of motor traffic and parking on the Condah land; and
(l) …
(m) the appointment of persons to enforce the by-laws, and the powers and duties of those persons.

(2) The by-laws may provide that a contravention of a by-law is an offence.

(3) The regulations may provide, in respect of an offence against the by-laws, for the imposition of:
(a) if the offender is a natural person—a fine not exceeding 5 penalty units; or
(b) if the offender is a corporation—a fine not exceeding 25 penalty units.

(4) …

(5) If the Kerrup-Jmara Elders Aboriginal Corporation makes a by-law, the directors of the Corporation must, within 7 days after making it, give a copy of the by-law to the Minister.

(6) …

(7) For the purposes of the Legislation Act 2003, a by-law made by the Kerrup-Jmara Elders Aboriginal Corporation and received by the Minister is a legislative instrument made by the Minister on the day the by-law is received.

Income and employment

Employment sector

Communities may want to be in control of employment through not only the creation of positions but also research and planning to map and implement employment priorities.

Indigenous Australians suffer higher levels of unemployment than non-Indigenous Australians. However, government strategies and targets around Indigenous employment often focus on superficial equality of outcomes, ignoring Indigenous priorities, values and ways of defining 'prosperity'.

Responses to the 2019 PBC Survey Report show that creating wealth and business opportunities and creating employment are aspirations for many PBCs. PBC-related employment opportunities can include land and sea management activities (water quality testing, controlled burning, weed and pest control etc.), tourism, bush food and medicine and research partnerships. These initiatives can be identified and supported through a comprehensive settlement agreement.

Agreements should additionally support claimants to influence and lead the generation of data relevant to their employment and other needs. National data tends to use parameters that do not reflect the needs and priorities of local communities, and as such is not very useful at the community level. An Indigenous-led employment survey in 2013 (see below) helped the community identify aspirations and barriers to employment in their community.

Yamatji Nation Indigenous Land Use Agreement

21.7 Expenditure for the Creation and Management of the Yamatji Conservation Estate

The State agrees to expend $22,040,000 over 10 years on and from the Conclusive Registration Date for the creation and management of the Yamatji Conservation Estate, including but not limited to:

(d) funding for a Yamatji Ranger program which includes:
(1) 13 FTE (or equivalent) ranger and ranger supervisor positions, of which at least 10 positions will be designated positions under section 50(d) of the Equal Opportunity Act 1984 (Cth);
(2) 1 FTE joint management coordinator; and
(3) 1 FTE project officer

21.8 Additional Ranger Position

In addition to the expenditure set out in clause 21.7 above, the State agrees to expend $200,000 over 5 years for the purposes of funding an additional Yamatji Ranger to undertake activities including the rehabilitation of abandoned mine sites located within the Agreement Area and to facilitate the inclusion of rehabilitation work as part of the management plan referred to in clause 21.1(a).

21.9 Transition of Yamatji Rangers

(a) The Parties agree that the Yamatji Rangers referred to in clause 21.7(d) and 21.8 will be employed by DBCA for the first 5 years or for a period agreed with the Regional Entity, with a transition to employment by the Regional Entity thereafter.

Dedicated positions	Agreements may provide for dedicated positions for claimants in relation to specific employment opportunities. Dedicated positions have had a positive impact on Aboriginal and Torres Strait Islander employment outcomes, with flow-on effects for families and communities. Options for employment and training have been commonly linked to mining and other development agreements developed in response to a specific opportunity. Longer-term arrangements could be considered to develop a specific economy relevant to a PBC or claim group. Dedicated positions should be considered within a broader understanding of the social, cultural and economic circumstances impacting upon employment rates. For example, a survey carried out by the Muntjiljtarra Wurrgumu Group in Wiluna (WA) found that one of the biggest barriers to employment in their community was the lack of, and difficulties in obtaining, a drivers licence. Family and cultural responsibilities were also identified as barriers to employment, highlighting the importance of an employment strategy that supports employees' cultural responsibilities to family and Country. Agreements could also include a commitment to flexible and alternative recruitment practices to assist in the recruitment of Indigenous applicants. Conventional recruitment practices, such as interviews and psychometric testing, may alienate and dissuade prospective Indigenous applicants.	**South West Native Title Settlement, ILUA Settlement Clauses, sch 10, cl 13.6** The Water Corporation … will work with the Regional Corporations to identify suitable persons to participate in its existing 'National Water Industry Traineeship Program'. **Yamatji Nation Indigenous Land Use Agreement** 17. The State … will provide to the Regional Entity, funds, over 10 years, to engage with TAFE to develop a training package and establish a water monitoring business for Yamatji Nation members (training project agreement attached under schedule 5) 17.3(b) on and from trust effective date, the State will provide funds totally $454,027 over 10 years to the regional entity in accordance with training project agreement.
Business development	Employment opportunities can be supported through preferential opportunities for native title parties. Tendering opportunities are commonly included in development-based agreements and include options for joint ventures. They are generally limited to the development opportunity and options created by the proponent. State-based comprehensive settlement agreements have the potential to include broader Indigenous procurement principles. This involves identifying the services that the community may be able to provide, the terms on which contracts will be awarded and establishing targets for volume and value of contracts to be awarded to claimant enterprises. See, for example, the *Commonwealth Indigenous Procurement Policy*. States and territories may have similar policies such as the *Aboriginal Procurement Policy* (NSW). A recent report highlighted the benefit of a national targeted procurement policy, but emphasised the need for additional capacity-building support and removal of barriers associated with, for example, accessing loans.	**South West Native Title Settlement, Annexure S: Noongar Economic Participation Framework** A framework to give greater opportunities for Noongar participation in South West development, including specific employment, contracting and investment opportunities, upcoming projects and tenders; to promote early engagement between state government agencies through early tender advice for all Noongar businesses registered with Tenders WA. Also to be exempt from competitive tendering processes that allows for direct engagement of registered Noongar business for works, goods and services procurements valued less than $150,000. E. Key Deliverables: Intensive capacity building in Year 1 of settlement and ongoing support in government tendering and contracting policies as well as development and submission of tender documentation (among others) **Yamatji Nation Indigenous Land Use Agreement, cl 12** The state … agree to work together to design and establish a Business Development Unit (BDU) to help Yamatji people or companies set up new business or improve existing businesses (12.2). This includes providing business incubation support to Yamatji businesses, support for existing businesses to access finance and partnerships and providing links to training opportunities administered by the relevant departments. The state also agrees to fund this BDU to value of $5 mil through the BDU Project Agreement between the Regional Entity, Yamatji Nation Economic Development Fund and the state (12.5). The state agrees to provide additional funding over a 5 year period and funding will be delivered to the Trustee of the Charitable trust on behalf of the Yamatji Nation.
Leasing	Despite the 'freehold' quality of exclusive possession native title rights and interests, it can be difficult to leverage economic opportunities from native title under current legislation. The current options for developing commercial interests generally have extinguishing effect including: • Conditional fee simple • Conditional leasehold and • Fee simple or leasehold for the advancement or benefit of Aboriginal or Torres Strait Islander people. Other options can be developed to enable Traditional Owner groups to leverage property rights to create economic and other benefits without compromising the integrity of their title. Where native title holders (or claimants) have exclusive native title (or equivalent), options include signing an ILUA to create a lease, including a long-term lease. This would not undermine native title rights and interests, as the right of reversion would remain with native title holders. Broad leases could enable substantial development over land, as is the case	**Massachusetts Indian Land Claims Settlement (1987)** Preserves right to lease land for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases. For example, leases for the development or utilisation of natural resources, grazing and farming. There are time limits applied to the leases, from 10-25 years (§1771e(c)(2) – also 'An Act to authorize the leasing of restricted Indian lands for public, religious, educational, recreational, residential, business, and other purposes requiring the grant of long-term leases'). **Connecticut Indian Land Claims Settlement (1983), §1757a(a)** Contemplates leases of land by the tribal corporation of the Mashantucket Pequot Tribal Nation with an option to renew for up to two additional terms, each not exceeding 25 years. **Maine Indian Claims Settlement Fund (1980)**

with mining and other leases (such as the *Mineral Titles Act 2010* (NT) ss 40, 44). However, this would not be incompatible with the imposition of conditions to ensure the land is not used in a way inconsistent with the wishes of Traditional Owners. Leases which contain conditions include: home ownership lease under *Aboriginal Land Act 1991* (Qld); conditional purchase leases under the *Land Administration Act 1997* (WA) and perpetual leases under the *Land Act 1958* (Vic) s 55. Conditions might include prescriptions that certain activities are/are not carried out or prohibitions on interfering with certain cultural or environmental heritage etc. Leasing could then allow for rent to be charged for use of land.

Practically, leasing could be negotiated by a subsidiary of a PBC or other Traditional Owner corporation in a manner similar to arrangements for leases over caravan parks, ski resorts etc. Although native title is inalienable, this should not be a barrier to leasing – Crown land in the ACT, for example, is 'purchased' as a 99-year lease with predictable renewal. Native title as communal ownership in perpetuity is also an advantage as it allows for stability and long-term leases.

Many US settlement agreements contemplate the lease of settlement lands by tribal corporations. For example, the *Connecticut Indian Land Claims Settlement* (1983) allows leases with an option to renew for up to two additional terms, not exceeding 25 years (§1757a(a)). Under the *Massachusetts Indian Land Claims Settlement* (1987), tribes may lease the land for certain purposes (including public, religious, educational, recreational, residential and business purposes) for 10-25 years (§1771e(c)(2)). Passamaquoddy and Penobscot land can even be sold at the request of the tribe or nation under s 5(g)(3)(C) of the *Maine Indian Claims Settlement Act* (1980).

The K'omoks people in Canada can alienate their land, however, it seems that once sold it would be impossible to return title.

Land or natural resources within the Passamaquoddy Indian Territory or the Penobscot Indian Territory or held in trust for the benefit of the Houlton Band of Maliseet Indians may, at the request of the respective tribe, nation or band be- (A) leased … (B) leased … (C) sold … (E) exchanged for other land or natural resources

K'ómoks Treaty
16. In accordance with the Final Agreement, the K'ómoks Constitution, and K'ómoks Law, K'ómoks may, without the consent of Canada or British Columbia:

a) dispose of its fee simple interest in any parcel of K'ómoks Lands to any Person; and
b) b. from its fee simple interest, or its interest in any parcel of K'ómoks Lands, create or dispose of any lesser interest to any Person, including rights of way and covenants similar to those in sections 218 and 219 of the Land Title Act.

Te Kawerau ā Maki Deed of Settlement
6.5 The governance entity, for 2 years after the settlement date, has a right to purchase the deferred selection properties, being the school sites named in clause 6.6A and described in part 4 of the property redress schedule, on, and subject to, the terms and conditions in part 7 and 8 of the property redress schedule.
6.6 Each of the deferred selection properties is to be leased back to the Crown, immediately after its purchase by the governance entity, on the terms and conditions provided by the lease for that property in part 8 of the documents schedule (being a registrable ground lease for the property, ownership of the improvements unaffected by the purchase).

***Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth)**, s 13

(1) Upon the vesting of the Condah land in the Kerrup-Jmara Elders Aboriginal Corporation, the Corporation has:
   (a) the full power of management, control and enjoyment of the Condah land, subject to the law of Victoria and the Commonwealth;
   (b) the power to transfer its interest in the Condah land to another Aboriginal and Torres Strait Islander corporation, subject to subsection (2);
   (c) and the power to give a lease of the Condah land or a licence over the Condah land to the Crown, a public authority of the State of Victoria or of the Commonwealth or any other person, subject to subsection (3).
(2) The Kerrup-Jmara Elders Aboriginal Corporation shall not transfer its interest in the Condah land to another Aboriginal and Torres Strait Islander corporation if there is an objection from a member of the Kerrup-Jmara Committee of Elders or any other adult member of the Corporation.
(3) The Kerrup-Jmara Elders Aboriginal Corporation shall not give a lease of the Condah land or a licence over the Condah land that is for a period of more than 3 years to a person who is not the Crown or a public authority of the State of Victoria or the Commonwealth unless the Minister has approved the giving of that lease or licence.

Revenue sharing

Settlement agreements may facilitate opportunities for revenue sharing.

In New Zealand, revenue sharing is particularly prominent where Crown forest lands are vested in claimant groups. In the Te Rarawa Deed of Settlement (2015), for example, Crown forest land was jointly vested in four groups as common tenants as a result of four overlapping group claims, with each group receiving a share of the accumulated rentals.

In Canada, natural resource revenue-sharing is achieved through treaties, as well as impact and benefit agreements signed with companies over specific developments. Under treaty, the Gwich'in and Sahtu peoples, for example, are entitled to 7.5% of the first $2 mil of resources collected and 1.5% thereafter.

Alaska Native Claims Settlement Act (1971), s 9
Provides for a two percent royalty on minerals extracted and two percent of bonuses and rentals, with no time limitation.

Crow Boundary Settlement (1994), s 1776C
Title of undisposed coal, oil, gas and methane underlying land forming part of settlement to be vested in the United States in trust for the sole use and benefit of the Crow Tribe.

Crown Tribal Trust Fund to receive historical royalties from 3 coal mines situated in the Crow Indian Reserve (s 1776d(b)).

Gwich'in Comprehensive Land Claim Agreement
9.1.1 Government shall pay to the Gwich'in Tribal Council, annually, an amount equal to:

	Revenue sharing in Australia is usually achieved through ILUAs and is generally tied to specific developments. An emerging option is carbon farming projects, which require the consent of native title holders to proceed: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), ss 28A, 45A. However, legal uncertainties and limitations (e.g. projects can commence before obtaining consent) can make it difficult for native title holders to negotiate a fair deal. The Common Law position in Australia is that subsurface resources, including minerals, vest in the Crown. However, this is not necessarily the case in overseas jurisdictions, presenting other options for revenue sharing (see also 'subsurface resources' above). Consider also amending s 38(2) of the NTA to allow the National Native Title Tribunal (NNTT) to order the payment of royalties when determining disputes over future acts.	(a) 7.5 percent of the first $2.0 million of resource royalty received by government in that year; and (b) 1.5 percent of any additional resource royalties received by government in that year. **Ngati Kahu Agreement In Principle Deed** 6.10 Aupouri Crown forest land will be transferred on settlement date to the Aupouri Forest entity together with accumulated rentals in relation to the land (held by CFRT); and any New Zealand Units in relation to the land. 6.11 The New Zealand Units will be allocated to the Aupouri Forest entity for nil consideration. 6.12 The allocation of New Zealand Units is subject to the Climate Change Response Act 2002. Aupouri forest entity to hold forest, rentals and emission units/carbon credits in trust 6.13 The Aupouri forest entity will hold the Aupouri Crown forest land, rentals and New Zealand Units for Te Hiku iwi until ultimate ownership of that land is determined under the manawhenua process referred to in paragraph 12.4.2; and will hold the following in trust for each Te Hiku iwi in equal shares - (a) accumulated rentals transferred under paragraph 6.10.1; and (b) New Zealand emissions units/carbon credits transferred under paragraph 6,10.2; and (c) rentals or other income; and New Zealand emission units/carbon credits, received in relation to Aupouri Crown forest land during the period from the settlement date until ultimate ownership of the land is determined under the manawhenua process. 6.13,3 Upon transfer of the ultimate ownership of the land, the annual rentals, Emission Trading units and any other income in respect of that proportion of the land will also be allocated to the relevant iwi. 6.14 Te Hiku iwi have agreed that the Aupouri forest entity will distribute the accumulated rentals in equal proportion to each of the five iwi at any time post settlement date. **Yamatji Nation Indigenous Land Use Agreement, cl 13** In this clause the State agrees to provide the Trustee of the Charitable Trust, on behalf of the Yamatji Nation, with annual rent from mining tenure in the Agreement Area for 10 years between 1 July 2022 and 30 June 2032.
Consultation fees	Fees for engagement or 'fees for service' can be considered. Amendments to the NTA in 2007 mean that PBCs can now charge fees for certain services rendered, including fees incurred when negotiating ILUAs, s 31 agreements and providing comments on proposed future acts (*Native Title Amendments (Technical Amendments) Act 2007* (Cth), Division 7 (ss 60AB and AC). There is no guidance on how much can be charged but the fees must 'not amount to taxation'. However, fee for service activities can extend beyond a PBC's core functions. Some PBCs and other Indigenous organisations have created subsidiary entities to provide services. The Ngaanyatjarra Council (principal governance organisation in Ngaanyatjarra Lands) has incorporated a separate organisation (Ngaanyatjarra Services) which provides building project management services and essential services maintenance services to members on a fee-for-service basis. Another example is the Northern Basin Aboriginal Nations group which provides fee for service advice to the Murray Darling Basin Authority and other authorities regarding water management of the Murray Darling Basin. In order to create opportunities for fee-for-service contracts to emerge, a base level of stable funding is often necessary. This allows the group to maintain a business structure, train and employ people and build skills. Good governance, community relationships and capacity are also key enablers. For more, see *Fee for Service in Indigenous Land and Sea Management: Impact Assessment and Analysis*.	**Yamatji Nation Indigenous Land Use Agreement, cl 17.3** (e) On and from the Conclusive Registration Date DWER may, subject to government procurement requirements, policies and performance, engage members of the Yamatji Nation accredited through the training program to provide water monitoring services with a combined value of up to $900,000 (indexed to CPI) over 10 years.

Taxation

Tax revenue	Settlement agreements may provide for cultural governance bodies to raise tax-based revenue. This has occurred overseas. For example, the Passamaquoddy Tribe and the Penobscot Nation have powers to enact ordinances and collect taxes within their respective	**Tsawwassen First Nation Final Agreement** 1. Tsawwassen Government may make laws in respect of:

	Indian territories. The Tsawwassen Government can also make laws to raise revenue. However, in these jurisdictions taxation is applied to the Indigenous government's own peoples which in most cases is likely to be undesirable. Agreements may consider other ways in which tax-based revenue could be raised.	a) Direct taxation of Tsawwassen Members within Tsawwassen Lands in order to raise revenue for Tsawwassen First Nation purposes; b) the implementation of any taxation agreement entered into between Tsawwassen First Nation and Canada or British Columbia. 2. Tsawwassen Government powers provided for in subclause 1.a will not limit the taxation powers of Canada or British Columbia. 3. Despite clause 59 of the General Provisions chapter, any Tsawwassen Law made under this chapter or any exercise of power by Tsawwassen First Nation, is subject to and will conform with International Legal Obligations in respect of taxation, and clauses 30 through 34 of the General Provisions chapter do not apply in respect of International Legal Obligations in respect of taxation. **Maine Indian Claims Settlement Act (§ 6206(1))** Except as otherwise provided in this Act, the Passamaquoddy Tribe and the Penobscot Nation, within their respective Indian territories, shall have, exercise and enjoy all the rights, privileges, powers and immunities, including, but without limitation, the power to enact ordinances and collect taxes.
Land taxes	Settlement lands should be exempt from land taxes to promote the beneficial purpose of settlement. Currently, tax treatment of native title lands is inconsistent. There have been instances where settlement lands have had to be surrendered to cover rates and administration costs. See *Taxation of Native Title Agreements*. Most US settlements contain a clause to the effect that 'any land held in trust … shall be exempt from taxation or lien or "in lieu of payment"' (*Massachusetts Indian Land Claims Settlement* (1987) (§ 1771e(d)), see also *Florida Indian (Miccosukee) Land Claims Settlement* (1982)). However, some settlement agreements do provide for the payment of taxes on settlement lands, including the *Houlton Band of Maliseet Indians Supplementary Claims Settlement Act* (1986) which, concerningly, further provides that if there are insufficient funds to discharge the tax liability, the tax is to be paid out of other income-producing property owned by the Band. This is currently the subject of review.	**Tsawwassen First Nation Final Agreement** 7. Tsawwassen First Nation is not subject to capital taxation, including real property taxes and taxes on capital or wealth, in respect of the estate or interest of Tsawwassen First Nation in Tsawwassen Lands on which there are no improvements or on which there is a Designated Improvement. **Massachusetts Indian Land Claims Settlement (1987), § 1771e(d)** Any land held in trust by the Secretary for the benefit of the Wampanoag Tribal Council of Gay Head, Inc. shall be exempt from taxation or lien or "in lieu of payment" or other assessment by the State or any political subdivision of the State to the extent provided by the Settlement Agreement: *Provided, however*, That such taxation or lien or "in lieu of payment" or other assessment will only apply to lands which are zoned and utilized as commercial: *Provided further*, That this section shall not be interpreted as restricting the Tribe from entering into an agreement with the town of Gay Head to reimburse such town for the delivery of specific public services on the tribal lands. **Houlton Band of Maliseet Indians Supplementary Claims Settlement Act (1986)** The settlement Act establishes the Houlton Band Tax Fund. The Secretary is required to pay out of the Tax Fund claims for taxes, payments in lieu of property taxes, and fees for which the Band are determined to be liable. If there are insufficient funds in the Tax Fund to pay the tax, the deficiency is to be paid by the Houlton Band of Maliseet Indians from income-producing property owned by the Band which is not held in trust for the Band by the United States. (i.e. they are not exempt from taxes). **Florida Indian (Miccosukee) Land Claims Settlement (1982)** The leasehold interest granted the Miccosukee Tribe under the Lease Agreement shall be exempt from all State and local taxes. **South West Native Title Settlement, sch 10 (settlement terms), cl 11** Transfer duty is not payable under the *Duties Act* 2008 Chapter 2 in respect of any transfer or lease of land in accordance with the Land Base Strategy to the Trust or the Land Sub. ***Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth), s 39** The Condah land and Framlingham Forest are exempt from land tax under the *Land Tax Act* 1958 of Victoria.
Treatment of compensation income	Native title benefits are not assessable income, and therefore not subject to income tax (*Income Tax Assessment Act 1997* (Cth) s 59.50). The definition of 'native title benefit' is broad, covering all compensation from the extinguishment or reduction of native title, ILUAs and settlement agreements. Other grants, funding and income raised from investing native title benefits are, however, still taxable, although there are certain schemes available to reduce the tax liability of Indigenous	**Seneca Nation (New York) Land Claims Settlement (3 November 1990), §1774f(a)** None of the payments, funds, or distributions authorized, established, or directed by this subchapter, and none of the income derived therefrom, which may be received under this subchapter by the Seneca Nation or individual members of the Seneca Nation, shall be subject to levy, execution, forfeiture, garnishment, lien, encumbrance, seizure, or State or local taxation. (Also Puyallup Tribe of Indians Settlement Act 1989 s 10) **Alaska Native Claims Settlement Act (1971), s 21**

	bodies. To maximise benefits, a PBC should consider whether they are eligible for registration as a: • Charity, • Public Benevolent Institution (PBI), and/or • Deductible Gift Recipient (DGR) For a discussion of the different options available, see *Taxation of Native Title Agreements*.	Exempts revenues originating from the Alaska Native Fund from Federal, State or local taxation at the time of receipt by a Regional Corporation, Village Corporation, or individual native.
Social security payments	The impact of compensation payments on the assessment of income for social security purposes is unclear under the *Social Security Act 1991* (Cth) (SSA) and related policy (Social Security Guide 4.3.9.50: Income from Gifts, Legacies, Royalties & Native Title Claims). Under published Department of Social Services guidelines, such payments are considered to be 'royalties' and, if paid directly to an Indigenous community (e.g. through a PBC) and used by the community for the overall benefit of the community, is not treated as income of an individual person. However, if a payment is subsequently made to an individual, those payments are considered income. This is not explicit in the legislation. Consider making the DSS policy more explicit in the legislation, e.g. as a deemed exempt lump sum payment under SSA s 8(11)(d). A number of payments to Indigenous people have been exempted under this provision including ex-gratia payments to Aboriginal and Torres Strait Islander people who are members of the Stolen Generation. Alternatively, settlement agreements could include a provision that the payment is not considered income under the SSA. Consider also exempting payments made from the community to individuals of that community. In the US, exemption of payments from assessment for social security purposes is made explicit (see right).	**Torress-Martinez Desert Cahuilla Indian Claims Settlement (2000), s 9** (a) Nothing in this Act or the Settlement Agreement shall affect the eligibility of the Tribe or its members for any Federal program ... (b) No payment pursuant to this Act shall result in the reduction or denial of any Federal services or programs to the Tribe or to members of the Tribe, to which they are entitled or eligible because of their status as a federally recognized Indian tribe or member of the Tribe. (Also Puyallup Tribe of Indians Settlement Act 1989 s 10). **Crow Boundary Settlement (1994), s 1776e** No payments made or benefits conferred pursuant to this subchapter shall result in the reduction or denial of any Federal services or programs to any tribe or to any member of a tribe to which the tribe or member of the tribe is entitled or eligible because of the status of the tribe as a federally recognized Indian tribe or the status of a member of such tribe as a member. **Connecticut Indian Land Claims Settlement (1993), §1758(c).** Notwithstanding any other provision of law, the Tribe and members of the Tribe shall be eligible for all Federal services and benefits furnished to federally recognized Indian tribes as of October 18, 1983.
Compound Interest	Native title compensation is an emerging area of law. Only one case so far – *Northern Territory v Mr A. Griffiths and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7 – has discussed the compensation provisions of the *Native Title Act 1993* (Cth), and it leaves many questions unanswered. In that case, interest was paid only on the economic component of loss, and only on a simple interest basis. The High Court held that there was no entitlement to compound interest as there was no evidence that the Claim Group would have invested the money or used it for commercial purposes (at [110]). However, the majority judgment remarked that 'it is possible that there may be circumstances in which ... it would be just to award interest on a native title compensation claim on a compound interest basis' [133], particularly where the evidence established that 'upon earlier payment of the compensation, the Claim Group would have put the compensation to work at a profit, or perhaps used it to defray costs of doing business' [133]. Compound interest has also been awarded overseas for appropriation of land. Settlement agreements are not bound by High Court jurisprudence and should consider expressly providing that compensation is inclusive of compound interest in the spirit of the beneficial intent of settlement.	
Protection and enforcement	Consideration should be given to options for protecting and enforcing comprehensive settlement agreements to ensure negotiated outcomes are properly realised. While States have an obligation under international law to honour and respect treaties and agreements concluded with Indigenous peoples (see *UNDRIP* art 37), this is not automatically part of Australian domestic law and is not 'binding'.	**Mohegan Nation (Connecticut) Land Claims Settlement, §1775g** (1) In general If a State Agreement or compact or agreement described in subsection (a) of this section is invalidated by a court of competent jurisdiction, the Mohegan Tribe or its members shall have the right to reinstate a claim to lands or interests in lands or natural resources to which the Tribe or members are entitled as a result of the invalidation, within a reasonable time, but not later than the later of—

	Agreements in Australia have taken a number of forms, including by registration of an ILUA and/or consent determination of native title, statute and contract. ILUAs and native title determinations are of course not available to groups who are unable to make a native title claim because of historic extinguishment and/or who choose not to pursue a native title claim. A difficulty with many agreements, even those with some statutory enshrinement (for example the South West Native Title Settlement, part of which included the passage of the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA)), is their vulnerability to changes in government and political will. Contracts can also generally be terminated by way of notice or other mechanisms. Constitutional enshrinement is generally considered the gold standard, and may be pursued as a long-term option. See, for example, art 35(1) in pt 2 of the *Canadian Constitution*. ILUAs are protected by the processes of the *Native Title Act 1993* (Cth). Another option is to guarantee a degree of judicial oversight. For example, a consent determination that native title does not exist, entered into as part of a settlement agreement, may include a proviso that consent is predicated on the continuing registration of any underlying ILUAs. See, for example, the orders of the Court in *Taylor on behalf of the Yamatji Nation Claim v State of Western Australia* [2020] FCA 42 which formalised the Yamatji settlement agreement. Agreements may also be protected to some degree by the nature of the outcomes themselves. Land transfers and funding (once expended), for example, are difficult to retract.	(A) 180 days after the Mohegan Tribe receives written notice of such determination of an invalidation described in subsection (a) of this section; or (B) if the determination of the invalidation is subject to an appeal, 180 days after the court of last resort enters a judgment. (2) Defenses Notwithstanding any other provision of law, if a party to an action described in paragraph (1) reinstates the action during the period described in paragraph (1)(B)— (A) no defense, such as laches, statute of limitations, law of the case, res judicata, or prior disposition may be asserted based on the withdrawal of the action and reinstatement of the action;

Appendix 1: Glossary of Agreements

AUSTRALIA

Agreement Name	Date Concluded	Parties	Page Reference
Dja Dja Wurrung Land Use Activity Agreement	25 October 2013	Dja Dja Wurrung Clans Aboriginal Corporation State of Victoria	8, 9.
Dja Dja Wurrung Recognition and Settlement Agreement	24 October 2013	Dja Dja Wurrung Clans Aboriginal Corporation State of Victoria	17.
Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)	2 June 1987	Kerrup-Jmara Elders Aboriginal Corporation Kirrae Whurrong Aboriginal Corporation Commonwealth of Australia	6, 28, 31, 33.
Narungga Nation Traditional Fishing Agreement	February 2021	Narungga Nation State of South Australia	20, 27.
Noongar (Korrah, Nita, Boordahwan) (Past, Present, Future) Recognition Act 2016 (WA)	6 June 2016	Noongar Peoples State of Western Australia	6.
South West Native Title Settlement	25 February 2021	Noongar Peoples State of Western Australia	7, 11, 15, 20, 24, 27, 30, 33.
Taungurung Land Use Activity Agreement	11 August 2020	Taungurung Clans Aboriginal Corporation State of Victoria	8.
Taungurung Traditional Owner Land Natural Resource Agreement	26 October 2018	Taungurung People State of Victoria	17.
Yamatji Nation Indigenous Land Use Agreement	26 October 2020	Yamatji Nation State of Western Australia	6, 9, 12, 15, 18, 19, 21, 23, 26, 29, 30, 32, 35.

NEW ZEALAND

Agreement Name	Date Concluded	Parties	Page Reference
Ngati Kahu Agreement-in-Principle	17 September 2008	Ngati Kahu The Crown	17, 18, 23, 32.
Ngāti Tūwharetoa Claims Settlement Act 2018	18 December 2018	Ngāti Tūwharetoa The Crown	19.
Te Aupouri Claims Settlement Act 2015	22 September 2015	Te Aupouri The Crown	6.
Te Aupouri Deed of Settlement	3 November 2011	Te Aupouri The Crown	18, 22.
Te Hiku Social Development and Wellbeing Accord	5 February 2013	Te Hiku o Te Ika The Crown	23.
Te Kawerau ā Maki Deed of Settlement	22 February 2014	Te Kawerau ā Maki The Crown	31.
Te Rarawa Deed of Settlement	21 September 1992	Te Rarawa The Crown	13, 19, 31.
Te Roroa Claims Settlement Act 2008	29 September 2008	Te Roroa The Crown	14.
Te Uri o Hau Claims Settlement Act 2002	17 October 2002	Te Uri o Hau The Crown	11, 19, 23.
Te Whānau A Apanui Settlement Agreement-in-Principle	28 June 2019	Te Whānau A Apanui The Crown	15.

Waitaha Deed of Settlement	21 September 1992	Waitaha The Crown	26.

CANADA

Agreement Name	Date Concluded	Parties	Page Reference
Canadian Comprehensive Funding Agreement	N/A	Canada Various First Nations	8.
Draft Umbrella Agreement with respect to Canada-Kahnawake Intergovernmental Relations Act	17 January 2001	Mohawks of Kahnawake Canada	10.
Framework Agreement between Quebec and the Mohawks of Kahnawake	16 July 2009	Mohawks of Kanesatake Quebec	9.
Gwich'in Comprehensive Land Claim Agreement	22 April 1992	Gwich'in Canada	32.
K'ómoks Agreement-In-Principle	24 March 2012	K'ómoks First Nation Canada British Columbia	20.
Kanesatake Interim Land Base Governance Act 2001	14 June 2001	Mohawks of Kanesatake Canada	9.
Kluane First Nation Final Agreement	18 October 2003	The Government of Canada Kluane First Nation The Government of the Yukon	9.
Kluane First Nation Self-Government Agreement	18 October 2003	The Government of Canada Kluane First Nation The Government of the Yukon	10.
Lheidli T'enneh Treaty	5 May 2018	Lheidli T'enneh Canada British Columbia	28, 29.
Maa-Nulth First Nations Final Agreement	1 April 2011	Canada British Colombia Maa-Nulth Nation	7, 16, 19, 20, 21, 22, 23, 24.
Nisga'a Final Agreement	11 May 2000	Nisga'a Canada British Columbia	24.
Tla'amin Final Agreement	5 April 2016	Tla'amin Nation Canada British Columbia	12, 14, 24, 25, 28.
Tsawwassen First Nation Final Agreement	6 December 2007	Tsawwassen First Nation Canada British Columbia	21, 22, 33.
Yale First Nation Final Agreement	11 April 2013	Yale Nation Canada British Columbia	12.
Yekooche First Nation Agreement-in-principle	22 August 2005	Yekooche Nation Canada British Columbia	13

UNITED STATES

Agreement Name	Date Concluded	Parties	Page Reference
Alaska Native Claims Settlement Act (1971)	18 December 1971	13 Regional First Nations corporations 224 Village First Nations corporations State of Alaska	9, 12, 15, 31, 34.
Connecticut Indian Land Claims Settlement (1983)	18 October 1983	Mashantucket Pequot People State of Connecticut	10, 31.
Crow Boundary Settlement (1994)	2 November 1994	Crow Tribe State of Montana	31, 34.
Federal Aroostook Band of Micmacs Settlement Act 1991	12 November 1991	Aroostook Band of Micmacs State of Maine	26.
Florida Indian (Miccosukee) Land Claims Settlement (1982)	31 December 1982	Miccosukee People State of Florida	7, 13, 33.
Florida Indian (Seminole) Land Claims Settlement (1987)	31 December 1987	Seminole People State of Florida	9, 14.
Houlton Band of Maliseet Indians Supplementary Claims Settlement Act (1986)	27 October 1986	Houlton Band of Maliseet Indians State of Maine	13, 33.
Maine Indian Claims Settlement Act (1980)	10 October 1980	Penobscot People Passamaquoddy People State of Maine	7, 10, 13, 25, 27, 28, 31,33.
Massachusetts Indian Land Claims Settlement (1987)	18 August 1987	Wampanoag Tribal Council of Gay Head State of Massachusetts	28, 30, 31, 33.
Mohegan Nation (Connecticut) Land Claims Settlement Act (1994)	19 October 1994	Mohegan People State of Connecticut	7, 19, 27, 35.
Pueblo de San Ildefonso Claims Settlement (2006)	27 September 2006	The Pueblo of Santa Clara New Mexico	12.
Puyallup Tribe of Indians Settlement Act (1989)	23 February 1989	Puyallup People State of Washington	10, 16, 19, 34.
Seneca Nation (New York) Land Claims Settlement (1990)	3 November 1990	Seneca Nation State of New York	24, 34.
Torress-Martinez Cahuilla Indian Claims Settlement (Not enacted)	18 September 2000	Torress-Martinez Cahuilla State of Utah	34.