**PROCESS GUIDELINES for negotiating under the LUAA
(Negotiation activities and Agreement activities)**

Negotiation activities (Class A and Class B) and Agreement activities under the Taungurung LUAA all require good faith negotiations between the Responsible Person and TLaWC (Taungurung Land and Waters Council).

The Act requires in each case that the parties negotiate in good faith regarding:

* the activity itself (i.e. what it is and whether it proceeds), and
* any conditions to be placed on the activity.

Depending on the circumstances, the negotiations may also include discussion of Community Benefits. See What’s the Process? (web page on DJCS website) for more information regarding who is responsible for providing Community Benefits.

This document provides additional guidance and recommendations to Responsible Persons regarding how they establish and conduct these negotiations.

1. Notify TLaWC

* TLaWC is the “traditional owner group entity” appointed by the Taungurung people to represent their interests for the purposes of the *Traditional Owner Settlement Act 2010* (*TOS Act*).
* You may wish informally notify TLaWC well in advance of an activity, e.g. when conducting long term or project planning;
* You must provide formal notification before commencing a Negotiation or Agreement activity. Formal notification must meet the requirements of the *TOS Act* and the *Traditional Owner Settlement Regulations 2017.*
* Templates are available at What’s the Process? (web page on DJCS website) to assist you with this formal notification step.

2. Meet or speak with TLaWC before commencing formal negotiations

* Ensure all parties are authorised to commence negotiations.
* Outline types of outcomes sought, so that parameters can be defined and understood by all parties.
* Agree on the broad structure, timeframes, parameters and purpose of the negotiation.
* Agree on roles and responsibilities of all parties.
* Where appropriate, appoint a facilitator.

3. Prepare for the Negotiations

* Identify and complete necessary research.
* Where relevant, spend time researching and considering the nature of the Community Benefits you can possibly provide (see examples below). This will ensure that when substantive negotiations commence parties have a clear idea of the parameters within which agreement can be found.
* Familiarise yourself (broadly) with the 2018 Settlement Package. It’s helpful for you to understand the broader context in which the requirement to negotiate has arisen.
* Take the time to develop awareness of culturally appropriate and effective ways to communicate with TLaWC.
* Take any preliminary steps needed to support your payment of TLaWC’s reasonable costs of negotiating (required under the *TOS Act*)
* Seek legal advice if you think you need it.

4. Negotiating

* Negotiate in good faith. Refer to “What is Good Faith Negotiating?” below.
* Explain the proposed activity (including through maps, plans, etc.), listen and answer questions.
* Where possible, use part of the meeting to inspect the proposed activity area. This may provide a useful way to explain the proposed activity, proposed area and access.
* Negotiate with a view to reaching agreement about:
	+ - the nature and scope of the activity;
		- ways of minimising the impact of the proposed activity on Traditional Owner rights and interests;
		- Traditional Owner access to the proposed activity area (if relevant);
		- the manner in which the activity may be done;
		- any other conditions that may be mutually agreeable;
		- where appropriate, addressing community or economic development needs or desires through Community Benefits.
* Be flexible in resolving issues that arise during negotiations.
* Create an atmosphere in which TLaWC representatives feel comfortable discussing their concerns.
* Be aware that people may have different understandings of the meaning of terms, and remember the spirit of “meaningful partnership” that underlies the LUAA and the rest of the Settlement Package.
* Recognise the importance of allowing sufficient time for decision-making by TLaWC, as they may want to consult with the Traditional Owners about the proposed activity.
* Be mindful that you may not reach agreement after one meeting – further negotiations may be required or requested. The time of, and need for, further negotation will need to be decided on a case by case basis.
* Where relevant, ensure that the Community Benefits you offer are practical and sustainable. Refer to “Community Benefits” (below) for more information.
* Make sure the outcomes of negotiation meetings are accurately recorded.

5. Reaching agreement

* Any agreement must be in writing and signed by all parties.
* The agreement must be legally binding on all parties.
* The agreement should be clear and in plain English.
* The agreement should be drafted so that it is self-contained and self-evident, and able to be used by people who were not present during the negotiations.
* The agreement should set out the roles and responsibilities of each party, including (where appropriate) schedules detailing the provision of Community Benefits.

6. Next steps

* If you are not the decision maker, you must contact the decision maker and advise them that you have reached agreement.
* Provide the decision maker with a statement signed by you and TLaWC that states you have reached agreement over the activity as required by section 51 of the *TOS Act.*
* Pay TLaWC’s reasonable costs of the negotiations. These costs are prescribed by regulations under the *TOS Act.*

7. What happens if no agreement is reached?

The activity must not proceed during the negotiations.

If, after negotiating in good faith for six months or more, agreement has not been reached, either party may be able to make an application to VCAT for a variety of determinations – depending on the classification of the activity. Some indicative examples are given below; seek legal advice where appropriate.

* For Agreement activities, VCAT has no power to order that the activity may proceed. It can only make orders regarding the classification of the activity or procedural matters such as good faith negotiation, the assessment of reasonable negotiation costs, etc.
* For Negotiation (Class A) activities, VCAT can decide whether or not the activity can proceed. VCAT may also impose conditions under which the activity may proceed.
* For Negotiation (Class B) activities, VCAT does not have the power to determine that the activity may not proceed. It can impose conditions under which the activity may proceed.
* If VCAT finds (on application by TLaWC) that the Responsible Person has not negotiated in good faith, then the activity cannot proceed until agreement is reached (or an order is made by VCAT after a further period of six months of good faith negotiations).
* VCAT may determine whether a Community Benefit is payable, the amount of the payment and when the payment is made.
* VCAT cannot make any determinations in relation to cultural heritage for a land use activity. Matters relating to cultural heritage must be dealt with under the *Aboriginal Heritage Act 2006.*
* In determining these matters, VCAT will be constituted with a member or members with appropriate knowledge of and experience in Aboriginal culture and land use.

What is good faith negotiating?

Good faith negotiating requires the parties to come to the table with open minds, and with a genuine desire to reach an agreement, as opposed to simply adopting a rigid, pre-determined position.

Negotiation involves communicating, having discussions, or conferring with a view to reaching an agreement. Negotiation will often involve making concessions in order to achieve agreement. The expression ‘good faith’is understood to involve honesty and sincerity of purpose or intention. In the context of the *TOS Act*,good faith negotiations also involve considering whether, in the circumstances of each case, there has been a reasonable effort to negotiate in order to reach agreement.

A preparedness to shift position or compromise in order to achieve agreement is an important part of good faith negotiations. But good faith does NOT mean that a party has an obligation to give up and agree to the other party’s views, or that a negotiated agreement must be reached between the parties. Good faith is about the quality of the party’s conduct by reference to what it has done or failed to do in the negotiations.

**DO:**

* Give special regard as to the nature of the activity you are proposing and the impact on the Traditional Owner rights of the Traditional Owner group
* Respond to communications with the other party within reasonable timeframes
* Make proposals or provide options for reaching agreement at the first instance
* Remain open minded, and be frank and open in your communication
* Be prepared to compromise
* Keep the lines of communication open with the other party
* Follow up matters with the other party if they haven’t responded
* Attempt to organise meetings between yourself and TLaWC
* Take reasonable steps to facilitate and engage in discussions with TLaWC
* Respond to reasonable requests for relevant information within a reasonable time
* Make counter proposals
* Go beyond merely facilitating discussions. Good Faith negotiating requires active participation in discussions and the making of proposals, and
* Keep accurate records of any information pertaining to the negotiations.

**DON’T:**

* Unreasonably delay initiating communications in the first instance
* Fail to make proposals in the first instance
* Stall negotiations by unexplained delays in responding to correspondence or telephone calls
* Unnecessarily postpone meetings
* Send negotiators without authority to do more than argue or listen
* Refuse to agree on trivial matters
* Shift position just as agreement seems in sight
* Adopt a rigid non-negotiable position
* Engage in conduct which may harm the negotiating process *(e.g. issuing inappropriate press releases)*
* Refuse to sign a written agreement in respect of the negotiation process or otherwise
* Fail to do what a reasonable person would do in the circumstances
* Fail to disclose facts or legal argument that you intend to rely on, or
* Otherwise engage in misleading or other unsatisfactory or unconscionable conduct.

Examples of Community Benefits

Community Benefits act as a form of compensation to TLaWC when their rights under a Land Use Activity Agreement may be impaired or restricted as a result of an activity undertaken by another party. They can be economic, cultural or social benefits, so they may be provided in monetary or non-monetary form (or a combination).

As noted above, please check What’s the Process? (web page on DJCS website) for more information regarding who is responsible for providing Community Benefits.

Community Benefits are not intended as a substitute for the provision of mainstream services to citizens by government that are available to all Victorians, nor for specific services generally available to Aboriginal people.

The following list provides examples of non-monetary Community Benefits that may be appropriate if agreed by TLaWC, depending on the circumstances.

* Provide training in office management, health education, or political engagement
* Assist in the delivery of sporting or cultural workshops (e.g. AFL workshop, music workshops, painting workshops)
* Arrange for Traditional Owner artists (e.g. singer, dance company, artist, story teller) to visit the relevant community.
* Arrange for keynote speakers to visit school groups or other community organisations
* Provide support for the local primary school to deliver a cultural enrichment teaching program
* Provide flood boat for flood-prone Traditional Owner communities
* Develop bilingual street signs
* Provide support for a cultural heritage keeping place, a community Traditional Owner knowledge centre or a library complex, or for a festival, dance or sports event.
* Run workshops to promote cultural awareness for non-local workers
* Name or rename streets, buildings (hospitals/wards), other centres, parks, and sports fields by agreement with Traditional Owners
* Fund a cultural heritage study (as distinct from a cultural heritage survey)
* Fund and assist in recording cultural heritage sites and values so as to aid protection and recognition
* Construct other centres (or provide for low-cost leasing of parts of government buildings) for use by community representatives, community groups or TLaWC for their own business or cultural purposes
* Assist in the recognition, promotion and funding of cultural days/events/ceremonies
* Provide resources for existing offices/associations e.g. provision of office equipment, telephones etc.
* Provide vehicles for use by offices/associations
* Provide cadetships or work-experience programs
* Provide land use or environmental education programs
* Provide resource material for community programs, educational material, etc.
* Fund or sponsor items to promote community events or associations, e.g. printing shirts for TLaWC identification
* Establish scholarship/bursary program
* Fund or assist in the provision of a skills audit for the community.