

How we got there: The Traditional Owner Settlement Act

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Introduction

I would like to begin by paying my respects to the Traditional Owners of the country on which we meet today – the Wurundjeri people and their elders past and present. [I appreciate the welcome we received this morning from Bill Nicholson].

Thank you, [Pam], for your introduction. I thank also the conference organisers – Nic, Cameo, and Tim – for inviting me to participate in this panel.

The struggle for land justice

The struggle for land justice and the recognition of Traditional Owners rights in Victoria has a long and intense history. However, it is the significant forward strides made in the early twenty-first century that I want to focus on here.

Over a four year period from 2006 to 2010 Victorian Traditional Owners successfully developed and negotiated an alternative framework for settling native title claims in Victoria. The conclusion of these efforts saw the commencement of the [Traditional Owner Settlement Act 2010 \(Vic\)](#) in September 2010.

The Act provides a framework for negotiating an out-of-court settlement of native title for a Traditional Owner group without the need for the lengthy and costly processes that are usually required under the Native Title Act.

It enables Traditional Owners to enter into agreements with the Victorian State Government to achieve comprehensive settlement of claims with real and lasting benefits such as the grant of freehold land, joint management of public lands and the foundation for sustainable economic development.

This represents a highpoint of alternative native title settlement processes in Australia.

The pathway to the Traditional Owner Settlement Act

The period of the early 2000s was a turbulent one in Victorian Aboriginal affairs. In 2002 the High Court decision on the Yorta Yorta native title claim¹ appeared to eliminate the possibility of a positive determination of native title in Victoria (or many other areas in south eastern Australia). In 2003 the Victorian Native Title Representative Body (Mirimbiak Nations Aboriginal Corporation - MNAC) lost its recognition under the NTA.

Other significant developments were the Labor Government securing comfortable majorities in both Houses of Parliament in 2002, and the creation of a new Native Title Service Provider with recognition under the NTA – Native Title Services Victoria (NTSV).

Traditional Owners, as well, were at a significant point in their struggle for land justice, and immensely disappointed with the outcome of the Yorta Yorta native title claim. A strict interpretation of the Native Title Act led to the view that Traditional Owners can only be officially recognised if they have remained immune from historical influences since European settlement. My personal experience of this was the devastating outcome of the Yorta Yorta case, which many Victorian Traditional Owners still carry as a deep wound. The injustice of the native title system was felt by me personally, by my family and by the whole Yorta Yorta nation.

Recognising the discord caused by the State's "victory" in the Yorta Yorta matter, the new Labor Government was committed to resolving native title matters through negotiation and agreement. In the new Board of NTSV the State found a partner able and willing to participate in the development of new structures with regard to both native title and Aboriginal cultural heritage.

This was a pivotal moment in relation to the administration and settlement of native title claims in Victoria and for strengthening relationships with the native title claimant groups and stakeholder groups in Victoria, with NTSV going on

¹ Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 212 CLR 422

to play a pivotal advocacy role in relation to related land justice matters, including the cultural heritage reform process.

NTSV board discussions with relevant government Ministers suggested the State was prepared to negotiate a range of possible non-native title outcomes in order to settle the claims of native title groups. This led to productive discussions with the State on cultural heritage reform matters, particularly in terms of Traditional Owners having greater control over their own cultural heritage.

While successful native title outcomes in Victoria were thought to be difficult to achieve, the State Government's approach to negotiating agreement packages nevertheless represented a real opportunity which NTSV committed itself to assisting its client groups to take advantage of.

In February 2005 NTSV convened a meeting of representatives in Melbourne of all First Nations people of Victoria. The meeting was chaired by myself, (Graham Atkinson) as Chairperson of NTSV, with assistance from Deputy Chairperson, Daphne Milward. The majority of Traditional Owner groups in Victoria were represented at the meeting, which was reported in the "Age" newspaper on Thursday 17 February 2005 under the heading "*Aborigines Join Forces on Land Rights*".

The meeting discussed key principles for the State Government's immediate consideration in relation to Indigenous land justice issues generally, the resolution of long standing native title claims, and options for the structuring of new Victorian legislation for Indigenous management of cultural heritage that would under which control would reside Traditional Owners. These key principles were incorporated into a Statement adopted by the meeting.

The Statement was provided to the Attorney General, Rob Hulls and the Minister for Aboriginal Affairs, Gavin Jennings when they attended on the second day of the meeting. In response to the Statement, the Attorney General agreed to meet with a negotiating team agreed upon by Traditional Owners to further discuss the land justice principles and their implications. Additionally, the state-wide First Nations meeting determined that a reference

group should be formed in order to negotiate with Government on behalf of Traditional Owners. At a subsequent meeting in August 2005 convened by NTSV, it was decided that the reference group would be called the Victorian Traditional Owner Land Justice Group.

The Land Justice Group was established with the assistance of NTSV as an unincorporated body mandated by Traditional Owner groups, each having nominated a representative onto the reference group. The full reference group had around 20 members, and a smaller team mandated to negotiate with Government on behalf of the full Land Justice Group.

When the Land Justice Group agreed to enter into negotiations with government, to sit down and try to resolve old issues of injustice, we were determined to continue the struggle of our ancestors in the hope our children wouldn't need to fight for land justice. The legacy of our ancestors, their determination to get outcomes, has always helped us focus our struggle.

Both the State and NTSV helped resource the process because they believed that these negotiations could resolve native title matters more expeditiously. All parties also acknowledged that negotiated native title settlements also seek to address underlying aspirations for land justice.

Once established and with a clear mandate, the three co-chairs of the Land Justice Group wrote to the Premier of Victoria, requesting a meeting to discuss the land justice aspirations of Traditional Owners. Premier Bracks in turn instructed three Ministers – Rob Hulls, Gavin Jennings and John Thwaites – to engage with the Land Justice Group on 'native title and land-related matters'.

In November of 2005 the Land Justice Group met to negotiate the detail of the Exposure Draft of the *Aboriginal Heritage Bill*. A number of resolutions regarding the *Aboriginal Heritage Bill* were endorsed at that meeting and submission was prepared for discussion with Minister Jennings, at the first meeting of the Land Justice Group's negotiating team with the three Ministers in December 2005.

The Exposure Draft of the *Aboriginal Heritage Bill* (2005) (the 2005 Bill) introduced the possibility for the first time that native title parties might be recognized for the purposes of managing cultural heritage. The Bill gave Traditional Owners a foothold, but as the Land Justice Group made clear, that foothold was not secure enough to satisfy its aspirations.

In response to submissions from the Land Justice Group and others, the revised *Aboriginal Heritage Act* – which was passed in 2006 – required that all the members of the state wide Aboriginal Heritage Council be Traditional Owners from Victoria. This was a welcome change to the old Regional Cultural Heritage Program. The Council's role included the recognition of the 'Registered Aboriginal Parties' to replace the functions to Aboriginal community organisations in the current regime. For the first time in Victoria, native title holders had exclusive rights in regard to cultural heritage within the outer boundaries of their claim area. Another benefit to Traditional Owners was the criteria for recognising other Registered Aboriginal Parties give a clear priority to Traditional Owner organisations.

The idea of a statewide policy framework to enable out of court settlements for native title claims and land justice matters was initiated at the April 2006 meeting of the Land Justice Group with three Victorian Government Ministers, the Attorney General, the Aboriginal Affairs Minister, and the Minister for the Environment. At this meeting, it was suggested that a statewide framework could provide benefits and structure for future negotiations with Traditional Owner groups. In August 2006, the Land Justice Group responded with its discussion paper on Framework Agreements advocating for reform around the following key areas:

- Transfer of culturally significant crown land;
- Non-extinguishment of native title;
- Establishing connection to country and Traditional Owners' boundaries;
- Hunting and fishing rights and natural resource management;
- Cultural recognition and strengthening;
- Strategies for economic development; and
- Claims resolution

The new strategic approach put forward by the Land Justice Group in this initial paper aimed to address the unfinished business of land justice, and it aimed to develop a new process for negotiation, collaboration and partnership building, which could occur outside the Courts, through agreement making.

In February 2008, the Attorney General, The Honourable Mr Rob Hulls announced Cabinet approval to establish a Steering Committee, chaired by Professor Mick Dodson, to develop a native title settlement framework. The Committee comprised five Traditional Owner representatives from the Land Justice Group, four senior State government bureaucrats, and the CEO of Native Title Services Victoria. The Steering Committee first met in March 2008, and then met regularly during the year. Throughout the process, Native Title Services Victoria provided advice and support to the Land Justice Group, developed research for Working Groups, and met regularly with a wide variety of stakeholders to further the development of the Steering Committee's report, which was submitted to Cabinet and to the Land Justice Group in December 2008 and received the endorsement of the Land Justice Group in February 2009.

Concluding remarks

A critical aspect of what we advocated for in Victoria was to establish a fairer process, which recognizes the nature of connection Traditional Owners have to land *today*, and does not view Traditional Owners as museum pieces frozen in time.

This is not the first land justice initiative in Victoria. Many have tried before, few won and sadly, many opportunities have been lost. But what has been different about this process, has been our strategic approach, and the willingness of government to collaborate closely. In Victoria, we have been spending our time intensively building partnerships in the hope that the future holds less heartache, better use of resources and successful agreements all Victorians can be proud of. Victorian Traditional Owners have learnt from hard experience that a win-lose approach is not in Traditional Owners' interests.