



Yoorrook Justice Commission

Submission on Land Injustice

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I INTRODUCTION

Dja Dja Wurrung Clans Aboriginal Corporation ('DJAARA') understands that the Yoorrook Justice Commission ('Yoorrook') is inquiring into systemic injustices Traditional Owners have faced regarding their lands, waters, skies and resources. This submission has been prepared by DJAARA's Dja Dja Wurrekatjalangu team; the team which operationalises the Recognition and Settlement Agreement (RSA) that the Dja Dja Wurrung People (Djaara) reached with the State in 2013. *Dja Dja Wurrekatjalangu* is the Djaara expression for "we say yes to each other". That expression reflects the spirit behind the agreement and the understandings and agreements reached along our journey.

Djaara are in a unique position among Victorian Traditional Owners. In 2013, Djaara entered the first comprehensive RSA under the *Traditional Owner Settlement Act 2010 (Vic)* ('the Settlement Act') and have worked tirelessly and in good faith with it for a decade now.

The Settlement Act was the outcome of the work of the Victorian Traditional Owner Land Justice Group, co-Chaired by Dja Dja Wurrung leader and elder Uncle Graham Atkinson. The motivation for that work was the failure of the Commonwealth Native Title system to deliver land justice for the Yorta Yorta people.¹

Uncle Graham said of the Settlement Act: "*This is a ground-breaking reform for Traditional Owners in Victoria. It allows groups to work in an agreement-making context rather than litigation*".

Of course, Victorian Traditional Owners were not the only beneficiaries of the recognition under the Settlement Act of some of their pre-existing rights... As the then Victorian Attorney-General Rob Hulls said: "*It will mean quicker resolution of claims, reduced transaction costs, reduced compensation liability for the State, and finality and certainty for the State, for business and for industry in relation to native title matters.*"

There is no doubt that today land justice for Djaara is stronger than it would be without the RSA. And it is likely that the outcomes secured through the RSA are greater than could have been achieved through a Native Title determination. But, 10 years on, we ask ourselves the question "Has the Settlement Act delivered land justice for Djaara?"

Dja Dja Wurrung people and their Traditional Owner Group Entity,² DJAARA, have worked hard at developing close and productive relationships with the Victorian government and its agencies. DJAARA recognises the good intentions and genuine interest of many Ministers. Some public servants understand the principles of the Settlement Act and the RSA and try to align government objectives with Djaara priorities and imperatives. But the RSA itself and the implementation of it have proved to be inconsistent with Dja Dja Wurrung aspirations. The RSA delivers less than expected and falls short of current Australian law. Despite positive elements, it entrenches and represents systemic injustice.

This submission describes some of the various ways in which the Settlement Act, the RSA and the implementation of the RSA work to limit Djaara's rights to Country.

¹ See *Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors* [2002] HCA 58.

² See Traditional Owner Settlement Act 2010 (Vic) s 3.



II SYSTEMIC INJUSTICES AFFECTING THE DJA DJA WURRUNG PEOPLE'S RIGHTS TO LAND

A *Deficiencies in the Current Regime*

The RSA fails to recognise that Djaara hold rights above, on, and beneath the land. The State also needs to recognise Traditional Owners' environmental, cultural and commercial interest in water and their right to participate in the management of water.

DJAARA owns a number of parks under Aboriginal Title, which are administered by the Dhelkunya Dja Land Management Board in accordance with the Joint Management Plan. Land held under Aboriginal Title is still considered Crown land under s 20 of the Settlement Act. When DJAARA and its subsidiaries are seeking to undertake activities such as cultural activities and maintenance works, DJAARA is required by the State to go through the standard procedure for planning and permits that any other entity or individual would. State and local governments fail to understand and facilitate DJAARA's inherent rights to carry out works on Aboriginal Title land, as a public land (or "Crown land") manager, exempt from these standard processes. It has been over 10 years, and the State has still not granted to DJAARA Aboriginal Title over Greater Bendigo National Park. It is not clear to DJAARA whether the Minister has taken reasonable steps to action this as required by the RSA.

In another act of disregarding First Nations' rights and interests in their land, the State continues to regularly declare parcels of "Crown land" as "surplus" and offer them to departments and the broader community for sale. Djaara are only made aware of this upon the listing of a property as being prepared for sale on the State government's website, or when DJAARA receives a notification under the Land Use Activity Agreement (LUAA) of the proposed sale.

B *Failure of the State to Implement 'Timber Creek' Compensation Principles*

In 2019, the High Court of Australia spelled out, for the first time, the methodology for calculating compensation for economic loss resulting from acts which damage the traditional rights of Australia's First Peoples.³ Five years on, the State has yet to develop a response to that decision, known colloquially as the 'Timber Creek' case. The State prefers to rely on the compensation formulae set out in the RSA,⁴ which produce compensation amounts well below those required by methodology of the High Court in Timber Creek. This has the effect of short-changing Djaara every day when their rights are harmed or extinguished as a result of activities on Country.

The State is reluctant to alter the RSA or its practices with Djaara even where the need is obvious, claiming that it must ensure consistency across the State. That approach not only holds up proper reform and initiatives, but also fails to recognise that the Dja Dja Wurrung Clans as a First Nation holds rights and priorities which may differ from other Nations across Victoria.

C *Non-Compliance*

1 *Recognition and Settlement Agreement*

The State and local government authorities have failed to comply with responsibilities under the RSA. Underlying the failure of some government agencies to comply with the RSA and to seize the opportunities Dja Dja Wurrung present to improve policy and land management practice is a

³ See *Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples v Northern Territory* [2019] HCA 7.

⁴ See Dja Dja Wurrung Land Use Activity Agreement sch 7.



sense that the RSA is a 'gift' to Djaara rather than a modest recognition of pre-existing rights recognised by the High Court of Australia, and the State of Victoria. Djaara know it is a struggle to change laws and practices which don't meet Djaara's needs or don't accommodate Djaara's priorities. Djaara appreciate that, but do not appreciate a pat on the head, an extravagant but stylised show of respect, and business as usual for the decision-makers. The failure to understand Djaara as a sovereign nation, with unique land and water management knowledge and skills, and a dynamic cultural contribution to make to policy and strategy represents a systemic failure on the State's part and denies Djaara justice in the management of land, water, and sky Country. It also represents a rejection of the gift Djaara are in fact providing all Victorians by applying their knowledge, practice, and willingness to share. DJAARA's strategies on climate change, renewable energy, and forest gardening to restore Country to health, DJAARA's food and fibre projects, and DJAARA's readiness to go on cultural fire management are evidence of the fact that Djaara has a significant and practical contribution to make for all as they lead the way to heal Country and its People for generations to come. Despite this, DJAARA faces barriers when trying to make positive change.

The initial Schedule 16 of the RSA, the Natural Resource Management Participation Strategies, commits the State to engaging Djaara in policy and strategy development for natural resources. A lack of resourcing for DJAARA to participate, and at times, a failure by the State to engage in a partnership approach, means that Djaara are excluded from decision-making about their land. For example, see Annexure 1 for information about the Central West Investigation Implementation. Schedule 16 was also intended to create economic opportunities for Djaara through natural resource management (procurement), and to date has not been implemented effectively.

2 Land Use Activity Agreement

Some State agencies, local governments and others routinely breach the RSA, and particularly the LUAA. Those breaches mean that Djaara are denied their legal rights to have a say in what happens on Country and to appropriate compensation. DJAARA regularly identify activities that have commenced or been undertaken on Djandak (Dja Dja Wurrung Country) without any notice to Djaara.

DJAARA has never been resourced to identify LUAA breaches or to monitor LUAA compliance. These are not roles that DJAARA ever wanted to undertake. Nor does DJAARA have the resources, or the authority required to compel the State and local governments, Utilities, and others undertaking activities on country to comply with the LUAA where a notification has not been provided. DJAARA, consequently, has great difficulty in pursuing what Djaara are lawfully owed as a result of breaches of the LUAA.

Indeed, there are many areas of the RSA, particularly the LUAA, that are ambiguous. This leads to disputes about interpretation. The State, local governments, and others that undertake activities on Crown land, through the RSA, often adopt a narrow interpretation to the LUAA to reduce Djaara's procedural rights and limit their liability to compensation. These parties will also rely on technical exclusions and reservations which artificially exclude the application of Djaara's rights to Crown land in which those rights would otherwise apply.

When DJAARA is notified of a Land Use Activity, it is often late in the project timeline when the proponent is facing tight deadlines for works to commence which places undue pressure on DJAARA in the negotiation. This inhibits Djaara's rights to free, prior, and informed consent, and prevents meaningful outcomes from being achieved.



Consecutive Public Land Authorisations, as defined in the Settlement Act, are categorised in isolation, rather than realising their cumulative impact. This has the effect of short-term leases, licences, and permits over Djandak being renewed over long-terms, effectively avoiding Djaara's procedural rights in decision making and to compensation.

DJAARA do not regard non-compliance with the LUAA as simply an administrative oversight or error, it is viewed as a failure to acknowledge Djaara's rights and interests and is a sign of disrespect. Such non-compliance is unlawful and seriously erodes the proper and legal rights of Traditional Owners.

D *The Aboriginal Heritage Act 2006 (Vic)*

DJAARA continues to identify breaches of the *Aboriginal Heritage Act 2006 (Vic)*, and *Aboriginal Heritage Regulations 2018 (Vic)*. Breaches lead to the disturbance or destruction of Djaara cultural heritage, heritage that is irreplaceable to Djaara.

DJAARA has made a number of submissions to the State to amend the Aboriginal Heritage Act to ensure compliance, further self-determination for Registered Aboriginal Parties, and recognise, protect, and conserve cultural heritage, including through the Victorian Aboriginal Heritage Council's 2021 report, *Taking Control of Our Heritage*, Recommendations for self-determined report to the Aboriginal Heritage Act 2006. Unfortunately, these efforts have failed to result in the necessary changes to protect cultural heritage.

E *Delays and Unactioned Recommendations*

The State fails to respond to matters, including issues and initiatives raised by DJAARA in a timely manner. Even when a formal dispute is raised, the dispute resolution process under the RSA is inefficient. DJAARA first initiated the dispute resolution process in March 2021 with the aim of resolving a dispute as to the methodology for valuing land for the purposes of calculating Community Benefits under the LUAA. Two years on, this dispute is yet to be resolved and the dispute resolution process in the RSA is not complete.

It is evident that the State is agreeable to commissioning reports to analyse its non-compliance but is not then willing to act on the recommendations made to resolve the issues identified.

1 *Report on the Initial Outcomes Review for the Dja Dja Wurrung Recognition and Settlement Agreement*

When Djaara took a leap of faith and entered into a partnership with the State by signing the first comprehensive RSA in Victoria, negotiators on both sides recognised that the agreement was novel and that the funding and operational aspects of the agreement should be regularly assessed. Provision was made in the RSA for a review after 5 years of operation. Terms of reference for the review were agreed between the then Attorney-General and DJAARA. The reviewer, Emeritus Professor Mick Dodson AM, was selected also by agreement between DJAARA and the State. Professor Dodson's analysis was undertaken with the cooperation and input of relevant State agencies. His report and 38 recommendations were produced in 2018. A copy of the Report on the Initial Outcomes Review for the Dja Dja Wurrung RSA is **attached** as Annexure 2 to this submission.

Professor Dodson noted in the report: *"Overall, the review found that considerable action must now be taken to realise the objectives and aspirations enshrined in the RSA within the spirit of its making. It is clear that both Parties entering into this Agreement have done so in good faith. However, the initial outcomes of the RSA have been undermined because of the novelty of an*



agreement of this nature and the subsequent inability to anticipate the sheer effort required to give the RSA good meaning in practical terms.”

Now, more than 5 years on from that review, only a very small number of Professor Dodson’s 30 recommendations for the State have been completed. A table setting out each of Professor Dodson’s recommendations and their status is **attached** as Annexure 3 to this submission. This inaction represents a systemic failure to observe the aims of the Settlement Act and curtails Djaara’s ability to exercise their land rights.

2 *First Principles Review of the Traditional Owner Settlement Act 2010 (Vic)*

The former Attorney-General, the Hon Jill Hennessy, launched a First Principles Review of the Settlement Act (‘the Review’) on 14 February 2020, for the purpose of reviewing the rights, interests, and financial payments available to Traditional Owners under the Settlement Act. In 2021, the Review produced a Report, prepared jointly by the First People’s Review Committee (comprised of representatives of Victorian Traditional Owner Groups) and the Executive Policy Owners Forum (comprised of State representatives). A copy of this report is **attached** as Annexure 4.

The Report contained 36 recommendations, 23 of which were recommendations jointly agreed to by the First Principles Review Committee and the Executive Policy Owners Forum (‘the Joint Recommendations’). These recommendations cover many of the issues raised in this submission. Not until December 2023 did the First Principles Review Committee receive a response to the recommendations raised by the Review. At this time, the State advised that it would only agree to implement the 23 Joint Recommendations and would, at this stage, not be engaging on the remaining 13 recommendations. For those “agreed” recommendations, the State has advised that:

- It does not yet have the necessary approvals to implement the recommendations;
- It proposes an implementation process that does not involve the First Principles Review Committee; and
- The estimated timeframe for implementation is uncertain but in the vicinity of between six months and five years depending on the recommendation.

Whilst DJAARA is ready, willing, and able to begin implementing these outcomes, the State is delaying remedial action for Djaara’s rights.

3 *Independent Audit of Compliance of the Dja Dja Wurrung Land Use Activity Agreement*

In December 2021, an independent consultant was engaged by the Department of Justice and Community Safety’s Land Justice Unit to undertake an audit of compliance with the LUAA. The report was commissioned upon request by DJAARA following its discovery and reporting of clear failures comply with the LUAA. DJAARA raised at least 55 breaches by the State and local governments. A redacted copy of the executive summary, findings, and recommendations of the LUAA Audit is **attached** as Annexure 5 to this submission. A full copy of the report can be made available to Yoorrook upon request.

We note that the audit process was deeply flawed for a number of reasons, including:

- Numerous agencies simply did not respond to the auditor’s requests;
- Agencies self-assessed their compliance with the LUAA;
- No “forensic” audit was undertaken; and



- There was no analysis of the systemic failures which led to obvious widespread ignorance of or disregard for the LUAA, such as: a lack of training by the State, the absence of penalties for a breach, and a failure to embrace the spirit and intention of the RSA.

Even so, it was found that of the 12 local governments audited, over half demonstrated poor to very poor levels of compliance with the LUAA. The report identified that at least seven land managers had issued zero notifications to DJAARA, where it is highly likely that notifiable activities had occurred. The report also found it likely that other land managers had conducted activities that should have been notified to DJAARA.

Soon after receiving this report, DJAARA sent a letter to the Attorney-General in December 2021 setting out how the recommendations from the audit could be implemented. DJAARA has not yet received a response to that letter. To DJAARA's knowledge, at the date of this submission only one of the recommendations from the LUAA Audit has been partially actioned by the State.

Breaches represent a fundamental failure of the RSA; Djaara rights are disregarded, and compensation remains unassessed and unpaid.

F *Secrecy and Bad Faith*

Despite 10 years of operation of the RSA, DJAARA continues to be subject to behaviour that inhibits the proper operation of the agreement. Repeated instances of failing to provide information requested through the LUAA process, blocking access to information, and being provided false information leaves DJAARA with no other explanation than that parties are actively engaging in secrecy and bad faith when dealing with DJAARA.

Some entities regularly withhold information that is necessary for DJAARA to undertake its assessments on the categorisation of activities under the LUAA. The effect of this is that DJAARA expends substantial unnecessary resources engaging in matters.

When seeking to address by way of a formal complaint specific behaviour by an employee of a Responsible Person and Decision Maker entity of a nature that misrepresented facts causing reputational damage to DJAARA, was inappropriate and disrespectful, and in general hindering rather than facilitating negotiations, DJAARA's complaint was disregarded without an appropriate response, and seemingly no due process and investigation. In this example, DJAARA provided a detailed letter of complaint to the entity with reference to specific examples and enclosing evidence of the behaviour substantiating the complaint. A redacted copy of DJAARA's letter of complaint is **attached** as Annexure 6 to this submission. The entity's short response dismissed the complaint as "unfair" and "unfounded" without any indication that adequate consideration had been given to the complaint, nor any explanation as to the entity's basis for their assertion that the complaint was as "unfair" and "unfounded". Redacted copies of the letter in response from the entity, and a relevant email thread confirming the entity's position on the complaint are **attached** as Annexure 7 and 8 to this submission. This response was very frustrating and disheartening for DJAARA, resulting in a feeling of powerlessness and lack of support in the face of behaviour that inhibits the recognition of Djaara's rights and the proper operation of the LUAA.



III PROPOSED SOLUTIONS

The Dja Dja Wurrekatjalangu Team does not yet have solutions to overcome all of the deep-rooted barriers to land justice raised in submission. However, DJAARA is pursuing a number of avenues to achieve land justice for Djaara and can set out those, and its further recommendations below.

To address the failure of the State, local government authorities, and others to comply with their responsibilities under the RSA, the Dja Dja Wurrekatjalangu Team recommends that:

- The State should develop a communication action plan and timeline for delivery in relation to ongoing legal obligations, implementation of outstanding recommendations from relevant inquiries, and compliance. This should include key performance indicators for the State to raise education and awareness and explain how a failure to comply impacts Djaara, Djaara rights and Djandak;
- DJAARA and the State should improve the drafting of the RSA, and jointly prepare materials to aid interpretation, and ensure the most beneficial interpretation to First Nations prevails;
- A strong media campaign with stakeholder engagement is required to share information to support the understanding and implementation of the RSA.
- DJAARA should be resourced to develop and deliver education and training on Djandak;
- Enforcement models should be considered, including models that provide for penalty compensation payments, recovery of costs incurred in pursuing breaches, and penalties for denying DJAARA, as a Registered Aboriginal Party, the opportunity to assess Cultural Heritage.

A licence system should be developed, and compensation made payable for the extraction and use of resources, including mineral and spring water, water from waterways, underground and other forms of water, all other minerals, any other form of ground disturbance and extraction for any and all purposes by any and all types of stakeholders. Licence fees inclusive of compensation should be payable upon application, sampling, accessing and at periodic intervals throughout the life of the licence.

DJAARA's veto powers and legal timeframes under the LUAA should be expanded to promote parties undertaking Land Use Activities from providing late notification to DJAARA. This will facilitate meaningful engagement at early planning stages, and permit free, prior and informed consent, in accordance with United Nations Declaration on the Rights of Indigenous Peoples.

In relation to "surplus" "Crown land", First Nations should have the option to recover full ownership of this land at no cost before they are offered to other State departments and then declared as surplus land, well before being offered to the public for sale.

IV CONCLUSION

We need the opportunity to have economic security and to have healthy and happy Djaara families so that the Country can have its people back: absences through illness, through dispossession, and through not having fuel or food money or homes on Country systematically keeps people off Country. Mob needs to be on Country to look after it and look after themselves.



For the Dja Dja Wurrung Community, reflecting on the RSA is a reminder that Country is not merely a geographic entity but an integral part of Djaara identity. Djaara are spiritually, physically, and emotionally linked to the land, and it, in turn, is woven into the fabric of who Djaara are. To sustain its strength and vitality, Djaara must engage in ongoing dialogue about Country, share its stories, cherish its connections, and protect it with unwavering dedication. This connection instils in Djaara not only a profound sense of belonging but also a profound belief that through nurturing this bond, Djaara have the power to heal Country and their People. Djaara's ancestral lands are not just a place, they are the canvas of Djaara stories, the point of connections, and the meaning for gatherings that bind Djaara together. As we navigate the complexities of the RSA, it is crucial that we carry this sacred knowledge forward, passing it down to future generations as a beacon of wisdom and resilience for the profound interdependence between Djaara and their cherished Country.

Let us underscore the immense importance of implementing the RSA with diligence and sincerity. By ensuring the proper performance of the RSA, we empower DJAARA and the State of Victoria to forge pathways that lead to meaningful outcomes for Dja Dja Wurrung, and the wider community. This agreement stands as a testament to our commitment to Country, a commitment that goes beyond words and resonates in actions that can shape a positive future. As we embark on this journey, let us be guided by the understanding that a well-executed RSA not only upholds justice but also paves the way for our collective vision. Together, let us build a legacy of respect, collaboration, and connections that reflect the true spirit of the RSA.

These fundamental principles are the very essence of the RSA. Without the RSA, they are at risk of getting lost. Throughout history, we have come close to losing our language & traditions, but we are not going to let that happen. We will work tirelessly to forge new pathways to have Djaara's rights recognised and respected.

18 March 2024



Appendix 1: Victorian Environmental Assessment Council's Central West Investigation: Failure of State Government to Enable the Active Participation of DJAARA in the Implementation Process

In March 2017, the Victorian Government requested that the Victorian Environmental Advisory Committee (VEAC) undertake the Central West Investigation. The purpose of the investigation, which included large areas of 'public land' on Djandak, was to:

- identify and evaluate the condition, natural and biodiversity values and cultural, social and economic values and the current uses of public land; and
- make recommendations for the balanced use and appropriate management arrangements to conserve and enhance the natural and cultural values.

In its final report, VEAC made general recommendations around creating new parks, implementation, resourcing, policy, and management.

DJAARA were not represented on the Committee formed to undertake the investigation, but DJAARA provided considerable input, and led a Traditional Owner engagement process to address a clear gap in the early inquiry process.

DJAARA identified cultural heritage values at each of the areas under investigation on Djandak. DJAARA noted, for example, that the areas of the proposed Wombat-Lerderderg National Park that are on Djandak are highly valued by Djaara.

In the course of the investigation, DJAARA highlighted the need for greater resourcing for Djaara to be involved in planning and implementation of future joint or sole management of all proposed parks on Djandak. This was picked up in the second recommendation of the inquiry, that the State "allocate adequate resourcing of Traditional Owner groups to engage in implementation activities and to collaborate with government in land management." This also reflects the obligations that the State has under the Natural Resource Agreement through the RSA.

State Government representatives met with DJAARA in early 2023 about the Government's implementation of the Central West Investigation recommendations. The State's presentation highlighted that the State Government has committed to partner with Traditional Owners in the management of parks and implementation of recommendations. However, at that stage, and at no stage since, has funding been secured to enable Traditional Owner participation and partnership. Funding has been secured for the Surveyor-General to create the parks.

At that meeting, State representatives asked how DJAARA would like to be involved and what support would be required to enable this. DJAARA staff confirmed that due to the high cultural values of proposed new parks, Djaara want to be intimately involved as partners in this process from the outset. DJAARA staff then briefed its Executive Management Team on the Central West Investigation implementation and its possible implications for Djaara.

In May 2023 DJAARA outlined the resourcing that the Executive Team suggested would be required to enable Djaara's active participation and provided detailed supporting information to State Government representatives.



The State's representatives undertook to brief their senior executives and get back to us by mid-2023. This did not occur. No opportunities were presented for DJAARA to provide input, let alone partner in the process.

Upon followed up in February 2024, DJAARA was advised that surveying and mapping of the proposed Wombat-Lerderderg National Park had already been occurring, legislation is being prepared, and funds for DJAARA's participation were still yet to be identified, but were being sought.

Staff highlighted in response that DJAARA is actively involved in a range of ways in multiple parts of the proposed National Park, and deeply invested in ongoing management arrangements for all public lands on Djandak. DJAARA noted that it would like to have the opportunity to review the legislation and be involved in the process to determine interim management arrangements.

At a follow up meeting in March 2024, it was suggested that only dry administrative aspects of the work had progressed without DJAARA involvement. The State acknowledged that the failure to provide resources to enable DJAARA to participate is not satisfactory, or in line with the State's commitments to self-determination. However, the resourcing issue remains unresolved and contingent on a further budget bid. This should have been part of the initial budget bid.

Clear issues emerged through the update that further underscore the need for DJAARA to be enabled to actively participate in the entire process, including what has been characterised as the dry administrative element. These include that

- in-principle, conversations had already occurred with Parks Victoria about interim management without DJAARA, despite our joint-management of 6 parks on Djandak;
- DJAARA's aspirations for handback and direct management of further parks under Aboriginal Title could be constrained by the current administrative/legislative process, but this does not appear to be under consideration; and
- The VEAC recommendation to consult with Traditional Owners about the naming of the proposed park VEAC's first recommendations is not being implemented at this time due to the stated complexity of working with three Traditional Owner groups about the name. However, no attempt to resource and hold conversations about a name has been made.

These are just some of the issues that should have been given thought from the outset and which could already have been factored in if DJAARA's right to actively participate had been honoured in the beginning.