Yoorrook Justice Commission

Submission

22 November 2024

I acknowledge the traditional owners of the country on whose land I live and work and their elders past and present. These are the lands of the Kulin Nation.

I make the following submission on my own behalf. These views are my own and do not represent the views of any employer, past or present.

1. I have worked as a lawyer in native title and related areas across Australia since the late 2000s, including Victoria. My work in Victoria has included native title, Traditional Owner Settlement Act settlements, and Aboriginal cultural heritage.
2. I am also possibly a descendant of Palawa (Aboriginal people of Tasmania), though the historical record is incomplete in relation to my family and any definitive evidence is now likely to be lost in time. Nevertheless, other distant relatives with the same ancestry have had their claims of Palawa descent upheld in the Administrative Appeal Tribunal, based on compelling oral history.[1] I do not myself identify as an Aboriginal person.
3. My submission primarily relates to the native title and settlement system in Victoria.
4. The *Traditional Owner Settlement Act 2010* (Vic) (**TOS Act**) introduced a framework for recognition of the traditional owners for a defined area in Victoria without having to meet the standards required for a positive determination of native title under the *Native Title Act* (**NT Act**). While this was in part the State's response to the negative native title determination of the Yorta Yorta People native title claim, the new framework was for all traditional owner groups of Victoria.
5. While a positive determination of native title recognises the ongoing rights of Aboriginal and Torres Strait Islanders over their traditional country, which confers certain rights under the NT Act, the framework under the TOS Act confers both recognition of traditional owner rights as well as a range of other outcomes. These other outcomes are not a constituent part of or required under a native title determination under the NT Act (though in other jurisdictions may be possible under an indigenous land use agreement or other statutory frameworks). TOS Act settlements therefore meet (in general terms) a broader range of aspirations of traditional owner groups to obtain rights to occupy, use and manage their traditional land and waters than a determination under the NT Act. However, as is clear based on the current record of settlements (i.e. only one finalised comprehensive settlement is currently in effect to date, with the Dja Dja Wurrung People), reaching a settlement is not straightforward.
6. The two primary obstacles in arriving at either or both a positive consent native title determination and a TOS Act settlement are negotiating boundaries with other

[1] *Patmore v Independent Indigenous Advisory Committee* [2002] AATA 962.

traditional owner groups and ascertaining the people who are entitled to be a member of the group ('group composition').

7. Defining boundaries and composition of a group entail similar processes, including:

   (a) research and preparation of reports by experts with relevant qualifications (usually anthropologists), including: interviews with contemporary members of the traditional owner group or people seeking inclusion of the group; review of primary ethnographic records (such as diaries, historical reports and records, and birth, death and marriage certificates); and review of secondary ethnographic materials (reports by other researchers);

   (b) consideration by the traditional owner group of research findings, informed by legal advice on the requirements of the applicable statutory regime;

   (c) discussions between claimants/interested parties and their representatives (including the State), sometimes facilitated by a mediator (such as a Federal Court Registrar if the matter is a native title claim);

   (d) if agreement cannot be reached, litigation in a court with jurisdiction over the dispute.

8. One of the key problems with this approach (to successfully defining boundaries and group composition) is that it can pit traditional owners against each other. It can therefore be destructive of longstanding pre-existing community and familial relationships and undermine the overarching objective of improved life outcomes for traditional owners. It can be caused by or exacerbate lateral violence – one of the continuing aftereffects of colonisation that permeates all facets of native title and First Nations communities. In my observation, lateral violence is one of the key barriers to Aboriginal groups in Victoria (and Australia) being able to work together and thrive. Appropriate programs to address this should established and properly funded, to support groups to heal and to relearn how to resolve disputes and make decisions respectfully.

9. The end result, where there is dispute, is often determined by who has the most resources or best legal advisors rather than the outcome that is most fair, just and reasonable for the traditional owners concerned, or what constitutes a fair compromise where there is no clear evidence that clearly supports one party or another. Where the underlying objective of the TOS Act settlement framework is to negotiate settlements that benefit traditional owners,[2] such disputes are not only destructive but counterproductive. They can also erode the confidence of the State, the traditional owner community, and the broader community in the TOS Act framework as a superior alternative to the NT Act.

10. The historical record can usually only ever, at best, be a partial source of assistance in determining the group for an area and the people entitled to be members of that group. The historical record contains gaps, inconsistencies and contradictions in relation to any given matter for which a party seeks to rely on it to support. Diaries or other documents that record firsthand observations or interviews with traditional owners from the 19th

[2] See the Preamble to the TOS Act.

and early 20th centuries must be understood in the context of the prevailing beliefs, cultural norms and social mores of the era when the record was created.

11. Where the historical record cannot provide a complete (or any) answer, it is then up to traditional owners to negotiate to try to find a solution amongst themselves. Where the weight of any decision reached bears heavily on traditional owners, who feel obligated to honour their ancestors as well as current and future generations, it can be difficult for those negotiating to reach agreement given the weight of the responsibility. The negotiations can also be heavily affected by lateral violence – both between and within groups. Such negotiations therefore have a reasonable potential to end in litigation, to the detriment of all involved.

12. In Victoria, the State government previously ran the Right People for Country project, which was aimed at assisting agreement-making between traditional owner groups in relation to boundary negotiations and group composition. A number of agreements were reached between various groups with the support of this program (including for the Dja Dja Wurrung settlement). The approach adopted by this program was laudable, as it facilitated decision-making by traditional owners through voluntary agreement-making on their own terms and avoided pressure or coercion in any form. It was in this way fundamentally about self-determination and free, prior and informed consent.

13. However, while agreements were achieved for various negotiations facilitated by the Right People for Country program, it was less successful where positions were more entrenched, and the historical record less complete and more inconsistent. In those circumstances, a more interventionist approach may have been warranted to avoid or mitigate the risk of dispute and litigation once the negotiation was more advanced. The Right People for Country program has now been discontinued.

14. One potential way for a more interventionist approach would be, once it is clear a negotiated agreement is not possible, for a formal inquiry into the application to be made by an independent person. A useful example of this approach in practice is the framework for Aboriginal land claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**). A similar approach was also previously taken for claims under the *Aboriginal Land Act 1991* (Qld).

15. The ALRA provides for an inquisitorial approach to identifying the 'traditional Aboriginal owners' for a particular area, which is conducted by a Commissioner who is a judge or former judge of the Federal Court or Supreme Court of the Northern Territory. In the ALRA system, all people claiming to be the traditional Aboriginal owners have the opportunity to participate in the inquiry, either in person or through their legal representatives.

16. The inquiry process and the Commissioner's functions are set out in Part V of the ALRA. The key functions of the Commissioner in relation to a land claim are (under section 50(1)(a)):

> *…on an application being made to the Commissioner by or on behalf of Aboriginals claiming to have a traditional land claim to an area of land…:*
>
> *(i) to ascertain whether those Aboriginals or any other Aboriginals are the traditional Aboriginal owners of the land; and*

(ii) to report his or her findings to the Minister and to the Administrator of the Northern Territory, and, where the Commissioner finds that there are Aboriginals who are the traditional Aboriginal owners of the land, to make recommendations to the Minister for the granting of the land or any part of the land…

17. The benefit of this inquisitorial approach is that it establishes a formal statutory framework in which all people who assert to be part of the group have an opportunity to be heard and to put their case, and for the traditional owners for the area identified based on all the evidence (oral and documentary). It also allows for the recognition of both people who make decisions for country ('traditional Aboriginal owners') as well as others who might hold (secondary) use rights over the area, thereby recognising a greater diversity of traditional rights that can be held over an area. Under the ALRA process, the Minister is the ultimate repository of power, not the Commissioner; whereas under the native title process, the Federal Court or High Court is the repository of power. Under the ALRA, challenge of a decision can be by way of judicial review of either the Commissioner's findings or the Minister's decision. The absence of this kind of formal identification process under the TOS Act framework (where an agreement between people or groups asserting rights in an area) increases the risk of a settlement between a traditional owner group and the State being challenged (including for not meeting NT Act requirements), and for such challenge to be successful.

18. To address these risks at a preliminary stage of settlement (or treaty) negotiations, it would be worthwhile investigating whether amendments to the TOS Act (and other relevant laws) to establish a formal framework similar to the process under the ALRA would help to ameliorate some of the issues outlined above. The amendments would entail establishment of an independent person or two (such as a commissioner or joint commissioners) with relevant expertise to conduct an inquiry, including by taking evidence from traditional owners as well as experts. Appointing two people as joint commissioners would enable different expertise to be brought to the inquiry, eg. a lawyer and an anthropologist.

19. This inquiry procedure could be used as part of the 'threshold process' and would only be used if required (depending what issues emerge in the threshold process). As with the ALRA, the inquiry could result in recommendations to the Minister, which the Minister may adopt or not. While there would remain a risk of judicial review of any decision made by the Minister that adopted the recommendations of the Commissioner (under either or both the TOS Act and NT Act, assuming an indigenous land use agreement was still required), the risk of that decision being held to have been made invalidly would be reduced where the decision is based on a process overseen by people with relevant expertise.

20. The trigger for the inquiry process would need to be further considered and would require amendment of the TOS Act. The same or a similar process could also be used for treaty to the extent it has not previously been resolved through native title or a TOS Act settlement.

21. For those traditional owner groups who have already lodged native title applications under the NT Act or who in future elect to seek a native title determination before a TOS Act settlement or treaty, existing provisions in the NT Act already enable an inquiry of

this nature. This is set out in Subdivision AA of Division 5 of Part 6 of the NT Act ("Native title application inquiries"). Such inquiries are conducted by the National Native Title Tribunal upon the issuing of a direction by the Federal Court to do so. However, one of the conditions of the Court issuing a direction is that the applicant to the native title claim (or claims) agrees to participate in the inquiry. If the applicant does not consent, they cannot be compelled to participate (the 2015 Australian Law Reform Commission report into the NT Act recommended this condition be repealed). As the NT Act currently stands, if there is no inquiry, any issues in dispute must be resolved through the usual Federal Court mediation or litigation processes.

22. The potential drawback of an inquiry of this kind, either by a commissioner or a tribunal member, is that it is contrary to the principle of self-determination. However, if relevant individuals/groups are given a reasonable opportunity (supported with adequate resourcing) to reach a negotiated agreement before an inquiry is used as a last resort, an inquiry mechanism would provide a useful means of breaking deadlocks where agreement is not possible. In addition, an inquisitorial process could be designed to minimise the distress suffered by traditional owners in processes such as these. Electing to have a disputed issue determined by an independent commissioner or commissioners could also be considered a form of self-determination.

23. Any boundary or group composition issues that have been agreed by relevant individuals/groups could be taken as conclusively resolved and would not be able to be interfered with as part of any inquiry. Traditional owners could also be entitled to reach agreement between themselves on the issues in dispute at any point of the inquiry to give primacy to self-determination, in which case, the inquiry would be terminated.

24. Although not perfect, the partnership approach to native title settlements in Victoria is, in my view, by far the most progressive and laudable in the nation. On the one hand, native title determinations are a formal legal recognition of the existence of native title, in which the State/Territory takes no ongoing role or formal partnership with the native title holders other than through future acts and Aboriginal cultural heritage compliance (and any other ad hoc programs).

25. On the other hand, TOS Act settlements are intended to meet a much wider range of aspirations of traditional owners in relation to their traditional land and waters and provide substantial continuing funding to enable those aspirations to be achieved. In addition, the State enters a settlement as a partner with the traditional owner group, in which the settlement is a living and evolving framework. In this way, a settlement can be reviewed, amended and improved continually to meet changing circumstances, standards and needs over time. The fact that settlements are made with partnership as an underlying principle means that, even if such partnership may be imperfect, it is something that can be continually worked towards.

26. There is generally very low awareness both in the general community and government of native title and TOS Act settlements. The native title and TOS Act systems are generally poorly misunderstood by the broader community, and what native title recognition and settlements might mean for other members of the community. Such misunderstandings have increased prejudice against and abuse of Aboriginal people. Sadly also politicians (including members of parliament) seek to use native title settlements for their own political ambitions. Petitions have been lodged in the State Parliament seeking to

overturn one TOS Act settlement in particular, which is based on a fundamental misunderstanding and mischaracterisation of the rights and benefits conferred on the traditional owner group by the settlement.[3] While it seems likely there will always be members of the community who resist or object to government policy based on the wrong information or misunderstandings, the respect for and confidence in the native title system in Victoria (and Australia) could be significantly strengthened against this through greater awareness and education within the community and government more generally. People who seek to publicly mischaracterise native title and TOS Act settlements should also be called to account and the record corrected.

27. Relatedly, although there have been improvements, there is still insufficient content on Aboriginal and Torres Strait Islander peoples, culture, history and society in our education system, at all levels. This includes education about native title. Improvements here would make it far more difficult for misinformation to be disseminated as if it were fact. It is particularly important for all Australian citizens to learn of the terrible violence and oppression that has been and still is inflicted on Aboriginal and Torres Strait Islander peoples since colonisation. Where First Nations peoples thrived in Australia for millennia, it seems curious that the broader community would not want to seek out and learn from First Nations peoples what they know about living and surviving here.

28. The horrifying accounts of elders, including those who gave evidence to Yoorrook, who lived through and heard firsthand accounts from friends and relatives about massacres and other criminal acts against Aboriginal and Torres Strait Islander peoples need to be told, commemorated and remembered. Such events need to be commemorated with at least the same sanctity and seriousness as other significant historical events to this state and nation. We need to remember. Not to feel guilty, but to be honest with ourselves, to reconcile with the true history of our country's founding, and to do justice to the country's First Nations peoples.

29. Finally, all of these matters are so important so that we can start to make amends to the First Nations peoples of this State (and country) for what was and is done to them, even though any amends we do make will never be enough for what was taken away. I believe this is crucial for the soul of our community so we can properly begin to heal and thrive together.

[3] https://www.parliament.vic.gov.au/parliamentary-activity/tabled-petitions-search/tabled-petitions-details/8472