Towards a Framework Agreement between The State of Victoria and the Victorian Traditional Owner Land Justice Group

Discussion Paper, 26 August, 2006

1. Preamble

The Aboriginal nations of Victoria have maintained their traditional countries as sovereign jurisdictions since time immemorial, and this sovereignty has never been surrendered.

The State of Victoria has implemented no statewide strategy for resolving issues of Indigenous land justice. The *Aboriginal Land Claims Bill* (1983), and the Social Development Committee *Report upon Inquiry into Compensation for Dispossession and Dispersal of the Aboriginal People* (1984) both ran into the sand. Short term political factors have been allowed to over-shadow the substantial and unresolved issues at stake.

While some of the State's policies relate to social disadvantage and the delivery of services to Indigenous communities, the core issues relating to land justice have not been addressed.

Progress under the *Native Title Act* has been slow and costly. There are currently 18 native title claims in Victoria, and more claims are likely to be filed. Previous attempts to establish a statewide framework to resolve native title matters in the State have proven fruitless.[1]

This proposed Framework Agreement with the Traditional Owner Land Justice Group will expedite the resolution of existing native title claims, while at the same time, addressing underlying aspirations for Indigenous land justice.

The success of the Land Justice Group's current negotiations with Ministers is critical. The Framework Agreement would even allow some matters to be resolved without the need for a formal native title claim being lodged – representing huge savings in the costs of claim resolution.

If land justice issues are adequately addressed through these negotiations, Indigenous cultures will be strengthened in ways which yield consequential benefits in the areas of health, education, employment and economic indicators. While these areas of policy are not covered by the Framework Agreement, a long-term economic analysis would recognize the associated benefits which will flow from the resolution of long-standing land grievances.[2]

The Land Justice Group seeks confirmation that the State Government is seriously considering the issues outlined in this Discussion Paper.

2. The Purpose and Limits of the Framework Agreement

The proposed Framework Agreement will establish a common set of expectations about the content and process of agreements with traditional owners, focussing on:

[1] Attorney General Rob Hulls signed a Protocol for negotiating a 'native title framework' in November 2000.

[2] See, for example, Recommendation 334 of the *Royal Commission into Aboriginal Deaths in Custody* on lands needs and cultural survival. So also 'Culture as a Determinant of Aboriginal Health' at www.aiatsis.gov.au/rsrch_pp/culture_as_determinant.htm.

- traditional lands and waters
- Aboriginal cultural heritage
- natural resources
- financial sustainability.

Each of the First Nations of Victoria retains the right to negotiate its own settlement with the State, in accordance with its own decision making process.

The outcome of negotiations with each traditional owner group shall be legally bound through the procedures required by the *Native Title Act*, whether in respect of a consent determination, ancillary agreements or ILUAs.

3. Restoration of Land

Lands of high cultural significance shall be returned to each traditional owner group.

The group themselves will identify which lands and waters should be returned. Each group's aspirations in regard to land, or any other matter, will be outlined in documents formally authorized through their own decision making processes.

State Government agencies should ensure that assistance is available for applications to the Indigenous Land Corporation for the purchase of any freehold land identified through negotiated settlements.

4. National Parks and Conservation Areas

Where traditional owners' aspirations include the return of a National Park, or a conservation reserve, the land shall be leased back to the Government on conditions negotiated in co-operative management plans. Such plans shall at least provide for:

- the protection and promotion of Aboriginal cultural heritage
- traditional owner representation on Boards of management
- maintenance of biological diversity
- negotiation of benefit sharing arrangements.

There are numerous successful examples of handback / leaseback arrangements in other States, including the most iconic national parks in the Northern Territory.

In recent months, two National Parks on the south coast of NSW - Biamanga and Gulaga - were handed back to the traditional owners and are to be jointly managed with the State. Similarly, the Namadgi National Park in the ACT is now cooperatively managed with the Ngunnawal people through an agreement that resolved their native title claim.[3]

[3] www.environment.act.gov.au/bushparksandreserves/strategiesandplans/namadginationalparkmanagementplan

Some of the goals of Namadgi's cooperative management agreement are already established in Parks Victoria's *Indigenous Partnership Strategy and Action Plan* (2005). There are a number of common strategies, for example, to recognize traditional owners' rights to care for country, to establish cultural protocols, to raise community awareness and respect for local Aboriginal cultures, to provide cross-cultural awareness training for park employees, to encourage the employment of traditional owners within the Parks system, and to implement programs that will strengthen traditional Indigenous cultures.

Traditional owners' aspirations will not, however, be satisfied until cultural protocols are seen to include not just culturally respectful signage and educational information in national parks but also an equitable participation in management.

Management plans shall allow for traditional owners rights to hunt, fish and gather in national parks or conservation areas, with due regard for public safety and the protection of threatened species.[4]

Traditional owners will also have the right to maintain cultural sites in National Parks.[5]

5. Control of Aboriginal Cultural Heritage

The Traditional Owner Land Justice Group acknowledges that the Victorian *Aboriginal Heritage Act* (2006) provides for the involvement of traditional owner corporations in the management of cultural heritage. Especially appreciated is the requirement that all members of the statewide Aboriginal Heritage Council be traditional owners from Victoria.

The Minister should exercise his discretionary powers in order to implement, in the long run, a system of nominations to the Council based on the decision-making processes of each traditional owner group. The Regulations associated with the Act could ensure that each group is represented on the AHC on a rotating basis.

Regulations should also ensure that Inspectors consult with traditional owner organizations before making decisions that affect their interests.

$12.6 million has been allocated in the State's budget for the implementation of the *Aboriginal Heritage Act*. There should therefore be adequate resources to:

- resolve by negotiation the boundaries of traditional country in the State
- establish traditional owner corporations in an economically sustainable manner
- ensure that RAPs and cultural officers are adequately indemnified and resourced for VCAT appeals
- ensure that VCAT adopts a level of cultural sensitivity comparable to the Koori courts.

[4] See the Australian Conservation Foundation's policy *Indigenous Peoples' Land and Water* www.acfonline.org.au/new.asp?news_id=465.

[5] Parks Victoria, *Indigenous Partnership Strategy and Action Plan*, p.47.

The AHA (s. 4) should be emended to ensure the protection of Aboriginal 'folklore' as defined under the Commonwealth *ATSI Heritage Protection Act* 1984 (s. 21A) to include 'songs, rituals, ceremonies, dances, art, customs and spiritual beliefs'.

6. Claim Resolution without extinguishing Native Title

6.1 The scale of dispossession in Victoria means that some groups may not be able to establish the level of connection to country which would ensure a positive determination of native title. For the State to require the surrender of native title rights and interests in any agreement with traditional owners would be like rubbing salt into the wounds of dispossession. It would be an unacceptable imposition on future generations.[6]

Where traditional owner groups are capable of pursuing a **consent determination** of native title, the boundaries of that determination should be stepped back to the area where a positive determination can actually be secured by negotiation. The remainder of the traditional country should be made subject to an ILUA. This policy would represent considerable savings in resources required to establish the full tenure history of a claim area.

Where a determination of native title is not being sought, **'alternative settlement'** ILUAs will contain an agreement to withdraw any native title claim for a period (such as 20 years) in exchange for negotiated benefits. The State's exposure to further claims under the NTA will in this respect be limited.

6.2 Where a native title claim has been withdrawn under an ILUA, the 'future act' procedures should be equivalent to the procedures accorded to claimant groups under the *Native Title Act*. Similarly, rights to compensation should not be less than those provided under the NTA.

6.3 The **connection requirements for an ILUA** are not determined by the *Native Title Act*. Any system of ILUA connection guidelines will therefore exceed what the law demands. The NTA has only procedural requirements for the registration of an ILUA, notably a three month period during which objections may be lodged.

The justification for re-negotiating ILUA connection guidelines is that all parties need to be assured that the claimant group is indeed the appropriate group to assert cultural rights and interests in the claim area.

An appropriate level of connection for ILUAs will be met by a traditional owner group establishing:

(a) a genealogical connection to the claimed area;
(b) a decision making process which enables them to manage the outcomes of the settlement process; and
(c) a contemporary use and cultural association with the claimed area.

Bearing in mind that all cultural traditions necessarily adapt to changing circumstances over time, such connection requirements would enable the appropriate people to assert their cultural rights and interests. Traditional owners

[6] See Article 25 of the *United Nations Declaration on the Rights of Indigenous Peoples,* adopted by the Human Rights Council on 29 June, 2006.

would be able to claim their rightful inheritance, without being subjected to the burdens of proof demanded for a determination of native title.

The registration of an ILUA will necessarily comply with the requirements under the NTA, and that process will itself address any residual conflict among traditional owners. ILUAs may be negotiated even in circumstances where a native title claim has not been lodged.

If the return of land and other benefits can be delivered within this alternative framework, then the aspirations of traditional owners may be satisfied without the need for land rights legislation.

7. Natural Resource Management and Customary Allocations

Under Aboriginal tradition, traditional owners have exclusive rights and responsibilities in regard to natural resources in their own country. Nevertheless, current participation in NRM may be limited by a range of social and economic constraints.[7]

Benefit sharing arrangements shall be negotiated in regard to mining, forestry, and with industries making use of native species for commercial purposes.[8]

In cases where the traditional owners themselves wish to carry the responsibility of joint management of lands and waters, Government agencies will provide resources for any capacity building that may be required to implement the agreed arrangements.

Provision shall be made for employment in Catchment Management Authorities and in land management.

Traditional owners' interests in native fauna and flora shall be legally recognized, and where necessary, by legislative amendments creating guaranteed allocations of natural resources.

7.1 Fisheries

A statewide agreement on Indigenous involvement in fishing and marine resource management will have reference to the principles formulated by the National Indigenous Fishing Technical Working Group. These principles include two key recommendations.

- In the allocation of marine and freshwater resources, the customary sector should be recognised in its own right, alongside recreational and commercial sectors, within the context of future sustainable management strategies.[9]

[7] *Case Studies in Indigenous Engagement in NRM in Australia*, Dept. of Environment and Heritage, May 2004, p.31.

[8] *Environment Protection and Biodiversity Conservation Act*, Amendment Regulations 2005, Division 8A.2.

[9] A legislative foothold for 'traditional' fishing was established in the Victorian *Fisheries Act 1995*, s. 3 (d) and s. 29, but this seems to have had little impact on the management of customary allocations.

- Government agencies shall work with other stakeholders to increase traditional owners' participation in fisheries-related businesses and management, along with related training and vocational development.

7.2 Water

Tradeable allocations of water consistently form a part of Indigenous aspirations for land justice. Consideration must be given to the social impact of water management regimes on traditional owners who have been dispossessed, and as a consequence of not holding title to land, are unable to obtain water allocations.

Transitional strategies may need to be explored, such as the establishment of "water trusts" to enable the purchase of water allocations.

The recent commodification of water interests in Victoria triggers the operation of the *Native Title Act* (s. 24HA) and, depending on the details of new management regimes, s. 24MA may also be relevant. The law requires that native title claimant groups be notified of water licences and permits issued within their claim area and be provided with an opportunity to comment.

Failure to comply with the statutory requirement of s. 24HA of the NTA does not invalidate water licences or permits, but native title is not extinguished by the granting of licences or permits. Should a native title right to water be recognized, just terms compensation would be payable. Other sanctions, such as those provided under the *Racial Discrimination Act*, may also become relevant.

Water policies should be formulated in a precautionary manner, with due regard for the legitimate interests of traditional owners. Proactive measures will ensure that compensation issues do not arise in the future.

The management of water flows may also bear on sites of cultural significance, and consultation protocols with traditional owners are therefore necessary – such as those developed between the Murray Darling Basin Commission and the Indigenous nations of the Murray.

The objects of the NSW *Water Management Act 2000* (s. 3) include 'benefits to the Aboriginal people in relation to their spiritual, social, customary and economic use of land and water'. Similar legislative recognition is needed in Victoria.

8. Access to a Share of State Revenues

The provisions for compensation under the *Native Title Act* do not relate to the historic dispossession of Australia's First Nations prior to 1975. But no serious attempt to address aspirations for land justice can avoid the question of compensation for traditional owners who have been deprived of their rightful inheritance of lands and resources.

The Social Development Committee's *Report upon Inquiry into Compensation for Dispossession and Dispersal of the Aboriginal People* (1984) considered the mechanism provided in the *NSW Aboriginal Land Rights Act* (1983). That legislation set aside 7.5% of land tax revenue for a period of 15 years. The Victorian inquiry decided

that the time period allowed in the NSW legislation was too short, and that 'it would directly benefit only one generation' (p.36).

The committee decided, with a measure of understatement, that it would take 'more than one generation' to overcome the effects of dispossession. Nevertheless, the NSW ALRA has provided a fund of some $500 million, which may accordingly be seen as a relevant budgetary comparison for addressing issues of land justice in Victoria.

Despite the changing circumstances over the past two decades, the Victorian *Inquiry into Compensation* from 1984 still has some validity. There would be considerable value - both practically and symbolically - in setting aside 7.5% of land taxes until such time as all traditional owner corporations in Victoria are firmly established in an economically sustainable manner.

9. Cultural Recognition and Strengthening

ILUAs or ancillary agreements will contain undertakings by the State to facilitate and to provide resources for cultural recognition, e.g.,

- signage on roads indicating traditional country
- cultural centres or keeping places
- protocols at public events
- curriculum modules in schools
- public monuments to Indigenous people
- language preservation and restoration projects.

Detailed negotiations about such matters will arise from aspiration statements, formally authorized by each of the traditional owner groups.

Traditional owners need to be prominently and appropriately represented in any 'new representative arrangements' introduced by the State Government. Democratic structures should not undermine the status of traditional owners and elders under Aboriginal tradition.

The State should provide resources for the establishment of a peak body of traditional owners to take over the business of the Land Justice Group on an ongoing basis.

10. Strategies for Economic Development

To the extent that economic aspirations relate to the sphere of traditional owner rights and interests (land, cultural heritage and natural resources), State agencies shall provide resources or networking that enable the sustainable economic development of traditional owner business enterprises.

Regardless of funding sources, State government agencies will play a role in co-ordinating funding possibilities and initiatives, and in the development of strategic plans for traditional owner corporations.

Periodic reviews will consider what progress has been made and what further actions, capacity or resources may be required to achieve sustainable development.

11. Treaties and Agreement Making

The need for a treaty is often expressed by both Indigenous and non-Indigenous Australians. In contrast to New Zealand, Canada and the USA, Australia stands in the uniquely invidious position of having no treaty with the traditional owners of its land base.

A treaty process would make symbolic and practical contributions to unresolved issues at the foundations of Australia's colonial history. A treaty is not the only instrument that could be used to establish the rights of Indigenous people, but it is the most appropriate way of reconciling the competing sovereignties that trouble our national identity.

The *Native Title Act* can be used as a vehicle for treaty-style negotiations, since this legislative instrument provides an opportunity to bind the sovereign powers of the State and the Federal Court in the process of recognizing Indigenous jurisdictions. Section 86F of the NTA allows for *negotiated* agreements which address the First Nations on their own terms, beyond the narrow definitions of native title enshrined in s. 223 of the Act.[10]

The treaty issue raises a number of difficulties, however, in regard to the parties who would sign such an agreement. If there were to be some form of negotiated compact or treaty between the Victorian Government and the traditional owners of this State, each of the First Nations would need to be signatories. No ATSIC-style representative body could assert a generic sovereignty in a manner consistent with Aboriginal tradition.

Since each of the First Nations will need to sign its own agreement in recognition of its own particular sovereignty, the proposed statewide Framework Agreement would not itself be a treaty. It may, however, include the key *principles* of a treaty[11], namely:

- recognition and acknowledgment
- cultural heritage rights of traditional owners
- the return or joint management of culturally significant lands
- jurisdictional issues
- customary allocations of natural resources
- economic strategies.

[10] S. Brennan, L. Behrendt, L. Strelein, G. Williams, *Treaty* (Federation Press 2005), p.137.

[11] See further Pat Dodson, 'Lingiari – Until the Chains are Broken', 4th Vincent Lingiari Memorial Lecture. Available at www.austlii.edu.au/au/other/IndigLRes/car/1999/2708.html.