

Traditional Owner Settlement Bill 2010 (Vic)

An information paper for Victorian Traditional Owners

Background

The *Traditional Owner Settlement Bill 2010 (Vic)* (**TOSB**) was introduced to the Legislative Assembly on 27 July 2010 by the Premier, the Hon John Brumby MP. The Premier gave the second reading speech on 28 July 2010, debate followed on 11 August and the bill passed the Assembly on 12 August.¹ The TOSB moved to the Legislative Council on 12 August. In order to pass, it must be debated and passed in the Parliamentary sitting time remaining before the 27 November State election. Those sitting times are:

- (a) 3, 14-16 September;
- (b) 5-7 October.

The TOSB is designed to provide statutory authority for 'Framework agreements' of the kind outlined in the December 2008 'Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework' (**Framework report**). The Victorian Government has committed to the full implementation of the Framework report, subject only to adequate Commonwealth funding.²

There are many aspects of the Framework report that are not reflected in the TOSB where legislation is not required for them, or where further legislation is expected in the future. For example:

- (a) the Right People for Country Project, by which the negotiated resolution of traditional owner boundary and group membership issues will be supported and facilitated;
- (b) the natural resource management collaborative body, by which traditional owner groups with individual Framework agreements will share information and develop policy with State land management agencies;
- (c) the threshold requirements for qualifying for negotiations with the State, which will reduce the excessive technicality of the native title connection process.

Components of the TOSB (the Bill)

Essentially, the TOSB contains provisions which will authorise individual Framework agreements (between the State and an individual traditional owner group) consistently with the Framework report. These provisions are made up of:

- primary provisions – which will form a new Act of Parliament under which Framework agreements will be made; and
- consequential amendments to other legislation (primarily Crown land legislation)

Authorising a recognition and settlement agreement

The TOSB will authorise the responsible Minister (the Attorney-General) to enter into a 'recognition and settlement agreement' (**RSA**) with a traditional owner corporation. The traditional owner corporation is a corporation appointed by a traditional owner group. The RSA corresponds to an individual Framework agreement.

A RSA will contain a number of provisions itself but will also be composed of a number of sub-agreements including:

¹ The second reading speech and the debate can be read in Hansard which is available at this site: www.parliament.vic.gov.au/hansard/daily-hansard.

² The Hon Rob Hulls MP, Attorney-General, speech at 2009 AIATSIS Native Title conference, 3 June 2009.

- a land transfer agreement;
- a land use activity agreement;
- a natural resource agreement;
- a funding agreement; and
- an Indigenous land use agreement.

Land transfer agreements

The TOSB will authorise a RSA to provide for the grant of vacant Crown land to a traditional owner corporation as freehold, with or without conditions. This category does not include land subject to a reservation or dedication. If, for example, land that a traditional owner group wished to be granted is subject to a reservation under the *Crown Land (Reserves) Act 1978* (Vic), that reservation would need to be revoked before it could be granted. In the case of a permanent reservation, this would require Parliamentary action and so any agreement to grant the land would be conditional.

An example of land that could be transferred under this provision is vacant Crown land that is identified and agreed by the State and a traditional owner group.

The TOSB will also authorise the grant of freehold land, in the form of ‘Aboriginal title’, for land that is jointly managed (where there is a traditional owner land management agreement (**TOLMA**) in place).³ Aboriginal title is a new form of freehold tenure for Victoria. It will be granted only for areas that are jointly managed and will be subject to restrictions that ensure it will be used for joint management, and not dealt with by a traditional owner corporation in a way inconsistent with joint management. Significantly, it will be a source of the State’s (or an agency’s eg. Parks Victoria) right to use and manage land that is jointly managed.

Examples of the land that could be transferred under this provision would be national parks and State forests that are identified and agreed by the State and a traditional owner group.

Very few categories of public land will be excluded from the potential for grant of Aboriginal title. For example, alpine resort land under the *Alpine Resorts Act 1983* (Vic) will be excluded.

Traditional owner land management agreement

Indigenous management agreements of the kind recommended by the Framework report will be authorised by the TOSB as a TOLMA. The primary function of a TOLMA will be to identify the land that is to be jointly managed and provide for the establishment of a board of management for those lands (a **TOLMB** – traditional owner land management board).

The form of joint management under a TOLMA that is part of a RSA will be a distinct form of agreement under the existing provisions of the *Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009* (Vic) (**River Red Gums Act**).⁴ The security for traditional owners with a RSA-based TOLMA will be significantly greater than that for joint management without a RSA under the River Red Gums Act.

In effect, this creates two kinds of joint management – RSA-based and River Red Gums Act based. The former offers more certainty for traditional owners but is only available as part of a final settlement of land justice issues through a RSA.

³ The capacity to make a TOLMA, together with joint management in the form of a traditional owner land management board, was established by the *Parks and Crown Land Legislation Amendment (River Red Gums) Act 2009* (Vic).

⁴ The River Red Gums Act inserted the joint management provisions that are part 8A of the *Conservation, Forests and Lands Act 1987* (Vic).

The TOSB provides for the conversion of a River Red Gums Act joint management TOLMA to a RSA-based TOLMA. That is, groups will be able to upgrade any current rights in this regard once the Bill is passed.

A TOLMA will also be able to provide for ancillary commitments about jointly managed areas, as is anticipated by the Framework report (eg. the employment of rangers, contracting opportunities etc). In this way the Bill creates economic development opportunities for traditional owner groups.

Land use activity regime (alternative future acts regime)

The land use activity agreement (LUAA) provisions of the TOSB are its most complex. They authorise the making of a LUAA for public land that is subject to a RSA. The provisions create the machinery for the classification of activities in the way envisaged by the Framework report – **routine, advisory, negotiation** (category A or B) and **agreement**. In this way, the current 13 (thirteen) categories in the future act provisions of the Native Title Act (NTA) are reduced to just 4 (four).

The Bill divides the general category of 'land use activities' into 'limited land use activities' and 'significant land use activities'. Only a significant land use activity can be classified as negotiation category A or agreement. The further classification of land use activities is determined in the actual LUAA negotiated by the group.

The bill distinguishes between:

- **advisory activities** – where decision makers (eg Parks Victoria for a national park) need to take into account traditional owner corporation submissions and deal with them appropriately; and
- **negotiation and agreement activities** – where a decision maker must be satisfied that the required steps (negotiation leading to agreement or VCAT/Ministerial determination, or agreement) have been done.

Consistently with the Framework report, no requirements are imposed for routine activities.

The TOSB echoes the NTA 'right to negotiate' procedure with some important differences. The most significant is that Aboriginal cultural heritage under the *Aboriginal Heritage Act 2006* (Vic) is excluded from the negotiation process (whether for determining if good faith has been observed, or as a factor for VCAT to consider in a determination) although the proponent of a negotiation activity and a traditional owner corporation may still deal with cultural heritage matters by reaching their own agreement.

The Ministerial override provisions of the NTA (where a Minister may make a decision before, or despite, a decision of the independent umpire) have effectively been copied in the TOSB.

'**Community benefits**' – the Framework report's mechanism for compensation payment – are payable only by a proponent under a LUAA (rather than by a proponent and/or the State, as required by the NTA). Only **negotiation** and **agreement** activities attract community benefits, as was recommended by the Framework report. For negotiation activities, VCAT determines the quantum of community benefits if there is no agreement reached in negotiations.

Natural resource agreement

The natural resource agreements (NRA) provided by the TOSB were envisaged by the Framework report. The program and funding commitments anticipated for a NRA do not require any statutory basis, and so no provision about them is contained in the TOSB.

Natural resource agreements will provide for the exercise of non-commercial, non-exclusive statutory rights for members of a traditional owner group with a RSA (including an agreed protocol for verification of traditional owner group membership).

The Bill will permit the Governor in Council to make a number of natural resource 'authorisations' (whether for taking flora and fauna, water, camping etc). The authorisations will give effect to the natural resources agreements. The Bill will not create a right to use natural resources independently of an authorisation. This two stage process is more complex than that recommended by the Framework report, which stated that every traditional owner group with a individual Framework agreement should have access to non-commercial, communal rights to use Crown and resources similarly to native title holders with a non-exclusive determination of native title.

Further policy development on this issue will occur in 2011, and we are confident that the State will simplify the provisions.

There are no provisions in the TOSB for fisheries authorisation. Instead, the Victorian Government has stated that it will establish an exemption for non-commercial, communal fishing by traditional owners in a regulation made under the *Fisheries Act 1995* (Vic).

Some aspects of the requirement to pay fees will be continued for camping where there is a private facility under a licence or lease (eg. a caravan park). In all other instances traditional owners with authorisations will not be obliged to obtain a permit or pay a fee to undertake the activity that is authorised.

Funding agreement

The Bill provides that the responsible Minister will be authorised to enter a funding agreement as part of a RSA. Statutory provisions are not required for establishing the trust fund for lump sum settlement amounts – and this matter is currently the subject of separate policy discussions.

Indigenous land use agreement

An ILUA will be a component of, or accompany, each RSA. This will be the vehicle for addressing the native title certainty requirements of the State and will also give security to traditional owners.

Overall assessment

The Bill adequately reflects the relevant parts of the Framework report, although it was never expected that the Bill would include every aspect of the State's new policy Framework, and there are several matters that will be enshrined in non-legislated policy settings, and the further collaborative work the government has committed to undertake.

Ultimately the Bill envisages that the final form of any agreement (RSA) between a traditional owner group and the State will be the product of negotiations. The Bill sets out the key elements that can be agreed through such negotiations and is also in itself an historic recognition of the first owners of Victoria.

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