'Native Title and Land Justice'
The Victorian Traditional Owners Land Justice Group

Bob Nicholls, Graham Atkinson and Mark Brett

Native Title conference, Darwin 26 May 2006
http://ntru.aiatsis.gov.au/conf2006/papers.html

We begin by acknowledging the traditional owners of this country, the Larrakia people and their elders past and present.

1. What is the Land Justice Group?

The Victorian Traditional Owner Land Justice Group is an unincorporated body mandated by traditional owner groups, each having nominated a representative onto the reference group. The full reference group has around 20 members, and there is a smaller team mandated to negotiate with Government on behalf of the full Group.

The Victorian Traditional Owner Land Justice Group has been formed with NTSV's assistance for a number of reasons:

- first, because historic land grievances of Traditional Owners across the State suggested the need for a representative group of traditional owners that could advocate directly with Government on native title and related matters;

- secondly, because NTSV is a service delivery organization focused on native title, it is limited in its capacity to advocate with Government on the broad range of Traditional Owner land-related aspirations;

- thirdly, because NTSV provides formal assistance to only some traditional owner groups at any given time – due to resource limitations and to the fact that some groups have not lodged claims;

- fourthly, because the Native Title Unit in the Victorian Department of Justice indicated that it wanted a review of current policies in regard to the resolution of native title matters in the state, and the State recognized that the Land Justice Group could participate in making of a new policy framework.

Both the State and NTSV are resourcing the process because they believe that these negotiations will resolve native title matters more expeditiously. But all the parties are concerned that negotiated native title settlements also seek to address underlying aspirations for land justice.

2. What are the objectives of the Land Justice Group?

Not only does Victoria have no land rights legislation,[1] but native title claims in our state have progressed very slowly and painfully, as we have already heard. In December 2005, when Justice Merkel ruled that at least in the Wimmera, traditional law and custom had *not* been 'washed away by the tide of history', the outcome was for many traditional owners a bittersweet victory. In particular, the State had required the surrender of native title rights and interests over most of the claim area, in return for a co-management agreement.

The Gunditjmara settlement is likely to set a new high water mark in Victoria, in several respects, but other groups may find it difficult to prove the level of connection required for a consent determination.

It does not follow, however, that the resolution of other native title claims in Victoria will lack substance. With the political will being demonstrated by the State Government, alternative settlements could yield very significant outcomes. And in contrast to remote Australia, the building of social capital within Victorian native title groups is not hampered by the tyranny of distance.

The current negotiations between State and the Land Justice Group will clarify the extent to which traditional owners can achieve land justice through native title processes. That is, if the land grievances of indigenous people in this State can be substantially addressed through negotiated agreements (such as Wotjobaluk and Gunditjmara) that resolve native title whilst at the same time providing other benefits through ancillary agreements, then the need for other land justice measures may be relatively minimal.

The negotiations cannot yield a one-off comprehensive land justice settlement across the State, partly because the resolution of native title claims - a communal form of title - will require each group to negotiate their own settlement, and no group's representative can speak for anyone else's country.

The most that can be negotiated in the first instance is a policy framework which enables each group to secure their own recognition and agreement. If this process proves to be successful, it would clarify the 'right people for right country'.

The accumulation of these agreements might, however, lead to a treaty-process with the Victorian Government, which would, in any case, need to be signed off by representatives of each of the first nations. The Traditional Owner groups in Victoria regard themselves as having – notwithstanding the ravages of dispossession – a degree of sovereignty that transcends any notion of pan-Aboriginality. Indeed, it has been recognized in a recent legal

[1] Nothing came of the 1983 *Aboriginal Land Claims Bill*, nor from the *Report upon Inquiry into Compensation for Dispossession and Dispersal of the Aboriginal People*. Victoria, Government Printer, 1984.

publication that s. 86F agreements under the *Native Title Act* could be used as a vehicle for treaty-style negotiations.[2]

In summary, the Land Justice Group's engagement with the Victorian Government is seeking to develop a framework that allows for:

- the expeditious resolution of the native title claims of every viable first nation in Victoria – including substantial 'alternative settlements';

- the addressing of the outstanding grievances or aspirations of groups whose native title has already been resolved;

- the possible negotiation of a statewide compact or treaty, acknowledging the first nations and incorporating a commitment to agreed principles of land justice.

The success of the Land Justice Group's negotiating process is critical. It will have considerable bearing on the progress of established claims and it may even allow native title to be resolved without the need for a formal native title claim to be lodged – thus representing a huge potential saving in claim resolution costs.

3. The Beginnings of the Land Justice Group

Before the tide was turning in the Wimmera, back in February 2005, a meeting was held in Melbourne that brought together representatives of virtually all the first nations in the State. That meeting agreed on a *'Statement' of land justice principles,* and the document was provided to the Victorian Attorney-General, Rob Hulls and to Gavin Jennings, the Minister for Aboriginal Affairs.

The meeting also decided that a reference group should be formed in order to negotiate with Government on behalf of Traditional Owners, and at a subsequent meeting in August, it was decided that the reference group would be called the Victorian Traditional Owner Land Justice Group.

The three co-chairs of the Land Justice Group then 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 2005, the reference group met to discuss the Exposure Draft of the *Aboriginal Heritage Bill.* This proposed State legislation was designed to replace Part IIA of the Commonwealth Act, which has governed Aboriginal

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

cultural heritage in Victoria since 1984. A number of resolutions regarding the *Aboriginal Heritage Bill* were agreed unanimously, and a submission was prepared on the basis of those resolutions.

The submission was delivered to Minister Jennings at the first meeting of the Land Justice Group's negotiating team with the three Ministers on 19 December, 2005.

4. Meeting with Ministers, December 2005

At this first meeting, the three Ministers agreed as a matter of principle that culturally significant Crown land could be returned to Traditional Owner groups. They indicated that this was an established policy in regard to consent determinations, but they also wanted to discuss the return of land in the context of 'alternative settlements', especially where the level of connection needed for a consent determination may not satisfy the standards set by the Yorta Yorta decisions. The Ministers suggested that they would negotiate a policy framework that would provide consistency and procedural fairness in the negotiation of both consent determinations and alternative settlements.

The Ministers also acknowledged that native title agreements might be progressed in ways that avoided the surrender of native title. The main issue on the State's side was their exposure to future claims. But there was a willingness to explore ways in which a range of benefits could be negotiated in exchange for the withdrawal of claims for a substantial period of time – such as twenty years. If return of land could be achieved within this alternative framework, then the aspirations of traditional owners might be satisfied without the need for a Victorian Land Rights Act.

5. What might land justice look like?

The *Native Title Act* supplies a limited answer to questions of justice: Crown land may be returned to Indigenous groups on the condition that traditional laws and customs have been substantially preserved. The *Act* itself does not provide for the realities of dispossession.

Land justice for Victoria's First Nations would need to include both a substantial return of land and management roles in regard to natural resources. Such measures, along with some form of allocation from State revenue streams, would probably be the minimum that would be expected in compensation for the loss of ownership and control of traditional country.

A statewide discussion of land justice offers the opportunity to recognize the rights of Traditional Owners within a broader, culturally appropriate framework. The policy negotiations with the Land Justice Group are likely to cover the following areas and might be set out in a treaty-type document:

1. Transfer of Culturally Significant Crown Land (including handback / leaseback arrangements)
2. Natural Resource Management and Customary Allocations (e.g., allocations of water and customary fishing allocations)
3. Access to a Share of State Revenues
4. Control of Aboriginal Cultural Heritage
5. Non-extinguishment of Native Title
6. Cultural Recognition and Strengthening (e.g., signage on roads, cultural centres, etc. as determined by each group)
7. Strategies for Economic Development.

6. Native Title and the Victorian *Aboriginal Heritage Act* (2006)

The Victoria-specific provisions of the Commonwealth *Heritage Protection Act* provide significant powers to Aboriginal community organizations listed in the Schedule, and decisions made by these organizations are final. The Commonwealth Act does not, however, ensure that Traditional Owners control cultural heritage in their own country. And as we recently saw in Victoria, even the Commonwealth Act still allows the Victorian Minister for Aboriginal Affairs to suspend every recognized Cultural Officer in the State.

The Exposure Draft of the *Aboriginal Heritage Bill* (2005) 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 our aspirations.

In response to submissions from the Land Justice Group and others, the revised *Aboriginal Heritage Act* – which was passed early this month – requires that all the members of the statewide Aboriginal Heritage Council be Traditional Owners from Victoria. That Council will recognize the 'Registered Aboriginal Parties' who will carry out similar functions to Aboriginal community organizations in the current regime. For the first time in Victoria, native title holders will have exclusive rights in regard to cultural heritage within the outer boundaries of their claim area. The criteria for recognizing other Registered Aboriginal Parties give a clear priority to Traditional Owner organizations.

But there is a sting in the tail. Decisions by the Registered Aboriginal Parties will be reviewable in the Victorian Civil and Administrative Tribunal. 'VCAT' will be bound by the Objectives of the new Act, but they also will be required to consider the interests of developers. VCAT, we should note, has

considerable experience with developers and minimal experience with Aboriginal cultural heritage.

Potentially on the positive side, however, the new statewide Aboriginal Heritage Council will be resourced to clarify the boundaries of areas over which Traditional Owners' exercise their management of cultural heritage. This process, if carefully managed, promises to accelerate the mediation of boundary disputes in a manner that may assist with the progress of native title claims and alternative settlements.

Conclusion

While the recognition of native title rights and interests has been slow and painful in Victoria, the environment has changed significantly in the last year with the positive determination in the Wimmera and the hopeful signs emerging from the Gunditjmara negotiations. The Land Justice Group has had some influence on the introduction of new cultural heritage legislation, and the implementation of that legislation offers an opportunity to clarify the boundaries of Traditional Owners' country within Victoria.

The involvement of three Victorian Ministers in the current engagement with the Land Justice Group indicates a certain level commitment from the Government's side. We are cautiously hopeful that these meetings will lead to substantial land justice outcomes through the medium of native title negotiations.