Preliminary submission by the Department of Justice, Victoria to the Australian Law Reform Commission Inquiry: Review of the *Native Title Act 1993*

in response to Issues Paper 45

This submission is made in response to the Issues Paper 45, released by the Australian Law Reform Commission in March 2014 as a part of its Review of the *Native Title Act 1993*.

The Department of Justice, Victoria, leads whole-of-government dealings with native title across Victoria.

The submission describes the features of Victoria's experiences with native title to date and the Victorian Government's current approach to the settlement of native title and compensation claims under the framework of the *Traditional Owner Settlement Act 2010* (Vic) (**TOS Act**), for the information of the Commission. It identifies the matters in the Issues Paper of most interest to Victoria, by reference to a selection of the headings and questions set out in the Issues Paper.

The Department of Justice looks forward to the Commission's further consideration of these issues in the Discussion Paper proposed for release in September 2014.

Trends in native title

In relation to **Question 3** - regarding variations across jurisdictions - Victoria notes the following key features of the operation of the *Native Title Act 1993* (Clth) (**NT Act**) in Victoria to date:

- The claimable Crown land estate comprises roughly one third of the State's land area.
- To date native title has been settled over approximately 40% of that area, by way of a positive or negative native title determination and/or a TOS Act settlement.
- 'Whole-of-country' claims, the predominant type of claim, have involved large numbers (up to 500) of third parties.
- The complexity of historical land dealings has given rise to high transaction costs for the required tenure analysis.
- The 2002 (and earlier) Yorta Yorta determination set the 'connection' test such that Victorian claimant groups faced what were perceived as significant risks of not achieving native title recognition.
- Nevertheless, four native title holding communities have been the subject of positive native title determinations since (Wotjobaluk and others in 2005; Gunditjmara in 2007 and 2011; Gunaikurnai in 2010 and Eastern Maar, part-area only, in 2011).
- The State of Victoria has adopted an approach to native title connection of a 'reasonably arguable case' with respect to ss.223 and 225 matters in the consent determinations made from 2007.

As the Commission is no doubt aware, Victoria has developed its own unique legislative approach to the settlement of native title and compensation applications by way of the TOS Act, as further discussed below. The Commission may observe that since commencement of the TOS Act the number of Victorian determination applications before the Federal Court has dropped from some fourteen to only two, with some but not all of these resolved under the TOS Act.

The first settlement made under the TOS Act was in 2010 with Gunaikurnai people, reached alongside their native title determination. In 2013, the State reached a settlement with Dja Dja Wurrung People, who withdrew their existing native title claims as a part of the settlement agreement. Only one new native title application has been made since enactment of the TOS Act.

In addition, the TOS Act enables settlements to be negotiated with groups who do not have a native title application before the Federal Court, in lieu of making an application, provided they meet the State's thresholds. To date, one Victorian traditional owner group has sought a TOS Act settlement without first making a native title application, and this matter is currently in process.

Learning from other jurisdictions and approaches

In relation to **Question 4(b)** – regarding law and practice from Australian states and territories in relation to connection requirements, authorisation and joinder - Victoria suggests that the alternative settlement approach under the TOS Act is likely to be relevant to these topics, perhaps at times as a point of contrast with native title processes.

As an overview, the TOS Act establishes a framework for the negotiation of a 'recognition and settlement agreement' between the State and a traditional owner group over a given area, as an alternative to a determination under the NT Act. The agreement 'settles' native title and compensation claims by way of agreement by the traditional owner group not to make or pursue native title or compensation applications in exchange for the agreed comprehensive settlement package. This relies in most instances on registration of an indigenous land use agreement (**ILUA**) under the NT Act. The settlements constitute a native title outcome via an ILUA, rather than by way of a determination of native title. The question of whether native title exists or not is, in effect, put to one side.

This approach provides significant savings in terms of transaction costs (such as for historical land tenure analysis), freeing up resources that can instead be invested in sustainable settlement outcomes that benefit traditional owner groups.

Recognition and settlement agreements extend beyond the recognition of a set of legal rights (framed as 'traditional owner rights' at s. 9) through the range of practical sub-agreements that may be made. These include agreements about:

- access to and transfer of land (under a Land Agreement – see Part 3);
- simplified procedures for the future use of public land (under a Land Use Activity Agreement - see Part 4);

- payment of funds into the Victorian Traditional Owner Trust, that may support corporation running costs through an annuity, plus funding for discretionary economic development projects (under a Funding Agreement – see Part 5);
- use, access and participation in the management of natural resources (under a Natural Resource Agreement – see Part 6); and
- joint management of parks and reserves, including establishment of a Traditional Owner Land Management Board (under Part 8A of the *Conservation Forests and Lands Act 1987*).

Also relevant are Victoria's '*Threshold guidelines for Victorian traditional owner groups seeking a settlement under the Traditional Owner Settlement Act 2010*' (Department of Justice, 2013) which establish a process for traditional owner groups to come forward to seek settlement negotiations. This is a matter of executive policy, as the TOS Act does not, of itself, set out an application process.

Importantly, the alternative approach to native title settlement has changed the way the State of Victoria deals with the key issues that this Inquiry seeks to address: that is, matters equivalent to connection, authorisation and third party involvement. The Department of Justice suggests that there will be lessons from the Victorian approach that can usefully inform the Commission's deliberations about how the NT Act is operating. Each of the three key topics is briefly commented on here, with respect to Victoria's practices under the TOS Act. Any areas where changes to the NT Act may have consequences for the operation of the TOS Act are also identified.

Connection and recognition concepts

As was noted in the second reading speech for the passage of Victoria's *Traditional Owner Settlement Bill 2010*, while native title rights and interests have their source in Aboriginal and Torres Strait Islander laws and customs, there is remarkable similarity in the form of rights recognised in determinations over the last twenty or so years. It may be of interest to the Inquiry that the TOS Act provides a description of the traditional owner rights that may be recognised by agreement; this is at s. 9, which covers the usual range of rights recognised by native title determinations across Australia, including land access, camping, using and enjoying land, taking natural resources, conducting cultural and spiritual activities and the protection of places and areas of importance, consistent with Victorian law. What is perhaps additional is the way they also reflect the 'cultural rights' of Aboriginal persons described in s. 19 of the *Charter of Human Rights and Responsibilities Act 2006* (Charter Act): s. 9(1)(a) of the TOS Act describes a right to "the enjoyment of the culture and identity of the traditional owner group", which mirrors s. 19(2)(a) of the Charter Act.

Victoria's Threshold Guidelines establish two headline thresholds that groups must address in putting themselves forward for settlement negotiations: (i) that they comprise the 'right' traditional owner group for an area appropriate for settlement; and (ii) that they are 'ready to negotiate' a settlement package that binds all persons who may hold native title for the proposed settlement area.

The first of these headline thresholds grapples with the question of how to establish a group appropriate for recognition as traditional owners. This picks up matters of some equivalence to the question of native title proof and native title connection, but also of authorisation.

Under the Threshold Guidelines, the State pays attention to two intersecting sources of information for the basis of a group description and its asserted territory: the results of ethno-historical and informant-based research, as well as the decision-making of the full group itself, including its agreement-making with neighbouring traditional owner groups. This approach acknowledges that the ethno-historical research cannot always resolve as fact all matters regarding the content of law and custom, such as extent of country, immediately prior to the commencement of European settlement. The ethno-historical record is both incomplete and sometimes flawed. The Victorian approach values contemporary traditional owner knowledge and agency alongside the historical and anthropological information that is able to be established.

The guidelines adopt the language of the TOS Act regarding a concept of 'traditional and cultural association', rather than native title 'connection'. Group descriptions are expected to include in some form 'descent from ancestors' from the mid 1800s. However, the Threshold Guidelines contemplate that additional membership factors may also operate to limit membership of descendants, such as self-identification, recognition by others in the group, observance of traditional laws and custom and/or activation of rights.

Traditional owner groups are also asked to submit a 'statement of association' where they describe their collective relationships to country in both cultural and traditional terms, but with a contemporary focus. The notion of 'traditional' association is considered in terms of 'linkages with the past', as already noted in the Issues Paper at paragraph 125.

Recognition as traditional owners thereby requires *more than* just demonstration of descent from ancestors, but *less than* a test of the continuity of observance of a body of traditional law and custom by a normative society, generation by generation since European occupation, as the native title jurisprudence may suggest is necessary for native title purposes.

The Threshold Guidelines may be seen as already putting into practice an approach that presumes 'continuity' between identified ancestors from the period of European settlement and current day 'claimants', but does not 'test' the continuity of a practised body of traditional law and custom. This approach has advantages, it can be argued, in better bridging the "disjunct between the contemporary worldviews and aspirations of Aboriginal people and the legal construction of native title" that the Issues Paper refers to (see p. 28, and also **Question 5**).

Regarding **Question 8** – about how a presumption of continuity may operate in situations of overlapping claims – it is clear that questions of descent and continuity of observance of law and custom in native title processes operate as tests for establishing 'who' should be recognised as native title holders. In the absence of the existing connection test, some other benchmarks or mechanisms for the identification of a group appropriate for recognition would

need to be developed. They would need to be able to operate in circumstances of competing or conflicting claims, both in terms of group membership and extent of country.

Providing a wider traditional owner constituency with opportunities to confirm or challenge claims is an important cross-check during claims preparation. Support for claimants to address and resolve conflicting claims *before* coming forward for recognition is also vital in seeking to build recognition outcomes that will be widely acceptable to native title constituents. It also means that government can avoid 'getting it wrong' with respect to who is afforded recognition.

The Inquiry may be interested to observe that the Threshold Guidelines require traditional owner groups to show that all traditional owners for the proposed agreement area are included and that all group members have had reasonable opportunity to participate in the decision-making that sits behind the lodgement of a threshold statement. This is in parallel with the authorisation requirements for the registration of area-type indigenous land use agreements regarding efforts to identify, and seek authorisation from, all persons who may hold native title. In the case of the TOS Act, however, these matters must be addressed *before* the State agrees to commence settlement negotiations, rather than being tested only after agreement-making effort has been expended and agreement between parties reached, as is the case with ILUAs.

Traditional owner groups seeking TOS Act negotiations with the State are also asked to demonstrate their efforts to seek discussions and reach agreements with neighbouring traditional owner groups about mutual territorial boundaries. This means that groups are required to discuss and negotiate their intentions within the wider traditional owner community domain, when they lodge a threshold statement. The wider Victorian traditional owner community is also invited to make submissions on key threshold issues in the 'threshold notification' process that the State undertakes, again *prior* to the State agreeing to commence negotiations (see Appendix 3 of the Threshold Guidelines).

In contrast, native title claims may be made without any reference to a wider traditional owner or native title claimant constituency. This leaves the making of overlapping claims as one of a limited number of avenues of recourse for disaffected or competing claimant groups, as discussed below.

In addition, in Victoria the State has established a program to offer specific support to traditional owner groups to reach agreements and resolve disputes about group composition and boundaries in the context of both native title and cultural heritage processes: the Right People for Country Project run by the Office for Aboriginal Affairs Victoria. This project provides indigenous agreement-making and dispute resolution support to groups during the preparation of threshold statements and the threshold phase of TOS Act processes. The project acknowledges that inter and intra-Indigenous disputes can stand in the way of reaching native title and cultural heritage outcomes. For further information, go to: http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/projects-and-programs/right-people-for-country-project.

Regarding **Question 12** – as to whether native title rights and interests include rights and interests of a commercial nature – the Inquiry may be interested to note that the provisions in the TOS Act regarding Natural Resource Agreements (see Part 6) contemplate use of, and access to, natural resources for commercial as well as traditional purposes, including strategies for obtaining employment in the management of natural resources (see s. 80(1)(a) and (b)). Natural resource flora and fauna authorisations and natural resource forest authorisations make reference to commercial use in particular (see s.82(1)(b) and s.84(1)). Commercial use is not specified in the list of traditional owner rights at s. 9 of the TOS Act, although s. 9(1)(b) does describe "the maintenance of a distinctive spiritual, material and *economic* relationship with the land and the natural resources on or depending on the land" [emphasis added].

Authorisation

The Commission may be interested to note that under Victoria's alternative approach there is no requirement equivalent to the NT Act provisions at s. 251B that require a 'traditional decision-making process' to be used if the native title claimant group has such a process in place, or if not, then by another process agreed and adopted by the group. Defining such 'traditional decision-making processes' is fraught in communities that may have been denied opportunities to make collective decisions regarding such matters as land and resource management for many generations. Nevertheless, elements of traditional authority may well still be in operation. Rather, Victoria's Threshold Guidelines simply ask groups to describe their decision-making processes in their threshold statement, without assessment of whether it is 'traditional' in nature or not. Decision-making processes are evaluated in terms of whether the processes are inclusive, fair and stable. The State seeks to avoid scenarios where members of groups challenge negotiated decisions later, including by forming competing breakaway groupings (see discussion on p. 44 of the Threshold Guidelines). One of the features of stable and fair decision-making identified by the Threshold Guidelines is that group processes can accommodate and constructively engage with a diversity of member views.

This is relevant to **Question 23** – regarding whether problems with existing authorisation processes amount to barriers to justice for claimants and potential claimants. Ongoing disputes amongst claimants clearly may delay or prevent access to the benefits and opportunities of recognition for traditional owners, as well as those who seek to use or develop Crown land. The question is whether existing authorisation processes provide sufficient checks and balances and avenues for the resolution of conflicts between claimants.

The matter of assistance available to groups to identify claim group membership and claim boundaries, in the context of authorisation issues - as contemplated by **Question 25** – is a subject clearly relevant to the key topics the Inquiry is addressing. Victoria's Right People for Country Project may be of interest to the Inquiry, as raised above. In addition to being able to provide assistance when threshold statements are in preparation, it may also provide assistance with later disputes, such as may arise from the threshold notification process or during settlement negotiations.

The Department of Justice observes that native title representative bodies or native title service providers (**NTRB/NTSPs**) have statutory dispute resolution functions under the NT Act as well as facilitation and assistance functions (see Part 11, Division 3). Where these organisations work for claimant groups in a conventional lawyer-client relationship, Victoria's experience is that this can compromise their ability, or perceptions thereof, to also perform a dispute resolution role if competing or disputing claimants emerge. This tension between functions is a significant issue that the Department of Justice considers worthy of further attention. It is not clear that the 'first-in, first-served' approach suggested by s. 203BB(4) best serves the interests of justice in all circumstances.

Victoria's Threshold Guidelines give attention to matters that demonstrate how the authority of those members acting on behalf of the group, such as negotiators, is maintained, such as requiring information about decision-making processes, about how meetings are notified and how information will be disseminated to group members during the negotiations with the State. The State is interested in the corporation's internal governance rules, including with respect to membership, so the State can be assured that the corporation is appropriate to represent and bind the traditional owner group members. This is of some relevance to the issues raised under **Questions 25, 26 and 28** of the Issues Paper**.**

Authorisation of ILUAs

The Issues Paper does not appear to address the matter of authorisation of ILUAs at s. 251A, as distinct from the authorisation of claimant applications at s.251B. The Department of Justice draws to the attention of the Commission that any consideration of possible changes to the authorisation processes for ILUAs in the NT Act should carefully consider any consequences for Victorian TOS Act settlements. Recognition and settlement agreements under the TOS Act rely on the registration of a certified indigenous land use agreement (of either the 'body corporate' or 'area' type), which binds the traditional owner group (including actual and potential native title holders) to the settlement agreement undertakings and validates future acts.

<u>Joinder</u>

(i) Aboriginal and Torres Strait Islander joinder applicants

The Department of Justice notes that joinder as a party to a native title proceeding by persons with a native title interest remains one of a fairly limited number of avenues for disaffected or competing claimants or native title parties to seek to have their interests taken into account. This distinguishes them from the other types of proprietary interest-holders who may be joined as parties to native title proceedings under s. 84(3) or s. 84(5). As identified in paragraph 269 of the Issues Paper, joinder of this type of interest holder raises broader questions of the availability of effective processes for dealing with conflict within and between claim groups. The need for conflict resolution support, including *prior* to the lodgement of claims, has already been discussed above.

(ii) Other joinder applicants

In relation to issues regarding joinder of third parties with proprietary interests (other than native title interests), the Inquiry may be interested to observe that settlement negotiations under the TOS Act are undertaken directly between the State and traditional owner groups, without other parties with proprietary interests in Crown land having any consenting role with respect to the overarching recognition and settlement agreement, although consent to the withdrawal of native title applications may be involved. Part of Victoria's rationale for this approach is that existing non-native title rights in claimable land are protected at law – see, for example, s. 73(2) of the TOS Act. Where a sub-agreement under the TOS Act may affect a third party, consultation will occur and the State also consults broadly, as it negotiates. In this way, the State seeks to act in a manner that protects and balances the interests of all, including third parties, State agencies, traditional owner groups and the wider public.

Victoria's TOS Act land use activity regime has established the rules of future engagement between recognised traditional owner corporations and third party users and managers of Crown land, including state agencies. Under this regime there are four tiers of procedural rights for different types of land uses. The State consulted with Victorian peak industry bodies with interests in Crown land use in developing the land use activity regime. One of the aims of settlements is to facilitate development of a stable traditional owner group interface for other Crown land users to be able to engage with into the future, via the land use activity regime.

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