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# THE DJA DJA WURRUNG NATIVE TITLE SETTLEMENT:

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## A NEW APPROACH TO SETTLING NATIVE TITLE

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by Adam McLean and Nick Testro

### INTRODUCTION

The Dja Dja Wurrung ('DDW') Indigenous Land Use Agreement ('ILUA') was registered by the Register of Indigenous Land Use Agreements on 24 October 2013. The registration of the ILUA finalised the settlement of the four DDW native title determination applications that were lodged between 1998 and 2000.<sup>1</sup>

The DDW settlement represents the first comprehensive settlement of a native title determination application pursuant to dedicated native title framework legislation in Australia, namely, the *Traditional Owner Settlement Act 2010* (Vic) ('the Act').

It is a common view that settlements of native title applications are taking too long. The National Native Title Tribunal predicts that, at the current rate of settlement, it will take over 30 years to settle all current applications.<sup>2</sup> The framework settlement regime enables comprehensive settlements of native title in significantly shorter periods than is currently experienced across Australia.

The authors predict that the DDW settlement will pave the way forward for settlements of native title across Australia.

### SETTLEMENT FRAMEWORK AND THE *TRADITIONAL OWNER SETTLEMENT ACT 2010* (VIC)

In 2008, the Victorian Government established a steering committee whose terms of reference were to develop an alternative means by which to resolve native title in Victoria. Representatives of each of the Victorian Traditional Owner Land Justice Group ('VTOLJG'), Native Title Services Victoria ('NTSV') and the State were appointed to the steering committee in early 2008. The steering committee, independently chaired by Professor Mick Dodson, produced its final recommendations in December 2008.<sup>3</sup>

One of the recommendations was to enact legislation that would enable the State to enter into comprehensive settlements with traditional owner groups. Accordingly, in 2010, the Victorian Parliament enacted the Act, enabling

the State to enter into comprehensive settlements with traditional owner groups. 'Comprehensive settlement' in this context means a settlement that enables negotiated outcomes to incorporate all or a substantial proportion of the aspirations of a traditional owner group.

The Act enables the State to enter into a settlement with a traditional owner group in the form of a recognition and settlement agreement ('RSA'). Under the *Conservation, Forests and Lands Act 1987* (Vic), and in addition to a RSA, a settlement may also include a traditional owner land management agreement ('TOLMA') for the joint management of parks and reserves. A settlement may also include an ILUA under the *Native Title Act 1993* (Cth) ('NTA'). The Act does not preclude a consent determination of native title as part of a settlement—though for various reasons that are outside of the scope of this paper, it is unlikely to occur where a land use activity agreement is included in a settlement.

Following the enactment of the Act, the State and NTSV negotiated templates of each of the relevant agreements required for a settlement.<sup>4</sup> The purpose of the templates was to reduce the time required for each negotiation under the Act.

Division 1 of Part 2 of the Act provides that a RSA can include the following:

#### LAND AGREEMENT

A land agreement can include the transfer to the traditional owner group entity<sup>5</sup> of either or both freehold title to one or more parcels of land and the underlying title to parks and reserves as 'Aboriginal title' (the latter must be subject to a TOLMA).

#### LAND USE ACTIVITY AGREEMENT ('LUAA')

Perhaps the most significant element of the Act is the creation of a simplified alternative future act regime. A LUAA provides the procedures for the doing of 'land use activities' (the common sense substitute term for 'future act'), including: when and how particular activities can

take place; notification and consultation requirements; and those activities where proponents must seek agreement, or must reach agreement, with the traditional owner group entity. Significantly, a LUAA applies to *all* Crown land in the agreement area (with some exclusions), irrespective of whether native title exists or not.

Land use activities are divided into four categories: routine; advisory; negotiation (class A and class B); and agreement. Each category (except routine) has procedural requirements that must be undertaken before the land use activity can proceed. A LUAA sets out the 'community benefits' (ie compensation) that must be paid to the traditional owner group entity for a range of land use activities.

The new procedures *must* be complied with for the State to grant an interest or to consent to a specified activity proceeding on public land. Activities done in accordance with a LUAA will be valid under the NTA because, under the ILUA that constitutes one of the settlement agreements, the traditional owner group will consent to all future acts in the agreement area.

#### FUNDING AGREEMENT

In recognition of the need for a traditional owner group entity to have adequate funding to give effect to a settlement, the Act enables the State to grant funding to the traditional owner group entity.

#### NATURAL RESOURCE AGREEMENT ('NRA')

A NRA may include strategies to enable members of a traditional owner group to participate in the management of natural resources in the agreement area. A natural resource agreement can also contain 'access and use provisions'. Access and use provisions authorise members of a traditional owner group to hunt and fish for particular animal and fish species, harvest particular plant species, collect forest produce, harvest water and camp on Crown land. Items taken must be used for personal, domestic or non-commercial communal needs (except flora and forest produce, which may be taken for 'commercial purposes').

#### RECOGNITION OF TRADITIONAL OWNER RIGHTS

A settlement may include the recognition of 'traditional owner rights'.<sup>6</sup>

#### THE DJA DJA WURRUNG SETTLEMENT

The DDW settlement is the first comprehensive settlement<sup>7</sup> concluded pursuant to the Act. It can therefore be considered a litmus test for the success or otherwise of this form of settlement.

The settlement agreements were authorised by the DDW full group at an authorisation meeting held on 16 March 2013 in Bendigo, and executed by the parties at a ceremony also in Bendigo on 28 March 2013. The ILUA that underpins the settlement was formally registered by a delegate of the Native Title Registrar on 24 October 2013 (following the delegate's consideration and dismissal of one objection to the registration of the ILUA). Registration of the ILUA was a condition precedent to the commencement of the settlement.

The DDW settlement is the first settlement to which the Indigenous Land Corporation agreed to contribute under its native title policy (introduced in 2012). The settlement includes each of the agreements referred to in the Act<sup>8</sup> (and outlined above) in an RSA; TOLMA; and an ILUA under the NTA. The key elements of the settlement are as follows:

#### INDIGENOUS LAND USE AGREEMENT

The ILUA is included as part of a settlement essentially to ensure the settlement's validity with NTA requirements. The parties to the ILUA are the applicants to the four DDW registered native title determination applications, the Dja Dja Wurrung Clans Aboriginal Corporation ('Corporation') as the nominated traditional owner group entity of the DDW, and the State of Victoria. In summary, the ILUA provides for:

- the validation of all future acts done invalidly by the State to the date of the settlement;
- the consent of the DDW to all future acts (to enable the valid operation of the replacement regime under the LUAA);
- the agreement of the DDW to the withdrawal of the four native title claims; and
- the agreement of the DDW not to lodge any native title determination or compensation applications in future.

#### RECOGNITION AND SETTLEMENT AGREEMENT

The DDW RSA formally recognises the DDW as the traditional owners for the country covered by the settlement. The RSA incorporates in specific clauses and schedules a number of elements that are identified in the Act as 'agreements' (as outlined above), including:

- a LUAA;
- a NRA;
- a funding agreement; and
- a land agreement.

The RSA also incorporates a number of elements that are not expressly contemplated by the Act, but to which the

State agreed to meet the aspirations of the DDW in the settlement, including:

- a protocol on acknowledgements and welcomes to country;
- an interpretive information protocol; and
- a local government engagement strategy.

The DDW LUAA<sup>9</sup> entitles the Corporation to ‘community benefits’ for certain land use activities on public land in the agreement area, including the sale of Crown land, mining exploration and production, the construction of public works, and other activities. The community benefit payable will depend on the activity in question. For some land use activities that require payment of community benefits to the Corporation, a set formula in Schedule 7 of the LUAA applies to determine the community benefit payable. For example, Formula D of Schedule 7 is the applicable formula for calculating the community benefit for the sale of Crown land. Where there is no formula, but a community benefit is still payable, the quantum of that benefit must be negotiated by the parties.

The DDW NRA contains specific strategies that reflect DDW aspirations to participate in the management of natural resources in the agreement area. The NRA also contains access and use provisions that specify particular species which the DDW can hunt or harvest without having to obtain a special permit (though some conditions do apply). Although members of the DDW are exempt from having to obtain special permits to hunt and harvest the species listed, they must carry identification to prove their membership of the group so that compliance officers can verify an individual’s DDW identity.

The funding provided as part of the settlement is in full and final settlement of any and all claims for compensation by the DDW (and its representative corporate entity) against the State (including under the NTA). The funding agreement in the RSA sets out the funding to be granted by the State and the terms on which the funding will be granted:<sup>10</sup>

- \$5 million to be transferred to the Victorian Traditional Owners Trust and distributed to the Corporation at a rate of at least \$250 000 per annum over a minimum of 20 years for the Corporation’s core operations;
- \$3.25 million in economic development funding, to be provided in three instalments from mid-2014, subject to the Corporation achieving specified milestones;

- \$900 000 grant funding for the core operations of the Corporation for the first two years after settlement, and salaries towards two key positions for the first two to four years after settlement; and
- \$500 000 in guaranteed contracts for works on public lands for the Corporation’s economic arm, Dja Dja Wurrung Enterprises Pty Ltd.

The land agreement provides for the transfer of freehold title of two culturally significant properties at Carisbrook and Franklinford to the Corporation. Land that is subject to the six parks and reserves that are to be jointly managed with the State under the TOLMA will be transferred to the Corporation as ‘Aboriginal title’.

#### TRADITIONAL OWNER LAND MANAGEMENT AGREEMENT

The RSA provides for the grant of ‘Aboriginal title’ over six parks and reserves in the settlement area to the Corporation, subject to a mandatory leaseback in perpetuity to the State. The TOLMA sets out the mechanics for the joint management process of the six parks and reserves. This is largely centred upon the process for the development of joint management plans. The parks and reserves to be jointly managed by the Corporation and the State are: the Greater Bendigo National Park; Kara Kara/St Arnaud Range National Park; Wehla Nature Conservation Reserve; Hepburn Regional Park; Kooyoorra State Park; and Paddy’s Ranges State Park. Further parks and reserves can be added in future.

A ‘Traditional Owner Land Management Board’ of seven people (called the ‘Dhelkunya Dja Land Management Board’) will be established to develop and oversee the implementation of joint management plans for the management of the six parks and reserves listed. The Corporation will be entitled to appoint a majority of the members of the board, as well as the chairperson. The RSA also requires the State to fund the employment of three DDW people, whose role will be to assist with the implementation of the joint management plans.

#### SETTLEMENT OUTCOMES

Although intangible, the act of recognition by the State that the DDW are the traditional owners for their country—and that the State accepts that it played a part in the dispossession of the DDW from that country—is an integral part of the settlement. The psychological impact of this component of the settlement on the DDW cannot be underestimated. In the context of many government policies that were ultimately intended to annihilate the

traditional owners of Victoria, including the DDW, the act of recognition constitutes an implicit rejection of those policies. The settlement thus legitimates the place of DDW in Australian history and society.

As a tangible outcome, the settlement will enable the DDW to work on establishing a solid foundation for the viability of their representative corporation. This will include developing available markets to generate a stable income, finalising all basic policies and procedures for the operation of the Corporation, and ensuring a high and consistent standard in corporate governance. As the Corporation is required to employ the settlement benefits for all members of the DDW, it will form the focal point for the DDW in relation to the settlement. Accordingly, it is imperative that the Corporation is fully functional and financially viable.

It is recognised by all parties to the DDW settlement that the Corporation requires significant financial resources to undertake the activities contemplated by the agreement process and to meet the aspirations of the DDW. On this basis, a significant proportion of the settlement funding is directed to at least partially meeting that need. The alternate future act regime (ie the LUAA), which requires payment of community benefits to the Corporation for certain activities, will also assist the DDW to meet their aspirations.

The DDW hope the settlement will support the Corporation to offer employment opportunities for members of the group; improve living standards; be a focal point for cultural activities and language renewal; provide opportunities to participate in the management of natural resources and land use activities; and give the group standing and credibility to engage with bureaucracy at all levels in relation to decisions over the group's traditional country.

## CONCLUSION

It is important to note that the Victorian settlement regime is an 'opt-in' process and is not dependent on a native title application. Once a traditional owner group opts in, while that group still needs to negotiate parts of the final settlement, the major planks of most issues are already settled (on the basis that template agreements are already in place). This not only gives certainty to the State, local government and development interests, it also gives a level of certainty to traditional owner groups so they know what to expect before the negotiations begin. One of the drawbacks of the opt-in process is that, unlike under the NTA, there is no legislated originating process,

and it is at the discretion of the State as to whether it will enter into negotiations with a particular traditional owner group or not.

Although there have been over ten years of negotiations to settle the DDW native title claims, once the parties agreed to progress the negotiations under the settlement regime, settlement was achieved in just over 18 months. In addition to an expedited conclusion to negotiations, settlements under the settlement framework also enable outcomes that are simply not possible if a strict native title determination model is followed.

In addition to funding, the DDW have been able to negotiate a range of matters of particular importance to them, including ownership and management of national parks, participation in the management of natural resources, guaranteed government contracts as well as employment opportunities and training.

Settlements made pursuant to the settlement regime outlined in this paper will produce comprehensive settlements of native title and related issues that provide certainty, and are concluded in much quicker timeframes than currently experienced in most jurisdictions in Australia. This may inspire governments, traditional owner groups and their representatives across Australia to seek to enact similar settlement frameworks in their own jurisdictions.

*Adam McLean was the barrister representing the applicants in this matter and was briefed by Native Title Services Victoria. Adam has over 20 years' experience in native title and related matters. He is currently the Principal Legal Officer at Cape York Land Council. Nick Testro is Managing Lawyer of the Central Team at Native Title Services Victoria Ltd. Nick's previous roles include a Judge's Associate at the Supreme Court of Victoria, Legal Officer at Cape York Land Council in Cairns and Senior Associate at Minter Ellison Lawyers in Brisbane. The views expressed in this article are those of the authors, which are not necessarily the same as the views of their employers.*

- 1 The settlement did not include a native title determination and, as such, no reasons for decision were given by the Federal Court. Copies of the settlement agreements are available on the website of the Department of Justice of the Government of Victoria, *Dja Dja Wurrung settlement commences* <<http://www.justice.vic.gov.au/home/your+rights/native+title/dja+dja+wurrung+settlement+commences>>.
- 2 Graeme Neate, 'Native title claims: Overcoming obstacles to achieve real outcomes' (Paper presented at the Native Title Development Conference, Brisbane, 27 October 2008).
- 3 Steering Committee for the Development of a Victorian Native title Settlement Framework Report, December 2008.

- 4 Department of Justice, Government of Victoria, *Land Use Activity Regime policy and agreement templates* <<http://www.justice.vic.gov.au/home/your+rights/native+title/land+use+activity+regime+policy+and+agreement+templates#sth.ash.fJ1RXFd5.dpuf>>.
- 5 *Traditional Owner Settlement Act 2010* (Vic) s 3.
- 6 *Ibid* s 9.
- 7 The first 'transitional settlement' under the Act was the Gunai/Kurnai settlement in 2010, which included a native title consent determination and a RSA, but no LUAA.
- 8 *Traditional Owner Settlement Act 2010* (Vic) pt 1 div 1.
- 9 Department of Justice, Government of Victoria, *Dja Dja Wurrung Land Use Activity Agreement* <<http://www.justice.vic.gov.au/home/your+rights/native+title/dja+dja+wurrung+land+use+activity+agreement>>.
- 10 The terms of the funding grants are also contained in ancillary agreements: a 'participation agreement' and a 'grant funding agreement'.

**Milngurr, 2013**  
Gunybi Ganambarr

*Foil, bark fibre and earth pigments on found board*  
55cm x 102 cm

