

## **'Indigenous Aspirations relating to Native Title'**

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We acknowledge the traditional owners of the land on which we meet, the Wurundjeri people.

This acknowledgement is an essential part of the reconciliation process, both for Indigenous and for non-Indigenous people. It is essential because the Aboriginal nations of Victoria have maintained their traditional countries as sovereign jurisdictions since time immemorial, and this sovereignty has never been surrendered.

As you are aware, the historic *Mabo* judgement of the High Court belatedly recognized that traditional Indigenous groups exercised an internal jurisdiction in defining their own laws. In this landmark decision of 1992, native title rights and interests were identified as "inherent". That is, they were recognized rather than "granted" by the Crown.

But instead of seeing the inherent system of traditional rights as implying a sovereign system of law (as in North America), the *Native Title Act* 1993 raised new questions about the ways in which Indigenous polities could be recognized in Australia.

Subsequent decisions of the Court have tended to reduce native title to a set of activities like hunting, fishing, gathering, holding ceremony or camping on a group's traditional land, rather than *possessory* title. A native title determination of exclusive possession comes close to land ownership, but such an outcome is not likely in

Victoria. Exclusive possession of traditional lands has been recognized only in remote settings where competing interests have been few.

The erosion of native title rights is especially problematic in Victoria, where there is no other mechanism to gain possession of land, such as a statewide land rights act, and the consequences are quite clear: the percentage of Indigenous held land in Victoria is 0.07% of the Victorian estate, around 200 times below the national average.

Traditional owners in Victoria also carry the deep wound of the Yorta Yorta case, which from our perspective, established unreasonable expectations in relation to proof of connection to country. Justice Olney coined an infamous phrase when he suggested that the 'tide of history' had washed away our connection. Of course, we don't believe that for a moment. Justice Olney could have spoken with more integrity about the 'tide of colonisation' instead of the 'tide of history'. But perhaps a more honest form of words would have raised questions about why the colonising legal system has provided no compensation in Victoria for dispossession from traditional lands.

We had to wait for the words of Justice Merkel at the consent determination in the Wimmera, December 2005, to put the record straight:

The outcome of the present claim is testimony to the fact that the tide of history has not washed away any real acknowledgement of traditional laws and any real observance of traditional customs by the applicants.

This careful choice of words formed a pointed allusion to Justice Olney's judgment against the claims of the Yorta Yorta people. The Attorney-General of Victoria spoke even more bluntly at that consent determination of 'a failure of our lawmakers and, in a broader sense, of white legal tradition'.

We are expecting another consent determination on 30 March, in Guntijmara country, which will also help to put the record straight, but there is still a lot more work to do in this State.

Another major problem with native title rights in Australia is that they are defined by the legal system as non-commercial. This isn't much help to traditional owners who are looking for economic development. What is needed is some policy imagination to bridge the gap between non-commercial native title rights on the one hand, and commercial activities on the other. After all, activities like hunting, fishing and gathering provided the basic needs within a traditional economy, supplemented by use of forest resources, and so on.

We don't yet have much policy consideration in Victoria of how contemporary recognition may be given to traditional uses of forest resources, but there is some evidence of policy development in the area of fisheries. It is important that this policy development sees Indigenous fishing also as an *economic* activity in continuity with the economic significance of traditional fishing. It is not enough to see customary fisheries simply as a dimension of recreation or culture in a narrow sense.<sup>1</sup>

The Victorian Traditional Owner Land Justice Group has taken up these issues in its Framework Agreement Discussion Paper, released in August 2006.<sup>2</sup> For example, in the section on 'Natural Resource Management and Customary Allocations', the Discussion Paper says this:

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

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<sup>1</sup> The broader understandings of 'culture' employed by anthropologists would suggest that traditional fishing customs have interrelated economic, political, religious and social dimensions.

<sup>2</sup> <http://www.nts.com.au/document/Framework-Discussion-Paper-26-August-2006.pdf>

include two key recommendations.

- (1) 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.<sup>3</sup>
- (2) Government agencies should work with other stakeholders to increase traditional owners' participation in fisheries-related businesses and management, along with related training and vocational development.

It is very gratifying to see that the recent DPI Indigenous Partnership Action Plan 2006/7 makes reference to these Fishing Principles.

Now we just need to “walk the talk” – put some of this policy thinking into action. For example, traditional owners along the Murray River have an interest in the restoration of the Murray Cod, and in establishing native fish farms that are managed by traditional owners.

I have mentioned the Land Justice Group, which is currently negotiating with three Ministers in the Bracks Government. The Land Justice Group has set the agenda for a Framework Agreement with the State that is designed to expedite the resolution of existing native title claims, while at the same time addressing underlying aspirations for Indigenous land justice. We are suggesting that some native title matters may even be resolved by ILUAs, without the need for a formal native title claim being lodged, saving the disproportionate expenses and tortuous Federal Court processes.

ILUAs negotiated under the *Native Title Act* allow for some policy imagination. We could, for example, negotiate ILUAs in relation to customary fisheries without waiting for all the complexities of native title to be resolved. Even more creatively perhaps,

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<sup>3</sup> A legislative foothold for ‘traditional’ fishing was established in the Victorian *Fisheries Act 1995*, s. 3 (d), s. 5(2) and s. 29, but this seems to have had little impact on the management of customary allocations. See further, Melissa Nursy-Bray and Rob Palmer, *Walk the Talk*, prepared by Research Strategy Training for the Australian Conservation Foundation and the National Environmental Law Association, June 2006.

native title claims could themselves be resolved by ILUAs which negotiated an alternative settlement of native title which included customary fishing rights along with a range of other benefits.

We also need to bear in mind that the Victorian *Aboriginal Heritage Act (2006)* gives primacy to traditional owners to manage their cultural heritage, within the prescribed areas of their country. This new system, when it is implemented, will entail a shift from the current arrangement in which Aboriginal co-operatives have been managing cultural heritage, in many cases without regard to the rights accorded to traditional owners under Aboriginal tradition.

This is an important consideration in any initiatives taken by DPI to promote the protection of Aboriginal heritage by farmers and other landholders. I note that these initiatives are part of DPI's *Indigenous Partnership Framework* (pp.14-15), and rightly so, since Aboriginal objects on private land are not yet sufficiently protected under the *Aboriginal Heritage Act*.<sup>4</sup>

The State can no longer view Aboriginal people without regard to their traditional connections and kinship. The habit of speaking about a generic "Aboriginal community" derives from old colonial attitudes that were, at best, uninformed. Negotiated settlements and ILUAs can go a long way towards dealing with our unfinished business. With sufficient good will on the part of the State, we could finally see some justice done in Victoria – making good the deficiencies in native title jurisprudence, and recognizing the responsibility of traditional owners for natural resource management.

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<sup>4</sup> It is a 'complete defence' to the offence of being in possession of Aboriginal cultural heritage if the person is the owner of the Aboriginal cultural heritage (AHA s 33 (2)(b)), for example, if it is located on private land.