

**SUBMISSION
FROM NATIVE TITLE SERVICES VICTORIA
TO
THE VICTORIAN GOVERNMENT**

**DEVELOPMENT OF AN ABORIGINAL LAND AND
RESOURCE DEVELOPMENT STRATEGY**

We hereby make submission to the Government in the context of the current consultation process being undertaken by the Minister for Aboriginal Affairs, the Hon Gavin Jennings, with regard to the development of an Aboriginal Land and Resource Development Strategy (which we understand is to include an Indigenous Land Management Framework).

Our submission is in response to the AAV Executive Director's letter of 29 September 2004, which attached "discussion papers" from both the Department of Victorian Communities and the Department of Sustainability and Environment setting out various questions, responses to which would inform the Government's approach to the development of the Aboriginal Land and Resource Development Strategy.

Native Title Services Victoria ('NTSV') is a corporation currently carrying out the functions of an Aboriginal representative body under the *Native Title Act 1993* (Cth) ('NTA') for the State of Victoria. As such it is the legal representative of many native title claimants throughout Victoria in Federal Court proceedings under the NTA. In addition, NTSV has a key role in representing Victorian traditional owners in relation to their wider land-related interests.

All matters associated with the ownership and management of land in Victoria should be regarded as matters of direct concern to the traditional owners of Victoria and, therefore, as being potentially linked to the negotiated settlement of native title claims across the State.

Comments on Process

(a) Focus of Consultations and Associated Documentation

NTSV has previously issued a discussion paper proposing a statewide land justice settlement with an "opt-in" facility for the settlement of native title claims.¹ This paper sought to stimulate discussion amongst traditional owners about possible mechanisms to resolve the issues which underlie their native title applications and is highly relevant to the consultations currently being undertaken across the State by the Minister and his officers.

¹ NTSV, *Towards A Comprehensive Indigenous Land and Resource Justice Settlement in Victoria*, May 2004.

In summary the NTSV discussion paper suggested that a comprehensive strategy for resolution of outstanding land grievances and unresolved native title and compensation issues could be achieved through a package that included at least some of the following measures:

- 1. Identification and transfer of parcels of Crown land to traditional owners**
- 2. The identification and transfer of parks to be turned into Aboriginal owned and co-managed national parks.**
- 3. The identification and transfer of certain State Forests to be turned into Aboriginal owned State Forests.**
- 4. Recognition of Aboriginal hunting and fishing rights and statutory protection for those rights.**
- 5. Statutory rights of access for traditional purposes similar to those contained in the *Aboriginal Land Rights Act 1983 (NSW)*.**
- 6. A compensation package comprised of a percentage of land tax and land transfer tax payable over an agreed period of years.**
- 7. In return for agreeing to forgo native title rights and interests and the associated right to negotiate, there should be a percentage of State revenue derived from mining and other uses of crown land and waters paid into the compensation fund on an ongoing basis.**
- 8. Aboriginal people should be entitled to a percentage of tradeable water flows to be held by a regional body. Those tradeable water flows should be capable of being sublet.**
- 9. A comprehensive settlement will need to include recognition that Aboriginal people are entitled to a share of fisheries resources and guaranteed a share of commercially exploitable native flora and fauna.**
- 10. Agreement on issues identified as being of importance to particular traditional owner groups across Victoria.**
- 11. Aboriginal people will agree to the resolution of native title claims.**

We submit that responding to current and anticipated native title claims requires a whole-of-Government approach capable of negotiating with traditional owners to resolve land and resource grievances in a comprehensive way.

We are aware that the NTSV discussion paper has been the subject of some consideration by officers of the State – including officers involved in current policy formulation.

NTSV is therefore concerned that the State's "discussion papers" and, in particular, that dealing with the development of the Indigenous Land Management Framework (the "ILMF Overview Document") does not adequately address native title and the interests of native title holders. Furthermore, there appears to be some reluctance on the part of both AAV and DSE to engage with this issue because native title is considered to be dealt with by the Department of Justice.

This is a serious flaw as it restricts the ability of the State to comprehensively address the concerns of traditional owners. It also means that one mechanism for meeting the aspirations of traditional owners in relation to land and resource management is being excluded from consideration and some of the legal imperatives to address those concerns are being ignored.

By failing to engage with traditional owners up front, AAV and DSE have preempted the manner in which those people wish to have their aspirations met. NTSV believes that the appropriate means by which to address land and resource grievances is through Indigenous Land Use Agreements or regional settlement of native title claims, based on a comprehensive land justice package negotiated with the State of Victoria.

A whole-of-Government approach should, we submit, have as a primary objective a statewide negotiated settlement of native title matters rather than merely seeking Aboriginal comment on a number of pre-formulated ideas.

(b) Quality of Consultations

The ILMF Overview Document provides the following statement in relation to the methodology being undertaken by DSE in preparing its Discussion Paper:

"The project team, with the support of DSE Indigenous Facilitators, has contacted Indigenous representative organisations and met with groups representing a wide cross-section of the Indigenous community. The team held interviews to try to gain a better understanding of Indigenous land and resource management aspirations."²

Whatever the quality of those consultations, there has been no attempt by the DSE Project Team to consult with NTSV and its Board in relation to the development of the Indigenous Land Management Framework. This is unfortunate because NTSV believes it could have assisted DSE to engage with traditional owners to enable them to have informed and constructive input into the process.

Furthermore, NTSV would have been able to assist DSE to develop strategies to address native title concerns of traditional owners and to ensure a holistic response to the land and resource aspirations of traditional owners in Victoria.

The DSE has rightly acknowledged that the framework will be "most useful" if it "has the support of government, Indigenous communities and the broader Victorian community to ensure a high level of ownership."³ The ILMF Overview Document also states:

² DSE, Development of the Indigenous Land Management Framework, p.1.

³ DSE, Development of the Indigenous Land Management Framework, p.2.

“Indigenous Victorians will be asked to think about whether the discussion paper accurately states Indigenous land and resource aspirations.”⁴

In relation to the recent round of AAV-led consultations, NTSV is concerned that community consultations which have occurred to date have not adequately sought to distinguish between the views of traditional owners as distinct from those of the broader Victorian Aboriginal community. This has made it difficult for traditional owners to adequately express their views in those consultations.

Any Government policy initiatives will not accurately reflect the views of traditional owners or their aspirations, nor will the process have their support, unless consultations are conducted in a manner which allows those people to participate in an informed way, and without having to do so in forums where they have to compete with other people to have their voice heard.

NTSV is also concerned that the community consultations have been unnecessarily complicated. A number of Aboriginal people who have attended the community meetings have expressed the views that the consultations were complicated and that they left the meetings more confused over what is trying to be achieved in the process than before. This is of concern to NTSV, because if the participants do not understand the process or find it confusing, they are unlikely to be able to participate in a constructive way. This would, of course, undermine the quality of the information that is being obtained.

General Observations

It is the view of NTSV that the questions posed by the DSE in the ILMF Overview Document under the heading “What We Need to Know” are so general that it is difficult to prepare a detailed response to those questions. For example, what may be appropriate in relation to the management of forests may be different in relation to the management of national parks. Similarly, what may be appropriate in relation to coastal waters may require a different approach in relation to inland rivers. General questions such as “How should Indigenous people be engaged in land and resource management?” are therefore somewhat difficult to respond to.

NTSV would, however, like to reiterate a number of general principles which it considers need to be addressed in any Discussion Paper which is prepared.

(1) The Need to Protect the Interests of Traditional Owners

Although, land and resource justice for Aboriginal people needs to occur in a manner that accommodates the broad range of circumstances in which Victorian Aboriginal people find themselves in contemporary society, it is imperative that the rights and interests of traditional owners in relation to land and resource management are respected and protected. The interests of traditional owners need to be expressly accommodated because:

⁴ DSE, Development of the Indigenous Land Management Framework, p.2.

- (a) it is traditional owners who have knowledge of their country and the appropriateness of various practices. Their involvement will be necessary to ensure that appropriate land and resource management occurs.
- (b) to the extent that traditional owners have native title rights and interests, they have legally enforceable interests which are required to be protected.
- (c) to the extent that traditional owners have native title rights and interests, procedural rights under the NTA are required to be observed and compensation may be payable for interference with those interests. Any difficulties this may cause for the State can be avoided if the land and resource management mechanisms that are introduced adequately accommodate those interests and are introduced with their consent.
- (d) ignoring traditional owners only serves to compound dispossession and their disenfranchisement from decisions affecting their country.

Recognising the rights of traditional owners need not occur by reference only to native title holders. Indeed such an approach would be unduly restrictive given the limitations on native title which are discussed below. Statutory definitions could be developed in consultation with traditional owners to ensure that they are appropriately respected. For example, the New South Wales *Aboriginal Land Rights Act 1983* provides for a register of traditional owners. That register considers traditional owners to be Aboriginal people who:

- “(a) are directly descended from the original Aboriginal inhabitants of the cultural area in which the land is situated, and
- (b) have a cultural association with the land that derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land.” (s.171(2) ALRA)

A similar scheme in Victoria might be a useful part of the process of identifying the traditional owners for the purposes of the Aboriginal Land and Resource Development Strategy (and the ILMF).

(2) Traditional Owners' Consent

A crucial precondition to achieving land and resource justice for traditional owners is to ensure that any outcome is achieved with their informed consent. In advocating a comprehensive settlement of claims NTSV's discussion paper stated that:

“The active participation of Aboriginal traditional owners in any such State initiative is essential as a matter of principle. Governments should secure the informed consent of Aboriginal people before taking steps which affect their interests.”⁵

This should be a non-controversial principle. It is best practice, consistent with international human rights standards, and should be a principle which guides the State's

⁵ NTSV, *Towards A Comprehensive Indigenous Land and Resource Justice Settlement in Victoria*, May 2004.

approach to achieving land and resource justice for traditional owners. Provisions under the NTA which allow for Indigenous Land Use Agreements are one mechanism by which this could be achieved. NTSV does not believe that informed consent is achieved by merely consulting Aboriginal people on a range of predetermined issues or simply taking their views on those issues into account.

(3) Recognition of Native Title Rights and Interests

In his Ministerial Statement on Aboriginal Reconciliation delivered to the Victorian Parliament on 26 August 2004 the Premier identified the practical steps that the Government is taking to deliver real outcomes to Indigenous Victorians. He identified one of those “practical steps” as being a commitment to respond to Indigenous Victorians’ aspirations for native title.⁶

As outlined above, NTSV is concerned that the current process is paying insufficient regard to the recognition and protection of native title rights and interests. This is unfortunate. The Aboriginal Land and Resource Development Strategy needs to contemplate the existence of native title rights and interests and look at means of protecting and complementing them where they do exist and providing other means of recognising and protecting customary rights where native title rights are unable to be proved or have been extinguished by other forms of land title.

The NTSV Board has consistently raised the need for the matters which will be the subject of the proposed Strategy to specifically address the needs of native title claimants. Notwithstanding these representations, NTSV and the groups it represents find themselves endlessly mired in a bureaucratic tangle which sees the responsibility for native title held by the Attorney-General’s Department, while the broad spectrum of issues such as those to be addressed in the proposed discussion paper are dealt with by the Department of Victoria Communities and DSE, neither of which appear to recognize the role of traditional owners nor to adequately engage native title claimants in discussions that clearly go to their fundamental rights and interests.

By not engaging with traditional owners in this process and addressing their aspirations, AAV and DSE risk compromising the ability for the State to resolve their native title claims. NTSV is concerned that there is inadequate coordination on the State’s behalf to ensure that the proposed Land and Resource Development Strategy (and the ILMF) can facilitate the settlement of the native title claims.

NTSV would like to stress that, although it is essential that the rights of traditional owners be recognised, it is imperative that their interests not be limited to the framework of the *Native Title Act* 1993 (Cth). As ATSIC Commissioner Rodney Dillon has noted:

“... one unintended and negative impact of the recognition of native title has been the increasing tendency of Australian governments to consider Aboriginal interests in marine resources only in terms of native title rights and interests. It is, however, a flawed approach to see the need to recognise the rights of Aboriginal people only in terms of the limited, and artificial, confines of native title.

⁶ Premier, The Hon Steve Bracks MP, Ministerial Statement on Aboriginal Reconciliation, Delivered to the Victorian Parliament on 26 August 2004.

Our involvement in resource management, the continuation of customary fishing rights, and our need to be able to obtain a livelihood from our country is required as a human right as well as an issue of social justice.⁷

The legal construct of native title has significant limitations. At the heart of the problem is the fact that the law of native title is not reflective of the reality of continuing Aboriginal interests in land. Laws that deem Aboriginal interests to be extinguished after various dealings in land underline the point in this regard. Aboriginal people can still have strong traditional connection to country but be unable to have native title rights and interests recognised, merely because of an inconsistent land dealing at some time in the past.

Comments on Specific Issues Raised in the ILMF Overview Document

For convenience we have used the questions identified by DSE:

(1) How could land and resource managers ensure effective engagement with Indigenous people? How should Indigenous people be engaged in land and resource management? How can Indigenous perspectives be best integrated into land and resource management?

NTSV believes that it is essential that traditional owners be involved in the management of land and resources, for the reasons outlined above. However, NTSV does not believe that the general questions set out in the ILMF Overview Document can be responded to in a meaningful way. As noted above, what will constitute an appropriate involvement of Indigenous people and how that may be achieved is likely to vary between resource categories and between various regions and will also vary depending on how that resource is currently being managed by the State.

NTSV would also want to make the general observation that it is essential that the participation in land and resource management be more than symbolic. As Rodney Dillon has noted in relation to Oceans Policy:

“Making a statement in relation to Aboriginal involvement in the management of coastal resources, and even making provision for such consultation to occur, does not guarantee effective involvement. Aboriginal people will be unable to benefit from measures designed to increase their involvement in those processes unless they are adequately resourced to participate effectively in those processes.

Furthermore, creating requirements for Aboriginal people to be consulted or to have representation on various committees does not mean that Aboriginal views will be accommodated. Meaningful recognition of a role in marine resources management means being able to make decisions in relation the management of resources. There are now, across the country, numerous policies which require consultation with Aboriginal people in relation to resources management but

⁷ Dillon, R., “Aboriginal Peoples and Oceans Policy in Australia – An Indigenous Perspective, *Journal of Indigenous Policy*, Issue 3, 2004, p. 146.

merely being able to put a point of view across, which may or may not be taken into account, does not constitute management of resources.”⁸

Others have set out the human rights basis for involvement of Aboriginal people in resource management:

“For Aboriginal people, having involvement in the manner in which resources are managed is as much an incident of ownership as the recognition of ownership of the soil itself. It is also a crucial component of the enjoyment of many traditional activities. There is no utility in, or enjoyment of, a right to traditional hunting and fishing activities if there are no fish to catch or if the fish are so full of toxins that they are not fit for consumption.

A right to be involved in the management of country clearly falls within the fields of operation of international instruments relating to the protection of property interests and the right to enjoy Aboriginal cultural heritage. Indeed, the Human Rights Committee has commented that Article 27 of the ICCPR imposes obligations to take “positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions that affect them.

The need to involve Aboriginal people in decision making processes in relation to natural resources is also recognised in Principle 22 of the Rio Declaration on Environment and Development and Article 8(j) of the Convention on Biodiversity. Key concepts in this recognition are “effective participation” and “equitable sharing of benefits”.

The starting point for the recognition and respect of these rights is not to see Aboriginal people’s involvement in resource management as just another interest group that needs to be consulted. Rather, it requires a starting point whereby Aboriginal people are seen as legitimate stakeholders with whom tangible outcomes need to be negotiated.”⁹

Traditional owners in Victoria are likely to see their participation in resource management in a similar way.

(2) Should Indigenous Victorians be given Aboriginal cultural access rights to land and natural resources? If so,

- **Should Aboriginal cultural access apply to all Indigenous Victorians in all or some areas of the State or should processes be developed to determine Aboriginal cultural access to land and natural resources on a regional or country basis?**
- **Which land and natural resources should be made available?**

In responding to this question, NTSV has assumed that a reference to ‘cultural access rights’ is a reference to hunting, fishing and gathering rights of Aboriginal people.

⁸ Dillon, R., “Aboriginal Peoples and Oceans Policy in Australia – An Indigenous Perspective, *Journal of Indigenous Policy*, Issue 3, 2004, pp. 151-152.

⁹ Behrendt, J., and Thompson, P., “The Recognition and Protection of Aboriginal Interests in NSW Rivers”, *Journal of Indigenous Policy*, Issue 3. 2004, pp.64-65.

Should Cultural Access Rights Be Given?

NTSV believes that it is essential that the Aboriginal people of Victoria have their rights to hunt and fish recognized and protected in legislation. Provisions similar to s.211 of the NTA should be introduced to ensure that those rights are not regulated out of existence by other laws.¹⁰

A right to hunt and fish is of no benefit to Aboriginal people unless they have access to lands upon which to carry out those rights. Accordingly, it is essential for land to be made available where such rights can be carried out.

Who Should the Cultural Access Rights Apply To?

NTSV's principal interest is in ensuring that the rights of traditional owners are recognised and protected. At the very least, cultural access rights should apply to those people and their invitees.

Whether other Aboriginal people should be able to exercise those rights in a given area will be a matter that will need to be considered in due course. However, if the cultural access rights are to be managed in consultation with Aboriginal people, it is likely that traditional owners will only find a broader entitlement acceptable if those with a traditional connection to country are the relevant decision makers in relation to when and how those rights are to be exercised.

NTSV believes that there is a strong case for a broader application of licence exemptions for all Aboriginal people in the State, particularly in relation to fishing.

Which Land and Resources Should Be Made Available?

NTSV believes that all types of Crown Land should be made available for cultural access rights. Given the amount of land which has already been alienated, it would be unfair to Aboriginal people to restrict access further. The manner in which the rights are carried out in areas where other members of the public are present can be managed through plans of managed drafted in consultation with the traditional owners for the area concerned.

Mechanisms for land access in other States also need to be considered. For example, a statutory mechanism for gaining access to land can be found in the *Aboriginal Land Rights Act 1983* (NSW). Section 47 of that Act provides that an Aboriginal Land Council may "negotiate agreements with the owner, occupier or person in control of any land to permit any specified Aborigine or group of Aborigines to have access to the land for the purpose of hunting, fishing or gathering on the land." Section 48 provides that where a Local Aboriginal Land Council wishes to obtain access to land for the purpose of hunting and fishing but has been unable to negotiate that access they can make an application to the Land and Environment Court to provide those rights.

The Court has the power to permit such access after considering any objections. Similar provisions could be enacted so that access can be obtained by Aboriginal people to particular categories of land. NTSV understands that that provision has operated in New

¹⁰ This provision is discussed in more detail below.

South Wales without controversy and ought to be considered in the Victorian Government's proposals.

NTSV also believes that Indigenous participation in resource management should not be limited to particular resources. Nor should they have to nominate the types of resources in which they wish to be involved. If there is an intention on the part of DSE to identify areas of land and resource management in which Indigenous people will not be able to participate, the DSE should identify those areas and provide the justification for the non-participation of Indigenous people. Otherwise Aboriginal people should be able to be involved unless they express a contrary view.

NTSV accepts however that a different level of involvement may need to be provided for in relation to different resources. Furthermore different communities may be more concerned over the management of particular resources over others. This may vary from community to community. This is part of the reason that NTSV wishes to stress to DSE the need to specifically engage with traditional owners in its consultation process.

(3) Should Aboriginal cultural access include:

- **Access for commercial purposes?**
- **Access to threatened species?**
- **Restrictions on catch, possession and equipment?**
- **Access to protected areas, including parks and nature conservation reserves?**
- **Exemptions from the payment of fees?**
- **Exemptions from the need to hold licences or other necessary authorities?**

NTSV would make the following observations in relation to these questions:

- "Aboriginal cultural access" should be for both commercial and recreational purposes.
- In relation to the issue of access to threatened species, restrictions on equipment and licencing issues could be considered. NTSV believes that Section 211 of the NTA provides an appropriate model for how a balance can be achieved between allowing traditional activities to continue and the need to protect endangered species. Section 211 provides that:

Preservation of certain native title rights and interests

Requirements for removal of prohibition etc. on native title holders

(1) Subsection (2) applies if:

(a) the exercise or enjoyment of native title rights and interests in relation to land or waters consists of or includes carrying on a particular class of activity (defined in subsection (3)); and

(b) a law of the Commonwealth, a State or a Territory prohibits or restricts persons from carrying on the class of activity other than in accordance with a licence, permit or other instrument granted or issued to them under the law; and

(b)(a) the law does not provide that such a licence, permit or other instrument is only to be granted or issued for research, environmental protection, public health

or public safety purposes; and

(c) the law is not one that confers rights or interests only on, or for the benefit of, Aboriginal peoples or Torres Strait Islanders.

Removal of prohibition etc. on native title holders

(2) If this subsection applies, the law does not prohibit or restrict the native title holders from carrying on the class of activity, or from gaining access to the land or waters for the purpose of carrying on the class of activity, where they do so:

- (a) for the purpose of satisfying their personal, domestic or non-commercial communal needs; and
- (b) in exercise or enjoyment of their native title rights and interests.

Definition of class of activity

(3) Each of the following is a separate *class of activity*:

- (a) hunting;
- (b) fishing;
- (c) gathering;
- (d) a cultural or spiritual activity;
- (e) any other kind of activity prescribed for the purpose of this paragraph.

- Whether Aboriginal people should be able to carry out traditional activities in nature conservation areas or national parks will need to be determined in consultation with the Aboriginal people concerned. Aboriginal people should not be precluded from such areas if they are the only areas in the region where Aboriginal people can carry out those activities.
- Traditional owners should be exempt from paying fees to enter national parks on their own country.

(4) Should Indigenous Victorians be assisted in acquiring and managing land and natural resources?

There is an undeniable need for Aboriginal people in Victoria to be assisted in acquiring and managing land and natural resources in the State. Victoria is one of the only States in Australia never to provide a legislative scheme for land justice for Aboriginal people, although there have been some land transfers under specific legislation (eg Framlingham and Lake Tyers).

Victorian Aboriginal people are recognised by the State as being the owners of approximately 0.01%¹¹ of the land that was once all theirs. In other words, the current generation of Victorians continues to benefit from the exploitation of 99.99% of the land and resources that once provided Victorian Aboriginal people with their economic spiritual and physical well-being.

Various categories of land are available to be dealt with in order to address these problems:

¹¹ See Atkinson, W., *Yorta Yorta Struggle For Justice Continues*, 1995 and O'Neill, N., and Handley, R., *Retreat from Injustice: Human Rights in Australian Law*, Federation Press, 1994, pp.95-97.

Crown Land

It is of course open for Victoria to develop a legislative scheme for the transfer of Crown Land to Aboriginal people. Every other State has developed some scheme for this to occur.

It is unlikely, however, that the return of Crown land alone to Victorian traditional owners will result in the establishment of a sufficient land base for Aboriginal people in Victoria to provide land justice and enable the cycle of welfare dependency to be broken. There are approximately 550,000 hectares of land in Victoria currently classified as Crown land. That represents only 2.4% of the State.¹² The lack of Crown land available for transfer means that there need to be alternative measures implemented to redress the dispossession of Aboriginal people.

State Forests

The uneven distribution of Crown land will mean that different Aboriginal communities in Victoria will have different amounts of land available to them. Land that is currently reserved or dedicated for forestry purposes is one category of land that could be considered for transfer to traditional owners. Furthermore, land managed for forestry purposes can be actively managed in a way that allows for the concurrent exercise of Aboriginal hunting and fishing rights.

National Parks

A considerable part of the lands that are the subject of native title claims in Victoria are National Parks. In other States and Territories there has been recognition of Aboriginal interests in land through various arrangements for Aboriginal ownership and management of National Parks. There is no reason why similar schemes can not be implemented in Victoria. It is also open for the State to establish equivalent schemes in relation to Marine Parks for coastal Aboriginal peoples.

(5) Should Indigenous Victorians be allocated revenue from the use of land and natural resources?

The concept of a fund as a form of compensation for dispossession of Aboriginal people is not new. It should not be considered controversial. They have been established elsewhere.

The benefits of such a fund should be obvious. A compensation fund for Aboriginal people to purchase land in circumstances where there is insufficient land in public ownership will enable a reasonable land base to be returned to Aboriginal people. It will form a financial basis by which traditional owners in Victoria can strive for self-sufficiency into the future. It will also allow for them to buy into commercial ventures and to purchase properties of particular cultural significance at market value in the future.

¹² Furthermore, the location of that land is not evenly distributed to ensure that all Aboriginal communities will benefit from its transfer.

One example of such a fund can be found under the *Aboriginal Land Rights Act 1983* (NSW), which provided for the payment into a special New South Wales Aboriginal Land Council Account a percentage of the total State land tax over a 15 year period between 1983 and 1998.

That fund is currently in the order of \$480 million.

A similar arrangement could be developed in Victoria. The 2003/2004 State budget estimates indicate that tax revenue for the financial year is expected to be \$26.5 billion. If that is the tax revenue in a single year then it seems that there is considerable scope to provide a meaningful compensation package.

Once a fund is established it would be open to funding it on an ongoing basis by reference to any number of licencing fees, royalties or other appropriate methods. A compensation fund could be resourced by a range of sources including land tax, a percentage of duty on land transfers and/or a percentage of mining revenues. It could also be derived from a percentage of gambling revenue. Gambling revenue is expected to be \$1.4 billion in the 2003/2004 financial year alone. Eighty-five percent of those revenues go into the Community Support Fund. It may be appropriate for a percentage to be used as part of a compensation fund for Aboriginal people.

(6) Should Indigenous Victorians receive natural resource allocations? If so, how could assistance or allocations be best provided to Indigenous Victorians?

It is essential that the economic importance of natural resources to traditional owners be reflected in tangible outcomes rather than tokenistic measures. Aboriginal people have historically been excluded from the wealth that is generated annually from the resources contained in their traditional country. That wealth is considerable and forms a benchmark against which the adequacy of any proposal for the resolution of Aboriginal land grievances can be assessed.

The gross value for Victorian fisheries in 2001-2002 alone has been estimated at \$117 million.¹³ The value of Victorian oil and gas was approximately \$3.2 billion during the 2002/2003 financial year. Non-coal mineral production is valued at \$93 million while extractive industries production for the 2001/2002 financial year alone was \$363 million.¹⁴

No substantive measures have been implemented to remedy indigenous injustice. Subsequent to the recognition of native title in *Mabo [No.2]*,¹⁵ it has been convenient for governments to see the need for Aboriginal land and resource justice only in terms of enabling Aboriginal people to seek an order that native title exists in the Federal Court. Such a mean-spirited approach is all the more miserly when it is remembered that this option only arose because of the development of the common law of Australia and not because of any effort on the part of State governments. It is even more unjust when it is

¹³ ABARE, *Australian Fisheries Statistics 2002*, p.2.

¹⁴ Information obtained from Victorian Department of Primary Industries homepage http://www.dpi.vic.gov.au/web/root/domino/cm_da/nrenti.nsf/frameset/NRE+Trade+and+Investment?OpenDocument

¹⁵ *Mabo v State of Queensland [No.2]* (1992) 175 CLR 1.

remembered that the State has until comparatively recently actively *opposed* the recognition of native title in native title determination proceedings.

In such circumstances there is a compelling case for Aboriginal people to be provided with an allocation of particular resources. While all living and natural resources need to be investigated in the proposal, it is possible to make some observations in relation to a number of specific resources:

Fishing Industry

Aboriginal people have always derived their economic well-being from the natural environment. Fishing activities, whether occurring in coastal areas or inland fisheries, have always been an important part of that economy. Fishing resources have always been managed by Aboriginal communities to ensure the resource is not over-exploited.

There could be a setting aside of an agreed proportion of any current or future fisheries resource. Secondly, there could be a purchase of licences (or granting of licence exemptions) to allow Aboriginal people to participate in the commercial fishing industry. Thirdly, ensuring Aboriginal involvement in aquaculture projects and other emerging industries and recognising Aboriginal ownership of resources that have not yet been the subject of commercial exploitation may be another means of providing tangible benefits in any land and resources justice settlement.

Rights to the Commercial Exploitation of Other Native Flora and Fauna

There is increasing interest in the commercial exploitation of native flora and fauna for food and medicinal purposes. In some instances Aboriginal knowledge has been relied upon and traditional practices mimicked in the development of these industries.

They are ordinarily the subject of State regulation and licensing arrangements. As these industries develop Aboriginal people risk being marginalised once again. Any comprehensive settlement should seek to secure to Aboriginal people in Victoria a share of these resources, including their exploitation.

Water

Currently, there is a national recognition of the need to reassess the manner in which water resources are managed. This has led to a need to increase pressure to create tradable water rights. In the rush to implement these reforms, insufficient regard has been paid to the interests of Aboriginal people in river systems. The changes to those regimes without ensuring an adequate share of the resource to traditional owners only serve to continue processes of colonisation and dispossession.

Aboriginal people should be provided with a fair quota of tradeable water rights. In New South Wales the principle of a Water Trust has been accepted, although the details are still being formulated.¹⁶ There is no reason why a water trust could not be established in Victoria to ensure that Aboriginal people are not excluded from that resource.

¹⁶ Behrendt, J., and Thompson, P., "The Recognition and Protection of Aboriginal Interests in NSW Rivers", *Journal of Indigenous Policy*, Issue 3. 2004, pp.124-126.

Timber Resources

Aboriginal people should be involved in the management and commercial exploitation of timber resources, including plantation timbers. NTSV understands that precedents exist in overseas jurisdictions that allow this to occur¹⁷ and can also be implemented in Victoria.

(7) How should rights of others with an interest in Crown land and resource management be considered?

It is not clear to NTSV what information is intended to be sought in response to this question. How the rights of others with an interest in Crown land and resource management are considered will depend on the nature of the land and the resource and the nature of the interest. It is not an issue that ought to be dealt with at a general level.

It can at least be noted that the existence of other rights and interests is not, and should not be taken to be, a basis for denying the need for land and/or management responsibility to be transferred to Aboriginal people. Under other legislative schemes which provide for the transfer of land, provision is made for the protection of other interests, where necessary through easements.¹⁸ Any existing leases could be retained where the underlying tenure is transferred to Aboriginal people.

(8) How would sustainable management of land and natural resources be maintained?

It is not clear to NTSV what is intended to be sought by this question. We would expect, however, that the principles and policy proposals that we have articulated in this submission would suggest the approach that NTSV would, in representing the interests of traditional owners in this State, take in relation to issues of sustainable management of land and natural resources.

**Native Title Services Victoria Ltd
November 2004**

¹⁷ See for example Chapter 17 of the Kluane First Nation Agreement 2003, http://www.ainc-inac.gc.ca/pr/agr/klu/fia_e.html

¹⁸ See for example, s.36(5A), *Aboriginal Land Rights Act 1983* (NSW);