



Research Brief

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Parliamentary Library Research Service
Department of Parliamentary Services
ISSN 1836-7828 (Print) 1836-8050 (Online)

Number 13
August 2010

Traditional Owner Settlement Bill 2010

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NB: Readers should note that this Research Brief was current at the time of its preparation prior to the conclusion of debate on the Bill by the Victorian Parliament. For further information please visit the Victorian Legislation and Parliamentary Documents website @ <http://www.legislation.vic.gov.au>.

Introduction

The Victorian Government introduced the Traditional Owner Settlement Bill 2010 ('the Bill') on 27 July 2010. If passed, the Bill will establish a new Act for a state-based native title settlement framework. The framework is designed to provide a state-based means of settling the native title claims of Indigenous Victorians, and act as an alternative to the litigious processes provided by the Commonwealth *Native Title Act 1993* ('the NTA').

The settlement framework provided by the Bill is based on the Report and recommendations of the Steering Committee for the Development of a Victorian Native Title Settlement Framework. The framework enables Victorian traditional owner groups to enter into negotiated settlement agreements directly with the state government rather than pursue native title claims through the courts. Traditional owner groups will have the option to withdraw existing native title claims, or agree not to make native title claims in the future, in exchange for a state-based 'recognition and settlement agreement'.

A recognition and settlement agreement functions by recognising the traditional owners and their cultural associations to certain Crown land in Victoria, and confers rights to access, own or manage that land. Under the proposed settlement framework, the recognition and settlement agreement constitutes the overarching agreement between traditional owners and the state. Recognition and settlement agreements may then include four sub-agreements, known as 'land agreements', 'land use activity agreements', 'funding agreements' and 'natural resource agreements'. The Bill sets out the details of each of these agreements and makes consequential amendments to related Acts.

1. Second Reading Speech

The Premier, the Hon. John Brumby, gave the second reading speech for the Traditional Owner Settlement Bill on 28 July 2010. Mr Brumby began his speech by stating that the Bill seeks to deliver land justice to traditional owner groups in Victoria. He said that while the Native Title Act represents a major step forward for Australia, there are shortcomings in the approach taken under that Act, primarily because the legislation was never intended to address land justice in the more settled regions of the country. Under the NTA, Aboriginal people are required to prove that they have maintained a continuous connection with their country since European colonisation. Mr Brumby said that, in Victoria's case, the task of meeting this requirement is 'almost insurmountable' given that the dense European settlement of the state dispossessed Indigenous people of their land.¹ He also pointed to the lengthy timeframe and large financial cost of determining claims through the litigious approach of the NTA. He additionally said that the current system has not functioned well for those wanting to do business on Crown land, because of the delays and uncertainty caused by drawn out litigation and the complex future acts regime of the NTA.²

Mr Brumby said that the Bill provides an alternative approach to native title in Victoria, an approach which 'delivers the practical and symbolic recognition of traditional owners' rights in Crown lands' and 'provides certainty to land managers, to industry

¹ Victoria, Legislative Assembly (2010) *Debates*, 28 July, Book 10, p. 2751.

² *ibid.*

and developers'.³ He said that the Bill establishes the legal framework for a state-based system that enables the government to enter into agreements directly with traditional owner groups, outside of any court setting.⁴ These agreements will be registered as Indigenous Land Use Agreements (ILUAs) under the NTA and will be legally binding.⁵ The agreements will continue in perpetuity and will give all the parties finality and certainty. He explained that the Bill empowers the Attorney-General to enter into a 'recognition and settlement agreement' with a traditional owner group entity for a given area. The four sub-agreements that sit below the recognition and settlement agreement – land agreements, land use activity agreements, funding agreements and natural resource agreements – will be entered into simultaneously by the state and the traditional owner group entity. He said that the sub-agreements will require the consent of relevant Ministers who administer the legislation with which the Bill will interact, in order to ensure a co-ordinated, whole-of-government approach.⁶

Mr Brumby concluded his speech by stating that the Traditional Owner Settlement Bill represents a new and better approach to land justice in Victoria, which will: fast-track the resolution of claims lingering in the courts; end public expenditure on limited outcomes; provide for the good management and appropriate development of Crown lands and natural resources; and foster positive relationships between the government and Victoria's traditional owners.⁷

2. Background

The following section of the Research Brief provides background to the Traditional Owner Settlement Bill. It provides an overview of the Mabo decision and the meaning of native title, the introduction of the *Native Title Act 1993* and the 1998 amendments, and the determination of native title claims in Victoria. It concludes with an overview of the Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework.

The Mabo Decision and Native Title

The Commonwealth *Native Title Act 1993* was enacted as a result of the decision made by the High Court of Australia in the case of *Mabo v Queensland (No. 2)* 1992. In the Mabo decision, the High Court recognised that the Meriam people of the Torres Strait held native title over part of their traditional lands. The High Court thus found that the common law of Australia recognised the rights and interests to land held by Aboriginal and Torres Strait Islander people under their traditional laws and customs.⁸ The decision overturned the legal doctrine that Australia was 'terra nullius', or land belonging to no one, at the time of colonisation. The High Court determined that Australia was not unoccupied on settlement and that Indigenous inhabitants had, and continue to have, legal rights to their traditional land, unless these rights have been

³ *ibid.*

⁴ *ibid.*

⁵ It should be noted that while the Bill is designed to provide an alternative to pursuing claims through the Federal Court under the NTA, the state-based agreements reached under the proposed legislation will be registered as ILUAs under the NTA.

⁶ Victoria, Legislative Assembly (2010), *op. cit.*, p. 2752.

⁷ *ibid.*, p. 2754.

⁸ Attorney-General's Department (2009) 'Indigenous Law and Native Title: What is Native Title?', Canberra, AG, viewed 16 August 2010, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_WhatisNativeTitle>.

extinguished by the Crown granting titles to land that are incompatible with native title, such as freehold title.⁹

Native title is, then, a common law principle which recognises that Indigenous people did not necessarily lose their land when the colonies were established, if they have maintained a continuous connection to that land. Native title is differentiated from 'land rights', which involve a special grant of land under freehold title or perpetual lease by the Commonwealth, state or territory government to an Indigenous community or company.¹⁰ Native title is, rather, a set or 'bundle' of rights relating to land that is not privately owned. Native title may amount to exclusive possession but is often constituted by more limited non-exclusive rights, such as the right to access the area, camp on the area, hunt, fish and gather food and bush medicines, and conduct cultural activities.¹¹

Following the Mabo decision, the Keating government affirmed the findings of the High Court. It opted to introduce native title legislation rather than allowing the law of native title to develop on a case by case basis through further litigation.¹² The Commonwealth Coalition Opposition, most state governments and the mining industry sought to diminish or reject the High Court finding.¹³ Debate over the formulation of the native title legislation was intense and prolonged. David Ritter writes that:

The final shape of the *Native Title Act 1993* was a product of petitioning, alliance building, negotiation and compromise that in the end for diverse reasons was supported by Labor, the minor parties in the Senate, most of the Aboriginal leadership, the Labor-held state governments and the National Farmers' Federation, but opposed by the Liberal and National parties, the Minerals Council of Australia, the states held by the parties of the centre-right and the government of the Northern Territory.¹⁴

Native Title Act 1993

The Native Title Act received royal assent on 24 December 1993 and came into effect on 1 January 1994. The NTA created a system under which Indigenous people could lodge claims for the recognition of native title. It set out the processes for determining where native title exists, how future activity impacting on native title might be undertaken, and the provision of compensation where native title is impaired or extinguished.¹⁵ It empowered the Federal Court to make determinations of native title and compensation, established the National Native Title Tribunal (NNTT), and provided Indigenous claimants with the 'right to negotiate' in regard to future acts on the specified land.¹⁶ Although the NTA established a system for dealing with native title claims, many matters were still left to determination by the courts.¹⁷

⁹ C. Cunneen & T. Libesman (1995) *Indigenous People and the Law*, Sydney, Butterworths, p. 108.

¹⁰ J. Healey (2007) *Native Title and Land Rights*, Issues in Society Series, Balmain, The Spinney Press, p. 13.

¹¹ National Native Title Tribunal (2008) *About Native Title*, Perth, NNTT, viewed 16 August 2010, <http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/Booklets.aspx>, p. 7.

¹² D. Ritter (2009) *Contesting Native Title: From Controversy to Consensus in the Struggle over Indigenous Land Rights*, Crows Nest, Allen & Unwin, p. 5.

¹³ R. Bartlett (2004) *Native Title in Australia*, Second Edition, Chatswood, LexisNexis Butterworths, p. 36.

¹⁴ D. Ritter (2009) *op. cit.*, p. 5.

¹⁵ *Native Title Act 1993* (Cth) Section 3; J. Healey (2007) *op. cit.*, p. 4.

¹⁶ *Native Title Act 1993* (Cth) Section 4(7).

¹⁷ D. Ritter (2009) *op. cit.*, p. 9.

In 1996, the High Court determined in *Wik Peoples v Queensland* that the grants of two Queensland pastoral leases did not necessarily extinguish all native title and that some native title rights may coexist with the rights of the pastoral leaseholders.¹⁸ The Wik decision engendered further controversy. The Howard government had been elected on a platform that included the amendment of the NTA. In response to the Wik decision, the Howard government developed a 'Ten Point Plan' which was designed to reduce the impact of the NTA on miners and pastoralists. The Howard government then introduced the Native Title Amendment Bill in mid 1997. After a long and contested passage through the parliament the substantially amended Bill was passed in mid 1998.¹⁹

The '1998 amendments', as they become known, made significant changes to the NTA. These changes included; revised claims processes, more complex procedures regarding future acts, the introduction of a threshold test for access to the right to negotiate, and a greater emphasis on agreement making through the provision of Indigenous Land Use Agreements (ILUAs).²⁰ The ILUA provisions established an opportunity for parties to negotiate voluntary and binding agreements about the use of the land, the intersection of various rights and interests, and how the relationship would proceed in the future.²¹ The amendments, with the exception of the ILUA provisions, were opposed by Indigenous representatives who asserted that they undermined the protection and recognition of native title rights.²²

The passage of the 1998 amendments, and determinations of test cases before the courts between 1998 and 2002²³, increased certainty and definition about the distribution of rights and power within the native title system.²⁴ The post 2002 period can be characterised by increased legal certainty about the operation of the native title system, a decrease in political controversy, and an increase in the practice of agreement making.²⁵

Native Title Applications and Determinations

Under the NTA, Indigenous people can apply to have their native title rights recognised by filing an application for a determination of native title in the Federal Court. The court refers the application to the Native Title Registrar at the National Native Title Tribunal. The Registrar then considers whether the application meets the requirements for registration (the registration test) on the Register of Native Title Claims.²⁶ In order to meet the conditions of the registration test, applicants must meet certain merit and procedural standards, including:

- reasonable identification of the area subject to the native title claim,

¹⁸ National Native Title Tribunal (2008) *About Native Title*, op. cit., p. 5.

¹⁹ R. Bartlett (2004) op. cit., pp. 52-53.

²⁰ D. Ritter (2009) op. cit., p. 11.

²¹ Aboriginal and Torres Strait Islander Social Justice Commissioner (2009) *Native Title Report 2009*, Sydney, Australian Human Rights Commission, viewed 18 August 2010,

<http://www.hreoc.gov.au/social_justice/nt_report/ntreport09/index.html>, p. 5.

²² *ibid.*, p. 4.

²³ Landmark decisions on native title include: *Mabo v Queensland (No.2)* 1992, *Wik Peoples v Queensland* 1996, *Commonwealth v Yarmirr* 2001, *Western Australia v Ward* 2002, *Wilson v Anderson* 2002, *Yorta Yorta Aboriginal Community v Victoria* 2002. National Native Title Tribunal (2008) op. cit., pp. 4-5.

²⁴ D. Ritter (2009) op. cit., p. 11.

²⁵ *ibid.*, p. 12.

²⁶ National Native Title Tribunal (2010), 'Applications and Determinations', Perth, NNTT, viewed 24 August 2010, <<http://www.nntt.gov.au/Applications-And-Determinations/Pages/default.aspx>>.

- sufficient description of the persons in the native title group so they can be identified,
- a description of the native title rights and interests claimed so that they can be readily identified by the Registrar,
- the provision of a sufficient factual basis for the rights and interests claimed, including that the group has a continuing association with the area claimed; that traditional laws and customs giving rise to the interests exist; and that the claim group have continued to hold native title in accordance with those traditional laws and customs.²⁷

If an application satisfies the conditions of the registration test, the details of the accepted application are entered on to the Register of Native Title Claims, and the application becomes a registered claim. If an application does not satisfy the conditions of the registration test, the Registrar will not accept it for registration.²⁸

The determination of an accepted native title claim is then made by the Federal Court, the High Court or another recognised body. A native title determination can be a litigated determination (which is made following a trial process), a consent determination (where parties reach an agreement), or an unopposed determination (when an application is not contested by another party).²⁹

Nationally, since the enactment of the NTA on 1 January 1994, there have been 129 native title determinations. The average timeframe for an application to be determined by consent was 6 years and 1 month. The average timeframe for an application to be determined through litigation was 6 years and 11 months, and the average timeframe for an uncontested application was 1 year. Of the 129 determinations made so far, native title was found to exist in 92 cases and not to exist in 37 cases. At present, successful determinations of native title cover 12.1% of the Australian landmass. There are 435 accepted native title applications pending and the average time since filing is 8 years and 5 months. There are currently 401 registered ILUAs³⁰.

Native Title Determinations in Victoria

Since the enactment of the NTA, there have been three determinations of native title in Victoria: two by consent (Wimmera 2005, Gunditjmara 2007) and one via litigation (Yorta Yorta 2002). The determination of the Wimmera claim took 10 years, the Gunditjmara claim took 11 years and the Yorta Yorta litigation took 9 years. The two consent determinations are set out in registered ILUAs between the State of Victoria

²⁷ National Native Title Tribunal (2007), 'Native Title Facts: What is the Registration Test?', Perth, NNTT, viewed 24 August 2010, <<http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/default.aspx>>.

²⁸ *ibid.*

²⁹ J. Healey (2007) *op. cit.*, p. 18.

³⁰ These figures are correct as of 31 December 2009. National Native Title Tribunal (2010) *National Report: Native Title*, March 2010, Perth, NNTT, viewed 18 August 2010, <http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/Corp_publications.aspx>, pp. 2,15.

and the traditional owners.³¹ There are currently 14 accepted Victorian native title claims pending, with most lodged 10 to 11 years ago.³²

The unsuccessful Yorta Yorta determination (*Yorta Yorta Aboriginal Community v Victoria* 2002) is considered a landmark decision that helped to clarify native title law in regard to settled areas of Australia. The Yorta Yorta claim was made to public land and waters in the Murray-Goulburn region of northern Victoria and southern New South Wales. The claim was made on the basis that the Yorta Yorta people had a continuing traditional connection with the claimed areas which could be demonstrated through the continuing observance of traditional laws and customs. The Yorta Yorta made an application for a determination of native title in early 1994. The application was accepted and referred to the Federal Court in 1995. The trial took place between late 1996 and late 1998 before Justice Howard Olney. It was the first native title claim to be heard by the Federal Court under the NTA.³³

In December 1998, Justice Olney determined that the Yorta Yorta could not demonstrate a continuing traditional connection to the claimed areas and that native title was not in existence. He emphasised the impact of European settlement on the Yorta Yorta and concluded that the 'tide of history has indeed washed away any real acknowledgment of their traditional laws and any real observance of their traditional customs'.³⁴ Critics of the decision argued that Justice Olney had applied an incorrect understanding of the level of 'continuity' that was required to determine the existence of native title under the NTA, and that he had applied a 'frozen in time' approach by not allowing for adaptation and change in traditional laws and customs. Justice Olney was also criticised for giving less weight to the evidence based on the oral history of claimants than on written European commentary.³⁵ Justice Olney's decision was upheld on appeal to the Full Court of the Federal Court (2001) and on appeal to the High Court (2002).³⁶

In May 2004, the Victorian State Government and the Yorta Yorta Nation Aboriginal Corporation entered into a 'Co-operative Management Agreement' that recognised the traditional owner status of the Yorta Yorta people. The agreement operates outside the native title process and is designed to formally involve the Yorta Yorta people in the management of their traditional land and waters. The agreement pertains to 50,000 hectares of Crown land and waters in north central Victoria and includes the Barmah State Park, Barmah State Forest, Kow Swamp and specific parcels of public lands and waters along the Murray and Goulburn Rivers.³⁷

³¹ Steering Committee for the Development of a Victorian Native Title Settlement Framework (2008) *Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework*, Melbourne, Department of Justice, viewed 27 July 2010, <<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/your+rights/indigenous+victorian/native+title/justice+-+steering+committee+for+the+development+of+a+victorian+native+title+settlement+framework>>, p. 11.

³² National Native Title Tribunal (2010) 'Applications and Determinations: Victoria and Tasmania', Perth, NNTT, viewed 19 August 2010, <<http://www.nntt.gov.au/Applications-And-Determinations/Search-Applications/Pages/Search.aspx>>.

³³ R. Bartlett (2004) op. cit., pp. 74-75.

³⁴ *ibid.*, p. 75.

³⁵ D. Ritter (2009) op. cit., p. 163; R. Bartlett (2004) op. cit., p. 75.

³⁶ R. Bartlett (2004) op. cit., pp. 75-76.

³⁷ See Department of Sustainability and Environment (2007) 'Yorta Yorta Co-operative Management Agreement', Melbourne, DSE, viewed 19 August 2010, <<http://www.dpi.vic.gov.au/dse/nrenlwm.nsf/LinkView/7FA349BEAE0F5A3FCA256E8D00210309A4AD52AC7C448F1A4A256DEA0024EDD2>>.

Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework

In 2005, the Victorian Traditional Owner Land Justice Group (LJG)³⁸ initiated talks with the Victorian Government about the native title system and the resolution of historic grievances.³⁹ The LJG asserted that native title as it was applied in Victoria was 'cumbersome, complex, costly and litigious and was delivering only ad hoc and limited outcomes'.⁴⁰ Subsequent meetings between the LJG, the Attorney-General, the Minister for Environment and the Minister for Aboriginal Affairs determined that there was broad agreement that 'a better process for resolving native title and land justice in Victoria needed to be explored'.⁴¹ In 2006, the LJG provided the government with a proposal in the form of a discussion paper entitled *Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Owner Land Justice Group*.⁴²

In March 2008, the Victorian Government announced the establishment of the Steering Committee for the Development of a Victorian Native Title Settlement Framework. The Steering Committee was chaired by Professor Michael Dodson and included representatives of the LJG, Native Title Services Victoria, and senior officers from the Departments of Justice, Sustainability and Environment, Aboriginal Affairs and Planning and Community Development.⁴³

The terms of reference for the Steering Committee were to oversee and guide the development of a Victorian Native Title Settlement Framework. In determining the key elements of the framework, priority was given to entry points for negotiations, threshold requirements and the content of settlements. The determination of the content of settlements was to include consideration of recognition, access to land, speaking for country, access to natural resources, strengthening culture, and claims resolution.⁴⁴ The Steering Committee delivered its Report in December 2008. The Report provided a draft settlement framework and discussion of the policies and core principles that underpin the key elements of the framework. In February 2009, the LJG endorsed the Steering Committee's Report.⁴⁵

In June 2009, the Victorian Government announced that it had accepted the recommendations of the Steering Committee Report and agreed to a new way of settling native title claims. The government noted that the final implementation of the

³⁸ The Victorian Traditional Owner Land Justice Group is the peak representative body for traditional owner groups in Victoria. Membership is open to one representative, and a deputy, from each traditional owner group in Victoria. See the Land Justice Group website for further information: <http://www.landjustice.com.au/?t=2>.

³⁹ Steering Committee for the Development of a Victorian Native Title Settlement Framework (2008) op. cit., p. 9.

⁴⁰ *ibid.*

⁴¹ *ibid.*

⁴² See Victorian Traditional Owner Land Justice Group (2006) *Towards a Framework Agreement between the State of Victoria and the Victorian Traditional Land Justice Group*, Melbourne, LJG, viewed 16 August 2010, <http://www.landjustice.com.au/?t=5>.

⁴³ Steering Committee for the Development of a Victorian Native Title Settlement Framework (2008) op. cit., p. 9.

⁴⁴ *ibid.*, p. 72.

⁴⁵ Department of Justice (2010) 'Steering Committee for the Development of Victorian Native Title Settlement Framework', Melbourne, DoJ, viewed 16 August 2010, <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/your+rights/indigenous+victorian/native+title/justice+-steering+committee+for+the+development+of+a+victorian+native+title+settlement+framework>.

framework would be subject to securing Commonwealth funding.⁴⁶ In November 2009, the Attorney-General issued a media release stating that without Commonwealth funding Victoria's landmark native title framework was on the verge of collapse.⁴⁷ In June 2010, the Victorian government secured Commonwealth funding and entered into a national partnership agreement to assist settlements made under the new legislation.⁴⁸ The Traditional Owner Settlement Bill was then tabled in parliament on 27 July 2010.

⁴⁶ R. Hulls, R. Wynne & G. Jennings (2009) 'Victoria Leads the Nation in Native Title Settlement', 4 June, Media Release, viewed 16 August 2010, <<http://www.premier.vic.gov.au/newsroom/media-releases/attorney-general.html?month=06&year=2009>>.

⁴⁷ R. Hulls (2009) 'Commonwealth Abrogating Native Title Responsibility', 5 November, Media Release, viewed 16 August, <<http://www.premier.vic.gov.au/newsroom/media-releases/attorney-general.html?month=11&year=2009>>.

⁴⁸ J. Brumby (2010) 'New Framework a Just Approach to Native Title', 28 July, Media Release, viewed 16 August 2010, <<http://www.premier.vic.gov.au/newsroom/media-releases-archive-mainmenu-320.html>>; Victoria, Legislative Assembly (2010), op. cit., p. 52.

3. Main Provisions of the Bill

This section of the Research Brief provides an outline of the main provisions of the Traditional Owner and Settlement Bill. For a more comprehensive description of the Bill in its entirety, readers are directed to consult the Explanatory Memorandum.

Preamble

The Bill begins with a four paragraph preamble which acknowledges the long history of Aboriginal peoples in the State of Victoria and their land-based culture. It acknowledges the impact of European settlement and the loss of ancestral lands, and the need for reconciliation and recognition of the rights of traditional owner groups.

Part 1 – Preliminary

Purposes

Section 1 of the Bill states that the main purposes of the proposed Act are to advance reconciliation and promote good relations between the State and traditional owner groups based on their traditional and cultural associations to certain land in Victoria by–

- (a) providing for the making of agreements between the State and traditional owner groups–
 - (i) to recognise traditional owner rights and to confer rights on traditional owner groups as to access to or ownership or management of certain public land; and
 - (ii) as to decision making rights and other rights that may be exercised in relation to the use and development of the land or natural resources on the land; and
- (b) making any amendments to other Acts that are necessary to ensure the agreements are effective; and
- (c) making any related and consequential amendments to other Acts.

Commencement

Section 2 of the Bill provides that the Act will commence operation on 1 July 2011 if it has not come into operation before that day.

Definitions

Section 3 of the Bill sets out the definitions of terms used in the proposed Act. It provides the definition of some terms in full, and in some cases directs the reader to definitions provided later in the Bill. The key terms defined in full in Section 3 include:

Department means the Department of Justice.

Joint management plan has the same meaning as in the *Conservation, Forests and Lands Act 1987*.

Native title has the same meaning as in the Native Title Act.

Public land means the following–

- (a) land under the *Crown Land (Reserves) Act 1978* including land under the *Alpine Resorts Act 1983*;
- (b) land in any park within the meaning of the *National Parks Act 1975*;
- (c) reserved forest within the meaning of the *Forests Act 1958*;
- (d) unreserved Crown land under the *Land Act 1958*;
- (e) land in any State Wildlife Reserve or Nature Reserve, within the meaning of the *Wildlife Act 1975*;

- (f) any other Crown land in Victoria that may be the subject of an application of the kind listed in the Table to section 61 of the Native Title Act.

Traditional owner group, in relation to an area of public land, means—

- (a) if there is a group of persons who are the persons in the native title group in relation to the area in accordance with section 24CD of the Native Title Act, that a group of persons, other than a group of persons that is a representative body under section 24CD(3)(b) of that Act; or
- (b) if there are native title holders (within the meaning of the Native Title Act) in relation to the area, the native title holders; or
- (c) in any other case, a group of persons who are recognised by the Attorney-General, by notice published in the Government Gazette as the traditional owners of the land, based on Aboriginal traditional and cultural associations with the land.

Traditional owner group entity, in relation to an area of public land, means—

- (a) a corporation within the meaning of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* of the Commonwealth; or
- (b) a company limited by guarantee that is registered under the Corporations Act; or
- (c) a body corporate—
that a traditional owner group for the area of public land has appointed to represent them in relation to that area, for the purposes of this Act.

Section 3 also provides definitions, or directs the reader to definitions provided later in the Bill, for the following terms; ‘aboriginal title’, ‘camp’, ‘funding agreement’, ‘indigenous land use agreement’, ‘land agreement’, ‘land management co-operative agreement’, ‘land use agreement’, ‘land use activity agreement register’, ‘Native Title Act’, ‘natural resource agreement’, ‘recognition and settlement agreement’, ‘relevant land Minister’, ‘traditional owner land management agreement’, ‘traditional owner rights’, and ‘unreserved public land’.

The Research Brief will provide the definitions of ‘aboriginal title’, ‘traditional owner rights’, and each of the agreements at the point in which they are set out in the Bill.

Part 2 – Recognition and Settlement Agreements

Minister may enter into Recognition and Settlement Agreements

Section 4 of the Bill provides for the making of recognition and settlement agreements between the Minister, on behalf of the State, and a traditional owner group entity in relation to an area of public land.

Sub-agreements within Recognition and Settlement Agreements

Sections 5-8 of the Bill provide that recognition and settlement agreements may comprise any one or more of the following sub-agreements: land agreements (set out in part 3 of the Bill); land use activity agreements (set out in part 4 of the Bill); funding agreements (set out in part 5 of the Bill); and natural resource agreements (set out in part 6 of the Bill).

Recognition of Traditional Owner Rights

Section 9(1) of the Bill sets out the ‘traditional owner rights’ that may be recognised in a recognition and settlement agreement, in relation to the land that is the subject of the agreement. The recognised rights may consist of any one or more of the following—

- (a) the enjoyment of the culture and identity of the traditional owner group;

- (b) the maintenance of a distinctive spiritual, material and economic relationship with the land and the natural resources on or depending on the land;
- (c) the ability to access and remain on the land;
- (d) the ability to camp on the land;
- (e) the ability to use and enjoy the land;
- (f) the ability to take natural resources on or depending on the land;
- (g) the ability to conduct cultural and spiritual activities on the land;
- (h) the protection of places and areas of importance on the land.

Section 9(2) of the Bill provides that the recognition of any of these rights in a recognition and settlement agreement is not to be taken to have any greater effect than is consistent with the law of Victoria.

Relationship with Indigenous Land Use Agreements

Section 10 of the Bill provides that a recognition and settlement agreement may be, or be part of, an Indigenous Land Use Agreement (ILUA) under the NTA. It may then be used for the settlement of any application of a kind listed in the Table to section 61 of the NTA.

Part 3 – Land Provisions

Part 3 of the Bill makes provisions for the first type of sub-agreement under a recognition and settlement agreement, known as a ‘land agreement’.

Division 1 - Definitions

Special Definition of Public Land

Section 11 of the Bill provides that in Part 3 of the proposed Act the term ‘public land’ does not include alpine resorts and state game reserves. The general definition of ‘public land’ set out in section 3 of the Bill does include alpine resorts and state game reserves.

Division 2 – Land Agreements

Land Agreements

Section 12 of the Bill provides that the Minister, on behalf of the State, may enter into a land agreement with a traditional owner group entity for any part of the land that is the subject of the recognition and settlement agreement. The land agreement may consist of one or more of the following possible arrangements:

- the grant of an estate in fee simple (freehold title) to the traditional owner group entity over unreserved public land with or without conditions;
- the grant of an estate in fee simple to a traditional owner group entity over any public land subject to conditions that include the joint management of the land between the State and the traditional owner group entity (this arrangement is known as ‘Aboriginal title’);
- the management of public land by a Traditional Owner Land Management Board under new provisions in amendments to the *Conservation, Forests and Lands Act 1987*.

Section 12 also provides that the Minister making the land agreement is required to obtain the consent of Ministers who administer related legislation on which the land agreement may impact.

Division 3 – Grant of Estate in Land

Division 3 of Part 3 of the Bill sets out the powers allocated to the Minister in order to give effect to land agreements that provide for freehold grants.

Division 4 – Grant of Aboriginal Title

Division 4 of Part 3 of the Bill sets out the provisions regarding the grant of Aboriginal title in land that is the subject of a land agreement. It provides that the Governor in Council may grant an estate in fee simple to a traditional owner group entity subject to conditions. The conditions include the requirement that the granted land is inalienable (s. 19(2)), except for the transfer to another traditional owner group entity (s. 19(4)), and that the land effectively remains public land even though it has been granted in fee simple (s. 20). Section 20(1) of the Bill provides that the grant of Aboriginal title requires the traditional owner group entity to enter into a special contract with the state to transfer to the state the right to occupy, use, control and manage the land as public land. Hence, the land subject to Aboriginal title is taken to be land reserved for the purposes for which it was reserved before the grant (s. 20(2)).

Part 4 – Land Use Activities

Part 4 of the Bill makes provisions for the second type of sub-agreement under a recognition and settlement agreement, known as a 'land use activity agreement'. Mr Brumby, in his second reading speech, said that land use activity agreements deal with activities such as mining on Crown land and are designed to replace the future acts regime set out in the NTA. He said that the land use activity agreements will 'operate over all Crown land within a given area of traditional owner recognition, but with agreed exclusions, such as areas with existing infrastructure, and Crown land set aside for identified future uses'.⁴⁹ These agreements will set out the procedural rights of the traditional owner group and the proponent of the activity, and are designed to provide certainty to both parties.⁵⁰

Division 1 – Definitions

Definition of Land Use Activity

Section 28 of the Bill provides that in the proposed Act, the term 'land use activity' in relation to agreement land or any part of agreement land, means any of the following –

- (a) the –
 - (i) granting of a public land authorisation over the land; or
 - (ii) amendment to or variation of a public land authorisation over the land, if the amendment or variation allows a change to an activity authorised by that authorisation;
- (b) the –
 - (i) granting of any earth resource or infrastructure authorisation in respect of the land; or
 - (ii) amendment to or variation of an earth resource or infrastructure authorisation in respect of the land, if the amendment or variation allows a change to an activity authorised by that authorisation;
- (c) the clearing of the land;
- (d) the planned controlled burning of the land;
- (e) the carrying out of works on the land;
- (f) the revegetation of the land;
- (g) in relation to land under the *Land Act 1958*, any alienation of the land by the granting of an estate in fee simple, other than a grant made under this Act;
- (h) the reservation of land under the *Crown Land (Reserves) Act 1978* or the revocation of any reservation of land under the *Crown Land (Reserves) Act*;
- (i) an approval of a timber release plan under Part 5 of the *Sustainable Forests (Timber) Act 2004*;

⁴⁹ Victoria, Legislative Assembly (2010), op. cit., p. 2753.

⁵⁰ *ibid.*

- (j) a change to an approved timber release plan under Part 5 of the *Sustainable Forests (Timber) Act 2004*;
- (k) the declaration of a management plan under section 28 of the *Fisheries Act 1995*;
- (l) the preparation of a management plan under section 17, 17B, 17D or 18 of the *National Parks Act 1975*;
- (m) the preparation of a management plan under section 18 of the *Wildlife Act 1975*;
- (n) the preparation of a working plan for Wildlife Management Co-operative Areas under section 32 of the *Wildlife Act 1975*.

Division 2 – Land Use Activity Agreements

Power to Enter into an Agreement as to Land Use Activities

Section 30(1) of the Bill empowers the Minister, on behalf of the State, to enter into a land use activity agreement with a traditional owner group entity for the whole or any part of the land that is the subject of the recognition and settlement agreement.

Section 30(2), according to the Explanatory Memorandum, effectively prohibits a land use activity agreement from providing for any matter inconsistent with the legislation with which Part 4 of the proposed Act must interact.⁵¹

Section 30(3) provides that the Minister must not enter a land use activity agreement until he/she has obtained the consent of other Ministers who administer the Acts which may be affected by a land use activity agreement.

Section 30(4) provides that the Minister must not enter into a land use activity agreement unless the Minister is satisfied –

- (a) that the agreement forms part of a recognition and settlement agreement that is part of an Indigenous Land Use Agreement that is capable of being registered under Division 3 of Part 2 of the Native Title Act; or
- (b) that the Federal Court has determined that native title does not exist in relation to the land that is the subject of the agreement.

The Explanatory Memorandum states that subsection 30(4) is intended to prevent any overlap of the provisions of Part 4 of the Bill with the future acts regime set out in Part 2 of the Native Title Act.⁵²

Listing and Classification of Land Use Activities

Section 32 of the Bill sets out the structure of a land use activity agreement. It provides that the agreement must specifically list and classify the land use activities that are the subject of the agreement. The land use activities must be classified as one of the following categories: 'routine activities'; 'advisory activities'; 'negotiation activities class A'; 'negotiation activities class B'; and 'agreement activities'. Section 32 then sets out limitations and allowances in regard to the land use activities.

Application in Emergency Situations

Section 39 of the Bill provides that a land use activity agreement is not to be taken to constrain any activity by a decision maker in an emergency for the purpose of protecting life, property or the environment.

⁵¹ Explanatory Memorandum, p. 17.

⁵² *ibid.*

Division 3 – Particular Requirements for Negotiation and Agreement Activities

Division 3 of Part 4 of the Bill deals with the particular requirements pertaining to land use activities classified as negotiation and agreement activities.

Requirements for Person Seeking Public Land Authorisation

Section 40 of the Bill states that if a provision of a land use activity agreement specifies that the grant of any public land authorisation over any agreement land is a negotiation or agreement activity, any person who is seeking to be the holder of such authorisation (the 'responsible person') must reach agreement with the traditional owner group entity as to the granting of the authorisation, and to the conditions to which the agreement is subject. The conditions may include the provision of 'community benefits' from the responsible person to the traditional owner group entity ('community benefits' is defined in section 27 of the Bill to mean an economic, cultural or social benefit provided to a traditional owner group entity). In reaching the agreement, regard must be given to the impact of the proposed activity on the rights of the traditional owner group.

Decision Maker May Determine to Undertake Compliance in Place of Person Seeking Authorisation

Section 41 of the Bill provides that a 'decision maker' (defined in s. 29, in relation to the granting of a public land authorisation, as the person or body authorised by the Act under which the land is managed, or regulations made under that Act, to grant the authorisation) may determine that he/she is to take the place of the person seeking the authorisation, if it is in the interests of the State for the decision maker to do so.

Division 4 – Negotiation and Determination Processes

Division 4 of Part 4 of the Bill sets out procedural details and limitations for negotiations required by Division 3. Subdivision 1 of Division 4 requires that for the purposes of reaching agreement under Division 3, the responsible person and the traditional owner group entity must negotiate with each other in good faith.

Subdivision 2 of Division 4 provides that where a responsible person and traditional owner group entity cannot reach an agreement, an application may be made to the Victorian and Civil Administrative Appeals Tribunal (VCAT) to determine the matter.

Subdivision 3 of Division 4 sets out the powers of the Minister in regard to the determination of the matter. If VCAT has not determined the matter within 6 months of the application, the Minister may request VCAT to report on why the determination has not been made and when it is likely to be made. If it is more than 4 months since the application was made and the Minister considers that the matter is urgent, he/she can request VCAT to determine the matter within a specified time that is not less than 6 months from the notice date. If VCAT does not determine the matter within the time specified by the request, the Minister may determine the matter (according to certain procedures). The Minister is also empowered, in certain circumstances, to substitute a VCAT determination with his or her own determination of the matter.

Division 5 – Register of Land Use Activity Agreements

Division 5 of Part 4 of the Bill provides that the Minister must establish a register of land use activity agreements. The information recorded on the register must include: the area of land to which the agreement applies; the date of the initial registration of the agreement; the copy of the initial registered agreement; and a copy and date of any registered variation of the agreement. All information in the land use activity agreement register is to be publicly available.

Part 5 – Funding Agreements

Part 5 of the Bill makes provisions for the third type of sub-agreement under a recognition and settlement agreement, known as a ‘funding agreement’. In his second reading speech, Mr Brumby said that the ‘funding agreement’ is designed to provide a suitable funding base for traditional owner group corporate entities. This funding will enable traditional owner group corporate entities to perform their functions and meet their responsibilities, in matters such as land use activity negotiations with industry and developers. Under the funding agreements, trusts will be established to deliver an annual income to recognised traditional owner group entities. Each trust will have a board of directors, appointed by the Minister, which will manage the funds for the benefit of the traditional owner group entity. These arrangements, and the settlement package as a whole, are designed to provide an alternative to compensation entitlements under the NTA.⁵³

Power to Enter into a Funding Agreement

Section 78 of the Bill empowers the Minister to enter a funding agreement with a traditional owner group entity, as a component of a recognition and settlement agreement. Section 78 is the only section in Part 5 of the Bill. It specifically provides that:

- (1) The Minister on behalf of the State, may enter into an agreement with a traditional owner group entity for an area of public land as to the provision of funding to the entity for the purpose of giving effect to the recognition and settlement agreement of which the funding agreement is a part.
- (2) An agreement under subsection (1) may provide for money to be paid to a trust approved by the Minister.

Part 6 – Natural Resource Agreements

Part 6 of the Bill makes provisions for the final type of sub-agreement under a recognition and settlement agreement, known as a ‘natural resource agreement’. In his second reading speech, Mr Brumby said that the ‘natural resource agreement’ recognises the rights of traditional owner group members to non-commercial forms of access and use of natural resources on the land subject to the agreement. This arrangement pertains to ‘hunting, the harvesting of certain plants and the taking of forest produce or water’ for traditional purposes.⁵⁴ These rights will, however, be subject to ‘laws of general application such as for firearm use, public health, public land management and safety and environmental protection’.⁵⁵ Mr Brumby additionally said that currently existing rights of use and access enjoyed by Victorians will continue unaffected.⁵⁶

Division 1 – Definitions

Section 79 of the Bill sets out the definitions of terms used in Part 6. The two key definitions are:

Natural resources, in relation to an area of land, means the flora, fauna, fish, forest produce and wildlife on or depending on the land and the water on the land.

⁵³ Victoria, Legislative Assembly (2010) op. cit., p. 2754.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*

Traditional purposes, in relation to a traditional owner group entity, means the purposes of providing for any personal, domestic or non-commercial communal needs of the members of the traditional owner group entity.

Division 2 – Natural Resource Agreements

Power to Enter into Natural Resource Agreements

Section 80(1) of the Bill empowers the Minister, on behalf of the State, to enter into a natural resource agreement with a traditional owner group entity for the whole, or any part, of the land that is the subject of the recognition and settlement agreement, which may provide for any of the following –

- (a) strategies to enable members of the traditional owner group entity to participate in or obtain employment in the management of the natural resources of the land;
- (b) the types of uses and access to the natural resources of the land for traditional purposes that the traditional owner group entity would like its members to have (access and use provisions), including, in particular, the types of uses and access that may be provided for under this Part;
- (c) the principles of sustainability that should apply when the giving of use and access in accordance with paragraph (b) is being considered (principles of sustainability provisions);
- (d) facilitation of the exercise of traditional owner rights by members of traditional owner groups, whether in accordance with this Act or under any other law;
- (e) any other related matter.

Section 80(2) of the Bill provides that the Minister must not enter into a natural resource agreement unless the Minister has first consulted with the Minister administering Part 2 of the *Conservation, Forests and Lands Act 1987*, and the Ministers administering the *Fisheries Act 1995*, the *Flora and Fauna Guarantee Act 1998*, the *Forests Act 1958*, the *Water Act 1989*, and the *Wildlife Act 1975*.

Evidence of Membership

Section 81 of the Bill provides that natural resource agreement must include an agreement between the traditional owner group entity and the Minister as to how membership of the traditional owner group entity should be verified by authorised officers. The Explanatory Memorandum states that this is necessary because authorisation orders made under Part 6 will only apply to members of traditional owner group entities, and accordingly a person's membership of the traditional owner group entity will need to be verified by authorised officers for the purposes of enforcing relevant laws.⁵⁷

Division 3 – Natural Resource Authorisations

Division 3 of Part 6 of the Bill provides for the granting of natural resource authorisation orders by the Governor in Council, on the recommendation of the Minister administering the relevant Act, to members of a traditional owner group entity that has a natural resource agreement in place. The authorisation orders pertain to flora and fauna, hunting, forest produce, water, and camping on the land subject to the agreement.

⁵⁷ Explanatory Memorandum, p. 28.

Part 7 – General

Regulation Making Powers

Part 7 of the Bill empowers the Governor in Council to make regulations for, or with respect to, the proposed Act.

Parts 8-17 – Consequential Amendments to Related Acts

Parts 8-19 of the Bill make consequential amendments to the following related Acts:

- *Aboriginal Heritage Act 2006* (Part 8),
- *Conservation, Forests and Lands Act 1987* (Part 9),
- *Crown Land (Reserves) Act 1978* (Part 10),
- *Flora and Fauna Guarantee Act 1988* (Part 11),
- *Forests Act 1958* (Part 12),
- *Lands Act 1958* (Part 13),
- *National Parks Act 1975* (Part 14),
- *Victorian Civil and Administrative Tribunal Act 1998* (Part 15),
- *Water Act 1989* (Part 16),
- *Wildlife Act 1975* (Part 17).

Part 18 – Miscellaneous Amendments of Other Acts

Part 18 of the Bill makes miscellaneous amendments to other Acts. As the Explanatory Memorandum states, Part 18 inserts a 'relevant note' into various other Acts to flag that certain things under those Acts may be affected by the land use activity provisions under Part 4 of the proposed Act, and makes other minor amendments.⁵⁸

⁵⁸ Explanatory Memorandum, p. 41.

4. Stakeholder Views

The Victorian Traditional Owner Land Justice Group (LJG) and the Victorian Division of the Minerals Council of Australia (MCA) have both issued media releases in support of the Traditional Owner Settlement Bill.

The LJG initiated the process that led to the formation of the Steering Committee for the Development of a Victorian Native Title Settlement Framework, and played a key role in the Committee's production of the draft framework which formed the basis of the Bill. The LJG supported the State Government's acceptance of the Native Title Settlement Framework and welcomed the introduction of the Bill. Mr Graham Atkinson, LJG Co-Chair, said in a media release that the Bill provides for 'ground-breaking reform for the traditional owners of Victoria' and that 'land justice is at last, within reach'.⁵⁹ He said that:

The Land Justice Group commends the State government on this initiative, which has come about because of the commitment by both parties to work together, to achieve greater understanding of each other's positions, and make considerable compromises to reach agreement about how traditional owner settlements will operate... In practical terms, it will facilitate improvements for land management and the environment in Victoria through joint management arrangements. It will also help educate the wider Victorian public about Indigenous cultural heritage.⁶⁰

Mr Atkinson further said that the Bill will benefit the economic development of Indigenous communities 'which will flow through to regional communities, with the development of jobs and business opportunities'. He concluded that the introduction of the Bill constitutes 'a historic achievement for the Land Justice Group and is leading the way for alternative native title resolution in Australia'.⁶¹

The Victorian Division of the Minerals Council of Australia said it 'welcomed' the introduction of the Bill and the 'new approach' it provides for the resolution of native title claims in Victoria.⁶² Mr Chris Fraser, Executive Director of the Victorian Division of the MCA, said that '[t]he new approach offers significant advantages to traditional owner groups and provides certainty for businesses that use Crown land in Victoria'.⁶³ He listed further benefits of the proposed legislation as including:

...the ability to deal with traditional owners on a commercial basis, rather than a legal basis; clarity and simplification about who can speak on Aboriginal heritage matters; and above all simplification of the access arrangements for exploration.⁶⁴

Mr Fraser also said that the Victorian Division of the MCA 'congratulates the Government on the Bill and looks forward to being engaged in effective consultation

⁵⁹ Victorian Traditional Owner Land Justice Group (2010) 'Land Justice Within Reach', Media Release, 28 July, LJG, viewed 26 August 2010, <<http://www.landjustice.com.au/?t=4>>.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² Minerals Council of Australia (Victorian Division) (2010) 'Miners Support New Approach to Native Title in Victoria', Media Release, 28 July, MCA, viewed 26 August 2010,

<http://www.minerals.org.au/information_centre/media_releases/2005_media_releases3/>.

⁶³ *ibid.*

⁶⁴ *ibid.*

with all the parties during the development of the individual agreements and in particular the terms of the Land Use Activity Agreements'.⁶⁵

⁶⁵ *ibid.*

5. Other Jurisdictions

The different historical, geographic and economic circumstances of the states and territories impacts on the nature of native title activity in each jurisdiction. New South Wales, Tasmania and Victoria have longer colonial histories, relatively large percentages of land under freehold title, and limited current minerals prospectivity. Western Australia, Queensland and the Northern Territory were generally settled later, are more sparsely populated, and have a greater reliance on mining and other primary industries. They have a greater area of land subject to native title claim and, particularly in the early days of the NTA, the issue of native title was subject to political controversy.⁶⁶ South Australia, as is explained below, opted to take a different approach to native title and was not as active in mainstream native title debates.⁶⁷

State and territory government approaches towards native title have, as stated earlier, increasingly moved towards an acceptance of the native title system and the articulation of policy positions that favour the resolution of claims by agreement, via consent determinations and ILUAs, rather than litigation.⁶⁸ Significantly, in terms of legislated alternative approaches to the resolution of native title claims, Victoria is the first state to introduce a Bill for comprehensive legislation to provide a pathway for resolving traditional owner land justice issues outside of the court processes of the NTA.⁶⁹

The following discussion focuses on New South Wales which is in the process of developing a new Aboriginal Land Management Framework, and South Australia which has pursued a negotiation-focussed approach to native title since 1999.

New South Wales

The NSW Government Department of Lands has responsibility for the State's day to day management of native title. In terms of native title claims policy, the NSW Government supports the use of Indigenous Land Use Agreements (ILUAs), where appropriate, 'as they are a means of dealing with native title through co-operation and agreement rather than lengthy and costly litigation'.⁷⁰ Evidence from native title groups of their connection to the land is required prior to the government proceeding with native title negotiations. The nature of this evidence is determined on a case-by-case basis.⁷¹

⁶⁶ D. Ritter (2009) op. cit., pp. 83-84.

⁶⁷ *ibid.*, p.87

⁶⁸ See D. Ritter (2009) op. cit., pp. 77-98.

⁶⁹ See Aboriginal and Torres Strait Islander Social Justice Commissioner (2009) op. cit., p. 47; G. Neate (2009) 'Victoria Has Its Own Approach', *Koori Mail*, 1 July, viewed 12 August 2010, <<http://www.nntt.gov.au/News-and-Communications/news/columns/Pages/default.aspx>>; R. McClelland & J. Macklin (2010) 'Gillard Labor Government Welcomes Victorian Native Title Framework', Media Release, 29 July, viewed 26 August, <<http://www.robertmcclelland.com.au/category/mediareleases/>>.

⁷⁰ Premier of New South Wales (1999) *Memorandum No 99-23 Native Title and Indigenous Land Use Agreements*, Sydney, DPC, viewed 12 August 2010, <http://www.dpc.nsw.gov.au/publications/memos_and_circulars/ministerial_memoranda/1999/m1999-23>.

⁷¹ Australian Institute of Aboriginal and Torres Strait Islander Studies (2009) *Native Title Resource Guide – New South Wales*, Canberra, AIATSIS, viewed August 2010, <<http://www.aiatsis.gov.au/ntru/resources.html>>. An updated version of this guide will be available on-line in September 2010.

In 2008, the NSW Government released a discussion paper regarding a proposed Aboriginal Land Management Framework.⁷² This framework will relate to access, use and management of publicly owned land by Aboriginal people and also to the services the government provides for Aboriginal landowners. The NSW Government states that the framework will:

- clarify the existing approach in NSW to issues regarding land access, use and management by Aboriginal people;
- identify gaps in current programs;
- consider and identify opportunities to establish common principles and policies in the area;
- improve the coordination of the Government's delivery of existing land management, cultural heritage, conservation and economic development responsibilities.⁷³

Following consultation about the proposed framework with Aboriginal community groups across NSW, the government is collaborating with the NSW Aboriginal Land Council and other stakeholders to develop 'agency-specific and whole of government policy responses to the underlying issues raised'.⁷⁴

Some of the NSW Government's current programs relating to improving Aboriginal access to land and involvement in land management include: the development of a Cultural Resource Use Framework to assist agencies in proceeding with granting access to resource use on public lands (such as for hunting purposes or collecting plants);⁷⁵ the development of a range of co-management and partnership agreements between the Department of Environment and Climate Change and Aboriginal people for national parks;⁷⁶ and, where credible evidence of native title is provided, the government has a coordinated approach to negotiation with claimants for ILUAs which encompass the management of public land in the claim area.⁷⁷

New South Wales also has Aboriginal land rights legislation. The *Aboriginal Land Rights Act 1983* (NSW) is administered by the NSW Government Department of Aboriginal Affairs and provides for a method of compensating Aboriginal people for the loss of their land. Through this Act, Aboriginal Land Councils may claim Crown land. If their claim is granted, the land is transferred to freehold title.⁷⁸

South Australia

In South Australia, Ministerial responsibility for native title is jointly held by the Premier and the Attorney General. The Crown Solicitor's Office within the Attorney-General's

⁷² Department of Environment and Climate Change (NSW) (2008) *Towards an Aboriginal Land Management Framework for NSW – Discussion Paper*, Sydney, State of NSW and DEEC, viewed 12 August 2010, <<http://www.environment.nsw.gov.au/nswcultureheritage/almf.htm>>.

⁷³ *ibid.*, p. 2.

⁷⁴ Department of Environment, Climate Change and Water (NSW) (2010) 'Supporting Aboriginal Connection to Country', Sydney, DECCW, viewed 12 August 2010, <<http://www.environment.nsw.gov.au/nswcultureheritage/almf.htm>>.

⁷⁵ Department of Environment and Climate Change (NSW) *op. cit.*, p. 7.

⁷⁶ *ibid.*, p. 10.

⁷⁷ *ibid.*, p. 11.

⁷⁸ Department of Aboriginal Affairs (NSW) (2010) 'The Aboriginal Land Rights Act 1983', Sydney, DAA, viewed 12 August 2010, <<http://www.daa.nsw.gov.au/landandculture/alra.html>>.

Department provides the government with native title, Aboriginal heritage and related legal services.⁷⁹

South Australia's relatively early adoption of a negotiation focussed approach to native title differentiated it from the other states and territories. The opportunities provided by the introduction of the ILUA provisions in the 1998 amendments to the NTA led the SA Government to initiate negotiations for a co-ordinated state-wide ILUA process in 1999. The SA Government sought to negotiate with traditional land owners and industry stakeholders to develop a state-wide approach to streamlining the ILUA processes and reducing the resources required for successive negotiations.⁸⁰ From 2000, the South Australian Native Title Resolution Process (previously known as the SA ILUA State-wide Negotiations) has involved the development of 'template' ILUAs and discussion between the stakeholders in structured forums. As the Aboriginal and Torres Strait Islander Social Justice Commissioner explained in his 2006 Report on the SA process:

The State-wide negotiating framework comprises a Main Table for discussion between representatives of the key stakeholders on major issues and process. The Main Table is responsible for monitoring progress, confirming agreed outcomes and providing direction. Side Tables were established for each of the industry groups and for the local government sector. An additional three tables include: a Relationship to Land and Water Table; a Heritage Table; and a Parks Table. Discussions from Side Tables are canvassed at the State-wide level with the native title claimants.⁸¹

The South Australian Native Title Resolution Process is set out in the *South Australian Indigenous Land Use Agreement (ILUA) State-wide Negotiations Strategic Plan 2006-2009*.⁸²

Additionally, South Australia has enacted an alternative state 'right to negotiate regime' for the mining industry. The alternative regime is set out in Part 9B of the *Mining Act 1971 (SA)* and came into operation in 1996.⁸³ South Australia also has legislation covering Aboriginal land rights. This legislation includes the *Aboriginal Land Trusts Act 1966 (SA)*, the *Pitjantjatjara Land Rights Act 1981 (SA)* and the *Maralinga Tjarutja Land Rights Act 1984 (SA)*.

⁷⁹ Australian Institute of Aboriginal and Torres Strait Islander Studies (2009) *Native Title Resource Guide – South Australia*, Canberra, AIATSIS, viewed 12 August, <<http://www.aiatsis.gov.au/ntru/resources.html>>. An updated version of this guide will be available on-line at in September 2010.

⁸⁰ See Aboriginal and Torres Strait Islander Social Justice Commissioner (2007) *Native Title Report 2006*, Sydney, Human Rights and Equal Opportunity Commission, viewed 9 August 2010, <http://www.hreoc.gov.au/social_justice/nt_report/ntreport06/index.html>, pp. 113-124.

⁸¹ *ibid.*, p.116.

⁸² See South Australian Government (2006) *South Australian Indigenous Land Use Agreement (ILUA) Statewide Negotiations Strategic Plan 2006-2009*, Adelaide, ILUASA, viewed 29 August 2010, <<http://www.iluasa.com/default.asp>>.

⁸³ Attorney-General's Department (2010) 'Indigenous Law and Native Title: Alternative State and Territory Native Title Regimes', Canberra, AG, viewed 30 August 2010, <http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_NativeTitle_Alternativestateandterritorynativetitle regimes>.

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Author

Dr. Catriona Ross and Bronwen Merner
Research Officers
Victorian Parliamentary Library

Enquiries

Enquiries should be addressed to:
Dr. Greg Gardiner
Senior Research Officer
Victorian Parliamentary Library
Parliament House
Spring Street, Melbourne

Telephone (03) 9651 8640
Facsimile (03) 9654 1339

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