

September 2010

Traditional Owner Settlement Act 2010 (Victoria)

The Traditional Owner Settlement Act 2010 came into force on 23 September 2010.

The Act is intended to provide an alternative state government regime for resolving native title claims based on the settlement of native title claims rather than the long and costly process of litigation under the Commonwealth *Native Title Act 1993*.

KEY FEATURES OF THE ACT

The Act establishes a framework for the making out-of-court agreements between the State and traditional owner groups through which the State will recognise traditional owner groups based on their traditional and cultural associations to certain land in Victoria and confer rights on traditional owner groups with respect to:

- access to, ownership or management of public land; and
- 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.

Under the framework, traditional owner groups will agree to withdraw existing native title claims, if they have one, and agree to not make native title or compensation claims into the future.

The Act will also make any amendments that are necessary to other Acts to ensure the agreements are effective.

DETAIL OF THE ACT

Preamble

The preamble of the Act acknowledges the special relationship aboriginal people have with their land. It recognises their spiritual, material and economic relationship with the land, waters and other resources to which they have a connection under traditional laws and customs. The preamble also acknowledges the impact of European settlement on the aboriginal people's connection with the land.

This preamble clearly acknowledges the important, long-standing relationship between the aboriginal people and their connection to this country. In doing so, this Act recognises the rights they hold to the land and is the foundation on which this Act is premised.

Recognition and Settlement Agreements

The Act provides for the making of recognition and settlement agreements between the Minister (on behalf of the State) and certain entities that represent traditional owner groups, known as a traditional owner group entity (s4), in relation to an area

of public land. A recognition and settlement agreement will primarily provide recognition for traditional owners and will record a settlement of a native title claim.

A recognition and settlement agreement may contain other sub-agreements, each of which is an agreement in its own right, and which will be entered into simultaneously by the State and a traditional owner group entity. These are:

- Land Agreements (s5)
- Land Use Activity Agreements (s6)
- Funding Agreements (s7)
- Natural Resource Agreements (s8)

Traditional owner rights

A recognition and settlement agreement may also recognise a number of *traditional owner rights* of the traditional owner group entity (s9). The recognition may relate to any one or more of the following rights:

- Enjoying the culture and identify of the traditional owner group;
- Maintaining a distinctive spiritual, material and economic relationship with the land and the natural resources on or depending on the land;
- Accessing and remaining on the land;
- Camping on the land;
- Using and enjoying the land;
- Taking natural resources on or depending on the land;
- Conducting cultural and spiritual activities on the land;
- Protecting places and areas of importance on the land.

When such a right is recognised through a recognition and settlement agreement, it is not taken to have any greater effect than is consistent with the law of Victoria (s9(2)). That is, there is no conferral of new rights by virtue of that recognition.

Relationship with Indigenous Land Use Agreements

A recognition and settlement agreement may include, or be, an indigenous land use agreement made under the *Native Title Act 1993* of the Commonwealth (an "ILUA"). To the extent that a recognition and settlement agreement is an ILUA, it may, subject to the *Native Title Act 1993*, perform various functions under that Act, including recording a settlement of any actual or future native title claim (s10).

Land Agreements

The Minister may enter into a land agreement with a traditional owner group entity for any land that is subject to a recognition and settlement agreement (s12).

A land agreement may provide:

- that if land, that is the subject of the agreement is *unreserved public land*, an estate in fee simple is to be granted to the traditional owner group entity; or
- that if land, that is the subject of the agreement is *public land*, aboriginal title is to be granted to the traditional owner group entity.

Under the Act, a land agreement may consist of one or more of the following possible arrangements:

- The grant of an estate in fee simple to the traditional owner group entity in respect of *unreserved public land*, without ongoing conditions.
- The grant of an estate in fee simple to the traditional owner group entity in respect of *unreserved public land*, subject to conditions. The conditions may include limitations on the grant itself, and may also include ongoing management conditions, which would be set out in a land management co-operative agreement between the State and the traditional owner group entity made under Part 8 of the *Conservation, Forests and Lands Act 1987*.
- The grant of an estate in fee simple to the traditional owner group entity over any *public land*, subject to various conditions, including that the traditional owner group entity agree that the State may continue to use, occupy, control and manage the land as public land, and for the establishment of a Traditional Owner Land Management Board over that land. This arrangement is referred to as *aboriginal title* under the Act.
- 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*.

To be given effect, the third and fourth arrangements require a separate agreement to be made between the traditional owner group entity and the Minister administering Part 8A of the *Conservation, Forests and Lands Act 1987*.

It is important to note the following in relation to land use agreements:

- Although the power to make land use agreements lies with the Minister administering the Act, the Act requires that the Minister to obtain the consent of other relevant Ministers whose statutory powers, functions or duties may be affected by the making of a land agreement. For instance, if the a land agreement deals with the granting of aboriginal title over public land that is part of a park under the *National Parks Act 1975* and reserved forests under the *Forests Act 1958*, the consent of the Minister who administers both of those Acts will be required.
- There is a special definition of public land for the purposes of this Part of the Act. The difference between this definition and the general definition in clause 3 is the exclusion of alpine resorts, State Game Reserves and land under paragraph (f) of the definition in clause 3.

Granting of Aboriginal Title

Aboriginal Title is referred to as an estate in fee simple granted to a traditional owner group entity under a land agreement. Such an agreement would transfer legal ownership to the traditional owner group entity, however, the grant of title does not allow the traditional owner group entity to sell, transfer, dispose of, encumber or otherwise deal with the estate or any legal or equitable interest in the estate, including lease or licence the estate of land (s 19(2)), except for the transfer to another traditional owner group (s19(4)).

The Act provides that the grant of aboriginal title requires the traditional owner entity group to enter into a contract for the transfer to the State of the right to occupy, use, control and manage the land as public land. On the transfer to occupy, use, control and manage the land, the land is taken to be land under the Act under which the land was managed before the aboriginal title was granted. Hence, the Act provides that land subject to aboriginal title is taken to be land reserved for the purposes for which it was reserved before the grant, despite its granting in fee simple to the traditional owner entity group. However, the Act protects the underlying interest of the traditional owner group entity in the land but providing that the State is unable to dispose of the land, lease or licence the land, except as provided for in the Act under which the land was managed prior to the making of the grant (s20).

Depending on the above land arrangements entered into between the State and the traditional owner group entity, the use and benefit of public land may affect public access. Jointly managed Crown land or aboriginal title in land will continue to be managed under the relevant public land Act. Thereby, public access to jointly managed land will be protected and the land will continue to be used as it was before.

If however, public land is granted as a freehold estate to the traditional owner group entity, then access may be restricted to the public, depending on whether or not conditions were negotiated in the agreement.

Any lease, licence, permit or other authority, granted under the Act under which the land was managed immediately before the grant of the estate in fee simple to the traditional owner group entity is taken to continue in force, as if it had been granted under that Act as it applies to the land on and after the grant of the estate in fee simple (s 22(a)). Also, any contract, agreement or arrangement relating to the management of the land, in force immediately before the grant of the estate in fee simple to a traditional owner group entity is taken to continue in force as if it had been entered into on and after the grant of the estate in fee simple (s 22(b)).

Before aboriginal title in land is granted to a traditional owner group entity (or transferred from one traditional owner group entity to another), the entity must enter into an agreement under section 82P of the *Conservation, Forests and Lands Act 1987* with the Minister administering that section and with the relevant land Minister (s23).

Land use activity agreements

As part of a recognition and settlement agreement, the Minister may enter into a land use activity agreement with a traditional owner group entity for recognising and protecting traditional owner rights when they are affected by land use activities on or in relation to the whole or part of land that is subject of a recognition and settlement agreement (s30).

Under the bill, a land-use activity is defined by reference to common activities that are carried out on, or affect, Crown land, such as building works by a land manager, approval of mining activities, and so on (s28).

Under land use activity agreements, activities are classified under one of five classes being routine activity, advisory activity, negotiation activity, class A, negotiation activity, class B (together referred to in part 4 as negotiation activities) and agreement activity(s32).

Each of these classes will each afford a different level of procedural rights and responsibilities to the traditional owner group and the proponent responsible for carrying out the activity.

Any land use activity is exempt if it is for the purposes of emergency protection of human life, property or the environment (s39).

Particular requirements for negotiation and agreement activities

Where the activity is classified as either a negotiation or agreement activity, the agreement becomes subject to a negotiation process between the “*responsible person*” for the activity (as defined in Division 2 of Part 4 of the Act) and the relevant traditional owner group entity (s 40).

Agreement must be reached —

- that the activity may proceed;
- as to the conditions, if any, on which the activity should proceed;
- as to the “*community benefits*” (defined in s27), if any, that should be provided to the traditional owner group entity by the responsible person, to provide due recognition of, and compensation for, the impact of the land use activity on the traditional owner rights of the traditional owner group entity.

Where a responsible person and a traditional owner group entity cannot reach an agreement about negotiation activities proceeding, an application may be made to the Victorian Civil and Administrative Tribunal (VCAT) to determine the matter (s53).

Funding Agreements

As a component of a recognition and settlement agreement, the Minister may enter into a funding agreement with a traditional owner group entity for an area of public land in relation to the funding of the entity for the purposes of giving effect to the recognition and settlement agreement of which the funding agreement is a part (s78).

Natural Resource Agreements

The Minister may, as part of a recognition and settlement agreement, enter into a natural resource agreement with a traditional owner group entity for any part of land which forms part of a recognition and settlement agreement, regarding the any of the following:

- 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;
- the types of uses of and access to the natural resources of the land for traditional purposes that the traditional owner group entity would like its members to have (defined as “access and use provisions”)
- the principles of sustainability that should apply when the giving of use and access is being considered (defined as “principles of sustainability provisions”);
- 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; or
- any other related matter (s80).

The Minister cannot enter into a natural resource agreement without having first consulted with various other Ministers administering relevant Acts (s80(2)).

Natural resource agreements allow members of a traditional owner group entity to engage in non-commercial forms of access and use of natural resources, such as hunting, the harvesting of certain plants and the taking of forest produce or water, but only for ‘traditional purposes,’ as defined in section 79 of the Act to mean personal, domestic or non-commercial communal needs of the traditional owner group.

Natural Resource Authorisations

The Governor in Council may grant various authorisation orders to members of a traditional owner group entity that has a natural resource agreement in force. Authorisation orders will enable members of a relevant traditional owner group entity to take and use (among other things) various natural resources without any individual member being required to hold a licence or permit or pay associated fees to undertake that activity.

Authorisation orders only apply to authorised activities for *traditional purposes*. The various types of natural resource authorisation orders are as follows:

- Natural resource flora and fauna authorisation (s82);
- Natural resource hunting authorisation (s83);
- Natural resource forest authorisation (s84);
- Natural resource water authorisation (s85); and
- Natural resource camping authorisation (s86)

The rights recognised under authorisation orders will be subject to laws of general application such as for firearm use, public health, public land management and safety and environmental protection. Also, all existing rights of use and access currently enjoyed by all Victorians continue to be unaffected.

The terms and conditions of an authorisation order can be varied by the Governor in Council (s87) and an authorisation order does not apply to any land that is not subject to the natural resource agreement (s88).

ABOUT THE ENVIRONMENT DEFENDERS OFFICE (VICTORIA) LTD

The Environment Defenders Office (Victoria) Ltd ('EDO') is a community legal centre specialising in public interest planning and environment law. Our mission is to support, empower and advocate for individuals and groups in Victoria who want to use the law and legal system to protect the environment. We are dedicated to a community that values and protects a healthy environment and support this vision through the provision of information, advocacy and advice.

In addition to Victorian-based activities, the EDO is a member of a national network of EDOs working collectively to protect Australia's environment through public interest environmental law.

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Publication date: August 2009

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