THE GUNAIKURNAI CONSENT DETERMINATION:

IS THIS THE HIGH WATER MARK FOR NATIVE TITLE IN VICTORIA?

by Katie O'Bryan

INTRODUCTION

On 22 October 2010, Justice North of the Federal Court made consent orders recognising the Gunaikurnai as the native title holders of a large part of Gippsland (approximately 13,390 sq km), and appointed the Gunaikurnai Land & Waters Aboriginal Corporation as the Prescribed Body Corporate ('PBC') for the Gunaikurnai.[1] The non-exclusive rights and interests recognised by the Court included: rights of access and use; the right to take resources for personal, domestic or communal needs; the right to protect and maintain places of importance; the right to camp; the right to engage in cultural activities, meetings, rituals and ceremonies; the right to teach about places of importance; and the right to take water for domestic and ordinary use.[2]

Alongside the consent determination and as part of a negotiated settlement package, the Gunaikurnai entered into an Indigenous Land Use Agreement and a number of other agreements with the State of Victoria pursuant to the recently enacted *Traditional Owner Settlement Act 2010* (Vic). Included in those agreements are: the recognition of traditional owner rights over all public land within the external boundary of the consent determination;[3] a grant of Aboriginal title[4] to 10 areas of land totalling approximately 46,000 hectares; joint management arrangements over those 10 areas of land; $12 million in funding, of which $10 million is to be placed in trust and the interest used to help fund the operations of the PBC; rights to access Crown land for traditional purposes such as hunting, fishing, gathering and camping; employment with Parks Victoria; assistance to set up a natural resource management contracting business; and various cultural strengthening commitments surrounding recognition of the Gunaikurnai as the native title holders and traditional owners of the land within the consent determination.

The *Traditional Owner Settlement Act 2010* (Vic) mentioned above introduced a new way of dealing with native title and land justice in Victoria. It is an alternative to the regime under the *Native Title Act 1993* (Cth)[5] for those traditional owners who might not be able to satisfy the high evidentiary standard required to prove connection arising from the decision in *Yorta Yorta*.[6] It also provides for the grant of a new form of freehold title, namely 'Aboriginal title'. Grants of Aboriginal title are conditional upon the land being jointly managed as public land reserved for a particular purpose such as a national park or wildlife reserve, and are not intended to extinguish native title.[7]

BACKGROUND

The first Gunaikurnai native title claim was lodged in April 1997.[8] It was a very large and complicated claim, extending generally from near Warragul in the west, to Point Hicks in the east, to the Great Dividing Range in the north, and 22 nautical miles into the sea. Members of the claim group were estimated to number around 3000.

It took over 13 years before a resolution was achieved. As with any claim taking this long, many elders and members of the community passed away during this time and were unable to see the culmination of the work they began in lodging the claim. There were a myriad of hurdles faced and ultimately overcome along the way to the settlement, a testament to the strength, perseverance and energy of the Gunaikurnai.

THE INTRA-INDIGENOUS DISPUTE

One of the biggest hurdles faced by the Gunaikurnai was the very public internal dispute with a sub-group of the claim group, known as the Kurnai Clans, over group composition. The dispute was essentially about whether the larger Gunaikurnai group or the Kurnai Clans were the right people to be making the native title claim.[9] This dispute was played out before the Federal Court, the ultimate conclusion being the dismissal of the Kurnai Clans claim.[10]

Enormous efforts were made to resolve this dispute without having to go to trial. Between December 1999 and April 2007 there were approximately 42 mediations, case management conferences or other similar meetings involving either the Federal Court or the National Native Title Tribunal. It even included the unusual step of the Federal Court commissioning an independent expert report on group composition to see if this would assist

the mediation process.[11] But these efforts were to no avail. Eventually the Gunaikurnai requested an early/preservation evidence hearing (EEH), the purpose being not only to preserve the evidence of a number of senior Gunaikurnai elders (and other respected members of the community with significant health issues), but also to enable the Gunaikurnai and the Kurnai Clans to put evidence before the court regarding group composition. Commencing on 3 December 2007 at Lake Tyers, the hearing ran for 16 days both on country and in Melbourne, involving eight witnesses (five Gunaikurnai witnesses and three Kurnai Clans witnesses). Closing submissions were heard in Melbourne on 11 March 2008.

Unfortunately the EEH was not enough to resolve the impasse between the Gunaikurnai and Kurnai Clans. Therefore in July 2008 and at the request of Kurnai Clans, Justice North made orders for Kurnai Clans to start preparing for trial. Following further adjournments requested by the Kurnai Clans and their application to strike-out the Gunaikurnai claim (which required significant preparation by the Gunaikurnai in response),[12] the Kurnai Clans claim eventually made it to trial in October 2009 and ran for six days. The Gunaikurnai, as respondents to the Kurnai Clans claim, participated in the Kurnai Clans trial, calling two expert witnesses and cross-examining the three Kurnai Clans witnesses. On 14 May 2010, the Kurnai Clans claim was dismissed.

NEGOTIATIONS WITH THE STATE

While the EEH did not resolve the dispute with Kurnai Clans, it was instrumental in bringing the State to the negotiation table, as the evidence given at the hearing gave comfort to the State that the larger and more inclusive Gunaikurnai claim group was the appropriate group to be negotiating with, a view expressed in closing submissions by the State's counsel.

Therefore following the EEH, and during the lead up to the Kurnai Clans trial, efforts were made to commence negotiations with the State.

In November 2008 the Gunaikurnai presented to the then Attorney-General Rob Hulls their Statement of Aspirations. A period of intense negotiations then commenced, lasting around 18 months, with State representatives meeting with a Gunaikurnai negotiation team on a near monthly basis. Meetings were held both on country in Gippsland and in Melbourne. During this time, not only were negotiations occurring, but extensive connection material was also being collected and provided to the State.

In May 2010 the Court was advised that an in-principle agreement with the State had been reached on connection. Following this, negotiations continued on the content of the settlement agreements. Although by the time of the July 2010 directions hearing there were still some significant issues to be resolved, work had already begun in earnest to translate what had so far been agreed into specific documents. For reasons noted further below, this was a particularly complicated task.

TENURE, EXTINGUISHMENT, A SECOND CLAIM AND NON-STATE RESPONDENTS

Occurring in parallel to the negotiations and connection assessment, and for the purposes of a consent determination of native title, was a tenure assessment of approximately 8,000 parcels of land to determine whether or not native title had been extinguished.[13] The State undertook the initial assessments, with the Gunaikurnai's legal representatives checking a significant sample of them for accuracy. Numerous mediations and case management conferences were held to resolve issues in the assessments.

In addition, the tenure assessments identified numerous parcels of crown land that had not been included in the original Gunaikurnai claim, due to the original claim having been lodged on a parcel by parcel basis. The Gunaikurnai then lodged a second claim in June 2009 to include all of the missing parcels, resulting in a new round of notifications and a second respondent list.

Having reached in-principle agreement with the State, the consent of the non-State respondents had to be obtained, including the consent of any additional respondents identified in the second Gunaikurnai claim.[14] The non-State respondents included the Commonwealth, local government, mining companies, farmers, water rights holders, forestry interests, telecommunications interests, fishing interests, beekeepers and recreational users. Commencing in mid-May 2010 and with approximately 175 respondents across the 2 claims who had been put into over 20 individually represented (or in some cases unrepresented) groups, this was a large and difficult task to undertake in a short space of time.

THE VICTORIAN STATE ELECTION

The State election in November 2010 was a factor that had a major impact on the Gunaikurnai settlement negotiations. From the beginning of negotiations, the Gunaikurnai had insisted that they wanted to reach a settlement with the State prior to the State election, as they were not prepared to risk a change of government.

This meant that the settlement had to occur before the government went into the caretaker period, commencing 2 November 2010.[15]

This deadline had both negative and positive consequences, the most significant of the negative being the very limited time frame in which to reach agreement over a large and complex native title claim, with the consequent compromises that such deadlines inevitably produce. However on the positive side, it kept the negotiation parties focussed on achieving an outcome. Ultimately, the deadline placed on negotiations by the Gunaikurnai proved to be prudent, as the Labor State government subsequently lost office in the election.

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

During the course of the negotiations, a parallel policy shift was happening in government. The Victorian Traditional Owner Land Justice Group ('VTOLJG') had been working with the State on finding a new way of dealing with land justice for Traditional Owners in Victoria. A steering committee chaired by Professor Mick Dodson and comprising members of the VTOLJG, NTSV and State representatives was set up to investigate and report on a way forward. The Steering Committee's Report was finalised in December 2008[16] and eventually endorsed by the State in June 2009.[17] The State then looked at how it could implement the recommendations contained in the Steering Committee Report. This led to the introduction of the *Traditional Owner Settlement Act 2010* (Vic). Although the Act did not incorporate all of the recommendations in the Steering Committee Report, it did contain some significant reforms, including the introduction of a new form of title, namely 'Aboriginal title'.

One of the reasons why this policy shift was such a complicating factor in the settlement of the Gunaikurnai native title claims was due to timing. Aboriginal title could not be included in any settlement agreement until the Traditional Owner Settlement Bill 2010 ('TOS Bill') had been passed by parliament and become law. But the Gunaikurnai had a deadline - the State election. The TOS Bill was first introduced into parliament on 27 July, eventually receiving royal assent on 21 September 2010, a mere month before the consent determination on 22 October 2010. As the substantive negotiations essentially all took place prior to this time, the Gunaikurnai were effectively negotiating on conjecture, not knowing whether or not they would be able to include *Traditional Owner Settlement Act 2010* (Vic) benefits in the settlement. This also complicated the drafting of the settlement agreements, for largely the same reason.

WHAT NEXT FOR THE GUNAIKURNAI AND FOR NATIVE TITLE IN VICTORIA?

The Gunaikurnai were fortunate to have settled their native title claims when they did and are now in the process of implementing their settlement agreements. As of April 2011, the Ballieu Coalition Government has not indicated a clear position on native title, and has already foreshadowed a review of the *Traditional Owner Settlement Act 2010* (Vic).[18] In the light of this uncertainty, the question thus remains: is the Gunaikurnai consent determination and associated settlement agreements the high water mark of native title and Aboriginal land justice in Victoria? Given the progress that Victoria has made since the High Court decision in Yorta Yorta,[19] it would be a shame if it was.

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1 *Mullett on behalf of the Gunaikurnai People v Victoria* [2010] FCA 1144.

2 Ibid p 3-4.

3 Traditional owner rights are listed in s 9 of the *Traditional Owner Settlement Act 2010* (Vic) ('TOS Act'), and are similar to other native title rights that have been recognised in Victoria (with the exception of rights to water, which are not referred to in the TOS Act). Unlike native title, the TOS Act enables a traditional owner group to be recognised as the traditional owners over all public land within an agreed area, whether or not native title has been extinguished.

4 More information about Aboriginal title and the TOS Act generally can be found on the Department of Justice website: <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/>.

5 Victoria, *Parliamentary Debates*, Legislative Assembly, 28 July 2010, 2750 (John Brumby, Premier).

6 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.

7 Unfortunately this is not clear in the legislation itself, so it is important that the non-extinguishment of native title be set out in the relevant settlement agreement as a condition of the grant of Aboriginal title, as was done by the Gunaikurnai.

8 A second claim was lodged in June 2008.

9 The larger Gunaikurnai group included all of the Kurnai Clans subgroup.

10 *Rose on behalf of the Kurnai Clans v Victoria* [2010] FCA 460.

11 See *Rose on behalf of the Kurnai Clans v Victoria* [2010] FCA 460, [23] (North J).

12 This application was also adjourned, and was subsequently struck out by consent on 22 September 2010.

13 The final number of parcels included in the consent determination following a reduction in the external boundary, was approximately 6,000 parcels.

14 The second respondent list was not finalised until 23 June 2010.

15 The caretaker period commences after the last sitting day of parliament and seeks to ensure that a government doesn't take action that will bind a future government. See Department of Premier and Cabinet, *Guidelines on the Caretaker Conventions. Guidance on handling government business during the election period* (2010), available at<http://www.jpps.vic.edu.au/uploads/714/Guidelines20on20the20Caretaker20Conventions202010.pdf>. There was a similar complication in relation to the federal election, which impacted on the Commonwealth's ability to obtain instructions.

16 Steering Committee for the Development of a Victorian Native Title Settlement Framework, *Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework* (2008). Available at <http://www.ntsv.com.au/document/report_sc_vic_native_title_settlement_framework_13May09.pdf>.

17 A-G Rob Hulls, 'Keynote Address' (Speech delivered at the AIATSIS Native Title Conference 2009, Melbourne, (9 June 2009) Aiatsis < http://www.aiatsis.gov.au/ntru/conferencepapers.html#2009>.

18 Peter Hunt, 'Crown Land Review', *Weekly Times Now* (online), 14 January 2011<www.weeklytimesnow.com.au/article/2011/01/14/281191>; Note, 'Native Title in the News', (2011) 2 *Australian Institute for Aboriginal and Torres Strait Islander Studies Native Title Newsletter*, 20.

19 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. Following Yorta Yorta but prior to the Gunaikurnai consent determination, there had been two consent determinations in Victoria, *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795;*Lovett on behalf of the Gunditjmara People v Victoria* [2007] FCA 474.

Whales Tail 2010
Mick Quilliam

Acrylic on canvas
1030mm x 760mm

It is not uncommon to hear the whale songs at night, especially when the air is very still. It is an erie sound especially when they are heard at night and a tiny glimpse can be caught under moonlight. It is hard to imagine what it would have been like for the Oyster Bay Tribe before settlement when whales were in abundance. It is nice to know their numbers are increasing and hope that my Mikayla will one day hear their songs.