TRADITIONAL OWNER AGREEMENT-MAKING IN VICTORIA: THE RIGHT PEOPLE FOR COUNTRY PROGRAM

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I Introduction

In Australia, since the High Court decision in the 1992 *Mabo Case*[1] and the subsequent passage of the *Native Title Act 1993* (Cth) ('*NT Act*'), there has been growing recognition of Aboriginal and Torres Strait Islander peoples as traditional owners of specific countries from which distinct rights and interests arise. One of the key features of these processes of recognition has been the normalisation, if somewhat uneven, of a culture of non-adversarial agreement-making between Aboriginal peoples and other interested parties including states, resource extraction companies and other industry developers. Overlapping and competing native title claims are not uncommon, and there has been a growing realisation of the limitations of the historical record in reconstructing native title land tenure, traditional laws and customs, and the affiliations of Aboriginal peoples at the time of colonisation, as required by the *NT Act*, to resolve questions of 'whose traditional country?'.

Both Aboriginal peoples and governments are also increasingly acknowledging the need for sound and durable agreement-making between and within native title claimant groups about 'the right people for country'. Such Indigenous agreement-making is foundational to the agreement-making that takes place between Aboriginal peoples and others. From the perspective of governments, developers and non-Indigenous land managers and users, agreements between and within claimant groups bring a stable native title party to the negotiating table. If disputes and power imbalances are not accounted for, their dynamics may be played out later, often in ways that are highly confusing to those parties, jeopardising the durability of any negotiated outcomes.

The matters of group composition and membership, territorial boundaries and the extent of countries which are involved in traditional owner agreement-making may be highly complex and are frequently contested between and within traditional owner groups across Australia. They involve deep-seated personal, family and community self-identification issues in multiple layered contexts, all overlain with the demands and sometimes fleeting opportunities of native title and cultural heritage legal processes and policies. Disputes amongst claimant and traditional owner communities have compounding effects; they create uncertainty, delays and increased costs for governments and land users wanting to interact with and acknowledge Aboriginal communities and arrive at agreements with them; and for the Aboriginal groups involved, they prevent access to the benefits that flow from recognition, create heartache and can significantly damage relationships between groups, families and individuals.

This paper draws on an approach to traditional owner agreement-making that is being taken in the south-eastern Australian State of Victoria, through the Right People for Country Program ('RPfC'). RPfC operates in the context of Victoria's approach to the settlement of native title claims under the *Traditional Owner Settlement Act 2010* (Vic)[2] ('*TOS Act*') and the operation of Victoria's *Aboriginal Heritage Act 2006* (Vic) ('*AH Act*'). The *TOS Act* arose out of reactions to the very limited outcomes from native title processes in Victoria in the late 1990s and early 2000s, not unrelated to a history of extensive land use and dispossession of Aboriginal peoples in Victoria. The negative determination in legal proceedings related to the Yorta Yorta peoples in Victoria and New South Wales was a particularly low point in the history of native title recognition under the *NT Act*. In 1998 Justice Olney infamously declared that the Yorta Yorta people's native title and their traditional laws and customs had been washed

away by the 'tide of history'.[3] This judgement was upheld on appeal in the Full Federal Court in 2001[4] and later in the High Court in 2002.[5]

While two positive but limited determinations of native title were subsequently made in Victoria in 2005 and 2007,[6] Victoria still had the lowest level of Indigenous land-holding and land access, as a percentage of land, of all the states and territories. In 2008 the Victorian Government convened the Steering Committee for the Development of a Victorian Native Title Settlement Framework ('2008 Framework Committee') on the basis that 'native title as it was applied in Victoria was proving too cumbersome, complex, costly and litigious and was delivering only *ad hoc* and limited outcomes' and that '[t]ransaction costs far outweighed benefits flowing to Traditional Owners'.[7]

The 2008 Framework Committee also recommended the establishment of RPfC to address boundary and group composition disputes amongst Victorian traditional owners. It noted that the project should be funded and facilitated by the Victorian Government, but led by traditional owners, 'based on the principle that recognition by other Aboriginal people is an integral element of establishing recognised traditional ownership'.[8]

In 2012 RPfC undertook three pilot projects; trialling a traditional owner led agreement-making approach to resolve issues of group composition and extent of country. It subsequently commissioned an independent evaluation of them. This paper provides further context to RPfC, describes the pilots and some of the evaluation findings, and discusses the successes, lessons learnt and challenges faced by all involved in the pilots.

The paper demonstrates that RPfC performs a unique role by allowing a focus on the processes of agreement-making amongst traditional owners, as a foundation to their reaching agreements with the wider world. This includes a focus not just on the dynamics of Indigenous agreement-making processes, but also on the collaboration of the partners involved in the bigger native title and cultural heritage context within which RPfC sits. In this wider context the RPfC partners include the Victorian Aboriginal Heritage Council ('VAHC'), the Office of Aboriginal Affairs Victoria ('OAAV'), the Department of Justice and Regulation ('DJR'), Native Title Services Victoria ('NTSV'), the Victorian Traditional Owner Land Justice Group ('VTOLJG') and, more recently, the Federation of Victorian Traditional Owner Corporations ('FoVTOC'). RPfC aims for durable agreement outcomes, and recognises that the effectiveness and appropriateness of processes has a major impact on whether the agreements traditional owners reach 'will stick'.

Professor John Paul Lederach suggests that working effectively with complex systems which are made up of multiple actors requires the capacity 'to imagine something rooted in the challenges of the real world yet capable of giving birth to that which does not yet exist.'[9] For all RPfC partners this requires imagining beyond what have become taken-for-granted ways of approaching native title, to consider the existence of 'untold possibilities capable at any moment to move beyond the narrow parameters of what is commonly accepted and perceived as the rigidly defined range of choices.'[10] At the same time, it requires engagement with the current context, with all its complexities, challenges and limitations, to create the new conditions of possibility which are envisaged. Both require traditional owners and staff of RPfC, NTSV and governments, to relinquish positional negotiating stances and instead build relationships, embrace complexity and be open to new possibilities that may emerge. They also require traditional owners and the partners and staff of RPfC to understand and engage with the past and with the contemporary conditions of possibility as a foundation for traditional owner agreement-making.

II Evolving Conditions of Possibility: The Importance of Process

A number of accounts of Australian Aboriginal agreement-making, decision-making and dispute management processes, which are so integral to the work of RPfC, describe the incremental building of consensus and the restoring of relationships over time amongst known kin, some of whom may be designated mediatory roles.[11] However, the conditions of possibility from which such processes emerge have dramatically changed: the scale of interests in which they may have been successful is no longer merely local and familiar. Today Aboriginal people do business in a national and global context characterised by increasing bureaucratic and legal requirements and involving the interests of numerous other parties including developers and governments. These parties often seek to deal at regional or 'whole of group' scales, sometimes demanding cohesion amongst groups of people with limited experience of working together.

Since the 1970s, Commonwealth legislation (including, most recently, the *NT Act*) and various Commonwealth, state and territory policies have required Aboriginal peoples to legally incorporate in order to undertake various activities, receive funding and hold title. This means working within the parameters of complex legislative and policy frameworks which seek collective decision-making about sometimes unfamiliar but complex issues. It also means taking responsibility for financial and administrative matters of which many Aboriginal groups and communities may have limited experience. The stakes can be high, implicating generations to come and requiring long term commitments to partnerships with governments and others. The issues to be negotiated are multiple and interrelated and require traditional owners to take risks and to make decisions when outcomes are not always easily anticipated.

In native title processes, Indigenous interests in land have also sometimes been reconfigured to match the boundaries of claim areas which have been artificially defined according to whether native title is seen to be extinguished under the *NT Act*. Legislative demands for 'absoluteness and systematicity'[12] and the codification[13] of rights and interests mean that groups are required to represent themselves collectively as groups restrictively defined by homogenous rights and interests in land – as tribes, nations and confederations of families of polity[14] – rather than as groups in which rights may be differentiated and hierarchical and in some cases networked and inherently negotiable.[15]

Processes of identification may no longer emerge from the ongoing daily routines and personal associations of everyday life in what Francesca Merlan has called 'epistemic openness'.[16] In order to differentiate themselves from others, traditional owners may resort to relatively minor differences such as the spelling of group names.[17] They may also try to limit the infinite possibilities of the membership of cognatic groups that emerge from models of unqualified descent from a set of named ancestors four or five generations back, sometimes identified from early ethnographic accounts, which are of mixed reliability and open to interpretation. Distinctions are made between 'traditional people', often those who can be identified from ancestors on such genealogies, and 'historical people' who came from 'elsewhere' but who have lived locally, sometimes for a number of generations, giving rise to exclusion of the latter from native title claims.[18]

While Sarah Burnside suggests that conflict is unavoidable in any system of property law 'as valuable rights capable of legal recognition will always be the subject of competing claims',[19] the processes of recognition by which Indigenous rights are attributed are significantly different. They involve layers of recognition within and between both Indigenous and non-Indigenous domains including active self-identification by Aboriginal people themselves, recognition of individuals and families by the wider traditional owner or claimant group or groups, and recognition between neighbouring groups, all of which provide the foundations for the recognition of traditional owners by non-Indigenous legal institutions, governments and the wider public. Burnside also acknowledges that:

> native title has distinctive characteristics that render conflict particularly problematic, including issues of historical dispossession and identity with which it is bound up, the communal nature of the title, which magnifies the potential for disagreement, and the fact that parties to a legal dispute are likely to live at close quarters so disputes impact claimants' daily lives.[20]

The 'material and symbolic stakes' may be high[21] and native title recognition processes may require revisiting intergenerational trauma arising out of colonisation.[22]

In recognising such complexities, the Indigenous Facilitation and Mediation Project ('IFaMP') (2003-06) at the Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS')[23] highlighted the importance of 'the business of process' in achieving sustainable and owned outcomes in the native title sector.[24] It recognised that disputes were located in systems and that dealing with them required holistic governmental, organisational and community approaches.[25] The mapping of the emotional, substantive and procedural interests of all parties[26] was found to be an essential foundation upon which to design and implement appropriate dispute management and agreement-making processes. The process capacities of traditional owners, governments and NTRBs in doing business with each other were considered important in achieving native title outcomes.[27] A number of process principles were identified: processes should do no harm, no one size fits all, traditional owners should have choices regarding appointments of mediators, processes should be tailored to local needs/interests and cultural practices, and all parties should be able to exercise free, prior and informed consent.[28]

IFaMP research identified two particularly counterproductive *modus operandi* in native title consultations. The first was ill-prepared 'big meetings' which bring together large numbers of dispersed traditional owners who have never acted as decision-making groups, let alone the fact that they may be considering issues often for the first time.[29] The second was the repeated calls for additional anthropological research in addressing disputes amongst Aboriginal people, when the research has already exhausted all sources of information and is inconclusive about the 'right people'.[30] Rather than 'big meetings' and 'more research', IFaMP identified that what is required in addressing disputes amongst traditional owners is support for them to negotiate their own heterogeneous (and at times hierarchical) cultural, economic, social and political interests.[31]

In addition, IFaMP found that lawyers who acted in an adversarial manner in representing their clients in agreement-making processes were having a significant negative impact on progress and outcomes, as was the lack of appropriate and effective third party management of facilitation and mediation processes.[32]

In its development, RPfC was aware of such pitfalls, building on this earlier native title process research, and mindful of the changed social and cultural conditions broadly described above.

III The Background to Victoria's Right People for Country Program

As noted, RPfC arose out of Victoria's development of an alternative approach to the settlement of native title claims, by way of the *TOS Act*. The framework for the negotiated out-of-court settlements which emerged resulted from the recommendations of the 2008 Framework Committee which was chaired by Professor Mick Dodson, with members drawn from VTOLJG, NTSV, and state agencies with responsibilities for land management and justice.[33]

At the time of the Framework Committee's work, Victoria already had in place a regime for traditional owner management of cultural heritage under the *AH Act*. This 2006 legislation established an all-traditional owner statutory body, the VAHC. One of its responsibilities is to appoint Registered Aboriginal Parties to manage cultural heritage for particular areas across the state. In so doing, it gives priority to the appointment of organisations that represent traditional owner groups for particular areas.

In the course of its deliberations about how to deliver land justice in Victoria, the Framework Committee identified the limited support for traditional owners in addressing 'intra and inter-Indigenous disputes over group composition and boundaries' and noted that these disputes could stand in the way of the resolution of native title.[34] The VAHC, whilst having made a number of appointments of Registered Aboriginal Parties over 'core areas' of traditional countries, also found that overlapping Registered Aboriginal party applications delayed or prevented party appointments.

The Framework Committee recognised that government could play a role in providing support to traditional owners in dealing with their own disputes, but it understood that traditional owner leadership was essential, 'consistent with principles of empowering the community in decision-making and self-determination'.[35] In June 2009, the state accepted the Framework Committee's recommendations, which included that the RPfC be established and that the RPfC's work should complement the VAHC cultural heritage processes alongside traditional owner settlements.[36]

Even before the drafting of the Traditional Owner Settlement Bill 2010 was complete, in July 2009 the government established a committee for the RPfC, bringing together key stakeholders from native title and cultural heritage processes, including representatives from VAHC, VTOLJG, OAAV, DJR and NTSV.

RPfC took time to build a partnership of traditional owners and government stakeholders and review best practice approaches to 'right people for country' issues. Victorian traditional owners confirmed that there was 'frustration that non-Indigenous information and systems are imposed on traditional owner groups and [that they] take precedence over Indigenous processes'.[37] They also emphasised the need to respect and value traditional owner decision-making structures and practices;[38] and the importance of traditional owners being appropriately resourced to participate in agreement-making.[39] Perhaps, most importantly, the traditional owner consultations identified that 'agreement-making needs to focus on restoring and building relationships because these relationships are ongoing and critical'.[40]

The RPfC's 2011 report was endorsed by all stakeholders. It established 32 core principles for traditional owner-led agreement-making which can be summarised as follows:

- Indigenous-led participatory approach to agreement-making empowering traditional owners to make their own decisions at every stage of the agreement process; from submitting an expression of interest for support to reaching agreements about identity or country.
- Tailored and coordinated support including information about the legal, policy and agreement-making parameters and resources for traditional owner participation and facilitators agreed to by traditional owners.
- Preparation, including strengths-based capacity building, to ensure traditional owners are ready to participate in agreement-making.
- Design of agreement-making processes that embed respect for cultural authority and practice and existing decision-making structures, and that match process and support options with traditional owner needs.
- Coordination of stakeholders and alignment of processes to ensure that RPfC complements and extends existing support and that institutional and policy barriers are addressed.
- Use of research as a tool to support but not determine agreement-making and confidentiality and legal protection to protect and support sharing of information.
- A focus on building and restoring relationships between traditional owners.[41]

The RPfC Committee then secured the Victorian Government's support to proceed with three pilot projects over 2011 and 2012 to test and further refine its approach.

IV The Right People for Country Pilots

RPfC commenced the pilots with a call for expressions of interest from traditional owners for specific agreement-making projects. This involved writing directly to traditional owner groups, circulating invitations through traditional owner networks and offering information workshops. With traditional owners taking the decision to opt into the process, the expression of interest process was an important first step in reinforcing their decision-making and building their understanding and trust in RPfC. Based on guidelines concerning consent and readiness, the RPfC Committee considered expressions of interest and agreed on three pilots. The three pilots encompassed group composition and extent of country issues with traditional owners who were at different stages of native title and cultural heritage recognition processes. The groups presented with varying levels of capacity and support needs and they displayed a spectrum of relationships.

RPfC was deliberately non-prescriptive about the type of support it could offer. While facilitation or mediation support was offered, RPfC resisted limiting support to third party interventions. The invitation to traditional owners to provide their own suggestions resulted in novel ideas not previously envisaged, such as the walking of country by neighbouring traditional owners in the boundary pilot, and they continued to reinforce traditional owner agency.

In early 2012, RPfC cast its net widely to compile a list of 50 Aboriginal and non-Aboriginal facilitators, with the aim of providing traditional owners requiring a facilitator with choices about who best matched their needs. The facilitators on the list have a broad range of mediation, facilitation, decision-making and capacity-strengthening skills, experience and approaches.

A Boundary Pilots

One pilot (Pilot A) involved boundary issues between three neighbouring traditional owner groups in central Victoria, all of whom knew each other and had reasonably amicable relationships. While one group was receiving native title service provider support in negotiations with the state to reach a settlement under the *TOS Act*, the neighbouring groups had little or no support to engage with traditional owner settlement processes. Each had been appointed as a Registered Aboriginal Party for their core country under the *AH Act*, which meant they had a corporate entity in place for cultural heritage purposes. There were, however, overlapping assertions of interests beyond the core areas which in each case had delayed their further appointment as Registered Aboriginal Parties for the whole of their asserted traditional country. The group already in negotiations with the state under the *TOS Act* needed to make boundary agreements with neighbouring traditional owner groups if any of the contested areas were to be included in their settlement.

The groups in this pilot advised RPfC that they wished to negotiate their own boundary agreements. They recognised

this would build their negotiation capacity for the future, strengthen their relationships with each other, respect and reinforce their cultural practices and allow for recording and strengthening of cultural knowledge for future generations. The RPfC pilots provided a range of support including grants to cover the costs of the groups 'walking country' together and payment of a 'cultural services fee', at a rate equivalent to cultural heritage field work, for representatives to jointly review research and maps, walk country and document agreements. Negotiation skills training was provided to one group to build its confidence in negotiating directly with the neighbouring group that already had negotiation capacity and support. The other group involved in this boundary dispute declined the offer of training, already feeling confident and experienced. RPfC partners also provided in-kind support; for example, NTSV provided legal and research expertise and OAAV provided mapping assistance.

Dja Dja Wurrung traditional owner, Rodney Carter, described the process in terms of 'negotiators following old ways, but using modern tools'. As he stated:

> Maps were spread out as broad as the rooms we met in, laid flat for our bird's eye view of the world, to talk about and share what we already know of the lands and waters and the special places that it held. We captured much of the journey electronically as data - you cannot see it, feel it or taste it, but the data provides a means to be applied to the decision making processes. It is used in the maps, it captures our voice, it captures our places and animals.[42]

This pilot delivered two boundary agreements that have supported the appointment of the three groups as Registered Aboriginal Parties for their agreed countries and the Dja Dja Wurrung's Recognition and Settlement Agreement reached under the *TOS Act* in 2013. At their agreement commencement ceremony in November 2013, the Dja Dja Wurrung spoke about the importance of mutual cultural respect with neighbours. Representatives from neighbouring groups attended the ceremony in a formal capacity, bearing gifts and offering speeches of support and mutual recognition.

B Group Composition Pilots

The other two pilots (Pilot B and Pilot C) involved group composition issues and questions of identity and association with country. In Pilot B, two corporations asserted exclusive representation of more or less the same group, both vying unsuccessfully for formal recognition in native title and Registered Aboriginal Party appointment processes. In Pilot C, the dispute concerned whether or not to include particular families in a traditional owner group pursuing a native title claim. In both pilots, the disputes were complex and long-standing; many players saw the disputes as 'intractable'. Tensions and conflict were high.

The key support provided by the RPfC in both of these pilots was the engagement of independent co-facilitators, who were chosen by the respective traditional owner groups. In Pilot B, traditional owners interviewed a number of co-facilitation teams before choosing the team they wished to work with. In Pilot C only one co-facilitator team was recommended by RPfC, but separate meetings with each group were convened to confirm acceptance. RfPC also arranged support for meetings, logistics, and mapping and for legal advice from NTSV about the parameters of recognition as they related to research findings.

The co-facilitators convened a series of family and group meetings on country. In Pilot B, a final agreement has not yet been realised. In Pilot C, one of the two disputed apical ancestors was accepted by the group, building the foundation for a further agreement to recognise the second ancestor shortly after the pilot was completed.

C Evaluation of the Pilots and Economic Cost Benefit Analysis

Following the pilots, RPfC commissioned an independent contractor to evaluate the effectiveness of RPfC's approach and the processes undertaken in the pilots.[43] It also commissioned an economic cost benefit analysis to establish whether the government's investment in RPfC represented value for money.[44]

(i) Independent Evaluation of the Pilots

A participatory evaluation of the pilots was undertaken, including thirty semi-structured interviews with traditional owners and key stakeholders such as NTSV, group interviews with the RPfC Committee and interviews with pilot facilitators. Subsequently, the contractor held a participatory evaluation workshop which sought to examine and refine the findings and which was attended by representatives of traditional owners, government, NTSV and the AIATSIS.[45]

The evaluation found that the RPfC pilots created new pathways for the resolution of group composition and boundary issues between and within traditional owner groups, leading to strengthened traditional owner relationships, increased agreement-making capacity and improved collaboration of the partners in the RPfC pilots.[46] The support of the RPfC pilots in assisting traditional owners to broker sensitive issues of identity was highlighted: 'The really big thing [about RPfC] is that it is helping with… traditional identity, as a major form of identity, and how that is fitting into the rest of Aboriginal Victoria as well.'[47]

The evaluation identified factors that underpinned the effectiveness of the pilots, which included: traditional owner leadership, tailored and flexible support, a focus on capacity building, use of independent facilitators, and building the collaborative partnership between stakeholders. These factors all matched RPfC's 2011 core principles.[48] Traditional owners reported that 'the groups are definitely the ones that are able to make their own decisions…they are supported to be able to do that'.[49] The evaluator commented that 'it [RPfC] has empowered Traditional Owners to try and work things out themselves together rather than going through another person.'[50]

Traditional owners and partners conveyed to the evaluator that the factors contributing to what they predicted to be the durability of boundary agreements were that it:

- was considered and undertaken from a traditional owner point of view;
- allowed traditional owner agency, with traditional owners driving the process according to their own motivations;
- allowed for a thorough and mutual understanding of territorial boundaries to develop;
- invested knowledge in traditional owner representatives and organisations;
- provided for transparent reporting back to the group by representatives directly involved, which supported strong group decision-making capacity;
- provided detailed cultural documentation of the agreement-making steps undertaken in different communication forms, which future generations could learn from; and
- developed protocols to support groups working together in the future.[51]

(ii) Economic Cost Benefit Analysis

The contractors for the cost benefit analysis undertook a desktop review and interviewed all key stakeholders to identify and value the economic costs and benefits arising from the pilots.[52] Key costs related to resourcing facilitators, training, walking country, meeting costs and traditional owner payments (the latter in recognition that they gave up their time and incurred expenses by participating). Key benefits or cost savings that might flow on from agreements included: reduced legal and administrative costs of dealing with disputes; greater certainty and reduced costs in relation to land dealings; greater efficiencies for government in its heritage management responsibilities; and strengthened capacity of traditional owner groups.

The economic cost benefit analysis found that every dollar spent returned cost savings valued at $3.80. Given that a ratio greater than one demonstrates that there is a net economic benefit of the pilots to society from RPfC, a cost benefit ratio of 3.8 is very high. Further, the net present value (being the amount by which the present value of benefits exceeds the present value of costs) was found to be more than $3 million. A sensitivity analysis found that even assuming an unrealistically large 50 per cent reduction in benefits, the RPfC pilots will still deliver significant economic benefits with a benefit cost ratio of 1.8.

The RPfC pilots' economic cost benefit analysis echoed the findings of an earlier economic analysis, commissioned by the Department of Justice in 2008, comparing native title transaction costs with the alternative model that was proposed by the 2008 Framework Committee.[53] The review identified that by 2008 the Victorian Government had spent in excess of $40 million on resolving native title claims over just 15 per cent of crown land. Of this $40 million, 80 per cent had been spent on legal, technical and administrative costs, while just 20 per cent had gone to traditional owners in the form of benefits. Similar to the purpose of undertaking a cost benefit analysis of the pilots, the 2008 analysis of the business case for an alternative settlement framework demonstrated efficiencies (value for investment) which as well as effectiveness (leading practice and better outcomes) which was critical to building support within the Victorian Government for the passage of *TOS Act*.

V The Parameters of Agreement-Making: The State's *Threshold Guidelines*

In 2013, the Victorian Government published the *Threshold Guidelines for Victorian Traditional Owner Groups Seeking a Settlement under the Traditional Owner Settlement Act 2010* ('*Threshold Guidelines*'),[54] which also arose out of the work of the 2008 Framework Committee. The Committee's report contained a commitment that if the alternative framework was to proceed, then the State of Victoria would develop a 'collaborative, non-adversarial, transparent and consistent approach' to establishing two key thresholds with traditional owners, as prerequisites to the negotiation of a traditional owner settlement: that the group are the 'right people for country' with respect to the area proposed, and that they have 'negotiation capacity' to meaningfully enter into negotiations with the state.[55] The *Threshold Guidelines* were subsequently developed in parallel with the establishment of RPfC, the two processes informing and influencing each other; and through a series of collaborative workshops in 2011 with traditional owners, the VAHC, DJR and NTSV. They were then redrafted after public consultations in early 2013. The Guidelines spell out what the state requires in order for traditional owners to enter formal negotiations under the *TOS Act*.[56] They are therefore of particular relevance to RPfC's work in assisting groups seeking to engage with the *TOS Act*.

The *Threshold Guidelines* require substantial agreement-making within and between traditional owner groups, as a pre-requisite for entering negotiations with the state. Groups are asked to demonstrate fair and stable internal decision-making processes, and their group description needs to be inclusive of all traditional owners for the proposed area. They are also asked to seek agreements with their traditional owner neighbours about their mutual boundaries, as part of the basis for the agreement area proposed. The views of the broader Victorian traditional owner community are also taken into account by the state through a threshold notification process: Victorian traditional owners, whether individually or through representative organisations, are invited to make submissions to the DJR about whether a group seeking a settlement is the right traditional owner group for the area and includes all the traditional owners for that area, and whether all group members have had a reasonable opportunity to participate in the full group's decision to seek a settlement. This referencing to other traditional owner groups increases transparency about the state's actions in determining who to enter settlement negotiations with. Where other traditional owner groups affirm the group seeking a settlement, this provides additional assurances to the state that they are dealing with the right people and breaks down the limiting circularity of self-definition. It also acknowledges a wider Indigenous domain of multiple groups or nations.

The *Threshold Guidelines* also represent a significant shift from the research-led 'continuity of connection' approach to group composition under the *NT Act*. While they require a 'statement of traditional and cultural association'[57] and significant research sits behind the basis for the group and area descriptions, association is framed in terms of the contemporary negotiated views of the group about itself. The statement of association is evaluated in light of the reconciliatory purposes of the *TOS Act*.[58] While descent from ancestors from the mid-1800s is an important defining feature, similar to native title processes, it is not the sole group-defining criterion under the *Threshold Guidelines*.

In threshold statements prepared to date, Victorian traditional owners have put forward membership criteria such as self-identification, recognition by the wider group and the activation of rights through participation in group activities or participating in the transmission of cultural knowledge. This has also been a way of establishing processes for recruitment and for traditional owners to earn their place in a group, rather than membership being defined solely on the basis of descent. It has also assisted traditional owners to negotiate matters of 'multiple descent'. The *Threshold Guidelines* state that in evaluating group descriptions, the state will 'need to balance factors of inclusivity with the rights of traditional owner groups to self-define and manage their membership and identity'.[59]

Many of the threshold requirements are seen by the state as indicators of the robustness of future negotiated arrangements and relationships. A 'lived' association with country, at least by a core of the traditional owner group members, is seen as supporting the sustainable implementation of on-the-ground agreements offered in settlements, which focus on matters of land and natural resource management, such as joint management of parks and reserves and Crown land. Negotiation capacity is a key focus, once thresholds regarding 'right people for country' have been met, with a requirement to develop a strategic plan that articulates aspirations and focuses the traditional owner group for the substantive negotiations ahead.

The RPfC pilots highlighted the benefits of clearly defined, transparent, and articulated parameters for traditional owner groups engaging with state processes in traditional owner settlements as set out in the *Threshold Guidelines*. These guidelines require traditional owners to take control and negotiate with each other and their neighbours, and to build effective governance and other capacities, as a foundation for a settlement that enables taking up direct involvement in managing traditional country.

VI Learning from Successes and Challenges in the Pilots

The evaluation sought to identify success factors, lessons and challenges, based on the views of the agreement-making participants and stakeholders in the pilots. Successes and challenges are two sides of the same coin. Challenges arise out of a deeper exploration of 'what worked' and 'what did not work': the complexity within succeeding and falling short.

RPfC's practices, and those of its partners, continue to evolve in response to the successes and challenges of the pilots, as new ways of doing things are found, as understanding grows and as practices are reviewed. The agreement-making processes themselves are dynamic and evolving, becoming sites of the negotiation of needs and interests, traditional owner perspectives, stakeholder interests and external parameters.

The remainder of this paper discusses some of the lessons and challenges for RPfC as identified in the evaluation of the pilots. They relate to: traditional owner leadership and agency; stakeholder partnerships; relationships and recognition; strengthening capacity; the use of facilitators and issues related to research and time.

A Traditional Owner Leadership and Agency

Throughout the life of RPfC, leadership by traditional owners on the RPfC Committee has played a significant role in building RPfC's credibility and legitimacy with the Victorian traditional owner community. The Committee has a majority of traditional owner representatives and has been chaired by a traditional owner since its outset. As the relationship between traditional owners and others on the Committee has matured, the Committee has placed an increasing emphasis on the value of traditional owner voices and has extended opportunities for genuine cross-cultural dialogue. A challenge for traditional owners on RPfC's Committee is to fulfil their dual roles as translators of government business to those they represent, while at the same time, informing their conversations as committee members and traditional owner representatives from a position of cultural integrity and identity.[60]

Leadership in the context of RPfC also requires traditional owners to exercise imagination; to step beyond their experiences of governments and courts imposing decisions and to imagine a context where their decisions carry weight and are respected, by both the state and their local communities. They also have to carry the weight of decisions not only for present, but for past and future generations:

> We pay respect to our ancestors before us that had the courage to never give up while their world around them was falling apart. They give us courage to take steps to maintain our culture in this imposed modern world. To our children and grandchildren, please do not judge us too harshly on decisions that we have made. Our ancestors did not choose what was imposed upon them. With this in mind we have tried our best to move forward for you. Look back at the beauty of our past, use the wrongs against us to give you drive for your goals, move forward to build a better future for your grandchildren.[61]

Traditional owner led processes under the *TOS Act* and *AH Act* demand of traditional owner representatives that they have courage and are willing to take risks, to choose to engage with processes, and to trust that good decisions will be made about country against a background where they have been denied this right for many years: 'The power to make decisions involves the tough issues of taking responsibility for actions, learning from mistakes and building knowledge, skills and capacity to exercise responsibility more effectively.'[62]

Traditional owner representatives must provide leadership to ensure a traditional owner group's effective articulation of what it wants, while refraining from bringing old wounds to the decision-making processes. In addition, they must also have the capacity to understand and explain the state's requirements to traditional owner groups, suggest ways of addressing these requirements, and relate meaningfully to the partners in RPfC. In doing so, they have to be realistic about the limitations of the benefits and ensure that the

whole group makes an informed decision to enter *TOS Act* and RPfC processes, in the knowledge that the benefits on offer will almost certainly not meet all traditional owner aspirations:

> Native title will never redress all past and present injustices, but it does provide an opportunity to be involved in the management of land and waters that are important to us… it's about trying to get the best outcome in our current context.[63]

The requirement of traditional owner groups to manage their affairs through a recognised corporation, whether under the *AH Act* or the *TOS Act*, involves a number of challenges, including the need to find effective, transparent and inclusive ways of working together and making decisions collectively. The corporate leadership has to take up the responsibilities of making hard and principled decisions that best serve the group membership as a whole. Processes need to be designed to accommodate and constructively engage with a diversity of members' views. This requires a particular conception of the role and function of the corporation by its office-holders as well as by its broader membership. The corporation is a representative structure, a creature of debate that must weigh-up circumstances and principles, rather than a vehicle that represents the interests and views of a limited group of individuals or families.

Where decision-making capacity is low and traditional owner leaders are in dispute, the evaluation found that the traditional owner-led principle is challenging to implement.[64] In these situations, RPfC must work with traditional owners to build leadership and support decision-making to ensure that each step of the process will build relationships rather than reinforce patterns of conflict as leadership itself becomes an outcome of agreement-making. Traditional owner representatives may also need to make decisions on behalf of their group, where people choose not to make a decision, or are unable to because of a range of issues, including concerns emanating from grief or loss.

RPfC's traditional owner-led principle also requires that government refrain from exercising what may have been previous roles as 'experts' or 'decision-makers' to enable and support traditional owner decision-making and leadership. It must give the agreement-making processes the opportunities to run their course, engage with traditional owner decisions as having standing and consequence, and be open to the creative solutions that traditional owners may develop. As Professor Mick Dodson has noted:

> Decades of research involving [I]ndigenous peoples in the United States and Canada makes it plain that communities facing serious, long-term disadvantage can and will take responsibility for sorting out problems if they are in a position to make decisions that will be respected and supported.[65]

B Collaborative, Cooperative and Coordinated Partnerships

RPfC may be conceptualised as complementing the work of the partners described above, and coordinating, reorientating and extending existing resources and processes related to the *TOS Act* and *AH Act*. One partner noted to the evaluator: '[RPfC] could have gone down the path … where you just worked with one or two [stakeholders] and it wouldn't have been nearly as successful.'[66]

The support of all partners through their resources, expertise, time and commitment has been critical in growing the partnership. DJR brokered four years of funding between 2009 and 2013 through a grant from the Victorian Property Fund. OAAV auspiced the project and has provided in-kind support. NTSV has played a pivotal role collaborating in specific agreement-making projects. VAHC and traditional owner leaders have provided critical advice and leadership as well as promoting RPfC in the wider Victorian traditional owner community.

The effectiveness of RPfC is dependent upon that of its partners, all of whom have a shared interest in its outcomes which can only be achieved through a coordinated, collaborative and cooperative partnership. The evaluation found that the pilots have made partners more aware of the need for coordination, and RPfC invests considerably in this role. Government departments have a diversity of agendas and policies. Previously, multiple processes including those initiated by government and NTSV may have been occurring simultaneously, working inefficiently or at cross purposes. RPfC partners also can have a range of other multidirectional and intersecting partnerships which (at least potentially) give rise to conflicting external demands, roles and responsibilities.

Maintaining coordinated, collaborative and cooperative partnerships can be challenging work. It is dependent on a number of factors, some of which are discussed below.

(i) 'Unlikely' Relationships

RPfC draws together a diversity of perspectives, expertise and knowledge. It involves what some might consider 'unlikely' relationships and alliances between government, traditional owners, native title lawyers, researchers and facilitators. It requires all parties to recognise that their actions can transform or perpetuate disputes.

The alternative settlement framework, and then the RPfC Committee, brought together traditional owner and government representatives to re-imagine native title in Victoria and find a new approach to questions of traditional owner identity and country. Time was taken to research and consult, but most importantly to build understandings and relationships as partners practiced agreement-making among themselves. Undertaking the pilots and the subsequent evaluation process represented a further deepening of understandings and revealed a number of challenges.

(ii) Clarity of Interests, Roles and Responsibilities

The pilots reinforced the need for the interests, roles and responsibilities of the partners to be articulated transparently and honestly. The challenge for RPfC is to ensure that these are clarified, and if necessary re-negotiated to suit specific circumstances. There can also be internal tensions in the roles and accountabilities of the partners that require open acknowledgement.

Under the *NT Act*, NTSV's primary statutory function is to facilitate native title recognition for traditional owner groups in Victoria. However, all native title representative bodies and service providers face the dilemmas of providing advice, managing process and making decisions about allocation of services and resources. In representing those who hold or *may* hold native title, representative bodies and service providers can find themselves representing two or more parties who are in dispute. In other matters, representative bodies and service providers may have a long-standing relationship with only one party to a dispute.

There are tensions in the roles and accountabilities of governments in agreement-making processes. In the case of Victoria, both DJR and VAHC are decision makers in matters relating to traditional owner recognition. DJR sets the requirements traditional owners must meet in order to enter negotiations with the state under the *Threshold Guidelines* and they lead negotiations on behalf of the state about the substance of any settlement. The VAHC makes decisions about the appointment of Registered Aboriginal Parties, often ahead of formal recognition processes under the *NT Act* or *TOS Act*. While, both DJR and VAHC must remain at arms-length from the traditional owner agreement-making processes under RPfC, they also have a keen interest in RPfC agreement outcomes. Their participation in the RPfC Committee indicates their support for traditional owner led agreement-making, but they must make independent decisions when they act on RPfC agreement-making outcomes. RPfC must manage itself around those tensions and multiple roles.

OAAV manages RPfC but also has responsibility for implementation of cultural heritage management and protection processes under the *AH Act*, Aboriginal community strengthening initiatives and coordinating government's Aboriginal affairs reform agenda. It has an interest in the appointment of more Registered Aboriginal Parties across Victoria and in capacity strengthening activities with traditional owner groups, to support the implementation of recognition responsibilities.

(iii) Open Acknowledgement of Parameters, Limitations and Potential Benefits

While RPfC can support traditional owners to develop innovative solutions, these solutions must engage with the institutional parameters set by the state in its *Threshold Guidelines* and in relevant legislation, and by the VAHC in its principles and decisions. The realities of available funding also establish parameters or limits on what is possible. Traditional owners are seeking agreements for both traditional owner settlement and cultural heritage management purposes, and so RPfC seeks to facilitate engagement with parameters from both processes.

A key role for RPfC is ensuring that traditional owners are well informed as they move into agreement-making, including about how RPfC works. The most significant and difficult message to communicate is that RPfC offers a process for traditional owners to build consensus and make their own decisions about 'right people for country' but does not offer a decision about who these people might be. This has been surprising to some traditional owners.

C Traditional Owner Relationships and Recognition

From the outset of RPfC, traditional owners have insisted that their agreement-making 'needs to focus on restoring and building relationships because these relationships are ongoing and critical to the successful implementation of agreements'.[67] The building of trust in each other and effective communication were seen as critical elements. The evaluator noted in one pilot that there was a 'shift essentially from disrespect, mistrust, and resentment through to a growing ease with being able to work with each other'.[68]

In the boundary pilot, traditional owners saw their relationships as facilitated and acknowledged by the demarcations of country boundaries, rather than as constrained by them. A boundary is 'a line that marks the limits of an area, a dividing line…but this is not a boundary in the usual sense…it is a place that brings us together with our neighbours, connects us and makes us stronger'.[69] Traditional owner representatives viewed 'walking of country' as a continuation of cultural practices and a contemporary expression of a perceived age-old federation of the five traditional owner groups of the Kulin nation. Traditional owner representatives also saw the project as providing an opportunity to strengthen the connections between the groups involved; talking to country, sharing stories, visiting significant places and reflecting on research findings concerning affiliations to the area, as one traditional owner reflected: 'We met; we talked and stepped back in time to walk the boundary. We followed the old ridgelines, we walked across the landscape, we looked through our ancestors eyes and agreed on countries.'[70]

Whilst social and country relationships are already overlaid by state legislative and tenure constructs, traditional owner agency can attribute new meaning. That is, boundaries are not to be seen as just fences, but also as symbolically marking obligations, partnerships, and responsibilities, founded on long standing kinship and cultural practices.

Agreement-making can also be painful, requiring some form of reconciliation with histories of loss and deep seated conflict within and between traditional owner families, sometimes from generations ago. It may also involve confirmation of traditional identities as identities are explored, researched and (re)negotiated.

(i) Agreements as Relationship Documents

Agreements in the pilots were documented in various ways according to purpose and audience. They were captured in written agreements but also in documented stories of agreement-making, signed maps, a Google flyover and signing ceremonies. Agreements were documented to share with other traditional owners unable to visit the country, and for future generations.

For external recognition purposes, agreements fed into native title or cultural heritage processes as 'contracts' between parties, or as records of resolutions made at full group meetings. They provided the state with greater certainty in its interactions with the group, such as agreed documented areas of country proposed as the subject for subsequent settlement negotiations. Traditional owners also documented agreements for their own internal purposes, such as recording understandings about reciprocal cultural rights, consultation protocols, future relationships, and knowledge and practices identified through photos, stories and language.

Just as boundaries were seen as markers of relationships, boundary agreements were conceived as relationship documents: 'They set out the basis on which [we] traditional owners will conduct [our] relationships with each other into the future,'[71] '[they] define us in the cultural landscape' and 'connect us with our neighbours'.[72] Agreements gave clarity to immediate issues and provided a basis upon which future issues could be resolved, as they arise: 'My children will use it and their children will use it.'[73]

While the pilots capture only a moment in time, relationship documents provide a platform for traditional owners to work together to implement and renew relationship agreements in changed future circumstances: 'We can change it and allow it to grow, or keep it the way it is. It has got that flexibility … so that is what contributes to the durability…'.[74]

RPfC is cognisant that relationships change and people may fall back into conflict. A challenge for RPfC and traditional owners alike is working out how to use agreements to address future issues and how to build the capacity of groups to do this. There is no way of predicting conflict in many situations, but the experience of agreement-making through RPfC can, at the very least, enhance understanding of, and strengthen capacity in, agreement-making processes

that can be picked up again in the future. It is ownership of agreements and processes by traditional owners that also makes them significant for future generations:

> Hearing the boundary negotiation team talk about the agreement that was made, about the report that was done, the evidence that was collected and is to be held by both groups, they were very conscious that this was not just for now. It was an enduring decision that they were making on behalf of generations to come. They carried that with them. It was much more about the cultural responsibilities of both groups to get this right for the long term.[75]

D Strengthening Capacity for Agreement-Making

Ownership of agreement-making outcomes by traditional owners cannot be achieved without traditional owner capacity to negotiate with each other. Strengthening the capacity of the partners is also an issue[76] since these are interdependent.

(i) Partners' Capacities

Through the pilots, partners reported an increased understanding of where traditional owner agreement-making fits within the wider cultural heritage and native title processes. In turn this affected the partners' practices and their interactions with traditional owner groups.[77] In one pilot, NTSV saw a need to articulate external parameters and budget restraints earlier than previously anticipated, and identified that group composition was an issue that needed to be settled *before* proceeding with other initiatives.[78]

Partners have also recognised the value of traditional owners making their own decisions. In the pilots, in contrast to the *modus operandi* of lawyers acting in an adversarial manner as identified in the research and noted earlier in this paper, lawyers working with *TOS Act* groups were encouraged to avoid adopting the positional negotiating stances which can be unhelpful in supporting traditional owners who will have to live and work together into the future to manage conflict. This represents a significant change in roles, as across Australia, lawyers managing claims in native title representative bodies and providers have often been focused on providing advice, taking instructions and getting a determination of native title for the claim group. The pilots built capacity through the firsthand involvement of NTSV legal staff, including via discussions about process with the facilitators. One NTSV lawyer undertook the negotiation training alongside traditional owners in the boundary pilot, reporting that this provided common tools and a negotiation process framework.[79] Since the RPfC pilots, NTSV has supported its staff by providing training in transformative mediation and interest-based negotiation.

(ii) Traditional Owner Capacities

Across the three pilots, there was evidence of increased skills and confidence amongst traditional owners to make agreements.[80] The evaluation identified the immediate skills and information that traditional owners needed to reach agreements, including skills in strategic negotiation, group decision-making, in managing internal disputes and in understanding relevant government processes.[81]

The negotiation skills training was particularly appreciated by traditional owners, providing 'capacity in understanding the game, the formalities and parameters of negotiation and the rules of engagement' and raising awareness about how important it is to be conscious of 'the interests of neighbours, the state and internally'.[82] One traditional owner reported learning the importance of managing emotions and feelings, having 'moments of empathy', needing to 'get on the same field and a comfortable space', being realistic and compromising in the understanding that there 'can never be compensation for what's happened to us and the loss of our land'.[83]

The evaluation found that group decision-making capacity is critical and identified the need for the further development of approaches to group decision-making support.[84] The evaluation observed that poor decision-making processes can entrench divisions, create fresh disputes and impact on the sustainability of the group. A majority vote at large group meetings can promote group instability, with decisions being reviewed and overturned depending on who has the numbers on the day.[85] The *Threshold Guidelines* also acknowledge that voting may not always be the best option for decision-making, but rather might be seen as a fall-back position, to be undertaken where efforts to reach consensus have been exhausted.[86] In the pilots, where decision-making capacity needed to be strengthened, agreement-making tended to stall or slow down, and in some instances RPfC needed to step in and take measures to further build skills and capacity, in order for traditional owners to fully engage in the processes they had hoped to follow.[87]

A major challenge for RPfC lies in building skills early in any agreement-making process: 'it will be much better to bring RPfC in early in the process…we would get even better results.'[88] As one traditional owner reflected, 'building capacity from the outset is something everyone says but no one does.'[89] The *Threshold Guidelines* also encourage traditional owners to develop agreed dispute resolution mechanisms early on, recognising that designing such processes once a dispute has arisen is more challenging, as agreement to the mechanism for dispute resolution can become a further site of disputation.

There is the ever-present chicken-and-egg paradox, however, where the group must agree to its collective decision-making processes at the same time as making decisions as to who should make a decision. The stakes concerning identity and country are high and 'who's in' or 'out' of a group can be in dispute and a vexed issue. The state's requirement for inclusivity in the *Threshold Guidelines*[90] can raise the criticism that it is demanding that 'too many' people are 'in,' but this is also countered by the more complex considerations of group membership issues which go beyond descent as the sole criterion of membership as discussed earlier in relation to these guidelines. The registration requirements under the *NT Act* for Indigenous Land Use Agreements ('ILUAs'), which are one of the agreements that must be reached in a *TOS Act* settlement, also demand inclusiveness.[91] The *Threshold Guidelines* indicate that the state considers that a group needs to be of sufficient size to warrant entering negotiations, as size is considered relevant to the capacity to operate a viable corporation and effectively perform post-settlement roles over the long-term.

The approach of RPfC when requested to assist with group composition by traditional owners, is to start with engaging all those who assert they are a member of the group. RPfC does not make judgements or decisions about who is in a group. Rather, it provides a forum for those people who are asserting connection but have differences of opinion about group membership to have discussions about traditional owner identity, and to engage with the state's threshold requirements and requirements of the *AH Act*. These discussions – how do people want to talk? When? Where? What support is required? – build the group's collective decision-making capacity from the start by supporting discussion and decision-making about the agreement-making process itself. All this should be done prior to discussing substantive issues relating to key issues, hopes and concerns.

While the tabling of research is one element in this process it is often not determinative and there are other issues that people also wish to discuss in order to move towards agreement such as the impact of colonisation, the activation of traditional owner rights, the sharing of cultural knowledge and practices, and relations between traditional owners living on and off country. Through these discussions, people develop a clearer understanding of their own perspectives and the perspectives of others, as well as of the external parameters required to achieve formal recognition. Where agreement-making brings together people who have not worked together before or who have a history of conflict, these dialogues provide an opportunity to build and test relationships and to find new ways of working together. Thus the process agreements and discussions along the way provide a critical foundation for durable agreements about group decision-making processes and group membership.

A challenge for RPfC remains, however, in that the legitimacy of representatives and their capabilities may not always be stable throughout an agreement-making process. From the start, the RPfC expression of interest process, referred to earlier, requires groups to describe how their decision to express interest in the first place was made, how representatives were authorised and the nature of the ongoing decision-making processes the group envisages. RPfC attempts to be 'alive' to representational issues throughout its work, measuring the effectiveness of early scoping processes by the degree and nature of traditional owner engagement, and also seeking to engage with factions to consent to participate or to submit their own expressions of interest, if they do not consider themselves to be represented by existing submissions. The authorisation of representatives may also be an outcome of facilitated processes.

E The Use of Facilitators

The opportunity to exercise choice over facilitators utilised in the pilots was highly valued by traditional owners. It was seen to strengthen traditional owner decision-making and ownership of processes from the start:

> I'm comparing it to what used to happen so the kind of agreement-making options that used to be available were "… these are the facilitators that are available, you use them that's it. Or nothing or [someone else] picks them for you".

> So in comparison to that, yes, the program has said; look, these are the sort of people we think will be able to achieve what you want…
>
> But then the next level is for the people who are participating in the agreement to make a choice. And what I really liked is…it kind of committed the parties to having to agree from the beginning or not so they had to either jump in or out of agreement-making from the start because they had to come up with a selection that they could both tolerate and they did. So I thought that was quite clever in a way. It started agreement-making from the outset.[92]

NTSV also reported the usefulness of facilitators in assisting traditional owners to clarify and discuss issues, freeing 'technical experts' such as researchers and lawyers from also managing those processes, and instead allowing these technical experts to focus on providing the appropriate information, explaining findings, providing advice on the requirements for formal recognition and responding to queries.

The evaluation found that RPfC's co-facilitation model of teams of Indigenous/non-Indigenous male/female facilitators also ensured that cultural and gender interests were taken into account and respected.[93] Indigenous facilitators were generally seen to have enhanced cultural understandings enabling them to 'hear and say important things that [others] might not'.[94] The co-facilitation model provided a broader range of process expertise and a structure for facilitators to support each other, including through debriefing. Facilitators were seen to have built confidence and to have grown the capacity of groups incrementally, taking one issue at a time, and creating contexts for building better working relationships:

> The facilitators have focused on discussing practical issues – how do you want to work together, what would a joint corporation look like, how would cultural heritage be managed, where would you draw a boundary? This has enabled small agreements along the way and the building of relationships (albeit slowly).[95]

One facilitator in the pilots particularly emphasised the importance of 'weaving a tapestry of relationship building',[96] including providing opportunities, as another commented, 'to unpick historical and relational dimensions and go beyond the immediate situation or conflict to assist the parties to explore their interactions with one another.'[97] Difficult conversations between specific families and smaller interest groups were facilitated to explicitly consider and agree on decision-making processes. The importance of private meetings with or amongst representatives – to identify their personal interests, explore their effectiveness in their representative roles and discuss how these were impacting on the overall process – was also noted as essential to effective practice.[98]

Notwithstanding these successes, there are a number of challenges for RPfC in the use of facilitators. The first site of negotiation amongst traditional owners and between them and the partners is the process itself.[99] This involves RPfC engaging with the traditional owners or their appointed representatives in accordance with their decision-making processes to identify whether a facilitator can assist, and then traditional owners choosing facilitators who best meet their specific needs. RPfC supported a choice of facilitators by identifying the general approaches and qualities that traditional owners were looking for and recommending a number of facilitators, based on their own assessment of desired facilitator skills and experience. In one group composition pilot, RPfC supported each disputing party to interview a number of facilitators before reaching an agreement. The challenge for RPfC lies in effectively responding to traditional owner needs and agency in relation to choice of facilitators.

RPfC has also learned from the pilots to formally clarify the roles, responsibilities and authority of the facilitators in relation to NTSV and traditional owners before any agreement-making process commences. These roles and responsibilities can come into tension, as they did in the pilots that utilised facilitators. Where traditional owners requested a 'big meeting' against the advice of the facilitators, this raised the question of whether traditional owners and NTSV were obliged to take the facilitator's advice.

The reality of building effective process is that practice is negotiated along a process journey and almost inevitably involves compromise. Some traditional owners may be hesitant to involve facilitators, possibly seeing them as replacements for lawyers and other advisers, and as yet again handing over responsibility to others – although a decision to use an arms-length facilitator can also be a demonstration of the group's maturity, confidence and

openness. Others with significant decision-making capacity, as was the case in one of the boundary pilots, may chose not to use a facilitator, instead directly negotiating with each other and successfully designing and implementing the agreement-making processes themselves. However, where the degree of conflict is high, some form of facilitation will almost certainly be of benefit.

The pilots have provided the opportunity for RPfC and NTSV and others to revisit their practices and build their own capacity. They also challenge RPfC to clarify its own relationship with the facilitators and their respective decision-making powers. For RPfC, this involves developing a consistent procedural logic which reflects its core principles.

F Using Research to Support Traditional Owner Decision-Making

In Victoria and elsewhere, research findings alone are rarely conclusive of group composition and country boundaries, particularly if research focuses on establishing the 'at-sovereignty' state of affairs. The *Threshold Guidelines* also acknowledge this.[100] RPfC can assist traditional owners to identify how to engage with and share research findings in their decision-making. Research thus becomes an information tool that informs negotiations, rather than being the pre-determinant of a particular outcome. Traditional owners reported that 'reviewing the historical research was useful because we could see it was up to us as traditional owners to work collectively to come up with an agreement.'[101]

In the pilots, traditional owners negotiated a range of ways of using research in their agreement-making. In one group composition pilot, relevant research materials were shared early on. In another, genealogical disputes were put to one side until groups were ready to discuss them, when the heat had gone out of the issue and groups had increased their negotiation experience through discussing less contentious issues first.

RPfC continues to develop its approaches to the use of research in traditional owner agreement-making, and to support traditional owner agency in making decisions as to its relevance and veracity. It has also facilitated dialogue between traditional owners and NTSV researchers about research processes, thereby encouraging greater methodological collaboration.

G Time Frames, Timeliness and Readiness: Enough Time and Resources at the Right Time

Time frames, timeliness, readiness and having enough time and resources at the right time are major challenges for all involved in RPfC, as well as in the broader cultural heritage and native title settlement processes. The amount of time and resources required for capacity building and negotiations is difficult to predict, as the processes raise issues along the way which, in turn, have to be addressed. The costs of meetings, training, boundary walks and independent facilitators are significant. They almost inevitably exceed the in-kind support provided by RPfC partners and core budget allocations to RPfC. Traditional owners, often time poor, need to attend meetings, often held on weekends at the personal expense of foregoing time that would otherwise be spent with their families. Agreements need time to settle. The processes of coordinating stakeholders and securing necessary resources can be protracted.

The time needed for a given project varies according to the complexity of the issues and the capacity and readiness of the group: the more complex the issues and the greater the seeming intractability of a dispute, the deeper the investment needed to achieve sustainable outcomes. Compromising on the time and resource requirements of processes can lead to heightened risks. The building of relationships and trust, so critical to the effectiveness of agreement-making and to the implementation of agreements into the future, also takes time. If sufficient time and resources are not allowed, existing or developing relationships can be jeopardised, and work on agreements to date can be wasted.

Timeliness is also an issue: disputes which are not addressed in a timely way can fester. Where RPfC traditional owner agreement-making processes are undertaken late in either native title or *TOS Act* processes, time pressures increase significantly and can compromise the ability to strengthen capacity, build relationships and negotiate durable agreements. The *Threshold Guidelines* attempt to ensure that such agreement-making is not left to the last minute, by requiring groups to present their efforts to reach agreements with neighbours and to develop sound internal-decision-making processes before the substantive stage two settlement negotiations can commence.[102]

On the other hand, external timeframes can provide incentives and impetus to traditional owners to come to the table and

work through disputes. In one pilot, traditional owners, tired of waiting, advocated for tight external timeframes to enable them to realise native title and cultural heritage management outcomes.

In another pilot, as a result of the work of RPfC, all stakeholders agreed that group composition issues were a priority and that the negotiations towards reaching a *TOS Act* outcome should be put 'on hold', to allow the composition issues to be resolved. In the end, it was reported that the internal group issues were resolved an estimated six months earlier than might otherwise have been expected.[103]

The RPfC Committee has learnt from the pilots to negotiate time, resources and readiness up front in the scoping of each project. At the outset of an agreement-making project, the time required to establish agreement-making, to plan and prepare, is invariably seen as a long time, as slowing things down. However, once agreement is reached, the process is seen as having saved time and resources.

Achieving agreements quickly in high priority matters, as opposed to dedicating more time and resources to longer term matters, is a tension that RPfC must work within. The reality is that RPfC needs to maintain a mixed work program – responding to both high priority matters with external time constraints, as well as working on matters much earlier in *TOS Act* and *AH Act* processes.

VII Conclusion

A number of factors created the conditions which made the Victorian alternative native title settlement process and RPfC possible. These include the poor native title outcomes of the 1990s and early 2000s that led traditional owners and government to search for more creative solutions to the question of land justice; the compelling nature of the business case for investing in native title settlement outcomes for traditional owners rather than chewing up millions in technical, legal processes; and the goodwill, productive collaboration and imagination of all stakeholders to work with the conditions of possibility offered by the alternative settlement framework and the *TOS Act* to create a different future.

Since the passage of the *TOS Act* in 2010 two comprehensive native title settlements have been made in Victoria. While the state still makes its own decision about who to negotiate with, according to the threshold requirements, this is not without substantial reference back to traditional owners, who are asked to reach collective agreements amongst and between themselves in order to interact collectively, as distinct traditional owner groups, with the state. Likewise, the VAHC encourages traditional owners to make their own decisions about their boundaries. RPfC provides support for traditional owners to act in both those interrelated spheres: settlements of native title via the *TOS Act* and traditional owner management of cultural heritage under the *AH Act*.

The reconciliatory purpose of the *TOS Act*[104] and the business case driving the Victorian Government to adopt an alternative settlement framework could equally apply in other states and territories. The realisation that the state can provide support for traditional owners to reach agreements about identity and country on their own terms, as they do in RPfC, is also something that other states and territories will hopefully arrive at.

Kirsty Gover identifies what she calls a foundational 'intervention paradox' of modern Indigenous self-governance: that the recognition of tribes requires a 'settler' government to intervene in the tribal sphere in order to identify, and render identifiable, the community that is to be recognised.[105] In seeking this recognition and thereby engaging with the legislative and policy approaches it entails, Aboriginal cultural worlds are profoundly reshaped. The extent of traditional owner agency in these interactions, however, has been significantly opened up in Victoria through RPfC and the *Threshold Guidelines* in the alternative settlement process.

RPfC brings a much needed process lens, a professional and respectful framework, an opportunity for dialogue, and a coordinating role to traditional owner agreement-making. As part of the broader native title and cultural heritage process in which it sits, RPfC advocates for traditional owner agreement-making to all its partners, at once dependent upon them, but also in having its own unique process role. Its key sphere of activity is in relation to supporting agreements within and between traditional owner groups, providing them with the opportunity and support to work things out amongst themselves, and to strengthen their integrity as traditional owners, so they can enter a collective dialogue with the world around them.

Through its process lens, RPfC responds to the evolving and intersecting needs and decisions of both traditional owner

groups and the state. In turn, the state plays a critical role in providing support and articulating transparent parameters for traditional owners. It is the totality of the interactions of the practices of all involved, negotiated as traditional owner agreement-making processes unfold, which creates the conditions of possibility for meaningful agreement-making. Central to RPfC's work is the building, renewing and strengthening of trust and relationships: not only in traditional owner agreement-making, but also between and amongst all those involved. Recognition is necessarily always mutual, including when it is between the state and traditional owner groups. By addressing issues of group composition and extent of country, traditional owner groups are also confirming and renewing processes of mutual recognition amongst themselves. Traditional owners negotiate meaning out of the conditions of possibility in which they are embedded, as they always have. As one traditional owner noted:

> In Victoria, the *Traditional Owner Settlement Act 2010* created an opportunity for my people to negotiate a non-litigated native title outcome...The Right People for Country Project allowed us to have closure of the pieces that were holding us back.[106]

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1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

2 The *Traditional Owner Settlement Act 2010* (Vic) ('*TOS Act*'), passed by the Victorian parliament in August 2010, provides a legal framework for the negotiation of a comprehensive out-of-court settlement package between the State of Victoria and a traditional owner or native title claim group. It aims for: 'agreements to be negotiated between the State and traditional owner groups to enable Aboriginal cultures to be recognised, in particular the recognition of the special relationship of Aboriginal peoples with their land, to recognise traditional owner rights and for rights to be conferred on identified traditional owner groups': see, *TOS Act* preamble. A settlement package includes agreements on recognition, land transfers, joint management, natural resource use and funding to support a traditional owner corporation to meet its responsibilities and pursue economic development opportunities. It provides incentives for traditional owners to opt into *TOS Act* processes rather than pursuing native title claims through the courts. Traditional owners are required to agree not to lodge future native title claims, but native title rights are not extinguished.

3 *Members of the Yorta Yorta Aboriginal Community v Victoria & Ors* [1998] FCA 1606 (18 December 1998) [19.8].

4 *Members of the Yorta Yorta Aboriginal Community v State of Victoria (Including Corrigendum dated 21 March 2001)* [2001] FCA 45 (8 February 2001).

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

6 *Clarke on behalf of the Wotjobaluk, Jaadwa, Jadawadjali, Wergaia and Jupagulk Peoples v Victoria* [2005] FCA 1795 and *Lovett on behalf of the Gundijmara People v State of Victoria* [2007] FCA 474.

7 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' (Department of Justice, Government of Victoria, 2008) 9 <http://www.landjustice.com.au/document/report_sc_vic_native_title_settlement_framework_13May09.pdf>.

8 Ibid 17.

9 John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (Oxford University Press, 2005) 29.

10 Ibid 38.

11 Designated kin, including sisters and not always Elders were often required to mediate: See, eg, Victoria Katherine Burbank, *Fighting Women: Anger and Aggression in Aboriginal Australia* (University of California Press, 1994); Nancy M Williams, 'On Aboriginal Decision-Making' in Diane Barwick, Jeremy Beckett and Marie Reay (eds), *Metaphors of Interpretation: Essays in Honour of W.E.H. Stanner* (ANU Press, 1985); Nancy M Williams, *Two Laws: Managing Disputes in a Contemporary Aboriginal Community* (Aboriginal Studies Press, 1987); Morgan Brigg and Roland Bleiker, *Mediating across Difference: Oceanic and Asian*

Approaches to Conflict Resolution (University of Hawaii Press, 2011); Fred R Myers, *Pintupi Country, Pintupi Self: Sentiment, Place, and Politics Among Western Desert Aborigines* (University of California Press, 1991); Kenneth Liberman, 'The Organization of Talk in Aboriginal Community Decision-Making' (1980) 5 *Anthropological Forum* 38; Kenneth Liberman, *Understanding Interaction in Central Australia: An Ethnomethodological Study of Australian Aboriginal People* (Routledge & Kegan Paul, 1985).

12 Francesca Merlan, 'Fighting over Country: Four Commonplaces' in Julie Finlayson and Diane Evelyn Smith (eds), *Fighting Over Country: Anthropological Perspectives* (Centre for Aboriginal Economic Policy Research, Australian National University, 1997) 13 <http://caepr.anu.edu.au/sites/default/files/Publications/mono/CAEPR_Mono12.pdf>.

13 Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000).

14 Peter Sutton, 'Families of Polity: Post-Classical Aboriginal Society and Native Title' in Peter Sutton (ed), *Native Title and the Descent of Rights* (National Native Title Tribunal, 1998).

15 Toni Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests amongst Indigenous Native Title Parties' (*Land, Rights, Laws: Issues of Native Title*, vol 3, Issues Paper No. 2, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, April/May 2005) <http://aiatsis.gov.au/publications/products/whose-benefits-whose-rights-negotiating-rights-and-interests-amongst-indigenous-native-title-parties>.

16 Merlan, above n 12, 1.

17 Simon Correy, Diane McCarthy and Anthony Redmond, 'The Differences Which Resemble: The Effects of the "Narcissism of Minor Differences" in the Constitution and Maintenance of Native Title Claimant Groups in Australia' in Toni Bauman and Gaynor MacDonald (eds), *Unsettling Anthropology: The Demands of Native Title on Worn Concepts and Changing Lives* (AIATSIS, 2011) 11.

18 David Martin, 'The Incorporation of "Traditional" and "Historical" Interests in Native Title Representative Bodies' in Julie Finlayson and Diane Evelyn Smith (eds), *Fighting Over Country: Anthropological Perspectives* (Centre for Aboriginal Economic Policy Research, Australian National University, 1997).

19 Sarah Burnside, 'Outcomes for All? Overlapping Claims and Intra-Indigenous Conflict under the Native Title Act' (2012) 16(1) *Australian Indigenous Law Review* 2.

20 Ibid 8.

21 Merlan, above n 12.

22 Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, 2002).

23 Toni Bauman, 'Final Report of the Indigenous Facilitation and Mediation Project July 2003/04 – June 2006: Research Findings, Recommendations and Implementation' (Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 1997) 28 < http://aiatsis.gov.au/publications/products/final-report-indigenous-facilitation-and-mediation-project-july-2003-june-2006>. These principles have also been adapted by Reconciliation Australia for their tool kit: see Reconciliation Australia, *Indigenous Governance Toolkit* <http://www.reconciliation.org.au/governance/>.

24 Toni Bauman and Rhiân Williams, *The Business of Process: Research Issues in Managing Indigenous Decision Making and Disputes in Land* (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004) <http://50years.aiatsis.gov.au/publications/products/business-process-research-issues-managing-indigenous-decision-making-and-0>.

25 Bauman, above n 23, 13.

26 The relationships between emotional, procedural and substantive interests also have been described in terms of a satisfaction triangle in interest-based negotiation models developed by CDR Associates: see Collaborative Decision Resources Associates, *CDR Associates* < http://www.mediate.org/>.

27 Bauman, above n 23, iv ff.

28 Ibid.

29 Unless 'big meetings' are well prepared, designed and facilitated, they can be overwhelming, many voices may be excluded, complex information may be poorly explained and understood, and decisions can fall apart after the meeting. Where big meetings had been seen to be successful, such as at Spear Creek and the Queensland Native Title Services Forum, these meetings had been prepared over significant periods of time, had multiple facilitators and high level technical mapping expertise available. See Dan O'Dea, 'Spear Creek: A Positive Alternative' (Paper Presented at the National Native Title Conference, Coffs Harbour, 3 June 2005); Toni McAvoy and Valerie Cooms, 'Even as the Crow Flies, It Is Still a Long Way: Implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan' (Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2008) <http://aiatsis.gov.au/sites/default/files/products/monograph/mcavoy-cooms-2008-crow-flies-qld-south-native-title-services.pdf>.

30 Bauman, above n 23, 9.

31 Bauman, above n 15.

32 Bauman and Williams, above n 24.

33 Steering Committee, above n 7.

34 Ibid 17.

35 Ibid.

36 With 60% of the state covered with appointed Registered

Aboriginal Parties, in 2012 the Victorian parliamentary 'Inquiry into the establishment and effectiveness of RAPs' found that in relation to the remaining 40% of the State, RAP appointments had been delayed or prevented in many instances because of ongoing conflict about the right people for country. See Environment and Natural Resources Committee, 'Inquiry into Establishment and Effectiveness of Registered Aboriginal Parties' (Victorian Government Printer, 2012) 192 <http://www.parliament.vic.gov.au/images/stories/committees/enrc/RAP/FINAL_RAP_WEB_Main_document_31_October_2012.pdf>.

37 Right People for Country Project Committee, 'Report of the Right People for Country Project Committee' (Aboriginal Affairs Victoria, Department of Planning and Community Development, 2011) 22 <http://www.dpc.vic.gov.au/index.php/aboriginal-affairs/projects-and-programs/right-people-for-country-project>.

38 Ibid 23.

39 Ibid 21.

40 Ibid 26.

41 Ibid 18–35.

42 Sally Smith, Rodney Carter and Tony Kelly, 'Making "Right People for Country" Agreements: Outcomes, Learnings and Questions' (Paper Presented at the AIATSIS National Native Title Conference, Alice Springs, 4 June 2013) 3.

43 Natalie Moxham, 'Right People for Country Summary Evaluation Report' (Office of Aboriginal Affairs Victoria, 2012); Natalie Moxham, 'Right People for Country Evaluation Report' (Office of Aboriginal Affairs Victoria, 2012). Copies on file with authors.

44 Anne Daly and Greg Barrett, 'Economic Cost Benefit Analysis of the Right People for Country Project' (University of Canberra, 2012).

45 Natalie Moxham, 'Right People for Country Evaluation Workshop' (Presentation facilitated at the Koorie Heritage Trust, Melbourne, 30 August 2012).

46 Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 10.

47 Ibid.

48 Ibid 8 ff.

49 Ibid 6.

50 Ibid 7.

51 Right People for Country Project Committee, above n 37.

52 Daly and Barrett, above n 44.

53 Deloitte Access, 'Options for Sustainable Native Title Funding' (Native Title Unit, Department of Justice, 2008); The Allen Consulting Group, 'Native Title Policy Framework. Cost Benefit Analysis' (Department of Justice, Victoria, 2007).

54 Native Title Unit, Department of Justice and Regulation, *Threshold Guidelines for Victorian Traditional Owner Groups Seeking a Settlement under the Traditional Owner Settlement Act 2010* (2013) <http://www.justice.vic.gov.au/home/your+rights/native+title/threshold+guidelines>.

55 Right People for Country Project Committee, above n 37, Appendix 7.

56 Native Title Unit, above n 54.

57 Moxham, 'Right People for Country Evaluation Report', above n 43, 41.

58 See *TOS Act* s 1.

59 Native Title Unit, above n 54, 36.

60 Rodney Carter and Mick Harding in Toni Bauman's notes from meeting with co-authors, 18th February 2014.

61 Rodney Carter, 'Dja Dja Wurrung Traditional Owner (Speech delivered at the Dja Dja Wurrung Recognition and Settlement Agreement Signing Ceremony, Bendigo, Victoria, 28 March 2013).

62 Larissa Behrendt and Alison Vivian, 'Indigenous Self-Determination and the Charter of Human Rights and Responsibilities: A Framework of Discussion' (Victorian Equal Opportunity and Human Rights Commission, 2010) 19.

63 Smith, Carter and Kelly, above n 42, 1.

64 Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 9.

65 Mick Dodson, 'Still Blaming the Victim' *The Age* (online), 22 June 2006 <http://www.theage.com.au/news/opinion/still-blaming-the-victim/2006/06/21/1150845241163.html>.

66 Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 8.

67 Right People for Country Project Committee, above n 28, 26; Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 7.

68 Moxham, ibid, 36.

69 Smith, Carter and Kelly, above n 42, 5.

70 Email from Sean Fagan (Wathaurung Aboriginal Corporation) to Sally Smith, 26 June 2013.

71 Personal Communication from Rodney Carter to Sally Smith, 4th February 2014.

72 Ibid.

73 Rodney Carter in Smith, Carter and Kelly, above n 42, 4.

74 Moxham, 'Right People for Country Evaluation Report', above n 43, 36.

75 Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 6.

76 Ibid 11.

77 Ibid 7.

78 Ibid 10.

79 Moxham, 'Right People for Country Evaluation Report', above n 43, 54.

80 Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 6.

81 Ibid 6 ff.
82 Mick Harding in Toni Bauman's notes from meeting with co-authors, 18 February 2014,.
83 Ibid.
84 Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 9.
85 Moxham, 'Right People for Country Evaluation Report', above n 43, 36.
86 Native Title Unit, above n 54, 45.
87 Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 9.
88 Ibid.
89 Right People for Country Committee, unpublished meeting notes, 23 May 2013.
90 Native Title Unit, above n 54, 8.
91 The registration requirements for Indigenous Land Use Agreements ('ILUAs') which are one of the suite of agreements reached in a *TOS Act* settlement, also demand inclusiveness in native title terms: ILUAs bind all native title holders, or persons who may hold native title (see s 24EA of the *Native Title Act 1993* (Cth)) and the State expects the native title service provider to certify ILUA registration applications.
92 Moxham, 'Right People for Country Evaluation Report', above n 43, 40.
93 Moxham, 'Right People for Country Summary Evaluation Report', above n 43, 8.
94 Rodney Carter in Toni Bauman's notes from meeting with co-authors, 18 February 2014.
95 Moxham, 'Right People for Country Evaluation Report', above n 43, 36.
96 Email from Helen Bishop to Toni Bauman, 17 December 2013.
97 Email from Rhiân Williams to Toni Bauman, 14 January 2014.
98 Email from Helen Bishop to Toni Bauman, 17 December 2013.
99 Email from Rhiân Williams to Toni Bauman, 14 January 2014.
100 Native Title Unit, above n 54, 43.
101 Mick Harding in Sally Smith' notes from Right People for Country Committee meeting, 23 May 2013.
102 Native Title Unit, above n 54, 14.
103 Daly and Barrett, above n 44, 15.
104 *TOS Act* s 1.
105 Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press, 2010) 2.
106 Rodney Carter in Smith, Carter and Kelly, above n 42, 4.