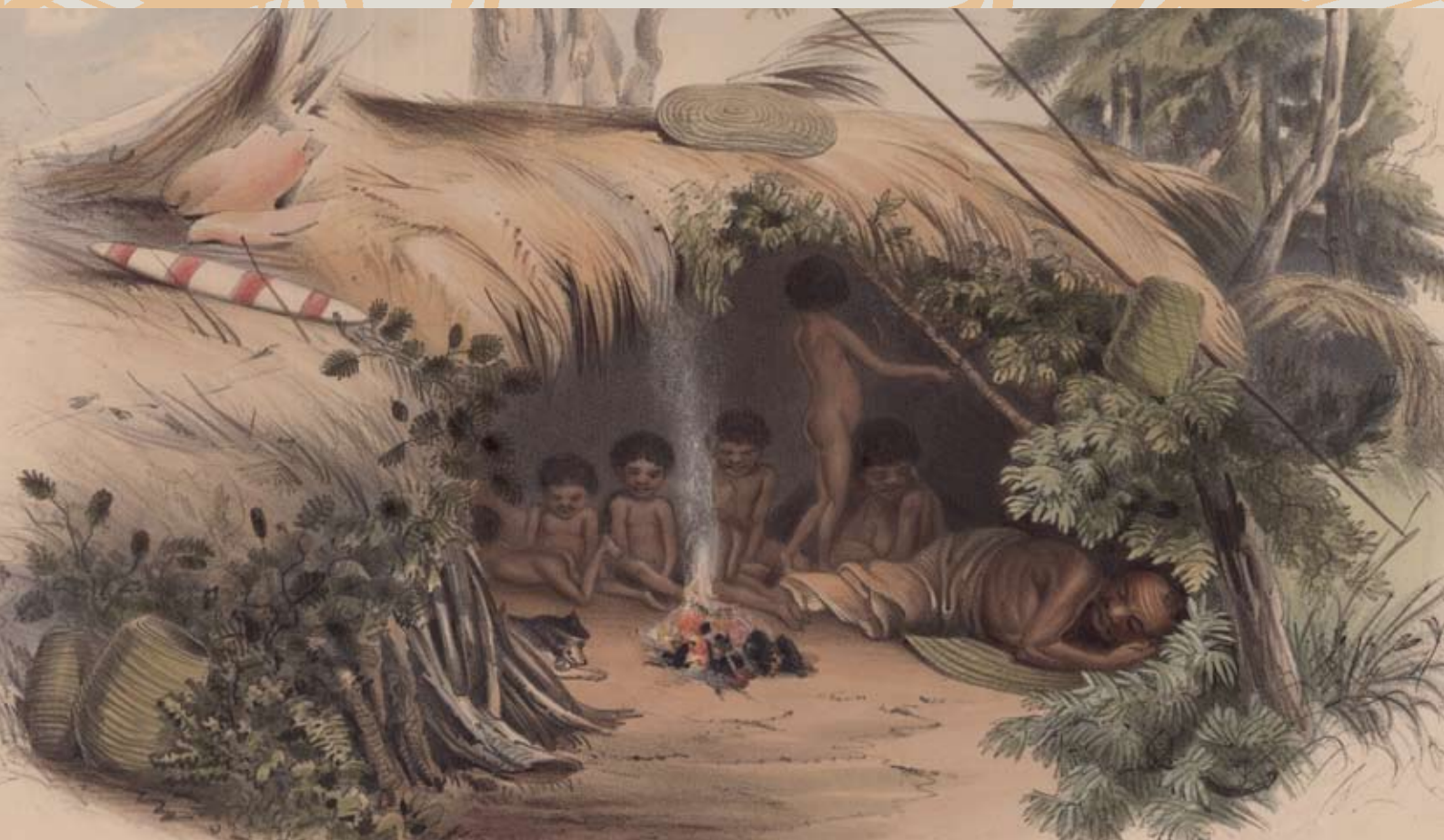




# The Gunditjmara Land Justice Story

JESSICA K WEIR





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**AIATSIS**

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and Torres Strait Islander Studies

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Front cover: Possum skin cloak; collecting gum; Elder Johnny Lovett; Deen Mar; 'Native encampment at Portland Bay, "Cold Morning" and his family', ca 1846, by GF Angas and JW Giles.

## FOREWORD

Gunditjmara country has many stories stretching back more than 30000 years. Over time, Gunditjmara Elders and people have told stories of ancestral creation beings revealing themselves in the landscape: erupting volcanoes; tsunamis; mountains forming; sea country creeping up onto the land; rivers changing; the relationship between people, animals and plants; abundant natural resources; settlement and aquaculture; the arrival of other people to Gunditjmara country; and of our ongoing spirituality and well being.

The Gunditjmara Land Justice Story tells us of two important events from recent decades; the precedence of the groundbreaking Onus (and Frankland) vs. Alcoa case before the High Court of Australia in the early 1980s and the Gunditjmara native title consent determination by the Federal Court of Australia in 2007. The recognition of Gunditjmara country and its people by Australian society is at the heart of these stories.

Telling the story of justice for Gunditjmara country is important and involves many of our voices. Jess Weir and the team from the Australian Institute of Aboriginal and Torres Strait Islander Studies have woven our stories with those of the broader community as well as the political and legal environments to document the achievements of the Gunditjmara and, in the same breath, Australia's growing acceptance of its own history and identity.

Now that our community has twice proven itself and gained the recognition that Gunditjmara country so rightly deserves, we can draw our own line in the sand and move on to caring for our country on our own terms. This is important to our Elders, our families, our young people, our future and our Gunditjmara country.

Damein Bell  
Chairman  
Gunditj Mirring Traditional Owners Aboriginal Corporation RNTBC





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We thank all the Gunditjmara people who took time out to be interviewed: Elder Eileen Alberts, Damein Bell, Elder Euphemia Day, Denise Lovett, Elder Johnny Lovett, Daryl Rose, Elder Kenny Saunders, Elder Donald Smith, and Elder Tony Vickery. Your experiences are the backbone of this story. Special thanks to Denise for helping at the consent determination. We also extend our sincere thanks and appreciation to Daryl Rose who took so much trouble to show us around beautiful Gunditjmara country or, as he so proudly calls it, 'the centre of the earth'.

In Canberra, my appreciation goes to Lara Wiseman, who conducted an exhaustive literature review and prepared a historical overview. Serica McKay provided a case note on the *Onus and another v Alcoa of Australia Ltd* case. Special acknowledgement goes to Amy Williams for her collegiality and good humour. Her audio-visual work brings life and texture to the Gunditjmara Land Justice Story monograph, as displayed on the DVD-Rom insert.

I particularly thank Damein Bell for reviewing and discussing the text with me over several months. Thanks to Mark Brett, Rob Blowes, Lisa Strelein and Ben Wurm for comments on an earlier draft, and Cynthia Ganesharajah, Tran Tran and Karen Deighton-Smith for editorial assistance. All errors or omissions are my responsibility.

The majority of photographs that appear in this book are taken by myself, Damein Bell or Amy Williams. For permission to reproduce the other photographs, I would like to acknowledge John Keily, Bestphotos.com, and the North Queensland Land Council. Permission was given by the South Australian Museum to reproduce the 'Portland Bay' image on the front cover. Amy and I thank Gunditj Mirring for the reproduction of their logo in the design throughout and on the DVD-Rom.

## THE DVD-ROM

In 2007 the project expanded to take advantage of the skills of NTRU communications officer Amy Williams who is also an aspiring young Indigenous film maker. Amy filmed the celebrations at the consent determination and the interviews. Excerpts of this material are included on the DVD-Rom at the back of this book, including a short-film that was screened at the 2007 National Native Title Conference in Cairns.



## WELCOME TO COUNTRY

*Vicki Couzens, spoken in Dhauwurd Wurrung, 30 March 2007*

mayapa wangan ngootyoong wanyoo Pernmeeyal, alam meen  
 koorrookee, ngapoon mangnooroo watanoo gunditjmara  
 ngatanwarr wooka ngootoowan ngathoo-ngat mangnooroo  
 watanoo gunditjmara koorrookee ba ngarrakeetong  
 teen ngeeye meerreeng  
 makatepa ngootyoong nanoong wanyoo gunditjmara  
 ngeeye meerreeng peeneeyt teenay

laka meerreeng  
 leerpeen meerreeng  
 karweeyn meerreeng  
 karman kanoo meerreeng  
 yana poorrpa meerreeng  
 mayapa meerreeng peeneeyt  
 mayapa maar peeneeyt



On the day of the  
 native title consent  
 determination  
 Gunditjmara dancers  
 welcomed everyone  
 to country.

### Translation

make/pay respects for the Great Spirit, ancestors  
 grandmothers, grandfathers from the Gunditjmara  
 welcome to you (all) (I give)  
 from the Gunditjmara grandmothers, grandfathers and families  
 here is our country  
 today is a good day for the Gunditjmara  
 our country is strong here  
 talk the country  
 sing the country  
 dance the country  
 paint up the country  
 travel through the country  
 make the country strong  
 make the people strong





## INTRODUCTION

In March 2007, celebrations were held on Gunditjmara country in south-western Victoria to celebrate a native title consent determination – a determination that is reached through the consent of all parties, rather than litigation.<sup>1</sup> The celebrations were at the base of the volcanic mountain Budj Bim, also known as Mount Eccles National Park, and followed a special hearing of the Federal Court of Australia on country. On this day, the Gunditjmara people spoke about how the native title determination was the end of a long struggle for recognition of their status as the first peoples of their country. They also talked about their future work to protect their native title rights and interests, and how the business of land justice continues.

Focusing on the term 'land justice' emphasises a broader agenda than the recent high profile native title determination. The historic *Mabo v Queensland (No 2)* native title decision (commonly known as the *Mabo* case) was not a comprehensive response to the land justice concerns of Australia's Indigenous peoples. Both native title claimants and governments have worked to overcome this. As a result, other languages have developed alongside native title, as well as those languages that pre-date native title, including: 'alternative settlements', 'non-native title outcomes', 'land justice' and 'treaty'. Fundamentally, 'land justice' encompasses respect for people and country; it is an expression of shared past, present and future with the land.

For the Gunditjmara, the road to native title was a long learning process and a long fight that was passed down through the generations. They are proud of their reputation as the 'fighting Gunditjmara'.

This book and DVD is only one version of the Gunditjmara Land Justice Story, a story that is told many different ways.

'Land justice' encompasses respect for people and country.

When Justice French handed down the native title determination, the crowd packed into the Federal Court marquee erupted in celebration.



The island Deen Marr is where the Gunditjmara believe the spirits of their dead travel to wait to be reborn.

The Tyrendarra lava flow is very important to the Gunditjmara people because it created an opportunity to build a vast and complex aquaculture network.

Glenelg River.

## GUNDITJMARA COUNTRY

Gunditjmara country is a dynamic place in far south-western Victoria which continues over the state border into a small part of south-east South Australia and is bordered by the Glenelg River. This country includes volcanic plains, a dramatic coastline, sea country, limestone caves, forests and rivers. Dormant and extinct craters disturb the measure of paddock fences, underground aquifers support permanent freshwater courses, and geothermal energy at the coast provides heated groundwater.<sup>2</sup> Volcanic activity was as recent as 5000 years ago, and volcanic explosions, earthquakes and tsunamis are a part of Gunditjmara oral history. Some lava flows reached into the Southern Ocean and today continue to be pounded by crashing waves as the land and sea wrangle over territory. Offshore, the island Deen Marr (Lady Percy Island), is where the Gunditjmara believe the spirits of their dead travel to wait to be reborn.

The Gunditjmara creation being revealed himself in the centre of this landscape, and his forehead is the mountain Budj Bim (Mt Eccles).<sup>3</sup> Budj Bim is the source of the Tyrendarra lava flow. Thousands of years ago this lava flow bubbled across more than 50 kilometres of land, travelled west and south to the sea, and dramatically altered the drainage pattern of the land.

This lava flow is very important to the Gunditjmara people because it created an opportunity to build a vast and complex aquaculture network. With the re-formed landscape the Gunditjmara engineered channels to divert water, fish and eels inland to holding ponds and wetlands. Here the fish and eels grew fat and were harvested with woven baskets set as fish traps and placed in the weirs constructed out of volcanic rocks. This resource allowed for permanent settlement, and the Gunditjmara constructed stone shelters. The success of the aquaculture also meant that excess eels were smoked and traded. Today this general area is known as Lake Condah, and the Gunditjmara names for places in the area include Kerup, Koon Doom and Tae Rak.





## THE ARRIVAL OF THE BRITISH COLONY AND THE FEDERATION OF AUSTRALIA

Europeans first came to Gunditjmara country from the sea in the early 1800s, hunting seals and whales for products to sell in distant markets. The fertility of the volcanic soils and fresh water ecologies in the surrounding countryside led to establishing the town of Portland in 1834.

The attractiveness of this country for the founders of the British colony, and subsequent Federation of Australia, has meant that the Gunditjmara have had an intensive experience of colonisation. The Gunditjmara resistance to incursions into their territory took many forms including: attacking livestock; harassing and robbing supply drays; retaliating against the kidnapping of Gunditjmara women and other acts of violence; and intimidating colonising settlers through demands for food and clothing.<sup>4</sup>

They fought for their lands in a series of clashes known as the Eumerella Wars, in which both parties experienced violent deaths.<sup>5</sup> The Gunditjmara resistance became overwhelmed by the colonisers who brought in the Native Police.<sup>6</sup> Missionaries sought to relocate Gunditjmara people of the west to a mission established further east near Purnim in 1861, however,

This beautiful manna gum forest grows on the stony country of the Tyrendarra lava flow. The lava flow extends from the volcanic mountain Budj Bim (Mount Eccles) over 50km to the south-west.



In 1866, 2043 acres of Crown land at Lake Condah was set aside for use as an Aboriginal mission.

the Gunditjmara refused because of tension with Aboriginal people from the eastern boundary of Gunditjmara country and beyond the Hopkins River.<sup>7</sup> Five years later, 2043 acres of Crown land at Lake Condah was set aside for use as an Aboriginal mission.<sup>8</sup> This land was gazetted as a reserve in 1869 and an Anglican mission was established. Not all Gunditjmara people were relocated onto the mission, many choosing to live elsewhere.<sup>9</sup> In 1885, 1710 acres were added to the reserve.<sup>10</sup>

With Victoria established as a separate colony in 1851, government policies regarding Aboriginal people became increasingly intrusive into their lives. The Gunditjmara had to navigate prejudicial policies of protection and assimilation that had little appreciation for Gunditjmara culture. As Elder Euphemia Day recalls:

*On the mission they weren't allowed – you lost your song and dance, the language that was taken away from us so we weren't allowed to speak your language ... My grandmothers were both in their nineties and I never ever heard them speak any language because they knew the consequences of that action.*

Demand for the fertile farming land steadily increased. As a result, in 1907 the Board for the Protection of Aborigines announced a proposal to relocate the declining number of residents of Lake Condah Mission to the Lake Tyers Mission in Gippsland. Ernest Mobourne wrote to the Government on behalf of the Aboriginal people at Lake Condah, requesting the move be reconsidered:

*Our fathers were brought here some forty years back to form a mission station here and were then informed that if they built houses, fenced in and cleared the reserve, the mission station would remain theirs for them and their children's children...our fathers have passed peacefully to rest and we would wish to live and work and be buried beside them.<sup>11</sup>*

In 1951, the Lake Condah reserve, with the exception of three small areas was revoked and the land was handed over to the Soldiers Settlement Commission.

The mission manager at Lake Condah also appealed to the Board to abandon its plan. The Board stated it would not forcibly move residents from Lake Condah and no further action was taken. In 1913, the Victorian government took over management of the reserve until the mission was closed in 1919. At this time Aboriginal people requested that the reserve be returned to them to be operated as a farming co-operative, however, this request was refused.<sup>12</sup> Despite the closure of the mission, Gunditjmara people continued to inhabit the buildings and the school and church remained in operation.<sup>13</sup>

In 1951, the Lake Condah reserve, with the exception of three small areas was revoked and the land was handed over to the Soldiers Settlement Commission.<sup>14</sup> The three exempt areas were the cemetery, the road providing access to it and an area of just 43 acres on which



the mission buildings were located. The many Gunditjmara who had served in the Australian Army had their applications for land under the Soldier Settlement Commission rejected.<sup>15</sup> These discriminatory State policies contained layers of hurt for the Gunditjmara that continue to resonate today.

With renewed calls for Aboriginal land rights across Australia in the 1970s, the Gunditjmara again sought to have the mission and mission lands at Lake Condah returned to them. In 1970, the Victorian Government introduced the *Aboriginal Land Act (1970)* which granted land reserved for Aboriginal people at Framlingham and Lake Tyers be vested in the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust respectively. However, the Gunditjmara living further west would not experience the hand back of some of their land until the mid 1980s.

The Gunditjmara acquired the Lake Condah Mission and cemetery as part of an out of court settlement after the 1984 High Court judgement *Onus v Alcoa* (see page 13). As part of the hand back of the land, the Victorian government introduced the Aboriginal Land (Lake Condah) Bill into Parliament. However, the opposition held a majority in the Legislative Council and blocked the Bill. The Victorian government then took the unusual step of requesting the Commonwealth to introduce the legislation under the powers of section 51(xxvi) of the Constitution, and the legislation was passed in 1987. Section 51(xxvi) enables the Commonwealth to make laws specifically for Aboriginal people, and its amendment was one of the outcomes of the 1967 referendum on Indigenous peoples' place in the Constitution.

The many Gunditjmara who had served in the Australian Army had their applications for land under the Soldier Settlement Commission rejected.

In the 1970s, the Gunditjmara again sought to have the mission and mission lands at Lake Condah returned to them.



Fur seals sleeping on the rocks at Cape Bridgewater.

In July 2004 an exceptionally wet season lead to water filling out the contours of Lake Condah. The waters of Lake Condah are crucial to Gunditjmara aquaculture industry. In recent times, this industry has been adversely affected by the construction of the Condah Drain in 1954.

Gunditjmara country has undergone many transformations in recent history, and the lives of the Gunditjmara and settlers are intertwined with shared experiences, common meanings and values. Place names of European and Gunditjmara heritage reflect this shared history, and are reminders of the collaborations made when the Gunditjmara told the newcomers where they were. Today, much law, language and culture has passed out of Gunditjmara knowledge within only a few generations, whilst according to native title, their laws, customs and traditions have continued as part of life in contemporary intercultural Australia. Gunditjmara country now supports European agricultural traditions, forestry, the export trade at Portland's deep-water port, wind farms and all the activity of rural and regional towns. In this context, the Gunditjmara have developed inclusive strategies to continue to live with and look after Gunditjmara country. The Gunditjmara have also kept pursuing recognition and protection for their unique responsibilities in country.





## ONUS V ALCOA

In the early 1980s, the Gunditjmara made national headlines when they successfully achieved common law recognition of their rights as traditional owners, which was more than a decade before the High Court *Mabo* native title decision.<sup>16</sup> The catalyst was a dispute over a proposed aluminium smelter near Portland. In 1980, Sandra Onus and Christina Frankland launched legal action in the Victorian Supreme Court to prevent Alcoa of Australia Ltd from damaging or interfering with Gunditjmara cultural sites located on the same place as the proposed smelter.

In order to proceed with the action, Onus and Frankland were required to prove they had a 'special interest' in protecting their cultural heritage under the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic). The Supreme Court judge dismissed the case, saying they had no standing to appear in Court because they had no significant interest in the land. The Supreme Court also dismissed their subsequent application for leave to appeal to the Federal Court. Onus and Frankland took the matter to the High Court where they were successful. High Court Chief Justice Gibbs judged that:

*The appellants have an interest in the subject matter of the present action which is greater than that of other members of the public and indeed greater than that of other persons of Aboriginal descent who are not members of the Gournditch-jmara people. The applicants and other members of the Gournditch-jmara people would be more particularly affected than other members of the Australian community by the destruction of the relics.*<sup>17</sup>

In the early 1980s, the Gunditjmara made national headlines when they successfully achieved common law recognition of their rights as traditional owners.

Sandra Onus and Christina Frankland, leaders in the struggle, at the protest camp in 1980.



Onus and Frankland had successfully argued that they carry responsibilities from their ancestors that specifically related to this part of Australia.

The State government drew up the legislation to transfer the former Lake Condah Mission to the Gunditjmara, which was passed in 1987.

Onus and Frankland had successfully argued that they carry responsibilities from their ancestors that specifically related to this part of Australia. With this High Court recognition, Onus and Frankland were able to continue their legal action.

The case set a land mark precedent for Indigenous people in the protection of their heritage, and the State of Victoria responded. In 1984 the Premier of Victoria, John Cain, wrote to the Gunditjmara to offer a deal in return for the withdrawal of the legal action against Alcoa. Keen to see the smelter go ahead, the government promised to implement a range of policies including Aboriginal ownership of 53 hectares that included the former Lake Condah Mission and cemetery.<sup>18</sup> The State government drew up the legislation to transfer the former Lake Condah Mission to the Gunditjmara, which was passed in 1987 with the help of the Commonwealth. A handover ceremony was celebrated at Lake Condah in 1988.

Denise Lovett talked about the 1988 hand back ceremony of the mission and cemetery, for her it was:

*...recognition of traditional ownership, connection to country, the importance of cultural heritage ... everyone was just so happy. I guess a lot of the Elders they were just over the moon about the settlement, the recognition, but the hand back of the mission<sup>19</sup> that a lot of them were raised on, that's where their childhood was.*

The handover agreement included funding for the Gunditjmara to govern this now formal recognition from government of their rights to country. In 1984 the Gunditjmara formed the Kerrup-Jmara Elders Aboriginal Corporation to manage the legal transactions for the hand back of the mission and cemetery. The Kerrup-Jmara are a clan who have always lived at Lake Condah. The Kerrup-Jmara Elders were allocated \$50000 annually for the upkeep of the mission buildings, and were responsible for a \$1.5 million Trust Fund set up by the Victorian Government. They used the money to purchase three farming properties in the area.

Another part of the settlement was the promised re-flooding of Lake Condah – with \$230000 for feasibility studies and associated works, and any remaining money to be spent on the reconstruction of fish traps, stone houses, and/or, interpretive facilities. The State government also acquired culturally significant properties around Mount Eccles National Park and Lake Condah and returned them to the Kerrup-Jmara.<sup>20</sup> Lake Condah itself remained a State fauna reserve, until March 2008 when it was also handed back to the Gunditjmara.



The 1988 hand back was an important step in recognising the collectively held rights of the Gunditjmara, as Damein Bell has said:

*[The settlement that was reached with the State of Victoria and Alcoa] really did a lot for our community in terms of developing things. We bought some farms and had tourism at the mission.*

However, the Kerrup-Jmara Elders Corporation was inexperienced in managing the business side of the hand back, which resulted in the loss of the purchased farming properties. The State government then engaged Winda Mara Aboriginal Corporation to manage the lands and facilities, including the mission buildings. Today this land is held by the Gunditj Mirring organisation as the representative body for Gunditjmara native title holders and traditional owners. The Kerrup-Jmara Elders Aboriginal Corporation was eventually liquidated. Damein reflected on these experiences:

*We also learnt a lot of lessons from [the settlement] because, when you think about it, we're just one generation from the mission, so we learnt a lot from that. I suppose this time around, 20 years later, we're putting those hard lessons to good use ... we might have mucked up but we learnt our lesson so we've got that behind us to set us up for the future.*

The legal significance of the *Onus v Alcoa* decision and the language the State of Victoria used in the Preamble to the Lake Condah legislation (see below), are often overlooked in the history of land rights and native title in Australia. These outcomes sit alongside other well known bench marks in our land rights history, including the Gurindji strike in 1966 (also known as the Wave Hill Walk-Off) and the land claim that led to the development of land rights legislation in the Northern Territory. In *Onus v Alcoa* the High Court recognised traditional ownership, and linked it with heritage protection, whilst the State government offered a settlement package also based on traditional ownership.

The recognition of traditional ownership is documented in the Preamble to the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth), in which the Victorian Government acknowledges that the negotiations were held between two legal and political bodies:

- i. that part of Condah land shown shaded and hatched on the plan in Part A of Schedule 1 was originally Aboriginal land and was on 22 February 1984 acquired under the *Crown Land (Reserves) Act 1978* of Victoria and is deemed to be temporarily reserved under that Act as an area of historic and archaeological interest;
- ii. that part of Condah land was traditionally owned, occupied, used and enjoyed by Aboriginals in accordance with Aboriginal laws, customs, traditions and practices;

In *Onus v Alcoa* the High Court recognised traditional ownership.

The Victorian Government acknowledged that part of Condah land was traditionally owned, occupied, used and enjoyed by Aboriginal people in accordance with Aboriginal laws, customs, traditions and practices.



Part of Condah land is of spiritual, social, historical, cultural and economic importance to the Kerrup-Jmara Community and to local and other Aboriginal people.

The High Court recognised the traditional owners as having a political status distinct from community groups formed around particular interests.

- iii. the traditional Aboriginal rights of ownership, occupation, use and enjoyment concerning that part of Condah land are deemed never to have been extinguished;
- iv. that part of Condah land has been taken by force from the Kerrup-Jmara Clan without consideration as to compensation under common law or without regard to Kerrup-Jmara Law;
- v. Aboriginals residing on that part of Condah land and other Aboriginals are considered to be the inheritors in title from Aboriginals who owned, occupied, used and enjoyed the land since time immemorial;
- vi. that part of Condah land is of spiritual, social, historical, cultural and economic importance to the Kerrup-Jmara Community and to local and other Aboriginals;
- vii. it is expedient to acknowledge, recognise and assert the traditional rights of Aboriginals to that part of Condah land and the continuous association they have with the land.

The State of Victoria acknowledged the distinct status of the Kerrup-Jmara in their country, as well as the failure of earlier governments to act in relation to this status with respect to the common law and Kerrup-Jmara Law. The State of Victoria acknowledged all this without requiring the continuity of laws and customs tests that have been so stringently applied in the native title law that followed in the 1990s. Instead, their acknowledgement followed the logic that the people who continue to live on their ancestors' country are the inheritors of their ancestors' title (clause v). Inherent to the State's approach was their respect for the political status of the other party at the negotiation table.

The recognition in the Preamble followed the High Court's articulation in *Onus v Alcoa* of the distinct political position of traditional owners.<sup>21</sup> The High Court recognised the traditional owners as having a political status distinct from community groups formed around particular interests. However, during the case the aluminium smelter proponents had argued otherwise; that the Gunditjmara's claims for special interest in their country was insufficient as it was 'entirely emotional and intellectual'. Their intention was to liken the Gunditjmara with community groups formed around environmental issues, because an earlier High Court decision had dismissed a case brought by environmental groups seeking special standing, in that instance, to protect part of Queensland.<sup>22</sup> However, in *Onus v Alcoa* the High Court disagreed with the parallel drawn between the environmental groups and the traditional owners, and determined instead that the Gunditjmara people did have grounds for special standing in their own country. This distinction has often been lost in the manoeuvrings of stakeholder politics in native title (as discussed further in *Recognising Gunditjmara* on page 24).

The Preamble acknowledges a number of matters that have since become contested under the native title regime. Despite pre-dating native title law, this preamble uses the language of ‘extinguishment’ to identify that the Gunditjmara’s traditional ownership rights are not extinguished (clause iii). Since *Mabo*, the extinguishment of native title has been an outcome sought by governments as part of the negotiations settlement packages with native title applicants. Another way the Preamble differs from the native title system is that it states that there has been no compensation for the land being taken by force, thereby acknowledging that the land was illegally taken and compensation is due (clause iv). Under the *Native Title Act 1993* (Cth), compensation is ruled out for lands forced from traditional owners prior to the *Racial Discrimination Act 1975* (Cth).

The Preamble also grasps a comprehensive approach to land justice – acknowledging that the land is of spiritual, social, historical, cultural and economic importance to the Kerrup-Jmara (clause vi). By ensuring that the State acknowledged their economic rights, the Gunditjmara were ensuring the State took into account Gunditjmara economic aspirations as part of the negotiation where the State government wished to see the smelter go ahead for economic development. While agreement making in native title often occurs in similar commercial circumstances, in the native title system the economic rights of traditional owners are rarely acknowledged. Instead, the economic rights of traditional owners are contested through discriminatory arguments that position Indigenous people as ‘uneconomic’. Another striking outcome of the settlement package was that it provided funding for the Kerrup-Jmara to manage the returned land, whereas native title holders do not receive operational funding to manage their lands. The State of Victoria also acknowledged the delayed ‘justice’ of the settlement by describing it as ‘expedient’ (clause vii).

For the Gunditjmara, the 1980s settlement with the State government provided an invaluable learning and comparative experience for the negotiations that were to come over native title. Sandra Onus reflected on all the highs and lows of the early days in *Onus v Alcoa*, and how that helped their confidence with native title:<sup>23</sup>

*We ended up with having to go to the High Court, because we lost every case in Victoria. We didn’t have a hope. And we were advised actually not to go to the High Court, by our own legal representatives. They’d thought we’d make it three judges out of seven, well we ended up with seven out of seven, which was a total surprise to us.*

In the native title system the economic rights of traditional owners are rarely acknowledged.

For the Gunditjmara, the 1980s settlement with the State government provided an invaluable learning and comparative experience for the negotiations that were to come over native title.



And:

*The Alcoa case would've certainly have helped to assist us in achieving native title. It would be hard for one judge, to argue with seven, as to who we really are.*

In the 1990s and continuing into the twenty-first century, the Gunditjmara drew on those experiences to negotiate a comprehensive settlement package through the complicated, fraught and arduous native title process.

The extraordinary stony woodland that is the Budj Bim landscape.





## AGREEING ON NATIVE TITLE

Native title is the common law recognition of the pre-existing rights and interests of traditional owners to their country. In response to the 1992 High Court *Mabo v Queensland (No 2)* decision, the Federal Parliament passed the *Native Title Act 1993* (Cth). Under the Native Title Act, Indigenous people and governments can address native title claims through mediation rather than litigation in the courts. An agreed outcome of native title is a 'consent determination', and is signed off by the Federal Court. This approach enables the parties to come to an agreement of what is fair, rather than positioning themselves on opposite sides of a court room. Elder Eileen Alberts prefers mediation to litigation:

*The mediation process was hard enough but I would endorse the mediation process against litigation any time. The chance to sit around the table and talk and talk issues over and reach a conclusion and go away and think about it and come back again to make sure we had the right conclusion was definitely the way to go.*

Native title is the common law recognition of the pre-existing rights and interests of traditional owners to their country.

Gunditjmara families together for a photo after a day out seed collecting for the revegetation of manna gum and tea tree.



It took 11 years for the Gunditjmara and the Victorian government to reach agreement on native title.

In 2000, the State government gave a policy commitment to approach all native title claims through mediation rather than litigation.

Elder Eileen Alberts giving evidence to Justice North.

It took 11 years for the Gunditjmara and the Victorian government to reach agreement on native title. The Gunditjmara had lodged their native title claim in 1996. In 2000, the State government gave a policy commitment to approach all native title claims through mediation rather than litigation, and in 2002 the parties entered into mediation. When this mediation stalled, Federal Court judge Justice North intervened. Justice North used the Court's power to move the case from mediation to litigation, and ordered an early evidence hearing in March and April 2005. This had the effect of pressuring the State to come to a fair and timely settlement, and simultaneously pressuring the Gunditjmara to keep up with the new timetable.

The Gunditjmara and the State were directed by Justice North to have their experts participate in a 'conference of experts' to identify any areas of dispute about the Gunditjmara's connection to country. This 'connection to country' is described in connection reports – reports requested by State governments when a native title claim is registered. These reports are prepared by experts such as anthropologists, linguists, and historians, and both the State and the native title applicants contract the experts to prepare separate reports. So, the conference of experts was held between the anthropologists of both parties, where they compared their findings. The outcome from this conference was that there was a large degree of consensus across the majority of issues at hand. With the Gunditjmara's 'connection' to their country agreed upon, the State moved to review the tenure of 2000 land parcels to determine



whether native title continued on those tenures. The land claimed by the Gunditjmara is Crown land and waters, including state forests, national parks, recreational reserves, river frontages and coastal foreshores. Agreement on these matters was sought and then reached with the Gunditjmara.

Elder Don Smith talked about how the native title process was complicated by the different understandings about what was important:

*The process, it was very dragging because of a lack of understanding about our culture. If they knew when they first came out here I suppose it would have been resolved but I guess it's better late than never.*

Elder Eileen Alberts talked about the native title journey for the Gunditjmara:

*It has been a long hard battle and in some instances it set family against family but the one and the most important of all thing that it did for us as Gunditjmara people was to really want to know more about our country, about where we're from. So we have a lot of people walking around now that can list their ancestors and that's been the great part of it. To know who they are, to know where they belong, which particular part of the Gunditjmara country they belong to: it has been a really positive process.*

The native title consent determination agreed to on 30 March 2007 recognises that the Gunditjmara people have maintained a traditional connection to their land and waters in the State of Victoria. In total, native title was recognised across 2000 parcels of vacant Crown land, national parks, reserves, rivers, creeks and sea, equating to 140 000 hectares or 1400 square kilometres in land area. These native title rights and interests are determined as being non-exclusive, that is, they exist on shared country. The rights are listed as:

- the right to have access to or enter and remain on the land and waters
- the right to camp on the land and waters landward of the high water mark of the sea
- the right to use and enjoy the land and waters
- the right to take the resources of the land and water,<sup>24</sup> and
- the right to protect places and areas of importance on the land and waters.

The land claimed by the Gunditjmara is Crown land and waters, including state forests, national parks, recreational reserves, river frontages and coastal foreshores.

The native title consent determination agreed that the Gunditjmara people have maintained a traditional connection to their land and waters in the State of Victoria.

These native title rights and interests are determined as being non-exclusive, that is, they exist on shared country.



These rights are subject to the laws of the Gunditjmara, the laws of the State, and the laws of the Commonwealth, including the common law.

The Gunditjmara will now be formally incorporated into the business of managing Gunditjmara country.

All these rights are subject to the laws of the Gunditjmara, the laws of the State, and the laws of the Commonwealth, including the common law. As shared country, the relationship between native title rights and interests and other interests in this country is described in the determination.

Where there is any inconsistency, the native title rights continue, they are not extinguished, but they have no effect in relation to the other interests. This means that the other interests prevail over native title.

The Gunditjmara can protect their native title through rights of notification and consultation about certain development applications – called ‘future acts’ – on their native title lands. More rarely, and dependent on the type of development, the Gunditjmara will have the right to negotiate. This is not a right to veto, but a right to raise native title issues with the development proponents, whether government or private. If the matter cannot be resolved, the National Native Title Tribunal is empowered to make a decision. All these rights are procedural rights, designed to protect native title into the future.

Critically, these procedural rights mean that the Gunditjmara will now be formally incorporated into the business of managing Gunditjmara country, as Elder Johnny Lovett said:

*[Native title] puts local tribes and councils on notice that they now have to deal with us as a people when they want to do whatever they used to just think they had the right to do. That no longer exists. They now have to negotiate with us and come through the proper channels instead of just thinking they can just go and dig this up and dig that up and do whatever they want to do. They now have to negotiate with us at a level that we have to come to an agreement, we have to be involved at last.*

These procedural rights, held in perpetuity, fundamentally express how the Gunditjmara are now formally part of the political landscape. As Elder Tony Vickery said:

*We are finding that the government has come to our way of thinking which has taken them a long time and I think it will be better in the future.*



At the consent determination, Gunditjmara family reunions took place, as people lined up together under the banners of the common ancestors, from whom they trace their descent. The 14 Gunditjmara ancestors recognised by this native title determination are: Jenny Green; Timothy James Arden and Barbara Winter; Mary, mother of James Egan; Billy and Mary Gorrie; William and Hannah King; James Lancaster; Susan McDonald of the Lovett's line; Mary McKinnon; Eliza Mitchell; John Henry Rose; James and Mary Sutton; Louisa Taylor; Andrew and Ellen Winter; and Lucy Sutton.



The Gunditjmara can now enjoy their native title; to go fishing and camping on their own country without the need for a licence.

Going fishing and camping are part of their continuing authority in their own country within their own laws and traditions.

## RECOGNISING GUNDITJMARA

A few days before the consent determination was handed down, I asked Elder Kenny Saunders what would happen when his native title was recognised. Elder Kenny said:

*Just the chance to do the things that I have been doing since I was a young tacker, and that's to hunt and fish and walk on country where I don't have to get permission to in this day and age. To go and get a feed of fish, to go and cut an armful of wood and light fire ... and don't need a licence for it.*

Daryl Rose also talked about how it would be different after the consent determination:

*We have the right to go hunting and fishing on our land and camping on our land. Well we've been doing that anyway but this time we can't get arrested for it if we haven't got a permit.*

But the most important thing I kept hearing about the long process of claiming native title was recognition. As Daryl said:

*It's the final recognition that I am who I am in the sense that I've been saying and our parents told us and other people told us, we're Gunditjmara.*

And:

*Every person who said they were Gunditjmara 11 years ago is still Gunditjmara today and so that just shows that we knew who we were but we had to spend 11 years convincing some other people ... no-one can take that away from us now.*

Twenty-six years earlier the *Onus v Alcoa* case recognised that the Gunditjmara held special standing to apply for a legal injunction under heritage legislation. The native title determination reiterated this recognition, but in a much more comprehensive manner. The Gunditjmara can now enjoy their native title; to go fishing and camping on their own country without the need for a licence. The term 'recognition' is used because native title rights are pre-existing rights. Going fishing and camping are part of their continuing authority in their own country within their own laws and traditions.

The unique relationship between Indigenous peoples and Australian governments and their legal systems was explicitly acknowledged on the day of the consent determination both in the transformation of the physical space of the Federal Court, and in the words used by Justice North. The Federal Court is a 'ritual space'.<sup>25</sup> This space is constructed by placing the Australian coat of arms at the front of the room, and in





front of this is the 'bench' which is a table where the judge and his or her associates sit. The Gunditjmara requested permission from the Court to place banners that listed their ancestors at the front of the Court, and a possum skin cloak on the bench. This was preceded by a welcome to country by Vicki Couzens in traditional Dhawurd Wurrung language, on behalf of Gunditjmara country, ancestors, Elders and families. The Court also observed one minute's silence to respect Gunditjmara who had passed away.

Justice North spoke about the reason for these arrangements within the rituals of the Federal Court:

*This court hearing today is really a coming together of two legal systems. For that reason, I have welcomed the applications made by Mr Bell to bring the Gunditjmara People and ancestors and tradition into the courtroom. It's an unusual thing for the Federal Court to do. Normally, at the end of a case, which is what we're witnessing today, the judge simply proceeds to go through all the legal issues raised by the case... What [the consent determination] is all about though is the non-Indigenous legal system engaging in an act of recognition. That is a formal act and it's done in accordance with the non-Indigenous law of Australia. It was greatly welcomed by me that the Gunditjmara People's contribution was evident in the courtroom and now I'll proceed to deal with the case under non-Indigenous law in the ordinary way it is done in a courtroom...*

The possum skin cloak and the banners of the ancestors joined the symbolism of the Federal Court to express the meeting of two systems of law. Whilst these laws have a history of over 150 years of interaction, and much has changed in that time, the ceremony formally recognised the continuing legal-political status of the Gunditjmara in their country.

The possum skin cloak and the banners of the ancestors joined the symbolism of the Federal Court to express the meeting of two systems of law.

The Federal Court is a ritual space. This space was transformed during the ceremony for the native title consent determination. Gunditjmara placed a possum skin cloak on the Federal Court Bench, and lined the back wall of the marquee with the banners of their ancestors.



A good example of the complexity of native title is the building of this bridge to the Tyrendarra Indigenous Protected Area. Under native title law, the building of the access bridge resulted in the extinguishment of the native title rights and interest of the Gunditjmara over that particular area of land. And yet the bridge provides access to Aboriginal owned land of cultural significance.

To accommodate the different legal traditions, the common law describes native title as *sui generis*, which is Latin for 'unique'. However, native title remains an awkward relationship between non-Indigenous laws and the laws of the Gunditjmara. Native title is a creature of non-Indigenous law; it is how the courts have decided to describe how they will treat Indigenous laws. Native title law includes much that is alien to Indigenous law, including the doctrine of extinguishment. The *Mabo* decision inherited over two hundred years of land grants made by the Crown that had not accounted for Indigenous peoples' property rights. The doctrine of extinguishment is a mechanism developed by courts and parliaments to address this. This doctrine has the effect that native title cannot be recognised in areas covered by certain land tenures irrespective of the connections the claimant group holds with those lands.<sup>26</sup> In contrast, under Gunditjmara laws, extinguishment does not exist.

Native title is sometimes described as a 'recognition space' between the two legal traditions, but it is more accurately described as one way



the non-Indigenous law acknowledges Indigenous peoples' laws.<sup>27</sup> Power is exerted as part of this process. As legal analyst Lisa Strelein has described, native title creates a hierarchy of laws, whereby non-Indigenous laws prevail over Indigenous laws.<sup>28</sup> Anthropologists Benjamin Smith and Frances Morphy have analysed how native title 'encapsulates' traditional laws and customs into the 'mainstream'.<sup>29</sup> Both Indigenous peoples and governments work with this bias in their native title negotiations.

Indigenous people who choose to make a native title claim must necessarily navigate the pros and cons of how the common law interprets their laws and customs.<sup>30</sup> Damein Bell described the pragmatic approach the Gunditjmarra took to claiming native title:

*We had lost a lot of people along the way and I suppose for the past 18 months the group had felt it's time to finish this. Native title is only so much of land rights and land justice, so we'll do this now and get the best possible outcome we can and set up for the next generation, 20 years down the time, 50 years down the time.*

Governments have a powerful role in making decisions about what is and what is not possible in native title, both in claiming native title and once native title has been determined. For example, connection reports are not required under native title law, but States have required native title claimants to provide evidence of their 'proof of connection' before they will enter into mediation. Thus, the Gunditjmarra provided a connection report to the State of Victoria. However, all native title claimant groups have already been through a process of identification and connection – the registration test conducted by the Native Title Registrar of the National Native Title Tribunal, which is a very difficult level of proof. By requiring a connection report, the State placed additional workload on the native title applicants, as well as placing itself in the position of judging the legitimacy of the party (the claimant group) with whom it was meant to be negotiating.

The positioning of power amongst parties in mediation also extends to how the State involves third parties. This can be called stakeholder politics. A recurring vexation expressed by Gunditjmarra about the native title process was the inclusion of more than 100 other parties in their native title negotiations. The Courts have taken a liberal approach to who can be involved in native title claims, resulting in a proliferation of parties, and the slowing of negotiations to the pace of the most difficult party.<sup>31</sup> Given that native title is a recognition of two-law making polities, many Gunditjmarra questioned the positioning of third parties as respondents in the mediation process. As Denise Lovett said:

Native title creates a hierarchy of laws, whereby non-Indigenous laws prevail over Indigenous laws.

Governments have a powerful role in making decisions about what is and what is not possible in native title, both in claiming native title and once native title has been determined.

There were more than 100 other parties in their native title negotiations.





*My biggest thing about native title is I don't think we should have had to negotiate with the respondents. There was no need for that. ... If the State is the one that manages it, then why aren't we just negotiating with the State government? Why do we have all these other people here that we have to tell our business to and try and convince? ... I don't see the fairness in it. We were negotiating with the State. They were the ones who gave the respondents a licence or an interest in the Crown land, they [the government] should have negotiated with them [the other parties]. They should have been the go between us, instead we were sitting at the table...*

The 130 plus parties created an additional strain for the Gunditjmara in the negotiations.

The Gunditjmara requested that they only negotiate with the Department of Justice, and so all the other government departments co-ordinated their involvement through that department.

The 130 plus parties created an additional strain for the Gunditjmara in the negotiations. Whilst the Gunditjmara value their partnerships with the wider community, many spoke about how their native title issues are matters they wish to deal with the Crown directly. Even with this, there is not just one government – but different government departments, different bureaucrats, politicians, and all the different laws and policies. To manage this, the Gunditjmara requested that they only negotiate with the Department of Justice, and so all the other government departments co-ordinated their involvement through that department.

Denise Lovett commented upon the limits of the native title process:

*The sad thing about it is that it's so, I don't know what the word is, it's where you get pressured and have to meet deadlines and that sort of trying with negotiations that you have to shift, I mean someone has to give a little bit and it's just frustrating that you have to give so much.*

Daryl Rose talked about how Gunditjmara had to prove their legal system, whereas the third parties had their position established as part of the 'status quo' of the colonial authorities:

*... all these other people come in... who say they had a vested interest in it, the fishermen who had interests, and the beekeepers.... Well the worse thing is all they had to sit down and prove is they had an interest in it now. 'Oh, I keep bees on this Crown land so I've got an interest in it.' ... We had to prove we had a continual connection, cultural, spiritual and peaceable connection to that bit of land.*



At the speeches held after the consent determination, each speaker made a point of mentioning the beekeepers in their acknowledgment of the long list of respondent parties. On that day the beekeepers became symbolic for the diversity of non-government groups who had taken a legal interest in the proceedings. Whether all the non-government parties should be involved in native title negotiations is a political-legal point, hinging on the positioning of native title in contemporary Australia.

Clearly, traditional owners hold and negotiate important relationships with country that are distinct from other groups in Australian society. Traditional owners are not another stakeholder or cultural group within a homogenous Australian polity; they are a constitutional entity.<sup>32</sup> Whilst the Gunditjmara live within shared intercultural society, their political-legal traditions have a source external to the common law. This political-legal distinction is acknowledged to differing degrees within the native title system.

Cobboboonee Forest.



## LAND JUSTICE

Attorney-General of Victoria Rob Hull, spoke about land justice in the speeches held after the native title consent determination:

*All of us know the limitations of the native title process, however, as the wheels of a bureaucracy the size of the Queen Mary come to grips with the concept of traditional ownership, we have I believe begun to explore how imagination and how good will can expand these limitations. How recognising that economic and social development, for example, are essential companions to keeping that connection with country flourishing.*

There is a broader land justice agenda to engage with that includes economic and social development.

Native title holders have no rights to the minerals on their lands, and the government grants licences for the water and forest resources on native title lands.

Despite the recognition of traditional ownership by the State of Victoria in the 1980s, understanding political diversity is still a complex matter for the Victorian bureaucracy to grasp. This engagement is further frustrated by the native title process. The Attorney-General points to this, and how there is a broader land justice agenda to engage with that includes economic and social development.

Traditional owners in Victoria have envisioned land justice as including land transfers, economic development, recognition of traditional owner authority over their cultural heritage, and a share of the wealth of the resources from the land.<sup>33</sup> However, for native title holders, land justice through native title is limited by the lack of commercial or economic rights, which are rarely recognised as native title rights. Native title holders have no rights to the minerals on their lands, and the government grants licences for the water and forest resources on native title lands. As a result, native title claimants are often without the funds to manage their lands.

Of particular concern to native title claimants in the more intensely settled parts of Australia, is how the doctrine of extinguishment has limited native title claims. As the Gunditjmara were only able to claim small parcels of Crown land in their native title claim, they submitted a larger 'claim boundary' map to show the extent of their country. This map will facilitate the recognition of the Gunditjmara's rights and interests in matters not strictly regarded as native title, such as cultural heritage and land and water management. Indeed, the Victorian government worked with the Gunditjmara to include a number of outcomes in support of the consent determination that went beyond the limitations of native title. These include a co-operative management agreement for Mount Eccles National Park, an Indigenous Land Use Agreement to work out a land management process, and a Memorandum of Understanding to underscore the on-going collaboration between the State and the Gunditjmara on various projects. The Indigenous Land Use Agreement sets out a timetable for developing a more formal process with respect to the Gunditjmara's hunting and gathering rights on their native title lands.





The Victorian government and the Gunditjmara also signed a funding agreement for the Gunditjmara to manage their native title lands. As required by the Native Title Act, the Gunditjmara have established the Gunditj Mirring Traditional Owners Aboriginal Corporation to manage their legal transactions and collective rights. The Victorian government has agreed to fund the corporation for five years. By investing in the Indigenous governance of native title lands, the Victorian government is setting a best practice benchmark for other State and Territory governments.

In 2005, the Attorney-General of Victoria Rob Hulls was invited to visit Gunditjmara country. On this visit, Elder Ted Lovett handed him a message stick and let the Attorney-General know that he was to bring it back when he had good news for the Gunditjmara. At that time, the Gunditjmara had become frustrated by the slow process of their native title claim, which they had lodged in 1996. On Saturday the 30 March 2007 the Attorney-General returned the message stick to Elder Ted at the native title celebrations.

Ted Lovett and Rob Hulls with the message stick Hulls returned to Lovett, at the speeches after the native title consent determination.



The Gunditjmara consent determination is celebrated by both the Gunditjmara and the Victorian government as the preferred way to work through native title issues.

Traditional owners in Victoria have formed a state level Land Justice Group, with the support of the Victorian Native Title Services. Together they work with government departments to deliver 'land justice' rather than, or in addition to, native title.

The Gunditjmara consent determination is celebrated by both the Gunditjmara and the Victorian government as the preferred way to work through native title issues. Consent determinations can establish valuable working partnerships, rather than the adversarial relationships that develop when native title is litigated. The Victorian government and the Gunditjmara took advantage of the relationships developed around native title to build partnerships centred on the broader land justice agenda. These initiatives are not just in response to the limitations of native title, but the disturbing personal experiences of the Yorta Yorta people, who had their native title claim dismissed by the Federal Court in 1998.<sup>34</sup> Yorta Yorta country traverses both sides of the Murray River, and centres on the Barmah-Millewa red gum forest and wetlands. In 2004, the Victorian government subsequently made a joint-management arrangement with the Yorta Yorta, partly addressing the inadequacies of the native title outcome. The New South Wales government is yet to respond. At the Gunditjmara consent determination, the Gunditjmara acknowledged the prior native title experiences of the Yorta Yorta, as well as the Wimmera people, to honour their hard work in the battle to claim native title in Victoria.

The *Mabo* decision always had limited applicability in Victoria because of the land tenure history, and the emphasis on a narrow interpretation of 'tradition' as the basis for native title. Traditional owners in Victoria have formed a state level Land Justice Group, with the support of the Victorian Native Title Services.<sup>35</sup> Together they work with government departments to deliver 'land justice' rather than, or in addition to, native title. Significantly, the Victorian government did not demand that the Gunditjmara surrender native title under an Indigenous Land Use Agreement, as was the case in an earlier native title determination in Victoria.<sup>36</sup> This was partly the result of the non-extinguishment policy consistently advocated by the Land Justice Group.

In March 2008, the Victorian Government went further by announcing their commitment to building an alternative framework for negotiating native title for traditional owners across Victoria.<sup>37</sup> The purpose of this framework is to allow for a more straight forward claims process for all parties. The steering committee for this work is a product of the Land Justice Group's advocacy. The negotiations will be between the State and five members of the Land Justice Group.



## HAVING A ROW

Many of the concepts of native title are difficult for people and institutions that are used to, and beneficiaries of, the former status-quo that denied the Indigenous peoples' legal rights to country. Years of denial, as lived experience, creates a disjunction in everyone's mind, including the traditional owners. At the consent determination, Elders and siblings Euphemia Day and Johnny Lovett talked together about how shocked and amazed their Elders would be that the Federal Court had conducted a hearing on their country, and recognised it as Gunditjmara country.<sup>38</sup> Remembering how her grandmothers were not allowed to speak their language at the mission, Euphemia said 'that was just so real and still so real today'. She continued:

*For us it's mind blowing sitting in a place like this today on our ground, on our land forced by us, for them to say 'yes, this is your land'.*

At the consent determination, Elder Don Smith also reflected on the legacy of this living history:

*We're talking about land, we're talking about culture, we're talking about people and we're talking about suffering, hurts and pain. [The consent determination] took that burden off today. ... to know that we're still here and the land is ours, and it is shared. One time it wasn't shared, it was just theirs. ... We're talking about vast lands, we're talking about future, we're talking about generations, stolen generations, taken away generations and murder. We're talking about murder that was never brought to justice. This is the start of the healing process as well to know that we still belong to the land. The land is recognised as ours and all our people.*

On the day before the celebrations, Elder Kenny Saunders talked about how the consent determination addressed the Gunditjmara's historic and contemporary struggle for land justice:

*You've got people who fought in the wars and recognised as returned soldiers but at that particular time we were not recognised as citizens and... didn't have that right to apply for soldier settlements.... It's taken a hell of a long time to be recognised completely as a human being on this earth and having the rights as true, true Australians and that's no offence to anybody at all. It's just that struggle has taken a long, long time and tomorrow will be another court case in recognising traditional owners, the true people again... to have that recognised in my life it's a huge plus for me so I'm actually over the moon.*

At the consent determination, Elders talked together about how shocked and amazed their Elders would be that the Federal Court had conducted a hearing on their country, and recognised it as Gunditjmara country.





Damein Bell thinks it is important to have a 'row to clear the air' on many of these issues. He talked about this when giving native title evidence about the restoration of the church at Lake Condah:<sup>39</sup>

*We see the act of restoring the church as bringing people together, both Indigenous and non-Indigenous people, to address those issues that are there, those hard histories because some of them are very – there is a lot of shame – there's a lot of anger involved in this history and we want to get people together to talk about it, have a row about it, but ultimately to get together and address what has happened, but to get to a stage where we can move forward as a community that [is] representative of the Indigenous and non-Indigenous people of the far south-west.*

Justice North spoke about the importance of native title in addressing past wrongs, and building a better future for shared Gunditjmara country:

*The day, therefore, marks a special achievement for the Gunditjmara People. They have won another battle to cement their place in this country and in history. But their success is a shared victory. By doing justice to the Gunditjmara People, the State, the Commonwealth and the other respondents have taken a step to right past wrongs and lay a basis for reconciliation between Indigenous and non-Indigenous Australians. In this respect, the agreement and the judgment of the Court is a major achievement taken on behalf of and for the benefit of the people of Victoria, in particular, and for the people of Australia more generally. To the extent that our society acts justly, it is enhanced.<sup>40</sup>*

For the Gunditjmara, the native title determination has strongly signalled that their relationship with the Victorian government has profoundly changed for the better, and that their position in society has likewise changed. This formal recognition has been profoundly felt, as Denise Lovett said:

*This feeling that we have now that we're recognised, it does give you a sense of pride and it does give you – to be recognised by the Federal Court is justice at last, I see it [as] justice at last.*



Elder Ted Lovett gave a speech at the consent determination about how the recognition of native title was a critical exercise in justice:

*We have never been in any doubts as to the ownership of this beautiful place where our legends and stories were handed down by our Elders but today we will be told officially by the government that we are the native title holders. There are many people from this area who have died waiting for this day to come who wanted so much to hear these simple words 'this is your country', in recognition of who we are and where we come from. We know who these people are because they are our families. Today is a day of reckoning, of finally having what belongs to us. We Elders now have a legacy to leave to the coming generations of the Gunditjmarra people in the future.*

Ian 'Bear' Johnson and Don Smith celebrate after the native title determination.





GUNDITJ - EARTH  
MARA - PEOPLE  
MIRRING - BELONGING



The logo the Gunditjmara developed for their native title corporation – Gunditj Mirring – which means belonging to the earth.

## GUNDITJ MIRRING TRADITIONAL OWNERS CORPORATION

By choosing Gunditj Mirring as the name for their native title corporation, the Gunditjmara are emphasising their unique connection to this part of Australia, where the people and country were created in the Dreaming. Country is their spiritual and ancestral home, and it is where they have long lived and supported themselves.

Because of the importance of Budj Bim, the Tyrendarra lava flow, and the extensive eel and fish traps at Lake Condah, the Gunditjmara have been acquiring the properties that are part of the journey made by the lava flow. The Gunditjmara successfully applied to the Indigenous Land Corporation and the former Aboriginal and Torres Strait Islander Commission to purchase land that was not possible to claim under native title. On one of these properties, the Winda Mara Aboriginal Corporation worked to establish an Indigenous Protected Area (IPA), which was declared in December 2003 by the Federal government. This Federal program has seen almost 20,000,000 hectares of Aboriginal land across Australia declared as IPAs, supporting cultural heritage and making an immense contribution towards the conservation and maintenance of Australia's ecological inheritance.

In addition, to being more formally involved in heritage work, Gunditj Mirring has been registered as a Registered Aboriginal Party under the *Aboriginal Heritage Act 2006* (Vic). The heritage of the extensive eel and fish traps are now widely acknowledged. In 2004 the Tyrendarra IPA and the surrounding area, including Mount Eccles National Park, Stones State Faunal Reserve, Muldoons Aboriginal Land, Allambie Aboriginal Land and the Lake Condah Mission, were placed on the National Heritage list as the Budj Bim National Heritage Landscape.





The channels the Gunditjmara engineered and the volcanic rocks they arranged into weirs, fish ponds and races are still intact in many places, including the fields of Lake Condah. Here the knee high volcanic rock structures are organised at different elevations to ensure that the aquaculture industry could operate in both flood and drought years. In the last 150 years, the techniques of European farmers have transformed the drainage patterns of the country again, draining the wetlands to create agricultural fields. It takes a trained eye to interpret this now relatively dry landscape. Daryl Rose spoke animatedly about how the traps started running recently during a particularly wet season. The flowing water works in with the engineered aquaculture systems that extend far beyond the beds of streams and creeks. Networks of volcanic stones and channels built out onto the flood plains were designed to trap eels following flood waters to feed on freshly drowned insects and bugs. This country comes to life when water flows through it.

Acquiring the farming properties of the Tyrendarra lava flow and getting recognition of their native title rights to country is meaningless without the life of country. The re-flooding of Lake Condah was negotiated as part of the 1980s settlement with the Victorian government, but proved difficult to implement. It remains important restoration work that the Gunditjmara have ahead of them. Restoring the flooding and drying regimes to Lake Condah, a project that environmentalists have also been pursuing, has become mobilised as the Lake Condah Sustainable Development Project (LCSDP). This project was launched in February 2002 as an initiative of the Winda Mara Aboriginal Corporation.<sup>41</sup> Some of the institutions and people involved in the project include the Glenelg Shire, the Glenelg Hopkins Catchment Management Authority, Portland Aluminium, Timbercorp, Royal Melbourne Institute of Technology, Deakin University, the Victorian Department of Sustainability and Environment, Parks Victoria, and local farmers and landowners. With this broad support, the lake restoration and development project has a more viable

Previous page: Gunditjmara woman Denise Lovett and her grandchild Nyawi watch the eel traps come alive with the flow of water. Joseph Saunders getting out on Lake Condah. Fish trap at Tyrendarra IPA.

This page: a Sink hole. A hollow tree where eels were smoked to be traded. Darlot Creek is spring fed by Lake Condah, and is a migratory route for eels and the basis of much Gunditjmara aquaculture industry.



To better care for country, the Gunditjmara proactively form and lead strategic partnerships with the wider community.

The town of Nelson on the heritage listed Glenelg River is on the far south-west border of Gunditjmara country.

future. A new feasibility study for the return of water to the lake was completed in December 2006, and the hand back of the Lake Condah land title to the Gunditjmara was achieved on 30 March 2008.

The LCSDP is working to restore the wetlands, re-establish biodiversity, preserve and display archaeological heritage, re-develop the Indigenous aquaculture business based on eels, restore the mission church site, facilitate education and develop sustainable tourism. These objectives reflect the type of work the Gunditjmara are keen to get on with: work that is good for country and good for Gunditjmara. This work stretches across the diversity of Gunditjmara country. For example, the Gunditjmara have lobbied for Cobboboonee state forest to be gazetted as a national park. The Gunditjmara have also been participating in sea country planning, through the development of the Kooyang Sea Country Plan which is part of the South-east Regional Marine Plan. The short-finned eels or kooyong travel 3000 kilometres from islands in the South Pacific, before they travel up the creeks and rivers in Gunditjmara country.

To better care for country, the Gunditjmara proactively form and lead strategic partnerships with the wider community, best exemplified by the LCSDP, with coordinating roles for their key governing bodies Gunditj Mirring and Winda Mara. Their past experience with the Kerrup-Jmara Elders Corporation, has made the Gunditjmara aware of the stakes involved in getting the management right. As Damein Bell said, 'It's a challenge, but it's going to be an enjoyable challenge.'





The native title corporation Gunditj Mirring carries the expectations and aspirations of the Gunditjmara to further realise and protect their native title and to continue to work for land justice. Gunditj Mirring also has a number of statutory responsibilities, including receiving and negotiating certain development applications (future acts), negotiating and implementing native title agreements, consulting with native title holders, and holding and investing money.<sup>42</sup> Elder Eileen Alberts talked about how the work of Gunditj Mirring will continue the work of the Gunditjmara, that is:

*...taking care of our country through land management teams, to continue to pass on the knowledge that we have, that we've gained throughout our lifetimes to the kids that are coming up. And to share some of that knowledge with the wider community, because without the wider community here we can't go forth as we want to so it has to be that reconciliation process.*

The Gunditjmara land justice story extends beyond the lifetime of any one individual. It is attentive to family and the extended generations of Gunditjmara; it includes justice for neighbouring traditional owners, and the creation of a more just Australian society. Running together with these kinship and ancestral networks, and relationships held within broader society is the concern for taking care of country. For the Gunditjmara, their future will always be tied together with country.

Claiming native title was not an exercise in segregation from the community. Native title formally recognised the unique responsibilities the Gunditjmara hold with country, but looking after country is to be done in partnership with the wider community. From this perspective, it is important for all people to respect country, so that country can continue to support the lives of all who belong. This is an investment in a more lasting land justice.

The Gunditjmara land justice story extends beyond the lifetime of any one individual.

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Newspaper headlines at the time of the native title consent determination. The determination was widely reported in the media.





## ENDNOTES

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- 17 *Onus v Alcoa of Australia Ltd (1981) 149 CLR 27*, per Gibbs J, para 6.
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- 20 Aboriginal Affairs Victoria in conjunction with The Kerrup Jmara Elders Aboriginal Corporation 1993, *Lake Condah Heritage Management Plan and Strategy*, Aboriginal Affairs Victoria, pp.9-10, 17.
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- 25 Morphy, F, 'Performing law: The Yolngu of Blue Mud Bay meet the native title process', in Smith B R and Morphy, F (eds) 2007, *The Social Effects of Native Title: Recognition, Translation, Coexistence*, CAEPR Research Monograph No. 27, ANU E Press, Canberra, p.34. Morphy discusses how the Yolngu of western Arnhem Land negotiated this ritual space in their native title hearing.
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The legal outcomes the Gunditjmara achieved in the 1980s are often overlooked in the history of land rights and native title in Australia. The High Court *Onus v Alcoa* case and the subsequent settlement negotiated with the State of Victoria, sit alongside other well known bench marks in our land rights history, including the Gurindji strike (also known as the Wave Hill Walk-Off) and land claim that led to the development of land rights legislation in the Northern Territory. This publication links the experiences in the 1980s with the Gunditjmara's present day recognition of native title, and considers the possibilities and limitations of native title within the broader context of land justice.



Euphemia Day, Johnny Lovett and Jessica Weir together at the native title consent determination

Jessica Weir is a human geographer focused on ecological and social issues in Australia, particularly water, country and ecological life. Jessica completed this project as part of her Research Fellowship in the Native Title Research Unit (NTRU) at the Australian Institute of Aboriginal and Torres Strait Islander Studies.



Amy Williams filming at Cape Bridgewater

Amy Williams is an aspiring young Indigenous film maker and the communications officer for the NTRU. Amy has recently graduated with her Advanced Diploma of Media Production, and is developing and maintaining communication strategies for the NTRU.