# The Road to the Dja Dja Wurrung RSA

FACT SHEET 4

**This fact sheet provides a brief history on Native Title and the road to the DJA DJA WURRUNG RECOGNITION AND SETTLEMENT AGREEMENT (RSA).**

## Mabo Decision (*Mabo & Ors v The State of Queensland (No 2)* [1992] HCA 23)

**On 3 June 1992, the High Court of Australia agreed that the Meriam People held traditional rights over their home Island of Mer (Murray Island), in the Torres Strait Island Region.**

Prior to this decision and from the time of British colonisation, Australia was considered Terra Nullius, land belonging to no one, a legal concept claimed by the British which disregarded thousands of years of law and customs practiced by Aboriginal and Torres Strait Islander people.

Acknowledgement of the Meriam people's traditional rights, called Native Title rights, over Mer challenged the doctrine of Terra Nullius.

This was an important milestone for First Nations communities, as the decision meant that Native Title rights could exist for Indigenous people across Australia. First Nations people's expectations were significantly raised.

## Introduction of the *Native Title Act 1993* (CTH)

**Many First Nations groups immediately began making Native Title claims. In response to the Mabo Decision, the Commonwealth Government soon after enacted the *Native Title Act 1993* which established a process through which Native Title could be claimed and set out how Native Title rights were to be recognised and interacted with.**

The Native Title Act clarified that Native Title can only be determined on land "owned" by the State or Commonwealth Government, known as Crown Land. A Native Title determination is essentially a modest recognition by British law of a bundle of rights held by First Peoples over an area of land to which their ancestors held a physical and cultural connection; a connection that has been maintained by those people since colonisation.

Depending on the activity, Native Title holders may have the right to be consulted, comment on, and in certain cases object to a proposed activity that will impact on their Native Title rights.

The Native Title Act is also a means by which First Peoples could be compensated for activities that impact on their Native Title rights.

The burden of proof on Native Title claimants is extremely high and involves a requirement for claimants to submit evidence of their ancestral occupation and connection to the claim area by demonstrating the existence of cultural customs and practices that have been continually exercised over time.

The rights of each group successful in their claim may differ, depending upon a number of factors that must be proved by the applicants and accepted by the court in each case. Native Title rights commonly include the right to occupy and enjoy the land for activities such as camping, hunting and gathering resources. Native Title rights can also include the right to possess and occupy an area to the exclusion of all others (exclusive possession).

The Dja Dja Wurrung people (Djaara) lodged a number of Native Title claims over their ancestral lands, known as Djandak.

## The Yorta Yorta Claim (*Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58)

**In 1994, the Yorta Yorta people lodged Victoria's first native title claim. The Federal Court of Australia determined in 1998 that "the tide of history has indeed washed away any real acknowledgment of [the Yorta Yorta Peoples'] traditional laws and any real observance of their traditional customs."**

This decision highlighted the consequences of the Native Title Act's high burden of proof; that First Nations people who have, as a result of colonisation, been displaced from their land, prevented from practicing their culture and customs, and have through loss of life lost essential knowledge, have little chance of bringing a successful claim.

Following the Yorta Yorta decision, it became evident that First Nations people in the areas where early colonisation was most prevalent are very unlikely to be able to satisfy the Commonwealth's tests. This unfortunate fact was cemented in 2002 when the High Court of Australia rejected the Yorta Yorta claim on appeal.

Djaara, many of whom also have Yorta Yorta heritage, were deeply affected by the negative determination in the Yorta Yorta claim and committed to finding another way to get recognition of their traditional rights.

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## Introduction *Traditional Owner Settlement Act 2010* (Vic)

**Recognising the issues of time, complexity, cost for the State, uncertainty, and the limited outcomes of the Native Title system, First Nations people in Victoria advocated for a more just process.**

Djaara played a key role in negotiating an alternate framework, including through leading the Victorian Traditional Owner Land Justice Group ('Land Justice Group') that engaged extensively with the State to find a better way to resolve Native Title claims in Victoria.

Following this intense advocacy, the State established a committee, comprising representatives of the Land Justice Group and the State, and chaired by Professor Mick Dodson AM. In 2008, after four years of negotiating, the committee presented the Victorian Native Title Settlement Framework to the Victorian Government. The Attorney-General announced that the State would adopt the Settlement Framework in full and enact legislation accordingly, which it did in 2010 in the form of the *Traditional Owner Settlement Act* ('Settlement Act'). Professor Dodson stated that the process undertaken had been consistent with the principles enshrined in the *United Nations Declaration on the Rights of Indigenous Peoples (2007).*

The Settlement Act is an alternative framework for First Nations people to seek recognition of their enduring rights, known as "Traditional Owner Rights" through agreements with the State. Comprehensive recognition and settlement agreements can include:

- **Land Agreements** – include terms for the provision of estates in fee simple, Aboriginal title and management rights to be granted to First Nations people.
- **Natural Resource Agreements** – recognise First People's rights and interests in relation to the use of land, vegetation, animals, water and the earth, excluding minerals.
- **Land Use Activity Agreements** – establish procedural rights for First Nations people in relation to activities that impact on Traditional Owner Rights including, depending on the level of impact, the right to be notified, comment, negotiate, place conditions on, receive compensation, and veto activities.
- **Funding Agreements** – for the provision of funding to Traditional Owner Group Entities for the purpose of giving effect to recognition and settlement agreements and for economic development and self-sufficiency of Indigenous corporations.

***More information about the Settlement Act can be found on the Government's First Peoples – State Relations website HERE.***

## The Dja Dja Wurrung RSA

**In 2008, Dja Dja Wurrung Clans Aboriginal Corporation (DJAARA) was formally recognised as the Registered Aboriginal Party (RAP) for Djandak (Dja Dja Wurrung Country), pursuant to the *Aboriginal Heritage Act 2006* (Vic).**

This empowered DJAARA with rights in relation to the protection of Djaara's Cultural Heritage but did not give Djaara any other rights in respect to Djandak.

**On 28 March 2013, DJAARA signed its own Recognition and Settlement Agreement (RSA) with the State, settling four Native Title claims, the result of 15 years of negotiations. The Dja Dja Wurrung RSA became the first comprehensive settlement under the Settlement Act. This strengthened the unique relationship between Djaara and Djandak.**

The RSA is a modest recognition of some of Djaara's pre-existing rights. It affirmed Djaara's rights to:

- enjoy the culture and identity of the Dja Dja Wurrung;
- maintain a distinctive spiritual, material and economic relationship with the land and the natural resources on or depending on the land;
- access and remain on the land;
- camp on the land;
- use and enjoy the land;
- take natural resources on or depending on the land;
- conduct cultural and spiritual activities on the land; and
- protect places and areas of importance on the land.

The RSA restored some of Djaara's management rights over Djandak including the right to have a say in the management of natural resources. Currently six reserves are jointly managed by DJAARA and the State pursuant to the RSA.

***More information about the RSA can be found on our website HERE.***

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## Timber Creek Decision (*Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* [2019] HCA 7)

**In 2019, the High Court of Australia handed down the landmark Timber Creek Decision, finding that the Ngaliwurru and Nungali Peoples were entitled to compensation for the extinguishment of their Native Title rights as a result of acts that occurred on land where they were later determined native title holders.**

After a series of appeals, the High Court held that the appropriate rate of compensation was 50% of the freehold value of the affected land for the Ngaliwurru and Nungali Peoples' economic loss of the area, plus an amount for non-economic or cultural loss.

The High Court has jurisdiction over all matters in Australia and its decisions set binding precedents for all States and Territories. The Timber Creek Decision has set a precedent as the method to determine compensation for a loss of traditional owner rights across Australia.

*More information about the Timber Creek Decision can be found HERE.*

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## How does the Timber Creek precedent affect the Dja Dja Wurrung RSA?

**Being the first comprehensive agreement under the Settlement Act, naturally, the RSA is not perfect and like any long-term agreement, requires periodic reviews.**

One area that requires revision is the basis for calculating Community Benefits (compensation) for certain Land Use Activities. When DJAARA and the State entered the RSA, the method for compensating First Peoples for their loss of traditional rights had yet to be tested in court. The RSA left DJAARA and proponents to negotiate appropriate Community Benefits in each case.

Following the Timber Creek case in 2019, First Peoples across Australia have been able to rely on the High Court's decision as a precedent for calculating compensation for a loss of traditional rights. DJAARA has adopted the Timber Creek precedent as the method for calculating Community Benefits for Land Use Activities.

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**Please watch this recording about Djaara's road to the RSA, in the words of Dja Dja Wurrung and Yorta Yorta Elder Uncle Graham Atkinson HERE.**

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## Resources

A list of resources referred to in this Fact Sheet, along with more information about DJAARA, Djaara history and the LUAA processes, can be found below:

FACT SHEET 1
Introduction to the Dja Dja Wurrung RSA

FACT SHEET 2
Land Use Activity Processes

FACT SHEET 3
Opportunities for Engagement with DJAARA and Potential Negotiation Outcomes

DJAARA Website

Dja Dja Wurrung Recognition and Settlement Agreement (RSA)

Dja Dja Wurrung Land Use Activity Agreement (LUAA)

DJAARA's aspirations, plans, and strategies for managing and healing Country (as set out on the right) and more resources can be found HERE.

- Dhelkunya Dja – Dja Dja Wurrung Healing Country Plan 2014-2034
- Turning 'wrong way' climate, 'right way' - Dja Dja Wurrung Climate Change Strategy 2023-2034
- Nyauwi Mutjeka 'To keep the Sun' - Dja Dja Wurrung Renewable Energy Strategy
- Galk-galk Dhelkunya - Forest Gardening Strategy 2022-2034
- Dhelkunyangu Gatjin Working together to heal water - Djaara Gatjin Strategy
- Djandak Wi (Country Fire) Strategy – dhelkunya wi (healing fire) 2024-2034

## Contacts

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