Review of the *Aboriginal Lands Act 1991*

Supplement to the Discussion Paper of 22 September 2020

VICTORIA State Government | Premier and Cabinet

Executive Summary

This document is intended to constitute a supplement to the 'Review of the Aboriginal Lands Act 1991 – Discussion Paper' (paper) sent to you on 22 September 2020.

Since sending the paper out, it has come to DPC's attention that Option 6 gives rise to further legal considerations in relation to native title. Since then, we have also considered exploring a further option (in addition to the seven identified in the paper), which may be attractive to stakeholders.

The purpose of this supplement is to therefore explain both the native title legal considerations in relation to Option 6 and raise the further option for consideration.

As with the paper, the intended audience for this supplement are the titleholders under the *Aboriginal Lands Act 1991* (Vic) (the Act) – Wurundjeri Woi-wurrung Cultural Heritage Aboriginal Corporation (Wurundjeri), Goolum Goolum Aboriginal Co-operative (Goolum Goolum) and Gippsland and East Gippsland Aboriginal Co-operative (GEGAC) – and the Traditional Owner corporations of the land on which the three cemeteries are located - Barengi Gadjin Land Council Aboriginal Corporation (BGLC) and Gunaikurnai Land and Waters Aboriginal Corporation (GLaWAC), noting that Wurundjeri is both the titleholder and corporation representing Traditional Owners as a RAP for the Coranderrk Mission cemetery.

Each of these stakeholders is invited to use the paper, together with this supplement, to consult with their respective communities in whichever way they deem appropriate.

How to make a submission

The paper asked that any written responses or submissions be sent to aboriginalaffairs@dpc.vic.gov.au by 13 November 2020. Given the release of this supplement, stakeholders are now invited to provide their written responses or submissions by 14 December 2020.

Alternatively, if you would prefer to meet with AV to discuss your views, please email the above email address and we will contact you to arrange a suitable time to meet with you virtually, or over the phone (noting current restrictions in relation to COVID-19).

As noted in the paper:

- Submissions do not have to address the whole Act. You can write about the parts of the Act or the themes which most interest you.
- The questions and proposed legislative changes in the paper and this supplement are suggested as a starting point and are not intended to limit responses.
- Multiple suggestions or changes can be submitted on the same topic.

Option 6 – Further legal considerations in relation to native title

As explained in the paper, Option 6 proposes amending the Act to allow the titleholders to surrender their titles (1991 grants) to the Crown for the Crown to then reissue the titles under the *Land Act 1958* (Vic) without either of the restrictions. Moreover, it was raised that the process of surrender and reissue may take some time, during which the Crown would technically own the titles to the cemeteries.

Requirement to conduct a historical extinguishment assessment

If Option 6 was chosen, once the land goes back to the Crown, it becomes Crown land and native title considerations arise.

Native title is usually extinguished where the land is freehold. However, the 1991 grants to the current titleholders are not likely to have extinguished any native title rights in the land, even though they granted a freehold interest in the land to the titleholders.

This is because under the *Native Title Act 1993 (Cth)* (NTA):

- the 1991 grants do not fall into any of the categories of past land dealings which lead to the full extinguishment of native title rights and interests;[1] and
- the grants are likely to be viewed as grants made for the benefit of Aboriginal people (and so are not 'previous exclusive possession acts' that would otherwise extinguish native title).[2]

The non-extinguishment principle under section 238 of the NTA applies to land falling into the second category above – meaning that any native title on the land is not extinguished by the relevant act (here – the 1991 grants). However, according to this principle, if the grants are inconsistent with native title (which the 1991 grants are, since they are freehold grants) then the native title effectively sits underneath the other interest. The means that while the current freehold interests exist over the cemetery land, any native title on the land has no practical effect on the freehold title.

However, if the other interest ceased to exist (because, for example, the current cemetery titleholders surrendered their land to the Crown) then the native title might be revived.

Therefore, if Option 6 is chosen, it will be important to further consider whether native title applies to the land. Although the 1991 grants may not have extinguished it, there may be earlier prior acts which did validly extinguish native title over the land. In order to know this, a historical extinguishment assessment would need to be undertaken in relation to each parcel of cemetery land. The Victorian Government Solicitors Office can undertake the historical extinguishment analysis, on behalf of the State.

Implications if native title interests have not been extinguished – Indigenous Land Use Agreement (ILUA) required

If a historical extinguishment assessment confirmed that native title has **not** been extinguished over the land, then the re-grant of the parcels under Option 6 to the current title holders would constitute an alienation of Crown land attracting native title compliance obligations under the NTA (regardless of whether a new native title claim were made enlivening the operation of section 47A of the NTA – see below).

[1] For example, the 1991 grants are not Category A past acts (s 229(2)(b)(ii), NTA), Category B or C past acts (ss 230 and 231, NTA).They are Category D past acts to which the non-extinguishment principle applies (sections 232, 15(1)(d) and 19, NTA).
[2] As provided in section 23B(9)(a) of the NTA.

This is because the re-grant would be an act that *affects* native title under the NTA.[3] This would be so even if the land were re-granted to the current titleholders and the non-extinguishment principle applied again.

If a new native title claim were made over the land (noting that there are no current native title claims or determinations affecting any of the three cemeteries), then section 47A of the NTA would apply to the land the subject of the grants. In that instance, similar to the position described above in relation to the effect of the 1991 grants, any prior historic interests extinguishing native title must be disregarded for all purposes under the NTA and for the purpose of that claim.[4]

In both instances, the re-grant of the title to the existing title holder would constitute a 'future act' under the NTA, and the procedural requirements under the NTA must be followed to make the re-grant valid. Relevantly, the re-grant will only be valid as a future act under the NTA if it is agreed under an ILUA.[5]

In summary, if Option 6 were chosen, stakeholders should be aware that:

1) further investigation of native title over the land would be required; and
2) if native title were confirmed to exist, at the point of the Crown re-granting the land to the current titleholders, they would need to enter an ILUA with the native title claimants or holders for the relevant areas in relation to the re-grant.

New Option 8 – Amend the Act to allow the Registrar of Titles to remove the restrictions on land use upon application by the titleholder

This option might be suitable if the preference is for the titleholders to themselves determine when to seek to have the restrictions removed. It would involve amending the Act to give the Registrar the power to remove the current restrictions on title, and to allow the titleholders to apply to the Registrar of Titles for this to occur. This amendment could be drafted to allow such application at any time. Unlike Option 6, it would not require the grants to be reissued as it would not involve a surrender of the relevant grants to the Crown.

Risks

Other than the general risk that applies to all legislative amendment, i.e., that it must pass through parliament, we do not consider there to be any additional risks involved with this option.

Please send any written responses or submissions to aboriginalaffairs@dpc.vic.gov.au by 14 December 2020.

[3] The re-grant would be an 'act' within the meaning of the NTA (section 226). The act would affect native title to the extent that it is inconsistent with the continued existence, enjoyment or exercise of the native title (see section 227 of the NTA).
[4] As provided in section 47A(2) of the NTA.
[5] Section 24AA(3) provides that a 'future act' will be valid if the parties consent to it being done, with details of the agreement captured in an ILUA.