

**The Victorian Government's comments on proposed amendments to the *Native Title Act 1993* to enable the historical extinguishment of native title to be disregarded in certain circumstances**

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These brief comments have been prepared by the Native Title Unit in the Department of Justice, in consultation with other Victorian Government Departments.

The Victorian Government welcomes the Australian Government's efforts to improve the operation of the *Native Title Act 1993* through minor amendment that allows for some greater flexibility in native title outcomes.

The amendment currently proposed – in summary, to allow claimants and a government to agree to disregard historical extinguishment over land set aside, granted or vested by that government for the purpose of preserving the natural environment of the area – is a positive step forward. It enables recognition of native title in areas of the conservation estate where native title connection may remain, but would otherwise be extinguished by way of Crown grants and reservations. This amendment appears to acknowledge that the persistence of native title connection may sometimes be stronger in areas where there has been minimal interference with the natural environment, amongst other factors. Where extinguishment in such an area is by way of the Crown's creation of other interests, but native title connections survive, these amendments offer some new options for positive native title outcomes.

In Victoria it is the case that, as a rule, Crown reservations and grants for the purposes of preserving the natural environment have only partially extinguished native title, unlike in some other jurisdictions. Therefore, the law as it stands has not prevented the State from recognising at least non-exclusive native title rights such as a right to hunt, fish and gather, as are recognised in Victoria's two native title consent determinations to date. The Victorian Government notes that higher order rights, such as exclusive possession and a right to control access, have not been recognised in Victoria by the Federal or High Courts to date, and due to the current onerous test for connection in native title jurisprudence, they remain unlikely to be recognised into the future in Victoria. That is in part why Victoria's preferred approach to the settlement of native title is through the Victorian Native Title Settlement Framework currently under development, which will provide greater flexibility and broader settlement outcomes.

Native title determinations may continue to be sought by some native title or traditional owner groups in Victoria. The Framework approach does not rule out such pathways to recognition. It is envisaged that there will be some land in Victoria currently reserved or set aside for the protection of the environment, where past extinguishment has occurred by way of grants of exclusive possession rights. These amendments appear to allow the inclusion of such areas within native title determinations, where previously that would not have been possible at law.

While the proposed amendments are likely of benefit in limited areas in Victoria, the Victorian Government nevertheless commends the Australian Government for this small step towards greater flexibility, and therefore greater land justice, for Australia's native title and traditional owner communities.