



**Review of the
Aboriginal Lands Act 1970**

Discussion paper

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1/ Definitions

Aboriginal communities: is used to distinguish the Lake Tyers and Framlingham Trust Land communities from the communities of the township of Lake Tyers Beach and surrounding areas and from the broader Framlingham area outside of the Framlingham Trust Land. The area of Framlingham Aboriginal community is shown on the plan in the First Schedule of the Act, and the Lake Tyers Aboriginal community is shown on the plan in the Second Schedule of the Act.

Aboriginal Corporation: A corporation established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) and regulated by ORIC. This structure is similar to a company limited by guarantee and strives to take into account Aboriginal customs and traditions. This structure is only available for organisations that meet an Indigeneity requirement.

ACNC: Australian Charities and Not-for-profits Commission.

Act: *Aboriginal Lands Act 1970* (Vic).

ASIC: Australian Securities and Investments Commission.

AV: Aboriginal Victoria.

Committee of Management: The governing body of the Trust, responsible for managing the Trust and the Trust Land, and elected by Members.

Community: Each of the communities on the Framlingham and Lake Tyers Trust Land, and **Communities** means each together. The members of the Communities include Members of the Trusts as well as other residents and frequent visitors to the Trust Land.

Company limited by guarantee: A company established under the *Corporations Act 2001* (Cth) and regulated by ASIC. Companies limited by guarantee are commonly used by not-for-profit organisations and charities, so may also be regulated by the ACNC. Companies limited by guarantee have members, rather than Shareholders, and the company cannot pay dividends.

Company limited by shares: A company incorporated under the *Corporations Act 2001* (Cth) and regulated by ASIC. Like the Framlingham and Lake Tyers Aboriginal Trusts, Companies limited by shares have shareholders, and can generally pay dividends.

CAV: Consumer Affairs Victoria.

DOGIT: Deed of Grant in Trust.

ILC: Indigenous Land Corporation.

IPA: Indigenous Protected Areas.

Members: The people who own a share in the Trust. The original Members were people who were living on the Trust Land on a certain day specified in the Act. Members may have passed on their shares, for example to relatives, who then become Members.

Minister: The Minister responsible for administering the Act, being currently, the Victorian Minister for Aboriginal Affairs.

NPAIHI: National Partnership Agreement on Remote Indigenous Housing.

ORIC: Office of the Registrar of Indigenous Corporations.

RAPs: Registered Aboriginal Parties.

RNTBC: Registered Native Title Body Corporate.

Shareholders: Another term for Members.

Trust: The body corporate established by the Act which owns the Trust Land. It comprises the Members of the Trust but is a separate legal entity from the Members of the Trust.

Trust Land: The land owned by the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust under the Act.

Victorian Incorporated Association: An Association established under the *Associations Incorporation Reform Act 2012* (Vic) and regulated CAV. This is a common corporate structure for locally focussed organisations and not-for-profit groups because they are generally limited to operating in the state or territory where they are established. If a Victorian Incorporated Association is also a not-for-profit organisation or charity it will also be regulated by ACNC.



2/ Purpose of the Review

The Victorian Government has made a commitment to review the *Aboriginal Lands Act 1970 (Vic)* to improve governance, facilitate economic development and enable greater self-determination for the Framlingham and Lake Tyers Aboriginal communities.

This can be achieved in a number of ways. The Victorian Government recognises the importance of first listening to the views and aspirations of the **Trust Members**, Framlingham and Lake Tyers **Aboriginal communities**, and other affected people and organisations, before making any changes. The Department of Premier and Cabinet through AV will lead this work on behalf of the Victorian Government.

To start the discussion, this paper sets out the history and context of the **Act**, current issues with the Act's operation and ideas about how to achieve better governance, self-determination and economic development for the Framlingham and Lake Tyers Aboriginal communities.

During the initial stage of the Review AV particularly wants to hear from and listen to the views of the **Trust Members** and Framlingham and Lake Tyers Aboriginal communities about how to approach these issues.

So far, AV has undertaken an internal literature review of the Act to assist with an initial understanding of the extent to which the Act is achieving its purpose. AV will also finalise a committee or other body to provide insights during the Review.

The committee will consist of resident and non-resident **Shareholders** from Framlingham and Lake Tyers Aboriginal Trusts. AV also hopes to include people who work in areas of relevance to the Review, including, but not limited to, local government members and people with expertise in law, governance, human rights, health and education.

What about treaty talks?

At the same time as this Review, the Victorian Government is holding separate consultations about treaty. While treaty discussions are also about self-determination, this Review is a more specific project for the Framlingham and Lake Tyers Aboriginal communities and Trust Members.

For information about the treaty process and to have your say about treaty for Victoria please visit the AV treaty website: <http://www.vic.gov.au/aboriginalvictoria/treaty.html>.



3/ What we want you to tell us

AV wants you to tell us what is and is not working with the Act and why. We also want to know your ideas about how to achieve better governance, self-determination and economic development for the Framlingham and Lake Tyers Aboriginal communities.

To assist you to provide feedback and ideas we have included in this paper a number of questions for discussion. We would like you to consider these questions and provide as much feedback on them as you would like.

This Discussion Paper includes some examples of different models and structures from other parts of Australia. AV acknowledges that there is no 'one-size-fits-all' model that can be transplanted to Framlingham and Lake Tyers. Effective and legitimate solutions need to be tailored to suit the local environment. We have included these examples for your information as another way to promote discussion.

Addressing the questions for discussion and commenting on other Australian examples is just one way to contribute to the discussion. Your comments might suggest ways for promoting better service delivery and prosperous economic development. You may prefer to tell a story about your experience as a Member of the Framlingham or Lake Tyers Aboriginal Trust or resident of the Framlingham or Lake Tyers Aboriginal community. You may have an idea for a small change that is important to you or have a big picture vision for the community you would like to live in. Perhaps you have seen an example of something that is working well in another part of the country. All feedback is welcome.

At the end of the Discussion Paper we outline how you can share your ideas. We also outline some important information about how change can happen.

Free Prior and Informed Consent

During this Review process AV will meaningfully consult based on principles of free, prior and informed consent.

This means we will consult extensively and respectfully with the Trust Members and Framlingham and Lake Tyers Aboriginal communities. We will do so transparently and openly, adopting a community led process. We will ensure that we provide enough time and space for people to think about ideas and options. We will provide objective, accurate and easily understandable information. We will make sure communities as a whole, including women, men, young and old people and different community organisations are provided with adequate resources to understand the options available to them and they are given proper opportunities to communicate their views on the Act and any proposed changes.



4/ History and context

The Act became law in 1970. Under the Act, the land at Framlingham and Lake Tyers is owned as freehold title by the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust respectively. This followed decades of involvement by the Church of England and the state government, policies of forced removal and re-settlement of Aboriginal people across

Victoria, and struggles by the residents and traditional owners of Framlingham and Lake Tyers.

The history of the Act and key legal milestones for the Framlingham and Lake Tyers Aboriginal communities is set out in the time line below.

1861 Aboriginal Mission reserved at Framlingham.	1965 Permanent Lake Tyers Reserve established.	2002 Second Review of the Act.
1863 Aboriginal Reserve gazetted at Lake Tyers.	1967 Permanent Framlingham Reserve established.	2004 Act amended. Amendments included changes to quorum requirements and a power to appoint administrator to Lake Tyers.
	1970 <i>Aboriginal Lands Act 1970 (Vic)</i> enacted – first recognition of Aboriginal land rights in Victoria.	2004 Administrator appointed to the Lake Tyers Trust.
	1997 Administration of the Act transferred to Minister for Aboriginal Affairs. First Review of the Act.	2012 Third Review of the Act and Discussion Paper released.
		2013 Act amended. Amendments included a power to appoint an administrator to Framlingham Aboriginal Trust, and power for the Trusts to lease land for more than 21 years.
		2015 Lake Tyers Aboriginal Trust returns to community self-management.
		2016-2017 Fourth Review of the Act and community consultation.



Who owns the land and manages the Trusts?

It is the Framlingham and Lake Tyers Aboriginal Trusts that own the **Trust Land** at Framlingham and Lake Tyers respectively. The Trusts have Members who are the people who own shares in the Trusts. Members are also known as Shareholders and the two terms are used interchangeably throughout this Discussion Paper.

Importantly, and as a matter of law, each of the Trusts owns the relevant Trust Land.

The Shareholders can have a say in how the Trust is run, for example by voting on issues at General Meetings.

Members of each Trust also vote to elect the **Committee of Management** for their Trust.

The Committees of Management make decisions about their Trust and control the day to day management of the Trusts' affairs, which includes land management. But there are some decisions that the Committee of Management cannot make without the input of the Members. For example, the Act contains special requirements for how decisions about selling Trust Land or leasing Trust Land for a period of more than 21 years must be made by Members.

The very first Members of each Trust were the people who were living on the Trust Land on a certain day specified in the Act. Since then Members' shares have been transferred, or passed down when a Shareholder has died. This complex system is talked about more in the shareholder system section on page 10.

Who lives and works on the land and under what systems and structures?

The residents living on the Framlingham and Lake Tyers Trust Land do not have to be Members of the Trusts. The residents include families with an historical or traditional connection with the Trust Lands.

The Framlingham and Lake Tyers Aboriginal communities rely on services, facilities and infrastructure provided by the Trusts, as well as by local, state and federal governments through various projects, policies and funding. This layering of services and interactions between levels of government responsibility is discussed in the services for the communities section on page 15.

What about native title and cultural heritage?

The Act and the Trusts are different from other land rights legislation and structures, such as native title under the *Native Title Act 1994* (Cth) and settlements under the *Traditional Owner Settlement Act 2010* (Vic). This Review will look at how these different types of land rights regimes work together.

The Act and the Trusts are also different from **RAPs** under the *Aboriginal Heritage Act 2006* (Vic). RAPs have responsibilities under the *Aboriginal Heritage Act* for Aboriginal cultural heritage matters. The Victorian Aboriginal Heritage Council determines which applicants will be registered as RAPs and generally requires RAPs to be representative of and inclusive of traditional owners for their area of responsibility.



5/ Discussion

In this section we set out some ways that we think the Act as it is presently structured does not promote good governance, economic development and self-determination for the Framlingham and Lake Tyers Aboriginal communities.

Good governance, economic development and self-determination do not stand separately from each other. Rather, ideas which promote one are likely to enhance the others. However, we have set this section out under these three headings as a way to simply help organise the discussion.

These ideas are only starting points. We anticipate that community consultation will promote new ideas and enable opinions to be expressed about what is and is not working and why.

Throughout this section we have included questions for discussion to assist you to provide feedback and ideas. Where relevant and to paint the picture, we have also included examples of different lands rights models and structures from other parts of Australia.

5.1 Good Governance

“Governance” refers to how an organisation operates and the system of control and accountability an organisation uses to achieve its vision and goals. Good governance is essential for accountability, efficiency, funding and overall legitimacy of any organisation. In a nutshell, healthy governance leads to a healthy organisation.

The Trusts are unique bodies corporate with the nature and powers of a company. Despite their corporate nature, the Trusts are not regulated under the *Corporations Act 2001* (Cth) or any other regulatory legislation of general application. They have no constitution or rule book or any other governing documents, other than what is included in the Act. This is different from more common corporate structures such as **Incorporated Associations**, companies limited by guarantee, companies limited by shares and **Aboriginal Corporations**, which all have constitutions or rule books, as well as regulating legislation (these structures are described in the glossary).

AV has identified some possible limitations in the Act’s corporate governance provisions, which are described under the following headings:

- governance documents;
- regulatory oversight;
- powers and responsibilities of the Committees of Management;
- powers and responsibilities of Trust Members;
- the shareholder system;
- dispute resolution; and
- culturally appropriate corporate governance.

Governance documents

As a governing document the Act is limited, outdated and unclear in places. A judge of the Supreme Court of Victoria has described the Act as providing ‘a fairly skeletal regime of regulation’. Only some governance requirements are outlined in the Act, such as having seven persons on the Committee of Management, the Committee of Management meeting at least six times each year and keeping proper books of account. But how meetings are called and held and how decisions are made, for example, are not clearly set out in the Act.

Having a governing document that is both unclear and unhelpful can make it extremely hard for the Trusts to know what procedures and rules they have to follow, and to generally govern effectively.

It is also difficult to change a governing document when it is an Act of Parliament. By contrast, where an organisation has its own constitution or rule book, the organisation is usually free to write and amend its own governing document, with the agreement of its members and within the relevant governance framework. For those organisations there are some things that the law requires of them such as meeting procedures that ensure the accountability of the board to its members, and complying with the duties and responsibilities of board members. But there is still more freedom and flexibility to determine and change corporate governance requirements than where the governing document is an Act of Parliament.

For discussion

- Do you think having an Act as the key governing document is the best way to administer the Trust? If so, what do you like about it? If not, what do you think would be a better way?
- Would having a separate governing document like a constitution or rule book be helpful? In what way?

Regulatory oversight

Unlike other corporate structures, there is no independent regulatory authority with the responsibility for overseeing the Trusts. The **Minister** responsible for administering the Act – currently the Minister for Aboriginal Affairs – assists in monitoring compliance with governance requirements, providing support where appropriate and intervening if necessary.

Other corporate structures such as Aboriginal Corporations and companies are overseen by independent regulatory authorities who provide this assistance, support and intervention.

For example, **ORIC** supports Aboriginal Corporations by advising them how to comply with their rule books and with the law, running corporate governance training, providing a range of fact sheets and online tool kits and intervening in limited circumstances, where needed. ORIC also keeps a register of all Aboriginal Corporations and has their rule books, financial statements and other relevant information collated and publically available, which assists with compliance, accountability and transparency.

Other regulators include the **ACNC** for charities and not-for-profits, **CAV** for Victorian Incorporated Associations and **ASIC** for companies limited by guarantee and companies limited by shares.

In the case of the Trusts, an independent regulator might be better placed than the Minister to provide regulatory assistance and oversee the Trusts (see the box below for examples of other structures).

Another likely limitation of the current model is that the power of the Minister for Aboriginal Affairs to regulate the Act is not clearly defined or limited. If the Minister reasonably decides that a Trust has not complied with the Act the Minister can give notice to a Trust to take a specified action for the purpose of complying with the Act. There is no process in the Act for notification and review of non-compliance. In contrast, the Minister's power to appoint an Administrator to a Trust specifically requires the Minister to first provide notice and relevant grounds for making such a decision.

Having reasonably broad and unclear power in relation to the Act and the Trusts is difficult for both the Minister and the Trusts. It is administratively burdensome for the Minister to develop and maintain systems to monitor and, if appropriate, support the Trusts, and the Trusts do not have explicit support or regulatory systems. This lack of clarity does not promote good governance, which potentially makes it difficult for the Trusts to attract non-Government funds. Given the lack of alternative options available under the Act, it also makes it more likely that external intervention will be imposed, such as the appointment of an administrator. This obviously impedes self-determination and economic development.

Example

How is Aboriginal land in other parts of Australia regulated?

Queensland

Aboriginal Land in Queensland encompasses multiple variations of land holding entities. Under the *Aboriginal Land Act 1991* (Qld), land can be held by land trusts. New land trusts are no longer created in Queensland. Instead, Aboriginal Corporations hold new grants of Aboriginal Land and land trusts have the option of establishing a corporation and transferring all land and assets to the Aboriginal Corporation, regulated by ORIC.

The **DOGIT** system also operates in Queensland. Under that system land is held on trust by a Ministerially appointed trustee, to be managed for the benefit of the Aboriginal inhabitants of the land. Many Aboriginal shire councils are trustees of DOGIT land which means they have dual purposes; one to be the shire council for the region and undertake the responsibilities of local government, and a second to manage the land trust land for the benefit of the Aboriginal inhabitants of the land.

South Australia

Aboriginal Land in South Australia also includes multiple variations of land holding bodies, including the Aboriginal Land Trust under the *Aboriginal Lands Trust Act 2013* (SA). The Aboriginal Land Trust holds land on behalf of Aboriginal people of SA, including former mission and reserve land and land purchased by the Trust. The Aboriginal Land Trust is made up of 8 Aboriginal persons, appointed by the Governor to form a professional and skills based organisation. Like the case in Victoria, there is no independent corporate regulator or constitution.

How are Native Title bodies regulated?

Native title is different from land rights and is regulated in a different way, which provides a useful comparison here. When traditional owners have their native title recognised, that native title right is held by an entity that has both a constitution and an external regulator. Once a determination of native title is made the native title rights and interests must be held by a **RNTBC**. RNTBC's must be Aboriginal Corporations regulated by ORIC. These corporations must comply with legislated governance standards and include certain minimum requirements in their rule book to ensure good governance. But they can also tailor their rule book to suit their requirements.

For discussion

- Should there be a separate body with oversight powers, independent of AV?
- If so, what functions should the separate body have?
- What external assistance, support or resources do you think the Trusts need but currently do not have access to?
- What do you think the role of the Minister should be with regard to compliance? Support? Providing resources?



The Committee of Management

The Committees of Management make most of the decisions about the Trusts. However, the Act does not say who is eligible to be on the Committee of Management, stipulate maximum terms for Committee members or provide much guidance on how the Committee of Management should operate.

This lack of detail likely makes it difficult for the Committee of Management to follow clear procedures. If the Committee of Management had clearer and stronger procedural requirements to adhere to, including term limits and agreed decision making procedures, this could make it easier to govern effectively.

For discussion

- What improvements could be made to how the Committee of Management runs?
- Who should be eligible to sit on the Committee of Management and what skills, experience or qualifications should they have? Should they also act in a representative capacity? If so, how should that work?
- Is the communication between the Committee of Management, the residents and the Members effective? How could it be improved?

Members of the Trusts

The Members of the Trusts can make decisions that the Committee of Management has to follow. The Act contains some provisions about how to hold Members' meetings and pass resolutions and which resolutions require special margins and notification before they can be made. But this regulation is very basic.

One of the changes made to the Act in 2004 provides that the quorum for a general meeting (the number of people required for the meeting to go ahead) is one half of the persons entitled to vote at the meeting who are residents of the reserve on the day the meeting was called. This means that the quorum required to hold a meeting might be quite a small number of people. It also assumes that there will always be Members of the Trusts residing in the Lake Tyers and Framlingham Aboriginal communities.

There are also provisions of the Act that may make it more difficult for the Members to participate in decision making. For example, the Act requires not less than one quarter of the Members of the Trust who are not infants to request a general meeting before it must be called. This is a high threshold for Members requesting a meeting, which may be difficult to achieve. As another example, there is no provision for voting by proxy which may limit the number of Members who are able to be involved in the business of the Trusts. Finally, those matters that are dealt with in the Act, such as how to call meetings and demand a poll at a meeting, are written in old fashioned language that is difficult to understand.

For discussion

- What improvements could be made to how the Members' meetings run?
- Do you think the quorum requirements work well? What should a quorum look like?
- Do you think proxy voting or holding meetings using audio-visual web technology would be useful?



The shareholder system

The Members of the Trusts are its Shareholders. The original Shareholders were residents of the Trust Land on a certain date specified in the Act.

As discussed on page 5, each of the Trusts, and not the individual Shareholders, own the relevant Trust Land. Shareholders instead own a 'share'.

The Act says that a share in a Trust is personal property. 'Personal property' is a term used to describe property like cars and bicycles. Personal property is distinguished from 'real property' which is the term used to describe property rights attached to land like owning a block of land.

Each Shareholder has rights under the Act, like the right to have a say in what happens on the Trust Land, the right to attend meetings of the Trust and the right to receive money available for distribution to Shareholders in the form of dividends.

There are rules in the Act about what can be done with the shares. Shares can only be transferred to the Trust, another Member, the Victorian Government or the family of the Shareholder. There is no requirement in the Act that a Shareholder be an Aboriginal person.

AV has previously assisted to audit the register of Shareholders, to help the Trusts comply with the Act.

The shareholder system is unique to the Act and is not used in any other land rights regimes in Australia.

AV has identified the following features of the shareholder system that might inhibit self-determination, good governance and economic development:

- The rights and entitlements of Shareholders are not objectively clear in the Act or well understood. Uncertainty as to what rights people actually have could undermine self-determination. It could also lead to dissatisfaction and even disputes.
- The value of a share is hard to determine. This could also undermine self-determination and lead to dissatisfaction and disputes. It could also impact upon economic development, because it is hard for Shareholders and the Trust as a whole to plan and to leverage off their assets when they do not know the value of them.

- Transferring a share is a complicated process. If a Member wants to exercise their rights to transfer a share but the process is too complicated they may well be impeded from realising the value of their asset or from taking action in relation to their rights. Uncertainty in how to transfer a share can also make it hard to have effective governance if there are Shareholders who do not want to be involved in running the Communities but find it too hard to dispose of their rights to those who do want to be involved in running the **Communities**.

There may be different options to improve or change the shareholder system. One option could be simply clarifying what the shares represent. Other options might be changing the process for transferring shares or even removing the shareholding system altogether and having members with voting rights rather than shares. AV has not investigated all alternative structures and whether they are possible. This will occur after we have heard the ideas of the Trust Members, the Framlingham and Lake Tyers Aboriginal communities and other affected people and groups.

For discussion

- Is the shareholder system important to you?
- How could the shareholder system be better explained to Shareholders and residents?
- Have you had any experiences trying to transfer your share or obtain a family member's shares? How could the process have been improved?
- Have you had any experiences of living on the Trust Land or being a traditional owner of the Trust Land and not having shares? What has this meant for you and how could it be improved?
- Would you like the Victorian Government to consider alternatives to the shareholder system?
- What alternative systems of ownership of the land of the Trusts do you think would work?

Dispute resolution

Overall, dispute resolution options in the Act are limited and do not involve cost effective and efficient alternative dispute resolution avenues. If a Member of a Trust believes that the Trust is conducting the affairs of the Trust unfairly or improperly, then they have the option to apply to the Supreme Court for an order under the Act. Similarly, aggrieved persons can apply to the Supreme Court for an order under the Act.

Applying for an order in the Supreme Court can be very complicated, expensive, emotionally taxing and time consuming. Alternative ways of resolving disputes, such as using a mediator, or an elder or group of elders to help resolve a dispute without going to Court, are generally simpler, less expensive, more culturally respectful, faster and are a better overall process. Appropriate dispute resolution options could assist with strong and effective governance.

For discussion

- How could disputes be better dealt with?
- What methods for resolving disputes could be included?

Culturally appropriate corporate governance

Good governance must be effective, and to be effective the governance procedures should be culturally respectful and appropriate, as well as be able to effectively respond to a wider governance environment. The Act is based on outdated Victorian companies' law from the 1960s. It is not current and is not sensitive to or reflective of culturally appropriate corporate governance.

Although acknowledging that there is no 'one-size-fits-all' model of Aboriginal governance, several Australian governance development initiatives have included a list of key components or elements of effective corporate governance.

According to the authors of the Indigenous Corporate Governance Research Project, basic conditions that assist to produce effective governance are, in combination:

- governing institutions (rules);
- leadership;
- genuine decision-making power;
- practical capacity;
- cultural legitimacy;
- resources;
- accountability; and
- participation.

AV has identified the lack of culturally appropriate corporate governance in the Act as a limitation to achieving good governance, self-determination and economic development.

For discussion

- How can the governance provisions be changed to be culturally appropriate?
- For example, should there be a formal role for elders? How should that role be structured?
- For example, should there be different models of decision making?



5.2 Economic Development

Owning and managing land and infrastructure is expensive and the Trusts require access to various sources of funding if they are to reliably prosper as they rightly should. Economic development would ideally enable the Trusts to move away from reliance on periodic and variable funding, where appropriate, and also provide an economic base for the Trusts to generate wealth from Trust Land.

Economic development opportunities are affected by many things, including the type of land tenure, the effectiveness of governance structures, the services available on the land, the commercial value of the land, the resources of the land and the available business expertise and support.

In this section we look at land tenure, resources and the potential idea of separating corporate entities for land ownership and economic development. We also note some policies and programmes that might assist with economic development that do not necessarily require changes to the Act.

Land tenure

The Framlingham and Lake Tyers Aboriginal Trust Land is held as alienable freehold title. This means the Trust Land can be sold or given away, but the Act provides that this can only happen if there is a unanimous resolution of the Trust to dispose of the land. The Trust Land can also be mortgaged and leased for up to 21 years or longer if a sufficient number of Members agree.

Alienable title is unusual for land rights models in Australia. Across Australia most land granted in land rights settlements is granted as inalienable title, which means it can be leased but never sold.

A key benefit of alienable title is that the land can be mortgaged to raise capital for investment and business development. But if for some reason investment or business development is not successful and the mortgage cannot be repaid, the bank or lender may have the right to seize and sell mortgaged land. Therefore the key benefit of having alienable title – being able to use it to raise capital – also carries the key risk, which is losing the land. If land is lost or otherwise disposed of, communal and intergenerational interests will not be preserved, and if the land is sold to non-Aboriginal land owners the Aboriginal estate is obviously then diminished.

Around Australia new ideas are needed to enable capital to be raised and economic activity to thrive on inalienable land rights and native title land. Most recent developments in this area involve privatisation, including for example converting parts of the overall land into freehold title with restrictions on who can initially own that title. Leveraging off the natural resources of the land, as well as private and commercial leasing, are the most common ways for Aboriginal land owners to realise the potential of their land without breaking it up or risking losing it.

For discussion

- Should the Trust Land remain alienable?
- Should there be any new titles created? For example, should part of the Trust Lands become inalienable freehold, with other private parcels of land available for home ownership or private business?
- What are your experiences or observations in relation to leasing the land? Have they limited or enhanced economic development?

Resources

The Act makes no special provisions in relation to resources. For example, the Act is silent about mining activities, which is in contrast to other land rights legislation in Victoria and other parts of Australia. Some land rights schemes provide for a basic right of veto to prevent exploration and/or mining. In the case of native title a robust 'right to negotiate' exists in relation to exploration and/or mining.

The Act could be clarified by addressing rights in relation to mining and exploitation of resources.

For discussion

- Are changes to the Act or clarification about the resources of the Trust Lands needed?



Separate corporate entities

The wide and extensive range of responsibilities held by the Trusts may be a further limitation to effective and efficient economic development. The Trusts are currently responsible for holding, managing, leasing and developing Trust Land and have the power to carry on any business on Trust Land. These are very broad responsibilities for one organisation.

Having one organisation responsible for so much also means that the Trusts' role as land holder and essential service provider cannot be easily separated from the risks associated with commercial activities, such as business ventures or 'for profit' economic development. For example, if a Trust decided to engage in a commercial venture and that commercial venture was to fail, the Trust could be forced to sell assets or land to repay creditors. This could mean taking assets and money away from the Trusts' other areas of key responsibility, like providing essential services to the Community and managing Trust Land. In this way, the current structure may even be a disincentive to the Trusts pursuing worthy economic development activities.

Creating one or more separate (but related) corporate entities, responsible for economic development or service delivery, can help minimise these risks.

Where separate entities or subsidiaries are created for the purposes of land holding and economic development or service delivery there can also be the following advantages:

- potential opportunities for any 'not for profit' entities to attract philanthropic and charitable funding;
- opportunity for different organisations to promote participation and representation; and
- land holding organisations may focus on internal accountability and socio-cultural and environmental objectives, while economic development organisations may focus on external accountability and economic objectives.

However, multiplying the number of organisations may be administratively burdensome and difficult if there are not enough people to effectively run them. This sometimes can be a key disadvantage of having multiple organisations.

Example

A South Australian corporate governance model

The Ngarrindjeri nation is comprised of 18 clans and around 4000 members. Ngarrindjeri Regional Authority (as an association) has two wholly owned subsidiaries – one a proprietary limited company and the other a charitable body.

The proprietary limited company has a skills based board and was established to focus on identifying business and tourism opportunities.

While the idea of a business skills based board was reportedly a challenge for the community - where appointments may usually be on family lines, age or standing - the separation of business development into a separate wholly owned subsidiary helped to resolve this tension. It allowed external investors to deal with a more familiar governance structure, while leaving other land-holding organisations to emphasise Aboriginal governance principles.

The Authority's success in designing corporate governance models has attracted the praise (and financial support) of Indigenous Business Australia and a variety of key stakeholders.

For discussion

- How are all the different responsibilities of the Trusts managed now?
- Would it be helpful to separate a 'not-for-profit' land ownership entity from an economic development entity?
- What would be some of the reasons for or against this?

Making use of policies and programmes

There are a range of policies and programmes that might assist economic development that do not require changes to the Act. For example, the Federal IPA programme involves voluntary agreements between Aboriginal landowners and the Australian Government through which funding is provided to protect biodiversity and cultural heritage. IPAs are intended to provide employment, education and training opportunities for Aboriginal people. The Deen Maar IPA and the Framlingham Forest IPA are examples of IPAs with which the Framlingham Aboriginal Trust is involved. The ILC also has a land management programme that can include funding for enterprise development and property management planning. The ILC has provided funding to the Trusts over the years. The ILC has a strong focus on good governance when partnering with or funding organisations.

While these policies and programmes all require some external funding, where that funding is geared towards capacity building it may lead to self-sustaining development.

For discussion

- What has been successful in assisting economic development on the Trust Lands?
- What has prevented economic development on the Trust Lands?
- What do you think should be done to assist and improve economic development on the Trust Lands?
- What changes to the Act should be made to assist and improve economic development on Trust Lands?
- Would it be helpful to separate a land ownership entity from an economic development entity?
- What has been your experience working with government and private funding providers?

5.3 Self Determination

Self-determination is difficult to define. The Victorian Government acknowledges that self-determination should of course be defined primarily by Aboriginal people themselves, consistent with the right to self-determination in Articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Peoples*.

United Nations Declaration on the Rights of Indigenous Peoples

Article 3: Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means of financing their autonomous functions.

While self-determination may be difficult to define, some of the things that can undermine self-determination are more obvious. For example, self-determination is unlikely to be supported where decision making is removed from the control of Aboriginal people, where governance structures are imposed and where economic development is impeded.

The Victorian Government has committed to making self-determination its core business. While land rights are an essential grounding and foundation for supporting self-determination, AV has identified other areas where the Act could do more to promote self-determination.

In the above sections we have considered governance and economic development. In this section we consider other important issues that relate to facilitating self-determination; primarily service delivery to the Communities and the language of the Act itself. We also raise for discussion the question of whether the Act could be improved by a preamble that sets out the history and objectives of the Act.

Services for the Communities

Each Trust has the power to manage, maintain, improve and develop any land held by the Trust, as well as carry on any business on the Trust Land. The Committees of Management are empowered by the Act to exercise these powers.

The Act is otherwise silent in relation to services to the Communities living on the Trust Lands, with the exception of sections relating to access roads within the Lake Tyers Aboriginal Trust.

Until recently, the Australian Government has financially provided for essential services in Aboriginal and communities across the country, including Framlingham and Lake Tyers. The services included, but were not limited to, Municipal and Essential Services and housing. However, in the last few years the Australian Government has transferred this responsibility to the states (the situation is different in the Northern Territory). This has directly impacted Framlingham and Lake Tyers.

In late 2014 arrangements were finalised for the transfer of responsibility for Municipal and Essential Services from the Australian Government to the Victorian Government. The current arrangements are in place until 2019. Beyond 2019, arrangements are yet to be finalised.

Similarly, funding arrangements in relation to housing in Aboriginal communities are in transition. The **NPARIH** is an agreement between the Commonwealth, the state and the Territory governments, aimed at reducing significant overcrowding, homelessness and poor housing conditions in remote Aboriginal communities. Funding from the NPARIH supports Aboriginal Community Housing Organisations. Both Trusts are recognised Aboriginal Community Housing Organisation housing providers. The NPARIH program funding concluded in December 2016. Part of the Victorian NPARIH agreement plans for transition of social housing to property and tenancy management that aligns with the current state public housing model. This model includes fair rent setting and regular rent collection, tenancy support and education services, ongoing repairs and maintenance programs.

Given the complexity of the current transitional arrangements it may take some time for the Victorian Government and both Trusts to consider alternative future arrangements that aim to ensure essential services are consistent with those that apply elsewhere around the state.

These financial and policy issues will likely not be resolved by changes to the Act, but they provide a context and background for understanding and improving service delivery in the Framlingham and Lake Tyers Aboriginal communities.

AV anticipates that improving governance will assist the Trusts to establish and manage service and funding agreements to improve service delivery.

AV has also identified this as an area where there are opportunities for economic development and self-determination. Aboriginal organisations are already involved in service delivery in the Aboriginal communities of Framlingham and Lake Tyers. As the Communities grow and thrive, there could be increased opportunity for these organisations to service the Communities. Similarly, if these services are run and managed by local people and the Trusts, then the Communities could become more independent and closer to becoming self-determining.

For discussion

- What do you believe are the difficulties with service provision in the Framlingham and Lake Tyers Aboriginal communities?
- What changes to the Act can be made to improve service delivery to the Communities?
- Is a renewal project like the Lake Tyers 10-year community renewal project better than changes to the Act, or can they stand side by side, and if so how?
- How can Communities gain and retain control over services from design to delivery to use?
- Would it be helpful to separate a land ownership entity from a service delivery entity?
- Should other models be considered? For example, should the Trusts be the land owners with other bodies established to manage the country, develop business opportunities and provide services?

Language and complexity

Self-determination, good governance and economic development are all assisted by plain English drafting that avoids old fashioned and out of place terms. Plain language means language that is clear, precise, useful, effective and understandable.

Unclear drafting on the other hand creates challenges for interpreting and applying the Act, which can make it difficult for Members, the Committees of Management, the Victorian Government and the Framlingham and Lake Tyers Aboriginal communities to understand their powers, rights and responsibilities. All these challenges and difficulties cause unnecessary confusion and lead to potential disputes.

AV has identified a number of places where the language of the Act could be modernised and simplified. For example:

- the Act uses the term “aborigine” rather than “Aboriginal person”. The term “aborigine” is defined with reference to the word “native” and without any element of self-identification and acceptance by the community;
- the financial control and share valuation provisions are out-dated and unclear; and
- the Act does not address what should happen to the assets of the Trust if it was ever wound up.

For discussion

- In what ways has the language of the Act affected your experience of working with the Act? For example, has it been difficult to understand or difficult to apply?
- Would a plain English drafting of the Act be helpful?
- Are there sections of the Act that should not be modernised?
- Should the term “aborigine” be replaced by “Aboriginal Person” and how should it be defined, or should there be different wording altogether?

A Preamble for the Act

The preamble to the Act describes the Act but does not set out its purpose and objectives. By contrast, nowadays it is common for the preamble to an Act of Parliament to generally explain the reasons for the legislation and the objectives of the legislation, and it can be used to help interpret unclear parts of legislation.

If the Act is to be reformed, the Government has identified this as an opportunity for the Trusts and residents to have the unique history of the Trusts acknowledged, and for an empowering and vibrant preamble to be inserted, to set the tone of the Act and Parliament’s ambition to foster self-determination.

For discussion

- What do you think are the objectives of the Act?
- Should these be written into the Act?

6/ Next steps

AV proposes to hold a series of forums in Melbourne and locations around and near to both Framlingham and Lake Tyers, including Bairnsdale and Warrnambool. Additional forums in the surrounding areas may occur if required. The forums will be widely promoted by direct mail and advertising in local and national media.

Feedback from these forums will be available on the AV website at <http://www.vic.gov.au/aboriginalvictoria>.

The feedback will capture the general topics of the discussion. The website will also allow for interactive input. This input will be available for viewing by the public but the individual or group providing the input will not be identified, to ensure privacy is respected.

What happens after that?

After the discussion stage of consultation, everyone's views and ideas will be collated and reviewed. All this information will be used to prepare an Options Paper.

The Options Paper will include specific options for improving governance and enabling greater self-determination and economic development, which might range from no changes at all to the Act through to a complete re-thinking of the legal framework of the Trusts and the repeal and replacement of the Act. We will then have further consultations about these options.

How will change happen?

This will depend on what change is ultimately decided upon. If the change includes legislative amendment then AV will draft a Bill and provide a further opportunity for community consultation and input on the draft legislation before it is prepared in final draft. Depending on what input is received, the Bill may be changed to reflect the input.

The Bill will then be finalised and put before Parliament. At that stage, the Bill will become public and all Victorians will have an opportunity to provide their views to Parliament.

As the Bill passes through Parliament to become law, Members of Parliament may also propose amendments. Ideally, Members of Parliament will only do this following input from the persons directly affected by what is being proposed.

For more information about the parliamentary process, please see the Parliament of Victoria's website, including interactive and animated online resources about how a law is made at: <http://www.parliament.vic.gov.au/about/how-a-law-is-made>.

