

## Submission to Yoorrook Truth Commission

**Date:** 17 November 2023

**Subject:** Deceased Estate & Superannuation Beneficiary Reparation Proposal

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### Recommendation:

The Yoorrook Truth Commission consider the paper, and if seen fit, use the proposal to generate a recommendation within the Land Injustice area of inquiry for the First Peoples Assembly to progress in Statewide Treaty Negotiations.

### Executive Summary

This paper provides a basis and recommendation for the Yoorrook Truth Commission to recommend a future focused reparation framework for land injustice and intergenerational wealth built upon Traditional Owner Country/stolen land. These recommendations are focused on deceased estates, and the legislative and regulatory changes under Wills Act 1997 (State Law) & Administration & Probate Act 1958 (State Law) required to enable three changes to deceased estates and the establishment of Wills. Moreover changes to the Superannuation Industry (Supervision) Act (SIS Act) 1993 (Federal Law) to mandate an opt in model for Traditional Owners to be a listed beneficiary option within a superannuation beneficiary form:

- Deceased Estates, with no Will and no next of kin being wholly distributed to the relevant Traditional Owner Group – *Currently Deceased Estates with no next of kin is distributed to government.*
- Alter the intestacy law to reprioritise Traditional Owners reparations in the order of inheritance of an estate where an estate is 'intestate'. Create a new order of inheritance for an estate which is deemed 'intestate' to the following order of inheritance: 1)Parents 2)Siblings 3)Grandparents 4)Traditional Owner Nation 5) Aunts/Uncles\* & 6)Cousins\*.
- \*Following Grandparents in the line of inheritance for a deceased estate a Traditional Owner Nation will receive a designated proportion of the estate as reparation, as well as distributions to aunts/uncles & cousins.
- Establish a legal requirement to include consideration for Traditional Owners in the drafting of all Wills & Testamentary Trusts. The individual/family drafting a Will or Testamentary Trust can make a conscious decision to distribute a proportion (0-100%) of Assets to the relevant Traditional Owner Nation for which the individual/family resides.
- Advocate to the Federal Government through the Assembly, Yoorrook and other advocacy channels to support a change to the SIS Act to enable an opt in model where a specific prompt is inserted for Australians/Victorians to consciously consider including Traditional Owners within

their beneficiaries of their Superannuation account upon death – This would apply to both ordinary superannuation and Self-Managed Superannuation Funds.

This proposal would provide a mechanism for the Government to partially resolve land injustice and reparation in a non-retrospective process and consequently would deal with reparation in a future focused framework. Moreover, the establishment of a legal requirement through the drafting of a Will would enable individuals and families to consciously consider the intergenerational wealth built upon stolen land and how they might be able to contribute partial reparation upon death.

Many people would not choose to pay reparation on death, however I believe many people would choose to consciously contribute reparations upon death.

The proposal would enable pathways for Traditional Owner reparation payments that do not immediately impact the lives of everyday Victorians/Australians and provides the option for Australians/Victorians to provide their reparations upon death.

Moreover, this is an avenue that Traditional Owners can activate as a revenue stream that would not directly impact Government budgets, and could be a palatable option for both political persuasions.

## **Background**

### What is a Will?

A Will is an important legal document outlining an individual's wishes for when they pass away. It details:

- who they want to receive their assets
- who they want to receive specific personal and heirloom items
- any religious or cultural arrangements for their funeral
- who they want as a legal guardian for any children under 18 years
- who they choose to be their executor when they pass away.

Currently, if someone dies without a will, they die *intestate*. Being intestate means that the laws of the state or territory they live in will decide how their estate is administered. An estate is made up of a person's assets and liabilities.

A person's assets are their property and belongings such as a house, car and bank accounts.

In simple terms your estate is your net worth at any point in time. It is the sum of all of an individual's assets, less any debts or liabilities at that time. The types of assets may form part of an individual's estate might include:

- Real property;
- Vehicles;
- Personal items (e.g. jewellery, art, heirlooms and antiques etc.) and a separate document with any assets they have in a trust;

- Any stocks or bonds that they have; and
- Bank accounts.

\*Superannuation does not make up part of an individual's estate on death, unless specifically instructed by the individual.

### What is a Testamentary Trust?

A testamentary trust is set up in a person's will and starts upon their death. It holds and protects all, or some, of the person's assets such as property and investments. The trust looks after the assets for the beneficiaries. Beneficiaries are the people or organisations that will benefit from the trust.

A trustee is named in a will to manage the assets in the trust. The trustee is responsible for distributing the assets to the beneficiaries, following the instructions in the will.

There are many types of assets that can be held in a trust, including:

- Investments
- Land or property
- Cash
- Other valuable belongings such as paintings, furniture, or jewelry.

These assets can produce income, such as interest from bank accounts or dividends on shares. Assets can also go up in value. This can mean the trust gets capital gains, but not the individual beneficiaries.

### What happens if an individual dies without a Will?

If an individual dies without a valid Will, their next of kin or family will need to apply for a grant of letters of administration. This will then give them legal authority to administer estate of a deceased individual in accordance with the applicable statutory formula of distribution of assets.

### What happens if an Individual dies without a will and no known next of kin?

If an individual had no partner or children, then all the estate goes to relatives in this order:

- Parents
- Siblings
- Grandparents
- Aunts and uncles
- Cousins.

### What happens if an individual dies with a Will, no next of Kin, and no relatives?

If there are no known relatives, the estate passes to the State government.

Proposed alterations:

The proposed alteration to the way a deceased estate is structured and administered would enable a future focused framework that provides for ongoing intergenerational reparation for land injustice to Traditional Owners without the need for direct compensation from the State, and by implication the tax revenue generated from individuals and companies within Victoria to administer the State Government & services of Government. We hear too often the myth that Government gives too much money to First Nations Communities and Traditional Owners, and in this model, Government is only approving the legislative framework, not the distribution of the estate.

The proposed alterations include:

- Deceased Estates, with no Will and no next of kin being wholly distributed to the relevant Traditional Owner Group – *Currently Deceased Estates with no next of kin is distributed to government.*
  - *This would enable Traditional Owners to directly inherit deceased estates where no relative can be found for an estate*
  - *Deceased estates may have housing which can provide for the opportunity for community housing needs etc.*
  - *Assets can be sold to generate revenue for self-determination of the Traditional Owner Nation*
- Alter the intestacy law to reprioritise Traditional Owners reparations in the order of inheritance of an estate where an estate is 'intestate'. Create a new order of inheritance for an estate which is deemed 'intestate' to the following order of inheritance: 1)Parents 2)Siblings 3)Grandparents 4)Traditional Owner Nation 5) Aunts/Uncles\* & 6)Cousins\*.
  - \*Following Grandparents in the line of inheritance for a deceased estate a Traditional Owner Nation will receive a designated proportion of the estate as reparation, along with distributions to aunts/uncles & cousins.
  - The alteration to the intestacy law enables reparation to Traditional Owners following direct family line of inheritance
- Establish a legal requirement to include consideration for Traditional Owners in the drafting of all Wills & Testamentary Trusts. The individual/family drafting a Will or Testamentary Trust can make a conscious decision to distribute a proportion (0-100%) of Assets to the relevant Traditional Owner Nation for which the individual/family resides.
  - Individuals and Family living on Traditional Owner lands will be able to make a conscious decision to recognise the intergenerational wealth generation they have built upon stolen land.

## **Risks and Mitigations**

Risk 1: There will likely be fearmongering from the right-wing (and others) about Wills & Estates and the imperative that all people obtain a Will to avoid monies being distributed outside the wishes of the deceased individual or family.

Mitigation 2: Altering legislation to mandate a specific consideration for Traditional Owners in the drafting of a Will or Testamentary Trust can ensure that these considerations are front of mind when the drafting of a Will occurs.

Risk 2: If this proposal is negotiated and agreed to with the State Government, there still yet may be areas of Country where Traditional Owners haven't established a form of status to receive distributions from Wills, and deceased estates that are intestate.

Mitigation 2: Monies could be allocated to the Self-Determination Fund (SDF) to be held in trust on behalf of the relevant Traditional Owner group up until a point where formal status is achieved and monies can be distributed or continued to be invested by the SDF through the self-determination of each Traditional Owner group.

Risk 3: Challenges by relatives of aunts/uncles/cousins or distant relatives of estates which are intestate and there is a proportion distribution to a Traditional Owner Group by the laws of intestacy.

Mitigation 3: This can be a change in the intestacy law to mandate the proportional distribution of an estate to Traditional Owners without the ability to challenge.

Risk 4: An individual leaves an allocation of an estate within a valid Will or Will with a Testamentary Trust that is challenged by family/relatives of the deceased individual.

Mitigation 4: Challenges are lodged to deceased estates by relatives every day. A representative entity like a 'Traditional Owner Estate Legal Service' should be established and receive perpetual funding through the State Government or against the estate in question to pursue the interests of Traditional Owners in distribution challenges to estates with a valid Will and Traditional Owners are a listed beneficiary, and distributions to estates where the deceased dies intestate.

Risk 5: A deceased person dies with multiple land assets on several Traditional Owner Lands.

Mitigation 5: The land assets are to be distributed to the Traditional Owner group in which the land is located upon. The remaining assets (cash, shares etc.) will be distributed to the Traditional Owner group of the home/residential/primary address of the deceased person.

## **Reference**

[Wills Act 1997](#)

[Administration and Probate Act 1958](#)

[Superannuation Industry \(Supervision\) Act 1993](#)

[Self-Determination Fund](#)