Australian Deer Assoc.

Hunter access to *Land Act* 1958 occupancy areas

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1 INTRODUCTION

Thank you for inviting The Public Land Consultancy (TPLC) to provide advice relating to deer hunter access to Crown land held under Land Act 1958 occupancies.

You have specifically sought our comment on advice (September 2001) provided by the Victorian Government Solicitor (VGSO) to the former Department of Natural Resources and Environment, in particular an interpretation of section 399 of the *Land Act* 1958 and its implications in terms of hunter access to private property as described in section 131 of the *Firearms Act* 1996.

The effect of the advice provided by the VGSO is that land held under a lease or licence granted under various provisions of the *Land Act* 1958 is to be regarded as private property for the purposes of the *Firearms Act*. The effect of this is that a person who possesses, carries or uses a firearm on such land must first obtain the consent of the lessee or licensee. (This advice apparently reinforces a view expressed in 1999, the detail of which we have not seen).

You have sought our views on whether we believe the VGSO's advice is sound.

As agreed, there has been no contact DELWP of any other party in preparing this advice. TPLC is not a legal practice and this should not be regarded as legal advice.

2 BACKGROUND

2.1 CURRENT POSITION

The ADA's publication *Hunter Access to Licenced Public Land and related Issue with Deer Hunting Maps*; August 2017 makes reference to this matter, noting that '*A number of new licences have recently been issued covering large areas of land which are popular for deer hunting.'* The effect of which '*… is that hunters must have the permission of grazing license holders in order to access large tracts of State Forest in which hunting would otherwise be permissible.'*

The information relating to these new licence areas was provided by DELWP, presumably acting upon the VGSO advice of 1999 and 2001.

The document also states that *"Previous legal advice* (presumably to the ADA) *has indicated that licences issued under the Land Act, although being defined as 'private property' under that Act, are not true parcels of private property when compared to the general definition of private property."*

2.2 THE LEGISLATION

*Section 131 of the Firearms Act makes it an o*ffence to possess, carry or use a firearm on private property without the consent of the owner or occupier of the property (extract below):

s.131(1) A person must not—

(a) possess, carry or use a firearm on private property; or

(b) discharge a shot, bullet or other missile from a firearm onto or across private property— without the consent of the owner or occupier of the property.

As stated in the VGSO advice, the term 'private property' is not defined anywhere in the *Firearms Act* or other Victorian legislation. The advice goes on to state that, *'In Butterworths Australian Legal Dictionary, private property is defined as property owned by individuals as opposed to public property or property owned by the State'*

This would appear to provide a very clear distinction between private property and Crown land; i.e. land 'owned' by the Crown.

As I understand it, the VGSO's advice of 17 September 2001 maintains that the inclusion of the words 'owner or occupier' in sub-section 131(1)(b) broadens the definition of private property beyond its 'common' definition and would include areas held under lease or licence, including areas defined as 'private land' in s.399 of the *Land Act* 1958.

The advice states that:

am still of the opinion that the definition in the F Act is wider because the words "owner or occupier" are used. In the F Act, private property would be both land owned privately or land occupied under a lease or licence. In my opinion, this would include Crown land held under lease or licence under the L Act. I was and am still assisted in my opinion by s. 399 of the L Act wherein private land is defined as including Crown land held under various licences or leases issued pursuant to Part 1 of that Act. In my opinion, private property is synonymous with private land.

I cannot agree with this interpretation.

Part XIII of *the Land Act* relates to unused roads and water frontages. Section 399 includes definitions that relate to this part of the Act (it incorporates the words *'In this part unless inconsistent with the context or subject-matter'*) and includes a definition for '**private land'**:

> *'private land means land which has been or is in course of being alienated from the Crown in fee simple or is held under a lease or a licence under Part I of this Act or as a residence area under Division 11 of that Part.'*

Part 1 of the Act includes the key provisions relating to the grant of leases and licences in respect of unreserved Crown land.

The remaining provisions contained within Part XIII of the *Land Act* relate to unused roads and water frontages, primarily to establish the principle that those that are not fenced must be licenced by the adjoining occupier (noting that s.399 defines occupier to be a tenant or an owner).

It would appear apparent that the reason for the inclusion of specific definitions in this Part of the Act was to establish a single expression to capture persons responsible for land that adjoins an unused government road or a water frontage, and ensure that they either fence the road or water frontage out or take out a licence over all or part of that road or water frontage. This responsibility is being placed on both the owners of freehold land - i.e. land that has been alienated from the Crown in fee simple; or tenants of Crown land held under lease or licence under the Land Act.

This definition of 'private land' is, I believe, only intended to be used in relation to Part XIII of the *Land Act* and should not have a broader application; either beyond Part XIII or to any other legislation, including the *Firearms Act*.

Such a view is discussed in paragraph 8 of the VGSO's advice, in which it is stated that *"There is a further contrary argument that s.399 only relates to the tenure of land adjoining unused roads and water frontages".*

I believe my view, and the contrary argument expressed by the VGSO, to be supported by both the Office of the Chief Parliamentary Counsel (Victoria) (OCPC) and the Parliamentary Counsel's Office (PCO) of Western Australia.

In its August 2016 publication 'The Legislative Process', the OCPC states that:

> *Section 2.4.5 Definitions*
> *'In a Principal Act, the definitions and other interpretative provisions that are to apply across the Act are usually located together in one place towards the front of the Act. Sometimes a definition is needed only for a limited part of the Act (this could be a section, a Division or a Part). In that case, the definition may be located close to the provisions in which it is needed rather than in the main definition section.'*

Such is the case with the definition of 'private land' in s.399 of the Land Act.

In *"How to read legislation", a beginner's guide* Edition 1, May 2011); prepared by the PCO in Western Australia, the section relating to Definitions states that:
'The purpose of defining a word or phrase is usually to give it a meaning which differs from its ordinary, everyday, current meaning … Sometimes they (definitions) *are defined for the purposes of the whole of the piece of legislation. Sometimes for only a Part or for only a Division of it. … If a word or phrase is defined for say only a section, the definition applies <u>only</u> in that section. So, if the word or phrase is used outside that section, that definition of it does not apply in those other places unless any of them clearly says it does. … If an Act defines a word or phrase, the definition does not apply in other Acts that use the word or phrase unless there is some law that says it does ….'*

The term 'private land' is used elsewhere in the *Land Act* (s.12A, 285 and 385). The references in s.12A and s.285 in particular would appear to clearly relate to private property as per its common definition, not to the broader definition provided in s.399.

I can find nothing in any legislation to suggest that the definition of public land in the *Land Act* is intended to have any relevance to the *Firearms Act*.

In relation to the view expressed in the VGSO's advice that *'In the F Act, private property would be both land owned privately or land occupied under a lease of licence.'* and *'this would include Crown land held under lease or licence under the L Act.'* I offer the following comment:

Section 131(1)(b) of the *Firearms Act* refers to the *"discharge a shot, bullet or other missile from a firearm onto or across private property— without the consent of the owner or occupier of the property."* I believe the reference to property in this sub-section relates to the private property to which s.131 relates. I believe the terms owner and occupier in s131(1)(b) relate to 'private property' as it is commonly defined, and is not in addition to it as appears to have been interpreted by the VGSO.

This view is, to some degree, supported in para 9 of the VGSO's advice which states:

> *"I am not confident that a court would hold that land held under a licence issued pursuant to the provisions of either the FO Act or CLR Act to be private property. The argument would be that the words owner or occupier in s.131 of the F Act do not add anything to the meaning of private property. The argument is that occupier means someone who is occupying the private property other than the owner."*

It is interesting to note that s.131 of the *Firearms Act* was amended in 2007 with the inclusion of an exemption from the need to obtain consent. Section 131 (4) states:

> *(4) Despite subsection (1), a person*
>
> *(a) who is possessing or carrying a firearm under a licence under this Act; and*
>
> *(b) who is crossing Crown land over which there is a licence, for the purpose of hunting in accordance with the Wildlife Act 1975 on land that can only be accessed by passage over the Crown land— is not required to obtain the consent of the holder of the licence over the Crown land.*

This amendment may have resulted from the interpretation made by the VGSO in 1999 and subsequently reinforced in advice of 17 September 2001. This provision was inserted by s.35 of the *Firearms Amendment Act* 2007. The Explanatory Memorandum for the *Firearms Amendment Bill* 2007 states:

> '*Clause 35 amends section 131 of the Principal Act (through inclusion of s131(4)) to clarify that a person possessing or carrying firearms under a licence who is crossing Crown land over which there is a licence, for the purpose of hunting in accordance with the Wildlife Act 1975 on land that can only be accessed by passage over the Crown land, is not required to obtain the consent of the holder of the licence over the Crown land unless the licence so requires. …The provision only applies to the possession and carriage of firearms across licensed land, not to their use. The provision does not relieve the person seeking access to Crown land from seeking the consent of the licence holder to cross the land and it could constitute an act of trespass if the consent is not obtained. This provision does not apply to Crown land held under a lease.'*

> Comment: I am puzzled by the reference to *'unless the licence so requires.'* If this is a reference to the Crown land licence – how is a hunter to know what conditions are contained within that licence? I am also puzzled by the reference '*to cross the land'* in the penultimate sentence, as it appears to contradict the intention of the clause. Maybe these words were intended to be '…to use the firearm on that land'.

The second reading speech relating to the Bill (Hansard - Legislative Assembly August 22, 2007, Page 2868) states:

> "*The bill implements an election commitment in the 'government's hunting and 4WD opportunities in Victoria' policy to 'amend existing firearms legislation to allow hunters unrestricted access to cross into … game reserves'. It does this by amending section 131 of the Firearms Act to allow hunters to carry (but not use) a firearm on Crown land over which there is a licence, for the purpose of hunting, without having to obtain consent to do so."*

In my view, if there is no requirement for consent to be obtained, then the exemption would appear to be of no benefit.

3 FINDINGS

- Because the term 'private property' is undefined in the Firearms Act, it is reasonable to use the definition in Butterworths, as suggested by the VGSO in its advice of 17 September 2001, namely - 'property owned by individuals as opposed to public property or property owned by the State.'
- Serious doubt must attach to para 7 of the VGSO's 2001 advice, insofar as it suggests that where section 131(1)(b) of the Firearms Act refers to the 'owner or occupier' of property, it somehow extends the meaning of 'private property' in section 131(1)(a). The better reading if the section is found in para 9 of the same advice, where the VGSO throws doubt on its own earlier interpretation.
- I cannot agree with the view expressed in the VGSO's advice that private land, as defined in s.399 of the *Land Act,* is private property for the purposes of s131 of the *Firearms Act*, with the result that the consent of the licensee/lessee is required to hunt on unreserved Crown land held under certain tenures. This definition of private land is, I believe, only intended to be used in relation to Part XIII of the *Land Act* and should not have a broader application; either beyond Part XIII of that Act or to any other legislation, including the *Firearms Act*.
- The 2007 amendment to section 131 of the *Firearms Act* seems to have been premised on the interpretation offered by the VGSO in para 7 of the 2001 advice - an interpretation which we believe to be in error. Further, the 2007 amendment seems to have been poorly advised, insofar as (a) it was implied that a licence can somehow bind a person other than a party to that licence, and (b) a licence can grant rights of exclusive occupation and rights against trespassers.
- The ADA publication notes that "*Previous legal advice has suggested that an appropriate change that would address this issue would be to amend the definition of private property*

as it is written in the Land Act to articulate to specify that it should not be considered 'private property' for the purposes of the Firearms Act." This would be an option, however I believe it preferable that DELWP be requested to revisit its legal advice and have confirmed that the leases and licences issued under Part 1 of the *Land Act* are not private property for the purposes of s131 of the *Firearms Act* 1996.

4 RECOMMENDATIONS

- The ADA request DELWP seek fresh advice from the VGSO in relation to this matter to confirm the ADA's view that Crown land held under leases and licences issued under Part 1 of the *Land Act* 1958 are not private property for the purposes of s131 of the *Firearms Act* 1996.
- Should DELWP not do so, or new advice from the VGSO confirm the existing view (which I would find surprising), the ADA could seek to have the matter resolved in the courts (noting that one outcome could be the government introduce legislation that mirrors its current approach with respect of Crown land occupied under the *Land Act* and expanded out to include Crown land occupied under licences under other legislation (e.g. *Forests Act* and *Crown Land (Reserves) Act*).
- TPLC would be happy to support the ADA in any relevant discussions with DELWP or the VGSO.

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