



Australian Government
Indigenous Land Corporation

GM2009/63

13 November 2009

Ms Catherine Skippington
First Assistant Secretary
Indigenous Heritage Law Reform
Heritage Division
Department of the Environment, Water, Heritage and the Arts
GPO Box 787
CANBERRA ACT 2601

Dear Ms Skippington

Re: Indigenous Heritage Law Reforms

The Indigenous Land Corporation (ILC) notes the Department of the Environment, Water, Heritage and the Arts' request for comments on the Indigenous Heritage Law Reform Discussion Paper (August 2009).

The ILC is an Australian Government statutory authority established in June 1995 under the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act). The ILC was established to provide economic, environmental, social and cultural benefits for Indigenous Australians through land acquisition and land management.

Please see below comments on those areas of the proposals on which the ILC holds views.

Question 1: Overall, what do you think are the main problems with the current situation, and what improvements are needed?

Consultation process

Current legislative requirements do not proactively involve Indigenous people in negotiations about property developments until the last minute, proving costly for all parties involved. This results in the process becoming reactive instead of proactive and is less likely to produce beneficial outcomes.

If developers were required to communicate with local Indigenous groups at the point of application or expression of interest, steps could be put into place to identify and address any concerns.

National Scheme

The present inconsistencies between the States and Territories in their schemes of protection are undesirable. Ideally, the Commonwealth could be more ambitious in its reform agenda and introduce a national scheme (analogous to the Commonwealth's actions in the industrial relations arena) where protection measures are administered by a well-resourced, Indigenous-controlled statutory body, similar to the Aboriginal Areas Protection Authority in the Northern Territory.

Question 2.1: Overall, what do you think about this proposal?

The paper should utilise the definition of 'traditional laws and customs' as used in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). This definition has been the subject of extensive judicial comment and is well understood in law.

Question 3.1: Overall, what do you think about this proposal?

As the proposal currently stands, there is little incentive for States/Territories to adopt the accreditation scheme. For States to do this they will have to go through the process of amending legislation and then constitute a body to administer the new scheme, at their own cost. If States decline to undergo this process, the very purpose of the proposed amendments would be negated.

Question 3.2: Could the proposed method of accreditation be improved?

The proposed amendments should contain incentives for the States to become accredited. These incentives should be in the form of minimising Commonwealth interference with State decisions on heritage issues under their legislation. However, in the absence of a funding incentive, it is problematic as to whether the incentives for accreditation will be sufficiently attractive to the States and Territories.

Question 3.3: If the Australian Government Minister could provide advice for a Minister of accredited States or Territories to consider when making decisions, could this help make accreditation work effectively?

This proposal could work against the efficiency of decision-making by creating two levels of influence acting on a single issue. It could make reaching a decision more difficult.

Question 3.4: Do you think that periodic reviews would help make accreditation work effectively, especially if the Minister can add to the standards for accreditation?

Although periodic reviews may help to overcome difficulties faced while the new legislation is implemented, ongoing periodic reviews will mean that the scheme for heritage protection is never settled. Periodic reviews should stop after one or

two rounds, after which legislative reviews must be done through the ordinary Parliamentary process.

Question 5.1: Overall, what do you think about this proposal?

People should not be excluded from applying for heritage protection merely because they do not have a legal entitlement relating to the area in question. The definition of who can apply for protection should be as broad as practicable to ensure that no-one with a legitimate interest in an area of cultural significance is prevented from making a protection application.

Question 5.2: Does it make sense to rely on existing legal processes like native title processes to identify Traditional Custodians?

Existing legal processes should be used to guide, but not limit, who may apply for heritage protection. Not every person who has a legitimate interest in heritage protection will be identified as a Native Title holder. In many areas, native title will have been extinguished such that an over-reliance on native title processes in heritage protection would be problematic.

Question 5.3: Is it fair to allow only recognised traditional custodians, using their representative bodies and processes, to apply to protect traditional areas and objects, if there are recognised traditional custodians?

Applications should not be restricted to traditional custodians, but also be accepted from others who can demonstrate a legitimate vested interest in the area to which the application relates.

Question 5.4: Should Indigenous persons who are not native title parties be able to apply for Commonwealth heritage protection over areas where native title rights and interests have already been recognised?

So long as the applicant can demonstrate a vested interest in the area subject to the heritage protection application, then it should not matter whether they are part of a recognised Native Title group.

Question 5.5: Are prescribed bodies corporate the appropriate organisations to apply for Commonwealth heritage protection over areas where Native Title rights or interests have been recognised?

The legislation should not be so prescriptive. The definition of people who can apply for heritage protection should be as broad as possible to ensure that no-one with a legitimate interest in protecting a site is excluded from making an application.

Question 6.1: Overall, what do you think about this proposal?

This proposal may be problematic depending on the actual content of the Indigenous Land Use Agreement (ILUA). It is possible that ILUAs could be entered into without full appreciation of the cultural significance of a site. If the new legislation were to allow any activity that is permitted under an ILUA, then sites that were not recognised as culturally significant before the ILUA was entered into could be jeopardised.

Question 6.4: Would this proposal complicate ILUA negotiations by encouraging people who are not Native Title parties to become involved in negotiations?

Yes.

Question 10.1: Overall, what do you think about this proposal?

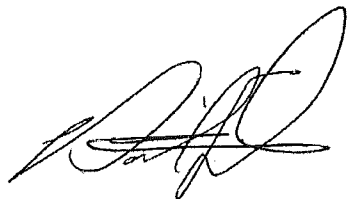
Holding conferences may be useful in resolving problems with applications but there is no need to have highly prescriptive legislative arrangements as to how conferences are held. Conferences can be arranged without such legislative arrangements.

Question 10.4: In practice would the process for setting up and running conferences be an efficient and fair way to decide how to respond to the issues raised by an application?

There is certainly a place for such conferences in the fair and efficient operation of heritage protection. However, if the formalities of the conference are too onerous then holding such conferences may actually reduce efficiency.

The ILC looks forward to seeing the reforms made to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* that will make protection of heritage more effective in Australia.

Yours sincerely

A handwritten signature in black ink, appearing to read 'David Galvin', written in a cursive style.

DAVID GALVIN
General Manager