

22 January 2015

Professor Lee Godden
Commissioner in Charge
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
Via Email: nativetitle@alrc.gov.au

Dear Professor Godden

Review of the *Native Title Act 1993* – Indigenous Land Corporation Submission

Thank you for meeting with the ILC on the 15th of January to discuss the above matter. As noted in that discussion, please find enclosed the ILCs written submission in response to the *Discussion Paper: Review of the Native Title Act 1993*.

As noted in the submission, the ILC would welcome the opportunity to engage in ongoing dialogue regarding the development of the ALRC final report.

Please do not hesitate to contact me on (02) 6269 2500 if your Committee would like to discuss the contents of this submission.

Yours sincerely



M C Dillon

Chief Executive Officer

**Indigenous Land Corporation Submission to
Australian Law Reform Commission Inquiry
Review of the Native Title Act (1993)**

January 2015

Introduction

The ILC continues to play a significant role within and complementary to the native title system. The ILC is pleased to provide this written submission to the Australian Law Reform Commission Review of the Native Title Act 1993, following a face to face consultation with members of the ALRC Review Team on the 15th of January 2015. The attached submission primarily provides a contemporary view of the activities and functions of the ILC. Section 3.7 of the Review of the Native Title Act 1993 Discussion paper¹ (The Discussion Paper) speaks to the function of the ILC under the heading of the *Context for Reform Proposals*. The reference points for this discussion are drawn from third party sources.

The ILC and the Land Account continue to be critical institutions in the architecture of native title. Established to deliver economic, environmental, social and cultural benefits to Aboriginal Australians and Torres Strait Islander Peoples through the acquisition and management of land, the enduring purpose of the Land Account and the ILC mirrors the guiding principle of the Inquiry; providing an effective basis for land (native title) to *support Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians*.

With respect to the Terms of Reference of the Review, the ILC provides broad support for the amendments proposed by the ALRC, but notes that its minimal involvement in the prosecution and resolution of claims under the Act necessarily exclude the ILC from having a specific position as to the likely impact of the more procedural of these proposals. Accordingly, the following discussion is limited to those proposals that the ILC considers impact broadly on the delivery of timely and just resolutions of claims, strengthening the function of the Native Title Act 1993 to more closely follow the objectives and beneficial intent of the legislation.

About the ILC

The ILC is an independent Corporate Commonwealth entity of the Australian Government that assists Indigenous Australians to acquire land, and manage Indigenous-held land, 'so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders'. Established originally under the ATSIC legislation in 1995 and latterly under the Aboriginal and Torres Strait Islander Act (Commonwealth) 2005², the ILC has two programs to support its purpose – Land Acquisition and Land Management.

Establishment Phase

The Land Account and the ILC were established as key elements of the '*grand bargain*' that underpinned the passage of the NTA in 1993 and provided recognition of, and partial compensation for the "*vast majority of Indigenous Australians (that) have been dispossessed of that which is most precious to their sense of history and spirituality, that most essential component of their heritage—their land*"³. The NTA (and the later Wik amendments) not only confirmed prior extinguishment of

¹ Review of the Native Title Act 1993 (DP 82)

² http://www.austlii.edu.au/au/legis/cth/consol_act/aatsia2005359/

³ ATSIC Amendment (Indigenous Land Corporation and Land Fund) Bill 1994 – Second Reading 1994

native title over much of the Australian continent, but validated grants by the Crown since 1975 over native title tenure which would otherwise have been invalid by virtue of inconsistency with the *Racial Discrimination Act*. In return for the certainty for non-Indigenous Australians regarding the security of land tenure provided by the NTA, Aboriginal interests were granted access to a Land Fund, which was subsequently implemented through the establishment of the Land Account and the ILC. As such, the ILC is a key institution in the architecture of native title. Thus the ILC has a fundamental role in complementing the NTA to deliver land justice for dispossessed Indigenous peoples. This was a common and strongly voiced theme throughout the consultation process conducted in 2012 by the ILC for the review of the National Indigenous Land Strategy (NILS).

The ILC is established as a perpetual entity, recognising the intergenerational impact of dispossession and the need to ensure the sustainable management of the Indigenous estate into the future.

In its early years, the ILC's initial focus was on redressing dispossession through acquiring properties and divesting them to Indigenous corporations expediently to contribute to the expansion of the Indigenous Estate. Simultaneously, the ILC worked with peak bodies of the time, including ATSIC and Native Title Representative Bodies to define a national strategy for the management of existing Indigenous-held land. During this time, the breadth of challenges experienced by Indigenous Corporations as Landowners emerged. Consequently, a proportion of divested properties were at risk of being lost from the Indigenous Estate and were re-acquired by the ILC where landowning corporations were unable to sustain the responsibilities of landholding so as to derive a benefit for Indigenous people. As has been the experience of subsequent successful native title claimants, early ILC acquisitions focussing only on redressing dispossession served to demonstrate that landownership is a complex responsibility that requires commitment, good governance, sound property management and financial skills and a sustainable income source in order to generate lasting benefits for Indigenous landowners. ILC Land Acquisition policies and processes have been incrementally refined to ensure that sustainable benefits are achieved through land ownership.

Benefits are optimised when:

- Indigenous land owners hold clear aspirations and a plan for the delivery of achievable and sustainable benefits;
- Indigenous land owners have the capacity and skills to implement viable activities on the land;
- The land sustains the activities and can support sufficient income to cover the costs associated with land ownership.

This refinement has driven an enhanced focus on income, training and employment generation as a vehicle for retaining acquisitions to the Indigenous estate and for supporting Indigenous economic development. Nevertheless, the ILC continues to give appropriate attention to Indigenous people's environmental, social and cultural aspirations in its decision making on land acquisition and management.

Current Priorities

In 2015, the ILC is a mature and experienced Indigenous controlled agency, and the combined Indigenous Estate represents almost 30% of the Australian continent.⁴

In recent years the ILC Board has been committing a greater proportion of funding to developing existing Indigenous owned land through land management assistance than to continuing to expand the Indigenous estate through land acquisition assistance. This reflects both the increase in the size of the Indigenous estate and the critical need to ensure that country owned by Indigenous Australians is well managed, productive and can provide long-term benefits to its owners.

In 2014, the ILC Board identified the following priority areas to target the achievement of enhanced Indigenous wellbeing through the ILCs programs.

- Developing land based enterprises, including agriculture and tourism with an emphasis on providing new and sustained Indigenous jobs
- Developing social and cultural enterprises without duplicating the responsibility of other agencies
- Providing access to and protection of cultural and environmental values.
- Giving priority to land management projects that bring together and benefit Indigenous people regionally
- Assisting land based activities following native title determinations and native title settlements and working with Prescribed Bodies Corporate.

As it continues to mature, the ILC is developing new program delivery arrangements which build on the previous mode of an annual call for applications. The new approach will have greater flexibility to work in partnership with Indigenous land owners to develop projects that deliver and maximize sustainable benefits. The ILC will have a stronger focus and commitment to forming collaborative partnerships that leverage funding from various industries, corporations, government agencies and philanthropic organizations; ultimately leading to long term benefits for Indigenous people. The ILC will continue to focus their land management assistance to care for, manage and improve the existing Indigenous land estate sustainably. While land management is a strengthening priority for the ILC, the Board will continue to consider proposals for acquisitions that resonate with current priorities and achieve sustainable Indigenous benefits.

Native Title Functions

The Land Account and ILC continue to stand as key resources in the native title system.

⁴ Toni Bauman, Lisa M Strelein and Jessica K Weir: *Living with native title : the experiences of registered native title corporations*; AIASIS Research Publications 2013; <http://nativetitle.org.au/documents/3%20Living%20with%20native%20title%20book%20interactive%20PDF.pdf> p 31

As noted at point 3.83 of the Discussion Paper, the ILC Board adopted a formal Native Title Policy in 2013⁵ The policy provides a framework for how the ILC may operate during the pre-determination/settlement phase to assist the achievement of Indigenous benefits through full and final settlements. Through the Native Title Policy, the ILC is able to use its land acquisition and land management functions to facilitate the achievement of greater benefits, where this will *facilitate a full and final resolution of claims and improve the quality of native title outcomes for Indigenous parties* and with preference to *working with those States or Territories and NTRBs that have an effective, fair and realistic State or Territory or regional wide framework in place for the settlement of native title claims.*

The ILC has formally contributed to one Alternative Settlement process under the auspice of its Native Title policy, in collaboration with the state of Victoria, Native Title Services Victoria and the Dja Dja Wurrung Clans Aboriginal Corporation. The ILCs contribution to the 'Dja Dja Wurrung' Settlement included both land acquisition and land management assistance, contributing to the establishment of a viable Natural Resource Management enterprise and the long term capacity of the Dja Dja Wurrung Clans Aboriginal Corporation to further the aspirations of native title holders.

More often, the ILC works to assist native title holders through post-settlement arrangements. The ILC collaborates with Prescribed Bodies Corporate and Native Title holding groups in both land acquisition and through land management activities. Throughout 2014 25% of all small land management funds allocated through ILC competitive funding rounds was to PBCs or their affiliates to support the land based aspirations of native title holders. Also in 2014, the ILC divested Roebuck Plains Station, the Roebuck Export Depot special lease area and the OTC Dampier block to the Yawuru native title holders. Cementing an innovative and long term relationship between Yawuru and the ILC, the divestment presents opportunities that balance protection of country and cultural and social enhancement with the generation of economic benefits. The ongoing partnership between Yawuru and the ILC provides for;

- The sub leasing of the cattle operations to the ILC for 15 years
- Income security to Yawuru through commercial rent of land for the cattle production
- A discrete lease arrangement for the export cattle yards facility
- Financial support for Yawuru to manage ecological and cultural significant area of Roebuck Plains through an Indigenous Protected Area (IPA)
- Processes for agreement over Yawuru use of Roebuck Plains Station for Yawuru cultural/ecological management, tourism and horticulture

Yawuru leader and Chairman of Nyamba Buru Yawuru Ltd, Mr Patrick Dodson, described the divestment as "highlight(ing) the fundamental importance of native title; producing cultural, social and economic dividends for the Yawuru and broader community." The determination of exclusive possession native title over the Roebuck Plains Station lease was based on section 47A of the Native Title Act, demonstrating an additional contribution by the ILC to the achievement of positive native title outcomes through the Federal Courts definition of the beneficial effect of its landholdings.

The role of the ILC in enabling the prosecution of S47A native title claims has demonstrated the capacity for actions of ILC to provide access to native title outcomes (through the ILCs Land Acquisition function). Recent findings with respect to the operation of S47A also identifies the

⁵ <http://www.ilc.gov.au/Home/Publications/Corporate-Documents/ILC-Native-Title-Policy>

potential for these actions to lead to significant conflict between Indigenous groups where the ILC acquires and divests land to groups not representative of the native title holders – as in highly urbanised locations with almost total extinguishment. The ILC Board, in assessing the interaction of ILC activities and S47A of the NTA have reiterated a commitment to the purpose of the ILC, noting that decisions of the Board reflect the generation of benefits to Indigenous people and that the S47A implications of any ILC action are considered *in conjunction* with the achievement of benefits as identified in the ATSI Act.

Amendments to the Regulations of the Native Title Act in 2011 identified the ILC as a potential ‘default PBC’. While the ILC has not been appointed under these provisions to date, the ILC is mindful of this function and aware of the critical role of PBCs in realising benefits from native title determinations. The ILC Board noted the outcomes of the Deloitte Access Economics Review (DAE) into the roles and functions of native title representative bodies and native title service providers and broader reviews of the roles and requirements of PBCs to inform the development of a PBC engagement strategy into the future.

ILC Business Operations

As noted at section 3.81 of the Discussion Paper, the ILC engages in commercial activity through the operation of pastoral and tourism businesses. ILC commercial activities provide training and employment opportunities for Indigenous people in land based enterprise and bring previously undeveloped Indigenous Held Land into production.

The ILCs wholly owned subsidiary, National Indigenous Pastoral Enterprise (NIPE) operates as a commercial enterprise using sound business principles in accordance with section 191F (1) of the ATSI Act. Through NIPE, the ILC uses its business operations to increase employment opportunities and to provide on-the-job training opportunities for Indigenous people, not only in pastoral activities, but also in natural resource management. Simultaneously, these businesses enable large areas of often marginally viable Indigenous owned Land to be brought into production.

Similarly, the ILC engages in the tourism industry through its wholly owned subsidiary Voyages Indigenous Tourism Australia Pty Ltd (Voyages). Voyages was established by the ILC Board in 2011 to manage and operate the ILC’s tourism business portfolio and act as a vehicle to assist in the development of Indigenous tourism across the nation. The ILCs tourism businesses at Ayers Rock Resort, Mossman Gorge Centre and Home Valley Station offer Indigenous traineeships in hospitality and tourism resulting in employment at one of the properties or with an employment partner. The Indigenous training to-employment program is creating a highly skilled Indigenous workforce for the hospitality and tourism industry.

For the financial year ending 30 June 2014, ILC enterprises provided traineeship or employment positions for 908 Indigenous participants.⁶

⁶ Indigenous Land Corporation Annual Report 2013-2014 pg 22-23.

In keeping with the maturation of its land acquisition and land management functions, the ILC Board is developing a strategy for the divestment of ILC Business land holdings and where appropriate will move to a model of stronger partnership with Indigenous Land owners.

Stronger Land Account Bill

The Land Account is a significant institution and a landmark achievement of Indigenous advocacy. It is technically established as a Special Account within the Commonwealth's financial arrangements, and is potentially vulnerable to unilateral changes by the Government of the day. In a worst case scenario, the Account's funds could be reallocated to alternative purposes inconsistent with the original compensatory purpose.

To address this risk, the ILC Board released a draft Stronger Land Account Bill in March 2014, aimed at reinforcing the fiduciary principle that the Land Account is held, by the Commonwealth, for, and on behalf of, Aboriginal persons and Torres Strait Islanders. The ILC Draft Bill has been endorsed in principle by senior Indigenous leaders, including Patrick Dodson, former chair of the Council for Aboriginal Reconciliation, and Dr Lowitja O'Donoghue, Noel Pearson, David Ross and Aden Ridgeway, all of whom were involved in the original native title negotiations.

Following the release of the draft Bill, the Australian Greens introduced the *Aboriginal and Torres Strait Islander Amendment (A Stronger Land Account) Bill 2014* to Parliament on June 24th. The Bill, based largely on the ILC Draft Bill introduces new measures to protect the Land Account and to ensure it continues to be available to strengthen Aboriginal and Torres Strait Islander peoples' links to their land. The Greens Bill also proposes new measures to ensure the Land Account grows over time so that it will continue to benefit future generations. The Bill also makes several amendments implementing stronger corporate governance measures for the Indigenous Land Corporation to ensure it continues to act in the interests of Aboriginal people and Torres Strait Islanders.

The ILC encourages the ALRC to recommend amendments to the Native Title Act provisions which provide for a Land Account to acknowledge that the Commonwealth's role in administering the Land Account is fiduciary in nature, and that the Land Account is established in trust for Indigenous people.

Responses to Proposals of the Discussion Paper

The ILC's principal objective is to achieve economic, environmental, social and cultural benefits for Indigenous people through its Land Acquisition and Land Management programs. The ILC recognises that an efficient, just and well functioning Commonwealth native title system, inclusive of; law, legal frameworks, the capacity of parties to settlements and the effective management of native title benefits is a critical complement to the achievement of enhanced Indigenous wellbeing that is the overarching purpose of the ILC. To this end, the ILC is broadly supportive of the proposals and recommendations of the ALRC Discussion paper on the basis that these have regard to the Terms of

Reference of the inquiry and can be seen to support the reviews core objective of improving the operation of Commonwealth native title laws and legal frameworks.

General comments:

The ILC notes that the proposed amendments result in a slightly broader conception of native title than at present, though one which reflects Indigenous people's conception of their traditional rights to land. While supportive of this proposal, the ILC is mindful that this widening of scope may give rise to an increased level of conflict 'on the ground' with regards to overlapping and conflicting claims of native title. This reinforces the need (which already exists in our view) for greater attention to conflict resolution within the native title system.

The ILC recognises that NTRBs currently play a significant role in the mediation of 'on the ground' conflict between groups, but that the capacity and indeed desirability for NTRBs to effectively mediate conflicts regarding right people for country is limited due to perceived and real conflicts of interests and the risk of effectively 'locking' non-favoured groups 'out' of the Native Title system. The ILC suggests that the National Native Title Tribunal may be well placed to assist in the resolution of conflict resulting from questions associated with defining right people for country following the reduction of its role in the mediation of claims following the 2009 reforms of the Native Title Act.

As a default PBC, the ILC is subject to the joinder provisions of the NTA as they impact PBCs. The ILC does not seek any additional joinder rights or provisions other than those accrued by virtue of definition as a PBC as per the default PBC provisions of the Act.

Proposals 5-1 through 5-4

The ILC supports the proposed amendments relating to section 223 of the Act defining native title with respect to ongoing development and intergroup transmission of Traditional Laws and customs. The ILC recognises that the 'large and liberal' interpretation of native title promoted by the proposed amendments is appropriate and supports the beneficial purpose of the Native Title Act, to which the functions of the ILC are complementary. Further, the ILC welcomes the proposed amendments addressing the degree of continuity required to establish native title as reflecting the Preamble and Objectives of the Act. These amendments support the guiding principles of the review (*Importance of native title*) by contributing to the reversal of the trend toward requiring evidence of continuity and which render successful claims increasingly difficult.

Proposals 6-1 and 6-2:

The ILC supports the removal of the references to 'physical connection' from sections 62(1)(C) and 190B(7) of the Act, rendering these sections consistent with section 223 of the Act.

Proposals 7-1 and 7-2

The removal of the word 'Traditional' in the definition of native title in both section 223(1)(a) and section 223 of the Act is provisionally supported by the ILC, in that the complexities regarding the application of traditional in the determination of connection provides for often lengthy and costly delays in the determination process. The ILC notes concerns raised in the discussion paper regarding

the removal of the term traditional with respect to the grounding of customary law and identifying right people for country, the ILC recommends consideration of the need for this amendment *in conjunction* with the amendments recommended in proposals 5-1 to 5-4.

Proposals 8-1 and 8-2

The ILC supports the proposed repeal and substitution of Section 223(2) of the Act. This amendment reflects the law in *Akiba v Commonwealth*⁷ and supports the just and timely resolution of claims while providing explicit recognition of rights and interests of a nature relevant to the *capacity of native title to support Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians*. The ILC suggests that the ALRC considers replacing 'commercial and/or trade' with 'economic' on the basis that this represents a broader scope of activities enabling Indigenous economic development.

Procedural Matters

The ILC makes no specific comment on the remainder of proposals presented in the Discussion Paper. As the ILC is not typically involved in the prosecution of Native Title Claims, it is not well placed to comment on the proposed reforms to the more procedural aspects of the Act detailed within the Discussion paper with regards to their impact on the function of the Act with respect to the ToR of the Inquiry.

Transitional Arrangements

The ILC welcomes further consideration by the ALRC of the area of transitional arrangements for the application of any reforms. It is critical that transitional arrangements balance the greatest achievement of just land outcomes through the native title system with the benefits of certainty and stability offered by the continuance of existing determinations and subsequent ILUA and other agreements. Further, with respect to both supporting stability within the native title system and the likely passage of any recommended reform, the ILC suggests that the ALRC give consideration to the merits of recommending that any significant changes come into effect into the future and be *prospective in application*. The ILC recommends that the ALRC prioritise the achievement of benefits to Indigenous and Torres Strait Islander peoples in the formulation of these arrangements.

Concluding Remarks

The ILC is an independent Corporate Commonwealth entity that assists Indigenous Australians to acquire land, and manage Indigenous-held land, 'so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders'. The Land Account and the ILC were established in conjunction with the Native Title Act. They reflect the negotiations between Indigenous leaders and the then Government which facilitated the passage of the Native Title Act, and they provide compensatory arrangements which are effectively a quid pro quo for the validation and extensive extinguishment of native title rights included in the Native Title Act.

⁷ *Akiba v Commonwealth* (2013) 250 CLR209.

The ILC has a broad remit in the expansion and management of the Indigenous estate, beyond the functions of the native title system and its role is not directly or strictly coupled to the functions of the NTA – the activities of the ILC are driven by a demonstration of land need by groups, rather than an assessment of their native title status/ likelihood of establishing a positive native title determination. Nevertheless, as the ILC approaches its 20th anniversary in 2015, its priorities and actions continue to be complementary to the functions of the NTA. Through its specific native title activities and its broader purposes, the ILC remains a key institution in the architecture of native title.

The ILC is broadly supportive of the direction of proposals made in the Discussion paper, as outlined above and in discussion with the Inquiry team. As such, the ILC would welcome an opportunity to engage in ongoing dialogue regarding the development of the ALRC final report.