

Welcome to our September edition of our Native Title Update. In this edition, we discuss two different and, we hope, timely things:

1. Developing Northern Australia White Paper, and
2. What to do if there is a need to act urgently to protect Cultural Heritage that is under threat.

Please contact us for further information.

DEVELOPING NORTHERN AUSTRALIA

In June 2015, the Australian Government released its first ever White Paper on developing northern Australia. It states: a strong north means a strong nation. Included in it are 2, 5, 10 and 20 year implementation plans. The paper provides that the Commonwealth Government will address challenges to development by:

Making it easier to use natural assets, in close consultation with, and the support of, Indigenous communities;

- ◆ Providing a more welcoming investment environment;
- ◆ Investing in infrastructure to lower business and household costs;
- ◆ Reducing barriers to employing people; and
- ◆ Improving governance.

It also states that the Commonwealth will work with the Indigenous communities to simplify and modernise land arrangements in the north. It recognises that native title is of importance to northern Australia and that the majority of native title determinations are in the country's north.

It recognises that there is strong support in the north to try new ways of using land to promote economic opportunity and refers to a native title regime that has a greater focus on economic opportunity for indigenous Australians.

The Government will invest \$10.6M to support pilot land projects in partnership between business and indigenous Australians to provide simpler and more efficient ways to investing. The project will focus on economic development and home ownership. It includes that “this White Paper, with its 20 year horizon, looks forward to when native title holders can fully participate in developing the north”.

The Government “aspires to have all current native title claims finalised within a decade”. It suggests that native title should not be seen as a barrier to development, but essential to it. Without providing any ready answers, it suggests that all parties are seeking better ways to leverage native title to develop the north. The Government also says that it will consider options to make processes to do with native title more efficient and transparent, while protecting indigenous interests.

It states that the Commonwealth Government will provide \$20.4M to better support to native title holders including direct funding for native title corporations. One of the aims is to ensure PBCs move “beyond basic compliance to active engagement in development”. It suggests that more effective native title corporations would create more certainty for investors and traditional owners, lower transaction costs and speed up agreement making.

The White Paper says that the Government will progress options to support the use of exclusive native title rights for commercial purposes. There is an aim to assist indigenous landowners, to create, on a voluntary basis, transferrable interests that can be used to support commercial loans, without extinguishing native title. That is currently possible without changes to the Native Title Act. It would rely on the non-extinguishment principle that automatically applies to native title decisions under indigenous land use agreements. Of course, as ILUAs are entered into on a voluntary basis by native title holders, the ILUAs must offer enough to be attractive to enter.

One example of what the Government is suggesting may be to consent to the grant of long term leasing of native title land to indigenous corporations or ventures that include substantial indigenous ownership.

The ideas set out in the White Paper do not appear to be new or revolutionary. Rather, they appear to be a summary of what many Aboriginal and Torres Strait Islander groups have been saying for a long time. What is new is that the statement is coming from the highest level in Canberra.

Importantly, the White Paper includes the observation that if the history of northern development teaches us one thing, it is that business and governments should stick to what they do best.

Government's role is to create successful business environments, not successful business. This is best achieved through prudent economic policies, the right infrastructure to get things moving, regulation that minimises costs on business, a workforce with the right skills, and basic research necessary for business to identify opportunities in the north.

Native title holders would be well advised to insist on having well-functioning PBCs to represent them in negotiations for any ILUAs to ensure that they get a good deal that not only looks good now, but will stand the test of time and look good in several decades time. Unusually, the Government's proposal to strengthen PBCs appears to be timely and essential if the aspirations stated in the White Paper are going to be achieved.

For more information, contact

Email: [Michael Neal](#), Director Telephone: 07 4041 7622

Adam Stephen from ABC Radio, Cairns, recently interviewed Michael Neal in relation to the Australian Law Reform Commissioner's '**Discussion Paper**'. If you would like to hear more about this topic, please click on the link to our website - [Michael Neal - Discussion Paper](#).

Prior to that Adam also met with Michael to discuss the '**Process for Native Title**' and what is involved. Some of the issues addressed in that interview were:

- ⇒ Simplifying the system, which is quite conservative;
- ⇒ Amendments to streamline evidence;
- ⇒ Evidence of connection to the land (mostly oral traditions); and
- ⇒ All existing claims to settle in next 10 years.

To hear the full interview, click on [Michael Neal - Process for Native Title](#).

TAKING URGENT ACTION TO PROTECT CULTURAL HERITAGE

In Queensland, a developer, mining proponent or other infrastructure provider planning to undertake substantial development activities likely to cause ground disturbance will usually negotiate a Cultural Heritage Management Agreement or Plan with the relevant Aboriginal or Torres Strait Islander Party. But what can you do if this has not happened? What if you find mining, earthworks or development occurring and you know that there is no cultural heritage plan in place?

What options do First Nations people have in Queensland to take urgent action to protect their cultural heritage?

The answer is that a mix of practical and legal steps can be urgently taken.

First and foremost it must be determined who is undertaking the work and they must be asked to stop immediately. You can make the request verbally but should confirm it in writing. If possible seek a written undertaking that they and their contractors will not re-commence works until an agreement has been negotiated.

Under the terms of the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* (the Acts) the relevant Queensland Minister may make a “stop order” requiring a proponent to stop activities that are likely to cause harm to cultural heritage. First Nations people will need to urgently apply to the Minister to make a “stop order”.

In addition or as an alternative to a “stop order”, the Land Court of Queensland has the power to order a proponent to stop work. Disobeying an order of the Land Court is a serious matter and could amount to contempt of court.

Court proceedings have been brought in the past to stop a local council from undertaking road construction without a Cultural Heritage Management Agreement in place. The Court can consider matters such as whether:

1. To make a declaration that the works are not undertaken in compliance with the cultural heritage duty of care under the Acts; and
2. To grant an injunction restraining the proponent from undertaking the proposed works to the extent those works will harm, excavate or relocate existing cultural heritage.
3. The developer should pay the indigenous party’s legal costs.

Lastly, First Nations people might wish to consider an Application to the relevant Commonwealth Minister for an order to protect cultural sites or objects. Be warned that the Commonwealth Minister intervenes only rarely. The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* enables the Australian Government to respond to requests to protect important Indigenous areas and objects that are under threat, if it appears that state or territory laws have not provided effective protection.

In all such cases we recommend seeking urgent legal advice.

For more information, contact....

Email: [Matt Patterson](mailto:Matt.Patterson@paelaw.com), Director Telephone: 1300 303 866



cairns po box 2337 cairns qld 4870 > 211 draper street cairns qld 4870 > t 07 4041 7622 > e cairnsreception@paelaw.com
 sunshine coast po box 2015 sunshine plaza qld 4558 > suite 2, 37 dalton drive maroochydore qld 4558 > t 07 5479 0155 > f 07 5479 5070
 > e reception@paelaw.com > w www.paelaw.com > ABN 97 836 362 898