VICTORIA'S SUBMISSION TO THE EXPOSURE DRAFT: PROPOSED AMENDMENTS TO THE NATIVE TITLE ACT 1993

This submission is in response to the *Exposure Draft: Proposed amendments to the Native Title Act 1993*, and has been prepared by the Native Title Unit in the Department of Justice, in consultation with other Victorian Government Departments.

Since 2010, Victoria has provided an alternative system for resolving native title claims, through the *Traditional Owner Settlement Act 2010* (TOS Act) which enables out-of-court settlements of native title claims. The TOS Act allows the Victorian Government to make agreements to recognise traditional owners and specific rights in Crown land, in return for an agreement to withdraw all current native title claims and not to lodge any claims in the future.

The *Native Title Act 1993* (Cth) (NTA) continues to have application in Victoria and interacts with settlements reached under the TOS Act; for example, Indigenous Land Use Agreements under the NTA form a necessary part of settlement packages. Native title claimants can also continue to pursue native title claims through the Federal Court if they so choose.

The Victorian Government welcomes the Commonwealth Government's commitment to improving the operation of NTA; however, Victoria has concerns about some of the proposed amendments.

Our first concern is the process of consultation employed in relation to these reforms. Victoria and other states and territories have made repeated requests this year to the Commonwealth Attorney-General to convene a meeting of Native Title Ministers to discuss the operation of the NTA, including these current proposed amendments. The most recent request was made by letter on the 20th September 2012. Better law will result from greater engagement with the Governments of Australia.

1. Streamlining the ILUA process

The Victorian Government supports attempts to streamline the Indigenous Land Use Agreements (ILUAs), including simplifying the process for minor amendments to ILUAs and clarifying the coverage of ILUAs.

However, Victoria is concerned about the proposed amendments to the authorisation requirements for area ILUAs, in particular the proposed section 251A (2). Section 251A (2) proposes to define persons who may hold native title as persons who can establish a prima facie case that they may hold native title. Victoria opposes this amendment in its current form.

It is understood the intention of the amendment to s.251A is to clarify who may object to the registration of ILUAs. It appears to have unintended consequences of affecting who may authorise an ILUA in the first place.

Firstly, it is not clear how this section will be administered and by whom. The exposure draft does not provide details on how this requirement to establish a prima facie case will be established, most particularly in circumstances where there is neither a registered native title body corporate nor a registered native title claimant.

The information required in an application for registration of an area agreement by the NTA and the ILUA regulations do not go to the question of establishing a prima facie case (unlike the s.190B(6), provision for the registration of native title claims). Given the legal nature of a prima facie test, it is considered that the insertion of such a test in the regulations may be inappropriate. In the absence of a clear process regarding how the prima facie case will be established and tested, this section has the potential to increase the transactional costs and time associated with registering ILUAs. Inserting a prima facie threshold for the making of ILUAs may reduce incentives in the Victorian context for traditional owners to pursue TOS Act settlements rather than native title determinations.

This is inconsistent with the statement in the cover sheet for the exposure draft that "the Government is keen to ensure that ILUAs remain an attractive option for resolving native title issues." Victoria contemplates entering into ILUAs with persons other than the registered claimants or registered bodies corporate, and applies its own rigorous policies to ensure it is settling with the 'right people for country,' capable of entering into a registered and legally binding ILUA. Some flexibility around reaching ILUAs with 'actual and *potential native title* holders' is understood to have been the intention in the construction of area ILUAs in the 1997 amendments to the NTA that introduced the ILUA system. The amendment to s.251A now proposed, potentially reduces flexibility, and has unintended consequences for future uptake of the TOS Act. Further consideration needs to be given to this proposed amendment by the Commonwealth in the Victorian context. Officials from Victoria are happy to discuss possible solutions with Commonwealth Attorney General's Department officials.

2. Historical extinguishment

The Victorian Government welcomes these amendments to allow claimants and a government to agree to disregard historical extinguishment over parks areas. Victoria believes this will allow for greater flexibility and therefore greater scope for agreement making.

However, Victoria notes that the retrospective element of this amendment has the potential to erode a degree of the finality and certainty of claims already settled. The application of this section to these settled claims may create some uncertainty for those interest holders and land managers who have previously expended considerable time and costs on earlier settlement negotiations.

The Victorian Government also notes potential constitutional issues, recently raised by Western Australia, relating to potential Commonwealth compensation liability for the application of s.47B of the NTA. They have argued that where the NTA applies to disregard native title over unallocated Crown land there is an acquisition of the State's property in accordance with s.51 (xxxi) of the Constitution. Accordingly, the Commonwealth may be liable to compensate the State in accordance with s. 53 of the NTA. Given that the proposed s.47C will extend the scenarios in which prior extinguishment can be disregarded, the Victorian Government strongly encourages the Commonwealth Attorney-General to convene a Native Title Ministers Meeting in order to discuss and resolve this outstanding constitutional issue. We also encourage the Commonwealth Attorney- General to consider this potential constitutional issue in the context of the Commonwealth contribution to the future costs of settlements. This is an outstanding matter between the Commonwealth and the state and territory governments, as identified in recent correspondence from the Victorian Attorney-General to the Australian Attorney-General.

3. Negotiation in Good Faith

Victoria conducts negotiations under the NTA and TOS Act in 'good faith' as defined by the common law. Victoria notes that in attempting to clarify the meaning of 'good faith' under the NTA, this reform has the potential to create new uncertainties regarding the legal interpretation of the new provisions. Other States have also raised concerns that codifying the definition of 'good faith' will limit the adaptability of negotiations, a view shared by Victoria.

Victoria is also unaware of the evidentiary basis of the need to increase the mandatory negotiation period from 6 months to 8 months. Increasing the length of time before a determination can be sought will not necessarily ensure greater adherence to 'good faith' principles and is highly likely to increase delays to the negotiation process. Victoria believes that adding two additional months will not lead to more negotiated outcomes or necessarily better quality negotiated outcomes. The Victorian Government does not support this increase to the required negotiation period.