Commonwealth rights and interests in Indigenous owned property – Further Information

Background

Until its abolition in 2005, the Aboriginal and Torres Strait Islander Commission (ATSIC) and its predecessor organisations, provided grants to Indigenous organisations for the purchase of property assets on freehold land. Often, these grant-funded assets were protected by the Commonwealth through perpetual rights and interests in the asset (usually in the form of a Purposes Agreement or Deed) and the registration of a caveat on the land title. Commonwealth rights and interests arose from both statutory law under the Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (the ATSIC Amendment Act) and contractual law under the grant terms and conditions.

From 2005, management of ATSIC’s rights and interests in grant-funded Indigenous land devolved to the Commonwealth, Indigenous Business Australia (IBA) and the Indigenous Land and Sea Corporation (ILSC) as the relevant Consenting Authorities. Currently, the consenting authorities are:

- The Department of the Prime Minister and Cabinet;
- The Attorney-General’s Department (AGD);
- The Department of Health (DoH);
- The Department of Communications and the Arts (DCA);
- The Indigenous Land and Sea Corporation; and
- Indigenous Business Australia.

The Department of the Prime Minister and Cabinet (PM&C) currently holds primary responsibility for Indigenous Affairs and is responsible for holding and managing the ATSIC records that demonstrate the Commonwealth’s interests in these assets.

Legislation

Previously, Item 200(1) of Part 3 of Schedule 1 to the ATSIC Amendment Act required the Commonwealth to retain its rights and interests in perpetuity until the asset was disposed through sale, transfer or mortgage.

Following consultation with key stakeholders, The Prime Minister and Cabinet Legislation Amendment (2017 Measures No. 1) Act 2018 amended Item 200 of the ATSIC Amendment Act, allowing the Commonwealth to choose to give written notice to Indigenous organisations that its consent is no longer required for a disposal. This means that, upon application from the Indigenous organisation, a
consenting authority can choose to have its rights and interests over ATSIC-funded land waived, and the caveat lifted perpetually, outside of a disposal process.

Note a notice under Item 200 will not release an Indigenous organisation from obligations under a purposes deed or other contractual arrangement the organisation may have with the Commonwealth. If we agree to release all or some of these contractual arrangements, these will be discharged under a separate deed of release.

**New Policy**

The new policy reflects the legislative changes regarding retention of Commonwealth rights and interests in Indigenous land funded under the *ATSIC Amendment Act 2005* and ATSIC’s predecessor organisations.

The policy gives the Department the choice of whether or not to maintain an interest in grant-funded land. This provides both an avenue to maximise economic success (by assessing an organisation’s ongoing viability) and an opportunity to implement a strategy to protect against the loss of land considered significant to the Indigenous Estate.

The Commonwealth may decide to remove a caveat on a land title, conditionally if required, or provide information to strengthen an organisation’s governance and sustainability with a view to future consideration of caveat removal, or maintain an existing caveat.

**Consultation**

The new policy and guidelines were developed by a Governance Committee, chaired by the Department of the Prime Minister and Cabinet, with representatives from the consenting authorities and invited representatives from the National Congress of Australia’s First Peoples, Aboriginal Housing Victoria and the NSW Aboriginal Land Council.

In developing the new policy and guidelines, the Australian Government undertook a national consultation process to get the views and experiences of Aboriginal and Torres Strait communities and landholders. Nearly 150 people, representing around 100 organisations, participated. Through the process, three key themes emerged:

- Economic opportunity – removing caveats will create economic development opportunities in Indigenous communities;
• Indigenous organisations and communities must remain protected – strong governance and good checks and balances are essential before removing caveats. Property of cultural significance should be protected; and
• Process – significant red tape and the length of time to remove caveats needs to be reduced. The process should be flexible and done on a case-by-case basis.

The process also determined three guiding principles for the guidelines:

• Supporting self-determination of Indigenous communities and organisations by maximising choice, flexibility, autonomy and economic independence;
• Supporting the sustainability of assets for community benefit, to assist positive cultural, legal, health, environmental, social and economic outcomes; and
• Ensuring no community or organisation is disadvantaged through the new policy.

These principles seek to balance the need to provide greater autonomy and economic empowerment to Indigenous people and communities, with the need to protect both significant assets in the Indigenous Estate and service continuity.

Reasons for change

In its 2015 Investigation into Indigenous Land Use, the Council of Australian Governments (COAG) recommended “the Commonwealth review remaining caveats on Aboriginal and Torres Strait Islander Commission properties and remove unnecessary restrictions to support economic development for Indigenous Land owners”.¹

Additionally, a number of Indigenous organisations had expressed concern and frustration that the perpetual Commonwealth rights and interests in their assets limited their ability to use their property for the development of the community. The red tape and complexity experienced during the disposal process also caused some organisations to miss out on economic opportunities.

The new approach better aligns the treatment of Commonwealth rights and interests in Indigenous grant-funded property with many other Commonwealth grant funding processes, such as the Indigenous Advancement Strategy (IAS), and obligations under the Public Governance, Performance and Accountability Act 2013.

Anticipated outcomes include:

• Providing Aboriginal and Torres Strait Islander individuals and organisations with greater autonomy and flexibility over their grant-funded property;
• Providing increased opportunities for economic development within Aboriginal and Torres Strait Islander communities;
• Reducing the administrative burden and regulatory requirements for Indigenous organisations and government; and
• Providing similar treatment of similar assets for Indigenous organisations and communities.

The new policy and guidelines will not have the effect of:

• Permitting the automatic or wholesale lifting of all caveats lodged over all ATSIC and predecessor properties;
• Forcing an Indigenous organisation to have caveats on its assets lifted against its wishes; or
• Eroding the protection of significant assets within the Indigenous Estate.

Further information

For information on how to apply for caveat removal, please go to <Guidelines link> or email CthRightsandInterests@pmc.gov.au.