19.02.2015

The Hon. David William Tollner MLA

Minister for Lands and Planning

GPO Box 3146

DARWIN NT 0801

*Copy by email: Minister.Tollner@nt.gov.au*

Dear Minister

**Kulaluk Lease Area: Request for Provisional Declaration – *Heritage Act* (NT)**

We refer to the above matter and confirm that we act for the Larrakia Nation Aboriginal Corporation (**LNAC**).

We understand that as this area falls within your electorate, you will be broadly aware of the issues relating to the development of the Kulaluk Lease Area. However, we have very briefly set out some background below to assist you in assessing this request.

**Background**

The following information provides relevant background to this request:

* On 5 June 2014, the LNAC made an application to the Northern Territory Heritage Council (**Council**), under section 20(1) of the *Heritage Act* (NT) to have all currently undeveloped land within Crown Perpetual Lease 671, being Lot 8603 Town of Nightcliff and Lot 5182 Town of Darwin, declared a heritage place (**Kulaluk Lease Area**).
* On 10 October 2014, the Council refused to declare the Kulaluk Lease Area a heritage place under section 24(1) of the Act. The Review Notice, provided to the LNAC, provided the Council’s reasons for its decision and stated, “the place did not meet the threshold of significance to warrant proceeding further”.
* On 19 December 2014, on behalf of the LNAC, we applied to the Lands, Planning and Mining Tribunal (**Tribunal**) to review the Council’s decision.
* On 30 December 2014, the Tribunal, constituted by Mr Greg Cavanagh, set aside the decision of the Council and referred the matter back to the Council for reconsideration following the commission of an objective and thorough historical analysis of relevant material.
* Our understanding is that the Council will meet in March and will decide then on its course of action in obtaining the report required by the Tribunal.
* Despite these ongoing proceedings relating to the heritage significance of Kulaluk Lease Area, parallel processes under the Planning Act, which could have a significant impact on the significance of the land continue. For example, parts of the Kulaluk Lease area have been rezoned from CN (Conservation) to Special Use Zones, namely SD37 and SD44. Numerous current planning applications have, and are, being considered, including, filling, excavation and subdivision of large areas within the lease.

**Request for Provisional Declaration**

With the above background in mind, the LNAC respectfully requests that you use the powers available to you under section 36 of the Act and make a provisional declaration of the Kulaluk Lease Area as a heritage place.

Section 36 of the Act requires you to be satisfied of two preconditions, prior to making a provisional declaration, namely:

1. *that a place or object is likely to be of heritage significance; and*
2. *a declaration under this section is necessary to ensure its conservation.*

*Can you be satisfied that the Kulaluk Lease Area is ‘likely to be of heritage significance’?*

We would submit that you can be satisfied that the Kulaluk Lease Area is likely to be of heritage significance. “Likely”, we would submit, should be read in this context as meaning ‘more likely than not’. Based on the available evidence, our submission is that the overwhelming conclusion is that the Kulaluk Lease Area is more likely than not to be of heritage significance.

In support of that submission we draw your attention to:

1. The Kulaluk Lease Area, Heritage Assessment Report 2014 (**Assessment Report**) (Attachment A), compiled by the Heritage Branch of the Department of Lands Planning and the Environment and provided to the Council.

That report states that the Kulaluk Lease Area does satisfy the requirements of a place of *heritage significance* when one applies the ***heritage assessment criteria*** (**Criteria**)set out under section 11 of the Act.

The Assessment Report finds that the Kulaluk Lease Area meets 3, and marginally meets 2, of the eight Criteria. The Assessment Report provided the following statement of heritage value for the Council’s consideration:

*The Kulaluk Lease Area symbolises the first land grant made to the Larrakia people in acknowledgement of their longstanding traditional ownership and occupation of land and seas in the Darwin region. After an eight-year long struggle for recognition, it was the first land title granted to an Aboriginal group in an urban environment in Australia.*

*The Kulaluk Lease Area has a strong and special association with the Larrakia people for spiritual, cultural and social reasons. The area is believed to contain a burial ground which has traditionally been used by the Larrakia and other Aboriginal people.*

1. The Tribunal at paragraph 12 of its reasons, set out the interpretation of the Criteria, which we agree with, and stated “[i]n my view, the heritage assessment criteria set out in section 11 of the Act are disjunctive in nature, ie, not each and every one of the criteria need be satisfied to classify a place as having heritage significance. However, I do find that if the significance hinges on one or a few of the criteria, then the weight involved in making a favourable decision increases”.

The Tribunal then set out, at paragraph 13 and 14 the findings of the Council’s own assessment of significance on the available evidence. Paragraph 14 of the Tribunal’s reasons states:

*And summaries:*

*“The Kulaluk Lease Area has been assessed against the relevant criteria established under the Heritage Act. It has been assessed as meeting Criterion (a), (c), (g) and marginally meeting (b) and (h)”*

At paragraph 15, the Tribunal made its own findings based on the evidence available to it and stated:

The Heritage Council procured an archaeological report that found no evidence of the existence of Aboriginal burial grounds.[[1]](#footnote-1) Therefore, I apprehend that section 11(c) criteria may not be set to be met to an extent. However, on the material submitted, in my view, sections 11(a) and (g) are strongly met and section 11(h) is not “marginally met”, but also strongly met.

When the findings of the Tribunal and the Assessment report are considered together, Criterion (a), (g) and (h) are strongly met, Criterion (c) is either met or marginally met and Criterion (b) is marginally met. When the above information is considered, it is difficult to escape the conclusion that the Kulaluk Lease Area is likely to be a place of heritage significance.

*Is a declaration necessary to ensure the Kulaluk Lease Area’s conservation?*

Currently nothing prevents the approval of development permits under the *Planning Act* (NT)*,* despite the fact that those developments may impact on the Kulaluk Lease Area’s heritage properties.

This creates a situation which is undesirable for two reasons:

* First, a development approved under the *Planning Act* could, if proceeded with, damage the heritage properties of the Kulaluk Lease Area prior to the proper assessment of the site’s heritage values, which will result from the report that the Council is required to commission.
* Second, a developer may be issued a with a planning permit that has less certainty than it should have. This is because of the possibility that future development of the Kulaluk Lease Area may be restricted following the outcome of the *Heritage Act* process.

In light of this, a provisional declaration is clearly necessary to preserve the status quo and ensure that the site’s heritage significance is conserved, pending the Council’s report and subsequent decision. Additionally a provisional declaration would have the desirable effect of ensuring that planning permits are not issued before such a time when a permit holder can be assured that a later heritage restriction will not come into force, altering the way the land can be developed.

**Conclusion**

Our clients are deeply concerned about development of the Kulaluk Lease Area prior to the outcome of the processes under the Heritage Act, which are currently on foot. Because of this, we request that you exercise your powers under section 36 of the *Heritage Act* and make a provisional declaration of the Kulaluk Lease Area as a *heritage place* to afford the land protection until such time as the Council’s process has run its course.

If we can provide any further information to you, your advisors or the Department, please don’t hesitate to contact me on 0402 778 997.

Yours sincerely,

**Environmental Defenders Office (NT) Inc**

David Morris

**Principal Lawyer**

1. We note the report referred to by the Tribunal only made findings about a very limited portion of the Kulaluk Lease Area. No findings have been made about the presence of burials or otherwise over the large majority of the site. [↑](#footnote-ref-1)