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Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

1 March 2018

Dear Sir/Madam,

Reforms to the *Native Title Act 1993* (Cth): Options Paper November 2017

1. I have practised in native title law since 1995 – since 1999 as a member of the Victorian Bar. I have worked for native title claim and holding groups in several States and Territories on matters including the recognition of native title, negotiating and drafting agreements, and establishing structures to manage native title and the benefits of native title agreements.

2. In 2013, I completed a PhD at Melbourne Law titled 'Getting it Right for the Future: Aboriginal Law, Australian Law and Native Title Corporations', which addressed the operations of registered native title bodies corporate (**PBCs**) within two systems of law. The PhD involved case studies with two native title corporations: Yawoorroong Miriuwung Gajerrong Yirrgeb Noon Dawang Aboriginal Corporation in Kununurra, and Jabalbina Yalanji Aboriginal Corporation RNTBC, based in Mossman. While the PhD is not yet published, I attach a copy of the abstract and table of contents for your information.

3. In addition, I am a Senior Fellow at Melbourne Law School, teaching the subject 'Native Title Law and Practice' in the Masters' program.

Structure and focus of this submission

4. This submission follows the structure of the Attorney-General's Department's 'Reforms to the *Native Title Act 1993* (Cth) Options Paper' dated November 2017 (**Options Paper**). It addresses each of the options and questions raised in the Options Paper, using the same numbering.

5. As a guiding principle, any amendments to the *Native Title Act 1993* (Cth) (***NTA***) should ensure that the legislation is consistent with the *United Nations*

Declaration on the Rights of Indigenous Peoples.[1] Further, the process of amending the *NTA* should itself be consistent with the standards for engaging with Indigenous peoples set out in the UNDRIP, particularly requirements that they be consulted in good faith through their own representative institutions in order to obtain their free, prior and informed consent in relation to legislation that affects them.[2] Thus, in this process of consultation and subsequently amending the *NTA*, the Commonwealth Government should give priority to the views of Aboriginal and Torres Strait Islander peoples.

6. While the *United Nations Declaration on the Rights of Indigenous Peoples* does not create any international obligations binding on Australia, it does provide a statement of standards and principles agreed to by the international community and by Australia, to which it should aspire in its dealings with Aboriginal and Torres Strait Islander peoples. Accordingly, the Commonwealth Government should ensure that its legislation and its consultative processes are consistent with the provisions of the Declaration.

Section 31 Agreements

Question 1 Should the Act be amended to confirm the validity of section 31 agreements made prior to the McGlade decision?

7. Paragraph 31(1)(b) of the *NTA* requires the negotiation parties to an agreement under s 31 (**Section 31 Agreement**) to obtain 'the agreement of each of the native title parties'. The 'native title parties' include 'any registered native title claimant'.[3]

8. Section 24CD(1) of the *NTA*, which was considered in *McGlade v Native Title Registrar* (***McGlade***),[4] requires all persons in the 'native title group' in relation to the area covered by an area Indigenous Land Use Agreement (**ILUA**) to be parties to it. The native title group relevantly consists of 'all registered native title claimants in relation to land or waters in the area'.[5] The Full Court in *McGlade* held that all members of the relevant registered native title claimant must execute an agreement for it to be an ILUA within the meaning of s 24CA, meeting the requirements of ss 24CB to 24CE.

9. The identity of the necessary parties to a Section 31 Agreement can be ascertained by reference to s 29 of the *NTA*, which requires a Government party to give notice of relevant future acts to parties including 'any registered native title claimant'.[6]

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1 *United Nations Declaration on the Rights of Indigenous People* GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) (**UNDRIP**).

2 See e.g., UNDRIP art 19.

3 See *NTA* s 29(2)(b)(i).

4 [2017] FCAFC 10. See, generally, Angus Frith, 'Case Note: *McGlade v Native Title Registrar*' (2017) 8(28) *Indigenous Law Bulletin* 24 (**Frith**).

5 See *NTA* s 24CD(2)(a).

6 See *NTA* s 29(2)(b)(i).

That reference is sufficiently similar to the phrase 'all registered native title claimants' that is used in s 24CD(2)(a) for it to be at least reasonably arguable that all persons who are registered native title claimants in relation to the relevant area must execute an agreement under s 31 to enable it to meet the statutory description of a Section 31 Agreement.

10. Given this potential uncertainty, and the economic and social value of Section 31 Agreements for native title holders and resource developers, there may be some utility in clarifying in the *NTA* that Section 31 Agreements made before to the *McGlade* decision, on 2 February 2017, are valid.

Question 2 *What should be the role of the applicant in future Section 31 Agreements? Which of the following three options, if any, do you prefer?*

Option 1: All members of the applicant are to be mandatory parties to Section 31 Agreements.

Option 2: All members of the applicant, other than deceased members, are to be mandatory parties to Section 31 Agreements.

Option 3: A majority of the members of the applicant are mandatory parties to Section 31 Agreements. This would align the process with that for making area ILUAs following the 2017 Amendments. However, the reduced threshold necessary to make the agreement would require an additional safeguard, so this option would also include an authorisation process for Section 31 Agreements, which is not currently required for this kind of agreement-making.

11. Option 1 is not appropriate, as this may require claim groups to change the composition of the applicant by way of an application under s 66B of the *NTA* to remove deceased members of the applicant, before making a Section 31 Agreement. This would add unnecessary cost and delay to the procedures for dealing with Subdivision P future acts. There are reasonable arguments in support of both the other options.

12. Option 2 reflects the approach taken by the Full Court in *McGlade* to determining the necessary parties to an Area ILUA. The policy reasons for that approach were best expressed by Mortimer J in *McGlade*,[7] including that:

    a. Parliament has chosen 'a representative model for the performance of functions under the *NTA*. In doing so, Parliament recognised the strength and authority of the [native title] claim group';[8] and

[7] See, generally, Frith.
[8] *McGlade* [361].

b. Parliament also directed 'how that authority is to be exercised'.[9] Since the *NTA* does not contemplate actions by only some of the individuals constituting the applicant, they must act collectively.[10]

13. Similar arguments apply in relation to any registered native title claimant who must execute a Section 31 Agreement. Further, allowing only a majority of the registered native title claimant to execute a Section 31 Agreement may mean that the views of a minority of the claim group are overridden, with no engagement with them or their views.[11]

14. Option 3 reflects the approach taken by the Parliament to Area ILUAs in enacting the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) in response to the *McGlade* decision. Option 3, however, has the tweak of an additional safeguard — an authorisation process for Section 31 Agreements, which is not currently required for this kind of agreement-making. Only requiring a majority of the members of the applicant to be mandatory parties to Section 31 Agreements would make them easier to achieve and provide more certainty for industry and for native title claim groups. It would also address the potential problem of Section 31 Agreements being vetoed by one member of the claim group who is a registered native title claimant who refuses to sign. Further, Option 3 tends to minimise the need for applications to replace the applicant under s 66B.

15. The additional safeguard of requiring an authorisation process for Section 31 Agreements recognises the strength and authority of the native title claim group, ensuring that Section 31 Agreements are only made with the consent and authority of the claim group as a whole. This safeguard also meets the concern that the views of a minority of the claim group will be overridden with no engagement with them or their views.

16. On balance, with this additional safeguard, Option 3 is preferred.

Who is the 'Applicant'? What is 'Authorisation'? (Attachment A)

Question 3 *Do you support the proposed amendments set out in Question 3, as expanded upon in Attachment A?*

Proposal A1: Clarify that the claim group may define the scope of the applicant's authority

17. In my experience working with native title claim groups, they 'do not generally invest full decision-making authority in the applicant but expect the applicant to

9 *McGlade* [361].
10 *McGlade* [379].
11 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (2017), [228]–[230].

bring important decisions back to the group to consider'.[12] Indeed, the applicant itself often feels unable to make certain decisions without referring them to the claim group, even though s 62A of the *NTA* in theory enables it to make decisions such as:

a. amending the application, including by changing the description of the native title claim group and the area covered by the application;

b. agreeing to future acts, even where authorisation by the claim group is not required by the *NTA*; and

c. resolving the application, including by agreeing to a proposed consent determination.

18. It would be appropriate for the *NTA* to reflect this practical reality by explicitly allowing claim groups to define the scope of the applicant's authority. Accordingly, the *NTA* should be amended to clarify that the claim group may do so. Within the parameters of the *NTA*, native title claim groups should be able to determine their own decision-making processes, and those of the applicants that represent them in native title litigation and agreement making.

19. Further, by way of example for native title claim groups, consideration should be given to inserting into the *NTA* a non-exhaustive (and non-binding) list of ways in which the native title claim group might define the scope of the authority of the applicant.

Proposal A2: The applicant should be able to act by majority unless the claim group specifies otherwise

20. The *NTA* should be amended to provide that the applicant may act by majority, unless the terms of its authorisation provide otherwise. I agree with the analysis set out in [10.39]–[10.41] of the ALRC Discussion Paper,[13] which concludes that, unless the authorisation provides otherwise, applicants should not be required to use arguably more burdensome unanimous decision-making than applies in other areas of decision-making, i.e., a simple majority.

21. The starting point for my submission is that native title claim groups should be able to determine their own decision-making processes. Significantly, a more complex structure for authorisation that involves decision-making by the native title claim group 'is an opportunity for a group to formalise its procedures and develop its governance structures and skills'.[14] Developing effective governance structures and skills, which can be carried forward to the prescribed body corporate (**PBC**) that must eventually manage the group's determined native title

12 Options Paper, p 7. See also Australian Law Reform Commission, 'Connection to Country: Review of the Native Title Act 1993 – Final Report' (Australian Law Reform Commission, 2015) [10.62] (**ALRC Final Report**).

13 Australian Law Reform Commission, 'Review of the Native Title Act 1993 – Discussion Paper' (Australian Law Reform Commission, 2014) (**ALRC Discussion Paper**). See also, ALRC Final Report, [10.81]–[10.83].

14 ALRC Final Report [10.38].

as trustee or agent, is an important, yet often overlooked, aspect of the work that a claim group must do with its applicant in making a native title determination application and dealing with matters arising in relation to it. The work of a claim group in developing strong and effective decision-making and governance structures for itself and its PBC is an important aspect of the work involved in dealing with a native title determination application. Claim group control of the scope of the applicant's authority is a significant aspect of this process.

22. As stated in the ALRC Discussion Paper, at [10.39], the current 'default position requiring a joint, or unanimous decision … gives a minority of the members of the applicant a veto power' over its decisions, which has the effect that if 'a disagreement cannot be resolved, the only recourse is to replace the applicant, which is expensive and time consuming, and does not necessarily resolve the disagreement'.[15] It is important that an applicant has workable and efficient decision-making processes. As a starting point, such processes should allow decision-making by simple majority. Preferably, however, the claim group should impose its own conditions on the authorisation and decision-making of their applicant, which reflect its practical needs and the requirements of traditional laws and customs.[16]

Proposals A3 & A4: The composition of the applicant should be able to be changed without a s 66B reauthorisation in certain circumstances

23. At present, the requirement that any change to the composition of the applicant can only be done under s 66B, which requires that the replacement applicant be authorised by the claim group, imposes substantial procedural and resource burdens on claim groups, which may unreasonably limit the applicant's ability to respond to the needs of the claim group and to those of third parties dealing with native title. This is the case even where the proposed change arises because a member of the applicant has died, or is unable or unwilling to continue in that capacity.

24. The decision in *McGlade* focussed attention on this issue, as it required that all named members of the applicant must execute an agreement for it to be an area ILUA under s 24CD of the *NTA*. The relaxation of these requirements by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) does not deal with the problem in all circumstances, as the number of surviving and willing members of the applicant may not meet the new majority threshold. Further, those amendments only deal with the making of area ILUAs, and do not assist the performance of the other functions of an applicant.

25. Accordingly, a simplified procedure should be provided to allow the removal of members of the applicant who are deceased, incapacitated or wish to be removed, without the need for evidence that the remaining members of the applicant are again authorised. In addition, there should be no need for the reapplication of the

15 ALRC Discussion Paper [10.39].
16 See ALRC Discussion Paper [10.40], [10.41].

registration test in relation to the amended application. Such an approach was proposed in 2006,[17] but not adopted due to a perceived risk that applications may not be properly authorised if there is such a streamlined procedure.[18] That position should be reconsidered.

26. Recommendation 10–7 in the ALRC Final Report should be adopted, for the reasons set out in [10.84]—[10.89] of that report. Neither element of the ALRC's proposed solution — allowing the remaining members of the applicant to continue to act without reauthorisation and empowering them to apply to the Court that they constitute the applicant — interferes with the maintenance of the ultimate authority of the claim group in making the application. This approach is consistent with the representative nature of the applicant, which is reflected in the provision that the applicant represents the native title claim group in making the application and dealing with matters arising in relation to it.[19] These changes are reasonable, particularly since native title applications take a long time to be finalised and the costs and time involved in reauthorising an applicant are so considerable.

27. Further, 'where the removal of a member of the applicant is not controversial or disputed, a simple and inexpensive procedure should be available to update the Register of Native Title Claims'.[20] Again, making such a change to the description of the applicant should not trigger the application of the registration test. In such circumstances, no substantive change is being made to the application such that its registration should be reconsidered.

28. For similar reasons, where the authorisation of an applicant provides that if a particular member of the applicant becomes unwilling or unable to act, another specified person ought to be able to take their place, the applicant should be able to apply to the Court for an order that that member of the applicant be replaced by the specified person, without requiring reauthorisation (Proposal A4). I support this proposal for the reasons set out in [10.90]–[10.93] of the ALRC Final Report.

Proposal A5: A statutory duty should be imposed on the applicant to avoid obtaining a benefit to the detriment of the claim group

29. I was a member of the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group and supported its recommendations, for the reasons set out in its report. Those recommendation include that:

> The Government take urgent steps to amend the Native Title Act or relevant regulations to clarify that the native title holding community is the beneficial owner of funds generated by native title agreements, irrespective of the

17 Commonwealth Attorney General, *Technical Amendments to the Native Title Act 1993: Second Discussion Paper* (22 December 2006).

18 Angus Frith and Ally Foat, 'The 2007 Amendments to the *Native Title Act 1993* (Cth): Technical Amendments or Disturbing the Balance of Rights?' (Native Title Research Monograph 3, AIATSIS, November 2008) 109.

19 *NTA* s 62A.

20 ALRC Final Report, [10.89].

identity of the legal owner or possessor of those proceeds, and that the named applicant is in a fiduciary relationship to their native title holding group.[21]

30. Arguably, at common law an applicant owes an obligation of a fiduciary nature to the native title claim group as a whole in dealing with the application and matters arising from it. The question is how such an requirement might be incorporated into the *NTA*.

31. The proposal that a statutory duty be imposed on the applicant to avoid obtaining a benefit to the detriment of the claim group reflects a conception of the applicant as the agent of the claim group in making the application and dealing with matters arising in relation to it, rather than considering it as trustee for the claim group in that regard. This approach better reflects the reality of the relationship between the applicant and the native title claim group and the representative model for the performance of the applicant's functions that is implicit in the *NTA*. It also recognises and supports the strength and authority of the claim group in dealing with their native title.[22]

32. In order to maintain the primacy of the role and of the interests of the claim group in terms of the work done by the applicant, the discretion of the members of the applicant in performing their obligations to the claim group should be limited as far as possible. The expression of the applicant's proposed obligation to the claim group in negative terms is likely to limit its discretion in determining the manner in which it must act in the best interests of the group. It also tends to reduce the need to identify the members of the group to whom the duty is owed.[23] The proposal is supported.

Proposal A6: Transitional requirements

33. The ALRC's recommendation in its Final Report that amendments similar to those set out in Attachment A to the Options Paper should only apply to matters coming before the Court after the commencement of any amendment to the *NTA* is reasonable.

Alternative Agreement-Making Processes (Attachment B)

Question 4(a) Do you support the creation of an alternative agreement-making mechanism? If so, what limitations would you seek to have applied to such an agreement?

34. The starting point for any consideration of alternative agreement-making processes, streamlining agreement-making or increasing its transparency must be the statement in the UNDRIP that:

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21 Australian Treasury, 'Taxation of Native Title and Traditional Owner Benefits and Governance Working Group Report to Government (2013), recommendation 4.

22 See, e.g., *McGlade* [361].

23 ALRC Final Report, [10.110].

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[24]

35. While the UNDRIP is not binding on Australia, it provides a guide to best practice behaviour for governments and others dealing with Aboriginal and Torres Strait Islander rights and interests in land. In my view, it provides a standard against which the proposals in the Options Paper must be measured. This standard is recognised in the statement in the Options Paper that:

> The purpose of the current agreement-making processes is to ensure that native title rights are protected and that decisions affecting native title rights are made with the consent of the native title holders, and ensuring that such agreements are binding on all persons holding native title within the area.[25]

36. Any proposal that does not measure up to this standard should not be accepted. The next sentence in the Options Paper raises concerns in this regard:

> However, the costs and time associated with the requirements to notify authorise and consult mean that these agreements can be difficult to obtain and may form a barrier to doing business for both native title holders and third party stakeholders.[26]

Care should be taken to ensure that achieving these ends does not preclude the obtaining of free, prior and informed consent.

Question 4(b) Alternatively, does the native title system currently allow for adequate flexibility in agreement-making?

37. The current system allows for considerable flexibility in agreement making by PBCs, as described in the Options Paper, at page 11. These include alternative consultation processes and regional agreements. In my experience, the full potential of such arrangements has not yet been realised or utilised by PBCs.

38. The value in using these options is that the common law native title holders retain ultimate control over PBC decisions affecting native title, so that native title decisions are made with the free, prior and informed consent of the native title holders. Amending the *NTA* to achieve more flexible agreement making and to reduce transaction costs may come at the expense of that control (and of free, prior and informed consent).

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24 UNDRIP, art 32(2).

25 Options Paper, p 10.

26 Ibid.

Question 4(c) Are there better ways to achieve the objectives of increasing flexibility in agreement-making and reducing transaction costs can be achieved (for example, through the COAG Investigation recommendations outlined in Attachment B)?

39. One problem with existing options for agreement making is that they are expensive in terms of the time and resources required to develop and implement agreements by PBCs and their claim groups. Developing models for ways in which these existing options might be used by PBCs to achieve more flexible and consensual agreement making would be a valuable step. In addition, providing training for PBCs about the existence of these options and about ways in which they might use them would assist them to be more flexible and efficient in their decision and agreement making.

Proposal B1: Allow a PBC to enter into a contract about certain types of future act, without the consent of the native title group

40. The proposal appears to be premised on the notion that many future acts have a limited effect on native title rights and interests and may ultimately be beneficial for the native title holders. It is argued that such future acts should therefore be able to be done without the free, prior and informed consent of the native title holders, and without recourse to the full set of procedural rights encompassed in the procedure for making and registering an ILUA.

41. It may be appropriate to introduce a swifter and cheaper process for achieving validity for such future acts, for example by negotiating an ILUA that sets out a procedure by which the native title holders and their PBC can agree to such an alternative contractual process. However, if any such process is introduced, it must still comply with the principle that the native title holders must be consulted and give their consent to future acts affecting their native title rights and interests, whether specifically or in general terms.

Proposal B2: Allow native title holders to vary the effect of s 211 through an ILUA.

42. The High Court in *Karpany v Dietman* held that s 211 of the *NTA* should be interpreted widely:

> The … term 'licence, permit or other instrument granted or issued ... under the law' in s 211 … is not to be read narrowly. It has application to a category of laws which prohibit or restrict activities, including fishing and gathering. Such laws may provide a variety of schemes for permitting some people or groups of people to conduct otherwise prohibited or restricted activities subject to terms and conditions which may be specified by law or lie within the discretion of the grantor or issuer of the 'licence, permit or other instrument'. Those terms accommodate a large range of possible statutory regimes. They are apt to cover any form of statutory permission issued to

individuals or classes or groups of people to carry on one or other of the classes of activities described in s 211(3).[27]

43. The significant rights encompassed in s 211 should not be derogated from, even by agreement. They provide an important protection for native title rights and interests, which should be retained in the *NTA* rather than being restricted or removed piecemeal by the operation of a series of ILUAs, where there is no guarantee of equality of bargaining power.

Proposal B3: Allow a PBC to contract out of future acts and compensation provisions of the *NTA*

44. As noted in the Senior Officers Working Group's Report to the Council of Australian Governments, 'Investigation into Indigenous Land Administration and Use' (**COAG Investigation**),[28] ILUAs may already provide for contracting out of the future acts and compensation provisions of the *NTA*. The advantage of using an ILUA to do so is that the process is designed to obtain free, prior and informed consent from the native title holders in relation to that contracting out.

45. As the COAG Investigation notes, such contracting out should only be done on a voluntary and informed basis. The existing ILUA mechanism already provides for such free, prior and informed consent. To the extent that achieving this end by mere contract affects native title rights and interests, without the PBC being required to consult and obtain the consent of the native title holders whose interests are affected, the proposal should not be contemplated.

Proposal B4: Amend s 24LA to permit the doing of low impact future acts following a determination that native title exists

46. This proposal is made purely for the convenience of State and Territory governments, at the expense of native title holders and their recognised rights and interests. It allows those governments to perform low impact acts on land determined to be subject to native title rights and interests, including some excavation and clearing and tree lopping, with no notice or regard for those rights in relation to that land or waters. In addition, the proposal tends to limit native title holders' participation in the management of their country, which tends to improve both its environmental, social and cultural values, and their health and well-being.

47. This proposal changes the balance between the interests of government and those of native title holders that is expressed in the *NTA*, even after the legislation was amended in 1998. There is no justification for diminishing native title rights and interests in this manner, apart from the convenience of governments and bureaucrats. There are already ways in which their convenience can be addressed

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27 [2013] HCA 47, [48].

28 Senior Officers Working Group, *Investigation into Indigenous Land Administration and Use* (December 2015) Council of Australian Governments (**COAG Investigation**), table 2 item 5 (p 18).

with the consent of the native title holders, including comprehensive ILUAs that cover such land management activities. This proposal is not supported.

Streamlining Existing Agreement-Making (Attachment C)

Question 5 *Do you support the proposals set out in Attachment C to streamline existing agreement making processes?*

Proposal C1: Allow body corporate ILUAs to cover areas where native title has been extinguished

48. PBCs should have the authority and ability to manage all native title related matters for the area within the external boundaries of the determination that gives them their functions; the native title holders are the right people for that country. From the native title holders' point of view, their PBC is the body that must manage all their rights and interests in relation to land or waters, whether or not those rights and interests have been recognised under Australian law. Those functions may still exist even if native title has been extinguished. This proposal recognises both that point of principle and the practical reality that ILUAs might be made, even where native title has been extinguished.

49. This proposal would also streamline processes for ILUA negotiation and registration, thereby reducing the cost and time required for negotiating an ILUA for all parties. It would reduce the use of area ILUAs, with their lengthy, costly notification processes. The proposal is supported.

Proposal C2: Allow minor technical amendments to be made to ILUAs without requiring re-registration

50. The proposal is supported in principle. Its scope should be limited to minor technical changes concerning the descriptions of parties and the subject matter of the ILUA, of the order described on page 13 of the Options Paper. The scope of the 'minor technical amendments' should be described, and circumscribed.

51. Another potential amendment that should be considered is as follows: if an Area ILUA is made in contemplation of a determination, a statutory assignment of functions from the registered native title claimant, which signed the ILUA, should be made to the PBC, which must manage rights and obligations arising under it. If this were done, the registered native title claimant would have no further role in relation to the ILUA. This would have the effect of making amendments to the ILUA easier, particularly where members of the registered native title claimant have passed away. Any ILUA amending the ILUA would potentially be a body corporate ILUA, rather than an area ILUA.[29]

[29] See *Conlon v QGC Pty Ltd (No 2)* [2017] FCA 1641.

Proposal C3: Remove the requirement that the Registrar give notice of an area ILUA if it is not satisfied the ILUA could be registered

52. The proposal is supported in principle. Any amendments should ensure that notification only occurs when the Registrar of the National Native Title Tribunal (**NNTT**) is satisfied that the formalities required for the agreement to be an ILUA are met.

Proposal C4: Remove the requirement for PBCs to consult with NTRBs before consulting about native title decisions such as entering an ILUA

53. This proposal is not supported. It removes the only available mechanism for the oversight of the ILUAs made by PBCs. PBCs are generally not well resourced, may not have access to appropriate advice, and therefore may be exploited in the agreement making process. The potential for oversight by the native title representative body or service provider (**NTRB/SP**) is an important mechanism for the protection of the native title holders and their rights and interests.

Proposal C5: Amend the *NTA* to ensure that the future acts regime applies to areas to which s 47B applies

54. This proposal covers future acts proposed to be done in relation to land or waters that appear to have been subject to a previous exclusive possession act, and that is now vacant Crown land and subject to a native title determination application. On its face, s 47B appears likely to apply to the area in such circumstances; however, s 47B does not actually apply until the determination is made. Before the determination is made, there is some uncertainty as to the correct process to be followed in relation to 'future acts'.

55. One of the requirements for an act to be a 'future act' is that native title exists: the act must affect native title. If native title has been extinguished, there can be no future act, and no future act notice need be given. However, if s 47B applies, which is decided at the time of the determination, that prior extinguishment must be disregarded. Arguably, in that case, the future act rights should have been accorded; if not, arguably the future act is invalid.

56. It is appropriate to clarify that the future act regime applies in relation to areas where native title is likely to be recognised via the operation of s 47B. However, any amendments should not disadvantage the native title claim group/native title holders who rely on s 47B. It follows that there should be a presumption, which probably already applies in practice, that areas of vacant Crown land subject to a native title determination application are likely to be subject to native title. This proposal is supported.

Proposal C6: Amend s 24EB to allow parties to an ILUA to agree that the ILUA does not provide compensation for a future act

57. It is appropriate to increase the flexibility available to the parties in finalising the assessment and payment of compensation, either before or after an ILUA is

finalised and registered. Further, delaying the assessment of the basis for and quantification of compensation, if it is not known before the ILUA is finalised, may assist the parties to resolve disputes between them. The proposal is supported.

Proposal C7: Amend s 199C to clarify that removal of details of an ILUA from the Register does not invalidate a future act that is the subject of the ILUA

58. The purport of this proposal is not entirely clear from the Options Paper or the COAG Investigation.

59. In summary, s 199C provides for the removal of an ILUA from the Register if:

    a. a determination of native title is later made in favour of a native title group other than that which made the ILUA;

    b. the ILUA has expired, or the parties wish it removed; or

    c. the Federal Court is satisfied that a party would not have entered into the agreement but for fraud, undue influence or duress.

60. Presumably, this proposal would clarify that the validation of future acts by such an ILUA is effective and can survive its de-registration. However, this can already be done in an ILUA. Further, it is not appropriate to continue to support the validity of future acts, where that validity is based on fraud, undue influence or duress.

61. The grievance that the proposal appears to be mainly directed to is situations where different groups make the ILUA and achieve the determination. In such circumstances, the determined native title holders may accept the terms of the ILUA through their own authorisation process, thereby by giving their own consent to it.[30]

62. The difficulty arises if the determined native title holders do not give their own consent to the future act: why should their native title be burdened by a future act to which they have not given their consent, and in respect of which, presumably, they did not exercise the relevant procedural rights under the *NTA*? For the purpose of analysing this proposal, this issue may be characterised either as a failure to obtain the free, prior and informed consent of the right people for country, or as a liability issue between competing native title groups.

63. If the issue is characterised as a failure to obtain the free, prior and informed consent of the right people for country, the ILUA may be seen as expressing something that the Aboriginal or Torres Strait Islander people who made it did not have the capacity to give: their consent to the validation of the future act. In such circumstances, they should not obtain the benefits of doing so; nor should the right people for country suffer the inappropriate burden of validation imposed by

[30] *NTA* s 199C(1A).

the ILUA. Therefore, the removal of the details of the ILUA from the Register should invalidate the future act that is the subject of the ILUA.

64. If the issue is characterised as a liability issue between competing native title groups, there should be a mechanism to ensure that the benefits of the agreement accrue to the determined native title holders. In those circumstances, where the grantee of the future act has acted in good faith, it is appropriate that the validity of its future act be confirmed, and the proposal should be accepted.

65. Given the potential impact of this proposal in terms of the failure to obtain the free, prior and informed consent of the determined native title holders to the future act, the proposal is not supported.

Proposal C8: Amend s 30A so that Government parties are not required to be a party to a Section 31 Agreement (for example, an agreement about mining)

66. This proposal is supported, provided that the other negotiation parties agree. Nevertheless, the government party should continue to be required to act in good faith, even if it is not a negotiation party.[31]

67. However, it is likely that the government party should remain a party to the negotiations (and to a resulting Section 31 Agreement) where the proposed future act is a compulsory acquisition, as only the government party has power to compulsorily acquire interests in land or waters.

Proposal C9: Amend the objection process created by s 24MD(6B)

68. Section 24MD(6B) provides for objection to and consultation about certain future acts. The relationship between these two procedures is not clear in the legislation. Particularly, there is no indication that making an objection, consultation and hearing the objection are linear processes, i.e., that (apart from the hearing of an objection) one must happen before or after any other. Some clarification of the relationship between and of the details of each of these procedures may be useful. Imposition of timeframes for these processes may be appropriate, if it does not diminish or detract from the native title parties' existing procedural rights, or mean that they are unable to give the future act their free, prior and informed consent.

69. My opinion is that 24MD(6B) provides, first, that a registered native title claimant or a PBC may object to the doing of the future act, within two months after its notification. If the native title party 'objects … to the doing of the act and so requests, the government party must ensure that the objection is heard by an independent person or body'.[32] There is also provision for consultation between

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31 See *Charles, on behalf of Mount Jowlaenga Polygon #2 v Sheffield Resources Ltd* [2017] FCAFC 218.

32 *NTA* s 24MD(6B)(d) & (f).

the government party or the private beneficiary of the future act and the native title party, about specified matters.[33]

70. There is no further description in the *NTA* of the procedure to be followed in making an objection and having it heard. Ultimately, the procedure for hearing the objection depends on the approach taken by the government party, and is subject to ordinary principles of natural justice and procedural fairness.

71. The detail of this proposal is not fully clear from the Options Paper and the COAG Investigation. The Options Paper appears to contemplate that a native title party must request that the objection be heard before the government party must ensure that it is in fact heard. On my reading of the legislation, this is not the case. In fact once an objection is made, the government party 'must ensure' that it is heard; there is no requirement that a hearing be specifically requested. Similarly, after notification, the government party or the third party beneficiary must consult with the native title party.

72. The future act should not be validated if the government party fails to ensure that the objection is heard.

Proposal C10: Options to encourage electronic transmission of notices including amending s 29 and cl 6(1)(a) of the *Native Title (Notices) Determination 2011* (No 1) to provide that notices can always be transmitted electronically

73. Digital communication of notices that may affect native title rights and interests is not appropriate in circumstances where PBCs, registered native title claimants and persons who may hold native title are poorly resourced and, often, remote from adequate internet and other support services. Care should be taken to ensure that remote native title parties or those without internet access are not disadvantaged.

74. This proposal potentially offends against the principle of free, prior and informed consent. Anything that tends to limit the ability of native title parties to be informed about a particular proposal that might affect their land or waters and their native title rights and interests should be rejected. Instead, the widest broadcast of such notices is preferable, so that as many people in the relevant native title group as possible are informed of the proposed future act without having to rely on the NTRB/SP, the registered claimants or the registered native title body corporate to be notified about future acts. I do not support the proposal.

75. In any event, notices can be sent electronically to known native title parties, in addition to public notification in the ordinary established manner.

Proposal C11: Amend s 251A to clarify who must authorise an ILUA as a person or persons who may hold native title

76. As noted in the Options Paper, in *QGC v Bygrave*,[34] the court found that where an ILUA area falls within the area of a registered native title claim and an

33 *NTA* s 24MD(6B)(e).

unregistered claim, the only people who are entitled to authorise the making of the ILUA are the registered claimants and not the unregistered claimants. On the other hand, in *Kemp v Native Title Registrar*,[35] the Court held that where the native title parties comprise more than one distinct group, all persons must authorise the ILUA, and must do so separately, provided their assertion of native title is more than 'merely colourable'. The approach in *Kemp* is preferable, as it does not exclude potential native title holders merely on the basis that they do not yet have a registered native title claim. The *NTA* should recognise that making and registering a native title determination application depends on being able to access the limited resources and expertise available for the purpose.

77. The *NTA* should therefore be amended to clarify that all persons with a claim to native title, whether registered or not, must consent to an ILUA before it can be registered. The amendments to s 251A at items 14–16 of Schedule 3 of the *Native Title Amendment Bill 2012* (Cth) achieve this end and should be reintroduced, apart from proposed s 251A(3).

78. Proposed ss 251A(3) has the effect that only those persons who may hold native title in relation to that part of the land or waters within the area subject to the proposed ILUA where there are no PBCs or registered native title claimants are required to consent to the ILUA before it can be registered. People who may hold native title in relation to an area where there is a registered native title claim and who are not part of that claim group are not required to consent to the ILUA.

79. Such potential native title holders may eventually achieve a determination that they hold native title and that the registered native title claimant (and its native title claim group) do not. If that is the case, their determined native title rights and interests will be subject to an ILUA in favour of another group of people who are not native title holders. The determined native title holders will not have had the chance to exercise procedural rights regarding developments on their country before the determination. That situation is not acceptable. Proposed ss 251A(3) should not be proceeded with.

Transparent Agreement-Making

80. The Options Paper does not explain or justify why agreement making should be transparent, apart from suggesting that:

    a. Knowing that other agreements have been made previously with the same mining company may assist a native title group entering into negotiations with that company to obtain a copy of previous agreements, which may help it prepare for the negotiations;

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34 *QGC v Bygrave* [2011] FCA 1457.

35 *Kemp v Native Title Registrar* [2006] FCA 939.

b. Ensuring that all individuals and organisations affected by an ILUA will have access to the agreement; and

c. Ensuring that where agreements may be affected by a flaw, such as that identified in *McGlade*, those agreements can be quickly and easily identified.

81. Otherwise, the Options Paper merely assumes that transparency is a public good and presents options designed to achieve it.

82. However, agreements are made between consenting parties, who may have good reasons for keeping their agreements confidential. Requiring transparency of agreement making overrides those reasons, apparently in the public interest rather than the contracting parties' private interests. Doing so may inhibit the parties making agreements that contain particular beneficial terms that might otherwise have included, if the terms of the agreement could be kept confidential.

83. On the other hand, there may be a public interest in knowing the terms of negotiated agreements. For instance, publicly available agreements are likely to assist later contracting parties to know what terms have been negotiated elsewhere. The quality of agreements and the benefits achieved under them is likely to be ratcheted up over time. In addition, academic analyses of agreement making will be enhanced if more agreements are publicly available.

Question 6(a) Should there be a Register of section 31 agreements?

84. Yes, there probably should be a register of Section 31 Agreements, limited to containing the same information as is publicly available in the ILUA Register. The only task of the NNTT would be to record relevant information. It should have no discretion whether to add the agreement to the register, apart from determining whether the agreement is a Section 31 Agreement.

85. It should probably not be called a 'Register', in order to limit confusion with the ILUA Register. It might more appropriately be called a 'List of Section 31 Agreements'.

Question 6(b) Should ILUAs – and other agreements made under the Act – be publicly accessible?

86. ILUAs and other agreement under the *NTA* should not be publicly available unless the parties agree, for the reasons outlined above.

87. However, parties should be encouraged to make their native title agreements publicly available in order to increase public knowledge of them and to improve their quality over time. This might be done by education as to the benefits of doing so. It might also be worth considering a statutory requirement that the parties consider whether to make their ILUA or Section 31 Agreement confidential, publicly available or to take a mixture of these approaches.

Indigenous Decision-Making **(Attachment D)**

Question 7 *Should the Act and the PBC Regulations be amended to allow native title claim groups and native title holders to determine their decision-making processes, rather than mandating the use of traditional decision-making where such a traditional process exists?*

88. Proposal D1 identifies four provisions in the *NTA* and the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) (***PBC Regulations***) that refer to decisions being made using either a traditional decision-making process or a process agreed to and adopted by the native title group:

    a. Section 251B (authorising an applicant);

    b. Section 251A (authorising an ILUA);

    c. Regulation 8 (consenting to a native title decision); and

    d. Section 203BC(2) (consenting to the general course of action taken by a NTRB/SP on their behalf).

89. Under each of these provisions, the native title party must use traditional decision making processes, if they exist, to make decisions. Only if such processes do not exist, may it consider agreeing to and adopting other decision-making processes.

90. Native title parties should be able to determine their own decision-making processes, whether or not a traditional decision-making process exists. Each of these provisions should be amended to allow native title parties to use a decision-making process agreed on and adopted by the group. I agree with the analysis in [10.10]–[10.16] of the ALRC Discussion Paper in relation to authorising an applicant. That analysis should also be applied to each of the other provisions dealt with in Proposal D1, which each concern the manner in which native title groups make decisions that affect their native title rights and interests. In that sense, no distinction can be drawn between the provisions. The decision making processes set out in the *NTA* should be consistent with each other.

91. Technically, there can be no traditional decision-making process in relation to authorising a native title application or an ILUA, or making a native title decision, since these actions under Australian law did not occur before sovereignty. However, to avoid groups being troubled by the process, it would be appropriate to clarify that the choice of decision-making process, whether agreed or traditional, is up to them.

92. As the ALRC Discussion Paper states:

> Allowing the group to choose its own decision-making process promotes the autonomy of the group. It 'maintains the ultimate authority of the claim group or native title holders'.[36]

[36] ALRC Discussion Paper, [10.16], quoting Law Society of Western Australia, Submission 9.

Claims resolution and process **(Attachment E)**

93. Several proposals to amend the *NTA*, which are set out in Attachment E to the Options Paper, purport to be directed to improving the efficiency and effectiveness of the native title claims resolution process. This aim is laudable. These proposals must be assessed in terms of their potential efficiency and effectiveness, but also in terms of their fairness and their impact on obtaining free, prior and informed consent.

Question 8 *Do you support proposed amendments detailed in Attachment E to improve the efficiency and effectiveness of claims resolution?*

Proposal E1: The Federal Court should be able to direct that a native title application inquiry be held without the applicant's agreement to participate (repeal s 138B(2)(b))

94. Any native title application inquiry is of little utility without the active participation of the applicant. Directing an applicant to participate in circumstances where it is chooses not to actively engage or does not have sufficient resources to participate properly may unfairly prejudice it and the claim group. I note the arguments expressed at [12.106] of the ALRC Final Report.

95. Further, imposing the burden of having to participate in an additional process on a poorly resourced applicant may further limit the applicant's ultimate prospects for achieving a successful determination or resolution of the application. It is likely that most, if not all, applicants are poorly resourced in this sense.

96. Notwithstanding the views expressed at [12.94] – [12.109] of the ALRC Final Report, this proposed amendment should not be supported.

Proposal E2: The NNTT should be able to summon a person to appear or provide documents in the context of a native title application inquiry (repeal s 156(7))

97. Notwithstanding the views expressed at [12.110] – [12.115] of the ALRC Final Report, for the reasons set out above in relation to Proposal E1, this proposed amendment is not supported.

Proposal E3: Permit the making of a determination that native title co-exists with a pastoral lease held by claimants through a company of which they are members (rather than shareholders) (amend s 47(1)(b)(iii))

98. I support this proposal. Many Aboriginal held pastoral leases are held through the mechanism of an Aboriginal corporation incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (***CATSI Act***). *CATSI Act* corporations have members, not shareholders. The fact that s 47(1)(b) does not already refer to companies whose only members are members of the claim group appears merely to be a technical oversight, which should be corrected.

Proposal E4: Allow a PBC to be an applicant for a compensation application

99. I support this proposal. More generally, a PBC should be able to perform functions in relation to the whole area subject to the determination (and associated native title determination application) in relation to which it was determined as the PBC, whether or not native title is recognised or held to have been extinguished. A PBC should be able to work on behalf of the common law native title holders in relation to all of their rights and interests in country, whether or not those rights and interests have been recognised as native title rights and interests. For many purposes under the *NTA*, and potentially under other legislation, drawing a distinction between parts of the native title holders' country, on the basis that some rights and interests have been recognised by the common law and some have not, is artificial and may give rise to inefficiency and unfairness.

Proposal E5: Clarify that a PBC's decision to make a compensation application is a native title decision

100. If a compensation applicant makes a native title compensation application, it must be authorised by the compensation claim group to do so.[37] Given the significance of such an application, if the PBC makes a compensation application on behalf of the common law native title holders, it should be required to be similarly authorised by them to do so. Including decisions to make a compensation application in the category of PBC decisions in relation to which it must consult the native title holders and obtain their consent would be an appropriate way to do so. This proposal is supported.

Proposal E6: Allow historical extinguishment over areas of national, state or territory parks to be disregarded, where the parties agree, for the purposes of making a native title determination (new s 47C)

101. The proposal to insert a new s 47C into the *NTA* that provides for disregarding extinguishment in relation to park areas is supported. As well as making more land available for positive determinations of native title, it recognises the reality that in many cases agreements are made that involve native title holders in the management of park areas, including through arrangements for the joint management of national parks and other parts of the conservation estate.

102. However, the proposal should be amended to better reflect the ideal that native title rights and interests should be recognised:

a. over all land or waters not subject to other interests in land; and

b. to the extent that the land or waters are not subject to other interests.

Thus, the proposed s 47C should apply more broadly, and its application should not be subject to government veto.

37 *NTA* s 61(1).

103. Therefore, the scope of the current tenures potentially giving rise to the operation of s 47C should be broadened to include:

    a. any non-extinguishing tenure; and

    b. any otherwise extinguishing tenure, under which the land is to be used for a public purpose (such as freehold grants under which the land is to be used for a public purpose, e.g., freehold granted to a State or Territory conservation authority for the purpose of preserving the natural environment of the area).

104. Further, government agreement should not be a pre-requisite for the operation of the provision. This is likely to create uncertainty and inconsistency between jurisdictions and governments. Rather, government engagement should be required as part of the operation of the provision, and be directed to finding means by which the various private, public and native title rights can co-exist. Therefore, s 47C should be drawn in similar terms to ss 47, 47A & 47B, so that prior government agreement is not a pre-condition to its operation.

Additional Option: Clarify who must agree to consent determinations over part of an application

105. This proposal is identified as an option for amending the *NTA* with a view to improving the efficiency and effectiveness of the claims resolution process at page 18 of the Options Paper. However, a description of the proposal and further detail about it are not outlined at Attachment E. Accordingly, it is difficult to respond.

106. However, as a mater of principle, it would be useful for there to be an express provision in the *NTA* requiring that only those respondent parties, whose interests are directly affected by a proposed consent determination over part of the land or waters subject to an application, must be required to consent to it for the Court's jurisdiction under s 87A to be enlivened. Respondents with no substantive interest in the area proposed to be subject to such a determination should not have power effectively to veto a proposed consent determination over it.

Post-Determination Dispute Management (Attachment F)

Question 9 Do you support the proposed amendments in Attachment F to address post-determination native title related disputation?

107. The proposed amendments in Attachment F are stated to be directed to increasing the transparency of PBCs and their decision-making to the common law native title holders, with the aims of reducing the potential for disputation and making the resolution of any disputes quicker, cheaper and final. The proposals are also intended to provide a wider range of pathways for addressing disputes in ways that minimise harm and costs.

108. It should first be noted that PBCs are inadequately funded to perform their existing functions. Therefore, their funding should be increased to enable them to perform those functions. Further, the lack of resources and the capacity of PBCs should also be addressed in terms of these proposals, in so far as they impose additional functions and requirements on PBCs.

109. In addition, NTRB/SPs already have a dispute resolution function.[38] Support should be given to NTRB/SPs for them to be able exercise this function effectively, especially as they are likely to have the best knowledge of the context of disputes and of traditional decision-making processes. They also have good access to relevant anthropological information and to personnel who can most effectively and efficiently assist with dispute resolution.

110. Thirdly, in some circumstances, the institutional, political and cultural closeness of NTRB/SPs to disputes involving PBCs and native title holders may limit their effective capacity to resolve them; their participation may just exacerbate the problem. In such situations, an external institution might be better able to assist. In my view, the NNTT is better placed to do so than the Office of the Registrar of Indigenous Corporations (**ORIC**), for the reasons given below.

111. In so far as these proposals recommend additional regulation of PBC functions relating to the common law native title holders or involvement of institutions other than NTRB/SPs in dispute resolution, it is submitted that those functions should be performed by the NNTT rather than by ORIC, wherever possible. The reason for this view is that the relationships between a PBC and its native title holders, and the performance of functions by a PBC on behalf of the native title holders are largely governed by and subject to traditional laws and customs, rather than corporate principles and the *CATSI Act*. In addition, many disputes arise from the relationships between native title holders and from their decision-making processes, both of which are likely to be influenced by traditional laws and customs.

112. Matters determined under traditional laws and customs that are relevant to the performance of these functions include:

a. the identity of the native title holders for whom the PBC performs the functions;

b. the processes by which decisions about native title are made, which are either determined under or likely to be strongly influenced by these laws and customs; and

c. the manner in which a PBC is accountable to the native title holding group.

113. Given the significance of traditional laws and customs to the performance of PBC functions, NTRB/SPs are best placed to perform functions relating to PBCs

[38] See *NTA* ss 203B(1)(c), 203BF.

and their relationships with native title holders and with traditional laws and customs. If for whatever reason, a particular NTRB/SP is not able to do so, the NNTT, which has significant experience in dealing with traditional laws and customs in performing its pre-determination registration and mediation functions and its future act and ILUA registration functions, is likely to be better able to perform functions relating to PBCs, native title holders and traditional laws and customs, than is the Registrar, with its corporate focus. ORIC simply does not have the expertise to address such disputes, while the NNTT can appoint legally qualified members, who can address the corporate aspects of any dispute.

Proposal F1: The Registrar's compliance powers should be expressly expanded to include matters of procedural compliance with the *PBC Regulations*, in particular to ensure that PBCs are fulfilling their obligations to common law holders to the same extent as members

114. As noted in the Options Paper, 'there is currently no body that has oversight of PBC compliance with obligations under the *PBC Regulations*, and the capacity to support these obligations'. There should be a remedy for disaffected members of the native title group that is cheaper and more efficient than litigation, which at present is the only other option. Consideration should be given to identifying the particular circumstances in which such a remedy might arise and a regulatory body should be involved.

115. ORIC's current regulatory functions are limited to the corporate aspects of PBC functions, including the governance of relationships between the corporation and its members. ORIC's functions do not currently extend to cover relationships between the corporation and native title holders who are not members. Since those latter functions arise in the context of traditional laws and customs, rather than more corporate rights and obligations, the relevant NTRB/SP (or the NNTT in certain circumstances) is a more appropriate regulator.

116. Thus, for the reasons set out above, NTRB/SPs (or sometimes, the NNTT) are more appropriate regulators than ORIC in relation to obligations under the *PBC Regulations* that relate to the management of native title rights and interests on behalf of common law native title holders.

Proposal F2: Amend the *CATSI Act* to provide a power for the Registrar to refuse to amend a PBC's rule book in circumstances where the amendment would result in the PBC no longer meeting the requirements of regulation 4(2) of the *PBC Regulations*

117. Currently, provisions in the *CATSI Act* governing PBC membership allow PBCs to amend their Rulebooks to restrict the eligibility of some of the native title holders for membership of their PBC.[39] The *PBC Regulations* require that, when the determination is made and at all times thereafter, all members of the PBC must

[39] See *CATSI Act* ss 69-5(1), 69-30, 63-1, 66-1.

be native title holders, or persons or a class of persons approved by them, but do not positively require that all native title holders be members of their PBC.[40]

118. The *CATSI Act* should be amended to require the Registrar to refuse to register or to amend a rule book, if its provisions regarding eligibility for membership of the PBC are inconsistent with the relevant native title determination, as required by reg 4(2) of the *PBC Regulations*. This is consistent with the following observation by French J, when he was a Judge of the Federal Court:

> it is desirable that the membership class of [an RNTBC] be textually aligned precisely with the definition of the native title holders in the relevant Native Title Determination. This is not a requirement of the [*PBC Regulations*] but will avoid any doubt as to compliance with them.[41]

119. The provision of such a power would assist the PBC to maintain such textual alignment, ensuring that the membership class of a PBC does not depart from the description of the common law native title holders for whose benefit the PBC was created and performs its functions.

Proposal F3: Introduce a requirement that the dispute resolution provision in the PBC rulebook specifically address arrangements for resolving disputes about membership (clarifying that such disputes can arise between members and directors, between native title holders, and between native title holders and the PBCs and its members and directors)

120. Yes, this would be a useful addition to the dispute resolution procedures of a PBC expressed in its rulebook. Such disputes currently fall into a gap in the legislative scheme, as they are governed neither by the *CATSI Act* nor by the *PBC Regulations*. This leaves the Registrar, the NNTT and the relevant NTRB/SP in the position of having to attempt to resolve such disputes, with no clear procedure that must be followed or any statutory or rulebook basis for attempting to do so. The only other alternative is litigation, which is costly, slow and inefficient, and may also not ultimately address the fundamental basis for the dispute.

Proposal F4: Remove the directors' discretion to refuse membership to a person who meets the PBC's membership criteria, other than in exceptional circumstances

121. Currently, provisions in the *CATSI Act* allow the directors of a PBC to refuse otherwise valid membership applications, subject only to the requirement that their discretion be exercised in good faith in the best interests of the PBC and for a proper purpose.[42] An aggrieved applicant for membership may have a cause of action against the PBC if the directors breach their obligation to exercise their powers in good faith, though there are substantial barriers to success on such an

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40 *PBC Regulations* reg 4(2).

41 *James on behalf of the Martu People v State of Western Australia (No 2)* [2003] FCA 731, [139] (French J).

42 See *CATSI Act* ss 144-10(3), 265-5(1).

application.[43] The effect of these provisions is that PBC directors have substantial control over the identity of the corporation's membership, and can prevent individual or family groups of native title holders from becoming members of the corporation that manages their native title.

122. This approach implicit in these provisions reflects the ordinary corporate principle that a corporation should be able to control its membership, with the corollaries that the members ultimately control the activities of the corporation and that they acquire all benefits accruing from those activities. This approach is simply not appropriate for native title corporations, which exist and perform functions for the benefit of non-members, the common law native title holders.

123. Since the role and functions of PBCs differ from those of other corporations in these and other ways, ordinary corporate forms and processes should not be blindly adopted without considering whether they are fit for the purposes of the native title holders and of others dealing with native title. Specifically, the nature and obligations of PBCs are distinct from those of other corporations to such an extent and in such a manner as to justify restricting ordinary corporate powers over membership. These differences arise from PBC's unique functions in managing native title; and in mediating between traditional laws and customs and Australian law, and between native title holders and other participants in the Australian society and economy.

124. Over the centuries, the nature and form of corporations has been adjusted to meet changed and varying circumstances. The enactment of the *Aboriginal Councils and Associations Act 1976* (Cth) and the *CATSI Act* are just two examples of the legislative design of corporations to meet specific needs: in these cases, the 'special incorporation needs' of Aboriginal peoples and Torres Strait Islanders.[44] The imposition of the corporate form on native title holders by the *NTA* demands a reassessment of whether the corporate form suffices to meet the special needs of native title holders. In this particular instance, it clearly doesn't, as individual native title holders, or groups of them, may be excluded from participating in the management of their common law native title.

125. It follows that the *CATSI Act* should be amended to ensure that those benefitting from the performance of PBC functions are eligible, as far as practicable, to participate in corporate decision-making about the management of their native title rights and interests. In order to ensure that the membership of a PBC is textually aligned with the description of the native title holders in the relevant determination, the *CATSI Act* should be amended to remove any discretion of the directors of a PBC to refuse an otherwise valid membership application from an eligible common law native title holder.

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43 See, e.g., *Re Smith and Fawcett Ltd* [1942] 1 All ER 542; *Australian Metropolitan Life Assurance Co Ltd v Ure* (1923) 33 CLR 199.

44 Explanatory Memorandum, Corporations (Aboriginal and Torres Strait Islander) Bill 2006 (Cth) [3.11] (**CATSI EM**).

126. In addition, attention should be paid to the applicability of other provisions of the *CATSI Act*, and the Act as a whole, to PBCs. The *CATSI Act* is designed to maximise alignment with the *Corporations Act 2001* (Cth) where practicable.[45] Given that increasing numbers of PBCs are established and operating, the *CATSI Act* should be reviewed to assess whether such alignment still meets the needs of native title holders, or whether its provisions should be adjusted so that they better meet their needs.

Proposal F5(a): Limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour

127. A PBC is established for the benefit of all the common law native title holders, as their trustee or agent. Therefore, in principle, subject to the relevant native title determination and the corporate structure they adopt, all common law holders should be entitled to participate in the internal operations of their PBC. Practical justifications for this view include that this is likely to:

a. encourage a seamlessly effective engagement between the common law holders and the PBC;

b. minimise conflicts of interest; and

c. ensure that together the native title holders can control the PBC's performance of its functions.

Doing so would ensure the PBC has the capacity to properly perform its fiduciary and statutory obligations to the common law holders and to work effectively in their best interests in managing their native title.

128. Therefore, not only should the common law holders be entitled, as far as practicable, to become members of their PBC, their membership should not be able to be cancelled.

129. At present, membership of a *CATSI Act* corporation can be cancelled on the grounds that:

a. the person is ineligible for membership or has failed to pay fees (this is a replaceable rule);[46]

b. the member is uncontactable;[47]

c. the member is not an Aboriginal or Torres Strait Islander person;[48] or

d. the member has misbehaved.[49]

130. While ineligibility for membership (or not being an Aboriginal or Torres Strait Islander person, which amounts to the same thing for a PBC) should be a ground

45 CATSI EM [1.7].
46 *CATSI Act*, s 150-20.
47 *CATSI Act*, s 150-25.
48 *CATSI Act*, s 150-30.
49 *CATSI Act*, s 150-35.

for cancellation of membership, none of the other grounds should continue to justify the cancellation of a person's membership of a PBC, especially given the significance of the role of the PBC in expressing and enforcing the native title rights and interests of the common law holders.

131. The underlying reason for this view is that the nature and obligations of PBCs are distinct from those of other corporations to such an extent and in such a manner as to justify restricting ordinary corporate powers over membership. These differences arise from PBCs' unique functions in managing native title and in mediating between traditional laws and customs and Australian law, and between native title holders and other participants in the Australian society and economy.

132. Cancellation of their membership is not necessary for disciplining PBC members for failure to pay fees, being uncontactable or for misbehaviour. Cancellation of membership can be replaced by suspending membership for a period or by reducing the rights and privileges of membership in other ways, which may have similar disciplinary effect. Given the significance of the role of a PBC for common law holders seeking to exercise and enforce their native title rights and interests, and the fact that they are not voluntary organisations in the way that most other corporations (and most other CATSI Corporations) are, cancelling membership for these reasons should not be an option available to PBCs.

Proposal F5(b): Require the process for cancellation of membership to include a general meeting

133. Subject to the above, if membership can be cancelled, the process should be as difficult as possible, with limited discretion left to the directors. Accordingly, it would be appropriate for the process for cancelling membership of a PBC to involve a decision of the general meeting. It might also be useful to involve the relevant NTRB/SP in such decisions.

134. Further, it might be appropriate to make cancellation of membership a decision on which the PBC must consult and obtain the consent of all the native title holders, under reg 8 of the *PBC Regulations*, particularly for decisions involving membership eligibility.

Proposal F6: Amend the *CATSI Act* to empower the Registrar to amend a CATSI corporation's Register of Members where, following appropriate consultation with the Corporation, the Registrar considers it reasonably necessary to ensure that rule books are complied with in relation to the revocation of membership of individuals

135. As noted in the Options Paper, this proposal complements the proposals in F4 and F5, and ensures that a PBC's Register of Members accurately reflects who ought to be a member of a corporation in cases where a person's membership is

revoked in a manner that does not comply with the *CATSI Act* or the corporation's rule book. The proposal is supported on that basis.

136. It might also be useful to involve the relevant NTRB/SP in such consultation, given its knowledge of traditional laws and customs and of the identity of particular native title holding groups.

Proposal F7(a): Amend the *CATSI Act* to require PBCs to set up and maintain:

- a 'Register of Native Title Decisions'; and
- a 'Register of Trust Money Directions'

Proposal F7(b): The Register of Native Title Decisions should include copies of documents created to provide evidence of consultation and consent in accordance with the *PBC Regulations*

Proposal F7(c): Each of the Register of Native Title Decisions and the Register of Trust Money Directions should be available for inspection by:

- members; and
- common law holders

137. Documenting native title decisions and trust money directions, and making them available to both PBC members and the common law native title holders on whose behalf the PBC manages native title, is an important change that is likely to increase the transparency and accountability of PBCs to both their members and to the larger native title group. These proposals are supported.

Proposal F7(d): PBCs should be required to provide an extract of the Register of Native Title Decisions or the Register of Trust Money Directions to any person having a 'substantial interest' (within the meaning of that phrase as used in the *PBC Regulations*) in the relevant decision

138. 'Substantial interest' is used only in reg 10(3) of the *PBC Regulations*, which provides that a person who has a substantial interest in a native title decision is entitled to a copy of a document evidencing a PBC's process of consulting affected common law native title holders about a decision affecting their native title and obtaining their consent (see regs 8–9). The term is not defined. Presumably, persons with a substantial interest in a native title decision, apart from the common law native title holders, are likely to include the other parties to a proposed ILUA, the beneficiaries of a proposed future act, the NNTT, and/or the relevant State or Territory government. Consideration should be given to defining 'substantial interest' in such terms.

139. While access to the details of a native title holding group's decision-making process should be restricted as far as possible, it is likely to be appropriate that some of these persons should be able to access an extract of the PBC's Resister of Native Title Decisions or Register of Trust Money Decisions. That access should be restricted to the terms of any decisions affecting their interests.

Proposal F7(e): The Registrar should have the same powers in relation to the Register of Native Title Decisions and the Register of Trust Money Directions as in relation to the Register of Members (and the Register of Former Members)

140. The purpose of this proposal is not clear. Subject to my observations above concerning restricted access to such Registers and my views of the appropriate roles of the NNTT and ORIC in regulating PBCs, I make no comment in relation to this proposal.

Proposal F8: Amend the *CATSI Act* to require PBCs to keep separate financial records and reports in relation to 'native title benefits' (as defined by the *Income Tax Assessment Act 1979* (Cth)) received by the PBC

141. A PBC, as a corporation, is required to account to its members for moneys held by it. This requirement is based on the presumption that such moneys are held on behalf of the corporation's members. Native title benefits, on the other hand, being the product of agreements about future acts or native title, or a native title compensation determination, are held by the PBC, as trustee or agent on behalf of the common law native title holders.

142. A PBC should be held to account by the native title holders for its management of native title monies. In addition, entities outside the PBC that hold such moneys on behalf of native title holders, such as charitable and other trusts and other corporations, should also be required to account to the native title holders for their management of such moneys, even if they do not have a direct relationship with the native title holders other than via the PBC. Doing so by requiring the PBC to keep separate financial records and reports in relation to such moneys may be an appropriate way to achieve this. Alternatively, requiring such third party entities to account directly to the native title holders for their management of such moneys may also be a useful approach. Further consideration should be given to whether other mechanisms to achieve these aims are appropriate.

Proposal F9: Require that the common law holders be consulted on the investment and application of native title monies so that the obligation to seek direction from the common law holders is met (whether or not the monies are held by the PBC)

143. Extending existing transparency and accountability provisions to non-PBC entities, in addition to PBCs, is an appropriate mechanism for improving accountability of the holders of native title benefits to the native title holders on whose behalf they hold those funds and other assets.

Proposal F10: Amend the definition in reg 3 of 'group of common law holders' to clarify that it refers to the determined native title holding group(s) for which the PBC acts as agent or trustee

144. It will be necessary to consider the drafting of any such amendment before expressing a final view on its appropriateness. That drafting should not limit the flexibility currently available through the application of this definition, along with the decision-making processes referred to in regs 8(3) & (4). Limiting that flexibility may unreasonably add to the cost and time required for PBCs to consult affected native title holders and obtain their consent to native title decisions.

145. Thus, care should be taken to maintain the flexibility currently available to a PBC in consulting the affected common law native title holders under reg 8(5). Where members of a group of common law native title holders who are subject to a determination have differential rights under traditional laws and customs, such that not all members of the group have the same (or any) rights and interests in relation to the whole of the native title determination area, the PBC should be able, on the basis of its knowledge of the traditional laws and customs which determine who holds what rights, to decide which subgroup of the native title holding group it must consult, or whether it should consult the whole native title holding group. This falls within the scope of the tasks a PBC must perform in managing native title as trustee or agent.

146. As stated in the Federal Court decision in *Gumana*, the identification of the native title holders and of which particular group can exercise what particular rights should be left for resolution by the PBC.[50] Further, the manner of its resolution of those issues in accordance with traditional laws and customs should also be left to the PBC.

147. Relying on the processes set out in regs 8(3) & (4) [obtaining consent using a traditional or an agreed decision-making process] adds an additional step to the process of consulting the affected native title holders and obtaining their consent. Not only must the PBC be able to identify which subgroup of the native title holders speaks for particular parts of the group's country, but it must also ascertain the decision making procedure of the group as a whole. If it only needs to consult the affected subgroup, it need not engage with the group as a whole about a particular decision. Of course, in practice, there may a considerable overlap between these processes.

148. Finally, any amendments to the *NTA* should not tend to codify the operation and effect of traditional laws and customs in terms of the structure and decisions making of the native title group. This proposal does tend to do so, by implying that all native title holding groups have an undifferentiated internal structure: all native title holders have exactly the same native title rights and interests. To the extent that it does so, this proposal is not supported. The internal processes of

[50] See *Gumana v Northern Territory* [2005] FCA 50, [138]–[140].

native title and native title groups should be left to the operation of traditional laws and customs.

Proposal F11(a): Create a broader role for NNTT in post-determination disputes by:

- allowing PBCs or individual native title holders to approach the NNTT directly for dispute resolution assistance; and
- providing a new arbitration power to the Tribunal e.g. to deal with questions of fact regarding membership

149. For the reasons set out above, NTRB/SPs should have the major role in post-determination dispute resolution. Therefore, PBCs or individual native title holders should only be able to approach the NNTT for dispute resolution assistance once opportunities for dispute resolution have been exhausted or are not available, for whatever reason.

150. Subject to this, it may be useful to provide the NNTT with additional powers that might help to resolve disputes. The appropriate nature and scope of such power will have to be considered in terms of a more specific proposal.

Proposal F11(b): Expand Federal Court's role by making its jurisdiction exclusive in relation to *CATSI Act* matters that affect PBCs

151. The Federal Court should have exclusive jurisdiction in relation to *CATSI Act* matters affecting PBCs. Over the last 25 years, it has built up a substantial amount of experience and expertise in dealing with native title and traditional laws and customs. These are likely to be substantial aspects of any litigation in relation to PBCs. That expertise is not simply available to Judges of State and Territory Supreme Courts.

State and Territory proposals (Attachment G)

152. Attachment G sets out many proposals to amend the *NTA*, which are not otherwise described in the Options Paper. The Options Paper generally seems not to approve of these proposals. I express particular views about some of them. Otherwise, my views about these proposals are generally not supportive.

Section 31 agreements

153. I make no comment on proposals G1 – G5.

The Applicant (and Authorisation)

154. I make no comment on proposals G7, G9 – G11, G14 & G15.

155. Proposal G6: Any limitations on the Applicant's authority should not be notified on the Form 1. This would unreasonably limit the claim group's flexibility in determining its own decision-making processes.

156. Proposal G8: The sunset clause on the operation of s 24JAA should not be removed.

157. Proposal G12: The potential problem contemplated by this proposal can be addressed under the existing law, as follows:

a. The proposed RNTBC can be a party to an Area ILUA in its own right, with rights and obligations that are contingent on it becoming the RNTBC; and

b. After the ILUA is registered, the registered native title claimant can assign its rights and obligations under the ILUA to the RNTBC. The ILUA itself can provide for this.

158. The proposed solution of binding a corporation, which may not yet exist, to a contract, which it has played no part in negotiating, should not be done without more substantive consultation and analysis than provided in the Options Paper.

159. Proposal G13: Section 211 should not be amended to reduce its beneficial operation.

Claims Resolution

160. I make no comment on proposals G16 – G24.

Prescribed Bodies Corporate

Proposal G25:

161. This proposal seems to be superfluous, especially given the requirement that any default PBC, like any other PBC, must consult and obtain the consent of affected native title holders to native title decisions and to perform other functions as directed by them. The proposal appears to over-emphasise the role of corporate members in performing these functions.

162. Specifically, it would not be appropriate to require the ILC, a statutory corporation, to have common law native title holders for areas in relation to which it becomes the PBC for a period during which it is the default PBC. It must still consult affected native title holders and obtain their consent to native title decisions.

163. The Top End Default PBC is already subject to reg 4(2) of the *PBC Regulations*, which requires all of its members to be common law native title holders in relation to the native title determination(s) in relation to which it is determined to be the PBC. This proposal seems to be superfluous in relation to the Top End Default PBC.

164. Proposal G26: This proposal does not seem necessary. It merely contemplates the creation of a statutory discretion, which need not be exercised.

165. Proposal G27: It may be appropriate to provide certainty for First Nations Legal and Research Services that it has power to perform the work it does under the *Traditional Owners Settlement Act 2010* (Vic) for persons who may hold native title in Victoria.

If you require any further information regarding any of the matters raised in this submission, please contact me.

Yours Faithfully

Angus Frith