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AIATSIS
AUSTRALIAN INSTITUTE OF ABORIGINAL AND TORRES STRAIT ISLANDER STUDIES

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

By email: native.title@ag.gov.au

AIATSIS Submission - Reforms to the *Native Title Act 1993* (Cth) Options Paper

The Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to make submissions about the proposed changes to the *Native Title Act* 1993 (Cth) (NTA).

AIATSIS is one of Australia's publicly funded research agencies and has legislative responsibility, inter alia, to provide leadership in Aboriginal and Torres Strait Islander research and provide advice to government on Aboriginal and Torres Strait Islander culture and heritage. AIATSIS is committed to ensuring Indigenous peoples knowledge, culture and governance is understood, respected, valued and empowered by laws and policies that concern them.

The AIATSIS Native Title Research Unit (NTRU), was established 25 years ago, following the High Court's historic Mabo decision. The NTRU is an enduring a partnership between successive Commonwealth Indigenous affairs portfolio agencies and AIATSIS. AIATSIS supports the native title sector and conducts research and analysis of the law, policy and practice of native title.

AIATSIS has been integrally involved in debates over reform to the NTA. Through longstanding events such as the National Native Title Conference and the AIATSIS National Indigenous Research Conference AIATSIS has promoted informed discussion and debate on legal, social, political, cultural and economic impacts of native title law. More specifically AIATSIS seeks to maximise the capacity of the NTA to fulfil the objectives set out in the preamble to recognise and protect the rights of Indigenous peoples to their traditional lands and waters.

The proposed amendments present a timely and necessary opportunity both to revisit some of the underlying assumptions of the native title system and to correct some of the practical difficulties in its operation. Whilst AIATSIS welcomes the proposed reconsideration of authorisation, agreement making and RNTBC governance and decision making, AIATSIS submits that native title was recognised within the common law of Australia and, as a result, its nature is affected by the traditions and habits of that body of law.[1] The developing common law of native title results in a evolving understanding of how native title operates as

[1] Strelein, LM. 2001. 'Conceptualising Native Title' 23 *Sydney Law Review 95.*

a system and in relation to other legal frameworks and the legislation must keep pace with developments in law and practice to ensure no native title group is disadvantaged.

AIATSIS would recommend that the focus of the amendments be expanded to also consider:

- The leasing of native title lands based on the non-extinguishment principle
- Measures to support the independence and capacity building of RNTBCs beyond regulation, compliance and reporting obligations
- Clarification of the operation of s 211 to extend to use of resources for any purpose
- Consideration of the creation of explicit enforcement mechanisms to drive ethical behaviour in negotiation
- Limit opportunities to contract out of or defer state government responsibility to negotiate with native title holders
- Reducing the burden of proof in consent and litigated determinations

Please find attached the AIATSIS submission which is based upon 26 years of research and practice by AIATSIS in the native title area. For any queries please contact Dr Lisa Strelein (lisa.strelein@aiatsis.gov.au).

Yours sincerely,

Mr Craig Ritchie

AIATSIS

Chief Executive Officer

28 February 2018

AIATSIS Submission

Introduction

Aboriginal and Torres Strait Islander peoples are the first peoples of this continent and as such have a unique and essential relationship to the lands and waters we now share as a nation. Retaining connection to country is critical to the identity and cultural continuity of Aboriginal and Torres Strait Islander societies and as a consequence, for the wellbeing and freedom of individual Aboriginal and Torres Strait Islander people. The laws and philosophical traditions, kinship, language and art are all connected through the relationship with lands and waters. As such, the rights of Aboriginal and Torres Strait Islander peoples are recognised under international law and reflected in Australia's obligations under the United Nations Human Rights framework, in particular, the *United Nations Declaration on the Rights of Indigenous Peoples 2007*.[2]

While just settlement and reconciliation with Aboriginal and Torres Strait Islander peoples remains an ongoing public policy discourse; native title exists as a transitional justice measure, which, while imperfect, attempts to achieve some measure of land justice. It remains one of the few avenues available for achieving genuine interest in and control over how traditional territories are responsibly managed into the future. Despite the challenges the native title system puts in front of Aboriginal and Torres Strait Islander peoples, the successful prosecution of native title claims is testament to the resilience and continued vibrancy of Indigenous peoples laws and culture.

Native title is now formally recognised over 34 per cent of the Australian land mass: with 12 per cent recognised as exclusive possession native title. As at the time of writing there were 338 registered determinations that native title exists, covering a total area of approximately 2,605,983 sq km and approximately 76,693 sq km of sea. There are 1196 Indigenous Land Use Agreements (ILUAs) on the Register of Indigenous Land Use Agreements.[3] These significant land holdings and interests are managed by over 179 registered native title bodies' corporate (RNTBCs).

Since 2006, the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) has been carrying out research on the structure and operation of RNTBCs noting that they are not appropriately equipped or supported via policy or resourcing to meet the increasing demands of managing the legal responsibilities associated with their native title land and waters. Moreover, some governments have been slow to change and adapt legislation, policies and programs to recognise the change in legal and governance arrangements in the management of land and waters or to harness the opportunity that native title recognition presents the Australian society and economy.

Despite this, RNTBCs have been very successful in asserting and implementing their land management aspirations via programs such as Indigenous Protected Areas and ranger employment programs. Indigenous ecological knowledge and Indigenous knowledges more broadly, have gained currency as an essential key to the management of Australian

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[2] United Nations General Assembly. *Declaration on the Rights of Indigenous People*. 2007 A/RES/61/295 (UNDRIP). See also, United Nations General Assembly *International Convention on the Elimination of All Forms of Racial Discrimination* 1966 Treaty Series 660, 195 (CERD); United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 1966, United Nations, Treaty Series 993, 3.

[3] National Native Title Tribunal: http://www.nntt.gov.au/Pages/Statistics.aspx (accessed 23/02/18).

landscapes.[4] These programs while outside of the native title system, heavily subsidise the effectiveness of the post determination management of native title lands and have been highly successful in providing a positive contribution to the Council of Australian Governments' Closing the Gap targets.[5]

Native title can be a foundation for cultural resurgence and renewal as well as contributing to socio-economic goals. Further, there is evidence that a shared values approach to Indigenous land management and administration has seen greater success with state government organisations, businesses and more recently private land holders. However, securing economic opportunities and investment in education and cultural renewal, outside of these land management programs have proved challenging for native title groups.

In contrast, the current native title legislative framework continues to reflect a false need to minimise the recognition of native tile and ensure 'certainty' for non-Indigenous development interests which results in conflict and the frustration of the interests of native title holders, their corporations and representatives. In fact, this also results in delays and uncertainty for state government parties and developers. AIATSIS supports reforms to the NTA that strengthen the recognition and protection of native title and embed native title as a secure, certain and strong interest within Australian property law, upon which to build culturally, socially and environmental sustainable economic development. To this end, AIATSIS does not support reforms that disempower Aboriginal and Torres Strait Islander peoples by weakening their legal right to determine the development of their lands.

The opportunities available to, and the support required by, RNTBCs will vary depending on the number of factors including the nature and extent of native title rights and interests, the remoteness of the determination area, the geographic dispersal of the native title holders and the level and type of future act or activity.[6] For present purposes, reforms to law and policy should be assessed in terms of how they maximise the economic and cultural potential of Indigenous held lands and waters, managed in accordance with the values and priorities of the Aboriginal and Torres Strait Islander peoples.

The NTA was intended to provide: a regulated system for the recognition and protection of native title; establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; whilst establishing a mechanism for determining claims to native title; and to provide for, or permit, the validation of past acts, and intermediate period acts, invalidated because of the existence of native title.[7]

The costs of prosecuting a native title claim remain extraordinarily high. There are 304 outstanding native title applications yet to be finalised with significant transactional costs

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[4] Blair, N 2008. 'Sweet potatoes, spiders & waterlilys – Privileging Australian Indigenous knowledges: Epistemological consequences of knowledge production' (PhD thesis University of Newcastle).

[5] Altman, J, Buchanan, G and Larsen, L 2007. 'The Environmental Significance of the Indigenous Estate: Natural Resource Management as Economic Development in Remote Australia.' CAEPR Discussion Paper No. 286/2007. (Centre for Aboriginal Economic Policy Research, ANU: Canberra.); Wohling, M 2009. 'The problem of scale in indigenous knowledge: a perspective from northern Australia. 14(1) *Ecology and Society'* 1; Memmott, P 1998. 'The Significance of Indigenous Place Knowledge to Australia Cultural Heritage' 4(16) *Indigenous Law Bulletin* 83, p9.

[6] Strelein, LM, JK Weir and T Bauman 2013. *Living with native title: The experiences of registered native title corporations* (AIATSIS Research Publications, Canberra), p47.

7 Section 3, *Native Title Act 1993* (Cth).

involved.[8] Given that substantial amounts of time and money are spent on proving or challenging the continuity of cultural practices; there is a question as to whether there is a convincing policy rationale for this. In addition, are the current legal requirements for establishing connection outpacing the policy approaches, thus requiring legislative clarification.

The current proposed amendments cannot achieve the stated aims of claims resolution and efficient future act management without the significant curtailment of native title rights and interests; increasing the transaction costs of conflict based dealings over native title lands and ultimately undermining shared objectives for social and Indigenous development outcomes.[9] The adversarial process of litigation is time consuming; unpredictable and involves significant costs. [10] While some state governments continue to apply extraordinary burden of proof and high 'trade-offs' to secure consent determinations, at the same time, the Federal Court of Australia is increasingly cognisant of its legislative responsibility to dispose of native title matters as a positive legal obligation. It is imperative that the rights of Indigenous peoples are not compromised in this drive for efficiency.

In the recent decision of *Western Bundjalung People v Attorney General of New South Wales* [11]Justice Jagot noted that the importance of ensuring that justice is achieved 'in a manner which is efficient, timely and at a cost which is proportionate to the importance and complexity of the matters in dispute'.

The Court noted that:

- The native title system is funded as a public resource (inclusive of Courts, State parties and the claimant group).
- The principle respondent – the Attorney General and state and territory agencies – are subject to the Model Litigant Policy as well as ethical conduct for individual lawyers. These standards are inclusive of the obligation to not cause unnecessary delay and to endeavour to avoid litigation wherever possible.
- The preamble and original intentions of the NTA should be central to driving the native title claims resolution process which should be driven by negotiation and agreement rather than contested litigation.
- The mediation provisions of the NTA 'disclose a statutory scheme by which the Commonwealth Parliament intends native title claims to be resolved by outcomes agreed between parties as a result of a process of negotiation in good faith if at all possible'.

AIATSIS is concerned that the proposed reforms to the NTA overlook broader structural issues present within the native title system including the variable and 'restrictive' standard

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[8] National Native Title Tribunal statistics: www.nntt.gov.au (accessed 26/02/18).

[9] Strelein, LM 2001 (op cit) 97 '*Arguably, it is not always necessary to have a considered and coherent theoretical foundation for public policy, so long as the outcomes are agreed*.' Citing C Sunstein 1995. 'Incompletely Theorized Agreements' *7 Ham LR* 108, p1733.

[10] McCann, L 1999. 'Induced Institutional Innovation in Response to Transaction Costs: The Case of the National Native Title Tribunal' (Agricultural and Resource Economics, paper presented at the 43rd Annual Conference of the Australian Agricultural and Resource Economics Society, Christchurch, New Zealand, 20-22 January, 1999) p5.

[11] *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992.

and burden of proof, the unregulated transaction costs of native title dealings imposed by these.[12]

The role of the court remains important in ensuring that the interpretation and application of the NTA achieves the objects set out in the preamble. The cultural competency of the Court in carrying out this task should be considered carefully. Professor Mick Dodson noted at the ceremonial sitting of the Federal Court of Australia for its 40th anniversary on 7 February 2017:

> For the Court to achieve meaningful outcomes, it is vital to maintain an experienced pool of Judges who are supportive of agreed outcomes wherever possible. Given that there are now a handful of Registrars continuing the mediation functions originally taken by the significant machinery of the Tribunal, it is critical that these roles remain specialist in nature and are sufficiently resourced.[13]

Where the courts are able to apply an intercultural in plural legal approach, the property law system is more than capable of creating mechanisms for dealing unique interests such as recognised native title laws and customs including the recognition of native title that implies the right to use resources for any purpose – including commerce and trade as per the decisions in *Brown* and *Akiba*.[14] In our view, a strong economic foundation for native title is in the national interest as well as achieving the objectives of Aboriginal and Torres Strait Islander peoples themselves.

In the same speech, Professor Dodson drew attention to the role of broader settlement frameworks:

> We need to move beyond thinking native title is the only solution. The increasingly legalistic nature of the native title system and limitations on outcomes achievable within it have prompted indigenous organisations, the Law Reform Commission and some governments to take action to find a better way. Recent focus is on new frameworks, alternative land justice processes and improved cohesion between different land management systems to provide practical benefits for Indigenous people. This will require the leveraging of the growing Indigenous estate in Australia into meaningful outcomes for Indigenous people.[15]

Justice Griffiths endorsed Professor Dodson's comments in: *In Lyndon on behalf of the Budina People v State of Western Australia*:[16]

As Justice Allsop recently stated:

> 'The judgments of the majority in *Mabo (No 2)* were an event in the history of this country that marked the recognition of an historical truth that laid a foundation for the commencement of the process of reconciliation and for the formation of a sense of

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[12] Kathleen Clothier 2006. 'Corporations (Aboriginal and Torres Strait Islander) Bill 2005: Positive or Negative Discrimination?' 10 *Australian Indigenous Law Reporter* 1, 11.

[13] Professor Mick Dodson Address: 40th Anniversary of the Federal Court of Australia Special Ceremonial Sitting of the Court Sydney, 7 February 2017, p 5.

[14] Macabe, Patrick 2015. 'Pilki and Birriliburu: Commercial native title rights after *Akiba'* 19 *Australian Indigenous Law Reporter* 64, 71-73.

[15] Professor Mick Dodson Address: 40th Anniversary of the Federal Court of Australia Special Ceremonial Sitting of the Court Sydney, 7 February 2017, pp 5-6.

[16] [2017] FCA 1214, [3].

> nationhood with its beginnings tens of thousands of years ago, and not merely 200 years ago in its modern manifestation. The emergence of that truth to the wider Australian society and its place in the experience of all Australians is not to be feared, nor is it to be seen as a diminishment of any one's history. It is, or should be, part of our lived experience.'[17]
>
> Substantive legislative reform must be in accordance with the preamble of the *Native Title Act 1993 (Cth)*. 'Accordingly, the NTA is clearly 'intended to achieve rectification of past injustice and current disadvantage so as "to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire".[18] 'Against this background, the duty to which we are all subject, to ensure that issues arising under the NTA are resolved according to law and in a manner which is efficient, timely and at a cost which is proportionate to the importance and complexity of the matters in dispute, is of the utmost importance.'[19]

Our specific responses to the proposed amendments (following) are made based on the abovementioned principles.

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[17] Allsop, Justice James 'The Role and Future of the Federal Court within the Australian Judicial System' [2017] *FedJSchol* 12.

[18] *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 at [13].

[19] *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 at [17]. The discharge of its duty by the State party is particularly critical. It is the State party which is the landed successor to the dispossession of Aboriginal peoples. It is the State party with whom the principal negotiations about native title claims must take place. It is within the power of the State party to agree to resolve a claim by an applicant without the need for contested litigation and in a manner which is timely, efficient and does not involve disproportionate resources. It is the State party which is subject not only to the duties imposed by the NTA and the Court Act but also by the obligations of a model litigant. Unless the State party is both vigilant about discharging all of its duties in good faith, recognising the objects of the NTA and its unique role, and committed to taking responsibility for driving sensible and fair outcomes in a timely manner, there is no real prospect of other parties or the Court being able to effectively discharge their and its duties. There is also no prospect of matters being resolved in a manner which is consistent with the objects of the NTA.

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

AIATSIS supports the amendment of the NTA to confirm the validity of section 31 agreements made prior to the *McGlade* decision in principle, to achieve consistency in approach.[20] We understand further discussion may required with NTRBs to finlaise this amendment.

QUESTION 2: What should be the role of the applicant in future section 31 agreements? Which of the three options, if any, do you prefer?

AIATSIS supports the adoption of Option 3: a majority of the members of the applicant are mandatory parties to section 31 agreements.

However, AIATSIS warns that allowing the applicant to execute the agreement by majority should not take the place of legitimate attempts to seek consensus. There should be clarity around what is required before the applicant can execute the agreement, both in relation to authorisation and attempts to reach consensus. An additional benefit of Option 3 is that the administrative burden is lessened. Option 3 allows for situations in which one or two members of the applicant are unable to sign while allowing the agreement to proceed.

QUESTION 3: Do you support the proposals to:

(a) allow claim group members to define the scope of the authority of the applicant,

AIATSIS supports proposal A1- to clarify that the claim group may define the scope of the authority of the applicant.

(b) clarify that an applicant can act by majority unless the claim group specifies otherwise,

AIATSIS supports proposal A2 that the applicant can act by majority unless the claim group specifies otherwise. AIATSIS notes that the amendment may create a binary between unanimous agreement and agreement by way of majority which excludes other kinds of decision-making processes which may be adopted by a claim group. For example, this binary may exclude decision-making processes which require a special majority or a majority of families, or where development or major impact is localised in a specific area that a family might speak for.

(c) allow the composition of the applicant to be changed without going through a section 66B reauthorisation process in prescribed circumstances, and/or

(d) impose a statutory duty on the members of the applicant to avoid obtaining a benefit at the expense of native title holders?

AIATSIS supports proposal A3 and A4. Currently the only way to resolve many issues relating to a member of the applicant is to remove applicants through the s 66B process and hold an authorisation meeting to replace the applicant, a process which takes considerable time and resources.

[20] See AIATSIS submission to Australian Senate Legal and Constitutional affairs committee (Native Title Amendment Indigenous Land Use Agreements Bill-2017 provisions) February 2017.

In the recent decision of *Gomeroi People v Attorney General of New South Wales* Rangiah J noted that the 'NTA does not prescribe rules for the conduct of authorisation meetings, or conditions for their validity'[21] and that decision making processes do not need to be over scrutinised in an 'overly technical or pedantic way' otherwise the ability of native title holders to pursue their native title rights and interests would be severely compromised.[22]

Further, in *Daniel v State of Western Australia,* French J noted that the 'beneficial construction of s 66B as a facultative provision [is] directed to maintaining the ultimate authority of the native title claim group.'[23]

In *Gomeroi People v Attorney-General of New South Wales*, Barker J outlined the following requirements of the provision:

- There is a claimant application.
- Each applicant for an order under s 66B is a member of the native title group.
- The person to be replaced is no longer authorised by the claim group to make the application and to deal with matters arising in relation to it.
- Alternatively, the person to be replaced has exceeded the authority given to him or her by the claim group.
- The persons making the application under s 66B are authorised by the claim group to make the application and to deal with matters arising under it.[24]

AIATSIS supports the ALRC *Connection to Country* Report findings that encourage succession planning for applicants who are unable or unwilling to act in native title matters so that the applicant may apply to the Federal Court of Australia for an order that a member be replaced by the specified person without re-authorisation.[25] The terms of the re-authorisation would need to be very clear and provided by the native title claim group by way of instructions set in the form of a resolution or affidavit evidence.

Another approach taken by claimants is referred to in the ALRC *Connection to Country Report* where attention is drawn to the Githabul people who authorised one applicant and then established a steering committee to assist the applicant in matters related to native title.[26]

AIATSIS advises caution over whether the amendment proposed will achieve the desired outcome without greater clarification of the meaning of 'unwilling to act' as well as the evidence required to prove this.

In *Gebadi v Woosup (No 2)* Greenwood J emphasised:

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[21] *Gomeroi People v Attorney General of New South Wales* [2017] FCA 1464, [46].

[22] *Gomeroi People v Attorney-General of New South Wales* [2017] FCA 1464 , [54].

[23] *Daniel v State of Western Australia* [2002] FCA 1147 [16].

[24] *Gomeroi People v Attorney General of New South Wales* [2017] FCA 1464 See Rangiah J at [35] referring to *Daniel v State of Western Australia* [2002] FCA 1147 [17].

[25] [10.93].

[26] ALRC 2016, ALRC 2016. *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report 126), at [10.41] referring to *Close on behalf of Githabul People #2 v State of Queensland* [2010] FCA [11].

> Those individuals who become or who are constituted as *the applicant* prosecute each application for and on behalf of all members holding the common or group rights and interests comprising the particular native title or, where relevant, those persons comprising the compensation claim group (apart from revocation or variation applications). In doing so, the Act contemplates that those individuals constituting the applicant act in the *interests* of the group members and also in their own interests but, in respect of their own interests, they do so only in their capacity as *members* of the group, and not in furtherance of their private interests which in any way conflict with the interests of the relevant group. These arrangements under the Act reflected in ss 13 and 61, and all of the provisions of the Act relating to those sections, have been enacted by the Parliament of Australia in order to give effect to the *Preamble* to the Act and the *main objects* of the Act. [27]

In *Gebadi* the Court considered that it would be inconsistent with the statutory scheme for some persons (amongst a group of persons constituting an applicant for the purposes of a s 61 native title determination application) to enter into a section 31(1)(b) agreement with a person or entity and not disclose the fact of it to the claim group or the other persons constituting the applicant; and cause payments made under the agreement to be applied and used for the personal benefit of those persons within the applicant who had struck the agreement. The payments under such an agreement do not become the 'applicants' money' personally. The payments retain their character as payments made to and for the benefit of those persons who hold the common or group rights and interests comprising the particular native title as claimed. An applicant, when exercising any aspect of the right to negotiate and bring into existence a section 31(1) (b) agreement, does so as applicant for those persons who hold the common law group rights and interests comprising the native title as claimed.

Conversely acting against the instructions and will of the majority of the native title claim group is contrary to the duties of the applicant.[28] AIATSIS notes however that a number of equitable defences and Indigenous Law defences may be relevant to any such inquiry. [29]

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[27] [2017] FCA 1467, [20].

[28] Note the contrast here between the fiduciary duty arising in this instance versus the fiduciary relationship a trustee holds to beneficiaries. In the latter case, the trustee is expected to act on its own judgement for the benefit of the beneficiaries. For Trustee RNTBCs this common law relationship is tempered by a statutory responsibility to consult with the common law native title holders on 'native title questions'.

[29] In *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group Pty Ltd* [2017] FCAFC 141, the Full Court (Dowsett, Greenwood and White JJ) considered the question of whether particular parties owed fiduciary obligations to another. In determining that question, the Court analysed the principles to be applied, within the relevant factual matrix, in answering that question. Greenwood J (with White J in agreement) identified the principles to be applied. Dowsett J differed as to the application of the principles to the facts in issue but did not depart from the expressions of principle of Greenwood J (and White J in agreement), although his Honour set out the relevant principles in his own terms. At [265] Greenwood J quotes Dr Paul Finn with approval:

> Dr Finn also observes at p 93 that the fiduciary question is "essentially factual in character" and "if we entrust our interests to another person's care, we should be entitled to expect that that other will act in our interests – at least where that other knows or has reason to know we are so doing and apparently accepts this". Dr Finn also observes at p 93 that the difficulty in examining the "factual phenomena in relationships" lies in isolating whether "something more" is present in a relationship so as to characterise a person as a "fiduciary" of another. Although Dr Finn was examining these matters of "relationship characterisation" in the context of whether something more is present between parties to an existing contractual relationship so as to render one person the fiduciary of another, the quoted opinions expressed at pp 85, 87 and 93 go to matters of essential principle which determine the question of appropriate characterisation in all the circumstances of the essential forensic factual enquiry.

Greenwood J further observed: [269] What must be shown, in the writer's view, is that the actual circumstances of a relationship are such that one party is entitled to expect that the other will act in his interests

AIATSIS supports an amendment – to confirm the fiduciary nature of the applicant's role. As the common law and practice in this area develops, a clear statement in legislation that the role of applicant gives rise to a fiduciary duty can play an educative role and gives an indication of the remedies available if the duty is breached.[30] However, AIATSIS does not support a prescriptive obligation as set out in the ALRC report which could fetter the development of the law of equity by the courts in a manner appropriate to the unique nature of native title as a societal interest emerging from an alternative legal system. There is a risk that an overly prescriptive approach to this matter could result in a strict statutory interpretation approach that fails to adequately incorporate the laws and decision making systems of the society to whom the duty is owed.

Currently, the applicant's duty relies on their relationship with native title holders in equity. However, the jurisprudence is in its infancy with Greenwood J's recent finding in *Gebadi v Woosup*[31] establishing the first precedent in this area. [32] In that case, the Court determined that the applicant owes fiduciary obligations to the native title claim group. That is, the applicant 'stood in a fiduciary relationship, often described as a relationship of 'trust or confidence' with the members' of the native title claim group.[33] The members of the claim group were 'entitled to expect that [the applicant] would act in the best interests of the claim group in exercising any of the functions, powers, responsibilities or discretions conferred upon the applicant.'[34]

Greenwood J articulated that the obligations owed by the applicant to the native title claim group were:

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in and for the purposes of the relationship. Ascendancy, influence, vulnerability, trust, confidence or dependence doubtless will be of importance in making this out, but they will be important only to the extent that they evidence a relationship suggesting that entitlement. The critical matter in the end is the role that the alleged fiduciary has, or should be taken to have, in the relationship. It must so implicate that party in the other's affairs or so align him with the protection or advancement of that other's interests that foundation exists for the "fiduciary expectation". Such a role may generate an actual expectation that the other's interests are being served. This is commonly so with lawyers and investment advisers. But equally, the expectation may be a judicially prescribed one because the law itself ordains it to be that other's entitlement. This may be so either because that party should, given the actual circumstances of the relationship, be accorded that entitlement irrespective of whether he had adverted to the matter or because the purpose of the relationship itself is perceived to be such that to allow disloyalty in it would be to jeopardise its perceived social utility.

[30] AIATSIS refers to the consequences for breach of authority as set out in paragraphs [10.75] to [10.80] of the ALRC *Connection to Country Report*. [10.80] Existing remedies available via the law of agency or in equity include: account of profits (as in *Gebadi* referred to in these submissions*)* and restitution.

[31] [2017] FCA 1467, 31.

[32] Strelein, LM 2001 'Conceptualising Native Title' 23 *Sydney Law Review* 95, 96 explains precedential development of the law:

> The Mabo decision did not exhaustively define the scope and nature of native title, nor would the High Court have intended it to do so. This is not the method of 'judge made law'. Unlike legislation, which seeks to lay down a law of general application and exhaustively set out the limits of its application, the common law develops on a case by case basis. A 'judge made law' or common law doctrine develops over time when a number of cases have arisen dealing with similar issues and which have been treated under the same rule. As difficult circumstances arise, the doctrine is refined or modified in order to do justice in the particular circumstances. Each case forms a 'precedent', which will be referred to in future cases. By referring back to past cases, and treating like cases alike, the law achieves consistency and a coherent doctrine emerges.

[33] *Gebadi v Woosup* [2017] FCA 1467, 31.

[34] *Gebadi v Woosup* [2017] FCA 1467, 31.

> (a) an obligation to not place themselves in a position where their private or personal interests came into conflict with the interests of the members of the Ankamuthi native title claim group: a conflict of interest and duty;
>
> (b) an obligation to not pursue and secure a personal benefit: a conflict of interest and duty;
>
> (c) an obligation to not make a profit from their position of trust unless expressly permitted to do so with the informed consent of the Ankamuthi native title claim group: a conflict of interest and duty;
>
> (d) an obligation to not place themselves in a position where their personal interests or duties conflicted with duties owed to the Ankamuthi native title claim group: a conflict of interest and duty, and a conflict of duty and duty.[35]

In finding the existence of such a duty, His Honour reasoned that the applicant 'undertook or agreed to act for and on behalf of and in the interests of the native title claim group in the exercise of any and all powers, responsibilities and discretions affecting the interests of the claim group in a legal or practical sense.'[36]

Clarification in the legislation that the applicant owes a fiduciary duty to the native title group without a prescriptive definition will provide guidance to the applicant to be on notice that the role is one of trust and confidence and not a personal appointment for individual gain.

However, the Courts and Indigenous decision makers must have the capacity to develop a jurisprudence that is cognisant of the intersection of two legal systems and to accommodate the unique nature of native title. This includes, for example, the need to take into account the fact that the beneficiary is a society not a group of individuals, and as such has an unknown and intergenerational character; or that there may be responsibilities under law and custom that direct particular actions that may impact the exercise of a fiduciary duty as it may be interpreted under existing common law.

In *Wik Peoples v Queensland* (1996), Brennan CJ considered submissions of the Wik People which asserted the existence of a fiduciary duty owed by the Crown to the Indigenous inhabitants of the leased area. Although that was the context of the discussion by Brennan CJ, nevertheless the statement of general principle remains important.

Brennan CJ stated that, In order to establish the existence of a fiduciary duty:

> …[i]t is necessary to identify some action or function the doing or performance of which attracts the supposed fiduciary duty to be observed. The doing of the action or the performance of the function must be capable of affecting the interests of the beneficiary and the fiduciary must have so acted that it is reasonable for the beneficiary to believe and expect that the fiduciary will act in the interests of the beneficiary (or, in the case of a partnership or joint venture, in the common interest of the beneficiary and fiduciary) to the exclusion of the interest of any other person or the separate interest of the beneficiary.[37]

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[35] *Gebadi v Woosup* [2017] FCA 1467, 31.

[36] Gebadi v Woosup [2017] FCA 1467, 31.

[37] *Wik Peoples v Queensland* (1996) 187 CLR 1, at 95-96.

In *Mabo (No 2)* Deane and Gaudron JJ observed that it is preferable 'to recognise the inappropriateness of forcing native title to conform to traditional common law concepts and to accept it as *sui generis* or unique'.[38] The sui generis nature of native title must mean as a consequence that the 'fiduciary principle is informed by the particular set of cultural experiences and the socio-economic conditions that underpin such experiences'.[39]

The content of the native title estate and the laws governing its enjoyment in the form of the determination will define the system of title management. The content of native title is defined by the law and custom of the native title group. Australian Courts rightly reject any role in determining the distribution of rights, membership or enjoyment of native title benefits - this is a matter for the laws of the particular group. 'The title was described as sui generis, or unique, because it reflected the rights and entitlements of Indigenous peoples under their own laws.'[40]

AIATSIS submits that further legislation and regulation does not necessarily guarantee certainty. While we have long supported the inclusion of a clarificatory provision, an overly prescriptive approach to defining the obligations of the applicant to the native title group would fail to appreciate how complex defining such responsibilities and obligations becomes and how particular to the factual circumstances and cultural perspectives these situations are.

The recognition of a fiduciary relationship between applicant and the native title society will not eliminate dispute or contested decisions. Examining each situation on its own facts and establishing who the appropriate cultural arbiter will be is a necessary condition. The arbiter in this situation should not necessarily be an anthropologist, a lawyer nor a judge but the community itself in a structured and agreed, culturally legitimate form of Indigenous dispute resolution. AIATSIS is strongly supportive of additional resources and support for native title groups and RNTBCs that build strong governance and decision-making structures and invest in the strengthening and renewal of traditional laws and governance regimes. Through investing in governance and arbitral roles of Aboriginal and Torres Strait Islander institutions, the use of the courts can, as it should, be a last resort.

QUESTION 4: 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?

Alternatively, does the native title system currently allow for adequate flexibility in agreement-making?

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)?

AIATSIS does not support proposals B1 or B3 - to allow PBCs to enter contracts in relation to future acts and compensation without consulting with or obtaining the consent of the native title group.

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[38] *Mabo v Queensland* (no 2) (1992) 175 CLR 1 at 89.

[39] C Mantziaris and D Martin (2000) *Native Title Corporations* (Federation Press Sydney, 1999 pp190-191).

[40] Strelein, LM 2001 'Conceptualising Native Title' 23 *Sydney Law Review* 95;98.

AIATSIS submits that further consideration of the creation of explicit enforcement mechanisms to drive ethical behaviour in negotiation is a priority.

In the recent decision *Charles, on behalf of Mount Jowlaenga Polygon # 2 v Sheffield Resources Limited* [2017] FCAFC 218 at [3] North and Griffiths JJ restated the objects and purposes of the legislation giving particular emphasis to the future act provisions of the legislation given the subject matter of the appeal proceeding:

> Subdivision P of Div 3 of Pt 2 of the *NTA* contains provisions relating to '*the right to negotiate'*. The importance of these provisions for native title parties has long been recognised, as has the significance of the correlative obligation on other persons to negotiate in good faith.[41]

This contracting process allows parties to avoid the ILUA and associated authorisation processes and consequently the connection back to the native title group. A process which affects native title rights and interests to the extent possible under these processes, including contracting in relation to future acts and compensation, should be not be permitted without consultation with and consent from the native title holders. Existing provisions and regulations for standing consents provide sufficiently for expedited decision-making

AIATSIS does not support proposals B2 or B4. These proposals would increase the negotiating power of the State in a context where native title holders are already in a position where they cannot walk away from negotiations and a continuing inequality of bargaining position often persists.

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

In general AIATSIS supports streamlined and improved agreement-making processes, as long as the process clearly supports improvements for all parties to the agreement and, in particular, native title claimants and holders.

As the recently retired chairperson of AIATSIS Professor Mick Dodson has stated:

> 'There were many aspects left to be resolved of the complex *Native Title Act 1993* by the common law and the Courts rather than the legislature. It was also clear from the outset in the preamble and provisions of the Act and the mandate of the Tribunal, that outcome by agreement rather than litigation was the preferred approach.'[42]

The technical amendments proposed, while important, do not address the main issues in agreement making in native title, which stem from the inequality of bargaining position between Indigenous and non-Indigenous parties to the agreement due to the right to negotiate, but without a right to say no. An alternative solution, which has been raised previously, is to allow native title claimants or holders to desist from negotiations where they are not receiving appropriate benefit or where parties have failed to act in good faith (or in the case of government failed to uphold the honour of the Crown and their model litigant obligations).

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[41] See *North Ganalanja Aboriginal Corporation and anor for and on behalf of the Waanyi People v The State of Queensland and Ors* (1996) 185 CLR 595 at 616 per Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ.

[42] Professor Mick Dodson Address to Ceremonial sitting of the Federal Court of Australia to mark its 40th anniversary: 7 February 2017: p3

In *Charles, on behalf of Mount Jowlaenga Polygon # 2 v Sheffield Resources Limited,* North and Griffiths JJ stated:

> The scheme of the relevant provisions of the Act recognises Parliament's intention that there must be a good faith period of negotiation in relation to the future act before there is any arbitral determination in relation to the future act. The period of six months provided for in s 35 of the Act ensures that there is reasonable time to enable those negotiations to be conducted. At the same time it permits the matter to be taken forward at the end of the six month period by way of an arbitral determination if the negotiations do not result in agreement. The ongoing protection provided for 'negotiation parties as defined by s 30A of the Act is that if any such party satisfies the arbitral body, in this case the Tribunal, that another negotiation party (other than the native title party) did not negotiate in good faith, the arbitral body must not make the determination on the application: s 36(2).[43]

AIATSIS respectfully disagrees with the Court about the protection provided by the NTA and refers to Professor Ciaran O'Faircheallaigh's observations that respondent parties know that if they fail to reach an agreement with Indigenous claimant parties after six months they can approach the Tribunal and have the future act proceed usually in the form of a lease being granted as more often than not, the native title party is not able to demonstrate the sufficient evidentiary requirement to meet the objection requirements.

This further entrenches the inequality of bargaining position of the negotiation parties in favour of the respondent and increases vulnerability in negotiations for resource deprived Indigenous parties.[44]

AIATSIS does not support any proposal which reduces the period for objection for ILUAs.

AIATSIS does not oppose proposal C1 - Allowing body corporate ILUAs to cover areas where native title has been extinguished.

AIATSIS does not oppose proposal C2 - Allowing minor technical amendments to be made to ILUAs without requiring re-registration.

AIATSIS does not oppose proposal C3 - Removing the requirement that the Registrar give notice of an area ILUA if it is not satisfied that the ILUA could be registered. AIATSIS agrees that this amendment may reduce unnecessary compliance and confusion.

AIATSIS does not support proposal C4 - Removing the requirement of PBCs to consult with NTRBs on native title decisions such as prior to entering an Indigenous Land Use Agreement in the PBC regulations.

Amendment C4 relates to informed consent and PBCs being able to make the best decisions in agreement making for native title holders and future generations.

While it may not always be suitable for a PBC to be consulting with the local NTRB, PBCs are rarely adequately resourced to obtain independent legal advice to fulfil their obligation to

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[43] [2017] FCAFC 218, [21].

[44] O'Faircheallaigh, Ciaran. 2004 'Evaluating agreements between Indigenous Peoples and resource developers' (Chapter 18) in Langton, M; Palmer, Lisa; Tehan, Maureen; Shain, Kathryn (eds) *Honour Among Nations?: Treaties and Agreements with Indigenous People* (Melbourne University Press, Carlton) pp303-328.

their native title holders.[45] This amendment does not address the financial burden of obtaining suitable legal advice faced by PBCs when negotiating agreements.

The proposed amendment does not address the broader issue of PBC resourcing. An alternative would be for the costs of the agreement, including legal advice, for the RNTBC to be covered by the respondent party, which is common practice but not mandatory. This can also be enforced if PBCs have the right to leave the agreement while retaining rights to their land.

AIATSIS supports proposal C5 - Amending the NTA to ensure that the future acts regime applies to land and waters to which 47B applies to disregard previous exclusive possession on vacant crown land.

AIATSIS does not support proposal C6 as currently worded - Amending section 24EB of the NTA to allow parties to an ILUA to agree that the ILUA does not provide compensation for a future act.

Central to this proposal is the issue of who is responsible for compensation and relies on an effective Court proceedings or a future regime for obtaining compensation from the State. This proposal seems to allow parties to the ILUA to avoid resolving State liabilities.

There is also an issue in relation to taxation as monies and other benefits received through an ILUA are currently deemed non-assessable, non-exempt (NANE) income and this amendment may break this nexus for a class of ILUAs.[46]

AIATSIS does not support proposal C7 – Consideration as to the possible amendment of s 199C of the NTA to clarify that removal of details from an ILUA from the Register does not invalidate a future act that is the subject of the ILUA is required.

This proposal is confusing - if the ILUA is no longer valid, this would suggest that the future act is no longer valid.

This proposal appears to remove authorisation from the process. AIATSIS submits that: 'At a policy level the involvement of the broader claim group in the negotiation and approval of the claim group is crucial both because of the potential impacts of development and because of the often contentious questions around financial benefits. Accordingly authorisation is as important to the agreement making process as the claims process.'[47]

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[45] Also note the comments from the Court in the recent decision *in* *Akiba on behalf of the Torres Strait Regional Seas Claim v State of Queensland* [2017] FCA 1560: When NTRBs do obtain advice at great expense to discharge their functions under the legislation. At paragraph [100] 'The Court examined its file in relation to the TSRA's funding of barristers and solicitors and found that in 2017, the TSRA funded at least 14 different barristers, many of whom are Senior Counsel, and law firms, on behalf of itself and Mr Akiba, and in one instance, on behalf of one of its lawyers. The Court was told during the 18 December CMH that the TSRA had sought its own legal advice from Senior Counsel about steps required for the authorisation process. The Court considered this to demonstrate 'the preparedness of some individuals within the TSRA to continue to spend significant amounts of public funds to further its own agenda and purposes (whatever those might be), while denying funding to claim group members' (at [102]) per Mortimer J. Funding and expenditure of public monies are always at the forefront of NTRB/SPs.

[46] See paragraphs [10.97] to [10.99] ALRC's *Connection to Country Report*

[47] Duff, Nick *Authorisation and decision making in native title* (AIATSIS Research Publications, Canberra, 2017) 161.

AIATSIS does not support proposal C8 – Further consideration as to the possible amending s 30A of the NTA so that Government parties are not required to be a party to s 31 agreements, for example, an agreement about mining is required.

AIATSIS submits that whilst there are practical benefits to making this amendment, there are also reasons as to why the government should remain a party to s 31 agreements. The government is the party who are giving the license and consequently are the party who must obtain free, prior and informed consent. The government, where they are not a party to the agreement, are breaching their duty to obtain free, prior and informed consent. The government should not be able to delegate their duty to consult.

This proposal reduces to negotiations to a private legal sphere instead of affording the sovereign to sovereign relationship between the Australian Government and native title claimants/holders.

Government must be a party if the agreement provides for extinguishment of native title rights by surrender, for validation of an invalid future act, or for the changed effect on native title of an intermediate period act, and may be a party otherwise.[48]

AIATSIS does not support proposal C9 – Further consideration of options for amending the objection process created by s 24MD(6B), which applies to some compulsory acquisitions of native title and the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility is required. There should be a presumption of an objection, and where an objection exists it should be appropriately determined.

AIATSIS does not support proposal C10 – Consideration of options to encourage electronic transmission of notices. AIATSIS supports the encouragement of electronic transmission of notices however these cannot be the only comprehensive form of notice at this point in time - electronic and paper notices are still required. There remains an obligation on the State to meet the standards of free, prior and informed consent including by ensuring that they are reaching the widest possible audience. Access to services including the Internet still eludes some regional, rural and metropolitan Aboriginal and Torres Strait islander individuals and communities. [49]

AIATSIS submits that Internet access (including download limit) is unreliable in many parts of Australia, particularly on some remote native title lands. Relying on internet alone in these areas would be a breach of free, prior and informed consent standards. Access to services is a critical component of social justice rights particularly for remote and regional communities and whilst the aim is to close the gap: the gap is ever increasing between Indigenous and non-Indigenous peoples in terms of access to services. [50]

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[48] Smith, DE 1998. 'Indigenous land use agreements: the opportunities, challenges and policy implications of the amended Native Title Act' Centre for Aboriginal Economic Policy Research, Australian National University, Canberra (Paper No. 163/1998).

[49] *In Charles, on behalf of Mount Jowlaenga Polygon # 2 v Sheffield Resources Limited* [2017] FCAFC 218 at [7] North and Griffiths JJ state that: 'As a result of section 29, before the future act is done, the Government party must give notice of the act in accordance with that provision. [Emphasis added] Notice must be given to various persons, including any registered native title claimant in relation to any land or waters that will be affected by the act. Any such claimant is included in the definition of a "native title party" in s 29(2). Notice must also be given to **the public and, if the doing of the act has been sought by a person (such as the grant of a lease for which the person has applied), notice must also be given to such a person, who is defined as "a grantee party" (see s 29(2) (c)).'**

[50] 'Much of the failure of service delivery to Aboriginal and Torres Strait Islander people and our communities, and the lack of sustainable outcomes, is a direct result of the failure to effectively engage with Indigenous people -

It may be possible to amend the NTA to provide a positive duty to ensure appropriate methods of communication that meet a standard of reasonableness in the circumstances of the group. But this may lack the clarity required by States and increase litigation on the meaning of 'appropriate' or 'reasonable' in any circumstance.

AIATSIS supports the introduction of penalties for a failure to notify or meet notification standards.

In the *Lardil Peoples v Queensland*[51], the Court found that future acts usually involve a government authority and it is the relevant government authority which is bound to comply with the notification and consultation requirements. There is no reason to assume that the relevant government authority will not comply with these requirements in the ordinary course.[52]

AIATSIS supports proposal C11 - Amending s 251A to clarify who must authorise an ILUA as a person or persons who may hold native title, being a person or persons who can establish a *prima facie* case to hold native title.

QUESTION 6:

(a) Should there be a Register of 31 agreements?

AIATSIS does not support a register of s 31 agreements in a form similar to registrion of ILUAs. We acknowledge that a publicly listing of agreements without an administrative decision-making process (eg without requirements for notice and objections) may be acceptable to native title holders and claimants.

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

AIATSIS does not support the proposals in (a) and (b).

There is a large administrative burden in having both a Register of s 31 agreements and in making ILUAs and other agreements publicly available. A large amount of work would be required to redact any sensitive, personal, or cultural information from each agreement and the maintenance of publicly available registers would certainly increase transaction costs.

Further, those affected by an ILUA or s 31 agreement will already be a party to the agreement and have access to the agreement. The only exception to this may be native title holders, who are not themselves party to the agreement, but will gain access to the terms of the agreement through the authorisation process required to take place before the agreement is entered into.

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and of the failure to invest in building the capacity of Indigenous communities to participate in processes that would enable us to realise our fullest potential.' Mr Mick Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010 'Social Justice and Aboriginal and Torres Strait Islander peoples access to services': Paper delivered to the QCOSS Regional Conference: Building a Better Future—themed around improving service delivery for regional and remote communities.

[51] [2001] FCA 414; (2001) 108 FCR 453 at [120].

[52] See *BHP Billiton Nickel West Pty Ltd v KN (Deceased) (TJIWARL and TJIWARL #2)* [2018] FCAFC 8 at [38] – [40] per North, Dowsett and Jagot JJ.

Further, the current system which results in the publication of personal details and membership registers on the Office of the Registrar of Indigenous Corporations (ORIC) should be repealed.

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?

AIATSIS supports proposal D1 - to allow native title claim groups and native title holders to determine decision-making processes for themselves with access to further support and external mediation and arbitration options appropriate to their needs.

At a minimum, these provisions should be changed according to the proposal in D1 to allow native title claim groups and native title holders to determine their decision making processes. However, consideration should also be given to recasting the relevant provisions to recognise that native title holders have a right and a responsibility to determine how they will be consulted. Native title claimants and native title holders should be empowered to select appropriate decision making processes and provide instructions to their PBC and/or NTRB to act in accordance with those processes.

In *Kum Sing on behalf of the Mitakoodi & Mayi People #5 v State of Queensland* [2017] FCA 860, Reeves J made the following observations:

> The authorisation meeting issue
>
> - One of two forms of decision-making process are to be followed when a native title claim group seeks to authorise an applicant. They are: the form that exists under the traditional laws and customs of the native title claim group concerned or, if that traditional form does not exist, whatever alternative form of decision-making that is agreed to, and adopted by, the members of the native title claim group.
> - The Court held that s 251B of the NTA does not contain any requirement that a native title claim group must hold a meeting in order to authorise a person or persons to make a native title determination application on its behalf. It follows that s 251B does not require the agreement to, and adoption of, the alternative decision-making process, nor does it require the authorisation decision that follows the decision making process so adopted, to be made at a meeting.
> - Nonetheless, the practice of convening and conducting meetings for the purposes of authorising an applicant, or replacement applicant, under s 251B has become the most practical and means of achieving that outcome: see *Burragubba on behalf of the Wangan and Jagalingou People v State of Queensland* [2017] FCA 373 (Burragubba) at [29].
>
> In particular, the provision should make no reference to 'traditional' decision making processes. Aboriginal and Torres Strait Islander peoples should not be bound by older (traditional) decision making rules and regulations during agreement making processes that are often already weighted towards favouring non-Indigenous parties.

It is not the right of the Australian State, but the right of native title holders to determine their own governance, including choosing their own culturally appropriate decision-making process. Native title holders should not have to scrutinise and label their decision-making processes as 'traditional'. Removing this requirement may assist in reducing intra-group

disputes about what exactly constitutes a traditional decision-making process and whom is the authoritative arbiter in such a situation.

The removal of references to 'traditional' decision making processes does not discredit the validity of decision-making under Aboriginal and Torres Strait Islander law and custom, rather it provides choice for native title claimants and native title holders. In the ALRC *Connection to Country Report* at [10.51] – [1054] attention is drawn to the difficulties that this presents to claim groups with the ALRC recommending that a group should be able to choose its own decision making process.

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

AIATSIS does not support proposal E1. AIATSIS promotes the retention of the requirement for the applicant to agree to participate, as consistent with the beneficial purpose of the NTA.

AIATSIS supports proposal E2 - to provide the National Native Title Tribunal with the power to summon a person to appear before it in a native title application inquiry.

As stated in AIATSIS' submission to the ALRC Discussion Paper:

> Inquisitorial tribunals with the power to summon persons arguably operate more effectively because the fact finding mission is not dependent on the willingness of parties to engage. Although parties rarely wish to be seen as uncooperative with or obstructive to the arbitral tribunal and usually will wish to comply when they reasonably can, the capacity to compel attendance arguably sets the tribunal apart from dispute resolution activities, such as mediation. Without the power to compel attendance by persons identified by the tribunal as important to its fact-finding mission, the effectiveness of the tribunal can be subverted. However, it is also arguable that compelling attendance may promote a disingenuous engagement by parties that also subverts the effectiveness of its processes.[53]

AIATSIS supports proposal E3 - to permit the making of a determination that native title co-exists with a pastoral lease held by the claimant where claimants are members of a company that holds the pastoral lease.

AIATSIS supports proposal E4 - to allow a PBC to be the applicant on a compensation claim.

AIATSIS supports proposal E5 - to clarify that the decision to make a compensation application is a native title decision.

AIATSIS supports proposal E6 - to 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. AIATSIS proposes that the new section should apply to all Crown land where there is no other current interest held or current occupant, in other words to where the Crown holds radical title.

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

[53] AIATSIS Submission to the ALRC Discussion Paper 82, February 2015, p. 16.

Many of the proposals raised here have been previously addressed in the recent *AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006* submitted in October 2017[54].

AIATSIS does not support proposal F1 - That the Registrar's compliance powers 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.

The Registrar already has extensive powers to conduct examinations and investigations into the affairs of CATSI Corporations where there has been misconduct or breaches of legal or equitable obligations.

Rather than punitive measures, AIATSIS supports broader education of the fiduciary duty PBCs have to the current and future generations of native title holders. This may include: guides and policies that facilitate effective decision making and articulate the differences between mediation and facilitation and arbitration.

AIATSIS does not support proposal F2 - that the CATSI Act be amended to provide a power for the Registrar to refuse to amend a PBC's rulebook in circumstances where the amendment would result in the PBC no longer meeting the requirements of regulation 4(2) of the PBC regulations.

AIATSIS supports the Registrar having an advisory and educative role, rather than increasing regulation and does not support the Registrar having the power to refuse to register or amend constitutions. There is currently no restriction on ORIC in advising PBCs on whether they are compliant or not, including on the membership requirements in constitutions. As AIATSIS suggested in the CATSI Act submission, there is a need for effective resourcing, education and training for PBCs to comply with consultation and consent provisions.[55]

AIATSIS does not support proposal F3 – The introduction of a requirement that the dispute resolution provision in the PBC rulebook specifically addresses arrangements for resolving disputes about membership with respect to non-members.

While AIATSIS agrees that it is problematic for the CATSI Act not to include dispute resolution provisions between members and non-members who are still native title holders, AIATSIS supports PBCs being able to choose the dispute resolution process that works best for them rather than having to engage with a prescriptive legal or litigated process.

PBCs should be better resourced to design their own policies and procedures for dispute resolution, which may include reference to one or more of the following:

- Internal structures, such as an elders council or arbitration council
- Using an external mediator/facilitator

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[54] AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006 October 2017

[55] Paragraph 12.2.2, p. 31 of AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006 submitted 31 October 2017.

- Seeking assistance from the NTRB, such as access to research
- Utilising ORIC or the NNTT[56]

AIATSIS does not support proposal F4 - Remove the director's discretion to refuse membership to a person who meets the PBC's membership criteria other than in exceptional circumstances. Our reasons are set out in CATSI submission dated October 2017.

AIATSIS supports approval of membership if consistent with the claim description but not automatic membership. Membership of the common law native title holding group is a matter of the operation of law; whereas membership of the corporation is a matter within the powers of the directors of a corporation and that is dealt with by way of application.[57]

Model rules or formal advice could include a rule that directors cannot unreasonably deny membership to a native title holder; however, this would not remove the membership dispute where membership of the group in accordance with law and custom is the material fact in dispute.

AIATSIS supports director's discretion in particular circumstances with written reasoning and policies and procedures in place that support a path for recourse if the individual or group of individuals do not agree with the written reasoning provided as a suite of internal dispute resolution processes.

AIATSIS does not support proposal F5 - Limiting the grounds for cancellation of PBC membership to ineligibility or misbehaviour: Requiring the process for cancellation of membership to include a general meeting.

As stated in the AIATSIS 2017 CATSI Act submission on this matter:

> There are circumstances in which a corporation may wish to suspend or expel a member for disciplinary reasons (including consistency with cultural disciplinary action).82 The circumstances in which a common law holder ceases to be a member is a matter for the relevant RNTBC, their dispute resolution procedures and then failing internal resolution- either arbitral or judicial relief. However, it should be clear that removal as a member of the corporation may not affect the individual person's status as a member of the native title holding group and whatever rights or interest the person may hold under traditional law and custom, including being involved in native title decisions. These interactions between legal regimes can be managed through policies and procedures and development of RNTBC governance practice, including training and education specifically directed to RNTBC governance.[58]

AIATSIS does not support proposal F6 - it is recommended that the CATSI Act be amended to empower the Registrar to amend a CATSI Corporation's Register of Members, where, following appropriate consultation with the Corporation, the Registrar considers in

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[56] p. 33 of AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006 submitted 31 October 2017.

[57] Paragraph 12.2.4, p. 33 of AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006 submitted 31 October 2017.

[58] Paragraph 12.2.5, p. 34 of AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006 submitted 31 October 2017.

reasonably necessary to ensure that rulebooks are complied with in relation to the revocation of membership of individuals.

As stated in the AIATSIS 2017 CATSI Act submission on this matter:

> AIATSIS does not agree that the Registrar should have the power to amend the register of members of an RNTBC to reflect the description of native title holders in the relevant native title determination. Attempting to include all of the common law native titleholders as members of the RNTBC would be impracticable and potentially even impossible. As noted above, attempts to do so may lead the RNTBC to confuse the membership and processes of the RNTBC with the membership of the group of native titleholders and the consultation and consent requirements. This could in turn expose purported native title decisions to being deemed as having no effect. For example, a decision made by a general meeting of an RNTBC may not satisfy the consent and consultation requirements of the RNTBC Regulations which must be addressed to all of the common law holders.[59]

In the ALRC *Connection to Country* report at [10.119] to [10.124] reference is made to the 2006 AIATSIS Indigenous Facilitation and Mediation Project, which identified a need for an accredited network of Indigenous facilitators, mediators and negotiators. [60] AIATSIS supports the ALRC recommendation at paragraph [10.124] for a national Indigenous dispute management service.

AIATSIS does not support proposal F7 - It is recommended that the CATSI Act be amended to require PBCs to set up and maintain:

1. A register of native title decisions
2. A register of Trust Money Directions

While AIATSIS acknowledges that keeping those registers may be of internal use to PBCs, making this a legal requirement is not realistic on the basis that PBCs are in the large part poorly resourced to discharge their administration and reporting obligations. Increasing regulatory and administrative burdens is not of benefit. At this time, while many RNTBCs desire to have access to research and genealogies created for the purposes of the claim, in many instances these are held by the NTRB and are not able to be transferred.

If such registers were to be kept, AIATSIS has previously suggested the registers are not to be made available to members of the public unless determined by the PBC directors and include appropriate fees and charges.[61] Furthermore, AIATSIS strongly recommends that the Registrar removes private details from existing personal registers, including members contact details, unless determined by a director for a specific cause and party, for example in an agreement. Having publically available members register is a breach of privacy and personal safety, particularly for victims of domestic violence or harassment.

Proposal 8-10

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[59] Paragraph 12.2.2, p. 31 of AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006 submitted 31 October 2017.

[60] Toni Bauman 'Final report of the Indigenous Facilitation and Meditation Project July 2003-June 2006; Research Findings and Recommendations' (AIATSIS Research Publications, Canberra 2006) 5.

[61] Pp 12.5.2-3, p. 35 of AIATSIS response to Office of the Registrar of Indigenous Corporations (ORIC) Technical Review of the Corporations (Aboriginal and Torres Strait Islander Act) 2006 submitted 31 October 2017.

AIATSIS does not oppose a broader role for the NNTT in post-determination disputes by allowing PBCs or individual native title holders to approach the NNTT directly for assistance. In the ALRC (2013) *Caring for Country Report* some Native Title Representative Bodies submitted that it found the Tribunal to be of assistance in this regard. AIATSIS submits that further consideration as to whether the role of the NNTT should be an arbiter within intra-Indigenous disputes when the NNTT lacks the cultural and local authority for the decisions to be sustained, maintained or followed, is required.

Attachment G

AIATSIS does not support the proposals outlined in annexure G.