Cape York Land Council Aboriginal Corporation
ICN 1163 | ABN 22 965 382 705

2 March 2018

Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
By email: native.title@ag.gov.au

Dear Sir/Madam

Re: Options paper proposing reforms to the *Native Title Act 1993* (Cth)

The Cape York Land Council (CYLC) is the Native Title Representative Body (NTRB) for the Cape York region. In our NTRB role we fulfil statutory functions under the *Native Title Act 1993* (Cth). In our broader Land Council role we support, protect and promote Cape York Aboriginal peoples' interests in land and sea to positively affect their social, economic, cultural and environmental circumstances. In this capacity CYLC welcomes the opportunity to comment on the Attorney-General's *Options paper for reforms to the Native Title Act 1993 (Cth)* (Act)[1] (options paper).

As a general observation, CYLC is concerned that statutory intervention does not result in further disadvantage to Indigenous Australians seeking the recognition and protection of their native title rights and interests, as the Act is already unfairly weighted against them. This was highlighted by the recommendations in the Australian Law Reform Commission's report on *'Connection to Country: Review of the* Native Title Act 1993 *(Cth)'* published June 2015 (ALRC report). We note that none of the ALRC report recommendations for reforming the test for proving native title, or amending the Act to confirm that a native title right that may be exercised for commercial purposes, are raised in the options paper.

We are also concerned that state and territory government views appear to form the backbone of the current draft reforms and that many of these were the subject of advice by governments to the Australian government last year. We refer to the significant proposals for reform found in Attachment G of the options paper, based on a consolidated position paper provided by state and territory governments to the Commonwealth in July last year.[2] In our view, there has been inadequate consultation with Aboriginal peoples and Torres Strait Islanders and their associated bodies, advisers and stakeholders (except possibly with the NNTC) in relation to the reforms identified in Attachment G.

[1] All statutory references are to the Act, unless otherwise indicated.
[2] See Queensland Government submission dated 14 February 2018 and the Table attached to that government's submission.

With these reservations in mind, we have the following to say about the proposals in the options paper:

Section 31 agreements

QUESTION 1: Should the Act be amended to confirm the validity of section 31 agreements made prior to the McGlade[3] decision?

We support amending the Act to confirm the validity of s. 31 agreements made prior to the *McGlade* decision, which did not have all applicant members as parties. It should be noted that s. 31 agreements-making involves the negotiation parties entering into a 'state deed' to confirm the native title party's agreement and entering into an 'ancillary agreement', with the latter agreement containing the substantive conditions that are attached to the native title parties' consent. It is the practice for the state deed but not the ancillary agreement to be given to the NNTT pursuant to s. 41A(1). In our view, validation should extend to all agreements entered into with the native title party pursuant to s. 31(1)(b).

Retrospective validation should be confirmed on the same basis that indigenous land use agreements (ILUAs) were confirmed by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) (2017 ILUA Amendments).[4] This means that validation should only be conferred on agreements:

- made on or before 2 February 2017;
- which purported to be agreements pursuant to s. 31(1)(b)(i) or (ii); and
- where the native title party includes a registered native title claimant/s.

Further, the validation should not extend to agreements vitiated by fraud, undue influence, duress, breach of fiduciary duty or other misadventure by any of the parties. This would be accommodated by confirming that validation is only conferred where the agreement is not the agreement of the native title party under s. 31(1)(b), because not all of the persons who make up the registered native title claimant/s negotiation party was a party.

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?

The three options relate to the mandatory number of applicant members who must be parties to section 31 agreements. Option one would require all the members of the applicant to be parties; option two stipulates all members of the applicant, other than deceased members; and option three proposes that a majority of the applicant members are mandatory parties. For option three, an authorisation process is proposed as an additional safeguard.

We do not support the introduction of a statutorily prescribed authorisation process for s. 31 agreements. In our view, this will limit the flexibility that is intended by s. 31 and will unreasonably add to the costs of agreement-making. We note also that registration of an ILUA binds not just the native title claim group with the registered claim but all persons who hold native title. Section 31 agreements give validity to the act, but only bind the relevant native title claim group (see s. 41(2)) and, if they relate to a mining future act, are subject to the non-extinguishment principle. These

[3] *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.
[4] See ss. 9(1) and (1A) of the 2017 ILUA Amendments.

distinctions between ILUAs and s. 31 agreements explain why the NTA does not mandate oversight of the authorisation process for s. 31 agreements.

The recent decision by Greenwood J in *Gebadi v Woosup*,[5] a case which we assisted the traditional owners to prosecute, establishes that there are limits to an applicant's authority to negotiate s. 31 agreements. In light of this important decision, our view is that legislative intervention to oversee the authorisation of s. 31 agreement-making on behalf of traditional owners is not required.

The fundamental principle that operates In Cape York Peninsula, including in relation to the Cape York United #1 Claim,[6] is that traditional owners have the authority in relation to agreement making, not the applicants chosen to prosecute their native title claims. The practice which we follow is that the traditional owners are consulted and their duly authorised applicants do not become parties to section 31 agreements, unless they have the authority of the traditional owners.

We do support an amendment to the Act confirming validity of post-*McGlade* section 31 agreements, where not all of the applicant members are parties. The question of which members of the applicant are authorised to be the party or parties is for the traditional owners to decide. The default position would be that unless the traditional owners decide otherwise, a majority of the applicant members must be parties to the agreement.

Authorisation and the applicant

QUESTION 3: Do you support the proposals to:

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

The options paper notes that s. 62A is not reflective of the practice that claim groups do not generally invest full decision-making authority in the applicant and require the applicant to bring important decisions back to the group to consider. The position in the options paper is that this causes problems for third parties negotiating with the applicant and that the legal status of any specific directions and constraints attached to an applicant's authority is unclear.

Section 62A provides that an authorised applicant for a claimant or compensation application *may* deal with all matters arising under the Act in relation to the application. The options paper suggests that the proposal in practice will clarify that claim groups can set limits on the authority of an applicant to change their legal representation or apply for leave to discontinue the claim.

In our view, s. 62A does allow the native title claim group to constrain the conditions of authority given to an applicant, particularly given that s. 66B(1)(a)(iv) provides for the replacement of an applicant who has exceeded the authority given by the native title claim group. Constraints on an applicant's authority are a common feature of authorisation processes undertaken in our NTRB region. However, it might assist if s. 62A is amended to confirm this.

We do not support the imposition of a duty on applicants to provide or keep current the details of the constraints on their authority on a public register. The relationship between native title applicants and others in native title proceedings is already an unequal one. We do not support any additional burden being placed on native title claimants. These provisions of the Act have long operated and third parties in the native title context well understand that there are constraints on an applicant's authority. Due diligence undertaken by third parties in the course of their negotiations or dealings will reveal the

[5] [2017] FCA 1467.
[6] QUD673/2014.

extent of an applicant's authority to make agreements, to settle native title proceedings or to take other significant action that may impact on the rights and interests of the native title claim group.

CYLC is concerned that maintaining an accurate public register will be difficult because the scope of an applicant's authority may not have been the subject of an expressly worded constraint, although law and custom would dictate community consultation and consent for critical actions. Also the extent of the authority could evolve or change over time in response to circumstances that were not foreseen when authority was given. Having to contribute to the maintenance of such a register will impose additional compliance costs on native title claimants and NTRBs.

Although one benefit for native title claim groups would be to constrain applicants from acting outside the scope of their authority, s. 66B(1)(a)(iv) is the means to remove applicants in such a case. We do not agree that the burden of contributing to a public register is justified given that the means to remove applicants acting outside their authority is currently provided for in s. 66B.

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

CYLC supports amendment of the Act to clarify that an applicant can act by majority, unless the claim group specifies that they must act otherwise, such as unanimously or in another specified way in relation to particular courses of action, e.g. 75% must be in favour of particular actions.

(c) *allow the composition of the applicant to be changed without going through a section 66B reauthorisation process in prescribed circumstances;*

In our view, the replacement of an applicant pursuant to s.66B does not invariably require a reauthorisation process. Whether a fresh or additional authorisation process is required depends on the terms of the original authority conferred by the native title claim group on an applicant. Our view is that if the original authorisation identifies the circumstances that would allow removal and replacement of an applicant (e.g. death) and also specifies the identity of the replacement applicant and/or the means by which that person is authorised (e.g. by nomination from a particular faction of the group, without the need for authorisation from the rest of the claim group), then there is nothing in s. 66B which mandates a reauthorisation process.

We agree with amending s. 66B to clarify that a reauthorisation process is not mandated if the original authority identified the circumstances which would support the Court ordering that an applicant is to be replaced. The options paper puts forward an example of an applicant deciding that he or she no longer wants to be involved. The proposed amendment of s. 66B[7] provides that where an applicant is 'no longer willing or able to perform the functions of the applicant', the remaining members of the applicant may continue to act without reauthorisation, unless the original authority provided otherwise. Further, they may apply to the Federal Court for an order that the remaining members of the applicant constitute the applicant. We note that there could be difficulties of proof associated with what is meant by 'no longer willing or able to act', if there is no direct evidence from the person, such as their written consent to being replaced or independent verification of incapacity.

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

[7] See Item A3 in Attachment A.

The Court held in *Gebadi v Woosup* that the applicant stands in a fiduciary relationship with the other members of the native title claim group. The Court ordered that a member of the applicant account for money received by him and appropriated to his own use and benefit, in breach of the duties owed to the rest of the members of the native title claim group.

We do not support the imposition of a statutory duty, due to the difficulties formulating a "one size fits all" set of rules. We note also that the fiduciary duties found to operate in *Gebadi v Woosup* were far wider than the negative duty proposed in the options paper. In our view, *Gebadi v Woosup* is good authority and the definition of duties in particular cases should be left to the Courts to decide on the particular facts, as they arise. We are concerned to ensure that statutory intervention does not have the unintended consequence of limiting or fettering the Courts' jurisdiction in cases where an applicant is asserted to have acted improperly because of the fiduciary duties owed to the native title claim group, or more broadly, to the later-determined native title holders.

We do see the need for clear consequences if an applicant is found to have breached the fiduciary duties owed to a claim group or the determined native title holders. We say this from our experience assisting Seven Rivers Aboriginal Corporation RNTBC (the PBC in *Gebadi v Woosup*) to enforce the judgement that has been obtained and the difficulties in so doing. We believe that an appropriate amendment of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, would be the automatic disqualification of persons found by a Court to have breached their fiduciary duties from being a director, employee or other office holder of a CATSI Corporation empowered to be a prescribed body corporate for determined native title holders or a land-holding body under legislation such as the *Aboriginal Land Act 1991* (Qld).

Agreement-making and future acts

Alternative agreement-making processes

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)?

B1 *Allowing a Prescribed Body Corporate (PBC) to enter into a contract, rather than an ILUA, about certain types of future acts that would not require the PBC to consult with, and obtain the consent, of the native title group.*

B2 *Allowing native title holders to vary the effect of s 211, which provides a statutory protection for the exercise of traditional hunting, fishing, gathering, cultural or spiritual activities from Commonwealth or state regulation.*

B4 *Addressing the relationship between state and territory natural resource management activities and native title rights, including amending s 24LA to permit low-impact future acts to be done after a native title determination.*

We do not support these proposals, nor any reforms which would further erode or diminish the rights of determined native title holders to be consulted and give consent before development is undertaken on their native title lands.

The 'proposal in practice' scenario[8] for B1 raises a number of concerns. That infrastructure is urgently needed in an Indigenous community, or is generally perceived to benefit the community, or is perceived to be low impact or where the future act proponent is a member of the native title holding community, should not over-ride the legal entitlement of the communal native title holders to be consulted and give their consent to future acts on their native title lands.

CYLC notes that there are already statutory processes in place for a prescribed body corporate (PBC) to establish standing authorisations for some kinds of native title decisions (other than ILUAs): see regulation 8A of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC regulations). There are also existing mechanisms utilised in Cape York to streamline agreement-making, such as parties agreeing more efficient processes for native title consent in a township community development ILUA.[9] These ILUAs provide simple, quick and inexpensive processes for seeking native title consent for multiple classes of future act associated with development, and are a key facilitator of development in Aboriginal towns, which ensure Traditional Owners are involved in decision making and receive ongoing benefits from development.

A far greater impediment to development on Aboriginal land are the layers of environmental, local government and state planning controls and regulations in Cape York Peninsula. By way of summary, some of the barriers that operate against our constituents in Cape York include:

- receiving native title consent for future acts including construction of infrastructure and creation of interests in land such as the grant of leases. However as stated above, process ILUAs provide a successful remedy for this issue, as does early and proper engagement with Traditional Owners;
- the tenure and ownership of land in cases where land remains Deed of Grant in Trust held by the local government Councils because Traditional Owners maintain that this land should be transferred to them, as provided for under the *Aboriginal Land Act 1991* (Qld);
- statutory land use planning, such as local government planning schemes provided for under the *Planning Act 2016* (Qld), which create unreasonable restrictions on the use of Aboriginal land;
- environmental legislation, such as the *Vegetation Management Act 1999* (Qld), which create unreasonable restrictions on the use of Aboriginal land;
- the capacity of Aboriginal land holding corporations to use and manage their land because they are not supported in this role by the Queensland Government.

We have also observed in the context of the State land dealing ILUAs for the transfer of Aboriginal land and the establishment and indigenous management of CYPAL National Parks that Traditional Owner groups who have post dealing capacity building assistance provided for in the agreement (including a coordinator or an executive officer) seem to succeed and progress far better than those without. We understand that Balkanu is in the process of preparing a proposal to be put to the Queensland Government seeking funding for this exact assistance.

For additional information on these topics, I refer you to the joint submission by the Cape York Institute and CYLC to the COAG Investigation dated 7 May 2015. I also refer you to the COAG Investigation findings that "best practice" agreement-making by proponents such as state/territory governments, including early and proper engagement with Traditional Owners, is critical to efficient and streamlined agreement-making.[10] Another critical policy initiative that is needed to support agreement-making with Traditional Owners is to increase the capacity of Indigenous land holding and representative

[8] Options paper, p. 12.
[9] See, for example, the Mapoon Township Community Development ILUA (QI2016/003) and the Pormpuraaw Township Community Development ILUA (QI2016/004).
[10] COAG Investigation, p. 43–44.

bodies to effectively respond to proposals for access to native title lands. These matters were canvassed in the COAG Investigation.[11]

Given these factors, it would be extremely disappointing for the Australian Government to focus on such a narrow range of legislative reforms, none of which assist to build capacity or empower Indigenous peoples in relation to the development of their native title lands.

We do not support any legislative intervention which could see the rights conferred by s. 211 curtailed or the subject of oppressive action by state/territory governments to secure enhancement of legislative control over native title lands. A primary concern for Cape York native title holders is that varying the effects of s. 211 should only be able to be done in an ILUA that is underpinned by the consultation and consent of affected native title holders (who have the right to refuse consent).

B3 Allowing a PBC to contract about future acts and compensation, including contracting out of those provisions of the Act.

We seek further information about this proposal. PBCs have the power to make ILUAs about compensation for future acts pursuant to ss. 24BB(ea) and 24EB(4). We do not support removing the requirement to consult with and get the consent of the native title holders when abrogating or settling the compensation entitlement that would otherwise arise under Division 3, Part 2 of the Act.

Streamlining existing agreement-making

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

C2: Allowing minor technical amendments to be made to ILUAs without requiring re-registration.

C3: Removing the requirement that the Registrar give notice of an area agreement ILUA if he/she was not satisfied that the ILUA could be registered.

CYLC supports these two proposals.

C1: Allowing Body Corporate ILUAs to cover areas where native title has been extinguished.

Whilst CYLC supports this proposal in principle, we believe there are additional considerations that need to be factored into any amending legislation, e.g. the amending legislation will need to accommodate that but for the extinguishment, the determined native title holders would hold native title in the area.

C5: Amend the Act to ensure that the future acts regime applies to land and waters to which s. 47B applies to disregard previous exclusive possession acts on vacant crown land.

Whilst CYLC supports this proposal in principle, we believe there are additional considerations that need to be factored into any amending legislation. One issue being that fairness dictates that the Act is also amended in relation to land and waters to which ss. 47 and 47A apply.

[11] COAG Investigation, Chapter 3, 'Improving the processes for doing business on Indigenous land and land subject to native title'.

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

We support this proposal in principle. Careful drafting will be required to ensure amendments operate fairly and without unintended consequences. For example:

- we do not endorse any requirement that the native title party is able to be compelled to make an agreement that does not include compensation;
- there should be a process in the agreement setting out how compensation is to be agreed, including alternative dispute resolution, easy access to the Court, if it is not agreed;
- the relevant state/territory/commonwealth government liable for compensation must be a party;
- we do not support the imposition of limitation periods on court action to recover compensation, if agreement is not later reached.

C11: Amend 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.

We support this proposal in principle. Careful drafting will be required to ensure amendments operate fairly and without unintended consequences. One issue is that when all of the ILUA provisions are read together,[12] it appears that s. 251A in fact provides what it says, namely that the persons who ultimately give authority for an ILUA are all persons who hold the native title; albeit that when authorisation was given the claim to hold native title had yet to be determined. The 'prima facie' test for area agreements is about satisfying the Registrar or the certifying NTRB that all reasonable efforts have been made to ensure that all persons who hold or may hold native title in the agreement area have been identified and the identified persons have authorised the making of the agreement.

C4: Removing the requirement for PBCs to consult with NTRBs on native title decisions such as prior to entering an Indigenous Land Use Agreement in the PBC regulations.

We do not support this proposal. CYLC's experience is that without the requirement for proper consultation, PBCs are likely to enter into ILUAs without the knowledge, agreement or support of the traditional owners. In addition, PBCs quite often fail to seek proper legal advice and fail to perform their duty as directors and to the traditional owners. NTRBs can provide the necessary oversight to ensure the PBC Regulations are complied with.

C7: Consider amending s. 199C to clarify that removal of details of an ILUA from the Register does not invalidate a future act that was the subject of the ILUA;

We do not support this proposal. In our view, future acts consented to in an ILUA are protected, provided that they were done whilst the ILUA was registered, as this is expressly provided in ss. 24EB(1)(b) and 24EBA(1)(b). We are also of the view that where an ILUA is removed pursuant to s. 199C(3), it would be wrong for the Act to confirm validity for anything other than the future acts described in ss. 24EB and 24EBA.

C8: Consider amending s. 30A so that Government parties are not required to be a party to a section 31 agreement (for example, an agreement about mining).

[12] ss. 24CD, 24CI, 24CK, 24CL, 24EA to EBA, 199C(1).

We do not support this proposal. Governments grant the tenements or other interests the subject of the agreement and should therefore be a party. In Cape York, there are often difficulties enforcing contractual obligations imposed on the grantee party. In fact, greater involvement by Governments to assist with compliance by the grantee party is needed, not less. For example, a more proactive stance by the Queensland government to enforce the conditions of tenement grants, where the grantee party is not performing it obligations to native title parties, is needed.

Additionally, the government will sign the section 31 deed upon confirmation from the negotiation parties that agreement has been reached. The execution of the section 31 deed paves the way for the grant of the tenement. The deed allows for the parties to warrant that the correct procedure has been followed; that consent has been sought; and importantly, that any compensation for the doing of the act has been negotiated and provided for in the ancillary agreement. It would appear to be beneficial for the government to be retained as a party to the deed to ensure the government party does not absolve themselves of all responsibility.

C9: *Consider options for amending the objection process created by section 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*

We do not agree with any curtailment of the rights afforded to native title parties under this section. Compulsory acquisition should not be able to undertaken without strict compliance and oversight, as is currently provided in the section.

C10: *Consider options to encourage electronic transmission of notices including amending sections 29 and 6(1)(a) of Native Title (Notices) Determination 2011 (No 1) to provide that notices can always be transmitted electronically.*

The only way for some of our constituents in Cape York to receive notice is through newspaper/ wide advertising. Phone reception/ internet connection / access to computers is often patchy or non-existent. In fact, there should be an additional requirement to post notices on public notice boards, e.g. the Council office.

There is a real risk of notifications not reaching their intended audience if limited to electronic means. Our region relies heavily on the appearance of notices in the locally circulating newspapers and we would not wish to see this diminished. We are not aware of similar kinds of notice under other legislation being curtailed in this way.

Transparent agreement-making

QUESTION 6:
(a) Should there be a Register of s. 31 agreements?
(b) Should ILUAs – and other agreements made under the Act – be publicly accessible?

We do not support either s. 31 agreements, ILUAs or other agreements made under the Act being publicly accessible. One objection is that these agreements are often commercial-in-confidence.

The information currently available on the ILUA Register is in our view sufficient for ILUAS.

A Register of s 31 agreements may help newly formed PBCs to know what agreements have been executed by the claimants. The register should not be public but available to be checked on application

to the NNTT and only minimum details made available – e.g. parties, area, future acts consented to and term of the agreement. A copy of the agreement however, should be able to be obtained by a newly formed PBC for the area covered by the agreement.

Indigenous decision-making

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?

This proposal raises significant concerns and we do not support it. It appears to us designed to destroy traditional decision-making processes and to facilitate western style decision-making for the benefit of proponents who want access to native title lands, thus undermining the operation of traditional law and customs.

Claims resolution and process

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

E1: Section 138B(2)(b), which provides that the Federal Court may only direct that a native title application inquiry be held if the applicant agrees to participate, should be repealed.

We do not support this proposal.

E2: Section 156(7), which provides that the National Native Title Tribunal's power to summon a person to appear before it or produce documents does not apply to a native title application inquiry, should be repealed.

We do not support this proposal.

E3: Amend s. 47(1)(b)(iii) to permit the making of a determination that native title co-exists with a pastoral lease held by the claimants where claimants are members of a company that holds the pastoral lease.

CYLC supports the amendment of s. 47(1)(b)(iii) to clarify that it operates not only for corporations with shareholders, but for other kinds of incorporated entities, whose members are also members of the native title claim group.

E4: Consider amending Part 2, Division 5 of the Native Title Act to allow a PBC to be the applicant on a compensation claim.

CYLC supports the proposed amendment to clarify that a RNTBC can bring a compensation application. However, the amendment will need to be clearly drafted to ensure that the there is a determination of native title in a contiguous area for which the RNTBC was determined as the trustee or agent PBC.

E5: Amend reg 3 (and reg 8) of the PBC Regulations to clarify that the decision to make a compensation application is a native title decision;

Subject to the reservation expressed in relation to E4, this amendment is supported by CYLC.

E6: *Introduce a new section into the Act allowing for 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.*

CYLC supports this proposal. In fact, we submit that it should not be contingent on the parties' agreement but should operate in the same as the other beneficial provisions of ss. 47, 47A and 47B. That is, if the relevant nexus of occupation and tenure status is in place when the claimant application is made, prior extinguishment is to be disregarded. We have noted that the Queensland government does not support this proposal because of the potential to affect a wide-range of third-parties holding interests within the protected areas, including commercial leases.[13]

We would be interested to know the statistics for commercial interests on conservation or protected areas across the various states/territories. We have not identified any in Cape York in the time available to us to comment on the options paper. We are aware of Telstra tower infrastructure, which we understand to be provided for by permit under the *Nature Conservation Act 1992* (Qld) and for legislated infrastructure, such as light houses/towers on islands.

In our view, protecting commercial interests on conservation parks is not a legitimate concern. We note also that validly constructed public infrastructure would be protected under the public work extinguishing provisions of the Act. The amendment can be drafted to ensure that areas affected by validly granted extinguishing interests (including because of validity conferred by the past, intermediate and future act provisions of the Act) that remain current when the claim is determined, could either be excised from the benefit of the disregarding of extinguishment and/or dealt with as an 'other interest' pursuant to ss. 225(c) and (d).

Post-determination dispute management

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

F1: *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.*

This is a role for the National Native Title Tribunal and/or the Federal Court, noting that these bodies have the requisite native title expertise and have oversight of PBCs under the Act and the PBC regulations. The Registrar's role is to ensure compliance with CATSI Act matters.

F2: *The CATSI Act be amended 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.*

We need further information in relation to this proposal. We do support it in principle, but would not agree that the Registrar is the final arbiter on these kinds of issues. There would need to be avenues for review (including merits-based review), procedural fairness and ultimate oversight by the Federal Court of this.

[13] See item 35 of the Table attached to the Queensland government's submission dated 14 February 2018.

F3: *Introduce a requirement that the dispute resolution provision in the PBC rulebook specifically addresses 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).*

More information is needed. We question how a rulebook can bind native title holding non-members to an alternative dispute resolution process. We can see the merit of alternative dispute resolution being provided for in the rulebook; but note that there needs to be a process and umpire (e.g. Federal Court) to finally resolve disputes.

F4: *Remove the directors' discretion to refuse membership to a person who meets the PBCs membership criteria other than in exceptional circumstances.*

We support this proposal in principle. Native title holders should have the right to be members unless there are reasonable grounds to refuse.

F5: *Limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour.*
Require the process for cancellation of membership to include a general meeting.

These grounds are too limited and the definition of 'misbehaviour' unclear. We submit that a PBC should have the right to cancel a membership where the member is uncontactable.

F6: *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 it reasonably necessary to ensure that rule books are complied with in relation to the revocation of membership of individuals.*

The ambit of this proposed amendment is not at all clear to us. For instance, what is meant by "appropriate consultation"? It is in any event objectionable that a power of this nature would be reposed in the Registrar, at the expense of a PBC's right to manage its own affairs in relation to memberships.

F7: *CATSI Act be amended to require PBCs to set up and maintain:*

1. *a 'Register of Native Title Decisions'; and*
2. *a 'Register of Trust Money Directions'.*

CATSI Act be amended to require the Register of Native Title Decisions to include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations.
It is recommended that each of the Register of Native Title Decisions and the Register of Trust Money Directions be available for inspection by:

1. *members;*
2. *common law holders.*

PBCs 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.

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).

These proposals have in principle support; however, the burden of compliance may be substantial and will require allocation of resources to support PBC capacity.

F8: *the CATSI Act be amended 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.*

This proposal seems good in principle but again, capacity for PBCs will be an issue.

F9: *Introduce a requirement 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).*

This is not supported. The costs of compliance would be massive and would impose burdens on PBCs far beyond what is imposed on regular Corporations or Trustees. The application of native title monies is at the heart of the division of governance that resides in a board of directors, who are obliged to report to the members and to account in the way currently prescribed by the CATSI legislation. To impose obligations of this nature on PBCs would be discriminatory and unlawful, in our view.

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

We support this proposal.

F11: *NNTT:*
Create a broader role in post-determination disputes by:

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

Federal Court:
Expanded role by making the Federal Court's jurisdiction exclusive in relation to CATSI Act matters that affect PBCs.

This is supported.

State and territory proposals

Our comments in relation to the reform proposals submitted to the Australian Government by states and territories in Attachment G are:

Section 31 agreements:

G1: *Shorten the objection period for acts which the government party considers attract the expedited procedure from 4 months to 35 days where the entire area affected by the act is subject to a native title determination.*

This is not supported. There is no reason to expect that determined native title holders will have any greater capacity to respond, nor principle which would justify them having a lesser time than claimants to respond.

G2: *Amend section 29 so that a minor defect in the notification of the proposed act does not invalidate the notice if there is no detriment to the native title party.*

This is not supported. We believe that there should be strict compliance with notice requirements. We question if similar notices under the general law are allowed this leeway in the statutes that mandate them. If not, we say that the proposal above would be discriminatory and unlawful.

G3: *Confirm that s 29 notices to identified parties may be made by email, and that public notice is able to be given online.*

This is not supported. Many of our constituents do not have access to email or internet coverage and public notice is essential to ensuring they receive notice. See our comments to item C10 above.

G4: *Amend section 141(2) of the Act to clarify that parties to inquiries in relation to expedited procedure objection applications are the Government party, native title parties which have objected under s 32(3), and the grantee parties.*

There might be instances where a native title party who did not lodge the original objection may be entitled to participate in an inquiry. Please provide further information in connection with the operation of this intended amendment.

G5: *Amendments to ensure that any changes to the role of the registered native title claimant in making section 31 agreements also extend to the role of the registered native title claimant in making agreements under approved alternative schemes.*

This is supported.

The applicant (and authorisation):

G6: *Require any limitations on the Applicant's authority to be notified, e.g. on the Form 1. The other parties to the claim should be entitled to assume that the applicant has full authority unless and to the extent it is informed otherwise.*

This is not supported, for the reasons outlined above under the heading 'Authorisation and the Applicant.

G7: *Amend section 24CH to replace with notification requirements with those of s 24BH where registration of the area ILUA is part of a consent determination process and the agreement area is fully within the determination area.*

More information is needed as to why this is identified as a necessary reform.

G8: *Repeal subsection 24JAA(1)(d) to remove the sunset clause applying to the process for construction of public housing.*

This is not supported. CYLC has successfully demonstrated that a process ILUA can provide simple, quick and inexpensive processes for native title consent for social housing. CYLC recommends that Township ILUAs should be negotiated across Cape York and potentially elsewhere to provide for the grant of social housing leases.

It is particular concerning that s. 24JAA was promoted as a remedy of last resort in response to the Northern Territory intervention; yet is now being routinely used by the Queensland Government to access native title lands in Cape York, without consent under an ILUA.

G9: *Clarify that section 24MD(3) (treatment of acts that pass the freehold test) applies to a compulsory acquisition of native title rights as if the taking of native title rights and grant of the new interest in land are the same act.*

More information is required before we can comment on this.

G10: *Amend the definition of sections 24MD(6B) and 253 to expand the definition of 'waste facilities' to include rubbish tips and other waste disposal facilities.*

This represents a further incursion into the rights of Aboriginal peoples and Torres Strait Islanders under the future act regime and should be rejected by the Australian government. CYLC maintains that native title consent should be obtained in all instances.

G11: *Insert 'or' between 24KA(8)(c) and (d) to clarify that notice can be given to either representative bodies or registered claimants.*

We believe that if there is a registered native title claimant, that entity is entitled to notice, in addition to the NTRB. Accordingly we submit that the word 'and' is to be inserted between these two sections, not the word 'or'.

G12: *Require RNTBCs to be bound by arrangements (e.g. ILUAs) negotiated prior to a determination, following a determination.*

This should be the decision of the RNTBC and not the subject of legislative intervention.

G13: *Amend section 211 to ensure adequate protection for native title rights against the government's need to regulate certain actions for public purposes, e.g. hunting with firearms in national parks or hunting endangered species.*

This is not supported, for the reasons outlined above under the heading 'Alternative agreement-making processes'.

Additionally, an issue with s. 211 is uncertainty around its application due to its current drafting. Any amendment to s. 211 should ensure that it does not result in any loss or reduction of native title rights and should only be done through careful and informed consultation. It appears to us that the section, as it stands, can be modified by ILUA. However, there may still be uncertainty to the extent that the government can fetter any rights under s. 211, contrary to the general legal principle of certainty.

G14: *Amend the Act to allow for the enactment of legislation by Western Australia which validates mining leases affected by the invalidity identified in* Forrest & Forrest Pty Ltd v Wilson & Ors [2017] HCA 30.

This is not supported. Again, this appears to represent a further erosion of rights under the future act regime and should not be countenanced by the Australian government.

G15: Amend the act to confirm that 'renewals' in s 26D(1)(a)(i) includes renewals within the meaning of 24IC(2) and (2A); allow for 'renewals' to be made without being subject to the right to negotiate process without any substantive reason for the application of that process.

This is not supported.

Claims resolution:

G16: Allow hearing of native title and compensation applications together.

This is supported.

G17: Amend section 61A to remove restriction on bringing a claim over an area subject to a previous exclusive possession act.

This is not supported. We question how such a provision will operate in light of the notice requirements in s. 66(3)(a)(iv). Additionally, it appears to us to be designed to allow for claimants being pressured to accept findings of extinguishment by the Court. We are concerned that this will be detrimental to the interests of native title claimants.

G18: Agreement as to part of the proceedings – amend s 87(3) to say that agreement is only required from those respondents whose interests relate to the relevant part.

This is supported.

G19: Amend section 47B to clarify meaning of 'when the application is made' in the case of combined claims.

Further information is required in relation to this.

G20: Confirm the purpose of a non-claimant application by distinguishing between those actively seeking a negative determination and those only seeking section 24FA protection.

Further information is required in relation to this.

G21: Clarify the 'applicant' in a non-claimant application – whether the claim 'runs with the land' and the applicant can be substituted (and 24FA protection remain) or whether a new claim must be brought by the new lessee /purchaser.

This is not supported.

G22: Clarify appropriate use of section 87 (power of Federal Court if parties reach agreement) vs 87A (power of Federal Court to make determination for part of an area).

Further information is required in relation to this.

G23: Amend section 87A to clarify that the Commonwealth is not required to sign a consent determination in circumstances where it previously intervened and later withdrew.

This is supported.

G24: Require respondents to applications under sections 84(3), (5) and (5A) to provide a proper address for service.

This is supported.

Prescribed bodies corporate:

G25: Introduce provisions for the establishment and membership of PBCs ensuring that native title holders are represented on any default PBC.

More information is required in relation to this proposal.

G26: Amend the Act to ensure that the Commonwealth may fund a PBC for various purposes including start-up and administrative/compliance costs.

This is supported in principle.

G27: Amend Part 11, Division 3 (Functions and powers of representative bodies) to make explicit reference to functions performed in relation to persons who may hold native title (including where they seek recognition and settlement agreement under the Traditional Owner Settlement Act 2010).

More information is required in relation to this proposal.

Graham O'Dell

Principal Legal Officer

CC [redacted]