Submission to the Attorney-General's Department – Reforms to the Native Title Act 1993 (Cth) Options Paper (November 2017)

First Nations Legal & Research Services Ltd (**First Nations** was formerly Native Title Services Victoria Ltd) is the Native Title Service Provider for the State of Victoria.

First Nations welcomes the opportunity to contribute to the development of the proposed amendments to the *Native Title Act 1993* (Cth) (**NTA**).

Section 31 Agreements

1. First Nations supports the amendment of the NTA to confirm the validity of section 31 agreements made prior to the *McGlade* decision.[1] Such an amendment would resolve the uncertainty in relation to authorisation that has arisen following the *McGlade* decision that has already been corrected, in relation to Indigenous Land Use Agreements (**ILUAs**), by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth).
2. As was First Nations' submission in relation to the amendment of the NTA to ensure the validity of pre-existing ILUAs, First Nations considers that the proposed amendments are essential to validate section 31 agreements that have been negotiated in good faith and entered into by native title holders and other parties across Australia in recent years.
3. In addition to the validations of *existing* section 31 agreements, the options paper provides three options for applicant execution of *future* section 31 agreements. First Nations is generally supportive of streamlining processes to ensure that positive outcomes are not prevented by unrealistic requirements. First Nations does not support Option 1, as this would not provide an adequate solution to the problems of the kind raised in *McGlade* that are continuing to persist in relation to section 31 agreements.
4. First Nations supports Option 3, which would require a majority of members of the applicant to be mandatory parties to section 31 agreements. As noted by the options paper, this option would also involve the imposition of an authorisation process for section 31 agreements. Whilst First Nations is generally supportive of Option 3, First Nations would caution against the imposition of too onerous an authorisation process for section 31 agreements.
5. First Nations supports amendments to ensure that any changes to the role of the registered native title claimant in making section 31 agreements also extends to the role of the registered native title claimant in making agreements under approved

[1] *McGlade v Native Title Registrar* [2017] FCAFC 10

alternative schemes. First Nations supports the proposals in relation to section 31 agreements being framed to capture agreements under alternative state regimes, such as the *Traditional Owner Settlement Act 2010* (Vic) (**Settlement Act**) and those that are contained in Part 9B of the *Mining Act 1971* (SA).

Authorisation and the applicant

Scope of Authority of the Applicant

6. Section 62A provides that the 'applicant may deal with all matters' arising under the NTA in relation to their application to have native title recognised. This obviously gives the applicant and the individuals involved substantial decision-making powers and responsibilities regarding the progress of the application, any settlement of the claim in a consent determination, and dealing with any future acts. It does not apply to the authorisation of Indigenous Land Use Agreements.

7. However, some groups wish to limit the authority that the authorised applicant has, or alternatively, the authorised applicant may not wish to make decisions regarding the native title matter without the direction of the native title claim group.

8. First Nations considers the amendments to section 62A essential to defining the scope and authority an applicant has when providing instructions to their solicitors on a native title matter. In some instances the authorised applicant may be reluctant to provide instructions without gaining feedback and authorisation from the claim group, or alternatively, the claim group may expect the applicant to bring certain native title decisions back to the group.

9. The proposed amendment would also ensure greater transparency and accountability in the actions the applicant undertakes on behalf of the full group.

Applicant can act by majority

10. First Nations supports the proposed amendments that allow the applicant to act by majority in so far as they will streamline the native title process. These amendments will assist the claim group and the Native Title Representative Body or Service Provider to progress a native title matter. Furthermore the proposed amendments will reduce the costs and resources required to replace an applicant through an authorisation process.

Composition of the Applicant

11. First Nations supports the proposal that the claim group can, at the time individuals comprising the applicant are appointed, either: appoint persons to stand in the place of a person appointed to the applicant if the appointed person is either unable or unwilling to act as directed by the claim group; or, determine a process by which replacement members of the applicant can be appointed in the event the appointed person is either unable or unwilling to act as directed by the claim group.

12. First Nations believes these sensible proposals will both reduce the cost and timeframes involved in native title claim resolution (and future act proposals), and also reduced the burden imposed on the Federal Court through the requirement to employ the section 66B procedures.

13. First Nations does not support the proposed amendment to the NTA which would introduce a process whereby the claim group would have to apply for a Federal Court order to allow the remaining members to continue to act. If such action is required, it is preferable that this decision be vested back in the claim group.

Fiduciary Duty

14. First Nations supports the proposal that the NTA should specify that an applicant must not obtain a benefit or an advantage at the expense of common law holders. The amendment of the NTA will ensure that stakeholders can negotiate with certainty that the applicant has consulted with its claim group regarding certain future act activities.

15. Furthermore, First Nations believes that the applicant owes a fiduciary duty to the claim group throughout the native title process and until determination. Statutory relief should be available for the claim group if the applicants breach their fiduciary duty.

16. Despite the recent judgment of Greenwood J in *Gebadi v. Woosup [2017] FCA 1467,* (who determined that an applicant owed a fiduciary duty to the claim group when negotiating agreements prior to a native title determination), First Nations believes a clear statutory expression of the existence of a fiduciary duty between applicant and claim group would put this matter beyond further doubt.

Retrospective application of amendments

17. First Nations submits that none of the proposed amendments regarding "Authorisation and the Applicant" can by their nature be retrospective.

Alternative agreement-making processes

18. The options paper outlines several recommendations proposed by COAG in respect of implementing simpler agreement-making processes, noting concerns of some stakeholders that transaction costs associated with negotiating future acts are too high.

19. The options paper suggests that the costs and time associated with current agreement-making processes may form a barrier to doing business for both native title holders and third party stakeholders; however it is important to note that the protection and safeguarding of rights of native title holders should be of paramount importance in any proposed business concerning their land rights.

20. First Nations is not opposed to the creation of an alternative agreement-making

mechanism, however we note that there are already mechanisms which exist in the NTA and the *Prescribed Body Corporate Regulations 1999* (Cth) (in particular Reg 8A) which should be further explored and if suitable, may be utilised to fulfil the objectives of increased flexibility and reducing transaction costs.

21. By way of example, a new agreement-making mechanism exists in the Victorian native title landscape under the Settlement Act in which traditional owner groups who have entered into Recognition and Settlement Agreements (RSA) with the State, are able to negotiate agreements under section 45 of the Settlement Act similarly to contracts.

22. The largely standardised nature of these agreements, with formulae set by the RSA to calculate benefits payable to a traditional owner group for specific works undertaken on their country, are negotiated between the traditional owner group entity (similar to a PBC), who do not have to consult with the broader group of native title holders. Accordingly, the process can be argued to be quicker than having to negotiate an ILUA.

23. First Nations generally support the proposal that an alternative agreement-making process be limited to certain future acts where, for example, the value of the future act is below a certain threshold.

24. Several proposals are put forward by the COAG Investigation, which are outlined in detail in Attachment B of the options paper. Part of Question 4 asks whether these recommendations serve as examples of better ways to achieve the objectives of increasing flexibility in agreement-making and reducing transaction costs. We note the following in respect of the proposals in Attachment B:

25. Proposal B1: As outlined above, First Nations is not opposed in principle to a 'contract' type alternative to an ILUA. However for such a proposal to have any utility such 'contracts' must be able to 'affect' native title rights and interests. Essentially therefore the 'contracts' adopt the character of an ILUA. As such any contract must be limited and have firm guidelines for use, to prevent misuse and avoid jeopardising the rights of native title holders.

26. Proposal B2: The option of allowing native title holders to vary the effect of section 211 through an ILUA fails to appreciate that section 211 creates rights which may be exercised by an individual in accordance with communal traditional law and custom. Accordingly it can be understood that section 211 rights are not appropriately regulated in the manner proposed.

27. Proposal B3: As a matter of principle First Nations supports greater flexibility in the management of native title rights by PBCs. As such First Nations generally supports the option that native title holders, through their PBC, can contract out of the future acts and compensation provisions of the NTA and instead enter into contracts to negotiate a wider range of topics. This may be achieved by 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. Any proposal of this nature, must be accompanied by strict guidelines to ensure safeguards remain in place for the native title holders, preventing exploitation of these rights and maintaining the right to obtain compensation for applicable future acts.

28. Proposal B4: This proposal fails to appreciate the fact that native title rights are a communally held private property right. The management of land in which both native title holders and the Crown have interests as contemplated by section 24LA prior to determination is, subsequent to determination most appropriately undertaken through the negotiation of approved management processes by both native title holders and the State. This is preferable to attempts to ignore the reality of the existence of native title rights and interests. By way of example under the Settlement Act, low impact activities may still warrant the requirement for comment by the traditional owner group and in so far as appropriate safeguards exist, including the option of an alternative agreement-making scheme, which may expedite these kinds of future acts.

Streamlining existing agreement-making

29. The options paper refers to the COAG Investigation making several recommendations as to options intended to streamline existing agreement-making processes. First Nations reiterate previous concerns of ensuring native title holders' rights are protected first and foremost, prior to exploring ways in which agreement-making can be made more efficient.

30. The COAG Investigation recommended allowing minor technical amendments to be made to the Register of ILUAs without requiring re-registration. First Nations supports this proposal.

31. The COAG Investigation recommended removing the requirement in section 24EB that compensation is dealt with in an ILUA. As noted above, First Nations supports this proposal and reiterates that any such proposal of this nature must be accompanied by strict guidelines to ensure safeguards remain in place for the native title holders, and to prevent exploitation of these rights and/or preventing the right to compensation for applicable future acts, completely.

32. The COAG Investigation recommended clarifying that the removal of details of an ILUA from the Register of Indigenous Land Use Agreements does not invalidate a future act that is the subject of the ILUA. First Nations is not opposed to this proposal.

33. The COAG Investigation recommended removing the requirement for government parties to be a party to a section 31 agreement under section 30A of the NTA. First Nations does not oppose this proposal, however it should not result in government stakeholders abandoning their duties and obligations in respect of the matters negotiated in these agreements, and in supporting native title parties in their dealings with proponents over the exploration of their country by enforcing and regulating these

proponents.

34. The COAG Investigation recommended clarifying the objection process created under section 24MB(6B). Further investigation should be required to ensure the rights of the objector under this section are protected and the objection process serves to provide flexibility to the native title parties without comprising their rights. In so far as the proposal provides a clear platform for which the objector's concerns can be heard by an independent body prior to the end date of the objection period, First Nations is not opposed to the proposal.

35. The COAG Investigation recommended providing for electronic transmission of notices for agreements and other processes under the NTA. First Nations supports this option, noting that delays of up to 7 days are common in the issue date of notifications and the date on which they are received by First Nations and our clients.

36. The COAG Investigation recommended amending the NTA to ensure that the future acts regime applies to land and waters to which section 47B may apply to disregard previous exclusive possession acts on vacant Crown land. First Nations supports this proposal and again, reiterates the importance of protecting the rights of native title holders in any such amendment.

37. The COAG Investigation recommended amending the PBC Regulations to remove the requirement that PBCs consult with NTRBs on native title decisions, such as prior to entering into an ILUA. First Nations does not support this proposal. The existing provisions ensure PBCs have the benefit of the views and experience of the relevant NTRB developed over many years and the benefit of an awareness of current practice in relation to future act benefits.

38. Further, not having oversight on the native title matters or decisions relevant to a PBC may likely impose disadvantage on the PBC in so far as the NTRB is unable to accurately gauge the resources it can dedicate to the PBC in its work with the native title holders on other projects. Having the requirement to consult with NTRBs in place for PBCs ensures the protection of the rights of all native title holders represented by the PBC in question.

39. In so far as the option paper canvasses amendments to section 251A regarding the authorisation of ILUAs, which were included in the *Native Title Amendment Bill 2012* (Cth), (***2012* Bill**) First Nations continues to support the provisions on the *2012 Bill* in this regard.

40. The proposal by the COAG Investigation to remove the requirement that the Registrar give notice of an area ILUA even if it does not meet the requirements of the NTA to be registered is supported by First Nations, in so far as the reduced compliance procedures do not cause detriment to or impose burdens on the native title applicant of the area ILUA.

41. The COAG Investigation also proposes that body corporate ILUAs cover areas where native title has been extinguished in specific circumstances, noting the benefits of enabling wider use of such ILUAs and reducing transaction costs and registration timeframes. First Nations supports this proposal.

42. Aside from developing a new, alternative agreement-making process, existing arrangements can be improved for example, by developing template ILUAs and section 31 Agreements. First Nations notes that COAG has previously outlined the benefits of template ILUAs which are currently being used in many states.

43. First Nations agrees with this option of streamlining agreement-making, however notes that flexibility must be afforded in such template documents to allow for PBCs and/or native title holders to be able to tailor provisions when required in certain circumstances. Any template agreement must not be rigid for native title holders who may wish to remove or insert clauses to serve their varied circumstances.

Transparent agreement-making

44. First Nations notes the desirability of transparent agreement-making, however submits this must be balanced against protecting the privacy of native title holders and PBCs, especially where NTRBs are involved in the negotiating of agreements.

45. The options paper proposes to require section 31 agreements to be registered. First Nations notes that if a register be considered desirable the existing s 41A(1) ensures that either the NNTT or the Commonwealth Minister is provided with the information necessary to create a public register identifying only the fact of an agreement and the parties to it. First Nations would not support the publication of information as to the content of section 31 Agreements beyond these matters. Nor, in First Nations submission should the register operate to any effect other than to give notice of the existence of an agreement.

46. To be quite clear, First Nations strongly opposes the proposal to make registered ILUAs and any other agreement negotiated by or on behalf of a PBC and/or native title holders publicly available or making their full contents publicly accessible on any register. Despite the qualification proffered in the options paper that there may be an argument for information which is commercially or culturally sensitive to be redacted by the parties, First Nations does not believe it appropriate to release any content of ILUAs, section 31 agreements or any other agreements to the public.

47. First Nations would argue that the example of the proposal in practice outlined in the options paper may ultimately weaken future bargaining positions of native title holders and/or a PBC as it would allow for all content of the agreement to be publicly accessible.

48. In the example provided in the options paper, an Indigenous group seeking to

determine whether a proponent has made a section 31 agreement with another Indigenous group in the past, can still uncover this information if a register of section 31 agreements exists. The full contents of the agreement need not be made available for this to proceed.

Indigenous decision-making

49. Based on our experience working with many native title groups in Victoria over many years, it is entirely appropriate that a native title group be provided with the opportunity, consistent with the rights recognised in the *United Nations Declaration on the Rights of Indigenous Peoples,* to authorise an ILUA or a native title application in accordance with a decision-making process agreed to and adopted by the native title group.

50. First Nations supports the amendment of the NTA and the PBC Regulations that would allow the claim group to decide whether they use a "Traditional Decision Making Process" or an "Adopted Process". Aboriginal and Torres Strait Islander law is fluid and has evolved over time. It is First Nations' submission that the claim group should have the autonomy to agree and self-determine their decision-making processes. First Nations believes that the claim group must have the flexibility to decide whether they adopt a narrowly defined Traditional decision making process in accordance with the NTA, or whether it is more fluid and is an adopted decision-making process.

51. First Nations Legal acknowledges that there are differing views conveyed by NTRB's and NTSP's regarding the amendment of the Traditional decision-making provisions within the NTA and the PBC Regulations.

Claims resolution and process

Pastoral Leases

52. First Nations supports an amendment of the NTA to allow the determination of native title over areas where claimants own or hold the pastoral lease. There are a number of PBCs and claim groups within Australia who hold multiple forms of land tenure over their native title Country. Land tenure systems within Australia can be quite complex for native title holders and this amendment will streamline the land tenure process.

53. First Nations submits that the changes to the legislation that allows a native title determination to include areas where a claim group holds the pastoral lease will promote economic development and autonomy for the native title holders.

Compensation Applications

54. Following from the *Griffiths* decision, First Nations supports the amendment of the legislation which allows a PBC to be an applicant on a compensation claim within their determination area.

55. The amendment of the NTA to allow a PBC to be an applicant for a compensation claim within their determination will streamline processes under the NTA. The PBC is the recognised entity to represent the rights and interests of the common law holders over the claim area, and it is unlikely that any party will be prejudiced by these amendments. Rather, this amendment will offer the native title holders flexibility on who they choose to represent their interests.

56. First Nations supports the amendment to the NTA confirming that a decision to make a compensation application is a native title decision. The rights and benefits that flow from a successful compensation determination will essentially be held on behalf of the native title group as a whole, and as such must be authorised in accordance with the requirements for other native title decisions (i.e. ILUA's etc.).

Historical Extinguishment

57. First Nations supports the amendment of the NTA to allow for historical extinguishment of National, State and Territory Parks to be disregarded. The *Traditional Owner Settlement Act 2010* (Vic) allows for Traditional Owners to hold Aboriginal Title over areas within National Parks where native title has been extinguished.

58. This proposal, first contained in the *2012 Bill* proposed section 47C operates to allow States and native title claimants to work in agreement to ensure stable and rational land management arrangements within the nations parks estate.

59. It is the experience in Victoria that the granting of Aboriginal Title within National Parks has created economic and employment benefits for Traditional Owners and their claim groups.

Post-determination dispute management

60. The options paper outlines a number of proposals regarding post-determination dispute management.

61. The paper explores three specific dispute-resolution proposals: (a) the creation of a system delivering what is said to be low cost and final resolution of disputes between members of the native title group and the PBC; (b) creating an arbitration function for the NNTT; and (c) modifying the role of the NNTT to allow PBCs or individual native title holders to approach the NNTT for dispute resolution assistance directly (without the consent of the NTRB/SP).

62. First Nations generally supports the creation of a system delivering low cost and final resolution of disputes between members of the native title group and PBCs.

63. Currently, the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) requires PBC rulebooks to include a dispute clause but does not prescribe the content of this clause.[2]

64. The ORIC 'Rule Book Condensed'[3] includes a rule which states that if a dispute relates to the meaning of a provision in the CATSI Act or the corporation's rulebook, a non-binding opinion may be sought from the Registrar and/or the Registrar may provide assistance in having the matter resolved. NTRBs have a dispute resolution function under s203BF of the NTA and given NTRBs generally hold significant legal and research knowledge relevant to the native title group, they can be well placed to assist in managing disputes.

65. First Nations recommends amending the CATSI Act to implement a staged approach to dispute resolution, with disputants only able to escalate a dispute to the next stage if they provide evidence (for example, a certificate) that the previous stage has been exhausted. The stages of dispute resolution suggested are:

    a. Internal – Disputants attempt to resolve the dispute following the PBC's internal processes (where relevant).

    b. NTRB/SP – In the event the dispute persists, disputants are required to engage the NTRB/SP from their area to assist in dispute resolution. NRTBs and SPs are well placed to perform this function as increasingly they have mediation and dispute management experience, as well as strong legal and research expertise.

    c. NNTT – In the event the dispute is unresolved at the NTRB/SP level and involves 'native title' (*cf* governance) issues, it can be referred to the NNTT. The NNTT has appropriately trained and experienced staff and would not face the same perceptions in relation to lack of impartiality as NTRBs/SPs may.

    d. ORIC – In the event the dispute involves governance (*cf* 'native title' issues) the dispute may referred to ORIC.

66. First Nations argues that there is ample scope to bring the PBC regulatory environment under one Act, rather than it sitting across the NTA, PBC Regulations and CATSI Act. This dispute resolution process would remedy the current situation of there being relatively limited avenues for support in relation to dispute resolution and would provide additional powers to ORIC in line with the proposed changes. First Nations is generally supportive of reform to the dispute resolution avenues available to PBCs and members of native title groups.

67. The options paper also proposes providing regulatory oversight to matters of compliance within the PBC regulations, amending the PBC regulations to extend the transparency and accountability provisions to native title monies held outside PBCs and requiring PBCs to better account for all native title funds to common law holders.

[2] Section 66-1 CATSI Act

[3] This document provides a template rulebook which satisfies CATSI Act requirements and proposes other measures for good governance.

68. A related proposal which would provide support to these kinds of objectives is the development of an Indigenous Community Development Corporation (**ICDC**) system. The ICDC proposal is a joint initiative of the Minerals Council of Australia and the NNTC which has also been recommended by the Treasury Working Group looking at *Native Title and Tax*.[4] The ICDC would be a 'custom built' corporate structure, available to native title groups under the CATSI Act and administered by ORIC. It would free native title groups from the restrictions inherent in charitable status, allowing them to invest in economic development opportunities without tax disincentives. The proposed system would be underpinned by strong mandatory governance and management processes with a set of minimum key principles supported by a mechanism for registration. The ICDC structure would be entirely voluntary and include some flexibility on requirements dependent on the ICDC's volume of revenue.

69. It is envisaged that the ICDC system would involve the provision of new functions to ORIC in determining standards of capacity, accountability, processes and prudential management for ICDCs and that guidance or regulatory requirements would need to be developed to ensure such standards were met. First Nations supports the establishment of an ICDC system along the lines set out above and submits that it would be an ideal mechanism by which broad issues relating to PBC compliance, transparency and accountability, which have been raised by the Options Paper, could be addressed.

70. A Document entitled "A Brief Overview of the ICDC" prepared by the NNTC and the MCA is annexed to this submission.

71. The COAG Investigation recommended 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. This change would reduce administrative and conflict-related issues in situations where amendments were proposed contrary to this regulation. First Nations is concerned that the ORIC does not have the necessary expertise to form a view on these matters. Accordingly, First Nations supports this recommendation provided that the Registrar's power in this regard is only exercised in accordance with advice provided by the NNTT.

72. The COAG Investigation recommended that a requirement be introduced that PBC rulebooks specifically address arrangements for resolving disputes about membership, including disputes between non-members and the PBC. First Nations supports this proposed amendment and suggests that it too would fall within the dispute resolution process outlined above at paragraphs 64 and 65. Sufficient timeframes and support would be required to enable PBCs to amend their existing rulebooks to comply with this requirement.

[4] See: Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, Report to Government, 1 July 2013.

73. The COAG Investigation recommended that the CATSI Act be amended to remove the discretion of PBC directors to refuse to accept a common law holder's membership application, even if the prospective member meets eligibility requirements. The proposed amendment would allow refusal of membership for an individual who meets the PBC's membership criteria only in exceptional circumstances. First Nations is generally supportive of preventing situations where directors can arbitrarily exclude prospective members who are relevant common law native title holders. However, a PBC must retain the ability to undertake processes leading to the exclusion from membership of persons who have not acted in the best interests of the corporation or have otherwise demonstrated misbehaviour. First Nations believes further discussion need be undertaken to determine the final legislative framing of this provision.

74. The COAG Investigation further recommended that the CATSI Act be amended to require that the process for cancellation of membership include a general meeting. First Nations supports an amendment to the effect that changes to membership requirements must be approved at a general meeting.

75. The COAG Investigation 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 it reasonably necessary to ensure rulebook compliance in relation to the revocation of membership of individuals. First Nations notes that the Registrar currently exercises power to refuse to remove members' names in appropriate circumstances. As such any proposed amendment would extend the Registrar's power to *including* members' names. It is at this stage unclear to First Nations in what circumstances such a power could appropriately be exercised.

76. The COAG Investigation recommended that the CATSI Act be amended to require PBCs to set up and maintain registers of native title decisions and trust money directions. First Nations believes this proposal imposes an unnecessary and unjustified regulatory burden on PBCs and strongly opposes it. First Nations believes that rather than imposing additional regulatory burdens on PBCs an appropriate response to any perceived deficiencies in administration is to provide further resources and training to PBCs.

77. The COAG Investigation recommended that regulation 3 of the PBC Regulations be amended to clarify that a group of common law holders refers to the determined native title holding group(s) for which the PBC acts as agent or trustee. The amendment would ensure that PBCs consult with the common law holders but would not mandate consultation with an affected sub-group, unless the traditional decision-making process of the group requires such consultation. First Nations supports this recommendation.

78. First Nations supports the proposal for ORIC to become the agency administering the PBC Regulations. However, First Nations believes it must be quite clear that ORICs function in this regard does not extend to overseeing or intervening in a PBCs functions in making "native title decisions". Finally, First Nations supports proposals to give the Federal Court of Australia exclusive jurisdictions with respect to disputes arising under the PBC Regulations.

Further Matters

79. While not addressed in the Options Paper, First Nations believes there are a number of additional matters that it is timely to consider including in any future *Native Title Act Amendment Bill*. These matters include:

    - Amendment to the current area agreement ILUA objection procedures in circumstances where the ILUA has been certified by the relevant NTRB pursuant to section 24CK. This proposal was included in the *2012 Amendment Bill*.

    - Development of an optional administrative process to determine native title compensation applications in order to ensure the fair and expeditious resolution of compensation applications while imposing on parties minimal transactions costs associated with such resolutions.

ANNEXURE A

The Indigenous Community Development Corporation (ICDC)

A brief overview

The ICDC is a proposal designed to facilitate native title Prescribed Bodies Corporate (PBCs) to achieve better economic outcomes for native title holders while also ensuring greater transparency and accountability in the management of native title monies by PBCs. The proposal is being jointly pursued by the Minerals Council of Australia (MCA) and the National Native Title Council (NNTC).

The ICDC would provide participating PBCs with tax exempt status not only with respect to native title monies (which is the current situation) but also in regard to income earned from those monies ("derived income"). Derived income is presently subject to tax. To achieve this benefit participating PBCs would be obliged to agree to much greater levels of transparency and accountability in the management of native title monies. The Office of the Registrar of Indigenous Corporations would be the regulator for PBCs that adopt the ICDC option as it is for other PBCs.

The current tax structure for native title monies encourages either immediate disbursement of native title monies or their accumulation in complex charitable trust structures. In either case the potential to use native title monies to leverage economic development opportunities for native title holders is not maximised. The use of charitable structures encourages a culture of welfare dependency and limits the use of native title monies for non-charitable economic development purposes (such as the financing of individual or community non-charitable business activities). Charitable structures can be complex and disempowering, with decisions being taken from native title holders and placed in the hands of anonymous trustees. This complexity and the resultant lack of transparency have been at the core of a number of instances of corruption in native title organisations. The open, transparent and rigorous regulatory regime around the ICDC would eliminate this.

Other features of the ICDC proposal include:

- A defined accumulation period greater than currently available to charitable trusts. This recognises the necessarily inter-generational nature of native title monies derived from for example large scale mining operations.
- The establishment of a process whereby a PBC can seek to have existing charitable trust funds rolled over into the ICDC regime. This would allow the economic development potential of native title monies accrued under the current limited regime to be unlocked.
- The ability of the ICDC to provide finance to individual native title holders (or groups of them) to establish private businesses.
- A clear break from the notion that native title monies represent some form of charitable welfare and recognition that this income is an Indigenous community's opportunity to develop private wealth.

The likely additional stream of native title monies as a result of a growing number of native title compensation cases makes the issue all the more pressing. By facilitating PBCs to undertake and to encourage economic development opportunities in Indigenous communities the ICDC provides one of the best opportunities these communities have to 'close the gap' through their own efforts, without dependence on passive welfare.