



Australian Government
Indigenous Land Corporation



The ILC GROUP

PEOPLE. LAND. OPPORTUNITY.



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

Submission by the Indigenous Land Corporation

A. Background regarding the ILC

1. The Indigenous Land Corporation (ILC) is a corporate Commonwealth entity established under Part 4A of the *Aboriginal and Torres Strait Islander Act 2005* (ATSI Act).
2. The purpose of the ILC is to assist Aboriginal persons and Torres Strait Islanders to both acquire and manage Indigenous-held land, so as to provide economic, environmental, social or cultural benefits for Aboriginal persons and Torres Strait Islanders.
3. The ILC occupies a unique space in the native title arena, given its genesis in the settlement between government and Indigenous stakeholders in the negotiation of the passage of the *Native Title Act 1993*. Though the Native Title Act and the ILC's enabling legislation, the ATSI Act, both aim to address the wider issue of Indigenous dispossession they are quite separate statutory regimes with specific/prescribed outcomes.
4. The only reference to native title in the ATSI Act is in Part 4A, which simply provides that, prior to the ILC's exercising its land acquisition function, it must first conduct a search at the National Native Title Tribunal to see if any portions of land proposed for an acquisition are affected by a native title claim or determination (s.191D(4)). This section does not prescribe a particular approach depending on the results of the search, and does not prohibit the ILC from acquiring land where there is already a determination of native title in favour of an applicant group.
5. Further, the ILC's land acquisition function delivers different forms of tenure (usually in the form of freehold or leasehold) rather than native title rights.
6. The acquisition of land by the ILC is not predicated on prior or continued traditional connection to the land acquired by the applicant group. Instead, the ILC is directed by the statutory requirement to provide economic, environmental, social or cultural benefits from its activities.
7. The existence of native title claims and determinations may have a bearing on how the ILC responds to an application for land acquisition or land management assistance, in so much as this influences the achievement of benefits through the proposed acquisition or management activity.

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8. However, the ILC is not equipped to solve complex disputes about traditional ownership and native title. Native Title Representative Bodies (NTRBs), the National Native Title Tribunal and ultimately the Federal Court are responsible for dealing with native title claims.

B. ILC Board Endorsed Policy in relation to Native Title

9. The ILC has a Board endorsed policy which is available on the ILC website.¹

10. The ILC supports the Australian Government's approach to promoting flexible and sustainable negotiated settlements instead of litigation where appropriate. It acknowledges that broader land settlements of native title can assist to close the gap in Indigenous disadvantage by assisting in the achievement of social, cultural, environmental and economic benefits.

11. The ILC is committed to contributing to the constructive and flexible settlement of native title claims by contributing to social, cultural, environmental and economic benefits for Indigenous Australians consistent with its own statutory responsibilities.

12. The ILC will work in good faith with Governments, Native Title Representative Bodies (NTRBs) and properly authorised Native Title Groups (NTGs) to assist in building a Native Title Group's capacity to own and/or manage land and achieve sustainable benefits for Indigenous Australians.

13. The ILC's role is not to resolve native title claims or to assist in conflict resolution, mediation or negotiation.

14. The ILC's involvement in a native title settlement is triggered when the Government and NTRB / NTG parties jointly provide the ILC with a formal written request, which includes:

- 14.1. an assessment by the Government parties and the relevant Native Title Representative Body (NTRB) that the NTG is properly authorised by the people who can legally settle a current or future claim;
- 14.2. confirmation that the Government parties and NTG have agreed to enter negotiations with a view to reaching agreement and a realistic expected timeframe for completion of those negotiations; and identification of the particular type(s) of ILC assistance sought to support the settlement.

15. Since 2011 the ILC has been a potential 'default' Prescribed Body Corporate (PBC). The ILC may be appointed as an agent PBC where:

- 15.1. The common law holders fail to nominate a PBC (in which case the ILC will be appointed by the Federal Court);

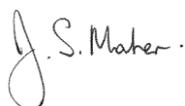
¹ http://www.ilc.gov.au/IndigenousLandCorporation/media/Items/Content/Publications/Corporate%20Documents/ILC-Native-Title-Policy_updated2017.pdf

- 15.2. A liquidator has been appointed to wind up an existing PBC; or
 - 15.3. The ILC accepts a nomination as an agent PBC from the common law native title holders.
16. The ILC has yet to be appointed as a default PBC and the statutory intention is that the provisions whereby it would be appointed would be used only as an option of last resort.
17. The ILC does not generally become a party to Federal Court native title claims.

C. ILC National Indigenous Land Strategy 2018-2022 and Our Land Our Future Program

18. The ILC Board has recently approved its fifth National Indigenous Land Strategy (NILS), 2018-2022.
19. The NILS sets out the ILC's strategic direction for the next five years in order to ensure the growth of the Indigenous Estate – from land, to people, to intellectual property.
20. The 'Our Land Our Future' Program is guided by the following Investment Principles:
- 20.1. Increase the productivity, value and profitability of the Indigenous Estate;
 - 20.2. Support new and emerging markets where evidence supports opportunity and sustainability;
 - 20.3. Invest in value-for-money projects focusing on cultural, social, environmental and/ or economic returns;
 - 20.4. Invest in socially responsible, sound, ethical and sustainable projects
 - 20.5. Support Indigenous-held land to remain within the Indigenous Estate;
 - 20.6. Maximise Indigenous procurement and employment opportunities through creating indigenous benefits through the supply chain;
 - 20.7. Build the capability of Indigenous investment partners
 - 20.8. Have measurable outcomes and a defined methodology for measurement;
 - 20.9. Have a clear path to divestment of land or ILC exit from a partnership agreement.
21. The ILC's submissions below are provided in the context of its statutory responsibilities, its Board endorsed policy in relation to Native Title and the NILS 2018-2022.

Thank you for the opportunity to provide comment on the proposed reforms.
Yours sincerely,



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Group CEO
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20 February 2018

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D. ILC Submission in Response to Options Paper Questions

Qn No.	Question	ILC Submission
1	Should the Act be amended to confirm the validity of section 31 Agreements made prior to the <i>McGlade</i> decision?	Yes – to provide certainty
2	What should be the role of the applicant in future s.31 agreements? Which of the three options, if any, do you prefer	Option 3 – to align with the ILUA process following the 2017 Amendments however noting that additional authorisation processes may not be the most appropriate. Alternatives, such as formal majority-endorsed decisions may be preferable.
3	Do you support the proposals to: (a) allow claim group members to define the scope of the authority of the applicant, (b) clarify that an applicant can act by majority unless the claim group specifies otherwise, (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?	Yes – to provide certainty
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?	Yes – to reduce transaction costs for all parties but only if the rights and interests of native title holders are appropriately protected.
5	Do you support the proposals set out in Attachment C to streamline existing agreement existing processes?	Yes – to streamline processes and reduce transaction costs but only if the rights and interests of native title holders are appropriately protected.
6	(a) Should there be a Register of 31 agreements?	Yes – for increased transparency

Qn No.	Question	ILC Submission
	(b) Should ILUAs – and other agreements made under the Act – be publicly accessible?	
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?	Yes – to increase flexibility in relation to processes but only if the rights and interests of native title holders are appropriately protected.
8.	Do you support the proposed amendments detailed in Attachment E to improve the efficiency and effectiveness of claims resolution?	Yes – to improve efficiency and effectiveness of claims resolution
9.	Do you support the proposed amendments in Attachment F to address post-determination native title related disputation?	Yes – to improve the effectiveness of native title resolution
	Feedback re Attachment G – State and Territory proposals	Yes to G6 only - consistent with proposal A1