OVERARCHING COMMENTS

KRED Enterprises Pty Ltd (**KRED**) commends the Commonwealth for taking steps to implement proposals made in the Senior Officers Working Group Report to the Council of Australian Government on Investigation into Indigenous Land Administration and Use following engagement with the Indigenous Expert Working Group (**COAG Report**). We are also pleased to see steps being taken to consider enhancing agreement making, claims resolution and processes for the settling of disputes.

However, we do have some overarching concerns in relation to the Options Paper[1]. These include the following:

- The implementation of the COAG proposals - or indeed any proposal affecting the rights and interests of native title holders - must be done with the key objective of the Investigation and report in mind – namely redressing historical inequities and providing Indigenous stakeholders with greater access to land, culture and the economy. Changes to the Native Title Act should not be for the benefit of non-Indigenous stakeholders, lest this lead to a further erosion of the rights of Indigenous stakeholders.

- Further to this, the COAG proposals must be read together with the Recommendations and Guiding Principles set out in the COAG Report and implemented taking into account the context within which the proposals were made, the guiding principles underpinning them and ensuring the further work required to be done to prove up some of the proposals is undertaken.

- Similarly, the implementation of any proposal affecting the rights and interests of Indigenous stakeholders must be subject to comprehensive and rigorous consultation processes. While we consider reasonable consultation was undertaken by the EIWG in respect of the COAG proposals, which the Options paper seeks to implement verbatim and in line with the guiding principles, further consultation is required in respect of the recommendations made by the Australian Law Reform Commission,[2] the Office of the Registrar of Indigenous Corporation[3]

[1] Attorney-General's Department *Options Paper* on *Reforms to the Native Title Act 1993 (Cth)*, November 2017
[2] See Australian Law Reform Commission's report on *'Connection to Country: Review of the Native Title Act 1993 (Cth)*', published June 2015
[3] See the Office of the Registrar of Indigenous Corporation's 2017 '*Technical review of the Corporation (Aboriginal and Torres Strait Islander) Act 2006'*

and in respect of those COAG proposals which are not being implemented in this way or in relation to which further work was required to be done.

In relation to those proposals, while we appreciate the effort being made by the Commonwealth to take steps to implement the COAG proposals, we share concerns raised by other Indigenous leaders to the effect that the timing is unfortunate. Issuing an Options Paper in November 2017 and requiring submissions by 25 January 2018 not only provides stakeholders with a short period of time to consider the important proposals in the Paper, but effectively excludes meaningful input from most of the Indigenous stakeholders in Northern Australia, who engage in ceremonial and cultural activities for most of that period.

- Finally, the opportunity for amendment of the Native Title Act[4] to improve Indigenous accessibility is rare. It is logical to take that opportunity to consult on and implement all appropriate recommendations. These include the few COAG proposals excluded from the Options paper which we would argue fall into the categories of agreement-making, claims resolution or dispute resolution. These include recommendations set out in our report to the Commonwealth of Australia on Land Tenure Model and Home Ownership (**Land Tenure Report**). A copy of that report is annexed at "A".

We echo the caution received by the Senior Officers Working Group received from Indigenous people and organisations during the COAG Investigation to the effect that "*there is potential for the COAG Investigation to represent nothing more than a 'Trojan horse' through which governments and industry would seek to further weaken Indigenous land rights legislation in the interest of proposing Indigenous economic development through more efficient 'processing' of land use proposals for third party interests*". This can be avoided by ensuring implementation of the COAG proposals in line with their letter and intent and ensuring appropriate further work and consultation is undertaken where required will avoid this.

Our detailed responses below are subject to these overarching comments.

[4] *Native Title Act, 1993* (Cth)

DETAILED RESPONSES

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

KRED response : In principle, s31 agreements entered into by native title parties on a free, prior and informed basis should be validated. However, further discussion is required on this proposal.

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?

KRED response: Option 3 is preferred, however, NRTBs and PBCs must be provided with resourcing beyond that currently provided, to enable them to comply with the additional safeguard referred to.

Question 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 reauthorization 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?

KRED response: Yes, on the basis that this is intended to provide greater autonomy and self-determination to native title groups.

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)?

KRED response: We support the COAG Investigation recommendations set out in Attachment B.

However, the commentary made by the Senior Officers Working Group in relation to COAG proposals, reproduced in Items B1 and B3 of Annexure B, require careful consideration and further work to be done by Indigenous stakeholders prior to implementation. This should not be overlooked.

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

KRED response: We support the COAG proposals set out in Attachment C. We also note:

- C1, C2, C3, C5, C6, C7 and C10 appropriately reflect the COAG proposal.
- C4 is not a COAG proposal, however, KRED would support this, in line with the principle of delivering greater autonomy and self-determination to native title groups.
- C9 as set out in Attachment C does not appropriately reflect the COAG proposal and fails to adequately cater for the need for amendments to primarily benefit native title groups. Further work is required to bring this amendment in line with the spirit and intent of the COAG proposals. For example, instead of clarifying that the future act may proceed in the absence of a referral but where objections are on foot, the amendments could clarify the following:
    - A consultation period of at least equivalent length to the notification period in right to negotiate matters;
    - A right for any party to refer objections for assessment by a mutually appointed and agreed independent arbitrator, at the grantee or government party's cost; and
    - A prohibition on the future act proceeding until the independent arbitrator has made a determination.
- KRED supports C11

Question 6(a): Should there be a Register of s31 agreements?

KRED response: We do not support a registration process, however would support agreements being listed on a register as an official record.

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

KRED response: Again, we do not support this, on the same terms as in 6(a).

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?

KRED response: We support the implementation of the COAG proposals in this regard, in accordance with the guiding principles applicable to those proposals. However, any change should be done with the intention of strengthening the capacity of native title parties to engage in decision making and be underpinned by the principle of free, prior and informed consent.

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

KRED response:

- E1 – We do not support the implementation of this recommendation on the information available to us. On the face of it, the recommendation serves to take control of the prosecution of the native title claim out of the hands of the applicant. This is in direct opposition to the principle of providing native title groups with greater access and participation in the resolution of matters relating to their traditional lands. Further, this is an important issue for native title groups to consider and one which they should be given sufficient and appropriate time to respond to.
- E2 – Similarly, we do not support this recommendation, on similar grounds to those set out above.
- E3 – We support the COAG proposal corresponding with E3.
- E 4 – We support the corresponding COAG proposal, however, the further work noted in the explanatory notes to that proposal in the COAG Report (to the effect that further work needs to be done to identify a possibly solution) should be undertaken.
- E5 – Although this goes further than the COAG Recommendation, KRED considers it appropriate in the circumstances.
- E6 – We would support the implementation of this recommendation, provided the change is made at the native title group's request, rather than by agreement of all parties.

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

KRED response:

- We support the COAG Recommendation that the provision of regulatory oversight to matters such as compliance with the PBC Regulations, including the investment and application of native title monies is considered, set out in table 2, Item 8 of the COAG Report. However, F1 extends the scope of this COAG Recommendation beyond the proposal that ORIC provide regulatory oversight into compliance with PBC Regulations, including the investment and application of native title monies.

We would support a proposal whereby the Act explicitly provides that a native title applicant owes a fiduciary obligation to the native title claim group. The NNTC therefore recommends that the proposal be considered as part of a discussion on dispute resolution.

- In relation to F2-F6 and F11, the COAG Recommendation in Item 10, Table 2 was to consider a system that delivers low cost and final resolution of disputes between members of the native title group and PBC. F2-F6 go beyond this and we could not support aspects of the recommendations. For example, the NNTT would not be an appropriate arbitrator from the perspective of many native title groups, given the NNTT has decided the overwhelming majority of matters before it in favour of grantee and government parties and, in many instances, is seen as an ineffective mediator. While implementation of the COAG proposal is encouraged, Recommendations F2-F6 fail to appropriately do this.
- F7 – Again, the COAG proposal in Item 8, Table 2 simply recommends regulatory oversight by ORIC. F7 goes beyond this. In our opinion, if there is to be any uplift in duties by PBCs, it should be in the promotion of NTP accessibility and involvement, and there must be an equivalent uplift in resources provided to NTPs to allow for them to discharge these duties.
- F8 and F9 – Again, while KRED supports the corresponding COAG proposals, F8 and F9 seek to detail these proposals, without having engaged appropriately with stakeholders. Further work is to be done for the COAG proposals to be implemented. However, a preliminary issue again is that, if there is to be an uplift in duties imposed upon PBCs, PBCs must receive appropriate additional resources to discharge those duties.
- F10 – We support amending the definition in Regulation 3 of 'group of common law holders' to clarify that it refers to the determined native title holding groups for which the PBC acts as agent or trustee.

Attachment G – State and Territory Proposals

KRED's response on the State and Territory Proposals set out in Attachment G are as follows:

- G1 proposes to shorten the objection period for acts which the government party considers attract the expedited procedure, where the area affected is subject to a native title determination. This is not currently supported by KRED, for the following reasons:
    - PBCs and NTRBs/SPs currently struggle to keep up with the workload and lodge objections within the current time frame on the relatively scarce resources they have. Shortening the time frame within which native title parties have to respond will unreasonably increase the pressure on those resources.

- Further, given inequities in bargaining power and resources any change to the law must be in the interests of increasing accessibility and participation of native title parties. However, the proposed amendment will have the opposite impact.

- Similarly, given the inequities referred to above, State policies should be developed in collaboration with native title parties and weighted in their favour. This is not currently the case. State policies governing the inclusion of a statement that the State considers the expedited procedure applies arguably benefit grantee and government parties to a much greater degree than they do native title parties. Given this, native title parties are already 'on the back foot' and shortening the period within which they have to respond only increases this inequity.

- G2 seeks to 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. KRED does not support this proposal, for the following reasons:

    - Arguably, any defect creates uncertainty for the native title party and, as such, any defect will be to the detriment of that party.
    - Further, in many cases, non-Indigenous parties are entitled to strict compliance and native title parties should be entitled to the same certainty and accuracy.
    - Finally, this amendment will create uncertainty and lead to further litigation, as 'minor defect' will need to be defined on a case by case basis.

- G3 seeks to confirm that notices to identified parties may be made by email and that public notice is able to be given online. Where an electronic address for service is nominated by a party, service by email is appropriate. However, many native title parties live remotely and access to the internet remains a real issue. For that reason, email service will only be acceptable where consented to expressly by a party and online notices will not be appropriate in all circumstances.

- G4 proposes amendments to clarify that parties in relation to expedited procedure objection applications are the Government party, native title parties which have objected under s32(3) and the grantee parties. KRED supports this proposal.

- We support in principle the proposal in G6 requiring limits on the Applicant's authority to be advised to other parties. However, limitations on authority can change throughout the life of a claim – sometimes frequently. A simple mechanism needs to be in place for notification of changes (for example, a simple letter advising other parties of the chance) together with an appropriate uplift in funding received by NTRBs/SCs and PBCs to allow that additional task to be undertaken, without placing further financial strain on those organisations.

- We support the proposal in G7.

- In relation to G8, KRED is supportive in principal of innovative measures to permit activities to be done at the request of, for the benefit of and with the free, prior and informed consent of the applicable native title holders, without native title being impacted upon.

  However, proposals to extend the operation of s24JAA do not necessarily tick these boxes. Further, the argument overlooks the overriding concern held by many native title holders that control and management of Indigenous reserves ought to be divested initially to PBCs, who may then grant subordinate management interests and tenure[5].

  Rather than simply extending the operation of s24JAA, the recommendations made in the [CR, refer to Land Tenure report] should be incorporated into any consultation on the proposal at G8 and implementation of the outcomes of that consultation.

- In relation to G9, we support clarifying any uncertainty, however, we submit that the clarification should be that the taking of native title rights and the grant of new interests in land are two separate future acts.

- We do not support the recommendation at G10. The creation of rubbish tips and other waste facilities potentially has significant social and environmental impacts for native title holders. The proposal at G10, if implemented, may result in the parties failing to identify them as separate acts warranting special consideration.

[5] See KRED Enterprises Pty Ltd, *Final report, Project 1, Land Tenure Model and Homeownership, 4-3NL0ZL, [November 2017].*

- In relation to G11, while we support the principle of clarifying the native title act being in line with the explanatory memorandum, there is a risk that notices sent to registered claimants will be missed, due to shortfalls in administrative and governance processes of some claimant groups. Notices should always be copied to the applicable representative body.

- Provided the applicable area ILUA falls wholly within the determination area, it is logical for those agreements to automatically be treated as body corporate ILUAs post determination and KRED supports the proposal in G12 on this basis.

- It is unclear whether the proposal in G13 is for the native title act to clarify exemptions for native title holders in respect of hunting with firearms or for endangered species, or for the curtailing of those exemptions. KRED would support the former, but not the latter.

- We support the validation of mining leases affected by the invalidity identified in the *Forrest* decision[6], but only where those mining leases were granted with the consent of the affected native title holders.

- We do not support the proposal in G15, which effectively further curtails the native title parties' rights to give or withhold their free, prior and informed consent to future acts, under legislation which – despite its original promises - is in reality already heavily weighted in favour of non-native title and non-Indigenous parties.

- We support the proposal in G16 to allow native title and compensation applications to be heard together, although the option must still be provided for compensation applications to be made after native title claims have been determined.

- We support the proposal in G18 to permit native title claims over areas subject to a grant of freehold estate or certain exclusive possession leases before 23 December 1996.

- We support the proposals in G19 – G24 inclusive.

[6] *Forrest & Forrest Pty Ltd v Wilson & Ors* [2017] HCA 30.

- We are not opposed to native title holders being represented on default PBCs nominated and established by NTRBs/SPs, however, KRED does not support the ILC being the default PBC in any circumstances. On that basis, the suggestion in G25 is partially supported by KRED.

- We support the proposal in G26.

- We support NTRBs/SPs being empowered to support persons who may hold native title and to this being clarified in the Act. However, appropriate resourcing must be provided and amendment to the NTRBs/SPs powers should not result in the curtailing of those powers.