Achieving a healthy, wealthy and culturally strong MG community

Yawoorroong Miriuwung Gajerrong Yirrgeb Noong Dawang Aboriginal Corporation
(**MG Corporation**)
ABN 79 270 210 553
ICN 4597
08 9166 4801
19 Chestnut Avenue, Kununurra, WA, 6743
PO BOX 2110, Kununurra, WA, 6743
eo@mgcorp.com.au
www.mgcorp.com.au

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Attn: [redacted]
A/g Assistant Secretary
Land Branch, Housing Land and Culture Division
Department of Prime Minister and Cabinet
PO Box 6500
Canberra
ACT 2600

Dear [redacted]

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

I refer to the Options Paper above and **attach** a submission in respect of the same on behalf of the two MG PBCs.[1] Thank you for the opportunity to provide feedback on possible reforms to improve the efficiency and effectiveness of the native title regime in Australia.

The Options Paper identifies a number of issues that are likely to be of concern to the MG PBCs, particularly in relation to alternative agreement-making processes and indigenous decision-making. Many of the proposed reforms within those categories would adversely affect the Miriuwung and Gajerrong people in the management of their native title rights. I largely agree with the recommendations in relation to transparent agreement-making and post-determination dispute management.

Please note that a lack of response to a proposal should not be taken as acceptance.

Please also note that, as at the date of submission, this paper has not been reviewed or sanctioned by the MG PBCs, as a meeting of the MG PBCs was not held within the consultation period. I will be presenting this paper to the MG PBC directors at the next reasonable opportunity with the recommendation that the comments be endorsed and will revert to you with confirmation as to their views in due course.

I look forward to participating in future stages of this process with the Department of Prime Minister and Cabinet and thank you once again for the opportunity to be involved.

Yours sincerely,

Dominique Reeves
Senior Legal Counsel
MG CORPORATION

[1] Miriuwung and Gajerrong #1 (Native Title Prescr bed Body Corporate) Aboriginal Corporation RNTBC and Miriuwung and Gajerrong #4 (Native Title Prescribed Body Corporate) Aboriginal Corporation RNTBC

SUBMISSION OF THE MG PBCs

REFORMS TO THE NATIVE TITLE ACT 1993 (Cth): OPTIONS PAPER NOVEMBER 2017

SECTION 31 AGREEMENTS

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

We have concerns about the *Native Title Act 1993* (Cth) (**the Act**) being amended as proposed for the following reasons:

1. existing section 31 agreements should be opened for review before a blanket confirmation is granted; and
2. agreements made between the *McGlade* decision and the proposed confirmation of validity should not be entitled to a de-facto confirmation.

We understand the commercial importance of confirming existing agreements already on foot. However, it would be prudent to ensure that all existing section 31 agreements are reviewed for compliance with the Act as it stands, prior to confirmation of their validity. This could be addressed via a review and objection period. During this period, an entitled person could object to an agreement on the ground that it does not meet the requirements and the agreement could then proceed to a more thorough rectification process.

We also have concerns that any section 31 agreements made since the *McGlade* decision may exploit any loophole as may be found. We note that the proposal is to confirm the validity of agreements made prior to the *McGlade* decision and agree that only those agreements that are made prior to the *McGlade* decision (on 2 February 2017) should be confirmed as valid under this proposal (subject to our concern noted above).

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?

We consider that none of the options proposed are adequate. Of the options provided, option 2, requiring consensus from living claimants, is the most acceptable. However, we would suggest that an exclusion whereby signatories unable to be included for a justifiable and verifiable reason may be discounted from this requirement. Our specific concerns are:

- **Option 1** requires deceased members to be signatories to the agreement, which is clearly impossible.

- **Option 2** would require all members other than deceased members to be signatories to the agreement. In our experience this would be a difficult threshold to satisfy although, of the three options, is the most workable whilst ensuring that all claimants are protected.

- **Option 3** would require a majority of members of the applicant to be signatories to the agreement. In our experience, this threshold would be far too low to reflect consensus on such a sensitive agreement. Decisions which affect native title, in practice, are discussed at length throughout the community, even where consultation is not legally mandated. Enabling a simple majority to execute an agreement could cause disharmony and lead to conflict within the claimant group.

AUTHORISATION AND THE APPLICANT

Question 3: Do you support proposals to:
(a) allow claim group members to define the scope of the authority of the applicant (A1);
(b) clarify that an applicant can act by majority unless the claim group specifies otherwise (A2);
(c) allow the composition of the applicant to be changed without going through a section 66B reauthorisation process in prescribed circumstances (A3); 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 (A4)?

As an entity that manages a settled native title determination, we no longer deal with these issues directly. However, in general terms, we do not support amending the Act as proposed as it appears that this will cause the rights of the broader group of native title holders to be constrained.

Specifically in relation to **A1**, whilst we support allowing the claim group to be involved in the determination of the scope of the applicant, we have concerns that the claim group will be unable to predetermine the scope of acts that the applicant will have to address. However, we are in support of an approach where the claim group restricts the scope of the applicants' authority to act, as governed by an agreed list of reserved matters, upon which the applicant(s) would need claim group approval. This would mean that key decisions as determined by the claim group would require the broader approval of the claim group but any decisions on unreserved matters could be made at the discretion of the applicant. In that way, the claim group would not be expected to determine the range of decisions that the applicant will come across, but instead would be able to indicate key decisions that they would require consultation on.

In relation to **A2**, we have concerns that allowing a majority to act unless authorised by the claim group, has the effect of bypassing consultation and authorisation of the claim group. The amendment also fails to recognise the traditional decision-making process of most native title groups by consensus.

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)?

We do not support the creation of a new alternative agreement-making mechanism. Alternative agreement-making mechanisms currently exist under the Act, via section 31 agreements and under Regulation 8A of the *Prescribed Body Corporate Regulations 1999* (Cth). Therefore, we do not see any need to create other mechanisms, especially those that have the potential to limit the rights of native title holders.

The proposal to allow a PBC to enter into a contract instead of an ILUA (**B1**) that does not require consultation or consent of the native title group could have the effect of unacceptably constraining the rights of native title holders to make decisions regarding their native title land. As a result, we strongly disagree with this proposal.

Allowing native title holders to contract out of the protection provided under section 211 of the Act (**B2**), which protects certain traditional activities of native title holders on their land, seems only to reduce the rights of native title holders. We are uncertain of an occasion where this mechanism would be appropriately applied.

The proposal to allow a PBC to make agreements about future acts and compensation including contracting out of provisions of the Act (**B3**) may entitle PBC directors to wield greater powers than native title holders would expect. We note that the proposal includes a restriction which would allow native title holders to pre-approve matters to be dealt with in this way. This may assist if well drafted. However - as discussed above in relation to **A1** - we have concerns with the ability of native titleholders to be in a position to pre-empt decisions that may arise. Our experience is that, in practice, the PBC directors are expected to consult with the community on major issues. By providing a mechanism to circumvent this traditional decision-making process, there is potential to

reduce community backing for the PBCs and cause community unhappiness with the PBC processes.

We do not support amending the Act to continue to allow low impact future acts by default, following a finding that native title exists in that area (**B4**). We have concerns for, and object to, any decision which allows any party to act on native title land without the consent of native title holders. Further, we have concerns over the broad definition of 'low impact future act' allowing most public works deemed 'reasonable necessary for the protection of public health or public safety'.[2]

AGREEMENT-MAKING AND FUTURE ACTS
Streamlining existing agreement-making

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

We support the proposal which allows body corporate ILUAs to cover areas where native title has been extinguished (**C1**). This will reduce the administrative burden that currently occurs because of the need to use area ILUAs even where only a small portion of the affected land is subject to native title extinguishment. This will also give PBCs a greater ability to negotiate agreements that affect native title land.

We support the proposal to allow minor technical amendments to be made to ILUAs without requiring re-registration (**C2**). This will also reduce administrative burden.

We are not in support of the proposal entitling the Registrar not to give notice of an area ILUA if the registrar is not satisfied that it will be registered (**C3**). Under the proposed amendment, the Registrar could undermine a pending ILUA decision by failing to issue a notice of the pending ILUA, causing confusion to all parties. This gives the Registrar an effective power of pre-determination that is not appropriate and goes against the spirit of the ILUA process.

We support the proposal for removing the requirement for PBCs to consult with NTRBs on native title decisions (**C4**). In the experience of MG PBCs, the requirement to consult with the NTRB for the area is simply duplication of effort. The MG PBCs are able to make native title decisions and negotiate ILUAs without the aid of the NTRB. However, we believe that the option to consult with an NTRB should still exist for PBCs who choose to retain that requirement, for example for PBCs that do not have the internal capacity to effectively make those decisions.

We support the proposal to clarify that s47B has effect from the date of lodging an application (**C5**). An application of this kind, if successful, will have the effect of allowing previous native title extinguishment to be disregarded. Therefore, it is unreasonable to allow dealings to continue on the land until that claim is determined. As such, this amendment would clarify that any dealings on that area would then have to comply with the future acts regime from the date of lodgement, under the assumption that the claim may be successful resulting in a native title determination.

We are not in support of the proposal to allow parties to an ILUA to agree that the ILUA does not need to make provision for compensation for a future act (**C6**). Entering into a contract that does not specify the amount of compensation is not considered to generally be in the interests of native title holders. There is potential for monies to be transferred outside of the main agreement, which bypasses the protections in place for the native title holders as a whole group and could lead to issues around financial transparency.

We are not in support of the proposal that establishes that removing the details of an ILUA from the Register does not invalidate a future act that is the subject of the ILUA (**C7**). If the ILUA is invalid and so removed from the register, then any act that was authorised under that ILUA must be invalid. If any such act were to continue, another agreement would need to be made. This will ensure that native title holders are always adequately consulted and compensated for future acts occurring on native title land.

[2] *Native Title Act 1993* (Cth) s42LA(2)(a).

In general, we are in support of the proposal to amend the Act so that Government parties are not required to be a party to a section 31 agreement (**C8**). However, we note that it would be important to secure the consent of all parties in order to remove the government as a party.

We are not in support of the proposal to amend the objections process for the compulsory acquisition of native title and the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility (**C9**). The proposal would allow the government, despite an objection, to proceed with the act regardless after a period of time, where the objector does not identify an independent person or body to adjudicate. We recommend that a more appropriate amendment would be to appoint a 'default' arbitrator after a prescribed period of time to address the objection. We suggest that an appropriate amount of time before appointing an arbitrator might be 6 months.

We are not in support of the proposal for the electronic transmission of notices (**C10**). In our experience, we do not find that electronic transmission of notices is always appropriate for Aboriginal communities. Many of our members and directors are not able to access electronic notices regularly. However, a dual process of electronic and physical transmission of notices could be appropriate in some circumstances.

We are in support of the proposal to clarify that all persons with a prima facie claim to native title, whether registered or not, must consent to an ILUA before it can be registered (**C11**). In our experience, this is how negotiations for ILUA registration work in practice.

AGREEMENT-MAKING AND FUTURE ACTS

Transparent agreement-making

Question 6:

(a) Should there be a register of section 31 agreements?

We support making a register of section 31 agreements and would propose aligning these with the existing ILUA register.

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

We support making all ILUAs and other agreements made under the Act publically accessible.

It is important that any agreements relating to native title land are made publically accessible for clarity and transparency to all parties and the public. While we understand that there may be commercial sensitivities, we believe that such concerns are outweighed by the public benefit in having transparency around these sensitive community agreements.

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?

We are not in support of the amendments proposed in Attachment D. From our experience, traditional decision-making should not be circumvented and, in practice, community decision-making will ultimately be made using traditional decision-making processes, regardless of any additional mechanisms that are developed.

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?

We have concerns with the proposals to allow the Federal Court to direct that an inquiry be held without the consent of the applicant and to allow the NNTT the power to summon a person or produce documents in relation to a native title application inquiry (**E1** and **E2**). This extension of

power may force Aboriginal people to make comment or submission in relation to facts which, because of cultural obligations, they are not in a position to speak on. The only effect we can envisage of leaving the legislation as drafted is that some native title applications may not be successful, and this may be a preferred option to a group rather than providing information they are not in a position to share. It should be at the discretion of the applicant as to what information they are willing to share and which inquiries they are willing to participate in.

We are in support of the proposals to allow native title to coexist with pastoral leases, where claimants are the members of a company that holds the pastoral lease (**E3**) and to allow for historical extinguishment over specified areas to be disregarded, where parties agree, when making a native title determination (**E6**). We note that this proposal should include provision to disregard historical extinguishment on land that has been held on trust for Aboriginal people. Allowing native title to coexist with pastoral leases and expand into areas that would ordinarily be subject to historical extinguishment is a welcome step towards greater native title recognition for Aboriginal people.

We are in support of the proposal to allow a PBC to be the applicant in a compensation claim (**E4**). However, we note that it is important that the native title holders have the ability to decide whether the applicant is the PBC or the authorised applicants. We also support an amendment to clarify that a decision to make a compensation claim is a native title decision (**E5**). In practical terms this means that a PBC will be required to consult with the common law holders, as required for all other native title decisions. Compensation claims directly impact the common law holders and, as a result, consultation with common law holders should be mandatory.

POST-DETERMINATION DISPUTE MANAGEMENT

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

We note that although significant time goes into preparing reports and paperwork to ensure compliance with the *PBC Regulations*, the reports and paperwork remain internal documents and are not audited. Regulatory compliance is important to ensure that PBCs are fulfilling obligations to both common law holders and members equally. As such, we are in support of the proposed amendment to expand the Registrar's compliance powers in order to monitor procedural compliance (**F1**). Further, any changes to a PBC rule book are required to comply with the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (***CATSI Act)***. Where this is not externally audited, it is possible that rules that are not in the best interests of the native title holders, members or directors may be added to the rule book, sometimes in breach of the *CATSI Act*. We therefore support the proposed amendment to expand the power of the Registrar to refuse to amend a PBC's rule book where it will no longer be compliant with the *CATSI Act* (**F2**).

We support the proposals to introduce a requirement that PBC rule books specifically address dispute resolution between non-members and the PBCs (**F3**) and to remove the right for directors to use their discretion in refusing membership applications other than in 'exceptional circumstances' (**F4**). Currently the *CATSI Act* does not contemplate a situation where a person is denied membership and seeks to resolve the dispute. In addition, directors are able to use their full discretion in deciding whether to accept a membership application. This could result in people being arbitrarily excluded as members with no recourse, contravening natural justice principles.

Also, the current rules could enable directors to control membership for their own benefit, despite any other membership criteria. This creates an imbalance of power and ultimately may result in a loss of trust and acceptance for the legitimacy of the PBC by the community.

We are in support of the proposal to limit the grounds to cancel membership of a PBC to ineligibility or misbehaviour and to require the cancellation process to include the resolution of a general meeting (**F5**). The current drafting of the *CATSI Act* allows memberships to be cancelled on arbitrary grounds, e.g. for example 'ineligibility' or 'non-payment of fees'. In our experience, any removal of a member is considered a decision that indicates to the community that the member no longer has the ability to speak for their country. Although this is not the legal implication of the decision, it is important that the way the community understands and relates to membership of PBCs is taken into consideration. As a result, removal should only be in very specific situations.

We support the involvement of all members in the decision to cancel membership, given how membership to the PBCs is regarded by the community. We note that it is important to ensure that there is an ability to cancel a membership for misbehaviour in certain circumstances.

We support an amendment that allows the Registrar to refuse to update a non-compliant membership register in relation to revocation of membership (**F6**). The Registrar does not currently have the power to amend a membership register if it is non-compliant with the *CATSI Act* and/or the relevant rulebook in relation to revoking membership. This means that despite any proposed amendments that would strictly limit the ability to revoke memberships, the person's status may not be correctly reflected in the membership registers.

We do not consider it necessary to amend the *CATSI Act* so that PBCs are required to maintain a Register of Native Title Decisions and a Register of Trust Money Directions that would be available for inspection by members and common law holders (**F7**). This proposal would create an unmanageable scenario of daily queries by members and non-members, creating an administrative burden. It would also allow information that is confidential to a sub-group of members to be public knowledge to the whole membership base and all common law holders. We strongly suggest against reforms that would jeopardise the confidential nature of information.

The proposal to amend the *CATSI Act* to require PBCs to keep separate financial records and reports in relation to 'native title benefits' received by the PBC (**F8**) would duplicate records as all assets are listed in company accounts. Any such proposal would create an unnecessary administrative burden simply to access information that can already be found using the current records.

We consider it unreasonable to expect CATSI companies to consult with all common law holders on the investment and applications of native title monies on an ongoing basis (**F9**). Currently annual financial reports are prepared and made public. Any more consultation would be administratively burdensome and would go beyond the equivalent entitlements of shareholders in other Australian companies.

STATE AND TERRITORY PROPOSALS

The Options Paper did not refer to any questions regarding the State and Territory proposals. However, we considered that some of the proposals require comment.

We refer to 'Attachment G- State and territory proposals'.

	Proposal/recommendation	MG Comments
	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.	We do not support proposal **G1**. Reducing the objection period will lessen native titleholders' rights and will result in some objections not being heard prior to the application determination. We do not support restriction of native title holder's rights.
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.	We do not support proposal **G2**. Any defects in a notice should invalidate the notice and a correct notice should be reissued.
G3	Confirm that s 29 notices to identified parties may be made by email, and that public notice is able to be given online.	We do not support proposal **G3**. Further to the above submission on proposal **C10**, from our experience, solely electronic transmission of notices is inappropriate for many Aboriginal communities.
G8	Repeal subsection 24JAA(1)(d) to remove the sunset clause applying to the process for construction of public housing	We do not support proposal **G8**. We do not believe that a government department should be allowed to continue building public housing on Native Title land after the expiry of the date specified in the section. Any further acts occurring after the expiry of the date should be done using an ILUA and consultation with the native titleholders. This amendment would result in the loss of native title holder's rights and as such we strongly disagree with the proposal.
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.	We do not support proposal **G10**. The definition of 'waste facilities' should not be expanded, this would allow rubbish tips and other waste disposal to be brought under the same ILUA as the future act. As this is a separate construction project, we recommend that these acts should be done under a separate ILUA. It is reasonable that native title holders would wish to be consulted about and compensated for any further acts that may occur on native title land, including the construction of rubbish tips or other waste disposal.
G11	Insert 'or' between 24KA(8)(c) and (d) to clarify that notice can be given to either representative bodies or registered claimants.	We recommend in relation to proposal **G11**, that the word 'and' should be inserted into the sections, instead of the proposed insertion of 'or'.
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.	We do not support proposal **G13**. The regulation of licences is appropriate as section 211 is currently drafted. We do not believe that the waiver for licences for native title holders carrying out cultural activities on their land should be amended.
G14	Amend the Act to allow for the enactment of legislation by Western Australia which validates mining leases affected by the	We do not support proposal **G14**. There should be **no** blanket amendment for leases that are flawed. Any agreements that are flawed should not be upheld and should be re-formed.

	invalidity identified in *Forrest & Forrest Pty Ltd v Wilson & Ors* [2017] HCA 30.	
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	We do not support proposal **G15**. This constrains the rights of native title holders to negotiate. Native title holders should have the right to negotiate any agreements made in relation to native title land.
	Claims resolution	
G16	Allow hearing of native title and compensation applications together.	We support **G16**. In our experience, this is already happening in practice.
G17	Amend section 61A to remove restriction on bringing a claim over an area subject to a previous exclusive possession act.	We support **G17**. This expands the right of native title holders to make claims.
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.	We do not support proposal **G18**. We recommend that all parties consent to any acts, not just parties who have a limited interest to a part of a claim area. This aligns with traditional decision-making and ensures that the correct people with authority to speak for that area are included the discussion. As drafted, the law will conflict with traditional decision-making structures and may ignore important cultural knowledge in the decision-making process. In our experience it is not only the people who have exclusive rights to a certain area of land who speak for that country.
G19	Amend section 47B to clarify meaning of 'when the application is made' in the case of combined claims.	We support **G19**.
G24	Require respondents to applications under sections 84(3), (5) and (5A) to provide a proper address for service.	We support **G24.**
	Prescribed bodies corporate	
G25	Introduce provisions for the establishment and membership of PBCs ensuring that native title holders are represented on any default PBC.	We support **G25.**
G26	Amend the Act to ensure that the Commonwealth may fund a PBC for various purposes including start-up and administrative/compliance costs.	We support proposal **G26**. Post-determination funding from the Commonwealth will ensure better resourced and represented PBCs. However, we do not recommend that all funding be received through the relevant NTRB. Direct funding to PBCs should be given where possible.