



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

Pastoralists & Graziers Association of Western Australia (Inc)

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1. Background on the Pastoralists and Graziers Association of WA (Inc.)

The PGA is a non-profit industry organization established in 1907 which represents primary producers in pastoral and agricultural regions of Western Australia and is the key industry body, which coordinates and facilitates pastoralists' involvement in native title proceedings in Western Australia.

Primarily due to remoteness and unfamiliarity with legal issues, the majority of pastoral leaseholders in Western Australia have authorised the PGA to act as their agent in native title claims.

Since 1998, the PGA has been involved in agreement making under the Native Title Act as the main agent for pastoral respondents. We are currently involved in 58 active native title matters that affect 435 pastoral leases (who have a total of 489 pastoral lease titles) that cover over 90 million hectares in Western Australia. Many pastoral leases have two or more claims with overlaps occurring in numerous cases.

Pastoralists and native title holders need to devise practical mechanisms for co-existence within the legal framework. In this regard, the PGA has developed pastoral Indigenous Land Use Agreements that provide practical and ongoing guidance to pastoralists and native title holders and regulate and codify on the ground interaction between the parties.

2. 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.

The PGA's primary interest in native title matters is the negotiation of indigenous land use agreements that provide for co-existence between native title and pastoral interests. The PGA supports allowing claim group members to define scope of the authority of the applicant provided that other parties are notified of the scope of the applicant's authority.

In this way the PGA would support Proposal G6 (Attachment G) that other parties be notified of any limitations on the Applicant's authority and would support a presumption that the Applicant has full authority from the claim group unless otherwise notified.

(b) Clarify that an applicant can act by majority unless the claim group provided otherwise.

Similarly, the PGA supports amendments to clarify that an applicant may act by majority unless the claim group provides otherwise. As the role of the applicant in relation to the claim is often related to the applicant's role in agreement making the PGA contends that other parties be notified of whether the applicant intends to act by majority particularly in regard to entering into ILUAs under the Act.

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

The PGA would support the streamlining of allowing the composition of the applicant to be modified without reauthorisation in prescribed circumstances.

The PGA would support amendments to allow the removal of members of the claim group who are deceased without reauthorisation. With regard to members who are “unwilling or unable” the PGA submits that this should only occur where the member to be removed consents to his or her removal (s 66b(a)(i) *NTA*.)

Any proposal to remove members of the applicant without his or her consent must be carefully considered and due diligence must be undertaken to satisfy the Court that the member of the claim group is in fact “unwilling or unable.” The PGA notes that such terms are not defined within the *NTA*.

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

The PGA views legislative amendment as unnecessary to achieve the aim of ensuring that the applicant acts in the best interest of the claim group and does not obtain a benefit at the expense of native title claim group.

In *Gebadi v Woosup* [2017] FCA 1467 it was held that the applicant owes a fiduciary duty to the claim group and that the members of the claim group are entitled to expect that the applicant would act in the best interests of the claim group in exercising the authority conferred on it by the claim group.

3. Agreement- Making and future acts

Question 5

Do you support the proposal set out in Attachment C of the Options Paper to streamline existing agreement processes?

The PGA supports efforts to make the agreement processes made under the Native Title Act 1993 (Cth) more streamlined. The technical amendments proposed in Attachment C based on Schedule 3 of the Native Title Amendment Bill 2012 are supported by the PGA.

In particular, the PGA supports amendments to allow minor technical amendments to the Register of ILUAs without re-registering. As will be outlined in section 4 of this submission the PGA seeks a Register of ILUAs which is procedurally more flexible and better reflects the needs of both native title claimants and the pastoral industry.

Question 6(b)

Should ILUAs, and other agreements made under the Act, be publicly accessible?

The PGA contends that Indigenous Land Use Agreements are solely between the parties to the agreement. They are commercial in confidence in nature.

There is limited utility in making such agreements publicly accessible as the agreement can only be enforced by parties to the agreement. There is no accountability benefit to be gained from making ILUAs accessible to those who are not party to the agreement itself.

Additionally, making ILUAs publicly accessible may harm the quality of future ILUAs negotiated under the Act. As previously outlined, ILUAs should be considered commercial in confidence. The PGA contends that their negotiation often requires the sharing of sensitive information for both pastoral respondents and native title claim groups. It would therefore be detrimental to this negotiation process to share the resulting agreement.

Question 8

Do you support the proposed amendments detailed in attachment E to improve the efficiency and efficacy of claims resolution?

The technical amendments proposed in Attachment E to improve the efficiency and efficacy of claim resolution are supported by the PGA.

Question 9

Do you support the proposed amendments in Attachment F to address post-determination native title related dispute?

The PGA supports the amendments outlined in Attachment F with regard to post-determination dispute. The PGA would support a greater role for the NNTT in mediating and arbitrating post-determination disputes.

The PGA primary concern is that Native Title PBCs are functional and able to be a party to and enforce ILUAs.

4. Further submissions

The PGA wishes to propose amendments to the NTA to facilitate the assignment of ILUAs in limited circumstances. This is of particular concern to the pastoral industry where leases business efficacy necessitates the transfer of lease. Certainty is required in regard to ILUAs and that the new lessee is bound by the ILUA on the same terms as the pastoral respondent who signed the initial ILUA at the time of the consent determination.

In circumstances where an assignment and assumption clause has been provided for in the ILUA (the native title claimant therefore having agreed to possible future ILUA assignment), if at some later date the ILUA is assigned by properly executed deed, it is the PGA's position that the NNTT Registrar ought to be authorised to update the register with all contact details of the new lessee.

At present there is no clear process to amend the NNTT register of ILUAs upon transfer of a pastoral lease to a new lessee. Currently, the registrar can only update the register with the new lessee's address in the event that a pastoral lease changes hands.

The PGA's proposed amendment provides certainty for both pastoral leaseholders and native title claimants as well as streamlines the existing ILUA process. It also provides certainty for the negotiation process that any ILUA that is negotiated will continue in force until such time as the period ends as provided for in the agreement.