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Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Sir/Madam

Options Paper: Submission to the Attorney General's Department

We refer to the Reforms to the *Native Title Act 1993* (Cth) (**NTA**) Options Paper (**Options Paper**) released by the Attorney General's Department on 29 November 2017.

Please see **enclosed** our submissions on the Options Paper. Please note that we have only made submissions on some of the proposed options.

Roe Legal Services has over 20 years of native title law experience. We currently act for a number of Registered Native Title Body Corporates (**RNTBC**) and have native title clients throughout Western Australia (**WA**).

Please contact us should you have any queries regarding this letter.

Yours sincerely



Roe Legal Services

Submission to the Attorney General's Department: Reforms to the NTA Options Paper

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

For the purposes of consistency across the board, we support amendment to confirm the status of pre-McGlade section 31 agreements consistent with the confirmation given to ILUAs as enacted by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (2017 Amendments)*.

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?

Subject to the qualification below, a majority of the Applicants should be mandatory parties to section 31 Agreements, consistent with the 2017 Amendments for ILUAs. This would ensure consistency across agreements negotiated under the NTA. This would also avoid the need to remove Applicants through section 66B processes for refusal to sign a section 31 agreement.

As canvassed in the Options Paper, it is important that there are safeguards to ensure the native title party (claim group) can provide informed consent to an Agreement and the views of a dissenting Applicant are considered by the claim group as part of the authorisation process. For example, if an authorisation process is introduced for section 31 agreements (as per option 3), the legislation could require that all of the Applicants, including those with opposing views to the majority, are given an opportunity to provide their views to the claimant group, whether that be at a community authorisation meeting or through electronic communications prior to authorisation.

Applicants are often authorised by the claimants usually because of their representative capabilities and/or characteristics such as eldership or cultural authority. The proposed amendments should be drafted to ensure that the voices of individual applications are not silenced in the decision-making process.

QUESTION 3: Do you support the proposals to:

A1. allow claim group members to define the scope of the authority of the Applicant;

We support this proposal to allow claim group members to define the scope of the authority of the Applicant. This practice is an important exercise in self-determination and is enshrined in the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**) at Article 18, that "*Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions*".¹ If claim groups are empowered by the NTA to determine the scope of an Applicants role at the initiation of a native title claim, this will hopefully foster certainty and deter challenges such as those in the McGlade situation because Applicants will be aware from the start, what their role encompasses and how their discretions should be exercised.

A2. clarify that an Applicant can act by majority unless the claim group specifies otherwise;

As indicated above, in our view, it is important that the thresholds that exist for ILUA Agreement making are in place for section 31 Agreement making. Consistency across both processes is

¹ United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 48, UN Doc A/RES/61/295 (13 September 2007) Art 18.

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important for the practice of authorisation. Further, it is important that the claim group's ability to specify otherwise where deemed fit is enshrined in the NTA to ensure that claim groups are not locked into decision-making by majority. A key aspect of these amendments must be to ensure that Indigenous decision-making principles, which are not based on majority decision-making are still able to be exercised by claim groups where necessary and determined appropriate by the claim group.

A4. allow the composition of the Applicant to be changed without going through a section 66B reauthorisation process in prescribed circumstances; and/or

The role of the Applicant is important, and as conveyed above, it is our view that any amendments to the NTA should not diminish their role. Therefore, we are not inclined to support this proposition entirely, the alternative proposal should only be for the circumstances where an Applicant has passed away or becomes incapacitated. The usual section 66B reauthorisation process should continue otherwise.

B4. Consider options for addressing the relationship between state and territory natural resource management activities and native title rights including amending section 24LA to permit the doing of low impact future acts following a determination that native title exists.

We do not consider this proposal to be a necessary amendment to the NTA. As considered by the COAG Investigation at Table 2, Item 6, there are already ways in which States and Territories can address this matter such as comprehensive, determination-wide ILUAs that could cover all manner of necessary natural resource management activities.

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

C4. Removing the requirement for PBCs to consult with NTRBs on native title decisions such as prior to entering an Indigenous Land Use Agreement in the PBC regulations.

We strongly support this proposal. In our practice as legal representatives for RNTBCs, we are required advise as to compliance with the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) (**PBC Regulations**), especially through fulfilment of the consultation and consent provisions for Agreement making.

In the case of the RNTBC's we represent, whom have either been established for some time or have had separate legal representation to the NTRB or both, the NTRB is not usually involved in the negotiation of NTA Agreements or, if they are, they play a limited role. While the requirement to consult with the NTRB is supposed to be for the purposes of ensuring '*common law holders understand the purpose and nature of the decision*', in practice the NTRB is not able to play this role or otherwise add value to the authorisation process. This is because the NTRB is not in any better position than the RNTBC to determine common law holders' views or provide a valid opinion on the merits of the decision when they have played no substantive part. This requirement has evolved into an unnecessary administrative exercise, placing a needless burden on RNTBCs.

C8. Consider amending section 30A of the Native Title Act so that Government parties are not required to be a party to a section 31 agreement (for example, an agreement about mining).

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We support this proposal proposed by the COAG investigation. In our practice in WA, we regularly represent RNTBC's in the negotiation of section 31 Agreements. Currently, the State of WA (the **State**) plays a very limited role but it is often perceived as adversarial to the native title party. The State seeks negotiation status updates from the parties regularly and where negotiations may have stalled or hit an impasse, the State will refer to the National Native Title Tribunal (**NNTT**) for mediation. In addition, where mediation has not been successful with outcomes, the State have encouraged proponents to apply for a section 35 Determination. The State do not take any formal part in the negotiations but are very forward in pushing for outcomes. When mediations and section 35 determinations have occurred, the State is perceived by the native title party, as very much acting in the interests of the proponent. This situation further increases pressure on RNTBCs who have limited resources. In our experience, from a native title party perspective, the State do not add anything of substance to the negotiation process for section 31 Agreements. We note that the COAG Investigation at Table 1, item 17 suggests the State should only cease participating as a negotiation party where all parties agree, but we suggest that the State should only commence as a negotiation party where all parties agree, ie the default position is that the State is not automatically a negotiation party, and so then they can apply to be a negotiation party in certain circumstances.

C9. Consider options for amending the objection process created by section 24MD (6B), which applies to some compulsory acquisitions of native title and the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility.

Where there is notification of an application for a miscellaneous license (to construct infrastructure), RNTBC's we represent regularly lodge section 24MD (6B) Objections. Further, in practice native title parties often lodge concurrent objections under section 24MD (6B) and the *Mining Act 1978* (WA) (**Mining Act**). There is uncertainty in WA about which objection should be heard first and whether section 24MD (6B) notice can properly issue before the Warden's Court process is completed. In our view, the Warden's Court process needs to be completed before the section 24MD (6B) is heard. We believe it would be hard for an independent to hear a section 24MD (6B) objection until after the Warden's Court has considered the objection. If the COAG recommendation about how and when the State can proceed to grant when the native title party does not request the objection be heard is accepted, we consider that such a period (the term the State can proceed to grant where the native title party has not asserted an independent hear the objection) should be extend for at least 1 month after the Warden's Court or other relevant statutory body in other States and Territories has heard any objections under the relevant Mining Act.

C10. Consider options to encourage electronic transmission of notices including amending sections 29 and 6(1)(a) of Native Title (Notices) Determination 2011 (No 1) to provide that notices can always be transmitted electronically.

We strongly support this proposal to increase efficiency. Currently, we rely on the RTNBCs we represent to provide any section 29 notices as they are sent via post to their registered address as our address is not able to be registered for notices from the WA Department of Mines, Industry Safety and Regulation (**DMIRS**) (even as their appointed legal representatives). Our current practices are an administrative burden that would be lessened where such a process as proposed in the Options Paper at Attachment C10 (newspaper summaries and comprehensive online versions) were to be included in the NTA.

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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?

In our view, it is important that traditional decision-making is given primacy in the NTA and PBC Regulations. We do not support this proposal and consider that where there is a traditional decision-making process that exists, claim groups and RNTBCs should be bound to follow such a process. Throughout Australia there may be traditional decision-making methods that are strong and in effect today. These methods should be upheld by the NTA as the desired approach where they are still known and used by the claim group.

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

F5. Limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour and require the process for cancellation of membership to include a general meeting.

We generally support the proposal to limit the grounds for cancellation of PBC membership. In addition to the two reasons for cancelling membership suggested in Attachment F5 to the Options Paper, there is a common reason included in the Rulebooks of the RNTBCs we represent, where a Member cannot be contacted for a certain period of time. This reason for cancellation can be effective in promoting involvement of members in the business of the RNTBC and this is important for some RNTBCs who have large membership bases. We note that if membership is cancelled, such former members should not be precluded from re-applying in the future. In our view, however, the proposed requirement to mandate a General Meeting for the cancellation of membership is overly proscriptive and unnecessary.

F9. Introduce a requirement that the common law holders be consulted on the investment and application of native title monies so that the obligation to seek direction from the common law holders is met (whether or not the monies are held by the PBC).

We support this proposal. It is noted that there must be consideration as to whether or not for the purposes of such a proposal, the common law holders can be sufficiently consulted in the form of advisory bodies of common law holders (ie Board of Directors or Trust Advisory Committees) or if consultation must occur at community meetings of common law holders. In addition, there would need to be clarity as to the extent to which consultation must occur. For example, would the consultation require common law holders to make decisions about the investment and application of native title monies and would the RNTBC have to report back to the common law holders after the proposed investment and application of native title monies?

F10. Amend the definition in regulation 3 of group of common law holder to clarify that it refers to the determined native title holding group(s) for which the PBC acts as agent or trustee.

We do not support this proposal. We do not agree with the sentiment expressed in Attachment F10 of the Options Paper that "in practice many PBCs represent groups whose members have equal interests in the determination area". This is not true for the clients we represent as there are specific people, family groups or sub-groups that speak for specific parts of the country within the determined area. It is foreseeable that there could be certain Agreements which would only affect certain family groups or sub-groups, to which the current provisions in the

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PBC Regulations could be utilised for authorisation purposes. Small Agreements are likely to only affect a small part of the Determination Area and the costs of consulting the whole of the claim group to authorise such an agreement, in circumstances where many native title holders are not affected by the decision, are likely to be disproportionate to the value of such an agreement.

Attachment F10 of the Options Paper asserts that the requirement to consult and obtain consent from only the affected group of common law holders "creates tension". In our view, the proposal suggested does not alleviate the purported tension. The provisions in PBC Regulation 8(3) and (4) relate to a different part of the authorisation process ie the way in which decisions should be made, not who the RNTBCs is required to consult with and obtain consent from. In our view, the proposed amendments could therefore be read as mandating a requirement for the PBC to consult and obtain the consent of the whole of the claim group.

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