Australian Government

TSRA
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Native Title Unit
Attorney General's Department
305 National Cct
BARTON ACT 2600

Reforms to the *Native Title Act* 1993

Further to our letter of 10 January 2018, thank you for the opportunity to provide an updated response to the Options Paper 'Reforms to the *Native Title Act* 1993'.

The Torres Strait Regional Authority's (TSRA) additional comments have been added to the original submission and the consolidated version is attached.

As a general comment, the TSRA supports amendments to the Act which will simplify the administration of the Act and provide greater flexibility for those Prescribed Bodies Corporate (PBC) who have demonstrated effective governance and mature processes.

Unfortunately the majority of PBCs still rely on the labour of voluntary directors and support staff to carry out their functions. These PBCs are impacted by a relatively high turnover of members who perform those functions. For example, in the Torres Strait region, there are 21 PBCs of which only two have remunerated part-time employees.

A number of proposed amendments to the Act (refer to the detailed comments), could work in an ideal post-determination environment where PBCs regularly demonstrate capacity to effectively engage with the common law holders (Traditional Owners). However; in the current environment, many PBCs struggle to perform this engagement function. The TSRA considers that the relaxation of some sections of the Act which would afford PBCs greater flexibility in decision making without mandatory engagement with Traditional Owners or assistance from the Native Title Representative Body, could be counter-productive.

The TSRA has supported the majority of the proposals in the Options Paper and has provided comment where appropriate. The point of contact is Mr John Ramsay, Programme Manager for Fisheries and Native Title. Mr Ramsay can be contacted on 07 4069 0700 or by email john.ramsay@tsra.gov.au.

Yours sincerely

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Acting Chief Executive Officer
Torres Strat Regional Authority

Torres Strait Regional Authority

Submissions on Proposed Reforms to the *Native Title Act* 1993 (CTH)

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

The TSRA supports such an amendment.

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?

The TSRA prefers Option 3. Applicants to a claim often live considerable distances from each other. Therefore, it can be costly and time consuming process to validly execute an agreement. The flexibility to choose the most expedient mix of applicant signatories would be beneficial. The addition of an authorisation process to make standing consents as to the Option 3 applicant execution process would also be beneficial.

Question 6: (a): Should there be a register of section 31 agreements?

The TSRA agrees that there should be a register of section 31 agreements.

Question 6 (b): Should ILUAS-and other agreements made under the Act-be publically accessible?

Indigenous Land Use Agreements and other agreements should only be publically accessible with the consent of all parties. If made public, they should be redacted to the extent requested by any party.

Responses to the questions posed in the Attachments

Serial	TSRA Response
A1	The Torres Strait Regional Authority (TSRA) agrees the *Native Title Act* 1993 (NTA) should be amended to clarify that the claim group may define and restrict the authority of the applicant at authorisation to reflect what already appears to be the case at common law.[1] As claim applications could take many years to determine and applicants of varying predispositions may come and go, we would further support the introduction of a mechanism in the NTA where the claim group can restrict or expand the scope of the authority of the applicant at any time during the lifetime of the claim without requiring amendment to the Form 1.
A2	The TSRA supports an amendment that would permit the applicant to act by majority unless the terms of the authorisation say otherwise.
A3	The TSRA believes such an amendment would benefit where a member of the applicant group is deceased. A safeguard such as a Federal Court Order to prevent an applicant from being pressured into stating they were unwilling to further act may be necessary if living applicants could be removed by the proposed process.
A4	The TSRA supports amendments which would allow succession planning within the claim group.
A5	The TSRA supports this amendment and suggests it could go further and affirm the common law position that a fiduciary duty is owed by the applicant to the claimants.
B1	The TSRA would prefer that this permission should be limited to future acts which involve low, non-permanent impacts and 'do not involve the 'surrender' [2] or suspension of Native Title. Non-determined claims often deal with such by approving standing instructions to delegate entering into such agreements to working groups or the Native Title Representative Body (NTRB).

[1] *Gomeroi People v Attorney-General of New South Wales* [2016] FCAFC 75, [79]-[83].

[2] Council of Australian Governments, *Investigation into Indigenous Land Use* (2015) 16.

Serial	TSRA Response
	Contracts which affect the Native Title Rights of Traditional Owners (TOs) held on trust by the Prescribed Body Corporate (PBC) or as agent should not be entered into by a PBC without consultation with, and the consent of, the relevant TOs. There is evidence that the consultation process under the Native Title (PBC) Regulations is at times not being followed. TOs of particular rights and interests in land the subject of acts which will result in extinguishment or suspension should be consulted and have a say in what happens to those rights.
B2	The TSRA supports an amendment to s 211 in regard to TOs contracting out of exemptions to statutory regulation for biodiversity and species protection purposes. The TSRA does not support any amendment which permits the contracting out of rights to hold cultural or spiritual activities. The perpetuation of such activities are necessary for the maintenance of Native Title to prevent its loss through 'abandonment'[3]. With regard to enduring Indigenous Land Use Agreements (ILUA) made with failed claims, the loss of ability of future generations to exercise traditional practices may impact on the registration of a new claim over the subject area. The loss of such activities may contribute to claim application failure pursuant to s 62(1)(c) in accordance with s 223(1)(a). This failure would not appear to be caught by s 190F(3).
B3	The TSRA does not support this amendment as it proposes that PBCs can contract out of future act/compensation provisions which would be binding on all TOs. The TSRA is concerned there may not be a process or type of agreement that would permit affected TOs, who are non PBC members, to fairly give their fully informed consent. This amendment may unintentionally disempower and alienate some TOs from control over their particular Native Title rights. This would be compounded by the proposed amendment in C4 and the general lack of any TO rights to be fully informed and obtain independent legal advice regarding Regulation 8 consultations and give consent for Native Tile decisions. Therefore, without adequate specification and restrictions on the type of acts, there is only limited benefit to TOs from enabling PBCs to contract out of TOs' rights to compensation.
B4	The TSRA could support this amendment subject to a more comprehensive definition of 'low impact future act' than that in s 24LA of the Act (eg definitions of 'excavation' and 'clearing'). There may also be scope to amend the wording to allow the use of herbicides (of low toxicity classification such as glyphosate to be used) and baiting subject to strict conditions for pest and weed control with the guidance of the affected TOs.
C1	The TSRA supports this amendment and suggests there should be a process to decide which PBCs can make agreements for a particular areas in cases where the area ILUA impacts more than one PBC. Such a process may be particularly applicable in areas where there has been a finding of 'No Native Title' by the Court bounded by more than one successfully determined claim area.
C2	The TSRA supports this amendment with some guidance as to the scope of 'minor technical amendments'.
C3	The TSRA supports this amendment to 'give notice' provided the Registrar should, as a minimum, advise the relevant parties that the subject agreement is not registerable in its present form.
C4	The TSRA does not support this amendment which we believe would disempowers TOs in processes which potentially affect their particular Native Title rights and interests.

[3] *Mabo v Queensland (No 2)* [1992] HCA 23, [60]; *De Rose v South Australia* [2002] FCA 1342, [913].

Serial	TSRA Response
	The possibility of TOs receiving legal advice from the NTRB is better than none. The TSRA would support an amendment to Regulation 8(2)(b) of the *Native Title (PBC) Regulation 1999* to the effect that PBCs are required to give any advice from the NTRB to affected TOs. Should C4 be adopted, the TSRA would prefer to see provision made for the affected TOs to obtain alternative advice or legal assistance (such as that offered to PBCs under ss 24BF, 24CF, 24DG or 213A in determined areas for example). To permit assistance from the Commonwealth in such circumstances, s 213A(7) would need to be removed. The TSRA would support a further amendment that the PBC must notify the TOs of any rights to access legal representation and other assistance (such as access to mediation or financial assistance) before the commencement of any negotiations regarding acts affecting the TOs Native Title rights. Further in the alternative, provision could be made for funding assistance for TOs to obtain independent legal advice on such matters if it would be a conflict of interest for the NTRB to assist the subject TOs under ss 203BA(2) and 203BB(1)(b). The Options Paper states that the Office of the Registrar of Indigenous Corporations (ORIC) has no powers under the Regulation to investigate and enforce compliance with the consultation process.[4] A further consideration would be to amend and tighten relevant legislation to empower ORIC to support, investigate and enforce compliance. The *Corporations (Aboriginal and Torrs Strait Islander) Act* (CATSI Act) currently empowers ORIC to refer other corporate compliance failures to the Commonwealth Director of Public Persecutions (CDPP). The TSRA notes this is partly addressed in proposal F4. The TSRA suggests that arbitration is a preferred alternative to using the Courts as the original forum for the resolution of disputes [5].
C5	The TSRA conditionally supports this amendment. However, any resulting future act agreements affecting Native Title on lands under s 47B should have the requirement that any benefits under any agreement are to then benefit any successor claimants if the claimant party's original claim fails.
C6	The TSRA does not support this amendment. The explanation for this amendment is that by not including provision for future act compensation in Subdivisions B and C ILUAs, compensation may better estimated after the ILUA is signed. However, s 24EB (4) and (5) state that if there is no compensation provision in an ILUA, Native Title parties '*are not entitled to any compensation for the act under the Act*'. Therefore, the TSRA supports the requirement for compensation to be clearly stated in the ILUA prior to execution.
C7	The TSRA does not support this amendment. The amendment would allow future acts which are the subject of de-registered defective ILUAs due to such failures as incorrect Native Title parties (eg wrongly authorised agreements) and fraud etc. by any party to stand. This is tantamount to the future act being granted without the requirement to provide any benefits to the Native Title parties or conditions being imposed on the doing of the act.
C8	The TSRA supports an amendment which permits government parties to withdraw as a party to s 31 agreements with the consent of all parties.

[4] Attorney-General's Department (Commonwealth), *Reforms to the Native Title Act: Options Paper* (2016) 19.
[5] Ibid.

Serial	TSRA Response
C9	The TSRA supports the objection process under s 24MD(6B) being clarified. However, would not support any subsequent amendment which would result in the procedural right to object being eroded.
C10	The TSRA supports support this amendment on the understanding that effective notice to required parties could be achieved.
C11	The TSRA supports the clarification of the authorisation process, noting until there is a successful determination, all registered claimants are persons who *prima facie* hold Native Title. The question as to the standard of a *prima facie* case is an issue. Persons who make spurious claims as to entitlement to participate may potentially influence the outcome of an ILUA authorisation process.
D1	The TSRA supports this amendment in all proposed spheres of application; however, there should be effective safeguards in place to ensure that whichever process is adopted or subsequently changed to, that it is done with the consent of the majority of TOs. Otherwise an extremely flexible change of process has the potential to be manipulated to provide on-going advantageous outcomes for particular factions or interests.
E1 to E3 (incl)	The TSRA supports these amendments.
E4	The TSRA supports this amendment noting there needs to be a process where all TOs have the opportunity to choose who brings the compensation application.
E5	The TSRA would support this amendment provided the Regulations are strengthened to empower TOs.
E6	The TSRA supports this amendment.
F1 and F2	The TSRA supports these amendments.
F3	The TSRA supports this amendment. This could also be addressed by the proposed amendment in F4.
F4	The TSRA supports this amendment, noting however that for PBCs with large membership it may become logistically and financially difficult for them to hold members' meetings. In such larger PBCs, a process of elected representation could be considered.
F5 to F7 (incl)	The TSRA supports these amendments.
F8	The TSRA supports this amendment and suggests that PBCs should be required to establish designated trust accounts to hold funds such compensation payments for particular TOs or for the use and benefit of the TOs as a whole.
F9	The TSRA supports this amendment.
F10	The TSRA has concerns that the proposed change to the definition may disempower 'affected sub-groups' of TOs by allowing the PBC to make decisions on their behalf without proper consultation. Noting the provisions of Regulation 8(3) and (4), it is unclear why the definition at Regulation 3(2) would need to be changed.
F11	The TSRA supports this recommendation. There is a need for low cost, binding resolution of disputes as arbitration can provide.

Serial	TSRA Response
G1	While the TSRA supports a reduction to the objection period, we consider that 90 days would be more appropriate.
G2	The TSRA supports this proposal, however has concern that should the defect, albeit minor, impact on any party knowing what was required of them to comply with the relevant process, some notification process would need to be in place. For example: a correction to an incorrect response date.
G3 to G 5 incl)	The TSRA supports this amendment.
G6	The TSRA has concerns this may adversely restrict the flexibility of the claim group to relatively easily change the scope of the authority of the Applicant throughout the life of the claim. As in A1, there should be a process which permits change to the scope of the authority of the applicant throughout the life of the claim without having to go through the process of amending the Form 1.
G7	The TSRA supports better alignment between the notification periods stated in 24BH and 24CH; however we consider that the period currently stated in 24CH(2)(d) is an appropriate notification period.
G8 to G11 (incl)	The TSRA supports these amendments.
G12	The TSRA does not support the automatic binding of pre-determination agreements unless the agreement specifically states that that the agreement is enduring and binding on all parties post-determination. The TSRA suggests that all agreements being negotiated in pre-determination areas should include a clause to that effect.
G13	The TSRA supports this amendment.
G14	The TSRA has no comment on this amendment.
G15 to G27 (incl)	The TSRA supports these amendments.