



Australian  
Human Rights  
Commission

# Exposure Draft Native Title Legislation Amendment Bill 2018

Submission to the Attorney-General's Department

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ABN 47 996 232 602  
Level 3, 175 Pitt Street, Sydney NSW 2000  
GPO Box 5218, Sydney NSW 2001  
General enquiries 1300 369 711  
National Information Service 1300 656 419  
TTY 1800 620 241

Australian Human Rights Commission  
[www.humanrights.gov.au](http://www.humanrights.gov.au)

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# 1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission in response to the Exposure Draft of the Native Title Legislation Amendment Bill 2018 (the Exposure Draft).
2. The Commission welcomes the opportunity to provide further feedback in relation to the proposals in the Exposure Draft, taking into account its previous submission on the Options Paper on reforms to the *Native Title Act 1993* (Cth) in February 2018 (Options Paper).
3. The Commission welcomes a number of the proposals contained in the Exposure Draft which, in the Commission's view, will translate into beneficial outcomes for native title holders and native title claimants on the ground.
4. The Commission particularly welcomes the following proposals as positive developments:
  - Allowing a native title claim or compensation group to place conditions on the authority of the applicant.
  - Allowing historical extinguishment to be disregarded over areas of national, state or territory parks with the agreement of the parties.
5. This submission will:
  - Comment on specific proposals in the Exposure Draft, including those we support and those with which we have concerns;
  - Comment generally on issues which the Commission considers need to be addressed in reforms to the *Native Title Act 1993* but which are not included in this Exposure Draft.

## 2 Specific comments on proposals in the Exposure Draft

### 2.1 Authorisation—Indigenous decision-making (Schedule 1, Part 1)

#### (a) Authorisation conditions and the applicant (item 21)

6. The Exposure Draft (item 21) proposes inserting a new section 251BA which allows for conditions to be placed on the applicant's authority as part of the authorisation processes under existing sections 251A and 251B.
7. As it has done previously, **the Commission welcomes this proposal and the greater degree of control it will give native title groups over the authority of the applicants who are negotiating ILUAs and consenting to native title applications.**
8. As noted by the previous Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda, this has the potential not only to empower Aboriginal and Torres Strait Islander peoples in important decision-making processes, but also to decrease the lateral violence and stress that can be caused by the native title process.<sup>1</sup>
9. In light of the amendments expanding the majority default rule to section 31 agreements, the Commission notes here that the capacity to specifically authorise applicants, and to place authorisation conditions on applicants, appears not to expressly apply to applicants' dealings with section 31 agreements. See section 2.2(a) for further details. **The Commission urges the Department to clarify the application of the authorisation process to section 31 agreements.**

#### (b) Fiduciary duty of the applicant to the native title group: legislating *Gebadi v Woosup (No 2)*

10. **The Commission supports the proposal at item 11 of schedule 1 to insert a new section 62B clarifying that, as *Gebadi v Woosup (No 2)* [2017] FCA 1467 decided, named applicants owe a fiduciary duty to the native title claim group or compensation claim group.**

**(c) Applicant decision-making**

11. Attachment D to the Options Paper proposed enabling native title claim groups and native title holders to be able to choose their decision-making processes, whether traditional or otherwise. This new choice of decision-making processes was proposed to apply to section 251A authorisation of ILUAs, section 251B applications for native title determination or compensation, Regulation 8, Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) consent native title decisions, and section 203BC(2) consents to 'general course of action' by a representative body. The Commission supported this proposal.
12. The Exposure Draft instead requires that a traditional decision-making process *must* be used, if it exists, when imposing conditions on the applicant as part of the authorisation processes under sections 251A and 251B. That is, that the native title claim groups and native title holders will *not* have the choice to use either a traditional decision-making process or another process agreed to by the claim group.
13. The Commission notes that the wording of this proposal is the same as the existing wording of authorisation processes in sections 251A and 251B—the sections to which the proposed new section 251BA relate. For this reason, **the Commission does not oppose the proposed amendment.**
14. The Commission is concerned that requiring native title claim groups and native title holders to use traditional decision-making processes, if they exist, may create opportunities for disputes and is difficult to enforce. Part of this issue was recently the subject of a federal court judgment, *Kimberley Land Council Aboriginal Corporation (ICN21) v Williams* [2018] FCA 1955 (5 December 2018). In that judgment, Barker J determined that the native title group had not considered the question of whether the native title group had a traditional decision-making process for decisions such as agreements involving surrender of native title, like the area ILUA in issue. Barker J found that, to the extent that the delegate had found that the native title group had a traditional decision-making process which must be used in such circumstances, the delegate erred—that is a finding which only the native title group itself can make. However, Barker J found that the Kimberley Land Council Aboriginal Corporation had not specifically put the relevant question to the native title group in the context of the legislative provision in section 251A that if such a process did exist, it *must* be used to authorise area ILUAs. As a result, the ILUA was not properly authorised.

15. However, the Commission also understands that the requirement to use a relevant traditional decision-making process where it exists can offer a level of protection for minority groups within a broader native title group who may not have influence over decisions if they are put to a majority vote, but who, traditionally, would have had a key role in decisions over the relevant land. The broader picture is therefore complex.
16. The Australian Law Reform Commission (ALRC) 2015 report, *Connection to Country: Review of the Native Title Act 1993 (Cth)*<sup>2</sup> notes that it received submissions arguing both the positives and negatives of allowing the native title group to choose any decision-making process, even if there is a traditional process which would have been used in the relevant circumstances.<sup>3</sup> The ALRC concluded that ‘allowing the group to choose its own decision-making process promotes the autonomy of the group’.<sup>4</sup> It also found that most stakeholders supported this approach.<sup>5</sup> However, the ALRC also notes AIATSIS’s submission that there is logical circularity in employing a decision-making process to choose a decision-making process’.<sup>6</sup>
17. The Commission is concerned that allowing a majority decision to allow a majority decision-making process which might overrule a traditional decision-making process – that is, a simple majority rules principle – is not necessarily promoting free, prior and informed consent and self-determination more broadly.
18. **The Commission urges the government to consider the decision-making processes within the authorisation processes in the *Native Title Act 1993 (Cth)* in the broader context.** For example, the majority default rule proposal discussed below at section 2.2 and the requirement to use a traditional decision-making process if there is one are interrelated. Central to any consideration of these issues must be the right to self-determination and the principle of free, prior and informed consent.

## 2.2 Applicant decision-making and the majority default rule (Schedule 1, part 2)

19. The majority default rule regarding area ILUAs was introduced by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth)* (the 2017 Amendments) following *McGlade v Native Title Registrar* [2017] FCAFC 10 (*McGlade*). The amendments in Schedule 1, part 2 propose to extend the majority default rule regarding area ILUAs to everything the applicant can or must do under the Native Title Act.

20. Schedule 1, part 2 proposes to insert provisions that establish a default rule that the applicant may act by majority when doing anything required or permitted under the *Native Title Act 1993* or for the purposes of the *Native Title Act 1993* under another law of the Commonwealth. The proposed amendments will also include a default rule which provides that only a majority of the 'applicant' (i.e. a majority of the named applicants) are required to be a party to area and alternative procedure ILUAs and future use agreements made under the section 31 of the *Native Title Act 1993*.
21. This would change (what is likely to be found to be) the current legal position whereby the applicant must act unanimously when carrying out its duties or performing its functions under the *Native Title Act 1993*, and for area and alternative procedure ILUAs, and for section 31 agreements—in practice, that all named applicants must sign applications and agreements.
22. As with the 2017 amendments, the proposed default majority position could be overruled by a decision of the native title group that a particular authorisation process was required, other than the majority of applicants' signatures.
23. The Commission is concerned that a minority family or bloodline, within a larger native title group, could find it very difficult to ensure that their concerns and interests are represented in the first instance at the authorisation stage, and consequently at the various stages of decision-making. In particular, it could be difficult to overrule the majority default position using authorisation meetings if the larger family or language group would prefer to maintain that control. The discussion of the recent case, *Kimberley Land Council Aboriginal Corporation (ICN21) v Williams*, above in section 2.1(c), highlights this. In that case, Barker J considered the facts of the authorisation meeting and how it was conducted, including that the native title group determined, by majority vote, that the decision-making process was to be by majority vote. The difficulty for a minority group in having its interests and concerns given weight is evident from this account.
24. However, this proposal is intended to address a specific issue—a minority of named applicants refusing to sign an agreement or application where a decision has been made by the native title group, in accordance with the agreed decision-making processes. That is, the minority of named applicants refusing to sign, in breach of their authorisation conditions.

25. **The Commission does not oppose this amendment (aside from in relation to section 31 agreements, see section 2.2(a) below)** on the grounds that an authorisation process agreed by the native title group should be respected. Legislation should not provide an avenue to subvert an agreement made by the whole group, where that decision reflects the free, prior and informed consent of the group.
26. The Commission also considers that the consensus default position, with provision to vary it through the authorisation process providing express authorisation to allow a majority of applicants to sign agreements and applicants, is workable.
27. The Commission notes that there is currently a remedy for the majority in circumstances where they consider that a minority are acting in breach of the limits of their authorisation: they can apply to the Federal Court under section 66B of the *Native Title Act 1993* to have a named applicant removed as applicant on the grounds that the person is no longer authorised by the claim group to make the application, or that the person has exceeded the authority given to him or her by the claim group to make the application and deal with matters arising in relation to it.
28. There is also a remedy if the majority is acting outside their authorisation, or if the purported authorisation has not been conducted in accordance with the law. At the objections phase of the ILUA registration process, a member of the claim group could seek to prevent registration of the ILUA by showing that the section 251 authorisation was not notified or conducted in accordance with the requirements. If an ILUA is registered despite these objections, a member of the claim group can contest the decision of the Registrar in the Federal Court.
29. The gap in remedies is where a majority is accused of acting lawfully—in accordance with an agreed authorisation process, conducted in accordance with the legislative requirements—but against the best interests of a (potentially significant) minority of the native title group. Perhaps the circumstances were not anticipated when the original decision-making process was agreed upon. Or perhaps in circumstances in which the majority made the original decision regarding what decision-making process would be used in subsequent decisions
30. Ideally, the original authorisation decision regarding the decision-making process for subsequent applications and agreements would be by

‘consensus’—meaning that there were no members of the group who objected to the mode of decision-making decided upon.

31. The Commission urges the Department to consider these issues as part of the broader context when looking at the authorisation and decision-making processes in the *Native Title Act 1993*.

**(a) Majority default rule in relation to section 31 agreements**

32. As mentioned in the above section, it is currently likely to be the case that all named applicants are required to sign a section 31 future use agreement, unless the native title group has provided express authorisation to deviate from that requirement. This is likely to be the case since *McGlade* decided this point in relation to area ILUAs. For this reason, section 31 agreements have been included in the proposed amendments including a majority default rule, as detailed above.

33. The Commission’s submission on the Options Paper stated the view that the majority default rule should not apply to section 31 agreements. The range of issues which can be affected by section 31 agreements and their significant implications make agreement by majority—instead of consensus—concerning. The Commission reiterates its concerns about the significance of the impact of section 31 agreements and notes the importance that decisions in relation to those agreements reflect genuine free, prior and informed consent of the native title holders.

34. In particular, the Commission notes that the authorisation processes in section 251A and section 251B, and the proposed new authorisation conditions in new section 251BA, do not appear to expressly apply to the applicant’s conduct when entering into section 31 agreements on behalf of the native title claim group. The ALRC has noted that, although the *Native Title Act 1993* (Cth) does not contain any explicit requirement for the approval of the claim group, the ‘practice of the National Native Title Tribunal suggests that some level of claim group consent is required’.<sup>7</sup> However the Commission understands that an appropriate degree of consent is not always sought and that the lack of legislative provision is a concern.

35. The Commission therefore considers that section 31 agreements should be subject to the explicit application of a requirement for agreement by the native title group. There should be no difference in the level of control that a native title group has between ILUAs and section 31 agreements. **The**

**Commission opposes extending the majority default rule to section 31 agreements until the authorisation requirements in the legislation are the same.**

36. If the Department was to amend the *Native Title Act 1993* to make the authorisation process applicable to section 31 agreements, in the same way as to ILUAs and applications, the Commission would consider the proposal in the same light as the proposal to extend the majority default rule to ILUAs and applications. That is, the Commission would view this proposal as intended to address a specific issue— a minority of named applicants refusing to sign an agreement, in breach of their authorisation conditions.
37. In either case, the Commission urges the Department to consider the broader issues regarding free, prior and informed consent at play in the authorisation processes, as discussed above.
38. While a native title group may (and often groups undoubtedly do) decide, in a manner reflective of genuine free, prior and informed consent, that the best decision-making process is by majority, it is difficult to see that a majority decision to adopt a majority rules decision-making process for subsequent applications and agreements is necessarily fulfilling the requirements associated with respecting the principle of free, prior and informed consent.
- 39. The Commission urges the Australian Government to consider the broader issues regarding free, prior and informed consent at play in the authorisation processes of agreements and applications, giving particular attention to section 31 agreements, before expanding the application of the majority default rule.**
40. The principle of free, prior and informed consent should underpin the development of all frameworks of engagement with Indigenous peoples and their representative institutions. This principle is fundamental to ensuring the effective participation of Indigenous peoples in decision-making and is a vehicle for reinforcing and implementing all of the rights contained within the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration). Free, prior and informed consent has been identified as a ‘requirement, prerequisite and manifestation’ of the exercise of Indigenous peoples’ right to self-determination.<sup>8</sup>
41. The Commission has previously commented on the importance of the principle of free, prior and informed consent both generally and in the

context of native title. Most recently, the Commission made a comprehensive submission to the 2018 EMRIP study.<sup>9</sup>

### ***Summary—Free, prior and informed consent***

The principle of free, prior and informed consent can be broken down into the following four elements:

- i. *Free* means no force, coercion, intimidation, bullying and/or time pressure.
- ii. *Prior* means that Indigenous peoples have been consulted before the activity begins.
- iii. *Informed* means that Indigenous peoples are provided with all of the available information and are informed when either that information changes or when there is new information. It is the duty of those seeking consent to ensure those giving consent are fully informed. To satisfy this requirement, an interpreter may need to be provided to provide information in the relevant Indigenous language to fully understand the issue and the possible impact of the measure. To satisfy this requirement of the principle, information should be provided that covers (at least) the following aspects:
  - the nature, size, pace, reversibility and scope of any proposed project or activity
  - the reason(s) or purpose of the project and/or activity
  - the duration of the above
  - the locality of areas that will be affected
  - a preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle
  - personnel likely to be involved in the execution of the proposed project (including Indigenous peoples, private sector staff, research institutions, government employees and others)
  - procedures that the project may entail.
- iv. *Consent* requires that the people seeking consent allow Indigenous peoples to say ‘yes’ or ‘no’ to decisions affecting them according to the decision-making process of their choice. To do this means Indigenous peoples must be consulted and participate in an honest and open process of negotiation that ensures:
  - all parties are equal, neither having more power or strength
  - Indigenous peoples are able to specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities.

## 2.3 Retrospective validation of section 31 agreements (Schedule 6, Part 2, clause 6)

42. Item 6 of Schedule 6, Division 1, Part 2 proposes to retrospectively validate section 31 agreements made before the passing of these amendments. The concern expressed to justify these retrospective amendments is that the *McGlade* decision may also have invalidated section 31 agreements which were not signed by all native title applicants.
43. As discussed above at section 2.2(a), the Commission notes that some section 31 agreements may not have been subject to the same authorisation processes as ILUAs and native title applications. That is, the broader native title group may not have specifically determined their decision-making processes in relation to section 31 agreements and as such, there is a risk that some section 31 agreements may have been made outside the broader group's knowledge. This differentiates section 31 agreements from ILUAs and applications.
44. The Commission understands that prior to *McGlade*, relevant parties were operating under the assumption that only a majority of named applicants were required to execute a section 31 agreement. *McGlade* is likely to have changed that commonly understood legal position. There may therefore be some section 31 agreements, made pre-*McGlade*, which were thought to be valid, but which are potentially invalid because they were only signed by a majority of applicants.
45. There is a common law principle against retrospective application of laws. The Commission therefore does not generally support retrospectivity in legislation and this is particularly the case where any invalidity intended to be rectified by such retrospectivity may have resulted from non-compliance with existing law.
46. The Commission considers that after *McGlade* was decided, it was clear that that decision was likely to, or at least *may well*, apply to other applications and agreements, including section 31 agreements. Since *McGlade* has been the law since 2 February 2017, retrospective validation is not an appropriate way of dealing with agreements made, in breach of that law, since that time.
47. The Commission is not in a position to ascertain whether retrospective validation of section 31 agreements since *McGlade* would involve substantive breaches of the rights of native title holders or claimants. **The Commission**

**encourages the Attorney-General's Department to investigate this issue further before retrospectively validating agreements which were made in breach of the law, as it is likely to be interpreted.** The Commission notes that the 2017 amendments did not purport to validate agreements (if there were any) made after 2 February 2017.

## **2.4 Commencement provisions for the majority default rule**

48. Clause 2 contains a table with commencement information which provides that the majority default rule in Schedule 1, Part 2 comes into force the day after the provisions in schedule 6, Part 2, Division 1 commence—which is the day after the end of the period of six months after Royal Assent. This means that native title claimants and holders will have six months to displace the majority default rule via the authorisation conditions, if they wish to.

49. The Commission is concerned that a period of six months is insufficient time for a native title group to consider the issues and displace the default majority rule if they wanted to. In particular, organising a meeting of all native title claimants or holders is often an extremely expensive process and can require a substantial amount of time. For example, if people need to attend a remote location from other areas; or if there is sorry business following the death of a person.

**50. The Commission recommends that the Department consult specifically on the time it would take for a group to displace the majority default rule if it needed to. The Commission suggests that the period of six months should be replaced with a minimum of 12 months to ensure that, at the least, the issue can be raised at an AGM of the PBC.**

51. The Commission also notes that the proposals to retrospectively validate section 31 agreements signed by a majority come into force the day after Royal Assent, while the provisions enshrining the majority default rule come into force 6 months later. This appears to leave a gap of six months.

## **2.5 Indigenous Land Use Agreements (ILUAs)—Schedule 2**

### **(a) Body corporate ILUAs**

52. As it has previously,<sup>10</sup> the Commission supports the proposal (inserting new subsections 24BC(2) and (3)) to broaden the scope of body corporate ILUAs to cover areas where native title has been extinguished or has been expressly

excluded from a determination because an application could not be made according to s61A(2) (a previous act of exclusive possession was done to the area by the Commonwealth or State or Territory). The proposal provides greater flexibility for the use of body corporate ILUAs.

53. In its submission on the Options Paper, the Commission specifically supported the wording contained in the 2012 Bill (proposed sections 24BC(2) and (3)) to allow parties to make a body corporate ILUA over areas that are wholly determined, but include areas where native title has been extinguished; and/or where an area has been excluded from a determination, and native title would have been held by the relevant native title group had native title not been extinguished over that particular area.<sup>11</sup>

54. The wording in the Exposure Draft is different from that in the Options Paper, however it appears that the effect of the provision is the same, in which case, **the Commission supports the proposed amendments.**

**(b) Validation of acts authorised by deregistered ILUAs**

55. Items 5 and 6 provide that if an ILUA is deregistered, future acts authorised by that ILUA are not affected, that is they remain valid.

56. Proposed new subsections 24EB(2A) and 24EBA(7) would apply to ILUAs which have been successfully challenged and found to be invalid—for example, for common law reasons, such as failure to take into account relevant considerations. In other areas of law, if an agreement is found to have been executed invalidly, then it is considered to have always been invalid and anything purportedly done under that agreement is not authorised by the agreement. These provisions purport to validate otherwise invalid actions made under invalid agreements. **The Commission opposes these amendments.**

57. The Commission also notes that it appears that these amendments would apply to future acts purportedly authorised by an ILUA which was deregistered under subsection 199C(3) because it was procured by fraud, undue influence or duress.

58. **The Commission is of the view that future acts purportedly authorised by ILUAs later deregistered should not be validated in the manner proposed in the Exposure Draft.**

**(c) Minor amendments to ILUAs without needing reauthorisation**

59. The Commission has previously supported simplification of the process of amending ILUAs, as this would provide flexibility to enable parties to make administrative amendments to ILUAs without requiring a new registration process.<sup>12</sup> In its submission on the Options Paper, the Commission supported this proposed amendment to the extent that it is consistent with the wording in the 2012 Bill amending section 24ED(1) which states that certain amendments can be made to ILUAs (whether body corporate, area agreement or alternative procedure) where:

- the amendments can mostly be categorised as administrative amendments, as set out in section 24ED(1)
- the parties to the agreement have agreed to the amendment
- the Register of the National Native Title Tribunal has been notified of the amendments in writing

60. The proposals in the Exposure Draft broadly reflect this wording with some specific limitations (at new section 24ED(1)(c)-(e)) which the **Commission does not oppose**.

61. However the Exposure Draft (at new section 24ED(1)(f) and section 24ED(3)) also contains provision for the Minister to specify by legislative instrument a 'thing' that an amendment to an agreement may do. It is unclear what type of 'thing' the Minister would be specifying and thereby allowing as amendments which do not require reauthorisation. As such, **the Commission cannot support providing the Minister with the power to allow amendments of a kind not on the face of primary legislation, given they would be taking effect without reauthorisation of the ILUA.**

## **2.6 Historical extinguishment—Schedule 3, Part 1**

62. **The Commission welcomes the proposal in Schedule 3, Part 1 of the Exposure Draft to allow historical extinguishment to be disregarded over areas of national, state or territory parks with the agreement of the parties (proposed new section 47C).** Under the proposal, the extinguishing effect of public works in a national park may also be disregarded with agreement from the relevant Commonwealth, State or Territory government (proposed subsections 47C(3) and 47C(4)).

63. Further, the proposed amendment to section 47(1)(b)(iii) (at item 17) would extend the application of the existing provisions which currently allow for historical extinguishment to be disregarded where a determination application is made over a pastoral lease that is held by the native title group. The extension would allow extinguishment to be disregarded where a company comprised of 'members', as well as one comprised of 'shareholders', holds the pastoral lease.
64. These are important developments which the Commission strongly supports, as it did with regard to the proposed 2012 amendments and the Options Paper.<sup>13</sup>
65. However, as with the proposed 2012 amendments and the Options Paper, the Commission is of the view that the proposal does not go far enough.
66. The Commission reiterates section 4.5(i) of the Commission's submission on the Options Paper. In particular, the Commission is of the view that the range of circumstances in which historical extinguishment can be disregarded should be expanded beyond those listed in Attachment E of the Options Paper and Schedule 3 of the Exposure Draft.
- 67. The Commission's long-held view is that historical extinguishment of native title should be disregarded over any areas of Crown land where there is agreement between the government and native title claimants. Historical extinguishment should not be restricted to 'onshore' areas of national, state or territory parks; historical extinguishment should also be disregarded in relation to marine parks and reserves.**

## **2.7 Schedule 5, Part 1—intervention and consent determinations**

68. The proposed amendments in clauses 2 and 3 amending subsection 87(1)(a) will require that the Commonwealth, if it has intervened in proceedings, must be a party to any agreement on the terms of an order of the Federal Court.
69. The Commission notes that the Commonwealth already has the capacity to intervene and become a party at any point in the proceedings under section 84A. Where the Commonwealth is a party, and the proceedings are otherwise resolved by consent with all other parties, then the Commonwealth's consent would also be required. The proposed amendments would therefore

effectively allow the Commonwealth Government a veto over orders which the relevant parties have agreed to.

70. There are remedies for a situation in which the Commonwealth unreasonably exercised this proposed power of veto (in effect). The Court has made orders resolving proceedings by agreement in the face of an unreasonable withholding of consent by a party. Parties may also seek removal of a party that unreasonably withholds consent.
71. However, the Government has not provided a reason for the extra control being granted to the Minister in these proposed amendments. The Commission notes that additional unnecessary parties to negotiations may be a hindrance to already complex negotiations.
72. The Commission does not consider the proposed extra powers of the Minister to be appropriate or useful to the negotiations between parties affected. **The Commission therefore opposes these amendments.**

## **2.8 Schedule 7—National Native Title Tribunal new dispute resolution function**

73. **The Commission supports the proposal in the Exposure Draft (inserting a new section 61AAA) to give the NNTT a new legislative function to assist PBCs and common law native title holders to resolve disputes.**
74. The Commission notes that this function would be useful in assisting native title holders to come to unanimous positions regarding agreements, which could be of benefit in a scenario in which the *McGlade* rule is left to apply to all native title agreements, rather than having the majority as default position stipulated for all agreements.

## **2.9 Schedule 8—Registered native title bodies corporate (RNTBCs)**

### **(a) Part 1—CATSI Registrar oversight**

75. **The Commission opposes the proposal in items 1–2 of Schedule 8, part 1 to give the CATSI Registrar the ability to appoint a special administrator to a RNTBC if they are of the view that the corporation is conducting its affairs ‘in a way that is contrary to the interest of the common law holders or a class of common law holders’.**

76. There is no provision regarding what conduct 'contrary to the interest of the common law holders' would involve, nor are there any checks and balances proposed regarding this discretion on the part of the Minister-appointed CATSI Registrar.

77. In principle, the Commission supports enhanced transparency and accountability for RNTBCs. However, concerns around RNTBC administration and decision-making will not be addressed by increasing the regulatory burden on RNTBCs without significant increases in technical and financial resources.

78. The Commission notes that the Declaration states:

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.<sup>14</sup>

79. Financial and technical assistance is essential to ensuring that Aboriginal and Torres Strait Islander peoples are able to enjoy their right to participate in decision-making in an effective manner. The United Nations Permanent Forum on Indigenous Issues has even suggested that the principle of free, prior and informed consent, combined with the notion of good faith, may be 'construed as incorporating a duty for States to build Indigenous capacity'.<sup>15</sup>

**80. The Commission is of the view that the capacity of PBCs to engage effectively in decision-making and consultative processes may be enhanced through an increase in Government provision of technical and financial resources to PBCs, as well as capacity-building training for PBC directors and native title holders more broadly.** This assistance will help to facilitate effective consultation processes and capacity development of PBCs and ensure they are well-functioning, sustainable and self-governing.<sup>16</sup>

**(b) Part 2—require RNTBC constitutions to reflect the native title determination (page 27)**

81. The proposed amendments to sections 141–25 (at item 14) would require RNTBC constitutions to 'include eligibility requirements for membership that provide for all the common law holders of native title to be represented, directly or indirectly'. In practice, the Commission understands that this is requiring RNTBCs' constitutions to reflect the native title determination in terms of eligibility for membership. That is, eligibility for membership would

be defined in a RNTBC constitution based on the way that the group's identity was described in the original native title determination.

82. The Commission understands that discrepancies between membership eligibility rules of a RNTBC and the terms of a determination creates the potential for conflict. The proposal reflects the duty of an RNTBC to all common law holders, including non-members.
83. However, the Commission also understands that, to date, RNTBCs have been able to navigate the changes and challenges of eligibility for membership with the flexibility inherent in the legislation as it is. The current provisions have allowed RNTBCs to deal (through the courts) with situations such as attempts at membership by people who claim connection to a group by ancestry alone, and who have never had any involvement with the land, people or culture.
84. Definitions of a native title group's identity have the potential to (and often do) develop and change over time with developing research and community understanding. It may present problems to fix that identity at a point in time, limiting membership decisions for a RNTBC.
85. The Commission is not in a position to ascertain whether there might be negative implications for the rights of native title holders of removing the flexibility currently inherent in the RNTBC's membership decisions by defining it by the native title determination. Therefore, **the Commission encourages the Attorney-General's department to give further consideration to the implications of this proposal.**

## **2.10 Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018**

### **(a) Regulation 9 certificate—additional power for the Registrar—Item 3**

86. **The Commission considers that the purpose of this proposed insertion of new regulation 55A is unclear.** The proposal would give the CATSI Registrar the function of determining whether or not, in the Registrar's opinion, a certificate given by a PBC under Regulation 9 of the PBC Regulations complies with regulation 9 (Schedule 1, Item 3).
87. The provision appears to provide the CATSI Registrar with the power to provide some kind of advisory opinion, however it is unclear what the implications of that opinion would be. The Discussion Paper says that it 'could

be a relevant consideration in considering whether to appoint a special administrator'. If the intention is to provide the CATSI Registrar with jurisdiction to entertain objections to all native title decisions, that should be made clear so that the implications can be properly considered.

**(b) New consultation and consent requirements for native title decision-making—Items 19-22**

88. The Commission does not consider that the proposals to establish a new decision-making regime according to 'high level' and 'low level' decisions is necessary, given the existing Regulation 8A would allow for different levels of delegated decision-making if a native title group wanted to use that.

89. As expressed in its submission on the Options Paper, **the Commission is of the view that existing provisions in the Native Title Act 1993 and the Prescribed Body Corporate Regulations 1999 (Cth), in particular Regulation 8A, should be further explored before introducing a new alternative agreement-making mechanism.** These existing provisions allow PBC rules to be drafted so that PBC directors have a degree of flexibility in making operational decisions pursuant to alternative consultation processes. Furthermore, the requirement of PBCs to consult with and obtain the consent of native title holders before making a native title decision is a critical protection within the PBC Regulations.

**(c) Remove the requirement to consult with NTRBs—Item 25**

90. **The Commission does not support the removal of the requirement for PBCs to consult with native title representative bodies (achieved by Schedule 1, item 25 repealing sub regulation 8(2) of the PBC Regulations).** There are many scenarios in which NTRBs play an important role in conveying information and representing the views of native title holders. It is the Commission's view that removing consultation requirements with NTRBs is unlikely to have the effect of streamlining any processes, but rather could be counterproductive in this regard.

**(d) Clarify requirements to consult with groups of common law holders—Item 27**

91. Item 27 of Schedule 1 of the Amendment Regulations will remove the requirement in sub-regulation 8(5) of the Native Title (Prescribed Bodies Corporate) Regulations 1999 for PBCs to consult and obtain the consent of

*only* those groups of common law holders whose native title rights or interests would be affected by the proposed native title decision.

92. This proposal broadens the potential groups with whom PBCs *may* consult. However, the Commission is concerned that the amendments could have the effect of weakening the position of sub groups within a broader native title group, in scenarios where that sub group is the relevant group for a particular area. The Commission suggests that, if this provision has been considered unduly restrictive in the past, then the Department consider not removing it, but rather amending it to allow for broader consultation, and making provision that, where there is one or more groups of common law holders whose native title rights or interests will be affected, they *must* be consulted and their views given particular weight.

**(e) Additional certification requirements on PBCs—Item 30, proposed regulation 9**

93. **The Commission opposes the requirements in new regulation 9 for a PBC to produce a certificate in relation to every native title decision taken by that PBC.** Currently, a certificate must be produced only if it is requested by a common law holder or other ‘interested person’. The proposal would impose a potentially significant regulatory burden on PBCs with little or no benefit. This type of regulation is relevant to the discussion at section 2.9(a) above regarding the regulatory burden on PBCs without accompanying resources.

### **3 General comments**

94. As stated in the Commission’s submission on the Options Paper and in previous native title reports, the Commission is of the view that the *Native Title Act 1993* in its current form does not provide for a just and equitable native title system, which is consistent with international human rights standards, in particular the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration).<sup>17</sup> The Declaration should serve as the compass for the development and implementation of any legislative measures that may affect Aboriginal and Torres Strait Islander peoples.

95. The Commission considers that an overhaul of the native title system is needed to ensure an equitable, human rights-compliant system.

96. In particular, the Commission reiterates its position that significant changes to the *Native Title Act 1993* are needed. In particular, the Commission has previously stated that key priorities for native title reform are to:

- establish a presumption of continuous connection in relation to a native title claim once native title claimants have met the requirements of the registration test, and
- enable native title holders to effectively govern their lands, territories and resources through their Prescribed Bodies Corporate (PBCs), including by providing PBCs with adequate technical and financial resources to meet their administrative, legal and financial functions.<sup>18</sup>

97. The Commission noted in its submission to the Options Paper that the scope of the Options Paper did not include several issues that the Commission and other stakeholders have consistently raised as priorities that should be included in any reforms to the native title system.<sup>19</sup> The Commission notes that none of the following issues were included in the Exposure Draft:

- the consistency of the *Native Title Act 1993* (Cth), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) with international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples
- the operation of section 233 of the Native Title Act
- proof and evidence in native title claims
- the content of native title rights and interests, in particular the use of native title rights and interests for a commercial purpose
- procedural rights over offshore areas
- what constitutes 'good faith' in the Native Title Act
- priorities that came out of the Indigenous Property Rights Project regarding ways to leverage the economic potential of the Indigenous Estate

### 3.1 Consistency with international human rights standards

98. The Commission draws attention to section 5.1 of the Commission's submission on the Options Paper—a discussion on the international human rights standards with which the *Native Title Act 1993* has been found not to comply.

99. The Commission also draws attention to Appendix 1 of that submission, 'Relevant recommendations on Native Title Reform made by the Human Rights Council, the Human Rights Committee, Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Australian Human Rights Commission'. That Appendix forms Appendix 1 of this submission too.

100. The Commission reiterates the recommendations made in that submission. All recommendations from the submission on the Options Paper reiterated in this section are listed in Appendix 2 of this submission.

### 3.2 The operation of section 223 of the Native Title Act 1993

101. The Commission draws attention to section 5.2 of the Commission's submission on the Options Paper—a discussion on the onerous standards of proof required for Aboriginal and Torres Strait Islander peoples to prove their connection to their lands, territories and resources from sovereignty to the current day. In particular, the Commission has repeatedly highlighted concerns about the operation of section 223 of the *Native Title Act 1993* and made recommendations with regard to:

- The presumption of continuity
- Consideration of reasons for interruption
- Definition of traditional
- Physical connection

102. **The Commission reiterates the recommendations made in that section.**

### **3.3 Commercial native title rights and interests**

103. The Commission draws attention to section 5.3 of the Commission’s submission on the Options Paper—a discussion on the need to ensure that native title rights and interests can be used for any purpose, including commercial and non-commercial purposes.

104. **The Commission reiterates the recommendation made in that section.**

### **3.4 Good faith**

105. The Commission draws attention to section 5.4 of the Commission’s submission on the Options Paper and the previous submissions referred to therein. That section contains a discussion on the need for the *Native Title Act 1993* to be amended to include explicit criteria as to what constitutes ‘good faith’ and that these criteria should be based on the model set out in section 228 of the *Fair Work Act 2009* (Cth) and the Njamal Indicia.

106. **The Commission reiterates the recommendation made in that section.**

### **3.5 Procedural rights over offshore areas**

107. The Commission draws attention to section 5.5 of the Commission’s submission on the Options Paper and the previous submissions referred to therein. That section contains a discussion on the need to amend the *Native Title Act 1993* to permit procedural rights in relation to offshore areas.

108. **The Commission reiterates the recommendation made in that section.**

### **3.6 Indigenous Property Rights Project**

109. The Commission draws attention to section 6 of the Commission’s submission on the Options Paper—a discussion on the Indigenous Property Rights Project facilitated by the Commission regarding ways to leverage the economic potential of the Indigenous Estate with the consent and guidance of Traditional Owners to deliver sustainable outcomes for Aboriginal and Torres Strait Islander peoples.

110. In particular, the Commission draws attention to relevant priorities that came out of the Indigenous Property Rights Project:

- Long term lease arrangements over the Indigenous Estate
- Increasing incorporation options for PBCs, including under the Corporations Act, and regulation by the Australian Securities & Investments Commission (ASIC) rather than the Office of the Registrar of Indigenous Corporations (ORIC)
- Progressing the recommendation of the Expert Indigenous Working Group in the Investigation into Indigenous Land Administration and Use for exemptions and concession from land user charges, land taxes and duties where Indigenous land is granted as freehold or leasehold to Indigenous land holding bodies and PBCs.

111. **The Commission reiterates the recommendations made in that section.**

#### 4 Appendix 1—Relevant recommendations on Native Title Reform made by the Human Rights Council, the Human Rights Committee, Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Australian Human Rights Commission

Report/Submission	Recommendations
<b>Human Rights Council</b>	
<b><i>Universal Periodic Review—2011</i></b>	86.102 Reform the Native Title Act 1993, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life (United Kingdom)
<b>Committee on the Elimination of Racial Discrimination</b>	
<b><i>CERD Report on Australia—2017</i></b>	21. The Committee is concerned that after centuries of conflict and negotiations over their traditional land rights, the claims of indigenous peoples to land remain unresolved. Despite the Committee’s previous recommendation (see CERD/C/AUS/CO/15-17, para.

	<p>18), the Native Title Act remains a cumbersome tool that requires indigenous claimants to provide a high standard of proof to demonstrate ongoing connection with the land. The Committee is also concerned about information that extractive and development projects are carried out on lands owned or traditionally used by indigenous peoples without seeking their prior, free and informed consent.</p> <p>22. The Committee recommends that the State party move urgently to effectively protect the land rights of indigenous peoples, including by amending the Native Title Act 1993, with a view to lowering the standard of proof required and simplifying the applicable procedures. It also urges the State party to ensure that the principle of free, prior and informed consent is incorporated into the Native Title Act 1993 and into other legislation, as appropriate, and fully implemented in practice. Furthermore, the Committee recommends that the State party respect and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples and consider adopting a national plan of action to implement those principles. The State party is also encouraged to reconsider its position and ratify the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169).</p>
<p><b><i>CERD Concluding Observations on Australia—2010</i></b></p>	<p>18. Reiterating in full its concern about the Native Title Act 1993 and its amendments, the Committee regrets the persisting high standards of proof required for recognition of the relationship between Indigenous peoples and their traditional lands, and the fact that in spite of large investment of time and resources by Indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5).</p> <p>The Committee urges the State party to provide more information on this issue, and take the necessary measures to review the requirement of such a high standard of proof.</p>

	<p>The Committee is interested in receiving data on the extent to which the legislative reforms to the Native Title Act in 2009 will achieve “better native title claim settlements in a timely manner”. It also recommends that the State party enhance adequate mechanisms for effective consultation with Indigenous peoples around all policies affecting their lives and resources.</p>
<p><b><i>CERD Concluding Observations on Australia—2005</i></b></p>	<p>16. The Committee notes with concern the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the Mabo case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments wind back some of the protections previously offered to indigenous peoples, and provide legal certainty for government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention. (article 5)</p> <p>The Committee recommends that the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all.</p> <p>17. The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since</p>

	<p>the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands. (article 5)</p> <p>The Committee wishes to receive more information on this issue, including on the number of claims that have been rejected because of the requirement of this high standard of proof. It recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.</p>
<p><b>Human Rights Committee</b></p>	
<p><b><i>HRCttee Concluding Observations on Australia—2017</i></b></p>	<p>51. While noting the various reforms implemented, the Committee remains concerned (see CCPR/C/AUS/CO/5, para. 16) about the high standard of proof required to demonstrate ongoing connection with the land under the Native Title Act 1993 and about the extreme difficulties in obtaining compensation under the current native title scheme for those people who had their native title extinguished. The Committee also notes that many recommendations of Australia Law Reform Commission’s Connection to Country Review of the Native Title Act 1993 (Cth) and of the Council of Australian Governments’ Investigation into Indigenous Land Administration and Use have not been implemented (arts. 2 and 27).</p>

	<p>52. The State party should remove the barriers to the full protection of indigenous land rights and consider amending the Native Title Act 1993, taking into account the Covenant and relevant international standards.</p>
<p><b><i>HRCttee Concluding Observations on Australia—2009</i></b></p>	<p>16. The Committee, while welcoming recent reforms, notes with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act. It regrets the lack of sufficient steps taken by the State party to implement the Committee’s recommendations adopted in 2000. (arts. 2 and 27)</p> <p>The State party should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples.</p>
<p><b>Committee on Economic, Social and Cultural Rights</b></p>	
<p><b><i>CESCR Concluding Observations on Australia—2017</i></b></p>	<p>15. The Committee is also concerned about:</p> <p>(c) Persistent difficulties in proving land titles under the Native Title Act 1993, which is still undergoing reform;</p> <p>16. The Committee urges the State party to:</p> <p>(d) Proceed with the legal reform of the Native Title Act 1993 in close consultation with all concerned stakeholders, taking into consideration the recommendations of the Australian</p>

	<p>Law Reform Commission review of the Native Title Act 1993, and the report by the Council of Australian Governments into indigenous land administration and use;</p> <p>(e) Ensure that the principle of free, prior and informed consent is incorporated in the Native Title Act 1993 and in other legislation as appropriate, and is fully implemented in practice;</p>
<p><b><i>CESCR Concluding Observations on Australia—2009</i></b></p>	<p>The Committee notes with concern that, despite the reforms to the native title system, the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act, have a negative impact on the recognition and protection of the right of indigenous peoples to their ancestral lands. (art.15)</p> <p>The Committee recommends that the State party increase its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples, and remove all obstacles to the realization of the right to land of indigenous peoples.</p>
<p><b><i>CESCR Concluding Observations on Australia—2000</i></b></p>	<p>16. The Committee notes with regret that the amendments to the 1993 Native Title Act have affected the reconciliation process between the State party and the indigenous populations, who view these amendments as regressive.</p>
<p><b>Australian Human Rights Commission—Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Reports</b></p>	

<p><b>Native Title Report 2016</b></p>	<p>Recommendation 14: The Australian Government work with the states, territories and relevant stakeholders including the National Native Title Tribunal, to ensure the integration of key information about the Indigenous Estate on state and territory land title information systems.</p> <p>Recommendation 15: The Australian Government support Indigenous land holders to more comprehensively map the extent of their Indigenous Estate.</p> <p>Recommendation 16: The Australian Government support the Indigenous Strategy Group's endorsed model(s) for long-term leasing.</p> <p>Recommendation 17: The Australian Government support the review of state and territory land use planning regimes in consultation with Indigenous organisations to ensure the Traditional Owners of the Indigenous Estate can exercise the right to free, prior and informed consent regarding land use planning decisions.</p> <p>Recommendation 18: The Australian Government:</p> <ul style="list-style-type: none"><li>• recognise the key roles that native title Prescribed Bodies Corporate (PBCs), Native Title Representative Bodies and Service Providers (NTRB/SPs), the National Native Title Council and locally based, Indigenous-led specialist cultural and economic development organisations play in driving and supporting economic development on the Indigenous Estate; and</li><li>• ensure these Indigenous-led organisations are properly funded and supported to carry out this important work, in addition to any statutory duties they may have.</li></ul>
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	<p>Recommendation 19: The Australian Government support locally based research and scoping initiatives to identify Indigenous-led economic development opportunities suited to the unique land holdings and strengths of Traditional Owner groups, including opportunities to develop the cultural economy, partner with local operations and ‘tap in’ to industry initiatives in the broader region.</p> <p>Recommendation 22: The Australian Government support legislative and policy measures to allow Prescribed Bodies Corporate (PBCs) to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters.</p>
<p><b><i>Native Title Report 2015</i></b></p>	<p>Recommendation 6: The Australian Government support and resource the Australian Human Rights Commission to undertake, with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, a process to identify options for leveraging Indigenous property rights for economic development purposes.</p> <p>Recommendation 9: The Australian Government recognise the level of research and consultation involved in the Australian Law Reform Commission’s Inquiry into the Native Title Act 1993 (Cth) and take action to implement its recommendations.</p> <p>Recommendation 10: The Australian Government take action to synchronise the work of the:</p> <ul style="list-style-type: none"> <li>• COAG Indigenous Expert Working Group</li> </ul>

	<ul style="list-style-type: none"> <li>• COAG Investigation into Indigenous land use and administration</li> <li>• White Paper on Developing Northern Australia</li> <li>• Australian Law Reform Commission’s Inquiry into the Native Title Act 1993 (Cth)</li> <li>• Broome Roundtable on Indigenous property rights</li> </ul> <p>to avoid duplication and to maximise outcomes for Indigenous communities in relation to the land and native title into the future.</p>
<p><b><i>Native Title Report 2013</i></b></p>	<p>3.12: The Australian Government reintroduces the Native Title Amendment Bill 2012 (Cth) and supports its passage through the Parliament.</p> <p>3.13: The Australian Government considers the following outstanding recommendations in the Native Title Report 2009:</p> <ol style="list-style-type: none"> <li>1. That the Native Title Act 1993 (Cth) be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test.</li> <li>2. That the Native Title Act 1993 (Cth) provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.</li> </ol>
<p><b><i>Native Title Report 2012</i></b></p>	<ol style="list-style-type: none"> <li>1. That the Australian Government establish and resource a working group which includes members from Native Title Representative Bodies, Native Title Service Providers, Aboriginal and Torres Strait Islander peoples, Australian and State and Territory</li> </ol>

	<p>governments and respondent stakeholders including mining and pastoralists to be tasked with developing proposals to amend the Native Title Act.</p> <ol style="list-style-type: none"> <li>2. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the <i>United Nations Declaration on the Rights of Indigenous Peoples</i> are given full effect.</li> <li>3. That the Australian Government reviews the <i>Native Title Act 1993 (Cth)</i>, the <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> and the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i> to ensure the statutes are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.</li> <li>4. That the Australian Government amends the <i>Acts Interpretation Act 1901(Cth)</i> to ensure all legislation is interpreted in accordance with the <i>United Nations Declaration on the Rights of Indigenous Peoples</i>.</li> <li>5. That the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternative legislation in relation to their lands, territories and resources.</li> </ol>
<p><b><i>Native Title Report 2011</i></b></p>	<p><b>Review of the Native Title Act</b></p>

1. That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with the United Nations Declaration on the Rights of Indigenous Peoples. The terms of reference for this review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. This inquiry could form part of the Australian Government's National Human Rights Action Plan.

**International human rights mechanisms**

2. That the Australian Government take steps to formally respond to, and implement, recommendations which advance the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources, made by international human rights mechanisms including:

- Special Rapporteur on the rights of indigenous peoples
- Expert Mechanism on the Rights of Indigenous Peoples
- United Nations Permanent Forum on Indigenous Issues
- Treaty reporting bodies

**Implementation of the recommendations from Native Title Reports**

4. That the Australian Government should implement outstanding recommendations from the Native Title Report 2010 and provide a formal response for next year's Report which outlines the Government's progress towards implementing the recommendations from both the Native Title Report 2010 and Native Title Report 2011.

**Implementation of the Declaration**

5. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the United Nations Declaration on the Rights of Indigenous Peoples are given full effect.

**Lateral violence, cultural safety and security in the native title system**

6. That targeted research is undertaken to develop the evidence base and tools to address lateral violence as it relates to the native title system. This research should be supported by the Australian Government.
8. That all governments working in native title ensure that their engagement strategies, policies and programs are designed, developed and implemented in accordance with the United Nations Declaration on the Rights of Indigenous Peoples. In particular, this should occur with respect to the right to self-determination, the right to participate in decision making guided by the principle of free, prior and informed consent, non-discrimination, and respect for and protection of culture.
9. That the Australian Government pursue legislative and policy reform that empowers Aboriginal and Torres Strait Islander peoples and their communities, in particular:
  - a. reforming the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples, and address the provisions that permit discrimination on the basis of race

	<p>b. ensuring that the National Human Rights Framework includes the United Nations Declaration on the Rights of Indigenous Peoples to guide its application of human rights as they apply to Aboriginal and Torres Strait Islander peoples</p> <p>c. creating a just and equitable native title system that is reinforced by a Social Justice Package.</p>
<p><b><i>Native Title Report 2010</i></b></p>	<p><b>Chapter 2: ‘The basis for a strengthened partnership’: Reforms related to agreement-making</b></p> <p>2.1 That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards. Further, that the terms of reference for this review be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Such terms of reference could include, but not be limited to, an examination of:</p> <ul style="list-style-type: none"> <li>• the impact of the current burden of proof</li> <li>• the operation of the law regarding extinguishment</li> <li>• the future act regime</li> <li>• options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements).</li> </ul> <p>2.2 That the Australian Government work with Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups to explore options for streamlining agreement-making processes, including</p>

	<p>options for template agreements on matters such as the construction of public housing and other infrastructure.</p> <p>2.3 That the Australian Government make every endeavour to finalise the Native Title National Partnership Agreement. Further, that the Australian Government consider options and incentives to encourage states and territories to adopt best practice standards in agreement-making.</p> <p>2.4 That the Australian Government pursue reforms to clarify and strengthen the requirements for good faith negotiations in 2010–2011.</p> <p>2.5 That the Australian, state and territory governments commit to only using the new future act process relating to public housing and infrastructure (introduced by the Native Title Amendment Act (No 1) 2010 (Cth)) as a measure of last resort.</p> <p>2.6 That the Australian Government begin a process to establish the consultation requirements that an action body must follow under the new future act process introduced by the Native Title Amendment Act (No 1) 2010 (Cth). Further, that the Australian Government ensure that Aboriginal and Torres Strait Islander peoples are able to participate effectively in the development of these requirements.</p> <p>2.7 That the Australian Government:</p> <ul style="list-style-type: none"><li>• consult and cooperate in good faith in order to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples</li><li>• provide a clear, evidence-based policy justification</li></ul>
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before introducing reforms that are designed to ensure the 'sustainability' of native title agreements.

2.8 That, as part of its efforts to ensure that native title agreements are sustainable, the Australian Government ensure that Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups have access to sufficient resources to enable them to participate effectively in negotiations and agreement-making processes.

**Chapter 3: Consultation, cooperation, and free, prior and informed consent: The elements of meaningful and effective engagement**

3.1 That any consultation document regarding a proposed legislative or policy measure that may affect the rights of Aboriginal and Torres Strait Islander peoples contain a statement that details whether the proposed measure is consistent with international human rights standards. This statement should:

- explain whether, in the Australian Government's opinion, the proposed measure would be consistent with international human rights standards and, if so, how it would be consistent
- pay specific attention to any potentially racially discriminatory elements of the proposed measure
- where appropriate, explain the basis upon which the Australian Government asserts that the proposed measure would be a special measure
- be made publicly available at the earliest stages of consultation processes.

	<p>3.2 That the Australian Government undertake all necessary consultation and consent processes required for the development and implementation of a special measure.</p>
<p><b><i>Native Title Report 2009</i></b></p>	<p><b>Chapter 2: Changing the culture of native title</b></p> <p>2.1 That the Australian Government ensure that reforms to the native title system are consistent with the rights affirmed by the Declaration on the Rights of Indigenous Peoples.</p> <p>2.2 That the Australian Government adopt and promote the recommendations of the Expert Meeting on Extractive Industries through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries.</p> <p>2.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a social justice package that complements the native title system and significantly contributes to real reconciliation between Indigenous and non-Indigenous Australians.</p> <p><b>Chapter 3: Towards a just and equitable native title system</b></p> <p>3.1 That the Australian Government adopt measures to improve mechanisms for recognising traditional ownership.</p>

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|  | <p>3.2 That the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the applicant has met the relevant threshold requirements.</p> <p>3.3 That the Native Title Act provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.</p> <p>3.4 That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that remain identifiable over time.</p> <p>3.5 That section 223 of the Native Title Act be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters.</p> <p>3.6 That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.</p> <p>3.7 That the Australian Government fund a register of experts to help NTRBs and native title parties access qualified, independent and professional advice and assistance.</p> <p>3.8 That the Australian Government consider introducing amendments to sections 87 and 87A of the Native Title Act to either remove the requirement that the Court must be satisfied that it is 'appropriate' to make the order sought or to provide greater guidance as to when it will be 'appropriate' to grant the order.</p> |
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	<p>3.9 That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements.</p> <p>3.10 That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information.</p> <p>3.11 That the Australian, state and territory governments actively support the creation of a comprehensive national database of land tenure information.</p> <p>3.12 That the Australian Government consider options to amend the Native Title Act to include stricter criteria on who can become a respondent to native title proceedings.</p> <p>3.13 That section 84 of the Native Title Act be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement.</p> <p>3.14 That the Australian Government review section 213A of the Native Title Act and the Attorney-General's Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993 to provide greater transparency in the respondent funding process.</p> <p>3.15 That the Australian Government consider measures to strengthen procedural rights and the future acts regime, including by:</p> <ul style="list-style-type: none"><li>• repealing section 26(3) of the Native Title Act</li><li>• amending section 24MD(2)(c) of the Native Title Act to revert to the wording of the original section 23(3)</li></ul>
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	<ul style="list-style-type: none"><li>• reviewing time limits under the right to negotiate</li><li>• amending section 31 to require parties to have reached a certain stage before they may apply for an arbitral body determination</li><li>• shifting the onus of proof onto the proponents of development to show their good faith</li><li>• allowing arbitral bodies to impose royalty conditions.</li></ul> <p>3.16 That section 223 of the Native Title Act be amended to clarify that native title can include rights and interests of a commercial nature.</p> <p>3.17 That the Australian Government explore options, in consultation with state and territory governments, Indigenous peoples and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose.</p> <p>3.18 That the Australian Government explore alternatives to the current approach to extinguishment, such as allowing extinguishment to be disregarded in a greater number of circumstances.</p> <p>3.19 That section 86F of the Native Title Act be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:</p> <ul style="list-style-type: none"><li>• the prospect of a negotiated outcome being reached</li><li>• the resources of the parties</li><li>• the interests of the other parties to the proceeding.</li></ul>
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	<p>3.22 That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.</p>
<p><b><i>Native Title Report 2008</i></b></p>	<p><b>Chapter 2: Changes to the native Title system – one year on</b></p> <p>2.1 That any further review or amendment that the Australian Government undertakes to the native title system be done with a view to how the changes could impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples.</p> <p>2.2 That the Australian Government respond to the recommendations made in the Native Title Report 2007 on the 2007 changes to the native title system.</p> <p>2.5 That the Australian Government create a separate funding stream specifically for Prescribed Bodies Corporate and corporations which are utilising the procedural rights afforded under the Native Title Act.</p> <p>2.7 That the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, work closely to ensure that funding provided to registered PBCs is consistent with the aim of building PBC’s capacity to operate.</p> <p><b>Chapter 3: Selected native title cases—2007-2008</b></p>

3.1 That the Australian Government pursues consistent legislative protection of the rights of Indigenous peoples to give consent and permission for access to or use of their lands and waters. A best practice model would legislatively protect the right of native title holders to give their consent to any proposed acquisition. A second best option would be to amend s 26 of the Native Title Act to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city.

3.2 That the Australian Government amend the Native Title Act to provide a presumption of continuity. This presumption could be rebutted if the non-claimant could prove that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.

3.3 That the Australian Government amend the Native Title Act to address the court's inability to consider the reasons for interruption in continuity. Such an amendment could state:

In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223:

- whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander
- whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the

	<p>Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander.</p> <p>3.4 That the Australian Government amend the Native Title Act to define 'traditional' for the purposes of s 223 as being satisfied when the culture remains identifiable through time.</p>
<p><b><i>Native Title Report 2007</i></b></p>	<p><b>Chapter 1: Changes to the Native Title System</b></p> <p>1.1 That the Australian Government immediately appoint an independent person to conduct a comprehensive review of the whole native title system and report back to the Attorney-General by 30 June 2010. This review is to:</p> <ul style="list-style-type: none"> <li>• focus on delivering the objects of the Native Title Act in accordance with the preamble;</li> <li>• seek significant simplification of the legislation, and structures so that all is in an easily discernible form; and</li> <li>• call for wide input from all stakeholders in native title, especially ensuring that the voice of Indigenous peoples is heard.</li> </ul> <p>1.2 That the government convene a national summit on the native title system with extensive representation.</p> <p>1.3 That the Attorney-General monitor the 2007 changes to the Native Title Act and prepare a report to Parliament before the end of 2009, in such a way that it identifies:</p> <ul style="list-style-type: none"> <li>• the extent to which Indigenous people are gaining recognition and protection of native title in accord with the preamble to the Native Title Act;</li> </ul>

- the extent, if at all, to which the parties' rights are compromised by the changes; and
- the extent to which the new powers given to the National Native Title Tribunal are used.

### **Chapter 8: Where to native title**

8.1 That the Attorney-General use the power in Section 137 of the Native Title Act to ask the National Native Title Tribunal to hold a public inquiry:

- into how the compensation provisions of the Native Title Act are currently operating; and
- whether they operate to effectively provide for Indigenous peoples' access to their human right to compensation.

In undertaking the inquiry the tribunal collaborate with native title claimants, Indigenous communities, native title representative bodies, prescribed bodies corporate, registered native title bodies corporate, the Federal Court, and the federal, state and territory governments.

The tribunal present to Parliament specific options for reform:

- to ensure Indigenous people can effectively and practically access their human right to compensation; and
- to ensure the amount of compensation is just, fair and equitable.

	<p>8.2 That the Native Title Act be amended to insert a definition of ‘traditional’ for the purposes of Section 223 that provides for the revitalisation of culture and recognition of native title rights and interests.</p> <p>8.3 That Section 82 of the Native Title Act be amended to include Subsections (1), (2), and (3) of Section 82 as it was originally enacted in 1993.</p> <p>8.4 That the Attorney-General prepare guidelines for the Federal Court and parties to native title proceedings on the application of Section 82 of the Native Title Act. In preparing these guidelines the Attorney-General should consult closely with Indigenous peoples to ensure the guidelines reflect and respect the culture and practices of Indigenous peoples.</p>
<p><b><i>Native Title Report 2005</i></b></p>	<p><b>Recommendation 1: Native title policy reform</b></p> <p>That State, Territory and Commonwealth governments alter their native title policies to:</p> <ul style="list-style-type: none"> <li>• increase funding to NTRBs and PBCs</li> <li>• adopt and adhere to the National Principles on economic development for Indigenous lands set out in the Native Title Report 2004. These principles are that native title agreements and the broader native title system should:</li> </ul> <ol style="list-style-type: none"> <li>1. Respond to the traditional owner group’s goals for economic and social development</li> </ol>

	<ol style="list-style-type: none"> <li>2. Provide for the development of the group’s capacity to set, implement and achieve their development goals</li> <li>3. Utilise to the fullest extent possible the existing assets and capacities of the group</li> <li>4. Build relationships between stakeholders, including a whole of government approach to addressing economic and social development on Indigenous lands</li> <li>5. Integrate activities at various levels to achieve the development goals of the group.</li> </ol>
<p><b>Australian Human Rights Commission—Submission to Connection to Country: Review of the Native Title Act 1993 (Cth) (ALRC Report 126)</b></p>	
<p><b>Australian Law Reform Commission</b></p>	<ol style="list-style-type: none"> <li><b>1.</b> The Australian Human Rights Commission recommends that the ALRC:             <ol style="list-style-type: none"> <li>1. assess the Native Title Act and the broader operation of the native title system against international human rights standards and address concerns raised by the Committee on the Elimination of Racial Discrimination.</li> <li>2. work in conjunction with existing native title working groups, review and inquiry committees to ensure an efficient and consistent approach is applied to reform processes.</li> <li>3. recommend that the Australian Government reintroduces and supports the passage of the Native Title Amendment Bill 2012 through the Parliament.</li> <li>4. recommend that the Native Title Act be amended so that it is consistent with the Full Federal Court’s decision in De Rose.</li> </ol> </li> </ol>

	<ol style="list-style-type: none"><li>5. recommend that the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test; and provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.</li><li>6. recommends amendments to the Native Title Act that:<ol style="list-style-type: none"><li>i. address the Court's inability to consider the reasons for interruptions in continuity, and empower the Court to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.</li><li>ii. clarifies that where the State establishes that the society which existed at settlement has not been able to maintain 'continuity and vitality' in its observance of laws and customs due to the actions of settlers, that the lack of continuity and vitality shall be disregarded.</li><li>iii. provides a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded, such as the forced removal of children and the forced relocation of communities onto missions.</li></ol></li><li>7. recommend that the Australian Government work with Native Title Representative Bodies and Native Title Service Providers to develop proposals to enable prior extinguishment of native title to be disregarded.</li><li>8. recommends reverting s 24MD(2)(c) of the Native Title Act to its original wording.</li><li>9. recommend that the Native Title Act be amended to clarify that native title rights and interests can include commercial or economic rights and interests.</li></ol>
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	<p>10. recommend repealing section 26(3) of the Native Title Act to allow procedural rights in relation to offshore areas.</p> <p>11. recommends inclusion of explicit criteria as to what constitutes ‘good faith’ in the Native Title Act. The criteria for good faith should be based on the model set out in s 228 of the Fair Work Act 2009 (Cth), consistent with the Njamal Indicia set out in the Western Australia v Taylor, and suggested legislative provisions should be supplemented by a code or framework to ‘guide the parties as to their duty to act in good faith’.</p>
<p><b>Australian Human Rights Commission—Submissions to Parliamentary Inquiries concerning the Native Title Amendment Bill 2012</b></p>	
<p><b>House Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Native Title Amendment Bill 2012</b></p>	<ol style="list-style-type: none"> <li>1. Support the passage of the Native Title Amendment Bill 2012.</li> <li>2. Consider incorporating the changes outlined in paragraph 15 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways:             <ol style="list-style-type: none"> <li>i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter</li> </ol> </li> </ol>

	<ul style="list-style-type: none"><li>ii. expand section 47C to allow historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants.</li></ul> <ol style="list-style-type: none"><li>3. Consider the implications of the amendment outlined in paragraph 28 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body.</li><li>4. Collaborate with the Senate Legal and Constitutional Affairs Legislation Committee on their Inquiry into the Native Title Amendment Bill 2012.</li><li>5. Consider the following outstanding recommendations in the Native Title Report 2012 in relation to implementing the United Nations Declaration on the Rights of Indigenous Peoples:<ul style="list-style-type: none"><li>i. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the United Nations Declaration on the Rights of Indigenous Peoples are given full effect.</li><li>ii. That the Australian Government ensures that the Native Title Act 1993 (Cth), the Native Title (Prescribed Bodies Corporate) Regulations 1999 and the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.</li></ul></li><li>6. Consider the following outstanding recommendations in the Native Title Report 2009 in relation to shifting the burden of proof for native title:<ul style="list-style-type: none"><li>i. That the Native Title Act 1993 be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test.</li></ul></li></ol>
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	<ul style="list-style-type: none"><li>ii. That the Native Title Act 1993 provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.</li></ul> <ol style="list-style-type: none"><li>7. Consider repealing section 26(3) of the Native Title Act 1993 to allow procedural rights in relation to offshore areas.</li><li>8. Consider amending section 223(2) of the Native Title Act 1993 to specify that native title rights and interests include the 'right to trade and other rights and interests of an economic nature'.</li><li>9. Consider the following outstanding recommendation in the Native Title Report 2012 in relation to Prescribed Bodies Corporate:<ul style="list-style-type: none"><li>i. That the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternate legislation in relation to their lands, territories and resources.</li></ul></li><li>10. Recommend that the Australian Government establish an independent inquiry to review the operation of the native title system and explore options for native title reform, with a view to aligning the system with the United Nations Declaration on the Rights of Indigenous Peoples. The terms of reference for this inquiry should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Participants in this inquiry should include representatives from Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate, Aboriginal and Torres Strait Islander peoples, Australian,</li></ol>
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	<p>State and Territory governments, and respondent stakeholders including mining and pastoral interests.</p>
<p><b>Senate Legal and Constitutional Affairs Legislation Committee</b></p>	<ol style="list-style-type: none"> <li>1. Support the passage of the Native Title Amendment Bill 2012.</li> <li>2. Consider incorporating the changes outlined in paragraph 13 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways:             <ol style="list-style-type: none"> <li>i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter</li> <li>ii. expand section 47C to allow historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants.</li> </ol> </li> <li>3. Consider the implications of the amendment outlined in paragraph 26 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body.</li> <li>4. Collaborate with the House Standing Committee on Aboriginal and Torres Strait Islander Affairs on an amendment to the Bill that would effectively reverse the onus of proof for native title claimants in relation to their on-going connection to their</li> </ol>

	<p>traditional lands, territories and resources, and to implement any other proposals recommended by that Committee for the future reform of the native title system.</p>
<p><b>Australian Human Rights Commission Submission—Native Title Amendment (Reform) Bill 2011</b></p>	
<p><b>Senate Legal and Constitutional Affairs Committee</b></p>	<ol style="list-style-type: none"> <li>1. The Committee endorse the stated intention of the Reform Bill.</li> <li>2. The Committee recommend the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples.</li> <li>3. A working group which includes members from Native Title Representative Bodies and Native Title Service Providers be tasked with developing proposals to enable prior extinguishment to be disregarded in a broad range of circumstances.</li> <li>4. The Committee recommend the Australian Government give full consideration to items 5-9 of the Reform Bill as part of its current review of good faith requirements. The Government should also consider developing a code or framework to guide the parties as to their duty to negotiate in good faith.</li> </ol>

## **5 Appendix 2—Other recommendations from the Commission’s submission on the Options Paper on reforms to the *Native Title Act 1993* (Cth) (February 2018) reiterated in above section 3 ‘General comments’**

### **(a) From section 5.2—recommendations regarding the operation of s223**

1. Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test; and provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.
2. Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to address the Court's inability to consider the reasons for interruptions in continuity, and empower the Court to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.
3. Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to provide a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded in relation to interruption or change in the acknowledgement and observance of traditional laws and customs, such as the forced removal of children and the forced relocation of communities onto missions.
4. The Commission supports an approach that allows for ‘the traditional laws acknowledged, and the traditional customs observed’ under s 223 of the *Native Title Act*, to change over time, provided they remain ‘identifiable’, are consistent with the recognition of Aboriginal and Torres Strait Islander peoples’ rights to culture and would clarify the level of adaptation allowable under the law.<sup>20</sup> Furthermore, a presumption of continuity as suggested above would be undermined if respondents could rebut the presumption simply by establishing that a traditional law or custom is not practised as it was at the date of sovereignty. (para 83)

5. Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) so that it is consistent with the Full Federal Court's decision in *De Rose v South Australia No 2* (2005) 145 FCR.

**(b) From section 5.3—recommendation regarding commercial native title rights and interests**

6. Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to clarify that native title rights may be exercised for any purposes, including commercial and non-commercial, and provide a non-exhaustive list of native title rights and interests.

**(c) From section 5.4—recommendation regarding the obligation to negotiate in good faith**

7. Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to include explicit criteria as to what constitutes 'good faith' in the Native Title Act. The criteria for good faith should be based on the model set out in s 228 of the *Fair Work Act 2009* (Cth), consistent with the Njamal Indicia set out in the *Western Australia v Taylor*, and suggested legislative provisions should be supplemented by a code or framework to 'guide the parties as to their duty to act in good faith'.

**(d) From section 5.5—recommendation regarding procedural rights over offshore areas**

8. Recommendation: permit procedural rights in relation to offshore areas.

**(e) From section 6—recommendations regarding the Indigenous Property Rights Project**

9. Recommendation: that the Australian Government support legislative and policy measures to allow Prescribed Bodies Corporate (PBCs) to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters.
10. Recommendation: that the Australian Government incorporate the priorities delivered from the Australian Human Rights Commission's Indigenous Property Rights Project into the development of any future reforms to the *Native Title Act 1993* (Cth) and the broader native title system, in particular in relation to enhancing economic development opportunities for Aboriginal and Torres Strait Islander peoples through native title.

11. Recommendation: that the Australian Government support and resource the continuation of the Indigenous Property Rights Project with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, in order for the agenda developed by the Indigenous Strategy Group to be further advance and achieved.

## End Notes

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- <sup>1</sup> M Gooda, *Social Justice and Native Title Report 2015*, Australian Human Rights Commission (2015), p 84.
- <sup>2</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report* (2015) p 301.
- <sup>3</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report* (2015) pp 301-302.
- <sup>4</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report* (2015) para 10.55.
- <sup>5</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report* (2015) para 10.57.
- <sup>6</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report* (2015) para 10.56.
- <sup>7</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report* (2015) para 10.27.
- <sup>8</sup> Human Rights Council, *Progress Report on the study on indigenous peoples and right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, para 34.
- <sup>9</sup> Australian Human Rights Commission, *Study on free, prior and informed consent: Australian Human Rights Commission Submission to the Expert Mechanism on the Rights of Indigenous Peoples* (12 March 2018)
- <sup>10</sup> Australian Human Rights Commission, *Submission to the Options paper on reforms to the Native Title Act 1993 (Cth)* (February 2018), para 37 at <https://www.ag.gov.au/Consultations/Pages/Reforms-to-the-Native-Title-Act-1993.aspx>
- <sup>11</sup> Australian Human Rights Commission, *Submission to the Options paper on reforms to the Native Title Act 1993 (Cth)* (February 2018), para 37.
- <sup>12</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Native Title Amendment Bill 2012*, p.8.
- <sup>13</sup> Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee, Inquiry into the Native Title Amendment Bill 2012*, p 5; and Australian Human Rights Commission, *Submission to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs, Inquiry into the Native Title Amendment Bill 2012*, pp 7-8.
- <sup>14</sup> United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 39.
- <sup>15</sup> United Nations Permanent Forum on Indigenous Issues, A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements, UN Doc E/C.19/2009/CRP.7 (undated), p 21.
- <sup>16</sup> M Gooda, *Native Title Report 2011*, Australian Human Rights Commission, p 187.
- <sup>17</sup> Australian Human Rights Commission, *Submission on the Options paper on reforms to the Native Title Act 1993 (Cth)*, para 5.
- <sup>18</sup> M Gooda, *Social Justice and Native Title Report 2013*, Australian Human Rights Commission, p 104.

<sup>19</sup> Australian Human Rights Commission, *Submission to the Options paper on reforms to the Native Title Act 1993 (Cth)* (February 2018), p 17.

<sup>20</sup> For a discussion of the rights of Indigenous peoples to culture, including adaptation and revitalisation of culture, see T Calma, *Native Title Report 2008*, Australian Human Rights Commission, pp 87–88.