



20 December 2018

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

Submission in response to:

**Exposure Draft:**

- **Native Title Legislation Amendment Bill 2018**
- **Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018**

Dear Native Title Unit,

The Australian Indigenous Governance Institute (AIGI) welcomes the opportunity to make a submission in response to the Exposure Draft:

- Native Title Legislation Amendment Bill 2018
- Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

AIGI is a privately funded institute that conducts governance research and training for Indigenous organisations, corporations, institutes and unincorporated bodies throughout Australia. AIGI is a national centre of governance excellence, connecting Indigenous Australians to world-class governance practice, providing accessible research, disseminating stories that celebrate outstanding success and solutions, and delivering professional development opportunities to meet the self-determined governance needs of Indigenous peoples.

AIGI welcomes the work being undertaken by the Native Title Unit and believe that the amendments in relation to procedural matters will significantly improve the efficacy of native title as a whole. However, AIGI has significant concerns in relation to certain amendments proposed in the Exposure Draft as well as one critical area that has been overlooked. These concerns are outlined in this submission. In particular, we entreat that no matter the strategies to reform and improve native title, the impact must foster structural decision-making power for Aboriginal and Torres Strait Islander peoples, communities and Nations.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Michelle Deshong', written in a cursive style.

Ms Michelle Deshong,

Chief Executive Officer, Australian Indigenous Governance Institute.

## Australian Indigenous Governance Institute

### Submission in response to the Exposure Draft:

- Native Title Legislation Amendment Bill 2018
- Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

### Summary

The Australian Indigenous Governance Institute supports the amendments proposed by the Native Title Unit to improve the procedural matters in relation to native title. However, AIGI has significant concerns in relation to the below-outlined amendments:

- **Applicant decision-making: Allowing the applicant to act by the majority as the default position**
- **Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018: Enhance the certification requirements for certain decisions made by prescribed bodies corporate**
- **Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018: Create an additional power for the Registrar of Indigenous Corporations to make a finding that a certification fails to comply with the PBC Regulations.**

AIGI is also disappointed that the amendments do not address the **double regulation experienced by some Registered Native Title Bodies Corporate (RNTBCs)**.

The following submission addresses these concerns.

## **Recommendations**

**Applicant decision-making: Allowing the applicant to act by the majority as the default position.**

**Recommendations:**

- That 'majority' be replaced with 'consensus'
- That a threshold of what constitutes a 'consensus' be included
- That the threshold for 'consensus' be no less than a two-thirds majority

**Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018: Enhance the certification requirements for certain decisions made by prescribed bodies corporate.**

**Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018: Create an additional power for the Registrar of Indigenous Corporations to make a finding that a certification fails to comply with the PBC Regulations.**

**Recommendations:**

- These amendments be removed in their entirety from the proposed amendments
- The development of a coordinated national approach toward funding Indigenous governance training for all PBCs

**Double regulation experienced by some Registered Native Title Bodies Corporate (RNTBCs).**

**Recommendations:**

- Additional amendments be included that resolve the issue of double regulation of PBCs that register as charities under the *ACNC Act*
- Additional resources be provided that offer assistance to PBCs registered as charities to fulfil their increased administrative duties

## 1. Introduction

- a. The Australian Indigenous Governance Institute (AIGI) is a national centre of governance excellence, dedicated to supporting the sustainable self-determination of Aboriginal and Torres Strait Islander peoples, communities and nations through strong and effective self-governance. AIGI is able to call upon several sources of robust national research and practice evidence directly relevant to this submission:
  - i. Firstly, AIGI builds upon the unique national baseline of research data produced by the Indigenous Community Governance (ICG) Project which investigated Indigenous cultural modes of governance in rural, remote and urban communities and organisations across Australia  
[\(<http://caepr.cass.anu.edu.au/indigenous-community-governance-project-overview>\)](http://caepr.cass.anu.edu.au/indigenous-community-governance-project-overview).
  - ii. Secondly, AIGI maintains Australia's only online Toolkit of case-study information and resources for Indigenous governance building initiatives (<http://toolkit.aigi.com.au/>).
  - iii. Thirdly, in 2014 AIGI partnered with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) to convene an Australian workshop to share knowledge on the current state of research and resource needs for supporting Indigenous governance  
[\(\[https://aiatsis.gov.au/sites/default/files/products/research\\\_outputs/bauman\\\_building-indigenous-governance\\\_web.pdf\]\(https://aiatsis.gov.au/sites/default/files/products/research\_outputs/bauman\_building-indigenous-governance\_web.pdf\)\)](https://aiatsis.gov.au/sites/default/files/products/research_outputs/bauman_building-indigenous-governance_web.pdf).
  - iv. Fourth, in 2018 AIGI has undertaken the only Australian audit of training and education programs available for Indigenous people on governance, identifying the almost complete absence of customised recurrent courses that integrate cultural and corporate governance. As part of its solution to this gap, AIGI has convened several masterclass workshops in 2017-18 with industry and sector groups on Indigenous women and youth in governance, and data governance (<http://www.aigi.com.au/audit-report/>).
  - v. Fifth, AIGI hosts the international Indigenous network 'Common Roots, Common Futures' which promotes identification and dissemination of Indigenous governance best-practice in Australia, Canada, New Zealand and the USA.
  - vi. Finally, AIGI is co-convenor of the biennial Indigenous Governance Awards (IGA). The IGA acknowledges and celebrates outstanding stories of success and best practice in the field of Indigenous governance throughout Australia. Since 2010, AIGI has published an analysis report from the experiences and solutions of applicants to the Awards. These reports remain the only sequential and up-to-date published analysis of Indigenous governance in Australia since the national ICG Project.

- b. AIGI views and recommendations provided in this submission are largely drawn from these combined resources, workshops and reports.
- c. Whilst this submission represents the views of AIGI, we recognise that Indigenous peoples, communities and traditional owner groups are best placed to speak about their experiences, circumstances and ambitions.
- d. This submission addresses three of the proposed amendments that AIGI believe are critical to reconsider as part of proposed native title reforms:
  - i. Applicant decision-making: Allowing the applicant to act by the majority as the default position.
  - ii. Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018: Enhance the certification requirements for certain decisions made by prescribed bodies corporate.
  - iii. Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018: Create an additional power for the Registrar of Indigenous Corporations to make a finding that a certification fails to comply with the PBC Regulations.
- e. It also addresses a key area overlooked by the proposed reforms; namely:
  - iv. Double regulation experienced by some Registered Native Title Bodies Corporate (RNTBCs).

2. **Applicant decision-making: Allowing the applicant to act by the majority as the default position**

- a. AIGI support the clarification of decision-making authority for native title applicants as well as clarifying that members retain decision-making authority in relation to native title agreements. However, AIGI has significant reservations concerning the lack of clarification on what a 'majority' means.
- b. Without a clear definition of 'majority', the assumption is that a majority is 50 + 1. However, some Indigenous groups may not adhere to this definition of a 'majority'. Analysis from the ICG Project, the AIGI Toolkit, the AIGI-AIATSIS research report, and the Indigenous Governance Awards overwhelmingly confirms that the vast majority of Indigenous Australians across the country prefer to use consensus approaches to decision making. A consensus approach has been identified as a process where a group comes to an agreed course of action, or at least, agree to disagree and are prepared to support a consensus decision (AIGI Indigenous Governance Toolkit 5.3.1; Bauman et al., 2015, AIGI & RA 2016, p. 68). Some IGA applicants in the awards had provisions where they would accept a decision

by the majority but only after due process had been observed and they were unable to reach a decision by consensus.

- c. AIGI strongly recommends replacing 'majority' with 'consensus'.
- d. AIGI further recommends that the amendment should also include a threshold for consensus of no less than a two-thirds majority. This larger threshold accounts for the potentially significance decisions often made by native title applicants and aligns with the practices being embedded in many Indigenous organisations and communities.
- e. AIGI welcomes the additional power of a claim or compensation group to displace the default rule by placing conditions on the applicant which would require unanimous action in terms of authorisation. However, as with consensus, a threshold must be identified that clearly articulates what constitutes a 'unanimous' decision.

3. **Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018:**

**Enhance the certification requirements for certain decisions made by prescribed bodies corporate**

4. **Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018: Create an additional power for the Registrar of Indigenous Corporations to make a finding that a certification fails to comply with the PBC Regulations.**

- a. These amendments will be addressed jointly as they relate directly to one another.
- b. AIGI has significant concerns about the proposal to increase certification requirements for decisions made by PBCs. AIGI research and professional workshops demonstrate that Indigenous groups and organisations already have procedures in place to make informed and meaningful decisions in their governing bodies. These procedures lend authority and legitimacy to decisions made and ensure decisions are made in line with community need (AIGI & Reconciliation Australia, 2018:33).
- c. Applicants to the most recent 2016 Indigenous Governance Awards described a range of reasons for why decision-making on their governing bodies was respected by members and the wider community:
  - i. **Cultural legitimacy**
  - ii. **The representation of stakeholders in decisions**
  - iii. **The professional expertise of the governing body**
  - iv. **The reputation of staff and directors**
  - v. **Institutional capacity**
  - vi. **Open and transparent processes.**

- d. Enhanced certification requirements—if coupled with the special regulatory powers of ORIC—will substantially increase the governance and administrative workload for Indigenous peoples, communities and nations, as well as their organisations beyond what is reasonable, and will put additional pressure on PBCs to focus on externally imposed government agendas, rather than working towards their own needs and aspirations.
- e. Enhanced certification requirements will also challenge the ability of PBCs to plan, conduct research, develop and maintain leadership, comply with other institutional requirements, collaborate with Indigenous organisations and governments, and provide ongoing governance training to directors, staff and the broader community (AIGI & Reconciliation Australia, 2018:33).
- f. Furthermore and importantly, AIGI does not endorse in any way an enhanced, imposed regulatory or legislative entry of ORIC into the native title arena. ORIC has no remit or expertise in this complex legal and cultural field and should have no regulatory role in regarding certification requirements for native title decisions made by PBCs on behalf of native title holders.
- g. For all these reasons, enhanced certification requirements have the potential to disrupt the foundations of effective governance of PBCs. They also have the potential to substantially undermine the native title rights and authority of native title holders and the legitimacy of their PBCs. Rather than increasing the regulatory powers of ORIC, AIGI recommends the development of a coordinated national approach toward funding Indigenous governance training for all PBCs. Currently, AIGI has identified that there is a disproportionate provision of corporate and compliance governance training at a national scale, and a lack of adequately funded, culturally informed and tailored governance training about how to put decision making and accountability into practice (Wighton & Smith, 2018).
- h. A more coordinated and collaborative approach by governments and their departments toward funding Indigenous governance capacity development is clearly required to ensure that training covers the wide range of competencies that have been shown to be necessary for effective Indigenous governance (Bauman et al, 2015:84; ICG Project; Smith, 2005). Tailoring effective training programs will require identifying and building upon existing governance strengths and capacities, as well as learning from past failures, and should be determined by the community and groups involved (Smith, 2012:16). In order to be effective, governance training must be place-based, practice-based, culturally informed and carried out over the longer term in a developmental manner; not via one-off workshops in distant locations.

- i. Government and non-government sectors continue to have an important role to play in contributing to the provision of effective governance training support and resources.
- j. However, this role should be framed within a recognition that genuine self-determination starts with Indigenous peoples being able to take control, assert their own agenda, and get things done by employing their own assets and capabilities.

5. **Double regulation of Registered Native Title Bodies Corporate (RNTBCs).**

- a. AIGI is concerned that the Exposure Draft does not acknowledge the issue of double regulation for PBCs registered as charities.
- b. For example, the 2016 Indigenous Governance Awards revealed that all PBCs incorporated under the *CATSI Act* were also registered as charities with the Australian Charities and Not-for-profits Commission Act (ACNC) (AIGI & Reconciliation Australia 2018:36). Having a charitable status makes an organisation more attractive to funders and, as such, starts to matter more when an organisation seeks to diversify income and move away from government funding.
- c. PBCs already face complex administrative duties, reporting obligations, underfunding and compliance costs. These costs are exacerbated if they are also registered as charities under the *ACNC Act*. One potential disadvantage of incorporation under the *CATSI Act* is that it has not been amended to operate in sync with the *ACNC Act*. The lack of clarity around regulatory requirements for corporations regulated under both ORIC and the ACNC has effectively led to a double up of regulation and related workloads; rather than reporting to one regulatory body, charities incorporated under the *CATSI Act* are required to operate within the regulatory requirements of both ORIC and the ACNC.
- d. From this perspective, the high proportion of charities incorporated under the *CATSI Act* in the 2016 Awards indicates a serious effort by PBCs across Australia to maximise self-determination in a context of federal funding uncertainty and increased reporting requirements.
- e. Although 2016 Indigenous Governance Awards applicants implemented a range of strategies to navigate the double administrative obligations under ORIC and the ACNC, the proposal to increase certification requirements has the potential to even further undermine the effective governance of PBCs.
- f. Should the proposed amendments be successful, PBCs registered as charities will need to navigate the issue of double regulation *as well as* increased administrative duties around certification requirements.

- g. If the proposed amendments are passed, AIGI recommends that at a minimum, additional resources need to be provided that offer assistance to PBCs registered as charities to fulfil their increased administrative duties.

## 6. Conclusion

- a. AIGI welcomes the process to review the Native Title and Registered Native Title Bodies Corporate Acts. Since the first ATSIC review of the Native title Representative Bodies in 1995, it has been well-documented that the establishment of PBCs would be fraught with major challenges; not the least of which has been the failure to provide adequate funding to enable them to undertake their functions, and the failure to provide them with adequate ongoing governance training and support.
- b. Once completed, the current reviews present an opportunity to enhance the native title process and ensure that the rights and interests hard won by Aboriginal and Torres Strait Islander peoples, communities and nations can be governed more effectively to build futures underpinned by self-determination.
- c. AIGI firmly believes that the issues and recommendations outlined in this submission would further enhance the legislative proposals and ensure they accord with the values and principles of effective governance by Aboriginal and Torres Strait Islander peoples, communities and nations.