Cape York Land Council Aboriginal Corporation
ICN 1163 | ABN 22 965 382 705

10 December 2018

Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
By email: native.title@ag.gov.au

Dear Sir/Madam

Re: Exposure Draft Native Title Reforms

The Cape York Land Council (CYLC) is the Native Title Representative Body (NTRB) for Cape York Peninsula land and seas. In our NTRB role we fulfil statutory functions under the *Native Title Act 1993* (Cth). In our broader Land Council role we support, protect and promote Cape York Aboriginal peoples' interests in land and sea to positively affect their social, economic, cultural and environmental circumstances. In this capacity CYLC provides the following submissions in relation to the exposure draft legislation released by the Attorney-General and Minister for Indigenous Affairs to amend the *Native Title Act 1993* (Cth) (NTA), *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) and *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC regulations) to implement some of the reforms to the native title system foreshadowed in an options paper released by the Commonwealth government at the end of last year (options paper).

As a general observation the proposed reforms are limited in reach and do not adequately address the systemic disadvantage and discrimination of First Nations peoples perpetuated in the Native Title Act and related legislation. We note also that this most recent attempt by the Government to reform native title laws suffers from the Government's continuing refusal to engage with the *Uluru Statement from the Heart* and its call for the establishment of a First Nations Voice enshrined in the Constitution and a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about the past.

With these reservations in mind, we have considered the proposals to amend the NTA, CATSI Act and PBC regulations. Those which we do not support or would like to see improved, are set out below:

1. Insert NTA s. 62B to confirm that any obligation of the applicant under the NTA does not relieve or detract from the operation of any other duty of the applicant at common law or in equity to persons in the native title claim group or compensation claim group.
    a. The applicant's duty extends not just to the native title claim group but to the broader group of common law holders determined to hold the native title rights and interests. This could be accommodated by a note to s. 62B referring to the definition of native title claim group in NTA s. 61(1).
    b. It is noteworthy that the applicant found to have breached duties owed to the Ankamuthi native title claim group in *Gebadi v Woosup* [2017] FCA 1467 was nonetheless permitted to remain as a director of the PBC established for the Ankamuthi People. In our view, it would be beneficial for the disqualification provisions found in CATSI Act Part 6-5, Division 279 to be expanded to include disqualification where a person who was an applicant for a native title claimant or

compensation application has been found by a Court to have breached their duties at common law or in equity whilst in that role.

2. Amendments to enshrine a default position that the applicant for a claimant application or compensation application are allowed to act by majority. This will extend to the role of an applicant that is also the registered native title claimant who must be party to an area agreement Indigenous Land Use Agreement pursuant to NTA s. 24CD(2)(a).
    a. The proposed amendments repeal the new ss. 24CD(2)(a) and 251A(2) introduced by the Native Title (Indigenous Land Use Agreements) Act 2017 which permit an authorising group to nominate something less than a majority of the persons who comprise the registered native title claimant for the group to be a party or parties to an area agreement ILUA.
    b. The fundamental principle that operates In Cape York Peninsula, including in relation to the Cape York United #1 Claim (QUD673/2014), is that traditional owners alone have the authority in relation to agreement making, not the applicants chosen to prosecute their native title claims.
    c. It is critical that the proposed amendments do not remove the ability of an authorising group to nominate or determine that only one of the persons who comprise the registered native title claimant should be the party to area agreement ILUAs or s. 31 agreements.

3. Changing the composition of the applicant without a further authorisation process where a previous member of the applicant dies or becomes incapacitated by inserting NTA ss. 66B(2A), (2B) and (2C).
    a. The proposed s. 66B(2B) would benefit from the insertion of the word “or” at the end of subparagraph (b).

4. Clarifying that the removal of an ILUA from the ILUA Register does not invalidate future acts by inserting new ss. 24EB(2A) and 24EBA(7) which provide that the removal of the details of an agreement from the Register would not affect any future acts done in accordance with the agreement, or any future acts already invalidly done which were purportedly validated by an agreement. This included inserting a new to s. 199C(1) referring to the existence of the new subsections and confirm their operation.
    a. CYLC does not support this proposal and reiterate what we said in our response to the Government’s 2017 options paper that amendments of this nature will protect agreements tainted by fraud, duress or undue influence which are later removed by s. 199C(3) and this is would be a grossly unfair and unjust outcome for native title holders.

5. Insert NTA s. 47C to allow historical extinguishment to be disregarded over areas of national, state or territory parks where there is an agreement in place with the relevant federal, state or territory government responsible for the creation of the park.
    a. It is not acceptable that disregarding historical extinguishment by agreement should be restricted to parks in onshore places only; the reform should apply also to offshore national parks, marine parks and reserves. This is crucially important for native title holders in our NTRB area, where there are island national parks of great importance to native title holders (e.g. Possession Island and the Denham Group Islands) and, of course, the Great Barrier Reef Marine Park.
    a. Section 47C should extend to any areas of Crown land where there is agreement between the government and the native title claimants, not just those which provide for or include the purpose of preserving the natural environment of the area. This would extend the operation of s. 47C to cover the widest possible interpretation of

Crown land, to include, for example, timber reserves, state forests and other areas reserved to the Crown, whether for preserving the environment or otherwise.

b. The occupation test set out in ss. 47, 47A and 47B is too onerous and should be repealed. If the relevant tenure is established for an area and there is a determination that native title exists which comprises or includes that area that should be the end of the matter.
c. Section 47B and related provisions of the NTA should be amended to reverse the effects of any decision by the High Court to uphold the Full Court's decision in BHP Billiton Nickel West Pty Ltd v KN (Deceased) [2018] FCAFC 8 that a licence granted under state or territory mining legislation to prospect or explore is a lease which prevents the operation of s. 47B;
d. The new section 47C would allow extinguishment by public works to be disregarded by agreement, which is a good development. This should be extended to ss. 47, 47A and 47B and should apply where there is an agreement between the native title holders and the government or where the evidence establishes that the public work no longer operates or exists (e.g. closed roads, abandoned infrastructure).

6. Section 47 will be amended to clarify that it can also apply to corporations that have members.
   a. The public consultation paper suggests that the amendment of s. 47 will apply only to corporations that are registered native title bodies corporate. The Exposure Draft amendment of s. 47 provides for all corporations with members to be covered by the section. The amendment of s. 47 should apply to all corporations with members, not just registered native title bodies corporate.
   b. Sections 13(4) & (5) of the NTA should also be amended to specifically provide for a revised native title determination application if the previous restrictive wording of s. 47 prevented it from applying to a pastoral lease held by members of a corporation with members.

7. Section 227 of the NTA will be amended to include within the definition of acts which affect native title, acts which are done in relation to land to which ss. 47 to 47C apply.
   a. The amending legislation should clarify that the NTA future act provisions apply to land covered by an Indigenous held pastoral lease (s. 47), Indigenous held freehold or DOGIT (ss. 47A) or if it is unallocated state land (s. 47B), regardless of whether there is a claimant application on foot in relation to the area.
   b. Section 26(3) of the NTA must be repealed so as to ensure that the right to negotiate provisions of the NTA apply to areas below the landward side of the mean high water mark of the sea.

8. Amend NTA s. 141 to clarify that it is only the native title parties who objected to an act attracting the expedited procedure who are party to the NNTT inquiry into the objection application.
   a. The proposed amendment needs to clarify that where the registered native title claimant "native title party" is succeeded by a registered native title body corporate or a replacement registered native title claimant pursuant to s. 66B that new entity is the native title party for the purposes of s. 141.

9. Amends 24MD(6B) to allow the Government party to refer the objection to an independent body for a final determination if a period of 8 months has elapsed since notice was given of the proposed compulsory acquisition.
   a. CYLC rejects this reform as it effectively limits the period for consultation with the native title parties to 6 months only, a totally unacceptable curtailment of the already

meagre rights afforded by the NTA in relation to compulsory acquisition of native title rights and interests by Governments.

10. Amend s. 41A(1) to require that, when parties provide a copy of their section 31 agreements to the NNTT, they must also notify the NNTT of the existence of any ancillary agreements.
    a. The consultation paper suggests creating process for the NNTT to keep a public record of s. 31 agreements, akin to the ILUA register. The exposure draft legislation does not contain provisions for this, so it remains a proposal only at this stage. We repeat the submission to the options paper that we do not support either s. 31 agreements, ILUAs or other agreements made under the Act being publicly accessible. One objection is that these agreements are often commercial-in-confidence. We also submitted that some kind of repository of
    b. A database maintained by the NNTT providing details of s. 31 agreements may help newly formed PBCs to know what agreements have been executed by the claimants. This should not be public, but available to be checked on application by a PBC to the NNTT and only minimum details made available – e.g. parties, area, future acts consented to and term of the agreement. A copy of the agreement however, should be able to be obtained by a newly formed PBC for the area covered by the agreement.

11. Amend ss. 25(2) and 31(1) to provide that a government party to a section 31 agreement may limit its participation in negotiations about matters which do not affect that party, provided the other parties to the agreement provide their written consent.
    a. We do not support this proposal. Governments grant the tenements or other interests the subject of the agreement and should therefore be a party.
    b. In Cape York, there are often difficulties enforcing contractual obligations imposed on the grantee party. In fact, greater involvement by Governments to assist with compliance by the grantee party is needed, not less. For example, a more proactive stance by the Queensland government to enforce the conditions of tenement grants, where the grantee party is not performing it obligations to native title parties, is needed.
    c. Additionally, the government will sign the section 31 deed upon confirmation from the negotiation parties that agreement has been reached. The execution of the section 31 deed paves the way for the grant of the tenement. The deed allows for the parties to warrant that the correct procedure has been followed; that consent has been sought; and importantly, that any compensation for the doing of the act has been negotiated and provided for in the ancillary agreement. It would appear to be beneficial for the government to be retained as a party to the deed to ensure the government party does not absolve themselves of all responsibility.

12. Amend CATSI Act s. 144-10 to remove the discretion for Directors of RNTBCs to refuse to accept membership where the person is a common law holder of native title and otherwise meets the eligibility requirements.
    a. CYLC does not support curtailing the discretion of directors to refuse membership entirely. We believe that Corporations should retain the right to refuse membership on reasonable grounds (e.g. evidence of previous misbehaviour, previous breach of common law or equitable duties to the native title claim group represented by the RNTBC) notwithstanding that the person otherwise meets the eligibility criterion of being a common law native title holder.

13. Repeal sub-regulation 8(5) of the PBC Regulations.
    a. CYLC resists the repeal of PBC reg. 8(5) as this will lead to arguments about how different rights are held, whether by the wider group of determined common law

holders or particular sub-groups, including any variation depending on the nature of the rights the subject of the native title decision. We also note that this is the very basis for the consultation/consent process which will be undertaken by RNTBCs established for the determined native title in the Cape York United No 1 Claim.

b. Further, as currently worded, PBC reg. 8(5) is clear that the RNTBC is only required to follow the course of consulting with and obtaining the consent of sub-groups within the broader group of native title holders, if that is in fact how native title is held in the determination area.

14. The government proposes to amend the certification requirements under the PBC Regulations to provide that when a PBC makes a native title decision, or decides to make a compensation application, the PBC is obliged to document and certify in writing that the consultation and consent requirements for that decision have been complied with.
    a. CYLC supports this proposal in principle. Having said that the burden of compliance will be substantial and must be accompanied by proper funding by the Commonwealth to support the capacity of RNTBCs to comply with these new requirements.

15. Repeal sub regulation 8(2) of the PBC Regulations so as to remove the requirement that PBCs must consult with their NTRB before they can make a native title decision.
    a. CYLC does not support this proposal. CYLC's experience is that without the requirement for proper consultation, PBCs are likely to enter into ILUAs without the knowledge, agreement or support of the traditional owners. In addition, PBCs quite often fail to seek proper legal advice and fail to perform their duty as directors and to the traditional owners. NTRBs are essential to providing the necessary oversight to ensure the PBC Regulations are complied with. Finally on this point, the increasing complexity of issues PBCs are required to deal with in a post-determination environment require more rather than less involvement of Land Councils to ensure that RNTBCs carry out their responsibilities on an informed basis.

Conclusion

CYLC welcomes some of the proposals for reform, particularly expanding the historical extinguishment provisions and giving greater flexibility to native title claimants to set limits on the conditions of the applicant's authority. We also welcome the creation of new pathways to address native title related disputes following a native title determination.

It is nonetheless disappointing that many substantial proposals for reform remain unaddressed, such as those relating to reforming the test for proving native title, amending the Act to confirm that a native title right may be exercised for commercial purposes and extending the right to negotiate to sea country, despite significant previous reviews and recommendations that these reforms are crucial to the recognition and protection of native title.

It is also critical that any reforms to enhance the management capabilities of PBCs is accompanied by long term and concrete funding for PBCs to build their technical, governance and financial capacity to effectively represent common law holders of native title.

Yours sincerely,

Richie Ah Mat
Chairman