THE UNIVERSITY OF WESTERN AUSTRALIA
Achieving International Excellence

Centre for Mining Energy and Natural Resources Law
Law School
CRICOS Provider No. 00126G
MBDP M253
The University of Western Australia
35 Stirling Highway, Crawley WA 6009

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

native.title@ag.gov.au

7 December 2018

Dear Sir / Madam

Submission on Public Consultation Paper on Native Title Amendments

[1] We are pleased to provide this submission in response to the October 2018 *Public Consultation Paper on Exposure Draft* amendments regarding native title. Given the amendments comprise changes to various Acts and Regulations, we considered the best way to address these is to respond to various summaries and explanations in the Consultation Paper, which we set out under the headings below.

[2] In summary, we support many of the proposed amendments in this paper, particularly those clarifying the (limited) role of the applicant and reinforcing and protecting the decisions of the native title group. However we raise concerns with three aspects in the proposed reforms, namely that:

(a) an ILUA which has been 'deregistered' because of fraud, should still be effective to validate and impact native title parties: see paragraphs [10]–[16] below;

(b) the Commonwealth, when an intervener (and not a party) to court proceedings, should have veto over a consent resolution of those proceedings: [17]-[20]; and

(c) proposed repeal of existing regulations (requiring PBC consultation where it it acts for more than one group of native title holders): [26]-[31].

We have not addressed every aspect of the Consultation Paper.

[3] Our submissions on the various proposed amendments are set out below, following some introductory comments about the relevance of international standards in informing native title law and its reform. We **attach** a recent article addressing native title law and international standards,[1] which informs our submission below. While we are happy for our submission to be made publicly available, please note there are publisher's restrictions on the dissemination of the article, so we suggest you do not make that available on your website without first confirming arrangements with the publisher.

[1] Southalan & Fardin 'Free, prior and informed consent: how and from whom? An Australian analogue' (2018) *Journal of Energy & Natural Resources Law* (in print).

Overview – relevance of international standards

[4] Free prior informed consent (**FPIC**) is a legal standard guiding developments which impact Indigenous groups. International standards and jurisprudence emphasise that impacts on an Indigenous group should not occur without that group's FPIC.[2] The *Native Title Act 1993* (**NTA**) establishes rights and procedures that have analogies within FPIC and the kinds of issues that arise in operationalising FPIC (although the NTA has not legislated FPIC in the terms of the relevant international standard[3]). Of particular significance in this context are the issues of group decision-making and accountability of the applicant – matters which are also canvassed in the Public Consultation Paper.

[5] An important preliminary point to note is that FPIC also has significance in the context of the *process* of legislative amendment (as distinct from the substance of any amendment ultimately adopted). This was explained in our recent article:

> *The Native Title Act commenced in 1994, after extensive national consultations with Indigenous people and other stakeholders including subnational governments. The laws were a compromise which legally validated historic dispossession as part of establishing a new system to regulate future use of land where those uses affected 'native title' rights. The international human rights mechanisms considered the consultations leading to the 1993 Native Title Act as involving the effective participation of Australia's Indigenous people – essentially the FPIC of that era (this was 1994 – well before that term gained ascendancy through UNDRIP). This is to be contrasted with subsequent amendments to some parts of the Native Title Act in 1998, which were not enacted after 'effective participation' and have been identified by various international treaty bodies as contravening Australia's international obligations.*[4]

[6] Those parts of the 1998 NTA amendments which were found contrary to Australia's international obligations have not been amended. This leaves companies who rely on those provisions, but do not have broader ameliorating agreements with native title groups, exposed to breaching their corporate responsibilities regarding human rights which has increasing legal significance since 2011.[5] This emphasises the importance of ensuring that any proposed reforms to the native title system occur with appropriate consultation and involvement of Indigenous groups.

Role of the applicant (schedule 1)

[7] We support and commend the five proposed amendments outlined in this section, which propose:

(a) allowing claim group conditions on the applicant's authority;

(b) providing public notification of any such conditions;

(c) clarifying the duties of the applicant to claim group;

---

[2] For a summary of the meaning and implications of FPIC at international law see Southalan & Fardin (n1 above), section *2. FPIC Internationally*.
[3] See Southalan & Fardin (n1 above), section *3.1 Basics of Australia's 'native title' law*.
[4] See Southalan & Fardin (n1 above), section *3.1 Basics of Australia's 'native title' law*.
[5] Southalan, 2016. 'Human rights and business lawyers: The 2011 watershed' 90(12) *Australian Law Journal* 889, 902-903.

(d) applying a 'default' that the applicant can act by majority; and

(e) enabling 'administrative' changes to the applicant (eg. where a person has died) without further authorisation process.[6]

[8] These changes will resolve various anomalies where group decisions have been thwarted from technicalities or unintended consequences of legislative drafting. In various cases the Federal Court has acknowledged the wishes of a broader native title group but adjudged these as unable to prevail in the specific instance because of the actions of some individuals.[7] The international FPIC standard is a *group* right, and not something exercised by an individual.[8] These amendments, which strengthen the priority and control of groups (rather than individuals) in native title, are commendable. They are also consistent with the general principles of native title, as explained in court decisions, which emphasise the paramount importance of the claim group and that the applicant structure is to enable advice and representation of the group.[9]

Indigenous land use agreements (schedule 2)

[9] We support and commend three of the proposed amendments outlined in this section, being those which:

(a) allow body corporate ILUAs to cover areas where native title has been extinguished;

(b) remove the requirement for NNTT notification where the proposal does not meet ILUA requirements; and

(c) enable minor amendments to an ILUA without 're-registration'.[10]

[10] We disagree, however, with the proposed change that validation by an ILUA should always remain even where the agreement is subsequently removed from the register: that is the proposed inclusion of s24EB(2A) & s24EBA(7). An exception should be made where the removal occurs because the native title party only entered the agreement under fraud or duress. In those cases, it would be unjust for the validation to remain effective where the Court has found the agreement was only entered because of 'fraud, undue influence or duress' on the native title group and ordered the agreement be removed.

[11] The NTA provides different grounds for which an ILUA may be 'de-registered', eg:

---

[6] These are the changes detailed in Consultation Paper, Schedule 1, Parts 1 to 3.

[7] eg. because the group's wishes were characterized as 'expectations' rather than requirements on the applicant (*Gomeroi People v Attorney-General NSW* [2016] FCAFC 75; 241 FCR 301, [11] per Reeves J, [89] & [93] per Barker J); or because the Court interpreted that individual applicant consent was required even where the person is dead (*Mingli Wanjurri Mcglade (formerly Wanjurri-Nungala) v Native Title Registrar* [2017] FCAFC 10; 251 FCR 172, [244] & [265] per North & Barker JJ; despite acknowledging the claim group had authorised the ILUA: [263]).

[8] See Southalan & Fardin (n1 above), section *2.3 Group decisions and individuals*.

[9] eg. *Bennell (Single Noongar Claim No 1) v Western Australia* [2004] FCA 760, [43] per French J (communal character of traditional law and custom is what grounds native title); *Far West Coast Native Title Claim v South Australia (No 2)* [2012] FCA 733; 204 FCR 542, [31] & [59] per Mansfield J (court proceedings 'necessarily conducted through representatives' but the 'claim group, by the terms of its authorisation, maintain[s] ... ultimate authority'); *Gebadi v Woosup* [2017] FCA 1467, [101] per Greenwood J (applicant owes fiduciary obligations to the claim group - see also [96], [100]-[104]).

[10] These are the changes detailed in Consultation Paper, Schedule 2, Part 1 and the first item in Part 2.

(a) because the Court subsequently determined some different persons are native title holders: s199C(1)(a) & (b);

(b) the agreement has expired or the parties want it to end: 199C(1)(c); or

(c) fraud/duress: s199C(3) – where 'a party would not have entered into the agreement but for fraud, undue influence or duress by any person (whether or not a party to the agreement)'.

[12] In *some* of these circumstances, the proposed change is acceptable. That is: anything validated while the ILUA was registered, should remain validated even after the ILUA is deregistered. However where an ILUA was entered (and subsequently deregistered) because of fraud or duress on a native title party, then that ILUA's registration should not impact those native title parties. As such the s199C(3) fraud/duress should be an exception to this proposal for permanent validation.

[13] There is a relevant comparison with Torrens Title, and the effect of registration there. Fraud is recognised as a general exception to Torrens Title indefeasibility. While there are some variations between different Australian jurisdictions 'all versions of the Torrens legislation, provides for circumstances in which a registered title may be defeated or qualified...[including] "fraud" exceptions'.[11]

[14] There seems no logical reason (and none was identified in the Consultation Paper) why ILUA registration should be any different. We note that, in *Burragubba v State of Queensland*, the Court indicated that if there were fraud that would be a basis on which to question the Tribunal's actions.[12] However that did not occur there because the Court found the circumstances alleged did not constitute fraud.

[15] We understand and accept the proposal that validation should remain effective even where an ILUA is subsequently deregistered *in two situations only*.

(a) Where the ILUA is removed because a Court determination has identified different native title holders. The earlier registration of the ILUA should only have occurred after assurance that 'all reasonable efforts have been made ... to ensure that all persons who hold or may hold native title ... in the area covered by the agreement have been identified [and] have authorised the making of the agreement'.[13] It would be anomalous that a subsequent Federal Court decision identifies different native title holders but, in such a situation, it is reasonable that the earlier 'due diligence' should allow that agreement's validation to continue.

(b) Where the ILUA is removed because the agreement has ended. As above, it is reasonable that parties are able to continue to rely on validation which took effect while the agreement was on foot.

[16] However, we disagree that an agreement which has been deregistered because of 'fraud, undue influence or duress' which impacted the native title party, should operate

---

[11] *Cassegrain v Gerard Cassegrain & Co* [2015] HCA 2; 254 CLR 425 [17] per French CJ, Hayne, Bell & Gageler JJ; see to similar effect [106] per Keane J.

[12] [2016] FCA 984, [197] per Reeves J. This was a case about a future act determination, but the principle should also inform the Tribunal's approach to ILUA registration and dealings, given that parties 'aggrieved by a decision' of the Tribunal can apply for Federal Court review where 'the decision was induced or affected by fraud': *Administrative Decisions (Judicial Review) Act 1977* (Cwth), s5(1)(g).

[13] eg. NTA, 24CG(3).

to impose any validation on that native title party. These proposed amendments should be amended to make this an exception to the continuing validation where an ILUA is 'deregistered'.

Intervention and consent determination (schedule 5)

[17] We disagree with the proposal that the Commonwealth, where it is only an intervener in Court proceedings, should have a veto power over s87 agreements.[14]

[18] If, and where, the Commonwealth is a *party* to proceedings then it is appropriate that the Commonwealth's consent is required for agreed resolution of those proceedings. To become a respondent in native title proceedings, other than through the automatic inclusions, merely requires the party to have 'an interest...[that] may be affected by a determination in the proceedings'.[15] The NTA envisages that 'all parties whose interests may be affected will be before the Court at the one time'.[16]

[19] The Court has repeatedly indicated that where a party's 'interest' would not be affected, then the party should not be a respondent.[17] This is because a party whose interest is indirect, remote or lacking in substance can effectively 'veto the process of mediation and conciliation which the NT Act favours'.[18]

[20] These NTA provisions and interpretation show that where the Commonwealth has an interest which may be affected by proceedings, then it can become a respondent (and, as such, a party whose consent is required for an agreed outcome of the proceedings). However, where the Commonwealth is only an intervener and does not have interests which will be affected, then its consent should not be necessary. If there is a case where all litigating parties have agreed a resolution, that should not be prevented by a mere 'intervener'.

Other procedural changes (schedule 6)

Validation of section 31 agreements

[21] We support the proposed amendment outlined in this section, being to confirm the validity of section 31 agreements potentially affected by the flaw identified in the McGlade Decision. As with our submission (above) in respect of the *Role of the Applicant*, these changes will resolve anomalies where the group's wishes are known but are thwarted by virtue of technicalities or unintended consequences of legislative drafting. By resolving such anomalies, such a measure strengthens the 'consent' element of FPIC.

[14] Explained in Consultation Paper, Schedule 5, Part 1.
[15] eg. NTA, s84; *Gamogab v Akiba* [2007] FCAFC 74, [59]-[61] & [64]-[65] per Gyles J, with whom Sundberg J agreed at [50].
[16] *Quayle v South Australia* [2017] FCA 552; BC201703771 at [18] per White J.
[17] eg. *Malthouse (Bar Barrum People No 6) v Queensland* [2016] FCA 692, [18] per Reeves J; *Chubby (Puutu Kunti Kurrama and Pinikura People) v Western Australia* [2015] FCA 964, [12] per Barker J; *Gordon (Kariyarra Native Title Claim Group) v Western Australia* [2018] FCA 430, [354]-[355] per North J.
[18] *Lewis (Warrabinga-Wiradjuri #6) v Attorney-General NSW* [2018] FCA 481, [17] per Griffiths J.

Allow the government party to cease being a party to negotiations for section 31 agreements

[22] This section proposes to allow the government to cease being a party to section 31 agreements. We would support this proposed amendment only if it were limited to circumstances where the relevant government has absolutely no involvement in the matter being negotiated – though this would seem to be an uncommon occurrence. Where government has any involvement in the matter being negotiated (such as the grant, to a third party, of rights in land or resources), it would be inappropriate for them to cease being a party.

National Native Title Tribunal (schedule 7)

[23] We support the proposed amendment about extending access to dispute resolution assistance from the National Native Title Tribunal to registered native title bodies corporate and common law holders. As we note in our recent article, there are complexities in implementing FPIC arise at the domestic level because of 'the practicalities of granting development rights, impacts on Indigenous groups, disputes about tensions between these two, and domestic courts having to adjudicate when such disputes cannot be resolved.'[19] Any proposal to enhance the availability of dispute resolution services to native title groups would in theory help those groups to reach FPIC by addressing these complexities.

Registered native title bodies corporate (schedule 8)

Require RNTBC constitutions to reflect the native title determination

[24] We support the proposed amendment requiring RNTBC constitutions to reflect the native title determination. The International FPIC standard applies to traditional owner groups, so in this light it is sensible to encourage similarity in domestic structures. The proposed approach aligns with the existing jurisprudence on native title group membership more generally, which we summarised in our article

> *[The Federal Court and Native Title Tribunal] have repeatedly ruled that a native title group must include all persons who have cultural or traditional rights in that area of land or water. Where a claim includes only some of those persons who have traditional rights in that area, then the claim will be neither registered … nor recognised in a court determination.*[20]

[25] Moreover, where there is internal disagreement about group membership the Federal Court can hear and adjudicate such disagreements[21] and make orders in the subsequent determining reflecting the outcome of this adjudication.[22] To allow an RNTBC to subsequently adopt additional or alternative criteria for membership (i.e., criteria which do not reflect the native title determination) could give rise to a situation where the relevant traditional owner group's ability to reach FPIC is jeopardised through different categories of RNTBC membership and voting provisions.

---

[19] See Southalan & Fardin (n1 above), section *1 Introduction*.

[20] Southalan & Fardin (n1 above), section *3.2 Who is the relevant community? Examining group membership*.

[21] See eg. *Aplin (Waanyi Peoples) v Queensland* [2010] FCA 625, [9], [18], [256], [260] & [267]–[271]; *Peterson (Wunna Nyiyaparli People) v Western Australia* [2016] FCA 1528, [18], [122]–[124] (upheld on appeal: *Wunna Nyiyaparli People v Western Australia* [2017] FCA 1056, [8]).

[22] See, eg, *State of Western Australia v Graham (Ngadju People)* [2013] FCAFC 143, [91]–[92]; and *Banjima People v Western Australia* [2013] FCA 868, [531]–[534].

Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018

Clarify the requirement to consult with groups of common law holders

[26] We do not support the proposal to repeal r8(5) of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (**PBC Regs**), about consultation requirements where a PBC holds native title rights and interests in trust for more than one group of common law holders.

[27] As a preliminary matter, we are unaware of any court decision which has adopted the meaning suggested by the Consultation Paper (that PBC Regs r8(5) imposes requirements in relation to sub-groups). We had always understood this provision to apply where a PBC acts for different groups, over different areas, arising from different determinations – the situation envisaged by reg 5 of the PBC Regs. In such a case, r8(5) makes sense: the PBC *does* have responsibilities to 'more than one group of common law holders', but is only required to consult with that group 'whose native title rights or interests would be affected by the proposed native title decision'.

[28] In relation to the potential of sub-groups within a single determination, that is not a common situation. Determinations normally establish a single PBC, with intra-Indigenous issues being addressed under traditional law and custom and not specified nor mediated in the Court's ruling, as indicated in *Murray (Yilka Native Title Claimants) v Western Australia (No 6).*[23]

> ***[U]sually the framework of the NTA suggests a single determination of native title in relation to a particular area*** *(including an area that has been the subject of overlapping claims), the delineation of the relevant native title rights and interests and the nomination of a registered native title body corporate to perform specified functions in relation to that native title (including usually, in some cases, by acting as trustee of that native title).* ***The NTA contemplates that the body corporate functions in respect of all native title in an area*** *the subject of multiple claims* ***will be performed by a single registered native title body corporate*** *(whether as trustee of that native title or as agent of the common law holders). In this way, the NTA provides third parties with a single point of interaction with the common law holders.* ***Intra-indigenous issues are resolved between the common law holders in accordance with traditional law and custom,*** *within the framework of the body corporate and the requirements of the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth) and in accordance with agreed dispute resolution mechanisms. Failing such resolution, there is recourse to other forms of protection and relief.*[24]

[29] Usually, therefore, a determination does not identify 'more than one group of common law holders', and therefore regulation 8(5) has no application. Any differing rights and responsibilities within a native title group do not have to be addressed in the determination, and instead can be addressed within the PBC's rules and procedures.[25] Unless there are specific and distinct groups and responsibilities to land, the determination does not need to refer to separate claim groups or other permutations

---

[23] *Murray (Yilka Native Title Claimants) v Western Australia (No 6)* [2017] FCA 703, [34] per McKerracher J.
[24] [2017] FCA 703, [34] per McKerracher J (emphasis added, citations omitted).
[25] eg. *Moses v WA* [2007] FCAFC 78; 160 FCR 148, [370] per Moore, North and Mansfield JJ.

of native title holders.[26] The Court has specifically rejected doing so where an asserted difference is secular and contemporary and 'did not reflect traditional law and custom. As such it is not appropriate to be reflected in a separate determination of native title'.[27]

[30] Where the Court has a determination needing to address distinct native title holding groups or areas, these are invariably explained and delineated in the terms of the Court order.[28] If a determination has specified the detail of areas or (sub)groups who hold native title, then it seems appropriate that only the relevant (sub)groups affected be the persons with whom the PBC is required to consent. That is also consistent with the current r8(5) of the PBC Regs.

[31] In relation to the proposal to clarify the requirement to consult with groups (or more specifically sub-groups) of common law holders, we note that international FPIC standards address this issue in broad terms. The IFC Performance Standards, as one example, require a process of engagement with Indigenous groups that ensures the 'meaningful participation of Indigenous Peoples in decision-making, focusing on achieving agreement while not conferring veto rights to individuals or sub-groups'.[29] FPIC, as a group right, necessarily concerns group consent. As we note in our article, the IFC Performance standards and other commentary consider the complexity of group consent and that it can sometimes exist despite internal disagreement. As acknolwedged in our article: '[t]he issue is, obviously, tremendously complex because it is not always easy to determine when a group's actions and decisions progressing FPIC are improperly impeding individuals' rights [or, in this case, the rights of a sub-group] and, if they are, what should occur in response'.[30]

Clarify the consultation and consent requirements for native title decisions

[32] We support the proposal to clarify the consultation and consent requirements for native title decisions. Such clarification is consistent with the FPIC objective of giving greater control to the relevant group, because increasing clarity positively affects the 'informed' and 'consent' components of FPIC.

Remove the requirement to consult with native title representative bodies

[33] We agree with the proposal to remove the requirement to consult with native title representative bodies. Though this reduces the role of NTRBs, it is consistent with the emphasis FPIC places on traditional owners' and their autonomy in decision making.

---

[26] eg. *Murray (Yilka Native Title Claimants) v Western Australia (No 6)* [2017] FCA 703, [37] per McKerracher J; see also [48].
[27] *Murray (Yilka Native Title Claimants) v Western Australia (No 6)* [2017] FCA 703, [44] per McKerracher J.
[28] See descriptions in *Murray (Yilka Native Title Claimants) v Western Australia (No 6)* [2017] FCA 703, [38]-[41] per McKerracher J of previous cases where a determination involved 'entirely distinct traditional groups determined to hold separate native title rights in relation to separate areas of country'.
[29] IFC, *Performance Standards on Environmental and Social Sustainability* (1 January 2012), [10] and GN22.
[30] Southalan & Fardin (n1 above), section *2.3 Group decisions and individuals*.

If you have any questions regarding this submission, please contact Joe Fardin:

T: +61 8 6488 8724

E: joe.fardin@uwa.edu.au

Yours faithfully

Joe Fardin
Associate Director
Centre for Mining, Energy and Natural Resources Law
University of Western Australia

pp 

JL Southalan
Adjunct Associate Professor
Law School
University of Western Australia