

10 December 2018



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

**By email: [native.title@ag.gov.au](mailto:native.title@ag.gov.au)**

**RE: REFORMS TO THE NATIVE TITLE ACT 1993 (CTH) – EXPOSURE DRAFT**

Nyamba Buru Yawuru (NBY) make the following submission on behalf of the Yawuru Native Title Holders Aboriginal Corporation RNTBC (Yawuru PBC). This submission is in addition to the previous submission made by NBY on 28 February 2018 in relation the proposed reforms to the *Native Title Act 1993 (Cth)* outlined in the Options Paper.

The Yawuru PBC again expresses its disappointment that the current proposed amendments do not address the fundamental inequalities in the Act which includes such issues as:

- the continuance of the injustice of *terra nullius* through the oppressive concept of native title extinguishment;
- the implementation of the concept of native title fungibility which involves a commercial means for native title groups to achieve economic development and self-determination without the loss of native title;
- reversal of onus or proof in native title claims;
- the oppressive expedited procedure future acts provisions which impose the burden on native title groups to pay for and make objections without any corresponding obligations on the State to justify why it considers the expedited procedure should apply;
- the very limited success rate of native title groups in future act determinations that demonstrates a strong systemic bias towards Government and proponents;
- the need for the future act system to be revamped to promote opportunities for native title groups to be involved in development projects on country for example by directing project proponents to native title groups as soon as development applications are made; and
- the need for an efficient system to deal with the future volume of native title compensation claims that will inevitably flow from the *Timber Creek* decision.

The Yawuru PBC’s comments on the proposed amendments in the exposure draft are set out in the attached table.

Yours faithfully

**Glenn Archer**  
**Manager – Native Title, Future Acts & Heritage**

REFORMS TO THE NATIVE TITLE ACT 1993 (CTH) – EXPOSURE DRAFT – YAWURU PBC COMMENTS

| Area of reform (Green indicates measure references options paper) | Options paper  | Yawuru PBC 28 February 2018 Comments   | Exposure draft legislation   | Yawuru PBC comment #2   |
|---|--|--|--|---|
| <b>The Applicant and authorisation</b>                            |  | The Yawuru PBC supports any proposed amendments to the Act that preserves and promotes the primacy of community decision-making in accordance with the principle of free, prior and informed consent over the say of individual members of the Applicant. This principle ought to be enshrined in the Act underpinning the following recommendations |  |   |
| <b>A1</b>   | The Native Title Act should be amended to clarify that the claim group may define the scope of the authority of the applicant. | The native title claim group defining the scope of the authority   | <p><b>New section 151BA (Item 21, Part 1, Schedule 1)</b> – would allow for conditions to be imposed on the applicant as part of the authorisation process. The conditions would need to be imposed in accordance with traditional decision making processes, or if no such processes exist, a process agreed to by the claim group (<b>subsection 251BA(2)</b>).</p> <p>The provision would not impose any new specific consequences for the application failing to comply with any conditions. A note is proposed that would explain that consequences may include the replacement of the applicant under section 66B, or a Federal Court of Australia order under section 84D</p> | <p>Consistent with earlier comments. Public notification increases transparency and accountability.</p> <p>However, the proposed reform should not place an unnecessary administrative burden on native title parties. Measures should be implemented to reduce this risk such as additional Commonwealth funding to NTRBs.</p> |

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|   |               |                                      | <p>Section 62A would also be amended to make clear that the applicant’s power to deal with all matters to do with an application is subject to conditions on the authorisation of the applicant under subsection 251BA (<b>Items 9 and 10, Part 1, Schedule 1</b>) – which creates new <b>subsection 62A(2)</b>).</p> <p><b>Public notification of conditions on the applicant’s authority</b></p> <p>New paragraphs <b>62(1)(ba)</b> and <b>62(3)(b)</b> would require the details of any conditions on the authority of the applicant to be part of the details required to be included in the originating native title claim or compensation application. New <b>subparagraphs 62(1)(a)(vi)-(vii) and 62(3)(a)(v)-(vii) (Items 5-7, Part 1, Schedule 1)</b> would also require any conditions on the authorisation of the applicant to be outlined in affidavits accompanying a native title claim or compensation applications.</p> <ul style="list-style-type: none"> <li>• Relevant court forms contained in NT Regulations would also be updated to reflect these changes;</li> </ul> |                       |

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|   |   |  | <ul style="list-style-type: none"> <li>• Contents of Register of Native Title Claims records to whether there are any conditions on the authority of the applicant;</li> <li>• The NT Registrar would be required to accept an amended registered claim for registration if, among other specified amendments, the only effect of the amendment was the imposition, variation or revocation of a condition on the applicant's authority;</li> <li>• The NT Registrar required to be satisfied that the applicant is authorised by the claim group and that conditions on the applicants authority have been satisfied;</li> <li>• NTRBs may only certify a native title application or agreement where it is of the opinion that any conditions on the applicant's authority that relate to the making of the application or agreement have been satisfied;</li> </ul> |                                   |
| <b>A2</b>   | The Native Title Act should be amended to provide that the applicant may act by majority, unless the terms of the | The applicant may act by majority unless the terms of the authorisation by the claim group authorise otherwise | New <b>section 62C (Item 32, Part 2, Schedule 1)</b> would create a general rule that the applicant may act by majority. The rule would be subject to any conditions on the authorisation of the applicant. Amendments to <b>sections 24CD, 24CG and 24DE (Items 23-29, Part 2,</b>  | Consistent with earlier comments. |

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|   | authorisation provide otherwise.   |   | <p><b>Schedule 1)</b> would change the requirements for how the applicant - known for the purposes of ILUA agreement-making as the RNTBC – can enter into area and alternative procedure ILUAs.</p> <p>Amended note to <b>subparagraph 29(2)(b)(i)</b> and new <b>subsections 31(IC) and (ID) (Items 30 and 31, Part 2, Schedule 1)</b> would clarify that only a majority of the RNTC are required to be a party to agreements made under the section 31 of the NTA (unless the claim group requires all members of the RNTC to jointly be a party.</p> |  |
| <b>A3</b>   | <p>Section 66B of the Native Title Act 1993 (Cth) should provide that, where a member of the applicant is no longer willing or able to perform the functions of the applicant, the remaining members of the applicant may:</p> <p>(a) continue to act without reauthorisation, unless the terms of the authorisation</p> | <p>Amending s.66B so that where any members of the applicant are unwilling or unable to act that the remaining members continue to act without reauthorisation unless authorisation provides otherwise.</p> | <p>New <b>subsections 66B(2A), (2B) and 2C (Item 42, Part 3, Schedule 1)</b> would set out the process by which the remaining members of the applicant may apply to the Federal Court for, and the power of the court to order, a replacement applicant in circumstances where a previous member of the applicant dies or is incapacitated.</p> <p>Subsection 66B(2B) would allow the court to make an order around the constitution of the applicant in the following circumstances of the applicant in the following circumstances:</p>                | <p>Consistent with earlier comments.</p> |

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|   | <p>provide otherwise; and</p> <p>(b) apply to the Federal Court for an order that the remaining members constitute the applicant.</p>   |   | <ul style="list-style-type: none"> <li>• Where there is an authorised ‘reserve’ member of the claim group, that this person and the other continuing members of the applicant constitute the applicant (<b>paragraph 66B(2B)(a)</b>) – i.e. this is the succession-planning scenario);</li> <li>• That the continuing members of the applicant may continue to act despite the death / incapacity of one member (<b>paragraph 66B(2B)(b)</b>); and</li> <li>• Members of the claim group applying for the order may be added to the continuing members of the applicant if so authorised by the claim group (<b>paragraph 66B (2B)(c)</b>).</li> </ul> |  |
| A4  | <p>The authorisation of an applicant sometimes provides that if a particular member of the applicant becomes unwilling or unable to act, another specified person may take their place. Section 66B of the Native Title Act 1993 (Cth) should provide that, in this</p> | <p>Giving effect under s.66B to the succession plans of claim groups.</p> | <p>See above</p>   | <p>Consistent with earlier comments.</p> |

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|   | circumstance, the applicant may apply to the Federal Court for an order that the member be replaced by the specified person, without requiring reauthorisation |  |   |                                     |
| <b>A5</b>   | The Act should be amended to provide that a member of the applicant must not obtain an advantage of benefit at the expense of the common law holders.          | Amending the Act to clarify that members of the Applicant owe fiduciary duties to the claim group and must act in their best interests at all times. | Consistent with the Federal Court decision in <i>Gedabi v Woosup</i> (2017) FCA 1467 – subsection 62B (Item 11, Schedule 1, Part 1) would 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. | Consistent with earlier comments.   |
| <b>A6</b>   | The amendments recommended regarding authorisation... should only apply to matters that come before the Court after the date of commencement of any amendment. | This proposed amendment should be qualified – <i>unless it is in the interests of justice to do so.</i>  | Changes would apply six months after Royal Assent.  | Proposed qualification not adopted. |

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| Alternative agreement - making                                    |   |  |                            |                       |
| <b>B1</b>   | Consider options for allowing a PBC to enter into a contract, as opposed to an ILUA, about certain types of future act that would not require the PBC to consult with, and obtain the consent of the native title group   | The Yawuru PBC supports a proposed amendment that relieves the burden on under-resourced and over-worked PBCs to consult with the broader group in certain prescribed circumstances approved by the broader group.   |                            | N/A                   |
| <b>B2</b>   | Consider allowing native title holders to vary the effect of section 211, which creates a protection for the exercise of traditional hunting, fishing, gathering, cultural or spiritual activities from regulation by Commonwealth, state and territory laws, through an ILUA | The Yawuru PBC is opposed to any attempt to water down the effect of section 211 of the Native Title Act and suspects that this proposed amendment can be exploited by third parties to the detriment of native title groups where an unequal negotiating relationship exists. |                            | N/A                   |



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| B3  | Consider options for allowing a PBC to contract about future acts and compensation, including allowing a PBC contract out of future acts and compensation provisions of the Native Title Act.   | The Yawuru PBC suspects that this proposed amendment can be exploited by third parties to the detriment of native title groups where an unequal negotiating relationship exists.  |   | N/A  |
| B4  | Consider options for addressing the relationship between state and territory natural resource management activities and native title rights including amending section 24LA to permit the doing of low impact future acts following a determination that native title exists. | The Yawuru PBC is opposed to any attempt to water down native title procedural rights by a <i>carte blanche</i> approval for “low impact” future acts post determination. What non-indigenous persons consider “low impact” may not necessarily apply to First Nations peoples particularly in culturally sensitive areas where any impact may have serious consequences. |   | N/A  |
| Stream-lining agreement making                                    |   |   |   |  |
| C1  | Allowing body corporate ILUAs to  | The Yawuru PBC considers that prior to any amendments concerning extinguishment   | <b>New subsections 24BC(2)(a) and (b) (Item 2, Part 1, Schedule 2)</b> , would allow a body | Yawuru supports any amendment that reduces the impact of |

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|   | cover areas where native title has been extinguished.                                     | that the definition of extinguishment ought to be amended in the Act to remove its current effect of restoring terra nullius and continuing the injustice suffered by First Nations people. It is proposed that instead of extinguishment that native title rights be suspended until such time as the existing interest in land lapses. | <p>corporate ILUA to include areas for which the relevant native title determination:</p> <ul style="list-style-type: none"> <li>Expressly or impliedly states that there is no native title over an area; or</li> <li>Expressly excludes an area because it was subject to a previous exclusive possession act.</li> </ul>  | extinguishment. However, as previously noted further amendments abolishing the notion of extinguishment needs to be addressed. |
| <b>C2</b>   | Allowing minor technical amendments to be made to ILUAs without requiring re registration | The Yawuru PBC does not have an issue with minor technical amendments to ILUAs without requiring re-registration to help alleviate the administrative burden on under-resourced and over worked PBCs.  | <p>New <b>subsection 24ED (Item 7, Part 2, Schedule 2)</b> would allow parties to an ILUA to make minor changes to ILUAs by agreement, while preserving its binding nature.</p> <p>New <b>subsection 24ED(1)</b> would outline the types of amendments that could be made to an ILUA, and would require those amendments be agreed to by the parties, and notified in writing to the Registrar.</p> <p>Limited to:</p> <ul style="list-style-type: none"> <li>Updating property descriptions previously covered by the ILUA, but not so as to result in the inclusion of any area of land or waters not previously covered;</li> <li>Updating descriptions identifying parties to the ILUA, including where a party has assigned or otherwise</li> </ul> | Consistent with earlier comments.  |

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|   |  |   | <p>transferred rights and liabilities under the ILUA;</p> <ul style="list-style-type: none"> <li>• Updating administrative processes relating to the ILUA; or</li> <li>• Doing a thing specified by the Minister by legislative instrument.</li> </ul> <p>New <b>subsection 24ED(2)</b> confirm the ILUA's binding effect on common law holders.</p> |                                   |
| <b>C3</b>   | Removing the requirement that the Registrar give notice of an area ILUA if it was not satisfied the ILUA could be registered   | As above  | The amendment to <b>section 24CH (Item 3, Part 1, Schedule 2)</b> would provide that the Registrar only needs to proceed to notify an ILUA if he or she is satisfied that the ILUA meets those requirements.   | Consistent with earlier comments. |
| <b>C4</b>   | Removing the requirement for PBCs to consult with NTRBs on native title decisions such as prior to entering an Indigenous Land Use Agreement in the PBC regulations. | As above  | Repeal <b>sub regulation 8(2)</b> of the PBC Regulations ( <b>Item 25, Schedule 1</b> of the Amendment Regulations).   | Consistent with earlier comments. |
| <b>C5</b>   | Amend the Native Title Act to ensure that the future acts regime applies to land and   | The Yawuru PBC supports any proposed amendment to strengthen future act procedural rights for First Nation peoples. | The proposed amendment to <b>section 227 (Act affecting NT) (Item 21, Part 3, Schedule 3)</b> would confirm that an act affects native title if the circumstances described in the proposed  | See earlier comments.             |

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|   | waters to which section 47B applies to disregard previous exclusive possession acts on vacant crown land.  |   | <b>subsection 227(2)</b> exist. Expanding this definition of an act affecting native title in this way would inform the definition of ‘future act’ in section 233, which in turn would inform the application of Part 2, Division 3 of the NTA (future acts regime).   |                                   |
| C6  | Amend section 24EB of the Native Title Act to allow parties to an ILUA to agree that the ILUA does not provide compensation for a future act   | The Yawuru PBC is concerned that if compensation is “parked” until after the finalisation of an ILUA that it will diminish the motivation of the third party to negotiate a fair and reasonable settlement. A possible mechanism to address this concern may be to amend the Act so that the ILUA does not take effect until the issue of compensation is resolved. |  | N/A                               |
| C7  | Consider amending section 199C of the Native Title Act to clarify that removal of details of an ILUA from the Register does not invalidate a future act that is subject of the ILUA. | No comment.   | <b>New subsection 24EB(2A) and 24EBA(7) (Items 5-6, Part 2, Schedule 2)</b> would clarify that the removal of the details of an agreement from the Registrar 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. | No comment.                       |
| C8  | Consider amending section 30A of the Native Title Act so that  | The Yawuru PBC does not have an issue with removing the Government Party for section 31 agreements particularly if the State seeks  | <b>Items 7 and 8, Part 2, Schedule 5</b> would amend <b>subsection 25(2) and subsection 31(1)</b> to provide that a government party to a  | Consistent with earlier comments. |

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|   | Government parties are not required to be a party to a section 31 agreement (for example, an agreement about mining).   | to exploit its position by compelling native title parties to enter their standard section 31 agreements.  | 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.   |                                   |
| <b>C9</b>   | Consider options for amending the objection process created by section 24MD (6B), which applies to some compulsory acquisitions of native title and the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility. | The Yawuru PBC does not support any watering down of procedural rights for native title parties where the compulsory acquisition of native title parties and propose that once an objection is made that the objection is automatically referred to an independent person.                                     | <b>Item 1, Part 1, Schedule 6</b> would amend paragraph <b>24MD (6B)(f)</b> to allow any of the parties to an objections process to refer the matter to an independent person for a final determination of appropriate conditions (if any) of the doing of the act. | Consistent with earlier comments. |
| <b>C10</b>  | Consider options to encourage electronic transmission of notices including amending sections 29 and 6(1)(a) of Native Title (Notices) Determination 2011 (No 1) to provide that notices can always be   | The Yawuru PBC supports any proposed amendment which makes the notification process more effective including in particular electronic transmission of notices particularly in remote areas in Broome where the postal service can cause delays in receiving notices to the disadvantage of traditional owners. |   | N/A                               |

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|   | transmitted electronically  |  |                            |                       |
| C11   | Amend section 251A to clarify who must authorise an ILUA as a person or persons who may hold native title, being a person or persons who can establish a prima facie case to hold native title.                                       | It is unclear from the proposed amendment what is required to establish a “prima facie” case and the Yawuru PBC considers that this may be answered by consultation with the broader group.  |                            | N/A                   |
| Indigenous decision making  |   |  |                            |                       |
| D1  | <ul style="list-style-type: none"> <li>Section 251B of the Native Title Act should be amended to provide that a claim group may authorise an applicant either by a traditional decision-making process or a process agreed</li> </ul> | The Yawuru PBC supports any proposed amendments that ensure that native title groups have the greatest degree of flexibility to choose their own decision-making processes as this is a fundamental element of providing free, prior and informed consent. |                            | N/A                   |

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|   | <p>to and adopted by the group.</p> <ul style="list-style-type: none"> <li>Section 251A of the Native Title Act should be amended to provide that persons holding native title may authorise an ILUA either by a traditional decision-making process, or a decision-making process agreed to and adopted by the group.</li> <li>Regulation 8 of the Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)</li> </ul> |                                      |                            |                       |

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|   | <p>should be amended to provide that common law holders may give consent to a native title decision using either a traditional decisionmaking process or a decision-making process agreed on and adopted by them.</p> <ul style="list-style-type: none"> <li>Section 203BC(2) of the Native Title Act should provide that a native title holder or a person who may hold native title may give consent to any</li> </ul> |                                      |                            |                       |



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|   | <p>general course of action that the representative body takes on their behalf using either a traditional decision-making process or a decision-making process agreed to and adopted by the group to which the person belongs.</p> |  |                            |                       |
| <b>Claims resolution and process</b>                              |  |  |                            |                       |
| <b>E1</b>   | <p>Section 138B(2)(b) of the Native Title Act, which provides that the Federal Court may only direct that a native title application inquiry be held if the applicant</p>  | <p>The Yawuru PBC opposes any watering down of the rights of native title groups to participate or not in the inquiry process.</p> |                            | <p>N/A</p>            |

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|   | agrees to participate, should be repealed.   |  |   |                                   |
| E2  | Section 156(7) of the Native Title Act, which provides that the National Native Title Tribunal's power to summon a person to appear before it or produce documents does not apply to a native title application inquiry, should be repealed. | Provided the above comment applies and that it does not impose an unreasonable administrative burden on native title parties, the increased powers of the Tribunal would assist the inquiry process particularly in relation to recalcitrant non-native title parties. |   | N/A                               |
| E3  | Amend section 47(1)(b)(iii) of the Native Title Act to permit the making of a determination that native title co-exists with a pastoral lease held by the claimants where claimants are members of a company that holds the pastoral lease.  | The Yawuru PBC supports this proposed amendment.   | <b>Amendment to subparagraph 47(1)(b)(iii) (Item 17, Part 2, Schedule 3)</b> would provide that section 47 applies to a body corporate that has members rather than shareholders, and holds a pastoral lease over an area subject to an application under section 61. | Consistent with earlier comments. |

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| E4  | Consider amending Part 2, Division 5 of the Native Title Act to allow a PBC to be the applicant on a compensation claim. | The Yawuru PBC supports this proposed amendment. | <p><b>Item 1-4, Schedule 4</b> would amend <b>section 58</b> of the NTA to expand the functions of RNTBCs in relation to compensation applications that are provided for under the PBC Regulations</p> <p><b>Item 5, Schedule 4</b> would amend <b>subsection 61(1)</b> to clarify and broaden the scope of circumstances under which an RNTBC can make a compensation application. The <b>new subsection 61(1)</b> would clarify the current position that an RNTBC can make a compensation application over areas held by the RNTBC on behalf of the common law holders or as an agent in relation to the native title. The new <b>subsection 61(1A)</b> would allow an RNTBC to make a compensation application on behalf of all the persons who claim to be entitled to the compensation if –</p> <ul style="list-style-type: none"> <li>• The determination is sought in relation to an area (the extinguished area) that is within the external boundary of the area covered by an approved determination of native title (the earlier determination) under which the RNTBC holds, or is an agent PBC in relation to, NT rights and interests, and either:</li> </ul> | Consistent with earlier comments. |

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|   |   |  | <ul style="list-style-type: none"> <li>○ The earlier determination is that native title does not exist in relation to the extinguished area, or</li> <li>○ The extinguished area was expressly excluded from the area covered by the earlier determination because it was a subject to a previous exclusive possession act.</li> </ul> <p><b>Subparagraph 61(1A)(c) at Item 5</b> would be that the ‘person who claim to be entitled to the compensation’ are the common law holders in relation to the earlier determination’.</p> |  |
| <b>E5</b>   | Amend reg 3 (and reg 8) to clarify that the decision to make a compensation application is a native title decision. | The Yawuru PBC supports this proposed amendment.   | <b>Item 23, Schedule 1</b> of the Amendment Regulations would insert a new regulation 7A into the PBC Regulations to confer functions on PBCs in relation to compensation applications. <b>Item 30</b> would insert new <b>regulations 8B</b> , which sets out the consultation and consent process to be used.   | Consistent with earlier comments.  |
| <b>E6</b>   | Introduce a new section into the Act allowing for historical extinguishment over areas of national, state           | The Yawuru PBC supports any proposed amendment that diminishes or, better, eliminates altogether the historical extinguishment of native title and as mentioned previously considers the concept | <b>New section 47C (Item 2, Division 1, Part 1, Schedule 3)</b> would apply to allow for the extinguishment of native title areas of national, state or territory park, to be disregarded. The relevant federal, state or   | Consistent with earlier comments to an extent. However it should not be a requirement that the relevant government body has to agree for |

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|   | <p>or territory parks to be disregarded, where the parties agree, for the purposes of making a native title determination.</p>                 | <p>of extinguishment itself ought to be replaced by an alternative concept of suspension of native title for the duration of the relevant tenure.</p>   | <p>territory government responsible for the creation of the park would need to agree that extinguishment can be set aside (<b>paragraph 47C(1)(b)</b>).</p> <p>The new section would cover any area set aside, or any area where an interest is granted or vested, under any law with an environmental purpose. Areas set aside for other reasons, such as Agriculture, would not fall within the definition and therefore not come within the scope of this section.</p> <p><b>New subsections 47C(3) and (4)</b> would allow the extinguishing effect of public works within the park to be disregarded.</p> | <p>the extinguishment to be disregarded.</p>   |
| <p><b>Post-determination dispute management</b></p>               |  |   |  |  |
| <p><b>F1</b></p>  | <p>It is recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the PBC</p> | <p>The Yawuru PBC does not have an issue with increasing ORIC oversight of PBC compliance with the PBC Regulations subject to ORIC also providing access to free legal services to PBCs on compliance issues and PBCs are provided a reasonable opportunity to take</p> | <p><b>Item 1-3, Division 1, Part 1, Schedule 8</b> would amend <b>section 487-5</b> of the CATSI Act to clarify that the Registrar may place an RNTBC under special administration where it has conducted its affairs in a way contrary to the interests of the common law holders.</p>  | <p>As noted in earlier comments - ORIC should provide access to free legal services to PBCs on compliance issues and PBCs are provided a reasonable opportunity to take steps to remedy any non-compliance</p> |

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|   | Regulations, in particular to ensure that PBCs are fulfilling their obligations to common law holders to the same extent as members.   | steps to remedy any non-compliance before any punitive measures are considered.  |  | before any punitive measures are considered.   |
| F2  | It is recommended that the CATSI Act be amended to provide a power for the Registrar to refuse to amend a PBC's rule book in circumstances where the amendment would result in the PBC no longer meeting the requirements of regulation 4(2) of the PBC Regulations. | As above.  |  | N/A  |
| F3  | Introduce a requirement that the dispute resolution provision in the PBC rulebook specifically addresses arrangements for resolving disputes about   | The Yawuru PBC does not object to the proposed amendment provided it does not create an unreasonable financial or administrative burden on PBCs. | <b>Items 9 and 10, Division 1, Part 2, Schedule 8</b> would add the requirement in <b>subsection 66(1)(3A)</b> that RNTBC constitutions also include dispute resolution pathways for common law holders who are non-members of the corporation. <b>Items 4, 5, and 8, Division 1, Part 2, and Schedule 8</b> would make this | The Commonwealth needs to increase its annual funding for PBCs particularly if PBCs will be required to amend Rule Books in line with the proposed amendments.<br><br>ORIC need to hold information workshops to explain to PBCs how |

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|   | membership (clarifying that such disputes can arise between members and directors, between native title holders, and between native title holders and the PBCs and its members and directors). |   | <p>additional rule part of the internal governance rules of the RNTBC.</p> <p><b>Items 11 and 12, Division 1, Part 2, Schedule 8</b> would require RNTBCs to include in their constitution particular eligibility requirements relating to common law holders. <b>Item 14, Division 1, [art 2, Schedule 8</b> would amend <b>sections 141-25</b> to require RNTBC constitutions to reflect the native title determination which would ensure that eligibility for membership is open to all common law holders either directly or indirectly, i.e. RNTBCs would continue to be able to recognize representative membership, whereby all family groups that make up the common law holders are represented by at least one member of the RNTBC. <b>Items 5-7, Division 1, Part 2, Schedule 8</b> would make consequential changes to internal governance rules provisions.</p> | the amendments will work in practice. |
| F4  | Remove the directors' discretion to refuse membership to a person who meets the PBCs membership criteria other than in   | It is acknowledged that PBC director's ought not have an arbitrary power to exclude eligible members except in exceptional circumstances. | <b>Items 15-19, Division 1, Part 2, Schedule 8</b> would amend sections <b>150-15</b> and <b>150-20</b> of the CATSI Act to remove the option to add further grounds for cancellation of membership.  | See earlier comments.                 |

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|   | exceptional circumstances.   |   |   |                              |
| F5  | Limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour. Require the process for cancellation of membership to include a general meeting.  | The Yawuru PBC is concerned the proposed amendment seeks to implement paternalistic measures demonstrating a distrust for PBC decision-making whilst imposing an unreasonable financial or administrative burden on PBCs. If such measures are to be introduced there ought to be a corresponding obligation on Government to provide additional funding to PBCs for governance and administrative training of PBC staff. | <b>Items 23 to 26, Division 2, Part 2, Schedule 8</b> would amend <b>section 144-10</b> of the CATSI Act to remove this discretion in relation to RNTBCs. | See earlier Yawuru comments. |
| F6  | It is recommended that the CATSI Act be amended to empower the Registrar to amend a CATSI corporation's Register of Members where, following appropriate consultation with the Corporation, the Registrar considers it reasonably necessary to ensure that rule books are complied with in | As above.   |   | N/A                          |



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|   | relation to the revocation of membership of individuals.  |                                      |  |  |
| F7  | <p>It is recommended that the CATSI Act be amended to require PBCs to set up and maintain:</p> <ol style="list-style-type: none"> <li>1. a 'Register of Native Title Decisions'; and</li> <li>2. a 'Register of Trust Money Directions'.</li> </ol> <p>It is recommended that the CATSI Act be amended to require the Register of Native Title Decisions to include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations. It is</p> | As above.                            | <p><b>Regulation 9 (Item 30, Schedule 1</b> of the Amendment Regulations), the decision-making process would be required to be clearly set out (<b>sub regulation 9(3) at Item 30</b>). PBC directors would be required to sign and certify, rather than five members (<b>subregulation 9(4) at Item 30</b>). The certificate could be taken as prima facie evidence that the consultation and consent requirements have been complied with (subregulations 9(6) and 9(7) at Item 30).</p> <p>In addition, under the new <b>regulation 10 at (Items 31-55)</b>, the common law holders (whether or not they are members of the PBC) and persons with a 'substantial interest' in the decision to which the certificate relates (including the Registrar of Indigenous Corporations) would be able to access a copy of the certificate on request.</p> <p>Similarly, if the decision is a 'standing instruction decision' (defined in subregulation</p> | <p>See earlier comments in F5. The Commonwealth should provide additional funding to PBCs so that the proposed amendments do not impose an unreasonable financial burden.</p> <p>The Yawuru PBC believes that access to decisions to which the certificate relates should not be extended to persons with 'substantial interest' unless the PBC board of directors agree. Otherwise access should be restricted to common law native title holders and members.</p> <p>Amendments to Regulation 55A should exclude persons with 'substantial interests' unless the PBC board of directors agree.</p> |

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|   | <p>recommended that each of the Register of Native Title Decisions and the Register of Trust Money Directions be available for inspection by:</p> <ol style="list-style-type: none"> <li>1. members;</li> <li>2. common law holders.</li> </ol> <p>It is recommended that PBCs be required to provide an extract of the Register of Native Title Decisions or the Register of Trust Money Directions to any person having a 'substantial interest' (within the meaning of that phrase as used in the PBC Regulations) in the relevant decision. It is recommended that the Registrar should have the same powers in</p> |                                      | <p>3(1) at Item 20), the PBC would be required to certify, in accordance with the new regulation 9 at Item 30, that such instructions had been given.</p> <p>The proposed changes to the certification regime under the PBC Regulations would require consequential amendments to the ILUA Regulations (<b>Item 6,8-10,12-14, and 16</b>).</p> <p><b>Regulation 55A</b> of the CATSI Regulations (<b>Item 3, Schedule 1</b> of the Amendment Regulations) would be amended to allow the Registrar of Indigenous Corporations to assess whether or not a certificate issued by a PBC complies with the certification requirements under the PBC Regulations. The certificate would be assessed following a request by a common law holder or a person who has substantial interest in the decision to which the certificate relates (paragraph <b>55A(1)(a)</b> at <b>Item 3</b>). This amendment would allow the person who requested the certificate to be notified of the Registrar's opinion as to whether or not the certificate complies (<b>paragraph 55A(1)(b)</b> at <b>Item 3</b>).</p> |                       |

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|   | relation to the Register of Native Title Decisions and the Register of Trust Money Directions as in relation to the Register of Members (and the Register of Former Members).   |  |  |   |
| F8  | It is recommended that the CATSI Act be amended to require PBCs to keep separate financial records and reports in relation to 'native title benefits' (as defined by the Income Tax Assessment Act 1979 (Cth)) received by the PBC. | As above.  |  | N/A   |
| F9  | Introduce a requirement that the common law holders be consulted on the investment and application of native title monies so that the obligation to seek  | The Yawuru PBC does not object to the proposed amendment provided it does not create an unreasonable financial or administrative burden on PBCs. | <b>Item 27, Schedule 1</b> of the Amendment Regulations would repeal <b>sub regulation 8(5)</b> of the PBC Regulations so that PBCs would no longer be required to identify and consult with groups of common law holders whose native title rights and interests would be affected by the proposed native title decision. | The proposed amendment should be qualified – provided this is consistent with the terms of the relevant native title determination. |

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|   | direction from the common law holders is met (whether or not the monies are held by the PBC).   |  |  |  |
| <b>F10</b>  | Amend the definition in reg 3 of group of common law holder to clarify that it refers to the determined native title holding group(s) for which the PBC acts as agent or trustee. | The Yawuru PBC supports decision-making based on the principles of free, prior and informed consent that allows all members of a native title group to have their say before decisions are made. | <b>Item 19, Schedule 1</b> of the Amendment Regulations would amend the definition of 'native title decision' under <b>subregulation 3(1)</b> of the PBC Regulations. <b>Item 18</b> would introduce a new 'high' or 'low' level classification. High level decisions would be those which require consultation with common law holders (including via standing instructions where relevant). Low level decisions would be those for which the PBC may, following consultation and with the consent of common law holders, adopt an alternative consultation process in their constitution. <b>Item 20</b> would outline the types of decisions which would be able to be made on the basis of standing instructions (essentially low level decisions to enter an ILUA where the future act in question is proposed by or for the benefit of the PBC or to enter a section 31 agreement where the PBC is the only grantee party). The common law holders would need to give their approval for | The Yawuru PBC considers that the proposed reform has the potential to balance community consultation obligations with PBC administrative and governance efficiency. |

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|   |  |   | <p>the PBC to act on the basis of standing instructions in relation to these types of decisions. The ability for common law holders to give or revoke this approval, and to impose, vary or revoke conditions on the approval, would be set out in subregulations 8(8) and 8(9) at Item 29.</p> <p>The new <b>regulations 8 and 8A (Items 24-30)</b> would set out the consultation and consent requirements for decisions which would be able to be made on the basis of standing instructions and which decisions would need to have the consent of common law holders.</p> |   |
| <b>F11</b>  | <p>NNTT: Create a broader role in post determination disputes by:</p> <ul style="list-style-type: none"> <li>• allowing PBCs or individual native title holders to approach the Tribunal for dispute resolution assistance directly</li> <li>• providing a new arbitration power to the Tribunal e.g. to deal</li> </ul> | <p>The NNTT is a trusted organisation and the Yawuru PBC would welcome an increased role for the Tribunal in relation to post-determination disputes.</p> | <p><b>Item 1, Schedule 7</b> would insert a new section 60AAA of the NTA that would establish a new function for the NNTT to provide assistance to RNTBCs and common law holders to promote agreement about native title and the operation of the Act.</p> <p>The new subsection <b>60AAA(3)</b> would allow the NNTT to enter into an agreement with the RNTBC or common law holder under which either or both would be liable to pay the Commonwealth for the assistance. This provision would allow the NNTT to seek</p>   | <p>Consistent with earlier comments.</p> <p>The NNTT's costs should be borne by the Commonwealth after all parties agree on a budget for the Tribunal's involvement. If the budget is exceeded due to the conduct of a party, that party should bear the additional costs.</p> <p>No issue.</p> |

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|   | <p>with questions of fact regarding membership. Federal Court: Expanded role by making the Federal Court's jurisdiction exclusive in relation to CATSI Act matters that affect PBCs.</p> |                                      | <p>contributions to cover the cost of assistance where this would support the NNTT's exercise of the function, for example travel or mediation costs. It is not intended that these agreements would go beyond cost recovery.</p> <p>The proposed subsection <b>60AAA(4)</b> would prevent the NNTT from disclosing information it has obtained in the course of exercising this function without the prior consent of the person who provided the information.</p> <p><b>Items 28-30, Part 3, Schedule 8</b> would amend <b>section 586-1</b> of the CATSI Act to consolidate the jurisdiction for native title related dispute matters within the Federal Court by conferring on it exclusive jurisdiction for: civil matters arising under the CATSI Act with respect to RNTBCs; and matters arising under the Administrative Decisions (Judicial Review) Act 1977 related to decisions under the CATSI Act with respect to RNTBCs. Item 31 – 38, Part 3, Schedule 8 would make consequential amendments to the CATSI Act to give effect to this amendment.</p> |                       |

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| Other Matters requiring amendments                                |               | <ul style="list-style-type: none"> <li>• The continuance of the injustices of terra nullius through the oppressive concept of native title extinguishment;</li> <li>• The implementation of the concept of native title fungibility which involves a commercial means for native title groups to achieve economic development and self-determination without the loss of native title;</li> <li>• Reversal of the onus of proof in native title claims;</li> <li>• The oppressive expedited procedure future act provisions which impose the burden on native title groups to pay for and make objections without any corresponding obligations on the State to justify why it considers the expedited procedure should apply;</li> <li>• The very limited success rate of native title groups in future act determinations that demonstrates a strong systemic bias towards Government and proponents;</li> <li>• The need for the future act system to be revamped to promote opportunities for native title groups to be involved in development projects on country for example by directing project proponents</li> </ul> |                            |                       |

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|   |               | <p>to native title groups as soon as development applications are made; and</p> <ul style="list-style-type: none"> <li>The need for an efficient system to deal with the future volume of native title compensation claims that will inevitably flow from the <i>Timber Creek</i> decision</li> </ul> |                            |                       |