Submission to the Attorney-General's Department – Reforms to the Native Title Act 1993 (Cth) Exposure Draft (October 2018)

First Nations Legal & Research Services Ltd (**First Nations**) is the Native Title Service Provider for the State of Victoria. First Nations welcomes the opportunity to contribute to the development of the proposed amendments to the *Native Title Act 1993* (Cth) (**Native Title Act**) and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (the **PBC Regulations**).

In January 2018 First Nations provided a submission to the November 2017 Options Paper 'Reforms to the *Native Title Act 1993* (Cth)' (the **Options Paper**). First Nations is encouraged to see a number of its recommendations, and the recommendations of other submitters, reflected in the current exposure drafts of the Native Title Legislation Amendment Bill 2018 and the Registered Native Title Bodies Corporation Legislation Amendment Regulation 2018, as explained by the Attorney-General's Department's October 2018 public consultation paper.

This submission addresses the changes proposed in the public consultation paper. To the extent that changes advocated for by First Nations' January 2018 submission have not been captured in the current proposed amendments, First Nations reiterates the positions it provided in January 2018.

Schedule 1 – Role of the applicant

Part 1 – Authorisation

Allowing the claim group to place conditions on the applicant's authority

1. First Nations supports the proposed amendments to the Native Title Act to clarify that a claim group may define the scope of the authority of the applicant.
2. Currently, section 62A of the Native Title Act provides that the 'applicant may deal with all matters' arising under the Native Title Act in relation to their application to have native title recognised. This obviously gives the applicant and the individuals involved substantial decision-making powers and responsibilities regarding the progress of the application, any settlement of the claim in a consent determination and any future acts.
3. First Nations considers the addition of section 251BA essential to defining the scope and authority an applicant has when providing instructions to their legal representatives on a native title matter. In some instances the authorised applicant may be reluctant to provide instructions in relation to significant or unexpected events without gaining feedback and authorisation from the claim group, or alternatively, the claim group may expect the applicant to bring certain native title decisions back to the group.
4. The proposed amendments would also ensure greater transparency and accountability in the actions the applicant undertakes on behalf of the full native title claim group.
5. First Nations supports the proposed amendments, particularly the pragmatic approach of including any changes to the conditions imposed upon an applicant in section 190A(6A), rather than requiring re-registration of a claim where the conditions upon the applicant are changed.
6. In imposing conditions, First Nations recommends that the amendment allow for an alternative decision-making process to be adopted by a group even where a traditional one exists, in

respect of the fact that Aboriginal and Torres Strait Islander law is fluid and has evolved over time and that claim groups should have the autonomy to agree and self-determine their decision-making processes.

7. To reflect this approach, First Nations recommends the following changes to the drafting of section 251BA(2):

   (2) The conditions must be imposed either:

   (a) ~~where there is~~in accordance with a process of decision-making that, under the traditional laws and customs of the persons, must be complied with in relation to authorising things of that kind~~—in accordance with that process~~; or

   (b) where there is no such process—in accordance with a process of decision-making agreed to and adopted, by the persons, in relation to authorising things of that kind; or

   (c) where, despite the existence of a decision-making process of the kind referred to above at (a), the persons agree to and adopt an alternate process of decision-making – in accordance with that process.

8. First Nations submits that this approach should also be adopted more broadly in relation decisions made under sections 251A, 251B and 203BC(2) of the Native Title Act and reg 8 of the PBC Regulations, as originally proposed on page 17 of the Options Paper and as supported at paragraphs 49 – 51 of First Nations' January 2018 submission.

Public notification of conditions on the applicant's authority

9. First Nations supports a pragmatic approach to the level of detail required to be registered in relation to any conditions placed by a group on the applicant's authority. Whilst there is utility in all those involved in a process being aware of constraints on the decision-making capacity of other parties (and related impacts on timing), First Nations cautions against an approach requiring large amounts of detail to be made public in relation to such conditions (as these are, in effect, internal decision-making processes established by groups in much the same way as a corporation establishes policies and procedures which it is not required to make public).

Clarify the duties of the applicant to claim group

10. First Nations recommends that there should be a clear statutory expression of the existence of a fiduciary duty between applicant and claim group enabling statutory relief for a claim group if the applicant breaches their fiduciary duty.

Application and transitional provisions

11. First Nations believes the system of commencement for these provisions is sensible and workable in practice.

Part 2 – Applicant decision-making

12. First Nations supports the proposed introduction of new section 62C and amendments to sections 24CD, 24CG, 24CL and 24DE of the Native Title Act to allow the applicant to act by majority in order to streamline the native title process. These amendments will assist claim groups and Native Title Representative Bodies/ Service Providers (**NTRBs**) to progress native title matters and will reduce the costs and resources required to replace an applicant through an authorisation process.

13. First Nations believes the system of commencement for these provisions is sensible and workable in practice.

Part 3 – Replacement of applicant

14. First Nations generally supports the introduction of means by which claim groups can appoint a replacement applicant and/or can succession plan to prevent against uncertainty following the death or incapacity of an applicant.
15. However, First Nations has concerns about proposed new subsections 66B(2A), (2B) and (2C) to the extent that they require applicants to apply to the Federal Court for a court order to allow a replacement member to be appointed or for remaining applicant members to act following the death or incapacity of an applicant. In some respects, this may be considered an unnecessary requirement that will nullify the proposal's intention to reduce the cost and timeframes involved in native title claim resolution and increase the burden imposed on the Federal Court. If such action is required, it may be preferable that this decision be vested back in the claim group, provided that there are appropriate checks and balances particularly in matters involving a question of the physical or mental incapacity of an applicant. First Nations considers that whilst requiring a court order would necessitate the provision of appropriate evidence to provide clarity in such matters, there may be scope to introduce similar requirements through a full group process.
16. For clarity, First Nations suggests the following re-wording of the new section 66B(2B):

    (ii) ~~unless~~ the authorisation of any continuing members ~~ceases~~ continues on the death or incapacity of the ceasing member—the continuing members;
17. First Nations believes the system of commencement for these provisions is sensible and workable in practice.

Schedule 2 – Indigenous land use agreements

18. First Nations supports these proposed amendments and believes the system of commencement for these provisions is sensible and workable in practice.

Schedule 3 – Historical extinguishment

19. First Nations supports these proposed amendments and believes the system of commencement for these provisions is sensible and workable in practice.

Schedule 4 – Allowing a registered native title body corporate to bring a compensation application

20. First Nations supports these proposed amendments and believes the system of commencement for these provisions is sensible and workable in practice.

Schedule 5 – Intervention and consent determination

21. First Nations does not oppose these proposed amendments.

Schedule 6 – Other procedural changes

Part 1 – Objections

22. First Nations does not oppose these proposed amendments.

Part 2 - Section 31 agreements

23. First Nations supports the proposed amendment of the Native Title Act to confirm the validity of section 31 agreements made prior to the McGlade decision.
24. First Nations does not oppose the inclusion of a requirement to notify of the existence of agreements additional or ancillary to Indigenous Land Use Agreements and section 31 agreements.
25. First Nations submits that, if a register of section 31 agreements is to be created, this system only requires provision of information necessary to create a public register identifying only the fact of an agreement and the parties to it.
26. First Nations does not oppose removing the requirement for government parties to be a party to a section 31 agreement. However First Nations cautions that this change should not result in government stakeholders abandoning their duties and obligations in respect of the matters negotiated in these agreements, and in supporting native title parties in their dealings with proponents over the exploration of their Country by enforcing and regulating these proponents.

Schedule 7 – National Native Title Tribunal

27. The public consultation paper proposes the introduction of a new section 60AAA into the Native Title Act, to establish a new function for the National Native Title Tribunal (**NNTT**) to provide assistance to registered native title bodies corporate and common law holders to promote agreement about native title and the operation of the Native Title Act. The public consultation paper states that it is expected that registered native title bodies corporate would go through internal dispute resolution processes prior to seeking the assistance of the NNTT.
28. First Nations is generally supportive of these amendments. However, it is recommended they be introduced amongst a more holistic, staged approach to dispute resolution, with disputants only able to escalate a dispute if they provide evidence that the previous stage has been exhausted. It is recommended that the amendments to the Native Title Act include specific reference to the requirement that registered native title bodies corporate go through internal dispute resolution as the first port of call, followed by engagement with relevant NTRBs, who are well placed to perform mediation and dispute resolution. First Nations recommends that a dispute is only able to be escalated to the NNTT where the dispute cannot be resolved at the NTRB level, and where referral to ORIC is not appropriate.
29. First Nations restates components of our January 2018 submission in relation to dispute resolution:
    a. First Nations generally supports the creation of a system delivering low cost and final resolution of disputes between members of the native title group and prescribed bodies corporate (**PBCs**).
    b. First Nations recommends amending the CATSI Act to implement a staged approach to dispute resolution, with disputants only able to escalate a dispute to the next stage if they provide evidence (for example, a certificate) that the previous stage has been exhausted. The stages of dispute resolution suggested are:
        i. Internal – Disputants attempt to resolve the dispute following the PBC's internal processes (where relevant) (noting that this is new proposed requirements in the CATSI Act reforms).
        ii. NTRB – In the event the dispute persists, disputants are required to engage the NTRB from their area to assist in dispute resolution. NRTBs are well placed to

perform this function as increasingly they have mediation and dispute management experience, as well as strong legal and research expertise.

iii. NNTT – In the event the dispute is unresolved at the NTRB level and involves 'native title' (*cf* governance) issues, it can be referred to the NNTT. The NNTT has appropriately trained and experienced staff and would not face the same perceptions in relation to lack of impartiality as NTRBs may.

iv. The Office of the Registrar of Indigenous Corporations (**ORIC**) – In the event the dispute involves governance (*cf* 'native title' issues), the dispute may referred to ORIC.

c. First Nations argues that there is ample scope to bring the PBC regulatory environment under one Act, rather than it sitting across the Native Title Act, PBC Regulations and CATSI Act. This dispute resolution process would remedy the current situation of there being relatively limited avenues for support in relation to dispute resolution and would provide additional powers to ORIC in line with the proposed changes. First Nations is generally supportive of reform to the dispute resolution avenues available to PBCs and members of native title groups.

30. Whilst First Nations thinks it appropriate to include the capacity for the NNTT to enter into agreements whereby parties are liable to pay the Commonwealth for assistance of the kind specified in section 60AAA, First Nations submits that the inclusion of this capacity should not, in practice, detract from the objective of providing low cost and final resolution of disputes.
31. First Nations does not oppose the insertion of section 115A into the Native Title Act.

Schedule 8 – Registered native title bodies corporate

Part 1 - Registrar oversight

32. First Nations does not support the current proposal to allow appointment of a special administrator in circumstances where the registered native title body corporate (**RNTBC**) "conducts its affairs contrary to the interests of the common law holders". As it stands, the proposal provides no detail about:
    a. What is meant by "contrary to the interests of the common law holders"?
    b. How is this assessed?
    c. Whether the power would be triggered by ORIC's assessment of an RNTBC's conduct being contrary to the interests of *all* common law holders or a *majority* of the common law holders versus a *minority* or a single individual?
33. First Nations has observed that complaints that an RNTBC is acting contrary to the interests of the common law holders can be triggered by disputes that are unlikely to resolved through the special administration process. In these circumstances, engagement in a dispute resolution process would be more likely to achieve meaningful outcomes.
34. Should this proposal be pursued, First Nations considers that it is critical to engage with the RNTBC sector to ensure any proposal in this regard is defined, supported, appropriate and workable.
35. In the interim, however, should this ground be included in section 487-5 of the CATSI Act, First Nations suggests the following language to clarify, in part, the intended operation and scope of proposed subsection 487-5(1)(ea):

    if the corporation is a registered native title body corporate – the affairs of the corporation are being conducted in a way that is contrary to the requirement that the corporation hold native title rights and interests on trust for the common law native title holders.

Part 2 – Membership and common law holders

Require RNTBC constitutions to include dispute resolution pathways for common law holders; require RNTBC constitutions to reflect the native title determination

36. First Nations supports the proposed amendments to subsection 66(1) of the CATSI Act in relation to disputes with non-members and the proposed amendments relating to eligibility requirements for common law holders.

Limit grounds for cancelling RNTBC membership

37. First Nations is generally supportive of the amendments related to limiting grounds for cancelling RNTBC membership. First Nations submits that the process for cancelling membership due to failure to pay fees should be analogous to the process for a member who misbehaves, i.e. should only be possible via a special resolution in a general meeting. First Nations views these grounds for cancellation as being of similar severity, particularly in circumstances where few, if any, RNTBCs require or rely on membership fees.

Application and transitional provisions

38. First Nations supports the inclusion of a two year period for corporation compliance with these amendments, provided that greater resourcing and support is made available to RTNBCs to assist with compliance.

Limit on RNTBC directors' discretion to refuse membership

39. First Nations supports the proposed amendments to remove director discretion to refuse membership where an applicant meets the corporation's eligibility requirements.
40. First Nations believes the system of commencement for these provisions is sensible and workable in practice.

Part 3 – Jurisdiction of courts

41. First Nations does not oppose these amendments and believes the system of commencement for these provisions is sensible and workable in practice.

Schedule 9 – Just terms compensation

42. First Nations supports this proposed insertion into the Native Title Act.

Registered Native Title Bodies Corporation Legislation Amendment Regulations 2018

Clarify the requirement to consult with groups of common law holders

43. First Nations does not oppose the repeal of sub-regulation 8(5) of the PBC Regulations.
44. First Nations generally supports the inclusion of a process whereby common law holders can make 'standing instruction decisions' in relation to native title decisions. However, First Nations submits that the amendments to the PBC Regulations should be clear that such 'standing instruction decisions' can be made by common law holders absent the need for a particular decision (i.e. common law holders could establish a decision-making process prior to the need to make a decision). Whilst First Nations supports the proposed process for standing instruction decisions and the distinction between high and low level decisions, First Nations believes that the drafting of these amendments could be made clearer.

45. First Nations supports the proposed amendments requiring consultation with, and consent of, common law holders or persons entitled to compensation before making a compensation application.
46. First Nations is generally supportive of the proposed changes in relation to certification.
47. First Nations opposes the proposed repealing of sub-regulation 8(2) of the PBC Regulations to remove the requirement for PBCs to consult and consider the views of native title representative bodies. First Nations reiterates that the existing provisions ensure PBCs have the benefit of the views and experience of the relevant NTRB developed over many years and the benefit of an awareness of current practice in relation to future act benefits. Further, not having oversight on the native title matters or decisions relevant to a PBC may likely impose disadvantage to the PBC in so far as the NTRB is unable to accurately gauge the resources it can dedicate to the PBC in its work with the native title holders on other projects. Having the requirement to consult with NTRBs in place for PBCs ensures the protection of the rights of all native title holders represented by the PBC in question.

10 December 2018