Australian Government
Attorney-General's Department

Submission

Consultation, reform or review details

Title: Exposure Draft Native Title Reforms

Date of submission: 10 Dec 2018

Your details

Organisation: n/a

If you are providing a submission on behalf of an organisation, please provide the name of a contact person.

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Yes No

Your submission

1. I am an independent legal consultant, with a decade of experience as a legal practitioner and consultant in NSW, specialising in native title and Aboriginal cultural heritage protection. I have represented and advised Traditional Owners in relation to native title claimant applications and the future acts regime, and have worked as a legal practitioner in the native title representative body (**NTRB**) system, in private practice, and at a Community Legal Centre. At postgraduate level, I hold an LLM from the University of Dundee, Scotland (as an Aurora Project Scholar) and an MPhil(Law) from the University of Newcastle; during the course of both these degrees I published several articles, research papers, dissertations and theses relating to native title jurisprudence. In addition, I have previously held a position as a member of the Law Society of NSW Indigenous Issues Committee.

2. This submission is not intended to provide a thorough examination and response to the proposed Bills[1] and the *Exposure draft Native Title Legislation Amendment Bill 2018, Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 - Public consultation paper* (October 2018) (**Consultation Paper**). Nor is it intended to address all the provisions of the exposure drafts of the proposed Bills; rather it intends provide particular comments and recommendations on those aspects relevant to my experience and expertise.

Summary of Recommendations

- The proposal to specifically provide provisions for the claim group to place conditions upon the authorisation of the Applicant are supported, as are the proposed mechanisms to support this. The proposed s 251BA and the amendments to s 62A of the NTA are supported. The mechanisms proposed by the new ss 186(1)(h), 24CG(3)(b)(iii), 203BW(2)(aa), 203BE(5)(c) and the amendments to ss 61 and 190C(4)(b) are supported. The consequential amendments to ss 24CH(2)(d)(i), 24CI(1) and 24CK(2)(c) are supported.

- Introduction of mechanisms for timely resolution of disputes between a claim group and an Applicant regarding alleged breaches of the conditions placed upon the authorisation of the Applicant should be investigated.

- The proposal to clarify that the Applicant owes a fiduciary duty to the claim group is supported. The proposed new s 62B of the NTA is supported.

- As per Recommendation 10-9 of the ALRC, provisions should be introduced into the NTA to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.

[1] The Native Title Legislation Amendment Bill 2018 (**NTA Bill**) and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 (**RNTBC Bill**).

- The proposal to provide a displaceable general rule that the applicant can act by majority and a majority must be parties to any native title agreement is supported. The proposed new ss 31(1)(1C) and 31(1D) of the NTA, the amendments to ss 24CD, 24CL, 24DE, and the Note to s 29(2) are supported.

- NTRBs should be given specific additional resources (including funding) to arrange for claim group meetings for all claim groups they represent, to enable those claim groups to consider whether they wish to impose conditions on the authorisation of the Applicant to displace the new general rule. Additional resources (including funding) should be provided to either the NNTT or the relevant NTRB to assist them inform claim groups not represented by an NTRB of the implications of the proposed amendments. Funding should be made available for claim groups not represented by an NTRB to hold claim group meetings to consider whether they wish to impose conditions on the Authorisation of the Applicant to displace the new general rule. Such additional resourcing should be provided within the six month transitional period.

- The proposal to introduce a specific mechanism to alter the composition of the Applicant, in accordance with the claim group's authorisation of the Applicant, in circumstances where a member of the Applicant passes away or becomes unable to perform their functions as Applicant is supported. The proposed new ss 66(2A)-(2C) of the NTA are supported.

- The Government should consider reforms to the right to negotiate process. Particularly, the Government should prepare and release for consultation draft legislation enshrining good faith negotiation principles within the NTA.

- Item 6(1)(d) of Division 1, Pt 2, Sch 6 of the NTA Bill should be amended to provide that Item 6(2) only applies where at least a majority of the members of the Applicant are a party to the agreement. Subject to this amendment, Item 6 is supported.

- The proposal to require the NNTT be notified of any ancillary agreements made pursuant to a s 31 agreement is supported. The proposed addition of a new s 41A(1)(c) to the NTA is supported.

- The proposal to create a public register of s 31 agreements is supported. The Government should consider, as part of this register, publication of the content of s 31 agreements and ancillary agreements thereto.

- The Federal Government should immediately investigate the practice of the State of NSW in withholding consent to native title determinations until the terms of an ILUA have been negotiated. If deemed necessary following these investigations, the Federal Government should publish recommendations to the State of NSW in regards to the proper conduct of consent determinations.

- The proposal that mechanisms for native title parties and the Government to agree to disregard extinguishment of native title over National and State Parks be introduced is supported. The proposed s 47C(8)(a)(iv) should be removed; otherwise the proposed new s 47C of the NTA is supported.

- Recommendations 5-1 to 5-5 and 6-1 to 6-2 of the ALRC Report should be included in the NTA Bill. Failing this, those recommendations should be immediately introduced in a separate Bill.

- The proposal that the coverage of s 47 be extended to include pastoral leases held by RNTBCs is supported. The proposed amendment to s 47C (1)(b)(iii) of the NTA is supported

- The proposal that the future act regime be extended to apply to land and waters to which ss 47, 47A, 47B and the proposed s 47C applies or may apply is supported. The proposed amendments to ss 224 and 227 of the NTA are supported.

- Guidelines should be developed to assist proponents to understand the implications of the aforementioned amendments, and direction provided to assist State and local governments in monitoring compliance with these new provisions.

- The proposal that the Commonwealth Minister's power to intervene in High Court proceedings be clarified is supported. The proposed amendments to s 84A(1) of the NTA are supported.

- The proposal that body corporate ILUAs be permitted over areas where native title has been extinguished is supported. The proposed new s 24BC(2)(a)-(b) of the NTA is supported.

- The proposal to require the Registrar to be satisfied that an ILUA meets the requirements of ss 24CB-24CE before instigating the notification process for that ILUA is supported. The proposed amendments to s 24CH of the NTA is supported.

- The proposal that minor amendments may be made to an ILUA without necessitating the ILUA to go through the registration process again is supported. However more explanation and/or clarity in drafting is required in relation to three of the proposed categories of minor amendments before they can be supported. Accordingly, the proposed ss 24ED of the NTA is only supported with the excision of ss 24ED(1)(c), 24ED(1)(e) and 24CE(1)(f).

- The proposal to clarify that removal of an ILUA from the Register does not invalidate future acts carried out pursuant to that ILUA is supported only to the extent that it does not apply to ILUAs deregistered pursuant to s 199C(1)(c)(iii). The proposed new ss 24EB(2A) and 24EBA(7) of the NTA should be amended by including the words 'other than an agreement removed pursuant to s 199C(1)(c)(iii)'.

- The Government should review the funding and resources available to RNTBCs, including under the Indigenous Advancement Strategy, to inform the extension of funding made beyond 2018-2019.

- The proposal to require that the membership requirements in an RNTBC constitution be drafted so as to allow all all native title holders (as per the determination) to become members is supported, subject to an amendment to permit constitutional provisions limiting membership to persons over 18 years of age.

- The removal of discretion of Directors of RNTBCs to withhold membership to persons meeting membership criteria is supported.

- The proposal to limit the grounds for cancellation of membership to non-eligibility, non-payment of membership fees or being uncontactable is supported, however it is recommended the Government consider allowing RNTBCs to retain discretion to expel members where there exist within traditional laws and customs mechanisms by which persons can be expelled for misbehaviour.

- Further amendments to 141-25 should be drafted permitting constitutional provisions which limit membership to persons over 18 years of age. The new s 150-22 of the NTA is supported, subject to consideration of amendments allowing RNTBCs to retain discretion to expel members where there exist within traditional laws and customs mechanisms by which persons can be expelled for misbehaviour. The proposed amendments to ss 144-10, 150-15 and 150-20 are supported.

- The proposal to create two categories of native title decisions, and the ability for native title holders to provide standing instructions in relation to making native title decisions and alternate consultation processes, is supported. The proposed amendments to cl 3(1) of the PBC Regulation and the proposed new cll 8 and 8A are supported.

- The proposal to remove the requirement for RNTBCs to consult with NTRBs before making native title decisions is not supported. The repeal of cl 8(2) of the PBC Regulation is not supported.

- The proposal to repeal of cl 8(5) of the PBC Regulation is not supported.

- The proposal requiring the preparation of certificates to document native title decisions made by RNTBCs is supported. The proposed amendments to cll 9 cl 10 of the PBC Regulation and cl 55A of the CATSI Regulations are supported. RNTBCs should be provided with the necessary resourcing to enable them to build the necessary capacity and develop and adopt the necessary operating procedures to enable them to comply with this proposal.

- The proposal to allow RNTBCs to make compensation claims where native title has been fully extinguished within the external boundary of the area of an approved determination of native title is supported. The amendments to ss 58 and 61 of the NTA and cll 7A and 8B of the PBC Regulation are supported.

- The proposal to require RNTBC rule books to include processes for resolving disputes with native title holders who are not members of the RNTBC is supported. The amendments to ss 57-5, 63-1 and 66-1 of the CATSI Act are supported.

- The proposal to add conducting affairs contrary to the interests of native title holders as a ground upon which ORIC may appoint a special administrator is supported. The amendments to s 487-5 of the CATSI Act are supported.

- Consideration should be given to building parameters for selecting special administrators into the regulatory framework, to ensure special administrators have the necessary experience, native title-specific knowledge and cultural competence.

- The extension of Federal Court jurisdiction to hear all civil matters relating to RNTBCs arising under the CATSI Act, and matters arising from the ADJR Act regarding decisions made under the CATSI Act with respect to RNTBCs, is supported. The amendments to s 586-1 of the CATSI Act and consequential amendments are supported.

- The proposal that the NNTT be empowered to provide assistance at the request of either RNTBCs or native title holders is supported. The proposed s 60AAA(1)-(2) of the NTA should be redrafted to better clarify and restrict the scope of the assistance NNTT is able to provide. The proposed s 60AAA(3) that allows the NNTT able to enter into cost recovery mechanisms in respect of this assistance should be removed.

Role of Applicant

<u>Allowing claim group to place conditions on the authorisation of the Applicant</u>

3. The placing of conditions upon the authorisation of the Applicant at authorisation is a mechanism that has, in fact, often been utilised in practice by native title claim groups. It is a process which serves to increase accountability of the Applicant to the claim group, and gives the claim group specific control over the scope of authority given to the Applicant. This is particularly important, given the extremely broad scope of the Applicant's power under s 62A of the *Native Title Act 1993* (**NTA**). Although there is no apparent reason why claim groups cannot continue to place conditions upon the authorisation of the Applicant under the NTA as it stands, the importance of this issue warrants clarification of this issue, to give direction to both claim groups and their Applicants in this regard. The drafting of the proposed s 251BA and the amendments to s 62A of the NTA are appropriate to achieve this aim, and consistent with existing claim authorisation procedures.

4. The proposals requiring any such conditions be outlined in the originating application (supported by affidavit evidence) and recorded on the relevant National Native Title Tribunal (**NNTT**) register, the process for amendment of these conditions for existing applications, and provisions for NTRB certification of conditions are sound, and consistent with the equivalent existing provisions.

5. The Consultation Paper and proposed Note to s 251BA(2) indicate that the remedy for claim groups asserting that members of the Applicant have not complied with the conditions placed upon their authorisation pursuant to s 251BA, will be to replace the Applicant pursuant to s 66B or seek a Federal Court order pursuant to s 84D. Both these processes, particularly s 66B processes, can be costly and time-consuming, so much so as to significantly delay both the resolution of a native title claimant application and any negotiation or other processes in train under the future act regime.[2] Therefore the Government should investigate options for timely resolution of disputes between a claim group and an Applicant regarding breaches of the conditions placed upon the authorisation of the Applicant. Such investigation should not delay the adoption of the proposed amendments to the NTA, but should be conducted once those amendments have been adopted.

   Recommendations:

   - *The proposal to specifically provide provisions for the claim group to place conditions upon the authorisation of the Applicant are supported, as are the proposed mechanisms to achieve this. The proposed s 251BA and the amendments to s 62A of the NTA are supported. The mechanisms proposed by the new ss 186(1)(h), 24CG(3)(b)(iii), 203BW(2)(aa), 203BE(5)(c) and the amendments to ss 61 and 190C(4)(b) are supported. The consequential amendments to ss 24CH(2)(d)(i), 24CI(1) and 24CK(2)(c) are supported.*

   - *Introduction of mechanisms for timely resolution of disputes between a claim group and an Applicant regarding alleged breaches of the conditions placed upon the authorisation of the Applicant should be investigated.*

<u>Clarification of fiduciary duty of the Applicant</u>

6. The Consultation paper at p 5 discusses the proposal to clarify, consistently with *Gebadi v Woosup*,[3] that the Applicant holds a fiduciary duty to the claim group. The proposed new s 62B seeks to achieve this by confirming that the obligations of the Applicant under the NTA do not relieve or detract from any other duties the Applicant owes to the claim group at common law or in equity. Although it could be argued that it is unnecessary to prescribe in legislation law that has already been made in the Federal Court, in this instance the importance of this issue necessitates it being specifically included in the NTA, for the clarity of laypersons engaging with native title claimant processes.

7. The Consultation Paper at p 5 also makes reference to the discussion in the *Connection to Country: Review of the* Native Title Act 1993 *(Cth) – Final Report* (April 2015) (**ALRC Report**) on this issue. The ALRC Report (at 10.101-10.111) discusses this issue in detail, and notes that there are 'difficulties' relying on fiduciary duties to regulate the conduct of Applicants. In order to avoid these difficulties, the ALRC recommended (Recommendation 10-9) that the NTA be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders. The Consultation Paper does not explain why this recommendation has not been adopted in the NTA Bill. In the absence of any reasons to the contrary, the recommendation of the ALRC should be adopted.

   Recommendations:

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[2] As an example of these issues, and the sprawling nature of legal challenges which can arise from them, see the several decisions relating to the scope of authorisation and replacement of the Gomeroi People native title claimant applicant: *Gomeroi People v Attorney-General of New South Wales* [2016] 241 FCR 301, *Gomeroi People v Attorney General of New South Wales* [2017] FCA 1464, *Boney v Attorney General of New South Wales* [2018] FCA 1066 and *Boney v Attorney General of New South Wales* [2018] FCAFC 218.

[3] [2017] FCA 1467.

- *The proposal to clarify that the Applicant owes a fiduciary duty to the claim group is supported. The proposed new s 62B of the NTA is supported.*

- *As per Recommendation 10-9 of the ALRC, provisions should be introduced into the NTA to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders.*

Allowing a majority of the Applicant to make decisions or sign native title agreement (as the default position)

8. The Consultation Paper discusses the proposal to provide a general rule that the applicant can act by majority, and that a majority of the Applicant must be parties to any valid native title agreement. It is intended (p 6) that this general rule can be displaced where the claim group places conditions upon the authorisation of the Applicant requiring a certain number/proportion of the Applicant to take specific actions. This displacement of the general rule is critical as it allows claim groups to consider whether the general rule would be appropriate for their claim group composition. For example, many claim groups appoint an Applicants each from particular family groups within the claim group. In such circumstances, the claim group may wish to ensure that all or certain family groups, via their representatives on the Applicant, must agree to particular actions taken by the Applicant.

9. The drafting of the general provisions (proposed new s 62C of the NTA), provisions regarding area and alternative procedure Indigenous Land Use Agreements (**ILUAs**) (amendments to ss 24CD, 24CL and 24DE) and s 31 agreements (amended note to s 29(2) and proposed new ss 31(1C) and 31(1D)) are appropriate to achieve this aim. These appropriately replace the amendments occasioned by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017*.

10. The transitional provisions provide for a six month lead-in period, to allow claim groups to consider whether the general rule should be displaced. This is an appropriate transitional period. The efficacy of the proposal relies on the existing claim groups (including those not represented by NTRBs) being informed as to the implications of the amendments, to consider whether they wish to impose conditions on the authorisation of the Applicant to displace the general rule. NTRBs should be given specific additional funding arrange for claim group meetings for all claim groups they represent, to enable those claim groups to consider whether they wish to impose such conditions. Either the relevant NTRB or the NNTT should be given funding to enable them to inform claim groups not represented by an NTRB of the implications of the proposed amendments, and make funding available for those claim groups to hold claim group meetings to consider whether they wish to impose such conditions. Without the provision of such additional resources, there may be claim groups whom are unaware of the new provisions, and thus unaware that, in the absence of conditions on authorisation to the contrary, their Applicants will be able to act by majority rather than unanimously.

Recommendations:

- *The proposal to provide a displaceable general rule that the applicant can act by majority and a majority must be parties to any native title agreement is supported. The proposed new ss 31(1)(1C) and 31(1D) of the NTA, the amendments to ss 24CD, 24CL, 24DE, and the Note to s 29(2) are supported.*

- *NTRBs should be given specific additional resources (including funding) to arrange for claim group meetings for all claim groups they represent, to enable those claim groups to consider whether they wish to impose conditions on the authorisation of the Applicant to displace the new general rule. Additional resources (including funding) should be provided to either the NNTT or the relevant NTRB to assist them inform claim groups not represented by an NTRB of the implications of the proposed amendments. Funding should be made available for claim groups not represented by an NTRB to hold claim group meetings to consider whether they wish to impose conditions on the Authorisation*

of the Applicant to displace the new general rule. Such additional resourcing should be provided within the six month transitional period.

Simplifying process for claim groups to replace ill or deceased applicants

11. The Consultation paper at p 8 indicates that the NTA Bill is intended to implement Recommendations 10-7 and 10-8 of the ALRC Report. These recommendations propose introducing a specific mechanism to alter the composition of the Applicant, in accordance with the claim's groups authorisation of the Applicant, in circumstances where a member of the Applicant passes away or becomes unable to perform their functions as Applicant. For the reasons outlined in the ALRC Report (at 10.84-10.92) this proposal is supported. Particularly, this removes the necessity for a claim group to go through the costly and time-consuming re-authorisation process in these circumstances. The proposal that altering the composition of the Authorisation may only be ordered by the Court provides a safeguard to ensure that it only occurs in the specified circumstances, and is not used as a means of resolving or progressing disputes between Applicants.[4] The drafting of the proposed new ss 66B(2A)-(2C) are appropriate to achieve the desired proposal.

Recommendation:

- *The proposal to introduce a specific mechanism to alter the composition of the Applicant, in accordance with the claim group's authorisation of the Applicant, in circumstances where a member of the Applicant passes away or becomes unable to perform their functions as Applicant is supported. The proposed new ss 66(2A)-(2C) of the NTA are supported.*

Section 31 Agreements

12. These reforms have missed an opportunity to address reforms to the right to negotiate (**RTN**) process under the NTA, particularly around the development of good faith negotiation principles. These were canvassed in the Native Title Amendment Bill 2012 (**2012 Bill**), which lapsed on the dissolution of the government in August 2013, and appears not to have been considered by the Government since. Given consultation had already occurred on these proposals, it would not have necessitated significant additional work to have reviewed the results of previous consultation and include the proposal in the NTA Bill. It is noteworthy that many of the matters addressed in the NTA Bill (e.g. streamlining of ILUA processes and the ability to disregard historical extinguishment) had their genesis in the 2012 Bill. Given the limited and minimal principles that have arisen at common law regarding the standard of good faith required in navigating the RTN provisions of the NTA,[5] a lack of good faith principles represents a significant barrier to native title holders realising significant and meaningful benefit from the RTN provisions of the NTA. Given the absence of these provisions in the Bill, the Government should prepare and release for consultation draft legislation enshrining good faith negotiation principles within the NTA.

Recommendation:

- *The Government should consider reforms to the right to negotiate process. Particularly, the Government should prepare and release for consultation draft legislation enshrining good faith negotiation principles within the NTA.*

Confirming validity of past agreement where at least 1 member of the Applicant has signed

[4] See discussion at 10.89 of the ALRC Report.

[5] See, for example, *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49.

13. The Consultation Paper on p 22 indicates the NTA Bill seeks, in further response to *McGlade v Native Title Registrar*[6], to extend the amendments made by the 2017 Bill in regards to area ILUAs, to also apply to s 31 agreements. Thus item 6 of Division 1, Pt 2, Sch 6 of the NTA Bill confirms that all section 31 agreements entered into prior to the enactment of the NTA Bill, where at least one member of the Applicant has signed, are valid.

14. There are several legitimate circumstances in which an existing s 31 agreement is not signed by all members of the Applicant (death of an Applicant, inability to contact an Applicant etc.). To respond to such circumstances, and the potential issue arising from *McGlade*, it is appropriate that the NTA be amended such that those agreements are rendered valid.

15. However, the proposal in the NTA Bill extends the response to *McGlade* too far. Unlike ILUAs (and as noted on p 22 of the Consultation Paper), there is no authorisation process required for the execution of s 31 agreements by the Applicant. The authorisation process is a significant safeguard to ensure the integrity of decision-making. Without it, the potential for proponents to (to adopt a phrase regularly adopted by the current Federal Government) 'game the system' in relation to s 31 agreements is significant. For example, a proponent may induce the signature of one member of the applicant to a s 31 agreement, in circumstances where the other members of the applicant have not yet agreed to the agreement in question. If the proposal outlined in the NTA Bill is introduced, such an agreement would be validated. This is clearly an unacceptable outcome.

16. In order to prevent this outcome, Item 6(1)(d) should be amended to require at least a majority of the Applicant to have signed the agreement. In circumstances where there are multiple members of the Applicant, it is likely that, where reasonable attempts have been made to have all the members of the Applicants execute a s 31 agreement, at least half of those members will have executed the agreement. Whilst it will not be perfect in all circumstances, and may require a small number legitimate of s 31 agreements to be rectified to avoid invalidity, it is an appropriate amendment to prevent illegitimate s 31 agreements being validated.

Recommendation:

- *Item 6(1)(d) of Division 1, Pt 2, Sch 6 of the NTA Bill should be amended to provide that Item 6(2) only applies where at least a majority of the members of the Applicant are a party to the agreement. Subject to this amendment, Item 6 is supported.*

Register of s 31 agreements

17. The NTA Bill proposes to add to s 41A of the NTA a requirement that, in addition to the existing requirement that a copy of any finalised s 31 agreement must be provided to the NNTT, the NNTT must be notified of any ancillary agreements made pursuant to that s 31 agreement. The Consultation Paper at p 23 indicates the Government is also considering introducing a requirement that the NNTT maintain a register of s 31 agreements. These proposals are strongly supported. In practice, there are many native title holders who are parties, either directly or via persons who have passed away, to ancillary agreements which, despite not having lapsed or terminated, contain obligations which are not being met by proponents. This is particularly acute in relation to agreements entered into regarding claimant applications which have since been withdrawn or dismissed.[7] In many cases, particularly where some time has elapsed since the ancillary agreement was entered into, the native title holders will not have retained or have access to a copy of the agreement, which inhibits their ability to take action to enforce

[6] [2017] FCAFC 10 ('*McGlade*').

[7] To give an indication of the extent of this issue, the author is aware of an incidence where there are more than 80 ancillary agreements in existence relating to a now-withdrawn claim, the majority of which are not being adhered to by the proponent parties.

the agreement. Although it will, presumably, only have a prospective application, the existence of a s 31 agreement register will enable, in the future, native title holders to access the details of ancillary agreements they are parties to, to assist them them in taking action to enforce those agreements as necessary.

18. The Consultation Paper at p 23 specifies that, in the register proposal, the ancillary agreements themselves would not be made public. No argument is made in the Consultation Paper as to why this is the case. The Government should consider amending this proposal, to provide that ancillary agreements would in fact appear on the register.[8] Concerns around the content of ancillary agreements is a significant source of tension within and between native title claim groups, which can work to the detriment of the just and timely resolution of native title claimant applications. Publication of ancillary agreements would provide transparency in relation to the content of ancillary agreements to alleviate these tensions. Publication of ancillary agreements would also improve the access of all native title holders to substantial benefits from the RTN process,[9] by providing proponents and native title holders alike with a clear indication of best practice in relation to the content of ancillary agreements. It would also allow academic analyses of ancillary agreements , which could assist by identifying trends and suggesting options for improvement in agreement-making process. Any concerns about sensitive information (particularly culturally sensitive information) being published as a result of the publication of ancillary agreement could be addressed by permitting the agreements to appear in redacted form on the register.

Recommendations:

- *The proposal to require the NNTT be notified of any ancillary agreements made pursuant to a s 31 agreement is supported. The proposed addition of a new s 41A(1)(c) to the NTA is supported.*
- *The proposal to create a public register of s 31 agreements is supported. The Government should consider, as part of this register, publication of the content of s 31 agreements and ancillary agreements thereto.*

Claims Resolution and ILUAs

19. As indicated below, most of the proposals provided regarding claim resolution and ILUAs are supported by this submission. However the issue of claim resolution and ILUAs raises a particular problem faced in NSW in practice in relation to settlement of claimant application and ILUAs. As examined by the Federal Court in *Western Bundjalung People v Attorney General of New South Wales*,[10] the State of NSW, as lead respondent, has developed a practice of refusing to agree to consent determination of native title unless an accompanying ILUA has also been negotiated. This, in effect, holds the claims resolution

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This proposal has been previously canvassed by commentators. See, for example, Ciaran O'Faircheallaigh, *Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples*, 2(25) Lands, Rights Laws: Issues of Native Title (2004), at 6.

9 In this regard, from the limited analyses that are available, it would appear there is a general trend that native title holders in the south-east of the country are not able to leverage the same benefits from the RTN process as their counterparts in rest of Australia: Ross Mackay, *Australia's own North-South Divide: Inequalities in Indigenous Participation in the Mining Approvals Process under the Native Title Act* (LLM Dissertation, University of Dundee, 2012), citing Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous Peoples and Resource Developers' in *Honour Among Nations? Treaties and Agreement with Indigenous People* (Langton M, Tehan M, Palmer L & Shain K, eds, 2004). This situation is inequitable and should be addressed to enable all native title holders to access the beneficial provisions of the NTA equally.

10 [2017] FCA 992 . See particularly [57]-[60]

process ransom to the ILUA negotiation process, which is a fundamental misunderstanding and misapplication of the consent determination negotiation framework established under the NTA. This practice significantly impacts the just, timely and equitable resolution of claims in NSW. The strength of the language used by the Federal Court regarding this issue is instructive:

> [58]...It is apparent from submissions on behalf of the first respondent in various matters that in New South Wales ILUAs are seen by the State as a means, at least in part, of confining the very rights which consent determinations acknowledge and recognise. Whatever else ILUAs might be intended to achieve, they are not intended to be the "price" for a negotiation in good faith of an agreement under ss 87 or 87A...
>
> ...
>
> [61]...It was difficult not to form the impression that what was meant was an ILUA confining native title rights and interests that might otherwise be recognised in an agreement under ss 87 or 87A. How does this, I ask, involve fidelity to the provisions of the NTA?

20. This practice of the State of NSW seriously impacts the ability of native title holders in NSW to access the beneficial elements of the NTA on the same footing as their counterparts in other states. Accordingly, it warrants investigation by the Federal Government.

Recommendation:

- *The Federal Government should immediately investigate the practice of the State of NSW in withholding consent to native title determinations until the terms of an ILUA have been negotiated. If deemed necessary following these investigations, the Federal Government should publish recommendations to the State of NSW in regards to the proper conduct of consent determinations.*

Allow extinguished native title to be revived in National and State Parks

21. The NTA Bill proposes to introduce a new s 47C of the NTA, which provides a mechanism for native title parties and the Government to agree to disregard extinguishment of native title over National and State Parks. This is a commendable proposal. Particularly, it will go some way addressing the difficulties native title holders in the south-east of Australia face in having their native title rights and interests recognised and protected in their Country. These difficulties are occasioned by, *inter alia*, the historical circumstances of earlier and more extensive granting of freehold and other extinguishing titles, and the consequences of the *Wilson v Anderson*[11] decision, and create a significant inequity in the ability of all native title holders in the country to share in the beneficial provisions of the NTA.

22. The proposed amendments are, for the most part, appropriately drafted to achieve this aim. It is particularly pleasing to see that the scope of the proposed s 47C(7)(b) extends to allowing the extinguishing effect of acts prior to creation of a park to be disregarded. However, the automatic provision that public access to the park cannot be affected should be removed (s 47C(8)(iv)). Given that a) the government party represents the public at large and b) there is opportunity for public comment, it is appropriate that the retention of public access should be up for negotiation between the parties in each instance (i.e. by negotiating the relevant terms of the consent determination, noting that s 47C only applies where the Government party agrees). This would particularly allow for native title holders to achieve, via a native title determination, protection of areas of high cultural significance, in circumstances where that is acceptable to the Government party.

23. However, the difficulties faced by native title holders in the south-east of Australia in having rights and interests recognised under the NTA are not limited to issues of extinguishment. The Government has

[11] [2002] HCA 29.

missed an opportunity in the NTA Bill to address the excessively onerous burden of proof claimants face in relation to proving continuity of native title. This burden is disproportionately borne by native title claimants in the south-east of the country, due the longer and more intense history of dislocation and dispossession suffered. Reform to this restrictive element of the NTA has been discussed and proposed in many forums, most notably in the ALRC Report at Chapters 5 to 6. A number of recommendations were made in the ALRC Report to amend the NTA to alleviate the burden of proof in native title claims. The Consultation Paper is silent as to why these recommendations are not addressed in the NTA Bill. These recommendations should be included in the NTA Bill and introduced to Parliament, or failing this, be immediately introduced in separate legislation, noting the significant consultation undertaken by the ALRC in producing the ALRC Report.

Recommendations:

- *The proposal that mechanisms for native title parties and the Government to agree to disregard extinguishment of native title over National and State Parks be introduced is supported. The proposed s 47C(8)(a)(iv) should be removed; otherwise the proposed new s 47C of the NTA is supported.*
- *Recommendations 5-1 to 5-5 and 6-1 to 6-2 of the ALRC Report should be included in the NTA Bill. Failing this, those recommendations should be immediately be introduced in a separate Bill.*

Allow historical extinguishment to be disregarded over pastoral leases controlled or owned by claimants

24. The NTA Bill proposes to amend s 47, which provides for the disregarding of historical extinguishment over certain pastoral ease, to extend to pastoral leases held by Registered Native Title Body Corporate (**RNTBC**). This is an appropriate amendment, which, as discussed in the Consultation Paper at p 5, addresses a likely unintentional failure of coverage of s 47.

Recommendation:

- *The proposal that the coverage of s 47 be extended to include pastoral leases held by RNTBCs is supported. The proposed amendment to s 47C (1)(b)(iii) of the NTA is supported.*

Ensuring the future act regime applies where prior extinguishment has been (or may be) disregarded

25. Amendments to ss 224 and 227 are proposed to provide that the future act regime applies to land and waters in which prior extinguishment has been disregarded under ss 47, 47A, 47B and the proposed s 47C. The proposal is appropriate to properly extend the beneficial aspects of those provisions to the future act regime while an application is on foot. To ensure that these provisions are effective in practice, guidelines must be developed and promoted to assist proponents to understand the implications of these amendments, and direction provided to assist State and local governments in monitoring compliance with these new provisions.

Recommendations:

- *The proposal that the future act regime be extended to apply to land and waters to which ss 47, 47A, 47B and the proposed s 47C applies or may apply is supported. The proposed amendments to ss 224 and 227 of the NTA are supported.*
- *Guidelines should be developed to assist proponents to understand the implications of the aforementioned amendments, and direction provided to assist State and local governments in monitoring compliance with these new provisions.*

Clarifying powers of and obligations of the Commonwealth Minister

26. The NTA Bill proposes to amend s 84A(1) to clarify that the Commonwealth Minister has the power to intervene in High Court proceedings relating to the NTA. For the reasons discussed in the Consultation paper on p 18, this proposal is supported.

Recommendation:

- *The proposal that the Commonwealth Minister's power to intervene in High Court proceedings be clarified is supported. The proposed amendments to s 84A(1) of the NTA are supported.*

Allowing body corporate ILUAs to be made over areas where native title has been extinguished

27. The NTA Bill proposes a new ss 24BC(2)(a)-(b) of the NTA which would allow body corporate ILUAs to be made over areas in which has been determined not to exist or which have been excluded from a determination on the basis that they are subject to a previous exclusive possession act. For the reasons outlined in the Consultation Paper on p 10, these provisions are supported as they will allow certain ILUA negotiations to be consolidated.

Recommendation:

- *The proposal that body corporate ILUAs be permitted over areas where native title has been extinguished is supported. The proposed new s 24BC(2)(a)-(b) of the NTA is supported.*

Simplification and clarification of ILUA registration processes

28. The NTA Bill proposes amendments to s 24CH of the NTA to require the Registrar be satisfied an ILUA meets the requirements of ss 24CB-24CE before instigating the notification process for that ILUA. This is an appropriate proposal, which reduces unnecessary wastage of NNTT resources in notifying ILUAs which are not capable of registration.

29. The NTA Bill proposes a new s 24ED of the NTA to allow minor amendments to be made to an ILUA without requiring the ILUA to go through a new registration process. The amendments covered by the proposed s 24ED are (where they are agreed between the parties):

    a) updating property descriptions, but not so as to result in inclusion of additional land (s 24ED(1)(c));

    b) updating the parties, where a party has assigned or otherwise transferred rights and liabilities (s 24ED(1)(d));

    c) updating administrative processes (s 24ED(1)(e)); and

    d) amendments specified by the Minister in a legislative instrument (s 24ED(1)(f)).

30. As a whole, the proposal is worthwhile, as it has the potential to reduce unnecessary expenditure of time and resources in the (re-)registration process. However, the Discussion Paper does not provide any significant discussion of the four categories of minor amendments adopted for this proposal. The types of amendments prescribed in s 24ED(1)(d) are clearly appropriate to be included in the proposal. However the other types of amendments prescribed in the proposed s 24ED(1), without further explanation, are not able to be supported. Specifically:

    - The rationale for s 24ED(1)(c) is not immediately clear. Therefore it is not possible to form an opinion as to whether it is appropriate;

    - There is no definition or explanation of what 'administrative processes' are for the purposes of s 24ED(1)(e). Without such definition or explanation, which should be drafted into the Bill, it cannot be supported; and

- No explanation has been provided on what types of 'things' to be specified in a Minister's instrument were contemplated in the drafting of s 24ED(1)(f). Without such an explanation, caution dictates that any particular categories of amendment subject to s 24ED should be drafted into the primary legislation.

31. The NTA Bill proposes amendments to ss 24EB and 24EBA of the NTA to clarify that removal of an ILUA from the Register does not invalidate future acts carried out pursuant to that ILUA. As noted at p 11 of the Consultation paper, the circumstances in which an ILUA may be removed from the Register, as prescribed by s 199C of the NTA, are:

    a) that the ILUA has expired;

    b) that all parties wish the ILUA to be terminated; and

    c) the Federal Court finds the ILUA was induced by fraud, duress or undue influence.

32. As it relates to the circumstances of a) and b) above, the proposal is appropriate, and clarifies what has always been the intent of the ILUA regime NTA. However this is not the case in relation to the circumstances in c) above. If a proponent induces an ILUA by fraud, duress or undue influence they should not get the benefit (i.e. future act validation) of that ILUA. It is entirely appropriate that those future acts should not be validated, and the proponents should be liable for any damage (including impairment of native title rights and interests) arising from that invalidation. To allow the validation of future acts pursuant to an improperly obtained ILUA would not only allow parties to existing ILUAs to benefit from this impropriety, it may also act as an incentive for parties wishing to validate future acts in the future to procure an ILUA by means of fraud, duress or undue influence. For native title holders, it would result in their native title rights and interests to be impacted, in perpetuity, pursuant to an agreement which was improperly obtained by another party, and to which they may not have given free, prior and informed consent. Accordingly, the proposed ss 24EB(2A) and 24EBA(7) should be amended by including the words '*other than an agreement removed pursuant to s 199C(1)(c)(iii)*'. It should be further considered whether this would necessitate the addition of a s 24EBA(8) prescribing the consequences of deregistration of an ILUA pursuant to s 199C(2) for future acts carried out pursuant to that ILUA, or leave it to be determined according to common law/equity principles. The proposed Note 2 to s 199C(1) should also be amended accordingly.

Recommendations:

- *The proposal to require the Registrar to be satisfied that an ILUA meets the requirements of ss 24CB-24CE before instigating the notification process for that ILUA is supported. The proposed amendments to s 24CH of the NTA are supported.*

- *The proposal that minor amendments may be made to an ILUA without necessitating the ILUA to go through the registration process again is supported. However more explanation and/or clarity in drafting is required in relation to three of the proposed categories of minor amendments before they can be supported. Accordingly, the proposed ss 24ED of the NTA is only supported with the excision of ss 24ED(1)(c), 24ED(1)(e) and 24CE(1)(f).*

- *The proposal to clarify that removal of an ILUA from the Register does not invalidate future acts carried out pursuant to that ILUA is supported only to the extent that it does not apply to ILUAs deregistered pursuant to s 199C(1)(c)(iii). The proposed new ss 24EB(2A) and 24EBA(7) of the NTA should be amended by including the words 'other than an agreement removed pursuant to s 199C(1)(c)(iii)'.*

RNTBC Accountability

33. Before addressing the proposals outlined in the Bills regarding RNTBCs, it is important to note that the ability of an RNTBC to effectively function is highly dependent on the funding available to RNTBCs. If RNTBCs are not adequately funded to carry out their functions, then native title holders will be unable to properly realise benefits afforded to them under the NTA. Therefore the Government should review the funding and resources available to RNTBCs, including the effectiveness of funding provided under the Indigenous Advancement Strategy. Such a review should direct the reservation and provision of funds to RNTBCS, including but not limited to the extension of funding available capacity building via the Indigenous Advancement Strategy beyond 2018-2019.

34. In relation specifically to the reforms proposed in the Bills, any actual benefit or improvement from the reforms relies upon RNTBCs having the ability and freedom to comply with those reforms and leverage them to benefit their members. This ability and freedom cannot be provided unless RNTBCs have access to sufficient, unconditional funding.

Recommendation:

- *The Government should review the funding and resources available to RNTBCs, including under the Indigenous Advancement Strategy, to inform the extension of funding beyond 2018-2019.*

<u>RNTBC membership</u>

35. The NTA Bill aims to amend the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI Act**) to ensure that the membership of RNTBCs reflects membership of the relevant native title holding group. It achieves this by three distinct provisions. Firstly, the RNTBC Bill will be amended to require that the membership requirements in an RNTBC constitution must be drafted so as to allow all native title holders (as per the determination) to become members. Secondly, the RNTBC Bill proposes to remove the discretion of Directors of RNTBCs to withhold membership to persons whom meet membership criteria. Thirdly, the RNTBC Bill will limit the grounds for cancellation of membership to non-eligibility, non-payment of membership fees or being uncontactable. This will be achieved by introduction of a new s 150-22 and amendments to ss 144-10, 141-25, 150-15 and 150-20.

36. The aim of these amendments is commendable. In recognition of the critical role RTNCs play in managing native title rights and interests, it is entirely appropriate to tighten the legislative controls on membership to ensure that all native title holders are able to benefit from and participate in the management of native title rights and interests. However there are some issues with the amendments as drafted. Firstly, certain native title holding groups may have mechanisms within their traditional laws and customs by which persons can be excised from the group for misbehaviour. In those circumstances, it may be appropriate to permit an RNTBC to expel a person from membership for misbehaviour (which could be achieved by adding an additional sub-section after the proposed s 150-22 (2) to that effect). Secondly, many RNTBC constitution s limit membership to person over 18 years of age. This is, of course, an appropriate mechanism. However, most native title determinations do not contain such an age limitation in describing the native title holders. Thus, if the proposed amendments to s 141-25 are made, it would require any RNTBC constitutional provisions limiting membership to persons over 18 years of age to be removed. Such constitutional provisions should be permitted to remain.

37. Transitional provisions proposed in the NTA Bill give existing RNTBCs 2 years to update constitutions to reflect the new requirements. This is an appropriate transitional period. The necessary constitutional amendments will likely require RNTBCs to obtain expert assistance (particularly legal advice) and hold general meetings. Specific funding and resources should be provided to RNTBCS, within this 2 year period, to allow them to make the necessary constitutional amendments.

Recommendations:

- *The proposal to require that the membership requirements in an RNTBC constitution be drafted so as to allow all all native title holders (as per the determination) to become members is supported, subject to an amendment to permit constitutional provisions limiting membership to persons over 18 years of age*.

- *The removal of discretion of Directors of RNTBCs to withhold membership to persons meeting membership criteria is supported.*

- *The proposal to limit the grounds for cancellation of membership to non-eligibility, non-payment of membership fees or being uncontactable is supported, however it is recommended the Government consider allowing RNTBCs to retain discretion to expel members where there exist within traditional laws and customs mechanisms by which persons can be expelled for misbehaviour.*

- *Further amendments to 141-25 should be drafted permitting constitutional provisions which limit membership to persons over 18 years of age. The new s 150-22 of the NTA is supported, subject to consideration of amendments allowing RNTBCs to retain discretion to expel members where there exist within traditional laws and customs mechanisms by which persons can be expelled for misbehaviour. The proposed amendments to ss 144-10, 150-15 and 150-20 are supported.*

Consultation and consent

38. The NTRB Bill proposes amendments in the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (**PBC Regulation**) to create 'high' and 'low' categories of native title decisions. Consultation with native title holders is required for high level decisions, which can include the provision of standing instructions. Alternative consultation processes may be adopted, with the consent of the native title holders, for low level decisions, which include decisions allowing native title holders to give RNTBCs standing instructions to enter into agreements where the RNTBC is the instigator and beneficiary of agreement. This proposal is supported as it strikes a balance between streamlining and truncating RNTBC decision-making, whilst still giving native title holders control over how decisions will be made by the RNTBC. The proposed amendments to cl 3(1) and the proposed new cl 8 and 8A are appropriately drafted to progress this proposal.

39. It is proposed that, via repeal of cl 8(2) of the PBC Regulation, the requirement for RNTBCs to consult with NTRBs before making native title decisions be removed. There is no explanation for this proposal in the Consultation Paper. In the absence of any justification for this proposal, it is not supported.

40. The Consultation Paper on p 31 discuss that the NTRB Bill proposes to repeal of cl 8(5) of the PBC Regulation to remove the 'implicit' requirement that an RNTBC must identify sub-groups of native title holders with particular rights and interests. The Consultation Paper argues this is necessary to address the 'uncertainty' around this requirement. Reviewing cl 8(5) it is not apparent what the 'uncertainty' asserted in the Consultation Paper is. Clause 8(5) only applies where and RTNBC hold native title rights and interests for more than one group of common law holders, and prescribes that, in those circumstances, only the group of common law holders affected need be consulted. This appropriately identifies that only native title holders affected by a decision of the RNTBC need be consulted. Therefore the proposal is not supported.

    Recommendations:

    - *The proposal to create two categories of native title decisions, and the ability for native title holders to provide standing instructions in relation to making native title decisions and alternate consultation processes, is supported. The proposed amendments to cl 3(1) of the PBC Regulation and the proposed new cll 8 and 8A are supported.*

    - *The proposal to remove the requirement for RNTBCs to consult with NTRBs before making native title decisions is not supported. The repeal of cl 8(2) of the PBC Regulation is not supported.*

- *The proposal to repeal of cl 8(5) of the PBC Regulation is not supported.*

Documenting native title decisions

41. The RNTBC Bill proposes to introduce a requirement that RNTBCs must document native title decisions, including the consultation underlying them, on certificates, which must be made available to native title holders on request. Compliance with this requirement can be assessed by the Office of the Registrar of Indigenous Corporations (**ORIC**). This requirement is an appropriate and simple mechanism to increase the transparency of decision-making by NTRBs to its membership. The proposed amendments to cll 9 cl 10 of the PBC Regulation and to cl 55A of the *Corporations (Aboriginal and Torres Strait Islander) Regulations 2017* (**CATSI Regulations**) are appropriate to effect this proposal.

42. RNTBCs should be provided with resourcing to enable them to build the necessary capacity and develop and adopt the necessary operating procedures to enable them to comply with this proposal.

Recommendation:

- *The proposal requiring the preparation of certificates to document native title decisions made by RNTBCs is supported. The proposed amendments to cll 9 cl 10 of the PBC Regulation and cl 55A of the CATSI Regulations are supported. RNTBCs should be provided with the necessary resourcing to enable them to build the necessary capacity and develop and adopt the necessary operating procedures to enable them to comply with this proposal.*

Making compensation claims

43. The NTA Bill introduces a proposal to allow RNTBCs to make compensation claims where native title has been fully extinguished within the external boundary of the area of an approved determination of native title. Such an application can only be made by an RNTBC with the consent of the common law holders / persons entitled to compensation (i.e. those identified in the earlier determination). Currently, the NTA only allows an RNTBC to make a compensation claim over an area partially extinguished. This proposal is to be achieved by amendments to ss 58 and 61 of the NTA, accompanied by amendments to cll 7A and 8B of the PBC Regulation. This proposal is supported, as it will enable native title holders, where they choose to do so, to utilise their RNTBC to make compensation claims post-determination, noting that the RNTBC has been determined to consist of the right people for Country. This will improve the synchronicity and complementarity of post-determination activities by native title holders, whilst retaining the freedom of native title holders to opt out of utilising the RNTBC for a compensation claim should they choose to do so.

Recommendation:

- *The proposal to allow RNTBCs to make compensation claims where native title has been fully extinguished within the external boundary of the area of an approved determination of native title is supported. The amendments to ss 58 and 61 of the NTA and cll 7A and 8B of the PBC Regulation are supported.*

RNTBC Dispute Resolution

Requirement dispute resolution with non-members

44. The NTA Bill proposes amendments to ss 63-1 and 66-1 of the CATSI Act to require RNTBC rule books to include processes for resolving disputes with native title holders who are not members of the RNTBC. Currently, the CATSI Act only requires rule books to contain processes for resolving disputes with members. This proposal is supported, as it covers what is effectively a regulatory gap in relation to this matter. The proposed amendments, including associated amendments to s 57-5 of the CATSI Act, are appropriate.

Recommendation:

- *The proposal to require RNTBC rule books to include processes for resolving disputes with native title holders who are not members of the RNTBC is supported. The amendments to ss 57-5, 63-1 and 66-1 of the CATSI Act are supported.*

Appointment of special administrators where RNTBC conducts affairs contrary to interests of native title holders

45. Section 487-5 of the CATSI Act provides the grounds upon which ORIC may appoint a special administrator. The NTA Bill proposes to add to s 487-5 a ground regarding NTRBCs conducting affairs contrary to the interests of native title holders. This is an appropriate addition.

46. In discussing the appointment of administrators, it is relevant to note existing problems relating to the appointment of special administrators. Anecdotally, certain of the special administrators appointed do not have the experience, native title-specific knowledge and cultural competence necessary to effectively and appropriately carry out their role under the CATSI Act. In order to address this, the Government should consider, in consultation with ORIC and RNTBCs who have been under special administration, whether parameters for ORIC when selecting special administrators should be instituted, and, if so, how to build these into the regulatory framework.

Recommendations:

- *The proposal to add conducting affairs contrary to the interests of native title holders as a ground upon which ORIC may appoint a special administrator is supported. The amendments to s 487-5 of the CATSI Act are supported.*

- *Consideration should be given to building parameters for selecting special administrators into the regulatory framework, to ensure special administrators have the necessary experience, native title-specific knowledge and cultural competence.*

Court jurisdiction

47. The NTA Bill proposes to provide that the Federal Court, and only the Federal Court, has the jurisdiction to hear civil matters relating to RNTBCs arising under the CATSI Act, and matters arising from the *Administrative Decisions (Judicial Review) Act 1977* (**ADJR Act**) regarding decisions made under the CATSI Act with respect to RNTBCs. For the reasons provided on p 29 of the Consultation Paper, this proposal is appropriate. The amendments to s 586-1 and consequential amendments enabling this proposal are appropriately drafted.

Recommendation:

- *The extension of Federal Court jurisdiction to hear all civil matters relating to RNTBCs arising under the CATSI Act, and matters arising from the ADJR Act regarding decisions made under the CATSI Act with respect to RNTBCs, is supported. The amendments to s 586-1 of the CATSI Act and consequential amendments are supported.*

Extension of NNTT assistance to RNTBs and native title holders

48. As discussed on p 25 of the Consultation paper, currently the NNTT can only assist RNTBCs and common law holders engaging with RNTBCs when invited to by the relevant NTRB. The NTA Bill proposes to additionally empower the NNTT to provide assistance at the request of either RNTBCs or native title holders. These assistance functions are drafted broadly, but according to the Consultation paper are intended to include:

    - establishing governance processes consistent with NTA and PRC regs;

- support resolution of disputes between RNTBCs and native title holders; and
- facilitate collaboration and resolve disputes between RNTBCs.

49. This proposal is contained within a proposed new s 60AAA of the NTA, with consequential amendments to ss 108 and 123. The amendments include the ability for the NNTT to enter into costs recovery mechanisms with the RNTBS of native title holders in question.

50. In broad terms, the proposed extension of the NNTT's assistance powers is appropriate. The NNTT has the requisite experience and independence to take on this much-needed role. However, given the extent of the issues that can arise between RNTBCs and native title holders, expectations as to what level of assistance NNTT can be provide need to be appropriately managed. The proposed s 60AAA(1)-(2) are drafted very broadly, and are likely to raise expectations beyond the relatively limited scope outlined the Consultation Paper. Therefore, s 60AAA(1)-(2) should be redrafted to better clarify and restrict the scope of the assistance NNTT is able to provide.

51. The proposal that the NNTT is able to enter into cost recovery mechanisms (s 60AAA(3)) is not supported. Many RNTBCs in NSW struggle to fulfil their existing obligations, even the minimum for compliance, particularly where they are reliant on limited (discretionary) government funding (noting that recent trends in NSW are seeing consent determinations being finalised prior to ILUAs being entered into). To ask these NRTBs to pay the costs of NNTT assistance to support them in their functions would be counterproductive, as it would undermine their financial ability to actually implement any recommendations arising from that NNTT intervention, and jeopardise their ability to perform their functions generally.

Recommendation:

- *The proposal that the NNTT be empowered to provide assistance at the request of either RNTBCs or native title holders is supported. The proposed s 60AAA(1)-(2) of the NTA should be redrafted to better clarify and restrict the scope of the assistance NNTT is able to provide. The proposed s 60AAA(3) that allows the NNTT able to enter into cost recovery mechanisms in respect of this assistance should be removed.*