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Ms Sabina Wynn
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Dear Ms Wynn

Australian Law Reform Commission - Review of the Native Title Act 1993 - Discussion Paper

The National Native Title Council (NNTC) is pleased to respond to the Australian Law Reform Commission's call for submissions on the Discussion Paper relevant to its Review of the Native Title Act 1993.

The NNTC is an alliance of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) from around Australia and was registered as a company limited by guarantee on 23 November 2006. The objects of the NNTC are, amongst other things, to provide a national voice for NTRBs/NTSPs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

The NNTC, as always, is committed to working closely with government to assist in the development of improved policy and legislation to secure socio-economic benefits for Aboriginal and Torres Strait Islander peoples across Australia. If you require further information or wish to discuss any aspect of our submission please do not hesitate to contact me on (03) 9326 7822 at your convenience.

Yours sincerely

Brian Wyatt
Chief Executive Officer

NATIONAL NATIVE TITLE COUNCIL

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION DISCUSSION PAPER (DP 82)

REVIEW OF THE NATIVE TITLE ACT 1993

January 2015

Introduction

1. The National Native Title Council (NNTC) is an alliance of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) in Australia. Its role includes providing a national voice for NTRBs/NTSPs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander peoples.

2. This submission seeks to address some of the questions and proposals raised in the Discussion Paper.

Framework for Review of the Native Title Act (Chapter 2)

3. The NNTC supports the retrospective operation of any amendments to the *Native Title Act 1993* (Cth) (*NTA*), and their application to determinations made before the date of their commencement (see Questions 2–1 and 2–2).

4. While the NNTC acknowledges potential difficulties in the practical application of such retrospectivity, failing to do so would unfairly and unjustly discriminate against native title groups with earlier determinations on no other basis than the passage of time. This is particularly egregious given the strong policy focus in the *NTA* on achieving just outcomes, as evidenced, for example, by the provision in s 13 for varying a determination in the interests of justice, and by the fact that a native title determination is a decision *in rem* that binds the whole world not just the parties to the native title application.

5. The Discussion Paper recognises the significance of the fundamental requirements of justice in the context of resolving native title applications, prioritising it over the value of timeliness.[1] In the view of the NNTC, the fundamental requirements of justice should also be prioritised over the common law presumption that legislation does not have a retrospective operation, over the possibility of unsettling existing agreements, and over arguments regarding certainty.

6. The retrospective application of the proposed amendment to s 223(2) would provide particular benefits to native title groups including that it would ensure that native title rights and interests:

[1] Discussion Paper [3.39].

(a) comprise rights in relation to any purpose; and

(b) may include, but not be limited to, hunting, gathering, fishing, commercial activities and trade.

Traditional Laws and Customs (Chapter 5)

7. **The NNTC strongly supports proposal 5–1.** There should be explicit acknowledgment in s 223 that the traditional laws and customs under which native title rights and interests are possessed may adapt, evolve or otherwise develop. The current law is inadequate to encompass the full extent of the rights and interests arising under Aboriginal or Torres Strait Islander laws and customs, and to enable the evolution of rights and interests that might support their future economic, social and cultural aspirations.

8. In particular, the NNTC agrees with the comments at paragraph 5.31 of the Discussion Paper that explicit recognition is appropriate "to ensure that further adaptation or evolution of traditional laws and customs following a determination does not provide grounds for variation or revocation of a determination of native title".

9. Further, the NNTC supports the views of the ALRC that:

   (a) "when assessing whether or not laws and customs are 'traditional', adaptation, evolution and development of laws and customs should be treated as the norm rather than the exception";[2] and

   (b) "recognition that traditional laws and customs may adapt, evolve or develop should not be limited by any requirement that such changes be of a kind contemplated by the laws and customs".[3]

10. Particular care should be taken when drafting the provision contemplated by Proposal 5–1 to ensure that the contemplated adaptation, evolution or development of traditional laws and customs extends so far as to cover these issues.

11. **The NNTC supports proposal 5–2.** The definition of native title in s 223 should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs.

12. **The NNTC supports proposal 5–3.** The definition of native title in s 223 should be amended to make clear that it is not necessary to establish that:

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2 Discussion Paper [5.35].

3 Discussion Paper [5.36].

(a) acknowledgement and observance of laws and customs has continued substantially uninterrupted since sovereignty; and

(b) laws and customs have been acknowledged and observed by each generation since sovereignty.

13. The NNTC notes that these matters are not specifically identified in the *NTA* as being necessary to prove in order to establish native title.

14. The NNTC supports the views of the ALRC that the promotion of the beneficial purpose of the *NTA* is consistent with clarifying that "it is not necessary to establish this level of intensity of continuity of acknowledgement and observance of traditional laws and customs", and that these requirements require "claimants to surmount unnecessarily high evidential hurdles to establish native title".[4] In addition, the requirement to provide evidence regarding these matters adds significantly to the resource and time burdens on native title applicants and their representatives to no particular point, while reducing the timeliness of the process.

15. **The NNTC supports proposal 5–4.** The definition of native title in s 223 should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

16. Again, the concept of "society" does not appear in the *NTA*. The NNTC agrees with the view of the ALRC that the requirement for proof that the relevant society has had a continuous existence since sovereignty imposes "an overly technical approach [on] statutory construction".[5] The concept adds unnecessary technicality and legalism, as well as considerable delay, to native title processes, generally to the detriment of native title claimant groups. The *NTA* should specify that proof of such continuity of the relevant society is not necessary before a determination of native title can be made.

Physical Occupation (Chapter 6)

17. **The NNTC supports Proposals 6–1 and 6–2**, regarding the removal of

(a) references to a native title application containing details of "traditional physical connection" (s 62(1)(c)); and

(b) the need for a native title applicant to provide evidence of "traditional physical connection" or of things done that prevent such a connection, in order to satisfy the

[4] Discussion Paper [5.47], [5.65].

[5] Discussion Paper [5.73].

registration test (s 190B(7)).

18. These provisions are inconsistent with the jurisprudence that has developed regarding what is required to establish native title under s 223. As the *NTA* stands, it is possible for an application made on behalf of a group without "traditional physical connection" not to pass the registration test, but ultimately to form the basis for a determination. As noted at [6.3] of the Discussion Paper, physical presence is not necessary for proof of connection under s 223(1)(b).[6]

19. In addition, removing any reference to a requirement for evidence of "traditional physical connection" may help persuade respondents that they should not treat such evidence as a necessary element in their decision making about whether to agree to a consent determination.[7]

The Transmission of Aboriginal and Torres Strait Islander Culture (Chapter 7)

20. **The NNTC does not support Proposal 7–1.** It is not persuaded by the arguments presented by the ALRC that the word "traditional" should be removed from s 223. The *NTA* should continue to refer to the concept of "tradition", albeit as modified as proposed in Chapter 5, so as to indicate and identify the unique relationship between native title holders and their country, which is defined by their laws and customs. That relationship should be seen as being based in a longstanding relationship with land and waters that is more significant than other more recent connections with country.

21. It refers to and supports the arguments identified by Dr David Martin that are quoted in the Discussion Paper, as follows:

> [I]t is tradition which grounds and legitimates claims to country from the perspective of Indigenous people, not mere connection.
>
> [R]emoving the concept of 'tradition'/'traditional' from s 223, while well intentioned, would actually cause more conflict and confusion within claimant groups. [To do so] ignores the deep significance accorded to traditional connections within Indigenous societies'.[8]

22. As also noted in the Discussion Paper,[9] '"[t]raditional" also plays a role in the identification of the "right people for country"'. Concepts of legitimate responsibility for and ownership of country that are embodied in the term "traditional" reflect values that are highly significant for Aboriginal and Torres Strait Islander communities across the whole of Australia. Removing the concept from the *NTA* denies the significance of these values for Indigenous peoples.

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6 *Western Australia v Ward* (2002) 213 CLR 1, 85–86.

7 See Discussion Paper [6.25].

8 Discussion Paper [7.21].

9 At [7.7].

23. Reliance on the concept of tradition in the recognition of native title rights and interests reinforces and reflects the *sui generis* nature of Aboriginal and Torres Strait Islander societies and their native title rights and interests. It also helps define and identify the native title group from whom membership of the ultimate prescribed body corporate (PBC) is drawn. Therefore, the concept of tradition helps guide and define the governance of the PBC and the management of the determined native title rights and interests. If the concept were removed from the *NTA*, some other mechanism would have to be found to help define these important aspects of native title governance.

24. Therefore, **in response to Question 7–1**, about including a definition related to a native title claim group identification and composition, the NNTC observes that the word "traditional" as modified in accordance with the proposals in Chapter 5, would do the work that otherwise might be required to be done by such a definition.

25. It would not be appropriate to develop a set of statutory guidelines for identifying the right people for country in substitution for the concept of tradition. Such guidelines would necessarily reduce the flexibility of current processes for identifying the composition of the native title group. This is particularly concerning given the wide variety of ways in which people relate to their country under their laws and customs. Retaining "traditional" retains the focus on that law and custom, rather than on statutory guidelines, as the mechanism for determining group composition.

26. For these reasons, the NNTC prefers the alternative proposals outlined in Chapter 5 to Proposal 7–1. Whilst it may provide some clarification for other interested stakeholders, removing the concept of "tradition" from s 223 would be of significant concern for the NNTC and for native title holders and traditional owners.

27. **The NNTC does not support Proposal 7–2**, which suggests requiring proof that the native title claimants have, by their laws and customs "a relationship with country that is expressed by their present connection with the land or waters", instead of proof that they have a "connection" with the land and waters.[10]

28. The NNTC prefers the adoption of the proposals in Chapter 5 as a better mechanism to address the difficulties of achieving determinations of native title under s 223 as it currently stands. Subject to this view, since the NNTC is of the opinion that proof of native title should start from an inquiry into the present connection to land and waters of native title claimants, to the extent that the focus of Proposal 7–2 is "to emphasise that the starting point in determining connection is the **'**present relationship with country' that the claimant group has with the

[10] *NTA* s 223(1)(b).

relevant land and waters" by their traditional laws and customs, the NNTC supports it.[11]

29. Ultimately, however, the NNTC believes that the suggested changes to the terms "traditional" and "connection" would undermine native title rights and interests, create confusion amongst native title groups, and completely erode any glimmers of confidence that native title holders might have in the *NTA* to protect their rights to country.

30. The NNTC does not support any reference to a "holistic relationship" in regard to connection.

31. **The NNTC's view is that no response to Question 7–2 may be necessary** if "traditional" is retained in s 223 along with an acknowledgement that laws and customs may adapt, evolve or otherwise develop and still be traditional (see Proposal 5 – 1). "Revitalisation of connection" would seem to fall within this conception of what is required to establish native title if "traditional" is defined broadly enough. A broad definition of "traditional" should allow a range of ways of transmitting laws and customs, including by using ethnographic, anthropological and biographical texts.[12]

32. **Similarly, no response to Questions 7–3 to 7–5 may be necessary** if "traditional" is defined sufficiently flexibly and equitably, so that any displacement of Aboriginal peoples or Torres Strait Islanders, whatever its cause, does not give rise to any loss of the relevant connection. Nor is such a response necessary if the focus in Proposal 7–2, on "present" connection by traditional laws and customs, is given full effect.

33. In addition, an inquiry into the reasons for any such "displacement" may limit the recognition of Aboriginal or Torres Strait Islander agency in responding to the particular circumstances of colonisation that they faced. Ultimately, there might not be much difference in practice between being "forced off" country and leaving "voluntarily", in either case to escape frontier violence and/or to access services. An inquiry into reasons for "displacement" may lead to inappropriate and unhelpful differentiations having to be drawn between various responses of Aboriginal and Torres Strait Islander groups to the impacts of colonisation. Examining reasons for past "displacement" amounts to yet another focus on the past rather than the future, reinforcing the inappropriate "frozen in time" approach to native title rights and interests. Further, such an inquiry may end up involving an assessment of competing versions of history, which may be difficult for the Court and for claim groups.

The Nature and Content of Native Title (Chapter 8)

34. **The NNTC strongly supports Proposal 8–1**, which would ensure that native title rights and

11 Discussion Paper [7.39].

12 See Discussion Paper [7.67].

interests may include "rights in relation to any purpose" (including commercial purposes), and rights regarding "commercial activities and trade", consistently with current case law.[13]

35. The NNTC welcomes any amendment to the *NTA* that encompasses the native title right to trade and other rights and interests of a commercial nature. The NNTC firmly believes that this would provide an important mechanism to secure economic development, while recognizing the value of existing cultural economies.

36. Together with Proposal 5–3 (regarding substantial interruptions to the acknowledgment and observance of traditional laws and customs), this proposal would considerably encourage the development of Indigenous commercial initiatives which take customary trade rights and practices as their starting point, but are not strictly confined to the manner and form of the Indigenous trade rights and practices which existed at the time of sovereignty. An approach which takes the Indigenous economy as "frozen in time" and does not allow for some degree of change and adaptation in indigenous commercial and trade practices to be recognised as native title is clearly incommensurate with Indigenous economic development.

37. Whilst the Preamble to the Act states that the legislation is a pathway to the "full recognition and status" of Indigenous people, this has not been borne out with regard to Indigenous economic aspirations. The proposal would go some way to fulfilling such aspirations, squarely embedding commercial rights and interests within Australia's native title regime.

38. **The NNTC supports Proposal 8–2**, which states that the terms "commercial activities" and "trade" should not be defined in the *NTA*.

39. The NNTC agrees with NTSV that the *NTA*

> need not prescribe the rights that are commercial in nature, as these will necessarily flow from the traditional laws and customs of particular groups. When linked to a 'not frozen in time' definition of 'traditional', rights that are commercial in nature would not be limited to a consideration of the content of the right at settlement.

40. Not defining these terms would allow flexibility and emphasise that native title rights and interests have their origin in and are given their content by traditional laws and customs.[14]

41. **In response to Questions 8–1 and 8–2, in general terms, the NNTC supports the inclusion of the protection or exercise of cultural knowledge in the indicative listing** proposed for s 223(2).

42. As noted by the ALRC,[15] there are unbreakable links between Indigenous knowledge systems, the land, and its resources. Knowledge, as stated by North J in the Full Federal Court in *Western*

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13 Consistently with *Akiba v Commonwealth* (2013) 250 CLR 209.

14 See Discussion Paper [8.7].

15 Discussion Paper [8.84].

Australia v Ward,[16] is "intimately linked with the land". It follows that the distinctions drawn by the High Court between rights in knowledge and rights in land are not consistent with Aboriginal and Torres Strait Islander peoples' views of the nature of their own laws and customs. The Courts' fragmentation of native title into a bundle of rights, each of which it can separately decline to recognise or determine to be extinguished, tends to limit the scope of the rights and interests that can be recognised as native title.

43. The indivisible nature of each native title group's system of traditional laws and customs and the limitations of the bundle of rights approach both mean that the protection or exercise of cultural knowledge should therefore be included among the native title rights and interests that might be recognised by the Court by including a reference to it in s 223(2).

44. Similarly to the situation with "commercial activities" and "trade", and for similar reasons, "cultural knowledge" should not be defined.

Promoting Claims Resolution (Chapter 9)

45. In general terms, the NNTC supports the principle of promoting claims resolution.

46. **The NNTC does not express a view in response to Question 9–1,** about the appropriateness and effectiveness of current procedures for ascertaining expert evidence in native title proceedings and for connection reports**.**

47. **In response to Question 9–2**, the NNTC notes that:

    (a) So-called archival material generated through the native title connection process in fact largely comprises information that has been provided by and belongs to individual members of the native title group and/or the group itself. As noted by the ALRC,[17] some of it comprises information that is culturally sensitive or refers to personal and family matters. Some of it is subject to confidentiality orders.

    (b) Some of the information is likely to have been provided to experts or representatives of the applicant for the purposes of the native title application, and for no other purpose. A comparison is made with the situation in *Foster v Mountford*,[18] where, on the application of those responsible for certain secret ceremonies under Aboriginal law and custom, the Federal Court prevented the publication of an anthropologist's photographs of those ceremonies.

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16 (200) 99 FCR 316, [865].

17 Discussion Paper [9.16].

18 (1976) 14 ALR 71.

(c) In any event, that material has only been provided to other parties in the litigation for the purposes of the litigation and is subject to restrictions on its use for other purposes. For instance:

> Where one party to litigation is compelled, either by reason of a rule of court, or by reason of a specific order of the court, or otherwise, to disclose documents or information, the party obtaining the disclosure cannot, without the leave of the court, use it for any purpose other than that for which it was given unless it is received into evidence.[19]

(d) The PBC is likely to require access to or control of this material in order to be able to perform its functions of:

i. detailing "internal" issues relating to the native title holders and identifying which people can exercise what rights;[20] and

ii. consulting with, and obtaining the consent of, only those groups of common law holders whose native title rights or interests would be affected by a proposed native title decision.[21]

48. For all these reasons, care should be taken before generally applying procedures adopted in respect of dealings with such "archival material" generated through the native title connection process. Public access to such an archive should not be the default position.

49. **In response to Question 9–3**, the NNTC is of the opinion that the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments should be addressed on a case by case basis by the Federal Court.

50. **The NNTC supports the proposals implicit in Questions 9–4 and 9–5 in principle.** It may be useful to develop or collate existing best practice principles which may be advanced in all jurisdictions with respect to the assessment of connection in respect of consent determinations.[22]

51. **In response to Question 9–6, the NNTC is strongly of the view that private agents should be regulated.** This opinion was expressed in detail in a submission to the Review of the Roles and Functions of Native Title Organisations, which focused on impacts of the behaviour of private agents, particularly in the context of future act negotiations. As noted in that submission, that behaviour does affect the resolution of native title applications.

52. The submission states, in part:

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19 *Hearne v Street* (2008) 235 CLR 125; [2008] HCA 36 [96] (Hayne, Heydon, Crennan JJ).

20 *Gumana v Northern Territory* (2005) 141 FCR 457, [138]–[140].

21 *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), reg 8(5) (*PBC Regulations*). See also reg 3(2).

22 Discussion Paper [9.32].

Members of the NNTC are increasingly concerned about the growing prevalence of predatory behaviour by agents other than recognised NTRBs/NTSPs seeking to represent native title parties (i.e. registered native title claimants and registered native title bodies corporate) in the negotiation of future act agreements, Indigenous Land Use Agreements (ILUAs) and other settlements contributing to the resolution of native title claims. This is particularly the case in resource-rich regions of Australia. Such behaviour is already generating significant negative legal, social and economic impacts for native title parties. Driving these impacts is the divisive and disruptive effect of the behaviour.

Such behaviour is creating new fractures and disputes within native title parties, which in turn are leading to further complexities and delays on significant decisions pertaining to claim business and the authorisation of agreements. This creates new challenges and pressures for NTRBs/NTSPs legal representatives seeking instructions from their clients on the basis of free, prior and informed consent. It also inevitably slows down any progress toward claim resolution.

These new divisions are also creating real distress for community members, many of whom are senior Traditional Owners and have been waiting over a decade for recognition of their native title rights and interests. NTRBs/NTSPs have drawn on their expertise and experience to establish tailored governance arrangements appropriate to the native title context in order to prevent such confusion, handle disputes and ensure transparent and legitimate decision-making processes.

The unprofessional conduct by third party agents is jeopardising the capacity of groups to leverage their rights and interests for economic development. Any benefits that flow from native title agreements need to be managed collectively, for the benefit of the whole community. Such behaviour will also create uncertainty for industry parties looking for guarantees that financial benefits will be managed effectively and lead to sustained employment and business development opportunities.

NTRBs/NTSPs have worked intensively with industry and government over the last decade and parties have worked collectively to identify best practice and build the capacity of native title parties in this area. The disruptive and divisive behaviour of third parties is undermining these achievements and threatening to significantly reduce the potential for native title to deliver real, practical economic outcomes for future generations of native title holders.

The NNTC is also concerned that compensatory benefits provided to native title parties through agreements may be significantly eroded to cover unreasonably high fees for service incurred during the negotiation process.

Under s 203B(1)(a) and (e) of the *NTA*, NTRBs/NTSPs have functions in relation to their defined area to represent native title parties in pursuing native title determination applications, compensation applications, future act agreements and ILUAs. In general these functions can only be performed at the request of the native title parties. In performing these functions NTRBs are bound by the extensive regulatory regime contained in Part 11 of the NTA. In addition, the legal practitioners employed by NTRBs to undertake these functions are bound by the legislative and ethical standards applicable to the broader legal profession under the relevant professional conduct rules. Under s 203FE, NTSPs are subject to essentially the same regulatory regimes, as are their employed legal practitioners.

Further, both NTRBs and NTSPs are subject to the prescriptive terms of their Program Funding Agreements (PFAs). The current PFAs include requirements going to (*inter alia*) consultation with the Department of]the Prime Minister and Cabinet (PMC)], regarding key personnel appointments and accounting for “program generated funds”, which would include fees or commissions arising from future act negotiations. The ability of [PMC] to withdraw funding from an NTRB/NTSP operates effectively as a further regulatory

mechanism. Finally, decisions made under 203BB by NTRBs/NTSPs are subject to external review pursuant to s203FB.

There is nothing in the *NTA* that requires native title parties to utilise the services of NTRBs/NTSPs in pursuing native title determination applications, compensation applications, future act agreements and ILUAs. In addition, while a party can be represented in the Federal Court by a person other than a legal practitioner only by leave of the Court (s 85), there is no such limitation in relation to future act proceedings before the National Native Title Tribunal (NNTT).

In practice, the funding provided to NTRBs/NTSPs to pursue native title determination applications and the "no costs" provision contained in s 85A ensures that, with few exceptions, only NTRBs/NTSPs (or legal practices funded by NTRBs/NTSPs) represent native title claimants in determination application and compensation application proceedings. The same is not true in relation to future act negotiations and agreements.

The current scheme of the NTA allows native title parties to appoint an "agent" (not being an NTRB/NTSP) in relation to future act negotiations and for that agent to secure for themselves a proportion of any benefits arising from those future act negotiations. In the case of future acts involving mining projects, even a small percentage of the benefits arising from the proposals can represent a significant amount that would otherwise be available for the native title parties.

In the event that these agents are a legal practice the only regulatory regime is that applicable under the relevant professional conduct rules. In the event an agent is an entity that is not a legal practice, even one that employs legally qualified staff, there is no regulatory regime.

On a simple analysis the situation described could be characterised as one of contestability or freedom to contract. On this analysis the native title party should be able to appoint any entity they chose as their agents in future act negotiations. However a number of factors militate against such a simple analysis. The unprofessional conduct that NNTC members are currently observing has a number of serious policy implications for the Commonwealth Government and suggest that the area may be one appropriate for some level of regulation.

Major policy implications include:

- the costs of administration of the future act regime are a cost borne predominantly by Commonwealth and States/Territory Governments and industry;
- the future act regime was established by the Commonwealth to reflect its perception of the concept of equality before the law under the *Racial Discrimination Act 1975* (Cth) and facilitated the delivery of benefits to native title parties;
- the extensive regulation regime of NTRBs/NTSPs was established (in part) to ensure best practice in future act negotiations;
- many native title parties may be yet to develop the governance capacity to make informed decisions as to the appointment of agents;
- the Commonwealth Government's broader policy objectives, including its commitments to reaching the Closing the Gap targets, are best served by ensuring thoughtful structuring of future act benefits;
- existing legal professional conduct rules are ill-suited to regulate relations "in the field" in the context of taking instructions from native title parties;
- the involvement of agents may delay the overriding imperative to expeditiously resolve claimant applications; and

- a lacuna in the *NTA* is being exploited whereby these agents are receiving financial reward from native title claim group monies but are only accountable to a proportionally miniscule group of people, being those who make up the applicant (s 61) or registered native title claimants (s 253). In contrast, NTRB/NTSPs do not charge the claim group for the same services and are accountable to all the people who hold or may hold native title (who, depending on the evidence, may or may not include the Applicant/registered native title claimants).

These factors suggest that some form of regulation of the activities of agents in their involvement in future act negotiations may be appropriate.

53. Based on these arguments regarding the regulation of private agents in the future act context, the NNTC argues that similar principles ought to apply in respect of native title determination applications. Therefore, the NNTC supports the development of a system for the training and certification of legal professionals acting in native title application matters, particularly in light of some of the behaviour of private agents in the native title area. Such a system should include a requirement for agents acting in future act negotiations to be registered with the relevant NTRB/NTSP, in line with a national, standardised registration test; the regulation of fees or commissions; and the possibility of imposing civil penalties[23].

54. **In response to Questions 9–7 to 9–11 regarding native title application inquiries by the NNTT**, the NNTC considers that the options identified are legally and practically viable. Otherwise, it neither rejects nor supports them.

Authorisation (Chapter 10)

55. **The NNTC supports Proposal 10–1** to amend s 251B of the *NTA* to allow native title claim groups, when authorising an application, to use a decision-making process agreed on and adopted by the group, for the reasons set out at paragraphs 10.10 – 10.16 of the Discussion Paper. Native title claim groups should be able to determine their own decision making processes.

56. **The NNTC also supports Proposal 10–2** that the Australian Government should consider amending s 251A to similar effect. It is desirable that the decision making processes set out in the *NTA* are consistent with each other.

57. It is also desirable that the decision making processes set out in the *PBC Regulations*, regarding the giving of the native title group's consent to native title decisions proposed to be made by a PBC, are consistent with those in the *NTA*. The Australian Government should consider amending regs 8(3) and 8(4) of the *PBC Regulations* to similar effect.

[23] The NNTC developed an *Issues Paper on Consumer Protection for Native Title Parties* which develops some of these ideas, a copy of which can be provided to the ALRC on request.

58. **The NNTC supports Proposal 10–3** to amend the *NTA* to clarify that the native title claim group may define the scope of the authority of the applicant.

59. **In response to Question 10–1, the NNTC agrees that the *NTA* should include a non-exhaustive list of ways in which the native title claim group might define the scope of the authority of the applicant**, if only to remind the native title claim group of ways in which it might define the scope of that authority.

60. **In response to Question 10–2, the NNTC does not agree that the *NTA* should contain any remedy for a breach of a condition of authorisation, apart from replacement of the applicant.** In this regard, it reiterates its view that "it is important to ensure that the process does not become more 'complex, adversarial and ... expensive to administer".

61. **In response to Proposal 10–4**, the NNTC refers to its view that "it is important to ensure that the process does not become more "complex, adversarial and ... expensive to administer". However, if those concerns can be addressed, it is content for the *NTA* to provide that, if the claim group limits the authority of the applicant with regard to entering agreements with third parties, those limits must be placed on a public register.

62. **The NNTC supports Proposal 10–5** to amend the *NTA* to provide that the applicant may act by majority unless the terms of the authorisation provide otherwise, for the reasons set out at paragraphs 10.39 – 10.41 of the Discussion Paper. Native title claim groups should be able to determine their own decision making processes.

63. **The NNTC supports Proposals 10–6 and 10–7 to amend s 66B** of the *NTA* to provide that:

    (a) where a member of the applicant is no longer willing or able to act, the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice with the court; and

    (b) a person may be authorised on the basis that, if that person becomes unwilling or unable to act, a designated person may take their place. The designated person may take their place by filing a notice with the court.

64. Where the removal or replacement of a member of the applicant in such circumstances is not controversial or disputed, a simple and inexpensive procedure should be available.

Joinder (Chapter 11)

65. **In response to Question 11–1, the NNTC is of the view that s 84(3)(a)(iii) of the *NTA* should be amended** to allow only those persons with a legal or equitable estate or interest in the land or

waters claimed, to become parties to a proceeding under s 84(3).

66. **The NNTC supports Proposal 11–1** to amend the *NTA* to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only. This could allow a person to join proceedings only when they concern matters affecting the party's interests, once questions of connection have been resolved.

67. This proposal could be extended by either:

    (a) giving the Court the discretion to limit the ability of a person to elect to be party to proceedings to participating in them only in respect of s 225(c) and (d); or

    (b) not allowing a person to be a party to the proceedings before the Court has made decisions concerning the identify of the native title holders and connection issues.[24]

68. **The NNTC supports Proposal 11–2** to amend s 84(5) of the *NTA* to clarify that:

    (a) a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and

    (b) when determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.

69. This provision would require the Federal Court to consider whether the claimant or potential claimant has a clear and legitimate objective in joining, which would limit joinder of claimants or potential claimants who seek to join for uncertain, frivolous or vexations reasons.[25]

70. **The NNTC supports Proposal 11–3** to amend the *NTA* to allow representative organisations that represent persons whose "interest may be affected by the determination" in relation to land or waters in the claim area, to become parties under s 84(3) or to be joined under s 84(5) or (5A).

71. This proposal has the potential to limit the number of third party respondents where their interests can be represented in the proceedings through a representative organisation. It also potentially allows a NTRB or NTSP to become a party or be joined in order to represent the interests of one or more of its constituents in the proceedings.

72. **The NNTC supports Proposal 11–4** to amend the *NTA* to clarify that the Federal Court's power to dismiss a party (other than the applicant) under s 84(8) is not limited to the circumstances contained in s 84(9).

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[24] See *Watson v Western Australia (No 3)* [2014] FCA 127.

[25] See Discussion Paper [11.44].

73. It should be made clear that the Court's discretion to dismiss a party from native title proceedings can be based on reasons other than the limited range of circumstances described in s 84(9).

74. **The NNTC supports Proposals 11–5 and 11–6** to amend s 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) to allow an appeal, with the leave of the Court, from a decision of the Federal Court to join, or not to join, a party under s 84(5) or (5A), or a decision to dismiss, or not to dismiss, a party under s 84(8) of the *NTA*.

75. **The NNTC supports Proposal 11–7** to recommend to the Australian Government that it should consider developing principles governing the circumstances in which the Commonwealth should either:

    (a) become a party to a native title proceeding under s 84; or

    (b) seek intervener status under s 84A.

76. An indication from the Commonwealth when it would seek to participate or intervene in native title proceedings would provide greater certainty to other parties.