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Native Title Legislation Amendment Bill 2018
National Native Title Council Submission in Response to the Exposure Draft

1. Introduction

The National Native Title Council (NNTC), Australia's peak body for Native Title Organisations, welcomes the Australian Government's commitment to pursuing long overdue reforms to improve the effectiveness and workability of the native title system as represented by the proposed *Native Title Legislation Amendment Bill 2018* (NTLAB) and the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* (RNTBCLAR).

The NNTC also commends the Government on the co-operative and inclusive approach it has adopted in the development of the Exposure Draft of the proposed Bill. In particular, the NNTC appreciates the model of engagement adopted through the establishment of the Expert Technical Advisory Group (ETAG) and would recommend a similar approach be adopted for other legislative reform or policy development initiatives.

The NNTC notes that the approach adopted through the ETAG has attempted to balance the need to ensure broad inclusion from stake-holders in the development of the current proposals with the need for a realistic assessment of which measures are likely to gain the necessary parliamentary support to become law. This process has been undertaken in a context when the last substantive legislative amendments to the native title regime occurred over 10 years ago.[1] The development and increasing maturity of the native title

[1] *Native Title Amendment Act 2007, Native Title (Technical Amendments) Act 2007.* The most recent amendment was the *Native Title Amendments (Indigenous Land Use Agreements) Act 2017.*

sector in the intervening years has the consequence that there is a pressing need for many, seemingly minor, amendments to the native title regime. Despite this appearance, many of these amendments are vital to ensure the ongoing effectiveness of the overall native title system. Many of the proposals contained in the NTLAB address these needs and, as is discussed in greater detail below, are supported.

This noted, the NNTC is unable to support all the proposals contained in the NTLAB and the RNTBCLAR and, in addition believes that there are further amendments necessary to ensure the ongoing effectiveness and fairness of the native title system. These additional matters are discussed in the conclusion to this submission. Before addressing these additional matters however, it is appropriate to provide some analysis of the matters that *are* contained in the NTLAB and RNTBCLAR.

2. Matters Contained in the *Native Title Legislation Amendment Bill 2018* Exposure Draft

Schedule 1 – Role of the Applicant (Amendments to the *Native Title Act 1993*)

Part 1 – Authorisation

The first purpose of Part 1 of this schedule is to insert a new s 251BA (clause 21). The proposed s 251BA clarifies that a native title group may impose conditions on the authorisation of an Indigenous Land Use Agreement (ILUA) and on an applicant making a native title determination or compensation application. Clauses 1 – 10 and 12 - 20 make consequential amendments to give effect to the insertion of the new s 251BA on matters such as certification of ILUAs.

These provisions clarify the legitimacy of what is often current practice by native title groups and empower those groups to have greater control of applications and ILUAs concluded in their name. They are supported.

The second purpose of the schedule is to insert a new s 62B (clause 11). The proposed new section clarifies the application of existing common law and equitable duties of named applicants to a native title group. The proposed new section is in conformity with current case law (*Gebadi v Woosup (No 2)* [2017] FCA 1467) and ensures accountability of named applicants to the native title group. The proposal is supported.

Part 2 – Applicant Decision Making

The purpose of Part 2 is to insert provisions into the NTA that establish a default position that in authorising an ILUA or prosecuting an application a majority of the named applicants have authority to act. The default position may be altered by decision of the native title

group requiring a particular authorisation process (for example particular persons to be parties to an ILUA). This purpose is given effect to in: clause 24 (amendments to s 24CD(2) certified area agreement ILUAs); clause 27 (amendments to 24CL(2) – uncertified area agreement ILUAs); clause 29 (amendments to s 24DE – alternative procedure ILUAs); clause 31 (amendment to s 31 – s 31 future act agreements); and clause 32 (insert s 62C native title determination and compensation applications).

The clause 38 application provisions ensure the new arrangements are prospective only. The proposals are supported.

Part 3 – Replacement of the Applicant

The main purpose of Part 3 is to insert a new subsection 66B (2A) (clause 42). In summary the new subsection provides that where a member of the applicant dies or is unable to act because of physical or mental incapacity, members of the native title claim group may apply to the Federal Court for an order to replace the current applicant and that the authority of the continuing members endures despite the death or incapacity.

The proposed amendment applies to applications to amend the applicant made after the commencement of the provisions – irrespective of when the death or incapacity occurred (clause 45).

The proposed amendment reduces some of the complexity arising from the 'named applicant' structure and is supported.

Schedule 2 – Indigenous Land Use Agreements (Amendments to the *Native Title Act 1993*)

Part 1 – Body Corporate Agreements and Area Agreements

The main purpose of the Part 1 amendments is to address one issue that currently limits the scope of body corporate ILUAs because of the requirement that there must be PBCs for the whole of the agreement area. The amendments provide that where there is a determination that native title does not exist in part of an area, or part of an area could not be claimed because of a previous exclusive possession act, it is not necessary for there to be a PBC for these parts of the area.

The proposed amendments remove an unintended consequence of the current body corporate ILUA arrangements and facilitate greater use of the ILUA model. They are supported.

Part 2 – Deregistration and Amendment

The first purpose of these provisions is to address the consequence of deregistration of an ILUA. Clauses 5 and 6 have the effect of ensuring that if an ILUA is deregistered, the validity of any future act authorised by that ILUA is not affected by deregistration.

Currently deregistration of an ILUA is provided for under s 199C. Under this section (s 199C(1)) an ILUA must be deregistered if a subsequent determination of native title is to the effect that there are persons who hold native title who did not authorise the agreement (including in the event of a revised determination of native title). Subsection 199C(1A) provides some discretion to the Federal Court in the event that the 'new' native title holders endorse the ILUA.

Subsection 199C(3) allows the Federal Court to order deregistration of an ILUA if it was procured by fraud, undue influence or duress. Subsection 199C(4) provides for compensation to be paid by the perpetrator of the fraud (etc).

The effect of proposed amendments to s 24EB(2) and s 24EBA would be that a future act purportedly authorised by an ILUA that was procured through fraud, undue influence or duress remains valid. This in effect (subject to the s 199C(4) compensation provisions) undermines the operation of s 199C(3).

As such the proposed amendments cannot be supported unless it is made clear that an ILUA deregistered by virtue of an order made under s 199C(3) will not operate to provide validity to any future act purportedly authorised under that ILUA.

The second purpose of the Part 2 provisions (clause 7) is to insert a new section 24 ED which will allow for amendments to registered ILUAs with respect to (for example) the identity of a party to the agreement or the description of property referred to in it without the need to reauthorise the ILUA.

These provisions provide for amendments to the Act that improve the workability and ongoing durability of ILUAs and are supported.

The Part 3 amendments are (in clause 10) expressed to apply to an ILUA on the register 'after the commencement of this item". Subject to the opposition to clauses 5 and 6 noted above this provision is generally supported. It must be noted though that there may be some constitutional issue in relation to the operation of this application provision in circumstances where the issue of the validity of an ILUA is at the time of the "commencement of the item" under consideration by the Federal (or other) Court.

Schedule 3 – Historical Extinguishment (Amendments to the *Native Title Act 1993*)

Part 1 - Park Areas

The main purpose of this part is to insert a new s 47C (clause 2). The new s 47C would enable prior extinguishment to be disregarded in Parks where this is agreed to by the Commonwealth, State or Territory. The extinguishing effect of public works in a Park may also be disregarded where the agreement with the Commonwealth, State or Territory includes a statement to this effect or there is a separate agreement to this effect.

The definition of “park area” (proposed s 47C(2)) is sufficiently broad so as to encompass the diversity of contemporary land tenure structures utilised for conservation purposes and is appropriate.

The proposed amendments apply to any claimant application made after the commencement of the legislation, or to an application made before commencement that has not yet been determined (so as to permit these applications to be amended where agreement about s47C has been reached with the Commonwealth, State or Territory).

The proposed s 47C in a similar form was included in the *Native Title Amendment Bill 2012*. It was considered extensively and supported by the report of the Senate Constitutional and Legal Affairs Committee that considered that Bill. The NNTC considers that the proposed s 47C facilitates the making of comprehensive settlement agreements with regards to parks and that such agreements can ensure effective uniform land management within these parks. The proposed amendments are supported.

It should be noted that the proposed s 47C is an *enabling* provision that merely *allows* a state or Territory (or where relevant the Commonwealth) to reach an agreement with native title holders that will facilitate rational, uniform, land management planning and operations within a (defined) park area. The interests of other parties who may be affected by such an agreement are addressed in the public notification provisions of (proposed) s 47C (5) and primarily by the obligations the state (etc) which created such interests. It is reasonable to assume the state (etc) would have regard to such interests in making a decision as to the terms of the agreement reached with native title holders.

Part 2 – Pastoral leases held by native title claimants

Clause 17 amends s 47(1)(b)(iii). Section 47 allows for previous extinguishment to be disregarded in the event a determination application is made over a pastoral lease that is held by the native title group. The proposed amendment would extend the application of the section to pastoral leases held by body corporates comprised of “members” and not just “shareholders”. This amendment would extend the application of s 47 to pastoral leases held by companies limited by guarantee under the Corporations Act or by corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act*.

These are sensible amendments that remedy a significant omission in the original drafting of the section.

<u>*Part 3 – Future acts where prior extinguishment to be disregarded.*</u>

The main purpose of these provisions (clauses 19-21) is to clarify the structure of s 227 and to extend the benefits of that section to encompass the incorporation of the proposed s 47C. Section 227 provides the definition of an “act affecting native title”. The definition is significant because it is central to enlivening the NTA future act regime.

As currently drafted, it is not clear that the definition of an “act affecting native title” in s 227 will apply to those areas where native title exists only subsequent to a determination of native title pursuant to a provision that allows previous extinguishment to be disregarded. The proposed amendment achieves this by inserting provisions that allow “extinguishment to be disregarded” for the purposes of the definition of an “act affecting native title” from the time a determination application is made over the relevant area.

The provisions eliminate uncertainty that currently exists in the act in relation to future acts undertaken subsequent to a determination application pursuant to ss 47, 47A and 47B but prior to final determination of such application. As such the proposed provisions will enhance rational, effective land management and are supported.

Schedule 4 - Allowing a RNTBC to bring a compensation application (Amendments to the *Native Title Act 1993*)

When a determination is made and a RNTBC (PBC) is established it may also occur that within the boundaries of the determination area it is found that native title does not exist because of previous extinguishment, at times this previous extinguishment may be potentially compensable. Under the current structure of the NTA the bringing of this compensation application must be by the usual method of native title claim group nominating named applicants who lodge and prosecute the compensation application.

The proposed amendments to ss 58 and 61 provide for the RNTBC to lodge and prosecute such a compensation application if it is authorised by the common law holders to do so. These proposals simplify the administration of compensation applications and ensure a RNTBC is best placed to manage the interests of its constituent common law holders. The provisions will apply to compensation applications made after the commencement of the amendments.

The proposed amendments are supported.

Schedule 5 – Intervention and consent determinations (Amendments to the *Native Title Act 1993*)

<u>*Part 1 – Intervention in Proceedings*</u>

The purpose of the proposed amendments is to increase the ability and significance of the Commonwealth to intervene in judicial proceedings involving native title matters.

Clause 1 amends subsection 84A(1) by clarifying that the Commonwealth can intervene in proceedings before the High Court. This provision reflects current practice and is supported.

Clauses 2 and 3 amends s 87(1)(a) to require that the Commonwealth, if it has chosen to intervene in proceedings, be a party to any agreement on the terms of an order of the Federal Court. The effect of this provision is to allow the Commonwealth to prevent orders that are consented to by the parties in circumstances where the Commonwealth does not agree to the course proposed by the parties. Clauses 4 and 5 propose consequential amendments to s 87(1) to give effect to the proposed amendments to 87(1)(a).

The effect of this amendment is to give the Commonwealth a veto over an agreement in relation to a Federal Court order reached by the actual parties to the proceedings. **The provision will only impede negotiated agreements reached by those parties actually affected and cannot be supported**. To the extent the proposed provision reflects current practice it is clearly unnecessary and imposes further technicality upon an already highly complex statutory regime.

Clauses 6 and 7 propose amendments to s 87A. This section deals with consent determinations. Currently s 87A requires the Commonwealth to be a party to an agreement for a consent determination if at any stage the Commonwealth had intervened in the proceedings. The proposed amendment would require the Commonwealth to be a party to such an agreement only if the Commonwealth is intervening at the time the agreement is made.

The proposed amendment reduces complexity in the reaching of an agreement for a consent determination and is supported.

Clause 8 deals with the commencement of the schedule's provisions. It provides that the proposed amendments would apply to any proceedings commenced after the amending provisions commence and any proceedings on foot at the time the amending provisions commence.

Parties are entitled to certainty in the administration of proceedings currently before the Court. **It is inappropriate for the amending provisions to apply to proceedings already on foot.**

Part 2 – Consent determinations

Clause 9 proposes an amendment to s 87A(1)(b) that clarifies that s 87A operates with respect to a consent determination with respect to part only of a determination application

area and that agreements with respect to consent determinations covering the entirety of a determination application are dealt with under s 87.

The proposed provision appears to merely clarify the operation of s 87A and is supported.

Schedule 6 – Other Procedural Changes (Amendments to the *Native Title Act 1993*)

Part 1 - Objections

Clause 1 proposes an amendment to s 24MD(6B). This subsection deals with the procedure for native title parties to object to a proposal for a compulsory acquisition of native title rights and interests for the benefit of a third party. The proposed amendment to 24MD(6B)(f) clarifies the mechanism for objection by specifying a time period (8 months) within which the objection must be heard by an independent person or body. The current 24MD(6B)(f) does not specify any time period.

The proposed amendment remedies a shortcoming in the existing objection procedure and is supported.

Clause 2 proposes amendments to s 141(2) that clarify only a native title party that maintains an objection to a statement that an act attracts the expedited procedure is a party to the inquiry into that objection (pursuant to s 75). The proposed amendment clarifies the situation where one native title party has withdrawn an expedited procedure objection. The amendment reduces unnecessary complexity in the future act inquiry process and is supported.

Part 2 – Section 31 agreements

Clause 4 inserts a new s 41A(1)(c). The new subsection requires negotiation parties to advise the arbitral body (the NNTT) of the existence (but not the content) of an ancillary agreement to any s 31 agreement. Clause 5 makes this new requirement applicable only prospectively.

The proposed amendment is seen as promoting transparency in relation to the conclusion of s 31 agreements while still protecting the essential commercial in confidence nature of many such agreements. As such the proposed amendment achieves a sound balance between these potentially competing priorities and is supported.

Clause 6. The clause does not affect any amendment to the *Native Title Act*. Rather it operates independently to validate any existing s 31 agreements that may potentially be

considered invalid because of the application of the "*McGlade*"[2] principle to s 31 agreements.

McGlade went to the circumstances where some named native title applicants either refused or were unable to execute an ILUA. Following the *McGlade* decision the *Native Title Amendments (Indigenous Land Use Agreements) Act 2017* was enacted to clarify that it was not necessary to have all named applicants execute an ILUA provided that the ILUA was properly authorised by the native title group. Clause 6 effects equivalent changes with respect to s 31 agreements.

The proposed provision gives effect to agreements that have already been negotiated and agreed with native title holders and thereby provides certainty and stability in the native title sector. They are supported.

Clause 6 (1)(c)(i) appears to validate s 31 agreements where the one (and only) named claimant did not execute the agreement. A similar situation arose in the case of the ILUA amendments. While the NNTC is not aware of any circumstance where this situation has arisen until there can be confirmation of this fact the provision represents a sensible "abundance of caution" approach to such a situation.

Clauses 7-9 insert amendments to ss 25(2), 31(1) and 36(2) to clarify that a "Government Party" does not need to be an active party to any "Right to Negotiate" proceedings. A Government Party would however remain classified as a negotiation party for the purposes of executing any subsequent s 31 agreement.

The proposed amendments reflect current practice and operate to simplify the Right to Negotiate procedure. They are supported.

Schedule 7 – National Native Title Tribunal (Amendments to the *Native Title Act 1993*)

Clause 1 inserts a proposed new s 60AAA into the Act. The proposed new section gives a legislative foundation to the NNTT having a function to assist in dispute resolution in PBCs. Such assistance may be requested either by the PBC or by a common law native title holder. Clause 2 proposes consequential amendments to s 108 ("Functions of the Tribunal") to reflect the insertion of the proposed s 60AAA.

The proposed provision is non-mandatory and enhances the ability of PBCs to resolve internal disputes without the necessity to involve the regulatory framework of CATSI. The proposal is appropriate and welcomed. The proposed provisions are supported.

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[2]*McGlade v Registrar National Native Title Tribunal* [2017] FCAFC 10.

Under current ss 111 and 115 the President and other members of the NNTT are appointed for a period not exceeding five years and may be appointed by the Governor-General on a full-time or part time basis for a term not exceeding five years. Section 121 prohibits members from having outside employment (other than with the ADF) except with the approval of the Minister (the Attorney-General). The terms and conditions of appointment are as prescribed (in accordance with the determination of the Remuneration Tribunal).

Clause 3 proposes to insert a new s 115A which would provide for the Minister to make "acting Appointments" to the Tribunal if a member (including the President or any Deputy President) is "absent from Australia" or "for any reason is unable to perform the duties of [their] office". Under s 33A of the *Acts Interpretation Act 1901* the terms and conditions of appointment are as determined by the Minister. Section 33A also places limitations on the use of Acting appointments when the 'permanent' office is vacant.

The proposed provisions provide for some flexibility in the management of the Tribunal's personnel. Balanced against this is the potential threat to the Tribunal's independence through having acting appointees of a limited tenure determined by the Minister appointed on terms and conditions also determined by the Minister. This threat is mitigated to some degree by the limitation imposed on the use of acting appointments through the proviso that they can only be made when the 'permanent' member is "absent from Australia" or "for any reason is unable to perform the duties of [their] office".

On balance the acting provisions are supported. However, it is noted with concern that Government has delayed announcing the appointment of a member to fill the vacancy created by the departure of a member of the Tribunal in April 2018.

Clause 4 amends s 123(1)(b)(ii) and removes the current limitation on the NNTT President in that they can (relevantly) only give directions as to the persons who are to "provide assistance in making or negotiating agreements under this Act. The proposed amended provision would allow the NNTT President to give directions as to the persons who are to "provide assistance under this Act." The proposed amendment reflects the expanded functions of the NNTT contemplated in the proposed s 60AAA and is supported.

Schedule 8 – Registered native title bodies corporate

This schedule proposes amendments to the ***Corporations (Aboriginal and Torres Strait Islander) Act 2006*** *as this affects PBCs (RNTBCs)*

Part 1 – Registrar Oversight

Clauses 1-3 proposes amendments to s 487-5 of CATSI. The main effect of the proposed amendments is to give the CATSI Registrar the ability to appoint a special administrator to

a RNTBC if they are of the view that the corporation is conducting its affairs "in a way that is contrary to the interests of the common law holders or a class of common law holders." The term "contrary to the interests" is not defined.

The proposed provision allows an unfettered discretion on the part of the ministerially appointed CATSI Registrar to second guess the lawful decisions of an RNTBC as to what is in the best interests of the common law holders. The provision is strongly opposed. The fact that the CATSI Act (s 487-5(1)(e)(iii) creates the ability in the CATSI Registrar to appoint a special administrator in the event the Registrar forms the view that the affairs of the Corporation are being conducted in a manner "contrary to the interests of the *members* of the corporation as a whole" (emphasis added) does not diminish this criticism. The existing s 487-5(1)(e)(iii) is a manifestation of condescending racism, the extension of the power as proposed extends this racism to an attempt to undermine Indigenous self-determination as well.

Part 2 Memberships and common law holders

Division 1 Requirements for constitutions

Clauses 4-7 amend the indexing provisions of s57-5 to reflect the amendments discussed below.

Clause 9 proposes the insertion in s 66-1 of a new s 66-1(3B) that would require an RNTBC's constitution to include provisions for dispute resolution between the RNTBC and a common law holder. Clause 8 amends s 63-1 to include such dispute resolution provisions within the definition of "internal governance rule requirements".

The proposal for the compulsory inclusion of dispute resolution mechanisms with common law holders reflects the particular duty of an RNTBC to potentially non-member common law holders. However, it avoids undue prescription in this regard. The proposal is supported.

Clause 14 proposes amendments to s 141-25 to require an RNTBC's membership rules "to include eligibility requirements for membership that provide for all the common law holders of native title to be represented, directly or indirectly". Clauses 11-13 propose amendments consequential to clause 14.

The proposal for the compulsory inclusion of membership provisions that ensure the representation of common law holders reflects the particular duty of an RNTBC to potentially non-member common law holders. However, it avoids undue prescription in this regard. The proposal is supported.

Clauses 15 – 21 deal with the cancellation of membership of an RNTBC. The main operative provision is clause 17 which proposes the insertion of a new subsection 150-15(2A). This subsection would limit the basis for the cancellation of membership of an RNTBC to those matters set out in (the existing) s 150-15(1) and (2). These are: ineligibility for membership or failure to pay membership fees (s 150-15(1)) or because the member is uncontactable, the member is not Aboriginal or Torres Strait Islander, and the member has misbehaved. (s 150-15(2)).

Clause 20 proposes a new s 150-22 that provides a mandatory procedure for the cancellation of the membership of an RNTBC on the basis of ineligibility for membership or failure to pay fees. The procedure set out ensures procedural fairness and is reasonable in the circumstances.

The provisions proposed recognise the particular position of a RNTBC as managing the native title rights and interests of common law holders and are supported.

Clause 22 proposes application and transition provisions. The proposed provisions would apply to all RNTBCs registered after commencement and all existing RNTBCs would be required to incorporate the new rules within two years, failing which the Registrar is empowered to make the necessary changes

Two years is considered an inadequate period to require the inclusion of the new rules, particularly as these may involve the development of an appropriate dispute resolution procedure. As such it is submitted the transition period should be extended to five years.

Division 2 – Refusal of Membership

These proposed provisions limit the ability of an RNTBC to refuse an application for membership. The main operative provision is clause 25 which proposes the insertion of a new subsection 144-10(3A). The effect of the new subsection would be to remove the discretion of directors to refuse the membership of an applicant who applies in the prescribed form and is eligible for membership. Clause 27 proposes the new provisions would apply to all membership applications subsequent to commencement of the amendments.

The general thrust of the proposed amendment is supported. That is, a common law holder should be entitled to membership of the RNTBC, noting that it is possible that membership could subsequently be cancelled on the grounds of (amongst other things) misbehaviour. However, the membership eligibility rules of an RNTBC may extend beyond common law holders. If so, non common law holders should **not** have an automatic entitlement to membership.

The proposed provision should be amended accordingly.

Part 3 Jurisdiction of courts

The clauses in this schedule (28-38) propose amendments to (primarily) Division 586 of CATSI that would have the effect of giving the Federal Court (and where appropriate the High Court) exclusive jurisdiction in all matters relating to RNTBCs. The proposed amendments would apply prospectively (clause 39) and not affect any matter currently on foot (or any consequent appeal).

The matters particular to RNTBCs are complex and commonly related to matters incidental to a determination of native title. The Federal Court as the Court with exclusive jurisdiction with respect to a determination of native title under the *Native Title Act 1993* and therefore the appointment of a PBC (RNTBC) is the appropriate Court for dealing with matters arising from the operation of the RNTBC under CATSI.

The proposed amendments are supported.

Schedule 9 – Just terms compensation

The single clause in this schedule inserts the standard savings just terms compensation provisions into the Amending Act to provide safeguard against unconstitutionality arising from any unintended acquisition of property.

It is not apparent any acquisition of property arises from the proposed amendments and the provision is a sensible 'abundance of caution' one that is supported.

3. Matters Contained in the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018.*

Schedule 1
– Amendments to the CATSI Regulations 2017

The first main operative provision of this schedule is found in clause 3 which proposes the insertion of a new regulation 55A into the CATSI Regulations 2017. The proposed regulation 55A would give the CATSI Registrar the function of determining "whether or not, in the Registrar's opinion, a certificate given by a PBC under Regulation 9 of the *PBC Regulations* complies with that regulation 9. Regulation 9 of the *PBC Regulations* establishes the process of the certificate a PBC issues to confirm that common law holders have been consulted about and consented to a native title decision (in accordance with the requirements of PBC Regulations 8 or 8A). Under existing PBC Regulation 9(4) the certificate is deemed to be evidence of satisfaction of the appropriate processes of common law holder consultation and consent if it is signed by at least five affected common law holders (or if there are less than five affected common law holders those affected common law holders).

Although the Discussion Paper circulated with the exposure draft asserts that the proposed regulation 55A does not grant the CATSIO Registrar the power to look behind the face of the certificate this matter is not clear from the terms of the proposed regulation. It is submitted that if the regulation is proceeded with (which is not supported) it should be amended to make this limitation clear.

This matter aside, taking the limited view of the scope of the power created under the proposed regulation it is unclear what purpose it is intended to serve. It would seem that it creates a power for the CATSI Registrar to provide an advisory opinion on a matter the Registrar has no involvement in. The suggestion in the Discussion Paper is that a defective certificate may provide a basis for the appointment of a special administrator. The ludicrous suggestion that the CATSI Registrar would appoint a special administrator on the basis of a technical error on the face of a regulation 9 certificate suggests the intent of the creation of the function is to give the Registrar a basis to investigate the process of native title decision making by a PBC. This risk balanced against an otherwise pointless function suggests that the proposed regulation should not be supported.

Clause 4 of the amending regulations operates to make (through the insertion of a new CATSI Regulations Regulation 61) the proposed new Regulation 55A operative from the time of the commencement of the new provisions (i.e. not retrospective).

In the case of a native title decision relating to the making of an area agreement ILUA the Native Title Registrar already has the function to consider objections to the registration of

a proposed ILUA on (*inter alia*) the basis that the relevant consultation and consent requirements were not met (NTA s 24CI). In the case of a body corporate ILUA, the Native Title Registrar has no jurisdiction to entertain objections (except in the event a NTRB advises it was not consulted (NTA s 24CA(3)). The effect of the proposed amendments then is to give the CATSI Registrar jurisdiction to entertain (in effect) objections to not only body corporate ILUAs but all native title decisions.

The proposed amendments would operate to introduce considerable uncertainty and potential delay into the native title decision making process and potentially have the effect of considerably increasing PBC operating costs. Government has provided no evidence that these measures are warranted. In addition, there is considerable uncertainty as to the operational effect of the proposed provisions (as outlined above) or that they would be effective in achieving their (unclear) purpose.

The proposed provision is opposed.

- **Amendments to the *Native Title (Indigenous Land Use Agreements) Regulations 1999***

Clauses 5 -17 apply. The effect of these provisions is to clarify the regulations apply only to ILUAs and to change the terminology used to refer to Regulations 9 Certificate discussed above. They are not opposed.

- **Amendments to the *Native Title (Prescribed Bodies Corporate) Regulations 1999***

Clause 23 introduces a new Regulation 7A which creates as a function of a PBC the role of pursuing compensation applications on behalf of their members. Proposed sub-regulation 8B (clause 30) sets out the method for authorisation of such an application This proposal is supported.

One function of the amendments proposed in clauses 19 – 22 is to alter the current structure of the existing PBC Regulations by inserting the notion of “high level [native title] decisions” and “low level [native title] decisions” as well as the notion of “standing instruction decisions”. A “high level decision” is a decision to enter an ILUA or conclude an (NTA) s 31 agreement. The consultation and consent requirements differ depending on the nature of the decision in question. In broad terms, this reconfiguration is an attempt to simplify the structure in existing Regulations 8 and 8A which specifies the relevant procedure for each type of native title decision.

Clause 25 replaces the existing Regulations 8(1) and (2) to pick up these new definitions in specifying differing procedures to be adopted depending on the ‘level’ of decision. The proposed new regulations also specify that consultation and consent is required from “the common law holders on whom the proposed native title decision would have an effect” which clarifies the intent of the existing provisions.

The provisions have the effect of allowing a standing instruction with respect to a high level decision where the proponent for that action is the PBC itself. While likely to be utilised in only a limited number of cases the provision is worthwhile and is supported.

Clause 30 continues the existing "alternative consultation procedures structure of existing Regulation 8A but amended to reflect the new 'low level decision' terminology

The proposal contained in the proposed new sub-regulation 8(8) facilitates the operations of a PBC and is supported.

Clause 30 also proposes a new regulation 9 relating to certificates as to native title decisions. In large part the proposed new regulation 30 picks up the changes discussed earlier regarding high and low level decisions and standing instructions. A significant additional change though is that whereas the existing regulation 9 provides that*: "[c]ommon law holders of native title rights and interests are taken to have been consulted on, and to have consented to, a proposed native title decision of a prescribed body corporate if [a certificate is issued*]". The proposed regulation 9 provides that a certificate is only "*prima facie evidence that the common law holders…have been consulted and have consented…*"

While the suggestion is that the change reflects only improved drafting technique in fact it would appear to create undesirable uncertainty regarding the efficacy of a regulation 9 certificate. **This aspect of the proposed new regulation 9 is not supported.** The new regulation 9 also proposes the certificate is executed by the PBC itself (rather than the current 5 common law holders). This provision recognises the function of a PBC and is supported.

In addition, the proposed version of regulation 9 would impose an obligation on a PBC to produce a certificate in relation to every native title decision taken by a PBC. Under the current provisions a certificate must be produced only if it is requested by a common law holder or other "interested person". This proposal imposes a further regulatory burden on PBCs (and a further ground for the possible appointment of a special administrator) for, literally, no purpose – the mandatory production of certificates unwanted by any party, solely for the sake of producing a certificate. **This aspect of the proposed new regulation is also not supported**.

4. Further Matters

The NNTC is committed to ensuring the native title system, in particular the future act regime, is fair to all parties. The existing future act determination process and other future act processes are demonstrably not fair to native title holders. To remedy this the NNTC believes the following further amendments to the NTA should be considered:

- Section 35(1)(a) be amended such that the minimum negotiation period before a proponent can seek a future act determination by the NNTT be extended from six months to nine months
- Section 38(2) of the *Native Title Act be amended to allow conditions relating to the payment of royalty (or equivalent) to be included in NNTT determinations.*
- That the criteria for NNTT arbitral determinations contained in NTA s 39 be amended to give greater weight to the views of native title holders.
- That NTA Part 2, Division 3, Subdivision G be amended such that the diversification of activities allowed on non-exclusive agricultural and pastoral leases described in that subdivision enliven the RTN procedure.
- That NTA Part 2, Division 3, Subdivision J be amended such that the undertaking of any civil engineering works that have the consequence of the extinguishment of native title rights enliven the RTN procedure.

In addition, the NNTC believes there are a number of proposals contained in the Australian Law Reform Commission's *Connection to Country* report that can usefully be considered as apart of any NTA legislative reform process.