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of
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National Native Title Council Pre-Budget Submission

An efficient and effective native title system can make a vital contribution to Australia's community and economy, particularly in Northern Australia. The native title system is an important component of the nation's land management processes and a vital component in the minerals and petroleum exploration and production industries. Crucially, the native title system can create an opportunity for both a resurgence of Indigenous culture and also opportunities to create economic advancement and independence for Australia's Indigenous Peoples. The facilitation of Indigenous economic development that can arise through native title creates important opportunities for remote and regional communities and, ultimately can lead to a reduction in the need for government transfer payments.

In assisting to achieve these outcomes the native title system can operate to complement and enhance a number of existing Government policies such as the Indigenous Procurement Policy and the Indigenous Business Sector Strategy.

The proposals contained in this submission are designed to support these outcomes. The proposals involve a mixture of funding and policy initiatives. They are put forward by the National Native Title Council. The NNTC is the peak body for Australia's Native Title Organisations representing Native Title Representative Bodies and Service Providers recognised under the *Native Title Act (NTA)* (sections 203AD and 203FE) as well as Prescribed Bodies Corporate (PBCs) established under section 55 of the NTA and other equivalent Traditional Owner Corporations (TOC) established under parallel legislation such as the Victorian *Traditional Owner Settlement Act*.

The NNTC proposals go to three main areas:

- The PBC Institutional Framework;
- The arrangements around the management of forthcoming native title compensation applications; and,
- The enhancement and expansion of Indigenous Ranger Programs.

Each of these areas will be considered in detail below, but the following provides a summary of the NNTC Pre-Budget recommendations.

PBC Institutional Framework

- That the *Corporations (Aboriginal and Torres Strait Islander) Act* be amended to include the proposed PBC-EVS provisions.
- That each PBC be allocated three-year recurrent funding at a level of \$300,000 p.a. and that this funding be made available six months prior to the expected date of a determination of the existence of native title by the Federal Government.

Managing Native Title Compensation Applications

- Funding under the Prime Minister & Cabinet Land Program be increased by \$50m annually for the next three years to allow Native Title Representative Body and Native Title Service Providers to adequately manage future native title compensation applications.

Supporting Indigenous Ranger Programs

- Funding for Indigenous Ranger Programs should be increased by \$100m annually for the next three years to allow the expansion of existing IRPs and the development of new programs in collaboration with PBCs and relevant NTRBs/SPs.

PBC Institutional Framework

Prescribed Bodies Corporate (PBCs) are the key structure for the management of native title rights. PBCs have statutory obligations to consult with many thousands of native title holders in relation to a broad range of major and less significant land use proposals. They also have the potential to be the organisational foundation for economic development activities for native title holders, particularly in remote locations. There are currently 187 PBCs across the country. The number is expected to rise to over 300 in the coming years.

PBC – Economic Vehicle Status

The current structures around the management of native title monies by PBCs are complicated, confusing and often lack transparency. They involve a complex combination of

native title, charitable trust and taxation law. The current arrangements often provide a positive *disincentive* for native title holders to utilise native title monies for long term economic development in favour of restrictive charitable trust or immediate disbursement.

The NNTC in conjunction with the Minerals Council of Australia has developed a proposal to overcome these shortcomings. The PBC – Economic Vehicle Status (PBC-EVS) proposal involve establishment of an optional ‘economic vehicle status’ (EVS) designation available to PBCs. This would enable the PBC-EVS to undertake a broader range of economic development activities, such as providing finance for private businesses, while accessing tax concessions that apply where an organisation is seeking to address disadvantage. Importantly the model would also enable existing trusts established for the management of native title monies but constrained by restrictive charitable trust rules to be rolled into the PBC EVS. The model would also include additional transparency and reporting requirements.

These reforms would be achieved through targeted amendments to the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), its regulations and associated legislation. The principles behind the PBC-EVS have already been endorsed by the Treasury *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group* in 2013 and in the 2015 *Our North, Our Future, White Paper on Developing Northern Australia*.

Supporting PBCs

Efficient and effective PBCs are crucial to a viable land management system across Australia. They currently have no guarantee of any resources to undertake their important task. A PBC can apply for funding to undertake economic development programs and charge proponents’ fees in some limited circumstances. Often the revenue raised by a PBC from its business activities must be used to fund its statutory obligations under the *Native Title Act*.

Obliging native title holders to raise their own funds to discharge obligations under Commonwealth and State law makes a mockery of the recognition of traditional ownership in the *Native Title Act* and fails to harness the opportunity for economic development inherent in a PBC.

However, if a PBC were allocated resources enough to undertake its core statutory functions this potential could be realized, and the objectives of the *Native Title Act* fulfilled. The NNTC estimates that this goal could be achieved if each PBC were allocated a three-year recurrent funding at a level of \$300,000 pa. To ensure that a PBC can effectively discharge its statutory and social obligations from the time of the determination of native title by the Federal Court, this funding should be made available some months ahead of the date of the determination.

Assuming there are 200 PBCs in existence as at mid-2019, this proposal would involve a maximum first-year expenditure of \$60m. However, this amount is likely to be significantly reduced through the development of regionally based PBC support services (essentially a services ‘hub’ that can be utilised by a number of PBCs in a specific region) in areas such as Torres Strait and elsewhere. While this is a not insignificant expenditure, given the role this funding could have in giving real effect to native title rights and facilitating economic development in remote communities it is a worthwhile investment.

Recommendation

- That the *Corporations (Aboriginal and Torres Strait Islander) Act* be amended to include the proposed PBC-EVS provisions.
- That each PBC be allocated three-year recurrent funding at a level of \$300,000 pa and that this funding be made available six months prior to the expected date of a determination of the existence of native title by the Federal Government.

Managing Native Title Compensation Applications

Compensation Application Procedures

The NTA provides that all “acts” that have “affected” native title rights and interests since the commencement of the *Racial Discrimination Act* in October 1975 accrue a liability of compensation on the part of the party doing the act (most commonly state and territory governments) to native title holders. Section 227 NTA defines an “affect on native title” as any act that extinguishes native title (in whole or in part) or “is otherwise wholly or partly inconsistent with their [the native title rights and interests] continued existence, enjoyment or exercise”. By way of example of the scope of the definition contained in s 227, the unanimous decision of the High Court in *Western Australia v Brown* [2014] HCA 8 (“*Brown*”) makes clear that both the grant of *and exercise* of rights pursuant to, for example, a mineral lease will operate to “affect” native title rights and that the *exercise* of rights may have an “affect” in addition to the original grant (*Brown* at [64]).

As the foregoing indicates, the compensation provisions of the NTA operate to create a state (or territory) government native title compensation liability in respect of potentially every grant of an interest in land where native title may exist (or may have existed) that has occurred since 1975. In Western Australia uniquely it has been sought to shift the compensation liability to the holder of a mining tenement (s125A Mining Act 1978).

On 4 September 2018 the High Court sat in Darwin for the first time to hear appeals in the matter of *Northern Territory v Griffiths* (the Timber Creek Compensation Case - *Griffiths*). The case is significant because, after 25 years of operation of the *Native Title Act*, *Griffiths* is the first litigated native title compensation application. It is likely that the decision of the High Court will be delivered in early 2019.

Evidentially establishing the elements in a compensation application will require the taking of evidence regarding traditional laws and customs from applicants. It would also involve issues of extinguishment and therefore tenure histories as a step in establishing the original existence of native title. These are the matters that are also involved in a native title determination application.

A compensation application would, in addition, involve evidence as to the areas of particular significance to the compensation applicants and of the scope of operations undertaken by the grantee during the currency of the title. Often of course the land the subject of a compensation application may have been the subject of the grant of various successive titles (particularly minerals titles). Evidence regarding the operation (not merely existence) of each of these titles would need to be led.

These matters established it would then be necessary for the parties to lead evidence regarding the appropriate valuation method for the subject land. As the first instance decision *Griffiths* (*Griffiths v Northern Territory (No 3)* [2016] FCA 900) suggests, the appropriate method for the valuation of remote land where there have been little relevant market dealings can be a complex and contentious issue. This experience is supported from that of other contexts such as the valuation of land the subject of "Township Leases" under the provisions of the *Aboriginal Land Rights (Northern Territory) Act*.

In short, the process of litigating a native title compensation application is significantly more complex than that involved in litigating a native title determination application. Absent the adoption of alternative processes, this litigation process would need to be repeated across all lands that may have been the subject of native title rights in 1975 but have since been the subject of the grant of any interest.

Management of Compensation Applications

The complexity and volume of future compensation applications that will emerge subsequent to the decision of the High Court in *Griffiths* raises questions around the management of the compensation application process. The NNTC has urged Government to investigate the establishment of policies and procedures that will ensure the efficient and orderly management of these applications. These policies go to matters such as the encouragement of comprehensive native title settlements where the existence of native title, the adoption of

tailored future act procedures and issues associated with compensation can be resolved, through negotiation, at one time. Other potential policies go to the establishment of voluntary administrative tribunal structures designed to reduce transaction costs.

While the development of these policies and procedures holds great promise for the future, there will be an inevitable time lag until the applicable jurisprudence is settled and the relevant structures are established and functional. This suggests there will be an inevitable surge in the demand from native title holding communities for resolution of compensation issues that will need to be dealt with through existing Federal Court structures.

Native title holding communities will need to be satisfied that this demand can be reasonably met. The undesirable alternative is that compensation applicants will be enticed to pursue poorly prepared applications in an *ad hoc* fashion. The consequences of this scenario are that the Courts will be clogged in the management of poorly prepared applications and the benefits of compensation applications may be consumed by excessive and unnecessary legal and other litigation costs. This scenario must be avoided.

To do so the existing Native Title Representative Body and Native Title Service Provider (NTRB/SP) system must be resourced to address the demand that will stem from native title compensation applications. There are currently 15 NTRB/SPs across the country. They are funded by the Commonwealth government to undertake a range of functions in particular the prosecution of native title determination applications, supporting native title holders and claimants in the management of future act proposals and the support of PBCs within their relevant regions. The existing funding NTRB/SPs receive under the Native Title and Land Rights Program of approximately \$100m, although efficiently managed by NTRB/SPs, is inadequate to adequately discharge even all of these functions. It is certainly inadequate to, *in addition*, undertake the extensive work associated with native title compensation applications.

Consultation with NTRB/SPs indicates that in order to adequately respond to the expected demand for the initiation and prosecution of native title compensation applications likely to arise in 2019-20 will require an additional \$50m in that financial year. This level of funding is likely to be necessary over the subsequent two years by which time it is anticipated that the greater utilisation of alternative resolution structures would make a review of this allocation appropriate.

Recommendation

- Funding under the Native Title and Land Rights Program be increased by \$50m annually for the next three years to allow Native Title Representative Body and Native Title Service Providers to adequately manage future native title compensation applications.

Supporting Indigenous Ranger Programs

As part of the Closing the Gap Refresh process all Australian Governments have committed to the following outcome:

Land and waters: Aboriginal and Torres Strait Islander people maintain distinctive spiritual, physical and economic relationship with the land and waters.

The specific outcome sought is that: *Aboriginal and Torres Strait Islander peoples' land, water and cultural rights are realised.* COAG notes that:

A Land and Waters target will be developed by mid-2019 by all jurisdictions to support Aboriginal and Torres Strait Islander peoples' access to, management and ownership of, land of which they have a traditional association, or which can assist with their social, cultural and economic development.

The NNTC is working with the Department of Prime Minister & Cabinet in order to further develop and refine this COAG Target.

In addition, for ongoing support for achieving native title (determination and compensation) outcomes the NNTC sees support for Indigenous Ranger Programs (IRPs) as a crucial aspect of achieving this COAG endorsed outcome.

There are currently 123 IRPS operating across the country employing in total more than 2,200 Indigenous people (840 FTE) usually in remote and regional areas, IRPs are a feature of the activities of many NTRB/SPs and PBCs. IRPs employ Indigenous land and sea managers to undertake cultural and natural resource projects to improve and enhance the unique biodiversity and cultural values of a region.

IRPs work with local Traditional Owner Groups to realise Indigenous aspirations to look after and manage country using a combination of traditional cultural knowledge, western science and modern technologies.

IRPs are supported by the Commonwealth Government and are proving to be a successful business model through integrating ecological, social and cultural values to generate economic growth in remote Aboriginal communities.

IRPs are creating not only jobs in remote communities but long-term career paths in the conservation and land management sector. Indigenous ranger positions are real jobs that require accredited conservation and land management qualifications. Ranger work can include:

- Biodiversity monitoring and research
- Traditional knowledge transfer
- Fee-for-service contracts
- Fire management
- Cultural site management
- Feral animal and weed management
- Cultural awareness and immersion experiences
- Tourism management
- School education programs and mentoring

IRPs are underpinned by cultural values and the positive benefits of the program have been far and wide reaching. They have significantly improved community wellbeing, are working to reduce poverty through creating economic opportunities and are building leadership in communities.

IRPs generally have regional governance structures founded on Indigenous cultural values. Aboriginal elders direct long-term conservation management plans, promote the transfer of traditional knowledge to younger generations and provide guidance, leadership and authority. Generally, the IRP governance models aim to connect all of the ranger groups within a region together to ensure that not only are community goals being achieved at a local level, but efforts are being made towards achieving targets at a regional and national level.

In April 2018 the Commonwealth Government announced a funding extension of \$250 million to fund IRPs until 2021. While this is a welcome addition the funding is aimed only at maintaining existing IRPs at current levels. The NNTC believes that existing IRPs should be expanded, and that new IRPs should be developed across the country.

To achieve this the existing Commonwealth funding allocation to support IRPs should be increased by an additional \$100m per annum for the next three years. This aspiration stated it is the firm view of the NNTC that in order to effectively develop stable ongoing IRPs that can achieve the long-term goals hoped for funding models should be based around a 10-year funding model.

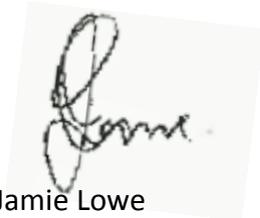
Recommendation

- Funding for Indigenous Ranger Programs should be increased by \$100m annually for the next three years to allow the expansion of existing IRPs and the development of new programs in collaboration with PBCs and relevant NTRBs/SPs.

The NNTC extends its thanks for the opportunity to make this submission. For further information in relation to the submission please contact the NNTC CEO, Dr Matthew Storey:

(matthew.storey@nntc.com.au, 0419 578 504).

Yours faithfully

A handwritten signature in black ink on a light-colored rectangular background. The signature is cursive and appears to read 'Jamie Lowe'.

Jamie Lowe

Chair, National Native Title Council