



Australian Government  
Attorney-General's Department

# REFORMS TO THE *NATIVE TITLE ACT 1993* (CTH)

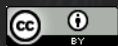
OPTIONS PAPER | NOVEMBER 2017

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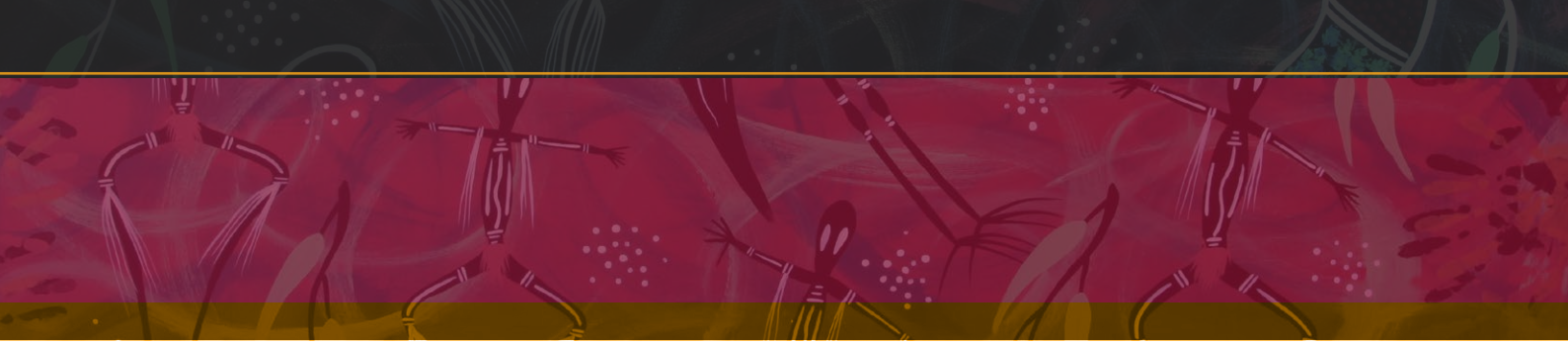
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## Making a submission

Submissions responding to the questions raised by this proposals paper can be emailed to [native.title@ag.gov.au](mailto:native.title@ag.gov.au).

Submissions may also be posted to:

Native Title Unit  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Submissions should be provided by **25 January 2018**. Submissions may be made publicly available. Please indicate if you wish your submission to be confidential. Please note that submissions or comments will generally be subject to freedom of information provisions.

# Introduction

This year marks the twenty-fifth anniversary of the High Court's landmark decision in *Mabo v Queensland (No 2)*, which rejected the doctrine of terra nullius applying in Australia and recognised pre-existing native title rights.

The decision also acknowledged the importance of country and the connection Aboriginal and Torres Strait Islander people have to their traditional lands. Since this decision, and the enactment of the *Native Title Act 1993* (Cth) (the Act), the native title system has matured greatly, with the total number of native title determinations now surpassing applications on foot (e.g. as at 6 October 2017, there were 291 native title applications compared to 401 determinations).

The resolution of native title claims is a priority for the Australian Government – to both enable native title holders to unlock the economic development opportunities that accompany the recognition of native title, and to provide certainty for all actors in the native title system. The resolution of claims also promotes connection with land and culture for native title holders. This is why the Government – through the *White Paper on Developing Northern Australia* – aspires to finalise all native title claims existing at June 2015 by 2025.

Despite significant progress, the Government considers there is scope for improving the native title system to increase access to native title rights and traditional lands. This paper seeks stakeholder views on a range of options to amend the Act which are intended to improve the efficiency and effectiveness of the native title system to resolve claims, better facilitate agreement-making around the use of native title land, and promote the autonomy of native title groups to make decisions about their land and to resolve internal disputes.

The options are mainly derived from recommendations made by a number of reviews of the Act, most importantly:

- the Australian Law Reform Commission's report on '*Connection to Country: Review of the Native Title Act 1993 (Cth)*', published June 2015 (ALRC Report)
- the report to the Council of Australian Governments on the '*Investigation into Indigenous Land Administration and Use*', published December 2015 (COAG Investigation), and
- the Office of the Registrar of Indigenous Corporations' 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act Review).

In deciding which options to consult on, the Government has taken into account the ongoing development of the case law and the broader native title system, with a view to ensuring that any legislative change meets the current needs of the system. Therefore this paper focuses on improvements to claims resolution, agreement-making and dispute resolution processes, rather than proposing significant changes to the key concepts of the law (including on connection and the content of native title).

The claims resolution and agreement-making options also build on amendments made to the Act earlier this year in the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (2017 Amendments). These amendments resolved the uncertainty created by the Full Federal Court decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (the *McGlade* decision) regarding area Indigenous Land Use Agreements.

State and territory governments have also raised a number of proposals, which are included as an attachment to this paper (see Attachment G). Stakeholder views on the merits of these proposals – and other measures not canvassed by this paper – are welcomed.

Following consultation on this paper, the Government will develop an exposure draft bill for further public comment. It is anticipated the exposure draft will be released in early 2018. The Government has also tasked an Expert Technical Advisory Group comprising native title, state and territory government, Commonwealth, and industry representatives to provide technical assistance on how to implement certain amendments to the Act.

## Section 31 agreements

### What is a section 31 agreement?

A 'section 31 agreement' is a term used to describe a particular kind of agreement-making mechanism under the Native Title Act. Section 31 agreements primarily relate to the grant of mining and exploration rights over land which may be subject to native title, and the compulsory acquisition of native title rights.

Section 31 agreements are not publicly registered (unlike Indigenous Land Use Agreements (ILUAs)). During the Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, stakeholders indicated these agreements are widely used, particularly in Western Australia.

Other differences between the two agreement types under the Act are:

	Section 31 agreement	Area ILUA
Scope (i.e. potential content of the agreement)	Limited (typically mining-related activities)	No limitation
Arbitration by NNTT	Yes	No
Authorisation process set out in NTA	No	Yes – s 251A
Execution (by the applicant)	Unclear (post the <i>McGlade</i> decision)	By majority (default post 2017 Amendments)

The Full Federal Court decision in *McGlade* led to uncertainty about the validity of certain ILUAs which the 2017 Amendments resolved. The *McGlade* decision found that area ILUAs to which all members of the Registered Native Title Claimants (RNTC) (aka 'the applicant') were not a party were invalid. That is, in circumstances where an ILUA was authorised by the broader claim group, if even a single member of the applicant was unwilling or unable (including because the person was deceased) to sign the agreement, that agreement could not proceed to registration.

While the facts before the Court only dealt with ILUAs, the Court's reasoning could potentially be applied to section 31 agreements to which all members of the applicant were not a party.<sup>1</sup>

<sup>1</sup> States and territories have also identified that *McGlade* may also impact agreements made under approved alternative right to negotiate scheme – see Item G5 in Attachment G.

## What is the problem?

There are two issues which require consideration in light of the *McGlade* decision and the 2017 Amendments:

- **The validity of existing section 31 agreements:** The decision, which related to ILUAs, potentially also affects the validity of existing section 31 agreements not signed by all members of the applicant.
- **The role of the applicant in future section 31 agreements:** Whether all members of the applicant should be required to execute future 31 agreements given this requirement was removed for ILUAs by the 2017 Amendments.

## What are the options?

The options for reform relate to existing and future section 31 agreements:

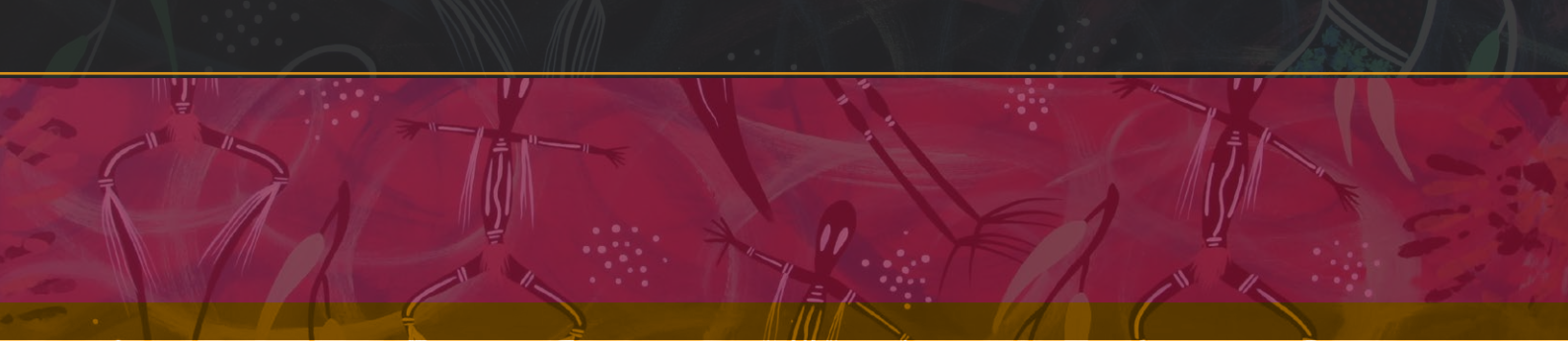
- **Confirmation of the validity of existing section 31 agreements:** legislative amendment to confirm the status of existing section 31 agreements.<sup>2</sup>
- **The role of the applicant in future section 31 agreements:** There are three options for how the applicant could be required to execute section 31 agreements in the future:
  - **Option 1:** All members of the applicant are to be mandatory parties to section 31 agreements.
  - **Option 2:** All members of the applicant, other than deceased members, are to be mandatory parties to section 31 agreements.
  - **Option 3:** A majority of the members of the applicant are mandatory parties to section 31 agreements. This would align the process with that for making area ILUAs following the 2017 Amendments. However, the reduced threshold necessary to make the agreement would require an additional safeguard, so this option would also include an authorisation process for section 31 agreements, which is not currently required for this kind of agreement-making.

In the context of ILUAs, authorisation is the process by which all persons who hold or may hold native title within the area of the ILUA decide whether or not to make the agreement.

### PROPOSAL IN PRACTICE

- *Options 1 and 2: A native title group has followed all the required steps to enter into a section 31 agreement with a mining company, and is now required to finalise the agreement. All members of the applicant are called together and execute the agreement.*
- *Option 3: A native title group has followed all the required steps to enter into a section 31 agreement with a mining company, and is now required to finalise the agreement. An authorisation meeting is called and the native title holders vote to enter into the agreement. Two of the twelve members of the applicant currently live overseas and are unable to sign the final agreement. In their absence, as the majority of the applicant, the ten local members execute the agreement.*

<sup>2</sup> This proposal received significant support during the Senate Legal and Constitutional Affairs Committee Inquiry into the provisions of the Native Title Act (Indigenous Land Use Agreements) Bill 2017, including from state governments, the National Native Title Council, and the mining sector.



## How do the options deal with the problem?

The options would confirm the validity of existing section 31 agreements, giving effect to the intention of parties to the agreement when they signed it, and would clarify the execution requirements for section 31 agreements to ensure that this regime remains a useful and efficient tool for making agreements.

**QUESTION 1:** Should the Act be amended to confirm the validity of section 31 agreements made prior to the *McGlade* decision?

**QUESTION 2:** What should be the role of the applicant in future section 31 agreements? Which of the three options, if any, do you prefer?

# Authorisation and the applicant

## Who is the ‘applicant’? What is ‘authorisation’?

The **applicant** for a native title or compensation application is the person(s) who have been **authorised** by the wider native title claim group to act on their behalf (see sections 61 and 251B).

The process of authorisation recognises the ‘communal character of traditional law and custom which grounds native title’<sup>3</sup> and ensures that claims are not lodged without the consent of the broader group of native title claimants.

The applicant has authority to *deal with all matters arising in relation to the claimant or compensation application* (see section 62A). A note to section 62A clarifies that this authority does not extend to the making of Indigenous Land Use Agreements (ILUAs); ILUAs are subject to a separate authorisation process (see section 251A and the chapter on ‘Agreement-making and future acts’).

The native title claim group can replace the applicant by seeking an order of the court, following the process set out in section 66B.

## What is the problem?

Stakeholders have raised a number of issues over time in relation to the authority and power of the applicant. This section of the paper deals with issues specific to the applicant in the context of claimant and compensation applications:

- **Scope of the authority of the applicant:** Section 62A provides that an applicant, once authorised, may deal with all matters arising under the Act in relation to an application. In practice, claim groups do not generally invest full decision-making authority in the applicant but expect the applicant to bring important decisions back to the group to consider. Such expectations may not be apparent to third parties negotiating with the applicant about the claim or other matters. It is also unclear what the legal status of specific directions and constraints that claim groups may attach to the applicant’s authority currently is.
- **How the applicant acts (internal decision-making):** Currently the applicant, in relation to applications, is required to act unanimously unless authorised otherwise by the claim group. This means that where the applicant is comprised of more than one person, those people must agree on a course of action before the applicant can act. This requirement potentially allows a member of the applicant, where unable or unwilling to act on instructions or in concert with the rest of the group, to frustrate the progress of the application. It is also not consistent with the 2017 amendments to the ILUA provisions of the Act which allow the applicant to act by majority.
- **Changing the composition of the applicant:** Currently the process outlined in section 66B is the only way to change the composition of the applicant. The replacement process can be costly and time consuming and may not be necessary in circumstances where authorisation by the claim group allows for changes without reauthorisation.

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3 French J in *Strickland v Native Title Registrar* (1999) 168 ALR 242, [57].

- **Duties of the applicant:** The ALRC Report commented that it is not currently clear whether a common law fiduciary duty is owed by the applicant to the claim group (which may change from time to time) or to the native title holders as finally determined, or both (see pages 314 to 315 of the ALRC Report).

Other issues regarding the role and responsibilities of the applicant are addressed in other sections of the paper.<sup>4</sup>

## What are the options?

The options to address these issues, as recommended by the ALRC, are:

- **Scope of the authority of the applicant:** Allow claim groups to define the scope of the applicant's authority in conducting a claim.

### PROPOSAL IN PRACTICE

*A native title claim group is keen to ensure that their views are taken into account if certain matters arise under the Act in relation to the application, which would normally be the responsibility of the applicant. To ensure this is the case, when authorising the making of the application under section 251B, the claim group restricts the scope of the applicant's authority by creating a rule that the applicant must have authorisation by the claim group to file a notice of change of lawyer, or apply for leave to discontinue the claim.*

- **How the applicant acts (internal decision-making):** Clarify that an applicant can act by majority unless the claim group specifies that unanimous decisions are required – this would be a reversal of the current default position.
- **Changing the composition of the applicant:** Allow the composition of the applicant to be changed in circumstances where a member is unwilling or unable to continue acting, or where the terms of an agreement provide for it, through an application to the Federal Court without going through the further authorisation process required by s66B(1)(b).

### PROPOSAL IN PRACTICE

*A native title claim group is made up of five family groups, each with a representative in the applicant. When authorising the applicant, the claim group decided on a backup applicant for each family group. After a year, one of the members of the applicant decides that they no longer want to be involved in the claim. The claim group applies to the Federal Court for a change of applicant. As the claim group has already authorised the replacement applicant, the Federal Court changes the applicant without requiring the group to convene an authorisation meeting.*

<sup>4</sup> This includes the role of the applicant in making section 31 agreements (Section 31 Agreements), who needs to authorise the making of an ILUA (Agreement-making issues), and the decision-making processes used by claim groups to make authorisation decisions (Indigenous decision-making) as well as who needs to authorise the making of an ILUA (Agreement-making and future acts – see Streamlining existing agreement-making processes).

- **Duties of the applicant:** Amend the Act to provide that a member of the applicant must not obtain a benefit at the expense of the claim group. The ALRC recommended imposing this negative statutory duty in place of a broader fiduciary duty.

Further detail about these proposals is set out in **Attachment A**.

## How do the options deal with the problem?

The options support claim groups as they develop their own governance structures. For example, allowing for the claim group to place conditions on the terms of an authorisation would retain the group's control over decision-making and increase the applicant's accountability. Allowing the claim group/applicant to apply directly to the court, in certain circumstances, to change the composition of the applicant, would avoid the need for costly and time consuming authorisation litigation. Imposing a statutory duty on the applicant clarifies the relationship between the applicant and the claim group and would ensure that the applicant is accountable for its actions as the claim group's appointed representative.

### **QUESTION 3:** Do you support the proposals to:

- (a) allow claim group members to define the scope of the authority of the applicant,
- (b) clarify that an applicant can act by majority unless the claim group specifies otherwise,
- (c) allow the composition of the applicant to be changed without going through a section 66B reauthorisation process in prescribed circumstances, and/or
- (d) impose a statutory duty on the members of the applicant to avoid obtaining a benefit at the expense of native title holders?

# Agreement-making and future acts

As more native title claims are determined, the focus of the system will shift to the ways in which native title holders can make agreements with other parties about the use of land and waters subject to native title. The efficient and effective operation of the Act's agreement-making processes is also critical to native title claimants and holders obtaining economic benefit from native title.

The Act includes provisions specifying the way native title rights are protected and can be used, and different mechanisms for making agreements about native title land. The primary source of these mechanisms is the future acts regime (Part 2, Division 3 of the Act), which provides ways for certain things to be done on native title land. A key feature of the future acts regime are ILUAs, of which there are three types – body corporate ILUAs (for areas where native title has been determined to exist), area ILUAs (where native title has not yet been determined), and alternative procedure ILUAs (where there is no registered native title body corporate for the entire agreement area – to date no such agreements have been entered into).

The proposals covered by this section of the paper are predominantly derived from recommendations made by the COAG Investigation to:

- introduce alternative agreement-making processes
- streamline existing agreement-making processes, and
- increase the transparency of agreements.

## Alternative agreement-making processes

### What is the problem?

Some stakeholders consider that transaction costs associated with negotiating future acts are too high, and would like simpler agreement-making processes. The purpose of the current agreement-making processes is to ensure that native title rights are protected and that decisions affecting native title rights are made with the consent of the native title holders, and ensuring that such agreements are binding on all persons holding native title within the area. However, the costs and time associated with the requirements to notify, authorise and consult mean that these agreements can be difficult to obtain and may form a barrier to doing business for both native title holders and third party stakeholders.

The COAG Investigation recommended several proposals to reduce transaction costs and give greater flexibility to native title holders in dealing with their determined rights. Those proposals include considering:

- allowing a Prescribed Body Corporate (PBC) to enter into a contract, rather than an ILUA, about certain types of future acts that would not require the PBC to consult with, and obtain the consent, of the native title group

- allowing native title holders to vary the effect of s 211, which provides a statutory protection for the exercise of traditional hunting, fishing, gathering, cultural or spiritual activities from Commonwealth or state regulation
- allowing a PBC to contract about future acts and compensation, including contracting out of those provisions of the Act
- addressing the relationship between state and territory natural resource management activities and native title rights, including amending s 24LA to permit low-impact future acts to be done after a native title determination.

Further detail on the COAG Investigation recommendations is contained in **Attachment B**.

## What are the options?

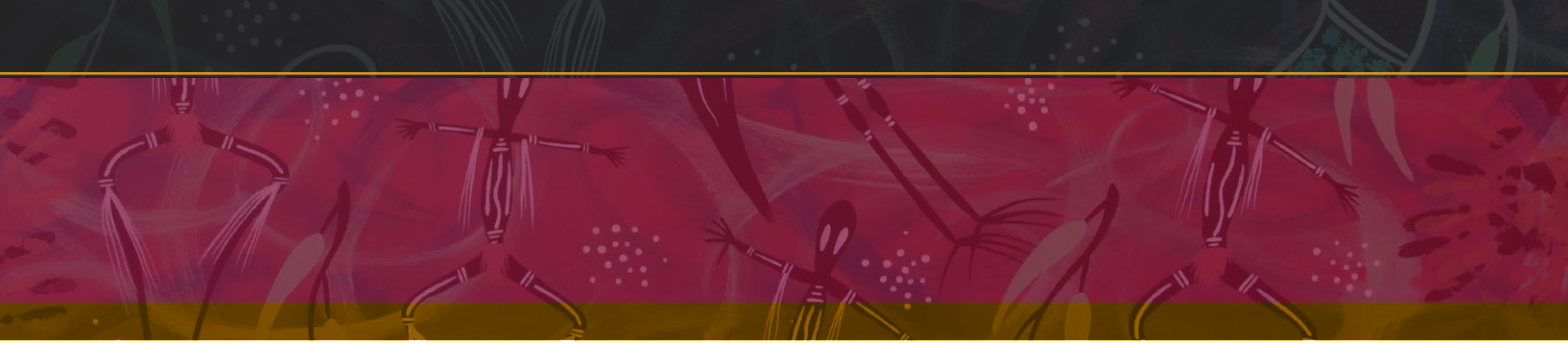
The Government supports **increased flexibility** in agreement-making, while also **reducing transaction costs** for all parties, but only if the rights and interests of native title holders continue to be **appropriately protected**.

Such flexibility may be achieved by actors in the native title system making better use of existing mechanisms allowed for under the Act and the *Prescribed Body Corporate Regulations 1999* (Cth). For example, native title holders can currently agree to alternative consultation processes under reg 8A which could enable their PBC to enter into certain agreements without obtaining consent of the native title holders. Native title holders can also enter into regional agreements which provide for simplified procedures for high volume activities, or opt in arrangements for third parties.

An alternative way of addressing the concerns raised about flexibility and transaction costs would be to include a **new agreement-making mechanism**, similar to a body corporate ILUA, which would not require consultation with the broader group of native title holders and could be entered into directly by the PBC. If an alternative mechanism was to be pursued, it would only be available after a claim is determined.

### PROPOSAL IN PRACTICE

*Native title holders in remote Queensland have been petitioning the state government for several months to build a small waste facility to process waste ordinarily created by the community and workers on an authorised mine within the determination area. The state government agrees, but is first required to enter into an ILUA with the PBC, before it can commence construction. This alternative process would require a party to the ILUA to lodge a negotiated agreement with the NNTT for registration. Following registration, the Registrar would be required to publicly notify the representative body for the area, federal, state and local governments, and any other relevant parties, by letter. As the PBC is already aware of the native title holders' widespread support, and urgently requires the waste facility, it decides to enter into an alternative body corporate agreement with the state. The PBC is able to negotiate the terms of the agreement without needing to consult with and seek the consent of the native title holders as the beneficiaries of the future act. The agreement is finalised, and as a result construction of the waste facility commences shortly thereafter.*



Other features of an alternative agreement-making mechanism could include limiting it to only future acts where the native title holders are the sole or controlling proponents of the future act proposed to be done under the agreement; or where they are the joint proponents. Criteria could also be prescribed in the Act around the kinds of future acts that an alternative mechanism could apply to, for example, including that the value of the future act subject to the agreement must be below a certain threshold.

## How does the proposal deal with the problem?

Creating a new type of ILUA which can be entered into by PBCs in specified circumstances and without undertaking the consultation and consent process required for the existing ILUA types, would streamline the agreement-making process and reduce transaction costs. Limiting the circumstances in which the agreement can be used ensures that a balance is maintained between effective decision-making by the PBC, and control of native title rights by the common law holders.

**QUESTION 4:** Do you support the creation of an alternative agreement-making mechanism? If so, what limitations would you seek to have applied to such an agreement?

Alternatively, does the native title system currently allow for adequate flexibility in agreement-making?

Are there better ways to achieve the objectives of increasing flexibility in agreement-making and reducing transaction costs can be achieved (for example, through the COAG Investigation recommendations outlined in **Attachment B**)?

## Streamlining existing agreement-making

### What is the problem?

A range of amendments are under consideration to streamline existing agreement-making processes, particularly in relation to negotiation and registration. The intention of these proposals is to reduce negotiation costs for all parties, and in turn improve the efficiency of doing business on land subject to native title.

### What are the options?

The options are set out in full detail in **Attachment C**, and are summarised briefly below.

The COAG Investigation recommended that the Government implement a range of technical amendments to streamline ILUA processes based on Schedule 3 of the Native Title Amendment Bill 2012. These amendments include **extending the scope of body corporate ILUAs** to cover areas where native title has been extinguished, and **clarifying who must authorise an ILUA**.

The COAG Investigation also recommended:

- **allowing minor technical amendments to be made to the Register of ILUAs** without requiring re-registration

### PROPOSAL IN PRACTICE

*A native title group has an ILUA with a pastoral lease holder named Zoe. Zoe approaches the native title holders to notify them that the description of the property where native title exists needs to be updated on the ILUA Register. The native title claim group agrees to amend the Register entry to reflect this change, while preserving the binding effect of the ILUA. As this is a minor technical amendment, the claim group is not required to apply for registration of the amended ILUA, and instead write to the Registrar to request that the Register be changed.*

- **removing the requirement in s 24EB that compensation is dealt with in an ILUA** that provides consent to the doing of a future act (noting that removing the mandatory requirement does not mean that it may not still be in the long-term interests of both parties to do so, and that compensation will still be available to the native title holders)
- clarifying that the **removal of details of an ILUA from the Register of Indigenous Land Use Agreements** does not invalidate a future act that is the subject of the ILUA
- removing the requirement for **government parties to be a party to a section 31 agreement** under section 30A of the Act
- clarifying the **objection process created under section 24MD(6B)**, which applies to some compulsory acquisitions of native title and the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility. At present it is unclear how the future act proceeds if an objection is issued but the objector does not request that the objection is heard by an independent person or body.

### PROPOSAL IN PRACTICE

*A state government wishes to compulsorily acquire a portion of native title land so that it can transfer it to an electricity company to build a power plant. A native title holder lodges an objection on principle, but does not request that the objection be heard by an independent body for determination. As the native title holder has not made this request, once the objection period is finished, the state is able to take the native title holder's concerns into account, while proceeding with their acquisition.*

- providing that notices for agreements and other processes under the Act can always be **transmitted electronically**

- amending the Act to ensure that the **future acts regime applies to land and waters to which section 47B applies** to disregard previous exclusive possession acts on vacant crown land, and
- amending the PBC Regulations to **remove the requirement for PBCs to consult with Native Title Representative Bodies (NTRBs)** on native title decisions (such as prior to entering an Indigenous Land Use Agreement).

The Native Title Amendment Bill 2012 (Cth) also included amendments to s 251A (regarding the authorisation of ILUAs) to clarify:

- that the provision also applies to *persons who may hold native title* (an omission that appears to be a drafting oversight; in practice the section has been interpreted in this way)
- that the reference to *persons who may hold native title* is a reference to persons who can establish a *prima facie* case that they may hold native title. Whether such a case is met would be assessed by the Native Title Registrar, and
- who needs to authorise the making of an ILUA where more than one group may hold native title in the agreement area. The court's interpretation of the Act in *QGC v Bygrave* [2011] FCA 1457 (*Bygrave*) and *Kemp v Native Title Registrar* [2006] FCA 939 (*Kemp*) appears to be inconsistent. In *Kemp*, the court found that an individual whose claim to native title was 'more than merely colourable' would need to authorise an ILUA, even in circumstances where that person did not have a registered claim. In *Bygrave*, the court instead found that only registered claimants needed to authorise ILUAs.

The 2012 Amendments preferred the outcome in *Kemp*, and would have entrenched the right of an unregistered claimant to participate in authorising an ILUA provided that person or group of people was able to establish a 'prima facie' claim to native title within the area of the ILUA. Views are invited on the degree to which unregistered native title claimants should participate in the ILUA authorisation process.

#### PROPOSAL IN PRACTICE

*Indigenous group A, which has a registered native title claim over 100 square kilometres of land in south east Queensland, has been offered a large sum of money by a developer that is seeking to build a theme park over part of the claim area. The group decides to commence the processes to accept the developers offer, and notifies the NTRB of this intention. Through its research, the NTRB is aware that Indigenous group B may also have native title rights within the area of the proposed ILUA. Indigenous group B has not yet lodged a claim, but has interests within the area of the ILUA. Having a prima facie case to native title, Indigenous group B is included in the negotiation and both groups, in separate authorisation processes, decide to enter into the agreement which allows for the building of the theme park and provides benefits to both groups.*

**QUESTION 5:** Do you support the proposals set out in Attachment C to streamline existing agreement existing processes?

## Transparent agreement-making

### What is the Register of Indigenous Land Use Agreements?

Section 199A of the Act requires the Native Title Registrar to keep a publicly available Register of ILUAs. The Register is available on the NNTT website and contains specific details of ILUAs as required by s 199B. The Registrar may also publish any other details of the agreement that the Registrar considers appropriate. The signed ILUA itself is currently not publically available.

In order to register an ILUA, an application for registration, including the signed agreement and supporting documentation, must be made to the Registrar. The Registrar will assess whether the application meets registration requirements and will also provide notification of the application. The notification period runs for three months for area and alternative procedure ILUAs, and one month for body corporate ILUAs.

Following the notification process, the Registrar will make a decision whether to register the ILUA. Once registered, certain details of the agreement will appear on the Register of ILUAs, and the agreement will have additional contractual effect under section 24EA of the Act.

### What is the problem?

- **Section 31 agreements are not required to be registered:** While parties are required to provide a copy of a section 31 agreement to the Tribunal under s 41A<sup>5</sup>, the Act does not presently require the registration of section 31 agreements. Accordingly, there is currently no publicly available register that records any details of these types of agreements.
- **ILUAs are not publicly available:** Currently, the only parties with access to the full details of an ILUA are the parties to the agreement. As an ILUA binds anyone who holds native title within the area of the ILUA, even if they are not a party to the agreement, it may be appropriate for the agreement to be more accessible. This would ensure transparency of agreement-making.

### What are the options?

- **Registration of s 31 agreements:** Introduce a new process to require the registration of section 31 agreements, and the creation of a section 31 agreement register to be maintained by the NNTT. This registration process would be distinct from the ILUA registration process in that it would not require a notification and an objection process and would not have the broad binding effect of registration provided for by s 24EA. The purpose of registration of section 31 agreements and making certain agreement details and a summary available is to increase transparency in agreement-making.

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<sup>5</sup> Generally, parties negotiate two agreements: a section 31 deed between all negotiation parties which records the parties' consent to the doing of the future act and a private agreement between the native title party and the grantee recording their commercial arrangements. It is the s 31 deed that parties ordinarily submit to the Tribunal.

- **Making registered ILUAs, and potentially section 31 agreements, publicly available:** In addition to the details already available on the Register of ILUAs, views are sought on whether it would be appropriate for members of the public to access copies of registered ILUAs (and if section 31 agreements were to be registered, potentially the section 31 deed and related commercial agreements). There may be an argument for information which is commercially or culturally sensitive to be redacted by the parties.

#### PROPOSAL IN PRACTICE

*A mining company seeks to enter into negotiations for a section 31 agreement with Indigenous group A. Indigenous group A, by consulting the section 31 agreement Register, finds out that the company has entered into a similar agreement with Indigenous group B. Indigenous group A seeks to obtain a copy of Indigenous group B's agreement from the NNTT in preparation for its negotiations with the mining company.*

## How do the proposals deal with the problem?

The proposals seek to increase transparency in agreement-making, as well as the accountability of the parties to the agreements. Requiring the publication of ILUAs would ensure that all parties affected by an ILUA will have access to the agreement. The law as it currently stands does not facilitate access to ILUAs by all individuals and organisations who may be affected by the terms of the ILUA.

Requiring the registration of section 31 agreements, in addition to the creation of a public register maintained by the NNTT, would provide greater transparency and whenever necessary, allow any party to locate details of existing s 31 agreements. It would ensure that in circumstances where agreements may be affected by a flaw such as that identified in the *McGlade* matter, those agreements can be quickly and easily identified.

**QUESTION 6:** (a) Should there be a Register of 31 agreements?

(b) Should ILUAs – and other agreements made under the Act – be publicly accessible?

# Indigenous decision-making

This section of the paper addresses four related proposals for changes to the ways native title claim groups and native title holders make decisions under the Act.

## What is the problem?

The Act and the *PBC Regulations* provide that decisions made under s 251A (authorising the making of an ILUA), s 251B (authorising the making of applications), s 203BC(2) (giving instructions to a Native Title Representative Body/Service Provider (NTRB/SP)) and reg 8 (providing consent to native title decisions) must be made using a:

- traditional decision-making process, if one exists, or
- if there is no traditional decision-making process, a decision-making process agreed and adopted by the group.

The Act does not currently permit any flexibility about these processes.

## What are the options?

The ALRC Report and COAG Investigation recommended that native title claimants and native title holders should be permitted to select their decision-making process, whether traditional or otherwise, rather than mandating the use of a traditional decision-making process, where one exists.

See Attachment D for more detail.

### PROPOSAL IN PRACTICE

*A native title group is required to authorise an ILUA. Under that group's traditional laws and customs, Elders make decisions that bind all members of the group. The two Elders of the group have long been concerned that young people do not participate in native title meetings. They feel that all generations should have a say when decisions are made about native title. They discuss this with the group and all agree that decisions should be made at a meeting to which all members of the group are invited. Those who attend the meeting will discuss the agreement and together with the Elders they will decide by show of hand whether they wish to enter into the agreement. The decision made at the meeting by the majority will bind all members of the group.*

## How does the option deal with the problem?

The proposed option increases flexibility and autonomy for native title claim groups. Groups would be free to choose a decision-making process appropriate for their circumstances. It would remain open to groups to decide that the traditional decision-making process is the most appropriate in the circumstances.

**QUESTION 7:** Should the Act and the PBC Regulations be amended to allow native title claim groups and native title holders to determine their decision-making processes, rather than mandating the use of traditional decision-making where such a traditional process exists?

# Claims resolution and process

Native title claimant applications seek the legal recognition of the rights and interests of the native title claim group to land and waters according to their traditional laws and customs.

Compensation applications seek compensation for the loss or impairment of their native title rights and interests.

## What is the problem?

Stakeholders consider that claims resolution procedures can be improved in a range of ways. The ALRC and COAG reports propose a number of amendments to this end. They relate to how far the Federal Court can direct parties to native title litigation and inquiries, the compulsive powers of the National Native Title Tribunal, the operation and scope of the provisions which provide for disregarding historical extinguishment, and a need to streamline compensation applications.

## What are the options? How do the options address the problem?

The options include:

- extending the provisions which allow **historical extinguishment** to be disregarded in areas of national, state and territory parks by consent of the parties
- clarifying the operation of the provision which allows **historical extinguishment** to be disregarded in areas of pastoral leases held by claimants
- clarifying who must agree to consent determinations over part of an application
- allowing the Federal Court to direct that a native title application inquiry be held without the applicant's agreement to participate
- allowing the NNTT to summon a person to appear or provide documents in the context of a native title application inquiry, and
- allowing a PBC to be an applicant for a compensation application, as an alternative and in addition to an authorised applicant.

Further detail on these proposals, and how they would improve the efficiency and effectiveness of claims resolution, is outlined at **Attachment E**.

**QUESTION 8:** Do you support the proposed amendments detailed in Attachment E to improve the efficiency and effectiveness of claims resolution?

# Post-determination dispute management

## What is the problem?

Prescribed Bodies Corporate are the entities charged with managing the native title rights of the common law holders. This role is an important one for the community, and for land management generally. Unlike other corporations, they have duties beyond their membership to the common law holders of native title. Importantly this includes a duty to consult the common law holders in relation to native title decisions.

Native title disputes, in particular between PBCs and native title holders, impact on governance and the ability of PBCs and native title holders to fulfil their obligations and to exercise their native title rights.

Notwithstanding that membership of the PBC is an important way in which the common law holders may participate in the exercise of their native title rights, directors generally have wide discretion in who is admitted to membership of the PBC. Disputes may arise regarding membership of the native title holding group, membership of the PBC, and, in relevant cases, regarding decisions to cancel membership.

Where native title funds are held by the PBC, the PBC Regulations require the corporation to consult with the common law holders regarding their investment and distribution. However the Office of the Registrar of Indigenous Corporations (ORIC) has no jurisdiction to support, or investigate compliance with, this obligation – and indeed any other obligation under the PBC Regulations.

Where native title funds are held outside the PBC, there is no express obligation to account to the common law holders in relation to the use or investment of these funds. The lack of transparency regarding the funds can be a source of conflict.

The avenues for support for dispute resolution for PBCs and common law holders are relatively limited. ORIC has no jurisdiction to investigate. The NNTT can mediate, however only with the consent of, and subject to cost agreement with, the relevant NTRB/SP. Only the courts can offer final resolution of disputes. However, litigation often does not lead to lasting outcomes and impacts on relationships. It is also costly and as such not accessible to many parties.

The Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, led by the Office of the Registrar of Indigenous Corporations (ORIC), includes reform proposals which address some of the above issues. These recommendations have been taken into account in developing the options below and in Attachment F.

## What are the options?

The COAG Investigation recommended that consideration be given to:

- providing regulatory oversight to matters such as compliance with the PBC Regulations including the investment and application of native title monies
- amending the PBC Regulations to extend the transparency and accountability provisions that apply to native title monies held by a PBC to also apply to native title monies held outside PBC, and
- creating a system that delivers low cost and final resolution of disputes between members of the native title group and PBC.



The Government is considering legislative changes which:

- require ORIC to support, and where necessary investigate PBC compliance with, the PBC regulations
- limit PBC directors ability to arbitrarily exclude common law holders from membership of their PBC
- require PBCs to address how disputes with common law holders will be resolved in their rulebook
- keep records of native title decisions
- better account for all native title funds to the common law holders.

In addition, to increase the avenues for dispute resolution the Government is considering:

- modifying the role of the NNTT to allow PBCs or individual native title holders to approach the NNTT for dispute resolution assistance directly i.e. without requiring the consent of the NTRB/SP.
- creating an arbitration function in relation to post-determination disputes for the NNTT, consistent with its statutory functions and roles.
- making the Federal Court's jurisdiction exclusive in relation to CATSI Act matters that affect PBCs, where parties can currently also commence proceedings in a State court. This will ensure consistency and coherency in jurisprudence and case management.

## How do the options deal with the problem?

These options increase transparency to the common law holders thereby reducing the potential for disputation. They also provide a wider range of pathways for addressing disputes. Mediation, arbitration and other forms of alternative dispute resolution help resolve disputes in a way that minimises harm and cost. Given the complexity of native title disputation, it may also be appropriate to recognise and develop the Federal Court's jurisdiction.

**QUESTION 9:** Do you support the proposed amendments in Attachment F to address post-determination native title related disputation ?

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# Attachment A – the Applicant (and authorisation)

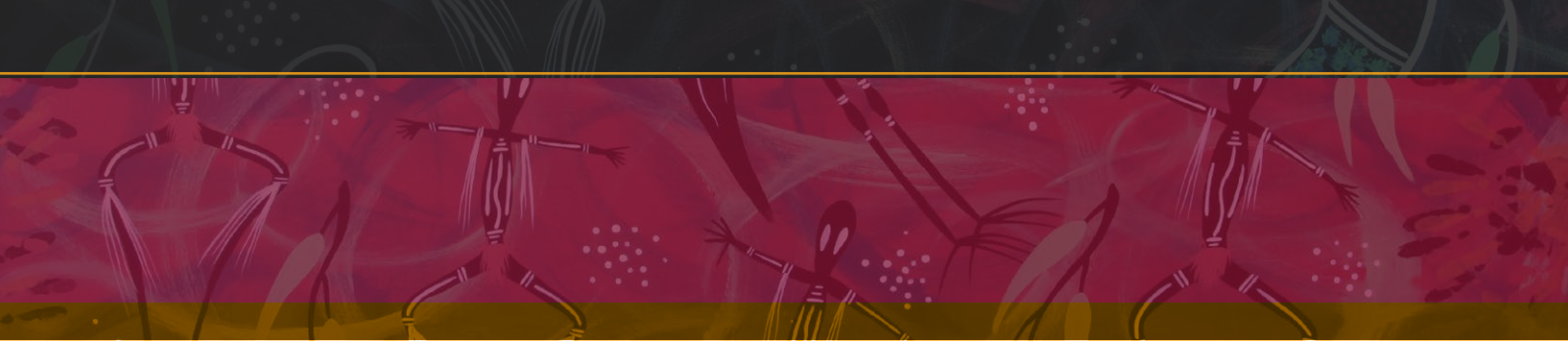
#	Proposal/recommendation	Source(s)	Further detail
A1	The Native Title Act should be amended to clarify that the claim group may define the scope of the authority of the applicant.	ALRC Report, Rec 10.5.	<p><b>Current practice</b></p> <p>Section 62A provides that, once authorised, the applicant may deal with all matters arising under the Act to deal with an application. According to the Explanatory Memorandum the provision ‘ensures that all those who deal with the applicant in relation to matters arising under the NTA can be assured that the applicant is authorised to do so’.</p> <p>In practice, however, some groups include in their authorisation specific directions or constraints on the applicant’s authority. Consequently, the extent of the authority of the applicant may not be clear to stakeholders. The legal status of these directions or constraints is also unclear.</p> <p><b>Benefits of proposal</b></p> <p>The proposal would allow the native title claim group to define the scope of the authority of the applicant in conducting the claim and confirm the status of such directions.</p>
A2	The Native Title Act should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.	ALRC Report, Rec 10.6  COAG Investigation, Table 1, Item 2	<p><b>Current practice</b></p> <p>The Act currently requires the members of the applicant to act unanimously unless the terms of authorisation specify otherwise. Where members of an applicant cannot agree, the claim group must re-authorise a replacement applicant. This can be costly and time consuming. Following the 2017 Amendments, the applicant for a registered native title claim can act by majority in relation to ILUAs. The execution requirements for section 31 agreements are considered in the first part of this Options Paper, Section 31 agreements.</p> <p><b>Benefits of proposal</b></p> <p>This proposal would ensure that a claim can progress where single members of the applicant do not agree with a proposed course of action, but ensure that a claim group can maintain the requirement for unanimity if the group chooses to do so.</p>
A3	Section 66B of the Native Title Act 1993 (Cth) should provide that, where a member of the applicant is no longer willing or able to perform the functions of the applicant, the remaining members of the applicant may: <ul style="list-style-type: none"> <li>(a) continue to act without reauthorisation, unless the terms of the authorisation provide otherwise; and</li> <li>(b) apply to the Federal Court for an order that the remaining members constitute the applicant.</li> </ul>	ALRC Report, Rec 10.7	<p><b>Current practice</b></p> <p>Currently, if a member of an applicant is no longer willing or able to continue in that role, a claim group must hold an authorisation meeting to authorise a replacement applicant. This can be costly and time-consuming and may be unnecessary in circumstances where the claim groups’ authorisation is such that a further authorisation process is not required.</p> <p><b>Benefits of proposal</b></p> <p>The proposal would streamline authorisation requirements. As a safeguard, an order of the Federal Court confirming the new composition based on evidence (such as a death certificate, consent from the person to be removed, or evidence of incapacity) would be required for the change of composition to come into effect.</p>



<p><b>A4</b></p>	<p>The authorisation of an applicant sometimes provides that if a particular member of the applicant becomes unwilling or unable to act, another specified person may take their place. Section 66B of the Native Title Act 1993 (Cth) should provide that, in this circumstance, the applicant may apply to the Federal Court for an order that the member be replaced by the specified person, without requiring reauthorisation</p>	<p>ALRC Report, Rec 10.8</p>	<p><b><i>Current practice</i></b></p> <p>Sometimes an applicant consists of representatives of each of the different family groups or clans that make up a claim group. Some claim groups have developed succession plans for circumstances where a representative is unwilling or unable to continue to act as a member of the applicant.</p> <p><b><i>Benefits of proposal</i></b></p> <p>The proposal would give legal status to the succession plans of claim groups without the need for a reauthorisation meeting under s 66B.</p>
<p><b>A5</b></p>	<p>The Act should be amended to provide that a member of the applicant must not obtain an advantage of benefit at the expense of the common law holders.</p>	<p>ALRC Report, Rec 10.9</p> <p>Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, Report published 1 July 2013, Rec 4</p> <p>Creating Parity: The Forrest Review, Report published 1 August 2014, Rec 27.1</p>	<p><b><i>Current practice</i></b></p> <p>It is not clear whether the common law fiduciary duty of the applicant is owed to the claim group (which may change from time to time) or to the native title holders as finally determined, or both.</p> <p><b><i>Benefits of proposal</i></b></p> <p>A statutory duty would avoid some of the difficulties associated with disputes between the applicant and claim group by making it clear there is a duty between these two actors.</p>
<p><b>A6</b></p>	<p>The amendments recommended regarding authorisation... should only apply to matters that come before the Court after the date of commencement of any amendment.</p>	<p>ALRC Report, Rec 12.2</p>	<p>This recommendation is to ensure that amendments to authorisation have prospective effect only, ensuring that disputes about authorisation cannot be re-opened after the law is changed.</p>

## Attachment B – Alternative agreement-making

#	Proposal/recommendation	Source(s)	Further detail
B1	Consider options for allowing a PBC to enter into a contract, as opposed to an ILUA, about certain types of future act that would not require the PBC to consult with, and obtain the consent of the native title group.	COAG Investigation, Table 1, Item 16	<p><b>Current practice</b></p> <p>Currently, PBCs are required to consult with native title holders, and obtain their consent, before entering into contracts.</p> <p><b>Benefits of proposal</b></p> <p>If this option was to be pursued, it may be limited to certain circumstances, i.e. where the native title holders are involved in the doing of the future act, or the types of future act that can be done under the mechanism. This would allow certain low risk activities to be carried out expeditiously within the bounds of native title holders' consent.</p>
B2	Consider allowing native title holders to vary the effect of section 211, which creates a protection for the exercise of traditional hunting, fishing, gathering, cultural or spiritual activities from regulation by Commonwealth, state and territory laws, through an ILUA.	COAG Investigation, Table 2, Item 3	<p><b>Current practice</b></p> <p>Section 211 operates to protect traditional hunting/fishing etc rights and to exempt such rights from being regulated under other statutory schemes (i.e. with respect to biodiversity protection). There is currently no mechanism in the Act for claim groups to contract out of this protection.</p> <p><b>Benefits of proposal</b></p> <p>This would allow native title holders to agree to vary the protection provided by section 211 through ILUAs with local or state government</p>
B3	Consider options for allowing a PBC to contract about future acts and compensation, including allowing a PBC contract out of future acts and compensation provisions of the Native Title Act.	COAG Investigation, Table 2, Item 5	<p><b>Current practice</b></p> <p>It is not currently open to PBCs to contract out of the future acts/compensation provisions of the Act. Parties can, however, enter into an ordinary contract which includes an agreement not to seek compensation under the Act. Such a contract can only bind the parties to the agreement.</p> <p><b>Benefits of proposal</b></p> <p>It may be desirable to allow PBCs to contract about a broader range of subject matter, including future acts and compensation. As the contract would be entered into by the PBC, it would bind all native title holders. Such a contract would need to balance the adequate protection of native title rights against any competing reasons for entering into the contract. Similarly to Item B1, similar restrictions could be included to require native title holders to preapprove the matters that a PBC can contract about.</p>



<b>B4</b>	Consider options for addressing the relationship between state and territory natural resource management activities and native title rights including amending section 24LA to permit the doing of low impact future acts following a determination that native title exists.	COAG Investigation, Table 2, Item 6	<p><b><i>Current practice</i></b></p> <p>After a native title determination is made, state and territory governments and proponents cannot rely on section 24LA and must enter into an ILUA in order to carry out activities which, pre-determination, would have been classified as “low impact” and did not require the consent of the native title claimants.</p> <p><b><i>Benefits of proposal</i></b></p> <p>Allowing low-impact future acts to occur on native title land after a determination would enable governments /proponents to carry out activities in a more flexible and efficient way. This would, however, need to be balanced against protecting the rights of native title holders to consent to activities on their land. An alternative agreement-making mechanism may also assist in addressing this issue by lowering transactions costs associated with negotiating ILUAs for certain kinds of activities.</p>
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# Attachment C – Streamlining agreement-making

#	Proposal/recommendation	Source(s)	Further detail
C1	Allowing body corporate ILUAs to cover areas where native title has been extinguished.	COAG Investigation, Table 1, Item 14  Native Title Amendment Bill 2012, Schedule 3	<p><b>Current practice</b></p> <p>Section 24BC provides that body corporate ILUAs can only be made if there are PBCs in relation to all of the ILUA area. It currently appears that PBCs cannot make body corporate ILUAs over areas where native title has been extinguished, on the basis that there is consequently no PBC in the area (even though compensation for extinguishment is one of the subject matters body corporate ILUAs can deal with under s 24BB). This means native title groups are required to enter into area ILUAs for areas where native title has been extinguished, which are more costly and time-consuming.</p> <p><b>Benefits of proposal</b></p> <p>Allowing body corporate ILUAs to include areas where native title has been extinguished in specific circumstances enables the wider use of such ILUAs and reduces transaction costs and registration timeframes.</p>
C2	Allowing minor technical amendments to be made to ILUAs without requiring re registration.	COAG Investigation, Table 1, Item 14  Native Title Amendment Bill 2012, Schedule 3	<p><b>Current practice</b></p> <p>The Act makes no provision for amendments to ILUAs. Other than updating a party's address (see s 199B(4)), the Registrar has no power to amend the Register of ILUAs. Parties wishing to make amendments to an ILUA, while preserving its binding effect on native title holders who are not parties to the ILUA, may need to make a new application for registration of the amended ILUA.</p> <p><b>Benefits of proposal</b></p> <p>Parties are able in certain circumstances to make minor changes to an ILUA without a new registration process; the Registrar will have express power to amend the Register of ILUAs accordingly. This saves time and resources.</p>
C3	Removing the requirement that the Registrar give notice of an area ILUA if it was not satisfied the ILUA could be registered.	COAG Investigation, Table 1, Item 14  Native Title Amendment Bill 2012, Schedule 3	<p><b>Current practice</b></p> <p>Section 24CH requires the Registrar to give notice of an area ILUA even if it does not meet the requirements of the Act to be registered. This imposes unnecessary compliance procedures and costs on the Registrar and may confuse stakeholders.</p> <p><b>Benefits of proposal</b></p> <p>Reduced compliance procedures where they are unnecessary in the circumstances.</p>
C4	Removing the requirement for PBCs to consult with NTRBs on native title decisions such as prior to entering an Indigenous Land Use Agreement in the PBC regulations.	Commonwealth proposal	<p><b>Current practice</b></p> <p>PBCs are currently required to consult with NTRB/SPs on native title decisions. This requirement is stated to be for the purpose of 'ensuring the common law holders understand the purpose and nature' of the decision. In practice it may be difficult for the NTRB/SP to advise on the merits of the decision if it has not been close to its development. Also, there is no requirement for the PBC to take account of the NTRB/SP views.</p> <p><b>Benefits of proposal</b></p> <p>Streamlines making native title decisions for PBCs.</p>



<b>C5</b>	Amend the Native Title Act to ensure that the future acts regime applies to land and waters to which section 47B applies to disregard previous exclusive possession acts on vacant crown land.	COAG Investigation, Table 1, Item 12	<p><b>Current practice</b></p> <p>There is uncertainty about whether the future act regime applies to acts on areas subject to a claimant application that relies on s 47B. If the requirements of s 47B are met, previous extinguishment over an area can be disregarded. Whether or not the requirements are met will only be known when the application is determined.</p> <p><b>Benefits of proposal</b></p> <p>Clarifies that s 47B has effect from the date of lodgement of an application. Dealings on the affected areas would have to comply with the future act regime in order to be valid.</p>
<b>C6</b>	Amend section 24EB of the Native Title Act to allow parties to an ILUA to agree that the ILUA does not provide compensation for a future act.	COAG Investigation, Table 1, Item 13	<p><b>Current practice</b></p> <p>Section 24EB provides that native title holders within the area of an ILUA are not entitled to any compensation for an act done under the ILUA, other than compensation provided for in the ILUA itself. This process requires parties to settle compensation in the ILUA. Stakeholders have reported difficulties in quantifying compensation prior to the doing of the future act.</p> <p><b>Benefits of proposal</b></p> <p>Stakeholders are able to delay finalising compensation until after the agreement is made, and they have a better understanding of an appropriate compensation figure. This will also ensure that agreements are reached sooner, as there are fewer initial matters to resolve.</p>
<b>C7</b>	Consider amending section 199C of the Native Title Act to clarify that removal of details of an ILUA from the Register does not invalidate a future act that is the subject of the ILUA.	COAG Investigation, Table 2, Item 2	<p><b>Current practice</b></p> <p>There is uncertainty about the effect of the removal of an ILUA from the Register of ILUAs on the future act that was the subject of the ILUA. In particular, whether the removal of an ILUA that validates a past act makes the act invalid.</p> <p><b>Benefits of proposal</b></p> <p>The clarification ensures that acts which were valid due to the operation of an ILUA at the time they were done remain valid even if the ILUA is removed from the Register.</p>
<b>C8</b>	Consider amending section 30A of the Native Title Act so that Government parties are not required to be a party to a section 31 agreement (for example, an agreement about mining).	COAG Investigation, Table 1, Item 17	<p><b>Current practice</b></p> <p>Section 30A defines the 'negotiation party' to a section 31 agreement as the grantee, the native title party and the government. Generally, parties negotiate two agreements: a section 31 deed between all negotiation parties which records the parties' consent to the doing of the future act and a private agreement between the native title party and the grantee recording their commercial arrangements. States and Territories consider that being a negotiation party imposes unnecessary costs and delays onto the negotiation process.</p> <p><b>Benefits of proposal</b></p> <p>It is proposed that section 31(b) is amended so that government can cease being a negotiation party with the consent of all parties. The government could however continue to be a negotiation party for the purposes of arbitration by the NNTT (s 35) where it generally plays an active role. This would result in reduced transaction costs for parties to s 31 agreements.</p>

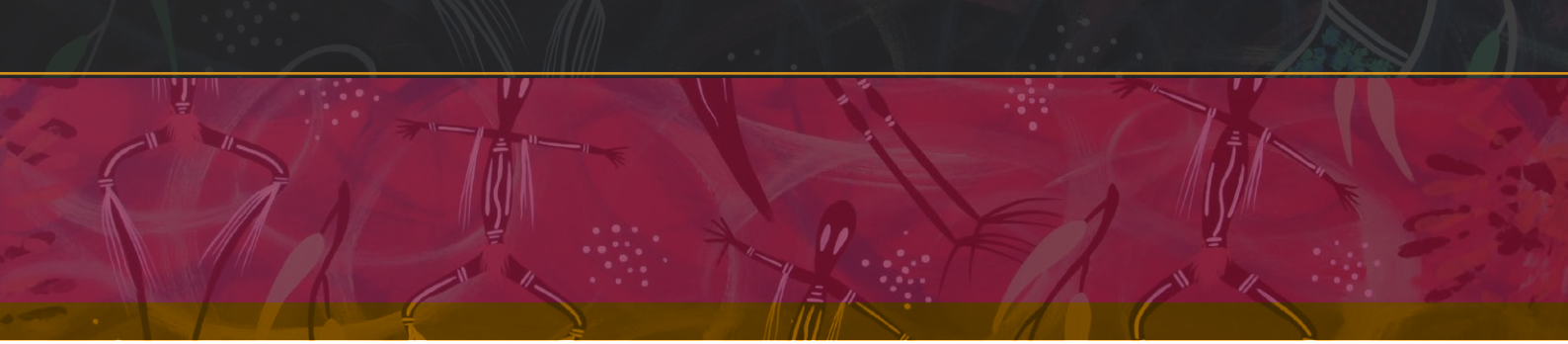
C9	Consider options for amending the objection process created by section 24MD (6B), which applies to some compulsory acquisitions of native title and the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility.	COAG Investigation, Table 2, Item 4	<p><b>Current practice</b></p> <p>Section 24MD(6B) provides procedural rights to registered native title claimants and native title holders, including the right to object to the doing of a future act. It is unclear whether government can proceed to do the act where an objection has been made but the native title party has not requested for the objection to be heard by an independent person or body for adjudication (s 24MD(6B)(f)).</p> <p><b>Benefits of proposal</b></p> <p>Clarifies that a future act can progress unless an objection is referred for adjudication, which ensures that the relevant future act can progress. It may be appropriate for a particular objections period to be imposed, after which the government can proceed to do the act; submissions are particularly sought on the appropriate length of such a period.</p>
C10	Consider options to encourage electronic transmission of notices including amending sections 29 and 6(1)(a) of Native Title (Notices) Determination 2011 (No 1) to provide that notices can always be transmitted electronically.	COAG Investigation, Table 2, Item 7	<p><b>Current practice</b></p> <p>Section 29 requires that government must give notice to any registered native title body corporate/registered native title claimant (as applicable) affected by the proposed future act as well as the NTRB/SPs. In addition, unless there is a PBC, government must also publish a notice in a local and an Indigenous newspaper.</p> <p><b>Benefits of proposal</b></p> <p>It is proposed that the public notification process is modified by allowing summary notices to be published in newspapers which refer to comprehensive notices available online or the option of being sent in the mail a copy of the comprehensive notice. This proposal could apply to notices other than s 29 notices (e.g. notices under s 66). Taking advantage of digital communication method would result in reduced transaction costs and wider notification reach.</p>
C11	Amend section 251A to clarify who must authorise an ILUA as a person or persons who may hold native title, being a person or persons who can establish a prima facie case to hold native title.	Native Title Amendment Bill 2012, Schedule 3, Items 13-16.	<p><b>Current practice</b></p> <p>Section 251A of the Act specifies the process for authorising area ILUAs. This provision limits access to this process to persons 'holding native title' within the area of the ILUA, which would mean that only individuals who could demonstrate that they held native title rights would be able to participate in the ILUA authorisation decision.</p> <p>Uncertainty around this provision also exists as a result of case law, which has created two conflicting precedents. In <i>QGC v Bygrave</i> [2011] FCA 1457, the court found that where an ILUA area falls within the area of a registered native title claim and an unregistered claim, the only people who are entitled to authorise the making of the ILUA are the registered claimants and not the unregistered claimants. However, <i>Kemp v Native Title Registrar</i> [2006] FCA 939 held that where the native title parties comprised more than one distinct group, all persons would have to authorise the ILUA, and would have to do so separately, provided their assertion of native title was more than 'merely colourable'.</p> <p><b>Benefits of proposal</b></p> <p>Addresses a drafting oversight and removes the confusion created by case law and ensures that all persons with a claim to native title, whether registered or not, must consent to an ILUA before it can be registered, thus protecting all native title rights in the area.</p>

# Attachment D – Indigenous decision-making

#	Proposal/recommendation	Source(s)	Further detail
D1	<ul style="list-style-type: none"> <li>Section 251B of the Native Title Act should be amended to provide that a claim group may authorise an applicant either by a traditional decision-making process or a process agreed to and adopted by the group.</li> <li>Section 251A of the Native Title Act should be amended to provide that persons holding native title may authorise an ILUA either by a traditional decision-making process, or a decision-making process agreed to and adopted by the group.</li> <li>Regulation 8 of the Native Title (Prescribed Bodies Corporate) Regulations 1999 [Cth] should be amended to provide that common law holders may give consent to a native title decision using either a traditional decision-making process or a decision-making process agreed on and adopted by them.</li> <li>Section 203BC(2) of the Native Title Act should provide that a native title holder or a person who may hold native title may give consent to any general course of action that the representative body takes on their behalf using either a traditional decision-making process or a decision-making process agreed to and adopted by the group to which the person belongs.</li> </ul>	<p>ALRC Report, Rec 10.1 COAG Investigation, Table 1 Item 1</p> <p>ALRC Report, Rec 10.2 COAG Investigation, Table 1 Item 9</p> <p>ALRC Report, Rec 10.3 COAG Investigation, Table 1 Item 10</p> <p>ALRC Report, Rec 10.4 COAG Investigation, Table 1 Item 11</p>	<p><b><i>Current practice</i></b></p> <p>Native title groups/native title holders are required to use traditional decision-making processes, if they exist, to make decisions. This means there is no flexibility for claim groups to tailor their decision-making processes to their circumstances.</p> <p><b><i>Benefits of proposal</i></b></p> <p>The proposal would ensure that native title groups have the greatest degree of flexibility to choose their own decision-making processes..</p>

## Attachment E – Claims resolution and process

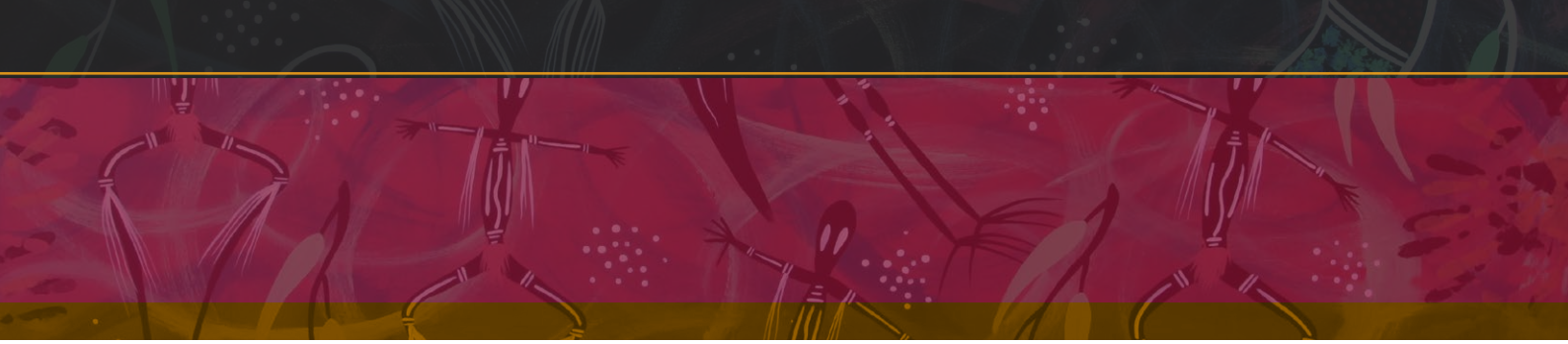
#	Proposal/recommendation	Source(s)	Further detail
E1	Section 138B(2)(b) of the Native Title Act, which provides that the Federal Court may only direct that a native title application inquiry be held if the applicant agrees to participate, should be repealed.	ALRC Report, Rec 12.4	<p><b>Current practice</b></p> <p>The Act currently provides that a native title application inquiry can only be held if the applicant agrees to participate in the inquiry. The inquiry process has been underutilised.</p> <p><b>Benefits of proposal</b></p> <p>By removing the consent requirement, the Federal Court will have greater scope to order a native title application inquiry where the inquiry process may assist the parties in resolving issues.</p>
E2	Section 156(7) of the Native Title Act, which provides that the National Native Title Tribunal's power to summon a person to appear before it or produce documents does not apply to a native title application inquiry, should be repealed.	ALRC Report, Rec 12.5	<p><b>Current practice</b></p> <p>The NNTT's power to compel the production of documents or summon a person to appear before it does not currently apply to a native title application inquiry.</p> <p><b>Benefits of proposal</b></p> <p>The proposed amendment could improve the effectiveness of application inquiries, by improving the capacity of the NNTT to obtain documents and summon people to appear before it.</p>
E3	Amend section 47(1)(b) (iii) of the Native Title Act to permit the making of a determination that native title co-exists with a pastoral lease held by the claimants where claimants are members of a company that holds the pastoral lease.	COAG Report, Table 1, Item 6 NTAB12, Schedule 4, Item 1	<p><b>Current practice</b></p> <p>The historical extinguishment provision dealing with pastoral leases held by native title claimants currently applies in circumstances where the holder of the pastoral lease is a 'company whose only shareholders are any of [the claim group]'. The section therefore does not apply to companies without shareholders.</p> <p><b>Benefits of proposal</b></p> <p>By expanding the scope of the provision, historical extinguishment can be disregarded in areas covered by pastoral leases provided that the company holding the lease is in some way controlled or owned by a member of the native title claim group, irrespective of the exact corporate structure.</p>
E4	Consider amending Part 2, Division 5 of the Native Title Act to allow a PBC to be the applicant on a compensation claim.	COAG Report, Table 1, Item 8	<p><b>Current practice</b></p> <p>A PBC can only be the applicant for a compensation application if the claim is made over land and waters for which the corporation is the PBC. This is because PBCs only operate in relation to areas where native title has been determined to exist. Where native title has been extinguished and an entitlement to compensation arises, a PBC cannot bring a compensation application and the application has to be brought by authorised applicants instead.</p> <p><b>Benefits of proposal</b></p> <p>The proposal would allow native title holders to choose whether their compensation application is brought by the PBC or authorised applicants.</p>



<p><b>E5</b></p>	<p>Amend reg 3 (and reg 8) to clarify that the decision to make a compensation application is a native title decision.</p>	<p>COAG Report, Table 1, Item 8</p>	<p><b><i>Current practice</i></b></p> <p>Currently the decision to bring a native title claimant application is not a native title decision as defined in reg 3 of the PBC Regulations which means the PBC, when deciding to make such an application, has no express obligation to consult with and seek the consent of the native title holders.</p> <p><b><i>Benefits of proposal</i></b></p> <p>The amendment would ensure that a decision to lodge a compensation application is treated in a similar way to other significant native title decisions, i.e. the common law holders of native title have a say in whether their PBC can bring a compensation application.</p>
<p><b>E6</b></p>	<p>Introduce a new section into the Act allowing for historical extinguishment over areas of national, state or territory parks to be disregarded, where the parties agree, for the purposes of making a native title determination</p>	<p>NTAB12, Schedule 1, Items 1-15</p>	<p><b><i>Current practice</i></b></p> <p>The historical extinguishment provisions currently apply only where:</p> <ul style="list-style-type: none"> <li>- A pastoral lease which is partly or wholly held by members of the claim group exists over an area within the claim boundary</li> <li>- An area within the claim boundary is unallocated crown land, or</li> <li>- An area within the claim boundary is a reserve held on trust for the benefit of Indigenous people.</li> </ul> <p><b><i>Benefits of proposal</i></b></p> <p>By expanding the scope of the provisions, the historical extinguishment provisions will make more land available for positive determinations of native title.</p>

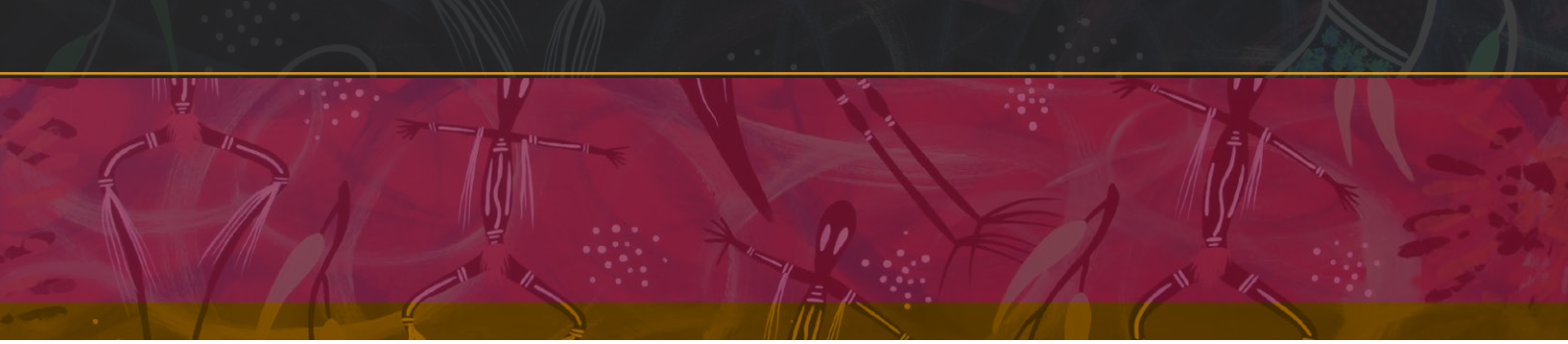
## Attachment F – Post-determination dispute management

#	Proposal/recommendation	Source(s)	Further detail
F1	It is recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the <i>PBC Regulations</i> , in particular to ensure that PBCs are fulfilling their obligations to common law holders to the same extent as members.	COAG Report, Table 2, Item 8 and Technical review report recommendation 44	<p><b>Current practice</b></p> <p>There is currently no body that has oversight of PBC compliance with obligations under the <i>PBC Regulations</i>, and the capacity to support these obligations.</p> <p><b>Benefits of proposal</b></p> <p>Giving ORIC the ability to consider compliance with the <i>PBC Regulations</i> will provide a low-cost remedy for disaffected members of the native title group in some circumstances. As regulator, ORIC would be best placed to have this role.</p>
F2	It is recommended that the <i>CATSI Act</i> be amended to provide a power for the Registrar to refuse to amend a PBC's rule book in circumstances where the amendment would result in the PBC no longer meeting the requirements of regulation 4(2) of the <i>PBC Regulations</i> .	COAG Report, Table 2, Item 10 and  Technical review report recommendation 54 and State and Territories proposal	<p><b>Current practice</b></p> <p>Membership criteria are set out in the rulebook. Membership does not have to be open to all common law holders, but has to be consistent with the native title determination. Currently the <i>CATSI Act</i> does not provide for a mechanism to ensure consistency.</p> <p><b>Benefits of proposal</b></p> <p>This amendment ensures that PBCs are not able to establish membership criteria to disenfranchise a section of the native title group.</p>
F3	Introduce a requirement that the dispute resolution provision in the PBC rulebook specifically addresses arrangements for resolving disputes about membership (clarifying that such disputes can arise between members and directors, between native title holders, and between native title holders and the PBCs and its members and directors).	COAG Report, Table 2, Item 10 and State and Territories proposal	<p><b>Current practice</b></p> <p>A <i>CATSI</i> corporation's rules must provide for the resolution of disputes internal to the operation of the corporation only. Technically, disputes about membership (between non-members and the PBC) are therefore not covered.</p> <p><b>Benefits of proposal</b></p> <p>This amendment will ensure a pathway for resolution of disputes of persons denied membership to a PBC. The resolution process will be based on a process chosen by the native title holders.</p>
F4	Remove the directors' discretion to refuse membership to a person who meets the PBCs membership criteria other than in exceptional circumstances.	COAG Report, Table 2, Item 10 and State and Territories proposal	<p><b>Current practice</b></p> <p>PBCs are the corporations established to represent the common law holders. Under the <i>CATSI Act</i>, PBC directors have discretion to refuse to accept a membership application by a common law holder, even if the eligibility requirements are met, thus having the power to arbitrarily exclude persons from PBCs. This gives rise to a large number of disputes. ORIC has no power to direct PBCs to accept eligible members.</p> <p><b>Benefits of proposal</b></p> <p>The benefit of the proposal would ensure that memberships are not refused arbitrarily when eligibility criteria are met and all persons who are entitled to membership and wish to become members of the PBC are accepted as members.</p>



<p><b>F5</b></p>	<p>Limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour. Require the process for cancellation of membership to include a general meeting.</p>	<p>COAG Report, Table 2, Item 10 and State and Territories proposal</p>	<p><b>Current practice</b></p> <p>The <i>CATSI Act</i> provides for the cancellation of PBC membership on the grounds of ineligibility or failure to pay fees. This is a replaceable rule which means it is open for a PBC to adopt its own rule, potentially arbitrarily cancelling the membership of eligible persons.</p> <p><b>Benefits of proposal</b></p> <p>This amendment ensures that PBCs are not able to change their rules to disenfranchise a section of the native title group; or allow them to cancel memberships on grounds other than ineligibility and misbehaviour.</p>
<p><b>F6</b></p>	<p>It is recommended that the <i>CATSI Act</i> be amended to empower the Registrar to amend a CATSI corporation's Register of Members where, following appropriate consultation with the Corporation, the Registrar considers it reasonably necessary to ensure that rule books are complied with in relation to the revocation of membership of individuals.</p>	<p>COAG Report, Table 2, Item 10 and Technical review report recommendation 53</p>	<p>This proposal complements the above and ensures that a PBC's Register of Members accurately reflects who ought to be a member of a corporation in cases where memberships are revoked not following the corporation's rule book.</p>
<p><b>F7</b></p>	<p>It is recommended that the <i>CATSI Act</i> be amended to require PBCs to set up and maintain:</p> <ol style="list-style-type: none"> <li>1. a 'Register of Native Title Decisions'; and</li> <li>2. a 'Register of Trust Money Directions'.</li> </ol> <p>It is recommended that the <i>CATSI Act</i> be amended to require the Register of Native Title Decisions to include copies of documents created to provide evidence of consultation and consent in accordance with the PBC Regulations.</p> <p>It is recommended that each of the Register of Native Title Decisions and the Register of Trust Money Directions be available for inspection by:</p> <ol style="list-style-type: none"> <li>1. members;</li> <li>2. common law holders.</li> </ol>	<p>COAG Report, Table 2, Item 8 and Technical review report recommendations 55 - 59</p>	<p><b>Current practice</b></p> <p>The functions of PBCs under the PBC Regulations include:</p> <ul style="list-style-type: none"> <li>• to use native title monies as directed by the native title holders; and</li> <li>• to obtain consent of native title holders on decisions to do with native title.</li> </ul> <p>PBCs are currently not required to document how they have obtained the direction or consent of the native title holders.</p> <p><b>Benefits of proposal</b></p> <p>The proposals would increase transparency and accountability of PBCs. Native title holders and non-native title holders dealing with PBCs will benefit from the increased transparency of decision-making.</p>

	<p>It is recommended that PBCs be required to provide an extract of the Register of Native Title Decisions or the Register of Trust Money Directions to any person having a 'substantial interest' (within the meaning of that phrase as used in the PBC Regulations) in the relevant decision.</p> <p>It is recommended that the Registrar should have the same powers in relation to the Register of Native Title Decisions and the Register of Trust Money Directions as in relation to the Register of Members (and the Register of Former Members).</p>		
F8	<p>It is recommended that the CATSI Act be amended to require PBCs to keep separate financial records and reports in relation to 'native title benefits' (as defined by the Income Tax Assessment Act 1979 (Cth)) received by the PBC.</p>	<p>COAG Report, Table 2, Item 9 and Technical review report recommendation 62</p>	<p><b>Current practice</b></p> <p>There are no express requirements for PBCs to separately account for native title monies received, other than in accordance with applicable accounting standards. These funds are different from other moneys the PBC holds as they are beneficially owned by the native title group (i.e. not merely by the PBC).</p>
F9	<p>Introduce a requirement that the common law holders be consulted on the investment and application of native title monies so that the obligation to seek direction from the common law holders is met (whether or not the monies are held by the PBC).</p>	<p>COAG Report, Table 2, Item 9</p>	<p><b>Current practice</b></p> <p>Where native title monies are held outside the PBC, there is no statutory requirement to seek direction from the common law holders or to report to them about the investment and application of the monies.</p> <p>This amendment increases native title groups' control over native title monies.</p> <p>The amendment ensures native title holders can have input in decisions about the use of native title monies.</p> <p><b>Benefits of proposal</b></p> <p>Extending the existing transparency and accountability provisions to non-PBC bodies will improve accountability for the use of those monies to the native title group.</p> <p>In relation to the establishment of charitable trusts, the direction to be sought from common law holders would be in relation to the establishment of the trust and its application arrangements.</p>

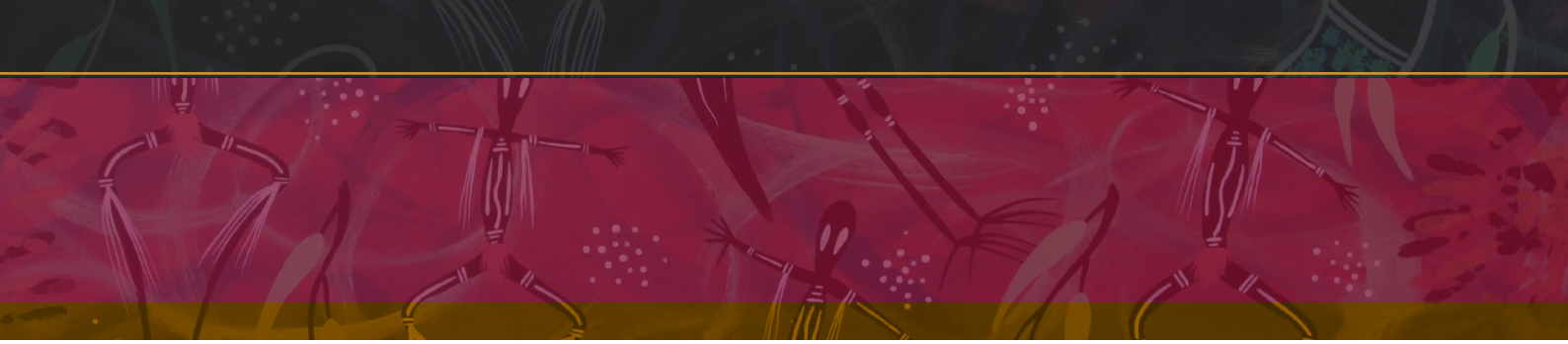


<p><b>F10</b></p>	<p>Amend the definition in reg 3 of group of common law holder to clarify that it refers to the determined native title holding group(s) for which the PBC acts as agent or trustee.</p>	<p>Commonwealth proposal</p>	<p><b>Current practice</b></p> <p>PBCs that hold native title for more than one group are currently required under reg 8(5) to consult only with the group of common law holders affected by the native title decision. Reg 3 defines group of common law holders as common law holders who belong to a tribe, clan or family or a descent, language or other group recognised as such under traditional laws and customs. In practice many PBCs represent groups whose members have equal interests in the determination area. As such, this requirement creates tension. That sub-groups of common law holders make native title decisions that affect their rights and interests can be ensured by the decision-making process under reg 8(3) and (4).</p> <p><b>Benefits of proposal</b></p> <p>The amendment would ensure that PBCs consult with the common law holders but would not mandate consultation with an affected sub-group, unless the traditional decision-making process of the group, which is to be used pursuant to reg 8(3) if one exists, requires such consultation.</p>
<p><b>F11</b></p>	<p>NNTT: Create a broader role in post-determination disputes by:</p> <ul style="list-style-type: none"> <li>allowing PBCs or individual native title holders to approach the Tribunal for dispute resolution assistance directly</li> <li>providing a new arbitration power to the Tribunal e.g. to deal with questions of fact regarding membership.</li> </ul> <p>Federal Court: Expanded role by making the Federal Court's jurisdiction exclusive in relation to CATSI Act matters that affect PBCs.</p>	<p>COAG Report, Table 2, Item 10</p>	<p><b>Current practice</b></p> <p>Currently the NTA requires the consent and funding by the NTRB/SP for the NNNTT to assist with the resolution of a dispute. The Tribunal has arbitration powers in relation to certain Future Act related applications. Currently, the Federal Court's jurisdiction in relation to CATSI Act matters is not exclusive of the jurisdiction of the Supreme Courts of the states and territories.</p> <p><b>Benefits of proposal</b></p> <p>The reform would make the Tribunal's mediation service more accessible and build on its existing expertise arbitration. Making the Federal Court's jurisdiction exclusive will ensure consistency and coherency in jurisprudence and case management.</p>

# Attachment G – State and territory proposals

This attachment sets out a number of reform proposals submitted to the Australian Government by states and territories for consideration. Stakeholder views on these proposals – and any others not canvassed by this paper – are invited.

#	Proposal/recommendation	Further detail
<b>Section 31 agreements</b>		
<b>G1</b>	Shorten the objection period for acts which the government party considers attract the expedited procedure from 4 months to 35 days where the entire area affected by the act is subject to a native title determination.	<b>Current practice</b> Under s 32(3) a native title party has 4 months from the notification day to object to the government's application of the expedited procedure to an act notified under s 29(7). This period applies regardless of whether native title in relation to the area subject to the act has been fully determined.
<b>G2</b>	Amend section 29 so that a minor defect in the notification of the proposed act does not invalidate the notice if there is no detriment to the native title party.	<b>Current practice</b> <i>Narrier v State of Western Australia</i> [2016] FCA 1519 provides that notice defects may invalidate notice. Re-notification would be required.
<b>G3</b>	Confirm that s 29 notices to identified parties may be made by email, and that public notice is able to be given online.	<b>Current practice</b> Notices under s 29 are currently to be given in writing to affected parties and published in a newspaper – see <i>Native Title (Notices) Determination 2011 (No 1)</i>  [See also related reform proposal C10]
<b>G4</b>	Amend section 141(2) of the Act to clarify that parties to inquiries in relation to expedited procedure objection applications are the Government party, native title parties which have objected under s 32(3), and the grantee parties.	<b>Current practice</b> Section 141(2), which deals with inquiries in relation to 'right to negotiate application', only refers to the 'native title parties' as opposed to the 'native title parties that have objected under s 32(3)'.  A proposal which changes how s 31 agreements are made should be framed to capture agreements made under alternative state regimes.
<b>G5</b>	Amendments to ensure that any changes to the role of the registered native title claimant in making section 31 agreements also extend to the role of the registered native title claimant in making agreements under approved alternative schemes.	<b>Current practice</b> The potential effect of the <i>McGlade</i> decision on section 31 agreements also extends to agreements made under alternative state regimes.  A proposal which changes how s 31 agreements are made should be framed to capture agreements made under alternative state regimes.
<b>The applicant (and authorisation)</b>		
<b>G6</b>	Require any limitations on the Applicant's authority to be notified, e.g. on the Form 1. The other parties to the claim should be entitled to assume that the applicant has full authority unless and to the extent it is informed otherwise.	<b>Additional information</b> Would operate consistent with proposal A1.



<b>Agreement -making and future acts</b>		
<b>G7</b>	Amend section 24CH to replace with notification requirements with those of s 24BH where registration of the area ILUA is part of a consent determination process and the agreement area is fully within the determination area.	<p><b>Current practice</b></p> <p>Section 24CH provides for a 3-months-notification process to specified persons and bodies and public notification in a newspaper. This is also a requirement where an area agreement has been negotiated as part of a consent determination.</p>
<b>G8</b>	Repeal subsection 24JAA(1)(d) to remove the sunset clause applying to the process for construction of public housing	<p><b>Current practice</b></p> <p>Section 24JAA allows a government department or body to build public housing and associated public infrastructure on land that is reserved for the benefit of Indigenous people and burdened by native title rights, without using an ILUA. Subsection 24JAA(1)(d) provides that this section will expire for future use in December 2020.</p>
<b>G9</b>	Clarify that section 24MD(3) (treatment of acts that pass the freehold test) applies to a compulsory acquisition of native title rights as if the taking of native title rights and grant of the new interest in land are the same act.	<p><b>Current practice</b></p> <p>States and territories have asserted that there is uncertainty around whether the acquisition of native title rights and grant of new interests are two separate acts.</p>
<b>G10</b>	Amend the definition of sections 24MD(6B) and 253 to expand the definition of 'waste facilities' to include rubbish tips and other waste disposal facilities.	<p><b>Current practice</b></p> <p>Proponents of future acts are currently required to enter into ILUAs in order to build waste facilities for future acts that ordinarily create waste.</p>
<b>G11</b>	Insert 'or' between 24KA(8)(c) and (d) to clarify that notice can be given to either representative bodies or registered claimants.	<p><b>Current practice</b></p> <p>The explanatory memorandum for the Act currently provides that notice can be given to either representative bodies or registered claimants.</p>
<b>G12</b>	Require RNTBCs to be bound by arrangements (e.g. ILUAs) negotiated prior to a determination, following a determination.	<p><b>Current practice</b></p> <p>RNTBCs are currently not bound by area ILUAs post determination.</p>
<b>G13</b>	Amend section 211 to ensure adequate protection for native title rights against the government's need to regulate certain actions for public purposes, e.g. hunting with firearms in national parks or hunting endangered species.	<p><b>Current practice</b></p> <p>Section 211 relieves native title holders of the need to hold licences under state, Commonwealth or territory laws for hunting, fishing, gathering and for cultural or spiritual activities.</p>
<b>G14</b>	Amend the Act to allow for the enactment of legislation by Western Australia which validates mining leases affected by the invalidity identified in <i>Forrest &amp; Forrest Pty Ltd v Wilson &amp; Ors</i> [2017] HCA 30.	<p><b>Current practice</b></p> <p>The decision of <i>Forrest &amp; Forrest</i> identified a flaw affecting the issue of a number of mining leases under Western Australian legislation. The Western Australian Government has requested an amendment to the Act to allow for Western Australian legislation which would validate the leases affected by this issue.</p>

<b>G15</b>	Amend the act to confirm that 'renewals' in s 26D(1) (a)(i) includes renewals within the meaning of 24IC(2) and (2A); allow for 'renewals' to be made without being subject to the right to negotiate process without any substantive reason for the application of that process.	<p><b>Current practice</b></p> <p>The Act as it currently stands potentially treats lease renewals which:</p> <ul style="list-style-type: none"> <li>- replace a single lease with multiple leases</li> <li>- replace multiple leases with a single lease</li> </ul> <p>as renewals for the purposes of Subdivision I, but not as renewals for the purposes of section 26D. This subsequently subjects such renewals to the right to negotiate.</p>
<b>Claims resolution</b>		
<b>G16</b>	Allow hearing of native title and compensation applications together.	<p><b>Current practice</b></p> <p>States and territories have expressed concern that there is not clarity around whether native title determination and compensation applications can be heard together.</p>
<b>G17</b>	Amend section 61A to remove restriction on bringing a claim over an area subject to a previous exclusive possession act.	<p><b>Current practice</b></p> <p>Section 61A provides that a native title determination application cannot be made over an area subject to a previous exclusive possession act. A previous exclusive possession act is a grant of freehold estates or certain leases on or before 23 December 1996.</p>
<b>G18</b>	Agreement as to part of the proceedings – amend s 87(3) to say that agreement is only required from those respondents whose interests relate to the relevant part.	<p><b>Current practice</b></p> <p>The Act currently allows for parties to reach agreement on a part of a proceeding or a particular matter, and for the court to give effect to such an agreement. The provision does not specify which parties need to consent to the agreement, and does not explicitly exclude parties whose interests are not affected by the agreement.</p> <p><b>Benefits of proposal</b></p> <p>The proposal would ensure that any parties whose interest is limited to particular parts of the claim area cannot affect whether a consent determination is made in relation to another area.</p>
<b>G19</b>	Amend section 47B to clarify meaning of 'when the application is made' in the case of combined claims.	<p><b>Additional information</b></p> <p>This has been addressed by <i>Rubibi Community v State of Western Australia</i> [2004] FCA 1019, which clarifies that for the purposes of ss 47, 47A and 47B of the Act an application is made when the application is filed in the Federal Court.</p>
<b>G20</b>	Confirm the purpose of a non-claimant application by distinguishing between those actively seeking a negative determination and those only seeking section 24FA protection.	<p><b>Current practice</b></p> <p>States and territories have indicated that some claimants are using both the 24FA and a non-claimant application process to the detriment of native title applicants and state and territory governments.</p>
<b>G21</b>	Clarify the 'applicant' in a non-claimant application – whether the claim 'runs with the land' and the applicant can be substituted (and 24FA protection remain) or whether a new claim must be brought by the new lessee /purchaser.	<p><b>Current practice</b></p> <p>This has been addressed by <i>Port Bajool Pty Ltd v State of Queensland</i> [2017] FCA 966, which clarifies that an interest holder can apply to federal court under rule 9.09 to substitute applicant on a non-claimant application.</p>

<b>G22</b>	Clarify appropriate use of section 87 (power of Federal Court if parties reach agreement) vs 87A (power of Federal Court to make determination for part of an area).	<p><b>Current practice</b></p> <p>States and territories have indicated that there is uncertainty around the appropriate use of section 87 and 87A. (E.g. If a claim is split into parts 'A' and 'B', there is an argument that 'A' should be determined by 87A and 'B' by 87, as that is the whole of the remainder. Case law however indicates that there is no practical difference other than in terms of what the Registrar must do and that this potentially affects timing.)</p>
<b>G23</b>	Amend section 87A to clarify that the Commonwealth is not required to sign a consent determination in circumstances where it previously intervened and later withdrew.	<p><b>Current practice</b></p> <p>The current drafting of section 87A indicates that there is a technical possibility that the Commonwealth would be required to sign a consent determination in circumstances where it previously intervened and later withdrew.</p>
<b>G24</b>	Require respondents to applications under sections 84(3), (5) and (5A) to provide a proper address for service.	<p><b>Current practice</b></p> <p>States and territories have indicated that there are instances where respondents are not providing proper addresses for service.</p>
<b>Prescribed bodies corporate</b>		
<b>G25</b>	Introduce provisions for the establishment and membership of PBCs ensuring that native title holders are represented on any default PBC.	<p><b>Current practice</b></p> <p>The Act is currently silent on this matter. Subregulation 11(1) of the PBC Regulations allows the Federal Court to appoint the ILC as a default PBC where</p> <ul style="list-style-type: none"> <li>• the common law holders have failed to nominate a PBC</li> <li>• a liquidator has been appointed to wind up a PBC</li> <li>• the ILC consents to a nomination by the common law holders.</li> </ul> <p>In addition, the Northern Land Council Northern has established the Top End (Default PBC/CLA) (Aboriginal Corporation) which functions as a PBC in relation to the vast majority of the NTRB's determinations, upon the request of the native title holders who have decided not to establish their own PBC.</p> <p>This proposal would ensure that the membership of these (and other) 'default PBCs' includes the native title holders for which it performs functions.</p>
<b>G26</b>	Amend the Act to ensure that the Commonwealth may fund a PBC for various purposes including start-up and administrative/compliance costs.	<p><b>Current practice</b></p> <p>Funding is currently provided for PBC start-up and administrative/compliance costs. Pre-determination, NTRB/SPs may support start up and administration of PBCs. Post determination, the NTRB/SP may apply for basic support funding on behalf of the PBC.</p>
<b>G27</b>	Amend Part 11, Division 3 (Functions and powers of representative bodies) to make explicit reference to functions performed in relation to persons who may hold native title (including where they seek recognition and settlement agreement under the <i>Traditional Owner Settlement Act 2010</i> ).	<p><b>Current practice</b></p> <p>NTRB/SPs currently provide support for persons who may hold native title, including where they seek alternative recognition and settlements. Once the native title claim is settled or withdrawn, funding is available under the Indigenous Advancement Strategy, including through the capacity building funding under the White Paper on Developing Northern Australia.</p>



