

Submission on Exposure Draft Native Title Reform

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With thanks:

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About ANTaR

ANTaR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document; and
- Justice - for action to reduce imprisonment rates and end deaths in custody.

We also engage in national advocacy across a range of policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including native title, languages and cultures, economic and community development, remote communities' services and infrastructure, health and human rights.

ANTaR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee and the Redfern Statement Alliance.

ANTaR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTaR is a non-government, not-for-profit, community-based organisation.

‘The recognition of native title came from an acknowledgement of important truths about our past and the need to reconcile these truths with contemporary notions of justice. But it also brought to the fore a fundamental conflict arising at the time of the establishment of Australia as a colony; that is the conflict between the assertion on one hand that the settlement of Australia gave rise to exclusive territorial jurisdiction by the colonial power and, on the other hand, the illegality and immorality of asserting this right without an agreement from those who previously occupied that land and who continue to maintain their deep spiritual, economic and social connection to the land...’

Dr William Jonas AM, 2002¹

Introduction

Thank you for the opportunity to provide some comments to inform the consideration of:

- Streamlining claims resolution and agreement-making processes
- Supporting the capacity of native title holders through greater flexibility around internal decision-making
- Increasing the transparency and accountability of prescribed bodies corporate (the corporations set up to manage native title) to the native title holders
- Improving pathways for dispute resolution following a determination of native title, and
- Ensuring the validity of section 31 agreements in light of the Full Federal Court of Australia’s decision in *McGlade v Native Title Registrar & Ors.* [2017] FCAFC 10.

ANTaR advocates for a fair native title system that gives equitable opportunity to Aboriginal and Torres Strait Islander peoples.

¹ William Jonas (2002) ‘Native Title and Treaty Dialogue’, [online] available at: <https://www.humanrights.gov.au/news/speeches/native-title-and-treaty-dialogue>

Background

In our previous submissions regarding native title reform, ANTaR has outlined its guiding principles², which shape and determine our responses to these proposals. Furthermore, any reforms to the *Native Title Act 1993 (Cth)* should be consistent with the intentions and principles set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Australia as a signatory to the Declaration, has committed to maintaining the standards it sets out. Specifically, the *Native Title Act* must comply with the principle of self-determination. This is set out in Articles 3 and 4 of the UNDRIP, whereby ‘By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’.³

Additionally, ANTaR welcomes the aim of Native Title reform to enhance transparency and good governance, as well as the legislation of a statutory fiduciary duty. However, ANTaR believes that without proper resourcing and support for First Peoples, it remains to be seen how this can come to fruition.

Fundamentally, any reforms to the *Act* must be favourable to Aboriginal and Torres Strait Islander peoples, recognising the historical trauma of colonisation and the impact of successive State and Federal government policies that have disadvantaged or ignored the First Peoples of this continent.

² ANTaR, 2011. *Submission to the Senate Legal and Constitutional Affairs Legislation Committee: Inquiry into the Native Title Amendment (Reform) Bill 2011*, Sydney: ANTaR; [online]: https://antar.org.au/sites/default/files/final_submission_to_senate_inquiry_into_native_title_reforms_july_2011.pdf; ANTaR, 2012. *Comment on Native Title Amendment Bill 2012 Exposure Draft*, Sydney: ANTaR; [online]: https://antar.org.au/sites/default/files/draft_native_title_amendment_bill_submission_-_final_22.10.12.pdf.

³ General Assembly resolution 61/295, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (2 October 2007), available from <https://www.undocs.org/A/RES/61/295>.

Contents

Schedule 1: The Role of the Applicant.....	6
Part 2: Decision-making.....	7
Part 3: Replacement.....	8
Schedule 4: Allowing a prescribed body corporate to bring a compensation application.....	9
Schedule 6: Other Procedural Changes (Section 31 Agreements)	9
Schedule 8: Registered Native Title Bodies Corporate (RNTBC).....	10
Part 1: Limit grounds for cancelling RNTBC membership and limit RNTBC directors’ discretion to refuse membership.....	10
Part 2: Jurisdiction of courts.....	11
Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018.....	11
General comments and Further Action Required.....	12
References.....	13

Schedule 1: The Role of the Applicant

ANTaR has raised concern over the wording of the proposed addition contained in schedule 1, item 21 ‘251BA Conditions on authorisation’ to the Act, which states that authorisation decisions be made ‘in accordance with a traditional decision-making process, or if no such process exists, a process agreed to by the claim group’.⁴

The recommendation from the ALRC calls for decision-making processes to be done through either a traditional process or an agreed upon process⁵. However, the proposal in the Exposure Draft outlined above does not seem to include the ‘either’ part of that equation. This may lead to unintended consequences that could limit the decision-making powers of native title claimants and may hamstring their internal governance structures prescribing only one form on decision-making process.

Broadly, ANTaR supports reforming the applicant authorisation process, to bring clarity to both the claim group and the applicant themselves. Despite having authority under s62A to act on all matters relating to the making of a native title application, applicants often feel unable to make decisions without referring them back to the claim group for consideration.⁶

This is mostly because native title claim groups ‘do not generally invest full decision-making authority in the applicant but expect the applicant to bring important decision back to the group to consider’.⁷ As such, the proposed reforms aim to help reflect the practical reality into the *NTA* by giving the claim group and the applicant a pre-agreed scope of authority on which to act.

However, consideration of the concerns raised should be given to ensure that potential unintended consequences are addressed.

⁴ Attorney-General's Department, 2018. *Exposure Draft Native Title Legislation Amendment Bill 2018 and Registered Native Title Bodies Corporate Regulation Amendment Regulations 2018: Public consultation paper*, Canberra: Commonwealth of Australia, p. 3.

⁵ Australian Law Reform Commission, 2015. *Connection to Country: Review of the Native Title Act 2003 (Cth)*, Canberra: Commonwealth of Australia, p. 28.

⁶ Angus Frith, 2017. *Reforms to the Native Title Act 1993 (Cth): Options Paper November 2017*, Canberra: Attorney-General's Department, p. 5.

⁷ Attorney-General's Department, 2017. *Reforms to the Native Title Act 1993 (Cth): Options Paper*, Canberra: Commonwealth of Australia, p. 7.

(1) Decision-making

The Exposure Draft proposes to reverse the current default position of requiring all members of the applicant to agree for native title agreements to be entered into.⁸ It proposes to allow the applicant to act by majority. The majority decision-making provision would be subject to the conditions or authorisation that are outlined under s251BA.

This is proposed in response to the ALRC recommendation stating that: ‘the *Native Title Act* should be amended to provide that the applicant may act by majority, unless the terms of authorisation provide otherwise’.⁹

This was proposed as a time and cost-saving measure to avoid to situation where claim groups (or the applicant) cannot reach agreement about matters under consideration and a replacement applicant member must then be re-authorised.¹⁰ The proposal aims to ensure that a claim group can still progress its desired course of action where single members of the applicant disagree, ‘but ensure that a claim group can maintain the requirements for unanimity if the group chooses to do so’.¹¹

ANTaR supports this proposal as a time- and cost-saving measure,¹² however, the concerns raised in response to this must be noted.

The National Congress of Australia’s First Peoples (Congress) ‘asserts that majoritarian decision-making procedures threaten the collective, communal nature of First Peoples’ ownership over¹³ lands and waters. Congress argues that it ignores the complexities of native title and may violate the rights of minority groups leading to potential economic consequences.’¹⁴

The Australian Human Rights Commission (AHRC) has also raised concerns about the default majority position. The AHRC argues, in alignment with Congress, that it leaves the complexity of native title unaccounted for. Namely, that is views a minority with a differing

⁸ Attorney-General’s Department, 2017. *Options Paper*, p. 8.

⁹ Australian Law Reform Commission, 2015. *Connection to Country*, p. 29.

¹⁰ *Ibid*, p. 21.

¹¹ *Ibid*.

¹² The cost- and time-saving potential of the amendment is also supported by the First Nations Legal & Research Service in their submission to the options paper [First Nations Legal & Research Service, 2017. *Submission to the Attorney-General’s Department – Reforms to the Native Title Act 1993 (Cth) Options Paper (November 2017)*, Canberra: Attorney-General’s Department, p. 1-2]

¹³ National Congress of Australia’s First Peoples, 2018. *Submission to the Inquiry into Reforms to the Native Title Act 1993*. Canberra: Attorney-General’s Department, p. 4.

¹⁴ *Ibid*.

opinion as a dissenting voice rather than as a concerned party with legitimate questions as to the impacts of the proposed course of action on the native title claim group as a whole.¹⁵ ANTaR agrees that these issues should be addressed in these reforms.

(2) Replacement

Currently under s66B, a claim group must hold an authorisation meeting to authorise a replacement applicant, and this can be both costly and time-consuming.¹⁶ Additionally, an authorisation meeting may be unnecessary if the conditions of authorisation do not require it.¹⁷ The proposed amendments are designed to streamline the process, with the new composition of the applicant requiring a Federal Court order to be approved. This would not require an authorisation meeting, implementing the recommendation of the ALRC.¹⁸

Congress has raised concerns in relation to the proposed amendments, stating that it is ‘another example of prioritising decision-making expediency over ensuring that the voices of Aboriginal and Torres Strait Islander peoples are properly heard’.¹⁹ Further, bypassing s66B re-authorisation ‘ignores the importance of consensus-based decision-making as a means of recognising the communal and collective nature of native title’.²⁰

The First Nations Legal & Research Services (FNLRS) supports the idea for streamlined replacement powers, however, arguing that the decision-making powers must rest with First Nations peoples in accordance with their processes.²¹

ANTaR supports the position of the FNLRS, and strongly recommends that the concerns of Congress be accounted for when the reforms to the replacement process are considered. ANTaR recommends collaboration with First Peoples to hear their concerns and develop processes to address these for future reform.

¹⁵ Australian Human Rights Commission. (2018). ‘Australian Human Rights Commission Submission to the Options Paper on Reforms to the *Native Title Act 1993* (Cth)’, Sydney: Australian Human Rights Commission, p. 10.

¹⁶ Attorney-General’s Department, 2017. *Options Paper*, p. 21.

¹⁷ *Ibid.*

¹⁸ Australian Law Reform Commission, 2015. *Connection to Country*, p. 29. Recommendations 10-7 and 10-8.

¹⁹ National Congress of Australia’s First Peoples, 2018. *Submission to the Inquiry into Reforms to the Native Title Act 1993*, p. 6.

²⁰ *Ibid.*

²¹ First Nations Legal & Research Service, 2017. *Submission to the Attorney-General’s Department*, p. 3.

Schedule 4: Allowing a prescribed body corporate to bring a compensation application

Schedule 4, item 5 of the Exposure Draft, proposes to allow for Registered Native Title Bodies Corporate (RNTBCs) to bring a compensation claim in relation to areas where native title has been fully extinguished. Currently, RNTBCs can only bring a compensation claim to areas where native title has been partially extinguished, if they obtained consent from the common law native title holders to do so.

ANTaR supports this reform in line with the views of the Goldfields Land and Sea Council and the Cape York Land Council.²² South Australian Native Title Services also expresses its support for this reform and states that such reforms would be expected to ‘streamline the settlement process’.²³

Schedule 6: Other Procedural changes (Section 31 Agreements)

The amendments in the Exposure Draft proposes in schedule 6, item 6 to ‘confirm the validity of section 31 agreements where at least one member of the applicant has signed the agreement’.²⁴ This was proposed in response to the Full Federal Court decision in *McGlade v Native Title Registrar* where the court found that because not all members of the applicant had signed the agreement it was invalid under s24CD which states that ‘all persons in the native title group in relation to the area must be parties to the agreement’.²⁵

Changes drafted to the role of the applicant under schedule 1 would be applied to future section 31 agreements. This will mean that these agreements can be made by a majority of the applicant.

ANTaR supports the validation of prior section 31 agreements made in good faith before the *McGlade* decision. It also emphasises the concerned voices of Congress, which raises concerns regarding the majoritarian position could ‘inherently discriminate against minority

²² Goldfields Land and Sea Council, 2017, *Submission to the Department of the Attorney General on the November 2017 Options Paper*, Canberra: Attorney-General’s Department, p. 5; Cape York Land Council Aboriginal Corporation 2018, *Options paper proposing reforms to the Native Title Act 1993 (Cth)*, Canberra: Attorney-General’s Department, p. 10.

²³ South Australian Native Title Services 2018, *Reforms to the Native Title Act 1993 (Cth): Options Paper November 2017*, Canberra: Attorney-General’s Department, p. 5.

²⁴ Attorney-General’s Department, 2018a. *Fact Sheet #1: Native Title Reforms: Overview of Reforms*, [online] available at: <https://www.ag.gov.au/Consultations/Documents/native-title/native-title-reforms-factsheet-1.pdf>, p. 3.

²⁵ *Native Title Act 1993 (Cth)*, 24CD(1).

groups, if the majority collude to or co-operate to vote against their interests'.²⁶ ANTaR would give support for the amendments contained in schedule 6 conditioned on close consultation with First Peoples so that reform to s31 agreements can best deliver the financial benefits to native title holders and not large mining corporations.

Schedule 8: Registered Native Title Bodies Corporate

The principal role of RNTBCs is to protect and manage the rights and interests of native title holders, after a determination of native title has been made.²⁷ RNTBCs are governed by the *Native Title Act 1993*, *Corporations (Aboriginal and Torres Strait Islander Act 2006 (CATSI Act))* and *Native Title (Prescribed Body Corporate) Regulations 1999 (Cth)*. ANTaR recognises that one of the main objectives of the *Native Title Act* reforms is to improve RNTBC accountability, transparency and governance, as well as providing clear and efficient pathways for dispute resolution within native title groups.

- (1) Membership and Common Law: limit grounds for cancelling RNTBC membership and limit RNTBC directors' discretion to refuse membership

The amendments propose to remove the ability of RNTBCs to add further grounds for cancellation of membership in their constitutions, and to remove the ability of RNTBC directors to refuse membership based on their own discretion. Item 20 of the Exposure Draft would insert new s150-22, which 'would set out the way in which membership of a member of an RNTBC has to be cancelled in case of ineligibility or unpaid membership fees'.²⁸ Item 22 proposes to provide an exemption for an Aboriginal or Torres Strait Islander corporations.²⁹

Congress supports the proposed amendments, stating that the amendment aims to

promote[s] the autonomy of native title holders in relation to the management of native title rights [... and] would safeguard [...] against the abuse of the PBC directors of their

²⁶ National Congress of Australia's First Peoples, 2018. *Submission to the Inquiry into Reforms to the Native Title Act 1993*, p. 4.

²⁷ PBCs, n.d., *About PBCs*, accessed <https://www.nativetitle.org.au/learn/role-and-function-pbc/about-pbcs>

²⁸ Attorney-General's Department, 2018. *Consultation Paper*, p. 28.

²⁹ *Ibid.*

discretion over membership, which can manifest in arbitrary amendments to the PBC's Rule Book that alienate some common law holders.³⁰

Congress also adds that common law holders should 'automatically qualify as members of an RNTBC.'³¹ Congress expresses the view of the importance of ensuring that RNTBCs fulfil their obligations to common law holders to the same extent as members.³²

ANTaR is supportive of the proposed membership amendments for the reasons as expressed by Congress. However, ANTaR recommends that consideration be given to the potential risks that may arise from the proposed membership amendments as they could undermine the autonomy and decision making authority of RNTBCs. Furthermore, although item 22 allows for a discretionary cancellation of membership by RNTBCs, ANTaR is concerned that this added process could further add to administrative burdens in an already heavily bureaucratized, and slow-moving native title system.

(2) Jurisdiction of Courts

The Federal Court has exclusive jurisdiction to hear and determine native title application and has thus gained unique experience and expertise in relation to the native title system.

However, matters relating to RNTBCs can be heard across a number of different courts in Australia. The amendments propose to refer all RNTBC related cases to the Federal Court to ensure that all matters relating to the native title system are heard by an expert court.

ANTaR supports these reforms in recognition of the unique and complex nature of the native title system, and the subsequent need for matters to be heard before an experienced native title judge. The Federal Court of Australia has also expressed its support for this reform stating that 'CATSI Act matters that affect PBCs are invariably complex and their judicial determination is significantly aided by a deep understanding of the operation of native title law'.³³

³⁰ National Congress of Australia's First Peoples, 2018. *Submission to the Inquiry into Reforms to the Native Title Act 1993*, p. 13.

³¹ *Ibid.*

³² *Ibid.*

³³ Federal Court of Australia Principal Registry 2018, *Reforms to the Native Title Act 1993 (Cth)* – November 2017 Options Paper, Canberra: Attorney-General's Department, p. 1.

Registered Native Title Bodies Corporate Legislation Amendment Legislation

- (1) Remove the requirement to consult with native title representative bodies

ANTaR notes that both the National Native Title Council (NNTC) and Congress oppose the proposed amendments. The NNTC opposes the amendments because the existing provision:

ensure[s] PBCs have the benefit of the views and experience of the relevant NTRB/SP developed over many years and the benefit of an awareness of current practice in relation to future act benefits. Further, not having oversight on the native title matters or decisions relevant to a PBC may impose disadvantage to the PBC in so far as the NTRB/SP is unable to accurately gauge the resources it can dedicate to the PBC in its work with the native title holders on other projects.³⁴

Congress also opposes the amendment because it ‘undermines the role of NTRBs in the native title process [and] undermines First Peoples’ autonomy by detracting from the central role of NTRBs, that is, to offer support to at least some of the RNTBCs [PBCs] in their region’.³⁵

ANTaR also shares the concerns of Congress and the NNTC that relaxing consultation processes may risk compromising the principal purpose of RNTBCs, which is to manage and protect the rights and interests of native title-holders. This reform may also lead to unspecified ideas about when consultation is and is not required, which could lead to a reduction of RNTBC transparency. It is recommended that additional resourcing and funding be considered as a way to lift administrative burdens, rather than relaxing consultation processes.

General Comments and Further Action

ANTaR supports amendments to the *Native Title Act 1993* that will improve the accountability and transparency of RNTBCs, if the amendments support to fulfill RNTBC’s primary obligation of protecting and managing the rights and interest of native title holders. ANTaR also supports amendments that support the efficiency of the native title system.

³⁴ National Native Title Council, 2017, *Reforms to the Native Title Act (Cth): Options Paper November 2017*, accessed (pp. 7-8)

³⁵ National Congress of Australia’s First Peoples, 2018. *Submission to the Inquiry into Reforms to the Native Title Act 1993*, Canberra: Attorney-General’s Department, p. 9.

It is also important that reforms do not act to disempower or undermine RNTBCs and that any reforms are made to benefit the native title system, in favour of native title holders. It is also important that amendments are made in consultation with RNTBCs and native title holders where possible. RNTBCs should also be provided adequate resourcing and funding by the government.

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