THE MABO CENTRE

NATIONAL NATIVE TITLE COUNCIL

Attorney General's Department
Native Title Engagement

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The Mabo Centre & National Native Title Council
Submission to the Attorney General's Department's
Evaluation of (the 2021) amendments to the Native Title Act 1993

This submission is made by the National Native Title Council (**NNTC**) in collaboration with the Mabo Centre to the Attorney General's Department Evaluation of (the 2021) amendments to the *Native Title Act 1993* (Cth) (**NTA**).

We[1] commence with a brief description of the organisations that bring forward this submission.

1 National Native Title Council

Established in 2006, the NNTC is the peak body for Australia's Native Title and other Traditional Owner organisations. The NNTC represents Native Title Representative Bodies (**NTRBs**) and Service Providers (**NTSPs**) as well as Prescribed Bodies Corporate (**PBCs**) recognised under the NTA and other equivalent Traditional Owner Representative Institutions (**TORIs**) established under Traditional Owner land rights legislation such as the *Traditional Owner Settlement Act 2010* (Vic) (**TOSA**), the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA).

The NNTC's work is guided by a rights-based approach rooted in best practice standards, such as the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) and Free, Prior, and Informed Consent (**FPIC**). It is a regular participant in a range of United Nations (**UN**) and regional international fora for addressing issues associated with the interaction between the resources sector and Indigenous Peoples across the globe.

In addition to representing the interests of our members, the NNTC is a signatory to the National Agreement on Closing the Gap, the secretariat for the First Nations Heritage Protection Alliance (**FNHPA**) and Sea Country Alliance (**SCA**), the PBC Steering Group,

[1] "We" in this submission refers to both the NNTC and the Mabo Centre.

and a member of both the First Nations Economic Empowerment Alliance with the Australian National University and the Coalition of the Peaks. This national leadership role of the NNTC is recognised by the Australian Commonwealth, state governments, and by key resources sector peak bodies.

2 The Mabo Centre

Launched in February 2025, the Mabo Centre is a newly formed First Nations-led partnership between the NNTC and The University of Melbourne. The Mabo Centre builds on the extensive and ongoing engagement with Traditional Owners undertaken by the NNTC.

Located on the University's Parkville campus, and working closely with Traditional Owners and communities, the Mabo Centre undertakes research to identify best practices, deliver training to strengthen and share knowledge, and develop local leadership skills to maximise economic outcomes through leveraging land and sea rights. Overtime, this will ensure strong principles of self-determination are embedded into native title agreements, better supporting community aspirations and providing greater opportunities for economic development and entrepreneurship on Country. Through this work, the Mabo Centre will provide that the benefits of land and sea rights are fully realised.

The Mabo Centre aims to achieve these outcomes through four focus areas:

- **Research** informing national policy development that will support Traditional Owners achieving the best possible outcomes from the resources they control and influence.
- **Training** working with Traditional Owners and their leadership to strengthen their capacities in crucial policy areas and skills.
- **Exchange** sharing knowledge through networked learning to support stronger Traditional Owner connections and effective agreement making.
- **Acceleration** driving entrepreneurship and leadership for Traditional Owner developed economies.

The Mabo Centre is guided by a Board of First Nations leaders and economic experts, Co-Chair Jamie Lowe and alternate Co-Chairs Professor Marcia Langton and Professor Paul Kofman. Professor Matthew Storey is the Research Lead at the Centre.

3 Evaluation of the schedules of the 2021 Amendments.

Schedule 1: *Role of the Applicant*

> *The intention of the amendments in Schedule 1 of the Native Title Legislation Amendment Act 2021 ("Amendment Act") was to provide greater flexibility to claim groups around developing their own internal decision-making structures. The changes also sought to ensure the applicant is accountable to the broader claim group.*

Practically, the amendments meant that additional conditions can be placed on the authority of the applicant by the claim group, which must be satisfied when making an application for registration of an Indigenous Land Use Agreement (**ILUA**).

The NNTC supported the intention of this amendment and believes that it has operated to assist in the fair and efficient operation of a complex area of native title procedure. The amendments have operated to allow a native title claim group, at this stage of proceedings unincorporated, to, as a collective, effectively engage in complex litigious and administrative matters.

As will be a recurring theme throughout this submission, it is unfortunate that the positive potential created by the legislative amendments have not been maximised through the allocation of desirable additional resources.

Frequently the development of a native title determination application will be in response to an impending future act process. This necessarily means the finalisation of the application will be in a constrained time frame. In addition to the truncated timeframe is the fact that, at this stage in the history of native title in Australia, many of the areas where determination applications are yet to be finalised have complex traditional ownership structures. Similarly, these areas are often where the impacts of colonial dispossession are most harshly felt.

This combination of factors both underscores the importance of these amendments and the fact that legislative amendment alone is not a sufficient response. The allocation of additional resources to NTRBs and NTSPs is also necessary to support these processes.

At a time when there is national attention being paid to the importance of quickly developing strategic land-based resources the imperative to support the native title processes attached to this task could not be greater.

Schedule 2: *Indigenous Land Use Agreements*

> *Schedule 2 amended [NTA] in relation to ILUAs with the intention to streamline and improve native title claims resolution and agreement-making.*

The inclusion of the ILUA provisions in the 1998 amendments to the NTA represent one of the few mechanisms in the NTA that allow the genuine application of the principle of FPIC. Therefore, any provisions that can assist in the operation and effectiveness of these provisions are to be welcomed.

As reported to the NNTC by its members and others operating in the sector, the amendments to these provisions arising from Schedule 2 of the *Amendment Act* have resulted in improved efficiency in the operation of the ILUA system and therefore increased capacity for native title holders to give effect to self -determination.

This noted, further improvement is still possible. For example, the *Amendment Act* did not lead to amendments that would give full effect to the processes contemplated in s 24CG(3)(a) of the NTA. In our submission giving greater weight to certification by an NTRB of area agreements would facilitate the more effective and cost-efficient use to the benefit of both native title holders and proponents.

We are also aware that some practical issues have arisen in respect to the limited terms of the current narrow terms of s 24ED. In our submission s 24ED should be broadened so that parties to ILUAs should be able to make larger variations to agreements by a more direct process than de-registration, amendment, and then re-registration of the amended agreement. Section 24ED should apply to all ILUA variations, subject, in appropriate circumstances, to a requirement that the amendments be authorised or the subject of a fresh native title holder consent process.

Further, in our submission consideration should be given to the amending the terms of s 24BC(2)(b). Such amendment would ensure that, in the registration of an ILUA, the Registrar should have the discretion to form an opinion on all the relevant evidence, "as to whether the relevant area was excluded from an approved determination because of the extinguishment of native title ". In such a case the requirement would be satisfied.

However, we are aware that the current review by the ALRC will examine some further matters related to the process around ILUAs and we will save further comments as a contribution to those processes.

Schedule 3: *Historical Extinguishment*

> *Schedule 3 extended the areas in which prior extinguishment can be disregarded to include areas of national, state or territory parks where there is agreement with the relevant Australian, state or territory government. This was done through the insertion of section 47C with the intention to expand the areas where native title can be recognised*.

The inclusion of s 47C of the NTA as a result of the schedule 3 amendments (to permit the historical extinguishment of native title to be disregarded so that native title can be recognised in specific areas, including national, state or territory parks where there is agreement with the relevant government) was a welcome and positive step. It has led to a positive benefit for native title holders and more efficient and effective management of the nation's parks estate by state and territory governments.

We submit that these benefits could be extended if consideration were given to developing further amendments that allowed the Court, in making a determination, to similarly disregard prior extinguishment despite the objection of the government respondent party to this course.

Schedule 4: *Allowing a registered native title body corporate to bring a compensation application*

> *Schedule 4 amended the [NTA] to allow registered native title bodies corporate (**RNTBCs**) to bring a compensation application over an area where native title has been extinguished within their native title determination area.*

The principle behind this amendment is imminently sensible. The amendment eliminates an irrationality from the original provisions. This stated, it must be noted that the amendment *itself* has not facilitated any (at least as far as we are aware) compensation applications being brought by RNTBCs. This failure cannot however be attributed to the amendments, but rather to the complete lack of resourcing provided to RNTBCs, NTRBs and NTSPs to allow a compensation application to be prepared.

The appropriate response in our submission is to arrange for appropriate resources to be provided to allow compensation applications to be developed and lodged. However, we are aware that the current review by the ALRC will examine some of these matters and we will save further comments as a contribution to those processes.

Finally, we note that there has been some uncertainty that has arisen as to whether the ability to bring a compensation application in these circumstances is exclusive to the RNTBC (see *Melville on behalf of the Pitta Pitta People v State of Queensland* [2022] FCA 387). In our view the legislation should be further amended to clarify that *only* an RNTBC ought to be able to bring a compensation application in the circumstances set out in (1) and (1A) of the relevant table entry in s 61.

Schedule 5: *intervention and consent determination*

> *Schedule 5 made several technical amendments to the [NTA] title proceedings.*

We make no submission in relation to these amendments.

Schedule 6: *Other procedural changes (including section 31 agreements)*

> *Schedule 6 made various procedural changes to the [NTA] including:*
> - *technical amendments with the intention of clarifying the role of the government party in the negotiation of section 31 agreements, and the objections procedures under the future acts regime*
> - *a requirement that the Native Title Registrar create and maintain a public record of section 31 agreements with the intention to provide transparency and certainty for all parties to native title matters and improve native title claims resolution and agreement-making …*

In relation to the first point, we are aware that the current review by the ALRC will examine some of these matters and we will save further comments as a contribution to those processes.

In relation to the second point, the amendments contained in Schedule 6 led to a public record of limited aspects of s 31 agreements. At the time of the passage of these amendments the NNTC expressed reservations to the effect that the amendments constituted an unwarranted regulatory intrusion into what is a private commercial transaction between native title holders and proponents. This reservation is maintained. However, the amendments were portrayed as advancing the transparency of the future act agreement process and reducing the occurrence of disputes within PBCs. It is not evidentially apparent to what extent the amendments have achieved this objective but nor is it apparent that actual harm has been caused. On this basis it is not proposed that the amendments are removed or further developed.

Schedule 7: *National Native Title Tribunal*

> *Schedule 7 conferred on the National Native Title Tribunal (**NNTT**) a new function to allow it to assist RNTBCs and common law holders of native title to promote agreement about native title and the operation of the [NTA]. This change created a new pathway to address native title-related disputes arising following a native title determination and was intended to support the early resolution and management of disputes which may arise after a native title determination.*

By contrast to the amendments contained in Schedule 8 and discussed below, the amendments contained in Schedule 7 were generally supported by the NNTC and we continue to support the processes so established. The provision of the specialist expertise provided by the NNTT in native title-related disputes arising following a native title determination has been of significant benefit to the sector.

As with other matters raised in this submission, the positive benefits flowing from the amendments has however been diminished by the lack of appropriate resources to support the NNTT in this additional task.

Schedule 8: *registered native title bodies corporate*

> *Schedule 8 amended the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) (**CATSI Act**) with the intention to improve the accountability, transparency and governance of RNTBCs through amendments that:*
>
> - *require RNTBC constitutions include dispute resolution pathways for persons who are or claim to be common law holders,*
> - *require RNTBC constitutions to provide for all common law holders to be represented in the RNTBC,*
> - *limit the grounds for cancelling the membership of a member of the RNTBC to those provided for in the CATSI Act,*
> - *remove the discretion of directors of RNTBCs to refuse membership when the applicant meets the requirements for application and eligibility, and*

- *clarify that the Registrar of Aboriginal and Torres Strait Islander Corporations may place a RNTBC under special administration where there are serious or repeated failures to comply with certain obligations imposed by the NTA and regulations.*
- *Schedule 8 also amended the CATSI Act to ensure that civil matters arising under the CATSI Act and that relate to an RNTBC are to be instituted and determined exclusively in the Federal Court unless transferred by the Court to another court with jurisdiction.*

It is appreciated that the amendments in schedule 8 went to the CATSI Act which is the responsibility of the Minister for Indigenous Australians. It is understood that there will shortly be a further review of this legislation to which we will contribute.

Suffice to note at this point that these amendments were not supported by the NNTC at the time of their passage. They were seen as an unnecessary and racially motivated example of over-regulation that imposed significant burdens on already overtaxed RNTBCs. These are matters we will pursue in any future review of the CATSI Act.

For the purposes of this instant review, we will note only our ongoing support for vesting exclusive jurisdiction in relation to civil matters arising under the CATSI Act in the Federal Court of Australia.

Schedule 9: *Just terms compensation and validation*

> *In the decision of McGlade v Native Title Registrar & Ors [2017] FCAFC 10, the Full Federal Court determined that ILUAs (as a particular kind of agreement under the NTA) are invalid where not all members of the applicant group are party to the agreement. As this reasoning could similarly affect section 31 agreements, the Act confirms the validity of these agreements in cases where not all members of the native title party have signed or entered into the agreement, but at least one member has.*
>
> *The changes operate to validate section 31 agreements that were entered into prior to 17 February 2021, if at least one member of each relevant native title party was a party to the agreement. The changes were intended to resolve uncertainty created by the McGlade decision in relation to section 31 agreements.*

The decision of the Full Federal Court in our submission was in error in failing to appreciate that the execution of an agreement by the "named applicant" was on the basis of endorsement by the overall claim group. The notion (had been) that named applicants could act as representatives of claim group 'jointly or severally'. Through misconstruing the nature of the applicants' authority, *McGlade* put this notion into doubt and introduced unnecessary and unwarranted complexity into the already complex ILUA authorisation process.

The amendments operated appropriately to ensure this mistaken approach was not flowed through to s 31 agreement. It operated to validate agreements executed under instruction of the full group and advanced the principle of self-determination. The amendments were and are supported.

We look forward to continuing to work with the Attorney General's Department through the Expert Technical Advisory Group on Native Title and other to achieve a functional NTA that recognises and gives effect to the rights of Australia's Traditional Owners and provides a practical component of the land management structure for all Australians.

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