

# SUMMARY OF THE PROPOSED REFORMS TO THE

## *Native Title Act 1993 (Cth)*

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**T**HE COMMONWEALTH ATTORNEY-General's Department released the proposed reforms to the *Native Title Act 1993* (Cth) (NTA) and its Options Paper<sup>1</sup> in November 2017. AIATSIS made a submission in response on 28 February 2018. The issues covered in the proposed reforms relate broadly to: authorisation & decision-making, agreement-making, the claims resolution process and post-determination dispute management.

### SECTION 31 AGREEMENTS AND *MCGLADE V NATIVE TITLE REGISTRAR*<sup>2</sup>

The decision in *McGlade*<sup>3</sup> has meant that a major focus of the proposed amendments to the NTA is about the signing of agreements. Currently, a native title party must ensure that section 31 agreements are signed by every member of the applicant<sup>4</sup> while the changes would allow agreements to be signed by a majority of the members of the applicant. Section 31 agreements are used primarily for future act agreements such as the grant of mining and exploration. AIATSIS viewed these as positive changes because they would allow agreements to be signed in situations where members of the applicant

are incapable of signing or disagree with the majority of the native title claim group. If this change is made, a separate authorisation process for section 31 agreements would be introduced so that the members of the native title claim group support the agreement.

### AUTHORISATION AND THE APPLICANT<sup>5</sup>

The options paper also asks whether the NTA should say clearly that the applicant has a duty not to obtain a direct personal benefit at the expense of the native title claim group or native title holders. Recently the Federal Court of Australia found that a 'fiduciary duty' does exist and said that this duty means that members of a native title claim group are: 'entitled to expect that [the applicant] would act in the best interests of the claim group in exercising any of the functions, powers, responsibilities or discretions conferred upon the applicant.'<sup>6</sup> AIATSIS suggested that in considering the introduction of a positive duty or obligation in the NTA there should also be an obligation to allow decisions of the Courts to evolve in accordance with Indigenous law and the developing common law of native title.<sup>7</sup>

Replacement of members could be simplified by proposed changes which allow members of the applicant to be replaced without an authorisation process. AIATSIS is supportive of these changes as they encourage 'succession planning' which means what will be done in the event of an applicant's death or illness, however the changes do not provide detail on the circumstances in which an applicant can be replaced.<sup>8</sup>

Several other proposed changes give native title groups more control, by (1) allowing the claim group to define what the applicant can or cannot do on behalf of the group, (2) allowing a *majority* of the members of the applicant to make a decision and (3) allowing native title claim groups to select an appropriate decision-making process regardless of whether they have a traditional decision-making process.<sup>9</sup> In its submission AIATSIS was broadly supportive of these proposed changes noting that decision-making should be re-framed to focus on the right and responsibility of native title holders to decide how they will be consulted and make decisions.

## AGREEMENT-MAKING

Several proposed changes would allow Prescribed Bodies Corporate (PBCs) to contract with respondent parties, such as mining corporations, in relation to future acts, compensation, and certain statutory protections of native title rights and interests. AIATSIS viewed this change as unfairly creating the ability to bypass the ILUA authorisation process.

AIATSIS perceived several of the changes as reducing the responsibilities of State Governments in agreement-making. These included (1) allowing parties to agree that an ILUA does not provide compensation, (2) no longer requiring Government to be a party to section 31 agreements, and (3) allowing for the transmission of notices to be by email, and electronic only.

PBCs would not be required to consult with NTRBs under one proposal which risks leaving PBCs without all the information to make an informed decision. The discussion paper also contained a proposal to make ILUAs and s 31 agreements as well as information about native title decisions and the spending of monies that are held in trust publically available.

AIATSIS expressed concern about the current resourcing of PBCs and the increased strain if these changes were made, and continued to recommend the Registrar of Indigenous Corporations (ORIC) remove private details from existing registers.

In relation to the agreement-making process, AIATSIS in its submission to the inquiry said that the proposals do not address the inequality in bargaining position between the parties,<sup>10</sup> and particularly the fact that native title holders cannot withdraw from negotiations where they feel that they are not receiving an appropriate benefit.<sup>11</sup> The Australian Human Rights Commission asked that the obligation to negotiate in good faith be clearly set out in the NTA.<sup>12</sup>

## CLAIMS RESOLUTION

Historical extinguishment of native title could be disregarded in areas of national, state and territory parks and pastoral leases held by claimants under a proposed change to the claims resolution process. This is something AIATSIS has supported for some time, although it doesn't go as far as disregarding extinguishment over all crown land which would be a more just outcome. In relation to native title

application inquiries, the proposals allow for an inquiry to be held without the applicant's agreement to participate with the National Native Title Tribunal (NNTT) able to summon a person or documents. Among the most sensible suggested changes, is that the proposed changes would allow PBCs to be applicants in compensation claims.

## POST-DETERMINATION DISPUTE MANAGEMENT

PBCs could have less freedom to decide membership and more rules to follow in sorting out disputes about membership under the changes. The proposal would create processes to be followed to refuse or cancel membership and require PBC rulebooks to have an additional section about resolving membership disputes involving non-members. The proposals also seek to expand the power of ORIC to include enforcing procedural compliance with the PBC Regulations, and to amend the Register of Members when the dispute processes are not followed.<sup>13</sup> AIATSIS supports PBCs being able to choose the dispute resolution process that works best for them rather than having to engage with a prescriptive legal process like the one set out in the proposals.



## COMMENTARY

Major progress is unlikely to be achieved by the proposed amendments without reconsideration of core issues addressing the relationship of Aboriginal and Torres Strait Islander peoples' relationship to their lands and water.<sup>14</sup> These include the burden of proof placed upon native title holders to prove their connection to lands and waters, the high cost of bringing claims and negotiating agreements, and the governance challenges that result from the forced incorporation of native title rights and interests.<sup>15</sup> The proposed reforms also do not address the recognition of native title rights to take and use resources for commercial purposes, as has been recognised by the Courts in the decisions of *Akiba*,<sup>16</sup> *Pilki*<sup>17</sup> and *Birriliburu*.<sup>18</sup>

Photo: Kiwirrkurra, Western Australia.  
Credit: Tran Tran, AIATSIS.

- 1 Attorney-General's Department, Reforms to the *Native Title Act 1993* (Cth) Options Paper November 2017.
- 2 [2017] FCAFC 10.
- 3 *Ibid.*
- 4 See sections 61(1), 62 A, 251B *Native Title Act 1993* (Cth).
- 5 See Duff, Nick 'Authorisation and decision making in native title' (AIATSIS Research Publications, Canberra, 2017).
- 6 *Gebadi v Woosup (No 2)* [2017] FCA 1467 at [101] Greenwood J
- 7 See Pearson, Noel 'The concept of native title at common law (1997)' Australian Humanities Review.
- 8 See Connection to Country (Australian Law Reform Commission, Report 126, April 2015) Chapter 10.
- 9 s 251A (a) *Native Title Act 1993* (Cth).
- 10 This is when one party to an agreement has more and better choices and resources than the other.
- 11 See AIATSIS submission to the inquiry.
- 12 See Human Rights and Equal Opportunity Commission submission to the inquiry, page 7.
- 13 See AIATSIS submissions about these issues to the CATSI Act Technical Review.
- 14 See *Australian Law Reform Commission's Connection to Country (2013)* report.
- 15 Native title rights must be held by a CATSI corporation. Sections 55, 56 and 57 *Native Title Act 1993* (Cth).
- 16 *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1; See also ALRC Issues Paper PI (45): Native Title and rights and interests of a commercial nature See McCabe, Patrick 'Pilki and Birriliburu: Commercial native title rights after Akiba' 19 Australian Indigenous Law Reporter 64 (2015–2016).
- 17 *Willis on behalf of the Pilki People v Western Australia* [2014] FCA 714.
- 18 *BP (deceased) on behalf of the Birriliburu People v Western Australia* [2014] FCA 715.

