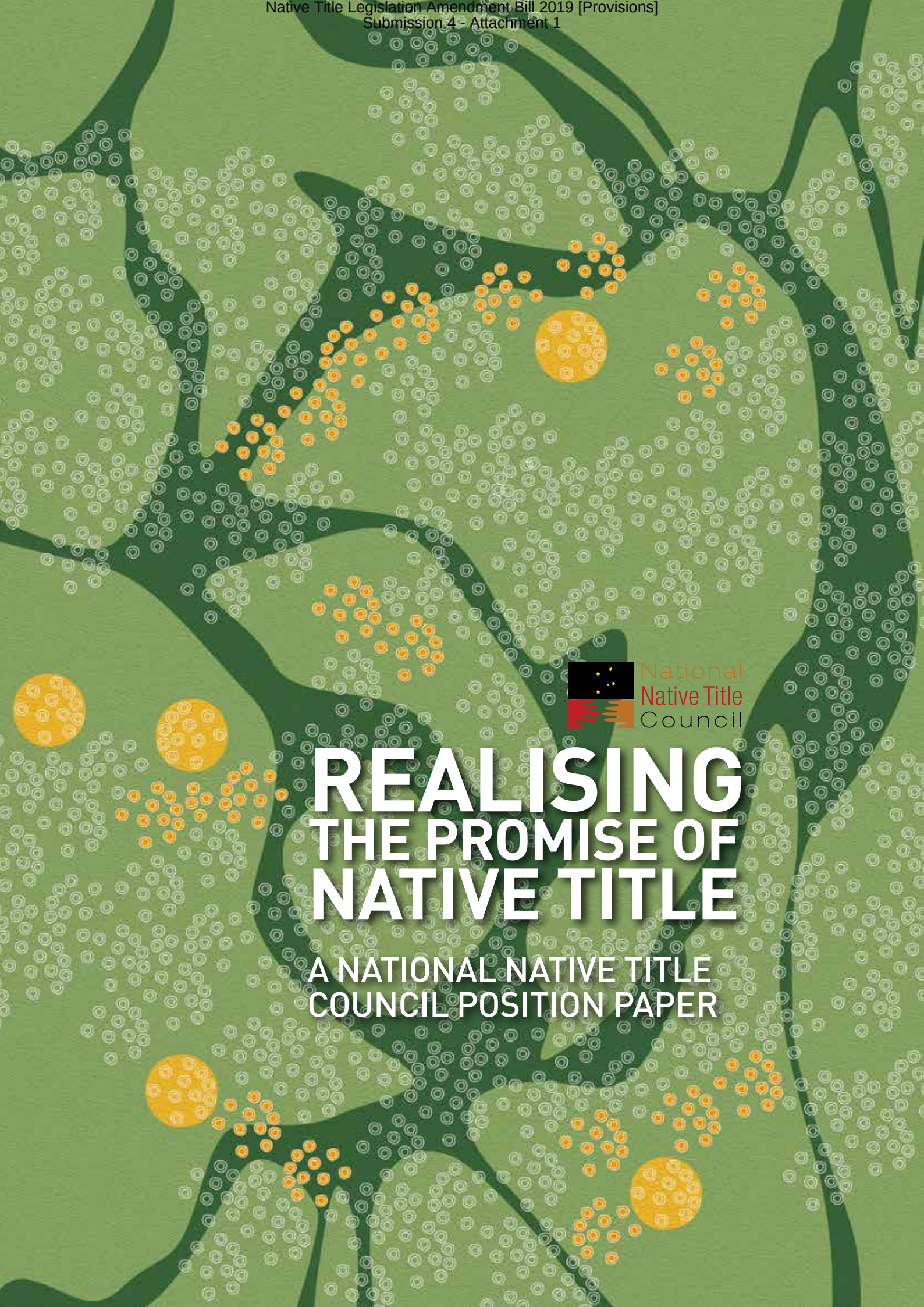
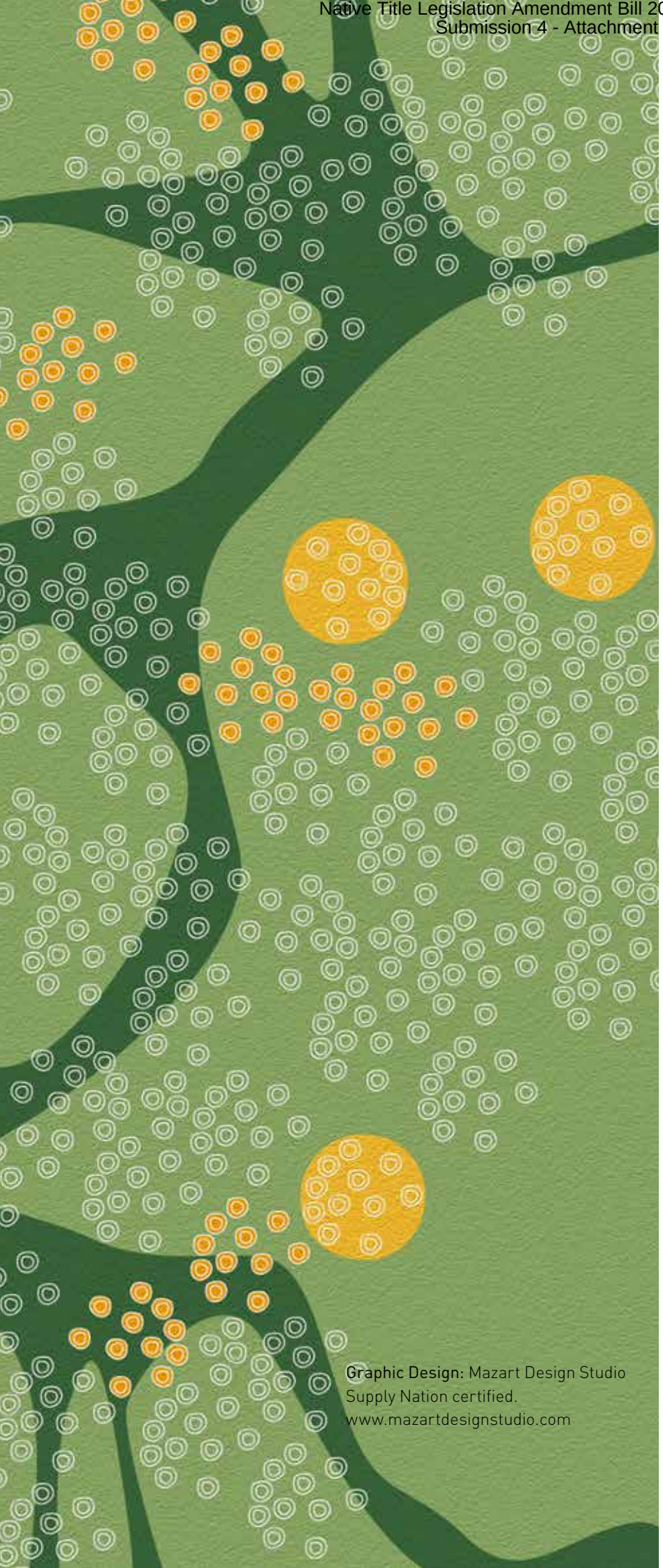


National Native Title Council

REALISING THE PROMISE OF NATIVE TITLE

A NATIONAL NATIVE TITLE COUNCIL POSITION PAPER



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National Native Title Council

The National Native Title Council is the peak body for Australia's Native Title Organisations. It represents Native Title Representative Bodies and Native Title Service Providers recognised under the *Native Title Act* (NTA) as well as Prescribed Bodies Corporate established under the NTA and other equivalent Traditional Owner Corporations established under parallel legislation such as the Victorian *Traditional Owner Settlement Act*.

Native title is a part of the redress for 200 years of dispossession endured by Indigenous Peoples throughout Australia; it is the result of the meeting of two systems of law - the ancient laws of Indigenous people and the Common Law of modern Australia; and it is a shift in the scales of justice towards a more balanced relationship between these two systems.

Native title outcomes create an opportunity for a resurgence of Indigenous culture and also opportunities for the political, social and economic advancement of native title holders.

While it is commonly accepted that in the 27 years since the Mabo decision, native title has had some success in delivering on its promise, the commitment of Indigenous people for healing and self-determination has not waned.

The proposals contained in this position paper outline a program of concrete steps that will continue to extend the promise of native title to Aboriginal and Torres Strait Islander communities across the nation.

The National Native Title Council (NNTC), Australia's peak native title organisation, has identified five key areas where the current arrangements are undermining the efforts of Indigenous communities to realise the promise of native title. These areas lie in:

- The administration of 'future acts' in the Native Title Act;
- The institutional framework around Prescribed Bodies Corporate (PBCs);
- The support for native title holders and claimants that Native Title Representative Bodies and Service Providers can deliver;
- The arrangements for the management of native title compensation claims;
- The development and expansion of Indigenous Ranger Programs.

Each of these matters has been considered by the NNTC and the position of the Council, together with recommendations for collaborative action, follows.

'FUTURE ACT' LEGISLATIVE STRUCTURE

The 'future act' regime in the *Native Title Act* is the key provision that recognises the rights of native title holders (and registered claimants) as real property rights. Under the current regime significant land use proposals (such as the grant of mining rights) enliven a 'right to negotiate' (RTN) procedure. However, under the current RTN procedure native title holders have as little as six months to reach an agreement that may include royalties or royalty equivalents (such as equity in a project) with a land use proponent.

If an agreement is not reached within that timeframe the proponent can seek arbitration before the National Native Title Tribunal (NNTT). The NNTT is prohibited from making any conditions relating to royalties (or equivalents) in its determination (NTA s 38(2)).

This timeframe and prohibition puts native title holders at a disadvantage from the outset. Both sides to the negotiation know that unless the native titleholders acquiesce to the proponent's suggested terms the alternative is an arbitrated outcome, without any provisions for the awarding of compensation, royalties or other arrangements for financial settlement.

Further, between 2009 and 2017 the NNTT dealt with over 100 applications to arbitrate the grant of a mining title because agreement could not be reached between the parties. On only two occasions has there been a determination that the grant of a mining title could not proceed[1].

Of course, many land use proposals are dealt with under the alternative 'Indigenous Land Use Agreement' (ILUA) structure. However, even when negotiating an ILUA, both sides again know the alternative open to a proponent is an NNTT arbitrated determination. The arbitration process thus also operates to 'set the standard' for ILUA negotiations.

Under the current regime many future acts do not enliven the RTN procedure. Many land use proposals only result in native title holders having a right to be consulted or sometimes a right to be notified in regard to a proposal.

Significantly many proposals to allow a pastoral lease to engage in non-pastoral "primary production" activities[2] will only result in a right for native title holders to be notified about proposals that may significantly affect their enjoyment of native title rights. These provisions (introduced in 1998) deny the native title rights co-existing with pastoral leases as legitimate private property rights.

Similarly, under the current future act regime the undertaking of often significant civil engineering works on land where native title has been determined to exist can be undertaken with only a token obligation to "notify" native title holders – even though often these works may lead to the complete extinguishment of native title rights.[3]

These structural arrangements are fundamentally unfair to native title holders and undermine the recognition of native title rights that the *Native Title Act* is founded upon.

RECOMMENDATIONS

- That s 35(1)(a) be amended such that the minimum negotiation period before a proponent can seek a future act determination by the NNTT be extended from six months to twelve?nine months.
- That s 38(2) of the Native Title Act be amended to allow conditions relating to the payment of royalty (or equivalent) to be included in NNTT determinations.
- That the criteria for NNTT arbitral determinations contained in NTA s39 be amended to give greater weight to the views of native title holders.
- That NTA Part 2, Division 3, Subdivision G be amended such that the diversification of activities allowed on non-exclusive agricultural and pastoral leases described in that subdivision enliven the RTN procedure.
- That NTA Part 2, Division 3, Subdivision J be amended such that the undertaking of any civil engineering works that have the consequence of the extinguishment of native title rights enliven the RTN procedure.

1 Weld Range Metals Limited/Western Australia/Ike Simpson and Others on behalf of Wajarri Yamatji, [2011] NNTTA 172 (21 September 2011); and Western Desert Lands Aboriginal Corporation (Jamukurnu - Yapalikunu)/Western Australia/Holocene Pty Ltd, [2009] NNTTA 49 (27 May 2009).

2 See NTA s 24GA.

3 See NTA s 24JA, 24JB(2) and 24KA.

PBC INSTITUTIONAL FRAMEWORK

Prescribed Bodies Corporate are the key structure for the management of native title rights. PBCs have statutory obligations to consult with many thousands of native title holders in relation to a broad range of major and less significant land use proposals.

PBCs also have the potential to be the organisational foundation for economic development activities for native title holders, particularly in remote locations. There are currently 187 PBCs across the country. The number is expected to rise to over 300 in the coming years.

PBC – ECONOMIC VEHICLE STATUS

The current structures around the management of native title monies by PBCs are complicated, confusing and often lack transparency. They involve a complex combination of native title, charitable trust and taxation law. The current arrangements often provide a positive *dis*incentive for native title holders to utilise native title monies for long term economic development in favour of restrictive charitable trust or immediate disbursement.

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

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

REVIEW OF THE CORPORATIONS (ABORIGINAL AND TORRES STRAIT ISLANDER) ACT 2006 (CATSI)

PBCs are *required* pursuant to the NTA to be incorporated under CATSI. In addition, under various other pieces of legislation (such as the *Victorian Aboriginal Heritage Act*) relevant Indigenous organisations are also *required* to be incorporated under CATSI. Further, Indigenous organisations in receipt of funding under the Commonwealth Government's Indigenous Advancement Strategy are (generally) also *required* to be incorporated under CATSI. For many of the nation's approximately 3,300 CATSI corporations then, incorporation under the CATSI Act is not voluntary.

CATSI is necessarily racially discriminatory. It is saved from offending the *International Convention for the Elimination of All Forms of Racial Discrimination* (and therefore the *Racial Discrimination Act 1975 Cth* (the RDA)) only if it can be characterised as a legitimate "special measure" under the Convention. This fact is acknowledged in the CATSI Preamble. To satisfy the definition of a special measure it is necessary for a measure be "appropriate and adapted" to facilitate the advancement of the relevant disadvantaged group.

Particularly after 12 years of operation, it is time that CATSI be the subject of a comprehensive review to ensure that it is in operation "appropriate and adapted" to facilitate the advancement of Australia's Indigenous Peoples.

A number of obvious CATSI matters are in need of review:

- there needs to be a comprehensive analysis of the areas where the provisions of CATSI impose obligations that are divergent from those contained in the *Corporations Act 2001 (Cth)* and each such divergence needs to be justified as a "special measure";
- the appropriateness of the fundamental equation between a CATSI corporation and a company limited by guarantee under the *Corporations Act 2001 (Cth)* particularly in the context of a rapidly expanding Indigenous private sector needs to be assessed;
- areas where legitimate additional special measures are desirable should be considered. The PBC- EVS is one example of such an initiative.

Unlike the processes that led to the current Corporations *(Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018* it is essential that a broad review of CATSI include representatives of affected Indigenous communities and that any resulting proposals for reform are supported by those representatives. Absent such engagement and support, the NNTC considers it obvious that no proposal can legitimately be characterised as a "special measure".

SUPPORT FOR PBCS

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

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

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

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

RECOMMENDATIONS

- That the *Corporations (Aboriginal and Torres Strait Islander)* Act be amended to include the proposed PBC-EVS provisions.
- That the *Corporations (Aboriginal and Torres Strait Islander) Act* be subject to a comprehensive review including representatives of affected Indigenous communities and that any resulting proposals are supported by those representatives.
- That each PBC be allocated three-year recurrent funding at a level of $300,000 pa and that this funding be made available six months prior to the expected date of a determination of the existence of native title by the Federal Court.

NATIVE TITLE REPRESENTATIVE BODIES AND SERVICE PROVIDERS SUPPORT FOR NATIVE TITLE HOLDERS

Native Title Representative Bodies and Native Title Service Providers (NTRB/SPs) are crucial to the effective functioning of the native title system now and into the future. NTRB/SPs provide the experienced, professional representation native title holders and claimants need to effectively pursue native title determination and compensation claims and conduct future act negotiations.

The *Native Title Act* (in ss 203C and 203FE) contemplates that NTRB/SPs will be funded independently of the political cycle to determine with their clients their own native title objectives and have the resources to pursue these. Recent years have seen the effective reduction of the resources available to NTRB/SPs to fulfil their function. However, the call on these resources does not diminish. Native title claim work continues and in many instances it is the most difficult claims that remain to be resolved: claims that require intensive research, mediation and negotiation. Further, PBCs need to be supported and the coming onset of compensation claims will create an additional burden on NTRB/SPs.

Recent funding structure changes have meant NTRB/SPs and their clients have had the ability to freely determine their own priorities diminished through abrupt changes in funding levels and departmental interference.

Finally, The NNTC itself plays an important role as a central point of contact and advocates for both NTRB/SPs and PBCs. It provides crucial information and training services to PBCs in particular. The NNTC is currently forced to undertake its work through insecure short-term IAS project grants. The NNTC should receive stable ongoing funding as the peak body for native title organisations.

Self-determination is central to native title, but current funding arrangements work against this.

RECOMMENDATIONS

- That resources allocated to NTRB/SPs should be increased to allow the efficient management of compensation claims in addition to resolving outstanding determination applications and supporting existing PBCs.
- That NTRB/SPs be provided with secure triennial funding as contemplated under NTA ss 203C and 203FE.
- That the NNTC be provided with secure funding in recognition of its role as the peak body for the native title organisations.

MANAGING NATIVE TITLE COMPENSATION APPLICATIONS

COMPENSATION APPLICATION PROCEDURES

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

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

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

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

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

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

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

MANAGEMENT OF COMPENSATION APPLICATIONS

The complexity and volume of future compensation applications that will emerge subsequent to the decision of the High Court in *Griffiths* raises questions around the management of the compensation application process. The NNTC has urged Government to investigate the establishment of policies and procedures that will ensure the efficient and orderly management of these applications. These policies go to matters such as the encouragement of comprehensive native title settlements where the existence of native title, the adoption of tailored future act procedures and issues associated with compensation can be resolved, through negotiation, at one time. Other potential policies go to the establishment of voluntary administrative tribunal structures designed to reduce transaction costs.

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

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

Existing Native Title Representative Bodies and Native Title Service Providers (NTRBs/SPs) system must be resourced to address the demand that will stem from native title compensation applications. There are currently 15 NTRBs/SPs across the country. They are funded by the Commonwealth government to undertake a range of functions in particular the prosecution of native title determination applications, supporting native title holders and claimants in the management of future act proposals and the support of PBCs within their relevant regions. The existing NTRBs/SDPs receive funding under the Native Title and land Rights Program of approximately $100m. Although efficiently managed by NTRB/SPs, these funds are inadequate for the discharge of all statutory functions and certainly inadequate to, *in addition,* undertake the extensive work associated with native title compensation applications.

Consultation with NTRBs/SPs indicates that in order to adequately respond to the expected demand for the initiation and prosecution of native title compensation applications likely to arise in 2019-20, an additional $50m is required from that financial year and the subsequent two years. A review of funding arrangements is recommended as greater utilisation of alternative negotiating/resolution structures takes place.

RECOMMENDATIONS

- The Commonwealth encourage the adoption of a 'comprehensive regional settlement' approach to the settlement of native title applications and explore, in partnership with native title organisations and other stake-holders, the development of alternative procedures for the resolution of native title compensation applications.
- Funding under the Native Title and land Rights Program be increased by $50m annually for the next three years to allow Native Title Representative Body and Native Title Service Providers to adequately manage future native title compensation applications.

SUPPORTING INDIGENOUS RANGER PROGRAMS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

To achieve this the existing Commonwealth funding allocation to support should be increased by an additional $100m per annum for the next three years.

RECOMMENDATIONS

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

OTHER MATTERS

The matters raised above are significant issues that challenge the ability of the native title system to realise its promise to the First Peoples of Australia. In addition, there are a range of other, particularly technical legislative reforms that require urgent attention.

Further there are a range of proposals contained in the 2015 Australian Law Reform Commission Report 126 *Connection to Country: Review of the Native Title Act 1993* that should be given urgent and serious consideration. The NNTC would welcome the opportunity for an ongoing discussion regarding these further legislative amendments.

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