MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE ATTORNEY-GENERAL'S DEPARTMENT ON REFORMS TO THE *NATIVE TITLE ACT 1993* (CTH)

FEBRUARY 2018

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EXECUTIVE SUMMARY

The Minerals Council of Australia (MCA) welcomes the opportunity to provide a response to the Options Paper on Reforms to the *Native Title Act 1993* (Cth) (NTA). This submission has the support of the Chamber of Minerals and Energy of Western Australia (CME), the Queensland Resources Council (QRC) and the South Australian Chamber of Mines and Energy (SACOME). The CME has also provided a separate submission, which the MCA supports, dealing with aspects of the Options Paper that are of particular concern to its members in Western Australia.

The Australian minerals industry acknowledges Aboriginal and Torres Strait Islander peoples as the first peoples of this nation with a special connection to their traditional lands and waters. In recognition of that relationship, the minerals industry is committed to a native title system that works effectively to both protect the rights of Indigenous Australians and facilitate activities on Indigenous land consistent with those rights.

Among the MCA's membership are companies that pioneered the use of the NTA to negotiate agreements with traditional owners, forge relationships with Indigenous communities, and build long-lasting partnerships to share the benefits of development on Indigenous land. This submission draws on the experience of resources companies as parties to native title processes and their commitment to seeing the native title system work to meet the social, economic and cultural aspirations of Indigenous Australians.

Active participant in native title reform

The Options Paper acknowledges and consolidates past efforts to streamline and bring clarity to aspects of the native title system. As the peak industry association representing Australia's mining, mineral processing and exploration industry, the MCA was actively engaged with each of the reviews and legislative processes dating back to 2012 that preceded the current Options Paper and informed many of its proposals.

The MCA provided detailed submissions, participated in multi-stakeholder groups and appeared before parliamentary inquiries relating to:

- The *Native Title Amendment Bill 2012*
- Taxation of Native Title and Traditional Owner Benefits and Governance Working Group
- The Australian Law Reform Commission's review of the *Native Title Act 1993* (Cth)
- The COAG Investigation into Indigenous Land Administration and Use

Most recently the MCA worked closely with the National Native Title Council to support the passage of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth). That collaborative effort illustrates the shared interest in a legislative framework that provides certainty and efficiency for all parties and enables native title holders to benefit from the recognition of their rights and the activities that take place on their land.

Priorities for the resources sector

Section 31 agreements

The Federal Court's judgement in *McGlade v Native Title Registrar & Ors [2017]* casts doubt over the validity of section 31 agreements which were not signed by all members of the applicant. Consequently, the status of mining and petroleum leases and other related interests granted in reliance on those agreements is also unclear.

The NTA should be amended to provide for the immediate and blanket validation of existing section 31 agreements. The MCA supports the recommendation in the CME's submission that amendments to validate existing section 31 agreements are needed urgently and should be separated from the wider reform process to allow for swifter passage through the parliament.

Forrest & Forrest Pty Ltd v Wilson and Ors [2017]

On 17 August, 2017 the High Court of Australia handed down its judgement in the *Forrest & Forrest Pty Ltd v Wilson & Ors [2017]* case. This ruling created significant uncertainty within Western Australia's resources sector as to the validity of granted tenements across the state and has consequential implications for the NTA.

The Western Australian (WA) State Government is now drafting a validation bill to provide retrospective validity to tenements affected by the ruling. It is essential for complementary amendments to be made to the NTA to allow the WA legislation to take effect and ensure continued validity of mining tenements and associated native title agreements.

It is understood that the Commonwealth Government's native title reform process anticipates amending legislation going before parliament in mid-2018. This timing is concerning for WA's resources sector. The validity of tenements requires urgent attention in order to provide certainty to all parties in WA.

The MCA supports the CME's submission and agrees that these amendments must be considered as a priority. They should be separated from the broader package of NTA reforms so that their passage through the Commonwealth Parliament can be coordinated with the legislative process in the WA Parliament.

Principles for constructive reform

Over the past two decades, the resources sector has acquired a deep knowledge of the native title system, its current capacity to meet its objectives and areas where outcomes can be improved. That experience has informed a set of principles against which the MCA measures previous proposals for reform.

Stability

For resources projects to succeed and attract necessary investment, companies need to secure access to land and be sure that the terms on which access is granted will be stable over the life of the project. This is often periods of 20-50 years. The MCA does not support changes to the legal basis of native title which could result in the reopening of existing determinations of native title, triggering of fresh claims or which lead to the renegotiation of agreements. Every effort should be made to identify procedural efficiencies and seek options within the existing framework to resolve issues as the native title system evolves.

Certainty

Regulatory certainty is needed for resource projects to secure investment. Proponents need to be certain as to the precise definition of the rights and obligations of all parties, the procedural pathway and the robustness of its outcome.

The current reform proposals should avoid adding complexity to the system. With complexity comes the risk of creating unintended consequences. Instead the focus should be on clarifying the meaning and/or operation of sections of the NTA that are the source of ambiguity and conflicting interpretations. The MCA commends the government for establishing the Expert Technical Advisory Group and undertaking extensive consultation on the Options Paper. These steps will ensure the broadest possible consensus among stakeholders on how to give effect to the reforms identified as being necessary for improved operation of the native title system.

Efficiency

Efficiency in the native title system is necessary in order for the benefit of agreements to be realised. It is in the interests of all parties that determinations of native title and the process of agreement-making can be concluded in a timely, flexible and cost-effective way so that rights can be secured and benefits can flow to native title holders. This requires a holistic approach to reform which considers the operation and interaction of all parts of the native title system – legislative, administrative and organisational – to find opportunities for streamlining procedures without diminishing rights.

Opportunity

The MCA believes that the native title system should assist native title holders to manage native title assets in ways that realise their cultural, social and economic goals. Reforms should promote the empowerment of claim groups and native title holders to make decisions and hold their representatives accountable. Key to empowerment is measures which support transparency and dispute resolution, together with resources to build the governance capacity of native title bodies.

Balanced regulation

The MCA endorses the principle in the Australian Government Guide to Regulation that regulation should not be the default option for policy makers.[1] An overly prescriptive regulatory framework for native title would place a disproportionate compliance burden on native title parties, and could lead to perverse outcomes. This is especially so if it directs scarce resources to enforcement to the detriment of capacity building activities.

Response to specific questions and proposals

The submission follows the structure of the Options Paper and provides a response to each question and individual proposal. Where questions refer to proposals contained in the attachments to the Options Paper, the MCA position is indicated in a corresponding table using the coding below:

Green Box	-	Support
Red Box	-	Oppose

[1] Department of Prime Minister and Cabinet, The Australian Government Guide to Regulation, Commonwealth Government, Canberra, 2014.

1. SECTION 31 AGREEMENTS

Question One

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

Yes. Retrospective validation of section 31 agreements is a matter of urgency for the resources industry and should not await the outcome of the other proposed reforms. This item needs to be the subject of separate amending legislation introduced as a priority. As was the case for Indigenous Land Use Agreements under the *Native Title Amendments (Indigenous Land Use Agreements) Act 2017*, validation of existing section 31 agreements should take immediate and blanket effect at the time of the commencement of the amending legislation.

Section 31 agreements are frequently used as the basis for the grant of mining and petroleum tenure. In a similar way to Indigenous Land Use Agreements which were the subject of the *McGlade* decision, it was common practice over many years for section 31 agreements to be relied upon even though the agreement had not been signed by all members of the applicant.

The judgment in *McGlade* has cast doubt over the validity of section 31 agreements which were not signed by all members of the applicant, and consequently the status of mining and petroleum leases granted on the basis of those agreements.

This is a matter of grave concern for the resources sector. There are potentially hundreds of grants of tenure made in reliance on section 31 agreements which are now in question.

Any amendment to the NTA with respect to section 31 agreements should apply equally to validate similar agreements made under approved alternative state schemes such as Part 9B of the *Mining Act 1971* (SA).

2. ROLE OF THE APPLICANT

Question Two

What should be the role of the applicant in future section 31 agreements?

Which of the three options, if any, do you prefer?

MCA's preferred position is a variation of Option 3. The required signatories to a section 31 agreement should be a majority of the living members of the applicant with legal and physical capacity to execute documents. No additional authorisation process should be required because a "right to negotiate" process (involving negotiations in good faith with any person who is a registered native title claimant) would have already been undertaken prior to the execution of the section 31 agreement.

A requirement for a majority of living members of the applicant with legal and physical capacity to be signatories to a section 31 agreement aligns generally with the ILUA signatory requirements, as enacted in *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth). However, the MCA proposes that for consistency the ILUA signatory provisions should be amended to ensure that deceased and incapacitated members are not "counted" in determining a majority of applicant members.

3. AUTHORISATION

Question Three

For all proposals relating to authorisation the MCA supports the position in Item 6 of Attachment A of the Options Paper. Amendments regarding authorisation should have prospective effect only and not enable previous decisions to be re-opened.

Do you support the proposals to:

(a) Allow claim group members to define the scope of the authority of the applicant?

Yes with some provisos to ensure that parties negotiating with the applicant can have confidence that the applicant has appropriate authority when they purport to represent the position of the group.

Other parties should be entitled to assume that the applicant has full authority except to the extent that notification is provided strictly in compliance with the method prescribed by the NTA and corresponding regulations should they be amended to reflect this proposal.

There is a risk that any limits to the scope of authority will create uncertainty for all parties, leading to delays or litigation to seek clarity. If limitations are set by a group, they must be expressed in a consistent way that can be readily understood by other parties, for example by making these publicly available. If, as suggested in Item 6 of Attachment G of the Options Paper, the scope of the applicant's authority is detailed in Form 1, the details should also be available in the claim extract on the National Native Title Tribunal's website. Other parties should be able to rely on those details and not need to inquire further as to authority when dealing with the applicant.

In addition, any defined scope of authority should not be able to change the effect of the provisions about the required signatories to section 31 agreements and ILUAs. In other words, a claim group should not be able to restrict the scope of the applicant's authority in a way that conflicts with the provisions dealing with the signing of section 31 agreements and ILUAs. For example, on the assumption that the MCA's varied Option 3 will be accepted for Question 2 above, a claim group must not be able to define the scope of the applicant so that all members of the applicant are required to sign section 31 agreements and ILUAs.

(b) Clarify that an applicant can act by majority unless the claim group specifies otherwise?

Yes.

The particulars of any decision by the claim group to differ from the default rule and provide specific directions to the applicant must be publicly notified in the same manner applicable to the general scope of authority discussed in (a) above. Parties dealing with the applicant should be able to rely on the notified particulars to the same extent.

(c) Allow the composition of the applicant to be changed without going through a section 66B reauthorisation process in prescribed circumstances?

Yes.

The applicant should be permitted to continue acting without reauthorisation in the event that a member (or members) is deceased or legally incapable.

The MCA does not support the proposal to introduce a requirement for remaining members of the applicant to apply to the Federal Court for an order sanctioning the change in the applicant.

The related proposal in Item 4 of Attachment A of the Options Paper to recognise the succession plans of groups is also supported to allow for a specified person to take the place of a particular member of the applicant in the event that the serving member needs to be replaced. In those circumstances the newly constituted applicant should be able to apply to the Federal Court for that substitution to occur without the need for reauthorisation.

(d) Impose a statutory duty on the members of the applicant to avoid obtaining a benefit at the expense of native title holders?

The intent of this proposal is supported however the MCA reserves its judgement on whether an amendment can be drafted to meet these aims while avoiding problems in its implementation. For example members of applicants routinely receive payment for attending meetings including sitting fees, time costs and associated transport and accommodation costs so that the negotiation and authorisation of agreements with resource companies can proceed without inconvenience or out of pocket expenses being incurred by individuals. Authorised representatives of native title groups and negotiating parties should not be put at risk of prosecution or mischief making when members are compensated for time spent on these legitimate duties

4. ALTERNATIVE AGREEMENT- MAKING PROCESSES

Question Four

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?

In some circumstances, an alternative agreement-making mechanism might be beneficial, especially in reducing timeframes and costs. The details of the mechanism however would need to be carefully examined and any proposed legislative changes should be weighed against the scope for utilising existing agreement-making practices more effectively to take advantage of the flexibility already provided for in the NTA and *Prescribed Body Corporate Regulations 1999* (Cth).

It may be possible to design a new agreement-making regime to facilitate low impact/low cost activities but any abbreviation of the process should not be achieved through the introduction of a right of veto over project proposals.

Further detail is required before the MCA can provide comment on this proposal. Due to the finely balanced nature of the NTA, the detail of any new proposal is important to accurately assess its impact and therefore what limitations the MCA would seek to have applied.

The MCA's position on each of the recommendations in Attachment B of the Options Paper is provided in the table below:

	Proposal/recommendation	**Source(s)**	**MCA comment**
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	The ability to contract should depend on the scope of authority of the PBC.
B2	Consider allowing native title holders to vary the effect of section 211 through an ILUA.	COAG Investigation, Table 2, Item 3	
B3	Consider options for allowing a PBC to contract about future acts and compensation, including allowing a PBC to contract out of future acts and compensation provisions of the NTA.	COAG Investigation, Table 2, Item 5	
B4	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	Any amendment to extend the operation of section 24LA should apply to all involved in the native title system, including proponents. The Options Paper clearly contemplates this by referring to proponents when describing the benefits of the proposal in Item B4 of Attachment B.

5. STREAMLINING EXISTING AGREEMENT- MAKING PROCESSES

Question Five

Do you support the proposals set out in Attachment C to streamline existing agreement-making processes?

In general, the MCA supports the intent to streamline agreement-making processes, improve efficiency and reduce costs for all parties. The MCA does not however support all proposals presented in the Options Paper as detailed below.

Proposals not supported

	Proposal/recommendation	**Source(s)**	**MCA comment**
C5	Amend the NTA 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	A claim under section 47B should not be sufficient to trigger the future act regime. Proponents should be entitled to rely on native title extinguishment by previous exclusive possession acts until there is a determination that section 47B applies.
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	Certainty is important. Lowering the threshold for who needs to be involved in the authorisation process introduces uncertainty as to whom a proponent needs to deal with. Safeguards for those who believe they have an interest are provided for within the registration process for ILUAs. Additionally section 199C of the NTA provides that an ILUA may be deregistered if not all potential native title holders have authorised it.

Proposals supported

	Proposal/recommendation	**Source(s)**	**MCA comment**
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	A PBC should be able to deal with matters such as compensation for native title extinguishment, in a body corporate ILUA or otherwise. Only the PBC for the claim that included the extinguished area be authorised under the NTA to enter agreements about compensation for extinguishment This would allow parties to recognise connection to country, even where the law may find that no native title continues to exist. The proposal would provide for additional certainty to all parties.

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	The Register of ILUAs should be an up-to-date record of ILUAs, not just a record of ILUAs made. In addition to technical amendments such as a change of name, change of property description, an ILUA amended/assigned etc in accordance with a process authorised in an ILUA should not require re-registration. Provided compliance with the authorised amendment process is appropriately certified, for example by the applicant or PBC, the Registrar should be required to update the Register of ILUAs.
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	This proposal would allow for better use of resources.
C4	Removing the requirement for PBCs to consult with NTRBs on native title decisions such as prior to entering an ILUA in the PBC regulations.	Commonwealth proposal	This requirement is not seen as necessary as there are other safeguards in place governing the entry into and registration of ILUAs. This proposal respects the PBC's autonomy to make native title decisions.
C6	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	This amendment would increase flexibility. The ability to defer compensation decisions to a later date (especially important when the calculation of native title compensation is uncertain) could result in quicker negotiations and grants of future acts. ILUAs surrendering (ie confirming the extinguishment of) native title, if they could be entered into without dealing with compensation, could also result in quicker consent determinations of native title. This is particularly true while the law regarding the quantum of compensation is still developing.

C7	Consider amending section 199C of the NTA 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	The MCA considers that this is generally accepted to be the case, but to the extent that there is any uncertainty, this should be clarified.
C8	Consider amending section 30A of the NTA 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	States/territories should not have to be a negotiation party but states/territories should execute the final agreement. It will be important to ensure that all State and Territory governments are supportive of this proposal to ensure it operates effectively.
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	It is suggested that the objection period be reduced to one month and that an appropriate period for consultation would be one month from the date of the objection. The future act could then be granted if a hearing request has not been made within that consultation period.
C10	Consider options to encourage electronic transmission of notices including amending sections 29 and 6(1)(a) of Native Title (Notices) Determination 2011 (No1) to provide that notices can always be transmitted electronically.	COAG Investigation, Table 2, Item 7	This represents modern business practices and takes into account the practical difficulty of sending formal hard copy notices to remote and rural Australia.

6. TRANSPARENT AGREEMENT- MAKING

Question Six

(a) Should there be a Register of section 31 agreements?

The MCA does not support the introduction of a registration process of any kind for section 31 agreements.

The MCA supports the proposal to maintain a public record of section 31 agreements with the following provisos:

- The term 'register' should not be used. It implies that a form of additional status is conferred on the agreement through its appearance on the public record.
- It should be clear that execution of a section 31 agreement is sufficient to give effect to the agreement and its legal status is not conditional upon its inclusion on the public record.
- The public record should include a list of future acts consented to but should not include any commercially-sensitive material.
- Any agreement related to a section 31 agreement should not be publicly accessible but its existence should be noted.

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

No.

Native title holders however should be entitled to obtain a copy of an ILUA that binds them from their applicant/ PBC/ representative body. It would be the responsibility of the applicant/PBC/representative body to determine if the person requesting the ILUA is a native title holder and therefore entitled to a copy of the native title agreement.

7. INDIGENOUS DECISION- MAKING

Question Seven

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?

Yes. The MCA supports each of the recommendations in Attachment D of the Options Paper.

8. CLAIM RESOLUTION AND PROCESS

Question Eight

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

The MCA does not have a position on items E1 and E2 and feels that it is more appropriate for native title parties and their representatives to comment on these proposals.

Historical extinguishment

The MCA is supportive of the intent of the proposal to allow historical extinguishment over national, state or territory parks to be disregarded where all parties agree to disregarding extinguishment. The MCA recognises the potential for economic and cultural opportunities for traditional owners that may arise from the recognition of native title over these areas. As mentioned in the executive summary, the MCA believes the native title system should assist native title holders to manage native title assets in ways that realise their cultural, social and economic goals.

In principle it is reasonable that connection to land preserved for the protection of the environment and public use should not be extinguished by the act of preservation. This is consistent with the view expressed by the MCA when an amendment with similar effect to E6 was included in the *Native Title Act Amendment Bill 2012* (Cth).

The proposal however raises substantial questions for MCA members, for example:

- how to ensure that all parties who hold or have held interests in that area agree to the treatment of that area
- what effect such a change would have on the validity of existing third party interests over the area, the exercise of rights under those interests and the compensation payable under the NTA in respect of existing and historical third party interests
- how to ensure that any revival of native title applies only where the extinguishment of the native title was the result of the act that created the relevant national, state or territory park
- whether enactment of the proposal will lead to reopening of determinations where there are national parks within the boundaries of determinations.

There needs to be further detail provided as to how this proposal can be given effect in a way that addresses these and related concerns and provides certainty for all parties. The MCA looks forward to being part of discussions about how that might be achieved.

Proposals supported

	Proposal/recommendation	**Source(s)**	**MCA comment**
E3	Amend section 47(1)(b)(iii) of the NTA 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 Investigation, Table 1, Item 6	The extent of ownership/control of the pastoral lease that qualifies for application of the section should be clear.

E4	Consider amending Part 2, Division 5 of the NTA to allow a PBC to be the applicant on a compensation claim.	COAG Investigation, Table 1, Item 8	Further consideration will need to be given to how compensation payments will be managed in the future.
E5	Amend reg 3 (and reg 8) of the PBC Regulations to clarify that the decision to make a compensation application is a native title decision.	COAG Investigation, Table 1, Item 8	

9. POST- DETERMINATION DISPUTE MANAGEMENT

Question Nine

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

Proposals not supported

The MCA strongly supports measures to promote improved governance and increased transparency within PBCs. The MCA does not agree however that these objectives are best achieved through the proposals below which would place greater regulatory and compliance burdens on PBCs without addressing the capacity constraints that often stand in the way of PBCs implementing good governance practices. Regulation mandating good governance will not of itself bring it into being.

Any reforms to the PBC sector have to recognise that the sector is relatively new and experience in management and dispute resolution is still being developed. As such the MCA favours an approach that puts additional resources towards building the governance capacity of PBCs. Further regulation of PBCs and new powers for the Office of the Registrar for Indigenous Corporations would necessarily require funding to be directed instead to supervision and enforcement activities.

While regulation is not warranted, appropriate support for building the governance capacity of PBCs would see desired outcomes reflected in these proposals, such as keeping records of native title decisions, being incorporated into routine PBC management practices.

	Proposal/recommendation	**Source(s)**	**MCA comment**
F1	It is recommended that the Registrar's compliance powers be expressly expanded to include matters of procedural compliance with the PBC Regulations, in particular to ensure that PBCs are fulfilling their obligations to common law holders to the same extent as members.	COAG Investigation Table 2, Item 8 and Technical review report Rec 44	
F7	It is recommended that the CATSI Act be amended to require PBCs to set up and maintain: 1. A 'Register of Native Title decisions'; and 2. A 'Register of Trust Money Directions'.	COAG Investigation, Table 2 Item 8 and Technical review report Rec 55-59	As a practical matter there are many instances in the context of agreements between the mining industry and native holders in which the native title funds are held and decisions made by a separate trustee not the PBC.
F8	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.	COAG Investigation Table 2, Item 9 and Technical review report Rec 62	

F9	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).	COAG Investigation Table 2, Item 9	Protections for the interests of common law holders are available under legislation dealing with trusts and charities.

Proposals supported

	Proposal/recommendation	**Source(s)**	**MCA comment**
F2	It is recommended that the CATSI Act 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 PBC Regulations.	COAG Investigation, Table 2, Item 10 Technical review report Rec 54 and State and Territory proposal	
F3	Introduce a requirement that the dispute resolution provision in the PBC rule book 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 PBC and its members and directors).	State and Territories proposal	
F4	Remove the directors' discretion to refuse membership to a person who meets the PBC's membership criteria other than in exceptional circumstances.	COAG Investigation, Table 2, Item 10 and State and Territory proposal	It is noted that enforcing this proposal may require an assessment of anthropological evidence, and therefore technical expertise in this area.
F5	Limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour. Require the process for cancellation of membership to include a general meeting.	COAG Investigation, Table 2, Item 10 and State and Territory proposal	

F6	It is recommended that the CATSI Act 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.	COAG Investigation, Table 2, Item 10 and Technical review report Rec 53	
F10	Amend the definition in reg 3 of *group of common law holders* to clarify that it refers to the determined native title holding group(s) for which the PBC acts as agent or trustee.	Commonwealth proposal	
F11	Expanded roles for NNTT and Federal Court	COAG Investigation Table 2, Item 10	

Indigenous Community Development Corporation

Resource companies have a strong commitment to seeing the benefits from projects on Indigenous land translating into economic development opportunities for Indigenous communities. Proposed jointly by the MCA and the National Native Title Council, the Indigenous Community Development Corporation (ICDC) is a purpose-built corporate structure that Indigenous communities could choose as an option for managing and investing native title related payments and similar funds.

The ICDC was recognised by the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group[2] as having advantages over other commonly used structures such as charitable trusts. The ICDC is conceived as a tax-exempt entity that could be used to provide financial support for a wider range of economic development activities than those allowed by the laws governing charitable trusts. It would also allow for the accumulation of funds so that the benefits flowing from native title assets can be directed to long term investments that provide sustainable income streams for future generations.

It is envisaged that the regulatory framework creating the ICDC model would include requirements to ensure appropriate standards of accountability, governance and prudential management.

[2] Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, Report to Government, The Treasury, Canberra, 2013.

10. STATE AND TERRIRORY PROPOSALS

Responses to proposals in Attachment G

Proposals supported

	Proposal/recommendation	MCA comment
G16	Allow hearing of native title and compensation applications together	This may result in a delay to consent determinations where recognition of native title is contingent on resolution of compensation entitlements. This is particularly difficult given the developing nature of the law regarding compensation.
G17	Amend section 61A to remove restriction on bringing a claim over an area subject to a previous exclusive possession act.	Such an amendment would create uncertainty for those with an interest in the land concerned.
G18	Agreement as to part of the proceedings – amend section 87(3) to say that agreement is only required from those respondents whose interests relate to the relevant part.	
G20	Confirm the purpose of a non-claimant application by distinguishing between those actively seeking a negative determination and those only seeking section 24FA protection.	

Proposals supported

	Proposal/recommendation	MCA comment
G1	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.	
G2	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.	
G3	Confirm that section 29 notices to identified parties may be made by email, and that public notice is able to be given online.	
G4	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 section 32(3), and the grantee parties.	
G5	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.	

G6	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.	The details of the applicant's authority should also be available in the claim extract on the National Native Title Tribunal's website. Other parties should be entitled to rely on this extract in dealing with the applicant.
G7	Amend section 24CH to replace its notification requirements with those of section 24BH where registration of the area ILUA is part of a consent determination process and the agreement area is fully within the determination area.	
G8	Repeal subsection 24JAA(1)(d) to remove the sunset clause applying to the process for construction of public housing	
G9	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.	If the native title rights are compulsorily acquired, the grant of the new interest will not be a future act – there will no longer be any native title rights and interests and the NTA therefore does not apply. The proposed amendment therefore seems unnecessary.
G10	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.	
G11	Insert 'or' between 24KA(8)(c) and (d) to clarify that notice can be given to either representative bodies or registered claimants.	
G12	Require RNTBCs to be bound by arrangements (e.g. ILUAs) negotiated prior to a determination, following a determination	An amendment as proposed could obviate the need for a novation or assignment of the ILUA to the PBC.
G13	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.	
G14	Amend the NTA to allow for the enactment of legislation by Western Australia which validates mining leases affected by the invalidity identified in *Forrest & Forrest Pty Ltd v Wilson & Ors [2017] HCA 30.*	This is a very high priority for the resources sector.
G15	Amend the NTA to confirm that 'renewals' in section 26D(1)(a)(i) includes renewals within the meaning of 24IC(2) and 2(A); 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.	
G19	Amend section 47B to clarify meaning of 'when the application is made' in the case of combined claims.	

G21	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.	An amendment which provides for the substitution of the applicant without the need for an application to the Federal Court would be beneficial.
G22	Clarify appropriate use of section 87 (power of Federal Court if parties reach agreement) vs section 87A (power of Federal Court to make determination for part of an area).	
G23	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.	
G24	Require respondents to applications under sections 84(3), (5) and (5A) to provide a proper address for service.	
G25	Introduce provisions for the establishment and membership of PBCs ensuring that native title holders are represented on any default PBC.	
G26	Amend the NTA to ensure that the Commonwealth may fund a PBC for various purposes including start-up and administrative/compliance costs.	
G27	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 *Traditional Owner Settlement Act 2010*).	