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Native Title Research Unit
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Ms Libby Bunyan
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Indigenous Programs
Department of Families, Housing, Community Services and Indigenous Affairs
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10 May 2010

Dear Ms Bunyan,

Thank you for the opportunity to comment on the draft Native Title (Prescribed Bodies Corporate) Amendment Regulations 2010. As you are aware AIATSIS through the Native Title Research Unit has been conducting an extensive research project involving native title holders and their registered native title bodies corporate (RNTBCs) since 2006. The comments provided in the attached reflect the findings of our RNTBC research. These comments do not necessarily reflect the views of the AIATSIS Council

For further information please contact Dr Lisa Strelein, Director Research Programs, on 02 6246 1155.

Sincerely,

Lisa Strelein
Director of Research

Native Title (Prescribed Bodies Corporate) Amendment Regulations 2010 Consultation Draft

Submission to the Department of Families, Housing, Community Services and Indigenous Affairs

Part 1

Regulation 1: Name of Regulations

The *Corporations (Aboriginal and Torres Strait Islander) Act* 2006 (CATSI Act) requires that corporations operating as registered native title bodies corporate must have the words registered native title body corporate or the abbreviation RNTBC in their name.[1] Currently within the native title sector the terms prescribed body corporate (PBC) and RNTBC are used interchangeably, although as your own Explanatory Statement highlights 'whilst PBCs may hold native title before becoming RNTBCs, under the Act and regulations, it is in fact RNTBCs that perform statutory functions and exercise statutory powers'.[2] Accordingly, consideration should be given to amending the name of the Regulations to Native Title (Prescribed and Registered Native Title Bodies Corporate) Amendment Regulations 2010. Over the course of our three year research project and the development of resources specific to RNTBCs it has become clear that there is a need to revise the use of the term prescribed body corporate both within the regulations and in the Commonwealth *Native Title Act* 1993 (NTA) in order to help clarify the distinction between the two types of bodies corporate and improve consistency between the NTA, the CATSI Act and the Regulations.

Part 2

(Regulation 4) Schedule 1 – Item 5: PBC Membership

The Native Title Research Unit's (NTRU) research project involving native title holders and their registered native title bodies corporate (RNTBCs) has highlighted the need for native title holders to be able to access expert advice and assistance to create sustainable governance structures and ensure native title holders can make informed decisions about how they will use and manage their land.[3] The proposed changes to Regulation 4 address Recommendation 8 of the Attorney-General Department's *Structures and Processes of Prescribed Bodies Corporate* (PBC Report).[4] This Recommendation to remove the requirement that all members of a PBC must be native title holders was proposed to 'assist in making the structure more representative of the broader community in which they live, and to increase the corporation's skill base'.[5] This proposal should not proceed. Membership of a RNTBC should be restricted to the common law holders of native title. Frith correctly argues that a RNTBC owes a fiduciary duty to the native title holders, not the broader

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[1] *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) Part 3-4, Division 85-1, 85-10.

[2] Department of Families, Housing, Community Services and Indigenous Affairs, 2010, Prescribed Bodies Corporate Amendment Regulations 2010 Explanatory Statement (Consultation Draft), p.7.

[3] Bauman, T and Tran, T, 2007, 'First National Prescribed Bodies Corporate Meeting: Issues and Outcomes, Canberra 11-13 April 2007', *Native Title Research Report No. 3/2007*, Australian Institute of Aboriginal And Torres Strait Islander Studies, Canberra.

[4] Attorney-General's Department , 2006, Structures and Processes of Prescribed Bodies Corporate, available at: http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Prescribedbodiescorporate(PBCs), accessed 20/04/2010.

[5] Ibid p.22.

community and that this obligation is inconsistent with owing duties, under the CATSI Act, to members who are not native title holders.[6]

A possible alternative to this would be for the regulations to permit RNTBCs to elect to include a clause in their constitution to allow a specified (minority) number of non-member (independent) directors, whilst ensuring that the majority of directors are native title holders. Frith highlights the fact that under the CATSI Act, if a corporation's constitution allows, then it may appoint directors that are not members of the corporation, and/or who are not an Aboriginal or Torres Strait Islander person.[7] However, RNTBCs should not be required to include such a clause in their constitution nor to appoint non-member directors. This model has proved successful in respect to some commercial organisations owned by native title groups, where the participation of non-member directors has given native title holding board members a better understanding of the circumstances under which they need to seek expert advice. Whilst these corporations are not RNTBCs, this model could easily be applied to RNTBCs. Safeguards would need to be in place to ensure that decision-making relating to native title matters remains under the control of native title holders.

In order to assist native title holders to access such expertise, a register should be established of individuals who may be eligible to stand for appointment as non-member directors. However, it should be acknowledged that the use of non-member directors could pose a potential risk of external intervention in the operations of RNTBCs and that rather than empowering native title holders such directors may contribute to increasing RNTBC dependency on external expertise at the expense of developing native title holders' capacity. Whilst acknowledging the role played by the Office of the Registrar of Indigenous Corporations in providing governance training for members and directors of Indigenous corporations, much more needs to be done to increase the capacity of native title holders to manage their own affairs. Similarly there is a risk that non-member directors may lack the necessary knowledge of the unique nature of native title and as such there would also be a need to increase their capacity and provide relevant training to address this.

Whilst this submission doesn't support the extension of RNTBC membership to non-native title holders, if this provision is to be introduced then RNTBCs should be able to decide whether or not they wish to include a clause in their constitution to allow non-native title holders to be members of their RNTBC. That is, it should not be mandatory. Further, the regulations should allow for RNTBCs to determine if they wish to identify non-native title holders as a particular class of member who may have different rights to native title holding members as permitted under the CATSI Act.[8] Consideration would also need to be given to how conflict is resolved between consultation with native title holders on native title decisions and instructions from native title holders (particularly in relation to agent RNTBCs) versus the wishes of the membership.

Part 3

(Regulation 11) Schedule 1 – Item 12: Indigenous Land Corporation as default agent PBC

The threshold issue of native title holders being required to incorporate in order to have native title determined should be re-considered at some stage. Given this inquiry concerns the regulations and not the statutory framework, our submission does not address this matter. However, it should be noted that a native title group has a legal personality under the common law. Currently the NTA does not allow for native title holders to hold **and** manage the title directly. While the agency

[6] Frith, A (with Ally Foat) 2008, The 2007 Amendments to the Native Title Act 1993 (Cth): Technical Amendments or Disturbing the Balance of Rights?, Native Title Research Monograph No. 3/2008, Native Title Research Unit, AIATSIS, Canberra, p.89.

[7] Frith, A (with Ally Foat) 2008, The 2007 Amendments to the Native Title Act 1993 (Cth): Technical Amendments or Disturbing the Balance of Rights?, Native Title Research Monograph No. 3/2008, Native Title Research Unit, AIATSIS, Canberra, p.89 and see CATSI Section 246-1.

[8] *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) Part 4-2, Division 153-1.

RNTBC model allows native title to be held directly, it must be managed through a prescribed corporate agent.[9] There may be circumstances in which it is appropriate for the native title group to hold native title directly and rely on the NTRB for assistance in management and representations as is the case prior to a determination. Of course this could dispense with the need for a default PBC, although raises issues around whether pre determination authorisation and certification provisions are adequate and appropriate in a post determination environment.

Within the constraints of the current legislative framework, which requires a corporate body to exist, there is a need to implement measures to reduce the effects of a non-functioning RNTBC for the native title sector. However, in the first instance native title holders should be supported and resourced to establish and operate their own prescribed bodies corporate. Concerns have been raised previously that the proposal to allow the Federal Court to appoint the Indigenous Land Corporation (which is a Commonwealth statutory authority) as a default agent PBC may in some circumstances breach s.10(3) of the Commonwealth *Racial Discrimination Act 1975* by authorising property owned by an Aboriginal or a Torres Strait Islander person to be managed by another person without the consent of the Aboriginal or Torres Strait Islander person.[10]

Shifting the functions of managing native title to the Indigenous Land Corporation (ILC) as proposed will raise a number of complex problems. Firstly there is a potential conflict of interest in circumstances where the ILC owns or manages a proprietary interest, such as a pastoral lease, within or even in close proximity to the native title determination area. The responsibilities of the ILC in relation to their own commercial interests and their fiduciary duty to the native title holders would need to be carefully managed.[11] If the ILC is not precluded from acting as the default RNTBC in such circumstances then, during any period of holding concurrent interest, the ILC should be required to keep a clear account of profits to the native title holders to avoid real or perceived conflict of interest. In addition, during the period of operation of the ILC as the default agent RNTBC the ILC should not be permitted to divest property to any person or group other than the whole native title group, unless instructed to do so by the native title holders.

Another difficulty that will confront the ILC is its ability to carryout the functions of an RNTBC. With an agency RNTBC the native title is held by the common law native title holders. The Regulations therefore prescribe the ILC will act as an agent RNTBC to ensure that the title itself is not transferred; only the management functions. As such, agency RNTBCs have no discretionary powers to override decision making by the native title holders, but must act upon the instructions given to them. An agency RNTBC 'has no legal power to manage the title, except when it is authorised to do so by the native title holders themselves'.[12] Mantziaris and Martin argue that there are unresolved practical problems arising from the agency relationship including:

- What happens when a number of native title group members, acting as principals, issue conflicting instructions to the agent?
- What happens when the right of a principal to issue instructions to the agent is disputed?
- How is liability for acts of the agent, performed pursuant to instructions of the principals, to be allocated as between the agent and the principal, and as between the individual principals?[13]

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[9] See Mantziaris, C. & Martin, D. 2000 *Native Title Corporations: a legal and anthropological analysis*. The Federation Press, New South Wales p.98.

[10] See Mantziaris, C. & Martin, D. 2000 *Native Title Corporations: a legal and anthropological analysis.* The Federation Press, New South Wales pp.132-133.

[11] Trustee RNTBCs are required to act in the best interests of the native title holders, agent RNTBCs must act in accordance with instructions given to them by the native title holders and have no discretionary powers to override decision making by native title holders. Both a fiduciary relationship with the native title holders.

[12] Fingleton, J 1994, Native Title Corporations, *Land Rights Laws issues of Native Title*, No. 2 Native Title Research Unit, AIATSIS, Canberra p. 4.

[13] Mantziaris, C. & Martin, D. 2000 *Native Title Corporations: a legal and anthropological analysis.* The Federation Press, New South Wales, p.115 and see also pp149 – 50 & 158-60, Chapter 5 provides a detailed examination of the trust and agency relationships.

It is likely that a default RNTBC will be required in circumstances where seeking instructions has been difficult. The capacity of the ILC to act as an agent RNTBC in such circumstances may be hamstrung.

Due to the nature and interpretation of its statutory functions, the ILC does not currently have strong relationships with the native title representative body sector and does not play an active role in native title matters. There have also been concerns raised about the ILC's reluctance to divest properties to traditional owners.[14] Accordingly, it would be necessary for there to be significant investment in building relationships and expanding the ILC's capacity in this complex area if the ILC is to take on this role.

It is not clear from the proposal whether it is intended that the ILC will be a passive or active default RNTBC. For example, during period of operation of the default RNTBC is it intended that the onus will be on the relevant native title representative body or service provider to assist native title holders to establish a RNTBC or establish a new RNTBC as well as to assist the ILC in relation to future acts and agreements. Under such circumstances it is unclear how the already stretched resources within the NTRB sector, particularly for RNTBC support, would stand in relation to resourcing to the ILC to act as the default agent RNTBC and how priorities and responsibilities for consultation are to be determined. Further consideration will need to be given to how a dispute between the native title holders and the ILC, or between the native title representative body and the ILC would be managed.

Given that the intention of the regulations is that the ILC default RNTBC be used as a last resort the set period of operation for the ILC default RNTBC specified in sub regulation 11 (3) should be reduced from five to two years, (with renewal options) to encourage native title holders and the relevant native title representative body to proactively engage in the establishment of a new RNTBC.

Consideration should also be given to ensuring that the introduction of this default mechanism does not result in native title holders who do not currently have a RNTBC having insufficient time and resources to establish a RNTBC. The introduction of the default provisions requires a transition period and should provide native title holders with a minimum of 2-5 years after a determination of native title has been made, and after the introduction of this default mechanism, to establish a RNTBC. Regulation 11 allows for the Federal Court to determine the Indigenous Land Corporation to be an agent prescribed body corporate in circumstances where the common law holders fail to nominate a PBC.[15] In many circumstance native title holders have been unable to nominate a PBC at the time of their native title determination. Information provided by the National Native Title Tribunal indicates that as at 6 April 2010 there were 8 native title determinations for which the PBC was yet to be determined and there is one judgment that is conditional upon a determination under section 56(1) or 57(2) of the Native Title Act 1993 (Cth).[16] Judges of the Federal Court have previously expressed frustration at the simultaneous determination requirement under section 55 of the NTA and have sought to address this issue through 'springing orders' whereby the determination of native title is conditional upon the nomination of a PBC.[17]

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[14] See Sullivan, P, 2008, Policy Change and the Indigenous Land Corporation, *Research Discussion Paper*, Australian institute of Aboriginal and Torres Strait Islander Studies, Canberra, pp.1-23.

[15] Department of Families, Housing, Community Services and Indigenous Affairs, 2010, Prescribed Bodies Corporate Amendment Regulations 2010 (Consultation draft).

[16] Information sourced via email from the National Native Title Tribunal, registered determinations of native title and RNTBCs as at 6 April 2010.

[17] For example, Beaumont J in *Deeral v Charlie* [1998] FCA 723 granted a time extension of four years for the nomination of a PBC; Drummond J in *Mualgal people v Queensland* [1998] FCA 1718 interpreted the requirement as an obligation on the Court to direct the claimants to commence to implement the PBC nomination process; both cited in Mantziaris, C. & Martin, D. 2000 *Native Title Corporations: a legal and anthropological analysis*. The Federation Press, New South Wales p.97.

The simultaneous determination requirement confounds the complex nature of establishing a PBC, particularly in circumstances where the membership of the native title group is contested as part of the native title claim litigation. In such cases the identification of native title holders is not known until the time of the determination making it impossible to specify the membership and structure of the PBC until after the determination of native title has been made.[18] Whilst the current trend to resolving native title through consent determinations will go some way to addressing this issue, native title holders still require a reasonable time period to establish a PBC.

To this end, the introduction of the default mechanism should be accompanied by provisions that set a minimum period of time between the determination of native title and a determination of the relevant prescribed body corporate, prior to appointment of the ILC as a default agent RNTBC. Native title holders should be given a minimum period of 2 or 3 years to establish a PBC before the Federal Court may appoint the ILC as a default agent RNTBC, whilst also providing an option for common law holders to nominate the ILC or other default agent PBC during this period if they so wish. As indicated above a transition period should also be implemented to allow native title holders affected by the 8 determinations mentioned above who have not yet nominated a PBC to have an opportunity to do so prior to the ILC being appointed as a default agent PBC. In the interim the NTRB would retain responsibility for providing support and services, for example in relation to agreements involving native title holders as they did prior to the determination.

Whilst operating as the default agent RNTBC it is likely that the ILC will play a passive role and issues around providing training and capacity building opportunities for native title holders during this period need to be considered, given that such opportunities may assist native title holders to establish a RNTBC or a new RNTBC.

Following the implementation of the proposed default mechanism there is a need for a review process to evaluate the effectiveness of the operation of the ILC as default agent RNTBC. Some consideration should also be given to the inclusion of other options in the revised definition of a prescribed body corporate in sub regulation 3(1). For example in some instances it may be more appropriate for existing organisations, such as Aboriginal land trusts, to operate as a default RNTBC.[19]

Part 4

Regulation 20: Fees for Service

Confirming that RNTBCs may charge fees for service is an important element of the proposed changes to the Regulations. However, such measures will not be a panacea for the resource problems faced by RNTBCs. The services provided by RNTBCs to the world relate primarily to parties wishing to access land and reach agreement in relation to future acts and are thus most commonly focused on negotiation and consultation with common law native title holders. The provisions may not assist RNTBCs to carry out their other function in relation to the holding and managing of native title lands. Without consideration of the resource requirements of RNTBCs to hold and manage their lands (for example where these functions were previously carried out by local or state government), the introduction of fees for service is likely to exacerbate current problems as RNTBCs that adopt a fee for service model will have additional administrative and reporting responsibilities similar to that of a small business, but the revenue stream is likely to be small in comparison to the overall responsibilities of the RNTBC.

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[18] Strelein, L & Tran, T 2007, Native Title Representative Bodies and Prescribed Bodies Corporate: native title in a post determination environment, *Native Title Research Report No. 2/2007*, PBC Workshop 5-6 December 2006, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, pp.12-13.

[19] See Memmott, P and Blackwood, P, 2008, Holding title and managing land in Cape York: two case studies, *Research Discussion Paper* Number 21, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra pp.1-44.

With the introduction of these provisions, there will be a need to revisit the key messages provided to RNTBCs in education and training materials. To date, in circumstances where native title holders have commercial assets they have been encouraged to separate any 'commercial' arm from their RNTBC through the creation of a separate corporate body. This has been a strong message in governance training provided by the Office of the Registrar of Indigenous Corporations. The introduction of fee for service will blur this distinction. That is, separating out a commercial activity must be clearly distinguished from running your RNTBC as a 'business'. It will be necessary to provide native title holders with clear information materials to assist them to work through these issues. While the Office of the Registrar of Indigenous Corporations provides governance training relevant to native title holders, its areas of operation do not extend to business planning

RNTBCs will benefit from information, resources and training in small business administration in order to take on this role successfully. The simple fact of having money coming and going out of the RNTBC requires an understanding of basic business administration. For example, in the Torres Strait, the TSRA, AIATSIS and small business development firm Future Solutions worked together to develop a workbook for PBCs wishing to charge fees for services. This experience revealed the need for one-on-one training, ongoing mentoring and support for the RNTBC and a specialised approach and adaptation of mainstream business advice to adapt to the unique context of native title.

In addition native title holders and stakeholders will need to be educated about what sorts of fees are appropriate; in particular the differences between a fee and a tax. In order to meet the requirements of the regulations (particularly in anticipation of a party's right to apply for a review of a fee), there will be a need to assist RNTBCs to consider what their products and services are, to establish a clear and transparent pricing structure and manage other aspects of the implementation of a fee for service approach, such as administrative overheads, taxes, etc, which will impact on the fees charged.

Importantly, the implementation of fees for service will require a significant shift in governments' expectations about the processes for consulting and negotiating with native title holders. To date, RNTBCs have often provided consultation with common law native title holders on the basis of a voluntary contribution, for example, from members of the Executive of the RNTBC, with only direct costs being reimbursed or outlaid by proponents. In other circumstances, government agencies in particular, have sought to consult with the whole native title group rather than working through the RNTBC. While fees for service are now a common part of dealing with NTRBs, it will be interesting to see how governments respond to a service delivery model in the RNTBC sector.

Subsection 60AB(3) of the draft regulations does not allow fees to be levied on the common law holders for whom the RNTBC holds native title, however there may be circumstances in which it is appropriate for the RNTBC to charge a native title holder who is acting in another capacity. This issue of the capacity in which the person who is charged may be acting should be clarified.

It should also be acknowledged the tax implications of charging fees will add to the already complex RNTBC operating environment. Previous proposals around allowing RNTBCs to operate as tax exempt entities should be considered as a matter of urgency.

Further consideration should also be given to the review process set out in the regulations which could result in a RNTBC waiting five months for payment of fees that are subsequently found by the Registrar of Indigenous Corporations to be able to be charged. The regulations should include a provision to allow for the RNTBC to receive payment for direct costs (such as fuel) within a limited time frame, while consideration of other fees may be subject to the longer time frame. There are no safeguards or penalties within the current provisions to deter applicants from launching spurious claims against RNTBCs in order to delay payment. The prohibition against the charging of interest should be removed.