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NTSCORP's submission to the consultation papers

Native title, Indigenous economic development and tax

and

Leading practice agreements: maximising outcomes from native title benefits

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The First Assistant Secretary
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And

The General Manager
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The Treasury
Langton Crescent
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Re: Government consultation on Indigenous Economic Development from mining agreements

This submission is made by NTSCORP Ltd (NTSCORP) in response to the Treasury Consultation paper – *Native Title, Indigenous Economic Development and Tax* and the joint Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs' Discussion paper – *Leading Practice Agreements: maximising outcomes from native title benefits.*

NTSCORP welcomes the opportunity to respond to these proposals. We have sought to address the substantive issues of both consultation papers in a single consolidated submission, this, because of the interrelated nature of the taxation and policy issues related to ensuring more sustainable economic outcomes flow from mining related Agreements.

Should you wish to discuss any of the issues outlined in this paper in further detail, please contact Rana Koroglu, Solicitor, or Danielle Bevins-Sundvall, Corporate Affairs Manager on (02) 9310 3188.

We look forward to the opportunity to continue to work with Government to deliver solid economic outcomes for Indigenous Australians.

Yours sincerely

Warren Mundine
CEO

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Introduction

1. NTSCORP Limited ("**NTSCORP**") has statutory responsibilities under the *Native Title Act 1993* (Cth) ("**the NTA**") to act to protect the traditional rights and interests of Aboriginal communities in New South Wales and the ACT. NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Peoples who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them exercise their rights under the NTA. In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:

    - Facilitation and assistance;
    - Dispute resolution;
    - Notification;
    - Agreement making;
    - Internal review; and
    - Other functions (s203BJ in particular).

    The facilitation and assistance function includes representation in native title matters.

2. NTSCORP welcomes the opportunity to provide submissions to the Federal Government's discussion papers, *Native title, Indigenous economic development and tax*, and *Leading practice agreements: maximising outcomes from native title benefits*.

3. NTSCORP has addressed both discussion papers within one submission. FaHCSIA and the Attorney-General's Department have presented a connection between the two discussion papers, by proposing that a type of taxation scheme is available only to groups who either negotiate agreements or establish structures, which are deemed to satisfy certain governance measures. NTSCORP considers it appropriate to respond to this linkage, and the associated proposals, within the one response.

4. NTSCORP supports the joint NNTC-MCA submission addressing the two discussion papers. We have highlighted where we provide additional and alternative comments to the NNTC-MCA joint submission.

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Executive Summary

5. NTSCORP is concerned that the Federal Government has, in the preparation of these discussion papers and in the formation of its preliminary positions, assumed a set of facts to be true, namely that native title agreements routinely involve large payments to traditional owners which are, or are likely to be, misappropriated, and therefore require Government regulation. Assumptions of this nature can be categorised as either inaccurate, a distortion of the reality or a general misrepresentation of the majority of native title agreements and native title claimant groups. Assumptions of this nature also serve to misconstrue the proper nature of the debate required around native title agreements and management of outcomes by native title claimants and holders which arise from native title agreements.

6. NTSCORP further expresses concern that confidential, commercial agreements between individuals and corporations in the broader Australian economy are not scrutinised in the fashion that native title agreements are and are proposed to be. We note there is a jurisdictional and constitutional issue arising out of the Federal Government's proposal to pass legislation and regulations which impinge on Aboriginal parties' legal right to confidentiality in order to 'increase transparency'.

New South Wales Context

7. NTSCORP notes that, to date, the number of agreements including consent determinations, ILUAs and future act agreements has been at a lesser number in the eastern states than elsewhere in Australia. NTSCORP also notes that the quantum of payment contained in future act agreements is significantly less in eastern states.

8. The types of native title agreements or native title related agreements which have been negotiated in New South Wales include:

    - Consent Determinations;
    - Indigenous Land Use Agreements (ILUAs);
    - Future Act Agreements under s31 of the NTA relating to the grant of mining leases, exploration licenses and compulsory acquisitions;
    - Future Act Agreements concerning the extinguishment and/or impairment of rights and interests; and
    - Deeds of Agreement relating to other future act provisions contained in the NTA including under s24KA in relation to the construction of electricity transmissions lines and jetties.

9. Some of the outcomes which may be included in agreements of this nature are outlined below:

    - ILUAs may include benefits such as alternative future act regimes including cultural heritage processes, co-management of National Parks, fisheries management arrangements, employment, minor financial contributions for the purpose of governance and capacity building for a PBC or traditional owner

corporation, impairment or extinguishment of native title and sometimes transfers of freehold land.

- Future Act Agreements under s31 of the NTA relating to the grant of mining leases, exploration licenses and compulsory acquisitions may include cultural heritage management plans, Aboriginal employment strategies and employment, involvement in planning processes and financial payments into trust or a traditional owner corporation; and
- Deeds of Agreement for Future Acts such as infrastructure may include simple benefits such as a cultural heritage management plan, paid site monitoring or minor contributions for sports or education sponsorship made through a traditional owner corporation.

Taxation

10. The premise of the discussion paper '*Native title, Indigenous economic development and tax'* is that the applicability of taxation legislation to native title agreements is uncertain and complex due to the inherent intricacies of Capital Gains Tax ("**CGT**") and the broad range of native title agreements that can occur. While it is true that there is some uncertainty, particularly with regard to the transfer of native title rights and interests and the vast range of matters which may form part of a native title agreement, NTSCORP is of the view that a large number of the benefits arising from native title agreements in NSW are not currently liable for taxation.

11. It is important to note that if native title payments are considered compensation, it is questionable whether they are liable to taxation.

12. NTSCORP has received advice that native title is a pre-CGT asset and as such, CGT is unlikely to attach to a large number of native title payments. We further note that the NTA was enacted in 1993 and did not take into account CGT issues (which had existed since 1985), however CGT provisions in the *Income Tax Assessment Act 1936* (Cth) were amended in 1996 (post NTA-enactment) to include within the tax regime a broader concept of 'asset' to include both contractual and statutory rights. Clearly the NTA did not envisage this amendment to CGT. NTSCORP considers there is a fundamental mismatch between the statutory regimes of the NTA and the *Income Tax Assessment Act 1936* (Cth).

13. In many cases, benefits received by individual native title claimants are unlikely to exceed or contribute to exceeding the minimum tax free threshold for an individual's income and as such, a large number of native title claimants would not be liable to pay income tax on such payments received by them.

14. In addition, some forms of compensation (such as a single up-front payment in an agreement) are arguably a payment for compensation for the giving up of an asset being the native title or the exclusive possession of the land, it is considered capital and therefore not assessable income.[1]

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[1] *Submission to Treasury in response to Consultation Paper 'Native Title, Indigenous Economic Development and Tax'* by Fiona Martin, Senior Lecturer, Atax, University of New South Wales 27 November 2010, p.6

15. The Federal Government appears to be making the assumption that native title outcomes are automatically subject to taxation. In many circumstances this is incorrect at law. NTSCORP supports the view that native title payments fall outside the income tax system, and are capital amounts relating to destruction or long term damage to an asset (that is, the native title) which has been in existence since before the introduction of CGT.[2]

16. The alternative, that the Federal Government is of the view that native title outcomes should be subject to taxation, is both offensive and of deep concern to NTSCORP. We believe in the strongest possible terms that it is fundamentally inappropriate for the Federal Government to seek to raise revenue from compensation to Indigenous peoples which arises from the historic and continuing dispossession of their traditional lands, seas and waters.

17. As many native title agreements in NSW do not involve direct financial benefits, where a native title agreement such as a future act agreement *does* include financial benefits, it provides a significant opportunity for a community to engage in enterprise or fund existing community-run programs. The importance of these rare opportunities cannot be underestimated in Aboriginal communities pursuing self-determination.

18. If taxation is imposed on native title agreements, a foreseeable outcome is that companies, predominantly mining companies, will decrease the quantum of financial benefits to Aboriginal communities in native title agreements to account for the taxation they are likely to incur.

19. To alter these benefits (for example, by imposing a taxation scheme upon them or alternatively by affecting the overall quantum paid to native title claimant groups to account for taxation) would be in conflict with the Government's stated commitment to policies promoting self-determination and to Closing the Gap, and would act as a disincentive to Indigenous economic development.

Options currently proposed by Treasury

Withholding tax

20. NTSCORP submits that it is inappropriate to introduce a withholding tax in instances where native title parties are not currently liable to taxation (and otherwise) and we are opposed to this proposal. We note that NTSCORP is not alone in holding this view, and in this regard we refer to extensive criticism of the current mining withholding tax from an equity perspective.[3]

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[2] *Submission to Treasury in response to Consultation Paper 'Native Title, Indigenous Economic Development and Tax'* by Fiona Martin, Senior Lecturer, Atax, University of New South Wales 27 November 2010, p.13.

[3] *Building on Land Rights for the Next Generation: The Review of the Aboriginal Land Rights (Northern Territory) Act 1976* (Reeves Report); Altman J.C. *Native Title and Taxation Reform,* , CAEPR Topical Issue No. 04/2010; Martin F. 'Native Title Payments and their Tax Consequences: Is the Federal Government's Recommendation of a Withholding Tax the Best Approach?' *University of New South Wales Law Journal* (2010) 33(3).

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21. If the Government were to determine that a native title withholding tax was to be introduced, then NTSCORP submits that it should be a 0% withholding tax. However, we note that there is an inherent risk in introducing any withholding tax, even at 0%, that it would be open for a future government to increase the rate of that withholding tax. NTSCORP is opposed to this proposal.

Indigenous Community Fund

22. The proposed structure of a new entity, referred to for discussion purposes as the 'Indigenous Community Fund', appears to already be an option which exists for native title claimant groups at law.

23. Charitable trusts are widely used by native title claimant groups to achieve objectives similar to those listed.[4] We note that although the description of objects is not exhaustive, a desirable object not listed is the establishment of Indigenous owned and managed businesses.

24. NTSCORP is advised, however, that under current law, charitable corporations can establish businesses in which the profits of that business are returned to the Aboriginal community, in a manner which is aligned with the charitable purposes of the corporation and for the communal benefit of the native title claimant group. The High Court has held that it is lawful for a company to have purposes which are solely charitable and which carry on commercial businesses only in order to effectuate those charitable purposes, provided that the goal of making a profit should not be an end in itself and only incidental to the charitable purposes. [5]

25. The proposal also indicates that the entity could be used for the benefit of a particular native title claimant group. Charitable trusts are also able to accommodate the often restrictive definition of a native title claimant group as the beneficiary, by broadening the scope to include Indigenous Australians more generally. In practice, the trust deed may be drafted to ensure that the trustee/s, who are empowered to make decisions about how the trust moneys are spent, are members of the native title claimant group.

26. NTSCORP broadly supports the NNTC-MCA's proposal of an Indigenous Community Development Corporation ("**ICDC**"). We note the important distinction between the operation of entities undertaking community development and charitable work and those that are essentially enterprise based. However, we remain committed to developing appropriate mechanisms to ensure that native title agreements can continue to support Indigenous enterprise and economic development.

27. Further discussion would also be needed around the proposed structure and the level at which accumulation of agreement benefits should be required, especially for smaller dealings, for example where a group receives a small payment of several thousand dollars, and wishes to purchase land to build a cultural centre or keeping place.

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[4] *Native title, Indigenous economic development and tax*, p.11.

[5] *Commissioner of Taxation of the Commonwealth of Australia v Word Investments Ltd* (2008) 236 CLR 204.

28. We strongly agree that such an entity should be an opt-in scheme, and not be available only to groups who have had their agreement approved by an Agreements Registrar (see comments below).

29. The proposal for an entity such as NNTC-MCA's proposed ICDC would need further development in conjunction with Native Title Representative Bodies **("NTRB")** or Native Title Service Providers **("NTSP")** and other bodies which may seek to make use of such a vehicle for the benefit of Aboriginal People.

Alternative options

Taxation ruling

30. It is unclear why such emphasis has been placed on the uncertainty surrounding taxation of native title payments as this uncertainty could be simply clarified by a taxation ruling from the Australian Taxation Office. It is conceivable that an NTRB or an NTSP on behalf of a native title claimant group could prepare a case or cases for a taxation ruling to be issued at any time.

31. Furthermore, any litigation potentially arising from a taxation ruling could be used to further develop the case law surrounding the taxation of native title outcomes and payments.

Providing certainty through legislative amendments

32. A simple and cost effective measure by which the Government could address the 'uncertainty' of taxation of native title outcomes and payments would be through the introduction of legislative amendment to the relevant taxation acts which would provide that any benefits or payments paid to a native title claimant group or arising pursuant to a native title agreement or native title –related agreement are not subject or liable to taxation, including income tax, CGT or GST.

33. This would appear to be the most appropriate and expeditious way to address the Government's concern and to ensure that Aboriginal communities can optimise the benefits, including economic development opportunities, arising from the native title agreements they enter into.

Native Title Agreement Making

Access to new tax treatment contingent on Government assessment of native title agreements

34. In its discussion paper, *Leading practice agreements: maximising outcomes from native title benefits,* the Government has proposed that 'new' tax treatment of native title benefits would be accessible only to those native title claimant groups who submit their confidential agreements for Government scrutiny.

35. NTSCORP is concerned by this proposal. The discussion paper appears to propose special legislation for Indigenous peoples to enable access to the

proposed taxation scheme (a scheme which may in several respects already be accessible at law). Nowhere in the discussion paper does it acknowledge that native title agreements (particularly future act agreements) are confidential commercial agreements. The extent of the acknowledgement in the discussion paper is limited to the proposal to keep the Agreements Register confidential. NTSCORP considers that native title claimant groups are entitled to maintain the confidentially of their agreements and still be a part of a taxation scheme that promotes Indigenous economic development.

36. Native title claimant groups are entitled to be afforded the same rights as other companies and individuals in Australia to enter confidential, commercial agreements. Furthermore, any assertion that the Agreements Register is intended to ensure the quality of native title agreements undermines the role of NTRBs and NTSPs who are funded to provide advice to native title claimant groups in relation to those agreements, including the provision of expert advice with regard to benchmarks for the agreement and the quantum of payments.

37. It is important to note in this regard, that the terms of an agreement between Aboriginal traditional owners and a proponent are wholly contingent on the particular circumstances of each community and each future act project.

38. It is difficult to imagine how any entity other than an Aboriginal community itself is able to decide whether the agreement is beneficial for the community. As the Government should be aware, Indigenous communities are diverse and what one community decides is beneficial now and for future generations, may be different from a neighbouring community. NTSCORP is strongly of the view that it is not the role of Government to decide this for an Aboriginal community, then allow or deny more favourable taxation treatment based on this assessment. NTSCORP considers that the suggestion of a fee to register an agreement for this type of assessment[6] would be offensive to Indigenous peoples.

39. In addition, NTSCORP believes the commentary surrounding the quality of native title agreements belies the true intention of the proposed Agreements Register.

Governance measures

40. As noted in the discussion paper,[7] the governance proposals of incorporating or appointing independent directors are relatively common. In NSW, it is common for a native title claimant group or native title holders to incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**'the CATSI Act'**) which provides this option.

41. NTSCORP notes the ASX recommendation to use independent directors. We regularly advises clients to consider appointing them, as one of a number of measures intended to increase the capacity of directors and build the governance structures of the corporation generally.

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[6] *Leading practice agreements: maximising outcomes from native title benefits*, p.10.
[7] *Leading practice agreements: maximising outcomes from native title benefits*, p.6.

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42. As noted in the discussion paper, the CATSI Act has transparency mechanisms that encourage accountability to members.

43. While NTSCORP welcomes the aim of encouraging CATSI Act corporations to adopt enhanced democratic controls, there are proactive measures that must precede the proposed legislative change.

44. NTSCORP supports increasing the resources available within Office of the Registrar of Indigenous Corporations ("**ORIC**") to assist CATSI Act corporations to remain compliant with existing legislation, and to up-skill native title claimant groups, members, and directors with programs that encourage transparency and accountability.

45. ORIC's assistance needs to extend to make directors of CATSI Act corporations aware of the ramifications of breaching their directors' duties and responsibilities.

46. The responsibility of enforcing the CATSI Act resides with the ORIC. Like organisations registered under the Corporations Act and regulated by ASIC, a CATSI Act corporation must be aware that the regulator, ORIC, will enforce the legislation. If ORIC chooses not to address or prosecute breaches in circumstances that involve clear impropriety, CATSI Act corporations will accordingly have no reason to abide by the legislation.

47. ORIC should make the above-mentioned resources available to native title claimant groups when governance structures are first discussed and established, and before the conclusion of a native title settlement. Once a negotiated outcome is reached and entered into, the members and directors will immediately have the capacity to make well-informed decisions regarding the corporation.

48. In NTSCORP's experience, when native title claimant groups receive advice on their constitution and make well-informed decisions about including non-voting independent directors on their board, many groups voluntarily elect to appoint independent directors. It is important to note that this is not always the case and there may be many reasons why a group may choose not to appoint independent directors.

49. Some groups elect not to include independent directors in their rulebook, instead preferring to call upon accounting or legal expertise when necessary. In a corporation established for the purpose of managing compensation arising from the extinguishment or impairment of native title rights, there may be cultural reasons why a board of directors otherwise comprised entirely of members of a native title claimant group would not wish to have a non-traditional owner sit on their board, regardless of the voting rights that person may or may not have. It is unlikely the ASX would have contemplated this situation when issuing its recommendation.

50. NTSCORP considers it inappropriate for legislation to require that native title claimant groups must have an independent director; as there is no comparable legislative mandate for non-Indigenous companies.

Government review and assessment of native title agreements

51. A mandated scheme imposed by Government on Indigenous peoples is unlikely to enjoy the same success of community driven initiatives to improve capacity and governance generally. The Government would be better placed to implement a program which directly builds the capacity of native title claimant groups, including through their Aboriginal corporations, to make decisions for their own communities. NTSCORP notes the historical failure of policies and programs focusing on Indigenous peoples that have been introduced without consultation and engagement with the targeted community.

Establishing the body

52. The discussion paper suggests that the functions of reviewing and assessing native title agreements could be undertaken by an existing independent body such as ORIC, or a newly created body, or private firms. As previously discussed, NTSCORP is of the view that a greater focus by the Registrar of Indigenous Corporations focused on performing its existing functions would have a positive influence in reducing the number governance issues arising in CATSI Act corporations. The discussion paper further suggests the ATO or the NNTT could perform this function.

53. None of the options provided in the discussion paper in relation to which body would undertake the role of reviewing and assessing native title agreements are appropriate. None of the suggested options – the Commissioner of Taxation, ORIC, private firms, or a new specifically-created entity – have the requisite contextual knowledge of each community that would enable them to determine whether an agreement is sustainable for that particular community.

54. Any entity, existing or otherwise, which would undertake the proposed role of reviewing native title agreements, would likely receive funding from the Government to perform this function. NTSCORP considers that funding a new layer of bureaucracy to review confidential agreements entered into by Indigenous peoples is an inefficient use of Government funds. These resources could be more productively directed to funding the organisations that currently engage in capacity-building with native title claimant groups, such as NTRBs/NTSPs.

55. A far more effective proposal would be to fund each NTRB and NTSP to establish an agreement implementation unit whose focus would be on assisting native title claimant groups to implement and enforce agreements, to build the capacity and governance structures within Aboriginal communities to manage native title related benefits, to assist native title claimant groups to harness economic development opportunities presented by native title agreements and to provide advice on issues such as taxation.

Functions

56. NTSCORP is supportive of Government funding in "research and communication to develop and promote leading practice in agreement making".[8] We submit that an established organisation such as the NNTC or the Aurora Project (subject to appropriate confidentiality provisions) is well-placed to assist NTRBs, NTSPs and PBCs in researching and disseminating information in an appropriate manner. Such research would be critical to NTRBs, who already perform the function proposed of "advising and assisting parties to implement leading practice in native title agreements".[9]

57. NTSCORP is strongly opposed to the other functions proposed in the discussion paper, those being to receive, review, assess and maintain a register of native title agreements, and to report on trends in Parliament and advise 'relevant' Ministers' for reasons discussed above. We are concerned that it is both inequitable and inconsistent with the treatment of non-Indigenous corporations.

58. NTSCORP notes the obligation of local, state and federal governments to provide services and infrastructure to all Australian communities in an equitable manner, regardless of the income or purported income of that community.

Leading practice agreements toolkit

59. NTSCORP considers the concept of an agreements toolkit should be further investigated, however we oppose such a toolkit being produced by an agreements review body.

60. We submit that an alternative initiative would be to fund existing institutions (such as the National Native Title Council ("**NNTC**") or the Aurora Project), which are well-placed to undertake this type of research, to produce these materials and to develop protections with and between NTRBs and NTSPs with regard to the treatment of agreement related materials. This type of research would further afford native title claimant groups and other parties the opportunity to decide whether they wanted to participate and disclose agreements or to provide agreements without confidential terms.

61. It is noted that the Government proposal seeks to impinge on a native title claimant groups legal right to choose whether to reveal confidential information by asserting its power to deny native title claimant groups a beneficial tax treatment if they choose not to participate.

Future acts reforms – streamlined ILUA process

Reduction of ILUA registration period

62. NTSCORP seeks to further expand on the comments made by the NNTC-MCA with the following submissions.

63. NTSCORP does not consider the registration of ILUAs to be the most resource intensive stage of the ILUA process, nor the lengthiest. The protracted period of

[8] *Leading practice agreements: maximising outcomes from native title benefits*, p.8.
[9] *Leading practice agreements: maximising outcomes from native title benefits*, p.8.

negotiations leading up to registration of an ILUA causes delays and frustration to all parties.

64. It is important to note that procedural fairness is the underlying rationale for providing time periods for ILUA registration. All persons whose rights or interests may be affected by the registration of an ILUA must be afforded the time to obtain more information and prepare submissions. We note that not all interested persons will have access to legal representation and this may effect their ability to respond within shorter timeframes.

65. NTSCORP is unable to provide comment on the implementation of safeguards to avoid lengthy delays caused by vexatious or frivolous objections to ILUA registration in the absence of further details on what type of safeguards would be proposed. NTSCORP reiterates that procedural fairness must be maintained in developing such measures. We welcome the opportunity to discuss what measures may be suitable.

66. As part of the amendments, a clarification on the single Court judgments of *Kemp*[10] and *Murray*[11] may be helpful in assisting the Native Title Registrar of the National Native Title Tribunal dealing with objections, including clarifying the correct statutory interpretation of s24CG(3)(b)(i) NTA.

67. NTSCORP is supportive of reforms which would reduce the duplication of registration requirements when an ILUA has been certified by a native title representative body, however an adequate period of notification must be provided within the overall process.

Information to be included on the ILUA Register should not be increased

68. NTSCORP is opposed to this proposal. There is no justification as to why confidential agreements should be made open to the public and there is no identified need for the public to inspect a registered ILUA and we submit this proposal be withdrawn. Furthermore, the 'accountability' of parties to an ILUA is with the Parties themselves. In that regard, we refer you to our earlier comments with regard to the potential functions of an agreement implementation unit within NTRBs and NTSPs.

Minor amendments to ILUAs

69. To re-register an ILUA after minor amendments may involve considerable time and expense, particularly where the agreement must be put before a native title claimant group at an authorisation meeting.

70. The 'disadvantages'[12] cited in the discussion paper are pertinent. They are relevant to how a 'minor amendment' would be defined. Minor amendments must not include changes to a claimant group description or any changes where the rights of a party or other person may be affected. NTSCORP submits it would be harder to define the periphery. Furthermore, minor amendments would

[10] *Kemp v Native Title Registrar* [2006] FCA 939.
[11] *Murray v Native Title Registrar* [2002] FCA 1598.
[12] *Leading practice agreements: maximising outcomes from native title benefits*, p.13.

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ideally be consented to by all parties however this may necessarily involve an authorisation meeting, which would add to costs and time. NTSCORP would welcome further consultation regarding this issue, particularly regarding how to avoid the potential disadvantages.

Clarifying good faith requirements

71. NTSCORP seeks to further expand on the comments made by the NNTC-MCA with the following submissions.

72. NTSCORP agrees with the criticism of the Full Federal Court decision in *FMG Pilbara Pty Ltd v Cox*.[13] NTSCORP is concerned that the Court's literal interpretation of the expression 'negotiate in good faith' is to be construed 'in its natural and ordinary meaning'[14] is now considered authority for a low standard of negotiations, and that general and basic discussions for a negotiation protocol are sufficient.

73. NTSCORP shares the concern that amendments could encourage compliance with the minimum standard. Any amendments should be framed in the positive to avoid setting minimum requirements. NTSCORP considers that any new requirements must be sufficiently clear to prevent legal uncertainty regarding satisfaction of the requirements.

74. Amendments should decrease the power imbalance within the NTA, which is currently skewed in favour of proponents by providing for the future act to proceed. The significantly under-resourced nature of NTRBs, NTSPs and PBCs adds to the inequality in negotiations.

Actual negotiations to occur for at least six months

75. NTSCORP submits that negotiations should occur for *at least* six calendar months. Currently, the NTA provides that a party can apply for arbitration after six months have passed since the notification day.[15] The practical effect of this provision is that six months from notification does not equate to six months of negotiations. NTSCORP submits that an amendment be introduced to provide for at least six months from the commencement of negotiations, which would require proponents to enter negotiations as soon as possible and would mean actual negotiations have to occur for a full six months.

No requirement for 'active bad faith'

76. The following words from *FMG Pilbara Pty Ltd v Cox* indicate that to fail the good faith test, a grantee or government party must be acting in a misleading, deceptive or otherwise unsatisfactory way:[16]

> *In the present circumstances there could only be a conclusion of lack of good faith within the meaning of s 31(1)(b) of the Act where the fact that the*

[13] [2009] FCAFC 49.
[14] *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, 19 (Spender, Sundberg and McKerracher JJ).
[15] s.35(1) *Native Title Act 1993* (Cth).
[16] *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, 27 (Spender, Sundberg and McKerracher JJ).

negotiations had not passed an "embryonic" stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct.

77. NTSCORP considers that this lowers the standard of good faith to one of active bad faith. NTSCORP submits that to safeguard against this, there should also be legislative amendments outlining that there is no requirement for 'active bad faith'.

Substantial agreement

78. There may be problems with requiring a substantial agreement to be reached before an application can be made to the NNTT. In the instance where a substantial agreement simply cannot be reached (whether in good faith or not), it would mean an application to the NNTT can never be made. Focus should instead be on the level of good faith.

Good faith negotiations about each particular act

79. In *FMG Pilbara Pty Ltd v Cox*, the Court was satisfied that the grantee could rely on 'whole of project' negotiations to discharge its obligations with respect to negotiating in good faith over the particular individual future act. This raises problems for circumstances such as those in *FMG Pilbara Pty Ltd v Cox*, where good faith was extrapolated to a future act which was included (at a late stage) within wider negotiations for other future acts.

80. NTSCORP considers that if several tenements or future acts are negotiated simultaneously, then this can only be done under the Project Act process.[17] Clarification from the *FMG Pilbara Pty Ltd v Cox* decision should be in favour of the interpretation that future acts are to be negotiated on an individual basis and that each act must be dealt with separately.

[17] s.29(9) *Native Title Act 1993* (Cth).