



**Law Council**  
OF AUSTRALIA

# **Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021**

**Senate Finance and Public Administration Legislation Committee**

**12 November 2021**

*Telephone* +61 2 6246 3788 • *Fax* +61 2 6248 0639  
*Email* [mail@lawcouncil.asn.au](mailto:mail@lawcouncil.asn.au)  
GPO Box 1989, Canberra ACT 2601, DX 5719 Canberra  
19 Torrens St Braddon ACT 2612  
Law Council of Australia Limited ABN 85 005 260 622  
[www.lawcouncil.asn.au](http://www.lawcouncil.asn.au)

## Table of Contents

<b>About the Law Council of Australia</b> .....	<b>3</b>
<b>Acknowledgement</b> .....	<b>4</b>
<b>Introduction</b> .....	<b>5</b>
<b>Amendments Establishing the NTAIC</b> .....	<b>8</b>
<b>Amendments Relating to Exploration and Mining</b> .....	<b>10</b>
<b>Amendments Relating to Land Administration</b> .....	<b>13</b>
Approved Entity for Lease of Township .....	13
Agreements Regarding Land the Subject of a Deed in Escrow .....	15
Entry Permits .....	16
<b>Amendments Regarding the ABA</b> .....	<b>17</b>
<b>Conclusion</b> .....	<b>17</b>

# About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2021 Executive as at 1 January 2021 are:

- Dr Jacoba Brasch QC, President
- Mr Tass Liveris, President-Elect
- Mr Ross Drinnan, Treasurer
- Mr Luke Murphy, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of the Law Society Northern Territory and its Indigenous Legal Issues Committee in the preparation of this submission.

## Introduction

1. The Law Council of Australia (**the Law Council**) appreciates the opportunity to provide a submission to the Senate Finance and Public Administration Legislation Committee (**the Senate Committee**) in relation to its inquiry into the Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021 (**the Bill**). It notes that the Law Society Northern Territory has been consulted and is broadly supportive of this submission.
2. The Bill seeks to amend the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**the Land Rights Act**), which is the legislative framework regulating Aboriginal land in the Northern Territory (**NT**).
3. The Land Rights Act was the first piece of legislation in Australia to provide for the return of traditional lands and waters to Aboriginal and Torres Strait Islander peoples, and a key part of the historic land rights movement that occurred throughout the 1960s and 1970s.<sup>1</sup> It followed the 1963 Yirrkala Bark Petition of Yolngu Traditional Owners and 1966 Wave Hill Walk Off of Gurindji peoples, and had its origins in the 1974 recommendations of the Woodward Royal Commission, which the Whitlam Government established to inquire into how to recognise Aboriginal land rights in the NT.<sup>2</sup> Through its operation, approximately 50 per cent of the NT has been recognised as Aboriginal land, which, as noted in the Explanatory Memorandum to the Bill, is a form of freehold land and the strongest form of traditional land title in Australia.<sup>3</sup>
4. Given the significance of the Land Rights Act, the Law Council notes the importance of carefully considering the amendments proposed under the current Bill, and in particular whether these might adversely affect the existing consent processes and protections afforded to Traditional Owners and Aboriginal communities in the NT. It is concerned in this respect by the short timeframe of the present inquiry, and would support an extension of the inquiry to enable consultation with these groups to appropriately occur.
5. It is the Law Council's overarching position that consideration of laws and policies affecting Aboriginal and Torres Strait Islander peoples should occur in the context of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**),<sup>4</sup> which is the international standard informing the way governments across the globe should engage with and protect the rights of indigenous peoples.<sup>5</sup> Australia formally announced its support for the UNDRIP on 3 April 2009.
6. Multiple articles of the UNDRIP refer to the rights of indigenous peoples in relation to land, water and resources. The Law Council notes Article 32 as particularly relevant to the present context,<sup>6</sup> wherein the stated intention of the Bill is to empower

---

<sup>1</sup> See, eg, National Museum Australia, *Aboriginal Land Rights Act* (website, 13 September 2021) <<https://www.nma.gov.au/defining-moments/resources/aboriginal-land-rights-act>>.

<sup>2</sup> See, eg, *ibid*; Australian Institute of Aboriginal and Torres Strait Islander Studies, *Land Rights* (website, undated) <<https://aiatsis.gov.au/explore/land-rights>>; Central Land Council, *The Aboriginal Land Rights Act* (website, 2021) <<https://www.clc.org.au/the-ala/>>.

<sup>3</sup> Explanatory Memorandum, Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021 (Cth) 2.

<sup>4</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Agenda Item 68, Supp No 49, UN Doc A/RES/61/295 (2 October 2007) annex ('**UNDRIP**').

<sup>5</sup> See, eg, Australian Government, Attorney-General's Department, 'Right to Self-Determination: Public Sector Guidance Sheet' (website, undated) <<https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/public-sector-guidance-sheets/right-self-determination>>; United Nations Human Rights Council, Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, UN Doc A/HRC/9/9 (11 August 2008) [85]-[86].

<sup>6</sup> UNDRIP, art 32.

Aboriginal Territorians to activate the economic potential of their land into the long term.<sup>7</sup>

#### *Article 32*

*1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*

*2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

*3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

7. Article 32 is underpinned by the principle of self-determination, which forms common Article 1 of the International Covenant on Civil and Political Rights (**ICCPR**)<sup>8</sup> and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**),<sup>9</sup> and is given specific expression in the context of the rights of indigenous peoples through Article 3 of the UNDRIP, as follows:

#### *Article 3*

*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

8. Article 32 also invokes in its terms the principle of free, prior and informed consent, which sets standards or conditions around decision-making processes, through which indigenous peoples are empowered to give or withhold consent to projects that may affect them or their territories.<sup>10</sup>
9. Evaluating the Bill in light of these principles necessitates an understanding of the decision-making structures established under the Land Rights Act, and, in particular, the role of the Aboriginal Land Councils (**Land Councils**) and their relationship to Traditional Owners and Aboriginal communities in the NT.
10. Land Councils are established under Part III of the Land Rights Act, and are body corporates created in relation to a specified geographic area (**the qualifying area**), the membership of which is comprised of Aboriginal people who are chosen by Aboriginal people living in the qualifying area to represent and consult them on issues

---

<sup>7</sup> Explanatory Memorandum, Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021 (Cth) 1.

<sup>8</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('**ICCPR**').

<sup>9</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('**ICESCR**').

<sup>10</sup> See, eg, United Nations Department of Economic and Social Affairs, Indigenous Peoples, Food and Agriculture Organization of the United Nations, *Free Prior and Informed Consent: Manual for Project Practitioners* (2016) 13 <<https://www.fao.org/3/i6190e/i6190e.pdf>>.

affecting the area.<sup>11</sup> The statutory functions of Land Councils are set out in section 23 and include:

- to consult with the Traditional Owners of, and other Aboriginal peoples interested in, the Aboriginal Land within the qualifying area of the Land Council, with respect to any proposal relating to the use of that land;
- to ascertain and express their wishes and opinions, assist, and protect their interests in relation to that Aboriginal land, any legislation concerning that Aboriginal Land, and any sacred sites located within the qualifying area; and
- to negotiate with persons having or desiring to obtain estates or interests in that land, with regard to the carrying out of commercial activities on the land, and with regard to any dealings in the land or other agreements.

11. Within certain contexts, such as for the granting of mining or exploration licences, the Land Rights Act provides for certain processes of consultation with Traditional Owners, which also require Land Councils to obtain the consent of Traditional Owners.<sup>12</sup>

12. The Law Council understands, from the input of its constituent bodies in relation to previous inquiries, that the Land Councils are generally viewed in a positive light and respected, as bodies of experience, history and a representative nature.<sup>13</sup> After four decades of conducting land claims and identifying Traditional Owners of land in their respective parts of the NT, the Land Councils are seen as having invaluable resources, archives and understanding of traditional ownership conducted by and controlled by Aboriginal people.<sup>14</sup> However, the Law Council does not have specific information on how the Bill is viewed from within this jurisdiction, including by Traditional Owners, or how it might impact local arrangements. Should the Senate Committee hear from Aboriginal people or Aboriginal organisations in the NT regarding the relationships between Ministers, Land Councils and Traditional Owners, the Law Council would defer to these views, as a matter of course. The Law Council notes that the Bill was developed through a co-design process with Land Councils,<sup>15</sup> and understands that the Land Councils in the NT are in strong support of the Bill.

13. With this background in mind, the following sections of the submission consider in turn each of the four key areas outlined in the Explanatory Memorandum in which the Bill will amend the Land Rights Act, these being:

- amendments establishing the Northern Territory Aboriginal Investment Corporation (**NTAIC**);
- amendments relating to the exploration and mining provisions of the Land Rights Act;
- amendments relating to the land administration provisions of the Land Rights Act; and
- amendments regarding the Aboriginals Benefit Account (**ABA**).

---

<sup>11</sup> Land Rights Act, ss 21, 21A, 22, 29(1).

<sup>12</sup> See, eg, Land Rights Act, ss 42(2), 42(3), 42(6).

<sup>13</sup> See, eg, Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020) 69.

<sup>14</sup> *Ibid.*

<sup>15</sup> Explanatory Memorandum, Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021 (Cth) 2.

14. The Law Council makes certain recommendations to further improve the Bill, as follows:
- proposed new subsection 42(4A) be redrafted for clarity;
  - proposed new subsection 42(4B) be redrafted for clarity;
  - consideration be given to including details of the matters referred to in proposed new subsection 3AA(9) within the provisions of the Bill, rather than leaving these to delegated legislation;
  - proposed new subsection 12D(7) be removed;
  - the Senate Committee seek further information on whether Traditional Owners and Aboriginal communities in the NT have been consulted on the proposed repeal of section 74AA, and what their views are; and
  - there be an extension of the inquiry timeframe to enable adequate consultation to occur, particularly with Traditional Owners and Aboriginal communities. The Law Council acknowledges that the Bill follows a process of co-design with Land Councils, but considers that a ten-day period in which to make submissions is too short for Aboriginal Territorians and the public generally to consider the detail of the Bill.

## Amendments Establishing the NTAIC

15. Schedule 1 of the Bill seeks to insert new sections 65A, 65B-BN, 65C, 65D-DA, 65E-EX, 65F-FD, 65G-GK, 65H-HA, and 65J-JE into the Land Rights Act, for the purpose of establishing the NTAIC. These sections cover such issues as the establishment, functions, powers, strategic investment plan and financial arrangements of the proposed corporation; the establishment, functions, processes and meetings of its Board; the establishment of its advisory committees; the appointment and functions of its Chief Executive Officer; and the engagement of staff and consultants.
16. Section 65B establishes the NTAIC as a body corporate. The NTAIC's purposes and functions are set out in sections 65BA and 65BB of the Bill respectively. These include:
- making 'payments' 'to or for the benefit of Aboriginal people living in the NT';<sup>16</sup>
  - making 'investments' for the purposes of promoting the 'self-management and economic self-sufficiency' and 'social and cultural wellbeing' of Aboriginal people living in the NT;<sup>17</sup> and
  - providing 'financial assistance', 'whether on commercial terms or otherwise, to or for the benefit of Aboriginal people living in the NT'.<sup>18</sup>
17. Section 65BC of the Bill provides that in performing its functions the NTAIC must, among other things, maximise the employment of NT Aboriginal people and the use of goods and services from NT Aboriginal-owned or -controlled businesses.
18. In addition, the Bill seeks to insert new section 64AA, which would require the Commonwealth to make payments from the ABA to the NTAIC, including a single payment of \$500 million, three payments of \$60 million, and such amounts as directed by the Minister having regard to the factors set out in new subsection 64AA(4).
19. Under this scheme, the Bill would repeal section 65 of the Land Rights Act, which currently establishes an Account Advisory Committee to advise the Minister on

---

<sup>16</sup> Bill, s 65BB(a).

<sup>17</sup> Bill, ss 65BB(b), 65BA(a)-(b).

<sup>18</sup> Bill, s 65BB(c).



debiting the ABA for the purposes of making payments under subsection 64(4) – these being payments ‘to or for the benefit of Aboriginals living in the Northern Territory’. Aboriginal representatives elected from each Land Council make up the majority of the membership of the Account Advisory Committee.<sup>19</sup>

20. The effect of the Bill is that the Account Advisory Committee would no longer exist, and making payments ‘to or for the benefit of Aboriginals living in the Northern Territory’ would instead occur through a new process. Under proposed new section 65DA, the NTAI would have the power to submit estimates of its expenditure, including for making payments ‘to or for the benefit of Aboriginal people living in the Northern Territory’, to the Minister for approval. The Minister could then direct that such amounts be released from the ABA to the NTAIC, in accordance with new subparagraph 64AA(4)(b)(i), but weighed against the other considerations of this subsection, including, as provided in new paragraph 64AA(4)(c), ‘the sustainability of debits and payments from the [ABA]’.
21. Prima facie, the purposes and functions of the NTAIC appear worthwhile. Whether in pursuing these objectives the NTAIC will have a positive or negative impact, however, depends in large part on the extent to which the proposed corporation is Aboriginal-controlled.
22. In this regard, the Law Council supports the process for determining membership of the Board under proposed new section 65EA, whereby, as currently occurs for the Account Advisory Committee, the majority will be comprised of persons appointed by the Land Councils.<sup>20</sup> These appointments are to be determined, in accordance with proposed new subsection 65EB(4), through an election conducted by each Land Council. As provided by subsection 65EB(2), a person is not eligible for appointment by a Land Council unless the person is a member of the Land Council, and, as noted above, subsection 29(1) of the Land Rights Act provides that the members of a Land Council shall be Aboriginal people who are chosen by Aboriginal people living in the qualifying area to represent and consult them on issues affecting the area.
23. In addition, proposed new paragraph 65C(6)(a) provides that the Board of the NTAIC, in developing a strategic investment plan, must consult with Aboriginal people and organisations in the NT. Proposed new paragraph 65C(11)(a) also extends this requirement to consult to any revisions of a strategic investment plan.
24. The Bill does not provide any further guidance to the Board regarding what such consultation should comprise in order to be meaningful. The Law Council also notes the concerns of the Senate Standing Committee for the Scrutiny of Bills that a strategic investment plan is not considered a legislative instrument under the Bill and the implications this has regarding parliamentary scrutiny, disallowance and sunseting.<sup>21</sup>
25. While the Law Council would ordinarily be concerned to ensure strong parliamentary oversight and legislative guidance to protect the consultation process with Aboriginal peoples, these concerns are assuaged to a certain extent in the present context by the fact that the Board itself is representative of Aboriginal peoples, by virtue of the fact that the majority of its members will be Land Council members, who must be Aboriginal peoples. This representation means that the viewpoints of Aboriginal

---

<sup>19</sup> Land Rights Act, s 65.

<sup>20</sup> There are four Land Councils currently in existence in the Northern Territory. Each Land Council must appoint two people as members to the Board: Land Rights Act, s 65EA(a). The Board will consist of only four other members: one appointed by the Minister, one appointed by the Finance Minister, and two independents appointed by the Board.

<sup>21</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2021* (16 September 2021) 4.

peoples will be available within the corporation, and more organically part of its decision-making. Accordingly, there may be less need than in previous legal policy contexts to seek legislative avenues to enable the opportunity for Aboriginal peoples to be heard on matters affecting them.

## Amendments Relating to Exploration and Mining

26. Schedule 2 of the Bill contains amendments relating to mining and exploration on Aboriginal land in the NT.
27. The Bill would remove the current requirement under paragraph 40(a) that the Minister, in addition to the Land Council, must give consent before an exploration licence can be granted in respect of Aboriginal land. To this effect, it would also repeal subsections 42(8), 42(8A), 42(9) and 42(10). The Law Council recognises that this is a further transferral of power from the Government to the Land Councils, which have greater obligations than the Minister under the legislation in relation to consulting with Traditional Owners. This transferral of power is not total, however. The Bill does not alter paragraph 40(b), which remains to allow the Governor-General to override in the national interest a Land Council's decision to refuse consent.<sup>22</sup> The Minister also retains the consent role for high value proposals under s 27(3) and also in relation to cancelling an exploration or mining interest where a proponent is not operating in accordance with the proposed work program under section 47.
28. The Bill would substitute current subsection 41(6A) for proposed new subsections 41(7)-(14), which anticipate an increased flexibility for the Land Council to negotiate directly with the applicant in the application process, such as by allowing the Land Council to request specified information from the applicant or to notify the applicant of its concerns with the application and invite the applicant to vary the application to address these concerns.
29. Subsection 41(6) (the substance of which is unaltered by the Bill) sets out the requirement that the application set out a comprehensive proposal which includes, but is not limited to, certain listed particulars, including, eg, the extent to which exploration activities will, or are likely to, affect the environment inside and outside the affected land, proposals for rehabilitation and proposals for minimising social impact.
30. One difference flowing from the Bill's changes is that subsection 41(6A) is repealed. This states that strict compliance with subsection 41(6) is not necessary and substantial compliance is sufficient. 'Substantial compliance' is an objective test. Instead, under the Bill, the amendments enable the relevant Land Council to determine whether it is satisfied that the application complies substantially with subsection 41(6).<sup>23</sup> Where the Land Council is not satisfied the application complies substantially with subsection 41(6), it will be invalid.<sup>24</sup> The Land Council may also provide the applicant a notice, which specifies its concerns and invites the applicant to vary the application.<sup>25</sup>
31. Questions regarding the application's substantial compliance with the matters specified in subsection 41(6) are therefore, under the Bill, subjective and devolved to the individual Land Council's satisfaction. This change is supportive of self-

---

<sup>22</sup> Although, if the Governor-General makes such a Proclamation, section 40 continues to require the person granted the licence to enter into an agreement with the Land Council as to the terms and conditions to which the licence will be subject.

<sup>23</sup> The Bill, s 41(7).

<sup>24</sup> The Bill, s 41(8).

<sup>25</sup> The Bill, s 41(10)-(11).

determination and decision-making by Indigenous people at a local level, which is more likely to retain a focus upon Aboriginal cultural heritage protection than if the decision remained with the Minister and subject to the broader legislative failures to protect Indigenous cultural heritage and the environment with respect to the destruction of the caves at Juukan Gorge, as set out in the Law Council's submission to the Joint Standing Committee on Northern Australia.<sup>26</sup> There is some prospect that introducing a subjective test, as opposed to an objective test of 'substantial compliance' may result in different practical applications in different geographical areas of the Northern Territory (based on Land Council area of responsibility), and some inconsistency in the administration of this part of the Land Rights Act. However, the proposed introduction of a subjective element to such decisions will be tempered by the fact that the decision will not be at the whim of any individual, and must be the decision of a Land Council which exists as a statutory body making an administrative decision, subject to the obligation to reach 'satisfaction' subject to all the administrative law curbs upon making a decision within its statutory jurisdiction.

32. In relation to the substitution of 'shall' with 'may' in subsection 41(1), the Law Council notes that this amendment relating to the requirement to provide a written application to the Land Council only makes optional the decision to enter into the process. The option conferred relates the act of 'submitting' the application per se, not to the act of submitting the application 'in writing'. The first step required in the application process is that the NT Mining Minister has given consent to the person seeking the exploration licence to enter into negotiation with the Land Council for its consent to the grant of the exploration licence. If the NT Mining Minister has given their consent, then the person is empowered, rather than obliged, to take the next step of making an application in writing to the Land Council. In other words, the substitution of 'shall' with 'may' makes clear that the person seeking the exploration licence has the option to walk away from the process. It does not enable the Land Council's consent to be obtained without the applicant providing an application in writing.<sup>27</sup>
33. The Bill also does not alter the existing requirements that the Land Council must not consent to the grant of the exploration licence unless it has consulted with the Traditional Owners concerning the exploration proposals and the terms and conditions to which the grant of licence may be subject, as well as any Aboriginal community or group that may be affected by the grant of the licence, and is satisfied that the Traditional Owners 'understand the nature and purpose of the terms and conditions and, as a group, consent to them'.<sup>28</sup>
34. It does alter some of the requirements relating to meetings facilitated during the consultation process, through substituting existing subsections 42(4), 42(5) and 42(5A) with new subsections 42(4), 42(4A), 42(4B), 42(4C), 42(4D) and 42(5). The Law Council views these changes as generally being negligible. However, the Law Council suggests that proposed new subsection 42(4A) is badly worded. It states:

*(4A) The following matters must be discussed at a meeting convened in accordance with paragraph (4)(a), unless the applicant notifies the Land*

---

<sup>26</sup> Law Council of Australia, Submission to the Joint Standing Committee on Northern Australia, *Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (21 August 2020). See also Professor Graeme Samuel, *Independent Review of the EPBC Act* (Final Report, October 2020).

<sup>27</sup> See Land Rights Act, s 41(1B), which provides that if the Land Council does not make a decision under paragraph (1)(a) before the end of the negotiating period, the consent of the Northern Territory Mining Minister referred to in subsection 41(1) is taken to be withdrawn at the end of that period.

<sup>28</sup> Land Rights Act, ss 42(2), 42(6).

*Council that the applicant does not wish its representatives to attend such a meeting to discuss the matter:*

*(a) the substantive content of the exploration program;*

*(b) the terms and conditions.*

35. At first glance, a reader might assume this is a change to the Land Rights Act, allowing the applicant to decline to attend a meeting with Traditional Owners to discuss the substantive content of the exploration program and the terms and conditions. But under the existing provisions of the Land Rights Act, applicants are entitled, not obligated, to attend these parts of the meeting with Traditional Owners, meaning there is little practical change in this respect.<sup>29</sup>
36. Re-reading the provision, a reader might then assume the wording to mean that the substantive content and the terms and conditions need only be discussed at the meeting if the applicant attends. The implication being that, if it is only the Land Council and the Traditional Owners in attendance, these subjects may or may not form part of the meeting. It is unclear whether this is the intention of the Bill. The Law Council thinks this unlikely, given that, under proposed new paragraph 42(4)(a), the purpose of convening a meeting is to consider these subjects. If it is the purpose, the Law Council would be likely to oppose the amendment.
37. While the paragraph may result in little practical effect, in that the Traditional Owners could refuse to give their consent to the terms and conditions if they are concerned these have not been discussed at the meeting, and they have to be consulted on them in some form in order to give effect to subsections 42(2) and 42(6) discussed above, it would seem to set an odd normative standard, and be liable to introduce confusion as to the Land Council's consultation obligations. The Law Council notes the following advice from one member of its expert advisory Indigenous Legal Issues Committee to much the same effect:

*The subsection sets those obligatory agenda items, with the qualification that the obligation does not apply if the applicant does not attend. This is an oddly expressed provision with that qualification, and the Explanatory Memorandum does not provide any illumination upon why it is expressed in that way. Given that the purpose of the meeting, as expressed in s 42(4)(a), is to consider the exploration proposals and the terms and conditions, it seems that those topics must inevitably be the subject of the discussions at the meeting, whether or not representatives of the applicant attend, so this provision creating the obligation, and then qualifying it, does not appear to make any substantive difference to the powers of the Land Councils or the manner in which they may exercise them in consulting with Traditional Owners.*

38. The Law Council recommends redrafting proposed new subsection 42(4A) for clarity.
39. Proposed new subsection 42(4B) relates to the proposed new ability, discussed above, for the Land Council to invite applicants to make variations to their applications. It provides that the Land Council is not required to convene a meeting for a varied application, provided 'the matters were discussed at one or more meeting convened ... before the variation'. Again, the Law Council notes the following advice

---

<sup>29</sup> Land Rights Act, s 42(4)(b).

from one member of its expert advisory Indigenous Legal Issues Committee regarding the effect of this amendment:

*This does give the Land Council a new power to proceed to consent to a varied application without convening a meeting following that variation, whereas under the legislation at present a fresh application would have been required, which would have also required that the new form of the application may have had to be taken before a meeting with the Traditional Owners, except that, under the present form of the Act, it would be open for the Land Council to consider that it was not 'necessary' to convene a meeting.<sup>30</sup> So, the combined effect of the amendment to s 42(4) and addition of s 42(4B) may be not to result in any substantive change to the power of a Land Council.*

40. The Law Council is again concerned that the effect of the amendment is not absolutely clear. Proposed new subsection 42(4B) provides only that the matters need to have been 'discussed' at a previous meeting. This leaves open the possibility that the Land Council could go ahead with consenting to the variation even if Traditional Owners had discussed their concerns with matters relevant to the variation, as opposed to their approval, at a previous meeting, or even if such matters had been discussed in passing as opposed to in the necessary detail required for meaningful consultation. The Law Council notes that, under existing subsection 42(6), the consent of Traditional Owners to the terms and conditions is still required before the Land Council can consent to the grant of the licence. However, the Law Council is concerned about whether it is possible that a variation to an application might be substantive without altering the terms and conditions to which the licence would be subject, and therefore without engaging the requirement of the consent of Traditional Owners under subsection 42(6). This would mean a variation could be approved without meaningful input from Traditional Owners. The Law Council suggests the Bill be amended for clarity, to avoid the chance, however remote, of such an unintended consequence. It might state, for example, that following a variation the Land Council must convene such meetings with Traditional Owner as it considers appropriate to discuss the variation.
41. Finally, Schedule 2 of the Bill would also substitute existing subsection 44A(1) with new subsections 44A(1), 44A(1A) and 44A(1B). The only substantive effect appears, in the opinion of the Law Council, a positive one for Traditional Owners, in that the existing prohibition against the terms and conditions including compensation for 'the value of minerals removed or proposed to be removed from the land' is removed from proposed new subsection 44A(1) and proposed new section 44A(1A) adds such compensation to the list of what may be included.

## Amendments Relating to Land Administration

### Approved Entity for Lease of Township

42. Schedule 3 of the Bill is in two parts, with Part I relating to approved entities for an area of land within the qualifying area of a Land Council.
43. Section 19A of the Land Rights Act allows a Land Trust to grant a lease of a township to an approved entity, provided the Minister consents and the Land Council directs.

---

<sup>30</sup> Land Rights Act, s 42(4)(a).



44. Currently, the definition in the legislation of an approved entity includes any person approved by the Minister as a Commonwealth entity, and any person approved by the NT Chief Minister as a NT entity.
45. The Bill repeals these concepts of Commonwealth entity and NT entity. In place of current sections 3AA and 3AAA, it substitutes proposed new section 3AA, subsection (1) of which relates to the Commonwealth and Commonwealth authorities being able to be an approved entity, and subsection (2) to Aboriginal and Torres Strait Islander corporations.
46. This makes it clear that Aboriginal and Torres Strait Islander corporations may be approved by the Minister as an approved entity, which, according to the Explanatory Memorandum, does currently occur in practice.
47. Subsections 3AA(2)-(9) then set out the processes by which such approvals (and subsequent revocations of such approvals) are to occur, which is new area for the Land Rights Act.
48. In this context, the Law Council is concerned with the combined effect of proposed new subsections 3AA(6) and 3AA(9). Paragraph 3AA(6)(a) provides that in deciding whether to approve a body as an approved entity, the Minister must have regard to any matters determined under subsection 3AA(9). In turn, paragraph 3AA(9)(c) allows the Minister to determine such matters by legislative instrument. Subsection 3AA(9)(c) also states that the Minister may, by legislative instrument, determine conditions for the purposes of paragraph 3AA(2)(c) and information for the purposes of paragraph 3AA(5)(g). These relate, respectively, to conditions for the Minister approving Aboriginal and Torres Strait Islander corporations as approved entities, and information required in Land Council nominations for such a corporation to be an approved entity. These go to the question of whether these corporations will be considered 'approved entities' for the purposes of being granted leases of townships and are therefore significant.
49. It is the general position of the Law Council that significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation.<sup>31</sup> It considers it an important responsibility of the Australian Parliament to safeguard against the unnecessary delegation of unfettered law-making authority to the Executive,<sup>32</sup> and notes that, given the sheer volume of delegated legislation, there is no guarantee that such legislative instruments will receive an appropriate level of scrutiny.<sup>33</sup>
50. While it recognises that the Land Rights Act as it currently stands leaves matters of what is an approved entity entirely to the Minister's discretion, the Law Council would like to see the Bill introduce improvements to promote clarity in how the law will operate in this area.

---

<sup>31</sup> See, eg, Law Council of Australia, Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation, Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight (2 July 2020) <<https://www.lawcouncil.asn.au/resources/submissions/exemption-of-delegated-legislation-from-parliamentary-oversight>>.

<sup>32</sup> Ibid, citing Law Council of Australia, *Legislative Standards* (website) <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/legislative-standards>>.

<sup>33</sup> Approximately 'half of the law of the Commonwealth by volume consists of delegated legislation rather than acts of Parliament': 'Chapter 15: Delegated legislation, scrutiny and disallowance', *Odgers' Australian Senate Practice* (Australian Parliament, 14<sup>th</sup> ed, 30 June 2021) <[https://www.aph.gov.au/About\\_Parliament/Senate/Powers\\_practice\\_n\\_procedures/Odgers\\_Australian\\_Senate\\_Practice/Chapter\\_15](https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15)>.

51. The Law Council notes the similar views of the Senate Standing Committee for the Scrutiny of Bills in relation to these proposed new subsections 3AA(6) and 3AA(9), including that:

*[S]ignificant matters, such as key details regarding the process for when a body will be an approved entity to hold a township lease should be included in primary legislation unless a sound justification for the use of delegated legislation is provided. ... [A] legislative instrument, made by the executive, is not subject to the full range of parliamentary scrutiny inherent in bringing proposed changes in the form of an amending bill. ...*

*In light of the above, the committee requests the minister's detailed advice as to:*

- *why it is considered necessary and appropriate to leave key details regarding the process for when a body will be an approved entity to hold a township lease to delegated legislation; and*
- *whether the bill can be amended to include at least high-level guidance regarding these matters on the face of the primary legislation.*<sup>34</sup>

52. The Law Council recommends that consideration be given to including details of the matters referred to in proposed new subsection 3AA(9) within the provisions of the Bill.

### **Agreements Regarding Land the Subject of a Deed in Escrow**

53. Part II of Schedule 3 relates to agreements in relation to deeds held in escrow.<sup>35</sup> The Bill inserts proposed new section 12D, which allows and sets out the process for Land Councils entering into agreements regarding land that is the subject of a deed in escrow.
54. The proposed new section provides for Land Councils to have significant influence over the grant of an estate or interest in such land to a proponent, a power currently residing with the Minister.
55. The Law Council supports the inclusion of subsection 12D(4), which echoes the consultation and consent obligations found in other sections of the Land Rights Act, wherein the Land Council must not enter into the agreement unless it is satisfied that the Traditional Owners understand and consent to the nature and purpose of the proposed grant, as well as that other relevant Aboriginal communities and groups have been consulted.
56. However, the Law Council is concerned by the inclusion in proposed new section 12D of subsection (7), which provides that a failure to comply with subsection (4) does not invalidate the agreement. The Law Council would characterise this as effectively undoing the obligation imposed by subsection (4), by removing the logical consequence for an omission to comply with it. It means that the consent of the Traditional Owners is not subject to legislative safeguards, because it can be ignored

---

<sup>34</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2021* (16 September 2021) 5-6.

<sup>35</sup> See, eg, Central Land Council, 'Output 5.2. Administer Land Trusts', Central Land Council Annual Report 2018-19 <<https://www.transparency.gov.au/annual-reports/central-land-council/reporting-year/2018-2019-71>>: Where land is granted in a deed of grant held in escrow, the Land Council holds the title deed in trust until a specific event or condition takes place, such as the lapse of a lease or interest.

without there being a legal consequence in relation to the carrying out of the agreement.

57. The Law Council notes again the concerns of the Senate Standing Committee for the Scrutiny of Bills, which has stated in relation to proposed new subsection 12D(7):

*Proposed subsection 12D(7) provides that a failure to comply with subsection 12D(4) does not invalidate the agreement. ... A legislative provision that indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision, may be described as a 'no-invalidity' clause. There are significant scrutiny concerns with no-invalidity clauses, as these clauses may limit the practical efficacy of judicial review to provide a remedy for legal errors. ... Consequently, the committee expects a sound justification for the use of a no-invalidity clause to be provided in the explanatory memorandum. ... In this instance, there is no justification in the explanatory memorandum for including a no-invalidity clause ... The committee therefore requests the minister's advice as to why it is considered necessary and appropriate to include a no-invalidity clause ...*<sup>36</sup>

58. The Law Council recommends that proposed new subsection 12D(7) be removed from the Bill, and consideration be given to also removing similar existing provisions from the Land Rights Act.<sup>37</sup>

### **Entry Permits**

59. The Bill would repeal existing section 74AA of the Land Rights Act, which provides that 'a permit issued under section 5 of the *Aboriginal Land Act 1978* of the Northern Territory may only be revoked by the issuer of the permit'.

60. The Law Council notes the Explanatory Memorandum includes the following reason for this amendment:

*Section 74AA will be repealed to improve the functionality of the permit system that regulates access to Aboriginal land. Section 74AA provides that only the issuer of a permit may revoke that permit. This means that minority groups within traditional owner communities may issue permits and refuse to revoke them. Repealing this provision will improve consistency with the AL Act in relation to the issuing and revoking of permits for access to Aboriginal land.*<sup>38</sup>

61. It further states:

*Repeal of section 74AA is supported on the basis that Land Councils are best placed to resolve disputes within traditional owner groups through their role in administering the Land Rights Act.*<sup>39</sup>

62. Prima facie, the Law Council accepts this reasoning and resulting amendment as reasonable. However, it notes the concern of one member of its expert advisory Indigenous Legal Issues Committee that, 'this amendment does appear to be a

---

<sup>36</sup> Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest 15 of 2021* (16 September 2021) 2.

<sup>37</sup> Eg, Land Rights Act, ss 11A(6), 19(6), 19A(3), 48D(3)).

<sup>38</sup> Explanatory Memorandum, Aboriginal Land Rights (Northern Territory) Amendment (Economic Empowerment) Bill 2021 (Cth), 6.

<sup>39</sup> *Ibid*, 57.



wresting back from Traditional Owners and consolidation in Land Councils of the power to control entry to the lands of the Traditional Owners and Aboriginal communities'. The Law Council therefore suggests the Senate Committee seek further information from the Australian Government on whether Traditional Owners and Aboriginal communities in the NT have been consulted on this amendment, and what their views are.

## Amendments Regarding the ABA

63. Schedule 4 of the Bill proposes technical amendments relating to the ABA. The Law Council has no substantive comments on these amendments at this time.

## Conclusion

64. In conclusion, the Law Council recommends that proposed new subsections 42(4A) and 42(4B) be redrafted for clarity, that proposed new subsection 12D(7) be removed, that consideration be given to including details of the matters referred to in proposed new subsection 3AA(9) within the provisions of the Bill, that the Senate Committee seek further information from the Australian Government as to the views of Traditional Owners and Aboriginal communities on the proposed repeal of subsection 74AA, and that the Inquiry's timeframe be extended to allow for appropriate consultation on the details of the Bill.