



Law Council  
OF AUSTRALIA

# Reforms to the Native Title System – Exposure Drafts

**Attorney-General's Department**

19 December 2018

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## 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 2018 Executive as at 1 January 2018 are:

- Mr Morry Bailes, President
- Mr Arthur Moses SC, President-Elect
- Mr Konrad de Kerloy, Treasurer
- Mr Tass Liveris, Executive Member
- Ms Pauline Wright, Executive Member
- Mr Geoff Bowyer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its Indigenous Legal Issues Committee, the Law Society of South Australia (**LSSA**), the Queensland Law Society, the New South Wales Bar Association (**NSWBA**) and the Law Society of New South Wales (**LSNSW**), in the preparation of this submission.

## Executive Summary

1. The Law Council is grateful for the opportunity to comment on the proposed reforms to the Native Title System as set out in the following Exposure Draft documents released by the Attorney-General's Department (**the Department**):
  - (a) Native Title Legislation Amendment Bill 2018 (**Exposure Draft Legislation**); and,
  - (b) Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 (**Exposure Draft Regulations**).
2. The Law Council welcomes the ongoing reform of the native title regime and notes that the extensive litigation and procedural activity associated with the regime gives rise to many operation issues and norms.
3. In this submission the Law Council indicates its support for the many aspects of the proposals. There are some aspects which, in the Law Council's view, require further work or explanatory material. Other proposals are opposed for the reasons set out in the submission.
4. Key points raised by the Law Council in responding to the Exposure Draft documents include:
  - measures that will confirm a native title claim group's (**Native Title Claim Group**) capacity to determine the scope of the authority of the applicant are generally supported. However, proposed new 251BA(2) creates a number of concerns, for instance, the language of paragraphs 251BA(2)(a) and (b) is unclear and requires clarification;
  - insertion of subsections 24CD(2A) and (2B) is opposed for a number of reasons, including that the requirement for notification only after the majority of a claimant has agreed to an agreement, may encourage entry into agreements without prior notice to those not in the majority who might dissent;
  - the 2017 amendments to the *Native Title Act 1993* (Cth) (**Native Title Act**) should be revisited in light of the discussion surrounding regarding the current amendments. A more refined mechanism of authorisation of agreements, consistent with the principles of free, prior and informed consent articulated under the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) could also be developed;<sup>1</sup>
  - the proposed amendments to sections 24EB and 24EBA are strongly opposed. The proposed mechanism is likely to lead to the validation of future acts purportedly permitted by agreements which were affected by fraud, duress or coercion or where registration has been made in circumstances of jurisdictional error (or other administrative law grounds);
  - proposed section 47C, regarding historical extinguishment of native title in park areas, should operate in the manner of section 47B or as an amendment to section 47B, with the additional option for operation trigger by agreement;
  - reforms to confirm the status of existing section 31 agreements are supported in principle. However, the Law Council raises concerns that the proposed process will lead to retrospective validation of agreements that may not have been entered into with the full consent and authority of all native title holders. The Law Council suggests that these concerns can be remedied by providing

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<sup>1</sup> See, in particular, United Nations Declaration on the Rights of Indigenous Peoples, art 32.

for registration of section 31 agreements, with an associated capacity for claim group members or native title holders to challenge the validity of the agreement;

- the Law Council supports the proposal for National Native Title Tribunal (**NNTT**) support for agreement making in relation to matters arising between the common law holders and the registered native title body corporate post-determination. However, the proposal for the NNTT to seek to enter agreements for payment for its services is not supported;
- consistent with the proposal to give the NNTT a role assisting in agreement making between common law holders and registered native title bodies corporate, the proposed oversight functions of the Registrar of Indigenous Corporations would be better placed with the NNTT; and
- the proposed changes to limit the hearing and determination of cases related to prescribed bodies corporate (**PBC**) to the Federal Court of Australia (**the Federal Court**) are supported.

## Introduction

5. The Law Council is grateful for the assistance of its Indigenous Legal Issues Committee, the Law Society of South Australia (**LSSA**), the Queensland Law Society, the New South Wales Bar Association (**NSWBA**) and the Law Society of New South Wales (**LSNSW**), in the preparation of this submission.
6. The Law Council's submission has been informed by its submission to the Australian Law Reform Commission's (**ALRC**) 2015 review of the review of the *Native Title Act 1993* (Cth) and the Options Paper released by the Department in November 2017 (**Options Paper**).
7. The Law Council recognises that the Native Title Act is complex legislation dealing with a range of intersecting legal and policy matters that affect Aboriginal and Torres Strait Islander peoples in particular, and the rights articulated under the UNDRIP.
8. These submissions will address the Exposure Draft Legislation and the Exposure Draft Regulation respectively in the order taken by the schedules.

## Exposure Draft Legislation

### Schedule 1 - Role of the applicant

#### Part 1 - Allowing the claim group to place conditions on the authorisation of the applicant

9. The Law Council supports measures that will confirm the Native Title Claim Group's capacity to determine the scope of the applicant's authority. This is particularly so given that the members of the applicant have additional legislative functions including executing agreements pursuant to section 31 of the Native Title Act, and cultural heritage functions under state laws.
10. Therefore, the Law Council supports, in principle, the insertion of proposed new section 251BA (conditions on authorisation). This proposal will confirm a greater degree of control over an applicant by the Native Title Claim Group and reflects authorisation practice that has occurred in many circumstances for some years now.
11. In the Law Council's view, the proposed amendment to insert section 251BA gives rise to certain concerns, namely:
  - (a) the language of paragraphs 251BA(2)(a) and (b) is unclear. It should be amended to clarify that if the traditional decision-making process, or the agreed and adopted process, are such that the authorisation of an application or Indigenous Land Use Agreement (**ILUA**) must only be done in a manner that is not captured by the ordinary obligations of the applicant or signatory, then the process must be made subject to conditions; and
  - (b) neither this section, nor the transitional provisions, make it clear that this section does not affect the validity of the existing conditions on applicants or the making of an ILUA.
12. The Law Council recommends a substantial review of the authorisation processes to ensure that processes relating to the authorisation of the making of an ILUA (section 251A) are consistent with the protection of native title rights and interests. In particular,

the notion that people who may hold native title can participate in decision making is problematic.

## **Part 2 - Allowing a majority of the applicant to make decisions or sign native title agreements**

13. The proposal to amend section 24CD by inserting new subsections (2A) and (2B) is opposed for the following reasons:
  - (a) It provides for a majority of the registered claimants to be a party to the agreement, unless section 251BA conditions are in place. This does not deal with circumstances where there are existing conditions imposed prior to the insertion of section 251BA.
  - (b) It provides (at subsection (2B)) that the majority must notify the other parties within a reasonable time *after* becoming a party to the agreement. The Law Council suggests that this is highly likely to encourage entry into agreements without prior notice to those that dissent.
14. The Law Council notes that the *Native Title Amendment Act 2017* (Cth) amended the Act in response to the decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 (**McGlade**). The amendments had the effect of validating existing agreements and providing a default position for execution of ILUAs.
15. While the amendments proposed by the Exposure Draft Legislation are largely consistent with the 2017 amendments in that regard, the Law Council argues that the provision of effective authorisation that is consistent with the principles of free, prior and informed consent by the Native Title Claim Group of common law holders (see Article 32 of UNDRIP) is fundamental to a fair and equitable land justice system.<sup>2</sup> The Law Council suggests that the 2017 amendments could be revisited in light of the discussion surrounding this raft of amendments and an attempt made to develop a more refined mechanism.
16. In particular, the decision as to whether there is law and custom requiring decisions about land to be made in a certain way is often determined by a simple majority vote. There can be no confidence that a decision taken in such a manner actually reflects law and custom. This issue was recently explored in the decision of *Kimberley Land Council v Williams* [2018] FCA 1955.
17. Similarly, there appears to be a greater need for certainty around:
  - (a) the process by which the Native Title Claim Group and the native title holders are identified;
  - (b) the law and custom around decision-making and how it is articulated and given operational effect; and
  - (c) whether there is any role for people other than the members of the registered Native Title Claim Group in making decisions in relation to agreements where a claim is registered but yet to be determined.

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<sup>2</sup> See United Nations Declaration on the Rights of Indigenous Peoples, art 32.



## **South Australian Circumstances**

18. The LSSA recognises that South Australia has an alternative ‘right to negotiate’ procedure (as allowed for in section 43 of the Act). This alternative state procedure comprises Part 9B of *the Mining Act 1971 (SA)*. While there are some significant differences between the provisions of Part 9B of the *Mining Act* and Subdivision P of the Native Title Act, they are sufficiently similar for these purposes. However, unlike in other states (e.g. Western Australia), it is comparatively rare for the state (or, more relevantly in South Australia, the grantee party) to seek to rely on the ‘expedited procedure’.
19. In the circumstances, a South Australian PBC may be faced with a significant number of mineral explorers negotiating the equivalent of section 31A agreements, each of which is limited in its scope to exploration (and does not provide consent to production). In practice, each such agreement is substantially the same terms as other such agreements negotiated and entered into by the same PBC with other mineral explorers. Accordingly, the LSSA maintains that the Native Title (Prescribed Body Corporate) Regulations 1999 should allow for ‘standing instructions decisions’ to be made, without the need for each such mineral exploration agreement to require a separate consultation and consent process to be followed.
20. The LSSA is informed that the cost of holding a meeting of native title holders can be substantial, and as such, it would be preferable to not have to call meetings at potentially considerable cost to the PBC where it is not warranted. However, where obliged to engage in a separate consultation and consent process, the PBC will no doubt seek to recover the costs of such meeting from the minerals explorer. However, in many instances such costs may be similarly prohibitive for a mineral explorer as it would be for the PBC to bear.
21. The Law Council directs the Department to the submission of the LSSA dated 10 December 2018 for further discussion of these issues.

### **Part 3 - Simplifying the process by which a claim group may replace individual members of the applicant if a member becomes too ill to perform their duties, or has passed away, including through pre-arranged successions planning arrangements**

22. The Law Council notes that the reforms proposed in Schedule 1 Part 3 (particularly through the proposed insertion of subsection 66B(2A) in the Native Title Act) seek to clarify and simplify the process for replacing a deceased or incapacitated member of the applicant. The Law Council supports the proposed changes. This reform is essential, and the concept of succession planning has been missing in Native Title Claim Group procedure. The reforms also reflect the terms of authorisation that have been used in practice for some time.

## **Schedule 2 - Indigenous land use agreements**

### **Part 1 – Body Corporate Agreements and area agreements**

23. The Law Council supports the amendments proposed by Schedule 2 Part 1.

### **Part 2 – Deregistration and amendment**

24. The Law Council strongly opposes the proposed amendments to sections 24EB and 24EBA of the Native Title Act. There may be circumstances where the entry into the

agreement has been affected by fraud, duress or coercion and on those grounds the future act purported to have been validated ought to be set aside. In addition, it is possible for the registration of an agreement to have been made in circumstances of jurisdictional error, or other administrative law grounds where the validation of the relevant future act by registration of the agreement cannot stand.

25. The proposed amendments to add new section 24ED to the Act are supported.

## **Schedule 3 – Historical extinguishment**

### **Part 1 – Park areas**

26. The amendment of the existing section 47 suite of provisions to insert a new section 47C is supported in principle. However, the requirement for an agreement between the claimant and the relevant government (state, territory or the Commonwealth) that extinguishment shall be disregarded is an unnecessary fetter on access to use of the provision.

27. There is no guidance as to the circumstances in which a government should exercise its discretion to agree to disregard extinguishment and therefore it is likely that that agreement will be forthcoming at the expense of some other benefit.

28. The Law Council submits that the proposed section 47C should operate in the manner of section 47B or as an amendment to section 47B, with the additional option for operation trigger by agreement.

29. The Law Council queries the need for the notification and comment provisions proposed to be inserted at subsections 47C(5) and (6). It is the Law Council's understanding that any interest holders in the park would have been notified of the claim when made.

30. The LSNSW advises that there should be a requirement to give written notice to anyone with an interest in the land, and if the land is owned by a person other than the State (such as Aboriginal owned national parks), then the landowner should be required to be a party to the agreement. Furthermore, the LSNSW submits that if the area was already the subject of a determination which had been made as a result of a section 87 or section 87A agreement, then the parties to the agreement should also be a party to any section 47C agreement to the extent that they have an interest in the land and waters to which it relates.

### **Part 2 – Pastoral leases held by native title claimants**

31. The proposed amendments to subparagraph 47(1)(b)(iii) are supported.

### **Part 3 – Future acts where prior extinguishment to be disregarded**

32. The Law Council notes that there may be an unintended impact on Aboriginal Land Councils in NSW and lands transferred to those councils pursuant to the *Aboriginal Land Rights Act 1983* (NSW).

33. The LSNSW is concerned that the effect of the proposed amendment to section 227 of the Native Title Act in Part 3, item 21 of the draft Bill on the rights of existing landowners is unclear, especially as it states that the extinguishment by the acts identified in column 3 of item 21 is to be disregarded in determining whether an act affects native title.

34. The LSNSW notes that the operation of section 47A is unusual in that it purports to re-enliven native title property rights which were previously extinguished in circumstances where another person holds a freehold interest. The LSNSW submits that it should be a fundamental requirement where this occurs that existing property interests are fully protected so that the exercise and enjoyment of the rights under that interest are not diminished. At present the non-extinguishment principle provides that the interest is not affected.
35. It is not clear, in the view of the LSNSW, that the proposed amendment does not undermine the operation of the non-extinguishment principle which otherwise is supposed to operate where native title is recognised pursuant to section 47A.
36. The LSNSW understands that in various matters in New South Wales, section 47A is currently asserted over land held by Aboriginal Housing Companies, other Aboriginal Corporations, and Aboriginal Land Councils established under the *Aboriginal Land Rights Act 1983* (NSW). Those organisations hold freehold titles which have been purchased on the open market and which can be sold on the open market. In many instances there may be an intention to utilise, develop or sell the land in the same way that other holders of the same titles enjoy.
37. In the LSNSW's view, having a provision in the Native Title Act that re-establishes native title on that land, and then deems certain acts to be acts affecting native title, without making clear what is intended to be covered by the amendment, or making clear that the rights of existing owners are fully protected, is highly likely to cause confusion for native title holders and existing Aboriginal land owners, and lead to unnecessary disputes. Furthermore, to the extent that the rights of the existing landowners are impaired by the amendment, liabilities for compensation will be created.

#### **Schedule 4 – Allowing a registered native title body corporate to bring a compensation application**

38. The Law Council supports the proposed amendment to subsection 61(1) in principle. However, the draft provision should also require a registered native title prescribed body corporate to be authorised to bring such an application.

#### **Schedule 5 – Intervention and consent determinations**

##### **Part 1 – Intervention in proceedings**

39. The Law Council considers that there is no justification for the proposal allowing for Commonwealth intervention in proceedings if it is not a party. It notes that efficient conduct of multi-party litigation and the negotiation of timely settlements will not be facilitated or advanced by late intervention by the Commonwealth.
40. It is accepted that there may be circumstances where joinder by the Commonwealth to proceedings in the High Court may be appropriate. However, the Commonwealth would ordinarily be able to join such proceedings in the Courts appellate jurisdiction if a relevant interest was disclosed.

##### **Part 2 – Consent Determinations**

41. The Law Council questions the need for the Commonwealth to intervene in consent determinations, and without further information to support this amendment, opposes this proposal.

## Schedule 6 – Other procedural changes

### Part 1 – Objections

42. The proposed amendment to paragraph 24MD(6B)(f) is supported in principle. However, the implications of an eight-month period for withdrawal, as opposed to a longer or shorter period, are unknown.
43. The proposed amendment to subsection 141(2) has the effect that if a native title party has not lodged an objection it will not be party to a right to negotiate application in respect of an expedited procedure. The result will be that right to negotiate applications may be dealt with in the absence of a native title party. This raises concerns.

### Part 2 – Section 31 agreements

44. The uncertainty that currently exists regarding the validity of section 31 agreements not signed by all members of the applicant in the wake of the decision in *McGlade* requires attention. The Law Council is therefore, in principle, supportive of reforms to confirm the status of existing section 31 agreements.
45. The Law Council is conscious that due to the poor visibility of existing section 31 agreements under the current legislative framework, there will be challenges with any attempt to retrospectively account for and validate agreements made in the past.
46. The Law Council also notes some concern regarding the proposal to confirm the validity of existing section 31 agreements where at least one member of the applicant has signed the agreement – in circumstances in which a majority of the named applicants (other than those who are deceased) have not signed. It is quite possible that the proposed process will lead retrospective validation of agreements that may not have been entered into with the full consent and authority of all native title holders.
47. The Law Council suggests that these concerns can be remedied by providing for registration of section 31 agreements, with an associated capacity for claim group members or native title holders to challenge validity of the agreement.<sup>3</sup> The Law Council notes that since the 1998 amendments to the Native Title Act, copies of all section 31 agreements are required to be given to the arbitral body (the National Native Title Tribunal) and should be readily recoverable.<sup>4</sup>
48. The Law Council notes that no such registration requirement has been included in the proposed reforms nor has the registration process for new section 31 agreements as was considered in the Options Paper. The Law Council submits that these failures facilitate inconsistency with Article 32 of the UNDRIP and create unnecessary tension between the applicant and the claim group.

## Schedule 7 – National Native Title Tribunal

49. The Law Council supports the proposal to insert a new section 60AAA providing for NNTT support for agreement making in relation to matters arising between the common law holders and the registered native title body corporate post-determination.

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<sup>3</sup> In the Law Council's submission regarding the Department's Options Paper, it was argued the validation exercise could potentially be linked to the registration of the agreements on a central register. The Law Council also supported the proposal to establish a register of section 31 agreements going forward.

<sup>4</sup> *Native Title Act 1993* (Cth), section 41A.

50. The Law Council does not support the proposal contained at subsection 60AAA(3) for the NNTT to seek to enter agreements for payment for its services by the registered native title body corporate or the common law holders.
51. The Law Council also expresses concern about the proposal for acting appointments. It is understood that from time to time it may be necessary for an acting appointment to be made while a member of the NNTT, for instance, takes long term leave. However, the system requires the maintenance of independence by the NNTT and there is concern that the proposed amendment would facilitate a failure to replace members who have retired, or whose term has not been renewed, with acting members.

## **Schedule 8 Registered native title bodies corporate**

### **Part 1 – Register oversight**

52. The Law Council is concerned about some aspects of the proposal to expand the oversight functions of the Registrar of Indigenous Corporations. The oversight function requires some detailed understanding of native title rights and interests and the manner in which such rights are exercised by the common law holders and managed by the registered native title prescribed body corporate.
53. Consistent with the proposal to give the NNTT a role assisting in agreement making between common law holders and registered native title bodies corporate, this function would be better placed with that institution.
54. The other amendments proposed to enhance the role of the Registrar are supported with the exception that the period of two years is considered to be too short. The Law Council is aware that many registered native title bodies corporate struggle to meet their existing regulatory obligations and may have difficulty complying within two years.

### **Part 2 – Refusal of membership**

55. The Law Council supports the proposed amendments under Part 2.

### **Part 3 – Jurisdiction of courts**

56. The Law Council supports the proposed changes to limit the hearing and determination of PBC-related cases to the Federal Court. As noted in Fact Sheet 2, 'the Federal Court, having been involved in native claims for more than 20 years, has developed unique expertise to deal with and resolve matters affecting PBCs'.<sup>5</sup>
57. Consideration should also be given to the issue of whether the Federal Court should also be given exclusive jurisdiction in relation to the interpretation and enforcement of ILUAs and section 31 agreements.

## **Schedule 9 – Just terms compensation**

58. The Law Council supports the amendments set out in Schedule 9.

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<sup>5</sup> Attorney-General's Department, *Native Title Reforms: Fact Sheet #2 - Prescribed Bodies Corporate* <<https://www.ag.gov.au/Consultations/Documents/native-title/native-title-reforms-factsheet-2.pdf>>.

# Exposure Draft Regulation

## **Schedule 1 - Amendments Registered native title bodies corporate**

### **Corporations (Aboriginal and Torres Strait Islander) Regulations 2017**

59. The Law Council supports the proposed amendments to sections 5 and 55, the insertion of a new section 55A, and the insertion of a Division 2 of Part 12 (section 61).

## **Schedule 5 – Intervention and consent determinations**

### **Native Title (Indigenous Land Use Agreements) Regulation 1999**

60. The Law Council supports the proposed amendments with the following exception.

61. Subregulations 6(2)(note 2), 7(2)(note 2) and 8(2)(note 2) appear to require refinement. These subregulations provide for consultation in respect of a native title decision with only those common law holders whose rights are affected by the decision. The assessment of which common law holders have rights which would be affected by the decision would require a degree of skill and knowledge and, in essence, require an application of traditional law and custom. On balance, if this provision were to work effectively, it would need much greater transparency around the process.

### **Native Title (Prescribed Body Corporate) Regulations 1999**

62. The Law Council supports the proposed amendments with the following exceptions:

- (a) The characterisation of decisions into two categories (high level and low level) does not allow for sufficient delineation between the various decisions that common law holders may make. The Law Council is aware of standing instructions which provide for major decisions, minor decisions and routine decisions.
- (b) Subregulation 3(1) - The benefit of standing instructions is that they can set out a consultation mechanism for seeking the consent of the common law holders for all types of decisions. The limitation to low level decisions and decisions benefiting the PBC is, in the Law Council's view, unnecessary.
- (c) Subregulation 7A(2) – This provision should make clear on its terms that the entry into an agreement regarding compensation is a native title decision.
- (d) Regulations 8A, 8B and 9 – The Law Council repeats its concerns set out in paragraph 33 above regarding compensation applications made by the registered native title body corporate. Namely, that the registered native title body corporate should be specifically authorised in a manner consistent with section 251B.