



Law Council
OF AUSTRALIA

Native Title Legislation Amendment Bill 2019

Senate Legal and Constitutional Affairs Legislation Committee

5 December 2019

Telephone +61 2 6246 3788 • *Fax* +61 2 6248 0639
Email 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

Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Introduction	Error! Bookmark not defined.
Native Title Legislation Amendment Bill 2019	7
Schedule 1 – Role of the Applicant.....	7
Part 1 – Authorisation	7
Section 251BA	7
Part 2 – Applicant decision-making	8
Sections 24CD, 24CL, 62C and 87.....	8
Schedule 2 – Indigenous Land Use Agreements	11
Part 2 – Deregistration and Amendment	11
Sections 24EB and 24EBA.....	11
Schedule 3 – Historical Extinguishment.....	11
Part 1 – Park Areas.....	11
Section 47C	11
Schedule 6 – Other Procedural Changes	12
Part 2 – Section 31 Agreements	12
Sections 41A and 41B	12
Schedule 8 – Registered Native Title Bodies Corporate	13
Part 1 – Requirements for Constitutions	13
Section 150-15.....	13

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 2019 Executive as at 14 September 2019 are:

- Mr Arthur Moses SC, President
- Ms Pauline Wright, President-elect
- Dr Jacoba Brasch QC, Treasurer
- Mr Tass Liveris, Executive Member
- Mr Ross Drinnan, Executive Member
- Executive Member, Vacant

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

Acknowledgement

The Law Council acknowledges the assistance of its Indigenous Legal Issues Committee, the Law Society of Western Australia and its Human Rights and Equal Opportunity Committee and the New South Wales Bar Association and its First Nations Committee in the preparation of this submission.

Executive Summary

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to provide input to the Senate Legal and Constitutional Affairs Legislation Committee's (**the Committee**) inquiry into the Native Title Legislation Amendment Bill 2019 (**the Bill**).
2. The Bill amends the *Native Title Act 1993* (Cth) (**the Native Title Act**) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**the CATSI Act**). It is almost identical in terms to the version that lapsed following the dissolution of the 45th Parliament.¹ More pertinently, it is similar to the Exposure Draft of the Native Title Legislation Amendment Bill 2018 (**the Exposure Draft**), having been developed following public consultations on the Options Paper and the Exposure Draft.² The Law Council previously provided written submissions to the Attorney-General's Department (**AGD**) in relation to both the Options Paper and the Exposure Draft.³ These submissions were informed by the Law Council's participation in the Australian Law Reform Commission's (**ALRC**) review of the *Native Title Act*, and the resultant *Connection to Country* report published in 2015.⁴ The Law Council also provided a written submission to the Senate Finance and Public Administration Committee in relation to the now lapsed Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018.⁵
3. The Law Council welcomes the ongoing reform of the native title regime established pursuant to the *Native Title Act* and acknowledges that the extensive litigation and procedural activity associated with the regime gives rise to many operational issues and norms. In this submission, the Law Council does not seek to address each of the amendments proposed in the Bill. Rather, it addresses issues of particular concern and provides the following key recommendations:
 - proposed section 251BA should be redrafted and related sections 251A and 251B revisited to implement previous recommendations 10-1 and 10-2 of the Australian Law Reform Commission that a claim group may use *either* a traditional decision-making process *or* a process agreed to and adopted by the group;
 - the matters listed in paragraph 190A(6A)(d) should be expanded to require the

¹ See Native Title Legislation Amendment Bill 2019, *Parliament of Australia* (Web Page, February 2019) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6304>. The exception being that the Bill no longer includes amendments to ss 57-1, 66-10, 150-15(1), 150-20(1), 150-22(1) and 150-22(2)–(3) of the *CATSI Act*.

² Attorney-General's Department, *Reforms to the Native Title Act 1993* (Cth) (Options Paper, November 2017) <<https://www.ag.gov.au/Consultations/Documents/Reformstothenativetitleact1993/options-paper-proposed-reforms-to-the-native-title-act-1993.PDF>>; Exposure Draft, Native Title Legislation Amendment Bill 2018; Exposure Draft, Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018. See Exposure Draft Native Title Reforms, *Attorney-General's Department* (Web Page, December 2018) <<https://www.ag.gov.au/Consultations/Pages/Exposure-draft-native-title-reforms.aspx>>.

³ Law Council of Australia, Submission to Attorney-General's Department, *Reforms to the Native Title Act 1993* (Cth) (27 February 2018); Law Council of Australia, Submission to Attorney-General's Department, *Reforms to the Native Title System – Exposure Drafts* (19 December 2018).

⁴ Law Council of Australia, Submission to Australian Law Reform Commission, *Review of the Native Title Act 1993* (Cth) (23 June 2014); Law Council of Australia, Submission to Australian Law Reform Commission, *Review of the Native Title Act 1993* (Cth) (23 January 2015); Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth) (ALRC Report No 126, 4 June 2015).

⁵ Law Council of Australia, Submission to Senate Finance and Public Administration Committee, *Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018* (25 January 2019). See Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018, *Parliament of Australia* (Web Page, December 2018) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=s1155>.

Registrar to accept an amended claim for registration made pursuant to proposed subsection 251BA(3), rather than re-triggering the registration test and requirements set out in sections 61 and 62;

- proposed subsection 24(4) should be redrafted to make it clear that proposed section 251BA applies *only* in relation to any authority given after the commencement of this item;
 - the retrospective scope of proposed sections 24CD, 24CL, 62C and 87 should be clarified. The proposed sections should *only* apply in relation to *any authority given* after the commencement of this item;
 - the Bill should be amended to ensure that any default rule by majority requires the majority to provide at minimum seven days' notice in writing to the larger group prior to making a decision or executing an agreement;
 - the proposed amendments to sections 24EB and 24EBA should be withdrawn or redrafted to recognise those circumstances in which the validity of an act ought to be set aside, such as where the agreement validating the act was affected by fraud, duress or coercion, or was registered in circumstances of jurisdictional or other administrative law error;
 - proposed section 47C should be revisited and an attempt made to develop a more refined mechanism, which would have regard to the complex interaction between native title rights and land rights in New South Wales and ensure that the two regimes operate in harmony to maximise outcomes for Aboriginal people;
 - the Bill should be amended to provide for a register of section 31 agreements and ancillary agreements with suitable information restrictions; and
 - the wording of proposed subsection 150-15(2A) should be clarified, but the ability of a corporation to cancel membership on the ground of misbehaviour not removed altogether (although greater restrictions on corporations could apply).
4. In responding to the Bill, the Law Council continues to be guided by the core principles underpinning native title reform, including the need for authority, legitimacy and recognition of the communal character of native title law. The Law Council is generally supportive of reform measures that are designed to promote certainty and efficiency in native title decision-making, but submits that reform measures must not undermine these core principles or the human rights engaged by native title considerations, including, but not limited to, the right to self-determination.

Native Title Legislation Amendment Bill 2019

5. The Law Council observes that the Bill implements in part the recommendations of the ALRC's *Connection to Country* report. Where the Bill addresses the recommendations of the report, the proposed amendments are generally appropriate. The exceptions are as follows.

Schedule 1 – Role of the Applicant

Part 1 – Authorisation

Section 251BA

6. As the text of proposed section 251BA has not changed between the Exposure Draft and the Bill, the Law Council seeks to clarify the position outlined in its submission to the Attorney-General's Department on the Exposure Draft, dated 19 December 2018.⁶
7. The Law Council supports the objective of proposed section 251BA on the basis that it confirms a greater degree of control over an applicant by a native title claim group and reflects practice that has occurred in many cases for some years now. The Law Council supports measures that strengthen the capacity of a native title claim group to determine the scope of the authority of an applicant.
8. Further, given proposed section 62C (as well as other proposed sections), the Law Council considers the function of proposed section 251BA to be particularly important. Section 251BA will enable a native title claim group to nullify the 'default rule' allowing an applicant to act by majority as introduced under subsection 62C(2), by imposing a condition on the authority, for example, requiring unanimity rather than majority. This application is confirmed by subsection 62C(4).
9. However, the Law Council remains concerned that section 251BA reproduces the dichotomy between 'traditional' processes of decision-making and 'agreed to and adopted' processes of decision-making imposed throughout the *Native Title Act*, including in existing sections 251A and 251B. Under proposed subsection 251BA(2), if a traditional decision-making process exists, the native title claim group must impose any conditions on the authority in accordance with that process. An agreed to and adopted decision-making process is only allowed in the absence of a traditional decision-making process. There may be understandable – if somewhat paternalistic – reasoning behind this, such as the protection and preservation of traditional laws and customs. However, lawyers working in this space have informed the Law Council that, in practice, this dichotomy has resulted in a 'narrowing' of when traditional laws and customs exist or need to be complied with for a particular type of matter, in order that for ease and clarity of decision-making, a native title claim group can agree to and adopt a different process. In 2015, the Australian Law Reform Commission recorded similar issues with mandating traditional laws and customs.⁷
10. The Law Council submits that the use of a traditional decision-making process, where such a process exists, should be optional rather than mandated. It would be preferable to enable a native title claim group to pursue a decision-making process of its choice, based on its needs and resources. This is consistent with previous recommendations of

⁶ Law Council of Australia, Submission to Attorney-General's Department, *Reforms to the Native Title System – Exposure Drafts* (19 December 2018) <<https://www.lawcouncil.asn.au/docs/b8c50833-c446-e911-93fc-005056be13b5/3560%20-%20Native%20Title%20Reforms.pdf>>.

⁷ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report No 126, 4 June 2015) 301.

the Australian Law Reform Commission, such as:

*Section 251B should simply provide that a claim group may use a traditional decision-making process or a process of decision-making agreed to and adopted by the group. The claim group would still be able to use its traditional decision-making process if it wished. If it did not have such a process, or preferred another process, it could use the other process.*⁸

11. The second concern with proposed section 251BA is that, when conditions on the authority of an applicant are imposed or changed, proposed subsection 251BA(3) requires leave to be sought to amend the relevant native title application. The Law Council understands that the legislative objective behind the proposed section is to require transparency as to the limits of the authority of an applicant.
12. However, the difficulty this causes for claimants is that amendments to applications trigger the registration test and requirements set out in sections 61 and 62. (Section 63 and subsection 64(4) require the Federal Court Chief Executive Officer to provide a copy of an application or amended application to the Native Title Registrar. Subsection 190A(1) obliges the Registrar to consider an application received. Under section 190C(2), the Registrar is required to test an application against the registration test conditions at sections 61 and 62).
13. This is undesirable because these requirements in sections 61 and 62 can be onerous and involve obtaining detailed evidence. There is also the risk that revisiting the registration test could result in the test not being passed. In order to avoid unnecessary work and risk, the Law Council suggests that the Bill is changed to ensure the registration test is not triggered through changes to any conditions placed on the authority of an applicant. This could be achieved by adding such changes to the matters listed in paragraph 190A(6A)(d), requiring that the Registrar must accept the amended claim for registration.
14. The Law Council also repeats its previous concern that ‘neither this section, nor the transitional provisions, make it clear that this section does not affect the validity of the existing conditions on applicants ...’.⁹ The Law Council suggests that this concern could be rectified by inserting the word ‘only’ into proposed subsection 24(4) as follows:

Section 125BA of the Native Title Act 1993, as inserted by this Part, applies only in relation to any authority given after the commencement of this item.

Part 2 – Applicant decision-making

Sections 24CD, 24CL, 62C and 87

15. The Law Council wishes to add to its previous position on proposed section 24CD outlined in its submission to the Attorney-General’s Department on the Exposure Draft, dated 19 December 2018.

Introduction

16. The current submission discusses sections 24CD, 24CL, 62C and 87 collectively, as giving rise to the same two issues: first, that the wording in relation to the application of these sections is vague enough to warrant concern that the default rule by majority inserted in these sections could apply in relation to claim groups or applicants

⁸ Ibid 301–302.

⁹ Law Council of Australia, Submission to Attorney-General’s Department, *Reforms to the Native Title System – Exposure Drafts* (19 December 2018) 7.

determined prior to the commencement of these sections; and second, that these sections do not require the majority of the claim group or applicant to give notice to the other persons of the claim group or applicant prior to entering an agreement or making a decision.

Issue One

17. The Law Council suggests that the proposed sections might have some retrospective application, because the wording in Item 55 dates the application of the proposed sections to 'any agreement in respect of which an application for registration is made after', 'any thing done after' or 'any agreement the terms of which are filed with the Federal Court after' the commencement of the proposed sections, rather than to 'any authority given after' the commencement of the proposed sections or other similar wording. That is, the proposed sections can change the rules around an authority agreed to *before* the commencement, in relation to acts occurring *after* the commencement.
18. For example, it is not clear that proposed section 62C would only apply to new authorisations, given that the phrase 'any thing' is vague. It may have the effect that a majority of the authorised persons who make up an applicant can make decisions after the commencement of the item, even if the native title claim group authorised the applicant at a time when it was expected all would have to agree. If section 62C does operate retrospectively in this regard, native title claim groups would need to undertake the cost and time of meeting again to impose conditions, should they wish to displace the new default rule by majority.
19. The Law Council has serious concerns that this may be contrary to the human right of Indigenous peoples to self-determination and to the exercise of free, prior and informed consent to development on their lands as set out in the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)*.¹⁰ Articles 18 and 19 of the UNDRIP provide:

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions.

*Article 19: States shall consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*¹¹
20. Where a native title claim group has already appointed a group of people to the role of applicant in the knowledge that Australian law operates in a particular manner, the Parliament should refrain changing that representative function unilaterally. The decision-making processes adopted and used by native title claim groups are integral aspects of the exercise of their law and customs. The amendments should, at the very least, not operate retrospectively in this regard.
21. The Law Council understands that the Government is likely seeking to achieve consistency with prior amendments relating to Indigenous Land Use Agreements (**ILUAs**). Proposed subsection 24CD(2A) establishes that a majority of those persons appointed as the applicant are entitled to validly execute a section 31 agreement. This

¹⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

¹¹ *Ibid.*

would bring the execution of section 31 agreements into alignment with the requirements for the execution of ILUAs since the commencement of the *Native Title Amendment Act 2017* (Cth) (**the McGlade amendments**), which in turn was a statutory response to the decision in *McGlade v Native Title Registrar* (2017) 251 FCR 172 (**McGlade**).

22. The McGlade amendments set up a default position mirroring proposed section 24CD(2A) in relation to the execution of ILUAs. The operation of the default position in relation to ILUAs does not take into account that minority groups may hold rights and interests according to traditional law and custom which constrain the capacity of the majority to make decisions interfering with or affecting those rights of the minority.¹²
23. The right to control and determine decision-making mechanisms is central to all legal systems including traditional law systems. The creation of the default mechanism usurps decision-making power. In the absence of evidence to the contrary, it must be assumed that an applicant appointed prior to 2017 was appointed according to law and therefore subject to the requirement that all members of the applicant execute ILUAs.
24. Accordingly, the Law Council suggests that the McGlade amendments be revisited in light of the above concerns and an attempt made to develop a more refined mechanism. In the alternative, recognising that the Government is likely seeking to achieve consistency with the provisions relating to ILUAs, perhaps a respectful means of achieving the legislative end is to provide that the amendments proposed only operate on authorisation processes undertaken after the amendments.

Issue Two

25. Similar concerns are raised in relation to the fact that the proposed sections allow the majority to act without providing notice. For example, subsection 24CD(2B) provides that the majority only needs to notify the other persons within the native title claim group after becoming a party to an agreement. This is likely to encourage entry into agreements without prior notice to those that dissent, effectively depriving the native title claim group as a whole of an opportunity to democratically discuss the issue. The new addition to subsection 24CD(2B) that 'a failure to comply with this subsection does not invalidate the agreement' adds another dimension to this disenfranchisement in that it removes the incentive to provide any notice at all, either prior to or post agreement.
26. Section 31 agreements usually commence operative effect from the moment of execution. A failure to provide notice therefore has the effect of allowing unscrupulous proponents to 'cherry-pick' a majority to permit activities that affect native title. Moreover, it would enable the majority to disregard the views and therefore disenfranchise a minority traditional owner. To the extent that future acts not uncommonly happen on the land of a smaller sub-group, such traditional owners would not even be provided the opportunity to be heard, removing their rights to self-determination and informed consent.

Conclusion

27. The Law Council recognises that the purpose of these proposed amendments is to improve the efficiency of the native title regime. It also recognises that proposed section 251BA will allow a native title claim group to displace a default rule. Further, the Law Council understands that Item 55 of the Bill is an attempt to deal with concerns around the retrospective application of proposed sections 24CD, 24CL, 62C and 87.
28. However, for the reasons given above, the Law Council is not convinced that the

¹² See *KLC v Williams* [2018] FCA 1955.

proposed amendments are adequate. The Law Council supports amendments that improve the recognition and rights of native title holders. It remains concerned that the proposed sections might enlarge the power of one small group at the expense of the whole native title claimant group, and diminish the right of many Indigenous peoples to participate in decision-making in matters that affect their interests.

29. The Law Council suggests clarification of the retrospective scope of proposed sections 24CD, 24CL, 62C and 87. The Law Council recommends that the amendments proposed should only apply in relation to authority undertaken after the amendments. The Law Council further recommends that at minimum there should be a requirement to provide seven days' notice in writing to all persons comprising the registered native title claimant, prior to the majority executing an agreement.

Schedule 2 – Indigenous Land Use Agreements

Part 2 – Deregistration and Amendment

Sections 24EB and 24EBA

30. As the proposed amendments to sections 24EB and 24EBA have not changed between the Exposure Draft and the Bill, the Law Council repeats the position outlined in its submission to the Attorney-General's Department on the Exposure Draft, dated 19 December 2018.¹³
31. The proposed amendments clarify that the removal of an agreement from the register does not affect the validity of a future act done in relation to that agreement.
32. The Law Council opposes the current form of proposed subsections 24EB(2A) and 24EBA(7), as there may exist valid reasons as to why the validity of a future act ought to be set aside, including that the agreement validating the act was affected by fraud, duress or coercion, or was registered in circumstances of jurisdictional error or other administrative law error.

Schedule 3 – Historical Extinguishment

Part 1 – Park Areas

Section 47C

33. The Law Council supports in principle proposed section 47C, but has some concerns regarding the detail of its operation.
34. Proposed section 47C leaves the rights of native title parties at the discretion and goodwill of the government of the day. Current sections 47, 47A and 47B simply require extinguishment to be disregarded where extinguishment has occurred by reason of the acts specified. That is, the effect is automatic. In comparison, proposed paragraph 47C(1)(b) requires an agreement in writing with the government in order to trigger the operation of proposed section 47C. As the rights of the government and the public are protected by reason that the extinguishing effect of public works prevails over native title rights and, under subsection 47C(4), would require an explicit statement of agreement from the government to be disregarded, there is no need in most jurisdictions to also require general government agreement under paragraph 47C(1)(b) or public notification

¹³ Law Council of Australia, Submission to Attorney-General's Department, *Reforms to the Native Title System – Exposure Drafts* (19 December 2018) <<https://www.lawcouncil.asn.au/docs/b8c50833-c446-e911-93fc-005056be13b5/3560%20-%20Native%20Title%20Reforms.pdf>>.

under paragraph 47C(6)(a).

35. However, the situation is more complicated in New South Wales.
36. Proposed section 47C has the potential to have a beneficial operation in the State because it would remove the 'swiss cheese' recognition of native title that currently occurs by reason of the fact that, in New South Wales, park areas do not extinguish native title, being dedications rather than vestings, but, within these areas, there may be historical leases or other interests that do.
37. The problem is the interaction of proposed section 47C with Aboriginal Land Claims made under the *Aboriginal Land Rights Act 1983* (NSW) (**the NSW Act**). Under proposed subsection 47C(3), the meaning of 'park area' is broad enough to pick up land beyond national parks or state forests, such as land reserved under legislation for purposes that 'include preserving the natural environment', which is land that might also be claimable under the NSW Act, meaning the two legislative regimes in theory overlap.
38. Currently, Aboriginal Land Claims made under the NSW Act might succeed in respect of land over which there is no native title claim or native title has been extinguished. Should the proposed Bill be passed, these Aboriginal Land Claims over park areas, which might otherwise succeed, would fail if preceded by a section 47C agreement. The Bill therefore has the potential to reduce the amount of land that might currently be returned in freehold to Aboriginal people, creating a tension between the native title regime and the land rights regime.
39. The Bill does not include explicit wording safeguarding the existing rights of Aboriginal Land Councils. Subparagraph 47C(9)(a)(ii) does not explicitly recognise as a 'prior interest' the rights arising under Aboriginal Land Claims made under the NSW Act. Subsections 47C(6) and (7) provide the opportunity for an Aboriginal Land Council to make its interests known, but do not guarantee that these interests will be acknowledged or protected. It is odd that the Bill requires explicit agreement with the government but not with other parties whose interests may be affected in ways that would collectively diminish the rights of Aboriginal peoples.
40. The explicit agreement requirement under proposed paragraph 47C(1)(b) raises another area of tension with the land rights regime. The Law Council notes that, under the NSW Act, the State has a duty to determine Aboriginal Land Claims. Over 30,000 such claims remain outstanding, some claims taking decades to be determined. This creates a problem for the State as to how it can consent to enter a written agreement with one party when it has incomplete duties to determine a claim lodged by another party.
41. The Law Council recommends the development of a more refined mechanism, which would have regard to the complex interaction between native title rights and land rights and ensure that the two regimes operate in harmony to maximise outcomes for Aboriginal people.

Schedule 6 – Other Procedural Changes

Part 2 – Section 31 Agreements

Sections 41A and 41B

42. Section 31 agreements in most cases provide consent to the future act proposed to be undertaken by the proponent. Usually, any collateral agreement as to the payment of compensation is captured in an ancillary agreement. Ancillary agreements often provide

for payment of signing fees and compensation to accounts.

43. The Bill does not establish a register of future act agreements. Where the existence of such agreements is not publicly available information, the principles of transparency and free, prior and informed consent are more difficult to realise, particularly where the people whom the agreements benefit and whose consent is required face significant health and educational gaps. Moreover, if the existence of future act agreements is not public information, the ability to misinform in such a way as to abuse the consent procedures is facilitated.
44. At present it is possible for a proponent to enter into an agreement affecting native title rights and interests with only the people comprising the named applicant. The rest of the native title claim group may be unaware of the negotiations or the fact that a section 31 agreement has been signed and may be unable to obtain copies of the section 31 agreement or the ancillary agreement. The wider claim group may be unaware of the signing fees and compensation paid or payable to the named applicant. In this way, the benefits of future acts are confined to a few members of the native title group, the rest of whom are excluded from access to that benefit, except through the grace and favour of the named applicant.
45. The Law Council recommends that the Bill be amended to provide for the creation of a register of section 31 agreements and ancillary agreements, with suitable information restrictions to prevent access by persons other than the parties to the agreement and the members of the relevant native title claim group.

Schedule 8 – Registered Native Title Bodies Corporate

Part 1 – Requirements for Constitutions

Section 150-15

46. It is unclear whether the wording of proposed subsection 150-15(2A) refers to current subsection 150-15(2) or to proposed subsection 150-15(1A). That is, it is unclear whether the requirement that 'a registered native title body corporate must not provide for cancellation of membership on any other ground' means any other ground than those mentioned in current subsection 150-15(2) or than those mentioned in proposed subsection 150-15(1A).
47. If the latter, the Law Council would be concerned that this would have the effect of removing the ability of a registered native title body corporate to cancel membership on the ground that a member has misbehaved under current paragraph 150-15(2)(c), which then triggers current section 150-35.
48. In such a case, the Law Council suggests that it would be preferable to attempt to develop a more nuanced mechanism to deal with the perceived overuse of misbehaviour as a reason to cancel membership. Proposed subsections 150-15(1A) and 150-15(2A) may leave a corporation without a remedy in proven situations of misbehaviour, such as where a person blatantly and consistently breaches the rules of a corporation or brings the corporation into disrepute. It may make sense to limit or place more hurdles on the ability of a corporation to remove a member for misbehaviour, but it may be dangerous to remove the ability to cancel membership on that ground altogether.