Law Council
OF AUSTRALIA

27 November 2025

Ms Katherine Jones PSM
Secretary
Attorney-General's Department
3–5 National Circuit
Barton ACT 2600

By email: nativetitle.engagement@ag.gov.au

Dear Ms Jones

Evaluation of amendments to the *Native Title Act 1993*

The Law Council thanks the Attorney-General's Department (the **Department**) for the opportunity to comment on its consultation paper of October 2025, entitled "Evaluation of amendments to the *Native Title Act 1993*".

This submission is informed by input from the Law Institute of Victoria, Law Society of NSW, Law Society of South Australia and Queensland Law Society, as well as the Law Council's Indigenous Legal Issues Committee and National Human Rights Committee.

The Law Council takes the view that the amendments made by the *Native Title Legislation Amendment Act 2021* (**2021 Amendment Act**) have resulted in appropriate and meaningful improvements to the native title system, particularly in enhancing flexibility, transparency, and efficiency. The intent of the amendments is broadly supported, particularly in relation to empowering native title groups, clarifying governance, and streamlining agreement-making. This submission identifies aspects that may require further clarification or refinement.

The Law Council notes that the Australian Law Reform Commission is currently conducting a review of the Future Acts regime in the *Native Title Act 1993* (**NTA**). Its report is due on 8 December 2025. Those findings and recommendations may also be relevant to the issues under consideration in this review.

Schedule 1: Role of the applicant

The Law Council supports the amendments made by Schedule 1 to the 2021 Amendment Act, which permit greater flexibility for native title claim groups to determine their own internal decision-making structures. The amendments also include a move to majority decision-making as the default position under section 62C of the NTA and the ability for claim groups to set conditions on the authority of the applicant.

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Members of the profession consider that these amendments have operated to assist in the fair and efficient operation of a complex area of native title procedure. In particular, the amendments allow for a native title claim group, unincorporated at this stage of proceedings, to—as a collective—effectively engage in complex litigious and administrative matters. The amendments have ultimately supported greater self-determination for First Nations peoples.

Feedback suggests these provisions would benefit from further guidance to claim groups on issues including:

- conditions that can be placed on the authority of the applicant;
- the applicant's fiduciary obligations and duties to the claim group;[1]
- the instances in which proof is required that any conditions on the authority of the applicant have been satisfied; and
- succession planning.

Guidance materials could also provide information to support claim groups to adopt decision-making processes that reflect cultural authority and group consensus, and provide assistance on how claim groups can monitor, and appropriately deal with, intra-group disputes if they do arise.

Funding could be allocated to an appropriate body, such as the National Native Title Council or the National Native Title Tribunal (**NNTT**), to develop these materials so that claimant groups can achieve the maximum benefit possible from the amendments. The development of such resources must respect the right to self-determination and be drafted in consultation with First Nations peoples.

As identified in the consultation paper, Schedule 1 was intended to ensure that applicants are accountable to the broader claim group. In this respect, we suggest that section 62C of the NTA could be amended to require an applicant to obtain approval from the claim group (at an authorisation meeting):

- before agreeing to a consent determination or discontinuing a claim, or
- before entering into a Section 31 Agreement, at least where this relates to resource production as opposed to exploration.

Practitioners also suggest that some indicators could be monitored to identify whether the amendments concerning decision-making (including with respect to majority decision-making, conditions on applicants and succession) are leading to unintended conflict. Indicators could include general trends in challenges or replacement applicant applications before the Federal Court of Australia, feedback from Native Title Representative Bodies when certifying authorisation (for example, under section 24CK of the NTA), and trends in governance-related complaints to the Office of the Registrar of Indigenous Corporations (**ORIC**) or requests for assistance from the NNTT.

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[1] See, eg, *Gebadi v Woosup* [2017] FCA 1467.

Schedule 2: Indigenous Land Use Agreements

The Law Council supports the amendments made by Schedule 2 to the 2021 Amendment Act, including to allow Indigenous Land Use Agreements (**ILUAs**) to include certain areas where native title has been extinguished and to streamline procedural requirements to improve efficiency and accessibility. Members of the profession consider that ILUAs are one of the few mechanisms in the NTA that allow the genuine application of the principle of Free, Prior and Informed Consent (**FPIC**) under the United Nations Declaration on the Rights of Indigenous Peoples.[2]

Members of the profession have indicated that the amendments made by Schedule 2 have resulted in improved efficiency in relation to ILUAs, and subsequently increased capacity for native title holders to give effect to self-determination and fair agreement-making processes.

In respect of section 24ED, it may be beneficial for the legislation to make provision for purely technical amendments and typographical corrections to an ILUA to be made and registered without the need for compliance with the strict requirements of Subdivision B, C or D of Division 3 of Part 2 of the NTA. Practitioners have also suggested that the impact of amendments made under section 24ED should be monitored to ensure they do not inadvertently undermine the integrity of agreements.

Schedule 3: Historical extinguishment

The Law Council supports in principle the amendments made by Schedule 3 to the 2021 Amendment Act, including the ability through section 47C to disregard historical extinguishment of native title in specific areas (including national, state or territory parks) so that native title can be recognised in those areas despite prior extinguishment. Those amendments significantly increased the number of areas where native title can be recognised.

However, the utility of these provisions still depends on State and Territory governments' willingness to participate in discussions with Prescribed Bodies Corporate and Registered Native Title Bodies Corporate (**RNTBC**s). As the Law Council previously submitted in respect of the *Native Title Legislation Amendment Bill 2019*,[3] this provision leaves the rights of native title parties at the discretion and goodwill of the government of the day. By comparison, sections 47, 47A and 47B of the NTA simply require extinguishment to be disregarded where it has occurred by reason of the acts specified, and do not require agreement with the relevant government.

The implementation of these amendments would also be supported by clearer guidance to claim groups and express protections for FPIC in all agreement-making processes and agreements, to ensure genuine and informed participation by those groups.

The following aspects of section 47C could be clarified or improved.

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2 *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).

3 Law Council of Australia, Submission to Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Legislation Amendment Bill 2019* (5 December 2019) [33]-[34].

Definition of "park area"

The Law Council suggests that section 47C would benefit from clarification of the definition of "park area". "Park area" is currently defined in subsection 47C(3) of the NTA as follows:

> *A **park area** means an area (such as a national, State or Territory park):*
>
> *(a) that is set aside; or*
>
> *(b) over which an interest is granted or vested;*
>
> *by or under a law of the Commonwealth, a State or a Territory for the purpose of, or purposes that include, preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, declaration, vesting in trustees or otherwise.*

Members of the profession have observed that, in the case of State forests, it is not clear whether those forests were set aside "for the purpose of, or for purposes that include, preserving the natural environment of that area", and therefore whether section 47C applies. An expansive definition, which includes all areas that could reasonably be understood to be State and Territory forests and national parks, should be adopted in the interests of certainty for parties wishing to enter agreements pursuant to section 47C.

Section 47C processes

Where a native title claim is already before the Federal Court, members of the profession have observed that the public notification and comment processes required by section 47C create unnecessary delays for native title groups and additional legal costs for all parties. As part of this review, the Department should consider how this process can be simplified.

Under subsection 47C(6), before making an agreement for the purposes of paragraph (1)(b) or subsection (5), the relevant government must arrange for reasonable notification of the proposed agreement in the State or Territory in which the agreement area is located, and give interested persons an opportunity to comment on the proposed agreement. This period for comment must be at least three months, during which no agreement can be made.

Once this period for comment has ended, and the parties enter an agreement pursuant to section 47C, the applicant to the native title claim must apply to the Federal Court to have their original claim amended to include the area covered by that agreement, in accordance with subsection 13(1) of the NTA. When the Native Title Registrar receives a copy of an amended application under section 64 of the NTA—and if paragraphs 66A(b) and (c) are satisfied—the Registrar must give notice of the amended application to each of the parties of the proceedings. If the period specified in the notice in accordance with paragraph 66(10)(c) has not ended, the Registrar must give notice of the amended application to the persons to whom the Registrar previously gave notice of the application in accordance with paragraph 66(3)(a).

The period of notice of the amended native title claim is a further three months, in accordance with paragraph 66A(1C)(b) of the NTA.

In circumstances where the original claim covered a broad geographic area, with generic exclusions about areas where native title was or appears to have been extinguished, it is reasonable to assume that any interested party would have become a party when the

original notice under section 66 was given, and had notice of the parties' intention to enter into the section 47C agreement when the notice was given under subsection 47C(6).

Moreover, members of the profession have observed that section 47C agreements are often negotiated and agreed towards the end of the native title claim. This has resulted in delays in either resolving the claim or requiring the claims to be split into two parts (with the section 47C area being determined at a later stage) and unnecessary legal costs.

Requiring two three-month periods for public comment—one prior to making a section 47C agreement, and one following the filing of an application to amend the original application—in addition to the three-month period when the claim was originally filed, represents an unnecessary duplication that results in delayed outcomes for native title claimants. The Department could consider dispensing with one of the two three-month periods for public comment to avoid delays in the resolution of native title claims.

Schedule 4: Allowing an RNTBC to bring a compensation application

The Law Council supports the expanded access provided by Schedule 4 to the 2021 Amendment Act for RNTBCs to bring a compensation application in relation to an area where native title has been extinguished within their determination area.

However, the bodies responsible for supporting native title claimants and holders are often significantly underfunded, and support to native title holders is often delayed where native title representative bodies have exhausted their designated annual funding. It is also important for RNTBCs to engage specialist, independent legal and financial advisors before lodging compensation applications, to develop a clear strategy and plan for how compensation will be used. Funding should be allocated to support RNTBCs to obtain this advice—for example, through a dedicated RNTBC Compensation Support Fund—to ensure the rights provided by Schedule 4 are practically accessible.

The Law Council also recommends provision of clear guidance for RNTBCs on evidentiary requirements for such applications.

Schedule 5: Intervention and consent determination

The Law Council supports the amendments made by Schedule 5 to the 2021 Amendment Act, including their clarification of the Commonwealth Minister's role as intervener in native title proceedings.

Schedule 6: Other procedural changes (including section 31 agreements)

The Law Council supports increased transparency and certainty to all parties to native title matters through a public record of section 31 agreements pursuant to Schedule 6 to the 2021 Amendment Act. Practitioners suggest further consultation with stakeholders on confidentiality and privacy concerns, particularly where names and addresses are visible in such agreements.

Schedule 6 inserted new subsection 31(1A) of the NTA, which provides that "the Government party does not need to negotiate about matters that the Government party determines do not affect the Government party if the other negotiation parties give written consent". Practitioners report that some State Governments tend to ignore that condition and treat the provision as though it provides an absolute exemption to any obligation to

negotiate in good faith (for example, in relation to the terms of a section 31 agreement to which a Government party must be a party). This misconception may need to be clarified, for example, by amendment to this subsection.

Schedule 7: National Native Title Tribunal

While the Law Council supports the new functions for the NNTT introduced by Schedule 7 to the 2021 Amendment Act, adequate resourcing remains essential for the Tribunal to discharge those functions effectively. The NNTT must also maintain a clear separation between its mediation and arbitral functions and provide culturally competent mediators and culturally grounded dispute processes where requested.

To further assist parties, we suggest that a list of experienced mediators and negotiators could be published, accompanied by funding for their engagement where needed.

Schedule 8: Registered Native Title Bodies Corporate

Members of the profession support enhanced governance and dispute resolution requirements for RNTBCs as effected by Schedule 8 to the 2021 Amendment Act. However, they have also identified the risk of administrative burden to smaller RNTBCs that may require additional support and training to comply with these provisions. It is crucial that RNTBCs are provided with sufficient resources to more effectively undertake the regulatory obligations under Schedule 8 and the numerous other regulatory obligations imposed upon them.

There may also be access to justice impacts of exclusive Federal Court jurisdiction under section 581.30 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI Act**) in this area in relation to remote RNTBCs and smaller RNTBCs with less access to funding and legal assistance.

Subsection 141.25(2), CATSI Act

The amendments to the CATSI Act achieved by Schedule 8 to the 2021 Amendment Act were designed primarily to ensure that the Rulebooks of RNTBCs properly reflect their representation of common law holders of native title, on whose behalf they hold the native title rights and interests over a particular area of land or waters or for whom they act as agents in respect of such rights and interests. In particular, these changes ought to result in all adult common law holders being eligible to apply for membership of an RNTBC and being accepted as members by its Directors.

However, new subsection 141.25(2) of the CATSI Act (when considered in conjunction with new subsection 144.10(3A)) may allow for too much ambiguity or flexibility in what may be provided for in this regard in an RNTBC Rulebook. Members of the profession have also observed that the insertion of subsection 141.25(2) of the CATSI Act, without defining the term “represented, directly or indirectly” and without clarifying the relationship between this provision and subsections 150.15 and 150.35 of the CATSI Act, has led to significant confusion over its scope.

Recent interpretation of this section by the ORIC and the Administrative Review Tribunal (**ART**) has restricted or undermined RNTBCs’ ability to determine their membership eligibility requirements or cancel the membership of individual members. ORIC (see ORIC Policy PS-10) and the ART (in *Wintawari Guruma Aboriginal Corporation RNTBC and*

Registrar of Aboriginal and Torres Strait Islander Corporations [2025] ARTA 1900) have formed the view that subsection 141.25(2) prevents RNTBCs from including membership eligibility requirements that make previously cancelled members ineligible for membership for a defined period of time (in this case, five years) without also providing for those cancelled members to be "represented indirectly" by another member of the RNTBC. Without further clarification, RNTBCs must then either:

- ensure that their rule books provide for some form of "indirect representation" of cancelled members, undercutting the ability of RNTBCs to effectively remove people from membership, including where there have been conduct concerns; or
- risk being caught in a situation where a cancelled member can immediately re-apply for membership and an RNTBC must accept their application for membership.

Arguably, the requirement to provide for "indirect representation" in an RNTBC now also applies to common law holders who are over the age of 15 (which is the CATSI Act minimum age for membership) but under the age of 18 (typically the minimum age for members of RNTBCs).

This position further restricts the ability of RNTBCs to regulate their own membership. It may also entrench dysfunction when disruptive members are unable to be effectively removed as members of an RNTBC, and impose an open-ended and uncertain requirement of "representation" in all cases (including as to what this entails, how this must operate and what a "represented" non-member must be provided).

Subsection 487.5(1) CATSI Act

In respect of compliance with the NTA, there is a risk that the amended subsection 487.5(1) of the CATSI Act could potentially be exploited by companies or entities to place RNTBCs into administration, for example if commercial negotiations do not result in an agreement. To prevent this outcome, paragraph 487.5(1)(ca) could be amended to provide that "there has been a serious failure, or a number of failures, to comply with its Native Title legislation obligations, *in a manner prejudicial to the common law holders*".

Schedule 9: Just Terms Compensation and Validation

The Law Council supports resolution of uncertainty following the decision in *McGlade v Native Title Registrar and Ors* [2017] FCAFC 10 through Schedule 9 to the 2021 Amendment Act. The amendments made by Schedule 9 operated to validate agreements executed under instruction of the full group and advanced the principle of self-determination. While the Law Council supports these intentions, there should be ongoing review of these processes (both in respect of ILUAs and section 31 agreements) to ensure no unintended consequences arise from the amendments. One possibility is the creation of a proportionate review and/or remediation mechanism to address agreements validated post-*McGlade* where FPIC or equitable benefit sharing is in doubt.

Practitioners have also sought clarification about what constitutes a "majority" for the purposes of these provisions, such as when negotiating ILUA agreements under

section 24CD (for example, whether it is constituted by a majority of members of the applicant or majority of attendees at a properly constituted meeting).

Contact

Thank you once again for the opportunity to comment on the consultation paper. If the Law Council can be of any further assistance, please contact Alan Freckelton, Senior Policy Lawyer,

Yours sincerely

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