



**MONASH** University  
Castan Centre for Human Rights Law

## **Castan Centre for Human Rights Law**

### **Monash University**

**Submission to the Reforms to the *Native Title Act 1993* (Cth) Options Paper**

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Native Title Unit  
Attorney-General's Department  
3-5 National Circuit  
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Dear Native Title Unit,

**Castan Centre for Human Rights Law - Submission to the Reforms to the *Native Title Act 1993* (Cth) Options Paper**

Thank you for the opportunity to make a submission to the above options paper. By way of general overview, the Castan Centre supports those recommendations which increase the autonomy of native title holders to decide the way in which they or their nominated representatives make decisions, and which strengthen Indigenous governance and dispute resolution. The Castan Centre also supports increased transparency between native title holders and their representatives.

The Castan Centre's responses to the questions in the options papers are set out as follows:

**I. Section 31 Agreements**

**Question 1: Should the Act be amended to confirm the validity of section 31 agreements made prior to the *McGlade* decision?**

Given the likelihood of there being a significant number of s 31 agreements, the Castan Centre supports the proposal to confirm the validity of s 31 agreements made prior to the *McGlade* decision.

**Question 2: What should be the role of the applicant in future section 31 agreements? Which of the three options, if any, do you prefer?**

In relation to the role of the applicant in future s 31 agreements, the Castan Centre supports option 3, provided that sufficient safeguards are put in place to ensure that the native title group has authorised the making of the agreement.

**II. Authorisation and the applicant**

**Question 3: Do you support the proposals to:**

**(a) Allow claim group members to define the scope of the authority of the applicant.**

The Castan Centre supports this proposal.

**(b) Clarify that an applicant can act by majority unless the claim group specifies otherwise.**

The Castan Centre supports this proposal on the basis that the claim group does not have to specify unanimous decision-making by the applicant as the only alternative. The claim group should be able to specify what it chooses above simply a bare majority up to unanimous, depending on the number of people comprising the applicant and the claim group's particular circumstances.

**(c) Allow the composition of the applicant to be changed without going through a section 66B re-authorisation process in certain circumstances.**

The Castan Centre supports this proposal provided that the circumstances are clearly defined and do not result in numerous changes to the applicant.

**(d) Impose a statutory duty on the members of the applicant to avoid obtaining a benefit at the expense of native title holders.**

The Castan Centre supports this proposal.

### **III. Agreement making and future acts**

**Question 4: Do you support the creation of an alternative agreement-making mechanism? If so, what limitations would you seek to have applied to such an agreement?**

The Castan Centre is of the view that it is not necessary to have an alternative agreement-making mechanism, as the native title system currently allows for adequate flexibility. It would appear that PBCs (and their advisors/NTRBs/SPs) are simply not aware of these existing mechanisms. Accordingly, these existing mechanisms need to be adequately promoted.

**Alternatively, does the native title system currently allow for adequate flexibility in agreement-making? Are there better ways to achieve the objectives of increasing flexibility in agreement-making and reducing transaction costs can be achieved (for example, through the COAG Investigation recommendations outlined in Attachment B)?**

The Castan Centre is not in favour of the recommendations in Attachment B, particularly recommendation B2, which recommends allowing native title holders to vary the protection provided by section 211. The only benefit of this proposal is for state and territory governments, there are no foreseeable benefits for native title holders. The protections in section 211 are limited in any event to carrying on activities 'for the purpose of satisfying their personal, domestic or non-commercial communal needs' and 'in exercise or enjoyment of their native title rights and interests.' There is a danger that native title holders may get coerced into reducing these already limited protections, given the disparity of bargaining power between state and territory governments and native title holders.

**Question 5: Do you support the proposals set out in Attachment C to streamline existing agreement existing processes?**

The Castan Centre supports proposals C1, C3, C5, C6, C7, C8 and C11.

In relation to C2, the types of minor technical amendments that could be made to an ILUA without re-registration would need to be clearly set out in the NTA. Clause 12 of the Native Title Amendment Bill 2012 would appear to be sufficient in that regard.

In relation to proposal C4, the Castan Centre suggests that NTRBs/SPs be notified of any native title decisions.

In relation to C9, the problem identified would appear to relate to the adequacy of the notice. Section 24MD(6B) only requires that any claimant may object, within 2 months after the notification. It does not require that claimants/body corporates/NTRBs etc be notified that they can have their objection heard by an independent person or body for adjudication. If s 24MD were to be amended to allow certain types of compulsory acquisitions to proceed if there is no request for independent adjudication (assuming s 24MD(6B)(e) has been complied with), then the notice of the future act and the ability to object must include notification of the ability to include in the objection a request for independent adjudication, and the consequences of not making such a request.

In relation to C10, the Castan Centre supports encouraging the use of electronic and online communications for the transmission of notices, provided that the option to obtain a hard copy of comprehensive notices by mail is retained. Internet access, particularly in remote and regional areas, may be lacking, or of poor quality. This should not be to the disadvantage of PBCs or registered claimants.

#### **IV. Transparent Agreement Making**

##### **Question 6:**

##### **(a) Should there be a Register of section 31 agreements?**

The Castan Centre supports the proposal for a Register of section 31 agreements. However, if the NTA is amended to remove the requirement for government parties to be a party to a section 31 agreement, then any content of the agreement placed on the Register may need to be limited.

##### **(b) Should ILUAs – and other agreements made under the Act – be publicly accessible?**

The Castan Centre is of the view that ILUAs and section 31 agreements should be publicly accessible, but not content that is commercially or culturally sensitive. (NB: Government parties must only be a party to an ILUA where it involves extinguishment of native title).

#### **V. Indigenous Decision Making**

**Question 7: Should the Act and the PBC Regulations be amended to allow native title claim groups and native title holders to determine their decision-making processes, rather than mandating the use of traditional decision-making where such a traditional process exists?**

The Castan Centre supports amendments to the Act and the PBC Regulations to allow native title claim groups and native title holders to determine their decision-making processes.

## **VI. Claims Resolution and Process**

### **Question 8: Do you support the proposed amendments detailed in Attachment E to improve the efficiency and effectiveness of claims resolution?**

The Castan Centre supports recommendations E1 and E2 in relation to the application inquiry process. It also supports recommendation E3 regarding historical extinguishment over pastoral leases held by native title claimants, E4 and E5 regarding the bringing of compensation applications by PBCs, and E6 regarding the disregarding of historical extinguishment by consent over national, state and territory parks.

## **VII. Post Determination Dispute Management**

### **Question 9: Do you support the proposed amendments in Attachment F to address post-determination native title related dispute?**

The Castan Centre supports recommendation F1 to give ORIC oversight of PBC compliance with the PBC Regulations, and recommendations F2 and F3. The Castan Centre also supports recommendation F4, on the basis that ‘exceptional circumstances’ are clearly defined so as not to allow its arbitrary application. The Castan Centre supports recommendation F5, insofar that it aims to prevent arbitrary cancellation of PBC membership. However, we note that general meetings can be quite expensive to run and/or attend and may therefore pose a significant financial burden on PBCs, or their members, if that is included in the mandated process for membership cancellations. Accordingly, this needs to be taken into consideration in developing specific legislative reforms. We support F6 as being complementary to recommendations F4 and F5.

The Castan Centre supports recommendation F7, provided that it does not create a significant administrative and financial burden on PBCs. Clarity is also required on ‘substantial interest’, as it is not defined in the PBC Regulations.

The Castan Centre supports recommendations F8, F9 and F10. The Castan Centre supports recommendation F11 insofar as it relates to the Federal Court. In relation to the NNTT, the Castan Centre supports allowing PBCs or individuals to approach the NNTT directly, without having to obtain the consent of the NTRB/SP, to seek dispute resolution assistance. In relation to expanding the NNTT's arbitration powers, the Castan Centre has concerns that it might displace traditional dispute resolution mechanisms or alternative mechanisms chosen by the native title group. The Castan Centre suggests further investigations be undertaken to identify the most appropriate independent dispute resolution mechanism.

Yours faithfully,

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