



Law Council
OF AUSTRALIA

Reforms to the *Native Title Act 1993 (Cth)*

Attorney-General's Department

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Table of Contents

About the Law Council of Australia	3
Acknowledgement	4
Executive Summary	5
Introduction	6
Section 31 agreements	6
Authorisation and the applicant	8
Agreement-making and future acts	9
Streamlining existing agreement-making	11
Transparent agreement-making	13
Indigenous decision-making	14
Claims resolution and process	15
Post-determination dispute management	16
Other comments	17

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 to the Law Society of New South Wales, the Queensland Law Society, the Law Society of South Australia and its Indigenous Legal Issues Committee for their assistance with the preparation of this submission.

Executive Summary

1. The Law Council welcomes the opportunity to provide the following submission in response to the Attorney-General's Department's Options Paper regarding reforms to the *Native Title Act 1993* (**the Native Title Act**). The Law Council wishes to thank the representatives of both the Attorney-General's Department and Prime Minister and Cabinet for engaging in consultations with stakeholders, including the Law Council, at the release of the Options Paper.
2. The Law Council previously participated in the Australian Law Reform Commission's (**ALRC**) 2015 report 'Connection to Country: Review of the *Native Title Act 1993* (Cth)' and is pleased to see a number of the recommendations of that report included in the Options Paper.
3. The Options Paper proposes a number of reform proposals to the Native Title Act which are intended to improve the efficiency and effectiveness of the native title system to resolve claims, better facilitate agreement-making around the use of native title land, and promote the autonomy of native title groups to make decisions about their land and to resolve internal disputes.
4. In general, the Law Council is supportive of reform measures that are designed to promote certainty, efficiency and effectiveness in native title decision-making. These goals, however, must not undermine core principals underpinning this area, including the need for authority, legitimacy and a recognition of the communal character of native title law.
5. In responding to many of the questions posed within the Options paper, the Law Council has attempted to reach a balance between efficiency and legitimacy. In some cases, views of the Law Council's various Constituent Bodies have differed. These instances are noted within this submission.
6. The Law Council looks forward to continuing to work with the Attorney-General's Department as these reforms are progressed, including through the provision of meaningful submissions to an exposure draft bill, once developed.

Introduction

7. The Law Council notes that the Options Paper has been informed by an Expert Technical Advisory Group, comprising of native title, state and territory government, Commonwealth, and industry representatives.
8. While the Law Council supports this multi-stakeholder format, it is important to ensure that representation accurately reflects the interests of traditional land owners, and the consultation process continues to recognise the importance of voices of those that will be most impacted by these proposed measures.
9. With this general comment in mind, the Law Council's key submissions in response to the questions contained in the Options Paper are as follows:

Section 31 agreements

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

10. 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 v Native Title Registrar* [2017] FCAFC 10 (*McGlade*) requires attention. The Law Council is therefore supportive of legislative reform measures to confirm the status of existing section 31 agreements and considers that the amendment should be a priority.
11. The Law Council suggests that this validation exercise could potentially be linked to the registration of the agreements on a central register (see response to Question 6 below). This approach provides an incentive for parties to existing section 31 agreements to register those agreements under any new arrangement.
12. 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. However, 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.¹ Consideration should be given as to whether the practical difficulties associated with retrospectively recognising existing agreements are outweighed by the benefits of greater transparency in this area.
13. In this regard, the Law Society of New South Wales has highlighted the uncertainty surrounding the circumstances under which many past section 31 agreements have been entered into, and has raised its concern with the retrospective validation of agreements that may not have been entered into with the full consent and authority of all native title holders.

¹ *Native Title Act 1993* (Cth), section 41A.

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?

14. The Law Council considers that Option 1, being the current status quo post-*McGlade* and which requires all members of the applicant to be mandatory parties to section 31 agreements is not workable, particularly where members of the applicant are deceased. Similarly, the Law Council considers that Option 2 provides little flexibility.
15. The Law Council considers that where possible, the Native Title Act ought to aim for consistency between the execution of section 31 agreements and Indigenous Land Use Agreements (**ILUAs**). In light of the amendments to the Native Title Act post-*McGlade* regarding ILUAs, the Law Council endorses the Option 3 approach which allows for section 31 agreements to be executed by a majority of members of the applicant unless the claim group has directed otherwise at an authorisation meeting.
16. Subject to the reservations set out in paragraphs 18 and 19 below, the Law Council considers Option 3 to be the most practical of the options proposed. It allows for a greater level of flexibility in providing for delegation of authority to deal with agreements of like nature, and should streamline the existing cumbersome process.
17. In addition, this option would ensure that a claim group would have to turn their collective mind to the appropriateness of only requiring a majority of members of the applicant to sign a section 31 agreement rather than it merely being the default position.
18. However, as noted in the Options Paper, this option requires safeguard procedures to protect against agreements being entered into that are unauthorised or unrepresentative. It is envisaged that an authorisation procedure as set out in section 251A for ILUAs would be an appropriate starting point from which to determine the appropriate safeguards for section 31 agreements executed by majority.
19. In endorsing Option 3, the Law Council acknowledges that a section 251A authorisation processes may be costly and time consuming, and is conscious not to impose authorisation procedures that are overly onerous or burdensome. However, there should be the capacity for the claim group to provide standing directions to the Applicant as to how future acts are to be dealt with in the same manner as common law holders direct Prescribed Bodies Corporate (**PBC**).
20. The Law Society of New South Wales adopts a slightly different view, noting that there may be good reasons for a claim group to require that all of the members of the applicant sign a section 31 agreement, particularly where there is a large claim group where the interests in land of members of the claim group vary. The Law Society of New South Wales' preferred position is that all of the members of the applicant, other than deceased members, are to be mandatory parties to a section 31 agreement, unless the claim group has directed otherwise at an authorisation meeting.
21. Further, the Queensland Law Society suggests that Option 3 should be avoided as it gives rise to the potential for arbitration being instigated by a person who makes up the applicant that does not sign the section 31 deed. In this instance, the Queensland Law Society has identified Option 2 as a more balanced proposal that allows for the applicant to act collectively, while removing the need for a native title claim group to undertake a costly section 66B exercise if a member has passed away.

22. As a related issue, the Law Council recommends that the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) (**PBC Regulations**) are reviewed so that they provide sufficient flexibility in the manner described further under Question 4 of this submission.

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?**
- b) clarify that an applicant can act by majority unless the claim group specifies otherwise?**
- c) allow the composition of the applicant to be changed without going through a section 66B reauthorisation process in prescribed circumstances?**
- d) impose a statutory duty on the members of the applicant to avoid obtaining a benefit at the expense of native title holders?**

23. The Law Council generally supports measures that will allow claim group members to determine the scope of the authority of the applicant.
24. As noted in our earlier submission to the ALRC, the Law Council holds the view that the Native Title Act should be amended to provide that, in authorising the applicant, a native title claim group must specify whether the applicant is to act by consensus, by majority or by other decision-making processes.² This would require the claim group to turn its collective mind to the issue at the point of authorisation, rather than having such a fundamental issue determined by the existence of a statutory default position.
25. If the decisions of the applicant are able to be made by majority, a question then arises as to the need to bypass the section 66B reauthorisation process. The removal of a member of the applicant can be an extremely controversial matter. Inserting into the legislation the capacity to remove a member of the applicant because they are unwilling or unable to perform their duties is likely to be open to abuse. Caution in this regard must be had to the attempted removal of a person that does not consent to being removed as an applicant, or where there is a dispute between members of the applicant about whether the person is able and willing to act as an applicant, or whether they simply want them removed.
26. With regard to Proposal (d), the Law Council suggests that the wording be clarified so that it clearly extends to protect members of claim groups, as well as native title holders. The Law Council proposes the following amendment to (d) as italicised below:
- Impose a statutory duty on the members of the Applicant to avoid obtaining a benefit at the expense of claim group members or native title holders or which is separate from any benefit of claim group members or native title holders.*
27. In relation to the proposal at item A3, the Law Council remains concerned to ensure that the response to the situation of a member of the applicant 'no longer willing or able

² Law Council of Australia, Submission No 64 to the Australian Law Reform Commission, <--break-->Review of the *Native Title Act 1993*, 23 January 2017, 19.
<https://www.alrc.gov.au/sites/default/files/subs/64._org_law_council_of_australia.pdf>.

to perform the functions of the applicant' is directed by the claim group. This could readily be done at the authorisation meeting where the scope of the powers of the applicant, and the question of whether they need to act by majority is addressed. This is in effect what is assumed in item A4 of Attachment A.

28. In relation to item A5, the Law Council notes the decision in *Gebadi v Woosup* (No 2) [2017] FCA 1467, that an applicant owes a common law fiduciary duty to the claim group. The Law Council supports the proposal in item A5 to create a statutory duty to that effect.
29. The Law Council agrees that the amendments proposed in Attachment A should only be prospective as proposed by item A6.

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?

30. The Law Council considers that the rights and position of native title holders should not lightly be diminished. However, it is submitted that there is a need PBCs to possess the ability to make prompt decisions in certain instances, and that not every one of these decisions will necessitate the consent of the broader native title holder group. The Law Council supports, in principle, measures that will provide for more efficient and effective decision-making processes for native title holders, including the introduction of simpler agreement-making mechanisms for future acts.
31. The Law Council is wary of supporting a change simply based on the involvement of native title holders in the doing of 'future acts' as contemplated in proposal B1 of Attachment B. It will be important to ensure that such measures are limited to a finite list of circumstances, and do not come at the expense of the authority, legitimacy and communal character that underpins native title decision-making.
32. The Law Society of New South Wales adopts a slightly different approach, noting that it does not support amendments which it believes would avoid the requirement of PBCs to consult or obtain the consent of native title holders when discharging responsibilities as either a trustee or agent of native title holders.
33. The Law Council notes that the capacity to develop and apply adapted processes already exists under the Native Title Act and the PBC Regulations. If PBCs are not making use of these provisions, then that issue should be investigated and resolved before amending the legislation.³
34. Proposal B2 of Attachment B, recommends allowing native title holders, through an ILUA, to vary the effect of section 211 of the Native Title Act. The Law Council notes that the justification for the proposal is not sufficiently explained in the Options Paper. The Law Council also notes the concerns of Jagot J expressed in *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992:

As the ILUA is confidential I can say only these things. It is apparent from submissions on behalf of the first respondent in various matters that in New South Wales ILUAs are seen by the State as a means, at least in part, of

³ See *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth), Reg 8A.

*confining the very rights which consent determinations acknowledge and recognise. Whatever else ILUAs might be intended to achieve, they are not intended to be the “price” for a negotiation in good faith of an agreement under ss 87 or 87A. Further, s 211 of the NTA which restricts the operation of State laws on native title rights and interests of certain kinds cannot be overlooked*⁴

35. The Law Council has some further concerns as to the potential for undue pressure for such variation being brought to bear in the context of a more comprehensive settlement/compensation ILUA.
36. Native title holders are often at a significant power disadvantage when negotiating with governments. The Law Council is concerned that if Proposal B2, which would enable native title holders to contract out of section 211, were implemented, many native holders may be unnecessarily persuaded into contracting out of section 211. This may, in turn, lead to additional offences where native title holders continue to hunt, fish, gather and engage in cultural or spiritual activities on land no longer covered by section 211. The Law Council is aware of the reliance of traditional owners on section 211 as a defence in relation to prosecutions for taking and use of fish.
37. More generally, it is noted that it is within the context of flexible and responsive PBC decision-making that the strength of a PBC’s governance can be tested, particularly for those entities that are under-resourced and do not have readily available access to quality advice or support, or the logical or other capacity to take advantage of the existing measures.
38. In this regard, any proposal to streamline decision-making procedures for native title holders raises the important issue of resourcing and support for PBCs. The Law Council has been made aware of many PBCs currently lacking the capacity to perform their functions properly. The ability for those under-resourced PBCs to comply with any proposed alternative agreement-making mechanism must be taken into consideration when introducing reforms that will bypass existing consent processes.
39. The Law Council has some concerns that Proposal B3 of Attachment B is inconsistent with the need for transparency and representative decision making. Given the knowledge about the operational difficulties, and funding and capacity shortfalls, amendments to provide the PBCs with such power would appear too open to potential abuse.
40. In commenting that Proposal B3 is too broadly expressed, the Law Society of South Australia has suggested that its application could be limited to:
 - ‘low impact future acts’ which would not be excluded by section 24LA(1)(b) (if that section had been capable of applying post native title determination);
 - ‘future acts’ within subdivisions G-K and N where and to the extent that they would provide only for notification and/or an opportunity to comment in relation to that proposed act;
 - ‘future acts’ allowing for minerals exploration only; and
 - where there is a ILUA authorising the PBC to contract in relation to a class (or classes) of ‘future acts’, such ‘future acts’.

⁴ At [58].

41. In relation to proposal B4 of Attachment B, which considers options for addressing the relationship between state and territory natural resource management activities and native title rights including amending section 24LA to permit the doing of low impact future acts following a determination that native title exists, the Law Council has concerns. The Law Council notes that there is a good policy reason as to why there is a higher level of compliance required for activities affecting native title post-determination. The precise terms of the mechanism would need to be considered before the proposal could be supported. The Law Council finally notes that this proposal was not supported by the Expert Indigenous Working Group.

Streamlining existing agreement-making

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

42. The Law Council is supportive of the proposal to streamline existing agreement processes, including the ability to make minor amendments to the register of ILUAs without the need for re-registration. Any reforms, however, will need to be subject to strict controls to ensure that the integrity of the register remains intact.
43. Proposal C2 seeks to allow minor amendments to be made to ILUAs without requirement for a new registration process. The Law Council considers that ILUAs should allow for minor amendments to be made by contract by PBCs, where amendments are only of a technical nature and not substantive. This would save a considerable amount of time and money by avoiding consultation over minor matters.
44. The Law Council further notes with respect to Attachment C:
- (a) Proposal C1 is an appropriate amendment proposal. However, the 'specific circumstances' in which that would be allowed to occur have not been identified. The Law Council considers that care would need to be taken that it is clear that any extinguished area is clearly within the tradition country of the people who PBC represents. It is also not clear that such agreement should be able to be made where there are third party interests on the land which may also have an interest in the subject matter of the agreement;
 - (b) Proposals C2-C3 are appropriate amendment proposals, however it is noted that the Law Council has concern over the scope and operation of the proposed amendments, particularly as the Options Paper does not further specify what is proposed;
 - (c) Proposal C4 is not supported. The Options Paper does not identify a need for the amendment. The current requirement does not appear to be onerous and it at least ensures that there is some external scrutiny of what may be significant long term agreements. Native Title Representative Bodies (**NTRB**) and Native Title Service Providers (**NTSP**) may also be well placed to bring to the attention of PBCs what may be glaring defects in the agreement. The number of PBCs requiring support from NTRBs and NTSPs is estimated to be far greater than those which do not need support. This amendment may be re-visited in the future when PBCs are better resourced;
 - (d) Proposals C5 and C7 are appropriate amendment proposals;

- (e) Proposal C6 has substantial ramifications and must be the subject of detailed and well supported justification. While it is difficult for parties to adequately estimate compensation prior to the Native Title Act, the failure to provide for compensation or a compensation mechanism prior to doing the Native Title Act will place the Applicant/PBC at a significant disadvantage in any later negotiation. Nevertheless, the Law Council supports the intent of proposal C6 to amend section 24EB, to allow parties to an ILUA to agree effectively to defer the negotiation or determination of native title compensation for a 'future act' to a future date;
 - (f) The Law Council is of the view that there is merit in the proposal at item C7 to amend section 199C to clarify that removal of details of an ILUA from the Register does not invalidate a future act in some circumstances. It is however currently unclear what is proposed. Section 199C provides for an ILUA to be removed from the register in a wide range of circumstances including where the agreement has expired, or the parties agree it should be removed. In those circumstances, it would seem appropriate to clarify that future acts authorised by the ILUA remain valid. However, section 199C also provides for the removal of ILUAs from the register where they are procured by fraud and it is not clear why a future act would necessarily remain valid in those circumstances, particularly if the beneficiary of the future act had notice of the fraud;
 - (g) The Law Council considers the proposed change in item C9 which proposes in relation to amending the objection process created by section 24MD(6B) would be appropriate where it was apparent that the registered native title holders were not wanting their objection to be heard;
 - (h) The Law Council notes that the proposal at item C10 to print summary notices in the paper and then have complete notices sent in the mail seems more time consuming than simply printing a complete notice in the first place and may cause unnecessary delays in circumstances where there are set timeframes for people to respond to the notice;
 - (i) With regards to proposal C11:
 - (i) The Law Council submits that the decision in *QBC v Bygrave* [2011] FCA 1457 (**Bygrave**) provides more certainty and is preferred to the decision in *Kemp v Native Title Registrar* [2006] FCA 939 (**Kemp**). In *Kemp*, the court found that an individual whose claim to native title was 'more than merely colourable' would need to authorise an ILUA, even in circumstances where that person did not have a registered claim. In *Bygrave*, the court instead found that only registered claimants needed to authorise ILUAs;
 - (ii) The Law Council considered that the decision in *Kemp*, would, in practice, create real difficulties and is likely to increase both costs and delays, as it is very difficult to assess as a matter of fact, whether an assertion of native title is more than 'merely colourable'.
45. Further, the Law Council supports the recommendation that the requirement for government to be a party to section 31 agreements be removed, only if a centrally accessible register of section 31 agreements be established, as is proposed in the next section of the Options Paper.

Transparent agreement-making

Question 6:

- a) Should there be a register of section 31 agreements?**
- b) Should ILUAs – and other agreements made under the Native Title Act be publicly accessible?**

46. The Law Council supports the proposal for there being a register of section 31 agreements, subject to restrictions over registerable content as detailed below.
47. The lack of transparency of section 31 agreements is a clear issue for traditional owners, many of whom are unaware of the existence or extent of section 31 agreements pertaining to their land. In recognition of this issue, the Law Council supports the mandatory registration of section 31 agreements, and suggests that the validity of past agreements be made dependent upon entry of the agreement in a register (see response to Question 1 above).
48. The Law Council considers that the information on the Register should be limited to basic details such as the existence of the agreement, the details of the parties, the date of the agreement and what tenements are dealt with under the agreements.
49. The Law Council also considers that registration should be subject to identification of the parties, the area to which the agreement applies, and production to the registrar of a copy of the agreement and any ancillary deed.
50. The Law Council also considers there should be a mechanism for facilitating awareness of the agreement amongst other applicants and non-applicant claim group members. An obligation to provide a copy of the agreement to every claim group member could be very onerous and contact details of claim group members may not be known. However, the Law Council suggests that an appropriate mechanism may be an obligation to provide a copy of the agreement to all members of the applicant who were not parties to the agreement and to other claim group members on request.
51. The Law Council considers that the presence of commercially and culturally sensitive material within many section 31 agreements must be taken into account when determining the level of accessibility of any new register. The disclosure of compensation information could also create a 'market' such that native title groups are not able to negotiate a better outcome for their group if a proponent is aware of previous deals negotiated.
52. For these reasons, it is submitted that access to the proposed register of section 31 agreements should maintain restrictions to protect sensitive data from third parties, rather than allowing unfettered public access, while promoting access for members of the native title claim group or PBC. In other words, the Law Council does not consider it appropriate for the details of agreements, many of which are commercially sensitive and confidential, to be publicly accessible.

Indigenous decision-making

Question 7: Should the Native Title 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?

53. The Law Council notes that any discussion on the decision-making processes for PBCs must have regard to the need for adequate resourcing of these entities to ensure appropriate decision-making and governance is in place.
54. There is an extremely broad spectrum of PBCs, ranging from well-resourced entities with access to advice and support, through to small under-resourced bodies that often lack the capacity and resourcing to perform its function properly. The Law Council submits that this diversity and imbalance should be kept front of mind as these reform measures are discussed.
55. The Law Council does not support the proposals set out in Attachment D of the Options Paper. The present provisions only require application of traditional making processes where those processes are required under traditional law to be made in a certain manner. Native title groups already have the opportunity to select their own decision-making processes, whether traditional or otherwise, where not otherwise bound by traditional law.
56. In many areas where native title has been recognised there is a clear demarcation of interests where different people have different interests. The proposal invites that to be ignored, and in relation to future acts affecting specific areas, leaves the interests of individuals with primary interests in an area open to being overridden by people who may not have a significant interest at all.
57. Although these proposals align with the recommendations of the ALRC relating to indigenous decision-making,⁵ and provides greater flexibility for native title holders to adopt procedures that are appropriate to their circumstances as a collective group, rather than having to operate subject to a legislative requirement to apply traditional processes, the effect of this amendment will be to allow a group of native title holders to make decisions which are in breach of traditional law and custom. The Law Council therefore considers that the current procedures should remain.
58. It is noted that the Law Society of South Australia has indicated its support for the proposal, asserting that this approach would have many practical advantages, and also can accommodate groups that adapt their decision-making process over time. Similarly, the Queensland Law Society considers this to be a sensible suggestion.

⁵ Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) recommendations 10.1-10.4.

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?

59. The Law Council supports in-principle attempts to make the claims resolution process more efficient and timely, however has reservations regarding the proposed amendments to permit native title application inquiries to proceed in the absence of consent from the applicant, and that the National Native Title Tribunal (**NNTT**) be empowered to summon a person to appear before it in a native title application inquiry.
60. While it is appreciated that these reforms will facilitate the greater use of native title application inquiries, the Law Council is concerned that such measures will have adverse and disproportionate effects on unrepresented parties, who under the current scheme would not be compelled to attend a native title application inquiry. Such inquiries may be resource intensive and are not binding. Such a procedure is likely to be more effective where the parties enter into it willingly and on terms they are comfortable with. For the reason, the Law Council has reservations about expanding the power of the NNTT to compel production of documents of summons a person to appear before it.
61. The Law Council also has reservations about the proposal at item E3 to expand the operation of section 47(1)(d) of the NTA to allow it to apply where claimants are members of a company that holds the pastoral lease. It is not clear from the proposal how many members of the company would need to be members of the claim group and as expressed it is not clear what range of organisations may be affected by such a proposal.
62. In relation to items E4 and E5, the Law Council supports the proposal to allow a PBC to be the applicant on a compensation claim, provided it is clear that the area concerned is within an area which the PBC would be properly regarded as representing the native title holders for. The Law Council also supports the proposal to amend the native title regulations to clarify that the decision to make a compensation application is a native title decision.
63. In relation to item E6, the Law Council generally supports the principle behind the proposal to introduce a new provision into the NTA to allow for historical extinguishment over areas of national state and territory parks to be disregarded as had been proposed in the Native Title Amendment Bill 2012, Schedule 1, items 1-15. However, the Law Council is concerned that any such provision should ensure that existing interests are wholly protected.
64. The requirement of government consent provides protection for the State and Commonwealth but may not provide protection for other parties. For example, in New South Wales, Aboriginal land councils may have existing claims under the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**) over land that is reserved under the *Crown Lands Act 1989* (NSW) for conservation purposes where native title might have been otherwise extinguished by operation of historical land dealings. Because of the operation of subsection 36(9) of the ALRA, the position of a land council, if its claim is successful, could arguably change from an entitlement to a fee simple interest to an interest subject to native title rights and interests. In considering the merits of this proposal, regard will need to be had on the potential impact on interests of this kind.

65. If such amendments are to proceed, in order to ensure applicants are not disadvantaged, the amendment might also provide that the court must be satisfied that the applicant has adequate and proper resources to engage and to be legally represented.
66. The Law Council notes that section 47 of the Native Title Act should be extended to achieve what it set out to achieve in the first instance (including by extending section 47(1)(c)(iii) to an Aboriginal corporation association or company limited by guarantee).

Post-determination dispute management

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

67. There are identifiable governance challenges within PBCs, with these challenges often exacerbated within PBCs that are under-resourced or by lack access to timely and quality support and advice. The Law Council is supportive of legislative reform measures that will assist PBCs in carrying out their functions and assist in the practice of good governance, including additional support for the resolution of internal disputes.
68. The Law Council agrees that the Office of the Registrar of Indigenous Corporations (**ORIC**) appears best placed to provide this support. However, the Law Council notes that the role of ORIC should primarily be educative and collaborative in nature. PBCs differ from entities established under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (**CATSI Act**) in many respects, and it will be imperative that ORIC is resourced and equipped to provide governance and dispute management support to PBCs that is specific and tailored to their needs.
69. As a related matter, the Law Council considers it may be useful for the CATSI Act to be amended to allow PBCs to enter into pre-incorporation contracts, which could be safeguarded by the same processes and requirements as set out in section 131 of the *Corporations Act 2001* (Cth).
70. With respect to the matters discussed in Attachment F the Law Council notes:
 - (a) F1-F6 are appropriate amendment proposals;
 - (b) F7 raises some concerns, specifically:
 - (i) The appropriate location for such provisions would appear to be the PBC Regulations rather than the CATSI Act. The existence or absence of such registers would still be matters that the Registrar, ORIC might take into account in terms of assessing compliance;
 - (ii) The existing provision allowing for access by a person with a substantial interest in a decision to obtain a copy of documents relating to that decision is too broad. There is no definition in the PBC Regulations for the term 'substantial interest in the decision' and therefore it could conceivably be relied upon by third parties to gain access to documents relating to future acts in which they have an interest.
 - (c) F8 and F9 are appropriate amendment proposals.

Other comments⁶

71. Attachment G of the Options Paper sets out a range of amendments with little supporting discussion. The generality of the description makes it difficult to understand the scope of what is proposed or the necessity of the amendments. The Law Council has the following views in relation to the proposals:

- (a) The Law Council does not support reducing the objection period for acts which attract the expedited procedure from 4 months to 35 days;
- (b) The Law Council considers that in relation to item G2, it is not clear what is intended to be covered in the concept of 'minor defects'. The importance of notice to the future act regime of the NTA was explained by Justice Mortimer in *Narrier v State of Western Australia* [2016] FCA 1519 at [1036]-[1046]. The Law Council would be concerned if there was a dilution of the notice requirements in the NTA;
- (c) In relation to item G3, the Law Council notes that the proposal to print summary notices in the paper and then have complete notices sent in the mail seems more time consuming than simply printing a complete notice in the first place and may cause unnecessary delays in circumstances where there are set timeframes for people to respond to the notice;
- (d) The Law Council supports the proposal at item G6;
- (e) Without more detailed discussion, the Law Council does not support the proposal at item G17 to remove the restriction on bringing a claim over an area subject to a previous exclusive possession act. It is not clear why this restriction is being proposed to be removed. The appropriate exclusions to bringing claims in relation to such areas are those set out in sections 47A and 47B of the Native Title Act. If a native title claim cannot succeed in such an area, it is not clear why those with interests in those areas should be subject to claims. In New South Wales the mandatory exclusions to native title claims have been important to allowing claims under the ALRA to continue in fact of s 36(1)(d) of the ALRA;
- (f) The Law Council supports the proposal at item G18;
- (g) The Law Council notes that it is not clear what is intended by proposal G20. It identifies that a matter requires clarification, but it does not state what amendment is proposed. The item notes that 'States and territories have indicated that some claimants are using both s 24F and a non-claimant application process to the detriment of native title applicants and State and Territory governments.' In the Law Council's view, it would assist to make comment if the concern could more readily be identified. The Law Council also notes that the non-claimant application process was inserted into the Native Title Act to provide third parties with certainty in relation to whether native title exists on their land. In relation to a specific future act it may not be necessary to obtain a determination that native title does not exist. The largest class of applicant which seek a determination that native title does not exist are Aboriginal land councils incorporated under the ALRA. Those land councils require a determination by operation of s 42 of the ALRA which provides that a land council cannot deal with land without a determination of native title. Merely obtaining s 24F protection is insufficient;

⁶ This section is based on input from the Law Society of New South Wales.

- (h) The Law Council notes that it is unclear what is intended to be proposed by items G21 and G22. Both items propose that a clarification is required but do not state what the proposed position is intended to be; and
 - (i) The Law Council supports the proposals referred to in items G23 to G27.
72. The Law Council notes that Part 9B of the *Mining Act 1971 (SA)* comprises South Australia's alternative 'rights to negotiate' provisions, which operate in lieu of subdivision P of the Native Title Act in relation to minerals exploration and production. Accordingly, the comments above regarding section 31 of the Native Title Act will currently have only limited application in South Australia.