Ross Mackay

28 November 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

**Online submission**

Dear Committee Secretary

**Submission on the *Native Title Legislation Amendment Bill 2019***

1. I am a solicitor and legal consultant, with a decade of experience as a legal practitioner in NSW, specialising in native title and Aboriginal cultural heritage protection. I have represented and advised Traditional Owners in relation to native title claimant applications and the future acts regime, and have worked as a legal practitioner in the native title representative body (**NTRB**) system, in private practice, and at a Community Legal Centre. At postgraduate level, I hold an LLM from the University of Dundee, Scotland (as an Aurora Project Scholar) and an MPhil(Law) from the University of Newcastle; during the course of both these degrees I published several articles, research papers, dissertations and theses relating to native title jurisprudence. In addition, I have previously held a position as a member of the Law Society of NSW Indigenous Issues Committee.

2. This submission is not intended to provide a thorough examination and response to the proposed *Native Title Legislation Amendment Bill 2019* (**Bill**); rather it intends provide particular comments and recommendations on those aspects relevant to my experience and expertise. Many of these comments and recommendations are identical to those in my previous submission to the Attorney-General's Department on the Exposure Draft of the Bill.

3. Before analysing the substance of the Bill, I would like to raise my disappointment that the Bill has failed to engage with some of the key problems which have become apparent over the 26 years of operation of the *Native Title Act 1993* (**NTA**). Certain of the provisions of the Bill touch upon practical issues confronting the native title holders in seeking to obtain benefit from NTA, such as clarification of the role and authorisation of the Applicant and broadening the ability to disregard historical extinguishment. However, taken as a whole, the Bill represents yet another opportunity missed to tackle issues such as (to name just two) the onerous burden of proof the continuity of connection requirement places upon native title claimants and a lack of parameters around the requirement to negotiate in good fath, which are among the key obstacles preventing Traditional Owners from utilising the NTA to 'receive the full recognition and

status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire'.[1]

**Summary of recommendations**

- The proposal to specifically provide provisions for the claim group to place conditions upon the authorisation of the Applicant are supported, as are the proposed mechanisms to achieve this. The proposed s 251BA and the amendments to s 62A of the NTA are supported. The mechanisms proposed by the new ss 24CG(3)(b)(iii), 186(1)(h), 190C(4AA), 203BW(2)(aa), 203BE(2)(a) and the amendments to s 61 and are supported. The consequential amendments to ss 24CH(2)(d)(i), 24CI(1) and 24CK(2)(c) are supported.

- Introduction of new mechanisms for timely resolution of disputes between a claim group and an Applicant regarding alleged breaches of the conditions placed upon the authorisation of the Applicant should be investigated.

- The proposed new s 62B of the NTA is supported. However, as per Recommendation 10-9 of the ALRC, further provisions should be introduced into the NTA to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law native title holders.

- The proposal to provide a displaceable general rule that the applicant can act by majority and a majority must be parties to any native title agreement is supported. The proposed new ss 31(1)(1C) and 31(1D), the amendments to ss 24CD, 24CL, 24DE, and the Note to s 29(2) are supported.

- NTRBs should be given specific additional resources (including funding) to arrange for claim group meetings for all claim groups they represent, to enable those claim groups to consider whether they wish to impose conditions on the authorisation of the Applicant to displace the new general rule. Additional resources (including funding) should be provided to either the NNTT or the relevant NTRB to assist them inform claim groups not represented by an NTRB of the implications of the proposed amendments, including funding to hold claim group meetings to consider whether they wish to impose conditions on the Authorisation of the Applicant to displace the new general rule. Such additional resourcing should be provided with enough lead-in time to allow this work to occur within the six month transitional period.

- The proposal to introduce a specific mechanism to alter the composition of the Applicant, in accordance with the claim group's authorisation of the Applicant, in circumstances where a member of the Applicant passes away or becomes unable to perform their functions as Applicant is supported. The proposed new ss 66(2A)-(2C) of the NTA are supported.

- The Federal Government should immediately investigate the practice of the State of NSW in withholding consent to native title determinations until the terms of an ILUA have been negotiated. If deemed necessary following these investigations, the Federal Government should publish recommendations to the State of NSW in regards to the

[1] Preamble to the *Native Title Act 1993* (Cth).

proper conduct of consent determinations and consider taking a more active role in native title proceedings in NSW to attempt to prevent such behaviour from occurring.

- The proposal that body corporate ILUAs be permitted over areas where native title has been extinguished is supported. The proposed new ss 24BC(2)(a)-(b) of the NTA is supported.
- The proposed amendments to s 24CH of the NTA requiring the Registrar be satisfied an ILUA meets the requirements of ss 24CB-24CE before instigating the notification process for that ILUA are supported.
- The proposal to require the Registrar to be satisfied that an ILUA meets the requirements of ss 24CB-24CE before instigating the notification process for that ILUA is supported. The proposed amendments to s 24CH of the NTA are supported.
- The proposal to clarify that removal of an ILUA from the Register does not invalidate future acts carried out pursuant to that ILUA is supported only to the extent that it does not apply to ILUAs deregistered on the basis they were induced by fraud, duress or undue influence. The proposed new ss 24EB(2A) and 24EBA(7) of the NTA should be amended by including the words 'other than an agreement removed pursuant to s 199C(1)(c)(iii)'.
- The proposal that minor amendments may be made to an ILUA without necessitating the ILUA to go through the registration process again is supported. However more explanation and/or clarity in drafting is required in relation to two of the proposed categories of minor amendments before they can be supported. Accordingly, the proposed ss 24ED of the NTA is only supported with the excision of ss 24ED(1)(c) and 24ED(1)(e).
- The proposal that mechanisms for native title parties and the Government to agree to disregard extinguishment of native title over National and State Parks be introduced is supported. The proposed s 47C(8)(a)(iv) should be removed; otherwise the proposed new s 47C and consequential amendments are supported.
- Recommendations 5-1 to 5-5 and 6-1 to 6-2 of the ALRC Report regarding the burden of proof in native title proceedings should be incorporated into the Bill. Failing this, those recommendations should be immediately be introduced in a separate bill.
- The proposal that the coverage of s 47 be extended to include pastoral leases held by RNTBCs is supported. The proposed amendment to s 47C(1)(b)(iii) is supported.
- As was proposed in the Exposure Draft, the future act regime should be extended to apply to land and waters to which ss 47, 47A, 47B and the proposed s 47C applies or may apply. Amendments to ss 224 and 227 of the NTA to this effect should be reinstated in the final Bill, or introduced in a separate Bill.
- The proposal to allow RNTBCs to make compensation claims where native title has been fully extinguished within the external boundary of the area of an approved determination of native title is supported. The amendments to ss 58 and 61 of the NTA are supported.

- The proposal to require the NNTT be notified of any ancillary agreements made pursuant to a s 31 agreement is supported. The proposed addition of a new s 41A(1)(c) to the NTA is supported.

- The proposal to create a public register of s 31 agreements is supported. The new ss 41A(4) and 41B are supported. The Government should consider amendments to these provisions to require, as part of the register, publication of the content of s 31 agreements and ancillary agreements.

- The proposal that the NNTT be empowered to provide assistance at the request of either RNTBCs or native title holders is supported in general terms. The proposed ss 60AAA(1)-(2) of the NTA should be redrafted to better clarify and restrict the scope of the assistance NNTT is able to provide. The provisions in s 60AAA(3) that allow the NNTT able to enter into cost recovery mechanisms in respect of this assistance should be removed.

- The Government should review the funding and resources available to RNTBCs, including under the Indigenous Advancement Strategy, to inform the extension of funding beyond 2018-2019.

- The proposal to require RNTBC rule books to include processes for resolving disputes with native title holders who are not members of the RNTBC is supported. The amendments to ss 57-5, 63-1 and 66-1 of the CATSI Act are supported.

- The proposal to require that the membership requirements in an RNTBC constitution be drafted so as to allow all native title holders (as per the determination) to become members is supported, subject to an amendment to permit constitutional provisions limiting membership to persons over 18 years of age. Further amendments to 141-25 should be drafted permitting this.

- The removal of discretion of Directors of RNTBCs to withhold membership to persons meeting membership criteria is supported. The proposed amendments to s 144-10 are supported.

- The proposal to limit the grounds for cancellation of membership to non-eligibility, non-payment of membership fees or being uncontactable is supported, however it is recommended the Government consider allowing RNTBCs to retain discretion to expel members where traditional laws and customs include mechanisms by which persons can be expelled for misbehaviour. The new s 150-22 and proposed amendments to ss 150-15 and 150-20 are supported, subject to consideration of amendments allowing RNTBCs to retain discretion to expel members where the traditional laws and customs of the relevant native title group include mechanisms by which persons can be expelled for misbehaviour.

- Specific funding and resources should be provided to RNTBCS, within the 2 year transitional period, to allow them to make the necessary constitutional amendments occasioned by the amendments to the CATSI Act.

- The proposal to add failure to comply with native title legislation obligations as a ground upon which ORIC may appoint a special administrator is supported. The amendments to s 487-5 of the CATSI Act are supported.
- Consideration should be given to building parameters for selecting special administrators into the regulatory framework, to ensure special administrators appointed by ORIC have the necessary experience, native title-specific knowledge and cultural competence.

**Role of Applicant**

Allowing claim group to place conditions on the authorisation of the Applicant

4. The placing of conditions upon the authorisation of the Applicant is a mechanism that has, in my experience, often been utilised in practice by native title claim groups. It is a process which serves to increase accountability of the Applicant to the claim group, and gives the claim group specific control over the scope of authority given to the Applicant. This is particularly important, given the extremely broad scope of the Applicant's power under s 62A of the NTA. Although there is no apparent reason why claim groups cannot continue to place conditions upon the authorisation of the Applicant under the NTA as it stands, the importance of this issue warrants clarification of this issue, to give direction to both claim groups and their Applicants in this regard. The drafting of the proposed s 251BA and the amendments to s 62A of the NTA are appropriate to achieve this aim, and consistent with existing claim authorisation procedures.

5. The proposals requiring any such conditions be outlined in the originating application (supported by affidavit evidence) and recorded on the relevant National Native Title Tribunal (NNTT) register, the process for amendment of these conditions for existing applications, and provisions for NTRB certification of conditions are sound, and consistent with the equivalent existing provisions.

6. The proposed Note to s 251BA(2) indicates that the remedy for claim groups asserting that members of the Applicant have not complied with the conditions placed upon their authorisation pursuant to s 251BA, will be to replace the Applicant pursuant to s 66B or seek a Federal Court order pursuant to s 84D. Both these processes, particularly s 66B processes, can be costly and time-consuming, so much so as to significantly delay both the resolution of a native title claimant application and any negotiation or other processes in train under the future act regime.[2] Therefore the Government should investigate options for timely resolution of disputes between a claim group and an Applicant regarding breaches of the conditions placed upon the authorisation of the Applicant. Such investigation should not delay the adoption of the proposed amendments to the NTA, but should be conducted once those amendments have been adopted.

[2] As an example of these issues, and the sprawling nature of legal challenges which can arise from them, see the several decisions relating to the scope of authorisation and replacement of the Gomeroi People native title claimant applicant: *Gomeroi People v Attorney-General of New South Wales* [2016] 241 FCR 301, *Gomeroi People v Attorney General of New South Wales* [2017] FCA 1464, *Boney v Attorney General of New South Wales* [2018] FCA 1066 and *Boney v Attorney General of New South Wales* [2018] FCAFC 218.

*Recommendations:*

- *The proposal to specifically provide provisions for the claim group to place conditions upon the authorisation of the Applicant are supported, as are the proposed mechanisms to achieve this. The proposed s 251BA and the amendments to s 62A of the NTA are supported. The mechanisms proposed by the new ss 24CG(3)(b)(iii), 186(1)(h), 190C(4AA), 203BW(2)(aa), 203BE(2)(a) and the amendments to s 61 and are supported. The consequential amendments to ss 24CH(2)(d)(i), 24CI(1) and 24CK(2)(c) are supported.*

- *Introduction of new mechanisms for timely resolution of disputes between a claim group and an Applicant regarding alleged breaches of the conditions placed upon the authorisation of the Applicant should be investigated.*

7. The proposed new s 62B confirms that the obligations of the Applicant under the NTA do not relieve or detract from any other duties the Applicant owes to the claim group at common law or in equity. Although it could be argued that it is unnecessary to prescribe in legislation law that has already been made in the Federal Court, in this instance the importance of this issue necessitates it being specifically included in the NTA, for the clarity of laypersons engaging with native title claimant processes.

8. However this new provision goes short of enshrining sufficient positive duties on the part of the Applicant to the claim group. The ARLC's *Connection to Country: Review of the Native Title Act 1993 (Cth) – Final Report* (April 2015) (**ALRC Report**) discussed this issue in detail at 10.101-10.111, noting that there are 'difficulties' relying on fiduciary duties to regulate the conduct of Applicants.[3] In order to avoid these difficulties, the ALRC recommended (Recommendation 10-9) that the NTA be amended to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law holders. This recommendation of the ALRC should be adopted.

*Recommendation:*

- *The proposed new s 62B of the NTA is supported. However, as per Recommendation 10-9 of the ALRC, further provisions should be introduced into the NTA to provide that a member of the applicant must not obtain an advantage or benefit at the expense of the common law native title holders.*

<u>Applicant decision-making</u>

9. The amendments in Pt 2 of Sch 1 of the Bill provide a general rule that the applicant can act by majority, and that a majority of the Applicant must be parties to any native title agreement made by the Applicant. This general rule can be displaced where the claim group places conditions upon the authorisation of the Applicant requiring a certain number/proportion of the Applicant to take specific actions. This displacement of the general rule is critical as it allows claim groups to consider whether the general majority rule would be appropriate for their claim group composition. For example, many claim groups appoint an Applicant/s from each particular family groups within the claim group. In such circumstances, the claim group may wish to ensure that all or certain

[3] It was held in *Gebadi v Woosup* [2017] FCA 1467 that an Applicant has fiduciary duty obligations to the claim group.

family groups, via their representatives on the Applicant, must agree to particular actions taken by the Applicant.

10. The drafting of the general provisions (proposed new s 62C), provisions regarding area and alternative procedure Indigenous Land Use Agreements (**ILUAs**) (amendments to ss 24CD, 24CL and 24DE) and s 31 agreements (amended note to s 29(2) and proposed new ss 31(1C) and 31(1D)) are appropriate to achieve this aim.

11. The transitional provisions provide for a six month lead-in period, to allow claim groups to consider whether the general rule should be displaced. This is an appropriate transitional period. The efficacy of the proposal relies on the existing claim groups (including those not represented by NTRBs) being informed as to the implications of the amendments, to consider whether they wish to impose conditions on the authorisation of the Applicant to displace the general rule. NTRBs should be given specific additional funding arrange for claim group meetings for all claim groups they represent, to enable those claim groups to consider whether they wish to impose such conditions. Either the relevant NTRB or the NNTT should be given funding to enable them to inform claim groups not represented by an NTRB of the implications of the proposed amendments, and make funding available for those claim groups to hold claim group meetings to consider whether they wish to impose such conditions. Without the provision of such additional resources, there may be claim groups whom are unaware of the new provisions, and thus unaware that, in the absence of conditions on authorisation to the contrary, their Applicants will be able to act by majority rather than unanimously.

*Recommendations:*

- *The proposal to provide a displaceable general rule that the applicant can act by majority and a majority must be parties to any native title agreement is supported. The proposed new ss 31(1)(1C) and 31(1D), the amendments to ss 24CD, 24CL, 24DE, and the Note to s 29(2) are supported.*

- *NTRBs should be given specific additional resources (including funding) to arrange for claim group meetings for all claim groups they represent, to enable those claim groups to consider whether they wish to impose conditions on the authorisation of the Applicant to displace the new general rule. Additional resources (including funding) should be provided to either the NNTT or the relevant NTRB to assist them inform claim groups not represented by an NTRB of the implications of the proposed amendments, including funding to hold claim group meetings to consider whether they wish to impose conditions on the Authorisation of the Applicant to displace the new general rule. Such additional resourcing should be provided with enough lead-in time to allow this work to occur within the six month transitional period.*

<u>Replacement of Applicant</u>

12. Part 3 of Sch 1 of the Bill introduces a specific mechanism to alter the composition of the Applicant, in accordance with the claim's groups authorisation of the Applicant, in circumstances where a member of the Applicant passes away or becomes unable to perform their functions as Applicant. Such a mechanism was proposed in

Recommendations 10-7 and 10-8 of the ALRC Report. For the reasons outlined in the ALRC Report (at 10.84-10.92) this proposal is supported. It removes the necessity for a claim group to go through the costly and time-consuming re-authorisation process in these circumstances. The proposal that altering the composition of the Authorisation may only be ordered by the Court provides a safeguard to ensure that it only occurs in the specified circumstances, and is not used as a means of resolving or progressing disputes between Applicants. The drafting of the proposed new ss 66B(2A)-(2C) is appropriate to achieve the desired outcomes.

*Recommendation:*

- *The proposal to introduce a specific mechanism to alter the composition of the Applicant, in accordance with the claim group's authorisation of the Applicant, in circumstances where a member of the Applicant passes away or becomes unable to perform their functions as Applicant is supported. The proposed new ss 66(2A)-(2C) of the NTA are supported.*

**Indigenous land use agreements**

13. As indicated below, most of the proposals provided regarding claim resolution and ILUAs are supported by this submission. However the interaction between claim resolution and ILUAs raises a particular problem in NSW, due to the conduct of the NSW Government. As examined by the Federal Court in *Western Bundjalung People v Attorney General of New South Wales*,[4] the State of NSW, as lead respondent, has developed a practice of refusing to agree to a consent determination of native title unless an accompanying ILUA has also been negotiated, the terms of which are intended, by the State, to confine the scope of the native title rights and interests to be recognised. This, in effect, holds the claims resolution process ransom to and limited by the ILUA negotiation process, which is a fundamental misunderstanding and misapplication of the consent determination negotiation framework established under the NTA. This practice significantly impacts the just, timely and equitable resolution of claims in NSW. The strength of the language used by the Federal Court regarding this issue is instructive:

> [58]...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 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...
>
> ...
>
> [61]...It was difficult not to form the impression that what was meant was an ILUA confining native title rights and interests that might otherwise be recognised in an agreement under ss 87 or 87A. How does this, I ask, involve fidelity to the provisions of the NTA?

14. This practice of the State of NSW seriously impacts the ability of native title holders in NSW to access the beneficial elements of the NTA on the same footing as their

[4] [2017] FCA 992. See particularly [57]-[60].

counterparts in other states. Accordingly, it warrants investigation by the Federal Government.

*Recommendation:*

- *The Federal Government should immediately investigate the practice of the State of NSW in withholding consent to native title determinations until the terms of an ILUA have been negotiated. If deemed necessary following these investigations, the Federal Government should publish recommendations to the State of NSW in regards to the proper conduct of consent determinations and consider taking a more active role in native title proceedings in NSW to attempt to prevent such behaviour from occurring.*

<u>Body corporate agreements and area agreements</u>

15. The Bill proposes a new ss 24BC(2)(a)-(b) of the NTA which would allow body corporate ILUAs to be made over areas in which native title has been determined not to exist or which have been excluded from a determination on the basis that they are subject to a previous exclusive possession act. These provisions are supported as they will allow certain ILUA negotiations to be consolidated and open up additional areas of land available to be dealt with in ILUA negotiations.

16. The Bill proposes amendments to s 24CH of the NTA to require the Registrar be satisfied an ILUA meets the requirements of ss 24CB-24CE before instigating the notification process for that ILUA. This is an appropriate proposal, which reduces unnecessary wastage of NNTT resources in notifying ILUAs which are not capable of registration.

*Recommendations:*

- *The proposal that body corporate ILUAs be permitted over areas where native title has been extinguished is supported. The proposed new ss 24BC(2)(a)-(b) of the NTA is supported.*

- *The proposed amendments to s 24CH of the NTA requiring the Registrar be satisfied an ILUA meets the requirements of ss 24CB-24CE before instigating the notification process for that ILUA are supported.*

<u>Deregistration and amendment</u>

17. The NTA Bill proposes amendments to ss 24EB and 24EBA of the NTA to clarify that removal of an ILUA from the Register does not invalidate future acts carried out pursuant to that ILUA. The circumstances in which an ILUA may be removed from the Register, as prescribed by s 199C of the NTA, are:
    a) where a determination is made in favour of native title holders other than those who entered into the ILUA;
    b) where an ILUA has expired;
    c) where all parties wish the ILUA to be terminated; and
    d) where the Federal Court finds the ILUA was induced by fraud, duress or undue influence.

18. As it relates to the circumstances of a) to c) above, the proposal is appropriate, and clarifies what has always been the intent of the ILUA regime in the NTA. However this is not the case in relation to the circumstances in d) above. If a proponent induces an ILUA by fraud, duress or undue influence they should not get the benefit (i.e. future act validation) of that ILUA. It is entirely appropriate that those future acts should be invalidated, and the proponents should be liable for any damage (including impairment of native title rights and interests) arising from that invalidation, above and beyond that which may be ordered by the Court under s 199C(4). To allow the validation of future acts pursuant to an improperly obtained ILUA would not only allow parties to existing ILUAs to benefit from this impropriety, it may also act as an incentive for parties wishing to validate future acts in the future to procure an ILUA by means of fraud, duress or undue influence. For native title holders, it would result in their native title rights and interests being impacted, in perpetuity, via an agreement which was improperly obtained by another party, and to which they may not have given free, prior and informed consent. Accordingly, the proposed ss 24EB(2A) and 24EBA(7) should be amended by including the words 'other than an agreement removed pursuant to s 199C(1)(c)(iii)'. It should be further considered whether this would necessitate the addition of a further sub-clause to s 24EBA prescribing the consequences of deregistration of an ILUA pursuant to s 199C(2) for future acts carried out pursuant to that ILUA, or whether this should be left to be determined according to common law/equity principles. The proposed Note 2 to s 199C(1) should also be amended accordingly.

*Recommendation:*

- *The proposal to require the Registrar to be satisfied that an ILUA meets the requirements of ss 24CB-24CE before instigating the notification process for that ILUA is supported. The proposed amendments to s 24CH of the NTA are supported.*
- *The proposal to clarify that removal of an ILUA from the Register does not invalidate future acts carried out pursuant to that ILUA is supported only to the extent that it does not apply to ILUAs deregistered on the basis they were induced by fraud, duress or undue influence. The proposed new ss 24EB(2A) and 24EBA(7) of the NTA should be amended by including the words 'other than an agreement removed pursuant to s 199C(1)(c)(iii)'.*

19. The NTA Bill proposes a new s 24ED of the NTA to allow minor amendments to be made to an ILUA without requiring the ILUA to go through a new registration process. The amendments covered by the proposed s 24ED are (where they are agreed between the parties):
    - updating property descriptions, but not so as to result in inclusion of additional land (s 24ED(1)(c));
    - updating the parties, where a party has assigned or otherwise transferred rights and liabilities (s 24ED(1)(d)); and
    - any other amendments specified in a legislative instrument (s 24ED(1)(e)).

20. As a whole, the proposal is worthwhile, as it has the potential to reduce unnecessary expenditure of time and resources in the (re-)registration process. The types of amendments prescribed in s 24ED(1)(d) are clearly appropriate to be included in the

proposal. However the other types of amendments prescribed in the proposed s 24ED(1), without further explanation, are not able to be supported. Specifically:

- The rationale for s 24ED(1)(c) is not immediately clear. In the absence of such rationale, its inclusion is not supported; and
- No explanation has been provided on what types of mattes might be specified in legislation pursuant to s 24ED(1)(e). Without such an explanation, caution dictates that any particular categories of amendment subject to s 24ED should be drafted into the primary legislation.

*Recommendations:*

- *The proposal that minor amendments may be made to an ILUA without necessitating the ILUA to go through the registration process again is supported. However more explanation and/or clarity in drafting is required in relation to two of the proposed categories of minor amendments before they can be supported. Accordingly, the proposed ss 24ED of the NTA is only supported with the excision of ss 24ED(1)(c) and 24ED(1)(e).*

**Historical extinguishment**

Park Areas

21. The Bill proposes to introduce a new s 47C of the NTA, which provides a mechanism for native title parties and the Government to agree to disregard extinguishment of native title over National and State Parks. This is a commendable proposal. Particularly, it will go some way addressing the difficulties native title holders in the south-east of Australia face in having their native title rights and interests recognised and protected in their Country. These difficulties are occasioned by, *inter alia*, the historical circumstances of earlier and more extensive granting of freehold and other extinguishing titles, and the consequences of the Wilson v Anderson[5] decision, and create a significant inequity in the ability of all native title holders in the country to share in the beneficial provisions of the NTA.

22. The proposed amendments are, for the most part, appropriately drafted to achieve this aim. It is particularly pleasing to see that the scope of the proposed s 47C(8)(b) extends to allowing the extinguishing effect of acts prior to creation of a park to be disregarded. However, the automatic provision that public access to the park cannot be affected should be removed (s 47C(9)(iv)). Given that a) the government party represents the public at large and b) there is opportunity for public comment, it is appropriate that the retention of public access should be up for negotiation between the parties in each instance (i.e. by negotiating the relevant terms of the consent determination). This would particularly allow for native title holders to achieve, via a native title determination, protection of areas of high cultural significance from the impacts of open public access, in circumstances where that is acceptable to the Government party.

23. However, the difficulties faced by native title holders in the south-east of Australia in having rights and interests recognised under the NTA are not limited to issues of extinguishment. The Government has missed an opportunity in the NTA Bill to address

[5] [2002] HCA 29.

the excessively onerous burden of proof claimants face in relation to proving continuity of native title. This burden is disproportionately borne by native title claimants in the south-east of the country, due the longer and more intense history of dislocation and dispossession suffered. Reform to this restrictive element of the NTA has been discussed and proposed in many forums, most notably in the ALRC Report at Chapters 5 to 6. A number of recommendations were made in the ALRC Report to amend the NTA to alleviate the burden of proof in native title claims. The Consultation Paper to the exposure draft of the Bill was silent as to why these recommendations have not been addressed in the Bill. These recommendations should be included in the Bill, or failing this, be immediately introduced in separate legislation, noting the significant consultation undertaken by the ALRC in producing the ALRC Report.

*Recommendations:*

- *The proposal that mechanisms for native title parties and the Government to agree to disregard extinguishment of native title over National and State Parks be introduced is supported. The proposed s 47C(8)(a)(iv) should be removed; otherwise the proposed new s 47C and consequential amendments are supported.*

- *Recommendations 5-1 to 5-5 and 6-1 to 6-2 of the ALRC Report regarding the burden of proof in native title proceedings should be incorporated into the Bill. Failing this, those recommendations should be immediately be introduced in a separate bill.*

<u>Pastoral leases held by native title claimants</u>

24. The NTA Bill proposes to amend s 47, which provides for the disregarding of historical extinguishment over certain pastoral leases, to extend to pastoral leases held by members of a relevant Registered Native Title Body Corporate (**RNTBC**). This is an appropriate amendment, which addresses a likely unintentional failure of coverage of s 47 in its current form.

*Recommendation:*

- *The proposal that the coverage of s 47 be extended to include pastoral leases held by RNTBCs is supported. The proposed amendment to s 47C(1)(b)(iii) is supported.*

<u>Application of the future act regime applies where prior extinguishment has been (or may be) disregarded</u>

25. The Exposure Draft of the Bill contained amendments to ss 224 and 227 of the NTA, proposed to provide that the future act regime applies to land and waters in which prior extinguishment has been disregarded under ss 47, 47A, 47B and the proposed s 47C. It is disappointing that this proposal has not made its way into the final Bill, as it was an appropriate way to properly extend the beneficial aspects of those provisions to the future act regime while an application is on foot. I urge the reinstatement of these proposed amendments into the final Bill, or the introduction of a separate bill incorporating these amendments.

*Recommendation:*

- *As was proposed in the Exposure Draft, the future act regime should be extended to apply to land and waters to which ss 47, 47A, 47B and the proposed s 47C applies or may apply. Amendments to ss 224 and 227 of the NTA to this effect should be reinstated in the final Bill, or introduced in a separate Bill.*

**Allowing RNTBCs to bring compensation applications**

26. The Bill introduces a proposal to allow RNTBCs to make compensation claims where native title has been fully extinguished within the external boundary of the area of an approved determination of native title. Such an application can only be made by an RNTBC with the consent of the common law holders / persons entitled to compensation (i.e. those identified in the earlier determination). Currently, the NTA only allows an RNTBC to make a compensation claim over an area partially extinguished. This proposal is to be achieved by amendments to ss 58 and 61 of the NTA. This proposal is supported, as it will enable native title holders, where they choose to do so, to utilise their RNTBC to make compensation claims post-determination, noting that the RNTBC has been determined to consist of the right people for Country. This will improve the synchronicity and complementarity of post-determination activities by native title holders.

*Recommendation:*

- *The proposal to allow RNTBCs to make compensation claims where native title has been fully extinguished within the external boundary of the area of an approved determination of native title is supported. The amendments to ss 58 and 61 of the NTA are supported.*

**Section 31 agreements**

27. The proposal in Pt 2 of Sch 6 to establish a register of s 31 agreements, including notation whether there exist any ancillary agreements, is strongly supported. Although the National Native Title Tribunal (**NNTT**) is currently notified of any s 31 agreements under s 41A, my experience in practice is that this has not led to the creation of a searchable list of s 31 agreements. Such a register is sorely needed as there are many native title holders who are parties, either directly or via persons who have passed away, to s 31 agreements and ancillary agreements which, despite not having lapsed or terminated, contain obligations which are not being met by proponents. This is particularly acute in relation to agreements entered into regarding claimant applications which have since been withdrawn or dismissed. In many cases, particularly where some time has elapsed since the ancillary agreement was entered into, the native title holders will not have retained or have access to a copy of the agreement, which inhibits their ability to take action to enforce the agreement. The existence of a s 31 agreement register will enable, in the future, native title holders to access the details of ancillary agreements they are parties to, to assist them in taking action to enforce those agreements as necessary.

28. However, the proposed new s 41B would only see the creation of a register with limited details entered into it in respect of each s 31 agreement. Notably, the agreements and ancillary agreements themselves will not be held and made available for inspection. The Government should consider amending this proposal, to provide that the content of s 31

agreements and ancillary agreements thereto would in fact appear on the register.[6] Concerns around the content of s 31 agreements and ancillary agreements is a significant source of tension within and between native title claim groups, which can work to the detriment of the just and timely resolution of native title claimant applications. Publication of s 31 agreements and ancillary agreements would provide transparency in relation to the content of these agreements, thus helping to alleviate these tensions. Publication of s 31 agreements and ancillary agreements would also improve the access of all native title holders to substantial benefits from the RTN process, by providing proponents and native title holders alike with a clear indication of best practice in relation to the content of such agreements. It would also allow academic analyses of these agreements, which could assist by identifying trends and suggesting options for improvement in agreement-making processes.[7] Any concerns about sensitive information (particularly culturally sensitive information) being published as a result of the publication of agreements could be addressed by permitting the agreements to appear in redacted form on the register and/or creating a limited class of persons who are entitled to view the agreements.

*Recommendations:*

- *The proposal to require the NNTT be notified of any ancillary agreements made pursuant to a s 31 agreement is supported. The proposed addition of a new s 41A(1)(c) to the NTA is supported.*
- *The proposal to create a public register of s 31 agreements is supported. The new ss 41A(4) and 41B are supported. The Government should consider amendments to these provisions to require, as part of the register, publication of the content of s 31 agreements and ancillary agreements.*

**National Native Title Tribunal**

29. The new s 60AAA proposes to empower the NNTT to provide assistance to RNTBCs at the request of either RNTBCs or native title holders, rather than only at the invitation of the relevant NTRB as is currently the case. These assistance functions are drafted broadly, and, according to the Consultation Paper on the Exposure Draft of the Bill, are intended to include:
    - establishing governance processes consistent with NTA and PRC regs;
    - supporting resolution of disputes between RNTBCs and native title holders; and
    - facilitating collaboration and resolving disputes between RNTBCs.

30. In broad terms, the proposed extension of the NNTT's assistance powers is appropriate. The NNTT has the requisite experience and independence to take on this much-needed

[6] This proposal has been previously canvassed by commentators. See, for example, Ciaran O'Faircheallaigh, *Native Title and Agreement Making in the Mining Industry: Focusing on Outcomes for Indigenous Peoples*, 2(25) Lands, Rights Laws: Issues of Native Title (2004), at 6.

[7] In this regard, from the limited analyses that are available, it would appear there is a general trend that native title holders in the south-east of the country are not able to leverage the same benefits from the RTN process as their counterparts in rest of Australia. See Ross Mackay, *Australia's own North-South Divide: Inequalities in Indigenous Participation in the Mining Approvals Process under the Native Title Act* (LLM Dissertation, University of Dundee, 2012), citing Ciaran O'Faircheallaigh, 'Evaluating Agreements Between Indigenous Peoples and Resource Developers' in *Honour Among Nations? Treaties and Agreement with Indigenous People* (Langton M, Tehan M, Palmer L & Shain K, eds, 2004). This situation is inequitable and should be addressed to enable all native title holders to access the beneficial provisions of the NTA equally.

role. However, given the extent of the issues that can arise between RNTBCs and native title holders, expectations as to what level of assistance NNTT can be provide need to be appropriately managed. The proposed ss 60AAA(1)-(2) are drafted very broadly, and are likely to raise expectations beyond the relatively limited scope outlined the Consultation Paper. Therefore, ss 60AAA(1)-(2) should be redrafted to better clarify and restrict the scope of the assistance NNTT is able to provide.

31. The proposal that the NNTT is able to enter into cost recovery mechanisms (s 60AAA(3)) is not supported. Many RNTBCs, at least in NSW where my experience lies, struggle financially to fulfil their existing aspirations and obligations, even the minimum for compliance, particularly where they are reliant on limited (discretionary) government funding (noting that recent trends in NSW are seeing consent determinations being finalised prior to ILUAs being entered into). To ask these NRTBs to pay the costs of NNTT assistance to support them in their functions would be counterproductive, as it would undermine their financial ability to actually implement any recommendations arising from that NNTT intervention, and jeopardise their ability to perform their functions generally.

*Recommendation:*

- *The proposal that the NNTT be empowered to provide assistance at the request of either RNTBCs or native title holders is supported in general terms. The proposed ss 60AAA(1)-(2) of the NTA should be redrafted to better clarify and restrict the scope of the assistance NNTT is able to provide. The provisions in s 60AAA(3) that allow the NNTT able to enter into cost recovery mechanisms in respect of this assistance should be removed.*

**Registered native title bodies corporate**

32. Before addressing the proposals outlined in the Bill regarding RNTBCs, it is important to note that the ability of an RNTBC to effectively function is highly dependent on the funding available to RNTBCs. If RNTBCs are not adequately funded to carry out their functions, then native title holders will be unable to properly realise the potential benefits of the NTA. Therefore the Government should review the funding and resources available to RNTBCs, including the effectiveness of funding provided under the Indigenous Advancement Strategy. Such a review should direct the reservation and provision of funds to RNTBCS, including but not limited to the extension of funding capacity building via the Indigenous Advancement Strategy beyond 2018-2019.

33. In relation specifically to the reforms proposed in the Bill, any actual benefit in practice relies upon RNTBCs having the ability and freedom to comply with those reforms and leverage them to benefit their members. This ability and freedom cannot be provided unless RNTBCs have access to sufficient unconditional funding.

*Recommendation:*

- *The Government should review the funding and resources available to RNTBCs, including under the Indigenous Advancement Strategy, to inform the extension of funding beyond 2018-2019.*

Requirements for constitutions and membership

34. The Bill proposes amendments to ss 63-1 and 66-1 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (**CATSI Act**) to require RNTBC rule books to include processes for resolving disputes with native title holders who are not members of the RNTBC. Currently, the CATSI Act only requires rule books to contain processes for resolving disputes with members. This proposal is supported, as it covers what is effectively a regulatory gap in relation to this matter. The proposed amendments, including associated amendments to s 57-5 of the CATSI Act, are appropriate.

*Recommendation:*

- *The proposal to require RNTBC rule books to include processes for resolving disputes with native title holders who are not members of the RNTBC is supported. The amendments to ss 57-5, 63-1 and 66-1 of the CATSI Act are supported.*

35. The Bill aims to amend the CATSI Act to ensure that the membership of RNTBCs reflects membership of the relevant native title holding group. It achieves this by three distinct provisions. Firstly, the CATSI Act will be amended to mandate that the membership requirements in an RNTBC constitution must be drafted so as to allow all native title holders (as per the determination) to become members. Secondly, the Bill proposes to remove the discretion of Directors of RNTBCs to withhold membership to persons whom meet membership criteria. Thirdly, the Bill will limit the grounds for cancellation of membership to non-eligibility, non-payment of membership fees or uncontactability. This will be achieved by introduction of a new s 150-22 and amendments to ss 144-10, 141-25, 150-15 and 150-20.

36. The aim of these amendments is commendable. In recognition of the critical role RTNCs play in managing native title rights and interests, it is entirely appropriate to tighten the legislative controls on membership to ensure that all native title holders are able to benefit from and participate in the management of native title rights and interests. However there are some issues with the amendments as drafted. Firstly, certain native title holding groups may have mechanisms within their traditional laws and customs by which persons can be excised from the group for misbehaviour. In those circumstances, it may be appropriate to permit an RNTBC to expel a person from membership for misbehaviour (which could be achieved by adding an additional sub-section to the proposed s 150-22 to that effect). Secondly, many RNTBC constitutions limit membership to person over 18 years of age. This is, of course, an appropriate mechanism. However, most native title determinations do not contain such an age limitation in describing the native title holders. Thus, if the proposed amendments to s 141-25 are made, it would require any RNTBC constitutional provisions limiting membership to persons over 18 years of age to be removed. Such constitutional provisions should be permitted to remain.

37. Transitional provisions proposed in the Bill give existing RNTBCs 2 years to update constitutions to reflect the new requirements. This is an appropriate transitional period. The necessary constitutional amendments will likely require RNTBCs to obtain expert assistance (particularly legal advice) and hold general meetings. Specific funding and

resources should be provided to RNTBCS, within this 2 year period, to allow them to make the necessary constitutional amendments.

*Recommendations:*

- *The proposal to require that the membership requirements in an RNTBC constitution be drafted so as to allow all native title holders (as per the determination) to become members is supported, subject to an amendment to permit constitutional provisions limiting membership to persons over 18 years of age. Further amendments to 141-25 should be drafted permitting this.*

- *The removal of discretion of Directors of RNTBCs to withhold membership to persons meeting membership criteria is supported. The proposed amendments to s 144-10 are supported.*

- *The proposal to limit the grounds for cancellation of membership to non-eligibility, non-payment of membership fees or being uncontactable is supported, however it is recommended the Government consider allowing RNTBCs to retain discretion to expel members where traditional laws and customs involve mechanisms by which persons can be expelled for misbehaviour. The new s 150-22 and proposed amendments to ss 150-15 and 150-20 are supported, subject to consideration of amendments allowing RNTBCs to retain discretion to expel members where the traditional laws and customs of the relevant native title group include mechanisms by which persons can be expelled for misbehaviour.*

- *Specific funding and resources should be provided to RNTBCS, within the 2 year transitional period, to allow them to make the necessary constitutional amendments occasioned by the amendments to the CATSI Act.*

Registrar oversight

38. The proposed new s 487-5(1)(c) of the CATSI Act inserts an additional ground upon which ORIC may appoint a special administrator, being a failure to comply with native title legislation obligations. This is an appropriate addition.

39. On the subject of administrators under the CATSI Act, it is relevant to note existing problems relating to the appointment of special administrators. Anecdotally, certain of the special administrators appointed in the past have not had the experience, native title-specific knowledge and cultural competence necessary to effectively and appropriately carry out their role under the CATSI Act. In order to address this, the Government should consider, in consultation with ORIC and RNTBCs who have been under special administration, whether parameters for ORIC when selecting special administrators should be instituted, and, if so, how to build these into the regulatory framework.

*Recommendations:*

- *The proposal to add failure to comply with native title legislation obligations as a ground upon which ORIC may appoint a special administrator is supported. The amendments to s 487-5 of the CATSI Act are supported.*

- *Consideration should be given to building parameters for selecting special administrators into the regulatory framework, to ensure special administrators appointed by ORIC have the necessary experience, native title-specific knowledge and cultural competence.*