The Senate

Legal and Constitutional Affairs Legislation Committee

Native Title Legislation Amendment Bill 2019 [Provisions]

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Recommendation

Recommendation 1

3.32 The committee recommends that the Senate pass the bill.

Chapter 1
Introduction

1.1 On 17 October 2019, the Senate referred, contingent upon introduction in the House of Representatives, the provisions of the Native Title Legislation Amendment Bill 2019 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 28 February 2020.[1] On 4 December 2019, the Senate granted an extension to report by 16 April 2020.[2] On 26 March 2020, the Senate granted a further extension of time for reporting until 19 August 2020.[3]

1.2 The Senate referred the bill to the committee following a recommendation of the Selection of Bills Committee.[4] In referring the bill for inquiry, the Selection of Bills Committee highlighted that the bill is a complex area of law and identified the 'need to consider cultural approaches to native title of different traditional owner groups'.[5]

Previous bill

1.3 Another bill, also called the Native Title Legislation Amendment Bill 2019 was introduced into the House of Representatives on 21 February 2019. That bill lapsed at dissolution of the House of Representatives on 11 April 2019. The previous bill was very similar to the bill subject to this inquiry. The only difference between the two versions of the bill is changes to the commencement dates for measures in schedule 8 due to the passage of time, and for which the National Indigenous Australians Agency has policy responsibility.[6]

Conduct of the inquiry

1.4 Details of the inquiry were advertised on the committee's webpage. The committee called for submissions to be received by 28 November 2019 and also wrote to a range of organisations inviting them to submit. The committee continued to accept submissions after the closing date. The committee received 27 submissions, which are listed at Appendix 1.

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1 *Journals of the Senate*, No. 23, 17 October 2019, pp. 696-698.

2 *Journals of the Senate*, No. 34, 4 December 2019, p. 1088.

3 *Journals of the Senate*, No. 48, 8 April 2020, p. 1469.

4 Selection of Bills Committee, *Report No. 7 of 2019*, 17 October 2019, [p. 3].

5 Selection of Bills Committee, *Report No. 7 of 2019*, 17 October 2019, Appendix 3.

6 Attorney-General's Department, *Submission 6*, p. 5.

1.5 The committee held three public hearings in Western Australia: Perth, Kalgoorlie and Broome. The witnesses who appeared at the hearings are listed at Appendix 2.

1.6 The public hearing scheduled to be held in Warburton on 11 March 2020 was unable to proceed due to COVID-19 travel restrictions to that area. The witnesses scheduled to appear in Warburton provided evidence to the committee via teleconference at the Kalgoorlie public hearing.

1.7 The committee scheduled a Canberra public hearing to take place in March 2020 to facilitate discussion on the bill and issues raised during the inquiry. The hearing was unable to proceed due to the COVID-19 situation and the committee subsequently submitted written questions on notice to a number of organisations. Answers to questions on notice received by the committee are listed at Appendix 1.1

Acknowledgement

1.8 The committee thanks all submitters and witnesses for their participation in this inquiry.

Structure of this report

1.9 This report consists of three chapters:

- This chapter outlines the background and key provisions of the bill and provides administrative details relating to the inquiry.
- Chapter 2 examines the key issues relating to the bill raised in evidence;
- Chapter 3 examines broader issues raised with the committee and provides the committee's view and recommendation.

Purpose of the bill

1.10 The bill, introduced into the House of Representatives on 17 October 2019 by the Attorney-General, the Hon Christian Porter MP, would amend the *Native Title Act 1993* (the Native Title Act) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act).[7]

1.11 When introducing the bill, the Attorney-General explained the purpose of the bill is:

> …to better support the resolution of native title claims and agreement-making around the use of native title land and to promote the autonomy of native title groups to make decisions about their land and to resolve internal disputes.[8]

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[7] *House of Representatives Votes and Proceedings*, No. 23, 17 October 2019, p. 347.

[8] The Hon Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 17 October 2019, p. 4483.

1.12 The Attorney-General also explained the bill would 'implement practical and pragmatic improvements to ensure the ongoing effectiveness of the native title system'. Moreover:

> The bill will also build on the amendments made by the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* to provide certainty around the status of important mining and exploration related native title agreements affected by the Full Federal Court of Australia's decision in the matter of *McGlade v Native Title Registrar & Ors*.[9]

Background to the bill

1.13 The development of the bill has been informed by feedback from stakeholders following public consultation on an options paper for native title reform released in November 2017 and exposure draft legislation released in October 2018. The Attorney-General's Department emphasised that the options for reform were drawn from a number of reviews of the native title system, including:

- the Australian Law Reform Commission's report on '*Connection to Country: Review of the Native Title Act 1993 (Cth)*', published June 2015 (ALRC Report);
- the report to the Council of Australian Governments on the '*Investigation into Land Administration and Use*' published December 2015 (COAG Investigation); and
- the Office of the Registrar of Indigenous Corporations' 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act Review).

1.14 The Attorney-General's Department explained that the purpose of its consultation on further potential native title reforms was twofold: (a) to seek stakeholder views on recommendations for native title reform from the reviews listed above and (b) to investigate and seek stakeholder views on any legislative response to the effect of the McGlade decision on section 31 agreements.[10] Further background information on the McGlade decision is outlined below.

The McGlade decision

1.15 The Full Federal Court's 2017 decision in *McGlade* held that a particular kind of native title agreement under the Native Title Act – area Indigenous Land Use Agreements (ILUAs) – were invalid where not all members of the applicant (being the authorised representatives of the native title claim group in a native title agreement or claim) were party to the ILUA, even in circumstances where a member of the applicant had passed away.

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[9] The Hon Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 17 October 2019, p. 4483.

[10] Attorney-General's Department, *Submission 6*, p. 3.

1.16 This decision led to significant uncertainty in the native title system because it overturned a previous decision which held that an area ILUA is valid provided at least one member of the applicant was a party to the agreement.[11] An audit of area ILUAs indicated that 126 area ILUAs were impacted by the decision.[12]

1.17 The government sought to address this uncertainty through the introduction and passage of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth)*, which came into force on 22 June 2017. The 2017 amendments retrospectively validated area ILUAs which were entered into without the signatures of all members of the applicant, and ensured that ILUAs could be entered into by a majority of the applicant, or otherwise according to the will of the claim group, in the future.[13]

1.18 The committee's report on the 2017 bill expressed the view that:

> [T]he Commonwealth should consider whether it is necessary to make further amendments to ensure the McGlade decision does not affect right-to-negotiate agreements, which are more widely used than ILUAs. Specifically, the Commonwealth should consider further amendments to ensure that the provisions for the 'right to negotiate in the future' under section 31 of the Act cannot be invalidated in a similar process to the McGlade determination.[14]

1.19 The amendments proposed in schedule 9 of the bill would address the uncertainty created by the McGlade decision by confirming the validity of certain agreements under section 31 of the Native Title Act (often referred to as section 31 agreements). Schedule 9 would validate agreements entered into before the McGlade decision was handed down even if they were not signed by all members of the registered native title claimant.

Overview of the bill

1.20 The bill proposes to amend the Native Title Act in a number of areas including:

- give native title groups greater flexibility around setting their internal processes, including to allow claim groups to impose conditions on the authority of the applicant and allow a majority of the applicant to make decisions on behalf of the applicant;
- amend processes relating to ILUAs;

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[11] *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412.

[12] Attorney-General's Department, *Submission 6*, p. 2.

[13] Attorney-General's Department, *Submission 6*, p. 2.

[14] Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, March 2017, p. 25.

- allow historical extinguishment over areas of national and state park to be disregarded where the parties agree;
- allow for compensation applications over areas where native title has been extinguished;
- clarify the role of the Commonwealth to intervene in native title proceedings; and
- require the registrar to create and maintain a public record of section 31 agreements.

1.21 The bill would also confirm the validity of certain agreements made under section 31 of the Native Title Act in light of the McGlade decision. These provisions would apply retrospectively to validate agreements entered into before the decision was handed down even if they were not signed by all members of the registered native title claimant.

1.22 The bill would amend the CATSI Act to increase transparency and accountability of registered native title bodies corporate (RNTBCs) by:

- requiring RNTBCs' constitutions to include dispute resolution pathways for persons who are or who claim to be common law holders, and provide for all the common law holders to be directly or indirectly represented in the RNTBC;
- limiting the grounds for cancelling the membership of a member of a RNTBC to certain grounds;
- removing the discretion of directors of RNTBCs to refuse certain membership applications;
- specifying that the registrar may place a RNTBC under special administration in certain circumstances; and
- ensuring that court proceedings relating to a RNTBC are to be commenced in Federal Court, unless transferred to another court.

Consideration by other parliamentary committees

Senate Scrutiny of Bills Committee

1.23 The Scrutiny of Bills Committee (the scrutiny committee) raised scrutiny concerns about the retrospective application of the bill[15] with particular reference to schedule 9 which deals with the validation of section 31 agreements made on or before the commencement of the Act.[16]

1.24 The scrutiny committee noted its particular concerns that the legislation will or might have a detrimental effect on individuals and reiterated its 'long-standing

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[15] Scrutiny of Bills Committee, *Scrutiny Digest 2/19*, 28 March 2019, pp. 56–57; Scrutiny of Bills Committee, *Scrutiny Digest 8/19*, 13 November 2019, pp. 25-26.

[16] Section 31 agreements are agreements made under section 31 of the *Native Title Act 1993*, which deals with the normal negotiation procedure for agreements made under that Act.

scrutiny concerns about provisions that have the effect of applying retrospectively'. Advice was sought from the Attorney-General about the necessity and appropriateness of retrospectively validating section 31 agreements, including more detail information regarding whether there will be a detrimental effect to any involved parties.[17]

1.25 In his response, the Attorney-General advised that section 31 agreements can underpin resources projects and provide benefits for native title groups and the 'uncertainty created by the potential invalidity poses risks to both those projects and the related benefits flowing to native title groups'. It was emphasised that widespread consultation on the proposed approach has indicated it is 'well-supported by the native title and Indigenous representatives, states and territories and peak industry groups'.[18]

1.26 Following consideration of the response, the scrutiny committee requested that the key information provided by the Attorney-General be included in the explanatory memorandum and, in light of the information provided, made no further comment on the matter.[19]

Parliamentary Joint Committee on Human Rights

1.27 The Parliamentary Joint Committee on Human Rights (the human rights committee) provided comments about how the bill may engage the right to culture and right to self-determination. Upon assessing the bill, the human rights committee noted legal advice provided to the committee that allowing native title applicants to act by majority as the default rule, and retrospectively validating section 31 agreements, may engage and limit the right to culture. The committee also noted advice that the measures may promote the right to self-determination. However, the bill's statement of compatibility with human rights does not provide an analysis as to how this right is promoted.

1.28 The committee sought advice from the Attorney-General about 'whether it would be appropriate for the bill to be amended to require an evaluation to be conducted within an appropriate timeframe to assess the impact of these measures on the rights to culture and self-determination'.

1.29 In his response, the Attorney-General reiterated the bill follows 'an extensive period of consultation with a wide range of native title sector stakeholders' and during the consultation 'there was a specific focus on engagement with

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[17] Scrutiny of Bills Committee, *Scrutiny Digest 8/19*, 13 November 2019, p. 26.

[18] Scrutiny of Bills Committee, S*crutiny Digest 10/19*, 5 December 2019, p. 54.

[19] Scrutiny of Bills Committee, S*crutiny Digest 10/19*, 5 December 2019, p. 54.

Indigenous peoples and their representatives, including through targeted meetings with native title and peak Indigenous groups'.[20]

1.30 The Attorney-General's view was the bill did not require amendment to include a formal evaluation mechanism and emphasised a commitment to 'ongoing engagement with stakeholders, and in particular Indigenous peoples and their representatives, on native title issues. Moreover, the Attorney-General advised:

> [E]xisting formal and informal consultation mechanisms will provide ample opportunity for feedback to be received on the operation of the provisions of the Bill, once enacted. If such consultations indicate legitimate issues with the operation of measures in the Bill, further amendments will be considered.[21]

1.31 In concluding its assessment, the human rights committee considered that:

> [W]hile the bill may limit individual enjoyment of the right to culture, this must be balanced against the fact that the measures also promote the right to culture for the group as a whole, and noting additional safeguards in the bill, these measures may be a proportionate limit on the right to culture. The committee also considers the measures may promote the right to self-determination.[22]

1.32 The human rights committee considered that 'ultimately much will depend on how the proposed amendments and safeguards operate in practice'.[23]

Note on references

1.33 In this report, references to *Committee Hansard* are to proof transcripts. Page numbers may vary between proof and official transcripts.

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20 Parliamentary Joint Committee on Human Rights (Human Rights Committee), *Report 4 of 2020*, 9 April 2020, p. 145.

21 Human Rights Committee, *Report 4 of 2020*, 9 April 2020, p. 146.

22 Human Rights Committee, *Report 4 of 2020*, 9 April 2020, p. 147.

23 Human Rights Committee, *Report 4 of 2020*, 9 April 2020, p. 148.

Chapter 2
Key issues

Introduction

2.1 This chapter begins with an overview of the evidence provided to the committee and then details the key issues raised throughout the inquiry, with a particular focus on comments on the provisions in the bill.

Overview of evidence on the bill

2.2 The committee received evidence canvassing a range of views on the bill and there was much variation in the level of detail provided in the submissions. Some schedules, for example, schedule 1–role of the applicant and schedule 3–historical extinguishment, were the subject of discussion in many submissions whereas detailed comments on other schedules, for example, schedule 4–allowing a registered native title body corporate to bring a compensation application and schedule 5–intervention and consent determination, were addressed in a small number of submissions.

2.3 Some submissions indicated their overall support for the bill.[1] For example, the Northern Territory Government submitted:

> The Northern Territory Government supports the proposed reforms, noting they have been the subject of extensive consultations by the Commonwealth Government and will implement the recommendations of a number of high-level independent reviews, including by the Australian Law Reform Commission, and will improve the native title system for all parties.[2]

2.4 The Minerals Council of Australia (MCA) 'generally' supported the bill, stating that it 'includes measures to provide greater certainty and improve operations of the Act'. The MCA acknowledged that while the bill does not include all recommendations made by the organisation, it contains 'important reforms to support a more practical native title framework by addressing many long-standing technical and administrative matters'. [3]

2.5 The Queensland South Native Title Services (QSNTS) welcomed and supported the amendments in the bill and argued 'that further revision of the

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1 See, for example, Western Australian Government, *Submission* 7, p. 2; Wintawari Gurumu Aboriginal Corporation, *Submission 27*, p. 1.

2 Northern Territory Government, *Submission 2*, p. 1.

3 Minerals Council of Australia, *Submission 8*, p. 1.

Act would increase its fitness for purpose and better achieve the ideals laid down in the Preamble to the Act'.[4]

2.6 Other submissions indicated support for most of the proposed amendments but raised concerns about some provisions.[5] The Central Desert Native Title Services (CDNTS) supported the bill with the exception of provisions relating to the Commonwealth intervening in native title proceedings (part 1 of Schedule 5) and the creation of a public register of section 31 agreements (part 2 of Schedule 6).[6] The National Native Title Council (NNTC) welcomed most of the proposed amendments but did not support current drafting of provisions relating to de-registration of certain agreements, provisions relating to the Commonwealth intervening in native title proceedings, increased powers of the ORIC Registrar and the two year transition period for RNTBCs to update their constitutions.[7]

2.7 Others argued that the bill includes urgent amendments (for example, schedule 3) and should not be delayed.[8] Representatives from Yamatji Marlpa Aboriginal Corporation (YMAC) argued that delaying the bill to address all matters that could be addressed would be 'counterproductive'.[9]

2.8 In contrast, the Law Council of Australia (Law Council) identified a number of areas of concern which, it argued, should be addressed by a number of amendments.[10] The Indigenous Peoples' Organisation argued that the bill is inconsistent with international law and the government's obligations under article 1 the International Covenant on Civil and Political Rights (ICCPR) and article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESR).[11] Emeritus Professor Jon Altman submitted:

> While some structural and systemic shortcomings might be ameliorated by this Bill, others might be exacerbated. This is not a very productive way to ensure that native title assists holders and claimants deploy their rights and interests to improve their circumstances in contemporary Australia.[12]

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4 Queensland South Native Title Services, *Submission 12*, p. 1.

5 See, for example, National Native Title Council, *Submission 4*, p. 4; ANTaR, *Submission 11*, p. 5.

6 Central Desert Native Title Services, *Submission 1*, pp. 8-9.

7 National Native Title Council, *Submission 4*, pp. 3-4, see also, ANTaR, *Submission 11*, p. 5.

8 Central Desert Native Title Services, *Submission 1*, p. 9; Yamatji Marlpa Aboriginal Corporation, *Submission 23*, p. 1.

9 Mr McKellar, Yamatji Marlpa Aboriginal Corporation, *Committee Hansard*, 10 March 2020, p. 7.

10 Law Council of Australia, *Submission 18*, pp. 5-6. The NSW Bar Association endorsed the Law Council's submission, *Submission 21*, p. 1.

11 Indigenous Peoples' Organisation, *Submission 20*, p. 1.

12 Emeritus Professor Jon Altman, *Submission 5*, p. 5.

2.9 Furthermore, Professor Altman opined that the 'reforms, like earlier amendments of the [Native Title Act], fail to address the first order issue of free prior and informed consent that would empower native title groups to determine what happens on lands and seas where native title rights and interests are legally recognised'.[13]

2.10 Mr Ross Mackay, a solicitor and legal consultant, stated that the bill fails to 'engage with some of the key problems which have become apparent over the 26 years of operation' of the Act. Mr Mackay stated that certain provisions of the bill 'touch upon practical issues' facing native title holders but 'taken as a whole' the bill is a missed opportunity to address broader issues such as the onerous burden of proof requirements and 'lack of parameters around the requirement to negotiate in good [faith]'.[14]

2.11 Original Power described the bill as proposing a range of 'disparate amendments', some of which 'seem to be beneficial to native title holders', some encompass legislative 'housekeeping' and some amendments 'appear to be in the interests of mining companies and other developers, and not in the interests of native title holders'.[15]

2.12 Several submitters focused their comments exclusively on schedule 3 relating to historical extinguishment. According to the NFF, schedule 3 'amounts to a vehicle that will undermine certainty and needs to be examined far more rigorously from a policy perspective'.[16] The New South Wales Aboriginal Land Council (NSWALC) supported 'in principle' the intent to disregard historical extinguishment but argued the bill as drafted would have unintended consequences for Aboriginal communities in NSW.[17] The Australian Maritime Safety Authority raised concerns about how the extinguishment provisions would affect their management of lighthouses and other infrastructure.[18]

2.13 While the Australian Lawyers Alliance (ALA) welcomed some amendments in the bill, including the historical extinguishment provisions, provisions which would give greater flexibility to native title claimants to set limits on the conditions of the applicant's authority, and the creation of new pathways to address native title related disputes following a native title determination, it was concerned that the amendments are limited in reach and 'several much needed proposals for reform have remained unaddressed in the bill'.[19]

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13 Emeritus Professor Jon Altman, *Submission 5,* p. 2.

14 Mr Ross Mackay, *Submission 13*, p. 1.

15 Original Power, *Submission 26*, p. 1.

16 National Farmers Federation, *Submission 19*, [p. 1].

17 New South Wales Aboriginal Land Council, *Submission 11*, p. 1.

18 Australian Maritime Safety Authority, *Submission 22*, pp. 1-3.

19 Australian Lawyers Alliance, *Submission 9*, p. 4.

2.14 Dr Anne Poelina did not support the bill, submitting that if the amendments 'proceed in their current form there will be a great injustice to Australia's original peoples, our land and living waters, lifeways and livelihoods'.[20]

Background and context when considering native title reform

2.15 Inquiry participants highlighted a number of broader issues to provide background and context to their consideration of native title reform.

2.16 Australians for Native Title and Reconciliation (ANTaR) emphasised that any reforms to the Native Title Act should be consistent with the intentions and principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and:

> …must fundamentally be favourable to Aboriginal and Torres Strait Islander peoples, recognising the historical trauma of colonisation and the impact of successive State and Federal government policies that have disadvantaged or ignored the First Peoples of this continent.[21]

2.17 The Kimberley Land Council (KLC) explained that when 'amendments to bills come through…they never really are from a traditional owner perspective'; the amendments are 'generally driven from a third-party proponent', such as the resource sector or government. Moreover:

> When we're trying to push through to make changes, when it's coming from the sector or from the traditional Aboriginal or Torres Strait Islander people, it tends to fall on deaf ears. In regard to saying, 'Hey, we've got concerns with the Native Title Act. We need to make some amendments,' we get pushed aside. However when it's big industry or government itself—I use the McGlade case as an example of this—we can see amendments getting turned around within six to 12 months. So we feel that we're always at the tail end of putting our requests for changes to the bill.[22]

2.18 Emeritus Professor Altman submitted that native title law should 'not be treated as a tradeable commodity' as it is 'a special generis form of property that needs to be treated in a special way'. In his view, a 'native title interests test' should always be applied and any 'reform that has the potential to weaken native title rights and interests, that are already severely limited in Australia law, should not be countenanced'.[23]

2.19 When discussing their experiences of native title claims processes, witnesses at the public hearing in Perth explained some of the challenges of engaging with

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[20] Dr Anne Poelina, *Submission 24*, p. 62.

[21] ANTaR, *Submission 10*, p. 4.

[22] Mr Tyronne Garstone, Acting Chief Executive Officer, Kimberley Land Council, *Committee Hansard*, 12 March 2020, p. 2.

[23] Emeritus Professor Jon Altman, *Submission 5*, p. 1.

a system to seek access to land which they have not ceded to any other party. Ms Margaret Culbong stated:

> I've been fighting and I've walked these streets for law and justice for my people for many years. We're still fighting the law and justice…But native title was never a part of my future for myself and for my grandchildren and everyone else. I have not ceded my rights to my country.[24]

2.20 Mr Mervyn Eades told the committee:

> I'm a Mirnang Wilman Noongar from the south-west of WA—Noongar country. I have not ceded my sovereign rights. I'm a sovereign First Nations person of his land. Native title—where it's come from and where it is today—serves our people no purpose. Native title has turned into the interest of mining companies and the states. They've taken all rights away from us.[25]

Schedule 1–Role of the applicant

2.21 Under the Native Title Act, a native title determination or compensation claim is made by a person or group of people who seek recognition of rights and interests in an area of land and/or waters according to their traditional laws and customs.

2.22 The 'applicant' is the person or group of people authorised by a native title claim group to make and manage a claim on their behalf. The 'applicant' can also enter into native title agreements (such as Indigenous Land Use Agreements (ILUAs)) on behalf of the group where authorised to do so.

2.23 Schedule 1 proposes amendments in three key areas:

- allowing the claim group to impose conditions on the authority of the applicant to make and manage a native title or compensation claim on its behalf (part 1);
- allowing a majority of the applicant to make decisions or sign native title agreements, rather than requiring all members of the applicant to act together (part 2); and
- streamlining the process for the claim group to replace individual members of the applicant if the member is unable to perform their duties, or has passed away, including through pre-agreed succession planning arrangements (part 3).

2.24 Much of the evidence received on this schedule focused on the amendments in parts 1 and 2.

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[24] Ms Margaret Culbong, private capacity, *Committee Hansard*, 10 March 2020, p. 20.

[25] Mr Mervyn Eades, private capacity, *Committee Hansard*, 10 March 2020, p. 20.

Part 1–Authorisation

2.25 Proposed section 251BA would allow a claim group to impose conditions on the authority of the applicant to make and manage a native title or compensation claim on its behalf. Examples of conditions that the claim group could place on the authority of the applicant include requiring the applicant to seek specific authorisation from the claim group before agreeing to a consent determination, or before discontinuing or amending an application. The group may also impose a condition that the applicant is required to act unanimously.[26] The explanatory memorandum states that these amendments implement Recommendation 10-5 of the ALRC Report.[27]

2.26 The bill would amend section 62A of the Act to require the details of any conditions on the authority of the applicant to be included in an originating claimant or compensation application and supported by affidavits. These provisions would assist relevant parties, when dealing with the applicant, to be aware of any conditions imposed on the applicant's authority.[28]

2.27 While the authorisation provisions were broadly supported,[29] a number of amendments were suggested to provide further clarity.

2.28 The WA Government outlined concerns regarding the practicality of ensuring that the conditions are imposed properly. To ensure transparency about the form of the conditions and the way they are utilised, it was suggested that the amendments set out requirements for the form of conditions imposed and how they are to be documented.[30]

2.29 YMAC explained that when changes are made to a claim's Form 1 document, this would ordinarily trigger the registration test under section 190A of the Native Title Act. YMAC contended that this could discourage claim groups from updating the conditions placed on their applicant and proposed that 'changes to the conditions on the applicant be added to the list of amendments to a claim's Form 1 that effectively do not trigger the registration test

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26 Explanatory memorandum to the Native Title Legislation Amendment Bill 2019 (Explanatory memorandum), pp. 30–31.

27 Explanatory memorandum, p. 27.

28 Explanatory memorandum, p. 28.

29 Central Desert Native Title Services, *Submission 1*, p. 3; National Native Title Council, *Submission 4*, pp. 6–7; Western Australian Government, *Submission 7*, p. 3; Queensland South Native Title Services, *Submission 12*, p. 2; Mr Ross Mackay, *Submission 13*. p. 6; Yamatji Marlpa Aboriginal Corporation, *Submission 23*, p. 1.

30 Western Australian Government, *Submission 7*, p. 3.

(s190A(6A)(d))'.[31] This suggested amendment was supported by CDNTS and the Law Council.[32]

2.30 CDNTS proposed an amendment to the application and transition provisions related to conditions on authority:

> (3) The amendments of sections 62A and 186 of the Native Title Act 1993 made by this Part apply in relation to any authority given after the commencement of this item but does not apply to any claims currently on the Register of Native Title Claims.
>
> (4) Section 251BA of the Native Title Act 1993, as inserted by this Part applies in relation to any authority given after twelve months of the commencement of this item.[33]

2.31 The Law Council supported the objectives of proposed section 251BA but expressed concern that it 'reproduces the dichotomy between "traditional" processes of decision-making and "agreed to and adopted" processes of decision-making imposed throughout the Native Title Act'.[34] Moreover:

> The Law Council submits that the use of a traditional decision-making process, where such a process exists, should be optional rather than mandated. It would be preferable to enable a native title claim group to pursue a decision-making process of its choice, based on its needs and resources. This is consistent with previous recommendations of the Australian Law Reform Commission.[35]

2.32 The Law Council also repeated its concern about the lack of clarity on how the amendments affect the validity of existing conditions on applicants. To rectify this it was suggested that the word 'only' should be inserted into proposed subsection 24(4) as follows:

> Section 125BA of the Native Title Act 1993, as inserted by this Part, applies only in relation to any authority given after the commencement of this item.[36]

Part 2–Applicant decision making

2.33 The bill would amend the Native Title Act to allow, as the default position, an applicant to a native title claim to act by majority for all things that the applicant is required or permitted to do under the Act, unless the claim group has determined otherwise (consistent with the amendments in part 1 of

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31 Yamatji Marlpa Aboriginal Corporation, *Submission 23*, p. 1.

32 Central Desert Native Title Services, *Committee Hansard*, 10 March 2020, p. 9.

33 Central Desert Native Title Services, responses to questions on notice, 10 March 2020 (received 6 May 2020), [p. 2].

34 Law Council of Australia, *Submission 18*, p. 7.

35 Law Council of Australia, *Submission 18*, pp. 7–8.

36 Law Council of Australia, *Submission 18*, p. 8.

Schedule 1). The provisions to allow the applicant to act by majority will commence six months after proclamation.

2.34 This part extends the amendments made in 2017, which changed the default position for making future area ILUAs, to make clear that the majority default position applies to other agreements including area ILUAs, alternative procedure ILUAs and section 31 agreements.[37]

2.35 CDNTS supported the proposal for a majority of the claim group being able to sign off on agreements provided there has been compliance with processes and conditions agreed to by the claim group. The CDNTS did not support the proposed six month commencement timeframe for the majority default position because six months is an insufficient length of time for claim groups to finalise any conditions on the authority of applicants, due to factors such as geographic locations, length of time required to get people together and resolve issues, and other cultural issues.[38]

2.36 The Law Council raised two issues of concern in relation to proposed sections 24CD, 24CL, 62C and 87:

> [F]irst that the wording in relation to the application of these sections is vague enough to warrant concern that the default rule by majority inserted in these sections could apply in relation to claim groups or applicants determined prior to the commencement of these sections; and second, that these sections do not require the majority of the claim group or applicant to give notice to the other persons of the claim group or applicant prior to entering an agreement or making a decision.[39]

2.37 The Law Council suggested:

> …clarification of the retrospective scope of proposed sections 24CD, 24CL, 62C and 87. The Law Council recommends that the amendments proposed should only apply in relation to authority undertaken after the amendments. The Law Council further recommends that at minimum there should be a requirement to provide seven days' notice in writing to all persons comprising the registered native title claimant, prior to the majority executing an agreement.[40]

2.38 Mr John Bowler, Mayor of Kalgoorlie-Boulder recounted a situation brought to his attention whereby two sisters were unable to access benefits from a native title determination to which they were part of the claim group.[41] Mayor Bowler

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[37] The 2017 bill changed the default position for making future area ILUAs so that only a majority of members are required to be a party to the agreement, unless the claim group determines otherwise (explanatory memorandum, p. 32).

[38] Dr Carolyn Tan, Director, Central Desert Native Title Services, *Committee Hansard*, 10 March 2020, pp. 10–12.

[39] Law Council of Australia, *Submission 18*, pp. 8–9.

[40] Law Council of Australia, *Submission 18*, p. 11.

[41] Mr John Bowler, Mayor, *Committee Hansard*, 11 March 2020, p. 2.

elaborated to illustrate some of the issues that should be considered with majority decision making and ensuring there are safeguards in place when imposing conditions on authorisations:

> In that case there were three brothers another sister, so there were four and two—60 per cent, 66 per cent, 33 per cent. But let's say you had 10 brothers and sisters and six wanted it and had the majority, and the other four—like those two sisters—were being excluded and wanted something different. So, yes, I think anything that's going to expedite things and move it along is better but I think you want some good safeguards.[42]

2.39 Several inquiry participants expressed reservations that majority decision making and the imposition of defined timeframes is inconsistent with Indigenous decision making processes. The Indigenous Peoples' Organisation (IPO) submitted:

> The IPO recognises and affirms that the exercise of the authority of each and every member of the claim group, and the exercise of their decision-making power, whether traditional or revitalised, in the course of discussion, consensus, abstention or dissent, represents the ontological concept of Indigenous decision-making and affirms the right to self determination. The proposed amendments undermine the cultural fabric of Indigenous claim groups and such amendments seek to impose western concepts of majority and minority membership within Indigenous groups.[43]

2.40 Emeritus Professor Altman explained that his preferred option for determining native title interests is based on consent being determined 'by land interest group consensus in accord with their own internal decision-making processes (as occurs in the NT under land rights law)'.[44] Professor Altman was concerned that the requirement to act by 'majority as the default position is fraught with potential dangers particularly when a larger regional group might be negotiating over a proposed development, like a mine, in a distinct locality'. Furthermore:

> Majority decision making is a very western liberal democratic institution that might not sit comfortably with Indigenous decision-making processes, bearing in mind that continuity of customs and traditions need to be demonstrated in legal native title claim processes.
>
> In other words, the rights and interests of those who matter in accord with tradition might be usurped by the wishes of a wider polity. This in turn could generate political conflict in the native title domain that should be avoided.[45]

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[42] Mr John Bowler, Mayor, City of Kalgoorlie-Boulder, *Committee Hansard*, 11 March 2020, p. 9.

[43] Indigenous Peoples' Organisation, *Submission 20*, [p. 2].

[44] Emeritus Professor Jon Altman, *Submission 5*, p. 3.

[45] Emeritus Professor Jon Altman, *Submission 5*, p. 3.

2.41 Mr Mervyn Eades stated that processes which enable a few to make a decision for all 'has never been right in traditional decision making in our mob':

> Our mob would turn their backs and walk away or sit with their back onto something if they didn't think it was right. To give authorisations, you've got to be consent of all. It can never be of a few.[46]

2.42 Ms Averil Williams expressed her view:

> You are applying a Westminster system, where you need an answer within a time frame. That has been mentioned throughout this meeting, when you were talking to the previous two—time frames. Time frames have never been a part of me as an Aboriginal person—though I work and there are things that I must do within that time frame. But we're talking about cultural people. We're talking about people who have history and connection to land. Yet you want us to give these old fellas a time frame in which to make a decision. I don't believe that's right. I believe that we need to work in line with what the old people are saying and what is appropriate for those areas. That has not happened.[47]

2.43 The Chamber of Minerals and Energy of Western Australia (CMEWA) spoke favourably about the majority default rule, describing it as a necessary inclusion in the legislation. According to CMEWA, the provision of a default majority rule would assist to facilitate a level of certainty and security for agreements at the same time as empowering individual groups to impose conditions on their claim group of acting by majority was not what that group wanted.[48]

2.44 The Australian Human Rights Commission (AHRC) did not oppose amendments to applicant decision making and the majority default rule as applied to ILUAs, 'on the grounds that an authorisation process agreed by the native title group should be respected'.[49] However, the AHRC maintained its view that the majority default rule should not be extended to section 31 agreements until the authorisation requirements in the Native Title Act are the same for ILUAs and section 31 agreements.[50]

2.45 The Attorney-General's Department advised:

> The amendment to allow the applicant to act by majority as default, and the streamlined provisions for replacing the applicant, will commence six-months after Proclamation of the Bill. The provisions allowing the native title claim group to place conditions on the applicant's authority will commence on Proclamation.

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[46] Mr Mervyn Eades, private capacity, *Committee Hansard*, 10 March 2020, p. 23.

[47] Ms Averil Williams, private capacity, *Committee Hansard*, 10 March 2020, p. 27.

[48] Chamber of Minerals and Energy of Western Australia, *Committee Hansard*, 10 March 2020, pp. 44–45.

[49] Australian Human Rights Commission, *Submission 3*, p. 2.

[50] Australian Human Rights Commission, *Submission 3*, p. 2.

> The six-month delay is to allow claim groups time to consider whether they want the applicant to be able to act by majority, and to organise authorisation meetings to impose any conditions on the applicant's authority, including conditions requiring the applicant to act unanimously.
>
> The department identified six-months as an appropriate timeframe through consultation with stakeholders, including native title representative bodies and the ETAG (the membership of which included representatives from the National Native Title Council).[51]

Schedule 2–Indigenous Land Use Agreements

2.46 The Native Title Act sets out processes by which native title groups can negotiate with other parties to form voluntary agreements in relation to the use of land and waters. A key agreement making mechanism under the Act is an agreement known as an Indigenous Land Use Agreement (ILUA). There are three types of ILUAs: body corporate agreements, area agreements, and alternative procedure agreements.

2.47 The scope of these agreements can be wide and can include access to land, the relationship between native title rights and the rights of other land users, activities such as mining or exploration, or be part of the resolution of a native title claim. ILUAs may allow for certain 'future acts' to be done on land and waters, in exchange for compensation to native title groups.

2.48 Part 1 of Schedule 2 would amend the Native Title Act to:

- allow body corporate ILUAs to cover areas where native title has been extinguished; and
- require the Native Title Registrar to register an area ILUA only when satisfied it meets the requirements to be an ILUA.

2.49 Part 2 of Schedule 2 includes provisions which seek to streamline the process to be undertaken when minor amendments are made to an ILUA. Two new subsections would be inserted to clarify that when an ILUA is removed from the ILUA Register, future acts done in accordance with the ILUA, or any future acts already invalidly done which were purportedly validated by an ILUA, are valid.

2.50 Concerns raised about this schedule predominately focused on the amendments in part 2, to amend sections 24EB and 24EBA, which seek to clarify the validity of future acts by the insertion.

2.51 Several submissions expressed concern that these amendments would validate any future act authorised by the ILUA, including circumstances when an

[51] Attorney-General's Department, responses to questions on notice 25 May 2020 (received 11 June 2020), p. 5.

agreement was affected by fraud, undue influence or duress.[52] In addition, the Law Council stated that there may be situations when an agreement was registered in circumstances of 'jurisdictional error or other administrative law error' which may be a 'valid reason as to why the validity of a future act ought to be set aside'.[53]

2.52 To remedy the issue, Mr Mackay suggested the provision be amended to explicitly state that the validation does not apply to ILUAs 'deregistered on the basis they were induced by fraud, duress or undue influence'. In particular, '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)'.[54]

2.53 The National Native Title Council and ANTaR argued that the amendment could only be supported if an exception was included:

> As with the recognised exceptions to indefeasibility of registered title under the Torrens system in Australia there should be similar exceptions in relation to future acts authorised pursuant to a de-registered ILUA.[55]

2.54 The WA Government supported the proposed amendment as drafted and suggested that 'the amendments should also clarify that payment of compensation pursuant to an ILUA would also be similarly valid, and not affected by the removal of that ILUA from the Register'.[56]

2.55 The Attorney-General's Department confirmed that the existing remedy for parties affected by a future act done under an ILUA made under fraud or duress is to take action at common law (even where the ILUA has been removed from the Register under section 199C). The proposed amendment would not change this position, and affected parties would continue to be able to seek remedies at common law.[57]

Schedule 3–Historical Extinguishment

2.56 Generally, once native title has been extinguished it cannot be revived. Existing sections 47, 47A and 47B of the Native Title Act operate to allow the courts to disregard extinguishment in certain circumstances, including

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[52] ANTaR, *Submission 10*, p. 5; National Native Title Council, *Submission 4*, p. 4, see also, Australian Human Rights Commission, *Submission 3*, pp. 2–3.

[53] Law Council of Australia, *Submission 18*, p. 11.

[54] Mr Ross Mackay, *Submission 13*, p. 10.

[55] ANTaR, *Submission 10*, p. 5; National Native Title Council, *Submission 4*, p. 4.

[56] Western Australian Government, *Submission 7*, p. 4.

[57] Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 4.

reserves set aside for Aboriginal and Torres Strait Islander peoples, pastoral leases held by traditional owners and unallocated Crown land.[58]

2.57 Schedule 3 would amend the Act to extend the circumstances in which historical extinguishment can be disregarded to:

- areas of national, state or territory parks where native title has been extinguished, with the agreement of the parties (part 1); and
- pastoral leases controlled or owned by native title corporations (part 2).[59]

2.58 The amendments in schedule 3 were the subject of much discussion during the inquiry.

Part 1–Park areas

2.59 Proposed section 47C would allow historical extinguishment of native title to be disregarded over areas set aside for the preservation of the natural environment (national, state and territory parks), where the native title party and the relevant government (Commonwealth, state or territory) agree. This means those areas can be included in claims for native title (including an application for revised native title determination), provided that the relevant conditions are met, and that any previous acts which may have extinguished native title can be set aside for the purpose of determining the claim.[60]

2.60 New section 47C would differ from existing sections allowing historical extinguishment to be set aside, in that the relevant government responsible for the park would need to agree that extinguishment can be disregarded. Once this agreement is reached, it would be open to the court to determine that native title exists in the area, provided it is established in the usual way (including by demonstrating connection with the land or waters concerned).[61]

Support for section 47C

2.61 Several submitters and witnesses supported the historical extinguishment provisions.[62] QSNTS welcomed the extension of 'circumstances in which historical extinguishment can be disregarded in relation to national park areas and pastoral leases controlled or owned by native title corporations'.[63]

2.62 CDNTS emphasised that while section 47C 'could be improved', these provisions are 'most urgent and important'. In particular:

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58 Explanatory memorandum, p. 4.

59 Explanatory memorandum, p. 4.

60 Explanatory memorandum, p. 44.

61 Explanatory memorandum, p. 44.

62 See, for example, Australian Human Rights Commission, *Submission 3*, p. 3; National Native Title Council, *Submission 4*, p. 3.

63 Queensland South Native Title Services, *Submission 12*, p. 4

> [W]e believe the urgency of getting it in place is the priority, so improvements are matters that could be sought later. The reason is that often the most significant areas for First Nations peoples are in the national parks and they're the most pristine et cetera. The impact of extinguishment of native title is quite traumatic for the people of those areas.[64]

2.63 Warnpurru Aboriginal Corporation (Warnpurru), the corporation representing the traditional owners of the Gibson Desert Nature Reserve, urged that the amendments to section 47C 'proceed without delay'.[65] Directors from Warnpurru explained the importance and value of the land to the traditional owners and their families:

> Can you please change the rule, change the law, because my people want to live out there, want to hunt and gather, want to do our ways of life as we've lived and the way our ancestors lived.[66]
>
> …
>
> We've been fighting for the country, but we want the native title. If we change it then we can get funding for [Indigenous Protected Areas] and the jobs would come. We'd be able to learn and grow, for Warnpurru to stand on our own feet, if we get that native title. But we need native title, because after 10 years we need to be able to get our own IPA money in the future, when that agreement's finished. That is bit of a hard one for us. We just want to know what we are going to do about that and see if you can help us.[67]

2.64 Mr David Reger, a lawyer working with Warnpurru, stated that these amendments 'will have a real and direct impact on people's lives' and:

> The proposed amendments will go a long way in healing that hurt and shame and restoring a sense of pride for this group and allowing them to move forward towards a future where they can hold their heads up high and proud, along with other groups in the desert who have held their native title for decades.[68]

2.65 Emeritus Professor Altman argued that allowing 'historical extinguishment over areas of national and state park to be disregarded where the parties agree to allow native title claim is a welcome way to deliver more land justice and help reduce massive inequalities in the national distribution of native titled lands'.[69] However, he also cautioned:

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64 Dr Carolyn Tan, Central Desert Native Title Services, *Committee Hansard*, 10 March 2020, p. 9.

65 Mr David Reger, Lawyer, Warnpurru, *Committee Hansard*, 11 March 2020, p. 19.

66 Ms Tjuparntarri (Daisy) Ward, Director, Warnpurru, *Committee Hansard*, 11 March 2020, p. 17.

67 Mr Robert Jennings, Director, Warnpurru, *Committee Hansard*, 11 March 2020, p. 19.

68 Mr David Reger, Warnpurru, *Committee Hansard*, 11 March 2020, pp. 19–20.

69 Emeritus Professor Jon Altman, *Submission 5*, p. 4.

> But if at some future date native title holders and claimants are to sole or joint manage national and state parks it is imperative that they are adequately resourced for such purposes.
>
> This is especially the case where lands are returned to Indigenous landowners in either degraded condition or facing significant environmental threat.

Concerns raised about section 47C

2.66 Other evidence highlighted concerns with the historical extinguishment provisions.

2.67 The WA Government supported proposed section 47C but considered there are a number of matters that require further attention:

> While the proposed new section 47C of the NTA is supported, WA considers there are a number of matters that require further attention including, but not limited to, the form and content of an agreement, the application of the future act regime of the NTA to the agreement area, the clarity of the process used to reach agreement and the proposed definition of a 'park area'.[70]

2.68 At the public hearing, the WA Government elaborated:

> I think WA is all for flexibility in the application of this section, and the written submission that we've made notes a couple of live matters. We're looking at a form of park area where according to the law native title has been extinguished, but we're looking for outcomes for the native title party involved and looking ahead as to whether or not section 47C will go into law, into the Native Title Act. I think also there's a technical question around how public works are dealt with in such areas. I note that proposed 47C does reference, specifically, public works in the area and the fact that if 47C is enlivened and a positive determination of native title is made any existing interest, including a public work, will be valid.
>
> One of the issues we sometimes find is that whilst there are public works that can be the subject of agreement on that basis, within 47C, sometimes the public works are excluded from the park area. So you get that situation where you can't formally say you're dealing with it. You might want to have an agreement about a particular public work but, because it's within the outer boundaries of the park area but not actually part of the park area, you may have an issue with whether or not proposed 47C covers it. I know that's a fairly technical issue but, I suppose, it's just part of an overview of a section that WA is very supportive of and we've got live examples we're dealing with that would benefit from it being enacted.[71]

2.69 The National Farmers' Federation (NFF) argued that should proposed section 47C become operational 'it will open a door to native title claims that currently

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70 Western Australian Government, *Submission 7*, p. 2.

71 Mr Jeffrey O'Halloran, Senior Adviser, State Solicitor's Office of Western Australian, *Committee Hansard*, 10 March 2020, p. 32.

[doesn't] exist'.[72] Of particular concern to the NFF was the proposed definition of 'park area'[73] which is, according to the NFF, 'too broad from a drafting perspective', making it difficult to understand how this 'section will operate considering the substantial uncertainty it creates'.[74]

2.70 While supporting the intent of the historical extinguishment provisions, the Minerals Council reiterated its concerns about 'significant unintended consequences':

> …including a potential compensation liability for parties that hold an interest or have held a prior interest in the land relating to the agreement, if this is not addressed in the relevant agreement. This is associated with grants where there was no prior requirement for a future acts process.[75]

2.71 The Australian Maritime Safety Authority (AMSA) was concerned about the historical extinguishment provisions as they may apply to management of its network of approximately 385 aids to navigation (AtoN). AMSA explained that many AtoNs are located in remote areas (marking hazardous features of coastlines) and situated on land that is now managed as national or state parks or reserves, 'and which may also be subject to native title claims or determinations, or on land subject to Aboriginal land claims'.[76]

2.72 AtoNs are considered 'public works' for section 253 of the Native Title Act and the establishment of historic public works extinguishes native title. As the proposed amendments at subsections 47C(4) would allow for extinguishment of native title by public works to be disregarded if agreement is reached between the relevant government and traditional owners, it was unclear to AMSA if its agreement 'would be required in such circumstances and including where the public work was constructed prior to federation'. To address this concern, AMSA recommended that 'if extinguishment in cases of public works are to be disregarded a mechanism is required to ensure at least consultation, but preferably consent, from the agency responsible for the public work'.[77]

Notice and time for comment

2.73 The bill provides that prior to making an agreement in relation to a park area or an area containing relevant public works, the relevant government must

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72 National Farmers' Federation, *Submission 19, Attachment 1*, p. 2.

73 New subsection 47C(3) provides that 'park area' means an area within a national, state or territory park that is set aside (or vested, or in which an interest in granted) for purposes that include the preservation of the natural environment.

74 National Farmers' Federation, *Submission 19, Attachment 1*, pp. 2-4.

75 Minerals Council of Australia, *Submission 8*, [p. 3].

76 Australian Maritime Safety Authority, *Submission 22*, p. 2.

77 Australian Maritime Safety Authority, *Submission 22*, p. 3.

facilitate a public notification process with a public comment period of at least three months. The Minerals Council supported the public notification period and suggested an additional measure to provide certainty for industry:

> Such a measure should require any party who holds (who has held) an interest in an area (who may be affected by section 47 agreement) be a party to the agreement, or as a minimum, consulted in regards to the agreement. This addition would complement the required reasonable notification and three month public comment period. The MCA considers this a balanced and enabling approach that does not affect the provision’s purpose of providing opportunities for Aboriginal and Torres Strait Islander peoples that may arise from areas of national, state or territory parks.[78]

2.74 According to the NFF, the proposed notification and comment process provides 'no security…for affected parties [as] notification isn’t consultation'. In the absence of 'any other mechanism the potential impact on the concession renewal process' was of concern to the NFF.[79]

2.75 The Attorney-General's Department informed the committee:

> Government and industry stakeholders expressed in-principle support for proposed section 47C during consultations on exposure draft legislation, subject to concerns that the provision may apply to privately held land, and the protection of third party interests.
>
> The provision was amended in the final Bill in response to stakeholder feedback to restrict the areas over which the provision applies to clearly exclude freehold title. There are also a number of safeguards built into the proposed amendment for third party or industry interests, including:
>
> - a requirement that there is public notification of a proposed agreement by the government party, and an opportunity for interested persons to provide comment, which must be for at least three months (proposed subsections 47C(6) and (7); and
> - a provision protecting existing interests, including third party interests, by requiring such interests to prevail over any native title rights while it operates (proposed subsection 47C(9).
>
> Finally, the new section 47C will also only operate where native title and government parties agree, and subject to any conditions required by the government party (which could include conditions in relation to the protection of third party interests).[80]

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78 Minerals Council of Australia, *Submission 8*, [p. 3].

79 National Farmers' Federation, *Submission 19, Attachment 1*, p. 5.

80 Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 15.

Aboriginal Land Claims in New South Wales

2.76 The New South Wales Aboriginal Land Council (NSWALC) and the Law Council supported proposed section 47C in principle but raised concerns about how it will interact with Aboriginal Land Claims made under the *Aboriginal Land Rights Act 1983* (NSW).

2.77 The NSWALC argued that the bill as currently drafted would 'have the unintended consequences of reducing the existing rights and interests of Aboriginal people' under the *Aboriginal Land Rights Act 1983* and increase 'legal uncertainty and costs for Aboriginal communities in NSW'.[81]

2.78 The Law Council explained:

> [The] meaning of 'park area' [in proposed subsection 47C(3)] is broad enough to pick up land beyond national parks or state forests, such as land reserved under legislation for purposes that 'include preserving the natural environment', which is land that might also be claimable under the NSW Act, meaning the two legislative regimes in theory overlap.[82]

2.79 It was explained that in NSW, Aboriginal Land Claims under the *Aboriginal Land Rights Act 1983* (NSW) can deliver freehold title where the claimed crown land is effectively unused and unneeded at the date of claim. Although land granted in this way 'is subject to, and does not affect any native title rights and interests existing in the lands immediately prior to transfer', Aboriginal Land Claims can be 'adversely impacted by a native title claim that has been registered or successfully determined prior to the land claim'.[83]

2.80 The NSWALC submitted:

> The proposed provisions to disregard historical extinguishment will mean that Aboriginal Land Claims that may currently succeed over "park areas" will now fail where they are preceded by a s47C native title application.[84]

2.81 It was stated that this would effectively exclude from claim lands that may otherwise be claimable in freehold under the *Aboriginal Land Rights Act 1983.* Currently Aboriginal Land Claims lodged after a native title claim can still succeed in circumstances where native title has been extinguished.[85]

2.82 The NSWALC expressed concern that 'proposed s47C provisions will have the effect of converting Crown land that is currently claimable under the ALRA to land that is un-claimable by virtue of the proposed s47C'. In order to remedy this, it was recommended that s47C not operate 'to diminish the rights and interests of Aboriginal Land Councils or defeat Aboriginal Land Claims that

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81 New South Wales Aboriginal Land Council, *Submission 11*, [p. 1].

82 Law Council of Australia, *Submission 18*, p. 12.

83 New South Wales Aboriginal Land Council, *Submission 11*, [p. 3].

84 New South Wales Aboriginal Land Council, *Submission 11*, [p. 3].

85 New South Wales Aboriginal Land Council, *Submission 11*, [p. 3].

would otherwise have been successful' under the *Aboriginal Land Rights Act 1983*.[86]

2.83 To mitigate possible unintended consequences, the NSWALC requested a number of amendments 'in the spirit of advancing the collective rights and interests of Aboriginal people'.[87]

(a) Aboriginal Land Claims made under the ALRA should be explicitly recognised as 'interests' in s47C(9)(a)(ii).
(b) The agreement of Aboriginal Land Councils, with an interest in the agreement area, should be required under s47C(1).
(c) Clarify that s47C does not operate to diminish the rights and interests of Aboriginal Land Councils or defeat Aboriginal Land Claims that would otherwise have been successful under the ALRA.[88]

2.84 The Law Council recommended the 'development of a more refined mechanism, which would have regard to the complex interaction between native title rights and land rights and ensure that the two regimes operate in harmony to maximise outcomes for Aboriginal people'.[89]

Schedule 4–Allowing a registered native title body corporate to bring a compensation application.

2.85 It is generally understood that the present terms of the Native Title Act do not allow an RNTBC to bring a compensation application over areas where native title has been fully extinguished. Currently, RNTBCs can only bring compensation applications over areas where native title has been partially extinguished or impaired. The provisions in schedule 4 would allow an RNTBC to also be able to make a compensation claim over areas within the external boundary of its determination area where native title has been fully extinguished.[90]

2.86 Several submissions expressed support for these provisions.[91] The QSNTS submitted that these amendments will mean that 'there will no longer be the existing cumbersome (and potentially expensive) process of compensation claims for contiguous lots being brought by both a compensation claim group and a RNTBC'.[92]

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86 New South Wales Aboriginal Land Council, *Submission 11*, [p. 3].

87 New South Wales Aboriginal Land Council, *Submission 11*, [p. 1].

88 New South Wales Aboriginal Land Council, *Submission 11*, [p. 2].

89 Law Council of Australia, *Submission 18*, p. 12.

90 Explanatory memorandum, p. 50.

91 Central Desert Native Title Services, *Submission 1*, pp. 6-7; Western Australian Government, *Submission 7*, p. 7; Mr Ross Mackay, *Submission 13*, p. 13.

92 Queensland South Native Title Services, *Submission 12*, p. 4.

Schedule 5–Intervention and consent determinations

2.87 Part 1 proposes amendments to clarify the role of the Commonwealth in its capacity, among other things, as an intervenor in native title proceedings. Part 2 of Schedule 5 seeks to clarify the procedural requirements for the Federal Court to make determinations with the consent of the parties. The explanatory memorandum describes these provisions as 'technical amendments'.[93]

2.88 CDNTS did not support the amendments in part 1 which, in its view:

> …will have the effect of requiring the consent of the intervenor in various procedural and substantive matters. This is particularly the case where the Commonwealth, as intervenor, has no rights or interests in the land under claim and therefore has only an academic interest in the proceedings. While it is important for the views of the intervenor to be heard in any claim, agreements which determine the rights and interests of parties should not be prevented as a result.[94]

2.89 CDNTS stated:

> We have expressed concern about expanding section 87 and the provision to require the Commonwealth, when it intervenes, to be a party to any consent determination. Our experience has been that the Commonwealth has sometimes intervened quite late in the piece when negotiations are well advanced, and, therefore, it delays matters to suddenly have to satisfy the Commonwealth as well after you've gone through and got agreement from most of the other parties. We see no need for the Commonwealth to be required to be a party to any consent determination. An area of concern we have noted in our submission is that section 31 agreements are basically private agreements. Our position is that that should remain the case.[95]

2.90 The NNTC and ANTaR did not support provisions in Schedule 5 on the basis that these provisions 'would theoretically allow the Commonwealth to oppose an agreement even where all the other parties are in agreement'.[96] These concerns were echoed by the AHRC.[97]

Schedule 6–Other procedural changes

2.91 The evidence received on schedule 2 was predominately focused on part 2 related to amendments to the operation of section 31 agreements and the proposed register of section 31 agreements.

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93 Explanatory memorandum, p. 4.

94 Central Desert Native Title Services, *Submission 1*, p. 9.

95 Dr Carolyn Tan, Central Desert Native Title Services, *Committee Hansard*, 10 March 2020,

96 ANTaR, *Submission 10*, 5.

97 Australian Human Rights Commission, *Submission 3, Attachment 2*, p. 20.

Operation of section 31 agreements

2.92 The proposed amendments to section 31(1) would allow government parties to withdraw from negotiations where the parties consent, while maintaining that government parties must remain parties to the agreements. CDNTS supported this amendment as 'accurately [reflecting] the manner in which these types of agreements are currently being negotiated in practice'.[98] The National Native Title Council shared this position, and stated that this amendment would 'operate to simplify the…procedure'.[99]

2.93 The WA Government was concerned about ambiguity that may arise in the operation of this provision if passed. It submitted that it:

> …has concerns about the practicality of the proposal that the government party would not be able to 'opt out' of negotiations about matters which does not affect it without the other parties' written consent, and what happens in circumstances in which it may wish to 'opt back in'.[100]

2.94 The WA Government also questioned whether the requirement for government parties to remain parties to the section 31 agreement, irrespective of involvement in the negotiation process, may still result in unnecessary costs and delays for all parties.[101]

2.95 While the Native Title Act currently requires parties to provide a copy of their section 31 agreement to the National Native Title Tribunal, proposed subsection 41A(1)(a) would require parties to also advise the relevant arbitral body about the existence of any other ancillary agreements. The WA Government supported this amendment, but suggested that it clearly state that it is the responsibility of the grantee and native title parties to provide the National Native Title Tribunal these agreements. It stated that such information is not provided to nor held by the WA Government, and it 'would want to avoid any expectation that it was otherwise responsible for compliance with the requirements of this proposed amendment'.[102]

Proposed register of section 31 agreements

2.96 The inclusion of proposed sections 41(4) and 41B would have the effect of requiring the Registrar to keep a record of all section 31 agreements, which would identify (to the extent known to the Registrar):

- a description of the area of land or waters to which the agreement relates;

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[98] Central Desert Native Title Services, *Submission 1*, p. 9.

[99] National Native Title Council, *Submission 4*, p. 4.

[100] Western Australian Government, *Submission 7*, p. 8; See also, Mr O'Halloran, State Solicitor's Office of Western Australia, *Committee Hansard*, 10 March 2020, pp. 34-35.

[101] Western Australian Government, *Submission 7*, p. 8.

[102] Western Australian Government, *Submission 7*, p. 8.

- the name of each party to the agreement and the address at which the party can be contacted;
- if the agreement specifies the period during which it will operate, that period; and
- whether or not there is any other written agreement made between some or all of the parties to the agreement in connection with the doing of the act to which the agreement relates.[103]

2.97 That information could be made available to a person on request, unless a party to the agreement requests that some or all of the information not be disclosed.[104]

2.98 The Attorney-General's Department explained that this amendment arose in reaction to concerns raised during the consultation process about the lack of transparency around section 31 agreements, in the absence of any pre-existing public register or record.[105] The NNTC expressed support for the provision, stating:

> [T]he proposed amendment is seen as promoting transparency in relation to the conclusion of [section] 31 agreements while still protecting the essential commercial in confidence nature of many such agreements. As such the proposed amendment achieves a sound balance between these potentially competing priorities.[106]

2.99 The MCA supported the creation of a public record of section 31 agreements, stating that it would 'support meaningful transparency while ensuring that agreement parties can jointly determine how information relating to the contents of these agreements is shared'.[107]

2.100 CDNTS argued that agreements reached between contracting parties should be kept confidential as a matter of public policy.[108] It submitted that the ability for a party to object to the request for such information to be made public did not alleviate its concerns because 'it is the exception rather than the rule'.[109] This position was shared by the Wintawari Guruma Aboriginal Corporation.[110]

2.101 The Law Council recommended that the bill be amended to expand the register of section 31 agreements to include ancillary agreements to assist

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103 Explanatory memorandum, pp. 58-59.

104 Native Title Legislation Amendment Bill 2019, Schedule 6, Item 9.

105 Attorney-General's Department, *Submission 6*, p. 4.

106 National Native Title Council, *Submission 4*, p. 8.

107 Minerals Council of Australia, *Submission 8*, p. 3.

108 Central Desert Native Title Services, *Submission 1*, p. 7. See also, Dr Carolyn Tan, Central Desert Native Title Services, *Committee Hansard*, 10 March 2020, pp. 17-18.

109 Central Desert Native Title Services, *Submission 1*, p. 7.

110 Wintawari Guruma Aboriginal Corporation, *Submission 27*, p. 2.

members of native title claim groups.[111] The Law Council explained that ancillary agreements often provide for payment of signing fees and compensation to accounts. The Law Council explained that currently a proponent may enter into a section 31 agreement affecting native title rights and interests with only the people comprising the named applicant. This may result in the rest of the native title claim group being unaware of the negotiations, or that a section 31 agreement has been signed, and may be unable to obtain copies of the agreement. It was argued that an expanded register, which included both section 31 and ancillary agreements, with suitable information restrictions to prevent access by persons other than the parties to the agreement and the members of the relevant native title claim group, would assist affected individuals to become aware of what agreements have been made and how their positions might be affected.[112]

2.102 Mr Ross Mackay, a legal practitioner in native title, stated that 'such a register is sorely needed' to assist native title holders to be aware of their rights and obligations, particularly where native title has been inherited.[113] Mr Mackay submitted that the content of section 31 agreements and ancillary agreements 'is a significant source of tension within and between native tile claim groups'. He argued that the content of agreements should be included on the register to address both issues, while confidential information could be redacted if concerns were raised.[114]

2.103 The Attorney-General's Department advised that the public record would 'contain certain details about section 31 agreements consistent with the details currently publicly available on ILUAs on the Register of ILUAs'. This information would include the parties and the area the agreement covers. A further detail to be recorded is whether there are any ancillary agreements to the section 31 agreement. It is also intended for a similar amendment to be made to the Native Title (Indigenous Land Use Agreements) Regulations to require the Register of ILUAs to similarly note whether there are ancillary agreements to ILUAs.[115]

Schedule 7–National Native Title Tribunal

2.104 Schedule 7 confers a new function on the National Native Title Tribunal (NNTT) to allow it to provide assistance to RNTBCs and common law holders of native title to promote agreement about native title and the operation of the

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[111] Law Council of Australia, *Submission 18*, p. 13.

[112] Law Council of Australia, *Submission 18*, p. 13.

[113] Mr Ross Mackay, *Submission 13*, p. 13.

[114] Mr Ross Mackay, *Submission 13*, pp. 13-14.

[115] Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 11.

Native Title Act. This function is intended to assist in the prevention and management of post-determination native title disputes.[116]

2.105 The Attorney-General's Department explained the background to the proposed new function:

> As part of consultation on the development of the Bill, stakeholder views were sought on how the Tribunal could better assist in the management and resolution of RNTBC/PBC disputes. The outcome was new section 60AAA, which confers a new function on the Tribunal to allow it to provide direct assistance to RNTBC/PBCs and common law holders to support the management and resolution of disputes about native title and the Native Title Act.[117]

2.106 It was emphasised that the new function is 'designed to provide the Tribunal with flexibility in how it is performed' but is intended to:

- establish governance processes that are consistent with the Native Title Act and PBC Regulations, for example, agreed processes that are consistent with traditional decision making;
- support resolution of disputes between common law holders and RNTBCs, which may include mediation; and
- facilitate collaboration between RNTBCs.[118]

2.107 While the new function would enable the NNTT to provide support in the event of conflicts, it is expected that RNTBCs would follow their own internal dispute resolution processes prior to seeking the assistance of the NNTT, as complemented by provisions in schedule 8, part 1 requiring RNTBCs to establish dispute resolution processes with non-member common law holders.[119]

2.108 The NNTT strongly supported the proposed amendments in schedule 7 and suggested 'that consideration be given to conferring upon it an arbitral power to complement the mediation function.[120]

2.109 According to the NNTT, proposed section 60AAA would 'allow the Tribunal to offer assistance to a wider range of native title stakeholder', however:

> where there has been an unsuccessful mediation, or where the parties do not agree to mediation, the only present alternative, if the dispute is to be resolved, is litigation, probably in the Federal Court. The Tribunal suggests that at least in some cases, it may be more efficient, and less expensive to

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116 Explanatory memorandum, p. 61.

117 Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 12.

118 Explanatory memorandum, p. 61; see also, Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 12.

119 Explanatory memorandum, p. 61.

120 National Native Title Tribunal, *Submission 17*, p. 4.

> provide, in the NTA, for some form of non-judicial arbitration. The Tribunal already has a mediation role in connection with expedited procedure matters and future act applications. In each case, the Tribunal also has an arbitral role. Of course, the Tribunal keeps the two processes separate. The Tribunal suggests that any arbitral role relate at least to:
>
> (a) disputes as to any failure by the Board of an RNTBC to admit a traditional owner to membership; and
>
> (b) disputes between members of an RNTBC and/or relevant traditional owners, on the one hand, and the Board of the RNTBC on the other, concerning the validity of any decision, or proposed decision, by the Board, which decision has had, or is likely to have any effect upon land or waters, subject to a relevant native title determination.[121]

2.110 The NNTC similarly supported the new function proposed to be conferred on the NNTT.[122] While also supporting the proposed new function 'as another avenue of redress for grievances', CDNTS suggested that this be viewed as a last resort on the basis that other avenues of dispute resolution are 'often more culturally appropriate and cost effective ways of dealing with internal disputes'.[123]

2.111 The Attorney-General's Department, in consultation with the NIAA, informed the committee that:

> NIAA (supported by the Attorney-General's Department) will consult on further possible measures to support RNTBC/PBC dispute resolution, including whether new section 60AAA (if passed) could be complemented by other functions such as an arbitral power, as part of the current Review of the CATSI Act.[124]

Schedule 8–Registered native title bodies corporate

2.112 Schedule 8 proposes amendments to the CATSI Act which seek to improve the accountability, transparency and governance of RNTBCs, with a particular focus on membership and improved dispute resolution pathways.

2.113 Schedule 8 comprises four parts:

- part 1 would introduce new requirements for RNTBC constitutions relating to establishing dispute resolution pathways with common law holders, create eligibility requirements for membership to RNTBCs, and limit the grounds for cancelling membership of a RNTBC;
- part 2 would amend the CATSI Act so that directors of RNTBCs are unable to exercise discretion to refuse to accept a membership application;

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[121] National Native Title Tribunal, *Submission 17*, pp. 4-5.

[122] National Native Title Council, *Submission 4*, p. 9.

[123] Central Desert Native Title Services, *Submission 1*, p. 8.

[124] Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 12.

- part 3 seeks to clarify that the Registrar of Aboriginal and Torres Strait Islander Corporations may place a RNTBC under special administration where the Registrar is satisfied that there has been a serious failure, or a number of failures, by the corporation to comply with its native title legislation obligations; and
- part 4 would create a requirement that civil proceedings arising under the CATSI Act must be instituted in the Federal Court, unless that court refers the matter to another court with jurisdiction.

Requirements for constitutions and membership

2.114 CDNTS supported the amendments to introduce requirements for RNTBCs' constitutions stating that the 'proposed amendments are largely in keeping with current practice' and that RNTBCs within its region already have similar clauses in their Rule Books of Constitutions:

> Our view is that there is an important balance between ensuring that native title holders' rights and interests are being properly protected by the RNTBC and the ability of an RNTBC to be able to expel disruptive members from its lists.[125]

2.115 With reference to proposed subsection 150-22 (4), which states that a member has 14 days to object to the cancellation of their membership and the objection needs to be made in writing and given to the corporation within 14 days from the day the notice is given, Councillor Dominic WY Kanak recommended that further consideration be given to provisions in the bill that specify timeframes for the consideration of matters and time for responding. Councillor Kanak advanced that provisions which determine response time based on the delivery of a notice and not receipt by the affected party 'may have unintended consequences' given that 'real time and remote circumstances may reasonably require extended notice time'.[126]

2.116 The bill provides that RNTBCs would be given a two year period from proclamation to update their constitutions to reflect the new requirements. Some submissions supported the two year transition as a 'sufficient period of time' for RNTBCs to amend their constitutions.[127] Others, such as ANTaR, suggested a 'longer transition period' was necessary because 'PBCs are often working with limited existing resources to manage any changes and amend processes'.[128] The NNTC recommended a five year transition period which would take 'into account the resource constraints on the native title sector to

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[125] Central Desert Native Title Services, *Submission 1*, p. 8.

[126] Councillor Dominic WY Kanak, *Submission 14*, [pp. 1-2].

[127] Queensland South Native Title Services, *Submission 12*, p. 5; see also, Mr Ross Mackay, *Submission 13*, p. 16.

[128] ANTaR, *Submission 10*, p. 5.

achieve these changes'.[129] Mr Mackay argued that 'specific funding and resources should be provided to RNTBCs, within the 2 year transition period, to allow them to make the necessary constitutional amendments'.[130]

2.117 The Attorney-General's Department explained that the proposed two year timeframe would 'allow a corporation two separate opportunities to bring a special resolution forward at a scheduled general meeting, enabling rule book changes with no additional costs'. Moreover:

> In considering an appropriate timeframe, NIAA balanced the burden placed on corporations and their capacity to revise their rule book with the interests of individuals whose access to a remedy may be delayed. In NIAA's view the addition of the dispute resolution process is an immediate need; it ought to be met as soon as possible to ensure the effective governance of RNTBCs/PBCs. Extending the timeframe to five years increases the sector's risk for reputational damage on social and governance practices.[131]

2.118 The Attorney-General's Department outlined how RNTBCs will be supported to implement these proposals:

> The Office of the Registrar of Indigenous Corporations (ORIC) can provide information, guidance and support around the process to update rule books to RNTBC/PBCs. The Registrar of Indigenous Corporations (the Registrar) has agreed to work with stakeholders including NIAA and the Tribunal to develop a generic rule template that corporations could insert, or amend and insert, into their rule books to meet the new requirements of the Act.[132]

2.119 The bill would amend section 114–10 of the CATSI Act to remove the discretion of RNTBCs directors to refuse to accept a membership application. Under current subsection 144-10(3), directors may refuse to accept a membership application even if the applicant applies for membership in the required manner and the applicant meets the membership requirements of the corporation.

2.120 Mr Mackay expressed support for this amendment, stating that directors of RNTBCs should not be able to withhold membership to individuals who meet membership criteria.[133] In contrast, the Wintawari Gurumu Aboriginal Corporation did not support the proposed removal of directors' discretion and suggested that requiring directors to give reasons for cancelling memberships

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[129] National Native Title Council, *Submission 4*, p. 4.

[130] Mr Ross Mackay, *Submission 13*, pp. 16–17.

[131] Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 9.

[132] Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 8.

[133] Mr Ross Mackay, *Submission 13*, pp. 16-17.

and for these to then be challenged through the proposed dispute resolution mechanisms would be a better way to improve transparency and accountability.[134]

Registrar oversight

2.121 ANTaR, NNTC and QSNTS opposed the provisions in part 3, which would clarify that the Registrar may place a RNTBC under special administration in the event of serious non-compliance with its native title legislation obligations, due to concerns about how they may impact the right of self-determination of native title holders.[135] NNTC submitted:

> Any increase in powers for the Registrar that may intervene in the rights of self-determination of native title holders and their corporation is of concern. As the proposed amendments seek to increase the powers of the ORIC Registrar in relation to RNTBCs, in the NNTC's opinion any new powers should be considered in the light of a more holistic review of the [CATSI] Act and the provisions affecting RNTBCs and the NTA.[136]

2.122 Subsequently, the NNTC advised that the Minister for Indigenous Australians, the Hon Ken Wyatt MP, announced a 'comprehensive review of the CATSI Act to consider if it is serving its intended purpose, including its effectiveness as a special measure under the *Racial Discrimination Act 1976*'.[137]

2.123 The NIAA is leading the review which will build on the findings of the Technical Review of the CATSI Act conducted in 2017. Phase 1 of the review received 60 responses to a survey published on the NIAA website and a further eight submissions via email. Governance was identified as the area that was important to most respondents, closely followed by the purpose of the CATSI Act. Survey responses and other submissions will inform discussion papers that will be published on the NIAA's website. The second phase of the review is now open and will close in September 2020.[138]

Proceedings in the Federal Court

2.124 Submissions, including those from the CDNTS and the NNTC, supported the amendments in part 4 of Schedule 8 that would require civil proceedings arising from the CATSI Act to be heard in the Federal Court and emphasised that the Federal Court has a particular understanding of native title related

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[134] Wintawari Gurum Aboriginal Corporation, *Submission 27*, [p. 2].

[135] ANTaR, *Submission 10*, p. 5; Queensland South Native Title Services, *Submission 12*, p. 6.

[136] National Native Title Council, *Submission 4*, p. 4.

[137] National Native Title Council, responses to questions on notice, 25 May 2020 (received 12 June 2020), [pp. 1-2].

[138] National Indigenous Australians Agency, *Review of the CATSI Act*, https://www.niaa.gov.au/indigenous-affairs/economic-development/review-catsi-act (accessed 11 August 2020)

matters that other jurisdictions do not.[139] The QSNTS agreed that the Federal Court is the appropriate forum for dealing with these matters but emphasised that the NNTT 'has skills and sector knowledge to provide a proper forum for the resolution of 'lower level' disputes'.[140]

Funding and support for RNTBCs

2.125 When discussing the proposed amendments to the CATSI Act several inquiry participants highlighted challenges for RNTBCs with particular reference to funding and resourcing. The NNTC emphasised it has 'consistently advocated for increased funding to RNTBCs' and the new requirements proposed in the bill 'are a further example of the need'.[141] The ALA argued that:

> [A]ny reforms that seek to enhance the management capabilities of PBCs' must be accompanied by long term and concrete funding for PBCs to enable them to build their technical, governance and financial capacity to effectively represent common law holders of native title.[142]

2.126 The KLC explained that the PBC support funding it receives from the Commonwealth government is 'minimal' which exacerbates challenges managing governance requirements of PBCs, such as holding board meetings and an annual general meeting which often involves coordinating hundreds of people.[143]

2.127 The AHRC identified 'limited financial resources and governance capacity' as barriers to RNTBCs being able to 'effectively discharge their statutory obligations and fulfil the cultural, social and economic aspirations of native title holders'. The AHRC reiterated its view that 'the capacity of RNTBCs to comply with their native title legislation obligations would be enhanced through an increase in the Government provision of technical and financial resources to RNTBCs'.[144]

2.128 Mr Mackay argued that the government should review the funding and resources available to RNTBCs 'including the effectiveness of funding provided under the Indigenous Advancement Strategy'. Mr Mackay also stated that if RNTBCs are 'not adequately funded to carry out their functions,

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139 Central Desert Native Title Services, *Submission 1*, p. 8; National Native Title Council, *Submission 4*, p. 10.

140 Queensland South Native Title Services, *Submission 12*, p. 6.

141 National Native Title Council, *Submission 4*, p. 9.

142 Australian Lawyers Alliance, *Submission 9*, p. 4.

143 Mr Garstone, Kimberley Land Council, *Committee Hansard*, 12 March 2020, p. 6.

144 Australian Human Rights Commission, *Submission 3*, pp. 3–4.

then native title holders will be unable to properly realise the potential benefits' of the Native Title Act.[145]

2.129 Mr Peter Yu, Chief Executive Officer, Nyamba Buru Yawuru discussed the importance of RNTBCs having the capacity to engage and 'adequately represent their constituents' as well as 'the broader community and economy to ensure that there is the required level of investment being attracted'.[146] Mr Yu drew the committee's attention to the legislative framework in Canada:

> It provides an opportunity for First Nation communities to opt out of the Indian affairs act to operate under this act. It has a process for the financial management board that's set up under that act to work to provide support for the development of capability in governance and management so that the First Nation corporation can comply with the nature of being able to attract government investments in developing economic projects.[147]

2.130 The Attorney-General's Department, in consultation with the NIAA, detailed the funding available to RNTBCs:

> To assist with the fair and equitable access to the native title system, the Australian Government funds a network of 15 Native Title Representative Bodies/Service Providers (NTRB/SPs) across Australia to assist Traditional Owners with native title claims and to provide advice and other native title services to RNTBCs/PBCs such as administrative support.
>
> RNTBC/PBCs have access to two specific funding streams, in addition to funding available under the Indigenous Advancement Strategy:
>
> - PBC Basic Support which assists RNTBCs to meet their basic operational and corporate requirements. This funding is provided through the relevant NTRB/SP. In 2019-2020, NIAA provided approximately $9.5 million to assist more than 100 RNTBCs.
> - PBC Capacity Building funding which aims to assist RNTBCs to generate economic benefits through the effective and sustainable management of their land, including by engaging with potential investors and proponents. Funding can be provided directly to RNTBCs. As at 30 April 2020, NIAA has provided $23.93 million to 59 capacity building projects across Australia. Approximately $6.5 million is available each year under this funding stream.
>
> PBC Capacity Building funding can also be provided to organisations offering services to RNTBCs. For example, NIAA has granted funding to the National Native Title Council to run PBC Regional Forums which include providing information on available funding, as well as developing and delivering a training curriculum to RNTBCs/PBCs.[148]

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[145] Mr Ross Mackay, *Submission 13*, p. 15.

[146] Mr Yu, Nyamba Buru Yawuru, *Committee Hansard*, 12 March 2020, p. 22.

[147] Mr Yu, Nyamba Buru Yawuru, *Committee Hansard*, 12 March 2020, p. 22.

[148] Attorney-General's Department, responses to questions on notice, 25 May 2020 (received 11 June 2020), p. 8.

Schedule 9–Just terms compensation and validation

2.131 Item 1 of the schedule is a 'fail safe' provision (often referred to as a shipwrecks clause) to ensure that if the bill effects the acquisition of property of a person other than on just terms (within the meaning of paragraph 51(xxxi) of the Constitution), that person would be entitled to compensation.[149]

2.132 Item 2 of Schedule 9 proposes to validate all section 31 agreements that may have been affected by the McGlade decision where not all members of the registered native title claimant were parties to the agreement. This item would apply retrospectively.[150]

2.133 The Attorney-General's Department submitted that the uncertainty about the validity or otherwise of section 31 agreements that might be captured by the McGlade decision affects both projects the subject of agreements and the benefits that flow from them to native title holders, including employment and monetary payments.[151]

2.134 Mr Wayne Bergmann, a member of the Walalakoo Aboriginal Corporation, indicated he was not in favour of validating all section 31 agreements. When asked about the consequences of the bill not being implemented, Mr Bergmann responded:

> I think it puts pressure back on those proponents to have their agreements validated. It puts pressure back on them to knock back on the traditional owner's door to try and get a deal so they aren't exposed to future liability or compensation.[152]

2.135 On the issue of whether this would mean that opportunities and benefits are being taken away from Indigenous people, the KLC stated:

> You've got to weigh up that process. We talked about the impacts around the future act process, and then if you get the right to negotiate, there are something like 3,906-odd cases throughout Australia likely to negotiate. There are only three that have ever ruled in favour of the TO [Traditional Owner]. So, we're wound into a process where we have no rights and we really know what the outcome is at the beginning of the negotiation process. So, you're right in regard to it being a balancing act. Do you take on what's currently in play? Or is there a real opportunity to go back and negotiate, knowing that you don't have any footing to really negotiate?[153]

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149 Explanatory memorandum, p. 74.

150 See also, National Native Title Council, *Submission 4*, p. 3.

151 Attorney-General's Department, *Submission 6*, p. 4.

152 Mr Wayne Bergmann, Walalakoo Aboriginal Corporation, *Committee Hansard*, 12 March 2020, p. 11.

153 Mr Garstone, Kimberley Land Council, *Committee Hansard*, 12 March 2020, p. 11.

2.136 Representatives from the resources sector expressed strong support for the validation of section 31 agreements. The MCA submitted that these agreements are:

> …widely used across exploration and minerals activities to establish terms of land access, including cultural heritage management and environmental commitments, as well as financial and non-financial benefits between minerals proponents and Traditional Owners.[154]

2.137 The MCA stated that section 31 agreements can be critical in the granting of mining leases and other interests. Therefore, 'any uncertainty surrounding their validity is a substantial risk for industry and other parties to these agreements'.[155] This view was shared by the Chamber of Minerals and Energy of Western Australia, which emphasised the critical nature of security of title in the resources sector 'because other things can flow from that, such as grant of tenure…a whole range of water licences, [and] environmental approvals'.[156]

2.138 The CMEWA stated that section 31 agreements provide outcomes for Indigenous peoples, including 'secure local…employment traineeships and other financial and nonfinancial benefits'. It noted that cultural heritage management plans are included in the 'wider package that is part of that agreement'.[157]

2.139 This sentiment was echoed by representatives from the native title sector. CDNTS stated that the retrospective application of it 'will provide certainty'.[158] The NNTC noted that these agreements 'provide significant benefits' to native title holders.[159]

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154 Minerals Council of Australia, *Submission 8*, p. 2.

155 Minerals Council of Australia, *Submission 8*, p. 2.

156 Ms Bronwyn Bell, Manager, Director, Chamber of Minerals and Energy of Western Australia, *Committee Hansard*, 10 March 2020, p. 40.

157 Ms Bronwyn Bell, Chamber of Minerals and Energy of Western Australia, *Committee Hansard*, 10 March 2020, p. 43.

158 Central Desert Native Title Services, *Submission 1*, p. 5.

159 National Native Title Council, *Submission 4*, p. 9.

Chapter 3
Other issues raised with the committee

3.1 This chapter outlines broader issues raised during the course of the inquiry including: the need for further reform to the *Native Title Act 1993* (the Native Title Act) and the consultation processes on the bill.

Further reform to the Native Title Act

3.2 Many submitters and witnesses advocated for further amendments to the Native Title Act. The National Native Title Council (NNTC) recommended further amendments to remedy the 'existing future act determination processes and other future act processes' which, in its view, are 'demonstrably not fair to native title holders'.[1] ANTaR echoed the proposals from the NNTC.[2]

3.3 The Western Australian Government (WA Government) expressed disappointment that a number of matters it supported in the Commonwealth Government's options paper process have not been included in the bill and viewed this as 'a lost opportunity that could provide for greater efficiency and effectiveness in the native title system'.[3] The WA Government emphasised that it would like to see these additional reforms pursued later in another bill.[4]

3.4 The Kimberley Land Council (KLC) suggested amendments to RNTBC costs recovery, and future act processes:

> (a) clarify and expand the functions in respect of which costs may be recovered by RNTBCs;
>
> (b) make clear that a party invoiced by a RNTBC / PBC for performance of native title functions is obliged to pay;
>
> (c) link the process and time frames for future act procedures to the obligation on proponents to pay invoiced amounts; and
>
> (d) require specific consideration of the matters under s237 of the NTA by the State party before an expedited procedure statement may be included in a s29 future act notice.[5]

3.5 Other evidence highlighted the need for broader reform to the Native Title Act. The KLC argued that 'there needs to be a complete overhaul of the act'.[6]

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1 National Native Title Council, *Submission 4*, p. 11.

2 ANTaR, *Submission 10*, p. 6.

3 Western Australian Government, *Submission 7*, p. 10.

4 Dr Deborah Fletcher, Director, State Agreements, Aboriginal Policy and Coordination Unit, Department of Premier and Cabinet, *Committee Hansard*, 10 March 2020, p. 36.

5 Kimberley Land Council, *Submission 16*, p. 3.

The NNTC suggested that a number of proposals from the Australian Law Reform Commission's *Connection to Country* report could 'usefully be considered as part of any [Native Title Act] legislative reform process'.[7] Similarly, the KLC referred to the ALRC review as providing a 'starting point' for discussing further reform and stated that 'there's some good work that can [be leveraged]'.[8] When discussing the timing of the passage of the bill, Mr Bergmann encouraged 'a more comprehensive process to look at how the act works in the best interests of everyone'.[9]

3.6 The Australian Lawyers Alliance argued that several 'proposals for reform remain unaddressed' in the bill. In particular:

> the Bill has failed to address the need to amend the NTA to confirm that a native title right may be exercised for commercial purposes and extending the right to negotiate to sea country. The ALA submits that this is crucial to the recognition and protection of native title.[10]

3.7 The Attorney-General's Department advised the committee:

> As with most legislative development processes, during consultation a number of suggestions were made by stakeholders on further reforms to the Act. Not all of these are reflected in the Bill. In some cases this is because proposals were refined as a result of the stakeholder consultation process itself, and may be subject to further consideration (such as the proposal for the conferral of arbitral functions on the NNTT…). In other cases, proposed reforms are contingent on external factors.[11]

3.8 The Attorney-General's department reiterated that 'the bill reflects a package of measures which are broadly supported by key stakeholders in the native title system' and would implement recommendations by a number of reviews including the ALRC Report. Moreover, the department, along with the NIAA, 'remains committed to ongoing engagement with stakeholders to continue to address emerging native title issues and future areas for reform'.[12]

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6 Mr Tyronne Garstone, Acting Chief Executive Officer, Kimberley Land Council, *Committee Hansard*, 12 March 2020, pp. 2–3.

7 National Native Title Council, *Submission 4*, p. 11.

8 Mr Garstone, Kimberley Land Council, *Committee Hansard*, 12 March 2020, p. 5.

9 Mr Wayne Bergmann, Member, Walalakoo Aboriginal Corporation, *Committee Hansard*, 12 March 2020, pp. 6-7.

10 Australian Lawyers Alliance, *Submission 9*, p. 4.

11 Attorney-General's Department, response to questions on notice, 25 May 2020 (received 11 June 2020, p. 4.

12 Attorney-General's Department, response to questions on notice, 25 May 2020 (received 11 June 2020, p. 4.

Comments on regulations

3.9 The South Australian Chamber of Mines and Energy (SACOME) submitted views on the Registered Native Title Bodies Corporate Amendment Regulations with particular reference to how the current Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations) are operating in South Australia. The SACOME advised that the 'current PBC Regulations require a RNTBC to consult with common law holders of native title and a representative body for the relevant area prior to making a native title decision'.[13]

3.10 The SACOME expressed concern that changes to the regulations outlined in the 2018 Exposure Draft regulations would 'require exploration companies and RNTBCs to consult with common law native title holders each time they propose to enter an exploration NTMA'.[14] In particular:

> From a South Australian perspective, the inability for a RNTBC to enter an exploration NTMA without first going through a detailed community consultation process each time, will place a significant time and cost burden on South Australian exploration companies. The costs of such community meetings can be quite large and, unless the meetings can be aligned with AGMs (or meetings at which other business is conducted), the costs will almost entirely be passed on to the explorer.[15]

3.11 The SACOME argued that the 'current PBC regulations work well with the existing Part 9B process in South Australia keeping costs to a minimum for all stakeholders'.[16]

Consultation process

3.12 As outlined earlier in this report, the development of the bill was informed by submissions to an options paper and exposure draft legislation.

3.13 The committee received evidence expressing a range of views on the consultation processes undertaken to inform the bill.

3.14 Some inquiry participants highlighted that the bill had been informed by 'significant stakeholder consultation'.[17] For example, the Minerals Council of Australia (Minerals Council) submitted:

> Key technical reforms contained in the bill are drawn from extensive reviews including by the Australian Law Reform Commission and the

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13 South Australian Chamber of Mines & Energy, *Submission 15*, [p. 1].

14 South Australian Chamber of Mines & Energy, *Submission 15*, [p. 2].

15 South Australian Chamber of Mines & Energy, *Submission 15*, [p. 2].

16 South Australian Chamber of Mines & Energy, *Submission 15*, [p. 2].

17 See, for example, Northern Territory Government, *Submission* 2, p. 1; Minerals Council of Australia, *Submission 8*, p. 1; Dr Deborah Fletcher, Department of the Premier and Cabinet, *Committee Hansard*, 10 March 2020, pp. 31, 36.

> Council of Australian Governments as well as the recent two year consultation process undertaken by the Commonwealth Government.[18]

3.15 The NNTC commended the 'co-operative and inclusive approach' adopted for the development of the exposure draft, with particular reference to the establishment of the Expert Technical Advisory Group (ETAG) which was recommended as an approach to be 'adopted for other legislative reform or policy development initiatives'.[19]

3.16 In contrast, some stakeholders that had engaged in the Commonwealth government's consultation process were less positive. Emeritus Professor Jon Altman, acknowledged that consultation with stakeholders had occurred but it was unclear how that consultation had informed the bill:

> [A]s one of those stakeholders it is far from clear to me how the issues that I have raised have been addressed. The departmental process for decision-making in this important area of national policy has received considerable input from submissions and stakeholder consultations, but there is no indication provided on how this input from a diversity of stakeholders has been assessed, nor how stakeholder trade-offs have been negotiated.[20]

3.17 The KLC offered mixed views on the consultation process. The KLC commended the government on its 'inclusive approach' and acknowledged the mechanisms provided 'an opportunity to drill down into some of the details around the operational concerns that happen within the Native Title Act'.[21]

3.18 However, the KLC also suggested that the consultation undertaken on the bill had been 'inappropriate' and not 'at the level of consultation that the KLC prefers'. In particular:

> [W]hen we're dealing with such important matters like this, I think it's imperative to try and get down to the community level and have broader consultations rather than dealing with individuals from particular corporations or entities.[22]

3.19 Original Power was critical of the consultation undertaken on the bill:

> [T]he Government has again apparently chosen to consult with select representatives of the NTRBs and NTSPs (through the "National Native Title Council") rather than with the authorised representatives of native title holders, even though there is no apparent urgency involved in the amendments. The Government claims to have held over 40 consultation meetings about the 2018 Bill, but does not say who it has consulted apart from an Expert Technical Advisory Group comprised of nominees from

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18 Minerals Council of Australia, *Submission 8*, p. 1.

19 National Native Title Council, *Submission 4*, p. 1.

20 Emeritus Professor Jon Altman, *Submission 5*, p. 1.

21 Mr Garstone, Kimberley Land Council, *Committee Hansard*, 12 March 2020, pp. 1-2.

22 Mr Garstone, Kimberley Land Council, *Committee Hansard*, 12 March 2020, p. 2.

> the National Native Title Council, National Native Title Tribunal, government and industry.
>
> The Government again seems to be relying on compliant NTRB and NTSP representatives to avoid proper, good faith consultation consistent with UNDRIP [United Nations Declaration on the Rights of Indigenous Peoples] standards and to provide the appearance of Indigenous support for its proposed amendments.[23]

3.20 At its public hearings, the committee heard from witnesses who were unaware of the bill and the consultation processes undertaken by the government, prior to attending the public hearings.[24] Mr James Murphy explained that, prior to learning about the committee's hearing in Kalgoorlie, he had no knowledge of the bill and was not aware of any prior consultation on the bill being facilitated by the government.[25]

3.21 Representatives from the Karajarri Traditional Lands Association advised they 'have had no opportunity to have any input or to consider what the proposed amendments may mean on a practical level'.[26] The Karajarri Traditional Lands Association elaborated by outlining some of the particular challenges experienced by Indigenous people when considering proposals such as those outlined in the bill:

> Any laws in relation to Indigenous people always seem to have some degree of urgency and happen without the proper consultation process. Unfortunately, that's to our detriment…
>
> To be fair to Indigenous people, it's all in a language that a lot of Indigenous people don't understand. As well, they don't understand the implications of that language, as far as the definitions and interpretations that are inserted into the amendments and how they are interpreted in law.[27]

3.22 The Attorney-General's Department detailed the public consultation process undertaken to develop the bill which was taken in two stages:

- release of an options paper on native title reform which sought views on the recommendations from the ALRC Report, COAG Investigation and the ORIC Technical Review, as well as policy proposals from the states and territories. The options paper was open for submission from 29 November 2017 until 28 February 2018; and

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23 Original Power, *Submission 26*, p. 3.

24 See, for example, Councillor Brownley, private capacity, *Committee Hansard*, 11 March 2020, p. 27; Dr Anne Poelina, private capacity, *Committee Hansard*, 12 March 2020, pp. 31-33.

25 Mr James Murphy private capacity, *Committee Hansard*, 11 March 2020, p. 24.

26 Mr Thomas King, Vice Chairperson, Karajarri Traditional Lands Association, *Committee Hansard*, 12 March 2020, p. 17.

27 Mr King, Karajarri Traditional Lands Association, *Committee Hansard*, 12 March 2020, p. 19.

- release of exposure draft legislation which was informed by stakeholder feedback on the options papers. The exposure draft was open for submissions from 29 October 2018 until 10 December 2018.

3.23 During consultation on the options paper, officials from the Attorney-General's Department and the National Indigenous Australians Agency (NIAA) met with over 40 stakeholder organisations in locations across Australia. The NIAA also sent copies of the options paper via post and email to all RNTBCs.[28]

3.24 To provide technical assistance on the development of the bill, the government convened a native title Expert Technical Advisory Group (ETAG) comprised of representatives from:

- the National Native Title Council;
- industry peak bodies (including the National Farmers' Federation, Minerals Council of Australia and Pastoralist and Graziers Association (WA));
- state and territory governments; and
- the Commonwealth (including officials from the Attorney-General's Department, NIAA, the National Native Title Tribunal and the Federal Court of Australia).

3.25 The ETAG held four workshops on 27 to 28 November 2017, 1 March 2018, 24 August 2018 and 30 November 2018.

3.26 The Attorney-General and then Minister for Indigenous Affairs also co-chaired a roundtable on options for reform with the National Native Title Council (the peak organisation for native title representative bodies and service providers) and other native title corporations and representative bodies on 16 March 2018.[29]

Committee view

3.27 The committee welcomes the amendments proposed in this bill, recognising that it has been informed by extensive consultation and options for reform drawn from a number of native title reviews.

3.28 The committee recognises the support for several measures in the bill which will improve native title claims resolution, agreement making, Indigenous decision making and dispute resolution processes. In particular, the validation of section 31 agreements will provide certainty for both the projects the subject of agreements and the benefits that flow from them to native title holders, including employment and monetary payments.

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[28] Attorney-General's Department, *Submission 6*, pp. 3-4; see, also, responses to questions on notice 25 May 2020 (received 11 June 2020), pp. 2-3.

[29] Attorney-General's Department, *Submission 6*, p. 3.

3.29 The committee supports proposals in the bill to increase the transparency and accountability of RNTBCs, and the creation of new pathways to assist in the resolution of disputes following a native title determination. The committee acknowledges the evidence explaining the challenges affecting RNTBCs, with particular reference to funding and resourcing. The ongoing review of the CATSI Act is an opportunity to identify further measures to assist and support RNTBCs to fulfil their roles and responsibilities.

3.30 The committee acknowledges calls for further reform to the Native Title Act and is cognisant that some inquiry participants may be disappointed that the committee did not undertake a broad analysis of native title legislation. However, the committee was tasked with undertaking an inquiry into the provisions of the bill and has therefore focused its attention on the proposed amendments in the bill.

3.31 The committee welcomes advice from the Attorney-General that emphasises the Commonwealth government's ongoing commitment to engaging with Indigenous peoples and their representatives on native title issues.[30] The committee understands that feedback on the operation of the bill provided through formal and informal consultation mechanisms will inform government consideration of future amendments. The committee is of the view that consideration of further reform should not delay the proposals in this bill, some of which are urgent.

Recommendation 1

3.32 The committee recommends that the Senate pass the bill.

Senator Amanda Stoker
Chair

[30] Attorney-General's Department, response to questions on notice, 25 May 2020 (received 11 June 2020, p. 4; Parliamentary Joint Committee on Human Rights (Human Rights Committee), *Report 4 of 2020*, 9 April 2020, p. 146.

Minority Report by Labor Senators

1.1 Labor Senators support the objective of the bill: to improve native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes.

1.2 Labor Senators note and support the concerns raised about deficiencies in this bill, which are outlined later in this report.

1.3 Labor Senators note that the Government introduced changes to the Australian Human Rights Commission (AHRC) which stopped the mandatory annual report by the Aboriginal and Torres Strait Islander Social Justice Commissioner into Social Justice and Native Title. No annual review has been conducted since 2016.

1.4 Labor Senators note that this bill only addresses a selection of technical refinements to the native title regime, and to date the Government has failed to respond to the 30 substantive recommendations for reform contained in the Australian Law Reform Commission's 2015 report on *Connection to Country: Review of the Native Title Act 1993* (the ALRC report).

1.5 Labor Senators note that recently significant court decisions have been made affecting native title. In *McGlade v Native Title Registrar [2017]* FCAFC 10 (*McGlade*), the Full Federal Court of Australia made a decision with potentially sweeping impacts on a range of existing and future native title claims, negotiations and arrangements. The Government responded by expediting amendments to the Native Title Act, primarily as advocated for by third parties concerned their interests would be impacted by the *McGlade* decision. In 2019, in *Northern Territory v Griffiths*[1] (*Timber Creek*), the High Court of Australia ruled that where native title was extinguished, native title holders were entitled to compensation for both economic loss and for non-economic loss arising from the intangible harm caused by the loss of spiritual connection to country. The Government has not responded to the *Timber Creek* decision. Labor Senators are concerned at the clear pattern from this Government of being unresponsive to native title holders but being expedient to accommodate the interests of third parties.

1.6 Labor Senators note that this bill does not address the consequences of the High Court's decision in *Forrest & Forrest Pty Ltd v Wilson [2017] HCA 30*.

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[1] *Northern Territory v Griffiths* [2019] HCA 7

Acknowledgements

1.7 Labor Senators thank all submitters and witnesses for their contribution to this inquiry, and especially acknowledge the work of the Secretariat in facilitating the public hearings in Western Australia.

Overview

1.8 On 17 October 2019, the Senate referred the Native Title Legislation Amendment Bill 2019 to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 28 February 2020. On 4 December 2019, the Senate granted an extension of time for reporting until 16 April 2020. On 26 March 2020, the Senate granted an extension of time for reporting until 19 August 2020.[2]

1.9 This bill is similar to another bill, also called the Native Title Legislation Amendment Bill 2019, which was introduced in the House of Representatives in April 2019 and subsequently lapsed at the dissolution of the 45th Parliament.

1.10 As stated in the Explanatory Memorandum, the bill:

> …amends the Native Title Act 1993 (Native Title Act) and the Corporations (Aboriginal and Torres Strait Islanded) Act 2006 (CATSI Act) to improve native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes…
>
> The Bill will also confirm the validity of agreements made under Part 1, Division 3, Subdivision P of the Native Title Act (section 31 agreements) following the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (McGlade).[3]

1.11 The Senate Scrutiny of Bills Committee[4] (scrutiny committee) and the Parliamentary Joint Committee on Human Rights[5] (PJCHR) made comments on the bill.

1.12 According to the Minister's second reading speech, the bill attempts to implement a number of recommendations from recent reviews of native title, including:

- the Australian Law Reform Commission's 2015 report on *Connection to Country: Review of the Native Title Act 1993*;
- the Council of Australian Government's 2015 *Investigation into Land Administration and Use*, and

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2 *Journals of the Senate*, No. 23, 17 October 2019, p. 698.

3 Explanatory Memorandum, p. 2.

4 Standing Committee for the Scrutiny of Bills, Scrutiny Digest 10 of 2019.

5 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report 4 of 2020.

- ORIC's 2017 Technical Review of the CATSI) Act, known as the ORIC review.[6]

1.13 Evidence considered by the committee supported the bill's overarching intentions but serious deficiencies were raised about certain elements in the bill along with general frustration at the lack of comprehensive reform of the Native Title Act.

Native Title in Australia

1.14 The Native Title Act was never intended to be the only response to *Mabo v Queensland [No 2]*. It was widely recognised that a much broader compensation package was required to redress more than 200 years of dispossession endured by First Nations.

1.15 Alongside the Native Title legislation, a land fund and a social justice package were intended – neither has eventuated as originally envisioned.

1.16 In considering its response to the 1992 High Court decision on native title, the Keating Government requested the Aboriginal and Torres Strait Island Commission (ATSIC) provide its views on measures the Government should take to address the dispossession of First Nations. It is worth revisiting the key objectives of its report as outlined in the preface:

> In this report, we propose draft principles of indigenous social justice to guide all future relationships between the Commonwealth and indigenous peoples and be capable of applying to the roles and responsibilities of other spheres of government. Acceptance of these principles would guide the major structural changes recommended in this report, including constitutional recognition, regional autonomy, the negotiation of a Treaty or comparable document, compensation, improved service delivery, recognition of the social and cultural diversity of Aboriginal and Torres Strait Islander peoples, protection of rights, and opportunities for economic development.[7]

1.17 It should be noted that there have been other significant inquiries into native title in Australia in the past five years, including:

- Australian Law Reform Commission 'Connection to Country: Review of the Native Title Act 1993 (Cth)' (June 2015);
- Australian Human Rights Commission 'Indigenous Property Rights Project - Garma Roundtable' (2016); and
- Council of Australian Government's 2015 *Investigation into Land Administration and Use* (2016).

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6 The Hon Christian Porter MP, Attorney-General, *House of Representatives Hansard*, 17 October 2019, p. 4484.

7 ATSIC–A Report to Government on Native Title Social Justice Measures: http://www.austlii.edu.au/au/other/IndigLRes/1995/1.html

1.18 A consistent theme in these reports to Government is the gradual weakening of mechanisms available to First Nations to recognise and protect their rights and interests under native title.

The role of the applicant and section 31 agreement validation

1.19 Schedule 1 amends the Native Title Act to allow, as the default position, an applicant to a native title claim to act by majority – within conditions imposed by the claim group and with allowance for the composition of the applicant to be changed in limited circumstances without further authorisation process.

1.20 Schedule 9 of the Bill seeks to confirm the validity of section 31 agreements that may potentially be affected by *McGlade*.

1.21 Evidence presented to this inquiry broadly supported both these changes however concerns were raised over their implementation.

1.22 As detailed in the Parliamentary Joint Committee on Human Rights (PJCHR) Report, both these measures affect First Nations' rights to culture and self-determination. The PJCHR sought the advice of the Attorney-General as to whether it would be appropriate for the Bill to include a requirement for an evaluation to be conducted within an appropriate timeframe to assess the impact of these measures. The Attorney-General rejected this proposal.[8]

1.23 Considering the possibility of First Nations rights being curtailed detrimentally, Labor Senators support an independent evaluation be conducted consistent with the terms set out in the PJCHR report.

Deficiencies in the Bill

1.24 While firmly supporting the broad objectives of the bill, and calling on the Senate to support legislation that addresses those objectives, Labor Senators note that there are some concerns with the bill as drafted.

1.25 Labor Senators note that the last substantive legislative amendments to the Native Title Act occurred in 2007[9] and in the intervening years, there have been significant developments in the native title sector – warranting amendments that ensure the ongoing effectiveness of the native title system. Many of the amendments in this bill seek to address these issues, and as such, are supported by Labor Senators. There remain, however, clear deficiencies in the bill.

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8 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report 4 of 2020, p. 145

9 *Native Title Amendment Act 2007* (Cth)

De-registration of an Indigenous Land Use Agreement (ILUA)

1.26 The bill proposes amendments to sections 24EB and 24EBA which allows any future act approved by a later de-registered ILUA to have no effect on the future act done in relation to that agreement.

1.27 Many submitters raised concerns about the appropriateness of this provision and the possibility of undue future acts remaining authorised.

1.28 The National Native Title Council notes:

> …This means that any future act authorised by the ILUA that has been done through fraud, undue influence or duress remains valid and will still affect native title.[10]

1.29 Similarly, the Law Council of Australia notes:

> The Law Council opposes the current form of proposed subsections 24EB(2A) and 24EBA(7), as there may exist valid reasons as to why the validity of a future act ought to be set aside, including that the agreement validating the act was affected by fraud, duress or coercion, or was registered in circumstances of jurisdictional error or other administrative law error.[11]

CATSI Registrar oversight

1.30 The bill (Schedule 8 Part 3) provides increased powers to the Office of the Registrar of Indigenous Corporations (ORIC) to determine that a Registered Native Title Body Corporate (RNTBC) be under special administration.

1.31 Many submitters raised concerns about the nature of these increased powers, viewed within the context of the operation of RNTBCs, and the already-stretched resources with which they function.

1.32 The Aboriginal and Torres Strait Islander Social Justice Commissioner, June Oscar AO notes:

> …the Commission also wishes to emphasise that the capacity of RNTBCs to effectively discharge their statutory obligations and fulfil the cultural, social and economic aspirations of native title holders can be hindered by limited financial resources and governance capacity, including a lack of understanding by directors of the regulatory and legislative obligations of RNTBCs. The Commission reiterates its view that the capacity of RNTBCs to comply with their native title legislation obligations would be enhanced through an increase in the Government provision of technical and financial resources to RNTBCs.[12]

1.33 While supportive of better transparency and accountability, Labor Senators share concerns raised about the increased powers of ORIC - which curtail the

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[10] National Native Title Council, *Submission 4*, p. 4.

[11] Law Council of Australia, *Submission 18*, p. 11

[12] Australian Human Rights Commission, *Submission 3*, p. 4.

rights of self-determination of native title holders – and the resourcing demands placed on RNTBCs as a result of these new compliance measures.

Commonwealth intervention

1.34 Schedule 5 of the Bill requires the Commonwealth to be a party to any agreement if it has intervened.

1.35 Submitters raised concerns about the complications and delays often associated with Commonwealth intervention. The Central Desert Native Title Services made the following comments in hearing:

> Dr TAN (Director, Central Desert Native Title Services): We have expressed concern about expanding section 87 and the provision to require the Commonwealth, when it intervenes, to be a party to any consent determination. Our experience has been that the Commonwealth has sometimes intervened quite late in the piece when negotiations are well advanced, and, therefore, it delays matters to suddenly have to satisfy the Commonwealth as well after you've gone through and got agreement from most of the other parties. We see no need for the Commonwealth to be required to be a party to any consent determination. An area of concern we have noted in our submission is that section 31 agreements are basically private agreements. Our position is that that should remain the case.[13]

1.36 Labor Senators share the concerns of the National Native Title Council[14] amongst others, that this proposal may allow the Commonwealth to oppose an agreement even when all other parties are in support.

Historical Extinguishment

1.37 Labor Senators support the proposed section 47C (Schedule 3, part 1) but have some concerns in relation to its activation and operation.

1.38 Section 47C is merely an enabling provision that allows for historical extinguishment provided an agreement has been reached between relevant governments and native title holders.

1.39 As noted by the Law Council of Australia in their submission:

> Proposed section 47C leaves the rights of native title parties at the discretion and goodwill of the government of the day. Current sections 47, 47A and 47B simply require extinguishment to be disregarded where extinguishment has occurred by reason of the acts specified. That is, the effect is automatic. In comparison, proposed paragraph 47C(1)(b) requires an agreement in writing with the government in order to trigger the operation of proposed section 47C. As the rights of the government and the public are protected by reason that the extinguishing effect of public works prevails over native title rights and, under subsection 47C(4), would require an explicit statement of agreement from the government to be

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[13] Dr Carolyn Tan, Director, Central Desert Native Title Services, *Committee Hansard*, 10 March 2020, p. 9.

[14] National Native Title Council, *Submission 4*, p. 4.

> disregarded, there is no need in most jurisdictions to also require general government agreement under paragraph 47C(1)(b) or public notification.[15]

Concerns raised in Public Hearings

1.40 During the consultation period of this inquiry, several issues were consistently raised with the Committee.

Consultation process

1.41 The inadequate level of consultation provided by the Government on this bill has been concerning to the Committee and those that appeared before it.

1.42 It is clear that the Government's repeated assurance of a comprehensive consultation process is not a view shared by many submitters to this inquiry.

1.43 An example of this shortcoming can be seen in the experience of the Ngaanyatjarraku Council (WA):

> Senator DODSON: … Did you have any consultation with the Attorney-General's Department?
>
> Mr McLean (President, Shire of Ngaanyatjarraku): We've had none.
>
> Senator DODSON: Is this the first time someone has talked to you about these amendments.
>
> Mr McLean: That's correct.[16]

1.44 This lack of consultation was also accompanied with an unexplained urgency from the Government to expedite the bill.

1.45 Evidence received by the Committee from native title holders and their representatives did not share this sense of urgency.

Increased cost burdens on Native Title representative bodies

1.46 Many submitters noted the increasing costs for representative bodies and the lack of adequate resourcing of PBCs to build their capacities as the responsible entities for the native title lands and third party impositions.

1.47 Mr Garstone, Acting CEO, Kimberley Land Council, explained these challenges:

> This sort of leads on to the second part of the point I want to raise around the funding with regard to the native title sector. Again, in the opening comments we talked about how there are currently about 22 PBC's within the Kimberley. There are 17 that we work with. If you broaden that out across the whole of Australia there are over 200 PBCs and over 50 per cent of them don't receive any funding at all. The actual PBC support funding that we receive from the Commonwealth is very minimal. If you weigh up

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15 Law Council of Australia, *Submission 18*, p. 11.

16 Mr Damian McLean, President, Shire of Ngaanyatjarraku, *Committee Hansard*, 11. March 2020, p. 13.

> the governance requirements on those PBCs: that's to generally hold four board meetings, have an AGM—and they're not just basic AGMs. We're talking of bringing in hundreds of people to the meetings, so the cost incurred to that. Just managing that is very difficult. So the heart of your question is that quite often traditional owners won't be able to go and put an objection in and get the evidence to fight that, and it will be a form of activity happening on the land without any benefit to the traditional owners.
>
> Senator SIEWERT: So that's a substantial loss to native title holders?
>
> Mr Garstone: A substantial loss and impact, yes. That's correct.[17]

1.48 In their written submission, the KLC notes:

> that an area in need of urgent reform is the matrix of legislative provisions and procedures adopted by State parties which shift the cost of future act processes onto native title parties and therefore, to the extent that native title parties have the resources to participate in future act processes to protect native title rights, onto the public purse. This is an unacceptable cost shifting from private enterprise to public funding which should be addressed through urgent legislative reform.[18]

The need for a comprehensive overhaul

1.49 Concerns were raised that the Native Title Act needs a more comprehensive overhaul so that native titleholders can benefit from their title and interests, and become more focused on developing economic opportunities - not just defence of their rights.

1.50 Mr Peter Yu, Chief Executive Officer, Nyamba Buru Yawuru, commenting on the lack of progress and the need for reform, notes:

> So there is a need to refresh and revive. To deal with Senator Smith's comments, we've got to a certain stage. We could have got to this stage 20 years ago. We're a bit slow in this country, you know. We could have been sitting here with a different context altogether had the government considered—what I'm saying is not new. I'm not saying anything new. This has been around for 40 years. Had we done that then, we'd be a different space, so let's not waste the opportunity now. But we do need the instruments and we do need the institutional reform to deliver that, because it's in the delivery.[19]

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17 Mr Tyronne Garstone, Acting Chief Executive Officer, Kimberley Land Council, *Committee Hansard*, 12 March 2020, p. 6.

18 Kimberley Land Council, *Submission 16*, pp. 1-2.

19 Mr Peter Yu, Chief Executive Officer, Nyamba Buru Yawuru, *Committee Hansard*, 12 March 2020, p. 29.

The impact of Native Title on families and communities

1.51 Submitters raised concerns about the litigious and adversarial nature of the native title regime and the division it has caused amongst families and communities.

1.52 Many expressed fatigue and cited the many years of legal struggle having detrimental impacts on individuals and communities.

1.53 Ms Mingli Wanjurri Glade observed:

> Native title—we'll start with native title, because that's where we are, and it's really the last thing—destroyed a lot of our culture with each other. It destroyed many things. At first, we had to prove we were Aboriginal. Please. I've practised this all my life down south.[20]

Concluding view

1.54 While it is clear that the broad objectives of this Bill are supported, evidence received by this committee overwhelmingly demanded a comprehensive overhaul of the Native Title Act.

1.55 First Nations have placed their trust in legal institutions to secure their native title rights yet have be repeatedly supplanted by the legislature denying their position in the interests of third parties. Multiple submitters noted that the high original undertaking of the Native Title Act has been brought into disrepute via amendments that have progressively eroded the rights and interests of First Nations.

Recommendation 1

1.56 Labor Senators call on the Minister for Indigenous Australians to instruct the Aboriginal and Torres Strait Islander Social Justice Commissioner to conduct a review of the operation of the Native Title Act and its impact on native title holders.

Recommendation 2

1.57 Labor Senators call on the Government to provide a comprehensive response to the 30 recommendations for reform in the Australian Law Reform Commission's 2015 report on *Connection to Country: Review of the Native Title Act 1993.*

Recommendation 3

1.58 Labor Senators call on the Government to work with First Nations people on a comprehensive legislative package to overhaul the Native Title Act so that

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[20] Ms Mingli Wanjurri McGlade, Private capacity, *Committee Hansard*, 10 March 2020, p. 21

native title holders can better leverage their land and sea assets without putting at risk their native title rights and interests.

Recommendation 4

1.59 Labor Senators call on the Government to include a formal evaluation mechanism on the proposed changes in relation to their effect on the rights to culture and self-determination of First Nations peoples, consistent with the terms set out in the PJCHR report.

Recommendation 5

1.60 Labor Senators call on the Senate to support the bill, with firm commitments from the Government to give effect to recommendations 1, 2 and 3 of this Minority Report, and the Government amending the Bill to give effect to Recommendation 4.

Senator the Hon Kim Carr
Deputy Chair
Labor Senator for Victoria

Senator Patrick Dodson
Labor Senator for Western Australia

Australian Greens Dissenting Report

1.1 The Australian Greens note the broad in-principle support from a cross-section of stakeholders and submitters for many of the amendments outlined in the Native Title Legislation Amendment Bill 2019. However, given the concerns raised through the submissions and at the inquiry hearings, the Australian Greens believe there are fundamental concerns that need to be addressed before the bill can progress any further.

1.2 The Australian Greens want to see a fair, accessible, and effective native title system that delivers outcomes for First Nations peoples, one which is consistent with the UN Declaration on the Rights of Indigenous Peoples and international human rights law.

1.3 Some stakeholders, including Yamatji Marlpa Aboriginal Corporation and Central Desert Native Title Services, submitted that the Bill contains urgent amendments to the Native Title Act that should be passed as a matter of urgency.

1.4 However, other submitters including the National Native Title Council, Law Council of Australia, ANTaR, and NSW Aboriginal Land Council, argued that they could not support some of the provisions as currently drafted.

1.5 The Australian Greens support the approach adopted by the National Native Title Council in examining the Bill from a native title holder's perspective and asking whether it improves the recognition and rights of native title holders.

Schedule 1: Role of the applicant

1.6 Several concerns were raised by submitters about the proposed amendments to the role of the applicant. Part 2 of Schedule 1 amends the Native Title Act to allow an applicant to a native title claim to act by majority as the default position. This provision would commence six months after proclamation.

1.7 The Law Council of Australia took issue with the retrospective scope of proposed sections 24CD, 24CL, 62C and 87.

1.8 The Law Council submitted that the vague wording of the sections could mean default rule by majority applies to claim groups or applicants determined prior to the commencement of these sections:

> For example, it is not clear that proposed section 62C would only apply to new authorisations, given that the phrase 'anything' is vague. It may have the effect that a majority of the authorised persons who make up an applicant can make decisions after the commencement of the item, even if the native title claim group authorised the applicant at a time when it was expected all would have to agree. If section 62C does operate retrospectively in this regard, native title claim groups would need to

> undertake the cost and time of meeting again to impose conditions, should they wish to displace the new default rule by majority.[1]

1.9 The Law Council has concerns that this may be contrary to the right of First Nations peoples to self-determination and to the exercise of free, prior and informed consent.

1.10 The Law Council also submitted these proposed sections:

> do not require the majority of the claim group or applicant to give notice to the other persons of the claim group or applicant prior to entering an agreement or making a decision.[2]

1.11 As a result, the Law Council recommends that the amendments proposed should only apply in relation to authority undertaken after the amendments and the default majority should be required to provide notice in writing at least 7 days prior to executing an agreement.

1.12 Emeritus Professor Jon Altman noted in his submission the dangers of a default majority position:

> But if such an approach is not countenanced, it strikes me that the requirement to act by majority as the default position is fraught with potential dangers particularly when a larger regional group might be negotiating over a proposed development, like a mine, in a distinct locality….
>
> Majority decision making is a very western liberal democratic institution that might not sit comfortably with Indigenous decision-making processes, bearing in mind that continuity of customs and traditions need to be demonstrated in legal native title claim processes.[3]

Schedule 2: Indigenous Land Use Agreements

1.13 Part 2 of Schedule 2 inserts two new subsections to 'clarify' that when an Indigenous Land Use Agreement is removed from the Register this does not invalidate future acts approved pursuant to that Indigenous Land Use Agreement.

1.14 ANTaR, the National Native Title Council and the Australian Human Rights Commission all expressed concern that these amendments would validate any future act authorised by the Indigenous Land Use Agreement, including instances where an agreement was affected by fraud, undue influence or duress.

1.15 The National Native Title Council said in its submission:

> This means that any future act authorised by the ILUA that has been done through fraud, undue influence or duress remains valid and will still affect

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1 Law Council of Australia, *Submission 18*, p. 9.

2 Law Council of Australia, *Submission 18*, p. 9.

3 Emeritus Professor Jon Altman, *Submission 5*, p. 3.

> native title. As with the recognised exceptions to indefeasibility of registered title under the Torrens system in Australia there should be similar exceptions in relation to future acts authorised pursuant to a deregistered ILUA. The amendment is only supported if this exception is included.[4]

1.16 It should be noted that the Federal Court already has the power to 'de-register' an Indigenous Land Use Agreement where it has been procured through fraud, undue influence or duress.[5]

Schedule 3: Historical Extinguishment

1.17 There was widespread support for proposed section 47C which enables prior extinguishment to be disregarded in national parks where this is agreed to by the Commonwealth, State or Territory. However, concerns were expressed about the detail of its operation.

1.18 Concerns were raised about the interaction of section 47C with Aboriginal Land Claims made under the *Aboriginal Land Rights Act 1983* (NSW):

> The New South Wales Aboriginal Land Council believe the Bill as drafted will have unintended consequences of reducing the existing rights and interests of Aboriginal people under the Aboriginal Land Rights Act 1983 (NSW) and increasing legal uncertainty and costs for Aboriginal communities in NSW.[6]

1.19 The New South Wales Aboriginal Land Council also submitted that the provisions relating to historical extinguishment in park areas:

- Do not appropriately consider the unique interaction of the native title and NSW land rights regimes;
- Do not provide sufficient legal safeguards to protect the existing and unique rights and interests for Aboriginal Land Councils in NSW;
- Will result in increased uncertainty and legal complexities for Aboriginal communities, further burdening our communities with costly and adversarial legal proceedings;
- Will reduce the amount of freehold land available to Aboriginal people under the compensatory and beneficial legislation of the ALRA;
- Undermines the hard won rights of Aboriginal people in NSW; and
- Fails to take into account the practical implications on Aboriginal communities in NSW.[7]

1.20 As a result, the New South Wales Aboriginal Land Council have requested minor amendments to the bill to safeguard existing rights of Aboriginal Land Councils in NSW, including:

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4 National Native Title Council, *Submission 4*, p. 4.

5 National Native Title Council, *Submission 4*, p. 8.

6 New South Wales Aboriginal Land Council, *Submission 11*, p. 1.

7 New South Wales Aboriginal Land Council, *Submission 11*, p. 2.

- Explicitly recognising Aboriginal Land Claims made under the Aboriginal Land Rights Act 1983 as interests in section 47C(9)(a)(ii);
- The requirement for the agreement of Aboriginal Land Councils, with an interest in the agreement area, under section 47C(1); and
- Clarification that section 47C does not operate to diminish the rights and interests of Aboriginal Land Councils.[8]

1.21 The Law Council also submitted that:

> Proposed section 47C should be revisited and an attempt made to develop a more refined mechanism, which would have regard to the complex interaction between native title rights and land rights in New South Wales and ensure that the two regimes operate in harmony to maximise outcomes for Aboriginal people.[9]

Schedule 5: Intervention and consent determination

1.22 Schedule 5 seeks to clarify the Commonwealth's role as an intervenor in native title proceedings.

1.23 The National Native Title Council does not support this amendment because it could allow Commonwealth to oppose an agreement when all other parties agree:

> The explanatory memorandum describes this amendment as 'technical' to clarify the role of the Commonwealth Minister in native title proceedings (Item 14). The amendment requires the Commonwealth to be a party to any agreement if it has intervened. This would theoretically allow the Commonwealth to oppose an agreement even where all the other parties are in agreement. This is not supported. It does not affect the existing right of the Commonwealth to intervene in proceedings generally (s 84A) or if its interests are affected.[10]

1.24 Central Desert Native Title Services also opposed these amendments:

> Central Desert does not support the proposed amendment which will have the effect of requiring the consent of the intervenor in various procedural and substantive matters. This is particularly the case where the Commonwealth, as intervenor, has no rights or interests in the land under claim and therefore has only an academic interest in the proceedings. While it is important for the views of the intervenor to be heard in any claim, agreements which determine the rights and interests of parties should not be prevented as a result.[11]

1.25 These amendments are problematic and the Commonwealth should not be enabled to intervene, especially when negotiations are well advanced, in this way.

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8 New South Wales Aboriginal Land Council, *Submission 11*, p. 2.

9 Law Council of Australia, *Submission 18*, p. 6.

10 National Native Title Council, *Submission 4*, p. 4.

11 Central Desert Native Title Services, *Submission 1*, p. 7.

Schedule 8: Registered Native Title Bodies Corporate

1.26 Schedule 8 introduces a range of amendments to the Corporations (Aboriginal and Torres Strait Islander) Act around accountability, transparency and governance, which were mostly supported.

1.27 Part 3 proposes that the Registrar may place a Registered Native Title Body Corporate under special administration in the event of serious non-compliance.

1.28 The National Native Title Council voiced its opposition to the increased powers of the Registrar to place bodies corporate into administration:

> The NNTC does not support increased powers of the ORIC registrar to intervene and place a RNTBC into administration. Any increase in powers for the Registrar that may intervene in the rights of self-determination of native title holders and their corporation is of concern. As the proposed amendments seek to increase the powers of the ORIC Registrar in relation to RNTBCs, in the NNTC's opinion any new powers should be considered in the light of a more holistic review of the Act and the provisions affecting RNTBCs and the NTA.[12]

1.29 We question whether this amendment is time critical or should wait until the National Indigenous Australians Agency has finished its comprehensive review of the CATSI Act and be included in future legislation.

Conclusion

1.30 The Australian Greens recommend the Government immediately addresses the key concerns raised by stakeholders throughout this inquiry, including around the majority default position of the applicant, Indigenous Land Use Agreements, the interaction with Aboriginal Land Claims made under the *Aboriginal Land Rights Act 1983* (NSW), and the Commonwealth's role as an intervenor in native title proceedings.

Recommendation 1

1.31 That the bill not proceed until these matters are addressed, or alternatively, that the provisions that do have support and are considered urgent are dealt with separately.

Senator Rachel Siewert

Greens Senator for Western Australia

[12] National Native Title Council, *Submission 4*, p. 4.

Appendix 1
Submissions, answers to questions on notice and media releases

Submissions

1 Central Desert Native Title Services Ltd
2 Northern Territory Government
3 Australian Human Rights Commission
4 National Native Title Council
5 Emeritus Professor Jon Altman
6 Attorney-General's Department
7 Western Australian Government
8 Minerals Council of Australia
9 Australian Lawyers Alliance
10 ANTaR
11 NSW Aboriginal Land Council
12 Queensland South Native Title Services Ltd
13 Mr Ross Mackay
14 CR Dominic WY Kanak
15 South Australian Chamber of Mines and Energy
16 Kimberley Land Council
17 National Native Title Tribunal
18 Law Council of Australia
19 National Farmers' Federation (NNF)
20 Indigenous Peoples' Organisation (IPO)
21 New South Wales Bar Association
22 Australian Maritime Safety Authority
23 Yamatji Marlpa Aboriginal Corporation
24 Dr Anne Poelina
25 Ms Naomi Ruth Johnson
26 Original Power Ltd
27 Wintawari Guruma

Answer to Question on Notice

1 Warnpurru, answers to questions on notice, 11 March 2020 (received 24 March 2020)
2 Western Australian Government, answers to questions on notice, 10 March 2020 (received 26 March 2020)
3 Attorney General's Department, answers to questions on notice, 25 May 2020 (received 11 June 2020)

4 Law Council of Australia, answers to questions on notice, 25 May 2020 (received 11 June 2020)

5 National Native Title Council, answers to questions on notice, 25 May 2020 (received 12 June 2020)

6 Australian Human Rights Commission, answers to questions on notice, 25 May 2020 (received 12 June 2020)

7 Central Desert Native Title Services, answers to questions on notice, 10 March 2020 (received 6 May 2020)

8 Mr Wayne Bergman, answers to questions on notice, 12 March 2020 (received 14 May 2020)

9 Indigenous Peoples' Organisation, answers to questions on notice, 25 May 2020 (received 22 June 2020)

Media Releases

1 Inquiry into the Native Title Legislation Amendment Bill 2019 - opportunities to speak to the committee

Appendix 2
Public hearings

Tuesday, 10 March 2020
Duxton Hotel
Perth

Yamatji Marlp Aboriginal Corporation

- Mr Cameron Trees, Principal Legal Officer
- Mr Colin McKellar, In-house Legal Council

Central Desert Native Title Services Ltd

- Dr Carolyn Tan, Director
- Mrs Jo Lanagan, Chief Executive Officer

Mr Rex Belotti, Private capacity

Ms Margaret Culbong, Private capacity

Mr Ben Taylor Cuermara, Private capacity

Mr Mervyn Eades, Private capacity

Ms Mingli Wanjurri, Private capacity

Ms Naomi Smith, Private capacity

Ms Averil Williams, Private capacity

Department of the Premier and Cabinet

- Ms Debbie Fletcher, Director State Agreements, Aboriginal Policy and Coordination Unit

State Solicitor's Office of WA

- Mr Jeffrey O'Halloran, Senior Advisor

Chamber of Minerals and Energy of Western Australia

- Ms Bronwyn Bell, Manager
- Mr Robert Carruthers, Director

Wednesday, 11 March 2020
Rydges Resort
Kalgoorlie

Goldfields-Esperance Development Commission
- Mr Kris Starcevich, Chief Executive Officer

City of Kalgoorlie-Boulder
- Mr John Bowler, Mayor

Ngaanyatjarra Council (via teleconference)
- Mr Gerard Coffey, Chief Executive Officer
- Ms Lalla West, Warburton community member and women director
- Ms Julie Porter, Warburton community member and women director
- Mr Clive Fraser, Chair, Warburton Committee and Director
- Mr Dereck Harris, Chair
- Mr Ronald Hunt, Warburton Committee member

Shire of Ngaanyatjarraku (via teleconference)
- Mr Damian McLean, President

Warnpurru Aboriginal Corporation (via teleconference)
- Mr Kumpari (Fred) Ward, Senior male, Member
- Ms Tjungupi (Nancy) Carnegie, Senior, Member
- Ms Tjuparntarri (Daisy) Ward, Director
- Mr Ben Brown, Director
- Mr Paul Carnegie, Director
- Mr Andrew Jones, Director
- Ms Annette Jones, Member
- Mr Robert Jennings, Director
- Mr Leese (Stephen) Giles, Member
- Ms Vera Anderson, Interpreter
- Mr David Reger, Lawyer
- Ms Jan Turner, Anthropologist
- Miss Rebecca Parker, Community Engagement Officer

Councillor Linden Brownley, Private capacity

Mr Trevor Brownley, Private capacity

Ms Sharon Dimer, Private capacity

Mr Dion Meredith, Private capacity

Ms Maria Meredith, Private capacity

Mr James Murphy, Private capacity

Thursday, 12 March 2020
Portlight Room, Mercure Broome
Broome

Kimberley Land Council

- Mr Tyronne Garstone, Acting Chief Executive Officer

Walalakoo Aboriginal Corporation

- Mr Robert Watson, Chairperson
- Mr Wayne Bergmann, Member

Karajarri Traditional Lands Association

- Mr Thomas King, Vice Chairperson
- Mr Gordon Marshall, Director

Nyamba Buru Yawuru

- Mr Peter Yu, Chief Executive Officer

Ms Valerie Albert, Private capacity

Ms Naomi Johnson, Private capacity

Madjulla Inc

- Mr Ian Perdrisat, Director of Operations
- Dr Anne Poelina, Managing Director