THE LAW SOCIETY
OF NEW SOUTH WALES

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Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
BRADDON, ACT 2612

By email: alan.freckelton@lawcouncil.au

Dear Dr Popple,

EVALUATION OF AMENDMENTS TO THE *NATIVE TITLE ACT 1993* (CTH)

Thank you for the opportunity to inform the Law Council's submission to the Attorney-General's Department (**AGD**) in respect of the Consultation Paper, 'Evaluation of Amendments to the *Native Title Act 1993* (Cth)' (**Consultation Paper**). The Law Society's Indigenous Issues Committee contributed to this submission.

Section 47C

It is our view that, in principle, prior extinguishment of native title in park areas should be disregarded without claimants having to reach an agreement with the relevant government, as is the case with ss 47– 47B, *Native Title Act 1993* (Cth).

However, if reform of this nature is not contemplated, we make the following comments about the scope and operation of s 47C.

Definition of "park area"

We suggest that s 47C would benefit from clarification of the definition of "park area". "Park area" is currently defined in s 47C(3) as follows:

> (3) A ***park area*** means an area (such as a national, State or Territory park):
>
> (a) that is set aside; or
>
> (b) over which an interest is granted or vested;
>
> by or under a law of the Commonwealth, a State or a Territory for the purpose of, or purposes that include, preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, declaration, vesting in trustees or otherwise.

In our view, this definition creates unnecessary uncertainty as to whether a State forest is a "park area". In the experience of our members, in the case of State forests, it is not clear whether they were set aside "for the purpose of, or for purposes that include, preserving the natural environment of that area", creating uncertainty for parties as to whether s 47C applies. It is the Law Society's view that an expansive definition, which captures all areas which are reasonably understood to be State and Territory forests and national parks, should be adopted in the interests of certainty for parties wishing to enter agreements pursuant to s 47C.

Section 47C process challenges

Additionally, where a native title claim is already before the Federal Court, we are of the view that the public notification and comment processes required by s 47C create unnecessary delays for native title groups and additional legal costs for all parties, and suggest that consideration be given as to how this process can be consolidated.

Pursuant to s 47C(6), before making an agreement for the purposes of paragraph (1)(b) or subsection (5), the relevant government must arrange for a reasonable notification of the proposed agreement in the State or Territory in which the agreement area is located, and give interested persons an opportunity to comment on the proposed agreement. This period for comment must be at least three months, during which the agreement cannot be made.

Once this period for comment has ended and the parties enter an agreement pursuant to s 47C, the applicant to the native title claim must apply to the Federal Court to have their original claim amended to include the area covered by the s 47C agreement.[1] Upon receipt by the Native Title Registrar of a copy of an amended application under s 64 (and if s 66A(b)–(c) are satisfied), the Registrar must give notice of the amended application to each of the parties of the proceedings and, if the period specified in the notice in accordance with s 66(10)(c) has not ended, give notice of the amended application to the persons to whom the Registrar gave notice of the application in accordance with s 66(3)(a).[2]

The period of notice of the amended native title claim is a further three months.[3]

In circumstances where the original claim covered a broad geographic area, with generic exclusions about areas where native title was extinguished, it is reasonable to assume that any interested party would have became a party when the original notice under s 66 was given, and had notice of the parties' intention to enter into the s 47C agreement when the notice was given under s 47C(6).

Moreover, it is the experience of our members that s 47C agreements are often negotiated and agreed towards the end of the native title claim, either resulting in delays in resolving the claim or requiring the claims to be split into two parts, with the s 47C area being determined at a later stage. This creates delays and unnecessary legal costs.

We suggest that requiring two three-month periods for public comment, one prior to making a s 47C agreement and one following the filing an application to amend the original application, in addition to the three-month period when the claim was originally filed, represents an unnecessary duplication that results in a delayed outcome for native title claimants without clearly achieving any public good or broader outcome. In our view, one of the two three-month periods for public comment should be dispensed with to avoid delays in the resolution of native title claims.

[1] Section 13(1), *Native Title Act 1993* (Cth) s 13(1).
[2] Ibid ss 66A(1)(e)–(f),
[3] Section 66A(1C)(b).

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Section 141-25(2), *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act)

The insertion of s141-25(2) in the CATSI Act without:

a. defining the term "represented, directly or indirectly"; and
b. clarifying the relationship between this section and ss 150-15 and 150-35 of the CATSI Act,

has led to significant confusion over the scope of s 141-25(2). Accordingly, we suggest clarification of these matters.

Recent interpretation of this section by the Office of the Registrar of Indigenous Corporations (**ORIC**) and the Administrative Review Tribunal (**ART**) restricts or undermines the ability of registered native title bodies corporate (**RNTBCs**) to:

a. determine their membership eligibility requirements; and
b. cancel the membership of individual members.

ORIC (see ORIC Policy PS-10) and the ART in *Wintawari Guruma Aboriginal Corporation RNTBC and Registrar of Aboriginal and Torres Strait Islander Corporations* [2025] ARTA 1900 have formed the view that s141-25(2) prevents RNTBCs from including membership eligibility requirements which make previously cancelled members ineligible for membership for a defined period of time (in this case, five years) without also providing for those cancelled members to be "represented indirectly" by another member of the RNTBC.

Without further clarification, the position that RNTBCs are left with is that they must either:

a. ensure that their rule books provide for some form of "indirect representation" of cancelled members, undercutting the ability of RNTBCs to effectively remove people from membership, including where there have been conduct concerns; or

b. risk being caught in a situation where a cancelled member can immediately re-apply for membership and a RNTBC must accept their application for membership.

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

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

Thank you for the opportunity to comment. Questions at first instance may be directed to Ursula Paetzholdt, Policy Lawyer, at ursula.paetzholdt@lawsociety.com.au or 9926 0130.

Yours sincerely,

Jennifer Ball

Jennifer Ball
President