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Attorney-General's Department

Evaluation of the operation of amendments made by the *Native Title Legislation Amendment Act 2021*

The Attorney-General's Department

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Acknowledgements

The Attorney-General's Department acknowledges Traditional Owners of Country throughout Australia and recognises their continuing connection to lands, waters and communities. We pay respect to Aboriginal and Torres Strait Islander cultures, and to Elders past and present.

The department also acknowledges the distinct cultural identity of Aboriginal and Torres Strait Islander peoples. In this report, the term 'Indigenous' is used in reference to original source materials.

The department also wishes to acknowledge and thank evaluation participants, including the Expert Technical Advisory Group convened as part of the evaluation, for their time and feedback, which has informed this report.

Parts of this report were prepared with input from the National Indigenous Australians Agency, noting the Minister for Indigenous Australians' portfolio responsibility for the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

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Glossary

Term	Definition
2021 Amendment Act	*Native Title Legislation Amendment Act 2021* (Cth)
ALRC	Australian Law Reform Commission
ALRC inquiry	Australian Law Reform Commission Review of the Future Acts Regime
CATSI Act	*Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth)
CLC	Central Land Council
ETAG	Expert Technical Advisory Group
FPIC	Free, Prior and Informed Consent
ILUA	Indigenous Land Use Agreement
Law Council	Law Council of Australia
LGAQ	Local Government Association of Queensland
McGlade Decision	*McGlade v Native Title Registrar & Ors* [2017] FCAFC 10
NIAA	National Indigenous Australians Agency
NNTC	National Native Title Council
NNTT	National Native Title Tribunal
NTA	*Native Title Act 1993* (Cth)
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
ORIC	Office of the Registrar of Indigenous Corporations
ORIC Registrar	Registrar as defined in section 700-1 of the CATSI Act
PBC	Prescribed Body Corporate
Registrar	Native Title Registrar as defined in section 253 of the NTA
RNTBC	Registered Native Title Body Corporate
YMAC	Yamatji Marlpa Aboriginal Corporation

1. Introduction

1. The *Native Title Legislation Amendment Act 2021* (2021 Amendment Act) introduced a number of changes to the *Native Title Act 1993* (NTA) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) with the intention to improve native title claims resolution, agreement-making, Indigenous decision-making and dispute resolution processes.[1]

2. The 2021 Amendment Act also introduced section 209A to the NTA, which requires that the Attorney-General must cause to be conducted an evaluation of the operation of the amendments to the NTA and CATSI Act made by the 2021 Amendment Act within five years of its commencement, i.e. 25 March 2026. This provision was included as a Government amendment during parliamentary debate on the Native Title Legislation Amendment Bill 2020, and provides a formal legislative mechanism to assess the impact of measures in the 2021 Amendment Act on the operation of the native title system.[2] This includes ensuring the 2021 Amendment Act is achieving its objectives, and provides an opportunity to consider whether there is a need for any adjustments to those measures.[3]

3. The Attorney-General caused the Attorney-General's Department (department) to conduct an evaluation and produce this report in fulfilment of the Attorney-General's obligations under section 209A of the NTA.

2. Background

2.1 Development of the 2021 Amendment Act

4. The 2021 Amendment Act implemented select recommendations from 3 independent reviews into the operation of the native title system carried out since 2015:
   - the Australian Law Reform Commission's (ALRC) report on 'Connection to Country: Review of the *Native Title Act 1993* (Cth)', published June 2015
   - the report to the Council of Australian Governments on the 'Investigation into Indigenous Land Administration and Use', published December 2015, and
   - the Office of the Registrar of Indigenous Corporation's 2017 'Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*'.

5. A comprehensive consultation process was undertaken in the lead up to the 2021 Amendment Act, involving an Expert Technical Advisory Group (ETAG), comprising representatives from industry, jurisdictions, and the native title sector. Additionally, over 85 submissions were received and 40 stakeholder meetings held.

[1] Replacement Revised Explanatory Memorandum, Native Title Legislation Amendment Bill 2020 (Cth) ('Replacement Revised Explanatory Memorandum') [1].
[2] Ibid [16].
[3] Ibid.

2.2 Context and Objectives of Evaluation

6. The NTA establishes statutory processes through which native title rights to land and waters can be claimed, recognised and protected. It was introduced in the wake of the 1992 decision in *Mabo v Queensland (No 2)* [1992] HCA 23, where the High Court held that the common law of Australia recognises the existence of native title, which reflects the rights and interests of Aboriginal and Torres Strait Islander peoples, under their traditional laws and customs, to their traditional lands and waters. The NTA has evolved since its introduction in 1993. Specifically, the NTA has been amended in 1998, 2007, 2009, and most recently in 2021.[4]

7. The NTA requires common law holders to nominate a corporation established under the CATSI Act, called a Prescribed Body Corporate (PBC), when a determination recognising native title is made.[5] The CATSI Act came into effect in 2007 to provide a framework for incorporation that is flexible enough to account for the traditions and circumstances of Aboriginal and Torres Strait Islander people. Once registered on the National Native Title Register, PBCs become Registered Native Title Bodies Corporate (RNTBCs). The effective management of native title rights and interests relies on the sustainable operation of RNTBCs. As well as amending the NTA, the 2021 Amendment Act made changes to the CATSI Act to improve the accountability, transparency and governance of RNTBCs, with a particular focus on membership and improved dispute resolution pathways.[6]

8. This report focuses on the amendments made to the NTA and CATSI Act in 2021. The findings of the evaluation are organised by the 9 schedules contained in the 2021 Amendment Act.[7]

9. The next section outlines the terms of reference for the evaluation which were agreed to by the Attorney-General, the Hon Michelle Rowland MP.

2.3 Terms of Reference

10. The Attorney-General has asked the department to undertake the evaluation, with targeted consultation, to:

    - evaluate whether the 2021 Amendment Act amendments are achieving their stated objectives,[8] including to:
        - » give greater flexibility to native title claim groups to set their internal processes
        - » streamline and improve native title claims resolution and agreement-making
        - » allow historical extinguishment over areas of national and state park to be disregarded where the parties agree
        - » increase the transparency and accountability of RNTBCs

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[4] See: *Native Title Amendment Act 1998* (Cth), *Native Title Amendment Act 2007* (Cth), *Native Title Amendment Act 2009* (Cth), and *Native Title Legislation Amendment Act 2021* (Cth) ('2021 Amendment Act').

[5] The *Native Title (Prescribed Bodies Corporate) Regulations 1999* prescribe Aboriginal and Torres Strait Islander corporations for this purpose.

[6] See 2021 Amendment Act schedule 8.

[7] See also Replacement Revised Explanatory Memorandum.

[8] Ibid [16].

  - » create new pathways to address native title-related disputes arising following a native title determination
  - » confirm the validity of agreements made under Part 2, Division 3, Subdivision P of the NTA (section 31 agreements) following the decision in [*McGlade v Native Title Registrar & Ors* [2017] FCAFC 10], and
- identify any need for adjustments to the introduced measures.

2.4 Conduct of Evaluation

11. As part of the evaluation, the department convened an ETAG, which has been stood up from time to time to support legislative reform or legislation-related projects, including, as noted above, during the development of the 2021 Amendment Act. The department convened ETAG to facilitate targeted consultation on the amendments, and to support the evaluation more broadly.

12. ETAG membership for this evaluation comprised representatives from:
    - the department
    - the National Indigenous Australians Agency (NIAA)
    - the National Native Title Council (NNTC)
    - the Mabo Centre (a joint initiative of the NNTC and the University of Melbourne)
    - state and territory governments
    - the National Native Title Tribunal (NNTT) and the Federal Court
    - the Association of Mining and Exploration Companies
    - the Minerals Council of Australia, and
    - the National Farmers Federation.

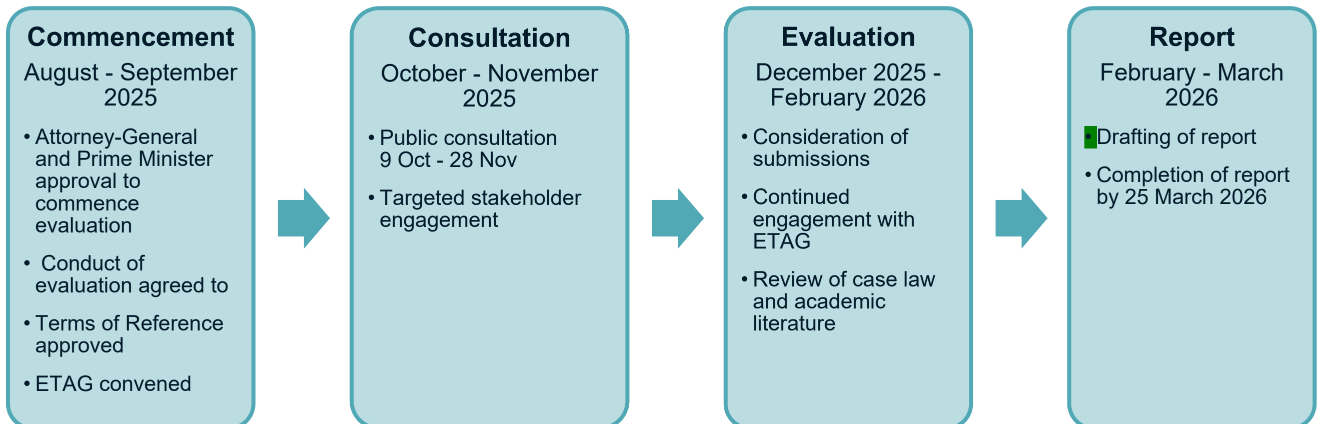
13. The department approached the above entities to ensure diversity of stakeholders within the native title system were consulted. State and territory government representatives were included to ensure each jurisdiction's assessment of how the amendments are operating in practice was captured, as relevant.

14. The NNTC, represented by Jamie Lowe (CEO), chaired ETAG. The NNTC is the peak body representing the native title sector and Traditional Owners across Australia, and is a member of the Coalition of Peaks, the First Nations Heritage Protection Alliance, and the First Nations Economic Empowerment Alliance, which forms part of the First Nations Economic Partnership. The department provided secretariat support to ETAG.

15. These governance arrangements are consistent with the Australian Government's responsibilities under the National Agreement on Closing the Gap and demonstrate its commitment to embedding the National Agreement's Priority Reforms, specifically Priority Reform One, by working in partnership with First Nations people and organisations. Beyond supporting the NNTC in its chairing responsibilities, the department engaged closely with the NNTC throughout the evaluation to ensure First Nations people were meaningfully consulted.

16. The department also directly consulted NIAA, noting the Minister for Indigenous Australians' portfolio responsibility for the CATSI Act, on aspects relevant to Schedule 8 of the 2021 Amendment Act, which made changes to the CATSI Act. Reflective of the cross-cutting nature of native title, the department also engaged with other Commonwealth departments, as relevant. Noting the department's engagement with key resources sector stakeholders, this engagement included the Department of Industry, Science and Resources, as well as the Department of Treasury, noting Treasury's lead role in the First Nations Economic Partnership.

17. The department's evaluation process is illustrated below.



2.5 Data Sources

18. This report is informed by the submissions received through the department's consultation processes. It is also informed by data provided by the NNTT as part of its submission to the evaluation and in response to the department's requests. The department conducted a desktop review of case law and academic literature available since the introduction of the 2021 Amendment Act, to further assess how the amendments are operating in practice. The report is also informed by this desktop review. Further detail about these sources of data and other sources of data relied on are discussed in the following sections.

2.5.1 Consultation

19. The department notes the comprehensive reviews and consultation process undertaken leading up to the introduction of the 2021 Amendment Act, and the broad stakeholder support the 2021 Amendment Act enjoyed upon its development and introduction.

20. Noting the context of the development of the 2021 Amendment Act and recent and contemporaneous reviews of aspects of the native title system, the Attorney-General and ETAG endorsed the department taking a proportionate approach to consultation, facilitating feedback without creating excessive participation burdens for native title system stakeholders. The department notes that in the lead up to its evaluation, key government and non-government native title system stakeholders did not press for a particular form of evaluation mechanism or consultation approach.

21. The department undertook both targeted and public consultation. Targeted consultation included engaging with ETAG throughout the evaluation, and providing technical briefing on the 2021 Amendment Act to stakeholders upon request. The department also sought views from other key stakeholders, both directly and via ETAG members who engaged their networks on the department's behalf.

22. A survey formed the basis of the department's public consultation. This was hosted on the department's consultation platform on its website. The survey was announced on the department's social media platforms. The department also notified Native Title Representative Bodies/Service Providers (NTRB/SPs) of the survey by email. The public consultation period commenced on 9 October 2025 and formally concluded on 28 November 2025.

23. In both consultation processes, the same questions were asked of participants in relation to each of the 9 Schedules of the 2021 Amendment Act:
    - Do you support the amendments made by this Schedule?
    - In your view, have the amendments made by this Schedule operated as intended?
    - Please explain further or add any other comments if you wish.

24. In the survey, the department outlined the operation and intention of the amendments for each Schedule.

25. Participants were invited to submit their response through an online portal or via email. Where the author consented, the submissions were published on the department's website on its consultation hub. In total 11 submissions were received from the following entities:
    - Central Land Council (CLC)
    - Deidentified entity
    - Law Council of Australia (Law Council)
    - Local Government Association of Queensland (LGAQ)
    - The Mabo Centre and NNTC
    - NNTT
    - Office of the Registrar of Indigenous Corporations (ORIC)
    - Sharon Todd on behalf of the Anderson Apicals of the Kariyarra Native Title Holders (Anderson Apicals Kariyarra Native Title Holders)
    - Tekan Cochrane, Lawyer and Human Rights Advocate (individual)
    - Victorian Department of Premier and Cabinet (Victorian government), and
    - Yamatji Marlpa Aboriginal Corporation (YMAC).

26. Following the conclusion of the public consultation period, the department collated feedback received, and conducted a preliminary analysis for ETAG to consider and provide any additional comments to inform the department's findings.

27. The department requested further information from the NNTT to supplement the data provided as part of its submission to the evaluation, e.g. the frequency with which

amendments have been used, and metrics to demonstrate their effective operation, where relevant.

2.5.2 Limitations

28. The department notes that only 11 submissions were received as part of its consultation.[9] The department also notes that due to statutory timeframes, the evaluation occurred at the same time as the ALRC's review of the future acts regime (ALRC inquiry) (as well as other reforms and related consultation processes occurring across the sector, e.g. in relation to cultural heritage and environmental protection). Some stakeholders advised the department that, to the extent that they would provide feedback in relation to the native title system, the ALRC's inquiry was a higher priority than the department's more narrowly focussed evaluation.

29. Parts of some submissions did not directly address the operation of the amendments made by the 2021 Amendment Act. The department's findings are only informed by those aspects of submissions that are within the scope of this evaluation.

2.5.3 Other sources of feedback

30. The department has an ongoing role in monitoring and collecting feedback from stakeholders as part of its regular policy function. This is also true for the NIAA in relation to the Minister for Indigenous Australians' native title portfolio responsibilities. For example:

    - The department has a dedicated, public-facing mailbox that regularly receives correspondence from stakeholders and members of the public on issues of concern in relation to native title.
    - As part of its policy development responsibilities, the department also regularly meets with stakeholders, including recently in relation to the concurrent ALRC inquiry into the future acts regime.
    - The department also has a number of forums with government and non-government bodies to discuss general and specific native title issues. These forums meet at regular intervals.[10] The department raised the evaluation at these forums during the consultation period to ensure appropriate awareness of the evaluation throughout the sector, and to encourage stakeholders to provide feedback to inform the evaluation.

31. The department also conducted a review of the four instruments that were due to sunset in 1 October 2023 under the NTA.[11] This review, over 2022-2024, provided an opportunity to comprehensively assess these instruments and whether they remain fit-for-purpose. The manner in which the department received feedback during this review ultimately informed the department's approach to the evaluation of the amendments made by the 2021 Amendment Act.

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[9] C.f. 159 submissions received for the ALRC inquiry.
[10] E.g. Preservation of Evidence Group, Commonwealth Inter-Agency Committee on Native Title.
[11] These included the *Native Title (Notices) Determination 2011 (No.1)*, the *Native Title (Indigenous Land Use Agreements) Regulations 1999*, the *Native Title (Tribunal) Regulations 1998*, and the *Native Title (Federal Court) Regulations 1998*.

32. Across all of these platforms of engagement and consultation, and since its introduction, stakeholders have not raised significant comments or concerns in relation to the 2021 Amendment Act, with the exception of some amendments made by Schedule 8.

33. Additionally, the department notes the ALRC inquiry involved extensive consultation with many of the same stakeholders. Noting that both the evaluation and the ALRC inquiry involve review of (distinct aspects of) the NTA, the department used the evaluation's consultation process to clarify for stakeholders how the two processes relate to and differ from one another, including the evaluation's interaction with, and independence from, the ALRC inquiry. The department made clear that it was content for stakeholders to cross-reference their submissions in the ALRC inquiry.[12] The department has not identified any submissions received during the ALRC's inquiry – published on the ALRC's website – that specifically raise concerns or feedback in relation to amendments made by the 2021 Amendment Act.[13]

2.5.4 Literature review

34. In reviewing relevant literature, the department notes that criticism raised at the time of the 2021 Amendment Act's passage invariably concerned broader issues in relation to native title, including that broader changes to the native title system were not pursued as part of the amendments.[14]

3. Key Themes

35. The department has not been able to identify widespread or systemic concerns with the changes made by the 2021 Amendment Act. The evaluation has not revealed feedback that suggests evaluation participants no longer support the intent of the amendments, or that they are not broadly operating as intended.

36. Overall, across the 11 submissions received for the evaluation, participants largely support the intent of changes made by the 2021 Amendment Act, particularly measures aimed at providing flexibility, efficiency and certainty, as well as post-determination dispute resolution. For example, in their media release regarding their submission to the evaluation, the Law Council noted that they 'took the view that the amendments made by the 2021 Amendment Act have resulted in appropriate and meaningful improvements to the native title system.'[15]

37. However, submissions indicate that effectiveness has been uneven in practice in relation to some amendments, and that further adjustments may improve their operation. Some reasons participants raise for this include:

- legislative ambiguity when it comes to practical application

[12] The ALRC inquiry is ongoing as at the time of writing this report. It is due to report its findings on 31 March 2026.
[13] Submissions published on the ALRC website and accessed via https://www.alrc.gov.au/inquiry/review-of-the-future-acts-regime/submissions/.
[14] See e.g. Native Title Newsletter Issue 1 2021: 'Takeaways from the *Native Title Legislation Amendment Act 2021* (Cth)' by Michael O'Donnell and Mia Stone, AIATSIS, which also notes that while the Parliamentary Joint Committee on Human Rights raised concerns regarding retrospective application of confirming validity of certain section 31 agreements, there was general unanimity that they should be validated despite these concerns.
[15] 'Evaluation of Amendments to the Native Title Act 1993', *Law Council of Australia* (Media Release, 11 December 2025) https://lawcouncil.au/media/news/evaluation-of-amendments-to-the-native-title-act-1993.

- procedural designs that have led to unintended consequences, and
- insufficient resourcing for RNTBCs, NTRB/SPs, local governments, and the NNTT.

38. While the department concludes from the evaluation of the feedback provided and review of case law and literature that the amendments are largely operating as intended, the department considers some technical amendments could improve the operation of some amendments, as outlined below.

39. Stakeholders consistently raise concerns regarding funding of the native title system as part of this evaluation and more generally, including the NNTT (particularly in relation to additional functions introduced by the 2021 Amendment Act) and ORIC, as well as PBCs and NTRB/SPs.

40. The next sections discuss the feedback received in relation to each of the 9 schedules of the 2021 Amendment Act and any case law the department identified as relevant to how the amendments are operating. The sections also include the department's key findings in relation to each schedule, noting that in relation to Schedule 8 the department sought input from the NIAA. The Overall Findings section provides a summary of those areas for further investigation and potential adjustments based on the department's evaluation.

4. Findings of Evaluation

4.1 Schedule 1: Role of the Applicant

Key Findings

- Evaluation participants generally agree the amendments are operating as intended, but raise concerns that some of the objectives of the amendments in Schedule 1 are not being fully realised in their implementation.
- Claim groups' understanding of decision-making processes during the claim stage of native title applications could be improved.
- To ensure applicant accountability to the broader claim group, further consideration could be given to requiring an applicant to obtain approval from the claim group when acting by majority in certain instances.
- The prevalence of internal disagreements could be further investigated to ensure that the operation of amendments is not causing unintended consequences.

4.1.1 Overview of amendments

41. The applicant is the person or group of persons authorised by a native title claim group to make a native title claimant application on their behalf. The applicant can also have a role in representing the native title claim group in making agreements over areas where native title has been claimed.

42. The intention of the amendments in Schedule 1 of the 2021 Amendment Act was to provide greater flexibility to claim groups around developing their internal decision-making structures. The changes also sought to ensure the applicant is accountable to the broader claim group. To achieve this, Schedule 1 amended the NTA to:

- allow the applicant to act by majority and make this the default position (the claim group can displace this default position by imposing alternative conditions on the applicant)[16]
- allow the claim group to impose conditions on the authority of the applicant, and to require those conditions to be recorded on the Register of Native Title Claims (for example, a condition to require the applicant to get approval from the claim group before agreeing to a consent determination or discontinuing a claim)[17]
- confirm that any obligation of the applicant under the NTA does not relieve or detract from any operation of any other duty of the applicant at common law or in equity to persons in the claim group,[18] and
- allow the composition of the applicant to be changed without a further authorisation process in certain circumstances, including where a member of the applicant is deceased, including through succession-planning arrangements.[19]

4.1.2 Feedback Received

43. Data from the NNTT indicates there is a strong uptake of the amendment provisions that allow conditions to be imposed on the authority of the applicant.[20] As at 9 December 2025 (following the conclusion of the consultation period for the evaluation), approximately 45 new or existing registered claims have conditions on the authority of the applicant since the amendments' commencement on 25 March 2021.

44. Feedback suggests that evaluation participants broadly support the intention of the amendments made by Schedule 1 and recognise them as positive reforms giving claim groups the flexibility to set decision-making rules suited to their circumstances, supporting greater self-determination, and providing clarity regarding the role of the applicant.

45. Feedback also suggests that these amendments have operated to make the complex area of native title procedure function fairly and efficiently.[21] In particular, participants note that the amendments allow for a native title claim group, being unincorporated at the claim stage, to collectively and effectively engage in complex litigation and administrative matters.[22]

Native title claimant applications

46. Feedback notes a need for clearer guidance around the claim stage of a native title application to support claim groups, including supporting claim groups to build their

[16] *Native Title Act 1993* (Cth) ('NTA') sections 39, 301, 31.
[17] Ibid section 251BA.
[18] Ibid section 62B and *Gebadi v Woosup* [2017] FCA 1467, in which the Federal Court found that members of the claim group are entitled to expect that the applicant will act in the best interests of the claim group in exercising any of the functions, powers, responsibilities and discretions conferred upon it.
[19] NTA section 251B.
[20] Data collated by the NNTT from the Register of Native Title Claims as at 9 December 2025.
[21] See submission from the Law Council and the Mabo Centre and NNTC.
[22] Ibid.

governance arrangements (for example, developing decision-making structures that are consistent with their traditional laws and customs).[23]

47. Some participants suggest that guidance material could support native title stakeholders to better and more fully understand the requirements and settings introduced by Schedule 1. For example, the Law Council in its submission proposes the development of guidance on issues including:
    - conditions on authority
    - applicant duties and fiduciary responsibilities
    - succession planning
    - information on how to adopt decision-making processes that reflect cultural authority and group consensus, and
    - how intra-group disputes can be monitored and addressed appropriately.

48. Evaluation participants stress it would be important to consult First Nations people and native title holders and claimants in developing any guidance material. This would ensure that First Nations peoples' right to self-determination is respected, and that the guidance material is appropriately targeted and fit-for-purpose.

49. In their joint submission, the Mabo Centre and NNTC note resourcing for NTRB/SPs hinders the effectiveness of Schedule 1's amendments. This submission explains that – in many remaining claim areas where the impacts of historical dispossession are most prevalent – native title determination applications often need to be prepared quickly due to impending future act processes, despite complexity of traditional ownership structures. The submission recognises the importance of Schedule 1's amendments, noting the ability to impose conditions on the applicant introduced by them, but argues that legislative change alone is inadequate. The Mabo Centre and NNTC note that with increasing national focus on activating strategic land-based resources, ensuring dedicated support for the native title system is more critical than ever.

Applicant accountability

50. A submission made by the Anderson Apicals Kariyarra Native Title Holders notes that decision-making rules remain unclear and are inconsistently applied, highlighting the experience of certain native title holders lacking access to internal governance information and sufficient notification regarding meetings.[24] This submission is concerned with post-determination decision-making, while Schedule 1 amendments relate to pre-determination decision-making. Another submission raises concerns around cultural integrity, noting the risk that majority decision-making may undermine collective, consensus-based decision-making that is deeply rooted in cultural practices.[25]

51. To ensure applicants are accountable to the broader claim group, the Law Council suggests that section 62C of the NTA – which provides for the default rule that the applicant acts by majority, and that this default rule can be displaced – could be

[23] See submissions from the Law Council and Tekan Cochrane.
[24] Submission from Anderson Apicals Kariyarra Native Title Holders.
[25] Submission from Tekan Cochrane.

amended to require an applicant to obtain consent from the claim group (such as at an authorisation meeting), in specific circumstances (such as before agreeing to a consent determination or discontinuing a claim), or before entering into a section 31 agreement.

52. Two submissions recommend investigating further whether the amendments made by Schedule 1 have led to unintended consequences, such as increased disagreements within groups or uncertainty about who holds decision-making authority. Monitoring indicators around decision-making practices could provide insight into whether these amendments have unintentionally increased instances of intra-group conflict. Indicators could include challenges in the Courts, replacement applicant applications, feedback from NTRB/SPs when certifying applications under section 203BEof the NTA, number and types of governance-related complaints to ORIC, or requests for NNTT assistance.

4.2 Schedule 2: Indigenous Land Use Agreements (ILUAs)

Key Findings

- Under-resourcing of key players in the native title space remains a concern for evaluation participants.
- Amending paragraph 24BC(2)(b) to provide the Native Title Registrar (Registrar) discretion regarding whether an area has been excluded may streamline the process for allowing body corporate ILUAs to be made over areas where native title has been extinguished.
- Section 24ED could be expanded or simplified to increase the uptake of the ability to amend ILUAs.
- The process for removing ILUAs on the Register of ILUAs warrants further investigation and discussion with the NNTT, including with respect to the Registrar's role under section 199C.

4.2.1 Overview of Amendments

53. The NTA sets out processes for native title groups to negotiate agreements with other parties about the use of land and waters. A particular agreement-making mechanism under the NTA is an agreement known as an ILUA. ILUAs can record the parties' consent to the doing of a 'future act', such as the grant of a mining or grazing tenement, and can involve compensation to native title groups.

54. The intention of amendments to the NTA in Schedule 2 in relation to ILUAs was to streamline and improve agreement-making. The amendments:

- allow 'body corporate' ILUAs to include areas where native title has been extinguished and where native title has been determined not to exist[26]

[26] NTA section 24BC.

- remove the requirement for the Registrar to notify an area ILUA unless they are satisfied it meets the requirements to be an ILUA[27]
- allow minor amendments to be made to an ILUA without requiring a new registration process,[28] and
- clarify that the removal of an ILUA from the Register of ILUAs does not affect the validity of acts agreed to have been done under that ILUA.[29]

4.2.2 Feedback Received

55. Given ILUAs are a significant aspect of the future act regime and native title agreement-making, amendments made by Schedule 2, in particular, relate to matters relevant to the ALRC inquiry. As such, the department has considered feedback received – and proposed recommendations made in submissions – in this context. The discussion in this section may need to be considered as part of any potential Government response to the ALRC inquiry's final recommendations.

56. Most responses indicate broad in-principle support for Schedule 2's amendments, noting they improve efficiency and reduce administrative burden. Commentary suggests that overall, however, there are some concerns around the amendments in practice that limit their use and efficacy.

57. In its submission, the Law Council note its members indicate that the improved efficiency has subsequently increased capacity for native title holders to give effect to self-determination and fair agreement-making processes, noting that ILUAs are one of the few mechanisms in the NTA that allow the genuine application of the principle of free, prior, and informed consent (FPIC) under the United Nations Declaration on the Rights of Indigenous Peoples.[30]

58. Conversely, in their submission, Anderson Apicals Karriyarra Native Title Holders note their experience that ILUA documents or agreement information remains inaccessible, that authorisation processes are often poorly communicated and not well understood, and that there is no effective mechanism to challenge defective authorisation processes.[31] This submission – which focusses on how ILUAs are being used in Western Australia – argues that ILUAs proceeding without informed consent from the full native title group undermines effective agreement-making.

59. The Mabo Centre and NNTC raise in their submission that Schedule 2's amendments did not give full effect to the processes contemplated in paragraph 24CG(3)(a) of the NTA, which requires that an area agreement is certified by an NTRB. They submit that giving greater weight to certification by an NTRB of area agreements would streamline processes to the benefit of both native title holders and proponents. The department notes that this was not pursued as part of the 2021 Amendment Act, and the Mabo Centre and NNTC's submission raises this matter in that context.

60. Feedback provided to and submitted by LGAQ highlights complexity and financial challenges associated with the ILUA process generally. The submission notes that the

[27] Ibid section 24CH.
[28] Ibid section 24ED.
[29] Ibid section 24EBA.
[30] See submission from the Law Council.
[31] Submission from Anderson Apicals Karriyarra Native Title Holders.

ILUA process is a complex one and under-resourcing is a limitation for both RNTBCs and small or regional local governments engaging in ILUA processes.

61. A number of submissions raise resourcing to the native title sector – including to support independent legal and cultural advisors, ORIC, PBCs, and other parties involved in agreement-making – to improve native title processes.

Body corporate ILUAs

62. Feedback received indicates that while evaluation participants support the intention to allow body corporate ILUAs to be made over extinguished areas, such ILUAs are complex to implement.[32]

63. The NNTT's submission, as well as the Mabo Centre's, the NNTC's, and the CLC's, note limitations to the efficiency and efficacy of the amendments at paragraph 24BC(2)(b). Specifically, paragraph 24BC(2)(b) includes the requirement that the relevant area be '*expressly* excluded' which may have a restrictive effect on the Registrar's ability to register the ILUA where the determination orders have not explicitly identified whether areas have been excluded.[33] As the Registrar's role does not include conducting any tenure assessment, practical challenges arise in the applicant providing this information prior to lodging an ILUA registration application.

64. Evaluation participants suggest granting explicit discretion to the Registrar under paragraph 24BC(2)(b) to form an opinion on all the relevant evidence as to whether the relevant area was excluded in the absence of express exclusion in the Federal Court's determination order.

Removal of notification requirement for Registrar

65. On this amendment, some submissions raise participation concerns, indicating fewer notification steps may mean some native title holders are never notified or given genuine opportunities to participate, particularly for native title groups with limited governance capacity or limited access to independent legal advice.[34]

Amended agreements

66. NNTT data indicates that section 24ED (allowing ILUAs to be amended) is rarely used, with 16 out of a total of 1528 – approximately 1.05% – registered ILUAs amended pursuant to the amendment provision.

67. Evaluation participants also suggest the narrow drafting of section 24ED limits the provision's ability to facilitate practical and minor amendments to ILUAs. Participants that raised this concern advocate for a more streamlined process for such changes to be made without the need for compliance with strict requirements set out in the NTA.[35]

68. In respect of section 24ED being under-utilised, the NNTT's experience suggests that this is due to poor understanding by practitioners. For example, the NNTT has observed that amendment notifications are often submitted unilaterally, even where the amendment proposes the addition or substitution of parties to the ILUA. This practice does not comply with paragraphs 24ED(1)(a) and (b), which require that all existing

[32] See e.g. submission from LGAQ.
[33] See submissions from the CLC, the Mabo Centre and NNTC, and the NNTT.
[34] Submissions from Anderson Apicals Karriyarra Native Title Holders and Tekan Cochrane.
[35] See submissions from CLC, Law Council, and the Mabo Centre and NNTC.

parties on the ILUA Register – and any new or substituted parties – jointly notify the Registrar. Amendments involving changes to the parties under paragraph 24ED(1)(d) are particularly complex. The NNTT suggests that uncertainty about how this provision interacts with individual ILUA terms and common-law principles of novation and assignment has likely discouraged parties from seeking such amendments.[36]

69. With respect to section 24ED, evaluation participants recommend simplifying the process to vary agreements, making technical adjustments to clarify the correct process to notify the Registrar of ILUA amendments, and making amendments to deal with large area ILUAs affected by multiple native title determinations held by different native title groups.[37] Participants stress it will be important to continue to monitor the impacts of section 24ED to ensure these settings don't undermine the integrity of agreements.[38]

Removal of ILUA on Register

70. The NNTT makes additional recommendations for clarificatory provisions around the Registrar's task under section 199C, the removal of ILUAs from the Register in respect of only part of the ILUA area, and the contractual effect of non-registered agreements.

4.3 Schedule 3: Historical Extinguishment

Key Findings

- Section 47C has had positive impacts both in principle and in practice.
- The precondition of government agreement in section 47C agreements is viewed as a barrier by some evaluation participants.
- The application of section 47C, including the definition of 'park area' and notification requirements, could be further explored to better support practitioners and native title claimants.
- Under-resourcing may be hindering the frequency with which section 47C is applied.

4.3.1 Overview of Amendments

71. In some circumstances, the NTA allows the historical extinguishment of native title to be disregarded so that native title can be recognised. Schedule 3 extended the areas in which prior extinguishment can be disregarded to include areas of national, state or territory parks where there is agreement with the national, state or territory government as relevant.[39] This was done through the insertion of section 47C with the intention to expand the areas where native title can be recognised. The intention was also to allow

[36] Assignment and novation are both legal mechanisms for the transfers of the rights and/or obligations under a contract which exist at common law. Ambiguity surrounds whether native title holders would be required to comply with both common law processes and ILUA-specific processes in the NTA when amending an ILUA. For example, the Registrar may require a signed Deed evidencing the agreement of current and proposed parties to an ILUA in line with common law principles, but this would not be required solely under the NTA.
[37] See submissions from the CLC, Law Council, the Mabo Centre and NNTC, and the NNTT.
[38] See submission from the Law Council.
[39] NTA section 47C.

existing determinations to be re-opened to obtain the benefit of this new section by way of a revised native title determination application under paragraph 13(1)(b) of the NTA. The grounds for a variation application are provided under subsection 13(5).

72. Schedule 3 also amended section 47 with the intention of clarifying its application to corporate entities controlled by native title claimants.[40]

4.3.2 Feedback Received

73. Most submissions broadly support the measures under Schedule 3 as a significant symbolic and substantive reform. In confirming their support, submissions note these amendments significantly increased the number of areas where native title can be recognised, leading to a positive benefit for native title holders and more efficient and effective management of the nation's parks estate by state and territory governments.[41]

74. Data retrieved from the NNTT (as at 10 March 2026) indicates that the Federal Court has made 5 determinations involving section 47C since its introduction, with at least another 5 determinations preserving the benefit of section 47C for future applications.

75. Determinations relying on section 47C to have Traditional Owners' native title recognised are:

Claim Group	State/Territory	National Park Area/s	Federal Court Ref.
Pila Nature Reserve Traditional Owners	Western Australia	Pila Nature Reserve (previously Gibson Desert Nature Reserve)	WAD174/2021
Purnululu and Gajangana Jaru	Western Australia	Purnululu National Park Purnululu Conservation Reserve Part of Ord River Regeneration Reserve	WAD536/2018 WAD401/2018 WAD65/2019
Wongkumara People	New South Wales	Part of Sturt National Park	QUD851/2018
Ngarrindjeri People and First Nations of the South East	South Australia	Part of Coorrong National Park Part of Gum Lagoon Conservation Park Tilley Swamp Conservation Park Martin Washpool Conservation Park	SAD6027/1998 SAD180/2017

[40] Ibid sub-paragraph 47(1)(b)(ii).
[41] See submissions from the Law Council and the Mabo Centre and NNTC.

Claim Group	State/Territory	National Park Area/s	Federal Court Ref.
		Bunbury Conservation Reserve	
Jaru People	Western Australia	Part of Ord River Regeneration Reserve	WAD334/2023

76. In its submission, the Victorian Government notes that section 47C is especially important in jurisdictions like Victoria, where the extent of extinguishment due to colonisation has had a profound and detrimental effect on native title outcomes and groups. The Victorian Government submits that the most important aspect of section 47C is that it disregards *all* previous extinguishment in the relevant parcel, effectively restoring the exercise of native title rights over the parcel as at the time of sovereignty. The Victorian Government further highlights another important aspect of section 47C is its express preservation for public access as well as access to maintain public works. This means that, under section 47C, native title rights are recognised in a way that does not conflict with broader public policy aims relating to access and enjoyment of parks.

77. Evaluation participants almost unanimously recognise the positive intention and effect of this amendment for recognising native title rights and interests. This is consistent with feedback received during consultation in the development of the amendments and upon their introduction, particularly native title sector, state and territory government, and legal sector stakeholders' in-principle support for the amendment.

78. Notwithstanding this, the department understands from feedback received that giving effect to section 47C agreements has involved sometimes significant resourcing implications for certain jurisdictions' governments.

Requirement for government consent

79. Despite the generally positive feedback, evaluation participants consistently raise the precondition of government agreement as a possible concern in relation to employing section 47C. The Law Council points out this is inconsistent with other provisions that allow for the extinguishment of native title to be disregarded.[42] The requirement for the relevant government to provide consent is seen by several evaluation participants as giving states and territories an effective veto power.

80. The Mabo Centre and NNTC suggest introducing the ability for the Court to disregard prior extinguishment in making a determination over national, state or territory parks, despite the objection of a government respondent party. Another submission recommends that the Commonwealth develop model agreements or provide incentives to encourage governments to allow extinguishment to be disregarded in areas where strong cultural connection persists.

[42] NTA sections 47, 47A, and 47B.

81. By contrast, one submission opposes the state governments' ability to disregard extinguishment in circumstances where the relevant area is covered by a current lease or license without the consent of the titleholder. [43] The submission raises concerns that this ability leads to tenure uncertainty, ultimately undermining proponents' ability to secure investment.

Application of section 47C

82. The Law Council's submission also raises concerns over the definition of 'park area' in section 47C, whether section 47C applies to certain state forests, and the potentially unnecessary prolonging of the two separate notification periods required under the provision.

83. The Law Council proposes expanding the definition of 'park area' to include all areas that could reasonably be understood to be state or territory forests and national parks, as well as removing one of the two three-month notification periods for public comment to simplify the section 47C process and avoid delays in the resolution of native title claims. Another submission requests clarification regarding timeframes for applications and decision-making.[44]

84. The Law Council further suggests that clearer guidance to claim groups, and express protections for FPIC in all agreement-making processes, would better support the principles underpinning section 47C.

4.4 Schedule 4: Allowing a Registered Native Title Body Corporate to Bring a Compensation Application

Key Findings

- There is legal uncertainty on whether compensation claims may be brought by an authorised applicant or only by an RNTBC.
- The use of 'expressly excluded' in relation to compensation applications in subsection 61(1A) may create issues for claimants (similar to the discussion on paragraph 24BC(2)(b) in Schedule 2).
- There is a need for dedicated resources to ensure that native title compensation rights are practically accessible.

4.4.1 Overview of Amendments

85. Schedule 4 amended the NTA to allow RNTBCs to bring a compensation application over an area where native title has been extinguished within their native title determination area. Before the amendment, RNTBCs could only make applications for compensation over areas where native title was partially extinguished or impaired. For fully extinguished native title, the claimants needed to authorise an applicant to make the compensation application.

[43] Submission from deidentified entity.
[44] Submission from the Law Council and a deidentified entity.

86. This amendment sets out procedural requirements and circumstances in which RNTBCs may bring such an application.

4.4.2 Feedback Received

87. Feedback received by the department suggests most evaluation participants support in-principle enabling RNTBCs to bring compensation applications, resolving an inconsistency in the NTA.[45] The feedback suggests that in practice the effectiveness of the amendments made by Schedule 4 are constrained by uncertainty regarding their operation and a lack of resources for RNTBCs and other native title bodies.

88. NNTT data indicates that RNTBCs have filed 5 compensation applications since the introduction of the amendments, out of a total of 8 compensation claims filed (as at 10 March 2026). For context, NNTT data indicates that a total of 62 compensation applications have been filed since 1994, with 5 having been determined.

Legal uncertainty

89. Evaluation participants highlight legal ambiguity under section 61 of the NTA, including whether *only* an RNTBC can make a compensation application, or whether a compensation claim may be brought by either the relevant RNTBC or an authorised applicant.[46] Participants recommend amending the NTA to clarify that only the relevant RNTBC can make a compensation application.[47]

90. The CLC suggests the inclusion of '*expressly* excluded' in subsection 61(1A) in relation to compensation applications creates problems similar to those discussed in relation to paragraph 24BC(2)(b) (see paragraph 62, above).

Resourcing

91. Feedback also suggests that resourcing for RNTBCs has ultimately limited participation, and adoption, of this provision, given the complexity and expense involved in establishing a compensation application.[48]

92. Two of the submissions propose dedicated resources to ensure native title compensation rights are practically accessible, including supporting RNTBCs to engage specialist, independent legal and financial advisors before lodging compensation applications, and clear guidance for RNTBCs on evidentiary requirements for compensation applications.[49]

[45] See in particular submission from the Mabo Centre and NNTC.
[46] Submissions from the CLC and the Mabo Centre and NNTC note this issue has arisen, without definitive resolution to date, in the case of *Melville on behalf of the Pitta Pitta People v State of Queensland* [2022] FCA 387.
[47] Submissions from the CLC; the Mabo Centre and NNTC.
[48] See submissions from the Law Council, the Mabo Centre and NNTC, and Tekan Cochrane.
[49] See submissions from the Law Council and the Mabo Centre and NNTC.

4.5 Schedule 5: Intervention and Consent Determination

Key Findings

- The procedural changes introduced by the 2021 Amendment Act and the amendment provisions are operating as intended.

4.5.1 Overview of Amendments

93. Schedule 5 made several technical amendments to the NTA, with the intention of clarifying the role of the Commonwealth Minister, i.e. the Attorney-General, as intervener in native title proceedings and the procedural requirements for the Federal Court to make determinations with the consent of the parties.

4.5.2 Feedback Received

94. The department received limited feedback in relation to the amendments made by Schedule 5. The Law Council expressed support for clarifying the Commonwealth Minister's role as intervener. Noting the changes to clarify the role of the Commonwealth Minister affects the department's management of native title litigation, the department considers the amendments made by Schedule 5 are operating as intended.

4.6 Schedule 6: Other Procedural Changes

Key Findings

- Negotiation obligations for – and the role of government parties under – section 31 of the NTA could be clarified and warrants further investigation through engagement with the native title sector.
- The timeframe for mandatory referrals under section 24MD could be problematic and further scrutiny is warranted, similarly through engagement with the sector.
- Resourcing for the NNTT is affecting its ability to effectively fulfil its functions.

4.6.1 Overview of amendments

95. Schedule 6 made various procedural changes to the NTA including:
    - requiring that any objection to a future act passing the 'freehold test' must be heard by an independent body if not addressed or withdrawn within 8 months[50]
    - technical amendments with the intention of clarifying the role of the government party in the negotiation of section 31 agreements (a particular kind of native title agreement which can relate to the grant of mining and exploration tenements over

[50] NTA section 24MD.

land which may be subject to native title), and the objections procedures under the future acts regime[51]

- a requirement that the Native Title Registrar create and maintain a public record of section 31 agreements to provide transparency and certainty for all parties to native title matters and improve native title claims resolution and agreement-making,[52] and
- a requirement that an evaluation of the 2021 Amendment Act be conducted within five years intended as an accountability measure to ensure that the amendments are operating as intended.[53]

4.6.2 Feedback Received

Section 31 Register

96. Feedback on the amendment to create and maintain a register of section 31 agreements indicate that some evaluation participants support the amendments, specifically in relation to improved transparency for native title agreement-making.[54]

97. NNTT data indicates parties are actively seeking registration of section 31 agreements and the Law Council supports the increased certainty the amendment has provided to all parties to native title matters.[55]

98. Some evaluation participants raise privacy concerns, expressing reservations that the public record of section 31 agreements constitute an unwarranted regulatory intrusion into what is a private commercial transaction between native title holders and proponents.[56]

99. Despite concerns the Mabo Centre and NNTC raise, their submission remains neutral on the amendments made by Schedule 6, noting they are unaware of any detrimental impacts resulting from the amendments. YMAC and the Law Council suggest consulting with stakeholders to address privacy and confidentiality concerns, particularly where names and addresses are visible in section 31 agreements.[57]

100. The NNTT notes that details of section 31 agreements since the 2021 Amendment Act commenced are recorded separately to those agreements lodged prior to the amendments, meaning there is a fragmented data set and comparison is challenging.[58] The NNTT notes that combining the data requires further resourcing. The NNTT submits there is utility in consolidating records of section 31 agreements prior to and following enactment of the 2021 Amendment Act. The NNTT argues that this data integration would enable better and more efficient analysis and allow a more complete application of the section 31 record to Geospatial, post determination, dispute resolution and future act functions. This would also improve native title, proponent and

[51] Ibid sections 25, 31, and 36.
[52] Ibid section 41B.
[53] Ibid section 209A.
[54] See submissions from the Law Council and YMAC.
[55] NNTT data indicates details of approximately 332 section 31 agreements have been entered into the Record of section 31 Agreements by the Registrar since the amendments were made.
[56] See submissions from the Law Council and the Mabo Centre and NNTC.
[57] See submissions from the Law Council and YMAC.
[58] The NNTT submits that section 31 agreements lodged between 1995 and March 2021 are recorded in a separate internal database, amounting to 3743 records.

government parties' understanding of the nature and spread of agreement-making under the right to negotiate process.

Role of government in section 31 agreements

101. Two submissions highlight good faith negotiation confusion, with Law Council members reporting that some state governments tend to misinterpret subsection 31(1A) as a blanket exemption to negotiate in good faith, even when negotiating the terms of a section 31 agreement to which a government party must be a party.[59] Despite this problem, YMAC submits that the requirement that the exemption only applies with the written consent of the other negotiation parties is helpful.

102. YMAC raises concern about the implications of the requirement that the government party sign any section 31 agreement. YMAC claims that this amendment has resulted in a rise in unopposed future act determination applications where the native title party and the grantee party have reached an agreement, but do not wish to enter an agreement with the government party. YMAC submit that this further leads to native title and grantee parties expending resources to go through NNTT processes unnecessarily.

103. YMAC and the Law Council recommend in their submissions clarifying negotiation obligations for government parties under subsection 31(1A), and removing the requirement that the government party be a party under subsection 31(1B).

Objections procedure under section 24MD

104. YMAC notes that the objections process under section 24MD is problematic in that mandatory referral of objections after 8 months undermines the intent underpinning consultation requirements. As drafted, referral under paragraph 24MD(6B)(f) is not contingent on consultation having to occur. YMAC further submits that the 8-month timeframe is impractical, noting that often negotiations and consultations arising through the section 24MD process take longer. As a result, mandatory referral cuts these processes short. To address this concern, YMAC recommends amending paragraph 24MD(6B)(f) to clarify that referral should follow completed consultation.

4.7 Schedule 7: National Native Title Tribunal

Key Findings

- Issues with resourcing have undermined the efficacy of the NNTT's function under section 60AAA, particularly noting the high demand.
- Evaluation participants view cultural competence as critical to performing mediation.

4.7.1 Overview of Amendments

105. Schedule 7 conferred on the NNTT a new function to allow it to assist RNTBCs and common law holders of native title to promote agreement about native title and the

[59] See submissions from the Law Council and YMAC.

operation of the NTA.[60] This change created a new pathway to address native title-related post-determination disputes and was intended to support the early resolution and management of such disputes.

4.7.2 Feedback Received

106. Feedback indicates evaluation participants welcome the NNTT's expanded role, noting the provision of its specialist expertise has been of significant benefit to the sector.[61] However, some participants note resourcing and operational challenges.

107. NNTT data indicates a significant demand for NNTT assistance under its new function, with the NNTT receiving approximately 293 requests for assistance since the introduction of this provision. Requests appear to be made predominantly by common law holders, and range from one-off enquiries to extensive requests for facilitation and/or mediation.[62]

Factors affecting NNTT's discharge of its functions under section 60AAA

108. The NNTT takes the view that section 60AAA may benefit from amendments to include 'persons who claim to be common law holders'. This is further discussed in relation to Schedule 8 below.

109. The NNTT submits that effective support requires relationship-building through direct on Country engagement with RNTBCs and native title holders, which is contingent on the NNTT's ability to travel. The NNTT notes that much of the period following the introduction of this new function – and from which their evidence base comes – was affected by Coronavirus Disease (COVID-19) travel restrictions, which constrained its ability to perform this new function effectively.

110. Evaluation participants, including the NNTT, emphasise that adequate resourcing is essential for the NNTT to discharge its functions effectively and that the benefits of these amendments have been diminished by inadequate resources to support the NNTT in its additional task.[63]

111. Two submissions emphasise the importance of the NNTT maintaining a clear separation between its mediation and arbitral functions to avoid real or perceived conflicts of interest. [64] These submissions also argue that cultural competence should be prioritised in engaging mediators.

112. Some submissions recommend securing funding and ensuring culturally competent mediation by engaging mediators who understand and respect traditional decision-making processes and community dialogue.[65] In particular, the Law Council suggests this could be achieved through publication of a list of experienced mediators and negotiators.

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[60] NTA section 60AAA.
[61] See in particular submissions from the Mabo Centre and NNTC and Tekan Cochrane.
[62] See submission from the NNTT for further details, including a breakdown of requests by jurisdiction and themes emerging from requests.
[63] See submissions from the Mabo Centre and NNTC, the NNTT, and Tekan Cochrane.
[64] Submissions from the Law Council and Tekan Cochrane.
[65] See submissions from the Law Council, the Mabo Centre and NNTC, the NNTT, and Tekan Cochrane.

4.8 Schedule 8: Registered Native Title Bodies Corporate (RNTBCs)

Key Findings

- Appropriately resourcing RNTBCs is crucial to the operation of the amendments to the CATSI Act made by the 2021 Amendment Act, particularly in relation to dispute resolution.
- There are practical challenges relating to the way that some RNTBCs have incorporated the new requirements in their rule books.
- The reference to 'indirect' and 'direct' representation in subsection 141-25(2) of the CATSI Act has caused some confusion and implementation issues.
- An unintended consequence of the amendments is that members whose membership has been cancelled because they misbehaved are entitled to be accepted as members when they reapply for membership.
- A lack of ORIC enforcement powers has made the amendments less effective than they could have been.

4.8.1 Overview of Amendments

113. The effective management of native title rights and interests relies on the sustainable operation of RNTBCs. Schedule 8 amended the CATSI Act to improve the accountability, transparency and governance of RNTBCs, with a particular focus on membership and improved dispute resolution pathways through amendments that:[66]

- require RNTBC constitutions include dispute resolution pathways for persons who are or claim to be common law holders[67]
- require RNTBC constitutions to provide for all common law holders to be represented in the RNTBC[68]
- limit the grounds for cancelling the membership of a member of the RNTBC to those provided for in the CATSI Act[69]
- remove the discretion of directors of RNTBCs to refuse membership when the applicant meets the requirements for application and eligibility,[70] and
- clarify that the Registrar of Aboriginal and Torres Strait Islander Corporations (ORIC Registrar) may place a RNTBC under special administration where there are serious or repeated failures to comply with certain obligations imposed by the NTA and regulations.[71]

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[66] For further information about these changes to the CATSI Act, please refer to the factsheet, Information for PBCs on changes to native title laws and obligations, available on the National Indigenous Australians Agency's website.

[67] *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ('CATSI Act') section 66-1.

[68] Ibid section 141-25.

[69] Ibid section 141-25.

[70] Ibid section 150-20.

[71] Ibid section 487-5.

114. Schedule 8 also amended the CATSI Act to ensure that civil matters arising under the CATSI Act and that relate to an RNTBC are to be instituted and determined exclusively in the Federal Court unless transferred by the Court to another court with jurisdiction.

115. The amendments in Schedule 8 fall within the portfolio responsibilities of the Minister for Indigenous Australians. The department has sought input from the NIAA on this part of the report and the overall findings in relation to the Schedule 8 amendments in Chapter 4.

4.8.2 Feedback Received

116. The Schedule 8 amendments received mixed support when introduced to Parliament in 2019 and the current submissions reflect this. While one submission reiterates that the imposition of a significant burden on already overtaxed and overregulated RNTBCs was and remains the reason for their opposition,[72] half of the submissions to the evaluation note the positive intent of the reforms.

117. Many submissions advocate for increased funding for RNTBCs in light of their increased administrative burden and governance challenges as a result of the amendments. The Law Council specifically notes a need for sufficient RNTBC resourcing to enable access to justice for remote RNTBCs and smaller RNTBCs with less access to funding and legal assistance.

118. ORIC and the NNTT, both of which have functions relevant to post-determination dispute resolution, note that despite good intentions, the new dispute resolution rules in RNTBC rule books have not led to a significant resolution of disputes, and ORIC's submission outlines practical issues in relation to the new membership requirements.

Dispute resolution pathways

119. ORIC submits that while the obligation to provide a dispute resolution process in RNTBC rule books has been positive, encouraging parties to engage in good faith dispute resolution has presented a number of challenges. ORIC considers the amendment ineffective, including because ORIC has limited powers to direct or intervene in the processes, further noting that post-determination dispute resolution is not just a regulatory matter for ORIC but also the NNTT (under section 60AAA, discussed above in relation to Schedule 7). In practice, a party may therefore shuffle between ORIC assistance and NNTT mediation. Given that participation is voluntary, an individual involved in the dispute resolution process may also be unable to seek assistance from ORIC or the NNTT to effectively resolve their grievance if other parties are unwilling to engage in these processes. ORIC submits that the dispute resolution amendments may be more effective in practice if they were supported by further amendments to the CATSI Act that introduce strict liability offences.

120. The NNTT submits that although the amendments require RNTBC rule books to include dispute resolution clauses dealing with disputes between RNTBCs and persons who are or claim to be a common law holder, many rule books are referring to 'common law holders' only. This impacts on the effectiveness of the amendments as in practice the dispute resolution mechanisms are not available to persons who *claim* to be common law holders. The NNTT also notes their experience that common law

[72] See submissions from the Mabo Centre and NNTC.

holders regularly raise issues concerning the operations or functions of the RNTBC. However, some rule book's dispute resolution clauses do not include the required provisions to deal with such disputes or are often limited to membership issues.

121. The Anderson Apicals Kariyarra Native Title Holders submit that dispute resolution pathways are non-binding and rarely accessible, noting that there is no culturally safe or adequately funded dispute resolution mechanism. They also submit that the thresholds for ORIC intervention remain too high for early or effective intervention and internal disputes frequently remain unresolved.

122. The NIAA notes in relation to the effectiveness of the new dispute resolution pathways, that its October 2020 CATSI Act Review Final Report[73] noted that even with the measures in the 2021 Amendment Act, some stakeholders indicated that certain disputes involving membership can be difficult to resolve and may benefit from the availability of an arbitration mechanism. The report sets out principles that could be used to inform the development of an arbitration mechanism, and recommendation 59 suggests that the NIAA lead a targeted design process with key bodies in the native title sector to develop an option for voluntary arbitration to assist in resolving disputes about RNTBC membership after other internal dispute pathways have been exhausted. Recommendation 59, to date, has not been implemented.

Membership provisions

123. ORIC submits that the introduction of the requirement in subsection 141-25(2) of the CATSI Act – that RNTBC membership criteria represent all common law holders – has been positive. However, the reference to ‘indirect’ and ‘direct’ representation has caused confusion and implementation issues, notwithstanding the detail provided in the 2021 Amendment Act's Replacement Revised Explanatory Memorandum.

124. The CLC submits that the amendments to subsection 141-25(2) impact on the ability of common law holders to adopt and maintain regional representative RNTBCs. This submission recommends that the CATSI Act accommodate representative corporations such as in areas where there are very few, or no, future acts occurring.

125. ORIC, the NNTT, YMAC and the Law Council submit that as a result of amendments to subsections 141-25(2) and 144-10(3A) (the obligation of RNTBCs to accept a valid membership application) members whose membership has been cancelled because they misbehaved are entitled to be accepted as members when they reapply for membership. YMAC notes that while it is good that RNTBC directors cannot refuse membership where the applicant meets the requirements for application and eligibility, this means there are no repercussions or deterrents for members who misbehave. The NIAA identifies this issue as an unintended consequence of the amendments.

126. YMAC recommends further amendments that would allow RNTBCs to reject an application for membership from a common law holder if that person previously had their membership cancelled for misbehaviour. The NIAA notes that a temporary power of refusal of such a membership application may address the intended purpose of the amendment. The NIAA notes ORIC's submission that it is the ORIC Registrar's position that there is no inconsistency or disharmony between the power to cancel a person's

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[73] National Indigenous Australians Agency, *CATSI Act Review* (Final Report, 30 October 2020). The Native Title Legislative Amendment Bill (NTLAB) was before the Parliament at the time this report was drafted.

membership for misbehaviour and the obligation to comply with subsection 141-25(2). ORIC's position is currently subject to legal challenge.[74]

127. ORIC further suggests that to reduce the number of potential disputes, the membership provisions may be improved by setting a maximum timeframe for processing membership applications, and adding an enforcement mechanism such as creating a strict liability offence where membership applications are not processed.

Placing RNTBC under special administration

128. The Law Council raises concerns that the new RNTBC-specific power, under subsection 487-5(1), may be exploited by third party entities where commercial negotiations do not result in an agreement.

129. To address this, the Law Council recommends paragraph 487-5(1)(ca) could be amended to provide that 'there has been a serious failure, or a number of failures, to comply with its Native Title legislation obligations, in a manner prejudicial to the common law holders'.

4.9 Schedule 9: Just Terms Compensation and Validation

Key Findings

- There is ambiguity as to the meaning of 'majority' for the purpose of the amendment provisions.
- Further investigation of the processes underpinning ILUAs and section 31 agreements could be explored.

4.9.1 Overview of Amendments

130. 'Section 31 agreements' are a particular kind of native title agreement which can relate to the grant of mining and exploration tenements over land which may be subject to native title. Schedule 9 confirmed the validity of section 31 agreements potentially affected by the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (*McGlade* decision).[75]

131. In this decision the Full Federal Court determined that ILUAs are invalid where not all members of the applicant group are party to the agreement. As this reasoning could similarly affect section 31 agreements, amendments made by the 2021 Amendment Act confirm the validity of these agreements in cases where not all members of the native title party have signed or entered into the agreement, but at least one member has.

132. The changes operate to validate section 31 agreements that were entered into prior to 17 February 2021, if at least one member of each relevant native title party was a party

[74] As at the date of this report, the Administrative Review Tribunal has considered this matter (2024/4701), affirming the ORIC Registrar's position. The affected RNTBC has now commenced proceedings before the Federal Court of Australia.
[75] 2021 Amendment Act schedule 9, section 2.

to the agreement. The changes were intended to resolve uncertainty created by the *McGlade* decision in relation to section 31 agreements.

4.9.2 Feedback Received

133. Feedback indicates evaluation participants consider the amendments addressing the *McGlade* decision has effectively restored certainty and improved legislative clarity. In stating their support, some evaluation participants note that the amendments have operated successfully to validate agreements executed under instruction of the full group and advanced the principle of self-determination.[76] Some submissions do, however, raise discrete issues, as discussed below.

134. Practitioners note ambiguity about what constitutes a 'majority' for the purpose of these provisions (e.g. majority of members of the applicant or majority of attendees at a properly constituted meeting when negotiating ILUA agreements under section 24CD).[77]

135. In their submission, the Anderson Apicals Karriyarra Native Title Holders argue that the amendments addressing the implications of the *McGlade* decision has not improved practical transparency.[78]

136. Two submissions propose that a review is undertaken of the processes underpinning ILUAs and section 31 agreements to uphold the integrity of the process and ensure no unintended consequences.[79] These submissions also suggest a dispute or remediation mechanism to ensure that validated agreements continue to reflect the principles of FPIC and promote benefit sharing among all affected groups.

5. Overall findings and concluding remarks

137. Based on the submissions received, feedback gathered during consultation, and a review of relevant literature and case law, the department has not identified consistent concerns or widespread challenges as a result of the amendments introduced by the 2021 Amendment Act. The department has also not identified any feedback as part of this evaluation or in the course of its administration of the NTA that suggests the legislative intent behind the 2021 Amendment Act no longer enjoys broad stakeholder support.

138. Relevantly, with the exception of RNTBC funding and membership cancellation on the basis of misbehaviour – raised in the context of Schedule 8 amendments – no issue or concern appeared consistently across a majority of evaluation participants' submissions.

139. Despite general support for the legislative intent across the 11 submissions, there are identifiable issues, notably concerning ambiguity and unintended consequences in relation to the practical application of some amendments, as well as underlying resource limitations, which have hindered the effective implementation and practical operation of the amendments. Summary findings in relation to each of the objectives of

[76] See submissions from the Law Council and the Mabo Centre and NNTC.
[77] See submission from the Law Council.
[78] Submission from Anderson Apicals Karriyarra Native Title Holders.
[79] Submissions from the Law Council and Tekan Cochrane.

the 2021 Amendment Act, and outlined in the Terms of Reference for the evaluation, are set out below.

Give greater flexibility to native title claim groups to set their internal processes (Schedules 1 and 8)

140. The intended flexibility for claim group governance has not been consistently realised due to uncertainty about how conditions, duties and succession should operate. There is strong support for majority decision-making, but some concerns about ensuring that the amendments do not interfere with the exercise of FPIC by native title holders. To address this, **further consideration could be given to requiring an applicant to obtain approval from the claim group when acting by majority in certain instances**.

Streamline and improve native title claims resolution and agreement making (Schedules 2 and 6)

141. While the amendments have contributed to improved efficiency regarding native title claims resolution and agreement-making, improvements could be made. Further efficiencies could be achieved by **providing the Registrar discretion regarding whether an area has been excluded**. To increase uptake of new ILUA amendment processes, **section 24ED could be expanded or simplified**. To improve clarity, **the role of government parties under section 31 of the NTA could be clarified**. Under-resourcing of key stakeholders has also hindered the achievement of this objective.

Allow historical extinguishment over national and state parks to be disregarded where parties agree (Schedule 3)

142. The objective of allowing extinguishment to be disregarded over parks is widely supported with growing uptake. Further investigations into aspects of section 47C, including the requirement for government consent, the definition of 'park area' and notification requirements may lead to better fulfilment of this objective.

Increase transparency and accountability of Registered Native Title Bodies Corporate (Schedule 8)

143. While about 95% of RNTBCs have complied with the requirement to amend their rulebook to incorporate the CATSI Act changes, the objective of increased RNTBC accountability has not been fully realised. **The reference to ‘direct’ and ‘indirect’ representation in section 141-25 of the CATSI Act could be clarified to resolve implementation issues**. Additionally, **subsections 141-25(2) and 144-10(3A) – the obligation of RNTBCs to accept a valid membership application of persons whose membership has been cancelled due to misbehaviour – could be adjusted to resolve the unintended consequence of the amendments**. In addition, **the introduction of related strict liability offences under the CATSI Act could be considered.**

Create new pathways to address native title related disputes following determination (Schedules 7 and 8)

144. In relation to the effectiveness of the new dispute-resolution pathways, the introduction of ORIC enforcement powers and strict liability offences could be considered. The appropriateness and efficacy of further alternative dispute resolution pathways could

also be investigated, including with reference to NIAA's October 2020 CATSI Act Review Final Report, as well as examining NNTT funding to ensure it can effectively discharge its post-determination dispute assistance functions under section 60AAA of the NTA.

Confirm the validity of section 31 agreements following the McGlade *decision (Schedule 9)*

145. There is consensus that the validation of section 31 agreements has restored certainty after the *McGlade* decision. **Ambiguity regarding the meaning of 'majority' for the purpose of the amendment provision could be resolved** to increase certainty.

Concluding remarks

146. The department considers the findings of this report should not be considered in isolation. Rather, the evaluation of amendments which operate within a broader, complex framework, is an important piece in the department's continuing work to strengthen the native title system and improve processes. The department assesses and consults on the operation of the native title system on an ongoing and continuous basis. While adjustments to some of the amendments have been identified as warranted through this evaluation, further investigation and consultation is needed to ensure further legislative refinement accommodates the interests of stakeholders across the native title sector.