

23 January 2015

Professor Lee Godden
Commissioner
Australian Law Reform Commission
GPO Box 3789
SYDNEY NSW 2001

By email: nativetitle@alrc.gov.au

Dear Professor Godden

ALRC Inquiry into the Native Title Act

The Law Council is pleased to provide this submission in response to the Australian Law Reform Commission's Discussion Paper on the Review of the *Native Title Act 1993* (Cth).

I apologise for the delay in the lodgement of this submission.

Please contact Policy Lawyer, Valerie Perumalla, on (02) 6246 3750 or at valerie.perumalla@lawcouncil.asn.au if you have any further enquiries.

Yours faithfully,



MARTYN HAGAN
SECRETARY-GENERAL

Review of the Native Title Act 1993 (Cth)

Australian Law Reform Commission

23 January 2015

Contents

Introduction	3
General Comments	3
Social justice package	4
Alternative settlements	5
Framework for Review of the Native Title Act	5
Presumption of continuity	6
Traditional Laws and Customs	6
Accommodation of change to laws and customs	6
Recognition of succession.....	7
Continuity of acknowledgement and observance of laws and customs.....	7
Physical Occupation	9
The Transmission of Aboriginal and Torres Strait Islander Culture	9
Nature and Content of Native Title	12
Promoting Claims Resolution	13
General comments	13
Comments by the Law Institute of Victoria (LIV).....	14
Review of the roles and functions of native title service providers and native title representative bodies.....	15
Nature of Legal Representation in Native Title Matters.....	17
Accreditation scheme for native title	18
Comments by the Law Society of New South Wales.....	18
Authorisation	19
Joinder	20
Conclusion	23
Attachment A: Profile of the Law Council of Australia	24
Attachment B: Application Process for Specialist Accreditation	25

Introduction

1. The Law Council is pleased to provide the following submission in response to the Australian Law Reform Commission's (the ALRC's) Discussion Paper regarding its Inquiry into the *Native Title Act 1993* (Cth) (the NTA). This submission follows a Law Council submission provided on 23 June 2014 in response to ALRC Issues Paper No. 45.
2. As outlined in **Attachment A**, the Law Council is the peak body for the Australian legal profession. Through the law societies and bar associations of the Australian States and Territories, plus the Large Law Firm Group Ltd (the "constituent bodies" of the Law Council), the Law Council speaks on behalf of 60,000 Australian lawyers on a broad range of national and international concerns, including legal and policy issues affecting Aboriginal and Torres Strait Islander peoples.
3. The Law Council thanks the ALRC for engaging in consultations with the Working Group that was established by the Law Council to respond to this Inquiry.
4. The Law Council's key submissions are summarised, as follows:
 - a. the social justice package should be re-visited and implemented as a matter of priority;
 - b. a presumption of continuity would reduce the considerable burden on traditional owners in proving that their connection with lands, laws, traditions and customs have not been substantially interrupted;
 - c. the term 'traditional' should be retained in s 223 of the NTA but interpreted flexibly, on a case by case basis;
 - d. the Law Council considers the current regulatory frameworks applicable to legal practitioners are sufficient and opposes any further regulation of native title lawyers; and
 - e. The Law Council considers that a voluntary accreditation scheme for native title may not be feasible given the limited number of native title practitioners.
5. The Law Council is grateful for contributions to this submission by members of the Law Council's Indigenous Legal Issues Committee the Law Institute of Victoria, and the Law Society of New South Wales.

General Comments

6. The Law Council commends the ALRC for its comprehensive Discussion Paper, which provides a number of proposals and questions to ensure 'recognition and protection of native title rights and interests', and provide an effective basis for native title to support

'Indigenous economic development and generate sustainable long-term benefits for Indigenous Australians.'¹

7. The Law Council considers the definition of native title in s 223 of the NTA has been interpreted in a technical and restrictive manner, which is not easily reconciled with the beneficial purpose of the NTA. The Law Council agrees with the ALRC that s 223 is now being interpreted in such a way that requires Aboriginal and Torres Strait Islander peoples to establish a number of requirements that do not appear in the text of s 223 of the NTA. The Law Council supports distilling the definition of 'native title' and 'connection to its core elements'.²

Social justice package

8. The Law Council agrees that native title is not sufficient to address the dispossession of Aboriginal and Torres Strait Islander Peoples. As is clear from the Parliamentary debates and Explanatory Memoranda for the original NTA, native title was intended to be accompanied by a Social Justice Package to compensate Aboriginal peoples and Torres Strait Islanders where their native title rights had been extinguished.
9. The Law Council considers that the absence of implementation of the Social Justice Package is an abrogation of a commitment made by the Commonwealth to provide justice to Aboriginal people for their past dispossession. The Law Council agrees with the observation in the Discussion Paper that the lack of the social justice package has placed great pressure on the native title system. The Law Council reiterates the then Social Justice Commissioner, Dr Tom Calma's comments that 'this abyss [referring to the failure to implement the social justice package which was to accompany the NTA] is one of the underlying reasons why the native title system is under the strain it is today'³. The Law Council's previous submission to this Inquiry notes the paradox of dispossession and native title described by the former Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr Tom Calma AO as follows:

"There are countless reasons why the law may have denied their rights. For many, it is because at some point since colonisation, white settlement and policy meant that the claimants lost their connection with their land, even if it was just for a moment. The more a community was hurt by government's policies, the less likely they can gain recognition of their rights." ⁴

10. The Law Council submits that the ALRC should recommend in its final report to the Government that the 'Social Justice Package' be revisited with a view to implementation as a matter of priority.

¹ Discussion Paper, para 2.2.

² Discussion Paper, para 1.7.

³ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Native Title report 2008', p46.

⁴ Calma, T., *Native Title in Australia: Good intentions, a failing network?*, Reform, Issue 93, 2009, Australian Law Reform Commission.

Alternative settlements

11. In principle, the Law Council supports use of alternative settlements in appropriate jurisdictions if they provide for Aboriginal control of land use and development on the land they own, resource royalties, participation in planning, development and environmental management in the area, joint management agreements, service delivery arrangements and measures to strengthen Aboriginal local government.
12. The Law Council sees merit in the *Traditional Owner Settlement Act 2010* (Vic) (TOSA) model if an assessment is made by traditional owners that an alternative settlement is preferable to prosecuting a native title claim where prospects of success are uncertain and likely to be protracted. An alternative settlement that authorises a broad range of positive outcomes for traditional owners of the kind referred to above is desirable. However, there are dangers in such models that claim groups may accept lesser rights where their native title rights and interests should be recognised. The risks in this regard largely depend on the bargaining power claim groups have in relation to their claims.
13. The Law Council considers that there are many difficulties with a proposal for a national model for alternative settlements. A national model for alternative settlements may not be appropriate given the legislative frameworks around Crown lands and the strength of native title claims vary significantly across jurisdictions.
14. The Law Council considers that State and Territory governments should be encouraged to draft legislation that provides for comprehensive settlement agreements that address broader land justice issues such as compensation, Aboriginal control of land use and development on the land they own, resource royalties, participation in planning, development and environmental management in the area, joint management agreements, service delivery arrangements and measures to strengthen Aboriginal local government. In addition, legislative frameworks for alternative settlements must be considered legitimate by Aboriginal and Torres Strait Islander people and based on principles of the kind set out in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), particularly the requirement to obtain free, prior and informed consent of traditional owners during the consultation process.
15. The Law Council considers alternative settlements should not be used to induce Aboriginal and Torres Strait Islander people into accepting lesser rights under an alternative settlement where their native title rights and interests can be recognised in a native title determination, by consent or otherwise.

Framework for Review of the Native Title Act

Question 2-1 Should the proposed amendments to the *Native Title Act* have prospective operation only?

16. The Law Council considers that there is not a sufficient case to alter the common law presumption against retrospective application of legislative changes. Accordingly, the proposed amendments to the NTA should only have prospective application.

Question 2-2 Should the proposed amendments to s 223 of the Native Title Act only apply to determinations made after the date of commencement of any amendment?

17. As noted in relation to Question 2-1, amendments should not have retrospective operation. However, the Law Council considers that there should be some provision to revisit existing determinations by agreement. The Law Council supports amendments that provide for amendments to determinations where the native title claimants (or applicants), the government parties, and any affected party consents to the amended determination.

Presumption of continuity

18. The Law Council notes the ALRC proposes that it does not intend to recommend the adoption of a presumption of continuity.

19. The Law Council supports the introduction of a presumption of continuity in appropriate circumstances. The Law Council considers that establishing a presumption of continuity, rebuttable by evidence to the contrary, would significantly reduce the time and cost of reaching determinations of native title claims.

20. The Law Council notes the ALRC's concern that the willingness of a state or territory respondent to agree to a consent determination is not clear if a presumption of continuity operated.⁵ However, the Law Council agrees with the NSW Young Lawyers' Human Right Committee's position that a presumption of continuity could strengthen the position of claimants in negotiations.⁶

21. The Law Council notes that a presumption of continuity is not appropriate for overlapping claims.⁷

Traditional Laws and Customs

Accommodation of change to laws and customs

Proposal 5-1 The definition of 'native title' in s 223 of the *Native Title Act* should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop.

22. The Law Council supports proposal 5-1 and considers that it provides useful guidance to the Court and is likely to ensure a more consistent interpretation of s 223 of the NTA, particularly in regards to 'substantial interruption'.

⁵ Discussion Paper, para 4.59.

⁶ NSW Young Lawyers Human Rights Committee, *Submission 29*, Inquiry into the Native Title Act, Australian Law Reform Commission;

⁷ A circumstance in which it may not be appropriate to apply the presumption of continuity is when there is a contest between native title claimants in relation to the same area and it is not possible to presume the existence of the title of each of the claimants.

Recognition of succession

Proposal 5-2 The definition of ‘native title’ in s 223 of the *Native Title Act* should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs.

23. The Law Council considers that proposal 5-3 should be rephrased as follows (changes in bold):

*The definition of native title in s 223 of the Native Title Act should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups or **otherwise acquired** in accordance with traditional laws and customs.*

24. The Law Council considers that succession can occur where rights and interests have been acquired, other than through transmission, in accordance with traditional laws and customs, where the original traditional owner group has ceased to exist.

Continuity of acknowledgement and observance of laws and customs

Proposal 5-3 The definition of ‘native title’ in s 223 of the *Native Title Act* should be amended to make clear that it is not necessary to establish that

(a) acknowledgement and observance of laws and customs has continued substantially uninterrupted since sovereignty; and

(b) laws and customs have been acknowledged and observed by each generation since sovereignty.

Proposal 5-4 The definition of native title in s 223 of the *Native Title Act* should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgement and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

25. The Law Council supports Proposals 5-3 and 5-4.

26. The Law Council considers that as a result of judicial interpretation of s 223, particularly in *Yorta Yorta Aboriginal Community v Victoria*⁸ (*Yorta Yorta*), Aboriginal peoples and Torres Strait Islanders must now establish a number of requirements that do not appear in the text of s 223 of the NTA. As noted in the Discussion Paper, in *Yorta Yorta* at [47] Gleeson CJ, Gummow and Hayne JJ held that:

⁸ (2002) 214 CLR 422

'The reference to rights and interests in land or waters being possessed under traditional laws acknowledged and traditional customs observed by the peoples concerned, requires that the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty.'

27. The Law Council considers that the additional requirement that there be a normative system with a continuous existence and vitality since sovereignty (which is not found in the text of s 223) has created a significant additional hurdle for Aboriginal and Torres Strait Islander peoples seeking to establish native title.
28. The Law Council submits that the emphasis on a pre-sovereign normative system based in a pre-sovereign normative society risks over-emphasising continuity of laws and customs of pre-sovereignty, such as rules about marriage, initiation and birthing practices, traditional language,⁹ which may have little relevance to whether particular customs in relation to land and waters have continued. The Law Council submits that the exercise of customary practices, such as hunting and fishing at particular times, are more relevant to establishing the existence of traditional customs than the requirement of a 'normative' system of laws and customs practiced by a 'normative' society.
29. The curial requirement for a normative system and society has generally led to a requirement that the contemporary society must be the same or substantially the same as what it was at sovereignty i.e. it must cover the same groups of people, and relate to the same geographical area. Aboriginal societies are not static or frozen in time. They evolve and change in the same way that other contemporary societies have changed in response to intergenerational shifts in attitudes, technology and other internal or external interactions. For example, Aboriginal societies can merge, split and take different forms.
30. The High Court in *Yorta Yorta* defined society as a "body of persons united in and by its acknowledgment and observance of a body of law and customs".¹⁰ The problem with adopting a rigid or inflexible approach to society is exacerbated by the imprecise notion of a society as "a body of persons united in and by its acknowledgment and observance of a body of law and customs".¹¹ This impreciseness was recognised by French J (as he then was) in *Sampi v Western Australia (No 1)*¹². His Honour said:

*Any finding of fact as to whether there is a relevant 'society' of Aboriginal peoples today capable of being the subject of a determination of native title is **evaluative in character**. The question could conceivably have more than one correct answer*¹³ [Emphasis added]

31. The finding that Society is evaluative in character is illustrated by the differing outcomes in *Sampi* at trial and on appeal. At trial, French J held that the evidence did

⁹ See for example *Wyman on behalf of the Bidjara People v State of Queensland (No 2)* [2013] FCA 1229 per Jagot J at [375]-[402].

¹⁰ *Yorta Yorta HCA* at [49]

¹¹ *Yorta Yorta HCA* at [49]

¹² [2006] FCA 777

¹³ *Ibid* at [970]

not allow him to infer that one society of Bardi and Jawi people occupied the claim area at sovereignty and were united by a single set of traditional laws and customs acknowledged and observed by that society today.¹⁴ The consequence of this finding was devastating for Jawi people - none of the islands forming part of their traditional territory were the subject of the determination of native title that was made by the Court¹⁵.

32. On appeal, however, the Full Federal Court held that French J erred in failing to draw the inference from the evidence that the Bardi and Jawi people formed a single society at sovereignty.¹⁶ The result was that the claimed islands that formed part of traditional Jawi territory were included in the determination.¹⁷
33. It is important to note that the Full Federal Court were silent on French J's characterisation of society as evaluative.
34. The Law Council submits that Courts should be able to interpret s 223 of the NTA flexibly; rather than in a technical and restrictive manner. Change over time to the pre-sovereignty society should not, of itself, result in the dismissal of a native title application. The approach that suggested by the ALRC in proposal 5-3 and 5-4 facilitates the main objective of the NTA, namely the recognition and protection of native title.¹⁸

Physical Occupation

Proposal 6-1 Section 62(1)(c) of the *Native Title Act* should be amended to remove references to 'traditional physical connection'.

Proposal 6-2 Section 190B(7) of the *Native Title Act* should be amended to remove the requirement that the Registrar must be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.

35. The Law Council supports the Proposals 6-1 and 6-2.

The Transmission of Aboriginal and Torres Strait Islander Culture

Proposal 7-1 The definition of native title in s 223(1)(a) of the *Native Title Act*

¹⁴ Ibid at [1046]

¹⁵ Ibid at [1082]

¹⁶ *Sampi v State of Western Australia* (2010) 266 ALR 537 at [50].

¹⁷ See the determination made by the Full Court at (2010) 272 ALR 97, par 1 and Schedules 1 and 8.

¹⁸ See s 3(a) of the NTA.

should be amended to remove the word 'traditional'.

The proposed re-wording, removing traditional, would provide that:

The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

36. The Law Council favours the proposals in Chapter 5 over those in Chapter 7 of the discussion paper.

37. The Law Council considers that removal of the term 'traditional' would significantly depart from *Mabo v State of Queensland*¹⁹.

38. The Law Council considers that , the word 'traditional' should be retained, but a clarifying section be included to make clear that 'traditional' need not reflect pre-sovereignty traditional laws and customs. The word 'traditional' should reflect contemporary views of Aboriginal and Torres Strait Islander laws and customs and those laws and customs be sourced in, but need not duplicate, what it was prior to the assertion of British sovereignty. Inferences should readily be drawn in determining whether laws and customs are 'sourced in' pre-sovereignty laws and customs. The Law Council refers the ALRC to paragraphs 58-59 of the Law Council submission in response to the Issues Paper for this Inquiry on the drawing of inferences.

39. The Law Council considers that too much weight has often been placed on pre-sovereignty laws and customs in the interpretation of 'traditional'. The Law Council reiterates that 'traditional' should be interpreted flexible on a case by case basis.

Question 7-1 Should a definition related to native title claim group identification and composition be included in the *Native Title Act*?

40. The Law Council considers that there should not be a definition related to native title claim group identification and composition in the NTA. Such a definition may give rise to intra-indigenous disputes and may further complicate the claim group identification process.

¹⁹ (1992) 107 ALR 1.

Proposal 7-2 The definition of native title in s 223 of the *Native Title Act* should be further amended to provide that:

The expression **native title** or **native title rights and interests** means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a relationship with country that is expressed by their present connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

41. The Law Council does not support proposal 7-2.

42. The Law Council considers that connection should not be determined solely by reference to present laws and customs. The Law Council considers that connection should be sourced in traditional laws and customs. The term 'traditional' should reflect contemporary views of Aboriginal and Torres Strait Islander laws and customs and need not be entirely based on the society as it was prior to the assertion of British sovereignty. It is sufficient for laws and customs to be sourced in pre-sovereignty laws and customs. The importance or relevance of pre-sovereignty laws and customs will vary across different indigenous groups and flexibility should be afforded as to how much emphasis should be placed on pre-sovereign laws and customs.

Question 7–2 Should the *Native Title Act* be amended to provide that revitalisation of law and custom may be considered in establishing whether 'Aboriginal peoples and Torres Strait Islanders, by those laws and customs, have a connection with land and waters' under s 223(1)(b)?

43. The Law Council considers that the NTA should be amended to provide that revitalisation of law and custom may be considered in establishing whether 'Aboriginal peoples and Torres Strait Islanders, by those laws and customs, have a connection with land and waters' under s 223(1)(b).

Question 7–3 Should the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b)?

Question 7–4 If the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders are to be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b), what should be their relevance to a decision as to whether

such connection has been maintained?

Question 7–5 Should the *Native Title Act* be amended to include a statement in the following terms:

Unless it would not be in the interests of justice to do so, in determining whether ‘Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters’ under s 223(1)(b):

- (a) regard may be given to any reasons related to European settlement that preceded any displacement of Aboriginal peoples or Torres Strait Islanders from the traditional land or waters of those people; and
- (b) undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.

44. The Law Council does not consider there should be an inflexible rule against the Court having regard to the reasons for displacement in the assessing whether ‘Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters’ under s 223(1)(b) of the NTA.
45. That said, the Law Council considers that having regard to the reasons for displacement should not result in a group of people with no meaningful connection to land or waters being found to have native title on the basis that their displacement explains the lack of connection.
46. The Law Council considers that an appropriate balance would be struck if the Court were permitted to have regard to the reasons for displacement (such as the impact of European settlement) so long as the particular Aboriginal peoples or Torres Strait Islanders have maintained **some** connection with the land or waters.
47. As mentioned in paragraph 8 above, the Law Council considers that the NTA is not, of itself, sufficient to address the injustices caused by the dispossession of Aboriginal peoples and Torres Strait Islanders. It notes that the proposed social justice package was intended to compensate Aboriginal people and Torres Strait Islanders who were dispossessed of their land through colonisation.

Nature and Content of Native Title

Proposal 8–1 Section 223(2) of the *Native Title Act* should be repealed and substituted with a provision that provides:

Without limiting subsection (1) but to avoid doubt, **native title rights and interests** in that subsection:

- (a) comprise rights in relation to any purpose; and
- (b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.

Proposal 8–2 The terms ‘commercial activities’ and ‘trade’ should not be defined in the *Native Title Act*.

48. The Law Council supports proposals 8-1 and 8-2, which it considers will assist Indigenous economic development and generate sustainable long-term benefits for native title holders.

Question 8-1 Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8-1, include the protection or exercise of cultural knowledge?

49. The Law Council considers that the indicative listing in the revised s 223(2)(b), as set out in Proposal 8-1, should include the protection or exercise of cultural knowledge.

Question 8-2 Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8-1, include anything else.

50. The Law Council does not consider that the indicative listing in the revised s 223(2)(b), as set out in Proposal 8-1, should include anything else.

Promoting Claims Resolution

Question 9–6 Should a system for the training and certification of legal professionals who act in native title matters be developed, in consultation with relevant organisations such as the Law Council of Australia and Aboriginal and Torres Strait Islander representative bodies?

51. The Law Council does not wish to comment on Questions 9-1 – 9-5 or 9-7 – 9-11.

52. In relation to 9-6, the Law Council makes the following comments:

General comments

53. The Law Council opposes any further regulation of legal practitioners.

54. Legal practitioners are already subject to comprehensive regulation from a range of sources, including statute, regulations, statutory rules, professional conduct rules and supervision by the court.

55. The Law Council considers that the question relating to a system for the training and certification of legal professionals gives rise to a number of complex issues that have not been adequately addressed in the Discussion Paper. These issues include:

- whether training and certification is intended to apply to barristers, solicitors, or both;

- whether training and certification is intended to apply to legal professionals acting for claimants, respondents (including Aboriginal respondents), or governments; and
- what constitutes a native title matter (discussed in further detail at paragraph 61 below).

56. Further, the Law Council is concerned that it may not have the opportunity to respond to submissions made in favour of regulation because the issue was not raised in the Issues Paper.

Comments by the Law Institute of Victoria (LIV)

57. The LIV has advised that regulation is financially onerous and a disincentive for young legal practitioners or practitioners not working solely in native title. Dual regulation, introduced for immigration lawyers in the 1990s, has not been proven to provide better service or transparency for consumers. On the contrary, dual regulation of immigration lawyers has led to greater confusion and increased costs to consumers. The dual regulation on immigration lawyers is currently being reviewed with a view of removing the increased regulation on legal practitioners as there has been no evidence of increased benefit over ordinary regulation of legal practitioners.

58. LIV has also advised that all legal practitioners who hold a Victorian legal practising certificate are required to complete 10 hours of continuing professional development every year. The LIV has previously provided professional development in native title as part of its education and training program and is consistently evaluating the professional development offering on the needs of legal practitioners, including native title practitioners.

59. Legal practitioners are subject to a significant degree of regulation in comparison to non-lawyer private agents. After completing their Bachelor of Laws, law graduates in Victoria must complete further supervised legal training or a practical legal training course and comply with strict guidelines before being admitted to practice as a legal practitioner. Once admitted, new practitioners are subject to supervised legal practice for a further 18 months / 2 years. Once admitted the *Legal Profession Act 2004 (Vic)* imposes strict obligations on legal practitioners in all areas of practice. The regulation of the legal profession affords adequate consumer protection with legal practitioners bound by strict codes of ethics and conduct together with a requirement of continual professional development. There are mechanisms for complaints, disciplinary proceedings and substantive penalties and sanctions against practitioners who fail in their professional duties.

60. LIV has further advised that if the purpose of the proposed certification is to limit the impact and operation of certain native title lawyers, this could equally be achieved by using the existing complaint mechanisms available under the current framework of the Legal Services Board.

61. Whilst the LIV acknowledges that native title claimants and traditional owners may have specific consumer protection needs, the LIV is unaware of an identified problem with legal practitioners in this area. The proposal for any dual regulation or certification of legal practitioners should be supported by clear case examples demonstrating the failure of existing regulatory frameworks to address alleged misconduct.

Review of the roles and functions of native title service providers and native title representative bodies

62. There are a number of recent reviews into the operation of the native title system, including:

- Deloitte Access Economics review of the roles and functions of native title service providers and native title representative bodies (the Deloitte's Review);²⁰ and
- Taxation of native title and traditional owner benefits and governance working group.²¹

63. The Law Council refers the ALRC to the [Law Council's submission](#) in response to the Deloitte Review.²²

64. The Discussion Paper states that "certification may help to ensure that practitioners meet certain standards or requirements"²³ and reduce a 'problem' identified by AIATSIS as follows:

"applicants accessing legal representatives who carry none of the additional obligations that currently vest in officers of the NTRBs/NTSPs. These obligations exist in order to assist, consult with and have regard to the interests of RNTBCs, native title holders and persons who may hold native title and they also extend to requiring the NTRB to identify persons who may hold native title."²⁴

65. However, the Law Council considers that the statutory functions of NTRBs/NTSPs are not a useful measure when considering the provision of legal services because the solicitor on record in a claims matter is the Principal Legal Officer and not the NTRB/NTSP (*QGC Pty Limited v Bygrave* [2010] FCA 659).

66. NTRBs have a range of functions and there are general directions in the NTA as to how those functions should be carried out. The comparison is problematic because it fails to acknowledge the broader role played by NTRBs, such as processing future act notices where there is no registered claim, and certification functions, requiring them to have regard to the interests of those who may not be their clients.²⁵

²⁰ Deloitte Access Economics, *Review of roles and functions of Native Title Organisations*. At <http://www.deloitteaccesseconomics.com.au/our+services/economic+analysis+and+policy/native+title/about+the+review>.

²¹ Commonwealth of Australia, *Taxation of Native Title and Traditional Owner Benefits and Governance Working Group*. At <http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title>.

²² Available [here](#).

²³ Discussion Paper, para 9.37.

²⁴ Discussion Paper, para 9.36.

²⁵ In this regard, it is noted that legal practitioners also owe fiduciary obligations to non-clients. For example, Dal Pont (*Lawyers Professional Responsibility*, 5th ed 2013 at [21.125]) states: "The relationship between a lawyer and client is presumed to give rise to fiduciary duties... Yet as fiduciary duties are superimposed upon a relationship in circumstances where a court considers that a party should be protected from another party's potential abuse of a position, it stands to reason that lawyers can owe fiduciary duties to non-clients. The danger is that fiduciary duties owed to a client may conflict with those owed to a non-client, placing the lawyer in a no-win situation of being unable to fulfill both legally enforceable duties. Prudent lawyers will take care not to put themselves in the position of inviting a non-client to place trust in them, an especial danger where the

67. The various functions that NTRBs have should not be conflated or generalised and then placed in contrast to the role of a solicitor on the record for a claim group who does not exercise those functions. It would be more relevant and appropriate to compare the way in which the solicitor on the record at a NTRB carries out his or her duties as a solicitor, and whether there are any obligations he or she has that differ from those of other practitioners.
68. In relation to legal services, the solicitor on the record in a claim is not the NTRB, but usually the Principal Legal Officer. For example, in *QGC Pty Limited v Bygrave* [2010] FCA 659, at [30], Justice Reeves stated that since “*Queensland South was not a ‘solicitor’ in any sense of the word, it could not be the ‘solicitor on the record’*”.²⁶ It is the solicitor on the record who is responsible for the conduct of the proceedings and who is subject to the legal professional duties and regulatory frameworks referred to above. In particular, the solicitor on the record has duties to his or her client. Those obligations are the same whether the solicitor on the record is employed by an NTRB or in private practice. Importantly, the obligations imposed on NTRBs by the Act are not imposed directly on the Principal Legal Officer – his or her obligations as an employee are merely to assist the NTRB in fulfilling its obligations, provided this is consistent with duties imposed on the solicitor under statute and at common law.
69. NTRBs carry out other functions, such as mediation and certification functions, where they may be required to have regard to the interests of other native title holders. The Principal Legal Officer cannot exercise those functions in breach of his or her duties to the client or to the Court.
70. It should also be noted that s 37M(1)(b) of the *Federal Court of Australia Act 1976* (Cth) states that the overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes “*as quickly, inexpensively and efficiently as possible*”, including through:
- (a) the just determination of all proceedings before the Court;
 - (b) the efficient use of the judicial and administrative resources available for the purposes of the Court;
 - (c) the efficient disposal of the Court's overall caseload;
 - (d) the disposal of all proceedings in a timely manner; and
 - (e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.

non-client is another party to the matter or transaction, and is not legally represented...Such a scenario also attracts the risk of a court finding that the non-client has in fact become client under an implied retainer.” There is also a significant body of case law on implied retainers – e.g. *Pegrum v Fatharly* (1996) 14 WAR 92; *McMullin v ICI Australia Operations Pty Ltd* [1997] FCA 1426 (27 November 1997); *Meerkin & Apel v Rossett Pty Ltd* [1998] 4 VR 54; *King v AG Australia Holdings Ltd* (2002) 121 FCR 480 at [24] & [27]; *Courtney v Medtel Pty Ltd* (2002) 122 FCR 168 at [57]; *Townsend & Anor v Roussety & Co (WA) Pty Ltd & Anor* [2007] WASCA 40 (20 February 2007)

²⁶ See also *Gorrington on behalf of the Mithaka People v State of Queensland* [2010] FCA 716 per Mansfield J at [9].

71. Parties have an obligation to conduct themselves in a manner which is consistent with those obligations.²⁷
72. The solicitor on the record has an obligation to assist his or her client to comply with these obligations²⁸ and can face personal costs orders for any breaches.
73. The obligations imposed by s 37M(1)(b) directly govern all legal practitioners, whether they are employed by NTRBs or not. They are in addition to, and complement, the professional duties imposed by legislation on all legal professionals. The personal liabilities of legal practitioners for negligence and breaches of fiduciary duties stand in contrast to the position of executives of NTRBs who enjoy certain statutory protections from liability.²⁹
74. Similarly, the Law Council is also opposed to the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group's recommendation that "[t]he Government take urgent steps to regulate private agents (persons or firms other than Native Title Representative Bodies or Native Title Service Providers and/or their legal representatives) involved in negotiating native title future act agreements" for the reasons set out above.³⁰

Nature of Legal Representation in Native Title Matters

75. The Law Council submits that it is unhelpful to view 'native title matters' as involving a narrow silo of legal practice. 'Native title' claims can be a catalyst for Aboriginal communities in a range of land management activities and commercial transactions. The legal services which those communities may require can be varied and complicated, and might include commercial contracts, taxation, resource management, cultural heritage, planning law and judicial review, as well as the technical requirements of the Native Title Act.
76. Furthermore, it is not only Aboriginal communities who are assisted by legal professionals in native title processes. Government and respondents to claims, and parties to future act negotiations also procure private legal advice and expertise. Those seeking to access land where native title may exist also seek legal advice to understand those risks and to ensure compliance with the procedures of the Act. The legal professionals providing that advice are also 'legal professionals who act in native title matters' and 'native title practitioners'.
77. Similarly, the Law Council is advised by the LIV that native title holders may require legal advice from private lawyers in a range of circumstances relevant to the claims process together with assisting native title holders in a post determination context (i.e. understanding and pursuing business development and other economic development activities). Certification or dual regulation inhibits access to justice for Aboriginal and Torres Strait Islander communities by limiting access to only certified and representative bodies. A legal practitioner who specialises in commercial agreements

²⁷ Section 37N(1), *Federal Court of Australia Act 1976* (Cth).

²⁸ Section 37N(2), *Federal Court of Australia Act 1976* (Cth).

²⁹ Section 203FED, NTA.

³⁰ Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, Report to Government, July 2013, the Treasury, Commonwealth of Australia, Recommendation 2.

may be the most appropriate expert sought; however, if the agreement contains native title issues, they may be precluded from providing advice for lack of certification and may ultimately limit consumer choice.

78. The sources of legal assistance are also varied. Aboriginal claimants are sometimes represented by the Principal Legal Officer in a NTRB. Other times they are represented by private law firms retained by a NTRB or acting directly for the claimant group. Legal professionals (whether they be solicitors or barristers) may act for an applicant in one matter, or a respondent in another.
79. Furthermore, the individuals acting in native title matters can also have a varied role. The high turnover of legal professionals at NTRBs has been previously noted. It is not unusual for practitioners at a NTRB to subsequently commence private practice or vice versa.

Accreditation scheme for native title

80. The Law Council wishes to highlight a number of practical issues that arise for any accreditation scheme for native title practitioners.

Comments by the Law Society of New South Wales

81. The Law Society of NSW has advised that given the nature of the existing specialist accreditation schemes, an accreditation scheme for native title is likely to be impractical for a number of reasons.
82. It is noted that the administration of the Law Society of NSW's Specialist Accreditation Scheme (for example) is resource intensive. The structure supporting the scheme involves the Specialist Accreditation Board, Advisory Committees for each practice area and the Society's Business Manager who is supported by a number of staff members with administrative and program coordination responsibilities. The administration of the scheme includes setting strategic priorities, processing applications, carrying out assessment of candidacy as well as developing curriculum and assessment tasks, marking assessments, providing resources for candidates comprising of both written resources and information forums, and also managing the annual renewal cycle.
83. A national scheme for native title practitioners would require setting up a separate structure to the specialist accreditation schemes currently existing in and administered by the State law societies.
84. The Law Society of NSW has also advised that the existing practice areas for accreditation are broad, and there are practical reasons for not offering specialist accreditation in niche practice areas, including the need to ensure that the program is viable and taken up by a minimum number of practitioners. For example, the Specialist Accreditation Board requires that any new area of accreditation put forward would need to have a minimum of 100 practitioners working predominantly in the area. A further consideration is that the maintenance and renewal of accreditation requires substantial involvement by the practitioner in that practice area, which includes meeting the additional continuing legal education requirements. This will present a challenge for some practice areas.
85. Finally, the inherent difficulty in defining "native title practice" is noted. While familiarity with the Act is required, native title practice necessarily involves a bundle of legal services, which might include contract law, property law, planning and environmental

law, tax law and litigation law. Specialist accreditation is already offered for some of these areas.

86. Attachment B to this submission contains further information on the application process for accreditation in New South Wales and current areas of accreditation.

Authorisation

Proposal 10–1 Section 251B of the *Native Title Act* should be amended to allow the claim group, when authorising an application, to use a decision-making process agreed on and adopted by the group.

Proposal 10–2 The Australian Government should consider amending s 251A of the *Native Title Act* to similar effect.

Proposal 10–3 The *Native Title Act* should be amended to clarify that the claim group may define the scope of the authority of the applicant.

Proposal 10–4 The *Native Title Act* should provide that, if the claim group limits the authority of the applicant with regard to entering agreements with third parties, those limits must be placed on a public register.

Proposal 10–5 The *Native Title Act* should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

Proposal 10–6 Section 66B of the *Native Title Act* should provide that, where a member of the applicant is no longer willing or able to act, the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice with the court.

Proposal 10–7 Section 66B of the *Native Title Act* should provide that a person may be authorised on the basis that, if that person becomes unwilling or unable to act, a designated person may take their place. The designated person may take their place by filing a notice with the court.

87. The Law Council generally supports the proposals 10-1 to 10-7. However, in relation to Proposal 10-5, the Act should be amended to provide that, in authorising the applicant, the native title claim group is to specify whether the applicant is to act by consensus, by majority or by other decision-making processes. This would require the claim group to put its mind to the issue, rather than having such a fundamental issue determined by the existence of a statutory default position.

88. The Law Council considers that proposal 10-6 does not account for situations where a person does not consent to being removed as an applicant, or where there is a dispute between members of the applicant about whether the person is able and willing to act

as an applicant, or whether they simply want them removed. This issue needs to be addressed.

Question 10–1 Should the *Native Title Act* include a non-exhaustive list of ways in which the claim group might define the scope of the authority of the applicant? For example:

(a) requiring the applicant to seek claim group approval before doing certain acts (discontinuing a claim, changing legal representation, entering into an agreement with a third party, appointing an agent);

(b) requiring the applicant to account for all monies received and to deposit them in a specified account; and

(c) appointing an agent (other than the applicant) to negotiate agreements with third parties.

89. The Law Council considers that including a non-exhaustive list of ways in which the claim group might define the scope of the authority of the applicant may assist some claim groups in the authorisation process.

Question 10–2 What remedy, if any, should the *Native Title Act* contain, apart from replacement of the applicant, for a breach of a condition of authorisation?

90. The Law Council does not wish to comment on this issue and considers that Native Title Representative Bodies may be better placed to suggest alternative remedies for claim groups against the applicant.

Joinder

Proposal 11–1 The *Native Title Act* should be amended to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only.

Proposal 11–2 Section 84(5) of the *Native Title Act* should be amended to clarify that:

(a) a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and

(b) when determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.

Proposal 11–3 The *Native Title Act* should be amended to allow organisations that represent persons, whose ‘interest may be affected by the determination’ in relation to land or waters in the claim area, to become parties under s 84(3) or to be joined under s 84(5) or (5A).

Proposal 11–4 The *Native Title Act* should be amended to clarify that the Federal

Court's power to dismiss a party (other than the applicant) under s 84(8) is not limited to the circumstances contained in s 84(9).

Proposal 11–5 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to join, or not to join, a party under s 84(5) or (5A) of the *Native Title Act*.

Proposal 11–6 Section 24(1AA) of the *Federal Court of Australia Act 1976* (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to dismiss, or not to dismiss, a party under s 84(8) of the *Native Title Act*.

Proposal 11–7 The Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either:

- (a) become a party to a native title proceeding under s 84; or
- (b) seek intervener status under s 84A.

91. The Law Council generally supports the proposals 11-1, 11-2, 11-5, 11-6 and 11-7.

92. The Law Council does not support proposal 11-3. The Law Council considers that the NTA should not be amended “*to allow organisations that represent persons, whose ‘interest may be affected by the determination’ in relation to land or waters in the claim area, to become parties under s 84(3) or to be joined under s 84(5) or (5A)*” (Proposal 11-3).

93. There are already mechanisms to allow classes of respondents to be represented by agents.³¹ It is true that multiple people are still required to be respondents, but that process ensures that those whose interests are at stake are properly identified and engaged in the Court process and specifically answerable for their position, in the same way all other parties are.

94. The Law Council has some reservations about proposal 11-4. Where a native title claim post-dates a claim under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA) lodged after 28 November 1994, the existence of native title may determine whether a land council has an unencumbered fee simple interest, or has a fee simple interest subject to native title rights and interests.³² Given the substantive effect on its interests, there seems little justification to deny an Aboriginal land council the right to be heard in those circumstances, and those kinds of interests should not be removed from the scope of s 84(3)(a)(iii). Reduction to the scope of s 84(3)(a)(iii) should be more limited than proposed by the ALRC.

³¹ Section 84B, NTA.

³² Section 36(9), ALRA. See also s 36(9A), ALRA.

95. It follows from this example that in answer to the question raised at para 11.52 of the Discussion Paper, the Law Council is of the view that Aboriginal land councils established under the ALRA should be able to be a party by virtue of their interest in undetermined claims. The Law Council understands that is currently the practice.

Question 11–1 Should s 84(3)(a)(iii) of the *Native Title Act* be amended to allow only those persons with a legal or equitable estate or interest in the land or waters claimed, to become parties to a proceeding under s 84(3)?

Question 11–2 Should ss 66(3) and 84(3) of the *Native Title Act* be amended to provide that Local Aboriginal Land Councils under the *Aboriginal Land Rights Act 1983* (NSW) must be notified by the Registrar of a native title application and may become parties to the proceedings if they satisfy the requirements of s 84(3)?

96. The Law Council does not consider that s 84(3)(a)(iii) of the NTA should be amended to allow only those persons with a legal or equitable estate or interest in the land or waters claimed, to become parties to a proceeding under s 84(3).

97. If a party with a substantive interest in relation to that land stands to have that interest adversely affected, then they should be entitled as a matter of procedural fairness to be heard in relation to it. If implemented, proposal 11-1 would arguably not cover those with a statutory right in relation to the land.

98. For example where an Aboriginal land council has an undetermined claim under the ALRA, the land council is entitled to have the land transferred in fee simple, provided the statutory criteria are met.³³ As noted at para [11.51] of the Discussion Paper, these entitlements have been referred to as “*inchoate property rights*”.³⁴ The potential recognition of native title rights and interests can adversely affect those interests.

99. It is important to first note that where a native title claim predates an ALRA land claim, the ALRA land claim will fail.³⁵ As native title claims have standard exclusions to prevent the claiming of areas where native title has been extinguished by previous exclusive possession acts and other scheduled interests, the land councils have a direct interest in the tenure history of the land and assessments as to what may constitute an extinguishing event.

100. Second, as mentioned above, where a native title claim post-dates a claim under the ALRA lodged after 28 November 1994, the existence of native title may determine whether a land council has an unencumbered fee simple interest, or has a fee simple interest subject to native title rights and interests.³⁶ Given the substantive effect on its interests, there seems little justification to deny an Aboriginal land council the right to

³³ *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act* (1988) 14 NSWLR 685 per Hope JA at 694D-E.

³⁴ *Narromine Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 79 LGERA 430 per Stein J at 433-434. See also *Worimi Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1991) 72 LGRA 149 per Stein J at 156.

³⁵ Section 36(1)(d), ALRA.

³⁶ Section 36(9), ALRA. See also s 36(9A), ALRA.

be heard in those circumstances, and those kinds of interests should not be removed from the scope of s 84(3)(a)(iii). Reductions in the scope of s 84(3)(a)(iii) should be more limited than proposed in the Discussion Paper.

Conclusion

101. The Law Council considers that the native title system should be revised to enable fairer outcomes for Aboriginal and Torres Strait Islander peoples.
102. The Law Council commends the ALRC for its comprehensive Discussion Paper, which provides a number of proposals and questions to ensure 'that the native title system can bring meaningful and positive outcomes to Aboriginal and Torres Strait Islander peoples.
103. The Law Council considers that establishing a presumption of continuity, rebuttable by evidence to the contrary, would significantly reduce the time and cost of reaching determinations of native title claims.
104. The Law Council opposes mandatory regulation of native title lawyers. While not opposed to a voluntary accreditation scheme, the Law Council considers that such a scheme may not be feasible or achieve any real benefit for Aboriginal people who access private legal practitioners.
105. In addition, there are many issues that have not been considered in detail in the Discussion Paper, including strengthening Aboriginal and Torres Strait Islander people rights in future act negotiations.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council acts on behalf of 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive are:

- Mr Duncan McConnel, President
- Mr Stuart Clark, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Dr Christopher Kendall, Executive Member
- Mr Morry Bailes, Executive Member
- Mr Ian Brown, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Attachment B: Application Process for Specialist Accreditation

Specialist Accreditation in NSW

The practice areas in which specialist accreditation is offered in NSW are:

- Business & Personal Tax Law
- Business Law
- Children's Law
- Commercial Litigation
- Criminal Law
- Dispute Resolution
- Employment and Industrial Law
- Family Law
- Immigration Law
- Local Government and Planning Law
- Personal Injury
- Property Law
- Wills & Estates Law

Not all practice areas are offered every year. In 2014, the areas available were Immigration Law; Dispute Resolution; Personal Injury; Government and Administrative Law; and Local Government and Planning Law.

In 2015, the practice areas offered will be Business Law; Commercial Litigation; Criminal Law; Family Law; Property Law and Wills & Estates Law.

1. Application process

The eligibility criteria for specialist accreditation candidacy are that the practitioner must:

- (1) Hold a current solicitor's practising certificate; and
- (2) Have practiced for five years full time or equivalent; and
- (3) For the three years prior to application demonstrate a substantial involvement in the area;
- (4) Time devoted to this area of practice in each year of this three year period is not less than 25% of normal full time practice; and
 - (i) In relation to any period the practitioner has worked part-time in the three year period preceding this application, the practitioner has undertaken work in this area not less than the equivalent of 25% of full time employment (for example, not less than two and a half days per fortnight working exclusively in the area).
- (5) Be a solicitor member of the Law Society of New South Wales or be a full solicitor member of an equivalent body in an Australian state or territory body.

Applicants are required to provide three referees who are Australian Legal Practitioners, in addition to a letter of support from their most recent supervisor.

Once the Law Society's Specialist Accreditation Department receives an application, it will assess the application for candidacy by taking steps including checking with the Professional Standards Department in relation to any adverse conduct findings made against the applicant.

2. Assessment process

The specialist accreditation program involves approximately a 10 week period of engagement by the practitioner. This is from when the first assessment is released until the last assessment is due and does not include any preparation time.

The standard applied in the specialist accreditation scheme is the standard of a "specially competent practitioner" in the core skills and practical capabilities in the selected area of law, assessed against the spectrum of capability of all practitioners in that area of law.

The methods of assessment vary between areas, but generally include:

- Take home assessments such as keeping a mock file, written advice, examination, portfolio of documents and resume of work;
- Live assessments such as a peer interview, mock hearing, simulated interview and simulated scenario; and
- Formal written examinations.

Advanced standing is available in certain circumstances.

Candidates are assessed on a pass/fail basis, and must pass every form of assessment in order to be eligible for accreditation.

Attached by way of example is the *2015 Property Law Specialist Accreditation Assessment Requirements*.

3. Obligations as an accredited specialist

Once the specialist accreditation program has been completed successfully, accredited practitioners must:

- (1) Continue to hold a current solicitor's practising certificate;
- (2) Continue to be a solicitor member of the Law Society of New South Wales or be a full solicitor member of an equivalent body in an Australian state or territory body;
- (3) Maintain a substantial involvement in the area of specialty, of not less than 25% of total practice of a solicitor engaged in normal full-time practice or equivalent (Note: for Mediation specialists only. This means not less than 12.5 hours of mediation as a mediator using the Law Society mediation model);
- (4) Undertake 10 additional hours of continuing legal education (CPD) in their specialty or sub-specialty area, and maintain records as proof of the additional study;
- (5) Pay an annual accreditation renewal fee.