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

Via email: legcon.sen@aph.gov.au

New South Wales Aboriginal Land Council
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Dear Senators,

Native Title Legislation Amendment Bill 2019

Thank you for the opportunity to comment on the *Native Title Legislation Amendment Bill 2019* (**Bill**).

The NSW Aboriginal Land Council (**NSWALC**) supports in-principle the intent to disregard historical extinguishment to make more land available for positive determinations of native title, as outlined in Schedule 3, Part 1 of the Bill.

However, as currently drafted, the Bill will have the unintended consequence of reducing the existing rights and interests of Aboriginal people under the *Aboriginal Land Rights Act 1983* (NSW) (**the ALRA**) and increasing legal uncertainty and costs for Aboriginal communities in NSW.

As such, we request minor amendments to the Bill to ensure that rights under the ALRA are not adversely impacted by the proposed reforms to the native title regime, and to safeguard the existing and unique rights and interests of Aboriginal Land Councils in NSW. These amendments are sought in the spirit of advancing the collective rights and interests of Aboriginal people.

Aboriginal Land Rights in NSW

NSWALC is the peak body representing Aboriginal peoples in NSW, with a membership base of over 23,000. In accordance with the ALRA, our organisation works to improve, protect and foster the best interests of all Aboriginal peoples in NSW on the basis of self-determination. Our responsibilities, and those of the 120 Local Aboriginal Land Councils (**LALCs**) across NSW include the protection and promotion of Aboriginal culture and heritage, land management, business enterprise and serving our communities.

The ALRA was established to return land in NSW to Aboriginal peoples through a process of lodging claims for certain Crown lands. A successful determination of an Aboriginal land claim generally delivers freehold title to land which includes rights to certain minerals in the freehold land. This freehold can be dealt with via sale, lease, etc and the owner of the freehold land (the Aboriginal Land Council) has the same rights as other freehold owners, subject to compliance with the ALRA.

Interaction of Land rights and native title regimes in NSW

Land rights and native title are important overlapping mechanisms for the recognition and provision of Aboriginal people's rights and interests in NSW. However, the two regimes are different in operation and the rights and interests they provide. NSWALC seeks to ensure that the two regimes operate in a complementary, rather than oppositional, manner. Land rights and native title laws

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should be constructed to maximise outcomes for Aboriginal people, rather than to diminish the rights and interests Aboriginal people.

In summary, we are concerned that the provisions relating to historical extinguishment in park areas, as currently drafted:

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

Recommended amendments

1. Aboriginal Land Claims made under the ALRA should be explicitly recognised as 'interests' in s47C(9)(a)(ii).

2. The agreement of Aboriginal Land Councils, with an interest in the agreement area, should be required under s47C(1).

3. Clarify that s47C does not operate to diminish the rights and interests of Aboriginal Land Councils or defeat Aboriginal Land Claims that would otherwise have been successful under the ALRA.

Historical extinguishment – park areas

Schedule 3, Part 1 of the proposed Bill will allow prior extinguishment of native title to be disregarded in a broad category of land defined as 'park areas'. The definition of 'park areas' includes any Crown land reserved for purposes that *"include preserving the natural environment."*

In NSW, Crown land that falls within this definition is substantial, and encompasses more than the national park estate. Importantly, the extent of such land that is claimable under the ALRA is potentially considerable.

Impact of proposed reforms on Aboriginal Land Rights in NSW

We have significant concerns that the Bill will result in Aboriginal Land Claims that would currently succeed under the ALRA being defeated due to the complex interaction between the *Native Title Act* and the ALRA. This will have the detrimental effect of reducing the amount of land that can be returned in freehold to Aboriginal people in NSW.

We note the Minister's second reading speech states that provisions relating to historical extinguishment of parks *"will only operate by agreement between the parties and will ensure that any existing third-party interests are appropriately recognised."*[i]

However, we are concerned that the Bill, in failing to take into account the unique situation of Aboriginal land rights in NSW, does not provide sufficient legal safeguards to protect what the NSW

Land and Environment Court has called the "inchoate rights" of Aboriginal Land Councils[ii] arising upon the making of Aboriginal Land Claims, and does not recognise Aboriginal Land Councils as 'parties' where their interests may be affected.

Overall, the Bill does not include any provisions to ensure that Aboriginal Land Councils rights and interests are explicitly protected.

Aboriginal Land Claims

In NSW, Aboriginal Land Claims under the ALRA can deliver freehold title where the claimed crown land is effectively unused and unneeded at the date of claim (s36 of the ALRA). Granted land is subject to, and does not affect any native title rights and interests existing in the lands immediately prior to transfer.

Even so, Aboriginal Land Claims under the ALRA, can be adversely impacted by a native title claim that has been registered or successfully determined prior to the land claim (see ss36(1)(d) and (e) of the ALRA).

The proposed provisions to disregard historical extinguishment will mean that Aboriginal Land Claims that may currently succeed over "park areas" will now fail where they are preceded by a s47C native title application. Effectively excluding from claim, lands that may otherwise be claimable in freehold under the ALRA.

At present, Aboriginal Land Claims lodged after a native title claim, can still succeed (despite s36(1)(d) of the ALRA which states that claimable Crown land excludes land in respect of which a native title application has been made) in circumstances where native title has been extinguished (because native title claims can currently only be made regarding land in which native title has not been extinguished - s62 of the *Native Title Act*).

We are concerned that proposed s47C provisions will have the effect of converting Crown land that is currently claimable under the ALRA to land that is un-claimable by virtue of the proposed s47C. We therefore recommend that s47C does not operate to diminish the rights and interests of Aboriginal Land Councils or defeat Aboriginal Land Claims that would otherwise have been successful under the ALRA.

Furthermore, a number of legal uncertainties will also arise where a land claim made under the ALRA pre-dates a s47C application. This includes uncertainties as to the title to be transferred to Aboriginal Land Councils, the ability of Aboriginal Land Councils to deal with any lands granted subject to s47C, as well as potential compensation liabilities for the State.

We note that proposed 47C(9)(a) states that if there is a determination that native title exists, it does not affect "*(ii) the validity of the creation of any other prior interest in relation to the agreement area*".

However, we are concerned that this does not provide a sufficient safeguard in respect to Aboriginal Land Claims made under the ALRA. Aboriginal Land Claims made under the ALRA should be explicitly recognised as interests under s47C(9).

Notice and time for comment

We note that, while s47C(6) and 47C(7) may provide some opportunity for an Aboriginal Land Council to comment on the agreement, there is no guarantee that their interests will be protected. We seek to ensure that the agreement of Aboriginal Land Councils is sought where their rights and interests may be affected.

In providing this submission we seek to ensure that the Parliament does detriment our communities by enacting laws that are contrary to bipartisan commitments to advance the lives of Aboriginal peoples. We are committed to working to improve social, cultural and economic outcomes for Aboriginal people and the wider community.

We appreciate that these issues are complex and would welcome the opportunity to brief you and your colleagues more fully at your earliest convenience.

Please contact us via Stephen Hynd, Executive Director, Land, Legal and Strategy on

Sincerely,

James Christian PSM
Chief Executive Officer
NSW Aboriginal Land Council

Date: 29 NOVEMBER 2019

[i] Minister's Second Reading Speech, *Native Title Amendment Legislation Bill 2019*
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fd7ec488d-6ed2-4bdf-86bf-90952f5f280d%2F0005%22

[ii] New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act and the Western Lands Act (1988) 14 NSWLR 685 (Winbar No. 3); and Narromine Local Aboriginal Land Council v Minister Administering the Crown Land Act (1993) 79 LGER