Law Council
OF AUSTRALIA

6 March 2017

Ms Toni Matulick
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Ms Matulick

Senate Legal and Constitutional Affairs Legislation Committee's inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

The Law Council of Australia appreciates the opportunity to provide input to the Senate Legal and Constitutional Affairs Legislation Committee's (the **Committee**) inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the **Bill**).

The Law Council acknowledges the assistance of its Indigenous Legal Issues Committee and the Law Society of New South Wales in the preparation of this submission.

The Bill amends the *Native Title Act 1993* (Cth) (the ***Native Title Act***), to resolve the uncertainty created by the Full Federal Court decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (*McGlade*), regarding Indigenous Land Use Area Agreements (**Area Agreements**).

Consultation Period

The Law Council is concerned about the relatively short timeframe of the consultation period for this inquiry, given its significance and the complexity of native title legislation. The proposed amendments have potentially significant consequences for a range of stakeholders, many of whom are impaired in engaging with inquiries such as this by distance and lack of resources. As such, it is crucial that stakeholders are given sufficient time to consider the amendments and prepare submissions. The Explanatory Memorandum states that:[1]

> *Given the limited timeframe, the Attorney-General's Department consulted with stakeholders in relation to the legal implications of the McGlade decision to the greatest extent possible, including State and Territory governments, the National Native Title Tribunal, and the National Native Title Council.*

However, the Full Court handed down its decision in *McGlade* on 2 February 2017 and the Bill was introduced by the Commonwealth Government on 15 February 2017. Such a short

[1] Explanatory Memorandum, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, [25].

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consultation period has not allowed stakeholders, including the Law Council, sufficient opportunity to consider the proposed amendments. The Government has not explained the reasons for the very short time frame, which is clearly unjustified given the nature of the interests being defined in the Bill.

In the available time period, the Law Council has identified a number of issues that should be considered by the Committee in the evaluation of the Bill and the Explanatory Memorandum. These are briefly set out below.

Effect of Area Agreements

In considering the appropriateness of the amendments, it is important to note the nature and effect of Area Agreements. The regime for Area Agreements was inserted into the *Native Title Act* by the *Native Title Amendment Act 1998* (Cth). The enactment of these provisions was a largely beneficial measure, as they greatly expanded the ability for negotiated outcomes of claims for native title, as well as the authorisation of future acts affecting native title. However, to provide certainty for the parties, amendments were also made to the *Native Title Act* which provided that, upon registration, an Area Agreement binds those who sign the agreement and also has the effect that:

> *"... all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to an agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be".*[2]

In other words, upon registration, it is possible that people who hold native title rights and interests can be bound by an agreement that they have not had actual notice of, have not had legal advice in relation to, and were not a party to. This is so, notwithstanding the safeguards contained in ss 24CG(3) and 203BE(5) of the *Native Title Act*.

The types of matters which may be the subject of an Area Agreement are not trivial. They may include the authorisation of any future act, the extinguishment of native title rights and interests (including without compensation), the manner in which the native title rights and interests may be exercised forever into the future, and to whom any compensation for the interference (if any) might be paid.[3] Any future act authorised by an Area Agreement is valid regardless of the procedural rights or entitlements to compensation that may arise under other provisions of the future act regime of the *Native Title Act*.[4]

Despite beneficial intentions, these provisions may be viewed as harsh provisions. Given the potentially significant effects of the registration of an Area Agreement, the procedural safeguards in relation to its registration are fundamentally important. The requirement that all the people who comprise the registered native title claimant be a party to the agreement is one of those safeguards and the removal of it should be carefully considered.

Section 66B of the Native Title Act

The Law Council acknowledges the concerns raised in the Explanatory Memorandum in relation to the costs associated with section 66B procedures to remove a person who is a registered native title claimant, who unreasonably refuses to execute an Area Agreement that has been properly authorised. We also acknowledge the impact of these costs for

[2] Sections 24EA(1)(b) and 24EA(2), *Native Title Act 1993* (Cth).
[3] Section 24CB, *Native Title Act 1993* (Cth).
[4] Sections 24AA(3), *Native Title Act 1993* (Cth).

those procedures where an applicant is deceased. The absence of adequate funding for native title representative bodies further exacerbates these problems. There is also the potential for a named applicant to refuse to sign an Area Agreement for reasons other than those set out in the Explanatory Memorandum.

The requirement for the people who comprise the registered native title claimant to act as a single entity may be regarded by those groups as a safety net to ensure decisions are made by consensus, rather than a blunt majority, particularly if there is a concern that one large faction may dominate. If a claim group has been operating on that basis, it would be understandable why a particular subgroup may be aggrieved, if that process is suddenly departed from in the authorisation of an Area Agreement.

Furthermore, if a representative of the subgroup believes that the process for the authorisation meeting has miscarried (and it may be a legitimate grievance), the first step the person would take is to refuse to sign the agreement. One of the advantages of the section 66B process is that the person is then made accountable to the community for the action and, if they are genuinely acting outside their mandate, they would be removed. It might be, as the Explanatory Memorandum notes, that an aggrieved subgroup has the capacity to take action to oppose the registration of the Area Agreement, and challenge it in Court, but those processes carry their own expenses and difficulties.

Invalidity of Area Agreements affected by McGlade

The Law Council considers that the Explanatory Memorandum does not contain sufficient detail about the Area Agreements affected by the *McGlade* decision to assess whether the amendments are appropriate. According to media reports there are 123 Area Agreements that are at risk of invalidity as a result of the *McGlade* decision,[5] but the circumstances of these are unclear.

If the invalidity of an Area Agreement has arisen because of a bona fide reliance on the position in Q*GC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019,[6] and there was no challenge to the Area Agreement by any member of the registered native title claimant, then the Area Agreement should be validated to give effect to what was the uncontroversial intention of the parties at the time. However, if there were genuine objections raised by such a person who refused to sign the Area Agreement, and the objection is ongoing, it may be unjust to validate it in those circumstances. As noted above, the Law Council does not have a firm view on the proposed amendment given the lack of clarity regarding how many (if any) Area Agreements fall within the latter category.

Prospective Impacts of the Bill

Regarding the proposed prospective application of the Bill, the Law Council notes the following:

(1) There may be some tension between the policy objectives of preventing dissident members of the registered native title claimant from obstructing an Area Agreement from being executed, versus allowing such persons to act in a manner to represent their constituents (for example, where their status is as a subgroup representative, and that subgroup disagrees with the others). This issue may be particularly relevant if the

[5] Micheal McKenna, 'Adani coalmine project frozen by shock land rights ruling', *The Australian*, 11 February 2017 <http://www.theaustralian.com.au/business/mining-energy/adani-coalmine-project-frozen-by-shock-land-rights-ruling/news-story/7f6d1e581fe8d5ba8b690253b44e9938>.

[6] Including where a named applicant is deceased or if it simply was not considered necessary to have all of the registered native title claimant as a party.

authorisation of an Area Agreement was passed by a close majority, or where the contents of an Area Agreement impacts differently on different sections of the community. The observations made above about the requirement for all the registered native title claimants to be a party to the agreement operating as a safety net is also relevant in this regard.

(2) Under proposed amendments to section 251A, in authorising an Area Agreement the native title claim group may do "*either or both*" of nominating a person or persons to be the party, or "*specify a process for determining which of the persons who comprise the applicant are the party*". Under subparagraph 24CD(2)(a)(i) the person or persons so identified are then the relevant party to the Area Agreement. However, under subparagraph 24CD(2)(a)(ii), if there was no such person identified, it defaults to the "*majority of the persons who comprise the registered native title claimant.*" It is unclear why the default position would be the "majority". At least for the time being, this default position may well govern the great majority of cases. One answer may be that the issue will invariably be considered when the process for decision making is determined at the outset, but if the assumption is that it is implicit in the authorisation process, there should be no difficulty in requiring a specific decision to the effect that the whole of the applicant is not required. It may therefore be preferable for subparagraph 24CD(2)(a)(ii) to be deleted, so that unless an authorisation meeting specifies a lesser number of people, the current position of requiring all of the registered native title claimants to be a party is maintained.

Finally, whilst the Parliament is considering these matters, attention may be given to the related "controversy" commented upon by Barker J in *Corunna v South West Aboriginal Land and Sea Council (No 2)* [2015] FCA 630 at [59]. That relates to a conflict between the decisions of *Kemp v Native Title Registrar* (2006) 153 FCR 38 and *QGC Pty Ltd v Bygrave* (2011) 199 FCR 94 in relation to who may authorise an Area Agreement.

The Law Council appreciates the opportunity to provide comments to the Committee. In the first instance, please contact Simon Henderson, Senior Policy Lawyer, at

Yours sincerely

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