THE LAW SOCIETY
OF NEW SOUTH WALES

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30 January 2013

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

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

Dear Sir/Madam,

Senate Committee Inquiry into the Native Title Amendment Bill 2012

I write to you on behalf of the Indigenous Issues Committee ("Committee") of the Law Society of New South Wales to provide its submission in relation to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2012 ("the Amendment Bill").

The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee commends the Government for seeking to improve the operation of the *Native Title Act 1993* (Cth) ("NTA") by broadening the circumstances in which native title rights and interests can be recognised, and by seeking to enhance the agreement making procedures in the NTA.

However, the Committee has concerns about the effect of amendments proposed for the registering of Indigenous Land Use (Area Agreements) ("Area Agreements") that are set out in Schedule 3. In particular, the Committee is concerned that they may prevent legitimate objections to registration, with potentially draconian effects on Aboriginal people who may hold native title rights and interests.

1. Indigenous Land Use Agreements: Background

Before setting out those concerns it is necessary to note the nature of Area Agreements and their function in the NTA.

One of the failings of the NTA (as it was enacted) was that while it envisaged resolution of claims and disputes over future acts through agreement, in the absence of a determination of native title there could be no certainty that those who entered into the agreement were in fact the native title holders for the area.[1] As a result there was no certainty of outcome for

[1] Section 21(1) of the NTA (as enacted) provided:
"*Native title holders may, under an agreement with the Commonwealth, a State or a Territory:*

any of the parties to it which in turn prevented agreements being a viable alternative to resolving claims and authorising future acts.

In order to remedy this difficulty a regime for Indigenous Land Use Agreements ("ILUAs") was inserted into the NTA by the *Native Title Amendment Act 1998* (Cth). The *Native Title Amendment Act 1998* provided for three types of ILUAs namely:

(a) Prescribed Body Corporate Agreements (ss.24BA – 24BI of the NTA) which operate where there is an approved determination of native title;

(b) Indigenous Land Use (Area Agreements) (ss.24CA – 24CL of the NTA) which can operate where there is no determination of native title; and

(c) Alternative Procedure Agreements (ss.24DA – 24DM of the NTA).

The enactment of these provisions was a largely beneficial measure in that 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, in order to provide certainty for the parties, amendments were also made to the NTA that provided that, upon registration, an Area Agreement binds not only those who sign the agreement but it 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, people who hold native title rights and interests can be bound by an agreement in relation to which they have not had actual notice, have not had legal advice, and to which they were not a party.

To be clear, 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 NTA.[4]

Despite beneficial intentions, the potential effect of these provisions is draconian. No other property owners in Australia are subjected to such a measure, nor would they accept it.

Given that the registration of an Area Agreement could lead to enormously adverse outcomes for the holders of native title rights and interests, the procedural safeguards to the registration of an Area Agreement are fundamentally important. Under the NTA as it currently stands:

(1) There is an obligation for an application for an agreement to be registered (an application) to either be certified by a Native Title Representative Body ("NTRB") or otherwise contain a statement that:

(a) by surrendering their native title rights and interests in relation to land or waters of the Commonwealth, the State or the Territory (as the case may be), extinguish those rights and interests; or

(b) authorise any future act that will affect their native title."

[2] Sections 24EA(1)(b) and 24EA(2), NTA.

[3] Section 24CB, NTA.

[4] Sections 24AA(3), NTA.

"*all reasonable efforts have been made (including by consulting all representative Aboriginal/Torres Strait Islander bodies for the area) to ensure that all persons who hold or may hold native title in relation to land or waters in the area covered by the agreement have been identified*"

and a statement that

"*all such persons so identified have authorised the making of the agreement*".[5]

(2) The Registrar must give public notice of the application and provide three (3) months for a "person claiming to hold native title" to either object to the certification (if it was certified),[6] or otherwise invite them to make a native title determination application over the area.[7]

(3) Where an Area Agreement is certified by a NTRB, the Registrar must register the agreement, if there is no objection, or, if despite any objection it is satisfied that it has been properly certified.[8] In considering that matter, the Registrar is required to consider the information given to it by the objector and the information in the application, but not any other matter.[9]

(4) Where an Area Agreement is not certified by a NTRB, the Registrar can register the agreement if,

a. the parties to the agreement include, any person who at the end of the notification period is a registered native title claimant, or who lodges a claim before the end of the notification period, and subsequently becomes a registered native title claimant;[10] and

b. the Registrar is satisfied that the agreement was properly authorised by those who may hold native title.[11] In making that decision, the Registrar can consider information provided to it by aggrieved Aboriginal people.[12] This allows for objections even though they are not expressly referred to in the way that objections to certified agreements are referred to.

(5) Finally, where agreements are certified by a NTRB, the right to object is limited to objecting to the basis of the certification.[13] That is a significant limitation in circumstances where the certification process is in itself not devoid of potential problems particularly where the representative body certifying the Area Agreement is at the same time the legal representative for the Aboriginal peoples to benefit from the agreement or is otherwise independently a signatory. The potential for conflicts of interest in those circumstances, require that there be some reasonable and accessible procedures to raise objections in relation to the process.

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[5] Section 24CG(3), NTA.
[6] Section 24CH(2)(d)(i), NTA.
[7] Section 24CH(2)(d)(ii), NTA.
[8] Section 24CK(2), NTA.
[9] Section 24CK(4), NTA.
[10] Section 24CL(2), NTA.
[11] Section 24CG(3)(b), and 24CL(3), NTA.
[12] Section 24CL(4)(b), NTA.
[13] See ss.24CK(2)(c) and 203BE(5)(a) and (b), NTA.

2. *QGC v Bygrave*

Up until 2011, it was generally accepted that those who have been identified as being people who "may hold native title" were the people who were required to authorise the agreement.[14] This is not least because s.24CG(3)(b)(ii) of the NTA required a statement that "all of the persons so identified have authorised the making of the agreement".[15] However, in *QGC Pty Limited v Bygrave* [2011] FCA 1457 ("*QGC v Bygrave*") the Federal Court held that despite the fact that a broader range of people had to be notified, by virtue of the definition of "authorisation" in s.251A it was in fact only registered native title claimants who were required to authorise an Area Agreement.[16]

QGC v Bygrave is problematic for a number of reasons including:

(1) The emphasis in *QGC v Bygrave* on the distinction between the phrase "who may hold native title" in s.24CG(3)(b)(i) and the phrase "may hold the common or group rights comprising the native title" in s.251A (a) and (b) ignores the fact that "native title" is itself a defined term in the NTA and includes "the communal, group or individual rights and interests".[17]

(2) It does not satisfactorily explain the express reference in s.24CG(3)(b)(ii) that it is the people in s.24CG(3)(b)(i) that are required to have "authorised the agreement".

(3) It ignores the fact that Area Agreements can be entered into despite there not being any registered claim.

(4) It is inconsistent with the requirements in the notice for registration which (under the NTA) invite the lodging of a native title claim after authorisation, but prior to registration. Indeed there would be insufficient time from the time of notice of a meeting to authorise an Area Agreement for a claim to be registered in that time.[18]

(5) It is wrong to assume that all Aboriginal groups have equal access to resources to prepare claims and it leaves groups who have had no assistance in an extremely vulnerable position.

In the Committee's view, given the potentially severe consequences for Aboriginal people who may have their rights curtailed by Area Agreements, there must be clarity in relation to who is entitled to participate in the authorisation of Area Agreements.

3. Indigenous Land Use Agreements - proposed amendments

In light of the significant consequences that follow from registration of an Area Agreement, the Committee is concerned that a number of amendments in the Amendment Bill have the potential to significantly reduce the capacity for Aboriginal people to object to registration. The only justification given in the Explanatory Memorandum for this measure is "to streamline registration".[19]

While it is understandable that there is a desire to make procedures more efficient, that should not be at the expense of fair and accessible procedures for Aboriginal people to raise

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[14] See generally *Kemp v Native Title Registrar* (2006) 153 FCR 38 per Branson J at [56]-[57].
[15] Section 24CG(3)(b)(ii), NTA.
[16] *QGC Pty Limited v Bygrave* [2011] FCA 1457 per Reeves J at [104]-[123].
[17] Section 223, NTA.
[18] For example, in *QGC v Bygrave* Reeves J at [53(b)] noted that the National Native Title Tribunal's accepted that 3 weeks was sufficient notice.
[19] *Explanatory Memorandum of Native Title Amendment Bill 2012*, p.3

objections, particularly where there may be significant adverse consequences for the enjoyment of their property interests into the future.

3.1. Limiting objection period to one month

While the Amendment Bill beneficially proposes to clarify that there are objections against registration of non-certified Area Agreements,[20] the Amendment Bill proposes to reduce the time period for either lodging a native title claim or making an objection from three months to one month.[21] There is no reason why the time for objection should be limited in this way. Given the potential adverse consequences for Aboriginal people, it is unreasonable, particularly given that the majority of Aboriginal peoples subject to the native title process live in remote or rural regions.

The people who may wish to object to the registration of an Area Agreement may include family groups who feel they have been inappropriately excluded from the negotiation and authorisation process, or potential claim groups who believe the Area Agreement covers land and waters which belong to them.

Despite the proposed amendments clarifying that a person who may hold native title may simply object to the registration, it will remain the case that the lodging of a native title claim and having a registered claim will be the only certain means by which a person can ensure that their interests are not adversely affected by an Area Agreement to which they are not a party.[22] The lodging of a native title claim is not possible in a one month time frame. The amendment will render the right to do so illusory.

Even if the intention of an aggrieved group or individual is to put in an objection, rather than to lodge a native title claim, there may be many reasons why there may be difficulty for those people to respond in a one month period. For example, there may be difficulty in obtaining legal advice. Upon receiving notice of an application to register an Area Agreement it may be necessary to request information in relation to the application and it may take some time for it to be provided. A relevant group may be spread over a considerable distance and it may take some time to arrange a meeting, where significant distances are travelled. It is also likely to take time to prepare an objection. At the very least objectors will need to compile information to "establish a prima facie case that they may hold native title".[23] It is unrealistic and unreasonable to require those matters to occur in a month.

3.2. Requiring native title claims to be registered within one month

The NTA currently anticipates that claims be lodged in response to applications to register an Area Agreement. Where registered, the failure for the claimants to be included in the authorisation process for an Area Agreement prevents its registration. The NTA does not currently require that a claim be lodged and registered within three months. It is sufficient if it is lodged within three months and registered afterwards.[24] The proposed amendments not only reduce the objection period to a month, but require an application to be registered in that time as well. That is an insufficient and unreasonable timeframe.

The inappropriateness of the time frame is apparent when it is considered that the NTA allows four months for a response to a s.29 Notice in relation to mining and exploration

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[20] The NTA currently allows for objections for uncertified ILUAs by virtue of the requirement for notice and s.24CL(4)(b), NTA which requires the registrar to consider any information provided to it by any other person or body.
[21] Proposed ss 24CH(5)(b), Clause 6, Schedule 3, of the *Native Title Amendment Bill 2012*.
[22] Proposed s.24CL(2), NTA, Clause 10, Schedule 3, *Native Title Amendment Bill* 2012.
[23] Proposed s.251A(2), Clause 16 Schedule 3 of the *Native Title Amendment Bill 2012*.
[24] Sections 24CL(2)(b), NTA

future acts (which cannot extinguish native title),[25] but in relation to the potential extinguishment of native title rights and interests through an Area Agreement only one month is to be provided. Also by analogy, an Aboriginal group faced with the draconian effect of s.24FA of the NTA has three months[26] to become a registered native title claimant to ensure that outcome does not arise. That same group faced with the potential extinguishment of that interest through an agreement with another group of people will only have one month to respond.

While it is acknowledged that the amendments anticipate that the lodgement of a claim would not be the only way an objection could be raised, it would remain an option and the most certain course for an objector. It is the only course available which is a complete answer to registration if the proposed ILUA is opposed.

3.3. Removal of objections for certified agreements

At present the NTA allows for limited objections in relation to certified agreements. The Amendment Bill proposes to remove that objection. Given the potentially serious effects on potential native title holders the entitlement to objections in relation to certified agreements should remain. Objectors could legitimately object on the basis of the matters currently set out in s.24CK of the NTA in that process. It may also provide an opportunity for people to object on the basis that the criteria in s.24CB and s.24CE of the NTA, as to what constitutes an Area Agreement, are not met. The proposed amendments appear to require the Registrar to register an agreement that is the subject of any application, as long as it is certified by a representative body.[27]

Furthermore, removing the objection periods remove the ability for aggrieved Aboriginal people to seek legal advice and make a considered response. While it is intended that there may be judicial review of both a representative body's decision to certify and the National Native Title Tribunal's decision to register, that will be of little comfort if there are adverse impacts in the meantime as a result of registration because of the effect of s.24EA and s.24EB of the NTA. Furthermore, there is an obvious difference in being able to raise objections on registration as opposed to requiring the commencement of separate Federal Court proceedings to raise concerns.

Native title representative bodies are not infallible. It is appropriate that the existing safety net remain in place in relation to certified agreements, particularly as there does not appear to be any existing deficiency in the current scheme.

3.4. Requiring objections to be in a prescribed form

The above concerns are compounded by the proposal to require that any objection to registration be in accordance with unidentified requirements determined by the Minister.[28] Although such requirements will need to be the subject of a legislative instrument, the amendment does not place any restriction on how onerous or extensive those requirements will be.

Given that some objectors may have limited literacy skills, it would be preferable if the form of objections was not prescriptive. The Committee's view is that objections should be

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[25] Sections 28 and 29, NTA.
[26] See s.66(10), NTA.

[27] Proposed s 24CK, Clause 7, Schedule 3, of the *Native Title Amendment Bill 2012*.
[28] Proposed s 24(CI)(1A), Clause 7, Schedule 3, of the *Native Title Amendment Bill 2012*.

considered on the basis of their substance rather than their form especially given the potential effects discussed above that the registration of an Area Agreement may have.

3.5. Defining "who may hold native title"

The Committee supports the proposal in the Amendment Bill to amend s.251A(1) to clarify that:

(a) the definition of "authorisation" for the purposes of an Area Agreement includes authorisation by people "who may hold native title"; and

(b) to remove the reference to "the common and group rights comprising" the native title.[29]

This would appear to reverse the approach in the decision in *QGC v Bygrave* and makes the language of s.251A(1), consistent with s.24CH(3)(b) of the NTA.

The Amendment Bill also proposes to define persons who "may hold native title" for the purposes of s.251A of the NTA:

> *"In this section, a reference to persons who may hold native title is a reference to persons who can establish a prima facie case that they may hold native title."*[30]

The Committee supports that measure but it would be clearer if the words "regardless of whether they are registered native title claimants" were added at the end of the section. However, the amendment will mean that a person objecting may need to satisfy the Registrar that they had a prima facie case they hold native title, which adds weight to the concerns raised above for the need to maintain a 3 month objection period.

The proposed s.251A(3) is unclear. As amended, the NTA will provide that an Area Agreement will need to be authorised by persons who can establish a prima facie case that they may hold native title, regardless of whether there is a registered claim. Section 251A(3) may be interpreted inconsistently with that approach to the extent it suggests that people who prima facie hold native title only authorise a "designated area" where there is a no registered body corporate or registered native title claim.

4. Amended Agreements

The Amendment Bill proposes a new s.24ED which provides:

> ***"24ED Amended agreements***
>
> *(1) If the details of an agreement are entered on the Register of Indigenous Land Use Agreements, the agreement has effect, for the purposes of this Act, as if the details included any amendments of the agreement that:*
>
> *(a) have been agreed to by the parties to the agreement; and*
>
> *(b) have been notified to the Registrar in writing by the parties;*
>
> *but only so far as the amendments:*

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[29] Proposed s 251A(1), Clauses 13-16, Schedule 3, of the *Native Title Amendment Bill 2012*.

[30] Proposed s.251A(2), Clause 16, Schedule 3, of the *Native Title Amendment Bill* 2012. The language of the definition appears to be consistent with the language of Branson J decision in *Kemp v National Native Title Tribunal* [2006] FCA 939 at [57] but higher than Her Honour's reference at [59] to showing that the claim was more than "merely colourable".

(c) update property descriptions, but not so as to result in the inclusion of any area of land or waters not previously covered by the agreement; or

(d) update a description identifying a party to the agreement, including where a party has assigned or otherwise transferred rights and liabilities under the agreement; or

(e) update administrative processes relating to the agreement; or

(f) do a thing specified by the Minister by legislative instrument for the purposes of this paragraph.

(2) If the details of an agreement are entered on the Register of Indigenous Land Use Agreements, the agreement has effect, for the purposes of this Act, as if it did not include any amendments other than those that have effect because of subsection (1).

Note: An application for registration of such an agreement as amended could be made under Subdivision B, C or D."

The Explanatory Memorandum notes that:

> "*Subsection 24ED(2) will enable parties to amend ILUAs without requiring re-registration in appropriate circumstances as necessary to meet changing circumstances*".[31]

For the reasons set out above, the requirement for registration is an important safeguard to protect third parties who may have their rights curtailed as a result of an Area Agreement. The strict requirements for authorisation and certification ensure Aboriginal people give informed consent to an Area Agreement. While it is understandable that there would be a desire to allow easier processes to make minor amendments without regard for further authorisation, the Committee submits that expedience should not be the only consideration.

Unlike ordinary contracts, Area Agreements bind a community. They bind people who are not a party. The only protection communities have is the authorisation and certification process. The only document which is authorised is the agreement in the form that it is agreed to by those present at the authorisation meeting, along with any amendments agreed to at that meeting (if any). If amendments are allowed outside that process then there will be significant procedural fairness issues for those affected.

In the Committee's view the proposed amendment is ambiguous and has a number of difficulties, particularly in the context of Area Agreements. In particular:

(1) The proposed s.24ED will allow for amendments to Area Agreements which may have been authorised by a broader group of people other than those who are party to the agreement, without the requirement for the same people to authorise the amendment. It is only the parties to the agreement who will have to authorise it. Accordingly, the amendment may affect, and be opposed by, people who will have no say in it. While the Explanatory Memorandum notes the inconvenience of requiring re-registration where there are minor amendments, it is silent about the safety net the registration process provides to Aboriginal people, particularly in ensuring that any amendments are authorised.

(2) If it is intended that requiring each party to agree to the amendment[32] will still require that the amendments be authorised in accordance with the NTA, then the section should make that clear rather than leaving it to be implied. However, if that is the

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[31] *Explanatory Memorandum of Native Title Amendment Bill 2012*, p.23

[32] Proposed s 24ED(1)(a), Clauses 12, Schedule 3, of the *Native Title Amendment Bill 2012*.

intention the issue remains as to why the safety net of the registration process should not remain to allow any person who does not believe the agreement was properly authorised to raise that concern.

(3) It is not clear that the matters which may be altered without the requirement for registration are necessarily minor. Altering the "party" to an agreement is a potentially significant variation, particularly if it is an amendment to the Aboriginal party.[33] It is also not clear what would be covered by the phrase "update administrative processes relating to the agreement".[34] Allowing the Minister to provide for changes to other matters, albeit only those identified by legislative instrument, [35] also potentially covers any range of matters.

(4) In this regard it is notable that proposed s.24ED refers to the updating of property descriptions "but not so as to result in the inclusion of any area of land or waters not previously covered by the agreement". It provides no prohibition on removing land previously covered by the agreement.

(5) Proposed s.24ED(1)(d) refers to amendments to "*update a description identifying a party*" including where there has been an assignment or transfer "*under the agreement*". However, if an assignment occurs pursuant to an agreement, there does not need to be an amendment to the agreement. The assignment is simply an implementation of the agreement. If an assignment or transfer is to occur outside of the agreement, then that is clearly not a minor matter. The terms under which land is transferred or obligations assigned may be contentious and should not occur without there being processes to ensure it is properly authorised.

Finally, the mischief which the proposed amendment is intended to address is not entirely clear. In some respects the proposed amendment appears to relate to updating information on the Register of Indigenous Land Use Agreements rather than amendments to agreements *per se*. The reference to "update property descriptions" and updating the identification of parties where interests have been transferred under the agreement fall within this category. If that is the concern, the appropriate response would be to broaden the powers of the Registrar under s.199B of the NTA in relation to how information is recorded on the Native Title Register. However in this regard it should be noted that s.199B of the NTA already confers a broad power that enables the Registrar to "enter into the Register any other details of the agreement that the Registrar considers appropriate,"[36] and to record changes in contact details for parties.[37]

The Committee thanks you for the opportunity to comment. If you have any questions please feel free to contact Vicky Kuek, policy lawyer for the Committee on

Yours sincerely,

John Dobson
President

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[33] Proposed s 24ED(1)(d), Clauses 12, Schedule 3, of the *Native Title Amendment Bill 2012*.
[34] Proposed s 24ED(1)(e), Clauses 12, Schedule 3, of the *Native Title Amendment Bill 2012*.
[35] Proposed s 24ED(1)(f), Clauses 12, Schedule 3, of the *Native Title Amendment Bill 2012*.
[36] Section 199B(2), NTA.
[37] Section 199B(4), NTA.