THE LAW SOCIETY
OF NEW SOUTH WALES

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22 October 2012

Attention: [redacted]
Legislation, Engagement and Policy
Native Title Unit
Attorney-General's Department
Barton ACT 2600

By email: native.title@ag.gov.au

Dear Sir/Madam,

Exposure Draft: Proposed amendments to the *Native Title Act 1993*

I write to you on behalf of the Indigenous Issues Committee ('Committee') of the Law Society of New South Wales to provide a submission on behalf of the Committee in relation to the Exposure Draft of the *Native Title Amendment Bill 2012* ('the Exposure Draft')

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.

The Committee is however concerned about the effect of amendments proposed for the registering of Indigenous Land Use (Area Agreements) ('Area Agreements') that are set out in Schedule 3, and in particular, 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.

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, NTA) which operate where there is an approved determination of native title;

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

(c) Alternative Procedure Agreements (ss.24DA- 24DM, 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 that they have not had actual notice of, have not had legal advice in relation to, and were not a party to.

The Committee notes that 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, these are draconian provisions. No other property owners in Australia are subjected to such a measure, nor would they accept it.

Given the potentially draconian effect of the registration of an Area Agreement, 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 "*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*

(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.

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.

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), 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"

[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.
[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.

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 current Act) 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 needs to be clarity in relation to who is entitled to participate in the authorisation of Area Agreements.

Indigenous Land Use Agreements - Proposed Amendments

Given the significant consequences that follow from registration of an Area Agreement, the Committee is concerned that a number of amendments in the Exposure Draft have the potential to significantly reduce the capacity for Aboriginal people to object to registration. The only justification given in the covering letter for this measure is "to streamline registration".

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

Limiting Objection Period to One (1) Month

While the Exposure Draft beneficially proposes to clarify that there are objections against registration of non-certified Area Agreements,[19] the Exposure Draft proposes to reduce the time period for either lodging a native title claim or making an objection from three (3) months to one (1) month.[20] 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

[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] 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.
[20] Proposed ss 24CH(5)(b) and 24(CH)(6)(b) and Clause 8, Schedule 3, of the *Native Title Amendment Bill 2012*.

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 that they are not a party to. The notice of registration will still invite the lodging of claims.[21] The lodging of a native title claim is not possible in a one (1) 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 getting 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 may 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*".[22] It is unrealistic to require those matters to occur in a month.

Requiring Native Title Claims to Be Registered Within a Month

The NTA currently anticipates that claims will 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 (3) months. It is sufficient if it is lodged within three (3) months and registered afterwards.[23] 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 timeframe is apparent when it is considered that the NTA allows 4 months for a response to a s.29 Notice in relation to mining and exploration future acts (which cannot extinguish native title),[24] but in relation to the potential extinguishing of native title rights and interests through an Area Agreement only one (1) month is to be provided.

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 notice will continue to invite that course.[25]

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[21] See s.24CH(2)(d)(ii), NTA and proposed s 24CH(6)(a) and (c), Clause 8, Schedule 3, of the *Native Title Amendment Bill 2012*.
[22] Proposed s 251A(2), Clause 18 Schedule 3 of the *Native Title Amendment Bill 2012*.
[23] Sections 24CL(2)(b), NTA
[24] Sections 28 and 29, NTA.
[25] See s.24CH(2)(d)(ii), NTA and proposed s 24CH(6)(a) and (c), Clause 8, Schedule 3, of the *Native Title Amendment Bill 2012*.

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 a prescribed form.[26] It is unclear how onerous or extensive those requirements will be. There does not appear to be any discretion to accept an objection that is not in the proper form. The requirement for objections to be in a prescribed form is potentially a significant restriction because for certified agreements the relevant condition for registration will be taken to be satisfied if the objection is not in the prescribed form.[27] It is equally of concern that there is no obligation in the notice to advise objectors, that any objections need to be made in a prescribed form or to advise where the details of the relevant form can be obtained.

Given that some objectors may have limited literacy skills, it would be preferable if the form of objections was not prescriptive. Given the potential draconian effects on Aboriginal people by the registration of an Area Agreement, objections should be considered on the basis of their substance rather than their form.

Access to Information

Given the potential effects of an Area Agreement on the property interests of third parties, it would be expected that the affording of procedural fairness to those affected would remain a paramount consideration. If there is an application for registration and information in relation to registration on which the Registrar is intending to rely a person who would be affected by the decision register the Area Agreement ought to have access to that information.

While the current Act leaves the matters which ought to be provided to the common law, the Exposure Draft proposes to prescribe the information that ought to be provided. Without any basis, it proposes that fundamental information (such as the application and the supporting information) must be provided but only if the Registrar is of the view that by providing the information "*it is reasonably likely that the objection would be withdrawn*".[28] However there is no requirement to provide it, if the objectors are reasonably likely to persist with their objection.

In other words, if a person who may hold native title has a legitimate objection s/he wishes to make to registration, and is likely to press the objection, s/he cannot require access to the information to which their objection needs to respond. That information will be provided if it will make them 'go away'. There can be no justification for such a position. If there is a group of Aboriginal people who wish to take issue with the authorisation process, or the certification by an NTRB, they ought (as a matter of procedural fairness) have access to that information.

Defining "Who May Hold Native Title"

The Committee supports the proposal in the Exposure Draft 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]

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[26] Proposed s 24(CI)(1B), Clause 9, Schedule 3, of the *Native Title Amendment Bill 2012*.
[27] See proposed amendment to s 24CK, Clause 11, Schedule 3, of the *Native Title Amendment Bill 2012*.
[28] Proposed s 24(CI)(1C)(b), Clause 9, Schedule 3, of the *Native Title Amendment Bill 2012*.
[29] Proposed s 251A(1), Clauses 15-17, Schedule 3, of the *Native Title Amendment Bill 2012*.

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), NTA.

The Exposure Draft also proposes to define persons who "*may hold native title*" for the purposes of s.251A, 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 needed to be authorised by persons who can establish a prima facie case they may hold native title, regardless of whether there is a registered claim or not. Section 251A(3) appears inconsistent 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.

Proposed Sections 24BB(ac)-(ad), 24CB(ac)-(ad), and 24DB(ac)-(ad)

The Exposure Draft proposes the inclusion of two matters that may be included in an Area Agreement. They are:

> *(ac) the making or not making of applications, including applications under Division 1 of Part 3 in relation to the area;*
> *(ad) the operation of section 211 in relation to the area;*

The intended scope of the proposed s.24CB(ac) and 24DB(ac) are unclear. The Committee is concerned about the effect of allowing an Area Agreement to effectively shut out third parties from accessing the Courts.

The Committee is also concerned about the terms of proposed ss.24BB(ad), 24CB(ad) and 24DB(ad). Stating that an Area Agreement can cover "*the operation of section 211 in relation to the area*" is problematic. Section 211 operates in accordance with its terms by force of being a Commonwealth law. It is difficult to see how parties can contract out of, or amend it. Parties can however already reach agreement as to how native title rights and interests will be exercised, including to place restrictions on them.[31]

Amended Agreements

The Exposure Draft proposes a new s.24ED which provides:

> *"(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; and*

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[30] Proposed s.251A(2), Clause 18, Schedule 3, of the *Native Title Amendment Bill* 2012. The language of the definition appears to be consistent with the language of the decision of Branson J 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*".

[31] See ss.24BB(d), 24CB(d), 24DB(d), NTA.

(c) *the Registrar is satisfied do not affect the conditions that were required to be satisfied in order for the Registrar to register the agreement.*

(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 Cover Sheet for the Exposure Draft identifies that there is a need to amend the NTA to make it easier to amend registered ILUAs. The explanation given is as follows:

> *"The reforms establish a threshold which will determine whether or not a new registration process is required. Where parties agree to amendments to an ILUA that do not affect matters which the Registrar was obliged to consider in deciding whether to enter the details of the original agreement on the Register of ILUAs, then the parties need not re-apply to the Registrar to have the amended agreement re-registered for those types of amendments to have effect pursuant to s 24EA, provided the parties inform the Registrar of the minor amendments they have agreed.*
>
> *The reforms establish a threshold which will determine whether or not a new registration process is required. Where parties agree to amendments to an ILUA that do not affect matters which the Registrar was obliged to consider in deciding whether to enter the details of the original agreement on the Register of ILUAs, then the parties need not re-apply to the Registrar to have the amended agreement re-registered for those types of amendments to have effect pursuant to s 24EA, provided the parties inform the Registrar of the minor amendments they have agreed.*
>
> *Examples of amendments that are contemplated by the reforms include:*
>
> *• Updated legal property descriptors (provided they do not change the geographic area covered by the ILUA in practice)*
>
> *• Updated legal description identifying a party (e.g. where parties have assumed or transferred responsibility under the agreement, or where a party is deceased)*
>
> *• Updated legal description identifying contact details.*
>
> *• Updated administrative processes (e.g. notification, communication, review)."*

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 the agreement. The strict requirements for authorisation and certification ensure Aboriginal people give informed consent to an ILUA. While it is understandable that there would be a desire to allow easier processes to make minor amendments without regard for further authorisation, that is not the only consideration.

Unlike ordinary contracts, ILUAs bind a community. It binds people who are not a party. Their only protection is the authorisation and certification process. If amendments are allowed outside that process then there will be significant procedural fairness issues for those affected. Identifying what is a minor amendment is problematic. What may be a minor amendment to one person may be considered significant to another.

In the Committee's view the proposed amendment is ambiguous. The matters to which the Register has regard to in relation to the registration of an agreement is the procedure by which it was certified, or the procedure by which it was authorised. The only document which is authorised is the agreement in the form that it is agreed to by those present at the authorisation meeting. No other document is authorised. It is therefore unclear what "*amendment*" could be a matter to which the Registrar was not required to have regard. Once the document is changed, it is no longer the document which was authorised.

If you have any questions please contact Vicky Kuek, policy lawyer for the Committee on victoria.kuek@lawsociety.com.au or (02) 9926 0354.

Yours sincerely,

Justin Dowd
President