

3 March 2017

Our ref (VK/M&R Committee)

Senate Legal and Constitutional Affairs Legislation Committee  
Parliament of Australia  
Parliament Drive  
Canberra ACT 2600

Attention: Toni Matulick  
By Email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)

Dear Committee members

***Native Title Amendment (Indigenous Land Use Agreements) Bill 2017***

I refer to the Legal and Constitutional Affairs Legislation Committee's (the **Committee**) call for submissions on 21 February 2017 in respect of the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the **Bill**).

Thank you for the opportunity to comment on the Bill.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote more than 10,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. The QLS is comprised of several specialist committees who provide policy advice to the QLS Council on law reform and areas of concern to the profession.

The Society's Mining and Resources Law Committee has reviewed the Bill and make the following comments for the Committee's consideration.

**The McGlade Decision**

The decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 (2 February 2017) (**McGlade**) cast doubt over the validity of Indigenous Land Use Agreements (**ILUA**) not signed by all registered native title claimants. The decision overturned the law as it was understood in *QGC Pty Limited v Bygrave (No 2)* (2010) 189 FCR 412, which required only one registered native title claimant need sign an ILUA for it to be registered.

**Changes to the Native Title Act in light of McGlade**

The Bill has been introduced to resolve the uncertainty created by the McGlade decision by:

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- retrospectively validating ILUAs already registered without the signature of all registered native title claimants, as required by McGlade;
- allowing ILUAs currently signed, but not yet registered, to be registered where not all registered native title claimants have signed the agreement; and
- enable future ILUAs be registered if they are signed by a majority of registered native title claimants or persons nominated by the wider native title group.

QLS has reviewed the McGlade decision and the uncertainties created by it and supports the proposed Bill amending the *Native Title Act 1993* (the **Act**) to validate existing ILUAs. The proposed amendments also reflect the position adopted by government, industry and indigenous groups prior to the McGlade decision. It therefore provides an appropriate framework for the validation of pre-existing ILUAs, as well as the execution and registration of future ILUAs.

### Review of the Right to Negotiate process in light of McGlade

QLS also recognises the importance of the right to negotiate (**RTN**) process which allows resources companies and native title groups to negotiate an agreement allowing, amongst other things, the grant of mining leases. We recognise that an agreement reached through the RTN process is different to ILUAs, particularly in that they are not authorised by the wider native title group, nor registered by the National Native Title Tribunal (**NNTT**). Furthermore, under the RTN process, if registered native title claimants do not sign an RTN agreement, the matter can be referred to the NNTT for a determination.

However, similar issues arise in the RTN context when a registered native title claimant passes away. If a registered native title claimant passes away before an RTN agreement is signed, State Governments have adopted the practice that agreements will be implemented if all living members sign the agreement and a death certificate of the deceased claimant is presented. While the decision in McGlade did not consider RTNs, the decision in McGlade could be applied, by analogy, to an RTN agreement where a registered native title claimant passes away.

QLS considers that the application to replace a deceased member under s 66B of the Act would be impractical, due to the significant delays and costs to all stakeholders involved. Should the Committee wish to make further amendments to the Act, QLS suggests that the RTN process could be amended to provide further certainty for all parties concerned, by:

- amending s 31(1)(b) of the Act by validating all existing RTN agreements which are not signed by all members of the registered native title claimant; and
- allowing the remaining member or members, as the case may be, to participate in the RTN process where members of the registered native title claimant are deceased or otherwise unable to participate, and sign a s 31(1)(b) agreement.

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These further amendments would provide certainty to all stakeholders involved in RTN processes.

The Society welcomes further consultation on the issues raised in this letter and on the Bill more generally. Thank you again for the opportunity to comment on the draft, and for the Committee's consideration of the Society's feedback.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Policy Solicitor, Vanessa Krulin on 3842 5872 or [v.krulin@qls.com.au](mailto:v.krulin@qls.com.au).

Yours faithfully

A handwritten signature in black ink, appearing to read "Christine Smyth". The signature is written in a cursive, flowing style.

Christine Smyth  
**President**