Law Council
OF AUSTRALIA

Office of the President

11 June 2020

Senator Amanda Stoker
Chair
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au; cc Margie.Morrison@aph.gov.au

Dear Senator Stoker

Native Title Legislation Amendment Bill 2019 – Questions on Notice

The Law Council of Australia (**Law Council**) is grateful for the opportunity to provide a supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee (**the Committee**) in relation to its inquiry into the Native Title Legislation Amendment Bill 2019 (**the Bill**).

We are pleased to submit the following response to the three written questions on notice, which were provided to the Law Council via email correspondence dated 25 May 2020, following cancellation of the scheduled public hearing for the inquiry due to the COVID-19 pandemic.

Introduction

In the time since the Law Council made its previous submission to the inquiry,[1] the High Court handed down its landmark decision in the case of *Love v Commonwealth of Australia; Thoms v Commonwealth of Australia* [2020] HCA 3 (***Love and Thoms***). The Law Council suggests the provisions of the *Native Title Act 1993* (Cth) (**Native Title Act**) dealing with the authority to enter into agreements be reconsidered in light of this decision.

In *Love and Thoms*, a 4:3 majority of the High Court found that Aboriginal Australians, understood according to the tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 (***Mabo [No 2]***), are not 'aliens' within the meaning of section 51(xix) of the Australian Constitution. While the majority judges reached their conclusions by different reasoning, they all focused upon the rights and interests that Aboriginal and Torres Strait Islander people have as a self-defining group, which are sourced in traditional laws and customs and alienable only by traditional laws and customs, with one such right and interest being native title.[2] The decision of the majority judges may be interpreted as confirming that the right to make decisions about membership of a native title group rests entirely with the

[1] Law Council of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Legislation Amendment Bill 2019*, 5 December 2019 <webpage available here>.
[2] See, eg, *Love and Thoms* (Bell J) 23, [70]; (Gordon J) 124, [364].

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relevant native title group.[3] This principle must extend to the right to make decisions about decision-making methods and about lands and waters. Just as the state cannot legislate to provide that native title groups can only make their decisions about group membership according to a particular method, it would seem the state cannot legislate to provide the way in which decisions are made affecting lands and waters. In the circumstances, it appears to be necessary that there be a substantial review of the 'decisions' and 'authority' provisions within the native title regime to ensure compatibility with the High Court decision in *Love and Thoms*.

Question 1 – Your submission highlights potential retrospectivity with respect to the operation of proposed sections 24CD, 24CL, 62C and 87. Does the Law Council see any merit in transition provisions to provide clarity on this? How might the same standard be applied to the McGlade amendments?

The Law Council's issue in its previous submission was the wording of the saving provisions that the Bill currently proposes. Legislative drafting experts have cautioned the need for saving provisions to be appropriately specific to avoid litigation and to save the correct existing rights.[4]

The Law Council is concerned because the proposed saving provisions do not adequately protect the existing decision-making rights of native title claim groups. The saving provisions save *applications* made before the commencement of the saving provisions, not *authorities* made before the commencement of the saving provisions.

Subject to the Law Council's introductory comments above, appropriate saving provisions would ensure that the existing authority remains in place until the issue is considered and determined by the native title claim group. If the existing authority is not sufficiently clear, then the statutory response to the decision in *McGlade v Native Title Registrar* (2017) 251 FCR 172 (**the McGlade amendments**) is applied.

Question 2 – How might your concerns for the diminished rights of small groups within a native title group, especially in the context of the default majority provisions, be safeguarded while still ensuring efficiency in the application process?

The concerns raised regarding the impact of the *Love and Thoms* decision take on added gravity in relation to the protection of the interests of minority groups within the native title claim group.

As an interim measure, some protection may be afforded by requiring the individual applicants to declare that there are no traditional law consents or authorities of minority interests which had to be obtained under traditional law, or if there were then those consents or authorities were in fact obtained.

Question 3 – Would you please expand on your submission that the bill be amended to provide for the creation of a register of section 31 agreements and ancillary agreements, with suitable information restrictions? Would this include future act agreements? How might this work in practice?

At present, the applicant for a native title claim group may enter a section 31 agreement without the knowledge or consent of the native title claim group. The agreements are usually

[3] See, eg, *Love and Thoms* (Bell J) 25, [76]; (Gordon J) 127, [371]. See also (Kiefel CJ) 9, [23] who was in the minority.
[4] Helen Xanthaki (ed), *Enhancing Legislative Drafting in the Commonwealth: A Wealth of Innovation* (Routledge, 2015).

confidential and accompanied by an ancillary agreement which provides for payment of money and other benefits. The applicants often refuse to provide the agreements to the members of the native tile claim group and the proponent relies on the confidentiality clause to refuse to disclose either the agreement or the ancillary agreement. The ancillary agreement usually provides for the payment of money to the applicant or the signatories to the agreement at various points.

Even though there are always clauses to the effect that the applicant receives the payment on behalf of and for the native title claim group, the absence of any opportunity for scrutiny by the native title claim group has two consequences. First, the applicants are able in practice to personally receive substantial amounts of money, without any notification provided to the whole group. Second, this potential personal gain, without scrutiny, provides a personal incentive to consent to section 31 agreements by reason of the person gain, at the expense of the whole group.

Every section 31 agreement and ancillary agreement should be able to be identified, and the native title claim group should be able to easily obtain copies. The register, as envisaged by the Law Council, is not intended to carry out any merit assessment of the content of the agreement or ancillary agreement. It is intended to allow knowledge by the native title claim group of the agreements made on their behalf. Although, there is some need for discussion in relation to the question of whether merit assessments in some form are appropriate.

Conclusion

The Law Council gratefully acknowledges the expert members of its Indigenous Legal Issues Committee for their assistance in preparing this supplementary submission.

Please contact Ms Alex Kershaw, Policy Lawyer, on (02) 6246 3708 or at alex.kershaw@lawcouncil.asn.au, in the first instance, should you require further information or clarification.

Yours sincerely

Pauline Wright
President