SUBMISSION TO THE SENATE CONSTITUTIONAL AND LEGAL AFFAIRS COMMITTEE
NATIVE TITLE AMENDMENT (INDIGENOUS LAND USE AGREEMENT) BILL 2017

This submission is made on behalf of the Bigambul Native Title Aboriginal Corporation (ICN 8479), the Wardingarri Aboriginal Corporation RNTBC (ICN 8305) of the Iman People and the Wangan and Jagalingou Family Representative Council of the Wangan and Jagalingou People and the Objectors to the Registration of the Adani ILUA.

Summary of Position

1. The wholesale validation of area agreements proposed by the Native Title Amendment (Indigenous Land Use Agreement) Bill 2017 ("the Bill") is unnecessary. Section 24EB of the *Native Title Act 1993* (Cth) ("NTA") provides that an act is valid while an area agreement is on the register and s 199C prevents its removal except in limited circumstances.
2. A thorough investigation of the impact of the *McGlade* decision on registered area agreements should be undertaken before any legislative response is made.
3. The Bill disturbs the primacy of determined native title holders in the statutory scheme by inhibiting the removal of area agreements which have not been authorised by the determined Native Title holders.
4. The validation provisions of the Bill should not apply where a court has set a date for a determination of native title. In such circumstances, proponents should be made to await the decision of the court as to who holds native title rights and interests in the determination area and if necessary negotiate a body corporate agreement with the Registered Native Title Body Corporate of the determined native title holders for the agreement area.
5. The Bill will undermine the use of s 66B of the NTA as a mechanism for claim groups to ensure that their representatives abide by the will of the claim group in being parties to area agreements.
6. The Bill is unlikely to be effective because it does not clarify or amend the operation of s 61 (2), (1) or s 62A of the NTA which mandate that no Registered Native Title Claimants ("RNTCs") may act independently of the others and empowers them to collectively deal with all matters arising under the Act relating to a native title claim (including area agreements).
7. At the very least the Bill will create a confusing dichotomy between the role of the RNTCs in conducting proceedings for native title claims and their functions in negotiating and consenting to area agreements.
8. The Bill does not amend the NTA to ensure that a claim group can mandate that the RNTCs make decisions by majority. On one line of authority this will also result in the Bill being in direct contradiction to s 61 (2), (1) and s 62A of the NTA.
9. The validation of agreements by the Bill which are not on the register but made before 2 February 2017 should not be made unless 75 percent of the Registered Native title Claimants have executed the agreement. The requirement that the signature of only one RNTC is required has the potential to paper over serious disagreements within the claim group and legitimise unfair practices by proponents.
10. By giving primacy to the role of the claim group in approving area agreements the Bill highlights the need for measures to be introduced that ensure free and informed consent. A court should be empowered to supervise and control the way authorisation meetings are conducted. A minimum level of support amongst claim group members (possibly 75 %) should be mandated, especially where an area agreement provides for surrender of Native Title.
11. Further amendments to the Bill are required to clarify:

(a) the point in time during which a RNTC is taken to be a party to an area agreement;
(b) that native title claim groups are the authorising group where a registered native title claim exists over an agreement area by amending s24CG (3) (b) and 203BE (2) of the NTA; and
(c) that where there is more than one Native Title group, the persons nominated or a majority of RNTCs from each group must be parties to the area agreement,

12. Section 10 of the Bill is unnecessary in the light of s 24CG (2) of the NTA and should be deleted.

Introduction

1. The *Native Title Amendment (Indigenous Land Use Agreements) Bill* 2017 ("the Bill") was introduced into the parliament on an urgent basis.[1] The justification for doing so was that there was a crisis in the Native Title system relating to the registration of Indigenous Land Use Agreements (ILUAs) caused by the decision of the Full Court of the Federal Court in *McGlade v Native Title Registrar* [2017] FCAFC 10 ("*McGlade*").

What did *McGlade* Decide?

2. The first matter to note is that the decision in *McGlade* does not affect all ILUAs. The decision is only relevant where an agreement relates to an area of land over which there is a registered Native Title claim. Importantly, it has no application where there is a determination of Native Title over the whole of the agreement area. Nor does it apply in circumstances where there is not a registered Native Title claim in relation to the area covered by an agreement. So, for example, ILUAs can still be made with a Registered Native Title Body Corporate where there has been a Native Title determination or a representative Aboriginal/Torres Strait Islander body in relation to land that is not subject to a Native Title determination or a registered Native Title claim without reference to the McGlade decision.

3. The ILUAs affected by *McGlade* are only a subcategory of what the *Native Title Act 1993* (Cth) ("NTA") refers to as area agreements.[2] It is important to note that the NTA has always required the registered Native Title claimant ("RNTC") to be a party to area agreements. Prior to the decision of Reeves J in *QGC Pty Ltd v Bygrave and Others (No 2)* (2010) 189 FCR 412; [2010] FCA 1019 (*Bygrave No2*) some six years ago, it was the orthodoxy that all RNTCs had to sign and be a party to an area agreement.

4. The mischief addressed by Reeves J *Bygrave No 2* was the perceived ability of a 'rogue' RNTC to frustrate the will of the claim group and the rest of the RNTCs by refusing to sign an ILUA. To address this situation, Reeves J in *Bygraves No 2* changed the legal landscape by emphasising that it was the Native Title claim group as a whole that was really the contracting party for an area agreement and that no one RNTC had the ability to frustrate the will of the Native Title claim group after it had made a decision to authorise an area agreement.

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1 See paragraph 24 of the explanatory memorandum.

2 This title is somewhat of misnomer, as other categories of ILUAs (body corporate and alternative procedure agreements) can also relate to the doing of future acts within an area specified by an agreement see s 24BB (a) and 24DB (a) of the Native Title Act.

5. In *McGlade*, the Full Court of the Federal Court held that where there is more than one person comprising the RNTC, each of those persons must accept and sign the relevant agreement. Where they do not, the Court held that the requirement that the RNTC be a party is not satisfied, and as a result the agreement is not an ILUA for the purposes of the Act and cannot be registered. The Court noted that any dissident or deceased members of the registered Native Title claimant who refuse to, or are incapable of, signing an agreement would need to be dealt with through the specific process provided for in section 66B of the NTA which allows the Federal Court to make an order replacing the person or persons who comprise the applicant for a Native Title claim.

6. In *McGlade ,* Mortimer J at paragraph 494 of his judgement commented on the policy behind the decision of Reeves J in *Bygrave No 2:*

> "I note Reeves J's observation at [90] that s 24CD should not be construed so as to allow an individual member of a registered Native Title claimant to "frustrate or veto" a Native Title contracting group entering into an ILUA. With respect to his Honour, just as I prefer not to embrace the terms "dissident" and "dissenting" as they were used in argument before the Court, so I prefer not to characterise the refusal of a person in Ms McGlade's position as a 'veto' or as 'frustrating' an ILUA. As I have noted, and as the example of Daniel's case shows, an individual who holds views different from those of the majority of the individuals constituting the registered Native Title claimant may nevertheless be conscientiously performing her or his representative role. If she or he is not, then she or he should be removed under s 66B, if the Court is satisfied on evidence that is appropriate. If she or he is performing such a role, then expressing a contrary view may lead to a change of mind, or at least a modification of views, in the remainder of the individuals constituting the registered Native Title claimant. One cannot assume the motives for entering into an ILUA are any more objectively appropriate and reasonable than the motives for not doing so. There are simply different perspectives, and it is for the claim group as a whole, and the claim group only, to decide which perspective should prevail. Ultimately, if the Native Title claim group desire the same outcome as the majority of individuals constituting the registered Native Title claimant, then the NT Act provides the solution in s 66B, read with s 251B, conditional upon the Court's satisfaction."

Policy considerations in *McGlade*

7. As noted at paragraph 66 of the joint judgements of North and Barker JJ, Counsel for McGlade submitted that the provisions relating to the making of area agreements should not be viewed only with the objective of facilitating the agreement making in the most cost and time effective way for proponents. Counsel for McGlade emphasised that the making of an area agreement may provide for the extinguishment of Native Title at a time in the Native Title process when the rightful common law Native Title holders have yet to be judicially identified and determined. They submitted that the statutory regime has struck a careful balance between providing a mechanism for the making of agreements affecting Native Title as an alternative to the judicial resolution of Native Title claims while also ensuring that these agreements are consensual and voluntary. In the case of area agreements, Counsel for

McGlade submitted that the legislature has provided for protections at different stages of the agreement making and registration process. Counsel for McGlade submitted that there were two levels of protections: the first being the requirement to comply with the authorisation process by claim group members provided for in ss 24CG, 203BE(5) and 24CK of the NTA and the second is the requirement that all persons comprising the RNTC for the agreement area be a party to the agreement. Counsel for McGlade noted that these protections are not present in the case of the other types of indigenous land use agreements, which either do not involve the extinguishment of Native Title or do not involve land or waters that are the subject of unresolved claims to Native Title and submitted that the current protective functions embodied in the NTA for area agreements should not lightly be overridden.

8. While the Court in *McGlade* did not specifically respond to the above submissions, at paragraph 264 of the joint judgements of North and Barker JJ a policy justification for the decision that all RNTC must sign and be a party to an area agreement is provided:

> "If a policy justification for the conclusion we have reached were required, it is readily supplied. If the claim group have generally authorised a number of their group to act representatively as "applicant" for them on the claim, and they are also thereby identified by s 24CD as the persons who must be parties to an area agreement, then it may be concluded that they have a special responsibility under the NTA towards the claim group not only in dealing with the claimant application but also when it comes to agreement making under Subdiv C. Each person in the applicant/claim group must be a party to the agreement and must individually sign the written agreement in cases such as the present. Additionally, the claim group must authorise the agreement, in relation to which the representative body (in this case, SWALSC) bears the important function of certification."

What does the Bill seek to do?

9. For all area agreements made on or after royal assent is given, the Bill empowers a Native Title claim group at a meeting held for the purpose of authorising an area agreement to determine which RNTCs must sign the agreement and/or establish a process for determining which of the RNTCs must be a party to and execute the agreement.[3] Conceivably, the Bill would enable the claim group at such a meeting to set the number of RNTCs who must execute the agreement at less or more than a majority. However, in the absence of such a decision, the Bill provides that a majority[4] of RNTCs must sign the ILUA[5].

10. After royal assent, the Bill also empowers a Native Title claim group to agree to a process of decision making for authorisation of both Native Title Claims and ILUAs generally,

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3 See paragraphs 1 (a) (i) and 5 (2) of the Bill.

4 Interestingly, the Bill does not provide a mechanism for resolving deadlocks and does not state the point in time in the registration process that a majority must be achieved. For example, is it possible for an application for registration to be lodged without a majority of signatures from RNTCs providing such signatures are obtained before a decision is made to register the area agreement. What happens if a RNTC dies after signing but before a registrar makes a decision to register the area agreement? What happens if the RNTCs are changed by an order of the Court under S66B of the NTA after lodgement of an application for registration of an area agreement, will the signatures of the former RNTCs be sufficient?

5 See paragraph 1 (a) (ii) of the Bill.

notwithstanding that a traditional process of decision making may exist.[6] For example, it is quite common for the traditional laws and customs of a Native Title claim group to provide that their elders must make decisions about how their traditional lands are used or to agree to surrender Native Title in any particular area. The Bill will allow the claim group to make a decision to authorise an ILUA to surrender Native Title, notwithstanding that the elders may have said no.

11. For agreements purporting to be area agreements which were made on or before 2 February 2017,[7] the Bill deems them to be and always have been ILUAs and to validate their registration notwithstanding the fact they were not signed by all or even a majority of the RNTCs[8] provided at least one of the RNTCs was a party.[9] It is noteworthy that the application of paragraphs 9 (2) and (3) of the Bill are not contingent upon such agreements being on or remaining on the register. Presumably, the statutory effects as set out in ss24 EA and EB upon validation are intended to be ongoing. If this is the case it would be in direct conflict with the statutory scheme for removal from the register set out in s 199C of the NTA.

12. The Bill deems agreements made on or before 2 February 2017 to be ILUAs and their registration to be valid where there is more than one group of RNTCs and not all the persons who comprise RNTCs have executed the agreement.[10] It is not clear if this section of the Bill is intended to apply in circumstances of overlapping claim group areas, where all the persons who comprise the RNTCs of one distinct group have signed the agreement and those comprising the other group(s) have not.[11] If this is the case, then this section of the Bill directly contradicts s 24CL (2) of the NTA[12] and cuts across the terms of many area agreements which deal with the issue of overlapping claims by reducing the area of the ILUA in the event that the other party will not agree.[13] It is difficult to see the justification for the validation of an area agreement and its registration on the basis that at least one RNTC from one Native Title group has signed an agreement with a proponent when no RNTC from another has similarly signed. Seemingly, this would reward proponents and disadvantage those Native Title groups who have held out for a better deal or have refused to surrender their Native Title. Where there are overlapping Native Title claims, s 67 of the NTA provides an appropriate mechanism for resolving the issue. Any validation of the registration of agreements signed by only one Native Title party should be dependent upon resolution of the dispute in favour of the Native Title party that has signed the agreement. It is also noteworthy that the application

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6 See sections 4 and 6 of the Bill. Interestingly this was not a matter that was in dispute in *McGlade*.

7 This is the date of the decision in *McGlade.*

8 See section 9 of the Bill.

9 The Bill does not say when the RNTC must have been a party. It is not clear whether there must have been at least one RNTC who was a party at the date of registration or at the 2 February 2017.

10 See paragraph 9 (1) (c) (ii) of the Bill.

11 The Bill does not make it clear whether Section 9 (1) (c) (ii) applies where at least on RNTC from **each** group has executed the agreement or whether it refers to the situation where the RNTCs from only one group have signed the agreement and the RNTCs from other groups have not.

12 The Bill does not purport to amend the operation of S24CL (2) of the NTA.

13 For example such clauses appear in the area agreement between QGC limited and the Iman #2 people and also the Bigambul People.

of this provision of the Bill could result in the validation of the registration of agreements where a majority of RNTCs from each Native Title Group has not signed the agreement.

13. The Bill deems applications for registration of area agreements which have yet to be included on the register as valid even though the agreement required to be lodged with the Application for Registration has not been signed by all the RNTCs, providing at least one RNTC has signed it.[14] However, s24CG (2) of the NTA requires only that the application be accompanied by a copy of the agreement. It does not say that when the application is made it must be accompanied by an agreement that is capable of being an area agreement. In light of s 24CG (2) of the NTA and s 9 of the Bill there would appear to be no need for s 10 of the Bill. Further, the Bill appears to validate applications even in circumstances where the accompanying agreement is not signed by any or a majority or any current RNTBCs because some or all of them have been removed prior to registration by the processes of s 66B. The Bill should make it clear that validation of applications is conditional upon an agreement being executed by persons who constitute a majority of persons who are applicants on the day that the registration decision is made. To do otherwise would have the effect of undermining the right of claim groups to change their applicants.

14. The Bill places the burden of compensation for validating area agreements on the Commonwealth. This may shift the burden from the States to the Commonwealth, particularly in circumstances where area agreements provide for the surrender of Native Title. But for the Bill, some area agreements would not be able to be registered and be ineffective in removing or impairing Native Title rights and interests. The Bill may also make the Commonwealth liable to pay compensation for future acts to Native Title holders who were not entitled to receive benefits under an area agreement or who were not involved in authorising the ILUA. Previously, s 199C (1)(b) of the NTA afforded some a level of protection from liability by requiring the removal of an ILUA from the register where the Native Title holders were different from those who authorised an ILUA, with the consequent loss of protection afforded by s 24EB (5). As stated above, the validation provisions of the Bill do not seem to be contingent upon an area agreement being on the register. While the Bill appears to allow payments for compensation from the Consolidated Revenue Fund of the Commonwealth there appears not to have been an attempt to assess potential liability.[15]

Is there a crisis in the Native Title system that justifies the Bill?

15. There have been reports in the press that the decision in *McGlade* potentially invalidates at least 200 agreements.[16] However, to date there has been no systematic evaluation as to how many area agreements are affected. Even if such an assessment were conducted, there is no telling how many area agreements reached over the last six years continue to be relevant in

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14 See section 10 of the Bill.

15 The explanatory memorandum states that the Bill will have a nil or insignificant financial impact on Commonwealth Government departments and agencies. However, it does not give an explanation of the basis for this assertion.

16 See article by Michael McKenna:" Native Title a risk to projects" published in the Australian 8 February 2017.

terms of the conduct of the project or the Future Act they authorise.[17] The experience of the writer is that very few area agreements provide for the surrender of Native Title and that the non-extinguishment principle generally applies.[18]

16. Even if a significant number of relevant area agreements are invalidated by the *McGlade* decision, the NTA provides that the future act is valid to the extent that it affects Native Title if, at the time the act was done, details of the agreement are included on the register.[19] It would therefore appear that there is little if any need for Part 2 of the Bill.

17. Further, the NTA restricts the grounds for removal of an ILUA from the register. Where the parties do not consent or the Registrar is not satisfied that the ILUA has expired, the basis for removal is where the determined Native Title holders have not authorised it,[20] or where at the time of entering the agreement a party was affected by fraud, undue influence or duress.[21]

18. It is unlikely that the removal from the register of any of the area agreements affected by *McGlade* could be justified on these grounds.

Unanticipated consequences of the validation provisions of the Bill

19. Some of the consequences of the Bill have already been touched on above. However, a serious consequence for the native title system is the potential of the Bill to prevent the effective operation of S199C (1)(b) of the NTA through validating area agreements, whether or not they are on the register. Section 199C (1)(b) provides a mechanism for removal of area agreements from the register where a court later determines that Native Title in the area covered by the agreement is held by somebody other than the people who authorise it. This is a common occurrence for two reasons. Firstly, as a Native Title claim progresses, expert evidence better informs the applicants as to the identity of the persons who held Native Title at sovereignty and the identity of their successors and the boundaries of the country that they traditionally occupied. [22] It is the exception rather than the rule that the description of the claim group for the Native Title claim is not amended between lodgement of a claim and the determination of Native Title. Secondly, area agreements by definition are authorised by the claim group at a time when the Native Title process has not been completed. The consequence of this is that irrespective of *McGlade* there are many area agreements on the register that are liable to be removed post a determination of native title. The consequence of the Bill is that it validates area agreements (and possibly the extinguishment of Native Title rights and interests) without considering whether the agreement was authorised by the persons who are to later become the determined Native Title holders. This could lead to the absurd result that persons who are not Native Title holders surrender Native Title which is not theirs to give away (and presumably are paid benefits for doing so).

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17 Area agreements in this category are liable to be removed from the register in any event. See S190C (1) (c) (i). of the NTA.

18 See s24EB (3) of the NTA

19 See s24EB (1) and (2) of the NTA

20 See s199C (1) (b)

21 See 199C (2) and (3)

22 It is common for aboriginal people to assert connection to country on the basis of a historical physical association sometimes going back many generations rather than a traditional connection.

20. On the assumption that an area agreement is signed by only one person who was a RNTC at the time of making an application for registration, another consequence of the Bill is that it negates any order of the Court under s 66B of the NTA to change the RNTC. The result could be that an agreement is deemed to be an area agreement despite the fact that, at the time of registration, it is not signed by a person who is a RNTC. Further, despite the fact that a person is no longer authorised by the claim group to perform the functions of a RNTC, it is that person and not the current RNTC which is a party to the area ILUA. This could have serious consequences for claim groups where the ILUA itself gives that Native Title Party a privileged role in nominating which entity is to receive benefits or sit on committee (such as cultural heritage committees). The importance of s 66B as a mechanism to allow a claim group to call to account the behaviour of RNTCs in the context of area agreements was emphasised by Mortimer J at paragraph 506 of *McGlade:*

> "I do not consider this approach departs from the proposition that, in the making of an ILUA, the members of the Native Title claim group have "ultimate authority": see Far West Coast Native Title Claim at [59] (Mansfield J); Daniel at [16] (French J). They have that authority in two ways. First, by their decision whether to retain or remove the representatives they have earlier chosen, and to use s 66B if they choose to remove them. Second, by their participation in the area ILUA authorisation for which s 251A provides, and the methods they, together with any other participating Native Title claim group, subscribe to for the purposes of s 251A(b), assuming there is no traditional decision-making process common to all the claim groups which must be followed."

21. It is noteworthy that the Court in *McGlade* referred to s 66B as an appropriate mechanism available to the claim group if it is dissatisfied with a refusal of the RNTC to execute an ILUA. The use of s 66B has been criticised because of the expense and effort involved in holding a meeting of the claim group. However, a meeting of the Native Title claim group is required to authorise an area agreement in any event. Apart from the reasoning of Reeves J in *Bygrave No 2*,[23] there is no reason why under the existing statutory scheme a meeting of the claim group cannot be held for the purposes of both determining whether to authorise an ILUA under s 251A and to authorise under s 251B a replacement Applicant for the purposes of s 66B (in the event that any RNTC defies the wishes of the Native Title claim group regarding the execution of the area agreement). There is support in *McGlade* against the view expressed by Reeves J that there is a strict delineation between the functions of an RNTC in the conduct of a Native Title claim and that performed when negotiating an ILUA.[24] It is submitted that this reasoning is equally applicable to the calling of claim group meetings. As it involves the same group of people, there is no conceptual reason why an authorisation meeting must be called for a single purpose (either authorising an area ILUA or authorising the Applicant to act).[25]

22. As demonstrated by the case studies below, especially in relation to the Wangan and Jagalingou people, the Bill has the potential to nullify the ability of the claim group to exercise

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23 See *Bygraves No2* at [117]-[118]).

24 See *McGlade* at par 493 per Mortimer J.

25 This view is conditional upon clear notice being given of the different functions of the meeting.

control over their RNTCs under s 66B. It is submitted that this is not a desirable or intended outcome.

Case Studies

23. We can see the consequences of the Bill by looking at the case studies below.

Iman # 2 people

24. The area agreement in the decision in *Bygraves No 2* was between the Iman #2 People and QGC Limited ("the ILUA"). The ILUA sought to provide financial and other benefits to the claim group with respect to the Iman #2 Native Title claim (QUD 6162 of 1998) ("the Iman Native Title Claim") in return for their consent to a project that involved the extraction of coal seam gas in central and southern Queensland. The development phase is now complete and the extraction phase of the project is now being undertaken. The ILUA was over an area which corresponded to the area of the Iman Native Title Claim.

25. The ILUA did not provide for the surrender of Native Title.

26. The claim group description for the Iman Native Title Claim at the time of registration and authorisation of the ILUA in 2010 were the descendants of:

> Mary Arwa, Jim Waterton, Nellie Dunn, Maggie Dun, Sarah Langford, Lizzie Palmtree, Eliza Shields, Maggie Palmtree and Cissy Henry.

The RNTCs were Russell Tatow, Patrick Silvester, Cynthia Kemp, Eve Fesl, Troy Noble, Fred Tull, Fergus Waterton , Richard Doyle and Madonna Barnes.

27. The ILUA was authorised by the descendants of the claim group as it was then and signed by all the RNTCs except Madonna Barnes. Whether Madonna Barnes was required to sign the ILUA for it to be registered was the subject of the decision of Reeves J in *Bygraves No 2.*

28. After the decision in *Bygraves No 2* the following events happened in relation to the Iman Native Title Claim of the Iman #2 people:

- Firstly, as a result of orders under s 66B of the NTA, Madonna Barnes was removed as an RNTC along with Russell Tatow, Troy Noble, Fred Tull and Fergus Warterton, and replaced with ten other people as RNTCs.
- Secondly, the claim group description was radically amended. Of the original nine descent groups that authorised the ILUA only five remained as members of the claim group and five new descent groups were added to the claim group that authorised the ILUA.
- Lastly, on 23 June 2016, Reeves J made a determination of Native Title over the ILUA area in favour of the Iman #2 people described as the descendants of:

> Mary Arwa; Jim Waterton; Ada Robinson; Maggie Palmtree; Lizzie Palmtree; Eliza Shields; Mary Ann (mother of Maggie Dunn); Fanny Waddy/Sandy; Dick Bundi/Bundai and Alice Dutton; and the mother of John Serico (known as Aggie).

29. Of the original Native Title Parties to the ILUA only four remained (Madonna Barnes was never a Party to the ILUA because she did not sign) and by the time of the Native Title Determination ten RNTCs were not parties to the ILUA. As part of the determination of Native Title in favour of the Iman #2 People, a Registered Native Title Body Corporate was established to hold the Native Title as Trustee for the Iman People with a Board of Directors who were composed of different individuals again.

30. In addition, the determined Native Title holders were substantially a different group of people than those who authorised the ILUA. Only five of the descent groups who were determined to be Native Title holders for the ILUA area had authorised the ILUA.

31. There are a number of observations that can be made from the events described above:

- Firstly, in respect to the refusal of Madonna Barnes to sign the ILUA, irrespective of the decision in *Bygrave No2,* the claim group took matters into their own hands and removed her as a RNTC for the Iman #2 Native Title claim.[26] In *McGlade,* at par 287*,* the Court made the following comment:

  > "While a person or persons are persons in the Native Title group, as defined, they must be parties to the agreement, and must sign the agreement if it is to be registered. **If they are effectively removed from the persons jointly comprising the applicant by an order made under s 66B, however, their signatures will no longer be required**. (emphasis added).

  The question of the timing was also considered in relation by the Court in *McGlade* at paragraph 271 in the context of an individual RNTC who did not sign the area agreement until after the application was made:

  > "In relation to WAD139/2016, where one of the persons comprising the registered Native Title claimant, Mr Morich, had not signed the ILUA at the time the registration application was made, but has done so since, it might be accepted that, at the time of the application for registration, the ILUA was an agreement that failed to meet the description of an indigenous land use agreement (area agreement) in s 24CA. However, because it has been signed at a time before registration has been completed, that impediment has been removed. In any event, as a matter of discretion, the Court should not grant the relief sought solely because Mr Morich had not earlier signed the ILUA. He has since plainly indicated, by signing the agreement, that he intends to make the agreement with the other parties. Although the relief sought in WAD139/2016 should be granted for the other reasons discussed above, it should not be granted on this basis."

[26] This was possibly the reason why there was no appeal from the decision in *ByGrave No 2*

This suggests that even when a RNTC executes or is removed after the event of registration a court will look to the intention of the parties and (the Native Title claim group) prior to granting an application for relief. [27]

- Secondly, due to changes in the composition and number of the applicant that occurred prior to the determination of Native Title for the Iman #2 people, the ILUA could not be said to have been signed by a majority of RNTCs (four out of fourteen). While this does not prevent it meeting the threshold requirement for validation as set out in s 9 (1)(d) of the Bill, it does seem objectionable that such validation occur when most of the parties to the ILUA were no longer authorised by the claim group to act as an RNTC.

- Thirdly, at the time of commencement of the Bill, as a determination of Native Title has been made for the Iman #2 people there are no RNTCs. Arguably the ILUA does not in any case meet the conditions for validation set out in s9 (1)(d) of the Bill.

- Lastly, taking into account the changes to the claim group description that took place during the six years between the time that the ILUA was authorised and the determination of Native Title, it appears the ILUA falls within the category referred to in s 199C of the NTA. To the extent that the Bill seeks to validate the ILUA in circumstances where it is liable to be removed from the ILUA it runs contrary to public policy for the provision. Rares J in *Weribone on behalf the Mandandanji People v State of Queensland* [2013] FCA 255 at par 66 articulated that policy:

  > "Where there is a real and live controversy that at a final hearing it may not be the correct applicant, the mere fact that one party may be able, procedurally, to satisfy the Court that it is entitled, for the purposes of conducting the proceedings, to be the applicant, may not be sufficient to enable that party, to the detriment of the Native Title claim group, to use its interim status as the applicant to take advantage for itself or its associates of rights under the Act or rights that that party can assert as a result of a status under the Act, that are intended for the benefit of whoever may be found at trial to be the claim group. Those rights were not intended to be conferred beneficially on the particular membership of the applicant or its associates for the time being. Rather, the Act intended that a determination of Native Title would benefit the claim group by recognising their continued rights to land and waters and permitting them, not a mere procedural intervener who was subsequently displaced, to benefit from their Native Title rights and to retain or obtain control over rights that had been acquired earlier by virtue of the applicant's status as the party bringing proceedings for that determination."

Bigambul People

[27] Having regard to s 199C, it is by no means certain that an application can be made for the removal of an area agreement from the register on the basis that all RNTC are not parties to the ILUA and if such an application were possible who would have standing to make it.

32. The Bigambul People are the Native Title claim group who were the subject of the decision of Reeves J in *QGC Pty Limited v Bygrave* ("Bygrave No 3").[28] This decision involved a contest between the Bigambul People and the Kamilaroi/Gomeroi People, a competing Native Title group. The Bigambul People were the applicants in a registered Native Title Claim (QUD 101 of 2009) ("the Bigambul Native Title Claim") over the area of the proposed area agreement and the Kamilaroi/Gomeroi People were not. In *Bygrave No 3*, Reeves J did not follow the decision of Branson J in *Kemp v Native Title Registrar*[29] ("*Kemp*") in which her honour found that all groups who claimed to hold Native Title in the area of an area agreement were required to authorise an ILUA unless their assertions were "merely colourable". Justice Reeves in *Bygrave No 3* found that only claim groups with a registered Native Title claim were required to authorise the ILUA. Both *Bygrave No 3* and *Kemp* are decisions of a single judge. To date, there has been no decision on point (or even seriously considered dicta) from a higher authority. Further, the decision of *Bygrave No 3* has been criticised by some legal commentators.[30]

33. Paragraph 5 of the Bill purports to amend s 251A of the NTA, by allowing the Native Title claim group to nominate one or more RNTCs to be party to the ILUA. However, the Bill does not seek to amend that section to make it clear that when there are competing Native Title claim groups, only those with a registered Native Title claim are entitled to authorise an area agreement, nor does it seek to amend s 24CG (3)(b) and s 203BE (2) which provide that area agreements must be authorised by all person who hold or may hold Native Title in the agreement area whether or not they are members of the claim group for a registered Native Title claim. It would seem that the Bill places too much reliance on the authority *of Bygrave No 3*. If *Bygrave No 3* is not followed, the effectiveness of the Bill will be undermined in circumstances where other persons who are not part of the claim group of a registered Native Title claim also assert traditional interests in the agreement area. In such circumstances s 24CD (2)(c) of the NTA would apply and any person who claims to hold Native Title in the ILUA area would need to be a party to the agreement area or the representative Aboriginal/Torres Strait Islander body[31] for the area would need to be a party and sign the area agreement.

34. Prior to the decision in *Bygraves No 3* an area agreement was authorised between the Bigambul People and QGC Pty Ltd ("the Bigambul ILUA").

35. The Bigambul ILUA covered an area of approximately 21,500 square kilometres in southern Queensland. The Bigambul ILUA did not provide for the surrender of Native Title. It provided benefits to members of the Bigambul Native Title claim group in return for consent to future acts associated with a project involving the extraction of natural gas from the Surat Basin in southern Queensland and transporting it via a pipeline to Curtis Island near Gladstone for processing into liquefied natural gas for export overseas.

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28 [2011] FCA 1457; 199 FCR 94

29 [2006] FCA 939; 153 FCR 38; 58 ACSR 169

30 See "Bigambul Bygrave: uncertainty in the law of authorisation of Indigenous land use agreements" by Mark Geritz and Tosin Aro (1 May 2012) published on the web site of Clayton Utz Lawyers.

31 See section 253 of the NTA.

36. The authorisation meeting was held on 12 December 2009. It was attended to by 139 persons who asserted that they held Native Title rights and interest in the lands and waters covered by the Bigambul ILUA. The majority of those in attendance (75) were members of the claim group for the Bigambul Native Title Claim. Prior to the passing of the resolution to authorise the ILUA, between 40 and 50 people walked out of the meeting in protest. Most of those persons were Kamilaroi/Gomeroi People.[32]

37. At the time of the meeting to authorise the Bigambul ILUA there were seven RNTC for the Bigambul Native Title Claim. One of those RNTCs (George Hopkins) refused to sign the ILUA. As a result, an authorisation meeting of the claim group was called to consider replacing the RNTC with persons who were prepared to sign the Bigambul ILUA. This authorisation meeting was held on 5 June 2010 and it resolved to replace the Bigambul RNTC and directed that an application be made for appropriate orders under s 66B of the NTA.[33] This application was made on 15 July 2010. On 16 July 2010 George Hopkins signed the Bigambul ILUA.

38. On 22 July 2010, the application for registration of the Bigambul ILUA was made. On 17 September 2010, Justice Reeves brought down his decision in *Bygrave No 2,* however, as the ILUA had already been signed by all the RNTCs, the principles outlined in that decision had no application to the parties to the Bigambul ILUA.

39. On 15 December 2010, Justice Collier brought down her decision and ordered, under s 66B of NTA, that the RNTCs on the Bigambul Native Title Claim be replaced by those who were authorised at the claim group meeting of 5 June 2010. However, although the Bigambul ILUA was not entered on registered until after Reeves J brought down his decision in *Bygrave No 3* (16 December 2011) the change in the RNTCs did not affect its registration because the Bigambul ILUA had also been signed by the replacement applicants.

40. The events relating to the registration of the Bigambul ILUA demonstrate that the changes to s 251A embodied in the Bill are unnecessary and would if implemented cut across the right of the claim group to hold their RNTCs to account by utilising the existing processes under s 66B of the NTA.

41. Because the Bigambul ILUA was signed by all the RNTCs the validation provisions of the Bill will not apply.

42. It is noteworthy that that on 1 December 2016, Reeves J handed down his decision granting the Bigambul people Native Title over an area that included the land and waters of the Bigambul ILUA. In the determination, the Bigambul people were described differently to those who had authorised the Bigambul ILUA: one descent line had been completely removed and others had been described by reference to different ancestors. Arguably therefore s 199C (1) (b) of the NTA may also have application to the Bigambul ILUA.

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32 See par 18 of *Bygraves No3.*

33 Initially a resolution was proposed which would remove only George Hopkins, however the meeting resolved to replace other RNTCs who even though they had signed the Bigambul ILUA abstained in the vote to criticise him for not signing the ILUA.

Wangan and Jagalingou People

43. The Wangan and Jagalingou people first lodged their Native Title claim (QUD 85/2004) on 27 May 2004 ("the W and J Native Title claim"). The claim group description for the W and J Native Title claim was amended on the claim group description on 14 August 2014. The amendment greatly expanded the number of descent groups who were part of the claim group description and changed the way the existing descent groups were described. This change has caused controversy amongst members of the claim group and the State of Queensland ("the State") has confirmed inconsistencies exist in the evidence provided to date in relation to the:

    (i) application or group name or descriptor;

    (ii) claim area boundaries; and

    (ii) group composition or membership of the claim group.

44. The RNTCs have sought more time to provide further lay and expert evidence to satisfy the concerns expressed by the State. The Court has given them until 19 May 2017 to do so. The Court has ordered that by 7 July 2017 the State provide notice if it is prepared to enter negotiations for a consent determination of Native Title or whether it is of the view that the proceeding should proceed to a hearing. The Court has further listed a case management hearing for 21 July 2017 to settle programing orders for a trial commencing in March 2018.

45. In addition, the RNTCs for the W and J Native Title claim have been amended by orders of the Court pursuant to s 66B of the NTA on a number of occasions.[34] Currently there are 12 RNTCs each representing a particular descent line. On 14 May 2016 an application was made to further amend the RNTCs pursuant to s 66B of the NTA. The application was prompted by decisions of individual family descent lines to replace their representative RNTCs who had against their wishes participated in negotiating an area agreement with Adani Mining Pty Ltd ("the Adani ILUA"). The application was heard by Reeves J on 29 November 2016. On 16 February 2017, the Court granted leave to the parties to file further submissions relating to the issue of whether *McGlade* increases the scope of a claim group to remove a RNTC because he or she is no longer authorised or has exceed authority. *Bygraves No 2* was authority for the proposition that a RNTC could not be removed under s 66B of the NTA where the claim group did not approve of its conduct relating to the negotiation of an area agreement as it did not relate to the conduct of a Native Title claim.

46. It is against this back drop that the Wangan and Jagalingou people have been involved in the negotiation of an area agreement with Adani Mining Pty Ltd ("Adani"). Adani intends to establish a large coal mine and associated infrastructure in the Galilee Basin of Central Queensland which is wholly within the area covered by the Native Title Claim ("the Mining Project"). In order to obtain approval by the State for the Mining Project, Adani requires the

[34] See orders made on 7 August 2014 and 21 August 2015.

extinguishment of Native Title rights and interests in up to 2,750 hectares of land located in an area designated by Adani as a surrender zone for the Mining Project.

47. The Adani ILUA has been controversial within the claim group for the W and J Native Title Claim. There appears to be three reasons for this. The first is that the ILUA requires the claim group to agree to surrender Native Title in an area where most of the Native Title rights and interests for the claim group have already been extinguished. Secondly, the Adani ILUA requires the claim group to consent to the Mining Project which we understand will involve the largest thermal coal project in the world. The claim group for the W and J Native Title claim is divided as to whether this is a good thing. Members of the claim group have expressed very strong concerns about the effects of the Mining Project upon their traditional culture and the environment. Others have expressed misgivings that the benefits offered in the Adani ILUA do not adequately compensate the claim group for the effects upon their Native Title and the disruption it will cause to their traditional culture. Concerns have also been expressed that the so called "business opportunities" that have been proposed by Adani as an incentive for claim group members to authorise the Adani ILUA have not been subject to an independent business feasibility study, are overstated and largely illusory.[35] Lastly, there has been a great deal of anger within the claim group about the way Adani has pushed for the Adani ILUA to be authorised by the claim group for the W and J Native Title claim.[36]

48. The claim group for the W and J Native Title claim has on three occasions voted against authorising the Adani ILUA (December 2012, October 2014 and March 2016). After the claim group meeting of March 2016, Adani organised a further meeting for April 2016 seeking to have the ILUA authorised ("the April Meeting"). Significantly this was not a meeting of the claim group for the W and J Native Title claim alone. The meeting was open to any aboriginal person who asserted that they held Native Title rights and interests in the Adani ILUA claim area, whether or not they were members of the claim group for the W and J Native Title claim. The meeting was called, organised and paid for by Adani. Adani paid for travelling and accommodation costs for people to attend and in many instances these costs exceeded the actual costs involved in attending the meeting. Significantly, for past meetings of the claim group for the W and J Native Title claim, travel costs and expenses were not paid. An analysis of the attendance register for the April Meeting shows that 60.64% of those who attended were not recorded as attending any prior meeting of the Wangan and Jagalingou claim group. Allegations have been made that the April Meeting was composed of a "rent-a-crowd" of persons who had never previously identified as Wangan and Jagalingou people.[37]

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35 A contract relating to provision of catering services for construction camps that was entered into by another proponent with a neighbouring Native Title claim group resulted in a financial loss to that claim group of an amount of approximately $3 million dollars (which came from Native Title compensation monies). This contract was entered into without a feasibility study being conducted or an assessment of the capacity of that claim group to fulfil that contract in a financially responsible manner. The result was the business entity of the claim group was wound up and liquidated and the properties put up by the claim group as security for a business loan were sold up when the mortgagee foreclosed.

36 These issues have been raised in submissions to the National Native Title Tribunal objecting to the Application to Register the Adani ILUA.

37 Evidence and submissions have been made on this point to the Registrar of the National Native Title Tribunal by objectors to the application to register the Adani ILUA.

49. Those in attendance at the April Meeting purported to pass the following resolution authorising and directing all the RNTCs for the W and J Native Title claim to sign the Adani ILUA.[38]

50. On the day of the April Meeting (16 April 2016) seven of the twelve RNTCs signed the Adani ILUA. The remaining five RNTCs did not attend the April Meeting and did not sign the Adani ILUA.

51. Adani lodged the application to register the Adani ILUA on 27 April 2016. The agreement accompanying the Application was signed by only seven of the twelve registered RNTCs.

52. The Application was advertised with a notification day of 22 June 2016. Objections to the registration of the Adani ILUA were lodged by the five RNTCs who did not sign the Adani ILUA and those persons who were the subject of the s 66B application to replace those RNTCs who supported the Adani ILUA.

53. A decision to register the Adani ILUA has yet to be made by the National Native Title Tribunal (the NNTT).

54. As things stand, if the Court makes the decision to change the Applicant, the Adani ILUA will not have been signed by a majority of the RNTCs.

55. Again, this highlights the potential of the Bill to cut across decisions of the claim group to exercise control over their appointed RNTCs. The situation could arise where an area agreement is registered even though it has not been signed by a majority of RNTCs and where the claim group has made a decision to change the composition of the RNTCs. One solution to this might be for the Bill to be amended to prohibit the Registrar from making any decision under s 24CJ of the NTA until the Court has decided any application under s 66B of the NTA filed before the end of the notification period.

56. As mentioned above, the Court has set down a hearing date at which it will be determined whether Native Title exists in the Adani ILUA area and if so who holds it. The purpose of area agreements is to prevent proponents from suffering delays while the Native Title determination process is in progress. However, the main drawback with an area agreement is that there is no guarantee the claim group that authorises it will ultimately be determined by the Court to be the Native Title holders. We have already alluded to the circumstances of the Iman and Bigambul people above. Because of this, the parliament should be cautious about validating area agreements which would, apart from the Bill, be invalid and of no effect. This is especially so where an area agreement (such as the Adani ILUA) provides for the surrender of Native Title. The Bill may have the effect of legitimising an area agreement by which a group of persons agree to surrender Native Title which is ultimately determined by a court to belong to somebody else. It would be prudent for there to be a prohibition in the NTA against the registration of area agreements where a court has set a hearing date for the determination of Native Title. After the determination date, the correct Native Title holders will be known and

[38] The resolution was resolution 4 of the April Meeting.

the proponent is able to negotiate a body corporate agreement as provided by s 24BA of the NTA.

57. As alluded to above the holding and the conduct of the April Meeting upon which the authorisation of the Adani ILUA is based is controversial within the claim group. Objections against the registration of the Adani ILUA have been made alleging that the April Meeting was not a meeting of the Native Title claim group, the information provided was not presented in a fair and balanced way and that the meeting was unduly influenced by Adani. In the circumstances, the parliament should not validate the Adani ILUA as it will be seen to be approving of these circumstances.

Will the Bill be effective?

58. The Explanatory Memorandum states that the purpose of the Bill is to resolve the uncertainty created by the Full Federal Court decision in *McGlade*.[39]

59. The Bill seeks to address the consequences[40] but not the underlying rationale for the decision in *McGlade*. As a result, whether the Bill is passed or not, the uncertainty will persist.

60. It is noteworthy that the Bill does not seek to amend s 61 (2)(c) or s 62A of the NTA. Section 61 (2)(c) of the NTA provides that where more than one person is authorised to make a Native Title application, those persons are jointly the applicant. Section 62A of the NTA provides that the applicant is empowered to deal with all matters arising under the NTA, including entering into agreements for future acts and the surrender of Native Title.[41]

61. The effect of these provisions of the NTA is discussed by Mortimer J in *McGlade.* After reviewing the statutory scheme for placing applicants on the register as RNTCs he concludes at paragraph 362 that:

> "These provisions support a view of the scheme as one intending that the individuals who constitute an applicant/registered Native Title claimant are a collective and singular representative entity; and any person needing or wanting to deal with land or waters covered by the particular claim knows reliably with whom they need to deal as representatives of those claiming to hold Native Title rights and interests. As individuals, they have no role and no status under the Act, beyond the role and status they share in common with every other member of the Native Title claim group."

And at paragraph 386 Mortimer J goes on to state:

> "As the analysis of the statutory concepts of "applicant" and "registered Native Title claimant" demonstrates, no division is possible between the individuals who constitute the applicant or registered Native Title claimant, and those statutory entities themselves. To do so is to treat them as if they were separate legal entities with separate capacity.

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39 See paragraph 1 of the Explanatory Memorandum.
40 See paragraph 5 of the Explanatory Memorandum.
41 See paragraphs 447 to 451 of *McGlade.*

> That is not the scheme the NT Act has established. The individuals, jointly, are the entity, which itself has no legal capacity. The Act operates on a structure of individual claim group members being representatives of the whole group, and having been properly authorised to perform that role. Where there are five named individuals, only those five named individuals, and not two, three or four of them, constitute an applicant/registered Native Title claimant."

62. The view expressed by Mortimer J appears to be accepted as orthodoxy by the authorities: [42]

As noted in the joint judgement of North, Barker in *McGlade*:

> "The States concedes that, as observed by the applicants, there are decisions of this court in the context of actions taken in Native Title claimant applications, to the effect that an applicant comprised of a number of people is required to act unanimously."[43]

63. The consequence of this authority is that no one individual RNTC can act in a representative capacity alone. The fact that one or more of RNTCs consent to sign a document is irrelevant; their signatures on a document do not make it an agreement binding upon them as representatives of the claim group nor can it purport to bind the other RNTCs who have not signed it. The very real question arises as to whether any arrangement negotiated by proponents that is not supported by all the RNTCs can be described as an agreement at all.

64. Further, on the authorities, it is by no means clear that s 251B of the NTA permits the Native Title claim group to authorise the applicant to act by majority, notwithstanding the s 61(2) requirement that the applicant act "jointly" and s 62A of the NTA. The authorities appear to be divided on this question.[44] The matter was not decided in *McGlade* although Mortimer J was inclined to agree that the statutory scheme of the NTA prevented the RNTCs acting by majority.[45]

65. The provisions of the Bill are therefore in conflict with s 61 (2)(c) or s 62 A of the NTA. At the very least they create a confusing dichotomy between the conduct of a Native Title claim and the area agreement provisions. It is clear though that the existing statutory process requires all the RNTCs to consent in order to be bound by agreements as representatives of the claim group. Further, the Bill does not change this position. While the Bill may relax the provision as to who may be considered to be a party to an area agreement, it does not alter the fact that agreements which seek to bind the RNTCs in their representative capacity must be made by all the RNTCs.

66. Section 9 of the Bill seeks to validate agreements made on or before 2 February 2017 which purport to be area agreements provided that at least one RNTC was a party to the agreement

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42 See Tigan and Others V Wester Australia (2010) 188 FCR 533, [2010] FCA 165 at [28] and Weribone and Others v Queensland and Others (2011) 197 FCR 397, [2011] FCA 1169 at [20] to [22]

43 At paragraph 200 of *McGlade*.

44 See *Anderson v Queensland* [2011] FCA 1158; 197 FCR 404 at [62] (Collier J); *Far West Coast Native Title Claim* at [50]-[54] (Mansfield J). In *KK v Western Australia* [2013] FCA 1234 *Cf Tigan v Western Australia* [2010] FCA 993; 188 FCR 533 at [28] (Gilmour J); *Gomeroi People v Attorney-General of New South Wales* [2016] FCAFC 75; 241 FCR 301 at [176]-[177] (Bromberg J).

45 See paragraphs 435 to 438 and especially 439 in *McGlade.*

and whether they are on the register or not. However, in light of the above authority the question that arises is whether one RNTC can be considered to be a party to an agreement and whether any document that has been signed by fewer than all the RNTCs can ever be characterised as an agreement.

Free and Informed consent

67. We have outlined above the different policy considerations in *McGlade*: Mortimer J emphasised the provisions relating to the protection provided by the NTA inrequiring RNTCs to be parties to an area agreement:

> "I accept that the terms of s 10 of the NT Act are important, and the applicants are correct to emphasise that s 10 discloses the NT Act has as one of its purposes the protection of Native Title. Of course, the protection which is afforded is, as s 10 states, protection "in accordance with" the NT Act, not despite it, or inconsistently with it. This engages the myriad of compromises which are found in various parts of the legislative scheme, where Parliament has addressed the competing interests affected by the recognition of Native Title. In my opinion, one aspect of 'protection' of Native Title is the relatively prescriptive set of provisions dealing with the constitution and identification of an applicant/registered Native Title claimant, and the mechanisms to change the constitution of those entities. These provisions ensure the NT Act's emphasis on representation through express authorisation is maintained, and no overriding of minority, sectional or special interests occurs unless the whole of the Native Title claim group authorises such an approach in accordance with the processes in s 251B."[46]

68. The focus of the Bill is to change the balance of protections embodied in the NTA away from requiring all RNTCs to consent to an area agreement. In the case of agreements reached before 2 February 2017, only one RNTC is required to agree. Whether this is appropriate in cases where area agreements surrender Native Title is open to question. One would have thought that where area agreements have such drastic consequences for future generations of Native Title holders, parliament should require a higher standard.[47]

69. However, it is fair to say that the Bill places weight on the authority of a claim group (rather than RNTCs) to approve an area agreement and to specify which RNTC must sign it. There are dangers with this approach which emanate directly from the fact that at the time an area agreement is authorised the true Native Title holders have yet to be judicially determined. As we have emphasised above this could result in a meeting authorising the surrender of somebody else's property rights.

70. In relation to the Wangan and Jagalingou people we have outlined some of the concerns raised by members about the way that April Meeting to authorise the Adani ILUA was conducted. The primary concern was that it was overwhelmingly attended by persons who had never before shown an interest or been involved in the affairs of the Wangan and Jagalingou people.

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46 *McGlade* at par 354

47 In corporate law matters affecting member's rights require special resolutions of 75 percent of members or court approved general meetings and where ownership rights are affected court approved general meetings are required.

This is not the first time that allegations have been levelled at proponents of mining projects about the tactics they have employed to obtain the consent of Native Title holders to area agreements.[48]

71. A criticism of the Bill is that while it places increased emphasis on a decision of the claim group to authorise an area agreement (and removes the protective step of the RNTCs having to agree and exercise independent judgement), it does not put in place any preventative measures to ensure that the consent given is by the right people and that this consent is free and informed.

72. The existing provisions in the NTA which allow for objections and comment prior to registration of an area agreement are narrow and reactive.[49] They do not allow for pro-active steps to be taken to ensure that the authorisation process is fair.[50]

73. It is submitted that the Bill should provide for judicial supervision of the conduct of meetings to authorise an area agreement. A proponent should be required to establish to the satisfaction of a court that:

(a) the descendants from pre-sovereignty aboriginal society who continue to identify as Native Title holders for the agreement area have been ascertained;

(b) reasonable steps will be taken to ensure that only those persons participate in the process to authorise the area agreement;

(c) payments made by the proponent to facilitate the negotiation of an area agreement have been fair and reasonable and have not influenced support for the agreement;

(d) seventy five percent of the RNTCs are in favour of calling a meeting of the claim group to consider authorising the area agreement;

(c) the arrangements for the conduct of the authorisation meeting will be independent of the Proponent;

(d) any funding of the meeting by the proponent will not jeopardise the independence of the meeting;

(d) any information presented to the meeting is fair and balanced and the value and the viability of any benefits or contracts to be provided will be independently assessed;

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48 See for example: "FMG accused of bullying tactics in Pilbara Land Battle." W.A. today.com. au Lucy Richard 14 April 2011.

49 S24CI of the NTA allows objections on limited grounds to be lodged to area agreements that have been certified by representative bodies and for area agreements that have not been certified, s24CL (4) of the NTA allows the registrar to take into account "any other matter or thing" in considering whether to register an ILUA. The registrar's decision is not reviewable on the merits but is subject to Judicial Review. The NTA does not provide an avenue for complaint or objections prior to the holding of an authorisation meeting or before an application for registration is made.

50 The NTA is silent on matters such as who may call an authorisation meeting, what steps should be taken to ensure that only claim group members authorise the proposed agreement, who pays for the meeting, who will conduct it, and what information should be put to the meeting and how many times a meeting may be called to discuss the same issue.

(e) the consequences of any agreement to surrender Native Title will be explained;

(f) reasonable steps will be taken to ensure the integrity of any vote to authorise the area agreement; and

(g) the meeting will be conducted in an orderly way and all prospective attendees will be provided with a reasonable opportunity to attend.

74. Where an area agreement provides for the surrender of native title, the Bill should provide that 75 percent of the claim group must authorise it.

75. If a decision has been taken not to authorise an area agreement, there should be a prohibition against a further authorisation process unless a court is otherwise satisfied that it is in the interests of the persons who will be required to authorise the area agreement.