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Senate Legal and Constitutional Affairs Committee  
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## **NATIVE TITLE AMENDMENT (INDIGENOUS LAND USE AGREEMENTS) BILL 2017**

### **Introduction**

BHP Billiton welcomes the opportunity to make a submission to the inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 which responds to the decision of the Full Court of the Federal Court in *McGlade v Native Title Registrar* on 2 February 2017.

BHP Billiton is aware of public comments made by Indigenous stakeholders and industry associations expressing support for the legislative intent behind the Bill. We, in turn, support the intent of the legislation.

BHP Billiton is committed to ensuring that Aboriginal and Torres Strait Islander peoples derive significant and sustainable benefit from our operations through the effective negotiation and governance of land access agreements. To this end, BHP Billiton has entered into Indigenous land use agreements over many of its mining projects across Australia. These agreements are designed in keeping with the principles of seeking free prior and informed consent, self-determination and Indigenous-led decision making.

We submit that the Bill as presently drafted adequately addresses the issues arising from the *McGlade* decision for Indigenous land use agreements and should be passed to provide certainty for all stakeholders.

### **Implications of the *McGlade* decision for right to negotiate agreements**

While we appreciate the issue of primary importance is to address the immediate and significant consequences of the *McGlade* decision for indigenous land use agreements, we also wish to draw to the Committee's attention the possible consequences of the *McGlade* decision for right to negotiate agreements under s 31(1)(b) the Native Title Act 1993 (Cth).

The right to negotiate is an important right afforded to native title parties in relation to the grant of mining and exploration rights over land where native title may exist.

Under this process the negotiation parties, being the miner, the relevant State or Territory government and the native title parties must negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the proposed mining tenement, whether or not on conditions. In areas where native title has not yet been determined, any person who is a registered native title claimant at the relevant time is a native title party for the right to negotiate.

If the parties do not reach agreement after at least six months' negotiation in good faith, then any of the negotiation parties may seek an arbitral determination from the National Native Title Tribunal about the grant of the proposed mining tenement.

Many significant mining projects throughout Australia have, since 1994, delivered substantive benefits to native title parties through the right to negotiate process, even in cases where those parties might not ultimately be found to hold native title.

While the structure and language of the right to negotiate provisions in the Native Title Act differs from the provisions relating to indigenous land use agreements, there is similarity in the requirement to have an agreement with any registered native title claimant in order to satisfy the requirements of s 31(1)(b).

Based on the Full Court's reasoning in *McGlade*, it may be arguable that an agreement with the registered native title claimant for a claim would require execution by all members of the registered native title claimant.

In circumstances where a member or members of the registered native title claimant refuses to sign an agreement under s 31(1)(b), then it is possible, and reasonably common, for the matter to be referred to the National Native Title Tribunal for a determination.

However, miners, native title parties and governments alike have long relied on agreements under s 31(1)(b) in circumstances where a member of the registered native title claimant is deceased and a death certificate is provided.

To address that issue the Bill could be amended to provide for the validation of right to negotiate agreements under s 31(1)(b) in cases where not all members of the registered native title claimant have signed the agreement.

The right to negotiate provisions could also be amended to make it clear that, for future matters, the requirements of s 31(1)(b) are able to be satisfied in circumstances where a member of the registered native title claimant is deceased.

This would remove any doubt about the ability of the registered native title claimant to properly participate in the right to negotiate process.

Without that certainty the native title group may be placed at a disadvantage in the negotiation and an increasing number of matters may be referred to the National Native Title Tribunal for arbitration in order to provide the parties with certainty. We consider this would cause all parties unnecessary cost and delay and undermine the intent of the right to negotiate.

We draw the possible implications for the right to negotiate to the Committee's attention in the event that there is an opportunity to amend the Bill to address the broader implications of the *McGlade* decision.

Yours faithfully

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