Carpentaria Land Council Aboriginal Corporation

Submission to the Senate Legal and Constitutional Affairs Committee

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

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Chief Executive Officer
CLCAC

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SUBMISSION

Senate Legal and Constitutional Affairs Committee

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

1. Introduction

1. This Submission is being provided by the Carpentaria Aboriginal Land Council Aboriginal Corporation (the "**CLCAC**") in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (the "**Amendment Bill**").

2. It is common ground that the decision of the Full Court of the Federal Court in *McGlade v Native Title Registrar* [2017] FCAFC 10 ("***McGlade***") has created uncertainty in relation to Indigenous Land Use Agreements (area agreements) ("**Area ILUAs**") either registered or submitted for registration under Pt. 2, Div. 3 Subdiv. C of the NTA prior to 2 February 2017.

3. The CLCAC supports, in principle, the Government's intent to restore certainty and flexibility to the use of indigenous land use agreements under the *Native Title Act* 1993 (Cth) (the "**NTA**"). However, the CLCAC is concerned that some of the proposed changes are unnecessary and remove safeguards established by the current native title claim group authorisation requirements.

4. In addition, the Amendment Act fails to deal with a number of key issues affecting the ongoing workability of native title agreements entered into under, or arising from, the NTA.

2. Proposed s.24CD(2)(b) is not supported

5. Item 1 of the Amendment Act proposes the insertion of s.24CD(2)(b) into the NTA. This provision establishes a default position that the majority of the persons comprising the registered native title claimant may be the native title party to an Area ILUA if no persons have been nominated or determined by the native title claim group concerned under the proposed s.251A(2).

6. The CLCAC does not support this proposal.

7. The authorisation meeting of the native title claim group should be required to specifically address the question of whether all or some of the persons comprising the registered native title claimant may be the native title party to an Area ILUA. The proposed legislation should provide that express authorisation must be given by the native title claim group to deviate from the requirement that all the persons comprising the registered native title claimant must be the native title party to an Area ILUA.

8. That is, the default position in the NTA should be that all the persons comprising the registered native title claimant must be the native title party to an Area ILUA unless the authorisation provides otherwise. This provides the greatest safeguard for the native title claim group and will ensure that the question of who may comprise the native title party to an Area ILUA is addressed at an authorisation meeting.

3. Complexity of proposed s.251A(2)(b)

9. Item 5 of the Amendment Act includes the insertion of s.251A(2)(b) into the NTA which provides that the native title claim group may:

> (b) specify a process for determining which of the persons who comprise the registered native title claimant for the group is to be a party, or are to be parties, to the agreement.

10. The CLCAC does not support this amendment.

11. The native title party to the Area ILUA should be clearly dealt with and nominated by the native title claim group at the authorisation meeting. Interposing a further process between the authoriation meeting and the nomination of the native title party to an Area ILUA overly complicates the nomination, may lead to evidentiary disputes and is open to abuse and misinterpretation by members of the registered native title claimant.

4. Contractual and Registration Issues

12. Nothing in Pt. Div. 3 or Subdiv. C of the NTA suggests that an Area ILUA is anything in nature but an agreement that would be recognised by the general law.[1] It is not open to argue that s.24EA of the NTA is intended to convert any Area ILUA into a statutory contract.[2]

13. The "parties" to an Area ILUA are parties in their own, individual right.[3]

14. The consent of the registered native title claimant as a party is intended to be the consent of the members of the native title claim group. However the scheme of Pt. 2 Div. 3 Subdiv. C of the NTA is such that the relevant native title claim group is bound by the terms of an Area ILUA by the operation of s.24EA(1)(b) and not under the general law. That is, the members to the native title claim group are bound "as if" the Area ILUA were a contract to which all of those persons were parties, but the members to the native title claim group are unlikely to be actual parties to the Area ILUA under the general law

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1 *McGlade* per North and Barker JJ at [243].

2 *McGlade* per North and Barker JJ at [254].

3 *McGlade* per North and Barker JJ at [252].

because the group is essentially an unincorporated association that does not have the legal capacity to be a party to the agreement.[4]

15. The common law status of an Area ILUA and the clear establishment of the native title party as those members of the registered native title claimant who satisfy the proposed new s.24CD(2)(a) of the NTA pose significant problems where an Area ILUA is intended to operate beyond a short time period. This issue has been growing as the operation of the NTA and agreements associated with it have progressed over the past two decades.

Replacement of a native title party: Register of ILUAs

16. It is not uncommon that the persons comprising the registered native title claimant will change regularly throughout the life of a native title determination application as a result of orders under s.66B of the NTA. The bases for those changes are set out in s.66B(1)(a). This may result in persons who are dead, incapacitated, or unwilling to act as a representative of the native title claim group, and who no longer have the claim group's authority, continuing as parties to an Area ILUA, with possibly a significant ongoing role in the performance of that agreement.

17. Whilst novation may offer a means to replace the native title party to an Area ILUA, there is no process under Pt. 8A of the NTA to simply amend the Register of Indigenous Land Use Agreements to reflect such a change.

18. Part 8A of the NTA should provide a process to simply amend the Register of Indigenous Land Use Agreements where a native title party to an Area ILUA has been replaced.

19. Similarly, if the native title claim group the subject of an Area ILUA proceeds to have its native title determined and a native title body corporate is placed on the National Native Title Register under ss.193(2)(e) or (f) of the NTA, there will be a substantial disjunction between the now unauthorised and unrepresentative native title party[5] to an Area ILUA (with possibly a significant ongoing role in the performance of that agreement) and the common law holders of the determined native title. Such a situation would be made worse upon the death or incapacity of persons comprising the native title party to the agreement. There is no process under Pt. 8A of the NTA to simply amend the Register of Indigenous Land Use Agreements to replace the native title party to an Area ILUA with the registered native title body corporate. It is acknowledged that such a replacement may also require re-characterising an Area ILUA as an indigenous land use agreement (prescribed body corporate agreement) that satisfies Pt. 2 Div. 3 Subdiv. B of the NTA.

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4 *Ex parte Goddard; Re Falvey* (1946) 46 SR (NSW) 289 at 296; *Smith v Yarnold* [1969] 2 NSWR 410; *Peckham v Moore* [1975] 1 NSWLR 353 per Hutley JA held at 363; *Carlton Cricket & Football Social Club v Joseph* [1970] VR 487 per Gowans J at 497.

5 See, for example, s190(4)(e) of the NTA.

Common law difficulties in replacing a native title party

20. There must be contractual intention (express or implied from conduct) and consideration for the common law novation of a contract.[6] Problems are therefore likely to arise in effecting a novation of an Area ILUA to replace a native title party to an Area ILUA, particularly where the agreement does not provide the native title party's consent and it must be subsequently obtained in a separate novation agreement. In circumstances where the persons comprising the native title party to an Area ILUA are dead, incapacitated or unwilling, their replacement by the registered native title body corporate may not be even more difficult to achieve.

21. A statutory mechanism should provide for the replacement of the native title party to an Area ILUA to occur upon the replacement of an applicant under s.66B of the NTA or the registration of a prescribed body corporate under ss.193(2)(e) or (f).

5. The use of Ancillary Agreements

22. Because of the inflexibility of agreements under s.31(1)(b) of the NTA and the inflexibility associated with amending an Area ILUA on the Register of Indigenous Land Use Agreements, it is common practice that registered native title claimants are required to move the majority of the terms of an agreement with a proponent or government party to an ancillary agreement that references a basic agreement that satisfies the requirements of Pt. 2 Div. 3 Subdivs. C or P of the NTA, as the case may be.

23. These ancillary agreements are common law contracts.[7] The native title claim group, as an unincorporated association, does not have the legal capacity to be a party to these agreements: see above at paragraph 14.

24. Ancillary agreements suffer the same difficulties in replacing the native title parties to those agreements as is referred to above at paragraphs 20 and 21, arising from:

    (a) changes in the person comprising the registered native title claimant; and

    (b) the determination of a native title claim and the registration of a prescribed body corporate under ss.193(2)(e) or (f) of the NTA.

25. Legislative provision for this to occur is sought.

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6 *ALH Group Property Holdings Pty Ltd v Chief Commissioner of State Revenue of the State of New South Wales* (2012) 245 CLR 338 per French CJ, Crennan, Kiefel and Bell JJ at [32] & [37]. See also *Olsson v Dyson* (1969) 120 CLR 365 at 389, and in Western Australia, see *Abbott v Hessen* (1913) 15 WALR 80 and *Piero Di Giovanni (T/As Timber Dimensions) v Dark Horse Developments Pty Ltd* [No 3] [2013] WADC 120 at [26].

7 *Karingbal Traditional People AC v Santos* [2011] FCA 1456, per Reeves J at [9].

6. Death, Incapacity or Unwillingness to be an Applicant Member

26. The CLCAC supports the confirmation of the current position in the NTA in relation to death and incapacity or unwillingness to be a member of the applicant under s.61 of the Act. Whilst this is not dealt with in the Amendment Act, the statutory confirmation of this position would assist the workability of the NTA.

27. The current position in the NTA in relation to death and incapacity or unwillingness to be a member of the applicant under s.61 is:

    (a) neither death nor incapacity of an applicant member must generate or require a new authorisation;

    (b) death or incapacity of one of more of the members of an applicant is a ground that the claim group can invoke to authorise a replacement applicant under s 66B(1) of the *NTA*; and

    (c) the earlier authority conferred jointly on the remaining members of an applicant after one or more of them has died or becomes incapable continues when such an event occurs.[8]

28. That is, in the absence of evidence to the contrary, the authorisation of an applicant of a native title determination application is to be understood in the context of the native title claim group recognising the circumstances of one or other of the authorised persons may change, and that one change may involve the death of one or more of the persons named as applicant.[9]

7. Capacity of the registered native title claimant: Pt. 2 Div. 3 Subdiv. P

29. The CLCAC supports the retention of the current position in the NTA in relation to the capacity of the registered native title claimant to enter into an agreement in accordance with s.31(1)(b) of the NTA, as is expressed by Mortimer J in *McGlade*:

> …Other negotiating parties under Subdiv P are entitled to assume, and the scheme is built on the assumption, that the individuals constituting the registered native title claimant will negotiate under Subdiv P in their representative capacity for the claim group. There is no suggestion in Subdiv P they can perform that function by majority decision-making. If they do not share a joint view, the remedy lies in the hands of the claim group in s 66B. …[10]

30. This principle should remain and apply equally to the registered native title claimant's capacity to consent to a determination under s.36 of the NTA.

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8 *FQM Australia Nickel Pty Ltd v Bullen* (2011) 191 FCR 261 per North, McKerracher & Jagot JJ at [33]. See also *Butchulla People v Queensland and Others* (2006) 154 FCR 233, per Kiefel J at [42]-[43] which was cited with approval by North and Barker JJ in *McGlade* at [258] and *Smallwood v Queensland* [2014] FCA 331 at [33].

9 See *Lennon v South Australia* [2010] FCA 743 at [34], cited with approval in *Goonack v State of Western Australia* [2011] FCA 516 at [11].

10 *McGlade* per Mortimer J at [457].

31. The primary basis for maintaining the current position is that there is no provision in Pt. 2 Div. 3 Subdiv P of the NTA for the native title claim group to authorise the registered native title claimant's entry into a s.31(1)(b) agreement or its consent to a determination under s.36. The only safeguard for the native title claim group is the unanimity of the registered native title claimant.

Carpentaria Land Council Aboriginal Corporation