Cape York Land Council Aboriginal Corporation

3 March 2017

Toni Matulick
Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Via Email: ***legcon.sen@aph.gov.au***

Dear Ms Matulick,

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

The attached submission is made to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2017. It is the joint submission of the Cape York Land Council as the Native Title Representative Body for Cape York Peninsula, and related regional organisations, Balkanu Cape York Development Corporation and the Cape York Institute for Policy and Leadership.

Yours sincerely

Richie Ah Mat
Chairperson
Cape York Land Council

Gerhardt Pearson
Executive Director
Balkanu

Noel Pearson
Director of Strategy
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CAPE YORK LAND COUNCIL, BALKANU CAPE YORK DEVELOPMENT CORPORATION AND CAPE YORK INSTITUTE FOR POLICY AND LEADERSHIP

SUBMISSION TO THE SENATE CONSTITUTIONAL AND LEGAL AFFAIRS COMMITTEE

NATIVE TITLE AMENDMENT (INDIGENOUS LAND USE AGREEMENTS) BILL 2017

Summary of position

1. There should not be blanket validation of ILUAs as proposed by this Bill.
2. The McGlade appellants are entitled to their judgment in the Full Federal Court and their case should be exempted from any validation provisions.
3. Consideration should be given to establishing a comprehensive claims settlement process to provide for the supervised conduct of negotiations and the authorisation and settlement of agreements in the form of ILUAs, under an agreements commission function of the National Native Title Tribunal.
4. Comprehensive claims like Cape York's 'One Claim' would benefit from a formal negotiation and agreement-making process such as we propose here.
5. ILUA law reform must include the confirmation that ILUAs are binding upon State Governments and other parties.
6. ILUA law reform must reflect the principle that traditional owners authorise ILUAs, not applicants.
7. ILUA law reform must address unconscionable conduct by third parties to ILUA procedures, so that unnecessary division and acrimony within and between native title groups is avoided.

Introduction

8. The decision in *McGlade v. Native Title Registrar [2017] FCAFC 10 ("McGlade"*) essentially means that all the people who make up the applicant in a native title claim must sign an Indigenous Land Use Agreement ("ILUA") before it can be registered pursuant to the *Native Title Act 1993* ("NTA").

9. The Cape York Land Council ("CYLC") has identified a number of ILUAs within its region that may be impacted by the ruling in *McGlade,* and believes legislative amendments are needed.

10. However the Bill that is the subject of this inquiry – the *Native Title Act (Indigenous Land Use Agreements) Bill 2017* ("the Bill") – is not an appropriate response to the implications of the *McGlade* ruling, and requires proper consideration and amendment. The speed with which this Bill has been produced and the urgency with which it is being urged through the Parliament, is unwarranted and if not properly considered, likely to cause injustice.

11. This submission urges the Committee to recommend amendments to this Bill.

The McGlade appellants are entitled to their judgment

12. The appellants in *McGlade* are entitled to rely on the judgment of the Full Federal Court in their favour. We do not seek to interfere in the dispute that gave rise to this action by McGlade. This is Noongar business, not Cape York business. In taking the position we do, we are taking a position of principle, not a position for or against any party to the Noongar dispute. We admire the Noongar agreement and commend those who have worked hard to secure the rights of native titleholders in the southwest region. However our concern here is that an indigenous party – indeed native titleholders – have secured a judgment in the Full Federal Court, and their judgment should not be reversed by parliament. Their judgment was secured under the existing law, and its implications need to be dealt with as such. If we in Cape York won such a judgment and governments and other parties sought to change the law to deprive us of the judgment – we would find that completely unacceptable. As much as there are reasons to address the implications of the judgment, the appellants in *McGlade* should not be deprived of their judgment as proposed by this Bill.

13. Reference has been made in submissions to the rights of indigenous people under the Declaration of the Rights of Indigenous People ("DRIP") that support the right to self-determination and other standards, in order to justify this Bill. However these same standards apply to McGlade; indeed depriving indigenous litigants of their court judgments would derogate from their rights under DRIP.

14. Reference has also been made to the point that excepting the ILUA which has been struck down by the *McGlade* decision from the intended application of this Bill – and the Adani ILUA in Queensland – would be discriminatory. We don't think this argument is compelling. Making an exception in the case of the McGlade ILUA would appear to provide a balance between the justice of preserving their judgment in the Full Federal Court, and remedying its implications for other ILUAs not concerned with the McGlade ILUA.

Consideration should be given to establishing a Comprehensive Settlements process within the Native Title Act to settle the McGlade ILUA and other like cases

15. Again, we have no right to argue the rights and wrongs of the Noongar ILUA and the effect of the *McGlade* decision. Our argument against peremptory reversal of the Full Federal Court's decision by the Commonwealth Parliament is a matter of principle.

16. However, the proposal we suggest here is put in good faith as a means of addressing the position of the McGlade appellants and the Noongar signatories to the ILUA, and potentially to other like circumstances across the country, such as instances in our own region of Cape York Peninsula.

17. It has often been said that the Noongar ILUA is a form of 'domestic treaty', the closest example we have of the type of settlement found in North America. Those who advocate local treaty agreement-making often point to the Noongar ILUA as Australia's first example. It is fairly (but

not completely) comprehensive in its scope, and it proceeds from the moral and legal foundation of native title.

18. The Committee should consult the Noongar people, their representative body, the Western Australian Government and the McGlade applicants, about establishing an agreement settlement process under the Native Title Act which enables the existing ILUA which has been struck down by the Full Federal Court to be revisited under a 'comprehensive agreement' process supervised by a special Settlements Commission established under the National Native Title Tribunal ("NNTT"). The procedures of the Waitaingi Tribunal and the BC Treaty Commission in Canada should be considered as a mechanism for revisiting the negotiations and seeking a comprehensive settlement that is satisfactory to all parties, including the McGlade applicants. The settlement should be captured in an ILUA under the Native Title Act, as secured by other amendments proposed in this submission.

There should not be blanket validation of ILUAs

19. We are therefore opposed to blanket validation of ILUAs as proposed by this Bill.

20. Whilst validation may be appropriate in respect of ILUAs which do not meet the requirements of the Full Federal Court's decision in *McGlade,* there is a case for treating those ILUAs where the non-signatory applicant/s have objected to the registration of the ILUA by the NNTT, differently.

21. In the latter case, perhaps a fair approach would require as a first step mediation between the non-signatory applicant/s and the signatory applicants and traditional owners by the NNTT, and if the mediation is unsuccessful, then a reconvening of the authorisation meeting under section 251A of the Native Title Act – before the ILUA, if so authorised, is registered. The amended provisions would provide for the ILUA to be registered even in the absence of all signatures provided that it reflects the authorisation of the traditional owners.

22. The principle that traditional owners should have the authority, not the applicants, is correct and should be put beyond doubt in the Native Title Act, and should be the law going forward. It is the retroactive application of this principle such that it would dispossess the McGlade applicants from their Full Federal Court judgment, that we oppose as a matter of principle. They are entitled to rely upon the Full Court Decision, notwithstanding Justice Reeves' contrary interpretation in *QGC Pty Ltd v Bygrave (No 2)* [2010].

23. There are other instances where the jurisprudence of native title has played out contrary to prevailing interpretations and expectations. The most fundamental example was the interpretation taken by the High Court of Australia in respect of section 225 of the Native Title Act, concerning the very definition of native title, in the Yorta Yorta Case[1]. The majority judgments in Yorta Yorta interpreted section 225 entirely against the intentions of parliament and contemporary understandings of its meaning (see Justice McHugh's judgment). This led

[1] *Members of the Yorta Yorta Aboriginal Community v Victoria [2002] HCA 58 12 December 2002*

to profound (and deleterious) implications for native title within Australian jurisprudence, but there was no rush to law reform.

24. The fact that these current ILUAs that are implicated in the wake of the *McGlade* decision concern the interests of governments and industry, explains the alacrity with which law reform is sought. Of course the interests of native titleholders under ILUAs are also implicated, but this should not mean we blindly rush into supporting blanket validation and not seeking a fair balance from law reform.

ILUAs should be secured against all forms of defeasibility

25. All of the focus of the commentary and submissions concerning this Bill has been on the effects on the validity of ILUAs occasioned by attacks from non-signatory applicants. But ILUAs are also vulnerable to defeasibility by the actions of governments, and there is currently no imperative to address this problem. Now is the opportunity to do so.

26. The Stradbroke Island ILUA is a case where the sanctity of the agreement entered into by the Quandamooka traditional owners and the Queensland Government, which was premised upon the scheduled cessation of sand mining on the island, was brought into question by the subsequent actions of the Newman Government, whose policy was to enable sand mining to continue. The question arose as to the primacy of the ILUA versus the actions of the Newman government. The matter was in the process of going to the High Court, before the Palasczuk Government reversed the Newman Government decision.

27. It has always been understood that ILUAs are statutory contracts authorised under Commonwealth law, binding upon governments and other parties. The indefeasibility of ILUAs is the cornerstone of their commercial and legal reliability as an instrument for dealing with native title lands through agreement.

28. The Committee needs to consider amendments that secure ILUAs against governments contradicting them, as was done in the Stradbroke Island case. Otherwise ILUAs will always be subject to over-ride by subsequent government action, making them commercially worthless.

Unconscionable conduct

29. Much is made of the importance of ILUAs to the native title system and indigenous engagement in resource development and other commercial development. ILUAs are certainly an important instrument for commercial engagement by traditional owners in the economy. But the record is not all positive.

30. When the benefits secured under ILUAs are measured against what traditional owners have been obliged to give away, the scorecard is not so great. The Committee should apprise itself of the pros and cons in this respect, in order to have a realistic understanding of the benefits that have been secured under ILUAs.

31. The benefits secured under ILUAs are confined to a proportion of them, and the best shared benefit agreements are an extreme minority of the total.

32. Furthermore, as the Adani case makes clear (and the James Point Price case before it), ILUAs and the processes surrounding them, are highly fraught and traditional owners are pushed and pulled by opposing forces from either (1) governments (2) resource companies and (3) environmental groups, pushing their own interests and agendas. It is clear the environmental groups involved in the Adani case have first and foremost an environmental agenda, and they seek to use the native title system to advance their agenda. In no sense is their agenda to uphold the native title rights of the traditional owners. But the resource companies and governments are just as unscrupulous, and just as careless about upholding the native title rights of the traditional owners. The Committee should understand that ILUAs are at the centre of this process, and traditional owners are torn apart by the ruthless politicking, dividing and ruling, misinformation, peeling off individuals and subgroups from the native title society: families that lived peacefully and respectfully for all of their lives are torn apart forever, when environmentalists and developers fail to respect proper processes and seek to manipulate traditional owners and cause division. ILUAs are the ground zero of this heartbreaking calamity.

33. There will be, like any community of interest-holders, people with a range of perspectives on social impact, environmental impact and cultural impact of either development or conservation initiatives on native title land. The native title community should be left to work out their own resolutions to these questions, without being vulnerable to the manipulation and divisiveness caused by third parties with agendas. The Committee should consider law reform that protect ILUA processes from this form of unconscionable dealing either by governments, developers or environmentalists.