

Chapter 1

Introduction and background

1.1 On 16 February 2017, the Senate referred the provisions of the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the bill) to the Legal and Constitutional Affairs Legislation Committee (the committee) for inquiry and report by 17 March 2017.¹ The committee tabled an interim report on 17 March 2017, seeking an extension of time to table its final report by 20 March 2017.²

1.2 The Senate Selection of Bills Committee recommended that the bill be referred to the committee for the following reasons:

The recognition and protection of native title is important to Indigenous Australians and the broader Australian community.

It is appropriate and responsible for the Senate to properly examine the impact of proposed amendments to native title law.³

1.3 Additionally, the Selection of Bills Committee noted the reason for referral was to allow the committee to seek 'Stakeholder views on the Bill'.⁴

Background and purpose of the bill

1.4 On 2 February 2017, the Full Federal Court handed down a decision on the *McGlade* case that overturned previous authority on the necessary parties to an area Indigenous Land Use Agreement (ILUA).⁵ Before the *McGlade* case, the established authority was the *Bygrave* decision that determined that an area ILUA could be registered if it had been signed by at least one member of the registered native title claimant (RNTC), on the basis that the RNTC is defined under the *Native Title Act 1993* (the Act) as a singular entity.⁶

1.5 The Full Federal Court in *McGlade* agreed that the Act defined the RNTC as a singular entity. However, it noted that subsection 24CD(1) of the Act contained the words 'all persons', as well as the plural 'registered native title claimants' in section 24CD(2)(a).⁷ Accordingly, the Court found these words indicate that the

1 *Journals of the Senate, No. 30*, 16 February 2017, p. 992.

2 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreement) Bill 2017 Interim Report*, 17 March 2017.

3 Senate Selection of Bills Committee, *Report No. 2 of 2017*, 16 February 2017, Appendix 2.

4 Senate Selection of Bills Committee, *Report No. 2 of 2017*, 16 February 2017, Appendix 3.

5 *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.

6 *QGC Pty Ltd v Bygrave (No 2)* [189] FCR 412.

7 Section 24CD requires that all persons in the 'native title group' must be parties to an area agreement and, in relation to land subject to a registered native title claim, provides that the native title group consists of all registered native title claimants and all registered native title body corporates (if any).

required parties to an area ILUA must include all individual members of the RNTC, including any relevant members who were now deceased.⁸

1.6 The Explanatory Memorandum explains that the *McGlade* decision created a level of uncertainty about the status of area ILUAs, which means:

- a. area ILUAs registered without the signatures of all RNTC members, including members who are deceased, were agreements which did not meet the requirements of ILUAs as defined under the Act, and
- b. area ILUAs lodged for registration which do not comply with *McGlade* could no longer be registered.⁹

1.7 The Explanatory Memorandum states that the primary objectives of the bill are to:

- a. confirm the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC);
- b. enable registration of agreements which have been made but have not yet been registered on the Register of Indigenous Land Use Agreements, and
- c. ensure that in the future, area ILUAs can be registered without requiring every member of the RNTC to be a party to the agreement.¹⁰

Indigenous Land Use Agreements

1.8 The National Native Title Tribunal (NNTT) defines an ILUA as:

...a voluntary agreement between a native title group and others about the use of land and waters. These agreements allow people to negotiate flexible, pragmatic agreements to suit their particular circumstances.¹¹

1.9 There are three kinds of ILUAs that are recognised by the NNTT, namely:

- **Body Corporate ILUAs**, which can be made once a determination of native title has occurred over the entire agreement area. These agreements are between the relevant Registered Native Title Body Corporate (RNTBC) and other parties.
- **Area ILUAs**, which are made over land and sea. These are agreements between the native title group and other parties about native title matters. The

8 Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, *Explanatory Memorandum* (EM), p. 3.

9 EM, p. 3.

10 EM, p. 2.

11 National Native Title Tribunal, 'About Indigenous Land Use Agreements (ILUAs)' at www.nntt.gov.au/ILUAs/Pages/default.aspx (accessed 7 March 2017).

native title group can be a RNTC and/or a RNTBC and/or any person who claims to hold native title over the agreement area.

- **Alternative procedure ILUAs**, which are agreements between a native title group, that is, RNTBC and/or representative bodies, and relevant government and other parties. This type of ILUA cannot provide for the extinguishment of native title rights and interests.¹²

1.10 The NNTT also sets out an overview of the ILUA registration process in a diagram (see figure 1.1 below). This process has the following steps:

- (a) identify the need for an agreement;
- (b) identify what the agreement needs to be about and the parties to the agreement;
- (c) establish the most appropriate ILUA for the circumstances;
- (d) commence negotiations;
- (e) apply to have the ILUA registered with the Registrar;
- (f) the Registrar checks that the application and the ILUA comply with the Act and parties will need to address any problems;
- (g) the Registrar notifies relevant parties and the public of the ILUA;
- (h) parties resolve obstacles to registrations, such as objections;
- (i) the Registrar registers the ILUA.¹³

1.11 The Explanatory Memorandum notes that ILUAs may provide for certain future acts to be undertaken, such as mining or to provide access to an area, in exchange for compensation to native title groups.¹⁴ Importantly, the Explanatory Memorandum explains that the *McGlade* decision only affects area ILUAs, and not body corporate or alternative procedure ILUAs.¹⁵

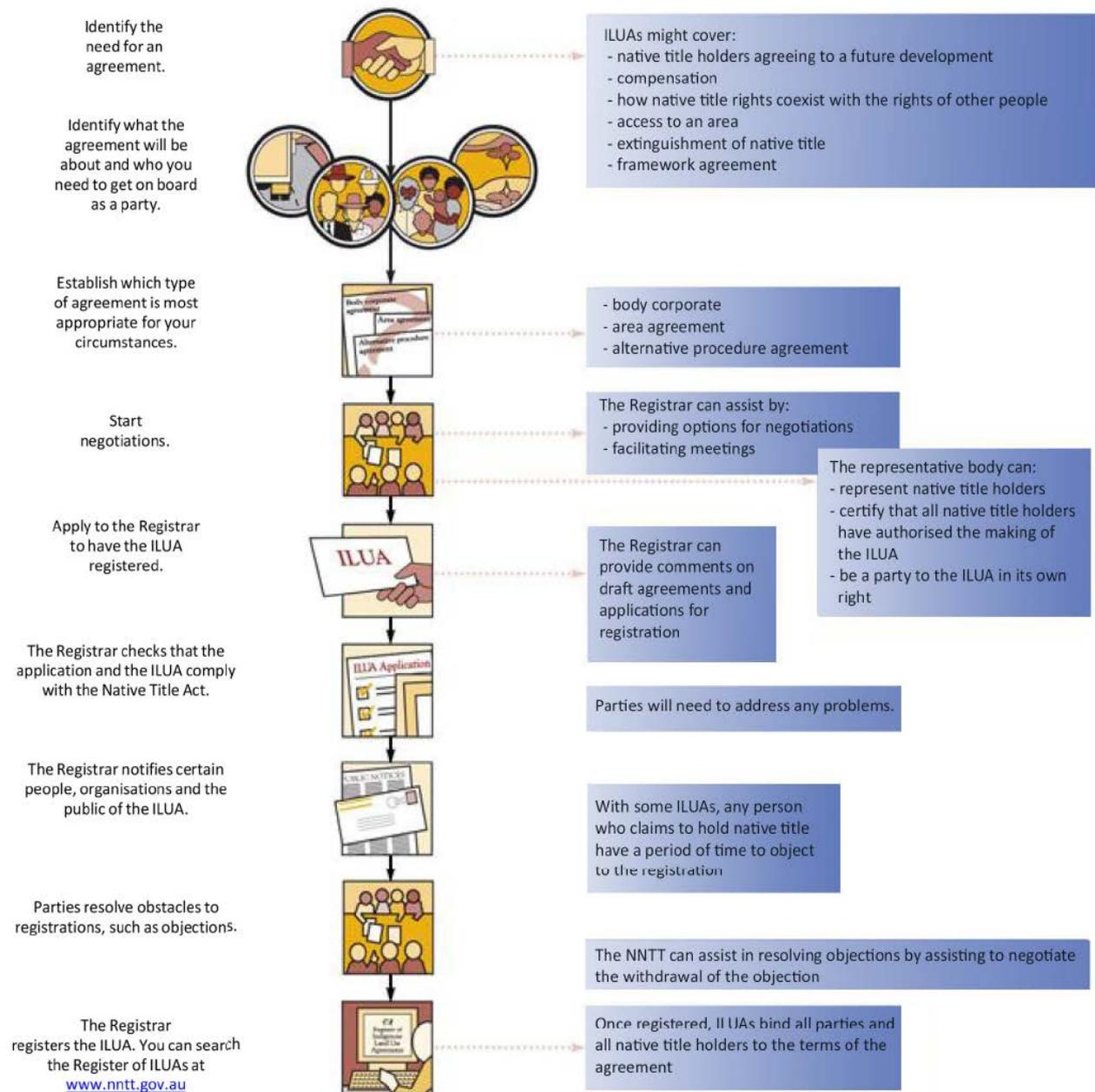
12 National Native Title Tribunal, *About Indigenous Land Use Agreements (ILUAs), Fact sheet 1: A general guide to ILUAs*, p. 2; www.nntt.gov.au/Information%20Publications/1.About%20Indigenous%20Land%20Use%20Agreements.pdf (accessed 7 March 2017).

13 See figure 1.1 below. National Native Title Tribunal, *Diagram of ILUA process*, www.nntt.gov.au/Information%20Publications/Diagram%20of%20ILUA%20Process%20July%202014.pdf (accessed 7 March 2017).

14 EM, p. 2.

15 EM, p. 3.

Figure 1.1 Diagram of the ILUA Process



The number of ILUAs and other agreements potentially affected

1.12 It is unclear exactly how many proposed and registered ILUAs may be affected by the *McGlade* decision. Regarding proposed ILUAs, the Parliamentary Library has noted:

In relation to the ILUAs that were the subject of proceedings in *McGlade*, the Western Australian Government has stated that the decision 'will delay the commencement of the 6 South West Native Title Settlement Agreements'. It is also reported that the *McGlade* decision could preclude the registration of a proposed ILUA relating to the Carmichael coal mine

and rail project in Far North Queensland, as the relevant agreement was reportedly not signed by all individual members comprising the RNTC.¹⁶

1.13 Regarding registered ILUAs that were not signed by all individuals comprising the RNTC, the Parliamentary Library has suggested:

The total number of affected ILUAs on the Register is unclear. On 11 February 2017, it was reported that the NNTT had commenced an audit of registered agreements to identify those which were potentially affected and, at that time, had identified a possible 123 area agreements that relied upon the reasoning in *Bygrave*, most of which were in Queensland. Since then, it has been reported that the number is 'at least 126 ... covering mines, gas fields and infrastructure projects'. Others have estimated that there are around 150 such agreements.

It has also been suggested that 'the problem could be even worse, however, because pre-*Bygrave*, the Native Title Registrar did not deny ILUA registration applications where the only missing signatures were those of deceased members of the registered claimant'.¹⁷

1.14 Moreover, the Parliamentary Library has also noted that some commentators have suggested that *McGlade* could have ramifications beyond ILUAs:

It has been suggested [by the law firm Clayton Utz, who acted for Adani in relation to the Carmichael coal and rail project] that 'the ramifications of the decision are likely to extend beyond ILUAs' and in particular the decision may mean that 'in all circumstances, including with respect to making right-to-negotiate, cultural heritage and other agreements, instructing lawyers, or taking steps in a native title claim, and despite any direction to the contrary that may be given by the claim group, the individuals who comprise an applicant or registered claimant will be required to act unanimously'.¹⁸

Overview of the provisions of the bill

1.15 The bill is divided into two parts, which this section will discuss in turn. Part one proposes amendments that would allow native title holders to determine who will be party to an agreement. It also prescribes the rules by which ILUAs made on or after the commencement of the bill would be governed.

1.16 Part two is intended to provide certainty to parties affected by the *McGlade* decision and prescribes the rules by which ILUAs made on or before 2 February 2017 would be governed.

16 Ms Christina Raymond, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, Parliamentary Library Bills Digest No 70 (March 2017), p. 10.

17 Ms Christina Raymond, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, Parliamentary Library Bills Digest No 70 (March 2017), pp. 10-11.

18 Ms Christina Raymond, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, Parliamentary Library Bills Digest No 70 (March 2017), p. 11.

Part one

1.17 The Explanatory Memorandum explains that the amendments proposed in part one of the bill would 'improve the flexibility and efficiency of area ILUA processes'.¹⁹ This would be achieved through a number of provisions:

- Paragraph 24CD (2)(a) of the Act would be repealed, which requires that all persons who comprise the RNTC within the area of the proposed ILUA to be parties to the area ILUA. The proposed new paragraph would allow the native title claim group to nominate which members of the RNTC are required to be parties to the area ILUA, or where no person(s) have been nominated, it provides that a majority of members of the RNTC must be parties to the area ILUA (proposed paragraph 24CD(2)(a)).
- It enables a native title claim group to nominate one or more members of the RNTC to be a party to the ILUA under section 24CD, as well as enabling the registered native title claim group to decide on a process which will determine who will be parties to the ILUA (proposed section 251A).
- Where the phrase, 'where there is no such process', appears in paragraphs 251A(b) and 251B(b), this is to be replaced with 'in any case'. The Explanatory Memorandum explains that this is to give effect to Recommendations 10-1 and 10-2 of the Australian Law Reform Commission's *Connection to Country: Review of the Native Title Act 1993* report. The proposed amendments would enable claim groups to choose whether to use a traditional decision making or an agreed upon decision making process, to authorise ILUAs, rather than requiring that a traditional decision making process is used to authorise ILUAs.²⁰

Part two

1.18 Part two of the bill proposes amendments to agreements that may be affected by the *McGlade* decision by:

- securing existing agreements which have been registered on or before 2 February 2017 but do not comply with the *McGlade* decision; and
- enabling registration of agreements which have been authorised, registered, or lodged for registration on or before 2 February 2017 but do not comply with *McGlade* decision.²¹

1.19 Item 13 of the bill sets out compensation provisions, which would ensure that should the operation of any of bill's provisions result in the acquisition of property from a person, then that person is entitled to claim reasonable compensation from the

19 EM, p. 6.

20 Note that these amendments are not strictly necessary to secure ILUAs following the *McGlade* decision.

21 Note, however, that the agreements at issue in *McGlade* (the South West Native Title Settlement Agreement) are dealt with separately by items 9(4) and 12 of the bill and would be deemed to be agreements from the commencement of the Act.

Commonwealth. Where the person and the Commonwealth do not agree on the compensation amount, the person may institute proceedings in the Federal Court.

1.20 Item 14 of the bill gives the Attorney-General the power to make legislative instruments to address transitional issues relating to this bill, to give effect to the bill's provisions.

Financial implications

1.21 The Explanatory Memorandum includes a financial impact statement that notes the bill will have no, or insignificant, financial impact on Commonwealth Government departments and agencies.²²

Compatibility with human rights

1.22 The Explanatory Memorandum notes the bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.²³

1.23 Moreover, the Explanatory Memorandum notes that the bill engages the right to enjoy and benefit from culture and the right to self-determination and concludes that the bill is compatible with these human rights.²⁴

Conduct of the inquiry

1.24 Details of the inquiry were advertised on the committee's website, including a call for submissions by 3 March 2017.²⁵ The committee also wrote directly to some individuals and organisations inviting them to make submissions. The committee received 59 submissions, which are listed at appendix 1 of this report. These submissions are all available in full on the committee's website.

1.25 Additionally, the committee received more than 20,000 campaign letters and emails that were substantially similar. An example of this letter is available on the committee's website.

1.26 A public hearing was held by the committee on 13 March 2017, in Brisbane. A list of witnesses who appeared before the committee is listed at appendix 2, and a Hansard transcript of the hearing is available on the committee's website.

Structure of this report

1.27 This report consists of two chapters:

- Chapter 1 provides a brief background and overview of the bill, as well as the administrative details of the inquiry.

22 *Explanatory Memorandum*, p. 5.

23 *Explanatory Memorandum*, p. 6.

24 *Explanatory Memorandum*, pp. 6–8.

25 The committee's website can be found at www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs

- Chapter 2 discusses the issues raised by submitters to the inquiry. It also outlines the committee's views and recommendations.

Acknowledgements

1.28 The committee thanks the organisations and individuals that made submissions to this inquiry and all witnesses who attended the public hearing.