Chapter 2

Key issues and concerns raised

2.1 This chapter sets out the main issues raised by submitters to the inquiry concerning the Native Title Amendment (Indigenous Land Use Agreement) Bill 2017 (the bill).

2.2 First, this chapter sets out support for the bill's provisions, particularly how it would give certainty, not only to Indigenous organisations and communities, but also industry and agricultural stakeholders.

2.3 Second, it sets out concerns that witnesses and submitters raised about the bill, including:

- the lack of consultation informing the bill's development;
- potential deficiencies in the bill's reliance on majority decision-making;
- that its provisions may increase complexity of the processes to remove certain applicants from the registered native title claimant (RNTC);
- retrospective provisions of the bill; and
- possible unintended consequences of the bill.

2.4 Lastly, this chapter also outlines the views and recommendations of the committee.

Support for the bill

2.5 The committee received evidence from witnesses and submitters that supported the bill. This support centred on several issues, including that its provisions would give certainty to:

- industry and agricultural stakeholders when making agreements with traditional owners, or for some agreements that have already been agreed; and
- Indigenous communities and organisations when making agreements for the use of their land, or where Indigenous Land Use Agreements (ILUAs) have already been agreed.

Certainty for industry and pastoral stakeholders

2.6 Some witnesses and submitters told the committee that they supported the bill's provisions, as it would give industry and agricultural stakeholders some certainty

to the viability of current and future ILUAs for the use of land, particularly given the ramifications of the *McGlade* decision.[1]

2.7 Ms Kirsten Livermore, Senior Adviser, Minerals Council of Australia, told the committee how private enterprise has supported positive relationships with ILUAs:

> Indigenous land use agreements have been and continue to be an essential part of the business of developing and operating resources projects in Australia. They secure legal rights and foster cooperative relationships, both important elements of the stability necessary for long-term resource projects. The relationship that resources companies seek to have with Indigenous people is based on two principles. Firstly, our member companies acknowledge that, as the first people of Australia, Indigenous people have a special connection to their traditional lands and waters. Also, as neighbours to resources projects, Indigenous communities should share in the benefits from the development of these resources.
>
> For the past two decades, companies have relied on ILUAs as a voluntary legal mechanism for reaching agreement with Indigenous parties over access to land and the sharing of financial returns and other benefits such as jobs and business opportunities. [2]

2.8 Ms Livermore told the committee how the *McGlade* decision had created a good deal of uncertainty over both active and future ILUAs:

> The number of existing ILUAs impacted by *McGlade* has not been fully determined. The National Native Title Tribunal tells us that 126 ILUAs have been registered without the signatures of all members of the registered native title claimant since the time of the Bygrave case in 2010, which endorsed the practice. What is not known is the much higher number of ILUAs registered despite missing the signatures of deceased registered native title claimants, which was the practice of the Native Title Tribunal dating back well before the Bygrave case, possibly as far back as 1998. Uncertainty of that scale and of such consequence must be resolved as a matter of urgency so that the benefits received by affected Indigenous communities are not affected or, at worst, revoked.[3]

2.9 Similarly, AgForce told the committee that the *McGlade* decision threatened to add more complexity to the already long, drawn-out process for many agricultural stakeholders negotiating leases with ILUAs:

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1 Dja Dja Wurrung Clans Aboriginal Corporation, *Submission 13,* p. 2; National Farmers Federation, *Submission 16,* p. 1; AMPLA, *Submission 26,* p. 2; Association of Mining and Exploration Companies, *Submission 40,* p. 1; Clayton Utz, *Submission 29,* p. 6; Minerals Council of Australia, Queensland Resources Council, and the Chamber of Minerals and Energy (WA), *Submission 15,* p. 2; Mr Franklin Gaffney, *Submission 2,* p. 1; Matthew Hansen, *Submission 3,* p. 1; Dr Stuart Bradfield, *Submission 46,* p. 1; and Central Desert Native Title Service, *Submission 41,* p. 1.

2 *Proof Committee Hansard,* 13 March 2017, p. 2.

3 *Proof Committee Hansard,* 13 March 2017, pp. 2–3.

> Communicating native title legislation to our pastoralists is a pretty difficult thing. It is associated with lots of paperwork and it is drawn out over years and years. Many of our pastoralists actually question what is a really cumbersome process to achieve what seems like a really easy, simple thing to do. The *McGlade* decision questions the validity of these agreements and would create further doubt and complexity for our people. It is a shadow over the legislation at a time when really we want people to have enough confidence in the system to agree to and understand the ILUA process and hold it up going forward. We would really value their participating in the process, and they really struggle to understand this legislation, the case and everything around it. We strongly recommend that the bill be passed for this reason, so that we can get on to negotiating good outcomes in good faith.[4]

2.10 Mr Ian Macfarlane, Chief Executive, Queensland Resources Council, noted that it was not just industry that had concerns about the ramifications of the *McGlade* decision, but also many traditional owners.

> As I said before—in terms of these operations—long before this issue was raised, they were operating with the support of their Indigenous communities or their traditional owners. Their traditional owners, as I said, are as concerned about the current situation as we are, as the government is and as infrastructure proponents are. It is not just the mining industry; it is quite a broad spread of business, community and government who have used ILUAs to progress projects.[5]

Certainty for Indigenous communities and organisations

2.11 Some Indigenous organisations also told the committee that the proposed amendments would ensure certainty for existing and new ILUAs.

2.12 Mr Wayne Nannup, Chief Executive Officer, South West Aboriginal Land and Sea Council (SWALSC), broadly supported the amendments. He set out the benefits the South West Native Title Settlement ILUAs for the claim group he represents, including statutory recognition as the traditional owners of the region:

> Effectively, the [*Noongar (Koorah, Nitja, Boordahwan (Past, Present, Future) Recognition Act 2016 (WA*)] is actually the glue for all the agreements. It is what actually gives life to the benefits that can flow from the agreement. The other benefits include our land, housing and conservation estate participation. There is an economic base, a standard Noongar heritage agreement, a community development framework and an economic participation framework. Everything contained in the ILUA gives us, the Noongar people, the opportunity to manage our assets, manage our programs, be financially independent and ultimately have self-determination. I note that, when we talk about resolving our claims, be they as they may, the opportunity actually provides us with exactly that:

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4 Ms Lauren Hewitt, General Manager, Policy, AgForce, *Proof Committee Hansard*, 13 March 2017, p. 10.

5 *Proof Committee Hansard*, 13 March 2017, p. 8.

> self-determination—how we look after our own concerns, our people, our way. That is exactly what we are endeavouring to do through the south-west settlement.[6]

2.13 The National Native Title Council (NNTC) told the committee that the bill was a positive step for negotiating agreements:

> The NNTC believes that the amendments proposed are not large and are technical in nature. The effects of the amendments however will be significant, will lead to improved agreement making processes and will put beyond doubt the currently uncertain interests of parties to affected ILUAs.[7]

2.14 The Dja Dja Wurrung Clans Aboriginal Corporation (DDWCAC) supported the amendments, submitting that the *McGlade* decision had:

> …created concern and uncertainty for DDWCAC about the validity of several exploration, mining, and development ILUAs we have negotiated in good faith over the past five years, and the current status of the obligations and benefits that are specified in these agreements….
>
> Our settlement ILUA and agreements provide the foundation for what we are working to achieve for present and future generations of Dja Dja Wurrung People. The agreements provide us with formal recognition by the State, resources that support our core operations and activities, Aboriginal title to and joint management of parks and reserves, active participation in natural resource management, an alternative future act regime, and business and economic development opportunities.[8]

Concerns raised about the bill

Insufficient consultation

2.15 Some submitters noted their dissatisfaction with the consultation period for this inquiry noting that the *McGlade* decision was handed down on 2 February 2017 and the bill was introduced in Parliament on 15 February 2017.[9]

2.16 For example, the Law Council of Australia (the Law Council) argued that the time period is not sufficient for stakeholders to properly consider the proposed amendments.[10]

2.17 The Cape York Land Council, the Cape York Partnership and Balkanu argued that the hasty consultation process may lead to unfair outcomes:

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6 *Proof Committee Hansard*, 13 March 2017, p. 36.

7 *Submission 9*, p. 10.

8 *Submission 13*, p. 2.

9 Law Council of Australia, *Submission 19*, p. 1; see also Maritime Union of Australia, *Submission 50*, p. 2.

10 *Submission 19*, p. 2.

> 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]

2.18 While the Cape York Land Council, the Cape York Partnership and Balkanu are not in favour of what they describe as 'blanket validation' of ILUAs proposed by the bill, they do agree that legislative amendments are needed:

> 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.[12]

2.19 Other evidence suggested that the bill's amendments were designed to favour mining and private sectors.[13] For example, the Wangan and Jagalingou Family Council suggested the bill was indicative of a 'knee-jerk reaction' made by the government to protect the interests of the mining industry and private sector.[14]

2.20 As discussed in chapter 1 of this report, the bill proposes amendments which give effect to Recommendations 10-1 and 10-2 of the ALRC report. The proposed amendments, contained in items 4 and 6 of schedule 1, would amend sections 251A and 251B of the Act to 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 be used to authorise ILUAs.

2.21 The committee notes that these proposed amendments appear to be in addition to amendments that are designed to reverse the decision in *McGlade.* The committee also notes that there are other, related recommendations of the ALRC report which are not dealt with in the bill; specifically amendments to section 203CB(2) of the Act and subregulations 8(3) and 8(4) of the Native Title (Prescribed Bodies Corporate) Regulations 1999.[15]

2.22 The campaign letter concerning this bill, of which over 20,000 copies were received by the committee, also argued that:

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11 Cape York Land Council, the Cape York Partnership and Balkanu, *Submission 14*, p. 3; see also Wangan and Jagalingou Family Council, *Submission 17*, p. 5.

12 Cape York Land Council, the Cape York Partnership and Balkanu, *Submission 14*, p. 2.

13 For example, see: Mr Albert Corunna, *Submission 5*, p. 1; Wangan and Jagalingou Family Council, *Submission 17*, p. 2 and p. 6; Oxfam Australia, *Submission 43*, p. 1; Seed Indigenous Climate Network/Australian Youth Climate Network, *Submission 44*, pp. 1–3; Maritime Union of Australia, *Submission 50*, p. 2; and Mr Paul O'Halloran, *Submission 52*, p. 1.

14 *Submission 17*, p. 2.

15 The Australian Law Reform Commission provided *Submission 6* to this inquiry, containing these recommendations at appendix 1. These were drawn from their report *Connection to Country: Review of the Native Title Act 1993 (Cth)* (April 2015). For the observation that ALRC recommendations have not received enough attention from the Commonwealth, see Wangan and Jagalingou Family Council, *Submission 17*, p. 2; Dr Bryan Keon-Cohen AM QC, *Submission 12*, p. 1; and the Yawuru Native Title Holders Aboriginal Corporation, *Submission 42*, p. 2.

> The Bill has not been subject to proper consultation
>
> There is no evidence that this Bill is urgent or that changes to native title laws need to be pushed through right now.
>
> I have serious concerns about the way this Bill was rushed into Federal Parliament and is being pushed to a vote, without adequate consultation.
>
> Any reforms should follow full and proper consultation with the people it impacts; Aboriginal and Torres Strait Islanders and their communities.[16]

2.23 However, some submitters disagreed. For example, the NNTC stated the bill's proposed amendments have been amply considered over a number of years in a number of processes, including:

- the ALRC's review of the Native Title Act in 2015;
- the Native Title Amendment Bill 2012; and
- the investigation into ILUAs prepared for the Council of Australian Governments in 2015.[17]

2.24 The Explanatory Memorandum explains the urgent need for the Commonwealth to introduce the bill, and sets out what consultation has been undertaken in developing its provisions:

> The *McGlade* decision raised considerable uncertainty for all parties doing business on native title land. Urgent amendments are imperative to preserve the operation of currently registered ILUAs and provide the sector with a prospective process for registering ILUAs which minimises the risks presented by the *McGlade* decision.
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> Given the limited timeframe, the Attorney-General's Department consulted with stakeholders in relation to the legal implications of the *McGlade* decision to the greatest extent possible, including State and Territory governments, the National Native Title Tribunal, and the National Native Title Council.

2.25 At the committee's most recent Estimates hearing, the Attorney-General provided further information about the stakeholders consulted about the bill:

> …the government with the support of the two most relevantly affected states, Western Australia and Queensland, [has sought] the support of the most immediately affected industry stakeholders, in particular, as represented by the Queensland Resources Council, and the National Native Title Council, representing the Indigenous claimant stakeholders, all of

16 Refer campaign form letter received by committee and published on its website, p. 1.

17 See the National Native Title Council, *Submission 9*, p. 5, referring to the Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (April 2015); the Native Title Amendment Bill 2012; and the Senior Officers' Working Group, *Investigation into Indigenous Land Administration and Use: Report to the Council of Australian Governments (*December 2015).

> whom pressed the government to move swiftly to restore the status quo—and we did so.[18]

Concerns over decision-making processes

2.26 The committee received evidence that raised concerns over the change to native-title decision making processes proposed by the bill. While some witnesses supported the move to allow decisions to be confirmed by majority, others maintained that decisions should be made unanimously.

2.27 The Law Council outlined the kind of decisions that may be considered by ILUAs. Given the serious consequences of many of these decisions, it noted the importance of rigorous procedural protocols and safeguards:

> [ILUAs] may include the authorisation of any future act, the extinguishment of native title rights and interests (including without compensation), the manner in which the native title rights and interests may be exercised forever into the future, and to whom any compensation for the interference (if any) might be paid.
>
> …Given the potentially significant effects of the registration of an Area Agreement, the procedural safeguards in relation to its registration are fundamentally important.[19]

2.28 Some submitters raised concerns about the default position that would allow a majority of members of a registered native title claimant to be a party to an area ILUA.[20] For example, whilst he was generally supportive of the bill, Mr Greg McIntyre SC, highlighted that it:

> …is posited upon the assumption that the minority view of a group of the persons comprising the registered native title claimant (or applicant) is wrong and should be over-ridden by a majority view.[21]

2.29 Mr McIntyre also acknowledged the proposition that some decisions are of such significance that they should not be made except by a unanimous or consensus position of those affected. He drew this theme out further at the public hearing, asking whether there should be more consideration of why some ILUAs were not agreed unanimously:

> …the overriding of the minority view is perhaps something which should not be done in haste, and the retrospective validation of over a hundred agreements without some inquiry as to why they were not signed by the

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18 Senator the Hon George Brandis, Attorney-General, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Committee Hansard*, 28 February 2017, p. 70.

19 *Submission 19*, p. 2.

20 Mr Greg McIntyre SC, *Submission 21*, pp. 2–3; Arnold Bloch Leibler, *Submission 34*, p. 5; Carpentaria Land Council Aboriginal Corporation, *Submission 20*, p.3; and Kelsi Forrest, *Submission 30*, pp. 3–4.

21 Mr Greg McIntyre SC, *Submission 21*, p. 2.

> unanimous group is something which ought to be considered before the legislation is passed.[22]

2.30 Mr McIntyre outlined the benefits of more nuanced decision-making processes that allowed minority views to be aired, investigated and evaluated so that the reasons for the dissenting view are understood.[23] In this, he highlighted that the notion that a minority view should be accorded some weight is not unique to the *Native Title Act 1993* (NTA), but that it is also found in legislation such as the *Corporations Act 2001 (Cth).*[24] Moreover, he also noted that a number of state Strata Titles provisions require unanimous resolution for particular types of decisions, which could provide some models for consideration.[25]

2.31 However, the committee also received evidence that supports the proposed amendments for agreement to be reached by majority.[26] Some noted that the effect of *McGlade* is to give individual members of a RNTC a right to veto decisions, simply by failing or refusing to sign an agreement authorised by the native title holders.[27] For example, the NNTC noted that it:

> …is not aware of any other Australian community whose decisions can be vetoed in the manner envisaged by the current provisions of the [Native Title Act] and puts forward that such a system is discriminatory, is inconsistent with the principles of self determination and is in contravention of articles 3, 18, 21.1, 23 and 32.1 of the United Nations Declaration on the Rights of Indigenous Peoples.[28]

2.32 In a similar vein, a number of submissions argued that a reliance on unanimous decisions could give undue influence to minority dissenters, who could prosecute their own grudges through ILUA processes.[29] For example, Ms Suzanne Kelly suggested:

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22 *Proof Committee Hansard,* 13 March 2017, p. 31.

23 *Submission 21,* p. 3. See also his evidence at the public hearing, *Proof Committee Hansard,* 13 March 2017, pp. 31–32.

24 *Submission 21,* p. 2.

25 As potential models, Mr McIntyre pointed to processes of negotiation, conciliation, mediation and arbitration that can be found in corporate rule books, articles of association and agreements. He noted that the bill does not address the appropriateness of such processes being employed in relation to the dissenting views regarding the Noongar Settlement Agreements. *Submission 21,* pp. 2–3.

26 HWL Ebsworth Lawyers, *Submission 23,* p. 4; South Australian Native Title Services, *Submission 53,* p. 2; Native Title Services Victoria, *Submission 49,* p. 2; AMPLA, *Submission 26,* p. 3; National Native Title Council, *Submission 9,* p. 4; and Yamatji Marlpa Aboriginal Corporation, *Submission 27,* pp. 1–2.

27 HWL Ebsworth Lawyers, *Submission 23,* p. 4; South Australian Native Title Services, *Submission 53,* p. 2; and Native Title Services Victoria, *Submission 49*¸ p. 2.

28 National Native Title Council, *Submission 9,* p. 2.

29 For example see Ms Suzanne Kelly, *Submission 10* and Mr David Collard, *Submission 11*.

> The decision about whether to enter into an agreement belongs with the community and we have a right not to be vetoed by recalcitrant individuals…
>
> The current Amendment Bill will overcome these problems and because of this I support the passage of the Bill and urge the Committee and the Parliament to support the decision of the Noongar people and to move ahead with passing it into law.[30]

Issues with the removal of applicants (section 66B)

2.33 An outcome of *McGlade* is that all persons comprising the RNTC must now sign the agreement for it to be registered. In the case where people comprising the applicant cannot, or refuse to, sign the agreement the only available mechanism is to remove those people as an applicant by making an application to the Federal Court pursuant to section 66B of the NTA. This includes cases where the applicant is deceased.

2.34 At the public hearing, Mr Greg McIntyre SC outlined some of the difficulties of removing a native title claimant, as well as the proper requirements for a meeting held under section 66B:

> The collective group are required to participate in an authorisation meeting. The Noongar claim is unique because it is such a large claimant and involves such large numbers of people. Typically, native title claimant groups would generally be 1,000 or 2,000 people—that is kind of an average group. The primary requirement under section 66B, which is for any authorisation meeting, is that proper notices go out, and then it is a question of who turns up. So it is a democratic process in the sense that people are given notice, and if they want to be there and participate then they do. If they do not, they are governed by whatever the view is of the meeting. The reason some of those meetings take a long time is that the quantity of people and often the geographical spread of them.[31]

2.35 Ms Simona Gory, appearing in a private capacity alongside the *McGlade* applicants, argued that section 66B provides important protections as it allows judicial oversight of any removal process:

> The effect of the bill is to in effect remove that protection and remove the built-in mechanism for judicial oversight in the event there is disagreement among the authorised representatives. We say that is highly significant given the fact that there are often alleged deficiencies in the authorisation process and the adequacy or fairness of that process is often hotly contested, as it is in the *McGlade* case.[32]

2.36 However, the NNTC outlined some of the difficulties with the current section 66B processes:

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30 *Submission 10*, p. 3.

31 *Proof Committee Hansard*, 28 February 2017, p. 32.

32 *Proof Committee Hansard*, 28 February 2017, p. 44.

> The process has a propensity to create community division which can fracture communities and in turn further undermine agreement making, it requires an authorisation meeting of the claim group – the notification and conduct of which is prohibitively expensive – and it is prohibitively slow in that final Court orders for removal of members of the Applicant (the RNTCs) generally take more than one year to be made following a s66B meeting.[33]

2.37 The Full Federal Court in *McGlade* considered that section 66B of the Act may not be an ideal mechanism to deal with such matters:

> As inconvenient as this outcome may be considered to be by some, especially in a case such as the present where a large number of persons jointly comprise the registered native title claimants; where some signatures may have been difficult to obtain, and where some persons are deceased, the textual requirements of the NTA in Subdiv C are as they are. While this may mean that any one of the persons who jointly comprise a registered native title claimant can effectively veto the implementation of a negotiated area agreement by withholding their signature to the agreement, that is what the NTA recognises as possible. Whether the NTA should provide for some mechanism, apart from section 66B or in addition thereto, for responding to the types of agreement making issues raised in these proceedings, is a policy issue for the Parliament to consider, not this Court.[34]

2.38 Concerns relating to the timely execution of agreements and the costs associated with the process outlined in section 66B of the Act were shared by some submitters.[35] For example, Native Title Services Victoria noted that in the case of a recently deceased applicant, the process may be culturally inappropriate.[36] The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) acknowledged its support of a simple and inexpensive procedure in the circumstances where the removal of the applicant is not controversial or disputed.[37]

2.39 The campaign letter concerning this bill was broadly supportive of amendments to the Act that could streamline the removal and replacement of an applicant that had passed away or lost capacity. However, this letter also noted that this is an entirely different situation to removing an applicant solely because they object to an agreement.[38]

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33 *Submission 9,* p. 9.

34 *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 [265].

35 For example, see: National Native Title Council, *Submission 9,* p. 9; HWL Ebsworth Lawyers, *Submission 23*¸ p. 4; and Michael Owens, *Submission 25,* p. 5.

36 *Submission 49,* p. 2.

37 *Submission 38,* p. 3.

38 See the campaign form letter received by the committee, p. 1.

Concerns over retrospective provisions

2.40 The retrospective provisions of the bill apply to area ILUAs made on or before 2 February 2017. 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…[39]

2.41 Mr Greg McIntyre SC urged caution in introducing retrospective provisions:

> This legislation purports to operate retrospectively on over 100 agreements. I am only really aware of the Noongar one, and I have seen some press about the Adani mine, which has always been a controversial topic. I am saying—and I see that a number of the other submissions are saying—'Don't we need to know a little bit more about some of these agreements, as to why the minority might not have signed up, or why it was not a unanimous decision? Was there some cogent reason for that?' As I said, historically in Australia we have passed retrospective laws from time to time, but it is not something that you would do automatically without being conscious of the broader social circumstances.[40]

2.42 The Law Council considered that the Explanatory Memorandum did not contain sufficient information about which ILUAs would be affected by the *McGlade* decision to assess if the retrospective amendments are appropriate.[41]

2.43 According to Arnold Bloch Leibler, the bill's proposal to reverse the *McGlade* decision by validating area ILUAs authorised, registered or lodged for registration 2 February 2017 could undermine certainty and the rights of Aboriginal and Torres Strait Islanders by:

> (a) facilitating registration of agreements that may in some cases be subject to significant intra-community dispute, at either or both the authorisation and signatory stages; and
>
> (b) denying native title claim groups the right to at least be given a fresh opportunity to nominate parties as signatories to an agreement, in light of the significant departure from the legal position as understood in Bygrave.[42]

2.44 Arnold Bloch Leibler submitted that it was of the view that a majority of area ILUAs awaiting registration are not the subject of dispute or conflict. However, it noted that:

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39 EM, p. 2.

40 *Proof Committee Hansard,* 13 March 2017, p. 33.

41 *Submission 19*, p. 3.

42 *Submission 34*¸ p. 3.

> …where there is significant dispute, rushing to paper over that dispute, without consultation as to the proposed legislative change, is likely to further entrench uncertainty and dissatisfaction.[43]

2.45 In this, concerns were raised by a number of submitters that there are many individual area ILUAs that have serious—and often unique— combinations of issues to address following the *McGlade* decision, including where:

- RNTC members were deceased;
- authorisation meetings may have occurred under advice that all signatures were not necessary, even if communities preferred seeking unanimous decisions to avoid tension;
- there was a preference for all claim groups to sign the ILUA; and
- claim groups were significantly divided over particular issues.[44]

2.46 However, strong support for the retrospective provisions was received from industry groups, and a number of Indigenous native title organisations.[45] For example, Clayton Utz outlined the importance of confirming and clarifying the validity of existing arrangements:

> The Native Title Registrar confirmed that, in its view, Bygrave represented binding law. As a result, validly authorised ILUAs were regularly registered even where they had not been signed by every member of every RNTC in relation to the ILUA area…Given that these agreements were entered into in good faith, while the enactment of retrospective legislation is justifiably to be regarded as exceptional, it is correct that Parliament should act to clarify the legal position.[46]

2.47 AMPLA agreed that ILUAs were entered into in good faith by the parties as well as by the NNTT and various governments, and set out potential consequences should the validity of established ILUAs be questioned:

> If ILUAs were not valid, it would call into question acts that have been done in the past in reliance upon them (such as the grant of mining and petroleum rights) and also the entitlement of native title parties to benefits paid, and no doubt in many cases still payable, under those agreements.[47]

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43 *Submission 34*¸ p. 4.

44 See in particular, Arnold Bloch Leibler, *Submission 34*¸ p. 3. See also: Cape York Land Council Aboriginal Corporation, Cape York Partnership, and Balkanu Cape York Development Corporation, *Submission 14,* p. 3; and Mr Greg McIntyre SC, *Submission 21,* pp. 7–9.

45 AMPLA, *Submission 26,* p. 2; Clayton Utz, *Submission 29,* p. 5; Minerals Council of Australia, Queensland Resources Council, and the Chamber of Minerals and Energy (WA), *Submission 15,* p. 2; South Australian Native Title Services, *Submission 53*¸ p. 2; Native Title Services Victoria, *Submission 49*¸ p. 2;and Western Australian Bar Association, *Submission 51,* p. 1.

46 *Submission 29*¸ p. 5.

47 *Submission 26*¸ p. 2.

2.48 AMPLA added that:

> Confirmation of the validity of those agreements is therefore commended and regarded as critical by AMPLA. It is considered by AMPLA to be in the interests of all parties to such agreements that this action is taken promptly.[48]

2.49 The Attorney-General's Department made it clear that the retrospective provisions would ensure existing agreements prior to *McGlade* would be valid, and not subject to challenges, as the bill would:

> …ensure that agreements which were registered or were pending registration prior to *McGlade* are deemed to be ILUAs and applications to register them are deemed to be valid. So that removes one of the potential grounds for challenge, as you have heard earlier today. While they are still on the register they are deemed to be valid, but, at any point, they are subject to challenge. So the retrospective validation removes that ability to challenge them…[49]

Effect on the Noongar agreements

2.50 The committee notes that subitem 9(4) of the bill provides that the retrospective validation provisions do not apply to the four Noongar agreements subject to the *McGlade* proceedings.[50]

2.51 The South West Aboriginal Land and Sea Council (SWALSC) raised concerns regarding the different validation process for the Noongar agreements:

> The consequences of limiting the validation of the Noongar Agreements to the commencement of the Act will create uncertainty as to whether the Noongar Agreements will be required to re-lodge for registration following validation. Any additional requirement will unnecessarily lead to delays and create significant cost implications.[51]

2.52 At the hearing, Mr Stefan Le Roux, Principal Legal Officer, SWALSC, drew the implications of re-negotiating agreements out further for the committee, particularly noting the time this would take and financial costs:

> We estimate that the time component is going to take roundabout nine months at least. Then there is also the race on the native title claimants, if I can call it that. They are already in a situation where they have been waiting a number of years for the outcome in this matter, and they will definitely have to wait at least another year for any outcome in this matter.

2.53 SWALSC noted that the current registration process has taken more than 18 months and has not been finalised. SWALSC sought clarity from the government

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48 *Submission 26,* p. 3.

49 Mr Iain Anderson, Deputy Secretary, Civil Justice and Corporate Group, Attorney-General's Department, *Proof Committee Hansard,* 13 March 2017, p. 64.

50 These agreements are: (a) the Wagyl Kaip and Southern Noongar ILUA; (b) the Ballardong People ILUA; (c) the South West Boojarah #2 ILUA; and (d) the Whadjuk People ILUA.

51 *Submission 22,* p. 2.

and argued that there would be 'no utility or benefit in requiring the Noongar Agreements to repeat the registration process…'[52]

2.54 However, a submission from the applicants in the *McGlade* matter argued that:

> …if amendments should be sought [relating to the *McGlade* decision] they should not be retrospective as this would undermine our successful outcome.[53]

2.55 The committee notes later in this report that South West Aboriginal Land and Sea Council will still be subject to the re-registration and objection period process.

Possible unintended consequences

2.56 A number of concerns about unintended consequences of the bill were raised by witnesses and submitters.

Different rules governing area ILUAs

2.57 As outlined in chapter one of this report, part 1 of the bill concerns ILUAs made on or after the commencement of the bill and part 2 sets out the rules governing ILUAs made on or before 2 February 2017. Consequently, there appears to be three different sets of rules governing area ILUAs depending on when the agreement was made:

- ILUAs made on or after the commencement of the bill – will be governed by the proposed amendments in part 1 of schedule 2 of the bill. That is, the claim group must specify, or agree to a process for determining the individuals comprising the RNTC who are to be parties to the ILUA. If no persons have been nominated or determined, the relevant parties must be a majority of individuals constituting the RNTC.
- ILUAs made on or before 2 February 2017 – will be governed by the proposed amendment in part 2 of schedule 2 of the bill. This essentially legislates the position in *Bygrave*, that the agreement must be executed by at least one individual comprising each RNTC in relation to the area ILUA.
- ILUAs made between 3 February 2017 and the day before the commencement of the bill – will likely be governed by the position in *McGlade*. That is, the area ILUA must be signed by all individuals comprising the RNTC, or RNTCs, in relation to the agreement area.[54]

52 *Submission 22*, p. 4.

53 Mervyn Eades, Margaret Culbong, Mingli McGlade and Naomi Smith, *Submission 24,* p. 1.

54 Ms Christina Raymond, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, Parliamentary Library Bills Digest No 70 (March 2017), p. 23.

2.58 There appears to be a degree of uncertainty about the rules governing ILUAs made between 3 February 2017 and the day before the commencement of the bill.[55] The Parliamentary Library noted that:

> The existence of three different sets of rules may generate complexity. It might be questioned whether the different arrangements could be streamlined further.[56]

2.59 The Attorney-General's Department clarified that, regarding the powers of the Attorney-General to make transitional rules by legislative instrument, including transitional rules, under Item 14 of the bill:

> At the moment, we do not have anything that would be dealt with [by rules]. It is really just to ensure that, if something did emerge, it could be dealt with. But it would still be subject to disallowance.[57]

Potential administrative and legal burdens placed on ILUA agreements

2.60 The committee heard that the bill's provisions may cause some ILUA signatories an additional administrative burden or subject them to additional legal challenges. Mr Stefan Le Roux, Principal Legal Officer, SWALSC, told the committee that his organisation would have to re-register four agreements, which would be a lengthy process, and could open up costly legal challenges or additional review processes.[58]

2.61 Mr Iain Anderson, Deputy Secretary, Civil Justice and Corporate Group, Attorney-General's Department, conceded that this may be an issue for some ILUAs:

> The difference with the SWALSC ILUAs is that they will still have to go through the registration process, which brings with it the objection process, but they will prospectively be ILUAs capable of being registered. So, in a sense, a disadvantage is that they have to go back through that registration objection process.[59]

2.62 Mr Anderson explained the rationale for this differential approach:

> The bill will validate the ILUAs subject to the *McGlade* decision, but only from the date of the commencement of this bill. So only once this bill actually—if and when this bill becomes law. The bill does not retrospectively validate the Noongar ILUAs or the applications to register them because this might constitute an inappropriate interference in the decision of the court and in the exercise of judicial power. The result of that

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55 Ms Christina Raymond, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017,* Parliamentary Library Bills Digest No 70 (March 2017), p. 23.

56 Ms Christina Raymond, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017,* Parliamentary Library Bills Digest No 70 (March 2017), p. 23.

57 Mr Iain Anderson, AGD, Senate Legal and Constitutional Affairs Legislation Committee, *Proof Committee Hansard,* 28 February 2017, p. 69. Note these rules are outlined in the EM, p. 12.

58 *Proof Committee Hansard,* 13 March 2017, p. 36.

59 *Proof Committee Hansard,* 13 March 2017, p. 66.

> is that the Noongar ILUAs can be resubmitted for registration or, alternatively, the parties might wish to use section 66B of the act to authorise a new claimant group.[60]

2.63 However, Mr Anderson also suggested some consultation with the SWALSC had already been undertaken on ways this situation could be addressed:

> We have met with SWALSC over the lunch break, and they have said they will send us some further material to consider what their proposal is. At the end of that it will be a decision for the government, and then for the parliament….
>
> Ultimately, [the matter of financing of this process] that is going to be a matter for SWALSC from within their own resourcing. It is not unusual for proponents to occasionally contribute to costs of meetings and things like that, but that would have to be done within the existing budgetary envelope for SWALSC and for the Western Australian government, if they wish to contribute something.[61]

Potential challenges to the 'right-to-negotiate'

2.64 Some witnesses and submitters who supported the bill's provisions raised concerns that the bill does not address potential challenges to 'future acts' agreements made pursuant to section 31 of the NTA following *McGlade.* Section 31 provides a right to negotiate, in good faith, with a view to obtaining an agreement in relation to the grant of mining and exploration rights over land which may be subject to native title.[62]

2.65 BHP Billiton explained that, in circumstances where the RNTC refuses to sign an agreement, the matter may be referred to the NNTT for a determination. This, they suggested, could disadvantage Indigenous communities by delaying their right to negotiate:

> 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.[63]

2.66 At the hearing, Mr Glen Kelly, Chief Executive Officer, National Native Title Council, agreed that this was a legitimate concern:

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60 *Proof Committee Hansard*, 13 March 2017, p. 64.

61 *Proof Committee Hansard*, 13 March 2017, p. 66.

62 See, for example, BHP Billiton, *Submission 8*¸ p. 1; Association of Mining and Exploration Companies, *Submission 40*¸ pp. 1-2; AMPLA, *Submission 26,* p. 2; Minerals Council of Australia, Queensland Resources Council, and the Chamber of Minerals and Energy (WA), *Submission 15,* p. 4; and Queensland Law Society, *Submission 32,* p. 2.

63 *Submission 8*¸ p. 2. See also the perspective voiced by Mr Ian Macfarlane, Chief Executive, Queensland Resources Council, *Proof Committee Hansard*, 13 March 2017, p. 3.

> It has been brought up by a number of parties independently of anything within the rep bodies. They are particularly used with town councils, main roads departments—infrastructure, all that sort of stuff—as well as with mining and those sorts of things. I have had a bit of contact—not vast amounts—with some state utilities in the west and I have seen advice floating around from other jurisdictions that show a similar concern. So I would say that there is a fairly legitimate concern, or that there is a reasonable level of concern.[64]

Committee view

2.67 The committee heard compelling evidence that a significant number of ILUAs have been placed in jeopardy by the *McGlade* decision, and so there is an urgent need for the Commonwealth to give certainty to all parties to registered and proposed ILUAS.

2.68 This was clear not only in evidence given by the primary and agricultural industry sectors, but also from the views expressed by traditional land owners looking for assurance about current agreements, as well as agreements that are yet to be negotiated, agreed and registered.

2.69 The committee heard that the ramifications of *McGlade* are far-reaching across Australia. For example, it was noted that in Queensland alone, 12 agreements currently face an uncertain future, with countless others across Australia potentially requiring lengthy and arduous re-negotiation processes.

2.70 The committee notes the amendments made by the bill secure existing agreements that were registered on or before 2 February 2017, but which do not comply with *McGlade*. This gives certainty to some groups of traditional owners, and other stakeholders and communities who have invested their time, efforts and goodwill to reach agreements in good faith.

2.71 The committee notes there are several areas that should be considered by the Commonwealth in implementing its provisions and, indeed, regarding further amendments to the Act.

2.72 The committee is concerned by the onerous administrative burden placed on the SWALSC and the Noongar native title holders by having to proceed through the re-registration process once again. The committee notes the department's commitment to consider SWALSC proposals regarding this matter.

2.73 The committee has formed the view that the Commonwealth should consider whether it is necessary to make further amendments to ensure the *McGlade* decision does not affect right-to-negotiate agreements, which are more widely used than ILUAs. Specifically, the Commonwealth should consider further amendments to ensure that the provisions for the 'right to negotiate in the future' under section 31 of the Act cannot be invalidated in a similar process to the *McGlade* determination.

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64 *Proof Committee Hansard*, 13 March 2017, p. 55.

2.74 Moreover, the Commonwealth should examine the proposals to amend the Act, so that where ILUAs involve particularly significant consequences for native title holders (such as the surrender of native title rights), then the minority viewpoint is given due consideration, perhaps through a higher threshold for decision-making.

2.75 In addition, the committee has noted that the bill contains proposed amendments to sections 251A and 251B of the Act, recommended by the ALRC in 2015, and which deal with matters outside of the *McGlade* decision. The committee considers that the Commonwealth should set out in the Explanatory Memorandum why these are included as part of the bill and why they are required to be implemented urgently while other related amendments recommended by the ALRC are not. Without such explanation the committee considers that these amendments should be deferred until such time as a bill dealing with all of the important recommendations of the 2015 ALRC report is able to be considered by the Parliament, therefore allowing the *McGlade* amendments to be urgently addressed now. This will give certainty to all parties to registered and proposed ILUAs, including traditional land owners, communities and other stakeholders.

2.76 The committee has also formed the view that the inclusion of item 11 of the bill has raised doubts in the mind of the committee as to its impact on the bill. Accordingly, the committee suggest that Item 11 be withdrawn from the bill, and that it be considered in any later bill.

2.77 While the committee has noted the evidence indicating that further consideration of other legislative amendments is needed, this process should not delay amendments proposed by this bill which will provide certainty to stakeholders following the *McGlade* decision. On this basis the committee recommends that the Senate pass the bill.

Recommendation 1

2.78 The committee recommends, subject to paragraph 2.75, that proposed amendments to sections 251A and 251B of the *Native Title Act 1993* be removed from the current bill and dealt with in any later bill involving government proposals arising from the Australian Law Reform Commission report *Connection to Country: Review of the Native Title Act 1993,* and that item 11 of the bill is also removed for later consideration.

Recommendation 2

2.79 That the Senate pass the bill.

Senator the Hon Ian Macdonald
Chair