Australian Greens—Dissenting Report

Introduction

1.1 At this time the Australian Greens cannot support recommendation 2 of the majority report that the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (the Bill) be passed.

1.2 The Australian Greens have concerns regarding the haste at which this Bill was introduced and passed through the House of Representatives and the lack of consultation that has been undertaken with Aboriginal and Torres Strait Islander communities regarding this Bill. It is particularly concerning given the complexity of native title arrangements and the significance of these amendments. Similar concerns were expressed in a number of the submissions to the inquiry.[1]

1.3 We also have concerns about the short time frame for the Senate inquiry into the Bill. Due to these concerns, the Australian Greens moved an amendment to the *Selection of Bills Committee Report (No. 2 of 2017)* to extend the reporting date of this inquiry until 8 May 2017. This amendment was not supported by the Senate.

1.4 During this inquiry concerns have been raised relating to Indigenous Land Use Agreements (ILUAs) that are outside the scope of the inquiry, such as the barriers to negotiation, the power imbalance between the parties, the ability to apply only once for registration, the role of prescribed body corporates, non-claimant applicants and the enforceability of the agreements.[2] Such concerns demonstrate the need for further consultation with Aboriginal and Torres Strait Islander communities with regards to changes to ILUAs as well as the *Native Title Act 1993* (Cth) more broadly.

1.5 The Bill is in two parts: part one measures will affect the rules for future area Indigenous Land Use Agreements (ILUAs) i.e. those that are made on or after the commencement of the Bill. Part two measures will affect existing area ILUAs as well as those agreements made on or before 2 February 2017. Arguments for and against the proposed amendments have been outlined in the submissions to the inquiry. This report will look at some of these arguments.

Part One Amendments

1.6 As outlined in the majority committee report, the authority prior to the decision in *McGlade*[3] was that in *Bygrave*[4], specifically that area ILUAs could be registered if they had been signed by at least one member of the registered native title

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[1] National Congress of Australia's First Peoples, *Submission* 57, pp 11-12; Law Council of Australia, *Submission 19*, pp 1-2; Professor Jon Altman, *Submission 45*, p. 2; Oxfam Australia, *Submission 43*, p. 1; Seed Indigenous Youth Climate Network, *Submission 44*, p. 2; Dr Stuart Bradfield, *Submission 46*, p. 3; Wangan and Jagalingou Family Council, *Submission 17*, pp 1-2.

[2] National Congress of Australia's First Peoples, *Submission* 57, pp 6-11.

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

[4] *QGC v Bygrave (No 2)* (2010) 189 FCR 412.

claimant (RNTC) on behalf of the majority where proper authorisation had been provided by the native title claim group.

1.7 Interestingly, the amendments in Part One (Items 1 and 5 of Schedule 1) to supersede the interpretation of the existing provisions in *McGlade* do not reinstate the interpretation applied in *Bygrave*. Rather, these amendments will apply a new set of rules to future area ILUAs, specifically the native title claimant group will be able to nominate which member/s of the RNTC are required to be parties to the area ILUA, or where no member/s have been nominated, a majority of the members of the RNTC must be parties to the area ILUA.

1.8 In its submission the National Congress of Australia's First Peoples says:

> We strongly oppose both nominating representatives, as well as the simple majority requirement in the proposed amendment to s24CD(2)(a). No Aboriginal or Torres Strait Islander person should have their native title rights violated by an ILUA they do not agree to. Allowing in ILUAs where a potentially large proportion of the native title claim group disagrees is unjust and compromises our native title rights.[5]

1.9 Mr McIntyre SC argues in his submission that some decisions are so significant that they should require unanimous support of those affected, rather than a mere majority. He says:

> In the *McGlade* case, where the decision being made included a decision to surrender all native title, a case could be made for requiring a greater than majority decision being required to make such a final decision as to rights, and a process which avoids the sublimation of a minority view opposing a decision of such significance, particularly if the majority is not substantial.[6]

1.10 The Law Council of Australia in its submission says:

> In considering the appropriateness of the amendments, it is important to note the nature and the effect of Area Agreements… upon registration, it is possible that people who hold native title rights and interests can be bound by an agreement that they have not had actual notice of, have not had legal advice in relation to, and were not a party to… The types of matters which may be the subject of an Area Agreement are not trivial.[7]

1.11 They then go on to say that:

> Given the potentially significant effects of the registration of an Area Agreement, the procedural safeguards in relation to its registration are fundamentally important. The requirement that all the people who comprise the registered native title claimant be a party to the agreement is one of those safeguards and the removal of it should be carefully considered.[8]

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[5] *Submission 57*, p. 12.

[6] *Submission 21*, p. 3.

[7] *Submission 11*, p. 2.

[8] *Submission 11*, p. 2.

1.12 The Northern Land Council (NLC), the Native title Representative Body for the Top End of the Northern Territory, notes in its submission that the *McGlade* decision does not affect its area because all the members of the RNTCs are parties to the ILUAs in its area.[9] It says:

> The NLC has always been of the view that the decision in *QGC v Bygrave (No 2)* (2010) 189 FCR 412 was not good law and should not be applied.[10]

1.13 One way to ensure that everyone's interests are represented from the outset is for the RNTC to reflect the various interests within the claim group. At the hearing, Ms Gory, the junior counsel for the applicants in *McGlade*, said:

> [T]he requirement that each authorised representative be a party is important for a reason that I think has been overlooked thus far, which is that it is not unusual for the claim group to appoint authorised representatives to represent the interests of different family groups or clan groups within a broader native title group. So if you remove the requirement that all of the authorised representatives need to sign an ILUA you in effect undermine the protection that has been given in the original authorisation, which requires that the different representatives will represent the different interests within the claim group.[11]

1.14 For the claim groups that have been utilising this process, and ensuring that decisions are made by consensus, Items 1 and 5 of Schedule 1 will undermine this process. As the Law Council of Australia says 'it would be understandable why a particular subgroup may be aggrieved, if that process is suddenly departed from in the authorisation of an Area agreement.'[12] This would particularly be the case where a single large faction or particular clan groups, where there is more than one involved, could potentially dominate.

1.15 On the other hand, a number of submitters argue that a single member (or small group of members) of the RNTC should not be able to frustrate the will of the majority by withholding their consent to being a party to the area ILUA, which is a possibility in light of *McGlade*.[13] The National Native Title Council (NNTC) says in its submission that '[t]he effect of this is to create an ILUA system that is markedly increased in its difficulty and which will stymie ILUA making.'[14]

1.16 In such a circumstance, the native title claim group would have to make a section 66B removal application to remove the member or members who refuse to become a party. This process can be costly and time consuming.[15]

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[9] *Submission 48*, p. 2.

[10] *Submission 48*, p.2.

[11] *Proof Committee Hansard*, 13 March 2017, p. 44.

[12] *Submission 19*, p. 3.

[13] National Native Title Council, *Submission* 9, p. 2; Dr Stuart Bradfield, *Submission 46*, p. 3; South Australian Native Title Services, *Submission 53*, p. 2.

[14] *Submission 9*, p. 2.

[15] Mr Pearson, *Proof Committee Hansard*, 13 March 2017, p. 19; National Native Title Council, *Submission 9*, p. 9; South Australian Native Title Services, *Submission 53*, p. 2.

1.17 The Cape York submission proposes that traditional owners, rather than applicants, authorise ILUAs. On the Cape York Peninsula, where there is 'One Claim', the traditional owners for each area currently make decisions for their area and who they want to sign off on the agreement.[16] At the hearing, Mr McLean, Barrister for Cape York Land Council, the Native Title Representative Council for the Cape York Peninsula, said:

> [I]n some agreements the signature has not even been sought for the ILUA from the applicant, whose country that might not be. So a person from the north of the country is not even being asked to sign off on an ILUA for the south of the country. In fact, as I understand it, it is a breach of traditional customary law to ask a person who is not of that country to put their name to an ILUA and to sign off on an ILUA which is not for their country.[17]

1.18 As a consequence of the *McGlade* decision, all individual members would be required to be parties to an area ILUA, even if the ILUA was not for their traditional country. Mr McLean gave an example at the hearing to demonstrate how the decision in *McGlade* would frustrate the process they are utilising. He said:

> There was a decision over a women's lake. It is women-only. We called the meeting, the men all walked out of the room and the women made the decision. They entered into an agreement and they signed off on the agreement. It is actually one of the ILUAs that is at risk. It is a very wrong for me to then go and ask the male applicants to sign off on the ILUA. They would have to be fully briefed and they simply will not do it.[18]

1.19 Mr McLean also raised section 66B and changing a member using this section during the hearing. He said:

> This is a bit of a nonsense that not only is expensive and takes a long time but I would have to change the applicants just for that ILUA. For the people from those example – the women nominated to sign off – I would have to change the applicant just for that. And tomorrow there would be the ILUA over here; I would have to change the applicant again.[19]

1.20 Following *McGlade*, a section 66B process would be required to remove a deceased person from the RNTC. As the NTC says:

> This is a prospect that is very unattractive given the cultural sensitivities and respect required for those who are deceased. In many places in Australia the names of deceased people are unable to be spoken let alone publicly advertised (as is required in the notification of a s66B meeting) and discussed at a large public meeting. Having to conduct such a meeting would result in enormous difficulty for claim groups and their legal representatives alike.[20]

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[16] *Proof Committee Hansard*, 13 March 2017, p. 21.

[17] *Proof Committee Hansard*, 13 March 2017, p. 21.

[18] *Proof Committee Hansard*, 13 March 2017, p. 21.

[19] *Proof Committee Hansard*, 13 March 2017, p. 22.

[20] *Submission 9*, p. 10.

> This issue is not explicitly dealt with in the amendments contained in the Bill; however, the amendments contained in items 1 and 5 of Schedule 1 do overcome this issue.[21]

1.21 At least one submitter suggested that a more streamlined approach is needed for removing and replacing a member where they have died or lost capacity, and that they would support a bill being put forward to deal with this issue.[22]

1.22 The Law Council of Australia acknowledged concerns regarding the cost of section 66B removals in its submission. However, it went on to say '[o]ne of the advantages of the 66B process if that the person is then made accountable to the community for the action [refusing to sign the agreement] and, if they are genuinely acting outside their mandate, they would be removed.'[23]

1.23 A number of alternative proposals were put forward for the consideration of the committee, specifically with regard to the default position of the majority contained in Item 1 of the Bill.

1.24 One proposal was that alternative dispute resolution processes should be looked at as a means for resolving disputes within claim groups. As Mr McIntyre SC says in his submission:

> If there is a dispute, with consequent dissentient voices, there is a cogent argument that the resolution of that dispute should be by a more nuanced approach tha[n] a mere majority over-ride. Arguably, there should be a process which enables a proper airing, investigation and evaluation of the reasons which may be the foundation for dissent, and a consideration of whether it is reasonable to give credence to the dissenting views and whether there is an opportunity to persuade those in dispute to a consensus decision.[24]

1.25 The National Congress of Australia's First Peoples advocates for all RNTCs to sign an ILUA, which was the process prior to *Bygrave*, and that 'a process be developed for determining voluntary and informed consent to mitigate against exploitation of our peoples.'[25] They too propose a alternative dispute resolution process, specifically mediation, where either the claim group is unable to choose who should make up the RNTC/s or where not all the members chosen agree to sign the ILUA. In this regard, they say:

> Providing for mediation in the event that not all authorised applicants agree respects our right to self-determination while also accounting for the complexity of native title rights and the importance of our connection to the land.[26]

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[21] National Native Title Council, *Submission 9*, p. 10.

[22] Seed Indigenous Youth Climate Network, *Submission 44*, p. 2.

[23] *Submission 19*, p. 3.

[24] *Submission 21*, p. 3.

[25] *Submission 57*, p. 5.

[26] *Submission 57*, p. 6.

1.26 Another proposal is that the traditional owners of the land as a group consent to any action to be taken on the land, similar to the requirements of section 23(3) of the *Aboriginal Land Rights (Northern Territory) Act 1976*.[27] It is argued that such an approach better reflects Aboriginal decision making processes than the default position contained in the Bill,[28] as it requires more than a mere majority.[29]

1.27 The Law Council of Australia posited yet another suggestion, specifically that subparagraph 24CD(2)(a)(ii) be removed from the amendments.[30] This would have the effect of upholding the decision in *McGlade* and require that all individual members of the RNTC be a party to an area ILUA, unless a lesser number is specified by a claim group at the authorisation meeting.[31]

1.28 The Australian Greens note paragraph 2.74 of the majority committee report and agree that consideration needs to be given to the proposals put forward in relation to ILUAs that involve significant consequences for native title holders such as the surrender of native title. Such proposals should be considered by the Government prior to debate on the Bill in the Senate and consultation undertaken with Aboriginal and Torres Strait Islander peoples, communities and organisations.

1.29 In regards to Item 4 of Schedule 1, which removes the requirement for a group's traditional decision-making process to be used where one exists under section 251A(b) of the *Native Title Act 1993* (Cth), and allows groups to utilise a non-traditional decision-making process 'in any case', the NLC raises concerns in its submission saying '[t]raditional decision making is the essence of native title as it reflects the ancient traditional laws and customs of the Aboriginal and Torres Strait Islander people concerned in any given claim or determination of native title.'[32]

1.30 The NLC goes on to say:

> The effect of that proposed change is to dilute the primacy of traditional decision-making and make it optional. This may lead to undue pressures bring placed on elders and senior people within a native title group to forgo their intramural rights to ensure the primacy of the maintenance of traditional law and custom especially in relation to the protection of cultural matters.[33]

1.31 The NLC does not support the proposed changes to s 251A(b) of the *Native Title Act 1993* (Cth) (though it does support the passage of the Bill otherwise).[34]

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[27] Professor Jon Altman, *Submission 45*, p. 5; Mr Michael Dillon, *Submission 58*, p. 3.

[28] Professor Jon Altman, *Submission 45*, p. 5; Mr Michael Dillon, *Submission* 58, p. 3.

[29] Mr Michael Dillon, *Submission 58*, p. 3.

[30] *Submission 19*, p. 4.

[31] *Submission 19*, p. 4.

[32] *Submission 48*, p. 2.

[33] *Submission 48*, p. 2.

[34] *Submission 48*, p. 3.

1.32 Item 6 of Schedule 1 makes a similar amendment to s 251B(b), by omitting 'where there is no such process' and substituting 'in any case'. The NLC did not address this item in its submission.

1.33 The Australian Greens note paragraphs 2.75 and 2.77 (Recommendation 1) of the majority committee report. Setting out in the Explanatory Memorandum the need for Items 4 and 6 of the Bill, will not alleviate the concerns with these provisions such as those articulated by the NLC with regards to the watering down of traditional decision-making processes. Amendments to the Bill are needed to address the issue but provision for consultation on these changes should be made so that the views of Aboriginal and Torres Strait Islander peoples, communities and organisations can be obtained.

1.34 Given the limited time for consultation on this Bill and the implications the Part One amendments will have on future area ILUAs, and the limited opportunity for submitters and witnesses to outline alternatives to the measures, the Australian Greens cannot support the Part One amendments of the Bill at this time.

Part Two Amendments

1.35 Area agreements that were made or registered prior to the *McGlade* decision will be subject to the amendments contained in items 9 to 13. This will include the proposed Adani ILUA.

1.36 As a consequence of the amendments in this part (Items 9 and 10 of Schedule 1), existing ILUAs that are not signed by all individual members of the RNTC will be considered to be, and to always have been, a valid ILUA. Area agreements that were authorised and lodged for registration prior to *McGlade* will be able to be registered, even if they were not signed by all individual members of the RNTC.[35]

1.37 Item 12 relates solely to the four agreements that were the subject of the *McGlade* litigation. If the Bill passes, these agreements will be taken to be ILUAs from the date of commencement of the amending Act. However, these agreements will still need to go through the registration process.[36]

1.38 The National Native Title Tribunal is aware of at least 126 existing ILUAs that are affected by the *McGlade* decision.[37]

1.39 In its submission, the NNTC says:

> It is not clear whether this will result in the automatic deregistration of registered ILUAs that are affected, however legal action to test whether such ILUAs can remain on the register has already been intimated. To avoid a period of protracted litigation and uncertainty, this situation is also

[35] *Explanatory Memorandum*, p. 6.

[36] Mr Anderson, *Proof Committee Hansard*, 13 March 2017, p. 66.

[37] National Native Title Council, *Submission 9*, p. 3.

> in need of remedy and the validity of currently registered ILUAs needs to be put beyond doubt.[38]

1.40 During the hearing, Mr Hardie, Legal Adviser, Wangan and Jagalingou Family Council said:

> The fact of the matter is: no one is going to move to overturn any ILUA where it is working because it is in no one's interest to overturn it. I expressed, in my view, that these whole amendments are necessary because of the existing provisions in the act. I refer to section 24EB, which says: while something is on the register, it is valid. Section 199C says you can only take it off the register in very limited circumstances. So you have two things: (1) who is going to complain? (2) what is the avenue for removal of those existing agreements? They are very narrow. I really think that we are getting the cart before the horse. There are amendments necessary for the Native Title Act. Some will have the consensus. But those amendment should not be made just because of one little decision when you have the whole system to worry about.[39]

1.41 In its submission, National Congress of Australia's First Peoples says:

> Even though there is controversy surrounding some of the agreements where not all traditional owners were required to sign, the strong need to secure existing agreements justifies, and indeed necessitates, the retrospective application of the proposed amendments.[40]

1.42 As Mr Anderson, Deputy Secretary, Civil Justice and Corporate Group, Attorney-General's Department, noted at the hearing:

> The information that the tribunal has given us is that there are 12 Queensland ILUAs where consent determination of native title was dependent upon the ILUA being executed, and the ILUA was perhaps affected by the decision in *McGlade*.[41]

1.43 There is, however, very little detail available about the affected ILUAs, and while we know that there are at least 126 ILUAs post 2010 that are affected by the decision in *McGlade*, we do not know the reason for the member/s of the RTNC not signing the agreement. We do not know the specific numbers that were not signed due to a member/s being deceased. We also do not know the numbers of ILUAs affected due to a deceased person not signing between 1998 and 2010 (the time period prior to *Bygrave*).[42] The National Native Title Tribunal has also been unable to establish how many of the affected ILUAs relate to national parks since the hearing for the inquiry.[43]

1.44 Some submitters raised concerns about retrospectively validating the affected ILUAs, however many there may actually be. In this regard, the joint submission of

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[38] *Submission 9*, p. 3

[39] *Proof Committee Hansard*, p. 29.

[40] *Submission 57*, p. 3.

[41] *Proof Committee Hansard*, p. 70.

[42] Ms Cooley, *Proof Committee Hansard*, 13 March 2017, p. 5.

[43] *20170316 a QoNs AGD Native title*, p. 1.

Cape York Land Council, Balkanu Cape York Development Corporation, and the Cape York Institute for Policy and Leadership said:

> 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.[44]

1.45 Their suggestion for existing ILUAs where the individual member/s who did not sign objected to the registration of the ILUA was for mediation to take place between those of the RNTC who had not signed and the traditional owners, facilitated by the National Native Title Tribunal. The suggestion for an alternative dispute resolution process to address disputes is not dissimilar from the recommendations of Mr McIntyre SC and the National Congress of Australia's First Peoples for future area agreements outlined at paragraph 1.23 and 1.24 above. If this was unsuccessful, they then recommended a reconvening of the authorisation meeting. Their argument being that if the Bill had passed, the Part One amendments would allow such an ILUA to be registered, following re-authorisation, even where all the individual members of the RNTC still had not signed.[45]

1.46 The Law Council felt it did not have sufficient information regarding the affected ILUAs to determine whether the amendments are appropriate.[46] It said:

> If the invalidity of an Area Agreement has arisen because of a bona fide reliance on the position in QGC Pty Ltd v Bygrave (No 2) [2010] FCA 1019, and there was no challenge to the Area Agreement by any member of the registered native title claimant, then the Area Agreement should be validated to give effect to what was the uncontroversial intention of the parties at the time. However, if there were genuine objections raised by such a person who refused to sign the Area Agreement, and the objection is ongoing, it may be unjust to validate it in those circumstances. As noted above, the Law Council does not have a firm view on the proposed amendment given the lack of clarity regarding how many (if any) Area Agreements fall within the latter category.[47]

1.47 Mr McIntyre SC says in his submission:

> The Committee has an obligation to satisfy itself that the circumstances relating to each of those agreements which resulted in the registered native title claimant group not acting unanimously did not have a justification in terms of declining to agree to an ILUA for a reason which legitimately addressed the rights and interests of the native title claim group. It should not be assumed without investigation that the majority decision of the

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[44] *Submission 14*, p. 5.

[45] *Submission 14*, p. 4.

[46] *Submission 19*, p. 3.

[47] *Submission 19*, p. 3.

> native title claim group was correct and any view to the contrary has no legitimacy.[48]

1.48 It would be helpful to know why all the individual members of the RNTCs did not sign on to the affected ILUAs. Is it because the member was deceased, or incapacitated? Were they representing the views of their constituency – the group they represented? Did they decline to sign because the agreement related to another's country? Or were they being vexatious?

1.49 With regards to item 14, which provides the Minister with rule making powers, the Bills Digest for the Bill says:

> The Explanatory Memorandum to the Bill does not provide information about the circumstances in which it is anticipated that statutory rules would be required to be made pursuant to item 14, including rules made for the purpose of item 11. Nor does it contain justification for the scope and breadth of the proposed rule-making power.
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> In a general sense, it might reasonably be surmised that some degree of flexibility is necessary to ensure that different factual scenarios in relation to the potentially wide variety of affected ILUA are covered.138 Some form of delegation of legislative power might be considered appropriate to deal efficiently with possible unforeseen and unintended consequences that might arise in individual cases, which would otherwise require legislative amendments to remove potentially arbitrary outcomes.
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> However, the absence of information in the extrinsic materials to the Bill about the intended use of the rule-making power makes it impossible to undertake meaningful analysis, in the abstract, of the proposed scope and effect of the proposed rule-making power.

1.50 The Australian Greens are concerned regarding the scope of the power conferred on the Minister via item 14, and its relationship to item 11.[49]

1.51 Given the limited time for consultation on this Bill and the minimal information available in relation to the affected ILUAs, the Australian Greens cannot support Part Two of the Bill at this time.

Right-to-Negotiate Agreements

1.52 The Australian Greens note paragraph 2.73 of the majority committee report and agree that the Government should consider any implications for right-to-negotiate agreements. More time is needed for any amendments to be considered by the Committee and Aboriginal and Torres Strait Islander peoples, communities and organisations.

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48 *Submission 21*, p. 9.

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

Recommendation 1

1.53 The Australian Greens recommend that the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 not be passed at this time.

Recommendation 2

1.54 The Australian Greens recommend that the inquiry into this Bill be extended until 8 May 2017 to allow further consultation with Aboriginal and Torres Strait Islander peoples, communities and organisations and other possible approaches to be developed and canvassed.

Senator Rachel Siewert
Australian Greens