

The Senate

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Legal and Constitutional Affairs  
Legislation Committee

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Native Title Amendment (Indigenous Land  
Use Agreements) Bill 2017 [Provisions]

March 2017

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# Recommendations

## 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.



# 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.<sup>1</sup> The committee tabled an interim report on 17 March 2017, seeking an extension of time to table its final report by 20 March 2017.<sup>2</sup>

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.<sup>3</sup>

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'.<sup>4</sup>

### 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).<sup>5</sup> 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.<sup>6</sup>

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).<sup>7</sup> Accordingly, the Court found these words indicate that the

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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.<sup>8</sup>

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.<sup>9</sup>

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.<sup>10</sup>

## 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.<sup>11</sup>

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

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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](http://www.nntt.gov.au/ILUAs/Pages/default.aspx) (accessed 7 March 2017).

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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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup> Importantly, the Explanatory Memorandum explains that the *McGlade* decision only affects area ILUAs, and not body corporate or alternative procedure ILUAs.<sup>15</sup>

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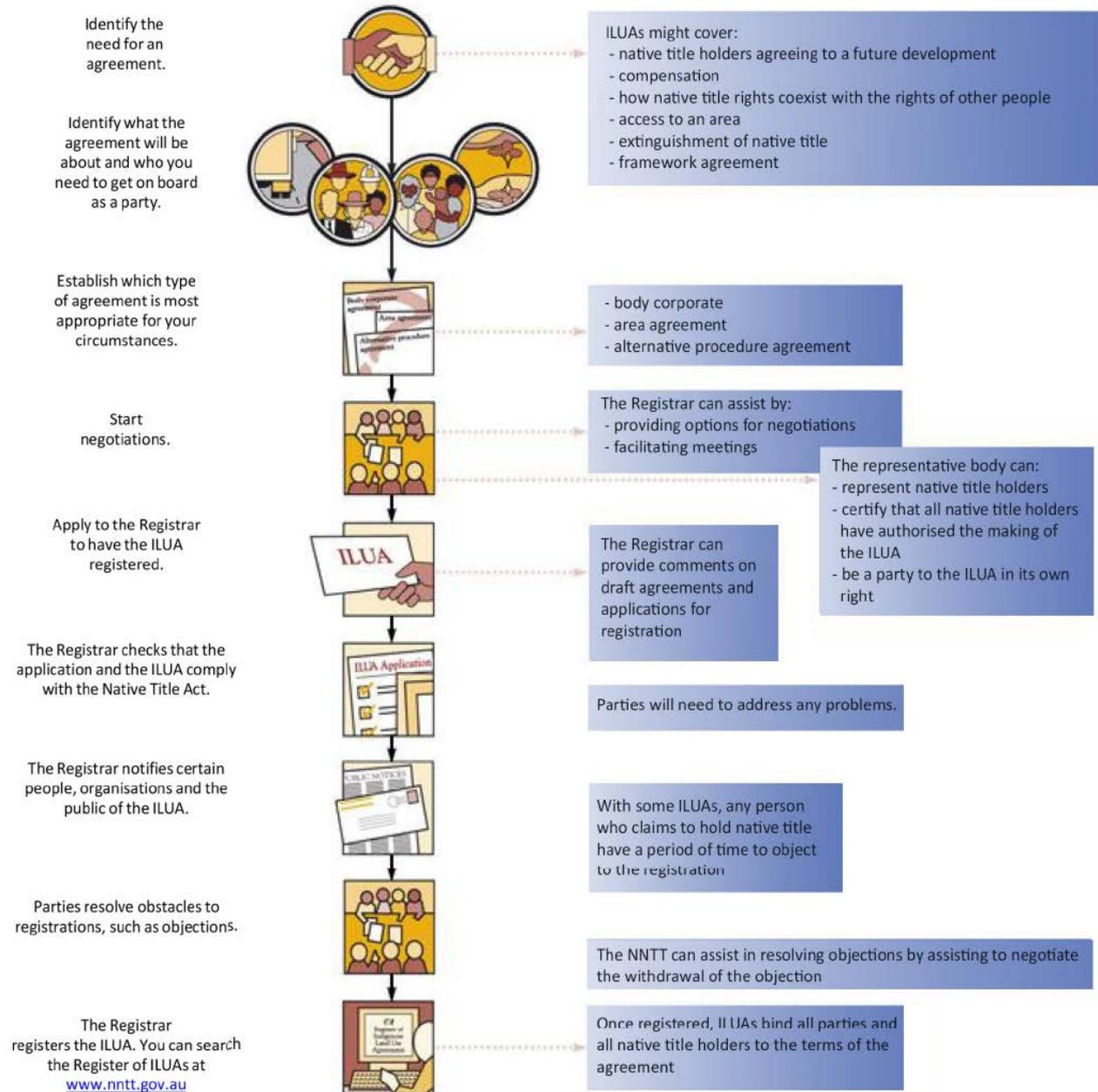
12 National Native Title Tribunal, *About Indigenous Land Use Agreements (ILUAs), Fact sheet 1: A general guide to ILUAs*, p. 2; [www.nntt.gov.au/Information%20Publications/1.About%20Indigenous%20Land%20Use%20Agreements.pdf](http://www.nntt.gov.au/Information%20Publications/1.About%20Indigenous%20Land%20Use%20Agreements.pdf) (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%20\\_July%202014.pdf](http://www.nntt.gov.au/Information%20Publications/Diagram%20of%20ILUA%20Process%20_July%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

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

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'.<sup>17</sup>

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'.<sup>18</sup>

## 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.

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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'.<sup>19</sup> 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.<sup>20</sup>

**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.<sup>21</sup>

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

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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.

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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.<sup>22</sup>

### **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.<sup>23</sup>

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.<sup>24</sup>

### **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.<sup>25</sup> 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.

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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](http://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.

## 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.<sup>1</sup>

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.<sup>2</sup>

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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

### ***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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

## 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.<sup>9</sup>

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.<sup>10</sup>

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.

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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.<sup>11</sup>

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.<sup>12</sup>

2.19 Other evidence suggested that the bill's amendments were designed to favour mining and private sectors.<sup>13</sup> 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.<sup>14</sup>

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.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

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.

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

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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).

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whom pressed the government to move swiftly to restore the status quo—and we did so.<sup>18</sup>

### ***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.<sup>19</sup>

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.<sup>20</sup> 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.<sup>21</sup>

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.<sup>22</sup>

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.<sup>23</sup> 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)*.<sup>24</sup> 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.<sup>25</sup>

2.31 However, the committee also received evidence that supports the proposed amendments for agreement to be reached by majority.<sup>26</sup> 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.<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> 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*.

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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.<sup>30</sup>

***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.<sup>31</sup>

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.<sup>32</sup>

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.<sup>33</sup>

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.<sup>34</sup>

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.<sup>35</sup> For example, Native Title Services Victoria noted that in the case of a recently deceased applicant, the process may be culturally inappropriate.<sup>36</sup> 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.<sup>37</sup>

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.<sup>38</sup>

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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.

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### *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...<sup>39</sup>

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.<sup>40</sup>

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.<sup>41</sup>

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*.<sup>42</sup>

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.<sup>43</sup>

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.<sup>44</sup>

2.46 However, strong support for the retrospective provisions was received from industry groups, and a number of Indigenous native title organisations.<sup>45</sup> 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.<sup>46</sup>

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.<sup>47</sup>

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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.<sup>48</sup>

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...<sup>49</sup>

### ***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.<sup>50</sup>

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.<sup>51</sup>

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...'<sup>52</sup>

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.<sup>53</sup>

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.<sup>54</sup>

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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.<sup>55</sup> 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.<sup>56</sup>

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.<sup>57</sup>

*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.<sup>58</sup>

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.<sup>59</sup>

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.<sup>60</sup>

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.<sup>61</sup>

*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.<sup>62</sup>

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.<sup>63</sup>

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.

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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.<sup>64</sup>

### **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**

## **Additional comments by Opposition Senators**

1.1 The *Native Title Act 1993*, passed by the Keating Government in 1993, is one of the most important suites of laws passed by this Parliament. That Act gave legislative form to the fundamental change to Australian law created by the High Court's decision in *Mabo*. In doing so, the Native Title Act has been instrumental in redefining the relationship between Aboriginal and Torres Strait Islander peoples and the wider Australian nation.

1.2 The law and practice of native title, including in relation to Indigenous Land Use Agreements (ILUAs), has necessarily developed over time. There have been a number of significant court cases, and at times amendments have been made to the Native Title Act to ensure that it better fulfils the important purposes for which it was established.

1.3 Labor members of this Committee acknowledge that the decision of the Full Federal Court in *McGlade v Native Title Registrar & Ors* has far reaching implications for a significant number of existing ILUAs made under the framework of the Native Title Act.

1.4 Having heard evidence from a range of affected Indigenous groups and other stakeholders, Labor accepts that legislative intervention is required to provide certainty by ensuring that existing ILUAs, that were made in accordance with the law as it was until the Court's decision in *McGlade*, are not rendered invalid. In addition, Labor members of this Committee accept that changes to the Native Title Act in this Bill are required to ensure that ILUAs currently under negotiation, as well as future ILUAs, are able to be effectively negotiated.

1.5 However, there are parts of this Bill that are not necessary to remedy the uncertainty created by the *McGlade* decision, specifically the changes to section 251A and 251B of the Native Title Act, and the provisions for validating applications for registration made on or before 2 February 2017 in cases other than in relation to a lack of signatures as required by the *McGlade* ruling. Accordingly, these provisions are not urgent, and Labor has argued for and supports their removal from this Bill.

### **Lack of consultation**

1.6 Labor members of this Committee also wish to express their concern about the process associated with this Bill, which has been rushed as a consequence of the failure of the Government to prepare for the possibility of an adverse ruling in the *McGlade* litigation, despite being warned about the need to prepare for that possibility last year. This has resulted in an extremely rushed consultation process, which, given the importance of native title law to so many Indigenous Australians, is at odds with the Prime Minister's own declaration in his Closing the Gap speech that the Australian Government would be doing things with the Indigenous community rather than to the Indigenous community.

1.7 When Labor was last in Government we recognised that aspects of the Native Title Act should be closely examined to ensure that the Act continued to operate to effectively to serve its key purposes. Those purposes include:

- to provide for the recognition and protection of native title; and
- to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings; and
- to establish a mechanism for determining claims to native title.

1.8 Labor tasked the Australian Law Reform Commission to look at making improvements to the Native Title Act, including a request to examine and make recommendations in relation to a range of matters, including connection requirements relating to the recognition and scope of native title rights and interests.

1.9 In June 2015 the ALRC tabled its report, which included some 30 recommendations for changes to the Native Title Act.

1.10 It is of concern to Labor that in over 18 months the Government has still not responded to the ALRC's Report, and Labor calls for the Government to respond to that report as soon as practicable. That Government response should then be subject to a period of extensive consultation with affected individual and communities, before any changes are made to the law itself.

**Senator Louise Pratt**  
**Deputy Chair**

# 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.<sup>1</sup>

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.<sup>2</sup> 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*<sup>3</sup> was that in *Bygrave*<sup>4</sup>, 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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<sup>1</sup> 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.

<sup>2</sup> National Congress of Australia's First Peoples, *Submission 57*, pp 6-11.

<sup>3</sup> *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.

<sup>4</sup> *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.<sup>5</sup>

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.<sup>6</sup>

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.<sup>7</sup>

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.<sup>8</sup>

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<sup>5</sup> *Submission 57*, p. 12.

<sup>6</sup> *Submission 21*, p. 3.

<sup>7</sup> *Submission 11*, p. 2.

<sup>8</sup> *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.<sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>

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.'<sup>12</sup> 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*.<sup>13</sup> 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.'<sup>14</sup>

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.<sup>15</sup>

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<sup>9</sup> *Submission 48*, p. 2.

<sup>10</sup> *Submission 48*, p.2.

<sup>11</sup> *Proof Committee Hansard*, 13 March 2017, p. 44.

<sup>12</sup> *Submission 19*, p. 3.

<sup>13</sup> National Native Title Council, *Submission 9*, p. 2; Dr Stuart Bradfield, *Submission 46*, p. 3; South Australian Native Title Services, *Submission 53*, p. 2.

<sup>14</sup> *Submission 9*, p. 2.

<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup>

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<sup>16</sup> *Proof Committee Hansard*, 13 March 2017, p. 21.

<sup>17</sup> *Proof Committee Hansard*, 13 March 2017, p. 21.

<sup>18</sup> *Proof Committee Hansard*, 13 March 2017, p. 21.

<sup>19</sup> *Proof Committee Hansard*, 13 March 2017, p. 22.

<sup>20</sup> *Submission 9*, p. 10.

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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.<sup>21</sup>

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.<sup>22</sup>

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 is 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.'<sup>23</sup>

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 than 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.<sup>24</sup>

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.'<sup>25</sup> 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.<sup>26</sup>

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<sup>21</sup> National Native Title Council, *Submission 9*, p. 10.

<sup>22</sup> Seed Indigenous Youth Climate Network, *Submission 44*, p. 2.

<sup>23</sup> *Submission 19*, p. 3.

<sup>24</sup> *Submission 21*, p. 3.

<sup>25</sup> *Submission 57*, p. 5.

<sup>26</sup> *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*.<sup>27</sup> It is argued that such an approach better reflects Aboriginal decision making processes than the default position contained in the Bill,<sup>28</sup> as it requires more than a mere majority.<sup>29</sup>

1.27 The Law Council of Australia posited yet another suggestion, specifically that subparagraph 24CD(2)(a)(ii) be removed from the amendments.<sup>30</sup> 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.<sup>31</sup>

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.'<sup>32</sup>

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.<sup>33</sup>

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).<sup>34</sup>

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<sup>27</sup> Professor Jon Altman, *Submission 45*, p. 5; Mr Michael Dillon, *Submission 58*, p. 3.

<sup>28</sup> Professor Jon Altman, *Submission 45*, p. 5; Mr Michael Dillon, *Submission 58*, p. 3.

<sup>29</sup> Mr Michael Dillon, *Submission 58*, p. 3.

<sup>30</sup> *Submission 19*, p. 4.

<sup>31</sup> *Submission 19*, p. 4.

<sup>32</sup> *Submission 48*, p. 2.

<sup>33</sup> *Submission 48*, p. 2.

<sup>34</sup> *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.<sup>35</sup>

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.<sup>36</sup>

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

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

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<sup>35</sup> *Explanatory Memorandum*, p. 6.

<sup>36</sup> Mr Anderson, *Proof Committee Hansard*, 13 March 2017, p. 66.

<sup>37</sup> 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.<sup>38</sup>

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.<sup>39</sup>

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.<sup>40</sup>

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*.<sup>41</sup>

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*).<sup>42</sup> 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.<sup>43</sup>

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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<sup>38</sup> *Submission 9*, p. 3

<sup>39</sup> *Proof Committee Hansard*, p. 29.

<sup>40</sup> *Submission 57*, p. 3.

<sup>41</sup> *Proof Committee Hansard*, p. 70.

<sup>42</sup> Ms Cooley, *Proof Committee Hansard*, 13 March 2017, p. 5.

<sup>43</sup> *20170316 a QoNs AGD Native title*, p. 1.

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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.<sup>44</sup>

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.<sup>45</sup>

1.46 The Law Council felt it did not have sufficient information regarding the affected ILUAs to determine whether the amendments are appropriate.<sup>46</sup> 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.<sup>47</sup>

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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<sup>44</sup> *Submission 14*, p. 5.

<sup>45</sup> *Submission 14*, p. 4.

<sup>46</sup> *Submission 19*, p. 3.

<sup>47</sup> *Submission 19*, p. 3.

native title claim group was correct and any view to the contrary has no legitimacy.<sup>48</sup>

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.

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.<sup>138</sup> 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.

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.<sup>49</sup>

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**



# Appendix 1

## Public submissions

- 1 Name withheld
- 2 Mr Franklin Gaffney
- 3 Extent Legal
- 4 Mr Gerry Georgatos
- 5 Mr Albert Corunna
- 6 Australian Law Reform Commission
- 7 Mr Glen Colbung
- 8 BHP Billiton
- 9 National Native Title Council
- 10 Ms Suzanne Kelly
- 11 Mr David Collard
- 12 Dr Bryan Keon-Cohen AM QC
- 13 Dja Dja Wurrung Clans Aboriginal Corporation
- 14 Cape York Land Council, Balkanu Cape York Development Corporation, and the Cape York Institute for Policy and Leadership
- 15 Minerals Council of Australia, Queensland Resources Council, and the Chamber of Minerals and Energy (WA)
- 16 National Farmers' Federation
- 17 Wangan and Jagalingou Family Council
- 18 Bigambul Native Title Aboriginal Corporation, Wardingarri Aboriginal Corporation, and Wangan & Jagalingou Family Council
- 19 Law Council of Australia
- 20 Carpentaria Land Council Aboriginal Corporation
- 21 Mr Greg McIntyre
- 22 South West Aboriginal Land and Sea Council
- 23 HWL Ebsworth Lawyers
- 24 Mr Mervyn Eades, Ms Mingli McGlade, Ms Naomi Smith and Ms Margaret Culbong
- 25 Mr Michael Owens
- 26 AMPLA

- 27 Yamatji Marpla Aboriginal Corporation
- 28 Ms Madeleine Love
- 29 Clayton Utz
- 30 Miss Kelsi Forrest
- 31 Name withheld
- 32 Queensland Law Society
- 33 Dunghutti Elders Council
- 34 Arnold Bloch Leibler
- 35 Mr Joseph Collard
- 36 Sovereign Union of First Nations and Peoples in Australia
- 37 Ms Mary Attwood
- 38 Australian Institute of Aboriginal and Torres Strait Islander Studies
- 39 Mr Nick Deane
- 40 Association of Mining and Exploration Companies
- 41 Central Desert Native Title Services
- 42 Yawuru Native Title Holders Aboriginal Corporation
- 43 Oxfam Australia
- 44 Seed Indigenous Climate Network/Australian Youth Climate Network
- 45 Professor Jon Altman
- 46 Dr Stuart Bradfield
- 47 Mr Stephen Young
- 48 Northern Land Council
- 49 Native Title Services Victoria (NTSV)
- 50 Maritime Union of Australia
- 51 Western Australian Bar Association
- 52 Mr Paul O'Halloran
- 53 South Australian Native Title Services (SANTS)
- 54 Federation of Victoria Traditional Owners Corporations
- 55 Mr James Fitzgerald
- 56 Business Council of Australia
- 57 National Congress of Australia's First Peoples
- 58 Mr Michael Dillon
- 59 Government of South Australia

## **Appendix 2**

### **Public hearings and witnesses**

#### **Monday 13 March 2017—Brisbane**

AH MAT, Mr Richard, Chairperson, Cape York Land Council

ANDERSON, Mr Iain, Deputy Secretary, Civil Justice and Corporate Group, Attorney-General's Department

ARO, Mr Tosin, Special Counsel, Clayton Utz

BERTRAM, Ms Judy, Deputy Chief Executive Officer, Queensland Resources Council

BOGE, Mr Mark, Solicitor, Thynne + Macartney

BURRAGUBBA, Mr Adrian, Spokesperson, Wangan and Jagalingou Family Council

COLEMAN, Ms Laura, Legal Officer, Attorney-General's Department

COOLEY, Ms Nerida, Counsel, Ashurst Australia, on behalf of Queensland Resources Council

CULBONG, Ms Margaret, Private Capacity

DENHOLDER, Mr Tony, Partner, Ashurst Australia, on behalf of Queensland Resources Council

GORY, Ms Simona, Barrister, on behalf of Ms McGlade, Ms Culbong, Mr Eades and Ms Smith

HANSEN, Ms Emma, Senior Policy Adviser, Resources, Queensland Resources Council

HARDIE, Mr Colin, Legal Adviser, Wangan and Jagalingou Family Council

HEWITT, Ms Lauren, General Manager, Policy, Ag Force

HUNTER, Mr Philip, Partner, HWL Ebsworth

JOHNSON, Ms Murrawah, Youth Spokesperson, Wangan and Jagalingou Family Council

KELLY, Mr Glen, Chief Executive Officer, National Native Title Council

KNOWLES, Ms Jacqueline, Manager, Natural Resources Policy, National Farmers' Federation

LE ROUX, Mr Stefan, Principal Legal Officer, South West Aboriginal Land and Sea Council

LIVERMORE, Ms Kirsten, Senior Adviser, Minerals Council of Australia

MACFARLANE, Mr Ian, Chief Executive, Queensland Resources Council

MCGLADE, Ms Mingli, Private Capacity

McINTYRE, Mr Greg, Private capacity

McLEAN, Mr Adam, Barrister, Cape York Land Council

MIRAGAYA, Ms Carmen, Director, Native Title Unit, Attorney-General's Department

MORGAN, Mr Kevin, Private Capacity

NANNUP, Mr Wayne, Chief Executive Officer, South West Aboriginal Land and Sea Council

PEARSON, Mr Gerhardt, Executive Director, Balkanu Cape York Development Corporation

SIMPSON, Ms Irene, Applicant Wangan and Jagalingou People claimant

SMITH, Mr Kevin, Chief Executive Officer, Queensland South Native Title Service

SMITH, Ms Naomi, Private Capacity

## **Appendix 3**

### **Tabled documents, answers to questions on notice and additional information**

#### **Answers to questions on notice**

##### **Monday 13 March 2017—Brisbane**

- 1 Just us Lawyers - Answers to questions on notice from public hearing 13 March 2017 (received 16 March 2017)
- 2 Attorney-General's Department - Answers to questions on notice from public hearing 13 March 2017 (received 16 March 2017)

#### **Additional information**

- 1 The committee received over 20,000 substantially similar campaign emails and letters
- 2 Additional information provided on behalf of the Cape York Land Council (received 15 March 2017)

