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SUBMISSION

Dear Dr White

Parliament of Australia - House of Representatives
Standing Committee on Aboriginal and Torres Strait Islander Affairs
Inquiry into the Native Title Amendment Bill 2012

Clayton Utz is Australia's largest independent law firm. We have a strong Energy and Resources focus, with the largest dedicated Energy and Resources practice of any law firm in Australia. Our Energy and Resources practice advises across all aspects of energy and mining, including oil and gas, LNG, electricity and renewable energy, as well as coal, uranium, iron ore and all other base metals extracted in Australia.

Located within our Energy and Resources team, the Clayton Utz Native Title and Cultural Heritage Services group operates nationally, with practitioners based in our Brisbane, Perth, Melbourne, Sydney and Darwin offices. Principally, our group provides advice (primarily to developers of very large resources, energy and infrastructure projects) on the impacts that native title, Aboriginal cultural heritage and Aboriginal land rights have on projects, and the agreement-making and other mechanisms available for the resolution of these issues.

The relevant Explanatory Memorandum (**EM**) states that the *Native Title Amendment Bill 2012* (**NTA Bill**) is intended to introduce "targeted amendments to the *Native Title Act 1993* … which aim to improve the operation of the native title system, with a focus on improving agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes".

In our view, while there are elements of the proposed amendments to be welcomed, much of the remainder will be of concern to proponents developing projects in areas where native title may continue to exist.

In these circumstances, Clayton Utz welcomes the opportunity to make this submission to the Inquiry into the Native Title Amendment Bill 2012 (**Inquiry**).

Dr John White
House Standing Committee on Aboriginal and Torres Strait Islander Affairs 27 February 2013

OVERVIEW

The NTA Bill would introduce amendments to the *Native Title Act 1993* (Cth) (**NT Act**) that are primarily intended to:

- permit relevant Government and native title parties, in particular circumstances, to agree to disregard the historical extinguishment of native title in relation to "park areas", being areas set aside, or over which an interest is granted or vested, under the law of the Commonwealth, the State or a Territory, for the preservation of the natural environment (where such extinguishment has occurred in spite of the exclusion in s.23B(9A) of the NT Act);
- in relation to the "right to negotiate" (**RTN**) process under Subdivision P of Division 2, Part 3 of the NT Act, with (retrospective) effect from 1 January 2013:
    - clarify the content of the good faith negotiation obligation that is the hallmark of the RTN;
    - extend the minimum period during which negotiations must occur before recourse may be had to the future act determination jurisdiction of the National Native Title Tribunal (**NNTT**); and
    - ensure, where a party to a future act determination application (**FADA**) asserts that another party has not negotiated in accordance with the new "good faith negotiation requirements", that it will be the second party who will need to satisfy the NNTT that it did satisfy those requirements; and
- in relation to Indigenous land use agreements (**ILUAs**):
    - extend the circumstances in which parties may make "body corporate agreements" (Subdivision B of Division 2, Part 3 of the NT Act);
    - clarify the operation of the authorisation requirement, and streamline the registration process, for "area agreements" (Subdivision C of Division 2, Part 3 of the NT Act); and
    - clarify the circumstances in which binding amendments may be made to registered ILUAs without the need for additional authorisation and registration processes.

The Preamble to the NT Act indicates that the purposes of the Act include the implementation of special measures designed to go some way towards rectifying the past injustices suffered by Aboriginal peoples and Torres Strait Islanders, injustices that have seen Aboriginal peoples and Torres Strait Islanders become (as a group) "the most disadvantaged in Australian society". These "special measures" include the key opportunities given to Aboriginal peoples and Torres Strait Islanders (through the media of the RTN and of ILUAs) to negotiate benefits for their communities out of the proceeds of energy and resources projects.

However, the Preamble also recognises that, notwithstanding the need for and appropriateness of these special measures, "it is also important that the 'broader Australian community' be provided with certainty that .. acts may be validly done".

In assessing the merits of the NTA Bill, we have borne in mind that one of the overriding objectives of the NT Act is to seek an appropriate balance between these (at times, competing) considerations.

PROPOSED REFORMS - HISTORICAL EXTINGUISHMENT

The NTA Bill would introduce a new s.47C to the NT Act. The new section would allow, within the context of an ongoing claimant application or revised native title determination application, the relevant Government party (on the one hand) and the applicable registered native title body corporate (**RNTBC**), applicant or representative body (on the other hand) to agree, in respect of a "park area" included within the area of the native title application in question, to disregard any previous extinguishment of native title resulting from:

- the setting aside of, or the granting or vesting of an interest over, the park area;
- the creation of any other prior interest in relation to the park area; and
- where the Government party so states, or the Government and native title parties so agree, the construction or establishment of any public works in the park area.

Before any such agreement is finalised, the Government party would need to publicly notify, and give interested persons an opportunity to comment on, the proposed agreement.

It is apparent from the EM that these amendments are intended to "partly ameliorate the effect of the decision in *Western Australia v Ward* (2002) 213 CLR 1". Further, we acknowledge that the NTA Bill provides that, if the relevant native title application results in a determination that native title exists in relation to the relevant park area, that determination, relevantly, would not affect the validity of the creation of any "prior interests", for example mining or petroleum tenements or authorities, in relation to the area (and that the non-extinguishment principle will apply in relation to any such prior interests).

Nevertheless, the prospect of having native title revive within areas of their tenements or authorities, and having no input into or control over the process by which this might occur, is the cause of some nervousness for the holders of such mining and petroleum interests.

From our perspective, however, there is a relatively simple way to achieve the intended objective of addressing the impacts of the *Ward* decision without unsettling industry. The solution would be to allow interested parties in an "agreement area", in addition to the opportunity to comment on a proposed agreement, to be able to require that they be made a party to any agreement. This "seat at the table", in the same way as the opportunity to join as respondents to native title applications, would give interested parties the ability to act to ensure that their "prior interests" are specifically listed (and protected) in the final form of any agreement reached.

A further practical issue arises. In carrying out its project due diligence, a project developer will often seek to ascertain where native title may continue to exist in its project area. This, in the main, will involve an analysis of tenures and interests to determine the native title position and will determine whether, for example, the RTN or an ILUA will be required to validate any future acts to be done as part of the project.

The amendments do require claimant and revised native title determination applications to be accompanied by copies of any s.47C agreements (including with respect to public works). However, there is no process or timeframe prescribed for how and when these agreements should be lodged. These need to be provided as any delay in lodging (or failure to lodge) an agreement would render the developer of a project that covers an area where historical extinguishment has been disregarded unable (given that the developer would only be analysing the usual tenure documents) to discover that native title has been revived over a park area.

PROPOSED REFORMS - THE RTN

The NTA Bill proposes changes, principally, to three discrete aspects of the RTN, as we discuss below.

Good faith negotiation requirements

The NTA Bill proposes to replace the obligation (in s.31(1)(b) of the NT Act) on the parties to a RTN process to negotiate "in good faith" with an obligation to negotiate "in accordance with the good faith negotiation requirements". The reasons, according to the EM, are to "clarify the meaning of good faith under the [RTN] regime, and the conduct and effort required of parties in seeking to reach agreement". The EM goes on to state that the NTA Bill also "creates the good faith criteria that *establishes [sic] the conduct expected of negotiating parties*".[1]

We consider these to be worthy goals, however, as we explain below, we do not consider that the relevant amendments achieve these targets. That said, we would preface our comments by observing that, in our experience of acting for energy and resources proponents, project developers generally view local Indigenous communities as key stakeholders and, in the main, are highly motivated to forge strong and ongoing relationships with the members of such communities. Critical to establishing such relationships is the conduct of whole-hearted and sincere negotiation processes, be they in the context of the RTN, ILUAs or the Aboriginal cultural heritage landscape.

With respect to the proposed amendments, we note that a new s.31A(1) of the NT Act would explain that the "good faith negotiation requirements" in accordance with which the negotiation parties must negotiate "are that negotiation parties use all reasonable efforts to reach agreement about the doing of the act".

This would seem to be a new, broader, substantive obligation that goes beyond the current s.31(1)(b) obligation to negotiate in good faith with a view to obtaining native title party agreement to the doing of the relevant act. In other words, it seems to us that, rather than simply *clarifying the meaning of* "good faith", as it appears this amendment was intended to do, the amendment *expands the scope* of the current good faith negotiation obligation.

It is not clear that this broader obligation is required and still less clear that it strikes the appropriate balance between allowing native title parties a right to negotiate benefits from developers of mining and petroleum projects and allowing the broader Australian community certainty that future acts can be done affordably, sustainably and in a timely way.

The RTN (given principally in the context of mining) is one of the "special measures" that was included in the NT Act for the sound policy reasons to which we have already alluded. The RTN is harnessed to the freehold test, which was intended to bring the rights of native title holders into line with those of ordinary title holders, however, it is a "special measure" in the sense that ordinary title holders are not given a right to negotiate. The RTN is not akin to, and indeed goes beyond, ordinary title holders' rights to negotiate compensation.

[1] Emphasis supplied.

Understood in this context, we believe the RTN was intended to provide to native title parties (even where their native title rights have not yet been determined) a fair opportunity to, in good faith, negotiate benefits for their communities out of revenues to be earned from the country's natural wealth.

However, we do not believe the RTN was intended to operate as a brake on efforts to explore for, and to mine, the country's substantial natural mineral resources (efforts that can have a measurable positive impact on a number of social and economic indicators that will be of benefit to both the "broader Australian community" and the native title community in question). It is, in our view, for these reasons that the RTN does not require that agreement be reached, does not otherwise provide native title parties with a right to veto projects and makes native title parties equally subject to the obligation to negotiate in good faith.

In these circumstances, we do not believe that the objectives of, or policy behind, the RTN, as we perceive them, are furthered by broadening and deepening the RTN good faith negotiation obligation (consequences that are only partially mitigated by the confirmation that the new good faith negotiation requirements do not require the parties to reach agreement).

Furthermore, we note that the NTA Bill does not stipulate what is meant by using "all reasonable efforts" to reach agreement. The explanatory memorandum to the NTA Bill only states that what constitutes all reasonable efforts "is to be assessed in the circumstances of the negotiation in question". That being the case, we do not see that these amendments will promote greater certainty than obtains under the current system. On the contrary, in the absence of a statutory definition, we fear that significant litigation will be instituted to fill the breach; that is, to generate sufficient judicial authority to clarify exactly what is involved in using "all reasonable efforts to reach agreement".

While the NTA Bill does not define the phrase "use all reasonable efforts to reach agreement", the amendments do give the following assistance to the arbitral body: in assessing compliance with the good faith negotiation requirements, regard is to be had, "where relevant", to whether the parties have adhered to the behavioural standards prescribed in the new s.31A(2).

While the elements to be prescribed in the new s.31A(2) could be considered broadly consistent with the well-known "Njamal Indicia" established by the Federal Court in 1996,[2] it again seems very likely that a good deal of litigation will be required to ascertain whether or not (and, if so, the extent to which) the new standards differ from the content of the current obligation to negotiate in good faith.

We do not believe that introducing this measure of uncertainty into the RTN process, particularly when one also takes into account the increased litigation that we believe will follow, will improve the experience of the RTN process for any of the negotiation parties. Introducing such uncertainty into to the process is also contrary to the relevant objectives of the NTA Bill, which are stated to include a desire to clarify the process. On balance, therefore, unless clear (and appropriate) content is given to the new obligation to negotiate in accordance with the good faith negotiation requirements, we would submit that these proposed changes should not be introduced.

[2] See *Western Australia v Taylor and Another* (1996) 134 FLR 211

Extension of the minimum period of negotiation

The NTA Bill proposes to extend the minimum period before a FADA can be made to the NNTT from six months after the notification day to eight months. Again, we do not consider that this proposed amendment will measurably improve the RTN.

The proposed amendment seems to be based on a conception that a negotiation party (usually, of course, the grantee party) will typically seek recourse to the arbitral body six months after the notification day if agreement has not been reached. This has not been our experience.

On the contrary, in our experience, where (as is usually the case) negotiations are proceeding between the negotiation parties in a constructive manner, the parties will generally try to see those negotiations through to agreement. Apart from the importance responsible proponents place on fostering strong relationships with their Indigenous stakeholders, savvy proponents will appreciate that negotiating through to a voluntary agreement will enable project approvals to be granted more quickly (and possibly also more cheaply, given the potential cost of delays to project approvals) than would be the case if they lodged FADA proceedings.

That said, there will be instances in which it is clear from a very early stage that negotiations have simply broken down and are very unlikely ever to result in agreement on commercial terms. There will also be examples of RTN processes occurring during the interregnum caused where an applicant constituting a registered native title claimant (**RNTC**) has lost the authority of its native title claim group but section 66B proceedings in the Federal Court have yet to result in the ordering of a new applicant (and the entry of details of that new applicant in the Register of Native Title Claims). In these circumstances, there will be no party with whom the proponent can safely and confidently deal and project timeframes may not allow the proponent the luxury of awaiting the outcome of the section 66B process.

In any of these types of circumstances, there would seem to be little utility in the proponent being required to undergo an extra two months of inactivity before it can lodge a FADA.

In our view, the amendment is seeking to right a wrong that in our experience is not perpetrated by project proponents. We do not believe the evidence supports any contention that project proponents generally go through the motions waiting for the six months to elapse so that they can commence a FADA application. On the contrary, the evidence shows that most RTN processes end in agreement and it is usually only when there are significant issues of difference between the parties that such applications are made.

Reversal of the onus of proof with respect to establishing negotiation in good faith

Currently, s.36(2) of the NT Act provides that the arbitral body does not have power to make a determination on a FADA if a negotiation party satisfies the arbitral body that another negotiation party did not discharge its obligation to negotiate in good faith.

However, if enacted in its current form, an amendment proposed by the NTA Bill would have the result that, where a negotiation party asserts that a second negotiation party has not negotiated in accordance with the good faith negotiation requirements, then (in order for the arbitral body to be invested with power to hear and determine the FADA) it is the *second negotiation party* who must satisfy the arbitral body that it has negotiated in accordance with the good faith negotiation requirements.

We note, on the one hand, that this is an unusual amendment in the sense that, under the common law, the legal burden generally rests on the party asserting a claim or cause of action to prove all facts whether positive or negative essential to that claim or cause of action.[3]

More practically, it is submitted that the proposed amendments will in all likelihood result in a marked increase in the number of cases in which the good faith point is taken by native title parties.

The EM states the view is that this amendment will "improve the quality of offers made by negotiating parties, discourage opportunistic conduct and encourage agreement-making". In our opinion, however, while these would all be desirable outcomes, it is not at all clear that they would all result from the proposed amendments.

A proponent already needs to make genuine offers (and desist from engaging in opportunistic and insincere conduct) if it is to be able to defend an assertion that it has not negotiated in good faith. As reversing the onus of proof (in and of itself) does not change the standard against which a proponent's conduct will be judged, it is not clear how doing so would "encourage agreement-making".

If there is to be opportunism that results from this proposed change, it is proposed that it is more likely to be engaged in by the native title party who would have no reason not to, routinely, assert an absence of good faith in each FADA, irrespective of whether it holds a genuine grievance in this regard, knowing that it will not be the party that needs to establish the converse. This is particularly so, given that the native title party would not have to bear the cost of raising the argument even were it ultimately to lose that argument.

In these circumstances, we believe that this amendment will result in native title parties routinely seeking that the project proponent prove that they negotiated in good faith not because that is their view, but simply because it could be considered good litigation practice. The result would clearly be a routine increase in the cost and duration of each FADA. This issue could assume particular pertinence for smaller, less well-resourced, proponents.

Once again, as we do not consider that this outcome would improve the RTN, we would suggest that the present position not be disturbed.

Retrospective application

Finally, we note that the RTN amendments that would be introduced by the NTA Bill are proposed to apply (retrospectively) to negotiations that commenced after 1 January 2013 and that are still ongoing when the amending Act receives royal assent. No explanation is given for this proposed amendment.

Given the uncertainty as to whether the proposed amendments will be introduced in their current form, it is submitted that such retrospective application will require negotiation parties to existing RTN processes to

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[3] See, for example, *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corp* (1985) 1 NSWLR 561 at 564. See also *Abrath v North Eastern Railway Co* (1883) 11 QBD 440, in which Bowen LJ held that:

> "*Wherever a person asserts affirmatively as part of his case that a certain state of facts is present or is absent, or that a particular thing is insufficient for a particular purpose, that is an averment which he is bound to prove positively*" (at 457).

comply with and adhere to (which will require an effort to anticipate the nature of) uncertain and quite possibly unascertainable obligations (and to expend significant amounts of money and time in so doing).

In the absence of any clear explanation as to why this retrospectivity is required or appropriate, it is submitted that the amendments to the RTN regime should, in the usual way, commence on assent.

PROPOSED REFORMS - INDIGENOUS LAND USE AGREEMENTS

We discuss below the changes proposed to be made by the NTA Bill to the processes for making and amending ILUAs.

Body corporate agreements

The NTA Bill proposes to extend the circumstances in which body corporate agreements may be used to include situations where the proposed ILUA area might include one or more "extinguished areas" for which there is no RNTBC. Currently, such ILUAs would have to take the form of area agreements, the registration process for which is significantly more onerous than it is for body corporate agreements.

We would support this proposed reform, which we consider is capable both of greatly simplifying the ILUA-making process and of giving effect to what would frequently be the wishes of all the parties to the ILUA.

Preliminary assessment of ILUAs

Section 24CH of the NT Act requires the Registrar, following receipt of an application to register an area agreement, to give notice of the agreement. Prior to the decision of the Federal Court in *QGC Pty Limited v Bygrave (No 2)*[4] (**Bygrave #2**), it is our recollection that the Registrar proceeded on the basis that he or she was required, before taking steps to notify an area agreement, to consider whether or not the agreement satisfied the "prerequisite provisions" for an ILUA in ss.24CB - 24CE of the NT Act.

In Bygrave #2, the Court held that, for a number of reasons, it was "unlikely … that the Legislature intended that the … decision … about whether [an] agreement meets [the] prerequisite provisions … should be made … before notice is given under [s.24CH of the NT Act]".[5]

The NTA Bill would clear up the resulting uncertainty by providing that the Registrar will only be required to notify an area agreement if satisfied that the agreement clears the preliminary hurdle of having complied with the requirements of ss.24CB - 24CE of the NT Act.

We would welcome this clarification, which promotes certainty into the ILUA registration process. It also reduces the prospects of ILUA parties expending time and money on a registration process only to discover, at the end of that process, that their agreement was not "technically" an area agreement in the first place.

[4] [2010] FCA 1019.

[5] Bygrave #2 [2010] FCA 1019, at [26] - [33] *per* Reeves J.

Objections

The NTA Bill proposes to overhaul the current processes available for either formally objecting, or otherwise communicating to the Registrar one's opposition, to the registration of an area agreement.

Currently, where an agreement is "certified" by the representative body, any person claiming to hold native title in the ILUA area may, within the (three-month) notice period, object to the Registrar on the basis that, in relation to the ILUA, the "identification" and "authorisation" requirements were not met.

There currently is no objection right where an agreement is *not* certified - because (as appears from the relevant EM), in these cases, the legislature took the view that the appropriate avenue of redress where one disagreed with the proposed registration of an ILUA, would be to lodge a claimant application and have it registered.

However, in deciding whether or not to register a non-certified area agreement, the Registrar is required to take into account any "information" provided by a representative body or by any other body or person. This requirement, from our observation, has led to a subversion of the relevant legislative intention by allowing the development of a "quasi-objection" process by which persons opposed to the registration of non-certified area agreements provide the Registrar, under the guise of providing "information", with often quite detailed submissions as to why the agreement in question should not be registered. Pursuant to ordinary common law rules of natural justice, the Registrar would then be obliged both to consider the information provided and to give the ILUA parties an opportunity to respond to the submissions. In reality, this process could (and, in our experience, generally does) involve the lodgement by the "objector" and the various ILUA parties of several rounds of submissions as to why the ILUA should not, or should, be registered.

It is our experience that the timeframes for resolving these "quasi-objections" can exceed those for the disposition of formal objections to certified agreements.

The NTA Bill would address these deficiencies in the ILUA registration process by:

- reducing the s.24CH "notice period" to one month;
- removing the right of persons who claim to hold native title in the area of a *certified* ILUA to object to the registration of the agreement;
- providing to persons who claim to hold native title in the area of a *non-certified* ILUA a *new* right to object to the registration of the agreement on the basis that the "identification" and "authorisation" requirements were not met; and
- amending s.24CL of the NT Act to require, relevantly, only that persons who become RNTCs *before* the end of the new one-month notice period be parties to non-certified ILUAs in order for such agreements to be registered.

We would generally welcome these changes. In particular, if the representative body has certified that an area agreement meets the "identification" and "authorisation" requirements, we think it appropriate that the Registrar be required to accept this conclusion, and that the redress available to persons aggrieved by this decision be limited to the opportunity to seek judicial review of the decision.

We also welcome the greater certainty, in respect of non-certified ILUAs, afforded by the reduction of the "window" within which a claim may be lodged and registered to the duration of the newly-abridged one-month notice period. The current practice, in which (for example) the lodgement of a claim on the penultimate day of a three-month notice period would require the ILUA registration process to be held in abeyance while the Native Title Registrar applies the registration test to that claim, provides insufficient certainty to ILUA parties. Combined with the new objection right given to persons who claim to hold native title in the area of non-certified ILUAs, we agree that the proposed amendments strike the correct balance between the need to ensure that non-certified ILUAs are authorised by the correct persons and the need for ILUA parties to be able to obtain registration of their ILUAs in timely fashion.

In our assessment, however, there is one issue that is not addressed by the proposed amendments.

As noted above, the proposed amendments would create a new objection right for persons who claim to hold native title in the area of a ILUA to object to the registration of the agreement on the basis that the "identification" and "authorisation" requirements were not met.

Resolution of the objection will require the Registrar to assess the reasonableness of the efforts made by the parties to identify all holders and potential holders of native title in the proposed ILUA area, persons who would then have been required to authorise the ILUA. Having made such efforts, the ILUA parties would have made their decisions as to whether a person or group "should" have been identified (as to which, see below) on the basis of the information that was available (or would have been discoverable had reasonable efforts been made) as at the date on which the ILUA was authorised.

In our view, then, the Registrar, in assessing compliance with the "identification" and "authorisation" requirements, should really be appraising the actions taken (and decisions made) in this regard by the ILUA parties in the light of the information that was to hand (or would have been discoverable had reasonable efforts been made).

If this is accepted, the question that arises is what is the appropriate date as at which this appraisal should be done. Unfortunately, the NTA Bill does not specify any such timeframe. In our submission, the relevant assessment should be performed on the basis of the information that was available or would fairly have been discoverable at the date of authorisation.

In this regard, if there are persons who claim to hold native title in relation to an ILUA area, notwithstanding that they are neither native title holders nor members of the native title claim group for a registered native title claim, there is judicial authority[6] that those persons would only need to be identified where they can make out a *prima facie* case in support of their claim.

Therefore, if there are such persons who are discovered by (or make themselves known to) the ILUA parties, from a practical perspective, the ILUA parties will have to review the available (or fairly discoverable) information to make an assessment of whether a *prima facie* case can be made in support of their claim. In particular, if those persons had evidence to hand that would support their case, one would expect them to have made that information available to the ILUA parties to allow them a fair opportunity to make the appropriate decision.

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[6] See *Murray v The Registrar of the National Native Title Tribunal* [2002] FCA 1598 (**Murray**), at [74] - [75] *per* Marshall J.

If those persons fail to provide the ILUA parties with any evidence they have before, and such evidence is not otherwise fairly discoverable as at the date of, authorisation of the ILUA, the ILUA parties will make their decisions (and often spend, or commit to spending, substantial sums) accordingly. It is in these circumstances that we suggest it would be inequitable if the Registrar, in assessing the reasonableness of the efforts that were made by the ILUA parties to "identify" the persons in question, took into account "new" evidence in support of their case that was not available to (and could not reasonably have been discovered by) the ILUA parties prior to authorisation.

We would submit that a fair avenue of recourse for such persons in these circumstances should be the opportunity to lodge (and have registered) a claimant application during the notice period.

Amendments

ILUAs, while registered, have effect as if all persons holding native title in relation to any part of the ILUA area were bound by the ILUA (notwithstanding that only a sample of those persons will have been included as "parties" to the ILUA in the conventional sense). In our view, this extended contractual effect is readily justified in the case of area agreements by the process of authorisation by which the native title holders (or potential holders), as a whole, sanction and accept the contractual commitments given by their negotiation representatives in their name.

In these circumstances, there is understandable uncertainty (as acknowledged in the EM) as to whether amendments made to registered ILUAs can take effect (and operate to bind all native title holders in the ILUA area) without the amendments themselves being made the subject of authorisation (in the case of area agreements) and registration.

The NTA Bill proposes reforms that would allow agreed amendments to registered ILUAs to take effect (and bind all native title holders in the ILUA area) upon written notification of such amendments by the parties to the Registrar, provided the amendments fall within certain stated categories.

We welcome these reforms, although we would recommend that the reforms clarify that it is permissible to change the register description of the parties to an ILUA, not only following an assignment or other transfer of rights and liabilities under the ILUA, but also (in the case of ILUAs relating to areas over which there is a registered native title claim) where the composition of a RNTC changes including as a consequence of the making of orders under s.66B of the NT Act and the updating of the relevant entry in the Register of Native Title Claims to reflect those orders.

Identification and authorisation (area agreements)

As previously noted, the Registrar will not register an area agreement unless satisfied that all reasonable efforts have been made to identify all persons who hold or may hold native title in the ILUA area and all persons identified (following the making of such reasonable efforts) have authorised the making of the ILUA.

Traditionally, it was commonly understood that, for areas in respect of which native title had not been determined, the persons in relation to whom reasonable efforts at identification had to be made were:

- members of the native title claim groups for any registered native title claims in the ILUA area; and

- additionally, irrespective of whether there was a registered claim over the ILUA area, all other persons who assert native title over the area and can demonstrate a *prima facie* basis to that assertion.

However, in *QGC Pty Limited v Bygrave*[7] (**Bygrave #3**), the Federal Court appeared to find that the Registrar could lawfully register an area agreement in the area of a registered claim (if all other registration conditions were satisfied) provided the agreement had been authorised by the native title claim group for such claim. In other words, the authorisation of any *other* persons asserting native title over the area would not be required (irrespective of the apparent substance of their claim). The avenue of recourse for such "other claimants" would be to lodge a claimant application during the notice period and have it registered, in which event the new RNTC would be a mandatory party to the ILUA.

The Court in Bygrave #3 did also appear to suggest that, while only "registered claimants" were required to authorise ILUAs in the area of their claim, reasonable efforts would still have to be made to "identify" any "person or group of persons with a characteristic from which it is reasonable to conclude that a person or a group holds native title in any part of the area covered by the agreement".[8]

While the Bygrave #3 decision had the beneficial effect of simplifying and clarifying the authorisation process that would apply in relation to area agreements covering registered claim areas, the decision created questions with respect to:

- the reason for (or purpose of) the requirement to identify "other claimants" in relation to ILUAs covering registered claim areas (given that they have no role in authorising such ILUAs); and

- the categories of persons who would need to be identified (and be required to authorise) ILUAs covering areas in respect of which there was *no* registered claim.

The Court in Bygrave #3 also declined to consider who would need to authorise ILUAs covering areas in respect of which there might be *overlapping* registered claims.

In response, the NTA Bill proposes reforms that, according to the EM, are intended to "address current uncertainty in the law about who may authorise an ILUA".

The principal stride made by the NTA Bill in this regard is the introduction of a new s.251A(3) to clarify that ILUAs in unclaimed areas must be authorised by all persons who claim to hold native title in the ILUA area and can make out a *prima facie* case in support of that claim. While we think this proposed amendment is helpful, we fear it does not go far enough.

In this regard:

- the NTA Bill would also introduce a new s.251A(2) defining persons who "may hold" native title as being those who can establish a *prima facie* case that they may hold native title. Unfortunately, this definition is stated to apply only in the context of the authorisation of ILUAs. We would prefer to

[7] [2011] FCA 1457.

[8] [2011] FCA 1457, at [100], *per* Reeves J.

see confirmation of the finding in Murray that the "*prima facie*" test also applies in the case of identification (in other words, the s.251A(2) definition should be applied to the references to persons who "may hold" native title not only in s.251A of the NT Act but also in ss.24CG(3)(b)(i) and 203BE(5)(a) of the NT Act);

- as it stands, the NTA Bill also does not confirm the correctness of the decision in Bygrave #3 that only native title claim groups need authorise ILUAs in their registered claim areas. This confirmation could be achieved by introducing clarification that, in relation to ILUAs over registered claim areas, a reference to "persons who can establish a *prima facie* case" is a reference to the members of a native title claim group for such registered claims. This amendment would have the added benefit of removing the uncertainty as to whether it is indeed necessary to identify "other claimants" in relation to ILUAs covering registered claim areas (again, given that, following Bygrave #3, they have no role in authorising such ILUAs); and

- finally, there is judicial authority[9] to suggest that, where more than one person or group "may hold" native title in the area of an ILUA, those persons or groups with competing claims to holding native title in the ILUA area should be required to authorise the ILUA separately. The amendment suggested above would have the result that, where there are overlapping registered claims in an ILUA area, authorisation is required from the native title claim groups for both claims. In our submission, the NTA Bill should clarify whether or not, in those circumstances, the different native title claim groups would be required to authorise the ILUA separately. We note that the issue would also arise where, in the context of an ILUA covering an unclaimed area, more than one person or group is able to establish a *prima facie* that they may hold native title in the ILUA area.

Thank you for the opportunity to make these submissions. If you have any questions, please feel free to contact our Mark Geritz or Tosin Aro using the contact details below.

Yours sincerely

[redacted]

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[redacted]

[9] See *Kemp v Native Title Registrar* [2006] FCA 939, at [44] - [61] *per* Branson J. We note that, while serious questions were asked about the decision in *Kemp*, the Court in Bygrave #3 stopped short of overruling the decision.