SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO

Program: 1.6 Indigenous Legal and Native Title Assistance

Question No. AE17/145

Senator Pratt asked the following questions at the hearing on 24 March 2017:

To the Attorney-General –

1. The former Labor Government commissioned the Australian Law Reform Commission to conduct an extensive inquiry into native title laws, and to make recommendations for any improvements to those laws. In June 2015 the ALRC tabled its Report, which included some 30 recommendations for changes to the Native Title Act, including changes to two of the key provisions that are the subject of the Native Title (Indigenous Land Use Agreements) Bill 2017.

a) Why is it that the Government has completely failed to respond to the Law Reform Commission's report, that has been on your desk for over a year and a half?

2. The Government introduced the Native Title (Indigenous Land Use Agreements) Bill 2017 to the House of Representatives on Wednesday 15 February, and the very next day the Government used its numbers to force that Bill through the House without proper consultation, claiming that responding to the outcome of the McGlade decision in the Federal Court was a matter of great urgency.

a) What was the urgency?

3. In a letter leaked to The Australian newspaper revealed that the Chief Executive of the National Native Title Council, Mr Glen Kelly, wrote to the Attorney-General last year warning the Attorney-General about the potentially significant impacts of the McGlade decision, and asking that the Attorney-General pass amendments to the Native Title Act to ensure that the impending Federal Court decision did not undermine existing ILUAs and negotiations then underway.

Mr Kelly went to the trouble to tell the Attorney-General about the potential problem, and then to make clear what the solution was in case the Attorney-General couldn't work it out himself writing that:

"The solution ... is a very simple amendment to the NTA to clarify that for an agreement to registered as an ILUA, not all RNTCs (applicants) are required to sign an agreement once it has been properly authorised … in a meeting on behalf of the wide traditional owner group. This would in effect codify Bygrave, eliminate the likelihood of repeated litigation on this point and re-establish the certainty and confidence in the ILUA provisions of the NTA that all parties need."

The Attorney-General completely ignored that advice from the Chief Executive of the National Native Title Council.

a) Is the Attorney-General personally responsible for the complete fiasco of this Government being blindsided by a legal decision that he was explicitly warned about last year?

b) Is it fair to say that if the Attorney-General had bothered to consider the advice provided to you by Mr Kelly, amendments could have been drafted to the Native Title Act in a timely manner, and then consulted on with the Indigenous community to ensure that they achieved the purposes for which they were being introduced without unintended consequences?

4. The effect of the Government's approach meant that Members of the House were compelled to vote on significant changes to the Native Title Act without having had a chance to

conduct any consultation with Aboriginal and Torres Strait Islander communities, or with legal experts and project proponents impacted by the McGlade decision.
Earlier that same week the Prime Minister quoted the words of Indigenous leader Chris Sarra, imploring the Government to 'Do things with us, not to us'.
a) How is using Government numbers to smash a bill through the House impacting native title processes, without consultation or proper debate, consistent with the Prime Minister's commitment to do things with, rather than to, Indigenous Australians?

The answers to the honourable senator's questions are as follows:

1a. Work is underway to respond to the ALRC report recommendations. The report was referred to the COAG Investigation into Indigenous Land Administration and Use. It is the Government's intention to address the ALRC report, together with other native title reforms recommended and considered by the COAG Investigation, through a package of native title reforms.

The native title reforms process was discussed at the National Native Title Ministers' Meeting on 13 October 2017, and an options paper seeking public comment on potential reforms was released on 29 November 2017.

2a. The outcome of the *McGlade* decision was to leave an estimated 126 registered Indigenous Land Use Agreements (ILUAs), vulnerable to challenge and invalidation. Such invalidation would have had poor outcomes for native title holders, third party stakeholders, and government alike.

One proceeding challenging an ILUA affected by *McGlade* had been filed in the Queensland Registry of the Federal Court prior to the amendments.

The *McGlade* decision had the potential to impose significantly higher transaction costs on making ILUAs than was previously understood to be the case. The decision does not align with Commonwealth policy on how ILUAs should be made. If the ILUA-making requirements outlined in *McGlade* had been allowed to stand, investment in regional and rural Australia and the benefits flowing to Indigenous communities as a result of that investment could slow. Addressing the issue decisively is necessary to avert negative consequences.

3a. It would be a complete fiasco if the Government was to seek to amend legislation ahead of every court hearing that could potentially change the law. Mr Kelly's letter was considered. The department responded to Mr Kelly's letter and was otherwise maintaining a watching brief over the proceedings.

3b. Awaiting the judicial determination ensured that the issues under consideration by the Court in that matter could be fully addressed by the legislation and the scope of the legislation confined to the specific issues determined by the Court. Amendments were then drafted in close consultation with Indigenous representatives.

4a. The Government's approach to the Bill was driven by the urgency of addressing the issue, as outlined in paragraph 2a. A significant degree of focused consultation was conducted before the Bill was introduced, including with the Opposition. The amendments – which ultimately provide a greater degree of flexibility and control to native title claim groups in the future – were broadly

supported by native title representative bodies (which are the bodies that represent Indigenous people who have native title claims), governments and third party stakeholders.