National Native Title Council

spirit of Change

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Toni Matulick
Committee Secretary
Senate Legal and Constitutional Affairs Committee
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Parliament House
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Dear Ms Matulick

Inquiry - Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

Please find attached the submission of the National Native Title Council (NNTC) to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2012.

The NNTC is the peak body of Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) from around Australia being formally incorporated in November 2006. The objects of the NNTC are, amongst other things, to provide a national voice for NTRBs/NTSPs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

The NNTC would be happy to provide further information about its submission should this be required.

Yours sincerely

Glen Kelly
Chief Executive Officer

SUBMISSION

Senate Legal and Constitutional Affairs Committee
Inquiry into the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*

PURPOSE

This Submission is being provided in response to the Senate Legal and Constitutional Affairs Committee Inquiry into the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (the 'Amendment Bill').

The National Native Title Council (NNTC) welcomes the Amendment Bill which provides for a range of amendments to the *Native Title Act* (the 'NTA') that have been sought by the Indigenous Native Title Sector for a number of years.

NATIONAL NATIVE TITLE COUNCIL (NNTC) SUBMISSION

This submission has been developed following consultation with members of the NNTC (see attachment 1) and represents a broad position from Native Title Representative Bodies and Native Title Service Providers (NTRBs/NTSPs) across the nation.

Each NTRB/NTSP and their respective clients are affected slightly differently by the recent Federal Court decision and the legislative response that is the subject of this Inquiry. As such, a number of NTRBs/NTSPs will provide their own submissions addressing their own particular circumstances.

Broadly however, the position of the NNTC is that it supports the passage of the Amendment Bill for the reasons that are set out in this submission.

BACKGROUND AND EFFECTS

On the 28th and 29th of July 2016, several cases focussing on the execution of area agreement Indigenous Land Use Agreements (ILUAs) (as set out in pt 2, div 3, sub C of the NTA) were heard before a Full Bench of the Federal Court in Perth WA – *McGlade and Ors v Registrar, National Native Title Tribunal and Ors* P59 of 2015 ('*McGlade*').

Since 2010, parties to ILUAs have relied upon a precedent judgment from Justice Reeves in *QGC v Bygrave (No 2)* (2010) 189 FCR 412 ('*Bygrave'*) which set out that the unanimous signatures of the registered native title claimants (RNTCs – as defined in s253 of the NTA) are not required for the execution of an ILUA, so long as proper authorisation was provided by the native title claim group within a s251A authorisation meeting.

In essence, the *Bygrave* judgment ceased the practice whereby the authority of the group itself could be usurped by one or a small number of individuals due to these individuals being victims of coercion, seeking inducement, not being competent (in a medical sense), for their own ideological reasons or (since *McGlade*) being deceased.

As such, the *Bygrave* decision has empowered native title groups and provided the groups themselves with the ability to make final decisions about matters that affect their interests. This claim group empowerment has seen an acceleration of ILUA making and has resulted in many positive outcomes for native title parties, Governments and industry alike.

This precedent and the practice it resulted in were reversed by the recent *McGlade* decision. This has the effect of disempowering the native title community and again allowing individual members of the Applicant to veto community decisions. The effect of this is to create an ILUA system that is markedly increased in its difficulty and which will stymie ILUA making.

Already there are a number of ILUAs soon to be subject to the registration test that are not able to be carried forward. Most of these are not controversial and provide great benefit to traditional owner communities. It is anticipated these will be addressed in individual NTRB/NTSP submissions.

Going forward, it could be expected there to be a high risk that ILUAs would not be able to be executed and that negotiations would simply not commence if, after the expense and effort of the parties, an agreement could not be guaranteed to be executed and implemented. The solution in these situations from a State point of view would be compulsory acquisition, an action that clearly disempowers Traditional Owners. This situation is in need of remedy.

The *McGlade* decision has also had the effect of invalidating existing registered ILUAs with some 126 being affected according to a preliminary audit by the National Native Title Tribunal. Many of these ILUAs have been made to secure access rights for Traditional Owner communities to their country, others grant tenure to Traditional Owners groups while others reach agreement and benefit sharing arrangements on government infrastructure projects, mining and petroleum leases and licenses.

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

As a general comment, the NNTC is not aware of any other Australian community whose decisions can be vetoed in the manner envisaged by the current provisions of the NTA 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.

What is clear about the *McGlade* decision however is that the Full Bench of the Federal Court interpreted the NTA literally. This points to the issues at hand residing within the NTA itself, not the decision of the Federal Court. This further points to the need for the NTA to be amended, as has been

sought by the Indigenous Native Title Sector for some years.

As such, the Amendment Bill is seen by the NNTC as an appropriate response to the *McGlade* decision. It is critical for the workability of the ILUA provisions of the NTA, that the scheme envisaged by the *Bygrave* decision be codified and that the affected ILUAs negotiated by and for Traditional Owner groups are validated in the manner that is envisaged in the Amendment Bill.

REMARKS ON ILUAS

A registered ILUA is a mechanism provided by the NTA to reach agreement and to then further guarantee and warrant the security of that agreement, which is a key factor as to why ILUAs have grown in importance over recent years. The intention to register an agreement as an ILUA is often presented as a pre-requisite to negotiations by industry and Government parties, a position that native title parties generally have little difficulty in accepting, particularly since *Bygrave*.

An ILUA binds all individuals in the native title group and therefore needs to be properly authorized via s251A of the NTA. The requirements for s251A authorisation are onerous, however given the binding nature of ILUAs, high standards are appropriate. It is also appropriate that the community, through its decision at a duly called and conducted s251A authorisation meeting, should be the authority for making decisions about matters that affect its interests.

ILUA processes have become a source of empowerment for native title groups. Many address matters of access to traditional lands, some provide tenures to the TO group, some resolve native title claims themselves while others generate benefits for the community as a result of negotiations over government infrastructure, land, mining and petroleum title.

Through such processes native title groups have been furnished with the ability to have a seat at the table, to negotiate outcomes that are of benefit to them, to make decisions on matters that concern them as a community and to make these decisions as a community.

Until the *McGlade* decision at least, ILUAs have done a great deal towards advancing the interests of Indigenous people. While it is true that some ILUAs are controversial, the vast majority are not and have played a key role in advancing Indigenous interests through creative uses in relation to future acts and major projects, the settlement of native title applications and a variety of other matters.

The NNTC sees the efficacious function of the ILUA provisions of the NTA as a key mechanism for ongoing Indigenous empowerment as well as social, cultural and economic development. In many respects, ILUAs have emerged as a significant element of the native title system, and it is of critical importance that this is maintained through the passage of the Amendment Bill.

APPLICANTS AND THE CLAIM GROUP

As the Committee would be aware, when a native title claim is lodged following authorisation in a s251B meeting, the claim group at the meeting nominate an individual or a number of people who are part of the claim group to be the Applicant of the claim, otherwise known under the NTA as the

Registered Native Title Claimants.

While claim management processes vary around the country, it is very common that the Applicant is not intended to be a representative instrument of the claim due to the number of people, families or groups who collectively make up the native title claim group or the complexity of the claim if for example, it is an amalgamated claim made on behalf of several traditional owner groups.

In situations like these, the Applicant is often provided with limits of authority in the s251B authorisation meeting and other representative forums are developed to manage the claim. In such examples, the Applicant is expected to follow the direction of the representative claim management structure or the entire claim group as the case may be.

This comment is mirrored in the report of the Australian Law Reform Commission (ALRC) into its review of the NTA where it states in paragraph 10.39 that '[c]laim groups do not generally invest full decision-making authority in the Applicant, but expect the applicant to bring important decisions back to the group and to follow the directions of the group. A variety of decision-making structures have been adopted.'[1]

The ALRC report, which canvasses the issue of Applicant versus group authority under the heading of 'Authorisation, the applicant and governance' at pages 299 and 300 of its report, also shows the common intention of claim groups is that the group itself holds ultimate authority and shall have the final say as to directions and indeed, whether to enter into an ILUA or not.

It is not the intention of these arrangements (which again, are common) to furnish the Applicant with deliberative powers that over-ride the express wishes and/or direction of the claim group itself, indeed such a situation would clearly disempower the group.

This however, is the exact situation claim groups find themselves in post *McGlade*, a situation where according to the NTA the claim group is no longer the ultimate authority in making decisions about matters that affect their interests and where individual members of the Applicant can veto the decisions of the group as a whole.

As previously mentioned, to the knowledge of the NNTC there is no other group in Australia that is able to have its decisions vetoed in such a way. Such a scheme would seem to be based on an assumption that Indigenous people are not capable of considering issues of any real complexity, are not capable of coming to a rational decision and need some sort of external party to mediate their decision making with the world at large.

Such a notion is extraordinarily patronizing and is one the NNTC categorically rejects.

The NNTC puts forward that native title claim groups are more than capable of considering complex issues and making their own decisions in fulfillment of the requirements for free, prior and informed consent (or refusal as the case may be). Further to this, any party that has the ability to veto a decision

[1] Australian Law Reform Commission, 2015, *Connection to Country: Review of the Native Title Act (1993) (Cth)*, Final Report, p 299.

of the claim group effectively removes the ability to achieve free, prior and informed consent – a notion all parties should reject.

The NNTC also puts forward that in providing individuals with the ability to veto group decisions as it exists in the NTA, supported by *McGlade*, is in contravention of the following articles of the United Nations Declaration on the Rights of Indigenous Peoples, all of which relate in various ways to ILUAs and their contents:

> **Article 3:** Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> **Article 18:** Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.
>
> **Article 21.1:** Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.
>
> **Article 23:** Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.
>
> **Article 32.1:** Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

The Australian Government has previously voiced its support for the Declaration and it is often cited when parties outside of the Indigenous community engage in actions that affect Indigenous rights and interests. It would be ironic if the rights described in the above clauses were actually curtailed by individual community members exercising a right of veto over the express wishes of their own community, however this is the current situation as set out in the provisions of the NTA.

Clearly then, the NNTC is strongly of the view that authority to make decisions on the rights and interests of the native title claim group properly resides within the native title claim group itself. It is for this reason that the NNTC supports the passage of the Amendment Bill as it will allow for this balance to be restored.

PREVIOUS CONSULTATION

The NNTC is of the view that the issues being addressed, particularly in the clauses of Schedule 1, Part 1 of the Amendment Bill have been significantly vetted over a number of years and any suggestion there has been no or inadequate consultation is not accurate.

This has occurred in three separate processes, the ALRC Review of the NTA[2] as reported in April 2015; the Native Title Act Amendment Bill 2012; and the Investigation into Indigenous Land Administration and Use which was convened by the Council of Australian Governments (COAG) and reported on in December 2015.

Australian Law Reform Commission Inquiry

In August 2013 the then Labor Government referred Commonwealth native title laws and legal frameworks to the Australian Law Reform Commission for inquiry and report in relation to two specific areas - connection requirements relating to the recognition and scope of native title rights and interests, and barriers imposed by the NTA's authorisation and joinder provisions.

The ALRC undertook a comprehensive consultation and reporting process over approximately 2 years, developing an Issues Paper, a Discussion Paper and a Final report. During the course of this process extensive input was provided by NTRBs/NTSPs as well as Academic Institutions, Governments, industry groups, Law Societies/Councils and others.

Broadly speaking, and as it relates to the current Amendment Bill before Parliament, the final report of the ALRC Inquiry included recommendations that were intended to:

- strengthen the internal governance of the claim group by clarifying the functions, powers and duties of the Applicant;
- streamline the process of removing a member of an Applicant who is unable or unwilling to act;
- ensure access to justice for parties whose interests may be affected by a native title determination, while recognising the need for efficient and fair administration of justice.[3]

The ALRC provided its final report in April 2015. Chapter 10 of this report deals extensively with the issues bought to hand by *McGlade* and it includes 2 specific recommendations which are taken up by the current Amendment Bill.

Firstly:

> **Recommendation 10–6** The Native Title Act 1993 (Cth) should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.[4]

The report states that '[t]he ALRC considers that a minority of members of the applicant should not be able to frustrate the will of the entire claim group. Most stakeholders agreed with this approach.'[5] The report further notes a number of submissions that indicated support for this position.[6]

[2] Ibid.
[3] Ibid, p. 26.
[4] Ibid, p. 308
[5] Ibid, p. 309
[6] Ibid, p. 310

This recommendation is reflected in clauses 1 and 5 of Schedule 1, Part 1 of the Amendment Bill.

The second recommendation reflected in the Amendment Bill is:

> **Recommendation 10–2** Section 251A of the Native Title Act 1993 (Cth) requires persons holding native title to use a traditional decision-making process for authorising an indigenous land use agreement (ILUA), if they have one. If they do not have one, they may use a decision-making process agreed to and adopted by the persons.
>
> Section 251A of the Native Title Act 1993 (Cth) should be amended to provide that persons holding native title may authorise an ILUA either by a traditional decision-making process, or a decision-making process agreed to and adopted by the group.

This recommendation is taken up by clause 4 of schedule 1, part 1 of the Amendment Bill.

Native Title Amendment Bill 2012

In 2012 amendments to the NTA were introduced into Parliament that had a particular focus on improving agreement making, encouraging flexibility in claim resolution and promoting sustainable outcomes. At that time the NNTC broadly supported a simplified registration process for minor ILUA amendments, as provided for in the proposed section 24ED.

Extensive consultation was also conducted during the development of the 2012 Amendment Bill and while the Bill wasn't passed by the Parliament, it does highlight that there has been an appetite to amend the NTA in a way which assists the making of agreements and ILUAs for some time.

Investigation into Indigenous Land Administration and Use

In October 2014, COAG announced an investigation into Indigenous land administration and use. A Senior Officers Working Group, drawn from various Governments was convened which in turn established an Expert Indigenous Working Group to provide advice on the subject matter of the Investigation.

This Working Group also conducted consultations with Indigenous parties and in December 2015 provided its final report to COAG.[7] The report recommended a number of amendments to the NTA that were supported in principle by the Senior Officers Working Group and the Expert Indigenous Working Group. These are contained within Table 1 of the Report of the Working Group.[8]

Both items 2 and 9 of this table support the implementation of the previously referred to recommendations 10-6 and 10-2 of the ALRC report respectively. It is the understanding of the NNTC that this table was endorsed by COAG in December 2015 and is awaiting implementation.

[7] Commonwealth of Australia (2015): Investigation into Indigenous Land Administration and Use, Report to the Council of Australian Government from the Senior Officers Working Group, December 2015.
[8] Ibid, Table 1: Native Title Act amendment proposals recommended to be implemented, pp 13-16.

CONTESTING ILUAS

As has been previously touched on, where an ILUA has generated controversy in the community, it is not appropriate for one or more members of the Applicant to be able to veto an agreement, particularly if it goes against the express wishes of the claim group.

There are in fact a number of mechanisms whereby members of the claim group can seek to more appropriately decline to enter into or contest an ILUA. These are:

1. In the s251A authorisation meeting itself, whereby a person or group of people can utilize their own agency and seek that an ILUA not be entered into;
2. In the objections phase of the ILUA registration process, where members of the claim group can seek to show that the s251A authorisation was not notified or conducted in a manner that meets the required legal thresholds;
3. In the event the ILUA is registered despite objections, by contesting the decision of the Registrar in the Federal Court.

It could be said that the system is in fact weighted against the registration of ILUAs given these substantial mechanisms that are at the disposal of individuals or groups, mechanisms that are used with regularity. There is no issue with the use of these mechanisms, s251A authorisations need to be conducted properly and claim groups need to be able to come freely to their own decisions. Where this has not occurred, these remedies are important to ensure quality of process and good decision making.

These mechanisms do however, serve as a further repudiation of the previously referred to notion that claim groups require some sort of separate deliberative instrument in the form of the Applicant to mediate their decisions with the outside world. The legal thresholds for the conduct of a s251A meeting are high and any person or group who does not agree with the content of an ILUA already has at their disposal several strong avenues to contest the making and registration of ILUAs.

In the case of ILUAs that have generated controversy, namely those associated with the Adani Mine proposal in Queensland and the South West Native Title Settlement, it is appropriate that these ILUAs are allowed to be subject to the ILUA registration test, and should they be registered, have the decision of the Registrar contested in the Courts.

The real test of these and all ILUAs should be whether the s251A meeting and authorisation meets the required legal thresholds and whether claim groups were able to freely come to their own decision, not measures in the Parliament where not all the facts of individual examples are able to be presented.

As the Bill stands, it allows these ILUAs to be subjected to the normal tests provided for in the NTA and any measures to exclude them from these processes through amendment to the Bill as it is currently drafted would be inappropriate and discriminatory. It is the view of the NNTC that the decision making process of the community should be respected and the normal tests provided for in the NTA should be able to be applied to all affected ILUAs.

REMARKS ON S66B APPLICATIONS

An alternative solution to the proposed legislative amendment would be for NTRBs/NTSPs to utilize the s66B provisions of the NTA to remove those members of the Applicant that have not signed an ILUA (ie, are unwilling to act) or those who have exceeded their authority.

The NNTC submits that this is not a practical response to the issues at hand, does not provide parties with the certainty that their actions in negotiating an agreement will ultimately be fruitful, or that agreement finalisation would be timely.

This is because s66B processes are exceedingly difficult for all parties involved. 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 the s66B meeting.

To illustrate the steps required (post *McGlade*) where a s66B process is necessary in the context of an ILUA negotiation and registration, it would require:

1. Instructions to be sought from the claim group representatives to negotiate an ILUA.
2. Upon completion of negotiation, convene a s251A authorization meeting to authorise the ILUA.
3. Assuming claim group authorises, seek that each member of the Applicant (the RNTCs) sign.
4. Upon failure of all members of the Applicant to sign, seek instructions from the claim group representatives to conduct a s66B procedure;
5. Notify and conduct a claim group authorisation meeting for the removal of non-signing members of the Applicant in accordance with s66B of the NTA;
6. Apply for and receive Court orders for removal, pending legal action against s66B application.
7. Submit ILUA to the National Native Title Tribunal for the three month objection period and the application of the registration test.

This process would likely take 2 years, possibly longer. With project approvals being time sensitive, it is not likely that any Government, industry or Indigenous party could wait for such a series of actions to be complete. The procedures involved in s66B then, are not a viable solution for the issue at hand. It is also common for the results of a s66B meeting to be subject to legal contest.

In the current situation post *McGlade*, it is arguable that this increased litigation will be an abuse of the courts due to their being an increase in contested s66B interlocutory applications not for the primary purpose of advancing the litigation but to deal with extraneous process. Aside from the obvious monetary implications, this will result in a higher workload for the Court as well as NTRBs/NTSPs, further time delays, more internal disputation and generally, less certainty for all parties.

A further point in relation to s66B is that under the current circumstances following *McGlade*, claim

groups will also be required to conduct a s66B meeting to remove deceased persons. 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.

This issue is not specifically addressed in the Amendment Bill, however it is overcome through the effect of clauses 1 and 5 of Schedule 1, Part 1 of the Amendment Bill.

MATTERS NOT ADDRESSED IN THE AMENDMENT BILL

There are a number of matters that are not addressed in the Amendment Bill that have been raised in other reviews and forums that the NNTC considers to be of significance. These are:

- Validation of s31 agreements – to also put beyond doubt s31 agreements where not all members of the Applicant have signed.
- Ensuring consistency of s251B with s251A in relation to decision making processes.
- Defining that members of the Applicant have a fiduciary duty to the claim group.
- Codifying that a person is a member of the Applicant group until they a) voluntarily remove themselves, b) become deceased or c) are removed by a s66B procedure.
- A simplified process for addressing minor ILUA amendments post registration.

While the NNTC is of the view that these matters are not controversial and are important matters that need to be addressed, their consideration should not occur at the expense of the passage of the current Amendment Bill, needed as it is to validate existing ILUAs and codify *Bygrave* into the NTA.

Given what the NNTC considers the non-controversial nature of these matters, the NNTC puts forward that an ongoing process be undertaken by the Parliament to examine and implement other technical amendments of the nature contained in the current Amendment Bill in an effort to improve agreement making processes and the operation of the NTA.

CONCLUDING REMARKS

The NNTC is of the view that the current issue is one that needs to be addressed with urgency in order for the integrity of the ILUA provisions of the NTA to be maintained and for the validation of existing registered ILUAs. As such, the NNTC supports the passage of the Amendment Bill.

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.

ATTACHMENT 1

Organisations Consulted in the Making of this Submission

Members of the National Native Title Council

- Central Desert Native Title Service (NTSP)
- Central Land Council (NTRB)
- Goldfields Land and Sea Council (NTRB)
- Kimberley Land Council (NTRB)
- Native Title Services Victoria (NTSP)
- Northern Land Council (NTRB)
- North Queensland Land Council (NTRB)
- Queensland South Native Title Service (NTSP)
- South Australian Native Title Service (NTSP)
- South West Aboriginal Land and Sea Council (NTSP)
- Yamatji Marpla Aboriginal Corporation (NTSP)