Australian Government
Attorney-General's Department

28 November 2019

Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Legislation Amendment Bill 2019

Submission of the Attorney-General's Department

The Attorney-General's Department welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee's (the Committee) inquiry into the provisions of the Native Title Legislation Amendment Bill 2019 (the Bill).

It has been over 25 years since the High Court of Australia's historic decision in *Mabo v Queensland (No 2)* [1992] HCA 23 and the passage of the *Native Title Act 1993*. The native title system has matured over this time, with a significant number of native title claims now determined and native title agreement making a recognised part of "doing business on land" in Australia.

Native title now covers a significant proportion of Australia. As of November 2019, native title has been recognised to exist over 38% of Australia's land mass, with a further 22.3% subject to a native title claim.[1] The number of native title determinations also now outnumber the number of claims on foot.

While the native title legislative framework is broadly operating well, the Bill seeks to implement a range of improvements to ensure the ongoing effectiveness of native title claims resolution and agreement-making, and the sustainable management of native title land post-determination. In particular, the Bill would amend the Native Title Act and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) to:

- give greater flexibility to native title claim groups to set their internal processes
- streamline and improve native title claims resolution and agreement-making
- allow historical extinguishment over areas of national and state park to be disregarded where the parties agree
- increase the transparency and accountability of registered native title bodies corporate (RNTBCs), and
- create new pathways to address native title-related disputes arising following a native title determination.

The Bill would also as a matter of urgency confirm the validity of agreements made under Part 2, Division 3, and Subdivision P of the NTA (also known as 'section 31 agreements') in light of the decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (*McGlade*). Section 31 agreements primarily relate to the grant of mining and exploration rights and the compulsory acquisition of native title rights. Passage of the Bill

[1] According to data held by the National Native Title Tribunal.

would provide certainty to native title groups, project proponents and relevant governments around the status of these important agreements, as well as the resource projects and benefits to native title holders that they underpin.

The Bill is informed by feedback from stakeholders following public consultation on an options paper for native title reform released in November 2017 and exposure draft legislation released in October 2018. The options for reform were drawn from a number of reviews of the native title system, including:

- the Australian Law Reform Commission's report on *'Connection to Country: Review of the Native Title Act 1993 (Cth)*', published June 2015 (ALRC Report)
- the report to the Council of Australian Governments on the '*Investigation into Land Administration and Use*' published December 2015 (COAG Investigation)
- the Office of the Registrar of Indigenous Corporations' 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act Review).

While the Attorney-General is primarily responsible for the administration of the Native Title Act, the Minister for Indigenous Australians is responsible for those parts of the Act that relate to native title representative bodies and RNTBCs, as well as the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act). Accordingly, the Bill has been developed jointly by the Attorney-General's Department (AGD) and National Indigenous Australians Agency (NIAA).

The purpose of this submission is to provide background on the context for this legislative reform process, including its relationship to the *McGlade* decision, and to provide an overview of consultation on the Bill.

Background – *McGlade* decision and 2017 Amendments

The Full Federal Court's 2017 decision in *McGlade* held that a particular kind of native title agreement under the Native Title Act – area Indigenous Land Use Agreements (ILUAs) – were invalid where not all members of the applicant (being the authorised representatives of the native title claim group in a native title agreement or claim) were party to the ILUA, even in circumstances where a member of the applicant had passed away.

This decision led to significant uncertainty in the native title system because it overturned a previous decision which held that an area ILUA is valid provided at least one member of the applicant was a party to the agreement (*QGC Pty Ltd v Bygrave and Others (No 2)* (2010) 189 FCR 412). An audit of area ILUAs registered on the Register of Indigenous Land Use Agreements by the National Native Title Tribunal indicated, for example, that 126 area ILUAs were impacted by the decision.

The Australian Government responded to the *McGlade* decision through the introduction and passage of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017 (Cth)* (2017 Amendments), which came into force on 22 June 2017. The 2017 Amendments retrospectively validated area ILUAs which were entered into without the signatures of all members of the applicant, and ensured that ILUAs could be entered into by a majority of the applicant, or otherwise according to the will of the claim group, in the future.

During consultation on the 2017 Amendments – and in particular, during this Committee's inquiry into the provisions of the 2017 Amendments – stakeholders raised concerns that the reasoning in *McGlade* could similarly affect section 31 agreements.

The Committee's report, tabled on 20 March 2017, recommended the 2017 Amendments be passed with respect to the validation of area ILUAs.[2] The Committee also noted that the Government should consider whether further amendments were necessary to address the effect of *McGlade* on section 31 agreements.[3]

Opposition Senators also expressed the view that the Government should respond to recommendations made by the ALRC Report, and that this should be subject to a period of extensive consultation.[4]

Consultation – process

Following the enactment of the 2017 Amendments, the Government commenced a process of public consultation on further potential native title reforms. The purpose of this consultation was to (a) seek stakeholder views on recommendations for native title reform from a number of reviews including the ALRC Report, COAG Investigation and CATSI Technical Review, and (b) to investigate and seek stakeholder views on any legislative response to the effect of the *McGlade* decision on section 31 agreements.

Options paper – November 2017 to February 2018

On 28 November 2017, the Government released an options paper on native title reform, which was open for submissions from the public until 28 February 2018. The paper sought views on recommendations from the ALRC Report, COAG Investigation and the ORIC Technical Review, as well as policy proposals from the states and territories.

In deciding what to consult on, the Government took into account the ongoing development of native title case law and the broader native title system with a view to ensuring that any legislative change met the current needs of the system. The options paper therefore focused on improvements to native title claims resolution, agreement-making and dispute resolution processes, rather than proposing significant changes to key concepts of the law (including on connection and the content of native title).

Over this period of consultation, officials from AGD and NIAA met with over 40 stakeholder organisations in locations across Australia. NIAA also sent copies of the options paper via post and email to all RNTBCs (being the Indigenous corporations established following a native title determination to manage native title rights on behalf of the common law holders) in the country.

52 written submissions were made in response to the options paper, which are available on AGD's website: <http://www.ag.gov.au/Consultations/Pages/Reforms-to-the-Native-Title-Act-1993.aspx>.

The Attorney-General and then Minister for Indigenous Affairs also co-chaired a roundtable on options for reform with the National Native Title Council (the peak organisation for native title representative bodies and service providers) and other native title corporations and representative bodies on 16 March 2018.

Exposure draft legislation – October to December 2018

Stakeholder feedback on the options paper informed the development of exposure draft legislation, which was released for further public consultation from 28 October 2018 until 10 December 2018 (this included an exposure draft of the Native Title Legislation Amendment Bill 2018 and the Native Title Bodies Corporate

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[2] Senate Legal and Constitutional Affairs Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* [Provisions] (March 2017) Recommendation 2 and paragraph 2.79.
[3] Paragraph 2.73, and paragraph 1.52 of the Australian Greens Dissenting Report.
[4] Paragraph 1.10 of the additional comments by Opposition Senators.

Legislation Amendment Regulations 2018). NIAA again sent copies of exposure draft documents to all RNTBCs via email and post.

38 written submissions were received on the exposure draft legislation, which are also available on AGD's website: <http://www.ag.gov.au/Consultations/Pages/Exposure-draft-native-title-reforms.aspx>.

Expert Technical Advisory Group

In addition, to provide technical assistance on the development of the Bill, the Government convened a native title Expert Technical Advisory Group (ETAG) comprised of representatives from:

- the National Native Title Council
- industry peaks (including the National Farmers' Federation, Minerals Council of Australia and Pastoralists and Graziers Association of WA)
- state and territory governments, and
- the Commonwealth (including the National Native Title Tribunal and the Federal Court of Australia).

The ETAG held four workshops on 27 to 28 November 2017, 1 March 2018, 24 August 2018 and 30 November 2018.

Section 31 agreements

A key finding from consultation on the Bill was that it is the strong view of most stakeholders in the native title system – including native title representatives, Indigenous groups, governments and industry – that the validity of section 31 agreements potentially affected by *McGlade* should be confirmed (as provided for in Schedule 9 of the Bill).

According to data held by the National Native Title Tribunal, 3656 agreements have been made across the country (as of October 2019). The majority of these agreements are located in Western Australia and Queensland.

The advice of stakeholders across the native title sector through consultation on the Bill was that, as with area ILUAs, there are likely a significant number of section 31 agreements where not all members of the applicant signed or entered into the agreement. For example, the Western Australian Government's submission to the options paper indicated it was aware of 307 mining leases, 11 land tenure grants, and 4 petroleum titles which were subject to section 31 agreements potentially affected by *McGlade*.

Section 31 agreements, reached between native title groups, project proponents and relevant governments, can underpin resources projects and provide benefits for native title groups. The uncertainty created by the potential invalidity poses risks to both those projects and the related benefits flowing the native title holders. These benefits may include employment, monetary payments and other arrangements.

During consultation on the Bill, stakeholders also raised concerns around there being a lack of transparency around section 31 agreements, in particular because there is no currently no public register or record of these agreements. This is contrast to ILUAs, which must be registered on the Register of Indigenous Land Use Agreements maintained by the Native Title Registrar to be legally binding on all persons who hold or may hold native title within the area of the ILUA.

Schedule 6 of the Bill includes a measure to require the Native Title Registrar to keep a public record of section 31 agreements, which will contain certain details including who the parties are, what area the agreement covers and whether there are other ancillary agreements. Consistent with the strong views of stakeholders across the native title sector, the public record will not have the same legal status as the Register of Indigenous Land Use Agreements (that is, the agreement will not need to be on the record to be legally binding on all native title holders). Parties to the relevant agreement may also request that the information is not published.

Relationship to Bill introduced on 21 February 2019

Finally, the Bill introduced on 17 October 2019 is substantially the same as the Native Title Legislation Amendment Bill 2019 introduced in the last Parliament on 21 February 2019. The only difference between the two versions of the Bill are changes to the commencement dates for measures in Schedule 8 (registered native title bodies corporate) due to the passage of time, and for which NIAA has policy responsibility.