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23 February 2017

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

By email: legcon.sen@aph.gov.au

Dear Committee Secretary

Native Title Amendment (Indigenous Land Use Agreements) Bill 2017

Introduction

1 I refer to the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth) (**Bill**) which was tabled in the House of Representatives on 15 February 2017 and referred to the Senate Legal and Constitutional Affairs Committee (**Committee**) on 16 February 2017.

2 I understand no terms of reference have been drafted to guide the Committee's consideration of the Bill. Accordingly, my comments are of a general nature concerning the purpose of the Bill; the likely impact on native title claim group members if the Bill is enacted; and possible solutions to address the identified concerns.

Background

3 In accordance with the guidelines for making public submissions to the Committee, I provide the following short introduction about myself.

4 I am currently engaged by Lavan as Special Counsel specialising in native title. Lavan has established Australia's inaugural First Nations Practice Group committed to providing comprehensive services to Prescribed Bodies Corporate (**PBCs**) and other Aboriginal organisations to support native title holders and groups in the management and protection of native title rights and interests and improving their communities' economic, social and cultural wellbeing through opportunities presented by native title agreements.

5 Prior to my employment with Lavan, I worked at the National Native Title Tribunal for nearly five years, including a year as Acting Native Title Registrar during the 2008

review of the native title system. I have also been CEO of two PBCs, Miriuwung Gajerrong Aboriginal Corporation (**MG Corporation**) in the East Kimberley for 2.5 years during the $500m Ord East Kimberley Expansion Project, and later with Kuruma Marthudunera Aboriginal Corporation (**KMAC**) for three years establishing the PBC and implementing various Indigenous Land Use Agreements (**ILUAs**) with resource companies, including Rio Tinto Iron Ore (**RTIO**), Chevron, BC Iron (formerly Iron Ore Holdings), CITIC Pacific, Dampier Bunbury Pipeline and API Joint Venture.

6 From an academic perspective, I was awarded first class honours degree in law from Murdoch University for my thesis on native title and regional agreements. Having completed my Master in Laws at the London School of Economics and Political Science, I am currently completing my Phd in Laws at the University of Western Australia. My research is exploring the identification, enforcement and implementation of native title agreement obligations that support the economic participation of local Aboriginal people in resource projects in the Pilbara.

7 Naturally, the views expressed in this submission are my own and do not necessarily reflect the opinions of Lavan or its clients.

The need for legislative response to address the *McGlade* decision

8 To ensure the certainty and security necessary for governments and resource proponents to develop lands and waters subject to native title claims, it is imperative that legislation is introduced to address the implications of the *McGlade v Native Tittle Registrar* [2017] FCAFC 10 (***McGlade***). I endorse the general proposition advanced in the Bill—the validation of ILUAs registered before 2 February 2017, the date of the *McGlade* decision—where they would otherwise be invalid due to the fact that not all the persons comprising the registered native title claimant group signed that agreement.

What did the *McGlade* decision tells us about the ILUA agreement-making framework?

9 The *McGlade* decision confirmed that, under the ILUA agreement-making framework, claim group members delegate the power of decision-making on a myriad issues to named applicants (usually Elders and/or senior/trusted family group members) and their expert advisers (for example, Native Title Representative Bodies and lawyers) while experts, for their part, ask that their efforts be received in good faith by the claim group that has, as a key requirement, sufficiently informed itself to make reasoned judgments.

10 Media reports surrounding the *McGlade* decision also confirm that a majority of Noongar claim group members did not participate in the ILUA agreement-making processes. Furthermore, the Acting Native Title Registrar confirms that there are at least 129 ILUAs where named applicants were not prepared to approve the registration of an agreement as an ILUA.

What the Bill does not address

11 While the Bill addresses the need for certainty and security for proponents, it does not address the certainty and security that is sought by claim group members to ensure that ILUA obligations are implemented and enforceable.

12 The already difficult task of implementing agreement obligations is becoming harder to manage because of faltering legitimacy for the ILUA agreement-making process

among many of the claim group members and named applicants. This is illustrated by the fact that:

12.1 while the *Native Title Act* does not require all members of a claim group to participate in the decision-making process, it is now common practice for as little as 10 percent of claim group members to attend authorisation meetings to approve the registration of an ILUA; and

12.2 at least 129 ILUAs were registered where one or more of the named applicants refused to approve the agreement during authorisation meetings.

13 The authorisation stage of the ILUA agreement-making process was described by former Justice French in *Strickland v Native Title Register* (1999) 168 ALR 242, at [57], as "*a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title.*"

14 From a claim group perspective, ILUAs are designed, among other things, to increase the economic participation of local Aboriginal people (through the provision of training, employment and business development opportunities) and can play a critical role in the socio-economic transformation of claim group members' wellbeing. These objectives were supported by the Council of Australian Governments in 2015 when it endorsed the principle that *"[m]aximising economic development on Indigenous land, and land and waters subject to native title is critical to the Closing the Gap agenda and strengthens the Australian economy*".

15 The latest Closing the Gap report supports emerging evidence that ILUA obligations that are meant to support the economic participation of local Aboriginal people are not being met. This was demonstrated last year when, at a major industry event to mark the 50th anniversary of RTIO's operations in the Pilbara, native title holders held a public demonstration to voice their disapproval over the implementation of the agreement they negotiated with RTIO.

16 Poor implementation of ILUA obligations directly impacts on the legitimacy that is necessary to support the continuation of the ILUA agreement-making framework. Some commentators assert that claim groups are now calling into question the ILUA agreement-making framework and considering returning to the agreement-making arrangements that existed prior to the introduction of ILUAs in 1998. Such a situation would not be conducive to supporting project developments or the Australian economy.

17 Enacting the Bill to ensure the necessary security and certainty for projects following the *McGlade* decision will not address the legitimate concerns expressed by many claim group members about the implementation of ILUAs. It is submitted that the Committee recommends the establishment of a Parliamentary Inquiry to examine the content and implementation of ILUAs in order to restore the legitimacy of the ILUA agreement-making framework among native title claimants.

Recommendations

17 To address the faltering legitimacy of the ILUA agreement-making framework it is recommended that:

17.1 The Bill is amended to require current agreements awaiting ILUA registration to commit to an external audit every three years to evaluate

the implementation of agreement obligations. With the exception of provisions that are vital to secure tenure for project development purposes, the external audits be authorised, if necessary, to make recommendations to amend ILUA obligations or direct more resources to the implementation of obligations.

17.2 A Parliamentary Inquiry be established to consider what improvement measures can be introduced to assist with the composition and implementation of ILUA obligations, such as:

17.2.1 Ascertaining the particular demographic circumstances and views of claim group members prior to negotiation of ILUAs to allow the negotiating committees to better tailor the composition of agreement obligations to the circumstances of each claim group;

17.2.2 Improving communication and engagement with claim group members during the negotiation of ILUAs;

17.2.3 Examining existing ILUAs to determine if their objectives are being realised, including with regard to increasing the economic participation of local Aboriginal people in projects that occur on native title lands and waters. If not, what lessons can be learned and incorporated into future ILUAs to encourage better outcomes; and

17.2.4 Considering whether the current ILUA disclosure requirements promote transparency and accountability for effective implementation of ILUA obligations.

18 I would be happy to speak to Committee members on any of the points raised in this submission.

Yours sincerely

Franklin Gaffney
Special Counsel