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Legal and Constitutional Affairs Committee

**RE: NATIVE TITLE AMENDMENT (INDIGENOUS LAND USE AGREEMENTS)  
BILL 2017 [PROVISIONS]**

**SENATE INQUIRY INTO THE NATIVE TITLE AMENDMENT (INDIGENOUS  
LAND USE AGREEMENTS) BILL 2017 [PROVISIONS] BY THE SENATE LEGAL  
AND CONSTITUTIONAL AFFAIRS LEGISLATION COMMITTEE**

Following appearance before the Senate Inquiry on Monday 13 March 2017 in Brisbane, Cape York Land Council (CYLC) has been invited by the Senate Inquiry to provide further comment regarding the proposed replacement of the words “where there is no such process”, with the words “In any case” in section 251A and 251B of the NTA.

Such an amendment would result in the provision reading as follows:

251A Authorising the making of indigenous land use agreements

(i) For the purposes of this Act, persons holding native title in relation to land or waters in the area covered by an indigenous land use agreement *authorise* the making of the agreement if:

- (a) where there is a process of decision-making that, under the traditional laws and customs of the persons who hold or may hold the common or group rights comprising the native title, *must* be complied with in relation to authorising things of that kind—the persons authorise the making of the agreement in accordance with that process; or
- (b) **In any case** ~~where there is no such process~~—the persons authorise the making of the agreement in accordance with a process of decision-making agreed to and adopted, by the persons who hold or may hold the common or group rights comprising the native title, in relation to authorising the making of the agreement or of things of that kind.

**Proposed additional words** – ~~Proposed deletions~~

CYLC supports the replacement of the words “where there is no such process” with the words “in any case” in section 251A(i)(b) NTA based upon the following principle: “traditional owners for the land and waters in question should be empowered to make decisions following process that they agree and adopt at the relevant time”.

It is important to note that traditional decisions making process are complicated and subtle, may vary depending on the type of decision being made – even over the same parcel of land and waters, - may vary over time and vary across Australia. That is: the process and the people who make the decision may vary – over the same parcel of land.

As an example, in the case of Cape York’s large regional claim (Cape York United Number 1 Claim QUD673/201), not all people included in the Native Title Claim Group<sup>1</sup> speak equally for all land within the claim or hold rights equally over the entire claim area. Therefore, the principle that traditional owners speak for their traditional country according to their traditional laws and customs critically applies to this claim. Therefore, decisions over country are made by those traditional owners who under traditional land and custom speak for that country – and as stated above this may vary depending on the issue at hand. This applies equally for smaller language group based claims. This is also the basis for supporting the proposed changes to the requirements in the NTA so that the relevant traditional owners choose who signs an ILUAs rather than the people who make up the applicant - who may have no rights over the country the subject of the ILUA.

Section 251A(a) as it currently stands, provides for situations where there is a traditional making processes that *must* be followed. Section 251A(b) currently provides for situations where there is no such process that *must* be followed.

The proposed amendment gives greater power to traditional owners who hold the native title rights and interests for the particular land concerned to control the decision-making process (with respect to ILUAs) are thereby avoid the largely artificial dichotomy between traditional making processes that *must* be followed and those agreed and adopted.

It also lessens the likelihood of legal challenge to decision making process agreed and adopted by the relevant traditional owners where such legal challenge is founded upon technical legal and anthropological bases as to whether there is a traditional making process that *must* be followed.

The use of the words, “in any case” empowers the traditional owners to decide themselves on their decision-making processes based upon their traditional decision making process as they exist for this type of decision.

The same considerations exist for the same amendment for section 251B NTA.

If I can be of any further assistance, please contact me at the above address.

Yours faithfully,

**Adam McLean**  
Barrister  
Foley’s List

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<sup>1</sup> Native Title Claim Group are those who according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed (s. 61 NTA)