6 March 2017

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

Dear Sir/Madam

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

The Minerals Council of Australia, the Chamber of Minerals and Energy of Western Australia and the Queensland Resources Council welcome the opportunity to provide a joint submission to the inquiry into the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*.

Strong support for the bill

As representatives of Australia's exploration, mining, petroleum and minerals processing industry MCA, CME and QRC support the intent of the bill and the measures it contains to address the uncertainty for all parties surrounding Indigenous Land Use Agreements (ILUAs) created by the decision in *McGlade v Native Title Registrar [2017]*.[1] The passage of the bill through the parliament should be a matter of utmost priority as soon as the process of additional consultation afforded by this inquiry is completed, in order to restore certainty to native title parties, project proponents, state and federal governments, all of whom are parties to ILUAs which may be affected by the McGlade decision.

The MCA, QRC and CME furthermore ask that the bill be amended to remove any potential uncertainty regarding agreements made under section 31 of the *Native Title Act 1993* (the NTA) resulting from the McGlade decision. The need for a legislative solution and the proposed form of amendments required are provided in the submission.

The use of ILUAs in the Australian resources industry

The Australian resources sector acknowledges that as the first peoples of this nation Aboriginal and Torres Strait Islander peoples have a special connection to their traditional lands and waters. In recognition of that relationship and as neighbours in large parts of rural and remote Australia, the resources sector is committed to processes that lead to robust and secure agreements with Traditional Owners and Indigenous communities about shared beneficial outcomes from development on their land.[2]

Consistent with these principles, for close to two decades resources companies have engaged in negotiations and concluded ILUAs with native title parties in accordance with the law of the day.

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[1] When referring to ILUAs, this submission is primarily referring to Area ILUAs, the subject of Part 2, Division 3, Subdivision C of the NTA. Prescribed Body Corporate ILUAs, the subject of Part 2, Division 3, Subdivision B, only apply where native title has been determined and are entered into by the Prescribed Body Corporate on behalf of the native title holders (ie. there is no applicant).

[2] See for more details: *MCA communique: Indigenous economic development*, June 2016.

ILUAs have been relied upon to facilitate the grant of mining leases and other interests which support billions of dollars of projects across Australia. The benefits provided by these comprehensive agreements are a means through which Indigenous communities share in the benefits of development and meet a broad range of social, economic and cultural aspirations.

The risks created by McGlade and the importance of the bill

By overturning the law as it has been understood and applied following *QGC Pty Limited v Bygrave (No 2) [2010]*, the decision in McGlade puts these achievements and future opportunities at risk. The decision casts doubt on the validity of hundreds of ILUAs already registered with the National Native Title Tribunal (NNTT) and consequently all the legal interests and actions that are derived from those agreements, such as mining and petroleum tenements granted by state and territory governments in reliance on registered ILUAs.

The uncertainty surrounding the current status of ILUAs as a result of the McGlade judgment has made state and territory governments unsure as to whether mining and petroleum tenures should be granted where the ILUA does not have all individual claimant's signatures. They also are apprehensive about the possibility of a legal challenge to tenures previously granted despite the fact that ILUAs were registered prior to the McGlade judgment.

If the decision is left to stand it will put significant hurdles in the way of future negotiations between Indigenous communities and resources companies. Negotiating parties will question the value of investing time and resources to reach an ILUA with a community if its fate can ultimately be determined by a small number of individuals. The bill confirms the power of native title groups to decide who should sign agreements on their behalf and prevents one person vetoing an agreement that has the support of many others.

The bill remedies two distinct problems created by the McGlade decision:

- *Existing Registered ILUAs*: the bill validates existing registered ILUAs that might be invalid due to McGlade and in doing so also validates all tenures granted, acts done and benefits provided in accordance with those ILUAs.[3]
- *Future ILUAs*: the bill clarifies who must be a party to a future ILUA. It provides that the native title claim group can either nominate which of the registered native title claimants will be a party to the ILUA or agree that the ILUA must be signed by a majority of the registered native title claimants.

The MCA, CME and QRC strongly support both aspects of the bill. This submission outlines why it is imperative that each of these issues is remedied and explains the implications for the mining industry and other stakeholders if they are not.

In order to understand these implications, Attachment One to this submission provides some background information about the valuable role of ILUAs, how they are negotiated and the benefits that they provide for all stakeholders.

The impact of McGlade on existing ILUAs – so much more than overturning Bygrave

We strongly support those aspects of the bill that:

- validate existing registered ILUAs that might be invalid due to McGlade
- validate all tenures granted, acts done and benefits provided in accordance with those ILUAs
- allow the registration of existing ILUAs lodged for registration on or before the date of McGlade that do not comply with McGlade.

[3] It also resolves the problem for existing ILUAs lodged for registration on or before the date of *McGlade* by allowing them to be registered notwithstanding they do not comply with *McGlade*.

While this submission focuses on the resources industry, it is important to note that these ILUAs do not just relate to resources projects, but cover native title claim resolution, community infrastructure, local government services, energy and telecommunications services, access to pastoral properties and more.

The consequences of McGlade pose a significant threat to the timely development of exploration and mining projects in Australia and render uncertain hundreds of mining and petroleum tenements granted by the State and Territory governments in reliance on registered ILUAs.

The issue of deceased applicants

The Explanatory Memorandum to the bill discusses the impact of McGlade as overturning the Federal Court's 2010 decision in Bygrave. However, ILUAs missing the signatures of deceased registered native title claimants have been accepted for registration by the National Native Title Tribunal for nearly 20 years. The McGlade decision means that this should not have occurred and casts doubt on the validity of hundreds of ILUAs.

This category of ILUAs is quite separate from those ILUAs registered after the 2010 Bygrave decision in circumstances where one or more members of the registered native title claimant refused to sign. The NNTT has advised that the 126 ILUAs reported to be affected by McGlade only refers to ILUAs registered after Bygrave and does not include the hundreds of ILUAs registered since 1998 without the signature of deceased applicants.

The passage of the bill is imperative to confirm the validity of these ILUAs and the tenures granted, acts done and benefits provided under them.

The impact on consent determinations of native title

The bill is also needed to remedy the uncertainty around the effect of consent determinations of native title that are dependent upon the registration of accompanying ILUAs.

ILUAs are often negotiated as part of the settlement of a native title determination application between the native title holders and the parties affected by the claim (eg pastoralists, energy and infrastructure providers and local government). The Federal Court's determination of native title will commonly state that the determination takes effect upon the registration of the ILUAs negotiated as part of the claim settlement.

If any of these ILUAs is missing the signatures of registered native title claimants, then the associated determinations of native title may not have taken effect. In addition to the significant impact of this for the relevant native title holders, the legal implications for all dealings by the native title holders since that time (eg through their prescribed bodies corporate) would also need to be considered.

Although this is clearly a far more significant issue for native title stakeholders than it is for the resources industry, we draw this issue to the Committee's attention because we have not seen the issue raised in any commentary around the implications of McGlade.

Additional changes: potential implications for Right to Negotiate agreements

We propose that the Committee consider additional amendments to provide certainty for right to negotiate (RTN) agreements under the NTA.

RTN agreements, which result from a mandatory process, are used far more frequently than voluntary ILUAs for the grant of mining and petroleum tenure. Under section 31(1)(b) of the NTA parties (the native title party, the government party and the proponent) are required to negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act proposed. As it does in relation to ILUAs, the McGlade decision could mean that a RTN agreement not signed by all members of the native title claimant is not an agreement with the native title party.

In a RTN process, if an agreement is not reached, the NNTT may make a determination about whether the relevant acts may be done. This provides an option for resolving the issue of a dissident member of a registered native title claimant so McGlade does not present a problem in that respect.

However, potentially hundreds of grants of tenure have been made in reliance on RTN agreements in which the non-signing member of the registered native title claimant was deceased. For example, the Western Australian government is reviewing 1400 RTN agreements that cover live tenements and it has been identified that at least 200 current mining leases were granted pursuant to a RTN agreement that did not have all signatures, many because they include a deceased person.

The NTA provides a mechanism in section 66B by which a native title party can make application to replace the registered native title claimant but that process can take six to eighteen months and could not be achieved within the statutory timeframes which apply to RTN agreements.

If it is possible to do so without delaying the passage of the bill the NTA should be amended to:

- Validate any existing agreements under section 31(1)(b) not signed by all members of the registered native title claimant and any grants made in reliance on those agreements and
- Provide that if some (but not all) of the members of the registered native title claimant are deceased, the remaining members can act as the native title party under the RTN process and sign any section 31(1)(b) agreement without having to go through a section 66B process to replace the deceased member.

Stakeholder support

There has been strong support for some time for the parliament to address the ambiguity in the NTA relating to authorisation and execution of ILUAs. These matters were the subject of extensive consultation during the course of the Australian Law Reform Commission's (ALRC) review of the NTA. In its 2015 report *Connection to Country*, the ALRC recommended the act be amended to provide that a registered native title claimant be able to act by a majority unless the terms of the authorisation provide otherwise. This was also endorsed by both the Senior Officers Working Group and the Expert Indigenous Working Group following the Investigation into Indigenous Land Administration and Use initiated by the Council of Australia Governments.

Since the Federal Court handed down its decision in McGlade the National Native Title Council (NNTC), an alliance of native title representative bodies and service providers, has called for a legislative response to validate existing agreements and provide certainty to those negotiating agreements now and in the future. The NNTC has worked closely with MCA, QRC and CME for many years to advocate a policy environment that allows Indigenous communities to make the most of the agreements struck with mining companies and invest the resulting financial returns in ways that meet their goals.

The MCA, CME and QRC are happy to assist the committee. If there are any questions about this submission please call Kirsten Livermore, Senior Adviser with the MCA .

Yours sincerely

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ATTACHMENT ONE

The valuable role of ILUAs in the Australian resources industry

Resource development involves the long term use of land. For resources projects to succeed, companies need to secure access to land and to have certainty the terms on which access is granted will be stable over the life of the mine – often periods of at least 20–50 years. Fundamental to that stability is the building of cooperative relationships with all those whose interests will be affected by the resources project.

Since more than 60 per cent of minerals operations in Australia have neighbouring Indigenous communities, ILUAs fulfil these two objectives for resources companies.[4] They represent a legal mechanism for obtaining long term, secure access to land and facilitating development in a way that respects the rights, interests and connection to land of native title holders and Indigenous communities and achieves compliance with the NTA.

At the same time, the process of negotiating and authorising an ILUA fosters certainty and stability as it lays the foundation for a relationship between a company and Indigenous communities that sustains ongoing dialogue and cooperation. It provides the basis for understanding the broad range of social, economic and cultural aspirations of Indigenous peoples adjacent to the mine and how those can be met through sharing the benefits from development on Indigenous lands.

ILUA-making processes contribute to the social and economic fabric of Indigenous communities by providing people an opportunity to express their needs and priorities and plan for community development across a range of aspects. They put a focus on governance, emphasising the importance of effective decision-making structures and leadership capacity. Additionally they 'give Indigenous parties a position in the market and the prospect of economic participation'.[5]

The establishment of more than 1900 land use agreements over the last two decades between Indigenous peoples and the minerals industry (99 per cent of which involved no legal contest of rights) has provided unprecedented economic potential for Indigenous communities.[6] There is scope for ILUAs to deal with the ways in which revenues paid from the mining project are managed to meet immediate, medium and long term community objectives as well as setting out expectations relating to employment for local people and opportunities for Indigenous businesses.

ILUAs have played a valuable role in making Indigenous people and resources companies active partners in the development of Australia's resources, working within that framework to find ways to resolve differences and reach agreement on mutually beneficial outcomes in a spirit of respect and cooperation.

For this reason, companies make large investments of time and resources into engaging with community members and developing protocols for conducting best-practice negotiations that go beyond the letter of the NTA. For example Rio Tinto last year published *Why agreements matter*, a how-to guide for industry on agreement making.[7] Representatives from BHPBilliton and other Australian mining companies were closely involved in the development of the International Council on Mining and Metals' 2015 *Indigenous Peoples and mining good practice guide*.[8] The mining industry also worked with the Department of Industry, Innovation and Science to update its *Leading Practice Guide for Working with Indigenous Communities* published in 2016.[9]

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[4] Department of Industry, Innovation and Science, *Working with Indigenous Communities – Leading practice sustainable development program for the mining industry*, Australian Government, Canberra, 2007.

[5] Marcia Langton, *From conflict to cooperation – Transformations and challenges in the engagement of the Australian minerals industry and Australian Indigenous peoples*, Minerals Council of Australia, Canberra, 2015.

[6] Toni Bauman & Lydia Glick (eds), *The limits of change: Mabo and native title 20 years on*, Australian Institute of Aboriginal and Torres Strait Islander Studies Research Publications, Canberra, June 2012. Note figure includes ILUAs and other forms of agreement.

[7] Rio Tinto, *Why agreements matter*, Melbourne, 2016.

[8] International Council on Mining and Metals, *Indigenous Peoples and mining good practice guide*, London, 2015.

[9] Department of Industry, Innovation and Science, *Working with Indigenous Communities – Leading practice sustainable development program for the mining industry*, Australian Government, Canberra, 2016.

Robust and transparent process for negotiating, authorising and registering ILUAs under the Native Title Act

The processes set out in the NTA for the negotiation, authorisation and registration of an ILUA ensure robust agreements that reflect the wishes of the native title claim group or holders as a collective and provide long term certainty to all parties.

The NTA recognises native title as a collective right, held by Traditional Owners who claim or who hold recognised native title rights and interests in relation to a particular land area. Resources companies understand the importance of working with the Traditional Owner group as a whole, not individuals or small groups of individuals in an ILUA-making process. Robust ILUAs require that all members of a group have opportunities to be involved in the negotiations and decision-making process.

For practical reasons, however, the NTA provides for a smaller group of authorised individuals to act on behalf of this group as persons comprising 'the applicant'. The applicant has the power to bind the group only where the group authorised it to do so, by way of a traditional decision-making process or other such decision-making process as is adopted by the group. This is important as the applicant can be given the power to do things that affect the native title rights and interests of the group as a whole.

There are multiple opportunities throughout the negotiation, authorisation processes for affected individuals to be heard and provide comment. The important features that incorporate checks and balances into the ILUA process include:

- The claim group as a collective to have authorised entry into the ILUA
- The review process conducted by the NNTT prior to registering an ILUA to ensure the correct process has been followed and
- The public notification of an ILUA allowing individuals who claim to hold native title in the proposed ILUA area an opportunity to object to the registration of the ILUA.

The conclusion of an ILUA is a time consuming and lengthy process for both the proponent and the native title party. ILUAs commonly take one to two years to finalise but there are no legislative timeframes so they can take considerably longer. One ILUA was registered after 13 years of negotiations. A company enters the ILUA-making process not knowing how long it will take, how much it will cost or whether it will result in a final agreement but knowing that it needs to lead to a constructive relationship with the Indigenous community involved. Compliance with the NTA is essential as is a commitment to act in a way that is respectful, inclusive and transparent throughout the process.

Common steps in the process of negotiating and entering into an ILUA

1. Before negotiations start, proponents must identify the appropriate native title claim group or holder for the agreement area to negotiate with. This may involve public notices, wide consultation and research. It may take some months to prepare for and carry out this step.
2. The native title claim group or holder authorises representatives to negotiate on behalf of the broader group. The negotiating team may be the persons comprising the applicant, or directors of the Prescribed Body Corporate where native title has been determined, but commonly includes other members of a group who are trusted to enter into negotiations with the proponent.
3. The selection of the negotiation team is typically made at a community meeting, through an authorisation process which may be a traditional decision-making process or some other decision-making process determined by the group (such as a vote, show of hands or secret ballot).

4. The negotiations usually start with the proponent explaining the project to the native title group, often in a large community meeting, and the group considering the impact on their native title rights and interests. It can take some time before discussions move onto the benefit arrangements and the parties begin to negotiate the terms of any deal between them.
5. The proponent and the Traditional Owner group will meet frequently to progress negotiations with updates being provided to the broader Traditional Owner group by both the negotiation team and proponent.
6. The Traditional Owner negotiation team will regularly seek instructions about how the Traditional Owner group wishes to progress specific matters in the negotiations at community meetings to ensure they are reflecting the wishes of the group as a whole.
7. If a deal is reached further meetings usually occur between the relevant legal teams to negotiate the documentation and reach a final agreement.
8. The NTA does not provide any timeframes on how long a ILUA should or must take to negotiate.
9. In order to finalise the negotiation of the ILUA, the native title claim group or holder must authorise the terms of the ILUA and authorise the submission of the ILUA to the NNTC for registration as an ILUA. This authorisation is again through a traditional decision-making process or another process adopted by the group.
10. Authorisation is another lengthy and costly process. It involves public notices, correspondence with group members, drafting meeting documentation and resolutions, well thought out facilitation of the meeting and complex administration. The cost of holding an authorisation meeting can run into hundreds of thousands of dollars depending on the size of the group and the location.
11. Assuming the group has agreed to enter into the ILUA, the persons comprising the applicant, who have previously been selected by the community to represent the wishes of the group in native title maters, typically sign the ILUA – reflecting the wishes of the group as a whole.
12. The ILUA is then submitted to the NNTT for registration. The NNTT assesses whether the requirements of the NTA have been followed. This includes assessing whether all reasonable efforts have been made to ensure that all persons who hold or may hold native title to the ILUA area have been identified and have authorised the making of the agreement.
13. The NNTT issues a public notification of the application to register the ILUA. For an area ILUA this notification period is three months when anyone claiming to hold native title in relation to the ILUA area may lodge an objection to the registration of the ILUA (if the ILUA has been certified by the Representative Aboriginal/ Torres Strait Islander Body) or file a native title claim over the ILUA Area.
14. For a certified ILUA, the NNTT will assess any objections and determine whether or not to register the ILUA. For an uncertified ILUA, the NNTT cannot register the ILUA unless all reasonable efforts have been made to ensure that all persons who hold or may hold native title to the ILUA area have been identified and have authorised the making of the agreement.