Options Paper November 2017 – *Reforms to the Native Title Act 1993* (Cth)

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27 February 2018

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Dear Sir or Madam,

This submission was prepared as a part of the course 5065LAW The Law and Practice of Native Title at Griffith Law School, Griffith University. This submission is the result of the effort of myself, Vanessa Antal, whom is currently in my 5th year of a double Bachelor of Laws and Arts at Griffith University on the Gold Coast Campus.

This submission consists of 2 essays, identifying my opinion on questions 1 and 4 as specified by the November 2017 Options Paper. This submission engages in both critical literature regarding these issues, case law, legislation, public opinion, and other submissions to various bodies.

I would like to specifically thank the Queensland Law Society and Christine Smyth, for their submission to the 2017 Senate Committee's Native Title Amendment (Indigenous Land Use Agreements) Bill 2017; their insights are highly regarded and cited in the first portion of this submission.

I would further like to specifically thank Senior Lecturer Heron Loban, for teaching the course 5065LAW The Law and Practice of Native Title at Griffith Law School, and for making the assessment so relevant to prominent issues.

I am humbled by the opportunity to provide a submission to such an inquiry, and thank you in advance for taking the time to consider my proposal. I trust that you find my submission beneficial to your review.

Kind Regards,

Vanessa Antal

Q1.

Should *Native Title Act 1993* (Cth) be amended to confirm the validity of section 31 agreements made prior to the decision in McGlade v Native Title Registrar & Ors [2017] FCAFC 10?

Introduction

The topic of this essay is s 31 (or the right to negotiate – RTN) of the *Native Title Act*[1] (NTA), and the necessity of its affirmed validity for agreements made prior to the 2017 decision of *McGlade.*[2] The central premise is that—as the widely accepted principle of legality goes—laws should not be implemented retroactively.[3] If there is not legislative actions put in place that affirms that validity of s 31 agreements[4] made prior to *McGlade,*[5] there is scope to argue that the law will be affected retroactively, in not addressing necessary reforms. This is because although *McGlade*[6] only considers Indigenous Land Use Agreements (ILUAs), 'the decision […] could be applied, by analogy, to an RTN agreement where a registered native title claimant passes away.'[7] Thus the potential implication of *McGlade*[8] on RTNs, is that fully and partially executed RTNs that were previously accepted as valid, are now put into question.[9]

Understanding of the Law: Previously and Currently

Previously (and for several years), the courts took the view of *Bygrave.*[10] That is, so long as one or the majority of claimants sign the ILUA, it is able to be registered.[11] However, in *McGlade,*[12] this decision was reversed, and provided that all claimants have to sign the ILUA

1 *Native Title Act 1993 (Cth)* s 31.
2 *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.
3 Kenneth I Winston, Lon L Fuller, *The Principles of Social Order: Selected Essays of Lon L Fuller* (Hart, Rev. ed, 2001) Editors note.
4 *Native Title Act 1993* (Cth) s 31.
5 *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.
6 Ibid.
7 Queensland Law Society, Submission No 32 to The Senate Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, 3 March 2017, 2.
8 *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.
9 Joel Reid, 'Full Federal Court decision in McGlade has significant repercussions for ILUAs' on Minter Ellison, *Insight* (08 February 2017) < https://www.minterellison.com/articles/full-federal-court-decision-in-mcglade-has-significant-repercussions-for-iluas>.
10 *QGC Pty Ltd v Bygrve (No. 2)* (2010) 189 FCR 412.
11 Ibid, 445-446.
12 *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.

in order for it to be registered, even if those that haven't signed, have died.[13] This was due to the wording in s 24CD of the *NTA*,[14] that specified 'all persons', and implemented the use of plurals.[15] In those circumstances, or where a claimant is unable to sign for another reason, an application should be made under s 66B,[16] to have that person removed from the ILUA.[17] This process is more lengthy and costly than the previously accepted process, whereby providing a death certificate if a claimant had died (and thus not signed), was sufficient.[18]

Irrespective of this case, the Commonwealth Government acted quickly to amend the *NTA*, to validate passed acts that were made in reference to the *Bygrave* decision.[19] This was done to provide some certainty for passed ILUAs, that have acted in light of their understanding of the previous authority.[20]

This recourse was not an uncommon way for the Commonwealth to react to a new decision.[21] Had this not been legislated, potentially over 7 years of ILUAs could have been deemed as invalid, notwithstanding the fact that the law at the time, was not in conflict. These reforms were put in place to ensure that law was not made retrospectively. Further, these amendments were widely supported.[22] However, with this support, there came some critique. Some of which is at the butt of the subject of this essay.

RTNs in light of *McGlade*[23]

After *McGlade*,[24] the Senate Committee devised an inquiry entitled the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions].[25] In the inquiry, one of the critiques of the bill is mentioned below:

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[13] Ibid, 130.
[14] *Native Title Act 1993* (Cth) s 24CD.
[15] *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10, 16.
[16] *Native Title Act 1993* (Cth) s 66B.
[17] McGlade v Native Title Registrar & Ors [2017] FCAFC 10, 130.
[18] Queensland Law Society, Submission No 32 to The Senate Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, 3 March 2017, 2.
[19] *QGC Pty Ltd v Bygrve (No. 2)* (2010) 189 FCR 412.
[20] Explanatory Memorandum, Native Title Amendment (Indigenous Land Use Agreement) Bill 2017 (Cth) 4 [20].
[21] See eg, *Native Title Act 1993* (Cth) pt 2,div 2.
[22] Queensland Law Society, Submission No 32 to The Senate Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, 3 March 2017, 2.
[23] *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.
[24] Ibid.
[25] Legal and Constitutional Affairs Legislation Committee, The Senate, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (2017).

> The committee has formed the view that the Commonwealth should consider whether it is necessary to make further amendments to ensure the McGlade decision does not affect right-to-negotiate agreements, which are more widely used than ILUAs. Specifically, the Commonwealth should consider further amendments to ensure that the provisions for the 'right to negotiate in the future' under section 31 of the Act cannot be invalidated in a similar process to the McGlade determination.[26]

As well as the Senate forming this view, there are academics that agree the 2017 amendments do not 'address the impact on *McGlade* on other agreements with the native title groups, particularly agreements under the right to negotiate process.'[27] This is because, although *McGlade*[28] did not consider the RTN, there is still scope to argue that the same argument could be applied in circumstances where a claimant dies.[29] Since there is no legislative safeguard in place preventing retrospective action, this gap in the law potentially deems years' worth of RTNs as invalid. As such, this essay recommends that the *NTA*[30] should be amended to confirm the validity of section 31 agreements[31] made prior to the decision in *McGlade*,[32] just as was done for ILUAs.

Reform

It is recognised that agreements made through an ILUA are quite different to those made through the RTN, in terms of their process. However—as stated earlier in this essay—similarities between the two arise when a claimant dies. That is, if 'a native title claimant passes away before an RTN agreement is signed, State Governments have adopted the practice that agreements will be implemented if all living members sign the agreement and a death certificate of the deceased claimant is presented.'[33] Prior to recent authority, this was also common practice for ILUAs. As such (and as previously mentioned), there is then scope

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[26] Ibid, 64 [2.73].
[27] Leonie Flynn, Nerida Cooley, Tony Denholder, 'A legilsative fix for McGlade ILUAs' (2017) 36 *Law Society of NSW Journal* 88, 88.
[28] *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.
[29] Queensland Law Society, Submission No 32 to The Senate Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, 3 March 2017, 2.
[30] *Native Title Act 1993* (Cth).
[31] Ibid, s 31.
[32] *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.
[33] Queensland Law Society, Submission No 32 to The Senate Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, 3 March 2017, 2.

to argue that *McGlade*[34] may be applied, and so there should too be a safeguard in place regarding RTNs. Also previously mentioned in this essay, it is recognised that to 'replace a deceased member under s 66B of the Act would be impractical, due to the significant delays and costs to all stakeholders involved.'[35] Further, it is likewise worth making mention of the fact that RTN agreements are more widely used than ILUAs,[36] and thus it could be argued that reforming the *NTA*,[37] could potentially be of more benefit than the already-implemented reforms regarding ILUAs.

As such, in reference to the submission made by the Queensland Law Society to the Senate Inquiry aforementioned in early 2017,[38] this essay recommends the following reforms:

1. amending s 31(1)(b) of the Act[39] by validating all existing RTN agreements which are not signed by all members of the registered native title claimant; and

2. allowing the remaining member or members, as the case may be, to participate in the RTN process where members of the registered native title claimant are deceased or otherwise unable to participate, and sign a s 31(1)(b)[40] agreement.[41]

As stated too by the Queensland Law Society; 'these further amendments would provide certainty to all stakeholders involved in the RTN processes.'[42]

Thus, in reference to the Options Paper,[43] this essay recommends option number 3 regarding section 31 agreements.[44]

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[34] McGlade v Native Title Registrar & Ors [2017] FCAFC 10.
[35] Queensland Law Society, Submission No 32 to The Senate Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, 3 March 2017, 2.
[36] Legal and Constitutional Affairs Legislation Committee, The Senate, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (2017) 64 [2.73].
[37] *Native Title Act 1993* (Cth).
[38] Legal and Constitutional Affairs Legislation Committee, The Senate, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (2017).
[39] *Native Title Act 1993* (Cth) s 31(b).
[40] Ibid.
[41] Queensland Law Society, Submission No 32 to The Senate Committee, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, 3 March 2017, 2.
[42] Ibid.
[43] Attorney-General's Department, Australian Government, *Reforms to the Native Title Act 1993 (Cth), Options Paper* (2017).
[44] Ibid, 7.

Conclusion

In this essay, it is recommended that the *NTA*[45] should be amended to confirm the validity of s 31 agreements[46] made prior to the decision in *McGlade*.[47] As discussed in this essay, there is still scope that *McGlade*[48] will be applied when/if a claimant has died, regardless of the fact that RTNs were not mentioned in the case. Therefore—similarly to how the recent legislative reforms prevented the case from being applied retrospectively regarding ILUAs—the same ought to be done with respect to RTNs.

Q4.

Does the native title system provided for in the Native Title Act 1993 (Cth) currently allow for adequate flexibility in agreement-making?

Introduction

The subject of this essay is the flexibility in the agreement making process, that is currently provided for under the *NTA.*[49] The central premise is that the current system does not allow for adequate flexibility on the part of the Aboriginal and Torres Strait Islander people (or for the purposes of this essay, Native Title Claimants—NTC), in the agreement making process. This will be demonstrated by two main points. The first point explores the fact that whilst a mining company for example, has ultimate discretion in deciding whether to mine on Native Title land (provided they have all of the requisite grants etc) or not, the NTC have no right to say no to the proposed development.[50] The second point is that there is little regard for the cultural significance and relationship that NTC put on their land, within the decision making process. This is evident in that the only compensation given to NTC that have this relationship jeopardised, is monetary, which may not fill the void of having their land tainted. The conclusion of this essay, is that NTC have to adhere to western values (rather than their own) in the agreement-making process, deeming the process inflexible.

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45 *Native Title Act 1993* (Cth).
46 Ibid, s 31.
47 *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.
48 Ibid.
49 *Native Title Act 1993* (Cth).
50 Council of Australian Governments, Parliament of Australia*, Investigations into Indigenous Land and Administration Use* (2015) 42.

The Current Influence of NTC and the "Right to Veto"

Currently, there are a few difference level of influences NTC can utilise, dependant on the nature of the act proposed. Firstly, there is a right to be notified.[51] This right has little influence, in that NTC have no direct capacity to affect the proposed future act. Secondly, there is the right to comment.[52] This right merely allows for the right to comment on the proposed future act and may not affect the future act whatsoever. It does not matter if these comments are listened to, and the future acts are valid even if the chance to comment was not made available. Thirdly, there is a right to be consulted.[53] This right is still of low-moderate influence, but it allows for consultation regarding ways the future act may minimise impact of native title. Fourthly, there is a right to object.[54] The right to object has a higher influence level on the proposed act, to the point which the objection of the proposed act must be heard by an independent body. Lastly, there is a right to negotiate.[55] The right to negotiate is the highest level of influence NTC can obtain, as it enables them to express their views fully, through the means of mediated negotiations.

All of these rights, have one common attribute; none of them give NTC a "right to veto".[56] In order for the agreement making process to be considered flexible, there should be ways in which—under certain circumstances—NTC have a right to successfully oppose a future act. This sought-after "right to veto", is highly desired by NTC, which is shown through this statement by the Expert Indigenous Working Group:

> [C]onsent should mean more than the ability to agree to development – it should include the right to say 'no' to development as well (particularly for high-impact activities such as exploration and mining).[57]

Further, there is no "right to veto" in regards to ILUAs. This is because ILUAs are mutually exclusive for all parties, and enabling the "right to veto", would defeat the purpose of an ILUA for the party wanting development.

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[51] See eg, *Native Title Act 1993* (Cth) s 203BG.
[52] See eg, *Native Title Act 1993* (Cth) s 24JAA.
[53] See eg, *Native Title Act 1993* (Cth) s 24MD.
[54] See eg, *Native Title Act 1993* (Cth) s 24ID.
[55] See eg, *Native Title Act 1993* (Cth) s 29.
[56] Council of Australian Governments, Parliament of Australia, *Investigations into Indigenous Land and Administration Use* (2015) 42.
[57] Ibid, 43.

To combat the fact that no "right to veto" exists, there seems to be a lot of weight on monetary compensation—a western means of reimbursement, that NTC may not equate to the value of their land. This will be discussed further in the next portion of this essay.

Monetary Compensation, Western Values, and Relationship with Land

Academic Kelsi Forrest has noted that:

> [Recent decisions] present a more limited view of the claims groups authority under the *NTA.* […] Where a majority decision-making process is adopted according to western standards of meeting procedure, as is most frequently the case, there is no provision for any cultural considerations whatsoever.[58]

An example of this would be monetary compensation. Where land is acquired or used, the general western procedure used to ensure good faith, is to provide monetary compensation. However, what if monetary compensation is not the relief sought, as there is no amount that could justify jeopardising the relationship NTC have with the land? This a very real possibility.

It has been acknowledged that NTC have a special attachment to their land.[59] However, this attachment still, has a monetary value attached to it by the western system.[60] Section 51xxxi of the Constitution[61] requires the Commonwealth Government to give monetary compensation for those that have their land acquired, on "just terms". "Just terms" is the amount of monetary compensation the acquiree will receive, in reference to the special value of the land.[62] Giving money as consideration for something that may be invaluable, could be the incorrect way of dealing with this issue. In fact, some sources state that there is danger that flows from dealing with 'Indigenous […] culture in a non-indigenous manner.'[63]

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[58] Kelsi Forrest, 'A Wajuk Barladong Mineng Nyungar Perspective On McGlade v Native Title Registrar and the Resulting Native Title Amendment (Indigenous Land Use Agreements) Bill 2017' (2017) 8(28) *Indigenous Law Bulletin* 29, 29-3.
[59] *Gerhardy v Brown* (1985) 159 CLR 70.
[60] Chris Humphry, 'Compensation for Native Title: The Theory and the Reality' (1998) 5(1) *Murdoch University Electric Journal of Law* [18] <http://www5.austlii.edu.au/au/journals/MurUEJL/1998/2.html#Special Attachment To Land>.
[61] *Australian Constitution* s 51(xxxi).
[62] Ed Wensing, 'Comparing Native Title and Anglo-Australian Land Law' (Report No 25, The Australian Institute, November 1999) vii.
[63] Ibid, 13.

Further, some experts have explicitly noted the differences in land values in terms of western and NTC:

> The Anglo-Australian approach is firmly rooted in statute law, the Crown's power to grant interests in land, and to regulate and change those rights and interests. In contrast, Indigenous Australian approaches to land management reflect their special relationship to land and waters and their sense of stewardship in the use, preservation and renewal of natural resources for present and future generations.[64]

As such, in order for the agreement making process under the *NTA*[65] to be considered flexible, it needs to adapt more to the benefits of NTC.[66] This could start with enabling the "right to veto" in certain circumstances, rather than putting a monetary amount in reference to how much a special attachment to land should be worth according to western values.

Conclusion

The current process under the *NTA*[67] does not allow for adequate flexibility in agreement making. This is because it is undoubtedly in favour of the party opposite the NTC, through utilising western values. Where the opposing party has ultimate discretion in developing the land (in that they may chose if they want to develop or not), the NTC have no right to say no. Rather, NTC are often given monetary compensation in reference to their special attachment to their land, which is determined again, through western values. In order for the system to be adequately flexible, a "right to veto" should be introduced under certain circumstances, to allow NTC an equal opportunity in agreement making.

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[64] Ibid, vii.
[65] *Native Title Act 1993* (Cth).
[66] Joint Working Group on Indigenous Land Settlements,' Guidelines for Best Practice Flexible and Sustainable Agreement Making' (Report, Joint Working Group on Indigenous Land Settlements, August 2009) 11[54]-[55].
[67] *Native Title Act 1993* (Cth).