

Native Title Unit

Attorney-General's Department

3-5 National Circuit

BARTON ACT 2600

The Australian Government has released exposure draft legislation proposing reforms to the native title system for public consultation. The purpose of the exposure draft legislation is to allow stakeholders to have an open discussion prior to its release as legislation. The Bills open for discussion are:

1. *The Native Title Legislation Amendment Bill 2018*;
2. *The Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018*; and
3. *the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018*

The Federal Government decided a reform was necessary into the native title system after reviews, case law and legislation proved to be inconsistent and challenging to everyone involved in native title. The reform is about simplifying the system for everyone involved.

The Federal Government held consultations for stakeholders to understand the intent of the reform and to have an input. At the consultations stakeholders were presented with the Federal Government's options into the native title reform. In deciding which options to consult on, the Government had undertaken the changes to case law and the broader native title system.

The proposed reforms are intended to improve the native title system for all parties, including by:

- streamlining claims resolution and agreement-making processes
- supporting the capacity of native title holders through greater flexibility around internal decision-making
- increasing the transparency and accountability of prescribed bodies corporate (the corporations set up to manage native title) to the native title holders
- improving pathways for dispute resolution following a determination of native title, and
- ensuring the validity of section 31 agreements in light of the Full Federal Court of Australia's decision in *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10.

The consultation process was undertaken earlier this year on an options paper for native title reform, released last November. That consultation involved more than 40 stakeholder meetings across the country as well as technical assistance from an Expert Technical Advisory Group comprised of nominees from the National Native Title Council, National

Native Title Tribunal, government and industry. None of these stakeholders were RNTBCs or Native Title Holders.

The options that derive from recommendations made from the following reports:

- 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 Indigenous Land Administration and Use', published December 2015 (COAG Investigation), and
- the Office of the Registrar of Indigenous Corporation's 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act Review).

### **The Australian Law Reform Commission's report 'Connection to Country: Review of the Native Title Act 1993'**

On 3 August 2013, the then Attorney-General of Australia, Mark Dreyfus, requested that the Australian Law Reform Commission (ALRC) conducted an Inquiry into Commonwealth native title laws and legal frameworks in the following areas:

- connection requirements relating to the recognition and scope of native title rights and interests; and
- any barriers imposed by the Act's authorisation and joinder provisions to claimants', potential claimants' and respondents' access to justice.

The Report reviews the law governing 'connection' in native title claims; authorisation of persons bringing claims; and joinder of parties to a native title claim. The ALRC Report 126 makes 30 recommendations for the reform. In formulating these recommendations the ALRC have referred to legislation, reports, reviews and inquiries regarding the native title system, stakeholders and operations in the native title system.

The review has discovered that the authorisation process is often costly, and at times protracted and disputed. The ALRC recommends reforms to ensure the authorisation process is robust, transparent, and able to reduce potential conflict and build governance capacity in the claim group. The authorisation provisions of the Act are intended to ensure that the application is made with the consent of the claim group. The group is also given the power to remove and replace an applicant, thus contributing to the ongoing legitimacy of the applicant.

The reforms recommended by the ALRC are fair and equal. From experience in Far North Queensland the process is costly and is a concern. There are 2 main reasons why the process is costly. The problems arise from the Land Councils which are the native title representative body. These are the common issues caused by Land Councils:

1. Error in claim descriptions
2. Error in boundary descriptions

There are several native title determinations and claims where there are claimants that don't belong to that claim group or native title group or the claimant is claiming native title from the descendant that is non-Aboriginal. If a true and correct member of the tribe provides evidence to correct the error then they are told they can no longer be represented by Land Council.

Land Council Anthropologists refuse archival evidence when presented to them during authorisation meetings and if they accept the evidence they say they have copyright over the evidence and that it can't be used in further court hearings to sue the State of Queensland.

Native Title groups have contacted the Aboriginal and Torres Strait Islander Land Services (ATSILS) which is the Connection Unit within the Claim Resolution within DNRM. They review the evidence collated by the Land Council anthropologist. It's clear that this Unit is incompetent because they either fail to realise the evidence is inconsistent or they ignore the evidence. When a native title claim group or determined group don't get a satisfactory response they contact the National Native Title Tribunal (NNTT) for intervention. The NNTT always works in conjunction with the Land Council. The Registrar never accepts complaints and is very abusive over the phone and in person. She says she doesn't have to accept complaints from anyone without a law degree.

From this entire process it leaves the native title claim group and native title determined group feel like they can't trust the native title system. The reform also needs to review the way Land Councils and the NNTT conduct business with the native title groups and the complaints process needs to be clearly outlined about how to complain about the public servants. All complaints should to be reviewed independently. There needs to be a Native Title Ombudsman who can handle the complaints and there needs to be a separate tribunal similar to Queensland Civil and Administrative Tribunal (QCAT) to address these issues.

### **Council of Australian Governments (COAG) Investigation into Indigenous land administration and use**

COAG announced on 10 October 2014, that it would conduct an urgent investigation into Indigenous land administration and use, to enable traditional owners to readily attract private sector investment and finance to develop their own land with new industries and businesses to provide jobs and economic advancement for Indigenous people.

The Investigation focused on how Indigenous land administration systems and processes that can support Indigenous land owners and native title holders to leverage their land assets for economic development. The Senior Working Group made six recommendations in the report and as a result COAG agreed to implement the recommendations on 11 December 2015.

The Investigation identified that Indigenous land can and does support economic development. The Investigation identified that Indigenous land administration systems are in a period of transition from a focus on recognition of rights to the use of rights for economic development. The Report sets out a policy direction for governments to support Indigenous peoples' use of their rights in land and waters for economic development. The Report identifies five key areas where governments should focus their efforts:

- gaining efficiencies and improving effectiveness in the process of recognising rights
- supporting bankable interests in land
- improving the process for doing business on Indigenous land and land subject to native title
- investing in the building blocks of land administration, and
- building capable and accountable land holding and representative bodies.

The Report recommends Commonwealth, state, territory and local governments commit to the six key recommendations to take forward this agenda.

The Report was authorised by the Senior Officers' Working Group, made up of officials from the Commonwealth, New South Wales, Northern Territory, Queensland, South Australian and Victorian governments.

Working alongside the Senior Officers' Working Group was an Expert Indigenous Working Group. The views and support of Indigenous land owners, native title holders and their representatives were of central importance to the Investigation. The Expert Indigenous Working Group worked closely with the Senior Officers Working Group to develop the Investigation's Report and ensure Indigenous perspectives were prominent.

Whilst the object of the *Native Title Act 1993* (Cth), is to recognise and protect native title, it also affirms for the non-native title holders certainty of land certified through a certificate of title. The native title holders have rights and interests to land determined by the Federal Court. The non-native title holders receive rights and interests to land through a certificate of title. The public servants of the Department of Natural Resources, Mines and Energy (DNRM), continuously tell native title holders in Far North Queensland they can only erect shantys that can be relocated. No permanent building is allowed on native title land according to the public servants whom have no authorisation over native title determined areas. The native title holders are continuously told they are not allowed to build houses on their determined native title land unless they transfer the land tenure into freehold and receive a certificate of title to come under all the mainstream state laws for building. They are told to sign ILUAs to transfer the land tenure to give non-native title holders the rights and interests to the land. Once the transfer of land tenure occurs the native title holders sign their rights and interests away and are not entitled to economically develop commercial and non-commercial ventures.

The reason DNRM public servants tell the native title holders to transfer the land tenure is because native title land is outside the taxation/electoral boundary. This mean the native title holders do not pay taxes and rates to the local government or the state government. Once the land tenure is transferred giving rights and interests to the non-native title holder a postcode is placed upon the land and the non-native title holder is required to pay taxes and rates.

As for commercial and non-commercial ventures, businesses are not allowed to be registered on native title land because there is no postcode address. The Federal Government entities of Australian Securities and Investments Commission (ASIC), Australian Charities and Not-for-profits Commission (ACNC) and Office of the Registrar of Indigenous Corporations (ORIC) will not accept a business address unless it has a post-code address which means certificate of title granted by DNRM.

Laws need to be clearly defined about commercial and non-commercial ventures. Until the land laws are changed to benefit the native title rights and interests of the native title holders in a commercial venture there will be minimal support from the native title holders to agree to the amendments proposed by the Attorney-General (Cth).

The COAG report refers to an Indigenous land system and a Western land system and wanting of integrate the two land systems. This is impossible. To integrate the land systems means either the native title group has to relinquish their native title rights or interests or the

non-native title holders begin to pay taxes and rates to the native title holders for utilizing their native title lands. For this to occur the government needs to give the native title holders their own statutory portfolio and voice to parliament which is recommended by Noel Pearson. This is necessary because native title statutory portfolio means regulations will be in place for the native title which currently none exists.

The Report reflects a targeted consultation process with Indigenous, government and industry stakeholders. The Expert Indigenous Working Group raised a very important and valid concern in regards to free, prior and informed consent.

The Expert Indigenous Working Group say that development on Indigenous land and waters will only be successful and sustainable where Indigenous people are provided with the opportunity to be partners in development, to give their free, prior and informed consent and to benefit economically and socially from the development.

The Expert Indigenous Working Group present a valid argument. Currently, Aboriginal peoples in Far North Queensland think they are entering into the ILUA making process equally to the other parties. The Aboriginal people assume the Land Council is their Legal Representation during the process and is there to give legal advice that will benefit the native title claimants and native title holders whom they represent.

The Land Councils legally represent the Aboriginal and Torres Strait Islander peoples under false pretences. Land Councils give the following advice to claimants during the negotiation process:

- Don't listen to the majority vote of the native title holders because only your signature is required.
- Sign now because the fight lasts forever

In the high court case of *Mabo v Queensland (No. 2)* [1992] HCA 23; (1992) 175 CLR 1, Eddie Mabo agreed that his people were settled under the *Act of Settlement 1701*. Once he had agreed to that he agreed that the laws of that settlement transaction applies. Once the laws applied it meant all business transaction for that settled land is conducted under common law.

The Aboriginal claimants and respondents don't understand about native title which is why they rely heavily on their native title representation (Land Councils) to explain and give them free prior and informed Consent. The Land Councils fail to explain that all business transactions conducted will commence under common law.

The confusion with the authorisation of the application is that the role of the applicant isn't clear. The Aboriginal Native Title Holders assume that they are conducting business transactions under Aboriginal customary law. However, the Non-native title parties are conducting business transactions under common law. The confusion for non-native title holders is that all parties are conducting business transactions under common law. In this regards, the Native Title Act needs to be clear about this matter.

An example of this and true story is: a Land Council Lawyer was advising the claimant to sign an ILUA that meant the RNTBC would only receive 50 cents per year for the next fifteen years. The ILUA stated that they cannot enter the premises without permission to practice their customary law. The party wanting to enter into the ILUA making process did

not have a certificate of title registered with DNRM. In fact, DNRM referred to that party as a squatter on the land.

The legislation needs to be amended to include a section that refers to free, prior and informed consent during the decision-making process. A new section to outline the procedures that will be followed.

The United Nations Permanent Forum on Indigenous Issues (UNPFII) has defined the principle of Free Prior Informed Consent as the following:

*Firstly 'Free' simply means that there is no manipulation or coercion of the Indigenous People and that the process is self-directed by those affected by the project.*

*Secondly 'Prior' implies that consent is sought sufficiently in advance of any activities being either commenced or authorised, and time for the consultation process to occur must be guaranteed by the relative agents.*

*'Informed' suggests that the relevant Indigenous people receive satisfactory information on the key points of the project such as the nature, size, pace, reversibility, the scope of the project, the reason for it, and its duration. This is the more difficult term of the four, as different groups may find certain information more relevant. The Indigenous People should also have access to the primary reports on the economic, environmental cultural impact that the project will have. The language used must be able to be understood by the IPs.*

*Finally 'consent' means a process in which participation and consultation are the central pillars.*

In order to facilitate free, prior and informed consent it is necessary to provide the Aboriginal race with opportunities to participate in decision-making and project development. These opportunities can only be granted when the Federal Government enacts *The United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the *International Labour Organization Convention 169* (ILO 169).

The obligation for governments and corporations to engage impacts on communities and is recognized in international law, especially with the principle of free, prior and informed consent. Free Prior Informed Consent is a principle protected by international human rights standards that state, 'all peoples have the right to self-determination' and – linked to the right to self-determination – 'all peoples have the right to freely pursue their economic, social and cultural development'. Backing free, prior and informed consent are the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Convention on Biological Diversity and the International Labour Organization Convention 169, which are the international conventions that recognize the plights of Indigenous Peoples and defend their rights.

On 13 September 2007, UNDRIP was adopted by a majority of 144 states in favour, 4 votes against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine). [Click here to view the voting record.](#)

Since then, the four countries voting against have reversed their position and now support the Declaration. The Australian Government officially endorsed the Declaration on 3 April 2009.

The Declaration, a product of more than 20 years of research and discussion at the United Nations, is a non-binding document that sets out how existing human rights standards apply to the recognition and protection of Indigenous peoples' rights internationally. It provides a framework for countries with different histories and circumstances to help reduce levels of disadvantage and discrimination experienced by many of the world's 370 million Indigenous people.

In November 2015, the Working Group on the Universal Periodic Review (UPR) held its twenty-third session. The UPR is a process which involves a review of the human rights records of all 193 UN Member States. On 9 November 2015, this included a review of Australia.

Recommendations from the 104 countries that made statements during the UPR included adherence to and/or implementation of the UNDRIP.

In response to the recommendations of UPR, in March 2016, Australia reaffirmed a number of its commitments to improving the lives of Australia's Indigenous peoples. This included measures to further implement its Indigenous Peoples Strategy 2015-2019, to better assist Indigenous women who were victims of family violence, and to develop a number of disability-inclusive strategies.

Until the Federal Government enacts UNDRIP and ILO169 into domestic law for the special measures race, the majority of the Aboriginal race will remain sceptical of the intentions of the Governments to not act in good faith of the negotiations. The native title holders in Far North Queensland believe a Royal Commission needs to be conducted on the role of Land Councils and the lack of free, prior and informed consent.

The Expert Indigenous Working Group firmly believes that traditional owners should be provided with the opportunity to be partners in the development, to give free, prior and informed consent and to benefit economically and socially from the development. The Expert Indigenous Working Group are correct when they refer to free, prior and informed consent.

### **The Office of the Registrar of Indigenous Corporation's Technical Review of the Corporations (Aboriginal and Torres Strait Islander) Act 2006**

The Federal Government say they are continuing with reforms to the way Aboriginal and Torres Strait Islander Corporations function.

The Department of the Prime Minister and Cabinet (PM&C) had commissioned KPMG in September 2016, to review ORIC and the *CATSI Act 2006*, in order to inform considerations of how the Registrar for ORIC can effectively support the capacity of Aboriginal and Torres Strait Islander Corporations to institute good governance and strong financial management.

The objective of the review of ORIC was to assess the effectiveness of:

1. The Registrar's administration of the *CATSI Act 2006*, with reference to the public's confidence in the administration of the *CATSI Act 2006*.

2. ORIC's staffing profile and current human resources to perform their function
3. The Registrar's risk-profile in conducting investigations and, in particular, its use of special administrations, examinations and investigations in a way that fulfils the objectives of the Act.
4. ORIC's engagement with, and support for, Aboriginal and Torres Strait Islander Corporations incorporated under the Act and the outreach programmes.
5. ORIC's dual role as educator and regulator and whether these functions are best performed by a single office.

KPMG made 47 recommendations based on the experience, expertise and insights of stakeholders through face-to-face and telephone consultation meetings, the online consultation process, submissions from stakeholders and review documents and other information provided by ORIC.

KPMG had assessed that ORIC is doing a good job. ORIC's support functions identified many positive features, noting there are also opportunities for activities to be enhanced. Consultation with funding agencies and co-regulators were also generally positive but with areas for improvement. Online consultation responses reflected ORIC's good work.

The overall assessment found that there are significant opportunities to enhance ORIC's contributions to better governance to become a more modern, intelligence-led, risk-based regulator.

Key opportunities for improvement identified by the KPMG review included:

- Potential amendments to the *CATSI Act 2006*, to better align with mainstream corporate regulation, streamline or otherwise strengthen and improve the *CATSI Act 2006*;
- Clarification and better articulation of ORIC's regulatory approach and strategy;
- Working towards a co-regulatory approach with Government agencies and co-regulators;
- Ensuring compliance programs are both more risk-based and well-targeted to ensure the best use of limited resources, and that this risk-based approach is demonstrated to key stakeholders;
- Ensuring more transparent, stable and certain multi-year funding arrangements.

A steering Committee was established to oversee the review. Membership consisted of PM&C, ASIC, and the Department of Health representatives. Michael D'Ascenzo, the former Commissioner of ATO, was a special advisor to the Steering Committee. The Steering Committee was engaged throughout the review, providing feedback on key deliverables such as the review project plan and the online consultation tool.

KPMG had presented their review to the steering committee which led to ORIC developing the 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act Review).

The ORIC 2017 Technical Review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act Review), is developed to consider technical amendments to strengthen and improve the CATSI Act and align it with changes in corporate law and regulation, particularly in *the Corporations Act 2001*.

The proposed amendments to the *CASTI Act 2006*, have been developed in accordance with:

- ORIC’s extensive experience of the application of the *CASTI Act 2006*, in its current form
- Recommendations from the Technical Review, and
- Consultations with stakeholders

The Minister for Indigenous Affairs, Nigel Scullion, had announced that ORIC led a technical review of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*. This meant ORIC has undertaken two rounds of consultations with stakeholders around Australia—the first in 2017 and the second in 2018. The consultations were held in every city where an ORIC office is based.

The Australian Government is proposing reforms to the *CATSI Act 2006*, intended to benefit Aboriginal and Torres Strait Islander Corporations by reducing red tape, especially for small corporations. The proposed changes cover the topics of:

- size classifications
- rule books
- prohibited names
- business structures
- meetings and reporting
- membership
- transparency of senior executives
- related third parties
- special administrations
- voluntary deregistration
- Compliance powers.

On 5 December 2018 the *Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018* was introduced into the Parliament.

The recommendations made in the KPMG report were excellent recommendations that promote healthy and good governance. However, the majority of the Aboriginal race don’t have confidence in the decisions the Federal Government makes, and in particular the decisions of the Minister for Indigenous Affairs, Nigel Scullion.

For example, the Indigenous affairs minister, Nigel Scullion, signed off on grants of almost \$460,000 to fishing and cattle grazer groups in the Northern Territory. The grants were from the Indigenous Advancement Strategy (IAS), earmarked for addressing Indigenous disadvantage, even though the groups had not applied for them. His reason is because “there is a clear need for the stakeholder group to be better informed on Aboriginal issues in the Northern Territory”. Documents were presented to the Senate. Scullion told the Senate the funds were for “legal fees, effectively ... to put forward a case of detriment to the land commissioner.”

The IAS has a strict assessment criteria. There are 4 areas which an Aboriginal and Torres Strait Islander Corporations applies for funding:

1. Community led grants

2. Tailored assistance employment grants
3. NAIDOC week funding
4. PBC capacity building funding

Any program that Corporations want to apply funding for under IAS needs to be clearly outlined of the intention. Under IAS the Corporations have to enter into an agreement referred to as the head agreement for indigenous grants. The purpose of IAS is to address Indigenous disadvantage.

The fishing and cattle grazier groups in the Northern Territory didn't apply for the funding to address Indigenous disadvantage. Yet, the Indigenous affairs minister, Nigel Scullion, took it upon himself to sign off on grants. Grants for the purpose of legal fees because the fishing and cattle grazier groups which are stakeholders don't understand their legal rights through the certificate of title.

From this one example, the majority of the Aboriginal race in Far North Queensland don't trust the Indigenous affairs minister, Nigel Scullion, and are reluctant to believe him.

Moving away from the reviews, recommendations and amendments to legislation and onto case law. As mentioned earlier, in deciding which options to consult on, the Government had undertaken the changes to case law and the broader native title system.

The options that derive from case law are made from the following native title cases:

- *McGlade v Native Title Registrar* [2017] FCAFC 10
- *QGC Pty Limited v Bygrave (No. 2)* [2010] FCA 1019

### ***McGlade v Native Title Registrar* [2017] FCAFC 10**

On 2nd February 2017, the Federal Court handed down its decision in *McGlade v Native Title Registrar* [2017] FCAFC 10. The Full Court held that an ILUA requires all named applicants for a claim to execute the agreement. There was no exception for situations where members of the applicant group have died or where an applicant refuses to sign against the wishes of the group as a whole. The Native Title Registrar did not have the jurisdiction to register the four Agreements as not all named applicants had signed the Agreements. Seven (two of whom were at the time deceased) of the 44 named Applicants across the six Native Title Agreement Groups did not sign the Agreements. The Full Court found that where a named applicant does not sign there must be an application under section 66B of the *Native Title Act 1993* (Cth) to remove that named applicant. The ILUA's were found to be invalid.

The decision raised questions about the validity of approximately 120 registered ILUAs and also the tenures granted and actions taken pursuant to such ILUAs, including the payment of significant benefits of native title groups.

In response to the Federal Court judgment the former Federal Attorney-General, George Brandis, had announced that the Federal Government would be introducing legislation "urgently" to reverse the effect of the decision in *McGlade v Native Title Registrar* [2017] FCAFC 10 and legislatively reinstate the Federal Court's decision in *QGC Pty Limited v Bygrave* (No. 2) [2010] FCA 1019.

On 15 February 2017 the Federal Government introduced the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*. The Bill was passed by both Houses and as a result the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017*, became legislation. The primary objectives of the Act are to:

- a) confirm the legal status and enforceability of agreements which have been registered by the Native Title Registrar on the Register of Indigenous Land Use Agreements without the signature of all members of a registered native title claimant (RNTC)
- b) enable registration of agreements which have been made but have not yet been registered on the Register of Indigenous Land Use Agreements, and
- c) ensure that in the future, area ILUAs can be registered without requiring every member of the RNTC to be a party to the agreement.

One of the options the Federal Government is proposing is to amend section 31 of the *Native Title Act 1993* (Cth), in regards to validating ILUAs. Stakeholders have been lobbying the Federal Government for amendments to address their loss from the Full Federal Court's decision in *McGlade v Native Title Registrar* [2017] FCAFC 10. Stakeholders claim the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) did not address the issue of validating their ILUA claims.

The Federal Government have decided to take the win away from the native title groups through further amendments in favour of the stakeholders. The proposed amendments intend to confirm the validity of existing section 31, of the *Native Title Act 1993* (Cth), where at least one member of the applicant is required to sign the agreement. Through the enacting of the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017*, the Federal Court's decision in *QGC Pty Limited v Bygrave* (No. 2) [2010] FCA 1019, has been reinstated. Meaning signatories are not required from all claimants of the native title.

### ***QGC Pty Limited v Bygrave* (No. 2) [2010] FCA 1019**

In the Federal Court Case of *QGC Pty Limited v Bygrave* (No. 2) [2010] FCA 1019, there were two main issues.

1. Could the Native Title Registrar's delegate decide not to give notice pursuant to s. 24CH of the *Native Title Act 1993* (Cth), of an agreement if the delegate decided it was not an indigenous land use agreement (ILUA) as defined in the *Native Title Act 1993* (Cth)?
2. Did the 'registered native title claimant' become a party to the agreement by naming one or more of the nine people named as 'the applicant' in the Register of Native Title Claims as a party to the agreement?

QGC Pty Ltd, entered into an agreement with the Iman People that was intended to deal with 'future acts' in relation to the development of a natural gas project. The Iman People #2 claim, which is registered, covers the agreement area. Nine people's names appear on the Register as the applicant for that claim. One of those persons, Madonna Barnes, refused to sign the agreement. The application for registration was certified under s. 203BE by Queensland South Native Title Services Limited.

The delegate determined that s. 24CD(1) was not met and, therefore, that the agreement was not an ILUA as defined in s. 24CA because it was not signed by all the persons who jointly

comprised the registered native title claimant as defined in s. 253. The Register of Native Title Claimant was a mandatory party. As a result, the delegate decided not to give notice of the agreement under s. 24CH because she was only authorised or required to do so if the agreement was an ILUA.

QGC Pty Ltd, applied for review of the decision to refuse to notify. The delegate was the first respondent and the persons comprising the Register of Native Title Claims were the second respondents. Queensland South Native Title Services Limited, applied and was joined as a respondent.

QGC Pty Ltd, submitted that the decision not to give notice of the agreement was a decision within the terms of s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and if not, it was a decision of a Commonwealth officer for the purposes of s. 39B of the *Judiciary Act 1903* (Cth). If the decision was to be reviewed under s. 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), it had to be of an administrative character and ‘made under an enactment’—see s. 3(1) of that Act. Justice Reeves noted it was necessary to construe the provisions of the *Native Title Act 1993* (Cth), as a whole and to consider the context, including the purpose and policy of the relevant provisions.

The delegate purported to make the decision pursuant to s. 24CH(1) which provides that the Registrar ‘must’ give notice of the application to register an agreement which, in the delegate’s view, was a reference to an agreement meeting the requirements of s. 24CA. It states: ‘An agreement meeting the requirements of ss. 24CB to 24CE is an indigenous land use agreement’. The delegate considered that, if s. 24CD(1) was not satisfied, then the agreement could not meet the requirements of s. 24CA and so was not an agreement covered by s. 24CH.

In *QGC Pty Limited v Bygrave (No 2)* [2010] FCA 1019, Justice Reeves decided that s. 24CD did not mean that every individual comprising each registered claimant for an area was a mandatory party to any ILUA to be made over that area, or that such individuals were required to assent to or sign the ILUA. All section 24CD required was that one or more of the individuals comprising each registered claimant for the area be named as a party to the ILUA. The delegate had no power to refuse to give notice of the agreement.

A Body Corporate Agreement is an agreement about native title matters (and can include non-native title matters) between the Registered Native Title Body Corporate(s) (RNTBC(s)) for the agreement area and other parties.

A Body Corporate Agreement can only be made where a determination of native title has been made over the entire agreement area.

Section 24BB of the *Native Title Act 1993* (Cth), refers to the coverage of body corporate agreements. This section sets out requirements for Body Corporate Agreements relating to the:

- subject matter;
- area covered;
- parties; and
- legal consideration and conditions.

The Body Corporate Agreements is about the following:

- future acts that are to be done;
- future acts already done;
- the surrender of native title rights and interests;
- the manner of exercise of native title rights and interests or other rights and interests;
- the relationship between native title rights and interests and other rights and interests;
- compensation; or
- any other native title matters

The law says that for a decision to enter into an ILUA the RNTBC(s) for the agreement area must consult with, and obtain the consent of the common law holders.

The consultation process requires the relevant RNTBC(s) to ensure that the common law holders understand the purpose and the nature of the proposed decision to enter into the ILUA. This is to be done by consulting and considering the views of a representative body for the area, and if the RNTBC considers it appropriate and practical – giving notice of those views to the common law holders.

The consent of the common law holders must be given either:

- by using a decision-making process under the traditional laws and customs of the common law holders where there is such a process that must be used; or
- if there is no such traditional decision-making process, by using a decision-making process agreed to and adopted by the common law holders.

During the decision-making process the Claimant/s express the importance of the rights and interests of the native title holders whom they are representing. The claimants know that they are representing the native title holders and agree to act in good faith and represent the native title holders to achieve the best outcomes to protect the native title rights and interests to possess, occupy and enjoy the determined area according with and subject to their traditional laws and customs. However, the Native Title Representative Body (Land Council) doesn't listen to the Claimant/s and act in good faith in representing their clients. The Land Council tells the claimants that they have all the power under the decision-making process and don't have to consult with the native title holders whom they represent. The Land Council Lawyers use tactics to pressure the claimants into signing the agreement on that day that the information has been told to them. The claimants are not allowed to go away and think about the agreement or do their own research or listen to the native title holders. When the native title holders ask questions about how their native title rights and interests will be affected or what benefits they will receive, the Land Council Lawyers refuse to answer questions their questions. Instead the Land Council Lawyers tell the claimants to remove themselves from the table and the group and walk to a different room of the hall to discuss and sign the agreements away from the native title holders. The claimants listen because they believe the Land Council is legally representing their best interest in the decision-making process.