

CASE NOTE: McGLADE V NATIVE TITLE REGISTRAR

by Angus Frith

In the recent *McGlade v Native Title Registrar* ('*McGlade*') decision,¹ the Federal Court held that four agreements signed on behalf of Noongar People were not Indigenous Land Use Agreements ('ILUAs') within the meaning of the *Native Title Act 1993* (Cth) ('NTA'). Accordingly, the Native Title Registrar had no jurisdiction to register the ILUAs.² These invalid ILUAs were four of the six ILUAs giving effect to the South West Native Title Settlement ('Noongar Settlement'), which was intended to resolve all Noongar native title applications.³ Only two weeks later, legislation overturning the *McGlade* decision, the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth) ('ILUA Bill'), was passed by the House of Representatives in the Commonwealth Parliament.⁴

Why such a swift reaction? What effects of the *McGlade* decision merited such attention by the Commonwealth Government? This case note addresses these issues by examining the context and reasoning of the *McGlade* decision, as well as the effects of and justification for the ILUA Bill. While the scope of this publication does not allow all the issues that arose in *McGlade* to be fully addressed, the key issues are summarised.

THE NOONGAR SETTLEMENT

Over the last decade, the Noongar People have been unsuccessful in litigation seeking the recognition of their native title.⁵ Rather than pursue further litigation, the native title representative body for Noongar country, South West Aboriginal Land and Sea Country Aboriginal Corporation ('SWALSC'), and the Western Australian Government agreed to resolve the Noongar native title applications by negotiation.⁶ In 2014, an Agreement-in-Principle was reached, which provided for the Noongar People to surrender native title in exchange for 'a comprehensive package of benefits' including:

- legislative recognition that Noongars are the traditional owners for south west Western Australia, and their body of laws and customs continues;
- an economic base for Noongar People worth up to \$1 billion;
- support to establish and run Noongar corporations;

- land transfers; and
- access, joint management, heritage and governance arrangements.⁷

THE NOONGAR ILUAS

The Noongar settlement was to be given effect by way of six ILUAs covering land and waters in Noongar country. At meetings in early 2015, SWALSC sought authorisation for the making of these ILUAs under s 251A of the NTA from Noongar People.⁸ At each meeting, a majority of those present resolved via a binding secret ballot to:

authorise the making of the proposed ILUA [and to] authorise and direct ... people [including the people comprising the applicant for certain named native title applications] to be named as Parties to, and to sign, the proposed ILUA as Representative Parties for all of the people who hold or may hold native title in relation to the ... Agreement Area.⁹

They also agreed that:

the signatures of those of such people who have signed by 3 April 2015 will be sufficient evidence of the decision of all of the people who hold or may hold native title in... the Agreement Area to authorise the making of the proposed ILUA.¹⁰

Two of the six ILUAs were signed in conformity with these resolutions. The other four were not signed by all the persons who jointly comprised the registered native title claimants ('RNTCs') in each case.¹¹ Specifically, five of 32 members of the relevant RNTCs did not sign the relevant ILUAs; one registered claimant died before the authorisation of the relevant ILUA and one died afterwards; and one person signed the relevant ILUA after it was lodged for registration.¹²

THE MCGLADE PROCEEDINGS

Four members of the relevant native title claim groups ('Applicants') challenged the registration of four ILUAs by the Native Title Registrar. The Respondents to the proceedings included the State of Western Australian and SWALSC. The key issue addressed by a full bench of the Federal Court was 'whether an ILUA can be registered if not

all individuals who jointly comprise the relevant registered native title claimant or claimants have signed the ILUA.¹³

THE STATUTORY FRAMEWORK¹⁴

The provisions in the *NTA* dealing with Area ILUAs address three general matters:¹⁵

1. the requirements for an agreement to be an ILUA;¹⁶
2. the registration of the ILUA, which, among other things, require its making to be authorised by the persons who hold or may hold native title in relation to the ILUA Area;¹⁷ and
3. the effects of registration of the ILUA.¹⁸

Pursuant to s 24CD, all persons in the 'native title group' must be parties to an Area ILUA.¹⁹ The native title group relevantly includes 'all [RNTCs] in relation to land or waters in the area' if there is a registered native title claimant in relation to the ILUA Area.²⁰ A 'registered native title claimant' in relation to land or waters is defined to mean 'a person or persons whose name or names appear in an entry on the Register of Native Title Claims as the applicant in relation to a claim to hold native title in relation to the land or waters'.²¹

Previously, in *QGC Pty Ltd v Bygrave (No 2)* ('Bygrave'),²² it had been accepted that 'the requirement in s 24CD was satisfied if at least one of the persons named as the applicant in the Register for the relevant claim was a party' to the ILUA.²³ The Full Court in *McGlade* disagreed with this approach.

THE APPLICANTS' SUBMISSIONS

The Applicants background their submissions as follows:

The ... ILUA provisions of the [*NTA*] strike a careful balance between providing a mechanism for the making of agreements affecting native title as an alternative to the judicial resolution of native title claims, and ensuring that these agreements are consensual and voluntary. A critical part of the balance is that all persons authorised as the applicant are required to be a party to the ILUA, which is consistent with those aspects of the [*NTA*] that require the persons authorised as the applicant to act 'jointly' or 'unanimously' in making and dealing with native title claims. The Applicants' contentions place considerable weight on the connection in the [*NTA*] between an applicant and a [RNTC], and in particular the representative character and function of both statutory entities.²⁴

Linking the applicant and the RNTC in this way is significant because s 66B provides the only mechanism for resolving the situation where one or more members of the RNTC 'does not agree to be a party to the agreement'. One or more members of the native title claim group 'can apply to the Court for an order ... to remove or replace that person'.²⁵

The Applicants say that structurally the *NTA* separates the making of the agreement from its registration,²⁶ arguing that 'in order to be an [ILUA] within the meaning of s 24CA, the agreement must ... meet the requirements in s 24CD, which requires that [everyone in the native title group, including all RNTCs] be party to the agreement'.²⁷ Since these ILUAs had not been signed by all those persons, they were incomplete, and could not be registered.²⁸

The key issue addressed by the Court was 'whether an ILUA can be registered if not all individuals who jointly comprise the relevant registered native title claimant or claimants have signed the ILUA'.

THE RESPONDENTS' SUBMISSIONS

The Respondents' submissions substantially overlapped. Firstly, the 'RNTC' in the *NTA* refers not 'to each individual acting separately and in their own interest', but 'to those people who collectively comprise the applicant for a registered claim and who act in a representative capacity'.²⁹ Secondly, ss 24CA–24CE do not require that each member of the RNTC be a party to the ILUA, just that each RNTC be represented by a signatory to the ILUA. They argued that 'the purpose of s 24CD is to provide a legal person or persons to act as the representative party for the authorising group in making an agreement'.³⁰ The phrase, 'All persons in the native title group' refers to all the bodies corporate, representative bodies ... or other entities that comprise the relevant 'native title group' for the particular area agreement. Thus, where the relevant 'native title group' consists of a [RNTC, only that entity needs] to be party to an ILUA. Further, by providing that the native title group consists of 'all [RNTCs] in relation to land or waters', s 24CD(2)(a) ensures that, if there is more than one registered claim, the [RNTC] for each claim must be a party to the agreement.³¹

Further, 'the role of the native title holders is paramount'; 'they have "ultimate authority"'.³² The RNTC has no discretion 'to override the authority of the native title holders'.³³ It follows that the authorising group can 'determine how the [RNTC] becomes a party to the ILUA'.³⁴ Ultimately, unanimity among RNTC members is not required for it to become a party to an ILUA.³⁵

NORTH AND BARKER JJ

The Full Court decided the matter in favour of the Applicants. However, two separate judgments were delivered: by North and Barker JJ, and by Mortimer J.

The plurality identified the key issue as 'whether the only way in which a "[RNTC]" can become a party to an [Area ILUA] is where each person who, jointly with the others who comprise the [RNTC], has signed the agreement'.³⁶ In addressing this issue, they focussed on 'the provisions in Subdiv C of Div 3 of Pt 2 of the NTA', and in particular 'on the words *all persons* and *must*' in s 24CD(1).³⁷ The plurality construed 'all persons' as 'referring to all individual persons comprising the "native title group" which is in turn comprised ... of the entity that is the "[RNTC]"'.³⁸ It follows that all persons jointly comprising the RNTC must sign each ILUA.³⁹ Failure to do so will mean that the ILUA will not be recognised under the NTA.⁴⁰

If a claim group disagrees with 'the decision of a [member of the RNTC] not to sign a proposed [ILUA, it must] remove or replace the person as one of those who jointly comprise the applicant' under s 66B.⁴¹ Outside this provision, the claim group cannot alter the identity of an applicant (or RNTC), or modify the requirements of Subdiv C. These conclusions are justified by the observation that an applicant/RNTC authorised by the claim group has a special responsibility 'towards the claim group not only in dealing with the claimant application but also when it comes to agreement making under Subdiv C'.⁴²

The Judges acknowledged that this outcome empowers 'any one of the persons who jointly comprise a [RNTC] to veto the implementation of a negotiated area [ILUA] by withholding their signature to the agreement'.⁴³ Procedural difficulties arising from the decision include that a deceased member of the RNTC must be removed under s 66B before it can make a valid ILUA.⁴⁴ In addition, if a member of the RNTC signs the ILUA after it is lodged for registration, it could be registered because the member had plainly indicated an intention 'to make the ILUA with the other parties'.⁴⁵

These issues reflect the inherent difficulties for native title holders defined by and operating under traditional laws and customs to make agreements enforceable in Australian law. The *McGlade* decision (and the response to it) reveals some of the imperfections of the available mechanisms.

MORTIMER J

Mortimer J observed that the NTA 'reflects a series of political

compromises ... to judicial and political developments, [which] have resulted in a textually dense and prescriptive legislative scheme'.⁴⁶ The Court's surest guide to construing the NTA remains the language and structure of that scheme.⁴⁷

The Judge based her analysis on a comprehensive consideration of the mechanisms in the NTA for the representation of a native title claim group through the statutory concepts of the 'applicant' and 'RNTC'. By choosing 'a representative model ..., Parliament recognised the strength and authority of the [native title] claim group'. It also directed 'how that authority is to be exercised'.⁴⁸

Accordingly, since the NTA does not contemplate actions by only some of the individuals constituting the applicant, they must act collectively.⁴⁹ Similarly, 'the individuals who constitute the applicant or [RNTC] jointly, are the entity, which itself has no legal capacity' to enter into an ILUA.⁵⁰ Therefore, ss 24CA-24CE require 'all individuals constituting a [RNTC] to consent to an ILUA ... by signing it'.⁵¹

Section 66B, rather than s 251A, sets out the 'process to resolve disagreements [among the] applicant/[RNTC] and the native title claim group, as well as providing the means to make changes to the constitution of these entities consequent upon illness, incapacity or death'.⁵² This is not an optional process that can be circumvented by passing 'resolutions purportedly pursuant to s 251A'.⁵³

Therefore, where

an ILUA is to be made and one or more of the individuals who constitute the applicant/[RNTC] has died or is incapacitated, an application should be made under s 66B to remove that individual prior to the making of the ILUA. Such an application would be straightforward if made by the remaining individuals who constitute the applicant ... There would be no need for any further authorisation meetings.⁵⁴

Finally, Mortimer J held that an ILUA signed after being lodged for registration is valid.⁵⁵

SOME OBSERVATIONS ABOUT THE *McGLADE* DECISION

A consequence of the Court's approach is that applications under s 66B are the only mechanism available to resolve disputes expressed by a member or members of the RNTC refusing to sign an ILUA. This process requires notification and meeting/s of the whole native title claim group to resolve to decide to authorise a new applicant. After the Court makes such an order, the ILUA must be authorised through a similar process potentially involving a different group of native title holders. These processes require substantial extra time and money to be expended by native title groups and their representatives.⁵⁶ These issues

reflect the inherent difficulties for native title holders defined by and operating under traditional laws and customs to make agreements enforceable in Australian law. The *McGlade* decision (and the response to it) reveals some of the imperfections of the available mechanisms.

NATIVE TITLE AMENDMENTS (INDIGENOUS LAND USE AGREEMENTS) BILL 2017 (CTH)

Between 120 and 150 registered ILUAs that were not signed by all members of the RNTC, including members who were deceased, may be affected by the *McGlade* decision.⁵⁷ Further, 'Area ILUAs lodged for registration which do not comply with *McGlade* could no longer be registered'.⁵⁸ Other agreements purportedly made on behalf of native title holders that have not been signed by all members of the RNTC may also be regarded as in doubt.

Given these issues, the Commonwealth took the view that '[u]rgent amendments are imperative to preserve the operation of currently registered ILUAs and provide the sector with a prospective process for registering ILUAs which minimises the risks presented by the *McGlade* decision'.⁵⁹ Two weeks after the *McGlade* decision, the ILUA Bill had been drafted and passed by the House of Representatives in the Commonwealth Parliament.⁶⁰

The primary objectives of the ILUA Bill are:

- a. confirming the legal status and enforceability of agreements which have been registered ... without the signature of all members of a [RNTC];
- b. enabling registration of agreements which have been made but have not yet been registered ...; and
- c. ensuring that in the future, Area ILUAs can be registered without requiring every member of the RNTC to be a party to the agreement.⁶¹

The ILUA Bill proposes to amend the NTA to validate:

- a. area ILUAs made or registered before the *McGlade* decision;⁶²
- b. applications for registration of Area ILUAs made before the *McGlade* decision;⁶³ and
- c. the four ILUAs that were the subject of the *McGlade* decision.⁶⁴

The Commonwealth's view is that these amendments will preserve the status quo of registered ILUAs, as they do not significantly alter the way the law operated before the *McGlade* decision.⁶⁵

The ILUA Bill also amends the NTA to enable the native title holders to appoint one or more of the persons comprising the RNTC to be a party to and execute an Area ILUA on their behalf.⁶⁶ However, if they do not appoint such a signatory, a majority of the persons comprising the RNTC must be a party to the ILUA.⁶⁷

These amendments only apply in relation to ILUAs made on or after the commencement of the ILUA Bill.⁶⁸

SENATE INQUIRY INTO THE ILUA BILL

On 16 February 2017, the Senate referred the ILUA Bill to its Legal and Constitutional Affairs Legislation Committee for inquiry and report.⁶⁹ The Committee received 59 submissions and more than 20 000 campaign letters and emails before reporting on 20 March 2017.⁷⁰ Many Indigenous organisations and communities, industry and agricultural stakeholders supported the ILUA Bill's provisions, as providing certainty for at-risk agreements.⁷¹ On the other hand many submissions expressed concerns about the ILUA Bill, including lack of consultation, potential deficiencies in the Bill's reliance on majority decision-making, and possible unintended consequences.⁷²

The Committee, including both Government and Opposition Senators, recommended that the Senate pass the ILUA Bill, except for proposed amendments giving effect to certain recommendations in the Australian Law Reform Commission report 'Connection to Country: Review of the Native Title Act 1993' ('ALRC Report').⁷³ It recommended that proposed amendments addressing the ALRC Report should be removed from the ILUA Bill and dealt with in a later bill.⁷⁴ The Government has not yet responded to the ALRC Report.⁷⁵ The Commonwealth proposes to amend the ILUA Bill consistently with these recommendations.⁷⁶

The Committee also advised the Commonwealth to address concerns raised in respect of ILUAs involving particularly significant consequences for native title holders (such as the surrender of native title rights), [to ensure that] the minority viewpoint is given due consideration, perhaps through a higher threshold for decision-making.⁷⁷ Following tabling of the Senate Committee Report, the Senate is yet to consider the ILUA Bill (as at 31 March 2017).

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1 *McGlade v Native Title Registrar ('McGlade')* [2017] FCAFC 10.

2 *Ibid* 273–276.

3 *McGlade* [2017] FCAFC 10, 279–283.

4 Christina Raymond, Parliament of Australia, *Bills Digest*, No 70 of 2017, 7 March 2017, 12.

5 See, eg, *Bennell v Western Australia* (2006) 153 FCR 120; *Bodney v Bennell* (2008) 167 FCR 84.

6 Raymond, above n 4..

7 Glen Kelly and Stuart Bradfield, 'Negotiating a Noongar Native Title

- 'Settlement' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 249, 249; *McGlade* [2017] FCAFC 10, 284, 285.
- 8 Ibid, 249.
- 9 *McGlade* [2017] FCAFC 10 18, 336.
- 10 Ibid.
- 11 Ibid 19.
- 12 Ibid 19, 20.
- 13 Ibid 22.
- 14 All references to legislation in this Case Note are to the *Native Title Act 1993* (Cth) (*NTA*).
- 15 See *NTA* pt 2 div 3 sub-div C.
- 16 *NTA* ss 24CA–24CE.
- 17 See generally *NTA* ss 24CG–24CL; See especially *NTA* ss 24CG(3)(a), 203BE(1)(b), 24CG(3)(b), 24CL(1), (3), 251A.
- 18 Ibid ss 24EA–24EC.
- 19 Ibid s 24CD(1).
- 20 Ibid 279.
- 21 Ibid 22.
- 22 (2010) 189 FCR 412.
- 23 *McGlade* [2017] FCAFC 10, 76.
- 24 Ibid 342.
- 25 Ibid 68.
- 26 Ibid 51.
- 27 Ibid 32.
- 28 Ibid 35.
- 29 Ibid 107.
- 30 Ibid 112, citing *Bygrave* [2017] FCAFC 10, 69.
- 31 Ibid, 69, 169, 170, 344.
- 32 Ibid 184.
- 33 Ibid 153.
- 34 Ibid 346; See also ibid 101, 175, 194.
- 35 Ibid 203.
- 36 Ibid 208.
- 37 Ibid 211, 219.
- 38 Ibid 240.
- 39 Ibid 242, 247.
- 40 Ibid 244.
- 41 Ibid 245.
- 42 Ibid 264.
- 43 Ibid 265.
- 44 Ibid 269.
- 45 Ibid 271.
- 46 Ibid 351.
- 47 Ibid 352.
- 48 Ibid 379.
- 49 Ibid 379; See *NTA* s 253 (definition of 'Registered Native Title Claimant').
- 50 Ibid 386.
- 51 Ibid 387, 397.
- 52 Ibid 452.
- 53 Ibid 453.
- 54 Ibid 486.
- 55 Ibid 499–503.
- 56 Explanatory Memorandum, Native Title Amendments (Indigenous Land Use Agreements) Bill 2017 (Cth) 17.
- 57 Raymond, above n 4, 11.
- 58 Explanatory Memorandum, Native Title Amendments (Indigenous Land Use Agreements) Bill 2017 (Cth) 11.
- 59 Ibid 24.
- 60 Raymond, above n 4, 12.
- 61 Explanatory Memorandum, Native Title Amendments (Indigenous Land Use Agreements) Bill 2017 (Cth) 2.
- 62 Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth) ('ILUA Bill') sch 1 pt 2, item 9.
- 63 Ibid item 10.
- 64 Ibid item 12.
- 65 Explanatory Memorandum, Native Title Amendments (Indigenous Land Use Agreements) Bill 2017 (Cth) 26.
- 66 ILUA Bill, sch 1 pt 1 items 1, 5 (as amended by Government Amendments (sheet LF185), items 1, 4, 6).
- 67 Ibid sch 1 pt 1 item 1.
- 68 Ibid sch 1 pt 2 item 8.
- 69 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (2017) 1 ('Senate Committee Report').
- 70 Ibid 7.
- 71 Ibid 9.
- 72 Ibid.
- 73 Report No 126 (2015).
- 74 *Senate Committee Report*, above n 66, 26.
- 75 Ibid 28.
- 76 ILUA Bill, (Government Amendments, sheet LF185).
- 77 *Senate Committee Report*, above n 101 26.