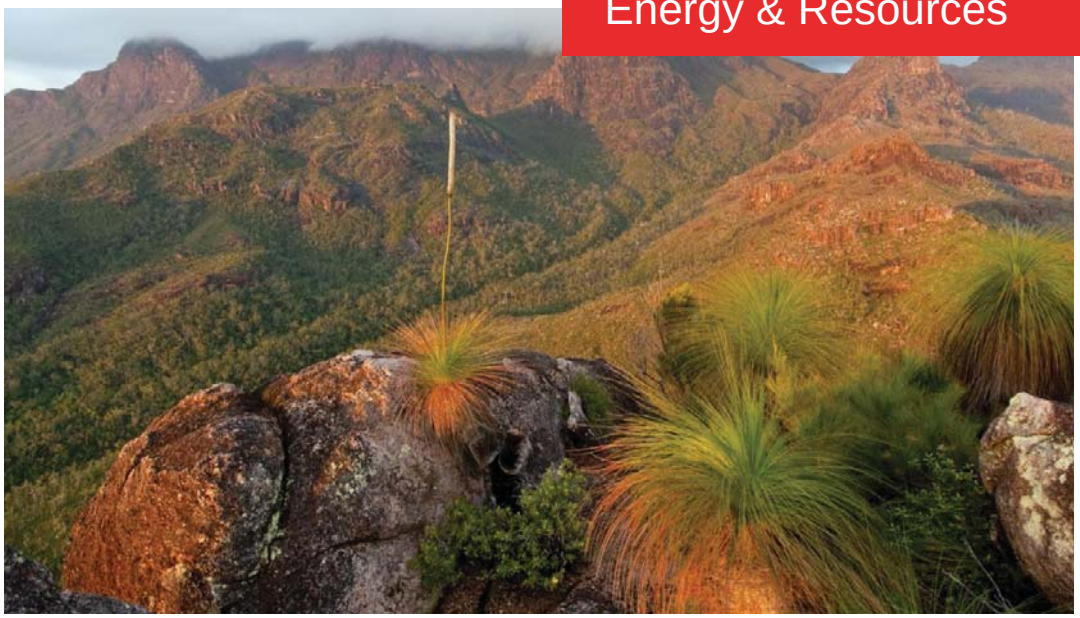
Carter Newell LAWYERS



The ILUA Imbroglio: Federal Parliament passes legislative fix to the *McGlade* decision

James Plumb, Partner

Jasmine Wood, Associate

Summary

The Commonwealth Parliament has passed legislation aimed at mitigating the impacts of a decision of the Federal Court that would have potentially invalidated at least 126 area Indigenous Land Use Agreements (**ILUA**) signed after 2010.

In February the Full Bench of the Federal Court sent the state and federal governments, resources companies, major developers and pastoralists into a spin when it handed down its decision in the case of *McGlade v Native Title Registrar* (***McGlade***).[1]

The decision would have invalidated a considerable number of ILUAs entered into following an earlier decision of the Federal Court in *QGC Pty Ltd v Bygrave* (No 2)[2] (***Bygrave***), where it was decided that there are several people listed on the native title register as the applicant, naming any one of those persons in an ILUA is sufficient to make the '*registered native title claimant*' a party to the agreement.

The *McGlade* decision prompted the Turnbull Government to seek urgent amendments to the *Native Title Act 1993* (Cth) (**NTA**) to '*return to the status quo ante as established in Bygrave for agreements that have already been registered or were awaiting registration at the time of the McGlade decision, … which followed the law as it was at the time*'.[3]

The Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (**ILUA Bill**) was introduced to the House of Representatives on 15 February 2017 and was passed by the House the following day.

The Bill was subsequently read in the Senate before being referred to the Senate Legal and Constitutional Affairs Legislation Committee. The Senate passed the Bill, with changes, last week.

The ILUA Bill has achieved certainty in respect of the ILUAs signed on the authority of *Bygrave*, but leaves some questions unanswered as to the ongoing impact of *McGlade*.

The *Bygrave* decision

The decision in *Bygrave* established the authority that an ILUA could be registered if it had been signed by at least one member of the registered native title claimant.

The dispute in *Bygrave* arose when the Native Title Registrar refused to register an ILUA on the basis that it was '*not an ILUA within the meaning of s 24CA*' because one of the nine persons named in the Registered Native Title Claim had refused to sign the agreement. The Registrar's view was that all the individual members of a registered native title claimant needed to be parties to the agreement in order for it to meet the requirements of the NTA.[4] The Registrar inferred that, because one of the named persons in the Registered Native Title Claim had not signed the ILUA, she did not assent to the agreement nor consent to being a party to the agreement.[5]

QGC challenged the decision on the basis that the phrase '*all persons in the native title group*' encapsulated all persons, bodies corporate and any other entity that identified with the native title group, and that the Registered Native Title Claimant was a collective entity and therefore the only '*person*' in a native title group.[6] QGC argued that the Registrar's construction of the NTA would in effect give any one person who happened to be named in the Registered Native Title Claim a right of veto over a decision made by the wider native title group at an authorisation meeting, which would lead to '*inconvenient, unjust and absurd consequences*'.[7] QGC's position was supported by eight of the nine individuals named in the Registered Native Title Group.

The Native Title Registrar argued that the reference to '*all persons in the native title group*' should be construed as a reference to all the persons named in the Registered Native Title Claim, and that the Registered Native Title Claim could only become a party to the ILUA if all of those individuals were signatories to the agreement. In response to QGC's contention that such interpretation would allow one person to veto the decision of the collective, the Registrar pointed to s 66B of the NTA, which sets out the process for replacing a member of the Registered Native Title Claim.

The court considered the statutory context of the provisions regarding ILUAs and determined that the purpose of the ILUA process is to enable future acts to be carried out while ensuring that those who claim to have native title in the affected areas:

(a) agree to those acts being carried out; and

(b) that they derive some benefit for so agreeing.[8]

The court noted that ILUAs have a '*radical*' effect of being binding on all persons who have an interest in the land, whether or not they are party to the agreement, which is paradoxical to the concepts of privity of contract and the voluntary assumption of contractual obligations. Against this backdrop, the court accepted that the purpose of the ILUA process was to '*provide a statutory mechanism by which a large unincorporated group of Indigenous persons with fluctuating memberships and undetermined native title rights and interests can enter into an ILUA under the Act*'.

Justice Reeve considered how the construction of s 24CD enabled a legal person or entity to act as a representative for a large unincorporated group of people, and concluded that the Indigenous party to an ILUA was '*not the RNTC, as a collective entity, because it is not a legal person, and nor was it all the individuals who comprise the RNTC. Instead, I consider it as one or more persons named in the relevant entry in the Register of Native Title Claims acting in theircapacity as representative parties to the ILUA*'.[9]

McGlade

McGlade relates to a native title claim by the Noongar People over Perth and the south-west area of Western Australia. The area is subject to six Indigenous Land Use Agreements (**Settlement ILUAs**) between the traditional owners of the land and the State of Western Australia. The deal represents one of the largest native title settlements since the introduction of the NTA, worth around $1.3 billion.

The Western Australia Government had sought to register the Settlement ILUAs with the National Native Title Tribunal to give effect to the agreements, when four individuals of the native title group brought an application against the Native Title Registrar, the government and the representatives of the native title group who signed the Settlement ILUAs on behalf of the native title claimants in a bid to block the registration.

At the heart of the issue was whether the agreements complied with the requirements of the NTA so as to constitute an ILUA.

A '*long and complex negotiation*' with the Noongar People had finally culminated in six ILUAs, known as the South West Native Title Settlement.[10] In February and March 2015, an authorisation meeting was held to approve the ILUAs, which contained resolutions as to how the native title parties would sign the ILUAs. Relevantly, the resolution authorised

'*any of the people comprising the Applicant*' for the Wagyl Kalp – Dillon Bay People Claim and the Single Noongar Claim (Area 1) to sign the ILUAs. The resolution also contained an acknowledgement that was not necessary for all of the persons listed to sign the ILUAs, and that the signatures of those person who had signed by 3 April 2015 would be '*sufficient evidence of the decision of all of the people who hold or may hold native title in relation to the land or waters in the Agreement Area to authorise the making of the Settlement ILUA*'.[11]

The Settlement ILUAs were signed in accordance with the resolution, but relevantly not all persons who were listed as a person claiming to hold native title in the Registered Native Title Claim were signatories. Also relevant to the *McGlade* proceedings was the fact that two of the registered native title claimants died before the Settlement ILUAs were signed.

The key issue for consideration in the *McGlade* proceedings was whether an ILUA could be registered when not all of individuals who jointly comprise the registered native title claimant/s had signed the ILUA.[12]

The NTA - what it says about ILUAs

The NTA prohibits development on land that may be subject to native title. A future act will be valid if the native title parties consent to it being done by way of an Indigenous Land Use Agreement.[13] An ILUA must be registered in order to be valid.

Section 24CD sets out who must be parties to an ILUA, and is relevant to the proceedings in *McGlade*:

24CD Parties to area agreements

Native title group to be parties

*(1) **All persons** in the native title group ... in relation to the area **must** be parties to the agreement.*

Native title group where registered claimant or body corporate

(2) If there is a registered native title claimant, or a registered native title body corporate, in relation to any of the land or waters in the area, the native title group consists of:

*(a) **all registered native title claimants** in relation to land or waters in the area;*

Note 1: Registered native title claimants are persons whose names appear on the Register of Native Title Claims as applicants in relation to claims to hold native title: see the definition of registered native title claimant in section 253.

… [***our emphasis***]

The court considered the definition of '*registered native title claimant*' in s 253, which states: '*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*' [***our emphasis***].

The applicants argued that a black letter reading of these provisions required each of the persons who were listed as a claimant in the registered native title claim to individually be a party to the ILUA and must sign it.

The State of Western Australia and the native title service provider representing the non-dissenting Noongar people argued that the definition of '*applicant*' in s 61(2) (which provides that, in relation to a native title determination application, the person or persons authorised to make the application on behalf of a native title group are jointly the applicant), produces a result where the 'applicant' is a '*singular entity that may be comprised of multiple people jointly*'.[14] On this construction, any of the named claimants could sign an ILUA on behalf of the native title group because the registered native title claimant was a single joint entity.

The Federal Court noted the textual ambiguities in the NTA, but ultimately determined that '*in order to construe the provisions of the NTA in a harmonious manner, the reference to* '*all registered native title claimants' in s 24CD(2)(a) must refer to each 'registered native title claimant*', if there is more than one…'.[15] Thus, the court held that the various persons who jointly comprised the registered native title claimant for each of the relevant claims must all be parties to each ILUA and must sign the ILUA in order to meet the requirements of the NTA to achieve registration.[16]

Where a person listed as a claimant in the registered native title claim has died or dissents to the agreement, the court noted that the NTA contains a mechanism for replacing applicants in a registered native title claim, by way of an application to the Federal Court (see s 66B). While the court acknowledged that the outcome may be '*inconvenient*', Justices North and Barker said the requirements of the NTA were clear in that regard, and that it was a policy issue for Parliament to consider whether this ought to be the case.

It was on the basis of this reasoning that the court rejected the argument that the native title group had authorised the execution of the Settlement ILUAs by another means. The court held that '*[w]hile the claim group's authority is unassailable when it comes to the authorisation of persons to lodge a claimant application and in deciding whether an applicant should be replaced, and in authorising an indigenous land use agreement for registration, the claim group does not have the power otherwise to alter the requirements of the NTA governing who should be parties to, and sign, an area agreement*'.[17]

The court considered whether it could exercise discretion in respect of deceased claimants to enable an ILUA to proceed toward registration in the absence of the deceased's signature or a s 66B application. The court held that while removing a deceased person's name from the list of claimants may be considered a '*formality*', it was not always the case, particularly if the native title group was seeking to replace the deceased person with another representative.[18]

Ultimately, the Federal Court decided that the Settlement ILUAs were not capable of being registered because the agreements were not an Indigenous Land Use Agreement within the meaning of the NTA.

The fallout from *McGlade*

The decision in *McGlade* had widespread implications for native title agreements across the country. It immediately brought into question the validity of at least 126 ILUAs that had been registered after the *Bygrave* decision and which were signed pursuant to the authority established in that case – most of which were Queensland-based agreements. In addition, there were at least eight ILUAs before the NNTT pending registration when the *McGlade* decision was handed down – including the Adani Mining Carmichael Project ILUA.

Of concern was also the potentially hundreds more ILUAs that were registered prior to Bygrave that did not contain the signatures of every registered native title claimants, either because the native title group had its own protocols for determining who signs an ILUA (which is the case in Cape York) or because a named claimant had passed away.

The uncertainty created by the *McGlade* decision caused the Acting Native Title Registrar to declare a moratorium on the registration of all ILUAs pending registration that may have been affected by the McGlade decision.[19]

The government moved quickly to introduce legislation into parliament that would overturn the *McGlade* decision, but the passage of that legislation was delayed by political processes in amidst strong criticism that the government had not consulted native title groups and indigenous communities prior to introducing the ILUA Bill. There was also concern that the bill, as introduced, would have serious unintended consequences. The ILUA Bill was passed by the House of Representatives on 16 February – only two weeks after the *McGlade* decision was handed down – subject to reservations by the Opposition and minority parties.

The ILUA Bill was subsequently introduced to the Senate and referred to the Senate Legal and Constitutional Affairs Legislation Committee for consideration. The Senate Committee called for submissions on the ILUA Bill and held a public hearing on the ramifications of the bill.

The Committee recommended the Senate pass the ILUA Bill, subject to a few changes.

The ILUA Bill was passed by the Senate on 14 June 2017 and remitted back to the House of Representatives to consider the Senate's amendments. It was passed by both Houses that same day.

The legislative fix

The key achievement of the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 is to validate ILUAs that were registered prior to 2 February 2017 that would otherwise be invalid because of the *McGlade* decision.

The bill also validates ILUAs that were pending registration when the *McGlade* decision was made.

Going forward, native title groups will be able to:

(a) nominate who signs an ILUA on behalf of the

(b) sign by way of example.

Some earlier amendments proposed by the Bill were removed when the Bill was before the Senate in order to ensure the Bill was passed without further delay. On those lines, the government declined to address some of the issues raised by the Senate Committee – including the application of *McGlade* to s 31 agreements – deferring those considerations until a later date.

What now?

The passage of the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 achieves certainty as to the validity of the 126 ILUAs that were registered by the National Native Title Tribunal on the authority of the *Bygrave* decision. It also gives legitimacy to the potentially dozens more ILUAs that were registered prior to *Bygrave* that did not contain all of the required signatures, including the Cape York agreements and ILUAs that were registered notwithstanding that one or more of the registered native title claimants were deceased.

However, the *McGlade* decision continues to cause ripples on the ocean of native title. The Noongar south west Settlement ILUAs will need to be resubmitted for registration, which leaves it open to further challenges.

The implications of the McGlade decision on other native title agreements – particularly s 31 agreements made under the Right to Negotiate procedure – are also yet to be resolved. While the *McGlade* decision was limited specifically to ILUAs, similar provisions apply in respect of the Right to Negotiate under the NTA. The government has acknowledged the possibility of a *McGlade*-style challenge to s 31 agreements, but has advised that the purpose of the ILUA Bill was 'merely to respond to the *McGlade* decision' and that it will '*consider the ramifications of McGlade on the right-to-negotiate procedure more closely with stakeholders before making amendments to the law*'.[20]

For now, proponents would be well advised to review their native title agreements to assess their validity and if found to be invalid, take steps to validate the agreements and / or the relevant acts by another mechanism.

1 [2017] FCAFC 10.

2 (2010) 189 FCR 412.

3 Commonwealth, Parliamentary Debates, House of Representatives, 15 February 2017, 1075 (Michael Keenan, Minister for Justice and Minister Assisting the Prime Minister for Counter-Terrorism).

4 *QGC Pty Ltd v Bygrave* (No 2) (2010) FCR 412, 11.

5 Ibid 49.

6 Ibid 52.

7 Ibid.

8 Ibid 59.

9 Ibid 85.

10 *McGlade v Native Title Registrar [*2017] FCAFC 10, 279.

11 Ibid 18

12 Ibid 22.

13 NTA, section 24AA(3).

14 McGlade v Native Title Registrar [2017] FCAFC 10, 227.

15 Ibid, 234.

16 Ibid 242.

17 Ibid 267.

18 Ibid 269.

19 National Native Title Tribunal, *McGlade v Native Title Registrar* [2017] FCAFC 10 (Statement from the Native Title Registrar, 10 February 2017) < http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/Statement-from-the-Native-Title-Registrar.aspx>.

20 Commonwealth Parliamentary Debates, Senate, 14 June 2017, 2 (George Brandis, Attorney General).

-

Authors

James Plumb
Partner

P: (07) 3000 8367
E: jplumb@carternewell.com

Jasmine Wood
Associate

P: (07) 3000 8379
E: jwood@carternewell.com