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# A WAJUK BARLADONG MINENG NYUNGAR PERSPECTIVE ON McGLADE V NATIVE TITLE REGISTRAR AND THE RESULTING NATIVE TITLE AMENDMENT (INDIGENOUS LAND USE AGREEMENTS) BILL 2017

by Kelsi Forrest

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## INTRODUCTION

The South West Native Title Settlement ('the Settlement') was a landmark native title settlement. It affects an estimated 30 000 Noongar People and encompasses approximately 200 000 square kilometres in the South West. The Settlement resolved the Noongar native title claim in exchange for a package of benefits, which included, for example, recognition through an act of Parliament,<sup>1</sup> a perpetual trust receiving yearly instalments of \$50 million for 12 years, numerous land arrangements, among other things.<sup>2</sup> The Settlement is made up of six individual Indigenous Land Use Agreements ('ILUAs'). Four of these six ILUAs were successfully challenged in *McGlade v Native Title Registrar* ('*McGlade*') earlier this year. As a Nyungar person who voted in the authorisation process for three of the ILUAs: the Wagyl Kaip and the Southern Noongar ILUA; the Ballardong People ILUA, and the Whadjuk People ILUA, I am a Claim Group member who supports the Settlement and supports the Registration of the ILUAs. As a Nyungar person who supports the Settlement, I was relieved to hear about the Commonwealth Parliament's proposed legislative amendments to the *Native Title Act 1993* (Cth) ('NTA') so the ground-breaking settlement could move forward in the direction that my elders hoped for and worked so hard for many years to achieve. However, as a Law Graduate who works in the native title space, there are some key issues with the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 ('Amendment Bill') that I believe need to be considered thoroughly before proceeding with their enactment.

## BACKGROUND—THE McGLADE DECISION

The *McGlade* decision overturned an earlier judgment that gave primacy to the will of the majority of a Claim Group in authorisation of agreements. The principles outlined in *McGlade* present a more limited view of the claim group's authority under the NTA. Claim groups still have the authority to authorise decisions such as whom are the Registered Native Title Claimants ('RNTCs'), whether RNTCs should be removed and authorising agreements for registration. But it was held in *McGlade* that the authority of the claim group falls short in having the power to decide whom should be parties

to said authorised agreements and whom should sign.<sup>3</sup> This in turn, results in any dissenting RNTCs having a potential veto power, which the Court in previous decisions such as *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 was wary to avoid. The policy justification for determining that RNTCs could potentially have a veto power, was outlined by the Court as being:

if the claim group had generally authorised a number of their group to act representatively as 'applicant' for them on the claim, and they are also identified by section 24CD as the persons who must be parties to an area agreement, then it may be concluded that they have a special responsibility under the NTA towards the claim group not only in dealing with the claimant application but also when it comes to agreement making under Subdivision C [of the NTA].<sup>4</sup>

This notion of the representative capacity of RNTCs and their special responsibility to the claim group is for me, a compelling proposition, for reasons that will be outlined below in my analysis of the proposed amendments.

## THE ROLE OF RNTCS IN AGREEMENT MAKING

The RNTCs representative role and the idea of their special responsibility for Agreement making will undoubtedly be diminished by the proposed amendments to the NTA. Section 5 of the Amendment Bill amends section 251A of the NTA to provide that the claim group may nominate one or more RNTC to be the party/parties to the ILUA. This could be described as in effect, a de facto section 66B process for the purposes of Agreement making. It is clear that the Parliament is considering acting on the comments made by the Court in *McGlade* at [265] whereby the Court contemplates a policy issue for the Parliament to consider whether there should be another mechanism other than Section 66B to deal with issues where all RNTCs refuse to sign off on agreements.<sup>5</sup> The section 5 amendments provide a mechanism that ensures the representative role of the RNTCs is consistent with the claim group's majority view, and if that is not the case, there is no obligation under the amendments for all RNTCs to be parties to ILUAs. The inclusion of such an amendment places primacy on the

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views of the majority in authorising the agreement, which means that where there is more than one RNTC, their role in Agreement Making is diminished to merely a procedural one.

This goes to the issue of whether the role of RNTCs, as a representative of the Claim Group, is meant to be merely procedural or more substantive. RNTCs are usually authorised representatives of the Claim Group because of their eldership and/or cultural authority. The individuals have been authorised by the claim group to act in a representative capacity, but that capacity in terms of decision-making has never been defined. Whilst it is hard to ascertain what a RNTCs role should be from a more global, Australia-wide perspective, there are options that have been canvassed in other forums such as the Australian Law Reform Commissions ('ALRC') Review of the *NTA*:

- Recommendation 10-5 provides that the *NTA* should be amended to clarify that the claim group may define the scope of the authority of the applicant.<sup>6</sup>
- Recommendation 10-6 provides that the *NTA* should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.<sup>7</sup>

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If the scope of the RNTC's authority is established from the point of their authorisation, it would provide greater clarification of their role and decisions that can be made in their representative positions. I believe it is important not to diminish the role of the RNTCs. This is particularly because the individuals whom are most often authorised by to be RNTCs by the claim group normally have some form of cultural authority, such as eldership or are chosen as representatives from particular family groups. Indeed, it could be said that the role of RNTCs as representatives for their people is upheld in one of the most prominent documents on Indigenous rights: the United Nations Declaration on the Rights of Indigenous Peoples ('UNDRIP'). The UNDRIP establishes the right of Indigenous Peoples to participate in decision-making in matters which would affect their rights, through representatives

chosen by themselves in accordance with their own procedures.

<sup>8</sup> In addition, whilst the alternative s 66B measures outlined in the amendments purport to only be relevant when authorising the making of the agreement, there may be wider implications in practice. For example, if there is an RNTC whom has made it clear that they do not wish to entertain an agreement such as an ILUA, their views and the views of those who they represent as a RNTC can be disregarded without consequence from the start of negotiations for the agreement, long before the decision is made to authorise an agreement. This type of issue about practical implications of the amendments may be able to be resolved if there is more time and consideration given to the Amendment Bill.

### MAJORITY DECISION-MAKING

There are issues that exist with the process of decision-making as outlined in section 251A of the *NTA* and these issues are not remedied by the amendments, rather the amendments reinforce these issues. The ability of the claim group to make decisions based on traditional and customary law is limited because of the established practice of determining the decision-making process by way of majority. Whilst the explanatory memorandum at [18] says that the amendments 'give primacy to the role of authorisation, reflecting the view of authorisation, along with other checks and balances established under the Act, and provides sufficient protection for the claim group',<sup>9</sup> it is my view that the amendments give primacy to the process of majority decision-making. The process of majority decision-making has been generally adopted as a means of authorisation where it is determined there is no compelling process of traditional or customary decision-making to authorise things of an ILUA kind. It is usually the case that majority decision-making is determined as appropriate for authorisation. Indeed, at all three authorisation meetings I attended, there was a decision by majority that there was no compelling process of cultural or customary decision-making and it was decided that the authorisation process would occur by way of majority through a secret ballot.

I believe there are no checks and balances on the authorisation process where majority decision-making is determined appropriate. This is by reason of the fact that there is no requirement in entering into an ILUA that the claim group have a particular quorum present in order to ensure the 'majority view' present at an authorisation meeting is in fact the majority view of the wider claim group. Indeed, at the three authorisation meetings I attended, there was no requirement that a certain number of claim members were present, rather the majority decision of those present on the day was accepted. In addition, where a majority decision-making process is adopted according to western standards of meeting

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procedure, as is most frequently the case, there is no provision for any cultural considerations whatsoever, such as the differences in authority between elders and young people.

## CONCLUSION

The Amendment Bill was tabled in Parliament only two weeks after the *McGlade* decision was handed down. The bill was designed to ensure that all those ILUAs that were at risk of being invalidated as a result of *McGlade* would no longer be at risk. However, the failure to thoroughly consider all possible implications of the amendments strikes me as a missed opportunity. I believe there should be consideration of the ways in which majority decision-making, as the most common form of authorisation process, is implemented. This is particularly because the amendments place primacy on the views of the majority at a cost to the role of the RNTCs, whom usually exert some form of cultural or family authority, in agreement making. These amendments will cause the role of the people we choose as representatives to be RNTCs to be diminished, and elevate western standards of majority decision-making. Whilst I am in favour of the South West Settlement proceeding and further objections being resolved as expediently as they can be, I am not sure that the proposed Amendments to the NTA are in the best interests of culturally appropriate decision-making processes.

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- 1 *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA).
- 2 See, South West Aboriginal Land and Sea Council, *Settlement Agreement* (3 October 2016) <[www.noongar.org.au/settlement-agreement/](http://www.noongar.org.au/settlement-agreement/)>.
- 3 *McGlade v Native Title Registrar* [2017] FCAFC 10 at 266; 267.
- 4 *McGlade v Native Title Registrar* [2017] FCAFC 10 at 264.
- 5 *McGlade v Native Title Registrar* [2017] FCAFC 10 at 265.
- 6 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) 31.
- 7 Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No 126 (2015) 31.
- 8 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 48, UN Doc A/RES/61/295 (13 September 2007) Art 18.
- 9 Explanatory Memorandum, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017, 4.

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Kamahi Djordon-King painting.

