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Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

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Dear Committee Secretary,

AIATSIS Submission – Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) welcomes the opportunity to make submission about the proposed changes to the *Native Title Act 1993* (NTA) addressed in the Native Title Amendment (Indigenous Land Use Agreement) Bill 2017 (the Bill).

AIATSIS is one of Australia's publicly funded research agencies and has legislative responsibility, inter alia, to provide leadership in Aboriginal and Torres Strait Islander research and provide advice to the Commonwealth on the situation and status of Aboriginal and Torres Strait Islander culture and heritage (*AIATSIS Act 1989* (Cth) Section 5).

Legal recognition and protection of Aboriginal and Torres Strait Islander peoples' rights to their ancestral lands and waters is central to ensuring the continued enjoyment of Aboriginal and Torres Strait Islander culture, heritage and livelihoods. AIATSIS is therefore engaged in research, advice and public education that promotes stronger recognition and respect for Indigenous law and custom and the ability to make decisions about their lands and waters and benefit from the sustainable development of those lands and waters.

For 25 years, AIATSIS has provided research and advice and supported the development of the native title sector. It is based on this long held expertise that we provide the following submissions on the Bill.


In summary, we recommend that the Bill be passed as is, or with minor amendments as outlined in the attached submission.

The Bill partially addresses concerns held by native title holders and their legal representatives, as well as respondent parties, that the provisions of the NTA in relation to authorisation of agreements require greater clarification and allow efficiencies for native title groups in reaching decisions. Passing the Bill in a timely way will also ensure that native title groups do not suffer disadvantage from disruption to the benefits and opportunities that flow

from many hundreds of existing Indigenous Land Use Agreements (ILUAs) currently at risk of invalidity.

While these amendments have been identified as urgent, we entreat the Parliament to also give consideration to other proposed reforms concerning authorisation and streamlining the ILUA process that have been identified in previous reform debates.

Yours sincerely,



Dr Lisa Strelein
Executive Director – Research

AIATSIS response to Native Title Amendment (Indigenous Land Use Agreement) Bill 2017

This submission is a response to proposed changes contained in the Native Title Amendment (Indigenous Land Use Agreement) Bill 2017 (the Bill). The Bill is a response to *McGlade v Native Title Registrar* [2017] FCAFC 10 (*McGlade*), in which North, Barker and Mortimer JJ determined that the authorisation meetings for four of the six ILUAs filed as part of the South West Native Title Settlement were not effective and that each member of the applicant group or registered native title claimant must sign an ILUA in order for it to be effective.¹ Their Honours drew attention to provisions in s 66B of the NTA for removal of a named applicant should they refuse to sign an ILUA.²

Before discussing the amendments it is important to note that the concept of the 'applicant' is a construct of the *Native Title Act 1993* (Cth) (NTA).³ The NTA requires that a group of named individuals must lodge a native title claim on behalf of the common law native title holding group. The common law native title holding group is a collective who are bound by the laws and customs of their people and who seek to have their rights and interests under those laws and customs, at least in relation to land and waters, recognised and protected as native title rights and interests, and registered by the Crown.

It is important that any amendments or legislative provisions recognise that native title is a communal title and that the Act empowers native title holders to make decisions as a group with cultural legitimacy rather than constrain or encumber decision-making and dispute management.

By introducing the role of 'applicant' it is incumbent on the Parliament to ensure that the roles and responsibilities of the applicant reflect their role as representative of the communal title holders.⁴

Discussion on proposed amendments to s24CD and 251A

AIATSIS recommends that the Bill is passed as is or with minor amendments and reminds the Senate that there has been a history of recommended amendments to streamline the ILUA process and make native title decision- and agreement-making more culturally appropriate, efficient, and cost effective for all parties to each agreement.

The proposed amendments to s 24CD reinstate the principle set in *QGC Pty Ltd v Bygrave* [2011] FCA 1457 decision (*Bygrave*), where Reeves J found that there is no requirement that members of the registered native title claimants act unanimously.

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

² *McGlade* [2017] FCAFC 10, 245.

³ The *Native Title Act 1993* (Cth) (NTA) refers variously to the 'applicant' and the 'registered native title claimants'. The applicant is the person or persons authorised to make an application and deal with matters arising under the Act in relation to the application on behalf of the native title claim group (NTA ss 61(2)(a), 62A). The person or persons are jointly 'the applicant' (NTA s 61(2)(c)). A 'registered native title claimant' is 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.

⁴ Here we note recommendations made elsewhere for corporate applicants to be recognised under the NTA.

In this decision, Reeves J found that eight of the nine members of the registered native title claimants signing the ILUA was satisfactory to fulfil the requirements of s 24CD. Usually a party to an agreement is a person who has agreed to the terms of the agreement; however, Reeves J previously found in an earlier decision in this case, that the native title claimant group were acting as the 'representative party' and the applicant was 'in much the same position as an agent concluding a contract on behalf of a principal'.⁵

Subsequent to this decision it became accepted practice in the authorisation of ILUAs for the applicant to act by majority, although this term was not used in *Bygrave*.

A recent report on the law of authorisation published by AIATSIS explained what it means to 'act by majority':

'Acting by majority' refers to a situation where an applicant purports to take a particular step in the proceedings but a minority of named applicants either disagree with the taking of the step or are unable to participate due to unavailability, disability or death. So the claim group will, at the same time as authorising the applicant, specify the applicant may act on the basis of a majority position.⁶

The Australian Law Reform Commission (ALRC) (Proposal 10–5) has previously recommended that the NTA should be amended 'to provide that the applicant may act by majority'.⁷ However, the ALRC limited the circumstances in which this would apply to where the native title holders have authorised the applicants by a clear, traditional or agreed decision-making process, which can be, and often is, to act by majority. In their proposal, if the authorisation of the applicant is unclear or silent as to the decision-making process, the default position remains for the applicant to act jointly (unanimously).⁸

The proposed amendment to s24CD contained in the current Bill is to be preferred. It provides flexibility to the native title group to adopt processes or nominate signatories where appropriate and retains a workable default position for the registered native title claimants to act by majority.

However, there is some ambiguity in the wording of the amendment to 24CD as presented in the Bill. Where s24CD(2)(a)(ii) refers to 'a majority of the persons who comprise the registered native title claimant'; the provision should read either 'persons who comprise the applicant' or 'person who are the registered native title claimants'.

According to the ALRC, if the current wording of 24CD is interpreted to require all registered native title claimants to be party to the agreement, a number of issues arise:

- The minority of the members of the applicant have veto power;
- If a disagreement cannot be resolved the only course of action is to replace the applicant, which is expensive and time consuming;
- The disagreement is not necessarily resolved by the s 66B process;

⁵ *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019, 98.

⁶ Nick Duff, 'Authorisation and decision-making in native title' (2017) *AIATSIS Research Publications* 107.

⁷ Australian Law Reform Commission, *Review of the Native Title Act 1993*, Discussion Paper 82 (2014) 195 (ALRC 2014).

⁸ ALRC 2014, 195.

- The accepted default position in other areas of decision-making is usually a majority; and
- Aboriginal and Torres Strait Islander peoples should not be required to use a more burdensome process of decision- and agreement-making.⁹

The s 66B process allows for the removal of an applicant who is deceased or has 'exceeded the authority given to him or her by the claim group' (NTA s 66B(1)(a)(ii, iv)). It requires the removal of an applicant by filing a notice in court and can trigger re-authorisation of any agreement that the group is currently involved in. This process can be time consuming and expensive, as the cost of authorisation meetings is generally high and is born by the native title claimant group, the Native Title Representative Body or Service Provider, or in a number of circumstances, by other parties to the agreement who are funding the negotiation.

The proposed amendments to ss 24CD and 251A will overcome some of the issues with relying on the 66B process and will also be more time and cost effective.

However, it should be noted that the proposed amendments will not necessarily remove all of the identified issues. For example, acting by majority will not remove disagreement or conflict within the registered native title claimants or between them and the common law native title holding group. There may also be circumstances in which no clear majority can be established (for example where there is an even number of registered native title claimants). For streamlined, time and cost effective native title agreement making that is also culturally appropriate, it is important that these amendments are accompanied by strong conflict resolution mechanisms and support across the native title sector.

AIATSIS and the National Native Title Council have long suggested that in circumstances where the removal of the applicant is not controversial or disputed, such as the death of an applicant, that a 'simple and inexpensive procedure should be available'.¹⁰ The ALRC proposal 10–6 reflected the National Native Title Council's position:

Proposal 10–6: Section 66B of the Native Title Act should provide that a person may be authorised on the basis that, if that person becomes unwilling or unable to act, the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice.¹¹

An additional sub-section under s 66B of the NTA allowing a registered native title claimant to automatically cease being a member of the applicant upon death or to simply become an inactive member would be a more time and cost effective measure.

Another suggested proposal by the ALRC (Proposal 10–7) to streamline authorisation (and, as a result, ILUAs) was to allow for the replacement of an applicant who becomes unwilling or unable to act through a simple process of a designated person filing a notice in court.¹²

⁹ ALRC 2014, 195.

¹⁰ National Native Title Council, Submission to the ALRC, *Review of the Native Title Act 1993*, January 2015, 14.

¹¹ ALRC 2014, 11.

¹² ALRC 2014, 11.

Traditional and agreed decision making

The ALRC have previously proposed amending the Act to allow for the claim group to adopt a decision-making process for authorisation:

Proposal 10–1: Section 251B of the *Native Title Act* should be amended to allow the claim group, when authorising an application, to use a decision-making process agreed upon and adopted by the group.¹³

AIATSIS supported the above amendment.¹⁴ We also agree that native title claimants should be able to adopt an agreed decision-making process for authorisation of agreements or parties to agreements.

AIATSIS agrees with the proposed amendments to repeal the ‘where there is no such [traditional decision-making] process’ and insert ‘in any case’.¹⁵ Aboriginal and Torres Strait Islander peoples should be free to adopt decision-making processes that are appropriate to their circumstances and have cultural legitimacy within the group and empower them to make decisions that affect their native title rights and interests without having to scrutinise and label their decision-making processes as ‘traditional’ or not. This flexibility may also assist in reducing intra-group disputes about what exactly constitutes a traditional decision making process.

For clarity in the proposed amendment to 251A(b) and to avoid duplication, consideration could be given to whether 251A(a) now becomes redundant with the introduction of the option to adopt an agreed decision making process in any case, particularly the reference to traditional laws and customs ‘must’ be compiled with in authorisation.¹⁶

¹³ ALRC 2014, 10.

¹⁴ Australian Institute of Aboriginal and Torres Strait Islander Studies, Submission to the ALRC, *Review of the Native Title Act 1993*, February 2015, 19.

¹⁵ NTA s 251A(1)(b).

¹⁶ NTA s 251A(a-b).