Article Information

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Bill introduced in Federal Parliament to address recent Federal Court decision on ILUAs

On 15 February 2017, the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 was introduced into Federal Parliament in order to reverse the effect of the recent decision of the Full Federal Court of Australia.

In *McGlade v Native Title Registrar* [2017] FCAFC 10 regarding who must be a party to an Indigenous Land Use Agreement (ILUA) under the N*ative Title Act 1993*. The Bill's introduction followed a moratorium implemented by the National Native Title Tribunal on the registration of ILUAs which may have been affected by the *McGlade* decision.

The decision and resulting Bill are of particular relevance to the energy and resources sector where ILUAs are routinely made to ensure the grant of tenements and other interests are valid for native title purposes. **Ashley Watson, Partner** and **Kelly Scott, Senior Associate**, provide an overview of the decision and the proposed amendments to the Act and discuss their implications for native title agreements.

The *McGlade* decision – When an "ILUA" is not an ILUA

In *McGlade*, the Court held four agreements (each called an ILUA) entered into between the State of Western Australia and the Noongar People were not ILUAs because certain persons were not a party to the agreements as required by the Act.

The decision is only relevant where an agreement relates to an area of land over which there is a registered native title claim. Importantly, it has no application where there is a determination of native title over the whole of the agreement area. Nor does it apply in circumstances where there is not a registered native title claim in relation to the area covered by an agreement. So, for example, agreements can be still be made with a representative Aboriginal/Torres Strait Islander body in relation to land that is not subject to a native title determination or a registered native title claim without reference to the *McGlade* decision.

Where there is a registered native title claim over an area, the Act has always required the *"registered native title claimant"* be a party to an ILUA. In *McGlade*, the Court held that where there was more than one person comprising the registered native title claimant, each of those persons must accept and sign the relevant agreement. Where they do not, the Court held the requirement that the registered native title claimant be a party is not satisfied, and as a result the agreements were not ILUAs for the purposes of the Act and could not be registered.

In reaching this conclusion, the Court did not follow an earlier decision of a single Judge of the Federal Court where it had been held it was sufficient if at least one of the persons comprising the registered native title claimant was party to the agreement provided the broader native title claim group had authorised the ILUA.

The Court noted any dissident or deceased members of the registered native title claimant who refuse to, or are incapable of, signing an agreement would need to be dealt with through the specific process provided for in section 66B of the Act which allows the Federal Court to make an order replacing the person or persons who comprise the applicant for a native title claim. However, this has been regarded by many as unsatisfactory given the potentially significant cost and time implications which would need to be factored into project planning.

Implications of *McGlade*

In response to the decision, on 10 February 2017, the Acting Native Title Registrar declared a "*moratorium on the registration of all area ILUAs currently in the registration/notification stage that may be affected by the McGlade decision*". Until the Bill presently before Parliament is passed, it is expected the Tribunal will continue to apply this moratorium. The moratorium will not affect body corporate agreements made in circumstances where there is a native title determination in relation to the whole of the agreement area. Aside from this, the moratorium should only prevent registration of agreements where there is a registered native title claim and not all members of the registered native title claimant have signed the agreement.

Further, until the Bill has passed, there remains uncertainty for agreements currently on the Register. While the Court in *McGlade* was only concerned with agreements which had not yet been registered, agreements currently on the Register and actions taken under them could well be impacted on the basis those agreements do not satisfy the legislative requirements of an ILUA. The Court also did not consider the extent to which agreements, while not ILUAs, would still have effect contractually.

The legislative fix

The Bill introduced in Parliament has now passed the House of Representatives. However, before debate occurs in the Senate, it is to be referred to the Legal and Constitutional Affairs Legislation Committee for inquiry and report by 17 March 2017.

The Bill is said to amend the Act so as to resolve the uncertainty created by the *McGlade* decision. Specifically, the amendments will allow a claim group to authorise one or more of the persons who comprise the registered native title claimant to be a party to an ILUA. The Act will then only require that particular person or persons to be a party to the ILUA.

The Bill will also retrospectively confirm the validity and enforceability of agreements which were entered into before the *McGlade* decision, providing at least one of the members of the registered native title claimant was a party. In addition, the Bill will enable registration of agreements which have already been made but not yet been registered, despite not all members of the registered native title claimant being a party.

Ongoing implications of *McGlade*?

The *McGlade* decision was only concerned with ILUAs and not with other native title agreements which are entered into with registered native title claimants. Likewise, the legislative fix introduced to Parliament only applies to ILUAs. However, while the *McGlade* decision turned to a large extent on the specific wording of the ILUA related provisions in the Act, it remains to be seen whether the underlying reasoning could still impact other native title agreements required to be made with registered native title claimants.

Piper Alderman routinely acts for companies negotiating and implementing ILUAs and other native title agreements and can assist you to review any existing or proposed agreements in light of the *McGlade* decision and proposed amendments to the Act.