NATIVE TITLE AMENDMENT (INDIGENOUS LAND USE AGREEMENTS) ACT 2017 (CTH): RELYING ON HUMAN RIGHTS TO JUSTIFY A LEGALISED FORM OF COLONIAL DISPOSSESSION?

by Stephen M Young

INTRODUCTION

The recent *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* ('the *Amendment Act 2017*') amended the *Native Title Act 1993 (Cth)* ('*NTA*') to rectify a perceived problem generated by the decision in *McGlade v Native Title Registrar & Ors* ('*McGlade*').[1] This article argues that the *Amendment Act 2017* was partially justified on human rights grounds, which reveals, perhaps, that human rights are becoming consistent with a legal form of colonial dispossession. It begins ~~in section 2~~ with a short history of the *NTA* and the creation of Indigenous Land Use Agreements ('ILUAs') in 1998, which were roundly criticised at that time for non-compliance with international human rights. ~~Section 3,~~ then discusses the case law leading to the *Amendment Act 2017*, how it adopts a standard for ILUA registration that is weaker than the standard created in 1998, and how it was justified. ~~Section 4 then~~ argues that the *Amendment Act 2017* fits a legalised form of colonial dispossession, as established by international legal recognition of 'the right of native tribes to dispose freely of themselves and of their hereditary title'.[2] The article ends by arguing that claims that the *Amendment Act 2017* complies with international human rights law should either be highly scrutinised or suggests that international human rights law is becoming consistent with forms of colonialism.

A BRIEF HISTORY OF THE NTA~~s~~ AND THE HUMAN RIGHTS CRITIQUE

In 1993, Parliament passed the *NTA* in response to *Mabo v Queensland (No. 2)*.[3] One of the *NTA*'s stated objectives was to 'establish ways in which future dealing affecting native title may proceed and to set standards for those dealings'.[4] As passed, the *NTA* created a Future Dealings process called the Right to Negotiate ('RTN'), which would facilitate mineral exploitation and other land uses that will extinguish Native Title. The RTN is a structured negotiation process facilitated by the National Native Title Tribunal ('NNTT') that enables grantees (developers) to petition the NNTT or Minister to make a determination regarding the doing of the act.[5] Under that process, so long as six months of negotiation have taken place and the developer exhibits good faith, the NNTT or Minister must determine that the doing of the act may be done or must not be done.[6] The RTN process could and continues to override any native title claimants' objections and extinguish any extant native title.[7]

Some vagaries in the *NTA* around the status of pastoral leases were resolved in *Wik Peoples v Queensland*.[8] In response, Parliament passed the *Native Title Amendment Act 1998* (Cth), which added the ILUA process for future acts determinations. The ILUA process is not facilitated by the NNTT and sought to 'facilitate the negotiation of voluntary but binding agreements as an alternative to more formal native title machinery'.[9] Since 1998, the *NTA* has two Future Dealings processes. Adding the ILUAs process for Future Dealings increased flexibility and efficiency, but drew significant criticism.[10] For instance, the United Nation Committee for the Elimination of Racial Discrimination ('CERD'), the treaty body tasked with monitoring implementation of the *International Convention on the Elimination of All Forms of Racial Discrimination* ('*Convention*'), criticised the *Amendment Act 1998* as inconsistent with the *Convention* and Australia's *Racial Discrimination Act*. CERD noted that the 'provisions … replace the right to negotiate with the lesser right to be consulted and to object to the land use', and criticised Australia's narrowing of what native title claims would be considered valid.[11] It also noted that the *Amendment Act 1998* was inconsistent with CERD's General Recommendations XXI and XXIII, which requires States to recognise Indigenous self-determination and ensure that 'no decisions directly relating to [Indigenous] rights and interests are taken without their informed consent'.[12] The *NTA* was never amended to address CERD's criticisms.

In sum, one of the *NTA*'s stated original purposes was to establish ways in which native title could be validly extinguished.[13] As such, and to the extent that one of its purposes is to facilitate extinguishing native title, the *NTA* may have always embraced a colonising purpose.[14] But after the *Amendment Act 1998*, CERD clarified that the *NTA* was inconsistent with Indigenous peoples'

self-determination and their informed consent, rights that would be recognised in the 2007 *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[15] CERD's criticism stands as an enduring benchmark for understanding if the *NTA* is or is not compliant with international human rights. The *Amendment Act 2017* adopts a standard for ILUA registration that is more flexible and efficient, and, for those reasons, weaker than the standard required by the *Amendment Act 1998*. Yet, the *Amendment Act 2017* was partially justified on human rights grounds. This has implications for how one views human rights today.

BYGRAVE, *McGLADE*, AND THE JUSTIFICATIONS FOR THE *AMENDMENT ACT 2017*

The *Amendment Act 2017* was passed in response to *McGlade*, which overturned a case from 2010. In 2010, *QGC Pty Ltd v Bygrave (No 2)* (*Bygrave*),[16] a natural gas company sought to enter into an ILUA with the Iman Peoples. The gas company obtained eight of nine signatures of the Iman Peoples that were listed as the registered native title claimant (RNTC). The problem was that the ninth named Iman person on the RNTC refused to sign the ILUA. Because all named RNTC members had not signed the ILUAs, the delegate of the NNTT registrar refused to give notice for the registration of the ILUA, finding that it did not comply with requirements for registration.[17] Thus, one question in *Bygrave* was whether the RNTC was legally a 'collective entity', or comprised of all individuals members of the RNTC.[18] Justice Reeves found that the RNTC was not a legal person and thus was not a collective entity nor was the RNTC all the named individuals.[19] Instead, the ILUA could be registered even if one member of the RNTC withheld their signature because the RNTC was one or more person named in the RNTC acting in a representative capacity for the ILUA.[20] Although, His Honour considered how a RNTC operated under the ILUA process, he failed to consider that the RTN was the original Future Dealings process. As a result and in response to *Bygrave*, the NNTT 'respectfully' interpreted the opinion as pertaining only to ILUAs and not to processes under the RTN framework. It noted, '[t]he passive role of the RNTC in the ILUA provisions, as found by Reeves J, is directly opposed to the role the RNTC plays in the right to negotiate provisions of the NTA'.[21] In short, His Honour may have made registering an ILUAs more flexible and economically efficient, but created legal inefficiencies for those constituted as the RNTC by forming it into an institution that would have different roles depending on the process chosen by the grantee, the entity seeking to extinguish native title.

Between 2010 and 2017, it is estimated that over 120 ILUAs were entered into according to the *Bygrave* standard.[22] A perceived problem arose in early 2017 when *McGlade* was handed down. *McGlade* involved several ILUAs the State of Western Australia sought to enter into with the Noongar Peoples to settle the Noongar Peoples' native title claims.[23] Like *Bygrave*, a smaller number of RNTC members of the Noongar Peoples refused to sign the ILUAs against the majority of RNTC members.[24] In *McGlade*, the Full Federal Court held that even if the RNTC is one entity, all named members of the RNTC must sign an ILUA for it to be registered, which reinstituted the pre-*Bygrave* standard.[25]

In response to *McGlade*, Attorney-General George Brandis released an Explanatory Memorandum (EM), which declared that the *Amendment Act 2017* was necessary because '[t]he *McGlade* decision created uncertainty in the native title sector regarding the status of areas ILUAs (Indigenous Land Use Agreements)'.[26] To rectify this perceived defect in the *NTA* arising from *McGlade*, the EM claimed that the *Amendment Act 2017* had three objectives:[27] 1) it would validate those ILUAs registered between *Bygrave* and *McGlade*; 2) it would enable the registration of agreements that had been made but not yet registered; and 3) from the time of its passage forward, a nominated member(s) of the RNTC would have to agree for ILUA registration or where there is not a nominated member(s) then a majority of the RNTC would have to approve it.[28] In essence, it would adopt a standard that was similar to *Bygrave*, but perhaps slightly more stringent by requiring majority approval where a nominated member(s) of the RNTC had not been established. Importantly, the *Amendment Act 2017* was less stringent than the *McGlade* standard or the pre-*Bygrave* standard. The *Amendment Act 2017* was tabled in the House of Representatives in February 2017 and, following some slight alterations, it passed both houses in June 2017.[29]

The EM suggests that *McGlade* caused the invalidation of ILUAs registered between 2010 and 2017. Yet, identifying the last event of a series as the cause misstates the law as well as the temporality and actual cause of the invalid ILUA registrations. *Bygrave* altered the requirements for ILUA registration by significantly weakening them. And rather than being harmonic with the *NTA*,[30] it caused divisions and hence legal inefficiencies within the *NTA* by re-formulating the RNTC as an legal institution with two functions under two different Future Dealings processes. To that extent, *McGlade* partially decreased *Bygrave*'s legal inefficiencies by increasing its economic inefficiencies. The *Amendment Act 2017* was then justified on flexibility and efficiency grounds as well as Australia's human rights commitments.[31] Although the amendments may increase flexibility and economic gain by lowering the barriers for registering ILUAs, in actuality, the belief that there are purported efficiency gains is the result of shifting legal inefficiencies back onto Aboriginal and Torres Strait Islander communities. Not only will the *Amendment Act 2017* continue two burdensome RNTC processes for Aboriginal and Torres Strait Islander peoples, it may dispossess Aboriginal and

Torres Strait Islanders as peoples, which is a community/collective rather than individualistic/democratic notion, by using legal means to perpetuate a form of colonialism. Comparing the *Amendment Act 2017* to the historical international legal concept of 'the right of native tribes to dispose freely of themselves and of their hereditary title' establishes why.

Bygrave weakened the ILUA process to the extent that it was wholly consistent with a colonising approach by legally legitimising development recognising 'the right of native tribes to dispose freely of themselves and of their hereditary title'.

ORIENTING ILUAS IN THE COLONIAL HISTORY OF NATIVE CONSENT

The history of international law and colonialism can help explain why an appeal to human rights and the justification of a legal act on the grounds of flexibility and economic gain may perpetuate a colonial form when States do not seek the consent of the entire community. At the Berlin Conference of 1884-1885, European powers met to divvy up parts of Africa to ensure that their attempts to civilise the natives were efficient and economically beneficial.[32] At the conference, US envoy John Kasson argued, perhaps benevolently, that '[m]odern international law follows closely a line which leads to the recognition of the right of native tribes to dispose freely of themselves and of their hereditary title'.[33] European states, who were in the process of dividing Africa into appropriable territories, then used 'modern international law' to dispossess native tribes throughout Africa on an *ex post facto* legal basis. The claims that a representative or someone nominated by native tribes, as legally supported and constituted by European powers, had consented to the development, partition and control of collectively-held lands was legally effective and economically efficient. As Antony Anghie argues, 'Kasson's apparently well-meaning attempt to make native consent an integral part of the scheme facilitated the construction of the pretence that natives have in fact consented to their own dispossession'.[34] The *Amendment Act 2017* continues this tradition.

The EM justifies the *Amendment Act 2017* as consistent with self-determination, as well as the right to pursue economic, social and cultural development, as principles contained in *UNDRIP*[35] and elsewhere.[36] The EM overlooks the *UNDRIP*'s recognition that Indigenous peoples may act collectively according to their own traditional legal and decision-making structures.[37] The *NTA* does not recognise *en toto* Aboriginal and Torres Strait Islander peoples' traditional legal and decision-making powers in all matters.[38] As the *Amendment Act 1998* authorised, the *NTA* narrowly allows the community to choose who and how many people represent their diverse and competing interests by using traditional laws and decision-making to act as one entity for authorising ILUAs. Essentially, for ILUAs, the *NTA* narrowly recognises traditional laws and decision-making for the purposes of agreeing to give away land, which presupposes that traditional laws and decision-making could have done such a thing. Now, allowing the registration of ILUAs where a nominated member(s) or majority of the RNTC has approved it, further constructs and forms the RNTC into, at most, a body that works by majority consensus rather than unanimity. While that might appear democratically flexible, efficient and laudatory, it may remove the voice of a minority group(s) that has more of, or a special connection to the land in question. The EM also claims that following *McGlade* would allow one RNTC member to hold out and prevent an ILUA registration.[39] The concern over a hold-out 'veto' seems to ignore the fact that the *NTA* has a process for removing people from the RNTC if they do not have support of the group,[40] which is not to suggest it is a perfect mechanism or that it is not cumbersome.[41] However, streamlining the ILUA registration process further undermines traditional decision-making processes by once again re-formulating the RNTC into an organisation that works on at most a majority preference, only this time as a mirror of democratic form.

Furthermore, comparing the *Amendment Act 2017* to the *Amendment Act 1998* reveals that the *Amendment Act 2017* is even less consistent with Australia's human rights commitments as criticised by CERD in 1998. *Bygrave* weakened the ILUA process to the extent that it was wholly consistent with a colonising approach by legally legitimising development in recognising 'the right of native tribes to dispose freely of themselves and of their hereditary title'. The *Amendment Act 2017* adopts a standard that is slightly more burdensome than *Bygrave*, but the standard is a weak approach to consent that undermines collective rights in favour of representative rights. In comparing *McGlade* and the controversy surrounding the *Amendment Act 2017* to the *UNDRIP*, the Special Rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, wrote that 'I would like to recall that the principle of free, informed and prior consent does not require the consent of all'.[42] Special Rapporteur Tauli-Corpuz's statement might appear to suggest that the *McGlade* standard is a higher burden than the international human rights standard for Indigenous people's free, prior and informed consent ('FPIC'). Of course, the principle of FPIC does not require unanimous consent, but believing that the

Amendment Act 2017 is consistent with Australia's human rights obligations ignores CERD's criticism, the history and nuances of the *NTA,* and how law has historically operated to dispossess Indigenous peoples.

CONCLUSION

Bygrave caused some ILUAs to be invalidly registered. However, if one believes that *McGlade* invalidated some ILUAs, then it would seem natural to return to a *Bygrave* standard or something less than *McGlade*. The *Amendment Act 2017* adopted a flexible and efficient standard that will allow Aboriginal and Torres Strait Islanders to agree to give away their land. The efficiencies gained are, however, only the result of shifting negative externalities to Aboriginal and Torres Strait Islander communities by reformulating the RNTC for ILUA registration as a semi-democratic group of individuals. Appreciating that *McGlade* was not the cause of the invalidations could have presented an opportunity for innovative, collaborate, and creative thinking as to how Aboriginal and Torres Strait Islander peoples can meaningfully participate in crafting legislation that may work for them as consistent with their traditional laws and internationally recognised human rights. Any claims that the 2017 amendment is consistent with human rights and Australia's human rights obligations does one of two things. It either ignores international human rights criticism, the legal history of colonialism and , hence, should be highly scrutinised, or it makes international human rights law consistent with the history of colonialism.

Stephen M Young is a casual lecturer at UNSW. He is also working on a PhD focused on understanding how Indigenous peoples use international human rights law to challenge natural resource development projects. This article is an expanded and altered version of a submission made to Parliament on the proposed Bill.

1 [2017] FCAFC 10 [hereinafter *McGlade*].

2 John Westlake, *Chapters on the Principles of International Law* (Cambridge University Press, 1894) 138.

3 (1992) 175 CLR 1.

4 *NTA* Part 1(3)(b).

5 *NTA* ss 28(f), 25(3), 29, 35, 38.

6 *NTA* s 36.

7 There are three cases where the RTN process has not overridden native title claimant's concerns: *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Western Australia/Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009); *Weld Range Metals Limited/Western Australia/Simpson* [2011] NNTTA 172; *Seven Star Investments Group Pty Ltd/Western Australia/Freddie* [2011] NNTTA 5.

8 (1996) 187 CLR 1.

9 John Howard, 'Amended Wik 10-Point Plan' (Press Release, 8 May 1997); *compare to* National Indigenous Working Group, 'Critique of the 10 Point Plan' 4(3) *Indigenous Law Bulletin* (1997) 10.

10 See Richard Bartlett, 'A Return to Dispossession and Discrimination: The Ten Point Plan' (1997) 27 *University of Western Australia Law Review* 44; Greg Marks, 'Australia, the Committee on the Elimination of All Forms of Racial Discrimination and Indigenous Rights' (2004) 6(7) *Indigenous Law Bulletin* 11.

11 CERD, Decision 2 (54) on Australia – Concluding Observations/ Comments, 18 March 1999, 6, UN Doc CERD/C/54/MISC.40/rev.2, [13].

12 Ibid [87].

13 *NTA* s 3(b).

14 Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015) 39-43.

15 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (13 September 2007) [hereinafter *UNDRIP*].

16 [2010] 189 FCR 412 [hereinafter *Bygrave*].

17 See NTA, s 24CD(1)

18 *Bygrave* [2010] 189 FCR 412, [56].

19 In constructing a false binary, he was able to find a 'centrist' interpretation.

20 *Bygrave* [2010] 189 FCR 412, [85].

21 National Native Title Tribunal, *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412; [2010] FCA 1019 (19 July 2014), 11.

22 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (2017), 10, *citing* Ms Livermore, Proof Committee Hansard, 13 March 2017, 2.

23 See Angus Frith, 'Case Note: *McGlade v Native Title Registrar*' (2017) 8(28) *Indigenous Law Bulletin* 24-9.

24 Another issue, which I treat as ancillary here, is what is required when a named individual on an RNTC has passed away. With regard to RNTC members who have passed away, the NTA could be amended to generate a simple or de facto process for removing them upon their passing. *See* below n 25.

25 *McGlade* [2017] FCAFC 10, [234]-[247], [490]-[495]. If any one member of the RNTC withheld their signature from the ILUA, they could be removed from the RNTC as a claimant according to other processes detailed in NTA s 66B. There are problems with s 66B, including procedural burdens as well as the sensitive matter of uttering the names of deceased peoples. See National Native Title Council, Submission No. 9 to Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (2 March 2017), 10.

26 Explanatory Memorandum, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth), [11] [hereinafter EM]. There are three types of ILUAs, one of which is area ILUAs. See *NTA*, Subdiv C of Div 3 Pt 2. I use 'area ILUAs' and 'ILUAs' synonymously throughout.

27 EM, above n 26, [2].

28 The *Amendment Act 2017* s 24CD(2)(a), states that if a person(s) have been nominated or determined under subsection 251A(2) they may sign an ILUA. If no person(s) have been nominated or determined under subsection 251A(2), then a majority of the RNTC is sufficient to register an ILUA. Section 251A(2) allows a native title claim group to nominate one person who comprise the RNTC to be a party to the agreement, or specify a process for determining which person(s) who comprise the RNTC it to be a party/parties.

29 Items 4, 6 and 11 of the *Amendment Act 2017*, as original proposed, were removed. Items 4 and 6 were suggested by the Australian Law Reform Commission's *Connection to Country: Review of the Native Title Act 1993 (Cth)*, Report No. 126 (2015).

30 *McGlade* [2017] FCAFC 10, [490]-[495].

31 EM, Statement of Compatibility with Human Rights, above n 26, [6].

32 See Makau Mutua 'Why Redraw the Map of Africa: A Moral and Legal Inquiry' (1995) 16 *Michigan Journal of International Law* 113, 1130-34.

33 Westlake, above n 2, 138.

34 Anthony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, 2005) 105.

35 *UNDRIP*, above n 15.

36 EM, Statement of Compatibility with Human Rights, above n 26, [9]-[21]. Other submissions also upheld the *Amendment Act 2017* as consistent with self-determination, *UNDRIP* and Indigenous peoples' rights.

37 *UNDRIP*, above n 15, Preamble, arts 1, 40.

38 *NTA*, ss 251A(1), 251B(a) allow a claim group to use traditional decision-making processes if the claim group has traditional process to authorise the making of a native title determination application or compensation application. The *NTA* does not, however, recognise their traditional decision-making processes qua traditional decision-making processes to the extent they are inconsistent with the common law.

39 EM, above n 26, [16].

40 *NTA*, s 66B.

41 Above n 25.

42 End of Missions Statement by United Nations Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz on her visit to Australia, 3 April 2017, <http://unsr.vtaulicorpuz.org/site/index.php/statements/181-end-statement-australia>.

Chrysalis, 2013
Karla Dickens

Mixed media
500mm x 750mm