

PRIVATE CLIMATE GOVERNANCE IN AUSTRALIA: INDIGENOUS LAND USE AGREEMENTS AND THE MAJORITY DEFAULT RULE

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The right to control and determine decision-making mechanisms is central to all legal systems including traditional legal systems. . . .¹

ABSTRACT

This article examines the majority default rule as a consent mechanism for area Indigenous land use agreements (ILUAs) in Australia. The area ILUA is a well-established long-term land use transaction entered into between Indigenous claimants and third parties. This agreement is highly amenable to the inclusion of focused climate governance that addresses escalating climate risks facing indigenous communities. Developing the area ILUA as a form of private climate governance (PCG) will improve climate justice concerns as it may address some of the inadequacies and omissions of the public governance framework. This Article argues that the majority default rule impedes the ability of claimants to utilize these agreements as a form of PCG by reducing the negotiating power of minority claimants and binding them to the terms of an agreement they did not approve. This undermines the relative bargaining power of all claimants because it diminishes their ability to hold out for climate governance. This Article proposes removing the majority default rule from the Native Title Act 1999 (Cth) and reverting to consensus approval. This will ensure all impacted claimants retain full participatory and approval rights. It will give all Aboriginal and Torres Strait Islanders a transactional voice over contracts that provide permission for projects that dramatically impact their land, resources, and climate. Removing the majority default rule will allow future ILUAs to become more amenable to climate governance which may include: adaptation and mitigation duties, transparency and accountability

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¹ Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Legislation Amendment Bill 2019* (Law Council of Australia Report, 5 December 2019) para 23.

obligations, and disaster and resilience management planning. Providing all impacted Indigenous claimants with rights of approval means everyone has the capacity to contribute to the negotiation and approval of a contract that will bind their land and resources into the future. This will better equip Indigenous Australians to address the impacts of an accelerating climate emergency.

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INTRODUCTION

This article argues that removing the majority approval amendments in the *Native Title Act* 1992 (Cth) (hereinafter NTA) and introducing new provisions requiring all native title claimants to negotiate and approve a compliant climate risk management plan are important reforms that will allow the area indigenous land use agreement (ILUA) to contribute more effectively to the advancement of climate justice.² Reforms to the NTA are urgently needed to allow contracts and exchange-based processes to be more effectively utilized to address emergent social,

² The *McGlade* amendments (as they are known) to the Native Title Act 1993 (Cth) were implemented in 2017 and are discussed in more detail in Part I. For an overview of the concept of climate justice, see Eric A. Posner & Cass R. Sunstein, *Climate Change Justice*, 96 GEO. L.J. 1565, 1596 (2008).

economic, and environmental concerns between Indigenous communities, government, and industry.³ Private climate governance is a term used to describe the increasingly common phenomenon of private entities pursuing mitigation and adaptation goals traditionally associated with public governance.⁴ While this type of governance is not a substitute for stronger domestic regulation, it can make significant contributions to climate management given the scale and capacity of the transacting parties.⁵ As one commentator has outlined; “If multinational corporations commit to environmental sustainability, climate management, and corporate social responsibility more broadly, the sheer scale of their potential impact may start moving the trend lines in the correct direction to reduce GHGs and poverty.”⁶ Private transactions can therefore function as a continuum for state and non-state-based solutions, facilitating hybrid governance models.⁷ This coheres with the development of more diffuse modes of climate regulation and the devolution of state control to a broader range of parties.⁸ Advancing private climate governance is crucial for Australian Indigenous communities given the weak public governance framework and the potency of the climate emergency threat to their cultural practices, intellectual traditions, social structures, health, and the core frameworks of their resource ownership and exchange.⁹

The area ILUA is a private contract, regulated by the NTA, making it well positioned to function as a climate governance tool because

³ See Lee Godden, *Native Title and Ecology: Agreement-making in an Era of Market Environmentalism*, in COUNTRY, NATIVE TITLE AND ECOLOGY 105, 114–16 (Jessica K. Weir ed., 2012).

⁴ See Michael P. Vandenbergh & Jonathan A. Gilligan, *Beyond Gridlock*, 40 COLUM. J. ENV'T L. 217, 242–43 (2015).

⁵ See Michael P. Vandenbergh, *Keynote: Motivating Private Climate Governance: The Role of the Efficiency Gap*, 71 ARK L. REV. 349, 351 (2018); Vandenburgh & Gilligan, *supra* note 4, at 242–43.

⁶ Melissa K. Scanlan, *Climate Risk is Investment Risk*, 36 J. ENV'T. L. & LITIG. 1, 14 (2021).

⁷ Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE L. 395, 397 (2011) (citing Jouni Paavola, *Climate Change: The Ultimate Tragedy of the Commons?*, in PROPERTY IN LAND AND OTHER RESOURCES 417, 418 (Daniel H. Cole & Elinor Ostrom eds., 2012)); Michael P. Vandenbergh, *Keynote Address, Reconceptualizing the Future of Environmental Law: The Role of Private Climate Governance*, 32 PACE ENV'T L. REV. 382, 397 (2015).

⁸ See Lee Godden, Francine Rochford, Jacqueline Peel, Lisa Caripis & Rachel Carter, *Law, Governance and Risk: Deconstructing the Public-Private Divide in Climate Change Adaptation*, 36 UNSW L.J. 224, 232 (2013).

⁹ See Ellen Van Neerven, *The Country is Like a Body*, RIGHT NOW (Oct. 26, 2015), <http://rightnow.org.au/essay/the-country-is-like-a-body/> [https://perma.cc/6BQN-6RNT].

the negotiated terms remain subject to legislative control.¹⁰ One of the biggest impediments to the area ILUA being utilized more extensively for this purpose lies in the lack of negotiation power held by Indigenous claimants.¹¹ Most native title claimants are aware that the ILUA provides an alternative pathway to the expense and time associated with native title litigation, however, they are also conscious that their choices are highly limited.¹² The structural power lies with the third-party proponent. This is because if claimants do not agree to the terms and conditions put forward, and the agreement is withdrawn, their only option will be native title litigation which is costly, time-consuming, and difficult to establish.¹³

The intention of the original drafters of the NTA was quite different as they sought to implement an enabling transactional framework that would allow parties to reach mutually beneficial agreements without lengthy and expensive adjudicative processes.¹⁴ The original objective was to give parties the freedom to negotiate their own terms and conditions and avoid having to comply with the complexity of litigation or other negotiation procedures.¹⁵ Unfortunately, these aspirations have largely

¹⁰ See J.B. Ruhl, *Climate Change Adaptation and the Structural Transformation of Environmental Law*, 40 ENV'T L. 363, 423–26 (2010).

¹¹ See Ciaran O'Faircheallaigh, *Native Title and Mining Negotiations: A Seat at the Table, but No Guarantee of Success*, 6 INDIGENOUS L. BULL. 18 (2007); Ciaran O'Faircheallaigh, *Implementation: The Forgotten Dimension of Agreement-Making in Australia and Canada*, 5 INDIGENOUS L. BULL. 7 (2002).

¹² See Wayne Bergmann & Ciaran O'Faircheallaigh, *Time for Law Reform in Light of Rio Tinto's Choice to Destroy Juukan Gorge*, NAT'L INDIGENOUS TIMES (June 16, 2020), <https://nit.com.au/time-for-law-reform-in-light-of-rio-tintos-choice-to-destroy-juukan-gorge/> [https://perma.cc/43L7-F98Z].

¹³ See O'Faircheallaigh, *Native Title and Mining Negotiations: A Seat at the Table, but No Guarantee of Success*, *supra* note 11, at 18 (“[N]ative title groups know that if they fail to reach agreement and accept the limited benefits on offer, they may end up with no benefits at all. This fundamental inequality in bargaining power helps explain the limited benefits achieved from mining agreements by many native title groups.”).

¹⁴ The ILUA scheme was brought in by the Howard government with the passing of the Native Title Amendment Act 2007 (Cth), which extended agreement making abilities under the Act, replacing agreements under s21 with ILUAs under pt 2, div 3, sub-divs B–E. See also Deirdre Howard-Wagner & Amy Maguire, *‘The Holy Grail’ or ‘The Good, The Bad and The Ugly’?: A Qualitative Exploration of the ILUAs Agreement-Making Process and the Relationship Between ILUAs and Native Title*, 14 AUSTL. INDIGENOUS L. REV. 71, 74 (2010); Sue Kee, *Indigenous Land Use Agreements: Which, Why and Where?*, in NATIVE TITLE IN THE NEW MILLENNIUM: A SELECTION OF PAPERS FROM THE NATIVE TITLE REPRESENTATIVE BODIES LEGAL CONF. 523 (Bryan Keon-Cohen ed., 2001); Daniel O'Dea, *The Indigenous Land Use Agreement as a Risk Management Tool: An Aboriginal Perspective*, AMPLA Y.B. 238, 239 (1999); Graeme Neate, *Indigenous Land Use Agreements: An Overview*, 4 INDIGENOUS L. BULL. 11 (1999).

¹⁵ *Native Title Act 1993* (Cth) sub-div P (Austl.) (recognizing the statutory right to negotiate for registered native title parties). It is a process that must be followed if future acts are to be lawfully

failed to materialize.¹⁶ Most ILUAs do not include terms and conditions that constitute a meaningful recognition of the interest native title parties have in the land nor have they adequately addressed emergent social, cultural, or environmental concerns.¹⁷ The presence of Native Title Representative Bodies (NTRBs) acting on behalf of native title claimants has not significantly improved this situation due in large part to the lack of expertise, resources, or capacity to provide adequate information and advice to claimants.¹⁸ Many NTRBs have become dysfunctional due to funding cuts and ineffective financial management, and struggle to satisfy regulatory responsibilities.¹⁹ In many instances, NTRBs simply lack the administrative and financial capacity to address broader community concerns regarding the ILUA negotiation process.²⁰

Consequently, the area ILUA has become highly susceptible to transactional and procedural inequity and there is no review provision for unconscionable dealing.²¹ Claimants do not necessarily comprehend the

carried out and applies predominately to acts of mining and compulsory acquisition. The parties must “negotiate” in good faith to get the consent of the native title party to the future act. *Id.* s 31.

¹⁶ See ANTAR, SUBMISSION TO AUSTRALIAN GOVERNMENT DISCUSSION PAPERS, LEADING PRACTICE AGREEMENTS: MAXIMISING OUTCOMES FROM NATIVE TITLE BENEFITS 7 (2010); Howard-Wagner & Maguire, *supra* note 14, at 83 (“There exists a clear power imbalance between Indigenous and non-Indigenous negotiating parties that may limit the benefits that ILUAs can deliver to Indigenous people.”).

¹⁷ Cf. THE FED’N PRESS, SETTLING WITH INDIGENOUS PEOPLE: MODERN TREATY AND AGREEMENT-MAKING 103 (Marcia Langton, Odette Mazel, Lisa Palmer, Kathryn Shain & Maureen Tehan eds., 2006).

¹⁸ See T. Summerfield, *Native Title Representative Bodies Under the NTA: A Chance to Excel?*, MURDOCH UNIV. ELEC. J. OF L. ¶¶ 23–27 (2001), <http://classic.austlii.edu.au/au/journals/MurUEJL/2000/24.html> [<https://perma.cc/9QVR-VFDR>].

¹⁹ See *Native Title Report 2001: Chapter Two: Resourcing Equality*, AUSTL. HUM. RTS. COMM’N, <https://humanrights.gov.au/our-work/native-title-report-2001-chapter-two-resourcing-equality> [<https://perma.cc/LAC6-4YYR>] (quoting PAUL WAND & CHRIS ATHANASIOU, THE REPORT TO THE GOVERNMENT OF WESTERN AUSTRALIA OF REVIEW OF THE NATIVE TITLE CLAIM PROCESS IN WESTERN AUSTRALIA (2001) (“[R]epresentative bodies are not adequately resourced to carry out their functions in relation to the resolution of native title applications, a situation which constrains the process of dealing with native title applications.”)).

²⁰ DELOITTE ACCESS ECONOMICS, REVIEW OF THE ROLES AND FUNCTIONS OF NATIVE TITLE ORGANISATIONS 12–14 (2014) (noting that underfunding is one of the most pressing issues significantly inhibiting the negotiation process undertaken by NTRB on behalf of Indigenous communities). See also LISA STRELEIN & TRAN TRAN, NATIVE TITLE REPRESENTATIVE BODIES AND PRESCRIBED BODIES CORPORATE: NATIVE TITLE IN A POST DETERMINATION ENVIRONMENT 8, 20 (Native Title Research Report No. 2, 2006); Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account, Parliament of Australia, *Report on the Operation of Native Title Representative Bodies* (Report, March 2006) [3.21].

²¹ See Deirdre Howard-Wagner, *Scrutinizing ILUAs in the Context of Agreement Making as a Panacea for Poverty and Welfare Dependency in Indigenous Communities*, 14 AUSTL. INDIGENOUS L. REV. 100, 104 (2010); Donna Craig, *Native Title and Environmental Planning: Indigenous Land Use Agreements*, 17 ENV’T PLAN L.J. 440, 444 (2000); *Native Title Act 1993*

operative dimensions of the terms and conditions they are presented with and, even when they do, they lack the bargaining power to negotiate stronger protection.²² As a consequence, claimants often find themselves bound by long-term agreements that fail to take account of the future interests of Indigenous communities and the accelerating climate risks connected with the approval of a carbon-intensive project, such as fossil fuel extraction, on their ancestral lands.²³ The failure of the NTA to adequately address these concerns has left many Indigenous communities feeling “bewildered, bitter, and resentful.”²⁴

The majority approval provisions, which only apply to area ILUAs, have aggravated these transactional concerns.²⁵ In effect, once a majority-approved area ILUA becomes registered, minority claimants find themselves bound by an agreement they did not approve. This not only contravenes the fundamental precepts of free, prior, and informed consent, it fosters factionalism and division within claimant communities. Majority approval takes away the veto power of individual claimants, making them disinclined to hold out for their negotiation value. Many prefer to conform with the minimum winning coalition.²⁶ This often means their

(Cth) pt 8A (Austl.) (establishing a Register of Indigenous Land Use Agreements without any provision setting unconscionability as a ground of review for registered ILUAs); Godden, *supra* note 3, at 115.

²² MALCOLM ALLBROOK & MARY ANN JEBB, NAT’L NATIVE TITLE TRIBUNAL, IMPLEMENTATION OF NATIVE TITLE RELATED AGREEMENTS 12 (2004).

²³ See, e.g., Christopher Knaus, *Beetaloo Basin’s Traditional Owners Condemn Government for Fracking Handouts to Gas Companies*, THE GUARDIAN (Aug. 2, 2021, 00:45 EDT), <https://www.theguardian.com/australia-news/2021/aug/02/beetaloo-basins-traditional-owners-condemn-government-for-fracking-handouts-to-gas-companies> [https://perma.cc/H8Q9-TJL2] (approving the shale gas project for Origin Energy in the Beetaloo Basin in the Northern Territory despite the objection of traditional owners who argued that the consent process in the ILUA did not involve proper information dissemination about the risks of hydraulic fracturing).

²⁴ DAVID RITTER, THE NATIVE TITLE MARKET 6 (2009); see also Howard-Wagner & Maguire, *supra* note 14, at 72.

²⁵ *Native Title Act 1993* (Cth), s 24CD(2)(ii) (Austl.); see also Hannah McGlade, *The McGlade Case: A Noongar History of Land, Social Justice and Activism*, 43 AUSTR. FEMINIST L.J. 185, 186, 193–94 (2017).

²⁶ See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 171–72 (2005); Luis Miller & Christoph Vanberg, *Decision Costs in Legislative Bargaining: An Experimental Analysis*, 155 PUB. CHOICE 373 (2013) (finding that proposals under unanimity rule were rejected more often than less-than-unanimity rule if the offer was not above their continuation value). For further discussion on the broader benefits of involving a broader range of indigenous claimants within indigenous land use agreements see: Danielle Campbell & Janet Eileen Hunt, *Achieving Broader Benefits from Indigenous Land Use Agreements: Community Development in Central Australia*, 48 CMTY. DEV. J. 197 (2013); Lily O’Neill, *The Bindunbur ‘Bombshell’: The True Traditional Owners of James Price Point and the Politics of the Anti-Gas Protest*, 42 U.N.S.W.L.J. 597 (2019).

transactional expectations are not met and, more often than not, the terms and conditions approved by the majority fail to address the impact of the climate emergency upon claimant communities. One example of this is the area ILUA entered into between Adani and the Wangan and Jagalingou People.²⁷ The agreement was approved by a majority of attendees, at a meeting where Adani funded all of the transport, accommodation, sitting fees, and food of those attending.²⁸ The attendees did not have to establish their status as native title claimants by proving, in accordance with native title requirements, that they were family member with a specific connection to the Country covered by the Adani ILUA.²⁹ The ensuing majority approval paved the way for the development of one of the largest coal mines in the world.³⁰ Despite the climate consequences of the mine, the ILUA failed to include any climate protection for claimant communities.³¹

Under this framework, native title claimants can become transactionally bound by an agreement they did not approve or which does not meet their transactional expectations.³² Such agreements are unfair because they simply do not represent the best interests of the community as a whole, and often fail to protect claimants from the impacts of an accelerating climate emergency.³³ Rather, they contravene the core tenets of climate justice and can require minority claimants to completely

²⁷ The area ILUA is known as the “Wangan and Jangalou People and Adani Mining Carmichael Project ILUA” and it was registered in 2017. See *Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA*, NAT’L NATIVE TITLE TRIBUNAL, http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/ILUA_details.aspx?NNTT_Fileno=QI2016/015 [https://perma.cc/ZG36-TNU9].

²⁸ See Michael Carey, *An Inside Look at How Adani Dealt with Traditional Owners*, THE GUARDIAN (May 16, 2019, 12:00 PM), <https://www.sbs.com.au/nitv/nitv-news/article/2019/05/16/inside-look-how-adani-dealt-traditional-owners> [https://perma.cc/36N3-A2CV].

²⁹ *Id.*

³⁰ See Cecilia Jamasmie, *Australia Clears Adani to Mine One of the World’s Largest Coal Reserves*, MINING.COM (Jun. 13, 2019, 4:05 AM), <https://www.mining.com/australia-clears-adani-to-mine-one-of-the-worlds-largest-coal-reserves/> [https://perma.cc/Z8MY-SAMB], for discussion of the scope and nature of the Carmichael coalmine.

³¹ See *Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA*, *supra* note 27.

³² See Deirdre Howard-Wagner, *Moving from Transactional Government to Enablement in Indigenous Service Delivery: The Era of New Public Management, Service Innovation and Urban Aboriginal Community Development*, 53 AUSTL J. SOC. ISSUES 262 (2018).

³³ See Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 570 (1982) (“[I]n order to be true to the institution, the decision maker must not enforce agreements that are the product of the superior power of one party, rather than the consent of both. . . . The injunction not to enforce ‘unfree’ agreements protects the strong against the weak, as well as the weak against the strong.”).

disregard their traditional laws and customs.³⁴ This framework has left many claimants feeling as if there is no provision for any cultural consideration whatsoever, including, for example, “the differences in authority between elders and young people.”³⁵

This Article outlines how the NTA framework operates, why majority approval is inappropriate, and how its removal will enable area ILUA participants to negotiate stronger climate protection. Part I outlines the existing legal framework for area ILUAs within the NTA and examines relevant case law. Part II examines majority approval and argues that its application to area ILUAs is concerning because it goes against the principles of free, prior, and informed consent,³⁶ and conflates the concept of collective transactional consent with collective voting consent thereby diminishing the space for transactional autonomy, discretion, and innovation within Indigenous communities.³⁷ Part III argues that removing majority approval will enable the area ILUA to become a more effective climate governance tool.³⁸ Given the close and synergistic relationship that exists between Indigenous people and their environment, optimizing private climate governance opportunities will improve climate justice for all Indigenous communities.³⁹

³⁴ ALETIA DUNDAS, TOWARDS CLIMATE JUSTICE: DECOLONISING ADAPTATION TO CLIMATE CHANGE (2016); Donna Green, Ursula King & Joe Morrison, *Disproportionate Burdens: The Multidimensional Impacts of Climate Change on the Health of Indigenous Australians*, 190 MED. J. AUSTL. 4, 4–5 (2009); J.C. ALTMAN ET AL., RISKS FROM CLIMATE CHANGE TO INDIGENOUS COMMUNITIES IN THE TROPICAL NORTH OF AUSTRALIA 9; John Von Doussa, *Human Rights and Climate Change: A Tragedy in the Making*, 31 U.N.S.W.L.J. 953, 956–60 (2008); Emily Gerrard, *Climate Change and Human Rights: Issues and Opportunities for Indigenous Peoples*, 31 U.N.S.W.L.J. 941, 951–52 (2008).

³⁵ Kelsi Forrest, *A Wajuk Barladong Mineng Nyungar Perspective on McGlade v Native Title Registrar and the Resulting Native Title Amendment (Indigenous Land Use Agreements) Bill 2017*, 8 INDIGENOUS L. BULL. 29, 31 (2017).

³⁶ *McGlade v Native Title Reg.* (2017) 251 FCR 172, para 360–61 (Austl.).

³⁷ See Godden et al., *supra* note 8, at 231; Eric W. Orts, *Climate Contracts*, 29 VA. ENV'T L.J. 197, 234 (2011).

³⁸ See, e.g., Emma L. Tompkins & Hallie Eakin, *Managing Private and Public Adaptation to Climate Change*, 22 GLOB. ENV'T CHANGE 3, 3 (2012).

³⁹ Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1635 (2007). See also Ruhl, *supra* note 10, at 407; Tony Birch, *Climate Change, Mining and Traditional Indigenous Knowledge in Australia*, 4 SOC. INCLUSION 92, 98 (2016); Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 50 (The World Bank, Policy Research Working Paper 5059, 2009); Michael P. Vandenbergh, *Private Environmental Governance*, 99 CORNELL L. REV. 129, 139 (2013); Heleen L.P. Mees, Peter P.J. Driessen & Hens A.C. Runhaar, *Exploring the Scope of Public and Private Responsibilities for Climate Adaptation*, 14 J. ENV'T POL'Y & PLAN. 305, 315–17, 321–23 (2012).

I. THE LEGAL FRAMEWORK

A. AUTHORIZATION, CERTIFICATION, APPROVAL, AND OBJECTION

The main purpose of the area ILUA is to facilitate a negotiated outcome for future acts impacting land or waters subject to native title claims.⁴⁰ This article focuses upon the area ILUAs, which involve native title claimants, rather than body corporate ILUAs, which involve registered native title interest holders.⁴¹ Where native title claimants have a registered claim over the land, an area ILUA may be entered into.⁴² The terms and conditions covered by the area ILUA are wide-ranging and include future acts such as exploration or mining as well as non-future acts such as use and access.⁴³ The area ILUA can also confirm or recognize native title rights by upholding a valid consent determination.⁴⁴

The first requirement for implementing a valid area ILUA is authorization.⁴⁵ Authorization is essentially a search-and-inform process whereby impacted claimants are identified and notified of the proposal to make an agreement. All reasonable efforts must be carried out to locate every person who holds or may hold a claim in the relevant area.⁴⁶ Once

⁴⁰ *QGC Pty Ltd v Bygrave* (No 2) [2010] FCA 1019 (17 September 2010) para 59 (Austl.).

⁴¹ The primary focus of this article is upon the area ILUA. Where the parties are registered interest holders and a registered native title body corporate exists, a body corporate ILUA must be entered and if the terms and conditions distinguish native title, the state must be a party. *Native Title Act 1993* (Cth), ss 24CA–CE (Austl.).

⁴² *See id.* ss 24CA–CD.

⁴³ *See, e.g.,* Howard-Wagner, *supra* note 21, at 104. *See also About Indigenous Land Use Agreements (ILUAs)*, NAT. NATIVE TITLE TRIBUNAL, <http://www.nntt.gov.au/ILUAs/Pages/default.aspx> [https://perma.cc/H8AZ-QP6U].

⁴⁴ Once a native title application has been made and the parties are determined, the Federal Court will refer it to mediation between the parties. *See Native Title Act 1993* (Cth) s 4(7)(aa) (Austl.). Where mediation results in an agreement between the parties, the Court may make a determination that is consistent with or that gives effect to the terms of that agreement. This is known as a consent determination. *See id.* s 87(1).

⁴⁵ *See Native Title Act 1993* (Cth) s 24CG(3)(b)(ii) (Austl.).

⁴⁶ *Id.* s 24CG(3)(b)(i). *See* Justice Reeves’s outline in *Kemppi v Adani Mining Proprietary Ltd* (No 4) [2018] FCA 1245 (17 August 2018) para 112 (Austl.), that authorization must be construed:

expansively and inclusively to mean every individual, group of persons, or community, of Aboriginal or Torres Strait Islander descent, who holds native title, or by any means makes a claim to hold native title, or otherwise has a characteristic from which it is reasonable to conclude that person, group, or community holds native title, in any part of the area covered by the agreement.

See also id. para 116 (Justice Reeves holding that “the primary purpose of s 203BE(5) is to ensure that all those indigenous persons whose native title could be adversely affected by a proposed ILUA are identified and given an opportunity to participate in the process. . . .”).

this has occurred, the NTA sets out that, in the absence of traditional practices, a meeting may be held and authorization will occur once a majority of the attendees give their approval.⁴⁷ It is not necessary for every impacted claimant to attend an authorization meeting, provided there is a fair representation of the identified claimants.⁴⁸

Once authorized, the ILUA must satisfy certification requirements before it can be registered.⁴⁹ The original NTA provisions required every claimant to give their informed consent by signing the agreement.⁵⁰ The NTA was amended to remove this requirement and now, in the absence of a nomination, approval for an area ILUA may be given by a majority.⁵¹ Following approval, the agreement must be certified.⁵² Certification will occur when the NTRB issues a certificate setting out that all reasonable efforts were made to locate, contact, and obtain the approval of impacted native title claimants or when the agreement is accompanied by what is known as an authorization statement.⁵³ This is a statement setting out that reasonable efforts have been made by NTRBs to ensure that all persons who hold or may hold native title in areas impacted by the ILUA have

⁴⁷ See *Native Title Act 1993* (Cth) s 251A (Austl.); *Moran v Minister for Land & Water Conservation for the State of NSW* [1999] FCA 1637 (25 November 1999) para 41 (Austl.) (stating that the authorizing individuals must be a majority of the group); *Booth v Queensl* [2003] FCA 418 (9 May 2003) para 11 (Austl.) (holding that where authorization occurs by a majority vote, evidence should be provided as to the constitution of the group or the basis on which it is claimed that a majority vote would be sufficient, how many persons are entitled to vote and precisely what is meant by “majority vote”); *Quall v Risk* [2001] FCA 378 (6 April 2001) para 33 (Austl.) (claiming that the word “all” could not mean every person in the group); *De Rose v S Austl* [2002] FCA 1342 (1 November 2002) para 928 (Austl.) (the word “all” is not to be taken to include every person).

⁴⁸ See *Bolton on behalf of the S Noongar Families v W Austl* [2004] FCA 760 (15 June 2004) para 46 (Austl.); *Anderson v W Austl* [2003] FCA 1423 (4 December 2003) para 45 (Austl.).

⁴⁹ *Native Title Act 1993* (Cth) s 24CG(3) (Austl.).

⁵⁰ See generally *Native Title Legislation Amendment Act 2021*, NAT’L NATIVE TITLE TRIBUNAL (2021), <http://www.nntt.gov.au/News-and-Publications/latest-news/Pages/Native-Title-Legislation-Amendment-Act-2021.aspx#:~:text=Specifically%2C%20some%20of%20the%20amendments,law%20holders%20of%20native%20title> [https://perma.cc/QG5N-6PQ9] (noting that the amendments aim to give greater flexibility to native title claim groups to set their internal processes and streamline resolution and agreement-making).

⁵¹ See *Native Title Act 1993* (Cth) s 24EA(1)(a) (Aust.) (upon registration, an ILUA is enforceable “as if it were a contract among the parties to the agreement”). Section 24EA(1)(b) goes on to state that a registered area ILUA will bind all parties, including minority claimants who did not approve it. See *id.* s 24EA(1)(b).

⁵² See *id.* ss 24CG(3)(a)–(b), 24CK(1).

⁵³ The latter method of authorization is described in *id.* s 251A.

been identified and that those who have been identified have authorized the making of the agreement.⁵⁴

Following certification, a notification period will apply before the agreement can be registered.⁵⁵ During this period, objections may be lodged against the validity of the authorization process.⁵⁶ Objectors must indicate their grounds for believing that reasonable efforts were not made to locate impacted native title claimants and obtain their authorization.⁵⁷ It is not possible to object to an area ILUA for any ground other than authorization.⁵⁸ The Registrar, the head of the National Native Title Tribunal, will then make a determination as to whether an objection to an area ILUA should be upheld. If the Registrar upholds an objection, registration cannot proceed; if the Registrar decides there is no evidence to support the objection, registration must proceed.⁵⁹

B. CASE DISCUSSION: KEMPPII, WILLIAMS, AND QUALL

The authorization and certification processes for area ILUAs have been the subject of considerable litigation. A brief review of recent significant cases dealing with ILUAs indicates courts have been much stricter in upholding protocols for body corporate ILUAs than area ILUAs. In *Kempii v Adani Mining (No. 4)* the Wangan and Jagalingou (W&J) people challenged an area ILUA entered into with the Indian mining conglomerate, Adani Pty Ltd.⁶⁰ They argued that the authorization meeting was unreasonable because it was stacked with people who were not W&J members and who, therefore, had no authorization power.⁶¹ Justice Reeves dismissed the case, holding that the “expansive and inclusive” process of determining impacted claimants made it acceptable to include persons who might have had a native title claim and that membership of the W&J group was not the sole criterion for voting at the authorization meeting.⁶²

⁵⁴ See *id.* ss 24CG(3)(b) (setting out the requirements for registering an area ILUA with an authorization statement), 24CK(1), (2)(c), (3) (setting out the requirements for registering a certified area ILUA).

⁵⁵ *Id.* ss 24CH(a), (b), (d).

⁵⁶ *Id.* s 24CI(1).

⁵⁷ *Id.* ss 24CI(1), 203BE(5)(a)–(b).

⁵⁸ See *id.*

⁵⁹ *Id.* s 24CK(2)(c).

⁶⁰ See *Kempii v Adani Mining Proprietary Ltd (No 4)* [2018] FCA 1245 (17 August 2018) paras 1–3 (Austl.).

⁶¹ See *id.* para 48.

⁶² See *id.* paras 109, 111–12, 169.

The Full Federal court dismissed an appeal.⁶³ The court held that the NTA only required the representative body organizing the authorization meeting to be “of the opinion” that all reasonable efforts had been made to identify persons who hold or may hold native title claims in the relevant area.⁶⁴ This meant all possible claimants could attend and vote at the meeting and there was no need to investigate the validity of their claim prior to their attendance.⁶⁵ This broad interpretation of the NTA authorization protocols dilutes their impact because it effectively allows anyone with the most remote claim to vote in an authorization meeting, which represents the first stage in the area ILUA process.

The decision in *Kemppi* can be contrasted with the conclusions of the court in *Kimberley Land Council Aboriginal Corporation (ICN 21) v. Williams (No. 2)*, which dealt with a body corporate ILUA rather than an area ILUA.⁶⁶ On the facts, an objection was lodged to the certification of a body corporate ILUA for two reasons: (1) non-compliance with section 203BE(5)(b) of the NTA, and (2) failure to register.⁶⁷ The appellants argued that it was contrary to the authorization protocols to assume that no traditional decision-making process for authorization existed.⁶⁸ The court agreed, holding that this assumption went against the requirements of section 251A of the NTA and that it was in the public interest for body corporate authorization protocols to be strictly adhered to.⁶⁹

In *Northern Land Council v. Quall*, the High Court considered an appeal on the question of whether the Northern Land Council, a NTRB for the native title claimants, could delegate its certification functions to its CEO.⁷⁰ The claimants had argued that the authorization protocols were invalid because the NTA did not permit delegation of this function to the CEO.⁷¹ The Full Federal Court agreed with the claimants, holding that

⁶³ *Kemppi v Adani Mining Proprietary Ltd (No 2)* [2019] FCAFC 117 (12 July 2019) paras 107–08 (Austl.).

⁶⁴ *Id.* para 48.

⁶⁵ *Id.* paras 48–49 (interpreting s 203BE of the NTA).

⁶⁶ See *Kimberley Land Council Aboriginal Corp (ICN 21) v Williams* [2018] FCA 1955 (5 December 2018) para 2 (Austl.).

⁶⁷ See *id.* paras 7, 14, 37. *Native Title Act 1993* (Cth) s 203BE(5)(b) (Austl.) (requiring an NTRB not to certify an area ILUA unless all identified parties who may hold native title have authorized it).

⁶⁸ See *Williams*, [2018] FCA para 39.

⁶⁹ See *id.* paras 61, 71.

⁷⁰ *N Land Council v Quall* [2020] HCA 33, para 1 (Austl.). The High Court is the highest court of appeal in Australia. In this decision, it focused upon the certification functions set out in s 203BE(1)(b) of the NTA. See *id.* para 16.

⁷¹ See *Quall v N Land Council* [2018] FCA 989 (29 June 2018) para 13 (Austl.).

strict adherence to the requirements of certification was important.⁷² The High Court overruled the conclusions of the Full Federal Court and allowed the appeal. It held that the Northern Land Council had the power to delegate, derived from section 27(1).⁷³ It further held that the certification function could not be delegated, but could be performed by an authorized agent.⁷⁴

This brief overview of current litigation highlights the preparedness of Australian courts to adopt a broader approach to the interpretation of area ILUA authorization and certification requirements under the NTA than it does with body corporate ILUAs. This means native title claimants who do not hold a native title interest in the land and who are bound by the terms of sub-optimal area ILUAs have found it extremely difficult to challenge their validity under the NTA. Given that relief under general contract law is not available because the NTA framework was implemented as a replacement, many minority claimants have found themselves bound by long-term contracts to which they did not consent, are unable to challenge, may be contrary to their traditional customs and laws, and which have uniformly failed to address any of the issues associated with the accelerating climate emergency.⁷⁵

C. UNANIMOUS CONSENT AND THE *McGLADE* DECISION

The Full Federal Court in *McGlade v. Native Title Register* examined whether the practice of allowing one or more registered claimants to sign an area ILUA on behalf of all claimants was valid.⁷⁶ Until this point, Australian courts had followed the decision of the court in *QGC v Bygrave (No. 2)*, which had concluded that the only role of claimants within area ILUAs was to facilitate the “native title contracting group” who would negotiate and approve the agreement.⁷⁷ The Full Federal Court in *McGlade* rejected *Bygrave* and held that the NTA framework, as it was at the time of the decision, required the signature of all registered native

⁷² See *N Land Council v Quall* [2019] FCAFC 77 (20 May 2019) para 103 (Austl.).

⁷³ See *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s 27(1)(a)–(b) (Austl.); *Quall*, [2020] HCA para 59.

⁷⁴ *Quall*, [2020] HCA para 86.

⁷⁵ See THE FED’N PRESS, *supra* note 17, at 115.

⁷⁶ See *McGlade v Native Title Reg* [2017] FCAFC 10 (2 February 2017) para 22 (Austl.). The Full Federal Court lies under the High Court. It deals with disputes arising under Commonwealth law and this case involved the appeal division.

⁷⁷ See *QGC Pty Ltd v Bygrave (No 2)* [2010] FCA 1019 (17 September 2010) paras 84, 88 (Austl.).

title claimants before an area ILUA could be eligible for registration.⁷⁸ In reaching this decision, the court held that the NTA did not intend to alter the general law requirements for contractual consent because this had not been explicitly set out within the terms of the act.⁷⁹ Native title claimants were found to be collective entities with a singular character whose contractual intention to enter an ILUA could only be manifested when they acted as a whole.⁸⁰ This meant that if individual claimants did not sign, the group could not be regarded as having acted collectively.

The *McGlade* decision generated significant concern in Australia because it meant many existing registered area ILUAs were potentially invalid, as they had been registered without the signature of all native title claimants. The federal government subsequently implemented amendments to retrospectively validate all registered area ILUAs, without any inquiry regarding why the agreements had been registered without the signatures of all of the claimants in the first place.⁸¹ Further, the government changed the NTA so that henceforth, in the absence of the claimants specifically nominating a group to approve an area ILUA, the agreement could be approved where a majority of native title claimants supported it. The combined effect of these amendments was a negation of the *McGlade* decision. The hasty implementation of these amendments was described in the explanatory memorandum to the Act as vital, because unanimous consent would create barriers to the efficient approval of such agreements, impeding the positive benefits offered to the Indigenous communities.⁸²

⁷⁸ See *McGlade*, [2017] FCAFC para 267.

⁷⁹ See *id.* paras 244–247 (stating that the area ILUA would lack the “quality of being an agreement recognized for the purposes of the NTA” if it was not signed by all parties who jointly made up the registered native title claimants).

⁸⁰ *Id.* para 397.

⁸¹ See Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Provisions, March 2017) [2.29], [2.40] (later enacted as the *Native Title Amendment (Indigenous Land Use Agreements) Act (2017)* (Cth) (Austl.)); *McGlade*, *supra* note 25, at 193 (discussing the “unprecedented parliamentary process” associated with the swift passing of the majority approval provisions despite the amendments not being supported by the Australian Law Council).

⁸² Explanatory Memorandum, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* (Cth) 4, 5 (Austl.).

II. WHAT IS THE MAJORITY DEFAULT RULE AND HOW DOES IT AFFECT AREA ILUAS?

A. WHY DOES IT ONLY APPLY TO AREA ILUAS?

The majority approval amendments that post-date the *McGlade* decision bind minority native title claimants to the terms and conditions of a registered area ILUA they did not approve.⁸³ The amendments only apply to area ILUAs not body corporate ILUAs. Where an agreement is entered into with registered native title holders (rather than native title claimants), the agreement is known as a body corporate ILUA. Full consent remains a requirement for body corporate ILUAs because the terms and conditions may involve an extinguishment of native title rights already granted. Hence, if a body corporate ILUA has been registered without the signatures of all native title holders, it must be removed from the Register.⁸⁴ This divergence in protocol is difficult to rationalize. The assumption appears to be that full consent is only a requirement for a native title collective where that collective has had their native title interest confirmed. Where this has not occurred, and the collective only has a registered claim, the right of each claimant to consent to the terms and conditions of the ILUA does not exist. This undermines the purpose of the ILUA, which was to encourage parties to pursue an alternative pathway to native title litigation in the first place. It is unfair to deny a native title claimant the same transactional entitlements as a native title interest holder because they choose a different pathway. Further, the ILUA was broadly intended to follow general law transactional principles and it is very clear under general law that the need for full consent is not dependent upon the nature of the entitlement held by the contracting party.⁸⁵ Denying native title claimants the same consent entitlements as native title interest holders undermines their right to participate in decisions impacting their collective

⁸³ See *Native Title Act 1993* (Cth) ss 24EA(1) (setting out that the ILUA takes effect as if it were a “contract among the parties to the agreement” and “all persons holding native title in relation to any of the land or waters in the area covered by the agreement, who are not already parties to the agreement, were bound by the agreement in the same way as the registered native title bodies corporate, or the native title group, as the case may be”), 24EB(5) (setting out that any native title claimant in relation to land or waters in the area covered by the agreement who has been identified and authorized the making of the agreement, and who is entitled to any benefits under the area ILUA is not entitled to seek compensation).

⁸⁴ See *id.* s 199C(1)(b).

⁸⁵ See Orit Gan, *The Many Faces of Contractual Consent*, 65 *DRAKE L. REV.* 615, 637 (2017) (noting that consent can be a quick, simple choice, oral or behavioral, singular or ongoing).

and this, in turn, diminishes the self-determination entitlements of their community.⁸⁶

A number of prominent bodies expressed concern at the majority approval amendments implemented in 2017.⁸⁷ In its submission to the Senate Committee, the Law Council of Australia stated that procedural safeguards in the negotiation of the area ILUA are profoundly important given the potential for the agreement to authorize any future act.⁸⁸ It argued that any protocol change should not come at the expense of the authority, legitimacy and communal character that underpins native title decision-making.⁸⁹ Previously, the Rashid Report had noted that the workloads of native title representative bodies were significantly higher than the level of funding allowed meaning many were unable to fulfil their core representation and consultation functions.⁹⁰ Denying minority claimants the right to approve an area ILUA impedes this consultative process further and is a reductive, non-representative protocol.

B. RECENT AMENDMENTS TO THE MAJORITY DEFAULT RULE: NATIVE TITLE LEGISLATION AMENDMENT ACT 2021 (CTH)

In 2021, the Commonwealth government passed the *Native Title Legislation Amendment Act 2021*.⁹¹ Schedule 1 of the Act expands majority approval so that it effectively operates as the default position for *all* things that the applicant is required or permitted to do under the NTA.⁹² This rule contains a number of qualifications as recommended by the

⁸⁶ See *Kimberley Land Council Aboriginal Corp (ICN 21) v Williams* [2018] FCA 1955 (5 December 2018) paras 99–104, (Austl.) (regrettably holding that the native title claimants failed to follow ILUA authorization procedure); Explanatory Memorandum, Native Title Amendment Bill 1997 (Cth) 47 (Austl.) (outlining what a native title group should include prior to the majority approval amendments, clearly indicating that the group should include “all registered native title claimants, and all registered native title bodies corporate, in relation to land or waters”).

⁸⁷ See, e.g., Senate Legal and Constitutional Affairs Legislation Committee, *supra* note 1, at p. 3, para 16.

⁸⁸ See *id.* paras 44–45.

⁸⁹ See *id.* paras 4, 26–28.

⁹⁰ Senator Brennan Rashid, *Review of Native Title Representative Bodies*, ATSIC (1999). See also *Native Title Act 1993* (Cth) s 203BA(2)(a)–(b) (Austl.).

⁹¹ See *Native Title Amendment Act 2021* (Cth) (Austl.).

⁹² See *Native Title Amendment Act 2021* (Cth) sch 1 paras 27, 35, 38, 43, 45, 47 (setting out the majority default rule). This includes not only the making of area ILUAs, but also the making of applications for native title determinations or compensation applications, as well as section 31 agreements, which relate to the grant of mining and exploration rights over land that may be subject to native title. To this extent, the provisions repeal and replace the aspects of the NTA that were amended in 2017.

Australian Law Council's Inquiry and the Australian Law Reform Commission's "Connection to Country" Report.⁹³ First, section 251BA allows a native title claim group to nullify majority approval by imposing a condition on the authority requiring unanimity and, when this occurs, section 24CD(2)(b) requires all such persons to become parties to the agreement.⁹⁴ Second, persons within the majority must notify minority claimants of their status within a reasonable period of becoming parties.⁹⁵ A failure to notify will not invalidate the agreement. Third, section 251BA(2) sets out that a claimant group may use either a traditional decision-making process or a process agreed to and adopted by the group.⁹⁶ Finally, the Registrar must be satisfied that the approval was authorized by the claimants and that any conditions imposed on that authority have been satisfied when registering the agreement.⁹⁷

These qualifications are important safeguard provisions for majority approval decision-making. The Australian Law Council made it clear that prior to these amendments being passed, the majority approval provisions failed to take account of the fact that minority groups may hold rights and interests that, according to traditional law and customs, constrain the capacity of the majority to make decisions. Further, while the amendments go some way towards addressing the concerns associated with majority approval, they fall well short of providing a solution. As outlined by the Law Council, where an area ILUA is subsequently removed from the Register for failing to adhere to the approval requirements, the validity of the underlying project or development is not impacted for the period of time that the agreement remained on the Register.⁹⁸ This is the case despite the fact that the area ILUA may have been procured by fraud, duress, or coercion.⁹⁹

⁹³ See generally Attorney-General's Department, *Reforms to the Native Title Act 1993 (Cth)* (Law Council of Australia Report, 27 February 2018) (suggesting reforms to the NTA); Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (Report No 126, 4 June 2015); Senate Finance and Public Administration Legislation Committee, Parliament of Australia, *Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Amendment (Strengthening Governance and Transparency) Bill 2018* (February 2019) (proposing the legislature further consult the Indigenous community as part of process of implementing the bill).

⁹⁴ See *Native Title Act 1993* (Cth) ss 251BA(1), n. 2(a), 24CD(1)–(2)(b) (Austl.).

⁹⁵ *Id.* s 24CD(2B).

⁹⁶ *Id.* s 251BA(2).

⁹⁷ See *id.* s 190C(4AA).

⁹⁸ See Senate Legal and Constitutional Affairs Legislation Committee, *supra* note 1, para 32.

⁹⁹ *Id.*

C. MAJORITY DEFAULT RULE AND THE RIGHT TO CULTURE

Article 15 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR)¹⁰⁰ and Article 27 of the International Covenant on Civil and Political Rights (ICCPR)¹⁰¹ make it clear that all individuals have a right to culture where it is exercised within a group; this right applies to minority groups including Indigenous people. For Indigenous people, the right to culture refers to their right to live on traditional lands and use the resources of that land where such use is consistent with traditional activities like hunting and fishing.¹⁰² Mandating a majority default rule for area ILUAs can impede an individual claimant's right to culture. Limiting the ability of a claimant to participate in the negotiation and approval of an area ILUA will impact the claimant's right to culture. Area ILUAs are land use agreements that operate in the future and impact the ability of Indigenous people to use their land and resources. This makes the process by which such agreements are authorized extremely important.

According to international law, where there is a conflict between the rights of individual members of a group and the rights of the group as a whole, individual rights to culture may be restricted provided the restriction is necessary for the continued viability and welfare of the group's right to culture.¹⁰³ Whether the majority default rule is necessary for the continued benefit of the group's right to culture is debatable.¹⁰⁴ The statement of comparability for both the 2017 and 2021 NTA amendments argued that the majority default rule was necessary because it promotes "efficient determinations of native title and native title agreement making" thereby helping "Indigenous Australians to realize the social and economic benefits of native title."¹⁰⁵ The Human Rights Scrutiny Report of 2019 and 2020 agreed with this claim, finding that the majority default rule supported the greater good of the collective group and their cultural rights.¹⁰⁶ The report noted that if unanimous approval was mandated,

¹⁰⁰ See International Covenant on Economic, Social, and Cultural Rights, art. 15, Dec. 16, 1966, 993 U.N.T.S. 3.

¹⁰¹ See International Covenant on Civil and Political Rights, art. 27, Dec. 19, 1966, 999 U.N.T.S. 171.

¹⁰² See Hum. Rts. Comm., Gen. Comment No. 23: Article 27 (The Rights of Minorities), ¶ 7, U.N. Doc. CCPR/C/21/Rev. 1/Add.5.

¹⁰³ See Hum. Rts. Comm., *Kitok v. Swed.*, Commc'n No. 197/1985, U.N. Doc. CCPR/C/33/D/197/1985, at 221 (1988).

¹⁰⁴ See Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 1 of 2020, 5 February 2020) para 1.138.

¹⁰⁵ See *id.* para 1.142 (quoting the NTA amendments' statements of compatibility).

¹⁰⁶ See *id.*

disputes between members could frustrate the entire agreement process causing delays and costs for the group as a whole.¹⁰⁷

The difficulty with these conclusions is that they assume the terms and conditions being approved by the majority support and reinforce a collective enjoyment of the right to culture. In the absence of equal bargaining power, there is no guarantee that this is true. Where, for example, an area ILUA agreement is passed by a majority but does not include any terms or conditions that actively manage or protect impacted communities against the accelerating impacts of the climate emergency, cultural rights may actually be damaged. This is because cultural rights are fundamentally connected to the natural environment and the climate emergency has made traditional lands less accessible, more dangerous, and less familiar to remote Indigenous communities.¹⁰⁸

Climate change is transforming the traditional landscape of remote communities and damaging a way of life that is central to Indigenous cultural identity and the right of Indigenous people to enjoy the benefits of their culture.¹⁰⁹ While upholding the right of all native title claimants to consent to an area ILUA may frustrate the decision-making process and prevent the expedient registration of a transaction that implements reciprocal native title and land use entitlements, this may prove to be a critical protection in the long term when it prevents the registration of an agreement with little or no climate governance.¹¹⁰ For example, the Adani Mining Carmichael Project and the Wangan and Jagalingou People area ILUA permits Adani to construct all works associated with the project, including the development of an airstrip, a

¹⁰⁷ See *id.* para 1.146; Joint Committee on Human Rights, Parliament of Australia, *Human Rights Scrutiny Report* (Report 4 of 2017, 9 May 2017) paras 2.175–176.

¹⁰⁸ This was the argument raised by the Inuit people in their petition against the United States in 2005 with the Inter-American Commission on Human Rights which alleged that the United States committed human rights violations against the residents of the Arctic through its climate change policies—including its decision not to ratify the Kyoto Protocol. See Petition to the Inter-Am. Comm’n H.R. Seeking Relief from Violations Resulting From Global Warming Caused by Acts and Omissions of the United States at 74–76, 82 (2005).

¹⁰⁹ See Joanna Harrington, *Climate Change, Human Rights, and the Right to Be Cold*, 18 FORDHAM ENV’T L. REV. 513, 520 (2006).

¹¹⁰ It has been argued that environmental activism is undermining the interests of Indigenous communities dependent upon mining and the benefits associated with registered area ILUAs. See, e.g., Katherine Murphy, *Indigenous People Victims of ‘Green Fight’ Against Adani Mine, Says Marcia Langton*, THE GUARDIAN (June 17, 2017, 05:41 EDT), <https://www.theguardian.com/australia-news/2017/jun/07/indigenous-people-victims-of-green-fight-against-adani-mine-says-marcia-langton> [<https://perma.cc/6UQ2-LLKQ>].

washing plant, and a 2,750 hectare area for critical infrastructure.¹¹¹ The area ILUA was approved by a majority and contains no provisions managing or protecting Indigenous communities against the accelerating impact of climate change.¹¹² A minority of claimants have resisted the agreement, arguing that approving the coal mine contravened their custodial obligations towards the traditional land and resources of the Wangan and Jagalingou people.¹¹³ The majority default rule allowed the agreement to be registered and enforced against all claimants, despite the objections of the minority and the absence of climate governance.¹¹⁴

D. UNDRIP AND THE MAJORITY DEFAULT RULE

Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) declares that States must “consult and cooperate in good faith with the indigenous peoples . . . in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources[.]”¹¹⁵ Australia endorsed UNDRIP, but at the time, made it clear that the declaration was an aspirational, non-binding instrument.¹¹⁶ As such, it does not have the legal force of customary international law in Australia.¹¹⁷ Despite its non-binding status, there has been increasing pressure to endorse UNDRIP in Australia so that Indigenous people have the right to free, prior, and informed consent (FPIC) over projects that impact their land or resources. This would represent an important step forward for transactional parity and represents “the principal determinant of whether there is a ‘social

¹¹¹ See *Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA*, *supra* note 27 (Schedule 2 sets out the “agreed acts”). An extract of the ILUA is available on the National Native Title Register at: <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/ILUA%20Register/2016/QI2016.015/ILUARegisterExport.pdf> [https://perma.cc/46TZ-KQBR].

¹¹² See *Wangan & Jagalingou People and Adani Mining Carmichael Project ILUA*, *supra* note 27.

¹¹³ See Ben Smee, *Access to Adani Coalmine in Queensland Blocked by Traditional Owners*, THE GUARDIAN (Aug. 24, 2020, 3:00 EDT), <https://www.theguardian.com/environment/2020/aug/24/adanis-carmichael-coalmine-in-queensland-blocked-by-traditional-owners> [https://perma.cc/9Y3W-6W8B].

¹¹⁴ See Stephen M. Young, *The Material Costs of Claiming International Human Rights: Australia, Adani and the Wangan and Jagalingou*, 20 MELBOURNE J. INT’L L. 598, 638 (2019).

¹¹⁵ G.A. Res 61/295, United Nations Declaration on the Rights of Indigenous Peoples, art. 32, para. 2 (Sept. 13, 2007).

¹¹⁶ See Megan Davis, Comment, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous People*, MELBOURNE J. INT’L L., Oct. 2008, at 3–4.

¹¹⁷ See *id.*

licence to operate and hence is a major tool for deciding whether to support an operation.”¹¹⁸

The majority default rule undermines the aspirational goals of FPIC. The United Nation’s Expert Mechanism on the Rights of Indigenous Peoples has set out that consent protocols must be consistent with international human rights standards.¹¹⁹ This means attention must be given to the needs of individuals, particularly marginalized sub-groups, within a collective.¹²⁰ For the most part, this has been achieved by institutional collectives via the adoption of consensus voting.¹²¹ For example, the United Nations Security Council requires a near-consensus vote from its members prior to any decision being approved because with a majority vote there is always the risk that a decision will benefit one member at the expense of another.¹²²

The majority default rule contravenes the fundamental aspirations of FPIC because, in failing to guarantee free and informed consent for all native title claimants, there is the distinct possibility that the terms of an area ILUA will benefit the interests of the majority at the expense of the minority. The new provision admittedly allows claimants to agree to an alternate decision-making process; however, where no such agreement is made, majority approval can operate as a fallback.¹²³ This reframing appears to give claimants greater control over the decision-making process, however, contracting out of the default rule will be difficult and costly meaning that in many instances the status quo will remain. Ultimately, the default rule is likely to continue operating as a primary

¹¹⁸ Fergus MacKay, *Indigenous People’s Right to Free, Prior and Informed Consent and the World Bank’s Extractive Industries Review* 4 SUSTAINABLE DEV. L. & POL’Y 43, 45 (2004).

¹¹⁹ See Hum. Rts. Council, Study of the Expert Mechanism on the Rights of Indigenous Peoples, Free, Prior and Informed Consent: A Human Rights Based Approach, ¶ 19, U.N. Doc. A/HRC/39/62 (Aug. 10, 2018).

¹²⁰ See *id.* ¶¶ 20(c), 27, 30.

¹²¹ The possibility of gridlock was put forward as a basis for rejecting unanimous approval in the explanatory memorandum of the NTA. See Explanatory Memorandum, Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth) 7 (Austl.) (“These amendments also aim to address concerns that agreements which have been validly authorised by the broader native title group can be frustrated in circumstances when RNTC members disagree and refuse to sign.”).

¹²² See U.N. Charter art. 27 (setting out that each member of the Security Council shall have one vote, with decisions made by an affirmative vote of nine members); Anthony D’Amato, *On Consensus*, CAN. Y.B. INT’L L. 104, 106 (1970) (discussing different levels of consensus).

¹²³ See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 87, 91 (1989) (discussing how default rules operate and how parties can contract around them).

principle.¹²⁴ The concern with all of this is that minority groups, who may be marginalized within the collective, will have no right to contribute to an agreement that will impact their land and resources for many years to come. As outlined by the Family Council, from the Wangan and Jagalingou people, in a letter to the United Nations Committee on the Elimination of Racial Discrimination. “We have not been consulted in good faith about the development . . . nor have we given our free, prior and informed consent—and we never will.”¹²⁵

E. COLLECTIVE TRANSACTIONAL CONSENT AND COLLECTIVE VOTING

Consent is an important enabling power within a transactional society. It gives parties the ability to decide whether to exchange rights and resources and upon what terms and conditions.¹²⁶ The *sine qua non* of general law decision-making is that no party should be bound by a decision they did not agree to.¹²⁷ This fundamental principle protects the autonomy of parties when exercising sovereignty over existing and future entitlements.¹²⁸ When deciding whether to consent to a transaction, parties must be “fully conscious, in a rational frame of mind, and know the meaning of the operative words[.]”¹²⁹ Where the party giving consent is a collective rather than an individual, collective transactional consent is required.¹³⁰ Collective transactional consent is a legal concept that will arise where members of a collective consent to a transaction that will bind

¹²⁴ See *id.* at 121; Jason Scott Johnson, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 615–16 (1990); Russell Korobkin, *Status Quo Bias and Contract Default Rules*, 83 CORNELL L. REV. 608, 612 (1998).

¹²⁵ See Request to the United Nations Committee on the Elimination of Racial Discrimination for Urgent Action under the Early Warning and Urgent Action Procedure, WANGAN & JAGALINGOU FAM. COUNCIL (Jul. 31, 2018), <https://wanganjagalingou.com.au/request-for-urgent-action-by-wangan-and-jagalingou-people-to-cerd-31-july-2018/> [<https://perma.cc/CV3H-9GWH>].

¹²⁶ See *Native Title Act 1993* (Cth), s 251A (Austl.); *Quall v Risk* [2001] FCA 378 (6 April 2001) para 64 (Austl.).

¹²⁷ See Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1192 (1983); Friedrich Kessler, *Contracts of Adhesion: Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 630 (1943).

¹²⁸ See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1106 (2001); MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* Ch. 2 (2012).

¹²⁹ JOHN RAWLS, *A THEORY OF JUSTICE* 302–03 (rev. ed. 1999) (stating that “extorted promises are void *ab initio*”).

¹³⁰ See Frances Svensson, *Liberal Democracy and Group Rights: The Legacy of Individualism and Its Impact on American Indian Tribes*, 28 POL. STUD. 421, 429–30 (1979).

the members of the collective as a whole. Collective transactional consent differs from collective voting as it focuses upon the enforceability of legal transactions and the validity of group consent entitlements.¹³¹ Collective voting is a core feature of democratic frameworks, its basic premise being that more votes must necessarily count for more.¹³²

Collective transactional consent activates the enforceability of a legal agreement against a collective. Under general law, neither a collective nor an individual can be a party to a contract unless they give their free and informed consent.¹³³ When this is not provided, the contract is unenforceable because there is no contractual privity. Privity of contract determines the boundaries of transactional enforceability because neither an individual nor a collective can enforce the terms and conditions of a transaction, or have the terms and conditions enforced against them if they are not a party.¹³⁴

These fundamental concepts are distorted by the NTA in its current form which seeks to replace collective transactional consent with collective voting. The consequence is that minority claimants are bound by area ILUAs they have not consented to, in circumstances where they have been unable to oust the default rule.¹³⁵ This statutory transposition of general transactional law principles is unfair. While it may be difficult to obtain consensus approval, it is necessary in circumstances where the

¹³¹ See Richard Healey, *From Individual to Collective Consent: The Case of Indigenous People and UNDRIP*, 27 INT'L J. ON MINORITY & GRP. RTS. 251, 252–54 (2020).

¹³² For a more general outline on the nature of collective voting consent and the foundation of majority rule, see Wojciech Sadurski, *Legitimacy, Political Equality, and Majority Rule*, 21 RATIO JURIS. 39, 39–40, 46–47, 62 (2008); THOMAS CHRISTIANO, THE RULE OF THE MANY: FUNDAMENTAL ISSUES IN DEMOCRATIC THEORY 43–44 (1996); Ben Saunders, *Why Majority Rule Cannot be Based upon Procedural Equality*, 23 RATIO JURIS. 113, 115 (2010); Jeremy Waldron, *The Wisdom of the Multitude: Some Reflections on Book 3, Chapter 11 of Aristotle's Politics*, 23 POL. THEORY 563, 563–64 (1995) (describing the principle that the people at large should be in power as the “doctrine of the wisdom of the multitude”); Healey, *supra* note 131 (discussing the meaning of collective consent for Indigenous people).

¹³³ See Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 67–68 (2012) (discussing the nature and importance of free and informed consent for contractual enforceability).

¹³⁴ See *Wollongong Coal Ltd v Gujarat NRE India Pty Ltd* [2019] NSWCA 135 (11 June 2019) para 59 (Austl.); *Clarence City Council v Commonwealth of Austl* [2020] FCAFC 134 (6 August 2020) para 39 (Austl.); *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460, 478 (Austl.); Sir Anthony Mason, *A Rule in Search of Decent Burial?*, in PRIVACY: PRIVATE JUSTICE OR PUBLIC REGULATION 88 (Peter Kincaid ed., 2001); MICHAEL FURMSTON & GREGORY TOLHURST, PRIVACY OF CONTRACT (2015).

¹³⁵ See Dwight G. Newman, *Collective Interests and Collective Rights*, 49 AM. J. JURIS. 127, 143 (2004); Russell A. Miller, *Collective Discursive Democracy as the Indigenous Right to Self-Determination*, 31 AM. INDIAN L. REV. 341, 357–60 (2007).

parties are legally bound by a contract that restricts their ability to utilize claimed land and resources into the future. It is even more important for remote Indigenous communities who are highly susceptible to the impacts of an accelerating climate emergency, and who, therefore, need to be better positioned to negotiate stronger private climate governance with area ILUAs.

Rights should only rise and fall in accordance with the preference of a majority where collectives are autonomous from their individual members.¹³⁶ An aggregate rights framework, designed to equalize the interests of the majority with the interests of the whole, should not be applied to collectives that are not defined or structured in that way.¹³⁷ The majority default rule authorizes most members of the group to disregard the interests of some members of the group even though native title claimants are collectives defined by the diversity and range of their claimants and their laws and customs.¹³⁸

III. A PATHWAY TO PRIVATE CLIMATE GOVERNANCE

The risks posed by climate change are profound and, in industrialized economies, have a cascading effect of potentially unforeseeable magnitude.¹³⁹ Stronger and more robust climate governance is an increasing imperative and the difficulties and impediments of public regulation, particularly in a highly politicized Australian framework, have made private climate governance (PCG) a particularly attractive

¹³⁶ See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1723 (2001).

¹³⁷ See, e.g., Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1865 (1992) (examining the group-based nature of the vote dilution claim). See also Samuel Issacharoff, *Democracy and Collective Decision Making*, 6 INT'L J. CONST. L. 231, 232, 237 (2008); LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 3 (1994).

¹³⁸ See David. A. Wishart, *Contract, Oppression and Agreements with Indigenous People*, 28(3) U.N.S.W.L.J. 780, 809–10 (2005); David Ritter, *Black and Green Revisited: Understanding the Relationship Between Indigenous and Environmental Political Formations*, 6 LAND, RTS., LS.: ISSUES OF NATIVE TITLE 1, 3 (2014); *McGlade v Native Title Reg* [2017] FCAFC 10 (2 February 2017) para 361 (Austl.) (“Native title claim groups are no different to any community: there will exist within them a variety of opinion, different and sometimes conflicting priorities, a spectrum of strength of views, flexibility and intransigence.”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 588 (1990) (describing essentialism as the “second voice, the voice that claims to speak for all”); Debdatta Dobe, *Contesting Essentialism: The Role of Pluralism and Intersectionality in Access to Justice*, 7 QUEEN MARY L.J. 125, 132 (2016).

¹³⁹ See WORLD ECON. F., *GLOBAL RISKS: AN INITIATIVE OF THE RISK RESPONSE NETWORK* 16–21 (Lee Howell ed., 8th ed., 2013).

pathway.¹⁴⁰ The global advancement of PCG is also reflective of the increasing importance of multiple, cross-tiered climate governance.¹⁴¹ The ILUA framework is an excellent foundation for the progression of PCG in Australia for remote Indigenous communities, particularly given the familiarity and longevity of these agreements. However, its progression is stymied by the majority default rule, which overrides the consent entitlements of minority claimants and, in so doing, undermines the negotiation power of the claimant group as a whole. This, in turn, impedes the capacity of claimants to hold out for stronger terms and conditions to manage and/or mitigate the impact of the climate emergency upon remote communities.

Entrenching the participatory and approval rights of all native title claimants is critical if we are to optimize their capacity to negotiate the inclusion of climate governance within private transactions. This form of governance is becoming increasingly imperative for many Indigenous communities because public regulation in Australia remains weak despite the accelerating climate emergency. If greater protection can be negotiated in transactions that are legally enforceable against third-party industries and developers, who are often seeking permission to develop carbon-intensive land projects, it may prove crucial over the coming decades. Transactional climate governance is, however, only viable if the parties have equal bargaining power; where they do not, PCG is likely to either be ignored or devolve into aspirational tokenism.

Abandoning the majority default rule will give individual native title claimants greater negotiation value, improving their capacity to hold out for climate governance. This is particularly important where claimants are seeking climate governance that supports their traditional laws and customs. Consensus voting gives every claimant an opportunity to negotiate terms and conditions that are sympathetic to their traditional laws and customs. This could include, for example, risk management plans that compel transacting parties to adhere to strategies that improve resilience planning and specifically address the longer-term impacts of the climate emergency on Indigenous communities via disaster management

¹⁴⁰ See Ian Burton, *Climate Change and the Adaptation Deficit*, in THE EARTHSCAN READER ON ADAPTATION TO CLIMATE CHANGE 89, 90–99 (L.F. Schiffer and I. Burton eds., 2009).

¹⁴¹ See J.B. Ruhl & James Salzman, *Climate Change Meets the Law of the Horse*, 62 DUKE L.J. 975, 1025 (2013); Elaine Kamarck, *The Challenging Politics of Climate Change*, BROOKINGS INST. (Sept. 23, 2019), <https://www.brookings.edu/research/the-challenging-politics-of-climate-change/> [<https://perma.cc/V4MB-P9F5>].

pathways and the compulsory exchange of asymmetric climate information.¹⁴²

Where an area ILUA has already been registered without a negotiated climate plan and without any PCG addressing the future impact of the climate emergency on remote communities, existing claimants should be entitled to suspend the agreement. When this occurs, parties should be entitled to improve their position by renegotiating the agreement to include PCG. If this does not occur, all parties should have the option to remove the agreement from the register permanently. Such reforms would dramatically improve the ability of transacting parties to initiate private climate governance allowing it to operate as a powerful supplement to existing state and federal initiatives. It would also give non-state parties a far more significant role in developing climate management and protection plans for Indigenous communities. This is an important new pathway for Indigenous communities who are too often marginalized by the universal meta-narrative of the State.¹⁴³

Removing the majority default rule is a strategic reform because it will mean area ILUAs that fail to incorporate PCG cannot be pushed through via tactics that may include vote stacking and non-representative voting. Collective transactional consent, or consensus voting, will invariably make it more difficult for an area ILUA to be negotiated; however, the eventual outcome will be a contract that is more reflective of the needs and expectations of all claimants rather than those that form a strategic majority. In this way, robust transactional entitlements support PCG and provide a platform for future climate planning. This is a necessary and increasingly imperative component of climate justice for Indigenous communities who will be ravaged by climate change in the coming decades. Climate disasters, like the 2009 and 2019 bushfires, have disproportionately impacted Aboriginal and Torres Strait Islander people in Australia and threaten the very foundation of their connection to the

¹⁴² See Elkanah O. Babatunde, *Distributive Justice in the Age of Climate Change*, 33 CAN. J. L. & JURIS. 263, 289 (2020).

¹⁴³ See Richard B. Stewart, Michael Oppenheimer & Bryce Rudyk, *Building Blocks for Global Climate Protection*, 32 STAN. ENV'T L.J. 341, 344–45 (2013); Catrien Termeer, Art Dewulf, Helena van Rijswijk & Arwin van Buuren, *The Regional Governance of Climate Adaptation: A Framework for Developing Legitimate, Effective and Resilient Governance Arrangements*, 2 CLIMATE L. 159, 160–61, 168 (2011); Maria L. Banda, *The Bottom-Up Alternative: The Mitigation of Private Climate Governance After the Paris Agreement*, 42 HARV. ENV'T L. REV. 325, 345 (2018); Benedict Coyne, Amy Maguire & Bethany Butchers, *Margins and Sidelines: The Marginalisation of Indigenous Perspectives in International Climate Governance*, 14 NEWCASTLE L. REV. 30, 34 (2019).

country.¹⁴⁴ Long-term land use agreements approved by the NTA need to be subject to comprehensive review, debate, negotiation, and approval by all claimants because their terms and conditions will bind them into an uncertain future.

IV. CONCLUSION

Developing a more representative and participatory framework for the negotiation and approval of area ILUAs will significantly improve the capacity of claimants to facilitate stronger climate governance.¹⁴⁵ This is acutely important for Aboriginal and Torres Strait Islander communities in Australia given their disproportionate and atomizing climate risk.¹⁴⁶ Legal frameworks need to respond to these climate justice concerns by addressing the structural and distributional inequities that have contributed to them.¹⁴⁷ The transactional inequities that underpin area ILUAs have meant that many registered agreements simply do not support the emergent social, economic, and environmental needs of Indigenous communities. Removing the majority default rule will allow all native title claimants to negotiate, evaluate, and approve the terms and conditions of an agreement that impacts their interests into the future. This framework will prevent majority voting from being utilized as a tool to undermine stronger contractual protections for Indigenous people. Fair, inclusive, and representative approval protocols are critical components in the advancement of private climate governance for Indigenous Australians.¹⁴⁸

¹⁴⁴ B. WILLIAMSON, F. MARKHAM & J.K. WEIR, *ABORIGINAL PEOPLES AND THE RESPONSE TO THE 2019–2020 BUSHFIRES* 11 (2020) (mapping in this report indicates that Aboriginal and Torres Strait Islander people made up 2.3 percent of the population in New South Wales, Victoria and the ACT, but 4.8 percent of the population of areas directly impacted by the fires).

¹⁴⁵ See Michael P. Vandenbergh & Mark A. Cohen, *Climate Change Governance: Boundaries and Leakage*, 18 N.Y.U. ENV'T L.J. 221, 227 (2010).

¹⁴⁶ See Lorena Allam, *For First Nations People, the Bushfires Bring a Particular Grief, Burning What Makes Us Who We Are*, THE GUARDIAN AUSTL. (Jan. 5, 2020, 12:00 EST), <https://www.theguardian.com/commentisfree/2020/jan/06/for-first-nations-people-the-bushfires-bring-a-particular-grief-burning-what-makes-us-who-we-are> [<https://perma.cc/8F7R-ZZGK>]; Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, 26 TUL. ENV'T L.J. 179, 182 (2013).

¹⁴⁷ See Jeff Todd, *A “Sense of Equity” in Environmental Justice Litigation*, 44 HARV. ENV'T L. REV. 169, 210–12 (2020) (describing how plaintiffs who attacked the distributive and corrective injustices of the status quo had greater likelihood of defeating motions to dismiss in court than plaintiffs who argued black letter law).

¹⁴⁸ Tsosie, *supra* note 39, at 1634–35; Ruhl, *supra* note 10, at 407; Birch, *supra* note 39, at 98; Ostrom, *supra* note 39, at 26; Vandenbergh, *supra* note 39, at 139; Mees et al., *supra* note 39, at 315.