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From:

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To:

Senate Standing Committee on Legal and Constitutional Affairs

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"Supporting the submission by the Yindjibarndi people, YAC"

With respect, the rights of indigenous people to self determination must be enshrined in The Native Title Amendment (reform) Bill, 2011. Part of that self determination must include protection of Traditional Owners sacred sites, around which so much Law, Culture and Community revolve. It must be well regarded, recognized and acted upon in law, not just in word.

As pointed out by Professor Ciaran O'Faircheallaigh of Griffith University an expert in Native Title, *'when a mining company sits down to negotiate with native title parties there is a six month period of negotiation. The mining company knows that at the end of the six months it can go to the National Native Title Tribunal and get its mining lease.'* (ABC Four Corners, 'Iron and Dust', 18/7/2011). Further on he states

'out of some 25 cases where a conflict over a grant of a mining lease has gone to the tribunal, in only one case has the tribunal turned it down. The tribunal has been very reluctant to impose onerous conditions on mining companies. For these reasons mining companies have come to believe that if they go to the tribunal they are virtually assured of getting their mining lease. So the pressure that should be on them to reach agreement is not there.' (ABC Four Corners, 'Iron and Dust', 18/7/2011).

In other words, the way the Act is currently constructed means mining companies (or any other industry barons, or governments at both State and Federal level) have all the power in negotiation and the traditional owners of the land virtually no negotiation power at all. This makes the Native Title Act a joke in regards to Aboriginal land rights. Initially it may not have been meant that way but, over time, it has obviously panned out that way hence the urgent need for reform.

A recent example is that of the Yindjibarndi people of the Pilbara region of Western Australia. The problem with the Native Title Act as it stands has brought to bear two significant dilemmas for the traditional land owners. The first that they feel pressured to sign an agreement in case Fortescue Metals Group simply go to the Native Title Tribunal (if the Elders do not comply with their wishes) and then are simply given the rights to the land to mine as they see fit. To quote Blair McGlew, Group Manager, Pilbara Approvals, FMG negotiator at the Yindjibarndi Aboriginal Corp meeting, in Roebourne, June 2008

'that number [the compensation sought by the Yindjibarndi] is extortionally high,... If we can't negotiate, yes we'll negotiate in good faith and I'm speaking from the heart but if we

can't negotiate in the end we'll get there. The project will go ahead...we will use our legal means.' (ABC Four Corners, 'Iron and Dust', 18/7/2011).

The assumption one must make from this statement is that, as Professor Ciaran O'Faircheallaigh pointed out, FMG will simply go to The Native Title Tribunal, put their case, and get what they want – the green light to mine the Yindjibarndi land even without their agreement or necessarily any sort of compensation at all.

The second problem The current Native Title Act has brought to the door of the Yindjibarndi people is the pressure now being exerted on them to agree to the mining deal as dictated to them (certainly not negotiated by them) by FMG has been to cause a split within the community over the negotiations with FMG. FMG has negotiated an agreement with a corporation Wirlumurra Yindjibarndi Aboriginal Corporation (WMYAC) that was brought into existence through FMG's financial support, to oppose YAC's position. All this has done is split the community, and split the Elders, where once they were unified. This has only been brought about by FMG's desperate and determined 'land grab' by putting pressure on the people to sign or possibly get nothing. If this were to happen even though WMYAC is not a party to the agreement between FMG and YAC, its members are to take the benefit of the compensation under that agreement.

If The Native Title Act were to be amended in such a manner as to empower the Aboriginal people of Australia, as I would argue was the original spirit of the Act, to make decisions on a level playing field with mining companies such as FMG then communities like the Yindjibarndi people would not be vulnerable to the determination of companies such as FMG to get what they want, regardless of how that is done, and splits such as occurred within the Yindjibarndi people would be less likely to occur.

I support the proposal in the Native Title Amendment (Reform) Bill 2011 to include the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) principles in native title act decisions. As an example of this Article 32 insists that *'States shall consult and cooperate in good faith with the indigenous peoples concerned...in order to obtain free, prior and informed consent prior to that approval of any project affecting their land or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources'*. It would appear in the case of the Yindjibarndi people the state (that of Western Australia) has simply abandoned them to the cashed up representatives of FMG long before the first meeting was held.

The Aboriginal Heritage Act 1972 (WA), has been proven to contain serious problems which impact negatively on Indigenous rights, and so, in support of YAC, I support the proposed amendment to give full protection to significant cultural and heritage sites as stated in section 24MB (1) (c).

I support the proposed amendments in section 31, 31(1)(b), 31(1a), and 31(2). Again, the situation with the Yindjibarndi community and FMG show the necessity of strengthening and protecting the negotiating position of Traditional Owners. “Negotiating in good faith using all reasonable efforts” was notably absent from proceedings in the meeting shown on the video. Also, “making reasonable offers and counter-offers” is a point of issue that should be given strength to. Of particular significance to the Yindjibarndi case is the statement “refraining from capricious or unfair conduct that undermines the beneficial nature of the right to negotiate, and “in any proceeding in which the application (1) (b) is raised, the party asserting good faith has the onus of providing that it negotiated in good faith.”

I support section 38 (2) which relates to entitlement in regards to profit sharing, including by way of royalties. In the Yindjibarndi peoples’ case the current Native Title Act allows companies such as FMG to cap any royalties offered and, further, not only to cap them but to tell them how the community should spend the money offered to them for the use of their land. To quote Mr Andrew Forrest ‘...social breakdown is complete. Now I’m not going to encourage *with our cash* that kind of behaviour’ (ABC Four Corners, ‘Iron and Dust’, 18/7/2011). The inference here is that even though the Yindjibarndi people are handing over their land (or at least a substantial part of it) knowing that most will end up (as described by Kerry O’Brien ABC Four Corners, ‘Iron and Dust’, 18/7/2011) as ‘an industrial landscape’ is that Andrew Forrest will consider any monies he hands over to YAC as still ‘his money’.

I support section 223 (2) in relation to “rights and interests” - which include acknowledgement of traditional rights which are an integral part of indigenous culture, such as (a) “hunting, gathering, or fishing. And (b) “the right to trade and other rights and interests of a commercial nature.” According to the current wording of the proposed agreement between FMG and YAC the Yindjibarndi must ask permission from FMG to walk on their own land for perhaps for hunting, gathering and fishing purposes. How legal is an agreement whereby a community allows a company to use their land to make billions of dollars for the company, for what really ends up being in effect ‘tea and flour’ as compensation; and yet the company has the right to demand the traditional owners ask permission to walk over their own land. I find this outrageous. The Native Title Act must be amended forthwith to enshrine rights, cultural rights such as these of the land’s original peoples.

In conclusion I thank you for the opportunity to allow me to provide my submission in support of the Native Title Amendment (Reform) Bill and in support of the submission by the Yindjibarndi People, YAC.

Yours sincerely
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