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Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Parliament house
CANBERRA ACT 2600

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By e-mail: legcon.sen@aph.gov.au

**Inquiry into the Native Title Amendment (Reform) Bill 2011**

## Introduction

Thank you for the opportunity to make submissions on the *Native Title Amendment (Reform) Bill* 2011("Bill"); and for providing extensions of time to lodge our submissions.

As the Committee may know, Yindjibarndi Aboriginal Corporation ("YAC") is the representative institution chosen by the *Yindjibarndi People*, and declared by the Federal Court in May 2005, to be the Prescribed Body Corporate under the *Native Title Act* 1993 ("Act"), to hold in trust the native title rights and interests that were declared to exist in the decision of Justice Nicholson on 3 July 2003.

The Board of Directors and the Council of Elders decided that YAC, as trustee, for and on behalf of the Yindjibarndi People should, in addition to responding to the particular items in the Bill, provide some concrete examples to the Committee to show how the Act, which was supposed to be for the benefit of Aboriginal Peoples, has in practice worked against the interests of the Yindjibarndi People, and continues to do so. Accordingly, first part of these submissions describes our experiences under the Act, as it presently stands; and, the second part addresses the items in the Bill that are relevant to us.

## Part 1:

**Part 2:**

**Item 1 - Objects and Interpretation**

On the basis of our experience under the Act, as it currently stands, YAC fully supports the spirit and intent of proposed amendment to the Objects of the Act. However we do not understand why only some parts of the Declaration have been referenced in the Bill, rather than simply declaring, in proposed section 3A, that:

> It is an additional object of this Act that governments in Australia take all necessary steps to implement the United Nations Declaration on the Rights of Indigenous Peoples.

YAC is concerned that a reference to only some aspects of the Declaration will be interpreted as an intention, on the part of Parliament, to exclude the remaining parts of the Declaration. For this reason YAC urges consideration be given to the more simple statement above.

YAC and the Yindjibarndi #1 Applicant have fought very hard over the past 2 ½ years, in the Tribunal, the Federal Court and the Warden's Court, to have the Act

[17] See: *FMG Pilbara Pty Ltd/Ned Cheedy and Others on behalf of the Yindjibarndi People/Western Australia* [2009] NNTTA 38; *FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia* [2009] NNTTA 69; and, *FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia* [2009] NNTTA 91

interpreted so as to accord with the principles enumerated in the various international human rights instruments.[18]

In the appeals before the Full Court of the Federal Court, against the decisions of the Tribunal allowing the grant of three mining leases, we argued that in determining whether or not to allow the mining leases to be granted, the Tribunal should have construed s 39 of the Act, consistently with Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR), since it was capable of being so construed; and therefore, that the Tribunal should have exercised its power to ensure we can continue to enjoy our culture and carry out our religious practises associated with sites located in the mining leases. The Full Court held[19]:

> The difficulty with this approach is that the plain language of s 38 and s 39 is inconsistent with a mandatory requirement that the Tribunal allow for the enjoyment of culture or practice of religion. Section 39 prescribes those matters which the Tribunal is required to consider in making its determination. Section 38 allows the Tribunal to determine that the future act be done, not be done, or be done subject to conditions. The language of these two sections leaves no room for the contention that the Tribunal is bound to come to a particular decision favouring the freedom to enjoy culture or practise religion. Thus, even applying the stand alone test proposed by the appellants, Art 27 can have no part to play in the construction of s 38 and s 39 of the Act because the two sets of provisions are directed to quite different subjects and the international obligations can provide no assistance to the construction of provisions which govern the scope of the Tribunal's jurisdiction.

In light of the above, YAC fully supports the proposed section 3A (2). In our view it is shameful that Australia has promised the international community it will protect our right to freely practice our religion but consistently allows our rights to be trampled by mining companies. In light of YAC's position on the proposed s 3A; YAC does not see the need for the proposed s 3A (3).

**Item 2 – Strengthening Heritage Protection**

As is suggested by the cases that have been fought against FMG in the Tribunal, the Federal Court and the Warden's Court[20]; and the battle fought in the Supreme Court of Western Australia, following the destruction of our sacred site "*Gurrwaying*

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[18] In addition to the matters referenced in footnote 17; see: Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2010] FCA 690; Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2011] FCAFC 100; and, FMG v YAC [2011]WAMW 13

[19] See: Cheedy on behalf of the Yindjibarndi People v State of Western Australia [2011] FCAFC 100, at [105]

[20] See cases referenced in footnotes 17 and 18 above; and see also FMG v YAC [2010] WAMW 15 (30 November 2010)

*Yinda*"[21]; the Aboriginal Heritage Act in Western Australia does not protect Aboriginal sites. The Department of Indigenous Affairs ("DIA), in its submissions to a "Functional Review Committee", established in 2006 to review the DIA's performance stated [22]:

> *"Although in 2003 Parliament substantially increased penalties for damaging sites under the AHA, DIA's capacity to respond to the priority placed on heritage protection is limited by lack of resources and on-ground staff. Criticism is directed at DIA's perceived failure to protect Aboriginal sites and to prosecute those who damage or destroy sites.*
>
> *Similarly, although DIA attempts to monitor compliance by land owners and developers with the conditions of the consent given by the Minister under section 18 of the AHA, financial and human resources are focused on the government priority of progressing applications through the section 18 development approvals process. For example, new funding for DIA through the Keating Review process will enable the DIA employ to additional heritage staff, but these officers will be devoted to supporting the development process.…*
>
> *The results of the DIA's inability to effectively monitor or enforce the State's heritage protection regime is that DIA is seen as an agency which facilitates the destruction of Aboriginal sites by developers and as incapable of effectively monitoring the conduct of developers; and, there is the risk that important heritage sites may be damaged or destroyed."*

The inability of the DIA to effectively enforce the provisions of the *AHA* is highlighted by its failure to prosecute a mining company for the damage it caused to *Gurrwaying Yinda*, a site of particular significance to the Yindjibarndi People, when, in February 2009, the company filled in the site and its immediate surrounds with 131,000 cubic metres of rocks and soil, to construct a temporary causeway adjacent to a damaged railway bridge. Significantly, the failure to prosecute in that instance occurred notwithstanding the following observations, made by the Chief Justice of the Supreme Court, in September 2009[23]:

> *Gurrwaying Yinda comprises a series of permanent pools of considerable natural beauty in which freshwater mussels known to the Yindjibarndi People as 'gurrwa' can be found. As a layperson it seems to me that the potential ethnographic significance of the site is and always has been obvious.*[24]
>
> *In February of this year, unusually large rainfall resulted in a flood which damaged the pylons at the base of the bridge supporting the rail line over the pools to which I have referred.*[25] *...*
>
> *In order to continue the transport of iron ore from the mine to the port, Robe, or perhaps Rio... commenced construction on the deviation of the railway line and its placement over a temporary bridge or causeway (called the Temporary Diversion) to be constructed adjacent to the existing damaged bridge. The Temporary Diversion involved the deployment of*

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[21] See: WOODLEY -v- MINISTER FOR INDIGENOUS AFFAIRS [2009] WASC 251; and, RE MINISTER FOR INDIGENOUS AFFAIRS; EX PARTE WOODLEY [No 2] [2009] WASC 296

[22] *Submission by the Department of Indigenous Affairs to the Functional Review Committee Established to Review The Department of Indigenous Affairs* (June 2006) at 56-57.

[23] in *Woodley -v- Minister For Indigenous Affairs* [2009] WASC 251.

[24] Ibid., at [4].

[25] Ibid., at [6].

> *approximately 130,000 cubic metres of rocks and soil which was taken from borrow pits in the immediate vicinity of the site. The work that I have described in the creation of the Temporary Diversion was strenuously opposed by Mr Woodley and the Yindjibarndi People and took place over their opposition. The applicants say that the activities which I have described caused severe desecration of the site, constituted a breach of the Act and took place without adequate consultation with them.*[26]
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> *... [T]he land in question is now a registered heritage site. The evidence would strongly suggest that it always had the characteristics of such a site within the meaning of the Act.*[27] *...*
>
> *The evidence before me ... suggests that there may well have been a ... breach of the Act when work was carried out to create the Temporary Diversion.*[28]

In this case, Yindjibarndi were seeking to quash a decision by the Minister, which gave the mining company the power to manage our cultural heritage, in another part of the *Gurrwaying Yinda* site, without our free prior and informed consent. In the course of the evidence it became clear that the ACMC had recommended to the Minister that a Cultural Heritage Management Plan be developed by the mining company "to the satisfaction of the Yindjibarndi People"; however, the DIA staff altered this part of the ACMC's recommendation so that it read to the satisfaction of the Registrar". This was done because the DIA staff apparently believed the ACMC had not intended to give the Yindjibarndi People a veto over the Cultural Heritage Management Plan. Yindjibarndi secured an order nisi from the Court, which required the Minister to come before the Court to give evidence, but the Court subsequently refused to quash the Minister's decision because the Minister said in evidence that he would never agree to attach any condition which gave Aboriginal people an effective veto over development.

Under the Act, as it presently stands, the Tribunal regularly allows mining tenements to be granted because it finds as a matter of fact that our sites will be protected by the AHA. As the Full Court of the Federal Court observed recently when it dismissed our appeals[29]:

> The appellants' case was considered by the Tribunal and the primary judge on the basis that the appellants' use of ochre and *gandi* are religious practices. This approach has not been contested by the State or FMG. Further, if the ochre and *gandi* sites are dug up in the process of mining iron ore, the appellants will be prevented from continuing to access the ochre and *gandi*. But, a number of steps are necessary before that outcome will eventuate. The future act determinations by the Tribunal were one step. But they alone will not prevent the appellants continuing their religious practices. FMG will only have authority to mine if the State exercises its power under the Mining Act to grant the mining leases. Western Australian State law also provides for yet a further step, namely, an application under the AHA for authority to excavate or disturb an aboriginal site. Only if FMG obtains authority to interfere with the ochre and *gandi* sites would the appellants be prevented from continuing to observe those religious practices.
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> …

[26] Ibid., at [7].
[27] Ibid., at [38].
[28] Ibid., at [39].
[29] See: *Cheedy on behalf of the Yindjibarndi People v State of Western Australia* **[2011] FCAFC 100** at [86]; and at [142]-[145]

> In both inquiries the Tribunal considered the mitigating effect of the AHA on the proposed grant of the mining leases. The Tribunal explained the statutory scheme which requires Ministerial consent to disturb an aboriginal site. The Tribunal accepted that FMG fully understands its obligations under the Act "and has complied with them to date".
>
> In oral submissions the appellants contended that this finding was wrong in fact. The appellants relied on a letter dated 8 February 2008 from the Yindjibarndi Aboriginal Corporation to FMG in which it was alleged that FMG had bulldozed a significant heritage site and that this action had been acknowledged in a letter of apology from FMG.
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> Before the primary judge the appellants argued that the Tribunal erred in law because the finding was manifestly unreasonable. The primary judge rejected the contention on the ground that no error of law was disclosed.
>
> …
>
> The primary judge correctly concluded that no error of law is disclosed in the finding that FMG had complied with the AHA to date. The issue was one of fact. It was for the Tribunal to answer the contents of the response to the letter of 8 February 2008.

The effect of the Tribunal's consistent reliance on the AHA is that it forces us to participate in heritage surveys for mining companies, "to ensure our sites are not damaged by mining activities", so it is said. However, what it really ensures is that any sites we identify or locate during a heritage survey, which stand in the way of any mining company's proposed activities, will be made the subject of a section 18 application for the Minister's consent to alter or damage those sites and if damage can't be mitigated to destroy those sites if it is not possible to mitigate the damage, then to destroy the site.

As was observed, as recently as 18 August 2011, by the WA Warden's Court,

> "…neither the AHA nor the Native Title Act create any right of veto to the grant of the mining tenements or the imposition of any particular condition that may be imposed on the grant of the mining tenements to any person or group of persons who hold any interest in the land…".[30]

This is the way it is in Western Australia, and the way it has always been. The reason we have never voluntarily registered any of our sites under the AHA, is because as soon as they are registered the management and control of them is removed from us and placed in the hands of the ACMC and the Minister. On this point we refer the Committee to the paper written by David Ritter which is attached as (Annexure 4).

YAC fully supports the proposed amendment to ensure the Tribunal assess the effectiveness of the protection given by State heritage regimes; however, in YAC's view, the desired outcome will be more easily achieved if the Act is amended so as to require our free and informed consent prior to the grant of any interest that affects our own traditional right to protect our sacred sites and areas of significance.

[30] FMG Pilbara Pty Ltd v Yindjibarndi Aboriginal Corporation [2011] WAMW 13, per Wilson M, at [71]

**Item 3 – Non-Extinguishment**

YAC supports any extension of the so-called "non-extinguishment principle", with one reservation there is a potential for this principle to be relied on and used to mask the real effect of future acts, such as large scale mining projects, which may effectively prohibit native title holders from exercising their rights in any part of their traditional lands, required for the project, for two or more generations. This is the real effect of FMG's proposed project agreement; and, in the long term, such an outcome could result in an application by the State, under s 13 of the Act, to revoke any native title determination, on the grounds that the tide of history has washed away the groups' connection with their lands.

**Items 5-9 – Negotiating in Good Faith**

YAC supports the amendments to strengthen the requirements for what constitutes "good faith" negotiations. In our view the question of whether or not mining companies and the State have negotiated in good faith with native title parties, should be considered at first instance by either the Australian Human Rights Commission or the Federal Magistrates' Court; but, in any event, it should be considered against the framework of the Declaration, and the extent to which the government and grantee parties have met its minimum standards.

**Item 10 - Royalties**

YAC supports the proposed amendment but would caution against the inclusion of the words "if relevant". The words are unnecessary; and, in the absence of any indication as to what should be considered to determine relevance, they can only lead to mischief.

There are a number of potential benchmarks that the Tribunal could be required in the Act to consider for the purposes of including a condition as proposed by the amendment. For example, as co-owners of country, compensation might be set at the equivalent of what the State receives in royalties in return for granting a mining lease in our country.

Alternatively (as already happens under s 38 of the WA Mining Act 1978, in relation to freehold estates granted before January 1899), a percentage of the State's royalties might be held for the benefit of the Yindjibarndi People[31].

Other potential benchmarks do exist. For example, compensation might set at the equivalent value of what a farmer on freehold land receives, in return for his free prior and informed consent to allow surface mining on land under cultivation or on land that is used as a burial site. We note, in this regard that "land under cultivation" includes any unimproved and uncleared land that the farmer claims is used for grazing

[31] In the case of such a freehold estate this is 90%

stock; and we note also that the farmer's free prior and informed consent is also required before a mining company can fell any trees in any area it wishes to use for mining operations[32]. A further benchmark might be the 2% - 2.5% royalty that is regularly paid by mining companies to acquire the right to mine an area that is already the subject of mere licence to explore for minerals, held by another[33].

Under the Act, as it currently stands, the Commonwealth has hand-balled responsibility for compensation to the State, and the State, under the WA Mining Act has hand-balled that responsibility to mining companies. The outcome is not pretty. In practice, it puts us at the mercy of corporations, (...) whose first duty is to make their shareholders rich; even if that makes us beggars in our own country.

**Item 11 – Disregarding Prior Extinguishment**

YAC fully supports this proposed amendment.

**Items 12-14**

YAC endorses and adopts the submissions of the Law Council of Australia on items 12 - 14; and endorses and adopts also the submissions made by the Law Council in respect of the scope and application of the Bill.

YAC does not take issue with the sections of the Act that required the Federal Court (following the decision of the High Court in the *Yorta Yorta* case) to be satisfied that the Yindjibarndi People remained *'a body of persons united in and by its acknowledgment and observance of a body of laws and customs'*, from which arise our native title rights. However, we believe the sections in Division 6 of the Act, which requires a '*society'*, so recognised by the Court, to turn itself into a corporation - as a pre-condition for a determination of native title - is demeaning and contrary to the spirit and intent of the Declaration.

The word that best describes a body of persons living under a distinct system of law, with a distinct language, culture and territory, is 'nation'. This is the meaning given to that word by the Macquarie Dictionary; and this is the word our old people always used when they talked about *Yindjibarndi*.

We do not see any danger in this word - because the Yindjibarndi People fully accepts and respects the sovereignty of both the Commonwealth and the State. However, having fought and won a long legal battle to prove we survived as a nation, so

[32] In respect of the farmer's veto see: Michael W Hunt, Mining Law in Western Australia, 4th Edition, The Federation Press, 2009, at 67.

[33] See: Dr Mary Edmonds,, '*They Get Heaps: A study of Attitudes in Roebourne Western Australia*', published by Aboriginal Studies Press, Canberra, 1994 , which uses the example of a 2.2% royalty paid by Hamersley Iron for a mining tenement held by the late Lang Hancock. See also: *Ammon v Consolidated Minerals Limited [No 3]* [2007] WASC 232, which provides an example of a "farmin" arrangement under which the holder of the exploration licence, as an alternative to a joint venture option, receives an 2.5% royalty.

defined; we believe we are entitled to go on surviving and to be treated as such, by governments and mining companies.

From our perspective, it would be for more difficult and problematic for mining companies, (...) to meddle in our internal and local affairs, in the ways described earlier, if the Yindjibarndi People were given formal recognition, as a People, under an instrument which acknowledges, as suggested by the current Chief Justice of the High Court, some form of 'sovereignty under our traditional laws and customs"[34].

YAC would welcome any opportunity to discuss whether such an outcome might be accomplished by an amendment to the Act to establish, for the Yindjibarndi People, a local authority under a constitution that properly reflects our culture and operates as an instrument for legitimate self-governance over our own local and internal affairs[35]; or alternatively, an amendment which facilitates the formal recognition of the Yindjibarndi religion, under a separate Act of Parliament, as given to other religions in Australia.

If the Committee has any questions about, or wishes to discuss any of the issues raised in, these submissions, please contact our

[34] Quoted in the Sydney Morning Herald, 28 March 2009; at http://www.smh.com.au/national/chief-justice-backs-aboriginal-treaty-20090327-9e79.html
[35] See: Articles 1-3 of the Declaration

Signed by the Directors of Yindjibarndi Aboriginal Corporation:

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|---|---|---|
| Stanley Warrie | Thomas Jacobs | Pansy Sambo |
| Tootsie Daniels | Jane Cheedy | Bigali Hanlon |
| Joylene Warrie | Russell Sandy | Curtis Lockyer |
| Jean Norman | Angus Mack | Gabrielle Cheedy |

AND, by the members of the Yindjibarndi Council of Elders

| | | |
|---|---|---|
| Ned Cheedy | Joyce Hubert | Shirley Woodley |
| Dora Solomon | Billy King | Rosie Cheedy |
| William Jerrold | Middleton Cheedy | Mavis Pat |
| Jean Norman | Kerry Warrie | Rosemary Woodley |