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CORSER & CORSER
LAWYERS

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

27 October 2011

By post and by email: legcon.sen@aph.gov.au

Dear Sir/Madam,

Submissions on Native Title Amendment (Reform) Bill 2011

We confirm that we act for the Wirlu-murra Yindjibarndi Aboriginal Corporation ICN 7483 ("WMYAC").

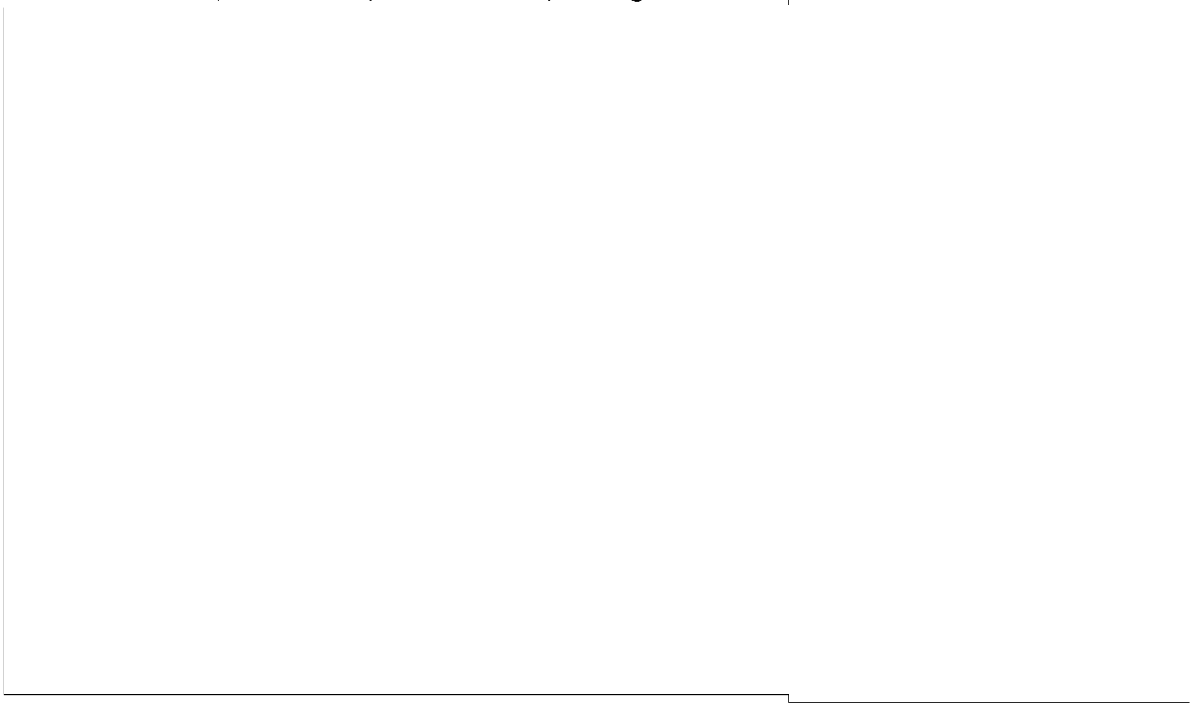
We thank you for allowing our clients the opportunity to make submissions in relation to the *Native Title Amendment (Reform) Bill 2011* ("the Bill").

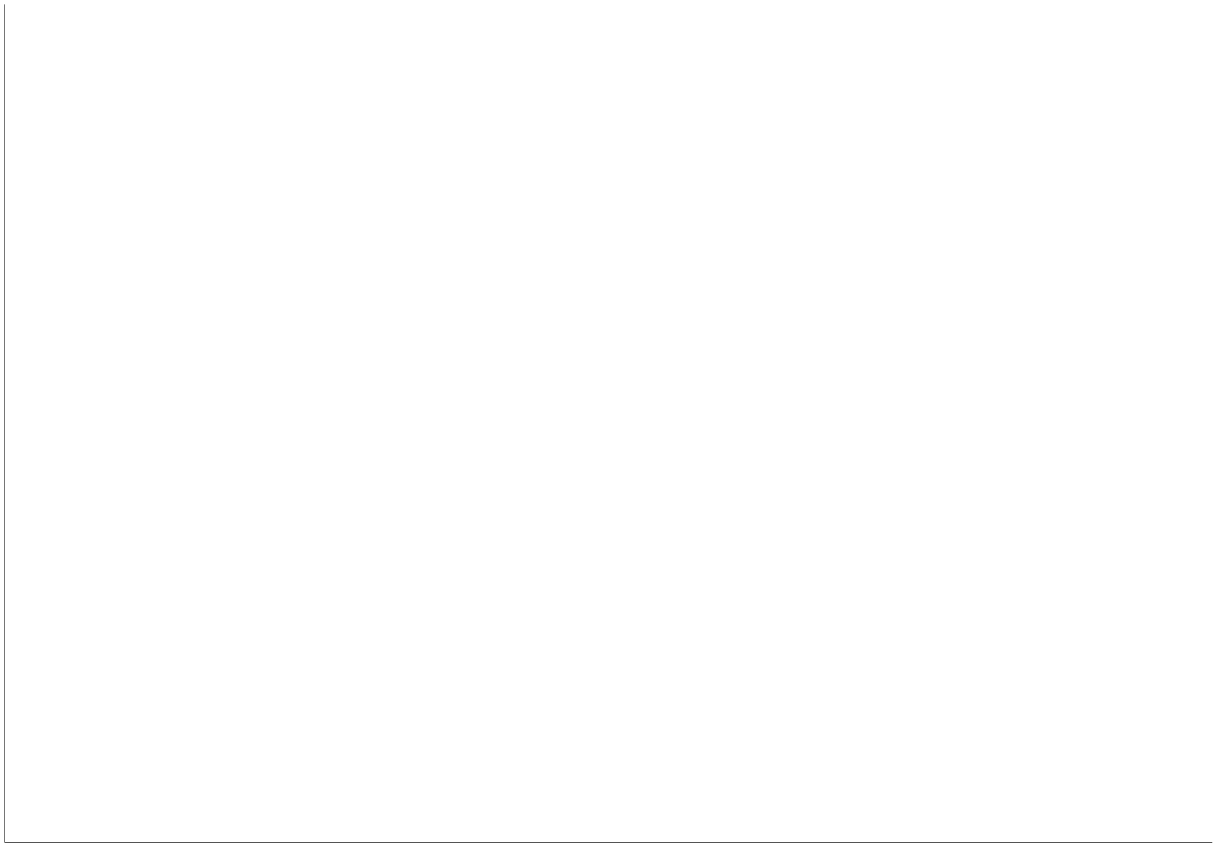
In principle, WMYAC does not oppose the proposed amendments to the *Native Title Act 1993* ("NTA") contained in the Bill. WMYAC believes the amendments will bring significant benefits to the Traditional Owners, their families and communities.

Proposed Amendments Specific to WMYAC Interests

WMYAC wishes to propose some further amendments to the NTA which they believe will expedite negotiations for the benefit of Traditional Owners.

In 2010 a majority of the members of the Yindjibarndi Aboriginal Corporation ("YAC") formed their own Aboriginal corporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* ("CATSI Act"), being WMYAC.





We refer to Part 3 Division 1 of the NTA and note that the NTA does not make clear whether, when there is more than one applicant, the applicants must act unanimously or by majority. WYMAC proposes that the NTA should expressly provide that where a majority vote of members has been taken, the Applicants must act in accordance with the majority vote. Furthermore, it should also provide that if there are applicants who are unwilling to comply with the majority vote of the rank and file members of the claim group, then the execution of documents or the doing any other acts to effect that resolution can validly be carried into effect by one or more of the applicants executing the document or doing any other act to effect the resolution of the rank and file membership.

We submit that such an amendment will avoid the situation where a small minority of members (being named applicants in the group's native title claim) hinder and delay negotiations, where a majority of the members wish to engage in negotiations and enter into an ILUA to further the native title claimants' interests.

Conclusion

WMYAC believes that

where there are a number of applicants, the applicants must act in accordance with a majority vote and that if some refuse to do so, their uncooperativeness will have no legal effect as from the date and time of the relevant decision of the claim group's membership. WMYAC submits that such an amendment will help to facilitate the realisation of the objects of the NTA and to enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander people.

Yours faithfully
Corser & Corser

Ronald Bower
PRINCIPAL

Cc. To clients by e-mail

NATIVE TITLE AMENDMENT (REFORM) BILL 2011

SUMMARY OF AMENDMENTS AND SUBMISSIONS

Item no	Proposed Amendment	Submissions For (National Native Title Council, YAC)	Submissions Against (State of WA, FMG, Minerals Council, NNTT)
1	Inserts an additional object of the Act (s3A) - that governments in Aus take all necessary steps to implement certain principles set out in *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) - The right to self determination - Full and direct consultation & participation - Free, prior and informed consent of indigenous ppls in matters affecting them - Demonstrated respect for indigenous cultural practices, traditions, laws & institutions - Reparation for injury to or loss of indigenous interests - Non-discriminations against interest of indigenous ppl	Senate - Gives the traditional owners a right to prior informed consent in matters affecting them, so they will be consulted and be able to participate in an open & honest process YAC - supports intent of amendment but submits that it should relate to the entire UNDRIP not just part of it, and that there is no need for subclause 3 Law Council of Aus - Supports it in principal, but concerned at the way it is drafted because: the seven 'principles' are formulated as principles but some are in the nature of rights, subclause 1 refers to 'implementation' whereas subclause 2 refers to 'consistency', and the language of the principles in the Act is different to the language in the Declaration.	Minerals Council: - the UNDRIP is more closely associated with racial discrimination than native title matters - the right to prior informed consent combined with the new negotiation provisions will elevate the native title rights to effectively a power of veto NNTT: - consequential and transitional amendments may be necessary - May lead to litigation to determine its effect - Might lead to the contention that certain parts of the NTA have no legal effect or are significantly limited in operation - The principles would render the provision in NTA relating to expedited procedure nugatory - May result in challenges in the application to current case law, which may result in substantial delays while they are being resolved - The impact of this amendment on the interpretation of s223 may also require judicial consideration - The impact on UNDRIP should be considered closely before amendment made - Outcome might be better achieved by amending the substantive provisions of the NTA State of WA - Will fetter the WA governments' ability to determine how to balance

			native title interest with other interests or to take into account key strategic goals through legislation - There are already effective processes to consult and negotiate so no need for 'prior and informed consent', this will just increase costs and cause delays
2	Amends section 24MB(1)(c) to state that the Commonwealth/State/Territory will provide <u>effective</u> protection or preservation of areas/site of particular significance, rather than just 'will provide protection or preservation'	Senate - Strengthens the reference to Aboriginal heritage legislation, as it will allow decision makers to consider the effectiveness of heritage laws when considering if the elements of s24MB have been met. NNTC - This amendment is important where the current heritage laws are inadequate to provide sufficient protection, and submits that a consideration of the practical application of protective legislation should be required wherever the issue of effectiveness is raised. YAC - supports the amendment but submits the desired outcome will be more readily achieved if the Act requires free and informed consent prior to the grant of any interest that affects their traditional right to protect sacred sites. Law Council of Aus - supports amendment, suggests amendment reflects what was originally intended	NNTT - NNTT already considers the effectiveness on a case by case basis State of WA - The term 'effective' is highly subjective and open to differing interpretations - Will introduce another level of uncertainty - It is the function of the States and Territories to enact heritage legislation - State governments are in the best position to determine the most effective means for heritage protection - WA gov is currently reviewing the Heritage Act - Accreditation of the WA legislation under the Clth Heritage Act is under consideration.
3	Amends section 24MD(2)(c) to provide that compulsory acquisition itself does not extinguish native title, only the act done in giving effect to the purpose of the acquisition leads to extinguishment (current section provides that compulsory acquisition extinguishes native title).	YAC - supports amendment, but states there is potential for this principle to be relied on and used to mask the real effect of future acts such as mining projects which prohibit native title holders from exercising their rights on traditional lands.	Mineral Council - it will result in uncertainty, as it will not be clear how and when compensation should be negotiated at different stages NNTT - submits that consequential amendments may need to be made, such as providing procedural fairness to those who may have interests which are affected by the

			proposed amendment. State of WA - May lead to an increase in litigation of determinations.
4	Repeals section 26(3) (which limits the rights to negotiate to acts that relate to the landward side of the mean high-water mark of the sea) so that rights will be available in relation to acts occurring over the sea, right to negotiate can apply to offshore areas	Senate - Brings Act into line with Australian Governments recognition that native title can exist out to the limits of modern territorial sea - Allows traditional owners to negotiate over acts that impact on their sea country	NNTT - This may require consequential amendments, for example section 24MC which refers to 'onshore place' State of WA - Complex issues of ownership and access to the sea associated with offshore native title rights - Would create a level of uncertainty which could render the WA Gov's administration of approvals and activities in offshore area's unworkable.
5	Amends section 31(1)(b) to require that parties must negotiate in good faith for a period of at least 6 months, and that parties must use all reasonable efforts to come to an agreement.	Senate - Will mean that mining companies can no longer 'sit on their hands' for 6 months knowing they can force the matter to arbitration without having to demonstrate they have made reasonable efforts to come to an agreement YAC - Supports amendment NNTC - it should be 12 months due to the practical realities of organising native title group meetings and ensuring free, prior and informed advice. Law Council of Aus - Supports amendment but suggests that consideration should be given to requiring a gov or commercial party to meet the reasonable costs of negotiation of the native title party.	FMG - this will slow the rate of native title claim resolution and disincentivise parties from reaching negotiated settlement Mineral Council - considers the 6 month requirement is unnecessary and will drag out negotiations State of WA - would result in delays and extra costs - Federal Court case of FMG Pilbara v Cox provided sufficient certainty to actively progress negotiations
6.	Inserts a new subsection 31(1A) which provides clarification as to what constitutes "negotiating in good faith using all reasonable efforts"	Senate - Strengthens requirement to negotiate in good faith by including explicit criteria for the type of negotiation activities which are indicative of good faith - Will make it more difficult for mining companies to establish good faith (currently, as long as the native title party could	State of WA - Indicia are already applied by the Tribunal - Determining whether parties have negotiated in good faith is not a formulaic exercise, but must take into account the detail of how the matters were addressed

		not demonstrated bad faith, it was taken that the mining company had negotiated in good faith) YAC - Supports amendment	
7	Inserts a new subsection 31(2) which provides that the onus of proving that negotiations have been in good faith lies on the party asserting good faith (rather than the onus being on the party asserting that the negotiations were not in good faith).	- Supported by YAC Law Council of AUs - Wary that this may lead to abuse, as it will be simple for commercial party to allege lack of good faith by native title party that fails to respond to requests in a 'timely fashion'.	State of WA - Practical result would be the native title party would merely need to raise the issue of good faith and this would give rise to an obligation to marshal evidence that negotiations were conducted in good faith, which will create unnecessary delays
8 & 9	Inserts a new subclause 35(1A) which provides that a party can not apply to an arbitral body until the party can demonstrate that the negotiations were in good faith	- Supported by YAC	NNTT: - This amendment is problematic because who is to judge compliance? - Arbitral body should have discretion to take into account any matter it considers relevant State of WA - Adds an additional layer of procedure in the approval process - Currently, a determination cannot be obtained in the absence of good faith
10	Substitutes a new section 38(2) providing that profit sharing conditions including payments of royalties may be determined by the arbitral body in relation to future acts.	Senate - Currently, native title interests are placed at an unfair disadvantage in negotiations because the proponent knows that if they are not inclined to share profits or pay royalties at the level they propose, they can force the matter to arbitration. This places considerable pressure on Native Title Parties to reach an agreement within the negotiation period. - Indigenous communities should be able to use their native title rights to leverage economic development. NNTC - Supports amendments, as currently native title claimants appear to be forced into accepting profit sharing and royalty clauses on terms proposed by the proponents. YAC - Supports the amendments but	FMG - Rejects notion that higher royalty payments will deliver increased community benefit - Past agreements with mining companies that results in tens of millions of dollars flowing to communities, has not improved the standard of living of the majority to Aboriginal peoples in the Pilbara, rather the standard of living has stagnated or reversed. - FMG does not want to be part of disincentivising another generation of aboriginal people with the result that they will opt out of the mainstream workforce. Minerals Council - Not appropriate to refer to payments to indigenous people as royalties

		cautions against the words 'if relevant' - Should consider benchmarks (such as what the State receives in royalties for the return for granting a mining lease/value of what a farmer on freehold land receives)	- Royalties are payable to the Crown as the owner of mineral resource - This change will require the arbitrator to decide compensation matters which would remove the incentive for parties to reach an agreement - May also have the effect of mandating ongoing payments to non-traditional owners. - Lack of clear guidelines as to how compensation will be awarded. - The term profit sharing is too narrow a focus relevant to the current approaches being taken in negotiations which is around benefit sharing (including both financial and non-financial benefits, such as education, training, employment) NNTT - Contrary to policy that rests on the freehold equivalence test: what can be done on freehold land can be done on native title land. - Likely to create an additional source of contention between native title, gov and grantee parties in arbitration - Likely to be uncertainty as to the extent of powers and width of discretion of arbitral body - Should set out factors which arbitral body should take into account when considering whether to make an order - Clarify when imposing this condition is 'relevant'
11	Inserts a new section 47C which provides that at any time prior to determination the parties may make an agreement that the extinguishment of native title rights are to be disregarded	Senate - the current breadth and permanence of the extinguishment of native title through the NTA is arguably unjustifiable, unnecessary and in breach of human rights obligations. - Amendments are consistent	State of WA - Has reservations about the practical implications of the proposed amendment. Mineral Council - Will create significant additional uncertainty and risk as the native title

		with the current application of the NTA and merely allow the existing co-existence provisions to be extended to allow extinguishment to be disregarded with an agreement in a wider range of circumstances. NNTC - It has been the experience of some native title groups that respondent parties have been happy to agree to disregard extinguishment. - Would provide for more timely negotiations and would simplify the process of coming to consent determinations - Queries the necessity to get consent of the relevant gov for s47C to apply - Submits the Act should also provide a presumption that the State agrees to disregard the extinguishment and the onus would be on the state to rebut the presumption YAC - Supports amendments Law Council of Aus - Will add flexibility to possible outcomes for negotiation and may allow native title claimants to obtain native title to an area which is particularly important to them & which is not of particular importance to the state.	party and gov could revive native title in an area of a mining tenement without the agreement of the tenement holder NNTT - May require consequential amendments, such as providing procedural fairness to those who may have interests that would be affected by the proposed agreement.
12	Inserts a new s61AA which provides for presumptions of continuous connection with the land (which shifts the onus to the respondents to rebut the presumption). And inserts s61AB which provides for when the presumption can be set aside.	Senate - Currently onus of proof is on indigenous people and requires written accounts, which denies the predominantly oral nature of Indigenous cultures. - It is unjust and inequitable to continue to place the demanding burden of proving all elements required under the NTA on the claimants, who are the traditional owners of the land and who have been dispossessed. - The State and Clth governments have granted the rights and hold many of the historic records needed to establish connection - Shifting the burden will encourage gov parties to be	State of WA - Likely to disrupt the existing processes for deciding claims due to need to make changes to policies & guidelines, further litigation, the need to clarify tenure arrangements prior to commencing negotiations Mineral Council - Requires careful and detailed analysis to avoid unintended consequences. NNTT - Although when NTA was first enacted there was litigation to clarify the legal effect, litigation on that scale is unlikely in the future, as the law is

		more inclined to settle claims with a strong prospect of success, rather than taking it to the Federal Court NNTC - In many instances there is little foundation for significant dispute over continuity, and the adoption of a rebuttable presumption should help reduce the resource burden on the system, helping facilitate the expeditious resolution of native title claims - Burden should be on the state because its 'corporate memory' is in a better position to elucidate on how it colonised a claim area. - State will have little incentive to expend resources in difficult disputes over continuity and connection to assert that continuity had effectively been broken. YAC - Supports this amendment Law Council of Aus - Will significantly reduce the time and cost of reaching determinations of native title claims - Would be consistent with the beneficial purpose of the NTA - However, notes that the presumption may be incapable of operating in cases of succession - Some technical issues with the drafting.	now much clearer in light of the HC *Yarmirr* case and the HC *Yorta Yorta* case. - Judges of the Fed Ct are willing to infer continuity back to the assertion of British sovereignty - Since *Yorta Yorta*, 88% of determinations recognising that native title exists have been made with the consent of the parties - Many of the determinations are accompanied by ILUA's - See para's 38 - 44 of submissions for comments on the drafting of the sections and the practical effects - Might allow for multiple claims over the same area by sub-groups claiming the benefit of the presumption. Each of the claims could be registered and each could obtain a determination recognising that it holds native title. - Practical effect on s87 &87A (see para's 59-68) - Practical effects on the registration test (see para's 69 – 73) - Could the presumption operate if the basis of the group's native title claim is that their ancestors succeeded to the area at some time after sovereignty? - Not clear whether it would apply prospectively - Implications for mediation (see para's 79 -82) - Questions whether there should be circumstances in which the presumption should not apply. - Compensation liability for the extinguishment of native title is likely to increase,
13	Inserts new subsections 223(1A)-(1D) providing clarification of the definition of 'traditional' to ensure that laws	Senate - Current definition of traditional fails to recognise the dynamic and living nature of	NNTT - Not clear what 'through time' means - At what point does a law

	and customs can be considered traditional if they remain identifiable through time. (currently only considered traditional if it remains largely unchanged).	Indigenous Aus cultures, and ignores the fact that by their nature their culture is geared towards adapting to and surviving in a harsh environment - Currently it is too easy for a respondent to rebut the presumption of continuity by establishing that a law or custom is no longer practiced in exactly the same way at the time of colonisation. - There is no opportunity to raise the role of past injustices in the interruption of cultural continuity, in an act which intends to provide remedy for those injustices. - Proposed amendment will allow for an appropriate level of adaptation to the changing circumstances brought about by colonisation. - Will allow for the Court to disregard any interruption in the observance of traditional laws and customs where it is in the interests of justice to do so. - And will help ensure that communities who have maintained a strong connection with their lands and culture will not have their recognition discounted based on changes which do not fundamentally alter the core of their cultural identity as the traditional custodians of their land, sea and country. NNTC - Amendment will encourage indigenous commercial initiatives YAC - Supports this amendment	or custom change so as to no longer be 'identifiable' - It is not clear what would constitute 'substantial interruption in s223(1D). - Will be likely to give rise to litigation to clarify meaning.
14	Substitutes s223(2) to clarify that native title rights and interests may be of a commercial nature.	Senate - Currently there is no mechanism to provide for the recognition of commercial rights to enable agreement making that advances social and economic advancement. YAC - supports this amendment	

Note: YAC also submits that the Act should make provision to recognise the Yindjibarndi people as a 'nation', with a distinct language, culture and territory. Although they fully accept and respect the

sovereignty of the Clth and the State, they want formal recognition of a form of 'sovereignty under our traditional laws and customs'. They wish for there to be 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'.