Submission to

# Native Title Amendment (Reform) Bill 2011


## Chuulangun Aboriginal Corporation

PMB 30 | Cairns Mail Centre | Qld 4871

E-mail: chuula@kaanjungaachi.com.au | Web: www.kaanjungaachi.com.au


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## 1. Introduction

The Native Title Amendment (Reform) Bill 2011 addresses some of the serious problems with the Native Title Act (NTA), but does not go nearly far enough. What is needed is for the NTA to be repealed or at least seriously overhauled, and appropriate legislation put in place which will ensure the true recognition of Indigenous customary law, custodianship, governance, intellectual property and land tenure in Australia. This submission comes from the perspective of relevant Kuuku I'yu Northern Kaanju Traditional Custodians living on their Ngaachi (Homelands) centred on the upper Wenlock and Pascoe Rivers in Cape York Peninsula, northern Australia. From our perspective the NTA is seriously flawed – the processes, institutions and structures it upholds:

- are in conflict with Indigenous land tenure, law and governance systems;
- create and maintain obstacles for the carrying out of on-ground Indigenous land and resource management aspirations and obligations, thereby perpetuating injustices to Indigenous Australians;
- work against the homelands development and economic development aspirations of Traditional Custodians living and working on homelands.

Our discussion is based largely on our experiences with a native title claim to a large part of our Ngaachi centred on the upper Wenlock and Pascoe Rivers (QC 97-45 Northern Kaanju and Yianh – known as the Batavia claim) and also on discussions for over a decade with Indigenous landowners across the wider region, as well as with researchers and commentators involved in Indigenous rights advocacy, native title, natural resource management and intellectual property. This submission discusses some of the amendments proposed by the Native Title Amendment (Reform) Bill 2011 and outlines other areas of the NTA that need serious and immediate reform.

## 2. UN Declaration on the Rights of Indigenous People

The Aboriginal and Torres Strait Islander Social Justice Commissioner and other commentators have called for the inclusion of the UN Declaration on the Rights of Indigenous People in the NTA. This has been taken up in the Native Title Amendment (Reform) Bill. While this is important and would be a positive step towards proper recognition of Indigenous rights and interests in land and waters, questions arise as to how these amendments if challenged could be upheld by the High Court of Australia. This demonstrates the uninformed thinking behind the Bill and how the Bill in itself is not an effective means of enshrining the UN Declaration in the NT process. It might be well-meaning but this is not useful if the principles of the UN Declaration cannot be enforced when put to the test.

## 3. Indigenous intellectual property

Nevertheless the inclusion of the UN Declaration is a first step in working out the relationship between Indigenous customary intellectual property norms, native title and the current statutory rules of intellectual property. For Indigenous people there are unbreakable links between their knowledge systems, the land and waters, and its resources. Currently the native title system is not clear about the rights of Indigenous people to control valuable biological resources on their land and waters, rights that do exist under customary intellectual property systems (for example, the rights that people have over plants with which they have a totemic relationship).

There needs to be serious and informed discussion about how customary intellectual property (IP) systems should and could best be recognized under the Australian law. As the NTA is such a flawed

legislation it might be more valuable to enshrine Indigenous IP into other legislation such as the Copyright Act.

## 4. Native Title Representative Bodies

The structure of Native Title Representative Bodies (NTRBs) preserved in the NTA is the mechanism with which 'native title holders' are expected to conform in terms of representation and governance in relation to the use, management and development of their 'native title' lands. While some may argue that NTRBS are needed and are working, and indeed some NTRBs may be functioning to the benefit of 'native title holders', the reality is that many individuals and organisations are benefitting from the status quo at the expense of Aboriginal people. NTRBs are an outside-in approach and there is nothing Indigenous about them. It is our view that too much authority is placed in NTRBs in the native title process which results in proceedings being dominated by them.

Further, through the power structures of specific land councils 'usurpers' are given legitimacy under statute law and become custodians in European terms over issues of native title[i]. This is often to the detriment of individual and sub-groups' rights and interests which are subsumed by the artificial wider native title group's rights and interests. For the Batavia claim, a number of claimants have had their position as Northern Kaanju people legitimised by the native title process. Therefore under government law through the NTA their identity as Northern Kaanju people and as people having authority to speak for the land has been recognised, but under Indigenous law they are not recognised. This situation of being legitimised under government law but not under Indigenous law further fuels the view of local people that government law is seen as superior to Indigenous law in the NTA. As noted by Muir, 'the "determination process" established by the NTA takes us full circle to a situation that again supports the notion that the Australian law is the only legitimate law'[ii] .

There needs to be better accountability checks and balances in place to ensure NTRBs are performing their functions satisfactorily. The internal review functions of the NTRBs are too weak. There also seems to be very little transparency and accountability in regard to NTRBs in regard to how resources provided to run native title claims have actually been spent.

A question also arises in regard to how representative NTRBs really are.

## 5. Commercial/Economic rights

The NTA seriously limits the right of Traditional Custodians to use and develop their land and associated resources economically in order to sustain their people and land into the future. As noted in the 2009 Native Title Report from the Australian Human Rights Commission the recognition of commercial rights is not clearly provided for in the NTA despite statements by government that Indigenous communities should be using their native title rights to support economic development[iv]. Allowing native title rights and interests to be of a commercial nature has been included in the proposed Bill, but again this is of no use if the processes and structures through which commercial and economic rights might flow are inappropriate and not representative of the proper Traditional Custodians.

The NTA has implications for the effectiveness of the Carbon Farming Initiative (CFI) process proposed by government which has the potential to provide economic opportunities for Aboriginal people. Under the CFI, NTRBs have the potential to act as 'gatekeepers' – while they would not necessarily have to be the carbon farming project proponent, they may be able to intervene as a proposed carbon farming project may affect native title. This has serious ramifications for the Kuuku I'yu Northern Kaanju people based at Chuulangun who are now actively undertaking customary fire management on their homelands and have for a number of years now contributed to reductions in hot late dry season fires by returning to traditional fire management. We are undertaking carbon farming based on our traditional fire management and have developed a comprehensive fire plan which sets out our strategy for appropriate fire management, weed management, revegetation and rehabilitation across the 840,000 hectares of our homelands, almost 200,000 hectares of which have been declared an Indigenous Protected Area. It would be a travesty if the proponent of an effective fire management strategy which is already seeing environmental and social benefits were denied the economic opportunities under the CFI due to being blocked by an unreceptive NTRB.

## 6. The right to negotiate on ALL land uses including mining

The Federal Parliament should properly address the principles of the UN Declaration on the Rights of Indigenous Peoples and restore our full set of rights, including the right to prevent exploitation of our land and waters by others. An integral step in this process is to ensure that the right for Indigenous Traditional Custodians to negotiate on all land uses including mining is included in native title reform.

Currently negotiation is unfairly stacked in favour of big mining companies. An obvious example of this is the current negotiations between the Yindjibarndi people and the Fortescue Metals Group (FMG) in the Pilbara region of Western Australia which highlight the fact that mining companies and native title holders do not negotiate on an equal footing and governments are turning a blind eye to the realities of this situation on the ground. Aboriginal people are not appropriately resourced so that they can undertake effective negotiations with proponents such as mining companies. This can result in divisions and conflict within the native title group as shown in the Yindjibarndi case.

There is a disparity between native title rights and the failure of legislation and governments to allow or effectively empower Aboriginal people to protect and benefit from these rights. Native title holders need to be backed by a negotiating position with the ability to say 'no' without fear that mining companies wanting to exploit their land can go to the Native Title Tribunal to get the go ahead, regardless of whether or not an agreement is reached with the proper Traditional Custodians. In the current system, Traditional Custodians are seen as by-standers to the negotiation process. Indeed, in mining and other development negotiations Aboriginal people are putting up there land and

resources for development so they should be full business partners and be entitled to an equal share of profits not petty cash.

## 7. The constitution of the Native Title claim group and the scale for recognition of native title rights and interests

The Native Title Amendment (Reform) Bill 2011 does not address the problem where the native title claim group contains people who under Indigenous law would not have the standing to speak on behalf of country and do not have entitlements under that law. The constitution of the NT claim group is an area of native title that needs serious reform and is an issue that is very close to us as Traditional Custodians and native title claimants to a large part of the Northern Kaanju Ngaachi (a claim locally referred to as the 'Batavia Claim').

For the Kuuku I'yu Northern Kaanju, as for other Indigenous peoples across Australia, there are different scales of social organisation in both the contemporary context and traditionally. As well as other wider scales of organisation there is a set of macro-groupings which includes but is not limited to language-named or place-based 'tribal' groups, and can also include groups of two or more of these 'tribal' or other groups in combination. As noted in the Draft Connection Report for the Batavia Downs NT claim "This is commonly ... the most typical scale for recognition of native title rights and interests *despite* the fact that groups recognised at this scale often *do not* correspond to the most significant land-holding group among the indigenous people of the region in their daily interactions"[v]. There are also sets of micro-groupings including 'clan' or 'family' groupings (classical patrilineal, and contemporary cognatic descent groups) which, for the majority of Aboriginal people across Cape York Peninsula *do* correspond to 'the most significant cultural group', particularly in relation to traditional or customary connections to country. Therefore it is odd that the native title process should favour macro-groupings over micro-groupings when the latter corresponds with the most significant land-holding group from an Indigenous governance perspective.

It is the NTA that shapes outcomes from the native title process, and apparently native title representative bodies (i.e. land councils) and anthropologists working on claims are bound to work within the requirements of the Act. This has lead to the inclusion, from our perspective, of the 'wrong people' in the claimant group for the Batavia claim. People might be 'all one mob' for country in terms of a claim, but that does not mean that all native title holders necessarily have the same rights and interests as each other, even under the NTA.

The area of the Batavia claim is also currently under state land dealing tenure resolution processes with the Queensland government. However, while the native claim and state land dealings are separate processes, the state land dealings still relies on information from the native title claim, including the composition of the native title group as the potential land-holding body. So the problems inherent in the native title claim are also manifested in the state land dealings. Our concerns about this process as it pertains to our rights and interests in our traditional lands prompted the preparation of a discussion paper 'Representation and Governance' which puts forward more appropriate mechanisms for Indigenous representation and the formation of Indigenous land-holding bodies on Cape York.

## 8. Recognition of Traditional Indigenous governance

In relation to the Batavia NT claim it is evident that little emphasis is placed on traditional Indigenous governance structures in determining the constitution of the native title group. The NTA which is

supposed to recognise Indigenous rights and interests in land sees Indigenous law as inferior to Western 'government' law. For the Batavia claim a 'macro-grouping' approach has been taken despite the fact that a number of claimants do not regard this as the most significant social scale at which customary interests are articulated. This conclusion has apparently been based on native title case law and contemporary forms of local custom (and on the assumption that ancient forms of Indigenous governance no longer exist or are not relevant in contemporary society). What has resulted is that claimants who are not actually from the claim area, and have no authority for that land under Indigenous custom, are dominating proceedings. This will only create a flawed outcome once a native title determination is finally reached.

The native title process which is based on the NTA takes a regional approach to land tenure systems that is inappropriate and non-Indigenous and thus inherently problematic and goes against the proper recognition of native (Indigenous) title and governance. Claimant groups are seen as "categorically defined, bounded and non-negotiable"[vi]. The problem with such groups is that what is presented on paper does not necessarily reflect what exists in reality on the ground where the action is taking place in terms of land management and Traditional Owners living and working on country. From our perspective as Traditional Custodians living on homelands the Batavia native title claimant group is an artificial group, which has become legitimised by the native title process.

In the Full Court Judgment in Ward v Western Australia, Beaumont and von Doussa JJ found that the NTA does not require the determination to specify precisely which members of the community have or exercise particular rights in the land, rather that is a matter left up to the native title holders to determine in accordance with their custom. This is problematic and will only cause arguments once a determination is made when different people have different perspectives about who has the authority to speak for country. It puts the onus on the native title holders to sort out problems after a determination is made which can only fuel more problems into the future.

It is questionable whether this serious flaw could be properly addressed within the bounds of the NTA. The relevant sections of the Act are 190B and 190C which concern registration of a native title claim and the constitution of the native title claim group. One avenue to address this flaw could be to look at whether the Native Title Registrar could conduct some sort of preliminary hearing with wide powers of evidence gathering in order to ensure that the NT claim group was properly constituted. It is very important that a mechanism for recognition of bloodline and kinship and Indigenous governance be worked into the NTA to ensure a native claim group is properly constituted.

The process for registration of native title claims also needs serious reform. One could argue that the registration process is a farce. An example is the recent registration of a native claim to a small parcel of land on Cape York Peninsula in Northern Kaanju country. 'Northern Kaanju Traditional Owners' were notified in a letter dated only 16 days before a proposed native title claim authorisation meeting to be held 900 kilometres from the land in question and during the wet season. So for many Traditional Owners attendance would be extremely difficult or impossible. The filing of the claim had to be 'fast-tracked' in order for the protection of the Traditional Owners' rights to negotiate with the mining company that held a lease over the land in question. In the letter it was requested that people who are seen as essential to Northern Kaanju decision making processes attend the meeting. Regardless of who or how many people attended the meeting, the claim was authorised and has since been registered with the National Native Title Tribunal. One has to question what process was used by the NTRB to determine whether the people at the meeting were the people with authority under customary law to speak for the land in question.

## 9. Recognition of civil liberties and individual rights

In regard to the native title process it has been noted that "broadly defined regional native title systems can overlook specific localised and individualised rights and interests as representatives of the broader group are seen to have an equal say in making decisions about matters which may not be their primary concern"[vii]. In this respect, our experiences with the Batavia claim have demonstrated that individuals firmly grounded in principles of bloodline, kinship and Indigenous governance have had their rights and interests marginalised in order to accommodate the wider group's perspectives which are not necessarily based in Indigenous law. Therefore recognition of civil liberties and individual rights should also be worked into the NTA to address the problem of individuals' rights and interests being subsumed by that of the wider group. This also has relevance for the inclusion of the UN Declaration on the Rights of Indigenous People into the NTA.

## 10. Conclusion

We urge the government to support an agenda of reform of the native title system that will see recognition of proper Indigenous governance, law, kinship and bloodline, as well as the unity of Indigenous customary intellectual property and the land, waters and all its resources. If the government is serious about this, it cannot be achieved with the current Native Title Amendment (Reform) Bill 2011. As a starting point the NTA needs to be repealed, or at least seriously overhauled, and new legislation formulated 'from the inside-out' that appropriately recognises the legitimacy of Indigenous customary law, governance, kinship, bloodline and intellectual property. At the same time, Indigenous law needs to be recognised in all Acts of government.

At a steering committee meeting for the Batavia claim held on country in 2001 a Traditional Owner expressed his frustration over the NTA: "All these Acts belong to the government but what about Aboriginal people. Can we produce a new Act that will combine everything?"[viii] In response, an officer from the land council replied: "We won't change the law but we can make progress through mediation and expedited native title process".[ix] It has been fourteen years since the claim was lodged, albeit with some incorrect people in the native title group, and native title has still not been settled for the correct Traditional Custodians.

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[i] See Foley, D. 2007. What has native title done to the urban Koori in New South Wales who is also a traditional custodian? Chapter 9 in B.R. Smith and F. Morphy (Eds). The Social Effects of Native Title: Recognition, Translation, Coexistence. Research Monograph No. 27, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra.

[ii] Muir, K. 1998. '"This Earth has an Aboriginal culture inside": recognising the cultural value of country', *Land, Rights, Laws: Issues of Native Title*, *Issues Paper No. 23*: 2–9, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, page3.

[iii] Transcript of Canberra hearing of the Senate Legal and Constitutional Committee Inquiry into the Wild Rivers (Environmental Management) available at: http://www.aph.gov.au/hansard/senate/commttee/S12918.pdf : page 20.

[iv] Aboriginal and Torres Strait Islander Social Justice Commissioner. 2009. Native Title Report. Australian Human Rights Commission, page 108.

[v] Smith, B. R. 2006. Connection Report. Batavia Downs Native Title Claim, confidential first draft prepared for the Cape York Land Council, 16 January 2006.

[vi] Bauman, T. and Williams, R. 2004 'The business of process research issues in managing Indigenous decision-making and disputes in land', *Research Discussion Paper No. 13*, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, page 11.

[vii] Bauman, T. and Williams, R. 2004, page 11.

[viii] D. Claudie, Batavia Downs Steering Committee Meeting, Moreton Telegraph Station, 16 October 2001, CYLC minutes from meeting, p. 4.

[ix] P. Blackwood, Batavia Downs Steering Committee Meeting, Moreton Telegraph Station, 16 October 2001, CYLC minutes from meeting, p. 4.