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ABORIGINAL CORPORATION

Our Ref: GENO33
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Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

INQUIRY INTO THE *NATIVE TITLE AMENDMENT (REFORM) BILL 2011*

Thank you for the opportunity to provide the following submission in relation to the *Native Title Amendment (Reform) Bill 2011.*

Yamatji Marlpa Aboriginal Corporation (YMAC) supports the main objectives of the Bill as stated in the Explanatory Memorandum: to address the barriers claimants face in making the case for a determination of native title rights and interests, and procedural issues relating to the future act regime. As noted in the National Native Title Council's submission to this inquiry, this Bill represents the first major attempt in many years to improve the *Native Title Act 1993* (NTA) for Traditional Owners, for whose benefit the legislation was primarily intended.

It is widely acknowledged that the NTA has failed many Traditional Owners, who have tragically passed away in the protracted period of time it takes to formally recognise what are pre-existing rights and interests in land. As the Attorney General, the Hon Robert McClelland MP, noted in 2009, 'In how many other areas of law would a seven year period of litigation be considered the 'norm'? What other area of law faces a predicted 30 year timeframe to clear the backlog of cases?'[1]

In the absence of adequate guidance under the current NTA, native title parties and respondents (including all levels of government) have struggled to find workable solutions in

[1] Hon Robert McClelland MP, Speech to the Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Conference 2009, Melbourne Cricket Ground. Available at http://www.attorneygeneral.gov.au

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terms of resolving conflicting interests. It is pleasing to see that many of the proposed amendments in this Bill have the potential to significantly speed up the resolution of native title claims and improve the quality of outcomes flowing from determinations for all parties.

Please find below our views on specific aspects of the Bill.

United Nations Declaration on the Rights of Indigenous Peoples

YMAC supports making the interpretation and application of the NTA consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). It is particularly important that the NTA facilitates Australia meeting its international obligations under the UNDRIP and other instruments pertaining to Indigenous peoples' right to free, prior and informed consent (Article 19 UNDRIP) and rights relating to the practice and protection of traditional land, language and culture (Articles 25-34).

Making the NTA consistent with the UNDRIP would also contribute to the implementation of recommendations arising from Australia's review by the United Nations Human Rights Council, during the Universal Periodic Review in January 2011, specifically recommendations 86.102 and 86.106.[2]

YMAC considers that, unless genuine action is taken to ensure domestic legislation such as the NTA reflects the fundamental principles underpinning the UNDRIP, initiatives of the Commonwealth Government such as the National Human Rights Action Plan will have no practical effect.

Effective heritage protection

State governments generally regard their own Aboriginal heritage legislation as sufficient to deal with conditions under section 24MB of the NTA. However, Indigenous heritage protection regimes vary widely between jurisdictions in their capacity to protect the interests of Traditional Owners and we consider there are serious flaws in Western Australia's *Aboriginal Heritage Act 1972* (AHA). In a period of escalating mining and development, the AHA is operating more as an approval mechanism for developers, rather than a means for protecting Indigenous heritage.

YMAC advocated strongly for this issue to be addressed through the Commonwealth's *Indigenous Heritage Law Reform* program in 2009-10. One of the key reforms canvassed then was the establishment of an accreditation system promoting national standards for Indigenous heritage protection laws in the states and territories under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*. YMAC generally supported this idea, providing it set appropriate minimum standards for the protection of heritage and was fully enforceable.

YMAC is disappointed that there has been no formal report or concrete outcomes arising from the consultations and submissions provided to the *Indigenous Heritage Law Reform* program. In the absence of any indication that this work will be revisited in the near future, the proposed amendment to 24MB(1)(c) of the NTA offers some consolation. However, we note that such a provision will be difficult to enforce in any consistent way without either defining 'effective protection', or establishing a national minimum standard for heritage protection laws.

[2] Recommendation 86.102: Reform the *Native Title Act 1993*, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life. Recommendation 86.106: Revise the Constitution, legislation, public policies and programmes under a human rights based framework implementing the UN Declaration on the Rights of Indigenous Peoples.

As a general comment, the NTA is not comprehensive enough to adequately protect Indigenous heritage in this country. It is vital that the Commonwealth revisit the recommendations made through the *Indigenous Heritage Law Reform* program to ensure complimentary frameworks are in place at the Commonwealth level to monitor State regimes and to support the provisions under the NTA.

Good faith negotiations

Over the last two years, YMAC has strongly urged the Commonwealth Government to introduce the proposed amendments to section 31 to clarify the meaning of 'good faith' under the NTA. YMAC therefore welcomes the proposed amendments inserting section 31(1A) and 31(2) and considers it will provide greater certainty for all parties as to what is expected during the course of fair and reasonable native title negotiations. Importantly, these amendments would require proponents to negotiate on substantive issues within the six-month period, rather than stalling on preliminary matters such as negotiation protocols and timetables.

The inquiry should note that the Government has committed to addressing this issue. The 2010 discussion paper 'Leading practice agreements: maximising outcomes from native title benefits', issued jointly by the Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs states:

> 'The Government has decided to amend the Act [the NTA] to provide clarification for parties on what negotiation in good faith entails and to encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions.'

More than six months has lapsed since the Government provided a response to public submissions on the discussion paper. YMAC strongly urges the Parliament to pass these already overdue amendments as soon as possible in order to prevent further abuse of the negotiation process.

NNTT to determine profit-sharing conditions

YMAC supports the amendment to s38(2) to provide the arbitral body with the power to determine profit-sharing conditions under native title agreements. If passed, it will be vital that the arbitral body (currently the National Native Title Tribunal) is properly resourced, including access to suitable experts to advise on the latest developments and innovations in native title agreements and regional industry standards for profit-sharing arrangements. Native title groups and their representative bodies have worked hard to improve the quality of agreements and it will be important to ensure the proposed amendment does not stifle or even reverse the progress made in this rapidly evolving area of law, policy and commercial practice.

It should also be noted that this amendment is required in order to get the full potential out of the clarification of the meaning of good faith negotiations. Currently, land developers are entering negotiations with native title parties secure in the knowledge that, under s35 of the NTA, where agreement has not been reached within six-months, the National Native Title Tribunal has historically granted proponents access, with or without any financial compensation for the loss or impairment of native title rights. This severely reduces the bargaining power of native title parties, who often feel pressured to enter into substandard agreements for fear that they will not receive any compensation at all once the six-month period has lapsed.

Presumption of continuity

YMAC supports the proposed amendment to insert a section 61AA, establishing a presumption relating to continuity. This would implement the recommendation of Justice North to establish a reverse onus of proof for determinations of native title.[3] The Attorney-General, the Hon Robert McClelland MP, also stated that there is merit in exploring this reform, in 2009.[4]

While YMAC supports the amendment in principle, we reiterate the point made by the Kimberley Land Council in their submission to this inquiry: that a presumption of continuity would not relieve the necessity for careful anthropological and historical research to identify the right people for the claim area, particularly in instances where there are overlapping claims in an area, and to determine group membership.

From a broader policy perspective, it should be noted that connection research is proving just as important for establishing robust governance and decision-making processes post-determination (e.g. establishing Prescribed Bodies Corporate). Therefore, if the amendment was to be adopted, Native Title Representative Bodies/Service Providers would still require adequate funding and support to undertake this expert research.

YMAC strongly supports the amendment to section 61AB which would take into consideration the action of States or Territories in significantly disrupting traditional laws and customs of applicants. However, we recommend that proposed subsection 61AB(2)(b) be amended to read:

61AB(2) In any proceeding relating to the application of subsection (1), the court must treat as relevant:

...

(b) whether the primary reason for any demonstrated significant change to the traditional laws acknowledged or the traditional customs observed by the Aboriginal peoples or Torres Strait Islanders is the action of a State, Territory *or other party* who is not an Aboriginal person or a Torres Strait Islander.

This would enable the Federal Court to recognise the long history of forced and institutionalised dispossession from traditional lands experienced by Aboriginal and Torres Strait Islanders, including by non-government organisations and institutions, such as churches.

Disregarding historical extinguishment

YMAC strongly supports the proposed amendments to insert section 47C, to recognise agreements to disregard historical extinguishment. The Commonwealth Government has previously consulted on a similar issue in 2010 (i.e. the historical extinguishment of parks and reserves), without following through with any discernable reform. The public submissions made in relation to those proposed amendments (though narrower in scope), were largely supportive.[5]

[3] See Justice North J and T Goodwin, 'Disconnection – the gap between law and justice in native title: a proposal for reform' (paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009).
[4] Hon Robert McClelland MP, Speech to the Australian Institute of Aborginal and Torres Strait Islander Studies Native Title Conference 2009, Melbourne Cricket Ground. Available at http://www.attorneygeneral.gov.au
[5] See public submissions posted at:
http://www.ag.gov.au/www/agd/agd.nsf/Page/RWP73DB7F92B8E8CE99CA25723A00803C08#possible

YMAC submits that the proposed section 47C should go further to enable the Court to disregard prior extinguishment within the scope of outlined, but not require an agreement between the applicant and the Government party. This matter should not be left to the discretion of a sympathetic State government as part of a negotiated outcome, but a firmly established policy principle established in legislation.

Amendments to section 223

YMAC strongly supports the proposed amendments to section 223 and notes that such changes have been called for by Traditional Owners and Native Title Representative Bodies/Service Providers for many years. It is widely acknowledged that the High Court's decision in relation to *Yorta Yorta*[6] set the evidentiary standard for section 223 higher than was intended by the NTA and has subsequently undermined the prospects of other native title claimant applications reaching a consent determination.[7] The decision in *Yorta Yorta* has also meant that native title determinations have relied on time-consuming and cost intensive anthropological research, which is prohibitive for some claimant groups.

Indigenous Australian and Torres Strait Islander cultures are, like all human cultures, subject to dynamic and changing influences. As indicated by Senator Siewert in her Second Reading Speech on this Bill, the native title system cannot adequately take into account these aspects of social dynamics and instead works to keep Indigenous culture frozen in a form and structure of pre-Sovereign times. YMAC fully supports the proposed amendments to section 223 of the NTA that would finally recognise Indigenous Australian and Torres Strait Islander cultures, like cultures worldwide, as dynamic and constantly evolving over time.

The amendment to subsection 223(2) to recognise the right to trade and other rights and interests of a commercial nature follows logically from the other amendments to subsection 223(1), defining 'traditional laws and customs'. Excluding such rights is contrary to widely accepted anthropological and archeological evidence that, pre-Sovereignty, Indigenous Australians engaged in diverse customary trade practices and these should be recognised where appropriate in the 'bundle' of native title rights and interests.

Including rights and interests of a commercial nature would also allow Traditional Owners to finally realise the full potential of their native title to deliver legitimate and sustainable economic benefits for themselves and future generations. This is consistent with the publicly stated policy objectives of the Commonwealth Government, including in the context of its draft Indigenous Economic Development Strategy, recent consultation papers on best practice native title agreements and key 'Closing the Gap' initiatives.

Yours faithfully

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CHIEF EXECUTIVE OFFICER

[6] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (Yorta Yorta)
[7] See North and Goodwin, 2009, pp. 6-7.