Yamatji Marlpa
ABORIGINAL CORPORATION

Our Ref: GEN033
Office: Perth

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Ms Kathleen Denley
Assistant Secretary
Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Ms Denley

***NATIVE TITLE AMENDMENT BILL 2012* – COMMENTS ON EXPOSURE DRAFT**

Thank you for the opportunity to comment on the Exposure Draft of the *Native Title Amendment Bill 2012.* Yamatji Marlpa Aboriginal Corporation (YMAC) welcomed the announcement by the Attorney General in July 2012 that the Commonwealth Government would pursue legislative reforms to: i) clarify the meaning of good faith negotiations under the *Native Title Act 1993* (the Act); ii) expand opportunities for the disregarding of historical extinguishment by agreement, and iii) improve the authorisation process for Indigenous Land Use Agreements (ILUAs).

This submission outlines YMAC's views on the Exposure Draft and provides some suggestions for minor drafting changes to enhance workability of the amendments.

*Good faith negotiation requirements*

In YMAC's experience, over the last five years there has been a measurable shift in the approach of industry parties to future act negotiations, with many resolved amicably by consent between the parties acting reasonably and respectfully. However, this shift should be placed in the context of one of Australia's largest resources booms, accompanied by high commodity prices and an urgent demand for land access. There has never been a stronger commercial imperative for industry parties to reach native title agreements that not only satisfy their obligations under the Act but also their broader 'social licence to operate'. YMAC is concerned that, in the absence of such favourable conditions, there is currently inadequate provision under the Act to protect native title parties' procedural right to negotiate and the

balance of power between the negotiation parties remains firmly in favour of industry with all the resources they can bring to the table. In fact, there is still a commercial incentive not to reach an agreement in some circumstances, through the operation of s 38(2) (which requires that the arbitral body can't determine profit sharing conditions).

In light of our extensive experience negotiating native title agreements, YMAC anticipates that introduction of 'good faith negotiation requirements' will underline the Attorney General's expectation for the behaviour parties across the board and ensure a consistent higher standard of agreement-making. In particular, the proposed amendment to s 36(2) will assist in ensuring considerations around good faith are an integral part of doing business with native title parties.

*Addressing the issues raised in Cox & Ors v FMG Pilbara Pty Ltd & Ors [2009].*

As you are aware, YMAC has been a strong advocate of these amendments following the outcomes of *Cox & Ors v FMG Pilbara Pty Ltd & Ors* [2009]. The matter covered a FMG mining application, encompassing 4,320 hectares of land in the west Pilbara. The area is the traditional country of the *Puutu Kunti Kurrama and Pinikura* (PKKP) people, a native title party represented by YMAC.

In 2008, the National Native Title Tribunal (NNTT) found that FMG failed to negotiate in 'good faith' with the PKKP people and fulfil its obligations under s 31 of the Act. However in 2009, FMG appealed and won the case in the Full Federal Court. The finding was based upon the court's interpretation of the Act, which states that as long as the party has negotiated within a period of six months "with a view to" reaching an agreement, the party has met its obligations. The High Court subsequently dismissed PKKP's application for leave to appeal.

In YMAC's view, this decision substantially eroded the strength of the right to negotiate under the Act. Until government and grantee parties are required, as a minimum standard, to negotiate about substantive issues pertaining to the 'doing of the act', native title parties remain powerless to protect their native title rights and interests with these being preserved at the discretion of other parties.

The finding in Cox has had wide ramifications for entrenching a significant imbalance of bargaining power between parties in future act negotiations, weighted strongly in favour of the grantee party. It is now open to the NNTT to make a future act determination as soon as the prescribed six month period expires, regardless of the stage negotiations have reached, provided negotiations were conducted in good faith during that period with a view to reaching agreement with the native title parties.

It is clear from the NNTT's list of future act determinations, that most determinations have found that the future act may be done, and the majority of determinations are made by consent between the parties. However, the reality is that arbitration is often used by the grantee as a threat to encourage the native title party to settle. Indeed, native title parties are not able to seek royalty based payments as a condition of the NNTT's determination, and cannot ask the NNTT to make a determination of compensation for loss or impairment of native title as a result of the doing of the relevant future act. There is therefore reasonable incentive for the native title party to reach agreement, however unfavourable the terms of that

agreement, in order to avoid the NNTT's arbitration process, which the native title party knows is unlikely to result in a favourable outcome. Native title parties are well aware that despite the numbers of consent determinations that have been made, the public record does reveal that:

i. there have been very few determinations that the future act cannot be done;
ii. that where the determination is that the act can be done there are not often conditions made that are in favour of the native title party, and
iii. that there have only been three decisions made that the grantee party did not negotiate in good faith. One of those was the Cox decision, which the Full Federal Court overruled.

The effect of this is that in many cases native title parties will accept heavy compromises and accept proposals put to them by the grantee party, for fear of the NNTT granting the tenement with no agreement in place or with no meaningful compensation agreed between the parties. These appear as 'consent determinations' on the public record and are referred to positively by industry and government parties as 'negotiated outcomes'. However, the reality is that in many cases agreements will contain much diluted protections for highly significant heritage sites, a permanent loss of access to traditional country for generations, and poor compensation for the impact of the future act on native title rights and interests.

YMAC considers that the amendments to sections 31-36 outlined in the Exposure Draft largely address these issues and we congratulate the Commonwealth Government on taking such a rigorous approach to this issue. We note in particular the following positive impacts we anticipate the amendments will have.

*Reversing the onus of proof as to whether negotiations have been conducted in good faith*

Currently it is up to the objecting party (in almost all cases native title parties) to demonstrate that negotiations have not been conducted in good faith. Demonstrating this in the negative, (that is, in terms of what *has not* been done) is extremely difficult, particularly given the lack of clarity under the Act as to what constitutes 'good faith'. While the introduction of good faith negotiation requirements is an important step in addressing this issue, the step of reversing the onus of proof will further assist by shifting some of the resource burden to the party seeking to do the act which is, in the majority of cases, better resourced and likely to benefit financially from the granting of the tenement. This fits with the broad principles articulated in the Commonwealth Government's *Strategic Framework for Access to Justice*. It also in our view, more accurately reflects the policy framework adopted by Parliament, as reflected in the Preamble and objects of the Act.

*Requirement to consider the effect of the doing of the act on native title rights and interests*

The introduction of s31(1)(c) directly addresses the issue raised above and will require the scope of negotiations to include substantive issues such as financial compensation and measures to reduce the impact of mining on significant cultural sites and ensure ongoing access to land for the practice of traditional law and customs.

***Drafting suggestions*:**
In order to ensure consistency throughout the The Act and for the removal of any doubt, section s 31(1)(b) should also require parties to:

"...negotiate *in accordance with the good faith negotiation requirements* (see s31A) ~~with a view to~~ *with the intention of* obtaining the agreement of each of the native title parties to..."

For the same reasons, section 31A(1)(a) should read: "(a) reach agreement *about the doing of the act;*"

This is a critical amendment. If a negotiation party can fulfil their good faith obligations by negotiating about matters unrelated to the doing of the act (e.g. unrelated future acts) it is less likely that agreement will be reached.

Finally, in order that the good faith negotiation requirements do not become an exhaustive checklist, we suggest inserting at the end of the opening clause at s31A(2): *"...and any other matters the arbitral body considers relevant."*

*Introduction of good faith negotiation requirements*

YMAC has long advocated for the introduction of some form of threshold guidance as to what constitutes good faith under the Act and suggested the *Fair Work Act 2006* provides a suitable model. We consider that the requirements at s31A of the Exposure Draft are well suited to the native title environment and are highly compatible with the Njamal Indicia currently considered by the NNTT in arbitration.

YMAC particularly supports the introduction of s31A(2)(c). We consider that inclusion will help resolve the uncertainty which currently surrounds the question of whether or not, and if so to what extent, the reasonableness of offers can be indicative of a failure to negotiate in good faith (see *Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/ Grace Smallwood & Ors* (Birri People)/Queensland, [2012] NNTTA 9 (6 February 2012); *Strickland v Minister for Land for Western Australia* (1998) 85 FCR 303 at 321; *Walley v Western Australia* (1999) 87 FCR 565 at 577)).

There are, in YMAC's experience, a minority of future act proponents who seek to take advantage of s38(2) by intentionally not reaching agreement, while superficially meeting their legal requirements. This is done by, for example:

- making unreasonable offers (relying on *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303);
- failing to negotiate for the time necessary to finalise a negotiation; and
- unreasonably extending the scope of the negotiation beyond the doing of the act.

Note that under the current law there is some confusion around the issue of the extent to which the reasonableness of offers can be taken into account by the NNTT in determining whether negotiation parties have failed to negotiate in good faith.

Compare the following positions. The leading case is *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303 where Nicholson J held (at 321):

> "I accept the submissions on behalf of the Government party it is not for a court or Tribunal to assess the reasonableness of each offer. What is required is the court or Tribunal apply the test of "negotiating in good faith", in accordance with the common understandings encompassing subjective and objective elements, to the total conduct constituting the negotiations. All those circumstances must be considered against the legal requirements of the phrase "negotiating in good faith".
>
> The reasoning of the Tribunal that negotiations in good faith require "reasonable substantive offers" requires, as submitted for the Government party, a further and unnecessary level of complexity and application to the interpretation of the words of s 31(1)(b). It is not necessary to have resort to any standard outside the words in the section itself. The question is whether the communications and other events as they have fallen out satisfy the legal standard of negotiating in good faith as required by s 31(1)(b)."

*Strickland* can be compared to *Walley v Western Australia* (1999) 87 FCR 565, where (at 577/[15]) the above paragraph is referred to:

> "I respectfully agree with and, with one slight reservation, adopting the reasoning in the above passages. The slight reservation is that I think that if a Tribunal, as part of the overall assessment of whether the Government party has negotiated in good faith, finds it useful to consider whether any particular offer (or all offers for that matter) appears (or appear) to be reasonable, then it is open to the Tribunal to engage in that exercise. But that is not to say that it will always be obliged to do so. Much will depend on the circumstances of the particular matter. The Tribunal will be engaged on a factual assessment of the Government party's conduct and, in some cases, the reasonableness or unreasonableness of its proposals or offers may be relevant. In other words there may be difference between making reasonable offers and being reasonable in negotiating in good faith."

These Federal Court decisions can be compared to the recent decision of the NNTT in *Drake Coal Pty Ltd, Byerwen Coal Pty Ltd /Grace Smallwood & Ors (Birri People)/ Queensland*, [2012] NNTTA 9 (6 February 2012) at [201]:

> "The Tribunal would only consider the fairness of a compensation package in two circumstances. First, if the offer of the grantee party is so manifestly and obviously unfair that any reasonable person would regard it as a "sham" or "unrealistic" offer. Second, if independent material is produced to the Tribunal which indicates that an offer is potentially unfair or unrealistic, such that the party put that proposal forward is not negotiating in good faith."

The proposed amendment of the Act to include 31A(2)(c) is a significant clarification of this existing uncertain area law. It is also a significant improvement because it clearly extends the

requirement of reasonableness to include the content of offers made. It won't impact upon the majority of negotiating parties who do make reasonable offers. It will only affect those negotiating parties who currently make unreasonable offers.

**Drafting Suggestion:**
To enhance the workability and effectiveness of this provision, we suggest a further requirement (e.g. s31A(2)(i)), that parties *"allowed reasonable time for each stage in the negotiation to progress."*

This will prevent the situation where a proponent makes a reasonable offer and then makes a s35 application without waiting for any response. It is important that the parties negotiate for long enough to reach an agreement; the length of time of the negotiation should be proportionate to the complexity of the negotiation.

*Amendments to sections 35 & 36*

The proposed amendment to s 35(1)(a) to extend the minimum negotiation period to 8 months since the notification day is welcome. We anticipate it will have little impact on government or grantee parties but will provide NTRB's with precious extra time to seek instructions from its clients who are often living in remote areas where organising meetings and taking instructions can take months. This particularly so in those remote parts of the country affected by the cyclone season and where claimants are not available to YMAC staff for certain times of the year as they attend to their cultural responsibilities and obligations. For example the majority of our Pilbara claimant groups are not available to meet with YMAC staff from November to February as they travel to their traditional country to take boys through cultural law business.

For the negotiation of complex future act agreements, however YMAC does not envisage that such a minor extension of time will contribute much to the process as these negotiations can go on for many years and effectively rely upon the good will of major mining companies. Often their view is that the making of native title agreements as a factor contributing to their social licence to operate in other parts of the world and they do not seek to rely upon a legal process which is heavily weighted in their favour.

As discussed recently with officers of the Native Title Unit, YMAC has identified some issues with the drafting of s 36(2)(a) as provided in the Exposure Draft. As it is currently drafted, if the Government party makes the s 35 application then the grantee party doesn't have to demonstrate that it negotiated in good faith (and vice versa). The grantee party and Government party often cooperate in the process and the proposed drafting therefore dramatically weakens the native title party's rights. We consider the following drafting suggestion addresses this problem.

**Drafting suggestion:**

***Section 36(2)*** The arbitral body must not make the determination unless:

*(a) the Government party and grantee party satisfy* ~~negotiation party that made the application under section 35 for the determination satisfies~~ the arbitral body that they negotiated in

accordance with the good faith negotiation requirements (see section 31A) *prior to the application being made* ~~until the application was made~~; *or*

*(b) the native title party advises the arbitral body that the Government party and grantee party negotiated in accordance with the good faith negotiation requirements (see section 31A) prior to the application being made.*

The addition of (b) is to allow consent determinations to be made without the Government and grantee parties having to demonstrate their compliance with the good faith negotiation requirements. Also the onus to demonstrate good faith should be on the grantee party and Government party only (consistent with the existing s 36(2)). If the onus was also on the native title party then there would be a strong incentive for the native title party to negotiate in bad faith, apply for a s 35 application, and by leading evidence of its own bad faith prevent the Tribunal from having jurisdiction to make a determination.

We consider that the drafting "until the application was made" at s 36(2) of the Exposure Draft is awkwardly constructed. YMAC's preference would be *"prior to the application being made"*, though we capture the intention of the existing drafting (which connotes a period of negotiation) in our proposed amendment at s 31A(2)(i).

*Historical Extinguishment*

YMAC is disappointed that the Commonwealth Government elected to proceed with the narrower option for the disregarding of historical extinguishment canvassed in earlier consultations, limiting the amendment to cover only parks and reserves. We do acknowledge and appreciate, however, the inclusion of public works under the proposed s 47C.

While the disregarding of historical extinguishment over parks and reserves has the potential to significantly increase the extent of land where native title rights and interests can be recognized, revived and exercised, we note the limitations on realizing this potential given it can only be achieved through agreement with State Government parties. This once again leaves native title parties at the discretion of the good will and flexibility of the government of the day.

In addition, YMAC submits that proposed s 47(5) requires public notice and time for comment to be given should be removed. This will only serve to compound the challenges outlined above of native title parties reaching agreement the State on the disregarding of historical extinguishment. It is highly likely that those with vested interests would, in any case, be respondent parties taking an active interest in the matter. It is vital that this period for comment does not introduce added delays and complexity to the advanced stages of claim resolution (including by consent) and a forum for members of the public with no direct interest to unconstructively ventilate their feelings. We note that it would be possible for State Governments to undertake such consultation if they deemed it necessary, without this provision in place.

Finally, while beyond the scope of consultations to date, YMAC wishes to note that the criteria in s47 (1) of the Act are currently too restrictive, and inconsistent with the intention of the section (to disregard extinguishment on pastoral leases controlled by native title claimants). There are many situations where native title claimants have taken control of a pastoral lease

but the ownership structure is such that it arbitrarily precludes the applicability of s47(1). While a comprehensive redrafting of the provision is considered necessary, at this point in time YMAC considers that even the following modest amendment to 47(1)(iii) would bring a number of native title claimant owned and controlled pastoral leases within the scope of 47(1).

**Drafting suggestion**

Section 47(1)(b)

(iii) a company *or other entity* ~~whose only shareholders are~~ *that is majority owned or controlled by* any of those persons.

*Indigenous Land Use Agreements (ILUAs)*

YMAC broadly supports the proposed amendments to streamline and improve the processes around the authorisation of ILUAs. However, we do have some reservations in relation to the proposed amendment to s 251A.

The *QGC v Bygraves* [2011] FCA 1457 decision, whereby only registered claimants need to authorise an ILUA, removes a potential significant burden on an NTRB. The impact of the proposed amendment to s251A to add (2) puts a registered claim in a difficult and resource-intensive position and makes ILUAs unappealing. For example, while NTRBs may spend significant time and resources already in identifying all the people who may hold native title, if anyone attends an authorisation meeting with an unexpected claim to hold native title, their vote may still need to be recorded separately and anthropologists may need to spend time carrying out further research and, depending on the numbers, the result of the authorisation may not be known until further research is carried out. There is also the uncertainty of who decides whether a prima facie claim can be made out by the non-registered group or individuals and at what point that is ascertained.

We suggest that further work needs to be carried out into the implication of any amendments and whether there is a better mechanism whereby a balance may be kept between not disenfranchising anyone who may hold native title and yet not making the authorisation process more complicated or uncertain.

*Conclusion*

As the Commonwealth Government is aware, a number of major native title agreements have been reached in the Murchison, Gascoyne and Pilbara regions over the last five years. However, these are in large part a product of an exceptional period of intensive mining activity and a resultant strong commercial imperative for industry parties to negotiate comprehensive agreements that provide certainty over land access for decades to come. Crucially, though, the Native Title Act will rapidly outlive this urgency and needs to serve *all* Traditional Owners including those with limited mining activity on their land. For this reason, it is simply not sufficient to rely on market forces to deliver quality future act agreements and negotiation processes. This task lies with the legislation itself.

YMAC submits that there is an urgent need to protect and strengthen the integrity and

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operability of the right to negotiate under the Act. In the absence of a veto over land development, the right to negotiate is one of the strongest levers that native title claimants and holders have to protect their cultural inheritance and obligations to future generations.

While many future act determination applications may result in a 'consent determination', this provides no indication of the duress and pressure many native title parties feel throughout the agreement-making process to accept sub-optimal proposals, for fear of losing their land with no compensation or protection of country at all. The introduction of good faith negotiation requirements will at least go some way to addressing this lack of equity between negotiating parties and provide greater certainty to all parties moving forward.

We congratulate the Commonwealth Government for its commitment in pursuing these well overdue reforms. We would also welcome an opportunity to continue working with the Native Title Unit to discuss our drafting suggestions and test the workability of the amendments moving forward.

Yours sincerely

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