Yamatji Marlpa
ABORIGINAL CORPORATION

Our Ref: GEN033
Office: Perth

16 August 2013

Mr Mick Gooda
Aboriginal and Torres Strait Islander
Social Justice Commissioner
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

Dear Commissioner

SOCIAL JUSTICE AND NATIVE TITLE REPORT 2013

Thank you for the opportunity to provide input to the Social Justice and Native Title Report 2013.

Please find below our views in relation to the key developments in native title that you have advised will be a key focus in the Report.

i. The review of the roles and functions of native title organisations currently being undertaken by Deloitte Access Economics

YMAC is currently conducting internal consultations with our Board of Directors, Regional Committees, Executive Management Team and other staff to develop our written submission to the Review Team. We are therefore not in a position to provide specific comments or recommendations at this stage.

Deloitte Access Economics has consulted directly with YMAC in face-to-face meetings and this provided an excellent opportunities to draw to the Review Team's attention existing and emerging challenges under the Government's current program funding and statutory arrangements under the *Native Title Act 1993 (Cth)*. We look forward to providing more extensive feedback and recommendations, particularly on funding and resourcing for Prescribed Bodies Corporate and on-country activities, through our written submission.

ii. The outcomes of the working group established to examine the tax treatment of native title payments

The Indigenous Community Development Corporation

While YMAC supports in principle the majority of recommendations made by the Working Group on tax treatments of native title payments (see also Attachment A being a joint YMAC/ABL submission on the Tax Laws Amendment (2012 Measure Nos 6) Bill 2012) and the Government's response, we also note the lack of detail supporting the proposals and the lack of consultation with Traditional Owners and their representatives. The proposed amendments will have significant and, potentially, unintended consequences in some circumstances. It will be vital that the legislative and other policy reforms are thoroughly canvassed with native title communities prior to being introduced. The following outlines our views on specific recommendations of the Working Group.

The introduction of the Indigenous Community Development Corporation entity will provide a positive alternative vehicle for native title parties seeking a combination of social and economic development outcomes, not just for current but also future generations.

This is something that we have already achieved in the design of benefit management structures built into comprehensive agreements between several Pilbara native title groups that we represent, and Rio Tinto and BHP Billiton. We anticipate that embedding the ICDC in law will clarify and streamline the establishment of tax free robust trust benefits management structure for native title groups, particularly those with small-to-medium income streams, reducing the overall administration and compliance burden for those communities.

Regulation of Private Agents

Over the last 12 months, YMAC has worked intensively with the National Native Title Council (NNTC) to develop proposals to regulate private agents other than Native Title Representative Bodies/Service Providers, involved in negotiating native title future act agreements. Please see **Attachment B** for further details on the proposals we have put to relevant Commonwealth Government Ministers, agencies and industry stakeholders, via the NNTC.

We are pleased to see that the Government has recognised the urgency of this issue for native title groups. Our current experience is that native title groups that are signatories to claim-wide, comprehensive agreements are extremely vulnerable to the divisive and unprofessional conduct of those seeking to represent the interests of individual claimants, rather than the wider native title community. This is not only undermining the successful implementation of agreements, but putting the native title claim process itself in jeopardy.

Register of Future Act Agreements

YMAC notes the recommendation of the Working Group to establish a process for the registration of section 31 native title future act agreements, and the Government's support in principle for such a register. We consider that benefits may follow from a S31 informed consent process where private agents other than Native Title Representative Bodies/ Service Providers are involved to ensure the interests of the Native Title claim group are protected. However, YMAC also notes that these agreements are often private commercial agreements between industry and native title parties. As such, they should be treated with the same level of confidentiality and respect as other agreements of this nature, to do otherwise would be to disrespect the wishes of traditional Owners in some cases to enter into private commercial agreements as any other person/entity with an interest in Land would seek to do.

Statutory Duty Model for Native Title Funds

YMAC needs further detail about this proposal before establishing a position. We agree there is a need for clarity that the native title holding community is the beneficial owner of funds generated by native title agreements, and that the named applicant is in a fiduciary relationship to their native title holding group. However, it is vital that a statutory trust does not simply become a default option for native title groups, or used by proponents or governments in an attempt to exert undue control over the management of benefits from agreements. This could result in an opportunity cost whereby funds remain locked in low risk investments that limit wealth generation for future generations.

Native title parties need to be provided with support and quality advice so they can fully realise the potential of benefits from agreements to drive economic development and reduce the incidence of intergenerational poverty among native title communities.

iii. The status of the Native Title Amendment Bill 2012

YMAC worked closely with the Attorney-General's Department and industry stakeholders for several years in an effort to build consensus on legislative reforms to improve the native title system. The failure of the *Native Title Amendment Bill 2012* to pass through the final stages of the Parliamentary process before the upcoming election is deeply disappointing, after such a lengthy incubation period. Please refer to our submission at **Attachment C** to the Attorney-General's Department on the Exposure Draft for our detailed position on the content of the Bill.

iv. The Attorney-General's announcement of the draft terms of reference for an Australian Law Reform Commission inquiry into native title.

The Government's announcement of a Review of the *Native Title Act 1993* by the Australian Law Reform Commission may provide some consolation to our members and native title claim groups, in the absence of broader amendments. YMAC notes that you and your predecessors have called for an independent review in almost every Native Title Report since at least 2008.

Recommendation 2.1 of the 2010 Native Title Report states:

> That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards. Further, that the terms of reference for this review be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Such terms of reference could include, but not be limited to, an examination of:
>
> - the impact of the current burden of proof
> - the operation of the law regarding extinguishment
> - the future act regime
> - options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements).[1]

In the 2011 Native Title Report, you wrote:

> 'Within the native title system there are significant obstacles to the full realisation of our rights, including, for example, the onerous burden of proof, the injustices of extinguishment, the weakness of the good faith requirements, and limitations on our

[1] Aboriginal and Torres Strait Islander Commissioner (2010), *Native Title Report 2010,* Australian Human Rights Commission, p.xii

ability to use our lands, territories and resources to develop and determine priorities for our own development.'[2]

The Terms of Reference set out two key issues as the focus of the Review:

i. Connection requirements relating to the recognition and scope of native title rights and interests, and

ii. The identification of barriers, if any, imposed by the Act's authorisation and joinder provisions to claimants' and potential claimants' access to justice, and access to and protection of native title rights and benefits.

YMAC welcomes the inclusion of the first issue relating to connection requirements and the scope of native title rights. This will provide an opportunity for the Government to properly consider the merits and practical implications of introducing a rebuttable presumption of continuity; a reform proposal suggested for many years by former Federal Court Judges and the Hon Robert McClelland MP, since 2009.

YMAC is disappointed, though, that our proposal that the Terms of Reference to inquire into the racially discriminatory doctrine of extinguishment was not taken up. This is a pervasive, system-wide issue that delays the claims resolution process and creates considerable cost and duress for all parties.

The circumstances prescribed by the Native Title Act in which the extinguishment of native title may be disregarded are far too limited in scope and in many cases unreasonably limits the area of land over which native title could be recognised.

The Commonwealth Government has already acknowledged the need for reforms to expand opportunities to disregard historical extinguishment. The *Native Title Amendment Bill 2012* included provisions to allow for the disregarding of historical extinguishment over parks and reserves under limited circumstances. Many stakeholders submitted during the public consultation period that these changes did not go far enough and the provisions should not depend on agreement by State governments.

In YMAC's view, the issue remains contested and merits an in-depth independent inquiry. We suggested the inquiry focus specifically on the operation of extinguishment in relation to pastoral improvements and Vacant Crown Land, over which non-exclusive possession leases have previously been issued. Disregarding extinguishment in these instances would go a significant way to delivering land justice for native title claimants.

To illustrate the perverse outcomes that can arise under the current regime, in one of the claims YMAC represents an applicant is facing the possibility that work he undertook as a stockman on a pastoral station years ago may be regarded as having extinguished his own native title. This is despite the fact that working on the pastoral station enabled this native title claimant to actively practice his culture and maintain his connection to traditional law and customs.

Uncertainty in relation to the operation of extinguishment also creates a significant burden for respondent parties. By including a reference to the operation of extinguishment, the Australian Law Reform Commission could have reviewed the cost and time consuming searches of historical tenure over land that State government parties undertake in order to resolve claims, and the intricate analysis of this historical tenure that is required to determine the existence and extent of extinguishment. As the Australian Institute of

[2] Aboriginal and Torres Strait Islander Commissioner (2011), *Native Title Report 2011,* Australian Human Rights Commission, pp19-20

Aboriginal and Torres Strait Islander Studies has raised in previous submissions to the Attorney-General's Department, 'Effectively, a potential dispute arises over each individual tenure granted over past 230 years. Regardless of whether these disputes take the form of negotiation or litigation, the time and cost associated with this aspect of the claims is significant.'[3] This issue has been raised recently by the judiciary and State Government in relation to Western Australian cases and merits independent review.

Finally, an inquiry into the operation of extinguishment could also explore ways to more constructively manage the potential compensation liability of State and Commonwealth Governments, thereby creating an additional incentive to speed up the resolution of claims and improve the quality of native title outcomes for all parties.

I trust that this information will be helpful in preparing the Social Justice and Native Title Report 2013. Please do not hesitate to contact me if you need anything further.

Yours sincerely

SIMON HAWKINS
CHIEF EXECUTIVE OFFICER

[3] Strelein, L. (2010), 'Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded in Certain Circumstances', Submission to the Commonwealth Attorney-General's Department, Australian Institute of Aboriginal and Torres Strait Islander Studies. Available at: http://www.aiatsis.gov.au/ntru/docs/2010historicalexting.pdf. Viewed: 26 June 2013.

ATTACHMENT A

Arnold Bloch Leibler

Lawyers and Advisers

Level 21
333 Collins Street
Melbourne
Victoria 3000
Australia

DX38455 Melbourne
www.abl.com.au

Telephone
61 3 9229 9999
Facsimile
61 3 9229 9900

19 December 2012

Yamatji Marlpa
ABORIGINAL CORPORATION

By E-mail
Private & Confidential

Ms Julie Owens MP
Chair
Standing Committee on Economics
PO Box 6021
Parliament House
Canberra ACT 2600

Your Ref
Our Ref ML
File No. 011749052

Contact
Mark Leibler AC
Direct 61 3 9229 9999
Facsimile 61 3 9229 9986
mleibler@abl.com.au

abl

Attention: Julie Owens MP

Dear Julie

Submission: *Tax Laws amendment (2012 Measures No 6) Bill 2012*

In your capacity as the Chair for the House Standing Committee of Economics in relation to the *Tax Laws amendment (2012 Measures No 6) Bill 2012* on the tax treatment of native title benefits we enclose for your and the Committee's review our joint submission on the *Tax Laws amendment (2012 Measures No 6) Bill 2012*.

We would welcome an opportunity to discuss the contents of our submission with you in due course.

Yours faithfully

Mark Leibler AC
Senior Partner
Arnold Bloch Leibler

Peter Seidel
Partner, Public Interest
Arnold Bloch Leibler

Simon Hawkins
Chief Executive Officer
YMAC

Michael Meegan
Principal Legal Officer
YMAC

JOINT SUBMISSION TO HOUSE STANDING COMMITTEE ON ECONOMICS

TAX LAWS AMENDMENT (2012 MEASURES NO 6) BILL 2012

PREPARED BY: ARNOLD BLOCH LEIBLER AND YAMATJI MARLPA ABORIGINAL CORPORATION

1 1 On 29 November 2012 the *Tax Laws Amendment (2012 Measures No 6) Bill 2012* (the **Bill**) was introduced to the Parliament. The Bill provides that, if enacted, native title benefits will be exempt from Australian tax. If enacted the changes will apply retrospectively from 1 July 2008.

1.2 The Bill represents a significant step towards achieving the policy intention behind Attorney-General Nicola Roxon's announcement at the National Native Title Conference in Townsville on 6 June 2012 that "*income tax and capital gains tax will not apply to payments from a native title agreement*".

1.3 In our view though, despite this significant step, further amendments to the Bill are absolutely necessary to fully realise this clear and unambiguous policy intention.

1.4 This Submission, which has been prepared by Arnold Bloch Leibler and Yamatji Marlpa Aboriginal Corporation, focuses on three areas of critical importance to the working ability of the Bill:

(a) the definition of "native title benefit";

(b) the definition of "Indigenous holding entity"; and

(c) the definition of "distributing body".

1 Definition of "native title benefit"

1.1 By the Bill, the exemption from income tax and capital gains tax will only apply to 'native title benefits'.

1.2 A "native title benefit" is defined in the Bill as an amount or non-cash benefit provided under certain specified agreements, to the extent that the amount or benefit relates to an act that would extinguish native title

or that would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native.

1.3 The definition of "native title benefit" in the Bill requires two things:

(a) there must be an amount or non-cash benefit provided under a relevant agreement; and

(b) the amount or benefit must relate to an act that would extinguish native title or that would otherwise be wholly or partly inconsistent with the continued existence, enjoyment or exercise of native. (For ease of exposition, we will refer to this 'act' as '**an act affecting native title**').

1.4 This two-step process does not at all properly reflect the clear and unambiguous intent of the Attorney-General Nicola Roxon's Media release of 6 June 2012 when she stated that "we will clarify that income tax and capital gains tax will not apply to payments from a native title agreement".[1]

1.5 The additional requirement for an amount or benefit to relate to an act affecting native title is also inconsistent with Example 1.8 in the Explanatory Material that appears to indicate (as is absolutely proper in our view) that no further inquiry is needed when an amount or benefit is made under an Indigenous Land Use Agreement (**ILUA**) or any native title related agreement.

1.6 In any event, the current drafting in the Bill is inconsistent with general native title commercial practice. In our experience ILUAs and native title related agreements very often do not include provisions that payments or amounts are being made in consideration for acts that amount to acts affecting native title.

1.7 As such this aspect of the Bill actually flies in the face of common commercial practice, which is the very opposite of what is being sought to be achieved here, as we understand it

[1] The Honourable Nicola Roxon MP, Attorney-General and Minister for Emergency Management, Media Release, "The Future of Native Title" 6 June 2012.

1.8 Further, an ILUA or a native title related agreement can cover past acts, as well as acts that amount to something less than an act of extinguishment or being wholly or partly inconsistent with the right or interest's continued existence, enjoyment or exercise. For example, an agreement may address issues of access or coexistence – both of which may not be wholly or even partly inconsistent with continued existence, enjoyment or exercise of native title rights or interests.

1.9 In addition, a requirement that a "native title benefit" will only be exempt from Australian tax to the extent it is an act affecting native title is not necessarily consistent with the application of the 'non-extinguishment principle', as defined in the *Native Title Act*.

1.10 There are also extremely strong policy reasons why the definition of "native title benefit" should not be a two-step process.

1.11 Native title agreements contain a wide variety of payment and benefit provisions, some of which may be expressly referable to acts affecting native title, whilst many others may be cast in more neutral language. Others still may be less clear on any such nexus.

1.12 If the test was intended to be a two-step process then potentially many years after the ILUA is registered or agreement is executed the Australian Taxation Office may question whether payments or amounts under an ILUA related to an act affecting native title. At best, confusion will abound, and at worst the ATO may assess the payments or amounts as subject to tax (and potentially penalties and interest), with litigation the likely result.

1.13 Such a result would singularly defeat the very reason why the tax laws are being amended here as a beneficial and positive measure.

1.14 It is obvious to us that the two-step test has no place in these amendments.

1.15 The definition of "native title benefit" should be changed to ensure that it applies to all benefits received pursuant to the relevant native title related agreement. The Bill should be silent on whether or not the

payment or amount relates to an act affecting native title. This will provide clarity and will ensure consistency with the policy intent of the government. In the result, it will avoid confusion and inevitable ensuing litigation, created by differences of interpretation.

2 Definition of "Indigenous holding entity"

2.1 A "native title benefit" is not assessable if received by an Indigenous person or an "Indigenous holding entity".

2.2 An "Indigenous holding entity" can be either a "distributing body" (see 3 below) or a trust, provided the beneficiaries of the trust **can only be** Indigenous persons or distributing bodies.

2.3 The use of the words 'can only be' results in overly rigid criteria for a trust to be an "Indigenous holding entity". For example, the following would seemingly not fall within the definition:

(c) a trust with a charitable unincorporated association or trust as a beneficiary; or

(d) a trust that has only Indigenous persons and/or 'distributing bodies' as beneficiaries, but the trust deed includes a general power to appoint additional beneficiaries.

2.4 From our work in this jurisdiction for nearly two decades now, we are aware of Indigenous entities that have entered into ILUAs and other native title related agreements where some of the benefits under that agreement are paid to a trust, and where the beneficiaries of the trust include a charitable trust (with a purpose to benefit an Indigenous community or communities). The trust that entered into the agreement would not be an "Indigenous holding entity" under the definition in the Bill.

2.5 Further, the definition would result in an immediate compliance burden on all trusts that seek to afford themselves of the tax exemption for native title benefits in the Bill. That is, all trusts would need to review, and possibly amend, the terms of their trust deeds to ensure all

beneficiaries are of the required type and there is not a general power to appoint additional beneficiaries. To the extent that an existing trust did not meet the criteria to qualify as an "Indigenous holding entity" the trust deed would need to be amended (if possible) or a new arrangement entered into. Difficult issues may arise under ILUAs and other arrangements if a new entity is required.

3 Definition of "distributing body"

3.1 The income tax legislation contains an existing definition of "distributing body". The Bill does not change this definition, except to the extent that the references to "Aboriginal" are replaced with "Indigenous person". If a "distributing body" receives a "native title benefit", the native title benefit is exempt from Australian tax.

3.2 The existing definition of "distributing body" is limited to incorporated bodies formed under laws that relate specifically to Indigenous persons.

3.3 We remain strong in the view that the existing definition of "distributing body" is **far too narrow in scope**, in that it prevents incorporated bodies, formed for the purpose of benefitting Indigenous persons, from being 'distributing bodies' where the body was formed, for example, under the *Corporations Act 2001* for the benefit of Indigenous persons, rather than under a law that relates specifically to Indigenous persons.

3.4 Many of the Indigenous organisations that we are associated and work with include companies limited by guarantee, where the 'not for profit' purpose or the object of the company is to principally benefit Indigenous persons. As it stands, under the existing definition of "distributing body" in the Bill, 'native title benefits' received by a company limited by guarantee under the *Corporations Act 2001* with a purpose of benefiting Indigenous persons would not qualify for the tax exemption. This is an anomalous outcome.

3.5 Further, many Indigenous organisations we work with do not necessarily want to be incorporated under laws that specifically relate to Indigenous persons, particularly under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

3.6 To prescribe, as the Bill does, that organisations that are empowered to benefit Indigenous persons must only be established under laws that specifically relate to Indigenous person risks being perceived as archaic, paternalistic and discriminatory.

3.7 Again, this seems to be anathema to what the Attorney General mandated was to be achieved when she made the announcement about the Bill at the National Native Title Conference in Townsville on 6 June 2012.

4 Conclusion

4.1 The Bill represents a significant positive step towards achieving the policy intention behind Attorney-General Nicola Roxon's announcement that "income tax and capital gains tax will not apply to payments from a native title agreement".

4.2 Despite this significant step, further amendments to the Bill are necessary to fully realise this clear and unambiguous policy intention.

4.3 We would be delighted to be given the opportunity to provide further detail on our concerns with the Bill at any time convenient to the committee.

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ATTACHMENT B

National Native Title Council

spirit of Change

Issues Paper

Measures to Address Unprofessional Conduct by Native Title Agents

Introduction

Members of the National Native Title Council (NNTC) are reporting an increasing prevalence of predatory behaviour by agents other than recognised Native Title Representative Bodies/Service Providers (NTRBs/NTSPs) seeking to represent Native Title Parties in the negotiation of future act agreements, Indigenous Land Use Agreements and other settlements contributing to the resolution of native title claims. This is particularly the case in resource-rich regions of Australia. For the purposes of this Issues Paper, we will refer to such agents as 'native title agents'.

A clear trend has emerged in terms of this behaviour which involves two scenarios.

Scenario 1

An agent will approach a member of a native title claim group that has had notice of a significant future act proposal. The agent will suggest that the relevant NTRB/NTSP is not securing for the claim group that quantum of benefits that the agent could secure (and) or that these benefits could be secured more quickly by the agent.

The agent will then facilitate a meeting of the Native Title Party (often of dubious legitimacy) to appoint them to undertake the future act negotiations. The negotiations conducted by the agent will not result in any overall higher level of benefits or more expeditious outcomes. However the agent will secure for themselves a proportion of the benefits; the balance is paid to the Native Title Party without regard for the structuring of these benefits to deliver long term economic development outcomes to the native title party.

Scenario 2

The second scenario involves the NTRB/NTSP representing the native title claim group in relation to the substantive native title claim proceedings in the Federal Court but a private law firm representing the same group in relation to future act negotiations and other cultural heritage matters. What is happening is that the NTRB/NTSP, in compliance with court orders, will prepare a connection report based on credible anthropological and other expert evidence to prosecute the claim to final resolution. Invariably, these reports will require the change group description to be amended to ensure the claim accords with the evidence and as such Applicants might be at risk of being replaced under s66B NTA.

In this scenario, NTRB/NTSPs are reporting that the agent (which in this context will be a private law firm) is prepared to ignore the connection report and advise the Applicant to change claim solicitors to ensure that the private law firm continues to receive instructions (and hence fee payments) from the extant Applicant in the non-court matters. In this scenario, the NTRB/NTSP will not fund the private law firm with the only consequence being that the money obtained in mining agreements on behalf of the broader native title claim group is then being transferred to the same agent to fund the claim that does not accord with credible evidence. Effectively, the agent is getting paid twice out of monies that should be for the benefit of the native title claim group; once, for undertaking the future act negotiation and, twice, to a maintain a claim that might not even accord with the evidence.

In this scenario, the gravest travesty of justice can occur as the Applicant may not even be members of the native title claim group according to the connection report; a clear abuse of process with the agent facilitating that outcome. There are at least three examples currently before the Queensland Division of the Federal Court of Australia where these issues have been or are currently being ventilated. A number of case studies illustrating this behaviour are set out at **Attachment A**.

Impact of Unprofessional Conduct

This behaviour is already generating significant negative legal, social and economic impacts for Native Title Parties. Driving these impacts is the divisive and disruptive effect of the behaviour.

Legal impact

NNTC members are seeing new fractures and disputes arising within Native Title Parties, which in turn are leading to further complexities and delays on significant decisions pertaining to claim business and the authorisation of agreements. This creates new challenges and pressures for NTRB/NTSP legal representatives and inevitably slows down any progress toward claim resolution.

Social impact

These new divisions are also creating real distress for community members, many of whom are senior Traditional Owners and have been waiting over a decade for recognition of their native title rights and interests. NTRBs/NTSPs have drawn on their expertise and experience to establish tailored governance arrangements appropriate to the native title context in order to prevent such confusion, handle disputes and ensure transparent and legitimate decision-making processes.

The unprofessional conduct by third party agents intervening mid-way through negotiation processes and native title claim work is only serving to undermine these efforts to strengthen governance and build leadership within Native Title Parties.

Economic impact

The predatory behaviour of third parties is jeopardising the capacity of groups to leverage their rights and interests for economic development. Any benefits that flow from native title agreements need to be managed collectively, for the benefit of the whole community. The new divisions and confusion described above will create uncertainty for industry parties looking for guarantees that financial benefits will be managed effectively and lead to sustained employment and business development opportunities.

Again, NTRBs/NTSPs have worked intensively with industry and government over the last decade have worked collectively to identify best practice and build the capacity of Native Title Parties in this area. The disruptive and divisive behaviour of third parties is undermining these achievements and threatening to significantly reduce the potential for native title to deliver real, practical economic outcomes for future generations of native title holders.

Current regulatory arrangements

Under s 203B(1)(a) and (e) NTRBs have functions in relation to their defined area to represent native title holders and claimants (collectively "Native Title Parties") in pursuing native title determination applications, compensation applications, future act agreements and Indigenous Land Use Agreements (ILUAs). In general these functions can only be performed at the request of the native title parties.

In performing these functions NTRBs are bound by the extensive regulatory regime contained in Part 11 of the NTA. In addition, the legal practitioners employed by NTRBs to undertake these functions are bound by the legislative and ethical standards applicable to the broader legal profession under the relevant professional conduct rules. Under s 203FE, Native Title Service Providers (NTSPs) are subject to essentially the same regulatory regimes, as are their employed legal practitioners.

Further, both NTRBs and NTSPs are subject to the prescriptive terms of their Program Funding Agreements (PFAs). The current PFAs include requirements going to (*inter alia*) consultation with FAHCSIA regarding key personnel appointments and accounting for "program generated funds" which would include fees or commissions arising from future act negotiations). The ability of FaHCSIA to withdraw funding from an NTRB/NTSP operates effectively as a further regulatory mechanism. Finally, decisions made under 203BB by NTRB/NTSPs are subject to external review pursuant to s203FB.

There is nothing in the NTA that requires native title parties to utilise the services of NTRB/NTSPs in pursuing native title determination applications, compensation applications, future act agreements and ILUAs. In addition, while a party can be represented in the Federal Court by a person other than a legal practitioner only by leave of the Court (s 85), there is no such limitation in relation to future act proceedings before the National Native Title Tribunal (NNTT). In practice the funding provided to NTRB/NTSPs to pursue native title determination applications and the "no costs" provision contained in s 85A ensures that, with few exceptions, only NTRB/NTSPs (or legal practices funded by NTRB/NTSPs) represent native title claimants in determination application and compensation application proceedings. The same is not true in relation to future act negotiations and agreements.

The current scheme of the NTA allows native title parties to appoint an "agent" (not being an NTRB/NTSP) in relation to future act negotiations and for that agent to secure for themselves a proportion of any benefits arising from those future act negotiations. In the case of future acts involving mining projects even a small percentage of the benefits arising from the proposals can represent a significant amount that would otherwise be available for the native title parties. In the event that these agents are a legal practice the only regulatory regime is that applicable under the relevant professional conduct rules. In the event an agent is an entity that is not a legal practice, even one that employs legally qualified staff, there is no regulatory regime.

IMPLICATIONS FOR THE COMMONWEALTH GOVERNMENT

On a simple analysis the situation described could be characterised as one of contestability or freedom to contract. On this analysis the native title party should be able to appoint any entity they chose as their agents in future act negotiations. However a number of factors militate against such a simple analysis. The unprofessional conduct NNTT members are observing currently has a number of serious policy implications for the Commonwealth Government and suggest that the area may be one appropriate for some level of regulation.

Major policy implications include:

- the costs of administration of the future act regime are a cost borne predominantly by Commonwealth and States/Territory Governments[1] and industry;

[1] Jurisdiction over land and resource management is vested in the State and Territories. Paramount

- the future act regime was established by the Commonwealth to reflect its perception of the concept of equality before the law under the *Racial Discrimination Act 1975* (Cth) and facilitated the delivery of benefits to native title parties;
- the extensive regulation regime of NTRB/NTSP was established (in part) to ensure best practice in future act negotiations;
- many native title parties may be yet to develop the governance capacity to make informed decisions as to the appointment of agents;
- Commonwealth broader policy objectives, including its commitments to reaching the Closing the Gap targets, are best served by ensuring thoughtful structuring of future act benefits;
- existing legal professional conduct rules are ill-suited to regulate relations "in the field" in the context of taking instructions from native title parties; ,
- the involvement of agents may delay the overriding imperative to expeditiously resolve determination applications; and

a lacuna in the NTA is being exploited whereby these agents are receiving financial reward from native title claim group monies but are only accountable to a proportionally miniscule group of people being those who make up the applicant (s61) or registered native title claimants (s253) whereas NTRB/NTSP do not charge the claim group for the same services and are accountable to all the people who hold or may hold native title (who, depending on the evidence, may or may not include the Applicant/registered native title claimants).These factors suggest that some form of regulation of the activities of agents in their involvement in future act negotiations may be appropriate. The question then becomes one of identifying an appropriate model for regulation.

POTENTIAL REGULATORY REFORMS

In broad terms, four models of regulation present themselves:

a) A prohibition on entities other than NTRB/NTSPs representing native title parties in future act negotiations;
b) Establishment of a system of registration of future act agents with registration dependent upon fitness and propriety tests (the 'fit and proper person' test) and satisfying prescribed requirements such as the demonstration of appropriate expertise, commitment to an enforceable code of conduct and Commonwealth scrutiny;
c) Regulatory limitation on the fees or commissions that may be imposed by agents arising from future act negotiations; or,

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jurisdiction with respect to 'people of any race' is vested in the Commonwealth. The NTA sought to give effect to State and Territory jurisdiction whilst securing a 'nationally consistent approach to the recognition and protection of native title': NTA 1993 s 207A(2).

d) A composite model involving elements of each of the above.

CONSIDERATION OF THE OPTIONS

Option a) – Prohibition

This option has the advantage of ease of implementation and also of utilising to best effect the previous investment of the Commonwealth in establishing the system of NTRB/NTSPs currently in place. Moreover, s203BB (5) permits the "briefing out" by NTRB/NTSPs to other persons which ensures adequate, ethical representation and assistance is given to native title parties where a conflict of duty and duty might arise. The disadvantages are that it may be perceived as an unnecessary reduction in contestability and may, due to the current funding constraints on NTRB/NTSPs and their limited ability to manage program generated funds, place excessive resource burdens on the current capacity of NTRB/NTSPs leading to delays in proposal finalisation.

Option b) – Registration

This option has the advantage of preserving contestability and expanding potential resources available to native title parties in future act negotiations. It has the disadvantage of requiring the allocation of resources in the establishment and maintenance of the register including those involved in developing appropriate standards for registration, enforcement of the code of conduct. In part these costs could be offset by the imposition of a registration fee. It should be noted that a similar model is utilised in the context of "migration agents", however the "market" in this context is considerably larger than in the context of native title future acts.

Option c) – Regulatory limitation on fees and commissions

This option also has the advantage of preserving contestability and expanding potential resources available to native title parties in future act negotiations. A similar approach is adopted in the context of fees charged by registered native title bodies corporate under ss 60AB and 60AC. It would though require identification (and enforcement) of the appropriate regulatory limit (what is a "reasonable fee"? Should a "scale of costs" approach be adopted?). Enforcement would require the development of an effective "audit" mechanism.

Option d) – Composite Model

While various elements of the foregoing options could be utilised to construct this model the following is illustrative. The model could include a prohibition on agents acting in future act negotiations unless the agent entity is registered with the relevant NTO. Registration

would be dependent upon whether an applicant is a 'fit and proper person'[2], demonstration of appropriate expertise and commitment to an enforceable code of conduct. The NTA could also impose civil penalties (differential amounts for individuals and bodies corporate) and/or injunctions for misconduct by an unregistered entity if that entity provides a service for a fee or reward that it knows, or ought reasonably to know, can only be offered under a registered status. Fees or commissions would be subject to a regulatory limit and could be audited as part of the NTO (re)registration system. Registration decisions made by NTRB/NTSPs could be subject to the existing processes of internal and external review. Effectively therefore the costs of regulation under this model are shifted to NTRB/NTSPs. Similarly to option b), some of these costs could be offset by the imposition of a (Commonwealth determined) registration fee.

Each of the foregoing options are feasible responses to the issue. Each option would require some level of legislative (or potentially regulatory) amendment. On balance it is considered that option d) minimises the resource implications to the Commonwealth while maintaining a desirable level of contestability and facilitating the maximum achievement of broader Commonwealth policy objectives.

Risk management

The main affected stakeholder group (outside of the native title community) is the legal profession represented by the Law Council of Australia (LCA). The LCA may see any system of registration as a limitation on legal practitioners' "right" to practise in a similar fashion to that organisations' objection to the requirement for legal practitioners to gain registration as migration agents. The NNTC is currently in discussion with the LCA in an effort to gain the LCA's support for proposals for regulation in this area.

Given the interests of resource companies in future act negotiations, it will be essential to bring the Minerals Council of Australia, and where appropriate State and Territory peak industry associations, into discussions on any regulatory and policy reforms. It is vital to ensure that any reforms are consistent with the cooperative approaches that NTRB/NTSPs have built up over the last decade and that industry understands the full implications of the unprofessional conduct we are observing on the successful implementation of native title agreements into the future.

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[2] Having regard to such considerations as whether an applicant is a person of good fame, integrity and character (the broad principles of integrity, competence, diligence and professionalism have already been spelt out by the High Court and full Federal Court in a number of cases), and whether any of the following events has occurred to them in the previous, say, five (5) years such as they have had the status of undischarged bankruptcy, served a term of imprisonment (whole or part), or convicted of an offence involving fraud or dishonesty.

ATTACHMENT C

Yamatji Marlpa
ABORIGINAL CORPORATION

Our Ref: GEN033
Office: Perth

19 October 2012

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

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

SIMON HAWKINS
CHIEF EXECUTIVE OFFICER