



Yamatji Marlpa

ABORIGINAL CORPORATION

Our Ref: GEN033
Office: Perth

28 June 2013

Native Title Unit
Attorney-General's Department
Robert Garran Offices
3-5 National Circuit
BARTON ACT 2600

Dear Sir/Madam

REVIEW OF THE *NATIVE TITLE ACT 1993* BY THE AUSTRALIAN LAW REFORM COMMISSION – DRAFT TERMS OF REFERENCE

Thank you for the opportunity to comment on the Draft Terms of Reference for the above review.

Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body for the Pilbara, Murchison and Gascoyne areas of Western Australia. The organisation has a representative area of almost one million square kilometres and represents 25 native title claimant groups, all with their own language, culture and traditions.

YMAC is a not-for-profit organisation run by an Aboriginal Board of Directors and provides a range of services to its members including legal representation throughout the native title claim process and future act negotiations; community and economic development, and natural resource management.

As you would be aware, YMAC has been working 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.

The Government's announcement of a Review of the *Native Title Act 1993* by the Australian Law Reform Commission will provide some consolation to our members and native title claim groups. YMAC notes that the Aboriginal and Torres Strait Islander Social Justice Commissioner called for an independent review in almost every Native Title Report since at least 2008.

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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, Commissioner Mick Gooda 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 ability to use our lands, territories and resources to develop and determine priorities for our own development.'²

The Draft Terms of Reference sets 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. 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.

With respect, however, YMAC considers the inclusion of the second issue regarding authorisation and joinder provisions a wasted opportunity. Section 84D of the Native Title Act was designed to allow the court to deal with issues arising with authorisation in a streamlined and efficient way. In YMAC's experience, this provision is largely working and not presenting significant issues for parties.

YMAC submits that it would be a much more valuable use of resources to amend the second issue in the Terms of Reference to inquire into the racially discriminatory doctrine of extinguishment. This is a much more pervasive, system-wide issue that delays the claims resolution process and creates considerable 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 determined.

The Commonwealth Government has already acknowledged the need for reforms to expand opportunities to disregard historical extinguishment. The *Native Title Amendment*

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

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

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 would encourage the inquiry to 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 review the cost and time consuming searches of historical tenure over land that State government parties must 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 Aboriginal and Torres Strait Islander Studies has raised in previous submissions to your 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.

Thank you again for the opportunity to comment on the draft Terms of Reference and please do not hesitate to contact me if you would like to discuss any of the issues raised in further detail.

Yours faithfully



MICHAEL MEEGAN
A/G 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/2010historicaexting.pdf>. Viewed: 26 June 2013.

