



Yamatji Marlpa

ABORIGINAL CORPORATION

Our Ref: GEN033
Office: Perth

27 September 2013

Deloitte Access Economics
Att: Native Title Review Team
PO Box N250 Grosvenor Place
Sydney NSW 1220

Dear Sir/Madam

SUBMISSION: REVIEW OF THE ROLES AND FUNCTIONS OF NATIVE TITLE ORGANISATIONS

Thank you for the opportunity to provide a submission to the above Review.

Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body (NTRB) for the Pilbara and Murchison-Gascoyne (Yamatji) regions of Western Australia.

The organisation has a representative area of almost one million square kilometres and represents over 20 native title claimant groups, all with their own language, culture and traditions.

YMAC is a not-for-profit organisation run by a Board of Directors comprising twelve Traditional Owners; six drawn from the Pilbara region and six from the Yamatji region. YMAC 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.

This submission provides a comprehensive overview of our current roles and functions (statutory and non-statutory), noting the challenges we encounter and opportunities arising through this work in Western Australia.

A summary of our key issues and recommendations can be found on the following page.

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Key Issues and Recommendations

1. Progress on a number of claims represented by YMAC has slowed due to a change in policy settings by the WA State Government, in particular the requirement to negotiate a whole-of-government State ILUA in parallel to a consent determination. If these delays continue, this will result in further resourcing pressures, with an increased need for Commonwealth funding to be redirected to preservation evidence hearings and contested litigation.
2. The Commonwealth Government should use its influence to encourage the WA State Government to adopt a more cooperative approach to claims resolution, providing meaningful feedback in relation to connection reports and not delaying consent determinations because of pending negotiations on the State's future interests in land.
3. A technically sound native title agreement is only the first step to achieving sustainable economic and social outcomes for native title groups, their communities and industry parties. NTRBs' statutory functions should be expanded to include implementation and compliance support for native title agreements. This is vital if native title communities are to grow intergenerational wealth over the long term, while preserving the integrity of their native title rights and interests.
4. NTRBs require adequate resourcing to support native title groups establish their PBCs and build capacity to be financially self-sustaining over the long term. NTRBs are best placed to undertake this work due to the extensive knowledge foundation that accumulates over the claims process, from connection research and understandings of intra-group dynamics, through to legal compliance and corporate governance requirements.
5. Unprofessional conduct by non-NTRB negotiation agents is jeopardising the progress of native title claims, the fair and equal distribution of benefits from native title agreements and creating tension and division among communities. YMAC supports previously suggested measures for regulation of negotiation agents, that include:
 - Establishing a register for negotiation agents seeking to act on behalf of native title parties, committing them to best practice standards, demonstration of appropriate expertise and a commitment to an enforceable code of conduct, and
 - A regulatory limitation on the fees or commissions and the kind of fees and commission (e.g. shares in native title benefits received) that may be imposed by negotiation agents arising from future act negotiations.
6. YMAC recommends that the Commonwealth Government consider extending NTRB's statutory functions to include heritage protection for native title groups, as this is integral to the protection and exercise of native title rights and interests.

YMAC urges the Commonwealth Government to recognise and leverage the extensive regional community networks that NTRBs have developed over the last 20 years. The long term relationships forged with Aboriginal communities throughout regional and remote Australia by NTRBs are an important asset that the Government should use to help strengthen local economies and preserve Aboriginal cultural heritage for future generations.

1. The unique and complex process of native title claim resolution

The path from claim registration to determination is unique for every native title group. A range of internal and external factors affect the length of time taken, the nature and strength of rights recognised, and the socio-economic opportunities that can be leveraged from those rights.

This is not simply a matter of the 'strength' of the connection evidence or the circumstances of contact history in that area. Rather, native title groups must constantly navigate their way through negotiations with competing land holders, changes in government, legislation and policy settings (including changes in appetite for negotiated outcomes) and changes in demand for land access, in light of fluctuations in global resource markets.

With native title rights being, for the most part, subordinate to competing land interests, positive outcomes for Traditional Owners cannot be secured through the legal process alone, but also via strategic stakeholder engagement and effective advocacy to industry and government.

YMAC's workload inevitably fluctuates along with these changes and pressures, requiring constant adaptation. This is compounded by the challenges of operating in remote and regional communities located across almost 1 million square kilometers. These challenges include attracting and retaining experienced staff, the high cost of renting office space, staff accommodation and travel.

Against this background, YMAC is successfully meeting and exceeding its statutory requirements. Our priority focus is to get the best native title outcomes for the groups we represent; that is, a positive determination. But we also work hard to secure cultural, social and economic outcomes wherever possible. We do this based on best practice developed over the course of 20 years. Over that time, YMAC has built a wealth of cultural and corporate knowledge. This is supported by the leadership and guidance of our Board and key Elders in our regions.

Currently we represent over 20 native title claimant groups within the Pilbara and Yamatji regions and provide the following services:

- Connection research and preparation of native title applications
- Assistance to native title groups in mediations, agreement negotiations, and other proceedings relating to native title
- Intra and inter-group dispute resolution, including for overlapping claims
- Planning and support for native title groups' transition to a Prescribed Body Corporate and other Aboriginal corporations
- Ongoing Prescribed Body Corporate support
- Agreement Compliance and Implementation
- Communications, stakeholder engagement and advocacy
- Natural resource management
- Economic and community development

1.1. Claim resolution

Despite a recent shift in policy focus by governments toward a 'post-determination environment', the WA Government expects that it will take another 20-30 years to resolve native title claims in WA. This fits with our recent experience. We have 10 connection reports lodged with the State and two expert reports with the Federal Court. The State has indicated that we should expect an increase in contested litigation in the coming years.

In 2010, the State Government introduced a new State Land Management Strategy, which has significantly contributed to the slow pace of claims in WA. An element of this strategy is a complex, whole-of-government template State Indigenous Land Use Agreement (ILUA). The State ILUA is now being put before native title claim groups at the late stages of their claim process often following the lodgement of connection evidence, but prior to any feedback on the assessment of that evidence. The ILUA seeks to address key land access and heritage approval issues for the State and mining and pastoral interests; however there is little incentive for native title groups to enter into the agreement. To date, the State has refused to fund these ILUA negotiations.

While there have been 9 native title determinations in WA this year, none have involved a State ILUA.

As a result of this slow pace of claim resolution, we are also seeing an increase in the need for preservation evidence hearings. Preservation evidence is the holding of early evidence of elderly or ill native title claimants. Unfortunately, with the claims process getting longer and more complex, it is becoming urgent for some native title groups to participate in such hearings.

Over the 2012-13 financial year, YMAC facilitated preservation evidence hearings for Kariyarra native title claim group and proceeded to trial for the Badimia claim (having previously conducted preservation evidence for Badimia in November 2010). Witnesses give their evidence in front of a Judge or Registrar and they are cross examined by the State Government's lawyers. This process usually takes place on country, making it a cost and time-intensive process that can be stressful for some participants. The Banjima trial subsequently resulted in a positive decision by the Federal Court in August 2013, which will result in a determination of native title on Banjima country in early 2014.

1.2. Connection Research

Connection research is conducted to aid groups in their pursuit of recognised native title. Boundaries, rules of membership, genealogies, land tenure, sites, society and traditional laws and customs are the primary foundations that connection reports cover. The process is large scale and involves archival research, field trips, claimant interviews as well as interviews with knowledgeable elders and review of all other relevant materials. The connection report provides details of the claimant group and map its position, both literally and theoretically, as it is situated within the country.

At times, in-house YMAC anthropologists assist with the production of the connection reports for the claims we represent. Alternatively YMAC contracts consultant anthropologists with the appropriate experience to author these reports. Once the report is

in the final stages it is legally reviewed and anthropologically peer reviewed before it is presented to the claim group before being submitted to the State. If it appears the claim will be litigated, often it is this report that will form the basis of the Expert Report for the Federal Court.

In late 2011, the WA State Government changed its approach to the assessment of connection reports and is reserving its right to withhold its position during mediation for consent determinations in the Federal Court. The State has adopted a difficult and intractable position regarding the assessment of connection reports. It is also no longer affording the same level of opportunity for NTRBs on behalf of their clients to provide additional anthropological and other information to address any concerns that it has in relation to the connection reports.

Unless the State changes its policy there is a likelihood that the Federal Court will continue to list matters for hearing, placing a significant strain on native title claimants and exceeding YMAC's financial and human resources.

1.3. Mediation and dispute resolution

YMAC actively participates in mediation as part of its commitment to resolving native title claims. These mediations have occurred with staff, consultants and also with the assistance of the National Native Title Tribunal (NNTT).

The process of mediation in native title by its very nature involves many parties. YMAC uses a range of strategies to assist in the mediation process including meeting separately with individuals and families at their homes or on traditional country. This can include the participation of in-house and consultant anthropologists and lawyers as required. Independent facilitators are also used with specific focus on alternative dispute resolution that can address the unique challenges native title brings to the claim groups we represent.

Native title mediation can be contrasted with mainstream mediation which often involves only two parties negotiating relatively discrete issues where there is common understanding of the issues, context and language. Native title mediation, on the other hand, often involves a clash of culture as claimants mediate issues relating to the resolution of native title claims, often in circumstances where the Native Title Act fails to accommodate the complex nature of the traditional law and culture as it relates to country.

YMAC has developed a deep corporate knowledge of these intra and inter-group disputes of native title groups.

1.4. Overlapping claims

In relation to overlapping claims, where appropriate YMAC participates in mediation with the native title groups it represents. YMAC has taken action to strike out or list matters for trial where it considers this is the most appropriate course of action to resolve outstanding native title claims.

YMAC will not provide assistance to a new claim that overlaps with an existing assisted claim without the consent of the existing claim. Once assistance is approved, YMAC will assess its priorities which will, in turn, determine the direction of its activities.

The type and level of assistance provided will be reviewed on an ongoing basis and will depend on a number of factors including:

- the need to comply with relevant Federal Court orders,
- the overall level of resources available to the organisation, and
- the ranking assigned to each claim through the claim appraisal and review process.

1.5. Certification

As part of its role as an NTRB, YMAC provides assistance with certification of native title claim determinations and ILUA registrations. Specifically, its functions include:

- to certify, in writing, applications for determination of native title relating to areas of land or waters, which are wholly or partly within the representative area, and
- to apply for the registration of an ILUA which certifies that all the persons identified as having native title interests in the area have authorised the ILUA's making.

YMAC has adopted a certification procedure in compliance with s202BE (2) of the Native Title Act.

1.6. Determining who our client is

The functions of YMAC include, under s.203BB of the Native Title Act, to assist persons who may hold native title (including by representing them or facilitating their representation) in proceedings relating to native title applications. Section 203BC requires that in performing those facilitation and assistance functions, YMAC must consult with, and have regard to the interests of, (amongst others) persons who may hold native title; and be satisfied that they understand and consent to any general course of action that YMAC takes on their behalf in relation to the matter.

Section 203BC(2) provides that such persons are taken to have consented to action if the consent was given in accordance with a traditional process of decision-making, or if there is no such traditional process then a decision making process which is agreed to and adopted by the group.

YMAC also has a dispute resolution function under s.203BF of the Native Title Act. That function involves assisting in promoting agreement between its constituents (which includes persons who may hold native title) about the making of native title applications and (amongst other things) the conduct of negotiations about future acts.

The conduct of native title claims under the Native Title Act raises unique challenges. A claim is a proceeding in the Federal Court of Australia, formally made by the "applicant", which usually comprises a number of individuals. Under s.62A of the Native Title Act, those persons may deal with all matters arising under the Native Title Act in relation to the claim. The Native Title Act requires that the claim be made on behalf of a "native title claim group", which must comprise all of the persons who, according to their traditional laws and customs, hold the common or group rights and interests comprising the particular native title claimed. The persons who comprise the native title claim group need not be named in the native title claim; it is sufficient that they be described in a general way, provided they

are described sufficiently clearly so that it can be ascertained whether any particular person is one of those persons. The members of the applicant must be “authorised” by all the persons in the native title claim group. Pursuant to s.66B of the Native Title Act, the members of the native title claim group can in certain circumstances replace the applicant.

YMAC provides facilitation and assistance to the applicant and native title claim group in respect of claims which are subsequently amended from time to time. This occurs as a result of research undertaken by YMAC pursuant to its representative body functions, and with the consent of the persons who may hold native title in country obtained in the manner referred to above.

In his judgment delivered on 28 August 2013 (*Banjima People v State of Western Australia* (No 2) [2013] FCA 868), contrary to the case that was put on behalf of the claimants, Justice Barker refused to make a finding that one of those 10 apical ancestors, Daisy, was Banjima. This means that those descendants of Daisy are not Banjima native title holders.

This decision highlights the peculiar nature of the work that native title lawyers in NTRBs perform and the unique challenges it poses from a legal and ethical perspective. There is a real question as to “who is our client” for the purposes of native title litigation and beyond – is it the applicant, the members of the native title claim group, all the persons who may hold native title in the particular area, or the persons who are ultimately determined to be the native title holders? In one sense, the full identity of the “client” NTRBs represent does not fully emerge until a native title determination is made. *Banjima* is one such example.

On one view, rules in relation to conflicts-of-interest, if applied to native title, could disqualify NTRBs from carrying on their facilitation and assistance functions to bring a claim to a native title determination. For example, if the NTRB was considered to be acting for each and every person who may hold native title in an area, and there was (as is often the case) conflict amongst those persons as to who are the actual holders of native title, then the NTRB could not act provide facilitation and assistance to all those persons to pursue a claim for recognition of a single communal native title.

NTRBs, by virtue of their facilitation and assistance functions, have a broader role in relation to those people that may hold native title including carrying out connection research which can result in changes to the description of claim groups from time to time and ultimately result in determinations for a group of people over an area of land which differs from the claim that was originally brought. It is vital that NTRBs (and their retained consultants) are protected in carrying out these tasks free from any allegations of conflicts-of-interest which would otherwise prevent this very important work being carried out.

To enable this work to continue it is suggested that the Native Title Act could be amended to make clear that NTRB’s and consultants retained by NTRBs who discharge the statutory functions of the NTRB in good faith with a view to facilitating the determination by the Federal Court of who holds native title in a particular area are not in conflict with any common law or equitable duty to persons who claim or claimed to hold native title in that area, and are not thereby prevented from continuing to provide facilitation and assistance to the determined native title holders.

1.7 Communications, stakeholder engagement and advocacy

While the native title claims process is ostensibly a legal one, the path to a determination involves ongoing consultation and negotiation with other land users and policy makers. In YMAC's experience, quality stakeholder engagement is vital to build and maintaining positive working relationships between native title groups and other land users, particularly the extractive industry, government and pastoralists.

Over the last decade, the investment YMAC has made in stakeholder engagement has led to tangible improvements in the speed and quality of future act agreement making and heritage protection.

We have developed internal and external communication tools, including an intranet for streamlined communications and records management across our regional offices. We have also developed a range of educational publications, newsletters and online resources providing information to Traditional Owners on native title issues, along with guidance for external stakeholders.

YMAC also makes a strong contribution to industry peak bodies and government liaison committees. For example, YMAC has been actively engaged in the WA Reference Group for the Commonwealth Government/Minerals Council of Australia MoU on Indigenous Employment and Enterprise Development. We are also represented on the Minerals Council of Australia's Mining, Gender and Communities Dialogue.

At the State level, YMAC is a member of the WA Alliance of Aboriginal Land Councils, which strives to provide a single interface for State Government Ministers and their agencies to engage with NTRBs/NTSPs. We are also active members of the Chamber of Minerals and Energy WA's (CMEWA) Native Title and Aboriginal Heritage Working Group. We made a significant contribution to the development of this group's new Native Title and Aboriginal Heritage Policy, which was launched by CMEWA in August 2013.

YMAC also produces reports and submissions to government on issues as diverse as amendments to the Native Title Act, reforms to the State Aboriginal heritage protection regime, carbon farming, mineral exploration and Constitutional recognition of Aboriginal and Torres Strait Islanders.

While the priority is to ensure as much as possible that our clients are able to make decisions based on free, prior and informed consent, we also play a key role in facilitating access for government and other land users to native title groups in order for them to meet statutory and other obligations for consultation. In other words, this work enables other land users to get on with their business.

1.8 Biodiversity and Culture Unit

Native title groups frequently ask about the opportunities available to participate in on-country activities during their claim and once native title has been determined. They also express aspirations to manage of their own affairs; develop commercial enterprises that utilise their country's natural resources; and provide meaningful training and employment for their people. YMAC has responded to these requests by developing a Biodiversity and

Culture Unit to provide opportunities for groups to actively engage in the management of their country and cultural heritage.

Natural resource management seeks to achieve a balance between economic and social development, and the need to protect biodiversity and to ensure the ongoing health and integrity of all land, marine and aquatic ecosystems. There is demand for expertise and skilled labour to carry out on-ground natural resource management and cultural heritage activities, as well as to provide technical and culturally appropriate advice.

The most visible form of these types of activity is the Caring for Country Aboriginal Ranger program, a successful collaboration between traditional owners and the State and Commonwealth Governments. However, the under-resourcing of this program has created limited sustainable employment opportunities, with a disproportionate amount of funding spent on expatriating workers to the environmental sites instead of hiring locally.

YMAC has facilitated other biodiversity and natural resource management programs, including:

Opportunities for Traditional Owners of the Midwest, Murchison Gascoyne and Pilbara regions under the Carbon Farming Initiative

Recording of Kuruma and Marthudunera Peoples' Traditional Ecological Knowledge

Nyangumarta Warran Indigenous Protected Area Consultation and Environmental Management Planning and Implementation

On-Country Knowledge Exchange with Central Desert Traditional Owners

Even though this important work is under-resourced, YMAC sees value in providing opportunities to its members and clients that have a flow-on benefit to other stakeholders, such as mining and pastoral interests. YMAC is currently negotiating projects in the following sectors:

Local councils and shires – managing and maintaining parks, gardens and conservation reserves, for example there are 65 conservation reserves in the Midwest Region that are managed by the City of Greater Geraldton.

Mining, oil and gas industry – natural resource management activities, such as monitoring and revegetation;

Pastoral industry – feral animal control, weed control;

Agriculture industry – feed stock, multi-purpose crops such as moringa; and,

Horticulture industry – community / market gardens for fruit, vegetables and native plants.

There are environmental challenges and associated business risks that continue to be driven by economic development tensions and competing land uses; increased population pressure; corporate social responsibility, shifts in regulation and greater scrutiny of environmental damage. Governments and business are dependent on environmental values for long term social and economic success, increasing the need for risk management, and the sustainable management and protection of natural resources and cultural heritage. The challenges of protecting natural resources, biodiversity and cultural heritage can be mitigated by utilising the experience, resilience and resourcefulness of traditional owners who have cared for country on-country for millennia.

NTRBs are actively engaging and working with government, non-government, primary industry and community organisations to provide the opportunity for relationships between government, primary industry and Aboriginal people over natural resources.

2. Native Title Agreements

One of the greatest ongoing challenges faced by YMAC is to how best to mitigate the negative impact of mining on our clients' traditional country, while also maximising the socio-economic benefits that can flow from the extractive industry to native title communities.

Despite the reported easing off of the mining boom, the level of future act activity across YMAC's region has remained high. In 2012-13, we received 787 notifications under section 29 of the Native Title Act. The right to negotiate automatically applied to 44 of these. The WA Department of Mines and Petroleum automatically asserts that the expedited procedure applies to all exploration and prospecting tenement applications. In many cases, native title groups instruct YMAC to lodge objections to the National Native Title Tribunal to the expedited procedure being applied.

The WA State Government previously provided funding assistance for future act officers to manage this workload and help expedite the mining approval process for Proponents. This funding was withdrawn in mid-2010 and has not been reinstated, despite mining activity remaining high. As a result, YMAC has had to cover the cost of two dedicated Future Act Officers through our Commonwealth Government program funding, supplementing this with income from other revenue streams.

Despite these challenges, over the last decade YMAC has successfully negotiated some of Australia's largest comprehensive native title agreements with mining companies undertaking large scale mining and infrastructure projects, including Rio Tinto, BHP Billiton, Fortescue Metals Group, Hancock Prospecting, Sinosteel and Atlas Iron.

2.1. Compliance and Implementation

YMAC and our clients genuinely share the Commonwealth Government's commitment to ensure native title agreements deliver real, practical outcomes help 'close the gap' in Aboriginal disadvantage. However, a technically sound native title agreement is only the first step in achieving sustainable outcomes for Traditional Owners, their communities and industry partners.

The real opportunities lie in capitalising on the commitments by industry and ensuring that all parties meet their obligations over the life of each agreement. This is vital in order for Traditional Owners to grow intergenerational wealth over the long term while preserving the integrity of their native title rights and interests.

High-value agreements finalised since 2011 with major resource companies such as Rio Tinto and BHP Billiton contain extremely rigorous investment and governance safeguards and commit the industry party to be active participants in implementation over the life of the agreement (between 40-100 years).

The quality of these agreements is a product of our native title groups and legal team building expertise in negotiations over a number of years. Industry has also increasingly needed a 'social licence to operate', given the high impact of their mining activity on native title land and the disparity between the profits generated by mining projects and the socio-economic conditions experienced by neighbouring Indigenous communities. These agreements are setting new standards for the negotiation and structuring of agreements to the point where we are now seeing elements of these agreements infiltrating negotiations with government and other industry parties.

YMAC's key message is that the Government's ultimate objective of 'closing the gap' on Indigenous disadvantage would be better achieved through a greater investment in monitoring and facilitating the implementation over the life of these agreements.

Once an agreement is finalised, our experience is that there is often a lack of quality and affordable practical support to transition native title parties from the negotiation into the implementation phase. Post-settlement, native title parties often do not have the necessary expertise or funds available to engage professionals to establish bank accounts and trusts.

Given the number of future act agreements concluded in the Pilbara and Yamatji region YMAC already employs two full-time compliance officers who have undertaken the task of auditing and recording compliance against agreements we have negotiated on behalf of our clients. YMAC has had to cover the cost of one of our Compliance Officers through our Commonwealth program funding, supplementing the other position through alternative income streams. YMAC has undertaken this work because of the critical need to ensure that claim group's benefit through agreements reached with mining companies.

Substantial work has already been undertaken in relation to auditing the agreements to follow up in relation to payments owing from mining companies to claimants and in relation to follow-up advice to claimants in relation to securing appropriate benefit management structures to secure those benefits.

The audit has revealed that the amount of work that could be undertaken in relation to maximising the non-financial benefits of these agreements is extensive, equivalent to another two Full Time Equivalent compliance officers in each region. In the absence of funding for these positions claim lawyers are being asked to take on this task in addition to the work they already undertaken by half of their clients. The lawyers' ability to undertake this task is affected by their existing obligations in relation to progress in native title claims and negotiating future agreements

NTRBs are not adequately funded to provide these fundamental services and it is not appropriate for other negotiating parties to undertake this on the behalf of the native title group, given the potential conflict of interest. This can result in a bottleneck whereby industry parties have nowhere to deposit financial benefits and/or those benefits cannot be distributed.

Dedicated NTRB resources are required to support the delivery of practical 'transition measures' that will enable financial and non-financial benefits to physically flow in the way the agreement intended. Transition measures include basic financial services to establish

bank accounts for the deposit of execution payments and training and support for groups to run a competitive tender process if they require quality and affordable independent trustees, financial and administrative services.

2.2. Corporate design and governance support

YMAC officers have developed expertise in relation to issues relating to compliance and implementation, the setting up of Aboriginal corporations and in relation to supporting groups who are setting up benefit management structures. Combined with our knowledge of the clients we represent YMAC is best placed to provide an efficient and effective service in relation to enabling our clients to close the gap from maximising benefits under this agreement

YMAC has also gained experience in assisting groups to set up Aboriginal corporations that act as agents in relation to the compliance and implementation of major agreements. Further, we have assisted groups in relation to accessing and setting up benefit management structures (e.g. trusts) relating to agreements and have developed expertise in relation to advising native title groups in relation to these matters.

YMAC currently relies upon S203BB (b) of the Native Title Act which by inference enables NTRB's to carry on this work. We consider it would be appropriate for S 203BB(b) of the Native Title Act to be amended to specifically state that the functions of NTRB's include:

"compliance and implementation of agreements and advice in relation to bodies corporate and matters relating to benefit management structures relating to those agreements"

3. Prescribed Bodies Corporate and local native title organisations

NTRBs require adequate resourcing to support native title groups establish their PBCs and build their capacity to be financially self-sustaining post-determination. Achieving this long-term sustainability will require looking beyond the native title sector for innovative social financing and service models.

NTRBs are best-placed to undertake this work due to the extensive knowledge foundation that accumulates during the claims process, from connection research and understandings of intra-group dynamics, through to legal compliance and corporate governance requirements. NTRBs require formal recognition of their role in facilitating this transition for native title groups moving towards a determination, especially where this is made more complex due to high future act activity on native title land.

Current funding arrangements only allow YMAC to provide limited support to PBCs. This includes:

- administering program funding for individual PBCs
- assistance with incorporation and compliance with any regulatory obligations
- assistance as required or on request, within the scope of program funding, such as:

- corporate identity development,
- meeting coordination,
- ongoing legal representation, and
- assistance with land management projects.

The needs of PBCs are much greater than this. We have the skills, corporate and cultural knowledge to do so much more. For example, YMAC is experiencing an increase in demand for assistance from native title groups to help them plan for the transition to a Prescribed Body Corporate. To this end, we are in the process of piloting new collaborative approaches to corporate governance design, consistent with cultural decision-making protocols and customary responsibility for country. We are also rolling out ground-breaking policies and procedures to enable the return of research material collected throughout the claims process back to native title groups, in accordance with instructions from those with relevant cultural authority. We have had strong expressions of interest from NTRBs across Australia for us to share the outcomes and lessons learnt through these pilots.

The aim of this work is to ensure the proper repatriation of research material to its rightful owners, but also the long-term physical preservation of this material (including digitisation where appropriate). This is sensitive work, given the various and complex cultural sensitivities surrounding certain types of information, as well as considerations of legal privilege. This is essential work though, as we anticipate that this process will allow for more proactive sharing of material for the purpose of community and economic development and the inter-generational transfer of cultural and family history.

While we have secured additional funding to run pilot workshops with two native groups this year, our funding will not allow us to meet demand. We need adequate resourcing to achieve economy of scale with this work and build the capacity of PBCs to implement and maintain their valuable archives into future.

3.1. PBC and Corporate Development Unit

Further, YMAC is developing a PBC and Corporate Development Unit that builds on the skills YMAC has already gained in relation to the setting up and development of Local Aboriginal Corporations (LACs) and PBCs in relation to the following:

- advice and assistance in relation to corporate design,
- advice and assistance in relation to setting up Aboriginal Corporations,
- developing collaborative design initiatives with Traditional Owners
- conflict dispute resolution service for members of Aboriginal Corporations,
- development of a Dispute resolution, collaboration and Management framework,
- corporate governance advice in relation to compliance and implementation for Aboriginal Corporations, including robust decision-making processes,
- advice and information for members of Aboriginal corporations and those seeking to become members,

- other YMAC services for Aboriginal Corporations

The development of this unit is based upon the substantial experience that YMAC has obtained in collaborative conflict management with groups to assist in the development and design of PBCs and other Aboriginal corporations. This corporate knowledge needs to be supported and adequately funded to enable Aboriginal corporations to effectively govern themselves, manage conflict collaboratively and succeed in their aims.

3.2. Planning for future support for PBCs

In addition to establishing a PBC and Corporate Development Unit, in the future YMAC also aspires to:

- **Act as a regional hub**, linking PBCs and other native title organisations to industry, community and government partners for commercial development opportunities, cultural heritage protection, and NRM opportunities. We have direct contact with around 5,000 Aboriginal people across our regions each year through meetings. This is an extensive network that Governments should take advantage of.
- **Provide a shared service environment**, to achieve scale and cost effectiveness in the delivery of financial services, client management systems, document management systems etc.
- **Provide training, early intervention and ongoing executive, strategic, legal and conflict resolution** support in relation to governance and compliance with the CATSI Act.
- **Knowledge Foundations**: Assist PBCs manage and utilise land management and cultural knowledge and research for future generations, including via new technologies.
- **Operational support and capacity building**: Support PBCs that want to transition to a point where they can independently manage the day-to-day administration of their corporation, including handling future act process, agreement compliance and implementation, heritage protection and drive cultural, community and economic projects.
- **Communication and public relations**: We are seeing a rise in demand from native title organisations (including PBCs) requesting media communications advice and services from YMAC. This includes corporate identity development, websites, newsletters and media relations.
- **Consumer Protection**: YMAC has an important role to play in terms of crisis-management, dispute resolution and preventative consumer education and protection. We are currently working with the NNTC and industry to develop measures to increase consumer protection for native title groups with mining agreements.
- **Advocacy**: YMAC is well placed to facilitate representation of PBCs and other native title organisations on a range of stakeholder forums. We can also assist with government submissions on policy and legislative developments.

While we try to assist wherever possible, the increased demand is outside of our funding and has stretched our capacity at times. With the right support, YMAC would be well placed to assist these corporations in these growth areas.

4. Private Agents

The position in relation to the negotiation of future act agreements varies widely across Australia. Some NTRBs play a very active role in relation to negotiating future act agreements on behalf of native title groups through internal staff and, in some cases, with appropriately authorised consultants who work alongside NTRB staff.

At the same time, many of the Proponents/mining companies ("Proponents") work with the NTRBs during the negotiation process (including providing funding) to ensure that native title payments arising out of future act agreements are placed into an appropriate benefit management structures for the benefit of the native title group into the short and long term.

The active role played by NTRBs representing the native title group helps secure benefits from future act agreements for the whole community in the long and short term. In-house lawyers act for the native title group either themselves, or assisted by consultants who are paid appropriate fees for their services.

Even for NTRBs that have historically played a greater role in negotiating future act agreements, the recent mining boom and improved benchmarks in compensation levels have attracted negotiation agents keen to profit from these processes.

4.1. Issues with non-NTRB negotiation agents

Over the last two years, YMAC and our clients have experienced the full effects of predatory and unprofessional behaviour by agents other than recognised the formally appointed legal or other representative seeking to represent native title parties (i.e. registered native title claimants and Registered Native Title Bodies Corporate) in the negotiation of future act agreements, ILUAs and other settlements contributing to the resolution of native title claims.

Problems have arisen when non-NTRB negotiation agents have taken shortcuts when negotiating future act agreements. In some cases negotiation agents fail to ensure that the applicant is appropriately authorised, fail to adequately seek instructions from the native title group to act, or intentionally manipulate a process for their own benefit. In those cases negotiation agents can secure disproportionate fees and allow individual payments to applicants, who together have little regard for what is required to set up an appropriate benefit management structure to benefit the native title group.

At the same time, some Proponents who are anxious to secure access to country do not conduct adequate due diligence processes to satisfy themselves that the negotiation agent is authorised to act, or is acting in the best interest of the whole native title group.

This often takes place at the front end of the process, with negotiation agents securing payments from Proponents on behalf of applicants, or in securing disproportionate fee arrangements long before any agreement is finalised, or any benefit management structures are set up. Individual applicants are susceptible to receiving individual payments in return for signing of future act agreements that fail to benefit the broader native title group.

YMAC's position is that:

- With good advice native title groups can make good decisions regarding the appointment of negotiation agents and in relation to the setting up of a benefit management structure;
- Unfortunately some individual native title group members and negotiation agents do take advantage of the future act process for personal gain;
- The behaviour of some negotiation agents seriously undermines the proper functioning of native title groups;
- With good advice and with proper resources, native title groups can limit the exercise of power by individual Applicants over other Applicants and the native title group more generally and take the necessary action to have them replaced if necessary via ss 251A and 66B of the Native Title Act; and
- Professional conduct rules do prescribe how legal negotiation agents should behave although enforcement procedures fail to respond quickly enough to the actions and impact of private agents on Traditional Owners.

This behaviour is already generating significant negative legal, social and economic impacts for native title parties. YMAC suggests that the issues referred to above call for some level of regulation or best practice standards to combat the behaviour of negotiation agents and protect the broader native title group community.

4.2. Regulation of Agents

These problems are multifaceted and complex. Native title groups are trying to navigate decisions that involve a combination of traditional and agreed and adopted processes. These processes are challenging and open to abuse.

YMAC suggests that the issues referred to above call for some level of regulation or best practice standards to combat the behaviour of negotiation agents and protect the broader native title group community. YMAC's observation is that Proponents do also contribute to the costs of administration of the future act regime and also have a responsibility in relation to these future act processes.

There is no one-solution to the challenge of ensuring negotiation agents act in the best interests of the native title group community and do not unfairly profit from the future act negotiations process.

YMAC's position is that the critical stakeholders in the process should play a part in ensuring that future act agreements are negotiated for and benefits flow to the broader native title group community. To assist that process YMAC supports the suggested measures that include:

- establishing a register for negotiation agents seeking to act on behalf of native title parties, committing negotiation agents to best practice standards, demonstration of appropriate expertise and commitment to an enforceable code of conduct; and
- a regulatory limitation on the fees or commissions and the kinds of fees and commission (eg share of native title benefits received) that may be imposed by negotiation agents arising from future act negotiations.

5. Aboriginal Heritage Protection

The last decade has involved one of the strongest mining booms in WA's history; one which, for native title groups, has meant a considerable increase in the extent and number of competing interests in their country, and consequently increased pressures on the protection and preservation of their cultural heritage.

Throughout the course of this boom, YMAC and the native title groups we represent have worked cooperatively with resource companies to deliver quality ethnographic and archaeological heritage surveys in line with their intensive exploration, construction and production work programs. Delivering 247 surveys, comprising 1428 survey days over 2012/13, and 241 surveys, comprising 2107 survey days in 2011/12, the administrative workload involved with this level of survey activity is understandably considerable, as is the stress on Elders whose extensive cultural knowledge is routinely called upon within the survey process, and in negotiations with Proponents.

However, the greatest challenges faced by YMAC and native title groups arise predominantly from the shortfalls of state level Aboriginal Heritage legislation, and the ineffective administration and compliance checking by state departments of that legislation in the context of so many financially powerful competing interests. Consequently, the negotiation of heritage protection measures with mining Proponents and participation in the heritage regime constitutes native title claimants' only avenues for effective protection of their heritage.

Western Australian Aboriginal Heritage legislation (the AHA) has not kept pace with the increased pressure from mining activity, nor the added complexities of multiple competing interests, including the recognition of native title. YMAC has actively lobbied for legislative change, providing an extensive submission to the WA Government's Review of the AHA, and has meanwhile continued to work constructively with industry and government to suggest ways to strengthen policy framework and reach positive negotiated outcomes. This is reflected in YMAC's contribution to the development of the Chamber of Minerals and Energy WA's Native Title and Aboriginal Heritage policy, launched in August 2013.

NTRBs are not alone in their concerns about the lack of protection for heritage under the WA regime. The National Native Title Tribunal has acknowledged that the 'protective regime' of the AHA is sometimes insufficient to protect Aboriginal Heritage: eg. Wilma Freddie (Wiluna Native Title Claimants) [2007] NNTTA 37, [34] and Banjo Wurrumurra (Bunuba Native Title Claimants) [2005] NNTTA 90, [33]-[34]. The Auditor General of WA has also criticised the heritage regime, noting the State Government 'has not actively monitored if operators are meeting...[heritage] conditions...[meaning] that...Aboriginal heritage sites could have been lost or destroyed without the State knowing or taking action': Western Australian Auditor General, Ensuring Compliance with Conditions on Mining (Report No 8, September 2011), p8 & 22.

As a result, the negotiation of strong heritage agreements on behalf of native title groups is one of YMAC's key functions in providing heritage protection and advocacy. However, as protection of Aboriginal heritage is primarily the responsibility of state governments, YMAC does not receive any funding for the delivery of heritage services under our Commonwealth Program Funding Agreement. In the absence of funding from the WA Government, YMAC

therefore has to recover the costs associated with heritage service delivery, from mining companies primarily, whose first interest is in extracting resources over protection of heritage. This not only creates a potential conflict of interest, but presents a situation where YMAC and native title groups are at a severe disadvantage in negotiations over heritage protection measures.

The majority of income YMAC generates from heritage services comprises direct payments to Aboriginal people participating in heritage surveys. The remaining income goes to payments for expert consultant anthropologists, internal staff coordinating surveys, administration costs and logistical expenses. As YMAC is a not-for-profit, charitable organisation any surpluses generated go back into the organisation to either reduce costs or to provide essential additional resources to resolve the backlog of outstanding native title claims, thereby reducing the burden on the taxpayer.

Compounding the pressures generated by the lack of funding for heritage services, funding for Future Act Officers to manage the escalating scale of mining activity was withdrawn by WA State Government in 2010 and not been reinstated. As a result, program funding has had to be redirected to address the high workload related to future act agreements.

Because native title rights are intrinsically linked with the protection of Aboriginal cultural heritage, YMAC encourages the Commonwealth Government to consider extending NTRB's statutory functions under the Native Title Act to include heritage protection for claim groups, under a sustainable funding model. We consider this would contribute to the long-term protection of native title rights and interests, as well as improved working relationships between all parties, and address the imbalance of power between Aboriginal people and entities with which they negotiate the sustainable and culturally sensitive use of their land.

YMAC suggests a policy response that:

- Addresses the responsibility for heritage protection implied by the NTA, and does not allow administration of that policy to be conducted solely by the states in conjunction with commercial interests.
- Realises the important role NTRBs serve in terms of heritage protection in light of native title.
- Provides an independent funding avenue to NTRBs to provide heritage and future act services, which alleviates the power imbalance created by much of this funding coming from commercial interests.

6. Conclusion

We trust the information provided in this submission has provided an insight into the diverse and unique nature of YMAC's work. The challenge of delivering native title and heritage services to native title groups across 1 million square kilometres is time consuming and labour-intensive. However, YMAC has proven extremely resilient and established itself across the Murchison, Gascoyne and Pilbara regions as a key institution, successfully navigating the pressures of industry and other land developments, while protecting the rights and interests of Traditional Owners.

A key to the success of the organisation is the depth and diversity of our professional experience and our ability to bring this to our work at a local, regional, national and even international level. While commentators have tended to lament from a distance the absence of any formal regional Aboriginal governance framework in Australia and the lack of capacity for Aboriginal people to manage their own affairs, YMAC tackles these issues and brokers solutions to such issues at the coalface every day.

The challenges of reconciling a European system of property law with diverse, constantly evolving traditional laws and customs do not magically stop at the point of a native title determination. In YMAC's experience, PBCs continue to rely on NTRBs to help manage inter- and intra-group disputes, using innovative and culturally appropriate approaches to mediation developed alongside native title groups, sometimes well over a decade.

YMAC continues to work collaboratively with industry and other land users to enable business and development to progress. The comprehensive agreements finalised between Pilbara native title groups and Rio Tinto and BHP Billiton over the last 2 years reflect the significant shift in attitude and behaviour on the part of both the extractive industry and native title organisations.

The potential for these agreements to lift Aboriginal communities out of intergenerational poverty is exciting. However, it is vital that a formal role be created for NTRBs to support and facilitate the implementation, monitoring and compliance with the terms of such agreements. Our extensive technical understanding of the terms of the agreement, together with our knowledge and understanding of the cultural sensitivities and inter-group dynamics within signatory native title groups, should be leveraged by all parties to ensure the aspirations of the agreements are met.

Native title is an imperfect legal framework and in many ways has failed Traditional Owners who are increasingly passing away before their native title rights are formally recognised. YMAC urges the new Commonwealth Government to adopt a collaborative approach with NTRBs and work together to speed up claims resolution across Australia and finally deliver real and lasting practical outcomes for native title communities.

Yours faithfully



SIMON HAWKINS
CHIEF EXECUTIVE OFFICER

Snapshots of our Work

Native Title Claim Resolution



On 25 May 2012, the Federal Court handed down a native title determination to the Nyangumarta and Karajarri communities across shared country near 80 Mile Beach in Western Australia.

The Nyangumarta/Karajarri joint determination resolves two overlapping claims of the Nyangumarta and Karajarri peoples, two different tribal groups who share traditional laws and cultural connection to the area. Justice North handed down the Federal Court's decision at an on-country determination at Anna Plains Station.

The Kimberley Land Council and the Yamatji Marlpa Aboriginal Corporation acted on behalf of the Karajarri and Nyangumarta claimants to negotiate native title across 2000 square kilometres of land and sea country across Anna Plains Station, a portion of Mandora Station and 80 Mile Beach, in the East Pilbara and West Kimberley regions of WA.

Kimberley Land Council Executive Board Member and Karajarri Traditional Owner Anthony Watson said the Nyangumarta/ Karajarri joint native title determination highlighted how two tribal groups could work together to achieve land rights.



Natural Resource Management

Joint Management of Eighty Mile Beach Marine Park

In 2011, consultation took place between the Nyangumarta people, YMAC and the Marine Policy and Planning Branch of DEC.

The program facilitated by YMAC and DEC was successful in raising awareness about marine parks and the need to

manage the coastal country for the future and with the input of Traditional Owners.

Nyangumarta Traditional Owners Janet Stewart and Nyaparu Rose attended the announcement of the Indicative Management Plan in Broome on the 30th of September 2011.



Nyangumarta Elders Janet Stewart (left) and Nyaparu Rose (right) with then Minister for the Environment, Bill Marmion

Indigenous Protected Areas

YMAC's project coordinator for heritage and environment projects. Tamara Murdock, has a degree with first class honours in environmental management.

She is currently working with the Nyangumarta people on Indigenous Protected Area consultations, with the Kurama and Marthudunera people to record ecological knowledge, and with the Nanda people for management of Kalbarri National Park.

Tamara also helps native title groups to understand environmental impacts of proposed mining projects, and offers professional assessments of companies' environmental protection measures.

In June 2013, YMAC provided funding for Tamara to attend the World Indigenous Network (WIN) Conference in Darwin, attended by around 1200 Indigenous delegates from 50 countries. The network encourages conservation, improved social cohesion, and increased economic opportunities.

Tamara has used her experience from the conference to organise a knowledge exchange trip for Traditional Owners to engage directly on these important issues.



Nyangumarta Elder Martina Badal on a Natural Resource Management Field Trip

Native Title Agreements

Kariyarra agreement with State Government, Port Hedland 2011



Kariyarra community members Donny Wilson, Diana Robinson and Kerry Robinson, with Regional Development and Lands Minister Brendon Grylls

The Kariyarra Traditional Owners signed an agreement with the Western Australian State Government to pave the way for much needed residential and commercial development in Port Hedland. YMAC is very proud to have helped deliver this outcome for the Kariyarra people and develop a platform for the community's future economic security.

Njamal Elders sign Joint Venture Agreement with FMG

The Njamal community and Fortescue Metals Group (FMG) entered a joint venture for the Northern Star tenements project on Njamal country.

YMAC, Njamal and FMG negotiated an agreement. FMG agreed to enter into a 50:50 joint venture with Njamal people. Under this agreement, the Njamal people act as the mine manager for the iron ore project.



Njamal elders Tony Taylor and Alice Mitchell

The agreement also achieved protection of Traditional Owner sites with exclusion zones placed on the sites to protect the sites.

YMAC is proud to have helped the Njamal Traditional Owners with negotiations to create commercial and economic opportunities for the Njamal community.

Historic Agreement between Pilbara Traditional Owners and

Rio Tinto

Over the last two years, five Pilbara native title claim groups have signed Australia's most comprehensive native title agreements with Rio Tinto. Another group is expected to sign soon. The agreements are a result of extensive negotiations between the four groups, represented by Yamatji Marlpa Aboriginal Corporation (YMAC), and Rio Tinto Iron Ore group.

The final agreement gives Rio Tinto surety for its operations in the area covered by the five native title claim groups:

- Nyiyaparli
- Puutu Kunti Kurrama and Pinikura
- Kuruma and Marthudunera
- Ngarlawangga (northern part of claim area).
- Yinhawangka



Women of the Puutu Kunti Kurrama and Pinikura Community

Under the agreement, the native title claim groups have negotiated a range of economic and non-economic benefits.

These include an income stream from mining on their lands, training and job opportunities, access to contracts for services for Rio Tinto and support for environmental and heritage activities.



Kuruma & Marthudunera community members at the signing of the Rio Tinto Agreement

The agreement also includes mining exclusion zones that recognize the importance of significant sites such as burial and ceremonial sites, as well as important water holes and ecologically sensitive areas.

Rigorous corporate governance and benefit management structures were being put in place to underpin the implementation of the agreements. This

includes the establishment of four local Aboriginal corporations to manage the agreements for each group and a broader regional corporation to advance the interests of Traditional Owners in the Pilbara.

Preservation Evidence

Evidence heard on country: Kariyarra preservation evidence hearing.

Preservation Evidence is held when there is an elderly or ill native title claimant. This evidence needs to be held early for the elderly or ill person.

Preparing for preservation evidence takes a lot of time and needs to be spent with witnesses to get information about the land and the Traditional Owners connection with country. This information is then preserved for the full and final trial for a native title determination.

YMAC worked with the Kariyarra Traditional Owners for the preservation evidence hearing that was heard on country during May 2013. YMAC is proud of assisting and preparing the Kariyarra preservation hearing with the Kariyarra community.

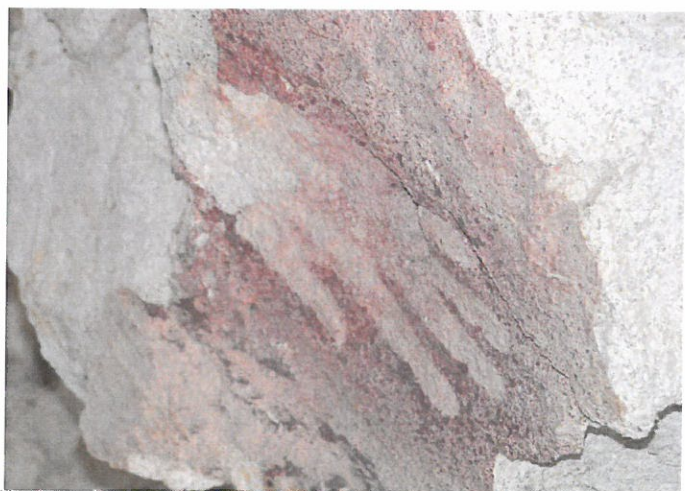


Cultural Heritage Protection

In 2011, the Weld Range in WA's Midwest joined other iconic Australian sites like the Great Barrier Reef, Uluru and the Sydney Harbour Bridge on the prestigious National Heritage List.

The Weld Range is situated approximately sixty kilometres north-west of the historic township of Cue in the Murchison district of Western Australia, and is of significant cultural importance to the Traditional Owners of the area, the Wajarri Yamatji people, as well as neighbouring Indigenous groups.

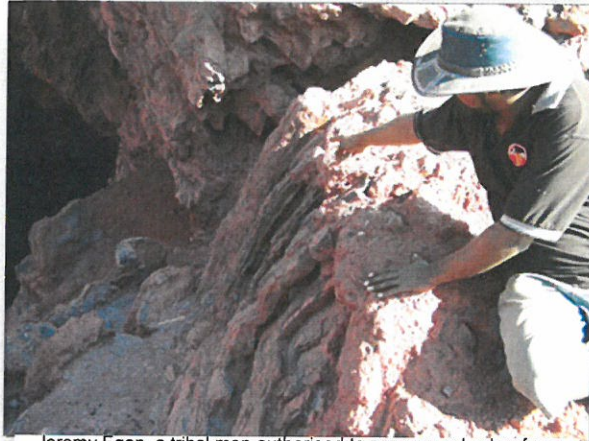
The 45ha area of the National Heritage Listing includes, Wilgie Mia, Little Wilgie Mia and the Marlu Resting Place. These sites contain



Hand stencil using red ochre from Wilgie Mia breakaway country Weld Range. There are over 64 registered art sites in the area being defined as the Weld Range, plus numerous unregistered sites.

sacred law grounds, dreamtime places, thousands of examples of rock art, extensive archaeological material, and the Wilgie Mia red ochre mine.

Ancient Ochre Mine Wilgie Mia is thought to be one of the world's oldest mines, with estimates placing it at about 27,000 years old. The heritage listed area includes the red ochre mine at Wilgie Mia (Thuwarri Thaa), the smaller yet significant ochre mines at Little Wilgie, as well as a yellow ochre mine further to the west.



Jeremy Egan, a tribal man authorised to procure red ochre from Wilgie Mia, seen here pointing out the red ochre powder.

Ochre from Wilgie Mia has long been prized by Aboriginal Australians as being of exceptionally high quality, and it formed an important part of the Indigenous economy through trade networks before European settlement. Today, as in the past, ochre is important to Indigenous Australians for its use in ceremonies, art, healing practices and its religious significance.

Yamatji Marlpa Aboriginal Corporation was proud to have assisted the Wajarri Yamatji people achieve the Listing. The

inclusion on the National Heritage List will

assist Wajarri Yamatji people to manage the area effectively, alongside the growing mining and tourism industries in Western Australia.

Publications

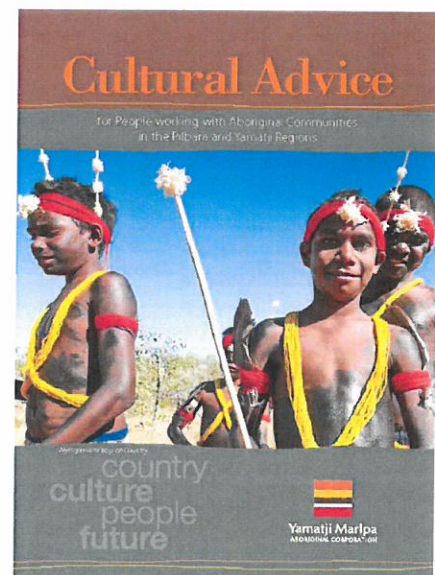
Cultural Advice Booklet

YMAC launched a Cultural Advice booklet for people working with Aboriginal people in the Midwest and Pilbara regions of Western Australia. This booklet was produced with the advice and guidance from Traditional Owners. The booklet emphasises that each native title group has their own unique culture and that the guide has been designed to give broad advice for meetings and on-country visits.

This guide is a starting point for Non-Indigenous people from the private sector or government. YMAC is proud to work with Traditional Owners, the private sector and government to achieve cultural advice and awareness.

Community Guide

YMAC has produced a Community Guide to outline the mission, values and services that YMAC offer for Traditional Owners. This Community Guide 2011 highlights the aims of the corporation as well as an introduction to



heritage services, legal services, community projects, country projects, exploration and mining for the general public.

Aboriginal Cultural Sites and Artefacts Booklet

YMAC has also produced an Aboriginal Cultural Sites and Artefacts booklet that establishes guidelines for companies, developers and the general public. This booklet serves to provide advice for the general public, developers or companies that are going on country or exploring country for mining purposes. YMAC is proud to engage in creating cultural awareness for Traditional Owners and the general public.

For further information please visit
www.ymac.org.au

