



# Yamatji Marlpa

ABORIGINAL CORPORATION

Our Ref: MM:CC  
Your Ref:  
Office: Perth

30 May 2013

Project Manager, Global Compact LEAD  
UN Global Compact  
Two UN Plaza  
New York NY 10017  
UNITED STATES of AMERICA

(by email [undrip@unglobalcompact.org](mailto:undrip@unglobalcompact.org))

Dear Sir or Madam

## Comments on *Exposure Draft of Guide for Business on Indigenous People's Rights*

The Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body (NTRB) for the Pilbara, Murchison and Gascoyne areas of Western Australia. The organisation has a representative area of almost one million square kilometres and represents 24 indigenous 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; cultural heritage protection advice and natural resource management.

### 1. General Comments

YMAC acknowledges and welcomes the United Nations Declaration on the Rights of Indigenous Peoples: A business Reference Guide, Exposure Draft, released on December 10, 2012 (hereinafter "**the Draft**").

YMAC supports the Draft and believes it to be a comprehensive and progressive initiative. The Draft reflects the need for businesses to understand the rights of Indigenous People and to develop policy and actions to protect Indigenous People's rights. Much of YMAC's time and resources is spent working with businesses towards this same goal and therefore we welcome the Draft.

YMAC would like to make the following comments and considerations for the Draft.

<b>Geraldton</b> 171 Marine Tce Geraldton WA 6530 PO Box 2119 Geraldton WA 6531 T (08) 9965 6222 F (08) 9964 5646	<b>Karratha</b> Units 4 & 5 26-32 DeGrey Place Karratha WA 6714 PO Box 825 Karratha WA 6714 T (08) 9144 2866 F (08) 9144 2795	<b>South Hedland</b> 3 Brand Street South Hedland WA 6722 PO Box 2252 South Hedland WA 6722 T (08) 9172 5433 F (08) 9140 1277	<b>Tom Price</b> Shop 2a, 973 Central Road Tom Price WA 6751 PO Box 27 Tom Price WA 6751 T (08) 9188 1722 F (08) 9188 1996	<b>Perth</b> Level 2, 16 St George's Tce Perth WA 6000 PO Box 3072 Adelaide Tce Perth WA 6832 T (08) 9268 7000 F (08) 9225 4633
---	--	---	--	---

## **2. Good Faith (page 22)**

YMAC suggests that the brief discussion of “good faith” on page 22 of the Draft could be elaborated on. In YMAC’s experience, over the last five years there has been a measurable shift in the approach of industry parties to negotiations with Indigenous groups in Australia, with the large majority resolved 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 Australia’s *Native Title Act 1993* but also their broader ‘social license to operate’.

YMAC is concerned that there is inadequate provision under the current *Native Title 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 s38(2) of the *Native Title Act* (which requires that the arbitral body can’t determine profit sharing conditions).

YMAC agrees with the suggestion at paragraph 12 of the comments by the Australian Lawyers for Human Rights (ALHR) Letter dated 24 May 2013. ALHR indicated that the Draft should include the following:

The requirement for ‘good faith’ consultation is central to the duty to consult, with its significance highlighted by Professor Anaya who argues that “in all cases, what fundamentally matters is that a good faith effort by the State is made to achieve agreement”, an observation equally applicable to businesses.

## **3. Free, Prior and Informed Consent (FPIC) (pages 24-26)**

YMAC endorses the ALHR’s point at paragraph 15 of their document that FPIC should apply to existing projects and agreements:

An area not covered in the Draft, and which should be, is the issue of FPIC in relation to existing projects and ‘agreements’. The need to address operations continuing without FPIC is obviously contemplated by the Draft’s:

- a. discussion of FPIC as not being a ‘one off’ process and that ‘businesses must ensure that they maintain FPIC throughout the life of a project’ (pages 24-25); and
- b. note that consent can be withdrawn (page 26).

Various courts and companies have recognised that earlier practices, which may have produced an ‘agreement’ on paper, often failed to represent any meaningful process of FPIC.

YMAC agrees with the ALHR’s stance that the Draft should identify that where the current operations of a business do not have the FPIC of indigenous people who are significantly impacted by those operations, the business needs to address this as a matter of urgency.

## **4. Consent / Right to say no (page 26)**

The consent discussion on page 26 of the Draft makes mention of “right to say no” / the right for Indigenous people to veto. YMAC believes that this is an important, contentious and complex issue that needs greater attention and further elaboration.

YMAC agrees with the ALHR’s point in paragraph 19:

The ‘right to say no’ is mentioned, but it is not clear whether the Draft is saying that



projects must not go ahead if people do say no. If there is no such veto, or there is not always such a veto, the Draft should explain what 'consent' does mean. This is a central issue and requires more detailed treatment. We note that Professor Anaya has indicated that FPIC is largely not a veto right (although this issue remains highly contentious). For example, Professor Anaya recently noted that he:

"regrets that in many situations the discussion over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that they could wield to halt development projects... [and that]... focusing the debate in this way is not in line with the spirit or character of the principles of consultation and consent as they have developed in international human rights law and have been incorporated into the Declaration".

The issue of FPIC and veto is difficult to address in the abstract. However, ALHR considers that the greater the impact of business on the substantive rights of an indigenous group, the greater the expectation that FPIC comprises a veto right for that group. Such an approach is consistent with the following comments from Professor Anaya.

"[w]here property rights are indirectly but still significantly affected, for example in the extraction of subsoil resources that are deemed to be under state ownership, the state's consultation with indigenous peoples must at least have the objective of achieving consent. If consent is not achieved, there is a strong presumption that the project should not go forward. If it proceeds, the state bears the heavy burden of justification to ensure the indigenous peoples share in the benefits of the project, and must take measures to mitigate its negative effects."

The uncertainty surrounding Indigenous People's "right to veto" has been a recurring issue for YMAC. Under Australia's *Native Title Act*, Indigenous groups don't have a veto over future development activities. A stronger provision in the Draft on the right to say no/right to veto would greatly assist in raising the standards and better aligning the rights of Indigenous people in Australia with those rights outlined in international law.

## **5. Foundation Principles (page 34)**

YMAC strongly supports the ALHR's point at paragraph 24 of their document that the Draft should:

Emphasise that business sometimes needs to exceed local laws in satisfying its responsibilities to respect indigenous people's rights. This may include instances where domestic laws do not reach the level, or cases conflict with, international standards.

An example of this is the *Aboriginal Heritage Act 1972* (WA), under which the government can grant permission for companies to destroy Aboriginal Heritage Sites against the wishes of Aboriginal people (s18). A major challenge for YMAC and our clients is that the *Aboriginal Heritage Act* has not been amended to recognise the introduction of the *Native Title Act* and therefore offers no direction on how the two pieces of legislation should properly interact. As a result, Aboriginal groups have had to endeavour to negotiate agreements with governments and companies, about heritage protection and management, rather than any consistent and workable legislative framework.

## **6. Compensation (page 44 -45)**

YMAC supports the ALHR's position on compensation at paragraph 33 and 34 of their document. We agree that businesses need to consider comprehensive compensation packages beyond financial benefits that facilitate and strengthen capacity for self-

determination and economic independence.

YMAC has worked extensively with large mining companies over the last decade to raise standards in agreement making. This includes moving beyond 'best endeavours' clauses to binding commitments for education, training and employment opportunities.

YMAC works to ensure agreements between businesses and Indigenous People offer greater heritage protection, participation in decision making and economic opportunities not afforded under Western Australia's laws about Aboriginal heritage and mining and the national *Native Title Act*.

An agreement between Rio Tinto Iron Ore (RTIO) and four Aboriginal groups is a good example of leading practice, which includes providing:

- Genuine profit-sharing from industry activity on native title land
- Binding commitments to deliver training, employment and business development opportunities
- Support by businesses for the recognition of native title
- Consultation and enhanced protection for heritage and the environment
- Strong, transparent governance arrangements, and
- Formal commitments to implementation by the business and the native title groups over the life of the businesses operations

## **7. Self-determination, self governance and nationality (page 36)**

YMAC supports and acknowledges the comment made on page 5 of the Grand Council of the Crees (Eeyou Istchee) letter dated 7 April 2013. The Grand Council of the Crees explain why the Draft should recognise that Indigenous people's governance goes beyond mere "internal or local affairs" which is identified in the Draft.

## **8. Spiritual and Material rights of Indigenous Peoples (page 77)**

YMAC agrees with the Grand Council of the Crees suggestions on page 9 of their document that Indigenous People's spiritual and material relationships should be acknowledged:

Other provisions in UNDRIP, especially those relating to lands, territories and resources make clear that there are also significant material aspects to Indigenous people's rights. Thus, it would be beneficial if the "Practical suggested actions" would highlight both the spiritual and material relationship.

If you have any questions regarding this letter, please contact Dr Christina Colegate who is YMAC's policy officer:

E: [CColegate@ymac.org.au](mailto:CColegate@ymac.org.au)

T: (+618) 9268 7000

Yours faithfully



**MICHAEL MEEGAN**  
**ACTING CHIEF EXECUTIVE OFFICER**