Yamatji Marlpa
ABORIGINAL CORPORATION

KNOWLEDGE PARTNERSHIPS

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Office:
Date: 22 February 2018

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Dear Sir/Madam

REF: REFORMS TO THE NATIVE TITLE ACT – OPTIONS PAPER SUBMISSIONS

In November 2017, your department produced an Options Paper titled 'Reforms to the *Native Title Act 1993* (Cth)'. It sets out, and calls for stakeholder views on, various options to amend the *Native Title Act 1993* (Cth) ("**NTA**").

Yamatji Marlpa Aboriginal Corporation ("**YMAC**") supports some, but not all, of the options to amend the NTA. The particulars of YMAC's views are set out below. All page references are to the PDF version of the Options Paper.

Section 31 Agreements

1. YMAC supports the proposal to confirm the validity of section 31 agreements made prior to the *McGlade* decision (Question 6, page 1). Furthermore, the amendments should extend to validating post-*McGlade* section 31 agreements.
2. As regards Question 2 (page 6), YMAC does not support any of the amendment options on page 5. Instead, YMAC submits a modified version of Option 3, namely, section 31 agreements must be –
   a. Signed by a majority of the members of the applicant, *and*;
   b. Approved by a process of authorisation agreed and adopted by the claim group/common law holders for approving such agreements.

   For clarity, YMAC does not support Option 3 as it stands because it would be too onerous if it required claim groups/common law holders to authorise each section 31 agreement.

Authorisation of Applicants

3. YMAC supports the proposals to –
   a. Allow claim groups to define the scope of the authority of the applicant (Question 3(a), page 9);
   b. allow the composition of the applicant to be changed in circumstances where a member is unwilling or unable to continue acting, or where the terms of an agreement provide for it, through an application to the Federal

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Court without going through the process required by section 66B(1)(b) (Question 3(c), page 9), and;

c. Impose a statutory duty on applicants to avoid obtaining benefits at the expense of native title holders, rather than imposing a common law fiduciary duty (Question 3(d), page 9).

4. However, YMAC does not support the proposal to clarify that an applicant can act by majority unless the claim group specifies otherwise (Question 3(b), page 9). The threshold for authorising applicants' actions should only be reduced if additional safeguards are introduced. Therefore, YMAC supports a modified version of the proposal, namely, applicants can act by majority if –

   a. There has been compliance with a process of authorisation agreed and adopted by the claim group/common law holders for approving such actions/decisions, *or*;

   b. The claim group has specifically decided that the applicant can act by majority (the safeguard is that this is an 'opt in' rule, whereas the proposed amendment is an 'opt out' rule).

The reason for requiring groups to opt in is because the groups may have appointed applicants and given them authority on the basis that they expect that each applicant represents particular families or people who speak for particular areas and do not wish those people's wishes to be overridden by a majority vote.

5. YMAC agrees with Proposal A6 (page 22) that these amendments "*should only apply to matters that come before the Court after the date of* [their] *commencement*"; the amendments should not reopen disputes about authorisation or past section 66B applications decided on the law of the time.

6. However, Proposal A6 does not clarify whether the amendments would apply –

   a. Only to new *claims* that come before the Court after the amendment's commencement ("**New Claims**"), or;

   b. To New Claims and also to new *steps* within existing claims where that step is brought before the Court after the amendment's commencement, such as, for authorisations of replacement applicants, new future acts and agreements etc. ("**New Steps**").

   YMAC submits that the proposed new authorisation provisions should apply to New Claims and to New Steps. However, existing limitations on authority and existing mechanisms to change applicants placed by the claim group members should remain after the amendments' commencement unless and until changed by the claim group members under their usual processes. For example, if, claim group members have resolved that all applicants have to all agree to decisions, then that needs to stay in place unless or until the claim members change it to allow people to act by majority only.

Agreement-Making and Future Acts

7. YMAC supports the principle of creating alternative agreement-making mechanisms, including allowing Prescribed Bodies Corporate ("**PBCs**") to enter contracts about some minor matters that do not require common law holders' consent (Question 4, page 12) subject to comments below.

8. In relation to Proposal B4 (page 24): YMAC does not support simply amending s24LA to allow the doing of low impact future acts following a determination of native title. We note that the concern is that otherwise ILUAs may be

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required for low impact future acts. YMAC proposes an alternative provision that would allow a low impact future act to be done in circumstances where an agreement has been reached between the relevant parties, without the need to comply with ILUA processes. This could be done by way of the alternative agreement-making mechanisms, perhaps formalised by lodging a standard agreement in a similar way to how s31 agreements are handled.

9. Alternative agreement making mechanisms should not apply to the decision to contract out of section 211 provisions, future act nor compensation provisions. These decisions should involve all common law holders. Therefore, they should occur only by way of an ILUA, or should not be allowed at all.

10. As regards Question 5 (page 14), YMAC supports all proposals in Attachment C (page 25), *except* for the following –

    a. Proposal C4. (It is obviously acceptable to remove the requirement for PBCs to consult with Native Title Representative Bodies ("**NTRBs**") on native title decisions where the PBC is represented by NTRB lawyers and avoid any need for duplication. However, in other circumstances, there is still merit in requiring PBCs to obtain NTRB advice because the NTRB may have dealt with similar negotiations and agreements and may be able to provide useful information and may also be more aware of the relevant issues);

    b. Proposal C9. There needs to be more of an overhaul of the provisions of s24MD (6B). That section sets out requirements to consult. However, if the consultation does not take place, it is unclear what the remedy is. The Independent Person in WA has indicated that he cannot adjudicate the question of adequacy of the consultation. On the Proposal C9, if the native title party who has objected wants s24MD(6B) complied with would have no choice but to refer for an adjudicated hearing on the merits when all they wanted was to be consulted as required under the Statute. YMAC recommends that s24MD(6B) be remodelled to a scheme to provide that the act can be done if the Independent Person decides that it may be done or if the objection is withdrawn, but that the Independent Person cannot proceed to decide on the merits unless the consultation requirements have been complied with first. This is similar to the process where negotiations in good faith have to occur in the right to negotiate provisions and the Tribunal cannot proceed to determine the matter if that negotiation in good faith has not taken place.

    c. Proposal C10 as claimants or often do not have facilities to receive electronic notices). Naturally if PBCs wished to provide an electronic address they could do so.

Transparent Agreement-Making

11.

    a. YMAC supports the creation of a register for section 31 agreements (Question 6(a), page 16).

    b. However, the contents of ILUAs and section 31 agreements should not be made publically available (Question 6(b), page 16).

Indigenous Decision-Making

12. YMAC supports the proposal to allow claim groups and native title holders to determine their decision-making processes, rather than mandating the use of a traditional process where one exists (question 7, page 17).

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Claims and Resolution Process

13. As regards Question 8 (page 18), YMAC supports all proposals contained in Attachment E (page 29), *except* the following –

    a. Proposal E1 as the applicant should not be forced into an inquiry process that could be expensive and time-consuming and may not result in any final determination of a matter;

    b. Proposal E2. This proposal would only be acceptable if persons appearing before the National Native Title Tribunal ("**Tribunal**") maintain the right to refuse to answer questions or produce documents: (1) on the basis that doing so would waive privilege, and; (2) on public interest grounds), and;

    c. Proposal E5. (The bringing of an application is merely a mechanical process which has no impact, negative or otherwise, on common law holders. Therefore, consultation and consent of common law holders should be required only if a decision is made to resolve, settle or concede a compensation application).

14. YMAC submits an additional amendment to the NTA's claims and resolution provisions, specifically sections 47-47B. Currently, if sections 47-47B become applicable only after the native title claim has been lodged, the native title claimant must lodge a new claim to obtain the benefits that these sections confer. This is a waste of resources. Therefore, sections 47-47B should be amended such that they can apply at any time up to the hearing or consent determination of the claim.

Post Determination Dispute Management

15. As regards Question 9 (page 20), YMAC supports the proposals contained in Attachment F (page 31), *but* with the following qualifications regarding –

    a. Proposal F3: the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) ("**CATSI Act**") should allow a reasonable time for PBCs to include rules for resolving disputes between members in their rulebooks. Alternatively, the CATSI Act could prescribe a default dispute resolution procedure which must be used by those PBCs that did not prescribe their own rules within a reasonable time. This would also mean that PBCs would not have to amend their rules if they find the default procedure satisfactory.

    b. Proposal F4: YMAC supports this proposal in principal, but emphasises that there must be continued scope to expel or limit the role of a member for misbehaviour.

    c. Proposal F7: YMAC does not support this proposal as it is too onerous. In the alternative, if Proposal F7 is introduced, it should only apply prospectively.

    d. Proposal F9: This requirement may be too onerous for smaller and impoverished PBCs. Accordingly, if introduced, it should only apply to applications and investments of native title monies exceeding a certain amount (for example, $1 million).

16. YMAC submits an additional proposal in relation to post determination dispute management. The *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) should be amended to clarify that common law holders can delegate to a smaller group or the PBC's Board the ability to make decisions on certain classes of "native title decisions" (for example, concerning exploration or prospecting licences) without needing to consult common law holders.

Attachment G – State and Territory Proposals

17. YMAC *opposes* the following proposals in Attachment G (page 35) which have the effect of reducing the already-limited rights of native title holders and impose onerous responsibilities on them, –

    a. Proposal G1. PBCs are often not well-resourced and it is unreasonable to expect them to lodge expedited procedure objections in such a short time as 35 days. Allowing a longer time may also enable the parties to reach a resolution that may not require objections to be lodged at all.

    b. Proposal G2. It is often difficult to say what is a minor defect and what is not a detriment to a native title party and may result in more argumentation. If the parties reach an agreement, then a defect in the s29 notice may no longer matter.

    c. Proposal G3, s29 notices should not be by email unless the party opts for this by registering an email address.

    d. Proposal G8. The public housing provisions should not be extended beyond 2020. An alternative could be to provide for a simpler mechanism than ILUAs as indicated in relation to Q4 above.

    e. Proposal G9. The taking of rights and grants of the new interest in land may be separate acts and need separate treatment.

    f. Proposal G10 –it is not appropriate to keep expanding the range of matters taken out of the right to negotiate process.

    g. Proposal G11. Notices should go to both representative bodies and claimants to ensure that notices are received.

    h. Proposal G14 -validating legislation should go through the future act processes, and;

    i. Proposal G15 -renewals that are not covered by sections 26D (1) or 24IC should go through the right to negotiate processes.

18. As regards Proposal G6, limitations on applicants' scope of authority should not be recorded on Form 1. Such limitations may change from time to time and Form 1 should not have to be amended to reflect these changes. Instead, the Court or the Tribunal could establish and manage a separate register recording limitations on the scope of applicants' authority.

19. Lastly, it is unclear what exactly is being proposed by Proposal G13. In any event, section 211 must contain protections for native title rights against government regulations such as requiring licences for hunting with firearms in national parks or hunting endangered species etc.

Next Steps

Thank you for considering these submissions.

We look forward to receiving the forthcoming exposure draft bill for our further review.

Yours sincerely,

Simon Hawkins

Chief Executive Officer

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