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Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
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Re: Submissions on the Native Title Amendment (Reform) Bill 2011

Cape York Land Council (CYLC) appreciates the opportunity to comment on this Bill, as part of the Senate's Legal and Constitutional Affairs Legislation Committee Inquiry.

We note that the bill was introduced into the Senate by Senator Rachel Siewert, Australian Greens, on 21 March 2011, and aims to "enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples" by introducing reforms in relation to the barriers claimants face in making the case for a determination of native title rights and interests, and procedural issues relating to the future acts regime.

CYLC agrees that the *Native Title Act 1993* (Cth) (the Act) has failed to deliver on its initial intent to provide meaningful rights and a basis for economic and community development for Aboriginal and Strait Islander people. We believe that there are a range of reasons for this failure, including the various amendments made to the Act since its inception which have effectively "wound back" native title rights and potential benefits. We support the Bill as a step in the right direction to start addressing the issues and improving the native title process.

We strongly support the need for simpler legislation to produce more meaningful outcomes in a more timely fashion, and we submit that the amendments

proposed will assist in achieving that. It is our experience from 18 years of assisting native title groups with their claims that significant amounts of time, money and resources have been expended for outcomes that in many cases have so far made little difference to the lives of those who should have benefitted.

Item 1

CYLC supports the insertion of an additional object into the Act to acknowledge the central principles in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and to provide for them to be applied in decision-making under the Act.

We hope that this will encourage decision makers, particularly governments, to exert greater efforts in ensuring that "consultation" with Indigenous people is not just window dressing.

Item 2

CYLC supports the proposed amendment of paragraph 24MB(1)(c) to refer to "effective" protection or preservation of areas or sites of significance to Aboriginal Peoples or Torres Strait Islanders. CYLC has made submissions in the past in relation to State and Federal reviews of legislation dealing with Indigenous cultural heritage, which raise concerns about the effectiveness of many of the provisions.

Item 3

CYLC supports the proposed amendment of paragraph 24MD(2)(c) (which reinstates the previous wording of the Act) to provide that the act of (compulsory) acquisition does not extinguish native title, only the act done in giving effect to the purpose of the acquisition.

If a compulsory acquisition does not proceed to its intended purpose, then it is appropriate for native title to remain in existence.

Item 4

CYLC supports the proposed repeal of subsection 26(3), so that certain procedural rights are available in relation to acts occurring over the sea. CYLC represents Indigenous groups who hold determined native title and/or assert the existence of native title rights and interests in offshore areas. The right to negotiate should extend to those areas, particularly in light of increased future act activity in offshore areas.

Items 5 to 9

CYLC supports the proposed expansion of the current requirements of the Act for parties to negotiate in good faith in relation to future acts by:-

- providing clarification of the meaning of "negotiating in good faith" and requiring parties to do so for <u>at least</u> 6 months;

- placing the onus of proof on the party asserting that they have negotiated in good faith; and
- requiring that a party comply with the requirement to negotiate in good faith before applying to the arbitral body under section 35.

CYLC has in past submissions to the Federal Government raised concerns about the way in which the right to negotiate has operated in practice, with some future act proponents failing to make reasonable (or even any) efforts to reach agreements with native title parties. We consider that the criteria proposed reflect a reasonable but not onerous level of participation in a negotiation process.

CYLC has represented native title groups in circumstances where we believe there was a lack of good faith on the part of the proponent/s, but insufficient funding and resources, as well as uncertainty about legal requirements, have prevented further action being taken. The proposed change in the onus of proof to the party asserting good faith and the requirement to demonstrate good faith before applying to the arbitral body would assist in ensuring that more appropriate efforts to reach agreement/s are made.

We note that the proposed amendments will not assist with the current tensions between the right to negotiate process and the Federal Court disposition strategy, notwithstanding that a percentage of native title claims have been or will be lodged primarily for the purpose of obtaining status for right to negotiate purposes.

Item 10

CYLC supports the proposed amendment to enable profit sharing conditions, including the payment of royalties, to be determined by the arbitral body in relation to future acts. We submit that native title groups are placed at a severe disadvantage in negotiations when there is no ability to obtain financial benefits once the matter goes to arbitration.

Item 11

CYLC supports the proposal to insert a new section 47C, to enable extinguishment of native title rights to be disregarded by agreement between the applicant and the Government party.

Many past and existing claims with which CYLC has assisted have involved parcels of land where native title has been or may have been extinguished by historical tenures. Significant amounts of time and resources have been expended in technical legal arguments about the effect of historical tenures on native title rights and interests. Many such historical tenures lack supporting documentation. Many others never proceeded to construction or use for the proposed purpose.

In some claims where ILUAs have been simultaneously negotiated, it has been possible to include such parcels of land in a package of benefits for the native title group as Aboriginal tenure, including where agreement has not been reached on the native title position. However, that has not been possible in

every claim. With increased pressures on parties to resolve claims expeditiously, and an increasing unwillingness on the part of the Federal Court to defer determinations whilst ILUAs are being negotiated, an option to enable extinguishment to be disregarded would increase the range of possible outcomes and benefits that can be achieved in tighter timeframes.

However, the proposed provision obviously relies on the good will of the Government party in being willing to agree to disregard the extinguishment. We have previously submitted to the Commonwealth that consideration should be given to an extension of the beneficial provisions contained in ss47, 47A and 47B of the Act, to enable specified categories of historical extinguishment to be ignored without requiring prior State or Commonwealth consent (noting that any current interests in the land would prevail over native title).

Item 12

CYLC supports the proposed insertion of new sections 61AA and 61AB, providing for presumptions of continuous connection in relation to applications for native title determination.

We share the now widely recognised view that the evidential burden of proving native title is significant (and unjust in circumstances where such proof is required despite concerted efforts by governments of the time to sever Indigenous people's connection to their land). CYLC has made numerous submissions to the Commonwealth Government raising concerns about the difficulties we have encountered in assisting native title claim groups to meet the burden of proof. We have previously indicated our support for the suggestions made by the now Chief Justice French for a presumption of continuity.

We are aware that some stakeholders have expressed the view that such an amendment would result in little change to outcomes of native title claims. Although we acknowledge that there are difficulties with the native title process that the proposed amendments won't resolve, we submit that improvements in resolution of native title claims would result, for the following reasons:-

- Whilst the presumption can be set aside by evidence of substantial interruption, the Court must take into account whether the primary reason for any such interruption is the action of a State or Territory or other person. Most Traditional Owner groups in Cape York assert that they have maintained their connection to their traditional land, but some may have difficulty in establishing that there has been no substantial interruption or change, because of the actions of the State (such as forced removals of people from their traditional country onto missions in North Queensland);
- The applicant in pursuing a native title application would have time and resources available at the front end of the process to establish appropriate representative structures (and if necessary to address overlaps or internal disputes), whilst the State (as the primary

respondent) considers available evidence and decides whether to seek to adduce evidence of substantial interruption;

- If the State (or another party) does seek to adduce such evidence, the applicant's efforts can be targeted to specific issues raised, rather than expending the considerable time and resources that have usually been required to date to prepare lengthy and detailed "connection reports". The State of Queensland has made it clear that it already holds significant material in relation to Indigenous people and communities in Cape York – a change in the onus of proof would enable relevant native title claim groups to "fill in the gaps", rather than having to "paint the whole picture", if the State or another party sought to establish substantial interruption;
- A change in onus of proof may assist in alleviating some of the recent additional burden that has been placed primarily on applicants by the new Federal Court disposition strategy, by spreading the burden more fairly to include the State party (and others if they wish to challenge connection);
- The provisions in relation to the term "traditional" (to ensure that laws and customs can be considered traditional if they remain identifiable through time, rather than largely unchanged) would allow for recognition that Indigenous people's traditional laws and customs (as with any culture) are not static over time;
- The proposal to provide that a connection with land or water need not be a physical one would again provide clarity and recognition that many aspects of native title do not depend on a physical link.

Item 14

CYLC supports the proposed inclusion of commercial rights and interests as part of native title, noting that the usual exclusion of such rights in non-exclusive native title determinations in Queensland has placed serious limitations on the ability of native title holders to maximise benefits from their native title rights and interests.

In our experience, there is ample evidence to support the existence of trade and other commercial rights as part of the traditional laws and customs of Cape York groups. However, they have been unable to have those rights recognised as native title rights because of the State's current views of native title jurisprudence.

Additional submissions:-

CYLC urges that consideration also be given to provision for native title rights and interests to be registered on State and Territory land title systems. We submit that such registration would assist in ensuring that native title, once recognised by a determination, is treated as a legitimate right along with other rights in land.

We would be happy to expand on any aspect raised in these submissions. Please do not hesitate to contact the writer on if you require any further information or have any queries.

Yours faithfully,

PETER CALLAGHAN
CHIEF EXECUTIVE OFFICER