# Submission 001

Yamatji Marlpa
ABORIGINAL CORPORATION

Our Ref: GEN033
Office: Perth

15 January 2013

Committee Secretary
House of Representatives Standing Committee
Aboriginal and Torres Straits Islander Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600
AUSTRALIA

Dear Sir/Madam

***NATIVE TITLE AMENDMENT BILL 2012***

Thank you for the opportunity to comment on the *Native Title Amendment Bill 2012.* Yamatji Marlpa Aboriginal Corporation (YMAC) welcomed the announcement by the Attorney General in July 2012 that the Commonwealth Government would pursue legislative reforms to: i) clarify the meaning of good faith negotiations under the *Native Title Act 1993* (the Act); ii) expand opportunities for the disregarding of historical extinguishment by agreement, and iii) improve the authorisation process for Indigenous Land Use Agreements (ILUAs).

Yamatji Marlpa Aboriginal Corporation (YMAC) is the native title representative body for the Traditional Owners of the Pilbara, Murchison and Gascoyne regions of Western Australia.

Aboriginal people are the first Australians and are widely recognised as the oldest civilisation in the world. YMAC represents 24 different Aboriginal Traditional Owner groups, each with their own distinct country, culture and identity. These living cultures are maintained though languages, ceremonies beliefs, music, art, laws and creation stories.
YMAC's representative area covers over one million square kilometres, with offices in Geraldton, South Hedland, Karratha, Tom Price and Perth.

This submission outlines YMAC's views on the Bill and provides some suggestions for minor drafting changes to enhance workability of the amendments.

***Good faith negotiation requirements***

In YMAC's experience, over the last five years there has been a measurable shift in the approach of industry parties to future act negotiations, with many resolved amicably 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 the Act but also their broader 'social licence to operate'. YMAC is concerned that, in the absence of such favourable conditions, there is currently inadequate provision under the 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 s 38(2) (which requires that the arbitral body can't determine profit sharing conditions).

In light of our extensive experience negotiating native title agreements, YMAC anticipates that introduction of 'good faith negotiation requirements' will underline the Attorney General's expectation for the behaviour parties across the board and ensure a consistent higher standard of agreement-making. In particular, the proposed amendment to s 36(2) will assist in ensuring considerations around good faith are an integral part of doing business with native title parties.

***Addressing the issues raised in Cox & Ors v FMG Pilbara Pty Ltd & Ors [2009].***

YMAC has been a strong advocate of these amendments following the outcomes of Cox & *Ors v FMG Pilbara Pty Ltd & Ors* [2009]. The matter covered a FMG mining application, encompassing 4,320 hectares of land in the west Pilbara. The area is the traditional country of the *Puutu Kunti Kurrama and Pinikura* (PKKP) people, a native title party represented by YMAC.

In 2008, the National Native Title Tribunal (NNTT) found that FMG failed to negotiate in 'good faith' with the PKKP people and fulfil its obligations under s 31 of the Act. However in 2009, FMG appealed and won the case in the Full Federal Court. The finding was based upon the court's interpretation of the Act, which states that as long as the party has negotiated within a period of six months "with a view to" reaching an agreement, the party has met its obligations, even if the negotiations only reach an introductory or embryonic stage, The High Court subsequently dismissed PKKP's application for leave to appeal.

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In YMAC's view, this decision substantially eroded the strength of the right to negotiate under the Act. Until government and grantee parties are required, as a minimum standard, to negotiate about substantive issues pertaining to the 'doing of the act', native title parties remain powerless to protect their native title rights and interests with these being preserved at the discretion of other parties.

The finding in Cox has had wide ramifications for entrenching a significant imbalance of bargaining power between parties in future act negotiations, weighted strongly in favour of the grantee party. It is now open to the NNTT to make a future act determination as soon as the prescribed six month period expires, regardless of the stage negotiations have reached, provided that any, even limited, negotiations were conducted in good faith during that period with a view to reaching agreement with the native title parties. This result provides little legal incentive to achieve the aims of the Native Title Act to, as the Preamble to the Act says, for future acts to only be able to be validly done "if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate".

It is clear from the NNTT's list of future act determinations, that most determinations have found that the future act may be done, and the majority of determinations are made by consent between the parties. However, the reality is that arbitration is often used by the grantee as a threat to encourage the native title party to settle. Indeed, native title parties are not able to seek royalty based payments as a condition of the NNTT's determination, and cannot ask the NNTT to make a determination of compensation for loss or impairment of native title as a result of the doing of the relevant future act. There is therefore reasonable incentive for the native title party to reach agreement, however unfavourable the terms of that agreement, in order to avoid the NNTT's arbitration process, which the native title party knows is unlikely to result in a favourable outcome. Native title parties are well aware that despite the numbers of consent determinations that have been made, the public record does reveal that:

i. there have been very few determinations that the future act cannot be done;
ii. that where the determination is that the act can be done there are not often conditions made that are in favour of the native title party, and
iii. since 1 January 200 there have only been three decisions made that the grantee party did not negotiate in good faith. One of those was the Cox decision, which the Full Federal Court overruled.

The effect of this is that in many cases native title parties will accept heavy compromises and accept proposals put to them by the grantee party, for fear of the NNTT granting the tenement with no agreement in place or with no meaningful compensation agreed between the parties. These appear as 'consent determinations' on the public record and are referred to positively by industry and government parties as "negotiated outcomes".

However, the reality is that in many cases agreements will contain much diluted protections for highly significant heritage sites, a permanent loss of access to traditional country for generations, and poor compensation for the impact of the future act on native title rights and interests.

YMAC considers that the amendments to sections 31-36 outlined in the Bill largely address these issues and we congratulate the Commonwealth Government on taking such a rigorous approach to this issue. We note in particular the following positive impacts we anticipate the amendments will have.

***Reversing the onus of proof as to whether negotiations have been conducted in good faith***

Currently it is up to the objecting party (in almost all cases native title parties) to demonstrate that negotiations have not been conducted in good faith. Demonstrating this in the negative, (that is, in terms of what *has not* been done) is extremely difficult, particularly given the lack of clarity under the Act as to what constitutes 'good faith'. While the introduction of good faith negotiation requirements is an important step in addressing this issue, the step of reversing the onus of proof will further assist by shifting some of the resource burden to the party seeking to do the act which is, in the majority of cases, better resourced and likely to benefit financially from the granting of the tenement. This fits with the broad principles articulated in the Commonwealth Government's *Strategic Framework for Access to Justice*. It also in our view, more accurately reflects the policy framework adopted by Parliament, as reflected in the Preamble and objects of the Act.

***Requirement to consider the effect of the doing of the act on native title rights and interests***

The introduction of s31(1)(c) directly addresses the issue raised above and will require the scope of negotiations to include substantive issues such as financial compensation and measures to reduce the impact of mining on significant cultural sites and ensure ongoing access to land for the practice of traditional law and customs.

***Introduction of good faith negotiation requirements***

YMAC has long advocated for the introduction of some form of threshold guidance as to what constitutes good faith under the Act and suggested the *Fair Work Act 2006* provides a suitable model. We consider that the requirements at s31A of the Exposure Draft are well suited to the native title environment and are highly compatible with the Njamal Indicia currently considered by the NNTT in arbitration.

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YMAC particularly supports the introduction of s31A{2)(c). We consider that inclusion will help resolve the uncertainty which currently surrounds the question of whether or not, and if so to what extent, the reasonableness of offers can be indicative of a failure to negotiate in good faith (see *Drake Coal Pty Ltd, Byerwen Coal Pty Ltd/ Grace Smallwood & Drs* (Birri People)/Queensland, [2012] NNITA Q {6 February 2012); *Strickland v Minister for Land for Western Australia* (1998) 85 FCR 303 at 321; *Walley v Western Australia* (1999) 87 FCR 565 at 577)).

There are, in YMAC's experience, a minority of future act proponents who seek to take advantage of s38(2) by intentionally not reaching agreement, while superficially meeting their legal requirements. This is done by, for example:

- making unreasonable offers (relying on *Strickland v Minister for Lands for Western Australia* (1998) 85 FCR 303);
- failing to negotiate for the time necessary to finalise a negotiation; and
- unreasonably extending the scope of the negotiation beyond the doing of the act.

Note that under the current law there is some confusion around the issue of the extent to which the reasonableness of offers can be taken into account by the NNTT in determining whether negotiation parties have failed to negotiate in good faith.

The proposed amendment of the Act to include 31A(2)(c) is a significant clarification of this existing uncertain area law. It is also a significant improvement because it clearly extends the requirement of reasonableness to include the content of offers made. It won't impact upon the majority of negotiating parties who do make reasonable offers. It will only affect those negotiating parties who currently make unreasonable offers.

***Amendments to sections 35 & 36***

The proposed amendment to s 35(1)(a) to extend the minimum negotiation period to 8 months since the notification day is welcome. We anticipate it will have little impact on government or grantee parties but will provide NTRBs with precious extra time to seek instructions from its clients who are often living in remote areas where organising meetings and taking instructions can take months. This particularly so in those remote parts of the country affected by the cyclone season and where claimants are not available to YMAC staff for certain times of the year as they attend to their cultural responsibilities and obligations. For example the majority of our Pilbara claimant groups are not available to meet with YMAC staff from November to February as they travel to their traditional country to take boys through initiation and to deal with other cultural law business.

For the negotiation of complex future act agreements, however YMAC does not envisage that such a minor extension of time will contribute much to the process as these negotiations can go on for many years and effectively rely upon the good will of major mining companies. Often their view is that the making of native title agreements as a factor

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contributing to their social licence to operate in other parts of the world and they do not seek to rely upon a legal process which is heavily weighted in their favour.

***Historical Extinguishment***

YMAC is disappointed that the Commonwealth Government elected to proceed with the narrower option for the disregarding of historical extinguishment canvassed in earlier consultations, limiting the amendment to cover only parks and reserves. We do acknowledge and appreciate, however, the inclusion of public works under the proposed s 47C. We have previously made submissions on the merits of an expanded provision and the removal of requirements for public notice and comment (which would not prevent the relevant government from engaging in such a public consultation but would not require it or prescribe the conditions for it).

However we note that the proposal is nevertheless an improvement on the present limitations of the Native Title Act caused by past extinguishment and we support them.

***Indigenous Land Use Agreements (ILUAs)***

YMAC broadly supports the proposed amendments to streamline and improve the processes around the authorisation of ILUAs. We do have some reservations in relation to the proposed amendment to s 251A designed to overcome the effect of the QGC *v Bygraves* [2011] FCA 1457 decision, but note that this should not delay the passage of what is a beneficial piece of legislation and can be the subject of further work in future.

***Conclusion***

As the Commonwealth Government is aware, a number of major native title agreements have been reached in the Murchison, Gascoyne and Pilbara regions over the last five years. However, these are in large part a product of an exceptional period of intensive mining activity and a resultant strong commercial imperative for industry parties to negotiate comprehensive agreements that provide certainty over land access for decades to come. Crucially, though, the Native Title Act will rapidly outlive this urgency and needs to serve all Traditional Owners including those with limited mining activity on their land. For this reason, it is simply not sufficient to rely on market forces to deliver quality future act agreements and negotiation processes. This task lies with the legislation itself.

YMAC submits that there is an urgent need to protect and strengthen the integrity and operability of the right to negotiate under the Act. In the absence of a veto over land development, the right to negotiate is one of the strongest levers that native title claimants and holders have to protect their cultural inheritance and obligations to future generations.

While many future act determination applications may result in a 'consent determination', this provides no indication of the duress and pressure many native title parties feel throughout the agreement-making process to accept sub-optimal proposals, for

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fear of losing their land with no compensation or protection of country at all. The introduction of good faith negotiation requirements will at least go some way to addressing this lack of equity between negotiating parties and provide greater certainty to all parties moving forward.

We congratulate the Commonwealth Government for its commitment in pursuing these well overdue reforms. We would also welcome an opportunity to continue working with the Native Title Unit to discuss our drafting suggestions and test the workability of the amendments moving forward.

Yours faithfully

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MICHAEL MEEGAN
PRINCIPAL LEGAL OFFICER