



# Yamatji Marlpa

ABORIGINAL CORPORATION

Our Ref: GEN377  
Office: Perth

30 November 2010

Ms Katherine Jones  
First Assistant Secretary  
Social Inclusion Division  
Native Title Unit  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Dear Ms Jones

## **Combined submission in response to the Discussion Papers: i) 'Native Title, Indigenous Economic Development and Tax', and ii) 'Leading practice agreements: maximising outcomes from native title benefits'**

Thank you for the opportunity to provide feedback on the proposals canvassed in the above Discussion Papers. We share the view of the Commonwealth Government that native title agreements provide a valuable and often once-in-a-lifetime opportunity to build intergenerational wealth for Traditional Owners and their communities. However, YMAC's strong view is that these opportunities will only be fully realised through targeted support for the long-term monitoring and implementation of agreements.

The proposals to achieve clarity around the tax treatment of native title benefits will only have a positive effect on Indigenous economic development if implementation milestones are met and the benefits flow to beneficiaries in the way the parties to the agreement intended. This submission will highlight some of the major impediments to successful implementation and identify possible solutions.

### **About Yamatji Marlpa Aboriginal Corporation**

Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body (NTRB) for the Traditional Owners of the Pilbara, Murchison and Gascoyne regions of Western Australia. We represent 24 different groups, all with their own culture, language, and traditions. Our representative area covers over one million square kilometres, with offices in Geraldton, South Hedland, Karratha, Tom Price and Perth.

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In addition to representing our clients throughout the native title claims resolution process, YMAC also provides a range of services including professional assistance with negotiations about mining and development on their country, heritage protection, natural resource management, environmental and community development projects.

One of the greatest ongoing challenges faced by YMAC is the impact of mining on our clients' traditional country. Western Australia had 89% of Australia's total future act agreements in the last financial year. This places a range of pressures on our organisation and our clients. For example, in 2009/10, YMAC conducted 376 native title group meetings. Of these, 228 meetings were to negotiate mining agreements.

The recent global financial crisis did not significantly reduce future act activity in our regions. Western Australia expects a number of large scale mining and infrastructure projects in the next five years, including Rio Tinto Iron Ore and BHP Billiton Iron Ore's significant expansion of their Pilbara operations, the Gorgon Gas Project, Oakajee Port and Rail Project and the new industry of uranium mining, all of which will be likely to generate future act activities.

Our experience in negotiating a broad range of native title agreements for diverse groups enables us to provide informed feedback on the reform proposals contained within the Discussion Papers. This submission begins by looking at the key proposals outlined in the 'Leading Practice Agreements' paper, then moves on to discuss those in the tax paper.

### **Best practice agreements: maximising outcomes from native title benefits**

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 Indigenous 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.

YMAC's experience is that we have now moved toward a mature culture of agreement-making between industry and native title groups. High-value agreements currently under negotiation with major resource companies such as Rio Tinto Iron Ore and BHP Billiton Iron Ore 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 teams building expertise in negotiations over a number of years and industry increasingly needing 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.



### *Limitations of a new review function*

It is our view that the Government's proposal to establish a new statutory review function to assess native title agreements is unlikely to increase transparency and accountability over the long term and will divert resources away from where they are most needed. Most importantly, reviewing an agreement close to the point of settlement would provide little indication as to whether the agreement will be sustainable over the long term.

Implementing the review function would also be challenging. While we appreciate that there are some general principles that can be identified as 'best practice' in agreement-making, how those principles are applied and manifest will vary widely according to the specific circumstances of the negotiating parties. It would also be extremely difficult to effectively assess the sustainability of an agreement in the absence of localised knowledge about:

- the character of the native title group(s) concerned and any relevant issues regarding their native title claim (e.g. outstanding connection issues)
- the native title group's approach and values in relation to cultural legitimacy and decision-making
- the scope within the native title group and proponent to fill leadership and governance roles
- the group's aspirations for current and future generations in terms of economic, social and cultural development
- localised issues such as the cost of living and administrative service provision (a crippling factor in resource-rich regions of WA),
- the corporate culture and practice of proponents in regard to the implementation of agreements and respect for Aboriginal heritage, and
- the proponent's project plan over the life of the mine.

This non-exhaustive list illustrates the diversity of factors impacting on the structure of native title agreements, well beyond the quantum of benefits and formal governance arrangements. None of these factors can be detected by reviewing a technical agreement. Rather, they need to be addressed on an ongoing basis, drawing on localised knowledge generated as a result of sustained relationship-building processes.

### *Implementation is key*

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 of bank accounts and trusts. NTRBs are not 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.

Native Title Representative Bodies (NTRBs) are well-placed to deliver these transition measures, given our intimate knowledge about the operation of the agreement, our relationships with native title groups and industry parties and working knowledge of on-the-ground implementation issues.

To successfully deliver these services, it is proposed that NTRBs' terms and conditions of funding be amended to include the monitoring and facilitating the implementation of native title agreements. As part of this function, NTRBs could provide a report back to Government on agreements struck each year and progress towards the implementation of certain agreements of high financial value and/or regional significance.

### *Scope of report*

NTRBs could provide confidential, annual reports to the Commonwealth Government outlining progress on the implementation of agreements valued above a prescribed threshold. The report would not include commercial-in-confidence information, but rather note whether parties had met their obligations under the agreement regarding the issuing of financial payments and other non-financial benefits. The report would also note progress against implementation milestones in areas such as:

- the establishment of legal entities to hold and administer financial benefits
- land transfers
- co-management arrangements
- education and training measures
- employment targets
- business and contracting measures
- cultural heritage protection and promotion, and
- environmental management measures.

### *Resourcing*

Given the resource-intensive nature of native title claim work, FaHCSIA funding for NTRBs is not sufficient to cover major future act negotiations or associated activities such as monitoring and compliance. Despite this, YMAC currently employs two Compliance Officers (one of which is part-time) across both our regions. WA State Government funding for these positions has ceased, but as YMAC considers them to be of vital importance, it has directed Commonwealth funding from our existing allocation to continue the employment of the officers.

YMAC's monitoring of agreements has already delivered benefits to Traditional Owners by ensuring companies fulfil their obligations under existing agreements, for example by extracting significantly overdue financial payments to community trust accounts and holding proponents to account in regard to their training and employment commitments.

The Western Australian Government also recently withdrew funding for Future Act Officers dealing with relatively minor future act agreements, which had provided crucial support to NTRBs struggling to manage the increased workload generated by the resources boom. This has compounded the lack of funding for Compliance Officers dealing with more substantial agreements.



If Government agreed to the proposal outlined above, additional funding – even seed funding for a limited period of five years – is required to engage a team of qualified staff to travel to meetings with clients and deliver basic financial services, monitoring activities, data analysis and reporting. It is crucial that it is not left to the discretion of proponents to cover these costs, given the lack of incentive for them to do so and their track record in this area.

The new function for NTRBs would compliment the establishment of a new legal entity better able to accommodate the unique needs of native title groups – such as the Indigenous Community Fund proposed in the Discussion Paper 'Native Title, Economic Development and Tax'. This would reduce the administrative burden for native title groups and provide a streamlined model process, particularly at the early stages of implementation.

#### *Other governance measures*

The Discussion Paper canvasses other governance measures to encourage entities that receive native title payments, such as: incorporating under the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (CATSI Act), or the *Corporations Act 2001*; appointing independent directors, and adopting enhanced democratic controls.

In YMAC's experience, many native title groups are voluntarily choosing to incorporate these types of governance measures into their constitutions and organisational cultures. Proponents are also increasingly requiring these measures as part of native title agreements. It is our view that every effort should be made to encourage groups to opt for the most robust governance arrangements possible, but that these measures should not be mandated. To do so runs contrary to widely accepted notions of 'good governance'. Native title groups should enjoy the same autonomy as equivalent organisations to manage their own affairs – particularly in relation to private commercial agreements – and be supported by Government through education and training to make sound decisions on behalf of their members.

The governance of legal entities that hold and distribute native title benefits is scrutinised via existing regulatory frameworks such as those under the CATSI Act, Corporations Act, State legislation governing trustee companies and relevant taxation laws. Any new function should not duplicate existing efforts in this area.

#### **Future Act Reforms**

YMAC welcomes the Government's proposal to streamline the Indigenous Land Use Agreement (ILUA) process by:

- reducing the ILUA registration period,
- implementing safeguards to protect against lengthy delays caused by vexatious or frivolous objections, and
- streamlining the registration process for minor ILUA amendments.

These amendments would provide an incentive to register agreements and ensure they are kept up to date.

#### **Clarifying good faith requirements**

As you would be aware, YMAC has been advocating to Government for some time the need to clarify the meaning of 'good faith' under the NTA and welcomes the Attorney-General's commitment to legislative amendments that will achieve this.

To support our strong position on this matter, we wrote to the Attorney-General in March 2010, following our experience in the appeal against the Full Federal Court decision in *Puutu Kuntti*



*Kurrama and Pinikurra People vs FMG*. The letter set out a proposed 'Guiding Framework for Parties Negotiating in Good Faith', using the good faith bargaining provisions in the *Fair Work Act 2009* as a model. **(Attachment A)**.

We believe a framework such as this would allow the necessary flexibility for parties to conduct timely, interest-based negotiations, while addressing (at least in part) the current power imbalance that exists between native title groups with limited procedural rights under the NTA and well-resourced industry parties.

### **Native Title, Economic Development and Tax**

#### *Tax treatment of benefits received for different reasons*

YMAC submits that any reforms to the tax system to clarify the treatment of native title benefits needs to strike a careful balance between a rights-based approach based on fundamental principles of native title and tax law and the practical need to drive Indigenous economic development. Exempting native title benefits from income tax, whether the benefits are compensation for the impairment *or* extinguishment of native title rights, achieves this balance. Our justification is set out below.

The Discussion Paper 'Native Title, Economic Development and Tax' distinguishes between compensation for the 'voluntary surrender of native title rights' and compensation for the 'extinguishment of native title', noting that periodic payments for the suspension of native title could be regarded as receipts in the nature of a return on a capital asset and therefore would normally be regarded as ordinary income. Similarly, drawing on this distinction the paper notes that a non-monetary benefit received in relation to the suspension of native title may become a Capital Gains Tax asset...'.<sup>1</sup>

Benefits (financial and non-financial) provided through native title agreements reached under the *Native Title Act 1993* (the NTA), while possibly addressing a variety of needs and interests (eg. financial payments, heritage protection, employment initiatives) should all be regarded as compensatory in nature. As Lisa Strelein has pointed out in her paper 'Taxation of Native Title Payments': 'Simply because the NTA requires native title groups and proponents to negotiate or take some other action when a future act is instigated does not necessarily mean that the negotiated compensation is voluntary.'<sup>1</sup>

YMAC agrees with Strelein's point that Traditional Owners cannot simply 'walk away' from an agreement or veto a future act. Claimants' and native title holders' procedural rights do not extend to a veto on future activity. Additionally, the practical effect of section 39 of the NTA (providing the criteria for making arbitral body determinations) and the historical application of that criteria, combined with case law, means where there is a conflict between native title rights and other rights, native title rights will usually yield to other rights. YMAC's recent experience in relation to *Cox & Ors v FMG Pilbara Pty Ltd & Ors* [2009], as outlined earlier, reinforces this view.

Strelein also correctly points out that, while an activity can be non-extinguishing, the result is often 'physical damage to the land itself... [and] damage to the associated rights and interests, the loss of associated rights and interests, the capacity to carry on cultural activities that sustain

<sup>1</sup> Strelein, L (2008) 'Taxation of Native Title Payments', *Native Title Research Monograph No.1/2008*, Australian Institute of Aboriginal and Torres Strait Islander Studies. See in particular pp. 40; 44-45.



connection to country, and the laws and customs of the group.<sup>2</sup> In YMAC's experience, this 'suspension' of rights and interests can extend across generations as the life of the agreement matches the life of medium- to large-scale mining projects, which can be anywhere between 40-100 years.

If it is accepted that native title benefits are compensatory in nature, it follows that a Native Title Withholding Tax is not appropriate. Non-native title parties should not be required to pay tax on benefits that should be tax-free due to their compensatory nature.

In summary, YMAC submits that the Australian Taxation Office (ATO) should not distinguish between benefits provided as compensation for the impairment (or suspension) of native title and that provided for the extinguishment of native title. An upfront income tax exemption should be applied in both instances, due to the element of compulsion involved and the fact that the benefits are compensatory in nature. Accordingly, there should not be a restriction on an exempt payment being used for purely private consumption. The ATO should only have regard to income generated through the investment and growth of those funds.

Finally, tax exemptions should not be dependent on a positive assessment by a new statutory review function. Not only are there considerable obstacles to implementing such a review fairly and consistently, but this would be a poor policy basis for granting a tax exemption. The benefit should be tax exempt because it is compensatory in nature, not because of the content and structure of the agreement providing that benefit. Further, the uncertainty this would create throughout already complex negotiations would lead to parties relying on existing options such as charitable trusts to hold and distribute native title benefits.

### *Indigenous Community Fund*

YMAC shares the Government's concerns with the limitations of charitable trusts in terms of meeting the diverse needs of Traditional Owners and their communities. Our native title groups often need to establish multiple trust funds in order to hold and distribute benefits for a variety of purposes. A single legal entity that could enable the distribution of funds for charitable purposes, allow for limited direct payments to individuals according to need and the accumulation of wealth for future generations would reduce the administrative burden on Traditional Owners.

While we acknowledge that the specific details would need further consultation, the Indigenous Community Fund outlined in the Discussion Paper generally suits this purpose. YMAC supports the proposal that there be no Capital Gains Tax (CGT) or income tax consequences in relation to benefits received by the fund. This is due to the compensatory nature of the benefits, as outlined in the previous section. Tax liability should only be assessed according to wealth creation as a result of the further investment of those benefits.

The Government should provide enough flexibility for the new entity and related tax treatments to support individual innovation leading to economic outcomes for the broader community, as well as community-owned and/or managed ventures. This is consistent with the Centre for Aboriginal Economic Research Policy (CAEPR)'s analysis of native title agreements and subsequent trust arrangements.<sup>3</sup> YMAC also supports the view that the new legal entity should

<sup>2</sup> Ibid, p.46.

<sup>3</sup> Altman J & Martin D, *Power, Culture and Economy*, CAEPR Monograph 2009/20. See in particular Chapter 7.

be flexible enough to receive funds from other sources, including non-native title agreements and other Indigenous members of the community.

It is important that the Government continues to explore how tax incentives could be used to encourage new approaches to economic development by Indigenous corporations, consistent with the approach outlined in the Government's draft *Indigenous Economic Development Strategy*. Amending existing Deductible Gift Recipient categories could assist in this way, but attention also needs to be given to tax concessions in relation to expenditure on initiatives such as seed funding for small business and privately owned enterprises.

YMAC submits that, while it is important that any new legal entity allows for multiple purpose expenditure and investment of native title benefits, it should not include a mandatory 'one-size-fits-all' distribution and accumulation framework in its design. It is vital that native title groups seek the support they require in terms of investment advice and the result of that advice will differ according to the demographic, geographical location, size and aspirations of the group.

Investment strategies, distribution and accumulation policies should be devised on a case-by-case basis so that the needs of current generations are not neglected at the expense of both current and future generations. Accumulating wealth to address future employment, housing and cultural needs will be pointless if current generations do not have the resources to invest in the health and well-being of themselves and their children.

It is difficult to understate the impact that changes to the regulation of native title agreements will have on Traditional Owners' economic and social well-being and the integrity of their native title rights and interests. We would therefore welcome an opportunity to discuss the proposals in this submission further and test the workability of reform proposals with Government, based on our extensive experience in this area.

Yours faithfully



**SIMON HAWKINS**  
**CHIEF EXECUTIVE OFFICER**





## Yamatji Marlpa ABORIGINAL CORPORATION

### Appendix 'X' – Guiding Framework for Parties Negotiating in Good Faith under section 31(1) (b)

Without limiting the scope of negotiations which may be conducted under section 31(1) (b), the following sets out a framework which negotiation parties may adopt (with or without adaptation) for the purposes of conducting good faith negotiations under Part 2, Division 3 of the Act.

Matters which may be the subject of good faith negotiations and an agreement as referred to in section 31(1) (b) include:

#### Grant of titles etc

1. the conditions on which the native title party may agree to the grant of titles or other authorisations to the grantee party;
2. the application of the non-extinguishment principle to the grant of titles or other authorisations to the grantee party;
3. agreed approaches to the future exercise or waiver of procedural rights in relation to the grant of titles or other authorisations;

#### Access rights

4. the native title party's rights to continue to have access to the land the subject of any future act;

#### Cultural heritage

5. the protection of Aboriginal cultural heritage, including the principles applying to such protection;
6. agreed approaches to the future exercise or waiver of procedural rights in relation to the proposed use of land or waters the subject of Aboriginal cultural heritage values;
7. agreed processes for conducting Aboriginal heritage surveys on land or waters the subject of proposed activities by the grantee party or others;
8. the payment or reimbursement to the native title party and its consultants of reasonable costs associated with the conduct of Aboriginal heritage surveys and other processes designed to protect Aboriginal cultural heritage.
9. the preparation and funding of cross cultural awareness programmes to be provided by the native title party or its consultants;

### Negotiation funding

10. the provision of financial benefits and resourcing of the negotiation process to the native title party which are appropriate having regard to such matters as the resources of the grantee part, the anticipated costs and returns associated with the proposed future act, the extent to which the future act will impact on the rights and interests of the native title party and other relevant matters;

### Financial benefits

11. the establishment of a trust or other corporate entity to accept payment of, and disburse, financial benefits received on behalf of the native title party;
12. the allocation of financial benefits to particular needs and interests of the native title party including heritage preservation, education and training, employment, community infrastructure and business opportunities;
13. the agreed methodology for determining payment amounts and processes for resolving any future disputes in this regard;
14. the time period over which payments are proposed to commence and continue;

### Education and training, employment and business opportunities

15. the provision by the grantee party and/or government party of education and training assistance (including traineeships and apprenticeships) to the native title party;
16. the employment of members of the native title party in operations associated with the government party and/or grantee party;
17. the provision by the grantee party to the native title party of contracting and/or other business opportunities associated with the grantee party's operations;

### Environmental protection

18. the provision of information to the native title party relating to environmental protection and applications made by the grantee party for environmental approvals;
19. the involvement of the native title party in environmental protection and management of the area affected by the future act or acts;

### Monitoring and implementation

20. the establishment of a joint committee representing the parties to monitor and implement the performance of obligations agreed by the parties in any agreement;

### Dispute resolution

21. appropriate dispute resolution processes, including negotiation and mediation, to address issues of default and disagreement;



Caveats on title

22. the ability of the native title party to lodge a caveat against titles or other interests conveyed to the grantee party to protect the native title party's rights under any agreement;

Aboriginal liaison officer

23. the appointment and funding of an Aboriginal liaison officer to assist in the implementation of the agreement and communications between the parties;

Assignment

24. the need for notice to, and consent of, the native title party in relation to any proposed assignment of rights or titles under the agreement by the grantee party in the future;

Confidentiality and intellectual property

25. the protection of confidential information and intellectual property of the parties in the negotiation and implementation of the agreement.

