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Native Title Unit  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

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## RE: REFORMS TO THE *NATIVE TITLE ACT 1993* (CTH) – OPTIONS PAPER

### Introduction

Nyamba Buru Yawuru make the following submissions on behalf of the Yawuru Native Title Holders Aboriginal Corporation RNTBC (**Yawuru PBC**). The Yawuru PBC holds native title on trust for the Yawuru community of over some 530, 000 hectares of land and waters in and around Broome. Yawuru native title is grounded in the power and richness of *Bugarrigarra*, the spiritual force that has existed since time immemorial that links Yawuru land, law and people.

*Bugarrigarra* shapes and gives meaning to the landscape and is maintained through the right to speak for and look after Yawuru country. It continues to inform Yawuru cultural practice, relations and obligations. Connection to country is also fundamental to having a strong *liyan*, which relates to wellbeing and strong relationships. Yawuru law requires country, community and *liyan* to be maintained and protected.

The *Rubibi* determination that recognized Yawuru law was an 'epic struggle by Yawuru people to achieve recognition under Australian law of their traditional connection to, and ownership, of their country'<sup>1</sup> that involved:

- 71 days of hearing;
- 7198 pages of transcript; and
- 7 Federal Court judgements<sup>2</sup>.

The Yawuru PBC's comments and observations on the proposed reforms to the *Native Title Act 1993* (Cth) are inextricably linked to this epic struggle that has left a legacy not of reconciliation but one of disillusionment with the native title system particularly concerning the issue of extinguishment. Ultimately the Yawuru PBC considers the proposed native title reforms as a missed opportunity to remedy the current inequalities of the Act in favour of native title groups.

### Preliminary Comments

This Options Paper and in particular the amendments to Section 31 cannot be viewed in isolation from *McGlade v Native Title Registrar & Ors* [2017] FCAFC 10 (**the McGlade decision**) or the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017*.

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<sup>1</sup> *Rubibi Community v State of Western Australia* (No.7) (2006) FCA 459 (159).

<sup>2</sup> *Ibid*

The Full Federal Court in the *McGlade* decision overruled the decision in *QGC Pty Ltd v Bygrave (No 2) (2010) 189 FCR 412* confirming that all Registered Native Title Claimants (**RNTCs**) are required for an ILUA to be properly authorised. The 2017 Amendments were quickly introduced into Federal Parliament by Attorney-General George Brandis to remove commercial uncertainty created by the *McGlade* decision.<sup>3</sup>

Prime Minister Malcolm Turnbull, while in India, in April last year, noted that native title laws would be 'fixed' to the head of the Adani Corporation.<sup>4</sup> The Yawuru PBC find it very disconcerting that the Government acted so swiftly to amend the *Native Title Act* to protect commercial interests but has long delayed or not acted at all to enact legislation that would benefit native title groups such as shifting the burden of proof.

### Time Frame for Submissions

The purpose of the Act is '*to recognise and protect native title*'. It is therefore intended to be beneficial legislation that seeks to rectify past injustices. As beneficial legislation it follows that any proposed amendments to the Act should not be undertaken without the full consultation and the free, prior and informed consent of native title groups.

The Government's release of the Options Paper at the end of November last year with submissions due by the end of February 2018 is a compressed time frame not consistent with these principles particularly for those native title groups that live across northern Australia as it is the height of the wet season as well as the usual time for the conduct of law ceremonies in areas such as the Kimberly.

### Purpose of Options Paper

The purpose of the Government's Options paper is to seek

*... stakeholder views on a range of options to amend the Act which are intended to improve the efficiency and effectiveness of the native title system to resolve claims, better facilitate agreement-making around the use of native title land, and promote the autonomy of native title groups to make decisions about their land and to resolve internal disputes.*

Native title holders and claimants are not mere stakeholders but those Australians who have suffered the wholesale dispossession of their traditional lands under the myth of *terra nullius* and to whom the native title system is intended to primarily benefit. However it is evident that the proposed amendments to Act are focused not on addressing the well documented inequalities in the native title system but rather on improving efficiency for third parties.

As Senator Patrick Dodson noted in his soon to be published Native Title Opinion Piece:

*'pragmatism, efficiencies, and procedures under the Act should not be weighted in favour of third parties to the detriment of native title holders. The underpinning principles of cultural continuity, communally held interests, and country shared and cared for by native title holders should inform any changes'.*

It is noted that the recommended changes to the Act are derived from a number of reviews of the Act including the ALRC Report, the COAG Investigation and the CATSI Act Review. However, where are the recommendations from native title representative organisations such as the National Native Title Council? It is submitted the

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<sup>3</sup> The Australian (2017) 'Land rights Native Title Act faces urgent changes after Adani move', <http://www.theaustralian.com.au/national-affairs/indigenous/land-rights-native-title-act-faces-urgent-changesafter-adani-move/news-story/5d9b6712af07fe253e98338606536a3b>  
<sup>4</sup> <http://www.openaustralia.org.au/senate/?id=2017-06-14.4.2&s=speaker%3A10846#g5.1>

process for proposing recommendations is flawed from the outset as the views of native title groups have not been included alongside the non-indigenous established institutions. Therefore the following comments are qualified on this basis.

#### **A. The Applicant and authorisation**

The Yawuru PBC supports any proposed amendments to the Act that preserves and promotes the primacy of community decision-making in accordance with the principle of free, prior and informed consent over the say of individual members of the applicant. This principle ought to be enshrined in the Act underpinning the following recommendations:

- A1 The native title claim group defining the scope of authority of the Applicant.
- A2 The applicant may act by majority unless the terms of the authorisation by the claim group authorise otherwise.
- A3 Amending s.66B so that where any members of the applicant are unwilling or unable to act that the remaining members continue to act without reauthorisation unless authorisation provides otherwise.
- A4 Giving effect under s.66B to the succession plans of claim groups.
- A5 Amending the Act to clarify that members of the Applicant owe fiduciary duties to the claim group and must act in their best interests at all times.
- A6 This proposed amendment should be qualified – *unless it is in the interests of justice to do so.*

#### **B. Alternative agreement-making**

Any proposed amendments to the Act concerning alternative agreement-making need to be made with an accompanying amendment to ensure that native title claim groups and PBCs are adequately resourced and so not disadvantaged in the negotiation process due to the usual power imbalance with third parties and have the requisite capacity to provide free, prior and informed consent to enter agreements.

- B1 The Yawuru PBC supports a proposed amendment that relieves the burden on under-resourced and over-worked PBCs to consult with the broader group in certain prescribed circumstances approved by the broader group.
- B2 The Yawuru PBC is opposed to any attempt to water down the effect of section 211 of the Native Title Act and suspects that this proposed amendment can be exploited by third parties to the detriment of native title groups where an unequal negotiating relationship exists.
- B3 The Yawuru PBC suspects that this proposed amendment can be exploited by third parties to the detriment of native title groups where an unequal negotiating relationship exists.
- B4 The Yawuru PBC is opposed to any attempt to water down native title procedural rights by a *carte blanche* approval for “low impact” future acts post determination. What non-indigenous persons consider “low impact” may not necessarily apply to native title groups particularly in culturally sensitive areas where any impact may have serious consequences.

#### **C. Stream-lining agreement making**

As above, any proposed amendments to the Act concerning “stream-lining” agreement-making need to be made with an accompanying amendment to ensure that native title claim groups and PBCs are adequately resourced and so not disadvantaged in the negotiation process due to the usual power imbalance with third parties and have the requisite capacity to provide free, prior and informed consent to enter agreements.

- C1 The Yawuru PBC considers that prior to any amendments concerning extinguishment that the definition of extinguishment ought to be amended in the Act to remove its current effect of restoring *terra nullius* and continuing the injustice suffered by native title groups. It is proposed that instead of extinguishment that native title rights be suspended until such time as the existing interest in land lapses.

- C2 The Yawuru PBC does not have an issue with minor technical amendments to ILUAs without requiring re-registration to help alleviate the administrative burden on under-resourced and over worked PBCs.
- C3 As above.
- C4 As above.
- C5 The Yawuru PBC supports any proposed amendment to strengthen future act procedural rights for native title groups.
- C6 The Yawuru PBC is concerned that if compensation is “parked” until after the finalisation of an ILUA that it will diminish the motivation of the third party to negotiate a fair and reasonable settlement. A possible mechanism to address this concern may be to amend the Act so that the ILUA does not take effect until the issue of compensation is resolved.
- C7 No comment.
- C8 The Yawuru PBC does not have an issue with removing the Government Party for section 31 agreements particularly if the State seeks to exploit its position by compelling native title parties to enter standard their section 31 agreements.
- C9 The Yawuru PBC does not support any watering down of procedural rights for native title parties where the compulsory acquisition of native title parties and proposed that once an objection is made that the objection is automatically referred to an independent person.
- C10 The Yawuru PBC supports any proposed amendment which makes the notification process more effective including in particular electronic transmission of notices particularly in remote areas in Broome where the postal service can cause delays in receiving notices to the disadvantage of traditional owners.
- C11 It is unclear from the proposed amendment what is required to establish a “prima facie” case and the Yawuru PBC considers that this may be answered by consultation with the broader group.

#### **D. Indigenous decision-making**

- D1 The Yawuru PBC supports any proposed amendments that ensure that native title groups have the greatest degree of flexibility to choose their own decision-making processes as this is a fundamental element of providing free, prior and informed consent.

#### **E. Claims resolution and process**

- E1 The Yawuru PBC opposes any watering down of the rights of native title groups to participate or not in the inquiry process.
- E2 Provided the above comment applies and that it does not impose an unreasonable administrative burden on native title parties, the increased powers of the Tribunal would assist the inquiry process particularly in relation to recalcitrant non-native title parties.
- E3 The Yawuru PBC supports this proposed amendment.
- E4 The Yawuru PBC supports this proposed amendment.
- E5 The Yawuru PBC supports this proposed amendment.
- E6 The Yawuru PBC supports any proposed amendment that diminishes or, better, eliminates altogether the historical extinguishment of native title and as mentioned previously considers the concept of extinguishment itself ought to be replaced by an alternative concept of suspension of native title for the duration of the relevant tenure.

#### **F. Post-determination dispute management**

- F1 The Yawuru PBC does not have an issue with increasing ORIC oversight of PBC compliance with the PBC Regulations subject to ORIC also providing access to free legal services to PBCs on compliance issues and PBCs are provided a reasonable opportunity to take steps to remedy any non-compliance before any punitive measures are considered.
- F2 As above.

- F3 The Yawuru PBC does not object to the proposed amendment provided it does not impose an unreasonable financial or administrative burden on PBCs.
- F4 It is acknowledged that PBC director's ought not to have an arbitrary power to exclude eligible members except in exceptional circumstances.
- F5 The Yawuru PBC does not object to the proposed amendment provided it does not impose an unreasonable financial or administrative burden on PBCs.
- F6 As above.
- F7 The Yawuru PBC is concerned the proposed amendment seeks to implement paternalistic measures demonstrating a distrust for PBC decision-making whilst imposing an unreasonable financial or administrative burden on PBCs. If such measures are to be introduced there ought to be a corresponding obligation on Government to provide additional funding to PBCs for governance and administrative training of PBC staff.
- F8 The Yawuru PBC does not object to the proposed amendment provided it does not impose an unreasonable financial or administrative burden on PBCs.
- F9 As above.
- F10 The Yawuru PBC supports decision-making based on the principles of free, prior and informed consent that allows all members of a native title group to have their say before decisions are made.
- F11 The NNTT is a trusted organisation and the Yawuru PBC would welcome an increased role for the Tribunal in relation to post-determination disputes.

#### **Other Matters Requiring Amendments**

The Yawuru PBC is disappointed that the current proposed amendments do not address the fundamental inequalities in the Act which includes such issues as:

- The continuance of the injustices of *terra nullius* through the oppressive concept of native title extinguishment;
- The implementation of the concept of native title fungibility which involves a commercial means for native title groups to achieve economic development and self-determination without the loss of native title;
- Reversal of the onus of proof in native title claims;
- The oppressive expedited procedure future act provisions which impose the burden on native title groups to pay for and make objections without any corresponding obligations on the State to justify why it considers the expedited procedure should apply;
- The very limited success rate of native title groups in future act determinations that demonstrates a strong systemic bias towards Government and proponents;
- The need for the future act system to be revamped to promote opportunities for native title groups to be involved in development projects on country for example by directing project proponents to native title groups as soon as development applications are made; and
- The need for an efficient system to deal with the future volume of native title compensation claims that will inevitably flow from the *Timber Creek* decision.

As mentioned previously, the Yawuru PBC view the current proposed amendments as a missed opportunity to address such fundamental issues as the above perpetuating the view that, rather than promoting the recognition and protection of native title, the Act is weighted in favour of third parties at the expense of native title groups.

**End.**