



Yamatji Marlpa

ABORIGINAL CORPORATION

Our Ref: GEN033
Office: PERTH

Resource Exploration Inquiry
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Commissioners

Inquiry into non-financial barriers to mineral and energy resource exploration

Thank you for the opportunity to provide a submission to the above Inquiry.

Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body (NTRB) for the Pilbara, Murchison and Gascoyne areas of Western Australia. The organisation has a representative area of almost one million square kilometres and represents 24 native title claimant groups, all with their own language, culture and traditions.

YMAC is a not-for-profit organisation run by an Aboriginal Board of Directors and provides a range of services to its members including legal representation throughout the native title claim process and future act negotiations; community and economic development, and natural resource management.

YMAC is also one of the largest providers of Aboriginal heritage services in Western Australia. We are the nominated Heritage Service Provider for many native title groups in the Pilbara and Geraldton regions and we provide cultural heritage protection advice and support to claimant groups in the course of our native title service delivery.

YMAC is aware that the Terms of Reference for the Inquiry excludes processes under the *Native Title Act 1993* (Cth). However, there are several intersections between native title and Aboriginal heritage processes in Western Australia and, to ensure the Commissioners have accurate information before it, it is necessary to clarify a number of matters addressed by the WA State Government in their submission to the Inquiry.

Clarification as to the funding and regulation of native title and Aboriginal heritage service providers in WA

The WA Government's submission refers at length to the contemporaneous growth in expenditure and decline in minerals exploration activity and seeks to link this directly to heritage and native title related consultation and negotiations. However, the submission fails to provide strong evidence to support any direct correlation and does not sufficiently acknowledge the overall increase in the cost of doing business in remote areas of WA during

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a mining boom. We note, for example, the absence of case studies relating to costs for comparative areas such as environmental approvals.

The Productivity Commission's Issues Paper 'Mineral and Energy Resource Exploration' acknowledges the impact of fluctuating commodity prices and the high Australian dollar on exploration activity, however these issues are not considered in the WA Government's analysis of exploration activity in our State. YMAC submits that the WA Government's assertions about the impact of Aboriginal heritage processes on levels of exploration activity are largely overstated and should be treated with caution.

Indeed, various inquiries at the Commonwealth and State level in the last decade have demonstrated that fluctuations in Australia's exploration spending are mainly due to international factors such as:

- falling mineral prices and demand;
- lack of investment to fund exploration (contributed to by a general economic downturn with the Asian economic crisis, other attractions for speculative investment funds in the dot com boom);
- gold sales by central banks since 1997, and
- company mergers & acquisitions resulting in rationalization of exploration budgets.

This has been well covered in the House of Representatives Committee on Industry & Resources, *Inquiry into resources exploration impediments*, 15 September 2003, 7.20; Australian Bureau of Agricultural and Resource Economics, *Mineral Exploration in Australia: trends, economic impacts and policy issues*, December 2002, pp44-46; E Finlayson (Rio Tinto) evidence to House of Representatives, Standing Committee on Industry and Resources, *Official Committee Hansard*, 30 October 2002, p116; Treadgold 'Exploration dollars continue their flight to safety', *Mining News*, 13 November 2002; and Western Australian Government, *Ministerial Inquiry into Greenfields Exploration in Western Australia*, November 2002.

This is not to diminish the very real challenges that exist in balancing the need for protection of Aboriginal cultural heritage and native title rights with the need for cost effective processes to encourage investment in exploration and mining.

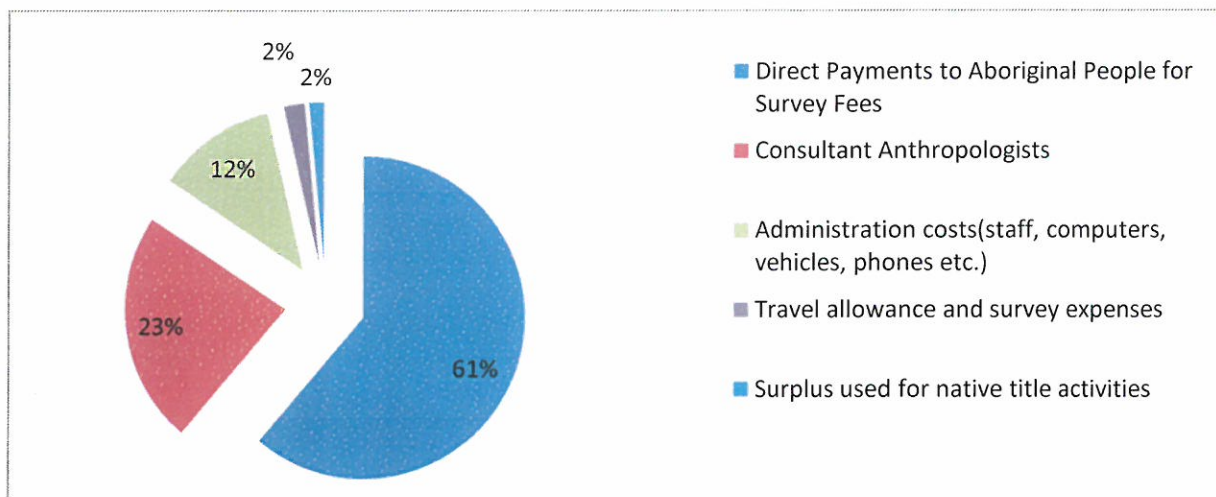
As the Inquiry would be aware, the last decade has involved one of the strongest mining booms in WA's history. Throughout the course of this boom, YMAC and the native title groups we represent have worked cooperatively with resource companies to deliver quality ethnographic and archaeological heritage surveys in line with their intensive exploration, construction and production work programs.

These work programs have put considerable pressure on the native title groups we represent, particularly Elders with extensive cultural knowledge and authority who are required to participate in multiple surveys, often for weeks at a time. In our clients' experience, surveys and negotiated heritage management planning are some of the only avenues available to them to protect significant sites for which they have cultural responsibility.

The Inquiry should note that protection of Aboriginal heritage is primarily the responsibility of state governments and therefore YMAC does not receive any Commonwealth funding for the delivery of heritage services under our Program Funding Agreement with the Department of Families, Housing, Community Services and Indigenous Affairs (FAHCSIA). In the absence of funding from the WA Government, YMAC therefore has to recover the costs associated with heritage service delivery.

Contrary to the claims made by the WA Government, the majority of income YMAC generates from heritage services does comprise direct payments to Aboriginal people participating in

heritage surveys (see table below). The remaining income goes to payments for consultant anthropologists, internal staff coordinating surveys, administration costs and travel expenses. As YMAC is a not-for-profit, charitable organisation any surpluses generated go back into the organisation to either reduce costs or to provide essential additional resources to resolve the backlog of outstanding native title claims, thereby reducing the burden on the taxpayer.



Compounding the pressures generated by the lack of funding for heritage services, funding for Future Act Officers to manage the escalating scale of mining activity was withdrawn by WA State Government in 2010 and not been reinstated. As a result, program funding has had to be redirected to address the high workload related to future act agreements. State funding would inevitably speed up and improve outcomes for all parties.

It is also necessary to respond to the WA Government's claims that NTRBs lack sufficient regulation by the Commonwealth Government. As a registered Indigenous Corporation, YMAC is required to comply with the regulatory regime provided for under the *Corporations (Aboriginal and Torres Strait Islander) Corporations Act 2006* (Cth) and report accordingly to the Office of the Registrar of Indigenous Corporations. YMAC is also subject to annual reporting requirements as part of our Program Funding Agreement with FAHCSIA. Further, every NTRB is required to apply to the Commonwealth Minister for Indigenous Affairs for re-recognition of their status, typically every three years. Far from being 'free agents', NTRBs are therefore subject to higher levels of scrutiny than most private companies.

Finally, the WA Government's claim that NTRBs have a 'monopoly' in terms of legal services for native title claimants is false and misleading. It is not compulsory for native title claimants to be represented by NTRBs and there are several examples in our region where groups have sought their own private legal representation and heritage services.

Weaknesses of the Aboriginal heritage protection regime in WA

A major challenge for YMAC and our clients is that the *Aboriginal Heritage Act 1972* (WA) has not been amended to recognise the introduction Native Title Act and therefore offers no direction on how the two pieces of legislation should properly interact. As a result, NTRBs have had to rely on the good will and cooperation of government and industry parties to arrive at negotiated agreements for heritage protection and management, rather than any consistent and workable legislative framework.

Many of the issues raised in the WA Government's submission to the Inquiry were resolved in partnership with industry, government and NTRBs with the development of the Regional Standard Heritage Agreement, a process initiated over a decade ago in 2002. YMAC and our

clients have not been immune to the increased operational costs generated by market pressures and have necessarily had to propose adjustments to this agreement over that time.

It should be acknowledged that the need for heritage agreements arises due to inadequacies in the *Aboriginal Heritage Act 1972* (WA). A wide range of administrative issues and widely acknowledged inequities in appeal rights under the Aboriginal Heritage Act can potentially undermine certain native title rights; for example, visiting traditional country to undertake customary activities. Native title claimant groups and native title holders are therefore forced to exercise their procedural right under the Native Title Act to object to the expedited procedure (automatically applied to all mining tenement applications by the WA State Government, a process not adopted in many other States or Territories) in order to arrive at a suitable level of protection for culturally significant sites. Arguably, if the Aboriginal Heritage Act was reformed in a way that gave comfort to Aboriginal custodians of cultural sites, the approval process could be made more efficient for all parties.

NTRBs are not alone in their concerns about the lack of protection for heritage under the Western Australian regime. The Native Title Tribunal has acknowledged that the 'protective regime' of the Aboriginal Heritage Act is sometimes insufficient to protect Aboriginal Heritage: eg. *Wilma Freddie (Wiluna Native Title Claimants)* [2007] NNTTA 37, [34] and *Banjo Wurrumurra (Bunuba Native Title Claimants)* [2005] NNTTA 90, [33]-[34]. The Auditor General of Western Australia has also criticised the heritage regime, noting the State Government 'has not actively monitored if operators are meeting...[heritage] conditions...[meaning] that...Aboriginal heritage sites could have been lost or destroyed without the State knowing or taking action': Western Australian Auditor General, *Ensuring Compliance with Conditions on Mining* (Report No 8, September 2011), p8 & 22.

Despite these concerns about the inadequacies of the Aboriginal Heritage Act, YMAC is nonetheless working constructively with industry and government to suggest ways to strengthen the legislative and policy framework and reach positive negotiated outcomes. For example, YMAC is an active member of the Chamber of Minerals and Energy WA's Native Title and Aboriginal Heritage Working Group and is helping to develop and implement the Chamber's new heritage policy. In addition, in 2012 YMAC provided an extensive submission to the WA Government's Review of the Aboriginal Heritage Act (**see Attachment A**). The Government did not provide a response to the submissions received and we are awaiting advice on the status of the Review following the recent election.

In conclusion, several of assertions made by the WA State Government in its submission to the Inquiry should be treated with caution. The statistics that were provided by the Department of Mining and Petroleum demonstrate that the expense borne by industry in relation to heritage protection and native title processes represent a relatively small percentage of the very high cost of undertaking exploration activity in some of the most remote and inaccessible areas of Australia. Furthermore, these costs should be considered in context alongside high operational costs and environmental and other approval processes that seek to protect the broader public interest.

We would strongly welcome an opportunity to discuss these issues further with the Inquiry and look forward to participating in the upcoming public hearings.

Yours faithfully

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