

To:

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Minister, Senators and Honourable Members,

I am writing to you collectively to seek your support in addressing an anomaly between the Native Title Act 1993 and the operational standards within the corporations formed under the CATSI Act 2006.

Native Title 1993 - 2006 - "What Happened"

We are now in the year 2020, 250 years after Captain James Cook landed in Botany Bay in 1770 and laid claim to the land of Australia under in the name of Great Britain.

This claiming of the land was made under the historical law of the day called Terra Nullius. Terra Nullius simplistically stated that claim to the land was made as the land was uninhabited.

It took until 3rd June 1992 for the High Court of Australia to hand down its landmark decision and overturned the legal fiction of Terra Nullius which had characterised Australian law with regards to land and title since the arrival of Captain James Cook.

This decision by the High Court opened up the opportunity for the people of the Aboriginal nations in Australia to seek claim over their traditional lands.

Initially, this decision led to many concerns in the wider community of how this decision and any subsequent claims would impact the ownership of people's homes, the land it sits on and particularly for the farming and pastoralist communities.

These matters were address by the government with the establishment of the Native Title Act 1993.

The preamble reads;

An Act about native title in relation to land or waters, and for related purposes

Preamble

This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms through:

(a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and

(b) the acceptance of the Universal Declaration of Human Rights; and

(c) the enactment of legislation such as the *Racial Discrimination Act 1975* and the *Australian Human Rights Commission Act 1986*.

The High Court has:

(a) rejected the doctrine that Australia was *terra nullius* (land belonging to no-one) at the time of European settlement; and

(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and

(c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.

The people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and 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 also important that the broader Australian community be provided with certainty that such acts may be validly done.

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and

(b) proposals for the use of such land for economic purposes.

It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.

There is no question that the recognition of Native title was well overdue.

So how have we gone as a nation in recognising and maintaining the rights the Native Title Act bestowed back to our first peoples of Australia.

I use the expression of First peoples of Australia in recognition of two key considerations of our countries population.

Firstly, the Aboriginal peoples of today's Australia come from over 500 "clan groups" or "nations" around Australia and the Torres Strait Islands many with distinctive cultures, beliefs and languages. They are our countries First peoples.

Secondly, since the first European settlement in 1788 on the east coast, Australia has added to its First peoples population through the migration of peoples from all nations of the world whom have chosen to make their home for their families in Australia. As such Australia has grown to the multi-cultural society we have today.

From the Native Title Act of 1993 came significant points.

- The recognition of Native title to the Clans and their families of the lands of their nations.
- Acknowledgement of support to each of the claimants for Native Title to assist them in such Titles to be formally granted.
- Definitions of Native Title which recognise the Native Title holders rights and those of existing land users of parcels of the land for residential dwellings or commercial activities, including Farmers and Pastoralists.
- Most importantly it recognised the Native Title holders ongoing role and rights in protecting the spiritual and culturally significant lands within each Native Title from any further development without the approval of the Native Title holders.

This fourth point is of particular significance today as it should be recognised that by including these aspects and considerations in the Native Title Act those whom drafted the act were respecting the Spiritual and Cultural attachment to the land, its fauna, flora, and stories of each clan or nation for which Native Title claims would be made.

This has further significance in that by acknowledging these rights in the Native Title Act they were writing into the Native Title governance respects in accordance with Aboriginal laws.

Aboriginal clan elders are respected with the authority of protecting spiritual and managing the use of the land of their nation.

It is important to note that whilst named claimant/s to which Native titles have been granted are the holders in common law of the native title, they too are also bound by their own Aboriginal clan laws.

It is also important to note that the Native title has sought to address the perpetuity of Native Title grants by awarding them to the named claimants on behalf of their clans/nations.

By way of example here is an extract of the determination by the Federal Court of Australia of Native title to Myra Hayes and others representing the Clan families of Alice Springs, NT.

Hayes v Northern Territory of Australia [2000] FCA 671 (23 May 2000)

Last Updated: 24 May 2000

FEDERAL COURT OF AUSTRALIA
Hayes v Northern Territory of Australia [\[2000\] FCA 671](#)

NATIVE TITLE - determination of native title - settlement of form of determination.

[Native Title Act 1993](#) (Cth)

MYRA HAYES AND OTHERS v THE NORTHERN TERRITORY OF AUSTRALIA AND OTHERS

DG 6002 1996

OLNEY J

23 MAY 2000

DARWIN

DETERMINATION OF NATIVE TITLE

THE COURT DETERMINES THAT:

1. Native title exists in relation to the land and waters more particularly described in the Schedule hereto (the determination area).
2. The persons who hold the common or group rights comprising the native title (the common law holders) are those Aboriginals who are descended (by birth or by adoption) from the original Arrernte inhabitants of the Mparntwe, Antulye and Irlpme estates who are recognised by the respective apmerekere-artweye and kwertengerle of those estates under the traditional laws acknowledged and the traditional customs observed by them as having communal, group or individual rights and interests in relation to such estates.
3. The nature and extent of the native title rights and interests in relation to the determination area are:
 - a) the right to possession, occupation, use and enjoyment of the land and waters of the determination area;
 - b) the right to be acknowledged as the traditional Aboriginal owners of the land and waters of their respective estates within the determination area;
 - c) the right to take, use and enjoy the natural resources found on or within the land and waters of the determination area;
 - d) the right to make decisions about the use of the land and waters of their respective estates within the determination area;
 - e) the right to protect places and areas of importance in or on the land and waters within the determination area;
 - f) the right to manage the spiritual forces and to safeguard the cultural knowledge associated with the land and waters of their respective estates within the determination area.
4. The nature and extent of other interests in relation to the determination area are:
 - a) rights and interests validly granted by the Crown pursuant to statute or by any valid executive or legislative act affecting the native title of the common law holders; and
 - b) other rights and interests of members of the public arising under the common law.
5. The rights referred to in paragraph 4:
 - a) continue to have effect and may be exercised notwithstanding the existence of the native title rights and interests referred to in paragraph 3; and
 - b) an activity done in exercise of such rights will prevail over the native title rights and interests referred to in paragraph 3.
6. The native title rights and interests of the common law holders do not confer possession, occupation, use and enjoyment of the land and waters of the determination area on the common law holders to the exclusion of all others.
7. The rights and interests from time to time comprising the native title are to be held by the common law holders.

AND THE COURT FURTHER ORDERS THAT:

8. Within six months of the date of this order a representative of the common law holders is to nominate in writing given to the Federal Court of Australia the Artepe Ulpaye Aboriginal Corporation:
 - (a) to be the prescribed body corporate for the purposes of [s 57\(2\)](#) of the [Native Title Act 1993](#); and
 - (b) to perform the functions mentioned in [s 57\(2\)](#) of that Act after becoming a registered native title body corporate.as to which the applicants have liberty to apply.
9. The parties have liberty to apply for the following purposes:
 - (a) to establish the precise location and boundaries of the public works and adjacent land and waters identified in relation to any part or parts of the claim areas referred to in the Schedule to this determination; and
 - (b) to establish the precise location of the boundaries of land affected by any previous exclusive possession act or category A intermediate act identified in relation to the claim areas referred to in the Schedule to this determination.

In this determination points 1-7 and 9, we are able to clearly relate the Native Title Acts stated goals for Native Title.

Likewise Point 8 is clear in its determination of the requirement for the establishment of a specific Artepe Ulpaye Aboriginal corporation in line with points 8a and 8b of this declaration.

However, point 8 brings with it a mechanism which has the capacity of enabling the deterioration of the respect given to the Claimants and their families by the determination of Native title.

During the establishment of the PBC, Artepe Ulpaye Corporation was renamed and became known as the Lhere Artepe Corporation.

The Native title determination of an Aboriginal Corporation to be established to oversee the management of the Native title is positive on face value, however, such Corporations or Body Corporations are established and managed under the Corporations (Aboriginal and Torres Strait Islanders) Act 2006 (CATSI Act 2006), not the original Native Title Act.

As such we now have a separate Act providing the governance over the Native Title act which unfortunately allows for ambiguities between the two Acts.

The CATSI Act 2006 was established to provide structure and governance to the operational responsibilities of the Native Title holders in their dealings with any of the Family concerning Native Title lands.

This said, the CATSI Act and subsequent Corporation or Body Corporation structures do not provide any protections for the families of the Native Title lands for which the Corporations have been formed i.e. enabling controlling representation on such Corporations. The CATSI Act states a minimum number of Directors on the Corporation / Body Corporation of 5. The number of Directors is at the individual Corporations discretion. The CATSI Act clearly states all of the legal responsibilities of the corporation. It documents the processes and responsibilities for the Directors, election of the Directors, resignation of a Director and all associated governance and procedural guidelines for the running of the Corporation. However, it does not have any clauses to protect the Native Title holders or their descendants from holding the majority of Directorships and as such enable the Families to fulfil their responsibilities under the Native Title Declaration.

The Body Corporate guidelines incorporates requiring approval for any development which involves consideration of Cultural or a Spiritual site, however, it does not state that such family approval must be given in accordance and with respect to the Aboriginal Laws of the families, in line with the Native Title declaration.

This can and has lead to Body Corporation's mis-representing the intentions of the Native Title holders and their descendants for whom the Body Corporations were established to represent.

By way to of example, here is a brief overview of a current case being addressed through ORIC between the Family of one of the Estates holding Native title of lands in Alice Springs and the LAAC which were formed under the CATSI Act to represent them. Please also note such alternative examples exist across the country. The matter is not political but procedural.

In this example the LAAC have been reported to be entering into an ILUA with the NT government for the release of 5 parcels of Land held under Native title back to the NT government in return for a monetary sum of investment by the NT government over the next 10 years, as long as Native title is handed back over the first 5. The issue being raised by the family is the validity of the LAAC to act on their behalf being that the 5 parcels of land being discussed in this ILUA are lands held by the Family under Native title making the challenge to ORIC, as they have had no input into any such ILUA negotiation or decision, have no representation on the LAAC and have given no

authority to the LAAC to act on the families behalf under common nor Aboriginal Laws or any such negotiations to give up Native title of their lands.

To address this situation the families need to do so through two distinct bodies. With regards to the complaint of Native Title, this is made to the Central Land Council as the Native Title representative body or the Native Title Tribunal and with regards to any complaint of the LAAC directly, this needs to be submitted to Office of Registrar for Indigenous Corporations. ORIC does not have the statutory power available to intervene on matters of native title.

So whilst the processes to challenge any Corporations actions and address Native title claims exist through these bodies, they are distinct in their jurisdictions and therefore only empowered to make determinations on stand alone components of such a challenge in the example above. As such the process is costly in monetary terms and particularly in time.

I believe that such an ambiguity is readily fixable.

The Lhere Artepe and the Central Land Council as the Native Title representative body hold a register of the genealogy of each of the Family groups whom hold Native Titles. As such and in respect of Aboriginal law CATSI Corporations can identify and determine that no development is permissible without the written agreement of the Elder of the Family whom holds the Native title.

I understand that under CATSI Act, ORIC can not intervene on matters of Native Title. On singular matters of Native Title I agree with this, however, in matters addressable under their direct jurisdiction involving Native Title they should seek a determination from the Native Title Tribunal and then should be afforded the power to include this determination in their own determinations.

In this manner the two Bodies have a process to address the matters raised holistically and with appropriate chronology.

I would also suggest that when a challenge, such as in the case above, is made, until a conclusive determination is made by the Central Land Council and ORIC, the commercial activity being challenged in the claim should be frozen from progressing.

Further to this it should be determined in the procedural governance of the Corporations that the senior elder or their named representative/s shall be Directors of the Corporation and that these Family members representing the families of the Native title holders have a representation of not less than 60% of the numbers of Directors of any Corporation or Body Corporation, proportionately numbered to the number of Estates of land held under the Native title, thus ensuring true representation and allowing the ability for the Families to maintain their cultural responsibilities.

I appreciate this will require amendment/s to the CATSI Act and as such yours and your colleagues support and intervention.

I appreciate you know this better than I. It took the 500 plus Aboriginal clans / nations in Australia and the Torres Strait Islands 223 years under European settlement to be recognised as the Native Title owners of the lands they and their ancestors had occupied for thousands of years and it took only a further 13 years for a subsequent Act of Parliament to provide a mechanism for the administration of these lands to be taken from them again.

I believe not by intent, however, the mechanism is there.

Above we have a matter which is fixable, which would clearly demonstrate recognition of the ambiguity and show leadership in the action of its rectification.

Minister, Senators and Honourable Member, as the 5 Parliamentarians of Aboriginal decent and also Mr Snowden as the Member for the Alice Springs area, I ask you and your Parliamentary colleagues investigate and address these matters with urgency.

I believe this needs to be actioned as a matter of urgency by our Parliament to ensure the integrity of Native Title as delivered by the Act is able to be maintainable by the holders with balanced consideration of Common and Aboriginal law.

Native title was an initial positive step on our journey of unifying and respecting all whom call Australia home. We have many more to take, so lets make this first positive step sustainable.

I thank each of you for your time in reviewing this email and should you require any further information from me please do contact me on the details below.

Kind regards

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