Thalanyji
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Aboriginal Corporation

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Attention: Wayne Bergman
Chairperson
Expert Indigenous Working Group

Dear Wayne,

**SUBMISSION BY BUURABALAYJI THALANYJI ABORIGINAL CORPORATION RNTBC 7105**

**POINTS TO BE RAISED IN SUBMISSION TO EXPERT INDIGENOUS WORKING GROUP**

1. Background

Buurabalayji Thalanyji Aboriginal Corporation ("**Thalanyji**") is currently engaged in certain native title negotiations which are conducted on a without prejudice basis. As such, the points raised below are general in nature. However, Thalanyji seeks an opportunity to make further, more detailed submissions at an appropriate time.

Thalanyji is concerned with the way in which the *Native Title Act 1993* ("**Native Title Act**" or "**Act**") is currently interpreted and applied by various governments within Australia as well as private entities. Within this submission, the term "proponent" refers to both governments and private entities.

Thalanyji's experience to date is that native title is not held in the regard with which it was originally intended at the time native title became a part of the written law. This is to the detriment of all Australian people, and it has flow on effects many of which cannot be remedied or which require significant resources in order to do so. The concerns Thalanyji have in this regard are set out more fully below.

2. Exclusive versus non-exclusive possession native title

A trend has developed recently in native title negotiations of quantifying the monetary value of non-exclusive possession native title as lower than exclusive possession native title and arbitrarily allocating a discount by way of percentage to the value of those lands under Australian law. This is inappropriate for a number of reasons. First, there is no agreed process for allocating a particular percentage value to the discount.

Secondly, the use of native title lands which is not inconsistent with native title does not reduce the value of that land to native title holders or their rights in relation to their traditional lands. There is room for this concept to be recognised within non-Indigenous Australian law. It is similar, for example to the position in relation to joint tenancy, where the existence of joint owner A does not reduce the value of joint owner B's share in the land.

The treatment of the exclusivity or otherwise of native title needs to be investigated and unfair processes and outcomes resolved.

3. Recognition of native title as a valuable property right

The recognition that native title is a valuable property right is not a new proposition and has gained significant support within the Australian legal system to date. However, in Thalanyji's experience, non-Indigenous negotiation parties consistently fail to afford native title this status. This can result in a uneven negotiation playing field, lower than fair offers of compensation for the use of native title lands and unreasonable conditions being placed on the offer and implementation of that compensation.

Native title should be capable of and routinely used as desired by the native title parties in whom it vests, in a similar fashion to other forms of land ownership. This should extend to the ability for native title holders to collectively grant tenure to third parties, as is the case with freeholders. Failure to treat the substantive value of native title rights and interests as being at least equivalent to freehold is contrary to the principles which underpin native title law, and contravene fundamental values found elsewhere in non-Indigenous Australian and international law relating to the treatment of Indigenous peoples and their human rights. These include, but are not limited to anti-discrimination laws and United Nations declarations.

4. Native title and sustainable economic development

Opportunities for real economic development do not appear to be currently held in high regard by proponents, despite that fact that improving these things offers benefits for all sectors of the Australian community at large.

Unfortunately, consultation with native title holders on these matters usually takes place at an advanced stage of negotiations, well after a proponent's development plan is well established, if consultation occurs at all. In many instances, proposals made by native title holders who often have direct knowledge and experience of both successful and unsuccessful measures to maximise these opportunities are watered down or disregarded.

By engaging early with native title holders in relation to proposed activities on native title lands, all facets of those activities can be tailored to ensure that they deliver maximum opportunities for sustainable economic development. Without meaningful consultation with native title holders and their representatives who have relevant knowledge in relation to what works and what doesn't in relation to employment, contracting and business development opportunities, proponents often arrive at the negotiation table with entrenched protocols which might tick the box on delivering these opportunities, without achieving that in substance.

5. Misapplication of the Native Title Act and its consequences

The purpose of native title legislation originally was fourfold (as identified in the second reading speech of the Native Title Bill 1993:

- ungrudging and unambiguous recognition and protection of native title;
- the provision for clear and certain validation of past acts including grants and laws, if they have been invalidated because of the existence of native title;
- the creation of a just and practical regime governing future grants and acts affecting native title; and,
- rigorous, specialised, and accessible tribunal and court processes for determining claims to native title, and for negotiation and decisions on proposed grants over native titled land.

The first of these is recognised in the opening object of the Native Title Act is to provide for the recognition and protection of native title. However, as can be seen from the issues raised above, the recognition given to native title is often treated in future act negotiations often falls short of what is appropriate and it is consequently undervalued and underutilised.

The second object of the Native Title Act picks up the third and fourth points, namely to establish ways in which future dealings affecting native title may proceed and to set standards for those dealings. Unfortunately, the approach taken in negotiations in which Thalanyji has been a party to date is often to view native title as an inconvenient hurdle to development, to be dealt with in as cursory fashion as possible. While standards set in the native title act are capable of achieving real outcomes, procedures like consultation and good faith in relation to future acts are read more narrowly than appropriate. As a result of these things, instead of upholding appropriate standards and the protection afforded by the Native Title Act, these baseline standards are being driven down over time. Further, the Act is consistently interpreted in such a way so as to impose significant costs on native title holders, deliver the minimum benefit to those parties and to curtail both their procedural and substantive rights to the maximum extent

possible. While this might be attractive to certain sectors of the community, such an approach cannot be said to be in line with the objectives of the Act and has little benefit to the Australian community as a whole.

Applying native title law in a manner consistent with the principles from which it emanated will serve only to improve the position of some of the most disadvantaged members of Australian society, thus mitigating the consequences experienced by native title holders as a result of impacts on their native title rights and interests. This has obvious beneficial flow on effects to the Australian people as a whole, both in economic and non-financial terms.

Kind regards

Tim Milsom
Chief Executive Officer