

# SUBMISSION BY NYAMBA BURU YAWURU LTD ON CHARITIES BILL 2013: STATUTORY DEFINITION OF CHARITY: 3 MAY 2013

Date: 3 May 2013

## SUMMARY

Nyamba Buru Yawuru Ltd (**NBY**) welcomes the attempt to deal with the particular situation of registered native title body corporates (**RNTBC**) as registered charities meeting the public benefit test. NBY supports clause 8 of the *Charities Bill 2013* to the extent that it clarifies that registered charities that distribute benefits to members of a native title group meet the public purpose test.

However, NBY is concerned that the proposed amendments may not apply to the circumstances of the Yawuru native title holders.

NBY recommends modifying the proposed amendments to include all corporations that are RNTBC related entities.

1. Yawuru people are the native title holders for an area around Broome in North West Australia. Nyamba Buru Yawuru Ltd (**NBY**) is the operational arm of the Yawuru corporate group.
2. NBY welcomes the Commonwealth Government's intention to clarify the tax consequences of native title benefits and provide Indigenous communities with flexibility as to how we structure our financial affairs.

## Background

3. On 28 April 2006, Justice Ronald Merkel recognised native title rights for the Yawuru people in *Rubibi Community v The State of Western Australia (No 7)* [2006] FCA 459.
4. The Yawuru people entered in to negotiations with the State of Western Australia seeking to reach agreement to accommodate Yawuru native title rights and interests with the Western Australia statutory land and regulatory planning regime. In 2009, during the negotiations Yawuru native title holders determined a corporate structure that provide the maximum benefit to Yawuru native title holders whilst maintaining appropriate protection for the native title trustee corporation.
5. The corporate structure involves three corporations, one registered under the *Corporations (ATSI) Act 2005* and the other two under the *Corporations Act 2001* (**the Yawuru corporate group**)

6. The Yawuru corporate group is made up of:
  - Yawuru Native Title Holders Aboriginal Corporation Registered Native Title Body Corporate ICN 7033 (**Yawuru PBC**), a corporation registered under the *Corporations (ATSI) Act 2005* that holds native title on trust for the common law native title holders
  - Murra Mala Yawuru Pty Ltd CAN 136 961 012, a proprietary limited company incorporated under the *Corporations Act 2001*. Its sole member is Yawuru PBC.
  - Nyamba Buru Yawuru Ltd ACN 137 306 917, a not for profit corporation incorporated under the *Corporations Act 2001*, whose purpose is to receive and manage assets and monies on behalf of Yawuru PBC. Its sole member is Murra Mala Yawuru Pty Ltd
7. NBY has been endorsed as income tax exempt by the Australian Taxation Office on the basis that its objects include:

*"The purposes of the Company are to provide community services in the relief of poverty, suffering, distress, misfortune, disability or helplessness of Indigenous individuals and families in the Broome area of Western Australia in a manner that promotes the maintenance and advancement of Indigenous culture and interests."*

8. On 25 February 2010, the Yawuru people (through the Yawuru PBC and NBY) and the State of Western Australia signed the:
  - Yawuru Prescribed Body Corporate Indigenous Land Use Agreement (registered on 24 May 2010) and
  - Yawuru Area Agreement Indigenous Land Use Agreement (registered on 6 August 2010) (**the ILUAs**)
9. Under the ILUAs the State of Western Australia agreed to transfer land title and monetary benefits to Yawuru PBC and NBY as compensation for the extinguishment of native title. All of the monetary benefits transferred under the ILUAs are held by NBY.

### **Concerns about the Charities Bill 2013**

10. NBY is concerned that clause 8 of the *Charities Bill 2013*, which clarifies that RNTBCs can provide benefits to their members, use the *Income Tax Assessment Act 1997* to define *indigenous holding entity*, which may not include the various corporate structures that native title holders have chosen to create.
11. Specifically Yawuru are concerned that the proposed amendments, through the definition of 'Indigenous holding entity', may not apply to the circumstances of the Yawuru corporate group. That is, where Yawuru people have chosen to have the benefits received under a native title agreement held by an ordinary<sup>1</sup> corporation, it is not clear whether the proposed definition will apply, and that the corporation can meet the public benefit test.
12. Further, requiring native title holders to use a distributing body or a trust restricts the flexibility of native title holders to choose how to structure their financial affairs and to leverage the native

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<sup>1</sup> That is a corporation incorporated under the *Corporations Act 2001* or other State or Territory legislation not specifically related to Aboriginal, Indigenous or Torres Strait Island people.

title benefits to meet the needs of their community. It may also discourage potential partners from entering in to partnerships with the native title holders based on corporate issues.

The unintended consequence of the proposed amendments in its current form is that it may restrict the self-determination capacity of native title holders to manage their affairs following the recognition of Indigenous common law rights, contrary to the intentions of the Australian Parliament when it passed the Native Title Act, 1993.

## Recommendation

13. NBY recommends that consideration be given to expanding the corporate entities covered by the proposed amendments to include ordinary corporations where appropriate.
14. Consideration should be given to specifically including all corporations that are related entities to the Registered Native Title Body Corporate (**RNTBC**), or specifically, subsidiaries of RNTBCs.
15. Such an amendment would allow native title holders to use ordinary corporations to hold the benefits of native title agreements with an appropriate level of corporate protection for the RNTBC, with the confidence that providing benefits to their members will not threaten their charitable status.
16. This could be achieved by amending:
  - The definition of *Indigenous holding entity* include *any corporation established by or under provisions of a law of the Commonwealth or of a State or Territory that is a related entity of the RNTBC*or
  - Amend the definition of a '*distributing body*' as set out in section 128U(1) of the ITAA 1936 to include "*(e) corporations that are established by or under provisions of a law of the Commonwealth or of a State or Territory that are a related entity of the RNTBC*"or
  - By removing "that relate to Aboriginals" from (1)(d)(i) of section 128U of the *Income Tax Assessment Act 1936*

## Further information

17. If you require any further information please contact Brendan Renkin on 08 9192 9600 or [Brendan.renkin@yawuru.org.au](mailto:Brendan.renkin@yawuru.org.au)