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Ms Jane Hall
Senior Legal Officer
Australian Law Reform Commission

By Email: [REDACTED]
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Dear Madam,

Discussion Paper: Review of the Future Acts Regime

We refer to our telephone conversations with you and thank you for agreeing to an extension of time to today's date for lodging a submission.

We confirm that we act for Dambimangari Aboriginal Corporation (**DAC**). DAC represents Dambeemangaddee People, the traditional owners and common law holders of native title in relation to Dambeemangaddee land and sea country in the north west of the Kimberley region of Western Australia (*Barunga v the State of Western Australia* [2011] FCA 518). The PBC for the Dambeemangaddee Determination Area and also for the Wunambal Gaambera and Wilinggin Determination Areas is Wanjina-Wunggurr (Native Title) Aboriginal Corporation RNTBC (**WW-PBC**). DAC is a Related Corporation of WW-PBC under the latter's Rulebook and has its delegated authority in relation to principal parts in the native title decision-making process, including the conduct of negotiations etc. with resource companies wanting to explore or mine within the Dambeemangaddee Determination Area.

DAC welcomes the opportunity to make a submission (through us) to the Australian Law Reform Commission in relation to the above Discussion Paper. The submission is focused primarily on future acts affecting intertidal and offshore areas within the Dambeemangaddee Determination Area.

The Dambeemangaddee Determination Area lies to the north of Derby and comprises an area of approximately 27,900 sq. kms, of which slightly over half comprises mainland areas and islands and the rest intertidal and offshore areas. Native title exists over most of the mainland and islands, apart from the Yampi Sound Training Area (which is held under freehold by the Commonwealth for Defence purposes) and the Dambeemangaddee part of Prince Regent National Park (originally created in the 1960's as a nature reserve). Where native title exists in relation to land (e.g. over Kunmunya and Wotjalum Aboriginal Reserves and areas of Unallotted Crown Land), it is for the most part Exclusive Possession Native Title.

The Sea Country within the Determination Area comprises:

- (i) intertidal areas (i.e. between high and low water marks) adjoining the mainland and surrounding the many islands; and
- (ii) offshore areas within the coastal waters of the State of Western Australia (including tidal creeks and rivers).

As with elsewhere in Australia, the native title determined to exist over Dambeemangaddee Sea Country is non-exclusive. However, native title has been determined not to exist (by reason of extinguishment) over Yampi Sound Port Area (being intertidal and offshore areas surrounding Cockatoo and Koolan Islands, on which iron ore mining has been taking place for the last 70+ years) and over the Dambeemangaddee part of the Derby Port Area.

Tidal variations in the Kimberley, including in relation to Dambeemangaddee Sea Country, are amongst the greatest in Australia. For example, Derby boasts variations reaching up to 11.8 metres. As a result, there are some very large intertidal areas within the Dambeemangaddee Determination Area. These include large expanses of *waddaroo* (coral) and *jirdarm* (algal) reefs, *julum* (seagrass beds), *jindirm* (mangrove communities), *galow* (salt marsh) and intertidal mudflats. These comprise important habitat for ecologically and culturally important animals, including *goiyoia* (estuarine crocodiles), *julawaddaa* (turtles), *waliny* (dugongs), *ganbaneddee* (crabs), *jigeedany* (dolphins), *iledda* (barramundi) and other *jaiya* (fish) and are nursery areas for many of these species.

Many reefs (including *Yowjab* (Montgomery Reef)) and *galaab* (beaches) are of high cultural importance to Dambeemangaddee People. Many of the beaches, for example, contain rock and stone arrangements and other manifestations of the actions of Lalai (Ancestral) Beings, including of Wandjina. There are particular Lalai Beings called Argoola, capricious and potentially dangerous beings that reside in the intertidal ecologies and influence the ability of humans to access and enjoy marine foods. There are other beings, Jilinya, some of which only live within the intertidal zone and, in particular, mangrove forests, that interact with human beings.

The narratives surrounding these Lalai Beings and their intangible and tangible manifestations continue to inform the Dambeemangaddee Traditional Owners about the nature of their material and non-material worlds as well as their social, community and economic lives.

Intertidal areas are, of course, also important for camping, fishing and hunting and gathering bush tucker (e.g. oysters, fish bait, mud crabs, bush honey) and for gaining access to rock art sites, shelters, caves etc. above high water mark. The intertidal areas are just one example of the many manifestations of the power of the Woongudd (primordial sacred serpent/spiritual life force associated with the creation of the land, sea and sky) to transform Country. Traditional Owners are able to identify numerous other manifestations of Woongudd such as in the shape and form of waves and ocean currents.

Many offshore areas (i.e. areas below low water mark) are also of high cultural significance, including, for example, as a source of freshwater springs that are exposed at low tide, as the location of pre-existent human spirits such as Yornadaiyn, and as locations of the powerful omnipresent Woongudd in the form of active whirlpools such as the 3 mile 'S' bend passage, *Jorjorguddim* (Whirlpool Pass); also *Gaaran-ngaddim* (Horizontal Falls) and *Ileda* (Walcott Inlet). The offshore areas also include the large portion of Camden Sound used by *ngunubange* (humpback whales), about which there are important Lalai stories too.

[The Double Log Craft (made of mangrove forest wood) is referred to in the National Heritage Listing of the whole of the West Kimberley as illustrative of the deep connection that exists between the Traditional Owners and their Saltwater Country and an example of unique technological innovation that allowed the Traditional Owners' ancestors to navigate their demanding and often treacherous marine environment and demonstrated a high degree of knowledge about and engagement with that environment (which continues to this day).]

The closest the Discussion Paper gets to addressing intertidal and offshore areas appears to be in the section concerning the possible establishment of an impact-based model in replacement of Subdivisions G to N of the *Native Title Act 1993* (Cth) (**NTA**) (see, for example Question 14). Dambeemangaddee People – and probably other Aboriginal and Torres Strait Islander groups with extensive Sea Country (particularly where there are islands within it which they occupied and regularly travelled to) – consider that insufficient attention has been (and is being) paid to the

importance to them of traditional rights and interests and connection to intertidal and offshore areas within their Country in their lives and world view and the need for these to be properly protected. The impact-based model as contemplated in paragraphs 146 to 179 would certainly go some way to ameliorating the situation, along with Proposal 6 where relevant (i.e. with section 26(3) being repealed and the Category B Right to Negotiate, as in Figure 4 and Table 1, extended to future acts in relation to intertidal and offshore areas). On that basis, DAC supports the establishment of such an impact-based model and the reforms to the Right to Negotiate process outlined in Proposal 6.

In the meantime, given the very limited procedural and other rights in the NTA of any assistance in relation to native title Sea Country (with Subdivisions H and N affording next to no such rights and Subdivision P wholly excluded), DAC has taken substantial measures to gain the greatest level of management control and protection it could secure under existing WA legislation by agreeing to all of it now being a marine park which DAC jointly manages with the WA Department of Biodiversity, Conservation and Attractions under the *Conservation and Land Management Act 1984* (WA) (**CALM Act**). Amongst other things, this gives DAC a significant role in the regulation of the activities of commercial tour operators within the park, including requiring the involvement of a Dambeemangaddee guide, where appropriate under cultural protocol. In addition, parts of the marine park are (or will be) classified as sanctuary zones or special purpose zones (including some designated for cultural protection) with, for the most part, extractive commercial and recreational uses being declared to be incompatible, e.g. commercial fishing, recreational fishing (where not undertaken as part of a licensed fishing tour), pearling and aquaculture, as well as oil and gas exploration/production and mining: see section 13B CALM Act; section 24A *Mining Act 1978* (WA).

However, these prohibitions and restrictions will not prevent all extractive commercial and recreational uses in the marine park. These may be permitted in general use zones and in those special purpose zones in respect of which such commercial or recreational use is not declared to be incompatible with the designated purpose. By way of example, a future act consisting of the grant of a pearling or other aquaculture lease or licence outside the restricted areas within the marine park would, it seems, be regarded as “relat[ing] to the management or regulation of...living aquatic resources” (section 24HA(2)(b)(ii) NTA), affording only the procedural right to be notified of the proposed future act and the opportunity to comment (section 24HA(7)). [Of course, not even these (inadequate) rights would apply in relation to the two Port Areas (within the Dambeemangarddee Determination Area), because native title was extinguished in relation to them, when they were vested in the relevant Minister under the *Marine and Harbours Act 1981* (WA).]

Finally, we are instructed also to express:

- full support for Proposal 9 and the repeal of section 32 of the NTA (expedited procedure), but (pending such repeal) repeat the submissions set out in our letter of 28 February 2025 and urge, in addition, that there be changes to the section to require a Government party to make a proper merits assessment for the purposes of section 237 (reviewable by the NNTT) before it may issue a statement triggering the expedited procedure;
- support for Native Title Management Plans (as contemplated in Question 6/paragraphs 48 to 64 of the Discussion Paper), subject to adequate resourcing of PBCs and their Related Corporations (as relevant);

- support for the amendment to the NTA contemplated in Question 16 (so that account may be taken of impacts on native title rights and interests in areas outside the footprint of the relevant future act; however, consideration should also be given to such an amendment extending to any impact to culture heritage outside that footprint, but within that part of the relevant Traditional Owners' Country in relation to which native title has been extinguished);
- general support for the other Proposals and ideas for constructive amendments to the NTA (which protect native title holders' interests) as set out in the Discussion Paper.

We will be pleased to respond to any queries you may have or provide further clarification in relation to this submission.

Yours sincerely

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