Thank you Mr Chairperson,

The Australian Native Title Act was proclaimed in 1993 following the Mabo decision in the High Court of Australia. After 16 years of operation the process for traditional owners to prove connection to country remains one of the major hardships for Indigenous communities.

Native Title representative bodies in Australia have been pushing for amendments to the Native Title Act that will relieve the crushing burden of proof that is required under the Act. Many native title practitioners in Australia are also calling for changes to the system, including our Chief Justice, the highest office in Australia's judicial system. In fact, that same Chief Justice recently likened the native title process to that of Sisyphus, a Greek God doomed eternally to roll a large rock to the top of a hill only to have it roll back down again.

We continue to call on the Australian Government to change the Native Title Act so that some elements of the burden of proof are lifted from traditional owners and their families. This could be satisfied by introducing a rebuttable presumption of continuity, reversing the onus of proof so that the State (or other respondent parties to a claim) bears the burden of rebutting such a presumption.
Given that in many instances (particularly in remote locations) there is little foundation for significant dispute over native title applicants’ continuous connection to their traditional lands, the adoption of a rebuttable presumption should help reduce the resource burden on the native title system, helping facilitate the expeditious resolution of native title claims. Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its ‘corporate memory’, is in a better position to elucidate on how it colonised or asserted its sovereignty over a claim area. This has the additional benefit of placing responsibility for investigating connection and extinguishment in the lap of the one entity; potentially leading to a more comprehensive understanding of the evidence in a given case.

Importantly, the burden placed on the State by virtue of such a presumption may also result in positive behavioural changes; with the State having little incentive to expend resources in difficult disputes over continuity and connection or to assert, for example, that continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent (e.g., genocide or other breaches of international human rights law). In this respect, the introduction of a rebuttable presumption may act as a significant catalyst for change, facilitating a shift in the way negotiations are conducted and in the quality and quantity of positive outcomes for claimants.

A rebuttable presumption would also have a significant impact on the negotiation process. With State Governments being required to rebut continuity and justify extinguishment with the associated costs involved they may be more inclined to negotiate earlier and more openly with the aim of spending less on the process and more on possible opportunities for Traditional Owners.

Mr Chair, from the perspective of traditional owners, the experience of trying to prove their continuous connection to traditional lands directly affects their identity as Indigenous peoples with the constant threat of being denied their individual history. After over 200 years of dispossession from their country, it is a travesty that our political system allows the continuation of such an unjust system.

Recommendations:

1. That the Permanent Forum seek a response from the State of Australia on amending the Native Title Act to shift the burden of proving connection to country from native title applicants to other respondent parties to claims.