Kimberley Land Council

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The Hon Christian Porter MP,
Attorney General of Australia

and

The Hon. Nigel Scullion
Minister of Indigenous Affairs

By email only: native.title@ag.gov.au

Dear Mr Porter & Mr Scullion,

Re: Reforms to the Native Title Act 1993 (Cth) - Submission

I write in response to the release in November 2017 of an *Options Paper* in respect of *Reforms to the Native Title Act 1993(Cth)* (NTA).

I note the reforms' proposed aim to improve the efficiency and effectiveness of the native title system to resolve claims, better facilitate agreement-making around the use of native title land, and promote the autonomy of native title groups to make decisions about their land and to resolve internal disputes.

The Kimberley Land Council (KLC) is a member of the National Native Title Council (NNTC). As such the KLC has actively participated in contributing to the NNTC's submission in response to the *Options Paper*. The KLC supports that submission.

Further to that submission though, the KLC considers that certain aspects of the future act regime are in need of reform.

Whilst the *Options Paper* deals with a number of issues arising in the day to day world of native title claims, Indigenous Land Use Agreements (ILUAs) and Prescribed Bodies Corporate (PBCs),

one issue that is not raised is the extraordinary outcomes of Future Act Determination Applications (FADAs).

Figures available from the National Native Title Tribunal (NNTT) indicate that FADA determinations have favoured the native title party (NTP) 3 or 4 times out of about 6000 decisions (approx 0.005%). There may be many contributing factors for such statistics but the imbalance against the native title parties would be still such even if there was a thousand-fold increase in determinations that favoured native title parties.

This imbalance in outcomes increasingly erodes any leverage native title parties have in agreement-making in the right to negotiate (RTN) processes. As the statistics related to FADA determinations clearly show, the miners and explorers only have to take part in negotiations, reach no agreement with the NTP, apply for a determination from the NNTT and proceed to get a determination in their favour.

The use of the "expedited procedure" (section 32 NTA) in the RTN process further exacerbates the imbalance against the NTP. In Western Australia, the State Government initiates the expedited procedure without making appropriate enquiries into whether or not the required criteria for its use applies in any particular situation. It inevitably falls to the NTP to object to the process, to investigate, to gather and present evidence and to make submissions to the subsequent NNTT inquiry – using significant levels of resources from scarce funds, to ensure that the expedited procedure is properly applied. If the native title party is successful before the NNTT, that is, the NNTT's decision is that the expedited procedure doesn't apply, the process reverts to that of the general RTN process – remembering that this is the process where decisions of the NNTT are in favour of the native title party just 0.005% of the time.

The expedited procedure was introduced for the benefit of government and explorers in order to "expedite" the grant of exploration and mining tenements, but it is the native title party that is paying for it. The process is clearly heavily weighted against the native title party. An outcome that is presumed not to have been intended.

State governments need to be contributing to the costs of use of the expedited procedure. Whilst the State would not usually be in a position to directly establish whether or not the expedited procedure criteria apply, they could seek out (and pay for) the gathering of relevant information by Native Title Representative Bodies (NTRB's) or other bodies.

Grantee parties (the explorers) should also be contributors to the use of the expedited procedure. Part of the imbalance in the expedited procedure could be addressed by making the use of the expedited procedure conditional upon the grantee party agreeing to a standard Heritage Protection Agreement with the native title party. Such an agreement would need to have sufficient levels of cultural heritage protection (and funding for such) that would enable the native title party to agree to not object to the use of the expedited procedure.

There are also emergent issues related to native title compensation and the protection and assertion of native title rights and interests which the KLC considers will need to be addressed in the near future through further legislative change.

Yours sincerely

Tyronne Garstone
Acting Chief Executive Officer