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Resources Sector Regulation study
Productivity Commission
LB2, Collins Street East
Melbourne Vic 8003

Dear members of the Commission

RESOURCES SECTOR REGULATION:
PRODUCTIVITY COMMISSION DRAFT REPORT SUBMISSIONS

Ward Keller is a Northern Territory law firm with a long history of providing legal services to the Northern Territory's resources sector, including in relation to indigenous issues. Ward Keller appreciates the opportunity to provide these submissions on the Commission's *Resources Sector Regulation, Draft Report*.

Information Request 5.1

The Draft Report indicates that the Commission is seeking further information on whether reforms to the following elements of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (**ALRA**) would help to enable resources sector investment while still achieving the aims of ALRA:

- *the conduct of resources companies and traditional owners during negotiations (including the way that moratorium rights are exercised)*
- *the conjunctive link between exploration and extraction approvals*
- *the potential costs and benefits of allowing other resources companies to apply to develop land rights land that is subject to a moratorium for another resources company.*

Reforms to these elements of ALRA that will enable resources sector investment while still achieving the aims of ALRA are both desirable and possible, benefiting the resources sector, Aboriginal communities and the Territory economy.

Before presenting proposals for reform, some background on Aboriginal land tenure land in the Northern Territory is necessary along with an identification of some of the challenges faced by resource companies under the current legislative regime.

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Approximately 46% (628,269 km^2) of the Northern Territory is Aboriginal land under ALRA. Approximately 45% (604,865 km^2) of the Northern Territory is covered by pastoral lease under the *Pastoral Land Act* (NT) on which native title rights and interests exist and are dealt with in accordance with the *Native Title Act 1993* (Cth) (**NTA**).

Part IV of ALRA (sections 40 to 48J) addresses resources exploration and production on Aboriginal land. The main challenges faced by resource companies in dealing with Part IV of ALRA are:

(a) The time taken to achieve a grant of tenure. It takes an average of 54 months to obtain the grant of exploration tenure on Aboriginal land, compared to 9 months on other land.

(b) The material costs incurred by resource companies in seeking the initial consent to negotiate under ALRA, clearance costs for non-consent areas, and exploration agreement costs.

(c) The lack of turnover of Aboriginal land exploration licences. Reduction requirements are not enforced, understandably so given the large investment in time and cost that has gone into obtaining the exploration licence.

(d) The veto right of traditional owners is often used to extract compensation terms far beyond that which reflects the effects on traditional owners.

(e) The unfamiliarity of resource companies with ALRA. The process is different from right to negotiate provisions of the NTA with which most resource companies are now familiar.

(f) ALRA conjunctive agreements. Resource companies and Land Councils are in a position of having to negotiate resource terms before exploration has occurred and without any meaningful assessment of the viability and economics of the resource project having occurred.

In the 2013 '*Report on Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976'* the Aboriginal Land Commissioner, Justice John Mansfield AM, states (at para 206) "*… it is difficult to resist the conclusion that Part IV operates as an impediment to the extent of exploration expenditure on Aboriginal land in the NT, relative to non-Aboriginal land*".

With those challenges in mind, Ward Keller offers a proposal that retains the veto right of traditional owners for Aboriginal land and then applies the right to negotiate provisions of the NTA to both the exploration phase and then the production phase. This disjunctive process with a veto at the outset is set out in the attached flowchart.

The process would work as follows:

1. After a resource company applies for exploration tenure (including a mineral exploration licence for minerals, a petroleum exploration permit for petroleum or a geothermal exploration permit for geothermal energy) on Aboriginal land, the Northern Territory Department of Primary Industry and Resources (**DPIR**), the department responsible for mineral and energy resources, determines whether the application is acceptable in accordance with the terms of the relevant legislation and whether the relevant Minister may be willing to grant the application.

2. If the application criteria are met and the Minister is willing to consider a grant, DPIR would notify of an application to the relevant Land Council under ALRA. Though the area of the application is identified (and whether it is exploration for minerals, petroleum or geothermal), the applicant is not identified and no specific work program or compensation proposal is provided to the Land Council.

3. The Land Council then has four (4) months to consult with traditional owners and obtain instructions whether to allow the application to proceed in full, to veto the whole of the application, or to veto the application in part. The veto is now 'cleaner' as it is not based on the identity of applicant, the details of any particular exploration program or what compensation might be offered. DPIR officers would attend (or be entitled to attend) these meetings to ensure that effective consultations are taking place. If there was no decision from traditional owners within the four (4) month period the veto would be foregone (for that application). There would be no cost to the applicant for this process. In effect the taxpayer wears the cost for ascertaining whether the ground is 'open' for exploration.

4. If traditional owners veto the application in full or in part, the veto would stand for five (5) years.

5. If the application proceeds in full or if there is only a partial veto, the applicant would be advised and parties would be obligated to negotiate in good faith for an exploration agreement under the same right to negotiate process as set out in the NTA. If there has been a partial veto, the right to negotiate would only apply to that area which was not vetoed. DPIR and the applicant may not avail themselves of an expedited procedure (as provided for in the NTA).

6. If the applicant and the traditional owners reach agreement within six (6) months, the application is referred back to DPIR to consider the grant. If there is no agreement after six (6) months and negotiations have proceeded in good faith, either the applicant or the Government party or the traditional owners may refer the matter to the National Native Title Tribunal (**NNTT**) for a determination as to whether a grant is recommended and, if so, on what terms to protect indigenous interests. Any determination of the NNTT that the exploration tenure should not be granted would be binding on the relevant Northern Territory Minister. However, if the NNTT decided against the grant, the applicant would have appeal rights to the Federal Minister.

7. If the parties enter into an exploration agreement then exploration would take place in accordance with the agreement. If the application is granted through a determination of the NNTT, then exploration would occur as granted by the Minister in accordance with the determination. Normal relinquishment rules – use it or lose it – will apply. The exploration title may be surrendered if no commercial discoveries are found. If a commercial discovery is made then the applicant may apply for production tenure, being a mineral lease (minerals) or production licence (petroleum and geothermal).

8. An application for production tenure would be made to DPIR, who would determine whether the application is acceptable and whether the relevant Minister may be willing to grant production tenure. If those criteria are met, DPIR refers the application to the relevant Land Council. The applicant and the Land Council will be required to negotiate in good faith for a resource/production agreement under the same right to negotiate process as the NTA.

9. If the applicant and the Land Council (on instructions from traditional owners) reach agreement within nine (9) months, the application is referred back to DPIR to consider the grant. If there is no agreement after nine (9) months and negotiations have

proceeded in good faith, either the applicant or the Government party or the traditional owners may refer the matter to the NNTT for a determination as to whether a grant is recommended and, if so, on what terms to protect indigenous interests. Any determination of the NNTT that the production tenure should not be granted would be binding on the relevant Northern Territory Minister. If the NNTT decides against the grant, the applicant would have appeal rights to the Federal Minister.

10. The full process outlined above, including the right veto, would apply to any new application for exploration tenure. Existing applications would be grandfathered.

There are numerous advantages that accrue to this process:

(a) It respects the veto, but is faster, simpler and more efficient.

(b) It retains the veto, but brings it up sooner in the process and converts it into a cleaner mechanism to reject exploration and the potential for mineral, petroleum, or geothermal development.

(c) It reduces the costs to resource and petroleum companies of the process.

(d) It gives the Northern Territory government a role in confirming Land Council consultations on whether to allow or veto all or part of an exploration tenure application.

(e) Negotiating a disjunctive exploration agreement is easier and relatively faster than negotiating a conjunctive exploration and resource agreement at the outset.

(f) A resource agreement will still be required if a commercial deposit is discovered, but at that time all parties will have more information at hand, meaning all parties can make better, more informed decisions about commercial value and the worth of an agreement to produce.

(g) It adopts the relatively well-known and oft-used right to negotiate process. Use of a process – or at least elements of a process – with which parties outside the Northern Territory have a greater familiarity, will increase the comfort level of international and interstate resource companies considering investment in the Northern Territory.

(h) Normal relinquishment rules would be applied, increasing turnover, efficiency and the chances of discoveries.

<u>Information Request 6.1</u>

The Draft Report also indicates that the Commission is still seeking further information with regard to Indigenous heritage:

> *The topic of Indigenous heritage has not been raised by many participants to this study and it is not clear which jurisdictions, if any, could be described as leading practice. Could interactions between Indigenous heritage and the resources sector be improved? Which jurisdictions manage these interactions well already? How do they* do it?

In the Northern Territory, interactions between Indigenous heritage and the resources sector are managed, in part, through the *Northern Territory Aboriginal Sacred Sites Act 1989* (**NTASSA**). To ensure indemnification against prosecution for the disturbance of sacred sites, the Aboriginal Areas Protection Authority (**AAPA**) may issue an Authority Certificate,

which sets out conditions for using or carrying out works proposed by a proponent in the vicinity of a sacred site. AAPA must consult with custodians of the sacred site before it can issue a certificate. So long as work is carried out in accordance with the conditions of the certificate, the holder is indemnified from prosecution under the NTASSA for damage to sacred site in the area covered by the certificate.

Non-transferability of Authority Certificates poses a concern, as there is no statutory mechanism for transfer. This means that a change in proponent requires repeat consultations for projects that have already received Authority Certificates, even if there is no change in the work plan to which the certificate applies.

Recommendation 14 of the 2016 *Report on the Review into Sacred Sites Processes and Outcomes*, commissioned by the Office of the Northern Territory Chief Minister, recommended in part "that a mechanism be introduced in the Act that allows for the transfer of Authority Certificates to other proponents subject to being bound to the original purpose and conditions of the Authority Certificate." Enacting this recommendation into law would improve the process.

We also caution that leading practices should not be divorced from cost considerations. Site clearances are costly, both in terms of direct costs and delays. In some cases, they are also duplicative. Our experiences have been that those costs have risen steeply over time.

Again, we thank you for the opportunity to provide submissions on the Draft Report. Please feel free to contact me if you have any enquiries about this submission.

Yours faithfully
WARD KELLER

KEVIN STEPHENS
Partner

PROPOSED PROCESS UNDER PART IV OF THE

***ABORIGINAL LAND RIGHTS (NORTHERN TERRITORY) ACT 1976* (CTH)**