CENTRAL LAND COUNCIL

NORTHERN LAND COUNCIL
Our Land, Our Sea, Our Life

CENTRAL LAND COUNCIL

and

NORTHERN LAND COUNCIL

Submission to the Productivity Commission

Draft Report into Resources Sector Regulation

21 August 2020

TABLE OF CONTENTS

1. KEY TERMS

ALRA Land	Land vested in an ALT or held in escrow by a Land Council under the ALRA NT. Around 50% of the Northern Territory's land mass and 85% of its coastline has been granted as ALRA Land.
ALRA NT	*Aboriginal Land Rights (Northern Territory) Act (Cth) 1979.*
ALT	Aboriginal Land Trust, a statutory land trust created under the ALRA NT to hold ALRA Land.
CLC	Central Land Council (ABN: 71 979 619 393), a Commonwealth statutory authority created under the ALRA NT.
EPBC Act	*Environment Protection and Biodiversity Conservation Act (Cth) 1999*
ILUA	Indigenous Land Use Agreement under the Native Title Act.
IPA	Indigenous Protected Area
Land Councils	The CLC and NLC
Native Title Act	*Native Title Act (Cth) 1993.*
Native Title Land	Land either subject to a registered native title claim or a determination that native title exists under the Native Title Act.
NLC	Northern Land Council (ABN: 56 327 515 336), a Commonwealth statutory authority created under the ALRA NT.
NTRB	A body accredited as a Native Title Representative Body under the Native Title Act.
NTSP	A body accredited as a Native Title Service Provider under the Native Title Act.
PBC	A prescribed body corporate (or registered native title body corporate) that holds native title in trust or as agent for the common law holders once a determination has been achieved under the Native Title Act.
Pt IV Agreement	An agreement under Pt IV of the ALRA NT for the grant of an exploration, mining or petroleum interest.
RNTBC	A PBC.
Section 19 Agreement	An agreement under section 19 of the ALRA NT for the grant of an estate or interest in ALRA Land.
Section 31(1)(b) Agreement	An agreement under section 31(1)(b) of the Native Title Act that an act (usually the grant of a mineral title) may be done.

2. INTRODUCTION

The Land Councils welcome this opportunity to make submissions to the Productivity Commission (the ***Commission***) in respect of its Draft Report into Resources Sector Regulation dated March 2020 (the ***Report***). The Land Councils would be pleased to provide any further assistance required by the Commissioner.

This submission is based on the Land Councils' long history and experience working with the Aboriginal people of the Northern Territory.

PART 1 – DETAILED RESPONSE AND COMMENTARY

3. LEGAL CONTEXT

The Land Councils have statutory functions in relation to protecting the interests of Aboriginal people. The CLC exercises these functions in the southern portion of the Northern Territory and the NLC in the northern portion of the Northern Territory. The CLC's area of responsibility spans 780,000 square kilometres, an area almost the size of New South Wales. The NLC's areas of responsibility spans approximately 571,733 square kilometres of land and inland waters and approximately 568,589 square kilometres of coastal and offshore waters extending northward to the outer edge of Australia's Exclusive Economic Zone.

The Land Councils have statutory functions with respect to resources exploration and development under several statutes, including the following Commonwealth Acts:

- the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* (***ALRA NT***); and
- *the Native Title Act 1993 (Cth)* (***Native Title Act***).

Both statutes have been of interest to the Commission in preparing the Report. It is important to note the separate and distinct operation of each statutory regime, which have been efficiently and effectively administered in the Northern Territory for almost 45 and 25 years respectively. Further it is important to clarify the operation of each, given the apparent confusion in parts of the Report regarding how each operates.

The Land Councils also have functions under various Northern Territory statutes.

3.1. ALRA NT

Approximately half of Northern Territory is ALRA Land, a form of inalienable statutory freehold, granted under (and with dealings subject to) the ALRA NT. ALRA Land is held by Aboriginal Land Trusts (***ALTs***). ALTs may grant an estate or interest in ALRA Land to a proponent under section 19 ALRA NT if directed to do so by a Land Council. The Northern Territory may grant an exploration, mining or production licence over ALRA Land under Pt IV ALRA NT with the consent of the Land Council (reflecting consent of traditional owners – see further below).

In accordance with their statutory functions, Land Councils negotiate and enter into two types of agreements to facilitate the Northern Territory's grant of exploration licences and mining and production permits. These are:

(a) agreements under Part IV of the ALRA NT. These agreements provide consent for the grant of exploration licences, mining and petroleum permits (***Part IV Agreements***).
(b) leases and licences under section 19 of the ALRA NT. These are used for associated infrastructure (such as pipelines, camps or haul roads) on ALRA Land (***Section 19 Agreements***).

A Land Council cannot direct an ALT to grant an estate or interest in land under a Section 19 Agreement, or provide consent under a Part IV Agreement, unless it has consulted with traditional owners, and those traditional owners have understood and consent to the proposal. The Land Council must also consult with the relevant Aboriginal communities and affected Aboriginal groups.

The ALRA has now existed for more than forty years, a period that is significantly longer than the NTA. Section 19 and Pt IV Agreements negotiated under ALRA NT make provision for management of sacred sites, and permits required under Northern Territory legislation, and constitute an efficient and streamlined approach to compliance with various statutory requirements under Commonwealth and Northern Territory law.

3.2. Native Title Act

The remaining half of the Northern Territory is mostly Native Title Land. The CLC is a Native Title Representative Body (***NTRB***) under the Native Title Act for the southern portion of the Northern Territory. The NLC is an NTRB under the Native Title Act for the northern portion of the Northern Territory.

Part 2, Division 3, Subdivision P of the Native Title Act sets out the process that a proponent must comply with before the Northern Territory can grant an exploration, mineral or petroleum tenement on Native Title Land. Agreements negotiated under this part are known as Section 31(1)(b) Agreements (***Section 31(1)(b) Agreements***). Sometimes proponents prefer to negotiate an Indigenous Land Use Agreement (***ILUA***) as an ILUA can provide consents for infrastructure tenements and other associated tenure. In some situations the expedited procedure applies, in which case a Section 31(1)(b) Agreement is not required. Notably the current policy of the NT Government is to apply the expedited procedure to the grant of all mineral exploration licences. The expedited procedure does not apply to productive tenements.

Pursuant to their statutory functions under the Native Title Act, Land Councils are involved in negotiating and entering Section 31(1)(b) Agreements and ILUAs.

3.3. The ALRA NT is not alternate to the Native Title Act.

The Report provides commentary in relation to the ALRA NT (on p. 143) in a sub-heading under approaches to dealing with native title. Further, in table B.7. in the Report the Commission lists, under the Category "Native title arrangements" that the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* covers nearly 50 per cent of the land mass of the Northern Territory and has unique provisions relating to resources development (chapter 5)." In draft finding 5.7 the Commission finds that the Northern Territory has implemented an alternative regime to that prescribed under the Native Title Act.

This is incorrect. The ALRA NT, enacted by the Commonwealth in 1976 is not an 'alternative regime' dealing with native title and regardless, was not implemented by the Northern Territory. The two legal regimes are independent and co-exist, often within the same Aboriginal estates. The Native Title Act provides that acts that would otherwise be future acts are not future acts when they occur on ALRA Land. The effect is that the Native Title Act future acts regime is suspended over ALRA Land.

4. POLICY CONTEXT

4.1. Land Council Policy Context

Aboriginal people are often supportive of exploration and mining, and willing to allow their land to be used to provide opportunities for employment, income and other social and cultural benefits, when they are confident that Aboriginal cultural heritage is well protected and the environment will be well managed. Australia's landscapes, water and unique biodiversity are of deep spiritual and cultural significance to the traditional owners of the Northern Territory. Protection and good intergenerational management of these natural assets is vital for the continuation of religious and cultural traditions and responsibilities and Aboriginal wellbeing.

Historically in the Northern Territory, there was a perception that industry on the one hand, and traditional owners and environmentalists on the other, were adversaries. In places, the Report reflects this historic misconception. In the Land Councils' experience, these distinctions do not reflect the contemporary environment, particularly involving organised and experienced proponents in the Northern Territory.

The CLC has a long-standing relationship with the traditional owners of its region, that has underpinned major projects in the region for over 40 years. The largest of these is the Newmont Tanami Operations, a gold mine. The Newmont Tanami Operations operates on ALRA Land 550 km north west of Alice Springs and employs close to 1000 people. It is the result of a Part IV Agreement negotiated in 1983 with the CLC. Last year, Newmont's board agreed to expand the mine's life beyond 2040 at a cost of more than $1 billion. Other projects on ALRA Land that are underpinned by a Part IV Agreement negotiated by the CLC include Edna Beryl gold mine near Tennant Creek, Twin Bonanza gold mine 520 km west of Tennant Creek, the L6 Surprise Oil field and Mereenie and Palm Valley oil and gas fields. Mereenie and Palm Valley fields were the sole providers of gas to the entire Northern territory for nearly 30 years until offshore gas became available. Recently, production in Central Australia has increased, with gas being provided to the east coast of Australia via the new Northern Gas Pipeline and to the Newmont Tanami Operations via the new Tanami Gas Pipeline. All such infrastructure is underpinned by Part IV or Section 19 Agreements negotiated by the CLC. The CLC has also entered 53 exploration agreements under Part IV ALRA.

In the NLC's region there are over 50 granted exploration and production tenements on ALRA Land the subject of 39 agreements. The NLC agreement negotiated with the Mirarr traditional owners in 1978 for the Ranger Uranium Mine was the very first mining agreement of its kind in Australia. The agreement came against the backdrop of self-government in the Northern Territory and recommendations in the second report of the Fox Inquiry to establish uranium mining, Kakadu National Park and ALRA Land in the region. Ranger Uranium Mine has been a 42 year project and is now in its final year of operation before rehabilitation commences. An agreement in relation to the Gove bauxite mine was negotiated by the NLC and traditional owners in 2011. This agreement laid the foundations for the most recent mineral production agreement finalised in the NLC's region, the Gulkula Mine agreement in 2017. Gulkula Mine is on ALRA Land in East Arnhem Land and is Australia's first Indigenous owned and operated bauxite mine. The mine is 100% owned by the Gumatj clan and employs 16 Gumatj people and 10 other Aboriginal people.

The Land Councils have also been involved in negotiations for linear infrastructure. The Tanami gas pipeline in the CLC's region supplies gas from the Amadeus pipeline, northwest of Alice Springs, to the Newmont operations. Because linear infrastructure often involves multiple tenures, the pipeline required agreements to be negotiated with the CLC representing three PBCs, and Yuendumu, Yalpirakinu, Ngalurrutju, Central Desert and Mala ALTs. Three ILUAs and five Section 19 Agreements were negotiated and executed.[1] These negotiations were recently concluded in nine months. In the NLC's region, the Blacktip Facility at Wadeye processes gas from the Bonaparte Gulf that is piped via the Bonaparte Gas Pipeline to the Amadeus pipeline, which runs between Alice Springs and Darwin. The Blacktip Facility and approximately 47% of the pipeline coriander is on ALRA Land and is subject to a Section 19 Agreement; the remainder is subject to native title interests and ILUAs. The Blacktip Facility and associated pipeline infrastructure was the result of agreements negotiated by the NLC with separate native title groups and the Daly River/Port Keats ALT.

Jemena's Northern Gas Pipeline Project was for a 622km pipeline and was completed in January 2019. It required negotiations with traditional owners from multiple ALTs and multiple native title groups. The CLC and NLC worked collaboratively to secure agreements over a period of about 12 months. The project is transformational for the Australian gas market because it allows gas sourced from the NT to be piped into the Eastern States pipeline network.

[1] See AGIG 2019 (Tanami Gas Pipeline. https://www.agig.com.au/articles/tanami-gas-pipeline (accessed 19 May 2020).

Projects in the Northern Territory often include tenure that is both ALRA Land and Native Title Land. For example, the Roper Valley Mine and associated ancillary infrastructure is underpinned by agreements with the NLC that cover Native Title Land and ALRA Land interests.

The NLC has also negotiated various agreements for projects on behalf of native title holders. ILUAs/Section 31(1)(b) Agreements have been finalised for the following mineral projects: the Nathan River Project (formerly Roper Bar Project) iron ore project (2012); the Frances Creek gold mining project (2007); the Mt Porter gold mining project (2004). All these mines are currently in care and maintenance due to factors unrelated to tenure arrangements. The NLC has also negotiated three agreements with Kirkland Lake Gold Australia for their gold projects in the Pine Creek region (2015, 2018, 2019). Prior to the hydraulic fracturing moratorium in 2016, the NLC had negotiated and finalised 16 ILUAs/Section 31(1)(b) Agreements for petroleum exploration on behalf of native title holders.

The CLC has also recently negotiated 2 major resource projects on behalf of native title holders, being the Mount Peake and Nolan's Projects. ILUAs / Section 31(1)(b) Agreements have also been negotiated and entered by the CLC for Molyhil Mine (2007) 240km north east of Alice Springs (2007), Harts Range garnet mine 200km north east of Alice Springs (2012), Jervois Mine (copper-silver) 380 km north east of Alice Springs (2016) and L7 Dingo gas field (2017). These mines, other than Dingo gas field, are in care and maintenance due to economic issues (for example poor recovery rates). This underpins the importance of geology in project viability.[2] See section 6.1 of this submission (Determinants of economic activity) for further information.

Land Councils are independent from industry and special interest groups. Good agreement making leads to long term productivity and certainty for industry, government and traditional owners when compared with the uncertainty, mistrust and litigation that arises from the absence of such consent and agreements. Agreements between Land Councils, traditional owners and industry underpin every major mine in the Northern Territory other than McArthur River Mine, and facilitate working relationships for industry and Aboriginal parties.

4.2. Productivity Commission consultation context

The terms of reference for the Commission requires consultation with key interest groups and affected parties. Term of reference number 5 expressly requires the Commission to: "Examine regulatory and non-regulatory examples of effective community engagement and benefit-sharing practices, and establish best-practice examples of where mutually-agreeable relationships were successfully developed between the resources sector and the communities in which they operate, **including with Indigenous communities**." (emphasis added).

The Northern Territory Land Councils were not consulted prior to the publication of the draft Report. The Forward of the Productivity Commission's recent draft Indigenous Evaluation Strategy discusses failure to obtain input from Aboriginal and Torres Strait Islander people in relation to the evaluation of policies and programs noting that "[S]uch an approach to evaluation rarely delivers useful findings to inform future policy".

The weight that can be given to the Productivity Commission Report is limited when key stakeholders are omitted from the consultation process. This is because comments from key stakeholders are restricted to the draft Report rather than the initial consultations that give rise to findings and recommendations. For example, paragraph 2 of section 5.3 (Resources Development on Indigenous Land) in the Report discusses issues relating to resources development on Indigenous Land for resources companies. A more balanced process would have weighed feedback from all stakeholders and also discussed issues relating to resources

[2] See, for example, https://www.abc.net.au/news/rural/20190-12-05/harts-range-garnet-mine-australian-abrasive-minerals-shuts/11764474

development on Indigenous land for others such as traditional owners and Indigenous communities and their representatives such as Land Councils.

The Report is particularly compromised in relation to items regarding the ALRA NT. The Commission's process to date means that appropriate balance and weight has not been afforded to the views of key stakeholders who utilise resources sector regulation on a day to day basis. Several findings in relation to the ALRA NT and Native Title Act raise complex policy and technical issues. Many of these have been well ventilated and considered in previous reviews and reports. See Part 1, sections 5.2 and 6 of this submission.

5. RECOMMENDATIONS AND COMMENTS

Recommendations and comments in relation to specific draft findings, draft leading practice findings and recommendations are set out in Part 2 (Table A) of this submission. In addition, the following comments are provided to assist the Commission.

5.1. The EPBC Act, and Northern Territory Environmental Law has recently been subject to specialised review

The Report notes at p. 62 that the Northern Territory has recently re-worked its EIS processes and that a review of the EPBC Act is being undertaken. Further, ANAO is auditing referrals, assessments and approvals of actions under the EPBC Act. Despite this, a significant portion of chapters 6 and 7 of the Report are dedicated to content, requests and findings in relation to the EPBC Act.

The Productivity Commission should avoid making findings in relation to these matters as they are the subject of a separate, comprehensive, and specialised review process. Any material views of the Commission should be addressed via the EPBC Act review process, so that they can be considered and weighed in the context of the EPBC Act reviewers' comprehensive, specialised and parallel work.

5.2. Pt IV of the ALRA NT has recently been subject to specialised review

The Report makes various recommendations and information requests in relation to the ALRA NT, a statute which has recently been reviewed, and recommendations of this are currently being implemented. A collaborative process between the Land Councils, Northern Territory and Commonwealth occurred in 2006 in relation to changes to Part IV of the ALRA NT. The resulting changes worked well to increase efficiency of processing exploration applications while maintaining and reinforcing the certainty provided by the scheme under Part IV. The 2006 amendments also provided for a further review five years on.

This further review of Part IV (***Part IV Review***) was undertaken by the Land Commissioner Justice Mansfield from 2012-2013. The introduction to the Terms of Reference for the Part IV Review outline the policy and legislative context:

> **TERMS OF REFERENCE**
>
> **Review of Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976***
>
> ***Background***
>
> Part IV (Mining) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (the Land Rights Act) provides for an administrative regime to control exploration and mining on [ALRA] land in the Northern Territory.
>
> The *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (the Amendment Act) implemented reforms to the Land Rights Act arising from three reviews of the principal Act over nine years, prior to 2006. A summary of those reviews follows.

> A review of the Land Rights Act by John Reeves QC in 1998 resulted in a report containing recommendations for an extensive suite of changes to the legislation. That report was referred to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA) for review. The subsequent HORSCATSIA report of August 1999 concurred with some of the findings by John Reeves QC, but did not endorse the recommendations contained in his report.
>
> Concurrent with the HORSCATSIA review, the Aboriginal and Torres Strait Islander Commission appointed the National Institute of Economic Industry Research to do a competition review of the Land Rights Act. The resulting "Manning Report" was also provided in August 1999.
>
> Subsequently, a process led by consultant Mr Bill Gray was initiated to develop a range of workable measures flowing from the various reports. This led ultimately to the *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*. The relevant Explanatory Memoranda provides more detailed background information and analysis of relevant issues.
>
> The relevant amendments were not confined to Part IV of the Land Rights Act. In respect of the amendments to Part IV embodied in the Amendment Act, the objective was to promote economic development on Aboriginal land by providing for expedited and more certain processes related to exploration and mining on Aboriginal land.
>
> The Amendment Act included, at Item 234 of Part 3, the requirement for an independent review of the operation of Part IV of the Land Rights Act as soon as practicable after the fifth anniversary of the amendments coming into operation. The amendments came into operation on 1 July 2007 and the independent review should therefore commence as soon as practicable after 1 July 2012.
>
> In conjunction with the passage of the Amendment Act, complementary amendments were made to Northern Territory mining legislation.[3]

The Part IV Review involved significant consultations with the Commonwealth and Northern Territory Governments, Land Councils and industry. The report, delivered on 28 March 2013, relevantly found that "the Review did not indicate that there was ongoing significant disquiet on the part of any section of the key stakeholders" and that "there were various matters raised about the Part IV processes and operations, but with few exceptions they concerned matters of relative detail rather than of deep concern or of policy." In relation to the right of traditional owners to veto exploration licences the Land Commissioner found that "the proposal to abolish the veto was strongly resisted by the Land Councils and was not supported by the NT Government or by FaHCSIA. The Review does not support the proposed change."

Land Councils and the Northern Territory and Commonwealth Government are currently members of a collaborative working group in relation to the implementation of recommendations of the Part IV Review. This working group operates on the understanding that amendments to Part IV should be supported by all members of the working group.

The Commission's report does not provide sufficient basis for changes to the ALRA NT.

5.3. Traditional owners are discrete from the Aboriginal Community and have special rights

In parts of the Report, the Commission conflates concepts of Aboriginal Community and traditional owners. These are distinct groups, including from a regulatory perspective. Traditional owners are those with primary spiritual affiliation to a site or sites on the land or who have rights and interests in land in accordance with traditional laws and customs. The Aboriginal Community includes Aboriginal people living in the vicinity, but who are traditional owners in other areas.

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[3] Justice John Mansfield AM, Aboriginal Land Commissioner, 'Report on Review of Part IV of the Aboriginal Land Rights (Northern Territory) Act 1976' (Report, Review of Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976*, 28 March 2013) (x).

The distinction is important because traditional owners have rights beyond those held by the community (including members of the Aboriginal community), for example rights to negotiate or provide consent under the Native Title Act and ALRA NT. Native Title Agreements and ALRA NT Agreements are negotiated on behalf of traditional owners. Some terms of the Agreements may cause benefits to flow to a broader group of local Aboriginal people, such as employment and local enterprise procurement requirements. Further, impacts of resources projects are often more deeply felt by traditional owners due to their cultural and spiritual responsibilities.

Chapter 9 (Community engagement and benefit sharing) should expressly include reference to the Indigenous community. Section 9.2 in the Report, (Identifying leading-practice community engagement) could include a section related to leading practice community engagement with Indigenous communities, if the Commission suggests there are different principles that apply.

Chapter 10 (Indigenous community engagement and benefit sharing) should be refined to apply to traditional owner engagement and benefit sharing. For example, the principles set out in section 10.2 of the Report (Effective Indigenous community engagement) actually relate to engagement with traditional owners, not the broader Aboriginal community.

5.4. Free Prior Informed Consent

Similar to the UNHCR principles that appear in Box 10.3 of the Report (p. 280), the Australian Human Rights Commission confirms the following elements of free prior and informed consent.[4]

Free: should imply no coercion, intimidation or manipulation.
Prior: should imply consent is sought sufficiently in advance of any authorisation or commencement of activities and respect is shown for the requirements of indigenous consultation / consensus processes.
Informed: should imply that information is provided that is sufficient.
Consent: Consultation and participation are crucial components of a consent process.

All sides in a FPIC negotiation must have equal opportunity to debate any proposed development. Equal opportunity should be read to mean equal access to financial, human and material resources for communities to fully and meaningfully debate the project and its impacts.

The current processes for negotiations on Native Title Land fall short of facilitating free prior and informed consent.

The Report finds that six months is too short to allow for adequate authorisation (p. 292). In most instances, proponents that genuinely commit to an agreement process will negotiate for a longer period voluntarily, in recognition of:

- the complex consultation processes required when dealing with large groups of often geographically dispersed native title holders.
- the fact that companies have often not fully developed their project proposals when the notices are issued, and within 6 months are still determining the tenure that they need and the infrastructure for the project; it is not possible for traditional owners to give free prior informed consent to tenure and a project configuration that is unknown.

The Report should also find that the statutory right to negotiate timeframe of six months is insufficient to incentivise substantive and informed negotiations towards true consent. To better resemble an informed consent orientated process, the statutory timeframe for the right to negotiate should be extended.

If negotiations fail, a proponent may apply to the NNTT for a determination that the act may be done. As set out in the Report on p. 292, the NNTT very rarely finds that an act cannot be done. The NNTT also holds proponents to a low standard of good faith negotiation. Traditional owners' bargaining power is

[4] https://humanrights.gov.au/our-work/appendix-4-elements-common-understanding-free-prior-and-informed-consent-social-justice Accessed 19 May 2020.

substantially weakened by the ability of the proponent to apply for a determination from the NNTT, and traditional owners frequently find themselves in a negotiating environment that is not free from intimidation or coercion. This should be reflected at p. 292 of the Report.

Further, traditional owners often do not have equal access to financial and human resources to allow them to inform themselves about all relevant aspects of a project and actively negotiate its impacts. These issues are dealt with further at Part 1, Section 7 (Funding NTRBs and PBCs) of this submission.

The Report asserts at p. 281 that FPIC is not a right of veto. While free prior informed consent is a process for obtaining consent, how an issue is resolved if consent is unable to be achieved goes to whether the process to obtain FPIC is adequate. If an issue can be resolved through an arbitration process that overtly favours mining interests (such as the process set up under the Native Title Act) this compromises the FPIC status of negotiations. The Report should make findings that the ability for proponents to obtain a determination from the NNTT compromises the FPIC status of native title negotiations. Free, prior and informed consent should be able to be given, or withheld. See Report at p.280. If there is no free prior and informed consent from traditional owners in respect of a project on their land, the project should not proceed. This should be made clear at p. 280 of the Report.

5.5. Inaccuracies in the draft Report

Statements in the Report in relation to the ALRA NT and the Native Title Act that are technically incorrect include:

- Page 133 – "*consequently, most (but not all) land rights land is not subject to native title (since its owners can do everything that they would be permitted to do as native title holders, and more*." This statement is incorrect. Native title coexists with all ALRA Land. However, a proponent does not have to comply with the future acts regime in the Native Title Act on ALRA Land because of the definition of future act in s 253 Native Title Act excludes acts on ALRA Land. Both regimes efficiently and adequately deal with this issue. See Pt 1, Section 3 (Legal Context) of this submission.
- Page 133 "*Native title is also removed ('extinguished') over land when freehold rights are granted over it, or when it is developed by government*." This is incorrect. Not all freehold "*removes*" native title (see section 47A Native Title Act) and only some categories of government developments extinguish native title.
- Page 137 – Figure 5.3 refers to compensation in several places. This should refer to benefits as compensation is a term associated with litigated outcomes and Section 31(1)(b) Agreements / ILUAs are negotiated in a commercial context which creates greater efficiencies with payments.
- Page 137 – "*The State or Territory Government, a project proponent and any native title group can reach an … ILUA*". The State or Territory Government may be a party, but ILUAs are regularly made without the State or Territory Government being a Party.
- Page 137 – "*Although there are many types of ILUAs, area ILUAs are of the most relevance for resources projects. These agreements can make general terms about any resources activity on the land they cover*." Whether an ILUA is an area ILUA or PBC ILUA depends on whether there is a determination recognising that native title exists. Area ILUAs are no more or less relevant for resources projects than PBC ILUAs.
- Page 143 – Land Councils do not have statutory functions to assist Torres Strait Islander communities.
- Page 276 describes Land Councils as "*organisations that help Aboriginal people claim land and protect sacred sites, and that may hold land on behalf of Aboriginal people*". Land Councils do not hold ALRA Land that has been vested; vested ALRA Land is held by ALTs. Land Councils may hold ALRA Land that is in escrow.
- Page 278 describes the ALRA NT as an "*indirect benefit-sharing scheme*" between the resources sector and Aboriginal people through the payment by the Commonwealth of statutory royalty equivalent amounts into the Aboriginals Benefit Account. Pt IV ALRA NT does not cause benefits to be shared between the resources sector and Aboriginal people, it

causes benefits to be shared between the Commonwealth and Aboriginal people, with the value or payments remitted by the Commonwealth to the Aboriginals Benefit Account equal to the value of royalties payable to the Northern Territory. There is no cost to the resources sector from this scheme.

- Page 290 "*Native title holders are those that the Federal Court determines to hold native title when it makes a determination that native title exists*." Native Title Holders is defined in the Native Title Act at section 224 and includes common law holders or a PBC holding native title in trust.
- Page 290 "*Further, in determining a claim, the Court may find that native title does not exist. This creates the possibility that, in the future, a different claim group making a different native title claim may be determined to hold native title over the area*." It is not technically possible to make a claim over an area where there has been a determination that native title does not exist; an application for revocation or variation must be made. See s 13 Native Title Act.

Additional corrections in relation to ALRA NT and the Native Title Act are discussed at Part 1, section 3.3 of this submission.

6. EXPLORATION, MINING AND PRODUCTION ON ALRA LAND - RECOMMENDATIONS

This section of the submission sets out specific information in relation to information request 5.1 and draft finding 5.6 in the Report, both of which are extracted below for convenience. The Commission should also review Part 1, section 5.2 of this submission which provides information about the tailored review of Pt IV of the ALRA NT that occurred in 2013, and is currently being implemented.

> *INFORMATION REQUEST 5.1*
> *The Commission is seeking further information on whether reforms to the following elements of the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth) would help to enable resources sector investment while still achieving the aims of the Act:*
> - *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.*
>
> *DRAFT FINDING 5.6*
> - *Very few projects are going ahead on land protected by the Aboriginal Land Rights (Northern Territory) Act 1976 (Cth). The requirements that agreements must cover both exploration and extraction, and that refusal of consent for one project in an area means that a moratorium is imposed on any other development while the original proponents retain a right to renegotiate, appear to be unnecessarily restrictive.*

6.1. Determinants of Economic Activity

Key determinants of economic activity associated with exploration, production and mining are geology, commodity prices and access to capital. The market price of each mineral commodity is also material to investment decisions. Geography (remoteness and infrastructure), workforce considerations and offtake arrangements are relevant as well. Access to land (or access to the resource) is one consideration among many in relation to project development. There is no significant difference between the number of projects on Native Title Land or ALRA Land.

Many of the projects in the Northern Territory are in care and maintenance. These projects are not currently economic due to external factors such as commodity price and ore quality. All these projects have granted tenure; the tenure is not the reason for their being non-operational, or for mines and other developments being uneconomic.

In the CLC's region these include:

- Molyhil Mine (native title);
- Harts Range Garnet Mine (native title);
- Jervois Mine (native title);
- Edna Beryl Gold Mine (ALRA Land);
- Twin Bonanza gold mine (ALRA Land);
- L6 Surprise Oil Field (ALRA Land); and
- Tanami Mine (ALRA).

In the NLC's region these include the following projects or parts of projects:

- Browns Oxide (ALRA Land);
- Esmeralda Gold Project (native title);
- Frances Creek (native title);
- Kazi Gold Project (native title);
- Merlin Mine (native title) ;
- Mt Porter (native title);
- Nathan River Project (native title);
- Roper Valley Iron Ore (ALRA Land and native title); and
- Woodcutters (native title).

There are multiple key determinants to economic viability of mineral and oil and gas projects in the Northern Territory, that extend beyond tenure considerations.

6.2. Information Request 5.1

There are a number of issues relating to Information Request 5.1.which are addressed under the sub headings below.

Parties' conduct (including the way moratorium rights and exercised)

The average time between receipt of an exploration application and a decision by traditional owners under ALRA in the CLC region was 16 months in 2018-2019.[5] In 2018-2019 the CLC conducted 10 consultation meetings with traditional owners who considered 37 individual exploration titles. The NLC conducted a similar number of consultation meetings with traditional owners.

The Land Councils' experience is that the key cause for delays in finalising Pt IV Agreements for exploration is companies "warehousing". Warehousing occurs when companies seek to maximise the number of titles they hold without having to pay rent to the Northern Territory or land access fees to traditional owners, or incur exploration costs. These companies make applications for tenements on ALRA Land for which they don't have the resources to explore. They then refuse to productively engage with, or intentionally delay the negotiating process set out in the ALRA NT through a range of strategies. This allows these companies to retain rights over large areas without incurring significant costs. It is presumably motivated by anticipating that a larger company will seek to buy out some or all of their interests, or with the intent of sourcing the necessary resources to explore in the interim period.

The practical effect of these actions is that it adds to the time taken to achieve Pt IV Agreements, and in doing so the Land Councils and traditional owners' attention and resources are diverted and could have been applied more productively elsewhere. Where Land Councils have not agreed to extend the negotiating period with companies who do not appear to be actively negotiating, the Northern Territory often re-issues the consent to negotiate to the company, so the process begins again. Resources are tied up with fruitless negotiations over extended periods.

[5] Central Land Council 2019 Annual Report 2018-2019, CLC, Alice Springs, p.56.

Companies' lack of will to progress to Pt IV Agreements should not be translated as the ALRA NT holding up development. Strategic delays on the part of some industry participants cannot justify the ALRA NT amendments sought by industry to the detriment of Aboriginal parties, and which would not have the intended consequence. The Northern Territory is encouraged to undertake more comprehensive and complete assessments of company capability to act on tenements applied for before issuing its consent to negotiate; this would go some way to resolving this issue.

Where traditional owners wish to see exploration occur and the proponent is reluctant to enter an agreement, there are limited options available to the traditional owners and Land Councils:

- Traditional owners can refuse the application.
- Traditional owners can wait until the circumstances causing the applicant not to enter an agreement are resolved or until the negotiating period ends.

Refusal is the least satisfactory option in this context, as the area falls under a moratorium for five years after a refusal. This is an unsatisfactory outcome for traditional owners who want the area explored. A refusal encourages warehousing as a licence in moratorium is an ideal outcome for an applicant wanting to hold ground and wait to explore. Refusal of consent is most appropriately used where traditional owners do not wish to have exploration or mining on the land the subject of the application, not as a default retention option for a proponent.

If traditional owners could choose whether to put an exploration licence application into moratorium or not it would streamline processes by:

- removing company ability to warehouse, when traditional owners wish to see exploration and there are better applicants willing and able to explore; and
- allowing moratorium to be in place where traditional owners will not consent to exploration, for example for cultural or alternative economic reasons, so that resources are not wasted by applicants making applications over areas that will not be consented to.

In relation to negotiations that involve a proactive and willing explorer, the Senior Officers Working Group December 2015 Report to the Council of Australian Governments on Investigation into Indigenous Land Administration and Use found the most effective way of increasing efficiency and timeliness of decision making and approvals processes was to increase the resources of indigenous land holding and representative bodies to effectively respond to land use applications. Further information regarding steps that can be taken is provided in response to Information Request 10.1 at Part 2 of this Submission (Table A attached).[6]

Finally, traditional owner refusal generally correlates with the capacity of the Northern Territory regulator and the reputation of industry participants. In many cases, industry's poor track record on environmental and social grounds and weak regulation of these sectors is espoused as the basis for decisions by traditional owners to refuse consent to applications under s 42 of the ALRA NT. For example, in the Borroloola Barkley region traditional owners' perceptions of environmental pollution caused by the McArthur River Mine is frequently cited as reason for resistance to new resources projects. The recent Northern Territory inquiry into hydraulic fracturing identified mistrust of government as a key contributor to lack of support for gas development in Northern Territory communities. Effective regulation and enforcement are key to ensuring traditional owner and public confidence in the resources sector.

<u>Conjunctive vs disjunctive Pt IV Agreements</u>

There is no mandatory conjunctive link between exploration and extraction approvals under the ALRA NT. That is, there is no mandatory requirement to discuss mining at the stage of negotiating exploration agreements. The only reference to mining is in s41(6)(e) of the ALRA NT which requires exploration applications to include a description, expressed as fully as practicable, of the various methods for the recovery of any minerals found as a result of the exploration.

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[6] Senior Officers – Expert Indigenous Working Group (2015) Report – COAG Investigation into Indigenous Land Administration and Use p. 44

However, because there is no requirement for traditional owner consent at the mining phase, traditional owners often wish to negotiate protections relating to subsequent mining activities at the earlier exploration phase (otherwise they will not agree to exploration). In many cases, explorers are equally keen to establish fundamental conditions for mining at an early stage, especially the payments regime, prior to investing in exploration.

Land Councils include provisions in exploration agreements about the mining phase to provide assurance to traditional owners about what may happen at the mining stage. These inclusions help traditional owners understand and gain comfort in relation to the later risks associated with mining and assist with informed consent at the outset.

Concerns with conjunctive arrangements can be resolved by enabling traditional owners of ALRA Land under the ALRA NT to have the right to withhold consent for any mining proposal, as proposed in the submission by ACF reproduced on p. 144 of the Report. Further, the rationale set out by the Commission at p. 126 of the Report (as to why landholders should not have a veto in relation to mining projects) do not apply to ALRA Land given the nature of the statutory scheme.

Finally, there exists doubt in some quarters over the enforceability of mining terms in exploration agreements. Changes that clarify that provisions related to mining may be included in an exploration agreement are supported. This would be resolved by amending Part IV of the ALRA NT so that there are no restrictions on the content of agreements for exploration or mining, subject to general commercial law requirements.

<u>Good faith</u>

Good faith negotiation is a concept that appears in the Native Title Act and given the relatively limited negotiating position that procedural rights under that Act afforded to native title holders, the potential for referral to the NNTT operates as a protection of last resort for the native title holders. The Commission (at p. 145) queries whether this concept should be imported into the ALRA NT with potential to seek a court to determination as to whether resources development should go ahead if they are not.

Given the significant differences between the ALRA NT and the Native Title Act, it is not clear to what end the concept of good faith would be utilised in the ALRA NT. The consent provisions under Part IV provide Aboriginal parties with the security they require to ensure that mining interests are only granted where an agreement has been entered into (s 45). Where access for exploration has been agreed, the ALRA NT enables a mineral proponent to utilise the referral process to a Mining Commissioner provided for in s 48B (variation) or s 48E (arbitration) in the even that a Land Council has refused, or is unwilling, to negotiate.

Fundamentally, the rights of traditional owners to determine whether exploration may proceed on their land is a key protection of the ALRA NT. It would be a retrograde and unacceptable proposition to diminish the rights of landowners by replacing the existing consent provisions of ALRA NT with the lesser rights entailed under the good faith/right to negotiate provisions of the Native Title Act

6.3. Corrections required to draft finding 5.6

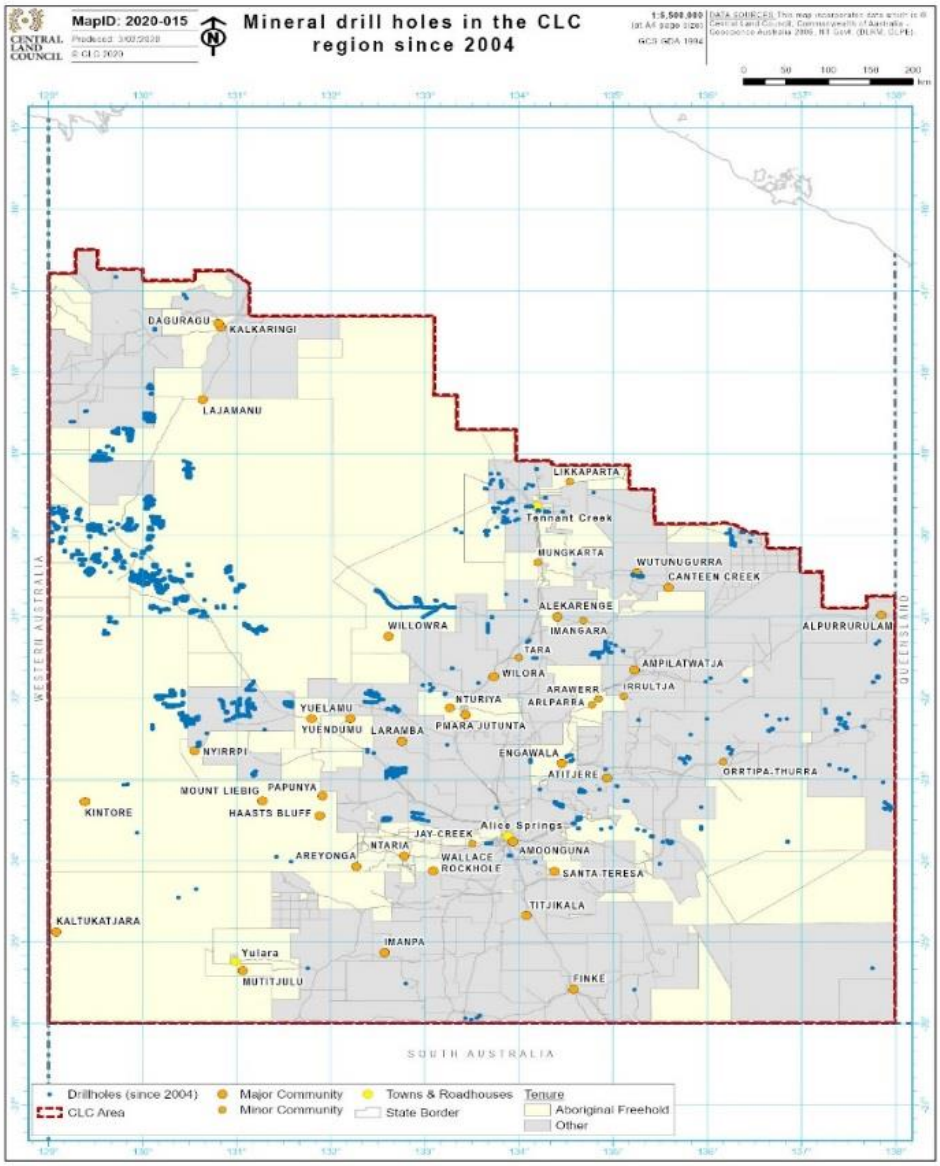
The Land Councils dispute draft finding 5.6 and consider this finding in the Report is an example of the Commission not adequately informing itself of all relevant interests, information and viewpoints.

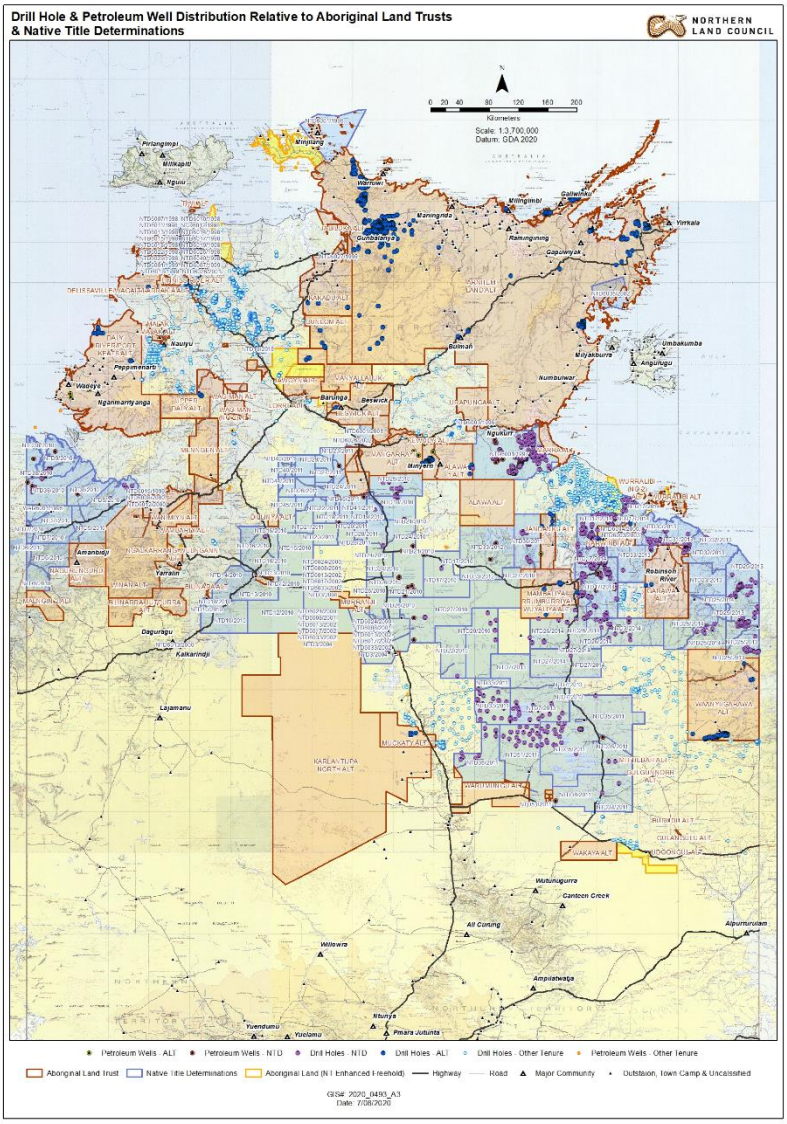
There is no greater amount of exploration and mining in the Northern Territory on Native Title Land than ALRA Land. In this submission, section 4.1 (Land Council Policy Context) sets out further information about the large number of mines in the CLC and NLC regions that are underpinned by ALRA NT Agreements. Section 6.1 of this submission (Determinants of Economic Activity) sets out further details regarding mines that are non-operational, despite having tenure.

This pattern is also true for exploration. Since 2004, 63% of drill holes in the CLC's region have occurred on ALRA Land (see Figure 1). Only 37% occur on Native Title Land. The spatial distribution of drill holes shown clearly follow geological patterns rather than land tenure. The spatial distribution of drill holes in the NLC's region also follows geological patterns (see Figure 2).

- **Figure 1 – mineral drill holes in the CLC region since 2004.**

- **Figure 2 – Drill holes NLC region (drill hole data from NTG Strike <http://strike.nt.gov.au/wss.html>)**





As discussed at Part 1, section 6.2 of this submission (Information Request 5.1), there is no requirement that Part IV Agreements cover both exploration and extraction. This has developed as a common practice due to the need to consent to exploration and mining at the exploration phase.

Third, moratoriums only apply within sectoral classes. That is, a moratorium on petroleum exploration does not equate to a moratorium on mineral exploration. There is no moratorium on "*any other development"* as set out in draft finding 5.6. Multiple other developments from grazing licences, tourism arrangements, leases and construction can occur in moratorium.

Fourth, a moratorium only lasts so long as the moratorium is not ended by the national interest override.

The Land Councils submit that draft finding 5.6 and associated sections of the Report be updated for accuracy and balance.

6.4. Contextualisation of quote

The Minerals Council of Australia (Northern Territory Division) (2014, p.10) is quoted on p. 144 of the Report as stating "there have been few mining projects, if any' that have been successfully approved by land councils. As set out in Part 1, sections 4.1 of this submission (Land Council Policy Context) there are agreements between Land Councils and proponents for every major mine in the Northern Territory other than the McArthur River Mine.

The quote from the Minerals Council of Australia (Northern Territory Division) on p. 144 of the Report, if retained should be better balanced and contextualised. Noting that the Commission has editorial control of its Report, it is respectfully suggested the quote be removed.

7. FUNDING NTRBS AND PBCS – RECOMMENDATIONS - Information Request 10.1.

This section of the submission sets out specific information in relation to information request 10.1 of the Report, which is extracted below for convenience.

The Commission is seeking more information on government programs that fund Indigenous prescribed bodies corporate, native title representative bodies and native title service providers. In particular:

- *Have the current funding programs met their objectives? Can you provide examples where funding has made a tangible difference to the native agreement-making process, or where it has reduced reliance on government funding?*
- *Are there alternative approaches that could improve the capacity of Indigenous organisations, such as training programs?*

The cost of doing business on ALRA Land is well understood in the Northern Territory context. CLC and NLC's cost recovery process is consistent with the Australian government cost recovery guidelines and reflects the Commonwealth's position that such costs should be payable on a user pays basis (by the proponent) rather than be transferred to the taxpayer. This model should be reflected in the native title system.

NTRBs in the Northern Territory provide significant services and capacity building to PBCs and are more efficient than private service providers due to economies of scale, experience and expertise. Major resources agreements are negotiated by NTRBs, not PBCs. If NTRBs do not provide assistance, it is unlikely that the process can achieve free, prior and informed consent for the reasons set out in Part 1, section 5.4 (Free, prior, informed consent) of this submission. Adequate resourcing through NTRBs can also mitigate the risk of rogue operators stepping in to fill resourcing gaps. See Report p, 297. Further, the adequate funding of NTRBs/NTSPs has efficiency savings for the resources industry. See submission by Alcoa in relation to the NLC, p. 286 of the Report.

Proponents are often reluctant to pay for representative bodies to provide these services, placing a burden on government funding. The cost to proponents of consultations and cultural heritage surveys are often emphasised because they can be quantified and are directly borne by the applicant.

The majority of PBCs in the CLC's region are non-financial therefore unable to notify native title holders of meetings, provide assistance to attend meetings, manage administrative functions or work through the legal requirements of the negotiation processes. These PBCs rely on funding available through PBC support funding programs or the CLC. FPIC requires PBCs to source and rely on independent external advice before engaging in meaningful negotiations, including legal, taxation and economic advice, however PBCs in the CLC's region generally do not have capacity to engage directly with resources companies, and have entered into service agreements with the CLC to obtain services in relation to future act, land access matters and implementation of ILUAs and other agreements. Aboriginal people of Central Australia have a very long history working with the CLC in negotiating agreements on ALRA Land, which has provided confidence in engaging CLC to negotiate agreements in the native title space.

The CLC has established a PBC Support Unit to support the governance and compliance processes of PBCs and the delivery of education and information material that is culturally and linguistically suitable. The CLC receives operational and PBC support funding, administered through NIAA. Operational funding is directed to future act and claims related activities, with the yearly work program dependant on available funds. PBC support funding is directed to providing native title and corporate services to PBCs to assist them to comply with corporate and legislative requirements. Funding through the Indigenous

Advancement Strategy has been considered to support specific projects identified by PBCs but the CLC has found the application process has been difficult and lengthy.

Top End Default PBC/CLA Aboriginal Corporation RNTBC (**TED PBC**) is currently the agent PBC for all of the 77 positive determinations of native title in the NLCs region, involving approximately 172 native title holding groups – that is distinct estate or language groups. There is no requirement for native title holders in the NLC's region to nominate the TED PBC to manage their native title rights and interests. Rather, it is an option presented to native title holders when seeking their instructions regarding the nomination of a PBC. In the last two financial years, the NLC received basic support funding from the Commonwealth to support the services it provides to native title holders on behalf of TED PBC.

In 2018-19, the TED PBC unsuccessfully applied for PBC Capacity Building Grant Funding available through the Commonwealth's Indigenous Advancement Strategy (**IAS**). Specifically, funding was sought to pursue economic development opportunities and support governance and capacity building in three areas: carbon projects, community planning and development support, and the Elliott land development project. All of the projects were expected to generate considerable employment opportunities for Aboriginal people.

NLC officers sought direction and advice about the contents of their IAS submission from relevant departmental staff in Canberra and Darwin to ensure their application was appropriately targeted and supported. It took eight months for the then Minister to consider the TED PBC's application for funding. Ultimately, the application was rejected in full and no reasons for the decision were provided. A request for feedback was made but declined. Anecdotally, the NLC has heard of many other PBCs who have also sought unsuccessfully to obtain IAS PBC Capacity Building Grant Funding. Our collective experiences leave us disheartened as to how to assist PBCs to build their capacity and/or engage in economic development.

In summary, no comprehensive funding program has been established to ensure PBCs can meet their ongoing responsibilities, which leads to the diversion of negotiated resource development payments to meet these needs.[7]

Additional approaches to improve the capacity of Indigenous organisations could include:

- Encouragement of industry sectors to introduce Aboriginal procurement policies and targets through policy, legislative or other means;
- Legislated guidelines for mine closure plans that require the inclusion of cultural criteria, to be developed in consultation with Aboriginal landowners and agreed by NTRBs or PBCs;
- Resourcing NTRBs to support landowners to engage in mine closure planning.
- Resource training and capacity building to enable landowners to take advantage of economic opportunities resulting from mine closure and rehabilitation.

Finally, economic analysis of costs regularly underestimates or fails to recognise social, cultural and economic benefits of consultations and cultural heritage surveys. Through consultations traditional owners are recognised and respected as landowners, treated as competent persons capable of making decisions requiring the weighing up of a range of complex factors. Through cultural heritage surveys sacred sites and other cultural heritage can be identified and protected, Indigenous employment opportunities created and proponents can minimise costly legal and reputational risks. The process allows cultural considerations to come to the fore and Aboriginal people to take responsibility for their decisions and gain effective control of their land. From the consistently good attendance and interest in exploration and development consultations, the Land Councils can attest to the seriousness with which this role is undertaken by traditional owners. Proponents' support for consultations and for professional advice (legal, economic, implementation) during mining and exploration negotiations forms an important contribution to FPIC principles in the Australian context.

[7] (Dillon MC (2019), Policy implications of the Timber Creek decision, Working Paper 128, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra)

In summary, NTRBs should be funded to provide much needed support and assistance to PBCs where PBCs request it, such as through respective well-resourced PBC Support Units or similar arrangement. Additionally, cost recovery from proponents in respect of negotiations should be supported through ORIC publishing more meaningful and practical guidelines about PBC cost recovery, and permitting NTRBs to cost recover directly from proponents for services provided to PBCs.

8. MAXIMISING BENEFITS FROM NATIVE TITLE FUNDS – RECOMMENDATIONS - Information Request 10.4

This section of the submission sets out specific information in relation to information request 10.4 in the Report, which is extracted below for convenience.

The Commission is seeking more information on whether there are barriers, unrelated to tax and charity law, to maximising benefits to communities from native title funds, including in relation to benefit management structures and the investment of native title funds. What are potential solutions to these issues?

This question raises complex policy and technical issues. Any amendments designed to resolve this issue should be subject to comprehensive consultation, particularly with NTRBs/NTSPs.

The question also confuses the difference between communities and native title holders (i.e.: the traditional owners). See comments at Part 1, section 5.3 of this submission.

As set out in section 7 of this submission (Funding NTRBs and PBCs), the failure to fund PBCs means that funds that would otherwise be available for investment or economic development are not available as they are diverted to administrative functions. Inadequate funding of PBCs is the significant barrier to effective benefits use.

When native title holders wish to direct benefits to community benefits, a range of skills to support community development are required. These skills are most efficiently and effectively provided by NTRBs/NTSPs. Both the CLC and NLC have designated Community Development Programs. Through those programs Aboriginal people are driving their own development by using their own resources to undertake projects that support long term social, cultural and economic benefits. With strong leadership from Land Council delegates, groups and families are working together to identify, plan, implement and monitor projects that benefit people at a regional, community and homeland level. At the heart of the community development approach are processes that ensure local participation and control over assets, projects and programs. This involves a flexible way of working and a set of principles and strategies aimed at building individual and collective capacity, self-reliance, good governance and stronger communities.

The CLC's Community Development Program works with Aboriginal people who direct their income from various negotiated benefits to community driven projects that help them to maintain their identities, languages, cultures and connections to country, and strengthen their capacity to participate in mainstream Australia through improved health, education, and employment outcomes. Since it started in 2005, the Community Development Program has continued to expand with groups committing $20.2 million to 160 new community benefits projects in 2018/2019. Since 2005 Aboriginal people in the CLC's region committed over $116 million of their money to projects ranging from multi-million dollar multiyear projects to small infrastructure projects. These investments have in turn attracted millions of dollars in co-contributions from government and hundreds of thousands from Newmont.

Mining related income makes up the majority of the money that comes through the CLC Community Development Program. This is largely due to Newmont's Granites Gold Mine which funds the Granites Mine Affected Area Aboriginal Corporation (GMAAAC) through affected areas income and the Warlpiri Education and Training Trust (WETT) through royalty income. There are also a growing number of smaller sources of mostly mining exploration benefits. The CLC Program is instrumental to supporting Aboriginal people maximise their benefits from agreements, well beyond cash disbursements, which provides only minimal gains to local community.

The NLC's Community Planning and Development Program is modelled on that of the CLC's. It has been operation since 2016. To date, the Community Planning and Development Program is working with Aboriginal groups in eight locations across the NLC region. Collectively, those groups have committed nearly $8 million of their income from various land use agreements to local projects. So far, one third of that income has been directed to 32 self-determined development projects that are at different stages of completion. Projects strongly focus on maintaining language and culture, supporting youth, employment and business development and a large number of infrastructure projects on outstations.

As discussed at section 7, the NLC submitted a funding application to IAS to support economic development and community planning and development activities, including in relation to Project Sea Dragon. Project Sea Dragon has both Major Project Status from the Northern Territory Government and recognition by the Federal Government in its White Paper for Developing the North. As noted this funding application was unsuccessful and basic PBC support funding is insufficient to fund community planning and development.

Supporting native title holder groups to maximise benefits through appropriate Benefit Management Structures or through investment strategies requires the establishment of significant enduring programs, such as the CLC's PBC Support Unit and the Land Councils' respective community planning and development units. Such programs need to be equipped with specialised policy to mitigate any risks and to enable efficient and effective practices and procedures, and specialised expertise that can provide appropriate advice to support native title holder decision making processes.

It is recommended that funding needs to be made available to adequately resource such specialised programs.

9. CONCLUDING REMARKS

In completing its inquiry and Report the Commission should recall that best practice implies a level of activity and undertaking that extends beyond mere compliance, including in relation to consultations to ensure that appropriate balance and weight has been afforded to the views of key stakeholders. The Land Councils would be pleased to provide further information about this submission or to discuss the matters raised in this submission with the Commission, to assist the Commission with the completion of its Report.

Part 2 of this submission (Table A below) sets out further recommendations and comments in relation to specific draft findings, draft leading practice findings and recommendations.

CENTRAL LAND COUNCIL

NORTHERN LAND COUNCIL
Our Land, Our Sea, Our Life

PART 2 - SUBMISSIONS ON DRAFT FINDINGS AND DRAFT LEADING PRACTICES

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
1.	Draft finding 4.1	There is no case for a major reform of the Australian pre-competitive geoscience arrangements given the quality of the information is generally highly regarded. However, the coverage of geoscience databases could be further improved, for instance, by all jurisdictions adopting sunset confidentiality periods for public release of private exploration and production reports prior to the end of the tenure of a project.	The Land Councils support the public release of private exploration and production reports prior to the end of the tenure of a project.
2.	Draft leading practice 4.2	Thorough assessments of potential licence holders address the risk of repeated non-compliance. Leading practice involves regulators taking a risk-based approach to due diligence when granting or renewing tenements and considering: • Whether the application has previously failed to comply with licence conditions or health, safety and environment legislation (whether in the same jurisdiction, or in other domestic and international jurisdictions) • Past criminal conduct, technical competency and past insolvency • <u>When mines are operating on Indigenous owned land or land subject to native title, the potential licence holder's track record of Indigenous engagement, including whether tenure arrangements were granted through agreement (rather than through National Native Title Tribunal or arbitrated processes), any breaches of agreements and/or cultural heritage legislation and the company's track record of Aboriginal employment and contracting.</u>	Recommendation: that the underlined text is added. Due diligence investigations in relation to the additional dot point must involve inquiries with the relevant Land Council, NTRB and PBC, rather than rely on Company statements. The proposed additional text reflects the 'fit and proper person test' for companies to obtain mining licences in Victoria. 2019 guidance associated with the Victorian context confirms a mineral lease can be rejected or withdrawn if a company has 'behaved unethically or failed to work cooperatively with relevant land holders or local communities."

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
		While all jurisdictions undertake some due diligence, none fully follows leading practice.	
3.	Draft finding 4.4.	Bans and moratoria are a response to uncertainty about impacts of unconventional gas operations. However, the weight of evidence available, and the experience of jurisdictions where unconventional gas development takes place, suggest that risks can be managed effectively by an experienced and adequately resourced regulator.	Recommendation: Suggest underlined words are added. See concerns re: regulator capacity outlined in chapter 11 of the Report. Effective regulation requires good data, including data related to social and cultural impacts.
4.	Draft recommendation 4.1	Rather than imposing bans and moratoria on certain types of resources activity such as onshore gas, governments should weigh the scientific evidence on the costs of a particular project on the environment, other land users and communities against the benefits on a project-by-project (or regional) basis. Traditional owners should be empowered to give free, prior, informed consent for developments that are undertaken on their land.	Recommendation: Suggest underlined words are added. See Part 1, section 5.4 of this submission on Free Prior Informed Consent. The Commission is cautioned against relying on common approaches to social impact assessments as these are often inadequate, involving desktop studies and cursory interviews with the local Aboriginal community. Frequently, they do not involve assessments of impacts on traditional owners. See comments Pt 1 Section 5.3 of this submission regarding traditional owners and the Aboriginal Community. Traditional owners often suffer deep spiritual and cultural impacts due to a project that are not felt by other members of the Aboriginal Community. Further, social impact assessments of dust, noise and other amenity disturbances do not regularly assess impacts on camping places, hunting places and cultural sites that may be impacted. For this reason, free, prior, informed consent from traditional owners should be required for developments that are undertaken on their land.
5.	Draft leading practice 5.1	Community concerns about mixed land use are best resolved through strategic land use frameworks rather than prohibitions on resources activity on agricultural land. Leading-practice frameworks seek to balance the trade-offs between resources development and other land uses, including the rights and interests of traditional owners, to maximise economic benefits for the community. These frameworks should thoroughly consider the costs and benefits of allowing resources development, and have approval processes proportionate to the risks of resources development on the relevant land. The Council of Australian	Recommendation: If Multiple Land Use Frameworks are being applied to Native Title Land, the rights, interests and wellbeing of native title holders must be a factor. The underlined text should be added.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
		Governments' Multiple Land Use Framework provides a leading-practice example.	
6.	Draft leading practice 5.2.	Where planned activity will be low impact, requiring early personal engagement between resources companies and landholders can ease potential tensions and be less costly than a negotiated agreement. The Queensland Land Access Code's notification requirements provide a leading-practice example of this approach.	Recommendation: Early personal engagement should also extend to native title holders through contacting the relevant NTRBs and PBCs at the same time as landholders. However, the finding does not need to and should not apply to ALRA Land as the requirement for an agreement on ALRA Land prior to exploration is well established, reflects the position in Victoria and NSW, and has been subject to multiple specialised reviews. This is implied by inclusion of draft leading practice 5.2 at section 5.1 of the Report (Access to Private Land) rather than section 5.3 of the Report (Development on Indigenous Land) but could be made explicit.
7.	Draft leading practice 5.3	A standard template for land access agreements can reduce information asymmetry and help to set expectations for land holders and resources companies, and improve confidence in the regulatory system. The Queensland Land Access Code, providing a combination of mandatory conditions as well as guidelines, provides a leading-practice model.	Recommendation: Findings about template conditions being best practice should be expressly excluded from application to ALRA Land, given that unique considerations apply in respect of such land. This is implied by inclusion of draft leading practice 5.3 at section 5.1 of the Report (Access to Private Land) rather than section 5.3 of the Report (Development on Indigenous Land) but could be made explicit. The application of generic codes, instruments and conditions on ALRA Land has been long considered. As far back as 1974, the ALRA Land Commissioner Justice Woodward gave consideration to this very issue and found: *"I am now convinced that the circumstances of each mineral venture are so different that it is simply not possible to lay down in advance conditions which will be fair both to Aborigines and to mining companies."*[8] Since then this issue has been considered on multiple occasions. Where generic codes, policy instruments and template conditions are best practice on Native Title Land (for example pastoral land access agreements), guidance notes should require early notification and consultation with native

[8] Woodward, AE (1974) ALRA Land Commission Second Report at [591]

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			title holders through the NTRB/NTSP. This can lead to increased efficiency due to early notification and planning. Recommendation: Standard templates for access to pastoral and other forms of Native Title Land should include engagement with native title holders through their respective organisations. Encouraging early engagement with native title holders in guidance notes to such template agreements can lay the groundwork for early relationship building and manage the risk of future conflict.
8.	Draft leading practice 5.4	[5.4] Low-cost dispute resolution methods that take an investigative approach to resolving problems between parties can reduce tensions between landholders and resources companies. The recently established Queensland Land Access Ombudsman provides an example.	There are already specialised dispute resolution methods under the ALRA NT in relation to mineral tenements on ALRA Land and via the NNTT in relation to native title. This leading practice note should not apply to ALRA Land or native title. This is implied by its inclusion at section 5.1 of the Report (Access to Private Land) rather than 5.3 of the Report (Development on Indigenous Land) but could be made explicit.
9.	Draft finding 5.3.	The McGlade decision of the Federal Court in 2017 created concerns in the resources industry about the validity of native title agreements that had only been signed by the majority of the individual members of the applicant. Amendments proposed in the *Native Title Legislation Amendment Bill 2019 (Cth)* should address these concerns.	The amendments in the Native Title Legislation Amendment Bill 2019 will resolve this issue for ILUAs and Section 31 Agreements.
10.	Draft finding 5.4	The level of ~~compensation paid~~ benefits negotiated for resources developments on native title land has typically been a matter for proponents and native title groups. However, the Timber Creek decision of the High Court in 2019 went to the value of native title rights and interests and could affect agreement-making with native title groups. ~~Any uncertainty will likely be resolved as access negotiations occur over time.~~	Recommendation: the words in strike out are deleted and the underlined words are added. The Timber Creek decision found that cultural impacts were central to a non-economic loss compensation component. As cultural impacts will differ in each factual situation around Australia the principles set out in Timber Creek are instructive, but do not lend themselves to implementation of a uniform scale or formula. Negotiations for native title consents are not usually limited to "access negotiations", and the payments made under native title agreements should be characterised as benefits or consideration payable as part of a voluntary commercial transaction rather than compensation. The matters discussed during native title negotiations ordinarily include employment, contracting,

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			cultural heritage protection and management and other matters relevant to an entity's social licence to operate. They also include financial benefits. In this way, agreements can streamline proponent compliance with multiple statutory regimes. It is broadly recognised that agreement based developments are a more efficient process, particularly for large and complicated projects. In these instances, an ILUA can cover all aspects of a diverse project, rather than rely on a more piecemeal statutory process, for the grant of tenure. ILUAs confer efficiencies and relationship benefits for companies. All of these factors inform agreements and the associated obligations and benefits under them. Benefits payable under Agreements are sometimes characterised as a cost, which exposes a proponent-centric viewpoint. Benefits are a transfer from the mining industry to traditional owners, who regularly spend their money locally thus further supporting local economies. For the Northern Territory, and particularly for Aboriginal people in the Northern Territory, these are a benefit, not a cost. Such benefits form a significant upside to Agreements and resources projects.
11.	Draft finding 5.5.	Exploration activities have differing impacts on native title land. Consequently, a case-by-case approach by States and Territories to assessing whether the expedited procedure under the *Native Title Act (Cth)* applies is necessary to give effect to the intention of the Act.	The Land Councils support the assessment of whether the expedited procedure applies on a case by case basis. There should be no blanket issuing of expedited procedure applications based on tenement type. Conditions, particularly standard form conditions, that attach to a tenement granted pursuant to the expedited procedure should be publicly and easily available. This occurs in some jurisdictions e.g. Queensland and is best practice. Such conditions are not publicly or easily available in the Northern Territory, which undermines transparency and confidence in the regulator.
12.	Draft recommendation 5.1	The National Native Title Tribunal should publish guidance about the circumstances in which the expedited procedure will apply.	The NNTT has produced useful summaries of cases relating to various matters heard by the NNTT, including expedited procedure objections. These publications are a useful tool that should be supported.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			Guidelines from the NNTT have no legal effect. The circumstances in which the expedited procedure should apply is a matter for legal analysis and advice. Regulators have in house lawyers who can and should deal with this issue.
13.	Draft finding 5.6	Very few projects are going ahead on land protected by the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).* The requirements that agreements must cover both exploration and extraction, and that refusal of consent for one project in an area means that a moratorium is imposed on any other development while the original proponents retain a right to renegotiate, appear to be unnecessarily restrictive.	See Part 1, section 6.3 of this submission.
14.	Information request 5.1	The Commission is seeking further information on whether reforms to the following elements of the *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)* would help to enable resources sector investment while still achieving the aims of the Act: • 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.	See Part 1, section 6.2 of this submission.
15.	Draft finding 5.7.	South Australia, Victoria and the Northern Territory have implemented alternative regimes to that prescribed under the Native Title Act 1993 (Cth) for negotiating agreements between resources companies and traditional owners. These approaches have both advantages and disadvantages; a leading-practice approach has not been identified.	There is no alternative regime in the Northern Territory. See comments under Part 1, section 3.3 of this submission (Legal Context). Note that 'alternative procedure' arrangement has a technical meaning in the Native Title Act. These have not been put in place in the Northern Territory or Victoria. Recommendation: This section should be updated for accuracy.
16.	Draft Leading Practice 5.5.	Conjunctive agreements that provide a standard set of terms for resources developments in a particular area can reduce impediments to investment on native title land. South Australia's ILUAs for gas and mineral exploration are a leading-practice example. <u>However, indigenous groups have expressed concern that such agreements</u>	Recommendation: The underlined text is added. The Land Councils do not consider that a standard set of terms for agreements with Indigenous parties represents best practice. No two exploration programs are the same, leaving doubt that a 'standard agreement' can deliver the

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
		represent a lowest common denominator agreement at the expense of Indigenous interests.	outcomes required, particularly in a mixed commodity jurisdiction like the Northern Territory. The result is often that a standard terms agreements represents the lowest common denominator at the expense of native title holders' interests. The Land Councils have template agreements that draw from a large body of precedent and for a particular applicant the template is tailored to the specific circumstances and preferences of the traditional owners and applicant through negotiations.
17.	Draft finding 6.1	Unnecessary delays in project commencements can be costly for proponents and the community, including traditional owners, and typically dwarf other regulatory costs.	Recommendation: The underlined words should be added. Unnecessary delays in project commencement can also negatively impact traditional owners. For remote area Aboriginal people coming to an agreement for mining on native title or ALRA Land reflects a significant commitment of time and energy. However, delays in project commencements are not always negative and may reflect good stewardship of the resource, that impacts the economics of a project. For example, if there is a fall in relevant commodity prices a proponent may delay commencement of production until prices stabilise and the economics of the project (including royalty revenues payable to the State) improve. Good stewardship of the resource aims to ensure that if the resource is developed it will be developed responsibly, effectively and efficiently, balancing economics, cultural, environmental and social aspects. Also, delays are sometimes due to the proponent's economic or market reasons, particularly those hoping to be bought out when market conditions are favourable. See Part 1, section 6.1 of this submission. Where traditional owners have committed to a mine proceeding through an agreement and the mine then fails or is postponed, it can have detrimental effects on traditional owners and the Indigenous communities who were hopeful about achieving benefits from the project.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			There should be transparent reporting and accountability in relation to estimates of reserves for all prospective mines (not just for ASX listed entities via the JORC system).
18.	Draft finding 6.2.	Environmental impact assessments are often unduly broad in scope and do not focus on the issues that matter most. This comes with costs — the direct costs of undertaking studies and preparing documentation and the more significant cost of delay to project commencement. Disproportionate and unfocused environmental impact assessments are also of questionable value to decision makers and the community.	This draft finding contains a number of subjective elements, particularly given global and national data in relation to biodiversity decline.[9] Clear and relevant parameters for environment impact assessments are important and regulators should be encouraged to be focussed and efficient. However, where environmental impacts are likely or certain, potential mitigation efforts or alternatives should be considered as part of the assessment project. It is inefficient to allow projects with clearly foreseeable and predictable impacts to go ahead on the basis that monitoring will indicate whether these impacts are occurring, triggering subsequent action. It is more efficient and certain to assume the predicted impacts will occur and establish acceptable avoidance, management or mitigation measures at the outset as conditions. In addition, terms of reference should be developed in collaboration with Land Councils and NTRBs/NTSPs where traditional owners will be impacted.
19.	Draft finding 6.3.	The referral process for the EPBC Act and the nuclear and water triggers are creating unnecessary regulatory burden: • Over half of all projects referred under the EPBC Act do not ultimately require Commonwealth approval. • Projects ruled out as nuclear actions in the EPBC Act explanatory memorandum are being treated as nuclear actions requiring Commonwealth environmental approval. • The evidence that the water trigger filled a significant regulatory gap is not compelling.	Recommendation: The finding should be updated for accuracy. The referral process relies almost exclusively on proponent self-assessment. A proponent forms a view about whether its project will or is likely to significantly impact a matter protected under the Act. Most proponents take a risk based approach to referral, frequently using the mechanisms to confirm that activities can be undertaken in the manner set out, without the need for assessment and approval (i.e.: for confirmation that their project is not a controlled action). This is likely to explain why there are a large number of referrals and fewer controlled action decisions.

[9] IPBES (2019): Global assessment report on biodiversity and ecosystem services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. E. S. Brondizio, J. Settele, S. Díaz, and H. T. Ngo (editors). IPBES secretariat, Bonn, Germany.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			The 2018-19 Department of the Environment and Energy Annual Report notes that of 144 'matters of national environmental significance under the EPBC Act considered in relation to impacts of a proposed action' in that year: • Only **<u>one</u>** related to a controlled action involving the nuclear action trigger (less than 1%); and • Seven related to controlled actions involving the water trigger (less than 5%). See Appendix 4A: Table A4.A.5. This context is important as it indicates the Commission's finding that there is an unnecessary regulatory burden may be incorrect. EPBC Act matters should be left with the concurrent EPBC Act review. See Part 1, section 5.1 of this submission. The draft finding in relation to the water trigger is at odds with the Scientific Inquiry into Hydraulic Fracturing in the Northern Territory. Chapter 7 of the report summarised their finding that the water trigger in the EPBC Act "does not apply to shale gas developments despite water resources clearly being of environmental significant to these developments. There is no good reason why that Act should not be amended to apply the water trigger to onshore shale gas". Recommendation 7.3 of the Inquiry provided that the Australian Government amend the EPBC Act to apply the 'water trigger' to onshore shale gas development to address this regulatory gaps.
20.	Draft leading practice 6.1.	Leading-practice environmental impact assessment involves application of a<u>n appropriate</u> risk-based approach, where the level and focus of investigations is aligned with the ~~size~~ <u>significance</u> and likelihood of environmental risks that projects create. In practice, this means: • allocating different projects to different assessment tracks depending on their level of risk, which occurs throughout Australia. • thorough scoping, including community consultation, <u>including with impacted indigenous communities and traditional owners and their representatives</u>, to identify which matters need to be investigated more or less thoroughly. The ongoing EIA	Recommendation: The underlined words should be added. Community consultation should include consultation with impacted indigenous communities and traditional owners. Where projects are on Native Title Land, native title representative bodies should be consulted in scoping consultations in relation to cultural heritage matters. Early identification of cultural heritage issues can flag issues with and streamline planning for cultural heritage processes.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
		improvement project in New South Wales shows movement in this direction. • terms of reference that focus on projects' biggest and most likely risks, <u>including cumulative impacts.</u> • regulators that are empowered to focus on what matters most, for example through Statements of Expectations as occurs at NOPSEMA.	
21.	Draft leading practice 6.4.	The use of deemed decisions, whereby the assessment agency's recommendation to the final decision maker becomes the approval instrument if a decision is not made within statutory timeframes, is a leading-practice approach to reducing delays. At the same time, deemed decisions should be subject to limited merits review. No jurisdiction ticks both boxes – The *Environment Protection Act 2019 (NT)* introduced deemed decisions but does not allow them to be subject to merits review.	See comment regarding draft leading practice 6.11 (item 28 below). The *NT Environment Protection Act 2019* provides for a recommendation of the Environment Protection Authority to be a deemed decision if the Minister fails to make his or her decision within the specified time. No merits review is available for the Minister's decision, or the deemed decision. Merits review of a deemed decision should be available in circumstances where merits review of the Minister's decision is available, (had he or she made the decision in time).
22.	Draft leading practice 6.8.	The use of standard conditions for standard risks can deliver efficiencies to approval processes, <u>provided that regulators can add to conditions to reflect the unique nature of each project</u>. Queensland's Model Mining Conditions are leading practice.	Recommendation: the underlined words are added. Standard conditions are a floor not a ceiling. Best practice allows a prudent regulator to add to conditions if to reflect the unique nature of each project. Standard conditions may be beneficial in jurisdictions where there are many projects focussed on the same commodity (iron ore in Western Australia, coal in Queensland). However, they are not necessarily useful in a small jurisdiction with multiple commodities like the Northern Territory.
23.	Draft recommendation 6.1.	The *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* should be amended, in line with the *Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 (Cth)* to enable negotiation of bilateral approval agreements.	Recommendation: Matters that relate to the EPBC Act should be left to the EPBC Review as it is a specialised area with specialised review. See Part 1, section 5.1 of this submission.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
24.	Draft recommendation 6.2.	When bilateral assessment agreements are renegotiated, State and Territory governments should consider making additional commitments to address inconsistencies and overlap in project approval conditions. These commitments could be modelled on those described in the EPBC Act *1999 Assessment Bilateral Agreement Draft Conditions Policy*.	State, Territory and Federal government decision makers already cooperate with respect to the timing of approvals and nature of conditions. Care is taken to avoid overlaps and enable streamlining where documents or plans may be required for multiple purposes and to respect common concerns. Therefore, the need for this recommendation is unclear.
25.	Draft leading practice 6.12	Effective coordination among agencies within a jurisdiction reduces uncertainty, facilitates timely processing and minimising overlaps and inconsistencies. This can occur through: • A lead agency or major project coordination office that provides guidance to proponents and coordinates processes across agencies (without overriding the decision-making capacity of other regulators). The coordination models in western Australia and South Australia, and the case management system in Northern Territory have been highlighted as leading practice by study participants…	Land Councils support assessment approaches that require the company to research, design then seek approvals once there is some certainty about project configurations. As well as reducing the cost or number of future project approvals this creates efficiency for agreement making processes under the Native Title Act and ALRA NT as it allows traditional owners to understand the tenure requirements and project configurations. Land Councils support effective coordination among agencies. This also leads to streamlined coordination and liaison with Aboriginal parties.
26.	Draft finding 6.7	Judicial review of administrative decisions is a fundamental element of good governance and a check and balance on democratic powers that should not be interfered with. Court cases brought by third-party opponents to resources projects may cause delay, but this does not imply that third parties should be excluded from seeking judicial review. Process-driven legislation creates opportunities for regulators to make invalid administrative decisions that open the door for judicial review.	Recommendation: the underlined text to be added. Judicial review of administrative decisions is a fundamental democratic principle and should not be interfered with. Relative to the number of applications/referrals for projects, the number of reviews/appeals is very small. Further the number of successful reviews/appeals is relatively rare.
27.	Draft finding 6.8	Resources projects typically require a range of assessments and approvals by multiple regulators within a jurisdiction. While regulatory coordination has improved over the past decade, proponents still report difficulties navigating the regulatory landscape. Lack of coordination can cause costly delays and liaising with multiple agencies can also give rise to significant compliance costs.	Coordination also benefits Land Councils, native title representative bodies and other stakeholders. In principle, the Land Councils support coordination and efficient navigation. However, the Land Councils do not support the removal or consolidation of regulatory requirements without an opportunity to consider details of what is proposed and involvement in the reform project.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
28.	Draft leading practice 6.11	Where approval decisions are made by unelected officials it is a leading-practice accountability measure that they can be subjected to merits review that allows for conditions and approval decisions to change to reflect substantive new information. The *Environment Protection Act 2019 (NT)* puts this principle into practice.	Recommendation: Decisions by unelected officials are either made by delegation, or in the case of the Northern Territory, deemed decision. The same process should apply no matter who the decision maker is, as judicial and merits review should apply consistently. To have inconsistency creates a risk of unintended consequences, politicising the process and allowing "difficult" decisions to default to a deemed decision and Court process.
29.	Information request 6.1	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?	The topic of indigenous heritage was likely not raised because it does not present material issues for proponents, governments and others consulted by the Commission. In leading jurisdictions, cultural heritage processes are driven by traditional owners. Protecting Aboriginal cultural heritage is of significant concern to Aboriginal people in the Northern Territory with significant reputation risks for proponents. Recent events in the Pilbara, Western Australia emphasise this point. Negotiations for major project agreements in the NT always involve consideration of cultural heritage protection. Sometimes, traditional owners require clearance certificates to be prepared by a Land Council as part of the agreement making process, and to ensure that the proponent clearly understands which areas cannot be developed/need protection. The negotiation of these cultural heritage protection provisions in a comprehensive agreement provides a streamlined process that benefits both proponents and traditional owners. Recommendation: If clearance certificates are prepared by a Land Council as part of an agreement making process, these should be given the same status in any processes that deal with cultural heritage as an Authority Certificate prepared by the Aboriginal Areas Protection Authority in the Northern Territory. The Land Councils support the inclusion of a positive duty of care to protect Aboriginal cultural heritage in the Northern Territory. The Land Councils also support the expansion of protection provisions beyond the protection of 'sacred sites' in the Northern Territory to broader Aboriginal cultural heritage

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			including sites, objects, environments, landscapes and areas of significance (whether traditional or historical), including tangible and intangible heritage. Aspects of Queensland and Victoria's cultural heritage legislation are leading in relation to these issues.
30.	Information request 7.1.	Is there evidence of any systematic deficiencies in the compliance monitoring and enforcement effort of regulators overseeing resources projects? In particular: • Are regulators adequately resourced to carry out effective monitoring and enforcement programs? • Do the monitoring and enforcement approaches of regulators represent good risk-based regulation?	Effective monitoring and enforcement depend on effective conditions at the outset. The Land Councils support the drafting of clear and transparent conditions associated with environmental approvals. **Federal regulator** The Department of the Environment and Energy Annual Report 2018-19, and information available on the EPBC Act website, indicates minimal enforcement action has been taken by the Department in recent years (four infringement notices since 2015). Similarly, EPBC Act compliance checks have decreased in number. The Department undertakes compliance audits. These audits are undertaken to review compliance with conditions attaching to approvals and related requirements and identify any non-compliances. Compliance audit summaries available on the EPBC Act website indicate that: • 3 audits were undertaken in 2019; • 11 audits were undertaken in 2018; • 12 audits were undertaken in 2017; • 7 audits were undertaken in 2016; and • 4 audits were undertaken in 2015. Further, in June 2020 the ANAO found the Department has been ineffective in managing risks to the environment, its management of assessments is not effective, and it has not adequately managed conflicts.[10]

[10] ANAO (2020) Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999. Available at https://www.anao.gov.au/work/performance-audit/referrals-assessments-and-approvals-controlled-actions-under-the-epbc-act <Accessed 3 July 2020>

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			This context indicates that issues may rest with implementation policy and resourcing rather than laws. That has also been the case recently in the Victorian context where an independent review found serious inadequacies in how the EPA regulated chemical waste, including its internal systems and processes and responsiveness. Since the commencement of the EPBC Act in 2000, and as at 30 June 2019, 6403 referrals had been made under the Act. Of those 6403 referrals, only 21 referrals (less than 1% (0.32%)) were refused or determined to be unacceptable on the basis of the referral information. Over 79% of referrals made since 2000 have proceeded (some with conditions), noting 9% of referrals made were withdrawn and 1% lapsed (in effect 728 referrals were not determined at all). **Northern Territory** The recent Northern Territory inquiry into fracking identified mistrust of government as a key contributor to lack of support for gas development in Northern Territory communities. Effective regulation and enforcement are key to ensuring traditional owner and public confidence in the resources sector. As set out in Part 1, section 6.2 of this submission, the Northern Territory is encouraged to undertake more comprehensive and complete assessments of company capability to act on tenements applied for before issuing its consent to negotiate. The Land Councils acknowledge that it is difficult for regulators to recruit to the Northern Territory, and that specialised knowledge is required for effective regulation, particularly where the Northern Territory mineral sector is not dominated by a single particular commodity. The Land Councils support measures designed to increase regulator capacity. There is a wealth of publicly available evidence demonstrating the Northern Territory's difficulty regulating the local mining industry.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			The NLC is aware that the number of full-time equivalent staff employed within the mining regulation sector has diminished significantly in recent years, suggesting a reduction in capacity and capabilities. Failures and missed opportunities include: • Frances Creek Mine- Recent supreme court proceedings outline the numerous failures of the Minister for Mines and Energy (NT) and his delegates to take action on inadequate environmental management at the Frances Creek mine site.[11] The findings from these proceedings highlighted issues with government processes, procedures, and the applicable legislation. • Bootu Creek (OM Manganese) - The *Mining Management Act 2001 (NT)* requires operators to protect the environment to the best extent practicable and includes human health in its definition of environment. A recent employee death on site was foreseeable and preventable as numerous structural failures of pit walls were noted prior to the catastrophic failure, despite this the regulator failed to take adequate action.[12] • Sandy Flat Mine (operated by Redbank Copper) The Sandy Flat mine is located near the Queensland and Northern Territory border, southeast of Borroloola. The Northern Territory initially failed to ensure that the environmental management system was adequate for the site, resulting in the Authorisation for the mine site being revoked. The Northern Territory has since failed to adequately progress rehabilitation work on-site since the Authorisation was revoked. The work unit charged with managing the site has not achieved the relevant 2015-2017 strategic plan commitments in 2020.[13]

[11] https://supremecourt.nt.gov.au/__data/assets/pdf_file/0012/760989/aaaNTSC28Sou1902TerritoryIronPtyLtdvMinisterforMinesandEnergy30April.pdf

[12] https://www.amsj.com.au/investigation-reveals-bootu-creek-mine-accident-waiting-to-happen/, https://www.amsj.com.au/bootu-creek-slope-failure/

[13] https://www.crccare.com/download.cfm?downloadfile=2CEA0F10-DEC1-11E6-86CE005056B60026&typename=dmFile&fieldname=filename

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			• McArthur River Mine - As set out in Part 1, section 6.2 of this submission, traditional owners often cite weak regulation, particularly environmental regulation of the McArthur River Mine as their reason for refusing consent to exploration applications under s 42 of the ALRA NT.
31.	Draft leading practice 7.4.	Public registers of activities with offset obligations and the projects developed to fulfil them provide valuable transparency about the application of offset policies. Information on offset projects should include their biodiversity values, location, date of approval, completion status, involvement of traditional owners, Aboriginal communities or Indigenous ranger groups and follow-up evaluations of benefits. Where companies fulfil their offset obligations by paying into a fund, the register should include the size of the payment. Western Australia's offset register is a leading-practice example.	Recommendation: the underlined words should be added. The Land Councils have significant land management expertise. For example, the CLC employs over 90 Indigenous Rangers to manage areas of importance, including Indigenous Protected Areas (***IPA***s). In the NLC's region there are 10 IPAs and 28 Aboriginal ranger groups. The NLC directly employs 52 full time, 59 part time and (on average) 158 casual staff across 13 of these ranger groups and 3 of the IPAs. 14 ranger groups in NLC's region are already involved in the carbon industry and various would benefit from involvement/further involvement in offsets projects and monitoring activities. The marine mammal monitoring program undertaken in Darwin Harbour as part of the Inpex project's offset arrangements provides an example of this in practice – monitoring is undertaken as a partnership between the Northern Territory, Larrakia traditional owners, Kenbi rangers and an independent consultancy. Efforts should also be made to increase the involvement of traditional owners and Aboriginal communities in offsets projects. The increased transparency is supported, including in relation to these issues.
32.	Draft finding 7.2	Limited transparency in most jurisdictions means that evidence about the effectiveness of compliance monitoring and enforcement activity is limited. This situation risks damaging public confidence in the regulation of projects.	Increased transparency, including easy public access to information, is supported.
33.	Draft finding 7.3	There are few examples of large resource extraction sites being rehabilitated or decommissioned in Australia – in part because rehabilitation and decommissioning only became a policy focus for	Pooled rehabilitation funds (effectively a tax levied on contemporary operators that is used to fund clean-up of legacy mine sites) make a valuable contribution in the Northern Territory.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
		governments in the latter half of the 20th century. As a result, there is a large number of legacy abandoned mines.	There are a large number of legacy abandoned mines and shafts in the Northern Territory. These include Harts Range Mt Palmer Mine and Rex Mines, Redbank, Peko, Goodall, Rum Jungle, Kathleen, several areas around Tennant Creek, Hatches Creek, Arltunga, Winnecke Goldfields. Pooled rehabilitation funds can make a valuable contribution to funding clean up and amendments allowing the risk of clean-up to be transferred to those who have benefitted from a mine can mitigate the risk of insolvent operators failing to clean up a mine site.
34.	Draft leading practice 7.8.	Having financial assurance arrangements in place to cover rehabilitation, based on the risk the project poses to the taxpayer, provides incentives for companies to undertake rehabilitation and minimises the risk that governments will be left responsible. These arrangements are present in most (but not all) jurisdictions.	Traditional owners have unique interests in relation to these matters given they generally resume the land at end of project life (for Native Title Land, the non-extinguishment principle applies. ALRA Land is inalienable). Once a mine ceases operating it may impact traditional owners (including native title holders). If containment of contaminants fails, neighbouring ALRA Land or Native Title Land may also be impacted. In this way, traditional owners bear significant risk and have shared interests in adequate and safe rehabilitation with the government. These interests extend beyond those of the general public. Traditional owners have long held concerns over whether environmental security paid to the NT government is sufficient, particularly if an operator becomes insolvent. Queensland law allows clean-up costs to be obtained from those who have significantly benefitted from the mine in these circumstances. This enables the transfer of risk of legacy environmental issues to beneficiaries rather than taxpayers. Further transparent reporting is needed and traditional owner input into decisions to release bonds or security at completion of rehabilitation. Recommendation: Best practice is to facilitate traditional owner input, through consultations with the relevant NTRB, PBC or Land Council, into priorities for rehabilitation and the discharge of bonds.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			A best practice approach is currently being undertaken for rehabilitation of the Ranger Mine. For example: • ERA has worked with the Mirarr to develop cultural criteria in their mine closure plan; building in cultural considerations to rehabilitation and close out plans. • The NLC and traditional owners have a formal role under the authorisations for the mine, including in relation to the approval of rehabilitation works. • The rehabilitation is subject to Commonwealth Government oversight; the Commonwealth also have ultimate responsibility for the site, which has promoted close regulatory scrutiny and improved rehabilitation standards in an otherwise weak regulatory jurisdiction (see item 30). Here, the risks to government and the taxpayer have promoted strong regulatory oversight and improved environmental outcomes. Finally, the Northern Territory Mining Security calculation tool, available here https://nt.gov.au/industry/mining-and-petroleum/mining-activities/mining-forms-and-guidelines/security-forms-and-guidelines, fails to provide adequate if any, estimates for the treatment and disposal of contaminated water. Given the wealth of knowledge regarding acidic and neutral mine drainage (AMD), and numerous examples of mines that produce AMD throughout the Northern Territory, the omission of water treatment from the security calculation cannot be considered good risk-based regulation.
35.	Draft finding 7.4	Concerns about resources sites being sold to smaller firms that may not have the resources to rehabilitate them are best addressed through effective rehabilitation bonds (draft leading practice 7.9).	For the reasons outlined at item 34, ineffective rehabilitation is of significant concern to native title holders and owners of ALRA Land. Agreement making is a valuable way to address these concerns through assignment provisions.
36.	Draft leading practice 7.10.	Progressive rehabilitation can lead to better understanding of rehabilitation requirements, ensure that funds are made available, reduce the total costs of rehabilitation, improve health and safety outcomes and	See comments above. Progressive rehabilitation is supported and can mitigate the risks to taxpayers and traditional owners should a mine be abandoned due to insolvency.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
		provide community confidence in the operator's commitment to rehabilitate. Progressive rehabilitation can be encouraged by financial surety requirements being reduced commensurate with ongoing rehabilitation work. Victoria's rehabilitation policy for Latrobe Valley mines represents a good example.	
37.	Draft leading practice 7.7.	Resources sites that are placed into care and maintenance can pose risks to the environment, and the operator may be at greater risk of default. These risks can be managed by a requirement to notify the regulator where a site is placed into care and maintenance, and the preparation of care and maintenance plans that identify these additional risks, such as those required in Western Australia. Best practice is to facilitate traditional owner input, through the relevant native title representative body or native title service provider, PBC or Land Council, into such plans.	Recommendation: The underlined text should be added. See comments at item 34.
38.	Draft finding 9.1.	The effects of resources extraction both positive and negative, are amplified for local communities. Resources extraction can stimulate economic activity in the community, but also lead to effects such as house price fluctuations and strains on local infrastructure. For traditional owners, impacts on cultural heritage can also be significant. It is appropriate that resources companies are required to address significant negative externalities associated with resources extraction, such as noise, odour and dust and impacts on cultural heritage, and provide or pay for infrastructure that they directly use. However, effects such as fluctuating house prices signal the need for market adjustments and should not be supressed. Approaches such as appropriate planning can moderate price spikes. Companies should not be required to fund or construct infrastructure that is not associated with their project (although they may do this voluntarily).	Recommendation: The underlined text should be added. Impacts on traditional owners can be particularly acute because of impacts on cultural heritage. Unlike non-indigenous community members, traditional owners have cultural and spiritual affiliations to land that mean that they cannot just move to avoid impacts. These significant negative externalities are deeply felt and often not addressed. In the Northern Territory guidance for MMPs outlines the expectations for social and economic effects to be considered. DPIR guidance notes that a community benefits plan and socio-economic management plan may be required. Negative externalities on traditional owners can be mitigated through good agreement making. The Land Councils ensure that terms of agreements cover socio economic matters and promote community development principles.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
39.	Draft finding 9.2.	Resources are owned by the Crown on behalf of all Australians. Although negative externalities of resource projects on local communities should be efficiently and effectively addressed, these communities should not benefit over and above other regional communities from resources royalties as a matter of right. An exception may be traditional owners who bear additional cultural and spiritual externalities.	Recommendation: The underlined text should be added. Traditional owners bear significant additional impacts that are cultural and spiritual and are not suffered by others. This occurs in a context where the level of social and government services for remote area communities may be less than those provided to city communities. Recommendation: Cultural and spiritual externalities should be appropriately managed and addressed.
40.	Draft finding 9.4	There is sufficient guidance available to companies from a range of institutions on how to engage with communities and other stakeholders. Most cover similar themes, and there is no one leading practice set of guidelines.	The Report may wish to offer specific guidance in relation to dealing with Indigenous communities and stakeholders here. See Part 1, section 5.3 of this submission on the distinction between the Aboriginal community and traditional owners.
41.	Draft leading practice 9.1.	Guidance on the social impacts that should be considered in the approvals process, and how they should be considered, helps improve the quality of social impact assessments. For example, the New South Wales Government has issued guidance that outlines: • What social impacts should be considered in the assessment • How to engage with the community on social impacts • How to scope the social impacts and prepare the assessment. The effects identified in social impact assessments should not always be the domain of companies to address. Rather, leading practice suggests that social impact assessments should provide a framework for companies and governments to work together to address these effects, in line with the principles outlined at draft finding 9.1. The Commission has not identified a leading practice jurisdiction in this area. Social impact assessments that relate to traditional owners and Indigenous communities must be designed and conducted in	See draft finding 9.1 at item 38 above regarding the impacts that are peculiar to traditional owners Recommendation: The underlined text should be added.

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
		collaboration with affected communities and include cultural impact assessment. Such assessments must start prior to the commencement of a project and continue throughout the project's life.	
42.	Draft finding 9.5.	Fly-in, fly out workforces provide flexibility for companies, and distribute the benefits of resources development around Australia. The use of fly-in fly-out workforces can also moderate some of the effects of resources extraction on local communities such as higher housing demand and prices, particularly during the construction phase. Use of fly-in, fly-out workforces can also reduce the impact of workers on remote indigenous people, but should not preclude remote indigenous people who live locally undertaking employment or contracting opportunities, or benefiting from improved essential services and utilities.	Recommendation: The underlined text should be added. Recommendation: The Report should make a finding recommending development of local capacity and skills as best practice. Local indigenous employment quotas may be a useful mechanism to encourage and facilitate local Aboriginal employment. Use of FIFO workers should not limit employment opportunities for local Aboriginal people. FIFO workers can decrease negative impacts of mining towns on remote Aboriginal communities. However, mining towns can also be important centres for the provision of services. One of the main negatives of FIFO workers is that it may be cheaper to fly FIFO workers from major cities than bring Aboriginal people from communities to the mine for work. This may depend on the distance between the mine and the Aboriginal communities and the quality of roads.
43.	Draft finding 9.6	It is reasonable that governments provide funding and support for services in regional areas. However, generally, there is no case for hypothecating royalty payments to communities near resource projects – this can weaken governance and encourage money to be spent on projects without fully considering their pay offs. Royalty revenues should be spent wherever community net benefits would be greatest. An exception to this principle is Aboriginal communities where resources are on ALRA Land. In that case, those communities should not be left with negative externalities and little benefit.	Recommendation: The underlined text should be added. The negative externalities associated with resources projects primarily impact remote communities, particularly indigenous communities. These communities should benefit from the projects, particularly when projects are on their land and given that government services provided to remote communities may not be at the same standard as other parts of Australia.
44.	Draft leading practice 9.2.	Local procurement requirements can be a relatively high cost way of meeting development objectives. In contrast, resources companies and governments providing businesses in local communities with the support needed to engage with resources companies, such as BHP's Local Buying Program, is likely to create more enduring benefits for communities. However, for Aboriginal communities, cost benefit	Recommendation: The underlined text should be added. Over the last two decades Aboriginal contracting and employment has been lauded as the means to address Aboriginal disadvantage in remote areas. However, in the Land Councils' experience opportunities for remote area Aboriginal people associated with resources projects are limited and are not

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		analyses of local procurement requirements need to take into account social and economic benefits.	strategically developed at the onset and throughout the life of a project. Company programs and policies can support the availability of such opportunities. Proximity between the mine and related ancillary infrastructure and Aboriginal communities is also a factor.
45.	Draft leading practice 9.3	Coordination between local communities and resources companies can improve the effectiveness of benefit sharing activities. Coordination can involve formal partnerships, such as that between Rio Tinto and the City of Karratha, or community consultation, such as that established by Hillgrove Resources in Kanmantoo and Callington. Traditional owners should also be involved through their representative bodies.	Recommendation: the underlined text should be added. Where projects are on ALRA Land, Land Councils have an important role in coordination. Where projects are on Native Title Land, NTRBs/NTSPs may have a role depending on the preference of RNTBCs.
46.	Information request 9.1.	Is there scope for greater sharing of resources company infrastructure with communities? Are there any examples of where this has been done effectively?	Opportunities for resources sharing with Aboriginal communities are limited by geographical constraints. Often, the distance between mining camps and Aboriginal communities that means that opportunities to share infrastructure are limited. On p. 258 the Report makes a finding that consultation is best practice. However, the Report does not make a formal draft leading practice finding to this. Recommendation: This should be rectified and a recommendation included in the final report.
47.	Draft finding 10.1.	Regulatory requirements to engage and share benefits with Aboriginal and Torres Strait Islander people, particularly under native title legislation, can mean that only small groups of Indigenous people benefit from resources activity. Voluntary activities offer the potential for larger groups of Aboriginal and Torres Strait Islander people to benefit, including those who reside in the local community but are not native title holders.	It is inaccurate to say that "only small groups of Indigenous people benefit". Agreements have the flexibility to benefit traditional owners and provide regional benefits; it is up to the groups and parties that negotiate them. An example is the Browse agreements (available online) which contain localised and regional benefits arrangements. Further, kinship systems operate in a manner that means that a broader group of people than traditional owners often benefit. Voluntary activities that benefit the broader Aboriginal community should be seen as additional to (and not in lieu of) benefits for traditional owners under

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			native title or ALRA NT agreements. Both forms of benefit are appropriate and desirable. See Part 1, section 5.3 of this submission on the distinction between the Aboriginal community and traditional owners. Recommendation: The finding should be updated for accuracy.
	Draft finding 10.2.	Effective engagement with Aboriginal and Torres Strait Islander ~~communities~~ traditional owners regarding the use of their traditional lands for resources development incorporates the principle of free, prior and informed consent (FPIC). FPIC ~~is not a right of veto, but~~ creates a process of genuine engagement where governments, resources proponents and communities aim to come to an agreement that all parties can accept.	See Part 1, section 5.3 of this submission on the distinction between the Aboriginal community and traditional owners and Part 1, section 5.4 of this submission on FPIC. Recommendation: The underlined text should be added.
48.	Draft finding 10.3.	The capacity of Prescribed Bodies Corporate to engage meaningfully with resources companies is critical to Aboriginal and Torres Strait Islander people being able to give their free, prior and informed consent to resources development on their traditional lands, and to negotiating effective agreements. However, many Prescribed Bodies Corporate lack this capacity.	Further information about how to support capacity building is set out in Pt 1, Section 7 (Funding NTRBs and PBCs).
49.	Information request 10.1	The Commission is seeking more information on government programs that fund Indigenous prescribed bodies corporate, native title representative bodies and native title service providers. In particular: • Have the current funding programs met their objectives? Can you provide examples where funding has made a tangible difference to the native agreement-making process, or where it has reduced reliance on government funding? • Are there alternative approaches that could improve the capacity of Indigenous organisations, such as training programs?	See Pt 1, Section 7 (Funding NTRBs and PBCs).
50.	Draft finding 10.4	Proposed amendments to the *Native Title Act 1993 (Cth)* will allow applicants to enter into future act agreements as a majority by default. This could increase the risk of a majority of the applicant entering into a	Agreements in the Northern Territory are, as a matter of practice, executed by all applicants.

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		future act agreement that is not consistent with the wishes of the claim group. However, other proposed amendments to the Native Title Act protect claim groups against this risk. They include allowing claim groups to impose limits on the authority of applicants, and clarifying that applicants owe fiduciary duties towards the claim group.	The process of obtaining consent, following traditional laws and customs, takes time. Whether this requirement is pursuant to authorisation, common law duties or fiduciary duties, 6 months is too short. See Part 1, section 5.4 (Free, Prior, Informed Consent) of this submission.
51.	Draft finding 10.5	Proposed amendments to the *Native Title Act 1993 (Cth)* make it clear that native title applicants owe fiduciary duties to their claim group when entering into native title agreements. However, they do not address questions of whether funds arising from native title agreements entered into before a native title determination belong to the claim group or ultimate native title holding group, and whether applicants and/or claim groups have any duties towards native title holders.	Recommendation: This finding raises complex policy and technical issues. Any amendments designed to resolve this issue should be subject to comprehensive consultation, particularly with native title holders and representative bodies. Further, these matters can be complicated by agreement provisions - ILUAs and Section 31(1)(b) Agreements frequently contain contingencies in relation to payments, for example if there is a new claim group or different determined native title holding group (or a negative/no determination of native title). These matters can also be complicated by the fact that native title holding groups are not static. The composition changes over time, with births, deaths and may also change with succession.
52.	Draft recommendation 10.1	The Australian government should review the question of whether native title claim groups or holders are the beneficial owners of funds arising from native title agreements made before a native title determination, and, if native title holders are considered to be the beneficial owners of funds, whether applicants and/or claim groups have any duties towards them in receiving and managing funds for their benefit.	Recommendation: This recommendation raises complex policy and technical issues. Any amendments designed to resolve this issue should be subject to comprehensive consultation, particularly with native title holders and representative bodies.
53.	Information request 10.2.	In principle, it appears appropriate for private agents to have obligations towards all those who hold or may hold native title (as native title representative bodies do). Should the *Native Title Act 1993 (Cth)* be amended to impose statutory obligations on private agents that are equivalent to those imposed on native title representative bodies? Why or why not?	Native title representative bodies have a multitude of statutory obligations. Page 297 indicates that the relevant statutory obligations under consideration are requirements to 'consult with, and have regard to the interests of, any registered native title bodies corporate, native title holders or persons who may hold native title who are affected by the matter." The anthropological, technical and logistical expertise required to hold consultations with native title holders prior to a determination is usually

Item	Section	Text (Land Councils' proposed additional text in underline)	Recommendation / Comment
			beyond the capacity of private operators. Extending statutory obligations to private operators is a blunt instrument, particularly where those operators (such as lawyers or accountants) are already heavily regulated. There may be more effective ways of addressing the underlying issue including through adequately funding NTRBs/NTSPs so that traditional owners do not perceive a gap in services. However, the policy and technical issues raised by this question are complex and should be subject to specific and comprehensive consultation, particularly with native title representative bodies.
54.	Information request 10.3.	• What are some potential reasons to allow native title funds to be removed from charitable trusts? • What are some mechanisms through which funds may be removed from charitable trusts, and what might the tax implications be? How would these proposals affect non-Indigenous charitable trusts?	Significant work has been undertaken in this field. The Commonwealth Department of Treasury prepared a report in 2013 on this issue.[14] On 28 June 2013 Parliament passed laws reforming tax implications for native title payments. See also "The Taxation of Native Title Payments for Individuals, Groups and Resources Proponents: Convergence, Divergence and Reform" (2015) 39(2) UWALR 99. Recommendation: This raises complex policy and technical issues. Any amendments designed to resolve this issue should be subject to comprehensive consultation, particularly with native title representative bodies.
55.	Information request 10.4.	The Commission is seeking more information on whether there are barriers, unrelated to tax and charity law, to maximising benefits to communities from native title funds, including in relation to benefit management structures and the investment of native title funds. What are potential solutions to these issues?	Comment: This raises complex policy and technical issues. Any amendments designed to resolve this issue should be subject to comprehensive consultation, particularly with native title representative bodies. For example, NTRBs/NTSPs are chronically underfunded. When native title holders wish to direct benefits to community benefits, that requires skills in community development that would most appropriately be provided by NTRBs/NTSPs. For further information see Part 1, Section 8 (Maximising benefits from native title funds) of this submission.

[14] Commonwealth of Australia (2013) "Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, Report to Government" Australian Government

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56.	Draft finding 11.2	The ability for regulators to operate effectively and efficiently is constrained by capability challenges, including limited technical expertise and inadequate use of data and technology. In addition, a lack of clarity and regulator transparency inhibits accountability, leads to unnecessary costs for industry and risks a loss of public confidence in the regulatory system. Not least, regulators collect a wealth of data but relatively little is made available to the public.	Capacity building in the regulators is supported. See item 30.
57.	Information Request 11.1.	The Commission is seeking views on the advantages and disadvantages of institutionally separating regulatory and policy functions in jurisdictions where separation does not already exist, and the effectiveness of other approaches to ensuring regulator accountability.	Best practice is for every regulator to have compliance and enforcement policies in relation to projects (i.e.: so there should not be a complete separation of policy functions). Compliance and enforcement policies create transparency, certainty and predictability.
58.	Draft recommendation 11.2	Regulators in each jurisdiction should consult with industry, including peak bodies (such as the Minerals Council of Australia and the Australian petroleum Production and Exploration Association), on developing a program of site visits in order to enhance technical expertise. The program should be ongoing and part of induction training provided to new staff.	Recommendations: Regulators in the Northern Territory should consult with Land Councils. Land Council mining officers should also be involved in similar site visits.
59.	Draft leading practice 11.8	Regulators can improve the public's understanding of regulatory objectives and processes by • Engaging with local communities on the regulatory process throughout the lifecycle of a resources project, including in the initial scoping stage, as occurs in Canada • Conducting broader consultation on an ongoing basis to understand community expectations and provide feedback to policy makers and the government, as occurs in New South Wales.	The Land Councils' support their involvement at the initial scoping stage and feedback stage.
60.	Table B.7.	Regulatory Arrangements in the Northern Territory.	Recommendation: The table contains information that is not correct and should be amended. See Part 1, section 3 of this submission (Legal Context)

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