Human Rights and Equal Opportunity Commission

Aboriginal Torres Strait Islander Social Justice Commissioner

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Dear Ms Hebron

RE: Comments on The Taskforce Report Recommendations

Thank you for this opportunity to comment on the Western Australian Governments' Technical Taskforce on Mineral Tenements and Land Title Applications. I welcome the development by the WA Government of an overarching strategy on mineral tenement and land title applications that formalises these processes according to policy objectives that include the protection of native title. This initiative is an opportunity to establish an equitable basis for the recognition of native title rights within the framework of land tenure and management in Western Australia.

I have a number of concerns about the Technical Taskforce's recommendations. In particular, I am concerned that:

- The focus of the recommendations is the reduction of the 'backlog' of mining license applications (and other future act applications), rather than the development of a long-term approach to the inclusion of native title rights within land management in Western Australia;

- The substitution of heritage agreements for more substantial negotiation with native title parties; and

- The failure to adopt a policy of non-extinguishment for all dealings with native title land.

While the immediate issue before the Technical Taskforce is the backlog of mining applications, this issue must be resolved within the broader, longer-term framework of native title rights to land. The relationship that is developed between Indigenous title-holders, industry, other stakeholders and the state

must respect human rights principles recognised at international law and must not detract from the current domestic legal rights of native title parties under the NTA and other relevant legislation.

My submission is divided into three sections:

1 the relevant international human rights law that applies to the resolution of these issues;

2 the nature of the rights conferred by the *Native Title Act 1993* and the legal requirements placed on the State government in processing future act matters; and

3 my evaluation of the current recommendations, based on the above considerations.

1 THE HUMAN RIGHTS STANDARDS

The major human rights standards elaborated at international law with regard to Indigenous people are:

1.1 The right to equality – including equal protection of property interests before the law

This is required by the International Convention against the Elimination of Racial Discrimination (ICERD), article 5 and the Universal Declaration of Human Rights (UDHR), article 17.

This right guarantees the equal protection of property rights, without distinction as to race, colour or national or ethnic origin. This means that the property rights of Indigenous people must be afforded the same protection before the law as non-Indigenous property rights.

The meaning of equality accepted at international law encompasses the recognition that where there are fundamental differences between a majority population and minority groups or Indigenous peoples, mere equal treatment before the law (through the application of general laws to their particular circumstances) will result in a failure to protect their fundamental human rights. In order that the human rights of minority groups or Indigenous peoples are equally protected to the general population, the mechanisms to achieve that protection must sometimes encompass differential treatment which takes account of their cultural specificity. This is the principle of *substantive* equality.

Where Indigenous property rights are less well defined in the general legal system than other property rights (because, for instance, they derive, not from the general legal system, but from the traditional laws and customs of the Indigenous peoples themselves), they may be more vulnerable to impairment. Thus differential treatment of such rights may be required to achieve their equal protection.

The requirement of substantive equality in relation to the protection of Indigenous peoples' property rights has been further developed by the CERD Committee's[1] *General Recommendation on Indigenous Peoples*, which calls upon state parties to "recognise and protect the rights of Indigenous peoples to *own, develop, control and use* their communal land, territories and resources".[2] This is an expansive protection of rights to property. It protects communal ownership of territories and the right of Indigenous peoples to control the development of their traditional territories.

1.2 The right to maintain and enjoy a distinct culture

This is required by the International Convention on Civil and Political Rights (ICCPR), article 27.

This right guarantees members of minority groups the right to maintain and enjoy their own distinct culture. The protection of this right requires protection of the *circumstances* required to maintain and develop that culture. Where land is of central significance to the sustenance of a culture, as it is with Indigenous culture, then the right to enjoyment of culture requires the protection of rights to territories upon which the culture is founded. If such territories are subject to other uses, the right to culture requires that the territories should not be subject to use in a way that erodes the minority or Indigenous culture.

Respect of minority or Indigenous cultures includes the recognition that the right to enjoyment of culture is not 'frozen' at some point in time when the culture was supposedly 'pure' or 'traditional'. The enjoyment of culture should not be falsely restricted as a result of anachronistic notions of the 'authenticity' of the culture, but includes a right to social and cultural evolution and economic development. In its General Recommendation on Indigenous People the CERD Committee recommended that States "provide Indigenous peoples with *conditions allowing for a sustainable economic and social development compatible with their cultural characteristics*".[3]

1.3 The right of Indigenous people to effective participation in decisions affecting them, their lands and territories

This is required by ICCPR, article 1 and the International Covenant on Economic Social and Cultural Rights (ICESCR), article 1.

Enjoyment of culture requires the provision of "measures to ensure the effective participation of members of minority communities in decisions

[1] The CERD Committee is the United Nations Committee that monitors signatory-states' compliance with the Convention on the Elimination of All Forms of Discrimination.

[2] CERD *General Recommendation 23, op.cit.*, para 5. (emphasis added)

[3] Committee on the Elimination of Racial Discrimination, *General Recommendation XXXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4 (1997), para 4.

which affect them.[4] In its General Comment on article 27 of the ICCPR, the Human Rights Committee stated that effective participation is particularly important in the context of the need to protect the particular cultural relationship of minority groups to the use of land resources, particularly in the case of Indigenous peoples. These principles also reflect those enunciated by the CERD Committee in its General Comment on Indigenous peoples when it called on States parties to "ensure that members of Indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent".[5]

2 HUMAN RIGHTS STANDARDS AND FUTURE ACTS PROCESSES: THE NATURE OF NATIVE TITLE

Any processes developed by the Taskforce to deal with the backlog should reflect the following human rights-based principles:

2.1 The principle of equality requires that Indigenous interests in land be protected equally to non-Indigenous interests:

- Future act processes that respect the equality of Indigenous peoples' property rights with other property rights will not seek further extinguishment of native title. The principle of non-extinguishment should apply to all future act processes affecting native title.

- Where the legal question of prior extinguishment is uncertain (such as on enclosed and / or improved pastoral lands as discussed in the *Ward* case), but native title parties maintain a relationship with the land based on traditional law and custom, future act processes should proceed as if native title continues to exist.

- Where native title claimants maintain a connection with land based on the observance of traditional law and custom, and even if native title has been extinguished in a part of the claim area, the fact of legal extinguishment should not preclude negotiations regarding that land if the interest that extinguished the native title has ceased (and the land has reverted to Crown title).

2.2 The unique nature of native title means that equal protection of native title interests will sometimes require native title to be treated differently to non-Indigenous interests:

- Native title has cultural, religious, social and economic significance. Future acts processes under the NTA are for the protection of the

[4] General Comment 23, article 27 para. 7 (1994), *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* UN Doc HRI/GEN/1/Rev 1 (1994) at 40.

[5] General Recommendation XXIII (51) concerning Indigenous Peoples (para.4) adopted on 18 August 1997, CERD/C/51/Misc.13/Rev.4.

unique nature of the native title rights. Future acts processes should not reduce the protections available to native title rights.

2.3 Future act processes should encourage and allow continued enjoyment of Indigenous culture and laws:

- Future act processes should encourage the economic, social and cultural development of Indigenous people.

- It must be recognised that, just as non-Indigenous Australian culture has changed since the British acquisition of sovereignty, so have Indigenous cultures. Native title includes contemporary cultural beliefs and economic practices forming a distinct indigenous culture that has developed from an earlier traditional culture as it existed at the time of the acquisition British sovereignty.

2.4 Future act processes should recognise and respect Indigenous peoples' rights to effective participation in decisions affecting their traditional lands:

- The fact that traditionally Aboriginal and Torres Strait Islander people used their land as a resource for the sustenance and well being of their community should translate in modern times into a right to participate in the modern management of their land. Native title must be given a role in the development of Aboriginal communities beyond permitting the practice of traditions and customs as they were practised by the predecessors of the native title parties before colonisation. Thus the right to negotiate is not merely a consultation on ways of minimising the impact of mining on registered native title rights or on protecting sacred sites. The right to negotiate should reflect an entitlement to manage the land or obtain a benefit from the resources that exist on the land.

2.5 Future act processes should respect the communal nature of native title rights and should protect the inter-generational aspect of the rights.

3 THE TASKFORCE REPORT AND RECOMMENDATIONS

3.1 Recommendations for Progressing Prospecting and Exploration Licenses and Mining Leases

The Technical Taskforce Report recommends that mining lease applications should be subject to the full right to negotiate processes under the Native Title Act (the NTA), but that the expedited procedure should be applied to all applications for exploration and prospecting licences. The Report further recommends a statutory requirement that exploration and prospecting licence applicants enter into a heritage agreement survey with native title claimants as a pre-condition to the grant of the licence. In return native title parties are to give up their statutory right to object to the application of the expedited

procedure to exploration and prospecting licence applications. The Taskforce Report recognises that the recommendation is dependent upon the development of a heritage protocol between native title-holders and industry.

There are a number of concerns with these recommendations.

(a) The blanket application of the expedited procedure to exploration and prospecting

The blanket application of the expedited procedure to all exploration and prospecting leases is both inconsistent with the NTA and breaches human rights standards.

The expedited procedure operates in the NTA as an exception to the right to negotiate where proposed mining activity has little impact on native title. The circumstances in which a Government may impose the 'expedited procedure' are guided by sections 29(7) and 237[6] of the NTA. In order to notify the native title parties that the proposed act attracts the 'expedited procedure', the Government must consider the *impact* of the proposed future act listed in section 237 of the NTA. That is, the Government must consider the impact of the proposed future act on (amongst other things) the 'carrying on of the community or social activities' of the *actual* native title-holders. This kind of consideration requires a case-by-case analysis of the *impact* of proposed future acts.

The criterion adopted by the Taskforce's recommendation is based on an arbitrary distinction between the impact of exploration or prospecting licenses and mining leases on native title. This distinction does not adequately address the requirements under the NTA for the application of the expedited procedure, as it does not involve any consideration of matters listed in section 237 NTA. In fact, exploration and prospecting activities may create significant interference with the cultural life of the community (section 237(1)(a)) and may cause significant harm to native title property rights. Exploration licenses can permit extensive activity, including drilling, the large-scale removal of soil, road grading and tree removal. Furthermore, it may be difficult for non-Indigenous people to recognize the impact on native title according to the traditional law and custom of the native title claimants.

The blanket application of the expedited procedure to all exploration and prospecting leases also potentially breaches human rights standards.

The 'right to negotiate' is a process that protects native title when development occurs on native title lands. It is based on Aboriginal customary laws regarding access to land and reflects the international human rights

[6] (a) the act is not likely to interfere directly with the carrying on of the community or social activities of the native title holders; and
(b) the act is not likely to interfere with areas or sites of particular significance, in accordance with their traditions, to the native title holders; and
(c) the act is not likely to involve any major disturbance to any land or waters concerned or create rights whose exercise is unlikely to involve major disturbance to any land or waters concerned.

principle that Indigenous people should have effective participation in decisions regarding their lands and territories.[7] The scope of the right can encompass negotiations regarding the impact of proposed future acts on claimants' native title, on their social, cultural and economic structures, including management, use and control of native title lands and waters[8].

The principle of effective participation requires that Indigenous people give their informed consent to development that occurs on their land. The expedited procedure is the removal of this internationally recognised right. It is inconsistent with human rights principles that the right to negotiate be removed by the blanket application of a formula that pre-empts a proper consideration of the effect of an exploration or prospecting licence on native title. Consequently, the Government must develop better procedures for assessing whether the expedited procedure may apply. These procedures must be based on the informed consent of native title parties.

The development of heritage survey agreements as recommended by the Taskforce could be instrumental in a process for assessing whether the expedited procedure is applicable. The Taskforce recommendation is commendable in so far as it formally introduces a requirement to assess the specific situation of the native title claim area as an aspect of the process of assessing future act applications. However, as the Taskforce Recommendation currently stands, the heritage survey requirement only occurs at a point after the native title parties have had to waive their right to object to the application of the expedited procedure. Furthermore, while the heritage survey could clearly be a useful indicator of the impact of proposed future acts on native title according to sub-section 237(1)(b) ("whether the act is likely to interfere with areas or sites of particular significance"), it would not necessarily be sufficient to determine the impact of the proposed future act on the other matters set out in section 237 and on native title generally.

(b) Waiving the right to object to the expedited procedure

The Taskforce recommendation that native title claimants give up their *right to object* to the imposition of the expedited procedure in exchange for a statutory requirement for heritage survey agreements potentially breaches international human rights standards.

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[7] This right has been emphasised in the last two decisions on Australia by the United Nations Committee for the Elimination of Racial Discrimination (the CERD Committee). The CERD Committee found that the 1998 amendments to the Native Title Act (including the restrictions on the right to negotiate) breached the International Convention for the Elimination of all forms of Racial Discrimination in that they failed to ensure the 'effective participation' of Indigenous people [Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia – Concluding observations/ comments*, 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2.] The Human Rights Committee (the United Nations committee monitoring the International Covenant on Civil and Political Rights) also criticised the NTA for limiting the effective participation of Indigenous people "…in all matters affecting land ownership and use, and affect[ing] their interests in native title lands, particularly pastoral lands."

[8] See section 39 NTA which sets out the minimum criteria to be taken into account by arbitral bodies when deciding on right to negotiate matters that have failed to be settled by negotiation.

Like the right to negotiate, the right to *object* to the imposition of the expedited procedure is a significant right that should not be easily displaced. The objection procedure is an important safeguard. It ensures that if the expedited procedure is applied inappropriately, native title parties retain some capacity to effectively participate in decisions affecting their native title. While lodgement of an objection does not reinstate the 'right to negotiate' process, it does ensure that an independent arbitrator assesses the effect of the proposed future act on the native title parties' native title rights.

Native title claimants should not be required to give up their *right* to object to the application of the expedited procedure.

(c) Heritage Survey Agreements

The recommendation relies upon the conclusion of regional heritage protocols between native title parties, the state and industry. While in themselves, the conclusion of such protocols are a positive step, I am extremely concerned about the reduction of native title to the status of a heritage concern.

Native title is not merely a right to have heritage concerns taken into account in the development of native title lands. Rather, native title is a substantial interest in land that gives rise to internationally recognised rights to effective participation in the management of that land. The 'right to negotiate' can encompass native title parties' rights to 'management, use and control of native title lands and waters',[9] and may even protect rights to negotiate about the effect of the future act on resources *owned* by native title parties.[10] The right to negotiate is thus a substantial right that enjoys protection within the international framework of human rights and which cannot be easily displaced.

The blanket removal of the right to negotiate for the grant of exploration and prospecting licences, although conditional upon a right to have heritage concerns taken into account, fails to take account of the nature of the native title interest that must be protected.

However, even at the level of protecting Indigenous heritage, which itself is an internationally protected right, I have serious concerns about the Report recommendations. Of particular concern is Recommendation 7.2 on page 55 of the Report, which limits heritage agreements to the protection offered by the *Aboriginal Heritage Act* (the AHA). The AHA is based on a very limited conception of heritage and provides only extremely weak enforcement of heritage protection.

In contrast to the model of Indigenous heritage enacted in the AHA, the United Nations Sub-Commission on the Rights of Indigenous people has elaborated

[9] see section 39(1)(b) NTA - Section 39 of the NTA sets out a broad range of matters to be taken into account by arbitral bodies when deciding on right to negotiate matters that have failed to be settled by negotiation.

[10] The question of whether native title includes rights in resources awaits the determination of the High Court in the Miriuwung Gajerrong case. Two judges in the courts below (Lee J and North J) found that native title rights could include rights in respect of minerals and petroleum.

human rights-based principles and guidelines for the protection of the heritage of indigenous people.[11] These include:

- The effective protection of the heritage of the indigenous people of the world benefits all humanity. Its diversity is essential to the adaptability, sustainability and creativity of the human species as a whole.[12]
- The discovery, use and teaching of indigenous peoples' heritage are inextricably connected with the traditional lands and territories of each people. Control over traditional territories and resources is essential to the continued transmission of indigenous peoples' heritage to future generations, and its full protection.[13]
- To be effective, the protection of indigenous peoples' heritage should be based broadly on the principle of self-determination, which includes the right of indigenous peoples to maintain and develop their own cultures and knowledge systems, and forms of social organisation.[14]
- Indigenous peoples should be the source, the guardians and the interpreters of their heritage, whether created in the past, or developed by them in the future.[15]
- Indigenous peoples' ownership and custody of their heritage should be collective, permanent and inalienable, or as prescribed by the customs, rules and practices of each people.[16]

Protection of Indigenous heritage thus requires much more than the protection of 'sacred sites' in isolation from the culture that gives them meaning. Heritage protection is not about protecting the relics of a culture frozen at some point in time when the culture was supposedly 'pure' or 'traditional', but about fostering that living heritage through the continuing development of Indigenous culture.

Underlying these five principles in relation to Indigenous heritage are the human rights of self-determination under article 1 of ICCPR and the protection of minority cultures under article 27 of ICCPR. The principles are inextricably connected with the rights to maintain and develop Indigenous cultures and the rights of Indigenous peoples to effective participation in the management of their lands and territories.

(d) Summary of prospecting / exploration recommendations

The introduction of a process requiring mining parties to conduct a heritage survey as a pre-requisite to grants of exploration or prospecting leases is a

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[11] *Report of the seminar on the draft principles and guidelines for the protection of the heritage of indigenous people by Chairperson-Rapporteur Erica-Irene Daes*, Geneva, 28 February --1 March 2000, E/CN.4/Sub.2/2000/26. These principles are annexed to the study *Protection of the Heritage of Indigenous People* produced in conformity with Sub-Commission resolution 1993/44 and decision 1994/105 of the Commission on Human Rights UN Doc E/CN.4/Sub.2/1995/26,

[12] *ibid*, para 1.

[13] *ibid*, para 5.

[14] i*bid*, para 2.

[15] *ibid*, para 3.

[16] *ibid*, para 4.

welcome formalization of an aspect of the NTA future acts regime. This *may* in some circumstances be sufficient to meet the concerns of the native title parties and may alleviate the current 'backlog' of mining lease applications. However, no matter how useful and expedient the adoption of such a process may be to Government or the mining industry, it must not be used to reduce the existing rights of native title parties to their lands, both under current law and according to international human rights standards.

It is imperative that native title parties retain their *right* to object to the adoption of the expedited procedure. It is not acceptable for native title parties to be required to give up legal rights to object to the expedited procedure in exchange for a lesser, if more expedient, right to have their heritage concerns taken into account in the conduct of exploration and prospecting activities.

Furthermore, any processes that displace the right to negotiate through the application of the expedited procedure must be based on a consideration of the impact of the proposed future act on the actual native title and must be based on the informed consent of native title holders.

3.2 Recommendations for Progressing Land Titles

The Taskforce recommendations regarding processing of land titles broadly advocate that Government departments, authorities and local governments try to reach agreed outcomes, but where that fails for NTA provisions (subdivisions K, M and P) be used to allow projects to proceed. The Taskforce recognises the difficulties in reaching agreements, in particular because of inadequate resourcing of native title parties (eg pages 18, 50). In addressing resources, the Taskforce must remain cognisant that the adequacy of resourcing controls the effectiveness of Indigenous involvement and the protection of native title rights. A system that operates on the basis that Indigenous people have rights to be involved in the process, where those people in fact are unable to effectively avail themselves of those rights, will encourage development over Indigenous interests.

In addition to this general response, I make some comments in relation to particular recommendations, below.

(a) Extinguishing native title (recommendation two)

I note the Taskforce's recommendation for non-extinguishment in situations where the proposed title has no significant non-Indigenous private interests (eg. "transfer of…title to Aboriginal people, …roads in remote areas [or] native title areas, … reserves where the land is to be used for…community purposes"). In contrast, however, the Taskforce indicates that where the government wishes to grant "interests in land for development, residential, commercial etc purposes", native title rights should be "extinguished". This recommendation is made even though the Taskforce acknowledges that native title rights can co-exist in certain circumstances (namely, "in some cases this maybe [sic] the outcome in a negotiated agreement between the parties", page 51).

Recommendation two proposes the government use subdivision K where possible, to permit the construction of public infrastructure. Under subdivision K, native title parties sometimes have the procedural rights of "ordinary" title-holders, but in other circumstances native title parties have less rights (eg. under s24KA(7)(a), native title parties have the rights of a non-exclusive lease holder). This gives native title parties inadequate protection of their interests, particularly where a proposed development will have a major impact on the exercise of native title rights.

(b) Use of compulsory acquisition where no agreement
(recommendation seven)

The Taskforce's recommendation is, in effect, where no agreement can be reached the government should grant the proposed interests after dealing with native title through compulsory acquisition under subdivision M. Subdivision M, in particular section 24MD(6B) which covers compulsory acquisition for conferring interests on third parties, was one of the 1998 amendments to the NTA that has been found by various international bodies to breach Australia's international obligations. Prior to the 1998 amendments, compulsory acquisition for third parties could not occur without native title parties first having the right to negotiate on the proposal. The 1998 amendments wound back the rights of native title parties to negotiate in relation to compulsory acquisition in towns and for infrastructure. The CERD committee found the reducing of negotiation rights (by sections such as s24MD(6B)) was in breach of Australia's obligations under ICERD.

The compulsory acquisition system contained in section 24MD(6B) does not adequately protect Indigenous interests (eg. because the section does not require the government to negotiate with any native title parties prior to "acquiring" native title rights). A recommendation supporting use of s24MD(6B) is recommending that projects proceed on a basis contrary to international law.

(c) Government obligations to protect Indigenous heritage
(recommendation four)

Recommendation four advocates that where there is a pre-existing heritage agreement made with native title parties, any grant of interest to a third party must require the third party to respect the heritage agreement. While it is commendable that grantees are required to fulfil previous heritage agreements, it is important that government maintains the primary responsibility of ensuring compliance with relevant laws and international standards. International obligations in relation to the protection and preservation of heritage rest with Australian government and should not be devolved to companies or individuals.

The Taskforce recommends compulsory heritage surveys where there is a pre-existing agreement with the relevant native title parties. However the Taskforce impliedly commends the current DOLA practice, where there is no

pre-existing heritage agreement, of granting interests with no compulsory heritage assessment and simply "requir[ing] the grantee to comply with…Aboriginal heritage legislation". The interests of native title parties are not adequately protected by heritage legislation - various treaties to which Australia is a party (eg. ICERD, ICCPR) require effective protection of Indigenous heritage. Indigenous heritage is not just a matter of ensuring significant sites or objects don't get damaged, but is properly seen as part of the human right to enjoy one's culture. Only through the effective involvement of, and negotiations with, native title parties can government expect to ensure heritage issues are properly addressed.

If you have any questions regarding this letter, please contact the Director of the Native Title Unit, Ms Margaret Donaldson, on (02) 9284 9835.

Yours faithfully

Dr William Jonas AM
Aboriginal and Torres Strait Islander Social Justice Commissioner