KIMBERLEY LAND COUNCIL
ABN 96 724 252 047 **ICN** 21

2 November 2022

Committee Secretary
Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs
PO Box 6021
Parliament House
Canberra ACT 2600

Via email: JSCATSIA@aph.gov.au

To the Secretariat,

1 The Kimberley Land Council (**KLC**) is pleased to provide the following further submission on the terms of reference of the **Inquiry** by the Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs into the application of the United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in Australia.

2 The KLC is an Aboriginal organisation that was established in 1978 for the purpose of working for and with Traditional Owners of the Kimberley region to get back country, look after county and get control of their future. The KLC's mandate is driven by its broad membership of Kimberley Aboriginal people, and delivered by an Executive Board of culturally and regionally representative Directors. The KLC plays a leading role amplifying the views and voices of Kimberley Aboriginal people locally, nationally and internationally, and we are dedicated to improving the cultural, social and economic well-being of our people. The KLC is committed to the principles of UNDRIP and we consistently advocate for and apply these principles in the work that we undertake.

3 This submission identifies current issues with adherence to the principles of UNDRIP in Australia and options for addressing these issues and improving adherence. The KLC makes this submission with particular regard to its role as a Native Title Representative Body (**NTRB**) recognised under s203AD of the *Native Title Act 1993* (Cth) (**NTA**) for the Kimberley region, and as a representative Indigenous community organisation with a mandate to achieve recognition of and protection for rights in country for Kimberley Aboriginal people. The KLC is conscious that the fundamental human rights recognised in UNDRIP are intended to cover a broad spectrum of the lives and experiences of Indigenous people including health, access to justice, childhood and children's rights, education, and nationality. KLC supports the implementation of UNDRIP in all of these areas, but given its role and mandate, will focus its submission on the area of the Uluru Statement from the Heart, native title, and heritage protection.

The fundamental human rights recognised in UNDRIP

4 The UNDRIP brings together fundamental human rights recognised in instruments including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (**ICCPR**), and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**), and describes these basic rights as

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they apply to the circumstances of Indigenous peoples.[1] Central to these basic human rights is the right of all peoples to self-determination.

5 The KLC submits that central to the Committee's inquiry is the fact that the rights recognised in the UNDRIP:

> *"…constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world."*[2]

6 The KLC notes in particular the following statements in the resolution of the United Nations General Assembly that adopted the UNDRIP on 13 September 2007 which identify the relevance of historic and contemporary experiences of colonisation, the fundamental importance of ongoing connection to country for cultural and ethnic identity, and the need for positive action by state parties to the UNDRIP to effectively implement their obligations.

> *Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,*
>
> *Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,*
>
> *……..*
>
> *Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,*
>
> *Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,*
>
> *Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,*

[1] Article 1, UNDRIP.

[2] Article 43, UNDRIP.

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……..

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

7 The right to self-determination is provided for by Articles 3, 4 and 5 of the UNDRIP, which replicates these rights as recognised in articles 1 of the ICCPR and ICESCR. The Australian Human Rights Commission has identified self-determination as an "ongoing process of choice to ensure that Indigenous communities are able to meet their social, cultural and economic needs".[3]

8 KLC submits that effective implementation of the UNDRIP therefore requires that Indigenous people in Australia have the ongoing opportunity to make choices about their social, cultural and economic needs.

Term of Reference (iii)

9 The KLC welcomes and strongly supports the additional term of reference (iii) which identifies the crucial relationship between UNDRIP and the Uluru Statement from the Heart.

10 KLC notes Articles 3, 18 and 19 of the UNDRIP which provide that:

Article 3

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

11 The Uluru Statement from the Heart is an unequivocal expression of choice by representatives of Indigenous peoples about their social, cultural and economic needs now and into the future. The process that led to the

[3] Australian Human Rights Commission, Right to self determination, https://humanrights.gov.au/our-work/rights-and-freedoms/right-self-determination

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Uluru Statement, including the 12 First Nations Regional Dialogues and the National Convention has also been identified as an act of self-determination.

12 The Uluru Statement calls for two substantive changes – a Voice to Parliament enshrined in the Constitution and a Makarrata Commission to supervise agreement making and truth telling about Australia's history. The KLC submits that a Voice to Parliament is integral to the application of UNDRIP in Australia, providing a key mechanism for the integration of the UNDRIP into the policy and law making of Australia.

13 Without a Voice, governments lack the expertise, lived experience and authority to make long-lasting and meaningful change in line with the principles of UNDRIP. With a Voice, First Nations people will have a body of representatives who are able to positively influence governments and policy makers to embed these principles and affirm the fundamental importance of the right to self-determination.

14 Further, a Voice enshrined in the Constitution will allow Australia to achieve best practice in relation to the rights of First Nations peoples, and ensures that despite changes in political systems, parties and beliefs, the principles of UNDRIP will remain a feature of the nation now and into the future.

15 The Uluru Statement and its reforms of Voice, Treaty, Truth are the outcome of the direct decision-making of First Nations people as members of the Australian community with rights to self-determination, which are the same as those of other Australians, but expressed differently because of the historical and contemporary experience of colonisation.

Term of Reference (ii) and (iv)

16 The KLC makes the following submission in response to terms of reference (ii) and (iv).

17 As noted above, KLC submits that effective implementation of the UNDRIP requires that Indigenous people in Australia have the ongoing opportunity to make choices about their social, cultural and economic needs.

18 KLC notes that Article 8 of the UNDRIP provides that:

> *1 Indigenous peoples and individuals have the right not to be subject to forced assimilation or destruction of their culture.*
>
> *2 States shall provide effective mechanisms for prevention or, and redress for:*
>
> *(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;*
>
> *(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;*

19 KLC submits that effective implementation of the UNDRIP requires that Indigenous people in Australia must not be subjected to forced destruction of their culture and the Australian Government must provide effective mechanisms to prevent such or, where prevention is not possible, redress for any action which has the aim or effect of depriving Indigenous peoples of their cultural values or dispossessing them of their lands and

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resources.

20 KLC also notes:

(a) Article 10 of the UNDRIP provides that Indigenous peoples must not be forcibly removed from their lands without their free, prior and informed consent and only after their agreement on just and fair compensation;

(b) Article 11 of the UNDRIP provides that Indigenous peoples have the right to practise and revitalize their cultural traditions and customs including the right to maintain and protect manifestations such as sites and ceremonies, and that state parties must provide effective mechanisms of redress that are developed in conjunction with Indigenous peoples for cultural, intellectual and spiritual property taken with their free, prior and informed consent;

(c) Article 12 of the UNDRIP provides that Indigenous peoples have the right to maintain, protect and have access to their cultural sites;

(d) Article 31 of UNDRIP provides that Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, and that States must take effective measures in conjunction with Indigenous peoples to recognise and protect the exercise of their rights;

(e) Article 32 of UNDRIP provides that:

> *1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
>
> *2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*
>
> *3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*

(f) Article 38 provides that state parties must take appropriate measures, including legislative measures, in consultation and cooperation with Indigenous peoples, to achieve the purpose and objects of the UNDRIP.

21 Having regard to the above, KLC's submission is that effective implementation of the UNDRIP requires that:

(a) Indigenous people in Australia have the ongoing opportunity to make choices about their social, cultural and economic needs;

(b) Indigenous people in Australia must not be subjected to forced destruction of their culture;

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(c) the Australian Government must provide effective mechanisms to prevent destruction of Indigenous cultural heritage and loss of lands and resources or, where prevention is not possible, redress for any action which deprives Indigenous peoples of their cultural values, lands or resources;

(d) Indigenous peoples must not be removed from their lands without their free, prior and informed consent, and prior agreement to compensation on fair and just terms; and

(e) Indigenous peoples have the right to determine and develop strategies for the development of their own resources and lands and that any activities done by governments, or lawfully by a third party, may only be done with the free, prior and informed consent of Indigenous peoples. Where development occurs without the free, prior and informed consent of Indigenous people, governments must provide effective mechanisms of redress and appropriate measures to mitigate adverse environmental, economic, social, cultural or spiritual impacts.

22 The KLC submits that the legislative measures in place governing the land and cultural heritage of Indigenous peoples in Australia fall woefully and significantly short of standards required for the Australian Government to meet its obligations under the UNDRIP, and therefore under the ICCPR, ICESCR and the Universal Declaration of Human Rights. Further to this submission, KLC notes the following significant fundamental impediments to achieving effective implementation of UNDRIP.

Heritage Legislation

23 There has been a persistent failure at a national and Western Australian state level[4] to implement laws which provide effective protection for Indigenous cultural heritage in Australia. This issue has persisted since colonisation and has been the subject of specific and repeated acknowledgment by successive inquiries since at least 1996 by the Hon. Elizabeth Evatt AC,[5] and most recently by the Australian Parliament Joint Standing Committee on Northern Australia in its inquiry into the disaster at Juukan Gorge (**Juukan Gorge Inquiry**) in its report titled "A Way Forward".[6] As yet, no measures have been put in place to address this issue and meet Australia's obligations under the UNDRIP in relation to protection of Indigenous cultural heritage and mechanisms of redress for its destruction.

24 The KLC recognises that the recommendations made in "A Way Forward" would, if implemented, be a significant advancement in the protection of Indigenous cultural heritage and the satisfaction of Australia's obligations to implement UNDRIP. KLC notes in particular recommendation 3 that the Australian Government should legislate a new framework for cultural heritage protection at a national level and that

[4] This submission is confined to the experience in Western Australia.

[5] *Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984*, Report by Elizabeth Evatt AC, 21 June 1996 http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/IndigLRes/1996/1.html?stem=0&synonyms=0&query=Review%20of%20the%20Aboriginal%20and%20Torres%20Strait%20Islander%20Heritage%20Protection%20Act%201984

[6] Commonwealth of Australia, *A Way Forward*, October 2021 https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJukanGorge/Report

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this new legislation should include minimum standards such as, amongst other matters:

(a) decision making processes that ensure traditional owners and native title holders have primary decision making power in relation to their cultural heritage;

(b) an ability for traditional owners to withhold consent to the destruction of cultural heritage; and

(c) a process for the negotiation of cultural heritage management plans which reflect the principles of free, prior and informed consent as set out in the UNDRIP.

25 KLC strongly supports a national framework for cultural heritage protection as an appropriate measure to implement Australia's obligations under the UNDRIP and to protect cultural heritage, consistent with Article 18 of the UNDRIP. Industry standards do not afford sufficient protection or consistency and leave Indigenous peoples vulnerable to the vagaries of the interest that particular proponents may have in holding a social licence to operate or meeting environmental, social and community obligations.

26 KLC notes that the Western Australian Government has recently passed new Aboriginal heritage protection legislation to replace the aged *Aboriginal Heritage Act 1972* (WA). Unfortunately, the *Aboriginal Cultural Heritage Act 2021* (WA) (**ACH Act**) persists with a flawed approach to the proper protection of Aboriginal cultural heritage and is not consistent with the basic human rights set out in UNDRIP. The KLC's concerns with the ACH Act, which mirror the concerns of most Indigenous and many non-Indigenous stakeholders, are set out in detail in its numerous submissions and the KLC would be pleased to provide these to the committee for consideration in this inquiry. The most fundamental of KLC's concerns is that the ACH Act does not provide self-determination to Indigenous peoples in relation to the management and protection of their cultural heritage but rather empowers governmental decision makers to decide whether Aboriginal cultural heritage is sufficiently significant to warrant protection and the manner in which protection should be provided (if at all). In relation to both permit processes and more comprehensive Aboriginal Cultural Heritage Management Plans, the owners of affected cultural heritage do not have the right under the ACH Act to withhold consent to activities which damage or destroy cultural heritage. This is a fundamental flaw inconsistent with the Australian Government's obligations under the UNDRIP.

27 In addition, the development of the legislation, the introduction of the Bill into the Western Australian Parliament and the subsequent 'co-design' of the legislation's regulations and guidelines have all been inconsistent with the UNDRIP because Aboriginal people in Western Australia have not been afforded the opportunity to make decisions about their own cultural heritage and the manner in which it is regulated and managed. The ongoing inability to make and influence decisions about legislation that significantly impacts Aboriginal people's heritage and culture further highlights the fundamental and ongoing inability of governments to apply the principles of UNDRIP to policy and law making.

28 In the context of the ACH Act's most recent iteration of government purported 'co-design', Aboriginal people were promised decision-making, but have in fact been further disempowered by the Western Australian Government's ongoing disregard of their views and feedback. Rather than co-design, participants have been involved in a process where they are talked at but never really listened to, where they have been asked to put forward solutions to retrofit an already flawed system – a system which the vast majority of stakeholders

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did not approve of and called on the WA Government not to implement, and where the solutions put forward are disregarded as inconsistent with the position of government or interests of industry.

29 Substantively and procedurally, the ACH Act is inconsistent with the principles of the UNDRIP, in particular the rights to self-determination, control over cultural heritage, and the right to free, prior and informed consent on matters that impact the culture and property of Aboriginal people of Western Australia. History gives no comfort that this experience will change at all in the future and it is for this reason that KLC supports the recommendations of "A Way Forward", in particular recommendation 3, as an appropriate mechanism to implement Australia's obligations under the UNDRIP.

Future Act Determination Applications (FADAs)

30 The KLC has made a number of recent submissions on the future act determination application (**FADA**) process under Part 2 Division 3 of the *Native Title Act 1993* (Cth) including to the Juukan Gorge Inquiry. KLC fully supports recommendation 4 of "A Way Forward" which is:

> *The Committee recommends that the Australian Government review the Native Title Act 1993 with the aim of addressing inequalities in the negotiating position of Aboriginal and Torres Strait Islander peoples in the context of the future act regime. This review should address:*
>
> - *the current operation of the future act regime and other relevant parts of the Act including s31 (right to negotiate), s66B (replacement of the applicant) and Part 6 (the operation of the NNTT)*
> - *developing standards for the negotiation of agreements that require proponents to adhere to the principle of Free, Prior and Informed Consent as set out in the UN Convention of the Rights of Indigenous People (UNDRIP)*
> - *'gag clauses' and clauses restricting Aboriginal and Torres Strait Islander peoples access to Commonwealth heritage protections should be prohibited*
> - *making explicit the authority and responsibilities of PBCs and Representative bodies in relation to cultural heritage.*

31 The KLC's concerns in relation to FADAs are the alarming disparity in outcomes experienced by native title parties and proponents when the National Native Title Tribunal (**Tribunal**) makes a determination of a FADA. FADAs are applications to the Tribunal for a decision on whether or not the grant of certain categories of interest in land which will impact, impair or extinguish native title rights and interests (that is, future acts) should be made, or made subject to conditions. FADAs may be made following at least 6 months of negotiations between native title parties, proponents and state parties.

32 In its submission to the Juukan Gorge inquiry, KLC made the following submission on this issue.

> *18 …….Since 1994, the NNTT has determined 163 future act determination applications (not*

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> *including applications withdrawn, dismissed or resolved by consent). Of these 163 determinations, three have resulted in a determination that the act may not be done, while 160 have resulted in a determination that the act may be done or done subject to conditions. That is, if native title holders do not agree to an act being done and the matter proceeds to determination before the NNTT, there is a 98% chance that the NNTT will determine that the act can be done or done subject to conditions. The extremely high likelihood that proponents will obtain the necessary approvals even if they don't reach agreement with and obtain the consent of native title parties means that the playing field for agreement-making is never level and native title parties participate in the future act process knowing that if they don't reach agreement with a proponent there is an almost 100% chance the proponent will have its interest granted if it makes a future act determination application.*
>
> *19 The KLC submits that the operation of the right to negotiate provisions effects a form of legislative force or coercion on native title parties when they negotiate agreements about activities which will impact their cultural heritage. While consent may appear to be given, it should not be assumed that it is freely given. For this reason, any inquiry into the adequacy of heritage protection laws should take into account the interaction between these laws and the NTA, in particular the future act provisions.*

33 KLC takes this opportunity to correct the figure referred to in [18] quoted above of 160 determinations that an act may be done or done subject to conditions, as this includes 35 FADAs that were dismissed by the Tribunal. However, the figure of only 2% of FADAs being determined in favour of native title parties who oppose the grant of an interest is correct.

34 The KLC has undertaken a comprehensive analysis of FADA outcomes by the Tribunal to the end of October 2022 in cases where a determination is made (that is, the decision does not relate to a jurisdictional issue or result in a dismissal of the application). One hundred and thirty-seven determinations were made by the Tribunal in the period 1994 – October 2022 with the following outcomes.

(a) In 77 applications, or 56% of FADAs, the Tribunal determined that the act (grant of an interest that impairs or extinguishes native title) may be done.

(b) In 57 applications, or 42% of FADAs, the Tribunal determined that the act (grant of an interest that impairs or extinguishes native title) may be done subject to conditions.

(c) In 3 applications, or 2% of FADAs, the Tribunal determined that the act (grant of an interest that impairs or extinguishes native title) should not be done.

35 While the 134 determinations that an act may be done or may be done subject to conditions include 44 cases where the native title party consented to the determination, the KLC repeats its submission made to the Juukan Gorge Inquiry that the significant disparity in outcomes for native title parties who do not agree to the grant of an interest that impairs or extinguishes their rights in country creates a form of coercion on native title parties to reach agreement with proponents because of the very high likelihood that, if they do not consent to the FADA, the Tribunal will find against them in any event. This legislative arrangement and

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administrative outcome is significantly below the standards set by the UNDRIP in particular Articles 11, 12, 31 and 32.

36 The KLC's analysis of the FADA determinations indicates that a series of assumptions have, over time, come to inform the consideration of FADAs by the Tribunal and created norms that presume the interest of proponents can be equated to the public interest and that the interest of native title parties should very rarely, if ever, outweigh the interests of proponents. Key findings from this analysis are as follows.

(a) In at least 90 of the 137 determinations, the Tribunal was satisfied that the future act should be done because it was of economic significance or in the public interest to permit exploration to maintain "a viable mining industry".[7] That is, exploration is in the public interest per se.

(b) There is a strong presumption that mining and exploration activities return an economic benefit and are in the community interest even absent any evidence to this effect. For example, the Tribunal held in one matter where there was no evidence of a public benefit from mining or exploration:

> *"The Tribunal has consistently accepted the economic benefits arising from the grant of mining tenure in Western Australia and therefore, in the absence of any evidence to the contrary, I accept the proposed leases are likely to generate some economic benefits, although I cannot draw any conclusions as to the extent of such benefit."*[8]

(c) The presumption of a benefit from mining and exploration is so persistent in the reasoning of the Tribunal that in 40 applications the Tribunal has inferred that the future act will provide a benefit to

[7] See, *Western Australia v Thomas,* at [176]; *Oceania Mining Resources Pty Ltd & Another v Koongie Elvire and Others* [2022] NNTTA 16; *PVW Exploration Pty Ltd v Tjurabalan Native Title Land Aboriginal Corporation RNTBC* [2021] NNTTA 53); *FMG Pilbara Pty Ltd and Another v Yindjibarndi #1* [2014] NNTTA 79 (31 July 2014); FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/ Western Australia [2012] NNTTA 142 (19 December 2012); FMG Pilbara Pty Ltd/ Wintawari Guruma Aboriginal Corporation/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2009] NNTTA 99 (27 August 2009); FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2009] NNTTA 91 (13 August 2009); *Wongatha People/Gregory Wayne Down/Western Australia,* [2004] NNTTA 106 (22 November 2004); *Western Australia/West Australia Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd/Leslie Hayes, Glenys Hayes, Judy Hughes, John Ard, Douglas Fazeldean, Valerie Ashburton, Laura Hicks and Albert Hayes on behalf of the* Thalanyji people (WC99/45), [2001] NNTTA 41 (1 June 2001); *Western Australia/B & D Champion, C & D Sambo, G Wilson and C Donaldson on behalf of the Gubrun People; Merle Forrest, Arthur William McKenzie and Mercy O'Loughlin on behalf* of the Karonie People (WC96/19)/R C Coumbe, [1999] NNTTA 245 (15 September 1999); Western Australia/Leo Winston Thomas & Ors on behalf of The Waljan People & Others [1999] NNTTA 99 (19 March 1999); Minister for Mines & Others[1998] NNTTA 5 (19 June 1998); James Arthur Livingston and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC [2018] NNTTA 22 (29 March 2018); *Muccan Minerals Pty Ltd and Another v Allen and Others on behalf of Njamal* [2018] NNTTA 24 (29 March 2018); *St. Ives Gold Mining Company Pty Ltd and Another v Ngadju* [2014] NNTTA 73 (25 July 2014), [34]; Western Australia/Jidi Jidi Aboriginal Corporation/Paladin Resources Ltd, [2002] NNTTA 114 (26 June 2002); *Robert John White and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC* [2018] NNTTA 23 (29 March 2018); *Muccan Minerals Pty Ltd and Another v Allen and Others on behalf of Njamal* [2018] NNTTA 24 (29 March 2018); *William Robert Richmond and Another v Walalakoo Aboriginal Corporation RNTBC* [2015] NNTTA 20 (21 May 2015).

[8] *Bradford and Julie Young v Kariyarra and Another* [2014] NNTTA 117 (16 December 2014), [62].

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native title holders or the local community despite no evidence to support that assertion being provided and / or the finding being contrary to the position of the native title party.[9]

(d) The presumed benefit from mining and exploration supported the grant of interests even in cases where such a benefit was "speculative".[10]

(e) In determinations where the Tribunal did not conclude that the future act would provide an economic benefit to the local Aboriginal community, it was satisfied that the economic benefit to the State was sufficient to grant the future act.[11]

(f) Even in cases where the Tribunal recognises that the impact of mining and exploration on native title rights and interests will be "enormous, resulting in an inability to exercise" those rights effectively

[9] See, Steven Mark Binder & Another v Marjorie May Strickland & Others on behalf of Maduwongga [2020] NNTTA 28 (5 March 2020); *Terry David Keyse and Another v Kyburra Munda Yalga Aboriginal Corporation RNTBC* [2019] NNTTA 49 (11 July 2019), *Kallenia Mines Pty Ltd and Others v Walalakoo Aboriginal Corporation RNTBC and Another* [2016] NNTTA 50 (9 November 2016); AGL Loy Yang Pty Ltd and Another v Gunaikurnai Land & Waters Corporation RNTBC [2015] NNTTA 50 (28 October 2015); *Peter George Hunt and Others v Widi People of the Nebo Estate #1 and Another* [2014] NNTTA 120 (23 December 2014; *John Edward Telfer and Another v Raymond Ashwin and Others on behalf of the Wutha and Another* [2014] NNTTA 97 (3 October 2014*); St. Ives Gold Mining Company Pty Ltd and Another v Ngadju [2014] NNTTA 73* (25 July 2014); *Peregrine Resources Pty Ltd and Another v Raymond Ashwin and Others on behalf of the Wutha and Another* [2014] NNTTA 59 (20 June 2014); *Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South Wales*, [2013] NNTTA 2 (15 January 2013); *Xstrata Coal Queensland Pty Ltd & Ors/Mark Albury & Ors (Karingbal #2);Brendan Wyman & Ors (Bidjara People)/Queensland,* [2012] NNTTA 101 (18 September 2012); D*ragutin Horvatic/Scott Gorringe & Ors (Mithaka People)/Queensland,* [2010] NNTTA 119 (2010) (4 August 2010); *Walalakoo Aboriginal Corporation RNTBC v Kallenia Mines Pty Ltd & Anor* [2019] NNTTA 91 (4 November 2019).

[10] *Areva Resources Australia Pty Ltd and Another v Walalakoo Aboriginal Corporation* [2014] NNTTA 70 (25 July 2014)

[11] See, Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation RNTBC [2021] NNTTA 7 (18 February 2021); Walalakoo Aboriginal Corporation RNTBC v Kallenia Mines Pty Ltd & Anor [2019] NNTTA 91 (4 November 2019); FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another [2018] NNTTA 64 (25 October 2018); Gold Road Resources Limited v Harvey Murray on behalf of Yilka and Another [2018] NNTTA 52 (3 September 2018); Edwin James Wherritt and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC [2018] NNTTA 19 (5 April 2018); Garry Verdon Higgins and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC [2018] NNTTA 18 (29 March 2018); St Ives Gold Mining Company Pty Ltd v John Walter Graham & Ors on behalf of the Ngadju People and Another [2017] NNTTA 35 (19 June 2017); alexandrea M Kranz and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC [2018] NNTTA 20 (29 March 2018); Backreef Oil Pty Ltd and Oil Basins Ltd/JW (name withheld) and Ors on behalf of Nyikina and Mangala/Western Australia [2013] NNTT 9 (1 February 2013); FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/ Western Australia [2012] NNTTA 142 (19 December 2012); FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2011] NNTTA 107 (17 June 2011); FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2009] NNTTA 91 (13 August 2009); Western Australia/West Australia Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd/Leslie Hayes, Glenys Hayes, Judy Hughes, John Ard, Douglas Fazeldean, Valerie Ashburton, Laura Hicks and Albert Hayes on behalf of the Thalanyji people (WC99/45), [2001] NNTTA 41 (1 June 2001); Areva Resources Australia Pty Ltd and Another v Walalakoo Aboriginal Corporation [2014] NNTTA 70 (25 July 2014); Dragutin Horvatic/Scott Gorringe & Ors (Mithaka People)/Queensland, [2010] NNTTA 119 (2010) (4 August 2010); FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia, [2009] NNTTA 69 (8 July 2009); The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia, [2006] NNTTA 19 (28 February 2006); Western Australia/Jidi Jidi Aboriginal Corporation/Paladin Resources Ltd, [2002] NNTTA 114 (26 June 2002)

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in perpetuity "even when mining is finished", the Tribunal's reasoning was that the interests of the proponent in the grant of the mining leases outweighed the interests of native title parties.[12]

(g) In cases where the native title party does not agree to the future act but does not put forward evidence to support its cases, the Tribunal has inferred in 31 FADA determinations[13] that the act will not impact, or minimally impact, the native title party's rights and interests, way of life, freedom of access, or sites of particular significance.

> *"in the absence of evidence, the logical implication is that there would be no effect".*[14]

This practice flies in the face of the notorious lack of resources available to prescribed bodies corporate to carry out their native title functions including responding to future acts. This chronic underfunding was recognised in recommendation 7 of "A Way Forward".

(h) Where the Tribunal determines that a site is of 'particular' significance sufficient to warrant protection, it is only in exceptional cases that the importance of protecting that particularly significant site outweighs the presumption of a public interest in mining and exploration. In one case, the Tribunal stated:

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[12] *Western Australia/Leo Winston Thomas & Ors on behalf of The Waljan People; Ted Coomanoo Evans & Richard Guy Evans on behalf of the Koara People; Quinton Paul Tucker & Ors on behalf of the Ngurludharra Waljan Clan; Dimple Sullivan on behalf of the Tjinintjarra Family Group; Sadie Canning on behalf of the Thithee Birni Bunna Wiya People; Trevor Brownley & Ors on behalf of the Bibila Lungkutjarra (Waljen) People; Thomasisha Passmore on behalf of the Milangka-Purungu (Wongatha) People/Anaconda Nickel Ltd* [1999] NNTTA 99 (19 March 1999), p 47.

[13] See, Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation RNTBC [2021] NNTTA 7 (18 February 2021); Walalakoo Aboriginal Corporation RNTBC v Kallenia Mines Pty Ltd & Anor [2019] NNTTA 91 (4 November 2019); FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another [2018] NNTTA 64 (25 October 2018); Gold Road Resources Limited v Harvey Murray on behalf of Yilka and Another [2018] NNTTA 52 (3 September 2018); Edwin James Wherritt and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC [2018] NNTTA 19 (5 April 2018); Garry Verdon Higgins and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC [2018] NNTTA 18 (29 March 2018); St Ives Gold Mining Company Pty Ltd v John Walter Graham & Ors on behalf of the Ngadju People and Another [2017] NNTTA 35 (19 June 2017); alexandrea M Kranz and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC [2018] NNTTA 20 (29 March 2018); Backreef Oil Pty Ltd and Oil Basins Ltd/JW (name withheld) and Ors on behalf of Nyikina and Mangala/Western Australia [2013] NNTT 9 (1 February 2013); FMG Pilbara Pty Ltd/NC (deceased) and Others on behalf of the Yindjibarndi People/ Western Australia [2012] NNTTA 142 (19 December 2012); FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2011] NNTTA 107 (17 June 2011); FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2009] NNTTA 91 (13 August 2009); Western Australia/West Australia Petroleum Pty Ltd and Shell Development (Australia) Pty Ltd/Leslie Hayes, Glenys Hayes, Judy Hughes, John Ard, Douglas Fazeldean, Valerie Ashburton, Laura Hicks and Albert Hayes on behalf of the Thalanyji people (WC99/45), [2001] NNTTA 41 (1 June 2001); Areva Resources Australia Pty Ltd and Another v Walalakoo Aboriginal Corporation [2014] NNTTA 70 (25 July 2014); Dragutin Horvatic/Scott Gorringe & Ors (Mithaka People)/Queensland, [2010] NNTTA 119 (2010) (4 August 2010); FMG Pilbara Pty Ltd/Flinders Mines Limited/Wintawari Guruma Aboriginal Corporation/Western Australia, [2009] NNTTA 69 (8 July 2009); The Griffin Coal Mining Co Pty Ltd/Nyungar People (Gnaala Karla Booja)/Western Australia, [2006] NNTTA 19 (28 February 2006); Western Australia/Jidi Jidi Aboriginal Corporation/Paladin Resources Ltd, [2002] NNTTA 114 (26 June 2002)

[14] *Gregory Mark Jensen/Scott Gorringe & Ors (Mithaka People)/Queensland,* [2011] NNTTA 41 (14 March 2011). See also, Muccan Minerals Pty Ltd and Another v Allen and Others on behalf of Njamal [2018] NNTTA 24 (29 March 2018); James Arthur Livingston and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC [2018] NNTTA 22 (29 March 2018);

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> *"The Tribunal has previously acknowledged that mining has had a detrimental effect on Aboriginal society (see Holocene at [92]) however in terms of factors to consider, I must also have regard to the Australian and Western Australian economies. I adopt the Tribunals findings in Waljen at 215-216 on the significance of the mining industry to Western Australia."*[15]

(i) In approximately 40[16] of the 90 determinations not made by consent, the Tribunal accepted that there are or may be an impact on sites of particular significance but held that any such impact would be mitigated by the obligations on proponents under regulatory regimes such as the *Aboriginal Heritage Act 1972* (WA) or government conditions or endorsements.[17] More recently the Tribunal

[15] *FMG Magnetite Pty Ltd/FMG North Pilbara Pty Ltd/Western Australia/Johnson Taylor and Others on behalf of Njamal*, [2011] NNTTA 213 (20 December 2011), [56]. See also *Victorian Gold Mines NL/Victoria/Graham (Bootsie) Thorpe, Lindsay Gordon Mobourne, Regina Lillian Rose, Robert James Farnham, on behalf of the Gunai/Kurnai People* (VC97/4), [2002] NNTTA 130 (4 July 2002); *Gregory John Blair and Another v Boonthamurra Native Title Aboriginal Corporation RNTBC* [2018] NNTTA 21 (29 March 2018), [32].

[16] *Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation RNTBC [*2021] NNTTA 7 (18 February 2021); *India Bore Diamond Holdings Pty Ltd and Another v Bunuba Dawangarri Aboriginal Corporation RNTBC* [2021] NNTTA 5 (12 February 2021) *Ngadju Native Title Aboriginal Corporation v Norseman Resources Pty Ltd and Another* [2020] NNTTA 47 (28 May 2020); *Walalakoo Aboriginal Corporation RNTBC v Kallenia Mines Pty Ltd & Anor* [2019] NNTTA 91 (4 November 2019); *Vandeleur Superannuation Pty Ltd and Another v Gwen Peck & Ors on behalf of the Gnulli People* [2019] NNTTA 73 (25 September 2019); *FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another* [2018] NNTTA 64 (25 October 2018); *William Robert Richmond and Another v Walalakoo Aboriginal Corporation RNTBC* [2015] NNTTA 20 (21 May 2015); *FMG Pilbara Pty Ltd and Another v Yindjibarndi #1 [2014] NNTTA 79* (31 July 2014); *Mark Albury & Ors (Karingbal #2)/OME Resources Australia Pty Ltd/Queensland* [2013] NNTTA 13 (11 February 2013); *Backreef Oil Pty Ltd and Oil Basins Ltd/JW (name withheld) and Ors on behalf of Nyikina and Mangala/Western Australia* [2013] NNTT 9 (1 February 2013); *FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia* [2012] NNTTA 11 (7 February 2012); *FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia* [2011] NNTTA 107 (17 June 2011); *Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia* [2011] NNTTA 80 (9 May 2011); *Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People* [2010] NNTTA 101 (16 July 2010); *FMG Pilbara Pty Ltd/ Wintawari Guruma Aboriginal Corporation/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia* [2009]; *FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia* [2009] NNTTA 91 (13 August 2009); *Timothy Glen Summons/Victoria/ Graham (Bootsie) Thorpe, Lindsay Gordon Mobourne, Regina Lillian Rose, Robert James Farnham, on behalf of the Gunai/Kurnai People* [2003] NNTTA 66 (16 April 2003) ; *WMC Resources Ltd/Western Australia/Richard Evans on behalf of the Koara people (WC95/1)* [1999] NNTTA 372 (23 December 1999); *Western Australia/Leo Winston Thomas & Ors on behalf of The Waljan People; Ted Coomanoo Evans & Richard Guy Evans on behalf of the Koara People; Quinton Paul Tucker & Ors on behalf of the Ngurludharra Waljan Clan; Dimple Sullivan on behalf of the Tjinintjarra Family Group; Sadie Canning on behalf of the Thithee Birni Bunna Wiya People; Trevor Brownley & Ors on behalf of the Bibila Lungkutjarra (Waljen) People; Thomasisha Passmore on behalf of the Milangka-Purungu (Wongatha) People/Anaconda Nickel Ltd* [1999] NNTTA 99 (19 March 1999); *Minister for Mines, State of Western Australia/Ted Coomanoo Evans on behalf of the Koara People/Sons of Gwalia Limited (WF 96/1);Tarmoola Australia Pty Ltd (formerly Mount Edon Gold Mines (Aust) Ltd (WF 96/5));DJ & RM Cottee & PJ Townsend (WF 96/11)* [1998] NNTTA 5 (19 June 1998); *Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People; Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families; Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwonjga) People* [1998] NNTTA 2 (20 February 1998)

[17] In *FMG Magnetite Pty Ltd/FMG North Pilbara Pty Ltd/Western Australia/Johnson Taylor and Others on behalf of Njamal*, [2011] NNTTA 213 (20 December 2011) the Tribunal found there were sites of particular significance including rock art, but

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has recognised in a small number of cases not relating to FADAs that the legislative scheme in Western Australia (and perhaps by inference under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth)) does not protect Aboriginal cultural heritage.[18] However, in FADA determinations the presumption still remains that future acts that impact Aboriginal sites of significance are acceptable because of the mere existence of laws such as the *Aboriginal Heritage Act 1972* (WA). This is a heart breaking circular argument that means native title parties can almost never rely on the *Native Title Act* to protect their interests.

(j) In 22 determinations the Tribunal was satisfied that the future act would, or would likely, have an adverse effect on native title parties but nonetheless approved the act subject to conditions intended to mitigate these effects.[19]

considered the AHA and conditions would ensure sites are not interfered with. "*The Grantee Party is now aware of the location of the rockshelters and the possibility of further caves and rock paintings in the area and will need to ensure it complies with the AHA"*, at [50]. In *FMG Pilbara Pty Ltd and Another v Yindjibarndi #1* [2014] NNTTA 79 (31 July 2014) 5 sites were held to be of particular significance, but conditions were imposed to addressed this. In *William Robert Richmond and Another v Walalakoo Aboriginal Corporation RNTBC* [2015] NNTTA 20 (21 May 2015), the Tribunal accepted there would be an effect on native title rights and interests (criterion 39(1)(a)(i)) , a minor effect on the NTP's way of life (ii), freedom of access (iv), sites of particular significance (v) but considered the Government endorsements and conditions would address this. The Tribunal did not consider the regulatory regime would not protect sites of particular significance, and the act was economically viable, so the act was granted. In *Eureka Petroleum Pty Ltd and Bularnu Waluwarra Wangkayujuru Aboriginal Corporation RNTBC and Another* [2022] NNTTA 3 (20 January 2022) at [42]: " I accept that at the least, the Aboriginal Historical Place (ATP 1114), the Story Place and Aboriginal Intangible Place (ATP 1117) and the Burials, Aboriginal Historical Place and Aboriginal Intangible Place (ATP 1123) are of particular significance to Bularnu Waluwarra Wangkayujuru. It is unclear the extent to which any of these areas relate to the dreamings. I intend to impose conditions on the grant of the ATPs to ensure that the effect of the exploration on any sites of particular significance is mitigated." See also *Ngadju Native Title Aboriginal Corporation v Norseman Resources Pty Ltd and Another* [2020] NNTTA 47 (28 May 2020).

[18] *Alec Alexander & Others on behalf of Jurruru #1 (Part B) Claim v Miramar Resources Limited and Another* [2022] NNTTA 35 (12 May 2022); *Tarlka Matuwa Piarku (Aboriginal Corporation) RNTBC v Autumn Gold Pty Ltd & Another* [2022] NNTTA 48; *Marputu Aboriginal Corporation RNTBC v Peter Romeo Gianni* [2019] NNTTA 18

[19] *Eureka Petroleum Pty Ltd and Bularnu Waluwarra Wangkayujuru Aboriginal Corporation RNTBC and Another* [2022] NNTTA 3 (20 January 2022); Atlas Iron Pty Ltd and Another v Nyamal Aboriginal Corporation RNTBC [2021]; NNTTA 7 (18 February 2021); India Bore Diamond Holdings Pty Ltd and Another v Bunuba Dawangarri Aboriginal Corporation RNTBC [2021] NNTTA 5 (12 February 2021); Ngadju Native Title Aboriginal Corporation v Norseman Resources Pty Ltd and Another [2020] NNTTA 47 (28 May 2020); FMG Pilbara Pty Ltd v Yindjibarndi Ngurra Aboriginal Corporation RNTBC and Another [2020] NNTTA 8 (5 February 2020); Walalakoo Aboriginal Corporation RNTBC v Kallenia Mines Pty Ltd & Anor [2019] NNTTA 91 (4 November 2019); Vandeleur Superannuation Pty Ltd and Another v Gwen Peck & Ors on behalf of the Gnulli People [2019] NNTTA 73 (25 September 2019); William Robert Richmond and Another v Walalakoo Aboriginal Corporation RNTBC [2015] NNTTA 20 (21 May 2015); FMG Pilbara Pty Ltd and Another v Yindjibarndi #1 [2014] NNTTA 79 (31 July 2014); Mark Albury & Ors (Karingbal #2)/OME Resources Australia Pty Ltd/Queensland, [2013] NNTTA 13 (11 February 2013); Backreef Oil Pty Ltd and Oil Basins Ltd/JW (name withheld) and Ors on behalf of Nyikina and Mangala/Western Australia [2013] NNTT 9 (1 February 2013); Magnesium Resources Pty Ltd; Anthony Warren Slater/Puutu Kunti Kurrama and Pinikura People; Puutu Kunti Kurrama and Pinikura People #2/Western Australia, [2011] NNTTA 80 (9 May 2011); Australian Manganese Pty Ltd/Western Australia/David Stock and Others on behalf of the Nyiyaparli People, [2010] NNTTA 101 (16 July 2010); FMG Pilbara Pty Ltd/ Wintawari Guruma Aboriginal Corporation/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2009] NNTTA 99 (27 August 2009); FMG Pilbara Pty Ltd/ Ned Cheedy and Others on behalf of the Yindjibarndi People/ Western Australia, [2009] NNTTA 91 (13 August 2009); Western Australia/Leo Winston Thomas & Ors on behalf of The Waljan People; Ted Coomanoo Evans & Richard Guy Evans on behalf of the Koara People; Quinton Paul Tucker & Ors on behalf of the

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37 The KLC's analysis of the 137 FADA determinations made since 1994 identifies that native title parties face an almost insurmountable series of norms that the interests of proponents are also the interests of the public, and that these interests always (except in 2% of cases) outweigh the interests of native title holders. This biased reasoning is not consistent with Australia's obligations under the UNDRIP to afford Indigenous people the basic human rights recognised in the ICCPR, ICESCR and the Universal Declaration of Human Rights. The KLC submits that the implementation of the UNDRIP in Australia must include legislative changes to the *Native Title Act* that rectify and overcome this bias.

Determining Significance

38 Further to the submissions above on heritage legislation and FADAs, KLC notes the persistence in legislative and administrative measures that purport to protect Indigenous cultural heritage but empower persons other than the owners of that cultural heritage to determine whether it is 'significant' enough to either protect or permit to be lawfully destroyed.[20]

39 KLC submits that before Australia can effectively implement its obligations under UNDRIP in relation to the culture and heritage of Indigenous peoples, Australian governments at all levels must come to terms with the reality that affording Indigenous peoples basic human rights in respect of their own cultural heritage, and allowing them to make decisions in respect of that, is neither an existential or economic threat to Australian's national identity or interests. This lack of threat is confirmed by the standard Heritage Protection Agreement (**HPA**) which KLC is authorised to negotiate on behalf of a majority native title groups and prescribed bodies corporate (**PBCs**) in the Kimberley. The HPA enshrines the principles of self determination and free, prior and informed consent by native title parties to any activities which impact on, damage or destroy cultural heritage. The HPA does not prevent development, stifle economic activity, or act as a device for false claims of significance. Rather, it is a strong foundation for respectful co-existence between native title holders and third parties and it confirms that implementation of the UNDRIP in relation to protection of Indigenous cultural heritage is not a threat to economics or sovereignty.

Compensation for loss of lands

40 KLC notes Article 28 of the UNDRIP.

Article 28

Ngurludharra Waljan Clan; Dimple Sullivan on behalf of the Tjinintjarra Family Group; Sadie Canning on behalf of the Thithee Birni Bunna Wiya People; Trevor Brownley & Ors on behalf of the Bibila Lungkutjarra (Waljen) People; Thomasisha Passmore on behalf of the Milangka-Purungu (Wongatha) People/Anaconda Nickel Ltd, [1999] NNTTA 99 (19 March 1999); Minister for Mines, State of Western Australia/Ted Coomanoo Evans on behalf of the Koara People/Sons of Gwalia Limited (WF 96/1);Tarmoola Australia Pty Ltd (formerly Mount Edon Gold Mines (Aust) Ltd (WF 96/5));DJ & RM Cottee & PJ Townsend (WF 96/11), [1998] NNTTA 5 (19 June 1998); Minister for Lands, State of Western Australia/Marjorie May Strickland and Anne Joyce Nudding on behalf of the Maduwongga People; Brian and Dave Champion, Cadley and Dennis Sambo, George Wilson and Clem Donaldson for their respective (Gubrun) families; Dorothy Dimer, Ollan Dimer and Henry Richard Dimer on behalf of Mingarwee (Maduwonjga) People, [1998] NNTTA 2 (20 February 1998).

[20] *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) ss9, 10; *Native Title Act 1993* (Cth) s39(1)(a)(v); *Aboriginal Cultural Heritage Act 2021* (WA) ss 119, 165

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> *1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*
>
> *2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.*

41 At present, the common law position in Australia appears to be that Indigenous people are not entitled to any compensation for loss of their traditional lands, territories and resources that occurred prior to the commencement of relevant provisions of the *Racial Discrimination Act 1975* (Cth) on 31 October 1975.[21] There is also no comprehensive national scheme for redress or restitution. The KLC submits that the implementation of Australia's obligations under the UNDRIP requires the Australian Government to specifically address Article 28. It is not enough to say that, prior to 1975 racial discrimination was lawful in our country and therefore, in 2022, nothing will be done to address the wrongs of the past. The KLC calls on the Committee to makes recommendations that address the loss of lands, resources and territories by Indigenous Australians prior to 1975.

42 We thank the committee for the opportunity to provide this further submission.

Yours sincerely,

Tyronne Garstone
Chief Executive Officer
Kimberley Land Council

[21] *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 per Mason CJ and McHugh J at 15-16.

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