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Human Rights and Equal Opportunity Commission

Aboriginal Torres Strait Islander Social Justice Commissioner

16 July 2002

The Secretary
Federal Standing Committee on Industry and Resources
Inquiry into Resources Exploration
Parliament House
Canberra ACT 2600

Dear Sir/Madam

RE: Submission to Federal Standing Committee on Industry and Resources: Inquiry into Resources Exploration

On 24 May 2002, the Minister for Industry, Tourism and Resources, the Hon Ian MacFarlane MP, referred an inquiry to the Federal Standing Committee on Industry and Resources. The Committee was requested to report on impediments to increasing investment in mineral and petroleum exploration in Australia (**Inquiry**) and invited to consider various matters including 'access to land including native title and cultural heritage issues' and 'relationships with indigenous communities'.

In my function as the Aboriginal and Torres Strait Islander Social Justice Commissioner[1] I have provided a number of submissions to similar State and industry based inquiries[2] and reported on this issue in the annual *Native Title Report 2001* (**Report**). I enclose a copy of the Report for your consideration and summarise below the key issues relating to human rights, native title, and mineral and petroleum exploration in Australia.

I understand the Inquiry's main purpose is to make recommendations for the improvement of exploration investment in Australia. In undertaking its work, the Inquiry should not focus only on exploration investment if the resultant approach and recommendations are inconsistent with Australia's human rights obligations.[3] To do

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1 The Commissioner has statutory functions to promote discussion and awareness of human rights in relation to Aboriginal and Torres Strait Islander people and to report to the Commonwealth Government on the enjoyment and exercise of human rights by Indigenous Australians: s46C, *Human Rights and Equal Opportunity Commission Act* 1986 (Cwth) and s209, *Native Title Act* 1993 (Cwth).

2 Copies of these submissions are available at <www.humanrights.gov.au/social_justice/native_title/index.html#wa>

3 If the Inquiry makes recommendations contrary to Australia's human rights obligations, governments (both Commonwealth and State) would be precluded from acting on the recommendations: see point 2.1 of my *Submissions on the Interim Report for Commen by Independent Review Committee* March 2002, available at <www.humanrights.gov.au/social_justice/native_title/submissions/independent_review.html>.

so would be unlikely to result in a sustainable relationship between exploration companies and Indigenous communities.[4]

NATIVE TITLE: SOME MISCONCEPTIONS

Discussion of land administration in Australia frequently includes common misconceptions about native title. I consider it useful to address relevant issues with the Inquiry.

Recognition of native title

The *Native Title Act* (**Act**), commencing in 1994, introduced a change in the granting of exploration tenements. The Act regulates the administration of native title and exploration tenements. The right to negotiate and other procedures under the Act require that before allowing exploration to proceed, governments must address matters that, prior to 1994, were not required. However, the time periods for the 'extra' processing under the Act are not prohibitive[5] and should not, of themselves, impede investment in mineral and petroleum exploration.

The fact that the Act imposes extra requirements in granting exploration rights, and that grants cannot be made as 'easily' as they could before 1994, should be unremarkable. Australia's land administration can no longer operate on a 'terra nullius' basis; a Joint Parliamentary Committee recently heard of the change of mind-set this requires for land use and planning:

> [P]lanners need to change their mind-set. They used to operate on the basis that greenfields were vacant and available for chopping up for land development and that nobody else had an interest in it, other than the Crown. That is now no longer the case. Planners have to shift the paradigm away from that. Land is no longer vacant. In fact, I do not use the term 'vacant crown land' any more. I use the term 'unallocated', because that is what crowns do. They allocate interest in land, and they do that on the basis of radical title, not beneficial title, in most cases, which means that native title may still exist.[6]

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[4] This caution is consistent with industry views: 'Purely economic criteria are clearly not sufficient to determine issues of land access. The mining industry must accept, for example, that mineral deposits in areas of high biodiversity or cultural value may be off limits', Sheehy B & Dickie P, *Facing the Future: The Report of the MMSD Australia Project*, 2002, Australian Minerals Energy Environmental Foundation, Melbourne, p66. The MMSD Australia Project was an industry-established and funded two-year review of the minerals industry and its role in sustainable development.

[5] A Western Australian inquiry noted that processing a tenement application through the expedited procedure (where there has been objection) takes around six months: Technical Taskforce on Mineral Tenement and Land Title Applications, *Final Report*, Government of Western Australia, Perth, 2001 (**Taskforce Report**), p40. National Native Title Tribunal (**Tribunal**) statistics indicate that, nationally, nearly 70% of expedited procedure applications are not objected to, allowing the relevant tenements to be granted within six months (Neate G, *Native Title and Mining Industries In Australia: Meeting The Challenges And Pursuing The Possibilities*, paper delivered at Australian Mining Seminar Australia House London, 7 February 2001, pp23-24). Where a tenement goes through the longer negotiation procedure there is a six month period for 'good faith' negotiation and, if no agreement is reached and the Tribunal is asked to arbitrate, a decision is required within a further six months (Taskforce Report, p43).

[6] Evidence of Wensing E, (Australian Local Government Association) to Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, *Official Committee Hansard*, 9 November 2000, pp NT27-28.

Native title as an impediment to investment

A number of reviews have been conducted in Western Australia examining the administration of native title and land use. One of the reviews, the *Technical Taskforce on Mineral Tenements and Land Title Applications* (**Taskforce**), addressed the issue of impediments to exploration in Western Australia. The Taskforce identified declining commodity prices, uncertainty in international gold markets and declining world exploration expenditure as key issues in the level of exploration expenditure in Australia. The Taskforce concluded that:

> There are major difficulties in attempting to quantify the impact native title has had on the State's mining industry beyond delaying the grant of titles... because far more prominent issues... have contributed to the fall in exploration expenditure, not only in Western Australia but worldwide.[7]

Tenement backlogs

I am aware that substantial 'backlogs' of exploration tenements have emerged in the last few years and this may discourage exploration investment. However, if Western Australia is indicative, the main reason for tenement 'backlog' is not because of the actions and objections of Indigenous people, or even because of the provisions of the Act, but because of government and company decisions.[8] A recent report by the Auditor General for Western Australia indicated that delay in processing titles applications is not simply caused by native title and that the Government's processing required attention:

> Irrespective of the impact of native title, the mineral titles application process can take as long as 22 months. Significant delays occur in the initial recommendation to grant by the Mining Registrar and by applicants failing to respond to requests for information. Of the 1 798 applications lodged in the first six months of 2000, 50 per cent still had to be referred under the Native Title Act 1993 (Cth) at the time of this audit examination.[9]

HUMAN RIGHTS AND THE ADMINISTRATION OF NATIVE TITLE

In my role as Commissioner I encourage strategies that ensure the effective participation of native title holders and commend such an approach to the Inquiry. A recent report, *Facing the Future*,[10] produced as part of the Australian Mining Minerals and Sustainable Development Project[11] recommended a stronger focus within the mining industry on sustainable development.

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7 Taskforce Report, p 46.

8 The Taskforce Report shows that over two thirds of the 'backlog' comprise tenement applications that haven't been submitted to the native title process (7,428 from a total of 11,081 'pending tenements', or 67%, are 'awaiting submission to the NTA process' -figures compiled from Taskforce Report Appendices 8 to 14).
'Because of the numbers [of 'backlogged' tenement applications] involved, lease applications are only being put into the [native title] process at the request of the applicant', Independent Review Committee, *Review of the Project Development Approvals System: Interim Report for comment*, Government of Western Australia, Perth, January 2002, p39.

9 Auditor General for Western Australia, *Level Pegging: Managing Mineral Titles in Western Australia, Government of Western Australia,* (Report 1, June 2002) available at <ww.audit.wa.gov.au/reports/report2002_01/pfreport2002_01.html> (accessed 25 June 2002), 'Executive Summary', heading 'Timeliness and Cost'.

10 Ibid.

11 The Australian project (see note 3, above) was part of the Global Mining Initiative (**GMI**). The GMI was established in 1999 in association with the World Business Council for Sustainable Development, against a background of considerable public concern about the mining industry's social and environmental performance. The purpose of the Initiative was to; review the international minerals sector, conduct an independent study of the broad

One of the critical issues identified in the report was:

> The promotion of the rights and well-being of Indigenous communities by ensuring that operations receive the prior informed consent of local indigenous communities; that traditional owners are able to assess and respond to mining proposals; and equitable distribution of benefits between companies, communities and government.[12]

Fundamental to achieving such an outcome is maintaining procedural rights under the Act and allowing Indigenous groups to be active participants in development on their land.

The right to negotiate assists the effective participation of Indigenous groups, consistent with human rights principles including: right to equality before the law; the right to self determination and principles of prior informed consent.[13] However, some State based administrative practices have functioned in such a way as to undermine these important human rights principles.[14] There have been State-based procedural reviews and pro-forma agreements seeking to achieve a more equitable and co-operative process. In Western Australia, the Taskforce was developed with the active involvement of key Indigenous stakeholder groups. In Victoria and Queensland respectively, pro-forma agreements[15] and a Model ILUA[16] have been negotiated with peak Indigenous groups and provide an alternative to accessing procedural rights under the Act. I urge the Inquiry to give consideration to these developments.

Key human rights principles that should be reflected in the Inquiry's recommendations include:

- the principle of equality that requires that Indigenous interests in land be protected equally to non-Indigenous interests;
- 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 interest; and
- processes should recognise and respect Indigenous peoples' rights to effective participation in decisions affecting their traditional lands.

I urge the Inquiry to address, in its analysis of impediments to increasing investment in mineral and petroleum exploration in Australia, the human rights of Indigenous peoples and their relationship to that exploration. The content and value of the Inquiry's final report will be diminished if it contains material or recommendations that are inconsistent with Indigenous human rights.

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community issues confronting the industry and, to inform debate at the Rio + 10 Conference and a major industry conference in Toronto in 2002.

[12] Ibid, p 7.

[13] See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, Human Rights & Equal Opportunity Commission, Sydney, pp13-14.

[14] See *Native Title Report 2001*, p24-53.

[15] *Pro forma Exploration Deed*, negotiated between Mirimbirak Nations Aboriginal Corporation, Victorian Government Department of Justice (Native Title Unit), and Victorian Minerals and Energy Council. Version 1, 11 December 2001.

[16] See <www.premiers.qld.gov.au/about/nativetitle/newweb/pages/statewide_ilua.htm>.

If you have any questions regarding this matter, please contact John Southalan. John's direct telephone number is (02) 9284 9728, or you can use e-mail to <johnsouthalan@humanrights.gov.au>.

Yours faithfully

W Jonas

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

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Included with submission no. 17 was the following attachment, which has been taken as Exhibit 1:

Aboriginal & Torres Straight Islander Social Justice Commissioner. 2001, **Native Title Report**, 119p. (Exhibit 1)