



North Queensland Land Council

Native Title Representative Body Aboriginal Corporation

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Agriculture, Resources and Environment Committee
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SUBMISSIONS ON BEHALF OF THE NORTH QUEENSLAND LAND COUNCIL ON THE *MINING AND OTHER LEGISLATION AMENDMENT BILL 2012* ("the Bill")

Proposed amendments to the *Mineral Resources Act 1989* in the Bill at Division 3
and to the *Mines Legislation (Streamlining) Amendment Act 2012* in the Bill at
Division 3 Part 8.

Under the current legislation small scale operations for opal and gemstones that do not qualify for a mining claim hold mining leases and in doing so may have attracted the right to negotiate pursuant to the *Native Title Act 1993 (Cth)* ("NTA") whereby a s31 agreement and/or Indigenous Land Use Agreement ("ILUA") may have been entered into. The current provisions are proposed to be modified to allow small scale miners of opal, corundum, gemstones and other precious stones who hold a mining lease up to 20ha to convert to a mining claim up to 20ha and new mining claims to be granted where the area has been decided by the Minister. After the conversion takes place rent will not be payable by holders of mining claims.

If there are existing s31 agreements or Indigenous Land Use Agreements between mining lease holders and native title holders or registered native title claimants the impact of these amendments on such agreements needs to be considered. Further negotiation may need to occur with native title parties by miners who have had the benefits under existing agreements or by miners who are currently eligible to opt in to such agreements. If this doesn't occur this may not comply with the *Legislative Standards Act 1992* regarding compliance with the principles of natural justice.

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It is noted that the amendments of s53(3) of the *Mineral Resources Act 1989* contained at Part 7 Division 3 (Clause 83) of the Bill will change the “prescribed area” of 1ha for mining claims to 20ha (“decided area”) for corundum, gemstones or other precious stones. The North Queensland Land Council requests that it be provided with details as to why the considerable increase in area is proposed in view of the lack of consultation in this area of the proposed amendments. The proposed increase in area has the potential to impact on increased areas of land that may still contain native title particularly as up to 20ha is also proposed to be the area that may be decided by the Minister in relation to new mining claims.

Proposed amendments to the *Fossicking Act 1994* in the Bill at Part 4

Under the existing provisions of the *Fossicking Act 1994* fossickers are required to enter into an ILUA with determined native title holders for the subject land before a fossickers licence can be granted. If the re-evaluation of “fossicking” as being “a future act passing the freehold test in the NTA” is solely based on the fact that fossicking is a hobby and a recreational non commercial activity, that re-evaluation should be revisited. Aboriginal cultural sites such as middens and graves may be disturbed in the activity of fossicking on land that may still contain native title and it should also be taken into account that in some cases visiting the area may not be permissible from a cultural perspective. Accordingly, the impact of the act on land that may still contain native title is a matter that needs to be taken into account in any re-evaluation of “fossicking”.

It is noted that hand held implements only are to be used in the fossicking, in which case sub division L of the NTA (s24LA(1)(b)(v)) may be the sub division that the NTA anticipates as being applicable, whereby the fossicking licence would terminate in the event that there is an approved determination that native title exists. This could be expressly provided for in the terms of the fossicking licence. Without expressing a decided opinion as to whether sub division L does apply, the North Queensland Land Council notes it is higher in the list of future act provisions under Part 2 Division 3 of the NTA than sub division M and legally the higher provision should be used, if applicable.

In any event, if the grant of a fossicking licence is an act passing the freehold test the effect of the act cannot be such as to cause the native title holders to be in a more disadvantageous position in law than they would be if they held ordinary title to the land .

Native title holders of exclusive native title rights and interests in land have been accommodated by the inclusion of a provision in the Bill requiring written consent to access their land before fossicking can take place. However, the proposed changes to the *Fossicking Act 1994* do not accommodate native title holders of non exclusive

native title rights and interests, prescribed bodies corporate that hold native title on behalf of native title groups or registered native title claimants.

If, as contended, s24MD(6A) of the NTA applies, native title holders and registered native title claimants are to be afforded the same procedural rights as they would have had on the assumption they held ordinary title. The undesirable aspect of this approach is that the *Fossicking Act 1994* provides no procedural rights to freehold owners and, accordingly, the situation may occur where potentially harmful activities are taking place on land which may still contain native title and native title holders of non exclusive native title rights, relevant prescribed bodies corporate, and registered native title claimants are totally unaware that this is occurring.

The future act regime of the NTA has been established, not only to protect the rights of holders of exclusive native title rights and interests, but also to protect the rights of native title holders of non exclusive native title rights and interests, prescribed bodies corporate and registered native title claimants.

The North Queensland Land Council suggests that a native title holder of non exclusive native title rights and interests, relevant prescribed bodies corporate and registered native title claimants should be provided with the opportunity to either consent or object to access on the subject land by a holder of a fossicking licence for the purpose of fossicking.

Amendments to the definition of "owner" in the *Mineral Resources Act 1989* or express amendments to the *Fossicking Act 1994* would be required to effect the above suggestion. If these amendments are not included in the Bill, the North Queensland Land Council would not support the removal of the ILUA provisions.

Proposed amendments *Petroleum and Gas (Production and Safety) Act 2004* in the Bill at Part 10

Under this proposed amendment, co-location of infrastructure or activities by petroleum pipeline licence holders will be permitted on pipeline land where the infrastructure or activity relates to other petroleum authorities. This is currently not possible.

Whether native title is an issue that must be addressed in the co-location activity will depend on whether the process undertaken to issue the tenure creating the pipeline has extinguished native title. The underpinning tenure may have been created by easement, compulsory acquisition of the easement or of all the interests in the land or by negotiation of a lease or licence. If native title hasn't been completely extinguished by the underpinning tenure or process undertaken to create the pipeline, the impact of the co-location activity may need to be considered to determine whether additional inconsistency with, or extinguishment of native title will

occur. Accordingly, the native title situation may need to be considered on a case by case basis.

Existing ILUAs and s31 agreements may need to be re-negotiated if the amendments to the *Petroleum and Gas (Production and Safety) Act 2004* change the compensable effect on the native title parties who have entered such agreements on behalf of their claim groups.

If further information or clarification is required please do not hesitate to contact Martin Dore, Principal Legal Officer, North Queensland Land Council, 61 Anderson Street Cairns 4870, Ph 0740427000.

Yours faithfully



Martin Dore
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North Queensland Land Council (ICN 1996)