North Queensland Land Council
Native Title Representative Body Aboriginal Corporation
ICN: 1996 ABN: 19 047 713 117
www.nqlc.com.au
nqlc@nqlc.com.au

Reply to: Head Office

Fax for service of legal documents only: 07 4042 7033

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The Research Director
Agriculture Resources & Environment Committee
Parliament House
BRISBANE Qld 4000

Email: AREC@parliament.qld.gov.au

Dear Sir/Madam

I refer to the introduction into Parliament of the *Mineral and Energy Resources (Common Provisions) Bill 2014* ("the Bill") on 5 June 2014 and on behalf of the North Queensland Land Council ("NQLC") I thank you for the opportunity to provide a comment to the Agriculture Resources & Environment Committee.

As you will be aware, the NQLC is the Native Title Representative Body for a large area of land and waters in North Queensland and represents clients who are native title holders and registered native title claimants in the exploration and mining process in its representative body area.

One over arching comment on the Bill is that the Department of Natural Resources and Mines has not taken into account the concerns raised by the NQLC about the use of a number of regulations to prescribe detailed technical and procedural matters. It is reaffirmed that the NQLC does not support this approach. Less complex matters and those which are required to be changed frequently are suitable to be included in regulations but complex detailed procedural and technical matters as are involved in current mining legislation are best placed within the legislation to provide certainty and to ensure the scrutiny of Parliament occurs when changes to the legislative provisions are to be made.

Of significant concern to the NQLC is that native title holders do not appear to be included in the Bill as "owners of land" and the omission needs to be rectified in the committee stage. Section 12 of the Bill provides that an "owner of land means each

person as stated in schedule 1 for the land". It is not absolutely clear what is meant by "schedule 1 for the land" which indicates that the drafting of the Bill needs to be improved to add clarity. The drafting could be improved by providing that "owner of land means each person stated in Schedule 1 as owner for the mentioned land".

Native title holders are conspicuously missing from Schedule 1. Accordingly, the Bill does not provide native title holders the same notice provisions in relation to entry for authorised purposes as "owners of land" who are listed on Schedule 1 of the Bill.

Determinations of native title and Indigenous Land Use Agreements ("ILUAs") in Queensland are now able to be noted on schedule 2 of the relevant certificates of title as are mortgagees and lease holders. As the Bill includes mortgagees and holders of forestry leases as "owners of land" there is no excuse for not including other holders of interests noted on schedule 2 of the relevant certificates of title. NQLC submits that express provisions need to be made in the Bill to include native title holders as "owners of land" in either Schedule 1 of the Bill or in s12.

The Bill is noted to implement three actions from the government's six point action plan of reforms relating to a land access framework for access by resource authorities to private land. These amendments are as follows:

1. Expanding the jurisdiction of the Land Court to hear matters and make determinations relating to conduct to encourage negotiations in good faith;

2. Requiring the resource authority holder to note the existence of an executed conduct and compensation agreement on the certificate of title at their own cost; and

3. Allowing willing parties to opt out of entering into formal conduct and compensation agreements where longstanding positive relationships exist.

In respect of amendment 1 above the NQLC generally supports that the Land Court should have wide powers. Because private land is provided in s13(1)(b) of the Bill to include an interest in land less than fee simple held from the State under another Act, there may be a small number of cases where, by the operation of s47 of the *Native Title Act 1993 (Cth)* ("NTA"), native title parties as pastoral lessees and/ or board members of registered native title prescribed bodies corporate and/or company shareholders may be involved in negotiations for access to private land. The NTA provides a process for when a lack of good faith is alleged in relation to negotiations concerning a future act. It is questioned whether the expansion of the Land Court's jurisdiction in this area is intended to replace the NTA process when native title parties are involved in negotiation for access to private land when that access would constitute a future act or whether the Land Court is to be used only when there is no native title party involved in the negotiations.

Amendment 2, although not directly related to native title, is supported by the NQLC because noting the certificate of title will make it far clearer for any person dealing subsequently in the relevant land and will ensure that the conduct and compensation agreements "run" with the land and bind successors in title.

In relation to Amendment 3 above, while opting out is voluntary and at the request of the owner of land it does need to be kept in mind that there is likely to be inequality of bargaining power between the owner of land and the resource industry party. Contractual law principles such as breach of contract, misrepresentation and fraud to protect the interests of the owner of land are said to be available, however, these avenues are expensive and are likely to involve legal representation. This may be beyond the financial reach of native title holders if, by the operation of s47 of the NTA, they are involved in negotiation of formal conduct and compensation agreements in relation to private land should they choose to opt out.

The original proposal to restrict the notification of mining lease applications is noted to have been modified so that now occupiers of land, infrastructure providers and local governments will receive notification. It is uncertain if this is intended to circumvent the notification provisions of the NTA in circumstances where native title holders and registered native title claimants should receive notice but, if so, that should not occur because the processes of Commonwealth legislation must be followed.

In addition, pursuant to the Bill, 90 percent of mining lease applications will not now be publically notified. Only site specific mining applications will receive full public notification. If this is intended to circumvent the notification provisions of the NTA so that only 10 percent of mining lease applications receive public notification, native title holders and potential native title claimants may not be aware of activities that could potentially impact on their native title rights and interests so they may not be able to take appropriate action.

Low impact activities are also not proposed to be notified pursuant to the Bill which is an approach that is rejected by the NQLC on the basis that the criterion that native title parties use to assess the risk a mining application will have on their native title rights and interests is different to the way in which non indigenous risk and impact is assessed. For example, the non indigenous risk may be minimal whereas the indigenous risk may be substantial and any attempt to restrict the awareness of native title holders and native title claimants by not providing notice of low impact activities may work unfairly against them.

The NQLC requests that it be kept fully informed of the review into what activities are considered to be low impact which is said to be taking place in the next 12 months. NQLC is of the view that native title representation would be required on the review panel to achieve a balanced outcome as well as full consultation with native title holders during the conduct of the review.

In relation to entry onto public land for authorised activities, s57 of the Bill provides that only the public land authority will receive notice in the form of a periodic entry notice. Determinations of native title occur over public land and the Bill should be amended to ensure that where there has been a determination of native title in relation to public land, the native title holders are also provided with an entry notice when access is being sought for an authorised activity. Failure to provide notice to native title holders shows a complete lack of understanding of Aboriginal culture whereby cultural activities which include significant mourning periods may be in progress during a time when access is being sought.

Section 68 of the Bill provides for prescribed distances in relation to restricted land for particular infrastructure including places of worship, cemeteries and burial grounds. NQLC requests that flexibility be provided in relation to places of worship and burial grounds as the Aboriginal concept of these places and the non Aboriginal concept differ. Currently the distances provided of 200m and 50m respectively are not considered to be sufficient.

It is clear as reflected in the Bill that the Department of Natural Resources and Mines still considers that there is no impact on native title when gas produced on a mining lease incidental to coal mining is used commercially or beneficially. The NQLC totally rejects this view because the right to negotiate process that occurred in respect of the grant of the mining lease would not have dealt with the additional aspect of coal seam gas because, currently, gas extracted incidentally during the process of coal mining cannot be used beneficially or commercially. Significant future financial gains will be achieved by the mining proponents from using incidentally extracted coal seam gas commercially and/or beneficially. The Bill should provide that relevant s31 agreements and ILUAs ("future act agreements") which have been entered into already should be permitted to be revisited to enable re-negotiation by native title holders and registered native title claimants in relation to gas produced on a mining lease incidental to coal purposes where that gas is to be used commercially or beneficially. It would be extremely unfair not to provide a process for re-negotiation of future act agreements so that native title holders and registered native title claimants are able to share financially in the proceeds of gas produced incidentally from coal mining.

If you would like to discuss this correspondence please do not hesitate to ring my staff members Ms Rhonda Jacobsen or Ms Jennifer Jude on 07 40 42 7000.

Yours faithfully

per J S Jude

Ian Kuch
Chief Executive Officer
North Queensland Land Council Native Title Representative Aboriginal Corporation