



Kimberley Land Council

29 November 2019

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email: legcon.sen@aph.gov.au

Dear Committee

Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Legislation Amendment Bill 2019

Kimberley Land Council

1. The Kimberley Land Council (**KLC**) is the recognised native title representative body (**NTRB**) for the Kimberley region of Western Australia. The KLC has been the NTRB for the Kimberley region since 1998 and during that time has represented native title claimants in achieving native title determinations over more than 93% of the region. There are now 20 prescribed bodies corporate / registered native title bodies corporate (**RNTBCs / PBCs**) in the region. The KLC provides essential governance support for 16 of these RNTBCs / PBCs, and administers support funding for the balance.
2. It is in this context that the KLC makes the following submission to the Senate Legal and Constitutional Affairs Committee inquiry into the *Native Title Legislation Amendment Bill 2019 (NTLA Bill)*.

Submission of the National Native Title Council

3. The KLC is a founding member of the National Native Title Council (**NNTC**). The NNTC is a national representative organization for NTRB / native title service providers. Its membership also includes RNTBCs / PBCs from across the nation. The NNTC has been engaged with its membership on the content and effect of the NTLA Bill. The KLC endorses the submission of the NNTC to the Committee on the NTLA Bill as an informed, balanced, and nationally representative response to the NTLA Bill.

Additional submission on cost recovery

4. The KLC notes the submission of the NNTC that additional amendments are urgently required to the *Native Title Act 1993 (Cth) (NTA)* to ensure that it delivers on the promises of the Act, particularly as set out in the preamble.
5. The KLC submits that an area in need of urgent reform is the matrix of legislative provisions

and procedures adopted by State parties which shift the cost of future act processes onto native title parties and therefore, to the extent that native title parties have the resources to participate in future act processes to protect native title rights, onto the public purse. This is an unacceptable cost shifting from private enterprise to public funding which should be addressed through urgent legislative reform.

6. The matrix of circumstances that permit this cost shifting includes the following.
- (a) Future acts are, in large part, triggered by third party proposals for commercial activities on native title lands. The driver behind future acts is therefore commercial activity for the benefit of a third party that native title parties must respond to in order to preserve or protect native title rights and interests. The mechanism for response are the procedural rights that native title parties have under the NTA. These procedural rights are strictly defined as to process and time frames. If native title parties do not participate in these processes, the commercial activity will, in the vast majority of cases,¹ take place on their land regardless of their views or capacity to put these views forward to proponents and governments.
 - (b) Section 60AB of the NTA provides that RNTBCs may charge a proponent for the costs the RNTBC incurs when performing certain functions associated with a future act agreement under s31(1)(b) of the NTA, alternative state or territory provisions, an ILUA, or the limited category of future acts provided for in the regulations.² However, this capacity to charge is not linked to any obligation on a proponent to pay or a consequence for the future act processes (such as suspension of the process or freezing of time frames) of a failure to pay. The provisions are therefore uncertain and largely ineffective in easing the significant burden on native title parties of responding to third party activities on native title lands.
 - (c) The vast majority to future acts in the Kimberley region are exploration licences subject to an expedited procedure statement under s29(7) of the NTA. Cost recovery for responding to these notices is not clearly provided for under s60AB, creating uncertainty as to whether fees for performance of these functions would be captured by that section.
 - (d) Section 29(7) of the NTA provides that the expedited procedure applies if the State party *considers* that the act (grant of interest) is not likely to interfere with the social or community activities of the native title party or areas or sites of particular significance, or involve major disturbance to land. However, in Western Australia it has been the practice of the State since 1998 to apply the expedited procedure statement to all exploration licences issued in the State without undertaking the consideration required by s29(7). The KLC understands that the reason for this blanket application is that the relevant government departments lack the internal processes and resources to undertake the necessary consideration in respect of each interest granted. The consequence of this lack of consideration, beyond a potential failure to comply with s29(7), is that the costs of actually determining whether or not the expedited procedure does apply to the particular grant is shifted to native title parties, who can object to the expedited procedure applying. An

¹ There is a narrow category of future acts which, if not otherwise provided for under the NTA, are invalid unless done by agreement under an indigenous land use agreement. See s24OA NTA.

² *Native Title (Prescribed Bodies Corporate) Regulations 1999(Cth)* r20

objection is, ultimately, heard by the National Native Title Tribunal and ordinarily involves representation by the State, the proponent and the native title party. All parties involved in this process other than the proponent is funded out of public monies (State or Federal). A high level estimate of the cost of this process on native title parties in the Kimberley represented by the KLC in the past 12 months is \$2 million, which is approximately 23% of the total native title grant funding received by³ the KLC for the 2019-2020 financial year.

7. The combination of State party practices in relation to expedited procedures, the large volume of future act notices issued each year, and the limits and uncertainty around what and how RNTBCs may recover costs for performance of functions under s60AB and associated regulations has resulted in an unacceptable cost shifting from the private sector to the public purse. Where performance of functions is driven by the commercial interests of a third party, the costs of performing those functions should in all cases be internalized to the commercial party as part of the cost of doing business. It is unacceptable for native title parties to continue to bear the risk of not being able to participate in the future act processes due to lack of resources. The fact that native title grant funding has been effectively frozen for 10 years aggravates the inequity caused by this matrix of circumstances.
8. The KLC submits that the NTLA Bill should include amendments to the NTA to:
 - (a) clarify and expand the functions in respect of which costs may be recovered by RNTBCs;
 - (b) make clear that a party invoiced by a RNTBC / PBC for performance of native title functions is obliged to pay;
 - (c) link the process and time frames for future act procedures to the obligation on proponents to pay invoiced amounts; and
 - (d) require specific consideration of the matters under s237 of the NTA by the State party before an expedited procedure statement may be included in a s29 future act notice.

Thank you for the opportunity to make these submissions to the Committee.

Yours sincerely

for
Tyronne Garstone
Deputy Chief Executive Officer
Kimberley Land Council

³ Annual funding is subject to a mid-year review process however the KLC expects that the total native title grant funding it will receive this financial year will be \$8.6 million.