GOLDFIELDS LAND AND SEA COUNCIL

Aboriginal Corporation (Representative Body)

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Mr Wayne Bergmann and Mr Brian Wyatt
Chair and Deputy Chair
Expert Indigenous Working Group
Via email – EIWGSecretariat@pmc.gov.au

Dear Wayne and Brian,

The Goldfields Land and Sea Council ('the GLSC') provides the following comments in response to your letter of 20 April 2015, seeking views on the COAG investigation into Indigenous land administration and use.

The COAG Investigation into Indigenous Land Administration and Use

1. The General Context

The public description of this exercise gives us some comfort about the motivation behind it. It is presented as follows:

> The Council of Australian Governments ('COAG') announced on 10 October 2014 that it would conduct an urgent investigation into Indigenous land administration and use, to enable traditional owners to readily attract private sector investment and finance to develop their own land with new industries and businesses to provide jobs and economic advancement for Indigenous people.
>
> The investigation is an opportunity to focus all governments' attention on how Indigenous land administration systems and processes can effectively support Indigenous land owners to leverage their land assets for economic development.

In essence, it is all about promoting and facilitating Indigenous jobs and economic development around Indigenous land assets. On the face of it, this is a worthy pursuit.

Before embarking on such an exercise, it is important that we ask ourselves what the long battle for land rights and recognition of native title has been all about. Has it been about jobs and economic development? The answer, of course, is a resounding NO. It has been about something much more important and fundamental to the Indigenous psyche, and we need to keep this strongly to the forefront in our consideration of proposals in this exercise. Decisions taken in this exercise could impact adversely on future generations, to whom we have an important obligation.

The Commonwealth representative on the SOWG, Mr Daniel Owen (from PMC) addressed NTRB CEOs and Chairs on the exercise at a meeting in Canberra in March. There were some danger signals in his description of the exercise. For example, he spoke of establishing "tradeable tenure" as a means of enabling Indigenous people to "use" their rights for economic gain. He also spoke of "eliminating external barriers to economic activity, such as environmental, cultural and heritage legislation, and maximising benefits from the use of rights (such as royalties and trusts, and how they are distributed and utilised).

The comment in your letter that the COAG investigation provides "the opportunity to determine our priorities in finding the balance between protecting culture and the environment while using our land in a productive business way" is another danger signal. Change a couple of words and you get "the opportunity to determine our priorities in finding the balance between protecting culture and the environment and ~~while~~ using our land in a productive business way". That is, there is a trade-off contemplated between economic development and protection of culture, heritage and the environment (including hard won rights to traditional lands). Such a trade-off would be anathema to most grass roots traditional Indigenous people. It is but a small step to extend this to the notion of tradeable freehold tenure. Both concepts can be seen as a betrayal of both ancestry and future generations.

It has taken over two centuries for Indigenous peoples to secure some reinstatement of past rights in Australian law. Such rights as have been secured have a long history measured in tens of thousands of years. Under tradeable freehold tenure, they can be sold and gone in a flash - forever, in return for a handful of silver – at the expense of future generations. In contrast, communal rights to inalienable freehold or exclusive possession native title are rights in perpetuity, secure for future generations. Any suggestion that there be a capacity to convert such rights to tradeable freehold tenure should be rejected, or at the very least treated with extreme caution. One only has to look at the experience under the NSW Land Rights Act, where it is not uncommon for freehold land tenure granted under that system to be sold off for short term financial gain, to the long term disadvantage of the groups concerned.

- **The process**

There is no suggestion of a draft paper for consultation on proposals being considered. In essence, we are being asked to suggest options that might be considered by the SOWG in formulating their report to COAG. An important threshold issue, then, is to secure an opportunity to comment on and have the EIWG views recorded in the draft SOWG report to COAG. It is not acceptable to merely have the opportunity to throw our suggestions into the ring.

We are strongly of the view that the SOWG draft report should be the subject of consultation with Northern Territory Land Councils, NTRB/NTSPs, the ILC, IBA and PBCs before being finalised, and that comments received should be reflected in the report.

The Native Title Ministers' proposals for change will be the subject of a separate letter.

- **The Underlying Assumption**

The assumption underlying the TOR for the "investigation" is that the current Indigenous land legislative, regulatory, administrative and operational systems and processes inhibit economic development, home ownership, private sector and infrastructure investment, industry and business development, etc , and that they inhibit these in a way that is unacceptable to Indigenous people (and therefor need fixing). We agree that some things need fixing – but generally, these relate to the administration of State and Territory laws in their application to

Indigenous land interests, and not to the existing framework of Indigenous rights relating to land.

Indigenous people have good reason to be sceptical about the motivation behind the "investigation". Virtually every time the *Native Title Act 1993* has been amended since its original passage, the purpose has been to take something away from Indigenous people through erosion of beneficial provisions. The same can be said of the Northern Territory ALRA, though perhaps to a lesser extent. This current exercise clearly has the potential to be a continuation of that erosive process, in the name of jobs and economic development.

- **Some general Comments**

The most recent example of a "fix" in the interests of Indigenous economic development is the insertion of s46JAA. This was a short cut, validating provision in the Native Title Act to facilitate construction of housing and other infrastructure on land in which a person holds a native title interest, without the need for the agreement of such persons (s46JAA), (essentially on the basis that negotiation of ILUAs for such works was troublesome and time consuming). There are signs of an intent to regionalise the NT land Councils – supposedly in the interests of Land administration, but more likely on the premise that regional councils will be easier to manipulate than the current strong major Councils. It is easy to present a proposal to be in the interests of Indigenous economic development, when in fact it erodes the Indigenous position and serves the interests of the establishment.

One point that is not dwelled upon by the proponents of tradeable freehold tenure is the fact that under existing arrangements (for both ALRA and native title) there is provision for traditional owners to agree time limited leasehold tenure for any purpose, including economic development and business purposes. Such leases could be tradeable subject to conditions requiring TO agreement to proposed purpose. This is effectively the current position, and requires no change.

The notion of seeking to regulate the use of benefits flowing to Indigenous people from their rights to land (such as royalties, compensation payments, payments under future act and other agreements, moneys held on trust, etc) is akin to seeking to regulate the way in which Australian households spend their income. Once such payments are in the hands of the relevant Indigenous organisation, they are private funds belonging to the group concerned. It would be inappropriate (not to mention patronising and paternalistic) for the Government to seek to regulate the use of such funds "to ensure that benefits are maximised". A case in point here is the flow of royalties to royalty associations under ALRA. Such payments are clearly intended as compensation to the groups concerned for the impact of mining on their land. For the Government to step in and seek to hold these private organisations accountable for the manner in which they use the funds would be an unwarranted and unwelcome intrusion into their private affairs. This is not to say that such organisations should not be expected to have sound fiduciary governance arrangements.

As a general rule, most things are possible under the existing native title and ALRA frameworks with the agreement of the TOs. So what are the impediments COAG is talking about? Surely not the "impediment" of having to obtain the TOs' agreement!

From our perspective, the strongest impediment to economic development for most communities will be the lack of practical support and assistance from government and its agencies for:

- Identifying business opportunities and developing strategies for converting concepts into activity;
- Start-up and Seeding capital funding for developed proposals; and

- Assistance and mentoring through the initial implementation stage.

Although the IBA and the ILC each have a role in these areas, they seem to be stretched too thin; have a focus on major investments as opposed to creating small business opportunities; and have too many restrictions on what they can and can't do by way of assistance. Perhaps some additional resources, broadening of focus, and increased risk taking would be in order here.

The notion of creating land tenure values through home ownership and tradeable leases in remote communities seems doomed to failure. As much as financiers might like to see the commercial environment of metropolitan Australia transplanted in remote Aboriginal communities, it is not going to happen – for a variety of reasons. The worst possible outcome of the COAG process in this regard would be to see existing rights eroded in favour of a pipedream that will never be realised.

2. The West Australian Context

As noted above, we agree that some things need fixing – but generally, these relate to the administration of State and Territory laws in their application to Indigenous land interests, and not to the existing framework of Indigenous rights relating to land. This is particularly the case in Western Australia.

One of the most significant issues that is facing the Indigenous people of Western Australia (WA) is simply the lack of available tenure solutions. It is a two-fold issue: first it is about the lack of economic drivers where much of the Indigenous held land is located; and secondly, the attitude of the WA government towards allowing Indigenous people access to land in a form of tenure that is able to be used for economic purposes in areas where an economy exists.

- **Issues**

In WA there is no land rights act that enables Indigenous people to hold land under such a regime and all land tenure needs to be secured under the *Land Administration Act 1997* (WA) (LAA). There was an attempt in the early 2000s to construct a form of tenure that specifically dealt with the needs of Indigenous people, but this was defeated by issues with the *Mining Act 1978* (WA).

In WA, the Department of Mines and Petroleum (DMP) has the right of veto over land tenure creation, under s16(3) of the *Mining Act 1978* (WA). This forces the department administering the LAA is to seek approval for the creation of any new tenure, and changes to the management of reserves, from DMP. This severely inhibits the ability of Indigenous people being able to hold tenure as there appears to be an institutional fear within DMP of Aboriginal people holding land.

Another important issue is that when land tenure is created for a purpose other than Crown reserves, legal access is required. In remote areas this is problematic as the nearest legal road may be some distance away, creating a need for an access leg attached to the tenure. If this is a rateable/taxable tenure then the increased area is subject to that regime. In some areas this is so problematic that land tenure in the form of freehold and leasehold is virtually impossible to obtain.

Once land tenure is created, the various state based planning acts apply to that tenure and these can have a serious impact on the ability of certain tenures to be created. This ranges from local planning schemes, through the department administering the *Planning and Development Act* (2005) placing conditions on land tenure that affect the ability to make use of it in an economically viable manner.

In WA, approximately 14% of land is currently held for Indigenous purposes. (This does not include freehold properties that are held by individual Indigenous people and organisations). No discussion of Indigenous land in WA can be engaged without making mention of the land held by the Aboriginal Lands Trust ('ALT'), which holds 78% of all Indigenous held land in WA.

Furthermore, the majority of Western Australia's Indigenous communities are situated on land held by the ALT, often in conditions that encapsulate the term 'Indigenous Disadvantage.'

- **ALT Tenure**

The land tenure of the ALT estate is varied, consisting of freehold, general leases and Crown reserves. All of these are held for 'the use and benefit of the Aboriginal inhabitants', and this is an issue that may be seen as a constraint against using the land for economic advantage. As they are under the control of the WA government through the ALT, the rights of the Aboriginal inhabitants are limited.

Many discussions regarding the mortgaging of Indigenous land revolve around the issue of whether a market exists for the property and thereby whether there is the ability for a lending institution to recoup their investment should the borrower default on their loan. This may not be an issue with land that is in and around a town where there is a housing market, but it is an issue in remote communities.

- **W.A. Government**

As the WA Government has been actively pursuing its Government Regional Standard Heritage Agreement (GSHA), it has resiled from agreeing to land being provided to Indigenous organisations and individuals unless there is a PBC to hold the land and it is willing to agree to the GSHA. In that instance, land will be provided as an incentive to agree to the GSHA. As there is no other legislative framework for Indigenous people to access land in WA, this creates a double-bind, especially for groups that have fought long and hard to have their native title recognised and then seek to pursue some benefit through land tenure reform. In these situations, they are required to surrender some of the rights that they have actively pursued for, in some instances, little gain. An example of this is where one group agreed to the GSHA in return for what was to be 100,000 hectares of land only to receive 27,000 hectares. With the funding that was attached to the GSHA, the group will be unable to service the debt from the rates and taxes on the land very far into the future.

- **Land Administration Act 1997 (WA)**

There is capacity in the legislative regime governing land in WA for Indigenous people to hold tenure - under s83 of the LAA, separate from mainstream land tenures. However, this tenure does not obviate processes under any planning acts or schemes. Unfortunately, since this section was introduced in 1998, only a limited number of tenures have been approved.

- **Recommendations**

1. All forms of land tenure in WA that is held outside of local/state government are subject to rates and taxes, including Crown reserves held by non-government organisations. Indigenous organisations that are set up for charitable purposes do have the ability to seek an exemption from local government rates and state land tax, but this remains at the discretion of the agency involved. There is no state-based automatic exemption for Indigenous held land. This should be remedied and such an exemption be implemented.
2. Where native title is determined, exclusive possession native title land be converted to a new type of tenure that:
   (a) provides all of the rights of freehold land;

(b) that is exempt from planning schemes;
(c) that is non-rateable and exempt from state government taxes; and
(d) affords the title owner with a veto right over mining activity.

3. Where a PBC acquires freehold land or a pastoral lease within the boundaries of a native title determination, the PBC can elect to have the land converted into the new type of tenure as outlined in 2 above, while that tenure remains in the ownership of the PBC and will revert to leasehold or freehold on disposal.
4. The State of Western Australia make greater use of s83 of the LAA.

3. Additional Comments

There is considerable need for robust discussion around funding for land management in a post-native title environment. To date, there has been no equity in the delivery of successful programs where almost all resources allocated to these "fully committed" programs have historically gone to the northern half of the country with no regard to the needs of the south, nor is any change apparent in the government's IAS rollout. Management of culture (inclusive of the environment) is integral in native title holders rights and interests. These obligations are true for Aboriginal people whether they are above or below the 26th parallel.

This lack of equity can clearly be seen in the fact that in the entire GLSC representative body area of WA, which covers over 640,000km^2 (almost 3 times the size of Victoria) has never been Commonwealth funding for the proven *Caring for Country* and/or *Working on Country Programs*; no Commonwealth funding for *Indigenous Protected Areas*; no Commonwealth support of an *Aboriginal Green Army Program*; no Commonwealth support of an Aboriginal defined *Remote Jobs and Community Program*; and no Commonwealth support of a single Aboriginal person to work on-country. Considering the billions spent over decades on these programs in the northern half of Australia, it is high time for some equity in the distribution of government expenditure in this area.

Yours sincerely,

Hans P. Bokelund
Chief Executive Officer