14 May 2014

The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

Dear Sir/Madam

Review of the Native Title Act 1993 Issues Paper

The Minerals Council of Australia (MCA) welcomes the opportunity to provide a submission to the Australian Law Reform Commission's Issues Paper on the Review of the Native Title Act 1993.

As you are aware, the MCA represents over 85 per cent of minerals production in Australia. The Council's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations. The minerals industry is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests. It supports reforms that are consistent with these principles and which promote certainty and timely, equitable and efficient outcomes.

The MCA supports efforts to resolve outstanding native title claims. Clearing the backlog will provide more certainty as to the claim groups with which the industry is required to negotiate land access in the future; confirm the validity and effect of non-native title interests; and help define how native title holders are entitled to compensation.

The MCA is of the view that the causes of the native title claim backlog and the proposed resolutions in the Issues Paper are not sufficiently grounded in evidence and, as a consequence, may unnecessarily introduce uncertainty for stakeholder groups. Further, we consider that a strengths based analysis of recent case law and operational improvements should be undertaken by the ALRC to broaden the types of strategies that could be incorporated. We also consider that there is a range of non-legislative and legislative solutions that are deserving of exploration as possible alternatives and/or complements to the Native Title Act.

The MCA looks forward to further engagement and would welcome the opportunity for our members to meet with the ALRC to facilitate the development of the Discussion Paper. Should you require further information or clarification of the issues raised please contact Therese Postma, Assistant Director Social Policy on 02 6233 0631 or Therese.Postma@minerals.org.au who has carriage of these matters in the MCA Secretariat.

Yours sincerely

Brendan Pearson.

BRENDAN PEARSON
CHIEF EXECUTIVE

WALTER TURNBULL BUILDING
LEVEL THREE
44 SYDNEY AVENUE FORREST CANBERRA ACT 2603
PO BOX 4497 KINGSTON ACT 2604
TELEPHONE: + 61 2 6233 0600
FACSIMILE: + 61 2 6233 0699
WEB: www.minerals.org.au
EMAIL: info@minerals.org.au
ABN 21 191 309 229

MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION'S REVIEW OF THE NATIVE TITLE ACT 1993 ISSUES PAPER

SUPPORTED BY:

QUEENSLAND RESOURCES COUNCIL

SOUTH AUSTRALIAN CHAMBER OF MINES AND ENERGY

MINERALS COUNCIL OF AUSTRALIA VICTORIAN DIVISION

MINERALS COUNCIL OF AUSTRALIA NORTHERN TERRITORY DIVISION

---

14 MAY 2014

DRAFT

Introduction

The Minerals Council of Australia (MCA) is the peak industry association representing exploration, mining and minerals processing companies in Australia. MCA members account for more than 85 per cent of annual minerals production in Australia and a higher proportion of mineral exports. Members of the MCA recognise that industry's engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australian's rights in law, interests and special connections to land and waters. This point is made even more acute by the fact that more than 60 per cent of minerals operations in Australia have neighbouring Indigenous communities.

The minerals industry is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests. The MCA supports approaches that encourage negotiation and mediation in determining agreed outcomes with traditional owners. Accordingly it supports reforms that are consistent with these principles and which promote timely, equitable and efficient outcomes. This submission outlines the minerals industry's response to the Australian Law Reform Commission's (ALRC) Review of the Native Title Act 1993 Issues Paper.

Background

The MCA supports efforts to resolve outstanding native title claims. MCA members are rarely involved in contests about the connection aspects of native title claims, but may participate in the native title claims resolution process to ensure certainty of their interests. Clearing the backlog will provide more certainty as to the claim groups with which the industry is required to negotiate land access in the future; confirm the validity and effect of non-native title interests; and help to define the native title holders who are entitled to compensation and to negotiate agreements.

In its submission on the scope of this review the MCA advocated that the ALRC be required to undertake a comprehensive and systematic analysis of the factors that have caused perceived delays and identify the full range of strategies that could be deployed to achieve balanced outcomes for all stakeholders. MCA also advocated that any proposed changes should not prejudice or unwind existing agreements and should not be retrospective.

This analysis should be undertaken because any review of the Native Title Act should proceed on an informed basis with the best possible understanding of whether there are any deficiencies and their causes. It would also be consistent with the recommendations of the Office of Best Practice Regulation and reduction of red tape requirements that regulatory reform can only be justified where it has been identified stated objectives have failed to be met and cannot be redressed by operational improvements.

Without being explicit, the presumption of the Issues Paper is that the native title test requirements are the critical barrier to expeditiously resolving the native title claims backlog. The MCA is of the view that there has been insufficient analysis to demonstrate that there is any systemic "failure" of the native title "system". As a consequence there is no evidence to support the native title test requirements are the critical barrier requiring redress or that the proposed legislative changes will be effective in resolving the problem.

The MCA has also advocated that the Review presented an opportunity to address emerging consumer protection issues in a post determination context (i.e. clarifying the fiduciary

DRAFT

responsibilities of native title applicants to the broader native title holding community; and requirements for management of funds generated from native title processes) and to provide more certainty as to the identity of persons who claim to hold native title over time. It is disappointing that the ALRC has not yet canvassed these issues.

Connection

The Issues Paper presumes that changing the connection requirements will expedite the claims resolution process. The MCA disputes the automaticity of this presumption and calls for more analysis to be undertaken to understand the cause of the perceived delays in determining native title claims and also determine whether those delays are resulting in a problem that requires any legislative action. We are unconvinced that there is sufficient evidence to support the contentions implicit in the Issues Paper that:

- the system is failing;
- the native title test is the critical and only barrier causing the backlog of claims; and,
- changing legislation to reduce the native title test requirements is the most effective solution.

The MCA submits that despite the implicit presumptions in the Issues Paper, significant progress has been made resolving native title claims and the rate at which native title claims are resolved outside a litigious process has increased in recent years.

To ensure that any problem/s are well understood and any proposed solutions will lead to the desired result (i.e. reduce the claim backlog whilst providing certainty to all stakeholders) it is submitted the analysis should be strengthened to focus on the following areas:

- Identifying the indicators of success e.g. more timely resolution of claims; clearing the backlog of outstanding claims; and maintaining certainty for all stakeholder groups.
- Identifying the number of claims that have been progressed since the introduction of the Native Title Act, where the claims have been resolved and where they are still outstanding.
- Identifying the factors contributing to long standing claims not being resolved. It is noted that the Issues Paper has not identified, or addressed, the following barriers: complexities caused by overlapping claims; conflicts between competing claim groups; lack of incentive for representative bodies to have claims resolved and lack of sufficient resources to progress the claim work which the MCA understands also contribute to native title claims not being determined in a timely manner.
- Examining the range of initiatives undertaken by Native Title Representative Bodies, Governments (e.g. the Victorian Government Traditional Owner Settlement Act) and Courts (recent case law[1]) to address the issues, particularly in the last five years.
- Consulting stakeholder groups about how the Native Title Act has been effective or not in providing a framework to resolve native title claims.
- Analysing the nature of the relationship between the role of State and Commonwealth Governments in implementing the Native Title Act, and the impact on claim resolution outcomes.
- Identifying the elements essential to preserving stakeholder certainty and alternative means of achieving certainty in a fair way.

[1] It should be noted that since the Yorta Yorta decision, Federal Court case law has consistently resulted in the connection test being satisfied in the vast majority of contested native title claims as well as a large number of consent determinations.

- Assessing the potential impacts of changes to legislation as opposed to processes associated with the application of existing legislation and case law.
- Examining the current political and economic climate and its intersection with the desired outcomes e.g. it is likely that Governments will have reduced resourcing capacity.

The MCA is concerned that the proposals currently being discussed could have a number of unintended impacts including:

- requiring the Courts to test new legislation which will be time consuming and introduce considerable uncertainty for stakeholders[2];
- initiate the emergence of new claimant groups and/or new people wanting to be registered as part of an existing claim group or native title group that could increase the contestability among the groups. This could further exacerbate timeframes and introduce uncertainty as to the legitimacy of existing agreements; and,
- potentially creating an increasingly adversarial relationship between claim groups and State Governments which could also exacerbate timeframes.

It is essential that a comprehensive analysis and impact statement is provided to ensure confidence that the problem is fully understood and the proposals to address the priority issues contribute to the desired outcomes whilst minimising the potential for unintended impacts.

The minerals industry understands that the Native Title Act recognises that not all Indigenous people will have their customary rights recognised in law. This is undeniably the reality, whatever the test for "connection" is.[3] Where there is low probability of native title claims being successful, it may be more appropriate to explore alternative outcomes rather than risk compromising the existing integrity and balance of the Native Title Act, or simply impairing its functioning.

Alternative outcomes could include heritage rights and negotiated packages (as opposed to native title rights), such as the Noongar claim settlement currently being considered in Western Australia, and the Traditional Owner Settlement Regime in Victoria. The MCA encourages the ALRC to analyse how the states have developed and implemented alternative agreements and the role they could play in resolving the native title claim backlog.

In the event any new legislation is introduced, consistent with good practice the regulation must not be retrospective in its application to native title claim determinations and relevant Indigenous Land Use Agreements (ILUAs). Such an approach would undermine certainty for all parties and increase investment risk.

[2] Importantly, the native title claims "system" has been in use and the subject of judicial examination and precedent for more than 15 years. The value of this experience should not be discounted. Any change to the basic underpinnings of the connection "test" will necessarily open up new opportunities for differences of opinion about the "test" and how it applies in each new case

[3] In some parts of New South Wales and most parts of Victoria (as well as large parts of Queensland), native title has been wholly extinguished by grants of non-native title interests in land. The "connection" test is irrelevant in these instances.

Interests of a commercial nature

While the MCA notes the recent High Court determination regarding Torres Strait Islanders and commercial rights (Akiba v Commonwealth), the industry notes that s223 of the Act contains no specific reference to commercial rights.

The Issues Paper has not identified the intent, intended benefits or outcomes being sought from clarifying whether "native title rights and interests" can include rights and interests of a commercial nature. There is currently insufficient clarity about the nature and effect of "commercial" native title rights and their implications. The type of resources which new provisions may have application to (e.g. water) need to be identified and discussed in detail both for cultural/legislative commercial implications. This discussion is important for stakeholders such as the minerals industry to understand the potential for additional business costs and their intersection with compensation requirements.

It should be reiterated in the Discussion Paper that minerals ownership (and ownership of some other natural resources including some water rights) is vested in the Crown in Australia imposing limits on the extent to which commercial rights and interests are able to be recognised.

Authorisation

The MCA is of the view that this review provides a valuable opportunity for facilitating consistency and alignment between the Native Title Act and the Indigenous Land Use Agreement (ILUA) authorisation procedures. The MCA would like to explore this further with the ALRC in its consultation processes leading up to the preparation of the Discussion Paper.

The minerals industry supports flexible provisions that allow decision making processes to be culturally appropriate as it is consistent with current ILUA practice. It has been the mineral's industry's experience when negotiating ILUAs, that where there is a willingness of parties to come to an agreement and sufficient resourcing, stipulating a time requirement is less consequential. MCA is therefore of the view that it is more important that the authorisation process is adequately resourced by government. Any changes to the authorisation process should ensure simplicity and certainty of process and outcome.

In a post determination context the MCA has raised consumer protection issues which require clarification of the fiduciary responsibilities of applicants which have not yet been addressed in the Issues Paper. These issues have been described comprehensively in the findings of the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group and to which this Review's Terms of Reference require the ALRC to have regard.

Joinder

In the context of native title claim resolution, the minerals industry's participation is as a respondent as the business implications of these decisions can be significant. Among other things, the current native title determination process involves an examination of the existence, effect and validity of all non-native title interests that coexist with native title.

Any notion that the states will adequately protect or represent the interests of all stakeholders in a claim area is not reflective of current practice and the resource limitations on state governments. There are several significant recent examples of challenges to the

validity of mining interests during the native title determination process. Accordingly, it is essential that the holders of non-native title interests are given the ability to participate in native title proceedings to address these issues as well as the requirements under the Future Acts process including compensation liability. Further the MCA considers that it is necessary that adequate resourcing is allocated to joinder provisions.

The need for MCA member companies to remain actively involved in native title proceedings would be significantly reduced by providing non-native title parties with simple mechanisms by which they may be assured of tenure security and clarity of the extent and quantum of any compensation liability.

In a post determination context there is also a need to consider how native title holder group member registers are kept up to date. A contemporary register is necessary for providing native title holders with information relating to legislative changes, agreement reviews and future negotiations. This is an issue that the MCA would appreciate the ALRC exploring through further consultation.

Principles

The MCA supports the guiding principles but would suggest that providing "transparency and certainty" for all stakeholders should be added to Principle 2. With respect to Principle 4, whilst the MCA agrees it is important to have regard to international law, it needs to be applied as ratified within the Australian context where the Crown has sovereign rights over minerals and with regard to the overall context and objects of the instruments in question, not just provisions read in isolation. Further, any reference to international law must recognise the different status of international instruments. For example, unlike some of the other instruments referred to, the UN Declaration on the Rights of Indigenous People is not a binding instrument and should not be read as such.

Conclusion

The MCA supports efforts to resolve outstanding native title claims. However we are concerned that the proposed resolutions in the Issues Paper are not sufficiently grounded in evidence and, as a consequence, may unnecessarily introduce uncertainty for stakeholder groups. We consider there are a range of non-legislative and legislative solutions that are deserving of exploration as possible alternatives and/or complements to changes to the Native Title Act.

The MCA is of the view that a strengths-based analysis of recent case law and operational improvements should be undertaken by the ALRC. This type of analysis will broaden the types of strategies that could be considered to resolve other unidentified critical barriers to determining native title claims.

Whilst the MCA is keen to discuss these concerns we also wish to pursue opportunities for alignment with ILUA processes and addressing post determination authorisation and registration issues. Accordingly, we extend an offer to organise a meeting of our members with the ALRC to facilitate the preparation of the Discussion Paper.

DRAFT