Submission to:

Australian Law Reform Commission

Review of the Native Title Act 1993

ASSOCIATION OF MINING AND EXPLORATION COMPANIES

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Introduction

Thank you for the opportunity to comment on the Issues Paper on the *Review of the Native Title Act 1993.*

The Association of Mining and Exploration Companies (AMEC) is the peak national industry representative body for hundreds of explorers, miners and the companies servicing them.

AMEC members have a direct interest in the development of strategies and initiatives that result in the streamlining of the complex native title system.

Executive Summary

AMEC has had a long standing objective for increased certainty, efficiency and effectiveness of native title processes in order to:

- reduce delays and costs for all stakeholders; and
- ensure fair, equitable and quality negotiated outcomes and benefits for governments, industry and Aboriginal people.

AMEC has also expressed concern that an apparent lack of strategic direction, leadership and consultation are significant factors why there are still over 400 native title applications still to be resolved.

AMEC has noted the number of reviews and inquiries that have occurred, or still in progress over the last few years, which do not appear to coherently articulate a program of legislative and policy reform.

Whilst AMEC remains supportive of initiatives to create a more efficient and effective native title system, it is concerned by the piecemeal approach to these reviews and inquiries on what is, arguably, one of the most complex Australian statutes.

AMEC does however express caution that prior to making any recommendations to change the current native title system careful consideration must be exercised to ensure that there are no unintended consequences emanating from any specific recommendations.

Recent reviews and inquiries

AMEC notes that there have been a number of reviews and inquiries on related native title over the past few years, namely:

- The tax treatment of native title payments and subsequent passage of the Tax Laws Amendment (2012 Measures No6) Act 2013;
- Review into the Roles and Functions of Native Title Organisations by Deloittes Access Economics;
- Productivity Commission Inquiry into non financial barriers to mineral and energy resource exploration; and
- Parliamentary Inquiries on the Native Title Amendment (Reform) Bill (No1) 2012.

The Government is still to respond to the above named Deloittes Access Economics and Productivity Commission reviews. AMEC considers that the Government response to these reviews will have a significant bearing on the outcomes of the ALRC Review.

The Australian Greens have recently re-introduced the Native Title Amendment (Reform) Bill 2014, which is essentially the same in content to that previously introduced.

Responses to matters raised in the Issues Paper

AMEC does not consider it relevant to respond to many of the specific questions raised in the Issues Paper, particularly relating to 'connection', but does provide the following broad comments to assist the Review.

Principles

AMEC generally agrees with the guiding principles expressed at pages 18-20 of the Issues Paper, particularly principles 1 to 3.

In addition, AMEC suggests that the review process should focus on achieving certainty, consistency and clarity. Increased certainty, consistency and clarity as to connection, authorisation and joinder processes is likely to assist industry to more effectively and efficiently participate in native title claim proceedings and make sustainable future act agreements with native title parties. At a broader level, increased certainty around the outcomes of native title processes (including, but not limited to, more timely resolution of native title claims) will encourage additional investment in mining and mineral exploration projects in Australia.

AMEC notes that the preamble to the Native Title Act recognises 'the need of the broader Australian community require certainty'. Paragraph (b) of the objects of the Act also recognises the need for certainty as to how parties should engage in respect of future acts.

Connection

General

AMEC supports measures which will improve the delivery of timely, certain and just native title outcomes to all Australians. In this regard, and acknowledging that proof of connection in native title claims is an area in which AMEC members rarely become involved. However, increased consistency and certainty in the connection process will assist:

- in the timely resolution of native title claims;
- industry in more effectively and efficiently participating in the claims process; and
- resolving uncertainties around claim group composition, which can affect future act agreement-making and implementation.

Any change to core concepts in the Native Title Act will need to be carefully considered and balanced against:

- the effect on existing jurisprudence which has been developed since 1992;
- an increase in litigation to 'test the law' (a feature of the native title system); and
- the impact on existing determinations of native title.

Native title rights and interests of a commercial nature

The uncertainties which may follow an amendment to core concepts, such as the definition of native title rights and interests, could outweigh any benefits of the proposal. This is particularly the case with the treatment of 'commercial' rights as the decision in *Akiba* has indicated that

native title rights and interests of a commercial nature can be recognised in appropriate circumstances under the current regime.

AMEC also notes that rights and interests "of a commercial nature" defines a category of native title rights by reference to their purpose. This contrasts to the accepted conceptualisation of native title as a "bundle of rights" which are primarily defined by their content rather than their purpose.

Transparency

AMEC members, who often find themselves as respondents to native title proceedings, may also benefit from greater transparency as to the basis on which the primary respondent, being the relevant State or Territory Government, accepts connection or refuses to so accept.

Clarity as to the lead respondent's position and the basis for that position, particularly early in a claim process, could assist third party respondents to more effectively and efficiently participate in claim proceedings.

AMEC members have expressed a need to access connection reports in order to better understand the actual history and customs of the claimant group and their veracity. At significant cost some AMEC members have had to commission their own connection reports to satisfy themselves with the authenticity of claim groups, and individuals within the claim group.

Authorisation

AMEC acknowledges the divergent lines of judicial authority relating to authorisation and is encouraged by the ALRC attempts to identify ways to bring about greater clarity.

AMEC specifically urges consideration of mechanisms that will provide greater certainty to third parties who need to engage with the Applicant and native title claim group outside the claims process – for example in the context of making future act and heritage agreements.

AMEC's members are also concerned about the uncertainties raised in the Issues Paper regarding:

- whether an Applicant must act unanimously or can act by majority, particularly when the terms of the authorisation are silent on the issue;
- whether a claim group can authorise an Applicant to act subject to restrictions; and
- whether, if a member of an Applicant group passes away or is unable or unwilling to act, the remaining members of the Applicant group can continue to act in absence of a successful s66B application (which AMEC members acknowledge can be unwieldy, time consuming and expensive).

AMEC suggests that the Commission should also consider:

- whether an Applicant can authorise an agent to act on its behalf, and what powers can be abrogated to the agent; and
- the extent to which the terms of an Applicant's authorisation (particularly in relation to agreement-making) are disclosed to counter parties.

These issues have flow-on effects for the authorisation of an Applicant in the agreement-making context. They can cause delays in the finalisation of native title agreements and can impact how

agreements are made with native title parties and more broadly how a native title claim group interacts with a proponent.

Some suggestions raised by AMEC's members to provide more transparency and certainty in respect of the scope of an Applicant's authority in both claim and future act contexts are:

- clarifying the extent to which a person is entitled to make certain assumptions about the authority of an Applicant in the context of agreement-making, along similar lines to the assumptions which can be made about the execution of documents and authority of directors of corporations under the Corporations Act and Corporations) Aboriginal and Torres Strait Islander) Act;
- introducing a requirement for the scope of authority of the Applicant (including in respect of agreement-making) to be set out in a form which is made publicly available (for example through the Register of Native Title Claims or Schedule of Native Title Claims);
- requiring that any such form outlines the extent to which, if a member of the Applicant dies or becomes unable or unwilling to act, the remaining members of the Applicant are authorised to continue to act;
- alternatively, providing that if a member of the Applicant dies or becomes unable to unwilling to act, the remaining members of the Applicant:
    - are to file a notice confirming the situation (as suggested in the Issues Paper at [236]); and
    - are deemed to have authority to continue to act, unless a s66B application is made or the terms of their authority (if made publicly available) specify otherwise.

AMEC has also consistently requested the release of much needed guidance material/protocols where there are multiple stakeholders and over lapping claims, particularly in circumstances where there may be a rebuttal by one of the parties.

Joinder

AMEC submits that certainty, clarity and efficiency in the law as it relates to joinder, is of concern to all parties, and in particular to third parties who accrue an interest in land which is the subject of a native title claim, outside the temporal limits of the statutory notification period.

Joinder process:

The distinction between joinder as of right under s84(3) and late(r) joinder under s84(5) does not reflect the reality that:

- claims often take a number of years to resolve;
- during the currency of a claim, it is not unusual for respondents' interests in a claim area to change significantly as a result of:
    - a party's interests being transferred to another party who may not be respondent to the claim;
    - a party (or a non-party) obtaining a new interest in the claim area; and
    - a party's interests expiring or being surrendered; and
- it is in the interests of justice if all parties with interests in a claim area are given the opportunity to participate in the resolution of the claim. This is because the Court is being asked to make a finding in relation to the nature and extent of third party interests in a claim area, which necessarily includes their validity.

Participation of third party respondents

AMEC does not support reforms which generally limit the participation of third party respondents in claim proceedings for the following reasons:

- although third party respondents generally choose not to be actively involved in the "connection" aspects of a native title claim, as native title determination applications are proceedings *in rem*, it is in the interests of justice for respondents to have the option of participating in any aspect of the proceedings;
- third party respondents often assist with the just resolution of a native title claim – for example, the State will often not be privy to the entire relevant history of an interest in a claim area;
- placing a limitation on the role of a respondent in a native title proceeding may prevent it from legitimately participating in the just and efficient resolution of any number of issues, but whether and to what extent such issues will arise often cannot be anticipated in advance;
- while a State party may be expected to look after the interests of the community generally, that does not mean it will take responsibility for looking after the particular interests and concerns of third parties with interests in a claim area, further the State may not have the necessary information; and
- the Court already has the power to limit the participation of respondents in exceptional cases, for example where the Court has found that a respondent party has conducted itself in the claim proceedings a way inconsistent with the overarching purpose set out in section 37M of the *Federal Court of Australia Act 1976* (Cth) (eg. *Watson v Western Australia (No. 3)* [2014] FCA 127).

Other matters

Leadership and consultation

Over the last two years AMEC has sought clarity on whether the Commonwealth has developed a strategy to deal with native title issues. AMEC has been advised that no such strategy exists in one place.

The apparent absence of any clear strategic direction by government/s appears to be a major flaw and impediment to what appears to be a very wieldy, cumbersome and inefficient native title process.

In addition, it is noted that the Native Title Ministers` Meeting (NNMM) was initiated by the Commonwealth in 2005 to bring together the Ministers responsible for native title from the Commonwealth and the States and Territories to review the native title system, and to consider how to improve its effectiveness.

AMEC understands that only four meetings of the NNMM occurred between 2005 and 2010, however, no meetings have been held since then. This lack of leadership, particularly at the Commonwealth level is of extreme disappointment, and reflective of what appears to be an ad hoc and piecemeal approach to resolving native title issues.

This frustration is highlighted by the Western Australian Attorney General in a speech to the Legalwise Native Title Seminar in June 2013, where he stated:

- "*The regrettable fact is that in the last ten years, there has been limited policy engagement on native title between the Commonwealth Government and the State and Territory Governments….*
- *The Commonwealth has shown only cursory interest in the practical impact of the native title process on both State and Territory Governments and on native title holders….*
- *The Commonwealth`s, most recent forays into native title policy have in common the effect of prolonging costly legal disputes or creating new grounds for litigation…*
- *Consultations between Commonwealth representatives and other governments on the amendments have been at best, superficial."*

AMEC understands that the incoming Commonwealth Coalition Government has re-commenced dialogue with the States and Territories, and may be convening such a meeting to develop policy based solutions.

This lack of strategic direction, leadership and consultation are significant factors why there are still over 450 native title applications still to be resolved.

AMEC remains convinced of the need for Government to develop and articulate an overarching native title strategy including a coherent long term plan for legislative and regulatory reform in this area.

In the meantime, AMEC supports and welcomes the commitment at the 2 May 2014 meeting of the Council of Australian Governments that '*each jurisdiction will target specific small business sectors, with reforms to reduce regulation in the following areas to be brought back to the next COAG meeting….native title in mining, gas and exploration.'*

Relationships and consultation

AMEC notes that relationships between the various stakeholders in the native title process are varied, and need to be significantly improved in order to achieve the ultimate objectives of timely, cost effective native title and quality outcomes for all parties.

AMEC considers that all parties in the native title process should attempt to develop a mutual trust and a cooperative, conciliatory and genuine willingness to engage and resolve any claims, negotiations and disputes in a timely and cost effective manner.

Despite the fact that there are many examples of very good and effective working relationships more needs to be done to encourage quality negotiated outcomes.