Submission
May 2014

CME Submission to Review of *Native Title Act* 1993 (Cth) Issues Paper

Australian Law Reform Commission

Contact
Kane Moyle
k.moyle@cmewa.com

The Chamber of Minerals and Energy of Western Australia Level 10, 2 Mill Street, Perth, Western Australia
Locked Bag N984, Perth WA 6844 **p** +61 8 9220 8500 **f** +61 8 9221 3701 **e** chamber@cmewa.com **w** cmewa.com

Contents

About CME 3
Recommendations 3
Context 5
Native Title System Stakeholders 5
Overview 5
Scope of Inquiry 9
Native Title Rights and Interests of a Commercial Nature 10
Authorisation 10
Joinder 11
Conclusion 13

About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia funded by its member companies, which generate 95 per cent of the value of all mineral and energy production and employ 80 per cent of the resources sector workforce in the state.

The Western Australian resources sector is diverse and complex, covering exploration, processing, downstream value adding and refining of over 50 different types of mineral and energy resources.

In 2013-14, the estimated value of Western Australia's mineral and petroleum production is $113.8 billion, accounting for 91 per cent of the state's total merchandise exports and thus representing the majority of Western Australia's 43 per cent contribution to Australian merchandise exports. Furthermore, royalty payments to the state government will total $6.2 billion in 2012-13.

Recommendations

CME is concerned the Australian Law Reform Commission's (ALRC) Issues Paper assesses facets of the Native Title Act 1993 (Cth) (NTA) in isolation from the broader legislative, legal and practical operational contexts.

The Issues Paper appears to assume the system established under the NTA for the recognition of native title has somehow failed or is "unduly limiting".[1] However, the Issues Paper does not substantiate the existence of a systemic failure with reference to any objective evidence.[2] The nature and extent of any perceived failure is unquantified and uncertain, as is the impact of potential changes to the native title system at an operational level.

CME considers the NTA is not the subject of systemic failure, and cautions against amending the core provisions of the NTA that concern the recognition of native title without probative and objective evidence to this effect. Amendments under consideration in the Issues Paper will risk making significant yet untested changes to the NTA, thereby creating uncertainty, potential litigation, delays and other unintended consequences on the ground for all stakeholders.

Native Title System Stakeholders

- Any amendment to the native title system should be considered in the context of how it will deliver, for all stakeholders:
  - greater consistency;
  - increased transparency;
  - more timely resolution of claims; and
  - certainty of outcome, including for holders of non-native title interests.

Overview

- Measures other than legislative reform should be investigated as a priority to improve the efficiency of the native title system.

---

[1] See in particular paragraphs 4 and 5 on page 13 of the Issues Paper.

[2] The sources cited in support of the conclusions in the Issues Paper are the subjective conclusions of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The perspectives of the Social Justice Commissioner are only one view.

- CME considers substantive changes proposed in relation to the "connection" provisions should not be made, based on current evidence.
- Any amendments must not apply retrospectively, to ensure system integrity and certainty for stakeholders.
- To assist in ensuring an informed discussion, any proposals for legislative amendment should:
    - be based on objective, substantive and quantitative evidence of the nature and extent of any specific problems or systemic failure;
    - include an assessment of whether the developments in case law and the way native title claims are being managed by the courts and parties in practice are likely to address issues without requiring codification or legislative change;
    - include an impact assessment for any proposed amendments on other aspects of the NTA; and
    - take into account the impact any amendments will have on the native title system at a practical level.

Scope of the Inquiry

- The Guiding Principles of the Inquiry should be amended to ensuring the NTA meets its objective and delivers consistency, transparency, sustainability, expediency and certainty for all stakeholders.

Native Title Rights and Interests of a Commercial Nature

- The extent to which native title rights and interests might include rights of a commercial nature should be clarified through the ongoing development of case law, rather than through legislative amendment.
- The upcoming Discussion Paper should give regard to how these rights and interests interact with existing legislation, statutes and titles.

Authorisation

- The Discussion Paper should provide further clarity regarding the role and authority of the applicant, and having consistency between s 251A and s 251B of the NTA.

Joinder

- The Discussion Paper should give consideration to:
    - how joinder provisions can have clarity, consistency and certainty, without inhibiting court discretion regarding joinder decisions;
    - maintaining the ability of holders of non-native title interests to participate in the proceedings, or monitor the development of these issues;
    - altering how respondents can withdraw from claims in a more efficient manner; and
    - how, following determination, native title group member registers can remain contemporary.

Context

Native Title System Stakeholders

Western Australia Resources Sector

Western Australia contains the largest area of land where native title has been determined to exist. As at 31 March 2014, native title has been determined to exist over 993,500 square kilometres, equating to 39.3 per cent of the Western Australian jurisdictional area.[3]

The State of Western Australia is also subject to the highest national volume of future act processes and native title claims.

As a result, changes to the operation of the native title system, particularly changes which affect future act and native title determination processes and outcomes under the NTA, will have a disproportionate impact on members of the resources sector operating within the State. This in turn has the potential to affect the timely and effective negotiation and delivery of agreements with native title parties, from which a range of economic, social and community benefits flow to local communities.

CME Members recognise and respect the rights of native title holders and registered native title claimants and are committed to developing relationships with Aboriginal people and entities based on integrity, mutual respect and sustainability.

Guiding Principles

CME members are committed to working with key stakeholders to establish efficient and equitable legislation and processes to provide expeditious outcomes and certainty to all parties.

CME members consider the below guiding principles should govern any assessment of whether it is appropriate to administer amendments to the NTA, its associated system, or its operation. As such, this submission's assessment of the Issues Paper recommendations has been framed with these principles in mind.

Any amendment to the native title system should be considered in the context of how it will deliver, for all stakeholders: greater consistency; increased transparency; more timely resolution of claims; and provide certainty for all, including the holders of non-native title interests and existing and future agreements.

Overview

The native title system is complex, interrelated and subject to operational and jurisdictional variability across the nation. CME does not at this time consider the native title system to be subject to a system failure. However, there are efficiencies to be gained from the system, as well as the need for additional clarity regarding the operational impact of some case law.

---

[3] National Native Title Tribunal, Determinations of Native Title, as at 31 March 2014.

CME is concerned the Issues Paper isolates specific sections of the NTA from the function of the broader system. By not taking into account the operation of the system, nor identifying system failures through quantitative evidence, not all factors which result in system inefficiencies are identified. Without taking into account all factors – including legislative, legal, resourcing, procedural and operational - there is a risk amendments could unbalance the system, have undetermined impacts to its operation, introduce uncertainty and delays for all stakeholders and impede the realisation of the objectives of the NTA.

Alternative mechanisms other than legislative amendments should also be considered to address the substance of issues raised in the Issues Paper. Other approaches, whether they be procedural, resourcing, program or operational in nature, should be investigated as a priority to legislative reform as these could be more appropriate or deliver more effective outcomes for all stakeholders.

Some items raised within the Issues Paper, such as the process by which a native title claim group proves they have the requisite 'connection to country', are not generally areas in which the resources sector typically is involved. However, to ensure the certainty of their interests, companies do participate in the native title claims resolution process. Of primary interest to the sector is the expeditious resolution of native title claims to deliver certainty, confirm the validity of non-native title interests[4], and define the native title holders. Any changes to connection requirements could create increased uncertainty for current and future agreements, or procedural delays.

Measures other than legislative reform should be investigated as a priority to legislation to improve the efficiency of the native title system.

Identification of System Failures

The Issues Paper does not provide clear objective evidence to support a need for legislative amendment.

Whilst it proposes solutions or outlines areas for potential reform, it does not present a clearly evidenced reason for change.

To enable a full assessment of the specific issues raised within the Issues Paper, CME seeks further quantitative evidence to identify what if any key aspects of the NTA are not working as intended and fully articulate the contributing causes so the best solution can be found.

Concerns and issues referred to in the Issues Paper are in material respects over stated or contributed to by factors that are not acknowledged in the Issues Paper. CME also maintains any amendment proposals must be underpinned with quantitative evidence and analysis, and reflect the guiding principles stated earlier in the paper.

CME considers the available information does not clearly support the case for reform suggested in the Issues Paper.

---

[4] The recognition of native title can lead to challenges to the validity of non-native title rights and interests, see for example *Bullen on behalf of the Esperance Nyungar People v State of Western Australia* [2014] FCA 197 and *Rubibi Community v Western Australia (No.7)* [2006] FCA 459.

In Western Australia, there have been 44 determinations of native title, 35 of which were obtained through consent and 9 through litigation. There has been only one contested case where native title has been determined not to exist.[5] In that one case, the claim failed because native title was extinguished over the entire area of the claim, not because the claim group were unable to prove connection.[6] In two other cases the Court dismissed claims on (in essence) lack of substantive evidence and/or authorisation, but did not make a positive finding that native title does not exist.[7]

Nationally, there has been a positive trend regarding the number of consent determinations where native title was found to exist in the entire, or parts of, the determination area: from 9 in 2009-2010 to 48 in 2013 and to 31 March 2014.[8]

While the statistics demonstrate a continued positive trend regarding determinations, CME cautions all statistics, in particular those cases where native title has been found to not exist through consent and litigated processes, require an assessment of the individual court decision. In addition, the jurisdictional context also may influence the nature of determinations and as such also needs to be taken into account.[9]

What is clear is that in many, perhaps the overwhelming majority, of cases where native title claims are pressed toward final resolution, the connection "test" has been satisfied and native title recognised. This is not consistent with the suggestion that the "system" places an unreasonably onerous burden of proof on native title parties.

CME considers substantive changes proposed in relation to the "connection" provisions should not be made, based on current evidence.

Consideration of Act Components

The Issues Paper considers specific facets of the NTA and associated case law. It does not consider the NTA in its entirety. Such an approach does not take into account or assess how the NTA's sections interact with each other. The risk is amendments are suggested which will cause inconsistencies within the NTA, introduce uncertainty and ambiguity into the NTA, fail to resolve the identified issue, or have unintended effects on the on-the-ground operation of the native title system.

The NTA is of course concerned with more than simply the recognition and protection of native title. It is in effect a compromise between the recognition and protection of native title rights and interests and the provision of certainty to the wider community, which holds or may seek to acquire or exercise non-native title rights.

Operational Sphere of Native Title System

The Issues Paper has been developed and presented in a manner which generally isolates the legislative and legal operation of the NTA from its implementation and operation on the ground.

---

[5] National Native Title Tribunal, Determinations of Native Title, as at 31 March 2014.

[6] *Bodney v Westralia Airports Corporation Pty Ltd* (2000) 109 FCR 178.

[7] *Harrington – Smith on behalf of the Wongatha people v The State of Western Australia (No.9)* [2007] FCA 31 and *Bodney v Benell* [2008] FCAFC 63.

[8] National Native Title Tribunal, Determinations of Native Title, as at 31 March 2014.

[9] For example, in some areas of NSW, Victoria and Queensland, native title has been extinguished through the grant of non-native title interests in land.

A lack of consideration to the entirety of the system means the operational context, practices and processes and jurisdictional variability are not fully considered. In some cases, this may result in factors which exist at an operational level and contribute to inefficiencies within the native title system not being identified and taken into account during the analysis and shaping of proposed amendments. For example, other factors that may lead to delays in the resolution of native title claims include:

- Native title claimants are given valuable procedural rights to negotiate with mining proponents upon the registration of a native title claim. This right is the same right afforded to native title holders after native title is recognised. Conversely, Native Title Representative Bodies are funded by Government to run native title determination applications, but not to advise Prescribed Body Corporates or generally have a significant statutory role after native title is determined to exist. This can tend to create a positive incentive to not expeditiously progress native title determination applications to final resolution.
- Similarly, it is possible for two (or more) overlapping native title claims to be registered and receive the benefit of the procedural rights in the NTA, but there is no expeditious means under the NTA (short of litigation) to resolve overlapping claims if agreement is not reached.
- States take different policy approaches to progressing native title claims to determination. For example, in Western Australia, the State effectively refuses to negotiate a consent determination in relation to any claim that is the subject of an overlap.

In other cases, operational processes may go some way to addressing some concerns of the ALRC Review, but are not considered. Reasoning to change the NTA's function should require an analysis of an operation of the system, and include a broad evidence base to substantiate this position. Failing to do so may result in amendments not having their intended impact, the introduction of inefficiencies, uncertainty, delays and conflict within the operation of the system.

In regards to existing native title claim determinations, agreements between companies and native title parties, and Indigenous Land Use Agreements (ILUA), CME requests amendments do not apply retrospectively. This will ensure certainty for all parties and ongoing operational and system integrity.

Any amendments must not apply retrospectively, to ensure system integrity and certainty for stakeholders.

Case Law

Native Title case law has evolved incrementally over this time, taking into account specific circumstances, and jurisdictional and stakeholder variability. While there is a need for additional clarity in some areas, the evolution of case law has generally produced more certain meaning of concepts within the NTA and under the general law, while also maintaining its flexibility to adapt to further changes in the landscape over time.

Codifying existing case law (or going beyond existing case law definitions) without a clear evidential base and reasoning, is unnecessary and could lead to further litigation and testing in court. This will negatively impact upon the expediency of claim determinations and create uncertainty within the system. Proposals to codify existing case law should be accompanied by an assessment on why codification is preferential to maintaining existing case law and whether the period of uncertainty and legal testing due to legislative change will be outweighed by benefits to the system's operation.

CME

In some areas identified in the Issues Paper, case law has moved beyond what has been referred to. For example, the Federal Court case law related to the *Yorta Yorta* determination no longer fully articulates the standard in regards to connection. More recent case law has effectively reduced the native title test from that employed in the *Yorta Yorta* decision. For example, recent case law has emphasised that although *Yorta Yorta* requires that a native title claim group prove its existence as a "society", the term "society" does not appear in the NTA and does not introduce "technical, jurisprudential or social scientific criteria for the classification of groups or aggregations of people as 'societies'".[10] This view is supported by the large proportion of native title determinations that have resulted in the recognition of native title compared to the claims that have "failed".

To assist in ensuring an informed discussion, any proposals for legislative amendment should:

- **be based on objective, substantive and quantitative evidence of the nature and extent of any specific problems or systemic failure;**
- **include an assessment of whether the developments in case law and the way native title claims are being managed by the courts and parties in practice are likely to address issues without requiring codification or legislative change;**
- **include an impact assessment for any proposed amendments on other aspects of the NTA; and**
- **take into account the impact amendments will have on the native title system at a practical level.**

Scope of Inquiry

CME supports the use of the Preamble and Objects of the NTA as providing guidance for the Inquiry. CME considers it important any review of the system ensures it is meeting the objectives of the NTA.

CME cautions the adoption of guiding principles which extend beyond ensuring the system maintains integrity, sustainability, efficiency, timeliness, certainty, and meets the objectives of the Act.

The ALRC Review is restricted to facets of the NTA and doesn't analyse the function of the entire NTA and its associated systems in an operational setting. It also does not take into account other legislation and programs which exist parallel to the NTA and provide outcomes complementary, or in addition to, the NTA. Noting the limited scope of this Review, CME cautions against the inclusion of broader principles.

The Guiding Principles of the Inquiry should be amended to ensuring the NTA meets its objective and delivers consistency, transparency, sustainability, expediency and certainty for all stakeholders.

[10] *Northern Territory v Alyawarr* [2005] FCAFC 135; (2005) 145 FCR 442, [78]; *Banjima People v Western Australia (No.2)* [2013] 305 ALR 1; [2013] FCA 868, [394] (Barker J).

Native Title Rights and Interests of a Commercial Nature

The Issues Paper suggests recent case law has given rise to uncertainty about whether native title can include commercial rights and interests. Some early court decisions suggested a right to trade was not a right in relation to land or waters and, therefore, could not be a native title right.[11] However, the Federal Court subsequently recognised that native title rights and interests could include commercial rights and interests, such as a right to trade.[12]

The High Court's 2014 decision in *Akiba v Commonwealth* affirmed that a broadly defined native title right, such as "the right to take for any purposes resources in the native title areas" may be exercised for commercial and non-commercial purposes.[13] Following *Akiba*, it is no longer necessary to establish that native title rights are exclusive in order to obtain commercial rights and interests, at least in relation to sea claims.[14]

In CME's view, recent case law has determined native title rights and interests can include commercial native title rights and interests, but in limited circumstances that will be developed as the case law develops. This view has been affirmed by the High Court. In light of this, it is unclear why amendments to the NTA to expressly recognise commercial native title rights and interests are required, particularly when the Issues Paper does not clearly explain the purpose or intended outcomes of such a proposed amendment.

The Issues Paper does not address how an amendment to recognise commercial native title rights and interests would function alongside existing legislation and case law or what broader policy advantage would be served by such an amendment. It is difficult to assess the impact of any proposed amendments without having a clearer idea of the issue raised by Question 14 of the Issues Paper – how "native title rights and interests of a commercial nature" would be defined.

The current legislative framework and case law recognises native title rights and interests of a commercial nature can exist, depending on the facts and circumstances of each case. There is a significant risk any amendment may introduce uncertainty into the NTA, and result in unintended consequences. It is important any impacts are clearly understood and quantified, so as to ensure informed discussion on any proposal to legislate in this area.

The extent to which native title rights and interests might include rights of a commercial nature should be clarified through the ongoing development of case law, rather than through legislative amendment.

The upcoming Discussion Paper should give regard to how these rights and interests interact with existing legislation, statutes and titles.

Authorisation

As a significant stakeholder in the native title agreement making area, the resources sector requires confidence in the authority of an applicant to not only progress the relevant native title claim, but to enter into agreements on behalf of the relevant claim group.

Specific issues of relevance to the resources sector are:

- whether the applicant owes fiduciary duties, to whom and the scope of those duties;

[11] *Yarmirr v Northern Territory* (1998) 82 FCR 533, 587 (Olney J).

[12] *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* (2005) 145 FCR 442, 486 [153] (French and Weinberg JJ).

[13] *Akiba v Commonwealth* (2013) 300 ALR 1, 10 [21] (French CJ & Crennan J).

[14] *Akiba v Commonwealth* (2013) 300 ALR 1, 4 [1], 14 [34] (French CJ & Crennan J).

- must the Applicant act unanimously, or may it act by majority;
- whether, under what circumstances, and to what extent, may the authority of the Applicant be fettered by the Claim Group;
- if the authority of the Applicant may be fettered, then how is the scope of its authority to be communicated to third parties;
- does section 84B apply to the Applicant, and if so under what circumstances may the Applicant appoint an agent to act on its behalf, and if an agent may be appointed, what is the nature of the relationship between agent and the claim group; and
- consistency between s 251B of the NTA and the ILUA provisions contained within s 251A. To ensure consistency in the operation of the NTA, any amendments that are made to the definition of "authorise" for the purpose of bringing native title claims (s 251B) must also be made to the definition of "authorise" for the purpose of entering into ILUAs (s 251A). Any inconsistency between those provisions has the potential to cause significant uncertainty and delay. This issue is of particular concern to the resources sector because the industry needs confidence that the native title applicants have authority to enter into ILUAs.

By creating certainty for stakeholders in the above, there are other positive procedural effects, including simplicity, expediency, and certainty of process and outcome.

The Discussion Paper should provide further clarity regarding the role and authority of the applicant, and having consistency between s 251A and s 251B of the NTA.

Joinder

CME considers it important there is clarity, consistency and certainty regarding joinder provisions. However, this needs to be balanced to not unduly inhibit court discretion on joinder decisions, as these enable the appropriate decision to be made based upon the specific case at hand, rather than constricting decision making through a one size fits all approach.

Resources companies are often drawn into the native title court process as a result of the potential effect native title has upon non-native title interests, and an examination of these interests as part of the determination process. There have been recent examples of the validity of mining interests being challenged through this process.

Two recent examples illustrate this. Firstly, a native title claim group recently challenged the validity of among other things, a miscellaneous licence granted to BHP Billiton for the construction of part of its Newman-Port Hedland railway line. Had that miscellaneous licence been found to be invalid, it would have had serious consequences for the railway line that BHP Billiton relies upon to transport iron ore from its mines to Port Hedland.[15]

Secondly, a native title determination in 2011 resulted in a finding that two mining leases held by a mining company in the South West of Western Australia were invalid to the extent they affected native title.[16] It took approximately three years of negotiations between that company, the State and the native title claim group to agree upon an ILUA that recognised the validity of the mining leases.

This demonstrates the importance of holders of non-native title interests maintaining the ability to participate in the proceedings, or monitor the development of these issues, so as to defend the validity of their rights and interests.

---

[15] *Banjima People v Western Australia (No.2)* [2013] 305 ALR 1, [2013] FCA 868

[16] *Bullen on behalf of the Esperance Nyungar People v State of Western Australia* [2014] FCA 197

It is sometimes the case that challenges to the validity of non-native title interests are not raised until many years after a native title claim is commenced. In that time, the interests of resource companies may have undergone significant changes, including by acquiring or selling their interests in the native title claim area.

In one recent example, a mining company only received notice that the validity of the tenure underpinning its main facility in the Goldfields was being challenged by the native title claim group weeks before the hearing. As a result, it was necessary for the mining company to make an expensive and contested application to become a party to the proceedings.

There must be a flexible approach to the joinder of holders of non-native title interests to native title claims to ensure that non-native title interest holders can ensure their interests are recognised and given full effect.

CME acknowledges the difficulty that can be caused by having very large numbers of respondents to native title claims. In CME's view, this problem could be addressed at least in part by amendments to make it easier for respondents to withdraw from claims. Presently, if a claim has been heard or part-heard, a respondent can only withdraw by making a formal application, which can involve significant time and resources. Allowing respondents to withdraw from a claim through a more informal process would reduce costs and help address the problem of having large numbers of respondents to claims.

Following determination, CME also considers there is a need for consideration on how native title holder group member registers remain contemporary.

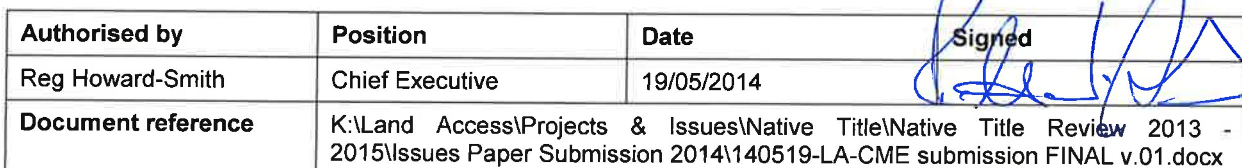
The Discussion Paper should give consideration to:

- **how joinder provisions can have clarity, consistency and certainty, without inhibiting court discretion regarding joinder decisions;**
- **maintaining the ability of holders of non-native title interests to participate in the proceedings, or monitor the development of these issues;**
- **altering how respondents can withdraw from claims in a more efficient manner; and**
- **how, following determination, native title group member registers can remain contemporary.**

Conclusion

CME would welcome further opportunity to provide additional input in the consultation period and the drafting process of the Discussion Paper. If you have any further queries regarding the above matters, please do not hesitate to contact:

Kane Moyle, Manager – Land Access and Environment, on (08) 9220 8511 or k.moyle@cmewa.com.



Authorised by	**Position**	**Date**	**Signed**
Reg Howard-Smith	Chief Executive	19/05/2014	
Document reference	K:\Land Access\Projects & Issues\Native Title\Native Title Review 2013 - 2015\Issues Paper Submission 2014\140519-LA-CME submission FINAL v.01.docx		

CME