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

Australian Law Reform Commission

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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 value of Western Australia's mineral and petroleum production was $121.6 billion, accounting for 91 per cent of the state's total merchandise exports. Furthermore, the value of royalties received by the Western Australian government from the resources sector increased by 33 per cent from the 2012-13 financial year to reach a record $6.98 billion in 2013-14.

Recommendations

CME is concerned the Australian Law Reform Commission's (ALRC) Discussion Paper recommends amendments to the Native Title Act 1993 (Cth) (NTA) without substantive empirical evidence justifying the changes.

If adopted, the combined outcome of the changes may result in more claims being registered and more claim groups having access to procedural rights under the NTA, including the right to negotiate process.

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. Proposals under consideration in the Discussion Paper 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.

Framework for Review of the Native Title Act

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

Traditional Laws and Customs

- **CME considers the Discussion Paper does not present significant evidence for the substantive changes proposed in relation to the "connection" provisions. CME recommend the existing definitions of native title in s223 of the NTA be retained.**

Physical Occupation and Transmission of Culture

- **CME does not support the removal of references to 'traditional physical connection' in the NTA.**

The Nature and Content of Native Title

- **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.**

Authorisation

- **CME supports Proposals 10-1 and 10-2 to amend s251A&B of the NTA to permit claim groups, when authorising an application, to use a decision-making process agreed on and adopted by the group.**
- **CME does not support Proposal 10-3 to amend the NTA to clarify a claim group may define the scope of the authority of the applicant. CME considers the introduction of a fiduciary duty on the applicant to the broader group would overcome public concerns**.
- **CME is concerned Proposal 10-6 does not provide sufficient procedural rigour and s66B should be retained as it currently exists. While it may be a complex process it does provide a form of natural justice.**

Joinder

- **CME does not support s84(3) of the NTA being amended to permit those only with a legal or equitable estate or interest in the land or waters claimed, to becomes parties to a proceeding.**

Context

Western Australia Resources Sector

Western Australia contains the largest area of land where native title has been determined to exist. As at 31 December 2014, native title has been determined to exist over 1,121,235 square kilometres, equating to 44.3 per cent of the Western Australian jurisdictional area.[1]

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 are committed to developing relationships with Aboriginal people and entities based on integrity, mutual respect and sustainability and the resolution of issues arising from the existence of native title by agreement. CME Members are parties to most of the native title determinations made by consent in Western Australia and have negotiated many agreements, including those which have provided significant economic contribution to the advancement of Aboriginal people in Australia.

Native Title Determinations in Western Australia

CME's Issues Paper submission highlighted 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.[2] 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.[3] 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.[4]

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 12 in 2009 to 31 in 2014 (see Table 1).

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.[5]

Note also in relation to footnote 5 there have been 59 determinations native title does not exist, 43 of which are in NSW and arose from non-claimant applications by the Local Aboriginal Land Council (effectively opposing native title).

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[1] National Native Title Tribunal, Determinations of Native Title, as at 31 December 2014.

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

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

[4] *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.

[5] 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.

Table 1: Statistics from National Native Title Tribunal website

Calendar Year	Total Determinations	Consent Determinations	No Native Title	Native Title in whole or part
2009	14	12	2	12
2010	13	10	2	11
2011	35	33	2	33
2012	46	40	7	39
2013	44	38	6	38
2014	39	31	5	34

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.

Framework for Review of the *Native Title Act*

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 legislation to be subject to a system failure and the Discussion Paper does not provide persuasive evidence to support a conclusion system failure has occurred. However, there are efficiencies to be gained in the system, as well as the need for additional clarity regarding the operational impact of some case law.

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.

In considering the reforms outlined in the Discussion Paper, the ALRC has canvassed if they should be applied retrospectively (Question 2-1).

CME considers certainty for all parties is vital for ongoing operation and integrity of the NTA. Any retrospective application of proposed amendments to the NTA risk undermining certainty which currently exists within the resources sector.

As highlighted in the CME Issues Paper submission, the industry remains opposed to any amendments applying retrospectively. Retrospective application of amendments of the nature contemplated in the Discussion Paper could result in:

- The reopening of existing determinations of native title by the holders of that native title (to have additional rights recognised) or other Aboriginal people (to change the group or groups holding native title);
- Additional claims to compensation;
- Challenges to non-native title interests and ILUAs that were made in reliance on the law as it existed before the amendments were made.

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

Traditional Laws and Customs

The ALRC Discussion Paper proposes a number of significant amendments to lower the threshold to prove native title exists.

Chapter 5 and 7 of the Discussion Paper put forward a number of proposals suggesting the definition of native title in s223 of the NTA be amended. These proposed amendments include:

- Clarifying traditional laws and customs may adapt, evolve or develop over time (proposal 5-1).
- Recognising rights and interests may be transmitted between groups in accordance with traditional laws and customs (proposal 5-2).
- Confirming it is not necessary to establish continuity of observance of laws and customs over time or by all generations (proposal 5-3).
- Clarifying it is not necessary to establish a single "society" unified by its observance of laws and customs since before sovereignty (proposal 5-4).
- Removal of the word "traditional" from the definition of native title in s223, to avoid the "complexity" of its interpretation and reflect contemporary views of law and custom (proposal 7-1).

These reforms would amount to a fundamental change to the concept of native title under Australian law, and move it away from its common law foundations, as articulated in the *Mabo* case. The ALRC proposals go well beyond what is expressly contemplated by the Terms of Reference. If adopted, these reforms will make it easier for claim groups to establish that native title rights and interests exist and mean:

- Native title rights and interests that did not exist at sovereignty may be recognised.
- Groups of persons who did not exist as native title holders under Aboriginal tradition may be recognised.
- The registration test will be a mere formality.

If the proposals are adopted, not only may native title be recognised where it had been extinguished under the current law, but groups with competing claims that may otherwise have failed because they were not recognised under Aboriginal tradition will hold native title on the basis of a "contemporary connection". This would include the possibility of more than one native title being recognised despite the opposition of the traditional land holding group.

The following is an example of how the changes could affect existing and future native title determination applications and give rise to additional uncertainty and litigation:

- Group A is descended from a group that held native title at sovereignty and continues to observe traditional laws and customs, and holds rights, based on that traditional system. The group made a native title determination application in 1999, which was not actively pursued toward determination until the late 2000s because the group was focussed on internal matters and negotiating agreements with mining companies. Under the current law, they should be recognised as holding native title.
- Members of Group B are descended from a traditional group who have been determined to hold native title to an area adjacent to (but not overlapping) Group A's lands. Some members of Group B relocated to live permanently at a community on the lands of Group A in the 1960s and 1970s. Group A formally recognised Group B's move so they could continue to live on Group A's lands. Members of Group B were originally included within the Group A native title claim group but Group A's claim was amended to exclude them in the 2000s on legal advice.

- Members of Group C are descended from an Aboriginal man who moved to the area of Group A in the early 1900s to work on a pastoral station, and married a member of Group A. Group C members claim their ancestor had rights to part of Group A's land transferred to him via a process of "adoption" giving rise to a native title right separate to that of Group A. Group C made a native title determination application over that area in 2013, which is opposed by Group A.

The amendments proposed by the ALRC would greatly increase the prospect of persistent competing and litigated claims by Groups A, B and C. Under the current system, Groups B and C are unlikely to hold native title within the lands of Group A. If the proposed reforms are made law, it is more likely the contemporary claims of Groups B and C will result in native title rights being recognised, either to the exclusion of Group A, or concurrently. This example is hypothetical but based closely on the actual circumstances of some native title determination applications in Western Australia.

While the resources sector does not typically become involved in the process by which native title claim groups prove "connection", it does have an interest in the expeditious resolution of native title claims to deliver certainty, confirm the validity of non-native title interests, and define the native title holders. The current underpinning of native title as finding its origin in the traditional pre-sovereignty system of laws and customs is fundamental to the NTA and the existing system as a whole. The proposed reforms would displace that underpinning and the full consequences will be unknown until the "new" system is the subject of legal test cases which will in all probability take many years to resolve.

The proposed amendments will, reduce certainty, broaden the scope and number of persons required to be engaged with over country and increase complexity, cost and time involved in the connection process.

CME considers the Discussion Paper does not present significant evidence for the substantive changes proposed in relation to the "connection" provisions. CME recommend the existing definitions of native title in s223 of the NTA be retained.

Physical Occupation and Transmission of Culture

The ALRC proposes amending the test to register native title claims by removing the requirement at least one member of the native title claim group has or previously had a *"traditional physical connection"* with any part of the land or waters (proposal 6-1).

The proposed amendments to the registration test may cause significant delays and costs through the splitting of claimants, resulting in multiple competing groups. An increase in the number of registered groups may lead to more overlapping claims and greater complexity in the negotiation process. Moreover, if the requirements for "tradition" in s223 are removed, then the other merits requirements of the current registration test will necessarily be watered down considerably, which will encourage more native title determination applications, including overlapping claims.

CME does not support the removal of references to 'traditional physical connection' in the NTA.

The Nature and Content of Native Title

The key question for this part of the Inquiry is whether there should be statutory confirmation of the current statement of the law in *Akiba v Commonwealth* as a platform for the courts to assess the evidence in each instance to determine the content of the native title rights and interest.[6]

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

The High Court's 2014 decision in *Akiba* affirmed 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. Following *Akiba*, it is not necessary to establish native title rights are exclusive in order to obtain commercial rights and interests, at least in relation to sea claims.[7]

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.

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 no need for the proposed reforms if the intention is as stated by the ALRC: to have s223 reflect the judgement in *Akiba*. *Akiba* itself reflects the current wording of s223. The proposed changes will, if they do anything, materially expand the scope of native title rights and interests that could otherwise have been recognised beyond traditional rights that existed under the pre-sovereignty system. This will further undermine the fundamental underpinnings of the Native Title Act.

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.

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.

CME supports Proposals 10-1 and 10-2 to amend s251A&B of the NTA to permit claim groups, when authorising an application, to use a decision-making process agreed on and adopted by the group.

To ensure consistency in the operation of the NTA, any amendments made to the definition of "authorise" for the purpose of bringing native title claims (s251B) must also be made to the definition of "authorise" for the purpose of entering into ILUAs (s251A). 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 the native title applicants have authority to enter into ILUAs.

CME does not support Proposal 10-3 to amend the NTA to clarify a claim group may define the scope of the authority of the applicant. CME considers the introduction of a fiduciary duty on the applicant to the broader group would overcome public concerns.

Proposal 10-6 recommends s66B of the NTA should provide, where a member of the applicant is no longer willing or able to act, the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise.

CME is concerned Proposal 10-6 does not provide sufficient procedural rigour and s66B should be retained as it currently exists. While it may be a complex process it does provide a form of natural justice.

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

However, it is important native title claim groups are able to continue to transact business within the authority of the applicant pending completion of authorisation using s66B. This is consistent with current practice and the approach taken by the Courts to the authorisation of ILUAs. That is, CME supports a modified version of proposal 10-6 to authorise the remaining members of the applicant to continue to act until reauthorisation is completed.

Joinder

CME considers it important there is clarity, consistency and certainty regarding joinder provisions. However, this needs to be balanced with not unduly inhibiting 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. A number of recent examples of the validity of mining interests being challenged through this process were highlighted in CME's Issues Paper submission, notably including the recent determination in *Graham v Western Australia* which resulted in a finding a range of significant mining interests were invalid because of technical non-compliance with the procedural requirements of the NTA, in some instances more than a decade before the decision.[8]

CME does not support s84(3) of the NTA being amended to permit those only with a legal or equitable estate or interest in the land or waters claimed, to becomes parties to a proceeding.

CME considers there must be a flexible approach to the joinder of holders of non-native title interests to native title claims so non-native interest holders can ensure their interests are recognised and given full effect. The ALRC paper appears to fail to take into account the decision in *Tec Desert Pty Ltd v Commissioner of State Revenue*, which might mean the proposed amendments would exclude mining leases from the class of interests which qualify for the purposes of s84(3).[9]

Proposals 11-1 to 11-7 if adopted should improve simplicity in the claims process and reduce costs.

[8] *Graham on behalf of the Ngadju People v State of Western Australia* (2014) FCA 1247.

[9] *Tec Desert Pty Ltd v Commissioner of State Revenue* (2010) 241 CLR 576.

Conclusion

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

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Authorised by	Position	Date	Signed
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