19 January 2015

Ms Sabina Wynn
Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001 WA 6005

Dear Ms Wynn

Native Title Act Inquiry

Thank you for the opportunity to comment on the Discussion Paper dated October 2014, on the *Review of the Native Title Act 1993.*

The Association of Mining and Exploration Companies (AMEC) has reviewed the Discussion Paper and is of the strong opinion that adoption of the proposals will result in major upheaval to the native title system, increased litigation, delays in claims resolution, high costs, deferred economic and social opportunities and uncertainty for all parties. These are all significant factors that must be considered in any reform program.

AMEC does not consider that the Commission has made a justifiable case to amend the *Native Title Act* in the manner proposed within the Discussion Paper.

A major issue for the mining industry is the considerable difficulty surrounding over lapping claims and the existence of multiple stakeholders. AMEC has therefore consistently recommended 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. This issue has not been addressed in the Paper.

AMEC expresses caution that prior to making far reaching recommendations to Government to change the current native title system as proposed, the Commission should fully consider and detail the extent and nature of the implications of those recommendations in its Final Report.

Please find **attached** the AMEC submission in response to the Discussion Paper.

If you have any questions please do not hesitate to contact me.

Yours sincerely

Simon Bennison
Chief Executive Officer

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Submission to:

Australian Law Reform Commission

Review of the Native Title Act 1993 – Discussion Paper

ASSOCIATION OF MINING AND EXPLORATION COMPANIES

January 2015

Contents

Prepared by

Association of Mining and Exploration Companies Inc (AMEC)

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Introduction

Thank you for the opportunity to comment on the Discussion Paper dated October 2014, 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 more efficient and effective operation of the complex native title system. It is in this context that this response is made.

Executive Summary

AMEC has a long standing objective for increased clarity, 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 previously expressed concern that an apparent lack of strategic direction, leadership and consultation are significant factors why there are over 400 native title applications still to be resolved.

This position appears to have marginally improved over the last six months as a result of claims resolution mainly in Western Australia (from 104 to 101) and South Australia (from 22 to 20).

Despite the marginal reduction in the number of outstanding claims, AMEC particularly notes the fact that the median time for resolutions has significantly reduced over the last 12 months. This is a positive development.

This has also been acknowledged in the Social Justice and Native Title Report 2014 which indicated that "*the primary focus of the native title system has moved to the resolution of claims*" (*page 77*).

A major issue for the mining industry is the considerable difficulty surrounding over lapping claims and the existence of multiple stakeholders. This issue has not been addressed.

AMEC has reviewed the Discussion Paper and is of the strong opinion that adoption of the proposals will result in major upheaval to the native title system, increased litigation, delays in claims resolution, high costs, deferred economic and social opportunities and uncertainty for all parties. These are all significant factors that must be considered in any reform program.

AMEC expresses caution that prior to making far reaching recommendations to Government to change the current native title system as proposed, the Commission should fully consider the extent and nature of the implications of those recommendations in its Final Report.

Responses to the Discussion Paper

AMEC does not consider it relevant to respond to all issues contained in the Discussion Paper, but does provide the following broad comments to assist the Review:

Case for change

AMEC does not consider that the Commission has made a justifiable case to amend the *Native Title Act* in the manner proposed within the Discussion Paper.

In fact, rather than addressing issues surrounding efficiency, effectiveness, and timeliness, implementation of the recommendations will undoubtedly result in long delays whilst new issues are dealt with through the Courts, increasing uncertainty and adding cost to participants.

This will be an unacceptable outcome for all parties, particularly whilst the Courts create new case law precedents over the next two decades, at a minimum.

Framework for the Review (Chapter 2)

The Commission has sought comment on whether the proposed amendments should have prospective operation only.

Any consideration of retrospective application of legislative change to the *Native Title Act* would be disruptive to the whole native title system and re-open case law which has developed over the last 20 years.

Defining Native Title (Chapter 4)

Acknowledging that proof of connection in native title claims is an area in which AMEC members do not usually become involved, increased consistency and certainty in the connection process would 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.

AMEC is however concerned that adoption of the proposals in the Discussion Paper will:

- affect existing case law which has been developed since 1992;
- increase litigation to 'test the law'; and
- impact on existing determinations of native title.

AMEC is also concerned that a number of proposals appear to lower the threshold to prove that native title exists. These include:

- clarifying that traditional laws and customs may adapt, evolve or otherwise develop,
- clarifying that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs,
- indicating that it is not necessary to establish that:

  (a) acknowledgement and observance of laws and customs has continued substantially uninterrupted since sovereignty,

(b) laws and customs have been acknowledged and observed by each generation since sovereignty

- removal of the word 'traditional' from the definition of 'native title'.

In addition, AMEC members, who may find themselves as respondents to native title proceedings, would benefit from greater transparency on the basis on which the primary respondent (the relevant State or Territory Government) accepts connection or refuses to accept.

Clarity on the lead respondent's position and the basis for that position, particularly early in a claim process, would 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. This transparency issue should be addressed.

AMEC considers the full implications on the claims process needs to be fully considered before pursuing the proposals contained in the Discussion Paper.

Physical Occupation (Chapter 6)

AMEC does not agree that the definition of native title should be broadened to the extent contemplated by proposals 6.1 and 6.2.

The proposed amendments seek to significantly expand the scope of potential claimants, making it difficult for parties to be certain of who may be involved in a claim and may have the effect of splitting claimant groups (resulting in multiple competing claims). Further, an increase in the registration of groups may lead to an increase in the costs of the right to negotiate process.

Nature and Content of Native Title (Chapter 8)

AMEC notes the proposal to expand the scope of Native Title rights and interests by amending Section 223(2) of the Act to:

a) comprise rights in relation to any purpose; and
b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.

These proposed amendments appear to be broad and far reaching, particularly with reference to '*any purpose*' and '*commercial activities*'.

AMEC 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.

AMEC does not support the recognition of commercial rights in the definition of native title.

Whilst mineral ownership rights would not be affected by the proposed amendments to s.223(2), the inclusion of "commercial activities and trade" raises some uncertainty with regards to other surface resource ownership rights, including water rights.

The Discussion Paper provides insufficient explanation or rationale for the proposal. Nor does it consider the implications of such a change, particularly in cases where rights and access to water may be required.

Authorisation (Chapter 10)

The Commission acknowledged that AMEC seeks clarity on the issue of the scope of the authority of the Applicant.

AMEC reiterates that mechanisms that will provide greater clarity and 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) are required.

Greater clarity regarding authorisation is needed because industry is concerned about the uncertainties raised in both the Discussion Paper and 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 the absence of a successful s66B application (which AMEC members acknowledge can be unwieldy, time consuming and expensive).

AMEC acknowledges that the Commission has considered the extent to which the terms of an Applicant's authorisation (particularly in relation to agreement-making) are disclosed to counter parties.

AMEC recommends 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.

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.

More transparency and certainty relating to the scope of an Applicant's authority in both claim and future act contexts should be provided. Clarity on the extent to which a person is entitled to make certain assumptions about the authority of an Applicant in the context of agreement-making would be of assistance. This would be along similar lines to the assumptions which can be made about the execution of documents and authority of directors of corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth).*

AMEC has also consistently recommended 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 (Chapter 11)

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).