31 January 2013

Committee Secretary
Senate Legal and Constitutional Affairs Committee
By email: legcon.sen@aph.gov.au

Dear Sir/Madam

CME and the WA resources industry

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 who generate 95% of the value of all mineral and energy production and employ 80% of the resources sector workforce in the State.

CME members are major stakeholders in the native title system in Australia. Many of the projects undertaken by CME members involve 'future acts' under the *Native Title Act 1993* (Cth) (**NTA**), in relation to which procedural rights are afforded to native title holders and registered native title claimants.

The State of Western Australia is subject to the highest national volume of future act processes. Since 2000, 75% of the tenement applications and land acquisitions notified under s29 and 87% of future act determination applications occurred in Western Australia. Western Australia also contains the largest area of land where native title has been determined to exist or is under claim. As a result, proposed amendments to the NTA, particularly amendments to future act processes under the NTA, will impact members of the resources industry operating within the State; a fact recognised by Coalition Senators in the 2011 Report of the Senate Legal and Constitutional Affairs Legislation Committee.[1]

CME members recognise long term productive relationships with Native Title Representative Bodies (**NTRBs**), Prescribed Bodies Corporate (**PBCs**), Aboriginal groups and traditional owners is inextricably linked to the resources sector maintaining and enhancing its 'social licence to operate'. 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.

CME members are committed to working with key stakeholders to establish efficient and equitable legislation and processes to provide certainty to all parties and appreciates the Senate Committee for the opportunity to provide comment on the Native Title Amendment Bill 2012 (**the Bill**).

CME has participated in the consultation process undertaken by the Commonwealth Attorney-General's Department in relation to proposed changes to the NTA, resulting in the Bill. As part of this process, CME raised concerns through meetings with the Commonwealth Attorney-General's staff and provided a formal submission (**Attachment A**).

Issues

Western Australian stakeholders are significant participants in the native title system and, as such, have extensive experience in all aspects of this system. Changes to the native title

[1] Report of the Senate Legal and Constitutional Affairs Legislation Committee; Additional Comments by Coalition Senators, November 2011, para 1.16

regime, through either legislation or policy, have significant consequences for this State and, ultimately the country, in economic and social terms. This was recognised by the previous Senate Committee inquiry into these matters.[2] Concerns expressed by members of the resources industry, who work with these processes on a daily basis, should be given appropriate weight in the consideration of the benefit of introducing amendments to the NTA.

The transparent and timely resolution of native title matters is essential for Western Australian industry members and CME supports genuine considered and sustainable reforms. The majority of submissions provided to the Commonwealth Attorney-General, regardless of the level of support for proposed amendments, identified the need for broader refinement of the native title system through more strategic and extended consultation. CME agrees improvements could be made to the NTA and the native title system but considers such changes should be undertaken in a strategic and holistic manner following substantial consultation with stakeholders, as occurred leading to the 1998 amendments.

It is concerning to CME members the Commonwealth Government has proceeded with a Bill that advances proposed amendments in essentially the same terms as previously raised despite it's own undertaking that "the Government will only undertake significant amendments to [the Act] after careful consideration and full consultation with affected parties to ensure that amendments do not unduly or substantially affect the balance of rights under the Act."[3] CME submits the Government has not achieved its goal in this regard.

1. Limited consultation

CME is concerned at the limited consultation undertaken in regards to elements of the Bill which introduce significant amendments to the NTA and the manner in which concerns of parties have been accommodated.

CME members have extensive experience working within the native title system and believe their concerns have, to date, not been afforded due consideration, with only minor amendments made to the exposure draft as a result of consultation. This is despite the provision of detailed submissions identifying how the proposed amendments would not only fail to deliver the Government's stated objectives but would, in fact, create greater uncertainty and delays in reaching negotiated outcomes to the detriment of native title holders and claimants.

For example, while CME members do not believe it is necessary to codify criteria relating to the Negotiation in Good Faith (**NIGF**) regime under the NTA, it is acknowledged other parties hold opposing views. However, if such codification occurs, it is logical to proceed with the indicia which have guided the National Native Title Tribunal (**NNTT**) and parties for more than 15 years – the 'Njamal Indicia'.[4] The Njamal Indicia, developed from consideration of the specific issues facing parties in native title negotiations, are directly relevant to native title and have been the subject of extensive arbitral and judicial consideration. To introduce criteria from the *Fair Work Act 2009* (Cth), which add little by way of guidance to the NNTT in considering whether a party has negotiated in good faith but which introduce new terminology into the native title system, will lead to uncertainty and consequently, litigation.

CME members made this point repeatedly in discussions with the Commonwealth Attorney-General's staff and in its submission. This issue was also raised by other stakeholders in their submissions.[5] However, the Bill proceeds on the same terms with only some minor changes

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[2] Report of the Senate Legal and Constitutional Affairs Legislation Committee; Additional Comments by Coalition Senators, November 2011, paras 1.17 and 1.20

[3] Commonwealth of Australia, Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment (Reform) Bill 2011, p1

[4] See *Western Australia/Johnson Taylor on behalf of the Njamal People/Garry Ernest Mullan,* [1996] NNTTA 34 (7 August 1996)

[5] See submissions by South West Aboriginal Land and Sea Council, Western Australian Government, Victorian Government, National Native Title Tribunal, Melbourne University, Just Us Lawyers, South Australian Government, Context Anthropology, Minerals Council of Australia and Association of Mining and Exploration Companies. The Australian Institute of Aboriginal and Torres Strait Islander Studies submitted the codification of *Fair Work Act* provisions were unlikely to improve the agreement making process.

between the exposure draft and the Bill on this issue. If the objective is to achieve greater certainty and timeliness, it is imperative this issue be the subject of further consultation and consideration before any amendments are made.

It is also concerning to CME members the scope of the inquiry by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs into the Bill has been broadened to include proposals for the future reform of the Native Title process, including the reverse onus of proof for claimants on on-going connection to land. CME will also be providing a submission to this Committee.

2. Achievement of policy objectives

CME's submission identified the lack of strategic alignment between the Commonwealth Government's stated policy objectives to improve agreement making, encourage flexibility in claim resolution and promote sustainable outcomes through reform of the native title system and the provisions of the Bill. Other submissions identified the same issue.[6]

As noted above, one significant issue is the how the proposed codification of negotiation in good faith criteria imported from the *Fair Work Act* would introduce uncertainty and ambiguity into the system, in direct contrast with the Government's objective to reduce uncertainty.

CME previously submitted, and reiterates, the commitment of its members to legislative and policy amendments to the native title regime, following considered stakeholder consultation, if proposed amendments deliver streamlined, flexible and sustainable outcomes in both the resolution of native title claims and future act negotiations which is not the case in the current Bill.

3. Justification for change

A significant concern for CME members, as articulated in its previous submission, is the justification for the proposed amendments and the consequences of these amendments as they are currently drafted. While CME members unequivocally support the Commonwealth Government's stated objective to improve agreement making, encourage flexibility in claim resolution and promote sustainable outcomes, members have significant concerns regarding the strategy being advanced to purportedly achieve these objectives. CME supports changes to deliver a certain, transparent and sustainable environment for native title stakeholders and is willing to work with the Commonwealth Government to achieve this.

The lack of a clearly articulated rationale and strategy for reform raises concerns among members. *Ad hoc* minor changes, more often than not, have unintended consequences which do little to address the difficulties faced by native title stakeholders, or industry seeking to negotiate with stakeholders. This fact was acknowledged by the Senate Committee on Legal and Constitutional Affairs Legislation in its November 2011 report where Committee members indicated they had "serious reservations about the introduction of legislation which seeks to make amendments – particularly in an area as complex and technical as native title – in a piecemeal manner...[so] that no unintended consequences arise."[7]

For instance, in its submission, CME queried the justification for the proposed changes to the NIGF regime and, to this end, provided detailed statistical analysis to support its position. These figures indicate there is no apparent justification for the proposed provisions which, in CME's view, will introduce fundamental changes to the system and will, in turn, have an overwhelmingly negative impact on the system.[8] Despite the provision of this data to the Commonwealth Attorney-General's Office, the concerns raised by CME remain largely unaddressed, particularly in relation to the case law provided by the Commonwealth Attorney-General's office allegedly identifying an issue with

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[6] National Native Title Tribunal, Minerals Council of Australia, Western Australian State Government.

[7] Report of the Senate Legal and Constitutional Affairs Legislation Committee, November 2011, para 3.83

[8] CME notes the Western Australian Government submission and the Association of Mining and Exploration Companies similarly provided statistical support for their contention there is no evidence of a systemic failure within the future act regime.

good faith negotiations. CME has examined the list of cases and can find no substantive basis for the proposed amendments in this body of law. Other parties also questioned the justification of the proposed changes in their submissions in this round of consultation[9] and previous consultation on the same issue.[10]

CME submits the Government should, at first instance, clearly identify the basis of the need for legislative amendments following consultation with stakeholders and then determine the most appropriate mechanism to address identified problems.

4. Unintended consequences

CME's previous submission identified unintended consequences which would flow from the proposed provisions. In summary these were:

- Litigation as a result of the introduction of provisions from the *Fair Work Act*, leading to delays in determinations; and
- Reduced flexibility in negotiations as a result of the introduction of NIGF criteria and the change of focus in NIGF inquiries.

In addition, the proposed provision at s36(2)(2) requiring the arbitral body to inquire into whether a particular party has negotiated in good faith when the issue is raised by another party would substantially alter the way these inquiries are conducted. As the President of the NNTT has noted, such enquiries require "contextual evaluation" whereby "the approach taken by one party is normally influenced by the approach taken by, or the conduct and actions of, another." To move from a holistic evaluation of a negotiation to a situation where one party's conduct is examined in isolation would substantially alter the inquiry process and move it towards a mechanistic evaluation of whether "a party has not met all of the indicia or even most of them."[11]

CME submits the Bill, in its current form, would not achieve the policy objectives of the Commonwealth Government but would create an increase in litigation, would reduce flexibility and would introduce delays in the resolution of negotiations.

5. Conclusion

Submissions provided in the consultation on the exposure draft indicated a strong desire by stakeholders to participate in further consultation to discuss potential amendments to the NTA in a more considered manner, particularly proposed additional amendments such as the reverse onus of proof. CME urges the Committee to recommend the Bill be referred back to the Attorney-General's Department for extensive public consultation on how the NTA, and the operational system supporting it, could best be improved. Only following this consultation should further legislative changes be introduced.

Should the Committee recommend the Bill proceed, CME submits:

1. NIGF criteria should not be enshrined in legislation, rather the Njamal Indicia should be used as Guidelines.
2. If the Committee sees benefit in enshrining NIGF criteria within the NTA, those criteria should be the Njamal Indicia.
3. The current NIGF inquiry process should be retained.

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[9] The Law Society of New South Wales, Western Australian Government, Victorian State Government, Minerals Council of Australia, Association of Mining and Exploration Companies.

[10] See Report of the Senate Legal and Constitutional Affairs Legislation Committee; Additional Comments by Coalition Senators, November 2011, para 1.21

[11] All citations in this paragraph are taken from the decision *Coalpac Pty Ltd/State of New South Wales/Gundungurra Tribal Council Aboriginal Corporation #6 (NC97/7), Wiray-dyuraa Maying-gu (NC11/3), Warrabinga-Wiradjuri People (NC11/4)/State of New South Wales*, [2012] NNTTA 145 (24 December 2012) paras38-9

4. Clarity should be provided regarding any compensation liability for third parties in reviving native title rights and interests through the proposed s47C.
5. No further legislative amendments should occur without extensive stakeholder consultation.

CME also requests the opportunity to attend any hearing the Committee may conduct to discuss this submission in greater detail and looks forward to hearing from the Committee in due course.

Yours sincerely

Reg Howard-Smith

Chief Executive