July 26, 2011

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Re: Native Title Amendment Bill

The Minerals Council of Australia (MCA) is the peak national industry association representing exploration, mining and minerals processing companies in Australia. MCA members account for more than 85% of annual minerals production in Australia and a slightly higher proportion of mineral exports.The MCA has prepared this submission in collaboration with the Chamber of Minerals and Energy of Western Australia, the South Australian Chamber of Minerals and Energy and the Queensland Resources Council.

Members of the MCA recognise that Industry's engagement with Indigenous peoples needs to be founded in mutual respect and in recognition of Indigenous Australians' rights in law, interests and special connections to land and waters. This point is made even more acute by the fact that more than 60% of minerals operations in Australia have neighbouring Indigenous communities.

The MCA's vision is a thriving minerals industry working in partnership with Indigenous communities for the present and future development of mineral resources and the establishment of vibrant, diversified and sustainable regional economies and Indigenous communities. Industry further recognises that the present and future operations of minerals companies are inextricably linked to building and enhancing our strong relationships with Indigenous communities, and to meeting the needs of this generation without compromising the ability of future generations to meet their own needs.

Industry is committed to working with Indigenous communities to ensure that they share the benefits of responsible resource development, this within a framework of mutual benefit, which respects Indigenous rights and interests. Accordingly, the MCAwelcomes changes that improve the efficiency and operability of the Native Title system without diminishing the rights of Indigenous Australians.

The MCA considers that given the importance of the native title system to all Australians, any proposed amendments to the system must be based upon a consultation process that is inclusive of ***all***keystakeholders. This is to ensure there is a shared understanding of both the intent of the change and that the proposed changes will be effective in addressing the matters to which they are targeted, while also ensuring that there are not unintended consequences of the reform.

As a significant stakeholder in the development and implementation of the Native Title Act the minerals industry believes it has a role in constructively contributing to a review of the Native Title Act. Accordingly, the MCA is disappointed that to our

knowledge there has been no effort by Senator Siewart in seeking to engage the minerals industry as a critical stakeholder in the native title system and a major user of the Future Act regime.
While the MCA acknowledges that there is a need to ensure that the native title system is effectively delivering on its intent it is MCA's view that the proposed Native Title Amendment Bill proposes the most significant change to the Native Title Act since its enactment. The Bill is a substantial realignment of the underpinnings of the current Native Title Act (1993) and is likely to require Courts to once again determine the key principles of native title.

The MCA considers that any review of the Native Title Act (especially one as significant as this proposed Amendment Bill) should address its effectiveness and alignment with State Government legislation and other requirements.

A number of the reforms put forward in the Bill are not supported by the Minerals Council of Australia, specifically:

a. *Insertion of the United Nations Declaration on the Rights of Indigenous People (UNDRIP)*

The intent of the Native Title Act (NT Act) is to provide a process as to how people who hold native title can have their rights to their land acknowledged and compensated for its use. The UNDRIP is a list or principles which have a broader application then the specific focus of the NT Act and are in fact more closely aligned to racial discrimination legislation.

At present the UNDRIP does not have any force or effect in law. The Government made the Declaration of Commitment on the basis that it would not need to be integrated into current legislation. Whilst the UNDRIP is increasingly being used in objections by Traditional Owners under the Act, its inclusion in the NT Amendment Bill is premature and should be preceded by a broader debate within the community and Parliament.Integrating UNDRIP into the NT Act without giving consideration to the full range of implications is premature and risks providing significant uncertainty about the intended outcomes and how they will be achieved.

Specifically, the entrenching of "prior informed consent" in the form proposed will, when combined with the changes to the right to negotiate, elevate the right to negotiate (and other processes) to effectively a power of veto. The original notion that the right to negotiate is supposed to be balanced and not provide a veto is a fundamental principle that underpins the NT Act which the MCA considers is essential to retain.

It was initially intended that a social justice package would be announced when the NT Act was introduced, however this has not yet occurred. MCA suggest that it maybe more appropriate for consideration to be given to incorporating components of the UNDRIP into a social justice package that complements the NT Act in the future.

b. *Acquisition does not in itself extinguish native title, (24MD (2)(c)).*

The MCA considers that this change will result in much greater uncertainty for all parties than exists under the current legislation as it will not be clear how and when compensation should be negotiated at the differing stages of exercising native title rights. Further, the change is inconsistent with the original intent of the NT Act (the principle throughout the Act has been that the granting of rights has an effect on native title, not the exercising of those rights) and is therefore not supported.

c. *Requires parties to negotiate in good faith for at least 6 months, (new paragraph 31(1)(b)).*

The MCA considersthat the quality of the negotiations should be the focus of the good faith provisions of the NT Act rather than the length of the negotiation period. The requirement to negotiate in good faith for at least six months may have the impact of pushing out the negotiation timeframes which in fact could have been undertaken in a shorter timeframe. The amendment is considered unnecessary and is therefore not supported.

d. *Onus of proving negotiation has been in good faith will be on the party asserting good faith, (new subsection 31(2)).*

The MCA understands that the proposed amendment could result in the requirement to have two hearings to test the application of good faith negotiations and challenge provisions, rather than the present one hearing to challenge provisions.The MCA considersthe existing provisions requiring the party asserting that negotiation in good faith has

not occurred and demonstrating the basis for contention are appropriate and that the proposed change is both unnecessary and a mis-use of already constrained resources in the native title system.

e. *Person may not apply to the arbitral body until it has complied with the provisions relating to demonstrating good faith in negotiations, (new subclause 35(1A)).*

See *d* above.

f. *Profit sharing conditions, including payment of royalties, maybe determined by the arbitral body in relation to future acts, (new subsection 38(2)).*

The Minerals Council of Australia considers that it is not appropriate to refer to payments to Indigenous people as royalties. Royalties are payable to the Crown as the owner of mineral resources, and the current payments under the Aboriginal Land Rights Act in the Northern Territory are consequently referred to as mining royalty equivalents.

Under the current Act it is a requirement to reach an agreement before proceeding to the compensation negotiations. This change will require the arbitrator to decide compensation matters which would remove the incentive for parties to reach agreement or expose people to two compensation processes. Revising the existing provision could also have other unintended consequences i.e. may mandate ongoing payments to non-traditional owners.

The amendments appear to be seeking to prescribe the outcomes of agreement making. This is evidenced by the lack of clear guidelines as to how compensation will be awarded, as well as references to profit sharing. These approaches have the potential to compromise current industry practice where in the agreement process Indigenous peoplewith inferred native title rights are treated as though they have native titledeterminations.This approach both broadens the range of benefits provided under the agreements as well as providing an incentive to reach an agreement.

The term profit sharing is too narrow a focus relative to the current approaches being taken in negotiations, which is around benefit sharing.The mining related agreements which are recognised by both industry and native title representative bodies as leading practice are those which contain a mix of both financial and non-financial benefits – including education, training, business development and employment. This is in addition to financial compensation for loss/impairment of rights.

It is the strong view of the MCA that the remaining proposed amendments require rigorous and inclusive stakeholder engagement and consultation to clarify their intent, assess their impact, and further develop amendments to ensure they deliver their desired intent. This includes the following proposed amendments:

g. *Effective protection or preservation of areas or sites (substitute paragraph 24 MB (1)(c))*

The MCA agrees with the intent of improving current cultural heritage provision. However, it believes there are other legislative instruments which focus on effective cultural heritage legislation which should be the focus of improvement in order to achieve better outcomes for Indigenous people. Amendments to the NTA are not an appropriate or effective means of forcing changes to State heritage laws or an addition to the Commonwealth Heritage Act.

h. *Right to negotiate to acts that relate to a place on the landward side of the high-water mark of the sea (repeal subsection 26 (3))*

The MCA considers the amendment has pragmatic implications in extending the right to negotiate to ports and other infrastructure. There needs to be greater clarity and justification for introducing the proposed onerous obligations in relation to offshore activities.

i. Criteria for parties who are required to negotiate in good faith (new subsection 31 (1A))

The MCA is concerned the new subsection is highly prescriptive, onerous, and likely to promote further litigation about the quality of negotiations. Any changes should be the subject of careful and balanced consideration, in order to give greater certainty by clarifying any present ambiguities rather than making the obligations substantially more onerous.

j. The applicant and government may make an agreement that the extinguishment of native title rights and interests to be disregarded (new section 47C)

The MCA is concerned that the new section would create significant additional uncertainty and risk as the native title party and government could revive native title in an area of a mining tenant without the agreement of the tenement holder.

k. *Native title determination in a range of new circumstances and connection (new subsection 61AA(1) and new section 61(B)*

The MCA considers the proposed change will still require that the registration process continues to exist. The proposal requires careful and detailed analysis to avoid unintended consequences. This includes ensuring the identity of the native title holders and the rules regarding who can exercise what rights (and how) is clear.

The MCA considers that is it also of particular concern that the proposed changes do not address the need to build capacity within Indigenous communities, including the need for Indigenous Australians to be supported in effectively managing the already significant transfer of wealth from the minerals sector to native title claimants who are fortunate enough to enjoy the existing rights under the NTA. In this vein, the MCA recommends that further consideration be given to the implementation of alternative trust and taxation structures, such as the joint MCA and National Native Title Council proposed Indigenous Community Development Corporation.[1]

Given the above significant concerns with the Bill, the MCA considers that it is critical that the Amendment Bill is opposed and that the matters raised are instead subject to a broader and more structured process of consideration.

Should you wish to discuss any of the issues outlined in this paper in further detail, please contact Melanie Stutsel, Director Health, Safety, Environment and Community Policy at the Minerals Council of Australia on (02) 6233 0625.

Kind regards,

Melanie Stutsel
Director – Health, Safety, Environment and Community Policy
Minerals Council of Australia

[1] Minerals Council of Australia (MCA) and National Native Title Council (NNTC), ***Government consultation on Indigenous Economic Development from mining agreementssubmission,*** *2010*