MINERALS COUNCIL OF AUSTRALIA

NATIVE TITLE ACT AMENDMENT BILL (2012) SUBMISSION

JANUARY 2013

SUPPORTED BY:

- Chamber Minerals and Energy Western Australia
- Minerals Council of Australia (Victoria)
- Minerals Council of Australia (Northern Territory)
- New South Wales Minerals Council Ltd
- Queensland Resources Council
- South Australia Chamber of Mines and Energy
- Tasmanian Minerals Council

Introduction

The Minerals Council of Australia (MCA) is the peak 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. Members of the MCA recognise that industry's engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australian's 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.

Industry is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests, and welcomes changes that improve the efficiency and operability of the Native Title system without diminishing the rights of Indigenous Australians. The MCA supports approaches that encourage negotiation and mediation in determining agreed outcomes with traditional custodians, in addition to promoting fair, transparent and timely decisions that do not impose unnecessary costs on those involved.

This submission outlines the minerals industry's concerns with the Native Title Act Amendment Bill (2012) (the Bill) proposed changes to the negotiation in good faith regime (NIGF), Indigenous land use agreements (ILUAs) and historical extinguishment provisions.

'Good faith' and associated amendments under the 'right to negotiate' provisions

The MCA is committed to facilitating implementation of good faith negotiations across the minerals industry in its engagement with Indigenous communities and organisations. It is our view that the NIGF processes under the NTA are working well, as demonstrated by over 15 years of practice and case law, and that the proposed changes to the NTA have the potential to unnecessarily create uncertainty, delays in decisions and opportunities for perverse outcomes which should be avoided.

The MCA supports the objectives of improving agreement-making and encouraging parties to focus on negotiated, rather than arbitrated outcomes. However the underlying assumption behind the proposed changes is that the right to negotiate processes do not adequately encourage the parties to focus on negotiated outcomes. The changes appear to be directed at changing the relative bargaining power of the parties to achieve a greater number of negotiated outcomes as opposed to arbitrated determinations.

The underlying assumption is also not supported by the statistics available from the National Native Title Tribunal (NNTT) in relation to agreement making versus determinations. The following tables in Attachment A clearly demonstrate that:

- the overwhelming majority of tenements granted from 1 January 2000 to 11 October 2012 (greater than 98.5%) were granted through negotiated outcomes (agreement between the parties) not arbitrated determinations, or are continuing in the negotiation process (or are no longer being pursued);
- whether a party has negotiated in good faith has only been challenged 31 times which is less than 1%, and only 3 determinations found that the grantee had failed to negotiate in good faith; and,
- the average negotiation period is 39 months demonstrating that a significant amount of time is invested in the process - much longer than the current minimum 6 month period. This supports the view that

proponents and State Governments are not simply complying with a process for the sake of it. They are investing considerable time before resorting to the determination process.

The MCA considers that the Government has provided no clear rationale for the proposed changes and the available data does not support the need for these reforms.

Changing the standard to which parties must negotiate

Previously the MCA was concerned that requiring negotiating parties to use "all reasonable efforts" to reach agreement as opposed to negotiating parties having to negotiate "with a view to reaching settlement" created a statutory expectation that an agreement would be reached, including an expectation that the relationship is of a particular standard. We have argued that from a legal perspective the change goes well beyond the existing requirement that the parties must negotiate in good faith with a view to obtaining the agreement of the native title parties and that the achievement of the standard being set by the Bill is potentially unrealistic even where a proponent has the best of intentions.

It is noted that s31A(1) of the Bill provides that parties must use all 'reasonable' efforts to reach agreement about the doing of the act. 'Reasonable', however, is not defined in the Bill, and will be assessed in the circumstances of the negotiation in question (e.g. size of project, amount of land involved). The MCA continues to be of the view that this new obligation will undoubtedly generate litigation to clarify what 'reasonable' means as the new provisions do not provide sufficient clarity or certainty. This was the experience with the original drafting of the provisions, which resulted in major 'test cases' over a period of years.

When this uncertainty and resultant delay is weighed up against the number of tenements that have had an arbitrated determination (which is significantly less than 1%) the MCA submits there is compelling logic not to proceed with the amendment.

Changing the indicia of good faith

The MCA considers that provision of NIGF guidance to all stakeholders is a preferable strategy for clarifying NIGF requirements rather than codification in law. The MCA would welcome the opportunity to work with the National Native Title Council and the Government to develop a resource that highlights NIGF leading practice.

The MCA considers that any NIGF guidance should be derived from existing bodies of judicial precedent which are formed within the native title regime. Accordingly, the MCA recommends the use of the Njamal Indicia Principles as the primary source of NIGF guidance because they are based on 15 years of Native Title Act case law, have informed the majority of decisions in the area, and have been tested by the Federal Court.

The explanatory notes to the Bill concluded that it is difficult to define negotiation in good faith. The Njamal Indicia describe the behaviours that can be used to determine when NIGF has not occurred. The MCA proposes that the Njamal Indicia be adopted to define when NIGF has not occurred.

Some of the proposed indicia in the Bill are similar to the Njamal Indicia but are also different in a number of respects. The majority have been taken from the Fair Work Act Australia and are expected to take effect in a new statutory context. Importantly, there has been no material provided to 'define' or 'interpret' the criteria and how they are to be applied in the NIGF context which may help to avoid necessary uncertainty.

The good faith criteria proposed in the Bill are not supported because they:

- do not match the relevance and more comprehensive nature of the Njamal Indicia Principles;
- will require litigation to define the intent and terminology. The litigation following the commencement of the NTA to establish clarity around the meaning of the NTA provisions, took considerable time and expense; and,

- could limit the adaptability of negotiation processes and encourage compliance with a minimum standard.

It is noted that the Bill appears to be requiring that the proposed criteria are used as a form of guidance (though not explicitly stated) as it states that not all criteria will be relevant in every case and that the list is not exhaustive. However the very existence of such a list in legislation prescribing NIGF 'requirements' will give it considerable weighting and raise expectations that they will need to be addressed. The Bill states that the NNTT will have the jurisdiction to determine which criteria are relevant for each case. In order to achieve certainty at the outset of a negotiation process it may be prudent for parties to seek NNTT or Federal Court advice, which will extend the existing capacity of the NNTT and increase costs and timeframes.

A preferable approach would be for:

- The legislation to refer to the Njamal Indicia Principles as guidance in constructing good faith negotiation strategies without specifically listing the criteria; and
- provision of tools/resource to enable practitioners to develop appropriate strategies.

This approach is more likely to promote flexibility as the system evolves and achieve the interest based style of negotiation that the Government is seeking to enable. If however there is to be codification then it is recommended that Njamal Indicia be adopted to define when NIGF has not occurred.

The Bill states the good faith negotiation requirements will apply upon commencement of the amendment to negotiations that commence on or after 1 January 2013. This will effectively have retrospective effect requiring companies commencing agreement negotiations to comply with proposed good faith negotiation requirements that are subject to ongoing consultation and debate and will likely result in changes to the Bill. Given the issues identified it is recommended any changes to the good faith negotiation requirements apply upon commencement of the legislation. It also discourages flexibility and encourages a compliance 'tick the box' mentality which is not the intent of the NTA amendments.

As a consequence it can be expected that the Bill in its current form will require considerably more resources to be allocated to the NNTT in order to undertake the additional responsibilities.

Extending the period of time before which a party may seek a determination

The MCA has always held the view that the focus of improving NIGF outcomes should be on the substance rather than the length of negotiation. Accordingly, extending the period after which a party can apply for an arbitral body determination from six to eight months is not supported by the MCA. In our experience many negotiations go for much longer than the six month minimum period (see above statistics), and even after an application is made for an arbitral determination, negotiations can and often do continue. If negotiations are occurring in good faith it is often the case that they will continue to occur in good faith past the minimum requirements.

It is our strong view that the 'intent to negotiate in good faith' from both parties needs to exist in order for agreements to be negotiated successfully. When this is not the case it becomes apparent very quickly, making the establishment of minimum negotiation periods a seemingly arbitrary exercise. When the 'intent' is non-existent it may be in the interests of both parties to seek arbitration earlier rather than later to avoid further relationship deterioration that becomes needlessly irreparable.

Changing the onus

It is unclear why the Commonwealth government considers legislative change with respect to changing the onus, s36(2)(2) and (2a), is necessary and the explanatory materials do not effectively address this issue. Moreover, it is unclear that the proposed change would drive, for example, different and substantively improved engagement.

Indeed, it may only drive a more paper and process focused approach to engagement in order to limit the risk of litigation.

It is the view of the MCA that any changes to the NIGF provisions in the NTA should be based on the reciprocity principle which assumes equal obligations and expectations on all parties if the desired Government outcomes are to be achieved. The NTA is currently asymmetrical in how NIGF is applied with the burden being on the mining (grantee) party and the Government party more than it is on the Native Title parties to NIGF. There is therefore a need for amendments to address this perceived asymmetry and not to accentuate it.

Although the NTA only permits an allegation of lack of good faith to be made against the mining (grantee) party or the Government party, the current NNTT processes do allow all parties to register concerns and make submissions about NIGF between the parties. The NNTT is required to assess the actions of potentially all three negotiation parties to develop a holistic understanding of the issues and deliver a fair assessment. The question of whether a party negotiated in good faith is currently only litigated if a party alleges that someone (other than the Native Title party) has not negotiated in good faith (typically, this is alleged by the Native Title party against either the grantee or Government party). The person making the allegation has the onus of proof, although the NNTT gives all parties the opportunity to make submissions.

MCA was concerned with the proposed amendment in the Exposure Draft that required the party seeking the determination to establish in every case that it has NIGF, by making it a jurisdictional precondition to the NNTT making a determination. In practice this meant that the mining (grantee) party would always bear the onus where it is making the Future Act Determination Applications (FADA), and may require the party asserting that it has NIGF to be assessed in isolation of the actions of the other party/parties. This was seen to be problematic as it may not provide sufficient information for the NNTT to make an objective determination based on all the available information (for example the actions of the 'other' party may make it impossible for the complainant to negotiate in good faith whilst the 'intent' to negotiate in good faith is evident). In addition, where all the parties were seeking a consent determination from the NNTT (the vast majority of FADA's fall into this category), the NNTT would be forced to consider the issue of NIGF.

The Bill has attempted to address the concerns identified in the Exposure Draft by providing that where a negotiation party asserts that another negotiation party, the second negotiation party, has not satisfied the good faith negotiation requirements, it is this second negotiation party that must then establish that it has met the good faith negotiation requirements, before being able to seek a determination from the arbitral body.

Whilst this amendment deals with consent determinations being caught by the proposed reversal of the onus of proof of NIGF, the MCA is concerned that as a result of the proposed change the NNTT will nevertheless be required to arbitrate more NIGF cases. It is therefore important that the NNTT has the resources required to continue to seek input from all parties in order to make an objective and transparent assessment. The MCA is of the view that the process currently being used by the NNTT, of evaluating a party's conduct within the holistic context of the negotiation, is integral to an effective determination process.

Additional right to negotiate concerns

The MCA does not support the NNTT being able to make orders about the period of time before another determination can be sought if there is a finding that a party hasn't negotiated in good faith. Consistent with views already expressed about the NIGF focus needing to be on the intent of the negotiation rather than the length of the negotiation, the MCA believes it would be more appropriate for the NNTT to provide direction on the aspects of NIGF that need to be addressed before returning for another determination which will help to provide more certainty to all involved parties.

The MCA consider that if the Commonwealth Government does proceed with its proposed NIGF changes to the NTA it should also give serious consideration to:

- resourcing the NNTT to adequately to prevent delays to determination outcomes and limit additional costs as much as possible. For example, by providing in the amendments that all NIGF hearings will be held 'on the papers' unless there are extenuating circumstances for a face to face hearing. [1] The MCA is anticipating that the proposed changes will result in the need to establish new case precedents which will delay decision making. We are also aware that the potential for program funding growth to fund NNTT expansion in the present economic climate is very unlikely;
- reducing the risk of State alternative legislative processes being substantively reviewed. It is the position of MCA that the integrity of the right to negotiate process across Australia should be retained to ensure certainty and avoid determination backlogs. Currently South Australian legislation mirrors the 6 month NIGF timeframes (for producers) and will require an amendment. The need to make this minor legislative amendment may provide the opportunity to review other aspects of the legislation which will be time consuming and create uncertainty; and
- remove the current reliance on the industry to provide resources for agreement progression to determination contributes to the creation of an asymmetrical power relationship which could be altered if Native Title parties were resourced adequately to share this cost.

Historical Extinguishment

The MCA is supportive of the intent of this reform insofar as it proposes a process for allowing native title to be recognised in areas that are currently reserved for the general public and protection of the natural environment despite the legal effect the dedication of those areas may have had. It also addresses historical anomalies that were not intended/foreseen at the time of the NTA development. However the MCA believes that some of the proposed amendments should be further considered to ensure a balance is achieved between the interests of all parties.

It is noted that mining interests created prior to any determination that native title exists in the area would be considered 'prior interests' and would be subject to the non-extinguishment principle by virtue of proposed paragraph 47C(8)(b). In accordance with section 238 of the *Native Title Act 1993*, this means the native title rights and interests would have no effect to the extent of any inconsistency with the prior interests. Thus, the relevant mining interests could continue to operate in such circumstances notwithstanding a determination of native title rights and interests in relation to the relevant area.

In order to provide more certainty to current and future interests the MCA seeks certainty on four matters:

- the revival of native title will not incur the right to compensation to protect the interests of the third parties;
- time parameters (commonly known as a 'sunset clause') for registering intent to have native title recognised be established so as to provide certainty third parties registered as having potential future interests;
- known third party interests should be provided with more direct forms of notice (i.e. a letter) rather than the currently proposed public notice; and,
- agreement to revive native title is required to be reached between ***all*** relevant agreement parties – the proposed right of third parties to comment is inadequate.

The difficulties experienced by Indigenous people to establish common law connection in order to secure their native title rights under the requirements of the NTA imply that the outcomes achievable from this proposed amendment could be limited. However, in circumstances where Government policy supports positive consent

[1] Whilst this is the current process within the NNTT procedures, including it in the NTA would be beneficial.

determinations of native title, including the disregard of extinguishment under the NTA, the standard of proof required by a State or Territory Government could be lower.[2] Moreover, in a practical sense the tenure research required before a consent determination may inhibit progress on claims more generally.

This is already experience in relation to s47A and s47B where research to determine the extent and application of those provisions can take State Governments months or years which contributes to delays in determinations. If the Commonwealth Government proceeds with the proposed reforms MCA is of the view that there are existing and more appropriate forms of recognising Indigenous ownership (e.g. statutory ordinary title) which should be considered and encouraged explicitly to expedite the process and avoid delays in determinations.

It should also be anticipated that this amendment will create an additional workload for the NNTT which will need to be considered in future Government budgets to ensure that costly delays are not incurred.

ILUAs

MCA is supportive of all the proposed ILUA reforms that simply process requirements for amendments and simplify registration processes. The MCA appreciates the attempts to address the concerns raised in relation to the Exposure Draft in the Bill.

With respect to the Amendment Bill the MCA is concerned that:

- should a third party amendment be made (e.g. land tenure change) that is material to the agreement and is not notified to the register it will not take effect in the provisions as described in 24ED;
- the proposed s.251A(2) defining people who "may hold" native title as those who can show a *prima facie* case to holding native title continues to apply only to the authorisation requirement. This means that there would still be nothing in the Act to assist with determining who "may hold" native title with respect to the identification requirement. We previously suggested ways in which s.251A(2) could be made broad enough to apply to both identification and authorisation;
- in relation to authorisation, the Bill does not clarify who is required/entitled to authorise an ILUA that covers the area of a registered claim. "Bygrave 3" suggests that it should only be the native title claim group for that registered claim. The Bill suggests that it should be people who "may hold" native title, being (as we've seen) people with a *prima facie* case. Without a definition of "*prima facie* case", however, it is unclear whether, in the area of a registered claim, people other than the native title claim group for that claim should be considered capable of showing a *prima facie* case. As a result, it will remain unclear whether the "authorising group" for an ILUA in a registered claim area is limited to the native title claim group for that claim or if it includes others who can show a *prima facie* case (whatever that is). If it is the latter, there is no assistance as to whether the various groups need to authorise that ILUA separately; and
- the issue of separate authorisation would similarly arise both where there are *overlapping* registered claims in an ILUA area and where, in the case of an ILUA covering an *unclaimed* area, there is more than one group that can show a *prima facie* case to holding native title in the area. The Bill should include amendments to s.251A clarifying what would be required in these circumstances.

Conclusion

The MCA is concerned about the proposed NIGF and historical extinguishment reforms as it is not clear how they will contribute to the efficiency and operability of the Native Title system and do not promote fair, transparent

[2] e.g. – under the former Labour government in Victoria.

and timely decision making. We also are not convinced that the proposed measures will achieve the intended outcomes of providing more clarity, improving agreement-making, encouraging flexibility in claim resolution and promoting sustainable outcomes. Instead we believe that these reforms will create a native title context of increased contestability, costs and timeframes for determinations, and uncertainty for stakeholders.

The MCA has highlighted in this submission specific concerns regarding the proposed reforms as outlined in the Exposure Draft and has made suggestions as to how the intended reform outcomes could be achieved more effectively. The MCA would welcome the opportunity to provide further input into any further NTA reform activity as it is very keen to contribute to a collaborative problem sharing approach to concerns about the efficiency and operability of the NTA.

Thank you for the opportunity to provide comment on the proposed amendments to the Native Title Act.

Ms Melanie Stutsel
Director Health, Safety, Environment and Community Policy