28 November 2019

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

Dear Committee Secretary

The Minerals Council of Australia appreciates the opportunity to inform the Senate Legal and Constitutional Affairs Committee's inquiry into the Native Title Legislation Amendment Bill 2019.

The MCA represents Australia's exploration, mining and minerals processing industry, nationally and internationally, in its contribution to sustainable development and society. MCA members represent the majority of Australia's total minerals production, with the sector directly employing around approximately 240,000 people and generating around $273 billion of export income.

In addition to its significant economic contribution the minerals industry is committed to operating responsibly to support social inclusion and sound environmental outcomes.

Native Title Amendment Bill

The minerals industry is privileged to partner with Aboriginal and Torres Strait Islander peoples and communities, including Traditional Owners, across Australia. The industry's approach is founded in recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia, and mutual respect and recognition of rights and interests.

The *Native Title Act 1993 (Commonwealth*) establishes comprehensive legal processes and requirements for consulting and negotiating with Traditional Owners regarding access to land. The minerals industry's particular interest in the act arises as native title covers much of the land on which it operates. Over the past 20 years the minerals industry has entered into thousands of agreements with Traditional Owners regarding minerals development.

The MCA generally supports the bill, which includes measures to provide greater certainty and improve operation of the Act. While not including all recommendations made by the MCA, the bill contains important reforms to support a more practical native title framework by addressing many long-standing technical and administrative matters.

The MCA notes the bill has been informed by significant stakeholder consultation. Key technical reforms contained in the bill are drawn from extensive reviews including by the Australian Law Reform Commission and the Council of Australian Governments as well as the recent two year consultation process undertaken by the Commonwealth Government.

Restoring certainty to section 31 agreements

Critically for the minerals industry the bill includes measures to confirm the validity of certain existing section 31 agreements made in accordance with the law as it was understood before the Full Federal Court's decision in *McGlade v Native Title Registrar [2017] FAFC 10* (McGlade).

It should be noted that the McGlade court decision was related to an Indigenous Land Use Agreement (ILUA), the background for which is provided below.

QGC Pty Ltd v Bygrave (No2) [2010] had previously determined that not every member of the claimant group needed to be a party to an ILUA. However, in McGlade the court found an ILUA must be signed by all members of the applicant even where a member may be deceased, legally incapable or acting against the broader group's wishes.

ILUAs cover various land uses, including for community infrastructure, mining, agriculture and other types of development. ILUAs stipulate terms of land access and often provide significant financial and non-financial benefits for Traditional Owners.

In response to the McGlade decision, governments, industries (including the minerals industry), Traditional Owner organisations and other stakeholders voiced concerns about its effect on existing ILUAs not signed by all members of the applicant.

In 2017 the government acted to confirm the validity of existing ILUAs potentially affected by McGlade through the Native Title Legislative Amendment (Indigenous Land Use Agreement) Bill 2017. The Senate Legal and Constitutional Affairs Committee undertook an inquiry into the bill and recommended passage of these amendments.[1]

While relating to ILUAs, McGlade could also be seen as casting doubt on certain section 31 agreements. Section 31 agreements are widely used for exploration and minerals activities to establish terms of land access, including cultural heritage management and environmental commitments, as well as financial and non-financial benefits between minerals proponents and Traditional Owners. The granting of mining leases and other related interests can be dependent on these agreements. Therefore, any uncertainty surrounding their validity is a substantial risk for industry and other parties to these agreements.

The minerals industry sought validation of section 31 agreements potentially affected by McGlade in the 2017 bill. The report of the Senate Legal and Constitutional Affairs Committee inquiry into the bill acknowledged this matter and noted the Commonwealth should consider whether additional amendments were needed for section 31 agreements.[2]

The Attorney-General and Minister for Indigenous Affairs affirmed the Commonwealth's commitment to consult on and progress this amendment at the October 2017 Native Title Ministers Meeting.[3] The matter was subsequently included in the Commonwealth's November 2017 reforms option paper and measures were included in the exposure draft of the legislation.

Given the significant risks posed to certain existing section 31 agreements and the ongoing uncertainty for industry the MCA strongly supports the bill's measures to validate section 31 agreements potentially affected by McGlade.

Other provisions

The MCA supports a range of measures within the bill aimed at improving the practical operation of the native title framework. These include amendments to clarify the duties of the applicant, determination of decision-making processes and to allow a body corporate ILUAs to cover areas where native title has been extinguished. The MCA also considers the measure to provide for a default majority unless the claim group determines otherwise a balanced response to the various options raised.

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[1] Legal and Constitutional Affairs Legislation Committee, *Native Title Amendment Bill (Indigenous Land Use Agreements) Bill 2017 [Provisions]*, Parliament of the Commonwealth of Australia, Canberra, 2017, p. 64.
[2] ibid.
[3] Attorney-General for Australia, *Native Title Minister's Meeting – 13 October 2017*, Canberra, Government of Australia, viewed 12 November 2019.

Furthermore, a public record of the existence of section 31 agreements will support meaningful transparency while ensuring that agreement parties can jointly determine how information relating to the contents of these agreements is shared.

Concerns raised in exposure draft bill

While supporting the bill, the MCA has in previous submissions recommended minor changes to the drafting of measures to disregard historical extinguishment where there is agreement between the native title party and relevant government party.

The MCA supports the intent of the proposal to recognise opportunities for Aboriginal and Torres Strait Islander peoples that may arise from native title recognition over areas of national, state or territory parks.

While supporting this intention, the MCA highlighted potential significant unintended consequences, including a potential compensation liability for parties that hold an interest or have held a prior interest in the land relating to the agreement, if this is not addressed in the relevant agreement. This is associated with grants where there was no prior requirement for a future acts process.

The MCA recognises the amendment is not intended to affect any prior interest in relation to the land or where prior acts were validly done. The requirement for the relevant government to undertake reasonable notification and a three month public comment period is supported.

An additional measure would provide certainty for industry. Such a measure should require any party who holds (who has held) an interest in an area (who may be affected by section 47 agreement) be a party to the agreement, or as a minimum, consulted in regards to the agreement. This addition would complement the required reasonable notification and three month public comment period. The MCA considers this a balanced and enabling approach that does not affect the provision's purpose of providing opportunities for Aboriginal and Torres Strait Islander peoples that may arise from areas of national, state or territory parks.

The MCA also supports the proposed measure to enable a proposed grantee to refer an unresolved objection for hearing by an independent body (section 24MD)(6B). In its submission to the exposure draft legislation the MCA recommended six months rather than eight months as an appropriate upper limit for consultation with relevant parties. This reflects the intention of the amendment to provide for appropriate consultation while ensuring efficiency and certainty of process.

Other matters relevant to the minerals industry

The MCA understands the Western Australian Government is continuing consultation regarding the Mining Amendment (Procedures and Validation) Bill 2018.

The bill seeks to restore certainty to the minerals industry and other parties following the 2017 Forrest & Forrest decision, in which the High Court found a mineralisation report must be lodged at the same time as the application for a mining lease in order for that application to be a valid application. This decision, based on an administrative matter, has created significant uncertainty and risks the significant shared benefits for all stakeholders associated with mining activity progressed in good faith. The minerals industry notes the bill to confirm the validity of these applications will also require a future complementary amendment to the Native Title Act.

An opportunity for progress

Outside of the issues raised, the MCA supports the Native Title Legislation Amendment Bill 2019, noting it takes the critical action necessary to restore certainty for section 31 agreements potentially affected by the 2017 McGlade decision. The bill will also support a more practical and responsive native title framework, drawing on successive comprehensive reviews and broad stakeholder input.

The MCA appreciates the opportunity to contribute to the committee's inquiry into the bill. Should you require any further information please contact Jillian D'Urso, Manager – Social Policy via email at

Yours sincerely

CHRIS MCCOMBE
GENERAL MANAGER SUSTAINABILITY