AUSTRALIAN CONSERVATION FOUNDATION
INCORPORATED ABN 22 007 498 462

Submission 018

FLOOR ONE, 60 LEICESTER STREET CARLTON VIC 3053
phone ■ 03/ 9345 1111 // facsimile ■ 03/ 9345 1166
email ■ acf@acfonline.org.au // web ■ acfonline.org.au

Attention: Dr Anna Dacre
Committee Secretary
House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs
Parliament House, Canberra

31 January, 2013

Submission re the Native Title Amendment Bill 2012

The Australian Conservation Foundation (ACF) is committed to inspiring people to achieve a healthy environment for all Australians. For over 40 years we have been a strong voice for the environment, promoting solutions through research, consultation, education and partnerships. We work with the community, business and government to protect, restore and sustain our shared and unique environment.

ACF welcomes this opportunity to comment on future reform of the Native Title process. This submission is focussed solely on one aspect of these reforms - how best to help ensure that Aboriginal people's gain lasting benefit from the extensive resource extraction and processing currently taking place on their traditional estate.

Mining agreements with Indigenous groups have been justifiably criticised for not operating on a level-playing field. Problems relating to financial and administrative resources, confidential and complex agreements, and inadequate representation show that the "Australian Government is unlikely ever to make *adequate* provision for the proper, professionally-supported preparation and execution of all significant future act negotiations." (Professor Ciaran O'Faircheallaigh, 'Financial Models for Agreements Between Indigenous Peoples and Mining Companies', *Aboriginal Politics and Public Sector Management*, Research Paper No. 12, January 2003).

ACF maintains that the cards are heavily stacked against Aboriginal people who are concerned about or would prefer to see no mining on their country. The inequity found in the relationship between mining companies and indigenous communities is further compounded by the limited rights afforded to Aboriginal people in relation to developments on their traditional lands and estate. According to prominent Aboriginal lawyer Noel Pearson:

> The legal framework that applies to mining and native title severely disadvantages indigenous landowners. Section 38 of the Native Title Act explicitly says that in arbitrating an application for mining, the National Native

> Title Tribunal "must not determine a condition ... that has the effect that native title parties are to be entitled to payments worked out by reference to:
>
> (a) the amount of profits made; or
> (b) any income derived; or
> (c) any things produced."
>
> You might as well make clear in the law that the tribunal can only determine beads and mirrors as acceptable outcomes from arbitration, because that is in effect what it has been doing.
> The mining lobby has been quiet on land rights for the past decade. Having secured an advantageous legal framework through the bitter conflicts over the Native Title Act in the '90s, they have learned that ideological opposition to land rights is unproductive for its members.

As long as member companies are winning hands-down through the so-called agreement-making process, they have had no interest in conflict. (Noel Pearson, 'Boom or dust lifestyle', *The Australian, 16* December 2008).

Aboriginal communities on native title land have extremely limited ability to say no to mining developments on their country. In ACF's experience, many Aboriginal communities are put in a position where they must choose between (i) non co-operation and non-consent with a mining or development proposal, an option that most clearly reflects opposition to the proposed development but is not of itself sufficient to halt the project and also precludes a place at the table should the project go ahead and (ii) forming an Agreement with the developer. This is invariably promoted by the project proponent as proof of community 'consent' and used to confine debate and any continuing concerns over the operation to in house forums. Often unreasonable pressures and expectations are placed on Aboriginal communities in order to fast track mining agreement and approvals.

The Aboriginal Land Rights (Northern Territory) Act 1976 provides Traditional Owners with some ability to veto mining proposals on their lands, however this is unnecessarily complicated and compromised by the conjunctive linkage between exploration approval and mining approval. It would be far better if exploration and mining approvals were discrete and separate processes. Such an approach would appear beneficial for all parties by providing increased clarity and certainty for Aboriginal Traditional Owners (that saying yes to exploration did not preclude any ability to say no to future mining), for industry (as Traditional Owner's would be arguably less likely to oppose exploration applications if they knew this would not constrain their options on future mining approvals) and for other stakeholders like ACF (who would have more confidence that the process facilitated and reflected free, prior and informed consent).

Aboriginal communities considering mining developments on their traditional estate need a way to ensure that their key concerns and questions receive meaningful attention, and that they retain a critical and empowered voice, both within and parallel

Aboriginal communities considering mining developments on their traditional estate need a way to ensure that their key concerns and questions receive meaningful attention, and that they retain a critical and empowered voice, both within and parallel to any Agreement process. The present legislative and procedural framework is clearly failing to provide this and these deficiencies need to be acknowledged and addressed.

Most mining agreements have – and continue – to fail to deliver benefits to Aboriginal landowners. According to the Native Title Payments Working Group Report, obstacles frequently get in the way of successful agreements for Indigenous communities with mining companies.

"There are *only a limited number of good agreements* to provide models…The reasons for the absence of more agreements containing substantial financial and other benefits for traditional owners after almost 15 years of the operation of the *Native Title Act 1993* (NTA) is, in itself, deserving of inquiry." (Native Title Payments Working Group report, December 2008)

ACF strongly supports this call for a dedicated Inquiry into the continuing failure of mining and resource agreements and operations to provide significant and on-going benefit to Aboriginal communities, organisations and representative bodies.

The Native Title Payments Working Group Discussion Paper and Report contains many valuable insights and assessments. In the current policy context of mining agreements being promoted as the primary solution to addressing widespread and profound Aboriginal disadvantage and economic exclusion, as seen in the recent Boyer Lecture series et al, ACF believes that there is a clear need for evidence based assessment and review.

A dedicated Inquiry into the nature, performance and constraints on current mining agreements to deliver lasting community benefit to Aboriginal people would be an important step in addressing current and historic deficiencies and facilitating better practice and outcomes.

ACF commends this important initiative to the Committee's consideration and would be happy to provide further detail or present to the Committee on this matter: please contact Dave Sweeney on [redacted] or [redacted] should you wish any further information or clarification.

Summary:

- Systemic Aboriginal disadvantage has not been addressed by mining operations and most mining agreements have failed to deliver lasting benefits to Indigenous communities.

- Indigenous peoples ability to exercise full, free, prior and informed consent and effective input into the activities of mining operations on their traditional lands is compromised by severe capacity and procedural constraints. The legal and

approvals framework under the Native Title Act should be changed to reflect and address this power imbalance.

- There is a clear and urgent need for a dedicated independent public review into the continuing failure of mining and resource agreements and operations reached under the native title framework to provide significant and on-going benefit to Aboriginal communities and representative bodies.

Yours sincerely,

[redacted]

Paul Sinclair

Acting Campaigns Director