Minerals Council of Australia

23 April 2007

The Secretary
Standing Committee on
Legal and Constitutional Affairs
The Senate
Parliament House
CANBERRA ACT 2600

Via email: legcon.sen@aph.gov.au

Dear Secretary,

Re: Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007

This submission is made by the Minerals Council of Australia (MCA) to the Senate Standing Committee's Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007 (Bill). The 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 welcomed the Attorney-General's announcement, in September 2005, outlining the Government's plan for practical reforms to improve the performance of the native title system. The Government's approach in wanting to improve the effectiveness of the native title system, without challenging the fundamental principles of native title, is consistent with the MCA's approach in seeking to improve the efficiency and operability of the system without diminishing the rights of Indigenous Australians.

The MCA considers that the Technical Amendments Bill 2007 proposes a suite of amendments consistent with the industry's and Government's shared objective to continuously improve the native title system such that its timely processes deliver effective outcomes for all parties. Accordingly, although the MCA supports the overall intent of the Bill, two specific issues – section 87A, and the resourcing of Prescribed Bodies Corporate, are of significant concern to the MCA and are addressed in the following comments.

Power of Federal Court to make determination for part of an area (s87A)

By way of background, section 87A, introduced in the *Native Title Amendment Act 2007*, relates to the power of the Federal Court to make a determination over part of a claim area where some, but not all, parties agree to the determination. In doing so, section 87A requires the consent of certain parties to the proceedings including each person who holds a registered proprietary interest in the determination area and is party to the proceedings. Specifically section 87A(1)(c) outlines all persons who are parties to the agreement including:

> section 87(1)(c)(v) "*each person who holds a proprietary interest, in relation to any part of the determination area, at the time the agreement is made, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth, a State or Territory and who is a party to the proceeding at the time the agreement is made*".

The Senate Committee inquiry into the *Native Title Amendment Bill 2006* (now *Native Title Amendment Act 2007*), heard evidence that the provisions of section 87A(1)(c)(v) may exclude persons with significant interest in the determination area, whose interests are not registered, from participation in a consent determination. For example, this could include owners of infrastructure installed under statutory powers, such as telecommunications networks, electricity and gas transmission and distribution systems. Subsequently, the Senate Committee recommended that the Federal Government consider inclusion of an additional amendment to this section to address this matter.

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On the basis of the Senate Committee's recommendation, the Bill proposes to replace s87A(1)(c)(v) with;

> "*each person who holds an interest in relation to land or waters in any part of the determination area at the time the agreement is made, and who is party to the proceeding at the time the agreement is made*".

The MCA opposes the removal of the words "*that is registered in a public register of interest in relation to land or waters maintained by the Commonwealth, State or a Territory*" from this section of the Bill.

The MCA considers that the removal of these words is both unnecessary and potentially destabilising, and therefore contrary to the majority of the amendments seeking to improve both the operability and efficiency of the Act. This, for three key reasons:

- the amendment removes the existing registration test applied to ensure that parties to a consent determination process have genuine and specific interests that will be impacted on by the determination process, beyond the general rights and interests of all Australians, potentially opening the process up to non-*bona fide* parties;
- the amendment enables parties, who are not a registered interest, to come late into the consent determination process, which has the potential to derail negotiations and delay outcomes of negotiations which may have already substantially progressed; and
- the National Native Title Tribunal currently has the discretion to allow amendments to the nature and number of registered interests based on changes within those companies subsequent to the commencement of the consent determination process – ie: statutory companies that have been privatised and no longer consider their interests effectively represented by government have an existing path to be recognised as a party to the negotiations.

Recommendation

The MCA :

> ***supports the proposed amendment to remove the word proprietary from s87A(1)(c)(v); but***

> ***recommends that the words 'that is registered in a public register of interest in relation to land or waters maintained by the Commonwealth, State or Territory' remain in the Act.***

Prescribed Body Corporate (PBCs)

Division 7 of the Bill gives effect to PBC Report, Recommendation 11, that the Native Title Act should be amended to authorise a PBC to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the Native Title Act or Regulations at the request of the third party. The PBC Report also recommended that the Amendments should provide for an appropriate authority to investigate such arrangements on request, to ensure the costs were reasonably incurred.

Specifically, the Bill proposes to insert sections 60AB and 60AC that deal with fees for services provided by Registered Native Title Body Corporate (RNTBC) and the giving of opinions about these fees by the Registrar of Aboriginal Corporations.

The MCA understands that proposed section 60AB(1) and section 60AB(2) enables a RNTBC to charge a person, other than a person mentioned in subsection 60AB(4), a fee for costs it incurs in negotiating agreements and in performing other functions.

The MCA has long maintained that Native Title Representative Bodies (NTRBs) and Prescribed Body Corporate (PBCs) are chronically under resourced. PBCs are a critical component in the native title system and are the logical forum to represent the broader Indigenous economic interests in a region.

There is a strong need for core government funding of PBCs to ensure appropriate capacity to meet their statutory functions, which include negotiating future acts. In addition, government funding should also be provided to assist the development of independent Indigenous enterprise.

The MCA considers there are some costs that are legitimately borne by industry, in terms of costs directly related to specific commercial negotiation, and supports the Bill's formalisation of existing practice where industry pays additional

commercial costs associated with specific RNTBC's activities. However, the MCA strongly opposes the ability of RNTBCs to charge a fee for fulfilling their core statutory responsibilities.

We consider it paramount that the Government provides core funding to these organisations to ensure their effective functioning. This for three key reasons:

- **Impact on independence of negotiations (real and perceived).** The minerals industry has strong concerns that industry provision of all of the capital for PBCs to engage in commercial negotiations regarding future acts will impact on the real and perceived integrity and credibility of such negotiations. Specifically, we consider that external parties would not consider the negotiations to be independent as they are fully funded by the company. This may also have an impact on the extent to which small to medium sized companies are able to engage.
- **Capacity of PBCs to engage with industry.** PBCs need to be established and capable of engaging with companies where there are potential projects in greenfield areas. Without some initial funding by Government these organisations will simply exist as shelf-companies and will not have the capacity to engage or to effectively fulfil their statutory roles. Agreements will only be easily negotiated in those areas where existing economic enterprise is providing a funding base to PBCs to enable them to operate; and
- **Sustainable Indigenous communities**. Without the provision of core funding, PBCs will not have the capacity to consider the development of independent economic enterprise, and will be restricted to mining or pastoralist activities for their economic development – this is counter to Government objectives of regional development and does little to build economic independence and respect in Indigenous communities.

Recommendation

The MCA:

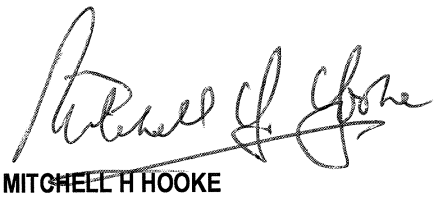
> ***proposes an amendment to 60AB(1) to reflect that a RNTBC may only charge a fee for additional costs incurred directly relating to specific commercial negotiation; and***

> ***the deletion of s60AB(2).***

Thank you for considering the MCA's position on the Native Title Amendment (Technical Amendments) Bill 2007.

Should you requires clarification on any matters outlined in this submission please do not hesitate to contact me directly, or Ms Kylie Ruth, Senior Social Policy Officer, who has carriage of this issue in the MCA Secretariat.

Yours sincerely,



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CHIEF EXECUTIVE