



29th July 2011

Committee Secretary
Senate Legal and Constitutional Committee
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Parliament House
Canberra ACT 2600

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Dear Sir / Madam

Native Title Amendment (Reform) Bill 2011

Thank you for the opportunity of providing comment on the Native Title Amendment (Reform) Bill 2011.

The Association of Mining and Exploration Companies (AMEC) is the peak industry body for mineral exploration and mining companies within Australia, and has a membership base exceeding 300 companies.

In 2010, AMEC convened an Industry Forum to discuss a number of issues and remedies surrounding indigenous affairs and native title matters.

The outcome was a submission to the Western Australian and Commonwealth governments which contained 28 recommendations; a number of observations and comments; and several supporting case studies.

The recommendations were primarily intended to lead to a streamlining of the approvals process and reduce the increasing costs to industry.

The submission also highlighted the significant degree of uncertainty that prevails around the cultural heritage and native title processes, and of the apparent attempts by some native title stakeholders to delay processes and then extract significant one off and ongoing financial payments from industry in return for quicker resolution of issues and claims. This situation was considered by industry to be inappropriate and unacceptable.

An extract from that submission with specific reference to native title matters is as follows:

"Where a Native Title determination has been made, AMEC acknowledges the traditional owners and conditions detailed in the native title determination.

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Similarly, AMEC acknowledges the legal rights afforded to native title claimants and always seeks to participate in mutually respectful, expedient consultation and negotiations to enable reasonable access to the Crown's resources while title is being determined.

Negotiations with traditional owners and native title claimants should be carried out in good faith with an anticipation that minerals exploration and mining companies may offer some form of benefit should they gain any commercial value from the resources contained within the claimed area.

Furthermore, the mining and minerals exploration sector requires clarity and certainty in the approvals process in order to enhance the investment and decision making processes.

In order for this to be achieved a renewed priority focus is required on resolving any outstanding native title claims in order to provide industry with this increased clarity and certainty eg the Wongatha claim area in the Goldfields, Western Australia has been outstanding for several years, and has resulted in many exploration licence applications being delayed.

Clarity is also required on the relevant consultation processes where there is more than one group of registered claimants or other stakeholders in the tenement area.

Where an Indigenous Land Use Agreement (ILUA) has been agreed, it is expected that both parties will adhere to the terms and spirit of the agreement, and that the native title claimants/owners will provide a reasonable level of access to the Crown's resources without undue delay or excessive demands for compensation. In the case of a proposed ILUA with the Nharnumangga, Wajarri and Ngarlawangga (NWN) people there have been several case studies provided to AMEC where a series of delays have occurred over a three year period preventing the Heritage Agreement attached to the ILUA from being signed by the NWN people; and subsequently delaying the implementation of the ILUA.

Where such a negotiation breaks down, AMEC believes that the Government has a role to play in ensuring a swift resolution to the disagreement, and in ensuring compliance and enforceability of the conditions contained in the ILUA.

Other key observations from the industry Forum included:

- *There are a number of claims with problems, overlaps, some of which are fatally flawed, unresolved and need remedying (eg Widji claim in the goldfields),*
- *The Federal Government can still appeal decisions under the EPBC Act and the ATSIHPA Act,*
- *In order to provide clarity and certainty in all jurisdictions there should be clarity and certainty in native title and cultural heritage matters,*
- *It is considered essential that an education and awareness program should be implemented to ensure that all stakeholders have an understanding of cultural heritage values, and of the mining and minerals exploration sector.*

In respect of Native Title, the submission recommended:

1. Renewed priority focus on resolving outstanding native title claims, including the Goldfields area,
2. Ensure that exploration access is maintained in areas subject to exclusive possession determinations,

3. Ensure that the conditions contained within Indigenous Land Use Agreements (ILUA's) are legally enforceable (eg the NWN ILUA),
4. Development of an education and awareness program to ensure that all stakeholders (claimants and industry) have an understanding of cultural heritage values, and of the mining and minerals exploration sector,
5. Promotion of an open and regular dialogue at all levels between State and Commonwealth agencies to improve relationships by establishing inter government working groups, and
6. Regular industry and Government Forums are conducted to discuss issues and remedies surrounding indigenous affairs and heritage matters.

AMEC concluded the submission by stating a commitment to resolving these issues with relevant government agencies.

In response, the Commonwealth Attorney General confirmed the Government's commitment to improving outcomes for native title stakeholders, and speed up the resolution rate of claims. In this regard, he referred to amendments that were initiated through the Native Title Amendment Act 2009, which gave the Federal Court the central role in managing the native title claims process in a more efficient and flexible manner.

The Attorney General also referred to the provision of increased funding for Native Title Representative Bodies to increase their capacity to process claims. He also confirmed his desire to encourage all parties to reach agreement as early as possible when developments are being planned, to identify and protect traditional areas, and that the outcome of these talks would be reflected in a legally binding instrument enforceable under state laws.

The Western Australian government has advised AMEC at two roundtable meetings over the past 12 months which indicates that substantial progress is being made in addressing most of the recommendations made in the AMEC submission concerning cultural heritage processes. The WA Government is also undertaking a review of the Aboriginal Heritage Act and the Aboriginal Sites Register. These are all positive changes that will improve the overall approvals process.

In addition, the Western Australian government is understood to be developing policies surrounding cultural heritage, land use and the resolution of native title claims.

More recently, AMEC attended a stakeholder Forum convened by the Federal Court of Australia, and subsequently advised the Court that it was fully supportive of the conduct of future Forums in the expectation that all parties in the process have a mutual trust and a cooperative, conciliatory and genuine willingness to engage and resolve any claims, negotiations and disputes in a timely and cost effective manner.

Unfortunately it was very evident from the Native Title Representative Bodies that were present at the Forum that there was little trust on their part, and a strong desire to enter expensive and time consuming litigation procedures, rather than a more conciliatory and cost effective mediation process.

AMEC considers that trust, cooperation, conciliation and willingness to engage are essential elements to a successful outcome and resolution of claims in a timely manner, and should be promoted at all times.

AMEC notes that the intention of the proposed Native Title Amendment (Reform) Bill 2011 is to enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples.

AMEC has reviewed the proposed Amendment Bill, and does not support the Bill as drafted as it will not meet the overall stated objective, and in fact is likely to result in an opposite outcome by increasing delays, transaction costs and uncertainty.

In view of the various policy initiatives that are already being taken and proposed at the Commonwealth and State / Territory levels AMEC is of the opinion that further amendment to the Native Title Act as drafted is unwarranted and unworkable.

AMEC further considers that the Commonwealth Government should work closely with the industry, representative bodies, traditional owners, and the various State and Territory Governments in order to develop practical and cost effective policies and procedures that will expedite the resolution of native title claims and agreements, rather than the development of more prescriptive legislation.

AMEC has concern with the following specific amendments as they will be unduly restrictive:

1. *Acknowledging the central principles in the United Nations Declaration on the Rights of Indigenous Peoples (UNRIP) – Section 3A*

The apparent intention of changing the United Nations Declaration from a declaratory statement into an implementation code will remove the current discretion that State and Territory Governments have to take that Declaration into account when making decisions and balancing native title with strategic, economic and social objectives.

AMEC understands that the various State and Territory Governments are already fully committed to ensuring that the rights of Indigenous people are protected and sustainably promoted at all times, whilst at the same time balancing native title interests with strategic objectives of State / Territory governments. There is therefore no apparent reason to amend the Act as proposed.

2. *Adopting the ‘presumption of continuity’ concept and expanding the connection criteria – Section 61AA and 61AB*

These amendments will result in the burden of proof being shifted from the claimants to the respondents to prove disruption, and broaden the criteria demonstrating continuity of connection.

AMEC considers that these amendments will significantly affect existing policies, processes and case law precedents for resolving claims. In fact, it is probable that further litigation and new case law precedents will be established, particularly in relation to what constitutes ‘substantial interruption’ as proposed in Section 61AB.

The amendments will therefore significantly increase uncertainty and the costs of the respondent, without any apparent improvement in the claims resolution process.

3. *Changing the current ‘good faith negotiation principles’ – Section 31*

AMEC notes that the Bill proposes to reverse the onus of proof by requiring the party claiming it has acted in good faith to provide proof, and linking good faith to conditions specified by the native title party.

AMEC is concerned that such amendments could introduce unsustainable procedural constraints on the claims resolution process, create uncertainty, increase delays and costs. The amendments also do not recognise that the current process allows for challenges on the basis of good faith.

Overall, AMEC does not consider that such amendments will encourage better agreement making, as intended.

4. *Expanding the definition of 'traditional' – Section 223(1)*

AMEC is concerned that an expansion of the definition of 'traditional' could result in native title rights and interests being increased, with the likely outcome being that there will be increased confusion, uncertainty, litigation and costs.

5. *Profit sharing condition may be imposed – Section 38(2)*

The proposed amendment to allow an arbitral body to impose conditions relating to profit sharing and other payments is not supported by AMEC as such dealings are commercial in nature and not within the role or expertise of such a body.

6. *Inclusion of commercial rights and interests – Section 223(2)*

The Explanatory Memorandum states this amendment clarifies that native title rights and interest may be of a commercial nature.

Unfortunately, no further explanation or supporting statement is made as to the rationale for this amendment.

AMEC is however concerned that the expansion of native title rights and interests to include commercial rights and interests could result in significant and inappropriate increases relating to compensable payments made by industry.

For the reasons stated above, and the fact that it will not meet its stated objective of enhancing the effectiveness of the native title system, AMEC does not support the proposed Amendment Bill.

Thank you for the opportunity of providing comment. If you have any queries on the content of this correspondence please feel free to contact Graham Short or myself.

Yours sincerely

Simon Bennison
Chief Executive Officer

