Submission to Senate Red Tape Committee

Effect of restrictions and prohibitions on business (red tape) on the economy and community

ASSOCIATION OF MINING AND EXPLORATION COMPANIES

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1. EXECUTIVE SUMMARY

The Association of Mining and Exploration Companies (AMEC) is the peak national industry body representing hundreds of mining and mineral exploration companies throughout Australia.

AMEC`s policy objectives are to stimulate greenfield and brownfield mineral exploration throughout Australia; and reduce the cost of doing business.

Removal of barriers caused by excessive regulation, duplication and red tape are critically important for growth and productivity in the national interest. A streamlined and cost efficient regulatory framework is a cornerstone to achieving those outcomes.

Accordingly, the Senate Inquiry is directly relevant to the Australia mining and mineral exploration sector as all companies are affected in one way or another as they move through the long exploration, discovery, development and production cycle.

It is in this context that this submission is made.

The Collins Dictionary describes “red tape” as:

> ‘*official forms and routines; too great attention to regulations and routine, resulting in delay in getting business done’*.

Australia`s mining industry is no longer as cost competitive as it once was with production costs continuing to rise dramatically. Contemporary research has clearly identified that Australia is far less competitive than its international counterparts.

The economic climate in the mining industry is such that it has faced:

- Lower discovery rates
- Fluctuating commodity prices,
- Increasing production and operating costs,
- Lower grades and higher strip ratios and waste removal costs,
- Deeper deposits requiring increased pre-production expenditure and the subsequent higher mining and extraction costs,
- Tighter margins, and
- Limited cash flow.

Cost pressures indicate that some projects are finely balanced with low margins. Various cost saving measures continue to be applied on a daily basis by emerging miners in order to keep their operations viable.

Industry has experienced significant growth in production costs over recent years – energy (a large diesel fuel input is essential as there is limited access to the power grid in remote locations), labour, water, fees and charges, duties, levies, taxes, third party royalties, community support, regulation and compliance costs.

The burden of unnecessary red tape is unsustainable, and acts as a major disincentive for critical investment and business decisions.

Mid-tier emerging miners are also invariably faced with shorter mine lives and increased unit costs as they do not have access to the same economies of scale available to large mature miners.

There has been lower greenfield mineral exploration activity with fewer mines being discovered and developed. Those that are being developed are often not much more than marginal operations and with shorter average mine lives. The result is a reduction in Government revenue streams.

These trends are of extreme concern and require attention at Commonwealth and State levels of Government in order to increase mineral exploration to generate revenue from the mines of tomorrow, and to reduce business input costs.

The urgency to take action is highlighted by the fact that the exploration phase of a project can take several years (subject to the barriers encountered) to be granted a licence / permit. As an example, the WA Department of Mines and Petroleum has stated that it takes on average 364 days for an exploration licence to be granted, and then commence the long approvals process. A major reason for this timeframe is the current cultural heritage approval process which can take on average 9 months to complete.

It then takes 7 to 10 years for a mine to be developed if a viable discovery has been made. These timeframes should be significantly reduced in the national interest.

AMEC is therefore supportive of the Senate Inquiry.

AMEC has made a number of recent representations to Governments in most Australian jurisdictions in order to address identified red tape, approvals and regulatory reform submissions to Governments at all levels (**Appendix 1**).

AMEC is currently working closely with State and Territory jurisdictions to implement the suggested recommendation and solutions contained in those submissions, where possible, with some slow progress being made.

The issues and concerns raised in these documents are a work in progress or are regularly being updated due to changing circumstances, process improvements and changes to public policy frameworks.

The focus of this submission to the Senate is therefore in relation to red tape and regulation surrounding Commonwealth Government issues.

2. RECOMMENDATIONS

1. **Approval related Bilateral Agreements with accredited State and Territory Government should be resolved and implemented**

2. **Remove the duplicative 'water trigger' requirements from the EPBC Act**

3. **Amend the EPBC Act to prevent vexatious appeals by third parties seeking to delay and block mining development**

4. **The State Government should negotiate with the Commonwealth Government the removal of "mining or milling of uranium ore" from the definition of 'nuclear action' in section 22(1)(d) of the *Environment Protection and Biodiversity Conservation Act 1999***

5. **Amend the Native Title Act to ensure validity of existing and future Section 31 Agreements**

6. **Develop guidance material/protocols where there are multiple Native Title stakeholders and over lapping claims, particularly in circumstances where there may be a rebuttal by one of the parties**

7. **Amend Part IV of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) to provide for a preliminary veto right to be exercised or not prior to any negotiations and reduce the veto period from five years to three years for mineral exploration activity**

8. **Ensure that a flexible and fair industrial relations framework exists**

9. **Continue to provide a skilled migration scheme**

10. **Undertake a detailed gap analysis of the infrastructure needs of the mining sector in regional Australia**

11. **Reform the framework for third party access to infrastructure**

12. **Increase competition within the upstream domestic energy sector**

3. COMMONWEALTH ENVIRONMENTAL ASSESSMENT AND APPROVALS

RECOMMENDATION

1. Approval related Bilateral Agreements with accredited State and Territory Government should be resolved and implemented

The Commonwealth administered *Environment Protection and Biodiversity Conservation Act* (EPBC Act) requires actions that have, or are likely to have a significant impact[1] on a matter of national environmental significance to obtain approval from the Commonwealth Government Minister for the Environment.

The 'significant impact' threshold of the EPBC Act is a filter on the number of matters which 'trigger' the involvement of the Commonwealth Minister for the Environment. It is understood that since 2014 there have been over 600 project referrals to the Minister.[2]

Further analysis of the referral list indicates that mining related projects (excluding quarries, sand and energy) represented around 8% (50) of that total, of which half were for new mining projects; and the remainder for mine extensions / modifications, or infrastructure projects. AMEC member company projects represented around half of the mining sector referrals to the Minister for the Environment during that period.

It should be noted that even if the EPBC Act threshold is not triggered in individual cases, **all** assessment and approval processes are fully managed and administered through robust State and Territory legislative and regulatory regimes. This process can take several years before a decision is made.

It is in this context that AMEC recently made a submission to the Senate Environment Committee *Inquiry into Rehabilitation of mining resource projects as it relates to Commonwealth Responsibilities – April 2017.*

In that submission AMEC considered that the role of the Commonwealth Government should be one of oversight to ensure that the requirements of the EPBC Act and approval conditions are being met. There is no need for the Commonwealth to be duplicating existing State and Territory Government regulatory regimes. The 'one stop shop' environmental assessment and decision making model previously tabled and debated in Parliament should be fully implemented immediately.

The significant duplication between existing environmental assessment and decision making processes has been acknowledged by previous Governments over the last decade. However, attempts to remove this duplication in assessment and approval processes have been thwarted as a result of opposition in the current Senate.

[1] DoEE website - A significant impact is an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is likely to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.

[2] Based on comments contained on p3 DoEE Consultation Paper – cost recovery exemption for small business.

The considerable economic gains and regulatory cost savings under the 'one stop shop' concept for environmental approvals have been highlighted in the following Reports:

- Department of the Environment – *Regulatory Cost Savings under the one stop shop for environmental approvals, September 2014*
- BAEcomics – *The economic gains from streamlining the process of resource projects approval, July 2014*

It is acknowledged that some duplication is removed through the existing assessment bi-lateral agreements between the Commonwealth and State / Territory Governments. However, the Minister`s approval powers under the EPBC Act should also be extended to accredited Governments to obtain the maximum efficiency benefits.

This delegation should also include compliance and enforcement matters, such as remediation, rehabilitation and relinquishment of mining areas.

State and Territory Government agencies already have local, on-the-ground and specialist experience and knowledge of each mining related project, and are in a far better position on which to manage and monitor a remotely located project which could be hundreds of kilometres from the nearest town.

The Department of the Environment has previously acknowledged and supported the view that unnecessary duplication exists under current arrangements. It also noted that '*high environmental standards will be maintained and appropriate checks and balances exist through an assurance framework'.*[3]

In industry`s view, environmental values will not be compromised by a robust accredited assessment and approvals regime at the State and Territory level.

RECOMMENDATION

2. Remove the duplicative 'water trigger' requirements from the EPBC Act

An additional area of duplication and red tape has been created as a consequence of the EPBC Act 'water trigger' requirements for coal seam gas or large coal mining developments. The approval trigger applies to an action which has, or is likely to have, a significant impact on water resources whether in its own right or when considered with other developments.

Industry considers that the management of water resources has almost always been a matter for State and Territory Governments and not the Commonwealth Government, or an independent expert Scientific Committee.

In addition to this duplication, retention of the current provisions for coal and coal seam gas projects has the potential for broader application through the resources sector, and should be removed as it creates another level of uncertainty for investment and business decision making.

[3] http://www.environment.gov.au/epbc/publications/regulatory-cost-savings-oss - Regulatory cost savings under the one stop shop for environmental approvals.

RECOMMENDATION

3. Amend the EPBC Act to prevent vexatious appeals by third parties seeking to delay and block mining development

An issue consistently raised by industry is the increasing number of vexatious appeals and deliberate strategies to delay and block mining development.

There have been a number of such appeals by sophisticated groups using the current provisions of Section 487 of the EPBC Act. These have significant and detrimental impacts on the costs and risk profile of the project.

Noting that Australia already has robust and extensive assessment and approvals frameworks in place, third party objections should be limited to those with a 'direct' interest in a project.

Industry considers that Section 487 of the EPBC Act should be amended accordingly.

RECOMMENDATION

4. The State Government should negotiate with the Commonwealth Government the removal of "mining or milling of uranium ore" from the definition of 'nuclear action' in section 22(1)(d) of the *Environment Protection and Biodiversity Conservation Act 1999*

It can take between 10-15 years for a uranium project to move through the discovery to production cycle, provided there are no further unexpected delays.

In order to reduce some of the costly delay and detrimental impact on the project risk profile "mining or milling uranium ore" should be removed from the requirement for assessment under the 'nuclear action' provisions contained in section 22(1)(d) of the EPBC Act, unless the project itself impacts on 'Matters of National Environmental Significance' (MNES).

There is no scientific justification for the argument that, of itself, uranium 'mining or milling of uranium ore' poses an inherent danger to the environment and therefore there is no need for the provisions of the *EPBC Act* to be 'triggered'.

The regulatory framework for the uranium industry is 'best practice' without duplicative and, arguably, discriminatory treatment under the *EPBC Act.*

4. NATIVE TITLE

RECOMMENDATION

5. Amend the Native Title Act to ensure validity of existing and future Section 31 Agreements

In its submission to the 2015 Australian Law Reform Commission Inquiry into the Native Title Act, AMEC called for greater clarity regarding authorisation procedures under the Act, regarding:

- whether an Applicant must act unanimously or can act by majority, particularly when the terms of the authorisation are silent on the issue;
- whether a claim group can authorise an Applicant to act subject to restrictions; and

- whether, if a member of an Applicant group passes away or is unable or unwilling to act, the remaining members of the Applicant group can continue to act in the absence of a successful s66B application.

These issues have flow-on effects for the authorisation of an Applicant in the agreement-making context. They can cause delays in the finalisation of native title agreements and can impact how agreements are made with native title parties and more broadly how a native title claim group interacts with a proponent.

More transparency and certainty relating to the scope of an Applicant's authority in both claim and future act contexts should be provided. Clarity on the extent to which a person is entitled to make certain assumptions about the authority of an Applicant in the context of agreement-making would be of assistance. This would be along similar lines to the assumptions which can be made about the execution of documents and authority of directors of corporations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth).*

These concerns have now been reinforced through a Full Federal Court decision (McGlade v Native Title Registrar & Ors – *McGlade decision*) which over turned the previous authority on the parties to area Indigenous Land Use Agreements (ILUAs).

The *McGlade decision* has created uncertainty on the validity of existing and future ILUAs which may not have been executed by every member of the 'registered native title claimants'. The proposed amendments aim to address that issue.

The *McGlade decision* also created angst amongst mining and mineral exploration companies which may have entered a range of 'Future Act' Agreements under section 31 of the Native Title Act.

These include Agreements relating to such issues as compensation payments, training and employment opportunities, consents to acts or projects, and cultural heritage processes. These Agreements represent billions of dollars to Indigenous people Australia wide.

The validity of these Agreements may now be open to legal challenge as a result of the *McGlade decision*. While *McGlade* dealt with a series of stated questions of law specifically addressing ILUAs and is therefore arguably not directly relevant with regard to section 31 agreements, the outcome is that the Court has determined all members of the 'registered native title claimant' must execute an ILUA if it can be considered a binding statutory Agreement under the Act.

The provisions in the Native Title Act dealing with s31 Agreements are similar in some important respects to the provisions dealing with ILUAs. In particular, s41(1) of the Act, appears to provide the contractual effect of a finalised s31 Agreement to bind the entire native title claim group to the s31 Agreement. Additionally, the Act prescribes that the 'registered native title claimant' must be a negotiation party to a s31 Agreement.

It is critically important that the Native Title Act is amended to ensure the validity of existing and future Section 31 Agreements.

RECOMMENDATION

6. Develop guidance material/protocols where there are multiple Native Title stakeholders and over lapping claims, particularly in circumstances where there may be a rebuttal by one of the parties

Delays and uncertainty are also created where over lapping claims exist and in circumstances where there may be multiple stakeholders. Industry has previously called for the issuance of guidance material in order to minimize these delays and provide some certainty for all parties. Appropriate guidance has not been forthcoming from the Commonwealth or other Governments.

RECOMMENDATION

7. Amend Part IV of the *Aboriginal Land Rights (Northern Territory) Act* 1976 (Cth) to provide for a preliminary veto right to be exercised or not prior to any negotiations and reduce the veto period from five years to three years for mineral exploration activity

Amendments to Part IV of ALRA provided for in the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* do not appear to be meeting their objectives as there has been no apparent material increase in the promotion of economic development on Aboriginal land resulting from the amendments.

Industry considers that the current ALRA system is not working as intended and stakeholders believe that there is too much power held by Land Councils to simply stop development. The power of veto for five years is considered to be too strong and absolute.

This has led to a situation where it is widely recognised that economic development and the welfare of Aboriginal people on Aboriginal land is in a poor state.

The key concept behind Part IV of ALRA as presently drafted is the right of "veto" over the grant of exploration tenure on Aboriginal land. This veto right reduces the potential for economic and social development for Aboriginal people by reducing the normal interaction with the minerals exploration and mining sector that other landowners regularly experience, deal with and benefit from.

The large extent of Aboriginal land in the Northern Territory (being approximately 46% of the Territory landmass and not confined to one particular area of the Territory) means that the veto right can be used as a bargaining tool to seek to obtain leverage over projects involving non-Aboriginal land. For example, where a mining project involves the use of both Aboriginal land and non-Aboriginal land then the use of the non-Aboriginal land can be severely restricted by the ability to veto the use of the Aboriginal land. This leverage can also be applied to mining projects which, although actual mining occurs on non-Aboriginal land, operations require key infrastructure to cross Aboriginal land.

Allowing Aboriginal people a "veto" over the grant of mineral tenure is uncompetitive and promotes uncompetitive behaviour.

Furthermore, the veto right provided for in Part IV of ALRA potentially promotes "land banking" by companies who seek to rely on a veto occurring and the consequential 5 year moratorium to

keep their footprint on an area (and prevent other companies from applying for that area) where they are not ready to commence any exploration activity there.

Industry considers the provisions of Part IV of ALRA which allow for a "veto" with respect to the grant of exploration licences over Aboriginal land should be determined much earlier without cost to explorers and then only for a period of three years.

Aboriginal Cultural Heritage

Various State and Territory based Aboriginal cultural heritage legislation exists, which also interact with the requirements of the Native Title Act. This includes the expedited procedure / heritage survey process which has created extreme angst, conflict, delays and significant leverage being applied on mining and mineral exploration companies to meet payment demands.

In WA for example, the daily cost of a cultural heritage survey / clearance (excluding meeting expenses) has increased from $11,000 in 2010 to a current level of over $30,000 per day, and higher in some regions.

AMEC is working with relevant jurisdictions to reduce red tape and make this process more cost effective for all parties.

5. ENSURE A FAIR AND FLEXIBLE INDUSTRIAL RELATIONS FRAMEWORK EXISTS

RECOMMENDATION

8. Ensure that a flexible and fair industrial relations framework exists

The mining industry is cyclical, often experiencing peaks and troughs in its activities due to a number of issues including project funding, approval delays, fluctuating commodity prices and exchange rates, increasing global competitive forces, the quantity and quality of mineral deposits and the mine life cycle itself.

For these reasons industry recommended to the Productivity Commission Inquiry that the workplace relations framework should be flexible and practical to cater for fluctuations in economic activity.

The ability to use Individual Flexibility Agreements is fundamental to meeting this objective.

RECOMMENDATION

9. Continue to provide a skilled migration scheme

Industry supports continuation of the Government`s Skilled Migration Programme where the standard Australian labour market is unable to meet demand.

This is currently being implemented through the use of S457 temporary skilled worker visas.

The cyclical nature of the resources sector requires flexibility to deal with work flow and demand for skilled labour, which is not otherwise available in the Australian market. This was clearly evidenced through the recent growth and construction phase of the mine cycle.

It was disappointing that the Government did not consult in any way with industry prior to recently announcing the removal of a number of mining related occupations from the list of eligible skilled occupations, such as mineral exploration drillers.

Industry has advised AMEC that despite domestic labour market testing there is an extreme shortage of skilled mineral exploration drillers in Australia.

The previous poor economic and employment circumstances have now started to dissipate to the extent that demand for this occupational group has returned. Mineral industry drilling companies have therefore been actively advertising for skilled drillers without success.

To meet current workplace demands for this classification AMEC has requested their urgent re-instatement on the eligible occupations list, and remove the red tape surrounding the list.

6. ACCESS TO COST EFFECTIVE REGIONAL INFRASTRUCTURE

RECOMMENDATION

10. Undertake a detailed gap analysis of the infrastructure needs of the mining sector in regional Australia

Development of cost effective and accessible infrastructure for the mining sector is a crucial component in unlocking stranded resource assets caused by inadequate or inefficient infrastructure across Australia.

The nationwide benefits in doing so are immense.

The Infrastructure Australia Plan and 2017 Infrastructure Priorities List describes Australia`s major infrastructure needs, expectations and future demands. In doing so, it looks at Australia`s current and prospective infrastructure gaps and funding issues. These documents do not go far enough as insufficient attention is afforded to the resources sector.

The 2017 Priorities List concentrates upon major project requirements around Australian cities, rather than broadening its focus to regional Australia. It mainly concentrates on urban congestion, national connectivity (mainly roads), and opportunity for growth.

There is no acknowledgement to the fact that cost effective regional infrastructure for the mining sector can play a major role in unlocking stranded mining assets and generate revenue streams and economic dividends for Governments throughout Australia.

A detailed gap analysis of the infrastructure needs of the mining sector in regional Australia should be undertaken in order to assist in future strategic planning of energy, transport corridors (including road and rail), ports (including for uranium exports), water and communication services and facilities.

RECOMMENDATION

11. Reform the framework for third party access to infrastructure

Access to funding and cost effective infrastructure would provide an avenue to unlock producing assets to the benefit of the nation as a whole.

Industry considers that the mechanisms by which small emerging miners may more efficiently and effectively access common user infrastructure (such as port and rail) can be complex and onerous through ongoing compliance with the Competition and Consumer Act, and State / Territory based consumer protection legislation. These mechanisms do not appear to be meeting the 'third party use' objective and need to be reformed.

RECOMMENDATION

12. Increase competition within the upstream domestic energy sector

Industry considers that there should be enhanced competition in the upstream energy sector through a specific focus on robust administration of the petroleum licensing system in line with the objective of ensuring resources are developed in a timely manner.

Increased competition within the upstream market should deliver a better result for energy users over the long term.

Industry supports a commitment to a *'use it or lose it'* policy as a mechanism to drive development of Australia's minerals and gas reserves.

The mining sector considers that robust examination of applications for retention licences against established criteria requiring the study of multiple development options including domestic gas is entirely appropriate and in line with the longstanding policy approach. The regulators must be technology and project concept agnostic and instead focus on ensuring timely development of this important input into Australia's economy.

Under Western Australia`s Domestic Gas Reservation policy, 15% of Liquified Natural Gas (LNG) production is to be reserved for domestic consumption.

A Deloitte Access Economics analysis of the WA gas sector (May 2014) found that "u*nder a reservation policy, rather than market forces influencing the quantities of gas available to the domestic market, supply is essentially imposed by the government. This intervention hampers the ability of the market to efficiently respond to dynamics and changing conditions facing market participants."*

The 2014 Report also found that "*In Western Australia there are currently 35 retention leases held in Commonwealth waters, 17 of which have been renewed more than once and hence have a duration of greater than five years. One of these retention leases was first granted in 1987 and is due to expire in 2015. This means that to date, 27 years have passed since the initial retention lease was granted and this field has not been developed. Retention leases are granted, however, with the expectation of reserves being developed within 15 years".*

Deloitte`s concluded that "*governments should more rigorously apply the principles of the retention lease policy and enhance transparency of the process. Along with phasing out the domestic gas reservation policy, these changes will result in a more competitive and robust domestic gas market."*

Industry considers that increased competition within the upstream domestic energy sector is sound public policy and would be of benefit to the nation, particularly with the pricing framework.

APPENDIX 1

AMEC has made a number of recent representations to Governments in most Australian jurisdictions in order to address identified red tape, approvals and regulatory reform submissions to Governments at all levels, including:

- Productivity Commission – *Mineral and Energy Resource Exploration – May 2013* (re non-financial barriers to exploration)[4]
  Productivity Commission – *Major Project Development assessment process* – November 2013[5]
- Western Australia - 17 September 2015 – *Reinvigorating Regulatory Reform Program*
- Western Australia – February 2017 – *Western Australian Election 2017 Policy Platform*
- South Australia – February 2017 – *Leading Practice Mining Acts Review*
- New South Wales – April 2017 – *New South Wales Reform Strategy*
- Northern Territory – February 2017 – *Northern Territory Reform Strategy*
- Queensland – January 2015 – *Queensland Policy Platform*

AMEC is currently working closely with State and Territory jurisdictions to implement the suggested recommendation and solutions, where possible, with some slow progress being made.

The issues and concerns raised in these documents are a work in progress or are regularly being updated due to changing circumstances, process improvements and changes to public policy frameworks.

Note - Copies of the AMEC submissions are available upon request.

[4] http://www.pc.gov.au/inquiries/completed/resource-exploration

[5] http://www.pc.gov.au/inquiries/completed/major-projects/report