Submission to:

The Senate Standing Committee on Legal and Constitutional Affairs, and

The House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs

Re: Inquiry into the Native Title Amendment Bill 2012

ASSOCIATION OF MINING AND EXPLORATION COMPANIES

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Introduction

Thank you for the opportunity to provide comments on the Inquiry into the Native Title Amendment Bill 2012.

AMEC notes that the proposed Amendment Bill is being examined by the Senate Standing Committee on Legal and Constitutional Affairs, and by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs.

AMEC is the peak national industry body for mineral exploration and mining companies within Australia. The membership of AMEC comprises over 360 explorers, emerging miners and the companies servicing them.

AMEC's strategic objective is to secure an environment that provides clarity and certainty for mineral exploration and mining in Australia in a commercially, politically, socially and environmentally responsible manner.

The need for clarity and certainty is particularly relevant to public policy settings, including those relating to native title determination and associated negotiation processes.

Where a Native Title determination has been made, AMEC acknowledges the Traditional Owners and conditions detailed in the native title determination.

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 is carried out in good faith with an anticipation that minerals exploration and mining companies may offer some form of economic and social benefits 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 order to enhance the investment and decision making processes.

Following an industry forum in 2010 on broad Aboriginal cultural heritage and native title issues, AMEC made three specific native title recommendations, as follows:

1. **Resolving any outstanding native title claims**

   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, which had been outstanding for several years, and resulted in many exploration licence applications being delayed. (AMEC notes that the Wongatha claim has since been dismissed).

2. Guidelines on consultation processes for multiple stakeholders and overlapping claims

To avoid confusion, potential conflict and delays, AMEC members are seeking clear consultation processes where there may be more than one group of registered claimants or traditional owners in the tenement area.

3. Enforceability of conditions contained in ILUAs

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/ Traditional 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 the ILUA with the Nharnumangga, Wajarri and Ngarlawangga (NWN) people several case studies were provided to AMEC where a series of delays 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.

These valid recommendations remain outstanding and, where appropriate should be included in any amendments to the *Native Title Act 1993* (Cth), and are therefore included in the **Recommendations** below.

The content of this submission is based on the limited information provided in:

- The Native Title Amendment Bill 2012, Explanatory Memorandum and the Attorney General`s Second Reading speech dated 28th November 2012,
- A brief teleconference on 15th August 2012 between representatives of AMEC and Attorney General`s Department (for which very short notice was provided to AMEC by the Government) prior to the release of the Exposure Draft and explanatory material, and
- Input from AMEC`s expert based Aboriginal Affairs Committee and AMEC member feedback.

Executive Summary

It should be noted that this submission is based on comments made by AMEC in its submission to the Attorney General`s Department dated 19th October 2012 in response to the Exposure Draft of the Amendment Bill (from which no feedback was provided).

In that submission AMEC expressed extreme concern with the very short stakeholder consultation period, and the limited information available to support the proposed amendments.

AMEC does not completely concur with the statement in the Explanatory Memorandum (page 5 refers) that the "...*Government has consulted extensively with stakeholders on the amendments in this Bill..."* There may have been some discussion with stakeholders however AMEC questions the substance, extent and validity of those discussions.

Despite recommending that the current amendment Bill be withdrawn, AMEC continues to be of the strong view that further detailed research and analysis should be undertaken of the proposed changes, including close consideration of any unintended consequences on Traditional Owners, Native Title Representative bodies, governments, industry and other stakeholders.

AMEC considers that native title determination and resolution is a very complex and sensitive area, which cannot be dealt with in an ad hoc or frivolous manner.

AMEC has therefore previously constructively and proactively recommended that following further research and analysis that the Commonwealth Government should convene a high level stakeholder forum in order to develop a collaborative long term native title strategy with the aim of reducing the hundreds of claims still requiring resolution.

In this respect, AMEC notes that according to the explanatory information released with the original Exposure Draft, '*the package of amendments aligns with the Commonwealth`s native title strategy'*.

However, AMEC has unsuccessfully attempted to locate or establish the specific content of that 'strategy', and in fact was advised on 28th November 2012 by the Attorney General`s Department that a '*strategy does not exist in one single document'*.

AMEC considers that the apparent lack of a publicly available long term strategy is a weakness in strategic planning, disclosure and accountability which will subsequently diminish the possibility of sustainable native title outcomes.

Based on the limited information available, and lack of evidence to support the proposed amendments, particularly those relating to Negotiations in Good Faith (NIGF), AMEC does not support the introduction of the amendment Bill in its current form, as it will not meet the stated objectives (*improving agreement making, encouraging flexibility in claim resolution and promoting sustainable outcomes*[1]).

AMEC considers that the proposed amendments to NIGF are unnecessary and unwarranted, will have a detrimental effect and lead to further delays, increased costs and uncertainty for all parties.

[1] Native Title Amendment Bill 2012 – Explanatory Memorandum, page 3

AMEC notes that no evidence has been provided to substantiate the view that the Amendment Bill will result in a reduction in the high number of claims requiring resolution.

It would be more appropriate to develop a collaborative long term strategy that contributes towards a reduction in the number of native title claims requiring resolution and a streamlining of the process for the benefit of all stakeholders.

Furthermore, AMEC notes that in November 2011 the Senate Legal and Constitutional Affairs and Legislation Committee when reviewing the Native Title Amendment (Reform) Bill 2011 introduced by the Greens recommended "that the Senate should not pass the Bill".

In doing so, the Committee, stated[2]:

- "*3.82 Based on the evidence received during the inquiry, the committee acknowledges that there is dissatisfaction among certain stakeholders with particular aspects of the native title system. The committee agrees that reforms to expedite effective native title outcomes are desirable. However, the committee is not persuaded that the Bill will achieve its stated objectives in that regard.*
- *3.83. The committee has serious reservations about the introduction of legislation which seeks to make amendments – particularly in an area as complex and technical as native title – in a piecemeal manner. As a general principle, the committee does not consider that piecemeal amendments represent good legislative practice. A more thorough approach is always favourable, in order to ensure that all relevant issues are considered in a holistic way and that no unintended consequences arise.*
- *3.84 With respect to the efficacy of the Bill, the committee notes that every key provision raised concerns among contributors to the inquiry, whether policy-oriented or relating to technical drafting issues. Numerous comments were also directed toward the lack of attention to practical considerations, which could result in unintended and undesirable consequences, as well as the dearth of comprehensive consultation and consideration."*

Despite the Senate`s November 2011 report, recommendation and observations, and without any apparent prior consultation, the Attorney General, Hon Nicola Roxon announced at the AIATSIS Conference in June 2012 various legislative changes around good faith negotiations, Indigenous Land Use Agreements, historical extinguishment in parks and reserves and the tax treatment of native title payments.

Limited and unsatisfactory consultation has occurred with AMEC prior to, and after this announcement.

In AMEC`s view the concerns raised in paragraphs 3.82 to 3.84 of the Senate`s November 2011 report still remain and have not been satisfactorily dealt with by the government.

AMEC and its members have extensive experience working within the native title system and would like to see any reforms to the Native Title Act deliver results streamlining the native title process for the benefit of all stakeholders. AMEC is of the view that, to date, its concerns and recommendations have not been afforded due consideration. Without a detailed and transparent consultation process the proposed reforms may have unintended consequences,

[2] Senate Legal and Constitutional Affairs and Legislation Committee, November 2011, page 37

and a detrimental and unwanted effect leading to further delays, increased costs and uncertainty for all parties.

Despite the foregoing, AMEC and its members recognise the need for native title legislative reform, but for the reasons set out, cannot support the current proposal. AMEC remains willing and able to work with all relevant stakeholders in relation to further on-going constructive consultation.

AMEC therefore does not support the Amendment Bill in its current form.

Recommendations

1. ***That the proposed amendments to the Native Title Act 1993* (Cth*) are withdrawn pending further detailed research and analysis of the changes, including close consideration of any unintended consequences***

2. ***Following such research and analysis, that the Commonwealth Government publicly releases a Regulatory Impact Assessment for stakeholder consultation and comment***

3. ***That the Commonwealth Government convenes a high level stakeholder consultation forum in order to review / develop a collaborative long term Native Title Strategy with the aim of reducing the hundreds of claims still requiring resolution***

4. ***Following the proposed stakeholder consultation forum, that any identified, necessary and agreed amendments to the Native Title Act 1993* (Cth) *be re-submitted to Parliament for consideration and further consultation***

5. ***That guidelines should be developed on how to deal with overlapping claims, competing, differing and multiple stakeholder views and needs***

6. ***That the conditions contained within Indigenous Land Use Agreements are legally enforceable***

Commentary on the draft legislation

Schedule 1 – Amendments relating to disregarding historical extinguishment of native title in areas set aside for the preservation of the natural environment

AMEC notes that the proposed amendments seeks to provide parties with more flexibility to agree to disregard historical extinguishment over parks and reserves, and provide for more opportunities for claims to be settled by negotiation.

Based on advice received from the Western Australian Government, AMEC understands that the amendments have the potential to have a significant impact on the State as approximately

80% of the State`s conservation estate consists of areas where native title has been extinguished, and covers a total area of over 14 million hectares.

AMEC members with projects in the Northern Territory have also expressed concern that the definition of 'park area' in the Bill is wide enough to cover pastoral land, of which 49% of the Territory is pastoral leased land under the *Pastoral Land Act (NT).*

There are also large areas in Western Australia that are 'pastoral leases', some of which may be converted to the conservation estate.

It is unclear on whether the intention of the Bill is to cover such pastoral lands.

AMEC is concerned that significant delays will occur in the claims settlement process as native title parties seek agreement from States and Territories to disregard prior extinguishment.

AMEC also notes with extreme concern that the amendment may also create a precedent for the over-turning of extinguishment and have far reaching and unintended consequences for industry and governments.

As this may lead to expectations of native title compensation, any such liability would need to be addressed by the Commonwealth Government as the amended Act would be entering areas previously exempt from future act obligations.

In the event that this amendment is introduced, it is therefore essential that the Commonwealth Government absolves all mineral exploration and mining companies from any liability that may arise, and agrees to underwrite any such compensation liability.

AMEC does not support this amendment.

Schedule 2 – Amendments clarifying good faith requirements in the right to negotiate provisions

Negotiations in good faith

AMEC understands that the aim of these amendments is to clarify the meaning of 'good faith', with the intention of:

- encouraging parties to focus on negotiated, rather than arbitrated, outcomes;
- improving the balance of power between negotiating parties, and;
- promoting positive relationship building through agreement making.

Although these are sensible and reasonable objectives, the reality is that all parties in the process must have a mutual trust, as well as a cooperative, conciliatory and genuine willingness to engage and resolve any claims, negotiations and disputes in a timely and cost effective manner.

AMEC understands that the proposed amendments to the 'Negotiations in Good Faith' (NIGF) are based on *FMG Pilbara Pty Ltd v Cox and Others (2009) ("**FMG v Cox**")* on the basis that the decision had a detrimental effect on the value of the Right to Negotiate (RTN).

Based on AMEC`s understanding and analysis of the decision in *FMG v Cox,* there is no evidence to demonstrate that the test for good faith negotiations is incorrect, or that systemic problems are prevalent.

Furthermore, and in accordance with feedback from AMEC members with projects in the Northern Territory there has been minimal litigation or resort to the National Native Title Tribunal in relation to the issue of good faith negotiations or in having the right to negotiate future acts determined by the Tribunal following failure to reach agreement within the 6 month period.

It should be noted in the Northern Territory that all exploration licences are processed under the expedited procedure and most mining companies continue to negotiate to reach agreement within the 6 month period.

AMEC also notes that any presumption that only non-native title parties fail to negotiate in good faith is incorrect. Many AMEC members have confirmed that it is the native title parties that fail to negotiate in good faith.

The proposed amendments to establish 'good faith criteria' are supported in principle by AMEC. However in practice they will add complexity and additional litigation as each criterion will be subject to individual interpretation and potential legal challenge.

As examples, the meaning of '*reasonable proposals and counter proposals*'[3], '*given genuine consideration to the proposals of other negotiating parties*'[4], '*refraining from acting for an improper purpose in relation to the negotiations*'[5] are all ambiguous and open to expensive legal challenge.

AMEC notes that the majority of parties negotiate in good faith and that the current process appears to be well understood and are largely productive.

In addition, as no evidence has been provided to indicate that systemic problems exist, AMEC does not consider that legislative intervention is necessary and notes that significant case law precedents already exist on what constitutes 'good faith'.

AMEC does not support this amendment.

Extending negotiation period to 8 months

AMEC notes the reforms also propose an extension to the time before a party may seek a determination from the National Native Title Tribunal (NNTT) from 6 to 8 months.

[3] Native Title Amendment Bill 2012, page 10, line 12
[4] Ibid – line 15
[5] Ibid – line 21

AMEC does not support this proposal as it is unnecessary and unwarranted and can severely disadvantage companies who have made every attempt to negotiate in good faith.

AMEC is extremely concerned that should this amendment be implemented it will be used inappropriately by native title parties, and therefore not achieve any benefit.

AMEC considers that emphasis should be given to the quality of the negotiations, rather than the length of the relevant negotiation periods.

The proposed amendment provides no incentive to facilitate negotiations in a timely manner.

AMEC does not support this amendment.

Schedule 3 – Amendments to Indigenous Land Use Agreement processes

AMEC supports the streamlining of processes surrounding Indigenous Land Use Agreements (ILUAs).

Registration

It is noted that the proposed reforms will establish a threshold which will determine whether or not a new registration is required. Where parties agree to amendments to an ILUA that are of a minor nature then the parties need not re-apply to the Registrar.

Broaden scope of body corporate ILUAs

AMEC notes that the new provisions will ensure that parties that have an ILUA that includes areas where native title has been extinguished are not prevented from using the Subdivision B ILUAs. Such an amendment should result in a simpler registration process.

Clarify the coverage and scope of ILUAs

AMEC notes that the reforms clarify that ILUAs can be used to cover a broad range of issues, including restrictions on native title rights, and final settlement of any compensation.

Improve authorisation and registration processes for ILUAs

AMEC notes that the government wishes to improve the efficiency of the registration process for Subdivision C ILUAs while maintaining its integrity.

The explanatory material indicates that the amendment is to reduce the mandatory three month notice period to one month, however no detail has been provided. It is therefore assumed that the intention of the amendment is to bring forward the time that a mining company can gain full legal protection as a result of an agreement reached with native title parties. Such an intention would be supported by AMEC.

AMEC is particularly concerned that there does not appear to be any in-built protections to prevent lengthy delays that may be caused by strategic delaying tactics, frivolous or vexatious objections to the registration of the ILUA.

AMEC generally supports the amendments.

Schedule 4 - Minor technical amendment

AMEC notes that a minor technical amendment is proposed in relation to who must hold the relevant pastoral lease, and covers circumstances where a corporation may not have shareholders, and that this amendment would ensure that where an Indigenous corporation has members rather than shareholders, Section 47 could still apply to disregard extinguishment over the area.

AMEC supports this minor technical amendment.

Future reform of the Native Title process

AMEC understands that the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs has been requested to specifically examine and report on the benefits or otherwise of an amendment to the Bill that would reverse the onus of proof for claimants on on-going connection to land.

AMEC also understands that the Standing Committee will be holding a roundtable public hearing in Sydney on 8th February 2013 to discuss:

1. The Native Title Amendment Bill 2012, and
2. Future reform of the Native Title process.

AMEC will be represented at the roundtable and in doing so will continue to promote broad stakeholder consultation on future reform initiatives to the benefit of all parties.

AMEC considers that the roundtable public hearing is a start to that consultation process, noting that there are other interested stakeholders that will not be in attendance.

AMEC will be seeking to appear before the House of Representatives Standing Committee, and the Senate Standing Committee.

In the limited time available in which to comment on the potential to reverse the onus of proof, AMEC is concerned that such a proposal will have wide reaching changes to the native title process and significantly impact AMEC and its members.

At this point, AMEC has not been provided with any substantiated evidence to indicate that:

- the current ‘onus of proof’ process is ‘broken’, or
- a reversal in the onus of proof will result in a streamlining of the native title process.

These are broad issues that warrant comprehensive and structured consultation and consideration.