MINORITY REPORT BY COALITION SENATORS

Introduction

1.1 The *Native Title Amendment Bill 2012* (Bill) proposes amendments that will address three major aspects of the *Native Title Act 1993* (Act):

(a) Changing and codifying the obligation to negotiate in good faith in relation to proposed grants of mining interests and acquisitions of native title.

(b) A proposed new section 47C, which will allow native title to be revived over areas that have been set aside or otherwise dedicated to the preservation of the environment.

(c) Some amendments to the Indigenous Land Use Agreement (ILUA) provisions of the Act, which are largely technical.

1.2 Various submissions received by the Senate Committee, including from the National Native Title Tribunal[1] (NNTT), the Western Australian Government,[2] the Minerals Council of Australia,[3] the Chamber of Minerals and Energy of Western Australia,[4] and the Association of Mining and Exploration Companies,[5] express serious concerns about the effect of the first element of the Bill in relation to changes to the obligations to negotiate in good faith and the latter four submissions on the second element of the Bill, namely new section 47C.

1.3 In relation to the amendments to the ILUA provisions of the Act, which are largely technical, Coalition Senators acknowledge the concerns of the Chamber of Minerals and Energy of Western Australia in their submission to the inquiry.[6]

1.4 Contrary to the stated intention of the Bill, it will, if enacted, lead to greater uncertainty and more litigation in the context of the 'future act' regime, without commensurate benefits in terms of tangible and lasting outcomes.

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1 National Native Title Tribunal, *Submission 17*.

2 Western Australian Government, *Submission 8*.

3 Minerals Council of Australia, *Submission 13*.

4 Chamber of Minerals and Energy of Western Australia, *Submission 7*.

5 Association of Mining and Exploration Companies, *Submission 20*.

6 Chamber of Minerals and Energy of Western Australia, *Submission 7*, *Attachment 1*, p. 9.

Context of the Act and Bill – lack of consultation

1.5 The Act is a complex piece of legislation of national significance.

1.6 The Act was originally introduced in response to the High Court's *Mabo* judgment,[7] which determined it was a legal fiction that Australia was uninhabited – or terra nullius – when sovereignty was acquired by the British Crown. At the core of the Act is the recognition and protection of native title within the framework of the Australian legal system. The Act was not developed in isolation, without regard to the wider interests of the community as a whole.

1.7 Its introduction to Parliament followed a year-long process of consultation and policy development, involving extensive talks with Aboriginal and Torres Strait Islander organisations, State and Territory governments and the mining and pastoral industries.

1.8 The Government of the time made clear that it was seeking to achieve twin goals to:

- do justice to the *Mabo* decision in protecting native title; and
- ensure workable, certain land management.

1.9 The Act is intended to deliver justice and certainty for Aboriginal and Torres Strait Islander people, industry, and the whole community.[8]

1.10 Significant amendments were made to the Act in 1998 following the High Court's *Wik* decision.[9] The 1998 amendments also followed extensive public debate and consultation and were finally enacted as a result of a compromise reached in the Senate.

1.11 Significant amendments to the Act can have major implications for not only the Aboriginal and Torres Strait Islander people who seek to have their native title rights protected, but also other land users, governments and the Australian community, who derive considerable prosperity from the minerals that lie beneath the land. Consequently, the proposals contained in the Bill to make further changes to the regime established by the Act must be carefully considered with the interests of all stakeholders and with the national interest as paramount consideration.

1.12 The amendments must also be considered in the context of where and by whom the implications of the proposed amendments will impact and be most keenly felt.

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7 *Mabo and Others v Queensland (No 2)* [1992] HCA 23.

8 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Native Title Amendment (Reform) Bill 2011*, November 2011, p. 41.

9 *Wik Peoples v The State of Queensland* [1996] HCA 40.

1.13 By far the most significant of the proposed changes is to the 'right to negotiate' regime, which applies to proposed 'future acts' (most often associated with mining) where native title exists or persons claiming its existence have a registered claim.

1.14 Australia's largest mineral province is located in Western Australia.

1.15 In 2011-2012 Western Australia exported more than $110 billion of mineral and petroleum product which represented more than 57% of Australia's mineral and petroleum exports.[10]

1.16 The proposed amendments will affect Western Australia more than any other State or Territory due to the high rate of mining and exploration activity which is conducted in WA.

1.17 Currently, 97% of 'future act' matters relate to activities being conducted in WA.[11]

1.18 The substance of the major amendments proposed by the Bill was originally canvassed, albeit in a different form, by the *Native Title Amendment (Reform) Bill 2011*, proposed by Senator Rachel Siewert on behalf of the Australian Greens (Greens Bill).

1.19 In the report on the Greens Bill, the Committee Majority, including Government Senators, concluded:

> 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.
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> 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

10 Government of Western Australia, Department of Mines and Petroleum, *Quick Resource Facts*, available at: http://www.dmp.wa.gov.au/7846.aspx (accessed 13 March 2013).

11 Attorney-General of Australia, *New President for National Native Title Tribunal*, Media Release, 4 March 2013, available at: http://www.attorneygeneral.gov.au/Mediareleases/Pages/2013/First%20quarter/4March2013-NewPresidentforNationalNativeTitleTribunal.aspx (accessed 13 March 2013).

> consequences, as well as the dearth of comprehensive consultation and consideration.[12]

1.20 Those concerns of the Committee expressed in relation to the Greens Bill also apply to the current Bill.

1.21 The measures proposed in the Bill do not represent a thorough or holistic approach to enhancing or improving the operation of the Act. Rather, the specific measures adopted represent a narrower list drawn from the original 'menu' established by the Greens Bill. No over-arching review or analysis of the Act in its totality has been conducted.

1.22 The proposed amendments are piecemeal at best and fail to achieve the objects enumerated in the Minister's Second Reading Speech or the Explanatory Memorandum.

1.23 The alleged consultation process was flawed and represented no more than an opportunity for certain interested parties to express a view, without those views being the subject of detailed scrutiny and analysis.

1.24 Coalition Senators believe that the consultative process for this Bill was not the kind of intensive and detailed engagement that has characterised previous major amendments to the regime established by the Act.

1.25 As a consequence of this ineffective consultation process, submissions raising serious practical considerations have been made and in many cases these issues which are of considerable concern to the mining industry and other interested parties have not been addressed or answered adequately by the Government.

1.26 Coalition Senators believe the Government has failed to understand the practical impact of the proposed amendments and the potential adverse economic and social consequences that will flow as a result of the Bill being passed.

'Good faith' negotiations

1.27 The Bill proposes substantial changes to the present obligation to negotiate in good faith, as follows:

(a) The negotiation parties will be required to use 'all reasonable efforts' to reach agreement and, in considering whether they have done so, the NNTT must have regard to a non-exhaustive list of criteria based on wording taken from the *Fair Work Act 2009* (Cth) (Fair Work Act).

(b) The minimum negotiation period will be extended to 8 months.

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12 Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the provisions of the Native Title Amendment (Reform) Bill 2011*, November 2011, p. 37.

(c) The current onus will be reversed, so as to require a proponent to positively demonstrate that it has negotiated in good faith as a precondition to becoming entitled to make application for an arbitral determination under section 35 of the Act.

1.28 These changes go to the heart of the nature of the 'right to negotiate' provisions, which are afforded as a procedural right to persons who have a registered native title claim or hold native title.

1.29 The touchstone for the asserted need for the amendments is the decision of the Full Federal Court in *FMG Pilbara Pty Ltd v. Cox*[13] (*FMG v Cox*).

1.30 The former Attorney-General, in her Second Reading Speech for the Bill, cites two reasons for the amendments.

1.31 First, to prevent parties from acting capriciously or unfairly:

> Many negotiating parties are already building strong and positive relationships with Indigenous Australians. Many are already fulfilling these 'good faith' obligations. But there are those, at the fringes, who are acting capriciously or unfairly, those who are not seriously sitting down at the table with proposals or offers, or not turning up to meetings regularly and withholding information which is not commercially sensitive and would assist in reaching an agreement. There is a minority who are just sitting through negotiations, waiting for the clock to tick and time to expire before rushing off to an arbitral body.
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> The government does not believe these practices are widespread, but this amendment will clearly set out the expectations of all parties—both Indigenous and non-Indigenous—in operating under the 'right to negotiate' regime. This bill is designed to address these types of situations.[14]

1.32 Second, to provide certainty:

> Currently, parties are required to negotiate in 'good faith' under the Native Title Act. But 'good faith' is not defined. This has caused confusion and litigation about what constitutes 'good faith' and at times, it has been difficult for parties to prove a lack of 'good faith'.[15]

1.33 The Explanatory Memorandum to the Bill at page 60 also states that the proposed amendment to section 31 will ensure that the parties negotiate about the impact of the proposed act on native title, and thereby 'cure' one of the perceived consequences of the *FMG v Cox* decision.

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13 *FMG Pilbara Pty Lty v Cox* [2009] FCAFC 49.

14 The Hon Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 28 November 2012, p. 13651.

15 The Hon Nicola Roxon MP, Attorney-General, *House of Representatives Hansard*, 28 November 2012, p. 13651.

1.34 Taking each of these issues in turn:

Avoiding unfair conduct

1.35 Firstly, in the evidence received by the Committee, it was common ground that most parties to negotiations conduct themselves appropriately, in accordance with not only the letter of the law but also an interest based approach to negotiation.

1.36 The Minerals Council of Australia and the Chamber of Minerals and Energy of Western Australia provided significant empirical and anecdotal information about how the 'system' functions in practice, including the time taken to conclude negotiations and the nature and quality of agreements being reached. This information included:

(a) Approximately 98.5% of tenements and land acquisitions notified under the 'right to negotiate' have during the last twelve years either been granted under an agreement, are continuing in the negotiation process or have been withdrawn.[16]

(b) Of the 7,140 mining tenements and acquisitions notified since 1 January 2000, 'good faith' has only been challenged on 31 occasions.[17]

(c) The average period between the giving of notice under section 29 of the Act and the making of an application for an arbitral determination under section 35 of the Act is some 39 months. In Western Australia, the period is even longer: nearly 43 months.[18]

(d) Agreements are the most common means (by far) of resolving matters under the Act. There is an increasing number of highly sophisticated agreements, some of which involve benefits worth hundreds of millions of dollars and, in a few cases, billions.

1.37 Coalition Senators note that this evidence was not directly challenged by any of those who made submissions to the Committee and is supported in substance by the position taken by many of those who gave evidence. The NNTT, which is the independent expert body established to oversee the 'right to negotiate' process, concludes in its submission[19] that most negotiation parties already take an interest-based approach to negotiations.

1.38 It is also noted that even where the negotiation parties are unable to reach agreement and there is an arbitrated outcome that the 'future act' may be done, the right for the native title party to seek compensation is not lost.

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16 Chamber of Minerals and Energy of Western Australia, *Submission 7*, Attachment 1, p. 3.

17 Chamber of Minerals and Energy of Western Australia, *Submission 7*, Attachment 1, p. 3; Minerals Council of Australia, *Submission 13*, *Attachment 1*, p. 1.

18 Chamber of Minerals and Energy of Western Australia, *Submission 7*, Attachment 1, p. 3.

19 National Native Title Tribunal, *Submission 17*, p. 7.

1.39 To the contrary, the Act preserves the right of the native title party to bring a formal compensation application. This is an important part of the Act and on the face of it provides a reasonable path forward where the negotiation parties cannot reach agreement as to the value of compensation for impairment of native title during negotiations.

1.40 Despite the absence of any specific evidence of material examples of capricious or unfair conduct of the kind that is claimed by the Attorney-General, there is an assumption that the Bill is necessary to 'cure' a current deficiency in the Act in that regard, which was putatively exposed by the *FMG v Cox* decision.

1.41 Coalition Senators consider that, given the failure of the Attorney-General to justify the Government's alleged concerns relating to capricious or unfair conduct, it is therefore both appropriate and necessary to carefully consider the *FMG v Cox* decision.

1.42 There is a deal of confusion about what the *FMG v Cox* decision means, only some of which can be explained by differing legal interpretations of its nuances.

1.43 The Full Federal Court in that decision was very explicit about its view of capricious or unfair conduct, and how that would be dealt with under the Act, in its current form:

> It may be accepted, as contended by [the Puutu Kurnti Kurruma Pinikura (PKKP)], that it is not sufficient for good faith negotiations to merely 'go through the motions' with a closed mind or a rigid or predetermined position but there is no suggestion at all on the Tribunal's findings that that was the attitude taken by FMG. To the contrary, the Tribunal concluded that FMG approached its negotiations with both native title parties with an open mind. It did initiate communications, did make proposals and did punctually respond to communications. It organised and attended meetings, facilitated and engaged in discussions, made counter-proposals, sent properly authorised negotiators and did not adopt a rigid non-negotiable position…The Tribunal concluded that FMG had from the outset a genuine desire to reach accord with the native title parties…Significantly, the conclusions the Tribunal drew were against the background of a contention by PKKP that FMG had 'engaged in disingenuous conduct amounting to obfuscation and pettifoggery'. The Tribunal expressly rejected that submission.
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> Had it upheld that submission, a conclusion of absence of good faith would not have been surprising. However, the Tribunal expressly concluded that FMG had 'discharged its duty fairly and conscientiously' concluding that there was no evidence that it had deliberately avoided negotiating about the Proposed Tenement or that it had engaged in deliberately misleading behaviour designed to avoid engaging in meaningful negotiations…Indeed, the Tribunal concluded that there had been productive negotiations on the [Land Access Agreement (LAA)].

> 'Good faith' is to be construed contextually (that is, it is necessary to identify what the 'good faith' obligation is intended to achieve). That obligation is made obvious by the wording of the provision in which it is found within the context of the statutory scheme. There is no reason to think that the ordinary meaning of 'good faith' should not apply. In the present circumstances there could only be a conclusion of lack of good faith within the meaning of s 31(1)(b) of the Act where the fact that the negotiations had not passed an 'embryonic' stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct.
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> The difficulty confronting PKKP is that the Tribunal quite reasonably concluded that FMG had negotiated in good faith during the six month period with a view to reaching the relevant agreement. There is nothing more under the statute that it was required to do. It is not surprising that the Tribunal reached that conclusion as the chronology of events makes it clear that from an early time an extensive draft LAA (exceeding 50 pages) was made available to PKKP dealing with all of the matters which would be expected to arise in such negotiations (as suggested by s 39 of the Act). FMG invited PKKP to participate in negotiations in relation to that draft LAA. Negotiations ensued. It was PKKP who suggested that there should be a negotiation protocol. FMG agreed. Much of the six month period was taken with addressing that topic but it was clearly directed to an attempt to reach agreement for the purposes of s 31(1)(b).[20]

1.44 Having considered the Court's reasons for its decision, and having regard to the evidence provided to the Committee, Coalition Senators consider it clear that:

(a) It was alleged that FMG had engaged in disingenuous conduct, of the kind that would have fallen within the scope of 'capricious or unfair'.

(b) The NNTT examined FMG's conduct and concluded the allegation was unfounded.

(c) Had the Court found the allegation to be true, it would have found FMG to have **not** negotiated in good faith.

1.45 It is patently clear that if a party is found on the facts to have been guilty of capricious or unfair conduct of the kind that concerned the Attorney-General, then the current wording of the Act provides clear protection for the party that is a victim of that conduct. No amendment is needed to 'cure' an omission of that nature and the *FMG v Cox* decision does not support or justify the changes to the 'good faith' regime proposed in the Bill.

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20 *FMG Pilbara Pty Lty v Cox* [2009] FCAFC 49 at [24-29].

Certainty

1.46 Secondly, the Attorney-General is concerned that the Act currently contains no definition of 'good faith' and is consequently somewhat uncertain.

1.47 It is contended that the amendments to the 'good faith' obligation, including the requirement to use all reasonable efforts to reach agreement about the doing of the act, will remove or mitigate this apparent uncertainty. There is, at the very least, a difference of view between some state governments and mining interests on the one hand, and native title interests on the other, as to whether the existing provisions are in any respect uncertain and, if so, whether the proposed amendments will reduce that uncertainty.

1.48 Coalition Senators consider that, in this regard, the analysis of the NNTT in its most recent submission, which is independent of the parties and expert in technical matters of this nature, is compelling and at paragraphs 11 to 45 supports the following conclusions:

(a) The NNTT believes that if indicia of 'good faith' are to be included in the Act, it would be preferable to use the *Njamal* indicia that have been developed over years of case law. The indicia based on the Fair Work Act are worded differently and consequently likely to be the subject of contentious debate and litigation in the context of the Act.

(b) The Bill does not give any guidance as to the meaning of 'all reasonable efforts' in proposed section 31A(1). There is also no guidance as to the role of government parties in negotiations under the amended provisions, which is likely to result in a contention by native title parties that the government party must do more than play a passive or supervisory role, as is currently the case. This lack of certainty will contribute to *"what may well be extended, expensive and adversarial proceedings"*.

(c) It is unclear how in particular the criteria in proposed s31A(2)(a)(vi) and (viii) will be interpreted.

(d) The current drafting of proposed section 36(2), to reverse the onus of proof in relation to 'good faith' matters, may effectively confer a veto on the native title party.

1.49 Consequently, far from creating the certainty contended for by the Attorney-General, the amendments will make the provisions less certain and will inevitably be the subject of litigation.

Impact of the 'act' on native title

1.50 Thirdly, in *FMG v Cox*, the Court concluded that the negotiations relating to the doing of the relevant act (say, the grant of a mining lease) could be incorporated into a wider course of negotiations.[21]

1.51 Coalition Senators do not agree with the Attorney-General's Department's analysis of the Court's decision.[22] In summary the Attorney-General's Department's concern is that the Court's decision demonstrates that it is sufficient to negotiate with a view to reaching agreement to authorise the doing of the act and it is not necessary to negotiate 'about the act' per se. It is implied in the Attorney-General's Department's analysis that no negotiation is required at all in relation to the doing of the act.[23]

1.52 Coalition Senators consider the Court's decision means it is permissible to negotiate about (for example) the terms on which a series of mining tenements, including the future act, will be granted for the purposes of a project, not just the particular future act. It is not necessary to re-focus the 'negotiation in good faith' on a single 'future act' (tenement) that is the subject of the relevant notice if the wider negotiation proves unsuccessful. This seems a practical and fair outcome.

1.53 In any case, if amendments to the Act to 'cure' this position are deemed appropriate, that could be achieved with a relatively minor amendment, not involving wholesale changes to the 'good faith' regime or the associated onus of proof. Coalition Senators believe that such amendments should be the subject of genuine and informed debate.

A better alternative approach

1.54 Some of the submissions traversed the idea that the NNTT should have a role in adjudicating what is a 'reasonable' offer in the circumstances of a given negotiation, or alternatively the NNTT should have power to determine some or all of the elements of an agreement. There are practical problems with proposals of this nature, some of the most obvious being that:

(a) The determination of any entitlement to compensation for the impact of an act on native title is exclusively the preserve of the Federal Court, notwithstanding the ability of the NNTT to impose a 'trust condition'.

(b) The NNTT is a technical expert in native title matters but not a commercial and technical subject matter expert in relation to mining and other matters that are the subject of negotiations.

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21 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 at [31-37].

22 Attorney-General's Department, answer to questions on notice, received 13 March 2013, Attachment A, paragraphs 12, 13 and 14.

23 Attorney-General's Department, answer to questions on notice, received 13 March 2013, Attachment A, paragraph 14.

1.55 A significant contributing factor to the lack of certainty about what might be 'reasonable' to offer native title parties for impacts on native title is the lack of any binding judicial guidance on how to determine monetary or non-monetary compensation for impacts on native title rights and interests. It is noteworthy that the Act speaks in only general terms of the entitlement to compensation on just terms (consistently with the Constitution) and there is not a single case where the value of that compensation has been assessed by a Court.

1.56 Coalition Senators believe that rather than seeking to make changes to the 'good faith' regime, a better approach to addressing the perceived inadequacies of the current regime would be to formally determine the value of compensation for impacts on native title or at least to provide greater guidance to allow for the formal determination of compensation.

1.57 It is clear from the written and oral submissions made to the Committee that much of the negotiation surrounds determining the quantum of benefits to be provided to the native title parties. Without any precedents that determine or provide guidance as to the value of compensation it is not surprising that this is an area where the views of the parties will differ.

1.58 On the issue of determining value, Mr Mark Donovan, Head of External Affairs, BHP Billiton Iron Ore, in oral evidence to the Committee, stated:

> For the last 20 years you have had exploration and mining companies negotiating agreements with native title parties. One of the principal objects of those agreements has been an attempt by those parties to place a value on the native title compensation. The issue is not that people are unable to reach agreement; the issue becomes—and this is the focus of the negotiations—what is the value of the native title compensation?
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> **Senator CASH:** Do you mean as a dollar figure?
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> **Mr Donovan**: In a dollar figure generally, but these negotiations are much broader than just a dollar figure. It depends on the organisation, but in my own company we have significant agreements that include employment and training programs, business opportunities, education, health—the full gamut of benefits. The debate is over the value of compensation for the impairment of native title rights. So, 20 years on, we still do not have any real guidance, other than the agreements that are entered into, by either the legislator or the courts, as to what the true value is of native title compensation.
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> My belief is that it would be a very good objective of the legislators and the courts to set up proper processes pursuant to which that fundamental issue can be addressed sooner rather than later, because I think that would give industry and also the native title parties much greater clarification as to what it is that they are actually trying to value. At the moment, we do not have that guidance.[24]

24 *Committee Hansard*, 6 March 2013, p. 22.

1.59 On the issue of recent payments made in respect of native title agreements the document tabled by Dr Debra Fletcher on behalf of the Chamber of Minerals and Energy of Western Australia at the hearing on 6 March 2013 indicates that, in the Pilbara region of Western Australia, more than $10 billion worth of compensation agreements have been entered into and this substantial amount relates to only one region in Western Australia.

1.60 Given the lack of certainty on the issue of the 'value' of compensation for the impairment of native title rights, Coalition Senators consider the issue of determining 'value' is a matter that should be pursued in order to provide parties to negotiations with 'considered guidance' on this important issue which remains a matter of uncertainty.

1.61 The Act is sufficiently clear to avoid a conclusion that the value of the mineral resource is to be used in determining the value of compensation for impacts on native title. However, it is clear from the evidence provided to the Committee that the negotiation parties have been left without any real guidance as to what compensation on 'just terms' means in practice.

1.62 Coalition Senators consider that determining the value of compensation would provide more practical assistance to parties in negotiations than the proposed highly technical and contentious changes to the 'good faith' regime.

Section 47C

1.63 Coalition Senators note the evidence given by the Chamber of Minerals and Energy of Western Australia (CME) in its submission to the inquiry at page 8:

> CME advocates the provisions of the Bill need to go further to protect third party interests in any area where the use of this proposed provision is anticipated. Third party rights can exist in these areas and are not adequately addressed. Moreover, in a consent determination environment, all parties should have the right to negotiate about their interests and the effect any determination would have on those interests. The rights conferred on third parties by the amendments are insufficient.
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> The current proposal provides for the notification of the intention to disregard historical extinguishment in an area subject to s47C, allowing interested persons to comment within a two month period. However, this proposal does not go far enough in providing the appropriate protection of other interests in the area and is not supported. The Bill is silent on the status of any comment provided by an interested party and there is currently no obligation on either the government or native title party to accommodate any comment by a third party.
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> Reducing incentives for exploration and mining companies to identify and extract mineral resources has an impact on the national economy. This needs to be balanced with the desire to recognise native title rights and interests wherever possible. A mechanism to achieve this balance for all parties is to ensure, should a government intend to rely upon the proposed s47C provision, that all parties with interests in the area should be afforded

> the opportunity to be parties to the negotiation. This would provide all parties with the opportunity to address any potential impact flowing from the application of s47C on non-native title rights and interests. The inclusion of third party interests in the negotiation process also promotes the maintenance of good relationships between the native title party and other land users in the area.
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> Importantly, third parties who have existing interests in an area where native title rights and interests are revived through the application of s47C should be absolved from any unintended compensation liability as a result of any impairment of native title.

1.64 Coalition Senators consider that mere notification of non-government interest holders is not sufficient. As a minimum genuine consultation or better agreement of those interest holders should be required.

1.65 This is to address concerns such as:

- Potential direct or indirect compensation exposure
- 'Standing' of interests
- Ex post facto resurrection of the right to negotiate for conversion of tenure.

Conclusion

1.66 Those provisions in the Bill dealing with:

(a) changing and codifying the obligation to negotiate in good faith in relation to proposed grants of mining interests and acquisitions of native title; and

(b) the proposed new section 47C, which will allow native title to be revived over areas that have been set aside or otherwise dedicated to the preservation of the environment;

should not be enacted for the following reasons:

(i) There was inadequate consultation on matters of national importance and which are likely to have considerable economic and social consequences.

(ii) The Bill will not achieve the stated objectives which the Government claims to be seeking.

(iii) The Bill will create less certainty and more litigation in the context of the 'future act' regime, without commensurate benefits in terms of tangible and lasting outcomes.

(iv) The Bill offers no greater certainty on the issue of 'value' for the impairment of native title rights.

(v) The Bill is poorly drafted, without adequate regard to all the practical adverse consequences of its enactment.

(vi) The Bill will lead to less certainty and further protracted disputes and litigation over the meaning of its provisions.

ILUA provisions of the Act

1.67 In relation to the amendments to the ILUA provisions of the Act, which are largely technical, Coalition Senators acknowledge the concerns of the Chamber of Minerals and Energy of Western Australia[25] in their submission to the inquiry.

1.68 If the Government is determined to pass these amendments, Coalition Senators believe the Government should have regard to the issues raised by the Chamber of Minerals and Energy of Western Australia in its submission.

Senator Gary Humphries
Deputy Chair

Senator Michaelia Cash

Senator Sue Boyce

Senator Dean Smith

25 Chamber of Minerals and Energy of Western Australia, *Submission 7*, Attachment 1.