Minerals Council of Australia

19 January 2006

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

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

Dear Secretary,

Re: Inquiry into the Native Title Amendment Bill 2006

The Minerals Council of Australia (MCA) welcomes the opportunity to provide a submission to the Senate Standing Committee's Inquiry into the Native Title Amendment Bill 2006 (Bill). The MCA is the peak industry association representing mining, minerals and processing and exploration companies in Australia. MCA members account for more than 85% of annual mineral production in Australia.

Industry's engagement with Indigenous people is founded in mutual respect and in the recognition of Indigenous Australians' rights in law, interests and special connections to land and waters in Australia. This point is made more acute by the fact that more than 60% of mineral operations in Australia have neighbouring Indigenous communities.

The MCA welcomed the Attorney-General's announcement, in September 2005, outlining the Government's plan for practical reforms to improve the performance of the native title system. The Government's approach in wanting to improve the effectiveness of the native title system, without challenging the fundamental principles of native title or winding back native title rights, is consistent with the MCA's approach in looking to improve the efficiency and operability of the system without diminishing the rights of Indigenous Australians.

Reform Process

The MCA considers that the Government adopted an appropriate consultation process in relation to the technical amendments to the *Native Title Act 1993* (NTA) - although the MCA would still prefer the release of an exposure draft of the proposed legislation before it is introduced to Parliament. In respect of those amendments, the Attorney-General's Department issued a preliminary discussion paper with a two month period for comment. After the Government had an opportunity to consider the first round of comments, a second discussion paper was released with a further period for comment.

In developing our position to the technical amendments, the MCA consulted broadly and worked through a structured process with Indigenous leaders to establish, where possible, a common platform for reforms on issues of mutual interest. The MCA benefited not only from engagement with members of the MCA's Indigenous Leaders Dialogue but also from discussions with the National Native Title Council (NNTC), the peak association for Native Title Representative Bodies (NTRBs) and Native Title Services (NTSs). The shared objective of ensuring an enabling framework for mutually beneficial relationships provided a strong foundation for productive discussions with Indigenous stakeholders that led to increased mutual understanding and consensus on many issues.

The MCA therefore finds it disappointing that similar consultation processes were not established for the other aspects of the native title system reforms. There has not been the same opportunity for stakeholders to jointly consider policy proposals and provide further comment before the Government announced the adoption of particular reforms and introduced the Bill to Parliament. The MCA also considers that the timeframes for this Senate Inquiry are inadequate and do not facilitate optimal input from stakeholders for improved outcomes.

WALTER TURNBULL BUILDING
LEVEL THREE
44 SYDNEY AVENUE FORREST CANBERRA ACT 2603
PO BOX 4497 KINGSTON ACT 2604
TELEPHONE: + 61 2 6233 0600
FACSIMILE: + 61 2 6233 0699
WEB: www.minerals.org.au
EMAIL: info@minerals.org.au
ABN 21 191 309 229

Representative Aboriginal and Torres Strait Islander Bodies

NTRBs are an important part of the native title system in providing an established enabling framework for the recognition of native title rights and interests, and the negotiation of future acts. Accordingly, appropriate governance and resourcing of Indigenous representative structures is critical to achieving optimal outcomes in the interaction between the minerals industry and Indigenous interests.

The MCA supports improved governance of NTRBs and NTSs and accordingly supports the proposed reforms to the NTA relating to representative Aboriginal and Torres Strait Islander bodies including;

> a simplified de-recognition process for poorly performing NTRBs;

> improved procedures to change boundaries of Native Title Representative Areas;

> allowing bodies incorporated under the *Corporations Act* to be recognised as NTRBs; and

> facilitating the functions of Native Title Service providers.

Further, our support for these reforms is qualified to the extent that the MCA considers it essential that improved governance is matched with increased resources directed towards capacity building of NTRBs and NTSs. Without adequate resourcing of NTRBs and NTSs, both in terms of financial and human capital, we consider that these reforms could destabilise the operations of the native title system, which would be to the detriment of business, Indigenous communities and the achievement of mutually beneficial native title outcomes.

The MCA has consistently argued that NTRBs have been chronically under-resourced in fulfilling their legislative functions in representing Indigenous interests, which has delayed the negotiation of mutually beneficial agreements with industry and the resolution of native title claims. In arguing for increased resources, the MCA clearly differentiates between the Government's responsibilities for core funding to fulfil legislative obligations, functional and capacity building requirements, from minerals companies' responsibilities in funding Indigenous engagement in specific commercial negotiations.

The MCA is concerned that the Government has taken a narrow and overly onerous approach to improving the performance of NTRBs, rather than focusing on building capacity for improved outcomes.

The additional measures have the potential to divert already limited resources towards bureaucratic processes, unnecessarily onerous compliance obligations or the winding-up and establishment of new services, and away from the primary functions of representing Indigenous interests and achieving native title outcomes. Without addressing the underlying capacity issues and resource constraints, such organisational changes may only provide a short-term impression of change. Further, such organisational changes can add significant delays and additional costs to industry in:

> suspending existing negotiations;

> requiring the re-negotiation of certain matters previously agreed upon;

> requiring the building of new relationships with new NTRB staff; and

> requiring new NTRB staff to acquaint themselves with the particular matter and the relevant native title holder/claimant group.

The MCA considers that it is in the interests of all parties that there is a level of certainty and stability in the organisational structures that are so critical to the effective functioning of the native title system. Accordingly, attention and resources should be focused on building capacity for improved outcomes within existing organisational arrangements rather than assuming a change of organisation will address all problems.

It is for these same reasons, and a preference for capacity building as the main driver of improved performance, that the MCA also recommends that the proposed fixed terms of periodic recognition for NTRBs should be for a minimum of three to six years, rather than the proposed terms of one to six years.

Recommendation

The MCA:

> ***supports proposed amendments to the NTA in relation to representative Aboriginal and Torres Strait Islander bodies; but***

> ***recommends that fixed periodic terms should be from a minimum of three to six years; and***

> ***cautions that such amendments are likely to be destabilising without appropriate funding and capacity building initiatives for NTRBs and NTSs to support improved outcomes.***

Federal Court and National Native Title Tribunal

The mineral industry's primary interest is in agreement making related to future acts, rather than active engagement in the native title claim process. Given increased legal clarity as to the protection of existing mining rights and interests contained within a claim area, there has been a reduced need for active engagement in the claims process. However, the claims process remains of significant importance to the minerals industry given its critical impact on the effective negotiation of future acts.

The effective resolution of claims, whether by consent determination or as a result of litigation, provides greater certainty to industry and efficiency in the negotiation of future acts in:

> clarifying the exact nature, extent and manner of exercise of the native title rights and interests held in country;

> identifying membership of the group of native title holders;

> resolving claim overlaps and clarifying claim boundaries; and

> establishing a clear holding entity and processes for future negotiations.

The minerals industry is generally supportive of measures to improve the mediation processes in the resolution of native title claims. However, whilst the minerals industry supports reforms that improve the resolution of native title claims in a timely manner, it also cautions against developing a system whose emphasis is simply on the efficient resolution of native title claims at the expense of achieving effective and long-lasting outcomes. That is, the minerals industry would not support efficiency measures that produce counter productive outcomes.

Whilst the independent review focused on the interaction of the National Native Title Tribunal (NNTT) and the Federal Court in the resolution of claims, it is now well established that the resolution of native title requires an effective native title system that is cognisant of the inter-dependence of various aspects of the system. To this end, it is important to highlight again the concerns of the minerals industry as to the resource limitations and other practical constraints that impact upon and limit the successful mediation of claims, particularly the chronic under resourcing of NTRBs in representing Indigenous interests.

Recommendation

The MCA:

> ***maintains a preference for the resolution of native title claims through mediation rather than litigation;***

> ***supports measures to clarify the respective roles of the NNTT and Federal Court in the resolution of native title claims; and***

> ***supports measures that minimise duplication in mediation undertaken by the NNTT and the Federal Court.***

National Native Title Tribunal mediation

The NNTT has always conducted mediations in relation to native title claims. The independent report of the Native Title Claims Resolution Review by Graham Hiley QC and Dr Ken Levy reported that as at January 2006, there were 356 claims that had been referred to the Tribunal for mediation. It was further reported that of those, 272 claims (approximately 76%) had formally been in mediation by the NNTT for more than three years and 170 (just under 48%)

had been in mediation for more than five years (paragraph 4.11 page 16). Although it is understood that not all such mediations are active, it does raise the issue of the NNTT's capacity in mediation of native title claims.

Given the Government's intention to provide the NNTT with greater powers in the mediation of native title claims, the MCA considers that there is a need to ensure that within the NNTT's existing resources, greater emphasis is given to building capacity to ensure competency in undertaking any expanded role.

A related point to the above is the proposed section 136GA of the Bill would allow the presiding member of an NNTT mediation to report the failure of a party to act in good faith in a mediation to certain prescribed persons. To ensure the fair exercise of this power, the MCA recommends that the NNTT develop clear and transparent criteria as to what constitutes "acting in good faith" in collaboration with key stakeholders so as to provide the parties to mediation with clear guidelines.

Recommendation

It is recommended that the NNTT:

> ***increase their internal capacity, within its existing resources, to ensure the Tribunal's competency in any increased role in the mediation of native title claims; and***

> ***develop clear and transparent criteria as to what constitutes "acting in good faith" in collaboration with key stakeholders.***

Prescribed Bodies Corporate

The lack of appropriate resourcing, both financially and in terms of capacity, for Prescribed Bodies Corporate (PBCs) is emerging as a business critical issue for the minerals industry. There are key risks for the minerals industry if PBCs are not appropriately resourced to be functioning and effective organisations that can:

> independently and proactively give effect to native title holder aspirations;

> engage in agreement making with third parties;

> meet their statutory requirements and obligations; and

> secure further assistance from existing programs and services.

The MCA considers that failure to have functioning and effective PBCs will:

> make it difficult for PBCs to engage in the employment and enterprise development opportunities that arise from mining activity;

> increase the costs of agreement-making for industry;

> lead to substantial delays in agreement-making for industry;

> increase the uncertainty that finalised agreements with PBCs meet the expectations of the native title holder community;

> make it difficult for PBCs to implement agreements with industry; and

> produce an over reliance on industry to support the basic functions of PBCs, particularly in areas where there is minimal commercial activity.

The MCA supports amendments to the NTA that may alleviate some of the resource requirements of PBCs, particularly:

> in allowing an existing PBC to be determined as a PBC for a subsequent determination, where appropriate consents are provided; and

> in removing the statutory requirements for compulsory consultations by the PBC with native title holders on all agreements and decisions affecting native except in relation to decisions to surrender native title rights and interest in land or waters.

In respect of the latter we expect that there will be many decisions of PBCs that do not surrender native title rights and interests, but nevertheless materially affect native title rights and interests, where it would be appropriate for native title

holders to expect full consultations before any decision is made. Such an approach is consistent with the minerals industry's commitment to earning and maintaining its social licence to operate.

The MCA considers that there is a pressing need for additional reforms to ensure the effective functioning of PBCs including:

> the provision of systematic and comprehensive resources to PBCs to assist capacity building to ensure functional and effective organisations;

> ensuring that additional resources are available to NTRBs to provide assistance to PBCs in native title matters post-determination, given that NTRBs are already chronically under-resourced;

> ensuring that industry is not burdened with additional costs on the basis that PBCs are not funded to be functional and effective organisations; and

> ensuring that funding arrangements for PBCs do not compromise the perception of an independent negotiation process.

Recommendation

The MCA:

> ***supports amendments to the NTA that relax statutory requirements on PBCs and which may reduce the resource needs of PBCs, particularly:***

- ***in allowing an existing PBC to also be a PBC for a subsequent determination; and***
- ***in removing statutory requirements on PBCs to undertake compulsory consultations with native title holders for all decisions affecting native title;***

> ***cautions that support should be provided to native title holders who decide the PBC should still consult with native title holders on decisions that materially affect the exercise of native rights and interests; and***

> ***urges the Government to reconsider the resources available to PBCs to ensure that PBCs are functioning and effective organisations as this is becoming a business critical issue for industry.***

Scale of Reforms

The statutory reforms to the NTA will introduce significant changes to the native title system. There will also be consequential reforms introduced to the regulations of the NTA and changes to the general administration of the system. Further, NTRBs and PBCs will also need to incorporate constitutional changes and new governance arrangements under the new *Corporations (Aboriginal and Torres Strait Islander) Act 2006* from 1 July 2007.

As discussed above, it is a native title system that is already under considerable strain, particularly given the unfulfilled resource requirements and capacity needs of NTRBs, NTSs and PBCs. Consequently, the MCA is concerned that the Government gives careful consideration to the introduction and implementation of these statutory reforms to minimise disruption and facilitate the transition to the new arrangements. It is also recommended that the Government consider providing additional resources to NTRBs and NTSs directed towards the development of appropriate changes to policies and practices for a transitional period of two years.

Further the MCA considers that Government should support the newly incorporated National Native Title Council, as the national peak body for NTRBs and NTSs and work collaboratively with the Council in the implementation of the reforms to the native title system.

Recommendation

The MCA recommends that careful consideration is given to the implementation of the reforms to minimise disruption and facilitate the transition to the new arrangements including;

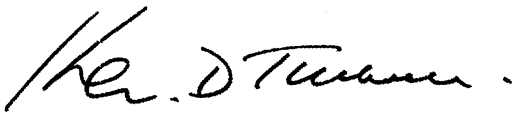
> ***providing additional resources to NTRBs and NTSs to develop appropriate changes to policies and practices for a transitional period of two years; and***

> ***supporting and working collaboratively with the National Native Title Council in the implementation of the reforms.***

Thank you again for the opportunity to provide a submission on the Native Title Amendment Bill 2006.

Should you have any queries on this submission please do not hesitate to contact me directly or Anne-Sophie Deleflie, who has carriage of this issue in the MCA Secretariat, on 6233 0600.

Yours sincerely,



KEVIN D TUCKWELL
ACTING CHIEF EXECUTIVE