

26 February 2018

Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Dear Sir/Madam,

RESPONSE TO THE NATIVE TITLE ACT 1993 (CTH) REFORM OPTIONS PAPER

The Chamber of Minerals and Energy of Western Australia (CME) welcomes the opportunity to comment on the *Reforms to the Native Title Act 1993 (Cth) Options Paper* (the Options Paper) released by the Attorney-General's Department in November 2017.

CME is the peak resources sector representative body in WA and is funded by its member companies who are responsible for most of the State's mineral and energy production and are major employers of the resources sector workforce in the State.

CME has collaborated with the Minerals Council of Australia (MCA) and the Queensland Resources Council to prepare a detailed submission on the Options Paper, which will be submitted by the MCA on behalf of all three organisations.

Additionally, CME makes this separate submission to outline particular issues of relevance to the resources sector in Western Australia (WA).

Section 31 Agreements in Western Australia

Section 31 agreements typically relate to the grant of mining and exploration rights over land which may be subject to native title and the compulsory acquisition of native title rights and are widely used in WA. CME considers it imperative the reform process ensures the validity of existing section 31 agreements.

CME advocated for the passage of the *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017* to alleviate immediate issues for Indigenous Land Use Agreement (ILUA) validity, however, these amendments did not address validity uncertainty of existing section 31 agreements made prior to the *McGlade v Native Title Registrar [2017] FCAFC 10* (McGlade) decision.

The McGlade case highlighted there was no exception for situations where members of the applicant were unwilling or unable to sign an agreement, or were deceased. Consequently, CME is concerned the validity of existing agreements under section 31(1)(b) are similarly compromised where not all members of the applicant have signed.

Specifically to address the Options Paper questions, CME supports the following:

- **Implement amendments which will confirm the validity of existing section 31 agreements (Question 1).**
- **The signatories to a section 31 agreement should be a majority of the living members of the applicant with legal and physical capacity to execute documents. No additional authorisation process should be required because a "right to negotiate" process (involving negotiations in good faith with any person who is a registered native title claimant) would have already been undertaken prior to the execution of the section 31 agreement. This is a modified version of Option 3 (Question 2).**

CME is very concerned about the prolonged uncertainty over section 31 agreement validity if these amendments are included as part of a larger NTA reform process. Therefore, **CME recommends amendments outlined for section 31 agreements (Question 1 and 2) are addressed separately and in advance of the larger NTA reform process.**

Urgent need for amendments to the *Mining Act 1978 (WA)*

On 17 August 2017 the High Court of Australia presented its judgement on the *Forrest & Forrest Pty Ltd v Wilson & Ors [2017] HCA 30* case. A majority of the High Court ruled a mineralisation report must be lodged at the same time as the mining lease application in order to be a valid application. In the absence of a valid application, subsequent acts (e.g. grant of a mining lease) are also invalid.

This ruling created significant uncertainty within WA's resources sector as to the validity of granted mining leases across the state with implications for the NTA such as:

- If a miner were carrying out mining pursuant to an invalid mining lease, they would arguably be committing the offence of mining without authority and potentially risking non-compliance with the terms of existing native title agreements.
- If an invalid lease needs to be replaced by an application for a new mining lease, the new lease may not automatically be covered by existing native title agreements and may trigger a new future act and right to negotiate process.

In November 2017, the WA State Government approved drafting of the *Mining Legislation Amendment and Validation Bill 2017* to provide retrospective validity to mining leases affected by the High Court's ruling. CME strongly supports these legislative amendments.

It is essential for complementary amendments to be made to the NTA to ensure continued validity of mining leases and associated native title agreements. As such, the timing for the proposed NTA exposure draft (March 2018) and Bill (July 2018) is concerning for WA's resources sector as the above issues require urgent attention in order to provide certainty to all parties in WA. Amendments to the NTA must be considered as a priority to enable this outstanding issue to be addressed.

Retaining proposal G14 listed in Attachment G of the Options Paper as part of an omnibus NTA amendment bill will unduly delay the process of retrospectively validating mining leases in WA. **CME supports proposal G14 and strongly recommends it progress separately and in advance of the larger NTA reform in order to enable concurrent amendment of the *Mining Act 1978 (WA)*.**

Conclusion

Almost 86 per cent of WA is covered by registered and native title determined areas. As a result, any changes to the operation of the native title system, particularly changes affecting future act and native title determination, will significantly affect the State's resources sector.

CME supports reforms to the *Native Title Act 1993 (Cth)* which increase certainty and improve efficiency in agreement making for all users of the legislation, including Aboriginal and Torres Strait Islander people, government departments and the resources sector.

To reinforce:

- this submission is to be read in conjunction with the detailed submission on the Options Paper submitted by the MCA and supported by CME; and
- **it is imperative the amendments outlined for section 31 agreements and proposal G14 are addressed separately and in advance of any wider NTA reform process.**

If you have any further queries regarding the above matters, please contact Bronwyn Bell, Manager - Natural Resources, B.Bell@cmewa.com

Yours sincerely



Reg Howard-Smith
Chief Executive

Cc: The Hon. Christian Porter, Attorney-General
The Hon. Ben Wyatt, Treasurer; Minister for Finance; Energy; Aboriginal Affairs (WA)
David Byers, Minerals Council of Australia