THE LAW SOCIETY
OF SOUTH AUSTRALIA

THE VOICE OF THE SOUTH AUSTRALIAN LEGAL PROFESSION

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

via email: native.title@ag.gov.au

Dear Mr Attorney

Exposure Draft Native Title Reforms

1. I refer to the exposure drafts of the Native Title Legislation Amendment Bill 2018 ("the Bill") and the Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018 ("the Regulations"), which have been released for public comment.

2. The Society has provided a submission regarding the proposed Native Title Reforms to the Law Council dated 22 November 2018. This submission is ***enclosed*** for your information.

3. Due to differences in legislation and current practices in South Australia, the Society is writing to you directly with respect to the issue of standing instructions (as highlighted in paragraphs 9-15 of the Society's submission of 22 November 2018) and raises the issues below for your consideration.

4. The Society is concerned that there is very limited provision for "standing instructions decisions" in the Regulations, which amend the Native Title (Prescribed Bodies Corporate) Regulations 1999 ("the PBC Regulations"). The Society refers to Fact Sheet #2 of the Native Title Reforms that deal with Prescribed Bodies Corporate (PBC). The Fact Sheet indicates that the proposed Regulations would limit "standing instructions decisions" to native title decisions to enter an agreement in relation to which the PBC is "the only grantee party".

5. The Society notes that South Australia has an alternative 'right to negotiate' procedure, as allowed for in section 43 (within Subdivision P of Division 3 of Part 2) of the *Native Title Act 1993* (Cth)("the Act"). The alternative State procedure comprises Part 9B of the *Mining Act 1971* (SA).

6. While there are some significant differences between the provisions of Part 9B of the *Mining Act* and Subdivision P of the Act, they are sufficiently similar for these purposes. However, unlike in other States (e.g. Western Australia), it is

comparatively rare for the State (or, more relevantly in South Australia, the grantee party) to seek to rely on the 'expedited procedure'.

7. The Society is aware that in Western Australia, for example, negotiated Heritage Protection Agreements are commonly entered into with mineral explorers outside of section 31 of the Act, resulting in objections to the expedited procedure (invariably relied on by the State of WA in its section 29 notices) being withdrawn or not being filed in the first place. More particularly, since these Heritage Protection Agreements have been negotiated outside of section 31 of the Act, there is no requirement for the consultation and consent process under Regulation 8 of the PBC Regulations to be satisfied. However, because the expedited procedure is so rarely sought to be relied on in SA, there are next to no Heritage Protection Agreements negotiated with mineral explorers in SA outside of section 31 of the Act or rather its Part 9B Mining Act equivalent (sections 63P and 63Q).

8. In the circumstances, a South Australian PBC may be faced with a significant number of mineral explorers negotiating the equivalent of section 31 Agreements, each of which is limited in its scope to exploration (and does not provide consent to production). Each such Agreement is invariably in substantially the same terms as other such Agreements negotiated and entered into by the same PBC with other mineral explorers.

9. Having regard to Regulation 8(1)(b) of the PBC Regulations (and its reference to Subdivision P), it seems apparent that Regulations 8 and 9 of the PBC Regulations apply to Agreements under Part 9B of the SA Mining Act.

10. The Society maintains that the PBC Regulations should allow for "standing instructions decisions" by Native Title Holders to be made allowing the relevant PBC Directors to authorize the PBC to enter into disjunctive section 31 (or their equivalent) Agreements with mineral explorers, i.e., without the need for each such mineral exploration Agreement to require a separate Native Title Holders' consultation and consent process to be followed.

11. The Society is informed that the cost of holding a meeting of native title holders can be substantial – as much as $70,000.00 or more. Typically, meetings are held no more than 1-2 times a year. As a matter of policy, it would be useful not to have to call meetings at a potentially considerable cost to the Prescribed Body Corporate ("PBC") where it is not warranted.

12. However, where obliged to engage in a separate consultation and consent process, the PBC will no doubt seek to recover the costs of such meeting from the mineral explorer. In many instances such costs may be similarly prohibitive for a mineral explorer as they would be for the PBC to bear.

13. In the Society's view, it is important that Native Title Holders retain the ability to delegate decision making powers to the PBC Directors in these circumstances. As noted above, in South Australia, these types of agreements appear to be entered into more frequently. If the Regulations are amended as drafted, this will result in an unreasonable cost burden on mineral explorers as per the requirements under section 60AB of the Act.

14. As this issue may be a greater problem in South Australia than in other jurisdictions (and may arise in part from the operation of the State's alternative 'right to negotiate' procedure), the Society seeks to bring this specific matter to your attention.

I trust these comments are of assistance. We would be pleased to provide further comment or assistance.

Yours sincerely

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