10 December 2018

Alana Fraser
Native Title Unit
Attorney General`s Department
3-5 National Circuit
BARTON ACT 2600

Email: native.title@ag.gov.au

Dear Alana

Reforms to the Native Title Act – Exposure Draft

Thank you for the opportunity to provide comment on the Exposure Draft relating to the *Native Title Legislation Amendment Bill 2018.*

The Association of Mining and Exploration Companies (AMEC) is the peak national industry body representing hundreds of mining and mineral exploration companies throughout Australia, all of which have some direct interest in the operations of the *Native Title Act.*

As detailed in our submission to the Options Paper dated 28 February 2018, AMEC members support the development of strategies and initiatives that result in increased clarity, certainty, efficiency and effectiveness of native title processes in order to:

- reduce delays and costs for all stakeholders; and
- ensure fair, equitable and quality negotiated outcomes and benefits for governments, industry and Aboriginal people.

AMEC is therefore supportive of amendments which achieve those objectives. We are however concerned that there are no unintended economic and social consequences from the proposed amendments.

In doing so, we note that there are several amendments originally being considered on the Options Paper which have been omitted from the current Exposure Draft, and should be re-instated.

Comment on specific omissions from the proposed amendment package

1. **WA Mining Amendment (Procedures and Validation) Bill 2018**
   It is vitally important that a proposed amendment[1] to validate Western Australian mining leases affected by the *Forrest & Forrest Pty Ltd v Wilson* case, is urgently progressed and de-coupled from any other broader legislative reforms.

[1] Options Paper G14

The Western Australian Government introduced legislation on 28 October 2018 [2] to confirm the validity of mining leases that have purported to be granted and whose validity might be affected by failure to have strictly complied with the requirements of the *Mining Act.*

In that context, it is understood that such validating legislation may be regarded as a new "future "act" under the *Native Title Act,* notwithstanding that the future act provisions of the *Native Title Act* were complied with at the time of the original purported grant.

In order to remove any uncertainty and secure the validity of tenure granted in reliance upon that compliance, the *Native Title Act,* should be amended to allow for validating legislation by the State or Territories, where it is necessary to address technical compliance with State legislation, but where there has otherwise been compliance with the *Native Title Act.*

It is critically important that relevant legislation is proclaimed in order to restore the assumption of validity in relation to the previous grant. In view of the prevailing uncertainty that has been created within industry by the *Forrest & Forrest* case and the associated validating legislation relating to the WA Mining Act, it is crucial that amendments to the *Native Title Act* are urgently and separately proclaimed.

2. Reduction of the 'expedited procedure' objection period

AMEC strongly supported the original proposal[3] to shorten the objection period for acts which the government party considers attract the expedited procedure from 4 months to 35 calendar days where the entire area affected by the act is subject to a native title determination.

Our members consider that the current notification and objection period appears to be anomalous in a process specifically designed to be 'expedited'. The proposal would promote more timely outcomes. However, it will be necessary to ensure that vexatious objections are minimised.

Member companies further noted that objections are invariably lodged as a 'matter of course', and that very few are actually progressed.

Consideration should have also been given to streamlining other periods under section 29 in cases where native title has been determined and there is a Prescribed Body Corporate.

---

2 http://www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForm&ParentUNID=7E35937E3EDD385F48258353000E9C9A

3 Options Paper G1

Specific comments on the current package of amendments

1. **Disregard historical extinguishment over pastoral leases (Item 17, Part 2)**
   The proposal to allow historical extinguishment to be disregarded over pastoral leases controlled or owned by the native title claimants, appears to give such parties procedural rights under the Native Title Act which do not currently exist. Our members are concerned that this may create expectations for further negotiation and compensation and additional uncertainty.

2. **Disregard historical extinguishment over areas of national, state or territory parks (Item 2, Division 1, Part 1)**
   AMEC continues to be concerned with any unintended consequences of this proposed amendment, which could add further complexity and time to the determinations. This disregarding, even if by agreement, of historical legislation may have the effect of undermining the broader legislation and potentially encourage an increasing trend towards seeking to re-negotiate existing land access agreements or include tenure that is extinguished.

3. **Ensuring the future acts regime applies to 'section 47s' land (Item 21, Part3)**
   AMEC did not support this proposal in the original Options Paper as it suggests that even where native title is being extinguished in an area, and ultimately a claim may be withdrawn or dismissed or s47B determined not to apply to an area, the lodgement and registration of that claim can force governments, proponents and native title claimants to comply with future act processes in the interim.

   There is not sufficient uncertainty about this issue to warrant such a significant amendment. It is a central concept of native title law that once native title in an area has been extinguished, it does not automatically spring back when the extinguishing tenure is removed. This is the difference between an extinguishing act and an act which is wholly inconsistent with native title but to which the non-extinguishment principle applies. The lodgement of a native title claim (essentially an application for declaratory orders of the Federal Court) does not change the legal or conceptual position. The position can be contrasted with where there is a positive determination of native title by the Federal Court which holds that going forward the historical extinguishment is disregarded - in this case respondent parties have had the opportunity to participation in the negotiations/mediations/litigation and the Court has made a decision after considering the evidence (including evidence of occupation) and often complex legal questions about whether the area was subject to a resumption process at the relevant time.

   AMEC's practical concern is the potential for significant additional transaction costs to proponents, government and native title parties in complying with future act processes in areas where native title has been extinguished and s47B is not ultimately applied. We note that s47B may not be ultimately applied for a number of reasons: eg. the relevant claim may be withdrawn or dismissed, the claimants may concede that s47B does not apply to the area or the Court may not be satisfied that the evidential or legal requirements of s47B are met for that area.

In addition, native title claims do not usually particularise the areas to which s47B is said to apply when first lodged. The relevant areas are often only specified when a litigated claim nears trial on extinguishment issues, or once the parties have entered into negotiations on the terms of a consent determination and resources are allocated to precise mapping and historical tenure research and analysis. At this point, the parties to the claim may negotiate or enter mediation about s47B issues, and the claimant may concede that s47B does not apply to certain areas. In the interim, it is not practical for a proponent (or the claimants or the State) to undertake that level of research and analysis to identify precisely which areas are or may be claimed under s47B in order to determine whether future act processes apply.

Further, this proposal may encourage 'ambit' claims made without proper research and formulation, in order to gain procedural rights in areas of historical extinguishment.

4. **Allow the government party to cease being a party to negotiations for s31 Agreements (Items 7 and 8, Division 2)**
   AMEC did not support this proposal in the original Options Paper.

   We continue to consider that the State is the person doing the future act and therefore should not be relieved of its responsibility to negotiate in good faith about the effect of the act on registered native title rights and interests. This is particularly relevant in jurisdictions where the State adopts inflexibly applied policy positions such as the insistence on regional standard heritage agreements which significantly impact the negotiation environment.

5. **Require the National Native Title Tribunal to be notified of the existence of ancillary agreements to ILUAs and section 31 Agreements (Item 4, Division1)**
   Our members are unclear on what benefits there will be as a result of this proposal. It would appear to be unnecessary and create an additional administrative and compliance burden on industry and Government.

Proposed amendment which should be urgently treated separately

1. **Validation of s31 Agreements (Item 6, Division 1, Part 2)**
   We strongly support proposed amendments to ensure that authorisation procedures relating to section 31 Agreements are valid. This arises from the uncertainties created by the Full Federal Court decisions in relation to McGlade v Native Title Registrar & Ors (McGlade decision) and area ILUAs. Members are concerned that a range of section 31 'Future Act' Agreements may be invalid, or legally challenged.

   These include Agreements relating to such issues as compensation payments, training and employment opportunities, consents to acts or projects, and cultural heritage processes. These Agreements represent billions of dollars to Indigenous people Australia wide, particularly in Western Australia.

While McGlade dealt with a series of stated questions of law specifically addressing ILUAs and is therefore arguably not directly relevant with regard to section 31 agreements, the outcome is that the Court has determined **all** members of the 'registered native title claimant' must execute an ILUA if it can be considered a binding statutory Agreement under the Act.

The *Native Title Amendment (Indigenous Land Use Agreement) Bill 2017* did not deal with the concerns raised in relation to s31 Agreements. AMEC is therefore fully supportive of appropriate amendments which urgently address the uncertainty as to the invalidity of existing and new section 31 agreements.

Thank you for the opportunity to comment and we look forward to ongoing consultation on these important reforms.

Yours sincerely

Warren Pearce
Chief Executive Officer