

10 December 2018

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

Dear Sir/Madam,

RESPONSE TO THE NATIVE TITLE REFORM EXPOSURE DRAFTS

The Chamber of Minerals and Energy of Western Australia (CME) welcomes the opportunity to comment on the exposure drafts of the *Native Title Legislation Amendment Bill 2018* and the *Registered Native Title Bodies Corporate Legislation Amendment Regulations 2018* (the Exposure Drafts) released by the Attorney-General's Department in October 2018.

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) to prepare a detailed submission on the Exposure Drafts.

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

In CME's letter dated 26 February 2018 in response to the *Native Title Act 1993 (Cth)* (NTA) Reform Options Paper, CME advocated for amendments to the NTA to address uncertainty relating to the validity of existing section 31 agreements made prior to the *McGlade v Native Title Registrar [2017] FCAFC 10* (McGlade) decision. The McGlade decision overturned law that had been understood and applied following *QGC Pty Limited v Bygrave (No2)* to find that Indigenous Land Use Agreements are invalid when not all members of the applicant are party to the agreement. While applying to ILUAs, there was potential that this decision would also affect section 31 agreements.

CME is therefore pleased with the commitment to confirm the validation of section 31 agreements that could potentially be affected by the McGlade decision. This is consistent with the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017*, which received broad support from governments, the minerals industry and native title groups.

CME recommends amendments be made to the Exposure Draft to provide certainty for the validity of future section 31 agreements including those which have been signed by the majority of the claim group members.

CME is also pleased that the exposure drafts include new flexibility to allow a majority of the applicant to make decisions or sign agreements, rather than requiring all members of the applicant to act together.

While CME's preference would be standard majority in all decisions, it understands the ability of claim groups to place conditions on the applicant authority could still improve efficiency of decision-making. Where a claimant group elect to displace the default rule that would allow a majority of applicant members to act together, the authorisation condition which displaces the default rule should be identified on the register.

CME understands that the intention is that persons whom are deceased or legally incapable are not to be included in determination of the majority. CME supports this intention.

This intention, that deceased or legally incapable persons are not to be included in the determination of the majority, should be made explicit in the bill.

URGENT NEED FOR NATIVE TITLE ACT 1993 AMENDMENTS TO COMPLEMENT MINING ACT 1978 (WA) VALIDATION AMENDMENTS

On 17 August 2017 the High Court of Australia presented its judgement on the case *Forrest & Forrest Pty Ltd v Wilson & Ors [2017] HCA 30* (Forrest & Forrest). A majority of the High Court ruled a mineralisation report must be lodged at the same time as the application for a mining lease in order to be a valid application. This was a significant change in how the administration of the law was understood.

From a practical perspective, the absence of a valid application means that subsequent acts (e.g the grant of a mining lease) may also be considered invalid. At this stage it is unclear how many mining leases may be affected by this administrative issue, which creates significant uncertainty on the validity of WA mining tenements and places at risk significant shared benefits associated with mining activity progressed in good faith.

For this reason, the WA Government has introduced the *Mining Amendment (Procedures and Validation) Bill 2018* to amend the *Mining Act 1978* to restore the *status quo* as understood prior to Forrest & Forrest. CME strongly supports this bill.

As uncertainty regarding the validity of WA mining tenements raises questions about subsequent acts, a complementary amendment to the NTA is also required to restore certainty for industry and native title stakeholders and to protect significant shared benefits negotiated over time and in good faith under the Future Acts regime.

In seeking this amendment, the CME strongly supports statements by the Minister for Mines and Petroleum, Hon. Bill Johnston MLA in his second reading of the Bill. Minister Johnston confirmed:

“The State is seeking only to restore the status quo as understood to have existed prior to the High Court decision, without causing any collateral effects, whether advantageous or disadvantageous, on native title holders or native title rights.

The State is not seeking to:

- validate any mining tenement in terms of the Native Title Act which was required to go through the Native Title Act's future act regime but did not for any reason;*
- alter title holders' entitlements to compensation for the grant of mining tenements which may have existed if the grants would have been past acts, intermediate period acts, or future acts had they been valid from the date of grant;*
- alter the extent of extinguishment of native title which would have arisen if the tenements had been valid from the date of grant.”¹*

To ensure the purpose of this amendment is understood by all parties, CME would strongly support a coordinated consultation process led by the Australian Government and supported by the Western Australian Government to engage with Representative Bodies. CME is open to assisting this consultation as needed.

Subject to such a consultation process, CME considers that the complementary NTA reform could be included in the current reform package being led by the Attorney-General's Department. This reflects the criticality of the reform to the WA resources sector and broader Australian economy.

CME strongly recommends the Attorney-General's Department urgently considers the necessary amendments to the NTA associated with amendment of the *Mining Act 1978 (WA)* to provide validity, security of title and certainty for subsequent acts in WA.

In raising this matter as urgent and a priority, CME wishes to highlight that this legislative fix is sought in order to restore certainty to the validity of mining leases which may have been brought into question as a direct result of the Forrest & Forrest case only.

¹ WA Legislative Assembly, Wednesday 28th November, 2018

CME holds that no party should be either advantaged or disadvantaged by these amendments but solely for the *status quo* to be restored.

CONCLUSION

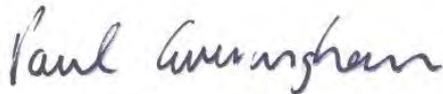
The *Native Title Act 1993* (Cth) is a significant piece of legislation for the resources sector in WA, with many Indigenous Land Use Agreements and section 31 agreements across the state associated with resources sector projects. CME supports reforms which will provide certainty and efficiency for all users of the NTA.

To reinforce:

- this submission is to be read in conjunction with the detailed submission on the Exposure Drafts submitted by the MCA and supported by CME;
- CME strongly supports the WA Validation Bill and urges the Australian Government to include complementary amendments in the NTA to give effect to the bill as a matter of urgency; and
- CME is open to working with the Attorney-General's Department and other stakeholders to support the necessary engagement that would enable passage of this complementary amendment in order to restore certainty and secure the shared benefits of mining activities for all parties.

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

Yours sincerely



Paul Everingham
Chief Executive

Cc: The Hon. Christian Porter MP, Attorney-General
The Hon. Bill Johnston MLA, Minister for Mines and Petroleum; Commerce and Industrial Relations; Electoral Affairs; Asian Engagement (WA)
The Hon. Ben Wyatt MLA, Treasurer; Minister for Finance; Energy; Aboriginal Affairs (WA)
Tania Constable PSM, Chief Executive, Minerals Council of Australia