

Friday 19 March 2010

The First Assistant Secretary
Social Inclusion Division
Attorney-Generals Department
Robert Garran Offices
National Circuit
BARTON ACT 2600

Re: Response to proposed amendment to enable the historical extinguishment of Native Title to be disregarded in certain circumstances

This submission is made by the Minerals Council of Australia (MCA) in response to the Attorney-General's announcement of the proposed amendment to enable the historical extinguishment of Native Title to be disregarded in certain circumstances. The MCA welcomes the opportunity to respond to the proposed amendment.

The MCA is the peak national industry association representing exploration, mining and minerals processing companies in Australia. MCA members account for more than 85% of annual minerals production in Australia and a slightly higher proportion of mineral exports. Members of the MCA recognise that Industry's engagement with Indigenous peoples needs to be founded in mutual respect and in the recognition of Indigenous Australians' rights in law, interests and special connections to land and waters. This point is made even more acute by the fact that more than 60% of minerals operations in Australia have neighbouring Indigenous communities.

The MCA's vision is a thriving minerals industry working in partnership with Indigenous communities for the present and future development of mineral resources and the establishment of vibrant, diversified and sustainable regional economies and Indigenous communities. Industry further recognises that the present and future operations of minerals companies are inextricably linked to building and enhancing our strong relationships with Indigenous communities, and to meeting the needs of this generation without compromising the ability of future generations to meet their own needs.

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Industry is committed to working with Indigenous communities within a framework of mutual benefit, which respects Indigenous rights and interests, and welcomes changes that improve the efficiency and operability of the Native Title system without diminishing the rights of Indigenous Australians.

The MCA supports approaches that encourage negotiation and mediation in determining agreed outcomes with traditional custodians, in addition to promoting fair, transparent and timely decisions that do not impose unnecessary costs on those involved. The MCA is therefore broadly supportive of the proposal to allow historical extinguishment to be "disregarded over Crown land, or reserves of various kinds, where the applicants and the relevant government party have agreed that it should".

The MCA does, however, consider it necessary to more clearly define the scope of the proposed amendment particularly where it applies to Crown land. In particular the amendment should refer *only* to an area that is, or part of a national, State or Territory park, or for the preservation of the natural environment of the area as defined under relevant conservation laws.

Further, the MCA is supportive of the proposed amendment only where the non-extinguishment principle applies to any existing interests over land, specifying identified interests are deemed to have always been valid from a native title perspective. This is to ensure certainty and access are not diminished for current operations, and that retrospective compensation is excluded where existing interests are identified.

The protection of third party interests should be strengthened. A simple right to comment is insufficient. The holders of other interests should be fully consulted and native title should not be "revived" unless the interests of that third party are not prejudiced, or the third party agrees. Consideration should be given to excluding the operation of the provisions from third party interests, such as mining tenements. In this regard, the MCA notes that sections 47, 47A and 47B do not apply to areas that are the subject of third party interests such as mining tenements. A consistent approach should be applied to the proposed amendment.

The effect on all third party interests should be expressly confirmed with language that is consistent with the other more comprehensive provisions of the *Native Title Act*. This must include affirmation that each third party interest is valid and has full effect notwithstanding the "revived" native title. If a third party interest would have extinguished native title to any extent but for the existence of the vesting that is to be "disregarded", the extinguishing effect of the third party interest should be confirmed.

The potential for compensation liability arising from the "revival" of native title should be clarified. If there is to be compensation, the State should be responsible for any compensation liability that arises directly or indirectly from the "revival" of native title. To aid transparency, the State should be obliged to identify all third party interests through a register search and public notices. Further, any agreement that revives native title should be recorded on a public register.

The MCA continues to advocate to Government the need for provisions that aid in the resourcing and operability of Native Title Representative Bodies (NTRBs) and Prescribed Bodies Corporate (PBCs) as part of the overall program of reforms to the Native Title system. As we have previously articulated to the Department and Government, we consider that the

effectiveness of these Indigenous representative organisations is being hampered by both inadequate resourcing and overly restrictive operating parameters.

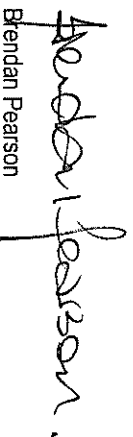
In particular, the underfunding of NTRBs is delaying the negotiation of agreements and therefore the benefits received by Indigenous communities. Improved resourcing of PBCs is also critical and could be addressed through:

- core funding capacity being provided by government to ensure that PBCs have the capacity to undertake independent negotiations with industry, or to facilitate the development of independent Indigenous enterprise;
- the Federal Government and State Governments reconciling funding responsibility for PBCs as part of the current State and Territory engagement process relating to the native title system reforms;
- the Federal Government committing to the provision of transitional funding for PBCs until this matter is resolved, given that these organisations are formed under Federal statutes;
- NTRB resourcing of PBCs should be enabled but not encouraged due to the finite nature of NTRBs in their statutory role;
- parterred funding assistance; while industry considers that there are some costs associated with the activities of PBCs that are appropriately met by industry, this is only where these relate specifically to additional matters directed at resolving commercial issues, and not capacity to engage with industry, and where they do not compromise the independence of negotiations; and
- the transition of PBCs to being self-supporting, through the establishment of properly functioning rural and remote economies that are not entirely reliant on revenues from third party access for mining, fishing or agriculture.

The MCA further considers that the historic lack of appropriate, government funded social and physical infrastructure in Indigenous communities continues to provide systemic barriers to participation, limiting effective engagement by Indigenous people in decision making and management of their traditional lands. The widespread disadvantage suffered by Indigenous Australians is an issue that requires urgent attention by Government for the development of long term sustainable solutions that facilitate Indigenous led approaches to management of their communities, lands and cultural heritage.

Thank you for the opportunity to provide comment on the proposed amendment to the Native Title Act. Should you have any queries related to matters outlined in this submission, please do not hesitate to contact Ms Melanie Stutsel, who has carriage of this issue in the MCA Secretariat.

Yours sincerely



Brendan Pearson
Deputy Chief Executive