Mining Act Review

Submission regarding Part 9B of the Mining Act 1971 (the Act)

1. Introduction

The alternative Native Title regime set out in Part 9B of the Act (***9B***) differs from the Subdivision P *Right to Negotiate* provision of the Commonwealth Native Title Act (***NTA***) in a number of subtle, but ultimately quite fundamental ways.

Since approval of 9B as an alternative regime and its introduction into the Act in 1993:

- the NTA has been amended a number of times[1]
- the nature and scope of Native Title rights and interests has been litigated, tested and redefined almost beyond recognition (compared with understanding of the these rights and interest which existed at the time of the introduction of the NTA in 1992);
- a body of jurisprudence has built up around the NTA and the *Right to Negotiate*

Throughout this time, 9B has remained essentially static [2].

2. Threats to Validity and Amendment Options

This part of the Act has been left in a virtual time warp due to concerns about failure of any attempt to substantively amend 9B (to modernise and bring it into line with current understanding of Native Title, the amended NTA or to address acknowledged lacunae and ambiguities).

It is almost a certainty that, if put to the Commonwealth Attorney General today, in its current form, the alternative regime, would not receive approval.

The growing distance between the outmoded 9B *Right to Negotiate* and the NTA has led South Australian Native Title Services (***SANTS***) to raise the spectre of invalidity of the entire regime on a number of occasions.

These threats to challenge the validity of the scheme, which have largely gone unaddressed by the State, have among other things caused:

- the industry to:
    - back off pursuing legislative rights provided for under the Act[3];
    - look for jurisdictions which provide more legislative certainty and a more robust, Government assisted, structure for negotiating land access;

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1 *Most notably in response to the Wik decision in 1998*

2 *Although minor amendments were effected in 2011 to acknowledge that an ILUA under the NTA may be used to comply with 9B.*

3 *eg s63W – ministerial override of the ERD Court (see* Straits Exploration v The Kokatha Uwankara Native Title Claimants [2011] SASCFC 9)

- DSD[4] to effect, what amounts to, legislative amendment through internal policy[5].

3. *Historical Benefits Eroded*

The initial perceived benefits of the scheme (which have long since been eroded) were that, exploration tenure in South Australia could be granted ahead of the *Right to Negotiate* process. This left the industry with the perception, at least, that the process was easier, quicker and more streamlined in SA than in other States.

It is true that those other State suffered significant, initial delays and backlogs in the grant of exploration permits while the *Right to Negotiate* processes were established, refined, tested in the NNTT[6] and eventually standardised to a large degree.

In contrast to the difficulties experienced in other States on the introduction of the NTA, the State in SA was able to grant exploration tenure with no substantive delay or additional cost. It did so however by disassociating itself with the practicalities of achieving Native Title approvals for land access.

The industry was asked to self-assess its compliance with these new and unfamiliar concepts of Native Title rights, bundles of rights and grapple with the question of whether their activities "*affected native title rights and interest*" at all.

During this period much of the industry assumed, (rightly or wrongly), that their activities, (at least those at the lower end of the exploration scale), did not in fact "*affect native title*". Most entered into some form of heritage survey agreement and sought "clearance" for their activities but many did not initiate formal *Right to Negotiate* negotiations under s.63M or conclude Native Title Mining Agreements (***NTMA***) under s.63Q.

4. *Amendment through Policy*

Through successive Federal Court and High Court decisions it became quite clear that the "Future Act", to which the NTA *Right to Negotiate* applies, is the granting of the rights to explore, not the exercise of those rights once granted.

9B is a system which, in practice, places the grant of rights – (the grant of an EL)- ahead of the Right *to Negotiate*. This, in and of itself, places 9B out of step with the Commonwealth NTA and in danger of falling.

It is argued that, the conditional nature of the EL grant saves the scheme from prima facie invalidity.

A number of years ago now, DSD introduced policy that it will not authorise exploration activities on a granted EL without either:

- a negotiated NTMA; or

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4 *Department of State Development*

5 *See discussion of policy changes under section 4*

6 *National Native Title Tribunal*

- an ERD[7] Court determination under s.63N[8] authorising activities

Provisions of the Act which allow exploration activities to be undertaken without either an NTMA or ERD Court determination have essentially been written out of the Act by implementation of this policy.

While this may overcome the State's risk of the legislation being struck down (at least on this ground), it leaves the industry with the full burden of:

- commencing *Right to Negotiate* processes (through s63M notices)[9];
- conducting negotiations (without the assistance of the State or publicly available template agreements or State developed heritage protocols or standards);
- litigating failed negotiations through the ERD Court which, in contrast to the NNTT[10], has experience with only a handful of contested matters and is not staffed by judges or commissioners who have any real experience in the Native Title or mining spheres.

5. *Effects on Industry*

The industry generally has no confidence that its issues will be dealt with fairly, consistently, competently or expeditiously through the ERD Court process.

Such is the fear and uncertainty associated with failing to reach agreement and ending up in the ERD Court process that, access to independent arbitration of Native Title land access disputes is essentially unavailable.

The ability of the industry to negotiate fair outcomes has been greatly eroded as a consequence.

Negotiated commercial results have, in many instances, been poor and the cost in terms of money and delay associated with overly lengthy negotiations have escalated over time as Native Title parties have come to recognise that the industry has little or no recourse in the face of unreasonable/ uncommercial demands or bad faith negotiation tactics.

6. *Areas of Discrepancy between 9B and NTA processes*

9b	NTA
2 months notification of commencing	3- 4 months notification of commencing

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7 *Environment, Resources and Development Court*

8 *or potentially under s.63O – the Act's equivalent of the NTA expedited procedures for low impact activities.*

9 *The issue of notices from mining proponents translates poorly to Aboriginal people who assume that this indicates some greater level of control over the process than is actually the case. The Federal system, under which the State initiates the notification, helps to ameliorate this misconception.*

10 *which is a specialist tribunal that has managed and resolved thousands of contested matters.*

9b	NTA
negotiations under s63M	negotiations under s 29
2 month objection period to registration of an NTMA	3 month objection period to registration of a s31 Deed
No Representative Body right of appearance in a s63N application to the ERD Court	No equivalent provision in NTA (see Expedited Procedure)
No Representative Body right of appearance in a s63S application to the ERD Court	No equivalent provision in NTA
No Representative Body right of appearance in a s63O (Expedited Procedure) application to the ERD Court	Representative Body right of appearance in an Expedited procedure under s32
Proponent initiates negotiations	Government initiates negotiations
Proponent manages timeline (but a Party may apply to ERD court if no agreement reached within 4 months (for Exploration) or 6 months (for Production)	NNTT manages timeline of negotiations and lists matter for hearing if process exceeds timelines without reason
S63W [11]– Ministerial discretion to overrule ERD Court Decision	S42 power to overrule decisions of the NNTT within 2 months of the determination
Proponent and Native Title parties are the only parties to an NTMA (although other parties are permitted)	State, Proponent and Native Title parties must be parties to a s31 deed[12]
Conjunctive authorisations **not** permitted in respect of exploration and mining[13]	Conjunctive authorisations permitted
Conjunctive authorisations **not** permitted in respect of future exploration authorities[14]	Conjunctive authorisations permitted

11 *But note argument by SANTS that such a power was unconstitutional. This matter may have been resolved by the decision in Straits Exploration v The Kokatha Unwankara Native Title Claimants [2011] SASCFC 9 which found that the ERD Court was, in making a decision under s63S, exercising administrative powers. To our knowledge, the Minister for Mines has never exercised this power.*

12 *ancillary / commercial provisions are usually contained in a separate agreement which does not include the State as a Party. Representative Bodies may, and sometimes must also be a party.*

13 *Reinterpretation of these provisions in* Maldorky Iron Pty Ltd v South Australian Native Title Services Ltd [2012] SASCFC 63 ***(Maldorky Decision)**; decision has altered the time at which s63M notification for a mining lease may be given (leaving in doubt a number of production NTMA's which were concluded and registered on the basis of notices issued in respect of Mineral Claims where no mining lease application was on foot at the time of notice, potentially meaning these agreement were "conjunctive" in nature.*

14 *A series of ERD Court determinations were made in 2012 authorising activities on ELs (and successor ELs). The law is unsettled on whether these authorisations would now be considered*

9b	NTA
Umbrella authorisations **not** permitted under s63N or s63S[15]	Umbrella authorisations permitted
2 year time limit on preservation of NTMA's concluded with Claimant groups following determination in favour of Native Title holders (where holders are different from Claimants)[16]	Registered future act agreement remains binding on subsequent holders of native title.

7. *A note on McGlade*[17]

The recent overturning of the Bygraves[18] decision by the McGlade decision has caused a scramble at a federal level to amend the NTA to catch up with legal precedent.

I am aware of at least one decision in the ERD court which falls within the McGlade example (that is registration of an agreement with native title claimants in the absence of its execution by all named applicants to the claim – as a result of the death of claimants between the date of notice and the date of agreement).

It is unclear as yet how (or whether) the amendments to the NTA designed to address these circumstances will flow through to 9B to regularise these situations in an SA context.

8. *A Note on the Petroleum Experience*

"conjunctive" in nature and beyond the statutory power of the court to make. The Maldorky Decision suggests that is the case but the issue of "conjunctive" authorisations has not been specifically considered in the context of ELs and successor ELs. Nevertheless, SANTS has recently agitated successfully against a proponent seeking this type of authorisation from the ERD Court meaning that the lengthy and costly ERD court determination process will need to be repeated in respect of the same EL area on application for a subsequent EL over the area, notwithstanding that, if re-granted, the subsequent EL would cover the same (or a smaller) area) and have the same (or fewer) rights attaching.

15 *The ERD Court may not grant an "umbrella authorisations" under s63N or 63S. An umbrella authorisation relates to authority for a class of mining operator rather than an individual operator. To what extent does this preclude the holder of an EL or ML, (in respect of which an ERD Court authorisation has been obtained), from assigning rights under the EL or ML. This area appears ripe for future litigation.*

16 *The currently proposed Adnyamathanha / Wilyakali / Ngadjuri combined overlap consent determination is likely to have consequences for a number of exploration and production NTMA's concluded with Adnyamathanha prior to the registration of Wilyakali / Ngadjuri claims. 9B agreements negotiated in good faith with Adnyamathanha while they were the only claimant group in the area may well fall over once a determination is made.*

17 *McGlade v Native Title Registrar [2017] FCAFC 10*

18 *QGC Pty Ltd v Bygrave (No 2) [2010] FCA 1019*

The petroleum sector has operated successfully under the NTA *Right to Negotiate* provisions since the commencement of the NTA.

In comparison to 9B, the State has played a very constructive role in relation to petroleum licencing under the federal system. The process has led to the development of standard precedents and a public register of all agreements. Both of these factors have greatly assisted the petroleum sector to reduce the cost of land access negotiation and to streamline timelines.

The transparency of the process to both proponents and Native Title parties is also conducive to the development of healthy working relationships from the outset. In contrast, the requirement to negotiate 9B access in a proponent driven, commercial vacuum often causes the parties to take an adversarial approach from the outset. Relationships which start on this basis often take a long time to recover, and in fact may never recover the level of trust and mutual respect which are necessary for successful, co-operative land use arrangements.

9. Conclusion

Now that there is a mature body of law and precedent surrounding the NTA *Right to Negotiate* process, including;

- an experienced, specialist tribunal in the form of the NNTT;
- other State and Territory processes and procedures to be drawn upon;
- established and publicly available set of template cultural heritage management plans (the equivalent of exploration NTMA's but more transparent)

it is time for SA to opt into the NTA *Right to Negotiate* system.

A deliberate election to do so would allow an orderly transition, with well-considered provisions in place to preserve "old system" agreements and procedural compliance issues.

The risks of doing nothing at this stage are significant, including that:

- the industry will remain fearful of seeking to pursue their statutory rights under the current scheme, including where necessary, through litigating those rights;
- an attack on the validity of the 9B regime could be precipitated at any time on any number of issues, leaving the industry vulnerable and in a state of uncertainty;
- if the scheme falls, it would likely precipitate a scramble to implement transitional saving provisions and leave large numbers of projects halted or in a state of legal uncertainty while the issue is addressed through emergency measures.