



**Discussion Paper 1 Reform Options – To
improve the operation of the Native Title
mineral exploration system in South Australia**

Submission to Stronger Partners, Stronger
Futures

26 July 2019

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1. Introduction

The South Australian Chamber of Mines and Energy (SACOME) is the peak industry body representing companies with interests in the South Australian minerals, energy, extractive, oil and gas sectors and associated service providers.

SACOME recognises that the purpose of Discussion Paper 1 (the Paper) is to identify policy options for improving the interaction between the Native Title system and mineral exploration in South Australia.

Discussion Paper 1 focuses on the following issues:

- facilitating early engagement between resources sector companies and Native Title groups;
- clarifying when early exploration should trigger engagement by resources sector operators; and
- identifying administrative processes, the Department of Energy & Mining (DEM) could implement to support this engagement.

SACOME member companies overwhelmingly engage in open and thorough negotiations with Native Title groups at the earliest possible stage of the project cycle.

The community engagement models of these member companies have allowed for relationships between the resources sector and Aboriginal communities to develop over time to one of increasing cooperation and collaboration. In some cases, these engagement processes have been held up as 'leading practice' examples of how to engage with Aboriginal communities.

SACOME understands that successful relationship building facilitates project development and mutually beneficial outcomes for all stakeholders and would support the development of a "Guideline of Leading Exploration Practice" document to assist in this regard.

SACOME is also broadly supportive of reforms that further improve relationships between resources sector companies and Native Title groups, while providing certainty on issues of land access; and security of exploration and/or mining tenure.

Importantly, SACOME supports predictable regulatory process that facilitate exploration investment at a time when mineral exploration investment in South Australia is low and our 'investment attractiveness' as a jurisdiction has declined from previous years.

SACOME welcomes the opportunity to provide comment to the Stronger Partners, Stronger Futures (SPSF) process and remains committed to working collaboratively with all stakeholders to improve outcomes for the resources sector, Native Title groups and the South Australian Government.

2. Government Information

Effective communication is a key aspect to any relationship. Governments can play a vital role in relationship building by providing quality information to all stakeholders.

SACOME supports the development and publication of Community Engagement Guidelines as a resource to increase understanding of low impact and advanced exploration activities in South Australia for all stakeholders.

SACOME submits that Community Engagement Guidelines should provide consistent, clear and concise documentation that is relevant and useful for all stakeholders. They should aim to improve understanding of operational activity for Aboriginal stakeholders; and outline a 'leading practice' approach for engagement with Native Title groups for resources sector operators.

SACOME notes that the Paper does not address the provision of Native Title and/or heritage information to explorers when an exploration licence is issued.

An on-going concern for resources sector operators is the lack of a central repository for cataloguing past clearances. Industry has consistently called for the establishment of such a repository, alongside standardisation and greater transparency in relation to fees for heritage clearances.

Some SACOME member companies have suggested that the South Australian Government provide a data pack which includes a map and information on all known traditional and heritage sites at the time an exploration licence is issued.

This data pack would accelerate the exploration process and reduce the cost of having to employ Native Title/heritage specialists to undertake further clearances for areas that have previously been cleared by other exploration companies.

SACOME understands that there may be cultural sensitivities surrounding access to such a register and cultural heritage information being placed in a public forum but again flags this issue for further discussion.

2.1 Are there aspects of the exploration process not described in the Paper we should include in our guidelines?

SACOME is broadly supportive of the issues outlined in the Paper. SACOME notes that DEM proposes to draft Guidelines for the issues set out therein and is committed to assisting DEM in ensuring the Guidelines reflect the operational reality of exploration.

Resolving these Guidelines as relevant, consistent, clear and concise is of primary importance.

The Paper refers individuals to the DEM website¹ which provides links to various documents, many of which are multiple versions of the same guidelines.

SACOME submits that it would benefit all stakeholders if the documents on the website were condensed, if not into a single succinct document, to as few documents as possible.

This would greatly improve ease of access and understanding for all stakeholders.

2.2 Which ways of communicating information best suits your organisations? Books, videos, internet, presentations, seminars or workshops?

SACOME member companies have raised that all Government prepared information should be freely accessible on the internet.

Regular workshops and access to project officers within DEM have also been raised as effective methods to distribute information amongst stakeholders.

SACOME submits that publications in all formats would be helpful for the resources sector if they are objectively written and illustrated. The key question is one of utility.

¹ http://energymining.sa.gov.au/minerals/knowledge_centre/regulatory_guidelines

3. Assessment of Exploration Licence Applications

SACOME supports regulatory reform that will reduce time and cost pressures for the resources sector while facilitating mutually beneficial outcomes for resources sector operators and Native Title groups.

3.1 Would the changes to the licence application and assessment process suggested in the Paper meet the needs of explorers who have asked for assistance in managing their responsibilities under Native Title and Aboriginal heritage legislation and Aboriginal engagement?

SACOME does not support the assessment of exploration companies' cultural competency, knowledge and capacity to engage with Aboriginal communities as a criterion to obtain an exploration licence.

Linking the grant of an exploration licence to an assessment of cultural competency will add uncertainty and delay to the awarding of an exploration licence.

SACOME understands that cultural heritage is fundamental to the identity of many communities that host exploration, mining and petroleum activities. The way heritage is respected and managed is crucial to the quality of the relationships, the facilitation of a smooth project environment and the effectiveness of community development efforts.

The large majority of SACOME member companies have a sound understanding of cultural heritage, with policies in place that manage their Native Title and Aboriginal heritage engagement.

Feedback from these SACOME member companies is that, as a matter of practice, they commence negotiations with Aboriginal communities in a respectful manner at the earliest possible stage of the resources cycle.

Development of a Guideline document that outlines a 'leading practice' approach to culturally sensitive engagement with Aboriginal people would assist explorers without adding further prerequisite licence conditions.

This document could confirm with the applicants their experience and understanding of working with Native Title groups; negotiating agreements; obligations under and compliance with the Part 9B process and Aboriginal Heritage Act; and potential costs in participating in the Part 9B process and managing Aboriginal heritage.

SACOME is mindful that all reform options need to balance the expectations of Aboriginal communities and the needs of explorers, while pursuing an overarching aim of encouraging exploration investment in South Australia.

3.2 Do the changes to the licence application and assessment process suggested above meet the needs of Aboriginal groups who have suggested that DEM should implement a process to assess cultural competency?

SACOME acknowledges, respects and supports the recognition of Aboriginal community's cultural heritage, interest, special connections and associated rights to land and water in South Australia.

Cross cultural awareness is crucial for effective negotiations and the facilitation of a smooth operating environment. Building robust, mutually beneficial relationships relies heavily on how the resources sector acknowledges and values Aboriginal cultural heritage and vice versa.

SACOME encourages its members to adopt identified leading practice in cultural heritage awareness and management and therefore considers that cultural competency, knowledge and capacity requirements could be outlined in a "Guideline of Leading Exploration Practice" document which describes best practice in a way that reflects the perspective of both industry and Native Title groups.

3.3 In addition to the issues listed in the Paper, what other information is needed to clarify cultural competency?

SACOME submits that there is no other information needed to clarify cultural competency.

3.4 Should the process suggested above be a voluntary process or a mandatory process?

SACOME does not support a mandatory cultural competency process, instead it favours development of 'leading practice' guidelines for explorers developed in collaboration and agreement with Aboriginal stakeholders.

The Paper does not clearly articulate how DEM would administer a process to assess cultural competency.

4. Early Engagement

SACOME understands the importance of direct, early engagement with Aboriginal communities in the exploration process.

Early engagement allows for the assessment of the role of people in the engagement process; the clarification of their expectations; and the identification of their issues and concerns at the beginning of the process to ensure sustainable outcomes are achieved for all stakeholders.

4.1 Is notifying Native Title groups of an exploration licence grant sufficient to start early engagement?

SACOME understands that Native Title groups want to know when exploration licences are granted over country and to have the opportunity to engage with licence holders before early exploration starts.

SACOME submits, for member companies to build enduring relationships with Aboriginal groups, it is important for them to notify Aboriginal groups of the grant of an exploration licence or to even engage prior to obtaining an exploration licence.

Respectful and early engagement with communities that may be impacted by resources sector activity is crucial, even during the exploration phase. SACOME supports the principle of early engagement by resources sector operators.

4.2 Would the inclusion of conditions on exploration licences help clarify the timing and nature of early engagement?

SACOME does not support the inclusion of conditions on exploration licences to help clarify the timing and nature of early engagement.

Resources sector companies and Aboriginal communities have raised concerns such as:

- the level of agreement making required relevant to the scope of the project;
- the process for the explorer and Native Title parties to engage and exchange information before and during exploration;
- how the explorer will engage with the Native Title party regarding the protection and management of cultural heritage during their life of the permit; and
- timeframes for response and action.

SACOME submits these concerns would be better supported via a "Guideline of Leading Exploration Practice" document which outlines early engagement requirements as mutually agreed between the resources sector and Aboriginal community groups rather than conditions being placed on exploration licences.

4.3 If you do not support the concept of conditioning the exploration licence, what are your suggestions for a standard process to support and manage early engagement?

SACOME would be supportive of a framework that facilitates further consultation between the resources sector and Aboriginal groups to reach an agreed position on 'leading practice' guidelines.

5. Early (Low Impact) Exploration

An exploration licence holder must not undertake any activities that affect Native Title without a Native Title agreement under Part 9B of the Mining Act, an Indigenous Land Use Agreement (ILUA) under the Native Title Act or a determination from the Environment Resources and Development Court (ERD Court).

However, the operation of Part 9B of the Mining Act allows exploration companies to self-assess whether their activities might affect Native Title, and how they should proceed.

This creates difficulties for both explorers and Aboriginal communities, as early exploration activities have the potential to damage, disturb or interfere with Aboriginal heritage sites depending on the landscape, activity and specific area under exploration.

While self-assessment by exploration companies removes some of the regulatory requirement to access land for operators, it can also create uncertainty and hinder the establishment of good relationships between resources sector companies and Aboriginal groups.

5.1 Would the actions suggested in the Paper, clarify how low-impact exploration and early engagement should be managed?

SACOME notes the action items suggested in the Paper such as:

- attaching conditions on exploration licences that trigger early engagement. This would prescribe how exploration companies must work with Native Title groups to clarify any heritage or Native Title implications incurred by proposed low impact activities; or
- specifying the appropriate level of engagement for certain exploration activities, that is, notification, discussion or inspection.

SACOME views these reforms as overly prescriptive, however, the development and use of risk management/due diligence guidelines to assist decision making as suggested in the Paper could form part of a "Guideline of Leading Exploration Practice" document.

5.2 If not, what do you suggest?

Some SACOME member companies have suggested, subject to defined limits and proper early engagement, adopting an assumption that low impact exploration activities can proceed without a heritage survey to reduce costs and facilitate early exploration.

This would require:

- low impact activities being clearly defined;

- early engagement with Native Title groups;
- advance notification to the Native Title group of the company's intention to conduct low impact exploration activities; providing the Native Title group with clear maps and explanations of timeframes and methodologies to be used; and
- a process for the Native Title group to dispute the assumption that a heritage survey is not required for early (low impact) exploration.

SACOME raises these views for further discussion between stakeholders.

6. Fees and Costs

SACOME would support the standardisation of fees via a Schedule of Rates incorporated as part of the agreement making process.

The standardisation of rates for Cultural Heritage Clearances will assist industry in its investment decision making by providing greater transparency and consistency in relation to operational costs.

6.1 Do you support the Government exploring a process to achieve the voluntary standardisation of fees and costs to support early engagement for exploration?

SACOME supports this proposition.

Standardised fees and costs could be included in a "Guideline of Leading Exploration Practice" document. The Guidelines document could also include detailed explanation of what these costs cover; and minimum expected standards/practices for consultants undertaking cultural heritage surveys.

7. Expedited Procedure

The expedited procedure process allows explorers who consider, that the exploration to be conducted, will have minimal impact on the land to apply to the ERD Court for a summary determination authorising mining operation in accordance with those outlined in the notice (rather than proceeding to negotiate an agreement to obtain this authorisation).

The Expedited Procedure process precludes the need to serve any notice.

7.1 Do you understand how the expedited procedure for South Australia works?

SACOME and the bulk of member companies understand how the expedited procedure process operates in South Australia. However, its use can be damaging to on-going relationships with Native Title groups.

The majority of SACOME member companies negotiate with Native Title groups rather than use procedures that remove Native Title groups from the input chain.

7.2 If not, what information do you need to understand this issue better, and how would you like this to be communicated?

The provision of any information to better inform resources sector operators is welcomed.

7.3 Has your organisation considered using the expedited procedure?

SACOME member companies have considered using the expedited procedure mechanism, however, it is rarely used in practice given the damage it can cause to on-going relationships with Native Title groups.

7.4 If the use of the expedited procedure is more widely promoted, under what conditions would your organisation agree to use the expedited procedure under Part 9B?

SACOME submits that better understanding why the expedited procedure process is not used more widely by industry should precede its wider promotion by DEM.

7.5 What processes would a good procedure need to contain to be effective?

SACOME's view of what processes, would a good procedure need to contain, to be effective would be best resolved through consultation between the resources sector and Aboriginal community groups.

8. Agreement-making for Exploration

SACOME broadly supports development of a standard or template agreement through consultation between the resources sector and Aboriginal groups within an overarching "Guideline of Leading Exploration Practice" document.

SACOME understands the difficulty in developing a "one size fits all" standard agreement given land access agreements are negotiated between a proponent and a Native Title holder under varying circumstances.

However, cohesive and consistent Native Title arrangements are critical to ensuring timely and culturally appropriate land access for resources sector operators and Native Title groups.

8.1 Do you support the concept of a standard or template agreement as a basis for Native Title agreement-making for South Australia? If not, please give reasons why.

SACOME supports the concept of a standard or template agreement being formulated through consultation between the resources sector and Aboriginal community groups within an overarching "Guideline of Leading Exploration Practice" document.

SACOME notes that any standard or template agreement will need to be reviewed periodically in order to remain relevant and acceptable to all stakeholders.

8.2 If yes, what terms and conditions should be negotiable and what should be non-negotiable?

SACOME submits that the terms and conditions of a standard or template agreement should be developed through negotiation between the resource sector and Aboriginal groups.

8.3 What arrangements would need to be in place for standard agreement templates to be accepted?

SACOME submits that all changes to improve the operation of the Native Title mineral exploration system in South Australia need to be achieved via negotiation between the resources sector and Aboriginal groups.

8.4 Has your organisation developed a low-impact access or heritage agreement? If so, are you willing to discuss how this was developed?

SACOME member companies have developed a low-impact access or heritage agreement.

8.4 Does your organisation support the development of local, regional to state-wide mineral exploration ILUAs for managing heritage and Native Title? If not, please give reasons why.

SACOME is supportive of local, regional and state-wide ILUAs for mineral exploration that lead to mutually beneficial outcomes for both explorers and Native Title groups.

The Whole of Mineral Claim Exploration ILUA negotiations in South Australia provided structured processes for land access and management of cultural heritage in that it: provided a clear definition of “early exploration”; set out processes to notify the Native Title group of an intention to carry out exploration activities; set out processes to request a heritage survey; and required clearance survey reports.

SACOME submits that ILUAs promote flexible and pragmatic agreements covering a multitude of areas such as future development; coexistence of rights; land access; an extinguishment of Native Title and compensation.

SACOME supports South Australian Government funding for the development of ILUAs that will lead to improved exploration outcomes.

9. Notices of Entry

Notice of entry is required to be served on the 'owner of land' as defined under the Mining Act. The owner of land includes a person who holds Native Title. For Native Title land, notice of entry must be served in accordance with section 5 of the Native Title (South Australia) Act 1994:

- *Where there is a Native Title declaration or registered claim group in the area – to the relevant Native Title holders or registered Native Title claimants, and the registered Aboriginal representative body in South Australia (currently South Australian Native Title Services Ltd).*
- *Where there is not a Native Title declaration or registered Native Title claim group in the area – to the registered Aboriginal representative body in South Australia (currently South Australian Native Title Services Ltd).*

SACOME understands the importance of direct, early engagement with impacted communities.

SACOME encourages member companies to engage with Native Title groups as soon as possible and to do so before a Notice of Entry is provided.

9.1 Would the changes proposed in section 6.3 of this document meet parties needs in respect of notices of entry?

SACOME does not support the proposed changes in section 6.3 of the Paper.

SACOME submits that, for member companies to build enduring relationships with Aboriginal groups, it is important for them to notify the Native Title group of the grant of an exploration licence before they are notified by DEM. This represents a 'leading practice' approach which should be captured in a Guideline document.

10. Monitoring and Compliance

10.1 If the changes suggested in the discussion paper for early engagement are agreed and implemented, would these changes address people's concerns regarding engagement and compliance for low impact exploration?

SACOME does not support the inclusion of conditions on exploration licences to help clarify the timing and nature of early engagement. These considerations should be captured in a 'leading practice' Guideline document.

The resources sector is already a highly regulated industry and any further monitoring and compliance requirements need to balance the regulatory and cost burden placed on the resources sector with the expectation of Aboriginal communities.

11. Conclusion

SACOME welcomes the opportunity to make this submission to the Stronger Partners, Stronger Futures process.

SACOME is supportive of reforms that improve relationships between the resources sector and Native Title groups, providing greater certainty in relation to issues of land access and result in a regulatory process that facilitates exploration investment in South Australia.

SACOME submits that the development of a “Guideline of Leading Exploration Practice” document is a practical approach to achieving these outcomes.

SACOME’s submission is informed by the desire to build and maintain long-lasting relationships with Aboriginal groups, balanced with the importance of realising economic growth outcomes for the resources sector, Aboriginal and government stakeholders alike.

SACOME remains committed to working collaboratively with the South Australian Government and Aboriginal stakeholders through the Stronger Partners, Stronger Futures process.