



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

Mike Woods
Commissioner
Resource Exploration
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear Mr Woods,

RE: Non-financial barriers to mineral and energy resource exploration

Thank you for your invitation to provide a submission to the Productivity Commission's Inquiry into the non-financial barriers to mineral and energy resource exploration. The New South Wales Aboriginal Land Council (NSWALC) is pleased to provide the following comments.

About the NSW Aboriginal Land Council

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 20,000 members is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983* (NSW), NSWALC is an independent, self-funded non-government organisation with an elected governing Council and the objective of improving, protecting and fostering the best interests of Aboriginal peoples in NSW.

The *Aboriginal Land Rights Act 1983* also recognises that '*Land is of spiritual, social, cultural, and economic importance to Aboriginal peoples*' and establishes the 120 autonomous Local Aboriginal Land Councils that NSWALC supports, which like NSWALC have the function to protect and promote Aboriginal culture and heritage.

Inquiry into the non-financial barriers to mineral and energy resource exploration

The Productivity Commission have been asked to examine the non-financial barriers to mineral and energy resource exploration in Australia, particularly focusing on regulatory frameworks and overcoming any "*unnecessary regulatory burdens*" in order to determine "*high priority reform options*". We note that mining and production activities are outside the scope of this inquiry, and that the Productivity Commission is undertaking a separate inquiry into major project development assessment processes that will address these activities and related issues.

The Issues Paper released by the Productivity Commission in December 2012 specifically identified Aboriginal heritage issues as a key area to be examined, and posed the following questions:

1. Are the current heritage requirements providing an appropriate balance between heritage preservation and resources exploration?
2. Are there aspects of Indigenous and non-Indigenous heritage requirements that pose an unnecessary impediment to resources exploration?
3. Are there ways to streamline the processes while still meeting regulatory objectives?

Aboriginal culture and heritage is of significant importance to Aboriginal peoples and this nation as a whole. However, Aboriginal culture and heritage laws, at least in NSW, are failing to provide the appropriate protections for Aboriginal culture and heritage.

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NSWALC and Aboriginal communities in NSW have long been calling for legislative changes to implement proper protections for Aboriginal heritage due to the high number of Aboriginal sites that are consistently destroyed and damaged. Legal mechanisms such as the Aboriginal Heritage Impact Permit (AHIP)ⁱ process under the *National Parks and Wildlife Act 1974* (NSW) and the major project or 'state significant' approval processes under the *Environmental Planning and Assessment Act 1979* (NSW), currently provide avenues for proponents to undertake activities that may impact on Aboriginal heritage sites without adequate consideration of Aboriginal culture and heritage values.

The NSW Government has issued approximately 3,000ⁱⁱ permits to destroy Aboriginal culture and heritage since the commencement of Aboriginal culture and heritage provisions in the *National Parks and Wildlife Act* in 1969. Between 2004 and 2009 approximately three to five AHIPs were issued per week. One permit, may allow for the destruction of several Aboriginal sites. Therefore the actual number of Aboriginal culture and heritage sites destroyed with the approval of the NSW Government may be far greater than 3,000.

The State of the Environment Report 2011 has highlighted these issues stating that:

“One of the main threats to Indigenous heritage places is conscious destruction through government-approved development—that is, development for which decision-makers are aware of (or obliged to be informed about) Indigenous heritage impacts, yet choose to authorise the destruction of Indigenous heritage. This widespread process, combined with a general lack of understanding of physical Indigenous heritage, means that individual decisions on assessment and development result in progressive, cumulative destruction of the Indigenous cultural resource.”ⁱⁱⁱ

In addition, the State of the Environment Report 2011 listed the following reasons for the destruction of Aboriginal sites in Australia:

- *“lack of listing or recognition,*
- *conscious, informed decisions by development consent authorities,*
- *prioritisation of economic considerations over heritage protection,*
- *little to no assessment or public reporting of the cumulative impact of development—that is, how much of the Indigenous heritage estate has already been destroyed through past activities in the region,*
- *insufficient consultation with Indigenous communities.”^{iv}*

It must be noted that illegal damage and destruction of Aboriginal heritage sites in NSW also remains a significant problem, and once damaged or destroyed Aboriginal heritage may never be replaced.

Exploration approval systems and processes in NSW are primarily outlined in the following legislation: *Mining Act 1992*, *Petroleum (Onshore) Act 1991*, and the *Environmental Planning and Assessment Act 1979*, and generally follow the below procedure:

1. Application lodged.
2. Public notification.
3. Decision of the Minister.
4. Environmental assessment.

Depending on the type of exploration activity, some exploration activities may be classified as 'low impact'. NSWALC has previously raised a number of issues around various kinds of 'low impact'

activities^v that allow a broad scope of developments and activities to be exempted from the routine development assessment process. Thus, it has long been NSWALC's position that these should be kept to a minimum to avoid unmitigated impacts on Aboriginal culture and heritage.

Recommendation 1: Appropriate protections for Aboriginal culture and heritage must necessarily form part of the regulatory environment for all potentially impactful activities, including those in the mineral and energy industries.

Recommendation 2: Any options for reform considered by the Productivity Commission must address and incorporate the following elements, at least in respect to NSW:

- Aboriginal people in NSW must have their inherent right to control and manage Aboriginal culture and heritage recognised.
- Any legislative system must effect a practical balance between:
 - a. The recognised need to preserve and enhance Aboriginal cultural traditions,
 - b. The need to deliver social justice to Aboriginal peoples in NSW to redress the significant cultural, economic and social dispossession they have suffered, and
 - c. The need for the economic, social and cultural advancement of other non-Aboriginal interests in NSW
- Any new legislation must provide for the establishment of management processes which:
 - a. Recognise cultural rights and responsibilities of local Aboriginal communities, traditional owners and custodians;
 - b. Allow for the advocacy of Aboriginal interests; and
 - c. Are clear, transparent and accountable.
- The principles espoused in the United Nations *Declaration on the Rights of Indigenous Peoples* must underpin any new legislation.

I trust that genuine consideration will be given to our comments. If you have any further questions regarding this letter please do not hesitate to contact the Policy and Research Unit on 02 9689 4444.

Sincerely, _____

Les Turner
A/g Chief Executive Officer
NSW Aboriginal Land Council

15 March 2013

ⁱ Formerly known as section 87 and section 90 permits or 'consent to destroy'

ⁱⁱ Answers to questions on notice in the NSW Parliament (refer to previous NSWALC submissions to the OEH available at: <http://www.alc.org.au/publications/other-publications.aspx>) and the Aboriginal Heritage Impact Permit register available on the NSW Office of Environment and Heritage website at <http://www.environment.nsw.gov.au/licences/ahipregister.htm> reveal that over 1000 permits to destroy Aboriginal

heritage have been issued since 2004 alone. NSWALC has repeatedly requested data about AHIPs from the OEH to no avail. As such, this figure is a conservative estimate based on the average rate of permits issued since 2004.

ⁱⁱⁱ Australian State of the Environment Committee, State of the Environment Report 2011, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Chapter 9: Heritage, Page 721, available at: <http://www.environment.gov.au/soe/2011/report/heritage/download.html>

^{iv} Australian State of the Environment Committee, State of the Environment Report 2011, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Chapter 9: Heritage, Page 735, available at: <http://www.environment.gov.au/soe/2011/report/heritage/download.html>

^v See for example, submission made NSWALC and NTSCORP in June 2010 relation to the draft National Parks and Wildlife Regulation 2010, available at:

<http://www.alc.org.au/media/52844/100907%20submission%20to%20deccw%20re%20regs%20-%20limited%20images%20updated.pdf>