



10 April 2013

Resource Exploration
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

resourceexploration@pc.gov.au

Submitted by email

Dear Sir/Madam,

Submission on the Productivity Commission's Study on Mineral and Energy Resource Exploration

We thank you for the opportunity to make comments regarding the Productivity Commission's Study on Mineral and Energy Resource Exploration (**Study**), specifically the Inquiry into '*Non-Financial Barriers to Mineral and Energy Resource Exploration*' and for providing an extended due date to allow us to submit comments.

NTSCORP Limited (**NTSCORP**) has statutory responsibilities under the *Native Title Act 1993* (Cth) (**NTA**) to protect the native title rights and interests of Traditional Owners in NSW and the Australian Capital Territory (**ACT**).

NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Peoples who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA.

In summary, the functions and powers of NTSCORP under sections 203B to 203BK (inclusive) are:

- Facilitation and assistance, including representation in native title matters;
- Dispute resolution;
- Notification;
- Agreement-making;
- Internal review; and
- Other functions.

This submission is made on the basis of our experience working with Traditional Owners of lands and waters within NSW in seeking best practice in assessment, protection and mitigation of impacts of mineral and energy exploration and exploitation on culture and heritage; and relationship-building between exploration proponents and Traditional Owners. Our submission will therefore have a strong focus on culture and heritage regulation in NSW.

Executive Summary

NTSCORP's submission addresses the following key issues:

- The need for **stand-alone culture and heritage legislation** to simplify the existing regulatory framework, which is highly fragmented and leads to proponent and stakeholder confusion;
- Addressing issues with **discretion, inconsistency and transparency** in processes around mineral exploration;
- Achieving a better **balance of rights and interests of stakeholders** in the exploration process;
- **Involving Aboriginal people in decision-making processes** and not just assessment processes;
- The need for a **mechanism to identify the appropriate people to speak for country** to be involved in cultural heritage processes;
- The need for Government to **appropriately skill and train stakeholders and cultural heritage processes**; and
- **Better integration between State-controlled culture and heritage processes and native title processes.**

Introduction

NTSCORP believes that holistic reform of current culture and heritage regulation, including as it relates to mineral exploration, is necessary to work towards social, economic and cultural sustainability of mineral exploration and other development. The current system is unworkable for both Aboriginal stakeholders and proponents. We believe delays and efficiency in the current exploration approval process could be greatly improved by investments in education and training, and by reforming engagement and consultation processes with Traditional Owners. These processes should promote quality of consultation, rather than quantity, and we believe with the right reforms the regulatory system's efficiency could be greatly improved.

NTSCORP supports all of the recommendations made by the New South Wales Aboriginal Land Council (**NSWALC**) in their submission to the Study. NTSCORP also agrees with comments made in other submissions that the regulatory system must be reformed to be clearer and more efficient for all parties. NTSCORP also agrees with the comments in other submissions that inconsistency, lack of transparency and lack of a clear policy are crippling factors which affect the efficacy of the current regulatory system. We agree that reforms which improve the efficiency of regulation

will promote the protection of heritage and other values, whereas ineffective State processes impose higher transaction costs for little to no added social, cultural or environmental benefit.

I. Broad issues with current State culture and heritage assessment processes

Fragmentation

The current framework for culture and heritage NSW consists of a plethora of overlapping regulations and guidelines. These involve the *Environmental Planning and Assessment Act 1979* (NSW), *National Parks and Wildlife Act 1974* (NSW) and guidelines under those pieces of legislation (including the *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*, *Code of Practice for Archaeological Investigation of Aboriginal Objects in New South Wales (2010)*, *Due Diligence Code of Practice for the Protection of Aboriginal Objects in New South Wales (2010)* and *Guide to Investigating, Assessing and Reporting on Aboriginal Cultural Heritage in NSW*).

There is concern and confusion amongst Traditional Owners regarding their rights and obligations, and the rights and obligations of exploration proponents, in respect of this regulatory framework. We believe consolidating these regulations and guidelines would result in a clearer, more streamlined and more accessible process for both Aboriginal stakeholders and exploration proponents. This would also limit the likelihood of proponents being uncertain of the validity of their approvals, as they would be better able to understand compliance requirements without requiring specialist advice to do so.

We refer the Commission to NTSCORP and NSWALC's previous joint submission regarding culture and heritage reform in NSW: "*Our Culture in Our Hands*" (December 2011). We note that one of the key recommendations in that submission was the need for stand-alone culture and heritage legislation in NSW, and reiterate this recommendation in regard to the current study, as an element of the regulatory regime surrounding mineral exploration development in NSW.

Recommendation #1:

One piece of stand-alone culture and heritage legislation should be introduced in NSW, which integrates with the exploration and production approvals requirements, to simplify and consolidate the current system.

Difficulty in weighing economic values against cultural values in culture and heritage decision-making

The process of making decisions about the protection and management of culture and heritage necessarily involves weighing up competing interests and values, including economic, social, cultural and environmental values.

There is a perception that Aboriginal cultural values are consistently overridden by economic considerations and decisions are frequently made in favour of development at the expense of intangibly valuable Aboriginal culture and heritage sites, objects and places. This perception works against the efficient functioning of the current regulatory system by leading to doubts regarding the integrity of the decision-making processes and results. Having a more balanced and transparent regulatory process would increase satisfaction with exploration assessment processes in respect of their impacts on culture and heritage.

Recommendation #2:

That the process for determining whether it is appropriate for exploration to proceed and taking into account potential cultural heritage impacts to be made more transparent. For example, a register of all Review of Environmental Factors (REFs) submitted, with accompanying decisions on how cultural heritage issues have been considered in approving or rejecting the exploration proposed in the REF.

NTSCORP also believes there needs to be some clarification as to the assessment requirements of different intensities of exploration. For example, are low-impact exploration licences exempt from any cultural heritage assessment requirements, especially in circumstances where a REF is not required? How does this fit in with the requirements imposed on explorers operating under low-impact exploration licences in respect of the protection of culture and heritage under the legislation and instruments outlined above?

NTSCORP would also note that Aboriginal cultural heritage goes beyond the physical, such that even designated 'low-impact' exploration can have an impact on Aboriginal spiritual and cultural values. However, it is difficult to see how this is taken into account through the current scientifically-based impact assessment framework.

Involving Aboriginal people in decision-making process

NTSCORP questions whether the current exploration assessment basis adequately takes into account the holistic nature of Traditional Owners' relationship to their country, which, for example, can see landscapes and spiritual features as interconnected. Additionally, it is difficult to see how the cumulative impact of exploration is taken into account in respect of this holistic aspect of Traditional Owners' relationship with land, including the continuing integrity of Aboriginal cultural and spiritual practices.

The only effective way for such an assessment to be undertaken is for appropriate Traditional Owners to be actively and directly involved in decision-making processes, both at the individual project level and also at the regional level.

Working relationships would also be greatly improved between proponents, Government Departments and Traditional Owners if there was a greater involvement

of Traditional Owners in culture and heritage decision-making processes, not just assessments.

Recommendation #3:

That there be direct Traditional Owners involvement in deciding whether to allow exploration to proceed. For example, Traditional Owners should have a specific input in the REF approval process and in setting regional exploration priorities and strategies.

II. Key gaps and inefficiencies in culture and heritage assessment processes

NTSCORP, in working with Traditional Owners to facilitate culture and heritage processes involving exploration proponents, have observed several key failures. Addressing these systemic failures presents opportunities to improve the efficacy, speed and cost of the current system. It would also improve the linkages between exploration approvals and culture and heritage assessment processes.

Need for a process to identify the appropriate people to speak for country

Effective consultation with Traditional Owners requires proponents to do more than simply establish a dialogue with local Aboriginal organisations. Effective consultation can only be achieved by identifying the correct Traditional Owners of the project area, and ensuring that these are the people speaking for their traditional country.

Currently in NSW there is no mechanism to ensure that the appropriate Traditional Owners (being those Registered Aboriginal Parties (**RAPs**) with sufficient traditional connection to and knowledge of the area of the assessment, as well as experience in carrying out heritage assessments) are involved in all aspects of the survey and field work which informs cultural heritage assessment processes.

Such a failure to identify the appropriate people to speak for country not only prevents appropriate consultation occurring, but fundamentally undermines the efficacy of the assessments conducted. These consultation and engagement flaws will then be carried into the finalised documentation which supports exploration approvals (such as REFs). If such failures occur in the assessment process, then they are present also in the decision-making process, since the efficacy of decision-making processes is inherently dependent on the quality and extent of the material made available to the decision-makers.

Other common deficiencies in the cultural heritage assessment process include:

- The use of broad historical and anthropological literature which is treated as representative of all Aboriginal groups in NSW, rather than sources which specifically refer to or examine the Traditional Owners for the area in subject to the exploration proposal; and
- Recommendations made by RAPs or other Traditional Owners are often not properly implemented, or the assessment documents still uphold most of the content which was not supported by the majority of RAPs or Traditional

Owners. An example of this is when a REF, despite consultation feedback to the contrary, still recommends for the destruction of or interference with sites and objects of cultural heritage significance or fails to employ monitors.

These engagement issues often lead to dissatisfaction amongst Traditional Owners regarding the validity of the culture and heritage assessment process and concerns that the cultural value of particular sites has not been adequately assessed. A perception that an erroneous culture and heritage process has been followed in the development of an exploration project will often lead to community opposition against the exploration proponent and the project.

Often, Traditional Owners will then consider alternative legal and administrative options to prevent the destruction of important sites and objects, or negotiating with the proponent company to redo their culture and heritage assessments for further exploration and, ultimately, production assessment processes. Clearly, this leads to added cost and delay which could have been avoided if a more thorough engagement process had been followed from the start.

This could be avoided by having a process for identifying appropriate Traditional Owners to speak for country being involved in the culture and heritage process from the beginning. We note that the services of an anthropologist could be helpful in this regard. Alternatively, NTSCORP, under our facilitation function in the NTA, may be able to assist in identifying the correct Traditional Owners to engage for culture and heritage assessment purposes.

NTSCORP is in fact currently required to be notified of any upcoming ACHA as per the *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*, but has concerns that not all explorations are complying with this requirement. Compliance with this requirement is essential to achieve an adequate level of engagement with the relevant native title holders for the area. NTSCORP is of the view that the State should investigate whether exploration proponents currently adhere to this and other mandated culture and heritage consultation and assessment processes.

Recommendation #4:

- **A mechanism to identify the correct Traditional Owners and RAPs with authority to speak for country should be developed and applied to all exploration and assessment processes such as REFs.**

Recommendation #5

- **That the State review whether exploration proponents currently operating in NSW comply with culture and heritage consultation and assessment requirements, with a view to determining whether current regulation measures are sufficient.**

Recommendation #6:

- **Proponents should be required to demonstrate a concerted effort to ensure that engagement with Traditional Owners and RAPs for culture and heritage management assessment processes is genuine and inclusive, rather than tokenistic.**

Need for Government to appropriately skill and train stakeholders and RAPs

As noted above, Traditional Owners have consistently expressed to NTSCORP their confusion and uncertainty in regards to their rights and obligations in relation to the NSW culture and heritage regime. NTSCORP recommends that the NSW Government provide appropriate and detailed education and training in this regard to assist stakeholders and RAPs fulfil their role in the process.

In our view, the training would greatly alleviate the number and intensity of disagreements between participants in cultural heritage processes, which will allow cultural heritage processes to proceed more smoothly and in a manner which properly and sufficiently identifies and protects sites and items of cultural heritage significance. It would also increase the capacity of stakeholders and RAPs to communicate and work with proponents efficiently toward a speedy and mutually beneficial process.

Recommendation #7:

That the State Government funds appropriate training for stakeholders and RAPs in culture and heritage processes associated with mineral exploration projects.

III. Integration of Native Title and Culture and Heritage processes

We note that while consideration of the NTA is explicitly excluded from the Terms of Reference of the Study, native title and culture and heritage are fundamentally interconnected concepts and processes. We believe that better integration of native title and culture and heritage processes in the mineral exploration realm would lead to a substantial amount of regulatory duplication being avoided. We have therefore included the following section regarding this topic, as we believe it falls within the general scope of the study.

Culture and heritage is consistently one of the key concerns and priorities of native title claimants. Having a registered native title claim over an area of land entitles the claimants to a higher level of procedural rights in regard to proposed developments and projects via the 'future acts' provisions of the NTA. Yet there is still confusion and uncertainty in regards to managing the input of native title claimants and other RAPs in cultural heritage processes.

Culture and heritage often becomes one of the key points in negotiations with proponents under the right to negotiate processes of the NTA in relation to exploration licences, as well as later in respect to production tenements. Yet tensions arise when proponents have already begun or completed State-mandated culture and heritage processes, to the dissatisfaction of the native title Applicant (due to various issues as outlined in previous sections). Culture and heritage assessment processes may be required to be repeated with the input of relevant native title applicants or nominated Traditional Owners with the authority to speak for country.

A requirement to integrate culture and heritage assessment and native title processes would avoid the delay, uncertainty and duplication which often arise as a result of these issues; along with improving overall relations between proponents and native title claimants.

Recommendation #8:

Better integration of culture and heritage assessment processes with native title processes. For example, by requiring that any native title issues accompanying exploration be included in the REF or other assessment documentation and that decision-makers must consider how the NTA will impact exploration and be satisfied that any culture and heritage assessment and management measures proposed and undertaken have been developed in consultation with native title parties.

Thank you again for the opportunity to provide comment on this important study.

Yours sincerely,

Natalie Rotumah
Chief Executive Officer
NTSCORP Limited