

***MINERAL AND ENERGY RESOURCES EXPLORATION:***

**AUSTRALIAN GOVERNMENT: PRODUCTIVITY COMMISSION DRAFT  
REPORT MAY 2013**

**SUBMISSIONS AND RECOMMENDATIONS OF THE NGARLUMA ABORIGINAL  
CORPORATION RNTBC (NAC)**

**A. SUBMISSIONS**

1. The NAC recognizes that there are many reasons for the delay in processing and granting of exploration tenements, and applauds the Australian Government for seeking ways to expedite the process whilst considering the needs of all stakeholders, and in a manner beneficial to all stakeholders.
2. The NAC supports the streamlining of applications, and the removal of policy and legislative inconsistency and duplication, provided that in so doing the interests of Aboriginal Australians are not compromised. The NAC agrees in principle with one State Government agency acting as a coordination point for matters pertaining to exploration licences, but stresses the necessity for any agency engaged in such a role to be competent in coordination and, especially, experienced in matters particular to Aboriginal Australians.
3. The NAC supports the findings of the Australian Government Productivity Commission (**Productivity Commission**) in relation to the need for full and open consultation in all areas that concern the use of native title holders' land in exploration operations. The NAC emphasizes the need for full engagement with and involvement of Aboriginal people at all stages of a consultative process relating to any exploration activity. Early and ongoing involvement as key stakeholders enables Explorers to progress expeditiously to land access and then the array of exploration activities required. The NAC strongly refutes that delays and difficulties in the process of application for exploration licences, or the conduct of exploration, are attributable to involvement of Aboriginal people.
4. In particular, the NAC applauds the support of the Productivity Commission for the continued utilization of native title agreements as a means to establish conditions that relate to compensation and financial arrangements and, in particular, to cultural heritage protection and environmental management.
5. The NAC further applauds the crucial importance that is evident as placed upon the protection of Aboriginal cultural heritage, and strongly advocates survey processes involving the adoption of practices by proponents that avoid Aboriginal sites. The NAC further considers that exploration should proceed only upon completion of heritage clearance by the appropriate Traditional Owners.
6. The NAC refutes any suggestion contained within the submissions of other parties to the Productivity Commission to the effect that Aboriginal people are using the cultural heritage process for financial gain. The NAC condemns the use of such terminology as 'The Native Title and Heritage Market' that insinuates a lack of good faith on the part of Aboriginal Australians. The NAC emphasizes that costs incurred in heritage survey work are those necessary for the provision of a specialized service, in the main to help

Explorers “risk manage” Aboriginal heritage and do not attract ‘profit’ but rather barely cover costs. These costs are associated with largely *assisting* exploration access, not hindering it. Provisions for financial compensation are made separately in native title compensation agreements.

7. With respect to cultural heritage surveys, the NAC stresses the need for Traditional Owners to determine methodology and selection of qualified and experienced archaeological and ethnographic experts as well as the Traditional Owner consultants that are deployed to assist in the conduct of surveys as the key part of “survey teams”.
8. The NAC is committed to exploring ways to expedite surveys and application approvals in a timely manner that benefits all parties, provided that at no time any aspect of cultural heritage protection is compromised in any manner. In this respect, the NAC recommends that working partnerships should be facilitated as part of contractual relationships.
9. The NAC applauds the emphasis placed upon environmental protection and management by the Productivity Commission and the Australian Government. The NAC maintains that Aboriginal people have expert knowledge in both environmental protection and management, and that policy and legislation should *require* their input, including with respect to Traditional Ecological Knowledge and the recommendations of their chosen ecologists. This should include the compulsory provision of environmental management plans and systems by proponents, as well as the input of Aboriginal people into requisite Government reports and studies. It is the view of the NAC that such input would expedite environmental-related aspects of applications.
10. The NAC strongly emphasizes the need for best practice, international standards and those obligations contained within Australia’s international obligations to underpin all cultural heritage and environmental protection and management practices and processes in relation to exploration licences throughout their grant-to-closure cycle.
11. The NAC supports any intention to look closely at requirements in relation to exploration in national parks and reserves, and emphasizes the crucial need for Aboriginal people to be involved in the cultural heritage and environmental protection and management of those places.
12. The NAC applauds any principle or policy adopted by the Australian Government that requires objectivity, transparency and consistency on the part of decision makers with respect to the grant and maintenance of exploration licences and favours the compulsory provision of reasons by decision makers to all stakeholders. All stakeholders should also have review and appeal rights. In Western Australia, a Proponent can appeal a Ministerial decision to disallow destruction of Aboriginal sacred sites but Aboriginal people have no such right if the Ministerial decision is to allow destruction of Aboriginal sacred sites.
13. The NAC supports the more extensive use of Aboriginal heritage Registers, so long as this in no way displaces any need for sound and extensive heritage surveys and identification of important areas of cultural heritage or Aboriginal sites, along with procedures to ensure confidentiality of same. The NAC insists further that the input and

guidance of Aboriginal people with respect to compiling site registers is essential and should be provided for adequately by policy and legislation.

14. The NAC supports the concept of a 'social licence' to operate for explorative operations and supports any initiative that encourages the same, or makes proponents more conversant with their responsibilities. To this end, the NAC strongly recommends that where proponents have set out policies with respect to consultation, engagement, social impacts, meeting specific cultural requirements, cultural heritage protection and environmental management that are to the satisfaction of Aboriginal people then they should be required to follow those policies.
15. The NAC strongly recommends the adoption by the Government and by proponents of policies of industry organizations with respect to involvement and engagement with Traditional Owners such as the Minerals Council of Australia's Framework for Sustainable Development *Enduring Value Guide* (July 2005).

## **B. COMMENTS OF THE NAC ON THE DRAFT RECOMMENDATIONS OF THE PRODUCTIVITY COMMISSION**

1. With respect to Recommendation 3.4, any formal guidance measures on the range of approvals to be required for exploration licences needs to be done in consultation with Native Title Representative Bodies (NTRBs) and Prescribed Bodies Corporate (PBCs).
2. With respect to Recommendation 4.1, in respect of assessing risk and impact, the relevant Aboriginal people need to be consulted.
3. With respect to Recommendation 4.2, the NAC approves the informing be governments of landholders (including Traditional Owners) that reasonable legal costs incurred by them in negotiating a land access agreement are compensable by explorers and additionally recommends that reimbursement or up-front payment by explorers be enforced, for example, by application of government conditions on tenements that require such payments.
4. With respect to Recommendation 4.3 consideration needs to be given to all forms of exploration for any type of mineral when weighing economic, social and environmental costs and benefits.
5. With respect to Recommendation 5.1, the NAC supports the retention of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*. Any view that state regimes are operating satisfactorily to Commonwealth standards should not be made without prior consultation with Aboriginal people and entities about the adequacy of those standards, including to an international "best practice" standard.
6. With respect to Recommendation 5.2, the NAC does not oppose the lodging of heritage surveys data with a designated regulatory authority, provided that the relevant Traditional Owners conditions associated with provision of such data are fully met.

These may include use of buffer zones and the withholding of confidential sites location and significance data.

7. With respect to Recommendation 5.3:
  - (a) the NAC disagrees strongly that a streamlined duty of care or due diligence should be adopted automatically where exploration is “low risk.” This may not suffice in sensitive areas, or for some forms of exploration.
  - (b) the NAC strongly supports that models of agreement making are far preferable to a government authorisation system.
  - (c) the NAC supports decisions by Governments about Aboriginal heritage protection being based on clear criteria, with transparency and in consultation with interested parties, but emphasizes the need for detail as to how this is to be carried out.
8. With respect to Recommendation 6.4, the NAC considers that consultation with NTRBs and PBCs is essential in determining whether Government environment – related regulatory requirements are “proportionate to the impacts and risks associated with the nature, scale and location of the proposed exploration activity.”
9. With respect to Recommendation 6.5, the NAC strongly recommends that performance based environmental outcome measures mandatorily match environmental international standards and governments should require, as part of environmental management, that environmental management systems and environmental management plans are compulsory prior to exploration activities, and are agreed with all relevant Traditional Owners prior to their commencement, and with consultative project life review with Traditional Owners. It is noteworthy and commended that AMEC in its *Code of Environmental Practice for Mineral Exploration in Western Australia* supports consultative development of environmental management plans by Explorers.

## **C. ADDITIONAL RECOMMENDATIONS OF THE NAC**

1. That governments require consultation, active engagement, joint decision making and joint management between Explorers and Aboriginal People at every stage of the planning, implementation and closure phases of exploration.
2. That joint environmental planning and management between Explorers and Aboriginal people be promoted, with emphasis on the joint preparation of environmental management plans and environmental management systems and with particular application to exploration in reserves, national parks and other environmentally sensitive areas. From an Aboriginal perspective, such areas include coastal and inland waterways such as permanent and seasonal rivers, creeks and lakes and hill country.
3. That in supporting and promoting the continued use of negotiated agreements between Explorers and Aboriginal Australians, governments ensure that those agreements

enhance the potential for working partnerships between Aboriginal Australians and Explorers and specifically:

- protect Aboriginal heritage;
  - prescribe regular consultation with Traditional Owners
  - prescribe joint management of the environment with Traditional Owners;
  - provide for financial assistance in the administration of agreements with Traditional Owners;
  - provide for training, business and employment opportunities for Traditional Owners in exploration activities.
4. That the Australian Government promote the use and application by Explorers of industry codes such as the Australian Petroleum Production and Exploration Association Code of Environmental Practice, the Australian Minerals Industry Framework for Sustainable Development: *Enduring Value Guide* (2005) and the *Code of Environmental Practice for Mineral Exploration in Western Australia* of the Association of Mining and Exploration Companies (AMEC) in all consultation and agreement making with respect to any Exploration.
5. That the Australian Government establish a stakeholders committee to further explore how best to manage exploration activity. The NAC would welcome its inclusion on such a committee.

M.R. Holmes  
Land Equity Legal  
for the NAC  
14 July 2013.