



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

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

Via email: resourceexploration@pc.gov.au

Dear Mr Woods,

RE: Productivity Commission Draft Report - Mineral and Energy Resource Exploration

The NSW Aboriginal Land Council (**NSWALC**) welcomes the opportunity to provide comment on the Productivity Commission's **Draft Report** on Mineral and Energy Resource Exploration. Our previous submission highlighted the failings of the current NSW regime to adequately protect Aboriginal heritage. We raised concerns that the ineffective current regulatory environment means that Aboriginal culture and heritage continues to be destroyed at alarming rates. This includes in circumstances where mineral and energy resource exploration activities fail to take into account Aboriginal heritage considerations. Furthermore, in circumstances where regulations are followed, there are often still poor outcomes for both Aboriginal communities and proponents.

As such NSWALC strongly advocates for broader reforms to Aboriginal culture and heritage regulation in NSW, such that new holistic legislation is enacted that is in line with international best practice standards and based on principles espoused in the United Nations *Declaration on the Rights of Indigenous Peoples*.¹

The Productivity Commission's Draft Report posits that there is some overlap between the Commonwealth *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (ATSIHP Act) and state and territory Aboriginal heritage legislation which may result in duplication of processes and delays for explorers. In NSWALC's view the ATSIHP Act, while underutilised, provides an important mechanism to protect Aboriginal heritage where state or territory laws have failed. Furthermore, we contend that some of the key issues regarding any perceived 'impediments' to projects are often as a result of the following:

- a lack of clear and transparent processes,
- reliance by proponents on outdated or inaccurate information from government databases,
- ineffective and/or inappropriate consultation with Aboriginal communities by proponents and government agencies,
- lack of understanding by proponents about Aboriginal culture and heritage,
- poor or no reporting and monitoring requirements, and
- inability of Aboriginal people to make decisions about Aboriginal culture and heritage.

In respect to the three draft recommendations made in the Productivity Commission's Draft Report relating to Aboriginal heritage, NSWALC has commented extensively on these issues in recent years, and refers the Commission to our previous submissions available at: <http://www.alc.org.au/culture-and-heritage/more-than-flora--fauna.aspx>. This includes a detailed submission to the Federal Government in 2009 on proposed reforms to the ATSIHP Act in titled '*Respect and Protect*'. This submission is **enclosed** for your reference.

DRAFT RECOMMENDATION 5.1

Until concerns with state and territory legislation have been fully addressed, the Commonwealth should retain the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (ATSIHP Act) and amend it to allow state and territory regimes to be accredited if Commonwealth standards are met. Once all jurisdictional regimes are operating satisfactorily to Commonwealth standards, the Commonwealth should repeal the ATSIHP Act.

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NSWALC Recommendation 1:

The ATSIHP Act should remain in operation. NSWALC believes that the further consultation with Aboriginal communities and peak Aboriginal groups is required to ascertain whether any proposed or revised Commonwealth standards are appropriate. NSWALC has previously raised a number of concerns regarding the proposed standards, and as such believes that it would be inappropriate to repeal the ATSIHP Act. There is insufficient evidence presented as to why the ATSIHP Act is recommended for repeal.

DRAFT RECOMMENDATION 5.2

Governments should ensure that their heritage authorities:

- *require that resource explorers or other parties lodge all heritage surveys with that authority,*
- *maintain registers which map and list all known Indigenous heritage,*
- *adopt measures to ensure that sensitive information collected by a survey is only provided to approved parties (and only as necessary for the purposes of their activities), on the basis of agreed protocols.*

NSWALC Recommendation 2:

Heritage authorities and relevant departments/ agencies must do more to actively monitor how resource explorers are implementing their duties to protect Aboriginal heritage. Reporting on these issues should be required in legislation. In respect to issues regarding registers, and the collection, management and use of Aboriginal heritage information, it is fundamental that protections for sensitive information and culturally appropriate protocols are secured in legislation and implemented.

DRAFT RECOMMENDATION 5.3

State and territory governments should manage Indigenous heritage on a risk assessment basis.

- *Where there is a low likelihood of heritage significance in a tenement and the exploration activity is low risk, a streamlined 'duty of care' or 'due diligence' process should be adopted.*
- *Where there is a high likelihood of heritage significance and the exploration activity is higher risk, models of agreement making should be adopted rather than a government authorisation system.*
- *When negotiated agreements cannot be reached, governments should make decisions about heritage protection based on clear criteria, transparency and consultation with all parties that have a direct interest.*

NSWALC Recommendation 3:

The 'due diligence' regime in NSW is ineffective in protecting Aboriginal heritage, and must be reformed. As such, proposals to expand due diligence processes are not supported in their current format. Proposals regarding 'agreement making' are not clear, and appear open to a number of problems, including power and resource inequities between large companies and community groups. Rigorous consultation with Aboriginal communities and peak Aboriginal organisations is required to ascertain potential risks and benefits of any agreement making provisions before such a scheme is implemented. NSWALC maintains that Aboriginal people must have key roles in decision-making processes.

If you have any further questions please contact the NSWALC Policy and Research Unit

Sincerely,

Malcolm Davis
Director, Policy
NSW Aboriginal Land Council

15 July 2013

ⁱ NSWALC has canvassed options for broader reform most recently in a discussion paper titled 'Protecting the Past, Guarding the future', available on the NSWALC website at: www.alc.org.au then click on 'Culture and Heritage'