



22 August 2013

Resource Exploration
Productivity Commission
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Submitted by email

Dear Sir/Madam,

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

We thank you for the opportunity to make comments regarding the Productivity Commission's Draft Report on Mineral and Energy Resource Exploration (**Draft Report**) and for providing an extended due date to allow us to submit comments.

We reaffirm all comments and recommendations made in our previous submission. This submission does not replace our previous one, but builds on it where necessary, focusing specifically on the issues raised in the Draft Report which are most relevant to NTSCORP Limited's (**NTSCORP**) functions and clients.

NTSCORP has statutory responsibilities under the *Native Title Act 1993* (Cth) (**NTA**) to protect the native title rights and interests of Traditional Owners in New South Wales (**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 and the ACT in seeking best practice in assessment, protection and mitigation of impacts of mineral and energy exploration

and exploitation on native title rights and interests, especially culture and heritage; and relationship-building between exploration proponents and Traditional Owners.

Executive Summary

NTSCORP's submission addresses the following key issues in regard to the points and recommendations raised by the Draft Report:

I. Exploration and Licensing Approvals

- Need to appropriately train regulatory staff in native title processes;
- NTSCORP supports Draft Recommendation 3.3.

II. Land Access issues

- Traditional Owners should be recognised as a major stakeholder in any discussion regarding changes to the way Crown Land is regulated;
- Any change to the way Crown Land is regulated may be a future act under the provisions of the *Native Title Act 1993* (Cth);
- NTSCORP does not support Draft Recommendations 4.1 or 4.3 because of concerns with the guiding principles of the Multiple Land Use Framework;
- NTSCORP generally supports Draft Recommendation 4.2.

III. Heritage protection issues

- NTSCORP does not support Draft Recommendation 5.1. unless worded in a more specific manner;
- Resource proponents should be made aware that for Indigenous heritage surveys, it is best practice to engage with Traditional Owners including any registered native title claim group as well as Local Aboriginal Land Councils;
- Ensuring registered heritage databases are not publicly accessible may increase listings;
- NTSCORP generally supports Draft Recommendation 5.2;
- NTSCORP believes agreement-making should be the principal method of managing Indigenous heritage;
- NTSCORP does not support Draft Recommendation 5.3.

I. Exploration Licensing and Approvals

NTSCORP notes the Commission's comments in Chapter 3 on page 94 regarding the need to appropriately train regulatory staff. We agree with this, and add that staff should also be trained in native title issues. This would reduce the confusion and delay that arises in the regulation and management of exploration in regard to native title processes. In NTSCORP's experience, department staff have given proponents advice regarding native title processes and procedures that directly contradict even the department's own written policies and procedures.

Draft Recommendation 3.3

NTSCORP supports this Draft Recommendation.

Exploration and Licensing issues summary:

- **NTSCORP supports Draft Recommendation 3.3.**

II. Land Access issues

Draft Recommendations 4.1 and 4.3

Traditional Owners to be recognised as a major stakeholder in any discussion regarding changes to the way Crown Land is regulated

Central to Draft Recommendations 4.1 and 4.3 is the endorsement of the guiding principles of the Multiple Land Use Framework (**MLUF**), both in regard to Crown Land being declared as a national park or reserve and in the regulation of coal seam gas exploration.

NTSCORP notes that Traditional Owners are a major stakeholder group in any discussion concerning Crown Land and the dedication of land as a reserve or park and any change in policy to the way that the land is dealt with.

Such land may include areas of high importance to Traditional Owners, including areas of historic and ongoing significance for social, ceremonial, medicinal and other purposes, and may include culturally significant sites, plants, animal species, land forms et cetera. Therefore it is crucial that Traditional Owners are recognised as a key stakeholder group and extensively involved in any discussion or decision to the way that land dedication is regulated in NSW.

Please note that any change to the way that Crown Land is dealt with, such as the adoption of a framework like the MLUF, may constitute a future act as per the provisions of Division 3 of the *Native Title Act 1993* (Cth).

Concerns with the Multiple Land Use Framework

NTSCORP has a number of concerns with the MLUF. The MLUF as endorsed by the Standing Council on Energy and Resources, supports a system of land use where land is used for different purposes simultaneously:

“Governments should seek to maximize the economic and social benefits of regulated land use for all Australians and future generations by encouraging multiple use of regulated land, while respecting and protecting environmental, cultural and heritage values.”

Standing Council on Energy and Resources, page 11, quoted in the Draft Report at page 114.

While the MLUF’s Guiding Principles are theoretically sound, we note that their application in practice may present a number of difficulties, particularly to stakeholder groups such as Traditional Owners.

Firstly, we note that there will clearly be circumstances when it is not possible to allow for multiple land uses while respecting and protecting environmental, cultural and heritage values. The most obvious example is invasive exploration in areas of high heritage or environmental significance. The Commission openly acknowledges this, and we agree with the Commission’s view that “in certain instances, it may be necessary to prohibit invasive exploration to protect environmental and heritage values of an area” (at page 17).

However, we reiterate our concern expressed in our original submission that there is a perception that Aboriginal cultural values are consistently overridden by economic considerations and that decisions are frequently made in favour of development at the expense of intangibly valuable Aboriginal culture and heritage sites, objects and places. This may partially be because of the difficulty in quantitatively weighing and comparing intangible values.

In light of this, NTSCORP is concerned that the adoption of the MLUF in regard to Crown Land may further tilt decision-making discretion towards allowing access of heritage-significant land for exploration and resource extraction regardless of cultural heritage and other native title impacts. In our view, a multiple land use strategy will not always be appropriate or capable of delivering balanced outcomes to diverse interests groups.

Furthermore, we reiterate that any land use planning framework used needs a mechanism to measure and assess the cumulative impacts of exploration and resource extraction on values such as heritage, and develop management and mitigation strategies. In our view, such considerations are not adequately provided for in the guiding principles of the MLUF.

Because of the above, NTSCORP does not support Draft Recommendation 4.1 or 4.3.

Draft Recommendation 4.2

We note that the *Mining Act 1992* (NSW)'s definition of 'landholder' includes a native title holder of the land.

Stakeholder groups such as landholders, particularly Traditional Owners, are at a financial and social disadvantage compared to explorers and resource extraction proponents. As such, their capacity to seek outcomes that effectively protect their interests is extremely limited. Furthermore, we believe that a fair and equal system of land use planning requires policy and legislative changes to address such an imbalance. These issues appear to be partially acknowledged by the Commission in Chapter 4, and are partially addressed in Draft Recommendation 4.2, which states that State governments should ensure that landholders are informed that reasonable legal costs incurred by them in negotiating a land access agreement are compensable by explorers.

NTSCORP generally supports Draft Recommendation 4.2. However, we further note the need for adequate compliance monitoring and enforcement measures to ensure that such provisions are being followed. As noted above, disadvantaged landholders may not have the financial capacity to enforce compliance.

We also note the definition of 'reasonable legal costs' may not be expansive enough to adequately cover the range of costs incurred by Traditional Owner groups in negotiating land access agreements. Traditional Owners generally make group decisions, reflecting the communal nature of native title, which require additional costs to cover necessary meeting expenses. NTSCORP believe that State and Territory governments should make it clear to resource proponents that these costs should be reasonably expected to be covered in negotiating terms of access for exploration purposes.

Miscellaneous Land Access issues

NTSCORP also supports the Commission's overview and commentary regarding the concept of a social licence to operate. This is an important concept in building functional, working relationships between Traditional Owners and resource proponents. We support the Commission's comments that there is merit in governments providing broad guidance on how to pursue a social licence. However, we note that there is discrepancy between the various States and Territories in how a social licence operates which needs to be addressed. Furthermore, we believe such guidance should be in the form of binding engagement requirements.

Land Access issues summary:

- **NTSCORP opposes Draft Recommendations 4.1 and 4.3 because of concerns regarding the Multiple Land Use Framework;**
- **NTSCORP generally supports Draft Recommendation 4.2.**

III. Heritage protection issues

We note that the Commission has canvassed and identified numerous issues regarding Indigenous heritage protection and exploration processes, however acknowledges that, as noted, ultimately the focus of the Study is on exploration rather than heritage protection.

NTSCORP generally supports a range of the Commission's comments, including:

- Comments made on page 146 regarding the trend in Indigenous heritage management towards entrenching a consultation model, recognition of the primacy of Traditional Owners and alignment of heritage legislation with native title in terms of determining who may speak for country.
- Endorsing the view expressed in our previous submission that there needs to be a mechanism to identify the appropriate people to speak for country, page 154.
- The list of practices for facilitating constructive relationships between resource proponents and Traditional Owners, page 155.

Draft Recommendation 5.1

NTSCORP believes the wording of Draft Recommendation 5.1 is too vague, particularly the reference to "Commonwealth standards." Until these standards are clearly defined and compliance can be ensured, we put forward that the Commonwealth should retain a role in the protection of cultural heritage through the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

Draft Recommendation 5.2

We make the following general notes in regard to issues raised regarding Draft Recommendation 5.2:

In regard to Indigenous heritage surveys, proponents should be made aware of their obligations under the NSW Office of Environment and Heritage's *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010*, particularly section 4.2 which requires NTSCORP to be notified. Also as a matter of best practice, resource proponents should be aware of the need to engage with any Traditional Owners, especially any registered native title claim group, as well as relevant Local Aboriginal Land Councils.

In areas where there are registered native title claims, engagement should be through the registered native title claim group's nominated representatives, generally known as the Applicant, which can typically be contacted through the group's legal representatives. Engaging with both Traditional Owners and the Local Aboriginal Land Council for Indigenous heritage surveys and other cultural heritage processes is best practice for ensuring satisfactory community representation and avoiding any potential disputes which may occur. Essentially, good engagement and consultation practices from the outset can avoid delay and cost that may arise if there is any dispute or conflict regarding appropriate representation in regards to the heritage surveys produced.

In regard to the issue of inadequate heritage listings and registers, we note that at times it may be culturally inappropriate for certain sites to be listed or disclosed on registers such as NSW Office of Environment and Heritage's Aboriginal Heritage Information Management System (**AHIMS**). This is an unavoidable fact in some circumstances. NTSCORP considers that some Traditional Owners would be more inclined to list sensitive sites and information if the relevant heritage system were not a public register, such as AHIMS. A process such as contemplated in the third dot point of Draft Recommendation 5.2 could be effective, in which the heritage authority provides details of listed Aboriginal sites and places to approved parties, only as necessary for the purposes of their activities, on the basis of agreed protocols.

Noting the above, NTSCORP generally supports Draft Recommendation 5.2.

Draft Recommendation 5.3

On page 160 of the Draft Report, the Commission states that agreement making "is likely to be more effective when explorers consult and negotiate directly with Indigenous groups." Could the Commission please clarify that "negotiate directly with Indigenous groups" means going through the protocols set up by Indigenous groups, particularly when they are a registered native title claim group. For example, most registered native title claim groups will consult and negotiation with their legal representatives.

If not, in NTSCORP's experience, agreements negotiated between resource proponents and Traditional Owners groups contrary to these protocols often lead to unsatisfactory results that may add further cost and delay, particularly on-going costs related to external consultancy, compliance and implementation.

NTSCORP generally supports the Commission's comments regarding agreement making producing sound outcomes, particularly when compared to State approval processes. Agreement making allows Traditional Owners to directly negotiate with the resource proponent in regard to mitigation of damage and management of cultural heritage, issues which can only be authoritatively determined by the appropriate Traditional Owners for that country. Such outcomes, if negotiated with appropriate financial capacity by both parties, can contribute towards positive relationship building between parties and may save cost and time by covering multiple tenements in a broader area.

NTSCORP does not support the Government making decisions about heritage protection, because of the numerous issues with cultural heritage regulation in NSW, as noted in our previous submission.

On this basis, NTSCORP does not support Draft Recommendation 5.3, and believes that agreement-making should be the primary model of managing Indigenous heritage.

Heritage protection issues summary:

- **NTSCORP does not support Draft Recommendation 5.1;**
- **NTSCORP generally supports Draft Recommendation 5.2;**
- **NTSCORP does not support Draft Recommendation 5.3.**



Thank you again for the opportunity to provide comment on this important report. If you require any clarification or further information, please do not hesitate to contact Hema Hariharan, Manager Strategic Development, on (02) 9310 3188 or hhariharan@ntscorp.com.au.

Yours sincerely,

Natalie Rotumah
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