

Submission  
No 334

## INQUIRY INTO COAL SEAM GAS

**Name:** Mr Warren Mundine  
**Organisation:** NTSCORP  
**Date received:** 9/09/2011

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The Hon Robert Brown MLC  
Chair, General Purpose Standing Committee No. 5  
Parliament House  
Macquarie St,  
SYDNEY NSW 2000

6 September 2011

Dear Chair,

**RE: GPSC 5 Inquiry into Coal Seam Gas**

Thank you for the opportunity to provide a submission to this inquiry. NTSCORP is pleased to be able to provide information to the Committee regarding important issues affecting the native title and cultural rights of Aboriginal within the context of the Coal Seam Gas (CSG) industry.

NTSCORP also notes that applicants from the Bandjalang, Western Bundjalung and Gomerioi native title claims have direct experience in dealing with CSG activity on their traditional lands, and we respectfully request that the Committee consider their request to give evidence at the upcoming hearings in Lismore (Bandjalang, Western Bundjalung), Narrabri (Gomerioi) and Sydney (NTSCORP staff).

NTSCORP's General Manager, Ms Natalie Rotumah, and Corporate Affairs Manager, MS Danielle Bevins-Sundvall, would be happy to liaise with the Committee Secretariat to identify and provide contact details of suitably qualified representatives of those claim groups and ensure they are briefed. They may be contacted on (02)

Yours Sincerely,

**Warren Mundine**  
**Chief Executive Officer**

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## Introduction

NTSCORP Ltd (“**NTSCORP**”) has statutory responsibilities under the *Native Title Act 1993* (Cth) (“**the 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 Act 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 (s203BJ in particular).

NTSCORP welcomes the opportunity to make comments regarding the NSW Legislative Council general Purpose Standing Committee No. 5 Inquiry into Coal Seam Gas (“**the Inquiry**”).

This submission focuses on two areas within the terms of reference of the Inquiry: the economic and social implications of CSG activities, including those which affect the legal rights of property owners and property values; and the environmental and health impacts of CSG activities.

Like many of the traditional owners, communities and claimant groups that we represent, NTSCORP believes extractive industries have an important role to play within the NSW economy, and offer valuable opportunities for the economic development of both Aboriginal and non-Aboriginal communities across the state.

We also note that the recent rise in CSG activity has created a number of new policy and regulatory issues to be addressed. The nature of CSG works – a large number of small drill sites and connecting pipelines located across a wide area, often on land owned and managed by a variety of different landholders – is quite different to traditional mining activity. While many Aboriginal and non-Aboriginal communities across NSW have longstanding experience in managing the impact of mining activity on their land and on addressing the social, economic and environmental impacts of traditional extractive industries, CSG activity raises a new set of issues requiring a revised regulatory framework. Furthermore, although the technology used by the CSG industry has been used overseas for many years, it is new in the Australian context, and it is therefore important that communities are provided with adequate and ongoing education about the operation and impact of this technology.

We believe that a revised framework and a commitment to ongoing community education is not only in the interests of Aboriginal and other landholders and land

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users, but also, ultimately, a positive development for industry by providing greater certainty and stability to all stakeholders.

Within this context, the relationship between the traditional owners of the lands, seas and waters and the CSG industry and government is important. NTSCORP believes that there must be recognition that CSG activity whether it is extraction or exploration will affect lands in which traditional owners hold a variety of interests.

The United Nations Declaration on the Rights of Indigenous People (“**The UN Declaration**”) has been adopted by the Australian Government, and provides for the recognition of Aboriginal rights. When considering how to The NSW Government should begin with the assumption that traditional owners have the right to benefit from the exploitation of all natural resources on their country, including CSG.

The obvious benefits arising from the CSG industry for traditional owners in NSW are employment and enterprise development. Sustainable economic development for Aboriginal people, families and communities provides ongoing benefits for both Aboriginal and non-Aboriginal members of the community by providing employment, stimulating the economy and reducing dependence on some public services. However, we note the importance of ensuring that such development is not only economically but also environmentally sustainable and is carried out in a manner which is respectful of and gives full protection to Aboriginal cultural heritage.

#### **The Native Title Context**

Under the NTA, traditional owners who are registered native title claimants or native title holders are afforded a number of substantive and procedural rights. In particular, provisions in the NTA concerning future acts and Indigenous Land Use Agreements will be impacted by and will in turn impact upon the regulation of CSG activity in NSW.

#### **Future Acts**

A future act is an act done after 1 January 1994 (the date of the commencement of the NTA) which affects native title. An act is taken to 'affect' native title if it extinguishes or is otherwise wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title. An 'act' is defined to include the making or amendment of legislation or the grant or renewal of licenses and permits.

The NTA contains procedural rights which ensure that future acts are carried out validly. It gives a native title claim group the right to be notified, a right to have their say about the future act and in some cases the right to negotiate about the doing of the future act, but does not give the native title claim group the power to stop or veto the future act from going ahead.

The strongest form of procedural right, the right to negotiate, is afforded to registered native title claim groups in relation to the following types of future acts:

- the grant of exploration licences;
- mining leases; and
- some compulsory acquisitions.

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The right to negotiate does not apply to all future acts, such as the construction of public works and management of water. The right is triggered when the Government issues a "section 29 notice" stating that a proponent intends to carry out a future act that is subject to the right to negotiate provisions. The notice is placed in major newspapers and is sent directly to any registered native title claim groups and the relevant native title representative body (NTSCORP in NSW and the ACT).

People who assert native title rights and interests in an area, but have not yet filed a native title application, have 3 months from the date given on a section 29 notice to file a native title application in the Federal Court and another month in which to obtain registration from the National Native Title Tribunal, following which they gain a right to negotiate about the proposed future act.

Where native title has been determined by the Federal Court to exist in an area, the registered native title body corporate (on behalf of the native title holders) has the right to negotiate on Future Acts occurring within that area. A registered native title claim group or registered native title body corporate is sometimes referred to as the "Native Title Party".

As noted above, the nature of CSG works is quite different to traditional mining activity, and this may affect the kinds of rights Traditional Owners are afforded under the NTA. In particular, although untested in NSW, NTSCORP is concerned that mining leases which apply to small drill sites may not invoke the right to negotiate despite connecting pipelines traversing country which, in the case of a traditional mine site, would bring about the right to negotiate.

This issue needs to be carefully considered by the NSW government to ensure that traditional owners' are notified about activities occurring on their traditional lands and are still able to participate in decisions affecting these activities. This approach accords with international law principles and with State and Federal government priorities concerning consultation with Indigenous People.

### **Indigenous Land Use Agreements**

Indigenous Land Use Agreements ("ILUAs") are voluntary agreements made between a third party and traditional owners about any matter concerning native title rights and interests and the use and management of land and waters. They are governed by Subdivision B of Division 3, Part 2 of the NTA. An act can generally be done under an ILUA registered with the National Native Title Tribunal, whether or not it falls within any of the categories of acts allowed under the future act regime. This requires the native title parties to give their agreement or consent to the act being done. Even if an act could be done under another subdivision of the future act regime, an ILUA may be the preferred option.

The NTA provides for different types of ILUAs to be registered, depending whether there are native title holders for the whole of the area covered the ILUA, and whether there are native title bodies corporate or representative bodies for the area concerned. NTSCORP notes that good faith negotiations and a willingness to make

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agreements foster a good working relationship 'on the ground' between proponents and traditional owners whose cultural rights may be affected.

Indigenous Lands Use Agreements can be negotiated with any Traditional Owners, whether native title claimants or otherwise and can provide the basis for the development of constructive relationships between Traditional Owners and other parties with an interest in land.

### **Cultural Rights under NSW Legislation**

Traditional owners may also enjoy rights to access and use land for cultural purposes – for example, hunting, collecting food, medicines and performing ceremony and other traditional cultural practices - under NSW legislation or, in some cases, under private arrangements with freehold land owners. These arrangements do not always afford traditional owners with the same rights in terms of notification, consultation and negotiation as the Future Acts regime of the NTA or an ILUA when a proponent wishes to undertake CSG activity on that land. However CSG activity may have a significant impact on the ability of traditional owners to access land or to safely collect food from the area. This is particularly a problem with CSG activity because it takes places on multiple parcels of land that are held and managed by different parties. This will affect the right of traditional owners to access those parcels of land for the purpose of exercising their cultural rights.

As Aboriginal people, traditional owners also enjoy rights to be consulted about matters of Aboriginal cultural heritage under the NSW *National Parks and Wildlife Act* 1987. However, this legislative framework only provides for consultation with Aboriginal people where a proponent seeks to destroy a heritage object, rather than a right of veto.

This patchwork of rights and regulatory regimes can make it difficult for both traditional owners and proponents to fairly and effectively manage access to land and protection of Aboriginal cultural heritage.

### **Recommendations**

NTSCORP has identified the following issues which we believe must be more thoroughly addressed in the legislative and regulatory framework in order to optimise the planning and approvals process for CSG projects and ensure that communities and government are best able to work with the CSG sector to promote mutually successful outcomes for all stakeholders.

### **Improving Consultation and Communication**

NTSCORP is concerned that the NSW Government is currently not fulfilling their obligations under the NTA due to inconsistent provision of services by Government departments under the NTA, specifically, the notification to relevant bodies and traditional owners. As a starting point, the NSW Government should ensure their compliance with their requirements under the NTA.

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There are substantial opportunities for economic advancement of traditional owners under the Future Act Regime of the NTA through appropriate engagement and negotiations with the resources industry that provide agreed outcomes. The Future Act regime under the NTA not only provides economic opportunities for native title groups, but also provide certainty for access to land. NTSCORP believes it is important for the NSW Government to assist in the smooth administration of the Future Act Regime.

The UN Declaration provides Aboriginal people with the right to free, prior and informed consent for determining and developing priorities and strategies for their traditional lands. In order to achieve this outcome, this right needs to be acknowledged by the NSW Government, and strategies developed to ensure full compliance with the requirements of the NTA.

### **Traditional Owners Engagement**

NTSCORP is concerned that there is a lack of engagement by government and industry with traditional owners in the development of policy and in the implementation of programs and commercial practices affecting traditional owner land. It is important that engagement commence at the planning stages of CSG activity rather than after plans have been formalised. Consultation and engagement should not be seen as hindrance to the process, nor should traditional owner engagement be seen as "tick box" but rather as a process that provides insight to land and land management.

Generally, traditional owners in NSW have been willing to work with the resource industry to achieve mutually beneficial outcomes in a culturally appropriate manner. Transparent and culturally respectful engagement at these preliminary stages of the development of the CSG industry in NSW will ensure the best possible chance for such mutually beneficial outcomes to be recognised.

Early engagement is important for the development of relationships between the stakeholders and will reduce or avoid unnecessary delay in achieving project objectives while statutory requirements of a minimum of notification and consultation take place. NTSCORP believes the development of an inclusive community engagement policy framework covering CSG activity that recognises the special rights and interests in land of traditional owners would greatly assist in the achievement of these goals.

### **Minimise Adverse Impacts**

NTSCORP is aware that significant concern exists within the broader community about the potential environmental and health impacts of CSG operations, in particular the by-products of the extraction process, the use of chemical additives during extraction, and the potential impact on groundwater.

The impact of CSG operations on surface and groundwater may affect native title rights to take and use water. While NTSCORP welcomes the introduction of an

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interim aquifer interference regulation by the NSW Government in July 2011, it notes that there is no specific protection for this native title right.

Environmental impacts of CSG exploration and extraction may affect Aboriginal people's ability to live traditionally of the land and conduct cultural practices in accordance with traditional law and custom. NTSCORP believes it is essential that mechanisms are developed to ensure that such matters are properly considered and addressed as part of the planning and approvals process.

Special consideration must also be given to the differing health needs of Aboriginal communities that will be directly affected by CSG activity in NSW.

We believe that the regulatory framework must take the unique factors associated with CSG operations into account and ensure that best-practice environmental and public health protection is put in place.

### **Aboriginal Economic Opportunities**

The current global and local demand for Australia's natural resources provide opportunities for real long term economic advancement for Aboriginal people. NTSCORP recognises the potential for commercial and economic development driven by the extractive industries sector, including CSG, to deliver sustainable benefits to Aboriginal people in NSW. We also acknowledge the relationship between the resources sector and Aboriginal traditional owner communities centred on a mutual interest in land.

We note that although CSG activity encourages the development of associated infrastructure, which also has the potential to develop aboriginal employment and business opportunities, such infrastructure generally occurs on a much smaller scale when compared to large mining projects with activity concentrated on a central site. As a result, CSG related infrastructure may not present a great potential to advance the economic and social circumstance of Aboriginal people affected by CSG activity by acting as a driver of economic development in local and regional communities. NTSCORP notes that promoting Aboriginal economic development in the regions has a positive flow on effect for the broader community.

However, NTSCORP sees that in order to reduce the socio economic gap between Indigenous and non-Indigenous Australians, there is a need for policy based on mutual respect and recognition of traditional owner rights, interests, and their special connection to land and waters. NTSCORP calls for the consideration and development of Government and industry supported funding or schemes for the purposes of business development to enable traditional owners of NSW to take advantage of opportunities arising from the ongoing development of the NSW resources sector.

### **World's Best Practice**

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NTSCORP believes it is important for the NSW Government and companies involved in CSG exploration and extraction to formally commit to engaging with traditional owners in a manner that is consistent with international best practice standards for the development of projects, including but not limited to the World Bank's *Operational Policy and Bank Procedure on Indigenous Peoples (OP/BP 4.10)* and the standards that are known as the "Equator principles."

In consultations with traditional owners, the NSW Government and proponent companies must also formally commit to acting in a manner consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* and the International Labour Organisation's *Convention No. 169 Concerning Indigenous and Tribal People in Independent Countries*.

### **Cultural Heritage**

NTSCORP notes the significant impact of extractive activities on land of Aboriginal cultural significance. This is a major issue in all areas impacted by CSG activity, particularly due to the multiple well sites associated with this sort of extractive undertaking. A fundamental principle of Aboriginal economic development is cultural sustainability. This refers to the ability of Aboriginal people to maintain cultural identity, whilst successfully operating in the mainstream economy.

NTSCORP is currently represented on the former Department of Environment, Climate Change and Water's Aboriginal Culture and Heritage Reform Working Group, which is to commence state-wide community consultation regarding Aboriginal cultural heritage law reform. The NSW Minerals Council is also represented on the Working Group which is now under the auspices of the Office of Environment and Heritage, Department of Premier and Cabinet. NTSCORP strongly believes that the recommendation made by the Working Party should be incorporated into future Government policy regulating CSG activity in NSW.

We believe that the onus is on government and proponents to appropriately engage traditional owners to conduct heritage surveys to identify all potential cultural areas that may be affected by a particular CSG exploration and extraction activity, and further that cultural awareness training is a necessity for stakeholders working closely with affected traditional owner communities.

We note that not all Aboriginal cultural areas and sites are recorded by NPWS and that heritage surveys are applicable at the exploration, extraction and infrastructure stages of any one development. Cultural heritage monitoring should be an ongoing process, as for instance, excavation could lead to more archaeological finds. It is important to recognise that it is the traditional owners who govern the cultural heritage survey process and will dictate when and how long it will take. Any cultural information gathered or produced in the course of Aboriginal site protection, monitoring and surveying is the property of the traditional owners who created it and must be kept confidential unless express permission is given to share that information.

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### **Social and Socio-Economic Impacts**

NTSCORP notes that the issue of the social and socio-economic impacts of CSG activity is a major concern for many traditional owners and other community members. Effective prior consultation is required to prepare local community members for the impact of the effect of CSG activity in an area, including the potential for changes to infrastructure needs and usage, including an increased load on current roads and transportation networks. It is critical that the NSW Government in partnership with Aboriginal communities and private enterprise creates mechanisms to address the systemic lack of investment in social and physical infrastructure in rural NSW. Social impact assessments are required for many resource projects and should be mandatory.

### **Aboriginal Employment Opportunities**

As previously stated, NTSCORP believes that the CSG sector offers opportunities for Aboriginal economic development and employment, and that not only Aboriginal communities but also many companies operating in the mining sector are eager to realise these opportunities. The experience in other states and territories with significant Indigenous involvement in the mining sector highlights the benefit of putting place strategies developed and implemented through the partnership of government, industry and community to increase Aboriginal employment opportunities that include education and training.

NTSCORP notes the importance of such strategies addressing issues such as education and training, career progression, ensuring that Aboriginal employment is not limited solely to field work but provides opportunities for staff to be trained for managerial positions, and that specific mechanisms are put in place to ensure priority of employment for local traditional owners who are affected by the CSG activity.

Thank you again for the opportunity to comment on this important issue. Should you require any clarification or further information, please don't hesitate to contact Danielle Bevins-Sundvall, Manager, Corporate Affairs on (

Yours Sincerely,

**Warren Mundine**  
**Chief Executive Officer**

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