

**INQUIRY INTO ECONOMIC DEVELOPMENT IN
ABORIGINAL COMMUNITIES**

Organisation: NTSCORP Limited

Date received: 15/02/2016

15 February 2016

The Director
Standing Committee on State Development
Parliament House
Macquarie Street
SYDNEY NSW 2000

By email: state.development@parliament.nsw.gov.au

Submission: Inquiry into Economic Development in Aboriginal Communities

We thank you for the opportunity to provide submissions to the Inquiry into Economic Development in Aboriginal Communities (**the Inquiry**).

BACKGROUND

NTSCORP Limited (**NTSCORP**) has statutory obligations 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 Traditional Owners 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, NTSCORP's functions and powers under sections 203B to 203BK of the NTA (inclusive) are:

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

This submission is based on our experience working with Traditional Owners of lands and waters within NSW and the ACT in seeking best practice standards for agreement making between Traditional Owners and proponents.

It is NTSCORP's view that Native Title affords options for capacity building of NSW Aboriginal communities, particularly through the interaction of Traditional Owners and the mining industry. The NTA facilitates the creation of partnerships and agreements between Traditional Owners and mining companies, which assists in leveraging economic development support and economic sustainability for Aboriginal communities. Furthermore, collaboration with mining companies under the auspices of native title facilitates the establishment and sustainability of Aboriginal-owned enterprises, which are sensitive to Aboriginal cultural issues.

Scope of the Inquiry

The inquiry into *Economic Development in Aboriginal communities* was referred by the Minister for Aboriginal Affairs, the Hon Leslie Williams MP, to the NSW Legislative Council Standing Committee (**the Committee**) on State Development in August 2015.

Submissions are sought in relation to options to sustain and build economic capacity in Aboriginal communities across the State, including leveraging economic support provided by both the Commonwealth and private sector, and the sustainability of Aboriginal-owned enterprises. The Committee is due to report on 30 September 2016. We note that, in the interim, release of the Baird Government's *Aboriginal Economic Development Framework* policy has been delayed until early 2016.¹ We understand that the Framework is part of the Opportunity, Choice, Healing, Responsibility, Empowerment policy. We welcome the opportunity to make recommendations in relation to this initiative, as well as remarks on the present state of economic development in Aboriginal communities.

NTSCORP encourages Parliament to take advantage of the opportunity this Inquiry presents to work collaboratively and effectively with Traditional Owners, business and

¹ *Budget Estimates 2015-16, Questions on notice taken during the hearing – Aboriginal Affairs*
<[http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/03c1ee3ded06d124ca257eca008102fc/\\$FILE/Answer%20to%20QoNs_Early%20Childhood.pdf](http://www.parliament.nsw.gov.au/prod/parliament/committee.nsf/0/03c1ee3ded06d124ca257eca008102fc/$FILE/Answer%20to%20QoNs_Early%20Childhood.pdf)>.

resources sectors in order to develop a comprehensive and nuanced policy to improve and sustain economic development in Aboriginal communities in NSW for the long term.

SUMMARY OF RECOMMENDATIONS

NTSCORP makes the following recommendations:

1. Australia's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* must be adhered to;
2. A State Government policy on economic development in Aboriginal communities must recognise and respect that economic development opportunities will vary in every community. Such a policy must recognise and complement the operation of the NTA;
3. The mining industry must work with regional and remote communities across Australia, and the Commonwealth and state governments to strengthen community enterprise and employment opportunities;
4. Traditional Owners must be recognised as principal stakeholders to be consulted with in regard to resource extraction or infrastructure development projects occurring on their traditional country;
5. That NSW planning processes be reviewed to ensure that native title processes are built in, in particular to ensure that the State affords native title holders their procedural rights under the NTA;
6. That representatives who assist Traditional Owners in identifying and exploring economic development opportunities be appropriately qualified;
7. Additional State funding should be allocated to support Registered Native Title Bodies Corporate and to Native Title Representative Bodies and Native Title Service Providers to facilitate and promote economic development opportunities in Aboriginal communities.

INTRODUCTION

NTSCORP supports the Inquiry and looks forward to working with the State Government on this matter. Issues of economic development in Aboriginal communities encompass a vast range of policies and industry sectors, from health to education, employment, housing and business. However, a holistic approach to economic development is not complete unless it comprehensively addresses the opportunities for economic sustainability provided through native title. Native title is a crucial pillar that has been underestimated and underutilised in supporting economic development in Aboriginal communities in NSW to date.

Disconnect from country remains an important contributor to Indigenous disadvantage in contemporary Australia. The NTA offers important opportunities to redress this through the recognition of native title rights and traditional laws and customs. This recognition can also assist in bolstering social cohesion and providing empowerment. The native title process seeks to address past injustice by providing a process for recognition and protection of rights in land and waters, in addition providing processes to reach agreements or provide compensation. The basis for NTSCORP's submission is that we represent native title holders in their applications for recognition of native title, as well as represent them with respect to future act processes. In addition we maintain close networks with other Native Title Representative Bodies/Native Title Service Providers (NTRBs/NTSPs) across the country and learn from their experiences. We also possess a number of staff with native title experience in other jurisdictions, which provides us with a national perspective as well as high objectives to aspire to.

NSW has the highest number of Aboriginal People of any state or territory. However the majority of best-practice examples are found elsewhere in Australia. Exciting opportunities currently exist in NSW to develop new partnerships between the Government, industry sectors and Traditional Owners to promote and advance the economic sustainability of Aboriginal communities. Stakeholders such as the Minerals Council of Australia have recognised that *"a clear opportunity exists to leverage increased economic activity associated with mineral wealth to enhance the social and*

economic capacity whereby Indigenous people can become long term contributors to and drivers of, regional and community development".²

The largest native title claim in the state's history was finalised in June 2015, securing the Barkandji People's traditional rights to land in western NSW. NTSCORP represented the Barkandji People in their native title claim. In handing down her judgment at Broken Hill, Jagot J observed that:

No one should be in any doubt. The winds of change are still blowing through how parties deal with native title claims. The glacial pace at which they have moved in the past is palpably unjust.³

Those winds of change, coupled with the willingness of the State Government to develop new strategies and the enthusiasm of industry to get involved, present an opportunity for a much-needed overhaul of economic development policy with respect to Aboriginal communities. Comprehensive, meaningful consultation must be undertaken with traditional owner groups and Aboriginal Peak bodies such as NTSCORP and NSW Aboriginal Land Council (**NSWALC**) in order to develop new policy and programs for sustainable Aboriginal economic development. Employment and economic participation provides important benefits to improve the quality of life and confidence of Aboriginal communities. This has the potential to help close the gap and overcome historically entrenched disadvantages across the State.

² Minerals Council of Australia, *Minerals Industry: Indigenous Economic Development Strategy*,
<[http://www.minerals.org.au/file_upload/files/publications/Minerals-Industry-Indigenous-Economic-Development-Strategy-17-10-11-Final-laser\(b\).pdf](http://www.minerals.org.au/file_upload/files/publications/Minerals-Industry-Indigenous-Economic-Development-Strategy-17-10-11-Final-laser(b).pdf)>.

³ *Barkandji Traditional Owners #8 v Attorney-General of NSW* [2015] FCA 604 (18 June 2015), [12] (Jagot J).

Due to the breadth of the issues covered in the Inquiry, NTSCORP addresses the following issues in our submissions:

1. Sustainability and capacity building of NSW Aboriginal communities into the future, utilising existing community networks and structures;
2. Leveraging economic development support including support provided by the Commonwealth Government and the private sector; and
3. Establishment and sustainability of Aboriginal-owned enterprises.

Australia's International Obligations

The *United Nations Declaration on the Rights of Indigenous People (UNDRIP)*, which the Australian Government has endorsed, affirms that Aboriginal People have the right to exercise control over developments affecting them, their lands and resources. NTSCORP is a strong advocate for the implementation of realistic measures to deliver sustainable outcomes. Such measures must be based on the fundamentals in the UNDRIP. Any planning framework should therefore, consistent with the UNDRIP, ensure that Aboriginal People are meaningfully engaged. Domestic legal frameworks and policies must reflect the intention behind these international instruments which the Australian government has endorsed.

Article 20(1) of the UNDRIP provides that:

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

UNDRIP provides a framework for the right of Aboriginal people to improve their economic and social conditions and for signatory states to take effective measures to achieve economic and social improvement.⁴ Further, UNDRIP provides that Aboriginal

⁴ UNDRIP, Article 21.

people have the right to be actively involved in developing and determining any economic programmes affecting them.⁵

Additionally, where the development, utilisation or exploitation of mineral, water or other resources is concerned, UNDRIP provides an obligation on the signatory state to provide fair redress for these activities and take appropriate measures to mitigate any adverse environmental, economic, social, cultural or spiritual impact.⁶ Aboriginal people have the right to develop strategies for the utilisation of the lands or territories.⁷

It is crucial that Australia's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)* continue to be implemented in order to facilitate economic sustainability and Indigenous control over development.

1. Sustainability and capacity building of NSW Aboriginal communities into the future, utilising existing community networks and structures

Native Title and Future Acts

One of the objectives of both the current and former Australian Government has been to harness the economic opportunities that native title can provide for Indigenous people. In addressing the 2014 National Native Title Conference, the Hon Nigel Scullion noted economic opportunity and economic independence as two of the key questions tied to native title, noting in particular the importance of the negotiation of future acts.⁸ The former Government's objectives for the native title system were to make "*native title an effective mechanism for providing economic development opportunities for Indigenous people*".⁹ The Preamble of the NTA identifies the intention of the Australian people to "*rectify the consequences of past injustices by the special measures contained in this Act... for securing the adequate advancement and protection of Aboriginal people and Torres Strait Islanders*".

⁵ UNDRIP, Article 23.

⁶ UNDRIP, Article 32.

⁷ UNDRIP, Article 32.

⁸ N Scullion, address to National Native Title Conference, Coffs Harbour, 2 June 2014

⁹ R McClelland, address to Negotiating Native Title Forum, Brisbane, 29 February 2008 [26].

Moreover, it states that “Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to claims to land, or aspirations to land, by Aboriginal peoples and Torres Strait Islanders; and proposals for the use of such land for economic purposes”.

The native title process recognises that Traditional Owners have a strong and unique connection to their Country. To date, eight determinations that native title exists in the State have been made pursuant to NTA,¹⁰ and there are twenty current claimant applications within the State. Current applications cover over 30% of the NSW.

Under Part 2 Division 3 of the NTA, Traditional Owners who are registered native title claimants or native title holders are afforded a number of procedural rights in relation to ‘future acts’. A future act is a proposed act on land or waters that affects native title rights and interests. The type of procedural right which the native title claim group may exercise will vary, depending on the type of future act that is being proposed, but can include the right to be notified, the right to comment, the right to object, or the right to negotiate with the developer.

The future acts regime is the lasting legacy of the NTA because it provides Traditional Owners with an ongoing voice in the future management of their land. This can and should facilitate the ongoing development and empowerment of Aboriginal communities. Native title can provide a range of economic development opportunities that are unique to each community. Where traditional lands encompass resource extraction projects or mining ventures, native title groups may be able to generate economic opportunity from agreements, future acts and associated enterprise development opportunities.¹¹ Mining-related future acts can be resolved through a Deed under the normal negotiation procedure outlined in Section 31 of the NTA or through the negotiation of an Indigenous land use agreement. Both types of agreement are legally binding and can include a range of positive outcomes for Aboriginal communities, including employment, training,

¹⁰ Monica Tran, ‘Largest native title claim in NSW history finalised after 18-year legal struggle’ *The Guardian*, 16 June 2015

< http://www.theguardian.com/australia-news/2015/jun/16/largest-native-title-claim-in-nsw-finalised-after-18-year-struggle-by-barkandji?CMP=share_btn_tw>.

¹¹ Deloitte, Review of the Roles and Functions of Native Title Organisations, 2014, 21

<<http://www.deloitteaccess.economics.com.au/uploads/File/DAE%20Review%20of%20Native%20Title%20Organisations%20-%20Final%20Report.pdf>> .

economic and business development, freehold land transfers and compensation. In addition the minerals industry has worked under the leadership of the Minerals Council of Australia to improve socio-economic outcomes in Aboriginal communities through employment and enterprise development. The minerals industry is now the largest private sector employer of Indigenous Australians.¹²

While native title groups may not always use their land for development, protection of cultural heritage and connection to country may nevertheless provide vital opportunities for economic development, growth and empowerment that could sustain the local community over a longer term. For example, this could include setting up a business to care for country. Heritage monitoring work may also provide income-generating opportunities in some communities.

The High Court affirmed in *Akiba* that the designation of native rights and interest as “usufructuary rights and interests” does not necessarily preclude their use for commercial purposes.¹³ This has been supported by the Australian Law Reform Commission who recently recommended in its *Connection to Country – Review of the Native title Act 1993* (Cth) 2015 that the Commonwealth repeal Section 223(2) of the NTA, and substitute the following:

Without limiting subsection (1), native title rights and interests in that subsection:

- (a) may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes; and*
- (b) may include, but are not limited to, hunting, gathering, fishing, and trading rights and interests.¹⁴*

-
- ¹² Minerals Council of Australia, *Minerals Industry: Indigenous Economic Development Strategy*,
<[http://www.minerals.org.au/file_upload/files/publications/Minerals-Industry-Indigenous-Economic-Development-Strategy-17-10-11-Final-laser\(b\).pdf](http://www.minerals.org.au/file_upload/files/publications/Minerals-Industry-Indigenous-Economic-Development-Strategy-17-10-11-Final-laser(b).pdf)>
- ¹³ *Akiba v Commonwealth* (2013) 250 CLR 209, [21] (French CJ and Crennan J), [60] (Hayne, Kiefel and Bell JJ).
- ¹⁴ Recommendation 8-1, Australian Law Reform Commission, *Connection to Country – Review of the Native title Act 1993* (Cth) 2015.

It is important that the State Government appreciate that economic development opportunities will be different in every community. Any policy proposed must balance flexibility and choice for Aboriginal communities with integrity and accountability for all involved in the representative or decision-making process. As argued by Deloitte:

Native title holders must have the opportunity to pursue a pathway for the use of their native title which is consistent with regional opportunities and their aspirations. This pathway will vary, in some cases leading to minimal activities beyond a role responding to land access requests and associated future acts. Other native title holders may be able to participate in a wide range of activities related to land management and economic development.¹⁵

Different resources and support will naturally be needed to assist Traditional Owners to realise these opportunities and manage their income. Existing community and representative structures are best placed to take the lead in these endeavours and should be supported by the State Government at both a policy and budgetary level.

Native title offers the promise but cannot guarantee economic opportunity, as recognised by the Australian Law Reform Commission. These opportunities depend upon the nature of the land, the effectiveness of the native title group's body corporate and governance and also the nature of the rights themselves.¹⁶ Aboriginal communities must be supported to make economic decisions that best benefit their members and interests.

Free, prior and informed consent

Article 19 of the UNDRIP provides that States shall consult and cooperate in good faith with Indigenous Peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

¹⁵ Deloitte, Review of the Roles and Functions of Native Title Organisations, 2014, 20
<<http://www.deloitteaccessseconomics.com.au/uploads/File/DAE%20Review%20of%20Native%20Title%20Organisations%20-%20Final%20Report.pdf>>.

¹⁶ Australian Law Reform Commission, *Connection to Country – Review of the Native title Act 1993* (Cth) 2015
<https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_126_final_report.pdf>.

The corollary of this is that companies seeking to develop on Aboriginal land must actively and appropriately include Traditional Owners and Aboriginal communities in their consultation. It is imperative that proponents undertake the groundwork to build relationships, participate in meaningful negotiation and provide opportunities for employment, investment and participation where possible. This requires consultation from the outset and should be undertaken in a timely, appropriate and respectful manner, utilising pre-existing channels of communication such as NTRBs/NTSPs, as required.

Importantly, the right to free, prior and informed consent is a collective right, as identified by Oxfam.¹⁷ This means that even where companies meet and engage with representatives of Aboriginal communities, representatives of those communities must be afforded the opportunity to go back to their communities to discuss and seek guidance on those matters. It is important that proponents respect Traditional Owners and engage accordingly in good faith.

State Governance

While the NTA is a Commonwealth Act, much of the responsibility for implementation falls to State Governments. NSW must assume leadership and responsibility for delivering the positive outcomes that can and should flow from the NTA but to date, remain underutilised. It is in the interests of the states to contribute to the funding of future acts because this initiative is a significant strategy towards closing the gap. Moreover, this correlates with the State's own policy goals. In 2015-16, the State Government budget set aside \$3 million to fund OCHRE initiatives including "*Industry-Based Agreements, to improve employment and enterprise development outcomes for Aboriginal people by developing relationships between Government, industry and Aboriginal communities*".¹⁸ Agreements have been established with the NSW Minerals Council, the Federation of Civil Engineers and the Master Builders Association. NTSCORP submits that the current policy would strongly benefit from a strategy aimed at including more small-scale Aboriginal businesses. NTSCORP also submits that there has

¹⁷ Christine Hill, Serena Lillywhite and Michael Simon on behalf of Oxfam, *Guide to Free, Prior and Informed Consent*, June 2010.

¹⁸ NSW Government, *Budget 2015-16 to provide for improved outcomes for Aboriginal communities*, 23 June 2015

<http://www.budget.nsw.gov.au/__data/assets/pdf_file/0006/126339/Budget_to_provide_for_improved_outcomes_for_Aboriginal_communities.pdf>.

been a duplication of policies and programs in this area and questions how this Inquiry relates to and furthers the aims of OCHRE. We ask the Inquiry to consider streamlining this current duplication of initiatives in favour of a more coordinated approach, fundamental to which, would be consultation with the peak bodies outlined above.

In developing the new NSW Economic Development in Aboriginal communities policy, a significant step forward would be the allocation of state funding to support the future acts regime and the right to negotiate under the NTA. This would be a significant step towards rectifying the social injustice that remains within Aboriginal communities and securing a voice and confidence in their future.

Prescribed Bodies Corporate

The NTA already provides existing community networks and structures that could be utilised and leveraged to improve and secure sustainable economic development. There is a governance model and capacity building readily available that could easily and successfully be adapted to capture economic opportunities to sustain Aboriginal communities. For example, after a determination of native title, the NTA requires the establishment of Registered Native Title Bodies Corporate (**RNTBCs**), often referred to as Prescribed Bodies Corporate (**PBCs**), to hold as a trustee or manage as an agent their native title pursuant to Sections 55-57.

Once a claim has been determined, the determination is entered onto the National Native Title Register and the corporation must be registered with Office of the Registrar of Indigenous Corporations. PBCs are regulated by the NTA, the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). The number of PBCs continues to exponentially increase, rising from 42 in 2006 to more than 100 across Australia in 2003.¹⁹

NTSCORP submits that more attention should be afforded to the engagement with RNTBCs through the planning system. There are currently limited opportunities for Traditional Owners to genuinely engage with the management of their natural resources.

¹⁹ AIATSIS, *Prescribed Bodies Corporate*

<<http://aiatsis.gov.au/research/research-themes/native-title-and-traditional-ownership/prescribed-bodies-corporate>>.

Moreover, public exhibition requirements have been inadequate to genuinely allow Traditional Owners meaningful engagement with planning processes.

Consequently, PBCs should be utilised to build capacity and sustain economic development as these are grass-roots structures with indelible links to local communities and strict regulation.

Native Title Representative Bodies/Native Title Service Providers

The NTA also provides for the creation of NTRBs and NTSPs such as NTSCORP. As identified by Deloitte in its 2014 *Review of the Roles and Functions of Native Title Organisations*, these bodies "have a clearly-defined ongoing role and the scope to evolve with different emphases in response to localised needs and circumstances".²⁰

These bodies have the potential to be invaluable in pursuing cultural, social and economic development activities for the benefit of local communities. NTRBs/NTSPs have developed proven, established relationships of trust with Traditional Owners throughout the claims process and generally maintain positive collaborative relationships with other Indigenous organisations and relevant government departments. They possess the personnel, physical resources plus the legal and cultural expertise to enable them to make a positive contribution to promoting development. Moreover, they are strictly regulated and accountable. They are examples of corporate infrastructure currently in existence that could be utilised and leveraged to promote economic development.

Unfortunately, the present capacity of these organisations to perform these roles at present is limited by resourcing. This must be addressed by the State Government in formulation of its new policy. Providing supplementary funding to assist existing NTRBs and NTSPs would be significantly more timely and cost-effective than seeking to establish new regulatory bodies or advisory regimes.

²⁰ Deloitte, *Review of the Roles and Functions of Native Title Organisations*, 2014, 20
<<http://www.deloitteaccessseconomics.com.au/uploads/File/DAE%20Review%20of%20Native%20Title%20Organisations%20-%20Final%20Report.pdf>>.

Land councils

In NSW another significant mechanisms by which Aboriginal people can have their rights to land recognised is through the *Aboriginal Land Rights Act 1983 (ALRA)*. Claims processed under the ALRA allow Aboriginal people to access traditional lands through a claims process, with freehold title granted to land councils. The NSWALC and the network of Local Aboriginal Land Councils are additional organisations which should be consulted and which play a key role in the economic development opportunities for Aboriginal people in NSW. Although LALCs can hold land for cultural and social benefit, they can also gain specific economic benefits, for example if the land was to be leased for a profit.

2. Leveraging economic development support including support provided by the Commonwealth Government and the private sector

'Closing the gap'

Closing the Gap is a commitment made by all the Commonwealth and State/Territory governments, through the Council of Australian Governments (**COAG**), to improve the lives of Aboriginal People. COAG set specific timeframes for achieving six Closing the Gap targets relating to health, education and employment outcomes, including closing the life expectancy gap by 2030.

This provides a firm non-partisan foundation upon which to build. The Human Rights Commission have endorsed the Closing the Gap initiative and have urged all Australian governments to continue along the path set in their Closing the Gap commitments. Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick Gooda has stated:

I believe that the Closing the Gap framework has been another watershed moment in Aboriginal and Torres Strait Islander affairs... Long-term commitments require long-term policy continuity... The complex nature of Aboriginal disadvantage requires policies and programs which are patient and supportive of

enduring change. A long-term investment approach is required accompanied by a sustained process of continuous engagement.²¹

The Closing the Gap strategy cannot stand alone but spans a diverse range of policy areas including education, employment, health and infrastructure. Native title is an important pillar that should not be overlooked.

A key outcome of the Commonwealth Government's *Indigenous Economic Development Strategy* to 2018 is to support Indigenous Australians to "get the most out of their assets", which includes:

- Supporting effective native title settlements
- Ensuring land and native title payments benefit future generations
- Ensuring leasing, access and planning arrangements support economic development
- Supporting Indigenous Australians to identify and develop economic opportunities
- Improving the protection of Indigenous Australians' intellectual property rights.

Collaborations and agreement-making between Traditional Owners and the mining industry

Much of the land in NSW on which the mining industry seeks to operate is subject to legal requirements under the NTA or the *Aboriginal Land Rights Act 1983* (NSW), as well as state and federal heritage requirements. All of these legislative provisions recognise the rights and interests of Aboriginal People to lands and waters.

Opportunities exist through the mining industry for Aboriginal communities to leverage the economic activity associated with mineral wealth. Aboriginal People's social and economic futures are somewhat either directly or indirectly dependent upon such opportunities.

According to the Minerals Council of Australia, the minerals industry has been a major catalyst for Indigenous economic development. The approach of the minerals industry is

²¹ Social Justice and Native Title Report 2013, Australian Human Rights Commission.

that the communities most impacted by mining operations should also be the ones that benefit most from the conversion of natural resources into societal capital.²²

Professor Marcia Langton has characterised the transformation of the minerals industry as one of “conflict to mutually beneficial agreement-making [that] has produced substantial Indigenous employment and enterprise outcomes.”²³ She has further observed:

*The Mabo case, the Native Title Act and engagement with the mining industry have changed the assumptions of that (welfare dependent) paradigm and catapulted Aboriginal people engaged in the mining industry into the mainstream economy. I have worked at mine sites and witnessed this extraordinary change...Mining offers many Indigenous populations a significant source of employment and contracting opportunities, as well as an alternative to the welfare transfers upon which many remote and regional Aboriginal communities depend.*²⁴

The importance of strong partnerships between the minerals industry, the government, and Indigenous communities is reinforced through the *Memorandum of Understanding on Indigenous Employment and Enterprise Development* signed in 2008 between the Australian Government and the Minerals Council of Australia. The purpose of the Memorandum of Understanding is to ‘contribute to developing self-sustaining and prosperous Indigenous communities in mining regions, in which individuals can create and take up employment and business opportunities’.²⁵

²² Minerals Council of Australia, *Indigenous economic development*.
<http://www.minerals.org.au/policy_focus/indigenous_economic_development/>.

²³ Marcia Langton, ‘From Conflict to Cooperation – Transformations and Challenges in the Engagement of the Australian Minerals Industry and Australian Indigenous Peoples’ (MCA, Canberra), 7
<http://www.minerals.org.au/file_upload/files/publications/From_Conflict_to_Cooperation_MLangton_WEB.PDF>.

²⁴ Marcia Langton, Boyer Lectures, Lecture 1 - Changing the paradigm: Mining Companies, Native Title and Aboriginal Australians, 18 November 2012
<<http://www.abc.net.au/radionational/programs/boyerlectures/boyers-ep1/4305610#transcript>>

²⁵ *Memorandum of Understanding on Indigenous Employment and Enterprise Development*, signed 2008, 2
<http://www.minerals.org.au/file_upload/files/resources/mou/MoU_-_OK.PDF>.

Agreement-making

The NTA provides two ways for identified groups of Aboriginal people to negotiate with proponents who wish to use areas of land where native title rights might exist for mining, exploration or prospecting for minerals. These negotiations can take the form of an Indigenous Land Use Agreement (ILUA) or the utilisation of the right to negotiate process. From those negotiations can flow further recognition, training, employment and other economic opportunities.²⁶

The total value of native title related payments across the country in 2011-12 was \$3 billion, which includes land access related payments, mining royalty equivalents, heritage payments, and impact benefit agreement payments. Preliminary evidence suggests that Indigenous communities now own up to \$40 billion in assets in total from agreement-making under the NTA.²⁷

The process of agreement-making through an ILUA under the NTA has contributed to a remarkable change in the minerals industry in relation to dealing with Indigenous people. An ILUA is flexible and can be tailored to suit the needs of the people involved and their particular land use issues. It provides a basis for Aboriginal people to gain benefits such as employment, compensation and recognition of their native title rights and interests.²⁸

The scope of economic benefits through mining even extends to areas of land where native title may not legally exist. For example, an ILUA allows developments on land to happen independently of any application for a determination of native title or before a determination of native title is reached. In such areas, leading resource extraction companies have negotiated with affected communities 'as if' they held the legal right to negotiate, thereby recognising their historical and cultural connections to the land.²⁹

²⁶ National Native Title Tribunal, 'Using native title to increase Indigenous economic opportunities' (5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2015), 52
<<http://www.nntt.gov.au/Information%20Publications/Using%20native%20title%20to%20increase%20Indigenous%20economic%20opportunities.pdf>>.

²⁷ Minerals Council of Australia, *Indigenous economic development*.

²⁸ National Native Title Tribunal, 'Using native title to increase Indigenous economic opportunities' (5th Indigenous Recruitment and Training Summit, Brisbane, 6 December 2015), 33.

²⁹ Minerals Council of Australia, *Indigenous economic development*.

NTSCORP believes that strengthening the culture of agreement-making between proponents and land holders, including native title holders can improve social, environmental and cultural heritage outcomes, in addition to reducing cost and shortening timeframes for proponents. Key to this is the recognition of Traditional Owners as principal stakeholders that must be consulted with in regard to resource extraction or infrastructure development projects occurring on their traditional country. It is widely accepted that reaching land access agreements with native title holders is a necessary cost of doing business on their traditional country. It's time that the State of NSW as well as proponents operating in NSW adhere to these national standards.

Industry-based Agreements

Three Industry Based Agreements (IBAs) have been signed in NSW, indicating a public commitment from peak industry bodies and the State Government to reaching long term partnerships to promote economic development and independence in Aboriginal communities. The NSW Minerals Council signed its agreement with the NSW Government in June 2013, followed by the Master Builders Association of NSW in April 2014 and the Civil Contractors Federation of NSW in February 2015.

NTSCORP cannot comment on the success of these individual measures. However, we support in principle efforts to initiate widespread industry awareness and reform in relation to native title and attitudes towards Aboriginal people. The State Government should draw upon its success and experience in these areas to establish as part of its new policy on economic development a broad brush best practice approach for proponents seeking projects in Aboriginal communities.

Employment opportunities

At a national level, the mining industry's community partnerships are driven by its support to "close the gap". The mining industry works with regional and remote communities across Australia, and the Commonwealth and state governments to strengthen community enterprise and employment opportunities.

To date, the minerals industry is the most significant industry generating Aboriginal employment in regional and remote areas of Australia. Over the last 20 years,

employment of Aboriginal People in the minerals industry has increased from 0.5% to 6%. Indigenous employment of both men and women in mining in regional communities has doubled from 2006-11.³⁰ At some mine sites Indigenous workers account for up to 40 per cent of those directly and indirectly employed.³¹

These increases in employment among the Indigenous population have been greater than non-Indigenous population employment growth. This means that the 'gap' in levels of disadvantage of Indigenous Australians as compared with other Australians is closing.³² The employment opportunities provided by contractors that service the mining and energy sector are significant. However, there is insufficient data about this contribution.³³

These efforts are encouraging. Yet more must be done at a policy level to bring other proponents to the table. A clear State Government policy that outlines expectations for engagement will not only offer business certainty to proponents operating in this space but restore confidence of Aboriginal communities in these processes.

3. Establishment and sustainability of Aboriginal owned enterprises.

There are now numerous government and minerals industry initiatives in place to assist Indigenous communities and individuals to develop self-sustaining and prosperous Indigenous businesses in mining regions.³⁴ For example, up to 150 Aboriginal

³⁰ Marcia Langton (2015), 'From Conflict to Cooperation – Transformations and Challenges in the Engagement of the Australian Minerals Industry and Australian Indigenous Peoples' (MCA, Canberra), page 8.

³¹ Minerals Council of Australia, *Indigenous economic development*.

³² Marcia Langton (2015), 'From Conflict to Cooperation – Transformations and Challenges in the Engagement of the Australian Minerals Industry and Australian Indigenous Peoples' (MCA, Canberra), page 19.

³³ Marcia Langton (2015), 'From Conflict to Cooperation – Transformations and Challenges in the Engagement of the Australian Minerals Industry and Australian Indigenous Peoples' (MCA, Canberra), page 21.

³⁴ Australian Government (2014), 'Getting it Right: Indigenous Enterprise Success in the Resource Sector' (MCA, Canberra), page viii.
<http://www.minerals.org.au/file_upload/files/media_releases/Getting_It_Right_%E2%80%93_Indigenous_Success_in_The_Resource_Sector_.pdf>.

businesses have been established in the mining supply chain in the Pilbara with combined turnover in excess of hundreds of millions of dollars.³⁵

Successful examples of the growth of Aboriginal enterprise and employment in the mining industry include:³⁶

- Ashburton Aboriginal Corporation and Rio Tinto Iron Ore, Pilbara, Western Australia;
- Wiradjuri Condoblin Corporation and Barrick Gold, Lake Cowal, New South Wales;
- Northern Haulage and Diesel Services and Rio Tinto Alcan Weipa, Cape York, Queensland; and
- Red Mulga Pty Ltd and BHP Billiton, Olympic Dam, South Australia.

Indigenous majority-owned businesses are approximately 100 times more likely to employ first Australians than other businesses'.³⁷ Encouraging Indigenous business development is thus an important way in which Australian governments can promote opportunities for Aboriginal employment.

Using appropriately qualified representatives when identifying and exploring economic development opportunities

It is critical that appropriately qualified representatives are resourced and utilised to identify and explore economic development opportunities for Indigenous people. This would avoid some of the issues associated with private agents and unethical practice that have arisen in native title law.

³⁵ Marcia Langton (2015), 'From Conflict to Cooperation – Transformations and Challenges in the Engagement of the Australian Minerals Industry and Australian Indigenous Peoples' (MCA, Canberra), page 7.

³⁶ See Australian Government (2014), 'Getting it Right: Indigenous Enterprise Success in the Resource Sector' (MCA, Canberra).
<http://www.minerals.org.au/file_upload/files/media_releases/Getting_It_Right_%E2%80%93_Indigenous_Success_in_The_Resource_Sector_.pdf>.

³⁷ Marcia Langton (2015), 'From Conflict to Cooperation – Transformations and Challenges in the Engagement of the Australian Minerals Industry and Australian Indigenous Peoples' (MCA, Canberra), page 21.

There have been calls in recent years for special accreditation requirements for native title lawyers to protect the reputation and integrity of practitioners operating in this space. Concerns have been raised about “private agents” in the native title sector; private agents who are “unregulated, unsupervised and are often perceived as acting out of self-interest rather than the best interests of the claim groups they represent”.³⁸ While the NTA contemplates that native title groups will usually be represented by NTRBs/NTRPs, Section 84B of the NTA permits private agents to provide these services but does not establish any mechanism to regulate them. These concerns are just as pertinent in the economic development space.

NTRBs and NTSPs receive government funding to undertake advocacy work and represent the interests of traditional owners in native title matters. Consequently, these bodies undergo intense scrutiny and monitoring. By contrast, private agents do not receive the same close attention.³⁹ While all lawyers must abide by legal professional standards, private agents (which include lawyers) arguably are not bound by as stringent responsibilities as their NTRB/NTSP counterparts. The Australian Institute of Aboriginal and Torres Strait Islander Studies has argued that:

*NTRBs/NTSPs must take a global approach to the prosecution of claims. Inter-group politics requires the NTRB/NTSP to tread a fine line to maintain community relationships particularly in remote communities. The private agent has no such obligation, or indeed is probably unaware of those dynamics.*⁴⁰

Examples of the irresponsibility of private agents range from a lack of expertise in native title law, a lack of cultural awareness and understanding of Indigenous society which can

³⁸ Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), *Submission to the Deloitte Review of the Roles and Functions of Native Title Organisations*, 1 October 2013, last accessed online 29 July 2015, <<http://www.deloitteaccessseconomics.com.au/uploads/File/AIATSIS%20Part%20A.pdf>>.

³⁹ See generally Deloitte Access Economics, ‘Broader Transparency Measures’ in *Review of roles and functions of Native Title Organisations – Final Report*, March 2014, p 38 last accessed 29 July 2015 <<http://www.deloitteaccessseconomics.com.au/uploads/File/DAE%20Review%20of%20Native%20Title%20Organisations%20-%20Final%20Report%20reissued.pdf>>;

⁴⁰ AIATSIS, *Submission to the Deloitte Review of the Roles and Functions of Native Title Organisations*, 1 October 2013, 46.

exacerbate divisions within claim groups to anecdotal evidence of receiving legal funding from mining companies.⁴¹ There is a risk of Aboriginal communities being taken advantage of by rogue practitioners who are not subject to the same stringent standards and regulation as statutory native title service providers such as NTSCORP. This risk could be mitigated by making use of existing social infrastructure, such as established service providers, to handle and advise Aboriginal communities on economic development. Mistakes made in the native title sector should not be repeated in the economic development space. Utilising existing mechanisms and bodies to bring integrity and continuity to the process would promote further accountability and increase public confidence in these policies.

Integration of native title within NSW planning systems

At present, there is no integration between the future act provisions of the NTA and the NSW development planning processes. The procedural requirements under the NTA are often brought to the attention of successful mining applicants very late in the process. This is despite the fact that these procedural requirements often involve consultation and negotiation with native title parties. It is important that this matter be addressed in the new policy on economic development in order to provide greater clarification and business certainty for proponents operating in this space, as well as restoring the confidence of Traditional Owners that their contribution is valued.

Funding for NTSCORP and RNTBCs

Native title on its own does not lead to sustainable economic outcomes. It provides mechanisms for developing opportunities, although further resources are needed to maximize these opportunities. Economic development is ancillary to the functions NTSCORP performs, such as agreement making and empowering native title holders.

As a native title service provider, NTSCORP has established and sustained effective working relationships with Traditional Owners and an intimate knowledge of Aboriginal communities across the State. NTSCORP has established contacts and the ability to provide services to Aboriginal communities. NTSCORP as a statutory body is subject to strict regulation and oversight. This is a proven mechanism in place that could be utilised

⁴¹ Ibid 49.

by the State Government to progress its economic development policies in NSW. The only requirement would be further resourcing.

NTRBs/NTSPs in other States and Territories have reached resourcing agreements with their relevant State and Territory governments. Such agreements ensure resourcing of the NTRB/NTSP to facilitate economic development opportunities for Aboriginal communities through the mechanisms provided within the NTA.

Similarly, RNTBC corporations currently operate on very limited annual funding, if any. Such funding barely supports book keeping, let alone the ability to sustain skeletal staffing and governance processes. While some RNTBCs are fortunate to have access to funds obtained through agreements, the majority do not. In particular those in the early stages of incorporation are often reliant on NTRB/NTSPs like NTSCORP to assist them with their governance processes. It thus becomes a Catch-22 situation, where to become economically sustainable an effective corporation is required to help establish a strong strategic plan for economic development, and yet without the benefits of economic development, a new RNTBC does not have the funds to develop strong governance and a strategic direction for its future. Despite this, such corporations are required under the NTA and are essential to the effective holding and managing of native title rights, as well as harnessing economic opportunities. They are thus existing institutions that should be leveraged to promote sustainable development. These corporations would however benefit from financial support to take on these additional responsibilities.

The Deloitte *Review of the Roles and Functions of Native Title Organisations* 2014 argued that "limited but well targeted additional funding for RNTBCs would relieve one of the most critical constraints on their capacity". Moreover, the report states:

At the state and territory level, increased focus should be given to ensuring that settlements reached with native title holders are of sufficient value and appropriately structured to support RNTBCs establishment and future operations. There is precedent for this in a number of jurisdictions, notably comprehensive settlements encouraged under the TOS Act in Victoria and those between the Government of Western Australia and native title groups such as the Yawuru, Miriuwung Gajerrong and (that proposed for) the Noongar group. In each of these cases, resources have, or will be, dedicated to

activities including corporate establishment, capacity-building and the planning necessary to identify further income-generating and economic development opportunities.

CONCLUSION

Thank you again for the opportunity to provide submissions with respect to the Inquiry. We trust our feedback will be meaningfully incorporated and look forward to contributing to any strategies developed by the NSW Government, Minister for Aboriginal Affairs and industry bodies to ensure effective economic development opportunities for Aboriginal communities.

If you require any further clarification or further information, please do not hesitate to contact Hema Hariharan, Manager Strategic Development

Yours sincerely,

Natalie Rotumah
Chief Executive Officer
NTSCORP Limited