Submission No 346

INQUIRY INTO CROWN LAND IN NEW SOUTH WALES

Organisation: NTSCORP

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General Purpose Standing Committee No 6
NSW Parliament Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Submitted by Email

9 August 2016

Dear Sir/Madam,

Inquiry into Crown Land in New South Wales

We thank you for the opportunity to make a submission to the Standing Committee Inquiry into the Crown Estate in NSW.

BACKGROUND

NTSCORP Limited (**NTSCORP**) has statutory responsibilities under the *Native Title Act 1993* (Cth) (**NTA**) to protect the native title rights and interests of Traditional Owners in 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;
- Certification; and
- Other functions.

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We welcome the opportunity to provide input to the Committee. Our submission is informed by our role, responsibilities and experiences working with Traditional Owners of lands and waters within NSW in seeking best practice in planning, management and governance of land, and in seeking to ensure the continued exercise of native title rights and interests in land and waters.

Traditional Owners have a strong and unique connection to their Country and are key stakeholders in any discussion about management of the Crown Estate.

Scope of the Inquiry

This Legislative Council Inquiry was established in June 2016 to inquire into and report on Crown land in NSW. The Committee is tasked with reporting on four terms of reference:

(a) The extent of Crown land and the benefits of active use and management of that land to NSW;

(b) The adequacy of community input and consultation regarding the commercial use and disposal of Crown land;

(c) The most appropriate and effective measures for protecting Crown land so that it is preserved and enhanced for future generations; and

(d) The extent of Aboriginal Land Claims over Crown land and opportunities to increase Aboriginal involvement in the management of Crown land.

In June 2014, NTSCORP made submissions to the NSW Crown Lands Management Review undertaken by the NSW Department of Industry. That Review responded to the specific initiatives outlined in the NSW Government's Crown Lands Legislation White Paper to consolidate and simplify the statutory framework that provided for management of the Crown Estate.

By contrast, it is more difficult to comment in the abstract on this Inquiry's terms of reference without further detail as to the practical initiatives that may be envisaged. However, it is evident from discussion before the Inquiry's First Hearing in Sydney on 29 July 2016 that there remains a significant degree of confusion as to how native title

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operates in relation to Crown land and in relation to the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**) in NSW.

NTSCORP seeks to assist the Committee by providing some clarification in this submission about the relationship between Crown land, native title and land rights and offering some recommendations to synchronise these statutes in NSW.

Our submission outlines the state of native title in NSW and outlines significant problems in Crown land management which must be overcome from a policy perspective in order to improve engagement with Traditional Owners and uphold the State's statutory obligations under the NTA.

We note that this Inquiry coincides with the NSW Legislative Council's Inquiry into *Economic Development in Aboriginal Communities*, with the committee due to report on 30 September 2016. Additionally, we understand that an interagency taskforce within the NSW Government is currently considering the issue of native title more broadly.

It is important that there is harmony and consistency between this Inquiry, and the findings and implementation of recommendations of these concurrent reports and inquiries, for the benefit of all stakeholders concerned. This is critical to ensuring a consistent approach to native title, planning and development in NSW.

SUMMARY OF RECOMMENDATIONS

Accordingly, 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. Traditional Owners must be recognised as important stakeholders in discussions concerning Crown land;

3. Engagement, community input opportunities and consultation with Traditional Owners regarding the commercial use and disposal of Crown land must be improved;

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4. Native title and land rights must be recognised as two independent but equally sound and viable mechanisms to increase Aboriginal involvement in the management of Crown land and maximise economic development opportunities for Aboriginal People in NSW;

5. Native title rights and interests cannot be overlooked in recommendations to Government because these provide unique social, cultural and economic development opportunities for Traditional Owners, including in relation to Crown land where land rights co-exist or do not exist. Failure to leverage native title rights will allow significant opportunities to go unrealised;

6. The Government should develop communication and education strategies, together with policies, to ameliorate any confusion between the overlay of the NTA and the ALRA in NSW, including to promote the potential for agreement making under s36AA of the ALRA;

7. The State Government should collaborate actively with the Commonwealth and stakeholders including NTSCORP and the NSW Aboriginal Land Council (**NSWALC**) to implement the COAG Land Investigation recommendation that the Governments work in concert to *'reduce complexity from overlapping legislative responsibility which impacts on the exercise of Indigenous land and native title interests'*;

8. The State Government should work with the Commonwealth to implement the COAG Land Investigation recommendation that Governments work in concert with relevant stakeholders to give further consideration to how native title holders may beneficially use commercial native title rights, including over Crown land;

9. The State Government should work with the Commonwealth to implement the COAG Land Investigation recommendation that the Governments work in concert with Indigenous representative bodies including NSWALC and NTSCORP to increase the availability of information to support land users' understanding of the application, approval and negotiation processes for developing land use agreements;

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10. The State Government must fulfil its statutory obligations to notify and negotiate in relation to future acts committed by altering Crown land management, uses or disposal;

INTRODUCTION

Traditional Owners have a strong connection to their land, sea and waterways. Section 2 of the *Constitution Act 1902* (NSW) explicitly recognises the unique spiritual, social, cultural and economic relationship that Aboriginal People have with their traditional lands and waters.

Yet, Traditional Owners in NSW have consistently been unrepresented and under-acknowledged in Crown land management and policy. This situation has been exacerbated by a lack of policy direction and Government leadership to address these issues. This cannot continue.

The Crown Estate in NSW makes up more than 40 percent of the State and enjoys a special nexus with native title.[1] There are compelling reasons why Crown lands remain especially important to Traditional Owners.

First and foremost, the NTA is premised on the potential for native title rights and interests to be recognised and exercised in Crown land. Traditional Owners may still claim native title over a range of public lands including vacant Crown land, Crown reserves and travelling stock routes,including by virtue of section 47B of the NTA which requires historic extinguishment of native title to be disregarded in certain crown lands used by Traditional Owners.

As such, the way that Crown land is managed or disposed of has the potential to extinguish native title rights that have not yet been formally recognised by a claim for determination. This would deny Traditional Owners the opportunity to seek formal recognition of their native title rights and interests in future.

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1 NSW Government, *Crown Lands for the Future: Crown Lands Management Review Summary and Government Response,* <http://www.crownland.nsw.gov.au/__data/assets/pdf_file/0003/652494/Crown_Lands_for_the_Future_accessible.pdf>.

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Second and furthermore, Traditional Owners may hold and exercise successfully determined native title rights and interests over Crown land. This means that Traditional Owners hold a legal interest in those lands and are entitled to exercise rights such as rights to hunt, fish, gather natural resources, camp or conduct ceremonies on Crown land. In this instance, any change to the way that Crown lands are managed or utilised may impact on the exercise of native title rights. Thus, this change would trigger statutory obligations for the NSW Government as a proponent under the NTA's future act regime contained in Part 2 Division 3.

Third, Crown lands remain important since they often encompass areas of cultural and practical significance to Traditional Owners. In fact in some areas Crown lands represent some of the only lands available for Aboriginal People to continue to undertake their traditional practices. Significant Aboriginal cultural heritage sites and objects are often located on Crown land.

Any policy and legislative changes in this space must proceed with caution and with full consultation with Traditional Owners in good faith. NTSCORP welcomes the opportunity provided by this Inquiry to promote a more meaningful and collaborative partnership between Traditional Owners and Government in the future management of NSW Crown land.

Effective and genuinely representative involvement in these processes is vital to maintaining and strengthening Traditional Owners' history, beliefs and their traditional laws and customs, and transmitting this knowledge to future generations. Native title remains underutilised as a tool to build capacity and lever economic development in Aboriginal communities and the management of Crown land can play an important role in rectifying this.

Accordingly, we address the following issues in our submission:

1. Australia's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) and other international treaties;
2. The inadequacy of engagement and consultation with Traditional Owners regarding the commercial use and disposal of Crown land;

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3. Traditional Owners and native title in NSW;
4. The distinction between native title and land rights;
5. The co-existence of the NTA and ALRA regimes in NSW; and
6. The Future Act Regime.

1. Australia's International Obligations

The Australian Government has ratified three landmark international agreements that recognise the rights of Aboriginal people to plan, decide, manage and access their land and cultural water resources:

- *United Nations Declaration of the Rights of Indigenous Peoples* (**UNDRIP**) Articles 14, 20, 25, 26;
- *United Nations Convention on Biological Diversity* Article 8(j); and
- *International Covenant on Civil and Political Rights* Articles 1.2 and 27.

The UNDRIP specifically provides in Article 25 for the right of Indigenous people to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, water and coastal seas and other resources.

Moreover, Article 19 enshrines the principle of Free, Prior and Informed Consent, requiring that:

> *States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.*

NTSCORP considers it imperative that any land management policy at any level of Government upholds and complies with Australia's international obligations under these conventions. This recommendation speaks to the Inquiry Term of Reference (b)

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concerning the adequacy of community input and consultation regarding the commercial use and disposal of Crown land.

Recognising and committing to upholding the UNDRIP throughout the delivery of planning and land management policies is not without precedent. In February 2016, the Australian Government released its updated *Guidance for proponents on best practice Indigenous engagement for environmental assessments under the* Environment Protection and Biodiversity Conservation Act 1999 *(EPBC Act)*. These Guidelines contain a clear commitment on page 3 to upholding the UNDRIP, stating:

> *The Australian Government supports the* United Nations Declaration on the Rights of Indigenous Peoples (2008). *The Declaration recognises the importance of consulting with Indigenous peoples on decisions affecting them and that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.*

The NSW Government should likewise demonstrate its sincerity in engaging Aboriginal communities and Traditional Owners by pledging to uphold the UNDRIP in the future management of Crown land in NSW.

2. The inadequacy of engagement and consultation with Traditional Owners regarding the commercial use and disposal of Crown land

It is disappointing that there is no consideration of Traditional Owners or their native title rights and interests in the Inquiry's Terms of Reference. This omission reflects a general pattern of inadequate engagement and consultation with Traditional Owners in NSW. It also speaks to a systematic tendency to overlook the value of native title and exclude Traditional Owners in NSW from important strategic discussions concerning land management.

We believe that more must be done to secure the confidence of Traditional Owners in the long-term protection of the Crown Estate, Aboriginal cultural heritage and associated rights. In reviewing management of Crown land policy and reporting to Government, the Committee should have regard to international instruments to which Australia is a signatory and as a best practice mechanism carry out the obligations and protect the rights that international declarations such as the UNDRIP provide.

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To date, the principle of Free, Prior and Informed Consent has not been honoured by governments in NSW. Engagement with Traditional Owners must occur in the spirit of good faith.

This means that Governments taking policy decisions that affect Aboriginal interest's in land must actively and appropriately consult with Traditional Owners and Aboriginal communities in a culturally-sensitive manner. 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 Native Title Representative Bodies and Native Title Service Providers, as required.

Importantly, the right to Free, Prior and Informed consent is a collective right, as identified by Oxfam.[2] This means that even where Governments or departmental representatives 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.

NTSCORP is opposed to any proposed course of action that would result in Crown land being managed, disposed of or dealt with in a manner that doesn't actively take into account the perspectives of Traditional Owners and involve them in the relevant processes.

We note that NSWALC has raised similar concerns about the inadequacy of community input and consultation and the reform proposal of rationalising Crown land notification provisions, including the removal of the Government Gazette notification mechanism. NSWALC noted in its submission that:

> *NSWALC does not support the weakening of any notification provisions and instead supports increasing the transparency around such notifications. Crown land is a public asset of the whole state and commensurate transparency is*

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

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needed to ensure that the public have an opportunity to participate in decision making regarding its commercial sale or use.[3]

We support the recommendation by the Environmental Defenders Office NSW that an exposure draft Crown Lands bill be released for public consultation and comment prior to its introduction to Parliament.[4] This would promote another opportunity for Traditional Owners to actively contribute by providing targeted feedback to specific reform proposals in a meaningful way.

It is critical that statutory future act requirements are taken into account and any changes made affecting native title rights comply with validation and notification procedures in line with the NTA. Otherwise, such acts (including legislation) may constitute un-notified future acts and would be invalid for the purposes of the NTA, leaving the State of NSW liable for compensation.

3. Traditional Owners and Native Title in NSW

The following sections of our submission address the Inquiry Term of Reference (d) regarding the extent of Aboriginal Land Claims over Crown lands and opportunities to increase Aboriginal involvement in the management of Crown land.

Crown lands are extremely important to Traditional Owners in NSW because these lands have a unique nexus with native title, as outlined above.

NSW has the highest number of Aboriginal People of any state or territory. However the majority of best-practice planning and land management examples are found elsewhere in Australia.

Native title is more important and more relevant to policy makers in NSW than ever before. 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:

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[3] NSWALC, Submission No 127 to the *Inquiry into Crown Land in New South Wales*, 5.
[4] Environmental Defenders Office NSW, Submission No 147 to the *Inquiry into Crown Land in New South Wales*, 2.

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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.[5]

To date, only eight determinations that native title exists in the State have been made pursuant to the NTA. As observed by Jagot J in the matter of *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 851 (15 August 2014), [1] , just two native title determinations were made in the two decades from the commencement of the NTA on 1 January 1994 to December 2013.

Six determinations have been made since December 2013, indicating that these matters have gained traction over the last two years as procedural difficulties are slowly resolved by parties working under the active case management of the Federal Court to reach consent determinations. More Native title claims are expected to follow in coming years, with the Deloitte Access Economics *Review of Native Title Organisations – Discussion Paper* estimating there could be a further 265 applications yet to be lodged in Australia.[6]

The Chair of the State Development Committee, the Hon Greg Pearce MLC, recently observed that '*there continues to be a lack of urgency and accountability, and only siloed responses' to Aboriginal development in NSW.*[7]

This Inquiry presents an opportunity for the State Government to overhaul Crown land management to bring it in line with the changing native title landscape and into synchronicity with the other important State policy initiatives that are currently under consideration. This would be a significant contribution to overcoming this silo-effect.

Unfortunately, the operation of native title in NSW has been significantly misunderstood since the inception of the NTA in 1993 and this is perhaps most demonstrably clear when it comes to considerations of the way in which native title interacts with the State based land rights regime introduced some ten years prior in 1983. This misunderstanding has in

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

Deloitte Access Economics, *Review of the Roles and Functions of Native title Organisations – Discussion Paper*, June 2013 <https://www.deloitteaccesseconomics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf>

7 Standing Committee on State Development Media Release, *Options to drive Aboriginal Economic Development – Discussion paper released today*, 7 July 2016.

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some instances produced the unintended consequence of excluding native title claimants from important discussions about the management of land, due to confusion about the scope and the capacity for these proprietary rights to co-exist. This is despite amendments to the ALRA in 1994 to make provision for the newly enacted NTA, which included the insertion of section 36(9) providing that transfer of lands to an Aboriginal Land Council under that section be for an estate in fee simple but shall be *subject to any native title rights and interests existing in relation to the lands immediately before the transfer*.

This submission seeks to address this misunderstanding by clarifying the distinction between native title and land rights, the interplay between the NTA, the ALRA and Crown land and the pressing need for communication and education strategies to be developed to ameliorate any confusion about the interaction of land rights and native title and to promote the peaceful co-existence of both regimes, to the benefit of Aboriginal Communities including through the potential for agreement making under new provision s36AA of the ALRA.

NTSCORP and NSWALC have jointly identified the need for improved communication and education strategies around the interaction of land rights and native title and in accordance with the Memorandum of Understanding between our organisations have taken steps to develop fact sheets and conduct forums with our respective clients and members to develop a better understanding of both regimes.

Improved communication and education strategies and policy responses by Government around the interaction of land rights and native title are also required and NTSCORP would welcome the opportunity to work jointly with Government and NSWALC to develop appropriate strategies and policies for use by Government.

4. The Distinction between Native Title and Land Rights

In NTSCORP's view, land rights and native title rights and interests can successfully co-exist for the benefit of Aboriginal Communities. As observed by Steven Wright, Office of the Registrar, *Aboriginal Land Rights Act 1983* (NSW), in oral testimony before this Inquiry:

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> *We cannot discount the important of native title rights and interests on your work… the Committee needs to remind itself that both native title rights and interests in land claims must be considered when the Crown estate is being assessed in any form.*[8]

Given the increasing number of successful native title determinations in NSW and the fact that there are currently 29,000 unresolved Aboriginal Land Claims in this state,[9] there is a clear need for government communication and education strategies and policy development to clarify the interrelationship and promote the co-existence of native title and land rights.

Confusion about the interplay between proprietary rights recognised under the Commonwealth NTA and granted under the State ALRA remains a significant barrier to progress in land management in NSW.

Crown land management must comprehensively address the dual opportunities for Aboriginal communities and Traditional Owners to access and utilise rights and interests in Crown lands via both the NTA and the ALRA.

Unfortunately, the role of native title has been misunderstood in NSW. Suggestions that pending native title claims lock up land and deny Aboriginal Communities land use and economic development opportunities are incorrect. The corollary of this fundamental misunderstanding about the interplay between native title and land rights has in part led to native title being underestimated and underutilised in supporting economic development in Aboriginal Communities in NSW to date.

What are native title rights?

The NTA provides statutory recognition of the communal rights and interests that Aboriginal People have in land and water, where Aboriginal People have continued to exercise their rights and interests in accordance with traditional law and custom and can

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[8] Legislative Council, *Inquiry into Crown lands*, Sydney hearing, 29 July 2016, 7, 8 <https://www.parliament.nsw.gov.au/committees/DBAssets/InquiryEventTranscript/Transcript/9712/Transcript%20-%2029%20July%202016%20-%20Uncorrected%20-%20Sydney%20hearing.pdf>.

[9] NSWALC, Submission No 127 to the *Inquiry into Crown Land in New South Wales*, 5.

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establish an ongoing connection with their Country pre-dating the British asserting sovereignty in Australia.

To date, eight determinations that native title exists in NSW have been made pursuant to the NTA.[10] Under Part 2 Division 3 of the NTA, Traditional Owners who are registered native title claimants or determined to be 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.

What are land rights?

By contrast, the ALRA provides a mechanism for compensating the Aboriginal People of NSW for the loss of their land. As explained by NSWALC:

> *Under the ALRA, Aboriginal Land Councils can make claims over unused and unneeded Crown land as compensation for dispossession. The successful determination of a land claim under the ALRA generally delivers freehold title to land to the relevant Aboriginal Land Council. This includes rights to less valuable minerals. The transfer of freehold title affords Aboriginal Land Councils the same rights as other freehold owners. Subject to compliance mechanisms of the ALRA, Aboriginal Land Councils can develop or deal with lands for the economic development of Aboriginal Communities.*[11]

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 (**LALCs**) are additional organisations which play a key role in creating economic development opportunities for Aboriginal people in NSW and in our view should also be consulted in relation to Crown land management.

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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 Submission No 20, NSW Aboriginal Land Council, 5-7.

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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. The ALRA does not have a Right to Negotiate provision as is provided for native title claimants and holders because of the nature of the proprietary interest it bestows upon Aboriginal Communities. Instead, freehold title in land generates different opportunities for economic development.

How do native title rights and interests differ from land rights?

Native title rights and interests differ from land rights in several ways. Land rights are granted in the form of freehold land where the Minister administering the *Crown Lands Act 1989* (NSW) decides that the land is "claimable crown land" for the purposes of the ALRA. Native title rights and interests are recognised by the Federal Court in the form of specific rights and interests in land and waters where those rights and interests are determined to have been held in an ongoing way and in accordance with an acknowledged and observed system of traditional law and custom since before the British asserted sovereignty over Australia.

Some native title rights and interests which have been recognised by the Court include the right to access; the right to camp; the right to live on certain land; the right to hunt; the right to gather and use resources; the right to fish; and the right to protect sites. As mentioned, often these rights exist and are exercised over Crown land. Of course, native title rights can also extend to a right of exclusive possession, such as the right to possess, occupy, use and enjoy land to the exclusion of all others. Native title claims which are successfully settled by agreement, such as with an Indigenous Land Use Agreement, can also include benefits such as the grant of freehold land and in some cases compensation. There are also differences in relation to the membership criteria for native title claim groups and LALCs. Native title claim group members are identified as the descendants of Aboriginal persons who held rights and interests in specific areas of land and waters at the time the British asserted sovereignty. By contrast, membership of LALCs includes Aboriginal persons who are resident within a LALC area or who are sufficiently associated with an area or who are an Aboriginal Owner for an area.

It is acknowledged that the membership of native title claim groups and LALCs can also overlap in some areas.

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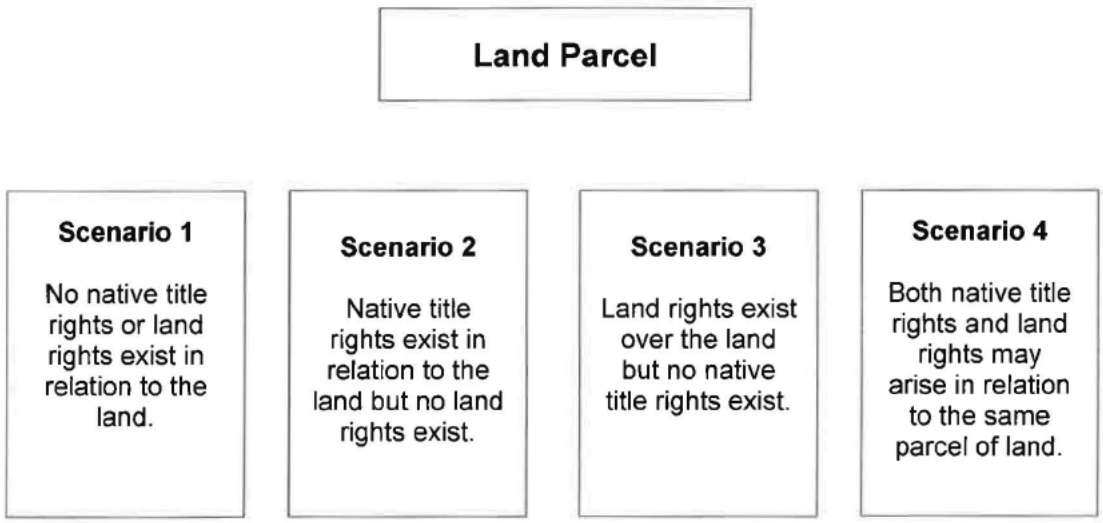
5. The Co-existence of the NTA and ALRA regimes in NSW

As alluded to by numerous parties during the Inquiry hearings, the relationship between land rights and native title is complex. This is precisely why there is a need for Government to develop communication and education strategies, together with policies, to promote greater awareness and understanding of the way in which the two regimes interact and of the opportunities presented by both models for Aboriginal Communities. We believe it is incumbent upon Inquiries like this, in conjunction with the Inquiry into Economic Development in Aboriginal Communities, to catalyse this change.

The following diagram illustrates the four possible scenarios that may exist in relation to a particular parcel of land:



Scenarios 2, 3 and 4 each provide valuable opportunities for economic development in Aboriginal Communities. They simply lever different proprietary rights delivered via different statutory mechanisms.

Both native title rights and land rights provide Aboriginal Communities with proprietary rights that may be different but are nevertheless valuable and should be utilised to promote economic development opportunities. Scenario 2 and Scenario 3 are relatively straightforward because only one statutory regime operates.

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In Scenario 2, Traditional Owners may use their native title rights to generate ongoing economic opportunity in accordance with the NTA and *Native Title (New South Wales) Act 1994*, including through future act negotiations and Indigenous Land Use Agreements.

In Scenario 3, LALCs may utilise their land rights to promote cultural, social and economic development, as outlined by NSWALC in its submission to this Inquiry.

Scenario 4 is more complex because the NTA and ALRA intersect in relation to the same property. It is possible for native title to be recognised on land rights land in particular circumstances. In this instance, the local Aboriginal Community should be empowered to leverage both native title rights and land rights to generate opportunities for the Aboriginal community.

Ordinarily, the NTA provides that the grant of freehold title extinguishes native title permanently.[12] However, exceptions may be made in relation to land that has been granted under the ALRA. It is possible for Traditional Owners to have native title rights and interests recognised in land that has been granted to a LALC under the ALRA.
In some circumstances the freehold title conveyed under the ALRA may suppress the operation of co-existing native title rights, in other cases the freehold title which has been granted to an Aboriginal Land Council has been granted "subject to" native title.

Section 36AA of the ALRA also now provides that parties may negotiate Aboriginal Land Agreements which may enable the transfer of lands to an Aboriginal Land Council subject to native title whether or not an Aboriginal Land Council has made a land rights claim over the land. This provision may also provide a more flexible approach to the determination of native title claims in areas where there is an as yet undetermined land rights claim made before 28 November 1994.

If native title has not been extinguished and the land rights claim was made after 28 November 1994, then the LALC will be restricted from 'dealing' with the land (ie using it in particular ways) until there has been a formal determination by the Federal Court to

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12 *Fejo v Northern Territory* (1998) 195 CLR 96, [112], cited in NSWALC, *Fact Sheet: Interaction between native title and land rights*, November 2014 <http://www.alc.org.au/media/83115/140306%20native%20title%20fact%20sheet%202%20-%20interaction%20between%20native%20title%20and%20land%20rights%20updated.pdf>.

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confirm one way or the other whether native title does in fact exist, in accordance with section 42 of the ALRA.

Dealing with land is defined under section 40 of the ALRA to include selling, leasing, mortgaging, granting an easement or covenant over, subdividing, or making a development application in relation to the land. If the LALC wishes to deal with the land in a particular way, it must first seek a determination of native title through the filing of a non-claimant application in the Federal Court. This process has been criticised as complex and costly, in terms of time, money and resources.

There are certain exceptions – for example, if the LALC bought or otherwise came to own the land, or the grant of the land claim was made before 28 November 1994, the Aboriginal Land Council may deal with the land under the ALRA without requiring a negative determination of native title. If a formal determination is made that native title exists over LALC owned land, then the LALC may proceed to deal with the land subject to complying with any provisions of the NTA which may apply to the dealing. Conversely, the relevant Minister must refuse an Aboriginal land claim lodged over land that is subject to a registered native title claim or successful determination.[13]

Admittedly, many stakeholders agree that there is a great need to promote public education, improve the timeliness and clarify the process by which a LALC may seek a determination as to whether native title exists in Scenario 4, as illustrated in submissions to this Inquiry.

NTSCORP considers that greater understanding in relation to the way in which the land rights and native title regimes interact and can co-exist would:

- improve cultural, social and economic opportunities for Aboriginal Communities;
- clarify the extent to which Crown land may be actively used and managed to benefit Traditional Owners and the broader NSW community;
- increase Aboriginal involvement in the management of Crown land;
- better achieve the purposes of both the NTA and ALRA; and
- promote greater awareness, clarity and certainty for proponents and policy makers operating in this space.

13 NSWALC, ibid.

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We urge the Inquiry to consider recommending that Government develop, together with NTSCORP and NSWALC, communication and education strategies, together with policies, to promote greater awareness and understanding of the way in which the two regimes interact and of the opportunities presented by both models for Aboriginal Communities. We also seek the Inquiry's support in advocating for the timely advancement of native title determinations to enable both native title holders and Aboriginal Land Councils to reap the benefits from the proprietary rights created by both statutory regimes in Crown land.

Moreover, this complexity should not detract from the potential for native title and land rights to be harnessed in Scenarios 2 and 3, which depict the reality facing many Aboriginal Communities and Traditional Owners in NSW.

Although simplistic, the diagram demonstrates the potential to promote further Aboriginal engagement and leadership in the management of Crown land. Yet, by offering recommendations to government that focus solely on land rights is to effectively tie the hands of Aboriginal Communities by restricting them to only one out of three viable mechanisms to enhance their interests.

This Inquiry must consider both mechanisms as dual levers to increase Aboriginal involvement in managing Crown lands and make a meaningful change in overcoming the economic and social disadvantage that remains prevalent in contemporary NSW.

Both statutory regimes may operate independently or concurrently and both merit attention from this Inquiry, and ultimately from the Government. Improving familiarity with both systems is critical. As identified by the Office of the Registrar of the Aboriginal Land Rights Act 1983 (NSW):

> *....both systems of rights recognition have experienced obstacles in converting land rights into socio-economic opportunities. This is primarily due to external parties not being familiar with the nature of Aboriginal land rights and native title, and technical legal limitations inherent in both systems.*

The NSW Government must improve awareness and coordination between its internal departments and agencies to overcome the silo effect. But more than that, increased collaboration with the Commonwealth's respective agencies and organisations including

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NSWALC and NTSCORP is critical in promoting meaningful ongoing dialogue to progress legislative reform to enhance the opportunities created by these statutory regimes.

6. The Future Act Regime

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*'.

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*'.

Traditional Owners who are registered native title claimants or native title holders are afforded a number of procedural rights in relation to 'future acts' under Part 2 Division 3 of the NTA. The future acts regime provides Traditional Owners with an ongoing voice in the future management of their land, including Crown lands. This can and should facilitate the ongoing development and empowerment of Aboriginal Communities.

While Traditional Owners 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 v Commonwealth* that the designation of native rights and interests as "usufuctuary rights and interests" does not necessarily preclude their use for commercial purposes, including the commercial right to fish.[14] This has been supported by the Australian Law Reform Commission who last year recommended in its *Connection to Country – Review of the Native title Act 1993* (Cth) that the Commonwealth repeal Section 223(2) of the NTA, and substitute the following:

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14 *Akiba v Commonwealth* (2013) 250 CLR 209, [21] (French CJ and Crennan J), [60] (Hayne, Kiefel and Bell JJ).

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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.[15]

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.

NTSCORP believes that strengthening the culture of collaboration between the Government and land holders, including native title holders can improve social, environmental and cultural heritage outcomes for all concerned. Reform of Crown land provides an opportunity to build new trust and a collaborative relationship to maximise the benefits of the Crown Estate for the Aboriginal community and the people of NSW generally.

Thank you again for the opportunity to make submissions on this important issue. We look forward to being notified of the outcome of the Inquiry and working with the committee in the future.

If we can be of assistance, or if you require any further information, please do not hesitate to contact , Manager Strategic Development, on

15 Recommendation 8-1, Australian Law Reform Commission, *Connection to Country – Review of the Native title Act 1993* (Cth) 2015.

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Yours sincerely,

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