

INQUIRY INTO ECONOMIC DEVELOPMENT IN ABORIGINAL COMMUNITIES

Organisation: NTSCORP Limited

Date received: 15/08/2016

Scope of the Consultation

We understand that submissions are sought in relation to the questions outlined in the Discussion Paper, released by the Standing Committee on State Development in July 2016, to harness capacity building of Aboriginal Communities and enterprises. The Discussion Paper responds to submissions received by the Committee in the course of the ongoing inquiry into *Economic Development in Aboriginal Communities (the Inquiry)*. The Inquiry 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.

NTSCORP was pleased to make initial submissions to the Inquiry in February 2016 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, governments and proponents.¹ In our previous submission, NTSCORP noted the importance of the Inquiry to engage with grass-roots Aboriginal communities. NTSCORP urge the committee to extend consultation to local Aboriginal communities and businesses throughout the State.

Further to our previous submissions, we welcome the opportunity to make additional comments specifically targeted to the questions posed by the Discussion Paper and initiatives raised by other stakeholders in submissions.

Introduction

As identified by the Chair of the State Development Committee, the Hon Greg Pearce MLC, *'there continues to be a lack of urgency and accountability, and only siloed responses'* to Aboriginal development in NSW.²

In principle, NTSCORP supports initiatives to overcome this 'silo effect' that has been prevalent in NSW to date, with devastating consequences for social justice in Aboriginal Communities. This silo effect has resulted in fragmented decision-making and policy agendas operating unsuccessfully in isolation, often leading to unnecessary duplication

¹ See Submission #25, NTSCORP Limited, *Inquiry into Economic development in Aboriginal Communities*, NSW Legislative Council Standing Committee on State Development, February 2016.

² Standing Committee on State Development Media Release, *Options to drive Aboriginal Economic Development – Discussion paper released today, 7 July 2016*.

of statutory red tape, confusion between decision makers and Communities and added stress on already overstretched resources.

The Discussion Paper states at 6.12 that:

The committee acknowledges the complexity arising in respect of conflicting and complex areas of native title law and the existing statutory land rights framework in New South Wales. In this inquiry, however, the majority of evidence received by the committee has related to land claims under ALRA, and will be the focus of this part of the discussion paper.

Respectfully, it is NTSCORP's view that the only way to overcome the silo effect identified by the Committee is to recognise the importance of native title as an economic, as well as a cultural, asset to Aboriginal Communities in NSW.

Native title and land rights must be recognised as two independent but equally important and viable mechanisms to promote economic development opportunities in NSW. Submissions to Government that do not address the interplay between native title and land rights, or advance recommendations to simplify legislative overlap, advance the timely resolution of native title determinations and minimise widespread confusion will only further entrench this silo effect for decades to come.

Native title affords important opportunities for capacity building of NSW Aboriginal Communities, which remain underutilised in NSW to date. However, the 2015 COAG Investigation into Indigenous Land Administration states that *'the complexity and uncertainty about these differing regimes often leads to the observation that Indigenous land and native title are barriers to development and investment'*.³ This Inquiry provides an important opportunity to address this misconception and advance recommendations to promote the timely determination of native title claims. This would open up new opportunities for economic development, whether through native title mechanisms if native title is found to exist, or concurrently or alternatively through land rights mechanisms under the *Aboriginal Land Rights Act 1983* (NSW) (ALRA) if native title has been extinguished.

³ COAG Report, page 22.

The existence of a claim to native title over a parcel of land is not necessarily a barrier to development opportunities. Unfortunately, under the status quo, a positive land claim determination under the ALRA requires a negative native title determination under the NTA. Despite the challenges presented by this inconsistent statutory landscape, Traditional Owner representative groups and LALCs have demonstrated a willingness to work successfully together to maximise the benefits for entire Communities.

In principle, land rights and native title rights and interests can successfully co-exist. Amendments to the ALRA in 1994 to make provision for the newly enacted NTA 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*. There is a clear need for communication and education strategies to remove confusion about the interaction of land rights and native title to enable Aboriginal Communities to utilise the full suite of mechanisms to leverage economic development opportunities from their respective rights and interests.

In addition to NTSCORP, several key stakeholders referred in their submissions to native title rights and interests as an important, although underutilised, asset for Aboriginal Communities, including:

- Submission No 32, Department of Prime Minister and Cabinet⁴
- Submission No 28, NSW Government⁵
- Submission No 36, Office of the Registrar *Aboriginal Land Rights Act 1983* (NSW)
- Submission No 3, Dr Janet Hunt, Centre for Aboriginal Economic Research, ANU

The fact that native title has not been more comprehensively addressed in submissions or the Discussion Paper is symptomatic of the greater problem of widespread uncertainty as to how the statutory regime of recognition outlined by the NTA is intended to operate concurrently with land rights provisions in NSW.

This Inquiry is uniquely placed to play a formative role in addressing this confusion through sound recommendations to recognise, readjust and re-energise the application

⁴ See especially page 6.
⁵ See pages 13-14.

of native title in NSW to advance economic development in Aboriginal Communities. In answer to Question 1, there is an urgent need for the NSW Government to adopt a whole of government approach to ensure a coordinated and targeted response to maximise the potential of the native title regime and the land rights regime created by the ALRA, as outlined in NTSCORP's previous submission.

This present submission provides additional clarification on the interplay between the statutes and offers recommendations that are specifically relevant to the Discussion Paper's Questions 2, 3, 10, 13, 17 and 22.

SUMMARY OF RECOMMENDATIONS

Further to our previous submission, NTSCORP makes the following additional recommendations:

1. Native title and land rights must be recognised as two independent but equally sound and viable mechanisms to promote economic development opportunities in NSW;
2. Native title rights and interests cannot be overlooked in recommendations to Government because these provide unique economic development opportunities for Aboriginal Communities, including in relation to land where land rights co-exist or do not exist. Failure to leverage native title rights will allow significant economic opportunities to go unrealised;
3. State Government departments must work collaboratively with Commonwealth Government counterparts, Traditional Owners and peak Aboriginal representative bodies including NSWALC and NTSCORP to improve familiarity and interagency understanding of how native title and aboriginal land rights systems operate separately, together and in concert with other areas of governance;
4. Communication and education strategies and (to an extent) legislative reform is needed to remove confusion and detriments of the overlay between native title and land rights existing in relation to the same parcel of land;

5. The State Government should collaborate actively with the Commonwealth and stakeholders including NTSCORP and 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'*;
6. 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;
7. 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; and
8. The State Government should introduce as soon as possible a stand-alone cultural heritage protection regime to bring NSW in line with best practice and cultural competence of other states and territories in Australia, consistent with international law.

Accordingly, we address the following issues in our submission:

1. The distinction between native title and land rights in NSW.
2. The future acts regime and economic development.
3. The co-existence of the NTA and ALRA
4. Additional recommendations raised by other submissions to the Inquiry.

1. 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. A whole of government approach to economic development is not complete unless it comprehensively addresses the dual opportunities for economic sustainability provided through native title and land rights.

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,⁶ 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 barrier to sustainable economic development in Aboriginal Communities.

Unfortunately, the role of native title has been significantly misconstrued and misunderstood in NSW. Suggestions that pending native title claims lock up land and deny Aboriginal Communities economic development opportunities are incorrect. The corollary of this fundamental misunderstanding about the interplay between native title and land rights has led to native title being underestimated and underutilised in supporting economic development in Aboriginal Communities in NSW to date. In order to fully harness economic development potential in NSW, this must change. Accordingly, we encourage the committee to make recommendations to the Government to this effect.

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

⁶ NSWALC, Submission No 127 to the *Inquiry into Crown Land in New South Wales*, 5.

To date, eight determinations that native title exists in NSW have been made pursuant to NTA.⁷ 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. The potential for future acts to create and enhance economic development opportunities is outlined in further detail on page 9 of this submission and in NTSCORP's original submission to the Inquiry.

Prescribed Bodies Corporate

Upon a determination of native title, the NTA requires the establishment of Registered Native Title Bodies Corporate (RNTBCs), otherwise referred to as Prescribed Bodies Corporate (PBCs), which act as trustee and manage native title rights on behalf of Traditional Owners. The number of PBCs continues to exponentially increase, rising from 42 in 2006 to more than 100 across Australia in 2003.⁸

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. NTSCORP submits that additional support must be provided to PBCs. Within NSW, several native title claims have taken approximately twenty years to finalise; PBCs then face limited funding and resources to utilise those rights and subsequently create sustainable economic opportunities. As detailed in NTSCORP's previous submission, PBCs have the ability to successfully provide economic opportunities to Aboriginal Communities. NTSCORP believe utilising Aboriginal culture to provide economic opportunities to Traditional Owners is paramount to build capacity at a grass-roots level.

⁷ Monica Tan, '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>.

⁸ AIATSIS, *Prescribed Bodies Corporate* <<http://aiatsis.gov.au/research/research-themes/native-title-and-traditional-ownership/prescribed-bodies-corporate>>.

What are land rights in NSW?

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

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.⁹

Claims processed under the ALRA allow Aboriginal People to access lands through a claims process, with freehold title granted to land councils. NSWALC and the network of Local Aboriginal Land Councils (LALCs) are additional organisations which play a key role in the economic development opportunities for Aboriginal people in NSW and should be consulted.

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. 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 land" for the purposes of the ALRA. Native title rights and interests are granted 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

⁹ Submission No 20, NSW Aboriginal Land Council, 5-7.

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 speak for country. 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. There are also native title claims, which are successfully settled by agreement, such as with an Indigenous Land Use Agreement. These agreements 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, under Section 54 of the ALRA a person qualifies for membership of a LALC if a) the person is an adult Aboriginal person who resides within the area of the LALC concerned, b) the person is an adult Aboriginal person who has sufficient association with the area of the LALC concerned or; c) the person is an Aboriginal owner in relation to land within the area of the LALC concerned.

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

2. The Future Acts Regime and Economic Development

Harnessing the economic opportunities that native title can provide for Indigenous people has been a priority of successive Commonwealth Governments. In his address to the 2014 National Native Title Conference, the Hon Nigel Scullion noted that economic opportunity and economic independence are two of the key questions tied to native title, placing particular emphasis on the importance of the negotiation of future acts.¹⁰

¹⁰ N Scullion, address to National Native Title Conference, Coffs Harbour, 2 June 2014.

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'*.

As outlined in NTSCORP's previous submission, 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.

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 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, economic and business development, freehold land transfers and compensation.

¹¹ Deloitte, Review of the Roles and Functions of Native Title Organisations, 2014, 21
<<http://www.deloitteaccessseconomics.com.au/uploads/File/DAE%20Review%20of%20Native%20Title%20Organisations%20-%20Final%20Report.pdf>> .

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 v Commonwealth* that the designation of native rights and interest as “*usufructuary rights and interests*” does not necessarily preclude their use for commercial purposes, including the commercial right to fish.¹³ 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:

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*

It is important that the State Government appreciate that economic development opportunities will be different in every community. Any policy proposed must balance

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.

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 opportunities and 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 including PBCs must be supported to make economic decisions that best benefit their members and their social, cultural and economic interests.

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.

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>>.

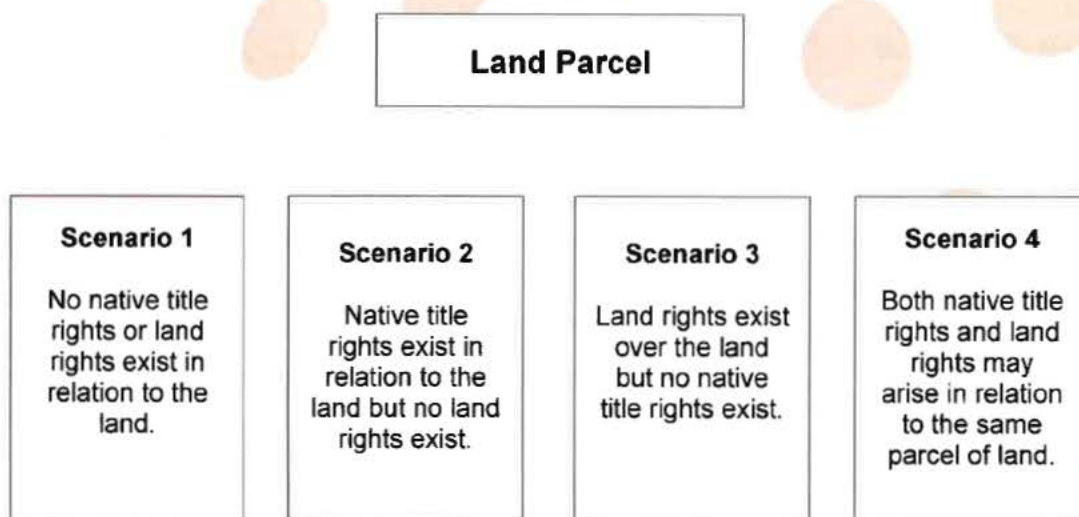
¹⁶ Australian Law Reform Commission, *Connection to Country – Review of the Native title Act 1993* (Cth) 2015
<https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_126_final_report.pdf>.

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 who must be consulted 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 is time that the State of NSW as well as proponents operating in NSW adhere to these national standards.

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

As alluded to by the Discussion Paper, 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 regimes for Aboriginal Communities. We believe it is incumbent upon the Inquiry 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.

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 ILUA and future act negotiations as outlined in NTSCORP's previous submission to the Inquiry.

In Scenario 3, LALCs may utilise their land rights to promote economic development, as outlined by NSWALC in its submission to the 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 economic opportunities for development. Currently, 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.

Communication and education strategies is needed to emphasise that native title rights can and should co-exist with land rights in order to:

- improve economic opportunities for Aboriginal Communities;
- better achieve the purposes of both Acts; and
- promote greater awareness, clarity and certainty for proponents and policy makers operating in this space.

Ordinarily, the NTA provides that the grant of freehold title extinguishes native title permanently.¹⁷ 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.

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 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. 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 claim that led to the land rights being granted 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 on the proviso that it comply with the statutory responsibilities under the NTA's future act regime, just as other proponents. Conversely, the relevant Minister

¹⁷ *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%20%20-%20interaction%20between%20native%20title%20and%20land%20rights%20updated.pdf>>.

must refuse an Aboriginal land claim lodged over land that is subject to a pending native title claim or successful determination.¹⁸

As explained by NSWALC:

It is important to recognise that native title rights and interests can co-exist over LALC land. This may be preferable to other options, such as Government ownership of land where the native title rights and interests exist (such as national parks). If the local community is keen to use land rights and native title together, the order in which the claims are made is very important. As noted above, a land claim cannot be granted over land that is under native title claim. On the other hand, native title can be recognised over land that is claimed or owned by a Land Council in many cases. NSWALC encourages LALCs and native title claim groups to work together to make the most of the two systems.¹⁹

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.

Native title rights and interests do not lock up land or deny Aboriginal Communities the opportunity to realise economic development opportunities.

It is critical that the Inquiry advocate for the timely advancement of native title determinations to enable both Traditional Owners (native title holders) and LALCs to reap economic benefits from the proprietary rights created by both statutory regimes.

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 that proposing initiatives to promote economic development 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

¹⁸ NSWALC, *ibid.*

¹⁹ NSWALC, *ibid.*

their interests. The Inquiry must promote all three scenarios and both mechanisms as dual levers to 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 the Government. Improving familiarity with both systems is critical. As identified by the Office of the Registrar 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 NSWALC and NTSCORP is critical in promoting meaningful ongoing dialogue to progress legislative reform to enhance the opportunities created by these statutory regimes.

4. Additional recommendations raised by other submissions to the Inquiry

NTSCORP is pleased to note that the submission by the Office of the Registrar Aboriginal Land Rights Act 1983 (NSW)²⁰ to this Inquiry made recommendations relating to the economic opportunities associated with Aboriginal cultural heritage in NSW. In particular, the Registrar's recommendations include that:

21. NSW Government prioritise the introduction of stand-alone cultural heritage protection laws that are consistent with international human rights law;

25. Commence section 21AA of the Fisheries Management Act 1994 immediately, without any further delay for regulations;

26. Legislative review of all natural resource management law to provide positive and more consistent recognition of Aboriginal rights (under the NTA and ALRA)

²⁰ Submission No 36.

and to provide commercial opportunities for Aboriginal people (ie allocate water licences, fisheries licencing, etc)

27. DPP and NSW Police promote clear legal guidelines to all enforcement personnel articulating Aboriginal people's rights at law to exercise their law and custom.

NTSCORP has been a vocal advocate for and has made numerous submissions to the State Government in support of these recommendations on previous occasions.

These initiatives would undoubtedly contribute opportunities for Aboriginal Communities to promote sustainable economic development, in addition to many other benefits.

Accordingly, we are pleased to support the Registrar in advancing these initiatives in the context of this Inquiry.

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

Yours sincerely,

Natalie Rotumah
Chief Executive Officer
NTSCORP Limited

