

Lisa Gropp
Commissioner
Resources Sector Regulation Inquiry
Productivity Commission
Level 12, 530 Collins Street
Melbourne VIC 3000, Australia

Via email: resources@pc.gov.au



**New South Wales
Aboriginal Land Council**
ABN 82 726 507 500
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Dear Commissioner Gropp,

Thank you for the opportunity to comment on the Inquiry into Resources Sector Regulation.

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW. In accordance with the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**), our organisation works to improve, protect and foster the best interests of all Aboriginal peoples in NSW. Our responsibilities, and those of the 120 Local Aboriginal Land Councils (**LALCs**) across NSW include the protection and promotion of Aboriginal culture and heritage, land management, business enterprise and serving our communities.

While we appreciate the desire for continuous improvement and best practice, we seek to ensure that the focus on any "impediments" to the resource sector are appropriately balanced. It is important that the review is framed to support important reforms underway to advance social, cultural and economic outcomes for Aboriginal communities, including the Government's commitments to Closing the Gap. We do not support reduced avenues for Aboriginal people to protect Aboriginal cultural heritage and manage Country.

Overall, we recommend the Productivity Commission:

1. Adopt the conclusions and recommendations outlined in the 'Study on Extractive industries and Indigenous peoples' prepared by the United Nations Special Rapporteur on the Rights of Indigenous Peoples for the Human Rights Councilⁱ,
2. Develop recommendations and proposals for reform in partnership with peak Aboriginal organisations and Aboriginal communities,
3. Ensure that all recommendations and proposals tangibly advance the rights and interests of Aboriginal peoples, and respect Aboriginal people's right to self-determination.

Protections for Aboriginal Cultural Heritage

Successive 'State of the Environment' reports have highlighted the widespread destruction of our cultural heritage and have observed that "*approved destruction*" and "*economic imperatives*" are key risks.ⁱⁱ

We note that many mining and resources projects in NSW are generally assessed via the State Significant Development (**SSD**) provisions in the *Environmental Planning & Assessment Act 1979*

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Head office	Western Zone	Northern Zone	Northern Zone (Tamworth)	Eastern Zone	Southern Zone	Far Western Zone
Level 5, 33 Argyle Street Parramatta NSW 2150	2/36 Darling Street Dubbo NSW 2830	Suite 5, Level 1 66-90 Harbour Drive Coffs Harbour NSW 2450	2/158 Marius Street Tamworth NSW 2340	Suite 23, 207 Albany Street North Gosford NSW 2250	Unit 22, 2 Yallourn Street Fyshwick ACT 2609	Ground Floor Suite 49 Oxide Street Broken Hill NSW 2880
PO Box 1125 Parramatta NSW 2124	PO Box 1196 Dubbo NSW 2830	PO Box 1912 Coffs Harbour NSW 2450	PO Box 890 Tamworth NSW 2340	PO Box 670 Gosford NSW 2250	PO Box 619 Queanbeyan NSW 2620	Ph: 08 8087 7909 Fax: 08 8087 3851
Ph: 02 9689 4444 Fax: 02 9687 1234	Ph: 02 6885 7000 Fax: 02 6881 6268	Ph: 02 6659 1200 Fax: 02 6650 0420	Ph: 02 6766 4468 Fax: 02 6766 4469	Ph: 02 4337 4700 Fax: 02 4337 4710	Ph: 02 6124 3555 Fax: 02 6280 5650	

(NSW)ⁱⁱⁱ. The SSD provisions effectively “switch off” a proponent’s already minimal obligations regarding the protection of Aboriginal heritage.^{iv} While the indicative Secretary’s Environmental Assessment Requirements (**SEARS**) for SSD mining developments requires the preparation of an Environment Impact Statement (EIS) to “*assess the likely Aboriginal and historic heritage impacts of the development,*” projects are rarely refused. Instead, consent conditions relating to Aboriginal heritage, if incorporated at all, generally do not require the protection of Aboriginal heritage, but ask proponents to consult with Aboriginal people or develop an Aboriginal cultural heritage (ACH) management plan.

Serious concerns have been raised about the lack of enforceability and poor compliance monitoring of the current regulatory approach, including in the *Calga* case which criticised the “amber light” approach of approving projects before assessing their impacts. The *Calga* case noted: “*approving the Project without having first obtained a full understanding of the heritage values of the Project site would be contrary to the precautionary principle: Warkworth per Preston CJ at [59] and common sense on the evidence as we see it.*”^v

We note that the NSW Government has long recognised that the current laws to protect Aboriginal heritage are severely deficient and create uncertainty for all parties. The NSW Government has a long standing committed to deliver reforms to improve outcomes for Aboriginal cultural heritage and Aboriginal people. This reform process has been slow, however in 2018 the NSW Government released a draft *Aboriginal Cultural Heritage Bill* for public comment. The Bill included important provisions to better integrate Aboriginal heritage considerations with the NSW planning system, provide for agreement making between proponents and Aboriginal communities, and support Aboriginal people’s self-determination.

We further note that the *Environmental Conservation & Biodiversity Act (Cth)* is currently under review and that a discussion paper is due for release shortly. NSWALC welcomes the opportunity to provide further comment on this review and other relevant reviews as they progress to ensure that Aboriginal people’s rights and interests are actively advanced.

NSWALC urges the Commission to ensure that:

- Any recommendations do not further erode the already deficient laws for the protection of Aboriginal cultural heritage,
- Any recommendations do not undermine the important work underway in NSW to enhance our State’s laws to better protect Aboriginal heritage and provide for Aboriginal self-determination.

Benefit sharing

It is difficult to cite encouraging examples of benefit sharing that have genuinely advanced the rights and interests of Aboriginal peoples. Where benefit sharing arrangements are utilized, concerns have been raised that ‘benefits’ are very limited, are not premised on genuine ownership and profit sharing arrangements with Aboriginal communities, can favour small sections of communities, are not sustainably implemented, and can be confused with compensation arrangements.^{vi} Case studies illustrate that the long term social, cultural, environmental and economic impacts on mining on Aboriginal communities has not lived up to initial promises of ‘benefit sharing’, and can actively detriment communities over the long term.^{vii}

In keeping Australia’s international obligations under the United Nations *Declaration of the Rights of Indigenous Peoples* (UNDRIP), we submit that Australia need to develop more appropriate models for benefit sharing that provide for Aboriginal people’s rights and interests, including the principles of free, prior and informed consent, and self-determination.

The former United Nations Special Rapporteur on the Rights of Indigenous Peoples, James Anaya has described a 'preferred model' for ensuring Aboriginal peoples having greater control over planning decisions and project implementation with regard to resource projects. We recommend that this model form the basis of the Commission's conceptualisation of these issues and recommendations.^{viii}

Further, we suggest that the Commission review learnings from the '*Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from the Utilization of Genetic Resources of the Convention on Biological Diversity*' (**Nagoya Protocol**)^{ix}. While the Nagoya Protocol relates to genetic resources, it is a model that could be developed and adapted in other arenas. We draw the Commission's attention to recent reviews of the Nagoya Protocol and key recommendations from that work.^x

Additionally we urge the Commission to ensure that the concept of benefit sharing with Aboriginal people is not limited to native title processes. NSW has unique land rights legislation that operates alongside native title processes. We suggest that native title approaches are a minimum standard in the conceptualization of benefit sharing.

The Commission may also wish to review examples of First Nations revenue sharing agreements in Canada^{xi}, and experiences of First Nations people in Alaska with respect to ownership of resource operations^{xii}.

NSWALC encourages the Commission to:

- Take a long term view of benefit sharing arrangements, and to adjust the concept and definitions of benefit sharing to recognise the concerns and shortcomings raised above,
- Adopt the conclusions and recommendations outlined in the 'Study on Extractive industries and Indigenous peoples' prepared by the United Nations Special Rapporteur on the Rights of Indigenous Peoples for the Human Rights Council.^{xiii}

Community engagement

NSWALC advocates for the principle of free, prior and informed consent to be embedded in all decisions affecting Aboriginal people. We also note that community engagement approaches are not equivalent to community consent, and approaches to date generally disempower Aboriginal communities. In our experience, significant improvements are needed to community engagement and community agreement processes.

We draw the Commission's attention to examples of effective engagement with Aboriginal people. For example, the Human Rights Commission have outlined the following principles for 'meaningful and effective engagement' with Aboriginal peoples^{xiv}:

- a) Consultation processes should be products of consensus
- b) Consultations should be in the nature of negotiations
- c) Consultations need to begin early and should, where necessary, be ongoing
- d) Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance
- e) Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision
- f) Adequate timeframes should be built into the consultation process
- g) Consultation processes should be coordinated across government departments
- h) Consultation processes need to reach the affected communities
- i) Consultation processes need to respect representative and decision-making structures
- j) Governments must provide all relevant information and do so in an accessible way

The *Closing the Gap Clearing House* has provided recommendations for what works and what does not work in engaging with Aboriginal and Torres Strait Islander peoples, and has outlined a number of minimum requirements including cultural competency to respond to Indigenous history, cultures and contemporary social dynamics and to the diversity of Indigenous communities and valuing the cultural skills and knowledge of community organisations and Indigenous people.^{xv}

Other important principles and requirements regarding processes seeking community consent include time, recognition of the difference between community-level consent and individual-level consent, and embracing Aboriginal ways of knowing.^{xvi}

NSWALC urges that the Commission to ensure any recommendations support the principles outlined in the UNDRIP, including the right to free, prior and informed consent, to be enshrined in domestic laws and policies.

NSWALC is committed to working with government, industry and other partners to improve social, cultural and economic outcomes for Aboriginal people and the wider community.

We welcome the opportunity to provide further comment on the draft report. If you have any questions regarding the content of this submission, please contact the NSWALC Strategy and Policy Unit

Sincerely,

James Christian PSM
Chief Executive Officer
NSW Aboriginal Land Council

Date: 22 NOVEMBER 2019

ⁱ James Anaya, 2013, Extractive industries and indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, Report to the Human Rights Council A/HRC/24/41, 2013, para 79 - 92

<http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>

ⁱⁱ Australia State of the Environment Report 2016, Heritage Chapter, page 27

<https://soe.environment.gov.au/sites/g/files/net806/f/soe2016-heritage-launch-v27march17.pdf?v=1488844294> and Australia State of the Environment Report 2011, State of the Environment 2011 Committee, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Canberra, page 721 <http://155.187.2.69/soe/2011/report/heritage/pubs/soe2011-report-heritage.pdf>

ⁱⁱⁱ Part 4, Division 4.7, EP&A Act

^{iv} s.4.41(1)(d), EP&A Act

^v Darkinjung Local Aboriginal Land Council v Minister for Planning and Infrastructure & Anor; Australian Walkabout Wildlife Park Pty Limited (ACN 115 219 791) as Trustee for the Gerald and Catherine Barnard Family Trust v Minister for Planning and Infrastructure & Anor [2015] NSWLEC 1465 (17 November 2015, [Para 481] <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWLEC/2015/1465.html?stem=0&synonyms=0&query=calga&nocontext=1>

^{vi} See for example Jon Altman & David Martin (ed), 2009, 'Power, Culture and Economy: Indigenous Australians and Mining', Centre for Aboriginal Economic Policy Research, Australian National University, in particular pages 34- 39 <https://press-files.anu.edu.au/downloads/press/p78881/pdf/book.pdf>; Emma Wilson, 'What is Benefit Sharing? Respecting Indigenous Rights and Addressing Inequities in Arctic Resource Projects', Published: 20 April 2019, Resources 2019, 8, 74; doi:10.3390/resources8020074 www.mdpi.com/journal/resources; James Anaya, 2013, Extractive industries and indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, Report to the Human Rights Council A/HRC/24/41, 2013, para 79 - 92 <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>

^{vii} See for example Jon Altman & David Martin (ed), 2009, 'Power, Culture and Economy: Indigenous Australians and Mining', Centre for Aboriginal Economic Policy Research, Australian National University, pages 34- 39 <https://press-files.anu.edu.au/downloads/press/p78881/pdf/book.pdf>

^{viii} See Chapter 2, <http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>

^{ix} See <https://www.cbd.int/traditional/Protocol.shtml>

^x See <https://www.cbd.int/doc/c/18ce/abf3/53492f6b9abeb890fef970a2/np-mop-03-10-en.pdf>

^{xi} See for example <https://www.mndm.gov.on.ca/en/mines-and-minerals/resource-revenue-sharing>

^{xii} See <https://www.akrdc.org/alaska-native-corporations>

^{xiii} James Anaya, 2013, Extractive industries and indigenous peoples, Report of the Special Rapporteur on the rights of indigenous peoples, Report to the Human Rights Council A/HRC/24/41, 2013, para 79 - 92

<http://unsr.jamesanaya.org/docs/annual/2013-hrc-annual-report-en.pdf>

^{xiv} Aboriginal and Torres Strait Islander Social Justice Commissioner, 2010, Native Title Report 2010, Chapter 3 and Appendix 4, available at: <https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/native-title-report-2010>

^{xv} See Janet Hunt, Closing the Gap Clearinghouse Issues Paper No.5, Australian Institute for Health of Welfare, 2013, *Engaging with Indigenous Australia— exploring the conditions for effective relationships with Aboriginal and Torres Strait Islander communities*, <https://aifs.gov.au/publications/archived/4715>

^{xvi} Professor Tony Dreise, *On our terms*, 2018 <https://www.aboriginalaffairs.nsw.gov.au/pdfs/new-knowledge/publications/on-our-terms-FINAL.pdf>