13 July 2015

The Executive Director – Resources and Industry Policy
NSW Department of Planning and Environment
GPO Box 39
Sydney NSW 2001

By Email: information@planning.nsw.gov.au

Submission on Stage 1 of the NSW Government's Integrated Mining Policy

We thank you for the opportunity to make submissions regarding Stage 1 of the Integrated Mining Policy (**IMP**) as regulated by the *Environmental Planning and Assessment Act 1979* (NSW) (**the EPAA**). We support the initiative to streamline government processes and policy around the assessment, determination and regulation of State mining activity.

INTRODUCTION

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 ACT.

NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Traditional Owners who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA.

In summary, NTSCORP's functions and powers under sections 203B to 203BK of the NTA (inclusive) are:

- Facilitation and assistance, including representation in native title matters;
- Dispute resolution;

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- Notification;
- Agreement-making;
- Internal review; and
- Other functions.

This submission is based on our experience working with Traditional Owners of lands and waters within NSW in seeking best practice assessment and mitigation of impacts of major projects on native title rights and interests, including cultural heritage. It is NTSCORP's view that cultural heritage should be an active component of the IMP and as such, our submission focuses on aspects of the IMP relevant to Traditional Owners in this regard.

Traditional Owners have a strong and unique connection to their Country, and are key stakeholders in all development assessment and approval processes, including any such processes which come under the purview of the IMP. Major development has a range of impacts on Traditional Owners' Country and cultural heritage, often irreversibly so. Traditional Owners have been consistently unrepresented and under-acknowledged in development assessment and approval processes in NSW. Such a situation has only been exasperated by both a lack of leadership and policy direction to directly address such issues on the behalf of government, and by recent NSW Supreme Court judgments like that of *Metgasco Limited v Minister for Resources and Energy* [2015] NSWSC 453 (24 April 2015), that have solidified mining company rights and responsibilities at the expense of the rights and concerns of the broader community including those of Traditional Owners.

Effective and genuinely representative involvement in these processes is vital to maintaining, strengthening, and transmitting to future generations Traditional Owners' history, beliefs and their traditional laws and customs. NTSCORP generally supports initiatives to increase the efficiency of development assessment and approval processes, but not where those initiatives fail to incorporate effective mechanisms which promote positive environmental, heritage and social outcomes for Traditional Owners.

Mining activity and related infrastructure significantly impacts the native title rights and interests of Traditional Owners in New South Wales. Delay in the official recognition of these rights and interests often results in the delay of operations, which can be a source of frustration for mining managers, due to their lack of understanding of the requirements

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of native title legislation. The State has the opportunity with the IMP to adopt processes which will reduce delays and confusion in mining operations across NSW by properly integrating the requirements for compliance with the Future Acts regime under the NTA into the early stages of the process. The opportunity at hand to integrate all legal requirements will result in more efficient and effective mining regulations and improve relationships between proponents and traditional owners, non-indigenous communities and the environment.

Scope of the Reform

We note that the IMP is being developed to introduce clear policies on important mining issues and reduce duplication between the three key mining approvals (development approvals, mining leases and environment protection licences). The IMP does not alter environment standards or community consultation requirements. Public consultation is currently sought in relation to three documents on exhibition as part of Stage 1 of the reform process:

- Standard Secretary's Environmental Assessment Requirements
- Biodiversity Offsets for Upland Swamps
- Mine Application Guideline

SUMMARY OF RECOMMENDATIONS

NTSCORP makes the following recommendations:

1. Australia's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* must be adhered to;

2. NTSCORP submits that Traditional Owners must have a formal and independent role in the development approval process;

3. That as a "whole of government" NSW policy, native title issues and processes should be specifically addressed within the IMP and integrated into the State's policy documents, in particular:

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a. Reference should be had to the concerns and rights of Traditional Owners under the NTA including the right to negotiate;

b. The IMP should synchronise planning approval processes with the NTA future acts regime to improve efficiency, as well as ensure that proponents begin to consider native title at an early stage, rather than towards the end of the approval process;

c. The recommendations made at pages 11-12 of this submission should be considered regarding sections of the SEARs documents where native title processes should be specifically mentioned;

d. The NTA and NSW State Heritage legislation should not be exempt from the IMP and the Standard Secretary's Environmental Assessment Requirements (**SEARs**) in the Significant State Development (**SSD**) assessment process.

NTSCORP appreciates that the NSW Government is working towards a "whole of government"[1] approach to requirements for mining applications. However, NTSCORP is concerned that native title has not been sufficiently addressed in Stage 1 of the IMR. Native title is only mentioned twice in the 45 pages of documentation released for comment.

A holistic approach to mining policy is not complete unless it comprehensively addresses native title. NTSCORP strongly encourages the government to take advantage of the unique opportunity this review presents to work collaboratively and effectively with the industry sector and NTSCORP as the Native Title Representative Body for NSW to align mining and native title policy in NSW and promote the efficiency of mining development in the state.

[1] http://www.planning.nsw.gov.au/NewsCentre/LatestNews/TabId/775/ArtMID/1658/ArticleID/371/Improving-mining-regulation-in-NSW.aspx

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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);
2. The current state of native title and mining policy in NSW;
3. Future acts;
4. Collaboration between Traditional Owners and industry;
5. IMP Stafe 1: *Swamp Offset Policy*;
6. IMP Stage 1: *Mine Application Guideline*;
7. IMP Stage 1: *Secretary's Environmental Assessment Requirements*.

1. Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples

It is crucial that Australia's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* (**UNDRIP**) continue to be implemented in relation to cultural heritage values affected by development. In particular, this includes ensuring that Traditional Owners give their free prior informed consent to projects. The IMP should be a mechanism for ensuring this. The UNDRIP provides for the right of Indigenous people to practice and maintain their cultural traditions, including the maintenance of their cultural heritage (Article 11); as well as the right to practice their spiritual customs and access their cultural sites (Article 12). Accordingly, to the extent that the IMP continues to exempt the principles of international law in existing NSW State heritage legislation while not providing alternative mechanisms for Traditional Owners to protect and enforce their cultural heritage rights, NTSCORP does not support it.

The NSW State Government 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.

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2. The current state of native title, future acts and mining policy in NSW

There are nineteen current claimant applications within the State of NSW[2], with a number of others planned to be filed. Current applications cover approximately 30% of the State.

NSW has the highest number of Aboriginal People of any state or territory. To date seven determinations that native title exists in the State have been made pursuant to NTA.[3] In particular, consideration should be given to the two recent successful native title determinations in NSW, including their impact on land development applications and the proposed IMP.

The largest native title claim in the state's history was finalised in a Federal Court decision in June 2015 that saw the recognition of the Barkandji People's rights to land and waters in western NSW. NTSCORP represented the Barkandji People in their native title determination application. In handing down her judgment at Broken Hill, Jagot J observed that:

> *Timeliness, efficiency and proportionality are part and parcel of just outcomes. When justice is delayed, it is also denied. No one should be in any doubt. The winds of change are still blowing though how parties deal with native title claims. The glacial pace at which they have moved in the past is palpably unjust.*[4]

Following the successful native title claim in Barkandji Country, the Yaegl native title claim was also announced in June 2015 at an historic event at Yamba's Pilot Hill. The Yaegl People's right to use and enjoy their traditional lands and waters was recognised at a consent determination hearing convened by the Federal Court of Australia on Thursday 25 June 2015. The acceptance of the Yaegl native title claims, which encompasses a large

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[2] http://www.nntt.gov.au/searchRegApps/NativeTitleClaims/Pages/default.aspx, last accessed 13 July 2015

[3] 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

[4] *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604 (18 June 2015), [12] (Jagot J) .http://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/single/201 5/2015fca0604

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stretch of the Clarence River and its tributaries, also brought to a close the oldest legal matter that existed in the Federal Court of Australia. Justice Jagot told the crowd the drawn out nature of the process had been shameful. "*How sad, indeed how shameful it is [in] that many of the matters, the people who started the claim often become too aged or too infirm to see the matter through or passed away never having seen their labours bear fruit*," she said. "*Delays of this kind sap away any sense of justice or fairness in the process.*" [5] The integration of native title requirements into the IMP would be one step towards reducing the overall time and resources of such litigation by incorporating *consultation with Traditional Owners into the early stages of the application assessment process.*

As noted above, Traditional Owners have a strong and unique connection to their Country. They are key stakeholders in all of the development, assessment and approval processes including those covered by the IMP. Mine developments and related infrastructure will generally impact upon Traditional Owners' country and cultural heritage, yet Traditional Owners have consistently been under-represented and under-acknowledged in development assessment and approval processes in NSW. The IMP represents an opportunity to correct this.

3. Future Acts

At present, there is no integration between the future act provisions of the NTA and the NSW development planning processes. This lack of integration has not been addressed in the current draft of the IMP. NTSCORP submits that there are opportunities for better integration and referencing of future act regime requirements within the IMP.

Under the NTA, Traditional Owners who are registered native title claimants or native title holders are afforded a number of procedural rights over a 'future act'. 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.

[5] Daily Examiner Friday 27th June 2015.

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In addition to ensuring procedural compliance with the future acts regime, development approval processes must also provide an opportunity to enable future act procedures, particularly agreement-making under the right to negotiate provisions of the NTA, to be better integrated into the approval process. This alignment would lead to better streamlining and co-ordination of approvals processes.

Currently, many developers do not instigate future act procedures until most or all other approvals have been obtained. This places undue time-pressure on negotiations required to take place under the future act regime, and exacerbates the power imbalance in negotiations between native title parties and proponents. It reinforces a culture where native title is blamed for delays, rather than acknowledged as an integral issue that should be addressed early in the process through effective consultation and negotiation. This creates a negotiating atmosphere that is often unfavourable to reaching a mutually beneficial outcome and lead to delays with projects. This issue can be resolved if the development approval regime aligns with the future act regime contained in the NTA, and requires developers (especially in respect of major, high-impact development, such as mining) to commence future act processes with native title parties at an earlier stage in the development process.

The introduction of the IMP provides an opportunity to better align the planning approval process with the future acts regime contained in the NTA. The NTA provides a framework of obligations required to be met by the Government and proponents to validate acts which affect native title, known as *future acts*. These provisions are contained in Part 2, Division 3 of the NTA. One particular right under such provisions is the right for native title claimants to negotiate in *good faith* with proponents in regard to certain future acts (subdivision P of Part 2, Division 3).

At present, the procedural requirements under the NTA are often brought to the attention of successful mining applicants very late in the process. This is despite the fact that these procedural requirements often involve consultation and negotiation with native title parties.

NTSCORP believes that integrating the future act provisions of the NTA into the NSW IMP would greatly increase efficiency for all parties and strengthen the efficacy of those

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provisions. The current IMP provides an opportunity to effect these reforms, which should be taken advantage of.

4. Collaboration between Traditional Owners and industry

Traditional Owners have a strong and unique connection to their Country, and are key stakeholders in all development assessment and approval processes, including any such processes which come under the EPAA and/or the *Mining Act 1992* (NSW), and therefore should be involved in any reforms pertaining to Mining Policy including the proposed IMP. As noted above, major developments have a range of impacts on Traditional Owners' Country and cultural heritage, and the effects are often irreversible.

Effective and genuine representation in development processes is vital to maintaining, strengthening, and transmitting to future generations of Traditional Owners' their history, beliefs and traditional laws and customs. NTSCORP generally supports initiatives to increase the efficiency of development assessment and approval processes, but not where those initiatives remove or fail to contain mechanisms which promote positive environmental, heritage and social outcomes for Traditional Owners. NTSCORP notes the practical improvements that could result from the inclusion of NTA as a core part of the Secretary's Environmental Assessment Requirements (**SEARs**) and would be happy to meet with the Department to further discuss effective inclusion of the NTA in the IMP.

5. IMP Stage 1: Swamp Offset Policy

NTSCORP strongly believes that the aim of environmental assessment and approval processes must be the promotion of ecologically sustainable outcomes. Whilst these processes must provide for timely assessment of impacts of proposed development, and provide a pathway for that development to proceed, they should not be a way of giving a 'green light' for development to proceed regardless of the consequences. In this regard, NTSCORP refers to the definition of ecologically sustainable development in the National Strategy for Ecologically Sustainable Development (1992), which is '*using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased*'.

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NTSCORP is concerned that the IMP Swamp Offset Policy does not consider the impacts on Aboriginal cultural or historic heritage, nor environmental values such as hydrology, flooding, water quality, air quality, land and soils.

Swamps are an important part of State ecosystems and hold cultural significance for many Aboriginal People. Waterways and their flora and fauna are inextricably linked to Traditional Owners' native title rights and interests.

As noted, Article 25 of the UNDRIP provides that Indigenous people have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, *waters* and *coastal seas*. Additionally, Aboriginal rights to subside, secure and enjoy their own means of subsistence pursuant to Article 20 are inextricably linked with their rights to hunt and fish in local waterways including swamps.

Consequently, the IMP Swamp Offset Policy should be examined further to consider how its 'avoid, mitigate, offset hierarchy' principles will be applied to Aboriginal cultural heritage.

NSW is the only State that does not have a universal Aboriginal cultural heritage law. It is critical that the Swamp offset Policy, as part of a whole of government IMP initiative, addresses concerns directly relating to the impact of remedial measures taken to protect the waters resource that are critical to Indigenous culture and heritage.

NTSCORP questions whether the framing of the proposed IMP, focussed as it is on 'improved efficiency', is appropriate. Rather the IMP should look at whether current environmental assessment and approval processes are achieving sustainable outcomes. Particularly, NTSCORP believes the IMP must consider whether these processes are achieving sustainable outcomes for Traditional Owners. This includes consideration of impacts on Aboriginal culture and heritage, which are, by the nature of cultural and heritage values, irreversible.

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6. Mine Application Guideline

Aboriginal cultural heritage identification, consultation and representation should be clearly specified as essential criteria to be addressed throughout the Preliminary Environmental Assessment (**PEA**) documentation in addition to the Environmental Impact Statement (**EIS**) to provide greater direction for proponents ahead of consultation with Traditional Owners. At present, the Mine Application Guideline (**the Guidelines**) is limited to general references and specify that proponents engage in consultation with key stakeholders, regulators and the community, with no specific reference to Aboriginal cultural heritage considerations or rights. In addition, specific reference should be made to consultation with native title parties, where appropriate within the documents.

NTSCORP believes that the Guidelines should ensure compliance with the NTA, in particular the future act regime under the NTA. In addition as the representative body for NSW, NTSCORP should be contacted at the time an application is received to assist in informing affected Traditional Owners of the proposed project and ensure that they are involved in decision-making processes from the beginning and at each stage of the development assessment process. NTSCORP would be happy to discuss practical ways in which informed decision making can be ensured.

7. Standard Secretary's Environmental Assessment Requirements (SEARs)

References to native title requirements

NTSCORP recommends that the following additions be incorporated to the SEARs documentation:

a. In the template Secretary's Environmental Assessment Requirements at page 3, a box be included for inserting the details of the "Native Title Group". This would result in SEARs Applications recognising and raising the consideration and acknowledgement of Traditional Owners in the mining area.

b. In the "General Requirements" at page 3, the second dot-point states 'The EIS for the Development must:

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- Be informed by stakeholder consultation, including with relevant local, State and Commonwealth Government authorities, infrastructure and service providers, community groups and affected landowners, as well as the local community."

c. The words "traditional owners" be added to the list of stakeholders to be consulted. It is important that the NSW Government acknowledges Traditional owners as a key stakeholder and identifiable "community group", holding powerful international and Commonwealth native title rights.

d. It is further recommended that "Native Title Group" be added to Schedule 2 of the *Environmental Planning and Assessment Regulation 2000* (NSW).

e. At the top of page 4, the NTA should be specifically acknowledged along with the other legislation. Its omission is currently a significant oversight.

f. In "Describing the measures that would be implemented to mitigate and/or offset the likely impacts of the development", (the second dot-point on page 4), a further measure that should be included is for the applicant to undertake an assessment of the impact of the development on native title rights and interests. This would be done by contacting the Registrar of the National Native Title Tribunal to ascertain whether the area of the proposed mine is covered by an existing determination of native title or registered native title application, as well as by contacting NTSCORP to discuss how the applicant can ensure at an early stage that it meets obligations under the future act regime of the NTA.

g. Under the heading "Regional context" at page 4, reference should be made to consideration of Traditional Owners as part of this consideration.

h. We note that under "Other approval requirements" at page 4, reference is made to compliance with the NTA where Crown land is involved. NTSCORP submits that reference should also be made to compliance with broader cultural heritage requirements.

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i. Footnote 5 at page 7 of the draft SEARs provides reference to various State Government policies regarding land issues. Reference should be made to the State's native title policy and the future act requirements under the NTA.

NTSCORP submits, therefore, that to ensure it meets its obligations under the UNDRIP and other international instruments, and to achieve best practice in development assessment, the NSW Government should contact NTSCORP with all applications so that the Traditional Owners of the mining location may assess the impacts of development upon cultural heritage and to better integrate consultation with Traditional Owners on native title and cultural heritage into the mining application approval processes.

Documentation requirements

In the sections titled: "Rehabilitation"; "Land and Soils"; and "Water" are all based on the EIS with no standard form and only the "relevant" plans, architectural drawings, diagrams and relevant documentation to be provided as required under Schedule 1 of the *Environmental Planning and Assessment Regulation 2000* (NSW). This leaves too much room for omission. Schedule 1 does not specifically address requirements under the NTA or Aboriginal cultural heritage issues. Section K states that land within a wilderness area that is the subject of a wilderness protection agreement or conservation agreement only requires a copy of the consent of a Minister for the Environment to carry out the development. The critical issue of caring for country is thereby left in the hands of an elected individual at any given time. This leaves little protection in a fundamental ongoing way for Traditional Owners and their ongoing significant connection to the land, regardless of who is in government at the time.

Rehabilitation

Aboriginal People in NSW know only too well the results of incorrectly considered Rehabilitation objectives, domains and methodologies. The Western Bundjalung People living in Barygulgil in northern NSW are still affected today from asbestos related diseases due to the incorrect rehabilitation practices adopted by the Asbestos Mines Pty Ltd, a former subsidiary of the James Hardie Group.[6] This is just one example of where the power

[6] Moerman, Lee, The Baryulgil Mine: Asbestos & Aboriginality, University of Wollongong, 2010.

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of mining companies at the conclusion of the mining activities fails to maintain the IMP objective of minimising potential impact on local communities and local Aboriginal communities. Indeed performance indicators can be no worse than the significant deaths within a community.

Reference is made within the draft SEARs to ecological land use and the requirement of a mining applicant to indicate a revegetation strategy. This is an excellent example of how early consultation with Traditional Owners could result in innovative and beneficial long-lasting results being left behind by a mining project. Traditional Owners of the area know the native plants, seed mixes and habitat features of the region. Exemplary projects, employment and ongoing economic benefits could be created between mining companies and Aboriginal communities at the mining location.

Water

No reference is made within the draft SEARs to the requirements under the NTA for the granting of water resources. The NTA allows legislation in relation to the management or regulation of water, living aquatic resources and airspace,[7] and the grant of leases, licenses, permits or authorities pursuant to such legislation[8]. The non-extinguishment principle applies to all such future acts[9] and compensation is payable to native title holders[10] Before any lease, licence, permit or authority , or a class of such interests, is granted, native title parties must be notified and given an opportunity to comment.[11] At footnote 6 of the draft SEARs, reference is made to 25 State policies that should be considered when addressing water issues. NTSCORP recommends that reference also be made to the NTA.

Heritage

NTSCORP believes the current legislative scheme in NSW provides ashamedly inadequate protection and recognition of the cultural values within Traditional Owners' Country across the State. We have discussed this in length in previous submissions to the NSW State Government during the course of the ongoing reform of the State cultural heritage regime. We summarise these failings as follows:

[7] Native Title Act (Cth) 1993. S.24 HA(1),
[8] Native Title Act (Cth) 1993, s.24HA(2)
[9] Ibid s.24HA(4)
[10] Ibid s24HA(5)
[11] Ibid s.24HA(7)

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- Failure to acknowledge Traditional Owners as the rightful owners of their cultural heritage;
- Failure to strike an appropriate balance between giving Traditional Owners control of their cultural heritage and the advancement of social justice for Aboriginal people against the need to develop Country for the advancement of non-Aboriginal people;
- Failure to recognise cultural properties and the relationship of Traditional Owners to their Country;
- Limitation of involvement of Traditional Owners to consultation under poorly – defined guideline in the assessment process, rather than an active decision making role; and
- Failure to establish land management processes which recognise the cultural rights and responsibilities of Traditional Owners in a clear, transparent and accountable manner.

NTSCORP notes the reality of the *National Parks and Wildlife Act 1974* (NSW) is that the legislation and associated guidelines act as a mechanism for securing approval for the destruction of Aboriginal heritage and sites. Section 90(2) allows Aboriginal Heritage Permits (**AHIP's**) to be issued subject to conditions or *unconditionally.* There are a number of issues with the legislation, some of which include:

a. The effectiveness and efficiency of the Aboriginal Advisory Committee required under Section 27, which constitutes a hierarchical system of decision making that goes against traditional tribal systems of elder decision making.
b. The broad defences available to an offender of an AHIP at 90J(a-c), including that the offender took "reasonable steps to prevent the contravention". This does not support the overall objects of the Act.
c. AHIP's currently sit outside of primary development processes, with the IMP current draft policy being just one example. This has the effect of making considerations on the applicability of AHIPs or any adherence to the NPW Act or the Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010(OEH) discretionary decisions.

NTSCORP submits that by referencing native title throughout the SEARs, a more holistic system for considering Aboriginal cultural heritage will be attained, rather than the consideration of Aboriginal heritage value being given cursory attention. NTSCORP has

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the contact details for Native Title Claim Groups, as well as the knowledge and experience to make this process simple for mining applicants with the potential for benefits to the entire community that can result from early consultation.

CONCLUSION

Whilst NTSCORP supports the stated aim of streamlining government processes and policy around the assessment, determination and regulation of State mining activity, we have concerns about the lack of integration of the future act requirements under the NTA within the IMP process.

We recommend that the draft documents be updated to reference Traditional Owners native title and cultural heritage rights, particularly in places indicated in this submission. It cannot be left to mine applicants to have a discretion in their assessment of either NTA rights or their adherence to the UNDRIP. The NTA must be listed when legislation is listed throughout the three documents, as the requirements under the future act regime are an essential part of the land management regime within NSW.

We look forward to being notified of the outcome of the review and working with your Department in the future including providing further submissions on Stage 2 of the IMP. If we can be of assistance, or if you require any further information, please do not hesitate to contact Hema Hariharan, Manager Strategic Development, on (02) 9310 3188 or hhariharan@ntscorp.com.au.

Yours sincerely,

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Natalie Rotumah
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