

11 July 2016

Director Regions Western
Department of Planning and Environment
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To whom it may concern,

Submission: Draft Central West and Orana Regional Plan

We thank you for the opportunity to provide submissions in relation to the Draft Central West and Orana Regional Plan (**Draft Plan**).

BACKGROUND

NTSCORP Limited (**NTSCORP**) has statutory obligations under the *Native Title Act 1993* (Cth) (**NTA**) to protect the native title rights and interests of Traditional Owners in New South Wales (**NSW**) and the Australian Capital Territory (**ACT**).

NTSCORP is funded under Section 203FE of the NTA to carry out the functions of a native title representative body in NSW and the ACT. NTSCORP provides services to Aboriginal Traditional Owners who hold or may hold native title rights and interests in NSW and the ACT, specifically to assist them to exercise their rights under the NTA. In summary, NTSCORP's functions and powers under sections 203B to 203BK of the NTA (inclusive) are:

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

NTSCORP acts on behalf of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People, the native title applicants in relation to the Native Title Determination Application NC2012/001 (Federal Court Proceedings NSD415/2012) (**the Native Title Claim**). We note the Native Title Claim falls partially within the Central West and Orana region.

This submission is based on our experience working with the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People in seeking best practice assessment and mitigation of impacts of planning and major projects on native title rights and interests, including cultural heritage.

The preparation of a 20 year plan for the long-term management of the Central West and Orana region is a welcome initiative to establish clear goals and policy frameworks to manage development across all levels of government. However, it is disappointing that there is no mention of native title itself or the recognition of the Traditional Owners in the region. It is NTSCORP's view that native title must feature as an active component of the Draft Plan, especially in light of recent changes to the native title landscape in NSW.

Native title affords opportunities for sustainability and capacity building of NSW Aboriginal communities, particularly through the interaction between Traditional Owners, councils, local businesses and industry. The NTA facilitates the creation of partnerships and agreements between Traditional Owners and proponents, which assists in leveraging economic development support and economic sustainability for Aboriginal communities. Collaboration under the auspices of native title would promote positive outcomes for all stakeholders in the Central West and Orana region. Moreover, it is critical that Traditional Owners including the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People are engaged in meaningful discussions and cooperation in the management of their traditional country and waters.

We encourage the Department of Planning and Environment and local councils of the Central West and Orana region to seize the opportunity presented by the creation of this plan to engage in good faith to build positive relationships with Traditional Owner including the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People in the region and secure cooperation on building, planning and environmental issues for the next two decades and beyond.

Scope of the Consultation

We understand that public comment is sought in relation to the Draft Plan. The Draft Plan identifies four goals:

1. A growing and diverse regional economy;
2. A region with strong freight transport and utility infrastructure networks that support economic growth;
3. A region that protects and enhances its productive agricultural land, natural resources and environmental assets; and
4. Strong communities and liveable places that cater for the region's changing population.

We note that one of the mechanisms for implementation of the Draft Plan is '*whole of government policy alignment*', as identified on page 16. To that end, we note that the preparation of the Draft Plan coincides with the NSW Legislative Council Inquiry into Economic Development in Aboriginal communities, with the committee due to report on 30 September 2016. We also note that the Baird Government is yet to release its Aboriginal Economic Development Framework policy.

The Draft Plan provides an unique opportunity to learn from community input provided to the Inquiry and actively put this into practice.

It is important that there is harmony and consistency between the findings and implementation of the Inquiry, the Framework policy and this Draft Plan on the Central West and Orana region.

Additionally, we understand that an interagency taskforce within the NSW Government is currently considering the issue of native title more broadly. The development of the Draft Plan therefore offers a valuable opportunity to collaborate with this taskforce in order to improve outcomes and strategies for the Central West and Orana communities and promote better engagement with Traditional Owners. The Coordination and Monitoring Committee as referred to in the Draft Plan should at the very least consult with this taskforce in relation to matters affecting Native Title.

SUMMARY OF RECOMMENDATIONS

NTSCORP makes the following recommendations:

1. Australia's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) must be adhered to;
2. A State Government 20 year plan for the Central West and Orana region must recognise and respect Traditional Owners as principal stakeholders to be consulted in relation to agriculture, planning, resource extraction, environment and heritage and infrastructure development projects occurring on their traditional country;
3. A fifth goal should be added to the Draft Plan that is dedicated to 'Recognition of and Engagement with the Aboriginal Community' to recognise and involve Traditional Owners across all aspects of the Draft Plan and ensure proponents' compliance with statutory obligations under the *NTA* ;
4. The Draft Plan must be harmonised and synchronised with the findings and implementation of the ongoing NSW Legislative Council Inquiry into *Economic Development in Aboriginal Communities* and the NSW Government's *Aboriginal Economic Development Framework* to promote consistency;

5. The Draft Plan must acknowledge and cater for the statutory obligations that currently exist for proponents under the NTA Future Acts Regime contained in Part 2 Division 3;
6. The NSW Government must implement a standalone statutory regime for Aboriginal cultural heritage protection, as referenced in the Draft Plan on page 79;
7. The use of appropriately qualified representation of Traditional Owners' rights and interests on the Coordination and Monitoring Committee is crucial in identifying and exploring economic and social development opportunities in the Central West and Orana region; and
8. The role of native title must be identified and actively considered as a significant factor shaping management of the Central West and Orana region over the next 20 years.

INTRODUCTION

NTSCORP supports the development of a 20 year plan for the Central West and Orana region and looks forward to working with the State and Local Governments to draft and implement the plan. The Draft Plan covers a wide variety of key issues and sectors with significant ramifications for Traditional Owners, including agriculture, mining, coal seam gas, infrastructure development and cultural heritage values.

A holistic vision for a sustainable future for the Central West and Orana region is not complete without recognition and engagement with native title. Native title is a crucial pillar that has been underestimated and under-utilised in supporting social and economic development and cohesion in Aboriginal communities in NSW to date.

NSW has the highest number of Aboriginal People of any state or territory. Opportunities currently exist in NSW to develop new partnerships between the

Government, industry sectors, local communities and Traditional Owners including the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People to promote and advance not only the economic sustainability of Aboriginal communities but better environment, planning and heritage outcomes for the broader community.

Traditional Owners in New South Wales have a strong connection to their land and waterways. Consequently, Aboriginal People and Traditional Owners are important stakeholders in any discussion about the future of the Central West and Orana region. Unfortunately, Traditional Owners have consistently been unrepresented and under-acknowledged in environmental and planning development assessment, policy management and approval processes in New South Wales. This situation has been exacerbated by a lack of policy direction and government leadership to address these issues. 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. This in turn yields undeniable benefits for the Central West and Orana communities.

Accordingly, we address the following issues in our submissions:

1. Australia's international obligations under the UNDRIP;
2. Traditional Owners in the Central West and Orana region;
3. Future Acts;
4. The need for a fifth goal focused on Engagement with Aboriginal Communities; and
5. Aboriginal Cultural Heritage

1. Australia's International Obligations

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

- *UNDRIP* Articles 14, 19, 20, 25, 26 and 32
- *United Nations Convention on Biological Diversity* Article 8(j); and
- *International Covenant on Civil and Political Rights* Articles 1.2 and 27.

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

The corollary of this is that proponents seeking to develop on Aboriginal land must actively and appropriately include Traditional Owners and Aboriginal communities in their consultation. It is imperative that proponents undertake the groundwork to build relationships, participate in meaningful negotiation, 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 through Native Title Service Providers namely NSTCORP, as required.

In addition to this, we note that Article 32 outlines '*Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*'

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 other resources....'*

NTSCORP considers it is imperative that any policy and management change including the Draft Plan upholds and complies with Australia's international obligations under these instruments.

Recognising and committing to upholding the UNDRIP throughout the implementation of environmental, planning and industry 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.

Australia is a signatory to *Convention on Biological Diversity*. Similar importance is placed on these rights in the *Convention on Biological Diversity*, which states at Article 8(j) that:

Each contracting Party shall, as far as possible and as appropriate:

...subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and

local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices

The *Convention on Biological Diversity Akwé: Kon guidelines* elaborates on Article 8(j) and provides clarification to support parties and governments in determining whether proposed developments that take place on, or are likely to impact on, sacred sites, lands and waters traditionally used by Indigenous communities.

The NSW Department of Planning and Environment should likewise demonstrate its sincerity in engaging Aboriginal communities and Traditional Owners by pledging to uphold the UNDRIP and Australia's international obligations in the future management of the Central West and Orana region. This is especially important, given the plan's emphasis on long-term planning to support conservation of the natural environment and biodiversity strategies.

The establishment of a fifth goal of obtaining free prior informed consent to address and specifically promote good faith engagement with Aboriginal communities across all areas of the plan would be an important step to fostering positive working relationships with Traditional Owners of the Central West and Orana region.

We welcome the adoption of a precautionary approach in relation to development in areas of high environmental value and biodiversity, as outlined on page 10 of the Draft Plan. However, we believe this precautionary approach should be extended to encompass Aboriginal cultural heritage and native title to ensure neither is disturbed until appropriate consultation is undertaken and statutory obligations complied with.

2. Traditional Owners in the Central West and Orana Region

As outlined, NTSCORP acts on behalf of the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People, the native title applicants in relation to the Native Title Claim within the Central West and Orana region. We are concerned that the mechanisms proposed in the Draft Plan currently do not recognise the specific concerns of Traditional Owners.

We note that the Draft Plan provides for consultations with Local Aboriginal Land Councils, which is an important and welcome initiative. It is important though to understand that Aboriginal Land Councils do not represent native title holders and their native title interests and accordingly are separate stakeholders. Both Land Councils and Traditional Owners provide important perspectives that must be acknowledged and consulted in the Draft Plan. Currently, the Draft Plan does not make mention native title, or its implications or the Ngemba, Ngiyampaa, Wangaaypuwan and Wayilwan People. It is crucial that this oversight be remedied.

Native title is more important and more relevant to policy makers in NSW than ever before. The largest Native Title Claim in state history was finalised in June 2015, securing the Barkandji people's traditional rights to land in western NSW. NTSCORP represented the Barkandji people in their Native Title Claim. In handing down her judgment at Broken Hill, Jagot J observed that:

No one should be in any doubt. The winds of change are still blowing through how parties deal with native title claims. The glacial pace at which they have moved in the past is palpably unjust.¹

¹ *Barkandji Traditional Owners #8 v Attorney-General of NSW* [2015] FCA 604 (18 June 2015), [12] (Jagot J).

To date only seven determinations that native title exists in the State have been made pursuant to 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.

Five 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 with 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* reporting there are a further estimated 265 applications yet to be lodged in Australia.²

We encourage ongoing, meaningful consultation and engagement between proponents, governments, councils and Traditional Owners, even in areas where native title has been extinguished. 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, proposed policy changes may constitute un-notified future acts and would be invalid for the purposes of the NTA, leaving the State of NSW liable for compensation.

The term “Native title rights and interests” is defined by Section 223 of the NTA to mean the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

² Deloitte Access Economics, *Review of the Roles and Functions of Native title Organisations – Discussion Paper*, June 2013
<https://www.deloitteaccess economics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf>

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognisable by the common law of Australia.

We stress that a 20 year plan must acknowledge the fact that there is currently a native title determination application on foot that creates statutory obligations for proponents under the Future Acts Regime of the NTA. We note several proposals contained within the Draft Plan may have a direct impact on the area of the Native Title Claim determinations. Moreover, as a long-term blueprint for development, the Draft Plan must recognise and respond to the possibility of future Native Title Claims and determinations within the Central West and Orana region.

Moreover, we support in principle Direction 4.2 to enhance the economic self-determination of Aboriginal communities in the region. We believe that native title has the potential to play a significant role in realising this outcome. Accordingly, in addition to consulting with Local Aboriginal Land Councils, we encourage the NSW Government to work directly with the Traditional Owners and Native Title Representative Bodies including NTSCORP to engage with Aboriginal communities and maximise the potential for native title to benefit the whole community.

3. Future Acts

Much of the planning, construction and development work envisaged by the Draft Plan may constitute a 'future act' triggering obligations under the NTA, including the granting of mining or petroleum exploration licences, energy resource extraction and infrastructure development.

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. Once a Native Title Claim is accepted for registration by the National Native Title Tribunal, the claim group has

certain 'procedural rights' in respect to future acts proposed within the claim area where native title has not been previously extinguished.

The types of procedural rights that a 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 or the right to object. 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, pursuant to subdivision P of Part 2 Division 3.

Forward planning should be undertaken as part of this assessment process to ensure that the new Plan for Central West and Orana region accommodates the Traditional Owners' existing procedural rights with their Native Title Claim and respond to native title determinations or future claims, in the event they do arise in future.

4. Inclusion of a fifth goal to promote consultation

Regardless of the status of Native Title Claims, Aboriginal communities in many areas are widely recognised as the Traditional Owners. Reaching out to establish connections with these Aboriginal communities in the Central West and Orana region and providing updates on projects will help to build positive relationships going forward, even where there is no statutory compulsion. This would assist in establishing the trust and a strong groundwork to establish stronger regional communities.

Such a guideline would be consistent with the Australian Government's *Ask First – A guide to respecting Indigenous heritage places and values* guideline, which includes an action to "*identify Indigenous people who may not necessarily be Traditional Owners but who have interests in an area so that any effects of the project or activity on the Indigenous heritage values of places such as mission stations and historic*

buildings will be identified".³ This would also be appropriate in an exploration space and foster positive relationships and goodwill between proponents and communities.

The Draft Plan must reiterate the importance of engaging in good faith. This policy provides a roadmap for engagement. The effectiveness of collaboration depends upon the spirit in which proponents and stakeholders approach negotiation and consultation. The principle of good faith is instructive and provides guidance where aspects of the statute are discretionary or less certain.

Engagement with Traditional Owners

Engagement with Native title claimants, Traditional Owners and Aboriginal communities must occur in a manner that is culturally sensitive and appropriate.

Advertising for public comment on development proposals or plans on a purely electronic platform is not an effective manner of engaging Traditional Owners. There must be meaningful and considered outreach into communities. While consulting with the Local Aboriginal Land Councils is undoubtedly important, that is not sufficient. The representative bodies of communities with pending Native Title Claims must also be consulted and actively engaged, especially in light of the Future Acts Regime.

Policies such as the Draft Plan cannot be developed in a vacuum. It is crucial that the Plan draw upon and replicate indigenous engagement strategies that exist in other areas of planning and environmental management to improve consultation and set benchmark standards for the method and manner of engagement required. This demonstrates the importance of the Department of Aboriginal Affairs and the native title policy taskforce being involved in advising and instructing the implementation committee on best practice approaches to these matters.

The Draft Plan should provide clarification as to appropriate methods for proponents to consult with native title claimants, recognising traditional barriers to public

³ Page 8, <http://www.environment.gov.au/system/files/resources/4aff65c-00dd-4001-878b-a28d8831293a/files/ask-first.pdf>

participation and catering accordingly to overcome these. Avenues of engagement could use as a starting model the AIATSIS *Guidelines for Best Practice Flexible and Sustainable Agreement Making* which recommends that:⁴

Government parties should take the time to develop awareness of the most appropriate and effective ways to communicate with the Indigenous parties involved. This includes creating an atmosphere in which Indigenous parties feel comfortable discussing their concerns. It also includes observing cultural rules regarding who can discuss certain cultural matters and may even include awareness of different understandings of the meaning of terms: Guideline 41.

Online announcements or forums cannot constitute good faith consultation for several reasons. First, from a practical perspective, many stakeholders including Traditional Owners live in remote areas where internet access is irregular or unreliable. Secondly, the type of organic, culturally-sensitive dialogue envisaged by the AIATSIS Guidelines cannot be achieved through one-way electronic communications or self-contained submissions.

In our experience, face to face consultation is the best vehicle to guarantee the provision of input that is meaningful, constructive and timely for proponents. Personal dialogue is much more powerful in fostering positive relationships between Traditional Owners and proponents than impersonal written communications undertaken remotely. This goes to the issue of good faith engagement in the intendment of the NTA and *Constitution Act 1902 (NSW)*.

Therefore, the inclusion of a fifth goal that specifically addresses indigenous engagement in the Central West and Orana region would promote better outcomes building relationships for co-management between decision makers and stakeholders with greater longevity.

⁴ AIATSIS Joint Working Group on Indigenous Land Settlements, 2009
<http://aiatsis.gov.au/sites/default/files/products/handbook_research_outputs/2009-ntru-best-practice-guidelines-agreements.pdf>

5. Aboriginal Cultural Heritage

It is encouraging that the Draft Plan acknowledges the Central West and Orana region's rich Aboriginal cultural heritage, including nine Aboriginal places that are protected under the *National Parks and Wildlife Act 1974* (NSW). We agree that NSW needs to significantly improve the manner in which Aboriginal cultural heritage concerns are considered and managed in planning. The Draft Plan refers on page 79 to the NSW Government's consultation in 2013 concerning a model for standalone Aboriginal cultural heritage legislation.

Almost three years later, there has been no progress on this front. The state of NSW's Aboriginal cultural heritage law is reprehensible. NSW is the only state without a state Aboriginal cultural heritage act. NTSCORP and the NSW Aboriginal Land Council (NSWALC) have repeatedly made submissions to NSW governments over many years calling for an end to the insensitive and distasteful practice of including Aboriginal culture and heritage management in NSW legislation concerned with the protection of fauna and flora.

NTSCORP calls on the NSW Government to ensure that Aboriginal interests are appropriately represented. The Central West and Orana region is home to important Aboriginal heritage sites which remain an integral part of the identity and culture of Aboriginal communities today. Adequate protection of Aboriginal cultural heritage must be secured by the Central West and Orana Regional Plan. We welcome increased collaboration and cooperation between local councils, the State Government and Aboriginal communities and Traditional Owners to this end.

CONCLUSION

Thank you again for the opportunity to provide submissions on the Department of Planning and Environment's Draft Plan for the Central West and Orana region. We trust our feedback will be meaningfully incorporated and look forward to contributing and collaborating with you in future.

If you require any further clarification or further information, please do not hesitate to contact me on (02) 9310 3188 or at hhariharan@ntscorp.com.au.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Hema Hariharan".

Hema Hariharan
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