



11 February 2016

NSW Department of Planning & Environment
GPO Box 39
Sydney NSW 2001

Via Web Submission

To whom it may concern,

**GINKGO MINERAL SANDS MINE MODIFICATION ENVIRONMENTAL
ASSESSMENT – SUBMISSION IN RELATION TO ABORIGINAL
CULTURAL HERITAGE ASSESSMENT**

Thank you for the opportunity to provide comments in relation to the Environmental Assessment for the Ginkgo Mineral Sands Mine Modification. The following submission is in respect of the Aboriginal Cultural Heritage Assessment (**ACHA**) included as Appendix G of the Environmental Assessment.

NTSCORP Limited (**NTSCORP**) acts for the Barkandji native title holders and the Barkandji Native Title Group Aboriginal Corporation (**BNTGAC**), which holds and manages native title on trust for the native title holders.

Background

NTSCORP has statutory responsibilities 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 Peoples who hold or may hold native title rights 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.

Our submission is based on our experience working with Traditional Owners of lands and waters within NSW and the ACT in seeking best practice standards for community consultation and agreement making between Traditional Owners, government and proponents.

The site of the proposed mine Modification is within Barkandji Country and is included within the external boundary of the successful Barkandji Traditional Owners Native Title Determination (NSD 6084/1998) made by the Federal Court of Australia on 16 June 2015.

BNTGAC is the Registered Native Title Body Corporate for the Barkandji Native Title Determination and holds native title rights and interests on trust for the benefit of the native title holders. These rights and interests include those relating to cultural heritage and conservation, for example the right to engage in cultural activities on the land, to conduct ceremonies and participate in cultural practices, the right to have access to, to maintain and to protect from physical harm sites and places which are of significance to the Barkandji and Malyangapa People under their traditional laws and custom and the right to teach on the physical, cultural and spiritual attributes of places and areas of importance.

Although the site of the proposed mine modification falls on land over which native title has been extinguished by underlying tenure, the Federal Court's Determination has recognised the Barkandji as the Traditional Owners for the country.

Under the Office of Environment and Heritage's guidelines, *Aboriginal Cultural Heritage Consultation Requirements for Proponents 2010 (Consultation Guidelines)*, the appropriate people to consult in relation to Aboriginal cultural heritage are primarily the Traditional Owners or custodians of the land subject to the proposed project.¹ As such, NTSCORP submits that BNTGAC, representing the interests of Barkandji Traditional Owners, should be given primacy in future consultation processes with respect to this project.

NTSCORP, as the legal representative for BNTGAC, was given the opportunity to comment on a draft of the ACHA. A submission was made by NTSCORP to Cristal Mining on 11 January 2016. A copy of this has been attached to the final ACHA and the submissions are considered at Appendix 6 of the ACHA.

¹ See Guideline 4.1.2(d)(e).

Submissions in relation to the ACHA recommendations

Management Strategies for Cultural Heritage - General Recommendations

The ACHA report recommends at section 11.2 on page 31 that ongoing consultation occur 'with the Aboriginal community throughout the life of the Modification.' BNTGAC and NTSCORP support the principle of ongoing consultation throughout the life of the Modification. However we submit that there should be greater clarity as to the 'Aboriginal community' which is to be consulted. We note that in the earlier sections of the Report, the term 'Aboriginal community' is used in a broad sense to refer to all of the Registered Aboriginal Parties, including third parties without traditional or historical connection to Barkandji Country.

As noted in NTSCORP's letters to Cristal Mining dated 29 October 2015 and 11 January 2016, a number of the Registered Aboriginal Parties do not purport to be Traditional Owners and do not have traditional knowledge of Barkandji Country.

This concern has been considered at Appendix 6 of the final report as follows:

Cristal Mining is required to comply with the requirements of the OEH policy Aboriginal cultural heritage consultation requirements for proponents 2010. In accordance with this policy, Cristal Mining is required to consult with all RAPs.

NTSCORP and BNTGAC appreciate and respect the need for proponents to adhere to the Consultation Guidelines. However, we wish to raise concerns about the practical operation of the current Consultation Guidelines and unintended consequences that may arise, particularly given the project falls well within the boundaries of the Barkandji Traditional Owners determination of native title.

Speaking for country

Sometimes it may be difficult to identify who has authority to speak for country in matters concerning aboriginal cultural heritage, as recognised by the Minister for Environment and Heritage, Mark Speakman MP.²

² General Purpose Standing Committee No. 5, note 10, p22 cited in L. Roth, *Aboriginal cultural heritage protection: proposed reforms*, NSW Parliamentary Service, November 2015, last accessed online 11 February 2016, <<http://www.parliament.nsw.gov.au/Prod/parlment/publications.nsf/0/55B510E57758>

NTSCORP and BNTGAC appreciate that the Department's current Consultation Guidelines note the valuable cultural information that Aboriginal people with historical ties to an area may provide in circumstances where native title has been extinguished. The directors of BNTGAC have, however, expressed significant concerns over third parties who are not Traditional Owners for Barkandji Country and have no historical ties to Barkandji Country registering as Registered Aboriginal Parties. This is of particular concern since the proposed project falls undisputedly within Barkandji Traditional Country.

The Department's Consultation Guidelines acknowledge that:³

Aboriginal people who can provide the information outlined ... above are, based on Aboriginal lore and custom, the traditional owners or custodians of the land that is the subject of the proposed project. Traditional owners or custodians with appropriate cultural heritage knowledge to inform decision making who seek to register their interest as an Aboriginal party are those people who:

- *continue to maintain a deep respect for their ancestral belief system, traditional lore and custom*
- *recognise their responsibilities and obligations to protect and conserve their culture and heritage and care for their traditional lands or Country*
- *have the trust of their community, knowledge and understanding of their culture, and permission to speak about it.*

In some cases, the information required for decision making will be held by Aboriginal people with statutory recognition for certain lands:

- *Aboriginal owners in accordance with the NSW ALR Act and/or*
- *Native title holders or registered native title claimants in accordance with the Native Title Act 1993 (Cth) and NSW Native Title Act 1994.*

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³NSW Department of Environment, Climate Change and Water, 'Who can provide this information', *Aboriginal cultural heritage consultation requirements for proponents 2010*, 8

As the native title holders, BNTGAC has statutory recognition as an appropriate body to speak for Barkandji country with the requisite trust of their community, knowledge and understanding of culture and permission to speak and consult with proponents.

Consultation should not be confused with employment

Moreover, even where it is accepted that all parties who register as Registered Aboriginal Parties should continue to be included as part of ongoing consultation with the 'Aboriginal community', NTSCORP submits that it is not necessary for such consultation to extend to the engagement of such third parties on cultural heritage monitoring. The *Consultation Guidelines* state at section 3.4:

The consultation process ... is not to be confused with other field assessment processes involved in preparing a proposal and an application. Consultation does not include the employment of Aboriginal people to assist in field assessment and/or site monitoring.

...The proponent may reimburse Aboriginal people for any demonstrated reasonable out-of-pocket expenses directly incurred in order to participate in the consultation process. A demonstrated reasonable expense would include documented loss of wages caused by the need to take time from paid employment to participate in meetings.

The proponent is not obliged to employ those Aboriginal people registered for consultation. Consultation as per these requirements will continue irrespective of potential or actual employment opportunities for Aboriginal people.

NTSCORP submits that while further consultation with all Registered Aboriginal Parties may continue in line with the Consultation Guidelines, consultation requirements with parties who do not possess traditional or historic ties to the country can be satisfied without the need to involve such parties in heritage monitoring.

This is of particular concern to the directors of BNTGAC, who believe site monitoring should be conducted by Traditional Owners or persons with historical connection who have cultural knowledge of the country on which the project will be conducted.

We therefore request that the following conditions be placed on the project's approval:

1. That consultation be primarily with the Traditional Owners of the land, namely the Barkandji Traditional Owners, whose native title is managed and held on trust by BNTGAC, and those Registered Aboriginal Parties with historical connection to Barkandji Country, including the Dareton Local Aboriginal Land Council; and
2. That the proponent, in undertaking any further site monitoring, involve only those registered parties with Traditional or historical connection to Barkandji Country.

We also wish to acknowledge the level of flexibility that Cristal Mining has taken in its approach to the cultural heritage monitoring process and the involvement of members of BNTGAC, for which Cristal Mining is to be commended.

We welcome the opportunity to continue this important dialogue in the same spirit of collaboration and cooperation throughout the life of the project.

Management Strategies for Cultural Heritage - Summary Recommendations

The second dot-point under the ACHA's Summary Recommendations on page 32 makes a recommendation for processes that will apply in the event that human skeletal remains are found during the course of the Modification. Reference is made to the need for strategies to be developed 'with the involvement of the local Aboriginal community.' Whilst this is supported, we submit that where such remains are found, cultural heritage monitors must be called upon to be present. This submission has been addressed at Appendix 6 of the RACHA as follows:

Comments received regarding the involvement of cultural heritage monitors in the event that skeletal remains are identified:

As described in Section 11.3, it is recommended that in the unlikely event that an Aboriginal burial is encountered within the Modification area, strategies for the management of the site would be developed in consultation with the local Aboriginal community (including all RAPs) and OEH.

Whilst this is generally supported, BNTGAC requests that a condition be placed on the project approval that, in the event an Aboriginal burial is

encountered, work stop immediately, the area be secured and site monitors be called to be present. We understand that this is in line with OEH policy but for certainty we request that the condition be clearly and explicitly stated.

There is reference in this recommendation to the involvement of all Registered Aboriginal Parties where a burial is encountered. Our comments made above in relation to primary consultation with Traditional Owners apply equally to this recommendation.

If you require any clarification on the matters outlined in this submission, please do not hesitate to contact the undersigned on (02) 9310 3188 or via email at frusso@ntscorp.com.au.

Yours sincerely,

A handwritten signature in blue ink that reads "Frank Russo".

Frank Russo
Senior Solicitor - Strategic Development
NTSCORP Limited