

23 May 2018

NSW Department of Planning & Environment
Via online submission

Dear Sir/Madam,

Re: Gunnedah Solar Farm – submission in relation to Environmental Impact Statement – Aboriginal Heritage Impact Assessment; Gomeroi People native title determination application (NSD2308/2011)

Thank you for the opportunity to make a submission in relation to the Environmental Impact Statement (**EIS**) for the proposed Gunnedah Solar Farm (**the Project**). This submission is provided on behalf of the Applicant for the Gomeroi People native title determination application (NSD2308/2011), principally in relation to the Aboriginal Heritage Impact Assessment (**the Report**) which was submitted as part of the EIS.

BACKGROUND

The Gomeroi People native title determination application NSD2308/2011 was filed in the Federal Court of Australia on 20 December 2011 and was entered on the Register of Native Title Claims on 20 January 2012, giving the Gomeroi People certain procedural rights under the *Native Title Act 1993* (Cth) (**NTA**). In addition, the registration of the application gives the Gomeroi People native title claimants recognition as the primary body to be consulted during consultations with traditional owners under NSW' cultural heritage guidelines.

NTSCORP Limited (**NTSCORP**) is the legal representative for the Gomeroi People and makes this submission on behalf of the Applicant for the Gomeroi People native title determination application. NTSCORP has statutory responsibilities under the NTA to protect the native title rights and interests of Traditional Owners in 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 and provides services to Aboriginal Peoples 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 Native Title Act.

ABORIGINAL HERITAGE IMPACT ASSESSMENT

We refer to the Report prepared by Kelleher Knightingale Consulting Pty Ltd (**Heritage Consultant**) in March 2018 for Photon Energy (**the Proponent**). A summary of the consultation conducted with the local Aboriginal community is provided at page 9 the Report:

The SEARs [Secretary's Environmental Assessment Requirements] required that Aboriginal heritage assessment should include adequate consultation with the local Aboriginal community. The proponent sought to prepare the assessment in consultation with the relevant Local Aboriginal Land Council to identify any sites or issues of cultural significance.

The assessment was undertaken in consultation with Red Chief Local Aboriginal Land Council (RCLALC) whose boundaries covered the study area. RCLALC was contacted at the commencement of the project to discuss the development proposal and invited to participate in site survey. Land Council representative Karen Matthews participated in a site survey on Tuesday 30 January 2018. RCLALC did not identify any archaeological or cultural features within the study area.

We note the following requirement contained in the Secretary's Environmental Assessment Requirements for the Project relating to Aboriginal cultural heritage:

- Heritage – including an assessment of the likely Aboriginal and historic heritage (cultural and archaeological) impacts of the development, including adequate consultation with the local Aboriginal community

We submit that the requirement for adequate consultation with the local Aboriginal community has not been met. In particular, the Report does not contain details of consultation with, or any attempt to contact, the Applicant for the Gomeroi People. It is not sufficient for the purpose of consultation with 'the local Aboriginal community' that consultation be conducted exclusively with local Aboriginal land councils. The Gomeroi People native title determination application was filed in 2011 and has been registered since January 2012, giving ample time to proponents operating within Gomeroi country to become aware of, and act on, their responsibilities to Gomeroi native title claimants.

CULTURAL HERITAGE AND NATIVE TITLE

Proponents have responsibilities to engage with and consult native title holders in relation to cultural heritage in NSW. Aboriginal objects within NSW are protected under

the *National Parks and Wildlife Act 1974* (NSW) and associated regulations. The responsibilities of proponents in relation to the protection of such objects are set out in the NSW Department of Environment, Climate Change and Water publication *Aboriginal cultural heritage consultation requirements for proponents 2010* and the NSW Office of Environment & Heritage publication *Aboriginal Heritage Legislation in NSW: How the Aboriginal heritage system works*:

(<http://www.environment.nsw.gov.au/resources/cultureheritage/commconsultation/09781ACHconsultreq.pdf>

<http://www.environment.nsw.gov.au/resources/cultureheritage/20120401system.pdf>

We note the following summary of the consultation requirements from page 16 of the latter publication:

The OEH publication *Aboriginal cultural heritage consultation requirements for proponents 2010* ... provides guidance on how Aboriginal consultation is to be undertaken during the development process, under the NPW Act regulations. The requirements specify that the right people to consult with are primarily 'the traditional owners or custodians of the land that is the subject of the proposed project'. The requirements also acknowledge that Aboriginal people with historic ties to the area, but whose traditional Country is elsewhere, may have important knowledge about historic heritage places and that they should be involved in consultation for other reasons.

In the first instance 'traditional owners or custodians' are to be identified as native title holders, registered native title claimants, and Aboriginal Owners registered under the *Aboriginal Land Rights Act 1983*. Where native title has been determined to exist for an area, only the native title holders or the relevant prescribed body corporate need to be consulted under the NPW Regulations. Otherwise, as well as contacting native title claimants and Aboriginal Owners, the person or company is also required to seek input more broadly from a range of organisations, including the regional office of the OEH, the Local Aboriginal Land Council, Catchment Management Authorities, Native Title Services, and also to place a notice in the local newspaper.

We note the requirement that consultation occur primarily with traditional owners or custodians, and in identifying who the traditional owners are, initial contact should be made with native title holders or native title claimants. The Report appears to have been prepared on the basis solely of consultation with the Red Chief Local Aboriginal Land Council, which is not one of the primary organisations to be contacted under the NSW cultural heritage guidelines for the purpose of consultation with traditional owners.

It is not sufficient that consultation on cultural heritage matters be arranged solely through local Aboriginal land councils, as the membership of such bodies is not based on traditional ownership or custodianship of the land.

We reiterate that the Gomeroi People native title determination application was first entered on the Register of Native Title Claims in January 2012 and searches of this register are available online at the National Native Title Tribunal's (**NNTT**) website or can be requested from the NNTT.

RECOMMENDATIONS

In light of the above failure to adequately consult with traditional owners, we request that following recommendations be adopted prior to any approvals being given in relation to the Project:

1. A condition be placed on the Proponent/Consultant to consult directly with the Applicant for the Gomeroi People native title determination application in respect of the Project.
2. The Proponent/Consultant organise a further cultural heritage site survey with monitors selected by the Applicant for the Gomeroi People native title determination application.
3. A revised Aboriginal cultural heritage assessment report be submitted following the above consultation and site survey.

Thank you again for the opportunity to contribute this submission. If you require any further information, please do not hesitate to contact Frank Russo, Senior Solicitor, or Hema Hariharan, Manager Strategic Development, on (02) 9310 3188 or frusso@ntscorp.com.au.

Yours sincerely,

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

Frank Russo
Senior Solicitor – Strategic Development
NTSCORP Limited