ABORIGINAL LAND RIGHTS AMENDMENT BILL 2014

Bill introduced on motion by Mr Victor Dominello, and read a first time and printed.

Second Reading

Mr VICTOR DOMINELLO (Ryde—Minister for Citizenship and Communities, Minister for Aboriginal Affairs, Minister for Veterans Affairs, and Assistant Minister for Education) [4.46 p.m.]: I move:

That this bill be now read a second time.

It is appropriate that I commence this speech by acknowledging the traditional custodians of this beautiful land upon which we meet, the Gadigal people of the Eora nation. I also pay my respects to the elders of other First Nations of New South Wales. We all understand that underneath the carpet, the floorboards and the concrete is Aboriginal land that has been there for tens of thousands of years. I respect that and the love and care that they have for this land of ours.

This bill will make a number of significant and important amendments to the Aboriginal Land Rights Act 1983. The review undertaken to inform this bill was the first statutory review of the Act in its 31 year history. I can proudly say that it is a true demonstration of this Government's commitment to working in genuine partnership with Aboriginal people. The proposed amendments seek to address critical issues raised during extensive and in-depth consultation conducted as part of the review. Nine public forums were held and I personally attended those held in Kempsey, Sydney and Tamworth. The review received 21 written submissions and I directly consulted with chief executive officers from different regions. Throughout the review we have worked closely with the New South Wales Aboriginal Land Council as the peak body representing Aboriginal people in New South Wales. It is only through this partnership approach that we have managed to secure the endorsement of the New South Wales Aboriginal Land Council for the majority of the proposed amendments.

I will deal with the detail of the amendments in my summary of the bill. However, in a nutshell, the resulting amendments are transformative. They aim to strengthen Aboriginal land councils by improving accountability, efficiency and economic capacity. The amendments will enable Aboriginal land councils to go to the next level and they will empower the Aboriginal people of New South Wales. The Aboriginal Land Rights Act was enacted in 1983 in recognition of the dispossession of Aboriginal people from their traditional lands without consent and without compensation. It is unique in that it provides Aboriginal communities with the right to claim unused Crown land and to hold that land in freehold title via 120 elected local Aboriginal land councils, which represent the interests of their members and the broader Aboriginal community in their areas.

In my almost four years as Minister for Aboriginal Affairs, I have spoken regularly to members of Aboriginal land councils and visited a large number of local Aboriginal land councils across New South Wales. What I have seen is a vibrant network of community

organisations in New South Wales striving to use their assets to deliver returns to Aboriginal communities and the broader population of New South Wales, including through providing social services, training and employment opportunities and business venture development and protecting our nation's cultural and environmental heritage. Examples of services being run by local Aboriginal land councils for the benefit of the community include medical centres, transport services, accommodation and tourism operations.

The work of these local Aboriginal land councils demonstrates that the Aboriginal Land Rights Act is not simply a tokenistic gesture acknowledging past wrongs; it is an important vehicle for Aboriginal people to shape their own social and economic futures. The importance of the Aboriginal Land Rights Act in Aboriginal social and economic development is recognised internationally. When James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, visited Australia in 2011, in addition to hailing our land rights model as "remarkable", he noted that the work of Aboriginal land councils in New South Wales in securing and developing Aboriginal lands to provide greater opportunities to Aboriginal peoples is:

> … essential to operationalizing the standards set forth in the United Nations Declaration and to move forward in a future in which indigenous peoples are in control of their development, participating as equal partners in the development process.

The New South Wales Government is committed to this vision of an equal partnership between Government and Aboriginal people. In furtherance of this partnership, the landmark reforms in this bill are part of the Government's efforts to ensure that the next generation of Aboriginal leaders have the best possible platform to secure sustainable and prosperous futures for their communities. As I have already mentioned, the amendments in this bill represent the results of the first statutory review conducted under the Aboriginal Land Rights Act. I commenced the review in December 2011 by establishing an expert working group, chaired by the Registrar of the Aboriginal Land Rights Act, to review the legislation and provide me with proposals to improve it. The working group also included the Chief Executive Officer of the NSW Aboriginal Land Council and two members of local Aboriginal land councils. These members ensured that the diversity of views held by Aboriginal land councils—those most affected by any changes—across New South Wales were represented.

As a result of the working group's recommendations, I introduced into Parliament mid-last year an initial suite of amendments to the Aboriginal Land Rights Act aimed at getting rid of unworkable and inefficient provisions in the Act. When I did so, I foreshadowed that further and more significant reforms were being developed. The bill sets out the further reforms in the policy areas of housing and land claims and the regulatory framework for Aboriginal land councils. These reforms were built on other recommendations from the working group and include further proposals developed in consultation with the New South Wales Aboriginal Land Council.

The final form of the amendments in the bill has been informed by extensive consultation with the community at large. Nine public consultation forums were held from August to September 2013, administered by the Registrar of the Aboriginal Land Rights Act on my behalf and independently facilitated. The forums were attended by more than 300 people. I personally travelled throughout New South Wales to speak with Aboriginal people during this process, and I am proud to say that the bill has, at its basis, the vision and aspirations of the communities we consulted.

The bill amends the Act in significant ways to improve three key areas: the efficiency, capacity and accountability of the network. I will deal with efficiency first. Critical to achieving greater efficiency are the proposed amendments relevant to land claims. Most significantly, these include the addition of a provision allowing the New South Wales Government and Aboriginal land councils to enter into agreements relating to land transfers and land use without having to go through the existing land claims determination process. The current determination process is a lengthy and costly process. As a result of these delays, there are more than 26,000 undetermined land claims in New South Wales.

The delays in determination and the backlog of undetermined claims result in uncertainty for government, industry and the Aboriginal communities that land rights are intended to benefit, and so discouraging investment and economic growth. Litigation on land claim determinations also results in substantial costs for both government and Aboriginal land councils. Further, the adversarial approach promoted in the existing system can undermine relationship building between government and Aboriginal communities. Currently, all land claims have to be individually assessed by the Crown lands Ministers as to whether they meet specific statutory criteria relating to use and purpose as at the date of lodgement of the claim. There is no discretion to take into account the Government's current intentions for that land, nor the local Aboriginal land council's strategic aims.

The bill will give both government and land councils flexibility to step outside the existing land claim determination process and negotiate the settlement of multiple land claims simultaneously. This has the potential to significantly reduce the amount of undetermined land claims. The amendments also allow the parties to agree on a range of alternative outcomes to the transfer of claimable Crown land in fee simple, enabling outcomes better aligned with the strategic interests of both government and local Aboriginal land councils. Specifically, the amendments will allow transfers of Crown land which may not otherwise fall within the definition of "claimable Crown land" in the Aboriginal Land Rights Act, potentially in exchange for the withdrawal of existing land claims by the Aboriginal Land Council parties or commitments not to lodge future claims over certain areas, whether for a limited time or in perpetuity.

Other agreed outcomes may include: financial and other forms of consideration; exchange

or leases of land from government to local Aboriginal land councils or from local Aboriginal land councils to government; conditions or restrictions on the use of land; joint access and co-management opportunities on land; and undertakings by the parties with regard to the future lease, transfer, management or use of any land. Negotiations for an agreement may commence whether or not there are current claims on foot, and any existing claims do not have to be determined or withdrawn before negotiations can begin. The process is purely voluntary, and Aboriginal land councils will retain the right to claim Crown land under the existing provisions of the Act if they do not choose to engage in the agreement-making process or if they no longer wish to participate. The time and priority of their claims will not be affected if they choose not to participate or if they withdraw from the process.

The bill also contains a number of legislative reforms to streamline and improve the existing land claims determination process, including by: allowing the Registrar to refuse to refer new land claims to the Crown lands Ministers for determination if a title search reveals that the land is privately owned and is therefore not Crown land available to be claimed; and preventing the lodging of sequential land claims while an appeal is awaiting final determination, while preserving the rights of Aboriginal land councils by prohibiting acts or omissions by the Crown lands Ministers which would affect the claimability of that land. These reforms will ensure that resources within government can be most efficiently directed towards the resolution of existing land claims.

The second critical reform to enhance efficiency is in the area of social housing management by Aboriginal land councils. Firstly, the amendment bill will streamline regulation of Aboriginal Land Council social housing by removing the additional requirements imposed on social housing schemes over and above ordinary community benefit schemes, and providing that local Aboriginal land councils, which have obtained registration as an Aboriginal housing organisation under the Aboriginal Housing Act or as a community housing provider under the national regulatory code, are exempt from having to separately obtain approval from the New South Wales Aboriginal Land Council for their social housing schemes. This means that Aboriginal land councils will not have to comply with two parallel schemes to obtain approval to run their social housing programs.

To promote sound and sustainable housing management by Aboriginal land councils well into the future, the bill also provides for additional grounds for the appointment of an administrator to local Aboriginal land councils to assist in achieving housing management approval.

It will also be an additional ground for the dissolution of local Aboriginal land councils if an administrator appointed under the Act fails to achieve the appropriate housing management approval within a certain time frame. These measures are absolutely a last resort and are designed to ensure that the housing stock owned by Aboriginal land councils

remains viable for the Aboriginal people of this State for some time. I also note that the Aboriginal Land Rights Act will provide clear procedural fairness provisions to members of Aboriginal land councils if ever these measures are required to be activated. Ensuring that local Aboriginal land councils obtain appropriate housing management approval will result in a reduced administrative burden on the network and improved asset management.

Thirdly, the bill addresses inefficiencies in the regulatory environment for Aboriginal land councils. The current reporting and compliance obligations are one size fits all and impose an onerous burden on less well-off local Aboriginal land councils. The bill also proposes changes to the reporting and compliance framework that are aimed at smarter, rather than cumbersome, regulation, so that more of the money that local Aboriginal land councils receive can go directly to the communities they serve. The bill also removes unnecessary external approval requirements in favour of local oversight mechanisms.

In particular, the bill contains amendments to provide the New South Wales Aboriginal Land Council with flexibility and discretion to prescribe the financial and administrative reporting obligations of local Aboriginal land councils in policy rather than in legislation. This will allow the level of reporting to be tailored according to the size and complexity of operations of the local Aboriginal land council. The bill will also remove the requirement for New South Wales Aboriginal Land Council approval of local Aboriginal land council budgets and community, land and business plans, in recognition that these are a community's strategic planning documents and are more appropriately decided at the community level. Local Aboriginal land councils will still be required to provide those budgets and plans to the New South Wales Aboriginal Land Council for noting.

Other improvements to efficiency will include exempting local Aboriginal land councils from the proactive mandatory disclosure requirements under the Government Information (Public Access) Act 2009 [GIPA], in recognition that local Aboriginal land councils do not have the resources of government departments to meet these requirements. All other disclosure requirements under the GIPA Act will remain the same and the New South Wales Aboriginal Land Council will still have to comply with all aspects of the Act. The bill removes the requirement in the Aboriginal Land Rights Act for the New South Wales Aboriginal Land Council to specifically supervise Aboriginal land council community benefits schemes, in recognition that this requirement is uncertain and an unrealistic resource burden on the New South Wales Aboriginal Land Council. However, the New South Wales Aboriginal Land Council will still maintain an oversight role over community benefit schemes through the approvals provision within the Act.

I will turn to capacity. In relation to improving the capacity of the network, the bill will better enable Aboriginal land councils to take advantage of economic development opportunities while also ensuring protection for their member assets. Currently, it is unclear

whether the function of Aboriginal land councils in the Act to "facilitate business enterprises" includes the ability for an Aboriginal land council to carry out and operate business ventures. The bill will provide certainty for Aboriginal land council operations by specifying that the current function of Aboriginal land councils to facilitate business enterprises includes forming, acquiring, operating or managing business enterprises.

Secondly, there is uncertainty around the extent to which Aboriginal land councils can operate through separate entities. Undertaking business ventures through separate entities assists the Aboriginal land council in limiting its losses but also creates tensions within the regulatory regime of the Act, which emphasises community control and oversight of the activities of Aboriginal land councils. The bill provides a regulatory framework around Aboriginal land councils establishing or entering into arrangements involving separate entities, which permits Aboriginal land councils to use such arrangements to assist them in the exercise of their functions but also ensures an element of community control of their activities and assets.

The bill provides that where Aboriginal land councils enter into an arrangement that includes the formation, acquisition, operation or management of an entity, such as corporations or trusts, they must comply with certain requirements. These requirements include an obligation to report on the operations carried out under such an arrangement in the accounts and records of Aboriginal land councils currently required to be kept under the Aboriginal Land Rights Act and the regulations. The amendments also impose an obligation on the council to take reasonable steps to ensure that the council will not be prevented from complying with such reporting obligations in connection with such an arrangement. This ensures that members and the regulators under the Act are informed about activities conducted through separate entities after assets have been transferred.

In certain instances Aboriginal land councils will be required to conduct risk assessments before the transfer of land council assets in connection with an arrangement involving separate entities. In other cases they will be required additionally to obtain the approval of the members of the Aboriginal Land Council for those transfers. Details relating to the content of risk assessments and when risk assessments and member approval are required will be prescribed in the policies of the New South Wales Aboriginal Land Council, allowing flexibility to adjust the obligations to the practical realities of business development. These proposed amendments aim to maintain a balance between keeping competitive the business environment for Aboriginal land councils and protecting member interests and land council assets.

Finally, it will be clarified that if local Aboriginal land councils wish to establish, acquire or operate a corporation they will be required to do so under the Corporations (Aboriginal and Torres Strait Islander) Act 2006—the CATSI Act—rather than the Corporations Act 2001,

unless authorised by an applicable policy of the New South Wales Aboriginal Land Council or, in the absence of such a policy, in the regulations. The CATSI Act regime is specifically designed for Aboriginal organisations and provides support and protections for members of those corporations not necessarily available under the Corporations Act, making it more appropriate as a vehicle for a community-based organisation such as a local Aboriginal land council.

The kind of support provided by the Office of the Registrar for Indigenous Corporations—the regulator for Indigenous corporations registered under the CATSI Act—include pro bono legal assistance and governance training. The ability of a policy of the New South Wales Aboriginal Land Council or, in the absence of such a policy, in the regulations to authorise local Aboriginal land councils to establish, acquire or operate a corporation under the Corporations Act regime will mean that there will be flexibility to allow local Aboriginal land councils to do so in appropriate circumstances.

I now turn to accountability. The protection of Aboriginal Land Council assets and accountability of a local Aboriginal land council to its members is absolutely key. In recognition that Aboriginal land councils are moving into a new era of economic and social development, which brings with it a potentially high level of risk and responsibility, the bill will provide also for strengthened enforcement mechanisms. The first of these mechanisms will address the difficulties currently faced by regulators of the Aboriginal Land Rights Act in enforcing the requirements to provide information in the Act. Consistently with other regulatory regimes, the Registrar will have the power to apply for a search warrant to obtain information if he or she has reasonable grounds to believe that there is a contravention of the Act or the regulations, or documents sought by administrators or investigators appointed to local Aboriginal land councils have not been provided.

The bill also inserts additional grounds for the appointment of administrators to local Aboriginal land councils, specifically the failure to comply with a compliance direction given by the Registrar. This improves the deterrence effect of a compliance notice and makes clear the progression from substantial failures to comply with the Act to being placed in administration. The bill will also increase the maximum penalties for offences in the Aboriginal Land Rights Act in line with penalties in similar legislative regimes. A new offence will be created by the bill for an individual who knowingly breaches or causes a local Aboriginal land council to breach a term of a notice by the Registrar prohibiting the local Aboriginal land council from exercising certain specified functions pending the appointment of an administrator.

The Registrar will also be given an express power to seek an injunction preventing a person or an Aboriginal land council from contravening the Aboriginal Land Rights Act.

This will assist the registrar to act quickly to stop assets leaving the control of members when there has been a breach of the Act. The power to appoint administrators and investigators to local Aboriginal land councils will be transferred to the Registrar of the Aboriginal Land Rights Act, in line with the other compliance mechanisms in the Act, and to ensure that it is independently exercised. To protect against the abuse of these new enforcement powers, procedural fairness requirements will be mandatory with respect to the appointment of administrators, and the registrar will be required to report annually to the Minister on the exercise of his or her powers under the Act.

As well as improving enforcement powers for the Registrar of the Aboriginal Land Rights Act, the bill introduces reforms to provide a clearer framework for managing misconduct of councillors, board members and staff of Aboriginal land councils. Part 10 of the Act currently sets out a disciplinary regime for councillors, board members and staff of Aboriginal land councils that engage in misbehaviour or breach the duty to disclose conflicts of interest. The existing system was adapted from the then disciplinary provisions of the New South Wales Local Government Act 1993, which has since undergone change. Public consultations and consultations with the network indicated that the current regime set out in part 10 is too complicated, making it easy for complaints to be made against the undeserving, and difficult to bring to account individuals whose behaviour justifies sanction.

The bill updates this regime to replace the framework of "misbehaviour" with one of "misconduct", consistent with recent changes to the Local Government Act 1993, provides clearer definitions of what constitutes "misconduct" and streamlines the procedures for dealing with complaints. In order to strengthen the disciplinary framework, both the registrar and the NSW Civil and Administrative Tribunal will also be able to impose harsher penalties once misconduct has been established. In addition to strengthening the accountability mechanism, the bill also provides for the ability of the registrar to appoint advisors to local Aboriginal land councils if he or she is of the opinion that the council or the board of the council requires assistance in the exercise of its functions. This will help local Aboriginal land councils build their capacity by calling on the expertise of external advisors.

Finally, the bill makes a number of improvements to the governance arrangements of local Aboriginal land councils and their operational procedures. For example, the notice and procedural requirements for member meetings considering significant decisions, such as member approval of land dealings and community land and business plans, currently differ depending on the nature of the business to be decided at the meeting. These requirements are confusing, making compliance unnecessarily difficult for local Aboriginal land councils. The bill makes these requirements uniform. The bill will also address difficulties the boards of local Aboriginal land councils have had in meeting quorum requirements for meetings and the lack of participation by members by allowing chief executive officers of local Aboriginal land councils to declare a member inactive if that member has not attended a

prescribed number of meetings.

Inactive members are not considered as voting members for the purposes of determining a quorum, but the amendment does not remove the voting rights of those members. Inactive members will cease to be an inactive member merely by attending a meeting of the council or by making a request in writing to the registrar for their status as an inactive member to be removed. Board member terms will be extended from two years to four years in order to allow board continuity, long-term capacity building, and sufficient time to implement longer-term strategic goals. Finally, a members' code of conduct will be introduced to clarify the grounds on which members can be suspended from attending meetings for unacceptable behaviour. A model code of conduct, which is adaptable to the circumstances of each local Aboriginal land council, will be developed by the registrar, in consultation with the Aboriginal Land Council network.

In conclusion, the measures provided for in this bill will significantly benefit the land rights network and Aboriginal communities throughout New South Wales by enabling more efficient and strategic delivery of land rights to Aboriginal land councils in New South Wales, giving greater capacity to Aboriginal land councils to generate economic outcomes from their land while at the same time providing for increased accountability and more effective enforcement of the Aboriginal Land Rights Act. The process undertaken to get where we are today with this bill has been an incredible one. I thank the following in particular: the Aboriginal Land Rights Act team within the Aboriginal Affairs agency, Kristy Masella, Ross Pearson, Daniel Lutton and especially Alice Lam, without whom this bill would not be as comprehensive or robust; and the NSW Aboriginal Land Council, in particular, Chairman Craig Cromelin, Deputy Chair Roy Ah-See, the councillors, Chief Executive Officer Les Turner, Senior Policy Advisor Stephen Hynd, and Legal Officers Anna Harding and Paul Bertram.

I also thank the Registrar of the Aboriginal Land Rights Act, Mr Stephen Wright, and his team, Adam Black, Megan Mebberson and Kathy Ridge; I thank Parliamentary Counsel Don Colagiuri, SC, and members of his office, specifically Nigel Hill and the principal drafter for this bill, Daniel Gray, who is himself a Wiradjuri person. I thank Verity Lomax, my Chief of Staff and Caity McLoughlin, my Policy Advisor for Aboriginal Affairs, and my parliamentary liaison officer Tom Green for all their work in getting the bill to where it is today. Finally, and most importantly, I thank all the Aboriginal people who participated in the review of the Aboriginal Land Rights Act. This bill that we have created together will allow the Aboriginal leaders of today to deliver enduring, generational change for the Aboriginal communities of tomorrow. I proudly commend the bill to the House.

Debated adjourned on motion by Mr Guy Zangari and set down as an order of the day for a future day.