

# ABORIGINAL LAND RIGHTS AMENDMENT (LOCAL ABORIGINAL LAND COUNCILS) BILL 2016

*First Reading*

**Bill introduced on motion by Ms Leslie Williams, read a first time and printed.**

*Second Reading*

**Ms LESLIE WILLIAMS (Port Macquarie—Minister for Early Childhood Education, Minister for Aboriginal Affairs, and Assistant Minister for Education) (16:56):** I move:

That this bill be now read a second time.

First and foremost, I begin by acknowledging that we meet today on the traditional lands of the Gadigal people of the Eora nation. I pay my respects to elders past and present, and I pay my respects to all other first nations people of New South Wales and to all the Aboriginal people who have joined here us today. I am pleased to welcome and acknowledge senior representatives from the NSW Aboriginal Land Council who are in the gallery today: Councillor Roy Ah-See, Chairman of the NSW Aboriginal Land Council, and Councillor for Sydney/Newcastle; Councillor Charles Lynch, Councillor for Northern Region; Councillor Craig Cromelin, Councillor for the Wiradjuri Region; and Councillor Peter Smith, Councillor for the Mid North Coast. I also welcome Mr Stephen Wright, Policy and Programs. I thank the councillors and NSW Aboriginal Land Council staff for their engagement, consideration and advice in preparation of the bill of amendments that I bring forward today.

It gives me great pleasure to introduce the Aboriginal Land Rights Amendment (Local Aboriginal Land Councils) Bill 2016 today. Principally, the bill has two interdependent aims. The first is to refine and enhance the regulatory structures and mechanisms of the Aboriginal Land Rights Act 1983. The second is to provide better means to build the capacity and strength of local Aboriginal land councils and the Aboriginal people who run them. The catalyst and drivers of this bill came to my attention early in my tenure as Minister for Aboriginal Affairs. While I have only been the Minister for Aboriginal Affairs since March 2015, in this short time I have appointed four administrators and one investigator to local Aboriginal land councils. These are not matters or decisions I have taken lightly. I know the administrative demands on small organisations and the complexity involved in managing community assets. I also appreciate the demoralising impact such appointments can have on local communities and individuals. But, as we all know, intervention when non-compliance is apparent is a necessary component in all corporate administration and regulatory regimes. The Aboriginal Land Rights Act [ALRA] is no different.

Notwithstanding this, it became apparent to me that there should be better and less interventionist mechanisms available to me and to other regulators, the Aboriginal Land Rights Act Registrar and the NSW Aboriginal Land Council to first support local Aboriginal land councils when compliance is about to falter markedly. Although the Act currently contains provisions to appoint interim administrators and advisers as they stand, provisions are limited in their application and their effect. It is for these reasons that I have developed this bill of amendments over the past 12 months to improve the operation of the Aboriginal Land Rights Act and, importantly, to support the growth, skill and strength of the Aboriginal people who make it happen.

I thank the NSW Aboriginal Land Council for its partnership in developing the early intervention framework that has informed our work. While most of those here are aware of the Aboriginal Land Rights Act, it is worth reminding ourselves of its purpose, for it is the purpose of the Act that the proposed amendments contained in this bill aim to reinforce. The purpose of the Aboriginal Land Rights Act is: to provide land rights for Aboriginal persons in New South Wales; to provide for representative Aboriginal land councils in New South Wales; to vest land in those councils; to provide for the acquisition of land and the management of land and other assets and investments

by or for those councils, and the allocation of funds to and by those councils; and, lastly, to provide for the provision of community benefit schemes by or on behalf of those councils. It is an Act unique in this Parliament—and, indeed, in all of Australia.

The New South Wales Aboriginal Land Rights Act provides for the right of Aboriginal communities to claim certain Crown land and, when granted, hold lands in freehold title. A network of 120 elected local Aboriginal land councils represents the interests of their members and the broader Aboriginal populations in their areas to provide economic, social and cultural benefits to their communities. In anyone's book, this is a big task. Nonetheless, the Aboriginal community and the Aboriginal land council members have taken it on to fulfil the purposes of the Act and to create the statewide network of local Aboriginal land councils operating in our State today. The Aboriginal Land Rights Act remains a source of pride for Aboriginal people, for what it stands for and what it has achieved. However, it has not been without burden, some mishap and failings.

Since the commencement of the Aboriginal Land Rights Act there have been many amendments made to address governance and operational matters to ensure that local Aboriginal land councils operate appropriately as independent corporate citizens of the State. This has included managing responsibilities in relation to housing stock, the payment of local government rates and charges, financial reporting and accountability, corporate governance structures, corporate codes of conduct, community planning and land dealings. Consistent corporate governance standards over the very diverse network have been difficult to meet since the commencement of the Act in 1983. Over time, Aboriginal land council members, and especially executives and board members, have had to undertake increasingly complex duties and responsibilities not dissimilar to the directors of private companies.

I acknowledge at this point the many individuals who have worked tirelessly over the 30-plus years of the land rights Act to realise the administrative operation and function of Aboriginal land councils. I acknowledge that most of this has been done on a voluntary basis—a commendable testament to the Aboriginal people of this State in bringing the purpose and objectives of the Aboriginal Land Rights Act to effect and providence. Part 11 of the Aboriginal Land Rights Act provides for standard corporate governance intervention mechanisms. It outlines the process for addressing any non-compliance with the Act by a land council, including the grounds for appointing investigators and administrators to Aboriginal land councils. These standard corporate governance intervention mechanisms will remain intact. To date, the mechanisms that have been used when local Aboriginal land councils have failed in their administrative capacities are the appointment of: investigators, to investigate the affairs of Aboriginal land councils when there is serious concern as to their operations; or administrators, when significant breaches of the Act remain unaddressed by the land council. These mechanisms have been the main way that compliance, and indeed capacity, matters have been dealt with.

The purpose of this bill is to provide an alternative mechanism—a mechanism that is more supportive and proactive, and which will address and rectify capacity and compliance issues at an early stage. As noted earlier, a principal aim of the proposed amendments is to refine and enhance the regulatory structures and mechanisms of the Aboriginal Land Rights Act 1983. The mechanisms within and policy intention behind this bill will enhance the intervention and compliance provisions of the Aboriginal Land Rights Act, specifically in relation to the appointment of advisors to assist local Aboriginal land council boards. The intention is to make available early intervention mechanisms for when local Aboriginal land councils need assistance to comply with the regulatory and operational requirements of the land rights Act. Since 2007, the ALRA has provided the Minister for Aboriginal Affairs with the power to appoint advisors to the board of local Aboriginal land councils on the recommendation of the Registrar or the NSW Aboriginal Land Council—section 234. However, this provision has never been used.

It has been unclear as to the role and actual powers of advisors, and so its applicability has been doubtful. Also, as it stands, the current provision to appoint an advisor under section 234 of the Act does not specify the repercussions for a local Aboriginal land council if it fails to follow an advisor's advice. The amendments I propose today will make the advisor provisions clearer. It will

provide the regulators, particularly the NSW Aboriginal Land Council, with additional but less punitive tools to support Aboriginal land councils. The proposed amendments are modelled on the improved intervention mechanisms that were introduced into the Local Government Act made by this Government in 2013. The basis of the amendments made to the Local Government Act—and those I propose here today—are underpinned by what is known as the Braithwaite regulatory pyramid, which links behaviour to responsive regulatory compliance.

Rather than classic "carrot and stick" compliance approaches and repercussions, the Braithwaite model encourages regulatory compliance on a voluntary and participatory basis. It creates a more positive relationship between the regulator and the regulated. In applying the Braithwaite pyramid to the New South Wales land rights network, we can acknowledge that most Aboriginal land councils and individuals are willing to act appropriately and that some councils and individuals try very hard but sometimes fall short of required standards. The effectiveness of "improvement orders"—the centrepiece of the amendments in this bill—coupled with the option of appointing advisors is to provide ways for local Aboriginal land councils to actively participate in their own regulatory oversight and recovery. Where there are councils or individuals who do not want to comply or follow good practice, then a more interventionist step, such as the appointment of an administrator, can still be considered. The proposed amendments will make for a midway and a more cost-effective intervention mechanism to assist councils to comply with the regulatory and operational requirements of the ALRA.

The ALRA has a tripartite regulatory structure comprising the Minister for Aboriginal Affairs, the Registrar and the NSW Aboriginal Land Council, which, over time, as a means of Aboriginal self-determination, has incrementally delivered the NSW Aboriginal Land Council increased regulatory powers, particularly in its oversight and support role to the local Aboriginal land council network. Since 1983, the New South Wales Government has moved towards increasing the independence of the Aboriginal land council network from government, increasing decision-making by local Aboriginal land council members and increasing the autonomy of local Aboriginal land councils in their relationship with the NSW Aboriginal Land Council. For example, in 2015 this Government commenced amendments to the Act to provide that community land and business plans of local Aboriginal land councils, which are obligatory under the land rights Act, are now developed and approved by members. The plans no longer require approval by the NSW Aboriginal Land Council, whose role now is to set the policy guidelines for the plans.

This bill aims to continue the empowering, self-determining and self-regulating trend of the Aboriginal Land Rights Act by reinforcing the support role of the NSW Aboriginal Land Council, but increasing local decision-making. The capacity-building aspects within this bill take on increased importance in this context. Specifically, the bill proposes to provide the NSW Aboriginal Land Council with the power to issue performance improvement orders either separately or supplemented by the appointment of an advisor to local Aboriginal land council boards who can advise and assist the council to implement change to address the issues identified.

The proposed performance improvement orders to be issued to local Aboriginal land councils are designed to give the members of councils greater oversight of the performance of their elected boards and provide transparency with regard to their governance, performance and diligence. The Minister for Aboriginal Affairs will retain the power for the highest level of intervention; that is, the appointment of administrators as last resort or interim administrators for urgent interventions. The independence of the registrar will be upheld. The registrar oversees the operation of the ALRA as a whole, and has the power to issue compliance directions to land councils to correct non-compliance with the ALRA. The option of performance improvement orders provides new and greater flexibility in how the registrar and the NSW Aboriginal Land Council apply their respective regulatory function. I have been assured that the two regulators will apply the new regulatory matrix to the greatest benefit and effect.

As I stated earlier, the second principal aim of the proposed amendments is to provide better means by which to build capacity and to strengthen Aboriginal land councils, thereby benefitting Aboriginal people in New South Wales. This bill will put in place an alternative early intervention option that aims to support local land councils before the need for punitive action arises through the

appointment of investigators or administrators. The bill provides that the NSW Aboriginal Land Council will have the authority to issue a performance improvement order to a local Aboriginal land council if it is satisfied that action must be taken to improve its performance, and thereby protecting the interests and assets of the LALC.

The decision to issue a performance improvement order will require consideration of the following criteria, which will be set out in the Aboriginal Land Rights Regulation: whether the local Aboriginal land council has failed to comply with the Act, the regulation or any policy of the NSW Aboriginal Land Council; whether meetings of the local Aboriginal land council are being conducted in accordance with the Act and this regulation; whether the appointment of an adviser is reasonably likely to assist the board of the local Aboriginal land council to restore, to improve or to develop the capacity for the proper and effective functioning of the council; whether the behaviour of one or more board members or members of staff of the local Aboriginal land council has adversely affected the council's performance of its functions under the Act and the council's response to that behaviour; and whether there are significant risks facing the local Aboriginal land council that are not being addressed. Any actions to improve the performance of a local Aboriginal land council may include any actions that the NSW Aboriginal Land Council considers necessary to improve or restore the proper or effective functioning of the local Aboriginal land council.

The NSW Aboriginal Land Council may amend a performance improvement order affecting an Aboriginal land council if the need for amendment becomes evident during implementation. In that case, notice of the amendment in writing must be provided to the Aboriginal land council. The notice of the NSW Aboriginal Land Council to amend a performance improvement order is to specify the terms of the proposed amendment and the reasons it has proposed to amend the order. A performance improvement order may, or may not, also provide for the appointment of an adviser. If the Minister decides to appoint an administrator to a local Aboriginal land council that has been issued with a performance improvement order, the order will then cease to be in force. Compliance with a performance improvement order is the responsibility of the board of the local Aboriginal land council.

A land council will be deemed compliant with a performance improvement order only if the action taken, including any actions required to be taken by individual board members, is to the satisfaction of the NSW Aboriginal Land Council. The board of the local Aboriginal land council must supply a report on steps it has taken to implement the order, known as a compliance report, to the NSW Aboriginal Land Council. A copy of the report must also be provided to the land council's members at the first meeting of the land council held after the report is submitted to the NSW Aboriginal Land Council. This will provide an important accountability mechanism and transparency to the members of the land council concerned.

If the NSW Aboriginal Land Council issues a performance improvement order to a local Aboriginal land council, it may also appoint one or more persons as an adviser. As I have already mentioned, the provision for appointment of an adviser is currently contained in section 234 of the Aboriginal Land Rights Act, but it has never been utilised. This is because it does not provide the adviser with a clear role or powers, it does not specify the repercussions for a local Aboriginal land council if it fails to follow an adviser's advice, and it does not state who has responsibility to fund the appointment of advisers. The overhaul of the current adviser provisions and the insertion of performance improvement orders will better support and assist local Aboriginal land councils when their performance is compromised by failing compliance or operational challenges, or any of the other criteria listed in the regulations that I mentioned earlier.

An adviser may be appointed in the performance improvement order or by a subsequent order of the NSW Aboriginal Land Council. An adviser may be appointed on the recommendation of the local Aboriginal land council on its own initiative or based on the NSW Aboriginal Land Council's consideration. An adviser will have, subject to any limitations specified in the adviser's instrument of appointment, a number of functions which include: to advise and assist the board of the local Aboriginal land council in the exercise of its functions; to provide guidance to ensure that the local Aboriginal land council complies with the performance improvement order; and to monitor compliance with the performance improvement order. An adviser's term of appointment to a local Aboriginal land

council will cease either at the end of the term specified in the instrument of appointment or at the expiration or revocation of the performance improvement order affecting the local Aboriginal land council. The NSW Aboriginal Land Council has authority to terminate an adviser's appointment at any time.

Importantly, the bill contains provisions for the payment of appointed advisers. The adviser is to be paid a salary determined by the NSW Aboriginal Land Council out of that council's funds. The cost of appointed advisers may be recovered from the local Aboriginal land council concerned at the discretion of the NSW Aboriginal Land Council. The bill's provisions make clear that both the board of the land council and members of the land council are to cooperate with the adviser during their term of appointment. This includes providing any information or assistance the adviser reasonably requires to exercise his or her functions. It also stipulates that the local Aboriginal land council is to give an adviser an opportunity to review a compliance report at least 14 days before the report is submitted to the NSW Aboriginal Land Council, together with the adviser's comments, if any, on the compliance report.

If the local Aboriginal land council fails to give an adviser the opportunity to comment on a compliance report, the adviser is to advise the NSW Aboriginal Land Council and then give the council a report on the local Aboriginal land council's compliance with the performance improvement order. If a local Aboriginal land council fails to provide a compliance report to the NSW Aboriginal Land Council as stipulated in the performance improvement order, the adviser must, as soon as is feasible after becoming aware of the fact, prepare a compliance report on behalf of the local Aboriginal land council and provide this report to the NSW Aboriginal Land Council.

The bill outlines that a land council is considered to have failed to comply with a performance order if it fails to submit a compliance report for the adviser's review and if it fails to submit a compliance report to the NSW Aboriginal Land Council within the specified time frame. These details for the implementation of the performance improvement orders are important because they make clear exactly what is expected of the local Aboriginal land council that has been issued with an order. They allow for a constructive remedial relationship between it and the NSW Aboriginal Land Council. Only a lack of willingness by a local Aboriginal land council will raise the need for a more interventionist approach under the other regulatory options under the Act. The Aboriginal Land Rights Act 1983 currently contains no provision for the issuing of performance improvement orders. The proposed new provision will empower the NSW Aboriginal Land Council to issue performance improvement orders to local Aboriginal land councils. It will also provide members of land councils with greater insight and transparency with regard to the land councils' governance and performance and the diligence of their elected board because directions will be made public and boards will be obliged to inform members of any performance directions issued.

The issuing of performance improvement orders brings an opportunity for a land council to respond to any issues and to request support before an investigator is brought in to investigate the affairs of the land council or an administrator is appointed to remedy serious breaches. The provision for the appointment of an adviser has both a capacity-building and an operational assistance purpose. Advisers will be chosen from a panel with a wide range of appropriate skills to assist land councils and will be appointed by the NSW Aboriginal Land Council. They will have diverse specialist or peer skills appropriate to address particular areas of improvement or assistance, such as those that apply in the operation of the performance improvement orders and the appointment of advisers under the Local Government Act. These areas can be as diverse as mediating relationships between elected and administrative arms of a land council or developing specialist financial management systems. The result will be the introduction of a mechanism for early, low-cost assistance in the affairs of local Aboriginal land councils.

The changes focus on capacity building and providing an alternative to the highly interventionist and costly alternative with the appointment of administrators. It is expected that the proposed amendments will reduce costs funded by the ALRA network or, at the least, be cost neutral by improving operational efficiencies in local Aboriginal land councils and reducing the need for the NSW Aboriginal Land Council to underwrite their debts. It will shift significantly the costs from

administrator appointments to capacity building in the land council network and enable capacity-building assistance to be provided to a much larger number of land councils than currently is the practice. The new capacity-building aspect of the improvement framework both provides a low-cost alternative to the appointment of administrators and long-term savings to the land council network through improved capacity and performance.

I have outlined the major components of the Aboriginal Land Rights Amendment (Local Aboriginal Land Councils) Bill 2016 relating to performance improvement orders and changes to section 234 of the Land Rights Act that relate to the appointment of advisers. I will now briefly outline further amendments included in the bill that relate to other parts of the Act. Firstly, the amendment to section 52 gives local Aboriginal land councils the discretion to establish, acquire, operate or manage related corporate entities under either the Commonwealth Corporations (Aboriginal and Torres Strait Islander) Act 2006 or the Corporations Act 2001 at their discretion. The Corporations (Aboriginal and Torres Strait Islander) Act 2006 and the Corporations Act 2001 have different statutory compliance requirements.

This amendment will give local Aboriginal land councils the power to choose how they want to register any corporation associated with the land council, dependent upon their needs and the differing resources and capabilities of each land council. Allowing LALCs to incorporate related entities under the Corporations Act 2001 as well as the Corporations (Aboriginal and Torres Strait Islander) Act 2006 will provide greater scope and flexibility for LALCs and third parties to set up Aboriginal enterprises. As local land councils are currently prevented from incorporating related entities under the Corporations Act without approval from the NSW Aboriginal Land Council this amendment will cut onerous regulatory red tape by removing the requirement for NSW Aboriginal Land Council to develop and implement a policy for this purpose.

In 2014, this Government enacted amendments to the land rights Act regulating how local Aboriginal land councils transfer any assets to related entities and requiring financial reporting back to the land council on their operations. These measures remain intact. The successful management of corporations by a land council represents a significant step towards the economic prosperity of the land councils, financial independence and benefit to the land councils members, and better engagement with the mainstream economy. And I say again, the improvement framework which is the linchpin of this amendment bill works on improving land council capacity for economic development and participation.

Additional and minor amendments are being made to section 231 of the Aboriginal Land Rights Act to clarify the powers of administrators in relation to boards when the terms of their appointment are extended, and to section 223B to clarify powers of interim administrators to make clear that appointees can exercise all or specific functions of LALCs or LALC boards or exercise only specific parts of those functions. This adds to the flexibility of appointments by enabling specific assistance or interventions. The costs of interim administrators will be paid by the NSW Aboriginal Land Council with the discretion to recover costs from the local Aboriginal land council concerned. Their terms of appointments can be varied when being extended, allowing for a flexible and graduated return to full self-administration.

The measures provided for in this bill will significantly benefit the land rights network and, by extension, Aboriginal communities throughout New South Wales. The bill will do so by providing a mechanism in the Aboriginal Land Rights Act 1983 for early interventions in the affairs of local Aboriginal land councils to build their governance capacity and provide a less interventionist and less costly alternative to appointing administrators where land councils have fallen into significant non-compliance with the Act or are not performing as expected. It will lead to reduced costs funded by the ALRA network or, at the least, be cost neutral by improving operational efficiencies in local Aboriginal land councils and reduce the need for the NSW Aboriginal Land Council to underwrite land council debts. That is, money currently being spent on costly administrators will be redirected to capacity-building initiatives at a lower cost and with wider application to better the outcomes for the Aboriginal community of New South Wales. I therefore proudly commend the bill to the House.

**Debate adjourned.**