Planning issues: Former Aboriginal reserves and missions

Background

In the 1883 the Aborigines Protection Board was established by the NSW Government. By 1939 there were over 180 reserves in NSW.[1] Reserves and missions were created for the purpose of 'protection' and 'control' of all Aboriginal people. Many of these settlements were located on low amenity land and isolated from local centres, services and facilities.

Whilst living on Aboriginal reserves and missions, Aboriginal people experienced forced confinement, separation from and removal of their children, the breakdown of traditional values, the banning of languages and cultural practices, and the imposition of strict religious observance. Despite such hardship, Aboriginal people formed and maintained strong communities on these lands and developed cultural and historical ties to the sites.

Under the ownership and control of the NSW Government these communities grew and were developed outside of local planning ordinances and remained removed from the co-ordinated upgrading of infrastructure in surrounding communities.

In 1969, the Aborigines Protection Board was abolished and from 1973 the reserves and missions were transferred to Aboriginal control and eventually to Aboriginal collective ownership. In 1983, with the passing of the *Aboriginal Land Rights Act 1983* (NSW) (**ALRA**), the freehold titles for the 59 remaining reserve and mission sites were transferred to the 49 Local Aboriginal Land Councils (**LALCs**) in whose area the land was situated.

While the transfer of ownership of former reserve and mission sites to LALCs was heralded at the time as a lands rights outcome, in reality LALCs had also assumed responsibility for significant liabilities in relation to the buildings and infrastructure on these lands. Notwithstanding the transfer of ownership to LALCs, investment in housing and infrastructure on former reserves and missions continued with disregard to local planning requirements.

Today the upgrade and replacement of housing and the development of facilities and infrastructure in these communities continues to occur outside the planning system.

Former Aboriginal reserve and mission sites today

Currently the nature and condition of the former reserves and missions vary significantly. They are located in major cities, regional towns and very remote areas. The proportion of developed land on former reserve sites also varies, from the whole of some sites to others which include large areas of

[1] *Bringing them Home:* Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, April 1997, available at: https://www.humanrights.gov.au/publications/bringing-them-home-chapter-3

bushland. Houses range in number and condition from recently renovated to those requiring extensive repair.

Similarly, the infrastructure on former reserve and mission sites varies significantly - from kerbed, guttered and lit streets to dirt tracks. Water supplies include town, rain, river and bore water. Sewage systems include includes town supply, septic tanks, wastewater treatment plants and effluent ponds. Some former reserves and missions also include community facilities, such as halls, playgrounds and basketball courts. Often these facilities are built by the community themselves.

In the majority of cases the residential properties situated on these lands are on a single title rather than individual residential allotments. In most cases therefore, the LALC with title to the land has responsibility for providing and maintaining all services within the site's boundary; including roads, water, sewerage, waste/garbage collection, street lighting, drainage systems, and common area management.

LALCs may generate a small income from the rental housing on these lands however it is insufficient to ensure the ongoing maintenance and upgrade of housing and infrastructure or the provision of services such as garbage collection and street lighting. Any revenue generated from rents is exhausted. Additionally, as these lands are not vacant they attract local Council land rates receiving limited services in return. Management of the former reserve and missions under the current system is placing significant burden and pressure on Aboriginal communities and LALCs.

Current title of many of the former missions and reserves preclude LALCs from considering the divestment of infrastructure assets and/or the long term tenure options for tenants such as home ownership, long term leasing, or other economic activities which may ease the financial and administrative burden associated with former reserves and missions.

Furthermore, former reserves and missions are of significant cultural and social value to Aboriginal people and as such the development of policies, which may impact their future use, management, and/or development must be underpinned by recognition of this social and cultural value.

Whilst planning change is not the only input required to improve the living conditions on these communities, overcoming planning impediments would provide options to Aboriginal communities and LALC's regarding future ownership and management, including housing options, divesting burdensome infrastructure and services, and would improve the overall asset management of these sites.

It also presents a significant equity issue, given that these Aboriginal communities do not enjoy an equal level of services and infrastructure as surrounding non-Aboriginal communities.

Zoning

A number of former reserves and missions do not have a zone that reflects or is consistent with their current land use. Current land uses include a combination of housing and community facilities such a child care centres, medical centres, shops, schools, halls, sheds, playgrounds and sports facilities.

Former reserves and missions that are currently not appropriately zoned would need to be rezoned before a LALC would be able to obtain planning approvals to undertake a range of activities or developments on the site.

Planning proposals to rezone land requires the preparation and submission of a rezoning application to the local Council which generally must include a range of supporting documents including

technical reports and the payments of fees. This application must then go through an assessment and approval process. In addition to the barriers of cost and time to prepare the rezoning applications, there is also a significant risk that an application to rezone lands will not be successful.

Furthermore, many former reserves and missions have been developed in an ad-hoc manner without an overall framework, a masterplan or similar, to guide their development. Other former reserves and missions have been developed to meet requirements and standards of the day that are no longer applicable. The structure of any future upgrade or development on the land will need to achieve a balance between formalising the existing pattern of development and maximising good planning outcomes.

Development Application process

Where lands have a current zoning that reflects its current use the current Development Application (DA) process also presents a number of challenges in facilitating the improvement of former Aboriginal reserve and mission sites.

The costs associated with development application processes for LALCs to undertake any planning proposals on each individual site, in terms of accumulative costs across the state, and for individual Local Aboriginal Land Council owner, are prohibitive.

Due to the individual nature of each former reserve or mission site, the multitude of localised planning controls applicable across the sites, and the extent of the compliance issues faced in regards to existing structures and infrastructure, a standardised state-wide approach is difficult to apply within the current planning regime.

Following a standard DA process presents challenges including:

- The sites fall under many local governments areas and each local government has its own controls to be complied with and DA process to follow,
- Each site is different and producing a DA submission for each site has significant time and cost implications,
- DA requirements can be onerous. Requirements may include studies for flooding, bushfire, heritage, energy usage, traffic and water usage, and environmental issues,
- The DA may require existing road reserves to be upgraded to meet Council standards. This may not be possible without significant financial investment,
- A standard DA process assumes an undeveloped site. This is not the case for former reserves and missions,
- Some sites may never be able to comply with requirements of the DA so may face significant barriers in terms of bringing the site up to standards outlined in the Local Environmental Plan (**LEP**) due to site constraints.

Current local planning controls for dwelling houses and residential subdivision are designed to facilitate the future development of standard types of residential development. These controls fail to recognise the unique issues that are specific to former Aboriginal reserves and missions, including the extensive existing built fabric, cultural connections and historical legacy in which these sites were formed.

Flood, bushfire and heritage planning requirements

Former reserve and missions are often located on flood and/or bushfire prone lands and/or are significant for heritage or environmental reasons. Despite their existence in such flood/bushfire prone locations, such physical constraints are a further obstacle to obtaining planning approval to subdivide these existing settlements. Local government authorities' have concerns over possible

ensuing liabilities, and there are significant costs associated with mitigating such risks, if mitigation is possible at all.

Although housing has already been established on these lands for decades, Councils are likely to require a series of issues to be addressed. To date, issues raised include:

- The outcome of a flood investigation may mean that houses need to be raised or levee banks need to be built or upgraded. These works will be very costly to undertake.
- The outcome of a flood or bushfire study may be that the land in whole or in part is not an appropriate location for housing and planning proposals will not be approved on that basis.
- The outcome of a bushfire investigation may mean a number of additional fire management strategies are required. This could likely be an ongoing cost for the LALC to deliver or individual land owners to manage.
- Insurance providers may be unlikely to provide home and contents insurance to properties that lie on flood or bushfire prone land. This exposes homeowners to undue physical and financial risks.
- Heritage listed sites may have additional requirements or constraints to allow subdivision to proceed.

Infrastructure and provision of services

As owners of former reserves and missions, LALCs are responsible for the management of infrastructure (roads and services) on these lands. Many LALCs do not have the resources to manage this existing infrastructure as the rent from the houses they manage and any supplementary funding they receive is insufficient to cover the costs associated with the upkeep of what can be extensive infrastructure.

It is also not typical for property owners to be responsible for the ongoing maintenance of infrastructure that services their plot in circumstances where government owned services are available in the community. This places an inequitable burden on the LALC's particularly as the original infrastructure many not have met the standards of the day or has not been upgraded in line with local improvements.

As the former reserves and missions are private land, services providers will not enter unless prior access has been agreed in advance with the LALC. In many instances, LALCs have arrangements in place that allow access to service providers including, but not limited to, emergency services (for example ambulance, and fire authorities), waste collection and public transport. Waste collection services are negotiated by the LALC on a 'fee-for-service' basis.

Road reserves

The condition of the road reserves on former reserve and mission sites is an obstacle for dedication, as the road reserves of few sites meet local government authorities' minimum standards, for examples, roads may not be wide enough. Local government authorities are reluctant to accept dedication of road reserves where they do not meet required standards.

Encroachments

In some instances dwellings and/or infrastructure has been located such that they encroach onto neighbouring lots. While some encroachments are relatively minor such as fences, others are significant and essential pieces of infrastructure, such as a flood levee. Such encroachments have occurred as a result of these sites' development outside of the planning regulations, and are an obstacle to the sites subdivision and reintegration with the planning system.

There may be instances where existing dwellings or infrastructure (fences, backyards, flood levies, and so on) encroach onto neighbouring lots not owned by the LALC.

In those instances where encroachments are minor – such as fences on lands owned by others – they are unlikely to present barriers. However, in those instances where encroachments relate to essential infrastructure – such as the flood levy which protects a township from flooding – it may be in the interest of the LALC to purchase this land from the adjoining owner to ensure that the integrity of the piece of infrastructure remains intact into the future. Additional funds will be needed to cover the cost of the purchase of any such lands.

Access

Formal rights of access for some communities are also an issue. In some cases, the access road to a former reserve is through land owned by others or Crown land. In some cases, there is no formal agreement in place granting right of access. While there may be verbal or informal agreement with the owners of these lands for members of the community to pass through their land to access the former reserve there is no guarantee that these informal agreements would continue if the ownership of these adjoining lands changed. Additionally, local Councils may require the creation of formal rights of access prior to approving any planning proposals on the land.

In addition to access by the community across private lands, rights of access need to be in place for Emergency and other services providers to be able to access LALC-owned land. Formal easements may be able to be created for access by these service providers, however this presents an additional timely and costly process for LALCs to undertake, and will require LALCs to negotiate with a range of parties.

Conclusion

There are significant gaps in the quality of life of Aboriginal peoples living on former reserves and missions. The long timeframes and significant costs that it will take to improve the living standards of Aboriginal communities on former missions and reserves under the current planning regime must be urgently addressed.

The issue of recognising existing settlements relates to a specific and quantifiable number of sites and each has been clearly identified and documented by NSWALC. All former reserves and missions contain existing residential settlements with some complimentary uses such as community facilities, and have been in existence for a significant period of time. The process of formalising these settlements should consider these sites as a legacy issue.

We have been encouraged by recent work undertaken by the NSW Government in this regard. However, we urge the Committee to support the facilitation of improved planning processes to ensure Aboriginal peoples living on former Aboriginal reserves and missions do not continue to be disadvantaged by the burdens of the current planning system. A coordinated strategy developed in partnership with NSWALC to address these issues without undue expense is essential.

We also wish to highlight the recommendations made by the Independent Planning Review Panel in respect to former Aboriginal missions and reserves[2] regarding the development of a specific approach to be undertaken in partnership with NSWALC and LALCs, and that no fees should be charged.

Furthermore, we note that the Queensland Government has addressed similar issues via a temporary State Planning Policy implemented for reconfiguration of a Lot Code for Land in

[2] Independent Planning Review Panel Report, Volume 2, Part 11, pages 119-121

Indigenous Local Government Areas.[3] The policy was only valid for a short period of time, creating the incentives for all those involved to work together to address the issues efficiently and effectively. While there are significant differences in the nature and circumstances of the Queensland Indigenous Local Government Areas and the NSW former Reserves and Missions, the implementation of a state wide approach with a fixed timeframe recognised the importance of these lands to Aboriginal people and recognised that the matter needed to be addressed outside of local planning.

[3] *QLD State Planning Policy 1/09 Reconfiguration of a Lot Code for Land in Indigenous Local Government Areas to which a Local Planning Scheme does not Apply.*