

**Submission
No 130**

**INQUIRY INTO MANAGEMENT OF PUBLIC LAND IN
NEW SOUTH WALES**

Organisation: New South Wales Aboriginal Land Council

Name: Ms Sharon Close

Date received: 3/08/2012



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

The Director
General Purpose Standing Committee No. 5
Parliament House
Macquarie St
Sydney NSW 2000

Dear Director,

Re: Inquiry into the Management of Public Land in NSW

Thank you for providing the NSW Aboriginal Land Council (**NSWALC**) with an opportunity to make comment and provide input into the Management of Public Land in NSW Inquiry.

The Aboriginal Land Rights system in NSW

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 20,000 members, is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**), NSWALC is an independent, self-funded non-government organisation that has an elected governing council and the objective of fostering the aspirations and improving the lives of the Aboriginal peoples of NSW.

Pursuant to the ALRA, NSWALC has the following functions amongst others:

- The acquisition, control, and management of (and other dealings in) lands in accordance with the ALRA; including the claiming of unused Crown land;
- The protection and promotion of Aboriginal culture and heritage in NSW;
- The facilitation of business enterprises; and
- The provision of advice to the NSW Government of matters related to Aboriginal land rights.

NSWALC provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) that exist in NSW. As elected bodies, Aboriginal land councils represent the not only the interests of their members, but of the wider Aboriginal community.

The preamble of the ALRA recognises that '*Land is of spiritual, social, cultural, and economic importance to Aboriginal peoples*'. The ALRA was established to facilitate the return of land in NSW to Aboriginal peoples through a process of lodging claims for unused Crown land.¹ The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for Aboriginal communities, as compensation for historic dispossession and in recognition of the ongoing disadvantage suffered by Aboriginal communities.

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When introducing the *Aboriginal Land Rights Bill 1983* into the NSW Parliament, the then Minister for Aboriginal Affairs, the Hon. Frank Walker identified that ‘...*land rights has a dual purpose – cultural and economic*’ⁱⁱ.

Recommendation 1: That the Inquiry into the Management of Public Land in NSW recognises the Aboriginal land rights system in NSW, which includes NSWALC as the peak representative body and a network of 120 autonomous LALCs across the state, as genuine stakeholders in decisions regarding the management of public land. Strategies should be developed to inform and engage the Aboriginal Land Rights network in any proposals related to such management.

Crown land and Aboriginal Land Councils

Aboriginal Land Councils can make a claim to Crown land in NSW under section 36 of the ALRA. Aboriginal land claims are the sole form of compensation available under the ALRA to compensate Aboriginal people for the past dispossession of their lands. At present, there are over 26,000 undetermined claims to Crown land, many of which are several years old. NSWALC is working with Government to address this backlog, however, pending resolution of the backlog NSWALC wishes to ensure the rights under those undetermined land claims are protected.

The ALRA is a compensatory regime that empowers Aboriginal Land Councils to acquire land (by claim over Crown land or by purchase), deal with land and maintain and enhance Aboriginal culture, identity and heritage. NSWALC is concerned to ensure that emphasis is not placed on converting Crown land into National Park estate or other types of conservation areas at the expense of Aboriginal people and land rights as this undermines the compensatory nature of the ALRA. Any proposals to convert Crown land to National Park estate must first take into consideration whether there are any undetermined land claims over that land, so that those claims can be determined first and Aboriginal third party rights are not affected by further dispossession. Further, any proposal to convert Crown land to National Park estate will mean that Aboriginal land claims will not be able to occur on such land and will severely limit the operation of the ALRA.

The management of public land in NSW must not undermine the ALRA and its purpose to provide land rights for Aboriginal persons in NSW, to vest lands in Aboriginal Land Councils as well as to provide a compensatory mechanism for dispossession while aiming to address issues of intergenerational equity.

NSWALC recommends that a priority of the Inquiry and any subsequent policy or legislative changes should be to adequately recognise NSW Aboriginal land rights mechanisms in the context of management of public lands and to avoid any conflict with the operative provisions of the ALRA.

Recommendation 2: Emphasis placed on the conversion of Crown land to National Park estate must not undermine the compensatory mechanisms of the ALRA. The ALRA is the only form of compensation given to Aboriginal peoples in NSW as a result of dispossession.

Travelling Stock Reserves

NSWALC recently provided a submission to the Review of the NSW Livestock Health and Pest Authority Model specifically on travelling stock reserves and their importance to the Aboriginal Land Council network and more broadly Aboriginal communities in NSW. The submission primarily noted that any changes to the way travelling stock reserves are managed must not undermine Aboriginal peoples and Aboriginal Land Councils rights to acquire, control and negotiate access arrangements to travelling stock reserves.

The areas of these reserves are frequently of substantial historical and cultural importance to Aboriginal communities. This is partly a result of the relative lack of impacts from European land use (compared to surrounding farm and grazing lands) which allowed for greater survival of cultural landscape features and material cultural items. Many of these reserves are also of significance as a result of their use by Aboriginal people for work and residence purposes in the past.

The NSWALC submission has been attached for the convenience of the Inquiry and to further expand on issues specifically relating to travelling stock reserves and the Aboriginal Land Council network.

Protecting Aboriginal culture and heritage and cultural knowledge

The Inquiry should sufficiently explore the role of Aboriginal peoples and communities in biodiversity management and recognise the huge contribution that Aboriginal people and communities have made to biodiversity management over millennia.

Aboriginal peoples in NSW and particularly the network of Aboriginal Land Councils are key stakeholders in relation to biodiversity management, are significant landowners and managers of lands with high biodiversity value, and at a local level are holders of specific Traditional Ecological Knowledge accumulated over millennia.

NSWALC supports practical measures by government that seek to implement the United Nations *Declaration on the Rights of Indigenous Peoples*, which was endorsed by the Australian Government on 3 April 2009. This includes mechanisms to support Aboriginal peoples' management of lands, waters and natural resources. The following excerpts from the United Nations Declaration on the Rights of Indigenous Peoples identify the inherent rights of Aboriginal peoples in relation to lands, waters, natural resources and Traditional Ecological Knowledge. These excerpts have been provided to assist the Inquiry:

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 29

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation, protection, without discrimination.

It is essential that in any future legislative or policy development in relation to the use and management of public land, recognition is provided regarding the past and ongoing efforts of Aboriginal communities in biodiversity management and conservation activities.

Recommendation 3: The Inquiry is encouraged to acknowledge Aboriginal peoples as the Traditional Custodians of land and waters who possess valuable Traditional Ecological Knowledge and are key stakeholders in the management of Crown lands.

NSWALC recommends that all objectives and guiding principles of the management of public land be in accordance with principles embedded within Article 8 (j) of the Convention on Biological Diversity (CBD) and the Nagoya Protocol. The CBD already commits Australia to “*respect, preserve and maintain knowledge, innovations and practices of Indigenous ... communities ... for the conservation and sustainable use of biological diversity*”. The Nagoya Protocol creates a framework applying to Traditional Ecological Knowledge. The Protocol requires parties to recognise and protect the inherent rights and interests of Aboriginal peoples to their Traditional Ecological Knowledge and ensure that policies and the governmental use of such knowledge is based on principles of free, prior and informed consent.

It is also essential that the Inquiry recognise that the protection of environmental values does not always necessarily align with the protection of Aboriginal culture and heritage and associated practices. In accordance with principles of self determination, and as outlined above, Aboriginal peoples must be able to use their own processes and structures to determine and identify their own priorities. Government must move beyond the environment focused ambit of public land management in relation to Aboriginal culture and heritage. Any future management of public land must support Aboriginal people’s priorities in relation to culture and heritage protection and management and must not prioritise environmental values above culture and heritage values and practices as determined by Aboriginal peoples.

Recommendation 4: The Inquiry should recognise that the protection of environmental values does not necessarily align with the protection Aboriginal culture and heritage, and associated practices. The Inquiry should not prioritise environmental values above culture and heritage values and practices as determined by Aboriginal peoples.

Again, I thank you for the opportunity to provide comment to the Inquiry regarding the Management of Public Land. I trust that genuine consideration will be given to our comments and that a response to the issues we have raised will be forthcoming.

If you have any questions regarding this letter, please do not hesitate to contact the Policy and Research Unit on 02 9689 4444.

Yours sincerely,



Clare McHugh
Director, Policy and Research Unit
NSW Aboriginal Land Council

Date: 3/8/12

¹ Section 36 of the *Aboriginal Land Rights Act* further outlines claimable Crown lands in NSW

² The Hon. Frank Walker, NSW Parliament Hansard, Legislative Assembly, 24 March 1983, at 5090, available at: [http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA19830324/\\$file/473LA046.PDF](http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA19830324/$file/473LA046.PDF)



The NSW Aboriginal Land Council (NSWALC)

Response to the Review of the NSW Livestock Health and Pest Authority (LHPA) Model

The NSW Aboriginal Land Council (**NSWALC**) is the peak Aboriginal representative body in NSW and with over 20,000 members is the largest Aboriginal member based organisation in Australia. NSWALC is a self-funded statutory corporation under the *Aboriginal Land Rights Act 1983 (NSW)*, and has a legislated objective to improve, protect and foster the best interests of Aboriginal peoples in NSW. NSWALC provides support to the network of 119 Local Aboriginal Land Councils (**LALCs**). LALCs are autonomous bodies which are governed by boards elected by local Aboriginal community members. NSWALC advocates and works for the return of culturally significant and economically viable land to Aboriginal peoples, self determination and independence for Aboriginal peoples on cultural, social and economic matters, and Government policy and action to address the issues that affect Aboriginal peoples.

Australia is party to a number of key international instruments related to the protection of Indigenous culture, heritage and land management. The United Nations Declaration on the Rights of Indigenous Peoples (**the Declaration**) recognises a range of Indigenous rights including: the right of Indigenous peoples to practice, protect and revitalise their cultures, the right to participate in decision-making, rights over lands, waters and natural resources, the requirement that States consult and cooperate in good faith with Indigenous peoples to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them, and the right to maintain control and protect traditional knowledge. If well managed to protect its environmental values, proper Travelling Stock Reserve (**TSR**) management could help to meet state and international obligations and targets for conservation and protection of Aboriginal culture and heritage.

Principles of the United Nations Declaration on the Rights of Indigenous Peoples

LALCs land management activities include custodianship of culturally significant land, maintenance of Aboriginal sites, management of local site databases, heritage site assessments, management of cultural centres and keeping places, participation in advisory committees and a range of projects in the community to improve awareness and understanding of Aboriginal culturally significant land.

Indigenous peoples claim greater control over their lives through participation in decision-making that affects them. Under the Declaration, states have a specific obligation to recognise and protect the rights of Indigenous peoples to own, develop, control and use their communal lands, territories

and resources. Lands and territories have material, cultural and spiritual dimensions for Indigenous peoples and are essential for their survival and economic sustainability.

In accordance with the underlying principles of the Declaration, the Government has an obligation to ensure meaningful and correct participation, engagement and consultation with Aboriginal peoples and local communities concerning the management of TSRs to ensure that they comply not only with customary law, but community level procedures and protocols.

Travelling Stock Reserves (TSRs)

The TSR network in NSW is a complex network of public land established during European colonisation, often along Aboriginal pathways through the landscape. The TSRs network is unique in composition as publicly owned land with vast cultural, economic and environmental and social benefits to NSW. The TSR network is a valuable environmental and cultural asset to many Aboriginal communities due to their unique management history.

TSRs are parcels of Crown land reserved under legislation for use by travelling stock. In NSW travelling stock are permitted, subject to conditions or restrictions imposed by legislation, to move or graze on a TSR or a public road. The network of stock routes was established so that livestock could move and graze between properties and to markets and as such they contained enough grazing to sustain a walking stock and a paddock with water at about every 16 km. Legislation and Regulation established management rules and management was divested by the States to regional authorities, currently, Rural Land Protection Boards (**RLPB**) in NSW. Today, TSRs currently cover around 600,000 hectares or 0.8% of NSW. The management of TSRs in NSW is complex and varies depending on the geographic divisions within the state, generally held in trust by the Livestock Health and Pest Authority (**LHPA**). Under the *Crown Lands Act 1989*, TSRs in the central division are crown reserves held in trust by LHPA.

Aboriginal association with TSRs

The management of land within NSW is complex and includes a range of natural resource management issues and practices by a range of diverse stakeholders. TSRs have rich tangible and intangible culture and heritage value for Aboriginal peoples. TSRs association with water and the logical pathways between these sources of water meant they often coincided with traditional Aboriginal pathways including trade routes and access to streams. As such it is not uncommon for TSRs to contain Aboriginal objects and sites. TSRs are also of significant importance to biodiversity as they protect ecological communities and threatened species and have important sustainable economic, cultural and social uses.

NSWALC recognises the importance of appropriate bio-security arrangements within NSW in relation to the issues including the management of TSRs which are important land management issues for Aboriginal communities.

Recommendation 1: Aboriginal community engagement in the development of a new model of management for TSRs is essential. Consultation with Aboriginal communities and particularly Local Aboriginal Land Councils is important in the development of sustainable management frameworks for TSRs.

TSRs and the *Aboriginal Land Rights Act 1983 (NSW)*

LALCs can make a claim to Crown land in NSW under section 36 of the *Aboriginal Land Rights Act 1983 (NSW)* (ALRA). Aboriginal land claims are the sole form of compensation available under the ALRA to compensate Aboriginal people for the past dispossession of their lands.

A TSR is a Crown land parcel that is reserved for a purpose and according to section 36 (1) of the ALRA, crown land that is reserved can be claimed if it is not lawfully used or occupied or needed or likely to be needed for an essential public purpose. Refusal of land claims over TSRs is generally made on the basis that they are lawfully used and occupied and required for the essential public purpose of movement of stock, the agistment of cattle, apiary needs and public recreation. As with all Crown land reserves, if a particular parcel of land is no longer required for its gazetted purpose, the reservation may be revoked.

The importance of TSRs to Aboriginal people in NSW is expressly recognised in the ALRA, which in some cases permits Aboriginal Land Councils to claim and acquire control of TSRs, and negotiate access agreements. Access agreements can allow Aboriginal people to access TSRs for hunting, fishing, gathering and other cultural activities. Agreements may also formalise existing access arrangements and protect the interests of different land users.

Recommendation 2: Any changes to the way TSRs are managed must not undermine Aboriginal peoples, and Aboriginal Land Councils, rights to acquire and control and negotiate access arrangements to TSRs.

Agreement under section 37(3) of the ALRA

It is important that any new model of managing TSRs incorporates principles that support sustainable use of TSRs and protect the environmental, social cultural and heritage values of TSRs.

Section 37 of the ALRA allows for land claims to be placed on TSRs (not western division). In this case the land title goes to the LALC and is leased back to the Crown with a Plan of Management. However, this only allows Aboriginal people participation in plan of management symbolic ownership only.

The Crown Lands Minister may enter into an agreement with the claimant Aboriginal Land Council to achieve the following:

- a. The vesting of the freehold title to that land, subject to any easements in the claimant ALC
- b. The leasing in perpetuity of that land to the Crown at a nominal rent
- c. The preparation of a plan of management in respect of that land giving the claimant ALC or Aborigines defined rights or defined functions, in respect of that land.

The Minister must be satisfied the claimant has traditional rights to or long association with the land and there are no appeal or review rights where a decision by the Minister is made not to enter into

such an agreement. Furthermore, the Minister responsible for the *Rural Lands Protection Act 1998* must also give approval for such an agreement.

Where TSRs are shown to not meet the core functions of the LHPA and ceded back to Crown Lands as part of their reserves system, LALCs should have the opportunity to retain and manage TSRs through claimable Crown land under the provisions of the ALRA (section 37).

It is important to note that, in some cases, TSRs that have been granted through appeal have been classified as contaminated land. This is of serious concern to the Aboriginal Land Council network. It is essential that the remediation of TSRs be conducted before the land is transferred to the LALC.

Recommendation 3: The remediation of any TSRs that have been granted through mechanisms within the ALRA should be conducted prior to the land being transferred to the respective Aboriginal Land Council.

Sustainable management of TSRs

Aboriginal access to TSRs should be recognised as part of any new management of TSRs model. A joint-management approach to the management of TSRs that is inclusive of various stakeholders including LALCs and other groups could potentially be employed where such groups become partners in the management of TSR networks for shared and sustainable multiple uses. This illustrates that it is possible for the TSR network to be maintained as public land and well managed for its multiple values, using sources of income other than landholders' rates.

However, in order for a transition to a more sustainable approach to management of TSRs, there is a need for agreements that guarantee future management of lands and waters by Aboriginal people rather than just access to public land for limited economic opportunities. There also needs to be consideration and discussion with Aboriginal communities about the transfer of any parcel of land to Crown Lands Act in their area and the impact of any development proposals for such lands.

It is nevertheless important to ensure that there are protections in any joint-management model to ensure that there are protections in place to protect TSRs from sale without appropriate consultation with Aboriginal Land Councils. Mechanisms must be implemented that recognise Aboriginal heritage or provisions that allow access for Aboriginal peoples to the areas. There should be broad public consultation with Aboriginal communities on the sale of any land that holds significant cultural value to the community under the provisions of the Crown Land Act and the ALRA. Information and resources should be provided where there is a desire within the Aboriginal community to pursue opportunities to claim land as TSRs.

Recommendation 4: It may be appropriate to employ a joint-management approach to the management of TSRs that is inclusive of various stakeholders including Aboriginal Land Councils and other groups, where such groups become partners in the management of TSR networks for shared and sustainable multiple uses. It is nevertheless important to ensure that there are protections in any joint-management model to protect the sale of TSRs without appropriate consultation with Aboriginal Land Councils.

Financial support for the management of TSRs

A broad financial basis for TSR funding, with support from other agencies is needed for the management of TSRs in an economically sustainable manner. There also needs to be further in assessments of TSRs, including economic assessments that incorporate cultural values and consideration of community, pastoral and Aboriginal interests.

It is important for the model to incorporate a **sustainable management framework** for the TSR network, which 'recognises the importance of TSRs to Australian heritage, habitat and livelihoods'. If the responsibility for TSRs is devolved to NSW Government agencies, a sustainable management framework for TSRs should be put in place to inform and coordinate partnerships at a regional and local level. The development of a sustainable management framework for the management of particular TSRs would help to ensure that all partnership participants adhere to key principles that recognise the right to self-determination (a pillar of the Declaration) and are in line with protection of cultural values and sites, maintaining access for sustainable economic uses, access to waterways and other uses as identified by the LALCs.

Recommendation 5: A sustainable management framework for TSRs should be implemented for the management of TSRs. This management framework should recognise the right to Aboriginal self-determination (a pillar of the Declaration).

Consultation with local community

NSWALC supports mechanisms that will ensure meaningful engagement with the Aboriginal peoples on the decisions the protection of culture and heritage and land management issues related to TSRs network. Consultation with Aboriginal peoples must occur **at a local level** to ensure that local Aboriginal interests are appropriately considered.

The management of TSRs should reflect the enhancement of sustainable practices. Aboriginal peoples and Aboriginal Land Councils are the rightful owners of Aboriginal culture and heritage in NSW, and equipped to manage the cultural and environmental values these corridors contain. LALCs have an important role to play in protecting these reserves.

The requirements for the effective management of the TSRs network should include:

- Oversight of TSRs that have adequate funding and resourcing,
- Transparent and easily accessed data that provides information that is streamlined and coordinated to facilitate information sharing,
- Management inclusive of a range of stakeholders interests and particularly LALCs, and
- A sustainable management framework that will assess the economic, cultural and environmental values that promotes and protects the range of TSRs and their sustainable use.

The TSRs network holds significant economic, cultural and environmental benefits for Aboriginal peoples in NSW and public funding should be provided to enable best-practice management of these assets to ensure their values are maintained effectively.