

**INQUIRY INTO ECONOMIC DEVELOPMENT IN
ABORIGINAL COMMUNITIES**

Organisation: Law Society of New South Wales

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THE LAW SOCIETY
OF NEW SOUTH WALES

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23 October 2015

The Director
Standing Committee on State Development
Parliament House
Macquarie St
Sydney NSW 2000

By email: state.development@parliament.nsw.gov.au

Dear Director,

Inquiry into Economic Development in Aboriginal Communities

I write to you on behalf of the Indigenous Issues Committee ("Committee") in relation to the inquiry into economic development in Aboriginal communities.

The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee commends the Government for identifying the importance of economic development in Aboriginal communities, and believes the inquiry represents an important opportunity to identify reforms to facilitate economic self-sufficiency within those communities.

The Committee notes that the Terms of Reference for the Inquiry are:

1. That the Standing Committee on State Development inquire into and report on strategies to support economic development in Aboriginal communities in New South Wales, including but not limited to:
 - (a) options for sustainability and capacity building of NSW Aboriginal communities into the future, utilising existing community networks and structures
 - (b) leveraging economic development support, including provided by the Commonwealth Government and the private sector
 - (c) establishment and sustainability of Aboriginal-owned enterprises.
2. That the committee report by 30 September 2016.

By way of context, the Committee notes that the NSW and Commonwealth Governments have agreed to the *Overarching Bilateral Indigenous Plan Between the Commonwealth of Australia and the State of New South Wales to Close the Gap in Aboriginal and Torres Strait Islander Disadvantage 2010-2015* (the "Bilateral Plan"). The Bilateral Plan notes that economic participation is one of the two priority areas for bilateral action.¹ There are also numerous other State Government documents that highlight the importance of increasing Aboriginal participation in the economy; for example, the Aboriginal Affairs OCHRE Plan² aims, among other things, to:

- "support more Aboriginal young people to get jobs that are fulfilling and sustainable";
- "grow local Aboriginal leaders' and communities' capacity to drive their own solutions" and
- "focus on creating opportunities for economic empowerment".

The Committee notes that Aboriginal Affairs is currently developing an Aboriginal Economic Development Framework³ as part of the OCHRE Plan.

While the terms of reference of the Inquiry are broad, the Committee has limited its submissions to:

- (1) consideration of impacts on Aboriginal community in legislative amendments and policy development; and
- (2) observations on the *Aboriginal Land Rights Act 1983* (NSW) ("ALRA")
- (3) observations on the *Native Title Act 1993* (Cth) ("NTA")
- (4) consideration of access to professional services in order to support the establishment of sustainable Aboriginal-owned enterprises.

1. Consideration of impacts on Aboriginal community in legislative amendments and policy development

The Committee considers that economic development of Aboriginal communities could be facilitated routinely integrating into the formulation of Government policy. For example, neither the recent *Comprehensive Review of Crown Lands Management*⁴ nor the Planning Reform White Paper⁵ had any consideration of the potential impact of proposals on

¹ *Overarching Bilateral Indigenous Plan between the Commonwealth of Australia and the State of NSW to Close the Gap in Aboriginal and Torres Strait Islander Disadvantage 2010-2015*, at 5-6, available online:

<http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/NSW.pdf> (accessed 28 September 2015)

² Aboriginal Affairs, OCHRE plan, available online: <<http://www.aboriginalaffairs.nsw.gov.au/wp-content/uploads/2013/04/OCHRE-Exec-Summ-Final-Web-Ready.pdf>> (accessed 20 October 2015).

³ See Aboriginal Affairs website: <http://www.aboriginalaffairs.nsw.gov.au/nsw-aboriginal-economic-development-framework/> (accessed 22 October 2015).

⁴ See the Department of Primary Industries website for access to the Crown Lands Legislation White Paper, the Crown Lands Management Review Report 2013 and the Crown Lands Management Review Summary and Government Response, available online: <http://www.lpma.nsw.gov.au/crown_land/comprehensive_review_of_nsw_crown_land_management/> (accessed 22 October 2015).

⁵ NSW Planning and Environment, *A New Planning System for NSW: White Paper*, April 2013, available online:

Aboriginal economic development, or consideration of how economic development on Aboriginal land could be facilitated.

The recent example of the Petroleum (Onshore) Amendment (NSW Gas Plan) Bill 2014 is also illustrative. The purpose of the proposed amendment was to expunge certain classes of gas exploration applications, largely in response to generalised unease about coal seam gas and "fracking". However, many of the affected applications had in fact been made by NSWALC, seeking to pursue the economic objectives of the ALRA. In that case, changes were made to the Bill in the Upper House to ameliorate its impact on NSWALC, and those changes are reflected in the *Petroleum (Onshore) Amendment (NSW Gas Plan) Act 2014* (NSW) which became law. It is encouraging that when the changes were proposed by the Hon Fred Nile MLC, they were unanimously supported.⁶ What is concerning about this example however, is that at no time before introducing the Bill did the Government identify, or consider, that it would have a disproportionate impact on NSWALC and hence adverse impacts on the economic and social goals of the ALRA and Aboriginal people.

Rather than treat the impact on Aboriginal people and their economic development as an "other" to be dealt with in a separate silo as a special interest group, the Committee's view is that the issue could be given specific consideration in the development of all legislation and policy which relates to land, water and resource management or environmental planning, or which might otherwise impact on Aboriginal economic and social outcomes.

In this regard, the Committee notes that the Victorian Government has developed an Aboriginal Inclusion Framework, which aims to do the following:

The objective of the Framework is to provide policy makers, program managers and service providers in the Victorian Government with a structure for reviewing their practice and reforming the way they engage with and address the needs of Aboriginal people. The Framework aspires to actively strengthen the inclusion of Aboriginal culture in the workplace and support successful Aboriginal participation in the design, implementation and assessment of policies and programs which directly or indirectly affect people.⁷

The Committee is not aware of an analogous whole of Government Aboriginal inclusion framework in NSW and is of the view that the NSW Government should develop a similar strategy.

Furthermore, the Committee is of the view that Government departments and agencies should be required to develop an Aboriginal economic inclusion or development strategy or policy to the extent that it is relevant to their portfolio and functions, so that legislative and policy development that affects Aboriginal people puts Aboriginal people at the centre of design and implementation.

<<https://majorprojects.affinitylive.com/public/50e8717a9968716223532455eb67e51e/White-Paper-full-document.pdf>> (accessed 28 September 2015)

⁶ See the official Hansard (Legislative Council, 19 November 2014) at 2924 and ff

⁷ Victorian Government, *Aboriginal Inclusion Framework 2011*, at 4, available online:

<http://www.dpc.vic.gov.au/images/documents/Aboriginal_Affairs/Aboriginal-Inclusion-Framework-2011.pdf> (accessed 28 September 2015)

The Committee is also of the view that the policy of local decision-making initiatives under OCHRE referred to above need to be given appropriate time and resources to determine how they may foster local economic empowerment. Too often government policies change from term to term, which not only disables potential initiatives and outcomes that may take time to develop. This leads to repeated disappointment and disillusionment and frustrates ongoing community participation.

2. Aboriginal Land Rights Act 1983 (NSW) ("the ALRA")

The Committee is of the view that if the Government seeks to develop strategies to support economic development in Aboriginal communities within New South Wales and utilise existing community networks and structures, a primary focus should be to assist Aboriginal land councils established under the ALRA to achieve their legislative objectives.

2.1. Economic objects of the ALRA

The ALRA is remedial and beneficial legislation⁸ which was enacted as a means to address the on-going effects of the dispossession of Aboriginal people their land without compensation and to address their economic and social disadvantage.

The enactment of the ALRA followed the *Report of the Select Committee of the Legislative Assembly upon Aborigines*⁹ in 1980, reporting on the circumstances of Aboriginal people in New South Wales and recommended a scheme for Aboriginal land rights (the "Keane Report").¹⁰ The Keane Report noted that at that time the majority of Aboriginal people in New South Wales lived in "urban situations". About 40% of the Aboriginal population live in Sydney¹¹ with the larger concentrations of Aboriginal people in Western Sydney and the inner city.¹² In considering the need for land, the Keane Report noted the varying situations of Aboriginal people in New South Wales, and in "urban situations":

[i]t would be expected that claims in the urban situation will be made on the basis of needs. One of the greatest needs for Aborigines in New South Wales, including those living in urban areas, is adequate housing.

Aboriginal people in the urban environment may also need land for the establishment of economic and social enterprises such as factories, neighbourhood/community centres, pre-schools, etc ...

In relation to the "fringe situation" the Keane Report noted that,

once again, housing is the greatest need, although people living in the fringe areas may,

⁸ See *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 per Kirby P at p 157. See also *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106; 80 LGERA 173 ("*Nowra Brickworks [No 1]*"), per Sheller JA at 117 and *Gandangara Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2011] NSWLEC 95 per Pain J at [6].

⁹ M F Keane, *First report from the Select Committee of the Legislative Assembly upon Aborigines: Report and Minutes of Proceedings* (1980) (referred to as the "Keane Report").

¹⁰ *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 per Kirby J at [45].

¹¹ *Keane Report* 45.

¹² *Ibid* 48.

like those on reserves, need lands for development of economic and /or social enterprises.

The scheme for land rights adopted in the ALRA was different to that recommended by the Keane Report, but the economic and social objectives of the legislation are clear. In the Second Reading Speech for the ALRA, the dual purpose of land rights in addressing both the cultural importance of land to Aboriginal people, as well as the use of land as a remedy for Aboriginal economic deprivation was explained:

The Government has made a clear, unequivocal decision that land rights for Aborigines is the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time laying a basis for a self reliant and more secure economic future for our continent's Aboriginal custodians.¹³

More recently, in the Second Reading Speech for the Aboriginal Land Rights Amendment Bill 2014, Victor Dominello, the Minister for Aboriginal Affairs, after referring the work of Aboriginal land councils, noted:

[t]he 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:

[e]ssential 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.¹⁴

The economic objects of the ALRA have been judicially noted on a number of occasions.¹⁵ Section 3 identifies the purpose of the legislation, that is:

- (a) to provide land rights for Aboriginal persons in New South Wales;
- (b) to provide for representative Aboriginal land councils in New South Wales;
- (c) to vest land in those Councils;
- (d) 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
- (e) to provide for the provision of community benefit schemes by or on behalf of those Councils.

To give effect to these purposes, the ALRA also provided for the constitution of New South

¹³ Hansard 24 March 1983, Legislative Assembly, p 5088. See also at 5089: "Some lands, with traditional significance to Aborigines, will retain a cultural and a spiritual significance. Other lands will be developed as commercial ventures designed to improve living standards." See also *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (1992) 76 LGRA 192 ("Education Building") at 194 per Stein J.

¹⁴ Hansard, Legislative Assembly, 21 October 2014, 1491.

¹⁵ See, for example, *Nowra Brickworks [No 1]* per Sheller JA at 117.

Wales Aboriginal Land Council ("NSWALC") and Local Aboriginal Land Councils ("LALCs").¹⁶ Some of the LALCs exist wholly within urban areas. Section 36(1) of the ALRA also establishes a scheme for Aboriginal land councils to make claims to Crown land. That scheme has been described by the Court of Appeal as the "primary mechanism" for giving effect to the purposes set out in s 3.¹⁷

The functions of LALCs in relation to the acquisition of land and related matters include making claims to Crown lands.¹⁸ Subject to the ALRA, a LALC may do any act or thing in relation to its property as if it was a natural person having the same interest in the property; including improving it or causing it to be improved.¹⁹

The Committee is of the view that the Aboriginal land council network provides a unique vehicle for the facilitation of economic development. In particular:

- (1) Economic development is an important part of the charter of every Aboriginal land council and each LALC has a statutory object:

to improve, protect and foster the best interests of all Aboriginal persons within the Council's area and other persons who are members of the Council.²⁰

The NSWALC has similar objects in relation to the Aboriginal people of NSW.²¹

- (2) A LALC's functions include (most relevantly):

- (a) to prepare and implement, in accordance with the ALRA, a community, land and business plan,
- (b) to manage, in accordance with this Act and consistently with its community, land and business plan, the investment of any assets of the Council,
- (c) to facilitate business enterprises (including by establishing, acquiring, operating or managing business enterprises), in accordance with this Act and the regulations and consistently with its community, land and business plan,²²
- (d) to provide community benefits under approved community benefits schemes.²³

- (3) NSWALC has similar functions, but they also include oversight and assistance functions in relation to the network of LALCs,²⁴ approval functions in relation to dealings with LALC land and LALC community benefits schemes,²⁵ and policy making functions in relation to the performance of its and the LALCs' functions.²⁶

¹⁶ *Aboriginal Land Rights Act 1983* (NSW) s 50.

¹⁷ *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 ("Wagga (CA)") per Mason P (with whom Tobias JA agreed) at [20].

¹⁸ *Aboriginal Land Rights Act 1983* (NSW) s 52(2)(g).

¹⁹ *Ibid* s 52AA.

²⁰ *Ibid* s 51.

²¹ *Ibid* s 105.

²² *Ibid* s 52(5).

²³ *Ibid* s 52A.

²⁴ *Ibid* s 106(3).

²⁵ *Ibid* s 52A; 106(3)(h), div 4 pt 2.

²⁶ *Ibid* ss 106(4)(b), 106(8)(a), ss 113 – 115.

- (4) Aboriginal land councils also have the advantages of being representative and inclusive:
 - (a) Membership of LALCs is open to Aboriginal people who live in or are recognised as having associations with the LALC's area, and to people listed on the register of Aboriginal owners in relation to land in the LALC's area,²⁷
 - (b) Voting members of a LALC elect the LALC's Board,²⁸ and
 - (c) Voting members of the LALCs in each Region vote in the election of a NSWALC councilor for that Region.²⁹
- (5) Finally LALCs have the benefit of being subject to a level of regulation which assists in ensuring assets are properly managed and that land dealings will achieve the intended outcomes. In particular:
 - (a) The management of LALC assets and performance of their functions is regulated by the ALRA and regulations and by NSWALC policy made under them
 - (b) LALCs are required to perform their functions consistently with community, land and business plans which, in the case of LALCs, are prepared and approved in consultation with members and Aboriginal owners,³⁰
 - (c) LALCs are accountable to members and to the public under the ALRA and under the *Ombudsman Act 1974* (NSW), the *Independent Commission Against Corruption Act 1988* (NSW) and the *Government Information (Public Access) Act 2009* (NSW).

2.2. Facilitation of the objects of the ALRA

Despite the economic objectives of the ALRA, the Committee's view is that the full potential of the ALRA is yet to be realised. The Committee believes that the economic outcomes intended by the ALRA would be improved if the Government took action to facilitate the more efficient return of land under the ALRA. In particular, the Committee notes the following.

- (1) *Reducing Delays in Determining Land Claims*: Historically, there have been significant and unacceptable delays in determining Aboriginal land claims. It has not been unusual for claims to remain undetermined for over 20 years.³¹ There is no reason or justification for such delays. As Justice Jagot noted in *Jerrinja*, "No land

²⁷ *Aboriginal Land Rights Act 1983* (NSW) div 2 pt 5.

²⁸ *Ibid* s 63.

²⁹ *Ibid* s 121.

³⁰ *Ibid* div 7 pt 5 and div 5 pt 7.

³¹ See for example, *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 156 LGERA 65 ("Jerrinja"); *Batemans Bay Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 800 which all involved claims which took 15 to 20 years for the Minister to determine.

council should have to wait for twenty years for its land claim to be determined".³² Such delays, particularly where the land is "claimable" is a deprivation of an asset to the Aboriginal community and represents an undermining of a claim process which was intended to be "simple, quick and inexpensive".³³ The Government should ensure that sufficient resources are in place to determine claims in a timely manner.

- (2) *A less oppositional approach to claims assessment:* With respect, in recent years the Minister has had a poor record in defending appeals to the Land and Environment Court against the refusal of land claims. Further, many claims which have been refused and then appealed have subsequently been resolved prior to hearing. This then requires Aboriginal land councils to commence and prosecute appeals in the Land and Environment Court in order to obtain land, which should have been granted by the Minister. This situation is a very inefficient use of the land council's resources and creates further delay in the claims process. Taking steps to ensure assessments of claims by the Department pay regard to the relevant case law, will allow land councils to direct resources to economic development rather than being absorbed by the claim process.
- (3) *Reducing delays in transferring 'claimable Crown land':* Where land has been determined to be 'claimable Crown land', many LALCs have experienced excessive delays in the transfer of land. Some LALCs have had to wait over 15 years for claimable Crown land to be transferred. As with delays for determining land claims, the failure to transfer land efficiently is a deprivation of an economic asset. For this reason the Government should ensure that all 'claimable Crown land' be transferred promptly.

2.3. Prioritising the ALRA over the sale of Crown land

In enacting the ALRA, the NSW Parliament clearly intended that surplus Crown land would be transferred to Aboriginal people. As noted above, it was acknowledged that the dispossession of Aboriginal people of their traditional lands without compensation had contributed to the social and economic disadvantage experienced by Aboriginal people. Accordingly, unless land was needed for an essential public purpose, or was lawfully used and occupied, it was required to be transferred to Aboriginal people. Such a measure was understood to be an appropriate and beneficial use of such land.

Given Parliament's intention, it is unfortunate that in recent years, rather than the exercise of this legislation as a beneficial outcome, the State has tended to prioritise the sale of surplus Crown land over the objects of the ALRA.³⁴ This has tended to undermine the intention of the ALRA.

³² *Jerrinja* per Jagot J at [124].

³³ Hansard, Assembly, 24 March 1983, 5095.

³⁴ See for example, J Behrendt, "Some Emerging Issues in relation to claims to land under the Aboriginal Land Rights Act 1983 (NSW)" (2011) 34(3) *UNSW Law Journal* 811 at 824-5. See also for example, *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 ("*Wagga HCF*") and *Minister Administering The Crown Lands Act v La Perouse Local Aboriginal Land Council* (2012) 193 LGERA 276.

The Committee submits that, if it is the Government's priority to promote the economic development of Aboriginal communities then, where land is surplus land to Government need, it should identify these lands to the LALCs and provide an opportunity for the relevant LALC to make a claim for that land under the ALRA.

2.4. Aboriginal Land Agreements

The Committee notes the recent amendments to the ALRA introduced by the *Aboriginal Land Rights Amendment Act 2014*, which made provision for the resolution of land claims, and the transfer of land through Aboriginal Land Agreements. The new provisions provide an opportunity for NSW Government and Aboriginal land councils to resolve claims by agreement and in innovative ways. However, the negotiation of such agreements are also likely to be resource intensive and the intended outcomes are likely to be illusory to Aboriginal land councils (and the Government) if the Government does not approach agreements with a view to delivering genuine economic outcomes to the land councils concerned.

2.5. Aboriginal land and the planning process

In 1980, the Select Committee in the Keane Report noted that:

As a result [of their socio-economic disadvantage and position of relative inequality], the Aboriginal people of New South Wales suffer discrimination from various Government decision makers in relation to land development and planning. Thereby the ability of Aboriginal groups to progress as self-determining communities can be stifled.³⁵

The Select Committee recommended:

That land owned by Aboriginal communities be governed by special planning provisions of the Planning and Environment Commission which would permit Aboriginal communities to develop projects that may otherwise be contrary to local planning ordinances, provided such projects were of special importance to the Aboriginal community and did not adversely affect adjoining residents.³⁶

Unfortunately, this recommendation has never been implemented and discrimination in relation to land planning decisions has continued.

Some LALCs have had their land disproportionately zoned restrictively, or otherwise made subject of, restrictive environmental classifications. As an example, Deerubbin Local Aboriginal Land Council submitted to Penrith Council that in the draft *Penrith City Centre Local Environment Plan 2008*:

- approximately 72% of its land in the Penrith local government area was to be rezoned E2 Environmental Conservation (a highly restrictive land use zone not generally considered appropriate for privately owned land); and

³⁵ Keane Report [9.15].

³⁶ Ibid 15.

- of its remaining land, 82% was to be designated as “environmentally sensitive”.³⁷

The reasons for this reclassification are likely include:

- (1) Land owned by an Aboriginal land council may be treated as though it was essentially public in character, and is therefore a safer and more attractive target for restrictive zonings rather than other privately owned land.
- (2) In some cases it may appear to planners that land of the Aboriginal land council is in fact publicly owned. This is a result of the long delays in determining claims and then transferring claimable land, which means that the land council has no registered title for many years, and during that time the land will appear from title searching to be State owned land.
- (3) A further effect of the lengthy delays in the determination of claims and the transfer of lands is that the land may have remained relatively undeveloped for many years, while neighbouring lands have been progressively subdivided and built upon. A result of this has been that in the relatively recent round of Local Environment Plan (“LEP”) amendments, Aboriginal land council lands have sometimes been amongst the last remained tracts of undeveloped land with conservation value.
- (4) While planners are likely to be influenced by the views of agencies such as the Office of Environment and Heritage when preparing environmental planning instruments, they are less likely to be aware of, or appreciate the importance of, the important public policy behind the transfer of claimable Crown lands to Aboriginal land councils.
- (5) Inappropriate and outmoded assumptions may be made by planners and relevant agencies about the values of Aboriginal land council land to the people whose benefit it is held for. These assumptions may lead to incorrect assumptions about the likely uses that the land council will make of the land. This may also contribute to planning decisions which can have an adverse effect on Aboriginal economic development.³⁸

There are many State Environmental Planning Policies (“SEPPs”) developed to address specific issues in the planning process, including to encourage particular kinds of development. The Committee is of the view that the Inquiry should consider the merits of the development of a SEPP specific to Aboriginal land council land. The purpose of the SEPP should be to ensure that the important social and economic policy embedded in the ALRA is given an appropriate place in the environmental planning and assessment regime. The SEPP’s provisions could override restrictions on land use in Local Environmental Plans where this is necessary and appropriate in order to allow development projects on Aboriginal land council land that will contribute to Aboriginal economic development.

³⁷ It should be noted that, in response to submissions made by Deerubbin Local Aboriginal Land Council and meetings between the parties, Penrith Council, the Office of Environment and Heritage and the Department of Planning, the proposed E2 zoning is currently deferred.

³⁸ An example of this was the document “Towards an Aboriginal Land Management Framework for NSW – Healthy Country, Healthy Communities” published in November 2008 by the Department of Environment and Climate Change which is available at <http://www.environment.nsw.gov.au/resources/cultureheritage/08545almfdp.pdf>

2.6. Simplifying Interaction between ALRA and Native Title

The interaction between the ALRA and native title is extremely complicated.

One thing that can be stated confidently, however, is that successful Aboriginal land claims made after 28 November 2004 will result in the transfer, to the relevant Aboriginal land council, of a special category of fee simple estate that is subject to any native title rights and interests existing immediately before the transfer.³⁹ The full effect of this is not certain. However, one immediate effect is the requirement in s 42 of the ALRA which provides that, subject to a number of narrow exceptions, an Aboriginal land council must not deal with such land "unless the land is the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act)".

The purpose of s 42 is clear. Because land claims under the ALRA lodged after 1994 may affect native title, the transfer of land can only occur if it will be subject to any native title that exists at the time of the transfer. In order to protect any such native title interests, s 42 of the ALRA prohibits the land being dealt with without an approved determination of native title. The terms of s 42 provide that the prohibition only arises in relation to native title rights and interests where native title exists at the time the land is transferred to a land council. It does not arise where native title does not exist.

However, the effect on the ability of the Aboriginal land council to use the land which is affected by s 42 may be unnecessarily prohibitive. The State Government, for example, has a range of avenues available to it to enable it to deal with State owned lands despite uncertainty about the existence of native title. Government may:

- (a) determine, on the basis of an internal investigation, that any native title has been extinguished and therefore that it is safe to deal with the land;
- (b) obtain "section 24FA protection"⁴⁰ in relation to the proposed dealing by commencing a non-claimant native title application and then discontinuing the application if there is no relevant response to the notification of it;
- (c) make an Indigenous land use agreement ("ILUA")⁴¹ with native title holders or claimants allowing the dealing, or
- (d) comply with any other relevant procedure in the "future act" regime of the *Native Title Act 1993* (Cth).⁴²

By contrast, where Aboriginal land council wishes to 'deal with land' that is subject to native title, it must commence a non-claimant native title application in the Federal Court and then prosecute the claim to conclusion.⁴³

³⁹ *Aboriginal Land Rights Act 1983* (NSW) s 36(9).

⁴⁰ See *Native Title Act 1993* (Cth), sub-div F div 3 pt 2.

⁴¹ *Ibid* sub-divs B-E div 3 pt 2.

⁴² *Ibid* div 3 pt 2.

Further:

- (a) the definition of the expression "deal with land" as it applies to s 42 of the ALRA is extremely broad;⁴⁴ requiring that the land council must obtain a determination of native title even for certain "dealings" that would not affect any native title,
- (b) the cost of bringing and prosecuting non-claimant native title proceedings in the Federal Court may well exceed the value of the land or of the proposed dealing with it,
- (c) if the determination is that native title exists, there is considerable uncertainty about what the land council may then do with the land, with or without the agreement of the native title holders.

The operation of s 42 of the ALRA is further complicated by s 47A of the NTA. Where this provision applies to an Aboriginal land council, it allows previous extinguishment of native title to be disregarded. However, the relationship between the land council's title and native title recognised as a result of s 47A of the NTA, is very different to the relationship where native title exists immediately before the transfer of land to the land council.

Where native title exists immediately before the transfer to the land council, s 36(9) of the ALRA states that the land council's freehold title is "subject to" the native title. However, where native title is recognised only because of s 47A of the NTA, the native title has "no effect" on the land council's title. The land council can deal with the land despite the fact that it is subject to a determination that native title exists.

⁴³ This contrast was noted by Perram J in the Federal Court in *Lightning Ridge Local Aboriginal Land Council V Premier Of New South Wales & Anor* [2012] FCA 792, particularly at [20] to [24]. His Honour concluded:

[24] *Considerations of that kind do, however, underscore the unsatisfactory nature of s 42(1) which may appear to burden those whom it was designed to assist. If s 42(1) were amended to include a reference to future act protection under the NT Act the problem would, in all likelihood, be solved. In turn that would relieve this Court from having to determine a constant stream of non-claimant applications from local aboriginal land councils. It is a matter which warrants attention from the New South Wales Parliament.*

⁴⁴ See ALRA s 40, which defines "deal with land" to mean:

- (a) sell, exchange, lease, mortgage, dispose of, or otherwise create or pass a legal or equitable interest in, land, or
- (b) grant an easement or covenant over land or release an easement or covenant benefiting land, or
- (c) enter into a biobanking agreement relating to land under the Threatened Species Conservation Act 1995 or a conservation agreement under the NPW Act, or
- (d) enter into a wilderness protection agreement relating to land under the Wilderness Act 1987, or
- (e) enter into a property vegetation plan under the Native Vegetation Act 2003, or
- (f) subdivide or consolidate land so as to affect, or consent to a plan of subdivision or consolidation of land that affects, the interests of an Aboriginal Land Council in that land, or
- (g) make a development application in relation to land, or
- (h) any other action (including executing an instrument) relating to land that is prescribed by the regulations.

Section 47A was introduced into the NTA in 1998. When s 42 of the ALRA was first enacted in 1994, it did not contemplate the revival of native title by s 47A of the NTA, or the difficulties this creates for a land council seeking to comply with s 42.

This problem is best illustrated by an example. Assume that a registered native title claim has been made over an area that includes Aboriginal land council land to which s 42 of the ALRA applies. The land council wishes to develop and sell the land. From land title investigations it is clear that any native title in relation to the land was extinguished *before* transfer to the land council. However, the native title claim group asserts that s 47A applies to the land, so that the extinguishment is to be disregarded.

For the land council to obtain a determination of native title in relation to the land it is obliged to wait until the whole registered claim has been finalised and it is determined whether – amongst other things – s 47A does in fact apply to the land.

The land council waits five years (not an unrealistic time for a native title claim to run its course) for the proceedings to be finalised. Eventually, at the conclusion of the proceedings, it is determined that s 47A *does* in fact apply; with the result that native title exists in relation to the land. Native title recognised because of s 47A has, however, no effect on the land council's title, and so ultimately the land council is free to deal with the land as it would have been if, it had been able to obtain a determination that native title did not exist. Simply put, the land council has been required to delay dealing with its land for a long period of time because of conflicting laws.

The Committee urges the Inquiry to investigate options to create greater flexibility in how land vested in an Aboriginal land council, which may be subject to native title, can be dealt with in a timely and reasonable process. For example, consideration could be given to whether s 42 of the ALRA should be amended to allow an Aboriginal land council to deal with land that may be subject to native title:

- (1) if the dealing is of a kind which will not extinguish or otherwise affect any native title, or
- (2) if the land council has commenced a non-claimant native title application and something equivalent to "section 24FA protection" arises,
- (3) if the dealing is permitted by an ILUA, or
- (4) if the dealing is the transfer of the land from the land council to the State or a Local Government Body.

Further, consideration ought to be given to the State liaising with the Commonwealth and the Federal Court to draft and implement a procedure allowing the Court to determine that native title did not exist at that point in time when the land was transferred to the land council (even though s 47A may apply and the land may be the subject of a positive determination of native title in future). Such an order would enable a land council to more efficiently comply with s 42. As the procedure would be premised on the existence of extinguishing events, there would no impact on native title.

3. Native Title

A further opportunity to assist Aboriginal communities with economic development arises in relation to native title. There are now a number of native title determinations in New South Wales,⁴⁵ and there are likely to be more in the future.

With the number of determinations increasing, there will be instances where limited native title rights and interests are recognised either in, or on the fringes of towns. Where those rights are recognised, they are likely to be limited to non-exclusive rights to hunt, fish and gather. In and on the fringes of towns, those rights may have limited utility. Native title does not, however, extend to the right to develop land.

The Committee considers that, consistent with the acknowledgement in the ALRA, the State should recognise that land was always recognised as an economic resource for Aboriginal people, and in a contemporary world Aboriginal people will need greater flexibility in how economic outcomes are achieved. Accordingly, where requested by native title holders, the Government should consider a scheme whereby certain lands on which native title exists can be converted into freehold and developed; including recognition of Aboriginal water rights and interests.⁴⁶

4. Access to professional services

Aboriginal-owned enterprises will require access to appropriate legal, financial and strategic services to establish a solid basis for the enterprise if it is to be sustainable. While some enterprises will have the means to access and obtain those services themselves, many will require assistance to access and pay for appropriate services in the establishment phase.

In developing strategies to encourage sustainable economic development in Aboriginal communities and to support the establishment and sustainability of Aboriginal-owned enterprise, the Inquiry should consider the need to ensure the availability of such services.

The Committee notes that, pursuant to commitments made under its Reconciliation Action Plan ("RAP") the Law Society of NSW is developing an Indigenous Enterprise Legal Assistance Scheme ("IELAS") in partnership with the NSW Indigenous Chamber of Commerce. This is a pragmatic initiative to assist in the establishment and sustainability of Aboriginal-owned enterprises in the establishment phase. The flow-on benefits of Aboriginal-owned enterprise are significant for communities. For example, 72% of the staff members employed by Indigenous businesses certified by Supply Nation (previously known as the Australian Indigenous Minority Suppliers Council) are Indigenous.⁴⁷

⁴⁵ See for example, *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847; *Bandjalang People No 1 and No 2 v Attorney General of New South Wales* [2013] FCA 1278; *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 851; *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604; *Yaegl People #1 v Attorney General of New South Wales* [2015] FCA 647.

⁴⁶ See V Marshall, *A web of Aboriginal water rights: The competing Aboriginal claim for water property rights and interests in Australia* (PhD law Macquarie University, 2014).

⁴⁷ Reconciliation Australia webpage: <<http://workplace.reconciliation.org.au/program/diversifying-your-supply-chain>> (accessed 9 October 2013).

In addition to the IELAS, the Committee notes that there may be potential to further leverage resources available under the RAP commitments made by law firms to assist Aboriginal-owned enterprises. Many law firms including Gilbert + Tobin, Ashurst and Allens Linklaters provide assistance to Aboriginal-owned enterprises through their pro bono programs as a priority under their RAPs.

Most law firms (and other corporates) with a commitment to reconciliation have committed to supporting Indigenous business through their procurement policies whether through Supply Nation or otherwise. Linking business with a commitment to purchase from Aboriginal-owned enterprises should also be a priority in the creation of sustainable businesses.

4.1. Enterprise assistance centre

It is anticipated that the IELAS will provide access to legal services for a number of Aboriginal-owned enterprises. However, it is unlikely to meet the demand for services generated by an effective Government strategy on economic development. Further, the IELAS will operate in isolation from other professional services which would benefit an Aboriginal-owned enterprise in its start-up phase.

In the experience of members of the Committee, there are a number of sources of assistance of various kinds available to fledgling Aboriginal-owned enterprises. There are multiple barriers to accessing the assistance, however, including:

- people establishing an enterprise for the first time may not be able to identify their needs;
- there is a lack of awareness of the assistance that is available;
- the services are fragmented and operate in isolation; and
- the requirements for accessing assistance can be onerous and differ markedly from service to service.

To ensure Aboriginal-owned enterprises are able to access the assistance they need, the Committee suggests the Inquiry consider recommending the establishment of an enterprise assistance centre with the following features:

- (a) an accessible entry point for all support and assistance available to Aboriginal-owned enterprises from government, the private sector⁴⁸ and organisations such as Indigenous Business Australia;
- (b) an assigned officer to assist the enterprise to identify and obtain the assistance it requires and to assist with regulatory compliance during the establishment phase of the enterprise;
- (c) the centre should work with existing service providers to leverage support already available;

⁴⁸ See for example Westpac's Indigenous banking initiatives" available online: <<http://rap.westpacgroup.com.au/financial-inclusion>> (accessed 22 October 2015).

- (d) all services should be provided through the centre (utilising technology where necessary) so clients of the centre do not have to attend multiple locations to receive the assistance they need at the same time they are trying to establish their enterprise;
- (e) development of the centre in consultation with Aboriginal people who are establishing or have recently established their own businesses;
- (f) culturally appropriate services both at the centre and by the service providers a person is connected with through the centre;
- (g) local presence in communities;
- (h) opening hours compatible with a person starting a business; that is, the centre should be open in the evenings and on Saturdays.
- (i) research capacity to identify gaps in the availability of assistance for Aboriginal-owned enterprises and to identify what supports and hinders the development of sustainable Aboriginal-owned enterprises.

The Committee thanks you for the opportunity to comment and would welcome the opportunity to provide further information to the Inquiry if required. Questions may be directed to Vicky Kuek, policy lawyer for the Committee, on _____ or _____

Yours sincerely,

John F Eades
President