

INQUIRY INTO ECONOMIC DEVELOPMENT IN ABORIGINAL COMMUNITIES

Organisation: NSW Aboriginal Land Council

Date received: 12/02/2016



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

Legislative Council NSW
Standing Committee on State Development

Dear Committee,

Submission to the Inquiry into Economic Development in Aboriginal Communities

The NSW Aboriginal Land Council (NSWALC) is the peak body representing Aboriginal peoples in NSW and with over 23,000 members, is the largest Aboriginal member based organisation in Australia.

NSWALC provides the following submission in response to the Standing Committee on State Development Inquiry into Economic Development in Aboriginal Communities.

This submission includes recommendations on the following:

- Return of land to Aboriginal peoples;
- Facilitating economic development on land including through planning laws and policies; and
- Development of appropriate assistance programs including mentoring

However, NSWALC is of the view that the development of any successful initiatives for the sustainable economic development of Aboriginal communities requires comprehensive and meaningful consultation with Aboriginal communities, Local Aboriginal Land Councils and Aboriginal Peak bodies including NSWALC and NTSCORP (Native Title Service in NSW).

Should you require further information regarding the content of this letter, please contact the Policy and Programs Unit on (02) 9689 4444.

Yours sincerely,


Chief Executive Officer

Date: 12/2/16

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OVERVIEW

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW and with over 23,000 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)* (**ALRA**), and has a legislated objective to improve, protect and foster the best interests of all Aboriginal peoples in NSW. NSWALC also provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) across the state. LALCs have similar statutory objectives to NSWALC in regards to their own local communities.

The governance structures within the Aboriginal land rights system in NSW are designed to achieve the highest degree of representation and participation for Aboriginal people through the election of nine regional Councillors and LALC Boards every four years.

As the peak representative body, NSWALC is committed to ensuring a better future for all Aboriginal people by working for the return of culturally significant and economically viable land and pursuing cultural, social and economic independence for Aboriginal peoples in NSW.

The Aboriginal land rights network has unique, first-hand knowledge of the challenges and opportunities facing Aboriginal peoples in regards to economic development. This submission identifies and analyses some of these challenges and opportunities and provides a number of recommendations regarding land compensation and Crown lands, planning, government programs and funding, service delivery and evaluation, job markets and models for economic development.

Aboriginal population in NSW

It is estimated that there were 631,757 Aboriginal people in Australia at the most recent Census.¹ Of these, 202,674 people were living in NSW. This represents more than 32 per cent of the total Aboriginal population and the largest count for any state or territory in Australia.

The national median age of Aboriginal and Torres Strait Islander population is 21 years in comparison to the national median age of 37 years. More than 36 per cent of Aboriginal and Torres Strait Islanders in NSW were under 15 years of age and just over 4.2 per cent were aged 65 and over.

Results from the most recent Census show that a much higher proportion of the Aboriginal population is aged 24 years or less than is the case for the non-Aboriginal population. Across males and females, these age groups represent 56.5 per cent of the total Aboriginal population compared to 31.5 per cent of the total non-Aboriginal population of NSW. At the other end of the age

¹ N. Biddle 'The Aboriginal population of NSW: Analysis of the 2011 Census' pg10:
http://www.alc.org.au/media/86737/The%20Aboriginal%20population%20of%20NSW_Analysis%20of%20the%202011%20Census.pdf accessed on 9/10/15

distribution, 26.6 per cent of the total non-Aboriginal population is aged 55 years and over compared to 9.4 per cent of the Aboriginal population.

Given these demographics the Aboriginal population is projected to grow into the future, and with this growth the economic significance of the population will increase, particularly in regional NSW.

Employment outcomes, is an important factor in determining the access to economic resources in an area. Those areas with high levels of employment (for both males and females) and those with a high proportion of the population working full-time and/or working as managers or professionals have relatively high incomes and therefore relatively high access to economic resources.

There is considerable variation in employment outcomes across NSW. This reflects in part the variation in education outcomes. However, it also reflects differences in the general labour market in regional NSW. Furthermore, there is considerable variation in the types of jobs that Aboriginal peoples in the regions have access to which does not necessarily correlate with general employment outcomes. For example, amongst Aboriginal males, the Northern tablelands region has the lowest percentage of the employed population working as a manager or professional amongst all regions (19.7 per cent) but a relatively high proportion working full-time (44.4 per cent).

In 2011, NSWALC published a report that analysed the 2011 Census population data and provided lifecourse analysis regarding education and employment outcomes for Aboriginal peoples across regional NSW. This is available on the NSWALC website: www.alc.org.au.

Economic development and the UN Declaration on the Rights of Indigenous Peoples

NSWALC is a strong advocate for practical measures to deliver sustainable socio-economic improvements to the circumstances of Aboriginal peoples. These measures must be based on the fundamental rights of Aboriginal peoples as espoused in the United Nations Declaration on the Rights of Indigenous Peoples; most notably the following:

- **Article 3** *Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
- **Article 23** *Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, Indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.*
- **Article 26** *Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.*
- **Article 28** *Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.*

NSWALC advocates that a rights-based community development approach is essential in delivering sustainable economic development opportunities for Aboriginal peoples. Such an approach supports community identification, development and implementation of strategies to achieve improved outcomes through increased self-reliance, and substantive empowerment of Aboriginal peoples; to give power to Aboriginal peoples to determine their own affairs at a community level.²

A rights-based community development approach must be founded on the core principles of the United Nations Declaration on the Rights of Indigenous Peoples including autonomy, participation, engagement and consultation. There is increasing international recognition that these principles have a practical and economic, as well as a moral and legal basis for their application in government decision making. The successful implementation of the community development approach in a range of international contexts supports the application of this approach to similar situations domestically. It is in this context that NSWALC provides the comments to the Inquiry.

SUMMARY OF RECOMMENDATIONS

Recommendation: The Committee should recognise that Aboriginal peoples' interests in Crown land is multifaceted and includes providing economic development opportunities for Aboriginal peoples.

Recommendation: The Committee should recognise that the compensatory and remedial intent of the ALRA supports Economic Development for Aboriginal peoples and communities and should be embedded into government processes and instruments to achieve this intent.

Recommendation: The Committee should consider the economic burden placed on Aboriginal Land Councils as a result of the NSW Government issuing limited title over lands granted under land claim.

Recommendation: NSWALC recommends that the Committee considers options for improving the ability of the planning system and planning bodies to work with Aboriginal Land Councils to strengthen economic self-determination of Aboriginal communities.

Recommendation: NSWALC recommends that further consultation occur with NSWALC and NTSCORP to develop options to better support recognised Native Title groups and LALCs to achieve economic development outcomes.

Recommendation: NSWALC recommends that, in partnership with NSWALC and NTSCORP, consideration is given to developing processes to simplify the interaction between the ALRA and Native Title so the two systems better complement each other's objectives.

Recommendation: NSWALC recommends that comprehensive and meaningful consultation must be undertaken with Aboriginal communities and Aboriginal peak bodies regarding the form and methods of developing new policies and programs relating to Aboriginal economic development.

² Cornell cited in Sean Brennan. 2004. Could a Treaty make a Practical Difference in People's Lives? The Question of Health and Wellbeing. *The Treaty Project Issues Paper No. 4*. UNSW, Gilbert + Tobin Centre of Public Law

Recommendation: The Committee should recognise the importance of data collection, particularly in relation to specific economic development opportunities for Aboriginal peoples and communities, to assist in the systematic and thorough evaluation of economic development programs.

Recommendation: The Committee should consider undertaking geographic specific analysis of industries to assist in identifying growth industries within regional areas.

Recommendation: The Committee should consider recommendations regarding the development of a strategy that supports small scale enterprises for Aboriginal peoples particularly in remote and regional NSW.

Recommendation: NSWALC recommends that formal mentoring programs should be developed to support industry experts to mentor Aboriginal entrepreneurs and businesses.

1. LAND RIGHTS (NSW)

Intent and purpose of the *Aboriginal Land Rights Act 1983 (NSW)*

In presenting the ALRA to the NSW Parliament on March 24, 1983, the Hon. Frank Walker, the then Minister for Aboriginal Affairs asserted that the Government 'had 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 the basis for a self-reliant and more secure economic future for our continent's Aboriginal custodians.'³

In enacting the ALRA the NSW Parliament provided historic recognition to the prior ownership of NSW by Aboriginal peoples.⁴ The Parliament also established a network of Aboriginal Land Councils to acquire and manage land as an economic base for Aboriginal communities, as compensation for historic dispossession and recognition of the ongoing disadvantage suffered by Aboriginal communities. The intent was to deliver a simple, quick and inexpensive mechanism for the claim and return of 'vast tracts' of Crown land to Aboriginal peoples.⁵

The claim process in the ALRA is the cornerstone for Aboriginal peoples' realising the land justice and economic outcomes envisaged by the ALRA and is the primary mechanism for giving effect to the purposes set out in section 3 of the ALRA.⁶

Under the ALRA, Aboriginal Land Councils can make claims over unused and unneeded Crown land as compensation for dispossession. The successful determination of a land claim under the ALRA

³ Preamble of the Aboriginal Land Rights Act 1983 statement by Minister Walker 24 March 1983: Office of the Registrar of the ALRA <http://www.oralra.nsw.gov.au/alrareviewpreamble.html> accessed on 30/09/2015

⁴ Preamble of the Aboriginal Land Rights Act 1983 statement by Minister Walker 24 March 1983: Office of the Registrar of the ALRA <http://www.oralra.nsw.gov.au/alrareviewpreamble.html> accessed on 30/09/2015

⁵ F. Walker Second Reading speech: Aboriginal Land Rights Bill, 24th March 1983
<http://www.oralra.nsw.gov.au/review/pdfreview/Extract%20from%20Hansard%20March%2024%201983.pdf>

⁶ *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 per Mason P (with whom Tobias JA agreed) at [20].

generally delivers freehold title to land to the relevant Aboriginal Land Council. This includes rights to less valuable minerals. The transfer of freehold title affords Aboriginal Land Councils the same rights as other freehold owners. Subject to compliance mechanisms of the ALRA, Aboriginal Land Councils can develop or deal with lands for the economic development of Aboriginal communities.

Currently there are more than 28,000 outstanding Aboriginal land claims awaiting Ministerial determination and the vast tracts of Crown land envisaged by the Parliament have amounted to the transferral of less than 0.4% of the Crown estate.⁷ The slow determination of claims, and the resulting slow return of land to Aboriginal peoples, negatively impacts on the ability of LALCs to deliver the social, community and economic objects of the ALRA and is a significant inhibitor to economic development outcomes for Aboriginal peoples.

Recommendation: The Committee should recognise that Aboriginal peoples' interests in Crown land is multifaceted and includes providing economic development opportunities for Aboriginal peoples.

Recommendation: The Committee should recognise that the compensatory and remedial intent of the ALRA supports Economic Development for Aboriginal peoples and communities and should be embedded into government processes and instruments to achieve this intent.

Limited title

Whilst the Parliamentary intent for the ALRA was to deliver a simple and speedy mechanism for the claim and return of Crown land,⁸ the economic impact of the slow determination of land claims has been further hampered by the practice of transferring limited title to claimed lands. Prior to November 2009, land claims delivered LALCs with an ordinary, surveyed freehold title. However, more recently many claims have resulted in the offer of only limited title as a result of the cost of land surveys.

There is significant cost shifting to LALCs as a result of issuing limited title. LALCs are responsible for undertaking surveying work, which in some instances costs hundreds of thousands of dollars depending on the size of the land parcel in question.

The shifting of responsibility and costs associated with this practice has fallen to Aboriginal Land Councils, many of which have limited financial capacity and more immediate community priorities. This in turn limits their ability to deal with the land or negotiate with developers or joint venture partners from an equal position.

⁷ Based on figures in *Facilitation to Enable not Frustration to Disable*, Aboriginal Land Rights Review 2012, Report of Findings and Recommendations for the Working Group, p.22
<http://www.oralra.nsw.gov.au/review/pdfreview/Working%20Groups%20Final%20Report%20ALRA%20Review%2011%20Oct%202012.pdf>

⁸ F. Walker Second Reading speech: Aboriginal Land Rights Bill, 24th March 1983
<http://www.oralra.nsw.gov.au/review/pdfreview/Extract%20from%20Hansard%20March%2024%201983.pdf>

Addressing issues relating to the granting of limited title has the potential to open up opportunities for Aboriginal Land Councils to engage in economic development opportunities on their land without significant financial burden of surveying land.

Recommendation: The Committee should consider the economic burden placed on Aboriginal Land Councils as a result of the NSW Government issuing limited title over lands granted under land claim.

NSWALC's Economic Development Policy

NSWALC and the Aboriginal Land Rights network have a key role to play in facilitating and supporting economic opportunities for Aboriginal peoples in NSW. NSWALC has legislated objects and mechanisms to continue to create intergenerational wealth, develop sustainable benefits which contribute to the financial, social, and cultural needs and wants of Aboriginal people in NSW and is the most significant non-government investor in programs to strengthen governance and economic outcomes at a local community level.

In 2014 NSWALC released an Economic Development Policy⁹ which provides a commitment of up to \$16 million over five years to drive economic development towards wealth creation and wellbeing for Aboriginal people in NSW.

NSWALC's Economic Development Policy is guided by the following principles;

- **Self-determination** – Aboriginal people making decisions for Aboriginal people; and Local Aboriginal Land Councils driving local and regional initiatives, that are supported by NSWALC.
- **Community development for economic self-reliance** – a broader community development approach to economic development with capacity development being a central element to all economic development strategies and initiatives.
- **Coordination not duplication** – recognise and utilise the expertise, experience and programs of others with NSWALC principally facilitating and coordinating partnerships with corporate, governments and program providers rather duplicating efforts.
- **Strong leadership and governance**– key to the success of any enterprise strong leadership and governance of Aboriginal Land Councils remain the foundation. As a community body, the governance structures within the Land Rights system within NSW are designed to achieve the highest degree of representation and participation for Aboriginal people and the NSWALC model is acknowledged as an example of good practice 'in securing land rights and developing Aboriginal lands to provide greater economic and social opportunities for Indigenous peoples'¹⁰ by the UN Special Rapporteur on the Rights of Indigenous Peoples.

⁹ NSWALC Economic Development Policy

<http://www.alc.org.au/media/92677/nswalc%20economic%20development%20policy.pdf>

¹⁰ Anaya, J (2011) 'Keynote Speech at the 2011 New South Wales Aboriginal Land Council State Wide Conference'. <http://unsr.jamesanaya.org/statements/keynote-speech-at-the-2011-new-south-wales-aboriginal-land-council-conference>

Planning and Local Aboriginal Land Councils

The planning system in NSW can provide an important mechanism for facilitating the objectives of the ALRA. In practice though, the planning system has created a number of barriers for Aboriginal peoples and LALCs in NSW. In particular the Planning system fails to meaningfully engage Aboriginal peoples, fails to recognise that Aboriginal peoples rights to determine and develop strategies for the development and use of Aboriginal lands, territories and other resources (as per Article 32 of the United Nations Declaration on the Rights of Indigenous People¹¹).

Under the ALRA, LALCs hold land for the economic, social and cultural benefit of all Aboriginal people living within their boundaries. With the consent of their members, LALCs are able to develop or sell their land and, may also seek to maintain key parcels of land for their cultural, social and/or environmental values.

As one of the largest private land holders across the state of NSW, and with a large community base, the Aboriginal Land Rights Network present an opportunity to stimulate local and regional economic development. This can be pursued through addressing the restrictive environmental zoning placed on LALC owned land and the development of genuine partnerships between government and the Aboriginal Land Rights network to seek mutually beneficial economic and social outcomes. However, to date this has not generally been the experience of LALCs, with some local government authorities having a tendency to view land owned by the Aboriginal community as public environmental assets (effectively privately owned parklands). This process of 'down-zoning' for environmental conservation purposes eliminates the development potential of those lands and undermines the social and economic mechanisms of the ALRA.

Aboriginal Land Councils use their land assets in a variety of ways, including, economic development projects and commercial enterprises. These can include housing developments, commercial ventures, construction/engineering services, and providing facilities for hire for social and community activities in the local area. Many of these land uses partner with or offer benefits for the broader community as well as the Aboriginal community. The 'down-zoning' of LALC lands substantially affect the amount of economic opportunity and activity within the Aboriginal Land Rights Network which in turn hinders economic growth across NSW.

Under the current planning system, there are limited opportunities for Aboriginal peoples and Aboriginal Land Councils, to genuinely engage with planning processes. A more systematic and meaningful approach is needed – including the creation of processes, protocols and mechanisms which allow for the broad integration of the objectives of the ALRA with planning processes.

Recommendation: NSWALC recommends that the Committee considers options for improving the ability of the planning system and planning bodies to work with Aboriginal Land Councils to strengthen economic self-determination of Aboriginal communities.

¹¹ United Nations Declaration on the Rights of Indigenous People
http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf : accessed on 7/10/2015

2. INTERACTIONS BETWEEN LAND RIGHTS AND NATIVE TITLE

In NSW there are two key mechanisms by which Aboriginal peoples can have their rights in land recognised, Aboriginal Land Rights (under the ALRA) and Native Title as legislated for in the *Native Title Act 1993* (Cth) (**NTA**). Land Rights and Native Title, whilst very different systems, both provide legal rights for Aboriginal peoples intended to deliver benefits to Aboriginal people. Unfortunately the legal interaction between the two systems is complex which can lead to lengthy and financially intensive legal processes.

NSWALC and NSTCORP have worked together to develop resources for the community that aim to assist in explaining the complexities between the two systems. NSWALC has also published a guide outlining the complex interactions between land rights and native title that is available on our website. However, there may be other opportunities to explore in terms of how the two systems can better work together to achieve outcomes for Aboriginal peoples.

Recommendation: NSWALC recommends that further consultation occur with NSWALC and NTSCORP to develop options to better support recognised Native Title groups and LALCs to achieve economic development outcomes.

Recommendation: NSWALC recommends that, in partnership with NSWALC and NTSCORP, consideration is given to developing processes to simplify the interaction between the ALRA and Native Title so the two systems better complement each other's objectives.

3. STATE AND FEDERAL GOVERNMENT APPROACHES

The role of government must shift from delivering systems predicated on disadvantage, to facilitating the aspirations, priorities and self determination of Aboriginal peoples.¹² Governments must be prepared to move into an innovative space to encourage Aboriginal self-determination, and long-term partnerships with industry with a view to generational outcomes.

In order to facilitate this, NSWALC provides the following advice.

Consultation and collaboration

Aboriginal people are the best determiners of how to address the needs of their communities and must be equal partners in the development of policy and delivery of programs which affect them. Comprehensive and meaningful consultation with Aboriginal communities and Aboriginal peak

¹² Australian Institute of Health and Welfare: J. Hunt October 2013, Issues paper no.5 CTG Clearing House 'Engaging with Indigenous Australia – Exploring the conditions for effective relationships with Aboriginal and Torres Strait Islander communities' <http://www.aihw.gov.au/uploadedFiles/ClosingTheGap/Content/Publications/2013/ctgc-ip5.pdf> Accessed on 30/09/2015

bodies regarding the development of new policies and programs relating to Aboriginal economic development is essential.

A commitment to genuine collaboration and engagement with Aboriginal peoples and communities must continue throughout the duration of the policy/program lifecycle, to build trust within the community and overcome the gap between policy intention and policy execution.

Recommendation: NSWALC recommends that comprehensive and meaningful consultation must be undertaken with Aboriginal communities and Aboriginal peak bodies regarding the form and methods of developing new policies and programs relating to Aboriginal economic development.

Service delivery & evaluation

There is currently a significant lack of adequate data to evaluate current government programs that target employment and economic development opportunities for Aboriginal peoples. The improved collection, understanding and use of data in relation to addressing Aboriginal economic development is essential, as it allows for benchmarks to be set and provides a way for programs to be measured and tracked. It also enables goals to be established for the improvement of economic development outcomes.

NSWALC is of the view that:

- The lack of available data has meant that conclusive outcomes of economic development programs are difficult to determine, and has resulted in limited evaluation of the effectiveness of the programs.
- With data collection methods having altered overtime, there has been insufficient focus on data collection for longitudinal studies. Therefore sufficient assessment of the effectiveness and cost effectiveness of economic development programs for Aboriginal peoples over the longer-term cannot be undertaken.
- Where data is collected, it is often limited and not centrally collated. State-wide data on the outcomes of service delivery and program provision is not consistently available and in many instances data is stored in isolation at the departmental level.
- There are significant issues in relation to the accuracy, variability and specificity of data where it has been collected.

There is a clear need to improve data collection and establish systematic and thorough evaluation of the design and implementation of economic development programs. Longitudinal data collection compatible with comparative data analysis for Aboriginal and non-Aboriginal people is needed both at the state level and at the local and regional levels.

Recommendation: The Committee should recognise the importance of data collection, particularly in relation to specific economic development opportunities for Aboriginal peoples and communities, to assist in the systematic and thorough evaluation of economic development programs.

Job market

There are significant issues in relation to job market supply and demand, particularly in communities in regional and remote NSW. In the context of employment outcomes, it should be recognised that in some regional and remote areas, engaging in employment proves difficult as there are simply limited jobs in the area. It is problematic if the supply of trained people does not match industry demand and number of jobs actually available.

NSWALC recommends that training and development programs should be linked to proper geographic specific analysis of industry needs, particularly in regional and remote communities. A clear strategy to progress this should be developed with peak Aboriginal organisations and regional and remote communities.

Recommendation: The Committee should consider undertaking geographic specific analysis of industries to assist in identifying growth industries within regional areas.

Aboriginal Entrepreneurs and Business

Aboriginal entrepreneurs are often forgotten, and often rendered invisible as the common perception of Aboriginal business is a community-run venture.¹³ Government support and investment is often focussed on Aboriginal community-based enterprises. This focus is important to the collective economic development of Aboriginal communities.¹⁴ However, the sole focus on Aboriginal people conducting business within the 'Aboriginal economy' has the potential to limit the capacity for growth and access to economies of scale and larger supply chains.

Within other states and territories in Australia there are significantly higher levels of Aboriginal involvement in local and small scale enterprises. However, there is not currently a strategy in NSW for identifying and facilitating small scale enterprise opportunities in regional and remote NSW, or in metropolitan NSW.

Recommendation: The Committee should consider recommendations regarding the development of a strategy that supports small scale enterprises for Aboriginal peoples particularly in remote and regional NSW.

Recommendation: NSWALC recommends that formal mentoring programs should be developed to support industry experts to mentor Aboriginal entrepreneurs and businesses.

¹³ Foley D 2006. Indigenous Australian entrepreneurs: not all community organisations, not all in the outback. CAEPR discussion paper no.279/2006. Canberra: Centre for Aboriginal Economic Policy Research, The Australian National University. Accessed 10 October 2015 http://caepr.anu.edu.au/sites/default/files/Publications/DP/2006_DP279.pdf and Foley D 2013. Jus Sanguinis: the root of contention in determining what is an Australian Aboriginal business. Indigenous Law Bulletin, Austlii. Accessed 10 October 2015 <http://www.austlii.edu.au/au/journals/ILB/2013/39.pdf>

¹⁴ Morley, S: Australian Institute of Health and Welfare 'Success factors for Indigenous entrepreneurs and community-based enterprises' April 2014 <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129546986>