

**Submission
No 36**

INQUIRY INTO ECONOMIC DEVELOPMENT IN ABORIGINAL COMMUNITIES

Organisation: Office of the Registrar Aboriginal Land Rights Act 1983 (NSW)
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Submission to Legislative Council Standing Committee on State Development Inquiry into Aboriginal Economic Development in Aboriginal Communities

Summary

The NSW Government has a long history of bipartisan support for Aboriginal land rights and a substantial settlement fund as a basis for self-reliant and secure¹ economic opportunities for Aboriginal communities. It is an internationally recognised benchmark².

The past 33 years has seen significant capacity development within the NSW Aboriginal Land Council network as a result of the Aboriginal Land Rights Act 1983 (NSW) (**ALRA**). Further, the national recognition of native title rights and interests through the Native Title Act 1993 (Cth) (**NTA**), has created an additional pathway for Aboriginal people to access rights and interests in land and resources which, over time, should lead to economic opportunities.

However, both systems of rights recognition have experienced obstacles in converting land rights into socio-economic opportunities. This is primarily due to external parties not being familiar with the nature of Aboriginal land rights and native title, and technical legal limitations inherent in both systems.

The Registrar works with Aboriginal people, their Local Aboriginal Land Councils (**LALC**), the New South Wales Aboriginal Land Council (**NSWALC**) and the NSW government to improve NSW land rights legislation, government policy and socio-economic outcomes primarily through the ALRA.

The functions of the Registrar are set out principally in section 165 of the ALRA³. The functions purposively mix registration, administrative, dispute resolution and regulatory matters to provide the NSW Aboriginal Land Council network with a range of independent and reviewable support.

The nature of this work tends to expose the major barriers to lasting socio-economic outcomes for Aboriginal people, the capacity issues communities regularly face, and the implementation failures that frustrate and bemuse them. Conversely, this work also reveals many solutions.

This submission is built upon the excellent work of previous inquiry recommendations and aims to identify some of the barriers to socio economic success that are encountered in NSW land rights, and importantly focuses on key outcomes that have proven to work at a community level.

It takes a broad view of the economic opportunities for Aboriginal communities which may flow from land rights and analyses where some legislative reform may assist in removing barriers to Aboriginal people's equitable participation in the NSW economy, to better reflect international norms with respect to Aboriginal Peoples' rights.

¹ The Hon Frank Walker MP, second reading speech Aboriginal Land Rights Bill, Hansard Legislative Assembly 24 March 1984

² Mercer Investments' First Peoples Settlement Peer Practices Report (2012)

³ <http://www.legislation.nsw.gov.au/#/view/act/1983/42/part9/div1>

The Registrar notes that the following principles emerge from an analysis of the many reports discussing these issues and recommends their implementation without further delay:

- Local Aboriginal people must be the determinants of their community's needs in terms of government service delivery, the modes of service delivery and appropriate economic priorities for their community⁴;
- Local Aboriginal communities consistently seek strong governance and demand inclusive decision making bodies that do not duplicate existing organisational capacity⁵;
- Government service delivery should be designed to meet those needs, rather than a generalized "one size fits all", least-cost model. Government agencies should be publicly accountable and transparent about service delivery to the Aboriginal community to ensure that what is provided is needs-based, appropriate to the local context and does not duplicate existing programs⁶;
- A closer view must be taken of the local context to create the conditions necessary for economic development, secure housing, education, health, appropriate justice systems and access to low cost finance. Factors differ from community to community; the needs of a small rural town are not those of a large urban centre; and
- Legislative reform is required to remove a number of key economic barriers to Aboriginal people's equitable participation in the economy of NSW, particularly to unlock the potential of land rights.

Finally, when the lack of progress on Aboriginal socio-economic indicators is being assessed, it cannot be overlooked that expenditure per capita on delivery of services to Aboriginal people in NSW is the second lowest of all Australian Government's expenditure⁷.

We note that this submission concerns itself with a range of issues that have come to the attention of the Registrar in the exercise of his functions under the ALRA. While not all bear directly on those functions, the nature of the Registrar's work directly with individual Aboriginal Land Councils and communities highlights that at the local level, issues are rarely compartmentalised.

Why do we have the Aboriginal Land Rights Act 1983?

The Select Committee of the Legislative Assembly upon Aborigines First Report (**Keane Report**) noted the immediate and significant need for Aboriginal people was land, both culturally and economically.

It was this central recommendation that was ultimately implemented by the NSW Parliament as the ALRA:

⁴ Royal Commission into Aboriginal Deaths in Custody Report: <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/24.html>, at 1.10 Recommendation 1 c, d and e

⁵ *Ministerial Taskforce on Aboriginal Affairs Report 2: Getting it Right*, page 9 of 78

⁶ *Two ways together: NSW Aboriginal Affairs Plan* Performance Audit in 2011, NSW Auditor General

⁷ The 2010 Indigenous Expenditure Report estimated that in 2008-09 NSW spent approximately \$2.65 billion on services for Aboriginal people in NSW, of which about \$240 million was spent on Aboriginal specific services.

“Though recognising this spiritual attachment to land with its uniqueness and complex beauty, the Keane report went further. It recognised also that Aborigines had experienced severe economic deprivations in this State. It concluded that urgent action was imperative. The committee believed that land rights could also, in our times, lay the basis for improving Aboriginal self-sufficiency and economic wellbeing.

This could be achieved through the provision of funds for open market purchases of economically viable properties with the purpose of providing an income for the numerous deprived Aboriginal communities. In this sense land rights has a dual purpose - cultural and economic. 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”

It should be noted that the Parliament considered the underlying reasons for the ALRA:

“Aborigines die the youngest, are the most undernourished, suffer the poorest health, live in the most deplorable housing, are the most unemployed and are educated the least of any racial group in this so-called lucky country. The reports on the social deprivation of Aborigines is the greatest single blot on this country's reputation for egalitarianism and fairness. Appalling living standards, which usually receive proper attention only after tragic events, shake the collective guilt of relatively comfortable Australians.”

The Social Justice Commissioner, Mick Gooda in his Social Justice and Native Title Report 2015 found similarly unacceptable outcomes for Aboriginal people today:

“The most recent Australian Bureau of Statistics data estimating Aboriginal and Torres Strait Islander life expectancy indicates small increases over a five year period from 2005-07 to 2010-12. As noted by the Close the Gap Campaign Steering Committee (Campaign Steering Committee):

the modesty of the gains, and the magnitude of the remaining life expectancy gap remind us why the Council of Australian Governments' (COAG) Closing the Gap Strategy and the target to close the life expectancy gap was needed. It remains necessary today.

Despite concerted efforts aimed at preventing Indigenous contact with child welfare agencies over the 18 years since the Bringing Them Home Report (BTH report) was published in 1997, disparities between Aboriginal and Torres Strait Islander children and non-Indigenous children continue to grow. Current statistics indicate that Aboriginal and Torres Strait Islander children are approximately nine times more likely to be in out-of-home care, compared to non-Indigenous children.”

The landmark report of the Royal Commission into Aboriginal Deaths in Custody⁸ found:

“However, the more fundamental causes for the over-representation of Aboriginal people in custody are not to be found in the criminal justice system but in those factors which

⁸ <http://www.austlii.edu.au/au/other/IndigLRes/rciadic/national/vol1/17.html> at 1.7.1

*bring Aboriginal people into conflict with the criminal justice system in the first place. The view propounded by this report is that the **most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society-socially, economically and culturally***"

After many decades of state and federal government commitment to improve economic and social outcomes for Aboriginal people, a series of landmark reports provides clear and surprisingly consistent advice regarding the obstacles to Aboriginal community participation in the economy, and solutions to address these barriers over the past 30 years.

Barrier 1 - Government Service Delivery models are chaotic, uncoordinated and underfunded

Mick Gooda has identified that poverty is the cause of most socio economic disadvantage suffered by Aboriginal people today, and in particular, incarceration rates.

He notes the chaotic environment of government service delivery has not assisted gains in a number of key socio-economic indicators, and recommends Aboriginal people are the determinants of need, best models and decisions regarding their communities in accordance with Articles 18 and 19 of the Declaration of the Rights of Indigenous Peoples. He helpfully articulates best practice guidelines for the meaningful engagement of Aboriginal communities⁹.

The Australian National Audit Office Report Audit No. 26, 2011-12 "*Capacity development for Indigenous service delivery*" also notes the chaotic service delivery environment as the basis for the reforms which led to the Indigenous Advancement Strategy (IAS), a matter reported to the Federal Senate Finance and Public Administration Inquiry into the Commonwealth IAS tendering process:

"... since July 2007 a total of 820 organisations had received funding from 84 different programs. On average each organisation had 4.5 funding agreements, and they were required to submit over 20,000 performance and financial acquittal reports"

Over half of all applications submitted to the streamlined IAS grant process were non-compliant and some were accepted on a "first round" basis. Many Aboriginal organisations simply failed to apply on the basis that they deemed their organisations non-compliant with the guidelines, or found the application forms too unwieldy. There was no corresponding flexibility to encourage "non – compliant" but previously successful Aboriginal organisations to apply or a strategy to allow any organisation to make a further submission.

Similar Commonwealth reforms in funding programs for the delivery of housing, domestic violence refuge, and aged care services have tended to either make Aboriginal community organisations ineligible (due to scale), and/or uneconomic (due to scale). This has created scenarios where care for Aboriginal people in their community is no longer available, leading to reduced health/housing outcomes, which necessitates travel to such services thereby reducing the employment (and income) of carers, and other related services being delivered by organisations with no cultural expertise.

⁹ Social Justice and Native Title Report 2015 at 1.8

Aboriginal people are less likely to engage with, and therefore receive, mainstream services. Aboriginal jobs are reduced when Aboriginal organisations are not engaged to provide services.

Ultimately this has led to poorer quality services and created increased conflict between the community and the organisation in service delivery, again diminishing the predicted outcomes sought by government and community alike.

To meet international human rights obligations and maximise socio-economic outcomes for Aboriginal people, agencies involved in government service delivery in Australia must adequately identify the needs of the community they serve. This requires efficient and meaningful engagement of the Aboriginal community and consideration of whether the “one size fits all” approach is creating racial discrimination and compromising positive outcomes at a community level¹⁰.

Together, fund allocation and poorly matched government service delivery drives people to demand more from locally based community organisations, merely because they are based in local communities, such as LALCs (see 2.2 of Annexure A to Darkinjung LALC Submission).

The demands of community and a lack of any decision making role in the provision of local services leads to greater pressure on LALCs and other local Aboriginal organisations to solve domestic problems, and manage the resulting community conflict. This dynamic ultimately sees community based organisations accept socio-economic failure which is not of their own creation.

This in turn leads to unacceptably high staff turnover and adverse health outcomes in community leaders¹¹, such as LALC Chief Executive Officers and Chairpersons, wasting the both individual, and organisational capacity investment that is delivered through the Aboriginal Land Council network.

This drain on capacity needs to be factored in to any program which is aimed at building the capability of Aboriginal organisations, i.e. the factors which deplete or undermine individual, organisational and community capacity need to be given at least as much attention those which will improve that capacity.

It is suggested that if such organisations had an adequately funded and supported role in scoping and undertaking local service delivery, and/or a reporting role on the outcomes of these services it could assist in reducing the capacity drain and enhance potential.

Recommendations 1 & 2:

- **Aboriginal people identifying, delivering and auditing services at a locally relevant scale; and**
- **Ensuring experienced local leaders and decision makers communicate with government policy makers effectively.**

¹⁰ Social Justice and Native Title Report 2015

¹¹ Michael Marmot, (2015) “The Health Gap” Bloomsbury “A review of twenty-one studies of many thousands of people working in a variety of conditions shows that people whose jobs are characterised by high demands and low control have a 34 per cent increased risk of coronary heart disease compared with people without job strain” at p 181 - 182

Barrier 2 – Accountability and Transparency in Service Delivery

Over \$2.5 billion is significant government expenditure for NSW¹² and this scale of investment could be transformative if applied effectively and efficiently on programs demanded by an Aboriginal community and in turn delivered by the same community.

The NSW Auditor General in his “*Two ways together: NSW Aboriginal Affairs Plan*” Performance Audit in 2011 assessed progress resulting from the reforms on how the NSW Government delivers services to the Aboriginal community under “*Two Ways Together: Partnerships A new way of doing business with Aboriginal People, NSW Aboriginal Affairs Plan 2003 – 2012*”. As the immediate predecessor to OCHRE¹³ this audit is relevant.

The Two Ways Together Plan had two objectives:

- *develop committed partnerships between Aboriginal people and the NSW Government; and*
- *improve the social, economic, cultural and emotional wellbeing of Aboriginal people in NSW.*

The Auditor General concluded:

“To date the Two Ways Together Plan (the Plan) has not delivered the improvement in overall outcomes for Aboriginal people that was intended. Stronger partnerships between the government and Aboriginal people are only beginning to emerge. The disadvantage still experienced by some of the estimated 160,000 Aboriginal people in NSW is substantial. For example, the unemployment rate for Aboriginal people is at least three times higher than the rate for all NSW residents and hospital admissions for diabetes are also around three times higher.”

Firstly, agencies need to be more publicly accountable. The Department of Premier and Cabinet tell us that a substantial level of effort is undertaken at a state level with initiatives being pursued through the NSW State Plan and various National Partnerships with the Commonwealth. Nevertheless, it remains the case that if agencies are given money they must be able to show at the end of the year how they spent it and how it has improved the wellbeing of Aboriginal people.

Secondly, there needs to be clear recognition that the local community is best placed to understand its own needs and be responsible for its own future. In this respect, the Two Ways Together Partnership Community Program is a promising development. The community governance bodies established under this program can bridge the gap between people who need services and those who deliver the services.”

¹² *Two ways together: NSW Aboriginal Affairs Plan*” Performance Audit in 2011, NSW Auditor General, Page 20, “2010 Indigenous Expenditure Report estimated that in 2008-09 NSW spent approximately \$2.65 billion on services for Aboriginal people in NSW, of which about \$240 million was spent on Aboriginal specific services.”

¹³ Opportunity Choice Healing Responsibility Empowerment: <http://www.aboriginalaffairs.nsw.gov.au/nsw-government-aboriginal-affairs-strategy/>

LALCs have broadly defined statutory roles and objectives and are heavily regulated. They are accountable and open to their memberships, they are required to hold member's meetings regularly, and they have elected Boards (see 2.2 of Annexure A to Darkinjung LALC submission).

This is in direct contrast to government agencies delivering services in their community.

This was a matter raised by the Auditor General of NSW in his report:

“Over the course of the Plan, changes in these performance measures and the complexity of the governance and reporting processes that supported them has made long term evaluation more difficult. It has contributed to a lack of accountability for results against changing targets. Agencies have not been held accountable for achieving them. The indicators used to report on the performance of the Plan in the biennial Report on Indicators show limited achievement in improving the lives of Aboriginal people.”

He concluded:

“Firstly, agencies need to be more publicly accountable. The Department of Premier and Cabinet tell us that a substantial level of effort is undertaken at a state level with initiatives being pursued through the NSW State Plan and various National Partnerships with the Commonwealth. Nevertheless, it remains the case that if agencies are given money they must be able to show at the end of the year how they spent it and how it has improved the wellbeing of Aboriginal people”

The Aboriginal people consulted by the Audit Office gave the following direct feedback:

“In 2010-2011, we asked some of the Aboriginal people we met with if, in their experience, there had been real and measureable improvements in the seven key areas initially identified in the Two Ways Together Plan.

The views we heard suggested that the impact of the services delivered to Aboriginal communities has not matched the resources spent. Various reasons were put forward for this including:

- services not being aligned to the needs of the community*
- community not knowing about the services available*
- poorly delivered services*
- services being duplicated.”*

The NSW Auditor made very specific recommendations to improve accountability and transparency in service delivery to the NSW Aboriginal community and to government:

“....

2. by June 2012, improve government agency accountability by:

- appointing an independent auditor to undertake an annual program of reviews of government programs and services to Aboriginal people against specific outcomes, accountabilities and timelines. Audit reports to be provided to the relevant Minister and made publicly available (page 19).*

- *using information obtained through the independent audit process to form an evidence base to determine which programs and services are making a difference and why (page 19).*

3. by June 2012, requiring every government agency funded to deliver programs and services to Aboriginal people to include in their annual report a breakdown of Aboriginal specific funds received, how they were spent and outcomes achieved (page 19).

4. by July 2011, ensure the compliance of NSW Government agency heads with the reporting requirements on Aboriginal targets as part of their performance agreement and develop a plan to regularly review compliance and results (page 19).

5. by January 2012, require all NSW Government agency heads and regional managers to undertake Aboriginal cultural competency training and support local Aboriginal community groups to provide an element in that training about the local Aboriginal environment (page 19).

And for the Department of Aboriginal Affairs:

“By January 2012, develop a process to monitor government agency compliance with the requirement to work with the community governance bodies in developing and delivering programs and services including an annual report on achievement against each community governance body’s priorities (page 24).”

Perhaps the Committee could inquire on progress against these specific recommendations?

Unless a LALC is formally involved in their Local Decision Making (**LDM**) body, they do not have a direct role in advising government on their locally specific needs, the modes of service delivery they believe to be most effective, and the policy failures which are most affecting the desired outcomes for their community.

It should be noted that 96% of those Aboriginal people consulted on the proposed LDM Model considered inclusiveness, transparency and the closely related issue of governance, as critical to their success¹⁴. This is consistent with the conclusions of the Social Justice Commissioner mentioned above, and the findings of the Auditor General of NSW detailed below.

The approach of “Empowered Communities” is similarly aimed at cutting through this confusion. In two Sydney regions, Darkinjung and La Perouse LALCs play a key role as a coordinating hub.

In both models, LDM and Empowered Communities, it should be noted that there is no requirement of accountability to members, or the election of individuals to represent members’ interests at a regional level. The Empowered Community model is locally owned and driven by voluntary membership of the hub, and currently has more effective relationships with Federal Government. This was a stated aim of the LDM model which is yet to be realised.

¹⁴ “Ministerial Taskforce on Aboriginal Affairs Report 2: Getting it Right”, page 9 of 78

The NSW Government should consider whether the original aims of LDM can be delivered more effectively through the Empowered Communities model with some revisions¹⁵. A key feature of the Empowered Communities program is an “opt-in” process whereby Aboriginal groups can readily be accepted on an ongoing basis with no deadlines for inclusion.

Due to an absence of accountability and transparency in government service delivery programs and the lack of a statutory regulatory structure (like those provided for Prescribed Bodies Corporate (**PBC**) through the Office of the Registrar, Indigenous Corporations and Native Title regulations, and LALCs through the ALRA), governance for these approaches needs to either have express links through to the rights holding structures (PBCs and LALCs), through involvement, or not purport to make decisions regarding Aboriginal people’s rights in relation to cultural heritage or land.

In the case of LALCs, some participate in LDM processes, and in the case of the NSW Central Coast and Murrumbidgee Regional Assembly models, are key players. There remains however confusion for LALCs about what their role is in such processes and how it relates to their statutory functions and strict governance requirements.

It will be critical that the relationship between Aboriginal Land Councils and the LDM bodies is clearly articulated to ensure the functions, legitimacy and capacity of both are respected and maintained.

It may be that formal, written agreements between LDM bodies and LALCs who choose to be part of the structure are necessary. This will preserve the LDM bodies’ legitimacy in directing their attention to government service delivery to Aboriginal people while maintaining the legislative functions of LALCs, particularly in relation to land and culture.

It is for these reasons that any decision that rests on, or involves leverage against LALC assets and in particular, land, must involve the LALC members directly, in conformity with the ALRA.

We note that the strict governance requirements of the ALRA does not mean the business of LALCs is simplified. It is often legally and politically complex and exhibits conflict as the mode of decision making. This should not cause LALCs to be side-lined, in the LDM process or otherwise. Complexity and conflict are hallmarks of mature governance structures and are to be preferred to less rigorous models that may rely only on governments selecting who they wish to engage with.

Similarly, decisions relating to native title rights must involve the relevant PBC (or the traditional owners’ representative body), and in NSW the Native Title Services Corporation (**NTSCorp**). Further, any decision that impacts cultural knowledge and heritage, must consult both the native title body (either PBC, NTSCorp or both) and the LALC, which has a statutory role in protecting cultural heritage.

Some land councils including Worimi LALC, have led the way in decision making regarding local cultural heritage, natural resources and land assets by establishing a traditional owner subcommittee thus ensuring relevant decisions are referred to a specialised group with the ability to provide appropriate advice to the land council.

¹⁵ Such as the obligations which have been required to date.

In this way, there is accountability in these decisions for LALC members as they are made by community elders. A subcommittee of this nature involves another section of the Worimi community in the decision making process of the land council thus allowing the LALC Board to move on to other matters. In turn, this arrangement affords larger parts of the Worimi community involvement in, and responsibility for their own assets and programs which enables the land council officers to “share the load” and avoid “burn out”.

Recommendations 3, 4, 5 & 6:

- **As per NSW Auditor General’s recommendations, agencies delivering services to Aboriginal communities must demonstrate:**
 - i. **how they have effectively consulted on community priorities;**
 - ii. **participate in an annual independent audit to report to the Parliament how much agency expenditure has been devoted to “on ground” services and how much has been used for internal administration; and**
 - iii. **how their programs have achieved improvements in key outcomes.**
- **Clarify the focus of LDM as facilitating efficient government service delivery that serves Aboriginal community needs, with consideration as to whether combining Empowered Communities and LDM would enhance that effectiveness;**
- **Do not use consultation mechanisms that lack regulatory structure for determination of issues regarding rights or policy development. Any advice to government on Aboriginal rights issues requires formal consultation with right holding bodies that are accountable and regulated; and**
- **Consider the development and implementation of written agreements between LDM bodies and Aboriginal land Councils about their functions and relationship.**

Barrier 3 – Capacity development and enabling capacity to be directed to service outcomes

As outlined above, articulating outcomes from agency delivery of services is extremely opaque, yet for Aboriginal organisations receiving government funding, the level of reporting has consistently been found by independent audits to be onerous and administratively burdensome, actually creating capacity issues.

For example, the Auditor-General Audit Report No.26 2011–12 “*Performance Audit of Capacity Development in Indigenous Service Delivery*” reported:

“Some constraints on capacity, and the utilisation of capacity for service delivery, are influenced by aspects of government administrative frameworks. Currently, the large numbers of Indigenous programs across the departments subject to audit, and the high number of short-term and small value funding agreements can make it difficult for organisations to predict future funding, which has planning and resourcing implications. Further, the extent of administration that is associated with individual funding agreements—from the funding application process through to operational plans and reporting requirements—can create a high administration load for organisations, limiting the utilisation of existing capacity for the actual delivery of programs and services.”

Furthermore, the short term, small value funding nature of third party service delivery is completely contrary to what research has consistently said is necessary to build capacity:

“International development experience suggests that the most successful capacity development approaches are systematic with a long-term outlook, flexible and suited to the circumstances or context, and address capacity at multiple levels.”

The Auditor General not surprisingly concluded:

*“A further consideration for government is the development of program administration and management arrangements that enable organisations to best utilise **available** capacity for the delivery of programs and services.”*

Recommendations 7 & 8:

- **Design government service delivery that aim to build capacity over the long term at numerous levels, including individual, organisational, and community; and**
- **Ensure that delivery models prioritise utilisation of existing capacity to deliver more appropriate community based services without the detracting of program duplication and unnecessary administration.**

Barrier 4 – More explicit support for success

To date, no public audit has focused on a success based approach to supporting Aboriginal economic development. Other institutions such as the Australian New Zealand School of Governance and Westpac Bank have looked at enabling factors for success for Aboriginal people, based on case studies of successful enterprises.

In Westpac’s 2014 report prepared by Urbis “*Enabling Prosperity: Success factors for Indigenous Economic Development*” noted:

“The success of Indigenous-led economic development appears to be due to Indigenous decision makers having better insight into the challenges unique to a particular community and location. Greater responsibility for decision making also means they are more likely to experience the consequence of decisions (thereby enhancing accountability).”

Appendix A of the Enabling Prosperity Report refers to Australian Bureau of Statistics data on Aboriginal entrepreneurial activity in NSW by region. This highlights the very low percentages of self-employed Aboriginal people accounting for less than 7.5% in the Sydney region.

They identified 5 factors for success:

- “1. An authorising environment which includes: - governance and institutions which are culturally legitimate and sound - government policy and regulation which facilitates development*
- 2. Human capital including leadership and social infrastructure (in the Indigenous context the role of culture as a resource is particularly important)*
- 3. Access to capital and markets (the literature suggests that Indigenous people face more significant barriers than others in gaining access to loans and other financial assets)*
- 4. Infrastructure*
- 5. Geography and agglomeration (this includes the location and resources available to a community to enable economic development).”*

Not surprisingly, the message is similar to the notion of successful service delivery outlined above. It is interesting that the first principle is an authorising environment which strongly suggests there is still a high reliance on government frameworks and funding, a reality for many remote and regional Aboriginal communities. It is also suggested that social infrastructure is crucial. The approach of the LDM and Empowered Communities is deliberately built around an existing social infrastructure, and in many case, local champions.

This begs the question about what strategy the NSW Government has for building human capital in areas beyond the LDM focus. In this respect, applying the identified principle of building capacity on existing resources, an explicit strategy to build more human capital in high priority service delivery areas, will require the utilisation of networks such as LALCs.

The land council network across NSW is a ready-made gateway for government services to use should their agencies choose to engage them; the provision of resources to support these services by government, however, is essential.

It seems to us highly inefficient not to support and rely upon the strong, legislatively supported Aboriginal Land Council network as a foundation of government service delivery, particularly in relation to economic development. There is a real risk of increasing complexity, cost and “red-tape” by overlaying the Aboriginal Land Council network with further administrative or legislative layers.

The third factor identified in the Prosperity Report, access to capital and markets, is not adequately addressed by existing programs such as IBA. Apart from the case studies already provided to the Inquiry, the Auditor-General’s ANAO Report No.11 2015–16 “Performance Audit of the Indigenous Home Loan Program of Indigenous Business Australia (IBA)” highlights the overly conservative approach of IBA, showing they were essentially loaning to Aboriginal people on high to medium incomes who could have obtained loans elsewhere. This conservative approach also arguably cost the Aboriginal community the opportunity to access \$2M in social impact investment capital (Indigenous Social Enterprises Fund) available through the IBA. This opportunity was oversubscribed, and yet only 15 applications of the 165 that were submitted were assessed as eligible, and only one participant funded for \$200,000¹⁶.

¹⁶ Indigenous Social Enterprise Fund: Lessons Learnt 2016

Similarly, if the service delivery strategy is primarily focused on LDM or Empowered Communities, or building on success, the risk is that the area of greatest need is not addressed.

Consequently, a stated strategy of supporting success must also have a clear strategy to build pathways towards success for those who are still overcoming barriers of human and financial capital. Funded opportunities to address disadvantage need to either accept the higher risk inherent in such programs, or manage that risk. For example, mortgage insurance is available at relatively low cost to offset any risk that IBA may assume by lending in accordance with their charter and the needs of the Aboriginal community.

The IBA Indigenous Social Enterprise Fund process demonstrated an appetite for low cost venture capital from Aboriginal social entrepreneurs.

Recommendations 9, 10, 11 & 12:

- **That the NSW Government adopt an explicit strategy of supporting success in Aboriginal organisations who have repeatedly demonstrated good governance, strong service delivery, value for money and better outcomes in their community, even if it detracts from other government service agencies;**
- **That the government also adopts a strategy to expressly build capacity in areas of highest service need based on existing Aboriginal organisations including LALCs;**
- **That the government carefully consider how any overlay of additional administrative or legislative structures may create unwanted complexity, cost or red-tape to the detriment of the Aboriginal Land Council network; and**
- **That the government request the NSW Office of Social Impact Investing work with NSW Treasury on a low cost, low documentation finance product for Aboriginal entrepreneurs to attract venture capital.**

Barrier 5 – Realising economic potential of Land Rights

There are currently 40,567 registered Aboriginal Land Claims lodged by LALCs in NSW. Of these, 11,031 have been determined by the NSW Ministers administering the Crown Lands Acts (over time) and 29,536 claims await determination.

At present, LALCs face some serious and intractable issues in realising the full economic potential of their lands.

Firstly, as raised by other submissions, the tendency of Crown Lands to transfer land with qualified title, shifts the cost of survey from government to the LALC. As a result, this process then tends to progress in two ways which may not be consistent with the objects of the ALRA. Primarily, the land council is restricted to selling or dealing with a subset of informed buyers who are willing to assume the risk the land carried with a limited title¹⁷, and accordingly the LALC attracts less competition upon sale and risks a sale not reflective of true market value for the land.

¹⁷ See the 2005 ICAC Report of the investigation into certain transactions of Koombahtoo Local Aboriginal Land Council for a discussion on a range of risks due to the limitations of the ALRA, some of which have been addressed.

Alternatively, the land is not able to be developed until such time as the LALC has sufficient funds to survey the land themselves and realise its full potential. It remains unclear why other Crown lands are surveyed (such as land prepared for sale) and dealt with by the government without issuing qualified title, whereas the majority of lands granted to LALCs are granted with qualified title. There should be equivalence afforded to grants of lands under the ALRA as to other government land dealings, and a similar level of priority.

Second, the current framework of the ALRA restricts land dealings on grants of land made subject to any native title rights in areas that have not yet been determined (section 42 of the ALRA). The Federal Court has increasingly limited the non-native title determinations that it is willing to make, particularly in areas that are subject to claim, but have not yet been granted. This has effectively acted as a barrier to LALCs dealing in much of their lands.

This is in contrast to Crown Land transfers and dealings to non-Aboriginal parties. For example; should an area of land be sold, leased or otherwise dealt with under the *Crown Lands Act 1989* (NSW) to a non-Aboriginal Land Council party, the Crown assumes the native title risk, and the matter is dealt with by way of an ILUA, as and when the native title claim is determined.

It is unclear as to why the NSW Government is willing to assume the risk for other transfers, or dealings which impact upon native title rights and interests, but not when transferring the lands to a LALC? It is recommended that the Committee consider advocating for the Crown to assume this risk and negotiate in globo for native title compensation upon determination for all invalid future acts in the area of a native Title determination.

Amendments to the ALRA in 2014 introduced the concept of “Aboriginal Land Agreements” (ALA)¹⁸. These amendments provide an alternative pathway for the resolution of land claims lodged pursuant to section 36 of the ALRA.

I understand the NSW government and the NSWALC having been working cooperatively on a model for ALAs. While this is commendable, it must be remembered that the NSW government, embodied by the Minister administering the *Crown Land s Act 1989 (NSW)* and Aboriginal Land Councils are always potential adversaries in relation to land claims.

The ALRA sets out the legal tests for what is claimable Crown land and while there is much objectivity in these tests, many contests have ensued from land claims in the form of appeals by the claimant Aboriginal Land Council to the court in relation to a Crown Lands Minister’s refusal of a land claim.

Because land claims are contestable, it is our view that the ALA process is best viewed from the outset as a dispute; not to create animosity between the parties, but to recognise the contestability of land claims and to ensure principles of ethical dispute resolution are enshrined in the ALA process. These are principles such as good faith negotiations, confidentiality, and authority to settle negotiations.

The well-established practices of alternative dispute resolution (mediation, conciliation etc) provide a well-established and highly respected framework that; in our view, should be the under-pinning of the ALA process.

¹⁸ *Aboriginal Land Rights Amendment Act 2014* – section 36AA

Such practices are well versed in ensuring cultural matters are properly considered. The concepts of “cross-cultural” dispute resolution are well understood.

It must also be recognised that a proper and effective ALA process will require resources, both from government and Aboriginal Land Councils, while respecting the independence of the parties. This will be no easy task.

Finally, due to the nature of the lands claimed under the ALRA and the NTA, there are usually many environmental, cultural and planning constraints on the lands granted. This is antithetical to the policy intention behind these acts, and can make economic development of Aboriginal lands uneconomic, due, for example to opposition by the wider community and institutional bias. This is a factor clearly identified in the Darkinjung submission to this Inquiry.

Accordingly, mechanisms, such as making a portion of LALC lands State Significant Development to provide commercial opportunities, or providing for a SEPP which adequately deals with the policy tradeoffs that LALCs must navigate (i.e. s 94 contributions, delivery of services to members, maintenance of lands with high cultural and biodiversity significance) in accordance with the ALRA, have merit and should be supported.

Recommendations 13, 14, 15, 16 & 17;

- **Lands granted under the ALRA should be transferred with unqualified title from Crown Lands consistent with other land dealings;**
- **Amendment to ALRA to confirm that lands granted are not subject to native title rights and interests, and therefore facilitate dealings in all lands granted subject to ALRA;**
- **Ensure the ALA process enshrines the principles of ethical dispute resolution;**
- **Consider amendments to the Planning Act framework to support the intent of the ALRA, and support Local Aboriginal Land Councils developing those lands which are commercially developable at a reasonable cost and reasonable timeframe such as by defining development on ALRA land as State significant, or providing for a SEPP; and**
- **Amend the NSW Planning Act purposes to provide “*valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition*”; as per proposed changes in Queensland.**

Barrier 6 – Implementation issues for Part 4A National Parks and Wildlife Act 1974

The ALRA and the National Parks and Wildlife Act 1974 (**NPWA**) provide the legislative framework for the Aboriginal ownership and joint management of lands in NSW. These lands are both culturally significant and of high conservation value. There are currently six Aboriginal owned and jointly managed conservation lands in NSW and the Registrar of the ALRA has responsibility to establish and maintain the Register of Aboriginal Owners for these lands. There are almost 1000 Registered Aboriginal owners that have legally acknowledged cultural rights and connections to these lands under Part 9 of the ALRA.

These lands include:

- Biamanga National Park,
- Gulaga National Park,
- Mutawintji National Park,
- Mt Grenfell Historic Site,
- Worimi Conservation Lands, and
- Gaagal Wanggaan (South Beach) National Park.

It should be noted that Worimi Conservation Lands and Gaagal Wanggaan (South Beach) National Parks were created following the lodgement of land claims pursuant to s. 36 of the ALRA. The Minister administering the Crown Lands Act refused both original land claims and in response to appeals by the LALC claimants, chose a settlement of the appeal proceedings that included the creation of a national park pursuant to Part 4A of the NPWA.

We note that both these major land settlement matters provide very good models for an ALA process.

In addition, Mount Yarrowyck Nature Reserve will soon be returned to Aboriginal ownership as the lease agreement for this land between Aboriginal owners, relevant LALCs and the NSW government, is about to be negotiated. Jervis Bay National Park and Mungo National Park are yet to be returned to Aboriginal people. The delay in returning the last two parks is an example of the barriers that Aboriginal people face in realising cultural and economic potential on culturally significant land they own and manage.

The Registrar has raised with successive NSW governments, the significant divergence between the statutory land rights, cultural authority and land management capability bestowed on Aboriginal owners by Part 4A, and the opportunities presented to Aboriginal owners and LALCs “on the ground” by this scheme. This divergence, in most cases, is the difference between legislation, agency policy and the resources available to the Office of Environment and Heritage (**OEH**) state-wide.

In practice, a range of entitlements should flow from Aboriginal ownership of land and a joint management agreement. In reality, the government maintains much of the authority over of any funds gained the Aboriginal owner group via a lease back arrangement, thus stifling economic authority and development on Aboriginal-owned lands. The Boards of Management (**BoM**) for each park, of which the majority are Aboriginal owners, remain tied to the government as banker, book keeper and auditor of their rent and other funds they accrue; this relationship has not manifested in the way it was conceived. In theory, Part 4A legislation affords Aboriginal people genuine land rights over culturally significant lands, and that joint management is a power sharing arrangement between Aboriginal owners and the NSW government. It must not be viewed by government as a financial burden.

Aboriginal owners and the BoMs that represent them in these arrangements do not have the economic freedom to use these lands as they should due to:

- (i) Confusion regarding the authority and resource sharing of the joint management agreement; what powers do the Minister administering the NPWA, OEH and regional National Parks and Wildlife Service (**NPWS**) agencies, and LALCs have over jointly managed land where there a BoM is appointed to exercise care, control and management of the lands pursuant to Part 4A?
- (ii) Aboriginal people who have entered into a joint management agreement should be assured that the titles of the lands for which they are Aboriginal owners, are formally transferred to the LALCs who hold the land on their behalf, in a timely manner; a number of titles still outstanding await transfer – this should be settled as a matter of urgency.
- (iii) Who controls the annual rent and funds received by the BoM which are held by government and released to the BoM, as NPWS allows. In some cases, NPWS uses the same funds to undertake work “on park” for standard conservation land maintenance. While funds are held by the government and not the BoM, a balanced power sharing arrangement cannot be realised. The authority of the BoMs to hold the funds remains a relevant and significant issue for the government to address before economic development is realised by Aboriginal people in this agreement.
- (iv) The availability of financial and personnel resources at agency level (NPWS/OEH & ORALRA) for the timely and fair completion of joint management engagement processes has directly affected the commencement of the registration process for Jervis Bay National Park and Mungo National Park. Despite Aboriginal people requesting the instigation of the Part 4A process here, the NSW government has stated that there is no capacity to hand back these lands despite both conservation areas being listed on Schedule 14 of the NPWA.
- (v) This resource gap is immediately evident upon the return of land to Aboriginal owners to support the care, control and management of jointly managed lands. The Aboriginal owners have no allocated financial support to meet on a regular basis (minimum annually) to do business. The lease for each park provides the government should employ a Joint Management Coordinator (JMC) for Part 4A lands however Mutawintji National Park and Mt Grenfell Historic Site have no dedicated local JMC in place to support the BoM and the Aboriginal owners and there is no expectation that this will change in the near future. The JMC remains a NPWS employee while working for the BoM and Aboriginal owners. The placement of this

role in a government agency is one the BoMs are lobbying to change as a further solution to the imbalance of power in the joint management relationship.

- (vi) Incongruities in the expectations of the NSW Government and Aboriginal people about the scope and operation of joint management remain one of the biggest obstructions to independent economic development for Aboriginal owners in this arrangement. In particular, Aboriginal owners expect the BoMs to be appointed by the government in a timely manner and be in place to do business all year round. Unfortunately, this does not occur and Aboriginal owner BoM members have appealed directly to the Minister for Environment and Heritage to either appoint their Board members after significant delays (over 12 months in some cases) or extend the current BoMs to counteract the government's delay in the appointment of a new BoM. This situation is controlled by government and is the single most undermining element of the power sharing relationship stifling Aboriginal economic potential. With no BoM in place, the NSW government (in effect the tenant in the relationship) holds power to expend funds on park without the authority of the owners of the land; in any other relationship of this kind, this would be considered untenable. Here the expectations of government and Aboriginal people about the operation of joint management diverge significantly.

- (vii) The demands placed on the Aboriginal community and in particular Aboriginal Owners to participate in joint management are not properly resourced by government. In this space, Aboriginal land ownership and rights to Country are overlain by native title determination, Aboriginal ownership, traditional owners, Aboriginal corporations and LALCs. There is genuine fatigue amongst Aboriginal communities in committing to yet another government process that may or may not deliver any more cultural rights, authority and jobs than the last project promised. Failure to engage is then seen by government as disinterest and an argument to shift resources. When Aboriginal people do engage, more often than not, the government is able to power share on its terms as Aboriginal owners juggle work, family and community expectation to serve on BoMs in their own time; the government is financially supported to do the same job.

The power sharing relationship between government and Aboriginal people must change dramatically before Aboriginal owners have the authority to manage land as the original custodians under joint management agreements, in the manner in which the legislation was enacted.

Recommendations 18, 19 & 20:

- **NSW government commitment to adequately support existing jointly managed parks, and return those remaining on Schedule 14 (NPWA) to Aboriginal ownership;**
- **Government to acknowledge the financial autonomy of BoM as a simple first step to address the perceived power imbalance of government in the joint management relationship; and**
- **BoMs to lead advice to the NSW government on how they can best support develop economic opportunities created by Aboriginal ownership of land that is jointly managed.**

Barrier 7 – More support for recognition for Aboriginal rights in cultural heritage

An area where many Aboriginal people identify that they could develop business opportunities in remote and regional areas is cultural tourism.

The projected total Australian tourism related spend is between \$135 – 160 billion per annum by 2020. Currently expenditure is at \$92 billion (as at 2009). Approximately 62% is domestic, and 38% international or inbound tourism.

The major inbound tourism markets are (in order of projected expenditure by 2020):

- China (4.3 – 6.3 billion per annum)
- United Kingdom (2.1 – 3.3 billion per annum)
- USA (2.2 – 3.2 billion per annum)
- South Korea (1.6 billion – 2.2 billion per annum)
- NZ (2.2 – 3.1 billion per annum)

A cultural heritage experience was rated in the top 8 experiences being sought by the inbound tourism market¹⁹.

Cultural tourism is also in high demand on the domestic tourism market, and it is exactly the type of tourist rural and regional communities want to attract:

- ✓ Indigenous Tourism visitors spend twice as long away (8 nights) as other visitors (4 nights)
- ✓ Indigenous domestic visitors spend more per night (\$190) than international visitors (\$91)
- ✓ Tend to be older: 45% are 45 – 64 years
- ✓ 87% of those who had an Indigenous Tourism experience, felt it met or exceeded expectations²⁰.

¹⁹ http://www.tourism.australia.com/documents/corporate/Jane_Whitehead_Australia_Consumer_Research.pdf

²⁰ Understanding the market for Indigenous Tourism: Mytravelresearch.com (2013) prepared for Tourism Australia

There is currently much confusion regarding Aboriginal rights and responsibilities in management of cultural heritage, and in who has the right to provide such a tourism offering. As you have seen from submissions, many Aboriginal tourism providers feel quite strongly about ensuring that Aboriginal tourism is provided by people with a right to speak for that country, and not have that right eroded, or undermined by other providers.

The Aboriginal Tourism Taskforce made the following recommendations:

- 1A: Brand development and communication to attract a broad spectrum of visitors.
- 6C: Identify and release Crown Land Suitable for visitor economy purposes, including family or Aboriginal-based tourism developments. Ensure that sustainable development and management practices are adopted.
- 16C: Support Industry and Government initiatives to promote and expand career opportunities for Aboriginal trainees in visitor economy occupations
- 18A: Ensure Destination Management Plans address the demand, supply, policy and planning issues including infrastructure and tourist industry development
- 26E: Increase Aboriginal cultural representation in Sydney, and work with stakeholders across Government.

These recommendations were picked up and consolidated into the Aboriginal Tourism Action Plan 2013 - 2016, which concludes this year and it would be a good time to audit its' implementation²¹.

The right to own and manage cultural heritage is an important internationally recognised right, which is reflected in domestic legislation, however in NSW cultural heritage is regulated under the National Parks & Wildlife Act 1974.

Stand-alone Cultural Heritage legislation was a key recommendation of the Keane Report, and it is repeatedly raised by peak Aboriginal organisations as a key priority.

Native title holders, and claimants, and arguable future claimants, have the rights to own and manage cultural heritage recognised in most determinations of native title. Post determination most rights are administered on their behalf by a PBC.

LALCs also have a statutory role in protecting Aboriginal cultural heritage, see section 52(4) of the ALRA.

Similarly, BoMs of Aboriginal owned conservation lands have legislated rights to speak for Country and cultural heritage within their Country. Tourism on their lands is a key economic opportunity that is pursued but to date, is not fully realised.

²¹ <http://www.destinationnsw.com.au/about-us/strategies-and-plans/aboriginal-tourism-action-plan>

The Social Justice Commissioner of the Human Rights Commission, Mick Gooda noting the various cultural heritage and natural resource regimes around Australia:

“Aboriginal and Torres Strait Islander peoples want legislation that specifically protects cultural heritage to be consistent across jurisdictions, and more work done to protect Indigenous languages. Our peoples would like to see a discussion about establishing a national Indigenous cultural authority.”²²

Current NSW Government policy has a broad approach to recognising the rights of Aboriginal people to have a say in the protection of cultural heritage and offers no clear guidance on how to resolve competing views on the significance of any particular area or item of Aboriginal heritage. This has most recently been demonstrated in Randwick²³.

Both NSWALC and NTSCorps as peak bodies have repeatedly called on the NSW Government to introduce stand-alone Aboriginal cultural heritage laws that are consistent with international human rights law to recognize those Aboriginal persons with a direct links to the heritage in question to be the primary determinants of the significance of that heritage. It should enable those Aboriginal persons to provide their prior free and informed consent to any act which affects the cultural heritage significance.

The important role of LALCs in relation to matters of Aboriginal cultural heritage in their area has been carefully analysed by the court.²⁴

The Registrar is currently undertaking a project in the Upper Hunter region of NSW, applying the methodology of Aboriginal Ownership in the joint management regime to the issues of cultural significance and authority.²⁵

The current NSW Government has agreed to introduce stand-alone cultural heritage legislation.

Experts in social and economic impacts of government processes upon Aboriginal People, such as Dr Janet Hunt have researched the socio economic impacts of Aboriginal People having a real role in the protection and management of their cultural heritage and concluded that there are real and measurable benefits to Aboriginal people, and more broadly, their families²⁶.

Recommendations 21, 22, 23 & 24:

- **NSW Government prioritise the introduction of stand-alone cultural heritage protection laws that are consistent with international human rights law;**

²² Social Justice and Native Title Report 2014

²³ <http://www.smh.com.au/nsw/hunt-rejects-call-for-halt-to-light-rail-project-to-protect-aboriginal-artefacts-20160425-goe2x7.html>

²⁴ See: *Darbinjung Local Aboriginal Land Council V Minister for Planning and Infrastructure: (and others) [2015] NSWLEC 1465*

²⁵ *Upper Hunter Project* – this project is being undertaken with the support of the “Upper Hunter Trust”

²⁶ Hunt J, 2010 “*Looking after Country in NSW: Two case studies of socioeconomic benefits for Aboriginal People*” CAEPR Working paper No. 75, CAEPR ANU, Canberra

- **NSW Government work with existing cultural tourism providers to support and build their enterprises (As per Aboriginal Tourism Action Plan strategy 2.8);**
- **NSW Government revisit their Aboriginal Tourism Action Plan with specific recommendations to build Aboriginal Cultural Tourism, (such as strategies 1.1 , 2.5 and 3.3); and**
- **Audit LALCs and Aboriginal cultural tourism providers to see how they were engaged in the implementation of the Aboriginal Tourism Action Plan and consider whether delivery of such plans should be through Boards of Management, and/or through the LALCs and PBC.**

Barrier 8 – More support for recognition for Aboriginal rights in natural resources

Further to the above unique relationship Aboriginal people have with their cultural heritage, recognition of the landscape and natural resources as part of the cultural landscape is not currently reflected in NSW legislative regimes.

Australia ratified the International Convention on the Elimination of all forms of Racial Discrimination (**ICERD**) and passed the *Racial Discrimination Act 1975* (Cth) to implement its domestic obligations under ICERD.

It was this Act which was critical to the Mabo judgment, as well as the High Court acknowledging that ‘terra nullius’ was a fiction: *“The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country”*²⁷.

The majority judgment of Brennan, Mason CJ and McHugh refused to accept that, subject to the *Racial Discrimination Act 1975* (Cth), compensation was payable to Aboriginal people for this removal of property rights without the express, plain legislative intent to so deprive Aboriginal People²⁸.

However Justices Deane, Toohey and Gaudron did not agree²⁹, observing: *“We know what was done and it is plain that what was done neither constituted a specific expropriation of pre-existing native interests in the lands of the Colony nor sufficed to negate the strong assumption of the common law that any such pre-existing native interests were respected and protected under the law of the Colony after its establishment. In any event, while those subsequent acts were increasingly inconsistent with the existence of any valid Aboriginal claims to land within the Colony, they cannot properly be seen as evincing an intention to extinguish any Aboriginal interests of a kind presumptively recognised by the common law”*.

It can be anticipated that there may well be changes to Native Title law in Australia to ensure that Aboriginal people are justly compensated for the loss of their lands, and the damage done to their people as a result, prior to the introduction of the Racial Discrimination Act 1975 (Cth).

²⁷ Per Brennan J at [42] *Mabo v Queensland (No 2)* (“Mabo case”) [1992] HCA 23; (1992) 175 CLR 1 (3 June 1992)

²⁸ Ibid at [2] per Mason CJ and McHugh

²⁹ Ibid at [36] per Toohey and Gaudron

Native Title law recognises a range of native title rights with respect to landscape resources and values, on both exclusive and non-exclusive Native Title lands, such as:

- right to live and be present on the area,
- conduct ceremonies,
- maintain places of importance and areas of significance to the native title holders, and
- take, use, share and exchange traditional natural resources and seawater for any non-commercial purpose (Traditional Natural resources include clay, rock sand, flora, fauna etc).

The most crucial aspect of Native Title which is currently being overlooked in our natural resource regulatory frameworks is that a determination of such rights being held by the native title holders of a particular area, is by definition a determination that the native title holders have always held the rights, and no act has extinguished their title. It is the existing nature of the rights, not reliant upon any determination, which dictates that current legislative regimes must proactively protect, manage and plan for those rights to be accessed and used by Aboriginal people in NSW today.

It follows that their rights to protect and maintain places, to take, share and use traditional natural resources as a form of property right should be given greater consideration prior to formal determinations in our natural resource legislation. It could be argued that it would be fairer, less discriminatory and limit future governments' liability³⁰.

There have only been 37 applications for compensation under the Native Title Act 1993 to date³¹, but as PBCs move beyond the initial heavy workload of governance, and sustainable financial operations, and start to realise the economic and social benefits of native title, one would expect their focus to turn to ensuring they have adequately acted to protect the native title interests of the native title holders the number of compensation claims could be expected to grow.

Natural Resources

Broader landscape resources, which run across many titles such as minerals, forests, native vegetation, water and biodiversity have always been regulated by the Crown by each State of Australia. This regulation has been largely through regulation of access by a system of permits, licensing and in later years, management plans.

None of these laws affect Native Title rights and interests, as they never acquired or purported to acquire the rights and interests from Aboriginal People without clear and plain intendment to avoid compensation. See recent High Court cases, such as *Karpany v Dietman* [2013] HCA 47, which reflect earlier Court of Appeal findings, such as Kirby J in *Mason v Tritton* (1994) 34 N.S.W.L.R. 572, at pp. 590-59.

This is the case around Australia, state natural resource regimes, by and large, do not extinguish native title.

³⁰ See compensation agreed to by the State of South Australia in *De Rose v State of South Australia* [2013] FCA 988, para 71.

³¹ Gooda, M "Social Justice and Native Title Report 2014" Australian Human Rights Commission

Water law at a Commonwealth level states that nothing in the Acts affect Native Title³². The NSW Water Management Act 2000 has better statements of recognition of Native Title, exempting Native title holders from the requirement for works approvals (section 55) and harvestable rights approvals and any limits that may apply (section 53).

The Nari Nari Tribal Council have delivered cultural water in NSW more often than any other group. Despite their success, they have recently had their water licence “reclaimed” by the Local Land Services Board without explanation. This unilateral act destroyed the single best example the NSW Government had of working with Aboriginal people to deliver cultural flows, and demonstrated, as if Nari Nari Tribal Council required reminding, that it was the Government that retained control, and that they were only allowed to use the water at their pleasure, rather than being involved in a partnership to build skills and capacity of the Nari Nari people in cultural watering.

This occurred despite strong support from the Office of Water and other agencies for the continued work of Nari Nari Tribal Council.

Likewise in Fisheries Management in NSW, section 287 of the *Fisheries Management Act 1994* (NSW) provides:

“This Act does not affect the operation of the Native Title Act 1993 of the Commonwealth or the Native Title (New South Wales) Act 1994 in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect.”

Section 104A of the Native Title (New South Wales) Act 1994 (NSW) provides, relevantly:

“(3) The relevant provisions of the National Parks and Wildlife Act 1974, the Wilderness Act 1987, the Marine Parks Act 1997, the Crown Lands Act 1989, the Fisheries Management Act 1994, the State Property Authority Act 2006 and the regulations or other instruments made under those Acts (and any related Act or law) do not apply, and cannot be applied, so as to affect those native title rights and interests. The relevant provisions are those provisions that apply because the land or waters concerned are reserved, dedicated, declared or vested under any such Act.

But that is the extent of it; the existing legislative framework fails to provide for the positive statements of recognition consultation, engagement in the management of, or ownership of natural resources, as they are required to do by international law.

The NSW Parliament resolved to address this issue in 2009, by passing the proposed section 21AA of the Fisheries Management Act 1994, which provided:

“21AA Special provision for Aboriginal cultural fishing

³² Section 13 of the Water Act 2007 (Cth), section

(1) An Aboriginal person is authorised to take or possess fish, despite section 17 or 18, if the fish are taken or possessed for the purpose of Aboriginal cultural fishing.

(2) The authority conferred by this section is subject to any regulations made under this section. ”

This section remains un-commenced, apparently awaiting gazettal of regulations. In the interim there have been over 500 regulatory interventions relating to offences under sections 17 and 18, including prosecutions, and Aboriginal men with native title rights and interests have been imprisoned.

There is no requirement under the provision for regulations, and the section can be commenced pending any regulations.

Furthermore, the knowledge and customary management of the resource in question is not appropriately incorporated into the management planning frameworks with a clear institutional bias towards a scientific data set which is very limited when measured against the thousands of years of observational and experiential science documented in Aboriginal people's law and custom.

This is a lost opportunity. It also leads to a devaluing of indigenous knowledge which is contributed, with Aboriginal peoples' participation in planning processes given less weight, and paid less, than consultants without the cultural knowledge or expertise.

Aboriginal people have fished for millennia, both inland and coastal. They have an extensive and discrete body of knowledge that would be extremely relevant and valuable to sustainable management, and yet they are treated by the current policy and management regime as people that get consulted once policy is determined, rather than being an integrated and valued determinant of the process.

Local groups, such as the Walbunga men of the South Coast with their consistent call to have their cultural take recognised and protected rather than being criminalised, and the Brewarrina communities' continued practice of taking fish at the weir for sale at the highway when the Brewarrina fish traps are in operation, are continued examples of opportunities that could be supported and developed into paid meaningful cultural work, rather than be treated as a regulatory process which often ends in jail time, criminal records, leading to further institutional costs and an undermining of self-esteem. In fact, they are not committing any crime and are exercising their rights under international and domestic law.

There is no support for the Aboriginal Legal Service or Legal Aid NSW to run expensive and time consuming native title defences, so people are encouraged to plead guilty or risk having no defence at all. This is completely counter to all oft stated efforts of State and Federal Government to reduce Aboriginal peoples' interaction with the criminal justice system.

Recommendations 25, 26 & 27:

- **Commence section 21AA of the Fisheries Management Act 1994 immediately, without any further delay for regulations;**

- **Legislative review of all natural resource management law to provide positive and more consistent recognition of Aboriginal rights (under the NTA and ALRA) and to provide commercial opportunities for Aboriginal people (ie allocate water licences, fisheries licencing, etc); and**
- **DPP and NSW Police promote clear legal guidelines to all enforcement personnel articulating Aboriginal people's rights at law to exercise their law and custom.**

Summary of Recommendations

1. **Aboriginal people auditing, identifying and delivering services at a locally relevant scale.**
2. **Ensuring experienced local leaders and decision makers communicate with government policy makers effectively.**
3. **As per NSW Auditor General's recommendations, agencies delivering services to Aboriginal communities must demonstrate how they have effectively consulted on community priorities; participate in an annual independent audit to report to the Parliament how much agency expenditure has been devoted to "on ground" services and how much has been used for internal administration; and how their programs have achieved improvements in key outcomes.**
4. **Clarify the focus of LDM as facilitating efficient and effective Government service delivery in a manner which serves the Aboriginal community needs, and NSW Government consideration as to whether combining with Empowered Communities would enhance that effectiveness.**
5. **Do not use consultation mechanisms with no regulatory structure for determination of issues regarding rights, or policy development. Any aboriginal advice to government on rights issues requires formal consultation with right holding bodies that are accountable and regulated.**
6. **Consider the development and implementation of written agreements between LDM bodies and Aboriginal land Councils about their functions and relationship.**
7. **Design government service delivery that aim to build capacity over the long term at numerous levels, including individual, organisational, and community.**
8. **Ensure that delivery models prioritise utilisation of existing capacity to deliver more appropriate community based services without the detraction of program duplication and unnecessary administration.**
9. **That the NSW Government adopt an explicit strategy of supporting success in Aboriginal organisations who have repeatedly demonstrated good governance, service delivery, value for money and better outcomes in their community, even if it detracts from other government service agencies.**
10. **That the government also adopts a strategy to expressly build capacity in areas of highest service need based on existing Aboriginal organisations including LALCs.**
11. **That the government carefully considers how any overlay of additional administrative or legislative structures may create unwanted complexity, cost or red-tape to the detriment of the Aboriginal Land Council network.**

12. That the government request the NSW Office of Social Impact Investing work with NSW Treasury on a low cost, low documentation finance product for Aboriginal entrepreneurs to attract venture capital.
13. Lands granted under the ALRA should be transferred with unqualified title from Crown Lands consistent with other land dealings.
14. Amendment to ALRA to confirm that lands granted are not subject to native title rights and interests, and therefore facilitate dealings in all lands granted subject to ALRA.
15. Ensure the ALA process enshrines the principles of ethical dispute resolution.
16. Consider amendments to the Planning Act framework to support the intent of the ALRA, and support Local Aboriginal Land Councils developing those lands which are commercially developable at a reasonable cost and reasonable timeframe such as by defining development on ALRA land as State significant, or providing for a SEPP.
17. Amend the NSW Planning Act purposes to provide “*valuing, protecting and promoting Aboriginal and Torres Strait Islander knowledge, culture and tradition*”; as per proposed changes in Queensland.
18. NSW government commitment to adequately support existing jointly managed parks, and return those remaining on Schedule 14 (NPWA) to Aboriginal ownership.
19. Government to acknowledge the financial autonomy of BoM as a simple first step to address the perceived power imbalance of government in the joint management relationship.
20. BoMs to lead advice to the NSW government on how they can best support develop economic opportunities created by Aboriginal ownership of land that is jointly managed.
21. NSW Government prioritise the introduction of stand-alone cultural heritage protection laws that are consistent with international human rights law.
22. NSW Government work with existing cultural tourism providers to support and build their enterprises (As per Aboriginal Tourism Action Plan strategy 2.8).
23. NSW Government revisit their Aboriginal Tourism Action Plan with specific recommendations to build Aboriginal Cultural Tourism, (such as strategies 1.1 , 2.5 and 3.3).
24. Audit LALCs and Aboriginal cultural tourism providers to see how they were engaged in the implementation of the Aboriginal Tourism Action Plan and

consider whether delivery of such plans should be through Boards of Management, and/or through the LALCs and PBC.

- 25. Commence section 21AA of the Fisheries Management Act 1994 immediately, without any further delay for regulations.**
- 26. Legislative review of all natural resource management law to provide positive and more consistent recognition of Aboriginal rights (under the NTA and ALRA) and to provide commercial opportunities for Aboriginal people (ie allocate water licences, fisheries licences, etc).**
- 27. DPP and NSW Police promote clear legal guidelines to all enforcement personnel articulating Aboriginal people's rights at law to exercise their law and custom.**

Table 1

Benchmark/Principle	NT Act	International Law	NSW Law	Aboriginal People's views
Native Title rights and interests are grounded in the land as the centrepiece of Aboriginal Law and custom.	S 223, North J in <i>Western Australia v Ward</i> (2000) 99 FCR 316	DRIP Article 8 (2)(b), Article 9 Article 25, Article 26(1)	S 2(2)(a) NSW Constitution	ANRA Principle 1 MLDRIN/NBAN Principle 1
It is for the owners of those Native Title Rights and interests to define their rights and interests.	S 223	DRIP Article 9 Article 34	Arguably inherent in s 2(2)(a)	ANRA Principle 13 MLDRIN/NBAN Principle 2(a)
It is for the owners of those Native Title Rights and interests to protect, maintain and control their cultural heritage, including in natural resources, ecosystems and species	S 223 subject to extinguishment	DRIP Article 11(1) and 11(2) Article 12(1), Article 18, Article 24(1) Article 25, Article 26(1), Article 29(1), Article 31(1) Article 32 (1) Article 34 Article 36	Arguably inherent in s 2(2)(a)	ANRA Principle 12 MLDRIN/NBAN Principle 2(a)
Owners of Native Title Rights and Interests must maintain ownership and control of all intellectual property in their rights and interests	Not yet recognised	Article 31(1)	Arguably inherent in s 2(2)(a)	ANRA Principle 10 MLDRIN/NBAN Principle 2(b)
No act shall affect Native Title Rights and Interests without the owners free, prior and informed consent	Partial – future act regime triggers limited rights to negotiate, or to be consulted and is subject to extinguishment	DRIP Article 11(2), Article 18, Article 19, Article 28, Article 32(2)	Arguably inherent in s 2(2)(a)	ANRA principle 6 MLDRIN/NBAN Principle 2(b)

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4 May 2016