

## **INQUIRY INTO CROWN LAND IN NEW SOUTH WALES**

**Organisation:** New South Wales Aboriginal Land Council

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The Director,  
General Purpose Standing Committee No.6,  
Legislative Council,  
Parliament House,  
Macquarie Street, Sydney NSW 2000.

Dear Committee Members

### **NSW Legislative Council General Purpose Standing Committee No. 6 Inquiry into Crown land**

As the peak Aboriginal Land Rights body in New South Wales, representing the interests of the 120 Local Aboriginal Land Councils and 23,000 members across the state, the NSW Aboriginal Land Council (**NSWALC**) appreciates the opportunity to provide this submission to the Committee's Inquiry into Crown land. The following background is provided as context to NSWALC's specific comments on the Inquiry's terms of reference below.

#### **Aboriginal Land Rights in NSW**

The *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**) was enacted in acknowledgement of, and in an attempt to remedy, the ongoing effects of the dispossession of Aboriginal peoples in NSW. In the preamble, the Parliament provided landmark recognition of Aboriginal ownership and dispossession of the lands of NSW and in the Act itself provided for equally innovative mechanism for compensation and self-determination. The preamble states:

1. Land in the State of New South Wales was traditionally owned and occupied by Aboriginal persons.
2. Land is of spiritual, social, cultural and economic importance to Aboriginal persons.
3. It is fitting to acknowledge the importance which land has for Aboriginal persons and the need of Aboriginal persons for land.
4. It is accepted that as a result of past Government decisions the amount of land set aside for Aboriginal persons has been progressively reduced without compensation.

The ALRA established a mechanism to facilitate the return of land in NSW to Aboriginal peoples through claim over essentially unused and unneeded Crown land. Section 36 of the ALRA states that claimable Crown land is land that is vested in Her Majesty, land that is reserved or able to be lawfully sold or leased under the *Crown Lands Act*, land that is not lawfully used or occupied, and land that is not in the opinion of the Crown Lands Minister needed or likely to be needed for an essential public

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purpose, or as residential land.<sup>1</sup>

Claimed lands that fall within the definition of claimable Crown land, at the date of claim, must be granted to the claimant Aboriginal Land Council. This lack of Ministerial discretion and the limitations on the categories of Crown land that cannot be claimed are seen as expressions of the remedial and beneficial intent of the ALRA.<sup>2</sup>

The ALRA also established the network of Aboriginal Land Councils to acquire and manage land as an economic base for social and cultural outcomes for Aboriginal communities. The claiming of Crown land is a core function of Aboriginal Land Councils and is the key compensatory mechanism of the ALRA.

In his Second Reading Speech the then Minister for Aboriginal Affairs, the Hon. Frank Walker, provided the central underpinning of this compensatory mechanism with the statement:

‘In recognising prior ownership, the Government thereby recognises Aboriginal rights to obtain land. The Government believes the essential task is to ensure an equitable and viable amount of land is returned to Aborigines.’<sup>3</sup>

Adding that:

‘Vast tracts of Crown land will be available for claim and will go some way to redress the injustices of dispossession’<sup>4</sup>.

And providing further explanation:

‘...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 it lays the basis for a self-reliant and more secure economic future for our continent’s Aboriginal custodians...’<sup>5</sup>

The objects and purposes of the ALRA, and the claim process are also significant in light of Australia’s obligations under the United Nations Declaration on the Rights of Indigenous Peoples which Australia ratified in April 2009. The Declaration recognises that:

‘Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, 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.’<sup>6</sup>

### **Aboriginal Land Claims and Aboriginal interests in Crown land**

The claim process in the ALRA is the cornerstone for Aboriginal peoples to realise the land justice and the cultural, social and economic outcomes intended by the NSW Parliament. This has been

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<sup>1</sup> Section 36 of the *Aboriginal Land Rights Act 1983* (NSW)

<sup>2</sup> *NSW Aboriginal Land Council v Minister Administering the Crown Land (Consolidated) Act and the Western Lands Act* (Winbar No. 3) (1988) 14 NSWLR 685 at 691-693; and *Minister Administering the Crown Land Act v Deerubbin Local Aboriginal Land Council* (No.2) (2001) 50 NSWLR 665 at 674.

<sup>3</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5089(Frank Walker).

<sup>4</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5095(Frank Walker).

<sup>5</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5088 (Frank Walker).

<sup>6</sup> Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples

recognised in the observation of the NSW Court of Appeal that the land claim process is the 'primary mechanism' for giving effect to the purposes set out in section 3 of the ALRA.<sup>7</sup>

However, despite the Hon. Frank Walker's assertion that vast tracts of land would be available for claim and that 'the system will be simple, quick and inexpensive'<sup>8</sup> the reality has fallen short of those expectations.

To date, only about a quarter of all claims lodged since 1983 have been determined, and presently there are approximately 29,000 unresolved Aboriginal Land Claims over Crown land in NSW.

These claims represent the undelivered cultural, social and economic outcomes for Aboriginal people that were intended by the Parliament with the enactment of the ALRA over 30 years ago. They also provide Aboriginal Land Councils with inchoate proprietary interests in the Crown land under claim.<sup>9</sup> For these reasons alone, Aboriginal Land Councils must be seen as special stakeholders when it comes to Crown land.

Even so, land claims are not the full extent of Aboriginal peoples' interests in Crown land. As the ALRA recognises, Aboriginal peoples' interests in land and Crown land is multifaceted. It includes, but is not limited to the use and management of land for the maintenance, protection and promotion of Aboriginal culture and heritage, as well as providing for social and economic opportunities for Aboriginal peoples.

These interests in Crown land cannot be separated from Crown land management. Given its nature, Crown land has significant Aboriginal culture and heritage values and retains cultural and spiritual significance. The cultural, social and economic interest of Aboriginal peoples in Crown land NSW is perhaps typified by the state's Travelling Stock Reserves (TSRs).

The TSR network in New South Wales is a complex assemblage of public land established during European colonisation; significantly often along Aboriginal pathways through the landscape.<sup>10</sup> The TSR network is a valuable ongoing cultural, social and economic asset to many Aboriginal communities due to their unique management history.

TSRs have rich tangible and intangible culture and heritage value for Aboriginal peoples. The location of TSRs in association with water and the logical pathways between these sources of water has meant that they often coincided with traditional Aboriginal pathways including trade routes and access to streams. As such it is not uncommon for TSRs to be particularly rich in Aboriginal objects and sites.

TSRs also continue to provide sources for traditional natural economic resources for Aboriginal communities and are utilised today by Aboriginal people as areas to hunt, fish and gather bush foods to supplement diets, and access bush medicines. TSRs are important places for Aboriginal people to access cultural sites, and to pass on knowledge.<sup>11</sup>

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<sup>7</sup> *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].

<sup>8</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5095(Frank Walker).

<sup>9</sup> *Narromine Local Aboriginal Land Council v Minister Administering the Crown Land Act* (1993) 79 LGER 430 per Stein J at 433-434.

<sup>10</sup> Tremain, James. Travelling stock routes: The Aboriginal elder's story [online]. *Nature New South Wales*, Vol. 56, No. 4, Summer 2012: 32-33.

Availability: <<http://search.informit.com.au.ezproxy.lib.uts.edu.au/documentSummary;dn=253075571643748;res=IELHSS>> ISSN: 2200-4580. [cited 16 Jun 14].

<sup>11</sup> Proft, Kirstin. The TSR network: Linking places, linking people [online]. *Australasian Plant Conservation: Journal of the Australian Network for Plant Conservation*, Vol. 20, No. 2, Sep-Nov 2011: 22-24.

The importance of TSRs to Aboriginal people in New South Wales is expressly recognised in the ALRA, which permits Aboriginal Land Councils to claim<sup>12</sup> and acquire TSRs even where they remain needed for stock purposes.

### **Aboriginal Land Agreements**

In recognition of the shortcomings of the claims process in practice, an alternative mechanism for negotiating land, land claims and other possible outcomes was proposed as part of the most recent review of the ALRA. This proposal that was supported by NSWALC found form in the Aboriginal Land Agreement mechanism of section 36AA of the ALRA that commenced in July 2015.

The mechanism allows for voluntary negotiations between the Minister for Crown lands and one or more Aboriginal Land Councils. These negotiations must be conducted in good faith, but are otherwise largely flexible in terms of the manner in which they may be conducted and in terms of the outcomes that may be agreed.

This flexibility of the provisions allow for the strictures of section 36 of the ALRA to be set aside. This significantly allows for Aboriginal interests in relation to specific lands to be considered for the first time; as opposed to section 36's strict application of the hierarchy of other interests in Crown land.

This mechanism is seen by NSWALC as a real opportunity to fast-track land justice for Aboriginal people and deliver the outcomes intended for the ALRA. To date, only tentative steps have been made towards the full realisation of this mechanism potential for delivering Aboriginal Land Rights.

### **Crown Land Reform Processes**

NSWALC has long advocated for greater inclusion of Aboriginal interests and Aboriginal Land Rights in Crown land management and reform processes. In the context of the Government's ongoing Crown land reforms, NSWALC continues to work towards that aim.

NSWALC remains committed to working with the Government wherever possible to deliver the cultural, social and economic outcomes intended for the ALRA. The ongoing need of the Aboriginal communities in New South Wales requires every such opportunity to be pursued.

NSWALC sees the ongoing reform process as a genuine opportunity to have Aboriginal interests and Aboriginal Land Councils afforded their due place in Crown land processes and to more fully deliver on the Parliament's promise of Aboriginal Land Rights in NSW.

### **Specific comment on terms of reference**

#### **(a) the extent of Crown land and the benefits of active use and management of that land to New South Wales,**

As alluded to above, with the enactment of the ALRA the Parliament identified Aboriginal Land Rights as one of the highest public policy initiative specific to Crown land in New South Wales.

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Availability: <<http://search.informit.com.au.ezproxy.lib.uts.edu.au/documentSummary;dn=667894150174065;res=IELHSS>>  
ISSN: 1039-6500. [cited 16 Jun 14].

<sup>12</sup> There are over 5500 outstanding Aboriginal land claims over TSRs yet to be determined.

Notwithstanding the difficulties faced in its full delivery to Aboriginal people, the benefits of Aboriginal Land Rights as public policy on the use of Crown land can be seen in every Aboriginal community across the state.

Furthermore in considering Aboriginal Land Rights as public policy, it is pressing upon the Committee to not see its benefits, or the Aboriginal communities it directly benefits in New South Wales, in isolation. The cultural, social and economic outcomes of Aboriginal Land Rights extend beyond the state's Aboriginal communities, to enrich and benefit the entire community of New South Wales, culturally, socially and economically.

**(b) the adequacy of community input and consultation regarding the commercial use and disposal of Crown land.**

NSWALC has long held concerns about the adequacy of community input and consultation regarding the commercial use and disposal of Crown land. The public nature and utility of Crown land, including for the provision of Aboriginal Land Rights, warrants transparency around its commercial use and disposal.

In the context of the Government's ongoing Crown Land Review, NSWALC has particular concerns about the proposed rationalisation of notification provisions as they relate to the sale of Crown land, and the weakening of Crown land assessment requirements.

The Government's reforms propose a rationalisation of notification provisions which include the removal of the Government Gazette notification, for the revocation or alteration of Crown land reserve purpose, or for the sale of Crown land. It is proposed that such notifications be provided instead in 'a newspaper circulating in the locality in which the land is situated or in a newspaper circulating generally in the State.'

NSWALC does not support the weakening of any notification provisions and instead supports increasing the transparency around such notifications. Crown land is a public asset of the whole state and commensurate transparency is needed to ensure that the public have an opportunity to participation in decision making regarding its commercial use or sale.

NSWALC recommends that Government Gazette notifications are maintained, and that the proposed local media notifications are added to these existing requirements. In addition, investigation should be undertaken into the use of additional online methods for greater information access and transparency.

NSWALC is similarly concerned that the pursuit of a more streamlined notification process will result in notification processes relating to the revocation of a reserve purpose, being published after land is sold. Where public assets are being administered for public purposes, rationalisation and efficient administration should not trump transparency.

At present the Minister is required to assess Crown land to determine its capabilities and preferred uses prior to dealing with the land.<sup>13</sup> While, it is understood that these assessment provisions are

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<sup>13</sup> Section 34 of the *Crown Lands Act 1989*

readily and regularly overcome through legislated exceptions,<sup>14</sup> such requirements must not be removed without adequate replacement. NSWALC has concerns about the Crown land reform proposal to remove these requirements in favour of unclear local planning processes under the new land use planning framework. This lack of clarity is even more concerning given the uncertainty that remains about the future land use planning framework in New South Wales.

It may assist the Committee's consideration of the adequacy of community input and consultation regarding the commercial use and disposal of Crown land to establish the specifics of the proposed reform to the notification and assessment requirements for Crown land.

As a final comment in regards to the commercial use and disposal of Crown land, NSWALC submits that Crown land that is surplus to strict public requirements is precisely the land intended by the Parliament for return to Aboriginal peoples as Aboriginal Land Rights compensation.

**(c) the most appropriate and effective measures for protecting Crown land so that it is preserved and enhanced for future generations.**

As alluded to above, NSWALC submits that the return of Crown land to Aboriginal peoples under the ALRA presents the most significant opportunity to deliver cultural, social and economic benefits to the whole community of NSW for generations to come.

**(d) the extent of Aboriginal Land Claims over Crown land and opportunities to increase Aboriginal involvement in the management of Crown land.**

In regards to Aboriginal Land Claims, as identified above, the number of unresolved claims is at present approximately 29,000. However, this is more of an administrative figure and does little to speak to the extent of Aboriginal Land Claims over Crown land, and the extent to which Aboriginal Land Rights is yet to be delivered for Aboriginal peoples.

It is submitted that the following information may assist the Committee with a clearer understanding of the extent of Aboriginal Land Claims over Crown land:

1. In respect to Crown land under Aboriginal Land Claim the area and estimated value of those lands; and
2. In respect to Traveling Stock Reserves under Aboriginal Land Claim the area and estimated value of those lands.

In regards to potential opportunities to increase Aboriginal involvement in the management of Crown land, as noted above, NSWALC has long advocated for greater inclusion of Aboriginal interests and Aboriginal Land Rights in Crown land management processes. This would include opportunities for involvement in Crown land management, provided such opportunities were genuine, meaningful and funded.

However, it must be stressed that such opportunities must not be a substitute for the compensatory return of land to Aboriginal people in freehold.

Even so, the benefits of combining tens of thousands of years of accumulated traditional ecological knowledge with the land management expertise of Government agencies such as Local Land Services

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<sup>14</sup> Section 35(2) of the *Crown Lands Act 1989* for example.

cannot be overstated. The outcomes in terms of improved land management and mutual capacity building from skills transfers should be given real consideration by the Committee and the NSW Government.

#### **In conclusion**

The Parliament established Aboriginal Land Rights in response to the ongoing socio-economic disadvantage experienced by Aboriginal peoples. It was to 'lay the basis for a self-reliant and more secure economic future for Aboriginal peoples in New South Wales'.<sup>15</sup> Central to this intended purpose is the return of Crown land to Aboriginal people.

Land justice outcomes for Aboriginal peoples in NSW remain to be realised. While the return of land to Aboriginal peoples is not fulfilled, the intent of the Parliament for a self-reliant and secure economic future for Aboriginal peoples will remain undelivered.

Yours sincerely,

Lesley Turner

**Chief Executive Officer**

Date: 26/7/16

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<sup>15</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5089 (Frank Walker)