

INQUIRY INTO ECONOMIC DEVELOPMENT IN ABORIGINAL COMMUNITIES

Organisation: Office of the Registrar Aboriginal Land Rights Act 1983 (NSW)
Date received: 18/08/2016

Economic development in Aboriginal communities

Discussion Paper, July 2016 – Questions for consideration

Response by the Registrar of the Aboriginal Land Rights Act 1983 ("the Registrar")

Introduction

The Committee in its July 2016 Discussion Paper posed a number of questions for the consideration of interested parties. The Registrar provided a submission to the Committee's inquiry into economic development in Aboriginal communities that canvassed a number of the issues reflected in the Discussion paper's questions. In this response I address the questions posed by the Committee which are relevant to the Registrar's submission. These responses should be read together with the Registrar's submission to the Committee.

Question 1

Is there an urgent need for the NSW Government to adopt a whole of government approach to ensure a coordinated and targeted response to address the critical issues within Aboriginal communities?

Put simply, I agree with the sentiments raised in Question 1 however, in my view the heart of this question is: where in the body of the NSW Government should policy advice to government about its Aboriginal citizens, reside? The Discussion Paper notes initiatives in the Northern Territory to establish a "stand-alone" Office of Aboriginal Affairs.¹

In NSW the principal Aboriginal affairs policy group reporting to the responsible Minister is a business unit within the Department of Education. There is then a plethora of Aboriginal affairs policy advice provided across many different NSW Government agencies and authorities.

While it is inevitable that government agencies will have policy advice about Aboriginal people specific to their own objectives, there is in my opinion, a strong case for a satisfactorily resourced Office of Aboriginal Affairs to reside within the NSW Department of Premier and Cabinet. This structural positioning of Aboriginal affairs policy within the Department of Premier and Cabinet has a number of advantages:

1. It recognises that as a group, NSW's Aboriginal citizens are both distinct and subject to the whole range of interactions with government;
2. It provides the best opportunity for the NSW Government to recognise and adopt priorities in Aboriginal affairs policy of concern to government and the Aboriginal community of NSW; and
3. It limits the opportunity for competing government agencies to overwhelm and confuse Aboriginal affairs policy and priorities development.

¹ See Discussion paper at paragraph 1.9

I note that there is historical precedent for Aboriginal affairs policy to principally reside with a Department of Premier and Cabinet in NSW; this occurred in the early 1990s under the Greiner/Fahey governments.

I am not advocating for a stand-alone NSW Department of Aboriginal Affairs but rather a return to an Office of Aboriginal Affairs residing within the Department of Premier and Cabinet as it would seem the best coordination opportunity for Aboriginal affairs policy for the NSW Government. A stand-alone office may only serve as another competing government agency in relation to Aboriginal affairs policy, rather than the NSW public sector leader with primary responsibility for policy and priorities.

Question 2

What are the options for the governance of Aboriginal affairs in New South Wales given the complexities, history, stakeholders, the need for accountability and transparency, and the need to engage the private sector?

I made a number of recommendations relevant to this question in our submission.²

Briefly, I identify three areas of governance in Aboriginal affairs:

1. Governance wholly within government structures;
2. Government service delivery structures; and
3. Aboriginal organisations partly or wholly outside a governmental structure.

Typical governmental administrative arrangements largely control Aboriginal affairs' governance wholly within government. The tensions between such control and proper consideration and application of Aboriginal peoples' cultural authority must always be addressed.

Government service delivery structures for Aboriginal people offer more scope for Aboriginal leadership. The fundamental tension in such structures is public accountability and service needs identified by Aboriginal people. I discussed this tension in our submission and suggested important ways to use best endeavours to balance the tension.

Accountability must be reasonable, transparent and appropriate to the specific service delivery structure. The public resources available need to be clearly identified and the limits of these well understood by all parties.

Aboriginal people leading service delivery structures must understand the organisation they are responsible for, be able to balance public accountability and Aboriginal community needs, and be confident to make decisions about service delivery that will be respected and can be implemented.

I note I expressed in our original submission that the "Empowered Communities" model active in NSW is an example of a well-designed and resourced Aboriginal service delivery structure.

Question 3

What can the NSW Government do to improve coordination in the area of economic development in Aboriginal communities?

² Refer to recommendations 1 – 12 in our submission.

Adding to the recommendations made in our submission³, I make two further observations about this issue:

1. Understanding the true level of economic potential in NSW Aboriginal communities will greatly assist the NSW Government to consider how best to apply limited public resources. Such understanding must arise from respectful engagement with Aboriginal communities and individuals to gain insights into the potential for economic development. This process would greatly benefit from a “place management” paradigm, giving weight to the specific attributes on a case by case basis. The concept of Aboriginal community may be fluid and diverse however it is best identified by dialogue with Aboriginal people.
2. Given the potential extent of economic resources held by Local Aboriginal Land Councils (“LALCs”) in NSW as land holdings and active land claims, a focus by the NSW Government on coordination of the relevant public resources to assist LALCs to engage in economic development will enhance the economic and social wellbeing of LALC members and the wider NSW community. I note the critical role of the New South Wales Aboriginal Land Council (“NSWALC”) in this process.

Question 9

Should there be targeted, centralised investment to stabilise and enhance capacity building and development for Aboriginal organisations? If so, what would this entail?

I note the Committee’s comments in the Discussion Paper about the detrimental impacts that short or uncertain funding cycles have on the capacity building and development of Aboriginal organisations.⁴

Capacity building and development for Aboriginal organisations often means training for the members, governing group and employees of the organisation in relation to the particular governance and administrative requirements of their organisation. It is therefore critical that Aboriginal organisations be provided with assistance to understand the requirements they must meet. This will often include a mix of legislative, corporate governance and managerial considerations.

Equally issues of how Aboriginal cultural authority and governance interact with matters of legislation, corporate governance and management must be properly considered.

In my view, the training and support provided by the NSWALC to LALCs in relation to the governance and administrative requirements of LALCs under the *Aboriginal Land Rights Act 1983* (“ALRA”) is a good example of effective capacity and development support for Aboriginal organisations. Such training and support greatly assists the LALC network’s stability and therefore the efficiency and amenity of LALCs to undertake their complex operations on behalf of their members.

I recognise that government must look wider than Aboriginal Land Councils when considering capacity building and development options for Aboriginal organisations. I further recommend the NSW Government:

1. Analyse the range of Aboriginal organisations within its jurisdiction;
2. Understand existing State and Commonwealth support to such organisations; and

³ Refer to recommendations 9, 10, 11 & 12 in our submission.

⁴ Discussion paper at para 5.15

3. Consider policy reform that identifies a focused pool of public resources that may be applied across the range of Aboriginal organisations equitably.

In the particular case of LALCs, the NSW Government should consider a partnership with the NSWALC that bolsters the latter's capacity to provide support and assistance to LALCs.⁵ The application of public resources to improve the governance and administration of LALCs will greatly enhance their ability to improve the circumstances of their members. This in turn will benefit the whole of NSW.

Question 10

What is your view on whether the compliance requirements in the Aboriginal Land Rights Act 1983 are unduly burdensome on Local Aboriginal Land Councils?

Would the compliance requirements applicable to corporations under the Corporations Act 2001 be more appropriate for Local Aboriginal Land Councils?

The Discussion Paper notes my view that the compliance requirements of the ALRA can be administratively burdensome and create capacity issues for LALCs.⁶ I add that the compliance regime under the ALRA already mixes with the Corporations Act 2001 ("CorpA") because Aboriginal Land Councils may establish corporations under the CorpA as part of their functions under the ALRA.

In my view, the jurisdictional issues between the NSW ALRA and the Commonwealth CorpA means that compliance for Aboriginal Land Councils will continue to principally reside within the ALRA with increasingly relevance to the CorpA.

I encourage the NSW Government to continue to work closely with the LALC network to further improve and clarify the compliance regime under the ALRA, keeping clearly in mind the need of LALCs to balance accountability, legitimate corporate agility with their diverse community activities. This balance is complex and goes to the heart of the public/private character of Aboriginal Land Councils in NSW. Like all corporate governance regimes, improvement often comes from trial and error over time. The continuing analysis of the compliance balance in the ALRA and the relationship between that Act and the CorpA should be a central theme of any future review of the ALRA.

Question 11

What training or other services could be provided to enhance the governance capacity of Aboriginal organisations? Who should provide the training and other services?

The more training options available for members of governing bodies and employees of Aboriginal organisations, the better. I have made earlier observations about this issue.

There is a role for the NSW Government to provide training however it is not solely a government responsibility. Continuing to identify and analyse different Aboriginal organisations in NSW and how government may interact and support these, should be a key policy initiative. Effective training and other services provided to such a diverse group of organisations must first understand their structure, operations and nuances. This will require an appreciation of what forms of training best suit the likes of Aboriginal Land Councils, Aboriginal organisations incorporated under Commonwealth law, (such as Native Title prescribed body's corporate, Aboriginal health care and housing providers ...) Aboriginal cooperatives and Aboriginal businesses.

⁵ I note the "pilot" Aboriginal Land Agreement Framework" that includes consideration of such a partnership in relation to the specific issue of Aboriginal Land Agreements.

⁶ Discussion paper at para 5.20

In my view, only by undertaking this process can the NSW Government develop effective policy and resource allocation towards training and services for Aboriginal organisations in NSW. It is therefore integral the NSW Government give priority to Aboriginal organisations arising under NSW law in this area.

Question 12

What can be done about potential conflicts of interest when Local Aboriginal Land Council board members are both the managers and the tenants of housing on land council property?

There is a deep and troubled history surrounding the imposition of social housing management on LALCs worthy of its own inquiry. The fundamental challenge is that social housing cannot exist without subsidy, whether it is wholly public housing, community housing or other arrangements such as residential properties owned by LALCs.

At a LALC level, before potential conflicts of interest are considered, often the provision of social housing is simply a significant financial loss borne by the organisation in an effort to afford their members appropriate care and shelter. In most cases, without external subsidy, social housing poses serious constraint on the capacity and development of LALCs. Despite this, some LALCs proudly manage effective social housing programs. However often even well-run schemes are reliant on episodic public subsidies as rental income is inadequate and the burden of local council rates and services can be crippling, especially for LALCs with inherited former Aboriginal housing reserves.

I respectfully recommend that the NSW Government consider extending the exemptions from local council rate payments available to LALCs under the ALRA to include categories for residential land use to ease the burden on LALCs providing essential social housing in difficult circumstances.⁷

Various public policies and programs have been offered over time to mitigate the burden social housing for LALCs. While these are well intentioned, the fundamental problems of acute housing shortages for Aboriginal people in NSW and the continuing difficulty with maintaining viable social housing, are serious risks for LALCs.

Returning to the issue of potential conflicts of interest arising for LALC board members and employees who are also tenants, in my view LALCs boards should either:

1. Delegate responsibly for the management of social housing to the Chief Executive Officer ("CEO") of the LALC in circumstances where the CEO does not have a direct or indirect conflict of interest; or
2. Wholly outsource by contract, agency, lease or other lawful means, the responsibility for social housing management ensuring that the LALC maintains proper oversight of the performance of their housing manager.

In both cases however, a LALC board's simple direction to recover costs but not make profit, may be problematic for social housing management. It must also be said that conflict arising from LALCs' responsibility for social housing bedevils them and can cause serious and long lasting harm to individuals and the LALC as an organisation. There is no simple solution here, however I simply highlight the larger dilemma faced by LALCs with regard to social housing in the context of Question 12 and note that conflict cannot be addressed in isolation as the problem is more complex.

⁷ See section 43 of the ALRA and clause 4 of the Aboriginal Land Rights Regulation 2014.

Question 13

What action can the NSW Government take to improve the business and financial capacity of Local Aboriginal Land Councils and other Aboriginal corporations?

I find all of the matters identified in the Discussion Paper about this issue helpful and I reiterate our initial recommendations touching on this issue.⁸ I add to those recommendations that the NSW Government could productively continue to broker and facilitate partnerships between Aboriginal Land Councils, other Aboriginal corporations and relevant private sector parties to assist with business and financial capacity.

In my experience when properly briefed about the economic potential of LALCs, the private sector is quick to realise the benefits of strong engagement; there is a role for government in ensuring such engagement is legitimate and of direct benefit to LALCs. I further note there are many cases in NSW where LALCs are one of the larger business entities in their town or region worthy of membership of their local chamber of commerce (or similar) if they so desire.

We note our support for any initiatives to achieve the objectives noted in Questions 14, 15 and 16

Question 17

What actions should the NSW Government take to address the backlog of land claims yet to be assessed?

Question 18

What actions should the NSW Government take to address the backlog of land claims that have been assessed but where the land has not yet transferred to land councils?

Question 19

What actions could the NSW Government (or others) take to provide the necessary support to Local Aboriginal Land Councils holding 'limited title' land to realise its economic potential?

I address these three associated questions together and note that these issues were considered in some detail in our submission with a number of recommendations proposed.⁹

At the date of writing, more than 41 000 land claims have been lodged in NSW and the number of undetermined land claims is approaching 30 000. These raw numbers can be daunting and the discussion paper notes evidence provided to the Committee about the possible time it would take to resolve land claims on a case by case basis.¹⁰

In relation to all the challenges that arise with land claims, the threshold issue is what public and private resources may be brought to bear to improve the land claims process and the outcomes for Aboriginal Land Councils. I understand that available public and private resources will not decrease the number of undetermined land claims rapidly. I do say however that the public resources available for the determination of land claims must be enhanced not diminished, into the future. I would urge

⁸ Refer to recommendations 9, 10, 11 & 12 in our submission.

⁹ Refer to recommendations 13, 14 & 15 in our submission.

¹⁰ See comments of Associate Professor Janet Hunt at para 6.15.

the use of 'Aboriginal Land Agreements' ("ALA") pursuant to section 36AA of the ALRA to the fullest extent by both government and Aboriginal Land Councils and recommend the ALA process reflect the principles of ethical dispute resolution.

There is also need for a continued focus on identifying undetermined land claims that are a priority for both the NSW Government and Aboriginal Land Councils, and attending to the determination of these claims. I suggest a proactive approach to identifying determination priorities will greatly reduce tensions in the land claims process.

In relation to land claims that are granted with limited or no title issued to LALCs for the land, I previously recommended all claims be granted and transferred with unqualified title. It is my view that section 36 of the ALRA requires this.

The issue of the dislocation between the administrative decision to grant a land claims and the transfer of unqualified title should be resolved. While I accept land survey costs directly impacts this issue, it must be addressed by the NSW Government as a matter of priority. I also accept that an Aboriginal Land Council may be satisfied with limited title for a granted land claim however this must be a matter of explicit consent at the point of grant, not an assumption, as it will later burden the LALC should they wish to deal in the land.

I further suggest that while the land claims process may be problematic for both government and the LALC network due to the volume of undetermined land claims, the significant "bank" of land claims lodged under the ALRA represents an accomplishment of the legislative regime, a credit of the NSW Parliament and successive NSW governments, and the land council network. The potential for Aboriginal economic development that this success brings, is large.

Finally, it would be timely for the NSW Government and LALC network to re-think their relationship in terms of Crown lands and land claims, beyond the positive steps already taken such as section 36AA of the ALRA and ALAs. There is scope for higher level, over-arching negotiations between the government and Aboriginal Land Councils looking towards to agreement making that settles an approach to the Crown land estate into the future. In my respectful view, such negotiations should commence.

Question 20

Do the issues raised with respect to zoning of land transferred to Aboriginal Land Councils warrant a change to current planning process? If so, what options are available to address issue(s) identified?

Should the NSW Government consider the introduction of a SEPP that would apply to land owned by Aboriginal Land Councils, and if so, what considerations and provisions should it include?

I note the recommendations and observations about this issue made in our submission, in particular the view that a SEPP in relation to Aboriginal Land Council land is critical.¹¹

Putting the interests of Aboriginal Land Councils in land, either by way of holdings or land claims, foremost in the minds of NSW Government and local planning authorities will greatly improve the NSW land use planning system.

¹¹ See in particular our submission at page 15.

Question 21

What are the potential benefits and disadvantages of the proposal that Local Aboriginal Land Councils partner with local government to identify and realise economic growth from land owned by land councils?

Historically the relationship between LALCs and local government in NSW has been problematic. Often the land claims process means the aspirations and needs of these parties in relation to available land resources in their areas is conflicted. There is no doubt that a good relationship between an Aboriginal Land Council and the local government(s) authority will benefit both parties and much can be done on a case by case basis to improve this relationship.

I note that potential power imbalances and information access however may adversely affect the relationship between Aboriginal land Councils and local government; the NSW Government's current focus on Crown land reform and land claims under the ALRA will provide further opportunities to evaluate the calibre of existing relationship between Aboriginal Land Councils and local government. My view is that time and effort spent on building relationships between LALCs and local government(s) authorities will greatly improve the possibilities of economic growth from Aboriginal Land Council land. In this respect it is vital that any relationship between these parties which concerns land development, particularly joint activities, must ensure that both parties are adequately and independently advised.

Question 22

What should the NSW Government do to support partnerships between Local Aboriginal Land Councils and other organisations, whether they are local government or private enterprises, to realise economic growth from land owned by land councils?

How can Aboriginal communities leverage economic opportunities from their cultural connection to water? What actions can the NSW Government take to facilitate this?

I note the recommendations in our submission that address various aspects of these two questions.¹²

In essence I recommend building on existing legal and organisational structures to create rights and relationships between LALCs and others that improve the cultural, economic and social circumstances of Aboriginal people. I highlight the potential for LALCs and the Boards of Management of Aboriginal owned conservation lands¹³ to form relationships that can create real tourism enterprise opportunities based on Aboriginal cultural authority.

While keeping in mind that engagement with other organisations will be at the discretion of LALCs, the NSW Government can do much to assist local government and private enterprise to understand how to best engage with LALCs in a respectful and meaningful way. Again, the important role of the NSWALC in such matters should not be overlooked.

Lastly, in relation to economic opportunities arising from Aboriginal peoples' cultural connection to water, I refer to our submission comments that suggest water, and in fact all natural resources, can form part of Aboriginal peoples' Native Title rights and interest in land and water. In this way, the NSW Government should continue to appreciate, acknowledge and respect Aboriginal peoples'

¹² Refer to recommendations 17 to 27 in our submission.

¹³ Land reserved under Part 4A of the National Parks and Wildlife Act 1974

cultural rights to coastal and inland waters and accept that such rights are an integral part of the states' natural resource management regimes.

I thank the Committee for allowing me to provide further comments on your Discussion Paper and look forward to your final report.

Stephen Wright
Registrar
ALRA