Submission
No 221

INQUIRY INTO CROWN LAND IN NEW SOUTH WALES

Organisation: Local Aboriginal Land Council Darkinjung

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Legislative Council
Parliament House
Macquarie Street Sydney NSW 2000

SUBMISSION INTO PARLIAMENTARY INQUIRY INTO CROWN LAND

I. INTRODUCTION

1. Darkinjung Local Aboriginal Land Council's **(Darkinjung)** is grateful for the opportunity to comment in relation to the Parliamentary Inquiry into Crown Land.

2. The Terms of Reference for the Inquiry are:

> *"1. That, notwithstanding the allocation of portfolios to the General Purpose Standing Committees, General Purpose Standing Committee No 6, inquire into and report on Crown land in New South Wales, and in particular:*
> *(a) The extent of Crown land and the benefits of active use and management of that land to New South Wales,*
> *(b) The adequacy of community input and consultation regarding the commercial use and disposal of Crown land,*
> *(c) the most appropriate and effective measures for protecting Crown land so that it is preserved and enhanced for future generations, and*
> *(d) The extent of Aboriginal Land Claims over Crown land and opportunities to increase Aboriginal involvement in the management of Crown land.*
> *2. That the committee report by 13 October 2016."*

3. Outcomes Darkinjung seeks from this inquiry include;

   (a) Recognition of the objects and intent of the *Aboriginal Land Rights Act* 1983 **(ALRA)**, and that ALRA is intended to be remedial and beneficial legislation for Aboriginal people;

   (b) Review mechanisms to facilitate dealings in land, including the determination of an Aboriginal Land Claim, or subsequent land dealings, pursuant to Section 40 of ALRA, for that land affected by Native Title;

   (c) Promote the use of *Aboriginal Land Agreements* (Sec 36AA of ALRA);

   (d) Provide appropriate resources to facilitate the processing of the estimated 28,000 unresolved Aboriginal Land Claims;

(e) Consider the registration of a caveat, or other similar mechanism, over any land upon which an Aboriginal Land Claim has been lodged and which has not yet been determined, (or in the case of a successful Claim, transferred to the LALC)

II. Darkinjung Local Aboriginal Land Council

4. Darkinjung is an Aboriginal Land Council established under the *Aboriginal Land Rights Act* 1983 (NSW) (**ALRA**). Darkinjung's area covers the whole of the Central Coast, with boundaries coinciding with the Local Government boundaries of Gosford City and Wyong Shire. Total area is 1,760km^2 with a total population of approximately 312,000, of which approximately 12,000 have registered as being of Aboriginal descent.

5. Darkinjung is the single largest non-Government land owner, in a Region located mid-point between the State's capital of Sydney and the second largest city of Newcastle. The Region is subject to various pressures as each of these cities continues to expand.

III. CROWN LANDS LEGISLATION AND THE DISPOSSESSION OF ABORIGINAL PEOPLE

6. It is now well recognised that land has always been a fundamental economic and social resource to Aboriginal people. It is also well recognised that the history of the alienation of land under Crown lands legislation has been a history of denial and disregard for interests of Aboriginal people in that land was alienated on the basis of discriminatory assumptions that Aboriginal people did not own their land and that their rights in land could be conveniently disregarded. As Justices Deane and Gaudron noted *in Mabo [No 2]*:

> *"It was only by fastening on the notion that a settled colony was* ***terra nullius*** *that it was possible to predicate of the Crown the acquisition of ownership of land in a colony already occupied by indigenous inhabitants. It was only on the hypothesis that there was nobody in occupation that it could be said that the Crown was the owner because there was no other."*[1]

7. Yet it was on this basis that Aboriginal people were dispossessed on land "*parcel by parcel*". As noted in by Justice Brennan in *Mabo [No 2]*, that dispossession "*underwrote the development of the nation.*[2] Justices Deane and Gaudron described it as a "*national legacy of unutterable shame.*"[3]

8. It is tempting to treat the dispossession of Aboriginal people as a long distant event. In truth, it has been an ongoing process. Crown lands legislation in New South Wales has never acknowledged the prior and continuing interests of Aboriginal people. Despite being the subject of numerous amendments since the High Court rebutted the discredited legal myth that Australia was terra nullius in *Mabo [No 2]*, the

[1] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 per Brennan J at 49.
[2] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 per Brennan J (Mason CJ and McHugh J agreeing) at 69.
[3] *Mabo v Queensland [No 2]* (1992) 175 CLR 1 per Deane and Gaudron JJ at 104.

Crown Lands Act 1989 (NSW) (**CLA**) remains silent on the interests of Aboriginal people.

9. In New South Wales the history of dispossession also needs to be understood in relation to the manner in which reserves set aside for the benefit and use of Aboriginal people where unlawfully revoked to the detriment of many Aboriginal people and communities. It has been estimated that between 1909 and 1969 approximately 10,000-15,000 ha of land reserved for Aboriginal people were revoked. In the early 1980's the Government received advice the revocations were unlawful and had "*no legal validity*".[4] In 1983 the Aboriginal Legal Service commenced proceedings challenging the revocations. In response the Government enacted the *Crown Lands (Validation of Revocations) Act 1983* which retrospectively validated the revocation of the reserves.[5] Section 3(1) of the *Crown Lands (Validation of Revocations) Act* 1983 provided that:

> *"Any revocation of a reserve for the use of Aborigines (being a reserve over an area of land which at the time of the revocation was vested in the Board for Protection of Aborigines or the Aborigines Welfare Board under the Aborigines Protection Act 1909) shall, to the extent of any invalidity, be deemed to have been validly effected".*[6]

10. As set out in more detail below, Darkinjung believes that the attitudes which underlay the parcel by parcel dispossession of Aboriginal people from the land continue to be perpetuated through Government policies which continue to ignore Aboriginal interests in Crown land, and which persist in prioritising the alienation of Crown land over the return of land to Aboriginal people under the ALRA.

IV. ABORIGINAL LAND CLAIMS OVER CROWN LAND AND OPPORTUNITIES TO INCREASE ABORIGINAL INVOLVEMENT IN THE MANAGEMENT OF CROWN LAND

Objects of the ALRA

11. The *Aboriginal Land Rights Act* 1983 (NSW) (**ALRA**) was enacted in response to the First *report from the Select Committee of the Legislative Assembly upon Aborigines: Report and Minutes of Proceedings* (1980) (**the Keane Report**). The Keane Report noted the special relationship of Aboriginal people to land, and noted that it was an economic resource:

> *"To fully understand the ramifications for Aboriginal ways of life and the destruction and disadvantage caused by their dispossession, it must be understood that land was and is the material and economic basis of Aboriginal society. It was the economic relationship that was the primary one. Religious and philosophical beliefs were an expression of, and strengthened, the basic dependence on land and nature. The land and what was contained in it was the*

[4] Parliament of NSW, Hansard, Legislative Council, 30 March 1983, p 5412 (Hansard, Council), 30 March 1983, p 541

[5] See section 3(1) of the *Crown Lands (Validation of Revocations) Act* 1983 (NSW).

[6] As to the ultimate effect of this provision see *Coe v Gordon* [1983] 1 NSWLR 419 per Justice Lee 428E - 429E.

source that supplied all needs -- food, water, shelter tools and so on. Without the land and what was on it, the people simply could not have survived. Their understanding of their relationship to the land was expressed in a religious and philosophical form."[7]

12. The ALRA was enacted to provide some remedy for the injustice of the dispossession of Aboriginal people. In introducing the *Aboriginal Land Rights Bill* in 1983, the then Minister for Aboriginal Affairs and Minister for Housing, Mr Frank Walker explained that the purpose of land rights was to address both the cultural importance of land to Aboriginal people, as well as to provide a remedy for Aboriginal economic deprivation:

> *"The Government has made a clear, unequivocal decision that landrights for Aborigines is the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time laying a basis for a self reliant and more secure economic future for our continent's Aboriginal custodians."*[8]

13. The ALRA is also an important measure consistent with Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples (**DRIP**), which Australia adopted in April 2009.[9] In the Second Reading Speech for the Aboriginal Land Rights Amendment Bill 2014, the Minister for Aboriginal Affairs, Victor Dominello explained:

> *"... The Aboriginal Land Rights Act is not simply a tokenistic gesture acknowledging past wrongs; it is an important vehicle for Aboriginal people to shape their own social and economic futures. The importance of the Aboriginal Land Rights Act in Aboriginal social and economic development is recognised internationally. When James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, visited Australia in 2011, in addition to hailing our land rights model as "remarkable", he noted that the work of Aboriginal land councils in New South Wales in securing and developing Aboriginal lands to provide greater opportunities to Aboriginal peoples is:*
>
> > *... essential to operationalizing the standards set forth in the United Nations Declaration and to move forward in a future in which indigenous peoples are in control of their development, participating as equal partners in the development process."*[10]

Scheme of the ALRA

14. The Preamble to the ALRA provides:

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[7] Keane Report at 2.39, p 32.

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

[9] See for example Articles 26(2) and 28 of the United Nations Declaration on the Rights of Indigenous Peoples.

[10] Hansard, Assembly, 21 October 2014, p 1491

"WHEREAS:

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

15. In this regard the ALRA acknowledges the important economic and social function of land. It also acknowledges the dispossession of Aboriginal people including through the revocation of reserves.

16. Section 3 of the ALRA provides that the purposes of the Act are to:

(a) To provide land rights for Aboriginal persons in New South Wales,
(b) To provide for representative Aboriginal Land Councils in New South Wales,
(c) To vest land in those Councils,
(d) To provide for the acquisition of land, and the management of land and other assets and investments, by or for those Councils and the allocation of funds to and by those Councils,
(e) To provide for the provision of community benefit schemes by or on behalf of those Councils.

17. The objects of Darkinjung are *"to improve, protect and foster the best interests of all* Aboriginal persons *within the Council's area and other persons who are members of the Council."*[11] Darkinjung has a number of statutory functions which enable it to pursue that object.[12] The functions include purchasing and making claims to Crown land.[13]

18. Rather than simply transfer unused Crown land to Aboriginal land councils, the ALRA requires Aboriginal people to claim it. Section 36(1), ALRA defines 'claimable Crown lands' as:

"... lands vested in Her Majesty that, when a claim is made for the lands under this Division:

(a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901,
(b) Are not lawfully used or occupied,

[11] Section 51, ALRA
[12] See generally section 52, ALRA.
[13] Section 52(2), ALRA.

(b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,

(c) Are not needed, nor likely to be needed, for an essential public purpose,

(d) do not comprise lands that are the subject of an application for a determination of native title (other than a non-claimant application that is an unopposed application) that has been registered in accordance with the Commonwealth Native Title Act, and

(e) do not comprise lands that are the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act) (other than an approved determination that no native title exists in the lands)."

19. In the Second Reading speech Frank Walker explained that the *"... system will be simple, quick and inexpensive. Vast tracts of Crown land will be available for claim and will go some way to redress the injustices of dispossession...."*[14]

20. The clear intention of the ALRA is that where Crown land is not lawfully used or occupied, not needed or likely to be needed for an essential public purpose or as residential land, it is required to be transferred to an Aboriginal land council. That process is recognition by Parliament of the need for Aboriginal people to be compensated for their past dispossession. It is also a recognition that Parliament has determined that it is in the public interest that Aboriginal people should be able to use such land to pursue the remedial and beneficial objects of the ALRA, and that this is an appropriate use of surplus or mismanaged Crown land.

21. The barriers that land councils have had in pursuing economic and social outcomes on land transferred under the ALRA have been recently documented in the Economic Development in Aboriginal Communities: Discussion Paper.[15] Despite these difficulties Darkinjung has had the benefit of being able to develop some of its land. Darkinjung therefore provides a good example as to what is achievable through the transfer of land under the ALRA.

22. In particular, Darkinjung has undertaken a number of land developments, or has otherwise leased land for commercial purposes. For example:

    (a) Construction of a 109 lot residential subdivision in Blue Haven, New South Wales called Menindee Ridge

    (b) Agreement to Lease with CASAR Motorsports Inc. over approx. 140 hectares of land located at Bushells Ridge, New South Wales

    (c) Rezoning (gateway) approval for 600 residential lots at Lake Munmorah and 900 residential lots at Wyee/ Doyalson.

    (d) Rezoning supported by Local Council for 42 Hectares of employment lands.

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[14] Hansard, Assembly, 24 March 1983, p 5095.

[15] Standing Committee on State Development, Economic Development in Aboriginal Communities: Discussion Paper, July 2016, (**Economic Development Discussion Paper**) paras [6.14]- [6.41], pp.67-75.

(e) Court approval for 99 site Manufactured Home Estate at Halekulani.

(f) Negotiated heads of agreement with 4 retail tenants for commercial development at Somersby.

23. Darkinjung currently provides a range of social and economic outcomes to the Aboriginal community on the central coast. These include:

(a) Housing 22 Aboriginal families with a further 15 houses either being built or in the planning process.

(b) Educating the next generation of leaders at Darkinjung Barker Campus

(c) Formation of the Barang Alliance

(d) Over 20 community events in the last 12 months to strengthen and empower our community

(e) MOU with Lendlease for employing and training Aboriginal people on the Gosford Hospital project

(f) 13 traineeships for Aboriginal people with the Commonwealth Bank of Australia

(g) 2500 tonnes of illegally dumped rubbish removed from our native bushlands

(h) Improvements to the planning process to ensure that Aboriginal culture and heritage is protected

(i) Protection and preservation of more than 7,000 registered Aboriginal sites.

(j) Darkinjung Funeral Fund which has over 160 members financially contributing to ensure ease of mind and security during sorry business.

24. These outcomes demonstrate the benefits of the ALRA, and highlight the public and social benefits that are capable of flowing to the Aboriginal community through the transfer of surplus Crown land under the ALRA. These tangible outcomes inform the recent observation of the Legislative Councils, Standing Committee on State Development:

> *"Aboriginal development is socially responsible and a key function of government. Importantly, it achieves results in delivering better lifestyle outcomes, including those related to health and wellbeing, as well as community*

engagement. However, it also promises significant savings to the state budget and unlocks Aboriginal community economic activity. The committee considers that there is a unique opportunity that exists in New South Wales as a result of the statutory land claims system, which holds the key to potentially unlocking an estimated $2 billion in value".[16]

Government Approach to the Claim Process

25. Despite the intention of the ALRA in relation to land claims, Darkinjung does not believe that either the Department or the Minister administering the Crown lands Act have always approached the ALRA with an understanding of its importance in providing land justice to Aboriginal people or by supporting the value to the public of the outcomes that can be achieved under it. While attitudes towards the ALRA have fluctuated over time, in Darkinjung's opinion the over arching attitude of Government since the enactment is one of either ambivalence, and in some instances antagonism towards the claim process. The transfer of land has been seen as a loss to the Department or the State.

26. It is well documented that that there are approximately 28,000 claims made under the ALRA that are awaiting determination.[17] Many land councils are waiting for the transfer of land which has been granted by the Minister or the Court. In Darkinjung's area there are approximately 760 claims lodged by Darkinjung which remain undetermined. The oldest outstanding land claims is ALC 5515 lodged on 28 February 1995. There are also additional claims lodged by the New South Wales Aboriginal Land Council that also remain undetermined.

27. There are also 15 claims which have been granted but are awaiting transfer.

28. While the influx of claims between 2005 and 2010 may have contributed to this matter, that is not the only explanation. It has not been unusual for claims to have remained undetermined for over 20 years. Darkinjung believes that the large backlog of claims which currently exist in the determination of land claims is in part a product from an historic antagonism to the ALRA by the Department and some Governments. Over the last 10 years there has also been a tendency for the Department to prioritise the sale of Crown lands over the transfer of land under the ALRA. That attitude has been highlighted in a number of land claim appeals. For example:

    (a) In *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285, the Minister argued that selling land was a use of it, so as to render it not claimable under the ALRA. The Court of Appeal and the High Court rejected that argument.

    (b) *Minister Administering the Crown Lands Act v La Perouse Local Aboriginal Land Council* (2012) 193 LGERA 276, involved a claim lodged over land which was about to be sold at auction, which the Minister refused on the basis that the

[16] Legislative Council, Standing Committee on State Development, *Economic Development in Aboriginal Communities: Discussion Paper*, July 2016, pp.5-6

[17] Economic Development Discussion Paper para [6.14], p 67.

land was lawfully used and occupied. The Land and Environment Court and the Court of Appeal determined that it was not lawfully used and occupied.

(c) *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (the Nelson Bay Claim)* (2014) 205 LGERA 219, involved land which was about to be unconditionally sold to a private developer. The Minister argued that all of the claimed land was in the opinion of the Crown lands minister needed or likely to be needed as residential land and wholly needed or likely to be needed for the essential public purpose of nature conservation.

(d) In other instances the Minister has sought to sell land while it was reserved from sale.[18] This in effect prevented the public from being able to comment on the sale, and for Aboriginal land councils it means that land councils cannot express their interest in the land through the lodging of a successful land claim.

29. The attitude underlying this approach is all the more miserly when it is considered that the ALRA has been reported as resulting in less than 0.4% of the Crown estate has been transferred to Aboriginal land councils.[19]

30. Darkinjung raises these matters because of its concern that recent and current proposals to transfer land to local government bodies, is not so much aimed at the management of Crown land, it is aimed at reducing the ability of land to be transferred under the ALRA.

31. Darkinjung also believes that as a result of the large number of undetermined claims and the delays in processing claims there is sometimes confusion within the Department and Local Government bodies that deal with land as to what land is the subject of claim. This increased the risk of land the subject of claim being dealt with. Delays in transferring land that has been granted creates similar issues. Darkinjung believes that consideration should be given to improving communication within the Department and local government bodies in relation to the existence of Aboriginal land claims. Darkinjung recommends that a caveat or similar mechanism be registered on lands title to acknowledge the claimant's interest and to prevent unlawful transfer of the land from crown ownership be considered.

Crown Lands White Paper and Government Response

32. The current review of Crown lands legislation commenced with the Crown Lands Management Review **(CLM Review)** progressed to the Crown Lands Legislation White Paper **(the White Paper)** and culminated in the Governments Response to Crown Lands Legislation White Paper: Summary of Issues and Government Response **(the White Paper Response)**.

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[18] See for example *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (The Kinchela Claim)* (2009) 166 LGERA 137

[19] Economic Development Discussion Paper para [6.14], p 67.

33. While it is appropriate for the Government to review Crown lands legislation to ensure it is operating efficiently and meeting community standards, Darkinjung believes that the fundamental starting point is acknowledging that the CLA was enacted prior to the recognition of native title and on misplaced assumptions that denied Aboriginal interests in Crown land. Given that disused Crown lands is the only land which is available to Aboriginal people to pursue the remedial and beneficial objects of the ALRA any review ought to consider how the objects of the ALRA can be furthered, rather than circumvented.

34. Darkinjung is concerned that the Crown lands review process has had insufficient regard for the Aboriginal interests in Crown land, is evasive about the potential impact on the ALRA and risks perpetuating the historical inequities that the alienation of Crown land has caused for Aboriginal people.

35. This outcome has arisen because from the outset, the Terms of Reference for the CLM Review did not start from a premise which acknowledged Aboriginal interests in Crown land and has skewed the review in relation to Crown land that has followed. The Terms of Reference were to "*identify and recommend:*

> *"key public benefits (social, environmental and economic) derived from Crown land,*
> *The NSW Government's future role in the management and stewardship of Crown land,*
> *The basis of an appropriate return on the Crown estate, including opportunities to enhance revenue,*
> *Business, financial and governance structures that enable achievement of desired outcomes within financial and resource constraints,*
> *Opportunities for efficiency improvement and cost reduction, consistent with red tape reduction objectives and accountability,*
> *Introduction by NSW Government of incentives to enable the Crown Lands Division to manage and develop the Crown estate in line with NSW Government objectives, and*
> *a contemporary legislative framework".*[20]

36. In relation to land ownership, the Crown Land Review created an inappropriate dichotomy in relation to the "*ownership of the Crown estate, depending on the balance of local and state uses and benefits*".[21] This dichotomy simply ignored, existing Aboriginal interests in land. Indeed, the CLM Review disavowed any obligation to consider Aboriginal interests, and left it to others to assess. It stated:

> *"Some recommendations may prove difficult to implement in the face of other constraints. In particular, the operation of the Aboriginal Land Rights Act 1983 is the focus of a separate legislative review. The Commonwealth's native title legislation and the impacts of the Aboriginal Land Rights Act 1983 on the implementation of some recommendation will be considered through that process."*[22]

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[20] NSW Government, Crown Lands Management Review, 2014, **(the CLM Review)**, pp.vii-viii and 1.
[21] CLM Review, pp.viii, 4 and 5-6.
[22] CLM Review, p.xi. See also p.11.

37. Later it noted that "*The outcomes of the review of the Aboriginal Land Rights Act 1983 will also need to be considered*".[23]

38. While the CLM Review made one passing reference to the possibility of the transfer of land to "*Aboriginal land councils*".[24] But the only discussion of the ALRA was in terms of how it impacted on the proposed transfer of land, and noted that:

> "*The proposed streamlining and modernising of the Crown Lands Act requirements in relation to Crown reserves, notification and other procedural matters will reduce the risk of unlawful use and occupation of Crown land and should reduce the complexity associated with the management of future claims*".

39. The CLM Review then only went on to discuss the case for transfer of land to local councils, and did not pay any regard to the manner in which this and other proposals would undermine the important objectives of the ALRA or remove land from being claimable.

40. By not properly identifying and acknowledging Aboriginal interests in Crown land, the CLM Review developed options which directly impacted on the operation of the ALRA. The primary enabling criteria for land to be claimable under the ALRA is that the land is, at the date of claim, vested in Her Majesty.[25] The proposal to transfer land to local government bodies has the effect of removing land from the limited class of land that is able to be claimed.

41. Finally, in failing to properly engage with ALRA, the CLM Review failed to inform itself, or properly consider, the Parliamentary intention behind the ALRA, the importance of its compensatory scheme, and the substantial benefits which flow to the community from its operation.

42. The failure of the CLM Review to properly consider the ALRA was not addressed in the White Paper which proposed reforms to the CLA. While the White Paper noted that one of the objects was to "*encourage Aboriginal use, and where appropriate co-management of Crown land*",[26] it did not elaborate on how that would be achieved.

43. In terms of "*land ownership options*" it did not refer to the transfer of land, but made a general observation about the different ways that lands of the Crown are held and noted that *"new legislation will rationalise the options for land ownership and provide that the management arrangements for Crown reserves will be the same regardless of the type of ownership.*"

44. While the White Paper was ambiguous about what outcomes might be pursued the failings of the CLM Review have been entrenched by the White Paper Response. The White Paper Response is also silent about the impact of the alienation of Crown land on Aboriginal people. Instead it promotes the ongoing alienation of Crown land which has occurred since colonial times, and states that:

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[23] CLM Review, p.3. See also p.11.
[24] CLM Review, p.4.
[25] Section 36(1), ALRA.
[26] NSW Government, Crown Lands Legislation: White Paper , 4 February 2014 (the White Paper), p.11.

"Since colonial times the NSW economy has developed through the release and sale of Crown land. This approach continues to be relevant, where Crown land does not have State of Local values it may make sense to dispose of it. The legislation will allow current processes to continue, but will not force or require land disposals."[27]

And:

"Since colonial times the NSW economy has developed through the release and sale of Crown land and this still continues today".[28]

45. The White Paper Response also promotes a number of proposals which will clearly impact on the ability of Aboriginal land councils to claim land under the ALRA. In particular:

(a) The proposal first raised in the CLM Review to transfer land to local councils[29] will clearly have an impact on claims. The statement in the White Paper Response that *"Local Councils currently manage land affected by native title and land claims and this will continue in the usual course"*[30] is misleading. The Government is well aware that it is a precondition to land being 'claimable Crown land' that it be land "vested in Her Majesty". Land vested in a local council will not be claimable. The CLM Review states that *"Land that is the subject of undetermined land claims under the Aboriginal Land Rights Act 1983 will not be transferred to Local Councils"*[31] and the that *"[t]he Aboriginal Land Rights Act and the Native Title legislation will not be amended by the new Crown land legislation".*[32] These statements ignore the fact that land that is not currently the subject of claim will be transferred to local government bodies and that if in future the land becomes disused and no longer needed for any public purpose, it will not be able to be claimed under the ALRA. If it remained vested in the State of New South Wales it would be. The ALRA does not need to be amended for the claim process to be thwarted, all that needs to happen is for the status of land to be altered, and that is what the White Paper Response proposes.

(b) In addition, the White Paper Response raises the potential for the validation of unlawful use. Under the current CLA there is a capacity to issue licences to normalise existing unlawful uses. The issue is whether any licences would be retrospective. Darkinjung shares the concerns raised by others[33] that it would be inappropriate for licences to be issued retrospectively if it is to impact on Aboriginal land claims.

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[27] NSW Government, Response to Crown Lands Legislation White Paper: Summary of Issues and Government Responses, October, 2015, (**White Paper Response**) p.16
[28] White Paper Response, p.20
[29] White Paper Response, p.23
[30] White Paper Response, p.21.
[31] White Paper Response, p 21.
[32] White Paper Response, p.21
[33] White Paper Response, p.14.

46. In putting forward these proposals, the White Paper Response does not discuss the benefits of the scheme for land rights, or the lost opportunities in having land being made available under the ALRA to Aboriginal land councils. As the examples set out above in relation to Darkinjung, those benefits are substantial.

Aboriginal Land Agreements

47. The recent amendment of the ALRA to make provision for Aboriginal Land Agreements creates further opportunities for achieving beneficial outcomes under the ALRA.

48. An "Aboriginal Land Agreement" is defined in 36AA(1), ALRA as

> *"an agreement, in writing, between the Crown Lands Minister and one or more Aboriginal Land Councils (whether or not the agreement also includes other parties) that, in addition to any other matter that may be included in the agreement, makes provision for:*
> *(a) The exchange, transfer or lease of land to an Aboriginal Land Council, or*
> *(b) An undertaking by an Aboriginal Land Council not to lodge a claim, or to withdraw a claim, in relation to specified land."*

49. Without limiting what may be contained in an Aboriginal Land Agreement, Section 36AA also provides that an agreement may provide for:

(a) Financial or other consideration,
(b) Exchange, transfer or lease of land,
(c) Conditions or restrictions on the use of any land to which the agreement relates,
(d) Joint access to and management of land (including a lease of a type referred to in section 36A),
(e) undertakings by an Aboriginal Land Council or the Crown Lands Minister with regard to the lease, transfer, management or use of any land,
(f) The duration of the agreement,
(g) The resolution of disputes arising under the agreement.[34]

50. The Aboriginal land agreement provisions provide greater direction and flexibility for the settlement of claims. However, there has always been a capacity to settle claims through agreement. The primary determinant of whether claims settle is the willingness of the parties. For the new provisions to be ffective, there has to be a willingness on the part of Government to engage with land councils to explore ways to resolve claims.

51. Unfortunately, it appears that the Government is unwilling utilise this provision other than to progress the transfer of land to local government bodies as proposed in the White Paper Response. This is highlighted by a recent matter that has arisen in Darkinjung's area.

[34] Section 36AA(5), ALRA.

52. On 2 May 2016 Darkinjung sent a letter to the Minister for Lands and Water (Hon Niall Blair MLC) inviting him to enter into negotiations to resolve 11 Aboriginal Land Claims lodged under the ALRA. The proposed ALA included resolution of issues relating to a number of government and Aboriginal entities. The issues are:

- Darkinjung intend to construct a 99 site manufactured home estate at Halekulani and require 8.3 hectares of land in the immediate vicinity to provide as environmental offsets (as required by Central Coast Council). Suitable land is available to the west of our site and is currently claimed by Darkinjung under the ALRA but is a reserve managed by Central Coast Council as trustee. This land is also affected by the Awabakal/Guringai Native Title Claim currently being filed in the Federal Court.

- Central Coast Council has Commonwealth Government Funding for development of regional sporting fields in Lake Road Tuggerah. The land in which this facility is supposed to be built is currently also the subject of an ALRA claim lodged by Darkinjung. Hence Council is unable to proceed with the work.

- Darkinjung wish to develop an Aboriginal Hub suitable for practicing culture, community events, education and a home for Darkinjung on the Central Coast. After extensive analysis of the region Darkinjung has identified the Pioneer Dairy site and adjoining reserve at Tuggerah as most suitable. This land has significant cultural value as it includes a repatriation burial site that is registered with the Office of Environment and Heritage (OEH) as an Aboriginal Place. Darkinjung placed an Aboriginal Land Claim over Pioneer Dairy and the adjoining parcel in 2004 and it remains unresolved.

- Tuggerah Primary School wishes to extend their footprint. The only suitable land adjoins the school and Darkinjung has claimed it under the ALRA. This claim was lodged in 2009.

- In 2014 The Glen Rehabilitation Centre located at Chittaway was informed by the NSW Government that it did not have a legal tenure in place over the land. Darkinjung placed a claim under the ALRA over it to provide The Glen with comfort around its future. Although The Glen successfully negotiated a lease with the state government the Aboriginal Land Claim remains unresolved.

53. On 2 May 2016, Darkinjung wrote to the Minister advising of its interest in negotiating an Aboriginal land agreement in relation to the Tuggerah and Halekulani land claims. On 22 June 2016 the Minister wrote back and advised that:

> "*Through the Crown Land Management Review, the NSW Government proposes to commence voluntary negotiations with LALCs and Councils in four local government areas which were previously involved in a local land pilot. The NSW Aboriginal Land Council (NSWALC) has indicated its support for this process. The negotiation framework will guide the negotiations with LALCs. These*

negotiations will commence in the second half of 2016 and are anticipated to take up to two years.
The NSW Government resources will, in the first instance, be directed to the negotiations in the four council areas during 2016 and 2017. It is anticipated that other ALA negotiations will commence subsequent to that."[35]

54. Darkinjung sees a number of difficulties with this approach. First, by limiting the operation of the provision to the transfer of Crown land to Councils as flagged by the White Paper Response, the operation of the Aboriginal land agreement provision is being used in a more restrictive way than what was either anticipated, or required. Second, it involves a refusal to investigate the resolution of claims in any other area, thus depriving other land councils of the benefits of the provisions. Third, it will result in negative outcomes for the community. As the Darkinjung example shows, there are achievable and mutually beneficial outcomes readily able to be obtained in relation to discrete land claims, which are not even being explored.

55. Darkinjung proposes that priority should be given to Aboriginal Land Claims, through the use an Aboriginal Land Agreement or other mechanisms, where it can be demonstrated that;

(a) The land subject to claim has the ability, subject to other planning actions, result in economic, cultural, environmental or social outcomes for the land council and the broader community or;

(b) The land is located within a strategic planning corridor.

V. EXTENT OF CROWN LAND AND BENEFIT OF ACTIVE USE AND MANAGEMENT TO NEW SOUTH WALES

56. The Department of Primary Industries website reports that:

"The Crown Estate represents approximately 33 million hectares
This is about 42% of the State and is valued at approximately $11 billion
The Crown Estate is made up of 580,000 individual parcels of land
There are over 58,000 tenures (leases and licenses)
This area does not include national parks and state forests
The majority of Crown land is in the Western Division of NSW representing around 30 million hectares and around 6,500 Western Lands leases
There are 34,000 reserves of which around 700 are managed by community trusts and around 7,800 are managed by councils."[36]

57. There is clearly a public benefit in having a properly managed reserve system. However, it needs to be remembered that there are only two classes of land which are available for claim under the ALRA. One is land which is able to be lawfully sold

[35] Letter from Minister for Land and Waters to Darkinjung LALC dated 22 June 2016.
[36] http://www.crownland.nsw.gov.au/__data/assets/pdf_file/0008/652490/crown_land_DL_accessible.pdf

or leased. The other is land which is reserved or dedicated under Crown lands legislation.[37] There are many lands which, in the past, have been reserved, where the land is no longer required or used for the reserve purpose. Furthermore, many parcels of land have been reserved for future public requirements without any specific public purpose or benefit in mind. On 31 March 2006 a notice appeared in the gazette which created Reserve 1011448 for Future Public Requirements over *"all Crown land in the Eastern and Central Divisions of the State that is not within a reserve or part of any holding"*.[38] That reserve was subsequently revoked and the land reserved in a series of 'parish reserves'.[39]

VI. ADEQUACY OF COMMUNITY INPUT AND CONSULTATION REGARDING THE DISPOSAL OF CROWN LAND

58. The CLA currently has a number of provisions which require public notification before the sale of Crown land[40], or the revocation of reserves. [41] These provisions are important in giving transparency to decision affecting Crown land. The White Paper Response noted that *"it was evident that community consultation is very important to community members environmental groups, Aboriginal groups, Local Councils and many other stakeholders"*.[42]

59. However, there are also a number of deficiencies in the CLA, and it is not clear that the consideration of public responses is always effective. As noted above, Darkinjung is aware of instances where the Minister has sought to sell land while it was reserved from sale.[43] This suggests that public notification is sometimes treated as a procedural inconvenience as opposed to a substantive requirement to engage with the public and that the outcome of the notification process is pre-empted.

60. The matter is not assisted by the fact that in relation to decisions to either revoke reserves, or to sell land, there are no clear criteria in the CLA in relation to the matters to be taken into account. This lack of guidance is more problematic where the requirements for a land assessment are waived.

61. It is not uncommon for land claims to be lodged in response to notices of intentions to sell or intention to revoke a reserve. Given that Parliament has determined that the transfer of land to land councils is an appropriate use of it, Darkinjung believes that there should be a more direct attempt to engage with land councils to assess their interest in the land before these procedures are commenced.

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[37] Section 36(1), ALRA.
[38] See R1011448 for Future Public Requirements notified 31 March 2006, fol 1624.
[39] See notification in the NSW Gazette, 29 June 2007, Fol.4182- 4188.
[40] See s 34(3), CLA.
[41] See s 90(2), CLA.
[42] White Paper Response, p.12
[43] See for example *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (The Kinchela Claim)* (2009) 166 LGERA 137

VII. MEASURES FOR PROTECTING CROWN LAND SO THAT IT IS PRESERVED AND ENHANCED FOR FUTURE GENERATIONS

62. Darkinjung believes that the existing regime in the CLA provides sufficient mechanisms for the management and use of Crown land, if properly utilised. The CLA provides for the reservation of land for particular purposes. Management of some reserves divest to the local government bodies.[44] In any other case the Minister has the capacity to create a reserve trust to manage the land,[45] and to supervise the operation of that trust. If the trust does not effectively function the Minister can dissolve or replace the trust.[46]

63. If there has been a failure of trusts to operate, it is because of an inadequacy of Ministerial oversight or Departmental support which is likely to be the issue, not a failure of the mechanisms available.

64. One area where there is the capacity to improve the management of Crown land, is by entering into agreements with adjoining land owners. Darkinjung believes there may be instances where a Crown reserve may be greatly enhanced by the addition or concurrent use of adjoining private land. In some instances there may be mutual benefit in having the land managed as a whole. At present a reserve trust may lease land as part of the reserve,[47] but the capacity to enter into agreements in relation to the management of the land is arguably more limited. Darkinjung believes that some Aboriginal land councils may hold land that falls within that category. A recent example in Darkinjung's area shows how those arrangements can work.

65. In November 2012 Darkinjung was successful in the Court to the granting of an Aboriginal Land Claim lodged over part of Kincumber Mountain, located on the NSW Central Coast. During and subsequent to the hearing a tri-party agreement was reached between Darkinjung, the Crown and the former Gosford City Council for the ongoing use of the land for environmental and public recreation purposes.

66. Darkinjung also believes that there should be better arrangements for the funding of reserve trusts, or land managed for the benefit of the public. Where land councils own land which is used for the benefit of the public in conjunction with reserved land, they (or the body managing the land under any agreement) should be able access the Public Reserves Management Fund to assist with the management of the land.

VIII. CONCLUSIONS

67. Effective management and use of Crown land is a significant issue for the State, and involves many issues and stakeholders. The New South Wales Government, through the introduction of the ALRA recognised the opportunity and potential to address the economic and social disadvantages caused to key group of stakeholders, the

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[44] Section 48, *Local Government Act* 1993 (NSW).
[45] Section 92, CLA.
[46] Sections 92(3) and 111A.
[47] See s 101, CLA.

Aboriginal people of NSW, as a result of their disposition of land since European settlement.

68. This current review provides an opportunity to ensure that the management of Crown land pays greater regard to the interests of Aboriginal people, and to ensure that the objects and purposes of the ALRA, and the beneficial outcomes achievable under the ALRA, are not undermined by the manner in which Crown land is managed or disposed of. .

69. Darkinjung is fortunate to be in a position to provide constructive input to this review process and appreciates and thanks the Committee for its time to discuss and consider those suggestions raised in this submission.

70. Should you wish to further discuss any aspect of this submission please do not hesitate to make contact.

Sean Gordon
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