NSWALC submission in response to the Draft Crown Land Management Regulation

Aboriginal Land Rights in NSW

The *Aboriginal Land Rights Act* 1983 (NSW) (**ALRA**) was enacted in acknowledgment 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 ALRA itself provided for equally innovative mechanisms 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 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 and the ability to negotiate Aboriginal Land Agreements are core functions of Aboriginal Land Councils. The return of land 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.'[1]

Adding that:

> 'Vast tracts of Crown land will be available for claim and will go some way to redress the injustices of dispossession'[2].

And providing further explanation:

[1] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5089(Frank Walker).
[2] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5095(Frank Walker).

'...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...'[3]

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.'[4]

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 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.[5]

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'[6] 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 33,000 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.[7] 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**).

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

[3] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5088 (Frank Walker).
[4] Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples
[5] *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].
[6] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5095(Frank Walker).
[7] *Narromine Local Aboriginal Land Council v Minister Administering the Crown Land Act* (1993) 79 LGER 430 per Stein J at 433-434.

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.[8]

The importance of TSRs to Aboriginal people in New South Wales is expressly recognised in the ALRA, which permits Aboriginal Land Councils to claim[9] 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 provides an opportunity to fast-track land justice for Aboriginal people and deliver the outcomes intended for the ALRA.

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.

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.

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

[9] There are over 5500 outstanding Aboriginal land claims over TSRs yet to be determined.

Crown Land Management Regulation 2017

a) Adequate community input and consultation with Local Aboriginal Land Council's.

NSWALC has long advocated for best practice consultation practices with Aboriginal communities and particularly LALCs when dealing with Crown land.

Clause 5 (1) and (2) of the Regulation states that a manager may by a publicly displayed notice, restrict the times, areas and purposes for which a reserve can be used.

Clause 6 of the Regulation allows a manager to set aside parts of a reserve for specific uses where it is consistent with the Plan of Management.

Effective engagement and consultation with Aboriginal peoples and communities requires specific measures beyond the passivity of general public notice provisions. NSWALC recommends effective, best practice consultation with LALCs is made a binding requirement when a manager is considering restricting access to, or setting aside a reserve, particularly where the reserve holds cultural or spiritual significance for Aboriginal people.

Clause 26 of the Regulation provides detail regarding the direction of the Minister to a non-council manager to appoint community advisory groups. NSWALC supports the establishment of community advisory groups as a mechanism to ensure community input to inform decisions around land use. NSWALC recommends that LALC representatives are appointed or invited to participate in any community advisory groups that are formed.

Clause 64 of the Regulation provides that the Minister is required to seek advice from various bodies, including NSWALC, on the draft State strategic plan. NSWALC welcomes the opportunity to review and contribute to the strategic plan. NSWALC recommends that sufficient time is allowed to give NSWALC adequate time to discuss elements of the strategic plan with LALCs in order to provide input. Allowing sufficient time will allow for meaningful input and a more effective strategic plan to be drafted.

Aboriginal community consultation is essential in informing effective and inclusive decision making.

b) Recognition of Aboriginal people's interests in the application of fees and charges

The intent of the ALRA is to provide compensation for dispossession through the transfer of land to Aboriginal Land Councils in NSW.

Clause 7 (1), (2), (5) and (6) provide that a manager may levy fees and charges for various activities on a reserve, may waive payment and the Minister may disallow or vary any fee or charge by serving a notice on the manager. Further **Clause 62** and **Part 1 of Schedule 1** sets out fees that can be charged for various activities.

NSWALC seeks clarification regarding how fees and charges are to be calculated. NSWALC recommends that waived or reduce fees and charges are offered to LALC members, staff and Aboriginal community members. NSWALC recommends that managers are required by express terms of the Regulation to consider reducing or eliminating fees and charges for Aboriginal community members. Additional weight should be given to this consideration where the use of the reserve relates to the preservation or enjoyment of cultural practices.

Clause 7 (3) allows Crown land managers to have regard to any contractual arrangements when setting fees and charges.

NSWALC recommends that Crown land managers have regard for any relevant agreements made between local councils and Aboriginal Land Councils (for example an Aboriginal Land Agreement under section 36AA of the ALRA) and are willing to negotiate the inclusion of provisions relating to the application of fees and charges.

c) Recognition, promotion and protection of Aboriginal culture and heritage

Clause 8 of the Regulation provides for the application of publicly displayed conditions for accessing a reserve and penalties for breach of the conditions.

NSWALC recommends that consideration is given to provide for special access conditions for Aboriginal community members, particularly when involved in cultural or spiritual activities on reserved land.

Clause 9 (1) (d) of the Regulation says that a person must not, "walk over, mark, scratch or otherwise mutilate, deface, injure, interfere with, remove or destroy any Aboriginal rock carving, its surrounds or any other Aboriginal object in or on the land". Clause 9 (2) provides that it is a defence to the prosecution for an offence as outlined in Clause 9 (1) (d) where there is a reasonable excuse for the conduct. Further **Clause 11** indemnifies authorised person's from committing an offence if done with the consent of the manager.

NSWALC supports express restrictions on damage or interference to Aboriginal culture and heritage. NSWALC, however, recommends that specific consultation is conducted with Aboriginal communities to ensure that all forms of culture and heritage are adequately protected. For instance, it may be relevant to include protection of scar trees and sacred sites in addition to the elements listed in **Clause 9**(1)(d).

Additionally, NSWALC is extremely concerned by the justification and defence provided for in the Regulations. Further, NSWALC is concerned that the provisions are not consistent with current and proposed culture and heritage laws.

NSWALC recommends that the Regulations as they relate to Aboriginal culture and heritage are strengthened in their protection of culture and heritage existing on reserve land consistent with the proposed culture and heritage legislation and that the defences are restricted to discourage any available defence.

Further, NSWALC requests that further clarification is provided as to what is a "reasonable excuse" and recommends that the circumstances in which an excuse is available are limited. NSWALC will continue to advocate for greater protections of Aboriginal culture and heritage and do not consider that there is a "reasonable excuse" for damage or interference.

NSWALC notes that the Crown land management rules will significantly impact on how Crown land is managed going forward, which significantly impacts on the rights and interests of Aboriginal Land Council's and Aboriginal communities in NSW. NSWALC notes that **Part 3, Division 3.3, 3.15(k)** of the *Crown Lands Management Act* provides that Crown land management rules may make provision for any matters prescribed by the Regulations. NSWALC recommends that a Regulation is included to the effect that Crown land management rules may make provision for access and protection of

Aboriginal culture and heritage consistent with the new culture and heritage legislation that is currently being developed.

d) Protection of Local Aboriginal Land Council interests and the remedial interests when vesting crown land

Clause 26 of the Regulation sets out the local land criteria that is required to be met if land is to be vested in local councils or other bodies.

Clause 28 of the Regulation provides for Crown land to be vested in another government agency, state owned corporation or statutory corporation where its functions are consistent with the reserve purposes.

Given the significant interests of Aboriginal Land Councils in Crown land entrenched in the ALRA, NSWALC recommends the Regulations provide more transparency around the types of agencies that Crown land may be vested in and the purposes for land may be used following vesting in such agencies. NSWALC is particularly concerned about the terms used in **Clause 26 (1) (c)** relating to the management of land by "some other body". NSWALC requests further clarification of the types of bodies that could be appointed to manage Crown land under this provision.

NSWALC is concerned that the purpose of the agency or corporation vested with Crown land may change, or that a body may have multiple purposes, and that this may impact the use of vested Crown land. NSWALC strongly recommends that any body vested with Crown land is required to own and manage vested land in accordance with the purposes for which the land is dedicated, reserved and used and that the land is required to be held for community purposes only.

NSWALC recommends that **Clause 28** be removed. At a minimum, NSWALC recommends that the vesting in a statutory corporation be permitted where the corporation is required to exercise its functions in a way that is consistent with the reserve purpose. The effect of this recommendation is that the word 'permitted' is removed from **Clause 28 (a)** as the vesting of Crown land in a statutory corporation is too broad where the consistent purpose is 'permitted' rather than exercised or 'required'. The mechanisms available for transferring management or ownership of Crown land to bodies are already far reaching and NSWALC holds genuine concerns regarding the further widening of these powers given the direct reduction of access to claimable Crown land and furthering of the objectives of the ALRA that this represents.

e) Recognition of Aboriginal people's rights and interests in lands in the Western Division

NSWALC notes that **Part 5, Division 5.9** of the *Crown Lands Management Act* restricts the ability of the Minister to sell or dispose of Crown land in the Western Division except under strict circumstances. NSWALC recommends that any provisions made in relation to the disposal or sale of Crown lands in the Western Division are made with consideration of the interests of LALCs in the area and are drafted so as to strive to achieve the objectives of the ALRA.

Clause 32 of the Regulation relates to the granting of licences for unauthorised users or occupiers of Crown land. NSWALC recommends that there be a maximum term applied to the licences so as not to allow for continuous unauthorised use or occupation of lands, which may impact of the ability of land councils to claim land.

Clause 35 of the Regulation provides for easements for public access over land for certain activities. NSWALC notes the prohibition of certain activities have been relaxed, for example in relation to

carrying of firearms and the use of vehicles. NSWALC is concerned regarding the potential impact on land owned by LALCs where public easements exist or are created that are contrary to the LALC's interests. NSWALC recommends consultation with land owners and parties with an interest in the land and in particular, LALCs.

f) The use and management of Crown Land in NSW

NSWALC notes that there is an inconsistency in the *Crown Lands Management Act* of what should or will be considered relevant to an assessment of potential "material harm" through the use of Crown land for an additional purpose or secondary interest in dedicated of reserved Crown land. Where duration is included as a consideration for additional purposes under **Part 2, Division 2.4, 2.14** of the *Crown Lands Management Act*, duration is omitted as a consideration in **Part 2, Division 2.5, 2.19** of the Act which deals with secondary interests. While additional considerations can be prescribed by the Regulations, they have not been prescribed. NSWALC recommends a consistent approach by applies and that duration is a consideration for both secondary interests and additional purposes for the use of Crown land.

Clause 31 of the Regulation provides for short-term licences over dedicated or reserved Crown land. NSWALC is concerned about the provisions regarding short-term licences. NSWALC recommends that the provisions for short-term licences over dedicated or reserved Crown land should be only be used for genuine, short-term or one-time uses and should not be continually rolled over effecting a long-term licence. This is especially pertinent due to the secondary interests enabled by the use of short-term licences.

NSWALC is concerned around the content of **Part 2, Division 3.6, 2.25** of the *Crown Lands Management Act* which deals with the provision of notice for challenges to the validity of interests in dedication or reserved Crown land. The *Crown Lands Management Act* prevents a challenge to the validity of a tenure over reserve land being challenged except where the Minister has been given a notice period of 3 months. This time period can be reduced by the Regulations and NSWALC recommends that this action is taken. NSWALC contends that the minimum period of 3 months is too long to enable the legitimate challenge to the validity of a tenure arrangement. Where any person's right to challenge a tenure is restricted for such an extended period of time, access to justice for Aboriginal people of NSW, in addition to the ability to protect Aboriginal culture and heritage is significantly impacted. NSWALC recommends that a Regulation be included to reduce the minimum period of notice to 2 weeks.

Unresolved Concerns in the management of Crown Land through the Act and Regulation

g) Co-Management of Crown land

NSWALC notes that while potential co-management strategies have drawn considerable attention in the drafting and imminent enforcement of the *Crown Lands Management Act* and Regulations, a definition or practical implementation plan in relation to co-management is yet to be realised. NSWALC is eager to see effective, cooperative and genuine partnership opportunities between Aboriginal Land Councils and Local Councils, however NSWALC feels further consultation and information is required in order to be in a position to provide comment on the effectiveness of such provisions.

h) Travelling Stock reserves

NSWALC notes that further clarification is required on the impact of the *Crown Lands Management Act* and corresponding Regulations on Travelling Stock Reserves and requests assurances that these areas will be protected.

i) Native Title interests

NSWALC notes the provisions in **Part 8, Division 8.5, 8.14** in relation to Native Title managers. NSWALC notes the importance of these provisions and the significant potential impact on Native Title and Traditional Owners rights and interests. NSWALC recommends that Regulations are made in relation to the role of Native Title managers to the effect that it places the requirement of thorough and rigorous training for Native Title managers to enable them to most effectively protect and promote Native Title interests.

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'.[10] Central to this intended purpose is the return of Crown land to Aboriginal people. Land justice outcomes for Aboriginal peoples in NSW remains to be fully realised.

[10] New South Wales, *Parliamentary Debates,* Legislative Assembly, 24 March 1983, p.5089 (Frank Walker)