The NSW Aboriginal Land Council's submission to Planning Review Panel: Review of NSW Planning System

November 2011

TABLE OF CONTENTS

Executive Summary

The New South Wales Aboriginal Land Council is the peak body representing Aboriginal peoples in NSW and is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983 (NSW)*, the NSW Aboriginal Land Council is an independent, self-funded non-government organisation that has an elected governing council and the objective of fostering the aspirations and improving the lives of the Aboriginal peoples of NSW.

In July 2011, the NSW Planning Review Panel, established by the NSW Government, commenced a comprehensive review of the current laws in NSW that govern planning, chiefly, the *Environmental Planning and Assessment Act 1979.* This significant step was taken in recognition of that the current system has become overly complex and is the cause of much community dissatisfaction[1].

This submission prepared by the New South Wales Aboriginal Land Council details how the current planning system is failing to adequately address the needs of Aboriginal peoples in NSW. It identifies, illustrates and makes recommendations in respect to the following four issues that are consistently raised by the Aboriginal Land Council Network in regards to the NSW Planning System and laws:

1. Consultation and engagement with Aboriginal peoples;
2. Aboriginal Culture and Heritage;
3. Economic development of Aboriginal lands; and
4. Former Aboriginal reserves and missions.

The key recommendations from this submission are outlined in brief in the Executive Summary.

1. Consultation and engagement with Aboriginal peoples

The NSW Aboriginal Land Council is of the view that public participation must underpin an effective and sustainable new planning system for NSW, and that based on the following, the Aboriginal peoples, Aboriginal communities and Aboriginal Land Councils of NSW must be recognised as a key stakeholder in public participation processes:

- The unique status of Aboriginal peoples as the first peoples of NSW;
- Aboriginal peoples ownership of Aboriginal culture and heritage; and
- The significant landholdings of the Aboriginal Land Council network.

[1] The Environmental Defenders Office have criticised the NSW planning system as being "*complex, highly politicised, disconnected from local communities, and resulting in poor environmental outcomes*". Source: Environmental Defender's Office, December 2010, 'The state of planning in NSW', available at: http://www.edo.org.au/edonsw/site/pdf/subs/101214state_of_planning_in_nsw.pdf

Accordingly the NSW Aboriginal Land Council recommends the following to the Planning System Review Panel in respect to consultation and engagement with Aboriginal peoples:

1.1 Public participation and genuine Aboriginal community participation must be a key objective of any new planning law for NSW and must fundamentally underpin both strategic planning and development consent mechanisms;

1.2 Aboriginal peoples and communities participation must be ensured by positive obligations upon planning authorities to engage with Aboriginal peoples; with mandatory notification to Local Aboriginal Land Councils as a minimum; and

1.3 Participation and engagement with Aboriginal peoples and communities should be based on building meaningful and ongoing relationships between relevant planning authorities and Aboriginal communities – not just one off consultation.

2. Aboriginal culture and heritage

The NSW Aboriginal Land Council is of the view that the current regulatory regime for protecting Aboriginal culture and heritage in NSW is failing, and that planning laws offer an appropriate opportunity to provide the needed protections.

Accordingly, the NSW Aboriginal Land Council recommends the following to the Planning System Review Panel in respect to Aboriginal culture and heritage:

2.1 That the new planning laws for NSW must include the protection of Aboriginal culture and heritage as a key stated objective;

2.2 That the new planning laws for NSW must include a broad all encompassing definition of Aboriginal culture and heritage that captures the tangible and intangible, as well as whole of landscape values;

2.3 That the strategic planning mechanisms of new planning laws for NSW must include mechanisms for the identification of Aboriginal culture and heritage values across the state, which trigger development prohibitions and/or further consultation and assessment as appropriate;

2.4 Such mechanisms must be based on mandatory and uniformly applied minimum standards for: the identification of Aboriginal culture and heritage values through consultation and engagement with Aboriginal peoples and communities, and the protection of culturally sensitive information; and

2.5 That development consent processes of new planning laws for NSW must include mandatory consideration of the potential impacts upon Aboriginal culture and heritage of any development. Development consent processes that circumvent assessment processes, such as the current complying developments, must be kept to a minimum to ensure that potential impacts upon Aboriginal culture and heritage are considered.

3. Economic development of Aboriginal lands

The NSW Aboriginal Land Council is of the view that socio-economic wellbeing and independence for Aboriginal peoples of NSW, is a significant public policy issue for this state. The NSW Parliament has recognised this most cogently in the passing of the *Aboriginal Land Rights Act 1983*. However, the key mechanism of this beneficial legislation has been hampered by the current planning system.

Accordingly the NSW Aboriginal Land Council recommends the following to the Planning System Review Panel in respect to the economic development of Aboriginal lands:

3.1 That the new planning laws for NSW must recognise the unique status Aboriginal peoples have in this state by virtue of being the first peoples of NSW;

3.2 That the new planning laws for NSW must include objectives that promote economic independence for Aboriginal peoples and self-determination in respect to Aboriginal lands in accordance with the principles underpinning and espoused in the *Aboriginal Land Rights Act 1983* and the United Nations Declaration of the Rights of Indigenous Peoples; and

3.3 That the new planning laws for NSW must include specific and appropriate state-wide mechanisms in relation to policy formation and implementation, as well as strategic and statutory land use planning, that promote economic independence for Aboriginal peoples and self-determination in respect to Aboriginal lands, and give effect to the principles underpinning, and espoused in, the *Aboriginal Land Rights Act 1983* and the United Nations Declaration of the Rights of Indigenous Peoples.

4. Former Aboriginal reserves and missions

The NSW Aboriginal Land Council is of the view that the actions of previous governments in the establishment of the former Aboriginal reserves and mission, and the ad hoc development of these communities outside of any planning considerations or laws, has resulted in the impediments now faced in attempting to subdivide these sites and to reintegrate them with the NSW Planning System.

Accordingly, the NSW Aboriginal Land Council recommends the following to the Planning System Review Panel in respect to former Aboriginal reserves and missions:

4.1 That the new planning laws for NSW must include specific transitional arrangements and provisions to allow for the reintegration of these sites into the NSW Planning System without undue expense; and

4.2 The new planning system for NSW must provide administrative and resource support for the transition of the existing communities of the former reserves and missions into the planning system; support such as a waiver of associated fees (provided there will be no net increase in the economic use), access to apply for funding including that of the planning reform fund, and assistance such as that provided by the former state significant sites now state significant precincts program.

Introduction

The NSW Aboriginal Land Council is the peak body representing Aboriginal peoples in NSW and is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983 (NSW)*, the NSW Aboriginal Land Council is an independent, self-funded non-government organisation that has an elected governing council and the objective of fostering the aspirations and improving the lives of the Aboriginal peoples of NSW.

Pursuant to the *Aboriginal Land Rights Act*, the NSW Aboriginal Land Council has the following functions amongst others:

- The acquisition, control, and management of (and other dealings in) lands in accordance with the *Aboriginal Land Rights Act*; including the claiming of unused Crown land;
- The protection and promotion of Aboriginal culture and heritage in NSW;
- The facilitation of business enterprises;
- The provision of advice to the NSW Government of matters related to Aboriginal land rights.

The NSW Aboriginal Land Council provides support to the network of autonomous 119 Local Aboriginal Land Councils which exist in NSW. As elected bodies Aboriginal land councils represent the not only the interests of their members, but of the wider Aboriginal community.

The preamble of the *Aboriginal Land Rights Act* recognises that 'Land is of spiritual, social, cultural, and economic importance' to Aboriginal peoples'. The *Aboriginal Land Rights Act* was established to facilitate the return of land in NSW to Aboriginal peoples through a process of lodging claims for vacant Crown land. The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for Aboriginal communities, as compensation for historic dispossession and in recognition of the ongoing disadvantage suffered by Aboriginal communities.

Although, when introducing the *Aboriginal Land Rights Bill 1983* into the NSW Parliament, the then Minister for Aboriginal Affairs, the Hon. Frank Walker identified that '*…land rights has a dual purpose – cultural and economic*'[2].

In July 2011, the NSW Planning Review Panel, established by the NSW Government, commenced a comprehensive review of the current laws in NSW that govern planning, chiefly, the *Environmental Planning and Assessment Act 1979.* This significant step was taken in recognition of that the current system has become overly complex and is the cause of much community dissatisfaction[3].

The Minister for Planning and Infrastructure the Hon. Brad Hazzard, has stated that "*this is the first comprehensive planning review in 31 years and we are ready for fresh ideas and consultation which will kick-start an era of integrity and transparency*."[4]

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[2] The Hon. Frank Walker, NSW Parliament Hansard, Legislative Assembly, 24 March 1983, at 5090, available at: http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA19830324/$file/473LA046.PDF

[3] The Environmental Defenders Office have criticised the NSW planning system as being "*complex, highly politicised, disconnected from local communities, and resulting in poor environmental outcomes*". Source: Environmental Defender's Office, December 2010, 'The state of planning in NSW', available at: http://www.edo.org.au/edonsw/site/pdf/subs/101214state_of_planning_in_nsw.pdf

[4] The Hon Brad Hazzard, Minister for Planning and Infrastructure, Media Release '*Overhaul of the planning system heralds a new era in NSW*', 12 July 2011

The NSW Aboriginal Land Council's submission details how the current planning system is failing to adequately address the needs of Aboriginal peoples in NSW. It identifies, illustrates and makes recommendations in respect to the following four issues that are consistently raised by the Aboriginal Land Council Network in regards to the NSW Planning System and laws:

1. Consultation and engagement with Aboriginal peoples;
2. Aboriginal Culture and Heritage;
3. Economic development of Aboriginal lands; and
4. Former Aboriginal reserves and missions.

1. Consultation and engagement with Aboriginal peoples

a. Background

The NSW Aboriginal Land Council is of the view that public participation must be a central tenet of an effective and sustainable new planning system for NSW.

The NSW Aboriginal Land Council contends that Aboriginal peoples, Aboriginal communities and Aboriginal Land Councils must be recognised as a key stakeholder in any public participation processes based on the following:

- the unique status of Aboriginal peoples as the first peoples of NSW;
- Aboriginal peoples ownership of Aboriginal culture and heritage; and
- The significant landholdings of the Aboriginal Land Council network.

The United Nations *Declaration on the Rights of Indigenous Peoples*, endorsed by the Australian Government in 2009 provides clear statements on the need to consult with Indigenous Peoples. The excerpt below has been provided to assist with the incorporation of consultation principles into practical measures in relation to planning laws:

> ***Article 32***
> *1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*
>
> *2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.*[5]

Under the current planning system, there are limited opportunities for Aboriginal peoples and Aboriginal Land Councils, to genuinely engage with planning processes. While there are some general public notice and exhibition requirements in the current planning laws, they tend to be insufficient for the purpose of engaging with Aboriginal peoples and communities, and have been significantly eroded in recent years.

Public consultation and exhibition processes are no longer a mandatory requirement in major projects provisions, having become a matter for the Planning Minster's discretion. This was seen as a significant enough issue to prompt the State's corruption watchdog, the Independent Commission Against Corruption (ICAC) to recommended:

> *"That the NSW Government amends the Environmental Planning and Assessment Act 1979 to mandate the public exhibition of proposed state significant sites that propose significant changes in land use"*[6].

Currently there are similar issues with the regulation of State Environmental Planning Policies (**SEPPs**) which are not required to be publicly exhibited before they are implemented[7]. This is a

[5] United Nations Declaration on the Rights of Indigenous Peoples, available at: http://www.un.org/esa/socdev/unpfii/en/declaration.html

[6] ICAC, December 2010 'The exercise of discretion under Part 3A of the *Environmental Planning and Assessment Act 1979'* and the State Environmental Planning Policy (Major Development) 2005, page 23, available at: http://www.icac.nsw.gov.au/media-centre/media-releases/article/3802

[7] *Environmental Planning and Assessment Act 1979*, Sections 37 and 38,

significant oversight of the current planning systems approach to public participation, given the place SEPPs take in the hierarchy of environmental planning instruments.

Perhaps more significantly though, changes made to the Local Environmental Plan (**LEP**) making process have resulted in the removal of the consultation and exhibition period previously required for draft LEPs[8]. As it now stands, the only consultation required in respect to this fundamental instrument of the current planning system occurs in regards to the initial planning proposal, which is vastly different from a draft LEP, and even then the extent of this consultation is discretionary[9].

There is a clear need to reinstate genuine public participation in the NSW Planning System which recognises Aboriginal peoples, communities and Aboriginal Land Councils as key stakeholders.

Community engagement

In recognition of the more holistic planning approach needed in communities generally, Local Councils are increasingly developing community and social plans. However, it is of concern to the NSW Aboriginal Land Council that there appears to be low levels of consideration of the needs of Aboriginal peoples in local planning.

In a recent Local Government and Shire Association survey less than half of all Local Councils have reported that they include the interests and needs of Aboriginal peoples in their Social Plan[10]. While these figures are somewhat encouraging compared to previous years, the current levels of engagement of local councils with Aboriginal communities remain relatively low compared with other sectors of the community.

There are 152 Local Councils in NSW, and of those who responded to the Local Government and Shire Association survey, only 12 Local Councils indicated that they had developed specific plans to meet the needs of Aboriginal and Torres Strait Islander Peoples. Furthermore, only 33 Local Councils identified that they had established a cross cultural awareness training policy for Councillors, management and staff, and only 18 Local Councils had established an Aboriginal Cultural Heritage Policy.

In relation to how Local Councils specifically engage with Aboriginal peoples, the LGSA survey indicated that:

- 75 councils have knowledge of Traditional Custodians and group naming.
- 61 councils engage with volunteers from the community to work with council on Aboriginal and Torres Strait Islander Peoples programs.
- 48 councils have Aboriginal and Torres Strait Islander Peoples Advisory Groups/Committees.
- 35 councils utilise an Aboriginal Police Liaison Officer.
- 18 councils identified Aboriginal Heritage Advisory Committees/Groups.
- 15 councils have Local Service Agreements, (compared with 4 in 1999).

While the Local Government and Shire Association has developed positive policy statements on engaging with Aboriginal communities[11] and have passed several motions at their annual

[8] *Environmental Planning and Assessment Act 1979,* Sections 56 and 57

[9] The Environmental Defender's Office has examined this issue in further detail in 'The State of Planning in NSW', published December 2010, available at: http://www.edo.org.au/edonsw/site/pdf/subs/101214state_of_planning_in_nsw.pdf

[10] Local Government and Shires Association (2011) '*Your Council in the Community: A snapshot of council activities and services from the Local Government and Shires Associations' Social Policy and Community Services Survey'*, available at: http://www.lgsa.org.au/resources/documents/LGSA010_SocialPolicyDoc_FINAL.pdf

[11] LGSA Aboriginal Affairs Policy Statement available at: http://www.lgsa.org.au/www/html/229-aboriginal-affairs.asp

conferences[12] this has not necessarily translated to significant improvements in the manner in which Local Councils engage with Aboriginal communities in general.

In respect to the planning system specifically, despite LALCs often being the single biggest land owner in a local government area, and despite the unique status of Aboriginal peoples as First Peoples of NSW and owners of Aboriginal culture and heritage, the Aboriginal Land Council Network consistently reports low levels of engagement by local councils.

This failure to engage with LALCs is particularly evident in the development of strategic initiatives, such as the preparation of LEPs; although it is also of concern in respect to the assessment of major development proposals.

CASE STUDY: PREPARATION OF STRATEGIC PLANNING STUDY
In 2009 a western shire council developed a growth strategy to inform the development of that shire's LEP. The shire had a significant and growing Aboriginal population, three Local Aboriginal Land Councils and three discreet Aboriginal communities living on former Aboriginal reserve and mission as well as a considerable proportion of Aboriginal people living in the town centres.

The growth strategy was developed without a specific engagement strategy for engaging with the shires Aboriginal community. As a result the strategy failed to include any information regarding the three discreet Aboriginal communities in the area, and the LEP applying inappropriate land use zones to the former reserve lands upon which the communities reside. In addition, while the strategy devoted an entire section to "European Heritage" it did not included information on the areas rich Aboriginal heritage.

Effective engagement with Aboriginal peoples and communities requires specific measures above the passivity of general public consultation provisions that offer between 14 and 30 days for 'public exhibition'. Processes that genuinely engage with Aboriginal communities are conducive to reduced community conflict and are more likely to result in reduced litigation.

This was recognised in the year following the passage of the Environmental Planning and Assessment Act 1979, when the NSW Legislative Assembly Select Committee on Aborigines made the recommendation in 1980 that *"there should be a positive requirement on local and State government authorities to consult with Aboriginal communities".*

The NSW Aboriginal Land Council recommends the following to the Planning System Review Panel that:

1.1 Public participation and genuine Aboriginal community participation must be a key objective of any new planning law for NSW and must fundamentally underpin both strategic planning and development consent mechanisms;

1.2 Aboriginal peoples and communities participation must be ensured by positive obligations upon planning authorities to engage with Aboriginal peoples; with mandatory notification to Local Aboriginal Land Councils as a minimum; and

1.3 Participation and engagement with Aboriginal peoples and communities should be based on building meaningful and ongoing relationships between relevant planning authorities and Aboriginal communities – not just one off consultation.

[12] Motions passed at annual LGSA conferences are available online at: http://www.lgsa-plus.net.au/www/html/2838-previous-years.asp

2. Aboriginal Culture and Heritage

Background

Aboriginal culture and heritage in NSW dates back tens of thousands of years and richly informs the living culture of the Aboriginal peoples of NSW, as it enriches the broader cultural heritage of this state and the world.

It is well understood that for Aboriginal people's maintenance of culture, and by extension the protection of Aboriginal culture and heritage, is a key factor in achieving success in community development initiatives and overcoming disadvantage.[13]

Despite the significance of Aboriginal culture and heritage, it is widely recognised within the Aboriginal communities of NSW that the current system for protecting Aboriginal culture and heritage is inadequate. The current system, governed principally by the *National Parks and Wildlife Act 1974,* is failing to prevent the wide-spread destruction of Aboriginal heritage, and is viewed as a system for regulating destruction of Aboriginal culture and heritage, rather than for its protection.

With some 3 permits to destroy Aboriginal culture and heritage items issued per week, an equally astonishing number of incidents of unlawful harm exposed, and a successful prosecution rate of just 10 cases since 2005, it is not surprising that this view is a widely held.

From its inception in the 1970's, the NSW Aboriginal Land Council has advocated for appropriate laws for the protection of Aboriginal cultural heritage in this state. To date, despite some 30 years of government inquiries[14] and undelivered promises to reform Aboriginal culture and heritage laws, adequate reforms have not yet been realised.[15]

The NSW Aboriginal Council concerns about the current system are well documented in other submissions to the NSW Government[16] and will not be canvassed in great deal here. Even so, it is the view of the NSW Aboriginal Land Council that with the current system for protecting Aboriginal culture and heritage so demonstrably failing to do so, the reform of NSW planning laws provides a critical and appropriate opportunity to bolster the state's Aboriginal culture and heritage protections.

Planning laws and Aboriginal culture and heritage

The planning system, as a framework for regulating development and land use activities on all land in NSW, is ideally positioned to ensure the long-term protection and management of Aboriginal culture and heritage. Both strategic planning and development consent processes afford opportunities to intercede at different stages in development and land use activities for the purpose of improving protections for Aboriginal culture and heritage. However, the processes of the current planning system do not adequately incorporate Aboriginal culture and heritage considerations or protections. As the Environmental Defenders Office has identified in the current regulatory environment:

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[13] For example, see Australian Institute of Health and Welfare (2011) 'What works to overcome Indigenous Disadvantage', available at: http://caepr.anu.edu.au/publications/working.php ; Janet Hunt (2010) '*Looking after Country in New South Wales: Two case studies of socio-economic benefits for Aboriginal people'* available at: http://caepr.anu.edu.au/publications/working.php.

[14] Previous reforms attempts are outlined in the NSW Aboriginal Land Council publication: 'Our Sites, Our Rights' (2010), available at http://www.alc.org.au/publications/other-publications.aspx

[15] The current inquiry into the possible reform of Aboriginal culture and heritage laws, headed by the Aboriginal Culture and Heritage Reform Working Party is acknowledged.

[16] NSW Aboriginal Land Council submissions on Aboriginal Culture and Heritage are available at: http://www.alc.org.au/publications/other-publications.aspx

> "*Impact assessment [for Aboriginal culture and heritage] is often more of an afterthought, and there is no requirement for potential impacts on cultural heritage to be comprehensively addressed prior to the grant of development consent*"[17].

Local government authorities are thought to also have a significant role to play in the protection of Aboriginal heritage. Under the current planning system, local government authorities have key responsibilities in regards to managing and approving land developments, and are ideally located to incorporate into these processes a range of local community and heritage values. In this regard, it should be noted that local government authorities across NSW have made commitments to recognise and respect the role and rights of Aboriginal communities in respect to Aboriginal culture and heritage amongst other things, and are working actively in partnership with Aboriginal groups in a number of areas.[18]

However, while recent developments in NSW planning policy have enhanced the responsibilities of local government authorities in identifying, managing and protecting Aboriginal heritage, effective legislative mechanisms have not been implemented to further this goal.

Strategic Planning

It is the view of the NSW Aboriginal Land Council that strategic planning mechanisms of a new planning system can play a significant role in the protection of Aboriginal culture and heritage, as they intercede in the early stages or inception of development and land use activities.

Effective identification of Aboriginal culture and heritage values in the early stages of development and land use activities has benefits for the protection of those values, as well as for the business efficacy of such activities. The current regulatory system that relies heavily upon the identification of Aboriginal culture and heritage values and issues after a development has been approved or commenced can result in considerable cost to proponents; in terms of delays, remediation/salvage works and large fines.

The current planning system already exhibits some of that potential, in the inclusion of Aboriginal culture and heritage provisions into the standard instrument LEP template and the expansion of heritage conservation objectives by Ministerial Direction which provides that all relevant planning authorities, when preparing planning proposals, must facilitate the conservation of:

> *"Aboriginal areas, Aboriginal objects, Aboriginal places or landscapes identified by an Aboriginal heritage survey prepared by or on behalf of an Aboriginal Land Council, Aboriginal body or public authority and provided to the relevant planning authority, which identifies the area, object, place or landscape as being of heritage significance to Aboriginal culture and people."*[19]

However, the provision of guidance or minimum standards on how these provisions are intended to operate has been minimal, and it appears that the implementation by local government authorities has been ad hoc and inconsistent.

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[17] The Environmental Defenders Office, 'Reforming NSW Laws for the Protection of Aboriginal Cultural Heritage', 2009,page 11.

[18] See for example LGA 2008, *Policy statements* available at http://www.lgsa-plus.net.au/resources/documents/LGA_Policy__Statements_08.pdf and LGSA 2009, *Executive decisions with recommendation from Conference* available at http://www.lgsa-plus.net.au/resources/documents/Recommendations-Conference-2009.pdf

[19] Ministerial Direction pursuant to S117 the Environmental planning and assessment Act 1979; issued on 1 July 2009, available at: http://www.planning.nsw.gov.au/LocalEnvironmentalPlans/LocalPlanningDirections/tabid/248/language/en-AU/Default.aspx

In practice, it appears that the Aboriginal culture and heritage values and considerations are only captured if a local government authority has undertaken an Aboriginal heritage study. These studies where undertaken by local government authorities, appear to have been approached with differing methodologies and approaches and accordingly results have been of varying quality.

The Local Government and Shire Association is supportive of efforts to effectively recognise Aboriginal culture and heritage in local, regional and state environmental plans, and specifically supports that its members consult with Local Aboriginal Land Councils to ensure that this occurs.[20] However, this is not binding on local government authorities. The NSW Aboriginal Land Council supports the view of the Local Government and Shire Association that mandatory state-wide minimum standards should be established.[21]

Cultural mapping

Mapping of Aboriginal cultural values, or cultural mapping, is becoming increasingly prevalent in a variety of governmental planning arenas. In a planning context this is most evident in the current Strategic Regional Land Use Planning approach of the NSW Government[22] and to a lesser extent in regards to the Standard Instrument Local Environment Plan process discussed above. However, it is also to be found in the area of natural resource management;[23] most notably in regard to the Murray-Darling Basin reforms.

Cultural mapping may provide an advantage to the current site specific, and largely inaccurate register of Aboriginal heritage objects and places; the Aboriginal Heritage Information Management System maintained by the NSW Office of the Environment and Heritage.

Culture and heritage values for Aboriginal peoples relates not only to specific 'sites' or 'objects', but also to the broader landscapes; including the natural features of the lands and waters, as well as plants and animals in the area. Pinpointing specific sites on a map will not always capture these broader heritage values. However, a broad landscape approach to capturing such values, in consultation with Aboriginal communities, may provide a suitable cultural mapping approach.

However, while cultural mapping methodologies may vary, it is clear that full and genuine engagement with Aboriginal peoples and communities must be the foundation upon which any such mapping exercises are based. Another key issue that must be appropriately addressed is the protection of culturally sensitive information. Some sites, areas, or landscapes may have values attached to them that are inherently sensitive. In other cases others, custodian communities may wish to keep information about sites from the public for risk of vandalism or harm. Furthermore, authorities undertaking cultural mapping must understand and accept that cultural knowledge is owned by the Aboriginal peoples who hold it, and appropriate protections must be provided for.

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[20] Motions from the Local Government and Shires Association Conference 2009, available at: http://www.lgsa-plus.net.au/resources/documents/Recommendations-Conference-2009.pdf

[21] Motions from the Local Government and Shires Association Conference 2009, available at: http://www.lgsa-plus.net.au/resources/documents/Recommendations-Conference-2009.pdf

[22] See NSW Department of Planning website, http://www.planning.nsw.gov.au/StrategicPlanning/StrategicRegionalLandUse/tabid/495/language/en-AU/Default.aspx

[23] For example, see 'Bundjalung Mapping project' http://www.wetlandlink.com.au/content/the-bundjalung-mapping-project ; 'Wetland Recovery Project for the Macquarie Marshes' http://www.wetlandrecovery.nsw.gov.au/projectsAboriginal_values.htm ; 'Brigalow Belt Aboriginal cultural heritage assessment' website http://www.environment.nsw.gov.au/resources/forestagreements/wra18.pdf

Case study: cultural mapping in strategic planning.
The Wollongong City Council has integrated Aboriginal culture and heritage protection into their Development Control Plan (DCP) through the adoption of a 'sensitivity mapping' approach.

This precautionary approach, requires Aboriginal archaeological and cultural heritage assessments to be undertaken for any new land use activity or development, that is to take place on land identified within the DCP as being 'sensitive' or likely to contain Aboriginal culture and heritage.[24]

The assessments when triggered are required to be undertaken jointly by an Aboriginal heritage consultant and the LALC.

Other studies, such as the Eurobodalla Aboriginal Heritage Study[25] made a number of recommendations for further steps to protect Aboriginal heritage, including listing some specific places in the LEP, developing a 'culturally sensitive landscapes' section of the DCP and 'cultural sensitivity zoning'. The Eurobodalla LEP has not yet been finalised.

The use of formalised Aboriginal heritage conservation or protection zones may be another option for protecting Aboriginal heritage across broad areas of the landscape. However, mechanisms should be put in place to ensure that such zones or precincts can be applied outside of 'green space' areas, and have the ability to be implemented in urban areas.

Different local Aboriginal communities will place different values on certain places. Community consultation is essential to ensure that Aboriginal communities are able to provide advice about which specific areas have heritage value, what those heritage values are, and how they can be best protected and managed. Allowing relevant communities to determine the significance of their heritage is also world's best practice, as outlined in Australian standards such as the *Burra Charter (The Australia ICOMOS charter for places of cultural significance).*[26]

When Aboriginal heritage is identified early in planning processes, the design and architecture of specific developments can be sympathetic to Aboriginal heritage to recognise the significance of Aboriginal heritage in the area over the long term, and raise awareness in the broader community.

Definitions

The current Ministerial direction provides broader definitions of Aboriginal culture and heritage than the current provisions in the *National Parks and Wildlife Act 1974*, and states that:

*"**(4)** A planning proposal must contain provisions that facilitate the conservation of:*

> ***(a)** items, places, buildings, works, relics, moveable objects or precincts of environmental heritage significance to an area, in relation to the historical, scientific, cultural, social, archaeological, architectural, natural or aesthetic value of the item, area, object or place, identified in a study of the environmental heritage of the area;*
>
> ***(b)** Aboriginal objects or Aboriginal places that are protected under the National Parks and Wildlife Act 1974, and*
>
> ***(c)** Aboriginal areas, Aboriginal objects, Aboriginal places or landscapes identified by an Aboriginal heritage survey prepared by or on behalf of an Aboriginal Land Council, Aboriginal*

[24] See http://www.wollongong.nsw.gov.au/council/governance/Policies/Chapter%20E10%20-%20Aboriginal%20Heritage.pdf
[25] See http://www.esc.nsw.gov.au/site/AboriginalHeritageStudy/pdf/stage4/SUMMARY_REPORT.pdf
[26] See the *National Trust* website at http://www.nationaltrust.com.au/burracharter.html.

body or public authority and provided to the relevant planning authority, which identifies the area, object, place or landscape as being of heritage significance to Aboriginal culture and people."

Recognising and recording significant Aboriginal heritage requires an understanding of how Aboriginal communities value certain places and areas of land within an area. Aboriginal peoples' definition of culture is not limited to particular places or physical evidence of Aboriginal existence on the land; it includes whole of landscape values and both tangible and intangibles that tell a story about the land, environment, people, family, history, law, community and spirituality.

The limited definition of cultural heritage under the *National Parks and Wildlife Act 1974* has made it difficult to provide adequate protection for some Aboriginal sites - See for example the case study of a 'Keepara Tree' (Diamond Tree) which was protected as an Aboriginal area under the *National Parks and Wildlife Act*, but without an appropriate buffer zone, leaving the tree exposed for viewing from the local playing field.[27]

Development consent processes

The current planning laws also allow a broad scope of activities to take place, such as through exempt and complying development mechanisms and provisions also exist, such as the major projects assessment provisions (formerly Part 3A of the *Environmental Planning and Assessment Act 1979*) which can circumvent consideration of Aboriginal culture and heritage impacts.

Provisions that allow a broad scope of activities to take place without any assessment or regulation have the potential to impact on Aboriginal culture and heritage, and fail to deter individuals and businesses from destroying Aboriginal culture and heritage are not supported.

In regards to 'major projects' there are currently no mandatory requirements to consider Aboriginal culture and heritage, no mandatory requirements to protect Aboriginal culture and heritage; no mandatory requirements to consult with Local Aboriginal Land Councils or Aboriginal communities, and the operation of section 90 of the *National Parks and Wildlife Act 1974* is excluded. This is of significant concern as major projects can include large mining operations and subdivisions which result in significant impacts on an area.

While the Standard Instrument LEP requires local government authorities to consider Aboriginal heritage and notify the Aboriginal community prior to granting consent for a development involving an Aboriginal object or Aboriginal place of heritage, this often only occurs if the item has been included on a public 'heritage schedule' or map in the LEP. [28] As outlined above, many local councils have not undertaken Aboriginal heritage studies in order to identify Aboriginal culture and heritage items appropriate for inclusion in this schedule. This has resulted in Aboriginal heritage being largely excluded from the this protection mechanism, which mainly incorporates 'European' or non-Aboriginal heritage items.

[27] As noted in *Caring for Country: A Guide to Environmental Law for Aboriginal Communities* by the Environmental Defenders Office NSW (updated 2009 edition). Other examples include reported massacre sites where no physical remains are present to be 'impacted' or protected. For more detail see discussion of case law in relation to the challenge of AHIPs by Aboriginal people, in *Discussion Paper: Reforming New South Wales' Laws for Protection of Aboriginal Cultural Heritage*, prepared by Neva Collings of the Environmental Defender's Office for the 28 May 2009 Culture and Heritage Roundtable.

[28] Clause 5.10(8) of the *Standard Instrument – Principal Local Environmental Plan* avaiable at www.legislation.nsw.gov.au. The Standard Instrument also outlines that 'Aboriginal places of heritage significance' and 'Aboriginal objects' may, but need not, be recorded on a public map attached to a LEP.

Case study: complying development
In a recent incident in a coastal local government area, a family carrying out complying development earthworks in their backyard, dug through an Aboriginal midden. Aboriginal middens are covered by the regulatory regime of the *National Parks and Wildlife Act 1974*.

Even so, the destruction of the midden occurred despite this regulatory regime, and despite the local government authority's awareness that the vicinity was cultural sensitivity and was likely to have such sites.

The earth works being undertaken were discovered by chance and despite being reported to the Office of Environment and Heritage were not stopped.

As a result of these many concerns, the NSW Aboriginal Land Council has been advocating for the establishment of an independent Aboriginal Heritage legislative structure and Aboriginal Heritage Commission based on principles outlined in the United Nations *Declaration on the Rights of Indigenous Peoples*.

The NSW Aboriginal Land Council recommends the following to the Planning System Review Panel:

2.1. That the new planning laws for NSW must include the protection of Aboriginal culture and heritage as a key stated objective;

2.2. That the new planning laws for NSW must include a broad all encompassing definition of Aboriginal culture and heritage that captures the tangible and intangible, as well as whole of landscape values;

2.3. That the strategic planning mechanisms of new planning laws for NSW must include mechanisms for the identification of Aboriginal culture and heritage values across the state, which trigger development prohibitions and/or further consultation and assessment as appropriate.

Such mechanisms must be based on mandatory and uniformly applied minimum standards for: the identification of Aboriginal culture and heritage values through consultation and engagement with Aboriginal peoples and communities, and the protection of culturally sensitive information;

2.4. That development consent processes of new planning laws for NSW must include mandatory consideration of the potential impacts upon Aboriginal culture and heritage of any development. Development consent processes that circumvent assessment processes, such as the current complying developments, must be kept to a minimum to ensure that potential impacts upon Aboriginal culture and heritage are considered; and

2.5. Aboriginal culture and heritage expertise should be included as specific criteria in appointing individuals to all relevant decision-making planning authorities.

3. Economic development on Aboriginal lands

Background

The *Aboriginal Land Rights Act 1983* recognises that the land in the state of NSW was traditionally owned and occupied by Aboriginal peoples, and that decisions of past Governments have progressively deprived Aboriginal peoples of those lands. It also provides legislative recognition of the fact that land is of social, cultural and economic importance to Aboriginal peoples.

The NSW Parliament in passing the *Aboriginal Land Rights Act 1983* acknowledged these facts and recognised that Aboriginal peoples have experienced severe economic deprivation. The legislation was intended to address these injustices and the neglect experienced by Aboriginal peoples in NSW, with a cultural and economic dual focus.

The *Aboriginal Land Rights Act* introduced a land-mark mechanism for claiming unused crown land as a form of compensation, as well as a form of limited self-determination for Aboriginal peoples in respect to managing and, overtime, dealing with that land. This, some 24 years before the United Nations General Assembly, and Australia two years later, confirmed the following rights of Aboriginal peoples in the United Nations *Declaration on the Rights of Indigenous Peoples*:

> *"**Article 3***
> *Indigenous peoples have the right to self-determination....*
>
> ***Article 26***
> *Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired....*
>
> *Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired".*

The claiming of land under the *Aboriginal Land Rights Act* was only intended to be the first step to *laying the basis for improving Aboriginal self-sufficiency and economic* wellbeing. The land rights legislation was intended to allow for the economic development of those claimed lands not deemed culturally significant to Aboriginal peoples, for the social and economic betterment of the Aboriginal peoples of NSW.[29]

This mechanism as a tool of public policy was both inventive and ground-breaking. However in practice, the mechanism envisaged by the NSW Parliament, has tended to be frustrated by the current mechanisms of the planning laws in NSW and the system they establish.

Today as a result of land rights, Aboriginal Land Councils hold significant freehold land, and are generally the largest single landowners in any local government area.[30]

[29] The Hon. Frank Walker, NSW Parliament Hansard, Legislative Assembly, 24 March 1983, at 5090, available at: http://www.parliament.nsw.gov.au/Prod/parlment/hanstrans.nsf/V3ByKey/LA19830324/$file/473LA046.PDF

[30] Aboriginal Land Councils may also hold other interests in landforms of land title including joint management leases over national parks

Strategic planning

The currently strategic planning mechanisms continue to perpetuate disproportionately adverse decision making in respect to Aboriginal lands. The resulting imposition of restrictive environmental conservation land use zonings on Aboriginal Land Council lands:

- elevates the social benefit of environmental protection above the social benefit envisaged by the NSW Parliament in the passing of the *Aboriginal Land Rights Act 1983*; and
- undermines the principle of Aboriginal self determination, which is given power to a limited degree in the *Aboriginal Land Rights Act 1983* in respect to Aboriginal Land Council lands, and as has been recognised in the United Nations Declaration on the Rights of Indigenous Peoples, along with the right of Aboriginal peoples to self-determined development of Aboriginal lands.

Aboriginal Land Council land tends to be 'greenfield' by virtue of the nature of claimable land (unused crown land) and is becoming of increasing strategic importance, in terms of future developments and the projection of conservation values. This is particularly so in the more developed coastal plains east of the dividing range.

There is often a tendency by local government authorities to view Aboriginal Land Council lands as public environmental conservation assets or as quasi parklands without any possible conservation values being established through formal assessments. Accordingly, Aboriginal Land Council lands have tended to be 'downzoned' for environmental conservation purposes while such land does not have significant conservation value. This has the effect of sterilising the development potential of those lands and undermines the social policy mechanism underpinning the *Aboriginal Land Rights Act 1983*.

Case study: Zoning of Aboriginal lands for environmental protection
A Local Aboriginal Land Council situated in coastal NSW has had three residential sized blocks zoned for conservation purposes as Coastal Habitat. While the residential area in which the blocks are located bounds an area of costal habitat, the Local Aboriginal Land Council blocks are the only zoned for this purpose.

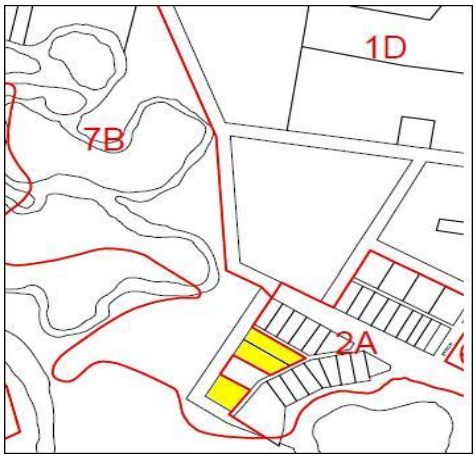

Figure 1. Environmental protections zones on Aboriginal lands.
2A – Residential Zone
7B – Coastal Habitat Zone
Local Aboriginal Land Council owned land in yellow.

The application of restrictive zoning provisions to Aboriginal Land Council owned land severely undermines the beneficial intentions of Aboriginal Land Rights legislation and curtails the economic and socially beneficial potentials to which such lands could be used.

It is important to note that Aboriginal Land Councils and Aboriginal peoples are not adverse to environmental conservation; a history of effective land management spanning tens of thousands of years attests to that. However, as the *Aboriginal Land Rights A*ct *1983* recognises, the interests Aboriginal peoples have in land go beyond those that narrowly align with environmental conservation. It must be understood that perspectives that continue to interpret Aboriginal interests in land so narrowly are both anachronistic and offensive.

Case study: Re-zoning decisions
A Local Aboriginal Land Council located in a metropolitan region was forced to challenge an attempted rezoning of significant parcels of land they had claimed, before the then Human Rights and Equal Opportunity Commission. The parcels of land were located in suburban streets on the metropolitan fringe, and had been former Landcom sites, previously earmarked for residential release prior to being claimed.

The local government authority seeking to re-zone the parcels of land, for environmental protection, had previously objected to the land claims lodged over the parcels, on the basis that the lands were needed or were likely to be needed for residential release. The local government authority had not proposed to rezone the land environmentally sensitive until after land claims had been lodged by the Local Aboriginal Land Council.

The local government authority withdrew the proposed rezonings before the Human Rights and Equal Opportunity Commission made its findings.

However, local government planning decisions that set aside Aboriginal Land Council land for the public purpose of environmental conservation effectively elevate environmental considerations above the social policy considerations the NSW Parliament gave expression to in passing the *Aboriginal Land Rights Act 1983;* the need for improvements to the socio-economic wellbeing and independence of Aboriginal peoples of NSW.

In addition, there are significant public liability issues associated with the public use of Aboriginal Land Council lands. The associated costs and risks have meant that in many instances lands intended to generate economic development for Aboriginal peoples have become more of a liability than an asset.

Case study: disproportionate impact of re-zoning
A Local Aboriginal Land Council located in a metropolitan region has encountered an attempt to rezone approximately 72% of their 1800 ha of land in a local government area from rural to “E2 Environmental Management”. The local government authority proposing the rezoning also proposed to subject approximately 85% of the Local Aboriginal Land Council’s remaining land to a restrictive “environmentally sensitive land” overlay.

Despite considerable effort and expense the Local Aboriginal Land Council has not as yet been able to overturn these detrimental decisions.

It should be noted in the review process that the disproportionate impact experienced by Aboriginal Land Councils in respect to strategic planning decisions is not new. In 1980 the NSW Legislative Assembly Select Committee on Aborigines recognised that:

> *"the Aboriginal people of New South Wales suffer discrimination from various Government decision-makers in relation to land development and planning".*

In recognising this situation, the Committee recommended that:

> *"land owned by Aboriginal communities should be governed by special planning provisions… which would permit Aboriginal communities to develop projects that might otherwise be contrary to local planning ordinances"* and that

> *"there should be a positive requirement on local and State government authorities to consult with Aboriginal communities where their land or its immediate surrounds are likely to be affected by zoning or development changes".*

The 'special planning provisions' recommended have not yet been enacted and it appears to Aboriginal Land Councils that planning decisions continue to discriminate against Aboriginal peoples in relation to the development of Aboriginal Land Council land.

It is noted that special planning provisions currently exist in the *Environmental planning and Assessment Act 1979* in regards to threatened species and Sydney's water catchment[31], and the making of planning instruments. It is the view of the NSW Aboriginal Land Council that the socio-economic wellbeing of the Aboriginal peoples of NSW, is at least of equal significance to these public policy issues, and that special consultation or concurrence mechanisms are required to ensure that planning decisions only neutrally or beneficially impact upon on the economic potentials of Aboriginal Lands.

Case Study: Other jurisdictions: British Colombia

In 2004 the Supreme Court of Canada handed down the landmark decision in Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, which affirmed that the provincial government 'had a duty to consult Indigenous peoples on decision that might affect their rights and title'[32].

Following this judgment a series of policy documents were developed to inform environmental planning in British Columbia. These policies combined to form A New Direction for Strategic Land Use Planning in British Columbia policy framework. The new policy framework included broad commitments to shared decision-making with First Nation peoples and offered possibility for the Indigenous peoples in British Columbia to self-design principles that guide planning policy.

Under this, First Nation peoples and the Fist Nations Leadership Council are recognised as 'legitimate planning actors,[33]' and the policy framework includes commitment to 'ensure that individual

[31] Environmental Planning and Assessment Act 1979, sections 34A & 34B (respectively).

[32] Pearlman 2005 in Barry and Porter, Recognising Indigenous Rights in Land Use Planning Governance, University of Glasgow, Scotland, UK, p.1; available at: http://www2.warwick.ac.uk/fac/soc/wbs/projects/orthodoxies/papers/101210_porter_l.pdf

[33] Barry and Porter, Recognising Indigenous Rights in Land Use Planning Governance, University of Glasgow, Scotland, UK

planning processes are jointly developed, address capacity, decision-making and conflict resolution, and are mutually acceptable[34].'

It is evident that British Columbia's approach to planning regimes and policy is based firmly in principles of collaboration, consultation and recognition of Indigenous peoples rights and unique status as First Peoples.

There is the potential for components of British Columbia's approach to be incorporated into the NSW planning regime as it is in line with principles of self-determination and the recognition of proper consultation and collaboration with Aboriginal peoples. If Aboriginal peoples and communities can adequately engage in the NSW planning system, issues particularly relating to zoning may be reduced.

The NSW Aboriginal Land Council recommends the following to the Planning System Review Panel:

3.1 That the new planning laws for NSW must recognise the unique status Aboriginal peoples have in this state by virtue of being the first peoples of NSW;

3.2 That the new planning laws for NSW must include objectives that promote economic independence for Aboriginal peoples and self-determination in respect to Aboriginal lands in accordance with the principles underpinning and espoused in the *Aboriginal Land Rights Act 1983* and the United Nations Declaration of the Rights of Indigenous Peoples; and

3.3 That the new planning laws for NSW must include specific and appropriate state-wide mechanisms in relation to policy formation and implementation, as well as strategic and statutory land use planning, that promote economic independence for Aboriginal peoples and self-determination in respect to Aboriginal lands, and give effect to the principles underpinning, and espoused in, the *Aboriginal Land Rights Act 1983* and the United Nations Declaration of the Rights of Indigenous Peoples.

[34] Barry and Porter, Recognising Indigenous Rights in Land Use Planning Governance, University of Glasgow, Scotland, UK

4. Former Aboriginal reserves and missions

Background

In the 1880s the Aborigines Protection Board was established by the NSW Government and 107 reserves and missions were created for the purpose of 'protection' and 'control' of all Aboriginal people. Many of these settlements were located on low amenity land and isolated from local centres, services and facilities.

Whilst living on Aboriginal reserves and missions, many people experienced forced confinement, the imposition of strict religious observance, separation from and removal of their children, the breakdown of traditional values and the banning of languages and cultural practices. Despite such hardship, Aboriginal people formed and maintained strong communities on these lands and developed cultural and historical ties to the sites.

Under the ownership and control of the NSW Government these communities grew and were developed outside of local planning ordinances and remained a step removed from the co-ordinated upgrading of infrastructure in surrounding communities.

In 1969, the Aborigines Protection Board was abolished and from 1973 the reserves and missions were transferred to Aboriginal control and eventual to Aboriginal collective ownership. In 1983, with the passing of the *Aboriginal Land Rights Act 1983*, the freehold titles for the 59 remaining reserve and mission sites were transferred to the 49 LALCs in whose area the land was situated.

While the transfer of ownership of former reserve and mission sites to LALCs was heralded at the time as a lands rights outcome, in reality LALCs had also assumed responsibility for significant liabilities in relation to the buildings and infrastructure on these lands.

Notwithstanding the transfer of ownership to LALCs, investment by government in housing and infrastructure on former reserves and missions continued with disregard to local planning requirements.

Today the upgrade and replacement of housing and the development of facilities and infrastructure in these communities continues to occur outside the planning system most often funded and managed by Government.

Former reserve and mission sites today

Today the nature and condition of the former reserves and missions vary significantly. They are located in major cities, and from regional to very remote areas. The proportion of developed land on former reserve sites also varies; from the whole of some site to others which include large areas of vacant land and bush.

Similarly, the infrastructure on former reserve and mission sites varies significantly; from kerbed, guttered and lit streets to dirt tracks; from town water and sewerage, to bore and river water, and effluent ponds.

Some former reserves and missions also include community facilities, such as halls, playgrounds and basketball courts. Often these facilities are built by the community themselves.

In the majority of cases the residential properties situated on these lands are on a single title rather than individual residential allotments. In most cases therefore, the Local Aboriginal Land Council with title to the land has responsibility for providing and maintaining all services within the site's

boundary; including roads, water and sewerage. This tends to exhaust any revenue generated from rents, and renders the ownership of the former reserve and mission unsustainable for Local Aboriginal Land Councils.

Current title issues preclude Local Aboriginal Land Councils from considering the divestment of these infrastructure assets and/or the long term tenure options for tenants such as home ownership, long term leasing, or other economic activities which may ease the financial and administrative burden associated with the former reserve and mission.

Case Studies: Former reserves and missions

Site: North West NSW

Site Features:
Located - 3km from town; Zoned - 1(A) Non-Urban; Access - Crown Road; Dwellings – 22; Other Buildings - Community facilities; Flooding and Drainage – flood prone, no levee but highset houses, erosion due to poor drainage and steep slopes; Road Condition - bitumen, roll kerb and guttering in places, no drainage; Water Supply - town water supply; and Sewage Provision - individual Enviro-cycle treatment systems.

Figure 2: Streetscape

Figure 3: Typical house

Subdivision Obstacles:
Zoning; Bushfire risk; Flood risk; and Substandard infrastructure

Site: North Coast

Site Features:
Located - 3km North of town centre; Zoned - 2(A) Low Density Residential; Access- Crown Road; Dwellings- 12 dwellings; Other Buildings - Community facilities; Road Condition - Sealed, un-named, narrow roads; Water Supply - Town water supply; and Sewage Provision - Town sewerage.

Figure 4: Streetscape

Figure 5: Typical House

Obstacles to Subdivision:
Environmentally sensitive land; Bushfire risk; Encroachment; Substandard infrastructure; location of infrastructure; and Fragmentation of site.

Subdivision Project
In order to assist Local Aboriginal Land Councils divest the unsustainable infrastructure assets on the former reserve and mission sites, in 2008 the NSW Aboriginal Land Council entered into a partnership project with the Australian Government to work towards facilitating the subdivision of all former Aboriginal reserve and mission and missions in NSW.

However, the initial pilot phase of this project identified significant obstacles within the NSW Planning System to achieving subdivision of former reserve and mission sites. These obstacles include:

Zoning: Numerous former reserve and mission sites are not zoned appropriately for their current land uses. This has been a failure of strategic planning and has resulted at least in part from the planning systems failure to engage with Aboriginal peoples and communities.

The NSW Aboriginal Land Council subdivision project has sought to have these oversights rectified in respect to some former reserve and mission sites, in the course of the standardisation processes for Local Environment Plans. However, many former reserves and missions remain with inappropriate zonings for their existing residential and community uses.

Standard Development Application process: The costs associated with development application processes for the subdivision of each individual site, in terms of accumulative costs across the state, and for individual Local Aboriginal Land Council owner, are prohibitive in the present funding environment.

Due to the individual nature of each former reserve site, the multitude of localised planning controls applicable across the sites, and the extent of the compliance issues faced in regards to existing structures and infrastructure, a standardised approach cannot be applied to approval processes for subdivision within the current planning regime.

Flood, bushfire and heritage planning requirements: Former reserve and mission and missions are often located on flood and/or bushfire prone lands and/or are significant for heritage or environmental reasons. Despite their existence in such prone locations for considerable periods of time, such physical constraints are a further obstacle to obtaining planning approval to subdivide these existing settlements. Local government authorities' concerns over possible ensuing liabilities, and the significant costs associated with mitigating such risks, are in the current funding environment insurmountable.

Road reserves: The condition of the road reserves on former reserve and mission sites is an obstacle for dedication, as the road reserves of few sites meet local government authorities' minimum standards. Local government authorities are reluctant to accept dedication of road reserves where they do not meet required standards.

Encroachments: In many instances dwellings and/or infrastructure have been located so that they encroach onto neighbouring lots. While some encroachments are relatively minor such as fences, others are significant and essential pieces of infrastructure, such as a flood levee. Such encroachments have occurred as a result of these sites development outside of the planning regulations, and are an obstacle to the sites subdivision and reintegration with the planning system.

Right of Access: formal rights of access for many of these communities are also an issue.

In recognition of the involvement of previous governments in the establishment of the now former reserves and mission, and the ad hoc development of these communities outside of any planning considerations or laws, the current NSW Government through the planning review, as well as other avenues, must assist with the difficulties these communities now face in integrating with the planning system.

The NSW Aboriginal Land Council recommends the following to the Planning System Review Panel:

4.1 That the new planning laws for NSW must include specific transitional arrangements and provisions to allow for the reintegration of these sites into the NSW Planning System without undue expense; and

4.2 The new planning system for NSW must provide administrative and resource support for the transition of the existing communities of the former reserves and missions into the planning system; support such as a waiver of associated fees (provided there will be no net increase in the economic use), access to apply for funding including that of the planning reform fund, and assistance such as that provided by the former state significant sites now state significant precincts program.

This submission has been prepared by the New South Wales Aboriginal Land Council. For more information about this submission please contact the NSW Aboriginal Land Council Policy and Research Unit by phone on 02 9689 4479 or by email policy@alc.org.au.