CROWN LANDS AMENDMENT (PUBLIC OWNERSHIP OF BEACHES AND COASTAL LANDS) BILL 2014

On the 21 October 2014 the *Crown Lands Amendment (Public Ownership of Beaches and Coastal Lands) Bill 2014* (the **Bill**) was introduced into the NSW Parliament.

The Bill is the NSW Government's response to a decision made by the Land and Environment Court (LEC) to grant an Aboriginal land claim over an area of land known as 'Red Rock'. Orders made in the Red Rock case[1] resulted in land that included a significant stretch of beach and foredune being transferred to an Aboriginal Land Council, subject to easements for public access.

The Bill proposes to allow the NSW Government to classify broad areas of land as no longer claimable under the *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**). The Government has taken the view that it needs to develop legislation (the Bill) to retrospectively provide that beach and coastal areas currently the subject of an Aboriginal land claim, and that have the potential to be claimed under the ALRA, cannot be granted.

NSWALC strongly opposes this Bill and urges all political parties to oppose this Bill.

Background - the *Red Rock* case

A land claim was made on 29 October 1993 over a strip of land that includes about 3.7km of beach and foredune, known as 'Red Rock beach'. The area included grass and vegetation typical of its coastal location and extended inland from the high water mark for distances that varied between 100m and 250m. The foreshore, being the area between the high and low water marks was not claimed.

The land claim was made as result of the local Aboriginal community seeking to protect the coastal land and Aboriginal cultural heritage in the area and prevent environmentally damaging activities on the land. Despite repeated requests to take action to protect the area from misuse and damage neither the NSW Government nor the Local Council took action or showed concern for the conservation of the dunes. As such, the Aboriginal Land Council lodged an Aboriginal Land Claim. At the date of the claim, the claimed land was unreserved Crown land under the administration of the then Department of Lands. Within the broader community there was support for ownership of the claimed land by the Aboriginal Land Council as the most effective means to ensure the protection and preservation of a sensitive environmental area.

On 17 December 2009, more than 16 years after the land claim had been lodged, the Minister administering the *Crown Lands Act* refused the claim on the basis the land was "*lawfully used and*

[1] A copy of the Land and Environment Court judgment *Coffs Harbour and District Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2013] NSWLEC 216 can be accessed online at: http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=168981

was needed or likely to ne needed for the essential public purposes of access, public recreation and environmental protection".

The Aboriginal Land Council appealed the Minister's decision to the Land and Environment Court and was successful. The Minister sought to contend that the land claim should be refused because the claimed land was 'likely to be needed'. The Aboriginal Land Council contended that the Minister had not discharged the onus of establishing the likely need of the whole of the claimed land for any of the purposes as at the date of the claim.

In the Red Rock judgment it was stated that "...*it is appropriate to observe that since the introduction of the Land Rights Act, the Courts have been at one in describing the legislation as being beneficial and remedial legislation*". And further that "[in the Maroota case]...*the Chief Justice stated that the beneficial purpose of the Land Rights Act 'suggests that the exceptions to the right to make claims on Crown land should be narrowly construed.'*"

Overall, the Bill will allow the Government to classify broad areas of land as no longer claimable under the *Aboriginal Land Rights Act* (ALRA), and to refuse Aboriginal land claims over an expanded category of Crown lands.

This Bill significantly undermines the objectives of the ALRA. The Bill is a misleading and disproportionate response to the issue of an Aboriginal Land Council claiming unused and unneeded coastal Crown land.

Aboriginal Land Rights in NSW

The *Aboriginal Land Rights Act* 1983 (NSW) (**ALRA**) was enacted in recognition of, and in an attempt to remedy, the ongoing effects of the dispossession of Aboriginal peoples in NSW. The ALRA significantly acknowledges and recognises the prior ownership of NSW by Aboriginal peoples. Principles of self determination and compensation are embodied in the ALRA.

The preamble of the ALRA recognises that:

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.

The ALRA was enacted by the NSW Parliament to facilitate the return of land in NSW to Aboriginal peoples through claim over Crown land.[2] The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for social outcomes in Aboriginal communities. A core function of Aboriginal Land Councils is the claiming of Crown land under compensatory mechanisms of the ALRA for the dispossession of Aboriginal peoples from land as a result of colonisation.

In his Second Reading Speech the then Minister for Aboriginal Affairs Frank Walker stated:

[2] Section 36 of the *Aboriginal Land Rights Act* 1983 (NSW) outlines claimable Crown lands in NSW

> '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.'[3]

He also explained:

> '...[the] Government has made a clear, unequivocal decision 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...'[4]

The claim process in the ALRA is the cornerstone for Aboriginal peoples' realising the land justice and economic outcomes envisaged by the ALRA. The Court of Appeal has observed that the land claim process is the 'primary mechanism' for giving effect to the purposes set out in section 3 of the ALRA.[5]

Although Aboriginal peoples originally owned all of the State, Aboriginal land rights under the ALRA afforded only parts of the State (unused and unneeded Crown land) to be returned to Aboriginal peoples as compensation for dispossession and recognition of prior ownership. Changing the way Crown land is owned and managed in a way that may further erode the compensatory mechanisms of the ALRA is of serious concern to the NSW Aboriginal Land Council (**NSWALC**) and the network of Local Aboriginal Land Councils (**LALCs**). It should also be noted that to date less than 0.4% of the Crown land estate has been transferred to Aboriginal Land Councils.[6]

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.'[7]

NSWALC's Key Concerns with the Crown Lands Amendment (Public Ownership of Beaches and Coastal Lands) Bill

1. **No consultation**: NSWALC has been constructively engaging with the NSW Government on a number of law and policy reform issues. NSWALC has previously raised concerns with the NSW Government in relation to the undermining of the ALRA in the *Crown Lands Amendment (Multiple Land Use) Act* (the Goomallee Amendment) and proposals put forward as part of the comprehensive Crown Lands review. Given the significance of the legislation, the targeted nature of the Bill to only impact on Aboriginal Land Councils, and the Aboriginal Land Rights network's willingness to openly negotiate with the Government, NSWALC would have expected to have been consulted on a way forward with this issue.

[3] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5089(Frank Walker).
[4] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5088 (Frank Walker).
[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] Based on figures in *Facilitation to Enable not Frustration to Disable,* Aboriginal Land Rights Review 2012, Report of Findings and Recommendations for the Working Group, p.22
[7] Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples

Instead, this Bill was developed and introduced **without any notification or consultation with NSWALC**. Furthermore, this Bill has been rushed through in the last sitting of Parliament prior to the election. NSWALC had previously flagged with the NSW Government that it would be keen to discuss mechanisms to address any concerns the Government may have had as a result of the Red Rock decision.

2. **Lack of certainty about what the Bill is trying to achieve:** NSWALC contends that this Bill represents an unjustified and reactive response to the Red Rock case. NSWALC also contends that the Bill and the framing of this debate contain a number of misleading statements. This includes that:
    - The ALRA already contains provisions for granting land subject to conditions 36(5A), which is what occurred in the Red Rock case. The land was transferred to the LALC subject to a number of easements being created to allow for public access to the beach. The LALC has always supported public access to the land that was granted, and this is legally supported through easements. The Minister's second reading speech failed to inform parliament that the public's access and use of the Red Rock beach was protected in perpetuity by the easement for public access.
    - The existing definition of claimable Crown land in the ALRA (see s.36(1) of the ALRA) would already exclude beaches and coastal land as defined in the Bill in the vast majority of cases.. In the Red Rock case the Aboriginal Land Council conceded that the beach was not claimable Crown land as it was needed for the essential public purpose of public access. It was the LEC that rocognised that this essential public purpose could be achieved by granting the land to the land council subject to the easement for public access. As such, NSWALC contends that to resort to retrospective measures is unnecessary and inappropriate.
    - As part of the *Aboriginal Land Rights Act Amendment Bill 2014* that is currently in the NSW Parliament (introduced on the same day as the *Crown Land Amendment Bill*), an amendment is proposed to allow negotiations and agreements to be made regarding land claims. It is not understood why the Government does not seek to pursue negotiations with Aboriginal Land Councils to resolve issues regarding land claims and has instead decided to introduce retrospective legislation.
    - The Bill includes a new section 44F (1)(c)(i) which proposes new and expanded definitions of what lands associated with beach areas will no longer be claimable. These include picnic areas, children's play areas, surf life saving clubs, toilets, restaurants, coffee shops and boat clubs. <u>It is important to note that these areas have a public use and are currently not normally claimable under the ALRA</u>. NSWALC contends that by including these items in the Bill, the NSW Government is seeking to misrepresent what is claimable Crown land under the ALRA.

3. **Retrospectivity and lack of respect of rule of law**: The Bill proposes to insert a new section 63 that will stipulate that any existing land claims to the extent that they relate to Crown beach and coastal land must be refused. Provisions that are retrospective that adversely affect rights are not appropriate. Aboriginal Land Councils are entitled to rely on the law as it exists when making a land claims and to presume a land claim will be determined on this basis. It is worth noting that many Aboriginal Land Councils have been made to wait more than two decades for some of their land claims to be determined. Retrospective interference with legal rights is a matter which in principle should be avoided.

4. **Discrimination**: This Bill is aimed solely at the Aboriginal Land Council network. The manner in which this issue has been approached by the NSW Government, including the lack of transparency and consultation, and the content of the reform proposals, is of serious

concern to NSWALC. NSWALC contends that this Bill is discriminatory as it protects existing interests of other Crown land users, but not the existing interests of Aboriginal Land Councils in undetermined claims.

5. **Further erosion of Aboriginal land rights:** NSWALC primarily seeks to ensure that Aboriginal Land Councils interests in Crown land and the objects and purposes of the ALRA are not undermined. As outlined in previous submissions to the NSW Government in response to both the *Crown Land (Multiple Uses) Amendment Act 2013* and the comprehensive Crown lands review, NSWALC is increasingly concerned regarding the significant impact on ALRA and further erosion of Aboriginal Land Rights. This Bill represents another significant and major change in the ability of Aboriginal Land Councils to claim Crown lands. Given the lack of transparency, changes to the Crown Lands Act through 2013 amendments, and proposed changes through the comprehensive Crown lands review, NSWALC has serious concerns regarding the NSW Government's commitment to Aboriginal Land Rights.

   NSWALC seeks a commitment from the NSW Government that Crown land will continue to be available for claim under the ALRA, and where the Government seeks changes to the Crown Lands Act or to dispose of land that Aboriginal Land Councils are consulted and are transferred this land through mechanisms in the ALRA or through provisions under Crown lands legislation.

6. **The definition of 'Crown beach and coastal lands'**: Section 44F(1) of the Bill proposes new and broad definitions of '*Core beach land'* and '*Crown beach and coastal land'.* NSWALC is extremely concerned about the proposed definitions and the impact on Aboriginal Land claims. The use of the words '*associated use*' and '*common practice'* are of particular concern as these terms appear to allow for much larger areas of lands to be deemed unclaimable as well as (as a result of the retrospective nature of the Bill) meaning that existing land claims will be refused.

7. **No provisions for negotiation in the Bill**: The Second reading speech states that ..."*the NSW government and Aboriginal Land Councils may negotiate access or joint management arrangements of a voluntary or case-by-case basis*". However the Bill makes no provision for this, and actively excludes joint management provisions through section 44H.

8. **No compensation:** Proposed section 64 of the Bill contains express provisions that compensation will not be payable as a result of this Bill, despite Aboriginal Land Rights being significantly undermined as a result of the Bill.

9. **Misrepresentation of Aboriginal Land Councils rights and interests:** Aboriginal Land Councils are not opposed to beaches being used by the public for public purposes. This Bill misrepresents Aboriginal Land Councils rights and interests in Crown Lands. As noted above, in the Red Rock case, the reason why an Aboriginal Land Claim was made was due to environmental damage and damage to Aboriginal heritage sites and that the Aboriginal Land Council, with local community support, believed that lodging a land claim would help to protect the site.

NSWALC position

The NSWALC has considered the Bill and has adopted the following position:

- Overall, NSWALC strongly opposes this Bill and urges all political parties to oppose this Bill.

- NSWALC strongly opposes any undermining of the objects and purpose of the *Aboriginal Land Rights Act*. The NSW Government should recognise that as the original owners of all Crown land, and as claimants of Crown land that is unused and not needed (which is the only form of compensation afforded to Aboriginal peoples for dispossession), Aboriginal Land Councils are more than merely stakeholders in the management of Crown land.
- NSWALC does not support legislation that extinguishes land rights claims that have been lodged legitimately in accordance with the ALRA. NSWALC believes that these claims should be determined in accordance with the law as it stood when the claims were lodged.
- NSWALC recommends that the Government, in proposals relating to changing the way Crown land is owned and managed, complies with international laws including the UN Declaration on the Rights of Indigenous Peoples that recognise, promote and protect Indigenous culture and heritage.
- Given that the existing exclusions to claimable Crown land are broad enough to exclude beaches and coastal land as defined, the resort to retrospective legislation is unnecessary and inappropriate and does not uphold the rule of law as well as best practice principles of Crown land management.
- NSWALC contends that this Bill is discriminatory as it protects existing interests of other Crown land users, but not the existing interests of Aboriginal Land Councils in undetermined claims.
- NSWALC is concerned regarding the Government's disregard for judicial process and Court decisions in pursuing such legislation.
- Despite being extremely disappointed and concerned by the manner in which the NSW Government has approached this issue, NSWALC seeks further engagement with the NSW Government to develop a way forward. NSWALC seeks to work collaboratively with the NSW Government to address concerns regarding the Red Rock case through an alternative approach that ensures that objectives and mechanisms in the ALRA are not undermined, and to improve rights for all Aboriginal people.

More information

A copy of the Bill and Second Reading Speech can be accessed on the NSW Parliament website at: https://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/131a07fa4b8a041cca256e610012de17/8228b4fa835c6c52ca257d7800164978?OpenDocument.

NSWALC's submission in response to the Crown Land Review is available on the NSWALC website at: http://www.alc.org.au/culture-and-heritage/crown-lands-and-the-aboriginal-land-rights-act-(1).aspx

The document is current as at the 22 October 2014.

Please contact NSWALC on 9689 4444 or policy@alc.org.au if you would like to discuss the Bill, or issues relating to the Bill.