NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

28 May 2014

By email: nativetitle@alrc.gov.au

Dear Sir/Madame

NSWALC Submission on Native Title Act Review

The New South Wales Aboriginal Land Council (**NSWALC**) wishes to submit the comments contained in this letter to the Australian Law Reform Commission (**ALRC**) for its Review of the Native Title Act 1993 (**the Review**).

Overview

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 22,000 members, is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983* (**ALRA**), NSWALC 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 ALRA, NSWALC has the following functions amongst others:

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

NSWALC provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) that exist in NSW. As elected bodies, Aboriginal Land Councils represent not only the interests of their members, but of the whole Aboriginal community.

The preamble of the ALRA recognises that *'Land is of spiritual, social, cultural, and economic importance to Aboriginal peoples'*. The ALRA was enacted by the NSW Parliament to facilitate the return of land in NSW to Aboriginal peoples through claim over Crown land. The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for social outcomes in Aboriginal communities.

Relationship between Aboriginal Land Councils and Native Title groups

The relationship between the Aboriginal Land Council membership and native title group membership varies from area to area. In some cases, the native title claimants may all be members of a LALC. However, this will not always be the case. That is because under the ALRA there is no requirement in regard to proving traditional connection to a Land Council's area to become a member of that Land Council.

Regardless of whether the LALC members and native title claimants/holders are one and the same people, the complex interaction of the two laws can create conflict and confusion in the community.

Legal Context: the interaction between Land Rights and Native Title

At the outset, it is important to understand the complex interaction of the ALRA with the Native Title Act 1993 (**NTA**). The complexities of the relationship between these two Acts is not often discussed or indeed understood.

Generally speaking, native title law provides that the grant of a freehold title extinguishes native title absolutely[1] and this extinguishment of native title is permanent and cannot be revived[2]. However, these two principles of native title law do not apply in the usual manner to land held by Aboriginal Land Councils under the ALRA.

Whether or not native title exists over land granted under the ALRA will depend on a number of factors, including how the LALC came to own the land (ie, as a result of a successful land claim or by some other means) and, if the land was claimed, the date upon which the land claim was lodged. Further information about the interaction between land rights and native title is provided in the **enclosed** fact sheet.

While similar issues may arise in other jurisdictions, NSW is unique in that Aboriginal freehold land granted under the ALRA can be dealt with (including sold) by Aboriginal Land Councils. The interaction of the ALRA and the NTA means that Aboriginal Land Councils may be in the unique position of having a freehold estate which is subject to some level of native title rights and interests (potentially suppressed by the operation of the non-extinguishment principle).

These complexities are compounded by the fact that LALCs have limited capacity to obtain independent legal advice about how their property interests might be affected by a native title determination, and have therefore not historically engaged actively in native title process. NSWALC is committed to providing assistance to LALCs to become more informed about native title issues in their areas, and make informed decisions about how they participate in native title proceedings to try and address some of these historical issues.

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[1] *Mabo v Queensland (1992) 175 CLR 1.*

[2] *Fejo v Northern Territory (1998) 195 CLR 96* at paragraph 112.

NSWALC would be supportive of any legislative changes which promote co-operation between the two systems to ensure both native title claimants and land rights claimants are given the opportunity to promote and utilise both legislative regimes in harmony.

Joinder (Questions 31-35)

We wish to provide specific comments only in relation to the following questions regarding joinder.

Question 31 – ***Do the party provisions of the NTA – in particular the joinder provision s84(5) and the dismissal provision s84(8) and (9) – impose barriers to justice in relation to access to justice? Who is affected and in what ways?***

To date, NSWALC and LALCs with property interests (being generally freehold estates) affected by a native title claim have received notification of the claim under section 66(3)(a)(iv) of the NTA.

However, NSWALC is not clear whether a LALC would receive notification of a native title claim under s66(3) of the NTA if the only interests affected in a native title claim area was land under land rights claim, as opposed to land already owned.

Land under claim by NSWALC or LALCs gives an important right. The Courts have held that having a land claim under the ALRA gives an inchoate property interest in the land.[3] When a land claim is lodged, an Aboriginal Land Council has more than just the right to have the claim determined; provided the criteria in s36(1) of the ALRA are met, it has the right to have the land transferred to it. There is no discretion otherwise.[4] This is a category of interest that would be covered by the s 84(3) joinder provisions. However, joining on these grounds relies on the relevant LALCs first having knowledge of the claim and notifying the Federal Court that they wish to be a party.

To address this, it may be useful for the NTA to provide separately (at least in relation to NSW) under s 66(3) that any Aboriginal Land Councils whose area overlaps with a native title claim, and NSWALC[5], be automatically notified of the claim by the Registrar. This would allow those Land Councils to check whether they have any Aboriginal land claims within the area of the native title claim and give them the opportunity to consider joining the claim at the earliest possible stage.

Question 32 – ***How might late joinder of parties constitute a barrier to access to justice? Who is affected, and in what ways?***

And

Question 33 – ***What principles should guide whether a person may be joined as a party when proceedings are well advanced?***

Paragraph 267 of the Review sets out three main categories of cases where Aboriginal and Torres Strait Islanders may seek to join claims as respondents. These categories appear to suggest that

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[3] *Narromine Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 79 LGERA 430 per Stein J at 433-434.

[4] *NSW Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act (Winbar [No: 3])* (1988) 14 NSWLR 685 per Hope JA at 696E-G.

[5] Since NSWALC also has the potential to make land claims within any LALC area in NSW, in its own right or on behalf of a LALC.

most Aboriginal respondents to native title claims are disgruntled members of the native title claim group, persons who are not members of the claim group but assert rights in a personal capacity and members of competing claim groups.

NSWALC would like to suggest a fourth important category of Aboriginal respondents, at least in NSW, being itself and LALCs.

Generally speaking, NSWALC and LALCs do not join native title proceedings to oppose native title claims or dispute the constituency of the claim group. Rather, they mainly join with the intention of ensuring that their property interests, in relation to land both under claim or already owned or granted, are accurately described and dealt with in any determination by the Court.

Therefore, the reason for joinder by Aboriginal respondents in this category of cases is an attempt to seek protection of other important Aboriginal property rights.

NSWALC is fully supportive and appreciative of the desire to avoid late joinder of parties to native title proceedings. NSWALC understands the stress this can place on native title claimants, the pressure put on parties to address such applications at a time when they would rather focus on the determination, and the delay and cost to proceedings.

However, unfortunately it is often the case that in NSW, LALCs are often in a position of having to decide whether to join native title proceedings at a late stage. There are many reasons for this, including:

- The recent increase in native title activity in NSW, which has meant that many LALCs are only now beginning to turn their minds to how a native title determination has the potential to impact on their land interests;
- Lack of awareness of a native title claim until a late stage (see above paragraph concerning notification provisions);
- Lack of appreciation by the LALCs in relation to the complex interaction between the two legislative regimes (ie, that the native title claim interests can affect their freehold land, unlike with other freeholders);
- Lack of resources and funding to participate;
- The location of a LALC (how remote it is);
- How functional a LALC is; and
- An often high turnover of staff within LALC offices and at the board level. For example, the members of a LALC board who decide not to join a native title claim as respondents at the outset of a native title claim being registered, are highly likely to be different to the members of a LALC board who realise at a later stage of proceedings that their property interests are likely to be affected by the claim and that it is in their interests to join as respondents.

NSWALC submits that LALCs are in a unique situation as potential respondents to native title claims. As Aboriginal organisations, they suffer the same general barriers to justice as in the wider Aboriginal community. The principles which guide whether they should be joined as a party must take this into account, and they should be given every chance and opportunity, particularly due to their vulnerability, to join and participate in legal proceedings which may affect the land holdings

they have fought so hard to gain. Whilst it would be ideal for this to occur earlier in the proceedings, NSWALC submits that a Court should be sympathetic to a LALC attempting to join at a late stage because of the time needed to overcome the barriers listed above.

Question 34 – *In what circumstances should any party other than the applicant for a determination of native title and the Crown: (a) be involved in proceedings? (b) play a limited role in proceedings?*

NSWALC is of the strong opinion that itself, and LALCs, should be involved in proceedings where their property interests are likely to be affected by native title claims, and that they should play not a limited role, but an active role as appropriate, throughout the proceedings.

The development of the law in relation to the interaction of land rights and native title rights over parcels of land in NSW is in its very early stages. To date, in NSW, there have not been any native title determinations made over Land Council land (though the first is expected to be made in the near future). This is in contrast to the legal issues that arise for other categories of respondent parties, which are more settled. It is crucial that Land Councils are actively involved in the development of this law.

Paragraph 284 of the Review states that *"some commentators suggest that some persons should not be involved in proceedings on the basis that their interests could be adequately protected by the relevant state or territory government".*

NSWALC submits that itself and LALCs do not fall into a category of people whose interests could be adequately protected by the State in native title proceedings/determinations.

As noted above, LALCs are in a unique situation under the NTA as property holders in NSW. No other property holder in NSW will have a determination of native title over freehold property. By virtue of s47A of the NTA , LALCs as holders of freehold estates in land can have any any extinguishment of native title disregarded (with the non-extinguishment principle applying to that land).

As stated throughout this submission, being a respondent party to a native title claim will allow Land Councils to ensure the accuracy of the rights described in any determination, and to have a seat at any mediation or in any negotiations relating to land management and caring for country. It may present an opportunity for LALCs and native title holders to work together in relation to their land.

We trust this information is of assistance and would be happy to discuss these matters further. Please contact Ms Anna Harding, A/g Principal Legal Officer, on 9689 4469 or anna.harding@alc.org.au, should you wish to do so.

Yours sincerely

Lesley Turner
Chief Executive Officer

Interaction between native title and land rights

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This document has been prepared by the New South Wales Aboriginal Land Council (**NSWALC**) for Local Aboriginal Land Councils (**LALCs**) and Aboriginal communities across NSW.

Please Note: While all care has been taken in the preparation of this document, the advice it contains should not be seen as a substitute for independent consideration of the issues and/or legal advice on this subject. This document is current as of March 2014.

Native title and land rights both relate to Aboriginal Peoples' rights in land, however they have different purposes and starting points. The interaction between native title and land rights is a complex area, but with community cooperation there is scope for the two systems to work together to deliver the best of both.

Recognition of native title compared to granting of land rights

To understand the interaction between native title and land rights, it is essential to understand that native title is about **recognition** of rights and interests in land whereas land rights is about **granting** interests in land.

When the Federal Court of Australia makes a native title determination, Australia's legal system recognises rights and interests that are, and always have been, held by Aboriginal people in accordance with traditional law and custom.

In contrast, when the Minister for Crown Lands grants land under the *Aboriginal Land Rights Act 1983* (**ALRA**), the Government is granting land to Aboriginal Land Councils as compensation to Aboriginal people for past dispossession of land.

For more information comparing native title and land rights, refer to *Native Title Fact Sheet 1*.

Using land rights and native title together

Land rights and native title are very different systems and each has its own aims and benefits that they can offer Aboriginal Peoples.

Native title offers recognition of rights and interests held under traditional laws and customs. If the native title claim is a registered claim, it also offers significant procedural rights while a claim is underway, including the right to negotiate in relation to certain acts including the grant of mining rights[1]. In most cases a native title determination in NSW is likely to recognise non-exclusive rights, such as the right to hunt and gather.

A land claim, if granted, will generally result in the Local Aboriginal Land Council having a fee simple interest in the land which is the strongest interest a landholder can have. Importantly, the fee simple granted under the ALRA includes ownership of certain minerals which no other landholder in NSW has.

With cooperation, LALCs and native title claim groups can work together to make the most of the two systems.

Can native title exist on land rights land?

Native title can exist on land rights land in certain cases. Because native title is about recognising rights and interests that already exist, native title can exist over land even if there hasn't yet been a determination of native title.

[1] Subdivision P of the NTA

For native title to be determined to exist, there must be a connection to the land by the native title claimants and there must not have been any 'act' that has extinguished native title.

Generally speaking, native title law provides that the grant of a freehold title extinguishes native title absolutely[2] and this extinguishment of native title is permanent and cannot be revived[3]. However, these two principles of native title law do not apply in the usual manner to land held by Aboriginal people under the ALRA.

Whether or not native title exists over land granted under the ALRA will depend on a number of factors including how the LALC came to own the land (ie as a result of a successful land claim or by some other means) and, if the land was claimed, the date upon which the land claim was lodged.

Land claims lodged after 28 November 1994

Following the commencement of the *Native Title Act 1993* (**NTA**) in 1993, the ALRA was amended on 28 November 1994 to take into account the new Commonwealth native title regime. As a result of these amendments, the ALRA now provides that, if the land was granted as a result of a land claim made **after** 28 November 1994, any native title rights and interests existing in relation to the lands granted immediately before the transfer continue to exist (sections 36(9) and 36(9A), ALRA).

This means that native title continues to exist on land rights land granted as a result of a land claim lodged after the amendments (ie 28 November 1994), assuming there was no act that extinguished native title before the land was granted under the ALRA and that there is a claimant group that continues to exercise rights and interests over that land or waters in accordance with traditional laws and customs.

This means that, should a native title claim group obtain a native title determination, the members of that group would be recognised by the Federal Court to hold rights and interests in the LALC's land. The rights and interests will vary but are likely to include the right to access land and to hunt or fish on land.

[2] *Mabo v Queensland (1992) 175 CLR 1*

[3] *Fejo v Northern Territory (1998) 195 CLR 96* at paragraph 112

Other land that is owned by a LALC – extinguishment of native title may be disregarded

For other types of land that are owned by a LALC, native title may have been extinguished (this includes Aboriginal Lands Trust lands and land granted under the ALRA as a result of a land claim lodged prior to 28 November 1994), however this would need to be considered based on the circumstances in each case. As noted above, for land claimed after 28 November 1994 native title may have also been extinguished if there has been an act that extinguished native title before the land was granted to the LALC.

However, even where native title has been extinguished, this may be disregarded in some circumstances.[4]

Section 47A of the *Native Title Act*, where it applies, enables the Federal Court to disregard any previous extinguishment over land owned by Aboriginal Land Councils when making a determination[5]. Section 47A may apply where the land held by the LALC is held for the benefit of Aboriginal people and members of the claim group occupy the area. Occupation in this context does not necessarily require people to live on the land. The land might be occupied even if people are only occasionally visiting the land.[6] Whether an area is "occupied" will depend on the context of each individual claim.[7]

Should section 47A of the NTA apply to the land, any extinguishment of native title caused by the grant of the land to the LALC or any prior act will be disregarded.[8] However, the native title rights and interests will be subject to the non-extinguishment principle[9] which means that the rights and interests have no effect in relation to the freehold interest granted to the Land Council under the ALRA.[10] Native title which is subject to the non-extinguishment principle is often described as native title that is 'suppressed' by the freehold interest.

[4] *Native Title Act (Cth),* Sections 47, 47A and 47B

[5] Section 47A NTA

[6] *Moses v Western Australia and Others* (2007) 241 ALR 268 at 315-318

[7] *Moses v Western Australia and Others* (2007) 241 ALR 268 at [210]

[8] Section 47A(2) NTA

[9] Section 47A(3) NTA

[10] Section 238 NTSA

Can a native title claim be lodged over land owned by an Aboriginal Land Council?

In some circumstances a native title claim may be able to be lodged over land owned by an Aboriginal Land Council. This will depend on the type of land, the prior uses of the land, and how the land came to be vested in the Aboriginal Land Council.

As noted above, if the Aboriginal Land Council owns the land as a result of a claim made after 28 November 1994, it is subject to any native title rights and interests that existed immediately before the transfer. While the history of the ownership of that land prior to it being granted under the ALRA (such as the grant of a special lease or previous freehold ownership) may have extinguished native title, if certain conditions are met this extinguishment may be disregarded as a result of s 47A as explained above.

Can a native title claim be lodged over land that has an existing undetermined Aboriginal land claim?

A native title claim may be lodged over land that has an existing undetermined Aboriginal land claim. If a native title claim is lodged over land that has an existing undetermined Aboriginal land claim, the land claim is to be determined as per the conditions on the land at the date the land claim was lodged.

This means where a native title application is lodged ***after*** the Aboriginal Land Claim, this should not influence the Minister's decision on the Aboriginal Land Claim.

Can an Aboriginal land claim be granted over land covered by a native title claim?

An Aboriginal land claim lodged over land that is the subject of a registered native title claim or determination must be refused by the Crown Lands Minister. However, it is important to be aware that many native title claims are made over very large areas of land, but exclude specific parcels within that area from the claim depending on the tenure history of that land. Accordingly, before accepting the Minister's refusal as correct it is important to ensure that the Aboriginal land claim was not over a parcel of land that is excluded from the native title claim. The NSWALC Legal Services Unit, which reviews the correctness of all of the Minister's refusals, makes sure of this.

Interested stakeholders can apply to become a party to native title claims

Local Aboriginal Land Councils should consider whether to apply to become party to native title claims.

Becoming a party gives people a say in mediation and, if necessary, in court. To become a party to a native title claim you need to apply to the Federal Court within the three month notification period.

Parties will often have legal representation and will need to provide a reason why they should be party to a claim.

More information and forms are available on the Federal Court of Australia website:

http://www.fedcourt.gov.au/forms-and-fees/forms/native-title-regulations/form-5-guide

How does native title affect land dealings on LALC land?

There are some restrictions on Aboriginal Land Councils dealing with land that may be subject to native title.[11] Section 42 of the ALRA provides, with certain limited exceptions, that an Aboriginal Land Council must not deal with such lands '*unless the land is subject to an approved determination of native title (within the meaning of the Commonwealth Native Title Act).*'

This means that, if an Aboriginal Land Council wants to deal with land where native title has not been extinguished or has not been the subject of a determination of native title by the Federal Court, the Aboriginal Land Council will need to seek a determination of whether or not native title exists on this land from the Federal Court.

Again, the way in which the LALC came to own the land is relevant. <u>If the claim that resulted in the land being granted was made before 28 November 1994</u>, or if the LALC purchased or otherwise came to own the land, the Aboriginal Land Council will be able to deal with its land in accordance with the ALRA without requiring a federal court determination that native title does not exist on that land.

However, <u>if the claim that resulted in the land being granted was made after 28 November 1994</u> and there has not been any extinguishment of

[11] Section 42, ALRA

native title, the LALC must comply with section 42 of the ALRA and obtain a native title determination from the Federal Court of Australia before dealing with its land.

If the LALC owns land where native title has been determined to exist it will need to comply with the future act provisions of the NTA which set out the manner in which dealings that may affect native title may be done.

Can Aboriginal Land Councils have a say over proposed developments in areas where native title has been claimed?

Aboriginal Land Councils can still **have a say** in proposed projects or activities over areas where there are native title claims. Where activities propose to damage or destroy Aboriginal culture and heritage, Aboriginal Land Councils generally must be notified, unless native title has specifically been determined to exist over that area.[12]

Making the most of both systems

As noted above, land rights and native title both have different advantages.

It is important to recognise that native title rights and interests can co-exist over LALC land. This may be preferable to other options, such as Government ownership of land where the native title rights and interests exist (such as national parks).

If the local community is keen to use land rights and native title together, the order in which the claims are made is very important. As noted above, a land claim cannot be granted over land that is under native title claim. On the other hand, native title can be recognised over land that is claimed or owned by a Land Council in many cases.

NSWALC encourages LALCs and native title claim groups to work together to make the most of the two systems.

More Information

If you would like additional information about this document, please contact the **NSWALC** Policy and Research Unit or NSWALC Legal Services Unit on 02 9689 4444 or policy@alc.org.au.

If you would like information about native title processes and claims in NSW please contact **NTSCORP** (formerly NSW Native Title Services Ltd). NTSCORP also has a research section that may be able to assist in providing information on your personal genealogy.

Phone: 02 9310 3188
Freecall: 1800 111 844
Email: ntscorp@ntscorp.com.au
Website: www.ntscorp.com.au

More information on native title including videos, maps, and a range of fact sheets, guides and publications can also be accessed by contacting the **National Native Title Tribunal**:

Telephone: (02) 9227 4000
Freecall: 1800 640 501
Email: nswenquiries@nntt.gov.au
Website: www.nntt.gov.au

[12] *National Parks and Wildlife Regulation 2009,* Clause 80C