NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

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

19 January 2015

By email: info@alrc.gov.au

Dear Madam

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. It is the peak body of Local Aboriginal Land Councils (**LALCs**), of which there are 120 with over 22,000 members. 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.

The preamble to 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 people through claims over Crown land. The network of LALCs was established to acquire and manage land as an economic base for social outcomes in Aboriginal communities.

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.

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NSWALC provides support to the network of 120 autonomous LALCs that exist in NSW which are also governed by elected Boards. LALCs have the object to improve, protect and foster the best interests of all Aboriginal persons in the LALC's area and other persons who are members of the LALC.

General comments on the ALRC Discussion Paper

NSWALC acknowledges the significant delays and expense claimants' currently incur when attempting to meet the requirements set out in s 223 *Native Title Act* and the further requirements placed on claimants' by the interpretation of s 223 in *Yorta Yorta.*

Considering the criticism Australia has received on the international stage regarding its treatment of Indigenous people and the difficulties currently faced by native title claimants when trying to meet the tests in s 223, NSWALC supports amendments to the *Native Title Act* that make the native title system quicker and fairer, removing the barriers to obtaining native title.

NSWALC supports the need to amend the *Native Title Act* to ensure its compliance with international laws and human rights instruments. In particular NSWALC notes the recommendation made by the UN Human Rights Commission, Universal Periodic Review of Australia in 2011 to "*Reform the Native Title Act 1993, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life.*" [1] The Australian government's response to this recommendation was:

> The Australian government continually reviews the operation of the native title system through practical, considered and targeted reforms. Legislation provides for Indigenous Australians to access, and to perform cultural activities on, their traditional lands through statutory regimes and cultural heritage laws.[2]

However, as the ALRC discussion paper highlights, there are significant issues with both the *Native Title* regime, and the current laws related to protecting Aboriginal Culture and Heritage are failing.[3] NSWALC draws attention to Article 27 of the United Nations Declaration on the Rights of Indigenous People:

> States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and

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[1] *Report of the Working Group on the Universal Periodic Review – Australia*, 17th Session, A/HRC/17/10 (23/03/2011),19.
[2] Australia's Formal Response to Universal Periodic Review Recommendations, Recommendation 102, available at https://www.humanrights.gov.au/summary-upr-recommendations-and-responses.
[3] Australian State of the Environment Committee, State of the Environment Report 2011, Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities, Chapter 9: Heritage, available at: http://www.environment.gov.au/soe/2011/report/heritage/download.html/.

> resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[4]

This supports the need for the government to continue to examine and implement change to the current native title system.

Native Title and Land Rights in NSW

It is important that any amendments are developed with an awareness of the complex interaction of the *Native Title Act* and the ALRA, as well as the historical experience of Aboriginal people in NSW.

Legislative interaction between the NTA and the ALRA

The ALRA provides that claims by Aboriginal Land Councils to Crown land that is not lawfully used or occupied, not needed or likely to be needed for residential purposes or an essential public purpose or not the subject of a registered native title claim or determination must be granted.[5] A grant of a land claim under the ALRA results in a Land Council being granted an estate in fee simple.[6] Land Councils can deal with the land for example via sale or lease, in accordance with the ALRA.[7]

The grant of Crown land under the ALRA was the NSW Parliament's response to compensating Aboriginal people for dispossession. The fact that no traditional connection to land is required for land to be granted under the ALRA acknowledges the extent to which Aboriginal people in NSW have been moved from their lands and the complexity of connection to land in areas where people have been connected to Aboriginal reserves or missions and other areas for generations.

Generally, in native title law, the grant of a fee simple estate extinguishes native title absolutely and this extinguishment of native title is permanent and native title cannot be revived.[8] 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.

The ALRA was amended on 28 November 1994 (following commencement of the NTA) to provide that the fee simple estate granted under the ALRA is subject to any native title rights and interests existing in relation to the lands immediately before the transfer.[9] This means that land claims lodged after 28 November 1994 may result in a Land Council holding a fee simple estate that is subject to native title rights and interests.

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[4] UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples : resolution / adopted by the General Assembly*, 2 October 2007, A/RES/61/295, available at: http://www.refworld.org/docid/471355a82.html [accessed 19 January 2015], Article 27.
[5] *Aboriginal Land Rights Act 1983* (NSW) s36.
[6] Ibid s36(9).
[7] Ibid Division 4 of Part 2.
[8] *Fejo v Northern Territory (1998) 195 CLR 96.*
[9] *Aboriginal Land Rights Act 1983* (NSW) s36(9) and (9A).

Further, in circumstances where a Land Council holds a fee simple that is not subject to native title (for example because native title rights and interests had been extinguished by an act that occurred prior to the grant to the Land Council), the extinguishment can be disregarded in certain circumstances under s 47A of the NTA. If s 47A of the NTA applies to the land, any extinguishment of native title caused by the grant of the land to the Land Council or any prior act will be disregarded.[10] The native title rights and interests will be subject to the non-extinguishment principle which means that the rights and interests have no effect in relation to the fee simple granted under ALRA.[11]

Another point of intersection between the two Acts relates to the grant of land under the ALRA. Land claims made under the ALRA cannot be granted over land that is the subject of a registered native title claim or determination.[12]

Lastly, if a Land Council wants to deal with land that it owns in circumstances where native title has not been extinguished or has not been the subject of a determination by the Federal Court, the Land Council will need to seek a native title determination from the Federal Court before it can deal with the land. This is due to the requirement under s 42 of the ALRA that a Land Council must not deal with land vested in it subject to native title rights and interests unless the land is the subject of an approved determination of native title. This provision is the reason that there are so many non-claimant applications lodged by Land Councils in NSW.

Practical Interaction between the NTA and the ALRA

Although the *Native Title* Act and the ALRA, have coexisted for over 20 years until recently there has only been limited interaction in practice. To date, native title has only been determined to exist over 4 areas in NSW.[13] As a result there is still a significant amount of confusion and misunderstanding throughout communities in NSW, both Aboriginal and non-Aboriginal, about how the two regimes interact.

A practical example of where the two legislative regimes have worked together is the Gaagal Wanggaan (South Beach) National Park, which is highly culturally significant land in Nambucca Heads on the mid-North Coast of NSW. In 1984, Nambucca and Unkya LALCs made Aboriginal Land Claims under the ALRA over land in that area. The community then lodged the Gumbaynggirr People Native title Claim in 1996 over the same area. The intention was to maximise both legislative regimes to ensure control and protection of the culturally significant land.

The State initially refused to grant the land to the LALCs under the ALRA on the grounds that it was needed for the essential public purpose of nature conservation. However, following an appeal by the

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[10] *Native Title Act 1994* (Cth) s47A(2).
[11] Ibid s47A(3).
[12] *Aboriginal Land Rights Act 1983* (NSW) s42.
[13] *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 851 (15 August 2014); *Bandjalang People No 1 and No 2 v Attorney General of New South Wales* [2013] FCA 1278 (2 December 2013); *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847 (29 November 2007); *Mary Lou Buck on behalf of the Dunghutti People v New South Wales and Ors (Consent Determination)* [1997] FCA 1624 (7 April 1997).

LALCs in the Land and Environment Court of NSW, and lengthy negotiations, in 2010 the majority of the land was granted to the LALCs, including part of the land which was leased back to the State Government as the Gaagal Wanggaan (South Beach) National Park, managed by a Board of Aboriginal Owners under Part 4A of the *National Parks and Wildlife Act 1974*. In August 2014 the *Gumbaynggirr People*[14] native title determination was made by the Federal Court, which also recognised native title rights and interests in the area which includes Gaagal Wanggaan National Park.

This example demonstrates the fact that the regimes can be used together, in this case resulting in a layering of freehold rights (held by the Land Councils), native title rights (held by the Native Title Holders) and decision making/management rights (held by the Aboriginal Owners[15]) over the same land.

However, it also demonstrates the complexities that can exist in NSW where there can be significant overlap between LALC membership and the native title claim group, and where individuals need to navigate the differing roles, rights and responsibilities that arise under the NTA and ALRA.

Joinder

NSWALC reiterates the position it made in Submission 25 that it is important NSWALC and Local Aboriginal Land Councils be notified of any native title applications and become parties to the proceedings.

NSWALC submits that the provisions in the *Native Title Act* adequately address issues regarding joinder.

NSWALC also submits that the current discretion of the Federal Court under s 84(5) of the NTA is appropriate and believes it would not be in the interests of justice to limit the Court's discretion.

NSWALC supports the proposal to allow organisations that represent persons to be joined to proceedings (**Proposal 11-3**) as this could potentially be utilised by Local Aboriginal Land Councils to allow them to have NSWALC represent them and avoid the need for them to be joined. However, given the NSWALC and LALCs are autonomous organisations, the definition of ***represent*** in 'organisations that **represent** persons whose interest may be affected by the determination' would need to make clear that representation of LALCs by NSWALC was included in the scope of this definition.

Question 11-2 Should ss66(3) and 84(3) of the *Native Title Act* be amended to provide that Local Aboriginal Land Councils under the *Aboriginal Land Rights Act 1983 (NSW)* must be notified by the Registrar of a native title application and may become parties to the proceedings if they satisfy the requirements of s84(3)?

NSWALC supports the proposed amendments to ss 66(3) and 84(3) as it will encourage the timely joinder of parties and decrease the risk of the late joinder of parties.

In support of this NSWALC repeats its prior submission that:

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[14] *Phyball on behalf of the Gumbaynggirr People v Attorney General of NSW* [2014] FCA 851 (15 August 2014).

[15] 'Aboriginal Owners' of land, being Aboriginal people who are descended from the original inhabitants of the cultural area in which the land is situated and have a cultural connection to the land (see Division 3 of Part 9 of the ALRA).

> 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.[16]

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

[16] *NSW Aboriginal Land Council,* Submission 25.