



Local Aboriginal Land Council  
**DARKINJUNG**

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Our Ref:  
23 March 2016

General Manager  
Department of Planning & Environment  
Hunter and Central Coast,  
PO Box 1226,  
Newcastle NSW 2300

Dear Sir,

**DRAFT CENTRAL COAST REGIONAL PLAN (CCRP) -  
DARKINJUNG LOCAL ABORIGINAL LAND COUNCIL**

The Darkinjung Local Aboriginal Land Council thanks the Department of Planning & Environment for the opportunity to provide comment on the Draft Central Coast Regional Plan.

We would particularly like to acknowledge and thank the Department for recognition of the local Aboriginal community, with specific reference at Direction 2.7 of the Draft Plan and Actions 2.7.1. and 4.1.2 We would also like to thank the Department for individual consultation through this process.

The key objectives and challenges for Darkinjung LALC are simple;

1. Recognition and preservation of significant cultural sites within a broad cultural landscape, and
2. Provide the ability for the Aboriginal community to achieve economic self-determination in accordance with the objects and intent of the Aboriginal Land Rights Act 1983.

The implementation of the above objectives is far more complex.

Yours faithfully,

Sean Gordon, CEO



1. The Department will be aware that over recent years Darkinjung LALC has worked tirelessly in efforts to promote and preserve Aboriginal interests on the Central Coast. Some achievements include;
  - Development of a GIS, GoogleEarth based mapping system to identify all land interests held by Darkinjung LALC on the Central Coast, to identify all land owned, granted or subject to an Aboriginal Land Claim lodged by Darkinjung LALC;
  - Ongoing engagement with stakeholder agencies including Department of Premier and Cabinet, both Wyong and Gosford Councils, Department of Planning & Environment, Office of Environment & Heritage, Local Land Services and others;
  - Preservation of significant cultural sites including a significant woman's site adjacent to a proposed quarry facility at Calga, and registration of Aboriginal places within the Brisbane Water National Park;
  - Participation in Government inquiries into economic development in Aboriginal communities and Regional planning reforms.
2. Darkinjung LALC is fortunate to be in a position to drive such initiatives and be a leader in this area for Aboriginal communities throughout the State.
3. This role is made easier when organisations such as the Department of Planning recognise the challenges and opportunities facing Land Councils, and seek to include appropriate measures within the strategic planning framework to facilitate the attainment of objects as specified under the Aboriginal Land Rights Act 1983 (ALRA).
4. In respect to some key items of the plan, Darkinjung LALC notes the following relevant comments, and responds as follows:-

Draft Plan	Darkinjung LALC response
<p><i>"...To meet the projected housing demand over the next 20 years, an average of 1,980 new homes will need to be constructed each year. This is 590 more homes than the average annual housing production of 1,390 dwellings over the 19 years to 2014-15..." – page 19</i></p>	<p>Darkinjung has identified potential for over 1,500 residential lots, and is working to deliver those lots over the life of the plan, but calls on the Government to look for innovative solutions, respecting the objects and intents of the ALRA, to allow for delivery of those lots.</p> <p>The draft plan identifies the Warnervale/Wadalba locale as the target land release area for the duration of the plan. Whilst this area is a growth area today the plan fails to identify future growth areas such as Bushells</p>

	Ridge, Wyee, Lake Munmorah and Crangan Bay. The plan is intended to have a life of 20 years but the planning within is restricted to areas that are currently under development only.
<i>The tourism and hospitality industries are significant industries for the region – page 27</i>	We agree, and are currently exploring a number of tourism and hospitality related ventures.
<i>Protecting heritage items and places is important foremost because of the way that it contributes to the region's identity and visual character, but also because it can help to attract tourists.</i>	We agree, and are currently chairing a Working Party to strengthen Cultural Mapping on the Central Coast.
<i>Heritage is a non-renewable resource and the significance of heritage to the community should be appreciated, valued, protected and conserved for the benefit of current and future generations. -51</i>	Many registered cultural sites are located in scenic and/or upon environmentally sensitive lands, so development of cultural mapping will achieve multiple benefits to the Region.

#### **DARKINJUNG LALC**

5. The Department will be aware that Darkinjung LALC is the largest private land owner on the Central Coast, with a membership of over 800 and representing a broader Aboriginal population of over 12,000 people on the Coast.
6. The Land Council is a not-for-profit organisation, with legislated responsibilities to protect, foster and enhance the cultural and social well-being of its members and all Aboriginal people within it's area.
7. In terms of land ownership, Darkinjung LALC owns (or will soon have title to) approximately 6,000 ha, with a further 7,000 ha subject to Aboriginal Land Claims.
8. Within this land portfolio, current planning investigations in Wyong Shire alone have identified the potential for approximately 1,500 residential lots, over 40 ha of employment land and significant conservation offset lands. Despite some external delays Darkinjung LALC is working towards unlocking these opportunities. Unfortunately, the draft plan is limited in assisting the realisation of our plans as it has only identified the opportunities that are being developed today, not into the future. Land Release areas through the north of Wyong Shire (such as Bushells Ridge, Wyee, Lake Munmorah, Crangan Bay) have not been identified as priorities yet it is these very areas that will provide housing opportunities over latter part of the plans 20 year lifespan.
9. The draft plan is light on detail regarding future infrastructure on the Central Coast. It actually states "the draft plan aligns regional economic and housing outcomes to existing and planned infrastructure investments". Surely a regional growth plan that is to service and area of a 20 year period needs to address future infrastructure and

identify new opportunities for economic and housing outcomes.

10. Further opportunities are currently being explored in the Gosford LGA for residential, rural-residential subdivisions, cultural tourist opportunities and there are ongoing negotiations with national corporations for some commercial developments. Once again, however not all of these opportunities
11. A significant portion of the portfolio includes remote and topographically challenged land unlikely to be developed, and many other parcels containing registered cultural sites being only part of the 8000 recorded sites over the broader Central Coast.

### **CULTURAL RECOGNITION WITHIN THE DRAFT PLAN**

12. Darkinjung LALC commends the Department for Direction 4.1 of the draft Plan, which acknowledges and recognises the need to protect and manage the Regions environmental and heritage values, and specifically Action 4.1.2 which discusses the identification and protection of Heritage values.
13. The Central Coast region is rich in Aboriginal cultural sites and values. Mount Yengo, immediately to the west of the region is very significant to all Aboriginal people. It's near location and our coastal environment has resulted in the region (in particular the southern area) having a matrix of interwoven story lines that provides a population of sites that compare to all regions of the continent (including the northern territory). The draft plan fails to identify the importance of this rich cultural network and the value that it provides to the whole of the region as an economic opportunity.
14. The Department will also be aware of the establishment of a Culture Mapping Working Group, which includes the Department of Planning and other stakeholder's agencies. Darkinjung LALC looks forward to the development of mapping and other tools through this Work Group, to raise awareness and protect Aboriginal cultural heritage across the Region.

### **PLANNING CONSTRAINTS PREVENTING ECONOMIC SELF DETERMINATION**

#### **Disjoint between planning & Aboriginal legislation**

15. Darkinjung LALC commends the Department for Direction 2.7 of the draft Plan, which seeks to strengthen the economic self-determination of Aboriginal communities. However, we would like to draw your attention a major disjoint between planning laws and the objects and intent of the ALRA.
16. The NSW Aboriginal Land Rights Act (ALRA), 1983 was 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 laying the basis for a self-reliant and more secure economic future for our continent's Aboriginal custodians (as quoted by the Minister for Aboriginal Affairs Frank Walker when presenting the proposed Act to parliament on March 24, 1983). The first review of the ALRA in 2012 went further stating that the Act recognised "that dispossession of Aboriginal people's land took with it the basis of their self-sufficiency."

17. In a recent submission to the inquiry into economic development in Aboriginal communities, the New South Wales law society identified that for one Land Council, approximately 72% of its holding was to be rezoned environmental conservation, and of the remaining land 82% was to be designated environmentally sensitive.
18. This high ratio of environmentally zone land – which limits the potential to unlock economic benefit intended under the ALRA, is also consistent with Darkinjung's holdings across the Coast, and likely to be the same for many other Land Councils throughout the State.
19. To remedy this situation, the New South Wales Law Society, amongst others, has floated the idea of planning reforms including introduction of a State Environmental Planning Policy to address this issue. Darkinjung LALC has also suggested to Government a number of other possibilities to promote economic development in Aboriginal communities. Copies of these submissions have been attached to this submission for further background reading.
20. We invite the local office of the Department of Planning and Environment to participate in a process which looks at all possible opportunities to help Aboriginal communities achieve economic independence.

#### **Conversion LEP's - negative impact on LALC's**

21. Two current examples where rezoning by Local Government/Department of Planning has impacted on the ability for Darkinjung LALC to unlock economic opportunity include the following;

- **Case example 1 - Land at Halekulani** in the Wyong LGA was previously zone 7(b) Scenic Protection, but was rezoned to E3 Environmental Management as part of Wyong Council's conversion LEP in 2013. In this case the former zone permitted a *caravan park*, but the new zone of E3 did not.

Darkinjung LALC took the pre-emptive move to lodge a development application under the former zone, and after 3 years, 8 months and many hundreds of thousands of dollars, has now secured development consent for a proposal, to which the Land Council would've otherwise lost opportunity under zoning changes.

- **Case example 2 - Land at Kariong** was zoned from 5 (Special uses) to E2 Environmental Conservation, as part of Gosford City Council's conversion LEP in 2014. Land zone E2 has limited development potential and has indirect planning ramifications by further limiting development potential such as the application of SEPP (Housing for the aged or people with a disability).

Darkinjung LALC is currently preparing background reports with the intent of submitting a rezoning application to reinstate lost development entitlement on this site

22. Summary maps of the above example are attached. In both cases, Darkinjung LALC objected to the proposed zone amendments, but were not supported by Council officers.

#### **RECOMMENDATION:**

Introduce a **New Action 2.7.2**, which follows on from just identifying priority sites, numerous of which have already been identified in the Darkinjung LALC region, **To implement a formal and collaborative process which seeks to unlock identified opportunities, having regard for relevant planning and environmental legislation AND the objects and intent of the Aboriginal Land Rights Act 1983.**

#### **BIODIVERSITY**

23. The Draft CCRP refers to the Draft Central Coast Biodiversity Management Plan, but does not provide further detail on this parallel and relevant document.
24. Similar to the previous plan in 2008 and the North Wyong Shire Structure Plan we are moving forward again with a strategic blueprint, without clear direction or position on intended Regional biodiversity outcomes.
25. The consequence of not having the timely release and consideration of parallel documents (or incorporated into a single Plan) is the potential for competing land-use interests as we have experienced in the North Wyong Shire Structure Plan – where identified Regional green corridors were in conflict with development proposal for much needed housing, State significant mineral resources, and other significant infrastructure.
26. Figure 10 of the CCRP identifies Regional Green Corridors, and whilst it is understood the Department may have intended a very broad brush approach, it offers little practical benefit to users of the document.
27. This has proven to be a contested issue in the past for Darkinjung LALC and it is hoped that a final document will incorporate, or provide further detail on the integration of planning and environmental outcomes.

#### **GOVERNANCE**

28. The introduction of a Coordinating and Monitoring Committee, as discussed on page 13 and in Figure 2 is commended.
29. The Committee has a similar constitution to the inter-agency taskforce, chaired by the Department of Premier & Cabinet, established under REDES. This taskforce was a positive move by Government to encourage greater cooperation and awareness to the delivery of Darkinjung LALC proposals.
30. Darkinjung LALC recognises the opportunities ahead for the Central Coast as both Gosford and Wyong Councils propose to merge creating the biggest Council in the State, being home to well over 320,000 people with a projected population of 410,000 by 2036.
31. The boundary of the amalgamated Local Government body will roughly coincide with the boundary of a single Local Aboriginal Land Council – Darkinjung.

32. A single Regional Plan will cover the same area, administered by the Department of Planning and Environment.
33. Collectively, we have the opportunity and ability within to deliver the vision, goals and actions identified in the Draft Plan.

**RECOMMENDATION:**

Darkinjung respectfully requests that it be included on any future Committees where strategic decisions are made over Aboriginal Land Council land within the Central Coast Region

**MOVING FORWARD**

34. In the forward to the Draft Plan, Parliamentary Secretary for the Central Coast, Scot MacDonald MLC, summarises the vision, goals and actions that are;
  - geared to growing the regional economy,
  - accelerating housing supply, and
  - protecting and enhancing the natural environment.
35. Darkinjung LALC believes that it has an essential role to play in achieving these goals. We are the largest private landholder in the region. We have identified 20 years of potential development across the region. We have identified potential corridors and landholdings that will secure unique natural environments into many future generations. Within the ALRA we have an obligation to protect the rich and valuable Aboriginal culture and heritage of the region. Within the ALRA we have an obligation to provide social benefits such as housing and employment to the fast growing Aboriginal community within the region.
36. All of these points are in line with the intent of the draft plan. We do not, however, see our essential role reflected in the draft plan in sufficient detail or clarity. The regional plan guides all levels of government in regard to what will happen over the next 20 years. A plan that does not emphasise a Land Councils value to a region as described above will not guide local councils to realize the potential of a Land Council. A case in point being the last regional growth plan which locked a large share of our land away as environmental land holdings.
37. The local councils of this region have often referred to the previous plan in our dealings with them, usually to the detriment of opportunities that we have identified. This plan, as with the previous plan, addresses opportunities that have already been identified by local government authorities but fails to be bold enough to look to the future. This will not improve the process of unlocking land via existing planning processes to develop opportunities throughout the region.
38. Darkinjung has to date had little success in negotiating planning outcomes with the local government authorities of the region. We had hoped that this draft plan would identify future opportunities that were in line with the planning we have already completed. The existing document will not assist us in this process. We can only hope that the amalgamation of Gosford City Council and Wyong Shire Council results in an improved relationship moving forward.



**Submission  
No 11**

**INQUIRY INTO ECONOMIC DEVELOPMENT IN  
ABORIGINAL COMMUNITIES**

**Organisation:** Darkinjung  
**Date received:** 12/10/2015

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## **Standing Committee - Terms of Reference**

1. That the Standing Committee on State Development inquire into and report on strategies to support economic development in Aboriginal communities in New South Wales, including but not limited to:
    - (a) Options for sustainability and capacity building of NSW Aboriginal communities into the future, utilising existing community networks and structures
    - (b) Leveraging economic development support, including provided by the Commonwealth Government and the private sector
    - (c) Establishment and sustainability of Aboriginal owned enterprises.
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## **Annexure**

1. Economic Development Framework for NSW Local Aboriginal Land Councils
2. Empowered Communities, Empowered Peoples Design Report
3. Sustainable Land Strategy
4. Discussion Paper Aboriginal Land Claims Process

**Darkinjung submission to Standing Committee on State Development Inquiry into and report on strategies to support Economic Development in Aboriginal communities in New South Wales**



The Director  
Standing Committee on State Development  
Parliament House  
Macquarie St  
Sydney NSW 2000

Dear Sir,

The Darkinjung Local Aboriginal Land Council (Darkinjung) commends the NSW Government on its initiative in deciding to inquire into and report on strategies to support economic development in Aboriginal communities in NSW.

The object of economic development is to empower and give people the option to live their lives as they wish. For some this will be having the middle class life in the suburbs. For others it may be living the high life. For many, it will be living in safe, stable communities where they have steady and secure employment, own their own home, get on with their neighbours, are able to send their kids to school and watch them get a good education, have time to enjoy life and are able to provide for their needs themselves without being unduly stressed with money worries. The comments below are largely focused on the latter group, most of whom are currently seen as battlers, particularly where they are living in regional or city fringe areas.

The challenges of city living are different to those of the country or in government terms remote, rural and urban. In urban regions, the costs are generally much greater and therefore incomes have to be higher to enjoy the same economic standard of living. In the rural or remote regions, employment is often harder to find and there is the real challenge of ensuring that kids (and their parents) do not drift into government dependant welfare which in turn leads many Aboriginal people down a path of low socio economic entrapment, further leading to boredom, despair and substance abuse. In this regard, economic development is directly interlinked with cultural and social development. For Aboriginal people Economic development becomes meaningless without cultural and social investment.

For many Aboriginal people in NSW the right to develop culturally, socially and economically was denied due to past government policies. Aboriginal people were dispossessed from their lands and refused the same rights as other Australians.

Darkinjung's experience in economic development to date has been uneasy and costly. "Our pathway and our right to economic development" to date is regrettably been "through the NSW Land and Environment Court".

I would welcome the opportunity to appear at the public hearing and again we thank the committee for the opportunity to have input into the inquiry to support economic development in Aboriginal communities in NSW.

Regards

Sean Gordon, CEO

Darkinjung submission to Standing Committee on State Development inquiry into and report on strategies to support Economic Development in Aboriginal communities in New South Wales

### ***Darkinjung Local Aboriginal Land Council***

1. In 1983 a significant shift in Government thinking led to the establishment of the NSW Aboriginal Land Rights Act (ALRA), which is arguably the greatest vehicle that Aboriginal people in NSW have to achieve economic independence and self-determination.
2. Darkinjung was formed in May 1984 under the provisions of the ALRA. That Act was established for the purpose of compensating Aboriginal people in NSW for the dispossession of their lands and to build an economic base.
3. To date the ALRA has been successful in some extent in compensating Aboriginal people for loss of land. Where it has failed is in its inability to convert land into economic opportunity. Which I will address further in the submission.
4. Located mid-point between the cities of Sydney and Newcastle, Darkinjung's area covers the whole of the Central Coast, with boundaries coinciding with the Local Government boundaries of Gosford City and Wyong Shire. Total area is 1,760km<sup>2</sup>, with a total population of approximately 312,000, of which approximately 12,000 have registered as being of Aboriginal descent.
5. Since formation, the Darkinjung has grown to be one of the largest and fastest growing Local Aboriginal Land Council's (LALC) in the State, with a direct membership exceeding 710 people, but also representing a broader Aboriginal population on the Central Coast.
6. During this time Darkinjung has been successful in numerous land claims made under the provisions of the ALRA, and now holds a portfolio of approximately 3,500 hectares – making it the largest non-government landowner on the Central Coast. This land portfolio is expected to grow over the coming years as further land claims are determined, with over 14,000 hectares currently subject to land claim applications.
7. As 1 out of 120 LALCs in NSW Darkinjung is one of the most progressive LALCs in the State. Darkinjung has taken a strong leadership position and have developed a good understanding of the challenges Aboriginal communities face in achieving *social, cultural* and *economic* outcomes for their community and members.
8. Darkinjung's submission aims to respond to the inquiry from two perspectives; one being Darkinjung's own journey and demonstrated experience of economic development and the second being what Darkinjung has determined are barriers to economic development for Aboriginal people and communities.
9. The experiences, challenges and opportunities Darkinjung has encountered as it embarked on its journey to achieve economic independence commenced more than a decade ago with the selling of a parcel of land for \$42million now known as Magenta Shores. Darkinjung was financially in a position where it could deliver real and tangible benefits to its community and members.

Darkinjung submission to Standing Committee on State Development inquiry into and report on strategies to support Economic Development in Aboriginal communities in New South Wales

10. Like many rags to riches stories, Darkinjung set out with all the best intentions for its members and community and quickly focused on ways to improve the disparity between Aboriginal and non-Aboriginal people.
11. However, Darkinjung at the time failed to factor into its strategy the limitations of the capability, capacity and knowledge of its members and the community to achieve their aspirations. Darkinjung became heavily dependent on external parties to deliver outcomes, i.e. lawyers, accountants and other advisors. The dependency on external experts led to the members having less control of the daily affairs, while investments and jobs creation was focussed outside the region of Darkinjung. During this period Darkinjung and the community lost over \$12million, which eventually led to Darkinjung being placed into administration.
12. The experiences of Darkinjung are not unique; other LALCs have experienced similar disappointment and will continue to do so. It is important that communities and LALCs are allowed to make mistakes, however it is more important that they learn from their mistakes to ensure that these mistakes are not repeated. This has resulted in a land portfolio of about 3,500 hectares, another 14,000 subject to land claims and over \$30 million cash on deposit with banks.
13. Today Darkinjung has learnt from its past and focussed heavily on ensuring that the organisation never backslides by adopting a shared vision, implementing strong governance, accountability, transparency and leadership.
14. Darkinjung has reviewed its success in detail and has written a Blueprint "*Economic Development Framework for NSW Local Aboriginal Land Councils*" that clearly articulates and demonstrates what it takes to be a successful LALC (Annexure 1).
15. Our success is not attributed to any one factor; in fact it is a range of factors that have allowed Darkinjung to grow into a successful and prosperous LALC delivering real benefit to our community and members.

#### ***Darkinjung Development Experience***

16. A significant burden on LALCs is the limitation the NSW ALR Regulations 2002 places on *investment of money in LALCs Accounts*. It provides:

*Money to the credit of an account established by a Local Aboriginal Land Council under section 152 of the Act may be invested in:*

- a. *any public funds or Government stock or Government securities of the Commonwealth or any State of the Commonwealth, or*
- b. *any debentures or securities guaranteed by the Government of New South Wales, or*
- c. *any debentures or securities:*
  - i. *issued by a public or local authority, or a statutory body representing the Crown, constituted by or under any law of the Commonwealth, of any State*

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*of the Commonwealth, of the Northern Territory or of the Australian Capital Territory, and*

*ii. guaranteed by the Commonwealth, any State of the Commonwealth or the Northern Territory, or*

*d. interest bearing deposits in an authorised deposit-taking institution.*

17. Imposing severe restrictions on how a LALC can invests creates further challenges and burdens, especially considering that interest on bank deposits is currently sitting at around 2.70%. Add to this the Global Financial Crisis of 2008 and returns on interest bearing deposit have been consistently low.
18. These restrictions on LALCs can only be seen as discriminatory as other statutory bodies are not burdened with these types of conditions on investments, including the NSW Aboriginal Land Council (NSWALC) and Local Government Authorities (LGAs).
19. Because of the stringent investment conditions on LALCs, Darkinjung has over recent years spent considerable effort and resources to better understand and manage its extensive land portfolio to identify greater opportunities to grow our assets.
20. This included the development of a strategic *Community Land and Business Plan* which guides the organisation's aspirations and development agenda.
21. In addition to this, Darkinjung engages specialist consultants to examine environmental and other issues which may impact on future land uses ensuring that we are fully informed about opportunities and barriers affecting the use of its land.
22. Darkinjung has also developed an asset management system and a mapping database, using the *GoogleEarth* platform, which has proven invaluable for its land management function and which has allowed it to maximise land opportunities within its area.
23. In recent years, Darkinjung has commenced its journey for sustainable economic independence, and is currently working towards the delivery of a portfolio with the potential to provide over nine hundred million dollars (\$900 million) economic stimulus into the Regional economy.
24. Current projects include but are not limited to the following;
  - a. "Menindee Ridge" estate at Blue Haven – a 109 lot residential estate;
  - b. Residential unit development within estate to provide for Member Affordable Housing;
  - c. Investigations into development of preschool within estate;
  - d. "Guruwarang Waters", a 99 site manufactured home estate, at Halekulani;
  - e. A multi-site rezoning application, with the potential to yield 1500 residential lots and 42 hectares of employment land;
  - f. Negotiated commercial lease for a period of 60yrs for the development of a motorsports precinct (CASAR);
  - g. Partnership for private school campus (K-6) with Barker College;

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- h. Partnership with existing provider for aged care accommodation with the Keith Payne Hostel;
  - i. Ongoing commercial negotiations for the delivery of a service station and fast food restaurant facility;
  - j. Negotiations of a long-term lease for delivery of a Supermarket (National company) and a number of specialty stores; and
  - k. Ongoing negotiations with 3<sup>rd</sup> parties and neighbours who have encroachments onto LALC owned land.
25. Whilst there has been some limited recognition for some rights for Aboriginal people, the legislation continues to evolve in a manner that does not adequately promote or assist Aboriginal communities to achieve economic independence – particularly over land gained via the ALRA or recognised being held under Native Title. This land is often the only remaining vegetated land (containing a myriad of threatened species), and is typically located adjacent to similar lands that have been cleared since European settlement. Examples of laws containing constraints that particularly impact on the commercial potential of Aboriginal owned land includes:
- a. 1967 Constitutional amendment to recognise Aboriginal people
  - b. 1979 Environmental Planning and Assessment Act
  - c. 1983 NSW Aboriginal Lands Right Act
  - d. 1995 Threatened Species Conservation Act
  - e. 1993 Native Title Act
  - f. 2003 Native Vegetation Act
26. Reform to planning legislation, to reflect the self-determination intent of the ALRA, would go some way towards assisting Aboriginal communities in achieving sustainable economic goals.
27. Darkinjung's economic delivery strategy referred to above (which has the potential to deliver over 1,500 new homes on the Central Coast and nine hundred million dollars (\$900 million) worth of direct investment in the local economy over the next 25 years), incorporates plans to secure regional conservation/environmental corridors and deliver social benefits to our members in the form of home ownership, local jobs, business creation, development of pre-schools and aged housing, social support services and the preservation and enhancement of cultural sites and knowledge.
28. Having already commenced this journey for sustainable economic independence, we have identified four key matters, which if implemented would assist Darkinjung LALC in the attainment of the above.
29. The recommendations to the Committee are:
- a. *Development of a Geographical Information System (GIS) to help identify what land LALC's own, have claimed and not yet determined, or what might be claimable;*

- b. *Appointment of a Government Facilitator (e.g. DPC, UrbanGrowth) who has appropriate experience to help deliver LALC economic development goals;*
  - c. *Development of a strategy that unlocks 'low hanging fruit', (being projects and assets capable of rapid development), and in doing so provides financial independence, knowledge and opportunity for further projects within the Aboriginal community; and*
  - d. *Provision of appropriate environment planning instruments and policies, which recognise the Preamble and purpose of NSW ALRA, and the unique nature of LALC's, along with the opportunities as well as the limitations within Aboriginal communities and organisations i.e. Aboriginal Land SEPP.*
30. If LALCs in NSW are to achieve similar success to Darkinjung then we must identify ways for these LALCs to access capital to realise opportunities on their lands. The source of capital could include NSWALC investment account or from strengthened creative partnerships with financial institutions.
31. In addition to the financial capital needed there is also a significant challenge for Aboriginal land owners to attract human capital to assist in increasing capability and organisational capacity. A successful program that has been operating for more than fifteen years is the Jawun program, which is a tripartite partnership between corporates, governments and Aboriginal organisations [www.jawun.org.au](http://www.jawun.org.au).

### **Empowered Communities**

32. Darkinjung has played a critical role in Empowered Communities which seeks to create a genuine and balanced partnership between Indigenous organisations, government and corporate Australia, where everybody is working together on a level playing field and towards a shared strategy. (Annexure 2)
33. The Empowered Communities report is the culmination of 18 months of engagement and design work by Indigenous leaders, communities and organisations across the eight Empowered Communities regions. In it, we propose a range of reforms that build on decades of effort by Indigenous people to reclaim control in driving our own priorities for development.
34. There needs to be a fundamental shift away from the traditional social policy framework in which Indigenous affairs has been conducted, to a comprehensive Indigenous Empowerment agenda. It is a long-term reform that requires a new partnership of Indigenous leaders, governments and corporate leaders in order to succeed, with all partners prepared to play their roles in a different way. We seek formal agreement to a 10-year Indigenous Empowerment policy framework.
35. Empowerment, in our meaning, has two aspects. It means Indigenous people empowering ourselves by taking all appropriate and necessary powers and responsibilities for our own lives and futures. It also means Commonwealth, State and Territory governments sharing, and in some cases relinquishing, certain powers and

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responsibilities, and supporting Indigenous people with resources and capability building.

36. The principle of subsidiarity - that authority to decide and act should rest at the closest level possible to the people or organisations the decision or action is designed to serve - is an important element in our concept of Indigenous Empowerment. Together with Indigenous self-determination and the mutual rights and responsibilities shared between Indigenous people and governments, it is at the heart of our Indigenous Empowerment reforms.
37. Our Indigenous Empowerment framework is based on the premise that Indigenous Australians have a right to development, which includes our economic, social and cultural development as families, individuals and communities and as Indigenous peoples. It recognises the primacy of the local nature of peoples and places, and is aimed at the empowerment of the families and individuals connected to those peoples and places. We recommend national and regional institutions only to support an enabling framework for place-based development agendas.
38. There are two parts to our development goal. They are each of equal importance, and are to be pursued concurrently and constantly tested to determine whether we are most productively using available resources and opportunities.
39. First, our goal is to close the gap on the social and economic disadvantage of the Indigenous Australians of the Empowered Communities regions.
40. Second, we aim to enable the cultural recognition and determination of Indigenous Australians of the Empowered Communities regions so that we can preserve, maintain, renew and adapt our cultural and linguistic heritage and transmit our heritage to future generations.

#### ***Government (Local, State and Federal)***

41. Governments have a significant role to play in advancing economic development and investment in Aboriginal communities, and although governments may have good intentions those intentions are not always demonstrated by their actions.
42. During the past twelve months there has been a major shift by government to create greater opportunities for Aboriginal people. These can be seen in the NSW Procurement Policy and the Federal Governments Indigenous Procurement Policy. However these policies do not automatically lead to change nor do they work effectively if they are not embraced by the departments.
43. The best example of a failed policy is the NSW Aboriginal Participation in Construction policy, which has been around for more than 10 years with limited success to create sustained procurement and jobs for Aboriginal people, especially those Aboriginal people within the building Industry.

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44. However, this may change with the increasing presence of business enablers such as Supply Nation and the NSW Indigenous Chamber of Commerce to help facilitate opportunities for Aboriginal businesses to secure procurement.
45. If governments stay true to their policies we can expect to see a substantial increase in Aboriginal business over the next ten years attracting their fair share of procurement opportunities from government departments.
46. However this strategy will only address one piece of the puzzle as there are capability gaps that exist amongst Aboriginal people. In many Aboriginal communities there are people entering into small business for the first time. Whereas many non-Aboriginal businesses practices have been passed down from one generation to the next, by reducing risk over time and transferring skills, knowledge, experience and goodwill. For an Aboriginal the first step in many cases is fraught with considerable risk both, personally and financially.
47. If governments are serious about Aboriginal economic development they must commit to structural change, greater resources, increased education, tax incentives (relief), Aboriginal state environmental planning policy (Aboriginal SEPP) and to amend existing legislation and policies that are unduly burdensome.
48. One Government initiative that has facilitated Darkinjung's drive for economic independence is the creation of an *Inter-agency Taskforce*, chaired by the Department of Premier & Cabinet, and which includes the Department of Planning, Office of Environment & Heritage, Trade and Investment, & Local Government Authorities. This taskforce has provided the opportunity to have round-table discussions with key stakeholder agencies on Darkinjung's development proposals.
49. To further promote this initiative, Darkinjung, in consultation with the eight LALC's of the Hunter region and UrbanGrowth NSW (Newcastle office), in response to Regional planning reviews, prepared a discussion paper, the "*Sustainable Land Strategy*" (annexure 3). This document identified the continuing role of the Department of Premier and Cabinet as facilitator, but also the need/opportunity for the Governments principal development agency, UrbanGrowth NSW, to partner with Land Councils to help unlock regional development and conservation opportunities.
50. Darkinjung's experience to date, including its participation on the *Inter-agency Taskforce*, and discussions with UrbanGrowth NSW, is that the current suite of policies/legislation does not foster economic development for Aboriginal communities.
51. Furthermore the current legislation/policies fail to recognise the unique position of Aboriginal land owners. LALCs are not ordinary private developers. Instead,
  - a. *LALCs are fixed to a regional/cultural boundary, therefore limiting opportunities to undertake economic development.*
  - b. *LALCs are not-for-profit entities whose whole objective is to improve the lives of Aboriginal members of their region through community benefit schemes.*

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52. Further to this LALCs are subject to greater public scrutiny through the local planning process and become the subject to increased community objection, especially during public exhibition of development applications. A case in point being Darkinjung's Halekulani DA which attracted a record number of DA objections being 2200, exceeding previous objections, across the whole of the Central Coast by more than 1500.
53. By contrast the Wallarah 2 Coal Mine DA received 272 objections, further demonstrating the increased scrutiny Aboriginal land owners are under.
54. The existing local planning process not only allows for overt public discrimination to occur, it also allows local governments (Councillors) to reject a DA because of increased public objection, forcing LALCs to appeal to the Land and Environment Court (LEC) adding substantial costs to the development.
55. In Darkinjung's case our original development application for a manufactured home estate cost two hundred thousand dollars (\$200,000). To appeal the decision of Wyong Shire Council in the LEC cost an additional five hundred thousand dollars (\$500,000).
56. Adding to our negative experiences is the recent LEC case Darkinjung Local Aboriginal Land Council v Wyong Coal Pty Ltd, where a coal company believed it had rights to lodge a development application over our land.
57. Darkinjung challenged Wyong Coal in the LEC and were successful in protecting our interest in our lands under the Regulations to the Environmental Planning and Assessment Act 1979 (EPAA). To date Wyong Coal believes that the NSW government will repeal the regulation to override the LEC decision.
58. The NSW planning Minister has not determined Wyong Coal's development application.
59. Darkinjung today is left with the belief that realising "Our Right to Economic Development necessarily means a trip to the NSW Land and Environment Court". Regrettably this pathway adds significant cost to our developments and further reduces our investment in our community and people.
60. In Darkinjung's experience we believe that the current 'toolbox' does not contain the right 'tools' - that Government planners, policy makers and local governments are not equipped to facilitate outcomes for a unique and significant land owner - that is more than just a cultural advisor and custodian for environmental lands.
61. Two key areas requiring review are enabling planning provisions to reflect the unique nature of Aboriginal land councils, and improvements to the land claims process.

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## **Planning Reform**

62. The NSW government is encouraged to create an Aboriginal Land State Environmental Planning Policy (SEPP) which applies to LALC and related land and overrides existing planning controls replacing them with more flexible controls that promote the attainment of economic independence established by ALRA. This may include a number of measures including:
- a. *Where appropriate payment of s.94 contributions by way of land or environmental offsets be offered in return for the planning concessions;*
  - b. *Recognition for social initiatives, such as homes provided under a home ownership scheme, provided by a Land Council; and*
  - c. *Provides for Joint Regional Planning (JRPP) or Planning and Assessment Commission (PAC) assessment of projects over \$2 million.*
63. Numerous precedents from existing SEPPs can be fashioned into one that is tailored to address critical issues facing LALCs, having regard to the types of land returned under the ALRA. Notable examples include SEPP (Infrastructure) which is structured in a manner to enable and facilitate the delivery of infrastructure and services and SEPP (State & Regional Development) which, together with relevant provisions of the EPAA, is designed facilitate the approval of major projects and includes special provisions for Bio-banking (Sec 89I) and "switch off" other legislation (Sec 89J)

## **Improving Land Claims**

64. Develop a process to 'fast track' Aboriginal land claims where it can be demonstrated that;
- a. *the land subject to Claim has the ability, subject to other planning actions, to result in economic, cultural, environmental or social outcomes for the Land Council and broader community, or*
  - b. *Is located within a strategic planning corridor.*
65. Introduce a period to the land claims process where, if the land claim is not determined within a prescribed period, the land council may 'appeal' to an arbitrator – similar to 'deemed refusal' provisions of the EPAA.
66. Provide additional resources to the Land Claim Division of Crown Lands to help reduce the back log of outstanding Land Claims and particularly to facilitate priority processing.
67. Darkinjung has prepared a discussion paper, previously tabled to Government, which highlights the current problems with the land claims process, and the opportunity, in conjunction with the above, to provide significant cost savings to Government and certainty for planning and policy decision makers. (Annexure 4).

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### **Private Sector**

68. Darkinjung has engaged with Jawun for the past four years and to date the partnership has contributed significant investment into the region in capability and capacity. We estimate that corporate secondees provided through Jawun have volunteered more than 24,000 hours working in our community over the past four years.
69. This relationship and experience has been invaluable to the development and growth of our people, organisations and community. The partnership engages all parties in a mutual exchange of ideas, and introduces corporate secondees to the Aboriginal communities.
70. The Jawun program as literally fast tracked our community's aspiration and plans by up to three years, and as further created networks with the corporate sector.
71. The exposure of Aboriginal people and communities to the corporate sector has been beneficial in increasing organisational and individual capability and capacity
- a. *Invite major corporations to partner with land councils to second business development officers to LALCs and to take Aboriginal youth on as short term interns for work experience in a variety of roles.*
  - b. *Invite corporations to partner with LALCs in developing their RAPs whereby they consider how they might apply some financial or, especially, non-financial resources in supporting the ALC's Community Land and Business Plan and the wider aspirations of the community for economic development. This would include invitations to corporations to participate in the life of the community; sporting events, family fun days. (Darkinjung already does this very well).*

### **Other Measures**

72. The list of opportunities for corporate partnerships is quite eclectic and directed to different aspects of the problem. There are many other possible options and variations on the above. In focusing on matters that are either within the scope of land councils or where they are well placed to advocate for change. We have not dealt with health, the myriad of other options capable of improving education outcomes, or peace building and crime reduction (Justice Reinvestment) options which are also fundamental. I have also not addressed options for promoting cultural enrichment, which are fundamental to people's sense of wellbeing and which are at least partly within the remit of land councils.
73. There is a myriad of other initiatives to assist with the attainment of economic development in Aboriginal communities. A brief overview is provided in the following points.
74. Other forms of improving economic outcomes in Aboriginal communities are through tax targeted investments and incentives, where governments explore new ways to support Aboriginal people in employment, businesses and enterprises development. For example:

Darkinjung submission to Standing Committee on State Development Inquiry into and report on strategies to support Economic Development in Aboriginal communities in New South Wales

- a. *Encourage Government to invest in Aboriginal land through infrastructure projects such as rail, tele communications facilities etc.*
- b. *Waive payroll tax on Aboriginal employers and employees from remote and rural areas for first 3 years after coming off welfare.*
- c. *Develop tax incentives for Aboriginal businesses, especially during the first five years when businesses are most vulnerable.*
- d. *Offer tax concessions for Aboriginal start-up businesses, including a lower rate of company tax for family businesses and tax concession charity status for community owned businesses, even where they distribute profits. A condition of attracting the concessions would be engaging an accredited business adviser to assist with planning and regular financial health checks.*
- e. *Offer targeted (select) government procurement in remote and rural regions to Aboriginal businesses. Special Commonwealth entitlements paid directly to Aboriginal employees who have come off welfare for staying in the job. Such entitlements could escalate for the first 12 months then stabilise for the next 2 years before tapering back to zero over the fourth year.*
- f. *Run family financial literacy and planning programs/workshops for members. Ideally this would get to a level of mentoring on education and employment matters as well as budgeting, banking, home loans and finance, insurance etc.*
- g. *Develop community benefit schemes (either at State or local levels) in partnership with the private sector to offer incentives (e.g. holidays) to successful school leavers in highly disadvantaged areas with smaller benefits to encourage kids through each year of school.*

75. Develop a partnership with the Property Council, Urban Development Institute of Australia (UDIA), and other professional bodies to educate both Land Councils and private developers, and practitioners on the process for and potential benefits of working with Land Councils.
76. Develop partnerships between Local Government organisations (e.g. Principles of Cooperation Agreement) to promote the sharing of information between organisations and improve working relationships between the two organisations, who are often the largest landowners in the locality.
77. Promote and foster relationships with the Department of Planning & Environment to ensure government planners are aware of the role, aspirations and extent of land holdings of Land Councils within planning sub-regions.
78. It has been Darkinjung's experience that all too often the economic aspirations of a LALC (leading social, cultural, community and environmental outcomes) are not understood by Government planners, who traditionally have viewed land controlled by a Land Council as default conservation lands, with the principal role of land council seen as being cultural advisors.

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79. Hold a carefully planned roundtable with banks and major developers to raise awareness of issues for all parties in dealing with land council land and explore opportunities for novel financing and joint venturing.
80. Develop a model joint venture agreement between land councils and developers for simple developments of LALC land; aimed at shared risk and reward but also skills transfer and mentoring.
81. Encourage LALC CEOs and board members to participate in local business forums and civic associations, chambers of commerce, Rotary etc.

**Submission  
No 13**

**INQUIRY INTO ECONOMIC DEVELOPMENT IN  
ABORIGINAL COMMUNITIES**

**Organisation:** Law Society of New South Wales

**Date received:** 26/10/2015

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THE LAW SOCIETY  
OF NEW SOUTH WALES

Our ref: IndgIssuesJFEvk:1054205

23 October 2015

The Director  
Standing Committee on State Development  
Parliament House  
Macquarie St  
Sydney NSW 2000

By email: [state.development@parliament.nsw.gov.au](mailto:state.development@parliament.nsw.gov.au)

Dear Director,

**Inquiry into Economic Development in Aboriginal Communities**

I write to you on behalf of the Indigenous Issues Committee ("Committee") in relation to the inquiry into economic development in Aboriginal communities.

The Committee represents the Law Society on Indigenous issues as they relate to the legal needs of people in NSW and includes experts drawn from the ranks of the Law Society's membership.

The Committee commends the Government for identifying the importance of economic development in Aboriginal communities, and believes the inquiry represents an important opportunity to identify reforms to facilitate economic self-sufficiency within those communities.

The Committee notes that the Terms of Reference for the Inquiry are:

1. That the Standing Committee on State Development inquire into and report on strategies to support economic development in Aboriginal communities in New South Wales, including but not limited to:
  - (a) options for sustainability and capacity building of NSW Aboriginal communities into the future, utilising existing community networks and structures
  - (b) leveraging economic development support, including provided by the Commonwealth Government and the private sector
  - (c) establishment and sustainability of Aboriginal-owned enterprises.
2. That the committee report by 30 September 2016.

By way of context, the Committee notes that the NSW and Commonwealth Governments have agreed to the *Overarching Bilateral Indigenous Plan Between the Commonwealth of Australia and the State of New South Wales to Close the Gap in Aboriginal and Torres Strait Islander Disadvantage 2010-2015* (the "Bilateral Plan"). The Bilateral Plan notes that economic participation is one of the two priority areas for bilateral action.<sup>1</sup> There are also numerous other State Government documents that highlight the importance of increasing Aboriginal participation in the economy; for example, the Aboriginal Affairs OCHRE Plan<sup>2</sup> aims, among other things, to:

- "support more Aboriginal young people to get jobs that are fulfilling and sustainable";
- "grow local Aboriginal leaders' and communities' capacity to drive their own solutions" and
- "focus on creating opportunities for economic empowerment".

The Committee notes that Aboriginal Affairs is currently developing an Aboriginal Economic Development Framework<sup>3</sup> as part of the OCHRE Plan.

While the terms of reference of the Inquiry are broad, the Committee has limited its submissions to:

- (1) consideration of impacts on Aboriginal community in legislative amendments and policy development; and
- (2) observations on the *Aboriginal Land Rights Act 1983* (NSW) ("ALRA")
- (3) observations on the *Native Title Act 1993* (Cth) ("NTA")
- (4) consideration of access to professional services in order to support the establishment of sustainable Aboriginal-owned enterprises.

#### **1. Consideration of impacts on Aboriginal community in legislative amendments and policy development**

The Committee considers that economic development of Aboriginal communities could be facilitated routinely integrating into the formulation of Government policy. For example, neither the recent *Comprehensive Review of Crown Lands Management*<sup>4</sup> nor the Planning Reform White Paper<sup>5</sup> had any consideration of the potential impact of proposals on

<sup>1</sup> *Overarching Bilateral Indigenous Plan between the Commonwealth of Australia and the State of NSW to Close the Gap in Aboriginal and Torres Strait Islander Disadvantage 2010-2015*, at 5-6, available online:

<[http://www.federalfinancialrelations.gov.au/content/npa/health\\_indigenous/indigenous-reform/NSW.pdf](http://www.federalfinancialrelations.gov.au/content/npa/health_indigenous/indigenous-reform/NSW.pdf)> (accessed 28 September 2015)

<sup>2</sup> Aboriginal Affairs, OCHRE plan, available online: <<http://www.aboriginalaffairs.nsw.gov.au/wp-content/uploads/2013/04/OCHRE-Exec-Summ-Final-Web-Ready.pdf>> (accessed 20 October 2015).

<sup>3</sup> See Aboriginal Affairs website: <http://www.aboriginalaffairs.nsw.gov.au/nsw-aboriginal-economic-development-framework/> (accessed 22 October 2015).

<sup>4</sup> See the Department of Primary Industries website for access to the Crown Lands Legislation White Paper, the Crown Lands Management Review Report 2013 and the Crown Lands Management Review Summary and Government Response, available online: <[http://www.lpma.nsw.gov.au/crown\\_lands/comprehensive\\_review\\_of\\_nsw\\_crown\\_land\\_management/](http://www.lpma.nsw.gov.au/crown_lands/comprehensive_review_of_nsw_crown_land_management/)> (accessed 22 October 2015).

<sup>5</sup> NSW Planning and Environment, *A New Planning System for NSW: White Paper*, April 2013, available online:

Aboriginal economic development, or consideration of how economic development on Aboriginal land could be facilitated.

The recent example of the Petroleum (Onshore) Amendment (NSW Gas Plan) Bill 2014 is also illustrative. The purpose of the proposed amendment was to expunge certain classes of gas exploration applications, largely in response to generalised unease about coal seam gas and "fracking". However, many of the affected applications had in fact been made by NSWALC, seeking to pursue the economic objectives of the ALRA. In that case, changes were made to the Bill in the Upper House to ameliorate its impact on NSWALC, and those changes are reflected in the *Petroleum (Onshore) Amendment (NSW Gas Plan) Act 2014* (NSW) which became law. It is encouraging that when the changes were proposed by the Hon Fred Nile MLC, they were unanimously supported.<sup>6</sup> What is concerning about this example however, is that at no time before introducing the Bill did the Government identify, or consider, that it would have a disproportionate impact on NSWALC and hence adverse impacts on the economic and social goals of the ALRA and Aboriginal people.

Rather than treat the impact on Aboriginal people and their economic development as an "other" to be dealt with in a separate silo as a special interest group, the Committee's view is that the issue could be given specific consideration in the development of all legislation and policy which relates to land, water and resource management or environmental planning, or which might otherwise impact on Aboriginal economic and social outcomes.

In this regard, the Committee notes that the Victorian Government has developed an Aboriginal Inclusion Framework, which aims to do the following:

The objective of the Framework is to provide policy makers, program managers and service providers in the Victorian Government with a structure for reviewing their practice and reforming the way they engage with and address the needs of Aboriginal people. The Framework aspires to actively strengthen the inclusion of Aboriginal culture in the workplace and support successful Aboriginal participation in the design, implementation and assessment of policies and programs which directly or indirectly affect people.<sup>7</sup>

The Committee is not aware of an analogous whole of Government Aboriginal inclusion framework in NSW and is of the view that the NSW Government should develop a similar strategy.

Furthermore, the Committee is of the view that Government departments and agencies should be required to develop an Aboriginal economic inclusion or development strategy or policy to the extent that it is relevant to their portfolio and functions, so that legislative and policy development that affects Aboriginal people puts Aboriginal people at the centre of design and implementation.

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<<https://majorprojects.affinitylive.com/public/50e8717a9968716223532455eb67e51e/White-Paper-full-document.pdf>> (accessed 28 September 2015)

<sup>6</sup> See the official Hansard (Legislative Council, 19 November 2014) at 2924 and ff

<sup>7</sup> Victorian Government, *Aboriginal Inclusion Framework 2011*, at 4, available online:

<[http://www.dpc.vic.gov.au/images/documents/Aboriginal\\_Affairs/Aboriginal-Inclusion-Framework-2011.pdf](http://www.dpc.vic.gov.au/images/documents/Aboriginal_Affairs/Aboriginal-Inclusion-Framework-2011.pdf)> (accessed 28 September 2015)

The Committee is also of the view that the policy of local decision-making initiatives under OCHRE referred to above need to be given appropriate time and resources to determine how they may foster local economic empowerment. Too often government policies change from term to term, which not only disables potential initiatives and outcomes that may take time to develop. This leads to repeated disappointment and disillusionment and frustrates ongoing community participation.

## **2. Aboriginal Land Rights Act 1983 (NSW) ("the ALRA")**

The Committee is of the view that if the Government seeks to develop strategies to support economic development in Aboriginal communities within New South Wales and utilise existing community networks and structures, a primary focus should be to assist Aboriginal land councils established under the ALRA to achieve their legislative objectives.

### **2.1. Economic objects of the ALRA**

The ALRA is remedial and beneficial legislation<sup>8</sup> which was enacted as a means to address the on-going effects of the dispossession of Aboriginal people their land without compensation and to address their economic and social disadvantage.

The enactment of the ALRA followed the *Report of the Select Committee of the Legislative Assembly upon Aborigines*<sup>9</sup> in 1980, reporting on the circumstances of Aboriginal people in New South Wales and recommended a scheme for Aboriginal land rights (the "Keane Report").<sup>10</sup> The Keane Report noted that at that time the majority of Aboriginal people in New South Wales lived in "urban situations". About 40% of the Aboriginal population live in Sydney<sup>11</sup> with the larger concentrations of Aboriginal people in Western Sydney and the inner city.<sup>12</sup> In considering the need for land, the Keane Report noted the varying situations of Aboriginal people in New South Wales, and in "urban situations":

[i]t would be expected that claims in the urban situation will be made on the basis of needs. One of the greatest needs for Aborigines in New South Wales, including those living in urban areas, is adequate housing.

Aboriginal people in the urban environment may also need land for the establishment of economic and social enterprises such as factories, neighbourhood/community centres, pre-schools, etc ...

In relation to the "fringe situation" the Keane Report noted that,

once again, housing is the greatest need, although people living in the fringe areas may,

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<sup>8</sup> See *Minister for Natural Resources v New South Wales Aboriginal Land Council* (1987) 9 NSWLR 154 per Kirby P at p 157. See also *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (1993) 31 NSWLR 106; 80 LGERA 173 ("*Nowra Brickworks [No 1]*"), per Sheller JA at 117 and *Gandangara Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2011] NSWLEC 95 per Pain J at [6].

<sup>9</sup> M F Keane, *First report from the Select Committee of the Legislative Assembly upon Aborigines: Report and Minutes of Proceedings* (1980) (referred to as the "Keane Report").

<sup>10</sup> *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 per Kirby J at [45].

<sup>11</sup> *Keane Report* 45.

<sup>12</sup> *Ibid* 48.

like those on reserves, need lands for development of economic and /or social enterprises.

The scheme for land rights adopted in the ALRA was different to that recommended by the Keane Report, but the economic and social objectives of the legislation are clear. In the Second Reading Speech for the ALRA, the dual purpose of land rights in addressing both the cultural importance of land to Aboriginal people, as well as the use of land as a remedy for Aboriginal economic deprivation was 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 laying a basis for a self reliant and more secure economic future for our continent's Aboriginal custodians.<sup>13</sup>

More recently, in the Second Reading Speech for the Aboriginal Land Rights Amendment Bill 2014, Victor Dominello, the Minister for Aboriginal Affairs, after referring the work of Aboriginal land councils, noted:

[t]he Aboriginal Land Rights Act is not simply a tokenistic gesture acknowledging past wrongs; it is an important vehicle for Aboriginal people to shape their own social and economic futures. The importance of the Aboriginal Land Rights Act in Aboriginal social and economic development is recognised internationally. When James Anaya, the former United Nations Special Rapporteur on the Rights of Indigenous Peoples, visited Australia in 2011, in addition to hailing our land rights model as "remarkable", he noted that the work of Aboriginal land councils in New South Wales in securing and developing Aboriginal lands to provide greater opportunities to Aboriginal peoples is:

[e]ssential to operationalizing the standards set forth in the United Nations Declaration and to move forward in a future in which indigenous peoples are in control of their development, participating as equal partners in the development process.<sup>14</sup>

The economic objects of the ALRA have been judicially noted on a number of occasions.<sup>15</sup> Section 3 identifies the purpose of the legislation, that is:

- (a) to provide land rights for Aboriginal persons in New South Wales;
- (b) to provide for representative Aboriginal land councils in New South Wales;
- (c) to vest land in those Councils;
- (d) to provide for the acquisition of land, and the management of land and other assets and investments, by or for those Councils and the allocation of funds to and by those Councils;
- and
- (e) to provide for the provision of community benefit schemes by or on behalf of those Councils.

To give effect to these purposes, the ALRA also provided for the constitution of New South

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<sup>13</sup> Hansard 24 March 1983, Legislative Assembly, p 5088. See also at 5089: "Some lands, with traditional significance to Aborigines, will retain a cultural and a spiritual significance. Other lands will be developed as commercial ventures designed to improve living standards." See also *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (1992) 76 LGRA 192* ("Education Building") at 194 per Stein J.

<sup>14</sup> Hansard, Legislative Assembly, 21 October 2014, 1491.

<sup>15</sup> See, for example, *Nowra Brickworks [No 1]* per Sheller JA at 117.

Wales Aboriginal Land Council ("NSWALC") and Local Aboriginal Land Councils ("LALCs").<sup>16</sup> Some of the LALCs exist wholly within urban areas. Section 36(1) of the ALRA also establishes a scheme for Aboriginal land councils to make claims to Crown land. That scheme has been described by the Court of Appeal as the "primary mechanism" for giving effect to the purposes set out in s 3.<sup>17</sup>

The functions of LALCs in relation to the acquisition of land and related matters include making claims to Crown lands.<sup>18</sup> Subject to the ALRA, a LALC may do any act or thing in relation to its property as if it was a natural person having the same interest in the property; including improving it or causing it to be improved.<sup>19</sup>

The Committee is of the view that the Aboriginal land council network provides a unique vehicle for the facilitation of economic development. In particular:

- (1) Economic development is an important part of the charter of every Aboriginal land council and each LALC has a statutory object:

to improve, protect and foster the best interests of all Aboriginal persons within the Council's area and other persons who are members of the Council.<sup>20</sup>

The NSWALC has similar objects in relation to the Aboriginal people of NSW.<sup>21</sup>

- (2) A LALC's functions include (most relevantly):

- (a) to prepare and implement, in accordance with the ALRA, a community, land and business plan,
- (b) to manage, in accordance with this Act and consistently with its community, land and business plan, the investment of any assets of the Council,
- (c) to facilitate business enterprises (including by establishing, acquiring, operating or managing business enterprises), in accordance with this Act and the regulations and consistently with its community, land and business plan,<sup>22</sup>
- (d) to provide community benefits under approved community benefits schemes.<sup>23</sup>

- (3) NSWALC has similar functions, but they also include oversight and assistance functions in relation to the network of LALCs;<sup>24</sup> approval functions in relation to dealings with LALC land and LALC community benefits schemes,<sup>25</sup> and policy making functions in relation to the performance of its and the LALCs' functions.<sup>26</sup>

<sup>16</sup> *Aboriginal Land Rights Act 1983* (NSW) s 50.

<sup>17</sup> *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 ("*Wagga* (CA)") per Mason P (with whom Tobias JA agreed) at [20].

<sup>18</sup> *Aboriginal Land Rights Act 1983* (NSW) s 52(2)(g).

<sup>19</sup> *Ibid* s 52AA.

<sup>20</sup> *Ibid* s 51.

<sup>21</sup> *Ibid* s 105.

<sup>22</sup> *Ibid* s 52(5).

<sup>23</sup> *Ibid* s 52A.

<sup>24</sup> *Ibid* s 106(3).

<sup>25</sup> *Ibid* s 52A; 106(3)(h), div 4 pt 2.

<sup>26</sup> *Ibid* ss 106(4)(b), 106(8)(a), ss 113 – 115.

- (4) Aboriginal land councils also have the advantages of being representative and inclusive:
- (a) Membership of LALCs is open to Aboriginal people who live in or are recognised as having associations with the LALC's area, and to people listed on the register of Aboriginal owners in relation to land in the LALC's area,<sup>27</sup>
  - (b) Voting members of a LALC elect the LALC's Board,<sup>28</sup> and
  - (c) Voting members of the LALCs in each Region vote in the election of a NSWALC councillor for that Region.<sup>29</sup>
- (5) Finally LALCs have the benefit of being subject to a level of regulation which assists in ensuring assets are properly managed and that land dealings will achieve the intended outcomes. In particular:
- (a) The management of LALC assets and performance of their functions is regulated by the ALRA and regulations and by NSWALC policy made under them
  - (b) LALCs are required to perform their functions consistently with community, land and business plans which, in the case of LALCs, are prepared and approved in consultation with members and Aboriginal owners,<sup>30</sup>
  - (c) LALCs are accountable to members and to the public under the ALRA and under the *Ombudsman Act 1974* (NSW), the *Independent Commission Against Corruption Act 1988* (NSW) and the *Government Information (Public Access) Act 2009* (NSW).

## 2.2. Facilitation of the objects of the ALRA

Despite the economic objectives of the ALRA, the Committee's view is that the full potential of the ALRA is yet to be realised. The Committee believes that the economic outcomes intended by the ALRA would be improved if the Government took action to facilitate the more efficient return of land under the ALRA. In particular, the Committee notes the following.

- (1) *Reducing Delays in Determining Land Claims*: Historically, there have been significant and unacceptable delays in determining Aboriginal land claims. It has not been unusual for claims to remain undetermined for over 20 years.<sup>31</sup> There is no reason or justification for such delays. As Justice Jagot noted in *Jerrinja*, "No land

<sup>27</sup> *Aboriginal Land Rights Act 1983* (NSW) div 2 pt 5.

<sup>28</sup> *Ibid* s 63.

<sup>29</sup> *Ibid* s 121.

<sup>30</sup> *Ibid* div 7 pt 5 and div 5 pt 7.

<sup>31</sup> See for example, *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 156 LGERA 65 ("*Jerrinja*"); *Batemans Bay Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 800 which all involved claims which took 15 to 20 years for the Minister to determine.

council should have to wait for twenty years for its land claim to be determined".<sup>32</sup> Such delays, particularly where the land is "claimable" is a deprivation of an asset to the Aboriginal community and represents an undermining of a claim process which was intended to be "simple, quick and inexpensive".<sup>33</sup> The Government should ensure that sufficient resources are in place to determine claims in a timely manner.

- (2) *A less oppositional approach to claims assessment:* With respect, in recent years the Minister has had a poor record in defending appeals to the Land and Environment Court against the refusal of land claims. Further, many claims which have been refused and then appealed have subsequently been resolved prior to hearing. This then requires Aboriginal land councils to commence and prosecute appeals in the Land and Environment Court in order to obtain land, which should have been granted by the Minister. This situation is a very inefficient use of the land council's resources and creates further delay in the claims process. Taking steps to ensure assessments of claims by the Department pay regard to the relevant case law, will allow land councils to direct resources to economic development rather than being absorbed by the claim process.
- (3) *Reducing delays in transferring 'claimable Crown land':* Where land has been determined to be 'claimable Crown land', many LALCs have experienced excessive delays in the transfer of land. Some LALCs have had to wait over 15 years for claimable Crown land to be transferred. As with delays for determining land claims, the failure to transfer land efficiently is a deprivation of an economic asset. For this reason the Government should ensure that all 'claimable Crown land' be transferred promptly.

### **2.3. Prioritising the ALRA over the sale of Crown land**

In enacting the ALRA, the NSW Parliament clearly intended that surplus Crown land would be transferred to Aboriginal people. As noted above, it was acknowledged that the dispossession of Aboriginal people of their traditional lands without compensation had contributed to the social and economic disadvantage experience by Aboriginal people. Accordingly, unless land was needed for an essential public purpose, or was lawfully used and occupied, it was required to be transferred to Aboriginal people. Such a measure was understood to be an appropriate and beneficial use of such land.

Given Parliament's intention, it is unfortunate that in recent years, rather than the exercise of this legislation as a beneficial outcome, the State has tended to prioritise the sale of surplus Crown land over the objects of the ALRA.<sup>34</sup> This has tended to undermine the intention of the ALRA.

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<sup>32</sup> *Jerrinja* per Jagot J at [124].

<sup>33</sup> Hansard, Assembly, 24 March 1983, 5095.

<sup>34</sup> See for example, J Behrendt, "Some Emerging Issues in relation to claims to land under the Aboriginal Land Rights Act 1983 (NSW)" (2011) 34(3) *UNSW Law Journal* 811 at 824-5. See also for example, *Minister Administering the Crown Lands Act v NSW Aboriginal Land Council* (2008) 237 CLR 285 ("Wagga HC") and *Minister Administering The Crown Lands Act v La Perouse Local Aboriginal Land Council* (2012) 193 LGERA 276.

The Committee submits that, if it is the Government's priority to promote the economic development of Aboriginal communities then, where land is surplus land to Government need, it should identify these lands to the LALCs and provide an opportunity for the relevant LALC to make a claim for that land under the ALRA.

#### **2.4. Aboriginal Land Agreements**

The Committee notes the recent amendments to the ALRA introduced by the *Aboriginal Land Rights Amendment Act 2014*, which made provision for the resolution of land claims, and the transfer of land through Aboriginal Land Agreements. The new provisions provide an opportunity for NSW Government and Aboriginal land councils to resolve claims by agreement and in innovative ways. However, the negotiation of such agreements are also likely to be resource intensive and the intended outcomes are likely to be illusory to Aboriginal land councils (and the Government) if the Government does not approach agreements with a view to delivering genuine economic outcomes to the land councils concerned.

#### **2.5. Aboriginal land and the planning process**

In 1980, the Select Committee in the Keane Report noted that:

As a result [of their socio-economic disadvantage and position of relative inequality], the Aboriginal people of New South Wales suffer discrimination from various Government decision makers in relation to land development and planning. Thereby the ability of Aboriginal groups to progress as self-determining communities can be stifled.<sup>35</sup>

The Select Committee recommended:

That land owned by Aboriginal communities be governed by special planning provisions of the Planning and Environment Commission which would permit Aboriginal communities to develop projects that may otherwise be contrary to local planning ordinances, provided such projects were of special importance to the Aboriginal community and did not adversely affect adjoining residents.<sup>36</sup>

Unfortunately, this recommendation has never been implemented and discrimination in relation to land planning decisions has continued.

Some LALCs have had their land disproportionately zoned restrictively, or otherwise made subject of, restrictive environmental classifications. As an example, Deerubbin Local Aboriginal Land Council submitted to Penrith Council that in the draft *Penrith City Centre Local Environment Plan 2008*:

- approximately 72% of its land in the Penrith local government area was to be rezoned E2 Environmental Conservation (a highly restrictive land use zone not generally considered appropriate for privately owned land); and

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<sup>35</sup> Keane Report [9.15].

<sup>36</sup> Ibid 15.

- of its remaining land, 82% was to be designated as "environmentally sensitive".<sup>37</sup>

The reasons for this reclassification are likely include:

- (1) Land owned by an Aboriginal land council may be treated as though it was essentially public in character, and is therefore a safer and more attractive target for restrictive zonings rather than other privately owned land.
- (2) In some cases it may appear to planners that land of the Aboriginal land council is in fact publicly owned. This is a result of the long delays in determining claims and then transferring claimable land, which means that the land council has no registered title for many years, and during that time the land will appear from title searching to be State owned land.
- (3) A further effect of the lengthy delays in the determination of claims and the transfer of lands is that the land may have remained relatively undeveloped for many years, while neighbouring lands have been progressively subdivided and built upon. A result of this has been that in the relatively recent round of Local Environment Plan ("LEP") amendments, Aboriginal land council lands have sometimes been amongst the last remained tracts of undeveloped land with conservation value.
- (4) While planners are likely to be influenced by the views of agencies such as the Office of Environment and Heritage when preparing environmental planning instruments, they are less likely to be aware of, or appreciate the importance of, the important public policy behind the transfer of claimable Crown lands to Aboriginal land councils.
- (5) Inappropriate and outmoded assumptions may be made by planners and relevant agencies about the values of Aboriginal land council land to the people whose benefit it is held for. These assumptions may lead to incorrect assumptions about the likely uses that the land council will make of the land. This may also contribute to planning decisions which can have an adverse effect on Aboriginal economic development.<sup>38</sup>

There are many State Environmental Planning Policies ("SEPPs") developed to address specific issues in the planning process, including to encourage particular kinds of development. The Committee is of the view that the Inquiry should consider the merits of the development of a SEPP specific to Aboriginal land council land. The purpose of the SEPP should be to ensure that the important social and economic policy embedded in the ALRA is given an appropriate place in the environmental planning and assessment regime. The SEPP's provisions could override restrictions on land use in Local Environmental Plans where this is necessary and appropriate in order to allow development projects on Aboriginal land council land that will contribute to Aboriginal economic development.

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<sup>37</sup> It should be noted that, in response to submissions made by Deerubbin Local Aboriginal Land Council and meetings between the parties, Penrith Council, the Office of Environment and Heritage and the Department of Planning, the proposed E2 zoning is currently deferred.

<sup>38</sup> An example of this was the document "Towards an Aboriginal Land Management Framework for NSW – Healthy Country, Healthy Communities" published in November 2008 by the Department of Environment and Climate Change which is available at <<http://www.environment.nsw.gov.au/resources/cultureheritage/08545almfdp.pdf>>

## 2.6. Simplifying Interaction between ALRA and Native Title

The interaction between the ALRA and native title is extremely complicated.

One thing that can be stated confidently, however, is that successful Aboriginal land claims made after 28 November 2004 will result in the transfer, to the relevant Aboriginal land council, of a special category of fee simple estate that is subject to any native title rights and interests existing immediately before the transfer.<sup>39</sup> The full effect of this is not certain. However, one immediate effect is the requirement in s 42 of the ALRA which provides that, subject to a number of narrow exceptions, an Aboriginal land council must not deal with such land "unless the land is the subject of an approved determination of native title (within the meaning of the Commonwealth Native Title Act)".

The purpose of s 42 is clear. Because land claims under the ALRA lodged after 1994 may affect native title, the transfer of land can only occur if it will be subject to any native title that exists at the time of the transfer. In order to protect any such native title interests, s 42 of the ALRA prohibits the land being dealt with without an approved determination of native title. The terms of s 42 provide that the prohibition only arises in relation to native title rights and interests where native title exists at the time the land is transferred to a land council. It does not arise where native title does not exist.

However, the effect on the ability of the Aboriginal land council to use the land which is affected by s 42 may be unnecessarily prohibitive. The State Government, for example, has a range of avenues available to it to enable it to deal with State owned lands despite uncertainty about the existence of native title. Government may:

- (a) determine, on the basis of an internal investigation, that any native title has been extinguished and therefore that it is safe to deal with the land;
- (b) obtain "section 24FA protection"<sup>40</sup> in relation to the proposed dealing by commencing a non-claimant native title application and then discontinuing the application if there is no relevant response to the notification of it;
- (c) make an Indigenous land use agreement ("ILUA")<sup>41</sup> with native title holders or claimants allowing the dealing, or
- (d) comply with any other relevant procedure in the "future act" regime of the *Native Title Act 1993* (Cth).<sup>42</sup>

By contrast, where Aboriginal land council wishes to 'deal with land' that is subject to native title, it must commence a non-claimant native title application in the Federal Court and then prosecute the claim to conclusion.<sup>43</sup>

<sup>39</sup> *Aboriginal Land Rights Act 1983* (NSW) s 36(9).

<sup>40</sup> See *Native Title Act 1993* (Cth), sub-div F div 3 pt 2.

<sup>41</sup> *Ibid* sub-divs B-E div 3 pt 2.

<sup>42</sup> *Ibid* div 3 pt 2.

Further:

- (a) the definition of the expression "deal with land" as it applies to s 42 of the ALRA is extremely broad;<sup>44</sup> requiring that the land council must obtain a determination of native title even for certain "dealings" that would not affect any native title,
- (b) the cost of bringing and prosecuting non-claimant native title proceedings in the Federal Court may well exceed the value of the land or of the proposed dealing with it,
- (c) if the determination is that native title exists, there is considerable uncertainty about what the land council may then do with the land, with or without the agreement of the native title holders.

The operation of s 42 of the ALRA is further complicated by s 47A of the NTA. Where this provision applies to an Aboriginal land council, it allows previous extinguishment of native title to be disregarded. However, the relationship between the land council's title and native title recognised as a result of s 47A of the NTA, is very different to the relationship where native title exists immediately before the transfer of land to the land council.

Where native title exists immediately before the transfer to the land council, s 36(9) of the ALRA states that the land council's freehold title is "subject to" the native title. However, where native title is recognised only because of s 47A of the NTA, the native title has "no effect" on the land council's title. The land council can deal with the land despite the fact that it is subject to a determination that native title exists.

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<sup>43</sup> This contrast was noted by Perram J in the Federal Court in *Lightning Ridge Local Aboriginal Land Council V Premier Of New South Wales & Anor* [2012] FCA 792, particularly at [20] to [24]. His Honour concluded:

*[24] Considerations of that kind do, however, underscore the unsatisfactory nature of s 42(1) which may appear to burden those whom it was designed to assist. If s 42(1) were amended to include a reference to future act protection under the NT Act the problem would, in all likelihood, be solved. In turn that would relieve this Court from having to determine a constant stream of non-claimant applications from local aboriginal land councils. It is a matter which warrants attention from the New South Wales Parliament.*

<sup>44</sup> See ALRA s 40, which defines "deal with land" to mean:

- (a) sell, exchange, lease, mortgage, dispose of, or otherwise create or pass a legal or equitable interest in, land, or
- (b) grant an easement or covenant over land or release an easement or covenant benefiting land, or
- (c) enter into a biobanking agreement relating to land under the Threatened Species Conservation Act 1995 or a conservation agreement under the NPW Act, or
- (d) enter into a wilderness protection agreement relating to land under the Wilderness Act 1987, or
- (e) enter into a property vegetation plan under the Native Vegetation Act 2003, or
- (f) subdivide or consolidate land so as to affect, or consent to a plan of subdivision or consolidation of land that affects, the interests of an Aboriginal Land Council in that land, or
- (g) make a development application in relation to land, or
- (h) any other action (including executing an instrument) relating to land that is prescribed by the regulations.

Section 47A was introduced into the NTA in 1998. When s 42 of the ALRA was first enacted in 1994, it did not contemplate the revival of native title by s 47A of the NTA, or the difficulties this creates for a land council seeking to comply with s 42.

This problem is best illustrated by an example. Assume that a registered native title claim has been made over an area that includes Aboriginal land council land to which s 42 of the ALRA applies. The land council wishes to develop and sell the land. From land title investigations it is clear that any native title in relation to the land was extinguished *before* transfer to the land council. However, the native title claim group asserts that s 47A applies to the land, so that the extinguishment is to be disregarded.

For the land council to obtain a determination of native title in relation to the land it is obliged to wait until the whole registered claim has been finalised and it is determined whether – amongst other things – s 47A does in fact apply to the land.

The land council waits five years (not an unrealistic time for a native title claim to run its course) for the proceedings to be finalised. Eventually, at the conclusion of the proceedings, it is determined that s 47A *does* in fact apply; with the result that native title exists in relation to the land. Native title recognised because of s 47A has, however, no effect on the land council's title, and so ultimately the land council is free to deal with the land as it would have been if, it had been able to obtain a determination that native title did not exist. Simply put, the land council has been required to delay dealing with its land for a long period of time because of conflicting laws.

The Committee urges the Inquiry to investigate options to create greater flexibility in how land vested in an Aboriginal land council, which may be subject to native title, can be dealt with in a timely and reasonable process. For example, consideration could be given to whether s 42 of the ALRA should be amended to allow an Aboriginal land council to deal with land that may be subject to native title:

- (1) if the dealing is of a kind which will not extinguish or otherwise affect any native title,  
or
- (2) if the land council has commenced a non-claimant native title application and something equivalent to "section 24FA protection" arises,
- (3) if the dealing is permitted by an ILUA, or
- (4) if the dealing is the transfer of the land from the land council to the State or a Local Government Body.

Further, consideration ought to be given to the State liaising with the Commonwealth and the Federal Court to draft and implement a procedure allowing the Court to determine that native title did not exist at that point in time when the land was transferred to the land council (even though s 47A may apply and the land may be the subject of a positive determination of native title in future). Such an order would enable a land council to more efficiently comply with s 42. As the procedure would be premised on the existence of extinguishing events, there would no impact on native title.

### 3. Native Title

A further opportunity to assist Aboriginal communities with economic development arises in relation to native title. There are now a number of native title determinations in New South Wales,<sup>45</sup> and there are likely to be more in the future.

With the number of determinations increasing, there will be instances where limited native title rights and interests are recognised either in, or on the fringes of towns. Where those rights are recognised, they are likely to be limited to non-exclusive rights to hunt, fish and gather. In and on the fringes of towns, those rights may have limited utility. Native title does not, however, extend to the right to develop land.

The Committee considers that, consistent with the acknowledgement in the ALRA, the State should recognise that land was always recognised as an economic resource for Aboriginal people, and in a contemporary world Aboriginal people will need greater flexibility in how economic outcomes are achieved. Accordingly, where requested by native title holders, the Government should consider a scheme whereby certain lands on which native title exists can be converted into freehold and developed; including recognition of Aboriginal water rights and interests.<sup>46</sup>

### 4. Access to professional services

Aboriginal-owned enterprises will require access to appropriate legal, financial and strategic services to establish a solid basis for the enterprise if it is to be sustainable. While some enterprises will have the means to access and obtain those services themselves, many will require assistance to access and pay for appropriate services in the establishment phase.

In developing strategies to encourage sustainable economic development in Aboriginal communities and to support the establishment and sustainability of Aboriginal-owned enterprise, the Inquiry should consider the need to ensure the availability of such services.

The Committee notes that, pursuant to commitments made under its Reconciliation Action Plan ("RAP") the Law Society of NSW is developing an Indigenous Enterprise Legal Assistance Scheme ("IELAS") in partnership with the NSW Indigenous Chamber of Commerce. This is a pragmatic initiative to assist in the establishment and sustainability of Aboriginal-owned enterprises in the establishment phase. The flow-on benefits of Aboriginal-owned enterprise are significant for communities. For example, 72% of the staff members employed by Indigenous businesses certified by Supply Nation (previously known as the Australian Indigenous Minority Suppliers Council) are Indigenous.<sup>47</sup>

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<sup>45</sup> See for example, *Trevor Close on behalf of the Githabul People v Minister for Lands* [2007] FCA 1847; *Bandjalang People No 1 and No 2 v Attorney General of New South Wales* [2013] FCA 1278; *Phyball on behalf of the Gumbaynggirr People v Attorney-General of New South Wales* [2014] FCA 851; *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604; *Yaegl People #1 v Attorney General of New South Wales* [2015] FCA 647.

<sup>46</sup> See V Marshall, *A web of Aboriginal water rights: The competing Aboriginal claim for water property rights and interests in Australia* (PhD law Macquarie University, 2014).

<sup>47</sup> Reconciliation Australia webpage: <<http://workplace.reconciliation.org.au/program/diversifying-your-supply-chain>> (accessed 9 October 2013).

In addition to the IELAS, the Committee notes that there may be potential to further leverage resources available under the RAP commitments made by law firms to assist Aboriginal-owned enterprises. Many law firms including Gilbert + Tobin, Ashurst and Allens Linklaters provide assistance to Aboriginal-owned enterprises through their pro bono programs as a priority under their RAPs.

Most law firms (and other corporates) with a commitment to reconciliation have committed to supporting Indigenous business through their procurement policies whether through Supply Nation or otherwise. Linking business with a commitment to purchase from Aboriginal-owned enterprises should also be a priority in the creation of sustainable businesses.

#### **4.1. Enterprise assistance centre**

It is anticipated that the IELAS will provide access to legal services for a number of Aboriginal-owned enterprises. However, it is unlikely to meet the demand for services generated by an effective Government strategy on economic development. Further, the IELAS will operate in isolation from other professional services which would benefit an Aboriginal-owned enterprise in its start-up phase.

In the experience of members of the Committee, there are a number of sources of assistance of various kinds available to fledgling Aboriginal-owned enterprises. There are multiple barriers to accessing the assistance, however, including:

- people establishing an enterprise for the first time may not be able to identify their needs;
- there is a lack of awareness of the assistance that is available;
- the services are fragmented and operate in isolation; and
- the requirements for accessing assistance can be onerous and differ markedly from service to service.

To ensure Aboriginal-owned enterprises are able to access the assistance they need, the Committee suggests the Inquiry consider recommending the establishment of an enterprise assistance centre with the following features:

- (a) an accessible entry point for all support and assistance available to Aboriginal-owned enterprises from government, the private sector<sup>48</sup> and organisations such as Indigenous Business Australia;
- (b) an assigned officer to assist the enterprise to identify and obtain the assistance it requires and to assist with regulatory compliance during the establishment phase of the enterprise;
- (c) the centre should work with existing service providers to leverage support already available;

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<sup>48</sup> See for example Westpac's Indigenous banking initiatives" available online: <<http://rap.westpacgroup.com.au/financial-inclusion>> (accessed 22 October 2015).

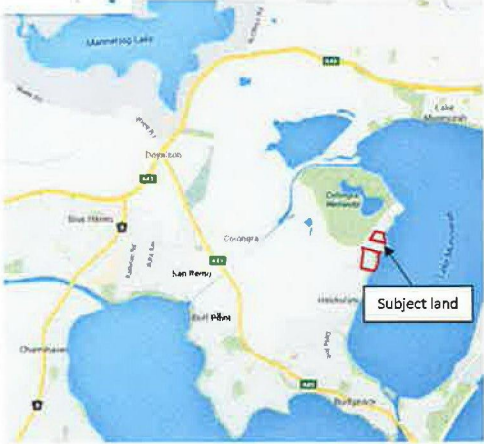


## Local Government has the ability to rezone land without Land Council approval

### Case example 1 – Halekulani – Wyong Local Government Area

The land was zoned **from** 7(b) Scenic Protection **to** E3 Environmental Management, as part of Wyong Shire Council's conversion ("Standard Instrument) LEP in 2013.

Darkinjung LALC opposed the proposed rezoning when placed on public exhibition in 2013, seeking an equivalent zone to permit a caravan park, or 'savings provisions' to permit the use in the future. The submission was rejected by Council planners.

Summary maps provided below.

Location Plan Macley Dr, Halekulani	Zoning Wyong LEP 1991 7(b) Scenic Protection	Zoning Wyong LEP 2013 E3 Environmental Management
		
	<p>"caravan parks" permitted with development consent</p>	<p>"caravan parks" are one of the uses now <b>prohibited</b> under the new E3 zone</p>

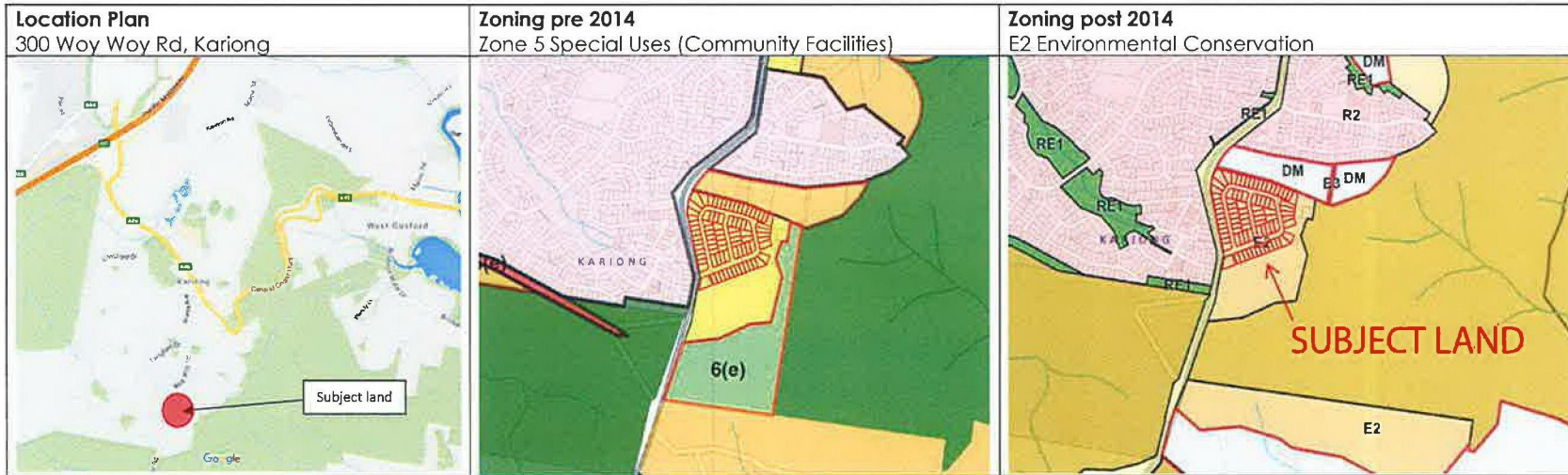
<p><b>Impacts</b></p>	<ul style="list-style-type: none"> <li>Limits development potential and ability to meet objectives of the Aboriginal Land Rights Act 1983.</li> <li>Prohibited <i>caravan parks</i> (and <i>manufactured home estates</i>) upon the land.</li> </ul>
<p><b>Proposed development</b></p>	<p>Manufacture homes estate comprising 99 sites, caretaker's cottage and community facilities</p>
<p><b>Capital Investment Value</b></p>	<p>Approximately \$20Million</p>
<p><b>Status</b></p>	<p>Development consent issued 8 Mar 2016</p>

**Case example - Kariong - Gosford Local Government Area**

The land was zoned **from** 5 Special Uses **to** E2 Environmental Conservation, as part of Gosford City Council's conversion ("Standard Instrument) LEP in 2014.

Darkinjung LALC opposed the proposed rezoning when placed on public exhibition in 2010, seeking an equivalent zone to permit alternate uses and balanced development. The submission was rejected by Council planners.

Summary maps provided below.



**Impacts**

- Limits development potential and ability to meet objectives of the Aboriginal Land Rights Act 1983.
- Prohibits individual site assessment under SEPP (Housing for Seniors or People with a Disability). This SEPP, at Cl. 4 & Schedule 1, excludes certain land from the operation of this SEPP, which includes the subject land.

Other comments

- The site has a total area of 13.2ha, of which approximately 7ha has been identified with development potential. The balance of the land (6ha) would be locked away for conservation purposes and provide a buffer to the adjacent National Park.
- The site forms a logical extension to the Kariong urban area as indicate by historic zones and road layouts.
- The site contains a 20m wide transmission easement, which in effect forms a logical limit to development to the south.

<b>Proposed development</b>	70 lot residential and/or mixed with aged care facility
<b>Capital Investment Value</b>	Exceeding \$25Million
<b>Status</b>	Rezoning application under preparation