THE LAW SOCIETY
OF NEW SOUTH WALES

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30 October 2013

Office of the Registrar of the Aboriginal Land Rights Act 1983
Post Office Box 112
Glebe NSW 2037

By email: alrareview@oralra.nsw.gov.au

Dear Registrar,

Review of the *Aboriginal Land Rights Act 1983*

I write to you on behalf of the Indigenous Issues Committee of the Law Society of New South Wales ("Committee") in relation to a number of matters raised in:

(a) the *Review of the Aboriginal Land Rights Act 1983* ("Review") and;
(b) the Report of Findings and Recommendations of the Working Group[1] ("Working Group Report")

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

The Committee provides the comments set out below in respect of proposal 23 and recommendations 32 and 35 in the *Review of the Aboriginal Land Rights Act 1983 Consolidated Recommendations and Proposals* ("Consolidated Recommendations and Proposals").

1. Community Development Levy

Proposal 23 in the Consolidated Recommendations and Proposals proposes that the community development levy in the *Aboriginal Land Rights Act* 1983 (NSW) ("ALRA") be increased to provide additional funding for the Registrar.[2]

The Committee believes that it is inappropriate for the Community Development Levy ("the levy") to be used to fund the functions of the Registrar.

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[1] *Facilitation to Enable Not Frustration To Disable: Aboriginal Land Rights Act Review 2012 – Report of Findings and Recommendations of the Working Group*, 11 October 2012 (the "Working Group Report").
[2] Consolidated Recommendations and Proposals: ALRA 2013, p. 16.

The ALRA was enacted in recognition of the past dispossession of Aboriginal people and intended to be a compensatory measure for that dispossession. In the second reading speech for the ALRA, the Minister for Aboriginal Affairs at the time, Frank Walker explained:

> ...[the] Government has made a clear, unequivocal decision that land rights for Aborigines is the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time it lays the basis for a self-reliant and more secure economic future for our continent's Aboriginal custodians...[3]

The ALRA establishes a scheme that was stated to embody the "principles of self-determination and compensation".[4] It does so by providing mechanisms to make claims to limited classes of land, and by providing a fund to support economic development and self-determination through a network of representative land councils. The accumulated assets of Aboriginal land councils should be understood and respected as compensation for Aboriginal people, and the means by which the economic objectives of the ALRA are achieved. It should not be treated as a pool of funding which can be dipped into to fund government bureaucracy.

The levy should also be understood in that context. The levy was introduced into the ALRA in recognition that the resources of the land council system were not evenly distributed. The levy is a charge on certain developments undertaken by local Aboriginal land councils ("LALCs") so that some of those benefits can flow to LALCs without an asset base. In the Second Reading Speech for the *Aboriginal Land Rights Amendment Act 2009* which introduced the levy, the then Minister for Aboriginal Affairs explained that:

> the levy will act to evenly spread the wealth from land councils with more valuable land holdings to those councils with less valuable land and development opportunities. The money from the fund is to be used to provide grants for local Aboriginal land council community benefits schemes, to assist land councils with land acquisition and land management and for other purposes.[5]

The levy affects the margins of developments that are intended to be for the benefit of Aboriginal people. It is a cost to the LALC on which it is levied, and to that extent operates as an additional hurdle for such land council to realise its economic goals. Given those detrimental effects, the levy is only justified on the basis that it allows for some benefits to flow to LALCs which have not been able to accumulate assets through the claim process.

The assets of Aboriginal land councils should be used solely for the benefit of their members and to enable them to pursue the objects and purposes of the ALRA. The levy should not be used as a tax to fund the government bureaucracy, including the Registrar. To do so would defeat the purpose of the levy.

The Committee's view is that if the Government imposes additional functions on the Registrar, then the Government should provide the resources for those functions to

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[3] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5088 (Frank Walker).
[4] New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5093 (Frank Walker).
[5] Hansard, Assembly, 25 June 2009, p 16821.

be exercised. In this regard it can be noted that the functions and obligations of LALCs have increased enormously since the ALRA was enacted. LALCs now have extensive and burdensome reporting requirements along with obligations to prepare community land and business plans. Government has never provided LALCs with additional funding when additional functions have been imposed on them. It is therefore inequitable to suggest that LALCs should fund the additional functions of a government agency.

2. Repeat Land Claims

Recommendation 32 of the Working Group Report raises the issue of new land claims lodged over land that is the subject of an appeal against the Minister's refusal of a prior land claim, and makes a recommendation that either:

(a) the ALRA is amended to prohibit the lodging of a new claim while a previous claim on the same parcel of land is the subject of appeal unless there is a change in tenure status of the land in which case the provision does not apply ("Option A"); or

(b) where there is an appeal there is a prohibition on the Minister dealing with the land and any further claim ("Option B").[6]

The Committee does not believe there is any justification for a prohibition on repeat land claims and both Option A and Option B are not appropriate. In particular:

(a) The land returned to Aboriginal people under the ALRA has been modest. The ALRA only allows for a limited class of land to be claimed according to the statutory criteria set out in s 36(1), ALRA. Given the limited scope of the claim process, there is no reason to limit the capacity to claim further.

(b) As the Working Group Report notes,[7] the relevant date for determining whether the statutory criteria in s 36(1) are met is the date the claim is lodged. Because the ALRA fixes the date for enquiry, land which is not "claimable" at one point in time, may be claimable at another. A use and occupation may cease, a need for land for an essential public purpose may dissipate, or the title to land may change. Land councils should be able to lodge further claims if the circumstances of the land change. Because the circumstances of the land can change at any time, there should be no restriction of when further claims may be lodged.

(c) There is no evidence that LALCs or the New South Wales Aboriginal Land Council have inappropriately lodged repeat land claims. Indeed, there have been many repeat land claims that have been found to be "claimable."

(d) Option A is unjustified in respect of land claims that are the subject of an appeal. Furthermore, in so far as a similar prohibition may be in consideration against repeat claims over land already under claim generally (see Recommendation 31), such a prohibition would be particularly unjustified. Freezing the lodging of repeat claims while an existing claim is on foot would be an extraordinary measure given that the Minister can take up to 25 years to determine a claim. Furthermore, it is no answer to provide an exception when

[6] Working Group Report, p.38.
[7] Working Group Report, p.37.

there is a "change in tenure status". Whether land is "claimable" or not is not only based on tenure. It may be changes in Government policy or infrastructure proposals which might be relevant.[8] It should be unsurprising that the circumstances of the land may change, and a further claim is lodged while an existing claim or an appeal is on foot. In any event, there is no mechanism in the ALRA which requires the Minister to disclose when there is a change in circumstances which would make the land claimable.

(e) Option B is equally problematic. The appeal process can take years. It is not unusual for a claim to be in the Land and Environment Court for a number of years and the circumstances in relation to the land may alter in that period. Again it is no answer to prohibit the Minister from "dealing with the land". It may be changes in policy, or a ceasing of use and occupation of the land that may determine whether the land falls within the definition of claimable Crown lands, and if those matters occur then a land council should be entitled to lodge further claims.

3. Native Title

Recommendation 35 of the Working Group Report states:

> That the legal question as to whether the problems concerning land claims pursuant to s 36 of Aboriginal Land Rights Act lodged after 28 November 1994 (to which s.42 apply) and native title rights and interests can be ameliorated within the Aboriginal Land Rights Act or require amendment to the Commonwealth Native Title Act (1993) should be examined.

While the wording of the recommendation is unclear, the Committee supports the thrust of it. The Committee believes that s 42, ALRA needs to be reviewed and amended as a matter of urgency.

Section 36(9), ALRA provides:

> any transfer of lands to an Aboriginal Land Council under this section shall be for an estate in fee simple but shall be subject to any native title rights and interests existing in relation to the lands immediately before the transfer.

Section 36(9A) is in similar terms but relates to the transfer of perpetual leases in the Western Division of the State. Sections 36(9) and (9A) only have effect in relation to claims lodged after 28 November 1994 when the section commenced.[9]

Section 42, ALRA provides that, subject to a number of narrow exceptions, an Aboriginal land council must not

> deal with land vested in it subject to native title rights and interests under section 36 (9) or (9A) 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 November 1994 may affect native title, the transfer of land can only occur if it will be

[8] See s 36(1)(c) which provides that land is not 'claimable Crown land' if it is needed or likely to be needed for an essential public purpose.
[9] See generally *NSW Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and the Western Lands Act (Winbar [No: 3])* (1988) 14 NSWLR 685.

subject to any native title that exists at the time of the transfer. In order to protect any such native title interests, s 42, ALRA prohibits the land being dealt with without an approved determination of native title.

The terms of s 42, ALRA provide that the prohibition on dealing with the land only arises where native title rights and interests exists at the time the land is transferred to a land council. It does not arise where native title does not exist.

However, where it does apply, the prohibition is broad. "Deal with land" is defined in s 40, ALRA 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.

It is not always clear when s 42, ALRA applies because of the uncertainty of whether land is subject to native title immediately before it is transferred to the LALC. In some instances tenure histories may show that native title is extinguished, but in many cases the only way a LALC can have certainty is to obtain an approved determination of native title. The costs of seeking such a determination can, however, exceed the value of the land concerned. Furthermore, while some tenure information can be readily obtained by on-line resources, other information is in the possession of the State.

The operation of s 42 is further complicated where a native title claim is lodged, and s 47A, of the *Native Title Act 1993* (Cth) ("NTA") is relied on by the applicants. Section 47A allows for previous extinguishment to be ignored. Where native title is recognised by operation of s 47A, the effect of the non-extinguishment principle is that land can be dealt with in the full way that the interest allows, but native title exists albeit suppressed by the existing interest. If native title was found to exist on land vested in a land council by operation of s 47A, there would be no prohibition on the land being dealt with in accordance with the ALRA.

Section 47A was introduced into the NTA in 1998. When s 42, ALRA was enacted in 1994, it did not contemplate the revival of native title or the difficulties it creates for a LALC seeking to comply with s 42. The disjunct between s 42, ALRA and s 47A is that s 42 requires an approved determination. While that may be readily obtained where there is a clear extinguishing event, the operation of s 47A would only allow that to occur after a full hearing. This will cause excessive delay for no good reason given that at the end of that process, even if native title exists, the native title rights and interests will be subject to, and suppressed by, the LALC's interest in the land.

In order to alleviate these difficulties a number of options ought to be given some further consideration:

(a) When land is transferred to a LALC, the Government should only include a notification that the land is subject to s 42 if the tenure history of the land shows that native title has not been extinguished, in other words, s 42 should not apply where native title does not exist over the land.

(b) The requirements of s 42, ALRA ought to be able to be satisfied if the land dealing is authorised by an Indigenous Land Use Agreement ("ILUA"). All other land holders are entitled to undertake future acts if they are the subject of an ILUA. LALCs should be in the same position.

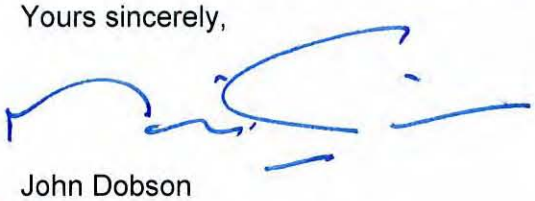
(c) At present the Minister, or a local government body, can make a non-claimant application in relation to land. If no registered claim is made in the relevant statutory procedure, acts are valid and there is in fact no requirement to seek an actual native title determination. Section 42, ALRA prevents LALCs having the benefit of this procedure and consideration should be given to whether this prohibition should be removed.

(d) At present s 42, ALRA prohibits any land dealing. However, some matters which would fall within the definition of a land dealing would not otherwise affect native title. Section 42, ALRA should be amended to exclude activities that do not affect native title. Some of the matters which may fall within this category are entering into "a property vegetation plan under the *Native Vegetation Act 2003"* or the making of a development application.[10]

(e) Further consideration ought also be given to liaising with the Commonwealth and the Federal Court to allow for a procedure where there are existing registered native title claims, to allow for the Court to order that native title did not exist at a given point in time (even if it may be the subject of a determination in future). Such an order would enable a LALC to more efficiently comply with s 42. As the procedure would be premised on the existence of extinguishing events, there would be no impact on native title.

The Committee thanks you for the opportunity to provide comments.

Yours sincerely,



John Dobson
President

[10] The Committee notes that it is currently proposed that development applications be removed from the land dealings provisions in any event.