



Native Title Unit
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

New South Wales
Aboriginal Land Council

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Dear Sir/Madam

NSWALC Submission on Exposure Draft Native Title Reforms

Thank you for the opportunity to comment on the Exposure Draft of the *Native Title Legislation Amendment Bill 2018 (the Exposure Draft)*.

NSWALC supports any amendments that strengthen the rights of Aboriginal people to land, in particular the proposal to disregard extinguishment in 'park areas' and welcomes the opportunity to provide comments on the Exposure Draft. In making this submission, we are focused on the potential impact of the Exposure Draft on the property interests of Aboriginal Land Councils (ALCs) in NSW. To provide context, we have included an overview of the Aboriginal Land Claims process in NSW and the interaction between land rights and native title in NSW.

As a general comment, NSWALC wishes to highlight the unique nature of Land Rights in NSW and the potential for unintended consequences if amendments to the NTA are considered without reference to the implications for NSW. NSWALC's objective is to act in the best interests of all Aboriginal people in NSW and therefore our interest in the Exposure Draft is in ensuring that the ALRA and NTA work together in a way that minimises conflict and confusion as much as possible.

NSWALC Background

NSWALC is the peak body representing Aboriginal peoples in NSW and with over 22,000 members, is the largest Aboriginal member based organisation in Australia. NSWALC has the objective of fostering the aspirations and improving the lives of the Aboriginal peoples of NSW.

NSWALC provides support to the network of 120 autonomous Local Aboriginal Land Councils (LALCs) that exist in NSW. LALCs are established under the ALRA to act in the best interests of both their members, and the whole Aboriginal community.

Aboriginal Land Claims under the Aboriginal Land Rights Act

The ALRA facilitates the return of land to Aboriginal people through Aboriginal Land Claims. Under section 36 of the ALRA, Crown land that is not lawfully used or occupied; is not needed for an essential public purpose or residential lands; and is not the subject of a registered native title application or determination is

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'claimable Crown land'.¹ If the Crown Lands Minister is satisfied that the whole or part of the land is claimable Crown land, the Minister must grant the claim by transferring the land to the ALC.²

Unlike other land rights regimes in Australia, ALCs are granted an estate in fee simple that is able to be dealt with on the open market so long as ALCs comply with the "land dealing" provisions contained within Division 4 of Part 2 of the ALRA. However, for claims lodged after 28 November 1994³, that fee simple interest is granted subject to any native title rights and interests existing in relation to the lands immediately before the transfer to the ALC, and the ALC cannot deal with that land until the land has been the subject of a native title determination.⁴

Legal Context: the interaction between Land Rights and Native Title

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

Native title and land rights laws both provide important mechanisms to recognise and provide for Aboriginal peoples' rights and interests. However, the interaction of the NTA and the ALRA can be complex.

Generally speaking, native title law provides that the grant of a freehold title extinguishes native title absolutely⁵ and this extinguishment of native title is permanent and cannot be revived⁶. However, these two principles of native title law do not apply in the usual manner to land held by ALCs under the ALRA.

There are two ways that native title can be recognised on LALC held land:

1. As noted above, Aboriginal Land Claims can be granted to ALCs subject to the existence of native title rights and interests;
2. 47A of the NTA can allow for extinguishment of native title on LALC held land to be disregarded and native title rights and interests to be recognised.

As you are aware, the effect of section 47A is that prior extinguishment of native title is disregarded on land held expressly for the benefit of Aboriginal people. This means that native title can be recognised, and extinguishment disregarded, on land that was vested in an ALC and was occupied by a member of the native title claim group at the date of the native title claim.

While similar issues may arise in other jurisdictions, NSW is unique in that Aboriginal freehold land granted under the ALRA can be dealt with (including sold) by ALCs. In particular, although the ALC's interest prevails because it is an existing interest under section 47A, this section can still create significant confusion in communities, particularly where the ALC proposes to utilise those lands for economic development.

Relationship between Aboriginal Land Councils and Native Title groups

It is not commonly understood that in many cases the membership of the ALC will significantly overlap with the membership of the native title group. NSWALC is supportive of legislative changes which promote co-operation between the two systems to ensure both native title claimants and ALCs are given the opportunity to promote and utilise both legislative regimes to obtain the maximum benefit for Aboriginal communities.

¹ Section 36(1) *Aboriginal Land Rights Act 1983* (NSW)

² Section 36(5) *Aboriginal Land Rights Act 1983* (NSW)

³ The date the ALRA was amended by the *Native Title (New South Wales) Act 1994* following the enactment of the Commonwealth NTA.

⁴ Section 42 of the ALRA.

⁵ *Mabo v Queensland (1992) 175 CLR 1*.

⁶ *Fejo v Northern Territory (1998) 195 CLR 96* at paragraph 112.

NSWALC advocates for simplified, less expensive and clearer interactions between land rights and native title to achieve better outcomes for Aboriginal peoples in NSW.

Comments on Exposure Draft

We wish to provide specific comments only in relation to schedule 3- Part 1 and Part 3 of the Exposure Draft.

Schedule 3 – Part 1 – Park Areas

47C National Parks etc covered by native title applications

Existing laws in NSW provide for Aboriginal people to own lands that can be managed as parks or other forms of nature reserve. Part 4A of the *National Parks and Wildlife Act 1974* (NSW) ('NPW Act') provides for certain types of lands to be vested in ALC's on behalf of Aboriginal Owners⁷ and then leased back to the NSW Government as jointly-managed national parks or other forms of nature reserve. ALCs may also make claims over Crown land that has been set aside for the purpose of nature conservation. In some cases, where the land is "lawfully used and occupied" or needed for the "essential public purpose of nature conservation" (as those phrases have been interpreted by the Courts) those lands may be granted to an ALC.

In our view, these lands would come within the scope of the proposed section 47C, which extends to areas set aside "for the purpose of preserving the natural environment of the area, whether that setting aside, granting or vesting resulted from a dedication, reservation, proclamation, condition, vesting in trustees or otherwise". For these reasons, ALCs may have an interest in lands that fall within the scope of this proposal.

NSWALC supports the intention of this proposal, however NSWALC submits that if an ALC has an interest in the agreement area, then the agreement of the ALC should be required under 47C(1)(b) in addition to the agreement of the relevant Commonwealth, State or Territory party. It is important that any interests of the ALCs in the land are recognised and protected.

Schedule 3 - Part 3 - Future acts where prior extinguishment is to be disregarded

NSWALC is concerned about the amendments that are intended to clarify the operation of the section 47s. We are concerned that the proposed amendments could have unintended consequences and add to the confusion as to the operation of those sections in relation to land in NSW.

Several Local Aboriginal Land Councils (LALCs) own land which has native title recognised as a result of s 47A. These include lands:

- held in freehold;
- held in perpetual leasehold.

These lands have been either:

- granted or vested under the Aboriginal Land Rights Act; or
- purchased on the open market.

The uses of these lands vary and include lands that are:

- leased for social or community housing;
- actively used for farming;
- identified as having economic development potential.

⁷ Sections 170 – 175, *Aboriginal Land Rights Act 1983* (NSW)

In each instance, native title was recognised through a consent determination rather than a contested hearing but in circumstances where the view was that s 47A was likely to apply. Other LALCs are currently in negotiations with Native Title Applicants in a number of matters about the application of section 47A to their lands. To date, there has not been a hearing about whether section 47A applies to LALC held land.

LALCs have agreed to the recognition on native title on their land on the understanding that the non-extinguishment principle (section 238 of the NTA) applies to their interest and the native title rights and interests have no effect in relation to the LALCs' freehold or leasehold. This is reflected in the form of orders which are being made in matters in New South Wales: see for example Order 11 in *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 (**Annexure A**).

The proposed amendments to section 227 would add complexity to the operation of section 47A and raise doubts about how the non-extinguishment principle operates on LALC held land.

Clause 21 provides that if section 47A has been claimed and does apply to any area, then any act in relation to that area that would be inconsistent with native title **affects** native title.

This is contrary to the way non-extinguishment principle currently operates. For example, under the non-extinguishment principle, as the holder of a freehold title, LALCs can grant leases over land where section 47A applies. However, a lease is an act that is inconsistent with native title. On one interpretation of clause 27, despite the fact that the LALC holds a freehold, the grant of the lease could still affect native title.

We are concerned that these proposed amendments add to the potential impact of the s 47 sections on LALCs' ability to pursue the economic potential of their land and would add further complexity to an already complicated interaction between native title and land rights in NSW. Any amendment to relating to the s 47 sections and future acts should ensure that existing interests are wholly protected and that the rights under those interests can be fully enjoyed despite the recognition of native title.

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

Yours sincerely,



James Christian PSM
Chief Executive Officer
NSW Aboriginal Land Council

Date: 10 DECEMBER 2018

Annexure A

Extract from *Western Bundjalung People v Attorney General of New South Wales* [2017] FCA 992 (29 August 2017)

11. The relationship between the native title rights and interests in relation to the land or waters described in Part 2 of Schedule One (land or waters to which section 47A of the *Native Title Act 1993* (Cth) applies) and the Other Interests described at items 1(b) and 2 of Schedule Six is that:

- (a) the Other Interests continue to have effect;
- (b) the non-extinguishment principle in section 238 of the *Native Title Act 1993* (Cth) applies to the grant or vesting of the Other Interests or any prior interest in relation to the area in accordance with section 47A(3)(b) of the *Native Title Act 1993* (Cth);
- (c) the native title rights and interests continue to exist in their entirety, but have no effect in relation to the Other Interests;
- (d) the Other Interests, and any activity that is required or permitted by or under and done in accordance with the Other Interests, may be exercised and enjoyed in their entirety notwithstanding the existence of the native title rights and interests;
- (e) the native title rights and interests may not be exercised on land or waters the subject of the Other Interests while those Other Interests exist;
- (f) if the Other Interests or its effects are wholly removed or otherwise wholly cease to operate the native title rights and interests again have full effect; and
- (g) if the Other Interests or its effects are removed to an extent or otherwise cease to operate only to an extent, the native title rights and interests again have effect to that extent.