

SOME EMERGING ISSUES IN RELATION TO CLAIMS TO LAND UNDER THE *ABORIGINAL LAND RIGHTS ACT 1983* (NSW)

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I INTRODUCTION

In 1983, the New South Wales Parliament passed the *Aboriginal Land Rights Act 1983* (NSW) ('*ALRA*'). The necessity to provide Aboriginal people with economic independence as well as providing compensation for past injustice was at the forefront of the policy underlying the enactment of the *ALRA*. In his second reading speech, the Minister for Aboriginal Affairs, Frank Walker noted that the *Keane Report*¹ prepared by the Parliamentary Select Committee that preceded the *ALRA* had noted that Aboriginal people experienced 'severe economic deprivations' and that the Committee believed that 'land rights could also, in our times, lay the basis for improving Aboriginal self-sufficiency and economic wellbeing'.² He stated that '[i]n this sense land rights has a dual purpose – cultural and economic. 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'.³

The legislative policy expressed in the *ALRA* to return land to the Aboriginal people as 'a form of economic compensation' was noted by Sheller J in *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council*.⁴

For the last 25 years, the *ALRA* has operated with mixed success. Although Frank Walker anticipated a quick process for the resolution of claims, the process of determining claims and transferring the land has taken much longer. As a result, the capacity for Aboriginal land councils to realise the benefits of the

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1 Select Committee upon Aborigines, Parliament of New South Wales, M F Keane, *First Report from the Select Committee of the Legislative Assembly upon Aborigines: Report and Minutes of Proceedings* (1980) ('*Keane Report*').

2 New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, 5089 (Frank Walker).

3 Ibid.

4 *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (1993) 31 NSWLR 106, 117 (Sheller J).

ALRA has been curtailed. This article looks at the land claim process under the *ALRA* and some of the ways it has been hindered.

II *ABORIGINAL LAND RIGHTS ACT 1983 (NSW)*

Section 3 provides that the purposes of the *ALRA* are:

- (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,
- (e) to provide for the provision of community benefit schemes by or on behalf of those Councils.

The *ALRA* established 119 Local Aboriginal Land Councils ('LALCs'),⁵ 13 regional councils⁶ and one State body entitled the New South Wales Aboriginal Land Council ('NSWALC'). The purpose of the land council system is to provide a form of self-determination for Aboriginal people.⁷

Membership of a LALC is not limited to people who might be regarded as traditional owners. It is open to an adult Aboriginal person who:

- (a) resides within the area of the LALC concerned and is accepted as being qualified on that basis to be a member by a meeting of the Council, or
- (b) has 'a sufficient association with the area of the Local Aboriginal Land Council concerned (as determined by the voting members of the Council at a meeting of the Council)', or
- (c) is an Aboriginal owner in relation to land within the area of the Local Aboriginal Land Council concerned.⁸

Because the *ALRA* allows for membership of a LALC based on residency, the scheme has the potential to benefit all Aboriginal people in an area, including those dispossessed or dislocated by past government policies. The objects of

⁵ New South Wales Aboriginal Land Council, *Annual Report 2009–2010* (2010) 22.

⁶ Subsequent amendments to the *ALRA* in 2006 removed the regional council structure.

⁷ *New South Wales Aboriginal Land Council v Alan Jones* (1998) 43 NSWLR 300, 310 (Handley JA, Powell JA agreeing); *Darbinjung Pty Ltd v Darbinjung Local Aboriginal Land Council* (2006) 203 FLR 394, 430–1 [130]–[131] (Barrett J).

⁸ *ALRA* s 54(2A). The reference to 'Aboriginal owner' is a specific reference to people placed on the Register of Aboriginal Owners established under pt 9 of the *ALRA*. A person cannot be placed on the Register in relation to land unless they are directly descended from the original Aboriginal inhabitants of the cultural area where the land is located, have 'a cultural association with the land that derives from, the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants', and they have consented to being on the Register: *ALRA* s 171. This provision was introduced as part of the scheme for Aboriginal ownership of National Parks under pt 4A of the *National Parks and Wildlife Act 1974* (NSW).

LALCs are ‘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’.⁹ An LALC has a broad range of functions to pursue those objectives, including ‘to use, manage, control, hold or dispose of, or otherwise deal with, land vested in or acquired by the Council’, to make claims for Crown land, to ‘protect the interests of Aboriginal persons in its area in relation to the acquisition, management, use, control and disposal of its land’, and to ‘take action to protect the culture and heritage of Aboriginal persons in the Council’s area’.¹⁰ NSWALC has functions that include acquiring land and making claims on behalf of LALCs, to assist LALCs in relation to budgets and preparation of community, land and business plans, to provide policy advice to the Minister for Aboriginal Affairs, and to take action to protect Aboriginal culture and heritage.¹¹

When the *ALRA* was enacted it provided for the immediate transfer of land that was at that time being administered by the Aboriginal Land Trust.¹² This was only about 4600 hectares of land.¹³ The *ALRA* also introduced a scheme for claiming Crown land. As Mason P noted in the Wagga Land Claim, the land claim process is the ‘primary mechanism’ for giving effect to the purposes set out in section 3 of the *ALRA*.¹⁴ That process is discussed in more detail below.

Any land the subject of a successful claim is transferred in fee simple.¹⁵ Any transfer includes ownership of certain minerals in the land, but does not include gold, silver, coal or petroleum.¹⁶ ‘Mining operations’¹⁷ cannot occur on land vested in a land council without its ‘consent’.¹⁸

While the *ALRA* originally provided that transferred land would be inalienable, it was amended to allow for the disposal of land. Aboriginal people can sell land to purchase other land that is of more significance to them or for other purposes. It also allows for the development of land for economic benefit which was one of the principle goals of the *ALRA*.

There is however a detailed scheme for dealings with land under the *ALRA*.¹⁹ A LALC cannot dispose of any interest in land without approval from NSWALC. Any dealing without approval is void and unenforceable against the land

9 *ALRA* s 51.

10 *ALRA* s 52.

11 *ALRA* s 106.

12 *ALRA* s 35 as originally enacted. See by way of background, Meredith Wilkie, *Aboriginal Land Rights in NSW* (Alternative Publishing, 1985) 58.

13 *Ibid.*

14 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18, 24 [20] (Mason P) (*‘Wagga (CA)’*).

15 *ALRA* ss 36(5), 36(7). The exception is that land in the western division is now transferred as a perpetual lease: *ALRA* s 36(9A).

16 *ALRA* s 45(12).

17 ‘Mining operations’ is defined in s 45(1)(a) to mean ‘prospecting, exploring or mining for mineral resources or other natural resources’.

18 *ALRA* s 45(4). That restriction does not apply to the mining of gold, silver, coal or petroleum: *ALRA* s 45(12).

19 See generally *ALRA* div 4.

council.²⁰ A LALC cannot dispose of land that is of cultural significance to its members without first considering that significance.²¹

Once land is vested²² in a LALC, section 42B of the *ALRA* provides that it cannot 'be appropriated or resumed except by an Act of Parliament'.²³

In addition to the claims process the *ALRA* established a fund to support Aboriginal land councils and to provide a means of purchasing land. For 15 years 7.5 per cent of land tax was paid into the fund. As at 30 June 2010, the value of the fund was \$554 million.²⁴ That fund provides a basis for land purchases and support for economic development in the future. The income earned also funds the administration of the land council system.

The *ALRA* also makes provision for agreements for access to private land for the purposes of hunting, fishing and gathering.²⁵ Where agreement cannot be reached there is scope for the Land and Environment Court to determine the matter.²⁶ There has however been little utilisation of the provision.²⁷

III THE LAND CLAIM PROCESS

A 'Claimable Crown Land'

The process for making claims under the *ALRA* is straightforward. A land council need only write to the Registrar of Aboriginal Land Rights identifying the land it wishes to claim. The Registrar then forwards it to the Crown Lands Minister ('the Minister') who then considers the claim. The usual practice is that the Department of Lands ('the Department') investigates the claim and makes a recommendation to the Minister. The only enquiry is whether the land is 'claimable Crown land' as defined in section 36(1). If the Minister determines that it is 'claimable Crown land' she or he must transfer it to the Aboriginal land council. If the Minister refuses the claim the land council can appeal to the Land and Environment Court. The Court then determines the claim again. At any such hearing, the Minister has the onus of satisfying the Court that land is 'claimable

20 *ALRA* ss 42C, 42E(4), 42E(5).

21 *ALRA* s 42G(5).

22 *ALRA* s 40(2) provides that land is 'vested' in an Aboriginal Land Council if:

- (a) the Council has a legal interest in the land, or
- (b) the land is the whole or part of land the subject of a claim under section 36 and:
 - (i) the Crown Lands Minister is satisfied that the land is claimable Crown land under section 36, or
 - (ii) the Court has ordered under section 36(7) that the land be transferred to the Council, and the land has not been transferred to the Council.

23 *ALRA* s 42B (formerly s 42).

24 New South Wales Aboriginal Land Council (2010), above n 5, 62.

25 *ALRA* s 47.

26 *ALRA* s 48.

27 See, eg, J Behrendt and P Thompson, 'The Recognition and Protection of Aboriginal Interests in New South Wales Rivers' (2004) 3 *Journal of Indigenous Policy* 37, 91–2.

Crown land'.²⁸ The Court will comprise a judge and at least one commissioner with 'suitable knowledge of matters concerning land rights for Aborigines and qualifications and experience suitable for the determination of disputes involving Aborigines'.²⁹

In this process, in contrast to claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) or the *Native Title Act 1993* (Cth), there is no need for any anthropological evidence, proof of traditional connection, or justification for why a land council may want the land. The only question to be determined is whether it is 'claimable Crown land'.

Section 36(1) of the *ALRA* provides that land is 'claimable Crown land' if it comprises lands vested in Her Majesty, that at the date the claim was lodged:

- (a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901*,
- (b) are not lawfully used or occupied,
- (b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands,
- (c) are not needed, nor likely to be needed, for an essential public purpose.³⁰

Because the *ALRA* fixes the enquiry into whether land is 'claimable Crown land' at the date the claim is made, land may not be claimable at one point in time but may become claimable later. There is no prohibition on repeat land claims. Indeed a substantial injustice would be worked against Aboriginal people if there was, particularly where uses expire or if the need for particular lands dissipates. The Wagga Land Claim³¹ is a recent example where land had previously been the subject of an unsuccessful land claim, but a subsequent claim, which was lodged when the land was about to be sold, was successful.

The definition of 'claimable Crown land' allows for unreserved Crown land and land reserved or dedicated under Crown lands legislation to be claimed. It does not allow for claims to land reserved under other legislation such as the *National Parks and Wildlife Act 1974* (NSW) ('*NPWA*') or the *Forestry Act 1916*

28 *ALRA* s 36(7). The Minister has the burden of 'satisfying the trial judge of the ultimate fact, namely that the lands were not claimable Crown lands' and has 'the burden of establishing such primary facts and inferences as must be drawn therefrom in order for his decision to be upheld': *Minister Administering the Crown Lands Act v Bathurst Local Aboriginal Land Council* (2009) 166 LGERA 379, 422 [202] (Basten JA) ('*Bathurst*').

29 See ss 12(2)(g), 37(2) of the *Land and Environment Court Act 1979* (NSW). Section 37(2) provides that a judge is to 'be assisted by 2 Commissioners or, if the Chief Judge so directs, by one Commissioner'.

30 There are two further exceptions relating to land the subject of a registered native title claim or a determination of native title under the *Native Title Act 1993* (Cth): *ALRA* ss 36(1)(d)–(e).

31 *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2008) 237 CLR 285 ('*Wagga (HCt)*').

(NSW).³² Lands vested in a Minister or Ministerial holding company or vested in a local government body are not claimable.³³

It has been noted that the *ALRA* is remedial and beneficial legislation and the exceptions to ‘claimable Crown land’ in section 36(1) are to be ‘narrowly construed’.³⁴ Generally speaking, land is ‘lawfully used or occupied’ if it is used ‘in fact’ or to more than ‘a merely notional degree’.³⁵ A constructive use or occupation is insufficient,³⁶ as is a future use.³⁷ Minor or transitory uses,³⁸ or administrative processes in relation to the land,³⁹ have also been held to be insufficient.

In order to fall within section 36(1)(c) of the *ALRA* the public purpose needs to be ‘essential’. ‘Essential’ means ‘necessary or indispensable’.⁴⁰ It has been noted that the reference to ‘essentiality’ sets a high standard and involves a ‘significant restriction’ on the exception to claimable Crown lands. It is not enough that the public purpose be ‘desirable’ or ‘highly desirable’.⁴¹

There are a broad range of matters which can, in given circumstances, comprise an essential public purpose including roads, schools, sewerage

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- 32 National Parks and State Forests cannot therefore be claimed under *ALRA* s 36(1). There is however a separate scheme for Aboriginal owned national parks under t 4A of the *NPWA*.
- 33 *Mogo Local Aboriginal Land Council v Eurobodalla Shire Council* (2002) 54 NSWLR 15, 29–30 [57]–[58] (Giles JA).
- 34 *Minister Administering the Crown Lands Act v Deerubbin Local Aboriginal Land Council (No 2)* (2001) 50 NSWLR 665, 674 [53]–[54] (Spigelman CJ) (*‘Maroota (CA)’*). See also *Bathurst* (2009) 166 LGERA 379, 419 [186] (Tobias JA), 426 [217] (Basten JA); *Darwinjung Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2006) 149 LGERA 162, 170 [14]–[15] (Pain J); *Wanaruah Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2001) 113 LGERA 163, 183 [97]–[98] (Lloyd J) (*‘Wanaruah’*); *Wagga (CA)* (2007) 157 LGERA 18, 24 [21], 25 [25] (Mason P); *Muli Muli Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2010) 176 LGERA 182, 209 [48]–[49] (Pain J) (*‘Urbenville Claim’*).
- 35 *Daruk Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 30 NSWLR 140, 164D–E (Priestley JA) (*‘Hawkesbury River Claim’*); *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (1993) 31 NSWLR 106, 108D–E (Priestley JA), 119G (Sheller JA) (*‘Nowra Brickworks (No 1)’*). See also *Wagga (HCT)* (2008) 237 CLR 285, 305–6 [69] (Hayne, Heydon, Crennan and Kiefel JJ); *Griffith Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 108, [39] (Pain J) (*‘Hillston’*).
- 36 *Hawkesbury River Claim* (1993) 30 NSWLR 140, 164B–D (Priestley JA).
- 37 *Wagga (CA)* (2007) 157 LGERA 18, 25 [32], 28 [50] (Mason P, Tobias JA agreeing); *Nowra Brickworks (No 1)* (1993) 31 NSWLR 106, 121C (Sheller JA).
- 38 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 241 (29 August 2008) [143] (Sheahan J) (*‘Berowra LEC’*); *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 35 (31 January 2008) [69] (Jagot J) (*‘Shoalhaven’*).
- 39 *Hillston* [2008] NSWLEC 108 (18 March 2008) [71] (Pain J).
- 40 *New South Wales Aboriginal Land Council v Minister for Natural Resources* (1986) 59 LGRA 318, 331–2 (Stein J) (*‘Tredega Claim’*); *Worimi Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1991) 72 LGRA 149, 163 (*‘Worimi’*); *La Perouse Local Aboriginal Land Council v The Minister (No 2)* (1991) 74 LGRA 176, 183 (Bannon J) (*‘La Perouse’*).
- 41 *Minister Administering Crown Lands Act v Illawarra Local Aboriginal Land Council* (2009) 168 LGERA 71, 80 [32(2)] (Hodgson JA, McCol JA agreeing) (*‘Illawarra (CA)’*). See also *Maroota (CA)* (2001) 50 NSWLR 665, 674 [55] (Spigelman CJ); *Dorrigo Plateau Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 155 LGERA 307, 313 [10] (Jagot J) (*‘Dorrigo’*); *La Perouse* (1991) 74 LGRA 176, 182–3 (Bannon J).

facilities, and nature conservation. Where the purpose can be dealt with by way of a grant subject to condition, the *ALRA* allows for the transfer by way of a conditional grant.⁴²

The word ‘likely’ in section 36 means ‘a real or not remote chance’.⁴³ In *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council*⁴⁴ the requirement of a real and not remote chance was referred to as a ‘substantial’ chance.⁴⁵

Section 36(1)(b1) of the *ALRA* differs from the other subsections in section 36(1) as it is termed by reference to an ‘opinion of a Crown Lands Minister’.⁴⁶ Section 36(1)(b1) requires that the opinion exist as at the date of claim.⁴⁷ The existence of such an opinion can be found by reference to direct evidence or inferentially from the whole of the evidence.⁴⁸ The fact that land is included in a future land release strategy, or is acknowledged in public planning documents as having a capacity for future urban development, does not necessarily establish that it is relevantly needed or likely to be needed as residential land.⁴⁹ The fact that the Land Commission or a local government body have made plans for future residential development, or that a local government body has sought permission to compulsorily acquire land for that purpose, has also been held to be insufficient.⁵⁰

What constitutes ‘residential lands’ is yet to be fully resolved. It is at least clear that ‘residential lands’ is not synonymous with ‘urban development’, which could clearly include a broader range of uses including commercial, industrial and recreation.⁵¹ In any large subdivision there may be roads, green space and community facilities provided for. In those circumstances it is arguable that those uses were *ancillary* components of ‘residential lands’ and therefore be able to be brought under section 36(1)(b1) without the need to have them separately dealt with under section 36(1)(c), but that is a matter which is unclear. In *Awabakal*, Pain J held that a community centre which was part of development application for a large subdivision was part of ‘residential lands’.⁵² In *Nambucca (No 2)*

42 See *ALRA* s 36(5A). See, eg, *Wanaruah* (2001) 113 LGERA 163, 184 [102]–[104] (Lloyd J).

43 *Maroota* (2001) 50 NSWLR 665, 674 [57] (Spigelman CJ).

44 (2009) 168 LGERA 71 (*‘Illawarra (CA)’*).

45 *Illawarra (CA)* (2009) 168 LGERA 71, 80 [32(1)] (Hodgson JA, McColl JA agreeing). See also *Illawarra Local Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2010] NSWLEC 124 (15 July 2010) [54] (Sheahan J) (*‘Illawarra (No 2)’*).

46 ‘Crown Lands Minister’ is defined in s 36(1) to mean ‘the Minister for the time being administering any provisions of the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901* under which lands are able to be sold or leased’.

47 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (No 2)* [2008] NSWLEC 13 (31 January 2009) [72] (Jagot J) (*‘Nambucca (No 2)’*).

48 *Ibid* [106] (Jagot J).

49 *Daruk Local Aboriginal Land Council v The Minister (No 2)* (1995) 89 LGERA 194, 204 (Bignold J) (*‘The Londonderry Claim’*); *New South Wales Aboriginal Land Council v Minister for Land and Water Conservation* [1997] NSWLEC 176 (17 November 1997) [9] (Talbot J).

50 *Wanaruah* (2001) 113 LGERA 163, 168–9 [18]–[19]; *Hillston* [2008] NSWLEC 108, [128] (Pain J).

51 *Londonderry Claim* (1995) 89 LGERA 194, 204 (Bignold J).

52 *Awabakal Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2008] NSWLEC 124 (8 April 2008) [100] (Pain J) (*‘Awabakal’*).

Jagot J found it unnecessary to determine whether drainage and open space fell within 'residential lands'.⁵³

B Operation of Land Claims Process

Approximately 27 021 land claims have been lodged since the *ALRA* commenced operation to 30 June 2010.⁵⁴ Around 20 000 of those claims have been lodged since 2005. NSWALC reports that 2398 of those claims have been successful while 6562 have been refused.⁵⁵ As at 30 June 2010 around 17 735 claims remained undetermined.⁵⁶

It is also estimated that approximately 81 813 hectares of land has been granted under the *ALRA* as at 30 June 2009.⁵⁷ That represents approximately 0.1 per cent of the State. The granting of a long outstanding land claim in late 2009 would have increased the area of granted land by an additional 20 000 hectares.⁵⁸ Estimates of the value of the land granted as at 30 June 2009 range from \$800 million to over \$2 billion.⁵⁹

By any standard, the amount of land transferred is modest compared to some other statutory land rights schemes. This is a direct result of the limited definition of 'claimable Crown land'. It may also have not been assisted by the fact that some LALCs did not fully exercise the entitlement to make claims to Crown land. Furthermore, when claims were refused, some land councils did not exercise their right of appeal or did not take steps to verify that claims were properly refused.

A further feature of the land that has been transferred is that it has not been evenly distributed. There has been little 'claimable Crown land' in the western division of New South Wales. The most significant holdings of 'claimable Crown land' are on the eastern third of the State.

However the lack of volume of land that has been successfully claimed conceals the fact that some of the land that has been transferred is very valuable. The *ALRA* allows land to be claimed in urban areas. The Wagga Land Claim and the Dorrigo Land Claim are examples where vacant buildings have been successfully claimed.⁶⁰ Even small parcels of land in built up or coastal areas can assist in the pursuit of economic goals of the *ALRA*. That is not to say that there have not been some substantial parcels of land transferred to LALCs including lands that are of cultural significance to the people concerned.

53 *Nambucca (No 2)* [2008] NSWLEC 13 (31 January 2008) [127] (Jagot J).

54 New South Wales Aboriginal Land Council (2010), above n 5, 77.

55 *Ibid* 78.

56 *Ibid*.

57 New South Wales Aboriginal Land Council, *Annual Report 2008–2009* (2009) 20.

58 That claim related to ALCs 2837, 2854 and 3023 which were lodged in 1987 and granted in 2009: Nathan Rees, 'South Coast Hand Back Makes History' (News Release, 14 November 2009) <http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0011/84791/2009.11.14_land_claim.pdf>.

59 New South Wales Aboriginal Land Council (2009), above n 57, 20.

60 *Wagga (H Ct)* (2008) 237 CLR 285; *Dorrigo* (2007) 155 LGERA 307. See generally J Behrendt, 'The Wagga Land Claim: Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council [2008] HCA 48' (2008) 7(9) *Indigenous Law Bulletin* 22.

IV HINDERING THE LAND CLAIM PROCESS

It would seem to be an unfortunate characteristic of land rights legislation that after the euphoria and self-congratulation of enacting the scheme, governments then focus their attention towards limiting the amount of land to be transferred under it. This may be a function of governments' thinking that simply enacting the legislation is enough. It may also stem from subsequent governments not being as committed to the scheme as their predecessors.

Perhaps one of the most notable examples was the attempt in 1978 to negate the operation of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) by expanding the town of Katherine to an area the size of greater London in circumstances where land claims were prohibited in town areas.⁶¹

Unfortunately, the *ALRA* has its own examples. The scheme for claiming land under the *ALRA* has been compromised through delay, the influence of subsequent government priorities in long outstanding land claims, the unjust use of evidentiary certificates, and attempts to elevate the sale of Crown land over the objects of the *ALRA*.

A Delay

In the second reading speech Frank Walker noted the imperative to take action on land rights because any deferment 'will unacceptably delay' the task of returning land to Aboriginal people and 'deny deserving Aborigines' enjoyment of their land and cruelly prolong deprivation and disadvantage'.⁶²

Sadly, subsequent governments have not been concerned about such cruel prolonging. While some claims have been expeditiously determined and either granted or refused, others have been undermined through delay which in some cases has occurred despite the land having been assessed as being 'claimable'.

In 2007, the New South Wales Auditor-General reported that as at 30 June 2007 there were over 344 Aboriginal land claims which had been unresolved for 10 years or more.⁶³ In fact a significant number of those claims had been outstanding for much longer. NSWALC estimated that as at 30 June 2010 there were 296 claims lodged before 2000–01 which remained undetermined.⁶⁴ Seven of those were lodged prior to 1993.⁶⁵ The oldest outstanding claim was lodged on 29 September 1984.⁶⁶

61 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170. See generally D Parsons, 'Kenbi Land Claim: 25 Years On' (1998) 4(8) *Indigenous Law Bulletin* 15.

62 New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, 5091 (Frank Walker).

63 Auditor-General New South Wales, *Auditor-General's Report: Financial Audits* (November 2007) vol 5, 210
<http://www.audit.nsw.gov.au/publications/reports/financial/2007/vol5/pdf/ag_report_entire_copy_volume_five_2007.pdf>.

64 New South Wales Aboriginal Land Council (2010), above n 5, 78.

65 *Ibid.*

66 *Ibid.*

It is now not unusual for the Land and Environment Court to be hearing appeals in relation to land claims which had been undetermined for up to two decades. Recent examples are *Nambucca*⁶⁷ (15 years), *Jerrinja*⁶⁸ (17–20 years), *Illawarra (No 2)*⁶⁹ (20 years), *Urbenville*⁷⁰ (18 years), *Awabakal*⁷¹ (16 years), and *Nelligen*⁷² (20 years).

In late 2010 there was before the Land and Environment Court at least 10 Class 3 Appeals involving claims which took more than 15 years to determine but which were ultimately refused.⁷³ The oldest of these relating to a claim at Ballina has taken 25 years to determine.⁷⁴

It is to be remembered that the claims process under the *ALRA* does not require an assessment of complex claimant evidence or any inquiry into the nuances of Indigenous law and custom or its continuity over time. It is simply an

67 *Nambucca (No 2)* [2008] NSWLEC 13 related to ALC 3721 which was lodged on 22 October 1990 and refused by the Minister on 4 May 2006.

68 *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 156 LGERA 65 ('*Jerrinja*') related to ALC 2756 which was lodged on 27 June 1986, ALC 2799 lodged on 21 November 1986, ALC 3148 lodged on 6 October 1988, and ALC 3476 lodged on 25 August 1989. All claims were refused by the Minister on 21 December 2006.

69 *Illawarra (No 2)* [2010] NSWLEC 124 (15 July 2000) related to ALC 2673 which was lodged on 3 March 1986 and refused by the Minister on 22 June 2006.

70 *Muli Muli Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2010) 176 LGERA 182 related to ALCs 3967 and 3969 which were lodged on 6 September 1991 and were refused by the Minister on 11 November 2009.

71 *Awabakal* [2008] NSWLEC 124 (8 April 2008) related to ALC 3508 which was lodged on 18 October 1989 and refused by the Minister on 1 November 2005.

72 *Batemans Bay Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 800 (14 December 2007) ('*Nelligen*') related to ALC 1431 which was lodged on 18 January 1985 and was refused by the Minister on 18 August 2005.

73 *Tharawal Local Aboriginal Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30057/2010 relating to ALCs 3843–3847, 3849–3857, 3859 and 3860 lodged on 6 February 1991 and refused on 20 October 2009 (18 years); *Yaegl Local Aboriginal Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30291/2010 relating to ALC 1932 lodged on 19 April 1985 refused on 23 December 2009 (24 years); *Darwinjung Local Aboriginal Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30293/2010 relating to ALC 3478 lodged on 12 August 1989 refused on 23 December 2009 (20 years); *New South Wales Aboriginal Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30294/2010 relating to ALC 3869 and 3870 lodged on 18 April 1991 refused on 23 December 2009 (18 years); *Narrabri Local Aboriginal Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30295/2010 relating to ALC 3920 lodged on 21 June 1991 refused on 23 December 2009 (18 years); *Birrigan Gargle Local Aboriginal Land Council v Minister Administering the Crown Lands Act* – LEC Proceedings 30357/2010 relating to ALC 4065, 4067 and 4069 lodged on 11 March 1992 refused on 12 January 2010 (19 years); *Armisdale Local Aboriginal Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30296/2010 relating to ALC 4151 lodged on 30 April 1992 refused on 23 December 2009 (17 years); *Deerubbin Local Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30246/2010 relating to ALC 3465 lodged on 15 August 1989 refused on 8 December 2009 (20 years); *Dubbo Local Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30297/2010 relating to ALC 4208 lodged on 8 May 1992 refused on 23 December 2009 (17 years); *Coffs Harbour & District Local Aboriginal Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30278/2010 relating to ALC 5133 lodged on 29 October 1993 refused on 17 December 2009 (16 years).

74 *Jali Local Aboriginal Land Council v Minister Administering the Crown lands Act* – LEC Proceedings 30290/2010 relating to ALC 1360 lodged on 16 January 1985 refused on 23 December 2009 (25 years).

enquiry as to the status of the land at the date of claim and a determination of whether it is lawfully used and occupied or needed or likely to be needed as residential land or for an essential public purpose. Many other claims have been determined within a couple of months⁷⁵ and, if the Minister really wants to, there is no reason why a claim could not be dealt with in a matter of weeks.⁷⁶

One can only speculate at the reason for the delay in such a large volume of claims. There is now a significant backlog of claims due to renewed activity on the part of land councils in lodging claims over the last five years. Some of the claims currently going through the Court were lodged in the first years of the operation of the Act. Other claims that have remained undetermined for significant periods, were investigated by the Department and then recommended for grant. For example, ALC 2892 was lodged by NSWALC in relation to land near Nowra on 19 March 1987. In 2000 (13 years after the claim was lodged), NSWALC received a letter from the Department advising that '[i]nvestigations regarding Claim 2892 have now been completed indicating that the majority of the claimed land may now be transferred to the Land Council'.⁷⁷ The only outstanding issue was whether NSWALC would consider accepting the transfer of the land subject to an easement for a sewer main and drainage. NSWALC promptly replied that it would.⁷⁸ Yet, on 8 December 2009 (23 years after the claim had been lodged, and nine years after the Department indicated that it had been investigated and was claimable) the Minister refused the claim.⁷⁹

Similarly, in *Jerrinja*, ALC 2799 was lodged on 21 November 1986 and the claim was investigated by the Department within a year. Officers in the Department recommended it for grant on 15 December 1987.⁸⁰ Nineteen years later the Minister refused it, relying on circumstances which came into existence 10 years after the date of claim.

In *Nambucca (No 2)* 11 claims in the immediate vicinity of another claim, ALC 3721, had been lodged around the same date as ALC 3721. While the first 11 claims were initially refused on 19 December 1994 on the basis that land was needed for residential land, the Court subsequently determined in 1997 that they were 'claimable'.⁸¹ ALC 3721 was refused 12 years later on the same ground and

75 See, eg, the claim at issue in the Wagga Land Claim was lodged on 23 May 2005 and refused on 8 March 2006. See *Wagga (CA)* (2007) 157 LGERA 18, 20-1 [1]-[2] (Mason P).

76 See, eg, in the Kinchela Land Claim, the claim was lodged on 13 October 2008 and refused three weeks later on 5 November 2008: *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2009) 166 LGERA 137, 141 [5]-[6] (Lloyd J) ('*Kinchela Land Claim*').

77 Letter from Department of Lands to New South Wales Aboriginal Land Council dated 11 September 2000.

78 Letter from NSWALC to Department of Lands dated 19 October 2000.

79 NSWALC subsequently appealed the refusal and the matter finally settled with the Minister agreeing to orders for the transfer of the land. Those orders were made on 17 September 2010 some 23 years after the claim was originally lodged.

80 *Jerrinja* (2007) 156 LGERA 65, 79 [32] (Jagot J).

81 See *New South Wales Aboriginal Land Council v Minister for Land and Water Conservation* [1997] NSWLEC 176 (17 November 1997).

again, on appeal, the Court determined that the land was ‘claimable Crown land’.⁸²

The delay is so great that the figures almost become meaningless. In *Illawarra* for example, the Minister sought to argue that a decade delay in taking any action to create a national park was part of a trajectory towards its inevitable creation. It is said that a week is a long time in politics. There were three state elections and a coalition government came and went between the lodging of the claim in that matter and any action towards the creation of the national park.

Because there are so many claims in this category, the delay is at risk of being seen as normal or to be expected. No doubt a LALC could maintain an action in mandamus to compel the Minister to make a decision, however, given the remedial nature of the *ALRA*, it should not require such action.

In *Jerrinja*, Jagot J commented that ‘[n]o land council should have to wait for twenty years for its land claim to be determined’ and that ‘[w]hile a reasonable time may vary on a case by case basis, a delay of 15 to 20 years in determining claims does not accord with any idea of reasonableness’.⁸³ In the *Nelligen* Claim Sheahan J noted that delays can ‘cause serious evidentiary problems for all parties, and can thus frustrate the beneficial and remedial legislative intention of the *ALRA* to return land to Aboriginal people’.⁸⁴

At present there is no real consequence for the Minister from inordinate delay in determining Aboriginal land claims. Because the Minister bears the onus of satisfying the court that lands were not claimable as at the date of claim, any uncertainty arising from the difficulty of establishing relevant matters with the passage of time should be resolved in favour of the applicant land council.⁸⁵ In *Illawarra CA* Basten JA held that the use of such an approach was neither novel nor an error of law.⁸⁶ He also observed that ‘evidence of long inactivity with respect to a proposed use of the land may give rise to an inference that there was not, at the date of claim, any real prospect that the land might be used for that purpose’.⁸⁷

Beyond that, the courts have not identified any consequence of the delay. Land claims have been unsuccessful despite the lengthy delay in determining the claim.⁸⁸ In *Jerrinja*, Jagot J did not think that there was any principle by which a 20 year delay would prevent the Minister from issuing an evidentiary certificate.⁸⁹

82 *Nambucca (No 2)* [2008] NSWLEC 13 (31 January 2008) [105]–[131] (Jagot J).

83 *Jerrinja* (2007) 156 LGERA 65, 105–6 [124]–[125] (Jagot J).

84 *Nelligen* [2007] NSWLEC 800 (14 December 2007) [89] (Sheahan J).

85 *Illawarra Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2008) 161 LGERA 294, 319 [128] (Sheahan J) (*‘Illawarra (No 1)’*).

86 *Illawarra (CA)* (2009) 168 LGERA 71, 97–8 [114] (Basten JA).

87 *Ibid* 91 [83] (Basten JA).

88 See *Awabakal* [2008] NSWLEC 124 (8 April 2008) where a land claim lodged 17 years earlier was refused and the subsequent appeal was unsuccessful.

89 *Jerrinja* (2007) 156 LGERA 65, 105–6 [124]–[125] (Jagot J).

The delay in determining land claims is a cause of ongoing injustice in the land claim process and one which significantly impairs the outcomes envisaged by the *ALRA*.

B Subsequent Priorities

There is nothing like an Aboriginal land claim to focus government, departments and agencies on what use they would rather put land to in preference to it being transferred to an Aboriginal Land Council. There are numerous examples where subsequent ideas for the use of the land have been relied on to refuse land claims.⁹⁰ One consequence of excessive delay in determining a land claim is that governments can develop other priorities for the land which, while not present until after the date of claim, nonetheless creates pressure to refuse land claims.

While post-claim events are generally irrelevant,⁹¹ there is often considerable difficulty in unravelling post-claim priorities from events that existed as at the date of claim. Mere speculation as to a possible use for land at the date of claim can be sought to be elevated to an inevitable outcome in light of subsequent government priorities.

For example, in its 1995 State election campaign the New South Wales Labor Party promised 24 new National Parks if elected.⁹² As it turned out, some of the lands promised for National Parks were subjects of undetermined land claims. On 15 March 1996, the Minister refused 50 land claims on the basis that all of the lands were needed or likely to be needed for the essential public purpose of nature conservation. In *Maroota* the Land and Environment Court saw through the refusal, noting it was only the later election promise that created the imperative at the relevant level of Government to suggest that any of the land was needed or likely to be needed for that purpose.⁹³ The Court of Appeal upheld the decision.⁹⁴

Maroota was a clear example of a land claim remaining undetermined for a number of years and, following a claim being lodged, political attitudes changing and a subsequent desire for the land being used to refuse the claim. In light of the clear rejection of that approach in *Maroota*, it would have been hoped that the Minister would not repeat it. Yet, the practice continues.

Jerrinja involved the Minister's refusal in 2005 of claims lodged up to 20 years earlier, because of the essential public purpose of nature conservation. At the date of claim there was no proposal for any of the lands to be included in any conservation reserve. In seeking to issue evidentiary certificates to defeat the claims the Minister relied on the need for the land to be added to Jervis Bay

90 See, eg, *Dorrigo* (2007) 155 LGERA 307, 320–1 [46]–[48] (Jagot J).

91 The exception is material that confirms a foresight: *Housing Commissioner of New South Wales v Falconer* (1981) 1 NSWLR 547, 558.

92 *Deerubbin Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [1999] NSWLEC 82 (1 April 1999) [64] (Bignold J) (*'Maroota (LEC)'*).

93 *Ibid* [64]–[67].

94 *Ibid*; *Mogo Local Aboriginal Land Council v Eurobodalla Shire Council* (2002) 54 NSWLR 15.

National Park and the fact that the land was zoned ‘8(b) – Proposed National Park’ under the Jervis Bay Regional Environmental Plan. The Jervis Bay National Park did not exist until 10 years after the date of the first of the claims and the land was only rezoned 8(b) in 1996.⁹⁵ The Minister relied on Government policies that only came into existence a decade later to refuse the claims.

In *Illawarra (No 2)*, shortly before the date of claim, Budderoo National Park was created. Certain lands were excluded from the park because of objections from the Department of Mineral Resources. A land claim was lodged on 17 January 1986. For a decade no action was taken in relation to the land. In 2001 (some 15 years after the date of claim) amendments to the *NPWA* were passed which allowed for State Conservation Areas, which are a type of reserve that is more compatible with mining activities.⁹⁶ Following election promises in 2003, the government developed interest in having the previously excluded land added to Budderoo National Park.⁹⁷ The claim was refused on 22 June 2006 principally on the basis that land was needed or likely to be needed for the essential public purpose of nature conservation. The Land and Environment Court twice determined that there was no likely need for the land at the date of claim with any such need only arising, 15 years later when the relevant legislative changes were made and government policies altered.⁹⁸ That decision was upheld when it was appealed for a second time.⁹⁹

The longer claims remain unresolved the greater the risk of this type of influence. That is not only in relation to claims which may be the subject of nature conservation proposals, but any range of matters which may constitute an essential public purpose. That is leaving aside the inherent oddity of the Minister asserting that land was ‘necessary’ and ‘indispensable’ for a particular purpose at the date of claim but then doing nothing for up to two decades to bring it to fruition.

C Selling Crown Land

In light of the definition of ‘claimable Crown land’ it would have been expected that land which is regarded as surplus to the State’s needs would be viewed as precisely the type of land which ought to be available for claim under the *ALRA*.

In 2005 a number of claims were refused on the basis that the land was being used for the purposes of preparing it for sale and in doing so the Minister sought

95 *Jerrinja* (2007) 156 LGERA 65, 109 [136] (Jagot J). Her Honour noted at 109: ‘An environmental planning instrument prepared in 1996 and made in 1997, more than five to ten years after the land claims were made, cannot be a decision or manifestation of political will about the use of land when the claims were made.’

96 *Illawarra (No 2)* [2010] NSWLEC 124 (15 July 2010) [58]–[59] (Sheahan J).

97 *Ibid* [52], [57]–[58].

98 See *Illawarra Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (2008) 161 LGERA 294; *Illawarra (No 2)* [2010] NSWLEC (15 July 2010) 124.

99 See *Minister Administering the Crown Lands Act v Illawarra Local Aboriginal Land Council* [2011] NSWCA 127 (24 May 2011).

to elevate the sale of Crown land over the objects and purposes of the *ALRA*. Aboriginal people could be forgiven for viewing the State's position as one where it would rather sell the land than give it to Aboriginal people as compensation for their past dispossession.

The approach was tested in a claim over a disused building at Wagga. This claim was refused by the Minister and the New South Wales Aboriginal Land Council appealed. The land had been identified as 'surplus' and was in the process of being sold. At first instance, the Land and Environment Court accepted that because the *Crown Lands Act 1989* ('*CLA*') included a power to sell Crown land, the sale of land was necessarily a use of it.¹⁰⁰ The Court of Appeal took a different view,¹⁰¹ as did the High Court in rejecting the Minister's Appeal.¹⁰²

The tension between the desire of the State to sell off Crown land and the desire of Aboriginal Land Councils for the return of land as anticipated by the *ALRA* was tested in a different context in the Kinchela Land Claim. Under the *CLA* the Minister can revoke a reserve, but he must do so only after publishing a notice to that effect in the Government Gazette.¹⁰³ The revocation of a reserve is an indication that the existing need or use of the land may have changed and therefore may be claimable. Not surprisingly, some Land Councils monitor the Gazette and where appropriate lodge claims. The Department however developed a practice of selling Crown land at auction notwithstanding the land was reserved from sale and then revoking the reserve in the settlement period. By the time a land council saw a notice and lodged a claim the land was already contracted to be sold. In the *Kinchela Land Claim* Lloyd J, relying on a long line of authority for the need for strict compliance with Crown lands legislation,¹⁰⁴ held that the practice of selling reserved Crown land in this way was unlawful and the subsequent land claim should succeed.¹⁰⁵

It would be open to the government to adopt a different approach and seek to facilitate claims to land by Aboriginal Land Councils. For example, the State could adopt a policy of informing a LALC when there is surplus Crown land in its area inviting them to lodge a claim prior to taking steps to sell, rather than leaving it to chance as to whether a LALC finds out about a proposed sale in time to lodge a claim. On the basis of the pattern of government behaviour in relation to the *ALRA* this seems unlikely. Instead, there is a continuing tension between the desire of the State to sell off Crown land and the desire of land councils to realise the benefits of the claims process.

100 *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 158 (30 March 2007) [63]–[65] (Biscoe J).

101 *Wagga (CA)* (2007) 157 LGERA 18; Wilkie, above n 12.

102 *Wagga (HCt)* (2008) 237 CLR 285; see above Part III(A).

103 *CLA* s 90.

104 *Kinchela Land Claim* (2009) 166 LGERA 137, 153–4 [72]–[77] (Lloyd J) referring to inter alia *Cudgen Rutile (No 2) Pty Ltd* (1974) 4 ALR 438; *Watson's Bay and South Shore Ferry Company Ltd v Whitfield* (1919) 27 CLR 268; *New South Wales v Scharer* (2003) 131 LGERA 208.

105 *Kinchela Land Claim* (2009) 166 LGERA 137, 155 [82] (Lloyd J).

D Evidentiary Certificates

A further way in which the land claim process has been undermined in recent years is through the unjust use of evidentiary certificates. Section 36(8) of the *ALRA* provides:

A certificate being:

- (a) a certificate issued by a Crown Lands Minister stating that any land the subject of a claim under this section and specified in the certificate is needed or is likely to be needed as residential land, or
- (b) a certificate issued by a Crown Lands Minister, after consultation with the Minister administering this Act, stating that any land the subject of a claim under this section and specified in the certificate is needed or likely to be needed for an essential public purpose,

shall be accepted as final and conclusive evidence of the matters set out in the certificate and shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatever.

Certificates enable the Minister to ensure that land which she or he has determined to be not 'claimable Crown land' is also determined by the Land and Environment Court to not be claimable. However, the effect of the certificates has rightly been described as 'draconian'.¹⁰⁶ In *Darkingung*, Bignold J noted that 'if resort to certificates were to become matters of routine ... the appeal rights conferred upon a claimant Aboriginal Land Council ... would be seriously curtailed, if not entirely emasculated'.¹⁰⁷

In *Darkinjung Local Aboriginal Land Council v Minister for Natural Resources (No 2)*¹⁰⁸ Stein J observed that the use of certificates 'resembles the act of giving food with one hand and taking it away with the other, before the food has reached the mouth'.¹⁰⁹

In the early stages of the *ALRA* the Minister used certificates in an oppressive way, in some cases producing a certificate shortly before a hearing,¹¹⁰ and sometimes with no indication of the basis upon which it was issued.¹¹¹ Certificates are however capable of being set aside for lack of procedural fairness and jurisdictional error¹¹² and a number of attempts to issue certificates have failed for this reason.

106 *Worimi Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1991) 72 LGRA 149, 156 (Stein J).

107 *Darkingung Local Aboriginal Land Council v Minister for Natural Resources* (1985) 58 LGRA 298, 302 (Bignold J). See also *New South Wales Aboriginal Land Council v Minister for Natural Resources* (1986) 59 LGRA 333, 337 (Stein J) ('*Winbar*').

108 (1987) 61 LGRA 218.

109 *Darkingung Local Aboriginal Land Council v Minister for Natural Resources (No 2)* (1987) 61 LGRA 218, 231 (Stein J).

110 See, eg, *Winbar* (1986) 59 LGRA 333, 336 (Stein J).

111 See, eg, *Darkingung Local Aboriginal Land Council v Minister for Natural Resources (No 2)* (1987) 61 LGRA 218, 231 (Stein J).

112 See *Worimi* (1991) 72 LGRA 149, 161 (Stein J); *Minister for Agriculture, Lands and Forests v New South Wales Aboriginal Land Council* (1987) 62 LGERA 27, 31 (Samuels, Priestley and McHugh JJA).

Despite initial use of certificates, the Minister refrained from using them for many years.¹¹³ This may have been because of a realisation that the draconian nature of the practice did the Minister no credit. It may have also been because of a realisation that it was unnecessary. If a claim is properly refused then the Minister should be able to satisfy the Court of that matter. If it has not been properly refused it is a disingenuous act, and one inconsistent with the remedial objectives of the *ALRA*, to prevent a land council from having that matter remedied in Court.

In the late 2000s the practice of issuing certificates was re-enlivened. They were issued in circumstances where the Minister had no basis to refuse the claims and the issuing of certificates was the only way of supporting a refusal. In *Winbar*, Stein J was perplexed about a certificate being issued two years after a claim was lodged.¹¹⁴ Certificates have more recently been issued after much longer periods as illustrated in the following matters.

In *Jerrinja* the Jerrinja Local Aboriginal Land Council had made a number of land claims in and around Jervis Bay in the mid to late 1980s. At the time there were no government proposals to reserve any of the land for conservation purposes. In December 2006, the Minister refused the claims on the basis they were needed or likely to be needed for the essential public purpose of nature conservation. Jerrinja Local Aboriginal Land Council appealed but the Minister issued certificates in each of the proceedings. They were issued between 16 and 20 years after the date of the claims. As noted above, that was in circumstances where there were no proposals for the conservation of the land at the date of claim and at least one of the claims had been recommended for grant nine years earlier.

In *Nambucca (No 2)* the Minister issued certificates stating that the land was needed as residential land some 17 years after the claim was lodged. That was despite the fact that in other claims lodged around the same time, over land in the vicinity, the Court had determined that there was sufficient residential land in the town of Nambucca to meet 50 to 60 years demand and that the other land was claimable.¹¹⁵ Ironically, the Minister did not argue that the land was likely to be needed for long term residential land needs. He argued that the land was needed as a stopgap measure for the two years after the date of claim, until other developments could be established,¹¹⁶ a period that had expired 15 years earlier.

Berowra LEC related to claims lodged between February and May 2000. The Minister refused the claim on 25 October 2005 on the basis that the land was needed or likely to be needed as residential land and for nature conservation. An appeal was commenced in the Land and Environment Court on 16 December 2005.¹¹⁷ The Minister issued certificates in relation to residential land on 22

113 Certificates do not appear to have been used for the 13 year period between 1992–2005.

114 *Winbar* (1986) 59 LGRA 333, 336 (Stein J).

115 See *New South Wales Aboriginal Land Council v Minister for Land and Water Conservation* [1997] NSWLEC 176 (31 January 2008) [9] (Talbot J).

116 *Nambucca (No 2)* [2008] NSWLEC 13 (31 January 2008) [50] (Jagot J).

117 *Berowra LEC* [2008] NSWLEC 241 (29 August 2008) [5]–[6] (Sheahan J).

October 2007 and in relation to nature conservation on 17 January 2008,¹¹⁸ some seven years after the claims were lodged and nearly two years after the proceedings were commenced. The Minister issued the certificates in relation to nature conservation in circumstances where on 9 February 2004 the Deputy Premier had indicated that there was no decision of executive government that any of the land be used for conservation purposes, the National Parks and Wildlife Service indicated it had no interest in the land, and the Department of Lands (which was responsible for the land) had not heard of the proposal.¹¹⁹ The Minister however relied on the fact that a senior executive in Landcom had indicated that the land should be reserved, notwithstanding that neither he nor Landcom had any responsibility for the land and his own Minister had disavowed the proposal.¹²⁰

In *Jerrinja* and *Nambucca (No 2)* the certificates were set aside by the Land and Environment Court for jurisdictional error for taking into account irrelevant considerations.¹²¹ In *Berowra LEC*, both the residential lands certificates and the nature conservation certificates were set aside by the Land and Environment Court for similar reasons,¹²² however by majority the Court of Appeal overturned that decision in relation to the nature conservation certificates and the claim in relation to that part of the land failed.¹²³

The use of certificates after considerable delay is a draconian step particularly where the claim would succeed but for the certificate. In light of these cases it is ironic that in the second reading speech the Minister explained in relation to certificates that they would not mean that ‘Crown lands will not be successfully claimed’ and made reference to the ‘notorious and reprehensible action of the Northern Territory Government in attempting to thwart Aboriginal land claims by extending planning boundaries of major Northern Territory towns’.¹²⁴ It is hard to see how the issuing of evidentiary certificates over a decade after claims are lodged, or where the land is clearly claimable, is any less reprehensible.

The issuing of certificates appears to have ceased again for the time being, although the threat remains. If the practice was to recommence a question would arise as to whether the High Court’s recent decision in *South Australia v Totani*¹²⁵ has any bearing on the lawfulness of evidentiary certificates under the *ALRA*.

118 Ibid [8] (Sheahan J).

119 Ibid [70]–[81] (Sheahan J).

120 Ibid [80], [118] (Sheahan J).

121 *Jerrinja* (2007) 156 LGERA 65, 101–2 [111] (Jagot J); *Nambucca (No 2)* [2008] NSWLEC 13 (31 January 2008) [101]–[103] (Jagot J).

122 *Berowra LEC* [2008] NSWLEC 241 (29 August 2008) [133] (Sheahan J).

123 *Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council* (2009) 171 LGERA 56, 69 [33] (Hodgson JA), 96–7 [149] (Macfarlan JA), 80–2 [88]–[98] (Basten JA dissenting) (*‘Berowra’*).

124 New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, 5095 (Frank Walker) quoted in *Jerrinja* (2007) 156 LGERA 65, 98 [101] (Jagot J).

125 (2010) 242 CLR 1.

E Dealing with Undetermined Land Claims

A Land Council has an inchoate right to the land provided that the statutory criteria in section 36(1) are met.¹²⁶ The Minister's obligations under section 36(5) of the *ALRA* in relation to land claims were outlined in *Winbar (No 3)*:

What the Minister was then required to do under s 36(5) was to investigate whether the land the subject of the claim satisfied the conditions of the definition at the time the claim was made, and if so satisfied he was required, under the Act in its original form, to transfer the land to the claimant Land Council in fee simple. He had no discretion in the matter, he was simply required to look at a state of facts existing at the date of the claim.¹²⁷

This is a mandatory statutory obligation.

However, there have been a number of recent instances where the Minister has sought to deal with land the subject of undetermined land claims. One instance occurred in 2006 when the Minister served a notice under the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) of the intended compulsory acquisition of 'all interests' in a parcel of land at Tuncurry. The notice was, in part directed at native title rights and interests but was served on NSWALC which had an undetermined land claim on the land that had been lodged the previous year. The notice advised that '[t]his Acquisition Notice will extinguish your interest in the subject land or part of the land so described, and will convert that interest into a claim for compensation.'¹²⁸ It was only after Class 4 Proceedings were commenced in the Land and Environment Court that the Minister agreed to defer the acquisition and to determine the claim.

A further instance involved land near Parkes where the Minister gave approval under the *CLA* to a compulsory acquisition of land by Parkes Shire Council. At the time the Minister gave the approval he was aware that the land was the subject of an undetermined land claim lodged by NSWALC. Again, it was only following the commencement of Class 4 Proceedings that the Minister determined the claim.

In both instances the Minister ultimately refused the claims and the land council did not pursue an appeal in relation to the area the subject of the acquisition. In relation to the land at Tuncurry, the Court determined that part of the land was claimable, but the area proposed for acquisition was not pressed.¹²⁹

Questions remain as to the lawfulness of the Minister dealing with the land the subject of undetermined land claims.

First, it is arguable that the Minister has no power to deal with land the subject of undetermined land claims. In *Japanangka*¹³⁰ the High Court dealt with

126 See *Narromine Local Aboriginal Land Council v Minister Administering the Crown Lands Act* (1993) 79 LGERA 430, 433–4 (Stein J). See also *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands (Consolidation) Act and Western Lands Act* (1988) 14 NSWLR 685, 694 (Hope JA) ('*Winbar (No 3)*').

127 *Winbar (No 3)* (1988) 14 NSWLR 685, 691 (Hope JA).

128 Proposed Acquisition Notice (3 July 2006).

129 See *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (2008) 159 LGERA 400 ('*Tuncurry Claim*').

130 *R v Kearney; Ex parte Japanangka* (1984) 158 CLR 395 ('*Japanangka*').

analogous circumstances under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). In that case Brennan J held that the making of a land claim conferred a ‘statutory right’ to have it dealt with in accordance with the Act,¹³¹ and that any general power to dispose of Crown land did not extend to disposal which would affect that statutory right.¹³²

That approach was endorsed by the Full Federal Court in *Attorney-General (NT) v Minister for Aboriginal Affairs*.¹³³ Justice Von Doussa noted that:

But this improbability is in my view of less weight than the improbability that the Commonwealth, in putting in place a legislative scheme to redress past injustices to Aboriginals entitled by tradition to use or occupation of the relevant land, would intend that the scheme could be made more difficult or less certain of attainment by an alteration in the status of the land under claim, which would occur if white men were granted interests.¹³⁴

That position is arguably applicable to the *ALRA* where the making of a claim creates an inchoate right to the land from the date of claim, and for which there is no discretion as to whether the Minister, or the court, grants ‘claimable Crown land’.

Secondly, by authorising dealings with the land, particularly authorising an acquisition of it, the Minister is arguably pre-empting the decision he is required to take under the *ALRA*.¹³⁵ To the extent that the Minister authorises the transfer to a third party, the Minister is putting himself or herself in a position where he or she cannot comply with his or her duty under section 36(5)(a) of the *ALRA* to transfer the land in fee simple in the event the land is claimable. In relation to acquisitions the fact that the Minister has created an entitlement to compensation for the government prior to the investigation of the land claim also impacts on the manner in which the statutory power can be exercised. As Brennan J described in *Japanangka* the creation of interests after the date of claim ‘place all burden upon the taking of a decision to recommend a grant’.¹³⁶

Thirdly, to the extent any acquisition was designed to avoid the obligations to transfer ‘claimable Crown land’ or to circumvent the protections which would otherwise flow to a land council by virtue of section 42B of the *ALRA*, the action is arguably ultra vires for being for an unauthorised purpose.¹³⁷

131 Ibid 421–2 (Brennan J).

132 Ibid 422 (Brennan J), 424 (Deane J).

133 (1989) 25 FCR 345, 366–7 (Lockhardt), 400–1 (Von Doussa J).

134 Ibid 400–1 (Von Doussa J).

135 See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 17 (Mason CJ).

136 *Japanangka* (1984) 158 CLR 395, 419 (Brennan J). See also *City of Subiaco v Heytesbury Properties Pty Ltd* (2001) 116 LGERA 117, 148 [53] (Ipp J); *Lower Hutt City Council v Bank* [1974] 1 NZLR 545, 547, 550, 551 (McCarthy P).

137 *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 188–93 (Gibbs CJ), 216 (Stephen J), 225–6 (Mason J), 264 (Aickin J), 281–4 (Wilson J).

V BARRIERS TO THE USE OF LAND

The ability for Aboriginal Land Councils to realise the potential benefits of the *ALRA* have, in some instances, been further compromised by actions after claims have been favourably determined. Some Land Councils experience excessive delay in the transfer of land and are vulnerable to rezoning of land both before and after transfer.

A Delay in Transfer

A Land Council cannot put land to any purpose unless it has been transferred to it. Even where a claim is granted it can take an inordinate period of time for the land to be transferred.

For example, in *Maroota* the Court made orders that the land be transferred to the land council and for that purpose any survey was to occur ‘as soon as reasonably practicable’. Those Orders were made on 12 May 1999. It took until August 2010 (11 years after the Order was made) for some parts of the land to be transferred. Other parts are still awaiting transfer. Adding the time it took to determine the claims, it was 21 years between when the claim was lodged until the land council was in a position to even plan what it would be able to do with the land.

In 2007, the NSW Auditor-General reported that there was over \$1 billion worth of land which had been granted to Aboriginal land councils but which had not been transferred.¹³⁸ One reason proffered is the cost and time required for land surveys. But if in the past resources were short in that regard it was only because the government, in making budgetary allocations, chose to not adequately fund a key component of the Act.¹³⁹

In 2010, NSWALC noted that during the 2009–10 financial year 230 Certificates of Title were issued.¹⁴⁰ However, 192 of those titles were issued with ‘limited titles’ meaning the boundaries are not certain. The limitation on the titles is not removed until a survey is undertaken.¹⁴¹ NSWALC has noted that this ‘effectively transferred the cost of surveying granted land from the Government to cash strapped Local Aboriginal Land Councils’.¹⁴²

The delay in transferring ‘claimable Crown land’ undermines the remedial objects of the *ALRA*. The Auditor-General’s Report has identified a significant land base which, while nominally required to be transferred to Aboriginal

138 Auditor-General New South Wales, above n 63, 210.

139 The observations in *Wei v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 29 FCR 455, 477 (Neaves J) in relation to a lack of resources for the administration of the *Migration Act 1958* (Cth) are pertinent:

‘Clearly, it is not for the Court to dictate to the Parliament or the Executive what resources are to be made available in order properly to carry out administrative functions under legislative provisions. Equally clearly, however, the situation cannot be accepted in which the existence of a right created by the Parliament is negated, or its value set at nought, by a failure to provide the resources necessary to make the right effective.’

140 New South Wales Aboriginal Land Council (2010), above n 5, 78.

141 *Ibid.*

142 *Ibid.* 52.

ownership, is not land which they can use to realise the economic outcomes that the *ALRA* anticipated. Pushing the costs of surveys onto land councils compounds that problem rather than remedies it.

B Rezoning

A further means by which the ability of Aboriginal people to realise the benefits of the *ALRA* is undermined, is the rezoning of land post the lodgement of claim, in ways which severely restrict its use. Even where the land is not rezoned it can nonetheless be subject to environmental overlays, such as flora and fauna corridor designations, which also place restrictions on the use of the land.

There are undoubtedly lands held by land councils which have high conservation values. Legislation such as the *Threatened Species Conservation Act 1995* (NSW) and *Native Vegetation Act 2003* (NSW) have general application and Aboriginal Land Councils are not exempt from their operation. However restrictions are now placed on the use of land in a variety of ways in the planning process and increasingly to the disadvantage of land councils.

For example, in preparing its North West Growth Strategy of Sydney, the State government identified land with rural zoning to be favourably rezoned residential and put in place a process where other environmentally sensitive lands would offset the development. The idea was to fast-track development to accommodate Sydney's population pressures. Deerubbin Local Aboriginal Land Council had 40 hectares of lands which were excluded from the favourable rezoning, while much of its other lands were under pressure to contribute to conservation outcomes.¹⁴³

In 2008, Penrith City Council released a Draft Local Environmental Plan ('2008 Draft LEP') under which approximately 72 per cent of Deerubbin Local Aboriginal Land Council's land in that local government area would be rezoned from rural to a highly restrictive environmental zoning.¹⁴⁴ Deerubbin Local Aboriginal Land Council has estimated that 'approximately 85% of its remaining land' would be subject to 'a restrictive "environmentally sensitive land" overlay' under the 2008 Draft LEP.¹⁴⁵

The extent to which rezoning is a problem for Land Councils has not been fully investigated. Nor is it clear why some Land Councils have had so much of their land either rezoned or subject to environmental overlays.

Part of the problem appears to be that some environmental studies which are used to support zoning changes or environmental overlays look to develop linkages between public lands. Land council land is sometimes treated as public land or, if under claim or considered 'claimable' but have not yet been transferred, may be identified as Crown land. Once significant resources are spent on such studies there is little incentive to revisit them even if the underlying

143 Deerubbin Local Aboriginal Land Council, *Community, Land & Business Plan 1 July 2009 – 30 June 2012*, 4–5 <<http://www.deerubbin.org.au/Final-CLBP-290609.pdf>>.

144 Ibid 5.

145 Ibid.

assumptions are flawed. Any planning scheme or environmental study which makes recommendations on the basis of the identity of the land owner is discriminatory to the extent it targets land council land on that basis.

The problem is compounded because there is no requirement in the planning process to have regard to the objects and purposes of the *ALRA* and the impact a rezoning decision will have on the objectives of the *ALRA*. That is aside from any need to consider how the planning process could positively assist land councils achieve the economic outcomes envisaged by the *ALRA*.

The delay in determining claims and transferring the land is compounding this problem. Aboriginal land councils in some areas have lodged claims over land and while they have remained undetermined or awaiting transfer the surrounding land has been increasingly developed. The Land Council's land is then viewed as the only means of achieving green outcomes in an area.

The trend in placing adverse planning constraints on Land Council land represents a growing constraint on the *ALRA* delivering the economic outcomes anticipated when it was enacted. It was a principle objective of the *ALRA* that Aboriginal land councils realise economic outcomes for the use of the land, not for it to be seen as the green offset for everyone else's economic development.

The concern of Aboriginal people over environmental constraints on Aboriginal land has received considerable publicity in recent times due to opposition to Wild Rivers designations on Cape York. The federal coalition in Opposition introduced the Wild Rivers (Environmental Management) Bill 2010 (Cth) seeking to prevent such designations without the consent of Aboriginal landowners. In the second reading speech for that legislation opposition leader Tony Abbott stated:

I think it is marvelous that Aboriginal people should have rights to land, but if those rights do not include the right to use their land for productive purposes it is not a real right; it is not the kind of right that the average Australian would take for granted ...¹⁴⁶

To date no attention has been given to similar problems facing Aboriginal Land Councils in New South Wales. Urgent consideration needs to be given to developing protections for Aboriginal Land Councils. There is no reason why a State Environmental Planning Policy could not be developed in relation to Aboriginal land to protect it from inequitable adverse rezoning and to streamline developments by land councils to facilitate the economic and social outcomes that the *ALRA* envisaged.

VI CONCLUSION

At a federal level, both sides of the political spectrum currently speak in terms of achieving tangible outcomes to improve the position of Aboriginal and

¹⁴⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 22 February 2010, 1402 (Tony Abbott).

Torres Strait Islander Peoples rather than relying on symbolic measures. To date there has not, in New South Wales at least, been a similar willingness to support Aboriginal property rights by taking direct action that will enable Aboriginal people to develop their own land. Instead, there have been instances of delay, obfuscation and attempts to put barriers in front of Land Councils achieving positive outcomes through holding and managing land.

On 8 September 2010, the New South Wales Parliament introduced a bill to amend the *Constitution Act 1902* (NSW) to include recognition of the unique position of Aboriginal people as the original custodians and occupants of the land.¹⁴⁷ While this recognition was long overdue, such symbolic actions are hollow if they are not coupled with tangible measures to remedy the disadvantage that non-recognition and theft of property rights has meant for Aboriginal people.

The potential for the *ALRA* to deliver economic self-sufficiency to Aboriginal people remains. The *ALRA* has delivered to some Land Councils a significant land base which they can now use to further the economic objectives of the *ALRA*. How effective it is will in part depend on how willing governments are to facilitate and cooperate with that result.

147 The *Constitution Amendment (Recognition Of Aboriginal People) Amendment Act 2010* (NSW) amended the *Constitution Act 1902* (NSW) to insert a provision which provides:

2 Recognition of Aboriginal people

- (1) Parliament, on behalf of the people of New South Wales, acknowledges and honours the Aboriginal people as the State's first people and nation section
- (2) Parliament, on behalf of the people of New South Wales, recognises that Aboriginal people, as the traditional custodians and occupants of the land in New South Wales:
 - (a) have a spiritual, social, cultural and economic relationship with their traditional lands and waters, and
 - (b) have made and continue to make a unique and lasting contribution to the identity of the State.
- (3) Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.