

23 September 2024

Legislative Committee – Planning & Environment
Parliament of New South Wales



**New South Wales
Aboriginal Land Council**

ABN: 82 726 507 500

[Via Email only]

Dear Committee,

NSWALC Addendum to the Hearing on the Biodiversity Conservation Amendment (Biodiversity Offsets Scheme) Bill 2024

We would like to thank you again for the opportunity to give evidence at the hearing recently and want to provide this additional information to support our statements on that day.

To echo our Chairperson's opening statement, Aboriginal people have managed and cared for Country for millennia and beyond resulting in a sustainably managed estate that in turn sustained Aboriginal communities. In a western sense it can be viewed as a reciprocal and even an economic relationship between peoples, resources and places.

It is this continuing sense of 'place' and enduring Aboriginal place names, many which denote a place of a certain resource, that provided some enduring recognition of Aboriginal peoples' rights to land. However, the devastating ongoing effects of dispossession of Country and of places of nourishment and resources can also be seen as enduring. It was the Keane *NSW Parliament Joint Select Committee on Aborigines* back in 1978-79 that recognised these facts and that also gave rise to *the Aboriginal Land Rights Act 1983 (ALRA)* in response and as partial remedy.

The ALRA established a mechanism by which Land Councils can claim Crown land and provide an economic basis for Aboriginal Communities to once again be sustained by Country.

However, though groundbreaking on a global scale, this mechanism still operates in a broader context that every freeholding event that has happened since colonisation has taken prime land out of Aboriginal hands. A reality that instead returns only unused and unneeded Crown land, quite literally what is left behind only after every other interest has been met. Such lands, by their very nature, tend to be disproportionately impacted by other legislative regimes and especially biodiversity legislation. This is only exacerbated by the lengthy delays in which claims lay unresolved and land use pressures and constraints increase, without any consideration of Aboriginal land use aspirations.

The result is a regime that inadvertently perpetuates a broader injustice and entrenches inequity in the system. The compensation for dispossession established through the ALRA, the economic basis to sustain our communities and try to remedy the ongoing impacts of dispossession, is again hollowed out.

In the same 1978-1979 Keane Committee, it was recommended that returned land operate under separate planning ordinances to address this disparity. In today's context, we recommend similar: an express exclusion for Aboriginal Land Council lands from the operation of the Biodiversity Conservation Regime or an

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express power for the Minister to exclude Aboriginal Land Council lands on a case-by-case basis to provide at least a legislative pathway for land council land to still be activated as intended by the Parliament in 1983.

As a corollary to the above exclusion, we ask the Committee to recommend a statutory requirement for the Minister to develop and implement a strategic plan in partnership with the NSW Aboriginal Land Council, to establish a conservation estate to be funded from the Biodiversity Conservation Trust, to positively enhance Biodiversity across Land Councils lands that are otherwise not required to economically sustain our communities.

While we support and see the opportunities in a nature positive restorative regime, we cannot support amendments that would further impact on Aboriginal land rights and the ability for Aboriginal communities to economically activate the residual lands that are made available for that purpose.

In support of the evidence that was given in response to the Committee's questions, we also provide the following:

- **Does the land council, or any of the local land councils currently engage in the biodiversity offset system through stewardship sites? Are these being investigated as a possible way of engaging with the system as it currently exists?**

We note that as regulator for Land Dealings on Aboriginal Land Council lands, which include Biodiversity Conservation Agreements, we are aware of one such agreement that has been completed. Additionally, there are a number of sites under investigation, as stewardship sites present a real opportunity to actively manage country. However, the approach is currently piecemeal and not considered at a strategic level. Because of this, many projects are simply unviable with many of our land councils unable to commit the funding and ongoing resources necessary to manage a long-term project.

- **In practical terms, what is the impact or delay in terms of the current Act on development projects? Why is an exemption to the existing regime necessary and why should that be something the Committee recommends?**

Under the current regime, any project requires upfront investigation i.e. consultant reports, ecological surveys, etc. These additional costs for regulatory approval, undermine the viability of projects particularly in regional areas. Even where viability might survive such additional costs, Aboriginal Land Councils don't tend to have the resources needed to technically investigate biodiversity constraints. The effect is that land with any suggested biodiversity values is self-selected out, and lands returned under the ALRA lay dormant. These dormant lands represent undelivered opportunity for housing in our communities, and a source of bigoted criticism from the broader community. All because the Biodiversity Conservation statutory regime, pays no consideration to the Aboriginal Land Rights statutory regime.

As noted above the delays in determining the approximately 40,000 backlog of Aboriginal Land Claims only exacerbates matters. Unused and unneeded Crown land, by its nature is not as impacted by development or land use impacts. So that the very limited lands made available for compensation for dispossession, are now the lands most impacted by the Biodiversity Conservation Regime's constraints.

The practical impediment means that the burden is being shifted onto Aboriginal communities who are having their compensation hollowed out by these requirements.

By way of stark illustration, within one of the state's special activation precincts, specifically designed to facilitate economic development, the only parcel of land impacted by biodiversity constraints is that owned by the Aboriginal Land Council. While that land had been grazed for decades and decades, it was not subject to the same monoculture cultivation regime or is not under a slab of concrete like the other adjacent freehold sites. So again, despite the enactment of the ALRA, and the specific facilitation of the special activation precinct, Aboriginal interests are relegated to the margins.

How much of an obstacle to participation in the offset scheme for Aboriginal land councils is the huge unresolved backlog of claims and the slow administrative processing of those claims? Would you want the Committee to make a recommendation around that issue?

As noted by our Chairperson at the hearing, it is difficult to imagine the possibility that lies within the land still under claim and there is a cost to the community as long as it remains unreturned.

As noted above, the delays in determining the claims certainly exacerbate the problem. However, it is more fundamental and has at its heart that the design of the Biodiversity Conservation Regime does not take into consideration of Aboriginal Land Rights.

NSWALC welcomes any and all recommendations that the Committee may wish to make regarding the impact that unresolved land claims has on the economic, social and mental wellbeing of Aboriginal people across the state. However, we would note the innumerable recommendations to the same effect made by Audit Office and annually since 2014 and in the more recent Performance Audit of Aboriginal Land Claims. As well as the findings and recommendations of numerous inquiries, including specifically on Aboriginal economic development in 2016.

- **Consideration of strategic land assessment by Government prior to return of land**

As the Committee has noted, this is an option that has been discussed at various stages and with a number of stakeholders and Government departments. NSWALC supports this strategic approach to returning lands including provisions for offsets and a conservation estate that also works for Aboriginal communities.

In conclusion, NSWALC supports the ongoing efforts to amend the Biodiversity Conservation legislative regime to one that is effective at delivering tangible and net positive outcomes. However, the revised regime must take into account the very real impacts that the current scheme has on Aboriginal landowners and communities.

For the reasons provided above and in our prior submission and evidence, the NSW Aboriginal Land Council recommends the following to the Committee to appropriately respect Aboriginal Land Rights in the Biodiversity Conservation Regime:

1. Provide an express exclusion for Aboriginal Land Council lands from the operation of the Biodiversity Conservation Regime or an express power for the Minister to exclude Aboriginal Land Council lands on a case-by-case basis; and
2. Require the Minister and/or the Biodiversity Conservation Trusts to develop in partnership with the NSW Aboriginal Land Council and Local Aboriginal Land Councils a conservation estate to be funded from the Biodiversity Conservation Trust, to positively enhance Biodiversity across Aboriginal Land Councils lands that are otherwise not required to economically sustain our communities.

We hope that the Committee will take into account the context in which we and our land councils operate and support our recommendations.

Should you require further information, please contact the NSWALC Strategy and Policy Unit via e-mail:

Sincerely,

Yuseph Deen

Chief Executive Officer