

ABORIGINAL LAND RECOVERY IN NEW SOUTH WALES

HISTORICAL LEGACIES AND
OPPORTUNITIES FOR CHANGE

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1 EXECUTIVE SUMMARY

Aboriginal Land Councils and Traditional Owner groups are on the precipice of a new era of land justice. From 2017 many more land parcels will be returned to Local Aboriginal Land Councils and native title determinations and agreements will occur in a more timely manner.

Aboriginal land recovery, to date, has been extremely slow. Land claims resolved under the state level *Aboriginal Land Rights Act 1983* (ALRA) have resulted in the transfer of less than one per cent of the total land mass of New South Wales to Aboriginal community control/ownership. Under the national level *Native Title Act 1993* (NTA), lengthy and protracted legal action has seen only eight native title claims favourably determined for locations in New South Wales.

The Federal and New South Wales Governments' recent commitment to resolving outstanding land claims is expected to usher in major changes. New negotiated settlement provisions in the ALRA and other additional measures should facilitate the resolution of thousands of land claims in New South Wales. At the Federal level, criticism of the slow and protracted native title determinations in New South Wales is driving more expeditious processing of the claims currently in place over more than 35 per cent of the state's land mass. One result will be the significant, and largely untested, interaction of these two predominant land recovery statutes in relation to Aboriginal communities' rights to and interests in land in New South Wales. At the same time, the resolution of land claims will coincide with other relevant land use provisions relating, for example, to conservation, Aboriginal land management interests, unique land grants (such as Goat Island) and the divestment of the Crown Land estate.

As we fast approach this new era of land justice, new insights are needed to assist Aboriginal groups to manage an expanded Aboriginal estate that takes into account conservation, culture heritage management, industry and development imperatives, as well as any intra-community contests over governance.

This is a significant asset base for Indigenous Australians that has not reached its full potential in supporting their economic independence and in turn their social, cultural and physical wellbeing

- Senior Officers Working Group (2015, p.1)

2 INTRODUCTION

This paper identifies emerging research and policy issues relating to the ‘return of public lands’ to Aboriginal communities in New South Wales.

In New South Wales, Aboriginal peoples’ rights to, and interests in, land are recognised predominantly through the state-level *Aboriginal Land Rights Act 1983* (ALRA) and the national-level *Native Title Act 1993* (NTA). The common intent of these two distinct pieces of legislation is to facilitate the return of land to Aboriginal communities, and the many benefits that brings. The two laws are, however, different in their approach. Land rights legislation enables land to be transferred back to Aboriginal communities who have been dispossessed. Native title, if established, confirms the water and lands in question have always been held by the Traditional Owners, so recognises a ‘pre-existing’ title. Although the ALRA and the NTA have been in force for 34 and 24 years, respectively, their promises have not, to date, been fully realised in New South Wales. From 2017, a rapid escalation is expected in the recognition of Aboriginal peoples’ rights to and interests in land and, consequently, in its recovery by Aboriginal communities. This is due largely to significant procedural changes intended to streamline the resolution of land rights claims and political support for such progress. This paper canvasses the issues emerging in relation to the return of public lands and the research, resources and policy reform required to ensure the anticipated social, cultural and economic benefits flow on to Aboriginal people, communities and nations.

Australian governments acknowledge the pivotal role of land in the economic, social and cultural worlds of Indigenous peoples. The New South Wales Government’s 2016 report of the Aboriginal Economic Development Inquiry reinforced this observation. The Hon. Greg Pearce MLC (New South Wales Legislative Council, 2016) concluded that improving social and economic outcomes for Aboriginal people, creating conditions for Aboriginal knowledge and cultural expression, and that alleviating large-scale disadvantage will depend on the timely processing of land claims.

The paper begins with a brief overview of the unique history of land recovery in New South Wales. The second section canvasses the changing landscape of land recovery in the state, ahead of the

anticipated major acceleration in the resolution of land claims and the expected transfer of significant land holdings to Aboriginal communities. The third section explores issues emerging from this acceleration, and considers how such issues intersect with existing programs and proposed policy reforms. The final section critically analyses developments in Aboriginal land recovery and nation-to-state relations to date, and considers the future implications of these developments.

The starting point is the identification of the pressing immediate and medium-term issues relating to land return that require further research and urgent policy innovation to best enable and support Aboriginal community aspirations. Longer-term philosophical and ideological issues are also canvassed.

3 LAND, DISPOSSESSION AND RECOVERY IN NEW SOUTH WALES

Access to land, and its resources, was central to the colonial project and was nearly always secured by violent means over an extended period. From the early years of the British settler invasion of Australia from the late 1700s, the Eora people of the Sydney Basin objected to settler land clearing. This contest over local resources soon escalated into conflict. From 1790, brutal retribution by the settlers was triggered over access to scarce yam resources along what was by then the Hawkesbury River, to the north of the initial British settlement at Port Jackson (Sydney). Retaliatory strikes by the Aboriginal resistance leader, Pemulwuy, saw a period of sporadic guerilla warfare emerge over the following decade, before punitive British military responses finally suppressed Aboriginal resistance. The conflict coincided with the devastating impact of imported European diseases on vulnerable Aboriginal communities. Epidemics of influenza, smallpox and measles, for example, accelerated the mass-scale depopulation of the Aboriginal peoples of the Sydney Basin, extending out to surrounding networked clans.

Beyond the Sydney Basin, 19th century colonisation can be most accurately characterised as a continuous series of regional conflicts, interspersed with shared zones of contact over a lengthy, 100-year, period (Goodall, 1996). The dispossession of Aboriginal peoples from their land took place in the absence of formal administrative governmental controls, and without negotiations with Aboriginal communities or a clear legal basis for the expropriation of their land.

Any early recognition of Aboriginal rights to land – such as land grants to select Aboriginal citizens (e.g. Colebee/Nurragingy Land Grant) in the opening decades of the Australian colony -- and from the 1850s the ‘setting aside’ of reserve land for ‘the use of Aborigines’ – had collapsed by the late 1800s. By this time, more authoritarian and racially inflected regimes of control, segregation and dispersal had taken hold. The establishment of the Aborigines Protection Board (APB) in New South Wales in 1883 ushered in a long period of state control over Aboriginal families.

The simultaneous exercise and interplay of a racial ideology of progress, settler capitalism and European cultural supremacy propelled a long running assault on Aboriginal communities across the territory of New South Wales. By the early 20th century, government policy reached into almost every aspect of Aboriginal peoples’ lives. The interests of, first, the British colonial economy and, then, the self-governing Commonwealth of Australia from 1901, were paramount, particularly those of the land-hungry wool industry. When combined with a prevailing ideology of white supremacy, these imperatives determined the shape and scale of an intense period of land dispossession across New South Wales.

There were repeated calls for land justice from Aboriginal communities from the early years of the colonial invasion and throughout the drawn-out process of settlement and settler land acquisition.

One well-documented Aboriginal petition for land was made by William Cooper and his brother John Atkinson in 1887. Their petition stated they wanted ‘a small portion of a vast land which is ours by Divine Right’. Another example was the formation of the Australian Aboriginal Progressive Association (AAPA) in 1922, with a platform of no more reserve land revocation, child removals or school segregation.

Histories of land rights activism (Goodall, 1996; Norman, 2015) show it was not until the 1970s that the Australian Government first sought to recognise Aboriginal rights to land. When the Aboriginal Tent Embassy was installed on the lawns opposite the Federal Parliament in Canberra on Australia Day, 1972, it represented a dramatic challenge to the status quo. The highly visible Tent Embassy highlighted the protracted and violent dispossession of Aboriginal peoples in their own land. From the early 1970s, the Commonwealth Government began to recognise and understand enduring Aboriginal demands for land. The 1973-74 Aboriginal Land Rights Commission (also known as the Woodward Royal Commission) was tasked with inquiring into appropriate ways to recognise Aboriginal land rights in the Northern Territory with the view to developing a model for the other states to follow.

By 1978, Aboriginal land demands in New South Wales were complex and multifaceted. It had been 200 years since the arrival of the first colonial settlers and extensive land dealings and numerous changes of laws, regulations and government had followed. The New South Wales Government realised any land rights response had to take into account the reality of two centuries of land dealings, the scale of the colonial violence and dispossession, the extent of the state’s interference in Aboriginal worlds, and the damage it has wrought to Aboriginal knowledge and connections. Skilled and strategic Aboriginal activists forged good working relationships with the New South Wales Government. Their aspirations were met with enthusiasm, optimism and engagement in a new political process, underpinned by a recognition of the many benefits land rights could deliver.

3.1 THE ABORIGINAL LAND RIGHTS ACT 1983

The *Aboriginal Land Rights Act 1983* (ALRA) created a mechanism for recovering eligible Crown Lands. It established a community-controlled Aboriginal Land Council network, made up of the state, regions and Local Aboriginal Land Councils (LALCs) representing their local areas, and provided an initial 15-year compensation fund to finance the network and community-initiated enterprises. It was premised on some key ideas including consideration of the sustained loss of Aboriginal peoples’ connection to land and land assets and the potential for land ownership to drive economic activity and enterprises. As this marked a clear point of departure from previous policies of assimilation, the new Act offered a form of self-determination.

3.2 PURPOSE OF THE ABORIGINAL LAND RIGHTS ACT

The purpose of the ALRA, as set out in Section 3, is to provide land rights for Aboriginal persons in New South Wales including the acquisition and management of land and other assets and

investments, for representative Aboriginal Land Councils to hold those lands and to provide for the provision of community benefit schemes.

3.3 MEMBERSHIP OF LOCAL ABORIGINAL LAND COUNCILS

Under the ALRA, land claims are made on behalf of communities through LALCs or may be made on behalf of a LALC by the New South Wales Aboriginal Land Council. The make-up of LALCs, as determined by the provisions of the ALRA, appreciates Aboriginal communities as both bound by cultural attachment to place, with developed historical associations, and as diasporic communities. This is reflected in the LALC membership criteria. LALCs are open to any adult Aboriginal person who resides within the LALC's boundaries or who has an association with the area of the LALC. Membership also extends to Aboriginal persons who are culturally associated with particular land.

3.4 RECOVERING LAND UNDER THE ABORIGINAL LAND RIGHTS ACT: CLAIMABLE CROWN LAND

Land that can be recovered under the ALRA is confined to certain types of 'available Crown Land'. The process for making claims under the ALRA is relatively straight forward - a LALC writes to the Registrar identifying the land they are claiming on behalf of their community. The Registrar, in turn, forwards the claim to the Minister/s responsible for Crown Lands. The Minister/s, through the Department of Lands, considers the claim and determines if the land is 'claimable Crown land' as defined in section 36(1). That is, if the land is not being used and is unoccupied and is not otherwise needed, such as for housing or an essential public purpose, and is not part of a claim under the national-level native title legislation. If appropriate, the Minister/s then vests the land in the LALC. If a land claim is refused, the LALC has the right to appeal the decision in the New South Wales Land and Environment Court. A successful land claim will usually result in the LALC being granted a fee simple interest in the land or freehold ownership - the strongest interest a landholder can have. Land recovered by LALCs, or by the New South Wales Aboriginal Land Council (NSWALC) acting on a LALC's behalf, also includes rights to certain minerals - a unique entitlement compared to all other freehold landowners in New South Wales.

3.5 LAND RIGHTS CLAIMS AND GRANTS

NSWALC reports 2,473 land claims were granted between 1983 and mid-2014 (NSWALC, 2014b, p.2) totalling 127,000 hectares, accounting for less than one percent of the 33.5 million hectares of Crown Land¹ in New South Wales. Of the 44,118 Aboriginal Land Claims lodged in New South Wales over the more than three decades since 1983, more than 70 per cent, some 32,291 claims, remained unresolved as of July 2014.

¹ 'Crown Land', Department of Industry website, http://www.crownland.nsw.gov.au/crown_land/about_crown_land, accessed 26th June 2017. Note that this includes the 3-nautical mile zone and Western Crown land and several thousand leases.

The New South Wales Government's commitment to addressing land justice has since showed signs of being realised. In the 2015–2016 financial year the Crown Lands Minister granted (in part or in full) 146 land claims, covering an area of 2,530 hectares (NSWALC, 2016, p.14). As the NSWALC notes, this is a significant increase on the previous five years in which the average number of claim determinations were 52 per year (NSWALC, 2016, p. 15). The New South Wales Government's interest in dealing with Aboriginal land claims reflect a number of driving forces. These include the Government's commitment to land justice and its recognition of the economic and social benefits this will provide, a desire to create certainty in relation to land dealings for a host of stakeholders, as well as the impact of the strong advocacy from NSWALC and LALCs, the findings of several inquiries and successful ongoing litigation initiated by the ALC.

3.6 JOINT MANAGEMENT OF NATIONAL PARKS AND ABORIGINAL OWNERS

Since 1996, if Crown Land needed for nature conservation is of Aboriginal cultural significance, a 'buy-back' arrangement can be negotiated. This enables LALCs to obtain ownership of the land and to then lease it back to the government for use as a national park or another form of conservation reserve under a joint management arrangement. This allows Aboriginal owners – those people with a cultural association and knowledge of that landscape - to actively participate in the management of and communication about Country.

3.7 ABORIGINAL LAND AGREEMENTS

In 2015, amendments to the ALRA introduced an additional mechanism for recovering land that aims to significantly speed up the resolution of land claims. This followed the passing of the *Aboriginal Land Rights Amendment Act 2014*, which allows for a new negotiated Aboriginal Land Agreement (section 36AA) as well as other provisions. This option brings together LALCs and the Crown Lands Department, along with any, by invitation, other parties and enables them to come to a mutually acceptable agreement. This offers a less transactional and litigious alternative pathway for resolving multiple land claims. The interested parties strategically assess land recovery options in alignment with LALC aspirations and available lands. The land that can now be recovered under section 36AA may exceed the areas of land covered by current claims, as Aboriginal Land Agreements (ALAs) can include previously refused land claims and land that might otherwise fall outside the 'claimable crown land' definition. The ALA process has been designed to provide a more effective mechanism for land recovery with a time limit on negotiations to settle outstanding Aboriginal land claims and interest in lands. To illustrate this, an inaugural discrete, small-scale Aboriginal Land Agreement under section 36 AA of the ALRA is expected to return up to 62 land parcels to the Eden LALC, on the south coast of New South Wales, to resolve 69 (of a total of 120) of the LALC's outstanding land claims. This compares favourably to the Eden LALC's past experiences: in the preceding 33 years to 2016, 80 land claims were granted (some with several lots).² While such different claims are not directly comparable, these numbers reveal a trend towards increased Aboriginal land repossession.

² This includes freehold title to residential blocks in Eden, Pambula, Wyndham and Bombala; eight heavy industrial lots in Eden; eight tenanted rental properties; land at Wonboyn Lake, East Kiah, West Kiah and Fisheries Beach totalling 960 hectares and Green Cape Plantation of 16 hectares in Ben Boyd National Park.

The full potential of the ALA process is expected to be seen following four pilot studies, which were due to commence in 2017. The pilot sites are in the Federation Council, Northern Beaches Council, Tamworth Regional Council and Tweed Shire Council areas, and involve multiple LALCs. Claims over hundreds of parcels of land are expected to be settled using ALAs during these negotiations. A senior official at the Department of Industry – Lands said a sharp increase in the total area and value of the lands held by Aboriginal Land Councils was expected over the next few years (personal communication, 2017). The value of the Aboriginal Land Council estate is likely to increase from the current \$1 billion land valuation to between \$5 billion and \$6 billion.

3.8 NATIVE TITLE IN NEW SOUTH WALES

The ‘political revolution’ that generated the *Aboriginal Land Rights Act 1983* was followed a decade later by a ‘judicial revolution’. In the famous ‘Mabo case’ - *Mabo and others v Queensland (No 2)* (1992) – Australia’s highest court, the High Court, overturned the ‘legal fiction’ of *terra nullius* (empty land, or land belonging to nobody) that the British had used to justify claiming Australia without recognition of Aboriginal and Torres Straits Islander peoples’ occupation and their unique connection to the land, and without agreement or payment.

Common law recognition of native title rights was subsequently legislated with the passing of the Commonwealth *Native Title Act 1993* (NTA). This was followed by complementary legislation in the New South Wales Parliament: the *Native Title (New South Wales) Act 1994* (NTNSW). The purpose of the NTNSW Act, included the validation of previous land dealings by the New South Wales Government and measures to continue native title rights over land recovered under the ALRA. The interaction between the ALRA and NTA is covered in the following section and while a detailed analysis of native title case law is beyond the scope of this paper, some key points follow.

Native title recognises the traditional rights to and interests in the land and waters of Aboriginal and Torres Strait Islander peoples. Under the NTA, native title claimants can make an application to the Federal Court to have their native title recognised by Australian law. The NSWALC clarifies that ‘native title is about recognition of rights and interests in land, whereas land rights is about granting interests in land’ (NSWALC, 2014a, p.1).

The New South Wales Department of Industry offers a useful summary of native title:

Native title is the name Australian law gives to the traditional ownership of land and waters that have always belonged to Aboriginal people according to their traditions, laws and customs. These rights are different to and separate from the statutory right of Aboriginal Land Councils to make claims for land under the *NSW Aboriginal Land Rights Act 1983* (New South Wales Department of Industry, 2017).

The NSWALC explains that ‘Land rights and native title are very different systems and each can be beneficial for Aboriginal Peoples’ because ‘Native title claims can deliver rights and interests in land that may not be claimable under land rights.’ They also point out that ‘the rights in land

delivered by land rights, generally being full ownership or freehold title, are significant rights that may not always be delivered under native title'. The NSWALC cautions that although both systems may provide benefits to Aboriginal people their interaction can lead to points of disagreement (NSWALC, 2014b, p.16).

Data from the Native Title Register shows that of the 51 native title determinations in New South Wales, eight have been beneficial determinations that native title exists in part (four determinations) or in full (four determinations). The majority of claims have been made by non-claimant applicants; that is not by Traditional Owner groups, seeking a determination that native title 'did not exist'. Somewhere between 33% and 45% of New South Wales is currently under native title claim and awaits determination.

In 1998, the Federal Court's dismissal of the native title claim in the *Yorta Yorta* case significantly restricted the likelihood of future applicants obtaining a declaration of native title in New South Wales. The *Yorta Yorta* case was the first native title claim to be lodged in south-eastern Australia, covering an area of land and waters in Northern Victoria and southern New South Wales. Its dismissal, upheld in the High Court in 2002, was based on narrow evidence and an interpretation of colonial records that now forms a threshold for native title determination.

As Justice Madgwick, in the case of *Gale v Minister for Land and Water Conservation (NSW)* [2004] FCA 374 said:

The decision in *Mabo* was regarded in various quarters as heralding a new dawn for at least a modest degree of reparation to Aboriginal people generally, by way of according them an ability to reclaim unalienated Crown lands. The decision in *Yorta Yorta* has confirmed that such was not the effect of *Mabo*. The ability to obtain a declaration of native title under the Native Title Act is, at least after *Yorta Yorta*, strictly limited.

In 2015, the Hon. Justice Michael Barker noted that Queensland, Western Australia and the Northern Territory 'continue to be "high volume" jurisdictions when it comes to proceedings in the Federal Court under the NTA' and he went on to note that 'to a lesser extent New South Wales, continues to be of significance' (Barker, 2015).

Two native title claims for land located in New South Wales were determined in the Federal Court in 2015. In both cases, the judge was scathing about the New South Wales Government's actions that had caused undue delays and imposed onerous evidence requirements on the claimants. In the Federal Court consent determination, Justice Jayne Jagot recognised the Barkandji people's connection to Country in far western New South Wales and the injustice of waiting 18 years for their claim to be resolved. In what was only the sixth native title determination in New South Wales, covering 128,000 square kilometres, Justice Jagot wrote:

When justice is delayed, it is also denied. No one should be in any doubt. The winds of change are still blowing through how parties deal with native title claims. The glacial pace at which they have moved in the past is palpably unjust. Because one of the factors which delays resolution, tenure searching, is so significant, directions have been made emphasising the need for a reasonably proportionate approach – that is, an investment of resources proportionate to the outcomes to be achieved. No claim can justify the kind of tenure searching which may take years, even decades, to complete (Jagot, 2015a, par. 12).

After a wait of almost two decades, the native title rights of the Yaegl people of the lower Clarence region on the New South Wales coast were also recognised in 2015, in a determination also made by Justice Jagot. The judge noted ‘today we are finally resolving the oldest matter that exists in the Federal Court of Australia’ and went on to emphasise:

I have spent time focusing on the effect of the gross delays which have bedevilled these matters since the inception of the NTA. I have done so because all involved in the administration of the NTA should have a true understanding of how extraordinarily pernicious are the effects of such gross delay that entrench injustice over generations (Jagot, 2015b, par 4).

She noted:

How shameful it is, that in many of these matters the people who started the claim often become too aged or infirm to see the matter through or pass away, never having seen their labours bear fruit. Delay of this kind saps away any sense of justice or fairness in the process. It erodes confidence in the institutions, which are meant to serve our common interests. It can instil a sense of despair and incapacity in those who should be actively engaged in and empowered by the process. These effects are intolerable – and the short point is this – they now are no longer being tolerated (Jagot, 2015b, par 5).

Justice Jagot’s criticism of the onerous evidence requirements for the Yaegl People to establish sufficient evidence for the state to proceed with a negotiated outcome draws attention to the need for more effective responses from the New South Wales Government.

More clear guidance about the expectations of the evidence required to demonstrate continuous connection to Country is also expected to contribute to more realistic outcomes for Traditional Owners. Both the COAG Land Administration Investigation (2015) and the Australian Law Reform Commission (ALRC) *Connection to Country: Review of the Native Title Act 1993* (2015) recommend greater support from the New South Wales Government for the work of Prescribed Bodies Corporates (that represent native title holders and their interests), a more coordinated approach from the New South Wales government – including clearer lines of responsibility – and the appointment of a New South Wales Minister for negotiating Indigenous Land Use Agreements

(ILUAs). Consideration of new approaches to improve native title administration in the state has been proposed as part of Aboriginal Affairs NSW reforms in 2017 (personal communication, 2016).

3.9 COMPENSATION

A recent significant case in the Federal Court of Australia, referred to as *Timber Creek*,³ included the first assessment of compensation payable in relation to the extinguishment and impairment of native title rights and interests. The Ngaliwurru and Nungali peoples were awarded \$3,300,261 as compensation for economic loss (plus interest) and loss of their cultural and spiritual relationship with their land. While this decision is currently on appeal, legal practitioners believe a suitable metrics will eventually emerge to calculate compensation for loss of native title rights that far exceeds the land value (Australian Human Rights Commission, 2016, p.138). The Commission's Social Justice and Native Title Report, notes: 'Compensation for impairment or extinguishment of native title rights and interests remains one of the biggest pieces of unfinished business for Indigenous peoples that must be addressed as a matter of justice and reconciliation' (Australian Human Rights Commission, 2016, p.138).

³ *Griffiths v Northern Territory of Australia (No 3) [2016] FCA 900.*

4 ISSUES EMERGING FROM ACCELERATION OF LAND RECOVERY

This report has detailed the anticipated acceleration of land recovery under the ALRA and the recognition of rights to and interests in land under the NTA. An expanded Aboriginal estate in New South Wales also raises questions about approaches to land management and development, the impact of climate change and environmental collapse caused by overgrazing and intensive farming and rebuilding relationships to Country. A central point of tension is the interaction between the ALRA and the NTA. Both pieces of legislation are evolving and, as the land recovery has been constrained across New South Wales to date, many of the principles they enshrine in law are yet to be fully tested and applied in the New South Wales context.

4.1 INTERACTION OF THE ABORIGINAL LAND RIGHTS ACT AND THE NATIVE TITLE ACT

There are several key ways the two predominant Aboriginal land recovery mechanisms in New South Wales, the ALRA and the NTA, interact. Views vary about the possibility for confluence and beneficial interaction and the potential for conflict and antagonism between those with interests in lands that both laws grant. It is useful to return to some early moments in the development of native title legislation to assess this interaction, along with other land recovery mechanisms, to appreciate the impact of an escalation in land recovery.

The NSWALC councillors and staff were enthusiastic and instrumental actors in the negotiation of the Commonwealth Government's Native Title law. The role of NSWALC Council and staff was considered critical in ensuring the interests of south-eastern Australian peoples were represented in the debates. NSWALC's appointed negotiator, Aden Ridgeway, argued that the NSWALC's role 'put ... the east coast on the map' in an environment dominated by the 'traditional north'. The then Council Chair Manul Ritchie, similarly expressed enthusiasm in his introduction to the NSWALC 1993–94 annual report, saying:

I look back on this year ... with great pride in having played a role in changing Australia. The NSWALC Councillors and staff have made a difference for Aboriginal people across Australia, and will be remembered for many years to come for doing so (NSWALC, 1994).

The passing of the *Native Title Act 1993* generated substantial interest from New South Wales Traditional Owners. The number of native title claims lodged in New South Wales is testimony to the enduring desire of Aboriginal people for recognition beyond what is prescribed in the ALRA. For example, during 1996–97 the NSWALC was involved in thirty-four native title claims, eight of which were accepted and lodged. By September 1998, the NSWALC reported that there were 'well over a hundred claims in NSW' (NSWALC, 1999, p. 23). At the same time, because of limited resources, and perhaps as an indication of the decisions to come, the NSWALC

introduced a process to prioritise claims. At the same time it raised concerns about some claims being ‘ill-conceived’, ‘without merit’ or lacking ‘appropriate consultation’. This enormous interest in native title, and the sheer number of claims, highlights some of the limitations of the state-level ALRA.

The initial enthusiasm for native title is apparent in the NSWALC becoming a registered Native Title Representative Body (NTRB) in 1994. However, by 2001 the Council had reviewed this position and decided to withdraw as a registered NTRB citing ‘ongoing potential conflict of interest’, along with concerns about the effectiveness of the legislation between land rights provisions and the native title laws (NSWALC, 2002). Since this time the Native Title Services Corporation (NTSCORP) has evolved as a Native Title Service Provider for Aboriginal Traditional Owners in New South Wales.⁴

In contrast to the ALRA that focussed on social justice and compensation, the *Native Title Act* (NTA) recalibrated land rights in New South Wales including recognition of connection to Country since time immemorial. In this sense, the two laws create different communities of interest in relation to land, or Aboriginal polities: LALC members and Aboriginal owners under the ALRA and Traditional Owners (TOs) under the NTA. Under the ALRA membership of LALCs and therefore to an extent issues of Aboriginal identity, take account of colonial dispossession and violence, social worlds forged by life on missions and reserves, urbanisation and town based affiliations. Native title, on the other hand and for the most part, is concerned with enduring and uninterrupted pre-colonial connection to place. There is understandable tension between the ALRA and the NTA that speaks to issues of connection to Country, cultural authority and governance.

As both the ALRA and the NTA are set to return far more Aboriginal land far more quickly than in previous decades, their alignment and the tensions between the two land recovery statutes comes into dramatic focus. The tensions include the following realities:

- Both statutes are (largely) confined to certain lands within the Crown Lands estate.
- The Crown Land estate is both decreasing and finite.
- The land is transferred to LALCs with native title rights (in most cases)
- Native title claims pertaining to LALC lands limits dealings on those lands (including, for example, development applications, sale or lease) and may require LALCs to seek a determination in the court to extinguish native title.
- Native title recognition is very difficult to prove and has proceeded at a glacial pace.
- Native title, once registered, provides rights to negotiate.
- There is limited scope for LALCs and Prescribed Bodies Corporate (PBCs) to enter into agreement to achieve land management objectives.

As the return of land gains momentum, and both the ALRA and native title holders seek to recover land from the same limited land resources, better understanding is critical. This should

⁴ See *Native Title Services Corporation website for more information at <http://www.ntscorp.com.au/>. Accessed 26th June 2017.*

draw on the experiences of all parties in how these two land-recovery mechanisms interact to better facilitate the return of land to Aboriginal peoples. Agreement-making along with alternative mechanisms for land dealings subject to native title are critical considerations.

The complex relationship between native title and land rights has the potential to create uncertainty and delays in realising the benefits of land rights and native title interests. Darkinjung LALC, on the New South Wales Central Coast, has expressed concern about the interaction between the ALRA and NTA. The LALC's Annual Reports show significant costs associated with native title-related litigation. Darkinjung LALC's 2014 Annual Report shows expenditure of \$65,551.47 and its 2016 Annual Report shows expenditure of \$37,317.10. In their submission to the New South Wales Parliamentary Inquiry into Crown Land, the LALC recommended a review of mechanisms to facilitate dealings in land affected by native title (Darkinjung LALC, 2016).

In other situations, LALCs and Traditional Owner groups have utilised both the ALRA and NTA to achieve management and oversight of their lands. On the New South Wales North Coast, the Gumbaynggirr people successfully sought a native title determination over lands owned by the Nambucca Heads LALC and the Unkya LALC. The decision drew on the recognition of native title rights along with the freehold land held by the LALCs, and the provision for joint management made possible under the ALRA. The NSWALC celebrated the case as an example of both regimes complementing each other. NSWALC Councillor Peter Smith said:

[the] decision shows that native title and land rights can work together and are both important systems that provide rights for and advance the interests of Aboriginal people in NSW (Our Land Council, 2014).

Both the NSWALC and NTSCORP appear committed to finding ways to deliver more beneficial outcomes for Aboriginal people through the return of land. Both groups see leadership as critical. A memorandum of Understanding (MoU) between the two groups in 2014 committed to regular working party meetings for sharing strategies about negotiating with government and the potential for achieving improved land justice outcomes.

In its submission to the New South Wales Parliamentary Inquiry into Economic Development in Aboriginal Communities, NTSCORP (2016) argued that native title and land claims regimes can coexist under section 36(9) of the ALRA as 'two independent but equally important and viable mechanisms to promote economic development opportunities in New South Wales'. This view is not, however, shared across the Aboriginal land rights and advocacy groups in the state. The author spoke to numerous stakeholders as background research for this report. Without exception, they emphasised impending conflict between native title and Aboriginal land rights, including competition over resources, the imbalance of power between the LALCs and Traditional Owner groups and the need for the two statutes to be more effectively aligned. That is, to be complementary rather than antagonistic, as they are currently perceived to be. Research into how such alignment can be achieved is now critical.

4.2 THE CONSERVATION ESTATE

Both the ALRA and NTA have made further land recovery and management options available to Aboriginal communities through the Indigenous Land Corporation, Indigenous Protected Areas and Joint Management arrangements with the National Parks and Wildlife Service (NPWS).⁵ The conservation estate already has registered significant Aboriginal land interest and partnership and this is set to escalate rapidly as Aboriginal land recovery is realised and the Aboriginal land holdings expand. The New South Wales Office of Environment and Heritage (OEH) reports that 25 per cent of the land reserved for conservation in New South Wales is currently subject to some form of agreement with Aboriginal communities, including Memoranda of Understanding, Indigenous Land Use Agreements (ILUAs) or Aboriginal-owned lands with Part 4A lease-back agreements. Within 20 years, the OEH estimates that there will be some form of Aboriginal interest registered over all 'public lands held in the conservation estate' (personal communication, 2017).

However, funding for expanding national parks has all but halted, and the ability to enter into leases with Aboriginal community landowners pursuant to schedule 14 of the *National Parks and Wildlife Act 1974* has already stalled as the OEH and NPWS don't have the resources to 'pay the rent'. OEH is currently considering a range of strategies to expand the conservation estate within a limited budget, such as the inclusion of private lands as conservation areas. Until now, all conservation lands with Aboriginal interests have been fully accessible to the public, although owned by Aboriginal communities. The idea of Aboriginal lands as private conservation lands with specified access and how they might work in New South Wales, is yet to be explored. OEH funding limitations means it is unlikely shared Aboriginal and conservation areas will be further expanded. Consequently, alternative funding for the Aboriginal and conservation estate needs to be considered so the rapid repossession of territory with significant cultural management responsibilities attached, can proceed. This is especially important as LALCs and Traditional Owners recover land that has suffered environmental degradation, and needs careful management and rehabilitation, and where land is of high conservation and cultural value. Many LALCs engage in land management and rehabilitation and consider restoring landscapes as integral to restoring people's health. These vital activities have not been investigated; such research may demonstrate the value of such regenerative labour.

4.3 CONSERVATION ESTATE AND ECONOMIC ACTIVITY

The conservation estate and the agreed management arrangements that have been negotiated between Aboriginal land holders and the administering department, the OEH, reveals a broad approach to land management encompassing conservation, culture and economic activity. The conservation estate favours sustainable, low-impact land-based economic activity, including rental return, caring for Country, ranger movement and tourism within a broader definition of economic activity that extends to less tangible outcomes such as wellbeing, connecting to Country and regeneration.

⁵ ILC has purchased a total of 57 properties covering 250,641.045 hectares.

There is a body of practice in Canada that seeks to measure and quantify 'eco-system based management' and 'Land Management Frameworks'. These examples offer useful insights into how broad based regional alliances can manage Indigenous land, often growing out of local-level gatherings immersed in culturally regenerative practices. These structures appear to emerge from local community needs, concerns and interests rather than government authorisation or agreements. The Coastal First Nations communities characterise their system as a 'land management approach that recognizes that people, communities and the land are inseparable' (Coastal First Nations, 2017). Land-based economic activity, according to their mission, is to 'consider the health of both the people and the land that sustains them'. Economic-based management has two goals: to maintain ecosystem health and improve human wellbeing. Several examples from the United States, where tribal groups have developed Land Management Frameworks for advancing their ecological, cultural and economic interests over their Aboriginal Estate, offer insights on how this might be pursued within a framework of self-determination in New South Wales. For example, the Nez Perce Tribe (NPT) has developed a management plan for the 15,325-acre Precious Lands Wildlife Management Area, located in northern Wallowa County, Oregon and southern Asotin County, Washington. The management plan includes a strategy to mitigate the loss of wildlife habitat caused by dams, but also a commitment to managing natural resources as 'cultural resources', and therefore 'to protect, preserve, and perpetuate all cultural resources necessary to the Nez Perce way of life' (Nez Perce, 2006).

In New South Wales, much of the economic activity on the Aboriginal-conservation estate has included rental returns and employment. Constrained budgets and a shrinking labour force demand innovative approaches to managing the Aboriginal conservation estate. There are some examples where flexible and negotiated options have been pursued. In the case of Worimi LALC, multiple outcomes – social, cultural and economic – were negotiated with NPWS as a 'package'. The negotiation resulted in 2,500 hectares of land being retained by the conservation estate, but with 400 hectares going to the LALC for a sand mine and quad bike enterprise. By all accounts, the unprecedented deal was difficult to negotiate with the existing bureaucracy (personal communication, 2017). The Worimi LALC's negotiations resulted in multiple outcomes and reveal a complex approach to economic development, in which environmental regeneration and care and Aboriginal cultural benefits (wellbeing, connection to place), are significant measures of success.

Creative and innovative approaches are required to achieve Aboriginal conservation and cultural heritage management aspirations alongside economic activity. Case studies of approaches to successful negotiations between Aboriginal landowners and the OEH (and others) and metrics for measuring the range of significant outcomes, will be instructive in future negotiations.

5 THE FUTURE OF LAND RECOVERY IN NEW SOUTH WALES

5.1 REGIONALISED SERVICE AND COMMUNITY GOVERNANCE ARRANGEMENTS

While the future of the Aboriginal Land Council network is guaranteed by its significant financial and land assets and its local and state-wide representative authority, the network also sits within a changing community and governmental arena.

The dedication, enthusiasm and participation required to achieve recognition of native title rights is underpinned by deep history, cultural rights and nation-based modes of organising. Increased Aboriginal urbanisation, declining bush industries, environmental degradation and climate change impacts and new mining interests means land rights and LALC activities are sited in difficult and contested spaces.

The emergence of regional governance models for Aboriginal communities across New South Wales as part of *OCHRE*, the New South Wales Government's community-focused plan for Aboriginal affairs, reveals local level innovation to strengthen service delivery, decision-making and community empowerment. Across the state, this has taken different forms, depending on local leadership and conditions. For example, in western New South Wales, the Murdi Paaki Regional Assembly functions as a peak social services and community development body; on the Central Coast under the nomenclature 'Empowered Communities', the Barang Regional Alliance brings Aboriginal community-controlled services together to form a peak body to advocate, and share resources and direction.

These regional networks can be seen to have grown organically within the footprint of the former ATSIC regions and the Regional Aboriginal Land Council (RALC) tier. Aboriginal Affairs NSW has established 'Local Decision Making' (LDM). This process is designed to facilitate local-level input into the design and delivery of services that reflects a more authentic understanding of Aboriginal communities and their future aspirations. It has community 'buy-in' over more than half of New South Wales.

A key point for consideration here is how the Aboriginal land estate interacts with the LDM and Regional Alliances. Anecdotal evidence shows that LALCs and Regional Alliances have the same personnel and leadership, and many Regional Alliance chairs are also LALC chairs, or secretariat support is provided by LALCs (such as Barang Regional Alliance by Darkinjung LALC). The cooperation of LALCs as part of wider regional networks provides a rich opportunity to understand the potential of the enhanced responsibility of LALCs that have previously been perceived in some areas to have low social, cultural and political capital. The abovementioned 'Land Management Frameworks' could be developed through Regional Alliances and therefore introduce local led decision-making in relation to the Aboriginal land estate.

5.2 GROWING NEW SOUTH WALES' FIRST ECONOMY

The engagement of Aboriginal people in economic activity is a matter of long-standing public debate and concern. The Aboriginal land estate is central to growing Aboriginal economic engagement. The federal and New South Wales Governments agree on the importance of enabling Aboriginal economic development. In launching the 'Closing the Gap' report in February 2016, the Prime Minister said that 'Indigenous economic development is at the heart of the national agenda', asserting that 'economic participation, underpinned by cultural participation, leads to vastly improved social outcomes'. The Federal Minister for Aboriginal Affairs, Nigel Scullion, in announcing the 2015 COAG inquiry, similarly emphasised that the reform priority was to 'support Indigenous land owners and native title holders to leverage their land assets for economic development as part of the mainstream economy' (Minister for Indigenous affairs, 2015). The New South Wales Parliamentary Inquiry into Economic Development in Aboriginal Communities, 2016, also concluded that 'economic development is considered key to unlock the spiral of shame' (New South Wales Legislative Council, 2016). Yet, while the connection between the land estate and shifting Aboriginal disadvantage is at the forefront of government discourse, examples of this transformative effect are limited.

To illustrate, from the opening months of operation of the ALRA, ALCs have pursued enterprise development. Norman's earlier work (2015), documenting the land rights movement and operations of the ALRA up until 2007, showed that despite considerable effort and commitment, most of the 400 or so enterprises funded from the compensation fund did not return a 'profit' in the decade from 1983, and many ceased to function beyond their first year. Since 1991, many LALCs have sold land to raise money for community development and to generate the necessary capital for enterprise development. There has been little scrutiny of local-level efforts to improve social, cultural and material conditions for Aboriginal people. This means the successes, failures and the values that have guided LALC-initiated enterprises have not been thoroughly examined. New theoretical insights into Aboriginal modernity, however, cannot be generated without a re-evaluation of policy settings. Despite this, governments continue to hold Aboriginal development – particularly the leveraging of communal land holdings for economic advancement – as a leading public policy objective.

The relationship between land holdings and economic development, and consequent improvements in the lives of Aboriginal peoples, is little understood. This means policy is being made without the benefit of an evidence base that can tell us what works and what doesn't, and why, or offers insights into how the benefits of land recovery are being realised and how those benefits – economic, social, cultural and wellbeing – can be measured and evaluated.

5.3 LOCAL ABORIGINAL LAND COUNCILS: THE BIGGEST LANDHOLDERS IN THEIR LOCAL GOVERNMENT AREA

The expected escalation in the return of land, means LALCs will need to plan more effectively and to secure access to more resources than are currently available. LALCs, as the owners of the Aboriginal land estate in New South Wales, will increasingly become the biggest land-holders in

their local government areas (LGAs). Therefore, they will be central to the future planning and development needs of regions, towns and cities across New South Wales.

5.4 LOCAL ABORIGINAL LAND COUNCIL PLANNING AND REGIONAL ECONOMIC PLANS

Since 2008, each LALC has been required to develop and adopt a five-year Community Land and Business Plan (CLBP). These plans, conceived and approved by LALC members, inform the development of land and other assets and provide a blueprint for initiating and managing business enterprises and investments. The Aboriginal Land Agreement (ALA) process situates the LALC CLBP as a critical document to guide nominated representatives in the negotiation process, however, these documents – that guide LALC planning - are limited to existing land holdings and LALC priorities. As the Aboriginal land estate increases, additional planning documents may be required to guide broader development objectives in alignment with future focused Aboriginal aspirations.

The 2016 New South Wales Ombudsman report, *Fostering Economic Development for Aboriginal People in New South Wales* (New South Wales Government, 2016), emphasises the links between the regional alliances and relevant economic planning vehicles (such as the New South Wales Department of Industry's work under the Economic Development Strategy for Regional New South Wales and the Federal Government initiative, Regional Development Australia) in enabling Aboriginal communities to leverage their assets, where desired and by informed consent.

In addition, *OCHRE: Growing New South Wales's First Economy* (Aboriginal Affairs NSW, 2016), the three-part New South Wales Government framework to promote the economic prosperity of Aboriginal people and communities in New South Wales, commits to 'all regional and district plans to include Aboriginal economic participation by 2019'. Participation by LALCs, guided by their members' values and aspirations, will be critical. However, regional alliances (such as Barang Regional Alliance and Murdi Paaki Regional Assembly) might also contribute to the management of the Aboriginal estate, particularly planning and development through 'land management frameworks' or 'land planning frameworks'.

5.5 ABORIGINAL LAND RIGHTS: NSW ABORIGINAL LAND COUNCIL ECONOMIC DEVELOPMENT POLICY

The NSWALC has had mixed success in the pursuit of land-based enterprises over the history of the ALRA. In relation to more recent initiatives, the NSWALC has pursued a cautious approach with careful project vetting, staging and support.

Starting in 2015, the NSWALC announced a new approach to supporting economic development by LALCs – the NSWALC Economic Development Policy - which commits \$16 million in investment funding to LALC enterprises over five years.

Under the NSWALC Economic Development Policy, resources available to LALCs are divided into three areas: business planning and feasibility studies; early stage investment loans; and equity loans. A LALC business development grant of up to \$50,000 is focused on conducting planning and feasibility studies of LALC-nominated business ideas. The pilot program resulted in two proposals nominated from each of the zones.

Under this program, the NSWALC facilitates the feasibility study, sometimes drawing on *pro bono* assistance. A 2015–16 trial facilitated the scoping of 18 proposed new enterprises. Of these, five did not proceed to the business development stage because they were not feasible, or because prevailing native title rights impacted the community's ability to deal in the land. Five are operational, five are in the planning stage and three are looking for funding to move forward. The second stage of investment is for up to \$500,000 from the NSWALC to a LALC in the form of a low-interest, flexible, long-term loan. The NSWALC contribution makes up 40–50 per cent of funding, with additional finance provided by the LALC and other partners. One LALC enterprise has been funded to date – a goat-farming business in far western New South Wales in partnership with the Indigenous Land Council. The third category of funding is equity investment and is capped at \$2 million. The NSWALC has not engaged in any equity investments to date (personal communication, 2017). For the ALC network, resources to pursue economic activities are highly constrained. Research into enhancing options for economic development in relation to Aboriginal land holdings is needed. This should include diverse approaches to 'economic' issues, planning needs and how regional structures, such as regional economic development commissions, might support Aboriginal land holders to manage their estate and to pursue development for the benefit of the communities.

5.6 PLANNING AND A HOSTILE PUBLIC

LALC-initiated enterprises have rarely operated on a regional basis, and instead tend to operate independently in their defined township or boundaries. They are also severely under-resourced. On top of these obstacles, LALCs also often meet broader community and local council resistance related to zoning.

Many local governments and residents assume Aboriginal land comprises green spaces and conservation zones. This point is highlighted by land rights lawyer Jason Behrendt (2011) in his study of land litigation under the ALRA, which includes cases involving the rezoning of land when land grants are pending and following land grants. Such zoning decisions can also include 'environmental overlays', such as flora and fauna corridor designations, which restrict the use of one's land (Behrendt, 2011, p. 832). With the exception of land of high conservation value that must be preserved, restrictions placed on land in the planning process may unnecessarily limit LALCs' activity on their land. For example, in 2008 the western Sydney-based LALC Deerubbin discovered some 72 per cent of its landholdings designated for re-zoning in a draft Local Environment Plan, from rural use to a highly restrictive environmental status (Behrendt, 2011, p. 832). As Behrendt shows, many LALCs find their landholdings either rezoned or subject to environmental overlays. This activity is likely to reflect deeply flawed assumptions that Aboriginal land is continuous with public conservation lands.

This same flawed assumption – that Aboriginal land is continuous with public land and green spaces – was evident in Darkinjung LALC’s 2012 development application to Wyong Council for the construction of a 251-dwelling manufactured housing estate on the edge of Lake Munmorah at Halekulani. It attracted the highest number of submissions in the history of the council, most of which were objections. Of the submissions, 2,157 related to ‘Save the bushland’ and ‘Save the bush for future generations’. In an apparent appropriation of the discourse of Aboriginal connection to Country, residents expressed their opposition to development and their connection to the bushland over their lifetime. In the author’s analysis of the submissions, residents referenced a ‘green corridor’ and ‘public access way’ over what was freehold Aboriginal LALC land. Darkinjung LALC’s Halekulani DA experience reveals the deeply held views of the public that equate Aboriginal land to ‘public’ land and therefore view it as incompatible with development (Norman, in press). An education and awareness campaign for local governments, along with stronger input into planning decisions by Aboriginal land holders would assist in achieving beneficial outcomes for Aboriginal people.

5.7 A TREATY: RESETTING THE RELATIONSHIP?

Scholar Marcia Langton argues that:

One of the most important, and fascinating, aspects of the debate about Aboriginal rights in the last two decades revolves around the legal personality of the Aboriginal polity, by which I mean the recognition of that social complex that is sometimes called sovereignty. Aboriginal people in Australia have continued to argue that just as British sovereignty did not wipe away Aboriginal title, neither did it wipe away Aboriginal jurisdiction. This is the logic of the many Aboriginal proponents of a treaty or treaties between the modern Australian state and Aboriginal peoples. (Langton, as cited in Behrendt et al., 2005, p. ix)

Langton argues the call for a treaty goes to the heart of the juridical denial in case law of the existence of Aboriginal nations prior to the seizure of land and coming dispossession – a denial that is anomalous among settler-colonial states (Behrendt et al., 2005). The absence of a treaty or treaties is the denial of Aboriginal polity, however; as Langton’s research shows (Langton and Palmer, 2002), ‘agreement-making’ with Indigenous people has been a feature of the Australian policy landscape for over 20 years. There has been a proliferation of agreements between Australian Aboriginal and Torres Strait Islander people and resource extraction companies, railway, pipeline and other major infrastructure project proponents, local governments, state governments, farming and grazing representative bodies, universities, publishers, arts organisations and many other institutions and agencies. Some are simple contractual agreements that set out the framework for future developments while others are registered under the terms of the *Native Title Act 1993*. Legal scholar Lisa Strelein (Williams, 2001) noted that the accelerating process of agreement-making in Australia necessitated ‘a national framework and protection for those agreements’.

In New South Wales, land recovery under the ALRA and interests in land under NTA will see accelerated processes of agreement-making. This is unprecedented in the state's history. The development of a bank of resources to support communities in the agreement making process, including training in agreement making, documentation and a database of agreements could enhance the outcomes and benefits.

Agreement-making, as well as the protection of agreement-making, was one proposed feature of constitutional change and the movement summarised as 'recognition'. Approaches to agreement making or treaty are now underway in Victoria, South Australia and Western Australia. The Victorian government has announced its commitment to negotiate a treaty with the 39 Indigenous nations residing within the state. A necessary first step was to decide who should represent these communities and who can, and should, negotiate a treaty on their behalf. Through a process of 16 community forums across Victoria in 2016, an Aboriginal Treaty Interim Working Group was established. The group's role is to consult with Aboriginal communities to develop options for a representative body and to provide advice to community and government on the next steps in a treaty-making process.

Since then, work towards self-determination and a treaty has focused on creating a new relationship between the Victorian Government and the Aboriginal community, a partnership that will empower Aboriginal communities to achieve long-term generational change and improved outcomes. Another round of consultations will take place in early 2017. According to some assessments, the process of reaching a treaty could lead to an agreement within two years.

According to the Victorian Traditional Land Owner Justice Group, the aims of the Victorian Government Treaty are:

- recognition of past injustices
- recognition of all 39 Indigenous Nations and their clans' authority
- recognition of and respect for Country, traditions and customs
- a future fund to implement and establish the treaty
- the establishment of a democratic treaty commission
- land rights and land acquisition legislation and funding
- freshwater and sea water rights.

In December 2016, the South Australian Government announced the commencement of treaty discussions with the Aboriginal nations of the state to help address past injustices (Winter, 2016). The government has set aside \$4.4 million over five years to support the treaty process and the appointment of an independent commissioner for treaty. At this stage, it is unclear what the treaties will cover or whether compensation will be included, but South Australian Aboriginal leaders quoted in the media said the process would set a positive course for the future and that the language alone – the word 'treaty' – has important meaning.

South Australian Aboriginal Affairs Minister Kym Maher said he expected initial negotiations with the Adnyamathanha Traditional Lands Association, Far West Coast Aboriginal Corporation and Ngarrindjeri Regional Authority to be followed up by 'several dozen' agreements. An independent treaty commissioner will be appointed to drive the program. Mr. Maher said he hoped would see the first treaties being written into law within a year and the remainder 'rolling out over time.' In preliminary discussions, he said financial compensation 'has not been widely mentioned but we are not ruling anything in or out.' According to the South Australian Government, the treaty discussions that were due to commence from 2017, represent a 'historic moment' in Australia's history with the first government to tailor negotiations with separate Aboriginal nations, to recognise the cultural authority of Australia's first people, and consider the consequences of settlement (Government of South Australia, 2017).

The West Australian Government and the South West Aboriginal Land and Sea Council (SWLSC) concluded formal negotiations on a comprehensive settlement agreement in late 2016. The SWLSC negotiated a benefits package worth more than \$1.3 billion, although the agreement was subsequently declared invalid in the Federal Court.⁶ Under the proposed settlement, native title over the south-west of the state would be exchanged for the formal recognition of the Noongar people as the Traditional Owners of Noongar country; annual payments of \$50 million would be made into a Noongar Future Fund over 12 years and approximately 320,000 hectares of land converted to Noongar ownership (Diss, 2015; Williams, 2016).

As Western Australia, South Australia and Victoria enter negotiations for treaties with Aboriginal peoples, the stage is set for a more active response from the New South Wales Government. A central feature is consideration of the defining features of the Aboriginal polity. Central to the Aboriginal polity in New South Wales is the ways in which the predominant land recovery regimes have constituted Aboriginal groups (the boundaries of LALC areas, for example, are not necessarily aligned with cultural or traditional associations with Country) as well as competition for scarce resources and benefits.

In New South Wales, where colonial dispossession took place over an extended period and at a varying pace and intensity, and where settler land dealings have been extensive, land recovery has been minimal. It has followed a different trajectory to the Aboriginal land recovery across Northern Australia, where roughly 33 per cent of Australian territory has been recovered by Traditional Owners.

The very different circumstances in New South Wales – by dint of its colonial history and the impact of statutes like the ALRA - are rarely canvassed in national land rights research and government inquiries. For example, the recent COAG Investigation into Aboriginal Land Administration (2015) described the circumstances of land recovery as being 'in a period of

⁶ *In February 2017 the Noongar agreement was ruled invalid by the Federal Court as the agreement did not reflect the consent of all claimants, see 'Noongar native title deal ruled invalid by federal court', The Guardian, 3 February 2017, viewed 18 February 2017, available at <https://www.theguardian.com/australia-news/2017/feb/03/noongar-native-title-deal-ruled-invalid-by-federal-court>.*

transition, from a focus on recognition and protection of Indigenous rights in land to being able to use those rights for economic development’.

As the circumstances of land repossession by Aboriginal communities in New South Wales are unique, more focused and detailed research is needed. The development of the ALRA demonstrates how, in New South Wales, the concepts of land recovery and resulting enterprise development were twinned from the outset. Unlike other state and territory land rights laws, the New South Wales ALRA was developed taking into account the reality that the potential pool of land available for recovery was limited and that compensation was therefore necessary for that loss. Part of this compensation funding was intended to be used to develop enterprises initiated by LALCs. This shows how legislative development in New South Wales was underpinned by the notion of an inextricable link between land holdings and community-led economic activity – however broadly defined. The incredible delays in the determination of native title claims in New South Wales - that will now be expedited - radically alters how we think about Aboriginal lands, land dealings and agreement making.

Thus, as land recovery will escalate over the next five to seven years, these circumstances require urgent consideration, policy reform and program innovation. In the 34 years of the ALRA, there has been no single empirical study documenting the landholdings recovered to date or the approaches LALCs (and to a lesser extent the NSWALC) have taken in relation to the management of their lands.

The New South Wales Crown Land estate, valued at some \$11 billion, is made up of 580,000 individual Crown land parcels covering over 33 million hectares.⁷ This reveals the enormous potential for Aboriginal land rights to create cultural, social and economic opportunities for Aboriginal people and communities across the state.⁸

The recognition of Aboriginal land rights has been slow and disappointing, but Aboriginal jurisdiction has continued without serious engagement. Agreement-making and local and regional alliances have created a new interface between the self-determining Aboriginal polity and the state. This expected substantial land returns identified in this report will increasingly place Aboriginal peoples as central actors in development and planning and conservation, as well as validating their own approaches to nation-building.

⁷ Minister of Industry in the second reading speech for the Crown Land Management Act (2016) NSW.

⁸ Private email correspondence with NSW Aboriginal Land Council, dated 15 June 2017.

6 REFERENCES

- Aboriginal Affairs NSW (2016). *OCHRE: Growing NSW's First Economy*. Sydney: NSW Government.
- Australian Human Rights Commission [AHRC]. (2016). *Social Justice and Native Title Report 2016*. Sydney, Australia: AHRC.
- Barker, M., The Hon. Justice (2015). 'Zen and the Art of Native Title Negotiation', 2015 *National Native Title Conference*, Port Douglas, Australia: Australian Institute of Aboriginal and Torres Strait Islander Studies.
- Behrendt, J. (2011). Some Emerging Issues in Relation to Claims to Land Under the *Aboriginal Land Rights Act 1983* (NSW). *UNSW Law Journal*, 34(3): 811–34.
- Behrendt, L., Brennan, S., Strelein, L. and Williams, G. (2005). *Treaty*. Sydney: Federation Press.
- Coastal First Nations. (2017). *Great Bear initiative*. Retrieved from <http://coastalfirstnations.ca>
- Darkinjung LALC (2016). Submission to Parliament of New South Wales Inquiry into Crown Lands, 2016, *Darkinjung LALC, Correspondence to Legislative Council*, 29th July 2016, submission no. 221 retrieved from <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2404#tab-submissions>
- Diss, K. (2015). Claimants Ink \$1.3 billion Western Australia Noongar Native Title Deal', *ABC News*, 20 March, www.abc.net.au/news/2015-03-30/south-west-noongar-native-title-deal-inked/6357746.
- Government of South Australia (2017). *Treaty discussions*. Retrieved August 28, 2018 from <http://www.statedevelopment.sa.gov.au/aboriginal-affairs/aboriginal-affairs-and-reconciliation/initiatives/treaty-discussions>
- Goodall, H. (1996). *Invasion to Embassy: Land in Aboriginal Politics in New South Wales, 1770-1972*, Sydney: Allen and Unwin.
- Jagot, J., Justice (2015a). *Barkandji Traditional Owners #8 v Attorney-General of New South Wales* [2015] FCA 604.

- Jagot, J., Justice (2015b). *Yaegl People #1 v Attorney General of New South Wales* [2015] FCA 647.
- Langton, M. and Palmer, L. (2002). *Negotiating Settlements: Indigenous Peoples, Settler States and the Significance of Treaties and Agreements: Overview of the Series*. Melbourne, Australia: Institute of Postcolonial Studies.
- Minister for Indigenous affairs. (2015) Expert Group Appointed to Indigenous Land Inquiry [Media Release]. Retrieved from <https://www.pmc.gov.au/news-centre/indigenous-affairs/expert-group-appointed-indigenous-land-inquiry>
- New South Wales Aboriginal Land Council [NSWALC]. (1994). *NSWALC Annual Report, 1993–94*.
- New South Wales Aboriginal Land Council [NSWALC]. (1999). *NSWALC Annual Report, 1998–99*.
- New South Wales Aboriginal Land Council [NSWALC]. (2002). *NSWALC Annual Report, 2001-2002*.
- New South Wales Aboriginal Land Council [NSWALC]. (2014a). *Fact sheet 2: Interaction between native title and land rights*, retrieved from <http://www.alc.org.au/media/83115/140306%20native%20title%20fact%20sheet%202%20-%20interaction%20between%20native%20title%20and%20land%20rights%20updated.pdf>
- New South Wales Aboriginal Land Council [NSWALC]. (2014b). *Land Rights and Native Title in NSW: a Guide for the Community*, retrieved from http://www.alc.org.au/media/90660/land%20rights%20and%20native%20title%20in%20nsw%20-%20a%20community%20guide%20final%20web_02.pdf
- New South Wales Aboriginal Land Council [NSWALC]. (2016). *Annual Report 2015 – 2016*, retrieved from <http://www.alc.org.au/media/121107/nswalc%20annual%20report%202015-2016.pdf>
- New South Wales Department of Industry, (2017). *'Native title'*, retrieved from http://www.crownland.nsw.gov.au/crown_land/native-title
- New South Wales Government (2016). *Fostering economic development for Aboriginal people in New South Wales, A Special Report to Parliament under s. 31 of the Ombudsman Act 1974*. Sydney: NSW Government.
- New South Wales Legislative Council, (2016). *Inquiry into Economic Development in Aboriginal Communities Report no. 40*. Sydney: NSW Government.

- Nez Perce Tribal website, *Department of Natural Resources* (2006). Retrieved from www.nezperce.org/Official/departmentofnaturalresources.htm
- Norman, H. (2015). *What Do We Want? A Political History of Aboriginal Land Rights in New South Wales*. Canberra: Aboriginal Studies Press.
- Norman, H. (in press). Contested Country: Development on Aboriginal Land. *Cosmopolitan Civil Society*.
- NTSCORP (2016). Submission to Parliament of New South Wales Inquiry into *Economic Development in Aboriginal Communities*, submission no. 45, retrieved from <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-submission-details.aspx?pk=%2056124>.
- Our Land Council (2014). NSWALC, Land Rights paves the way for historic agreement', retrieved from <http://ourmob.org.au/gumbaynggirr/>
- Senior Officers Working Group. (2015). *Investigation into Indigenous Land Administration and Use: Report to the Council of Australian Governments*. Canberra: Commonwealth of Australia.
- Williams, G. (2001). Bill of Rights, The Republic and a Treaty: Strategies and Lessons for Reform', *AIATSIS Seminar Series, Limits and Possibilities of a Treaty Process in Australia*, Canberra.
- Williams, G. (2016). Australia Needs a Treaty and Constitutional Recognition for Indigenous People', *Sydney Morning Herald*, 8 August, retrieved from www.smh.com.au/comment/australia-needs-a-treaty-and-constitutional-recognition-for-indigenous-people-20160805-gqm0xp.html
- Winter, C. (2016). Treaty: South Australian Government enters historic discussions with Aboriginal Nations, *ABC News*, 15 December, 2017, www.abc.net.au/news/2016-12-14/south-australia-enters-historic-treaty-discussions/8120162.