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15 September 2017

By Post and E-mail

The Hon Sarah Mitchell MLC
Minister for Aboriginal Affairs
Aboriginal Affairs NSW
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Dear Ms Mitchell

Aboriginal Land Rights Act 1983 (NSW) - Review 2017

Please find **enclosed** a submission in response to the 2017 statutory review of the *Aboriginal Land Rights Act 1983* on behalf of Arnold Bloch Leibler.

Yours sincerely
Arnold Bloch Leibler

Peter Seidel
Partner, Public Interest Law

Enc

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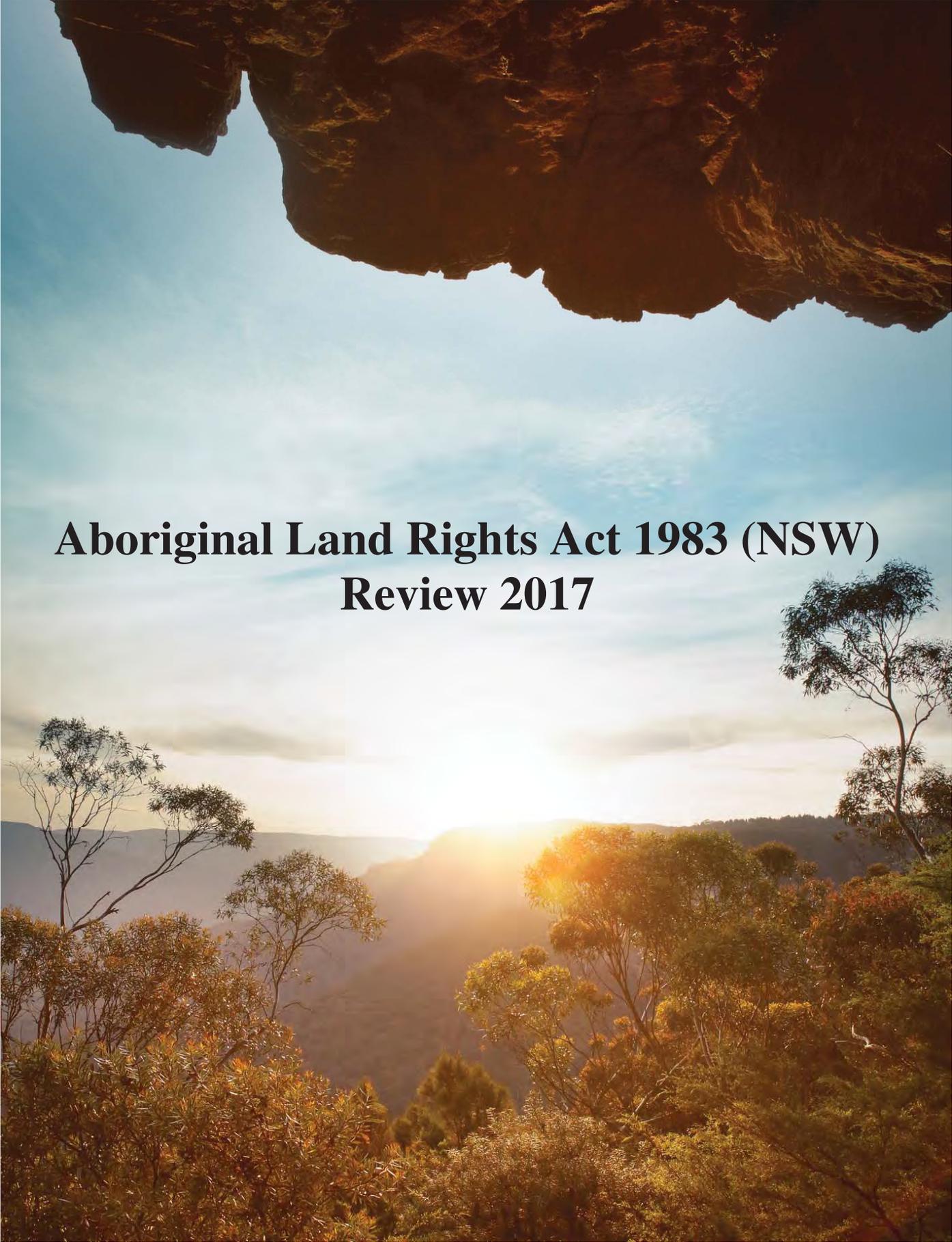
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**Aboriginal Land Rights Act 1983 (NSW)
Review 2017**

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Aboriginal Land Rights Act 1983 (NSW)

Review 2017 – Submission

Background

- 1 Arnold Bloch Leibler, Lawyers and Advisers (**ABL**) has a leading public interest and native title/land rights practice. Working with and supporting Aboriginal and Torres Strait Islander peoples, their communities and organisations, has been a core part of ABL for a quarter of a century. The firm's central objective is to assist Aboriginal and Torres Strait Islander clients to overcome legal obstacles that serve to entrench the status quo of systemic disempowerment, and to support Indigenous-led initiatives to identify, address and overcome challenges that ultimately affect the health and overall well-being of communities.
- 2 ABL makes this submission having regard to the information and anecdotal evidence ABL has received and the experience it has gained over the last 25 years from Aboriginal persons in New South Wales with whom the firm has worked.
- 3 This submission, which has been prepared by Gabrielle Piesiewicz, ABL lawyer, Jonathan Milner, ABL Partner and Peter Seidel, ABL Partner Public Interest Law, addresses Part 1 of the scope of the Statutory Review: to inquire into whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives, today and into the future.
- 4 This submission addresses two specific aspects of how the terms of the *Aboriginal Land Rights Act 1983* (NSW) (**the Act**) may be improved to better secure the objectives of the Act. First, how the terms of the Act with respect to membership of a Local Aboriginal Land Council (**LALC**) could be amended to better secure the objective of the Act to provide for representative Aboriginal Land Councils in New South Wales. Secondly, how the terms of the Act with respect to community benefits schemes (**CBSs**) could be amended to better facilitate the objective of providing for the provision of CBSs. More broadly, this submission addresses how the terms of the Act could better secure consistent and transparent decision making by each LALC and LALC Board.

Summary

- 5 In order to improve the representativeness of each LALC and the consistency and transparency of the exercise of decision making powers by the voting membership and Board of each LALC, ABL recommends that amendments be made to the Act to:
 - (a) make it clear that each LALC must take reasonable steps to promote applications for membership of the LALC being made;
 - (b) clarify the decision making power of a LALC in relation to applications for membership of a LALC;
 - (c) clarify the procedure for determining applications for membership of a LALC;
 - (d) clarify the decision making power of a LALC Board in relation to the administration of CBSs;

- (e) make it clear that the decision making powers of each LALC must be exercised consistently with the objects of each LALC; and
- (f) provide clear requirements in relation to the adoption and implementation of policies by each LALC.

Submission

- 6 The purposes of the Act are set out in section 3:
- (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.
- 7 In ABL's view, the terms of the Act should be amended to more effectively secure the objectives of:
- (A) providing representative Aboriginal Land Councils, in particular representative LALCs;
 - (B) providing for the provision of CBSs by or on behalf LALCs; and
 - (C) securing consistent and transparent decision making by LALCs.
- 8 Each of these issues is addressed in turn below, and proposed amendments to the terms of the Act and/or the *Aboriginal Land Rights Regulation 2014* (NSW) (**the Regulations**) are suggested to fulfil these objectives.
- 9 We recommend that amendments be made to the Act or to the Regulations, rather than by way of policy directives or guidelines provided to a LALC on an ad hoc basis, for two reasons:
- (a) it will most strongly clarify and create certainty in respect of the scope and the proper exercise of the decision making powers of each LALC and LALC Board, assisting each LALC to perform its functions; and
 - (b) it will make the scope and the proper exercise of the decision making powers of each LALC and LALC Board more transparent to all Aboriginal persons in the area of a LALC. It is these persons whom the Act intends to receive the benefits from the proper performance of a LALC's functions, but they may not otherwise have access to documents or information to test or investigate decisions made by LALCs without overcoming specific hurdles (such as making an application under the *Government Information (Public Access) Act 2009* (NSW)).
- 10 ABL is cognisant that there is a balance to be struck between the need to avoid hamstringing the ability of each LALC to operate autonomously and flexibly, and the need

to promote consistency and transparency in decision making by each LALC. In ABL's view, the terms of the Act in their present form do not go nearly far enough to achieve the latter need.

(A) IMPROVING THE REPRESENTATIVENESS OF EACH LALC

Increasing membership of Local Aboriginal Land Councils

- 11 The majority of Aboriginal persons in NSW are not members of a LALC. Based on ABL's experience working closely with Aboriginal persons in New South Wales, more Aboriginal persons should be members of a LALC to improve the representativeness of those bodies and to enable those bodies to better achieve their objectives.
- 12 Whilst section 51 of the Act provides that the objects of each LALC 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*", in practice a LALC is likely to more strongly represent the interests of persons who are members of the Council than the interests of non-member Aboriginal persons within the Council's area. Each LALC will be more representative, and be better informed and better able to achieve the objects set out in section 51 (and the object set out in section 3(b)) if more Aboriginal persons in each LALC's area are made members of the Council.
- 13 Membership of LALCs is dealt with in Division 2 of Part 5 of the Act. This Division does not address the role, if any, of each LALC with respect to promoting and assisting Aboriginal persons to apply for membership of the LALC.
- 14 As a result, many Aboriginal persons who may be qualified for membership are not members of a LALC and as a consequence a LALC may not adequately represent the community of Aboriginal persons in the Council's area.
- 15 In ABL's experience, some Aboriginal persons have encountered serious difficulties in obtaining membership of their LALC and/or non-members of a LALC have felt disillusioned and disempowered by the failure of the LALC to represent and maintain their interests as non-members.

Proposed amendment 1

- 16 ABL submits that the Act should be amended to include requirements to the effect that:
 - (a) a LALC must ensure that membership application forms are readily available to Aboriginal persons in the area of the LALC; and
 - (b) a LALC must provide information and reasonable assistance to Aboriginal persons in the area of the LALC who wish to apply for membership of the LALC.

Improving LALC decision making with respect to membership applications

- 17 The power to decide whether a person is qualified for membership of a LALC is conferred on the voting members of each LALC by sections 52G(1)(a) and 54(2A). This power cannot be delegated to the LALC Board (section 52E(1)(b) and 52G(1)(a)).
- 18 The Act is unclear about the scope of the decision making power of a LALC with respect to accepting or rejecting applications for membership. Section 54(2A) sets out the criteria that a person must satisfy to be qualified for membership. The criteria in sub-sections (b) and (c) include that the person "*is accepted as being qualified on that basis to be a member by a meeting of the Council*".

- 19 The Act is unclear about whether the members of a LALC are entitled to take into account any other consideration in deciding whether or not to accept a person as qualified on the basis of the other criteria in sub-section (a) (the person is an adult Aboriginal person who resides within the area of the LALC), or (b) (the person is an adult Aboriginal person who has a sufficient association with the area of the LALC concerned, as determined by the voting members of the Council at a meeting of the Council).
- 20 In ABL's view, the Act should be clarified to provide that if a person is accepted as an adult Aboriginal person who resides within the area of the LALC or who has a sufficient association with the area of the LALC, they should qualify for membership notwithstanding any other circumstance. There should be no doubt that each LALC does not have unlimited discretion to determine whether a person is qualified for membership of the LALC having regard to any criteria other than those in section 54(2A).
- 21 This is clearly consistent with the Act's objective of providing for representative Aboriginal Land Councils in New South Wales and is also entirely consistent with a fair, reasonable and proper reading of the Act.
- 22 ABL is aware that this view is not necessarily universally shared amongst LALCs. In ABL's view, the fact that there appears to be some doubt about this matter is sufficient reason for the Act to be amended.
- 23 ABL's view is also entirely consistent with other relevant provisions in Division 2 of Part 5 of the Act:
- (a) Section 57 of the Act provides that in certain circumstances, a LALC may suspend a member of the Council (other than a Board member) from attending meetings of the Council for a specified time, but may not disqualify a person from membership in any of those circumstances.
 - (b) Section 57A of the Act provides that in certain circumstances, a LALC may declare a person an "inactive member" with the effect that they will not be a voting member, but the person will remain a member on the LALC's membership roll.
 - (c) Section 58 of the Act provides that the CEO of a LALC must remove a person from the LALC's membership roll "*if and only if*" certain limited criteria (which parallel the criteria for initial qualification for membership under section 54(2A)) are met.
- 24 In addition, the term "sufficient association" in sub-section (b) should be clarified. Also, or alternatively, the extent to which the voting members of a LALC are entitled to determine the meaning of "sufficient association" on an applicant by applicant basis (as distinct from having standard criteria for "sufficient association" to be applied in relation to all applicants) should be clarified.

Proposed amendment 2

- 25 ABL submits that the Act should be amended to make it clear beyond any doubt that:
- (a) If the voting members of a LALC accept that an applicant is an adult Aboriginal person who resides within the area of the LALC concerned, the Council must accept that person as qualified for membership of the LALC on that basis.
 - (b) If the voting members of a LALC accept that an applicant is an adult Aboriginal person who has a sufficient association with the area of the LALC concerned, the Council must accept that person as qualified for membership of the LALC on that basis.

- (c) In determining whether or not an applicant has a “sufficient association” with the area of the LALC concerned:
- (i) the voting members of the LALC must have regard to the applicant’s current, historical and ancestral association with the area of the LALC in accordance with well settled common law principles; and/or
 - (ii) a LALC should adopt a written policy¹ with respect to the considerations the Council will take into account in determining whether a person has a sufficient association with the area of the LALC for the purposes of section 54(2A)(b) of the Act, and any such policy must:
 - (A) require the voting members of the LALC to have regard to the applicant’s current, historical and ancestral association with the area of the LALC; and
 - (B) be made publicly and readily available to Aboriginal persons in the area of the LALC; and
 - (iii) any changes to a written policy adopted in accordance with (ii) must be promptly notified to Aboriginal persons in the area of the LALC.

Clarifying LALC procedure with respect to determining membership applications

- 26 The Act is unclear about the process each LALC is required to follow with respect to applications for membership received by the LALC. From sections 54(2A) (a) and (b) it can reasonably be inferred that a meeting of the Council is to be held at which the Council will decide whether to accept a person as qualified for membership on the basis of the criteria in sub-section (a) or (b), but there is no more information about the process. There is no indication at all of the process with respect to membership applications made on the basis of the criteria in sub-section (c).
- 27 Whilst it would be undesirable to overburden each LALC with procedural rules that are overly prescriptive, a minimum standard should be established to protect the procedural fairness rights of applicants and to ensure transparency of the process followed by each LALC and preserve the integrity of the LALC’s decision making.

Proposed amendment 3

- 28 ABL submits that the Act should be amended to include provisions to the effect of the following:
- (a) Each application that is received by a LALC must promptly be brought to the attention of the voting members at a meeting of the LALC.
 - (b) An application for membership of a LALC must be considered and determined within a period of two months of receipt of the application.
 - (c) If, at a meeting of the LALC, the voting members consider they are unable to make a decision as to whether a person is qualified for membership on the basis of the criteria in section 54(2A)(a) or (b) because the voting members do not have sufficient information or have concerns or queries in relation to the application under consideration, the LALC must:

¹ Subject to ABL’s proposed amendment 6 at paragraphs 46 to 48 below.

- (i) inform the applicant promptly of the status of their application in writing; and
 - (ii) invite the applicant to provide further information and/or respond to the concerns or queries held by the LALC with respect to the applicant's application.
- (d) If, at a meeting of the LALC, the voting members vote to reject a person as being qualified for membership because they consider the applicant does not satisfy the criteria in section 54(2A)(a) or (b) (or for any other reason),² the CEO of the LALC must:
- (i) inform the applicant promptly of the result of the vote in writing; and
 - (ii) provide a statement of reasons for the decision in writing.
- (e) If, at a meeting of the LALC, the voting members vote to accept a person as being qualified for membership on the basis of the criteria in section 54(2A)(a) or (b), the CEO of the LALC must:
- (i) inform the applicant promptly of the result of the vote in writing and the basis on which the person was accepted as qualified for membership.

(B) IMPROVING THE PROVISION OF COMMUNITY BENEFITS SCHEMES ADMINISTERED BY LALCS

- 29 Section 52A of the Act provides that a LALC may, with an approval of the New South Wales Aboriginal Land Council (**NSWALC**), provide community benefits under a CBS. The administration of a CBS, including specifically the entry into and termination of short-term residential tenancy agreements (section 62(1)(c1)), but also long-term tenancy agreements, is a function of the Board of the LALC.
- 30 The provision of CBSs, in particular with respect to residential accommodation, is a key function of each LALC in achieving the objects of each LALC in section 51 and the object of the Act in section 3(e).
- 31 However, the language of the Act is inconsistent and unclear about the administration of CBSs by a LALC. Again, there is a lack of clarity about the scope of each LALC Board's discretion in making decisions in the administration of a CBS.
- 32 Section 52A(2)(e) provides that one of the requisite criteria for the NSWALC to approve a CBS of a LALC is that "*the proposed scheme is fair and equitable and will be administered in a way that is responsible and transparent*". This requirement is expanded upon in the NSWALC *Policy on the Approval of LALC Community Benefits Schemes (Residential Accommodation)*.³ Section 52A(3)(a) provides that a LALC must ensure that any CBS under which community benefits are provided by or on its behalf complies with the Act and the Regulations. However, the Act and the Regulations do not provide any general framework or any specific requirements to guide each LALC and LALC Board in making decisions in relation to the administration of CBSs.
- 33 The lack of any such framework may affect the quality of a LALC Board's decision making in relation to a CBS, and/or may lead to costly disputes that ought to be avoidable.

² Only if ABL's proposed amendment 2 (a) and (b) are rejected. If ABL's proposed amendment 2 (a) and (b) are accepted, the members would not be entitled to vote to reject a person as being qualified for membership for any other reason.

³ Gazetted 14 August 2014.

Proposed amendment 4

- 34 ABL submits that the Act should be amended to provide a framework for each LALC Board's decision making in relation to a CBS, including the following:
- (a) In adopting and implementing a CBS, each LALC Board must consider the best interests of all Aboriginal persons within the Council's area as well as other persons who are members of the Council.
 - (b) Each LALC Board must make publicly available copies of policies it has adopted with respect to CBSs under which community benefits are provided by or on its behalf.⁴
- 35 ABL also strongly recommends that the Regulations be amended to include a Model Policy for the administration of a CBS with respect to residential accommodation operated by a LALC containing specific requirements, including that:
- (a) there be enumerated objective criteria for determining the eligibility of a person for residential accommodation under the CBS and the basis upon which residential accommodation is to be allocated;
 - (b) a LALC must ensure that information about making an application for residential accommodation is publicly and readily available to Aboriginal persons in the area of the LALC;
 - (c) a LALC must provide reasonable assistance to Aboriginal persons in the area of the LALC who seek to apply for residential accommodation provided under the CBS;
 - (d) applications for residential accommodation must be considered by the Board of a LALC promptly by making a decision that the person is or is not eligible to be allocated residential accommodation under the CBS, and, if it is decided that the person is eligible, making a decision to:
 - (i) allocate the person a house; or
 - (ii) place the applicant's name on a waiting list for housing;
 - (e) the CEO of a LALC, upon the Board making a decision in respect of a person's application for residential accommodation must promptly notify the person of the decision and provide a statement of reasons for the decision in writing; and
 - (f) if the Board considers that it is unable to make a decision as to whether a person is eligible to be allocated residential accommodation under the CBS because the Board does not have sufficient information or has concerns or queries in relation to the application under consideration, the CEO of the LALC must:
 - (i) inform the applicant promptly of the status of their application in writing; and
 - (ii) invite the applicant to provide further information and/or respond to the concerns or queries held by the Board with respect to the applicant's application.

⁴ Subject to ABL's proposed amendment 6 at paragraphs 46 to 48 below.

(C) LALC DECISION MAKING GENERALLY

- 36 In this submission ABL has discussed ways of amending the Act to improve the exercise of each LALC's functions with respect to membership applications at paragraphs 11 to 28 above, and each LALC Board's functions with respect to CBSs at paragraphs 29 to 35 above.
- 37 Other sections of the Act directly or implicitly confer functions or powers on each LALC, including, for example, in relation to:
- (a) land acquisition, land use and management, Aboriginal culture and heritage, financial stewardship and corporations (section 52);
 - (b) land dealings (section 42E);
 - (c) mineral rights and mining on Aboriginal land (section 45);
 - (d) hunting, fishing and gathering (section 47); and
 - (e) exploring and exploiting mineral or natural resources or other property vested in a LALC (section 52AA).
- 38 Some of the functions and powers of each LALC may be delegated to the Board of the LALC, and the Board of each LALC has further specific functions under section 62 of the Act.
- 39 ABL submits that consideration should also be given to amending the terms of the Act to improve the consistent and transparent exercise of all the decision making powers exercised by the voting members of a LALC and by the Board of a LALC.

Requiring consideration of the objects of each LALC in decision making by LALCs

- 40 As discussed at paragraph 12 above, in practice the interests of Aboriginal persons in the area of a LALC who are not members of the LALC are likely to be less effectively represented by the LALC than the interests of Aboriginal persons who are members of the LALC, which practice is entirely inconsistent with the objects of each LALC as set out in section 51 of the Act.

Proposed amendment 5

- 41 ABL submits that the Act should be amended to provide, in addition to the statement of the objects of each LALC in section 51, that:
- (a) In exercising any decision making power conferred on it by the Act or the Regulations, the members of each LALC and the Board of each LALC must take into consideration whether or not that decision will serve to improve, protect and foster the best interests of all Aboriginal persons within the Council's area as well as other persons who are members of the Council.

.Providing a procedure for policies adopted and implemented by LALCs

- 42 It appears that the Board of a LALC has the power to adopt policies as part of its managerial functions under section 62 of the Act, although no specific power of a LALC to adopt policies is provided for in the Act.
- 43 Currently, the extent to which each LALC is able to adopt policies is unclear and the nature of, and in some cases the very existence of, any such policies is opaque. ABL

recommends that policies adopted by a LALC must be consistent with the objects of each LALC in section 51.

- 44 Section 113(1) of the Act provides that the NSWALC may prepare and implement policies about certain matters. Subsection (2) provides that a policy relating to CBSs that provide residential accommodation is to include criteria for determining applications for approval that have been determined after consultation with the Aboriginal Housing Office. Sub-section (3) provides that the NSWALC must review all of its policies every 5 years, and sub-section (4) provides that the NSWALC must make copies of its policies publicly available.
- 45 ABL submits that a provision along the lines of section 113 should be introduced with respect to LALC functions. ABL also submits that a provision along the lines of section 114, concerning the procedure of the NSWALC for making policies, should be introduced. ABL recommends that, in particular, a requirement that each LALC consult with its members and other adult Aboriginal persons in the area of the LALC will significantly enhance the transparency of the performance of the LALC's functions, enable the LALC to better understand and better serve the interests of its members and other adult Aboriginal persons in its area, and therefore encourage the adoption of more robust and appropriate policies.

Proposed amendment 6

- 46 ABL submits that the Act should be amended to include a section concerning policies relating to LALC functions that provides:
- (a) Each LALC may prepare and implement policies about specific enumerated matters.
 - (b) Without limiting (a), a policy relating to a CBS that provides residential accommodation must include the criteria for determining applications for residential accommodation.
 - (c) All policies prepared and implemented by a LALC must be consistent with the objects of each LALC set out in section 51 and with the community land and business plan of the LALC.
 - (d) Any policy prepared and implemented by a LALC that is inconsistent with the objects of each LALC set out in section 51 or inconsistent with the community land and business plan of the LALC will be invalid to the extent of that inconsistency.
 - (e) Each LALC must review all of its policies every 5 years.
 - (f) Each LALC must make copies of its policies publicly available.
- 47 In ABL's view, the matters in relation to which a LALC ought to be able to prepare and implement policies for the purposes of paragraph 46(a) should include matters corresponding to those in section 113 of the Act, modified as appropriate.
- 48 ABL submits that the Act should be amended to include a further section concerning the procedure for each LALC for making policies that provides:
- (a) Before a LALC adopts a policy it must:
 - (i) notify its members and adult Aboriginal persons in the area of the LALC of the proposed policy;

- (ii) provide a mechanism by which the LALC's members and adult Aboriginal persons in the area of the LALC may provide comment on the proposed policy, whether by written submission, oral submission in a forum arranged by the LALC or otherwise;
 - (iii) consider any submissions made by any member of the LALC or any adult Aboriginal person in the area of the LALC within 30 days of the notification of the policy pursuant to (i); and
 - (iv) obtain the approval of the NSWALC to the policy.
- (b) A policy takes effect on the day specified in the policy.
- (c) A policy may be amended or revoked in the same way as a policy may be made.

Conclusion

- 49 ABL supports the autonomy and empowerment of each LALC in NSW. However, we are very concerned to ensure that these worthy objectives are not pursued at the expense of the empowerment of Aboriginal persons as individuals and as a broader community - whether or not they are members of a LALC.
- 50 We strongly believe that by improving the consistency and transparency of the exercise of functions by LALCs and LALC Boards (generally and in the specific ways identified in this submission), Aboriginal individuals, communities and Land Councils as organisations will all be better assisted to achieve this end.