



NEW SOUTH WALES ABORIGINAL LAND COUNCIL

ABN 82 726 507 500

8 November 2013

Access to Justice Arrangements
Productivity Commission
LB2 Collins Street East
Melbourne Vic 8003

By email: access.justice@pc.gov.au

To whom it may concern,

The New South Wales Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW. Under the *Aboriginal Land Rights Act 1983 (NSW) (ALRA)*, NSWALC has responsibilities to improve, protect and foster the best interests of all Aboriginal persons in NSW. NSWALC is an independent, self-funded non-government organisation with key functions in respect to Aboriginal land claims, the protection and promotion of Aboriginal culture and heritage, and economic development.

NSWALC provides support to the network of 120 elected and autonomous Local Aboriginal Land Councils (**LALCs**) across NSW also established under the ALRA. LALCs also have similar functions to NSWALC within their boundary area. As elected bodies, NSWALC and LALCs represent not only the interests of their members, but of the wider Aboriginal community.

NSWALC's submission to the Productivity Commission's Access to Justice Inquiry relates to the Commission's assessment of the level of demand for legal services, including its analysis of the number of persons who cannot afford to secure legal services but who do not qualify for legal assistance services. Based on our experience and the issues consistently raised with NSWALC, LALCs fall into this category of persons.

It is important to note that in NSW there are two different legislative systems that relate to Aboriginal peoples rights in land - land rights (under the ALRA) and native title (under the *Native Title Act 1993 (Cth)*). While both systems are about recognising and providing for Aboriginal peoples' rights, the two systems operate under two different laws and differ in the rights they address.

The ability to access justice services and legal representation is fundamental to the protection of human rights. International instruments such as the UN Declaration on the Rights of Indigenous Peoples and the Universal Declaration of Human Rights outline rights in regard to fairness and equality within justice systems and particularly for Aboriginal/Indigenous peoples, who are often disadvantaged in this area due to compounded issues relating to colonisation and dispossession.

Aboriginal peoples in NSW often face barriers in regard to accessing justice services and appropriate legal assistance due to a range of issues including, but not limited to, lack of cultural sensitivity and lack of a holistic approach to addressing underlying social, cultural and legal factors leading to limited engagement in the legal system and justice services.

Head Office

Ground Floor, 33 Argyle Street
Parramatta NSW 2150
PO Box 1125
Parramatta NSW 2124
Tel: 02 9689 4444
Fax: 02 9687 1234
DX 28308 Parramatta 2150

Western Zone

2/36 Darling Street
Riverview Business Park
Dubbo NSW 2830
PO Box 1196
Dubbo NSW 2830
Tel: 02 6885 7000
Fax: 02 6881 6268
DX 4009 Dubbo 2830

Northern Zone

Suite 2-26, Park Avenue
Coffs Harbour NSW 2450
PO Box 1912
Coffs Harbour NSW 2450
Tel: 02 6659 1200
Fax: 02 6650 0420

Eastern Zone

50/24-26 Watt Street
Gosford NSW 2250
PO Box 670
Gosford NSW 2250
Tel: 02 4337 4700
Fax: 02 4337 4710

Southern Zone

Suite 110, Corporate Level
Riverside Plaza
Monaro Street
Queanbeyan NSW 2620
PO Box 619
Queanbeyan NSW 2620
Tel: 02 6124 3555
Fax: 02 6297 3541
DX 24202 Queanbeyan 2620

Far West Zone

Level 3, NSW State
Government Building,
32 Sulphide Street
Broken Hill NSW 2880
Tel: 08 8087 9587
Fax: 08 8087 3851

This submission particularly discusses access to justice services for LALCs, and the needs of LALCs in this area. We urge the Productivity Commission to contact the Aboriginal Legal Service (NSW/ACT) Ltd (who is the recognised peak body on Aboriginal justice issues in NSW and the ACT) in relation to broader issues in regard to Aboriginal peoples' access to justice services and legal representation. The Aboriginal Legal Services (NSW/ACT) Ltd can be contacted at 02 8303 6699.

Background

Aboriginal people who are adults and reside within the area of a LALC, have sufficient association with the area of the LALC or who are an Aboriginal owner in relation to land within the area of the LALC can become members of their respective LALCs. The map available at <http://www.alc.org.au/media/84166/lalc%20boundary%20map%202009.pdf> shows the boundary areas of these LALCs.

Most LALCs are registered as charities or public benevolent institutions with the Australian Charities and not-for-profit Commission.

Under s51 of the ALRA, the Objects of each LALC are to improve, protect and foster the best interests of all Aboriginal persons within the Council's areas and those who are members of the Council.

One of the key ways LALCs achieve these objects is through land acquisition and management. Aboriginal Land Councils are able to claim certain Crown Land that is not lawfully used or occupied, not needed or likely to be needed for an essential public purposes or residential purposes and is not the subject of a registered native title claim or determination.¹ Land that is privately owned cannot be claimed.

The NSW Minister administering the *Crown Lands Act*, currently the Minister for Trade and Investment and Minister for Primary Industries, decides whether land is claimable Crown land under the ALRA – if the land is claimable Crown land, it must be granted to an Aboriginal Land Council.

Another way LALCs achieve their objects is by running community benefit schemes, which is the mechanism under the ALRA by which LALCs provide community benefits, such as housing, to Aboriginal persons in their area.

Each of these functions can create legal needs, as can the day to day running of a community organisation (such as employment issues).

Legal needs of LALCs

NSWALC is aware that LALCs have difficulty accessing legal assistance. As LALCs generally perform a wide range of community based functions in addition to roles relating to protecting Aboriginal culture and heritage, they may be under-resourced, spending what funds they do have on providing services to their local Aboriginal communities. As such many LALCs do not have adequate resources with which to obtain private legal assistance.

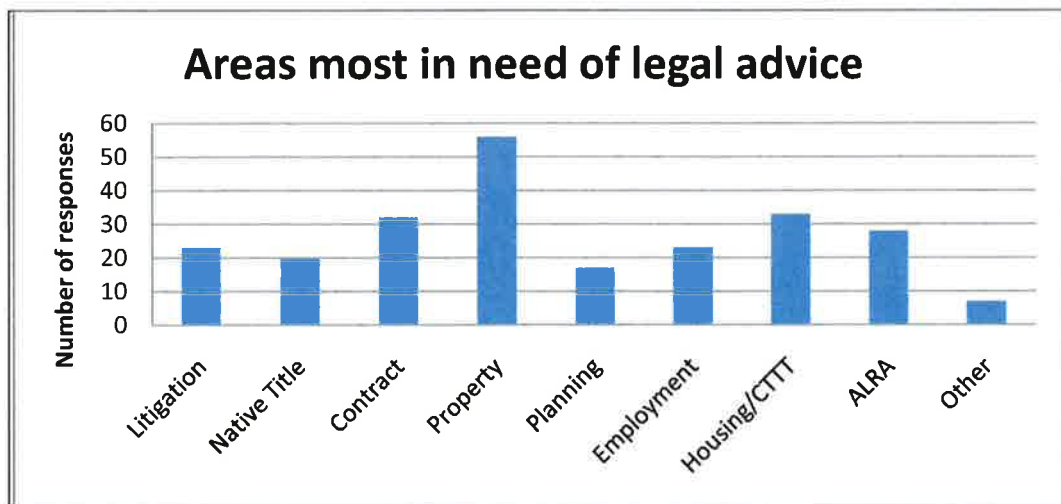
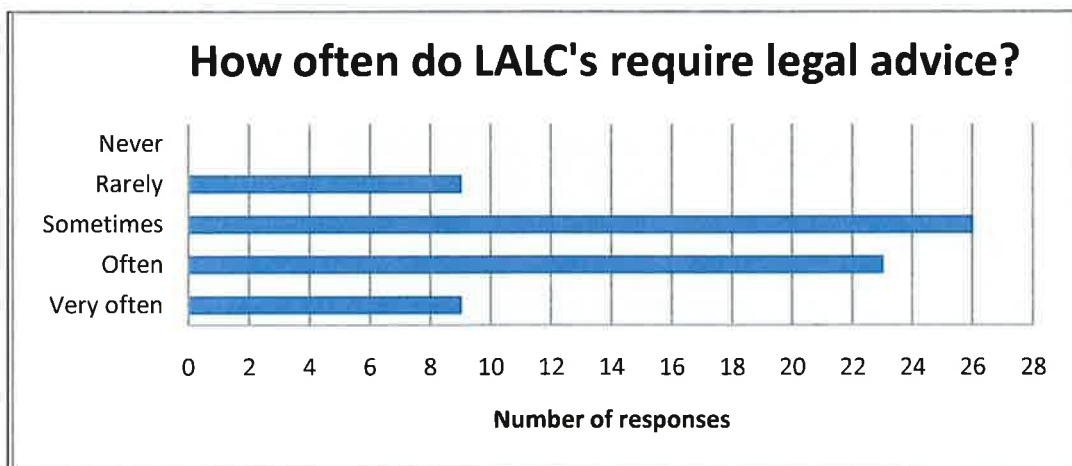
LALCs experience civil legal needs and problems in relation to land dealings and in relation to the many community services they provide. Issues surrounding housing, tenancy and employment are particular areas in which civil disputes may arise for LALCs.

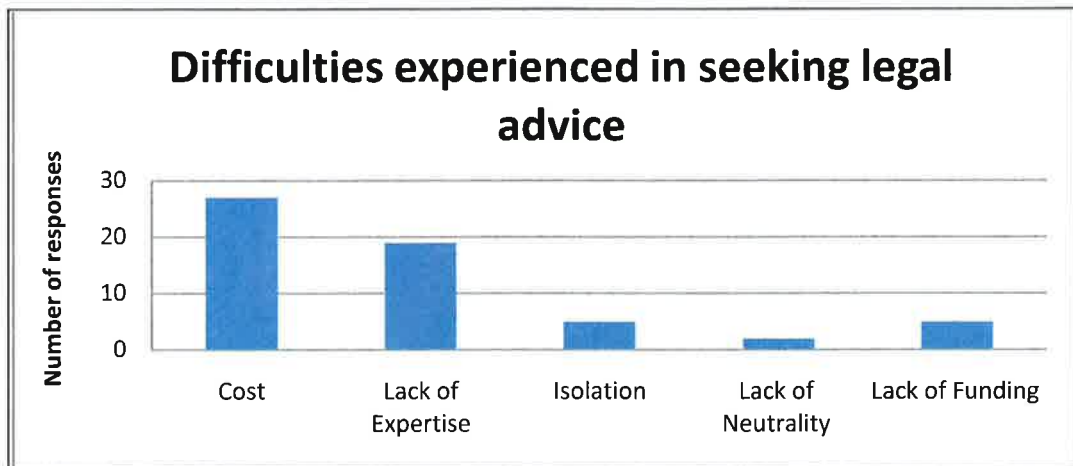
Native title disputes and litigation are also an area where legal needs can arise for LALCs. The interaction between the ALRA and native title can mean that LALCs may be in the position of respondent in native title matters or the applicant for a determination that native title does not exist (non-claimant application). As a result of recent changes to the Commonwealth's native title respondent funding scheme, the circumstances in which LALCs might receive assistance under that scheme have been dramatically reduced.

Generally LALC Boards and members do not have professional expertise or training, and oftentimes do not have the capacity to deal with civil legal needs and problems without assistance. In circumstances where LALCs cannot afford or cannot otherwise access legal assistance, their capacity to reach satisfactory outcomes is significantly affected. In other cases, LALCs are forced to divert already limited resources from their community support and outreach programs in order to obtain legal services.

NSWALC has recently conducted a survey of LALCs regarding their legal needs. NSWALC received 68 responses to the survey.

As is demonstrated by the graphs included in this submission, the survey found that most LALCs need legal advice either **often** or **sometimes**. The legal advice required was found to be primarily in the area of **property law**, though there was a **wide range of other areas** of advice that were also required. The majority of LALCs indicated that they found **cost and lack of expertise** to be the most prominent obstacle to obtaining legal advice.





The findings of the survey indicate that there is a significant need amongst LALCs for free or low-cost legal assistance that is not currently being met. Considering that LALCs were established for the purpose of providing services and benefits for their local Aboriginal communities, the difficulties that LALCs face in accessing justice compromise their ability to provide those benefits to the Aboriginal people in NSW.

Availability of legal services for LALCs

In conjunction with the legal needs survey mentioned above, the NSWALC has also recently undertaken research into the availability of pro bono legal advice for LALCs. This research has shown that there are **no community or government bodies in NSW** that are willing to provide pro bono legal advice to LALCs. This is because most community and government services that provide pro bono legal advice are specifically focused on addressing the legal needs of individuals, not organisations. As organisations, LALCs do not fit the initial intake criteria that these services use to assess clients.

Our study found that the following pro bono advice services **will not provide assistance** to LALCs:

- Community Legal Centres
- Aboriginal Legal Service
- Legal Aid
- Salvos Legal Humanitarian
- LawAccess

Our study further found that there are **pro bono referral services are willing to provide referrals** for LALCs. However, despite their willingness to provide pro bono referrals to LALCs, the criteria set by these services are often difficult to meet. They also depend on the willingness of individual lawyers to take particular matters on. It is our understanding, as indicated by a number of these services, that because LALCs' legal matters can be novel and/or complex, many lawyers are hesitant to take on these matters. As such, the access to legal assistance that these pro bono services provide is often closed to LALCs.

The pro bono referrals services that our study found that will provide services to LALCs include:

- Law Society Pro Bono Scheme
- Public Interest Law Clearing House
- National Pro Bono Resource Centre
- NSW Bar Association's Legal Assistance Referral Scheme

NSWALC is currently working with these services to try and build relationships with lawyers and raise awareness of LALCs' legal needs and circumstances.

In comparison to Aboriginal organisations incorporated under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), LALCs have very limited options for accessing free legal advice. Aboriginal corporations incorporated under this act have access to the free legal service operates by the Office of the Registrar of Indigenous Corporations. This service provides advice and assistance in areas such as contracts, employment, tax, corporations compliance, and property dealings. LALCs cannot access this service, nor is there a comparable service available to them, which severely limits LALCs ability to access justice.

Conclusion

On the basis of the above information, the NSWALC submits that there is a significant gap in the provision of legal services in regards to LALCs in NSW. We recommend that the Commission consider the needs of Aboriginal organisations and the barriers to access to justice that they face.

We note that the Commission will be carrying out further consultation, including the preparation of a draft report. We would be pleased to provide further information or more specific recommendations in due course. If you have any questions, please contact Ms Kate Aubrey-Poiner, Senior Policy & Research Officer,

Yours sincerely,

Lesley Turner
Acting Chief Executive Officer

ⁱ Section 36 of the *Aboriginal Land Rights Act* outlines the criteria for claimable Crown land.