



environmental defender's office new south wales

Submission on the Aboriginal Land Management Framework

23 April 2009

The EDO Mission Statement

- ◆ *the importance of public participation in environmental decision making in achieving environmental protection*
- ◆ *the importance of fostering close links with the community*
- ◆ *the fundamental role of early engagement in achieving good environmental outcomes*
- ◆ *the importance of indigenous involvement in protection of the environment*
- ◆ *the importance of providing equitable access to EDO services around NSW*

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Executive Summary

The Environmental Defender's Office (EDO) is a community legal centre specialising in public interest environmental law. We welcome the opportunity to make comment on the Discussion Paper on the Aboriginal Land Management Framework (ALMF).

Of particular concern to the EDO is the need to maintain the distinction between private and public lands, recognising that land conferred under the *Aboriginal Land Rights Act 1983* (NSW) is private freehold title. Indeed, it is important that the decision-making power of Aboriginal people over private landholdings conferred pursuant to the NSW *Aboriginal Land Rights Act 1983* should not be compromised. Therefore we submit that the ALMF should focus on public lands, and access to public lands, rather than make comments or suggestions about private land as part of the ALMF.

However, given the desire amongst Aboriginal people in NSW to gain greater access to public lands, the EDO submits that an overarching policy to facilitate improved access to and management of public lands would be a positive outcome.

We make the following comments and recommendations:

- In principal the ALMF is a good idea however it is important to retain the delineation between private and public title to lands;
- Access to lands depends on the form of title to land, and varies significantly depending on the title. Access to public lands does not deliver the same social justice outcomes as owning land;
- It is important that an ALMF provides concrete solutions with coordinated strategies that are resourced, otherwise there it will create more bureaucratic red tape;
- There needs to be some recognition of the impacts of lack of access to land has had on Aboriginal communities in order to move forward in a positive way in the future. This needs to occur through legislative reforms that recognises these associations ; and
- A whole of government approach should be reflected in a true partnership that would see relevant government agencies involved from the outset. This could be demonstrated by Ministers of relevant agencies expressing their commitment in the foreword of the ALMF and sign up to its terms.

This submission will make comment on the following areas:

1. Introduction
2. Theme 1: Acknowledging Aboriginal Connection to Country

3. Theme 2: Improving Aboriginal access to public lands
4. Theme 3: Increasing Aboriginal participation in the management of public lands
5. Theme 4: Developing economic opportunities from the sustainable use of land
6. Theme 5: Learning and working for Country
7. Appendix – Work of Government agencies

1. Introduction to the ALMF Discussion Paper

The EDO makes the following comments on the introduction to the Discussion Paper:

Whole of Government

It is not clear from the Discussion Paper the role of other government agencies in the implementation of the ALMF.

Resourcing

Implementation of the ALMF as a whole of government approach will require resourcing contributed by the various departments.

Self-determination

The ALMF promotes the rights of Aboriginal peoples as first peoples. First and foremost this necessitates recognition of the right to self determination which is a pillar of the Declaration of the Rights of Indigenous Peoples which Australia has endorsed. The right to self determination translates to a right of Aboriginal people to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. The ALMF appears to promote Aboriginal representation via Departmental committees, however it is essential for Aboriginal controlled organisations to drive program implementation and prioritisation by which the right to self-determination can be exercised.

Access to public lands

The Discussion Paper suggests that Aboriginal people can readily access public lands. However, access to public lands varies depending on the type of public land. Moreover, taking into consideration the current trend of the NSW Government to sell off public and Crown land, particularly land of high commercial value, what is 'public land' is constantly changing. For example, the proposed Taylor Oval development at Moree will result in the sale of public land and loss of access of the Aboriginal community to a valuable recreational facility.

Land Claims

There is a need for resolution of land claims. Access to public lands is important but it has a secondary role where, for example, Aboriginal people are unable to control their own land.

2. Theme 1: Acknowledging Aboriginal Connection to Country

In relation to Theme 1 of the ALMF we make the following comments:

Aboriginal Cultural Heritage Protocols

Theme 1 is focussed on promoting the importance of Aboriginal connection to country from within government and throughout the broader community. Will we support this, this could be strengthened by ensuring that the NSW Government formally acknowledges the expertise of Local Aboriginal Land Councils and Traditional Owner representative groups as experts on Aboriginal cultural and heritage by developing protocols that recognise and facilitate the involvement of Traditional Owners in this process.

Return of Public Lands

The EDO submits that where possible, public lands should be returned to Traditional Owners, such as the hand-back of areas and leasing for National Parks. This is discussed further under Theme 3 below. It is important for the general community to be aware of the cultural significance of land to Aboriginal people and why social justice is best achieved by owning land rather than by merely being provided with access to public lands. This community education component requires resourcing and should be driven by Aboriginal personnel.

Representation / Self-Determination

Whilst the ALMF targets both public and private lands it only mentions government committees under Theme 1 - that is the DECC Aboriginal Cultural Heritage Advisory Committee and the Department of Primary Industries Aboriginal Reference Group. We submit that Aboriginal controlled representative bodies must be included as a centrepiece of the ALMF.

Program Delivery and Coordination

Aboriginal representative bodies are key to program delivery and coordination, and should be the first point of contact on connection to country.

3. Theme 2: Improving Aboriginal Access to Public Lands

Public lands include state forests, Crown reserves, national parks, council owned land and travelling stock routes. Aboriginal access to the different categories of public lands varies and is usually restricted to hunting, fishing and gathering rights.

The EDO submits that there should be recognition in the ALMF of the primacy of Aboriginal rights to public land, as a separate category to 'stakeholders' with greater rights and interests to other stakeholders.

As noted above, some categories of public land are the subject of proposals to sell public land which will clearly limit Aboriginal access to, and use and management of, such lands. It is imperative that the ALMF advocate against the sale of public land especially where there is no investigation of whether that decision will impact on Aboriginal persons in that area and no consultation with the relevant Aboriginal community.

The ALMF Discussion Paper mentions access 'as appropriate' which is problematic. There needs to be a concerted effort to provide access where there are no public safety or other reasons to limit access. Even where there are safety considerations, access may be required to ensure Aboriginal cultural heritage sites are not being destroyed or damaged.

It is important for a strategy to be developed on issues concerning the right to speak for country and other community protocols, given that there is frequent conflict between LALCs and Traditional Owners over these issues. This would ensure that primacy is given to the views of Traditional Owners in speaking for country, and ways to facilitate disputes over such issues.

State Forests

Access to forests is determined and managed by Forests NSW and must comply with Ecologically Sustainable Forest Management Plans (ESFM) and Regional Forest Agreements (RFAs) which outline the management strategies for access to Aboriginal places and sites in state forests, and which should be revised to ensure consistency with the ALMF. Access to forests for cultural purposes can be enabled by agreement through Memorandums of Understanding, Partnership agreements and agreements under the Regional Forest Agreements process.

Local Council land- Community Land

There is no mention of the role of Local Councils in managing community land in the ALMF, nor of the total area of such land throughout NSW. Local Councils are supposed to manage community land for the benefit of the public which can be problematic in situations where the local council does not have good relations with the Aboriginal community. It may be necessary to ensure that there are protections imposed in the *Local Government Act 1993* to facilitate the Aboriginal community gaining access to community land through Plans of Management and also ensuring that there are protections in place to stop land being reclassified and sold by Local Councils without appropriate consultation with the local Aboriginal community.

Travelling Stock Routes:

There is a current trend in NSW to thoroughly examine the sale or lease of travelling stock routes. However, there is no recognition of Aboriginal heritage or provisions that facilitate access to Aboriginal persons to these areas. The ALMF needs to address these issues.

National Parks

Aboriginal access to National Parks is determined by Plans of Management that are negotiated for each individual Park and vary. Any group use of a park must be consistent with the plan of management. As there is no specific requirement to consult with Aboriginal groups in developing a Plan of Management for a park, access can be limited depending on whether Aboriginal people are consulted during this process.

Crown Land

Crown Land includes Crown lands held under lease, licence or permit; community managed reserves; lands retained in public ownership for environmental purposes; lands within the Crown public roads network; and other unallocated lands. Many non-tidal waterways across the State also comprise Crown land as does most tidal waterway land.

As noted above, access to Crown land is hindered by the state-wide sale or lease of Crown land, which should be underpinned by broad community consultation. However there is no active engagement with community, including the Indigenous community, on the policy behind the sale of some public land.

The balancing of interests between community sectors, including access by the Aboriginal community, is embodied in the principles of the *Crown Land Act* which are set out at s.11 as follows:

For the purposes of this Act, the principles of Crown land management are:

- (a) that environmental protection principles be observed in relation to the management and administration of Crown land,*
- (b) that the natural resources of Crown land (including water, soil, flora, fauna and scenic quality) be conserved wherever possible,*
- (c) that public use and enjoyment of appropriate Crown land be encouraged,*
- (d) that, where appropriate, multiple use of Crown land be encouraged,*
- (e) that, where appropriate, Crown land should be used and managed in such a way that both the land and its resources are sustained in perpetuity, and*
- (f) that Crown land be occupied, used, sold, leased, licensed or otherwise dealt with in the best interests of the State consistent with the above principles.*

Clearly there are a wide range of competing interests for access. The EDO submits that there is greater potential for social justice and self-determination by Indigenous people owning land rather than sharing land with a range of other stakeholders. Amendment of the *Crown Lands Act* to recognise the needs of Aboriginal people to access Crown land - particularly in its management and prior to its lease or sale - is needed to ensure consistency with an ALMF.

4. Theme 3: Increasing Aboriginal Participation in the Management of Public Lands

We make the following comments in relation to Theme 3:

Protocols

The development of protocols is needed relating to how Government will build partnerships with Aboriginal people in particular areas and ensure all Aboriginal stakeholders are involved in these discussions. This would also extend to whether Aboriginal “lore” should be formally recognised in some cases where particular groups may have rules as to who should speak for country.

Engagement

It is essential for the ALMF to consider consultation protocols in areas where the Local Aboriginal Land Council is not functioning due to being under administration.

Resourcing

The Discussion Paper does not refer to training and support for Aboriginal leaders in discussing appropriate land management arrangements. Resourcing is required to make informed decisions about land use options, which requires independent legal and economic advice on decision making.

Aboriginal Cultural Heritage law reform

Law and policy for the conservation and management of Aboriginal Cultural Heritage is in desperate need of reform, and of great concern throughout the Aboriginal community in NSW. The Discussion Paper does not refer to the inter-relationship between the Aboriginal community and protection of cultural heritage on both public and private land. The process by which consultation occurs on cultural heritage is also a divisive process. DECC must commit to reforming the system to ensure Aboriginal people can safeguard their own cultural heritage.

Co-management of national parks

The Discussion Paper does not refer to co-management of national parks which are currently managed in an ad hoc manner. There have been successful c-management

arrangements in NSW where Aboriginal groups have been well organised. This demonstrates the need for DECC to work with Aboriginal communities to achieve co-management outcomes, and provide the necessary resources to achieve good outcomes. This would include ensuring members of the Aboriginal community receive information about consultations and undertaking capacity building to ensure local Aboriginal people are aware of the steps involved in negotiating a co-management agreement

Co-management Agreements must ensure that Memorandums of Understanding recognise native title or involve Traditional Owners where required. For example, the Darug MOU in Western Sydney does not acknowledge the Traditional Owners nor does it provide for rent or compensation for National parks in the area.

There is mention in the Discussion Paper of an upcoming evaluation of co-management. It would be useful if such reviews are included as part of an integrated Government approach to the ALMF.

Handback of parks

The ALMF must have scope to incorporate changes to Part 4A of the NPW Act which is under review. Resourcing of lease back arrangements must be given consideration because they tend to take a long time to negotiate and resolve – for example Mutawintji National Park. It is important that the appropriate people negotiate such agreements.

Indigenous Land Use Agreements

One of the difficulties foreshadowed in this section is that the Department of Lands has the lead role in negotiating ILUAs as part of their role in dealing with native title claims. There needs to be a culture of facilitating ILUAs rather than making them a difficult exercise bound in technical issues associated with the *Native Title Act*. It is important that Aboriginal groups are able to access information about the terms adopted in ILUAs as this ensures that they are well resourced to negotiate any future agreements.

5. Theme 4: Developing economic opportunities from the sustainable use of land

As a large proportion of public lands are inaccessible, flood prone, or subject to environmental protection or existing public uses, economic outcomes for Aboriginal people on public lands needs to be considered carefully.

What is required from Government is information and resources to facilitate economic use agreements where there is a desire within the Aboriginal community to pursue such opportunities. Aboriginal people must remain the decision-makers

relating to which economic opportunities are most appropriate for their land. Thus, training should be provided to enable Aboriginal people to run businesses and make the most of economic opportunities on their lands.

Longer term, there is a need for long term agreements by Government that guarantee future management of lands and waters by Aboriginal people rather than just access to public land for limited economic opportunities. There also needs to be consideration and discussion with Aboriginal communities about the appropriateness of economic development in their area bearing in mind issues such as climate change and availability of water.

Forestry agreements

Information is required by Aboriginal communities on the impact of plantation forests on such issues as the availability of water, being entering into agreements. Moreover, to Aboriginal people need information about options like forestry and carbon offsets to make informed decisions prior to entering into such arrangements.

Aquaculture

Throughout NSW there are limited examples of aquaculture enterprises that are positive developments and it would be useful to ensure these opportunities are expanded.

Park management

EDO clients have expressed interest in cultural tourism. However, it is difficult to gain support and assistance from NPWS, which highlights a need for resources, support and information to be more readily available.

Aboriginal owned land

As noted above, Aboriginal people are keen to embrace enterprise opportunities. However, what is missing is the support network to enable such enterprises to develop. There is a mention of funding through the NSW Environmental Trust but this is limited to biobanking only.

Another major emission in this chapter relates to Local Councils. Not all Aboriginal communities are engaged with their Local Council in a meaningful way. The Local Government & Shires Association has committed to ensuring participation with each Council and Aboriginal community. However, there is a need to determine whether this is actually occurring. The EDO has been approached by a number of communities who are concerned about destruction of cultural heritage in particular, and the level of consultation and awareness within their Local Council of how to work together to avoid such issues. Thus, considerable progress needs to be made on cultural heritage issues arising on public land, as well as in assessing development applications in the Local Council area.

6. Theme 5: Learning and working for Country

The EDO addresses the question below.

What are your views on providing site identification training?

As noted above, there is widespread dissatisfaction and frustration in NSW with the protection of Aboriginal cultural heritage to the extent that there is a view DECC has failed to recognise Aboriginal Culture and Heritage and should hand back the right to manage it back to Aboriginal people.

The EDO submits that the necessary reforms needed include appropriate penalties for the desecration of Aboriginal culture. Currently there are more severe penalties for damaging flora and fauna. Furthermore, breaches of the *NPW Act* are rarely prosecuted.

We submit that site identification awareness training should target a range of people such as the Roads and Traffic Authority, Local Councils, Aboriginal Land Councils, and communities. Moreover, Aboriginal cultural heritage identification training must be performed by Aboriginal Elders and persons who have been actively involved in Aboriginal heritage management and who have an intricate knowledge of local families and local customs. At no stage should a non-Aboriginal person be permitted to train Aboriginal people.

This is a major issue of contention with cultural heritage issues, as often people in the Aboriginal community feel that inappropriate persons who may not have knowledge of a local area are providing what may become an accepted view on the cultural heritage status under the *NPW Act*.

7. Appendix – Government agencies

The Appendix provides details about what Government agencies are doing in working with Aboriginal communities. As noted above, the whole of government approach should ensure the Departments listed are signatory partners in an ALMF with logos presented on the documents, and ministers commitments expressed in the forward.

Department of Environment and Climate Change

The reliance of MOU's by DECC in relation to co-management raises concerns because even though they are regarded as a more flexible option, they are not legally binding and therefore DECC is not liable for a failure to comply with such an agreement.

Also of concern is that MOU's can impact on native title and other rights because Aboriginal groups do not have the protection of an ILUA which protects their rights. Access to MOU's should be readily available to ensure accountability and compliance.

It is important for DECC to integrate Aboriginal people within all of its work given that Aboriginal people have significant Traditional Knowledge that can add value to biodiversity research, and would uphold Australia's commitments under Article 8(j) of the Convention on Biological Diversity.

Department of Primary Industries

The information about DPI focuses on forest and fishery issues. A number of Aboriginal communities have expressed concerns to the EDO about cultural heritage protection in the context of forestry operations.

Rural Lands Protection Boards

The recent proposals to sell or lease Travelling Stock Routes are not canvassed in the ALMF discussion paper, and there needs to be proper consultation with Aboriginal communities before any sale or lease of TSR is considered.

Department of Lands

The preparedness of the Department of Lands to negotiate outcomes through the native title process is slow, difficult, and frustrating for the Aboriginal community, which is an ongoing issue for the for dealing with public land.

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