

# Review of the Aboriginal Land Rights Act 1983



## Summary of Issues Paper 1 Review of the Land Dealings Provisions of the Aboriginal Land Rights Act 1983

Prepared by the New South Wales Aboriginal Land Rights Act Review Task Force August 2005

# Preamble to the Aboriginal Land Rights Act 1983

- (1) *Land in the State of New South Wales was traditionally owned and occupied by Aborigines:*
- (2) *Land is of spiritual, social, cultural and economic importance to Aborigines:*
- (3) *It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land:*
- (4) *It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation:*

## DEFINITIONS

<b>ALC</b>	Aboriginal Land Council	<b>NSWALC</b>	the New South Wales Aboriginal Land Council
<b>ALC land</b>	land owned by an Aboriginal Land Council	<b>Task Force</b>	the Aboriginal Land Rights Act Review Task Force
<b>ALRA</b>	Aboriginal Land Rights Act 1983 (the Act)	<b>ToR</b>	Terms of Reference (of the Aboriginal Land Rights Act Review)
<b>ICAC</b>	Independent Commission Against Corruption		
<b>LALC</b>	Local Aboriginal Land Council		

## KEY TERMS

### Alienable, alienability

the capacity to be transferred to another; traditionally one of the hallmarks of property; native title rights cannot be freely transferred and can only be alienated to the Crown (source: Nygh, Dr Peter E, Butt, P, (eds), Butterworths Australian Legal Dictionary, 1997)

### Cultural association

a cultural association with land derives from the traditions, observances, customs, beliefs or history of the original Aboriginal inhabitants of the land (Aboriginal Land Rights Act, s.171(2)(b))

### Cultural significance

This term is defined in the Aboriginal Land Rights Act only for the purposes of section 40D – “land is of cultural significance to Aborigines if the land is significant in terms of the traditions, observances, customs, beliefs or history of Aborigines”.

### Deal, dealing

an act of buying or selling property, goods or commodities, or the registrable instrument that evidences such an act (source: Butterworths Australian Legal Dictionary, 1997) (these terms not defined in the Aboriginal Land Rights Act)

### Dispose of

to deal with definitely, get rid of (source: The Macquarie Dictionary, second edition, Macquarie University, 1991) Disposal of land means sale, exchange, mortgage or other disposal of land, change of use of land and the grant of an easement over land, and includes purported disposal of land (Aboriginal Land Rights Act Amendment (Gandagara Estate) Act 2004)

### Effective

having effect at law

### Inalienable

characteristic of a right or benefit that the courts will not allow the holder to transfer to another (Butterworths Australian Legal Dictionary)

### Subdivision

the division of land into parts whether by sale, transfer, partition, or by creating a new certificate of title for a part of the land: for example (NSW) Local Government Act 1993 s.573 (Butterworths Australian Legal Dictionary, 1997)

### valid

legally sound, effective, or binding; having legal force; sustainable in law (The Macquarie Dictionary)

### void

without legal force or effect; not legally binding or enforceable (The Macquarie Dictionary)

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## TERMS OF REFERENCE

The formal Terms of Reference (ToR) of the Review are:

1. Inquire into and make recommendations as to whether the aims and objectives of the NSW Aboriginal Land Rights Act require expansion or change in light of developments since 1983.
2. Evaluate the material and other benefits achieved for Aboriginal people since the commencement of the Act in 1983 including:
  - whether the Aboriginal Land Rights Act allows benefits available under the Aboriginal Land Rights Act to be delivered efficiently to Aboriginal people of NSW at state, regional and local levels; and
  - whether better outcomes could have been achieved and what alternative arrangements might have facilitated better outcomes.
3. Report on the present resource and asset base of land councils and make recommendations for the efficient and effective use of assets and resources for the benefit of Aboriginal people of NSW, *including an inquiry and recommendations into an improved framework for managing, selling and developing land council assets, in particular the sale and commercial development of land council real property.*
4. Inquire and make recommendations regarding:
  - (a) the development of funding models for the equitable distribution of land council resources; and
  - (b) the development of funding models which tend to the better delivery of measurable outcomes for land council members and other stakeholders and which deliver benefits in a transparent and outcome oriented manner.
5. Inquire and make recommendations more generally on the strengths and weaknesses of present legislative and administrative arrangements with a view to improved efficiency and effectiveness of the land council system.
6. Make recommendations for more representative, effective and efficient governance within the NSW Aboriginal Land Rights system.



## 1.1 Background

The Aboriginal Land Rights Act is important legislation that recognises the rights of Aboriginal people and provides a vehicle for the expression of self-determination and self-governance.

This Review of the *Aboriginal Land Rights Act* 1983 was called by the then Minister for Aboriginal Affairs, the Hon Dr Andrew Refshauge, on 26 May 2004.

The Minister established an Aboriginal Land Rights Act Review Task Force:

### Ms Jody Broun

Director-General, Department of Aboriginal Affairs

### Mr Murray Chapman

Administrator, New South Wales Aboriginal Land Council (NSWALC)

### Mr Stephen Wright

Registrar, Aboriginal Land Rights Act

The Terms of Reference of the Review are shown at left.

## 1.2 What is this paper about?

This paper is a summary of the first formal issues paper presented by the Review Task Force. It addresses the land dealings provisions of the Act.

In 1990, the Act was changed to enable land councils to sell their land. After 20 years of land rights, some land councils now have valuable land holdings and several have begun to be involved in large-scale land development projects. Problems associated with some of these developments have brought to light some serious flaws in the Aboriginal Land Rights Act.

The Task Force has found that a number of major projects have run into serious difficulties because of mistakes made by land councils or their advisers, caused largely by lack of clarity in the Act itself. The major problems are outlined in chapter 3.

The land dealings issue was addressed first because of the central importance of land to the Aboriginal Land Rights Act and because of the magnitude of Aboriginal Land Council (ALC) landholdings. If this part of the Act is well constructed, the Act will establish a strong foundation for ALCs to acquire, own and dispose of land in ways that will give Aboriginal people and communities long-term prosperity and independence.

The Task Force has proposed a new scheme for land dealings which is explained in chapter 4. The scheme is subject to recommendations that may arise from forthcoming issues papers being developed by the Task Force.

## 1.3 The land dealings context

Many Local Aboriginal Land Councils (LALCs) are under financial pressure to sell or develop their land.

Land ownership of itself puts a cost and resource burden on LALCs to manage their land (e.g. rehabilitation, bushfire management, rates). LALCs also have responsibilities to provide services, such as cultural heritage advice, and are expected to provide a range of social benefit functions which are not funded under the Act. Many LALCs 'inherited' former reserves and missions (and poor quality housing stock), and are responsible for housing programs that are not financially sustainable.

Many LALCs are ‘asset rich and cash poor’ – they may have valuable land, but little income to pay rates, repair houses and manage their lands. LALCs with valuable landholdings are often approached directly by developers.

The Act currently allows few ways (apart from subsidised housing) for Aboriginal people as individuals to benefit from land rights. This issue is directly related to the question of land dealings because if a LALC’s members live in poor housing and are disadvantaged there may be extra pressure to find ways of giving benefits to members. It may also work to encourage land councils to enter into undesirable joint venture or financial arrangements to get around the restriction. This paper also addresses the question of how the Act can be changed to provide legitimate ways for Aboriginal people to gain greater benefits from land rights.

## 1.4 What do land councils own?

The Aboriginal Land Rights Act has delivered valuable assets to the Aboriginal Land Council (ALC) system.

A total of 7,280 land claims have been lodged since 1983 and 2,146 have been granted. The total area granted is approximately 80,036 hectares, just under 1% of the New South Wales land area. It has an estimated value of \$771.6 million.

In addition, properties have been bought or transferred (such as former missions/reserves) into LALC ownership – giving a total number of approximately 4,050 LALC properties over 616,461 hectares, valued at about \$952.6 million.

Although some valuable land has been returned to some land councils, not all land councils have benefited equally. Land values vary greatly from region to region and, as the map in figure 2 on

page 3 shows, generally the coastal land councils have benefited most from a boom in land values in the last few years. In some regions there are few opportunities to claim land at all because of the nature of the land tenure (for example, in the Western Division).

**Figure 1. Characteristics of LALC Properties and Assets**

Area	LALC Properties and Assets
West and North-West	Mainly former missions.
Central Wiradjuri and Murray	Have town periphery settlements; town expansion plans add value to Indigenous land.
Northern/Northern Tablelands	Former missions and town periphery settlements; growing demand for land potentially adding value.
North Coast/Central Coast	Development pressures on some Indigenous land.
Sydney/Newcastle and Western Metro	Some LALCs have valuable assets.
South Coast/South East	Some LALCs have valuable assets.

Figure 2. Distribution of LALCs by Value of Properties

Source: NSW Department of Lands, November 2004

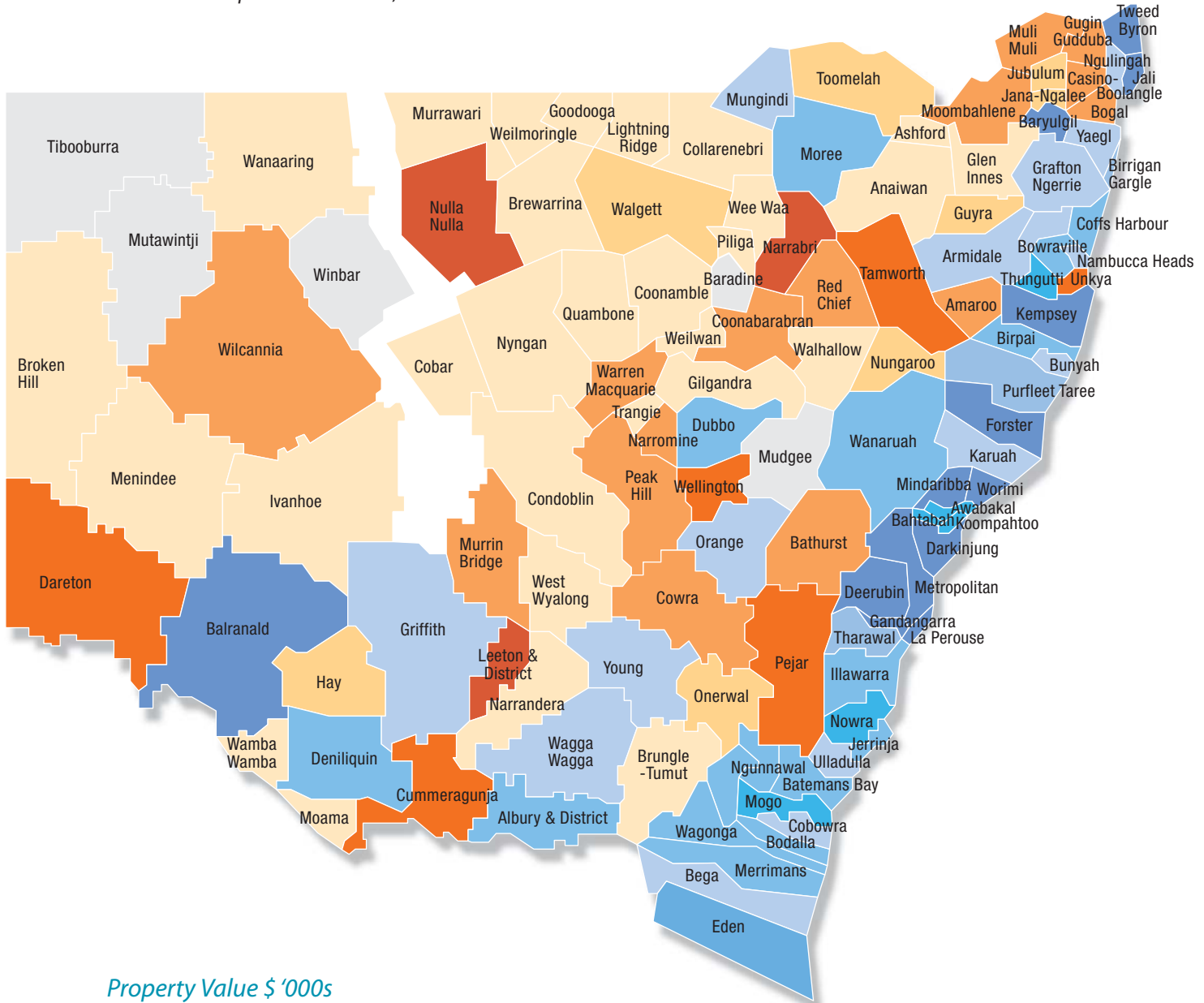
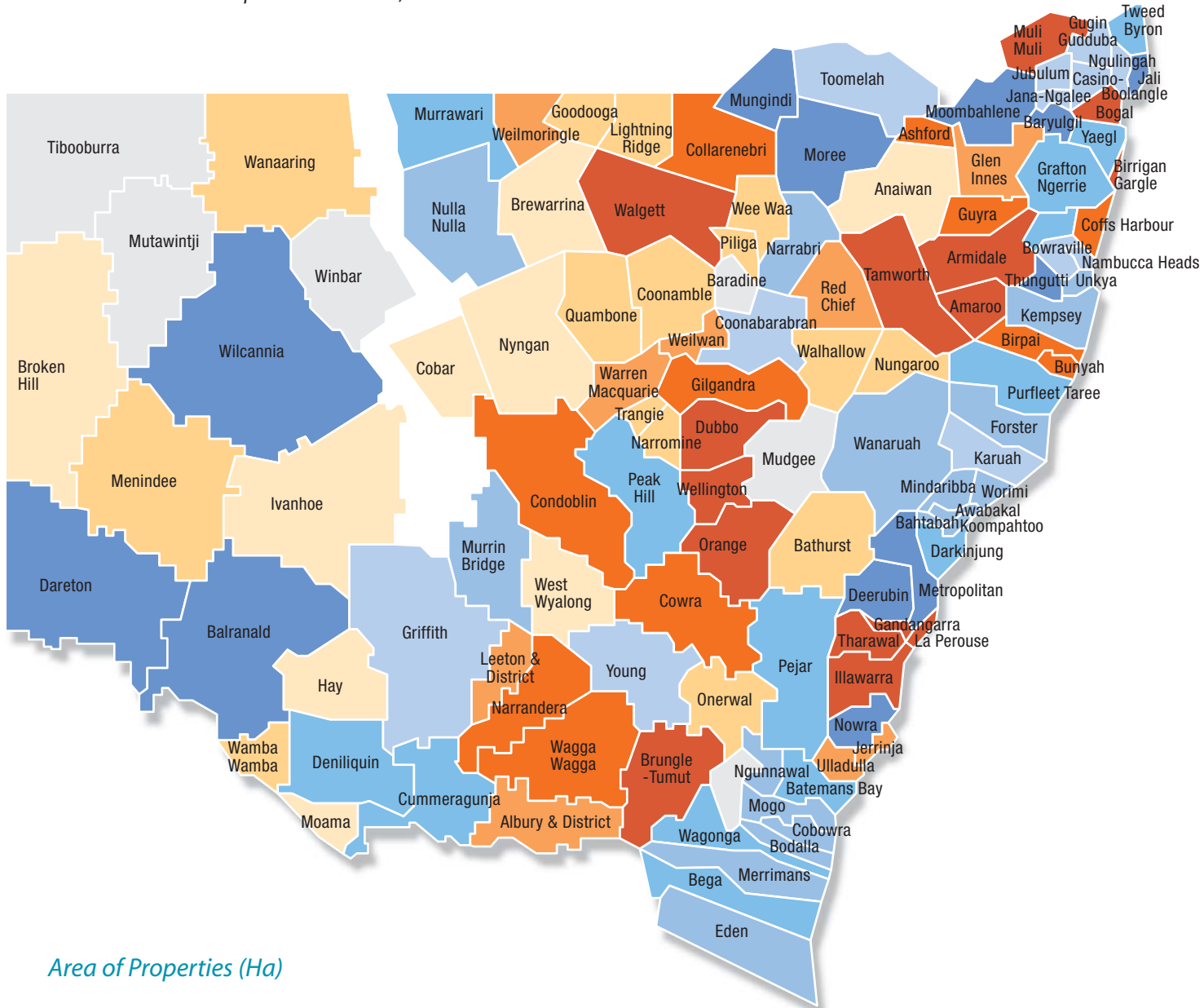


Figure 3. Distribution of LALCs by Total Area of Properties owned

Source: NSW Department of Lands, November 2004

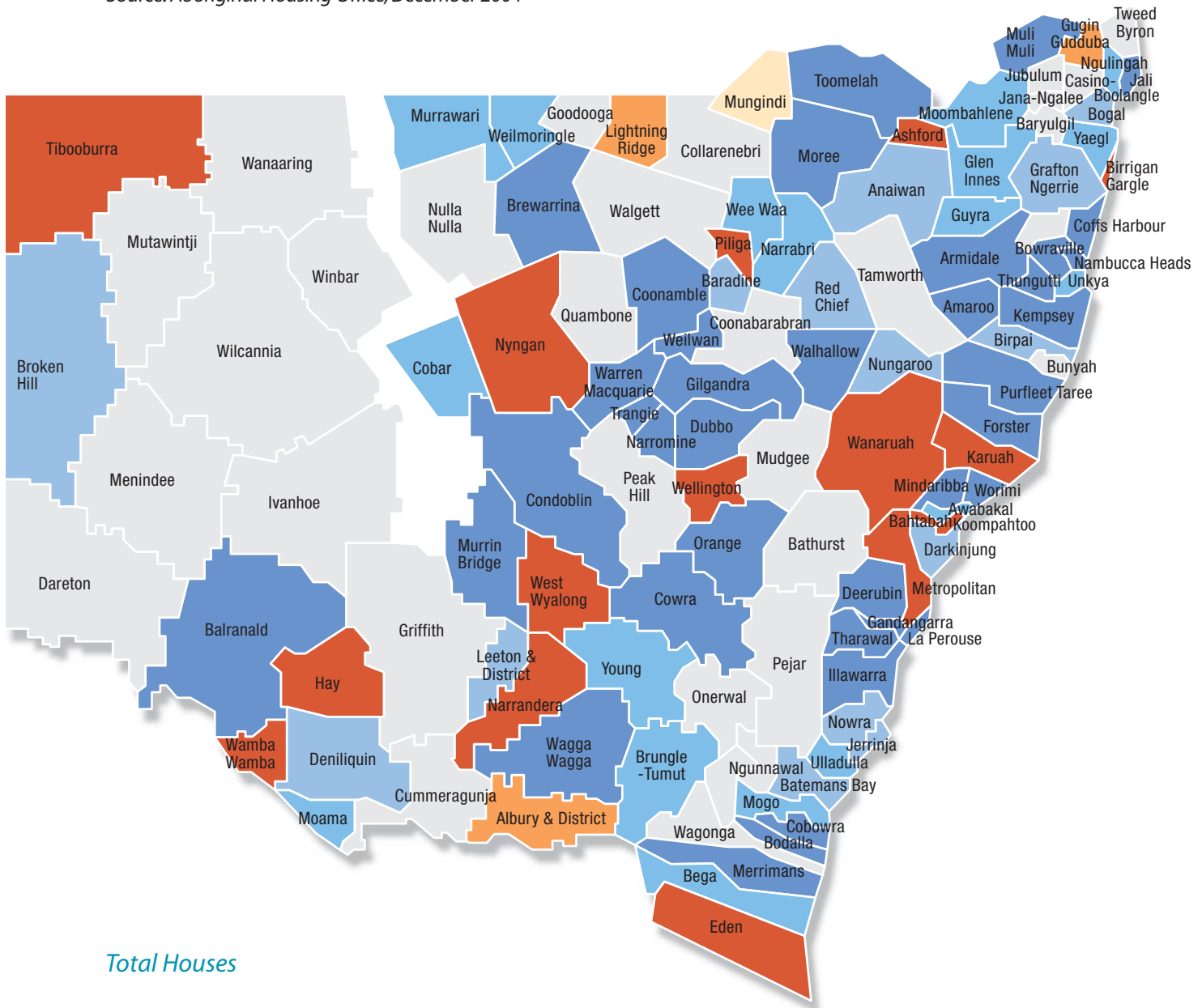


Area of Properties (Ha)

- 3,000 to 180,000 (12)
- 1,000 to 3,000 (13)
- 430 to 1,300 (14)
- 200 to 430 (12)
- 95 to 200 (14)
- 31 to 95 (12)
- 16 to 31 (13)
- 1.7 to 16 (15)
- 0 to 1.7 (9)
- Not Available (5)

Figure 4. Distribution of LALCs by Number of Housing Properties Owned

Source: Aboriginal Housing Office, December 2004



Total Houses

- 23 to 85 (34)
- 17 to 23 (14)
- 11 to 17 (21)
- 5 to 11 (16)
- 4 to 5 (4)
- 2 to 4 (1)
- 0 or NA



The Task Force has taken a holistic approach to addressing the land dealings issue. In the past, amendments to the Act have been done in a piecemeal way and as a result many problems have arisen, especially in relation to the land dealings provisions.

The first step was to consider what should be in the land dealings regime, and what the underlying key principles should be.

It is important to bear in mind the original intentions of the Aboriginal Land Rights Act, and the role and functions it outlines for Aboriginal Land Councils (ALCs).

### 2.1 The purpose of land rights

The Act is a compensatory regime<sup>1</sup> that recognises Aboriginal peoples' need for land and enables Aboriginal people in New South Wales to acquire land to address their spiritual, social, cultural and economic needs.



### 2.2 The objects and functions of Aboriginal Land Councils

The Aboriginal Land Rights Act sets up a three level system of representative Aboriginal land councils (ALCs) at local, regional and state level.

At every level, land councils have responsibilities in acquisition, management, use, control and disposal of land.

*The objects<sup>2</sup> of Aboriginal Land Councils (ALCs) are to improve, protect and foster the best interests of all Aboriginal persons within the area administered by the land council.*

Self-determination is an underlying theme. At the local level, land councils have a particular responsibility to represent the wishes of their members in acquiring, managing, using, controlling and disposing of land (Section 52 (1) (g)).

In summary, ALCs:

1. are intended to be representative of their constituents;
2. may acquire land and have land vested in them; and
3. are to use those lands and apply the funds they get in the best interests of the people that they serve.

<sup>1</sup> See the Preamble to the Aboriginal Land Rights Act (inside front cover)

<sup>2</sup> Section 51 of the Aboriginal Land Rights Act (LALCs), Section 87 (RALCs) and Section 105 (NSWALC)

### 2.3 The purpose of the land dealings regime

The land dealings regime should:

- support and facilitate the broad purposes of the Aboriginal Land Rights Act;
- ensure that ALC land is and continues to be a valuable tool for addressing the needs of the ALCs' constituents, whether those needs are spiritual, cultural, social, and/or economic;
- enable ALCs to use their land effectively to fulfil their objects and functions; and
- ensure that ALC land is not misused or wasted.

### 2.4 The need for safeguards

The land dealings regime should provide safeguards to make sure that ALC land is not used or disposed of in a way, or for a reason, that is not consistent with the purposes of land rights.





Most of the problems associated with land dealings have arisen because the existing provisions of the Act are not clear, especially for complex land dealings (such as where a land council wants to make an agreement with a third party developer to subdivide land for residential housing blocks).

The current provisions of the Act on land dealings leave land councils vulnerable to making serious and costly mistakes about land disposals, and to making decisions about land that are not in the best interests of their members and other Aboriginal people in their area. Some mistakes cannot be reversed and can have very serious consequences for the land council itself and the wider land council system.

### 3.1 What does the Act say?

The land dealing provisions are set out in sections 40 to 40D of Part 2, Division 4 of the Act. When a land council wishes to sell, transfer, mortgage, lease, “or otherwise dispose of” land it holds, it must fulfil the requirements of this Division.

#### LALCs

Section 40D says that a LALC may dispose of land it holds if:

- a meeting is specially called for the purpose;
- at least 80% of the members voting and present have determined that the land is not of cultural significance to Aborigines in the area and should be disposed of; and
- NSWALC has approved of the proposed disposal.

#### NSWALC

Under s.40C, NSWALC can dispose of land it holds if:

- a meeting of the LALC in the area where the land is calls a meeting specially for the purpose; and
- at least 80% of the members voting and present have determined that the land is not of cultural significance to Aborigines in the area and should be disposed of.

#### When is a land dealing invalid?

If the requirements summarised above are not met, then the land dealing is not valid. Section 40(2) says ‘**Any sale, exchange, lease, disposal or mortgage of, or other dealing with, land in contravention of this Division is void.**’

#### Section 40C and 40D certificates

The Act allows for certificates to be issued by either a LALC (in the case of a LALC land dealing) or NSWALC (if the land is held by NSWALC) that confirm that the requirements of the Act have been met.

- a LALC can issue a certificate signed by the Secretary that certifies that the disposal of its land does not contravene s.40D; NSWALC must endorse the certificate (cl.6 of the ALRA Regulation);
- NSWALC can issue a certificate signed by the Chairperson that certifies that the disposal of land it holds does not contravene s.40C;

Certificates give third parties (for example a person or company buying the property) confidence that the requirements of the Act have been met and the land transaction is legal and valid.

### 3.2 Why is there uncertainty?

Where a land transaction is simple and straightforward (such as a decision to sell a block of land at auction), few problems are likely to arise. More complex dealings, such as joint venture agreements to develop land for residential housing, may run into serious problems because of confusion about what is required under the legislation. For example, the current provisions are not clear as to exactly what LALCs must do and what NSWALC must approve of to ensure that the requirements of the Division have been complied with.

Because of the sweeping effect of s.40(2) (see 3.1 above), any dealing in land that is done in a way that does not meet the requirements of Division 4 is void – in other words, it is of no effect at law. Because it is not clear exactly what must be done to meet the requirements, mistakes can be made that could make a land dealing void, with serious consequences for everyone involved. For example, a developer might have invested a lot of money because they have a contract to buy land and build houses. If the deal falls through they might take legal action to get their money back.

The current position is that entering into complex land deals has very high risks, both for Aboriginal land councils and for third parties.

Uncertainty means higher risk for third parties. If dealing with land councils is perceived to be a high risk venture, more reputable firms are less likely to want to deal with land councils and the land itself will have less value. The economic value of land rights itself will be greatly reduced.

There are a number of confusing aspects of the Act that can lead to legal and commercial uncertainty. These are discussed in section 3.3 below. Some examples of how mistakes can put major land development projects at risk are given at the end of this chapter.

### 3.3 Examples of some of the problems in the provisions

The Review Task Force has identified a number of serious problems that are explained in detail in the full Issues Paper. The following is a summary of some of the major issues.

- The Act is not clear about which land is subject to regulation – for example, land acquired “as an investment” is not regulated by the land dealings provisions.

*Relevant recommendation: 1*

- The Act is not clear about which dealings are regulated.

*Relevant recommendation: 2*

- Legal opinions differ widely about what LALC members must decide, and what NSWALC must approve – for example, if a LALC resolves to dispose of land in one way, is that decision still valid if the LALC disposes of the land in a different way instead? Does NSWALC approval cover the detail? If NSWALC has given approval but the disposal does not go ahead on the basis that approval was given, is the land dealing valid?

*Relevant recommendations: 3, 4, 5, 6, 8, 9, 10, 11 and 12*

- The Act identifies three kinds of meetings that can be convened by LALCs, but is not clear about what kind of meeting has to be called to consider a land dealing. It is important to clarify this issue to ensure that ALC land dealing decisions are valid and legitimate.

*Relevant recommendations: 3, 4 and 5*

- The provision that “80 per cent of the members voting and present” must decide whether to dispose of land is not effective to make sure that a significant number of the LALC’s members have given their informed consent to the land dealing.

Under s.76, the quorum for a valid meeting of a LALC (of 27 or more voting members) is 10 people, and so a decision to dispose of land may be made by as few as eight members. In smaller LALCs, even fewer could make a major land disposal decision. In a recent example, just 10 members of a LALC with a membership of more than 600 made a decision to dispose of land worth tens of millions of dollars.

This situation increases the risk that a small group of dominant members may make decisions that are in their own interests, rather than the interests of the membership as a whole. It also increases the risk of corruption; for example, unscrupulous developers could try to offer inducements to key members or employees of ALCs.

*Relevant recommendations: 3 and 4*

- The restriction on selling land that has “cultural significance” doesn’t work well. The definition of “cultural significance” in the Act is very broad and could be said to apply to any land in New South Wales. The members making the decision about the land may not know whether it is culturally significant or not, and in any case a LALC can simply determine that the land is not culturally significant in order to lawfully sell it. The Act does not require LALCs to consult people with traditional cultural links to land they want to sell, or make any special inquiries about the cultural significance of the land. In addition, a LALC could have good reasons for wanting to sell land, despite its cultural value, to achieve other important goals.

*Relevant recommendation: 6*

- The Act is not clear about what NSWALC should consider when deciding whether to approve a disposal of land (s.40D(1)(b)). Legal opinions on this issue vary greatly. One view is that NSWALC may be limited to making sure that the formal requirements of the Division are met (that is, that the decision was made at a properly constituted meeting and that the correct number of members approved it).

Other legal opinions suggest that NSWALC can take any relevant matter into account when deciding whether to give approval.

Some LALCs believe that the approval is just a formality and NSWALC is obliged to give approval. NSWALC has often been approached for approval after a deal has already been done with a third party and in several cases, LALCs have put great pressure on NSWALC to give approval at a late stage.

*Relevant recommendations: 8, 9, 10, 11 and 12*

- The land dealing provisions are not workable for property development projects. NSWALC can't simply approve a development project as a whole, nor can it approve a development proposal that is merely conceptual. Successful property development requires an investment of time and money in investigations and planning, and may involve a number of separate changes in use, dealings and partial disposals before the final disposal of the land takes place.

As the Act stands, it appears that **each dealing** involved in the project (for example, subdivision of land, granting or release of easements, or possibly development consent) requires a **separate authorising resolution** by the LALC and a **separate approval** from NSWALC. In practice, LALCs have tended to seek approval only for the final disposal of the land and have taken other steps along the way without authorisation or approval. Any steps taken without a proper decision by the LALC and NSWALC approval may be void and so the whole project could fail.

It would be better if NSWALC approval could be given at an early stage, but that might require NSWALC to put conditions on the approval to make sure that the development goes ahead as approved. NSWALC probably does not have the power to grant conditional approvals under the present provisions.

*Relevant recommendations: 1, 2, 8, 9, 10, 11, 12, 15, and 16*

- The Act does not provide for a policy framework to guide LALCs and NSWALC in making decisions about land. LALCs can make decisions to dispose of their land without any guiding strategy or plan about how to use and manage their landholding, or how the proceeds from any sales should be used. It is a matter of great concern that decisions about land dealings can be made in a policy and planning vacuum.

*Relevant recommendations: 3, 4, 8, 9 and 10*

- In a complex land project, if one step is not properly done, or any mistakes are made, the **whole** of a complex land dealing may be void – this could affect a whole series of transactions involving many parties. This situation has the potential for a great deal of legal uncertainty.

In addition, the opinion of lawyers who are familiar with the Act is that an error cannot be corrected after the fact. The only way to correct a mistake (for example an approval not being obtained as required under the provisions) is to go back and re-do all steps in the process from the point at which the error occurred. It may in fact not be possible to re-do the steps – for example, if a LALC has to meet again and make a new resolution about selling the land, the later meeting may not reach the same decision. This could leave a LALC that has entered into a multi-million dollar agreement with a developer liable to legal action and owing millions of dollars in damages.

*Relevant recommendation: 11, 12, 13, 14 and 15*

- The provisions that allow land councils to issue a certificate (sections 40D(2) and 40C(2)) to certify that the disposal does not contravene the requirements of the Division is not very effective to provide certainty for all parties. If the requirements have not been met it is likely that the dealing will be void even if a certificate has been issued, although there is another legal view that if a certificate has been issued, then the dealing would be valid.

Certificates are intended to protect the innocent purchaser, but there have been instances where a certificate that was incorrectly issued was later used by people (who knew the requirements of the Act had not been met) to have land titles transferred to them.

The secretary of the LALC itself issues the certificate. This increases the risk of fraud or mistake because just one person has responsibility for issuing the certificate.

*Relevant recommendation: 15*

- Section 40D(2) certificates are only issued by LALCs for sales and disposals. The Act doesn't provide for a certificate to be issued for leases, for example, for a 99 year lease (which may be the basis of a major development). This could make long term leases of ALC-owned land very high risk.
- Under s.52(1)(n), the functions of a LALC include ensuring that "no part of the income or property of the Council is transferred directly or indirectly by way of dividend or bonus or otherwise by way of profit to members of the Council..."

If there is no legitimate way of gaining benefits from the wealth owned by their LALC, members are less likely to be active and involved, and there is more chance of corruption and more likelihood that LALCs will go into unfavourable joint ventures and land developments. Eventually, the land base will be reduced, the reputation and economic value of ALC land will be reduced and the financial rewards from land rights will not be used in the best way, or will be drained from the system by a handful of dominant individuals.

The Task Force believes it is very important to find ways that members can legitimately benefit from ALC land ownership.

*Relevant recommendation: 17*



### 3.4 Examples of mistakes that could threaten land dealings

The following are some hypothetical examples of mistakes that can occur under the current provisions:

#### *Example 1*

An ALC asks for and is given NSWALC approval to sell some of its land. Under its agreement with a developer, a series of complex steps, including development consent and registration of a subdivision plan, are to take place before the actual sale of the land. Because the ALC already has NSWALC approval the land council does not hold special meetings for the membership to approve each of the individual steps. The steps are taken and eventually the ALC starts to sell some of the building blocks.

*If the ALC has not held a special meeting to authorise each of the steps and been given NSWALC approval for them, it is likely that the sale of the building blocks will not be valid and the people who bought the blocks will not be able to have title transferred to them, even though they have paid for the land. At this late stage of a complex development it is likely that many parties will be involved (including the developer, individual buyers, builders etc.). This could have serious consequences for everyone involved, and especially for the land council as the other parties might take legal action to recover their money or for lost profit.*

#### *Example 2*

A land council has been approached by a third party to develop some of its land. A special meeting is held and the ALC passes a resolution to dispose of the land. An option to buy the land is granted to the developer. Later it is realised that a small mistake was made in the description of the land in the resolution. This detail is not thought to be important at the time, but some time later it is realised that because of the mistake, the option granted to the developer might not be valid. By this time the developer has invested a lot of money in the project.

*Even a very small mistake could cause a major multi-million dollar development to fail. Because the ALC did not correctly describe the parcel of land in its resolution, the land dealing could be void. This could put the land council in a serious position if the ALC is not able to go back and do all the steps involved since the first mistake – again it could leave the ALC liable for very costly damages if another party is involved in the project.*

#### *Example 3*

An ALC with a very valuable landholding is approached by a developer to go into a joint venture. The ALC agrees to go into a contract and sets up a joint company with the developer. Under their joint venture agreement, the ALC is supposed to mortgage its land to pay for the cost of the development and will split the final proceeds 50-50, after the developer had taken out 'development costs'. The development costs are not quantified in the agreement, so there is no real way of knowing what the developer might charge and what the land council will get out of the deal.

*This kind of deal is unfair to the ALC and may not be approved by NSWALC because of that. Again, the ALC could be at risk of legal action by the developer.*



The Task Force has developed a set of recommendations that aim both to remove the problems that have arisen and develop a basis for a workable regime that provides transparency and certainty for all parties. The full list of recommendations is at the back of this paper.

The following summarises how the new land dealings approach would work and what it would cover.

#### 4.1 What land, and what types of dealings are covered by the regime?

The provisions would apply to all land held by ALCs and would cover all types of dealings, except for residential leases of less than three years.

*Refer to recommendations 1 and 2*

#### 4.2 Strategic land and business planning at local level

The provisions would require ALCs to plan for the management, use and/or disposal of their lands. The plans could be called “Community Land and Business Plans”.

This planning underpins the proposed regime. At present LALCs can make *ad hoc* decisions about disposing of land, and a small number of members can make major decisions about selling land. The new scheme would require that all decision-making about an ALC’s land would be done in the context of an approved plan.

The matters which should be addressed in the plan, the process for making it, the period of operation and how plans could be amended will be set out in the Regulation. The plans would be approved by NSWALC.

The planning process would require ALCs to classify their land according to its intended use. (The range of uses could include land for commercial development, residential/social housing land, community purpose land, land that should be preserved and managed because of its cultural value, and so on).

The purpose of this planning is:

- to make sure that important decisions about the future use of an ALC’s lands will be taken strategically and will maximise the benefits of land ownership to the ALC’s constituents,
- to increase member participation in and improve transparency of decision-making.

Planning would help ensure that an ALC’s members are fully informed about and give their informed consent to any proposals about the development and disposal of the ALC’s land. The Task Force hasn’t made a recommendation about how many or what percentage of members must approve the plan, but it should be set at a level that ensures that the broad membership endorses and agrees with the plan.

In general, an ALC’s decision to dispose of land would have to be taken in the context of the existing plan. The provisions may allow for exceptions in specific cases, for example, in a situation where an ALC that hasn’t had the opportunity to prepare a plan may have a reasonable need to dispose of some of its land.

*Refer to recommendations 3, 4, 5 and 6*

### 4.3 Approval criteria for proposed land dealings

NSWALC would continue to have responsibility for approving proposals for land dealings, but the Act would provide clearer criteria about the basis on which approvals should be given. These criteria would be broadly defined in the Act in a way that ensures that land can only be dealt with in a way that fits with the purposes and objects of the Act.

NSWALC would be given power under the Act to make binding policies<sup>3</sup> about how it will exercise its approval function. The Act would also set out the procedures which would be required for NSWALC to develop and publish its policies. The policies would explain the basis on which land dealings proposals would be likely to be approved in more detail. The policies would be required to be reviewed and amended from time to time.

*Refer to recommendations 8, 9 and 10*



### 4.4 Cultural heritage and protection of culturally significant land

The current requirement that LALCs must determine that land “is not culturally significant and should be disposed of” in s.40D does not ensure that land that is of high cultural value will be protected and remain within the Aboriginal estate.

The Task Force has recommended that the current “cultural significance” requirement be removed. Instead, when an ALC wishes to dispose of land, it would be required to consider and report on the likely impact of any proposed dealing on the cultural value of the land. The cultural value of land would also be amongst the criteria that would need to be considered by NSWALC in any assessment of an application for approval to dispose of land.

Under the proposed regime, ALCs would be able to identify land of cultural importance in the land planning process. They might be empowered to pass special resolutions that would declare certain land unavailable for disposal on the grounds of its cultural significance, in such a way that the decision could not be revoked within a certain time frame.

*Refer to recommendations 6*



<sup>3</sup> That is, policies that NSWALC would be legally obliged to comply with.

#### 4.5 Transfer of land subject to native title interests

In regard to transfers between land councils of land that may be subject to native title rights and interests, the Task Force believes that such transfers would not affect any native title rights or interests, and has recommended that such transfers be exempted from the provision that prevents such land being transferred (s.40AA).

*Refer to recommendations 7*

#### 4.6 Creation of an expert advisory panel to assess proposals and advise NSWALC

An expert advisory panel will be established to:

- provide expert advice to NSWALC; and
- make recommendations as to whether an application for a land dealing should be approved.

Some minor land dealings may be exempted from this process – in general it would apply to more complex dealings.

The expert panel would meet on an ‘as needed’ basis, and would be able to request reports and other information from NSWALC and other sources.

The composition of the panel and its method of appointment will be subject to further consideration by the Task Force.

The panel would formulate its recommendations in line with the criteria in the Act and NSWALC’s published policies (see 4.3 above). Its recommendations would be provided to NSWALC, the ALC which made the application, DAA and the Registrar.

*Refer to recommendations 11*

#### 4.7 Approval of proposed land dealings

NSWALC would continue to have responsibility to give or refuse its approval for proposed land dealings. The matters it would be required to consider would be broadly defined in the criteria that would be put in the Act.

Its decisions would have to accord with the statutory criteria and its own policies. NSWALC could make a decision against the advice of the expert panel, but would have to publish its reasons and provide this to the ALC, DAA and the Registrar.

NSWALC would have the power to give approval with conditions that would have to be met after the disposal, and could require the ALC and a third party enter into a contractual agreement with NSWALC to ensure that the conditions are enforced. This might be further supported by changes to the *Real Property Act 1900* that would allow for registration of the conditions and notification to be placed on the title.

*Refer to recommendations 11 and 12*

#### 4.8 Review of decisions

NSWALC decisions would be subject to judicial, but not merit review. In other words, an ALC could ask for a review of whether the correct processes were followed, but not whether NSWALC made the wrong decision. Only the ALC that made the original application for approval would have the right to ask for a review.

*Refer to recommendations 13*

## Towards a new Land Dealing Regime

### The ALRA :

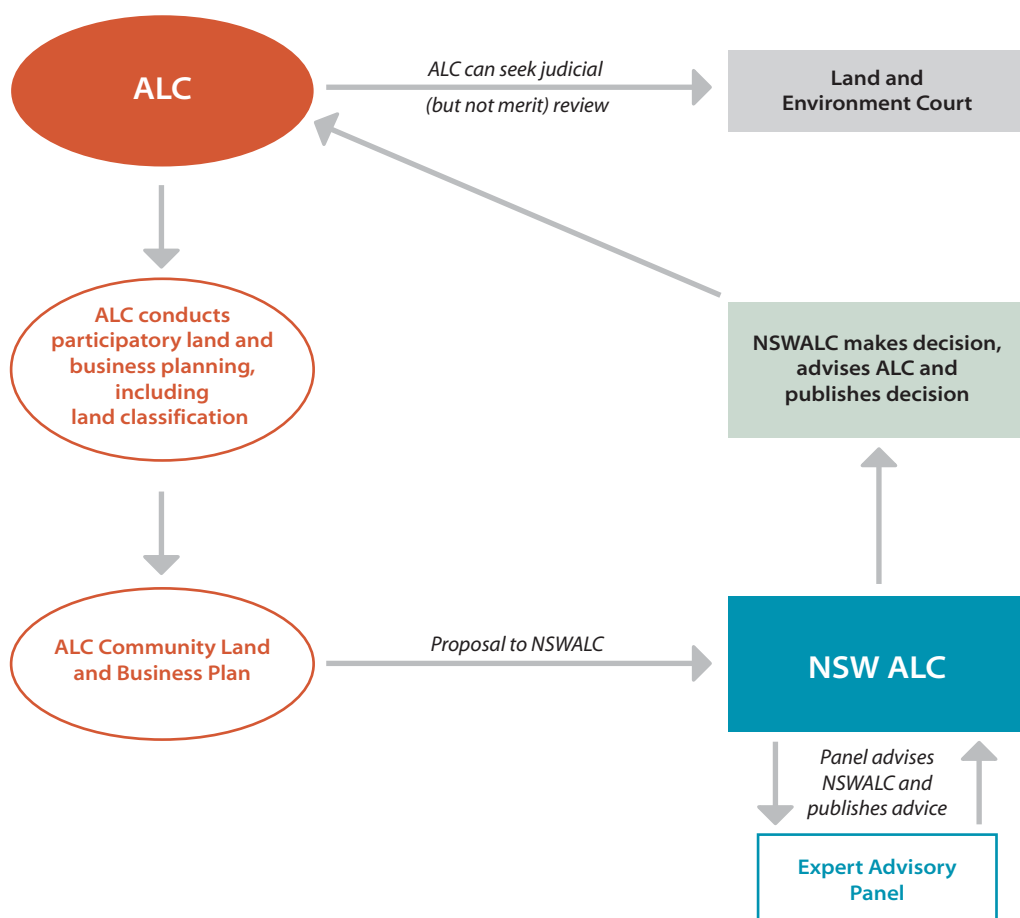
- sets out broadly defined criteria for assessment of land dealing proposals;
- provides for the making and amendment of NSWALC policies.

### ALRA Regulation:

- sets out process for and matters that must be included in an ALC 'Community Land and Business Plan'.

### NSWALC policies,

- provided for in the Act, give detailed information e.g.:
- required content of Community Land and Business Plans;
  - requirements for ALC decisions on land use and disposal;
  - what ALCs must consider and report on in making applications;
  - what NSWALC must consider in relation to approvals;
  - kinds of land dealings that would be referred to advisory panel.



## 4.9 Safeguards

The land dealings regime should reinforce and help to deliver the aims and purposes of land rights. Land, and the proceeds of any sale of ALC land, must be used in the most effective way to benefit Aboriginal people, both present and future generations.

The proposed regime is designed to achieve these aims in several ways. An important one is the land and business planning that ALCs will do. This will:

- strengthen ALC decision-making process and the assessment and approval processes, as applications for approval to dispose of land must accord with the plan;
- reduce the risk of poor decisions by ALCs about their land;
- help ALCs and their members to identify and protect land that is culturally important;
- strengthen the broader membership to make informed decisions about the management and use of the ALC's landholdings;
- help ensure that decisions about land dealings are made with the informed consent and agreement of the majority of the ALC's members;
- improve transparency of decision making and reduce opportunities for corrupt conduct.

Further safeguards are provided in the new scheme by:

- the criteria that will be set out in the Act (which will include ways of identifying and protecting culturally significant land);
- the new NSWALC policies;
- the creation of an expert advisory panel to provide independent assessment; and
- the ability of NSWALC to give conditional approval and enforce conditions.

There will be much more transparency in decision-making because all of these new elements – ALC plans, NSWALC policies, the advice of the expert advisory panel and NSWALC's decisions – will be published.

Strengthening all of these processes will increase the confidence of reputable third parties about forming agreements with ALCs and confidence that if they buy or develop ALC land, the title will be secure. This in turn will add to the value of ALC land.

Finally, the Task Force has also recommended that the Act should provide for specific offences aimed at deterring corrupt or fraudulent conduct by ALC members or third parties.

*Refer to recommendations  
3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 16 and 20*



## 4.10 Certainty mechanisms

Greater legal and commercial certainty is provided in a number of ways in the proposed scheme.

First, the ALCs' land and business planning provides a framework for parties wishing to enter into agreements with ALCs about the future development of their land. ALCs and third parties can have greater confidence that proposals that fit with a previously approved plan are more likely to be given NSWALC approval.

Further, the criteria set out in the Act, and the policies that will be produced by NSWALC will also give more clarity about the kinds of applications that are likely to receive approval. These parts of the scheme give greater commercial certainty for all parties.

The proposed scheme also clarifies and simplifies the Act to provide more certainty – especially to ensure more certainty that land transactions are legally valid and titles will be secure. Under the scheme, it will be clear:

- which property is regulated;
- what kinds of land dealings are regulated;
- what kind of transactions or land dealings must be subject to the assessment and approval provisions.

Another important change that has been suggested is to remove the provision that makes void any action that “contravenes the division”.

Instead of that concept, there would be a positive notification, given by NSWALC, that confirms that the dealing is valid. This will be based on a strong assessment and approval process that will ensure that all the requirements of the Act have been met. Certainty would be provided by the authorisation notice.

This approach removes the sweeping “all or nothing” effect of the existing provisions which could make a transaction, or a whole series of transactions void because of a single mistake. It greatly reduces the present uncertainty.

*Refer to recommendations 1, 2, 5 (ref 3 and 4), 8, 9, 10, 11, 12, 13 Key recommendation: 15*

## 4.11 Information recording and record keeping

Very careful record-keeping will be needed. The land assets involved are very valuable, and the rights of all parties need to be protected.

The Task Force has proposed that NSWALC should keep a register of all applications and decisions that can also track any conditions that might be put on an approval to make sure they are complied with.

Some of the information in the register may be publicly available and some will need to be kept confidential. The register will need to be compatible with registers held by the Department of Lands. It will need to be audited regularly.

*Refer to recommendation 14*



#### 4.12 Costs of the proposed scheme

The proposed scheme has several parts that work together to make sure that Aboriginal land is used and managed for the benefit of present and future generations of Aboriginal people in New South Wales.

The scheme is expected to achieve very desirable benefits and greater security for Aboriginal people. However, the planning and increased regulation will cost more. Some of the cost could be recovered by a 'user pays' scheme for approval applications, but probably not all.

The ALC system is already fully stretched now to fulfil the present accountability requirements of the Act within budget. The Task Force has proposed a careful costing and financial impact assessment of the new scheme before it becomes law.

*Refer to recommendations 18 and 19*

#### 4.13 Deriving benefits from land rights

This issue is not directly part of the land dealings provisions of the Act, but the restrictions on benefits to individual ALC members does affect how people might act as members and office-bearers of an ALC.

The Task Force has discussed how proceeds from land sales could be controlled, and suggested how benefit schemes could be established. These could include home ownership, scholarships and other similar benefit schemes. The Act could set out criteria for the types of schemes that would be eligible, and ALCs could put forward their own schemes (that fit with the criteria) for approval.

*Refer to recommendation 17*





### Scope of the regulatory regime

#### Recommendation 1

That the land dealing provisions apply to all land held by an ALC in its own name and to any other land with the agreement of the proprietor of that land.

That “land” will retain its current wide definition which is consistent with the use of the word in the general law.

That, to the extent that it is desirable that land purchased by an ALC should be treated differently to land transferred under the land claim provisions, consideration be given to making special policy specifically applicable to land acquired other than by land claim.

#### Recommendation 2

That the Aboriginal Land Rights Act should be amended so as to apply to all those dealings that, if valid and effective, would pass a legal or equitable interest in the land, other than residential leases for a term of less than three years.

In addition, the Act should be amended so as to apply to:

- the creation or release of an easement or covenant benefiting or burdening the land;
- subdivision of the land; and
- lodgement, and consenting to the lodgement, of an application for development consent under the Environmental Planning and Assessment Act, or alternatively to the grant of development consent.

In addition to dealings which would pass an interest in the land, the Act should be amended so as to apply to the making of agreements between an ALC and any other person that relate primarily to the development and/or disposal of land (including land which has been granted following a successful land claim but not yet transferred to the claimant ALC). This will include joint venture agreements and exclusive dealing agreements.

Further, the Act should be amended so as to apply to the giving of guarantees by an ALC.

## ALC decision-making in relation to land

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### **Recommendation 3**

That ALCs be required to prepare detailed periodic plans in relation to the use, management and disposal of their lands (and other aspects of their activities).

That the plans be required to be approved by a ‘special majority’ of the ALC’s members (not yet determined) and are to be subject to scrutiny and approval requirements.

That the plans be developed through a process which involves a high threshold of membership participation. Land dealing decisions that are consistent with the plans will require a lower threshold of member participation.

There will be a need for an exception to this decision making structure where there is to be a disposal where a plan is not in existence.

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### **Recommendation 4**

That ALCs be required by the Aboriginal Land Rights Act to prepare Community Land and Business Plans.

That the Regulation is to provide the matters to be addressed by each Plan, the process for its making and amendment and the period of its operation.

That the Community Land and Business Plan should include a process of land assessment that involves (as a first stage) the categorisation of land according to classes determined by the Regulation which may include culturally sensitive lands, community lands, lands potentially available for commercial development and/or disposal.

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### **Recommendation 5**

That there be no specified requirements for the form or content of a valid and effective decision to deal with or dispose of land.

Rather, that it be made clear in the legislation that land is not to be dealt with without the informed consent of the ALC’s decision makers. The extent to which this is the case will be a matter for assessment by NSWALC when an application for approval to deal with the land is made.

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## Native Title, traditional land ownership and culturally significant land

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- Recommendation 6** That the present “cultural significance” requirement be abandoned.
- Rather, the cultural significance of the land concerned, and the likely impact of the proposed dealing on the cultural values of the land, will be amongst the other criteria that need to be considered in the approval process.
- This might be supported by a requirement that the ALC itself consider, and provide to NSWALC, a report on the Aboriginal cultural and heritage values of the land concerned and the likely impacts of the proposal on those values.
- In addition, that ALCs be able to pass special resolutions declaring certain land unavailable for disposal on the grounds of the cultural significance of the land.
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- Recommendation 7** That transfers between ALCs be exempted from the operation of the requirement in s.40AA.
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## Approval criteria

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- Recommendation 8** That the criteria for assessing land dealing proposals should be defined so as to ensure that ALC land is dealt with only to the extent that this is likely to be useful for achieving the purposes and objects of the Act.
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- Recommendation 9** That broadly defined criteria for the assessment and approval of land dealings be set out in the Act.
- That more specifically defined criteria and minimum standards may be set out in binding policies (i.e. binding on NSWALC), the process for the making and amending of which will be specifically provided for in the Act.

- Recommendation 10** That NSWALC be given statutory power to make binding policies on how it shall exercise its approval function and that policies, once made, be published in the Gazette.

That the Act set out the procedure for making and publishing such policies, including requirements for:

- notification of drafts to ALCs and opportunities to comment;
- Ministerial concurrence or approval; and
- review of policies.

That the Act set out the consequences for decisions contrary to policy and resolution of inconsistencies between applicable policies.

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## Approval process

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### **Recommendation 11**

That a single procedure and broad criteria for assessment and approval of dealings of all kinds be set out in the Act but capable of tailoring through the Regulation and policies with a statutory foundation.

That an external body/panel assess and make recommendations and refer to the NSWALC for decision.

- Classes of dealings might be excluded from external assessment by Regulation.
  - The external body or panel would be required to provide copies of its recommendation to NSWALC, the ALC, DAA and the Registrar.
  - The body/panel must formulate its recommendation in accordance with any relevant statutory criteria and policies. NSWALC would be at liberty to depart from the recommendation but must publish its reasons for doing so to the ALC, DAA and the Registrar.
  - NSWALC's decision must also accord with any statutory criteria and policies.
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### **Recommendation 12**

That NSWALC be empowered to insist on conditions precedent to considering an application, to the extent that such a requirement is consistent with a published policy.

- NSWALC can impose conditions on its approval that prevent the lodgement or registration of development applications or dealings unless the conditions have been complied with.
  - In relation to conditions that must necessarily operate following a disposal (such as with some joint ventures), NSWALC has a power to require the ALC and third parties to enter contractual arrangements with it to enforce conditions of approval post disposal.
  - This power might be supported by amendments that make performance of such agreements by the ALC the subject of Registrar's compliance directions.
  - This power might also be supported by amendments to the Real Property Act to allow for the registration of a memorandum of the conditions and a notation to be made on the folio of the register with the consent of the registered proprietor, whether or not the proprietor is an ALC.
  - It might also be supported by a statutory power for NSWALC to lodge and maintain caveats over properties held by the ALC or a related company.
  - The power might also authorise NSWALC to lodge and maintain caveats over properties held by third parties with the agreement of those parties.
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## Review of approval decisions

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**Recommendation 13** That judicial review by the Land and Environment Court shall be available in relation to all NSWALC decisions.

That standing to bring such proceedings be expressly limited to the applicant ALC.

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## Information keeping and recording

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**Recommendation 14** That NSWALC be expressly required to keep a register of all applications and decisions.

- Where conditions are imposed on an approval, the register will need to track and record compliance with those conditions.
- The register would need to be in separate parts. One part is to comprise information that may be accessed by the public, for a fee. This information will include the description of land in respect of which an approval (or authorisation notice) has been issued and a brief description of the nature of the approval.

The other part is to contain information that remains confidential to NSWALC and the ALC, including applications refused as well as any commercially sensitive information in respect of approvals granted. This part would be accessible only by the ALC, NSWALC, the Minister and the Registrar, and would be exempt from the Freedom of Information Act 1989.

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## Certainty mechanisms

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**Recommendation 15** That validity depend not on actual compliance with all of the provisions (and the extent to which a person dealing with the ALC has knowledge of any non-compliance) but with the existence of a registered ‘authorisation notice’ (issued by NSWALC).

- Any disposal or other dealing otherwise than in accordance with a registered authorisation notice is void.
  - A development application in respect of ALC land must be accompanied by an authorisation notice in order to be valid and effective. This will require appropriate amendments to the Environmental Planning and Assessment Act.
  - The requirement for an authorisation notice may apply in respect of land held by an entity other than an ALC where that entity has agreed to the restriction on dealing being placed on its title. This will require amendment to the Real Property Act and the Environmental Planning and Assessment Act.
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## Control on proceeds of land dealings

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### **Recommendation 16**

That the functions and powers of ALCs be further defined to provide guidance and control as to the application of ALC funds generally.

That approval for proposed transactions be given subject to conditions as to the application of proceeds. Such conditions might operate by reference to a Community Land and Business Plan or by specific provisions set out in an agreement between NSWALC and the ALC (see conditional approval and enforcement, Recommendation 12).

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## Providing benefits to members

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### **Recommendation 17**

That a new Part be created in the Aboriginal Land Rights Act that provides for the registration, implementation, monitoring and regulation of benefit schemes for ALC members.

- ALCs could propose a scheme for registration.
  - The Regulation could provide criteria for eligible schemes.
  - Limits might be set on the proportion of an ALC's property which could be set aside for distribution in any given period.
  - Community Land and Business Plans would also need to consider and, if appropriate, provide for the implementation of benefits schemes.
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## Costs of funding the system

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### **Recommendation 18**

That there must be a financial impact assessment of the proposed land dealing scheme before it is legislated.

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## Cost of the approval process

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**Recommendation 19** That the approval process be funded on a “user pays” basis by either:

- the payment of an application fee;
  - the payment of a percentage of the proceeds of any sales; or
  - the payment of an amount assessed by NSWALC (or any alternative decision maker) upon receipt of the application for assistance; or
  - a combination of some or all of the above.
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## Probity and integrity – corruption prevention

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**Recommendation 20** That the Act include offence provisions that might be directed towards preventing actions such as:

- pressure and inducements being applied to ALC members and officials and/or NSWALC Councillors;
  - ALC members and officials receiving inducements to deal with ALC land;
  - providing false information in support of an application for approval;
  - unauthorised and fraudulent execution of land dealing documents; and
  - misappropriation of ALC funds.
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