

2004 – 2005 REVIEW OF THE
ABORIGINAL LAND RIGHTS ACT 1983

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

TABLE OF CONTENTS

DEFINITIONS	III
1 INTRODUCTION.....	1
1.1 Background to this Review	1
1.2 Terms of Reference	2
1.3 Historical impetus for the Review	3
1.4 Scope of this paper	5
1.5 Challenges for the Review and the Task Force	6
1.6 The present context	7
1.7 Timeliness of the Review	14
1.8 Structure of this discussion paper	17
1.9 Cost implications	17
2 KEY PRINCIPLES.....	19
2.1 The purpose of land rights	19
2.2 The objects and functions of Aboriginal Land Councils	20
2.3 The purpose of the land dealings regime	21
2.4 The need for safeguards	21
2.5 Key principles of the Aboriginal Land Rights Act land dealings regime	21
3 PROBLEMS EVIDENT IN THE EXISTING PROVISIONS	24
3.1 The scope of the regulatory regime	26
3.2 Decision-making in relation to land	29
3.3 Certainty issues	38
3.4 Limited avenues for members to benefit from ALC land ownership	45
4 ISSUES AND RECOMMENDATIONS.....	47
4.1 Scope of the regulatory regime	50
4.2 NSWALC land dealings	53
4.3 ALC decision-making in relation to land	55

4.4	Certainty mechanisms	73
4.5	Benefits of ALC land ownership	76
4.6	Funding the system	80
4.7	Probity and integrity	81
5	TOWARDS A NEW LAND DEALINGS REGIME UNDER THE ABORIGINAL LAND RIGHTS ACT.....	84
5.1	What land, and what types of dealings are covered by the regime?	84
5.2	Strategic land and business planning at local level	84
5.3	Approval criteria for proposed land dealings	85
5.4	Cultural heritage and protection of culturally significant land	86
5.5	Transfer of land subject to native title interests	87
5.6	Creation of an expert panel to assess proposals and advise NSWALC	87
5.7	Approval of proposed land dealings	88
5.8	Review of decisions	88
5.9	Safeguards	88
5.10	Certainty mechanisms	90
5.11	Information recording and record keeping	91
5.12	Costs of the proposed scheme	92
5.13	Deriving benefits from land rights	92
6	NEXT STEPS IN THE ABORIGINAL LAND RIGHTS ACT REVIEW.....	94
7	TABLE OF RECOMMENDATIONS – LAND DEALINGS.....	96
APPENDIX 1	PREAMBLE TO THE ABORIGINAL LAND RIGHTS ACT 1983.....	104

DEFINITIONS

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

Key terms (a list of terms used in this paper; the definitions provided may not be exhaustive)

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)

Call option an option which gives its holder the right but not the obligation to purchase an asset at a predetermined date (maturity date) for a predetermined price (exercise price) (Fairfax Digital Glossary)

Cultural heritage values – *see also Indigenous heritage value*

Under the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), “heritage value” is defined as *the place’s natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance for current and future generations of Australians* (s.528)

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 [Gandangara Estate] Act 2004)

Effective	<p>serving to effect the purpose; having the intended or expected result (<i>The Macquarie Dictionary</i>); having effect at law</p>
Inalienable	<p>characteristic of a right or benefit that the courts will not allow the holder to transfer to another (<i>Butterworths Australian Legal Dictionary</i>)</p>
Indefeasibility	<p>that cannot be annulled or made void: <i>an indefeasible claim; indefeasible rights</i></p>
Indigenous heritage value	<p>Indigenous heritage value <i>of a place means a heritage value of the place that is of significance to indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history (Environmental Protection and Biodiversity Conservation Act 1999 (Cwt)</i></p>
<i>Prima facie</i>	<p>at first sight; on the face of it</p>
Put option	<p>an option giving its purchaser the right, without the obligation, to sell an asset at a specified price (the exercise price) at any time between the purchase of the option and its expiry date (Fairfax Digital Glossary)</p>
Subdivision	<p>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 (<i>Butterworths Australian Legal Dictionary, 1997</i>)</p>
<i>ultra vires</i>	<p>an act which is beyond the powers or authority of the person or organization</p>

valid	legally sound, effective, or binding; having legal force; sustainable in law (<i>The Macquarie Dictionary</i>)
void	without legal force or effect; not legally binding or enforceable (<i>The Macquarie Dictionary</i>)

1 INTRODUCTION

1.1 Background to this Review

On 26 May 2004, the then Minister for Aboriginal Affairs, the Hon Dr Andrew Refshauge, announced that a task force was to be established to conduct a major review of the *Aboriginal Land Rights Act 1983* (Aboriginal Land Rights Act).

The Aboriginal Land Rights Act Review Task Force members are:

- the Director-General of the Department of Aboriginal Affairs, Ms Jody Broun;
- the Administrator of the New South Wales Aboriginal Land Council (NSWALC), Mr Murray Chapman; and
- the Registrar, Aboriginal Land Rights Act, Mr Stephen Wright.

According to the media release issued by the Minister, the Task Force is to report on:

- the three tiered structure of the land council system (the NSWALC, Regional Aboriginal Land Councils (RALCs) and Local Aboriginal Land Councils (LALCs) to see if there is a better way of delivering outcomes to Aboriginal people;
- clearer separation of powers between the administrative and elected arms of local councils to avoid nepotism and conflicts of interest;
- attracting more qualified people with relevant managerial and financial expertise;
- improved intervention strategies to avoid the costly and often ineffective appointment of administrators and investigators to local land councils;

- an improved framework for managing, selling and developing land council assets – in particular the sale and commercial development of landholdings; and
- clarifying the role of elected representatives.

1.2 Terms of Reference

The 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*** (emphasis added).

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 New South Wales Aboriginal Land Rights system.

1.3 Historical impetus for the Review

The historical impetus for the current Review into the operation of the Aboriginal Land Rights Act is based on a number of concerns and investigations into the operation of the three tiered system of land councils. Inquiries into and reviews of the operations of the Act and performance of land councils include:

- ICAC: Investigation into Aboriginal Land Councils in New South Wales
 - April 1998 – Corruption Prevention and Research Summary;
 - June 1999 – Investigation Report;
 - October 1999 – Report on investigation into travel allowance and expense claims by the Councillors of the New South Wales Aboriginal Land Council;

- NSW Ombudsman: June 2002 *Report concerning compliance with various provisions of the Annual Reports (Statutory) Bodies Act 1984 and the Aboriginal Land Rights Act 1983*;
- successive Auditor-General's reports;
- NSW Public Accounts Committee: December 2002 *Enquiry into Aboriginal Land Councils Mortgage Fund*; and
- Bentleys MRI: August 2003 *NSW Aboriginal Land Council Investigation Report* – Report to the Minister for Aboriginal Affairs.

It should be noted in the context of this paper, which focuses on the land dealings regime of the Act, that the investigations and reviews listed above did not generally address issues related to land dealings.

The investigations and reviews generally made findings that go to the performance of land councils, accountability processes, separation of powers, conflicts of interest, organisational capacity, record keeping and the appointment of administrators, investigators and consultants.

As a report prepared by SGS Economics & Planning consultancy¹ as part of NSWALC's submissions to this Review observes, many of the shortcomings that have been identified are administrative and system-based in nature; whilst perhaps identifying a failure to meet modern best practice standards, they are not indicative of malpractice or corruption. Rather, they are symptomatic of administrative overload and lack of capacity of Aboriginal land councils (ALCs). Further, ICAC's inquiry found that of the total number of complaints received, a significant proportion were based on unfounded rumour, innuendo, suspicion and

¹ The most recent draft of this report, *NSWALC Situation Report*, by SGS Economics & Planning in conjunction with Dan Gillespie, Tallegalla Consultants (dated January 2005), is attached to this issues paper (hereinafter, "the SGS Report")

misunderstandings and that some of the complaints may well have been generated by the attention focussed by the inquiry itself.

The latest investigation of NSWALC conducted by Bentleys MRI (2003) was critical of NSWALC's governance, accountability and operations and recommended the appointment of an administrator to NSWALC. It was the report of this investigation that led to the Minister establishing the Task Force to report on the operation of the Act and make recommendations for the improved operation of the New South Wales Aboriginal land rights system.

1.4 Scope of this paper

The then Minister, the Hon Dr Andrew Refshauge, formed the view that land dealings by Local Aboriginal Land Councils (LALCs) was a significant issue that should be addressed first in the Review process. He asked the Task Force to focus its first consideration on 'an improved framework for managing, selling and developing land council assets, in particular the sale and commercial development of land council real property' (ToR 3).

This paper therefore specifically focuses on the land dealings provisions which are set out in Division 4 of the Aboriginal Land Rights Act and makes recommendations as to how the provisions could be improved.

Subsequent papers will specifically consider other areas of the Review. Inevitably some issues overlap and this paper will touch on issues and make recommendations that are relevant to other elements of the Terms of Reference (in particular ToR numbers 1 and 6). Where appropriate, issues that have a bearing on other matters that will be subject to the Review will be highlighted as matters that require further consideration. It will also be important to review the recommendations made in this paper in the context

of recommendations that will be made in response to other elements of the Review (for example recommendations on governance or ALC structure).

1.5 Challenges for the Review and the Task Force

It must be said at the outset that the issues involved are extraordinarily complex. Particular complexity lies in identifying the legal implications of and administrative difficulties associated with the current provisions, and in seeking more effective and efficient mechanisms to achieve the aims of land rights.

Because of a lack of clarity in the language and intent of the provisions, there have undoubtedly been some major problems in the operation of the land dealings provisions, and outcomes that were not intended when the provisions were drafted. This discussion paper explores these issues in some depth and explains the consequences (both legal and practical) that have arisen or potentially could arise because of the way the current provisions are drafted.

It has become clear to the Task Force that a much more comprehensive and holistic approach to managing land dealings is needed, and that very careful consideration will be needed in re-drafting the relevant provisions.

A particular challenge is to find a way to ensure that the land that has been acquired and returned to the Aboriginal estate in New South Wales over the past 20 years, as a result of the considerable efforts of ALCs and many individuals to prepare and pursue claims, is managed and dealt with in a way that is sustainable, that preserves the value of the land for present and future generations, and that delivers real and ongoing benefits to Aboriginal people now and in the future.

1.6 The present context

The Aboriginal Land Rights Act has in many respects been successful and has delivered significant and valuable assets to the Aboriginal Land Council (ALC) system.

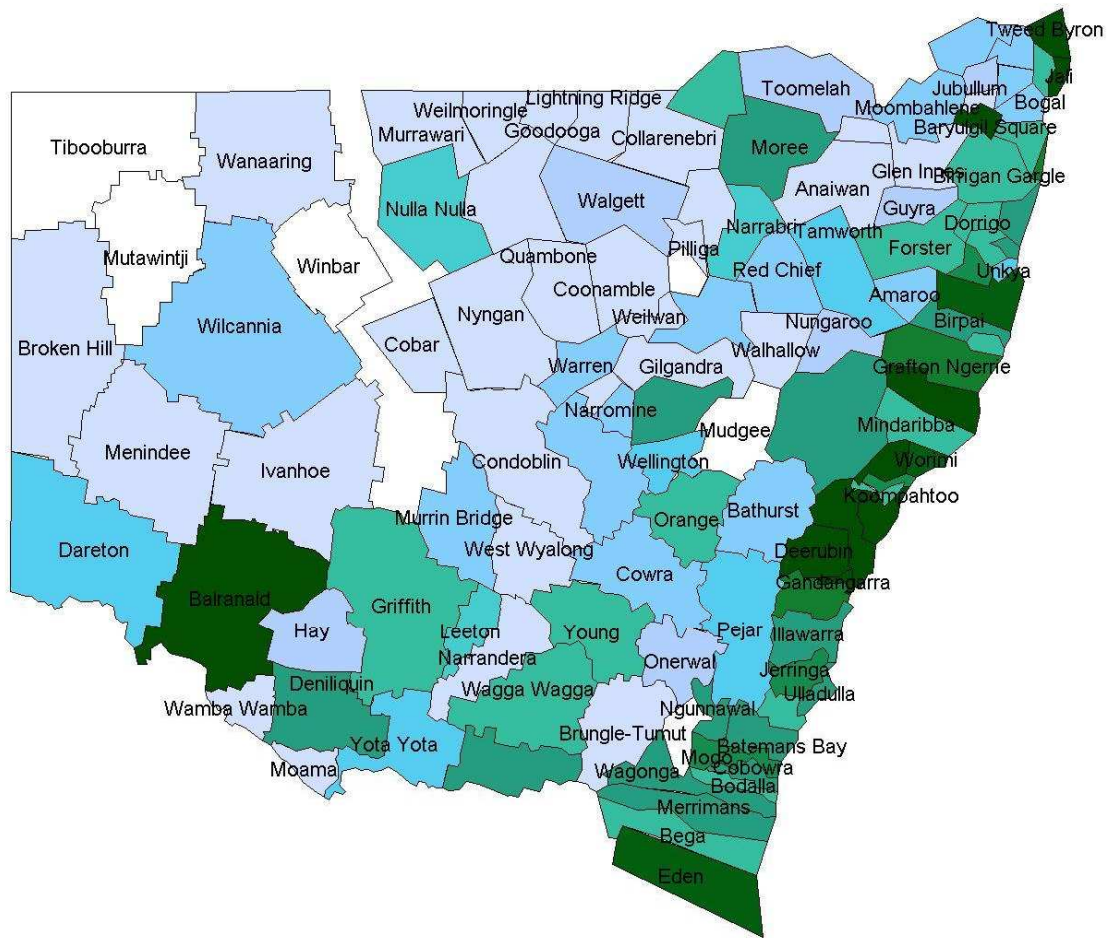
According to data provided by the Registrar, Aboriginal Land Rights Act, the total number of land claims lodged since the Aboriginal Land Rights Act came into effect is 7,280, of which 2,146 have been granted. The total area granted is approximately 80,036 hectares, just under 1% of the New South Wales land area, and has an estimated value of \$771.6 million.²

Added to this are properties acquired by purchase or other transfer of land (such as former missions/reserves) into LALC ownership – giving a total number of approximately 4,050 LALC properties over 616,461 hectares, valued at approximately \$952.6 million.

The amount and value of land held by LALCs is not evenly distributed. In the Western Division, the nature of land tenure has meant that little land has been available for claim. LALCs in coastal areas have benefited from greater opportunities to claim land and from the boom in land prices of the past decade. The following figures graphically illustrate these differences.

² See SGS draft report, section 6.3.4. Note that these figures are conservative and are based on an indicative value of land that may not reflect true market value.

Figure 1. Distribution of LALCS by Value of Properties



Property Value \$ '000s

Greater than 11,000 (11)	800 to 1,000 (3)
10,000 to 11,000 (3)	600 to 800 (6)
7,000 to 9,000 (3)	400 to 600 (15)
5,000 to 7,000 (4)	200 to 400 (7)
3,000 to 5,000 (15)	Less than 200 (30)
1,000 to 3,000 (17)	Not Available (5)

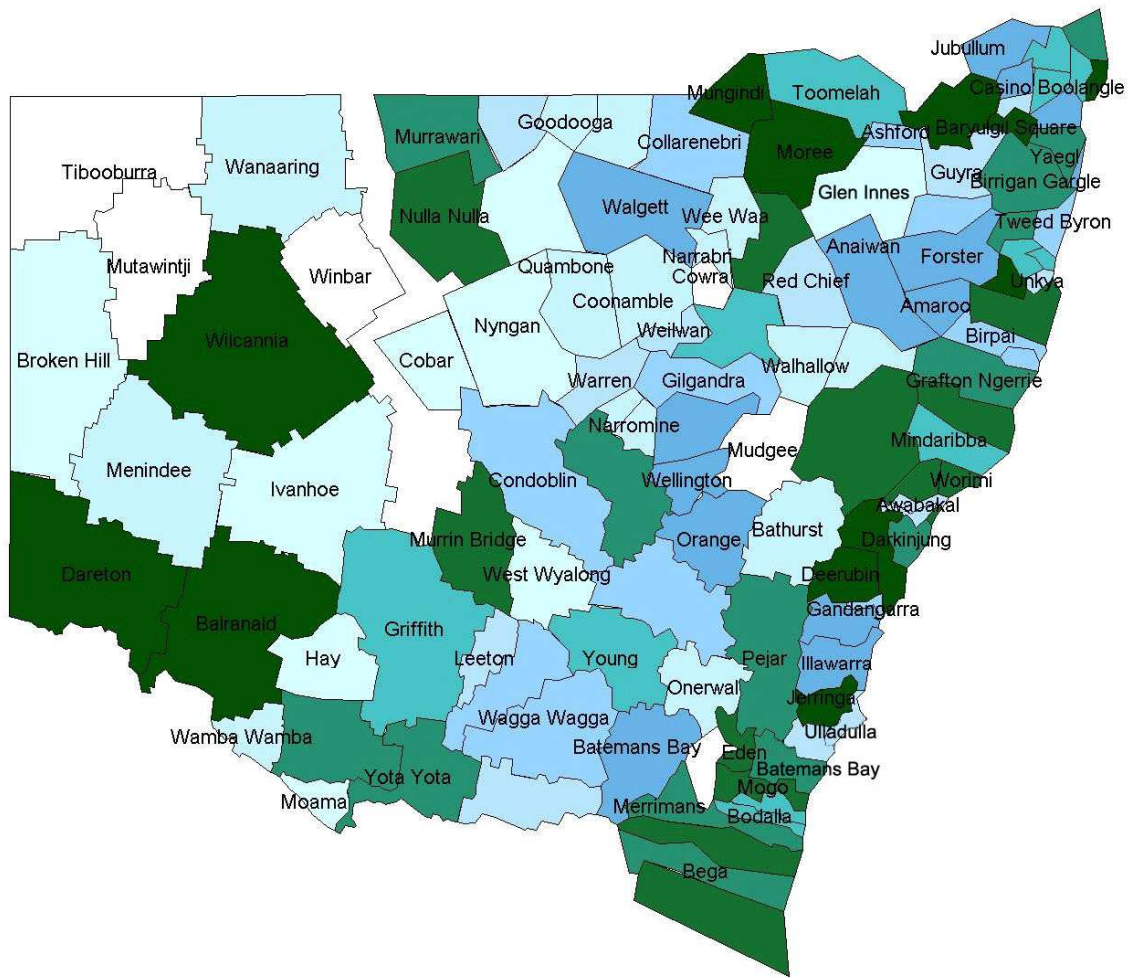
Source: NSW Department of Lands, November 2004

Figure 2. Characteristics of LALC Properties

	LALC 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

Source: NSWALC

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



Area of Properties (Ha)

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

Source: NSW Department of Lands, November 2004

According to the analysis prepared by SGS Economics & Planning, the underlying performance of the ALC system is good: the membership of LALCs is high, and they carry out important representative functions.

A major difficulty for ALCs is the broad range of social benefit functions that they are expected to perform. This might arise in part from the expectations that are inherent in the Act and that are embodied, for example, in the objects of the NSWALC:

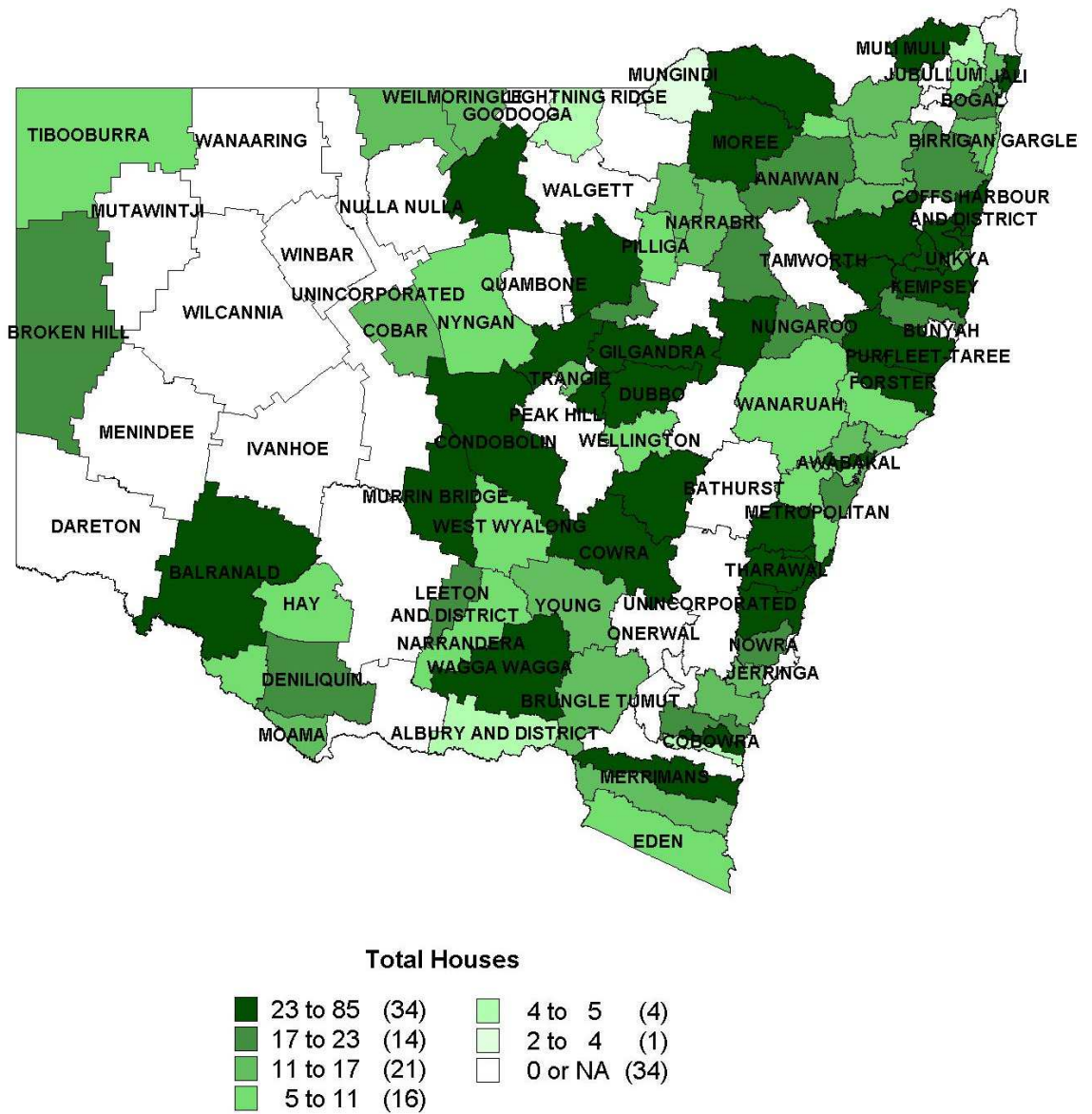
to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal persons within New South Wales³

This implies an expectation that land rights will play an important role in relieving the poverty and social disadvantage of Aboriginal people in New South Wales, even though the financial and organisational capacity of ALCs to meet such demands may be well below what is required to perform these broader ‘social benefit’ functions effectively. The extent to which local land councils perform such functions has not been taken into consideration, and although often expected of LALCs, these activities have never been funded under the Act.

The expectation might also arise from the fact that many LALCs “inherited” the former reserves and missions – and the housing – that were transferred to them under the Act. Many are now responsible for providing unsustainable social housing programs and managing housing stock which was often in poor condition when it was transferred into LALC ownership.

³ This object (s.105(b)) was inserted in 2002 and was expressed in these terms to provide NSWALC with an opportunity to obtain charitable or benevolent status

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



Source: Aboriginal Housing Office, December 2004

The present reality for many LALCs is that they are asset-rich and cash-poor. Land ownership of itself places a cost and resource burden on LALCs. Many are burdened by social housing programs that they are unable to maintain.⁴ In this context, it is easy to understand the pressure that may be felt by LALCs and their members to sell some of their assets.

This problem is exacerbated by the requirement to pay rates on all ALC land that is income-producing.⁵

There is likely to be additional pressure where the LALC is the owner of very valuable land, yet its members live in poor housing, have difficulty gaining employment and generally are suffering from the social disadvantage that is widely experienced by Aboriginal people in New South Wales.

A further major difficulty is that the Act allows few legitimate ways for Aboriginal people to benefit from the land and wealth that have been gained over the 20 years of the operation of the Act. As a corruption prevention measure, the Act specifically requires LALCs to ensure 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.

It is evident to the Task Force that the expectation that land rights *could* resolve the deep-seated and complex disadvantage of Aboriginal people, let alone within 20 years, is simply unrealistic, yet this is a widely-held expectation.

⁴ See SGS Report, chapter 8 “LALCs as Social Housing Providers”.

⁵ except where a LALC has successfully applied to the Minister for an exemption on land that, though used for a commercial purpose, is of cultural significance

As the SGS Report observed:

Although there have been slow improvements over the last two decades in Aboriginal socioeconomic status there is no evidence from anywhere in Australia that land rights alone has made any marked contribution to better socioeconomic outcomes. Some indicators such as unemployment and life expectancy (health outcomes) are either worsening or remaining intractable (Altman, 2004. p 37). There remain constant socioeconomic gaps between Aboriginal and non-Aboriginal populations despite the relatively robust performance of the Australian economy over the last two decades ...

These are not the types of socioeconomic indicators that are readily responsive to a limited land rights regime and yet they are part of the complex barrier of disadvantage that faces almost all Aboriginal people in New South Wales.

It is unfair and unrealistic to expect the relatively small and overcommitted structures of the NSW Land Councils to deliver the socioeconomic outcomes for Indigenous people that have eluded Governments across Australia. It is essential that Government recognises the need to clarify and simplify the objectives of the Act and that Government and the community modify the expectations that are placed on the Act and its operations. At the same time Government needs to commit to understanding the complex reasons behind Aboriginal people's poor socioeconomic status and to sheeting home the responsibility for achieving better outcomes to the relevant agencies and programs.

The fact that little has changed for Aboriginal people over the past 20 years further adds to the pressure on the land rights system to find ways of delivering benefits to people that will improve the quality of their lives.

This challenge lies at the heart of this Review.

1.7 Timeliness of the Review

The announcement of the Review was preceded by several key events, including the establishment of an ICAC Inquiry into land dealings of Koopahtoo LALC, the appointment of an administrator to NSWALC, and a series of negative media reports about land dealing activities by some LALCs.

In the broader context of the development of land rights, however, a thorough review of the Act and the operation of the land rights system is well-timed.

In relation to land dealings, it has become apparent that an overhaul of the regime is certainly timely, if not overdue. In part this has arisen as a result of rapid changes that have occurred in the New South Wales property market over the past five years and the resulting pressure on LALCs to realise or develop their land assets. It may be that the kinds of changes needed and the best approach to address the issues would not have emerged so clearly if not for the rapid transitions in proposed land management and disposal by ALCs that have occurred in the past few years, and the shortcomings in the legislation that have become evident as a result.

After 20 years of the operation of the Act, much of the substantive work of lodging and conducting land claims and establishing a land base has been done. Although the process of claiming land will and must continue into the future, it could be said that the land rights system is now expanding its scope of activity into the broader field of regulating and developing that asset base. It is essential that this occur in a way that will deliver genuine benefits to Aboriginal people in a way that is sustainable for present and future generations.

Whilst instances of corruption have in fact been found to be relatively few, many serious problems have arisen. It is now evident that, for the most

part, these occurred because of legal problems associated with the Act as currently drafted and date back to amendments made to the Act in 1990.

Prior to the amendments, land granted to ALCs as a result of successful land claims was inalienable. The 1990 amendments made it possible for ALCs to dispose of their land, but in the view of many legal advisers, failed to give adequate consideration to the complexity of land dealings that might arise, the relationship of the land dealings provisions to other sections of the Act, and the relationship between the Act and other relevant legislation.

It is now apparent that these are serious flaws that lead to legal uncertainty for ALCs and third parties seeking to deal with them, and that leave ALCs vulnerable to making serious errors when attempting to dispose of their land. The Act is very unclear about what they are required to do to dispose of their land in an effective and legitimate way.

These issues are discussed in depth in chapter 3. In general,

- the current land dealing provisions offer little clarity as to what kind of land and what types of dealings are subject to the provisions;
- there is little guidance as to the content of decisions that need to be taken by LALCs in regard to land disposals in order for them to be (legally) effective, nor any clarity about what NSWALC must consider when giving its approval for a land dealing;
- the Act provides no guidance as to how land should be determined to be culturally significant and how that land should be preserved and managed;
- the Act does not require strategic planning about management or disposal of landholdings and how any proceeds may be used;

- the lack of clarity about the relationship between the Aboriginal Land Rights Act and other legislation, such as the *Real Property Act 1900* and the *Environmental Planning and Assessment Act NSW 1979*, has important implications for the legal certainty and commercial efficacy of land transactions.

These are serious deficiencies, especially given the present size of ALC landholdings and the complexity of the land management and development issues that arise. Most of the problems that have arisen occurred because of the lack of clarity in the Act and the inexperience and/or lack of commercial expertise in LALCs. This inexperience also leaves LALC office holders and members vulnerable to being drawn into schemes that have high risk and few real benefits.

A significant omission is the lack of provision in the Act regarding the protection of cultural heritage. Although it was envisaged in 1983 that legislative measures for cultural heritage protection would be introduced, this matter has never been dealt with effectively.

It is clear that substantial improvements are needed in the land dealing regime in order not only to minimise opportunities for corrupt conduct and costly mistakes, but to assist ALCs to make the most effective use of their land and resources.

Finally, it should be recognised that despite some of the mistakes that have occurred, the Act has proven resilient in that minimal land has been lost (even where major land dealings and large parcels of land were involved), although some funds (in some limited cases, large amounts of money) may have been lost or spent less effectively than they could have been.

1.8 Structure of this discussion paper

Chapter 2 reviews the purposes of a land dealings regime within the underlying purposes and aims of land rights, and establishes the key principles upon which an effective land dealings regime must be based.

Chapter 3 explains in detail the deficiencies of the Act as it is currently drafted and provides some explanatory examples.

In the course of this part of the Review, the Task Force has identified a number of key issues that need to be addressed and resolved through redrafting of the land dealing provisions. In chapter 4, each of the key issues is explored and discussed, followed by a relevant recommendation.

Chapter 5, outlines the land dealings regime proposed by the Task Force.

1.9 Cost implications

The mechanisms that the Task Force has identified as needed for a comprehensive regulatory regime include:

- a strategic land planning process at the local level;
- the development of published binding policies by NSWALC that will require careful preparation, and formal notification and consultation;
- more detailed assessment and approval processes, including the establishment of an expert advisory panel to review applications for land development and disposal and to advise NSWALC;
- processes to review decisions; and
- record keeping and maintenance of a detailed register of ALC land dealings.

Each element has cost implications. While some of this cost, for example the approval process, could be funded at least in part by a ‘user pays’ scheme, overall there will be significantly increased costs in the new regulatory regime. NSWALC will have a particular responsibility in developing policies and a structure for detailed assessment of proposals from ALCs in relation to land dealings.

It is very important that the cost implications are considered carefully before introducing further legislated responsibilities for ALCs. As the SGS Report observes, there is already a burdensome and complex administrative load on NSWALC that places strains on its limited staffing and operational resources.⁶ NSWALC’s budget is already fully accounted for by legislated and core functions.⁷

The Task Force has recommended that there be a financial impact assessment of the proposed land dealing scheme in the context of the broader review of the Aboriginal Land Rights Act. This cost assessment will precede the enactment of any amending legislation.

⁶ SGS Report, section 2.4

⁷ *ibid*, section 9.4, “Financial Sustainability of the ALC System”

2 KEY PRINCIPLES

In identifying the key principles of an effective and appropriate land dealings regime, it is important to bear in mind the original intentions of the Aboriginal Land Rights Act, and the role and functions it outlines for ALCs. The Act establishes a compensatory regime that enables Aboriginal people in New South Wales to acquire land to address their spiritual, social, cultural and economic needs, primarily through the work of the representative ALCs which the Act establishes. Self-determination of Aboriginal people and communities is an underlying theme of the New South Wales land rights regime.

2.1 The purpose of land rights

The preamble to the Aboriginal Land Rights Act acknowledges the spiritual, social, cultural and economic importance of land to Aboriginal people, and their need for land (see Appendix 1).

It also recognises that, as a result of past government decisions, the amount of land set aside for Aboriginal people has been progressively reduced without compensation.

The purposes of the Act, stated in Section 3, are:

- (a) to provide land rights for Aboriginal persons in New South Wales,
- (b) to provide for representative Aboriginal Land Councils in New South Wales,
- (c) to vest land in those councils,
- (d) to provide for the acquisition of land by or for those Councils and the allocation of funds to and by those Councils.

2.2 The objects and functions of Aboriginal Land Councils

The Aboriginal Land Rights Act established a three-tiered system of representative land councils at local, regional and state level: LALCs, RALCs, and NSWALC.

The objects⁸ 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, and, in the case of NSWALC, include:

to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal persons within New South Wales.

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

LALCs have a particular responsibility to implement the wishes of their members in these matters⁹ and have a degree of relative autonomy from the regional and state land councils, which reflects the underlying theme of self-determination.

In summary, ALCs:

1. are intended to be representative of their constituents;
2. may acquire land and have land vested in them;
3. are to use those lands and apply the funds that are allocated to them in the best interests of the people that they serve; and
4. in the case of NSWALC, at least, are to work towards the relief of poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal people.

⁸ Section 51 of the Aboriginal Land Rights Act (LALCs), Section 87 (RALCs) and Section 105 (NSWALC)

⁹ Section 52 (1) (g)

2.3 The purpose of the land dealings regime

The land dealing regime must support and facilitate the broad purposes of the Aboriginal Land Rights Act and must 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.

It must enable ALCs to use their land effectively to fulfil their objects and functions. It must also ensure that ALC land is not misused or dissipated.

2.4 The need for safeguards

The land dealing regime should provide safeguards to minimise risks that might result in ALC land being dissipated, or used or disposed of in a way, or for a purpose, that is not consistent with the purposes and principles of the Act.

2.5 Key principles of a land dealings regime

Bearing in mind the purposes of the Act and the safeguards that are needed to ensure its effectiveness, the land dealings regime should be constructed in a way that reflects the following inter-related principles.

1. land is at the heart of Aboriginal culture and is the central concern of the land rights regime;
2. land is important to the Aboriginal peoples of New South Wales for many reasons, including cultural, spiritual, social and economic reasons. ALCs need to be able to hold, use, manage, develop and dispose of their lands in ways that best address the needs and aspirations of their constituents;

3. appropriate recognition and protection must be given to traditional ownership¹⁰ rights and interests, and to the cultural and heritage values of ALC land;
4. the economic value of ALC land is important;
5. ALC land must not be inherently inalienable, but should allow for a mechanism that would enable an ALC to decide not to dispose of some or all of its land for a specified period of time (with the informed consent of a special majority of members). A blanket prohibition on disposal of land would severely limit the usefulness of ALC land as a means of addressing social and economic needs and would deny Aboriginal people in New South Wales the right and the ability to make their own decisions on matters that are important to them, and deny them rights that are available to all other landholders;
6. ALCs should be able to deal with their land so as to realise the most favourable economic return;
7. the land dealing provisions and approval regime must not diminish the market value of ALC land;
8. the ALC asset base must be preserved for future generations so that it is available to address their needs and aspirations as well. ALCs have an obligation to plan ahead;
9. ALC land must not be dissipated. High quality decision-making about land dealings should be fostered and assured;
10. ALCs, and any other persons seeking to deal with ALC land, must do so in an honest and transparent manner;

¹⁰ The concept of ‘traditional owner’ is a colloquial term that indicates an Aboriginal person who has some rights and interests in country, for example, according to traditional law and custom or historical association.

11. ALC land should be dealt with only in ways that are in accordance with the wishes of the members and are in the best interests of the members and other Aboriginal persons within the Council's area;
12. the land dealings provisions must provide certainty and security of title to all parties;
13. the system for land dealing authorisation should be efficient. ALC resources are intended to meet the needs of members and should not be wasted on unnecessary processes; it is important that ALCs have the resources required to fulfil their responsibilities (a review of the responsibilities of ALCs and the resources required [including those recommended in this paper in relation to land dealings] should be conducted as part of the Review as a whole);
14. the system for land dealing authorisation should enhance the working relationship between NSWALC and ALCs and ensure that sufficient resources are available to ALCs to fulfil their responsibilities;
15. the land dealings regime should be rational:
 - there must be a good reason for any requirements it imposes;
 - it must not produce irrational results; and
16. the land dealings provisions should give proper weight to principles of self-determination and self-government.

While at first glance these key principles appear straightforward, some will to some extent conflict with others. Careful balancing and some compromise is needed. In addition, complex legal issues can arise in attempting to give the key principles practical effect.

Finally, proposed legislative amendments to the land dealings regime will need to be reviewed against future recommendations that may be made in response to other elements of the Review, such as governance and structure.

3 PROBLEMS EVIDENT IN THE EXISTING PROVISIONS

In recent years, it has become clear that there are significant deficiencies in Division 4 of Part 2 of the Aboriginal Land Rights Act.

The central issue of concern is the lack of certainty provided by the current provisions (both legal certainty as to the validity of dealings in land under the Real Property Act, and commercial certainty). This arises because of the sweeping effect of s.40(2), which states:

Any sale, exchange, lease, disposal or mortgage of, or other dealing with, land in contravention of this Division is void.

As will be discussed in detail in this chapter, there is a great deal of uncertainty in the current provisions as to exactly what LALCs are required to do and what NSWALC is required to approve of to ensure that the requirements of the Division have been complied with. If any mistakes are made, the *whole* of a complex land dealing, such as a development and subdivision of land for residential housing, is arguably void. This could have the effect of invalidating a whole series of transactions involving many parties.

In addition, the existing provisions leave LALCs vulnerable to making costly and potentially irreversible mistakes about land disposals that are not in the best interests of the constituents they serve. This can result in land being effectively dissipated or misused (in terms of the broader aims of land rights). This may occur in situations where:

- an ALC does not understand the limits of its functions, and/or exceeds its functions under the Aboriginal Land Rights Act;
- legal advisers to ALCs and third parties fail to give due consideration to requirements of the Act;

- an ALC's members and officers are relatively inexperienced, and influence the ALC to make decisions or enter into arrangements that are not favourable to the ALC;
- outside parties (such as land developers) put pressure on an ALC or its members and officers to enter into arrangements that are not favourable to the ALC;
- an influential minority of members from one family or group effectively governs an ALC, and is concerned with its own interests rather than the interests of others;
- the proceeds of land dealing transactions are lost because of mismanagement;
- an ALC does not take a strategic approach to managing and using its landholdings;
- an ALC does not know or understand the needs and aspirations of its members or other Aboriginal people in the area; and/or
- a "cash-poor" ALC is under pressure to realise some of its assets in order to cope with the cost of land ownership (e.g. to pay rates), to sustain a social housing scheme that is running at a loss, or otherwise to provide basic services to members.

Over the past 18 months, several disputes, and related inquiries and litigation, have highlighted the shortcomings of the existing provisions. The kinds of problems that have arisen include:

- confusion and frustration within the ALC system about the rights and obligations of ALCs at different tiers;
- some LALCs facing huge potential liabilities in damages due to uncertainty as to whether their land dealings were valid;

- resources being expended on costly crisis resolution and litigation;
- poor decision-making by some LALCs about the use and disposal of their lands;
- some instances of possible corruption of LALC members, generally arising from pressure from third parties seeking to gain access to valuable ALC land for development (and in a context where the Aboriginal Land Rights Act is silent on how LALC members can benefit);
- intense pressure on NSWALC Councillors to approve land dealings which have already been agreed between LALCs and third parties;
- LALCs falling prey to disreputable and predatory third party developers;
- ultimately, the devaluation of ALC land.

To a large degree, these problems have arisen because of the inadequacy and lack of clarity of the existing provisions. These issues are discussed in detail in the following sections of this chapter.

3.1 The scope of the regulatory regime

3.1.1 What land is regulated by Division 4: Disposal and use of Aboriginal land?

There is a lack of clarity in the Act as to which land is subject to regulation.

Section 40 imposes a general prohibition on land dealings except in accordance with Division 4, and renders void all dealings that contravene it. However s.40(3) states that Division 4 “does not apply to land acquired as an investment under s.149 or s.152”.

Under s.149, NSWALC may invest its funds in land, provided that the investment satisfies the so-called “prudent person test”.¹¹

Under s.152(4), a LALC may invest funds in any manner authorised by the regulations, however Clause 94 of the ALR Regulation 2002 does not include land in the kind of investments that may be made by LALCs, so LALCs may be effectively prohibited from investing funds in land.

At the same time, s.38, in Division 3 (Acquisition of other lands) specifically provides for the purchase of land by both NSWALC and by LALCs.

The intended relationship between s.38 and ss. 149 and 152 is not clear. Section 38 is not referred to in s.40 so it is not clear whether lands acquired under that section are regulated by Division 4.

As matters stand, this means it is difficult to understand:

- the extent to which Division 4 is intended to apply to lands which were acquired other than by a land claim made under s.36 (the land claim provisions);
- what land, if any, is excluded from the operation of the provisions of Division 4;
- if an ALC wishes to deal with land purchased under s.38 (Acquisition of other lands), whether the requirements of Division 4 must be observed for the dealing to be valid and effective;
- what policy reason there might be for including some purchased land within the scope of the provisions, but excluding land that could be characterised as having been acquired as an investment;

¹¹ See clause 93(1) of the ALR Regulation 2002, and ss.14 and 14A of the *Trustee Act 1925*.

- how it can be determined what land has been purchased “as an investment”. All land purchased by an ALC will in some sense be an investment, even if financial return was not the primary reason for the purchase.

Relevant recommendation: 1

3.1.2 Dealings to be regulated

The language of the Act is inconsistent and unclear about which dealings are regulated. For example, the use of the words “deal” and “dealing” in s.40 suggests that these are actions that have the effect of passing a legal interest in land. Section 40B(2), however (which deals with lease and use of LALC land), also refers to “change the use of land”. This term is very ambiguous – does “change the use of land” mean a change in the actual physical use of the land (say a change from cropping to grazing), or a change in the title or planning status of the land (such as when land is subdivided or a development consent is given)?

It is also unclear whether all changes in use will amount to a “dealing” in land for the purposes of s.40(2), which states “Any sale, exchange, lease, disposal or mortgage of, or other dealing with, land in contravention of this Division is void”.

In addition, the words “dispose” and “disposal” are used inconsistently in several sections within Division 4, so it is not clear what dealings or actions might amount to a “disposal” that would be subject to the provisions of Division 4. Most recently, the *Aboriginal Land Rights Amendment (Gandangara Estate) Act 2004*¹² offers another definition:

¹² http://www.austlii.edu.au/au/legis/nsw/consol_act/alraea200403/

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.

Any confusion about these matters can have important consequences because certain types of dealings may require particular approvals from NSWALC, and if these are not obtained or are not obtained correctly, then the dealing could be void.

Relevant recommendation: 2

3.2 Decision-making in relation to land

3.2.1 What must LALC members approve, and what must NSWALC approve under s.40D(1)(a) and (b)?

Section 40D(1) provides that a LALC may “sell, exchange, mortgage or otherwise dispose of land” if, among other things:

- at a meeting of the Council specifically called for the purpose, at least 80% of the members present and voting have determined that the land is not of cultural significance and should be disposed of;
- NSWALC has approved of the proposed disposal; and
- in the case of land acquired by claim under s.36, the Crown Lands Minister and the Minister have been notified.

Opinions differ widely as to what the members must “determine”, and what NSWALC must have “approved of”. These are very important matters, both of policy and legal certainty. For example:

- does NSWALC need detailed knowledge of the proposal before giving its approval?

- is it sufficient for members simply to determine to dispose of the land, without any further specification, or do members need to resolve to dispose of the land in a particular manner, to a particular person, or on particular terms (which need to be specified in the resolution)?
- is a resolution that the land be disposed of in one way enough to authorise another form of disposal?
- does NSWALC approval authorise any kind of disposal on any terms, or does it depend on the specific words used by NSWALC in giving approval?
- does NSWALC approval apply to the *detail* – for example, is it conditional according to whether the terms which were approved actually take place?

In a number of recent matters, the question whether or not a land sale contravened this section (and therefore, whether it was effective or void) turned on how these questions were answered. It is highly desirable that these issues be resolved in the legislation.

Relevant recommendations: 3, 4 and 5

3.2.2 What kind of LALC meeting makes decisions about land dealings?

Sections 40B, 40C and 40D of the Aboriginal Land Rights Act refer to meetings being “specifically called for the purpose” of considering a sale, exchange, mortgage or other disposal of ALC land. In relation to ss. 40B and 40D there is some uncertainty about whether such a meeting should be characterised as an ordinary meeting or an extraordinary meeting of an ALC.

The Act identifies three kinds of meeting that may be convened by LALCs:

- ordinary meeting, called by the secretary either to satisfy a resolution of a prior meeting or called in the “ordinary course of business”;
- annual meeting, called by the secretary to fulfil the requirements of the Act with respect to annual reporting and elections of officers and regional representatives; and
- extraordinary meeting, which may be called by the secretary, on receipt of a request by a quorum of LALC members, or by any two officers of the LALC (chairperson, secretary or treasurer) for any relevant reason.

While a preferred view may be that a meeting specifically called for the purpose of considering a land dealing should be regarded as an extraordinary one to ensure a focussed meeting, it is currently not certain that this is correct. It is important to clarify this issue to ensure that ALC land dealing decisions are valid and legitimate, and are arrived at as a result of the best possible meeting procedure and participation by ALC members.

Relevant recommendations: 3, 4 and 5

3.2.3 Ensuring that a significant number of members have given informed consent to a proposed land dealing

Whilst s.40D requires that “not less than 80% of the members present and voting” should determine whether to dispose of land, this provision does not ensure that a significant number of the ALC’s members have given their informed consent to sell land.

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 the case of smaller LALCs (i.e. less than 27 members) where the quorum is one third of the total number of voting members plus one, it is quite possible that even fewer than eight people could make a major land disposal decision.

In a recent matter, just 10 members of a LALC with a membership of more than 600 made a decision to dispose of land worth some tens of millions of dollars. While this is quite lawful at present, as a matter of policy it is clearly not appropriate that decisions of such magnitude be made with such limited participation of members (and thus lack of informed consent by the membership as a whole). The current situation also carries high risk¹³ and should not be permitted to continue.

The Independent Commission Against Corruption (ICAC) and others have expressed concern about this from the point of view of preventing corruption:

- decisions to develop or sell land may be made by a small group of dominant members looking after their own interests, rather than the interests of the members as a whole;
- dominant individuals may be susceptible to pressure and inducement.

For example, unscrupulous developers could attempt to exercise undue influence, or offer inducements or benefits to members or employees of ALCs.

Relevant recommendations: 3 and 4

3.2.4 “Cultural significance” restriction arbitrary and ineffective

A LALC cannot dispose of land unless at least 80% of the members present and voting at a meeting specifically called for the purpose have

¹³ Section 3.3.1 below provides an example.

determined that “the land is not of cultural significance to Aborigines of the area” (s.40D(1)(a)).

“Cultural significance” is broadly defined for the purposes of this section (s.40D(3)). Land is of cultural significance in terms of the traditions, observances, customs, beliefs or history of Aborigines.

At some level, all land in New South Wales fits this definition. The cultural significance of land should not be approached as a ‘positive fact’ that either exists, or does not.

The cultural significance provisions may be perceived by Aboriginal people as arbitrary and discriminatory. A land council may, for example, wish to dispose of land that has historical importance (e.g. the site of a former mission) in order to purchase land that is perceived to be of greater cultural or traditional significance (for example, a sacred site), or in order to realise, with the informed consent of members, certain ‘non-land “social benefit” goals’.

The number of members required for a quorum also has a bearing on this issue. There is currently no specific provision in the Act to provide guidance as to how ‘cultural significance’ should be determined, nor any requirement that an ALC conduct inquiries as to the cultural significance of land to Aboriginal people in its area. Since a decision to dispose of land can be made by a relatively small number of people, it is quite possible that land that is regarded as culturally significant could be disposed of because the decision-makers were unaware of its importance, and/or because people for whom the land is culturally important did not participate in the decision.

From a legal perspective, if the purpose of the restriction on disposal of land that is ‘culturally significant’ is to preserve such land from disposal, then as presently drafted, it is unlikely to be effective. At present a LALC

can simply determine that the land is not culturally significant in order to lawfully sell it.

Relevant recommendation: 6

3.2.5 Lack of clarity about NSWALC's discretion to approve a proposed disposal of land

The Act is not clear as to the nature and extent of NSWALC's discretion to approve a disposal of land in s.40D(1)(b).

Opinions on this issue have varied greatly. On one view, NSWALC's discretion may be limited to ensuring that land that is culturally significant is not sold and that the formal requirements of s.40D have been met – i.e. that the members of the LALC have convened a properly constituted meeting, and that 80% of the members present and voting have determined that the land is not of cultural significance.

Other legal opinions have suggested that the discretion is only limited by the scope and purpose of the Aboriginal Land Rights Act, and that while NSWALC is only obliged to consider whether the requirements of s.40D have been met, it may also take into account any matter that is relevant to the objects and purpose of the Act.

LALCs that believe that NSWALC's discretion is a limited one may therefore regard NSWALC approval as merely a formality. NSWALC has often been approached for approval after a deal has already been struck with a third party. In a number of recent matters, LALCs have pressured NSWALC to give approval at a late stage, arguing that the discretion is limited and that NSWALC is obliged to give approval.

There have also been differing opinions as to the extent to which ALCs should be given free rein` to determine their own affairs. Lack of clarity on this issue may have affected NSWALC decision-making in the past. NSWALC currently has in place strong, consistent policies in relation to

giving approval and implements them, however the law remains uncertain and this will continue to affect the quality of decision-making.

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

3.2.6 Provisions of the Aboriginal Land Rights Act not amenable to property development projects

In order to maximise the return on the disposal of its lands, an ALC may choose to develop the land, either by itself or in joint venture with other parties, rather than disposing of it in a simple one-off transaction.

However, there are fundamental problems with the land dealings regime in its application to complex property development projects, a major one being that NSWALC cannot approve a “LALC development project” (i.e. a development or disposal that may involve multiple transactions), 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 requires a *separate authorising resolution* and a *separate approval* (for example, for the subdivision of land, granting or release of easements, and possibly development consent¹⁴). In practice, however, 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, which may therefore be void.

¹⁴ It is uncertain whether development consent requires a separate authorisation or approval.

In a recent matter, a LALC sought and obtained NSWALC approval to sell some of its land¹⁵ and then disposed of the land through a series of sophisticated transactions involving a put and call option agreement. Under the agreement with the developer, a series of steps including development consent and registration of a subdivision plan were to take place before the actual sale of the land. After putting considerable time and money into the project, both the LALC and the developer were frustrated to learn that the intermediate steps could be void because they had not been authorised by the membership and approved by NSWALC under s.40B.

This further highlights the lack of certainty provided by the current regime and heightens the risk of disputation, including costly legal action and breakdown in cooperation between the parties, as well as lost opportunities for the ALC.

Further, any part of a project which requires approval under s.40B (under which a LALC may be authorised to lease its lands, change the use, or grant or release an easement over its lands) will lack certainty because there is no certification provision for these types of activities such as is required for sale under s.40D(2).¹⁶

To proceed with confidence, ALCs and third parties should seek NSWALC approval at an early stage, before time and money are invested in the project. If approval cannot be given at an early stage, the risks for the developer will be raised and this is likely to be reflected in the commercial terms that will be offered to the ALC. High risk may mean that ALCs will be unable to attract the most reputable developers, offering the most favourable terms.

¹⁵ Doubts later emerged as to the validity of the LALC's authorising resolution, and of NSWALC's approval.

¹⁶ See section 3.3 and 3.3.3 below where certification and certainty issues are discussed in detail.

If NSWALC is to diligently exercise its discretion to give approval (assuming it is not narrowly confined, as discussed in section 3.2.5 above), it may require more information than is available at an early stage.

There may also be no way of ensuring that a project will actually proceed on the basis upon which approval has been given. Although NSWALC could attempt to deal with this by making approvals subject to conditions, a number of problems might arise:

- NSWALC may lack sufficient information to impose sensible and effective conditions;
- the imposition of conditions will tend to erode certainty as to whether the dealing is actually approved (and therefore whether it is in accordance with Division 4 – if it is not, it is void). Whether conditions have been complied with may not be tested until a party seeks to register a transfer or other dealing, at which time a dispute may emerge;
- if the conditions were not accurately described in the s.40D(2) certificate¹⁷ which is issued as “conclusive evidence” that the disposal does not contravene s.40D, compliance with the conditions may become irrelevant.

In any case, it is likely that NSWALC lacks the power to grant conditional approvals under s.40D.

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

3.2.7 Lack of policy and strategic planning framework

The Aboriginal Land Rights Act does not establish or provide for a policy framework to guide ALCs in making decisions in relation to land.

¹⁷ See section 3.3.3 below.

It is a matter of great concern that decisions about land dealings may therefore be made in a policy and planning vacuum. ALCs may be making decisions to dispose of their lands without any guiding strategy or plan about the use and management of their lands, or how the proceeds should be used. In this situation, there is a real chance that valuable land will be dissipated without providing sustainable long-term benefits to the Aboriginal people in the ALC area.

Historically, NSWALC may have approved such disposals, either because a ‘hands off’ policy about the local affairs of LALCs was thought appropriate or legally correct, or because of lack of clarity about the scope of its discretion in making approval decisions (see section 3.2.5 above). Without more detailed legislative guidance and support, NSWALC is susceptible to claims that its approval is the only thing preventing a project proceeding, and to pressure from ALCs to approve deals that have already been done.

Relevant recommendations: 3 and 4

3.3 Certainty issues

The current provisions of the Act do not provide sufficient certainty, either in terms of legal certainty in relation to the validity of dealings in land under the Real Property Act and planning under the Environmental Planning and Assessment Act, nor, by implication, commercial certainty. For commercial certainty, ALCs and third parties need to know that the proposed land dealings are valid, so that finance can be raised and it is clear what risks are involved when decisions about developments are made.

Relevant recommendations: 1, 2, 9, 10, 11, 14, 15, and 16

3.3.1 ‘All or nothing’ consequences of s.40(2)

The effect of s.40(2) is that any purported dealing in land undertaken in a way that does not conform with the requirements of Division 4 is void, that is, it is of no effect at law.

In other words, if one step is not properly done, the whole process is void. Even a slight departure from the requirements may result in a land dealing being void and have far-reaching consequences.

Where a land transaction is simple and straightforward (such as a decision to sell land at auction), few problems are likely to arise. However more complex dealings, such as joint venture agreements for the development of land for residential housing, may run into problems because of confusion as to what is required under the legislation.

Further, the preferred legal view is that an error cannot be retrospectively corrected. The only way to correct a mistake (for example an approval not being obtained as required under the provisions) is to re-do all steps in the process from the point at which the error occurred, making dealing with ALCs a risky business for third parties.

In a recent case involving a multi-million dollar development (a project that was otherwise properly managed and conducted), a LALC made a simple error in the description of the land in its resolution to authorise the sale. Although aware of the mistake, it was not thought to be important. It was not until after the developer had invested considerable time and money in the project that it was realised that the resolution may have been invalid, and that, as a result, the option granted to the developer for the purchase of the land might be void.

Although a further meeting of LALC members could have been held, there was a risk that members might not authorise the sale a second time,¹⁸ leaving the LALC potentially liable for damages estimated by the developer at \$150 million in lost profit, which it would be unable to pay.

¹⁸ There are a number of reasons why this might occur – including the fact that the disposal was originally authorised by a small number of members, and if a further meeting were called, a different group of members might consider the matter and decide differently (see also section 3.2.3).

There are few areas of law where such liabilities can be created by a simple mistake.

In the recent Gandangara Estate matter, uncertainty as to whether the LALC had complied with the requirements of s.40B and s.40D came to light at a late stage, when the LALC had entered into 20 contracts for sale and three had already been (probably invalidly) registered with the Land Titles Office. In this case, two building companies and some 30 different parties were involved. The only practical way in which the purchasers could get good title to their blocks, and the LALC could avoid potential liability in damages, was by the passage of special validating legislation.

If dealing with ALCs is perceived to be a high risk venture, the value of ALC land and therefore the economic value of land rights itself will be greatly diminished.

Relevant recommendation: 15

3.3.2 Unclear relationship between s.40(2) and the *Real Property Act 1900*

The Gandangara Estate matter raised the question of the validity of the three transfers that were registered in favour of the purchasers. The remaining purchasers wanted their transfers also registered, apparently believing that this would give them secure title; NSWALC was concerned, however, that registration might create an impression of validity on the basis of which the buyers might try to deal with the land further, when the likely position was that the sales were void.

While s.42 of the Real Property Act confers indefeasibility¹⁹ on dealings that are registered, what is the position if the land dealing was void because of the operation of s.40(2) of the Aboriginal Land Rights Act?

¹⁹ Indefeasibility: that cannot be annulled or made void

Although it has not been tested, there is a possibility that the Aboriginal Land Rights Act, being later and more specific legislation, would prevail over the Real Property Act. In that case, even where a transfer has been registered in favour of a third party, if the land disposal contravened s.40(2) no legal or equitable interest in the land would have passed from the land council.

Careful thought is needed to clarify the relationship between the protective provisions of Division 4 and the Real Property Act to ensure that the purposes and integrity of both regimes are preserved.

Relevant Recommendation: 15

3.3.3 Section 40D(2) certificates

Section 40D(2) provides for a certificate issued by the LALC concerned that provides a degree of certainty for third parties that the requirements of the Division have been complied with. In the case of NSWALC, a similar certificate is provided for in s.40C(2) and regulates NSWALC land dealings in the same way.

Section 40D(1) provides that a LALC may “sell, exchange, mortgage or otherwise dispose of land” if, “at a meeting of the Council specifically called for the purpose, at least 80% of the members present and voting have determined that the land is not of cultural significance and should be disposed of”, and NSWALC “has approved of the proposed disposal”.²⁰

Section 40D(2) provides for a certificate, signed by the secretary of the LALC, to certify that the disposal of the land does not contravene this section (i.e. the points above). The certificate is “conclusive evidence” that

²⁰ In addition, in the case of land acquired by claim under s.36, the Crown Lands Minister and the Minister must have been notified.

the section was not contravened, except for a person who had notice when the certificate was issued that the disposal did contravene the section.

What is the effect of a s.40D(2) certificate? (Unclear relationship between s.40(2) and s.40D(2) or s.40C(2))

By the operation of s.40(2), a disposal of land might be void because it actually was in contravention of s.40D(1), yet the purchaser might have a s.40D(2) certificate purporting to give “conclusive evidence” that s.40D(1) was not contravened.

What is the effect then of the s.40D(2) certificate?

On one view, if a dealing is void because it actually contravenes the requirements of Division 4, then a certificate issued by the LALC that denies there has been a contravention is of little use.

The opposing view is that the existence of a s.40D(2) certificate creates an exception to the operation of s.40(2), and so where a s.40D(2) certificate exists, for practical purposes the dealing would be valid, regardless of whether the provisions had actually been contravened.

Further, a certificate may not provide certainty as the certificate itself may be invalid for a variety of reasons (such as unclear language), or for example, where a certificate purports to provide evidence for a disposal of particular parcels of land that, under the LALC’s agreement with its purchaser, will no longer exist at the time of transfer of title because of intervening activity such as a subdivision (see section 5.2.3), or because the actual dealing is not the dealing to which the certificate refers.

Section 40D(2) or s.40C(2) certificates may provide protection to the wrong people

The certification provisions protect the interests of any person except “a person who had notice, when the certificate was issued” that the disposal contravened the section.

While intended to protect the innocent purchaser, it may actually operate to protect purchasers who had in fact had notice that the relevant section of the Act had been contravened.

For example, a certificate issued by a LALC at an earlier point in time in circumstances where it should not have been issued (for example through fraud, negligence or a simple mistake), may be relied on at a later time by persons who have actual notice that the disposal contravenes s.40D(1).

Is it desirable that LALCs issue s.40D(2) certificates?

The current requirement is that the secretary of the LALC itself certifies that the LALC’s disposal of land is in compliance with s.40D. This is contrary to the principles of transparency and provides opportunities for corruption.

The risks of fraud, negligence or error are heightened by the fact that responsibility for issuing the certificate rests solely with one person, the secretary of the LALC.

It would be preferable for compliance to be certified by a person or body external to the ALC that has objectively assessed compliance with s.40D.

The current situation has been assisted by the introduction of cl.6 of the ALR Regulation, which describes the “prescribed form” of the certificate

and requires that it be signed and sealed by NSWALC.²¹ However, this may not be a valid exercise of the Regulation-making power. It is arguable that, given that the legislation provides for the secretary of the LALC to sign the certificate, the introduction of NSWALC supervision in cl.6 may be *ultra vires*.

It would be preferable that the issue be resolved within the Act rather than in the Regulation.

When is a s.40D(2) certificate “issued”?

It is not clear when a s.40D(2) certificate can be said to be issued. It may be when the certificate is:

- signed by the secretary of the LALC;
- signed and sealed on behalf of NSWALC under cl.6 of the ALR Regulation
- first delivered to the person to whom it is addressed or for whose benefit it is issued.

As the certificate is a critical factor in whether or not a property transaction is effective or void, it is undesirable that this should be vague or uncertain.

No s.40(D)2 certificate required for leases

A striking limitation of the s.40D(2) certificate is that it certifies compliance with s.40D only (sales and disposals) and there is no comparable provision for compliance with s.40B(2), under which LALCs may be authorised to lease their lands. It is a glaring omission that the Act

²¹ This was introduced on 25 October 2002, with the commencement of the Aboriginal Land Rights Regulation 2002.

does not provide certification, for example, for a 99 year lease (which may be the basis of a development).

Entering a long-term lease from an ALC may therefore be a very risky proposition, depending on the circumstances.

This type of uncertainty is highly undesirable in a legislative regime regulating property dealing and is an anomaly that needs to be resolved.

Relevant recommendation: 15

3.4 Limited avenues for members to benefit from ALC land ownership

LALCs are encouraged to increase their land base, to use the land well, and to amass wealth, but the scope for members to actually derive any benefit from the land and wealth is extremely restricted.

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...*

Although this provision is not part of the land dealing regime of the Aboriginal Land Rights Act, it has significant consequences for it.

If the membership perceives that there is no legitimate means of deriving a benefit from the wealth of their ALC, the incentive for responsible participation is diminished, and the incentive for corruption is increased. Unfavourable joint ventures and land developments are likely to proliferate, with the result that:

- the land base will dwindle;

- financial rewards from land rights will not be applied in the most effective way, or will be siphoned from the system by a handful of dominant individuals; and
- the reputation and economic value of ALC land will be eroded.

The intent of s.52(1)(n) is clear and understandable, but it is essential that ways in which members can legitimately benefit from ALC land ownership be identified, and to the extent necessary, expressly acknowledged as exceptions to the general rule.

Relevant recommendation: 17

4 ISSUES AND RECOMMENDATIONS

In approaching the task of reviewing the land dealings regime of the Aboriginal Land Rights Act, the Task Force identified key principles which are outlined in chapter 2 above. As has been noted, very complex legal issues arise in attempting to give these key principles practical effect.

Having considered the shortcomings of the present regime, the Task Force then focussed on what the essential subject matter of an effective land dealing regime should be and identified a number of issues which need to be addressed.

It is important to note that there is some overlap in the matters that must be addressed, and it is therefore essential that the recommendations of the Task Force be considered *as a comprehensive whole*.

The Task Force is concerned that previous amendments have been approached in a ‘patchwork’ fashion, and that many of the problems that currently exist, in relation to the land dealings provisions in particular, arise because the implications and possible consequences of well-intended amendments were not adequately considered at the time they were legislated.

The Task Force has therefore adopted an holistic approach which seeks not only to address the problems that have arisen, but to provide a basis for a workable, effective regime that provides transparency and certainty for all parties.

Broadly, the recommendations provide for a new and more comprehensive land dealing regime which builds a structure for land dealings to be conducted in an orderly, planned fashion.

Briefly, it would be a regime in which:

- all ALC land would be covered by the provisions;

- there would be clarity as to what constitutes a land dealing, how decisions may be made about disposing of the land, and the basis upon which NSWALC approval would be given;
- ALCs would be required to prepare strategic land management and business plans that include classification of land into categories and that consider any proposed land dealings and the possible uses of the proceeds;
- ALCs would be required to give careful consideration as to the cultural values of any land which is being considered for disposal;
- proposed land dealings would be referred to an independent high level advisory panel to advise NSWALC;
- NSWALC would be required to produce binding policies with respect to land dealings to guide its decision-making with regard to approving land disposals;
- NSWALC would be empowered to impose conditions on an approval it may grant to an ALC to dispose of its land;
- NSWALC's disposal of its own land would be subject to consideration of a range of pre-determined issues; and
- the Act would provide for approved schemes that would enable Aboriginal people to legitimately derive benefits from the land rights scheme.

The regime will regulate all ALC land, and specific recommendations have been made as to regulation of ALC-held land other than land currently held by NSWALC. The Task Force is continuing its consideration of options for the regulation of land held by NSWALC (a brief discussion is included in this paper) but has not yet made firm recommendations on this issue.

The elements of the proposed land dealings regime are discussed under the following headings.

1. Scope of the regulatory regime
 - the land to be regulated
 - the dealings to be regulated
2. NSWALC land dealings
3. ALC decision-making in relation to land
 - Ensuring that members understand and participate in land disposal decisions and give their informed consent
 - ALC strategic planning
 - content of ALC resolutions to dispose of land
 - native title, traditional ownership and culturally significant land
 - approval criteria
 - approval process
 - conditional approval and enforcement
 - review of approval decisions
 - information recording and keeping
4. Certainty mechanisms
5. Benefits of ALC land ownership
 - controls on proceeds
 - benefits to members
 - “land-poor” ALCs
6. Funding the system
 - costs of the processes
7. Probity and integrity
 - corruption prevention

4.1 Scope of the regulatory regime

4.1.1 Land to be regulated

Issue: What property is to be subject to regulation by the provisions?

As discussed in section 3.1.1 above, there is a lack of clarity in the Act as to which land is subject to regulation under Division 4. Section 40(3) states that the provisions of Division 4 do not apply “to land purchased as an investment under section 149 or 152”. It is not clear whether the provisions do apply to land purchased under s.38. A further difficulty is that it is impossible to know what land has been purchased “as an investment”. All land purchased by an ALC will in some sense be an investment, even if financial return was not the primary reason for the purchase.

Considerations:

Land is at the heart of the Aboriginal Land Rights Act and is a valuable asset held for the purposes of land rights, regardless of whether it was transferred under the land claim provisions or was purchased. *Prima facie*, all land held by ALCs should be subject to regulation, regardless of how it came to be held.

All ALC property, including especially real property, should be dealt with in a manner that is transparent, equitable and sustainable. It is appropriate that the land dealing provisions involve a greater degree of scrutiny than other controls that may be placed on an ALC’s operations.

There is a need for certainty as to what property is covered by the provisions. Regulating all land held by an ALC in its own name is clear and avoids unnecessary uncertainty.

There is a need to consider land that might be transferred from an ALC to another entity, for example, as part of a transaction or series of transactions for which NSWALC has given its conditional approval (such as in a large joint venture development). Such dealings would need to be regulated to ensure that the conditions were enforced. This could be achieved by a deed entered into by the parties, in which the third party would agree to a notation on the title to the land to the effect that it cannot be dealt with except in accordance with Division 4 of the Aboriginal Land Rights Act. This could have implications for the Real Property Act.

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” retain its current wide definition 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.

4.1.2 Dealings to be regulated

Issue: What types of dealings or actions will be regulated by the provisions?

At present, the land dealing provisions regulate the “sale, exchange, lease, disposal or mortgage of, or other dealing with” land (s.40). As discussed above in section 3.1.2, there is also reference in s.40B to dealings which “change the use of land”. The language in the Act is inconsistent and unclear.

Any confusion about these matters can have important consequences because certain types of dealings may require particular approvals from NSWALC, and if these are not obtained or are not obtained correctly, then the dealing could be void.

In a recent matter, for example, opinions differed significantly on whether NSWALC's approval was required for such things as:

- registering a s.88B Instrument under the *Conveyancing Act 1919*, creating an easement; and
- obtaining development consent to turn bushland into a residential subdivision.

Considerations:

Generally, all “dealings” that pass an interest in the land should be regulated.

There is also a need for regulation in circumstances where:

- changes in use of land may impact significantly on the value of land, for example, many actions which may require development consent under the Environmental Planning and Assessment Act;
- development of land, for example for residential housing, may require a number of complex, related transactions (including development applications for a change in use) that occur before an actual disposal of the land;
- agreements that some land councils have entered into, or may wish to enter into, could result in significant liability for the ALCs concerned in the event that NSWALC approval is refused. Such agreements would fall short of ‘passing an interest’ in land, but it is important that they be regulated;
- an ALC may seek to enter into a joint venture with a third party, that could also include the creation of a related entity for the purpose of a land development project. It may be necessary to regulate such situations to ensure that ALCs, their joint venture partners and any

related entities are bound as much as possible by the Aboriginal Land Rights Act land dealings regime.

The leasing of land by a LALC is presently regulated in different ways depending on whether the term of the lease is for a period of three years or more. LALCs regularly issue large numbers of residential leases and no problems have arisen with the existing provisions for control of short-term leases.

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.

4.2 NSWALC land dealings

Issue: What modifications should be made to the land dealings provisions in relation to NSWALC land dealings?

Under the current provisions of the Act (s.40C) NSWALC may “sell, exchange, mortgage or otherwise dispose of land vested in it” if a meeting

of the LALC where the land is situated has determined that the land is not of cultural significance to Aborigines of the area and should be disposed of. At present, NSWALC land dealings are not subject to any other approval mechanism.

Section 40C(2) provides for a certificate (similar to the 40D(2) certificate in the case of LALCs), signed by the Chairperson of NSWALC and certifying that the disposal does not contravene s.40C of the Act.

Options for consideration

In relation to land disposals by NSWALC, possible options for consideration include:

- that NSWALC makes such decisions but is required to consider a range of specified issues, including the cultural significance of the land to local Aboriginal people;
- that NSWALC should be subject to an assessment process similar to that proposed for other landholding ALCs (see section 4.3 below), but subject to some qualifications (e.g. where land is purchased by NSWALC for investment purposes).

It is NSWALC's current view that it has an exclusive statutory responsibility for the prudent investment of its assets and that it has qualitatively different landholdings to most ALCs. It should therefore be subject to a different type of regulatory regime in regard to the disposal of its real property assets.

It is argued that the "prudent person test" should apply to land disposals by NSWALC and that where sale of non-performing assets would meet that test, it is inappropriate that other ALCs should have the power to prevent this. An appropriate formula could be devised – for example a prescribed proportion of the proceeds – as payment to ALCs in whose area the

property or properties lie. If this option were adopted, such a payment should be subject to NSWALC discretion and be based on the compliance record of the ALC concerned; subject to the ALC's agreement, the funds could be invested in a strategic and approved way.

In this option, NSWALC land disposals would be required to be referred to the proposed expert advisory panel (see *Recommendation 11*).

The Task Force is continuing its consideration of how NSWALC land should be regulated.

4.3 ALC decision-making in relation to land

4.3.1 Ensuring that members understand and participate in land disposal decisions and give their informed consent

Issue: What type of authorisation should be required for a decision by an ALC to deal with its land?

As discussed above in section 3.2.3, the present requirement that 80% of the members present and voting must approve a disposal at a meeting specifically called for the purpose does little to ensure that a significant number of the ALC's membership have considered the proposal and approved of it. An ALC may have a large membership, but only a few members who attend meetings.

Under the present provisions, as few as eight members are needed to authorise anything from disposal of a single residential housing lot to a major, multi-million dollar land dealing.

Considerations

It is important to consider transparency issues and corruption prevention. The present structure may encourage situations where a small number of

members and/or elected office-bearers effectively control the affairs of an ALC without a level of transparency appropriate to the magnitude of the matters that are being decided. This suggests the need for a higher level of participation of the membership of ALCs in important decisions.

However, simply changing the percentage of the members who would be required to attend meetings and vote on relevant resolutions is unlikely to provide a solution that would meet the needs of all ALCs. For example, a requirement that say 50% of an ALC's membership must support a resolution to dispose of land may be simply impractical for the larger ALCs with hundreds of members, and the effect might be to render their land inalienable in practice.

Staged developments may require multiple approvals and it may be necessary for the membership to consider a proposal more than once. This could significantly increase the costs of making a decision to deal with land for all but the smaller ALCs. In addition, achieving the necessary member participation and approvals may be too unpredictable, and have the effect of drastically reducing the range of transactions an ALC could enter into.

Concerns about the small number of members approving land dealings are closely linked with the broader issues of ALC structure and governance and may reflect problems with the structure of ALCs and the mechanics of ALC decision-making. These issues are being considered in depth in other parts of the Task Force Review. Some issues that may be considered may include:

- whether attendance requirements are needed;
- whether all decisions must be made by all members, or whether some decisions could be made by an elected executive; and

- whether ALCs should be restructured more in line with mainstream corporations and associations which are directed and controlled by elected boards and committees.

An important consideration, discussed above in section 3.2.7, is the lack of a requirement either for a policy framework or strategic planning mechanisms in the Act to guide local and state level land council decision-making.²² ALCs may currently make major decisions about the disposal of their lands without any long-term plan or strategy about the use and management of their land, or how the proceeds should be used.

If detailed planning with a statutory basis was to be given a central role in the regulation of ALCs' affairs, and plans about the use and disposal of ALC lands were arrived at through a transparent, participatory process, then concerns about a low level of participation in the actual authorisation of a disposal agreed in the plan may not arise, or would at least be minimised.

In the event that an ALC wished to sell land but had not prepared a plan, there should not be a prohibition on the ALC making an application to NSWALC. In that case, discretion would rest with NSWALC to approve the disposal of the land. The provisions would need to provide a formula for the basis on which the ALC would make a decision to sell the land in the absence of a plan.

²² There are several precedents for a statutory requirement for such strategic planning. Under the *Aboriginal and Torres Strait Islander Commission Act 1989*, a primary function of ATSIC Regional Councils is to prepare regional plans. The Indigenous Land Corporation, established under the *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*, is required to produce national and regional Indigenous land strategies and has developed a policy framework to guide its land acquisition program in the context of sub-regional and local land needs plans.

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.

4.3.2 ALC strategic planning

The Task Force envisages that these ‘periodic plans’ would provide the basis on which ALCs will make sound decisions about the land they own, including its management, use and disposal. It is particularly important that ALCs direct attention to identifying different categories of their land (e.g. land that will be used, for example, for commercial purposes or social housing; or that should be protected, managed and preserved for its cultural value). This process of land categorisation would underpin the planning process. It is envisaged that the process would be similar to land assessment under the *Crown Lands Act 1989*.

Consideration could be given to the publication of “model plans” analogous to the model rules and model codes of conduct for ALCs that are provided for in the Regulation.

Recommendation 4

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

That the Regulation 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, and lands potentially available for commercial development and/or disposal.

4.3.3 Content of a LALC resolution to dispose of land

Issue: What should be the content of an ALC's resolution to ensure it is valid and effective?

At present there is uncertainty about what is required for a valid resolution (see discussion in section 3.2.1). Section 40D(1) simply states that a LALC may dispose of land if the required 80% of members present and voting “have determined that the land is not of cultural significance to Aborigines in the area and should be disposed of”.

On one view, all that is required to satisfy this section is for the members to determine that the land should be disposed of. In another view, the members must resolve to dispose of the land in the manner and according to the specific terms that are intended.

Should the Act stipulate the form and content of an authorising resolution?

Considerations

The key question is: *what is required to satisfy s.40D(1)(a), and thereby to ground a valid and effective land disposal?* For example, is a decision of the members to sell a single parcel of land sufficient to authorise the ALC to later transfer sub-divided parts of that land under a complex agreement between the ALC and the purchaser? (see discussion in sections 3.2.6 and 3.3.3 above).

In giving its approval of an ALC decision to dispose of land, NSWALC should be satisfied that the members of the ALC understand the proposal and have given their informed consent to it.

It is clearly important that the ALC decision-making body (currently the members of the ALC) has been informed, understands and agrees to the detail of a land development proposal, but it may not be possible to ensure this by stipulating the mandatory form and content of the authorising resolution. In the abstract, it is difficult to specify what critical matters or terms the members should consider and approve before a proposal can proceed. In practice, a number of decisions may have to be made before the exact details of the proposal and the terms on which the land will be disposed are known.

Since it is not practical to stipulate the exact form of the resolution that an ALC would need to make, consideration needs to be given as to how to reduce the risk that the end dealing might be invalid because of non-compliance.

The basis on which a dealing would be void because of non-compliance would need to hinge on NSWALC approval, rather than on actual non-compliance with a provision in the Division (see *Recommendation 15* below). There will be greater responsibility on NSWALC in giving its approval to ensure that the requirements of the Division have been complied with, with concomitant resource implications for NSWALC.

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.

Consideration will also need to be given to the question of review of ALC decisions in relation to land, including what elements of a decision may be reviewed and who should have standing to seek such a review.

4.3.4 Native title, traditional ownership and culturally significant land

Issue 1: what special protection, if any, should apply to land of special cultural significance?

Under s.40D(1), land may not be disposed of unless the members of the LALC concerned have determined that it is “not of cultural significance to Aborigines of the area”.

As discussed above in section 3.2.4, this restriction is arbitrary and ineffective. The broad definition of cultural significance “in terms of the tradition, observances, customs, beliefs or history of Aborigines” will most likely apply at some level to all land in New South Wales.

The provision is unlikely to be effective. If a LALC wishes to sell land, it can determine that it is not of cultural significance in order to lawfully sell it.

The Act currently provides no guidance as to how ALCs should make decisions about cultural significance.

Considerations

It is appropriate that a land rights regime provide a mechanism for formal protection of the cultural values of the land, particularly in regard to land which may be sold.

Principles of self-determination must be respected. For example, an ALC may wish to sell land that has cultural significance (say for historical reasons) in order to buy land that it regards as having greater cultural value.

The issue of cultural significance should not be approached as a “polar” question (i.e. one which must be answered ‘yes’ or ‘no’ – in this case, “is the land of cultural significance or not?”), but rather as a matter which

must be properly considered in any decision that is taken about land dealings. This would provide a more flexible, and more effective way of protecting the cultural value of land.

Provision could be made for this in a number of ways. For example, at local level, it is recommended that the strategic land planning process outlined above (see *Recommendations 3 and 4*) should include a land classification process (e.g. culturally significant land, land suitable for commercial development etc.). ALCs should also be required to prepare and consider a report on the cultural and heritage value of land before making a decision to deal with the land.

Similarly, when giving its approval for a land transaction, the cultural value of the land and the likely impact of the proposal on those values might be amongst criteria that NSWALC would have to consider in the approval process (see also section 4.3.5 and 5.4 below). Further, ALCs could be required to consult the Register of Aboriginal Owners to ascertain whether there are any registered Aboriginal Owners whose cultural area includes the land being considered for disposal, and if so, the ALC could be required to seek the views of those Aboriginal owners as to the cultural heritage values of the land.

Provision should be made for ALCs to pass binding resolutions that certain land cannot be dealt with on the grounds of its cultural significance, in order to protect land from being sold in future should there be a change of office holders in the ALC.

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.

Issue 2: *transfer between Aboriginal land councils of land that may be subject to native title rights and interests.*

While land may be transferred between land councils under s.40A of the Aboriginal Land Rights Act, it is not clear whether land that is subject to native title rights and interests can be transferred between land councils. Under s.40AA there is a general prohibition on dealings in ALC land that may be subject to native title rights and interests. It is the view of the Task Force that transfers between land councils under s.40A do not affect any native title rights or interests in the land the subject of the transfer, and therefore such transfers should be exempted from the provisions of s.40AA.

Recommendation 7

That transfers between ALCs be exempted from the operation of the requirement in s.40AA.

4.3.5 Approval criteria

Issue 1: *on what bases should proposed dealings be either approved or rejected?*

As discussed above in sections 3.2.1 and 3.2.5, the Act is unclear as to the nature and breadth of NSWALC's discretion to approve or reject a disposal of land. At present the Act does not give guidance as to whether NSWALC's discretion is confined merely to ensuring that the formalities

of s.40D(1) have been met,²³ or whether NSWALC may take into account any matter that is relevant to the objects and purposes of the Act.

Considerations

Uncertainty and lack of clarity about the basis on which approval will be given undermines the confidence of parties wishing to deal with land councils and reduces the value of ALC land.

Land should be dealt with in a way that is consistent with the purposes of land rights.

Bearing in mind the fundamental aims of land rights, it is important that NSWALC has the power to prevent conduct that could lead to land being dissipated. NSWALC should therefore be required to assess all matters that might affect the desirability of a proposed land dealing in view of the overarching objects and purposes of land rights.

Decisions about land dealings should be made in a way that is transparent and fair to all parties.

The scope of NSWALC's approval is a very important matter of policy and legal certainty, and it is important that this issue be clarified in the Act. The Act should confirm the nature and breadth of the approval discretion.

To avoid uncertainty, and increase the level of confidence for third parties, it is important that clear criteria for the assessment of land dealing proposals be spelt out.

²³ that is, that 80% of members present and voting at a meeting specifically called for the purpose have determined that the land is not culturally significant and should be disposed of.

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.

Issue 2: *How and where should the criteria for assessment of land dealings proposals be set out?*

Considerations

The criteria must be sufficiently well-defined to avoid uncertainty but should have enough flexibility so as to be applicable to a wide range of circumstances.

If specific criteria were set out in the Act, it would be difficult to amend and develop them (for example, in the light of previous applications and approvals). It would be preferable to empower NSWALC to produce and publish policies about the process and criteria for assessment of applications for approval of different classes of transactions.

The policies would play a role analogous to planning instruments under the Environmental Planning and Assessment Act in that they would operate as delegated legislation that would not require amendments of the Aboriginal Land Rights Act *per se*. Such policies would assist with dealing in land under the Real Property Act and the Environmental Planning and Assessment Act by providing guidance to all relevant parties. For example, lawyers acting for parties who are purchasing land from ALCs would have access to information about the legal relationship between the Aboriginal Land Rights Act, the Environmental Planning and Assessment Act and the Real Property Act.

Detailed policies, binding on NSWALC, would improve the transparency of decision-making and reduce the potential for corruption. They would

also ensure greater consistency in decision-making and should improve the quality of decisions.

Published policies would provide guidance to ALCs and to third party proponents as to the standard that will have to be met, and provide a degree of certainty as to the sorts of arrangements that are likely to be approved of and the circumstances in which approvals will and will not be given.

Greater certainty and predictability in the decision-making process would enhance the value of ALC land and at the same time, reduce the risk of wasting resources on proposals that are unlikely to be approved.

The Act should authorise NSWALC to make and publish detailed binding policies. The process which NSWALC would need to follow to produce the policies should also be stipulated in the Act.

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.

4.3.6 Approval process

Issue: Should different types of land dealings be subject to different authorisation and approval processes and criteria?

At present, the Act effectively provides different procedures for approval of the lease of land (s.40B) and the sale of land (s.40D). In the case of sale or other disposal, NSWALC's discretion to approve the LALC's decision is not defined, but as discussed above could be a broad one. In the case of leases the discretion is strictly limited. The Act also distinguishes between long term leases (of three years or more) and leases of fewer than three years.

This means that leases and easements are treated quite differently from all other dealings, though in practice a long-term lease may have just as great an impact on the interests of the ALC and its members as a sale.

A difficulty with the present system is that in some contexts, it is not clear what transactions need to be approved. In recent cases involving complex land developments, opinions were divided as to whether an approval to dispose of land included approval to sub-divide and take other steps to develop the land, or whether specific approvals were required for each stage of the development. The weight of legal opinion was in favour of the latter.

Considerations

Sophisticated land development projects commonly involve a series of related actions, such as sub-division, creation of easements, dedication of public roads and sale of residential blocks. Each of these might be defined as dealings and some have high impact. It is desirable that all dealings comprised in such a project be considered as a whole, and that there is no confusion about whether any part of the project has not been properly approved.

The current differentiation between leases, long-term leases and sales and other disposals is not clear.

For the sake of consistency and certainty, it is desirable that all transactions be regulated by one assessment and approval process, however not all matters are complex or have high risks or potential long-term consequences for land councils. Only those that do would require a high level of assessment and consideration.

The approval process needs flexibility. A ‘one size fits all’ approach is likely to be inefficient and costly. For example, the renewal of an existing commercial lease, say for a shop, might not require elaborate assessment. It is also important that resources are allocated where they are most needed and that the costs of assessing a proposal are commensurate to the risks associated with that proposal. Where the risks are high, it is appropriate that time and resources be allocated to ensure that the proposal and its potential benefits are carefully assessed.

In general, it is the Task Force’s view that the net needs to be cast wide enough to ensure that all transactions and developments (other than residential leases) will be subject to the same approval process and broad criteria set out in the Act. From this starting point, the Act could authorise the making of regulations and policies which could exempt more straightforward dealings from particular aspects of the assessment process.

Using this approach, many transactions could be handled as a matter of routine, especially if they accorded with the ALC’s own properly formulated and endorsed plan (see *Recommendations 3 and 4* above).

Final responsibility to grant or refuse a proposed disposal rests with NSWALC, however whilst members of the council may be very effective representatives of their communities, they may lack expertise to assess more complex proposals.

It is the Task Force's view that an expert advisory panel should be established. The expert panel will meet on an 'as needed' basis to provide expertise, assess proposals and advise NSWALC as to whether approvals should be granted. This will reduce the potential for Councillors to be lobbied and improve the quality and transparency of their decision-making.

The expert panel would be required to formulate its recommendations in accordance with the criteria set out in the Act and the policies developed by NSWALC. Its recommendations would be provided to NSWALC, the ALC, the Department of Aboriginal Affairs (DAA), and the Registrar, Aboriginal Land Rights Act.

Whilst circumstances may arise in which NSWALC might depart from the recommendation of the expert panel, further protection for the integrity of the approval process could be provided by a requirement that NSWALC publish its reasons for doing so.

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 through policies that have a statutory foundation.

That an external body/panel (which may include members appointed by the Minister) assess and make recommendations and refer to 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.*

4.3.7 Conditional approval and enforcement

The effectiveness of an approval system would be significantly diminished without clear powers to impose conditions. The assessment framework outlined above would be pointless if it were not possible to place enforceable conditions on an approval to ensure that the proposal goes ahead as approved.

It is not clear whether NSWALC presently has power to impose conditions on an approval given under s.40D, although the Regulation (cl.6) does enable NSWALC to withhold its endorsement of the s.40D(1) certificate until satisfied that conditions have been complied with.

Considerations

NSWALC needs to have the power to impose conditions to prevent subsequent actions and activities that were not contemplated in the approval.

In the case of complex disposals such as joint ventures for the development of land, it is likely that critical aspects of the arrangement will not take place until after the disposal has occurred and transfer of title registered. For example, the first step in a proposed joint venture might be to transfer the land into another company.

In a “staged” approval process, the commercial value of ALC land is diminished if developers and investors cannot be confident that successive approvals will be given. NSWALC should be able to commit itself at the outset to provide any subsequent approvals that will be needed. It can only do so, however, if it has sufficient, and sufficiently detailed, information at the start of the process to make defensible and rational decisions about the future course of complex commercial transactions.

A mechanism for enforcing conditions might include giving NSWALC power to require ALCs and third parties to enter into contracts that enforce the conditions of approval. As discussed in section 4.1.1 and recommended in *Recommendation 1* above, the ALC and a third party may agree to a notification on the title that would prevent further dealing in the land unless conditions were complied with.

The question of how to give effect to any conditions that are needed is a complex matter that needs to be thought through carefully in the drafting stage.

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 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.*

4.3.8 Review of approval decisions

The Task Force recommends that review of approval decisions should be limited to judicial review and should not include merit review, and that only the ALC that made the application for approval should have standing to seek a review of NSWALC's decision.

The scheme that is being developed includes strategic land planning, clearly-stated criteria and binding policies to guide applicants, and an expert advisory panel to consider proposals and advise NSWALC as to whether they should be approved. The approval scheme is comprehensive and ensures that the merits of any matter will be dealt with; opening decisions to merit review is, in the Task Force's view, unnecessary and could open the process to potentially costly and time-consuming litigation. It is appropriate that decisions be subject to judicial review.

The right to appeal decisions should be restricted to the ALC that is seeking approval because no other party has a direct interest.

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.

4.3.9 Information recording and keeping

In view of the value of the assets regulated under the scheme, and the rights dependent on the approvals granted, meticulous record-keeping is essential. NSWALC would be required to keep a register of all applications and decisions, some of which would be available to the public. The register could be established by the Act, and the detail of its administration specified in the Regulation.

The register would need to be integrated into and compatible with registers held by the Department of Lands to ensure that records held by NSWALC are consistent. Regular auditing would also be required to ensure that entries in the NSWALC register accord with those held by the Department and local government bodies.

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.*

4.4 Certainty mechanisms

Issue: How can persons doing business with ALCs, and the world at large, have certainty that the ALC is authorised to deal with the land in the manner proposed and that the dealing will be valid and effective?

As discussed above in section 3.3, the Act is currently worded so that any transaction that contravenes Division 4 is void. This makes dealing with land councils a very high risk business, and ultimately operates to diminish the value of ALC land.

In the current regime, a s.40D(2) certificate is the mechanism that provides “conclusive evidence” that a disposal of land does not contravene Division 4 and is a valid transaction,²⁴ except for a person who had notice when the certificate was issued that the disposal of the land did contravene the provisions.

Section 40D(2) certificates have been an important mechanism in reducing, although not eliminating, the risks to third parties (see discussion in section 3.3.3).

There are conflicting views as to whether the certificate provides certainty in circumstances where the dealing did actually contravene the requirements of Division 4.

In some circumstances, the existence of a certificate may in fact act to protect people who were aware that the disposal contravened the provisions.

There is further scope for uncertainty as a result of the present interplay of the Aboriginal Land Rights Act with the Real Property Act. Would a non-complying disposal be void, even though a transfer to a third party has been registered under the Real Property Act? There is a prospect that the Aboriginal Land Rights Act would prevail over the Real Property Act, and so if the transaction had contravened its provisions, then no legal interest in the land would have been passed to the third party.

At present, certificates are only provided for in relation to disposals and there is no certainty mechanism at all in the case of leases and other dealings. This situation would be addressed by *Recommendations 2 and 11*

²⁴ The s.40D(2) certificate is issued by the LALC (and under cl.6 of the Regulation, endorsed by NSWALC), essentially to certify that the required 80% of members present and voting at a meeting specially called for the purpose have determined that the land is not culturally significant and should be disposed of.

above, that all types of land dealings be subject to the land dealings regime and should effectively go through the same type of approval process.

Considerations

Greater certainty is needed for all parties to reduce risks associated with dealing with ALC land and prevent the value of ALC land being diminished by uncertainty.

The current operation of s.40(2) that makes any dealing in contravention of the Division void is unclear and should be removed in favour of a positive notification process that provides certainty that a dealing has been done in accordance with the provisions of the Act.

The responsibility for authorising the transaction and confirming that it has been done in accordance with the provisions should rest with the approving body, that is NSWALC, rather than the ALC. The existence of an authorisation by NSWALC would provide certainty, and dealings would be void only if they contravened the authorisation that had been given by NSWALC.

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.*

4.5 Benefits of ALC land ownership

It is quite clear that a key purpose of land rights is to compensate Aboriginal people and to ensure that they derive benefit from the return of land.

In practice however, the Act does not state how benefits are to be derived. On one hand, LALCs are encouraged to acquire land, gain assets and invest money, but s.52, which lists the functions of LALCs, does not specify ways in which LALCs can spend money for the benefit of members other than social housing. In fact, s.52, quite specifically prohibits LALC members from receiving any direct or indirect benefit.

The invidious position of many LALCs now is that having acquired land, they are asset-rich and cash-poor, having also acquired considerable responsibilities and costs associated with land ownership and management. Many are also responsible for unsustainable and costly social housing programs. Yet there appear to be few if any ways that land councils can legitimately use the proceeds of a disposal of land in ways that deliver a direct benefit to individual members.

4.5.1 Controls on proceeds

Issue: What controls can and should be placed on an ALC's investment or expenditure of the proceeds of land dealing?

In the event that land is disposed of, it is important that the proceeds are used effectively in ways that fit with the overall aims of land rights. In other words, if land assets are to be changed into other forms of property, such as cash, securities or businesses, then the choices need to be made prudently and be carefully approved so that the value of the assets is maintained and sustainable.

For example, the Task Force would be concerned to ensure that the proceeds of a land sale were not invested say in a business that was acquired merely to provide employment/wages for ALC members, but without real consideration of the value and sustainability of the business.

Clearer statutory controls are needed. At present, the controls on investments (in cl.94 of the Regulation, which apparently prohibit investment in land) are inconsistent with LALCs' powers to acquire land (in ss. 38 and 52) and businesses (s.52(1)(g)(ii)).

The Task Force's recommendations here are aimed at supporting the principles of autonomy and self-determination, but recognise that some ALCs may lack capacity (for example business experience), or may seek to transfer assets into other entities to avoid the controls of the Act. The Task Force envisages that ALC strategic land and business planning would assist in identifying the aspirations of the members and their intentions as to how to use the proceeds of any land disposals. This would be strengthened by a thorough assessment and approval process, and the ability of NSWALC to give conditional approval.

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 any Community Land and Business Plan or by specific provisions set out in an agreement between NSWALC and the ALC (see conditional approval and enforcement in section 4.3.7 and Recommendation 12).

4.5.2 Benefits to members

The restriction in s.52 which prohibits members from receiving direct or indirect benefits is clearly intended to prevent the risk of corruption, however it has a much more sweeping effect because, apart from community housing, it means that there is in effect no way for the

constituents of an ALC to gain benefit from the years of effort involved in claiming and acquiring land and assets. This is despite the clear intention of the Act that land rights should compensate and benefit Aboriginal people as expressed in the Preamble to the Act (see Appendix 1).

If members cannot legitimately benefit there is little incentive for them to participate in the ALC and ensure the proper and efficient management of its affairs. There are also risks that members may try to gain benefit by activities that are not legitimate, or will move assets into other entities from which benefits may then be lawfully distributed, but which are not subject to the accountability requirements (and thus the protections for ALC members) of the Aboriginal Land Rights Act.

Instead of the blanket prohibition, transparent and fair mechanisms that enable members and constituents to draw benefits are needed. Without such mechanisms it is doubtful that the Aboriginal Land Rights Act can achieve its objects, and as the assets of ALCs increase, there is likely to be a corresponding increase in temptation to find ways around the restrictions. The mechanisms could include registered schemes, such as housing schemes, scholarships, low interest loans, or certain approved forms of trust over which ALC members retain effective control.

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.*

4.5.3 Land-poor ALCs

Issue: How can land-poor ALCs be assisted to acquire valuable property?

Whilst some ALCs have been able to successfully claim land since the introduction of the Aboriginal Land Rights Act, others, especially those in the Western Division, have had far fewer opportunities to establish a land base because of the tenure of landholdings and the lack of land available for claim.

The current situation is inequitable, and arguably unjust. Some ALCs, especially in coastal areas where land values have boomed in recent years, own large and very valuable holdings, while others have few assets, or the value of their assets is much lower because of the comparatively low market value of claimable or claimed land. In effect they have received less compensation and fewer benefits from the operation of land rights, regardless of their means.

It has always been envisaged that ALCs unable to claim land should have access to funds to purchase land on the open market, however income from the NSWALC account is insufficient to fund significant land purchases.

The Task Force regards this as an important area that requires careful consideration and intends to explore ways to achieve greater equity that will be discussed in detail in a subsequent discussion paper.

At this stage the Task Force does not make a recommendation on this issue, but notes that the types of schemes that might be considered could include:

- the establishment of a special fund to which NSWALC would contribute a proportion of any proceeds from its sales of land acquired by claim; and/or
- a levy assessed on the proceeds of sales of ALC land.

4.6 Funding the system

A range of processes forms the recommended land dealings scheme, including:

- the strategic land planning process at local land council level;
- development and publication of NSWALC policies;
- the assessment and approval process, including the appointment of an expert advisory panel and the associated costs;
- review processes; and
- record-keeping and maintenance of a detailed register of applications and approvals.

Each of these will have a financial impact on the land rights system that has not yet been quantified. Further consideration of the costs and how they will be managed is needed.

Recommendation 18

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

4.6.1 Costs of the approval process

The Task Force has given in-principle consideration as to how the approval process should be funded.

A comprehensive approach to assessment and enforcement of approval decisions will be more resource-intensive and costly, especially in the case of complex land development proposals. It is not recommended that the costs of the approval process be funded from the NSWALC statutory account. This would be a drain on funds that should be available to achieve the positive purposes of land rights. It would also mean funds being spent

disproportionately in regions where ALCs have large landholdings and/or significant reserves of other assets.

The Task Force considers that a ‘user pays’ scheme is most appropriate, however further economic modelling and consideration of how such a scheme could be implemented is needed.

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.*

4.7 Probity and integrity

Whilst there have been some instances of possibly corrupt conduct associated with recent land dealings by ALCs, these are relatively few.

Mistakes made through ignorance of the law, confusion or misguided perceptions of the role of NSWALC are more often a cause of land dealings going awry than outright corruption. Regardless, any error, however minor and whatever its origin, could mean that a land dealing would be void, with potentially devastating consequences not just for the ALC concerned but for the land rights system in New South Wales itself.

Nevertheless, corrupt conduct defeats the purposes of land rights by diverting benefits intended for all Aboriginal people to the hands of a few, and the Act should endeavour to prevent and combat this.

4.7.1 Corruption prevention

The Task Force has conceptualised and recommended a land dealings regime which will, in itself, greatly reduce the potential for corruption.

Broadly, it does this by:

- establishing land planning processes at the local level which require a high level of participation of an ALC's membership;
- establishing clear policy guidelines about what kind of disposals will be approved; and
- requiring that the approval process itself consider any land transaction proposal in the context of the ALC's own local plans.

In general, any proposal that did not accord with the plan would not be likely to receive approval. The regime would impose conditions, if they were required, to ensure that the disposal proceeded as planned, and that the proceeds were used as intended by the ALC's members when the plan was developed.

This approach effectively reverses the current approach of very *ad hoc* processes for decision-making, in which strategic planning about land disposals is not required, and in which sound approvals are expected to be given by the authorising body (NSWALC) in the absence of a guiding (and binding) policy, because there is no requirement for such planning or policies under the Act. It is expected that the proposed regime will greatly reduce opportunities and potential for corrupt conduct.

Although the potential for wrongdoing is probably covered in the *Crimes Act 1900*, the *Independent Commission Against Corruption Act 1988*, and the *Ombudsman Act 1974*, expressly providing *offences* within the Aboriginal Land Rights Act would be likely to strengthen the existing deterrents.

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.*

5 TOWARDS A NEW LAND DEALINGS REGIME UNDER THE ABORIGINAL LAND RIGHTS ACT

5.1 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 that pass a legal or equitable interest in the land, except for residential leases of less than three years.

Refer to recommendations 1 and 2

5.2 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. Rather than the present system, in which ALCs can make *ad hoc* decisions about disposing of land, and disposal decisions of great magnitude can be made by relatively small numbers of members, 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 Regulation would set out the matters which should be addressed in the plan, the process for making it, the period of operation and how plans could be amended. 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 earmarked 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).

In addition to ensuring that important decisions about the future use of an ALC's lands be taken strategically and with the deliberate purpose of maximising the benefits of land ownership to the ALC's constituents, the planning process also aims to increase member participation in and improve transparency of decision-making.

The plan would essentially be the means whereby the ALC's decision-makers – currently its members – are fully informed about and provide their informed consent to any proposals about the development and disposal of the ALC's land. The threshold number or percentage of members who must approve the plan may be set at a level that ensures that the broad membership endorses and agrees with the plan, and therefore the plan has legitimacy.

In general, it is envisaged that an ALC's decision to dispose of land would be taken in the context of the existing plan, and this would be confirmed by the approval process. The provisions may allow for exceptions in specific cases, for example, where an ALC that has not had the opportunity to prepare a plan may legitimately need to make a disposal of land.

Refer to recommendations 3, 4 and 5

5.3 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 as to the basis on which such approvals should be given. These criteria would be broadly defined, but NSWALC would be given statutory power to make binding policies about how it will exercise its approval function.

The broad criteria in the Act should be defined in such a way 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.

The Act would also set out the procedures which would be required for NSWALC to develop and publish its policies. The policies would set out in greater detail the basis on which land dealings proposals would be likely to be approved. The policies would be required to be reviewed and amended from time to time.

Refer to recommendations 8, 9 and 10

5.4 Cultural heritage and protection of culturally significant land

The current requirement that ALCs must determine that land is not culturally significant and should be disposed of is not effective to ensure that land that is of high cultural value will be protected and remain within the Aboriginal estate. In addition, there is no guidance as to how ALCs or NSWALC should determine whether land is culturally significant; there is no requirement of ALCs to make any special inquiry or prepare reports on the cultural value of land they wish to dispose of, nor is there any special mechanism for the protection of culturally significant land.

Under the proposed regime, ALCs would be able to identify land of cultural importance in the course of 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.

The Task Force has recommended that the current “cultural significance” requirement be abandoned. 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.

Refer to recommendation 6

5.5 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 considers that such transfers would not affect any native title rights or interests, and has therefore recommended that such transfers be exempted from the relevant provision that in general prevents such land being transferred (s.40AA).

Refer to recommendation 7

5.6 Creation of an expert panel to assess proposals and advise NSWALC

An expert panel will be established to provide expert advice to NSWALC and to make recommendations as to whether applications for dealings should be approved. Some minor land dealings may be exempted from this process, but in general it would apply to more complex dealings.

The expert advisory panel would meet on an ‘as needed’ basis, and would be able to request reports and other information needed 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 not be required to consider all applications for approval. Some classes of dealings might be excluded from external assessment by Regulation. The panel would formulate its recommendations in line with the statutory criteria and the published policies. Its recommendations would be provided to NSWALC, the ALC which made the application, the DAA and the Registrar.

Refer to recommendation 11

5.7 Approval of proposed land dealings

NSWALC would continue to have responsibility to give or refuse its approval for proposed land dealings. Under the new regime, its discretion and the matters it would be required to consider would be broadly defined by the criteria for decision-making set out in the Act.

Its decisions would be required to accord with the statutory criteria and its own policies. NSWALC may make a decision contrary to the advice of the expert panel, but would be required to publish its reasons for doing so and provide this to the ALC, DAA and the Registrar.

NSWALC would have the power to make its approval subject to conditions that would have to be complied with following disposal, and could require that the ALC and a third party enter into contractual agreements with NSWALC to ensure that the conditions are enforced. This provision might be further supported by amendments to the Real Property Act that would allow for registration of the conditions and notification to be placed on the title.

Refer to recommendations 11 and 12

5.8 Review of decisions

NSWALC decisions would be subject to judicial, but not merit review. Standing would be restricted to the ALC that made the original application for approval.

Refer to recommendation 13

5.9 Safeguards

It is important that the land dealings regime reinforces and assists to deliver the aims and purposes of land rights, i.e. that land is not lost or dissipated, and that the proceeds of any disposal of ALC land are used in

the most effective way for the benefit of Aboriginal people in the area served by the land council, now and in the future.

The requirement that ALCs conduct land and business planning processes, and that any application for approval to dispose of land must accord with the plan, strengthens both the ALC decision-making process and the assessment and approval processes, and reduces the risk that arbitrary or ill-considered decisions will be taken by the ALC regarding its land. The planning process will also assist ALCs and their members to identify and protect land that is culturally significant or valuable.

Planning will reduce opportunities for corrupt conduct by introducing a transparent process that strengthens the broader membership to make informed decisions about the management and use of the ALC's landholdings, and increases the likelihood that any decision to deal with land is made on the basis of the informed consent and with the agreement of the majority of the ALCs membership. In developing the plans, ALCs will be mindful of the criteria for land dealings that will be provided in the Act, and of NSWALC's policies in regard to its assessment criteria for approvals.

Further safeguards are established by the mechanisms for identifying and protecting culturally significant land by criteria to be set out in the Act, together with the published policies of NSWALC and the creation of an expert advisory panel to provide independent assessment. The publication of ALC plans, NSWALC policies, the advice of the expert advisory panel and NSWALC's decisions will all add to the transparency of decision-making processes.

Strengthening of all of these processes adds to the value of ALC land and the confidence that reputable third parties may have about entering into agreements with ALCs concerning the development of ALC land, and the validity of the associated land dealings.

In addition, the scheme provides for conditional approval of a land dealing, and mechanisms whereby the conditions can be enforced.

Finally, if the recommendations of the Task Force are accepted, the Act would provide for specific offences aimed at deterring corrupt or fraudulent conduct on the part of ALC members and third parties.

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

5.10 Certainty mechanisms

Greater certainty, both legal and commercial, is needed in the land dealing regime. This is provided in a number of ways in the proposed scheme.

First, the requirement that ALCs conduct land and business planning, and that any application for approval to dispose of land must accord with the plan, provides a framework for parties wishing to enter into agreements with ALCs about the future development of their land.

The criteria set out in the Act, and the policies that will be produced by NSWALC to guide its decision-making in granting approvals, will also provide greater clarity about the form and content required of applications and the kinds of applications that are likely to receive approval. In other words, from the first stage, ALCs and third parties interested in entering into agreements with them will be aware of the circumstances in which an approval is likely to be given. These elements of the scheme provide greater commercial certainty for all parties.

As has been discussed in some detail in the preceding chapters, there are major concerns regarding certainty – in the sense of legal validity – associated with the current provisions of the Act. The proposed scheme clarifies and simplifies the Act to provide greater certainty than is presently the case by:

- clarifying which property is regulated;

- clarifying what kinds of land dealings are regulated;
- clarifying what matters must be subject to the assessment and approval provisions;
- removing the current wording of the provision that makes void any action that “contravenes the division” and reversing the existing concept of “compliance”; and
- replacing that concept with a positive notification, given by NSWALC, that confirms that the dealing is valid (based on a comprehensive merit assessment and approval process that will ensure that all the requirements of the Act have been met).

Certainty would be provided by the existence of the authorisation notice, issued by NSWALC, that the land dealing has been approved. This would only be granted after a thorough review and assessment of the application, which in general will have been made in the context of the ALC’s local community and business plan.

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

5.11 Information recording and record-keeping

Meticulous record-keeping is required in view of the value of the assets and the rights that may be dependent on any approvals granted. The Task Force has proposed that NSWALC be required to keep a register of all

applications and decisions that has the capacity to track and record compliance with any conditions that might be imposed on an approval decision. Some of the information may be made available to the public, whilst some will need to be kept confidential. The register will need to be integrated into and compatible with existing registers held by the Department of Lands, and will need to be audited on a regular basis.

Refer to recommendation 14

5.12 Costs of the proposed scheme

The proposed scheme includes a number of elements that, together, are aimed at ensuring that ALC land is used and managed effectively in line with the purposes of the Act for the benefit of present and future generations of Aboriginal people in New South Wales.

The elements of the scheme work together and are expected to achieve very desirable benefits and greater security for Aboriginal people in New South Wales. However, the increased regulation and participatory planning that are envisaged necessarily involve significant increased costs. To a limited extent, some of the additional cost could be recouped by a ‘user pays’ scheme for approval applications. In general, however, given that the ALC system is fully committed now to fulfil the present accountability requirements of the Act within budget, the costs of the scheme must be thoroughly investigated and a financial impact assessment made before the scheme is legislated.

Refer to recommendations 18 and 19

5.13 Deriving benefits from land rights

Whilst this issue is not, strictly speaking, a part of the land dealings provisions of the Act, the restriction on benefits to individual ALC members has a definite bearing on how people might act as members and

office-bearers of an ALC. Recommendations are made by the Task Force about how proceeds from land sales could be controlled, and how beneficial schemes that would allow members to benefit without leaving the system vulnerable to any accusations of corruption or incorrect conduct could be established.

Refer to recommendation 17

6 NEXT STEPS IN THE ABORIGINAL LAND RIGHTS ACT REVIEW

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 issues paper on land dealings is the first of several papers that will be produced by the Aboriginal Land Rights Act Review Task Force in response to the Terms of Reference of the Review.

The land dealings issue has been addressed first because of the central importance of land to the Aboriginal Land Rights Act and because of the magnitude of ALC landholdings. If well-constructed, these provisions of the Act will establish a strong foundation for ALCs to acquire, own and dispose of land in ways that will provide long-term prosperity and independence for Aboriginal communities.

Although this paper focuses on one major element of the Review, it is important to note that the Task Force is adopting an holistic approach to reform. It is the hope of the Task Force that this paper has illustrated the complexity of the reform task, and the importance of careful and detailed consideration of all the issues involved.

Too often in the past, piecemeal amendments have resulted in confusion and inconsistencies in the law.

The issue of land dealings touches upon other important issues such as ALC governance, ALC skills and capacity, and the benefits that may be provided to Aboriginal people by the Act. The further work of the Task Force will be informed by the issues raised and recommendations made in this issues paper on land dealings.

The Task Force will publish further issues papers in response to the Terms of Reference, covering topics such as:

- Governance, structure, representation and benefits;
- ALCs and Aboriginal housing;

The NSW Aboriginal community will be informed and consulted about the Review and each of the papers will be widely distributed. It is likely that this will be a staged process as each issues paper is released. Comments and submissions will be welcomed by the Task Force throughout the review process.

The work of the Task Force will culminate in amending legislation that is expected to be presented to the New South Wales Parliament in early 2006.

7 TABLE OF RECOMMENDATIONS – LAND DEALINGS

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

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.

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.

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.

Native title, traditional land ownership and culturally significant land

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.

Recommendation 7 That transfers between ALCs be exempted from the operation of the requirement in s.40AA.

Approval criteria

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.

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.

Approval criteria (cont)

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.

Approval process

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.
-

Approval process (cont.)

- 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.

Review of approval decisions

- 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.
-

Information keeping and recording

- 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*.

Certainty mechanisms

- 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.
-

Control on proceeds of land dealings

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 any 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).

Providing benefits to members

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.

Costs of funding the system

Recommendation 18 That there must be a financial impact assessment of the proposed land dealing scheme before it is legislated.

Cost of the approval process

- 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.

Probity and integrity – corruption prevention

- 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.
-

APPENDIX 1

PREAMBLE TO THE ABORIGINAL LAND RIGHTS ACT

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: