

# Statutory Review of the Aboriginal Land Rights Act 1983

November 2017



Education  
Aboriginal Affairs



## MINISTER'S FORWARD

It is with great pleasure I table this five yearly Statutory Review Report (the Report) on the *Aboriginal Land Rights Act 1983* (the Act), before the NSW Parliament. This report constitutes my report to the NSW Parliament as required under section 252A of the Act, setting out the outcomes of my review of the Act undertaken in 2017.

The *Aboriginal Land Rights Act 1983* is a unique Act of the NSW Parliament, which for 34 years has provided a vehicle for the Aboriginal people of NSW to pursue their social, economic and cultural aspirations. Without equivocation I am of the view that the policy objectives of the Act remain valid. Likewise, I am of the view that the terms of the Act remain appropriate for securing the key policy objectives and support the operation of Local Aboriginal Land Councils (LALCs) throughout NSW, their oversight by the NSW Aboriginal Land Council (NSWALC), and the transfer to them of certain claimable Crown land as compensation for past dispossession.

The NSW Government strengthened the relevance of the Act's existing provisions by important amendments to it via the *Aboriginal Land Rights Act Amendment Act 2014*, and the *Aboriginal Land Rights (Local Aboriginal Land Councils) Amendment Act 2017*. The 2014 Amendment Act brought greater flexibility to LALC compliance obligations, introduced measures to facilitate LALC economic enterprise through related entities, and contained the framework for negotiated settlement of land claims through Aboriginal Land Agreements (ALAs). The 2017 Amendment Act introduced a new LALC Intervention and Improvement Framework which focuses on building capacity and strengthening governance within LALCs.

This 2017 review of the Act, was undertaken amid an exciting time in NSW when a range of key NSW Government reforms are being implemented to support Aboriginal interests in this State. The Act is administratively central to the success of a number of those reforms that will benefit Aboriginal communities across NSW, and all citizens of NSW. This Report notes that in particular, the implementation of the Crown Lands Management Act 2016 and reforms to Aboriginal cultural heritage (ACH) legislation will require ongoing assessment of the Act's provisions.

The specific findings and observations of the review, outlined fully in the body of this report, make reference to those key reform areas where future work and development may be undertaken to see the policy objectives and terms of the Act further strengthened for many years to come. Any future work, including proposed amendments, will be undertaken in close collaboration with NSWALC, and in consultation with LALCs and the broader Aboriginal community of NSW.

Importantly, my review of the Act, specifically focused on pursuing a genuine dialogue with the Aboriginal community, seeking not their endorsement of predetermined Government proposals and agendas, but rather providing a blank canvas for them to craft their own agenda and future aspirations. The dialogue was achieved through targeted focus groups, of invited stakeholders with a range of perspectives, knowledge and roles within the Aboriginal community.

The intention of bringing a range of Aboriginal interested parties of NSW into a discussion about the future of the Act, aimed to generate creative and strategic thinking about ways for the entire Aboriginal community of NSW to use, and benefit from the Act through interaction with Aboriginal Land Councils (ALCs).

The state-wide dialogue was facilitated by Dr Aden Ridgeway of Cox Inall Ridgeway who was engaged to conduct nine regional forums. Dr Ridgeway, an esteemed Aboriginal man in Australian public life, brought a wealth of knowledge, expertise and insight to the 2017 review. I greatly appreciate Dr Ridgeway's work undertaken for me, and I thank him and his team for the quality of the forums convened, and the final report received for my consideration.

I also thank NSWALC for its collaborative approach and support in undertaking the 2017 review. I am grateful for the comprehensive and thoughtful nature of the NSWALC submission to the 2017 review. I look forward to working with its Council to continue to improve the potential of the Act to deliver positive outcomes for the Aboriginal people of NSW.

Finally, I extend my gratitude to those who contributed written submissions and to all of the participants who attended the forums, shared their experiences and contributed ideas about ways to improve the Act now and into the future.

  
\_\_\_\_\_  
The Hon. Sarah Mitchell MLC  
**Minister for Aboriginal Affairs**

Date 9/11/17

## 1 INTRODUCTION

This Report constitutes the Minister for Aboriginal Affairs' statutory report to the NSW Parliament (the Report), as required under section 252A of the *Aboriginal Land Rights Act 1983* (the Act), following a review of the Act from 4 December 2016.

The Report provides a sequential narrative of the review as follows:

- Section 1, introduces and outlines the contents of this Report.
- Section 2, provides background information including the outcomes of the last statutory review undertaken from 2012 to 2014.
- Section 3, outlines the legislative requirements of the 2017 review.
- Section 4, outlines the policy objectives and terms of the Act.
- Section 5, outlines the review process undertaken in 2017, including:
  - The NSW Government's collaboration and partnership with NSWALC.
  - The rationale for, and details of the engagement of an independent facilitator to undertake certain works to inform the review.
  - The terms of reference to guide the review, specifically for the work of the facilitator.
  - The methodology, rationale and intention of the consultation process.
  - The written submissions received by the Minister.
  - Consideration of the findings of the review.
  - The tabling of the report in the NSW Parliament.
- Section 6, provides analysis on the findings of the 2017 review proposing suggestions and questions for future work and consideration, through collaboration between the NSW Government and the Aboriginal community of NSW.
- Section 7, concludes the Report.

## 2 BACKGROUND

The Act has been reviewed and amended on many occasions since it commenced operation in 1983. The review and reform of the Act over the years, has responded to the social and economic environment within which Aboriginal Land Councils (ALCs) operate, especially the property boom and rapid urban and regional development throughout NSW. The various changes to the Act have adapted and shaped the operation and governance of ALCs in NSW within the changing external economic and social environments. Necessary changes have instilled NSW ALCs with strong corporate governance and the capacity to engage and thrive within the NSW economy and polity for the benefit of all the Aboriginal people of the State.

The last review of the Act which commenced in December 2012, was the first prescribed five-yearly review undertaken in accordance with section 252A, inserted into the Act in 2006. The last statutory review was undertaken over an extended time period, from 2012 to 2014. Following the review and extensive public consultation, significant amendments were made to the Act in 2013 and 2014 to:

- reduce onerous regulation to facilitate more effective administrative functionality within Aboriginal Land Councils,
- streamline housing management,
- improve accountability and processes for wrongdoing,
- clarify the means to establish and manage business enterprises and related entities, and
- provide the means for Aboriginal Land Agreements (ALAs), a mechanism for the NSW Government and ALCs to enter negotiations to settle multiple land claims for mutual benefit and outcomes.

Further amendments were made in 2017 to introduce more flexible intervention mechanisms when problems occur in the operation of LALCs (referred to as the LALC Intervention and Performance Framework). The new Framework aims to build the capacity of LALCs, with early intervention measures to improve performance through 'Improvement Orders' issued by NSWALC, and the appointment of skilled advisors to support LALCs to implement the Improvement Orders to achieve compliance and better operations.

### **3 REVIEW REQUIREMENTS**

Section 252A of the Act requires the Minister for Aboriginal Affairs to review the Act every five years to determine whether the policy objectives of the Act remain valid, and whether the terms of the Act remain appropriate for securing those objectives. A review of the Act was due to commence as soon as possible after 4 December 2016. Following a review of the policy objectives and terms of the Act the Minister is required to table a report on the outcomes of the review in each House of the NSW Parliament within 12 months.

### **4 POLICY OBJECTIVES AND TERMS OF THE ACT**

The policy objectives of the Act, and the objects of LALCs, and of the NSWALC, are captured in sections 3, 51 and 105, respectively, of the Act. Section 3 sets out the purposes of the Act as follows:

- a) to provide land rights for Aboriginal persons in New South Wales,
- b) to provide for representative Aboriginal Land Councils in New South Wales,
- c) to vest land in those Councils,
- d) to provide for the acquisition of land, and the management of land and other assets and investments, by or for those Councils and the allocation of funds to and by those Councils,
- e) to provide for the provision of community benefit schemes by or on behalf of those Councils.

Section 51 of the Act provides that the objects of LALCs are to improve, protect and foster the best interests of all Aboriginal persons within the Council's area and other persons who are members of the Council.

Section 105 of the Act states that the objects of the NSWALC are:

- a) to improve, protect and foster the best interests of Aboriginal persons within NSW; and
- b) to relieve poverty, sickness, suffering, distress, misfortune, destitution and helplessness of Aboriginal people within NSW.

Importantly, the purpose and objectives of the Act are underpinned by the preamble which acknowledges:

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

The 'terms' of the Act are not defined or made explicit. Instead the 'terms' of the Act, amongst other things are construed to mean:

- The form and function of ALCs.
- The regulatory structure of the network of ALCs in NSW and the policy framework within which NSWALC and the Minister oversees the network of LALCs.
- The administrative mechanisms in place to support the operation of the Act, such as the Code of Conduct and Model Rules of Aboriginal Land Councils, the NSWALC Statutory Fund and the land claim process.

It is noteworthy that the 'terms' of the Act have been amended in significant ways by the 2014 and 2017 amendments referred to above by the introduction of ALAs, new processes for establishing and transferring assets to LALCs' related entities, and greater emphasis on flexible compliance reporting. These changes in the 'terms' incorporate a greater focus on agreement making, economic enterprise, and self-determination as a means for achieving the objects of the Act in the contemporary economic and social contexts.

## 5 REVIEW PROCESS

### 5.1 Collaboration with the NSW Aboriginal Land Council

The NSWALC is both the chief regulator and financial steward of the 120 LALCs constituted across NSW. It manages the Statutory Investment Fund (SIF) established under the Act, currently worth approximately \$650 million, and advocates in all jurisdictions, including internationally for the Aboriginal people of NSW.

NSWALC is a principal partner with the NSW Government in relation to Aboriginal affairs policy and the operation of many laws and policies of the State. Consequently, close collaboration with NSWALC was determined by the Minister and Aboriginal Affairs as essential to effectively undertake the 2017 statutory review of the Act.

Following meetings and correspondence with NSWALC from early 2017, and subsequent consultation and correspondence between the Minister and Aboriginal Affairs with the elected NSWALC Councilors and senior administrative staff, the Minister determined that the 2017 statutory review was to comprise:

- Terms of reference to focus on the future of the Act, including its regulatory structure and interaction with government reforms especially those directly related to land management (see details at 5.3 below).
- Nine targeted and independently facilitated forums held across NSW to elicit a dialogue between the multiple Aboriginal groups, organisations and interests in NSW (see detail at 5.4.1 below).
- A report from the facilitator on the nine regional forums in the context of current NSW government reforms and policies with potential impact on the Act (see detail at 5.4.2 below).
- An open call for public submissions for the Minister's consideration by any person or party to articulate their views and ideas with regard to the future of the Act (see details at 5.5).

NSWALC and the Minister for Aboriginal Affairs subsequently agreed that:

- NSWALC participate in preliminary briefings with the facilitator.
- The NSWALC Chairperson and relevant NSWALC Regional Councillors attend and participate in the regional forums.
- NSWALC would make a submission in response to the facilitator's report and findings, as an annexure to the Minister's Report.
- NSWALC would be able to consider and incorporate any public submissions received by the Minister into its submission.

## **5.2 Independent Facilitator**

Mr Aden Ridgway of Cox Inall and Ridgeway was engaged to:

- facilitate nine state-wide community forums,
- attend meetings with Aboriginal Affairs and NSWALC to prepare community forums,
- be available for other meetings and discussion as required during the term of the agreement,
- lead a final debriefing with Aboriginal Affairs at the conclusion of workshops,
- provide a comprehensive final report on the community forums to assist the Minister's review process.

Mr Ridgeway was engaged to provide an objective and independent perspective on the current and future operation of the Act. Mr Ridgeway's esteemed career and qualifications positioned him well for the task and remit of the 2017 review. He brought extensive experience in business, public service, Australian politics and procedure, and land rights and Native Title, to the facilitation of the forums.

Mr Ridgeway was engaged from 24 May 2017 and with the submission of his final report on 26 October 2017, the services of Mr Ridgeway and his firm ceased.

## **5.3 Terms of Reference**

The terms of reference set by the Minister to guide the regional consultation forums were:

1. Inquire into and make recommendations as to whether the policy objectives of the NSW *Aboriginal Land Rights Act 1983* (the Act) remain valid, and whether the terms of the Act remain appropriate for securing those objectives, today and into the future.
2. Inquire into and make recommendations as to whether the governance, structural, regulatory and administrative arrangements of the Act support the aspirations of the NSW Aboriginal community.
3. Ensure that recommendations of the review take into account any current and emerging reforms which might impact on the operations of the Act, in particular the Aboriginal Cultural Heritage reforms.

The focus of the consultation forums was to generate innovative ideas and included:

1. Encouraging thought, generating ideas and putting forward proposals for the Minister's consideration about the future role, operation and status of the land council network and of the ALRA in NSW.
2. Inquiring into and seeking views about whether the governance, structural, regulatory and administrative arrangements of the ALRA support the aspirations of the NSW Aboriginal community.
3. Ensure that discussion and any proposals from the review take into account any current and emerging reforms which might impact on the operations of the ALRA, in particular the Aboriginal Cultural Heritage reforms.

## **5.4 Consultation**

### **5.4.1 Methodology**

The consultation process was underpinned by the following principles:

- **Inclusiveness:** consultation with broader Aboriginal interests and stakeholders in NSW together with representatives of the land rights network.
- **Respect:** facilitated engagement to elicit a wide range of views and perspectives.
- **Collaboration:** the Government and the Aboriginal community working together.

On the basis of these principles, consultation design comprised the following three key elements:

- Nine regional forums with representatives from the Aboriginal community of NSW.
- A short survey distributed to forum attendees.
- A public call for submissions open to all parties and interests.

The nine regional forums were held in the following locations in each of NSWALC regions:

<b>Place</b>	<b>Date</b>	<b>Venue</b>
Broken Hill	Wednesday, 28 June 2017	Demo Club
Wagga Wagga	Wednesday, 19 July 2017	Wagga Wagga RSL
Dubbo	Tuesday, 25 July 2017	Dubbo Zoo
Lightning Ridge	Wednesday, 26 July 2017	Walanbaa Dhuruli
Tamworth	Tuesday, 1 August 2017	IBIS Towers
Kempsey	Wednesday, 9 August 2017	Kempsey Macleay RSL
Lismore	Wednesday, 16 August 2017	Goonellabah Sports Club
Sydney	Wednesday, 23 August 2017	Rooty Hill Novotel
Batemans Bay	Wednesday, 30 August 2017	Coachhouse Marina

Following three briefings with NSWALC and Aboriginal Affairs, the independent facilitator, Mr Aden Ridgeway, developed a presentation based on the following key themes to facilitate a dialogue to address the terms of reference:

- Governance
- Decision making and representation
- Capacity
- Land, culture and heritage, including Native Title
- Partnerships, collaboration and coordination.

The community was not asked to consider or endorse any specific policy proposals for amendment to the Act, or to engage in detailed discussion or analysis of other government reforms. But, the forums were open and flexible to the needs and directions of each group. The primary aim in each forum was to identify strategic, collaborative and innovative proposals to realise optimum outcomes and opportunities for the Act, for the entire Aboriginal community of NSW to use and benefit from, into the future.

Participants in the forums were directly invited. The basis of this approach, in contrast to open public forums (the usual practice of past consultations) was to craft a targeted and strategic dialogue with Aboriginal people about the immediate and long term future of the Act. As the prime stakeholders, all LALCs were invited to nominate two representatives from their LALC to attend a forum.

In addition to LALCs, direct invitations were also sent to a range of Aboriginal community organisations, service providers and other Aboriginal interested parties to attend the forums. The purpose of directly inviting other organisations and interested parties was to bring additional expertise, experience and views of the NSW Aboriginal community together, to facilitate a broad and targeted discussion about the potential for synergy and collaboration for the benefit of the Aboriginal community of NSW as a whole. This approach was based on the primacy of the Act, as the principal legal instrument for Aboriginal people in NSW most capable of delivering self-determination.

The aim was to have the following Aboriginal interested parties included and represented in each forum:

- LALCS and NSWALC

- People with Native Title interests
- Aboriginal Owners
- Local Decision Making Alliances
- Aboriginal housing providers
- Other key Aboriginal organisations, corporations and service providers.

A total of 234 people attended the forums representing 156 organisations, of which the majority were from LALCs. Nineteen other organisations attended predominantly representing local decision making bodies, housing, Native Title and traditional owner interests.

NSWALC staff and Councillors were in attendance and participated in the discussions at all forums. Aboriginal Affairs officers and staff from the Office of the Registrar of the Act also attended the majority of the forums, but did not participate in the discussion. Except for some non-Aboriginal staff attending from Aboriginal Affairs, NSWALC and the Registrar's Office, the forums were exclusively attended by Aboriginal people. Government agencies and local government associations were not invited so that discussion would not be constrained.

There was some opposition expressed to the consultation approach adopted, both in relation to the attendance by invitation only, and for some LALCs, the invitation to other Aboriginal groups into the review process of the Act. However, other attendees welcomed and embraced the idea. It is also important to note that anyone who attended the forum that had not been directly invited or registered were welcomed and participated in the discussions.

#### **5.4.2 Independent Facilitator's Report**

The facilitator's report is available at <http://www.aboriginalaffairs.nsw.gov.au/alra>. It outlines the approach and methodology undertaken to convene the nine regional forums, together with the 'insights and recommendations' derived from the content discussed in the forums, and the results of the survey distributed to all persons invited and/or participating. A detailed record and commentary of the issues raised in each of the regional forums were included as appendices to the report. It should be noted that the report's recommendations are those of forum attendees and not those of the facilitator.

The facilitator's Summary of Findings and Outcomes (para. 1.4 at page 2 of report) lists the 'Top 5' priorities identified by LALCs in the forums, being:

- Funding (ongoing)
- Land claims backlog
- Local Government and planning processes
- Native Title
- Proactive and Strategic Approach.

In relation to the above, it should be noted that LALCs receive annual funding allocations from NSWALC, which has the statutory function of providing funding for LALC operations under section 106(8)(e) of the Act. NSWALC determines those allocations and other grants to LALCs subject to the budgetary pressures and

broader budgetary policy it applies in its management of the SIF. The funding issue for LALCs, raised in the forums, cannot be alleviated by amending the ALRA.

However, the forums presented a unanimous call for a resumption of NSW Government contribution to the SIF by reintroducing the ongoing diversion of a percentage of land tax to the SIF (page 3). This proposal is not one that can be unilaterally considered or implemented by the Minister as an amendment to the Act, but requires consideration in the context of a broader conversation with NSWALC and the LALC network. NSWALC's submission to this 2017 review (see below, and Appendix 1 at p.2)) did not repeat the forum call for a 'land tax' solution but referred to the need to resource Aboriginal communities' "capacity, community and economic development programs" in the context of a codified and possible 'Treaty process'. NSWALC may instigate further discussion with the NSW Government on this broader issue.

The land claims backlog is being addressed via the 2014 Amendment Act which provides a framework for broad negotiations, between LALCs and NSWALC and the Minister for Crown Lands, of one-off settlements of multiple land claims known as Aboriginal Land Agreements (ALAs). ALAs may also provide for land swaps by which LALCs can exchange land of low value or utility for land with zoning that has potential for economic development. This process overcomes scenarios where the zoning of land claimed by LALCs has changed prior to the eventual transfer of the land to a LALC.

The Minister administering the *Crown Lands Act 1989* is responsible for resourcing and investigating the process for determining Aboriginal land claims.

LALCs should be supported by NSWALC in proactively engaging with local councils to assert their interests in land use and zoning.

The interaction of land rights under the Act and Native Title rights under the Commonwealth *Native Title Act 1993* is widely acknowledged as a source of conflict in Aboriginal communities and is amenable to legislative amendment to ameliorate those conflicts. The Minister for Aboriginal Affairs is committed to exploring ways to make the Act more accommodating of Native Title interests and at the same time facilitating LALC management of their land holdings where Native Title interests subsist. Any work on amending section 42 of the Act will need to be progressed in consultation with relevant stakeholders. NSWALC's submission states it welcomes further discussion to facilitate 'better interactions and outcomes' for both LALCs and Native Title groups.

The facilitator's report notes (at page 4) that LALCs recognise that positive change for them will not necessarily derive from legislative change to the Act, but rather through proactively managing their external relationships with local government, and in constructive approaches to planning and Native Title.

The facilitator's report also presents a more comprehensive list of the core and consistent themes and issues arising in each forum as:

*Undetermined land claims* – the backlog of over 33,000 undetermined land claims remains a major concern and source of frustration. There is a widespread view that the backlog of land claims is denying Aboriginal people the compensatory benefits intended from the land claim process under the Act. While the facilitator found the objective of the Act in providing land rights for Aboriginal people in NSW and compensation for dispossession is valid, he argues that outcomes against this objective are not being achieved due to the backlog of unresolved land claims.

*Economic development* – there is a strong desire in Aboriginal communities and LALCs to be involved in economic development. However, there is frustration that there are limited resources and long term capacity to do so, and that the slow land claim process is hindering opportunities to make economic plans and gains.

*Governance* – the forums acknowledged the need to have a strong regulatory system in place, including support for punitive measures for wrongdoing. However, there is concern the regulatory requirements of the Act are complex and overly onerous in contrast to other comparable businesses and corporations. The facilitator concluded that there are insufficient funding and resources required to meet compliance requirements of the Act, and for Aboriginal Land Councils to engage in strategic and proactive activities sustainably.

*Capacity building* – there is a consistent call for funding and training to build the capacity of staff and Board members of LALCs to fulfil the objectives of the Act and LALC functions. In particular, more in depth governance, financial reporting and leadership training are considered priority areas, together with targeted training on the compliance requirements of the Act. The facilitator concluded the training and capacity of LALCs, particularly with regard to governance, is required to improve the internal efficacy of LALCs and to promote business development to tap into emerging procurement and service delivery opportunities.

*Service delivery* – many LALCs are under community pressure to diversify their activities and provide other services. LALCs want to play a more central role in relation to government service provision, particularly informing how and who delivers services to Aboriginal communities, including involvement in processes to hold service delivery providers accountable. There is interest in greater involvement in the OCHRE Local Decision Making (LDM) initiative, coupled with the desire to provide direct services to communities through business enterprise, Community Benefits Schemes, or through Indigenous Procurement Policy (IPP) opportunities.

*Emerging reforms and collaboration* – LALCs want to build their capacity to engage, advocate and influence emerging government reforms. They want to be proactive rather than reactive to emerging issues relevant to the divestment of Crown lands, Native Title, LDM, Aboriginal culture and heritage legislation, Indigenous Procurement Policy, Indigenous Advancement Strategy and their engagement with local government.

*Local Government* – all forums highlighted the importance of engagement with local governments, yet it was found most LALCs have mixed relations with local and shire councils. LALCs conveyed that they are not being engaged, or engaged appropriately in the early stages of local government developments and planning

processes. It was claimed in some cases, the level of services provided by certain local governments to LALC owned lands (usually the former missions and reserves) are not commensurate with other rate payers, or the rates being paid by LALCs. The facilitator concluded that relationships with local government and issues with environmental zoning of Aboriginal lands, the divestment of Crown Lands, Native Title, and planning laws are restricting how Aboriginal people can exercise their land rights and use of lands once granted under the Act

*Membership and representation* – ALC membership matters were widely discussed ranging from policy to procedural matters. Matters relating to membership approval, the complexity and confusion of some provisions in the Act (such as inactive members and suspensions) and the complexity of roll management, meeting and quorum requirements were all consistently raised and debated in the forums. Broader strategies with regard to engaging youth, succession and leadership were also discussed and considered priorities. The ‘confirmation of Aboriginality’ continues to be a challenge for LALCs, and the forums acknowledged there was no simple solution to this issue. There is a need for further comprehensive discussion to come up with a better legislative mechanism with regard to confirmation of Aboriginality, and its connection with LALC membership requirements. The need to develop a strategic regional approach to establish LALC advocacy, planning and resourcing was canvassed and considered a priority.

*Native Title* – all forums were in agreement that the current state of affairs regarding interaction between the Act and the Native Title Act 1983 (C’wltth) (NTA) was not productive or sustainable. It was proposed that NSWALC, NTSCorp and the NSW Government need to work collaboratively to better the ways the Act and the NTA operate together. The objective of the Act in providing for representative Aboriginal land councils in NSW is being challenged by Native Title and cultural heritage law reforms that seek to give greater recognition to the rights of traditional owners, and discussions about treaties between Aboriginal nations and the NSW Government. While ALCs seek to engage with these issues, the facilitator concluded the workability of the Act with Native Title needs harmonisation and recommended that consideration is given to reforms to Aboriginal land council structure to make it more compatible with the rights of Traditional Owners.

*Housing and Home Ownership* – there is some interest in looking beyond collective rental to home ownership, through rent-buy programs run by LALCs. However, discussion also acknowledged the ongoing complexity of sustainable housing management in Aboriginal communities, especially on the former missions and reserves.

*Innovation* – there was widespread interest in the potential for innovation, specifically in ways to streamline administrative reporting and accounting to free up time and resources for LALCs to be dedicated to other priorities.

*Water Rights* – there is a consistent view that the Act should explicitly include water rights, and that the exclusion of water rights is a fundamental flaw in the Act which needs rectifying. Water rights are important to Aboriginal people for cultural and economic reasons.

## **Survey Results**

In addition to the forums an online confidential survey comprising seven questions and one open ended question was distributed to participants. A total of 28 surveys were completed and returned. Overall, the survey revealed the priority concerns of LALCs to be the return of land, and culture and heritage, followed by economic opportunity and outcomes, and then social services and benefits.

Furthermore, the survey highlighted the need for more training and education opportunities for LALC Board members, LALC members and the wider Aboriginal community, specifically in corporate governance, finance, bookkeeping and administrative skills.

The survey results also suggest that with the right support, greater economic benefits could be delivered through the Act. The survey results highlight the barriers to economic development are zoning constraints, disparity of land values between coastal areas and inland NSW, and that LALCs are burdened with multiple rates and charges.

Ideas put forward to improve economic development opportunities within Aboriginal communities included greater opportunity for LALCs to invest using the NSWALC Statutory Fund, and for NSWALC to invest in greater training and support for LALCs.

The survey identified that the number one issue adversely impacting the success of the Act is the backlog of land claims, and the slow return of land from the government.

### **5.4.3 Recommendations**

The facilitator reported the following recommendations from forum participants for the Minister's consideration:

- a. Funding is increased to provide LALCs with additional staff to reduce the administrative burden of compliance with the Act, and/or ways are investigated to streamline the compliance processes (including digitisation).
- b. NSWALC expand its compulsory governance training and explore partnerships with organisations such as the Office of the Registrar of Indigenous Corporations (ORIC) or the Australian Institute of Company Directors (AICD) to help build land council capacity.
- c. Amendment to Section 42 of the Act is considered, namely to change the interplay between land rights and Native Title, specifically to provide laws for all land owners to be treated in the same manner with regard to Native Title.
- d. Legislative and/or policy changes are considered to ease the regulatory requirements upon Aboriginal Land Councils regarding:
  - suspension of disruptive members;
  - strategic and proactive approaches to participate in or address emerging issues;
  - self-review of the Act tied to the NSWALC state-wide conferences.
- e. The NSW Government and local governments make land information available to Aboriginal Land Councils to assist in land mapping, valuation and surveying.
- f. The Registrar of the Act considers the specific areas of uncertainty identified regarding membership and quorum requirements in this report, and issues a directive to LALCs explaining the new rules.

- g. The Registrar of the Act issues a governance directive that clarifies:
  - The circumstances in which it is permissible to remunerate a board member and whether there should be an exemption for board members undertaking culture and heritage work.
  - The mechanism for filling casual board vacancies and how land councils form a quorum when there are vacancies.
  - The process for removing a board member and ways this process might be made easier.
  - The circumstances in which a board member is ruled ineligible for having a criminal record, including the types of offences and process a board should undertake when they become aware of a member's criminal history.
- h. NSWALC leads further discussion in consultation with LALCs about ways the certification of Aboriginality, including appropriate internal policies and procedures might be put in place to ensure the integrity of certification.
- i. NSW Government and local governments change their perception that Aboriginal Land Councils exist only for the purpose of claiming land, by promoting recognition of the broader role Aboriginal Land Councils play in NSW.
- j. The NSW Government consider, in consultation with LALCs and NSWALC, ways the Act might be reformed to make it more compatible with the proposed Aboriginal Culture and Heritage reforms.
- k. The NSWALC and the NSW Government consider practical steps they can take to enable LALCs to develop businesses and access opportunities under the indigenous procurement policies of the NSW and Commonwealth governments.
- l. The NSW Government consider ways to better utilise Aboriginal Land Councils as existing and embedded community governance structures in NSW.
- m. The NSW Government and/or NSWALC provide more support to assist LALCs to identify opportunities to take on service provision roles, or expand their existing service delivery roles (an example given, was opportunities under the Indigenous Advancement Strategy, where funding will be given to Aboriginal organisations rather than non-Aboriginal NGOs).
- n. The NSW Government consider amendments to local government legislation to improve recognition of LALCs politically, and promote the potential held in LALC-owned land via existing or reformed planning instruments.

This 2017 review report notes that the above recommendations focus primarily on administrative measures that NSWALC and the Registrar might consider to assist efficiencies in LALCs application of the Act's provisions rather than the need for legislative amendment.

## **5.5 Submissions**

The consultation process included an open public invitation for written submissions. A total of three submissions were received from:

- The NSW Aboriginal Land Council;
- Arnold Bloch Leibler, Lawyers and Advisers; and
- The Independent Commission Against Corruption (ICAC).

The public call for written submissions was promoted on both the Aboriginal Affairs and NSWALC websites, in the invitations sent, in the forums, and through Aboriginal Affairs networks.

The independent consultant's report and all public submissions received by the Minister were provided to NSWALC to inform its submission. This information sharing exercise was undertaken to complement NSWALC's advice to the Minister. The submissions may be viewed at <http://www.aboriginalaffairs.nsw.gov.au/alra>.

### **5.5.1 Submission from the NSW Aboriginal Land Council**

The NSWALC submission to the Minister proposes that the review process undertaken in 2017 highlighted the significance of Aboriginal land rights to the Aboriginal community of NSW. While noting the Act is not without challenges, NSWALC also confirmed that the LALC network is *"the most significant vehicle for Aboriginal self-determination in NSW, providing a democratically inclusive infrastructure of Aboriginal community planning, decision making and development"*. NSWALC affirmed its view, to address the current challenges and to facilitate the opportunities the Act provides Aboriginal people of NSW, significant legislative reform of the Act is not required at this time, notwithstanding any miscellaneous amendments that may be identified or useful.

The NSWALC submission highlights resourcing, planning, Aboriginal cultural heritage issues and promotes NSWALC's recent public call for a treaty process *"to codify, and provide certainty about, the relationship between the Government and Aboriginal peoples in [NSW]"*. The submission notes that the framework of the Act provides a basis for a treaty process to be undertaken in NSW. NSWALC's involvement and participation in the forums, coupled with consideration of the facilitator's interim report and the public submissions received informed the NSWALC submission. NSWALC's observations and undertakings in relation to the key themes identified in the review process are as follows:

*Accountability standards* – NSWALC is committed to supporting and fostering good governance and the improvement in regulatory compliance including *"work[ing] collectively and collaboratively with the Government and the Office of the Registrar [of the Act] to improve the support, guidance and capacity building available to LALCs"*.

*Capacity building and training* – NSWALC is committed to reviewing its capacity development plan for LALCs in collaboration with the Office of the Registrar and the Government.

*Building capacity to engage with emerging issues* – NSWALC notes there is strong need to build on the investment of the Act to support LALCs providing the foundation infrastructure of Aboriginal community governance across NSW.

*Emerging reforms and issues* – NSWALC proposes government reforms must build on LALCs as multi-faceted, community controlled, state-wide infrastructure to assist in the engagement with the Aboriginal community, and to provide for coordination within government. NSWALC advises Government reforms should not be undertaken in isolation, specifically in relation to the proposed Aboriginal culture and heritage legislation for NSW. NSWALC note that the Aboriginal culture and heritage reforms *"were always intended to be the second stage of the Aboriginal land rights ... and must build on and complement [the Act]."*

*Local government* – NSWALC confirms its commitment to working with government and Local Government NSW (LGNSW) to improve the relationships between LALCs and local governments throughout NSW.

*Backlog of unresolved claims* – NSWALC acknowledges the improved relations with the NSW Government in addressing the backlog of unresolved land claims. However, NSWALC notes that the Aboriginal Land Agreement process has limited resourcing of four years duration. NSWALC asserts improved support to LALCs is needed to fully realise the benefits of land granted.

*Native Title* – NSWALC proposes legislative reforms are made to simplify the interaction between the Act and Native Title laws. Specifically, NSWALC proposes some reform with regard to section 42 of the Act is required. To facilitate the reform and to better the interaction of the Act and Native Title generally, NSWALC welcomes discussion with the relevant Native Title groups including NTS Corp.

*Aboriginal Owners* – NSWALC strongly recommends the NSW Government provides resources for registration of Aboriginal Owners in relation to NSW national parks, and more broadly across NSW to provide legal recognition of Aboriginal traditional connection to Country which is less onerous than Native Title.

*Membership* – NSWALC acknowledges the challenges associated with the membership provisions and processes of the Act. NSWALC supports and proposes collaborative work between the Registrar of the Act, NSWALC and Aboriginal Affairs to improve membership compliance and issues, and to promote a more active membership in the operation the Act and LALCs.

*Aboriginality* – NSWALC affirms that matters regarding identity and confirmation of Aboriginality are matters which “*remain firmly in [Aboriginal] community hands*”. NSWALC supports collaboration between the Registrar of the Act, NSWALC and Aboriginal Affairs to ensure robust and respectful membership processes are in place.

The complete NSWALC submission is attached to this report at **Appendix 1**.

### **5.5.2 Submission from Arnold Bloch Leibler Lawyers and Advisers**

Arnold Bloch Leibler Lawyers and Advisers’ (ABL) submission focused on LALC membership and Community Benefit Schemes (CBS). The following recommendations were made for the Minister’s consideration:

- 1) make it clear that each LALC must take reasonable steps to promote applications for membership of the LALC;
- 2) clarify the decision making power of a LALC in relation to applications for membership of a LALC and clarify the procedure for determining applications for membership of a LALC;
- 3) clarify the decision making power of a LALC Board in relation to the administration of Community Benefit Schemes (CBSs);
- 4) make it clear that the decision making powers of each LALC must be exercised consistently with the objects of each LALC; and
- 5) provide clear requirements in relation to the adoption and implementation of policies by each LALC.

### **5.5.3 Submission from the Independent Commission Against Corruption**

The Independent Commission Against Corruption (ICAC) submission drew on its report on *Governance and regulation in the NSW Aboriginal Land Council network* released in May 2017, and certain LALC investigations it had undertaken in recent years (see [www.icac.nsw.gov.au](http://www.icac.nsw.gov.au)). The following recommendations were made:

- 1) That the Minister consider the resource implications of future amendments to the Act in consultation with the NSW Aboriginal Land Council, given that the network bears the costs of such amendments.
- 2) That the Minister review Part 10 of the ALRA which relates to excluding individuals who have been found to have engaged in corrupt conduct or serious misconduct, for a period of up to 5 years.
- 3) Amending the Act and Regulation so that the Model Code of Conduct is applicable to not only board members, but to Chief Executive Officer's (CEO's), staff and contracted consultants and, include a model code of conduct for LALC members. This amendment would also clarify the basis for suspension of members based on unacceptable conduct.
- 4) A review of resourcing of the Registrar's office to enable the Registrar's Office to implement the full scope of the regulatory role.
- 5) The NSW Government consider amending the Act to provide for an 'incorporation purpose test' to ensure that the purpose, cost, effectiveness and efficiency of corporate entities created by LALCs, is established as a risk mitigation measure.

### **5.6 Consideration of findings**

The Minister for Aboriginal Affairs has considered the specific findings and observations of the 2017 review, including the facilitator's report on the regional consultation forums, the NSWALC submission and all public submissions received.

The themes and areas highlighted for future work, including some recommendations for amendment to the legislation, have been referred to Aboriginal Affairs to develop further with NSWALC and the broader Aboriginal community. Importantly, all future policy work or amendments will be pursued in the context and progress of other Aboriginal affairs reforms underway in NSW. These include, but are not limited to, the expansion of *OCHRE* and its initiatives, improved Native Title administration, and the introduction of new Aboriginal cultural heritage legislation. All works undertaken will involve collaboration with NSWALC, and consultation with LALCs and the broader Aboriginal community of NSW.

The findings of the review and future actions are discussed in further detail in section 6 of this report.

### **5.7 Tabling of the report**

In accordance with Section 252A of the Act, the Minister will table this report in both houses of the Parliament within twelve months of 4 December 2016.

## 6 FINDINGS

### 6.1 Overview

The Act is unique in Australia with the breadth of rights and potential it provides Aboriginal people to strengthen and improve their lives and communities. However, it has been found the potential envisaged for the operation of the Act is still to be fully realised, both for the Aboriginal people of NSW and the state as a whole.

The facilitator reported that some LALCs have evolved into strong community organisations, providing leadership and a range of services while others are grappling with the administrative and regulatory challenges of the Act which have evolved with the complexity of LALCs operating environment and the significant increase in assets owned and managed by the network. The facilitator also reported that LALCs expressed a feeling of being “left out in the cold” with regard to current government reforms, and can be “*viewed narrowly by the wider community as existing only for the purpose to claim land*”. The terms of reference of the review aimed to elicit views on these prevalent issues.

Overall, the 2017 review has identified from a number of parties involved in the operation of the Act, the potential for greater realisation of its intents and purposes. These parties include NSW Government agencies, local governments, the NSWALC, LALCs, and other Aboriginal community bodies and people of NSW. To see improvement, further education is required to foster a better understanding of the operation of the Act in NSW. Other improvements may be found in relationship building initiatives, particularly local government, and more strategic use of resources by all parties, to see greater efficiency and better outcomes for land rights in NSW. For example, the large number of undetermined land claims, which remains a major concern, will benefit from greater understanding of the Act and collaboration between all levels of Government and the Aboriginal community of NSW. This 2017 report identifies the most prevalent issues and challenges revealed by the review process, where improvement is most needed. These findings do not propose any changes or “solutions” to the challenges identified with the current operation of the Act and the ALC network, at this time. However, the findings of this 2017 review mark the beginning of future strategic thinking and collaboration between the Government and the Aboriginal community to see the Act enhanced for ongoing empowerment and opportunity for the Aboriginal people of NSW. With the passing of amendments to the Act that commenced operation in July 2015, marking the final phase of the previous review, and the further governance-focused amendments to the Act in early 2017, this 2017 review report finds that the terms of the Act remain appropriate for achieving its objectives. The findings of this 2017 report propose to raise questions, rather than determine “answers” or a set of prescribed legislative or policy changes to be made. The four key areas identified where further research, investigation, collaboration and creative thinking, appears to be most pressing are listed and discussed briefly below.

### 6.2 Regulation

While there is broad agreement with the need for a strong regulatory system, including the demand and acceptance of high accountability standards, the

complexity of the regulatory framework of the Act continues to be an issue. Concerns and frustration include views that the regulatory framework is onerous and impedes stronger participation and productivity. Similarly, some LALCs express confusion about the roles and responsibilities of the regulators (NSWALC and the Office of the Registrar), including possible duplication of functions, and limited resources in the provision of them.

These matters remain prevalent despite a major overhaul of the regulatory framework of the Act from 2013 to 2017 which included:

- In 2013, a Bill of miscellaneous amendments was passed by the Parliament to improve efficiency and reduce onerous regulatory requirements to assist and enhance LALCs and NSWALC in their day-to-day operations.
- In 2014, a Bill of comprehensive amendments was passed by the Parliament that:
  - Streamlined the social housing management approval process.
  - Created targeted reporting and compliance obligations instead of one-size-fits all compliance including reduced reporting requirements for smaller LALCs.
  - Strengthened enforcement mechanisms to ensure greater protection for community assets.
- In 2017, a Bill of amendments was passed by the Parliament that created a Performance Improvement and Interventions Framework to focus on early intervention to support good governance and build the capacity of LALCs.

It may be too early to affirm if the regulatory changes made in the past five years have had enough time to test their long term effectiveness. Alternatively, the regulatory framework of the Act may require more fundamental change to fulfil its policy objectives comprehensively. This is a question for future work. The ongoing concern that the regulatory requirements of the Act and NSWALC policy burdens LALCs, to the point where LALCs are limited in fulfilling their community aspirations and obligations, may be a structural issue, but particularly reflect the difficulty of the Act's provisions being uniformly appropriate for the great diversity of assets, operations and capacity within the 120 LALCs. The principal changes made to the Act in 2006, namely the move to a corporate governance model (Boards and CEOs) and mandatory community, land and business planning had been proposed by a working group which also anticipated a reduction in the number of LALCs to about 60 with a view to increasing their size and capacity.

Additionally, the ALRA regulators have vastly more numerous and complex compliance matters to oversee than was envisaged for the 60 LALCs in the corporate and network design initially proposed and recommended by the Working Group who reviewed the Act in 2006. The increase in regulatory oversight of the election of Boards, oversight of the compliance and governance of approximately 800 voluntary Board members, and more complex land dealings and community business planning, coupled with the standard financial reporting and record keeping requirements of corporations for 120 LALCs is highly costly.

Notwithstanding these observations, the Act generally has a relatively small number of people and organisations to oversee, within the limited area of NSW. And yet, it has been found that aspects of the regulatory framework and systems remain

complex and confusing to members and external parties. The ICAC submission, and its *Governance and regulation in the NSW Aboriginal Land Council network* report released in May 2017, explored and mentioned some of these regulatory issues. In its submission the ICAC made the specific recommendation for:

*A review of resourcing of the Registrar's office [is undertaken] to enable the Registrar's office to implement the full scope of the regulatory role.*

The Act must have and maintain strong governance, supported by sound, accessible and efficient regulatory processes. However, there is also clearly ongoing concern, frustration and struggle with the regulatory requirements of the Act put upon LALCs, volunteers and even the regulators. These matters may have their source in the capacity of some LALCs and the structure of the network more than reflecting an inappropriate regulatory framework. These matters will require future consideration and work to find ways to make the regulatory and compliance framework better and easy to engage with. This review report supports the NSWALC's undertaking to "work collectively with the Government and the Office of the Registrar to improve the support, guidance and capacity building available to LALCs" (Appendix 1 at p.3). If that work identifies areas where the Act might be amended to increase the capacity of LALCs to meet their compliance obligations and better engage with emerging issues and deliver on community expectations the NSW Government will consider appropriate proposals.

### **6.3 Structure and sustainability**

The evolution of the Act has seen significant amendments made since its inception in 1983. The amendments made have progressively improved the operation of the Act, but in doing so they have also increased the overall costs (both financial and administrative) to the land rights network. A sustainable and well-resourced network of LALCs empowered and capable of working with all tiers of government, business and Aboriginal communities is critical for the future operation of the Act. Additionally, the value of the NSWALC Statutory Fund must be maintained and strengthened for future generations, including the capacity for it to endure the volatility of financial markets and a shifting global economy.

There has been a consistent call for greater support and resourcing to build the capacity of the network in this review, in past reviews also, and in relation to other government reforms mentioned in this report that are currently underway and impact Aboriginal interests in NSW. Many of the challenges endemic to the operation of the Act and LALCs stem from the varying capacity of Boards, CEOs and members. Greater capacity within LALCs would mean they function more efficiently and be equipped to take on broader community roles to foster the best interests of Aboriginal people within their areas, for example, by stronger engagement with local government. However, with limited resources this critical task of addressing capacity issues remains a perennial challenge. The limits in capacity may also be a disincentive to membership and participation in the network. It is expected that the performance improvement measures in the 2017 amendments to the Act will assist with capacity issues and NSWALC's submission refers to its intention to place more focus on LALC support.

## 6.4 Jurisdiction, membership and representation

A well governed, representative and empowered Aboriginal jurisdiction is of prime importance for the Aboriginal community of NSW, the government and the wider NSW public. Indeed since 1983 this has and remains fundamental to the intention of the Act and its operation. An empowered Aboriginal jurisdiction will be assured through a broad membership base to strengthen the Act, through an open and inclusive application process capable of increasing and empowering the whole Aboriginal community of NSW. Such jurisdiction has the potential to hold comparable status to local government representation as authority for Aboriginal people throughout NSW.

At present barely twenty percent of eligible adult Aboriginal people are registered as members of LALCs, which also make up the electoral roll for NSWALC elections. NSWALC's advocacy for support of the centrality and capacity of the ALRA to deliver on broader Aboriginal community aspirations depends on increasing the active engagement of members in LALC affairs (Appendix page 5). For NSWALC and LALCs to have greater prominence and partnership with the state and other parties, an increase in membership and participation will further their pre-eminence in the NSW polity and economy.

Importantly, an increased land rights membership will also provide the legal vehicle to bring together the many Aboriginal groups and interests operating in NSW to engage directly with governments on any matter. This is particularly critical in relation to a range of government reforms underway in NSW that impact on, or are at the heart of Aboriginal peoples' rights, interests and lives. Many of the reforms are focused on or will rely on the Act as a key component for the objectives of the various reforms to be structured. A clarified or, in NSWALC's words, 'codified', Aboriginal jurisdiction through the operation of the Act, as the state's principal statute for Aboriginal people, is critical for the success of the reforms and their implementation.

### Current Reforms

The reforms of particular importance in relation to the Act, NSWALC and LALCs include:

#### *Land (access, management and ownership)*

- **Aboriginal Land Agreements**, enabling negotiated settlements of the nearly 33,000 currently unresolved Aboriginal land claims in NSW.
- **Travelling stock reserves review**, to review the management, use and regulation of the reserves, as owned by the Crown.
- **Crown Land Negotiation Program**, that aims to improve the management, use and regulation of Crown land by identifying the appropriate future owner (ie local government and LALCs).
- **General Purpose Standing Committee Inquiry into Crown Land.**

#### *Land-related*

- **Standing Committee on State Development Parliamentary Inquiry into economic development in Aboriginal communities in NSW.**

- **Standing Committee on State Development** Parliamentary Inquiry into regional planning processes in NSW.
- **Biodiversity**, to improve and streamline the management and regulation of biodiversity in NSW (biodiversity has cultural and economic significance for Aboriginal peoples).

#### *Cultural rights*

- **Aboriginal cultural heritage**, to introduce new stand-alone legislation for the protection and management of Aboriginal cultural heritage.
- **Fisheries management**, to protect stocks and allow for the exercise of Aboriginal cultural rights and interests.

#### *Service-related*

- **Aboriginal Community Land and Infrastructure Project**, to improve services in the discrete Aboriginal communities of NSW, and potentially provide the means for private home ownership.
- **Aboriginal and public housing**, to improve Aboriginal housing strategies and the liveability for Aboriginal peoples in rental housing.

#### *Relationship/Engagement*

- **OCHRE**, the expansion of the Aboriginal Affairs Plan in particular Local Decision Making.

#### **Membership considerations**

How to increase the membership and build a definitive Aboriginal jurisdiction will require further work, consultation and consideration by the Aboriginal community. At present membership is voluntary and requires an application process where the LALC membership (at a duly constituted members' meeting) determines an individual's eligibility. LALCs in the consultation forums expressed the view that the membership application process can be confusing, leading to contention in some communities. This is mainly because the membership provisions require an individual to meet certain qualifications in context with the "three pronged" definition of Aboriginality defined under Section 4 of the Act, which defines an "Aboriginal person":

- a) is a member of the Aboriginal race of Australia, and
- b) identifies as an Aboriginal person, and
- c) is accepted by the Aboriginal community as an Aboriginal person.

The membership requirements under Section 54 of the Act provides that adult Aboriginal persons may qualify to become a member of a LALC if they:

- reside within the LALC area, or
- have an association with the area, and
- have been accepted as being *qualified* by a meeting of the LALC as a member.

The "qualification" pertains to meeting the definition of "Aboriginal person" under Section 4 of the Act. However, issues and contention arise in the process because the Aboriginal community of NSW is not limited to LALCs and the membership of the Act. Therefore, some Aboriginal people may be "accepted by the Aboriginal community", that is by other Aboriginal groups and people, but not necessarily

accepted by the LALC approving membership applications. The process can exclude many Aboriginal people from being involved and contributing to the future success of the Act and its full potential. The ABL submission in part directly addressed these issues, asserting a lack of clarity in the membership process and the difficulty many Aboriginal people encounter in seeking membership, thwarting their efforts to be actively involved in the Act and their LALC. ABL specifically recommended clarifying:

*The decision making power of a LALC in relation to applications for membership of a LALC [and] ... the procedure for determining applications for membership of a LALC.*

Membership issues are ongoing, evidenced by the persistent number of correspondence and community calls the regulators receive each year regarding LALC membership issues. These matters align with the independent facilitator's discussion and concern that young Aboriginal people are not joining their LALCs at a rate commensurate with the growing demographic of young Aboriginal people, which is substantially faster than non-Aboriginal people in the same cohort and will continue to grow. The facilitator also pointed out the need for succession planning in LALCs to reduce the burden on elders in future years. These matters will not be addressed, nor will the LALC network or NSWALC grow if membership remains static or decreases.

LALCs in the forums expressed uncertainty about the process and appropriate standards of evidence for determining whether applicants meet the required qualifications. The facilitator's report notes recommendations from the forums for the Office of the Registrar to issue directives to LALCs to guide them in implementing the Act's provisions relating to 'inactive' members, and that NSWALC lead discussions with LALCs to assist them in dealing with issues of 'Aboriginality' and membership applications (page 5). NSWALC's submission supports the proposal that it supports and guides LALCs through membership processes in collaboration with the Registrar of the Act, and the Government (at page 6).

Increasing the size and the active engagement of membership of LALCs is likely to ensure greater representation and by effect establish a strong and definitive Aboriginal jurisdiction to empower the whole Aboriginal population of NSW. Increased membership also has the potential to bring new skills, ideas and energy into the LALC network, to see it gain strength, expertise and power to comprehensively fulfil the complete policy objectives of the Act.

## **6.5 Native Title**

The recognition of, and the ongoing management of Native Title is of great importance to Aboriginal people in NSW, the NSW Government and the people of NSW. The recognition and management of Native Title often involves a lengthy and complex legal processes in which the state is working to improve and quicken. Unlike other states and territories in Australia, the administration of Native Title in NSW also involves the interaction with the Act, which commenced ten years before Native Title laws came into operation Australia wide. This inevitably requires additional processes and consideration of the rights afforded to the Aboriginal people of NSW when Native Title is claimed, determined and agreements are negotiated.

Native Title laws and the Act give the Aboriginal people of NSW two means to gain and assert rights which can operate separately or concurrently. Together, Native Title laws and the Act provide the Aboriginal people of NSW with the opportunity to gain a range of rights, interests, access to public lands and benefits. However, the laws are conceptually different. Native Title is a pre-existing right, based on the ability to establish continuing rights derived from traditional ownership or custodianship. In contrast, the Act enables land to be returned to Aboriginal people as a matter of redress for past dispossession and the loss of traditional rights. LALC membership is mostly based on residence and does not require ongoing traditional or cultural connection. Some Crown land held by the government may be claimed by Aboriginal Land Councils. When granted, land is transferred as freehold title and is vested in Aboriginal Land Councils. Generally, land claimed and granted under the NSW ALRA does not require cultural or traditional connection. Aboriginal Land Councils may use their land like any other freehold land owner, including disposal by sale. In the event where there is any inconsistency between the NTA and the NSW ALRA, the Commonwealth legislation overrides.

The interaction between Native Title and land rights in NSW can be complex, contentious and divisive within Aboriginal communities. The facilitator reported the tensions between Native Title law and rights and the operation of the Act are ubiquitous and problematic. The facilitator explicitly found:

*.....the interplay between the ALRA and the NSW and Federal Native Title Acts, can in many cases thrust Aboriginal people operating under two separate land rights systems, into conflict with each other over the same areas of land. This creates a sometimes, tense relationship between land councils and native title groups which could be improved, starting with addressing the relationship (or lack thereof) between NSWALC and Native Title Services Corporation (NTSCorp) (p. 19).*

*....All were in agreement that the current state of affairs was not productive or sustainable and strongly wanted to see NSWALC, NTS Corp and the NSW Government work together in a positive manner to ensure that land councils are treated the same as all other landholders in respect of native title, to pursue a better working relationship with the NTS Corp, and make the Native Title legislation work more harmoniously with the ALRA (p. 19)*

A conclusive finding of this review is that a specific dialogue on the operation of Native Title and NSW land rights laws should be a priority. The necessary dialogue may be best served in two ways. First, NSWALC and NTS Corp can provide the Aboriginal people of NSW with guidance in how the considerable rights and powers under both legislative regimes can bring coordinated benefit to Aboriginal communities. These rights and powers could be a starting point of the dialogue process to see Native Title and land rights better realised in NSW. The second part of a dialogue regarding Native Title and land rights will be between the NSW Government and the Aboriginal community, primarily to devise proactive and efficient ways to work together, to ensure the best from both laws is secured for the Aboriginal people of NSW and the state of NSW.

## 7 CONCLUSION

This 2017 report constitutes the Minister's report to the Parliament, as required under section 252A of the Act. Specifically, the Act required the Minister to table a report with outcomes following a review of the Act, in both houses of the Parliament within 12 months of when the review was due to commence from December 2016.

The 2017 review process undertaken confirms that the policy objectives of the Act remain valid. Concomitantly, the review has confirmed that the terms of the Act remain functional and appropriate for securing its policy objectives, through the successful operation of a network of independent Aboriginal Land Councils, empowered with considerable land holdings and assets which provide for widespread Aboriginal representation and authority across the state of NSW.

The 2017 review was undertaken differently to past reviews in that a strategic, forward thinking dialogue was facilitated, rather than a consultation process designed to respond to a predetermined agenda or pre-developed legislative proposals. In this review, the government was genuinely seeking the strategic and aspirational views and perspectives from the Aboriginal people of NSW about the future of the Act and land rights in NSW, first and foremost. At its heart the review aimed to start a fresh conversation, however complex, divergent and mixed with the Aboriginal people of NSW to envision the future of Act. This approach stems from the foundational principle of *OCHRE The Aboriginal Affairs Plan for NSW*, which aims to be "less about government and more about Aboriginal people". This approach is achieved by asking Aboriginal people first to determine the matters in most need of attention and action.

Overall the key finding of the 2017 review is that considerable more work needs to be undertaken to continue the dialogue to see the Act meet its full potential, especially in context with a number of government reforms, particularly with regard to Aboriginal owned land and Aboriginal culture and heritage. The outcomes of the review are not a set of "solutions" or proposed legislative amendments. This review acknowledges that increased efficiencies can be achieved through increased support, guidance and capacity building in LALCs by the NSWALC and greater coordination between NSWALC and the Registrar in some cases. Importantly, the future dialogue and works will be collaborative and creative, and at all times seek the views of the Aboriginal community first to drive any changes, evolution or transformation of the Act that may be positive and beneficial.

# APPENDIX 1



New South Wales  
Aboriginal Land Council

ABN 82 726 507 500  
www.alc.org.au

The Hon. Sarah Mitchell MLC  
Minister for Early Childhood Education  
Minister for Aboriginal Affairs  
Assistant Minister for Education  
GPO Box 5341  
SYDNEY NSW 2001

24 October 2017

Dear Minister,

## **Review of the *Aboriginal Land Rights Act 1983***

Thank you for the opportunity to provide this statement on the Review of the *Aboriginal Land Rights Act 1983 (ALRA)* to you and the New South Wales Parliament.

The New South Wales Aboriginal Land Council (**NSWALC**) appreciates the important work you have undertaken in partnership with NSWALC to review the ALRA. It is this continued commitment from the Government and all sides of the Parliament to both Aboriginal Land Rights and to working in partnership with Aboriginal peoples that will deliver the much needed cultural, social and economic outcomes of the ALRA.

### **Community Consultations**

NSWALC and Local Aboriginal Land Council (**LALC**) representatives participated in the nine consultation forums held across New South Wales to:

1. Inquire into and make recommendations as to whether the policy objectives of the ALRA remain valid, and whether the terms of the Act remain appropriate for securing those objectives, today and into the future.
2. Inquire into and make recommendations as to whether the governance, structural, regulatory and administrative arrangements of the ALRA support the aspirations of the NSW Aboriginal community.
3. Ensure that recommendations of the review take into account any current and emerging reforms which might impact on the operations of the ALRA, in particular the Aboriginal Cultural Heritage reforms

The feedback from the consultations has been encouraging and we welcome the constructive discussions that have taken place.

**OUR LAND COUNCIL OUR MOB OUR FUTURE**

[www.ourmob.org.au](http://www.ourmob.org.au)

**Head Office**  
Level 5, 33 Argyle Street  
Parramatta NSW 2150  
PO Box 1125  
Parramatta NSW 2124  
Tel: 02 9689 4444  
Fax: 02 9687 1234

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

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

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

**Southern Zone**  
Unit 22, 2 Yallourn Street  
Fyshwick ACT 2609  
PO Box 619  
Queanbeyan NSW 2620  
Tel: 02 6124 3555  
Fax: 02 6280 5650

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

Based on the feedback received we provide the following comments and proposals for continuing to work with you, the Office of the Registrar of the ALRA and others to continue to enhance and build on the strengths of the ALRA.

### **Overview**

The community consultation discussions have again highlighted the significance of Aboriginal Land Rights to our communities. While not without their challenges, LALCs are the most significant vehicles for self-determination in our communities and provide democratically inclusive infrastructure for community planning, decision making and development.

The discussions have also confirmed our belief that facilitating opportunities for LALCs and our communities, and addressing challenges we face, does not require significant legislative reform of the ALRA at this time. What is clear, is that there needs to be an increase in the coordination and collaboration of efforts from across Government, the Office of the Registrar, ALRA and NSWALC to maximise the opportunities LALCs present.

While that is the case, Aboriginal Land Rights and the delivery of its full potential to Aboriginal communities faces many challenges outside of the drafting of the ALRA itself, including:

- The resourcing of capacity, community and economic development programs;
- Planning law impediments to unlocking the economic and social potential of Aboriginal Land Council lands; and
- Ongoing difficulties protecting and promoting Aboriginal culture and heritage.

### **Treaty**

These are just some of the reasons why NSWALC is calling for a treaty process to codify, and provide certainty about, the relationship between the Government and Aboriginal peoples in New South Wales. The democratically inclusive framework of the ALRA and the many achievements it has delivered to date, provide a good basis for codifying this relationship. However, it is incumbent on us all to reimagine and then reshape this relationship; to deliver the social, cultural and economic outcomes for Aboriginal peoples that will enrich New South Wales.

NSWALC strongly believes that the ALRA provides us with the opportunities and foundations for delivering these outcomes and addressing the challenges we face; with 34 years of community governance and Local Aboriginal Land Councils associated with every community across the state. However, it will also require the Government to support the centrality and capacity of the ALRA to deliver for our peoples.

### **Community Consultation – Key Themes**

NSWALC also provides the following brief commentary on the key themes highlighted in the Dr Aden Ridgeway authored: *2017 Statutory Review of the Aboriginal Land Rights Act – Report of regional community consultations*.

### **Accountability standards**

Striking the right balance between regulatory accountability and business flexibility is a challenge in any system. In the Aboriginal Land Rights system, the accountability of LALCs to our members is a paramount organising principle. However, so too is the ability of our LALCs to deliver for our members and our communities.

The community consultation discussions did not raise issues that require significant legislative reforms. However, discussions have revealed areas where additional support and guidance could assist in improving the implementation and practice of Aboriginal Land Rights as it relates to good governance; areas such as the provisions and practices relating to members participation and inactive members for example.

NSWALC is committed to supporting and fostering a culture and system of good governance and continual improvement, and to a compliance and regulatory framework which actively recognises and responds to performance as well as risk. To this aim, NSWALC seeks to work collectively and collaboratively with the Government and the Office of the Registrar, ALRA, to improve the support, guidance and capacity building available to LALCs.

### **Capacity building and training**

The broad need for capacity building was a key theme of the community consultations discussions. It is recognised that the mandatory governance training provided by NSWALC to Board members pursuant to section 65 of the ALRA, constitutes only a mandatory minimum. It is also recognised that the further success of Aboriginal Land Rights will call for improved support, advice, guidance, training and capacity building for LALCs.

To date, efforts at providing enhanced training and capacity building have been challenged by the limited resources available to provide training to the Boards, staff and members of 120 LALCs while addressing the many needs of Aboriginal communities across the state. The voluntary nature of the already extensive commitment of most individuals supporting Aboriginal Land Rights also presents a challenge for the provision of enhanced training and capacity building.

In recognising both the need and these challenges, NSWALC has committed to reviewing the capacity development plan for LALCs. Given the limited resources available to meet these capacity needs, in undertaking this task NSWALC seeks to work collectively and collaboratively with the Registrar, ALRA, the Government and other potential partners to improve the support, guidance, capacity building provided to the LALCs.

### **Building capacity to engage with emerging issues**

The community consultation discussions highlighted that community expectations drive the work of LALCs well beyond what may be seen as their core functions under the ALRA. Community expectations allied with an ever changing operating and policy environment, mean that Aboriginal Land Councils need to be equipped to meet a wide array of emerging issues, opportunities and challenges. Trends in government service delivery have also seen an increasing role for community coordination and delivery of services.

LALCs provide foundational community infrastructure across the state, for our communities to meet emerging issues and challenges, and make the most of emerging opportunities.

There is a strong need to build on the investment into the ALRA and LALCs to date. LALCs are key local Aboriginal bodies providing a range of social, cultural and economic services and opportunities. Government investment must actively recognise the role and build the capacity of LALCs to engage with emerging issues and deliver on community expectations.

### **Emerging reforms and issues**

A key and consistent message from LALCs and Aboriginal communities is that improving coordination of Government processes and engagement with Aboriginal peoples when setting policy agendas will greatly assist in facilitating the objectives of the ALRA.

There needs to be recognition that Aboriginal Land Rights is multi-faceted and that LALCs provide state-wide infrastructure for community planning, decision making and development. Reforms must build on these community controlled institutions rather than establishing government appointed governance structures, such as the Local Decision Making bodies of OCHRE. This distracts efforts away from improving existing community governance and institutes division within our communities. LALCs must also be seen as a principle point for community consultation and coordination.

Crown lands management, planning and development issues, water management, national parks, culture and heritage, service delivery, land management and natural resource management all have significant impacts on Aboriginal peoples and LALCs. These should not be addressed in isolation or with the ongoing lack of coordination. Again, the democratically inclusive framework of the ALRA provides a good basis for codifying the relationship between Government and Aboriginal peoples in these and other areas.

This is particularly needed in relation to the impending Aboriginal Culture and Heritage reforms. These reforms were always intended to be the second stage of Aboriginal Land Rights. These reforms must place Aboriginal culture and heritage in Aboriginal hands and to do so, must build on and complement the Aboriginal Land Rights system.

### **Local government**

Local Government plays a significant role in the lives of all in the community. It also presents a significant opportunity to improve the lives of Aboriginal peoples through better service delivery to Aboriginal communities, greater engagement with LALCs and providing assistance in facilitating the outcomes of the ALRA.

Relationships between Local Governments and LALCs vary significantly across the state. NSWALC is committed to working with the Government, Local Government NSW (**LGNSW**) and the Local Government sector to achieve outcomes for the communities we both represent. NSWALC is keen to further discuss practical mechanisms and opportunities to work together and build relationships between the Aboriginal Land Rights Network and Local Councils across the state.

NSWALC believes that improved outcomes for both Aboriginal and non-Aboriginal communities can be achieved in a range of areas by working together including:

- Improved community engagement with both sectors;
- Opportunities to improve the governance of both sectors through increased engagement and exchange;
- Increased protection and promotion of local Aboriginal culture and heritage;
- Delivery of improved services and infrastructure to Aboriginal communities; and
- Facilitating economic development of Aboriginal lands.

### **Backlog of unresolved claims**

The return of land to Aboriginal peoples rightly remains at the core of Aboriginal Land Rights. The centrality of land to cultural, social and economic outcomes for Aboriginal peoples cannot be overstated. However, the return of land in accordance with the ALRA and the full realisation of the intended outcomes from the return of land remains unfulfilled.

There are currently c.30,000 unresolved land claims and the administration of claims sadly remains under-resourced and slow. Improved relations with the Department of Industry, Lands and Forestry and the Aboriginal Land Agreement mechanism of s36AA of the ALRA are showing signs of delivering different outcomes for Aboriginal peoples. However, the shift to this outcomes focused processes takes time.

NSWALC is working to ensure that the Aboriginal Land Agreement mechanism delivers on the return of land and the social, cultural and economic outcomes envisaged by the ALRA. However, it is noted that the program is in its infancy and Government has only committed to four years of resourcing. Furthermore, improved support to LALCs is needed to fully realise the social, cultural and economic benefits from the return of land.

### **Native title**

NSWALC is committed to reforms that simplify interactions between Aboriginal Land Rights and Native Title, and better achieve outcomes for Aboriginal peoples in New South Wales. NSWALC supports working with NTSCORP, and both the NSW and Commonwealth Governments to achieve such reforms. In particular, NSWALC notes the agreed need for reforms to section 42 of the ALRA, which was also recognised in the 2012 Review of the ALRA.

NSWALC and NTSCORP have an existing Memorandum of Understanding which provides an important framework for progressing discussions to achieve social, cultural and economic outcomes for all Aboriginal peoples across the state. We welcome discussions on further options to facilitate better interactions and outcomes for both LALCs and Native Title groups.

### **Aboriginal Owners**

The Aboriginal Owners register of the ALRA provides a useful and inclusive mechanism for recognising Traditional Owners in the Aboriginal Land Rights regime. It also provides a less onerous definition and process for recognising traditional connection to Country. In conjunction with joint management arrangements for National Parks it provides opportunities in relation to cultural connections.

NSWALC strongly recommends that the Government supports and resources the Aboriginal Owners register for National Park management and more broadly to provide certainty in relation to future Aboriginal Culture and Heritage reforms.

### **Membership**

The membership provisions of the ALRA provide clear and appropriate mechanisms for openly democratic community self-determination. However, in practice they are not without their challenges, and the provisions can be complemented by improved guidance and support.

NSWALC supports:

- The continued guidance and oversight of the Officer of the Registrar, of the ALRA regarding compliance with membership processes. NSWALC is keen to work in partnership with the Office of the Registrar ALRA where appropriate in this regard,
- The joint development of guidance materials, systems, and advice by NSWALC, the Office of the Registrar and AANSW,
- More effectively activating the existing membership provisions of the ALRA,
- Measures to support LALC members to play their roles,
- Initiatives to encourage Aboriginal peoples to become active members of their LALC.

## **Aboriginality**

Issues of identity are inherently complex and emotive, particularly given the history of Government dispossession, displacement and assimilation of Aboriginal peoples. In recent years we have seen an increase in discussions and concerns raised about Aboriginality. It must be stated that it is important for our communities to have these discussions, and for such matters to remain firmly in our communities' hands.

While that is the case, the ALRA provides a framework for providing with the following legal definition of an Aboriginal person, the three elements of which are:

- *is a member of the Aboriginal race of Australia, and*
- *identifies as an Aboriginal person, and*
- *is accepted by the Aboriginal community as an Aboriginal person.*

The voting membership of LALCs provides local community infrastructure for the confirmation of the important third element. Robust and respectful processes around membership can provide both the needed certainty and safeguards. NSWALC supports guidance and support of LALCs through these processes through constructive and collaborative approaches with the Office of the Registrar, ALRA and the Government.

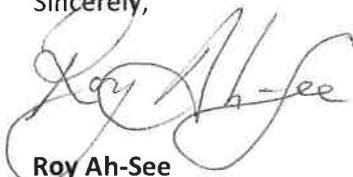
## **Next steps**

While this review has not identified the need for significant reforms, it is clear that there is a need for closer collaboration on improving the delivery of Aboriginal Land Rights. NSWALC is seeking a commitment from the Government to an ongoing mechanism for jointly developing policy and miscellaneous amendments to improve the operation of the ALRA.

Thank you for your time in considering our statement to the Aboriginal Land Rights Act Review. NSWALC remains committed to achieving social, cultural and economic independence for Aboriginal peoples in New South Wales and seeks to work in partnership with the NSW Government to achieve that outcome.

Should you require further information please contact Mr James Christian PSM, Chief Executive Officer at [james.christian@alc.org.au](mailto:james.christian@alc.org.au) or 02 9689 4444.

Sincerely,



**Roy Ah-See**

Chairman

New South Wales Aboriginal Land Council