



Submission to the NSW Government
Crown Lands Legislation White Paper

June 2014

NSW Aboriginal Land Council
33 Argyle St Parramatta NSW 2150
Phone: 02 9689 4444
Email: policy@alc.org.au

Contents

Table of Contents

Contents.....	2
1. Overview	3
2. Summary of recommendations	6
3. The reform process to date	11
4. Aboriginal Land Rights in NSW and Aboriginal interests in Crown land.....	14
5. White Paper	16
5.1 Consolidation of legislation.....	16
5.2 Proposed new objects.....	16
5.3 Rationalisation of land ownership	20
5.4 Sale and disposal of land.....	21
5.5 Crown reserves	23
5.6 Travelling Stock Reserves.....	25
5.7 Use of Crown land without permission	28
5.8 Other streamlining measures	28
5.8.1 Land assessment requirements	28
5.8.2 Notification requirements.....	29
5.9 Western Land Leases	30
5.10 Enforcement provisions	30
5.11 New business model Crown Lands Division.....	30
5.12 Abolition of commons.....	31
6. Conclusion.....	32

1. Overview

The *Aboriginal Land Rights Act 1983 (NSW)* (**ALRA**) was enacted in recognition of, and in an attempt to remedy, the ongoing effects of the dispossession of Aboriginal peoples in NSW. The ALRA significantly acknowledges and recognises the prior ownership of NSW by Aboriginal peoples. Principles of self determination and compensation are embodied in the ALRA.

The preamble of the ALRA recognises that:

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.

The ALRA was enacted by the NSW Parliament to facilitate the return of land in NSW to Aboriginal peoples through claim over Crown land.¹ The network of Aboriginal Land Councils was established to acquire and manage land as an economic base for social outcomes in Aboriginal communities. A core function of Aboriginal Land Councils is the claiming of Crown land under compensatory mechanisms of the ALRA for the dispossession of Aboriginal peoples from land as a result of colonisation.

In his Second Reading Speech the then Minister for Aboriginal Affairs Frank Walker stated:

‘In recognising prior ownership, the Government thereby recognises Aboriginal rights to obtain land. The Government believes the essential task is to ensure an equitable and viable amount of land is returned to Aborigines.’²

He also explained:

‘...[the] Government has made a clear, unequivocal decision that land rights for Aborigines is the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time it lays the basis for a self-reliant and more secure economic future for our continent’s Aboriginal custodians...’³

The claim process in the ALRA is the cornerstone for Aboriginal peoples’ realising the land justice and economic outcomes envisaged by the ALRA. The Court of Appeal has observed that the land claim process is the ‘primary mechanism’ for giving effect to the purposes set out in section 3 of the ALRA.⁴

Although Aboriginal peoples originally owned all of the State, Aboriginal land rights under the ALRA afforded only parts of the State (unused and unneeded Crown land) to be returned to Aboriginal peoples as compensation for dispossession and recognition of prior ownership. Changing the way Crown land is owned and managed in a way that may further erode the compensatory mechanisms of the ALRA is of serious concern to the NSW Aboriginal Land Council (**NSWALC**) and the network of

¹ Section 36 of the *Aboriginal Land Rights Act 1983 (NSW)* outlines claimable Crown lands in NSW

² New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5089(Frank Walker).

³ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5088 (Frank Walker).

⁴ *NSW Aboriginal Land Council v Minister Administering the Crown Lands Act* (2007) 157 LGERA 18 per Mason P (with whom Tobias JA agreed) at [20].

Local Aboriginal Land Councils (**LALCs**). It should also be noted that to date less than 0.4% of the Crown land estate has been transferred to Aboriginal Land Councils.⁵

The objects and purposes of the ALRA, and the claim process are also significant in light of Australia's obligations under the United Nations Declaration on the Rights of Indigenous Peoples which Australia ratified in April 2009. The Declaration recognises that:

'Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.'⁶

Aboriginal peoples' interests in Crown land and Aboriginal land rights cannot be separated from Crown land management. Crown land has significant Aboriginal culture and heritage values and retains cultural and spiritual significance as well as providing important opportunities to lay the basis for a self reliant and more secure economic future for Aboriginal peoples. As such is essential that the Crown land review genuinely incorporates Aboriginal peoples' interests into proposals regarding the future ownership and management of Crown land.

NSWALC has concerns regarding the approach the Government has taken in the review process to date. Despite correspondence requesting early consultation and involvement in the review process the Government has not considered the views of NSWALC or the Aboriginal Land Council network in its initial stages. The content of the White Paper proposes significant reforms that have the potential to undermine the objects and purpose of the ALRA.

NSWALC recognises that there is a need for efficient Crown lands management processes. NSWALC is dedicated to working with the Government, wherever possible, to facilitate strategies that allow the Government to deliver social, community and economic benefits through the objects of the ALRA. As such, NSWALC seeks greater involvement in the Crown lands review processes and seeks responses from the Government regarding how issues raised in this submission will be addressed.

While this submission makes comments regarding the proposals outlined in the White Paper and recommendations of the interagency steering committee, NSWALC primarily seeks to ensure that Aboriginal Land Councils interests in Crown land and the objects and purposes of the ALRA are not undermined. NSWALC seeks a commitment from the Government that Crown land will continue to be available for claim under the ALRA, and where the Government seeks to dispose of land that Aboriginal Land Councils are transferred this land through mechanisms in the ALRA or through provisions under Crown lands legislation.

The NSW Aboriginal Land Council:

The NSW Aboriginal Land Council (**NSWALC**) is the peak body representing Aboriginal peoples in NSW and with over 22,000 members, is the largest Aboriginal member based organisation in Australia. Established under the *Aboriginal Land Rights Act 1983 (ALRA)*, NSWALC is an independent, self-funded non-government organisation that has an elected governing council and the objective of improving, protecting and fostering the best interests of Aboriginal peoples in NSW.

Pursuant to the ALRA, NSWALC has the following functions amongst others:

⁵ Based on figures in *Facilitation to Enable not Frustration to Disable*, Aboriginal Land Rights Review 2012, Report of Findings and Recommendations for the Working Group, p.22

⁶ Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples

- The acquisition, control, and management of (and other dealings in) lands in accordance with the ALRA, including the claiming of Crown land;
- The protection and promotion of Aboriginal culture and heritage in NSW;
- The facilitation of business enterprises; and
- The provision of advice to the NSW Government on matters related to Aboriginal land rights.

NSWALC provides support to the network of 120 autonomous Local Aboriginal Land Councils (**LALCs**) that exist in NSW. Aboriginal Land Councils represent not only the interests of their members, but of the whole Aboriginal community.

2. Summary of recommendations

The reform process to date

Recommendation 1: The NSW Aboriginal Land Council seeks a commitment from the NSW Government for good faith cooperation, collaboration and transparency in the Crown lands review process. The NSW Aboriginal Land Council seeks a commitment that Aboriginal Land Councils will be provided opportunities to be involved in all stages of the review process into the future as well as in the development of any criteria or pilots associated with the review process.

Recommendation 2: The NSW Aboriginal Land Council recommends that the Government make publicly available the timeframe for the Crown lands review process and for the implementation of reform proposals.

Recommendation 3: The NSW Aboriginal Land Council recommends that the Government publicly releases any draft Crown lands legislation and undertakes best practice consultation processes to seek public comment on the draft legislation.

Aboriginal land rights in NSW and Aboriginal interests in Crown land

Recommendation 4: The Government should recognise that Aboriginal peoples' interests in Crown land are multifaceted and includes, but are not limited to, the use and management of land for culture and heritage purposes as well as providing economic development opportunities for Aboriginal peoples. The Government must recognise that the compensatory and remedial mechanisms of the *Aboriginal Land Rights Act 1983* are intertwined with the *Crown Lands Act* and changes to the way Crown land is owned and managed will significantly affect Aboriginal land rights.

Consolidation of legislation

Recommendation 5: The NSW Aboriginal Land Council seeks a commitment from the Government that any change to Crown lands legislation will not limit or impair the ability of Aboriginal Land Councils to claim land or have land granted to them under the *Aboriginal Land Rights Act 1983*.

Recommendation 6: The Government should not rely on outcomes of secondary legislative reviews that have not been finalised, such as the Local Government Act review and the review of planning laws, in Crown lands law reform proposals.

Proposed objects

Recommendation 7: The NSW Aboriginal Land Council recommends that the Government, in proposals relating to changing the way Crown land is owned and managed, complies with international laws including the UN Declaration on the Rights of Indigenous Peoples that recognise, promote and protect Indigenous culture and heritage.

Recommendation 8: The NSW Aboriginal Land Council recommends that mechanisms within any new Crown lands laws should be designed to further the protection of Aboriginal culture and heritage in NSW and to better recognise the rights of Aboriginal people to own and control Aboriginal culture and heritage and land more broadly.

Recommendation 9: The NSW Aboriginal Land Council seeks clarification regarding what the Government’s definition of co-management is and more comprehensive details regarding co-management arrangements.

Recommendation 10: The NSW Aboriginal Land Council recommends that the object to ‘encourage Aboriginal use, and where appropriate co-management, of Crown land’ is amended to include, as the principal mechanism, the transfer of Crown land to Aboriginal Land Councils through the *Aboriginal Land Rights Act*.

Recommendation 11: The NSW Government should recognise that as the original owners of all Crown land, and as claimants of Crown land that is unused and not needed (which is the only form of compensation afforded to Aboriginal peoples for dispossession), Aboriginal Land Councils are more than merely stakeholders in the management of Crown land. Any new objects for Crown land legislation must recognise Aboriginal Land Council’s preeminent interests in Crown land which includes, but is not limited to, the use and management of land for culture and heritage purposes as well as providing economic development opportunities and must include a clear object that recognises the dispossession experienced by Aboriginal peoples.

Rationalisation of landownership

Recommendation 12: The NSW Aboriginal Land Council is concerned that in proposals regarding the rationalisation of land ownership and changes to land disposal provisions the Government is preferencing the disposal of Crown land rather than transfer of land under the *Aboriginal Land Rights Act*. In any processes regarding the disposal of Crown land, there must be provisions to ensure that when land becomes surplus to the Government’s needs, that the land is first brought to the attention of Aboriginal Land Councils so that a claim can be made to support the objects and intent of the *Aboriginal Land Rights Act*.

Recommendation 13: The NSW Aboriginal Land Council opposes any changes to land ownership that removes land from being claimable under the *Aboriginal Land Rights Act* and opposes the sale of Crown land under local government legislation. The NSW Aboriginal Land Council recommends that the Government pursue the rationalisation of land ownership through ensuring that all lands held by the Crown are Crown land as defined in the *Crown Lands Act*. In accordance with the *Real Property Act* the ‘State of New South Wales’ should be recorded as the registered proprietor.

Recommendation 14: The NSW Aboriginal Land Council seeks clarification regarding whether the Government is seeking to vest land in local government under local government legislation, how this will be undertaken and what legislative or non-legislative provisions will be developed to support this.

Sale and disposal of land

Recommendation 15: Any categorisation of land must not undermine the objects of the *Aboriginal Land Rights Act*. The NSW Aboriginal Land Council recommends that the Government, when assessing land, seeks to not simply investigate the transfer of ‘local’ land to local government, or the transfer of land to other Government agencies, but as a priority negotiates with the Aboriginal Land Council network regarding the transfer of land to Aboriginal Land Councils.

Recommendation 16: The NSW Aboriginal Land Council recommends that criteria used to determine 'local' and 'state' land must not be limited to the criteria proposed in the interagency steering committee report and must include Aboriginal Land Council's interests in Crown land. The NSW Aboriginal Land Council seeks to work in good faith with the agencies carrying out pilots and any pilot programs must actively engage with the Aboriginal Land Council network.

Crown reserves

Recommendation 17: The NSW Aboriginal Land Council seeks clarification regarding whether the Government will be transferring/divesting Crown reserves to local government, or whether, where Crown reserves are currently being managed by local government, that local government will be able to manage these Crown reserves as community land under the *Local Government Act*.

Recommendation 18: The NSW Aboriginal Land Council seeks further clarification regarding whether the Government proposes to afford powers to local government to, in addition to changing the reserve purpose, being able to sell the land.

Recommendation 19: The proposal for local government to manage Crown reserves under local government legislation has the potential to undermine the compensatory mechanisms of the *Aboriginal Land Rights Act*. The NSW Aboriginal Land Council recommends that powers to lease the land or dispose of it are retained in the *Crown Lands Act*. If the Government pursues allowing the disposal of land through the *Local Government Act*, the NSW Aboriginal Land Council seeks to negotiate with the Government regarding safeguards to ensure that land is not prevented from being claimable under the *Aboriginal Land Rights Act*.

Recommendation 20: The NSW Aboriginal Land Council does not support statements in the White Paper regarding consultation processes under the *Local Government Act* supporting 'greater public involvement.' There is no empirical evidence to support this statement and the Government should instead pursue the development of best practice consultation processes.

Travelling Stock Reserves

Recommendation 21: Aboriginal community engagement in the development of a new model of management for TSRs is essential. Consultation with Aboriginal communities and particularly Local Aboriginal Land Councils is important in the development of sustainable management frameworks for TSRs.

Recommendation 22: Best practice consultation must occur with the relevant Local Aboriginal Land Councils and Aboriginal communities regarding local Aboriginal heritage assessments. This consultation must involve engagement throughout the assessment/study including the proposed methodology and design, on-ground works, and final recommendations.

Recommendation 23: The NSW Aboriginal Land Council recognises that all Aboriginal heritage including contemporary heritage is important to Aboriginal people and supports decision making by local Aboriginal people about Aboriginal culture and heritage. Proposals to classify Aboriginal heritage as 'low' value are not supported.

Recommendation 24: Due to the significant Aboriginal culture and heritage associated with travelling stock reserves any pilots or criteria that are designed to inform the future ownership or

management of travelling stock reserves must be developed in partnership with the Aboriginal Land Council network.

Recommendation 25: It may be appropriate to employ a joint-management approach to the management of TSRs that is inclusive of various stakeholders including Aboriginal Land Councils and other groups, where such groups become partners in the management of TSR networks for shared and sustainable multiple uses. It is nevertheless important to ensure that there are protections in any joint- management model to protect the sale of TSRs without appropriate consultation with Aboriginal Land Councils.

Use of Crown lands without permission

Recommendation 26: The NSW Aboriginal Land Council seeks further information regarding issuing of licences on Crown land and seeks a commitment from the Government that mechanisms that retrospectively authorise uses of Crown land will not be pursued.

Land assessment requirements

Recommendation 27: The NSW Government should pursue site specific assessments, rather than relying on any 'new planning framework' in determining the preferred use of land.

Notification requirements

Recommendation 28: The NSW Aboriginal Land Council urges the Government to ensure that notification processes prioritise effective community engagement and do not reduce community engagement at the expense of seeking more streamlined administrative processes. Processes for notifications should not be reliant on strategic planning provisions in proposed planning laws. In any changes to notification provisions, the intention to revoke or alter the purpose of a reserve should require notification in the Government Gazette as a minimum.

Western Lands Leases

Recommendation 29: The NSW Aboriginal Land Council requests further information regarding how Aboriginal land rights and ownership of culture and heritage will be supported in the freehold conversion processes of Western Lands leases.

Enforcement provisions

Recommendation 30: The NSW Aboriginal Land Council supports improved protection and enforcement provisions. The NSW Aboriginal Land Council recommends that the Crown be able to seek a restoration order against a polluter even if the land has been transferred.

New business model Crown Lands Division

Recommendation 31: Any move to a Public Trading Enterprise must not undermine Aboriginal Land Council's rights to claim Crown land under the *Aboriginal Land Rights Act*. The NSW Aboriginal Land Council seeks confirmation from the Government that the Crown will retain ownership of Crown land and asset portfolio (not the PTE) and that the Crown land will not be vested in the PTE or in another entity.

Abolition of commons

Recommendation 32: The NSW Aboriginal Land Council supports the conversion of commons to Crown land and the management of commons under a single management regime. Commons that are no longer used or needed should be available for claim under the *Aboriginal Land Rights Act*.

3. The reform process to date

In June 2012 the NSW Government began a review into the management of Crown land. The aim of the review was to address the overall management of Crown land including legislation, financial management, governance and business structure and was overseen by a high level interagency steering committee chaired by Michael Carapiet. A number of NSW Government Departments were represented on the steering committee including the Department of Trade and Investment, Premier and Cabinet, Treasury, the Department of Finance and Services, Aboriginal Affairs, the Division of Local Government, the Office of Environment and Heritage, the Department of Planning, Transport for NSW, the Department of Education and Communities, the Department of Primary Industries and the Department of Trade and Investment.

Throughout the review process very limited detail was provided regarding the conduct and the scope of the review, including the terms of reference and the priorities of the Government in the review process. On a number of occasions NSWALC wrote to the interagency steering committee, the Minister and Government Departments seeking details of the review such as the terms of reference, information regarding the review process and timeframe for public consultation and that details of the proposals that have the potential to undermine the objects, purpose and compensatory intent of the ALRA are discussed with NSWALC as a matter of priority. Responses to these requests were not forthcoming. Information regarding the content of the review was released when the White Paper was recently made public. The White Paper lacks any substantial detail or recognition of Aboriginal peoples' interests in Crown land.

NSWALC has concerns regarding the approach the Government has taken in the review process as it has not actively sought to discuss or incorporate the views of the Aboriginal Land Council network in its initial stages. Proposals developed by the steering committee were developed in isolation from the interests and views of Aboriginal Land Councils and the White Paper would have benefitted significantly from NSWALC's input at an earlier stage. It remains unclear why there appears to have been unwillingness from the Government to provide ongoing opportunities for input and regular updates to the Aboriginal Land Council network about this reform process. A commitment to good faith cooperation, collaboration and transparency is required in the review process.

Although the Government has released a White Paper and is seeking public submissions, it remains unclear whether there will be any future opportunities for public consultation and engagement in the development of proposals. Best practice consultation involves:

- **Consultation being more than just submission writing:**
It is essential that Aboriginal peoples, and in particular the Aboriginal Land Council network are provided with opportunities to provide meaningful input into the development of new Crown lands legislation. It has become a generally accepted principle in international law that Indigenous peoples should be consulted on decisions affecting them.⁷ Where this principle is put into practice effectively, it is apparent that the benefits for both governments and Indigenous peoples alike extend well beyond the confines of the legal imperative.

To date the Crown lands review process has only undertaken a process for receiving written submissions from the public. NSWALC urges the Government to move beyond a review process that only supports written submissions and undertake a variety of consultation

⁷ James Anaya, 2005, 'Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resource Extraction: The More Fundamental Issue of what Rights Indigenous Peoples have in Lands and Resources', *Arizona Journal of International & Comparative Law*, 22(1), p. 7.

methods (including face-to-face consultations) to encourage and support the engagement of Aboriginal communities in the review process.

- **Adequate and appropriate notice provisions:**

Although the Government appears to not be currently considering undertaking a program of face-to-face consultations, the Government is encouraged to do so. As a part of the process it should be noted that a minimum one months notice should be provided to communities of consultations dates and locations. A minimum of two months should be allocated for written feedback/submission processes. In addition to providing direct notification to peak local and state Aboriginal organisations, there should be wide advertisement of consultations and workshops, including via direct post, email, local and Aboriginal media and local radio. It is insufficient to place details about a consultation on a Government website only.

- **Consultations should be in the nature of negotiations:**

Consultations should be conducted in a collaborative and shared manner where the Government seeks feedback, but also comprehensively answers questions and queries. As a part of this process the Government should provide ongoing, regular reports back about the reform process, public involvement and participation provisions and when to expect further opportunities to comment. Furthermore, it is essential that sufficient time is allocated in consultations to question and answer processes and that Government staff foster debate and provide in depth answers to questions.

- **Consultations should include the provision of all relevant information in an accessible way:**

NSWALC recommends that the Government provide plain English documentation of a rationale for why changes are needed to the *Crown Lands Act*, detailed content of the proposed reforms, what the proposed reforms are intended to achieve and evidence for why the reform proposals are justified. Workshops and consultations should then provide further detailed information in order to allow participants to provide meaningful feedback.

In June 2014 NSWALC conducted a roundtable with representatives from each Aboriginal Land Council region to discuss Crown lands review proposals. Representatives from the Aboriginal Land Council network raised a number of concerns including:

- Requesting further details from the Government regarding the rationale behind the proposals in the review documents that so significantly changing Crown lands legislation and the current Crown lands management regime;
- The Government's intentions for the ALRA and how the Government will support the objects and purpose of the ALRA;
- The number of significant government review processes currently underway (including planning legislation, Aboriginal Culture and Heritage review, local government review, in addition to the Aboriginal Land Rights Act review). To date the Government has not explained in any detail the intended interaction of this legislation and legislative reform processes;
- The Government's lack of engagement with the Aboriginal Land Rights network in the review process.

The NSWALC seeks a commitment from the Government that Aboriginal Land Councils will be afforded opportunities to be involved in the review process into the future as well as in the development of any criteria or pilots associated with the review process. NSWALC advocates for Aboriginal Land Council's interests in Crown land to be embedded in proposals relating to Crown land management and ownership, and NSWALC offers solutions to the Government on how this could best be achieved.

Recommendation 1: The NSW Aboriginal Land Council seeks a commitment from the Government for good faith cooperation, collaboration and transparency in the Crown lands review process. The NSW Aboriginal Land Council seeks a commitment that Aboriginal Land Councils will be afforded opportunities to be involved in the review process into the future as well as in the development of any criteria or pilots associated with the review process.

Recommendation 2: The NSW Aboriginal Land Council recommends that the Government make publicly available the timeframe for the Crown lands review process and for the implementation of reform proposals.

Recommendation 3: The NSW Aboriginal Land Council recommends that the Government publicly releases any draft Crown lands legislation and undertakes best practice consultation processes to seek public comment on the draft legislation.

4. Aboriginal Land Rights in NSW and Aboriginal interests in Crown land

Aboriginal peoples' interests in land is multifaceted and includes, but is not limited to the use and management of land for culture and heritage purposes as well as providing economic development opportunities for Aboriginal peoples.

The alienation of land in NSW has had a significant effect on Aboriginal people's land and property rights. The impact of alienation had particularly negative impacts on Aboriginal peoples in NSW as a greater range of exclusive possession interests were granted in NSW (compared to other states).⁸

In response to the ongoing socio-economic disadvantage experienced by Aboriginal peoples, the NSW Parliament established the land rights system 'for the regeneration of Aboriginal culture and dignity' and to 'lay the basis for a self-reliant and more secure economic future' for Aboriginal peoples in NSW. The intention of Aboriginal land rights was to enable 'Vast tracks of Crown land (to) be available for claim (to) go some way to redress the injustices of dispossession...'.⁹ 'The descendants of the original inhabitants of this State are entitled to that acknowledgment and recompense for the dispossession of lands they would otherwise have inherited'.¹⁰

The preamble of the ALRA recognises that 'land is of spiritual, social, cultural and economic importance' to Aboriginal peoples, and the ALRA was established to facilitate the return of land in NSW to Aboriginal peoples through a process of lodging Aboriginal land claims over claimable Crown land.

Section 36 of the ALRA states what claimable Crown land is.¹¹ Claimable Crown land is land that is vested in Her Majesty, land that is reserved or able to be lawfully sold or leased under the *Crown Lands Act*, land that is not lawfully used or occupied, and land that is not in the opinion of the Crown Lands Minister needed or likely to be needed for an essential public purpose, or as residential land. Lands that fall within the definition of claimable Crown land must be granted to the claimant Aboriginal Land Council. There is no discretion.

The proposals in the White Paper and recommended by the interagency steering committee propose fundamental changes to Crown land and the current system of Crown land management. Although the Government has confirmed that new Crown land legislation will not amend the ALRA, it must be recognised that the compensatory and remedial mechanisms of the ALRA are intertwined with the *Crown Lands Act* and changes to the way Crown land is owned and managed will significantly affect Aboriginal land rights. While the final report of the interagency steering committee states that 'review recommendations will not impact on land claims that have already been made',¹² there nevertheless remains issues regarding the effects of changes to the way Crown land is owned and managed on the future ability for Aboriginal Land Councils to make claims over land and for that land to be granted and transferred.

Recommendation 4: The Government should recognise that Aboriginal peoples interests in land is multifaceted and includes, but is not limited to, the use and management of land for culture and heritage purposes as well as providing economic development opportunities for Aboriginal peoples. The Government must recognise that the compensatory and remedial mechanisms of the

⁸ Compare *Wik Peoples v Queensland* (1996) 187 CLR 1 and *Wilson v Anderson* (2002) 213 CLR 401.

⁹ New South Wales, *Parliamentary Debates*, Legislative Assembly, 24 March 1983, p.5089 (Frank Walker)

¹⁰ *Keane Report* at para [3.34]-[3.35], p.61.

¹¹ *Aboriginal Land Rights Act* 1983 (NSW), s.36

¹² Crown Lands Management Review (the Interagency steering committee final report), p.11

Aboriginal Land Rights Act 1983 are intertwined with the *Crown Lands Act* and changes to the way Crown land is owned and managed will significantly affect Aboriginal land rights.

5. White Paper

5.1 Consolidation of legislation

The White Paper proposes the consolidation of a number of NSW laws including the *Crown Land Act 1989*, the *Crown Lands (Continued Tenures) Act 1989*, the *Western Lands Act 1901*, the *Commons Management Act 1989* and other Acts¹³. The stated aims of this consolidation are to streamline existing legislative requirements, reduce red tape and support public and multiple uses of Crown land.

It is proposed that new Crown lands legislation will be consistent with other legislative frameworks (in particular local government and planning frameworks), streamlined so that Crown land will be managed by the most appropriate level of government, including that land with local uses will be managed by local government under local government legislation and will reduce approval requirements for activities on Crown land.

NSWALC does not oppose the consolidation of legislation provided that new legislation does not undermine provisions within the ALRA, and does not change the management and ownership of Crown land so that Crown land is no longer claimable under the ALRA.

NSWALC, however, has concerns regarding the reliance on other legislative frameworks in the White Paper proposals, such as local government and planning frameworks considering the *Local Government Act 1993* is currently under review and the Government had proposed a new Planning Bill, which did not pass the Legislative Council, to replace the *Environmental Planning and Assessment Act 1979*. Many of the proposals in the White Paper rely on these secondary legislative review processes. For instance proposals relating to new land assessment provisions rely on strategic planning frameworks under the Planning Bill, and consultation processes relating to the potential disposal of Crown reserves rely on consultation provisions proposed in the Local Government Acts Taskforce Report recommendations. NSWALC is of the view that it is inappropriate for a White Paper to rely on outcomes of secondary legislative review processes when these outcomes are yet to be finalised and details of the proposals are lacking.

Recommendation 5: The NSW Aboriginal Land Council seeks a commitment from the Government that any change to Crown lands legislation will not limit or impair the ability of Aboriginal Land Councils to claim land or have land granted to them under the *Aboriginal Land Rights Act 1983*.

Recommendation 6: The Government should not rely on outcomes of secondary legislative reviews that have not been finalised, such as the Local Government Act review and the review of planning laws, in Crown lands law reform proposals.

5.2 Proposed new objects

The White Paper proposes a series of new objects for new Crown lands legislation that include:

- a. To provide for the management of Crown land for the benefit of the people of NSW;
- b. To provide a system of management for Crown land that is efficient, fair and transparent;
- c. To integrate social, economic and environmental considerations in decisions;
- d. To provide for the management of Crown land by local government, other entities and the community as well as the NSW Government;

¹³ Including the *Public Reserves Management Fund Act 1987*, the *Trustees of School of Arts enabling Act 1902*, the *Wentworth Irrigation Act 1890* and the *Hay Irrigation Act 1902*.

- e. To provide that the disposal of Crown land be for the benefit of the people of NSW;
- f. To ensure that Crown land is put to its best use in the public interest;
- g. To encourage public use, enjoyment and, where appropriate, multiple uses of Crown land;
- h. To preserve cultural heritage (Aboriginal and non Aboriginal on Crown land);
- i. To encourage Aboriginal use, and where appropriate co-management, of Crown land;
- j. To provide an appropriate system of land tenure and to facilitate diversification of land use in the Western Division of NSW.

Object H:

NSWALC seeks clarification regarding the object 'to preserve cultural heritage (Aboriginal and non Aboriginal on Crown land)' and in particular what mechanisms will be included in any new legislation to support this object in relation to Aboriginal culture and heritage.

NSWALC refers the Government to Article 31 of the UN Declaration on the Rights of Indigenous Peoples that states that:

1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
2. *In conjunction with Indigenous peoples, States shall take effective measures to recognise and protect the exercise of these rights.*¹⁴

NSWALC recommends that the Government supports international laws that recognise, promote and protect Indigenous culture and heritage in any proposals regarding changing the way in which Crown land is owned and managed. Mechanisms within any new Crown lands laws should be designed to further the protection of Aboriginal culture and heritage in NSW and to better recognise the rights of Aboriginal people to own and control Aboriginal culture and heritage and land more broadly. Additionally, NSWALC recommends that the language of this object is amended to read 'to protect and promote *culture and heritage* (Aboriginal and non Aboriginal) on Crown land' as this recognises the distinct separateness of culture - being the practice of traditions; and heritage - being the link to that culture and history.

Recommendation 7: The NSW Aboriginal Land Council recommends that the Government, in proposals relating to changing the way Crown land is owned and managed, complies with international laws including the UN Declaration on the Rights of Indigenous Peoples that recognise, promote and protect Indigenous culture and heritage.

Recommendation 8: The NSW Aboriginal Land Council recommends that mechanisms within any new Crown lands laws should be designed to further the protection of Aboriginal culture and heritage in NSW and to better recognise the rights of Aboriginal people to own and control Aboriginal culture and heritage and land more broadly.

Object I:

A purpose of the ALRA is to provide for land rights for Aboriginal peoples, to provide for

¹⁴ United Nations Declaration on the Rights of Indigenous People, available at: http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf

representative Aboriginal Land Councils and to vest land in those Land Councils.¹⁵ In keeping with the intent of the ALRA, NSWALC is of the view that the objects of new Crown land legislation should reflect the intent and the mechanisms within the ALRA that support the claiming of Crown land.

Unlike the granting of Aboriginal land claims (that provide for the transfer of freehold title to Aboriginal Land Councils) co-management and 'use' of land by Aboriginal peoples do not effectively and appropriately support Aboriginal self determination. Co-management may refer to agreements (such as Memoranda of Understanding) between Aboriginal groups (such as LALCs or native title groups) and the Government. These agreements can support Aboriginal community access to land for cultural activities, Aboriginal community participation in the management of land, including establishing Aboriginal advisory groups. Co-management generally does not result in the transfer of freehold title and, as such, does not provide for ownership of land, and the use of the land for purposes determined by Aboriginal peoples. NSWALC seeks clarification regarding what the Government's definition of co-management is and more comprehensive details regarding co-management arrangements.

Additionally, the flexibility of co-management agreements makes them vulnerable to changes to budgets, limited funding and a lack of political will to honour commitments within the agreements. NSWALC notes that the pursuit of co-management agreements or other access and arrangements for the use of land, do not support the decision making rights of Aboriginal peoples and should only be employed when land is not otherwise capable of being handed back under the ALRA.

The Government is reminded of commitments made in OCHRE – the NSW Government plan for Aboriginal Affairs that state that opportunities for economic development stem from land granted under the ALRA. As a complementary measure to the object 'to encourage Aboriginal use, and where appropriate co-management, of Crown land', NSWALC recommends that the object is strengthened to support the purpose of the ALRA, the OCHRE plan and principles of self determination, so that the object supports the transfer of Crown land to Aboriginal Land Councils through the ALRA.

Recommendation 9: The NSW Aboriginal Land Council seeks clarification regarding what the Government's definition of co-management is and more comprehensive details regarding co-management arrangements.

Recommendation 10: The NSW Aboriginal Land Council recommends that the object to 'encourage Aboriginal use, and where appropriate co-management, of Crown land' is amended to include, as the principal mechanism, the transfer of Crown land to Aboriginal Land Councils through the *Aboriginal Land Rights Act*.

Other objects:

NSWALC urges the Government to recognise that in order to achieve other proposed objects the Government should consider the following:

- The management of Crown land for the benefit of the people of NSW;
NSWALC supports the object that the management of Crown land should be for the benefit of the peoples of NSW. The benefit of the peoples of NSW should inherently include being for the benefit of Aboriginal peoples of NSW – as the first and original owners of land in NSW. Objects about managing land for the public benefit and therefore what is in the public

¹⁵ *Aboriginal Land Rights Act 1983 (NSW)*, s.3 (a)(b) and (c)

interest should be based on a proper understanding of the rights of peoples under international and domestic laws as well as principles of intergenerational equity, fairness and social, cultural and economic rights. Aboriginal peoples in NSW have a right to access expression of the ALRA which includes fundamentally the ability to claim Crown land to support Aboriginal peoples' economic, social and cultural lives.

- To provide a system of management for Crown land that is efficient, fair and transparent:
NSWALC supports the proposal that the management of Crown land should be efficient, fair and transparent. In particular, new models for the ownership and management should be fair and transparent. Aboriginal peoples in NSW have been significantly disadvantaged as a result of the dispossession of land since colonisation. A fair system of land management in the current context is a system that addresses the injustices that Aboriginal peoples experience as a result of land dispossession. A fair and efficient system is also supported through ensuring that the development of new laws or methods of Crown land management conforms to existing rules and standards, including the ALRA. Although the review of Crown land does not propose amendments to the ALRA, changes to the way Crown land is owned will have significant implications for Aboriginal land rights, limiting Aboriginal Land Council's ability to claim unused and unneeded Crown land. This could compound the injustices faced by Aboriginal peoples in regards to land dispossession and does not support a system that is based on principles of fairness.
- To integrate social, economic and environmental considerations in decisions:
NSW Government has made various commitments to supporting Aboriginal rights including statements made by the NSW Premier to 'build real and effective linkages with State Government and Aboriginal communities (and) put locally-driven solutions for economic and cultural empowerment front and centre' as well as goals in NSW 2021 to foster opportunity and partnership with Aboriginal people.¹⁶ The NSW Government has also made statements in the OCHRE plan that note that there are significant, untapped opportunities to build wealth and strengthen economic independence in Aboriginal communities through land granted under the ALRA.

It is essential that Aboriginal peoples' economic and cultural rights are central to any decision making regarding the future ownership and management of Crown land, and NSWALC urges the Government to honour statements made publicly that support these rights.

The integration of social, economic and environmental considerations in decision making regarding Crown land is supported by NSWALC, provided:

- That cultural concerns are also incorporated into 'considerations'.
- That 'considerations' are strengthened so that there are processes and methodologies to determine social, economic, cultural and environmental concerns and needs, and that the Minister, or those making decisions, are required to address and integrate these concerns and needs prior to making decisions.
- That there is not a hierarchy in 'considerations' and that the economic considerations of the Government are not prioritised over other considerations.

Recommendation 11: The NSW Government should recognise that as the original owners of all Crown land, and as claimants of Crown land that is unused and not needed (which is the only form of compensation afforded to Aboriginal peoples for dispossession), Aboriginal Land Councils are

¹⁶ Goal 26, NSW 2021, Available http://www.2021.nsw.gov.au/sites/default/files/NSW2021_WEB%20VERSION.pdf.

more than merely stakeholders in the management of Crown land. Any new objects for Crown land legislation must recognise Aboriginal Land Council's preeminent interests in Crown land which includes, but is not limited to, the use and management of land for culture and heritage purposes as well as providing economic development opportunities and must include a clear object that recognises the dispossession experienced by Aboriginal peoples.

5.3 Rationalisation of land ownership

The White Paper proposes new arrangements regarding land ownership, tenures and the sale and disposal of land amongst other things. The White Paper notes that 'new legislation will rationalise how land can be owned' and the review aims to 'bring all land to be managed under new legislation into a single, simplified framework'. The White Paper notes that currently land is held in a number of ways including as Crown land vested in Her Majesty (with the State of NSW recorded on the land title), dedicated land held by trustees including local government, land in the name of the Minister and land held in the name of another Minister or public authority and dealt with as if it were Crown land.

The White Paper does not have details regarding exactly how options for land ownership will be rationalised. NSWALC is of the view that in order to achieve the Government's desired rationalisation of Crown land, and in order to be consistent with other legislation (in accordance with reference made in the White Paper that 'the effective management and protection of Crown land...will be consistent with other legislative frameworks'¹⁷) such as the ALRA, the Government should pursue rationalisation through ensuring that all lands held by the Crown are Crown land as defined in the *Crown Lands Act*. NSWALC supports recommendations made by the NSW Law Society Indigenous Issues Committee that the 'State of New South Wales' should be recorded as the registered proprietor.¹⁸

In addition, NSWALC notes that the Government has in principle supported recommendations by the Interagency Steering Committee that recommend the vesting of land in local government under the *Local Government Act*. This, however, is not referred to in the White Paper.

NSWALC is unclear of the intent of the Government in supporting this recommendation in principle, without providing any detail in the White Paper. It is unclear whether this is because the Government does not seek to include the vesting of Crown land in Local Government legislation in any new Crown lands legislative reform package, and plans to do so solely through the *Local Government Act*. However, there is no discussion of this proposal appears in the recent local government review papers. Alternatively, the Government may be seeking to undertake the vesting of Crown land in Local Government through non-legislative mechanisms, although it is unclear how this could occur.

NSWALC seeks clarification regarding whether the Government is seeking to vest land in local government under local government legislation, how this will be undertaken and what legislative or non-legislative provisions will be developed to support this. NSWALC is of the view that vesting Crown land in local government is not appropriate as it undermines Aboriginal land claims mechanisms under the ALRA, but in addition, gives rise to complex legal issues in regards to native title as native title rights and interests will be potentially affected.

Recommendation 12: The NSW Aboriginal Land Council is concerned that in proposals regarding

¹⁷ Crown Lands Legislation White Paper, p.5

¹⁸ *Real Property Act 1900 (NSW)*, s.13H

the rationalisation of land ownership and changes to land disposal provisions the Government is preferencing the disposal of Crown land rather than transfer of land under the *Aboriginal Land Rights Act*. In any processes regarding the disposal of Crown land, there must be provisions to ensure that when land becomes surplus to the Government's needs, that the land is first brought to the attention of Aboriginal Land Councils so that a claim can be made to support the objects and intent of the *Aboriginal Land Rights Act*.

Recommendation 13: The NSW Aboriginal Land Council opposes any changes to land ownership that removes land from being claimable under the *Aboriginal Land Rights Act* and opposes the sale of Crown land under local government legislation. The NSW Aboriginal Land Council recommends that the Government pursue the rationalisation of land ownership through ensuring that all lands held by the Crown are Crown land as defined in the *Crown Lands Act*. In accordance with the *Real Property Act* the 'State of New South Wales' should be recorded as the registered proprietor.

Recommendation 14: The NSW Aboriginal Land Council seeks clarification regarding whether the Government is seeking to vest land in local government under local government legislation, how this will be undertaken and what legislative or non-legislative provisions will be developed to support this.

5.4 Sale and disposal of land

In accordance with the current NSW Government principles to 'devolve decision making to local communities' (NSW 2021), for land to be managed by the most appropriate level of government (NSW Commission of Audit), the Government's desire to cut red tape and the Property Utilisation Taskforce recommendations that the NSW Government only hold onto property to support core services and that surplus property should be sold to realise funds to maintain a capital base, the interagency steering committee recommended the Government categorise Crown land as being either 'state' or 'local'. Although the White Paper does not discuss the state or local categorisation of Crown land, the Government has supported in principle recommendations of the interagency steering committee to conduct a strategic assessment of land to determine state or regional values as well as to conduct a pilot to test and refine the state and local land criteria and to develop an implementation plan for the transfer of local land to local government.

NSWALC notes that the interagency steering committee report proposes that this categorisation is designed to determine which land should remain with the NSW Government for core service delivery, or has 'state' values, and which land should be divested to local government to be managed locally. The interagency steering committee proposed criteria to be used to categorise land as below. It remains unclear whether the Government will utilise the criteria, or will develop other criteria.

State land

- a) Land currently subject to leasehold tenure that is not reserved, except for where the tenure is held by local government
- b) Land required for critical infrastructure
- c) Land that is a part of a system or network (e.g. environmental corridors, beaches, rivers)
- d) Iconic land, including major sporting venues (identified through the NSW heritage list, the NSW Stadia Strategy or another method)
- e) Land within a certain distance from beaches, coasts and estuaries
- f) Land within a certain distance of the central business zones of cities or towns with populations of more than 10,000 (for example)
- g) Land known to be subject to serious contamination or other significant liability.

Local land

- a) Land that is providing a public good predominantly for people in the local area or in adjacent parts of neighbouring local government areas
- b) Land that is used for the purposes that are consistent with the functions of local councils
- c) Land that is managed as a community asset by councils or some other body.

The criteria proposed by the interagency steering committee does not have any consideration of Aboriginal Land Councils interests in Crown land. There appears to be emphasis placed on the transfer of local land to Local Government, without consideration of transferring local land to Aboriginal Land Councils through the compensatory mechanisms of the ALRA.

Aboriginal peoples' interests in Crown land must be included in any criteria regarding 'state' and 'local' land. This must include the interests of Aboriginal Land Councils including land rights interests and the protection and promotion of Aboriginal culture and heritage.

It is unclear how local government holding 'local' land under the *Local Government Act* will support the proposed objects in the White Paper particularly relating to Aboriginal peoples use of Crown land. The *Local Government Act* does not have that objective, or other objectives relating to the use and management of land by Aboriginal peoples.

The White Paper alludes to the fact that there may be the potential for Crown land (which has been transferred as 'local' land) to be sold under local government legislation. As a result, options for 'local' land to be transferred as freehold to LALCs to own the land for the benefit of the local community must be included. There are a number of arrangements that could be pursued in the transfer of local land to Aboriginal Land Councils, including plans of management that afford local people access rights and conditional grants such as easements/covenants to protect the local use (as has occurred in a number of land claims matters).

NSWALC recommends that the Government, when determining whether land is 'state' land or 'local' land, not simply investigate the transfer of 'local' land to local government, but as a priority negotiates with the Aboriginal Land Council network regarding the transfer of local land to Local Aboriginal Land Councils. Transfer to Local Aboriginal Land Councils would be in keeping with the ALRA, as well as proposed objects to new Crown land legislation as outlined in the White Paper including 'to encourage Aboriginal use...of Crown land'¹⁹ and could occur either under mechanisms of the ALRA, or through disposal provisions under the *Crown Lands Act*.

In addition to recommendations regarding the devolving of 'local' land to local government, the interagency steering committee recommended that Crown land be devolved to other NSW Government agencies if they are best placed to manage the values and risks associated with a parcel of land. The devolving of ownership of Crown land to other Government agencies undermines the objects of the ALRA.

Recommendation 15: Any categorisation of land must not undermine the objects of the *Aboriginal Land Rights Act*. The NSW Aboriginal Land Council recommends that the Government, when assessing land, seeks to not simply investigate the transfer of 'local' land to local government, or the transfer of land to other Government agencies, but as a priority negotiates with the Aboriginal Land Council network regarding the transfer of land to Aboriginal Land Councils.

Recommendation 16: The NSW Aboriginal Land Council recommends that criteria used to determine 'local' and 'state' land must not be limited to the criteria proposed in the interagency

¹⁹ Crown Lands Legislation White Paper, p.11

steering committee report and must include Aboriginal Land Council's interests in Crown land. The NSW Aboriginal Land Council seeks to work in good faith with the agencies carrying out pilots and any pilot programs must actively engage with the Aboriginal Land Council network.

5.5 Crown reserves

The interagency steering committee recommended to the Government that the reserves framework should be revised to facilitate multiple uses as well as to allow local government to manage reserves under local government legislation. The Government supported these recommendations. The White Paper also notes that devolving Crown reserves to local government will support local communities in having 'greater involvement through consultation and advisory opportunities provided under local government legislation'.²⁰

Local government managing Crown reserves:

NSWALC seeks to clarify the approach of the Government in regards to the management of Crown reserves. Although the White Paper lack significant details regarding responsibility for Crown reserves, it appears that the Government intends to transfer Crown reserves to local government to be managed under local government legislation. In respect to recommendation 33 of the interagency steering committee, NSWALC seeks clarification regarding whether the Government will be transferring/divesting Crown reserves to local government, or whether, where Crown reserves are currently being managed by local government, that local government will be able to manage these Crown reserves as community land under the *Local Government Act*.

Additionally, the White Paper notes that 'Crown reserves managed under the local government legislation will retain their reserve purpose unless the use of those reserves changes through processes under the local government legislation'.²¹ Currently under the *Crown Lands Act* the Minister may, by notification in the Gazette, reserve any Crown land from sale, lease or licence or for future public requirements or other public purpose. NSWALC seeks further clarification regarding whether the Government proposes to afford powers to local government to, in addition to changing the reserve purpose, being able to sell the land.

NSWALC is sympathetic to the issues faced by local government in the management of land under both the *Crown Lands Act* and the *Local Government Act*. Nevertheless, there are many occasions where landowners and land managers must manage different parcels of land in accordance with a range of laws. The justification for Crown reserves being managed under local government legislation as it is impractical for local government to manage land under two legislative regimes is not sufficient in mitigating such a radical departure from principles of Crown reserve management. Similarly the argument that adjacent land cannot be managed as one entity, and therefore Crown reserves should be managed under local government legislation, is not necessarily accurate as not all Crown reserves adjoin local government owned community land.

Addressing the issue of confusion at a local government level about land management requirements does not necessarily have to be undertaken through legislative processes. Where there is land under different tenures a plan of management can support local government in managing land in accordance with existing legislation. Thorough mapping of Crown reserves managed by local government would also assist local government in being able to successfully manage Crown reserves in accordance with the *Crown Lands Act*.

²⁰ Crown Lands Legislation White paper, p.14

²¹ Crown Lands Legislation White Paper, p.14

It also remains unclear, when a local government body does not adequately manage land as a reserve trust or reserve manager, how it could manage community land under the *Local Government Act* in a more successful way. Further details are requested regarding how adequate management can be achieved through simply changing tenures.

Of the most significant concern however, regarding the proposal for local government to manage Crown reserves under local government legislation, is the potential for the compensatory mechanisms of the ALRA to be undermined by the proposal for local government to manage Crown reserves under local government legislation. If land is no longer able to be 'lawfully sold or leased, or reserved or dedicated for any purpose under the *Crown Lands Consolidation Act 1913* or the *Western Lands Act 1901*'²² then it is sterilised from being claimable under the ALRA. This is of significant concern as it limits Aboriginal Land Councils ability to support Aboriginal peoples in social, cultural and economic pursuits. NSWALC recommends that powers to lease the land or dispose of it are retained in the *Crown Lands Act*.

Recommendation 17: The NSW Aboriginal Land Council seeks clarification regarding whether the Government will be transferring/divesting Crown reserves to local government, or whether where Crown reserves are currently being managed by local government, that local government will be able to manage these Crown reserves as community land under the *Local Government Act*.

Recommendation 18: The NSW Aboriginal Land Council seeks further clarification regarding whether the Government proposes to afford powers to local government to, in addition to changing the reserve purpose, being able to sell the land.

Recommendation 19: The proposal for local government to manage Crown reserves under local government legislation has the potential to undermine the compensatory mechanisms of the *Aboriginal Land Rights Act*. The NSW Aboriginal Land Council recommends that powers to lease the land or dispose of it are retained in the *Crown Lands Act*. If the Government pursues allowing the disposal of land through the *Local Government Act*, the NSW Aboriginal Land Council seeks to negotiate with the Government regarding safeguards to ensure that land is not prevented from being claimable under the *Aboriginal Land Rights Act*.

Consultation under the *Local Government Act*:

NSWALC has concerns regarding the statements in the White Paper that note that consultation processes under the *Local Government Act* may support greater public involvement as there is no empirical evidence to support this statement. Currently under the *Local Government Act* the change of purpose of community land to operational land is generally achieved by a Local Environmental Plan (LEP), or through a resolution of the Council.

There are significant issues regarding inadequate and inappropriate consultation requirements for both the current and proposed processes for creating and amending LEPs. Currently, once a relevant planning authority, such as a Local Government develops a LEP or 'planning proposal' the Minister for Planning makes a 'Gateway Determination' about whether the proposal should proceed, and any conditions. There is no mandatory requirement for environmental or heritage assessments to occur. Requirements for public consultation are at the discretion of the Minister for Planning. The relevant planning authority is only required to 'consider' public submissions. There is no automatic requirement for the LEP or planning proposal to be re-exhibited if the relevant planning authority decides to vary the proposal after the initial consultation period. Failure to comply with the

²² *Aboriginal Land Rights Act 1983* (NSW), s.36(1)(a)

requirements set out in the Minister's gateway determination will not invalidate an LEP, unless the failure relates to community consultation requirements.²³

While the Standard Instrument LEP requires local government authorities to consider Aboriginal heritage and notify the Aboriginal community prior to granting consent for a development involving an Aboriginal object or Aboriginal place of heritage, this often only occurs if the item has been included on a public 'heritage schedule' or map in the LEP.²⁴ Many local government bodies have not undertaken Aboriginal heritage studies in order to identify Aboriginal culture and heritage items appropriate for inclusion in this schedule. This has resulted in Aboriginal heritage being largely excluded from this protection mechanism, which mainly incorporates European or non-Aboriginal heritage items.

Effective engagement with Aboriginal peoples and communities requires specific measures above the passivity of general public consultation provisions that in practice only offer between 14 and 30 days for 'public exhibition'. Processes that genuinely engage with Aboriginal communities are conducive to reduced community concerns and are more likely to result in reduced litigation.

The transfer of Crown reserves to management under the *Local Government Act* does very little in increasing consultation and community participation in the management of these reserves.

Recommendation 20: The NSW Aboriginal Land Council does not support statements in the White Paper regarding consultation processes under the *Local Government Act* supporting 'greater public involvement.' There is no empirical evidence to support this statement and the Government should instead pursue the development of best practice consultation processes.

5.6 Travelling Stock Reserves

The Travelling Stock Reserve (TSR) network holds significant economic, cultural and environmental benefits for Aboriginal peoples in NSW. The TSR network in NSW is a complex network of public land established during European colonisation, significantly often along Aboriginal pathways through the landscape.²⁵ The TSR network is a valuable environmental and cultural asset to many Aboriginal communities due to their unique management history.

TSRs have rich tangible and intangible culture and heritage value for Aboriginal peoples. TSRs association with water and the logical pathways between these sources of water meant they often coincided with traditional Aboriginal pathways including trade routes and access to streams. As such it is not uncommon for TSRs to contain Aboriginal objects and sites. TSRs are also of significant importance to biodiversity as they protect ecological communities and threatened species and have important sustainable economic, cultural and social uses.

²³ *Environmental Planning and Assessment Act 1979*, Part 3, Division 4

²⁴ Clause 5.10(8) of the *Standard Instrument – Principal Local Environmental Plan* available at www.legislation.nsw.gov.au. The Standard Instrument also outlines that 'Aboriginal places of heritage significance' and 'Aboriginal objects' may, but need not, be recorded on a public map attached to a LEP.

²⁵ Tremain, James. Travelling stock routes: The Aboriginal elder's story [online]. *Nature New South Wales*, Vol. 56, No. 4, Summer 2012: 32-33.

Availability: <[25](http://search.informit.com.au.ezproxy.lib.uts.edu.au/documentSummary;dn=253075571643748;res=IELHSS>_ISSN: 2200-4580. [cited 16 Jun 14].</p></div><div data-bbox=)

TSRs continue to be utilised today by Aboriginal people as areas to hunt, fish and gather bush foods to supplement diets, and access bush medicines. TSRs are important places for Aboriginal people to access cultural sites, and to pass on knowledge.²⁶

Recommendation 5 of the interagency steering committee final report states:

'Local Land Services work with the relevant stakeholders to develop assessment criteria to review all TSRs and determine their future ownerships and management.'

The NSW Government supported this recommendation, stating that:

'Work will commence in 2014 on a pilot program with the Local Land Services. Community consultation will occur through the pilot process.'

While the White Paper does not discuss TSRs in detail, chapter 4 of the interagency steering committee's final report discusses options for the future management of TSRs. While NSWALC notes that Aboriginal Land Councils have been listed as a potential body to manage certain TSRs in the future, NSWALC is concerned to ensure that Aboriginal Land Councils are key partners in discussions regarding the future use and management of TSRs.

Recommendation 21: Aboriginal community engagement in the development of a new model of management for TSRs is essential. Consultation with Aboriginal communities and particularly Local Aboriginal Land Councils is important in the development of sustainable management frameworks for TSRs.

Best practice assessments of Aboriginal heritage values on TSRs

The 2009 'Assessing the values and management of the NSW Travelling Stock Reserve' report by the LMPA acknowledges that TSRs contain significant cultural heritage.²⁷ While the methodology used in that study included some acknowledgment of Aboriginal land claims and Aboriginal heritage values, these were addressed in a superficial and inadequate way. While it can be a starting point to utilise existing databases and listing tools to assist in identifying Aboriginal heritage sites, the limitations of these tools must be specifically addressed and additional assessment methodologies built in to any assessment criteria. In addition, the scale utilised in the study to rate heritage significance from 'Very high' to 'Very low'²⁸ is extremely flawed and inappropriate.

Numerous issues have been raised by proponents, heritage professionals and Aboriginal communities about current listing tools and their limitations including the Aboriginal Heritage Information Management System (AHIMS) database.²⁹ This mapping and spatial data has inaccuracies; AHIMS only records known sites, often in areas where there has previously been a large amount of heritage studies, which has resulted in significant areas not being mapped, concerns about providing information to a government database which can be accessed by the public due to the risk of vandalism and desecration and the State Heritage Register lists only a relatively small

²⁶ Proft, Kirstin. The TSR network: Linking places, linking people [online]. *Australasian Plant Conservation: Journal of the Australian Network for Plant Conservation*, Vol. 20, No. 2, Sep-Nov 2011: 22-24.

Availability: <<http://search.informit.com.au.ezproxy.lib.uts.edu.au/documentSummary;dn=667894150174065;res=IELHSS>> ISSN: 1039-6500. [cited 16 Jun 14].

²⁷ NSW Land and Property Management Authority, 'Assessing the values and management of the NSW Travelling Stock Reserve', 2009, available at: http://www.lpma.nsw.gov.au/_data/assets/pdf_file/0018/130383/TSR_Report_August_2009.pdf

²⁸ NSW Land and property Management Authority, 'Assessing the values and management of the NSW Travelling Stock Reserve', 2009, pp.26-27

²⁹ NSW Minerals Council, Submission to the review of the *National Parks and Wildlife Act 1974* and the *Threatened Species and Conservation Act 1995*, July 2009, Available

<http://www.environment.nsw.gov.au/resources/legislation/NSWMineralsCouncilSub.pdf>, p.4-5

number of places for their Aboriginal heritage significance, which does not reflect the true extent or significance of Aboriginal heritage in NSW.

NSWALC's position is that all Aboriginal heritage is important and decisions relating to the protection and management of Aboriginal heritage must be made by those local Aboriginal people, not based on government registers. Proposals to classify Aboriginal heritage as 'low' value are not supported.

In addition, the use of formal agreements and protocols that seek to address how cultural information is to be recorded and stored must be underpinned by the principles espoused in international human rights instruments such as the Nagoya Protocol,³⁰ which includes mechanisms for fair and equitable benefit-sharing.

Recommendation 22: Best practice consultation must occur with the relevant Local Aboriginal Land Councils and Aboriginal communities regarding local Aboriginal heritage assessments. This consultation must involve engagement throughout the assessment/study including the proposed methodology and design, on-ground works, and final recommendations.

Recommendation 23: The NSW Aboriginal Land Council recognises that all Aboriginal heritage including contemporary heritage is important to Aboriginal people and supports decision making by local Aboriginal people about Aboriginal culture and heritage. Proposals to classify Aboriginal heritage as 'low' value are not supported.

Aboriginal on TSRs

The importance of TSRs to Aboriginal people in NSW is expressly recognised in the ALRA, which in some cases permits Aboriginal Land Councils to claim³¹ and acquire control of TSRs and negotiate access agreements. Access agreements can allow Aboriginal people to access TSRs for hunting, fishing, gathering and other cultural activities. Agreements may also formalise existing access arrangements and protect the interests of different land users.

In addition, Aboriginal access to TSRs should be recognised as part of any new management of TSRs model. A joint-management approach to the management of TSRs that is inclusive of various stakeholders including LALCs and other groups could potentially be employed where such groups become partners in the management of TSR networks for shared and sustainable multiple uses. This illustrates that it is possible for the TSR network to be maintained as public land and well managed for its multiple values, using sources of income other than landholders' rates.

It is nevertheless important to ensure that there are protections in any joint- management model to ensure that there are protections in place to keep TSRs from sale without appropriate consultation with Aboriginal Land Councils. Mechanisms must be implemented that recognise Aboriginal heritage or provisions that allow access for Aboriginal peoples to the areas. There should be consultation with Aboriginal communities on the sale of any land that holds significant cultural value to the community under the provisions of the *Crown Lands Act* and the ALRA. Information and resources should be provided where there is a desire within the Aboriginal community to pursue opportunities to claim land as TSRs.

Recommendation 24: Due to the significant Aboriginal culture and heritage associated with travelling stock reserves any pilots or criteria that are designed to inform the future ownership or management of travelling stock reserves must be developed in partnership with the Aboriginal Land

³⁰ The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) to the Convention on Biological Diversity, available at: <http://www.cbd.int/abs/text>

³¹ There are over 5500 outstanding Aboriginal land claims over TSRs yet to be determined.

Council network.

Recommendation 25: It may be appropriate to employ a joint-management approach to the management of TSRs that is inclusive of various stakeholders including Aboriginal Land Councils and other groups, where such groups become partners in the management of TSR networks for shared and sustainable multiple uses. It is nevertheless important to ensure that there are protections in any joint- management model to protect the sale of TSRs without appropriate consultation with Aboriginal Land Councils.

5.7 Use of Crown land without permission

Currently section 6 of the *Crown Lands Act* provides that it is unlawful to use or occupy Crown land without a lease, licence or other authority. The White Paper states that, to address the issue of land being used without permission, 'it is proposed to include in the new legislation a power for the Minister to issue a licence for the use of the land where a user has not applied for one.'³² The White Paper also states that the issuing of a licence 'will create equity by ensuring that all users of Crown land pay equally for the privilege.'³³

NSWALC does not support this proposal, and in particular is concerned regarding whether the proposal will include the retrospective authorisation of uses. Retrospective authorisation is not appropriate as it has the potential to undermine the objects and intent of the ALRA, and particularly limits the ability of Aboriginal Land Council's to make claim over Crown land where the land is not lawfully used or occupied.

The Government should support principles of equity for all, including Aboriginal Land Council's rights to claim land that is not lawfully used or occupied and should not seek to rely on the retrospective authorisation of uses to defeat Aboriginal land claims. Aboriginal Land Councils are entitled to rely on the law as it exists when making a land claim when determining a land claim under the ALRA and to presume that a claim will be determined on that basis.

In addition, it remains unclear why the Government, in the pursuit of equity for all users of Crown land, does not require the person using the Crown land to apply for a licence.

Recommendation 26: The NSW Aboriginal Land Council seeks further information regarding issuing of licences and seeks a commitment from the Government that mechanisms that retrospectively authorises uses of Crown land will not be pursued.

5.8 Other streamlining measures

5.8.1 Land assessment requirements

Currently there is a requirement for the Minister to assess Crown land to determine its capabilities and preferred uses prior to dealing with the land.³⁴ It should be noted however, that these assessment provisions and the limitation on the Minister's power is easily and frequently overcome through exceptions within the *Crown Lands Act*, particularly section 35(2).

The White Paper proposes the removal of land assessments and suggests that Crown lands be assessed as part of the process of developing local plans under the new planning framework. NSWALC is concerned regarding proposals in the White Paper that reference planning legislation,

³² Crown Lands Legislation White paper, p.22

³³ Crown Lands Legislation White paper , p.22

³⁴ *Crown Land Act* 1989 (NSW), s.35

particularly given that planning legislation is currently under review with significant community concerns raised about proposed changes.

This uncertainty is even more concerning given that the proposed planning bills did not pass the NSW Parliament and that the timeframes for any proposed amendments or transition periods are unclear. While upfront strategic planning processes may be a useful tool to help identify some broad land use planning concepts and initiatives, it is inappropriate to rely on these alone or in isolation to address specific parcels of land in the determination of a preferred use.

Recommendation 27: The NSW Government should pursue site specific assessments, rather than relying on any 'new planning framework' in determining the preferred use of land.

5.8.2 Notification requirements

The White Paper proposes a rationalisation of notification provisions which potentially includes the removal of the notification of the revocation or alteration of a reserve purpose or the sale of land from the Government Gazette. The White Paper instead proposes providing notification in 'a newspaper circulating in the locality in which the land is situated or in a newspaper circulating generally in the State.'³⁵

NSWALC does not support the weakening of any notification provisions and instead supports increasing the transparency of notification requirements so that the public can have greater participation in decision making regarding the changing of purposes and selling of Crown land. NSWALC recommends at a minimum that notification provisions are maintained in the Government Gazette and in addition are placed in both local and state media.

NSWALC is also concerned that the pursuit of a more streamlined notification process does not result in notification processes regarding the revocation of a reserve purpose being published after the sale of land.

Although the White Paper is not clear regarding the specifics of changing notice provisions, NSWALC supports the Government's statement in the White Paper that 'the focus for notification should be on providing for effective community engagement'³⁶ including the development of online portals. The development of these portals, however, should be in addition to notification in the Gazette and other community participation provisions.

In the process of changing notification provisions, NSWALC urges the Government not to value the goals of 'rationalisation' and 'efficient administration' above goals of supporting active community participation and engagement in decisions regarding public assets. Proposals in the White Paper currently appear to favour rationalisation above the genuine support of community engagement and participation. Furthermore, the focus of the White Paper on addressing issues of community engagement through strategic planning process under the proposed planning framework is inappropriate. Provisions outlined in the planning bills relating to community consultation are inadequate and include vague and non-binding language.

Recommendation 28: The NSW Aboriginal Land Council urges the Government to ensure that notification processes prioritise effective community engagement and do not reduce community engagement at the expense of seeking more streamlined administrative processes. Processes for notifications should not be reliant on strategic planning provisions in proposed planning laws. In any changes to notification provisions, the intention to revoke or alter the purpose of a reserve

³⁵ Crown Lands Legislation White paper, p.18

³⁶ Crown Lands Legislation White paper, p.18

should require notification in the Government Gazette as a minimum.

5.9 Western Land Leases

The White Paper, in accordance with recommendations of the Public Land Inquiry Final Report by the General Purpose Standing Committee No. 5, proposes allowing lessees of Western Lands grazing leases to apply for freehold conversion. Under the ALRA, claimable Crown lands include lands that are able to be lawfully sold or leased, or are reserved or dedicated for any purpose under the *Western Lands Act 1901*. As a result, the conversion of leases removes Aboriginal Land Councils ability to make claim over land under the ALRA into the future, as land would be held as freehold. Additionally, NSWALC requests further information regarding how Aboriginal land rights and ownership of Aboriginal culture and heritage will be supported in freehold conversion processes.

Recommendation 29: The NSW Aboriginal Land Council requests further information regarding how Aboriginal land rights and ownership of culture and heritage will be supported in the freehold conversion processes of Western Lands leases.

5.10 Enforcement provisions

Part 7, Division 5 of the *Crown Lands Act* contains mechanisms for the protection of public land including penalties for offences on public land (such as grazing stock, cultivating public land and leaving rubbish amongst others). The White Paper notes that these enforcement provisions have not been imposed properly and recommends the issuing of stop work orders, remediation notices, removal notices and that the courts should be able to make restoration orders.

Aboriginal Land Councils have been affected by a failure to enforce Crown land offences when the Aboriginal Land Council is an adjoining landowner, or where the land has been granted but not yet transferred and as such, NSWALC supports improved protection and enforcement provisions.

NSWALC particularly supports the use of restoration orders³⁷ and recommends that the Crown is able to seek a restoration order against a polluter even if the land has been transferred to an Aboriginal Land Council.

Recommendation 30: The NSW Aboriginal Land Council supports improved protection and enforcement provisions. The NSW Aboriginal Land Council recommends that the Crown be able to seek a restoration order against a polluter even if the land has been transferred.

5.11 New business model Crown Lands Division

The interagency steering committee recommended that the NSW Government establish the Crown Lands Division as a Public Trading Enterprise (PTE). The Government has supported this recommendation.

There currently is insufficient detail regarding the legal form that the PTE would take, although it appears that the interagency steering committee considered that the PTE would not be in the form of a state owned corporation.

NSWALC seeks confirmation from the Government that the Crown will retain ownership of Crown land and asset portfolio (not the PTE) and that the Crown land will not be vested in the PTE or in

³⁷ Crown Lands Legislation White paper, p.31

another entity. NSWALC also seeks clarification regarding whether the PTE will have the authority to lease and licence Crown land without the approval of the Minister Administering the Crown Lands Act and more broadly what decision making capacity and role the PTE will have in Crown land management.

Of concern to NSWALC is how the commercial focus of the proposed PTE, which will have revenue targets and will need to raise the majority of income from user charges, will support the objects of the ALRA. The commercial focus of a PTE sits uncomfortably with the competing requirements for claimable Crown land under the beneficial and remedial objects of the ALRA. Further detail is sought from the Government regarding the PTE proposal and how it will support the compensatory mechanisms of the ALRA that enable Aboriginal Land Councils to claim unused and unneeded Crown land.

Recommendation 31: Any move to a Public Trading Enterprise must not undermine Aboriginal Land Council's rights to claim Crown land under the *Aboriginal Land Rights Act*. The NSW Aboriginal Land Council seeks confirmation from the Government that the Crown will retain ownership of Crown land and asset portfolio (not the PTE) and that the Crown land will not be vested in the PTE or in another entity.

5.12 Abolition of commons

The White Paper proposes the abolition of commons and the *Commons Act*. Commons are parcels of land which have been set aside as a common for the use of inhabitants of any specific locality or the cultivators or farmers in which the parcel of land is situated. Commons are managed for the benefit of commoners (who are registered on a commoners roll kept in respect to the common) under the *Commons Management Act 1989*.

The White Paper notes that 'many commons have environmental or Aboriginal or other heritage values' and proposes a series of options for the future use of commons including converting commons to Crown land and managing them as reserves, converting commons to Crown land with commoners continuing to use the land through lease or licence arrangements or disposing of commons to commoners, adjoining landowners or otherwise.

The proposals to dispose of commons through the sale to commoners or adjoining landowners do not support Aboriginal land claims processes. NSWALC is of the view that commons that are in use by commoners should be used through lease or licence arrangements under Crown lands legislation and that where commons are no longer used or needed, that they should be available for claim under the ALRA.

Recommendation 32: The NSW Aboriginal Land Council supports the conversion of commons to Crown land and the management of commons under a single management regime. Commons that are no longer used or needed should be available for claim under the *Aboriginal Land Rights Act*.

6. Conclusion

Through the administration of Crown lands legislation, land was alienated by the Crown in disregard to the property rights of Aboriginal peoples and without regard to the importance of land as a cultural and economic resource for Aboriginal peoples.

NSWALC urges the Government to not isolate the rights and interests of Aboriginal people in Crown land from the Crown land review and not to undermine the objects and purpose of the ALRA. Crown land should be managed to facilitate the objects of the ALRA.

NSWALC is dedicated to working with the Government, wherever possible, to facilitate strategies that allow the Government to deliver social, community and economic benefits through the objects of the ALRA as well as allowing the Government to get on with business. As such, NSWALC seeks greater involvement in the Crown lands review processes and seeks responses from the Government regarding how issues raised in this submission will be addressed.

If you have any questions regarding the content of this submission, please contact the Policy and Research Unit on policy@alc.org.au or 9689 4444.