

**New South Wales Aboriginal Land Council**

**The Sustainability of the  
NSW Aboriginal Land Rights Network**

**A Discussion Paper**

**December 2010**

# Table of Contents

<b>FOREWORD</b> .....	<b>II</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>V</b>
<b>1. INTRODUCTION AND BACKGROUND</b> .....	<b>1</b>
<b>2. WHAT DO WE MEAN BY ‘SUSTAINABILITY’?</b> .....	<b>3</b>
<b>3. ISSUES AND CHALLENGES</b> .....	<b>5</b>
3.1 ISSUES .....	5
3.1.1 <i>LALCs in breach of s.91 of the ALRA</i> .....	5
3.1.2 <i>Risk assessment and the LALC performance</i> .....	5
3.1.3 <i>Additional administrative and other demands on the Network</i> . ....	7
3.1.4 <i>The state of the Investment Account</i> .....	8
3.2 CHALLENGES .....	9
3.2.1 <i>Does NSWALC have enough money to sustain the Land Rights Network?</i> .....	9
3.2.2 <i>Is the Network capable of meeting all of the demands being placed upon it?</i> .....	9
3.2.3 <i>How can the Network’s resources be better distributed?</i> .....	10
3.2.4 <i>Are there too many LALCs?</i> .....	10
3.2.5 <i>Are LALC membership levels right?</i> .....	11
3.2.6 <i>Can the performance of LALCs be improved?</i> .....	11
3.2.7 <i>Can LALCs achieve the requirements for community, land and business planning?</i> .....	12
3.2.8 <i>Can LALCs establish and maintain successful community benefit schemes?</i> .....	12
3.2.9 <i>Can LALCs establish and maintain successful social housing benefit schemes?</i> .....	13
<b>4. OPTIONS</b> .....	<b>14</b>
4.1 REVIEW FUNDING ALLOCATIONS TO LALCS.....	14
4.2 DISPOSE OF NON-PERFORMING NSWALC ASSETS .....	14
4.3 MAKE GOVERNMENTS PAY FOR THE EXTRA DEMANDS ON THE NETWORK.....	15
4.4 ENCOURAGE RESOURCE SHARING BETWEEN LALCS .....	15
4.5 PROVIDE INCENTIVES FOR VOLUNTARY AMALGAMATIONS BETWEEN LALCS.....	16
4.6 ONLY APPROVE BENEFIT SCHEMES THAT HAVE BEEN BUSINESS PLANNED AND/OR FEASIBILITY TESTED .....	16
4.7 LINK BENEFITS TO MEMBERSHIP .....	17
4.8 OTHER OPTIONS .....	17
<b>5. CONSEQUENCES</b> .....	<b>19</b>
5.1 CONSEQUENCES OF THE OPTIONS .....	19
5.2 CONSEQUENCES OF NOT RESPONDING TO THE CHALLENGES .....	19
<b>6. RECOMMENDATIONS</b> .....	<b>21</b>
<b>REFERENCES</b> .....	<b>22</b>
<b>ABBREVIATIONS</b> .....	<b>22</b>

## Foreword

The New South Wales Aboriginal Land Council has now begun planning for its next State Wide Conference to be held in April, 2011.

The Conference will bring more than 200 delegates from Local Aboriginal Land Councils together with the nine members of NSWALC's Governing Council, and its senior management and staff.

It will provide a rare opportunity for the elected representatives of First Nations from across the State to come together and network over three days on a wide range of issues which face our people and our elected organisations as we work to improve the social, political, economic and cultural well-being of our constituents.

A wide range of key policy, planning, operational and advocacy issues will be discussed and debated at the Conference.

Chief among them will be the future financial and political sustainability of the land rights network.

This discussion paper has been prepared on behalf of the New South Wales Aboriginal Land Council to stimulate informed discussion and debate on this issue.

As all LALC members would be aware this is an issue with a long and fraught history.

A Review of the Aboriginal Land Rights Act in 2000 canvassed the idea of reducing the number of LALCs, as recommended by the NSW Audit Office, and increasing the minimum numbers of LALC members (10) required to seek constitution of a new LALC.

It recommended the number of LALCs be reduced by voluntary amalgamations.

The ALRA Review Taskforce Report on Structure, Representation, Governance and Benefits, released in November 2005, noted this had never occurred.

Indeed, the number of LALCs had increased.

The Task Force concluded the number of LALCs should be reduced by a compulsory process.

It recommended the optimal number of LALCs should be 60.

The Task Force proposed that a process of amalgamation be commenced by a project, conducted by the Registrar of the ALRA, which would consider and make recommendations as to how amalgamations should take place.

The amalgamation project would need to consider issues such as: the size and Aboriginal population of the area; the number and nature of local Aboriginal communities and cultural boundaries, the number of LALC members; assets and income of the LALCs in the area; and the wishes of members.

Consideration would also need to be given to the future location of LALC offices; staff requirements for the new LALCs, transition arrangements and management of debts and liabilities.

The Registrar would be required to give notice of amalgamation proposals to affected LALCs and seek their comments and those of NSWALC.

On finalising an amalgamation plan the Registrar would forward it to the Minister. The Minister would finalise the plan and re-draw the boundaries.

The recommendation was opposed during community discussions.

The Government of the day rejected this recommendation and, instead, abolished the 13 Regional Aboriginal Land Councils.

It should be remembered that some in Government had lobbied for all LALCs to be abolished.

Recent public statements by Opposition MP's indicate this position may well be revived should NSW have a change of State Government in March, 2011, as all current opinion polls increasingly suggest.

NSWALC takes the view this is an internal debate we must have. We will ignore it at our peril.

It should be clear to everyone, however, that we have no hidden agenda.

It would be far better, in our view, for the Network to work through these matters and be ahead of government, and other stakeholders, in taking positive steps toward addressing the sustainability challenges we currently face.

Unless the Network demonstrates its preparedness to confront these issues it runs the risk the Government of the day will take the most direct option for reducing the overall costs of the Network—a mandatory reduction in the number of LALCs without prior consultation with the network.

We have been buoyed by the fact that the majority of delegates at the last State Wide Conference in March last year supported the need for further detailed and open debate on these issues.

NSWALC has conducted a considerable amount of work on the sustainability issue since then.

We have done so conscious of the results of that survey and the imminent changes in our political environment with a potential change of State Government just before the 2011 Conference.

This Discussion Paper is the result.

NSWALC's Governing Council has accepted a key recommendation that it be widely circulated within the Network to communicate the outcomes of the analysis to date, and to give the regions and LALCs, an opportunity to work through the issues, options and consequences with all LALC members.

It is the view of NSWALC's Governing Council that a full report be prepared for Council following debate and discussion at LALC level, and at State Wide Conference, which clearly indicates the level of support for the various options outlined in this Discussion Paper.

We would urge all LALC members to acquaint themselves with the issues and the threshold questions posed in this Discussion Paper.

If you have a feasible alternative to the options outlined in the Discussion Paper let us hear about it.

The future of a sustainable land rights network depends upon it.

We commend this document to you.

**Bev Manton**

**Geoff Scott**

**Chairwoman**

**Chief Executive Officer**

## Executive Summary

The NSW Aboriginal Land Council (NSWALC) has been concerned for some time that several issues are placing a high level of demand on the NSW Aboriginal Land Rights Network and if these are not addressed in the immediate future, there is a very real threat to the sustainability of the Network in the longer term.

The NSW Government made a number of changes to the *Aboriginal Land Rights Act 1983* in 2006. The impact of these changes on the structure and operations of Aboriginal Land Councils has been and continues to be significant. The NSWALC has a number of new obligations that it must keep, and the land rights system as a whole will be threatened if NSWALC is not able to meet these obligations. The financial and political sustainability of the Land Rights system is the key issue, not just for the year ahead, but for the next twenty to thirty years.

The focus of this Discussion Paper therefore is on the need for improvements in the overall operation of the Land Rights system. It has been prepared to stimulate thought and discussion within the Land Rights Network.

The term 'sustainability' has achieved widespread popularity and is being increasingly applied beyond its original focus. Its relevance to the future of the NSW Aboriginal Land Rights Network is discussed in **Chapter 2**. In the context of the future of the NSW Aboriginal Land Rights Network, the term 'sustainability of the Network' takes on a focus on the costs of operating the Network. The NSWALC is aware of a number of threats to the viability of the Network, and, consistent with a precautionary approach, wants to address the issues in ways that will not harm the Network.

The Network faces a number of issues and challenges, which if not addressed, threaten its future and these are discussed in **Chapter 3**. The issues include:

- LALCs in breach of s.91 of the ALRA
- Risk assessment and LALC performance
- Additional administrative and other demands on the Network
- The state of the Investment Account

The challenges include:

- Does NSWALC have enough money to sustain the Land Rights Network?
- Is the Network capable of meeting all of the demands being placed upon it?
- How can the Network's resources be better distributed?
- Are there too many LALCs?
- Are LALC membership levels right?
- Can the performance of LALCs be improved?
- Can LALCs achieve the requirements for community, land and business planning?
- Can LALCs establish and maintain successful community benefit schemes?
- Can LALCs establish and maintain successful social housing benefit schemes?

In preparing this Discussion Paper, the NSWALC considered several options for addressing the challenges facing the Network. **Chapter 4** discusses the following seven options which are considered by the NSWALC as having the greatest potential to deliver the best outcomes for the future sustainability of the Network:

- Review funding allocations to LALCs and consider new funding formula that takes account of need and rewards better performance by LALCs.
- Dispose of non-performing NSWALC assets to raise funds.
- Make government aware of and pay for costs of extra demands it places on the Network.
- Encourage the sharing of resources between LALCs.
- Provide incentives for voluntary amalgamations between LALCs.
- Only approve benefit schemes that have been business planned/feasibility tested.
- Link benefits to membership.

Chapter 5 provides a brief discussion of the consequence mapping that was undertaken of each of the options and how the seven options discussed in Chapter 4 were selected. This chapter also includes a brief discussion of the likely consequences of not responding to the challenges.

In Chapter 6, the NSWALC believes that the seven options discussed in Chapter 4 are the measures most likely to deliver the most financial gain with the least political risk for the Network, and recommends that the Network supports the following options:

1. That a comprehensive review of funding allocations to LALCs be undertaken, including that a new funding formula takes account of need and rewards better performance by LALCs.
2. That NSWALC dispose of non-performing NSWALC assets to raise funds.
3. That the Network makes government aware of and pays for the costs of extra demands it places on the Network.
4. That NSWALC encourages the sharing of resources between LALCs and explores a range of incentives that could be offered.
5. That NSWALC provides incentives for voluntary amalgamations between LALCs.
6. That NSWALC only approves benefit schemes that are supported by professionally prepared business plans and /or feasibility tested.
7. That NSWALC links benefits to membership such that it encourages eligible people to join their LALC and become active members.

The NSWALC urges members of the Network to read this Discussion Paper and looks forward receiving your comments and feedback.

# 1. Introduction and Background

*This Introduction sets out the purpose of this Discussion Paper and how to provide comments. It includes a brief overview of the changes that were made in 2006 to the Aboriginal Land Rights Act 1983 and the impact of those changes.*

The NSW Aboriginal Land Council has been concerned for some time that several issues are placing a high level of demand on the NSW Aboriginal Land Rights Network and if these are not addressed in the immediate future, there is a very real threat to the sustainability of the Network in the longer term.

In 2004 the NSW Government established a taskforce to review the *Aboriginal Land Rights Act 1983* (NSW) ('the Act') with a view to overhauling the Aboriginal Land Council system in NSW. The review culminated in a number of reforms aimed at improving the overall operations of the Aboriginal land rights system. Major changes to the Act in 2006 included the following:

- New governance and accountability arrangements for Local Aboriginal Land Councils (LALCs);
- LALCs and the New South Wales Aboriginal Land Council (NSWALC) to develop community, land and business plans and to be reviewed within 5 years;
- LALCs may develop community benefit schemes to be approved by NSWALC;
- Social Housing Schemes to be classified as community benefits schemes, with LALCs to gain approval to operate existing and proposed schemes as part of their community, land and business plans;
- Voting restrictions imposed on Members who have not attended at least two meetings of the LALC in the preceding 12 months;
- NSWALC to provide training for LALC Board members on issues relating to the operation of LALCs;
- Increased powers of the Minister, including measures for assisting LALCs which are functioning poorly or not complying with the requirements of the Act; and
- Changes in functions and powers of the Registrar, including increased powers to investigate and report on complaints.

The impact of these changes on the structure and operations of Aboriginal Land Councils has been and continues to be significant. In order to avoid the costly appointment of administrators to LALCs and to avoid the potential dissolution of poorly functioning LALCs by the Minister, strategies are required to ensure the financial and political sustainability of the system into the future. As the CEO of NSWALC said in his Annual Report for 2006-07, the system remains at the whim of government and that what the government gives it can also take away. It is also important to understand that the NSWALC has a number of new obligations that it must keep, and the land rights system as a whole will be threatened if NSWALC is not able to meet these obligations.

The financial and political sustainability of the Land Rights system is the key issue, not just for the year ahead, but for the next twenty to thirty years. The focus of this Discussion Paper therefore is

not on individual LALCs, but rather on the total system, and focuses on the need for improvements in the overall operation of the Land Rights system. It has been prepared to stimulate thought and discussion within the Land Rights Network.

This Discussion Paper has been prepared after a lengthy process of analysis and discussion by the NSW Aboriginal Land Council over the past 18 to 20 months. The NSW Aboriginal Land Council welcomes comments on the issues and options and it is only through frank and fearless discussion and feedback on the contents of this Paper, that the Council will be able to make informed decisions about the future sustainability of the NSW Aboriginal Land Rights Network.

Comments can be submitted in writing to:

**The NSW Aboriginal Land Council**  
**PO Box 1125**  
**PARRAMATTA NSW 2124**

Email: [Malcolm.Davis@alc.org.au](mailto:Malcolm.Davis@alc.org.au)

## 2. What do we mean by ‘sustainability’?

*This chapter discusses the concept of ‘sustainability’ and how this term applies to the future of the NSW Aboriginal Land Rights Network.*

The term ‘sustainability’ has achieved widespread popularity and is being increasingly applied beyond its original focus.

The term has its origins in the World Commission on Environment and Development’s report ‘*Our Common Future*’ published in 1987 (also known as the Brundtland Report).<sup>1</sup> The World Commission on Environment and Development concluded that only sustainable development could blend the fulfilment of human needs with the protection of air, soil, water and all forms of life. Thus the concept of ‘sustainable development’ was launched.

An oft quoted definition from the Report defines the term as “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs” (Brundtland 1987). The definition contains within it two key concepts:

- the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the natural environment’s ability to meet present and future needs (Brundtland 1987).

Since that time, the term ‘sustainable development’ has taken on an economic emphasis. The Macquarie Dictionary defines the term as “economic development designed to meet present needs while also taking into account future costs, including the costs to the environment and depletion of natural resources” (Macquarie Dictionary 2003:996).

The important element in the concept of ‘sustainability’ is the precautionary principle. That is, that we take caution in advance, or that caution is practiced in the context of uncertainty. Two key points are generally included in a definition of the precautionary principle:

- that decision makers need to anticipate harm before it occurs; and
- the establishment of an obligation that if the harm may be high or severe, action to prevent or minimise such harm is taken, even in the absence of any scientific certainty that makes it difficult to predict the likelihood of harm occurring or to predict the level of harm should it occur.<sup>2</sup>

The New South Wales Aboriginal Land Council acknowledges that the term ‘sustainability’ includes social, cultural and environmental matters as well as economic or financial matters, and that this integrated view of sustainability is common amongst Aboriginal people and communities.

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<sup>1</sup> <http://www.un-documents.net/wced-ocf.htm>

<sup>2</sup> [http://en.wikipedia.org/wiki/Precautionary\\_principle](http://en.wikipedia.org/wiki/Precautionary_principle)

This Discussion Paper uses the term 'sustainability' in the context of the future of the NSW Aboriginal Land Rights Network and in particular its ability to continue operating for the purposes for which it was established.

In this context therefore, the term 'sustainability of the Network' takes on a focus on the costs of operating the Network and signals that the NSWALC is aware of a number of threats to the viability of the Network, and, consistent with a precautionary approach, wants to address the issues in ways that will not harm the Network.

## **3. Issues and Challenges**

### **3.1 Issues**

*This part provides a discussion of the issues facing the NSW Aboriginal Land Rights Network.*

#### **3.1.1 LALCs in breach of s.91 of the ALRA**

*This section analyses the issues associated with LALCs being in breach of s.91 of the Act.*

Under s.87 of the Act, the Minister has the power to amalgamate two or more LALCs, include the whole of the area of a LALC within the area of one or more other LALC, dissolve the LALC or change the name of the LALC. In order for the Minister to make a dissolution under section 87, the Minister must be satisfied of any of the criteria in section 91 of the Act. These are serious matters because the sustainability and performance of the Land Rights Network depends on LALCs not triggering any of the subsections of s.91 of the Act at any time.

The NSWALC is required under s.159(2) of the Act to submit a report to the Minister every quarter or every six months on the extent to which the LALCs are complying with the requirements of the Act.

LALCs need to be aware that the Minister is regularly informed of the extent to which LALCs are currently in breach of the Act, and that under ss.87 and 91 of the Act, the Minister has the power to dissolve LALCs for triggering one or more of the criteria in s.91(1) of the Act. If the NSW Government chooses to act in accordance with its powers under the Act at the present time, then several LALCs could be dissolved and the Network would be in disarray.

#### **3.1.2 Risk assessment and the LALC performance**

*This section discusses the NSWALC's funding policy, the LALC Management Support System (LMSS) and LALC performance under the NSWALC's funding policy.*

Under s.106(8)(e) of the Act, the NSWALC is able to grant funds for the payment of costs and expenses of the LALCs. These funding decisions must be exercised by the NSWALC. This function cannot be delegated to the Chief Executive Officer (CEO) and by the CEO to other officers. The decision to make funding allocations is also subject to other mandatory conditions, including to cease funding a LALC in certain circumstances and to make payments on behalf of a LALC in circumstances where NSWALC is not permitted to fund the LALC. It is therefore legally necessary for NSWALC to be aware of which LALCs it is entitled to fund and which it is not. It is also in the interests of the Land Rights system as a whole, for the NSWALC to further differentiate between LALCs according to performance with respect to their entitlement to receive funding.

Under section 162 of the Act NSWALC may enter into a funding agreement with a LALC under which NSWALC agrees to grant funds to a LALC under specified conditions.

In 2009, the NSWALC adopted a new LALC funding policy that is aimed at achieving an improvement in the application of funding procedures. In support of the new funding policy, the NSWALC also developed a LALC Management Support System (LMSS) to assess and establish the risk level of each

LALC in the management of their functions. The performances of the LALCs are measured against five criteria, which are:

1. Governance
2. Human Resources
3. Property Management
4. Financial Management
5. Administration.

These criteria measure the total performance of each LALC with each of the five key areas comprising 20 percentage points. The total result determines the LALC's place within one of five risk assessment levels, as follows:

<b>Low Risk</b>	If the LALC achieves 90 plus percentage in their performance ratings. These LALCs get their funding allocation on a quarterly basis and report on a half yearly basis.
<b>Medium Risk</b>	If the LALC's achievement is between 70 and 89 percentage in their performance ratings. These LALCs get their funding allocation on a quarterly basis and report on a quarterly basis.
<b>High Risk</b>	If the LALC's achievement is between 50 and 69 percentage in their performance ratings. These LALCs get their funding allocation on a monthly basis and also report on a monthly basis.
<b>Unfunded</b>	If the LALC's achievement is below 50 percent, even if that LALC may be in regulatory compliance. These LALCs are entitled to receive essential payments for their core business under an Assistance Agreement if executed by them for the necessary assistance.
<b>Administration</b>	The LALCs under administration are not subjected to the LMSS assessment until the completion of the administration period. However, these LALCs receive an allocation on a quarterly basis and report in accordance with the term of the administrator's appointment.

Each LALC will always fall within one of the five categories above. If a LALC meets all the legislative requirements and achieves a good performance assessment as captured in the LMSS, then the LALC is funded in accordance with the rating achieved. In the event that a LALC falls below a risk rating of 50%, funding will cease, as these LALCs are deemed to present significant management difficulties and will fall into the unfunded category.

As at 30 June 2010, 94 LALCs were in the funded categories, compared to 86 in June 2008. Also as at June 2010, 23 LALCs were in the Unfunded Category, dropping from 28 in June 2008. The number of LALCs under Administration in June 2008 was 7. This increased to 13 in December 2008 and dropped back to 7 in June 2009, and has dropped to 2 in June 2010, although one of those LALCs successfully completed its period of Administration just before the end of the financial year. During the 2009-10 financial year, NSWALC expended approximately \$708,281 against the budgeted figure of \$1.2 million for Administration fees. Funds spent on Administration fees are not being used to obtain benefits for Aboriginal people in NSW.

An analysis of the results over the last three financial years reveals the system is not functioning very well because a large number of LALCS were in either the High Risk Funding Category, the Unfunded Category or in Administration. The system is in crisis when such a large number of LALCs are operating below the requirements in the Act for optimum performance and accountability.

### **3.1.3 Additional administrative and other demands on the Network.**

*This section discusses the impact of the additional burdens that have or are being placed on the Land Rights Network.*

The recent amendments to the Act place a number of additional administrative responsibilities on all parts of the Land Rights Network. For LALCs, these include:

- Managing the LALC's assets consistent with its community, land and business plan;
- Reviewing the LALC's community, land and business plan at least every 5 years;
- Developing and administering the LALC's community benefit schemes;
- Reviewing the LALC's social housing scheme and seeking the NSWALC's approval.

For the NSWALC, the additional administrative responsibilities include:

- Arranging training for LALC Board Members on their governance responsibilities;
- Assisting LALCs to carry out their functions;
- Approving each LALC's community, land and business plan, initially by 31 December 2008 and after they have been reviewed;
- Approving each LALC's community benefit scheme;
- Approving each LALC's social housing scheme;
- Maintaining a register of approvals and notifying the Minister of such approvals;
- Supervising any approved community benefit scheme and social housing scheme;
- Establishing an expert panel to assist Council in assessing land dealing applications.

Some of the additional functions that the NSWALC is required to undertake are intended to ensure that the NSWALC continues to provide the necessary support and guidance to LALCs in order for them to satisfactorily perform their functions. However, some of these additional functions also have a regulatory aspect to them. While NSWALC does not have any powers to issue penalties, it nevertheless is required to provide regular reports to the Minister on how well the Land Rights system is functioning. This places NSWALC in an invidious position. On the one hand the NSWALC is expected to provide support and guidance to LALCs to perform their functions and carry out their responsibilities. On the other hand, NSWALC is required to provide regular reports to the Minister and inform the Minister of any issues with respect to LALCs failing to meet their obligations satisfactorily.

There is an increasingly burdensome and complex administrative load on the NSWALC. The seemingly never ending demand for accountability places strains on the NSWALC's limited staffing and operational resources. While increased demands for accountability are an inevitable aspect of contemporary public administration, amendments to the Act over time have focussed accountability responsibilities on the NSWALC. This, coupled with performance problems and failures at the LALC level, adds to the growing demands on the Land Rights system in NSW.

### **3.1.4 The state of the Investment Account**

*This section analyses the current state of the Investment Account that supports the Land Rights system.*

The NSW Land Rights system is funded by way of draw downs from the NSWALC Statutory Investment Account that is established under the Act. For the first 15 years the State paid an amount equivalent to 7.5 per cent of NSW Land Tax (on non-residential land) into the Account as compensation for land lost by the Aboriginal People of NSW. This annual payment ceased in December 1998 and since then the NSWALC and the Network have been self sufficient. This fact is still not well understood in the wider community.

The two basic objectives of the Account are to:

- provide sufficient income to meet the basic administrative expenses of the LALCs and the NSWALC; and
- ensure sufficient funds are put aside so that the value of the Account increases with inflation.

The Act prescribes a minimum statutory limit for the Account at \$485 million. As at 30 June 2010 the balance of the Account was approximately \$541.0 million, down from a high of \$720.8 million as at 2006-07. As with most other investment organisations, the Account has experienced significant losses due to the global financial downturn. This is placing added pressures on the Account and on the NSWALC.

In 2006-07 a drawdown of \$27.9 million was made to fund the operational expenditure of NSWALC and the network of local and regional land councils. In 2007-08 the drawdown from the Account was \$37.8 million. In 2008-09 the drawdown from the Account was \$40.2 million. In 2009-10 the drawdown is \$37.4 million.

In 2006-07 NSWALC's direct funding to the land council network comprised more than \$13 million. Indirect funding to the Network accounted for a considerable amount of the balance of the drawdown. The changes to the structure of the network of Councils brought about by the changes to the Act in 2006 resulted in NSWALC making some changes to the grant funding to the LALCs. Among the changes to the land council network, the Regional Land Councils were abolished and each LALC is required to appoint a Chief Executive Officer or CEO.

For the 2008-09 and 2009-10 financial years, the grant funding per LALC has been increased to \$130,000 totalling \$15,340,000 for 118 LALCs in 2008-09 and 2009-10. It is expected (because of unfunded LALCs) that NSWALC will only require around \$14.6million in this financial period and has adjusted the budget accordingly, reducing expenditure by around \$800,000.

As the NSWALC states in its Annual Report for 2006-07, it is important to understand that while NSWALC has a great deal of money invested, it is not able to spend more than the realized interest from the investment less the allowance for inflation.

It is also important point to understand that if there is a continual slump in the financial markets, then further cuts to the current budget may be required.

## 3.2 Challenges

*This part provides a discussion of the challenges facing the NSW Aboriginal Land Rights Network and poses key questions for each of the challenges.*

### **3.2.1 Does NSWALC have enough money to sustain the Land Rights Network?**

The Investment Account that NSWALC uses to support the Land Rights Network has been under pressure because of the global financial crisis and if the financial markets don't improve there will be added pressures on the Account. At the same time, the cost of operating the Land Rights Network is growing. Both these factors are major threats to the sustainability of the Land Rights Network.

To overcome these threats, NSWALC must find better and more efficient ways of funding the Network. It can do this either by raising more income, or reducing the cost of operating the Network.

In the current economic climate, raising more income will be very difficult. The Investment Account may not grow much in coming years, particularly in the light of the continuing global financial situation. NSWALC also has to be careful not to take too much money out of the fund or it will result in the fund being below the required limit.

Therefore, the Network needs to accept that it must reduce its operating costs if it is to remain sustainable.

#### ***Key Questions***

- *How can greater efficiencies be found within the Land Rights system to achieve better value for money from the funds being used for the operation of the system?*
- *What strategies can be adopted to lift the overall performance of the Land Rights system as opposed to simply reducing operating costs?*

### **3.2.2 Is the Network capable of meeting all of the demands being placed upon it?**

The NSWALC and its members should be proud that the Land Rights Network is established and has been maintained by Aboriginal people for many years. On behalf of Aboriginal people, the NSWALC has used the opportunities created by land rights to take on many responsibilities and functions, and deliver many benefits. Many of these responsibilities and functions are those that the NSWALC has felt are most important to Aboriginal people, and which have not been taken up by other parts of government and the community generally.

However, over the years the NSWALC has either placed more and more demands upon itself or has had more and more demands placed upon it by government and society. This has often happened without the NSWALC being sure that the NSW Land Rights Network has enough capability and capacity to meet these growing demands.

To achieve a sustainable Network, we need to ask ourselves whether the Network has the capability to meet all of the demands being placed upon the Network or can expect to have the capability in

the very near future. We also need to ask ourselves whether there is a need to reorganize the Network so that it can better direct and manage its overall capabilities.

### **Key Questions**

- *What activities could or should be funded from other sources?*
- *How can the Network get Governments of all levels to pay for the additional demands they place on the Network over and above what the Network is required to do under the Act?*

### **3.2.3 How can the Network's resources be better distributed?**

Currently, NSWALC tries to make sure that all LALCs have fair access to funding and other resources. There are different categories for funding depending on how a LALC is performing its responsibilities. What we also know is that capabilities and assets (for example, land) are not evenly distributed across the Network. So some LALCs are better off than others.

In many cases LALCs receive the same amount of funding as each other. Some members of the Land Rights Network may see this as unfair, because some LALCs are better off than others and should be expected to fund themselves more. This would allow more of the Network's funding to flow to LALCs that are less well off. Other members may disagree and suggest that the better performing LALCs should be rewarded so that good performance is encouraged.

The NSWALC has little choice but to consider whether there are better ways of distributing the Network's resources, as this may help save on the costs of funding the Network from the Investment Account.

### **Key Questions**

- *Should every LALC receive the same level of minimum funding from the NSWALC each year?*
- *If so, on what basis?*
- *Are there alternative ways of determining the level of funding support from the NSWALC that better reflect the capability of LALCs and their level of resources?*
- *Would it be fair to better target resources to those LALCs that show and maintain continuous improvement rather than continue to prop them up year after year?*

### **3.2.4 Are there too many LALCs?**

There are 119 LALCs in NSW. The Aboriginal Land Rights Act Review Task Force thinks that this number of LALCs is unsustainable because of how much it costs to support this many LALCs. This cost is increasing because of the changes to the Act. No one really knows what the 'right' number of LALCs should be, but the Land Rights Network is clearly struggling to keep all of the current LALCs operating successfully.

The Land Rights Network therefore needs to accept that one way to improve the sustainability of the Network would be to reduce the number of LALCs. The question then focuses on how we go about reducing the overall number of LALCs, and what criteria we use to determine a reasonable number.

### **Key Questions**

- *What are the core functions of LALCs in a Land Rights system and what is their primary purpose?*
- *Should the role be confined to the central function of land asset management?*
- *What do LALCs do best in terms of local service delivery?*
- *What models offer the best opportunity for local communities to retain their identity and yet be able to participate effectively in the affairs of the relevant LALC?*
- *What is the best way of working out the geographic area for any particular LALC?*
- *Are there cultural considerations that need to be taken into account?*

### **3.2.5 Are LALC membership levels right?**

Under the Act, LALCs are required to have a minimum of 50 voting members and NSWALC is required to use its best endeavours to increase their membership by a minimum 3% each year. If a LALC has less than 50 voting members, it is in breach of s.91 of the Act and the Minister can take action against that LALC including dissolution. At the moment, there are 9 LALCs with less than 50 members.

So making sure that LALCs have enough members is also very important for improving the sustainability of the Land Rights Network. Some of the LALCS cover very small local areas and have a very small adult population, which makes it very difficult for these LALCs to maintain and grow their membership at the required levels. However, there is a large and growing population of Aboriginal people in NSW under the age of 18 years. As these people come of age, it will be vital that LALCs try to gain their membership to ensure the continued survival of their LALC and ultimately the Network.

### **Key Questions**

- *Is a minimum of 50 voting members too arbitrary a number for minimum voting membership given the small population size in many of these LALC areas?*
- *What can be done with the very small LALCs in terms of their potential membership base?*
- *Based on membership to population numbers in some areas, is there a case for amalgamating LALCs to provide a larger population base from which membership can be drawn?*
- *Can LALCs increase their membership?*

### **3.2.6 Can the performance of LALCs be improved?**

A large proportion of LALCs are struggling to meet their responsibilities and this is costing the Land Rights Network a lot of money. If the performance of LALCs can be improved, the Network would save costs associated with placing LALCs in administration and supporting LALCs that are struggling.

However, the NSWALC has already been trying hard to improve the performance of LALCs but because of the increasing burdens on the Land Rights Network, little real progress has been made in terms of cost savings. The cost of continually having to fund poorly performing LALCs and Administrators means that funds are being diverted from delivering benefits to the Aboriginal people of NSW. Improving the performance of all LALCs would improve sustainability, but the Network must also consider the scale of the challenges.

### **Key Questions**

- *What additional measures can be put in place to assist LALCs with a long history of poor performance?*
- *How long can NSWALC continue to provide support and guidance to poor performing LALCs before a recommendation should be put to the Minister to dissolve a LALC and merge its area with one or more other neighboring LALCs?*
- *If the Government does not act to dissolve a LALC, then why should NSWALC continue to provide any support?*

### **3.2.7 Can LALCs achieve the requirements for community, land and business planning?**

NSWALC has a responsibility under the Act to ensure that every LALC has undertaken community, land and business planning in line with the requirements of the Act. The requirement for high quality community, land and business plans helps sustain the NSW Land Rights Network and delivers benefits to local Aboriginal communities.

However, there are several challenges associated with achieving this. Some LALCs have the capability to do this and do this well. Other LALCs will struggle with this requirement and will need a lot of support. Further, NSWALC has had to allocate substantial resources to support this requirement because it must report to the Minister about community, land and business planning. This increases the cost of operating the system, and NSWALC is already finding it difficult to resource the current Network to the required level.

### **Key Questions**

- *How are the LALCs coping with the new requirement?*
- *What support or guidance did they need to complete their Plan?*
- *Are there any LALCs that struggled to meet the deadline for their first Plan?*
- *What assistance will LALCs require to review their plans?*
- *How useful are the plans as a measure of the LALC's achievements?*

### **3.2.8 Can LALCs establish and maintain successful community benefit schemes?**

The requirements for setting up and maintaining Community Benefit Schemes for LALCs are complex. Again, some LALCs have the capability to do this and do this well, but others may not. NSWALC must supervise the operation of these schemes and report to the Minister about them. This imposes an extra cost on the Network.

If LALCs can set up and maintain successful Community Benefit Schemes, then this will improve the sustainability of the Land Rights Network. But if LALCs set up Schemes that ultimately fail, this may become a major threat to the Land Rights Network because the Minister has the power to intervene. Therefore, the Network has to be very careful. It must ask whether the Network as a whole can realistically expect to set up and maintain successful Community Benefit Schemes across the entire Network as it currently stands without threatening the viability of the Network in the long term.

### **Key Questions**

- *What factors should LALCs consider before establishing a community benefit scheme?*

- *Would a set of performance criteria assist LALCs in their deliberations about setting up a community benefit scheme?*
- *Are there merits in allowing each LALC to develop their own community benefit scheme?*
- *What measures can the Network put in place to ensure community benefit schemes are successful and will not unduly burden the Land Rights system?*

### **3.2.9 Can LALCs establish and maintain successful social housing benefit schemes?**

Access to housing is very important to local Aboriginal communities, and LALCs have become significant providers and managers of housing for the benefit of Aboriginal people. The provision of housing also provides an income to LALCs through rent collection. In fact, for many LALCs their social housing function is their main activity.

However, providing and managing housing is also a very complex and expensive exercise. The income raised from rent collection rarely, if ever, covers the cost of managing and maintaining housing. As houses get older, it is becoming more expensive to manage and maintain them. The Aboriginal housing system is critically underfunded and there is virtually no chance that the Land Rights Network can address this underfunding from its own resources.

The Act requires LALCs to obtain NSWALC approval if they wish to set up and maintain Social Housing Benefit Schemes, and the NSWALC must report progress with these to the Minister. There are other major changes happening to the way in which Aboriginal housing will be funded by the Commonwealth and State Governments. These changes will also introduce performance standards that will increase the pressure on LALCs and the Land Rights Network generally.

As usual, some LALCs are able to perform the housing function very well, while others continually struggle with it. Under the changes to the Act, NSWALC must satisfy itself and ultimately the Minister that any Social Housing Benefit Schemes operated by LALCs are financially viable. Either the Land Rights Network must finance that viability itself, or a government subsidy is required. As neither of these options is likely to be supportable, the NSWALC must ask whether and how LALCs can continue to provide and manage housing in a way that does not threaten the sustainability of the Network.

#### ***Key Questions***

- *Should LALCs continue to be social housing providers?*
- *If so, then how can they access the subsidies on offer from the Commonwealth via the State Government without having to compromise their primary role as land holders and managers on behalf of the Aboriginal people in their area?*

## 4. Options

*This Chapter provides a brief discussion of a range of options for responding to the challenges the Network is facing. Some of the options will be easy to implement, while others will be more difficult.*

In preparing this Discussion Paper, the NSWALC has considered a range of 27 options for addressing the challenges facing the Network. The following seven options are considered by the NSWALC as having the greatest potential to deliver the best outcomes for the future sustainability of the Network:

- Review funding allocations to LALCs and consider new funding formula that takes account of need and rewards better performance by LALCs.
- Dispose of non-performing NSWALC assets to raise funds.
- Make government aware of and pay for costs of extra demands it places on the Network.
- Encourage the sharing of resources between LALCs.
- Provide incentives for voluntary amalgamations between LALCs.
- Only approve benefit schemes that have been business planned/feasibility tested.
- Link benefits to membership.

### 4.1 Review funding allocations to LALCs

*This option proposes a review of funding allocations to the LALCs and would include consideration of a new funding formula that takes account of need and rewards better performance by LALCs. It addresses the challenges of a better distribution of resources and improving the performance of LALCs.*

This option was due to be considered in 2006, but other priorities pushed its consideration aside. While there is a strong view that the core level of funding at \$130,000 per LALC is about right at the present time, there is also a countervailing view that there are too many LALCs in NSW given their overall size and functions and that perhaps a “set allocation fits all” approach is not desirable. A comprehensive review of funding policy would enable the NSWALC and the Network to develop a formula that both takes account of need and provides incentives to improve performance. A review of funding policy also provides the Network and the NSWALC in particular with an opportunity to set some clear directions for the Network that are aimed at improving its financial sustainability in the medium to long term. The scope of the funding policy review should therefore be as wide as possible to take account of the full range of pressures on the Network.

### 4.2 Dispose of non-performing NSWALC assets

*This option proposes the disposal of non-performing NSWALC assets. It addresses the challenge of generating additional resources for the Network.*

There is strong support for disposing of assets if the asset is no longer required and/or it cannot meet a return on investment based on an agreed threshold. However, care needs to be taken not to dispose of valuable assets because once an asset is sold, it can be extremely difficult to regain. It is important to consider how the proceeds of such asset disposals can be used. Where possible, they

should be used to reduce the operating costs of the Network because the overall revenue from asset sales is not an endless source of income. They will be once-off opportunities.

### **4.3 Make governments pay for the extra demands on the Network**

*This option proposes NSWALC and the Network make governments pay for the extra demands they place on the Network, especially for those that are beyond the statutory responsibility of the Network. It addresses the challenge of attracting additional resources to the Network.*

The NSW Government continues to place additional demands on the Network, some of which are far removed from the primary purposes of the Network (i.e. providing social housing benefit schemes). The danger for the Network as a whole and for LALCs individually, is that the additional demands being placed upon the system do not result in the system overreaching its capacities. It is not an unreasonable proposition therefore for the Network to put to government that it should pay for services that it expects of the Network that are not related to the core purposes of the Network under the ALRA. The additional expectations are not easy to calculate, but that is not a reason to shy away from asking government to pay for them.

There is strong support for this option because government is continuing to place extra demands on the Network, some of which are not directly related to the primary reasons for the Network's existence. The Network will have to invest some effort into convincing government that it needs to pay for the additional services it expects from the Network, especially if the extra demands being placed on the Network are not directly related to its core business.

If the NSW Government refuses to consider any kind of recompense for the additional demands it places on the system (especially where they have little relation to the core purpose and functions of the Network), then the Network may have to consider saying 'No' to external demands as a way of managing the impacts on the sustainability of the Network.

### **4.4 Encourage resource sharing between LALCs**

*This option proposes encouraging LALCS to share resources between them to achieve some reduction in the overall costs of operating the Network. It addresses the challenge of a better distribution of resources.*

Resource sharing involves two or more LALCs pooling relevant assets or resources such as equipment, infrastructure, personnel or technology. This option has merit provided there are willing partners, and in a Network the size of 119 Councils, there must be opportunities for sharing resources. The scope for resource sharing between LALCs is as wide as they may wish it to be, including things like sharing administrative functions, strategic planning for community, land and business planning, and developing and managing benefit schemes. NSWALC could kick-start the process by providing some incentives for neighbouring LALCs to consider ways they could share resources with the bottom line being they must demonstrate net savings in core operating costs, and those savings must be returned to the Network as a whole.

In terms of the Network's longer term sustainability, this option has the potential to offer not only greater financial benefits for the Network but also more desirable social and community outcomes.

If any comparison can be made with resource sharing initiatives in the Local Government sector around Australia and provided the processes and administrative arrangements for resource sharing between two or more LALCs is carefully planned and managed, then there are considerable gains to be made from encouraging LALCs to share resources.

#### **4.5 Provide incentives for voluntary amalgamations between LALCs**

*This option proposes providing incentives for voluntary amalgamation between LALCs. It addresses the challenge of reducing the number of LALCs.*

Under Clause 19 of the Regulations to the Act, a LALC may apply to the Registrar for an order under Section 87 of the Act to alter the boundaries of a LALC area. Under Section 87 of the Act, the Minister may change the boundaries of a LALC area or amalgamate two or more LALC areas and constitute the amalgamated area as a LALC area. Voluntary amalgamations between LALCs therefore require the agreement of the Registrar and the Minister.

This option has the potential to generate some savings to the Network from reducing the number of LALCs in the long term and improving the financial viability of the Network. Some of the political consequences will need to be carefully managed. For example, some incentives may be required to make it happen and securing the support of the Registrar and the Minister. There could also be some difficulties drawing new boundaries and they may be difficult to reconcile with cultural geography. The larger coverage for LALCs may also have adverse impacts for some members in terms of access to services and result in some loss of representation.

This option needs to be considered in the light of the fact that a future State government may force some amalgamations on the Network to achieve greater efficiencies and reduce the overall operating costs of the Network. And voluntary amalgamations may be preferable to forced amalgamations, because with forced amalgamations the process will be driven by external stakeholders with little interest in the details and the consequences.

#### **4.6 Only approve benefit schemes that have been business planned and/or feasibility tested**

*This option proposes that the NSWALC only approve benefit schemes that have been business planned and/or feasibility tested. This option addresses the challenges of LALCs achieving the requirements for Community, land and business planning and establishing and maintaining successful benefit schemes.*

This option would require LALCs to conduct a feasibility test or have a business plan prepared on their proposed benefit scheme prior to submitting it to NSWALC for approval. This option has considerable merit and could be tested against a set of criteria that NSWALC could develop as part of its broader policy in relation to the development of community benefit schemes. NSWALC could develop criteria for self-assessment by LALCs before they submit their proposed benefit schemes for

approval, and the criteria should include some guidance on developing a business plan or feasibility analysis for a proposed benefit scheme. Having some rigour around the assessment of community benefit schemes would lessen the risk of the schemes running into financial difficulty.

## **4.7 Link benefits to membership**

*This option proposes that benefits be linked to membership. It addresses the challenges of improving membership levels and sustaining the Network into the future.*

This option is consistent with the overall purpose of the Network. However, there are competing views about this option. On the one hand, some regard it as a nice ideal. On the other hand, there is a widely held view among the Network that LALCs are increasingly being distracted from the cultural functions bestowed on them under the ALRA. The latter view is one that tends to galvanise members because they see the primary role of the Network as protecting what little rights have been won through the ALRA and enhancing or expanding the range of opportunities those hard won rights present.

This option is worth exploring in more detail as there are other benefits to be gained from connecting rights, cultural education and development opportunities to membership.

## **4.8 Other Options**

If any of the measures discussed above are unable to deliver a more sustainable Network, then other options will need to be given closer consideration. The other options considered by Council included:

- Withdraw funding from low performing LALCs.
- Withdraw funding from high performing LALCs.
- Completely withdraw funding from LALCs that are in breach of the Act.
- Link funding to membership size.
- Seek funds to support the Network from other sources.
- Forced amalgamation to reduce operating costs.
- Reduce the amount of allocation to individual LALCs.
- Providing better guidance, training and support for establishing and maintaining benefit schemes.
- Require or promote combined benefit schemes where shared purposes are evident.
- Only approve benefit schemes that arise out of / have been reviewed during community, land and business planning.
- Restrict practice of using benefit schemes for very simple forms of assistance.
- Involve other partners in supporting LALCs.
- Regionalise certain functions e.g. LALC CEOs, management and administration functions.
- NSWALC to ensure links between CLB planning and DAA planning.
- NSWALC to establish central help desk & have zone reps to assist LALCs.
- Increase local benefits make membership more attractive.
- NSWALC runs marketing drive for membership.
- Lower membership age to 16 years.

- Reduce travel costs through video conferencing via TAFEs or the Network's administrative hubs.
- NSWALC invests in the improvement of skills of CEOs, LALC staff and Council members.

Some of the options listed above may appear to be easy to implement, but may not deliver much to the Network in terms of cost savings. While others may have the potential to deliver some good outcomes for the sustainability of the Network, they may for a range of reasons be politically or culturally difficult to pursue at this time.

## 5. Consequences

*This chapter provides a brief discussion of the consequences of the options discussed in the previous chapter. It also includes a brief discussion of the consequences of not responding to the challenges.*

### 5.1 Consequences of the options

In 2009 the NSWALC engaged SGS Economics and Planning to assist the Council with analysing the issues facing the Network and in identifying the options for responding to the challenges they pose.

To assist with making decisions about how to address the challenges facing the Network, SGS Economics and Planning considered each option in terms of:

- The issue or issues the option would address – Will the option address more than one of the issues that threaten the sustainability of the Network?
- The financial consequences of the option – Is the option likely to increase costs, decrease costs, or be cost neutral?
- The political consequences of the option – Is the option likely to be supported by LALCs and members, unlikely to be supported, or is it politically neutral?

The consequence of each option was then mapped against these criteria. On the basis of the ‘consequence mapping’, each of the options fell into one of five categories as follows:

- Category 1: Positive financially and positive politically;
- Category 2: Positive politically but negative financially;
- Category 3: Negative financially and negative politically;
- Category 4: Positive financially, but negative politically; and
- Category 5: Neutral, because the effects are most likely to be neither positive nor negative financially or politically.

Five of the options discussed in Chapter 4 fell within Category 1 because they will have positive effects both financially and politically. Two of the options fell within Category 3 because they will have positive effects financially but potentially negative effects politically.

Many of the options listed in Part 4.8 above fell into Categories 2, 3, 4 and 5.

### 5.2 Consequences of not responding to the challenges

If ‘push comes to shove’ by the State Government through lack of action by the Network to address the sustainability challenges it is currently facing, the State Government may leap to force some changes on the Network without adequately considering the consequences.

It must surely be better for the Network to work through the issues and be ahead of government in terms of taking positive steps toward addressing the sustainability challenges, rather than waiting for government to take action.

There is a real risk that if the Network as a whole is not being seen to address the sustainability challenges before it, the State Government may opt to force amalgamations of LALCs, just as it did in the Local Government sector in 2004 (Marshall 2010:89-90, NSWDLG 2004). In these circumstances governments generally don't like to spend a long time conducting consultations to arrive at a desired result. Governments have a tendency to act unilaterally rather than wait for the Network to arrive at its preferred options. There is plenty of evidence of this in relation to local government reforms in NSW and in other jurisdictions around Australia of how governments act in these circumstances.

Although there are some stark differences in the roles and functions between the LALCs and local Government councils in NSW or elsewhere, some valuable lessons can be drawn from Council amalgamations in the Local Government sector across Australia.

- Local Council amalgamations have long been a feature of local government reform in Australia and are based on the premise that "bigger is better" in local governance.
- Local Government council amalgamations have occurred in four states in recent decades – Tasmania, Victoria, South Australia, Queensland, and to a lesser extent, New South Wales.
- The perception was and still is, that consolidation will deliver significant efficiencies in operation.
- Larger Councils are seen as providing economies of scope and scale, enhanced management capacity and reduced administrative costs.
- It is universally accepted that the proportion of funds allocated to administration will decline with increased size.
- The majority of post-amalgamation studies indicate that consolidation programs across Victoria, South Australia and Tasmania have resulted in reduced costs. In South Australia savings on total councils' expenditures have been estimated at between 3% and 5%, while in Tasmania, administrative outlays are thought to have fallen by as much as 6%, and in Victoria by about 8-9%. (Marshall 2010:88)

Of course, there are also negative outcomes from Council amalgamations, and these need to be carefully managed to minimise their impacts on the effectiveness of the Network. These are matters for further discussion.

## 6. Recommendations

*This chapter includes some final observations and recommendations for improving the long term sustainability of the Network.*

The creation of a sustainable Land Rights Network does not necessarily require the Network to adopt all of the options identified in Chapter 4, but serious consideration should be given to adopting as many of them as can be supported by the Council and the wider membership.

The NSWALC puts forward the options discussed in Parts 4.1 to 4.7 as the measures most likely to deliver the most financial gain with the least political risk for the Network.

The NSWALC therefore recommends the Network support the following options for addressing the immediate challenges it currently faces:

1. That a comprehensive review funding allocations to LALCs be undertaken, including that a new funding formula takes account of need and rewards better performance by LALCs.
2. That NSWALC dispose of non-performing NSWALC assets to raise funds.
3. That the Network makes government aware of and pays for the costs of extra demands it places on the Network.
4. That NSWALC encourages the sharing of resources between LALCs and explores a range of incentives that could be offered.
5. That NSWALC provides incentives for voluntary amalgamations between LALCs.
6. That NSWALC only approves benefit schemes that are supported by professionally prepared business plans and /or feasibility tested.
7. That NSWALC links benefits to membership such that it encourages eligible people to join their LALC and become active members.

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## Abbreviations

ALRA	<i>Aboriginal Land Rights Act 1983</i> (NSW) ('the Act')
CEO	Chief Executive Officer
CBS	Community Benefit Scheme
CLBP	Community, land and business planning
LALC	Local Aboriginal Land Council
NSWALC	New South Wales Aboriginal Land Council
SHBS	Social Housing Benefit Scheme