



LAND DIVESTMENT PROGRAM

# ABORIGINAL LAND AGREEMENT NEGOTIATION FRAMEWORK

Designed for the NSW Crown Land Divestment Program

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## **ABORIGINAL LAND AGREEMENT NEGOTIATION FRAMEWORK**

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### **More information**

Land Divestment Unit, Newcastle

[www.industry.nsw.gov.au](http://www.industry.nsw.gov.au)

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### **Acknowledgments**

NSW Aboriginal Land Council

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## Foreword

On 1 July 2015, the NSW Government enacted section 36AA of the Aboriginal Land Rights Act 1983 (NSW) (ALRA), which provides for Aboriginal Land Agreements (ALAs).

ALAs allow for the strategic settlement of multiple land claims, providing flexibility in achieving the social, cultural and economic outcomes intended by the ALRA.

ALAs were introduced to provide a new and additional mechanism to progress land claims under section 36AA of the ALRA.

Developed in partnership with the NSW Aboriginal Land Council this new Negotiation Framework will guide and enable voluntary ALA negotiations as part of the NSW Government's Crown Land Divestment Program arising out of the Crown Land Management Review.

This is a fundamental step forward in the examination of matters relating to land claims in NSW.

The new Framework outlines principals to support fair and respectful negotiations with Aboriginal Land Councils toward the shared objective of consolidating and resolving land claims in a timely way.

The NSW Government is committed to achieving sustainable social, cultural and economic outcomes from the return of land to Aboriginal communities.

A greater degree of certainty in the progression and resolution of land claims will build a strong, resilient and prosperous economy for all citizens across New South Wales.



A blue ink signature of Leslie Williams, written in a cursive style.

The Hon. Leslie Williams MP  
Minister for Aboriginal Affairs



A blue ink signature of Niall Blair, written in a cursive style.

The Hon. Niall Blair MLC  
Minister for Lands and Water  
Minister for Primary Industries

## Foreword

Aboriginal Land Rights has been a long and at times hard journey for our people.

It's a journey we are committed to because the return of our land sustains Aboriginal people culturally, socially and economically.

Regrettably, our Land Rights journey has a long way to go but through trust and genuine partnership, hopefully we won't be walking alone.

The NSW Aboriginal Land Council welcomes this framework for the inclusion of Aboriginal interests and Local Aboriginal Land Councils into the NSW Government's Crown Land Divestment Program.

In the history of Crown land reform, this framework represents a significant first step towards inclusion.

Aboriginal Land Agreements present an opportunity for Local Aboriginal Land Councils and the Government to negotiate on a range of issues starting with land and land claims.

The Agreements present an opportunity for a new approach to expedite the processing of Aboriginal land claims and the delivery of land justice to Aboriginal people in New South Wales.

The framework provides an opportunity to deliver on the promise of the Aboriginal Land Rights Act 1983 – that the return of land to Aboriginal people and the creation of a democratically-elected structure can empower us to make our own decisions and achieve economic independence.

The NSW Aboriginal Land Council acknowledges the NSW Government's willingness to work in partnership with the Land Rights network. By travelling together we are in a stronger position to deliver outcomes that benefit Aboriginal people and the broader community in New South Wales.

This framework and the growing partnership that informs it are just the first steps on what we hope is a new journey together.

It is undoubtedly a long road ahead but with good faith and goodwill, we can work together to realise the potential of greater Aboriginal involvement in the social and economic life of New South Wales.



A handwritten signature in black ink, appearing to read 'Ray A. Lee'.

Chair of NSW Aboriginal Land Council (NSWALC)



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## Commonly used acronyms

Aboriginal Land Agreements	ALAs
Aboriginal Land Councils (includes both the NSW Aboriginal Land Council and Local Aboriginal Land Councils)	ALCs
<i>Aboriginal Land Rights Act 1983</i> (NSW)	ALRA
Local Aboriginal Land Councils	LALCs
NSW Aboriginal Land Council	NSWALC

## Introduction

On 1 July 2015, the Government enacted section 36AA of the *Aboriginal Land Rights Act 1983* (NSW) (ALRA), which provides for Aboriginal Land Agreements (ALAs). ALAs allow for the strategic settlement of multiple land claims and for flexibility in providing the social, cultural and economic outcomes intended by the ALRA. ALAs were introduced as a new and additional option to the existing land claim mechanism under section 36 of the ALRA.

The ALA Negotiation Framework (the Framework) has been jointly developed by the NSW Government and the NSW Aboriginal Land Council. It will be used to guide and enable ALA negotiations as part of the NSW Government's Crown Land Divestment Program arising out of the Crown Land Management Review.

The Crown Land Divestment Program will seek to use ALAs as the mechanism to guide voluntary negotiations with Local Aboriginal Land Councils (LALCs) for the divestment of land. This will occur as part of voluntary negotiations between the State, local Councils and Aboriginal Land Councils (ALCs) that will explore the divestment of Crown land to local Councils and/or to LALCs, whilst retaining land of State significance. Crown land cannot be divested to local Councils where it is subject of a land claim unless agreed to by ALCs.

The Framework aims to ensure ALA negotiations are fair and likely to succeed in the shared objectives of:

- Speeding up the processing of land claims;
- Providing more sustainable social, cultural and economic outcomes for LALCs and Aboriginal communities from the return of land; and
- Providing greater certainty to all parties over Crown land.

The Framework defines the scope of ALA negotiations, provides principles that will guide how negotiations are conducted, and prescribes procedural elements to ensure negotiations are fair and likely to succeed. The Framework provides suggested best practice standards; however, it does not interfere with the rights of parties to agree on their own negotiation processes.

The Framework also provides an avenue for native title rights and interests to be considered as part of the ALA negotiation process. Native title exists under the Commonwealth *Native Title Act 1993* and recognises a set of rights and interests over land or waters where Aboriginal or Torres Strait Islander groups have continued to practice traditional laws and customs since before settlement. These rights are different to and separate from the statutory right of Aboriginal Land Councils to make claims for land under the NSW *Aboriginal Land Rights Act 1983*.

## Ten Principles for ALA Negotiations

A set of ten principles has been developed to guide ALA negotiations. It is expected that the parties to an ALA negotiation will affirm these and any other relevant principles at the commencement of negotiations and rely on them to guide the conduct of negotiations.

The ten principles are:

1. ALA negotiations are voluntary. Parties must agree to participate and can withdraw from the negotiations at any time.
2. ALA negotiations must be conducted in good faith. Good faith negotiations mean the parties must act honestly; each party must have regard to the legitimate interests of the other parties; and no party may act in a manner which is arbitrary, capricious or intended to cause harm to the other parties.

3. Negotiations will be conducted transparently in terms of process, options and information sharing, including potential constraints and opportunities.
4. Shared understanding and good relationships between parties is the foundation for success.
5. Agreements should be reached based on free, prior and informed consent, and the capacity, capability and advice needed to achieve this.
6. Government capacity to appropriately engage with ALCs is critical.
7. Outcomes of ALA negotiations should be equitable and accessible for Aboriginal people.
8. ALA negotiations should take a broad perspective of what is possible in a settlement and consider flexibility and adaptability in negotiated outcomes.
9. Outcomes should be solution-focused to deliver social, cultural and economic benefits for Aboriginal people and greater certainty for Government.
10. ALAs are a Government initiative. Processes will be put in place to ensure relevant government agencies participate and share information with parties to negotiations where appropriate.

## Scope of ALA Negotiations

Without limiting the matters that may be included, section 36AA(5) of ALRA states that the following may be the subject of an ALA:

- Financial or other considerations
- The exchange, transfer or lease of land
- Conditions or restrictions on the use of any land to which the agreement relates
- Joint access to and management of land (including a lease of a type referred to in section 36A)
- Undertakings by an ALC or the Crown Lands Minister with regard to the lease, transfer, management or use of any land
- The duration of the agreement
- The resolution of disputes arising under the agreement.

In accordance with section 36AA(5), ALA negotiations will be principally land focused - Crown land in particular. Crown land does not have to be the subject of a land claim to be considered in ALA negotiations.

ALA negotiations will consider the potential settlement of land claims and transfer of agreed land to a LALC. They may also consider matters relating to the subsequent use and management of that land by a LALC. This may include, but not be limited to, matters such as:

- Employment opportunities and business enterprises
- Training and capacity building
- Recognition and protection of cultural rights, including access and management rights
- Land remediation and land management
- Ongoing relationships and dialogue.

ALA negotiations do not override legislative provisions relating to the use, management and development of land. Any land granted through an ALA negotiation must comply with all relevant legislative provisions. Rezoning or planning approvals cannot be agreed to in an ALA. However, ALAs may provide a platform for promoting or supporting such approvals.

Section 36AA(5) also means that ALA negotiations can consider non-land issues. This is anticipated to be by agreement between the parties. Without limiting the scope of non-land issues, it is anticipated these may include matters relating to employment, training, capacity building, business development, recognition and cultural awareness and other matters. In most cases it is anticipated that non-land issues will have a link to the land that is the subject of the negotiations, however, this is not a requirement.

Where an outcome is proposed by an ALC that is outside the envisaged scope, there will be a mechanism for the Government negotiator to seek further consideration of that outcome by Government in a timely manner.

The determination of individual land claims in accordance with section 36 of the ALRA will continue in parallel with any ALA negotiations. In areas where ALA negotiations are occurring it is anticipated that all existing land claims will be the subject of ALA negotiations and therefore will not generally require individual determination for the duration of the negotiation.

ALCs continue to have rights under the ALRA to lodge further land claims. In areas where ALA negotiations are occurring, it is anticipated that ALCs may put a temporary hold on the lodgment of further land claims for the duration of the ALA negotiations. Any agreement reached through an ALA may include provisions to withdraw existing or not lodge future land claims.

## Procedural Elements

ALA negotiations as part of the Crown Land Divestment Program will be undertaken in accordance with this Negotiation Framework.

Parties to an ALA may supplement or amend this framework in a specific negotiation agreement agreed by parties to an ALA.

### Parties to negotiations

Parties to ALA negotiations will include:

- NSW Government
- Relevant LALC(s)
- NSWALC.

The relevant local Council will generally participate in ALA negotiations, but will not necessarily be a party to the ALA.

Native title holders or registered claimants can be invited to participate in ALA negotiations by the agreement of the parties.

### Native Title

Where native title parties are included in ALA negotiations, native title outcomes will be explored. This may require use of an Indigenous Land Use Agreement in accordance with the *Native Title Act 1993* to give effect to any agreed native title outcomes.

Where this is not possible, land transferred to LALCs will be in accordance with the requirements of the *Native Title Act 1993*.

### Commencement

The ALA process will commence when the Minister for Lands and Water and an ALC agree in writing to initiate a negotiation.



## Facilitation

ALA negotiations are to be facilitated or co-facilitated by independent third parties who, to the satisfaction and agreement of the negotiating parties, have or collectively have the following attributes:

- Independence and no real or perceived conflicts of interest
- Advanced negotiation and mediation skills and experience in facilitating complex negotiations within a set timeframe
- An understanding of Aboriginal land rights, native title and property law
- Is Aboriginal, or has appropriate knowledge and understanding of Aboriginal culture values and cultural protocols.

## Data

The NSW Government will provide parties to ALA negotiations with spatial data and related information as necessary to ensure informed decision making. This data is anticipated to include details about the following within the areas of negotiation:

- Crown land
- Crown reserves
- Tenures over Crown land
- Aboriginal land claims and Native Title.

## Authorisation

All parties must be represented by negotiators with sufficient authority to participate in negotiations.

LALC members must authorise ALA negotiations and the negotiators who are to act on behalf of the LALC.

Any agreements reached through ALA negotiations must be approved by LALC members.

NSWALC negotiators will provide support for, and be guided by, informed consent of LALC members.

The Government negotiator will be authorised to negotiate on behalf of Government. Given the focus on Crown land, the lead Government agency will be the Department of Primary Industries – Lands.

## Timeliness

The progress of ALA negotiations will allow sufficient time for the following:

- ALCs to consult and engage with native title holders and registered claimants about their potential inclusion in ALA negotiations
- Parties to adequately plan for negotiations and make key decisions prior to and during negotiations
- Parties to build shared understanding
- Parties to consider issues, options and proposed outcomes
- Negotiators to update and receive instructions from parties as necessary.

## Confidentiality

Any confidentiality requirements will not prevent negotiators from updating and receiving instructions from the parties as necessary. Specifically, LALC Negotiators will be able to update and receive instructions from LALC Boards and members and Government Negotiators will be able to update and receive instructions from Government.

## Capacity Building

It is critical that LALCs have the capacity and capability to negotiate in an effective and timely manner and make any agreements on the basis of free, prior and informed consent. The Government will work with NSWALC to ensure capacity needs are considered and addressed.

Government must also have the capacity to appropriately engage with ALCs, including cultural awareness training for Government officers.

## Rollout of Land Divestment Program

ALA negotiations will initially commence in four local government areas (LGAs) which were involved in the Government's Local Land Pilot in 2015 (Tweed, Tamworth, Corowa and Warringah). ALA negotiations will commence in two of those LGA areas (with the respective LALCs) in 2016 and the other two of those LGA areas in 2017.

ALA negotiations may then proceed in 2018 and 2019 in additional areas (based on LGA boundaries or LALC boundaries), subject to Government approval.

Proposals for other ALAs to be initiated during 2016-2019 that are not part of the above rollout will be considered. However, it is unlikely that other ALA proposals will be commenced, particularly during 2016-2017.

A State-wide rollout of ALA negotiations is not currently proposed; however, will be considered once the results of the initial ALA negotiations from 2016-2019 are evaluated.

## Communication

While ALA negotiations will be confidential between the parties, it is anticipated that parties will agree to undertake a range of supporting communication activities. External stakeholders and the broader community will be consistently informed of agreed key messages.

The Framework notes the statutory functions of the ALRA Registrar include keeping and maintaining a register in relation to ALAs. Section 36AA provides that subject to the *Aboriginal Land Rights Regulation 2014*, the register is to include 'such information and to be in such form as is determined by the Registrar'. No regulations have been made to date to prescribe the information to be kept in the register of ALAs.

## Evaluation

The Framework and any ALAs in progress or finalised will be independently evaluated after two and four years respectively. ALCs will be consulted on the design and undertaking of this evaluation.

## Governance

An ALA Governance Committee consisting of representatives from the Department of Premier and Cabinet, the Office of Aboriginal Affairs, the Department of Primary Industries - Lands and NSWALC will oversee the program of work to implement this Framework.