



PERFORMANCE AUDIT

28 APRIL 2022

# Facilitating and administering Aboriginal land claim processes

NEW SOUTH WALES AUDITOR-GENERAL'S REPORT

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# THE ROLE OF THE AUDITOR-GENERAL

The roles and responsibilities of the Auditor-General, and hence the Audit Office, are set out in the *Government Sector Audit Act 1983* and the *Local Government Act 1993*.

We conduct financial or 'attest' audits of state public sector and local government entities' financial statements. We also audit the Consolidated State Financial Statements, a consolidation of all state public sector agencies' financial statements.

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In accordance with section 38E of the *Government Sector Audit Act 1983*, I present a report titled '**Facilitating and administering Aboriginal land claim processes**'.

A handwritten signature in black ink, appearing to read 'Margaret Crawford'.

**Margaret Crawford**  
Auditor-General for New South Wales  
28 April 2022

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## RECONCILIATION COMMITMENT STATEMENT

The Audit Office of New South Wales pay our respect and recognise Aboriginal people as the traditional custodians of the land in NSW.

We recognise that Aboriginal people, as custodians, have a spiritual, social and cultural connection with their lands and waters, and have made and continue to make a rich, unique and lasting contribution to the State. We are committed to continue learning about Aboriginal and Torres Strait Islander peoples' history and culture.

We honour and thank the traditional owners of the land on which our office is located, the Gadigal people of the Eora nation, and the traditional owners of the lands on which our staff live and work. We pay our respects to their Elders past and present, and to the next generation of leaders.

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## **Section one**

Facilitating and  
administering Aboriginal  
land claim processes

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# Executive summary

The return of land under the *Aboriginal Land Rights Act 1983* (NSW) (the Act) is intended to provide compensation for the dispossession of land from Aboriginal people in New South Wales. A claim on Crown land<sup>1</sup> made by an Aboriginal Land Council that meets criteria under the Act is to be transferred to the claimant council as freehold title. The 2021 statutory review of the Act recognises the spiritual, social, cultural and economic importance of land to Aboriginal people.

The Minister for Aboriginal Affairs administers the Act, with support from Aboriginal Affairs NSW (AANSW) in the Department of Premier and Cabinet (DPC). AANSW also leads the delivery of Opportunity, Choice, Healing, Responsibility and Empowerment (OCHRE), the NSW Government's plan for Aboriginal affairs, and assists the Minister to implement the National Agreement on Closing the Gap – which includes a target for increasing the area of land covered by Aboriginal and Torres Strait Islander people's legal rights or interests.

The Act gives responsibility for registering land claims to an independent statutory officer, the Registrar of the Aboriginal Land Rights Act (the Registrar), whose functions are supported by the Office of the Registrar (ORALRA) which is resourced by AANSW.<sup>2</sup>

The Land and Environment Court of New South Wales has stated that there is an implied obligation for land claims to be determined within a reasonable time. The Minister administering the *Crown Land Management Act 2016* (NSW) is responsible for determining land claims. This function is supported by the Department of Planning and Environment (DPE),<sup>3</sup> whose staff assess and recommend claims for determination based on the criteria under section 36(1) of the Act. There is also a mechanism under the Act for land claims to be negotiated in good faith through an Aboriginal Land Agreement.

The NSW Aboriginal Land Council (NSWALC) is a statutory corporation constituted under the Act with a mandate to provide for the development of land rights for Aboriginal people in NSW, in conjunction with the network of 120 Local Aboriginal Land Councils (LALCs). LALCs are constituted over specific areas to represent Aboriginal communities across NSW. Both NSWALC and LALCs can make land claims.

DPC and DPE are responsible for governance and, in partnership with NSWALC, operational and information-sharing activities that are required to coordinate Aboriginal land claim processes. LALCs, statutory officers, government agencies, local councils, and other parties need to be engaged so that these processes are coordinated effectively and managed in a way that is consistent with the intent of the Act, and other legislative requirements.

The first land claim was lodged in 1983. The number of undetermined land claims has increased over time, and at 31 December 2021 DPE data shows 38,257 undetermined claims.

The issue of undetermined land claims has been publicly reported by the Audit Office since 2007. Recommendations to agencies to better facilitate processes and improve how functions are administered have been made in multiple reviews, including two Parliamentary inquiries in 2016.

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<sup>1</sup> Crown land is land that is owned and managed by the NSW Government.

<sup>2</sup> AANSW and ORALRA were previously part of the Department of Education, before the 1 July 2019 Machinery of Government changes.

<sup>3</sup> Previously, these functions were undertaken by the Department of Industry (2017–June 2019) and the Department of Planning, Industry and Environment (July 2019 to December 2021).

The objective of this audit was to assess whether relevant agencies are effectively facilitating and administering Aboriginal land claim processes. In making this assessment, we considered whether:

- agencies (DPE, DPC (AANSW and ORALRA) and NSWALC) coordinate information and activities to effectively facilitate Aboriginal land claim processes
- agencies (DPE and DPC (ORALRA)) are effectively administering their roles in the Aboriginal land claim process.

We consulted with LALCs to hear about their experiences and priorities with respect to Aboriginal land claim processes and related outcomes. We have aimed to incorporate their insights into our understanding of their expectations of government with respect to delivering requirements, facilitating processes, and identifying opportunities for improved outcomes.

## Conclusion

**The Department of Premier and Cabinet (DPC) and the Department of Planning and Environment (DPE) are not effectively facilitating or administering Aboriginal land claim processes. Neither agency has established the resources required for the NSW Government to operate a coordinated program of activities to deliver land claim processes in a way that transparently commits to the requirements and intent of the *Aboriginal Land Rights Act 1983* (NSW) (the Act). Arrangements to engage the NSW Aboriginal Land Council (NSWALC) in these activities have not been clearly defined.**

**There are more than 38,000 undetermined land claims that cover approximately 1.12 million hectares of Crown land. As such, DPE has not been meeting its statutory requirement to determine land claims nor its obligation to do so within a reasonable time. Over 60 per cent of these claims were lodged with the Registrar of the Aboriginal Land Rights Act, for DPE to determine, more than five years ago.**

**DPE's Aboriginal Outcomes Strategy 2020–23 identifies transferring claimable Crown land to Local Aboriginal Land Councils (LALCs) as a priority to enable economic and cultural outcomes. Since mid-2020 DPE has largely focused on supporting LALCs to identify priority land claims for assessment and on negotiating Aboriginal Land Agreements. This work may support the compensatory intent of the Act but is in its early stages and is unlikely to increase the pace at which land claims are determined. Based on current targets, it will take DPE around 22 years to process existing undetermined land claims.**

**Delays in processing land claims result in Aboriginal Land Councils being denied the opportunity to realise their statutory right to certain Crown land in NSW. The intent of the Act to provide compensation to Aboriginal people for the dispossession of land has been significantly constrained over time.**

Since 2014, numerous reviews have made recommendations to agencies to address systemic issues, improve processes, and enhance outcomes: but DPC and DPE have made limited progress with implementing these. Awareness of the intent and operations of the Act was often poor among staff from some State government agencies and local government representatives we interviewed for the audit.

DPC has not established culturally informed, interagency governance to effectively oversee Aboriginal land claim processes – and ensure accountability for outcomes consistent with the intent of the Act, informed by the expectations of the NSWALC and LALCs. Such governance has not existed since at least 2017 (the audited period) and we have not seen evidence earlier. DPE still does not have performance indicators for its land claim assessment function that are based on a clear analysis of resources, that demonstrate alignment to defined outcomes, and which are reported routinely to key stakeholders, including NSWALC and LALCs.

LALCs have raised strong concerns during our consultations, describing delays in the land claim process and the number of undetermined land claims as disrespectful. LALCs have also noted a lack of transparency in, and opportunity to engage with, Aboriginal land claim processes.

DPE's role in assessing Aboriginal land claims, and identifying opportunities for Aboriginal Land Agreements, requires specific expertise, evidence gathering and an understanding of the complex interaction between the Act and other legislative frameworks, including the *Native Title Act 1993* (Cth) and the *Crown Land Management Act 2016* (NSW). In mid-2020, DPE created an Aboriginal Land Strategy Directorate within its Crown lands division, increased staffing in land claim assessment functions, and set a target to increase the number of land claims to be granted in 2021–22. In the six months to December 2021, DPE granted more land claims (207 claims) than in most years prior. DPE has also assisted some LALCs to identify priority land claims for assessment.

But the overall number of claims processed per year remains well below the historical (five-year) average number of claims lodged (2,506 claims). As such, DPE has not yet established an appropriately resourced workforce to assess the large number of undetermined land claims and engage effectively with Aboriginal Land Councils and other parties in the process. There also are notable gaps in DPE's procedures that impact the transparency of the process, especially with respect to timeframes and the prioritisation of land claims for assessment.

DPC (the Office of the Registrar of the Aboriginal Land Rights Act, ORALRA) has not secured or applied resources that would assist the Registrar to use discretionary powers, introduced in 2015, not to refer certain land claims to DPE for assessment (those not on Crown land). This could have improved the efficiency and coordination of end-to-end land claim processes.

DPC (ORALRA) is also not effectively managing data and ensuring the functionality of the statutory Register of Aboriginal land claims. This contributes to inefficient coordination with DPE and NSWALC, and creates a risk of inconsistent information sharing with LALCs, government agencies, local councils and other parties. More broadly, responsibilities for sharing information about the location and status of land under claim are not well defined across agencies. These factors contribute to risks to Crown land with an undetermined land claim, which case law has found to establish inchoate property rights for the claimant Aboriginal Land Council.<sup>4</sup> It can also lead to uncertainty around the ownership, use and development of Crown land, with financial implications for various parties.

## 1. Key findings

**DPE has not been meeting its statutory requirement to determine Aboriginal land claims, nor its obligation to do so within a reasonable time, and lacks a clear, resourced strategy to achieve this**

DPE has a statutory requirement under the *Aboriginal Land Rights Act 1983* (NSW) (the Act) to determine Aboriginal land claims, but there are over 38,000 undetermined claims. A total of 53,861 land claims have been lodged by Aboriginal Land Councils since 1983 (up to 31 December 2021) and DPE has processed about a third (31 per cent) of these claims.

Defining reasonable timeframes in administrative processes promotes effective, transparent service delivery, and enables an agency to plan strategically for the resources needed to undertake its functions. The Land and Environment Court of New South Wales has stated that the Crown Lands Minister (supported by DPE) has an implied obligation to determine land claims within a reasonable time.<sup>5</sup> DPE acknowledges this but has not defined targets or expectations around timeframes for land claim assessments, and does not routinely collect and report on timeliness to monitor the efficacy of these processes.

Land claim assessments vary in complexity and there is a wide variation in the time it takes DPE to determine individual claims, but the overall rate of processing is inadequate. At the end of 2019–20, around 60 per cent of claims had been awaiting determination for more than five years and around 20 per cent for more than ten years. On average it has taken DPE 4.4 years to determine a claim. Based on DPE's current targets, it would take around 22 years to process existing undetermined claims.

<sup>4</sup> The lodgement of a land claim creates an unformed property interest for the claimant Aboriginal Land Council over the claimed land. This interest will be realised if the Crown Lands Minister determines that the land is claimable.

<sup>5</sup> *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 577 at 125.



DPE did increase staff resourcing of its land claim assessment function in mid-2020 and in December 2021 there were 17 permanent positions filled. There were around eight staff in the years beforehand, since at least 2013. DPE is projecting increases in the number of land claims processed, and granted, in 2021–22. In the six months to the end of December 2021, 72 per cent of claims processed were granted (207 grants). These recent outputs may reflect the recent application of additional, permanent resources. But there is still a lack of business planning to support the delivery of a sustained upward trend in claim determinations, and a focus on land grants.

Delays in processing land claims impacts on the return of land to Aboriginal people and communities. The Local Aboriginal Land Councils (LALCs) we consulted expressed strong concerns about these delays. This situation also makes it more difficult for DPE to gather the evidence required to assess claims and creates uncertainty about the ownership of Crown land – which can have financial impacts on Aboriginal Land Councils, government agencies, local councils and other parties.

DPE identifies land claims as a priority action under its Aboriginal Outcomes Strategy 2020–23. Its first State Strategic Plan for Crown Land, finalised in 2021, states that accelerating the realisation of Aboriginal land rights and native title in partnership with Aboriginal people is a priority. But DPE has not finalised a resourced strategy to achieve these priorities, or to process the large number of undetermined land claims in a reasonable time.

**Neither DPC nor DPE have led strategic planning to establish the resources required across agencies to effectively deliver end-to-end Aboriginal land claim processes**

DPC (AANSW and ORALRA) and DPE have not planned and resourced the end-to-end Aboriginal land claim process to ensure its efficiency and effectiveness. Neither has reviewed interagency resourcing to confirm what is required for timely land claim processing and related outcomes – consistent with the Act, and other legislative frameworks. There is no evidence that the opportunity cost to the NSW Government of the large number of undetermined land claims has been estimated.

In the strategic plans of DPC (ORALRA and AANSW), DPE and NSWALC, there is broad alignment between high-level objectives relating to land rights. But strategic planning specific to land claim processes and functions is less formalised and resources are not clearly coordinated as a program of activities.

In particular, DPC (ORALRA) and DPE have not undertaken an interagency review to ensure the efficient use of available staff or resources, to streamline processes, and to avoid duplication – particularly with respect to information sharing with other parties about the location and status of land claims. A lack of strategic planning around resources has also contributed to options to streamline processes not being effectively used, such as the Registrar's discretionary powers to refuse to refer certain land claims (those not on Crown land) to DPE for assessment.

**DPC has not established and led culturally informed interagency governance that monitors and ensures accountability for delivering coordinated Aboriginal land claim processes, consistent with the Act**

DPC (AANSW) has not established governance arrangements to define the accountabilities of DPC and DPE, and other agencies as relevant, to oversee and facilitate land claim processes. DPC (AANSW) and DPE have identified the need for partnership with Aboriginal communities to achieve outcomes,<sup>6</sup> but no clear mechanism for this exists that is specific to defining outcomes and delivering effectively on land claim processes.

<sup>6</sup> DPE through the State Strategic Plan for Crown Land, and DPC (AANSW) through OCHRE and Closing the Gap priority reforms.

Opportunities for improved oversight, greater collaboration and streamlining processes have been repeatedly identified in internal and external reviews since at least 2014, but neither DPC (AANSW and ORALRA)<sup>7</sup> nor DPE have progressed recommendations in a significant way. Overall, previously identified systemic issues remain. Poor record keeping in relation to executive meetings between DPC (AANSW and ORALRA), DPE and NSWALC limits accountability and transparency around addressing barriers and progressing actions on these issues.

Performance monitoring in the end-to-end Aboriginal land claim process is also not well defined and is not routinely reported to the public. Both DPC (ORALRA) and DPE report internally on the number of claims lodged and processed, but there is no evidence of regular monitoring against service delivery standards (such as timeframes) or of routine evaluation of activities as a program to ensure statutory requirements are met, and that performance is consistent with the intent of the Act.

**There is no coordinated approach to educating agencies and other parties about the Act, such as about opportunities to promote its aims and safeguard land under claim**

DPC (AANSW and ORALRA), DPE and NSWALC have not clearly defined their roles or coordinated activities to educate government agencies, local councils and other parties about opportunities to support the intent of the Act with respect to land claims. For example, to educate parties about the importance of providing relevant, timely evidence to DPE for claim assessments; or about consulting with Aboriginal Land Councils on the proposed development of land under claim; on decisions about property or asset maintenance on land under claim, or on land-use zoning changes that may affect the economic potential of claimed land.

Activities on Crown land subject to an undetermined claim are restricted and can directly impact the achievement of the compensatory intent of the Act. Interested parties therefore need to understand the requirements of the Act and related government policy to inform the activities they want to undertake.

Statutory reviews of the Act since 2014 have highlighted the need for an improved understanding of the Act among relevant parties and noted that this would facilitate processes to determine land claims, among other benefits. But DPC (AANSW) has not provided evidence of leading specific education activities to do this. DPE makes limited relevant training available to Crown land managers but this is not mandatory. DPE has identified that Crown land manager non-compliance with legislative requirements has a 'very high' inherent risk with weak internal controls. DPE also notes that compensation has been paid to Aboriginal Land Councils for activities on Crown land subject to an undetermined claim.

**DPE lacks a transparent, well-defined framework for prioritising land claim assessments**

DPE's approach to prioritising land claims for assessment is not clearly defined, which creates a lack of transparency and accountability around decision-making relating to which of the 38,000 undetermined claims are assessed, and when.

This issue is critical because DPE staff need to consider when to assess new claims as well as respond to Aboriginal Land Council, government, local council and private interests in having existing land claims determined. During consultations, LALCs expressed feeling devalued when their interests are given low priority in the land claim assessment process.

The evidence shows that DPE has used various but poorly coordinated prioritisation approaches since at least 2017, and that State priorities are generally given higher priority than LALCs'. Since September 2020, DPE has been implementing a project ('LALC20') to support LALCs to identify up to 20 existing land claims for priority assessment, and in March 2022 DPE reported that there were 36 LALCs engaged in this project. DPE has also advised that it is proactively identifying claims for assessment that are likely to be granted and that it has targets to increase the number of land claims granted in 2021–22. But these approaches are not yet well integrated into other prioritisation approaches, or the business-as-usual land claim assessment process.

<sup>7</sup> AANSW and ORALRA were previously part of the Department of Education, before the 1 July 2019 Machinery of Government changes.

More broadly, there is no clear link between DPE's various prioritisation approaches, workload planning, operational projects, performance indicators, and risk management strategies.

**Functionality and quality issues with DPC (ORALRA)'s Register of land claims, and poorly defined information sharing roles with DPE and NSWALC, create inefficiencies and poor service delivery**

The database used by DPC (ORALRA) to maintain the Register of Aboriginal land claims (ALC Register), as required under section 167 of the Act, has limited functionality and lacks controls to ensure data integrity. Although it can capture the minimum information required by the Act, the location of land claims is not represented spatially, and the information has not been fully validated since the database was developed in the 1990s.

Functionality and quality issues with the ALC Register create risks for the Registrar and DPC (AANSW and ORALRA) with respect to delivering statutory and non-statutory land claim-related functions. It also creates inefficiencies and is a barrier to integrating land claim data systems: DPC (ORALRA), DPE and NSWALC each independently operate systems to record information about land claims, involving the manual re-entry and re-mapping of land claim data. As such, there is no central source of 'live' information about the location and status of land claims. The lack of transparency relating to the status of land claims has been raised as a concern by the LALCs that we consulted.

Accurate and timely information about the location and status of land claims is also critical to reduce the risk of activities occurring on land under claim that negatively affect an Aboriginal Land Council's inchoate property right, and to facilitate appropriate infrastructure, development and other activities on Crown land. But there is no shared understanding of which agency is responsible for providing access to this information. Search requests can be resource intensive to fulfil, and quality issues with the ALC Register can result in delays and the double- or triple-handling of requests across DPC (ORALRA), DPE and NSWALC.

Both DPE and DPC (ORALRA) collect data on the number of requests for information received and responded to – for example, in February 2021 DPE completed searches of 57 land parcels and DPC (ORALRA) received 48 search requests – but there is no evidence that the data has been used to review operational or coordination needs.

**DPE has not operated an effective mechanism for coordinating activities with DPC (ORALRA) and NSWALC – but some work has been underway since 2020 to improve this**

There has been a lack of planned collaboration between DPC (ORALRA), DPE and NSWALC to define and coordinate operational activities as a program that effectively delivers Aboriginal land claim processes.

There are few records of routine, minuted operational meetings, limiting transparency and accountability around actions to address operational issues and systemic inefficiencies. The coordination that does occur is heavily reliant on the expertise of key staff and their constructive working relationships at the officer level.

Since July 2020, DPE has been engaging more routinely with NSWALC in relation to the reform of DPE's Land Negotiation Program. This is contextually relevant as part of DPE's activities to achieve outcomes under the Act through Aboriginal Land Agreements but is not a mechanism to address specific inefficiencies in the coordination of land claim processes.

DPE established the Aboriginal Land Strategy Directorate within its Crown Lands division in 2020, which brings together a range of functions with operational interdependencies relevant to land claim processes. DPE has advised that strategic and operational planning and performance monitoring for this directorate is in development.

### **DPE lacks current, approved land claim assessment procedures including for managing timeframes and delays in receiving evidence**

DPE has not fully updated and approved its procedures for land claim assessment functions since 2013. A key document that DPE uses for this function notes the statutory intent of the Act as beneficial legislation, but procedures do not provide clear guidance on how this should be interpreted in decision-making and applied in interactions with Aboriginal Land Councils and stakeholders.

Until April 2020 when DPE introduced a controlled system (CrownTracker), land claim assessments were managed and recorded in an unprotected, uncontrolled spreadsheet that had been developed in 2013. CrownTracker now provides a more structured workflow for assessments, but the system has functionality issues and at the end of 2021 DPE was still developing procedures to reflect its integration with assessment practices and with broader Aboriginal Land Strategy policies and procedures.

Further, DPE has not developed effective strategies to manage delays in receiving evidence for land claim assessments from government agencies, local councils and other parties. For example, DPE does not have a formal procedure for stakeholder engagement in the evidence-gathering process and staff are not supported with protocols to effectively escalate delays or to decide at what stage a claim should be determined based on the available evidence.

These factors impact on DPE's ability to meet its obligation to determine claims within a reasonable time. Quality and control gaps in DPE's procedures are also significant given the nature and complexity of land claim assessments, and the expectations of Aboriginal Land Councils for transparent, timely decision-making.

### **DPE has not established an appropriate workforce profile for land claim assessments, which can be complex, and does not provide sufficient support to staff**

DPE has not reviewed its workforce profile to ensure that sufficient numbers of appropriately graded staff are recruited and retained within the claim assessment team to meet the demand and complexity of the work.

DPE has not also provided sufficient training and procedural guidance to staff tasked with assessing claims. This is significant considering the nature and complexity of assessments, including the need to manage evidence and undertake culturally appropriate, sensitive stakeholder engagements. The relevant role descriptions do not include a requirement for staff to have experience working with Aboriginal people and communities.

### **DPE has not yet embedded culturally informed engagement with Aboriginal Land Councils into its land claim assessment procedures, but is taking steps to improve its engagement**

DPE has not embedded timely and culturally informed engagement with NSWALC and LALCs in procedures for land claim assessment functions. The key point of contact with LALCs in DPE's procedures is the notification of the determination outcome. NSWALC and the LALCs we consulted with highlighted that they value proactive engagement and transparency in land claim assessment processes, and generally this expectation has not been met.

There is no effective guidance in DPE procedural documents about LALC engagement to provide an update on the claim assessment status, to discuss amending or withdrawing a claim, to discuss opportunities for Aboriginal Land Agreements or other negotiated outcomes, or to explain the reasons for a claim refusal. These are significant gaps which create a lack of transparency and a risk that opportunities for engagement are missed or handled inconsistently. DPE advised it has developed a template to notify LALCs when a claim is allocated for assessment (in use since March 2022) and a prioritisation request form that will allow LALCs and other parties to submit requests in a standard format (expected to be used from July 2022).



DPE has been implementing some activities to better engage with LALCs since September 2020, particularly in relation to the reform of the Land Negotiation Program which is ongoing. DPE's Aboriginal Land Strategy Directorate is also developing a cultural capability strategy for implementation in 2022, which includes initiatives to improve cultural competence and train staff within its Crown Lands division to understand Aboriginal land rights, and other relevant legislative responsibilities.

**NSWALC has improved the information it has for claim-making, and DPE has been making its data more accessible to NSWALC and LALCs for this purpose, but more work is needed**

NSWALC has improved the information it has for claim-making by investing in a GIS (Geographical Information System) mapping tool in 2018 that incorporates DPE Crown land data and information from other relevant sources. NSWALC makes this tool available to the LALC network, and has identified there is an opportunity to build LALC capability to expand the use of this tool.

DPE's data sharing with NSWALC has improved but is not formalised, routine or complete. DPE also enhanced its information sharing with LALCs in 2021 and is developing an update to the NSW Planning Portal to progress this. This work is in its early stages and there may be opportunities for better coordination and communication of these information sharing arrangements for LALCs.

## 2. Recommendations

**By the end of 2022:**

1. **DPC should establish and lead strategic governance that oversees a resourced, coordinated interagency program that is accountable for delivering Aboriginal land claim processes.** These strategic governance arrangements should include the Registrar, senior executives from DPC (AANSW), DPE, and NSWALC as the relevant state-wide peak Aboriginal organisation.

At a minimum, these arrangements should:

- express a whole-of-government commitment to achieving the intent of the *Aboriginal Land Rights Act 1983* (NSW) (the Act)
- reflect the relevance of the NSW Government's OCHRE Plan and Closing the Gap reform priorities
- define how DPC (ORALRA) and DPE's land claim processing activities should be aligned to outcomes and be consistent with obligations
- conduct strategic planning that results in sustained investment in facilitating land claim processes, and to increase the rate of land claim processing
- lead the strategic management of risks and opportunities (to Aboriginal Land Councils, state agencies and other parties) given the large number of undetermined claims and which may arise with an increased rate of claim processing
- establish a mechanism for regular reporting by DPC (ORALRA) and DPE on the coordinated program of land claim processing activities, including on outputs and outcomes against defined measures, and for annual reporting to the community
- monitor the progress of relevant reform priorities identified in the 2021 statutory review of the Act, including work on the interaction between the Act and native title legislation.

2. **DPE and DPC (ORALRA) should jointly establish operational arrangements to deliver a coordinated interagency program for end-to-end Aboriginal land claim processes.** These arrangements should be developed and regularly reviewed in collaboration with NSWALC and with input from LALC representatives. These arrangements should be clearly documented and communicated to promote transparency, and at a minimum should:
  - express key principles for operational 'ways of working' consistent with the Act
  - define a culturally-informed service charter, reflecting relevant aspects of Closing the Gap priority reform 3 (transforming government organisations)
  - clarify operational roles and responsibilities, particularly with respect to information sharing and capacity building activities with LALCs
  - manage interagency operational risks to effective land claim processing, and contribute to the management of strategic risks by reporting on actions to manage risks and the delivery of the outputs and outcomes from land claim processes to the DPC-led strategic governance group (recommendation 1).
3. **DPC should implement, in partnership with NSWALC, an education program that enhances understanding of the Act and its operations.** The program should incorporate subject-matter expertise from the Registrar and DPE. At a minimum, it should include tailored education for key state agencies and the local government sector that clearly communicates how their activities can impact on land claim processes, land under claim, and the intent of the Act.
4. **DPC should complete planning for an interagency, Aboriginal land claim spatial information management system.** Planning should be done in partnership with the Registrar, DPE and NSWALC, and with input from LALC representatives. The plan should aim to have the information management system operational in 2023.
5. **DPE should finalise updates to its land claim assessment procedures** to ensure their currency and consistency with the Act, and integration with other DPE policies and functions, and with the activities of other agencies. DPE should seek input from NSWALC and LALC representatives on relevant aspects of these procedures.

In particular, assessment procedures should be finalised to support:

- transparent approaches to identifying and prioritising land claims for assessment
- timely and consistent approaches to evidence gathering and escalating related delays, informed by transparent evidentiary thresholds for determining claims
- clearer protocols for engaging with Aboriginal Land Councils in relation to claim assessments, amendments and withdrawals, and Aboriginal Land Agreements.

**By 1 July 2023:**

6. **DPE should implement a resourced, ten-year plan for its land claim assessment functions that increases the rate of land claim processing, consistent with the Act.** DPE's processes for identifying and prioritising claims for assessment, and for identifying opportunities for Aboriginal Land Agreements, should be transparently aligned with this plan.

At a minimum, this plan should:

- increase the annual rate of land claim processing to be above the five-year average number of claims lodged<sup>8</sup>
- set and monitor target timeframes for:
  - determining new claims (for example, those made after 30 June 2023)
  - determining 'current' claims (for example, those made after 30 June 2021)
  - determining 'aged' claims (for example, those made before 30 June 2021).
- focus on determining claims that are likely to result in land grants, at least in the initial years of its implementation
- detail how DPE will transparently report on the outputs and outcomes of this plan to government and communities.

This plan should be developed with the support of the DPC-led strategic governance group to ensure adequate resourcing and alignment with outcomes (see recommendation 1).

7. **DPE should implement a five-year workforce development strategy for its land claim assessment function.** This strategy should involve a review of its current resourcing profile, consider options to expand specialist expertise, and ensures access to adequate training for staff. This strategy should be aligned to the NSW Government's Aboriginal Employment Strategy and reflect Closing the Gap priority reform 3 (transforming government organisations).
8. **DPC (ORALRA) should finalise the remediation and upgrade of the statutory Aboriginal Land Claims Register** to ensure its accuracy, enhance functionality, and enable its integration with an interagency land claim information system (recommendation 4).

**On an ongoing basis:**

9. **DPE should maintain, enhance and formalise information-sharing arrangements** with NSWALC and LALCs to inform their claim making and engagement in relevant processes.
10. **NSWALC should maintain and enhance information-sharing and other forms of support** to LALCs to inform their claim making and continue to build LALC capacity to engage in relevant processes and decision-making about land claims.

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<sup>8</sup> The average number of land claims lodged per year since 2016–17 is 2,506.

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# 1. Introduction

## 1.1 The *Aboriginal Land Rights Act 1983 (NSW)* was enacted to compensate Aboriginal people for historic dispossession

The *Aboriginal Land Rights Act 1983 (NSW)* (the Act) was enacted by the New South Wales Parliament in 1983 to compensate Aboriginal people for dispossession of their land in the State.

The purposes of the Act include ‘to provide land rights for Aboriginal persons in New South Wales’. The Act does this primarily through the statutory Aboriginal land claim process in section 36.

The preamble to the Act sets the grounds upon which the legislation was introduced, including its compensatory intent. It states:

### **Exhibit 1: Preamble to the *Aboriginal Land Rights Act 1983 (NSW)***

Whereas—

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

Source: *Aboriginal Land Rights Act 1983*.

The development of this legislation was described in its Second Reading Speech as representing:

a clear, unequivocal decision [by the New South Wales Government] that land rights for [Aboriginal people] is the most fundamental initiative to be taken for the regeneration of Aboriginal culture and dignity, and at the same time laying the basis for a self-reliant and more secure economic future for our continent's Aboriginal custodians.

The Act has been amended on several occasions since its commencement but its purpose and policy objectives relating to land rights have remained unchanged and been confirmed in statutory reviews, most recently in November 2021. Decisions made by the Land and Environment Court of New South Wales provide guidance on interpreting the statutory requirements of the Act.

## **Responsibilities of Ministers and statutory officers**

Aboriginal land claim processes fall under two ministerial portfolios and involve operational and information-sharing activities between the Department of Premier and Cabinet (DPC), the Department of Planning and Environment (DPE)<sup>9</sup> and the New South Wales Aboriginal Land Council (NSWALC), as well as engagement with other government agencies, local councils and third parties.

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<sup>9</sup> DPE should be read in this report as referring to the agency that supported the Crown Lands Minister's role under the Act at the relevant time. Before December 2021, these functions were undertaken by the Department of Industry (2017 – June 2019) and the Department of Planning, Industry and Environment (July 2019 to December 2021).



The Minister for Aboriginal Affairs is responsible for administering the Act. The Minister's powers include monitoring the operations of Local Aboriginal Land Councils (LALCs) and NSWALC, and conducting five-yearly legislative reviews of the Act.<sup>10</sup> The Minister for Aboriginal Affairs is supported by Aboriginal Affairs NSW (AANSW), currently within DPC.

The Registrar of the Act is an independent statutory officer whose functions are set out in section 165 of the Act and include registering and maintaining the Register of Aboriginal land claims (the 'ALC Register').<sup>11</sup> The Registrar is supported by the Office of the Registrar of the Aboriginal Land Rights Act (ORALRA), which is resourced by AANSW.<sup>12</sup>

The Minister administering the *Crown Land Management Act 2016* (NSW) (the Crown Lands Minister) is responsible for assessing and deciding whether to grant or refuse land claims under the Act. Since December 2021, this role has been held by the Minister for Lands and Water.<sup>13</sup> The Crown Lands Minister is supported by DPE.<sup>14</sup>

The statutory position of Crown Land Commissioner was established in 2018. The Commissioner's functions include inquiring into and reporting on matters arising out of the administration of the *Crown Land Management Act 2016*. The Commissioner also has a role in providing independent advice to Crown land users, stakeholders, the community and government about the management of Crown land.<sup>15</sup>

## NSWALC and the Local Aboriginal Land Council network

NSWALC is a statutory corporation constituted under the Act with a mandate to provide for the development of land rights for Aboriginal people in NSW in conjunction with the NSW Local Aboriginal Land Council (LALC) network. This network consists of 120 LALCs that are constituted over specific areas ('LALC boundaries') to represent many of the Aboriginal communities across NSW.

NSWALC is the State's peak representative body in Aboriginal affairs and its statutory functions under section 106 of the Act include oversight, support, and financial stewardship of LALC network, preparing policy (including for its functions and those of LALCs) and providing advice to the Minister for Aboriginal Affairs on matters relating to Aboriginal land rights. Land acquisition and the protection and promotion of Aboriginal cultural heritage are also statutory functions. NSWALC also manages funds to support its operations, including a Statutory Investment Fund which allows it to invest and disburse funds to maintain the LALC network, and to invest in community benefits or economic development initiatives.<sup>16</sup>

NSWALC states that securing the return of land to Aboriginal people is part of its core business. Its powers include making land claims and in doing so NSWALC seeks to maximise the amount of land that is in Aboriginal ownership, control and management; and the social, cultural and economic outcomes from land.

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<sup>10</sup> Other powers of the Minister for Aboriginal Affairs under the Act that are less directly related to the Aboriginal land claim process include working in partnership with NSWALC and ORALRA to ensure compliance with the Act.

<sup>11</sup> Other functions of the Registrar include maintaining the Register of Aboriginal Owners, approving the rules of Aboriginal Land Councils, issuing compliance directions, investigating complaints, and mediating disputes.

<sup>12</sup> AANSW and ORALRA were previously part of the Department of Education before the 1 July 2019 Machinery of Government changes.

<sup>13</sup> From May 2019 to December 2021, the Crown Lands Minister role was shared by the Minister for Planning and Public Spaces, who had responsibility for metropolitan Sydney, and the Minister for Water, Property and Housing, who had responsibility for regional NSW. From January 2017 to May 2019, it was held by the Minister for Lands and Forestry.

<sup>14</sup> The Crown Lands Minister was previously supported by the Department of Industry up to 1 July 2019, then the Department of Planning, Industry and Environment up to 20 December 2021. The administrative order finalising current ministerial arrangements, commenced in February 2022.

<sup>15</sup> This position is currently vacant (in March 2022).

<sup>16</sup> Each LALC receives an annual funding grant of approximately \$150,145 from NSWALC. LALCs may also raise funds by other means such as government grants, donations, bequests and commercial dealings or investments.

NSWALC is a member of the NSW Coalition of Aboriginal Peak Organisations (NSW CAPO), which has been established to represent the interest of Aboriginal Controlled Community Organisations and Aboriginal people of New South Wales. NSW CAPO and the NSW Government are signatories to the July 2020 National Agreement on Closing the Gap.

## 1.2 The Act creates statutory rights for Aboriginal Land Councils and duties for State government in relation to land claims

The Act enables an Aboriginal Land Council to lodge a land claim and creates a right for the land council to have the claim determined. NSWALC can make a claim on its own behalf or on behalf of a LALC. A LALC may also make a claim for land within its boundary and, with the approval of the Registrar, outside of its boundary.

### Claimable Crown lands

If the Crown Lands Minister determines that the claim relates to 'claimable Crown lands' under section 36(1) of the Act, the Minister must grant the claim and transfer the land to the relevant Aboriginal Land Council as freehold title.<sup>17</sup> Importantly, the assessment of whether land is claimable is based on the status of the land when the claim was made, being the date the claim was lodged with the Registrar.

#### Exhibit 2: Claimable Crown lands under section 36(1) of the Act

Under section 36(1), claimable Crown lands means lands vested in Her Majesty that, when a claim is made for the lands:

- a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the *Crown Land Management Act 2016*<sup>18</sup>
- b) are not lawfully used or occupied
- (b1) do not comprise lands which, in the opinion of a Crown Lands Minister, are needed or are likely to be needed as residential lands
- c) are not needed, nor likely to be needed, for an essential public purpose
- d) do not comprise lands that are the subject for an application of native title (other than a non-claimant application that is an unopposed application) that has been registered in accordance with the *Commonwealth Native Title Act 1993*
- e) do not comprise lands that are the subject of an approved determination of native title (within the meaning of the *Commonwealth Native Title Act 1993*) (other than an approved determination that no native title exists in lands).

Source: *Aboriginal Land Rights Act 1983*.

The Land and Environment Court of New South Wales has stated that a claimant Aboriginal Land Council has an inchoate interest in claimed land once a land claim has been lodged.<sup>19</sup> In practical terms, this means that activities on Crown land are restricted while land is subject to an undetermined land claim, such as the sale of the land or activities that might change the physical or environmental condition of the land.

<sup>17</sup> Section 36(5) of the Act, which enables the Crown Lands Minister to determine that the claimed land is 'claimable Crown lands' in whole or in part.

<sup>18</sup> The *Crown Land Management Act 2016* replaced the *Crown Lands Consolidation Act 1913* and the *Western Lands Act 1901* which are referred to in section 36(1) of the Act.

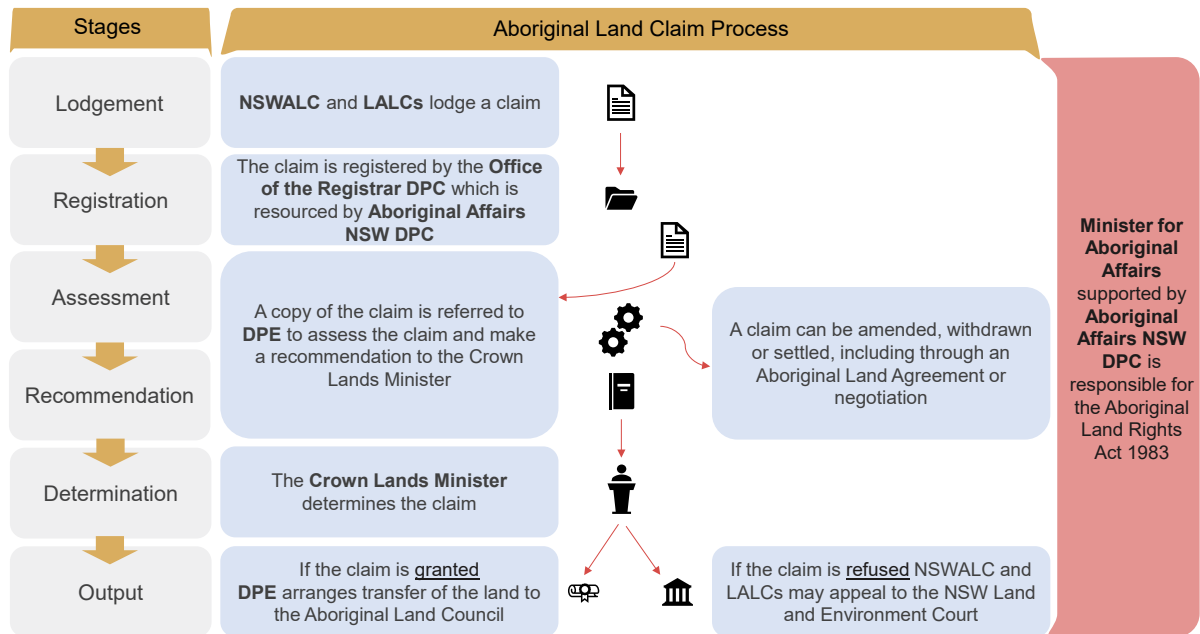
<sup>19</sup> *NSW Aboriginal Land Council v. The Minister (Winbar claim)* (1988) 14 NSWLR 685 at 696; *Narromine Local Aboriginal Land Council v The Minister Administering the Crown Lands Act* [1993] NSWLEC 34, p.4.

The land claim process under the Act is different to and separate from native title rights under the *Native Title Act 1993* (Cth). But there are interactions between these legislative frameworks that affect land that can be claimed through the Aboriginal land claim process (section 36(1) above), and that (under section 42 of the Act) restrict land dealings by Aboriginal Land Councils in relation to the land transferred through the claim process, until that land is subject to an approved determination of native title.

## The Aboriginal land claim process

Core features of the administrative process through which an Aboriginal land claim is lodged, registered, assessed, and determined are illustrated in Exhibit 3 and outlined below.

### Exhibit 3: Overview of the key steps in the land claim process



Source: NSW Audit Office summary.

As illustrated, a land claim must be made by NSWALC or a LALC in writing and describe or specify the lands in respect of which the claim is made. A claim must be lodged with the Registrar (through ORALRA). A parcel of land may be subject to more than one claim.<sup>20</sup>

The land claim is registered in the ALC Register by DPC (ORALRA) staff, including certain required information about the claim such as a claim number, the name of the claimant Aboriginal Land Council, a description of the land claimed and the date of lodgement.

The Registrar refers the claim to DPE for assessment, with discretion to refuse to refer claims in certain circumstances.<sup>21</sup>

DPE assesses claims against the statutory criteria for 'claimable Crown lands' by considering the status of the claimed land at the date when the claim was made, and makes a determination recommendation to the Crown Lands Minister. The boundaries of a land claim can also be amended by NSWALC or a LALC prior to determination.

<sup>20</sup> DPE is required to assess whether each claim relates to 'claimable Crown lands' on the date at which the claim was made. Land that may not be 'claimable Crown lands' at one point in time may become claimable later due to changed circumstances. The only limitation on an Aboriginal Land Council making more than one claim over the same land is where there is already a claim subject of a current appeal (section 36B(3) of the Act).

<sup>21</sup> This discretion under section 36(4A)-(4C) was introduced into the Act by the *Aboriginal Land Rights Amendment Act 2014*. As discussed in Exhibit 11, the discretion has not been used since August 2017.

Unless the land claim is withdrawn by the claimant Aboriginal Land Council or a negotiated outcome is achieved (see Exhibit 4), the Crown Lands Minister (or their delegate) is required to:

- grant the claim (or part of the claim) by transferring land as freehold title to the claimant Aboriginal Land Council if satisfied that the land is claimable (apart from in limited circumstances where a relevant Aboriginal Land Agreement has been made)<sup>22</sup>, or
- refuse the claim (or part of the claim) if satisfied that the land is not claimable.

The Land and Environment Court of New South Wales has stated that there is an implied obligation on the Crown Lands Minister to determine land claims within a reasonable time.<sup>23</sup>

Once a claim has been determined, DPE notifies the Registrar and claimant Aboriginal Land Council of the outcome. DPC (ORALRA) updates the ALC Register with the determination outcome and date.

If a claim is refused, the claimant Aboriginal Land Council has a right to appeal the decision in the Land and Environment Court of New South Wales at any time within four months after the refusal.

DPE is responsible for arranging the transfer of land to the relevant Aboriginal Land Council following a determination that a land claim should be granted (or a successful appeal), which can involve surveying the land before transfer.

## Aboriginal Land Agreements and negotiated outcomes

Aboriginal Land Agreements were introduced by amendments to the Act in 2014 (see Exhibit 4).

### Exhibit 4: Definition of an Aboriginal Land Agreement

Under section 36AA of the Act, an Aboriginal Land Agreement means:

‘an agreement, in writing, between the Crown Lands Minister and one or more Aboriginal Land Councils (whether or not the agreement also includes other parties) that, in addition to any other matter that may be included in the agreement, makes provision for—

- a) the exchange, transfer or lease of land to an Aboriginal Land Council, or
- b) an undertaking by an Aboriginal Land Council not to lodge a claim, or to withdraw a claim, in relation to specified land.’

Source: *Aboriginal Land Rights Act 1983*.

Aboriginal Land Agreement negotiations can result in the finalisation of one or multiple land claims, generally as a result of the claimant Aboriginal Land Council agreeing to withdraw the land claim(s) based on the negotiated agreement. Aboriginal Land Agreements may include other matters such as financial or other consideration, conditions or restrictions on the use of any land to which the agreement relates, and joint access to and management of land. Other parties may also be involved in negotiations, such as local councils.

Negotiated outcomes with respect to the land rights and property interests of Aboriginal people and communities in NSW may also be achieved through mechanisms other than an Aboriginal Land Agreement under section 36AA, such as Indigenous Land Use Agreements under the *Native Title Act 1993* (Cth).<sup>24</sup>

<sup>22</sup> Under section 36(5AA) of the Act, the Crown Lands Minister must not grant a claim if satisfied that the claimant has entered into an Aboriginal Land Agreement under section 36AA that includes an undertaking by the claimant not to lodge a claim in respect of the lands claimed or to withdraw the claim.

<sup>23</sup> *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 577 at 125.

<sup>24</sup> The National Native Title Tribunal describes Indigenous Land Use Agreements as voluntary agreements between native title parties and other people or borders about the use and management of areas of land and/or waters.

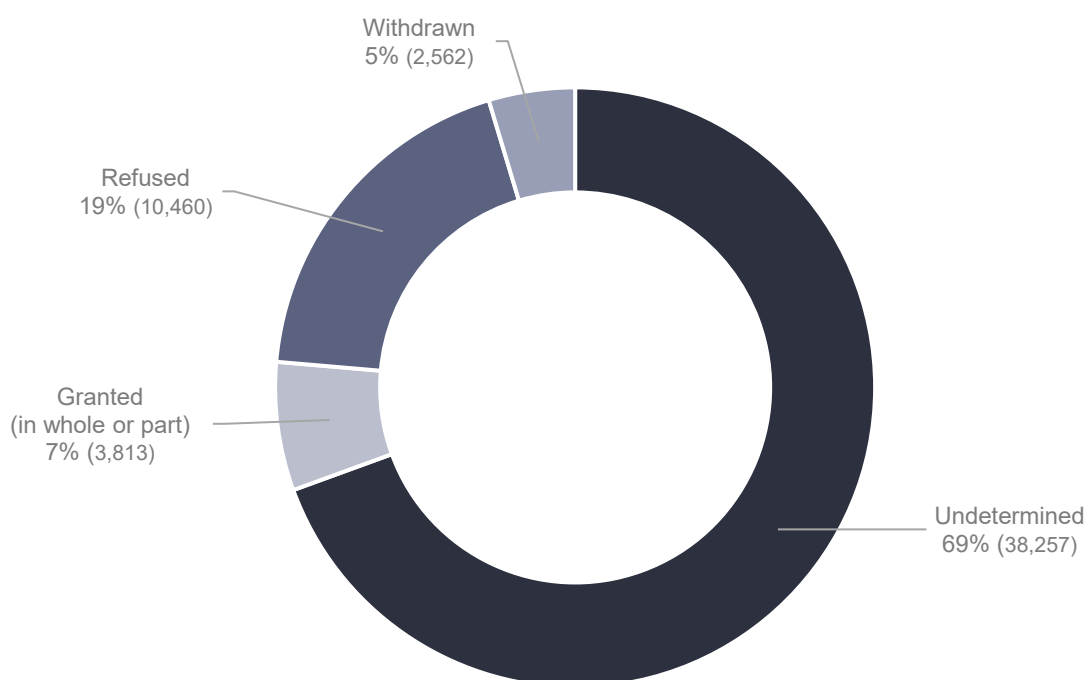


### 1.3 Undetermined land claims have been increasing for decades

Since 1983, 53,861 land claims have been lodged under the Act according to the ALC Register. DPE reports that, by 31 December 2021, 16,835 claims had been processed, that is determined (in whole or part) or withdrawn. Twenty-two per cent of claims processed have resulted Crown land being granted to a claimant Aboriginal Land Council.

DPE reports 38,257 undetermined land claims at 31 December 2021 (about 70 per cent of all claims lodged since 1983). DPE has also advised that there is about 1.12 million hectares of Crown land subject to an undetermined land claim.

#### Exhibit 5: Status of land claims lodged since the Act was introduced to 31 December 2021



Note: The total number of land claims represented in this exhibit (55,092) is greater than the total number of claims lodged (53,861 according to the ALC Register). This difference is because one claim may be processed in multiple ways, for example some land parcels within the claim may be granted and others may be refused or withdrawn, or not yet determined.

Source: DPE data compiled by NSW Audit Office.

Since 2007, NSW Auditor-General Reports to Parliament have recommended action to address the increasing number of undetermined claims. In 2007, there were around 9,000 undetermined land claims. The 'significant backlog' of land claims was also raised in the NSW Ombudsman's 2008–09 Annual Report.

The Second Reading Speech for the *Aboriginal Land Rights Amendment Act 2014* stated that 'delays in the determination and the backlog of undetermined claims result in uncertainty for government, industry and the Aboriginal communities that land rights are intended to benefit, and so discouraging investment and economic growth'. By 2014, there were around 26,000 undetermined land claims.

In 2016, the Committee of a Parliamentary Inquiry into Crown land in NSW noted 'the slow and inefficient state of the current land claim process which hinders the ability of Aboriginal communities to become economically sustainable' and that 'the land claims process urgently needs to be sped up in order to address these concerns'. By that time there were around 29,000 undetermined land claims.

In a separate 2016 Parliamentary Inquiry into Economic Development and Aboriginal Communities, the Committee acknowledged the economic potential of land owned by local Aboriginal Land Councils and stated disappointment that ‘this opportunity is being dampened by the significant backlog in the determination of land claims’.

Both Committees acknowledged the potential of Aboriginal Land Agreements in addressing the ‘backlog’ of claims and made recommendations that the NSW Government, and the then Department of Industry in particular, increase the use of the Aboriginal Land Agreement mechanism; and that land claim determinations and Aboriginal Land Agreement negotiations focus on the return of economically viable land to Aboriginal communities.

In 2016, the Department of Industry commenced the Land Negotiation Program, which aimed to process multiple land claims through Aboriginal Land Agreements in a pilot program involving certain LALCs and local councils (see Exhibit 6 for further information).

At the time of the 2017 statutory review of the Act, there were around 33,000 undetermined land claims. The report stated that ‘the large number of undetermined land claims, which remains a major concern, will benefit from greater understanding of the Act and collaboration between all levels of government and the Aboriginal community of NSW’.

At the time of the 2021 statutory review of the Act, there were more than 38,000 undetermined land claims. The Minister for Aboriginal Affairs Foreword to the November 2021 report on the statutory review stated that, ‘The nature of, and limitations on, the land that is able to be claimed and a history of slow progress in settling claims and transferring claimed lands to LALCs has contributed to a situation where the outcomes of the Act have not been maximised for Aboriginal people in NSW’.

## 1.4 What we’ve heard from Local Aboriginal Land Councils

From our consultations with LALCs, and consistent with research and consultations by other parties including in the 2017 statutory review of the Act, we understand that the efficacy of Aboriginal land claim processes and the delivery of outcomes under the Act matters greatly to LALCs.

Below are some key themes gathered through our consultations with LALCs:

- The return of land through the Aboriginal land claim process is of great significance to Aboriginal people from a cultural, social and economic perspective.
- The Act is deeply valued as a potentially powerful vehicle for rights and recognition, but there is disappointment with how it has been realised by government. The large number of undetermined claims has been described as disrespectful and LALCs are concerned that State interests are given priority over LALC priorities.
- Agencies have provided little transparency in the land claim process, which concerns LALCs – they do not know, and cannot easily find out, when a land claim is being assessed or might be determined. LALCs have a strong expectation that they should be kept better informed about the process.
- LALCs interact with the land claim process in different ways and with different priorities. Some may have greater resources than others to access information to make claims and engage with government, including on alternatives such as land agreements.

These themes are also reflected and elaborated on in relevant sections of this report.

## 1.5 Agencies' roles and responsibilities

### Department of Premier and Cabinet

The Department of Premier and Cabinet (DPC) leads the NSW public sector to deliver on the NSW Government's commitments and priorities. DPC supports the NSW Premier and Ministers by partnering with agencies, and by coordinating the initiatives of Ministers and their agencies to achieve government targets. DPC is also responsible for delivering State outcomes including 'effective and coordinated government', and 'empowering Aboriginal communities' through the delivery of Opportunity, Choice, Healing, Responsibility and Empowerment (OCHRE). OCHRE is the NSW Government's plan for Aboriginal affairs, released in 2013. Its aims include:

- supporting Aboriginal economic empowerment
- growing local Aboriginal leaders' and communities' capacity to drive their own solutions
- making both government and communities accountable for money spent.

The NSW Premier signed the National Agreement on Closing the Gap on behalf of NSW in July 2020, along with the NSW CAPO, the Australian Government, State and territory governments, the Australian Local Government Association.

The Minister for Aboriginal Affairs, supported by AANSW, is responsible for leading the implementation of the National Agreement on Closing the Gap across the NSW Government, with individual targets allocated to specific Ministers. The NSW Implementation Plan 2021–22 for Closing the Gap sets out priority reforms and identifies socio-economic targets to enhance the lives of Aboriginal and Torres Strait Islander people. Target 15a is particularly relevant to the Aboriginal land claim process (discussed further below).

### Aboriginal Affairs NSW and the Office of the Registrar

Aboriginal Affairs NSW (AANSW) is part of the Community Engagement Group of DPC and aims to work with Aboriginal communities to promote social, economic and cultural wellbeing through the delivery of OCHRE. AANSW also provides advice to the Minister for Aboriginal Affairs about their legislative responsibilities under the Act. AANSW states that the principle of self-determination underpins the Act. Its roles include:

- considering advice from NSWALC on matters relating to land rights, and Aboriginal affairs more generally
- supporting the Minister to undertake the five-yearly statutory review of the Act.

The Minister for Aboriginal Affairs reported on the latest statutory review of the Act in November 2021 and confirmed that the policy objectives of the Act remain valid.

AANSW's budget includes the staff in the Office of the Registrar of the Aboriginal Land Rights Act (ORALRA) to support the Registrar.

### Department of Planning and Environment

DPE and its cluster entities are responsible for delivering on identified state outcomes, including for a 'strong and liveable NSW' and to achieve 'maximum community benefit from government land and property'.

The Aboriginal Strategy & Outcomes group in DPE develops the strategic direction for achieving Aboriginal outcomes across DPE in line with the NSW Government's OCHRE Plan. DPE's 'Our Place on Country: Aboriginal Outcomes Strategy 2020–23' (Aboriginal Outcomes Strategy 2020–23) identifies Aboriginal land claims as a priority action working towards improved economic and cultural outcomes for Aboriginal communities as intended under the Act.

The Minister for Lands and Water is responsible for the delivery of Target 15a under the NSW Closing the Gap Implementation Plan. That is, a 15 per cent increase in landmass subject to Aboriginal and Torres Strait Islander people's rights by 2030. This is intended to support the outcome of Aboriginal and Torres Strait Islander people maintaining a distinctive cultural, spiritual, physical and economic relationship with their land and waters.

### **Crown Lands division**

DPE's Crown Lands division is responsible for the Crown land estate (land that is owned and managed by the NSW Government) which constitutes around 42 per cent of New South Wales. There are around 35,000 Crown reserves and 54,000 leases and licences over Crown land. DPE also manages the development, marketing and sale of Crown land not required for public purposes.

The management of Crown land was reformed with the *Crown Land Management Act 2016* (NSW), which commenced in 2018. The objects of this Act include to facilitate the use of Crown land by the Aboriginal people of NSW because of its spiritual, social, cultural and economic importance and, where appropriate, to enable the co-management of dedicated or reserved Crown land.

In June 2021, DPE released the *State Strategic Plan for Crown Land – Crown land 2031* (State Strategic Plan for Crown Land), which is the first strategic plan for the Crown land estate. The Plan sets out the vision, priorities, outcomes and strategy for managing Crown land for the next ten years. DPE identifies the acceleration of 'the realisation of Aboriginal land rights and native title, in partnership with Aboriginal people', as one of the five priorities within this plan.

DPE advised in March 2022 that it is developing the 2021–23 action plan under the State Strategic Plan for Crown Land which will set out actions to deliver the outcomes in the first three years.

A claim assessment team within DPE's Crown Lands division is responsible for assessing land claims and making determination recommendations to the Crown Lands Minister. Since July 2020, the claim assessment team has been part of the Aboriginal Land Strategy Directorate, which also has teams responsible for land surveying, native title, cultural capability, policy and Land Negotiation Program reforms.

The Aboriginal Land Strategy Directorate also facilitates the processing of land claims through Aboriginal Land Agreements under section 36AA of the Act, including through the Land Negotiation Program. This program is currently being reformed following an independent review in 2020 (see Exhibit 6).



## Exhibit 6: Overview of the Land Negotiation Program and reform activities

The Land Negotiation Program commenced as a pilot in September 2016 and was designed to enable the divestment of Crown land of local significance to local councils and commence the strategic settlement of land claims with LALCs through Aboriginal Land Agreements. Between 2016 and 2019, eight local councils and seven LALCs participated in the Program.

In November 2019, DPE commissioned an independent review of the effectiveness of the Land Negotiation Program. In March 2020, the reviewer, Chris Ronalds AO SC, reported on the program. The report identified various issues that had 'emerged from the consultations and the document review and that contributed to the failure of the Land Negotiation Program to achieve any measurable results at all over three years'. At that time, no Aboriginal Land Agreements had been finalised as part of the Land Negotiation Program. The report made 12 recommendations relevant to the future implementation of the program, 11 of which were accepted by DPE.

In September 2020, DPE established a Land Negotiation Program (LNP) Governance Taskforce which would oversee three primary streams of work from the recommendations:

- Priority Transfer Program: activities to finalise existing negotiations that were part of the pilot program
- LNP Refresh: activities to reform the Land Negotiation Program in co-design with NSWALC and LALCs
- LALC20 project: activities to invite and assist LALCs to identify up to 20 existing land claims for priority assessment and determination (see Exhibit 10 for further information).

The LNP Governance Taskforce met for the last time in September 2021. At that time, DPE advised the Taskforce that four of the review recommendations were 'complete'. DPE activities to implement the other recommendations are ongoing.

Source: NSW Audit Office analysis of DPE documents.

In July 2021, the Crown Land Commissioner released an evaluation of DPE's implementation of the *Crown Land Management Act 2016* over the three years since July 2018. The report focused on issues most relevant to the outcomes that the Crown land reforms sought to achieve, including the 'accessibility and usability' of Crown land and 'Aboriginal connection'.

The Commissioner noted that 'The scale of unresolved land claims and related uncertainty for the Aboriginal community and the Crown land estate present as major challenges to Aboriginal interests in Crown land – as well as the interests of other stakeholders – and will require focus and commitment to be resolved'. The Commissioner also made recommendations to DPE and the NSW Government, which are referred to in this report where relevant.

## 1.6 About the audit

This audit assessed whether the relevant agencies are effectively facilitating and administering Aboriginal land claim processes.

The 'relevant agencies' are the Department of Planning and Environment (DPE); the Department of Premier and Cabinet (DPC); and the NSW Aboriginal Land Council (NSWALC).

The term 'Aboriginal land claim processes' is used in this audit to describe processes which underpin the delivery of the requirements of the Act in relation to land claims and which contribute to achieving its statutory intent.

The audit focus was on the administration of the process under section 36 of the Act – from claim lodgement to determination, and land transfer – as well as the interagency arrangements required to facilitate this process, efficiently and effectively. This involved examining governance, operational coordination, information-sharing and stakeholder engagement activities from an agency and interagency perspective, as well as policies, procedures, systems and resources to support administrative functions.

Aboriginal Land Agreements under section 36AA of the Act are also a mechanism for processing land claims through negotiation (see Exhibit 4) but do not replace the statutory requirement to determine claims. Aboriginal Land Agreements have been considered in this audit as a mechanism through which the intent of the Act may be met, but the Aboriginal Land Agreement negotiation process itself has not been separately reviewed.

The audit period is from and including 2017. Activities and decisions before 2017 have also been considered where relevant and for context.

The audit did not examine individual land claim assessments, determinations or outcomes.

We consulted with LALCs to hear about their experiences and priorities with respect to Aboriginal land claim processes and related outcomes – all LALCs in NSW were invited to make a submission to the audit and we facilitated consultations with a sample of LALCs.

### **Note on terminology and data**

Consistent with the Act, the term Aboriginal Land Council is used to refer to the NSWALC or LALCs.

Unless otherwise specified, the term ‘undetermined’ land claims in this report applies to any claim that has been made and not yet determined or otherwise processed (for example, by way of withdrawal, amendment or negotiation). The term ‘processed’ is used to describe land claims that have been either been determined or otherwise processed.

Data reported on land claims lodged has been sourced from the ALC Register, held by DPC (ORALRA). Due to data integrity issues discussed in this report, the ALC Register has not been used to source data on the number of land claims determined or otherwise processed.

Data reported on land claims determined or otherwise processed (in whole or part) to 31 December 2021 has been sourced from DPE. Known issues with the quality of this data have been manually remediated by DPE. In some cases, certain data is only reported to the end of the 2019–20 financial year as more current data of sufficient accuracy could not be provided to the Audit Office. DPE has informed us that this is due to data integrity issues following the migration and spatial mapping of land claim information into a new system in 2020.

While this report identifies quality issues with data held by both agencies, and a lack of integration between their systems, we nevertheless determined it was necessary and reasonable to use the available data for the purpose of highlighting the volume and status of land claims. We advise readers that these data sets were not quality-assured by the Audit Office.

For further detail on our audit procedures see Appendix two.

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## 2. Meeting requirements to deliver land rights

Since 1983, 53,861 Aboriginal land claims have been lodged with the Registrar.<sup>25</sup>

The Land and Environment Court of New South Wales has stated there is an implied obligation on the Crown Lands Minister to determine land claims within a reasonable time.<sup>26</sup>

As at 31 December 2021, DPE has processed less than a third (31 per cent) of these land claims: 14,273 were determined by the Crown Lands Minister (that is, granted or refused, in whole or part) and 2,562 were withdrawn. This amounts to 16,835 claims processed, including the negotiated settlement of 15 claims through three Aboriginal Land Agreements. As a result, DPE reports that approximately 163,900 hectares of Crown land has been granted to Aboriginal Land Councils since 1983 up to 31 December 2021.

There are 38,257 land claims awaiting determination, which cover about 1.12 million hectares of Crown land.

The 2017 report on the statutory review of the Act noted that the land claims 'backlog' was one of the 'Top 5' priorities identified by LALCs during consultations. The importance of this issue is consistent with findings from our consultations with LALCs in 2021 (see Exhibit 7).

### **Exhibit 7: LALCs report that delays undermine the compensatory intent of the Act**

LALCs raised concerns about delays in the Aboriginal land claim process, including waiting decades for claims to be assessed and years for land to be transferred once granted.

The large number of undetermined claims has been described by LALCs as disrespectful, and as reflecting under-resourcing by governments.

LALCs reported that these delays undermine the compensatory intent of the Act, including by creating uncertainty for their plans to support the social and economic aspirations of their communities.

Source: NSW Audit Office consultation with LALCs.

Delays in delivering on the statutory requirement to determine land claims, and limited use of other mechanisms to process claims in consultation or agreement with NSWALC and LALCs, undermines the beneficial and remedial intent of Aboriginal land rights under the Act. It also:

- impacts negatively on DPE's ability to comply with the statutory requirement to determine land claims, because often the older a claim becomes the more difficult it can be to gather the evidence required to assess it
- creates uncertainty around the ownership, use and development of Crown land, which can have financial impacts on Aboriginal Land Councils, government agencies, local councils and developers.

Risks that arise in the context of undetermined claims are discussed further in section 3.3.

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<sup>25</sup> According to DPC (ORALRA) data in the ALC Register up to 31 December 2021. DPC (ORALRA) data indicates that the Registrar has refused to refer claims to DPE for assessment under section 36(4A) of the Act in a small number of cases – for example, seven times in 2017 and none since that time.

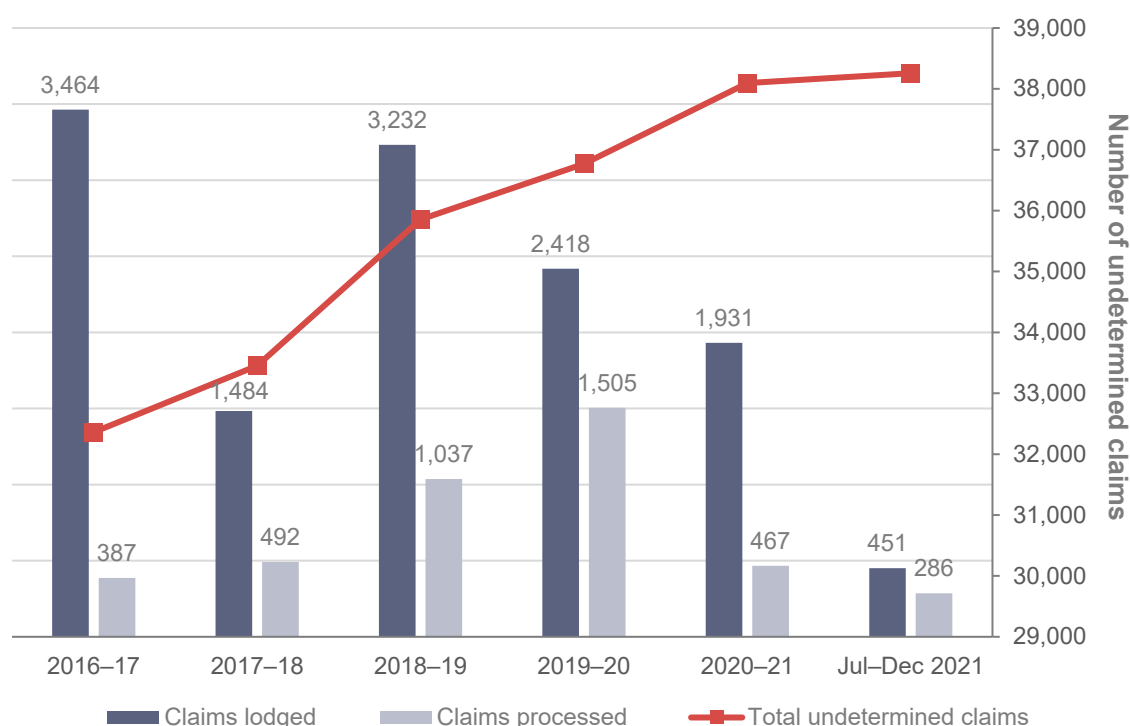
<sup>26</sup> *Jerrinja Local Aboriginal Land Council v Minister Administering the Crown Lands Act* [2007] NSWLEC 577 at 125. The Court stated, 'While a reasonable time may vary on a case-by-case basis, a delay of 15 to 20 years in determining claims does not accord with any idea of reasonableness'.

## 2.1 Determining land claims within a reasonable time

### DPE has not been meeting its statutory requirement to determine land claims, nor its obligation to do so within a reasonable time

The number of land claims processed by DPE each year has been consistently well below the average annual number of claims lodged, including in recent years since 2016–17. As such, the number of undetermined land claims has increased year-on-year to 38,257 at the end of December 2021. DPE's rate of processing land claims did increase in 2018–19 and 2019–20, but this was not sustained in 2020–21 and overall remains far below the historical lodgement rate.

**Exhibit 8: Existing claims processed compared to new claims lodged from 2016–17 to end of December 2021**



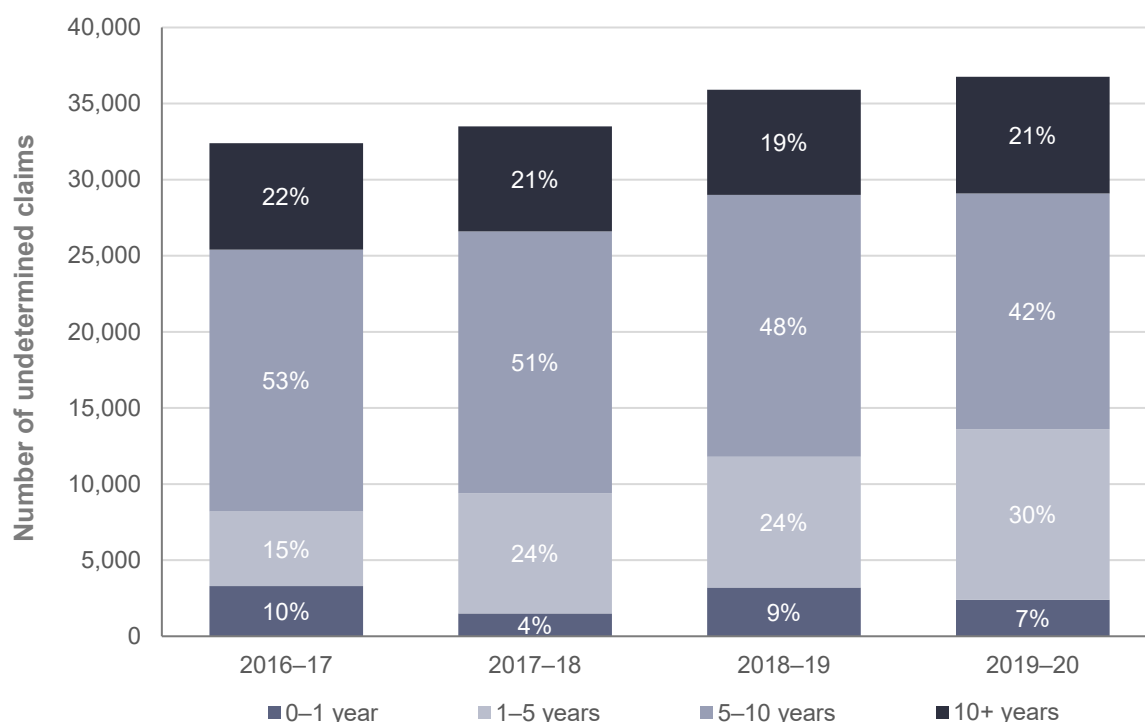
Source: DPE data compiled by NSW Audit Office.

DPE has not defined targets or expectations around timeframes for undertaking land claim assessments, although there is an implied obligation on the Crown Lands Minister to determine land claims within a reasonable time.

DPE data shows that, of all claims determined (granted or refused, in whole or part), the average time taken to determine a claim is about 4.4 years. But there is a wide variation in the time that can be taken on individual claims: from less than one week to 27.6 years.

At the end of 2019–20, around 63 per cent of claims had been awaiting determination for more than five years with around 20 per cent of claims being more than ten years old (see Exhibit 9). DPE has not been able to produce current, reliable data on the age profile of undetermined claims at the end of 2020–21 due to data integrity issues following the migration and spatial mapping of data to a new system, CrownTracker.

## Exhibit 9: Age profile of undetermined land claims from 2016–17 to 2019–20



Note: DPE data on the age profile of undetermined claims for 2020–21 has not been included due to concerns about data quality.

Source: DPE data compiled by NSW Audit Office.

If DPE meets its current target of processing 1,750 land claims per year (see Exhibit 14), it may still take about 22 years to process existing undetermined claims. This does not account for new claims being lodged.

### **DPE does not have a clear and resourced strategy to process more than 38,000 land claims and to ensure claims are determined within a reasonable time**

DPE does not have a clear and resourced strategy to process the high number of undetermined land claims and meet its statutory requirements under section 36 of the Act, within a reasonable time. DPE has not defined what would constitute a reasonable time, although setting timeframes in administrative processes promotes effective, transparent service delivery, and enables an agency to plan strategically for the resources needed to undertake its functions. This remains important when administrative processes involve cases of varying complexity.

In 2016, a Parliamentary *Inquiry into economic development in Aboriginal communities* recommended that the NSW Government allocate additional resources ‘to reduce the backlog of Aboriginal land claims’. The NSW Government’s May 2017 response stated that this recommendation was ‘Accepted in principle’ but did not make any commitment to review or increase resourcing.

The last time DPE completed analyses of the benefits, costs and resources required to enhance its processing of land claims was in 2013. In 2016, DPE estimated the resources involved in using Aboriginal Land Agreements, but these analyses were not directly relevant to land claim determinations.<sup>27</sup> DPE produced a draft business case in January 2021 that considered resources to deliver outcomes under the Act broadly, including by reducing the ‘backlog’ of undetermined claims, but this document was not finalised.

<sup>27</sup> These were related to seeking resourcing for the Land Negotiation Program, see Exhibit 6.



DPE did increase staff resourcing of its land claim assessment function in mid-2020. Recent trends in land claim processing and changes in this resourcing are outlined below:

- There were between seven and nine filled full-time equivalent, permanent positions between 2013 and 2016. Over this period, between around 200 and 560 claims were processed each year.
- There were also around eight full-time equivalent during between 2017 and mid-2020. The number of land claims processed tripled over this period (to 1,505 claims processed in 2019–20). This increase involved a high number of claim refusals (about 80 per cent of claims determined were refusals).
- In mid-2020, DPE funded 11 new temporary positions in the land claim assessment team. This increase was intended to support an acceleration in land claim processing, but DPE advised that turnover of temporary staff affected their delivery against targets in 2020–21. Only 467 claims were processed that year.
- Temporary positions were converted to permanent in April 2021, and in July 2021 there were 23 permanent positions allocated to land claim assessment functions. By December 2021, 17 permanent positions were filled.

DPE is now projecting increases in the number of land claims processed, and granted, in 2021–22. DPE reports an increased proportion of land grants over the six months to December 2021 with 72 per cent of processed claims granted (see Exhibit 14).

These recent outputs may reflect the recent application of additional, permanent resources. It is unclear, however, what evidence base DPE has used to plan for and resource land claim assessment functions over time. There is still a lack of business planning to support the delivery of a sustained upward trend in claim determinations, and a focus on land grants. Overall, since 2016 DPE has focused its resourcing on the use of Aboriginal Land Agreements, particularly through the Land Negotiation Program and its reform (see Exhibit 6).

DPE's June 2021 State Strategic Plan for Crown Land includes a priority of accelerating the realisation of Aboriginal land rights but does not refer to DPE's requirement to determine land claims under the Act or a specific strategy to address the large number of undetermined claims. It does refer to targeting initiatives to better define and utilise Aboriginal Land Agreements and Indigenous land use agreements to enable co-management and generate greater mutual benefits.

Apart from evidence that DPE has budgeted for \$30 million per year (from 2021–24) of Crown land to be transferred out of the estate (for Land Negotiation Program reform activities), it is unclear what budget has been identified to ensure that DPE is meeting its statutory requirement to determine land claims, and its obligation to do so within a reasonable time. For example, DPE has not provided evidence that it has analysed and secured resourcing to implement actions relevant to land claim processing that are identified as priorities in the Aboriginal Outcomes Strategy 2020–23 or the Aboriginal Land Strategy Directorate's 2021–22 business plan that is intended to deliver on the priorities in the State Strategic Plan for Crown Land.

There is potential for elements of the Land Negotiation Program reform activities, particularly the LALC20 project, to contribute to DPE meeting statutory requirements, but this work is in its early stages (see Exhibit 10).

#### **Exhibit 10: Scope and status of the LALC20 project**

There are 120 LALCs in New South Wales and over 38,000 undetermined land claims.

DPE commenced the LALC20 project in September 2020. It involves a DPE team providing LALCs with a list of their undetermined claims and other information to assist them identify up to 20 claims for priority assessment. A Community Engagement Officer works with LALCs to help them understand the process and access other relevant support. Once a LALC has identified their list of priority claims, it is passed onto DPE's land claim assessment team.

DPE advised in March 2022 that 36 LALCs had expressed an interest in the project. DPE has a target of assisting 25 LALCs to develop their list of priority claims in 2021–22.

By March 2022, the project had resulted in 298 priority claims being progressed for assessment. Around 12 claims had been resolved through this process, nine of which were granted (in whole or part).

Source: NSW Audit Office summary of DPE information.

## **2.2 Strategic interagency planning and resourcing**

### **Neither DPC nor DPE have led strategic planning to establish the resources required across agencies to effectively deliver end-to-end Aboriginal land claim processes**

DPC (AANSW and ORALRA) and DPE have not planned and resourced the end-to-end Aboriginal land claim process to ensure its efficiency and effectiveness. There is no documentation demonstrating that DPC (AANSW and ORALRA) or DPE have reviewed resourcing from an interagency perspective to ensure the timely delivery of land claim determinations and related outcomes – consistent with the Act, and other legislative frameworks.

The opportunity cost to the NSW Government of the large number of undetermined land claims (for example, the social and economic benefits that have not been realised from claimable land yet to be transferred to Aboriginal Land Councils) has not been estimated by DPC (AANSW and ORALRA) or DPE.

From a financial perspective, DPE has reported that undetermined land claims represent a contingent liability for the NSW Government due to the unquantifiable reduction in the value of Crown land assets resulting from land transferred out of the Crown land estate. But there is limited evidence that DPE has analysed this or other potential financial liabilities that may result from undetermined land claims (see section 3.3).

There is also no evidence of DPC (AANSW and ORALRA) or DPE operating a formal process for periodic interagency strategic planning, which involves NSWALC where appropriate and that is specific to enhancing Aboriginal land claim processes. These agencies do have formal, periodic strategic planning processes and there is a broad alignment between the high-level objectives relating to land rights in the most recent strategic plans of NSWALC, DPC (AANSW), DPC (ORALRA) and DPE's Crown Lands division. But there is no evidence of interagency collaboration or consultation when developing strategic planning specific to land claim functions, and resources are not clearly coordinated as a program of activities or with State priorities.

DPC (ORALRA) and DPE have also not undertaken an interagency operational review to improve service delivery and ensure the efficient use of available staff or resources and avoid duplication – particularly with respect to information sharing activities (see section 3.4).

There are examples of missed opportunities for streamlining processes due to resources not being strategically reviewed in a timely way by the relevant agencies (see Exhibit 11).

**Exhibit 11: An example of a lack of strategic planning resulting in options to streamline processes not being effectively used**

In 2014, the Act was amended to give the Registrar the discretion to refuse to refer a land claim (or part of a land claim) to DPE for determination if the Registrar is satisfied that it relates to land that is not Crown land, or on land that contravenes an undertaking in an Aboriginal Land Agreement (section 36(4A) of the Act).<sup>28</sup>

According to the second reading speech for the amending bill, this discretion was introduced to 'streamline and improve the existing land claims determination process' by 'allowing the registrar to refuse to refer new land claims to the Crown Lands Ministers if a title search reveals that the land is privately owned and therefore is not Crown land available to be claimed'.

DPC (ORALRA) and the Registrar advised that the discretion has been used occasionally in the past, when ORALRA was located within the Department of Education, but has not been used since August 2017 (this advice is consistent with data in the ALC Register). Reportedly, not exercising this discretion relates to resourcing constraints, including the cost of undertaking the required land title searches following the privatisation of the NSW land title registry in 2017.<sup>29</sup> All land claims lodged with ORALRA since August 2017 have been referred to DPE for determination. ORALRA and AANSW have not reviewed the resourcing required to enable the Registrar to exercise this discretion.

In 2019, a DPE internal audit identified that not using legislative provisions to assist in managing claims could result in the inefficient use of ministerial time in determining claims. At that time, DPE committed to explore with DPC (AANSW and ORALRA) the viability of options to better enable the Registrar to use this discretion. DPE reports that some internal discussions occurred but were not progressed.

The Minister for Aboriginal Affairs' report on the 2021 statutory review of the Act states that consideration is being given to repealing the Registrar's discretion to refuse to refer claims (see Exhibit 13).

Source: NSW Audit Office analysis based on DPE, ORALRA and AANSW documentation.

<sup>28</sup> Section 36(4A) of the Act was introduced by the *Aboriginal Land Rights Amendment Act 2014* and states that 'The Registrar may refuse to refer a claim, or part of a claim, to the Crown Lands Minister if the Registrar is satisfied that – (a) the claim, or the part of the claim, relates to lands that are not vested in Her Majesty, or (b) the claim, or the part of the claim, has been made in contravention of an undertaking given by the claimant in an Aboriginal Land Agreement under section 36AA while such an undertaking remains in force'.

<sup>29</sup> Since July 2017, the NSW land title registry has been operated by a private company, NSW Land Registry Services, on behalf of the NSW Government and a fee has been payable to access title information. The NSW Land Registry Services 2021–22 schedule of fees states that the cost of a title search is \$15.10 including GST.

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### 3. Governance and coordination across processes

NSW Treasury describes public sector governance as providing strategic direction, ensuring objectives are achieved, and managing risks and the use of resources responsibly with accountability.

Consistent with the NSW Treasury's Risk Management Toolkit (TPP-12-03b), governance arrangements for Aboriginal land claim processes should ensure their effective facilitation and administration. That is, arrangements are expected to contribute to and oversee the performance of administrative processes and service delivery towards outcomes, and ensure that legal and policy compliance obligations are met consistent with community expectations of accountability and transparency.

DPC and DPE are responsible for governance and, in partnership with NSWALC, operational and information-sharing activities required to coordinate Aboriginal land claim processes. LALCs, statutory officers, government agencies, local councils, and other parties (such as native title groups and those with an interest in development on Crown land) need to be engaged so that these processes are coordinated effectively with risks managed – consistent with the intent of the Act, and other legislative requirements.

Policy commitments to Aboriginal people and communities made by the NSW Government in the OCHRE Plan and Closing the Gap priority reforms establish an expectation for culturally informed governance.

#### **Exhibit 12: LALCs want their voices to be heard and responded to by government**

LALCs expressed a strong desire to have their voices heard so that outcomes in the Aboriginal land claim process are informed by LALC aspirations and consistent with the intent of the Act. The importance of respect and transparency were consistently raised.

The following quotes are from our consultations with LALCs during this audit which illustrate the inherent cultural value of land being returned, as well as the importance of its social and economic value and potential.

There's batches of land in and around town. This land is significant...We want to get the land activated to encourage economic development, and promote the community...our job is to step up to create infrastructure, employment, maintenance and services and lead by example.

One of the best things we were able to do is develop a long term 20-year plan and where Crown Land could directly see where land was transferred to us and it was going to things like education, housing, health and other social programs...

There has been a claim lodged on a parcel of land that has long lasting cultural significance, a place that is very special to the Aboriginal community members and holds a lot of history. If the claim lodged was successful this land would be used to strengthen the cultural knowledge of the local youth, through placing signage that depicts stories that have been passed down by the Elders, cultural talks and tours and school group visits. This land, although not large in size, has a significant number of cultural trees and artefacts. Aboriginal families and members of the LALC that have lived in our town are very protective of the site and others surrounding it, respecting the importance of the cultural history of the site.

There is one, which is a cultural one. We received a land claim that contained a cultural site. This is the high point: we were given back lands that contained rock engravings, carvings. A real diamond for us, especially as an urban based land council.

At the heart of the ALRA is the ability to claim Crown Land...The slow determination of claims gets in the way of us doing what we want to do, which is focus on our communities and address our real needs which are about health, wellbeing and culture. If we could realise these rights, we can address all sorts of socio-economic needs. We would become an economic benefit to the state...If it was operating well there could be more caring for Country too.

Note: Permission has been granted by LALC interviewees to use these quotes in this context.

Source: Excerpts from NSW Audit Office interviews with LALC representatives, facilitated by Indigenous consultants.

### 3.1 Governance for accountability

#### **DPC has not established and led culturally informed interagency governance that ensures accountability for delivering coordinated Aboriginal land claim processes consistent with the Act**

DPC is responsible for supporting the Minister for Aboriginal Affairs to administer the Act consistent with its purpose, to provide land rights for Aboriginal people. DPE is responsible for supporting the Crown Lands Minister to undertake administrative functions to achieve this purpose: by determining Aboriginal land claims. But DPC (AANSW) has not established governance arrangements to define the accountabilities of DPC and DPE, and where relevant other agencies and parties, to oversee and facilitate land claim processes. Such governance has not existed since at least 2017 (the audited period) and we have not seen evidence earlier. These factors contribute to a lack of accountability for identifying and progressing actions to improve processes.

NSWALC is the peak representative body for Aboriginal land rights in New South Wales, but DPC (AANSW and ORALRA) and DPE's engagement with NSWALC in relation to land claim processes is poorly defined. There are also no clear arrangements for direct LALC input to inform the effective delivery of land claim processes.

While DPC (AANSW) and DPE have identified the need for partnership with Aboriginal communities and working with Aboriginal people to achieve outcomes through the OCHRE Plan and Closing the Gap priority reforms as well as DPE's State Strategic Plan for Crown Land, no clear mechanism for this exists that is specific to delivering land claim processes.

Some governance arrangements established since 2017 have involved NSWALC, including those for the Land Negotiation Program (led by DPE) and DPC (AANSW)'s recent activity relating to Closing the Gap priority reforms. But these arrangements do not provide oversight for accountability around land claim processes specifically, and the governance taskforce established to guide DPE's Land Negotiation Program reform activities met for the last time in September 2021.

The Crown Land Commissioner's July 2021 evaluation of the *Crown Land Management Act 2016* and its implementation identified that there has been an, 'ongoing lack of progress in delivering land outcomes to Aboriginal people' under the Act. The Commissioner chaired a taskforce overseeing DPE's implementation of the State Strategic Plan for Crown Land, which identifies the realisation of land rights and native title, in partnership with Aboriginal people, as a priority.<sup>30</sup> This mechanism may support but is not designed to oversee DPE's performance in delivering land rights via the timely transfer of claimable Crown lands to Aboriginal Land Councils.

<sup>30</sup> This position is currently vacant (in March 2022).



**There is a lack of accountability around DPC and DPE's responsibilities to implement recommendations to improve Aboriginal land claim processes and key barriers remain**

Neither DPC (AANSW and ORALRA) nor DPE have led a coordinated approach to address reported barriers to the effective facilitation and administration of land claim processes. Opportunities for improved oversight and greater collaboration have been repeatedly identified in internal and external reviews since 2014, but recommendations have not been progressed in a significant way. This includes two Parliamentary inquiries in 2016, and concerns raised by the NSW Audit Office (see section 1.3).

DPC (AANSW) has not been directly involved in operational matters related to the land claim process over the audit period, since at least 2017. But DPC (AANSW) has identified that it has an advocacy role. Statutory reviews of the Act since 2014 have highlighted the need for an improved understanding (among State government agencies and other parties) about the operations of the Act to help address barriers affecting DPE's processing of land claims in a timely manner, and to minimise risks to Aboriginal Land Councils' inchoate property rights attached to land under claim (see section 3.2 on managing risks).

DPC (ORALRA) and DPE have separately reviewed their relevant functions, identifying barriers to their efficacy in 2016 and 2019 respectively. But DPC (AANSW and ORALRA) and DPE have not implemented effective mechanisms for monitoring and reporting on the status of recommendations from these reviews. For example:

- ORALRA's poorly functioning information management systems were identified as a key issue in a 2016 internal review, and upgrades to the ALC Register have been a strategic priority for ORALRA since 2018 – but no substantive progress has been made on these issues (see Exhibit 19).
- DPE has not maintained current reporting on its implementation of recommendations from a 2019 internal review of its land claim assessment functions, and the latest reporting (from August 2020) indicates that five of seven recommendations were 'overdue' and that some could not be progressed due to lack of resourcing.

There is evidence of some recent improvements in DPE processes, such as introducing delegations to streamline certain determinations (specifically, in 2020 delegating the Crown Lands Minister's authority to refuse land claims to senior executives and extending this to grants in February 2022) and providing further access to information to NSWALC (see section 3.5).

Overall, key barriers to the efficacy and efficiency of Aboriginal land claim processes which have been previously identified remain. These include:

- insufficient agency and third-party education to protect rights (see section 3.3)
- poor functionality of information management systems used by DPC (ORALRA) to maintain the ALC Register (see section 3.3)
- absence of integrated information management systems between DPE, DPC (ORALRA) and NSWALC (see section 3.4)
- DPE not managing timeframes throughout the assessment process (see section 4.2)
- DPE not having a clear prioritisation approach for claim assessments (see section 4.2)
- limited use of Aboriginal Land Agreements (see Introduction).

We have been advised that interagency, executive meetings between DPC (AANSW and ORALRA), DPE and NSWALC take place, but there is limited documentation on these. Meetings involving DPC (AANSW and/or ORALRA) and DPE do not appear to be routinely minuted or guided by agendas or terms of reference. DPE has provided agendas relating to monthly or bi-monthly executive meetings with NSWALC since October 2020, but there are no minutes of these meetings.

Poor record keeping in relation to these meetings limits accountability and transparency around progress to address issues, and is not consistent with requirements under the *State Records Act 1998* (NSW) to make and keep full and accurate records of activities.

### **DPE's internal coordination of activities relevant to land claim assessments is not well defined following recent restructuring, but work is underway to enhance this**

The Aboriginal Land Strategy Directorate was established in mid-2020, with a dedicated executive lead, after an external review of the Land Negotiation Program raised concerns about a lack of coordination between DPE staff involved in negotiating Aboriginal Land Agreements and DPE's land claim assessment team.

As well as the land claim assessment team, the directorate has teams responsible for land surveying, native title, cultural capability, policy and the Land Negotiation Program reforms (see Exhibit 6). But DPE has not provided evidence of effective operational planning relevant to resourcing and coordination of activities within the directorate. There is also a lack of clarity around how the directorate's activities are to be coordinated to progress outcomes and engage with Aboriginal Land Councils. As discussed in section 3.2 below, interdependencies between outputs and targets across the directorate are not well defined.

In December 2021, DPE produced a 2021–22 business plan for its Aboriginal Land Strategy Directorate that includes activities and actions relevant to land claim processes. It also identifies timeframes and the teams responsible for leading activities. DPE advised (in February 2022) that it is preparing a business case to support current operational requirements but was not able to provide any evidence relating to this.

### **The 2021 statutory review aims to progress reforms that may improve the operations of Aboriginal land claim processes, and facilitate better outcomes**

DPC (AANSW) supports the Minister for Aboriginal Affairs in undertaking periodic statutory reviews of the Act. Statutory reviews are an opportunity to examine barriers to realising the intent of legislation and can be useful for clarifying whether barriers relate to operational issues, interactions within or between legislative frameworks, or other factors. As noted in the Introduction to this report, statutory reviews of the Act have confirmed its purpose and policy objectives.

The latest statutory review, finalised in November 2021, proposes amendments to the Act which may form the basis of a draft amendment bill. It includes opportunities that the report states are intended to facilitate the return of land to Aboriginal Land Councils and/or to better land claim processes.

#### **Exhibit 13: Extract from the 2021 statutory review of the Act**

'To facilitate the return of land to ALCs [Aboriginal Land Councils] and/or better the land claim processes, the 2021 review identified some potential amendments of the ALRA [*Aboriginal Land Rights Act 1983* (NSW)] that may include:

1. Removal of current barriers for ALCs to access land for residential development, as one ground Crown land may not be claimable.
2. Repeal the provisions giving the Registrar a discretion to refuse claims without referral to the Crown Lands Minister where the claimed land is not vested in Her Majesty.
3. Repeal of the keeping of a register of ALAs [Aboriginal Land Agreements] by the Registrar ALRA and the provisions giving the Registrar a discretion to refuse land claims made contrary to ALAs.
4. Compel relevant Crown landowners and managers to disclose known contamination on Crown lands subject to Aboriginal land claims.
5. Where land has been successfully claimed, clarify the assessment and/or administrative processes for finalisation of any other made claims over the same land.'

Source: Report on the 2021 statutory review of the *Aboriginal Land Rights Act 1983*, November 2021, page 19.

The statutory review report also states that work on the interaction between the Act and the *Native Title Act 1993* (Cth) will be a priority, in continuation of work commenced following the 2017 statutory review. It identifies five key themes for major policy matters recommended for further development, including 'stronger focus and commitment on the compensatory basis and purpose of the ALRA [*Aboriginal Land Rights Act 1983* (NSW)], specifically the return of Crown land to ALCs [Aboriginal Land Councils] in fair and timely ways and consideration of ongoing financial compensation contributions to sustain the ALRA in perpetuity'.

## 3.2 Defining outcomes, monitoring outputs and reporting

### **DPC is not leading an interagency mechanism to define, monitor and report on outcomes from Aboriginal land claim processes**

DPE reports that since 1983 up to the end of December 2021, 3,813 land claims have been granted, either in whole or part which is about seven per cent of all claims lodged, and 22 per cent of all claims processed.

DPC (AANSW and ORALRA), DPE and NSWALC have advised that positive outcomes from the land claim process include, but are not limited to, the total number of land claims determined and the amount of land returned to Aboriginal Land Councils. We have been advised that features of land related to its cultural heritage, as well as its social and economic potential can also be significant to achieving outcomes. This is consistent with views expressed in LALC consultations (see Exhibit 12), although these consultations still highlighted strong concern among LALCs about the total number of undetermined claims.

But DPC (AANSW) has not established mechanisms for defining, monitoring, and reporting outcomes from land claim processes that are consistent with the requirements and intent of the Act. DPE has not provided information that explains how its performance measures or output monitoring related to land claim processes is aligned with internal priorities (discussed further below) or NSW Government priorities, including Closing the Gap targets.

There has been no routine mechanism for reporting publicly on outputs from, or outcomes related to, land claim processes. This has created a lack of accountability around the activities of DPC (ORALRA) and DPE. The absence of an interagency reporting mechanism also means there is a lack of evidence being collated about how the activities of other government agencies and parties (including local councils) impact on land claim processes. DPC (AANSW) has advised that from 2022, the Minister for Aboriginal Affairs will report to Parliament on Closing the Gap priority reforms, but has not explained what monitoring will occur to support this reporting.

Both DPC (ORALRA) and DPE periodically report internally on input and output data relating to the number of claims lodged and processed. For example, DPC (ORALRA) reports monthly to DPC (AANSW), and DPE reports monthly to DPE executive officers (see below for detail on DPE's internal reporting). DPE also provides data to DPC (AANSW) when requested. But there is no evidence that reported data is evaluated to inform service delivery standards such as timeframes, to review performance from an interagency or whole-of-government perspective, or to understand the contribution of land claim processing activities towards achieving of the intent of the Act.

DPE's strategic planning documents also lack a clear expression of how DPE intends to manage the intersection between outcomes under its administration of land claim processes, and its other statutory functions (such as the management and divestment of Crown land under the *Crown Land Management Act 2016*).

### **DPE lacks a clear framework for monitoring outputs and reporting on the performance of its land claim assessment function in a way that aligns with priorities and outcomes**

DPE's performance monitoring of its land claim assessment functions has not enabled effective oversight of whether its processes are achieving timely outcomes, consistent with the Act. Some performance monitoring occurs but has not been clearly aligned with its strategic priorities or operational projects to drive efficiency and ensure compliance. DPE has not clearly documented the evidence base and rationale for its land claim assessment targets over time, limiting transparency around its priorities (see Exhibit 26 for an overview of DPE's various prioritisation approaches).

Since at least 2017, DPE has primarily measured performance in relation to land claim assessments against targets for the number of land claims processed ('resolved' or 'finalised') each financial year (see Exhibit 14). DPE has not measured performance based on expectations around timeframes for assessing and determining land claims, or whether they are keeping pace with incoming claims over time.

**Exhibit 14: DPE's performance against its targets for land claim processing, since 2016–17**

| Year              | Number of claims lodged | DPE target number of claims to be 'resolved' | DPE report on claims 'resolved' (i.e., determined or withdrawn) | Number of undetermined claims at EOFY |
|-------------------|-------------------------|--|---|---------------------------------------|
| Five-year average | 2,506                   | n.a.   | 778   | n.a.                                  |
| 2016–17           | 3,464                   | 500  | 387   | 32,361                                |
| 2017–18           | 1,484                   | 500  | 492   | 33,452                                |
| 2018–19           | 3,232                   | 700  | 1,037   | 35,855                                |
| 2019–20           | 2,418                   | 1,500  | 1,505   | 36,769                                |
| 2020–21           | 1,931                   | 3,000  | 467   | 38,095                                |
| 2021–22           | n.a.                    | 1,750  | n.a.  | n.a.                                  |

Note: The five-year average relates to 2016–17 to 2020–21. In this DPE reporting, the term 'resolved' is used to refer to land claims that are determined or otherwise processed (i.e., granted, refused or withdrawn, in whole or part). DPE reports that in the six months to the end of December 2021 there were 451 claims lodged and it had 'resolved' 286 claims.

Source: DPE data compiled by NSW Audit Office.

A DPE internal audit in 2019 states that DPE had agreed to reassess key performance indicators to align claim targets with prioritisation frameworks and projected processing rates to ensure the relevance of performance monitoring. But DPE has not aligned its claim targets (shown in Exhibit 14 above) to the various prioritisation approaches in use (see section 4.2). Some prioritisation approaches have focused on increasing the number of claim determinations that result in land grants, but as shown in Exhibit 15 below, there is no overall trend since 2016–17 in the proportion of land claims that have been granted.

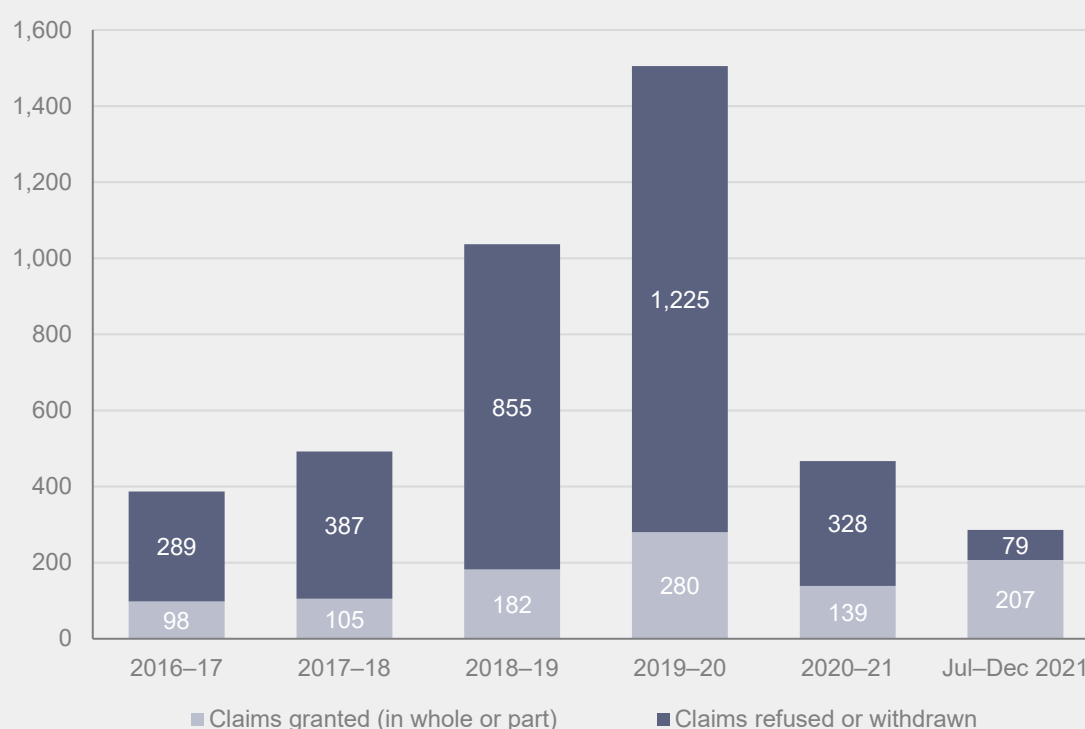
Since 2017, DPE has monitored the number of claims processed against an annual target in monthly reporting to DPE executive officers. This monthly reporting also includes trends on the number of incoming claims compared to those determined, and on the number of granted claims awaiting land survey before transfer. But as DPE lacks a resourced strategy to process the large number of undetermined claims, it is unclear what contribution its targets have been projected to make to the statutory compliance issue of undetermined land claims over time.

**Exhibit 15: There is no clear trend in the proportion of processed land claims that have been granted since 2016–17, but there are signs that the number of grants is increasing**

DPE's administrative decisions about which claims to allocate for assessment can change the proportion of determinations that result in land grant determinations for example, by focusing its resources on recommending claims for determination that appear, after an initial assessment, to have a higher likelihood of meeting the criteria for 'claimable Crown lands' (see Exhibit 2).

Overall, there are no clear trends in the proportion of processed claims that have been granted between 2016–17 and 2020–21 (see graph below). There was some increase in the number of claims granted (noting the historical average of about 67 grants per year since the Act came into force), but this was not sustained in 2020–21. DPE has advised that it set targets to increase the number of land claims granted in 2021–22. In the first six months to the end of December 2021, 207 land claims had been granted (72 per cent of all claims processed in 2021–22).

**Claims granted (in whole or part) compared to claims refused or withdrawn**



Source: DPE data compiled by NSW Audit Office.

DPE's monthly executive reporting has, since April 2021, also included data on the area of land granted and the number of different Aboriginal Land Councils granted land. Additionally, DPE has prepared quarterly reporting relevant to its Aboriginal Outcomes Strategy 2020–23 since April 2021 with information about the area of land granted to Aboriginal Land Councils as a key performance indicator, but DPE lacks targets for this indicator. There is some evidence that indicators related to the area of land granted and LALCs granted land were developed in 2019–20, but it is unclear how routinely these have been used and reported on between that time and April 2021. DPE has also reported land claim outputs data to the Crown Land Commissioner, for example in September 2021. In December 2021, DPE finalised a 2021–22 business plan for its Aboriginal Land Strategy Directorate which provides some further information on these measures, indicating an intention to grant 2,000 hectares of land to at least 50 LALCs in 2021–22.



DPE has advised in 2021 that it is shifting to outcomes-focused performance monitoring of its land claim assessment functions, but overall there is more work to be done to link outputs monitoring with prioritisation frameworks and its various outcome measures. There are, for example, interdependencies between the inputs and outputs of various teams' activities within the Aboriginal Land Strategy Directorate which are not coordinated and limit the potential for those activities to maximise outcomes and meet expectations for Aboriginal Land Councils. It also creates risks to DPE's ability to deliver on targets and priorities. Examples are provided below:

- The relationship between targets for determining claims and those for surveying land before transfer is not defined or coordinated, creating a risk that land transfers are delayed. At the end of 2019–20, there were 47 granted claims awaiting survey that had not yet been transferred, and 29 had been awaiting transfer for more than five years (amounting to about 20,000 hectares of Crown land).
- The relationship between the target number of LALCs engaged in the LALC20 project (see Exhibit 10) and targets for the land claim assessment team (such as the number of claims processed or area of land granted) are not defined or coordinated, creating a risk of competing priorities and poor service delivery towards outcomes (see section 4.2).

DPE has also not clarified what reporting will occur to monitor the delivery of the activities set out in its 2021–22 business plan for the directorate.

### 3.3 Managing risks and identifying opportunities

**There is no coordinated approach to educating relevant agencies and other parties about the Act, such as about opportunities to promote its aims and safeguard land under claim**

DPC (AANSW and ORALRA), DPE and NSWALC have not clearly defined their roles or coordinated activities to educate government agencies, local councils and other parties that have an interest in Crown land about opportunities to support the intent of the Act. This creates a risk that activities will be undertaken on land under claim that are inconsistent with the Act, and that opportunities may be missed to better facilitate land claim processes and engage with Aboriginal Land Councils (see Exhibit 16).

Statutory reviews of the Act since 2014 have identified the large number of undetermined land claims as a barrier to achieving the intent of the Act and noted that building greater understanding of the Act would facilitate processes to determine claims. For example, the 2014 and 2017 reviews identified:

...the need to improve understanding of the land claims determination process among all stakeholders involved in the process. This will assist in reducing time delays that occur as a result of misunderstandings by the lodging parties and agencies and other stakeholders with potential interests in the land concerned (2014 statutory review)

...the large number of undetermined land claim, which remains a major concern, will benefit from greater understanding of the Act and collaboration between all levels of government and the Aboriginal community of NSW (2017 statutory review).

DPC (AANSW) has not provided evidence of leading specific activities to improve understanding about the operation of the Act among government agencies, local councils and other parties whose activities can:

- impact on land claim assessment timeframes (see section 4.2)
- affect opportunities attached to land under claim (such as rezoning decisions or contamination remediation costs impacting the economic potential of land)
- create risks to inchoate property rights attached to land under claim (such as the sale or compulsory acquisition of land).

DPC (ORALRA), DPE and NSWALC have all advised that they seek to raise understanding of the Act when engaging with parties in relation to queries about land under claim. But this engagement is not undertaken in a routine, coordinated or formalised way.

We observed generally low levels of understanding about the Act in our interviews with relevant State government agencies (including in some parts of DPE, although not within the Aboriginal Land Strategy Directorate) and local government representatives.

#### **Exhibit 16: Risks and opportunities related to land under claim**

Crown land managers (including local councils), agencies and other parties may have an interest in undertaking activities on or developing Crown land subject to an undetermined land claim. These activities can directly impact the achievement of the compensatory intent of the Act. Activities may also involve the intersection of various legislative frameworks and requirements (for example, the intersection between the Act and the *Crown Land Management Act 2016* or NSW planning laws). It is therefore critical that interested parties understand requirements and expectations when managing or undertaking activities on land under claim.

Risks to achieving the intent of the Act include where activities on land under claim are inconsistent with the claimant Aboriginal Land Council's inchoate property rights, or change the condition or spiritual, social, cultural and/or economic value of the land. This may include selling Crown land; developing land without the consent of the claimant Aboriginal Land Council; contamination of land; land rezoning decisions; and allowing land or property/assets on land to fall into disrepair due to a lack of maintenance. Risk management is discussed below in this section.

Opportunities relating to land under claim include co-management of Crown land involving Aboriginal communities; consulting with Aboriginal Land Councils in planning and rezoning decisions to promote opportunities for activation of the land if granted; and engaging with the claimant Aboriginal Land Council to seek consent to undertake activities or reach negotiated outcomes in relation to land claims.

Source: NSW Audit Office analysis based on documentation and interviews.

DPE has identified in its strategic risk register that Crown land manager non-compliance with legislative requirements has a 'very high' inherent risk with weak internal controls.<sup>31</sup> DPE makes some training available to Crown land managers about the Act and land claim processes, but this training is not mandatory and provides limited guidance on expectations and requirements to enable Crown land managers to comply with the Act and support its intent. DPE has also developed some resources which provide Crown land managers with some guidance in relation to undertaking activities on land under claim. But there is no coordinated program to ensure that education covers all relevant stakeholders and is routinely provided.

DPE's draft action plan to support the State Strategic Plan for Crown Land identifies June 2024 as the expected delivery date for its actions to, 'deliver resources and training to build capability in Crown land manager and raise the awareness of managers and users about the rights over and cultural connections to the land of Aboriginal people so that managers and users can better meet their responsibilities and obligations'.

#### **DPC and DPE do not have effective processes to manage risks related to the large number of undetermined claims, creating uncertainty that affects land use and development**

DPC (ORALRA and AANSW) and DPE have not agreed accountabilities or established effective processes, such as protocols for information sharing with third parties, to manage risks related to the large number of undetermined land claims. As a land claim establishes an inchoate property right over Crown land for the claimant Aboriginal Land Council, undetermined land claims create uncertainty about what activities can occur on that land.

<sup>31</sup> In 2016, a NSW Audit Office performance audit in relation to the 'Sale and lease of Crown Land' found that 'the Department's overall governance of decision-making for the sale and lease of Crown land is inadequate and has exposed the Department to risk. Policies and guidance are applied inconsistently, and oversight of decisions has been limited, particularly in relation to leases' (p.10).

In July 2021, the Crown Land Commissioner's report on the evaluation of the *Crown Land Management Act 2016* and its implementation stated:

There are over 37,000 Aboriginal land claims (ALCs) still under investigation in NSW, causing uncertainty for Crown land managers and tenants across an extensive part of the estate. The uncertainty this creates is a major factor contributing to investor hesitancy on Crown land subject to unresolved claims. Current or prospective tenure holders consider the department [DPE], as landlord, to be responsible for resolving ALCs and any related costs.

We also understand, informed by advice during interviews, that this uncertainty can impact the progression of NSW Government infrastructure projects or local grants for community facilities.

Parties require accurate and timely information about the location and status of land claims to reduce uncertainty and the risk of non-compliant activities on land under claim. But there is no shared understanding of whether DPC (ORALRA), DPE and/or NSWALC are responsible for providing such information in response to requests, and these roles are not defined in the Act. This is discussed in section 3.4 on the coordination of information. NSW Treasury states that, in the context of interagency risk management, defining accountabilities can help coordinate and communicate risk management information among agencies.

DPE has acknowledged that non-compliant activities on land under claim can create financial risks and have resulted in the payment of compensation to LALCs. But, DPE lacks effective systems to identify, assess and manage this risk.

DPE's implementation of a new information management system, CrownTracker, may improve Crown land manager visibility of data showing the location and status of land claims. However, implementation of CrownTracker is not complete and improved claim visibility does not address a lack of understanding of requirements and expectations relating to managing land under claim.

**DPE has identified multiple strategic risks, but DPE does not have adequate mechanisms to manage operational risks specific to its land claim assessment function**

DPE did not have a risk register specific to its land claim assessment function until December 2021, when one was developed by the Aboriginal Land Strategy Directorate (DPE reviewed and approved this register in February 2022). Before this time, accountabilities for risk management in the land claim assessment function were not clearly defined.

The DPE Risk Management Policy identifies executives and managers as responsible for ensuring that appropriate resources are assigned to manage risks effectively and that risk information and risk register quality is maintained to an acceptable standard. But there is limited evidence that formal organisational risk management policies and procedures have been effectively applied to land claim assessment functions during the audit period.

## Exhibit 17: Risks to administration of the land claim assessment function

In addition to the issue of non-compliance with statutory requirements outlined in section 2, key risks for DPE identified by the audit in relation to the land claim assessment processes include financial, reputational and litigation risks caused by:

- delays in determinations, which may result in unavailability of evidence to inform claim assessments (see section 4.2)
- lack of formal processes for managing State, local council and private interests in Crown land under claim (see section 3.3)
- unclear prioritisation procedures for claim assessments (see section 4.2)
- lack of formal training and finalised procedures to support staff in undertaking claim assessment functions (see section 4.2)
- poor data quality and coordination relating to Crown land and land claim assessment status data (see section 4.1)
- poorly defined service delivery expectations, including around timeframes and engagement with Aboriginal Land Councils (see section 4.2).

There is some awareness of these sources of risk in a draft DPE business case relevant to land claim assessment functions (last updated in January 2021), but there remains a lack of clear guidance to assist staff to identify, address and escalate risks specific to the land claim process.

Source: NSW Audit Office analysis based on documentation and interviews.

The risk register developed in December 2021 includes risks specific to DPE's land claim assessment functions but does not clearly identify the timely determination of land claims as a statutory compliance issue. It is also unclear whether this risk register has been aligned with broader risk management strategies within DPE.

For example, DPE has also provided evidence of risk management relevant to its Crown Lands division – although this work is in draft. This strategic risk register does not analyse risks with specific consideration of the Aboriginal land claim process but many 'sources of risk' in this register are relevant to the land claim process and DPE's ability to deliver statutory requirements and policy objectives under the Act. These sources of risk include:

- a poor understanding of the stakeholder context
- incomplete understanding of the Crown land estate and related data issues
- a lack of strategic alignment between resources, workforce, operations and requirements
- insufficient resources to meet requirements and expectations.

The seven areas of risk (of the ten in the register) that relate most directly to the Aboriginal land claim process are rated very high or high, with only 'partially effective' controls.

**DPC (ORALRA) has identified risks to effectively maintaining the statutory ALC Register since at least 2017, but these data quality and functionality issues have not been addressed**

The Registrar (supported by DPC (ORALRA)) has a statutory requirement to maintain the ALC Register with information about land claims (section 165 of the Act).

Data fields in the system used by DPC (ORALRA) to maintain the ALC Register can capture the minimum information requirements set out under the Act (section 167), but this system has limited functionality and lacks controls to ensure data integrity (see Exhibit 18). DPC (ORALRA) advised that land claim registration is prioritised above other business but does not have complete, finalised procedures that explain roles in relation to maintaining the ALC Register. Until 2020, there was no quality assurance of data manually entered into the ALC Register. DPC (ORALRA) has advised that current practices involve staff checking manual data entry.

These issues create risks for the Registrar and DPC (ORALRA and AANSW) with respect to the delivery of statutory and non-statutory land claim-related functions.

## Exhibit 18: Key issues with the functionality of the ALC Register

The system used to maintain the ALC Register was developed in the 1990s. It cannot be accessed outside of DPC (ORALRA) and has limited functionality, including:

- one user at a time
- manual data entry including text fields with limited validation
- poor search functionality
- limited reporting capabilities
- only captures textual information and does not spatially map land claims
- does not capture and maintain current property descriptions.

These issues create risks to data integrity, as well as efficient searching of information.

Source: NSW Audit Office analysis based on interviews and direct observation of the system used to maintain the ALC Register.

Since at least 2017, ORALRA (then, in the Department of Education) has communicated risks to AANSW relating to issues with systems supporting its land claim-related functions. In 2019, ORALRA identified that an urgent data cleanse would be required to correct typographical errors in the ALC Register and add current property descriptors. This is yet to commence.

## Exhibit 19: ORALRA activities to upgrade the ALC Register have been ongoing since at least 2017 but have not significantly progressed

ORALRA has identified since at least 2016 (when it was part of the Department of Education) that there is a need to upgrade the system used to maintain the ALC Register. However, ORALRA did not develop a project plan to guide activities in relation to the ALC Register upgrade.

In 2018, ORALRA contracted an organisation to deliver a new system for maintaining the ALC Register including a spatial mapping system but this was not progressed. A key barrier to progression was the quality of existing data which needs to be validated and remediated before it can be migrated to a new system. ORALRA started to explore options to remediate the data in 2018 but limited progress was made at the time. A process to digitise hard copy records of land claim lodgement forms was also explored but not progressed. AANSW and ORALRA moved from the Department of Education to DPC in July 2019.

Activities to upgrade the ALC Register have remained irregular and unstructured since then, and until recently limited progress has been made on options to remediate and digitise the data.

In July 2021, DPC (ORALRA) requested operational support from DPC's Information Technology department in relation to the ALC Register upgrade, data cleanse and records digitisation.

In December 2021, DPC submitted a business case (sponsored by the Registrar) to the Department of Customer Service (Digital Restart Fund). The business case (which was updated in January 2022) seeks seed funding to assess and determine a spatial solution (which would first require remediation of the existing data) enabling the online lodgement and management of land claims accessible by Aboriginal Land Councils, DPE's Crown Lands division and the Registrar.

Source: NSW Audit Office analysis based on ORALRA and AANSW documentation and interviews.

The absence of spatial mapping of land claims by DPC (ORALRA) in the ALC Register also creates inefficiencies, particularly when responding to requests for information about the status and location of land claims (see section 3.4). It is also a barrier to integrating data systems between DPC (ORALRA), DPE and NSWALC, and checking for inconsistencies between land claim related data held by DPC (ORALRA), DPE and NSWALC.



## 3.4 Coordinating interagency operations

**DPE does not operate an effective mechanism for coordinating land claim-related activities with DPC (ORALRA) and NSWALC – but some work has been underway since mid-2020 to improve this**

Overall, there has been a lack of planned collaboration between DPC (ORALRA), DPE and NSWALC to define and coordinate activities and enhance interagency operations in the end-to-end Aboriginal land claim process. DPE has not led a program of activities to facilitate land claim processes across agencies and for stakeholders. There is no program-level documentation that defines operational roles and responsibilities. Limited progress has been made on addressing operational issues and systemic inefficiencies, exacerbating barriers to the effective delivery of land rights under the Act.

Based on interviews with DPC (ORALRA), DPE and NSWALC, the operational coordination that does occur is heavily reliant on the expertise of key staff and their constructive working relationships at the officer level.

DPE has advised that interagency meetings between operational staff in DPE's Crown Lands division, DPC (ORALRA) and NSWALC have been taking place for a number of years and are supposed to occur every quarter. But based on the evidence provided, interagency operational meetings with a clear focus on the land claim assessment process have been without a regular schedule and we only have sufficient documentation from DPE for three scheduled interagency meetings on operational matters since 2017, two of which included DPC (ORALRA). Poor record keeping in relation to these meetings limits accountability and transparency around progress to address coordination issues and is not consistent with requirements under the *State Records Act 1998* (NSW) to make and keep full and accurate records of activities.

There are examples of poor end-to-end coordination impacting land claim processes:

- NSWALC temporarily agreeing to limit the number of claims lodged per day to assist DPC (ORALRA) manage its workload during the COVID pandemic, impacting on NSWALC's statutory right to make claims.
- DPE not providing DPC (ORALRA) with advance notification about a rapid increase in determinations at the end of 2019–20, impacting on DPC (ORALRA)'s ability to update the ALC Register in a timely manner.
- Duplication of resources between DPC (ORALRA) (which maintains the statutory ALC Register), DPE and NSWALC in responding to requests for information about the status and location of land claims (discussed further below).

Since July 2020, DPE has been engaging more routinely with NSWALC in relation to the reform of the Land Negotiation Program (see Exhibit 6 for an overview of the program). A 'project control group' has been established, including DPE and NSWALC operational staff, which is intended to lead the operations of joint projects.

DPE has provided agendas for project control group monthly meetings between July 2020 and August 2021, but not all meetings have minutes. Meetings since June 2021 have included 'Aboriginal Land Claims Assessment and Survey' as an agenda item, as well as items specific to the Land Negotiation Program reform projects. It remains unclear whether this group is intended to focus on addressing barriers affecting land claim assessment processes specifically.

**DPC (ORALRA), DPE and NSWALC operate separate systems for recording Aboriginal land claim data which creates inefficiencies and data quality risks**

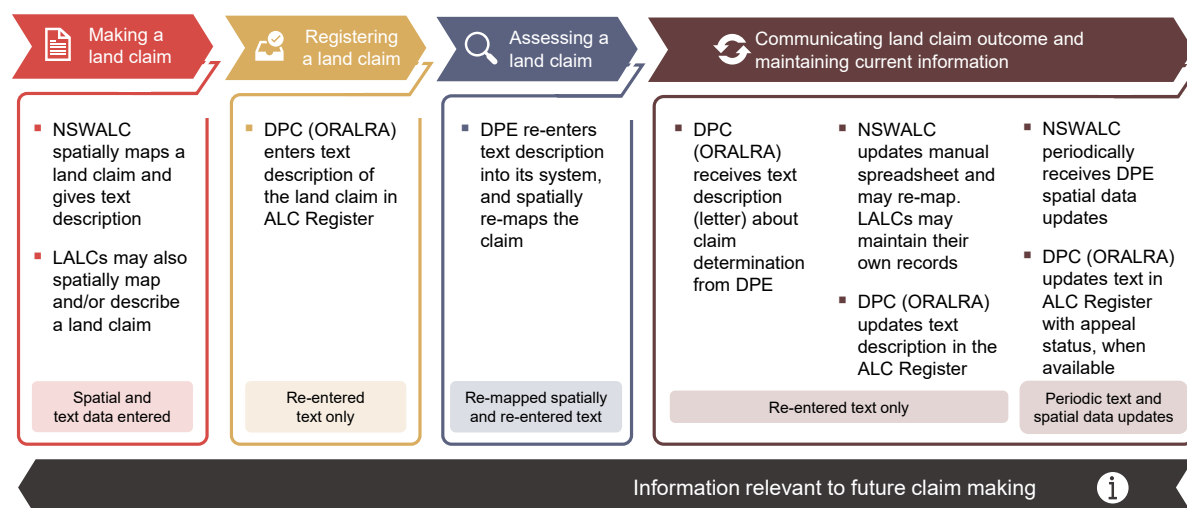
DPC (ORALRA), DPE and NSWALC each independently operate systems to record information about land under claim, and the status of claim assessments. These systems are not integrated, require manual re-entry and re-mapping of land claim data and do not record data in a consistent format. As a result, there is no central or shared source of 'live' information about land claims. Data-sharing arrangements between DPC (ORALRA), DPE and NSWALC are informal or incomplete.

As illustrated in Exhibit 20, there are currently four separate key data entry points in the land claim process:

- NSWALC maps land claims on its mapping tool before lodgement. A textual description of the claimed land is included on an application form and data is also recorded in NSWALC's internal list of land claims (first data entry point).
- NSWALC submits the application form to DPC (ORALRA) which then manually enters the textual description of the claimed land into the ALC Register (second data entry point).
- DPC (ORALRA) provides a copy of the application form to DPE and DPE re-enters the information about the land claim onto DPE's system for the purposes of claim assessment (third data entry point).
- DPE, DPC (ORALRA) and NSWALC each update their systems with claim outcome information once a claim is determined or otherwise processed, such as, withdrawn (fourth data entry point).

There is no protocol that establishes a shared understanding of terminology used to record key data for land claims across these systems. For example, the terms 'completed', 'finalised' and 'resolved' are used but are not clearly defined, and responsibilities for maintaining information about the status of land claims once an appeal has been lodged are unclear. This creates a risk of inconsistent record keeping which can impact efficiency and service delivery in responding to requests for land claim information.

#### Exhibit 20: Information handling in the Aboriginal land claim process



Source: NSW Audit Office summary.

DPC (ORALRA) activities in relation to upgrading the systems used to maintain the ALC Register have included some exploration of integrating or interfacing with NSWALC and DPE systems, including for spatial mapping. However, progress has been limited and as discussed in section 3.3, activities to upgrade the ALC Register are still in the scoping stage (see Exhibit 19).

A DPE internal audit in 2019 highlighted integration of data between DPE and DPC (ORALRA) as an opportunity in DPE's project to implement its new case management system, CrownTracker, but this was not progressed. Some DPE data is currently shared and integrated into NSWALC's mapping tool, but there are gaps in these arrangements (see section 3.5).

#### Separate information handling systems and uncoordinated processes leads to duplication and poor service delivery in responding to Aboriginal land claim search requests

Neither DPE nor DPC (ORALRA) have clear procedures or agreed accountabilities for responding to requests for information about land claims. This creates inefficiencies and delays, which could have financial implications for government and third parties (for example, by impacting on the delivery of State infrastructure projects) as well as creating a risk of non-compliant activities on land under claim (see section 3.3).

Government agencies, local councils and other parties may require information about the status and location of land claims to inform whether they can undertake activities on Crown land. For example, to inform planning for infrastructure (such as roads) and other development, building and asset maintenance, or applications for grants. But DPC (ORALRA) and DPE do not have a coordinated approach to providing timely and accurate information. Nor are there defined service delivery standards:

- DPC (ORALRA)'s published timeframe for responding to requests for searches of the ALC Register (ten working days) is usually not met: DPC (ORALRA) data indicates that most requests between September 2019 and August 2021 were responded to outside of this timeframe, despite almost half of the requests being identified as 'urgent'. DPC (ORALRA) cannot provide assurance about the accuracy of the data it provides, and reports that it includes a disclaimer about the accuracy of data held in the ALC Register when responding to requests for information.
- DPE lacks documented procedures to guide staff when dealing with enquiries about the location and status of land claims and has not identified timeframes for this activity.
- DPC (ORALRA) and DPE do not have agreement on the conditions under which information about land claims is provided, and what constitutes appropriate engagement with NSWALC and LALCs in this process.

DPC (ORALRA) and DPE have advised that delayed response times (by ORALRA) and concerns about the integrity of data in the ALC Register result in requests for information being handled by both DPC (ORALRA) and DPE. Our interviews with other parts of DPE (Property NSW), Regional NSW and Transport for NSW indicate that agencies requiring access to information about land under claim (for example, to inform land management or development activities), do not have ready access to clear and reliable information.

#### **Exhibit 21: Data about the volume of requests for information about land under claim**

DPC (ORALRA) and DPE advised that the volume of requests for information about land under claim can be high and some can be complex to manage. It is possible the one search request could involve investigating hundreds of parcels of land.

Both DPC (ORALRA) and DPE report monthly on the number of requests received and responded to.

DPC (ORALRA) reported that 131 requests were received, and 58 searches were conducted between November 2020 to February 2021. This included 48 search requests in February 2021.

DPE completed 57 search requests in February 2021. DPE data also shows about 500 enquires (via phone or email) about land claims a month in 2021, for example 531 enquiries in February 2021.

In reporting this data, neither DPC (ORALRA) nor DPE do so in accordance with a defined level of service, such as with respect to accuracy or timeliness. There is no evidence that the data has been used to review operational or coordination needs.

Source: NSW Audit Office analysis based on DPE and DPC (ORALRA) data and interviews.

## 3.5 Facilitating access to information for claim-making

**NSWALC has improved the information it has for claim-making and DPE has been making its data more accessible to NSWALC and LALCs for this purpose, but more work is needed**

Access to relevant data and information held by DPE about Crown land can assist Aboriginal Land Councils to maximize the likelihood of a land claim being granted. It could also be used to inform priorities about which land to claim.

NSWALC can make a claim on its own behalf or on behalf of a LALC. A LALC may also make a claim for land within its boundary and, with the approval of the Registrar, outside of its boundary.<sup>32</sup>

NSWALC has improved the information it has to inform claim-making since 2018 through investing in the development and use of a GIS (Geographical Information System) mapping tool.

The tool incorporates relevant information gathered by NSWALC and DPE data about Crown land, including spatial data on the location of Crown land and land claims, and information about Crown reserves and tenures. This has improved NSWALC's access to information relevant to whether land is within the Crown land estate<sup>33</sup> and likely to meet the definition of 'claimable Crown lands' under section 36(1) of the Act.<sup>34</sup>

Title searches can also be useful for additional clarity in some cases, but there is a charge for land title searches through the NSW Land Registry Services. NSWALC states it has a budget allocated to accessing land titles. DPE has an agreement with the NSW Land Registry Services that gives it access to title information at no cost.

DPE and NSWALC reviewed data sharing arrangements in July 2021, but these arrangements are not formalised to support routine and complete data sharing – there is no memorandum of understanding, for example. There is also a lack of agreement between DPE and NSWALC around the availability and relevance of certain information. Arrangements agreed to in previous years (such as a 2018 data sharing agreement) have not occurred in practice. Some relevant information is also held by other government agencies such as the Department of Regional NSW (Local Land Services) and by local councils.

Further, there is a risk of quality issues with the Crown land and land claim data that DPE supplies:

- quality issues with DPE's Crown land information management systems have been raised by the NSW Audit Office since 2017, and found in DPE internal projects and reviews<sup>35</sup>
- functionality issues with DPE's CrownTracker system (introduced for land claim assessment functions in April 2020) have been reported and at times prevented DPE from sharing current, accurate information about the status and location of land claims.

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<sup>32</sup> DPE data indicates that historically, about 60 per cent of all land claims have been lodged by NSWALC although in recent years this has increased, for example in the 2020 calendar year 95 per cent of all land claims were lodged by NSWALC.

<sup>33</sup> Previous reviews have noted that claims have been made over land outside the Crown land estate. These claims still require assessment.

<sup>34</sup> In particular, section 36(1)(a), (d) and (e) of the Act. Respectively, these provisions relate to whether Crown lands are able to be lawfully sold or leased, or are reserved or dedicated for any purpose under the *Crown Land Management Act 2016* or *Western Lands Act 1901*; do not comprise lands that are subject of a registered application for determination of native title (other than a non-claimant application that is an unopposed application); or do not comprise lands that are the subject of an approved determination of native title (other than an approved determination that no native title exists in the lands).

<sup>35</sup> The Auditor-General of New South Wales' financial audit reports to Parliament since 2017 have recommended that DPE should ensure the Crown land database is complete and accurate. This was also noted in a 2017 performance audit report on the 'Sale and lease of Crown land'.

There is evidence that DPE is undertaking activities to improve information-sharing with LALCs and there may be further opportunities for better coordination and communication of these arrangements:

- DPE has been making information available to LALCs as part of the Land Negotiation Program reform projects which may facilitate informed claim making as well as enabling LALCs to consider negotiated outcomes or prioritisation preferences. For example, DPE has advised that information made available to LALCs as part of the LALC20 project includes planning and biodiversity information, as well as desktop assessments about the likely claim-ability of land.
- DPE is updating the NSW Planning Portal<sup>36</sup> so that LALCs can view data about the status and location of their land claims (and land holdings) alongside other information held by DPE about Crown land, such as tenure and leasing information. In November 2021, DPE advised that testing had been undertaken and the portal was anticipated to be available to all LALCs that month, but DPE advised in March 2022 that the portal is not yet available for use.

### **NSWALC's support to inform LALCs' claim-making and opportunities for further assistance**

NSWALC provides information to LALCs to inform their claim-making, in particular by providing LALCs with access to its GIS mapping tool. NSWALC advised that it also provides LALCs with advice about the land claim process, whether land may be claimable, the requirements of the Act, as well as issues related to third party activities on land under claim (for example, local council acquisitions).<sup>37</sup>

NSWALC sends correspondence to LALCs to inform them of claim registration and determination. NSWALC has also advised it has a practice of engaging or informing LALCs prior to claim lodgement, although there is no requirement to do so. Some LALCs we consulted with expressed a desire for further engagement from NSWALC, especially before claim lodgement. Other LALCs were satisfied with the current arrangements.

NSWALC reports that there are opportunities to build LALC capability, including to support use of its GIS mapping tool. NSWALC user data shows that in 2020, 63 of 116 registered LALCs (54 per cent) used the tool at least once, and 16 LALCs (14 per cent) were 'regular' users (more than 37 log-ins per year). This is consistent with LALC advice during consultations that there is a need for capability building in relation to use of the tool, and the land claim process more broadly.

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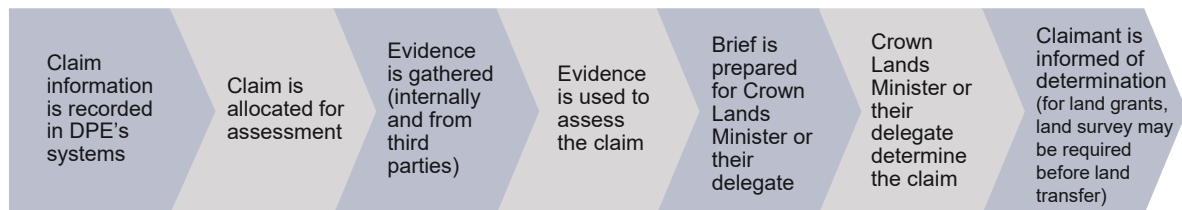
<sup>36</sup> DPE states that the NSW Planning Portal provides public access to a range of planning services and information including documents or other information in the NSW planning database established under the *Environmental Planning and Assessment Act 1979*.

<sup>37</sup> An assessment of these activities was not within the audit scope.

## 4. Administration and transparency of assessment processes

The Crown Lands Minister, supported by DPE, is required to determine whether Aboriginal land claims meet the criteria to be 'claimable Crown lands' under section 36(1) of the Act. DPE staff within its Crown Lands division are responsible for assessing land claims and preparing recommendation briefs to the Crown Lands Minister, or their delegate, on determination outcomes. That is, on whether to grant or refuse the claim.<sup>38</sup> DPE staff also make decisions about which land claims within the large number of undetermined claims should be processed first.

### Exhibit 22: Overview of the land claim assessment function



Source: NSW Audit Office analysis based on DPE documentation and interviews.

The NSW Ombudsman's guidelines on 'Good conduct and administrative practice' (March 2017) states that agencies can facilitate compliance with legal requirements by ensuring a 'clear and unequivocal' commitment to compliance, that relevant legal requirements are identified (including timely updates to reflecting changes to the law) and documented, and that staff are kept fully informed and trained.

The guidelines also provide examples of good conduct and administrative practice including:

- making adequate inquiries to support recommendations to decision-makers
- providing quality service by carrying out duties in a reasonable timeframe without undue delay
- ensuring that decisions are consistent with government policy, internal policies, established practice, and other relevant codes or guidelines
- acting transparently, including by giving reasons for decisions.

<sup>38</sup> Since 2020, the Crown Lands Minister has delegated the power to refuse land claims to certain DPE executive staff. This delegation was extended to include the power to grant land claims (in whole or part) in February 2022.



## Exhibit 23: LALCs are concerned about a lack of transparency in the land claim process

A lack of transparency in the Aboriginal land claim process was consistently raised as a concern during our consultations with LALCs. They report often not knowing, and that it is not easy to find out, when a land claim is being assessed or might be granted. LALCs have a strong expectation that they should be kept better informed.

LALCs reported that they feel undervalued in the land claim process over decades – they have experienced the interests of government agencies and local councils being prioritised above engagement with them to process claims consistent with their aspirations. The process has been described as a ‘scattergun approach’ or as feeling like a ‘lottery’.

LALCs have reported that they would benefit from support to better understand the process and the reasons why land claims are refused. Some LALCs also stated that Aboriginal people and communities may be interested in Aboriginal Land Agreements and other ways to secure rights and interests in land, working with DPE, native title groups and other parties – but assistance to identify and progress such opportunities is not readily accessible. A lack of information about the potential costs of managing land, and its economic potential, can also be a particular financial concern.

Source: NSW Audit Office consultations with LALCs.

## 4.1 Currency, quality assurance and controls

### **DPE’s policies and procedures for its land claim assessment functions are not current or approved, although DPE has plans to update these**

DPE lacks current and approved policies and procedures related to administering its land claim assessment functions, which is significant given this is a core statutory function. DPE has not fully updated and approved its documented procedures for land claim assessment functions since 2013.

The team responsible for preparing recommendation briefs for claim determinations are required to interpret legislation, apply the statutory criteria, and make judgements based on case law. DPE guidance within the 2013 procedures reflects a high degree of subject matter expertise on the part of those involved in developing the procedures. However, DPE’s procedural documents have not been fully updated to ensure they reflect statutory amendments to the Act, developments in case law, and changes to administrative arrangements within and between government agencies.

Updated procedures were partly developed in 2019 and 2021 but not finalised or approved. DPE has developed some resources to assist staff undertaking claim assessments, such as templates, precedent lists and workflow guides. But there is no central procedure document that explains how these various resources are expected to be used to inform the administration of land claim assessment functions or interact with other relevant DPE policies and procedures, such as definitions of land use in the planning system.

The absence of current and approved procedures to promote effective and efficient processes is significant given the nature and complexity of land claim assessments (see Exhibit 24).

## Exhibit 24: Nature and complexity of land claim assessments

Land claim assessments vary in complexity from case to case. While all assessments require statutory interpretation, some are largely administrative and only require a desktop review of land titles. Others require spatial analysis and evidence gathering (including stakeholder engagement) about the actual and lawful use of land, as well as the interpretation and application of case law and legal principles based on available evidence. Some recommendation briefs reviewed for the audit include over 80 pages of materials and attachments.







Factors that contribute to the complexity of claim assessments include:

- Land claims on the same piece of land need to be uniquely assessed against the statutory criteria at the date when the claim was made.
- Evidentiary issues causing ambiguity about the status of the land at the date of claim, including evidence availability due to the passage of time since the claim was lodged (for example, due to record keeping practices) and evidence being provided in an unstructured form.
- Lack of stakeholder engagement in providing timely responses to evidence requests, or understanding of the claim process and the evidence required.
- The interaction between the Act and other legislative frameworks (for example, the *Crown Land Management Act 2016*).

Source: NSW Audit Office analysis based on documentation and interviews.

In 2021, DPE started developing a new set of procedures intended to reflect the integration of assessment processes with a new case management system, CrownTracker (implemented in April 2020). DPE has also advised that it is currently reviewing policies and procedures within the Aboriginal Land Strategy Directorate. This work has been ongoing since mid-2021 and DPE has advised it is due to be completed by the end of June 2022.

## Exhibit 25: Key gaps and limitations in DPE's procedures relating to land claim assessment functions

-  Policies and procedures are not current and approved, but are under review
-  Procedures lack quality assurance and controls, including timeframes
-  A case management system was introduced in April 2020, but it is not fully functional
-  Workforce profiling has not been reviewed to ensure it is adequate and that staff assessing claims have sufficient training and support
-  There is no clear and transparent framework for prioritising land claim assessments and responding to priority requests
-  There are no clear protocols for LALC engagement, including in relation to opportunities for negotiated outcomes

These gaps and limitations are discussed further in sections 4.1 and 4.2 of this report.

Source: NSW Audit Office analysis based on documentation and interviews.

## DPE's assessment procedures lack quality assurance and controls, including defined timeframes

The procedures that are used by DPE for its land claim assessment function do not adequately articulate the statutory intent of the Act as remedial, beneficial legislation. This feature of the legislation is mentioned at the start of the 2013 procedures. Draft updated procedures from 2019 cite the spiritual, cultural and economic importance of land to Aboriginal people, but the procedures do not provide clear guidance on how this should be interpreted in decision-making or interactions with stakeholders and Aboriginal Land Councils. DPE has not established quality assurance and control mechanisms to ensure claim assessments are commenced, progressed and completed in a transparent and timely manner.

Staff in the claim assessment team need to exercise discretion in deciding how to progress land claim assessments – for example, in deciding whether sufficient attempts have been made to gather evidence to inform the claim assessment before recommending a determination outcome. But quality assurance is poorly defined in procedures until the recommendation brief is ready for review. In practice, DPE staff rely heavily on shared knowledge and experience to manage claim assessments.

Claim assessment staff are also responsible for dealing appropriately with various interests in Crown land during the claim assessment process. For example, land under claim may also be relevant to a proposed State infrastructure project. But there is no policy or procedure to guide staff in managing the interests of government agencies, local councils or other parties while ensuring that the land claim is progressed and assessed in accordance with the Act.

A 2019 DPE internal review of the land claim assessment function identified that 'customer service requirements' for Aboriginal Land Councils include the return of land, timeliness in this process, and economic benefit from the land. It also identified that other stakeholders and the wider community have service requirements relating to the need for certainty in relation to undertaking activities on land under claim. But DPE's procedures do not set service delivery standards, including in relation to timeframes and prioritisation approaches. This contributes to a lack of transparency around which claims are assessed and why.

A DPE business planning document from 2019–20 did indicate that a sign of success would be 'actioning' requests from LALCs and agencies 'requiring certainty in land dealing for public infrastructure works within three months of request'. But there is no evidence that data to report against this timeframe has been routinely collected or reported, and DPE does not define what 'actioning' the request means (for example, commencing the assessment or determining the claim).

Poor control over timeframes can also be a particular issue when requesting evidence from third parties required to undertake claim assessments (discussed further in section 4.2 below).

DPE did not have a case management system to control or provide oversight of land claim assessment functions until April 2020. Before then, since at least 2013, case management information was recorded in an unprotected, uncontrolled spreadsheet that was used to track active assessments (about 10 per cent of all undetermined claims at that time are reflected in this spreadsheet).

Since April 2020, DPE has been using CrownTracker as a case management system for land claims, which provides a more structured workflow through which the assessment process is documented and managed.<sup>39</sup> For example, CrownTracker has automatic controls around sign-off steps.

<sup>39</sup> Since 2018, DPE has been undertaking a project to replace the Crown Land Information Database (CLID) system with CrownTracker across relevant business units. DPE has advised that CrownTracker should be 'live' for all relevant business units by May 2022.

Although CrownTracker is in use, guidance to support staff to use the system is not complete and there are system limitations affecting some data recording and reporting functions. Enhancements that could improve the functionality of the system to better support the claim assessment process have been identified, and DPE has advised that these are being addressed but there is no clear timeframe for completion.

### **DPE has not established an appropriate workforce profile for its land claim assessment function and does not provide sufficient support to staff assessing claims**

DPE does not provide sufficient training to staff tasked with assessing Aboriginal land claims and has not reviewed its workforce profile to ensure that sufficient numbers of appropriately graded staff are recruited and retained – especially to manage or oversee complex cases, and culturally appropriate and sensitive stakeholder engagements. This contributes to quality and efficiency risks given the nature of the work involved in assessing land claims (Exhibit 24), and the lack of current and approved policies and procedures (discussed above).

DPE does not have a formal induction or training program specific to land claim assessment functions, but DPE has advised that its Crown Lands division has a general induction program. New staff are inducted and trained on land claim assessment functions via knowledge sharing by existing staff.

DPE increased staff resourcing of its land claim assessment function in mid-2020. But there is limited evidence of workforce or operational planning to ensure that the grading distribution is appropriate considering the nature of the work, and the volume of undetermined land claims (see section 2.1). Positions overall are junior for the required level of responsibility and complexity. These relevant role descriptions do not include a requirement for staff to have experience working with Aboriginal people and communities.

The NSW Government's Aboriginal employment strategy 2019–25 sets out the key initiatives to be implemented across the NSW public sector and within departments and agencies. DPE does not have an Aboriginal employment strategy for its Crown Lands division, or the Aboriginal Land Strategy Directorate. The DPE Aboriginal Outcomes Strategy 2020–23 states that there will be cluster-wide targets and plans to increase the Aboriginal workforce across all portfolio areas.

## **4.2 Prioritisation approaches and engagement with Aboriginal Land Councils and stakeholders**

### **DPE lacks a transparent, well-defined framework for prioritising land claims for assessment and responding to prioritisation requests**

DPE's approach to prioritising land claims for assessment is not clearly defined or documented. This creates a lack of transparency and accountability around decision-making relating to which of the approximately 38,000 undetermined claims are assessed, and when – especially as new claims are made, and when managing the interests of government agencies, local councils or other parties in land under claim.<sup>40</sup> This is significant in the context of DPE not having a resourced strategy to address the large number of undetermined land claims (see section 2.1).

During consultations with LALCs, they described feeling devalued when their interests are given low priority in the land claim assessment process. The evidence shows that DPE has used various but poorly coordinated prioritisation approaches during the audit period and that State priorities are generally given higher priority than LALC priorities (see Exhibit 26).

<sup>40</sup> In addition to receiving prioritisation requests from NSWALC or LALCs, DPE also receives requests from other parts of DPE (such as areas responsible for the sale or leasing of Crown land) and parties with an interest in Crown land under claim (for example, if Transport for NSW or a local council wants to undertake infrastructure works, or if Property NSW is deciding whether to invest in the maintenance of assets on land under claim).

DPE does not have policies or procedures to guide decision-making in relation to prioritisation approaches and the rationale for prioritisation approaches is not documented. DPE advised that an initial assessment of incoming claims is undertaken to consider when the claim should be allocated for assessment based on its complexity or a priority request. However, this is not supported by documented procedures. There is also no clear framework to guide staff in their decision-making with respect to how to respond to prioritisation requests – and how to balance incoming requests with existing workloads and projects – in a way that is consistent with the Act, and other legislative or policy requirements. For example, DPE may receive and be expected to respond to requests to prioritise certain claims in view of public safety considerations, such as the need to undertake emergency works or road safety measures.

#### Exhibit 26: Summary of various claim assessment prioritisation approaches used by DPE

| Category  | Purpose   | Approach   |
|---|---|--|
| <b>Ministerial requests</b>                           | To respond to requests from a NSW Government minister for a claim determination | Ministerial requests to process claims are given high priority, reflected in a procedure document about prioritisation categories.   |
| <b>External requests</b>                              | To triage and respond to external requests for a claim determination            | <p>Triaged for processing according to whether a claim is:</p> <ul style="list-style-type: none"> <li>high priority or 'state significant' (for example, road widening, public safety, major development that is state significant)</li> <li>medium priority or made by a local council or LALC</li> <li>low priority or 'other requests' (for example, a citizen interested in purchasing residential property).</li> </ul> |
| <b>DPE-identified projects ('proactive projects')</b> | To determine claims with high likelihood of being granted                       | A project to identify claims for processing where the land was identified as having a future public requirement or purpose, but not a present or likely need at the date of claim, indicating the land may be claimable. <sup>41</sup>   |
|   | To determine claims that are unlikely to be claimable                           | A project to identify claims for processing that may be located on a National Park or State Forest.  |
|   | To determine aged claims  | Process focusing resources on assessing the oldest claims, such as the oldest 1000 land claims or claims lodged before 2005.   |
|   | To determine 'easy' claims, and help to manage workflow                         | A triaging process by which straightforward determinations are identified to provide 'easy wins' for assessors with many complex claims, to balance workload.  |
|   | To determine claims potentially affected by a lease                             | A process to identify claims for processing where DPE is considering renewing a lease over land under claim.   |
| <b>LALC20 project</b>                                 | LALC-led prioritisation, facilitated by DPE                                     | A project that involves DPE inviting LALCs to identify up to 20 existing claims for priority assessment, since September 2020 (see Exhibit 10).  |

Source: NSW Audit Office analysis based on DPE documentation and interviews.

<sup>41</sup> 'Claimable Crown lands' under section 36(1) of the Act do not include lands which are needed, nor likely to be needed, for an essential public purpose.

Operational strategies to deliver these various prioritisation approaches above are not clearly documented, nor are the approaches regularly communicated to Aboriginal Land Councils and stakeholders – with the exception of the recent LALC20 project. There is also no clear link between these prioritisation approaches, workload planning, key performance indicators, and risk management strategies.

In December 2021, DPE advised that it is planning to implement a prioritisation request form that allows Aboriginal Land Councils and other parties to submit requests in a standard format. DPE has advised that it anticipates the form will be used from July 2022 and that it is developing related communications for stakeholders.

### **Engagement with LALCs to identify priority claims**

DPE commenced the LALC20 project in September 2020. This involves DPE engaging with LALCs so that LALCs can identify up to 20 existing land claims for priority assessment (see Exhibit 10). The project represents a response to a recommendation made in the 2020 external review of DPE's Land Negotiation Program (see Exhibit 6) so that land claims that are important to individual LALCs are prioritised: for example, claims of cultural significance or with potential for economic development.

DPE has advised that this project is intended to become part of business-as-usual, but the project is not yet well integrated into the land claim assessment process. In particular, DPE has not clearly defined how claims identified in the LALC20 project will be prioritised in the context of the various other prioritisation approaches that are in use.

### **DPE lacks clear policies and effective procedures to engage third parties in providing timely, relevant evidence for land claim assessments**

DPE has identified that delays in receiving evidence from government agencies, local councils and other parties impact the progress of land claim assessments, but DPE has not developed effective strategies to manage this. In 2020, DPE developed some materials intended to better communicate evidence requests and timeframes, but DPE advised that slow and poor-quality responses continue to be a challenge. This affects DPE's ability to meet its obligation to determine claims within a reasonable time.

DPE does not have a formal procedure for managing stakeholder engagement in this evidence-gathering process, although correspondence templates that include timeframes have been used since 2020 (see Exhibit 27). Timeframes are managed by staff in the claim assessment team and there is evidence that these are applied flexibly. Staff are not supported with formal protocols to ensure that delays are effectively managed (for example, by escalating a matter to more senior staff if the requested evidence is not received within the set timeframe).

DPE also has not clearly defined procedures or evidentiary thresholds for determining a claim based on its efforts to secure the available evidence. There is no clear guidance on how to progress claims where there are concerns that all available evidence has not been received. In addition to evidentiary issues caused by delayed responses, there is also a challenge to the assessment of older claims because evidence may no longer be available due to the passage of time. As discussed in section 2.1, in 2019–20 about 63 per cent of undetermined land claims were lodged more than five years ago (see Exhibit 9).

Noting that DPE does not have statutory powers to compel parties to provide evidence, the lack of guidance to staff creates a risk to the timely and effective administration of land claim assessments.



## Exhibit 27: Managing timeframes when requesting and receiving evidence from third parties

Each land claim is unique, even those on the same parcel of land with a different claim date. The assessment process often requires the claim assessment team to request evidence from government agencies, local councils and other relevant third parties about the use and/or occupation of the claimed land on the date when the claim was made. For example, where there is a structure on the land under claim, DPE will investigate who owns or maintains the structure and may need to request evidence to assist with assessing the criteria for 'claimable Crown lands' under section 36(1) of the Act (see Exhibit 2).

In these cases:

- DPE uses a template letter to request evidence from third parties about the status of the land at the date of claim and requests a response within 28 days.
- If no response is received within 28 days, DPE uses a template letter to follow up and give an additional 14 days for response. DPE staff use their discretion to decide whether to allow additional time for a response to be provided.

There is no clear process to guide DPE staff on how to proceed if there is no response within the set timeframe, or the response received appears inadequate (such as poor-quality evidence, or an inability to locate evidence).

DPE has advised that these templates are being reviewed in 2022 to consider updates that express clearer expectations to third parties about providing evidence to improve the quality and timeliness of responses.

Source: NSW Audit Office analysis based on DPE documentation and interviews.

DPE's case management system for land claims, CrownTracker, was introduced in 2020 but reportedly does not have functionality to provide quality assurance and controls to assist with the management of timeframes, such as prompting staff to follow up where responses to evidence requests are overdue.

DPE advised in November 2021 that it had recently updated its processes to ensure that an evidence request is sent to the relevant parties when DPE receives a claim from the Registrar. This is intended to address evidentiary issues that can arise if there is a delay between the claim being received and assessed.

### **DPE has not yet embedded culturally informed engagement with Aboriginal Land Councils into its land claim assessment procedures**

DPE identifies the acceleration of the realisation of Aboriginal land rights in partnership with Aboriginal people as one of the five priorities within the State Strategic Plan for Crown Land. DPE has not yet embedded timely and culturally informed engagement with NSWALC and LALCs in their policies or procedures for land claim assessment functions, but has recently been undertaking activities to improve engagement with LALCs, such as through the LALC20 project since September 2020 (see Exhibit 10).

LALC capacity and capability to engage in land claim processes vary. LALCs vary in size and resourcing. LALCs also have both shared and unique aspirations for land under claim. NSWALC and the LALCs we consulted with highlighted that they value proactive engagement and transparency in Aboriginal land claim assessment processes, and that generally this expectation has not been met.

The DPE Aboriginal Outcomes Strategy 2020–23 states that it will 'recognise appropriate engagement and connection with Aboriginal people and Country as core to our service delivery', including by involving Aboriginal people in decision making in areas that impact them. But DPE's land claim assessment procedures do not identify expectations and opportunities for LALC engagement. The key point of contact in DPE's existing procedures is notification of the determination outcome.

There is limited documented guidance for staff about engaging with Aboriginal Land Councils at other stages including:

- to provide an update on the processing status of the claim, such as when a claim is under active assessment (although DPE advised that a letter template for this has been developed for use since March 2022)
- to discuss the amendment or withdrawal of a land claim
- to discuss options when the recommended determination appears inconsistent with the beneficial intent of the Act (for example, a grant of contaminated land)
- to discuss the potential for an Aboriginal Land Agreement or other negotiated outcome rather than proceeding to a claim determination
- to discuss claim priorities (including as part of the LALC20 project)
- to build LALC understanding of the evidence base for assessments, particularly claim refusals.

These are significant gaps, and create a lack of transparency around the process, a consistent concern raised during our consultations with LALCs. It also creates a risk that opportunities for engagement in the land claim assessment process are missed or handled in an inconsistent way.

### **Lack of coordinated approach to engagement with Aboriginal Land Councils**

DPE does not coordinate Aboriginal Land Council engagement activities in different parts of DPE, although there are different teams that engage with NSWALC and LALCs in relation to the administration of land claim processes.

Different teams within the Aboriginal Land Strategy Directorate and DPE are involved in activities that impact on land claim assessment functions, for example in relation to negotiating agreed outcomes on land claims. But there is no overarching framework for engagement with NSWALC and LALCs in relation to land claim assessment processes that embeds cultural competency and guiding principles (such as, transparency and good faith), and that ensures appropriate internal coordination. This creates quality and consistency risks to the process, and reflects feedback from LALCs that DPE's communication with them is not well coordinated.

### **DPE started implementing some activities to better engage with LALCs since mid-2020**

During consultations, some LALCs reported recent improvements in engagement with DPE in the Aboriginal land claim process. However, other LALCs expressed a strong desire for better engagement.

DPE advised that, since September 2020, targeted engagement with LALCs has occurred as part of the LALC20 project to identify priority claims (see Exhibit 10).

DPE has also engaged with certain LALCs to negotiate Aboriginal Land Agreements – three recent agreements have resulted in the finalisation of land claims. Other negotiations are ongoing. Our consultations with LALCs did not specifically discuss Aboriginal Land Agreements, however some LALCs did note the potential of Aboriginal Land Agreements and other types of negotiated agreements to achieve the intent of the Act.

DPE has provided evidence that, in 2021, the Aboriginal Land Strategy Directorate started to analyse LALC capacity to participate in Aboriginal land claim processes, including their service needs to enhance participation. Key findings of this analysis include that, while there are several existing services available to LALCs, these services are not coordinated and are fragmented across various providers. DPE has advised that it is developing a framework for engagement with LALCs, but the status of this work is unclear. DPE is aiming to improve LALCs' access to information about Crown land and land claim data through providing access to information via the NSW Planning Portal (see section 3.5).

DPE's Aboriginal Land Strategy Directorate is developing a Crown land cultural capability strategy which it intends to implement in 2022. The draft strategy includes initiatives to train and support Crown land staff to build cultural capability, as well as understanding of Aboriginal land rights and the intent of relevant legislation.

## **Section two**

### Appendices

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# Appendix one – Response from agencies

## Response from Department of Premier and Cabinet



Ref: A5356904  
Your Ref: D22044658

Ms Margaret Crawford  
Auditor-General for NSW  
NSW Audit Office  
GPO Box 12  
SYDNEY NSW 2001

Dear Ms Crawford

I write in response to your letter to the Department of Premier and Cabinet (DPC), dated 24 March 2022 which enclosed the final report for the performance audit investigating whether DPC, the Department of Planning and Environment and the NSW Aboriginal Land Council are effectively facilitating and administering Aboriginal land claim processes under the *Aboriginal Land Rights Act 1983* (ALRA).

As invited by you, this constitutes my formal response to the final report of the performance audit. This response has been prepared in consultation with Ms Nicole Courtman, Registrar of ALRA and is provided on behalf of DPC and the Office of the Registrar ALRA.

The recent Statutory Review of the ALRA noted that “a history of slow progress in settling claims and transferring claimed lands to Local Aboriginal Land Councils has contributed to a situation where the outcomes of the ALRA have not been maximised for Aboriginal people in NSW.”

Your report provides a framework to guide improvements in the Aboriginal land claim process and I am hopeful this report will lead to substantial improvements in outcomes for Aboriginal people in NSW.

DPC is broadly supportive of the recommendations detailed in the final report and included with this letter is a table detailing specific responses to each of the recommendations attached. I am pleased to advise you work has already begun on progressing several of the recommendations.

Thank you again for the professional and productive engagement your team afforded my staff over the course of this important performance audit. I look forward to the tabling of the final report in the NSW Parliament.

Yours sincerely

A handwritten signature in black ink, appearing to read 'M. Coutts-Trotter'.

**Michael Coutts-Trotter**  
**Secretary**  
26 April 2022

## Performance Audit: Facilitating and administering Aboriginal land claim processes

## Recommendations

| By the end of 2022 |  |   |
|--------------------|--|---|
| No.                | Recommendation   | Response  |
| 1.                 | <p>DPC should establish and lead strategic governance that oversees a resourced, coordinated interagency program that is accountable for delivering Aboriginal land claim processes. These strategic governance arrangements should include the Registrar, senior executives from DPC (AANSW), DPE, and NSWALC as the relevant state-wide peak Aboriginal organisation.</p> <p>At a minimum, these arrangements should:</p> <ul style="list-style-type: none"> <li>express a whole-of-government commitment to achieving the intent of the <i>Aboriginal Land Rights Act 1983</i> (NSW) (the Act)</li> <li>reflect the relevance of the NSW Government's OCHRE Plan and Closing the Gap reform priorities</li> <li>define how DPC (ORALRA) and DPE's land claim processing activities should be aligned to outcomes and be consistent with obligations</li> <li>conduct strategic planning that results in sustained investment in facilitating land claim processes, and to increase the rate of land claim processing</li> <li>lead the strategic management of risks and opportunities (to Aboriginal Land Councils, state agencies and other parties) given the large number of undetermined claims and which may arise with an increased rate of claim processing</li> <li>establish a mechanism for regular reporting by DPC (ORALRA) and DPE on the coordinated program of land claim processing activities, including on outputs and outcomes against defined measures, and for annual reporting to the community</li> <li>monitor the progress of relevant reform priorities identified in the 2021 statutory review of the Act, including work on the interaction between the Act and native title legislation.</li> </ul> | <p>The Minister for Aboriginal Affairs (the Minister) will convene a taskforce to be chaired by an independent and eminent individual. The taskforce will report directly to the Minister and comprise of senior executives from DPC (AANSW), DPE and NSWALC, as well as the Registrar <i>Aboriginal Land Rights Act 1983</i>.</p> <p>The taskforce will provide advice directly to the Minister broadly aligned with the arrangements detailed in this recommendation.</p>   |
| 2.                 | <p>DPE and DPC (ORALRA) should jointly establish operational arrangements to deliver a coordinated interagency program for end-to-end Aboriginal land claim processes. These arrangements should be developed and regularly reviewed in collaboration with NSWALC and with input from LALC representatives. These arrangements should be clearly documented and communicated to promote transparency, and at a minimum should:</p> <ul style="list-style-type: none"> <li>express key principles for operational 'ways of working' consistent with the Act</li> <li>define a culturally-informed service charter, reflecting relevant aspects of Closing the Gap priority reform 3 (transforming government organisations)</li> <li>clarify operational roles and responsibilities, particularly with respect to information sharing and capacity building activities with LALCs</li> <li>manage interagency operational risks to effective land claim processing, and contribute to the management of strategic risks by reporting on actions to manage risks and the delivery of the outputs and outcomes from land claim processes to the DPC-led strategic governance group (recommendation 1).</li> </ul>   | <p>DPC supports this recommendation and will provide support to the delivery of this recommendation to both the Registrar ALRA and DPE through the taskforce identified in Recommendation 1.</p> <p>ORALRA has recently been awarded seed funding from Department of Customer Services, (through the Digital Restart Fund) to develop a concept for end-to-end processing of Aboriginal land claims through the development of a new <b>Aboriginal Land Claim Spatial Information Management System (ALCSIMS)</b>.</p> <p>ORALRA aims to establish a steering committee for this project with membership from AANSW, DPE (Crown Lands), NSWALC and ORALRA that will guide the development of the project to ensure that there is end-to-end process and reporting that meets this recommendation.</p> <p>ORALRA welcomes the opportunity to work with DPE on ongoing operational arrangements including, but not limited to, joint funding requests</p> |

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|    |  |   |
|----|--|---|
| 3. | <p>DPC should implement, in partnership with NSWALC, an education program that enhances understanding of the Act and its operations. The program should incorporate subject-matter expertise from the Registrar and DPE. At a minimum, it should include tailored education for key state agencies and the local government sector that clearly communicates how their activities can impact on land claim processes, land under claim, and the intent of the Act.</p>   | <p>DPC (AANSW) supports this recommendation and will design and implement a learning and engagement programme to meet this recommendation. While this recommendation identifies that an education programme should be delivered by the end of 2022, DPC (AANSW) has identified a need more broadly across the sector in relation to the general level of understanding of the NSW land rights system and underpinning legislative framework.</p> <p>This recommendation is to be delivered as part of a broader programme that is intended to transition to a business-as-usual activity as part of the DPC (AANSW) role in supporting the Minister for Aboriginal Affairs to administer the <i>Aboriginal Land Rights Act 1983</i> and to support the achievement of the intended outcomes of the Act.</p> |
| 4. | <p>DPC should complete planning for an interagency, Aboriginal land claim spatial information management system. Planning should be done in partnership with the Registrar, DPE and NSWALC, and with input from LALC representatives. The plan should aim to have the information management system operational in 2023.</p>   | <p>DPC supports this recommendation. The delivery of the proposed <b>Aboriginal Land Claim Spatial Information Management System (ALCSIMS)</b> is in progress as detailed in response to Recommendation 2.</p>  |
| 5. | <p>DPE should finalise updates to its land claim assessment procedures to ensure their currency and consistency with the Act, and integration with other DPE policies and functions, and with the activities of other agencies. DPE should seek input from NSWALC and LALC representatives on relevant aspects of these procedures.</p> <p>In particular, assessment procedures should be finalised to support:</p> <ul style="list-style-type: none"> <li>transparent approaches to identifying and prioritising land claims for assessment</li> <li>timely and consistent approaches to evidence gathering and escalating related delays, informed by transparent evidentiary thresholds for determining claims</li> <li>clearer protocols for engaging with Aboriginal Land Councils in relation to claim assessments, amendments and withdrawals, and Aboriginal Land Agreements.</li> </ul> | <p>DPC supports this recommendation and has been advised by DPE that this work is in progress and scheduled to be completed in line with this recommendation.</p>   |

| By 1 July 2022 |   |  |
|----------------|---|--|
| No.            | Recommendation  | Response   |
| 6.             | <p>DPE should implement a resourced, ten-year plan for its land claim assessment functions that increases the rate of land claim processing, consistent with the Act. DPE's processes for identifying and prioritising claims for assessment, and for identifying opportunities for Aboriginal Land Agreements, should be transparently aligned with this plan.</p> <p>At a minimum, this plan should:</p> <ul style="list-style-type: none"> <li>increase the annual rate of land claim processing to be above the five-year average number of claims lodged<sup>8</sup></li> <li>set and monitor target timeframes for: <ul style="list-style-type: none"> <li>determining new claims (for example, those made after 30 June 2023)</li> <li>determining 'current' claims (for example, those made after 30 June 2021)</li> <li>determining 'aged' claims (for example, those made before 30 June 2021).</li> </ul> </li> <li>focus on determining claims that are likely to result in land grants, at least in the initial years of its implementation</li> <li>detail how DPE will transparently report on the outputs and outcomes of this plan to government and communities.</li> </ul> <p>This plan should be developed with the support of the DPC-led strategic governance group to ensure adequate resourcing and alignment with outcomes (see recommendation 1).</p> | <p>DPC supports this recommendation and has been advised by DPE that Crown Lands is in the process of developing a multi-year plan that addresses this recommendation.</p> |

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|    |   |  |
|----|---|--|
| 7. | DPE should implement a five-year workforce development strategy for its land claim assessment function. This strategy should involve a review of its current resourcing profile, consider options to expand specialist expertise, and ensure access to adequate training for staff. This strategy should be aligned to the NSW Government's Aboriginal Employment Strategy and reflect Closing the Gap priority reform 3 (transforming government organisations). | DPC supports this recommendation and has been advised by DPE that this work is in progress. DPC notes that the proposed Taskforce discussed in the response to Recommendation 1 will provide support and guidance on the delivery of this recommendation.  |
| 8. | DPC (ORALRA) should finalise the remediation and upgrade of the statutory Aboriginal Land Claims Register to ensure its accuracy, enhance functionality, and enable its integration with an interagency land claim information system (recommendation 4).   | DPC supports this recommendation and notes that work is in progress. DPC will provide support to the delivery of this recommendation to both the Registrar ALRA and DPE through the taskforce identified in Recommendation 1.<br><br>ORALRA has recently been awarded seed funding from Department of Customer Services, (through the Digital Restart Fund) to develop a concept for end-to-end processing of Aboriginal land claims through the development of a new Aboriginal Land Claim Spatial Information Management System (ALCSIMS). This will include an upgrade to the existing Aboriginal Land Claims Register<br><br>ORALRA aims to establish a steering committee for this project with membership from AANSW, DPE (Crown Lands), NSWALC and ORALRA that will guide the development of the project to ensure that there is end-to-end process and reporting that meets this recommendation. |

| On an ongoing basis |  |   |
|---------------------|--|---|
| No.                 | Recommendation   | Response  |
| 9.                  | DPE should maintain, enhance and formalise information-sharing arrangements with NSWALC and LALCs to inform their claim making and engagement in relevant processes.   | DPC supports this recommendation. DPE has advised that Crown Lands is establishing communications systems in consultation with NSWALC to address this recommendation.               |
| 10.                 | NSWALC should maintain and enhance information-sharing and other forms of support to LALCs to inform their claim making and continue to build LALC capacity to engage in relevant processes and decision-making about land claims. | DPC supports this recommendation and will discuss with NSWALC opportunities for the Government to assist NSWALC in system solutions to support the information sharing recommended. |



# Response from Department of Planning and Environment



## Department of Planning and Environment

Our ref: DOC22/070816

Your ref: D22046459

Ms Margaret Crawford  
Auditor-General for New South Wales  
GPO Box 12  
Sydney NSW 2001

21 April 2022

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### Subject: Performance audit – facilitating and administering Aboriginal land claim processes

Dear Ms Crawford

Thank you for your letter dated 24 March 2022 inviting our response to your performance audit report of the facilitation and administration of Aboriginal land claim processes.

The Department of Planning and Environment (the Department) supports the recommendations of the audit. The Department's responses to these five recommendations are contained in the enclosed table.

The Department looks forward to continuing to assist the Department of Premier and Cabinet (DPC) and the NSW Aboriginal Land Council (NSWALC) in relation to the audit's other recommendations.

We thank you for acknowledging that the Department has recently been making changes to improve the processes and outcomes of Aboriginal land claims, but we recognise that further changes are needed to enhance effectiveness.

Since 2020, to address the historical under-resourcing and structural issues that have led to the backlog of land claims, the Department has begun increasing its resourcing and implementing reforms to improve land claim processes. The Department has:

- doubled the resources of the team responsible for assessing land claims,
- commenced prioritisation projects in partnership with Local Aboriginal Land Councils (LALCs),
- established a community engagement team to engage with Aboriginal stakeholders,
- focused on negotiating more Aboriginal Land Agreements (ALAs) with LALCs which will assist to address multiple claims in a region,
- improved cross-agency collaboration and governance with NSWALC, LALCs and other government agencies, and,
- improved operational efficiencies through streamlining assessment procedures.

The Department will integrate the audit recommendations into the Department's work on Aboriginal land rights and native title to best achieve cultural, economic and spiritual outcomes with Aboriginal people and NSW communities. We appreciate the necessity for an interagency approach and will continue to work with DPC, NSWALC and LALCs to improve Aboriginal land claim processes.

Yours sincerely,

Mick Cassel

Secretary

| Recommendations directed to the Department (DPE)  | Response   |
|---|--|
| <p>2 By the end of 2022, DPE and DPC (Office of the Registrar Aboriginal Land Rights Act (ORALRA)) should jointly establish operational arrangements to deliver a coordinated interagency program for end-to-end Aboriginal land claim processes. These arrangements should be developed and regularly reviewed in collaboration with NSWALC and with input from LALC representatives.</p> <p>...</p> | <p>Supported – the Department is in the process of reviewing and updating current and new procedures to work with ORALRA, NSWALC and LALCs to jointly establish operational arrangements, forward planning, and regular reviews for practice improvements.</p> <p>The Department has invited ORALRA, NSWALC and Aboriginal Affairs NSW to participate in an end-to-end review. The Department has also established a LALC Reference Group to provide initial advice and direction on refreshing the Aboriginal Land Agreement process, which can settle multiple claims.</p> <p>The Department has been advised by DPC that the strategic interagency governance group to be set up under recommendation 1 will support the delivery of recommendation 2. The Department is supporting DPC in establishing that governance group.</p> <p>The Department assisted ORALRA in its successful application for funding to develop an end-to-end Aboriginal land claim spatial information management system. The Department will continue to assist during the system's development, which will also address recommendations 4 (interagency land claim spatial information management system) and 8 (upgrading the Aboriginal Land Claims Register), which are directed to DPC.</p> |
| <p>5 By the end of 2022, DPE should finalise updates to its land claim assessment procedures to ensure their currency and consistency with the Act, and integration with other DPE policies and functions, and with the activities of other agencies. DPE should seek input from NSWALC and LALC representatives on relevant aspects of these procedures.</p> <p>...</p>                              | <p>Supported – the Department is making substantial progress on updating its Aboriginal land claim procedure manual to include new processes that have been incorporated in response to case law and to align it with the recent enhancement of IT and engagement systems.</p>   |
| <p>6 By 1 July 2023, DPE should implement a resourced, ten-year plan for its land claim assessment functions that increases the rate of land claim processing, consistent with the Act.</p> <p>...</p> <p>This plan should be developed with the support of the DPC-led strategic governance group to ensure adequate resourcing and alignment with outcomes (see recommendation 1).</p>              | <p>Supported in principle – the Department will be seeking further resourcing to develop and invest in a ten-year plan.</p> <p>The Department has established prioritisation projects, is finalising a prioritisation form for LALCs and other stakeholders, and is developing the tools to use Aboriginal Land Agreements flexibly to achieve multiple objectives including the settlement of multiple claims.</p>  |

| Recommendations directed to the Department (DPE) |   | Response   |
|--|---|--|
| 7  | By 1 July 2023, DPE should implement a five-year workforce development strategy for its land claim assessment function.<br>...  | Supported in principle – the Department will be seeking further resourcing to invest in the five-year strategy.<br><br>The Department is commencing the review of its current resourcing profile as the first stage of addressing this recommendation.<br><br>The Department has been advised by DPC that the proposed strategic governance group in recommendation 1 will provide support and guidance on the delivery of this recommendation.  |
| 9  | On an ongoing basis, DPE should maintain, enhance and formalise information-sharing arrangements with NSWALC and LALCs to inform their claim making and engagement in relevant processes. | Supported – the Department is establishing communications systems in consultation with NSWALC to address this recommendation. This work is being designed to be flexible in accordance with feedback from LALCs.<br><br>The Department continues to make information available to LALCs through the LALC20 claim prioritisation project and through data provided directly into NSWALC's Geographical Information System mapping tool. The Department will soon finalise updates to the NSW Planning Portal to make additional spatial claim data available to LALCs.<br><br>In implementing this recommendation, the Department will enhance NSWALC's ability to support LALCs through information-sharing (recommendation 10). |

# Response from New South Wales Aboriginal Land Council

Margaret Crawford  
Auditor-General for New South Wales  
Audit Office of NSW



**New South Wales  
Aboriginal Land Council**  
ABN 82 726 507 500  
alc.org.au

Cc: Claudia Migotto, Assistant Auditor-General

Dear Ms Crawford,

## Re: Performance Audit – Aboriginal land claims processes

We thank the Audit Office for the work undertaken on the 'Performance Audit – Facilitating and administering Aboriginal land claims processes' and appreciate the opportunity to respond.

The report's key findings and insights into Aboriginal land claim processes highlight the long-standing concerns NSWALC and the Land Rights network have consistently raised, as have multiple reviews over more than a decade. The failure of government to meet its statutory requirements to determine Aboriginal land claims is beyond unacceptable.

We agree with the Audit Office that further work is needed by governments to deliver on their obligations to administer Aboriginal land claim processes. However, we are concerned that the Audit Office recommendations fall short of the transformational approach needed. Given the report notes government has not progressed recommendations from previous reviews<sup>1</sup>, we are not convinced that the latest recommendations are sufficient, efficient or effective to address the scale of the problems government has created.

The lack of progress by Governments in delivering Aboriginal land rights outcomes to date emphasises the urgent need to do things differently, in partnership with us. Further work is needed, in line with the NSW Government's commitments to Closing the Gap, on how the issues identified in the report can be best addressed. Unless this occurs, Aboriginal Land Councils will continue to wait decades for the compensation and intended outcomes promised by the *Aboriginal Land Rights Act 1983*.

Brief responses to the Audit Office's recommendations are below.

We look forward to working in partnership to develop and implement actions to support genuine improvements to Aboriginal land claim processes and deliver Aboriginal land rights outcomes.

Thank you for your work on these important matters. For further information please contact Stephen Hynd, Executive Director Land, Legal and Strategy on [Stephen.Hynd@alc.org.au](mailto:Stephen.Hynd@alc.org.au) and Jarrod Chapman, Manager, Land and Property on [Jarrod.Chapman@alc.org.au](mailto:Jarrod.Chapman@alc.org.au).

Sincerely,

**Yuseph Deen**  
Chief Executive Officer

Date: 22 April 2022

## ALWAYS WAS ALWAYS WILL BE ABORIGINAL LAND

| Head office   | Western Zone  | Northern Zone   | Northern Zone (Tamworth)   | Eastern Zone  | Southern Zone   | Far Western Zone   |
|---|---|---|--|---|---|--|
| Level 5, 33 Argyle Street<br>Parramatta NSW 2150<br>PO Box 1125<br>Parramatta NSW 2124<br>Ph: 02 9689 4444<br>Fax: 02 9687 1234 | 2/36 Darling Street<br>Dubbo NSW 2830<br>PO Box 1196<br>Dubbo NSW 2830<br>Ph: 02 6885 7000<br>Fax: 02 6881 6268 | Suite 5, Level 1<br>66-90 Harbour Drive<br>Coffs Harbour NSW 2450<br>PO Box 1912<br>Coffs Harbour NSW 2450<br>Ph: 02 6659 1200<br>Fax: 02 6650 0420 | 2/158 Marius Street<br>Tamworth NSW 2340<br>PO Box 890<br>Tamworth NSW 2340<br>Ph: 02 6766 4468<br>Fax: 02 6766 4469 | Suite 23, 207 Albany<br>Street North<br>Gosford NSW 2250<br>PO Box 670<br>Gosford NSW 2250<br>Ph: 02 4337 4700<br>Fax: 02 4337 4710 | Unit 22, 2 Yallourn Street<br>Fyshwick ACT 2609<br>PO Box 619<br>Queanbeyan NSW 2620<br>Ph: 02 6124 3555<br>Fax: 02 6280 5650 | Ground Floor Suite<br>49 Oxide Street<br>Broken Hill NSW 2880<br>Ph: 08 8087 7909<br>Fax: 08 8087 3851 |

# Audit Office Recommendations

| By the end of 2022 |   |   |
|--------------------|---|---|
| No.                | Recommendation  | Response  |
| 1.                 | <p><b>DPC should establish and lead strategic governance that oversees a resourced, coordinated interagency program that is accountable for delivering Aboriginal land claim processes.</b> These strategic governance arrangements should include the Registrar, senior executives from DPC (AANSW), DPE, and NSWALC as the relevant state-wide peak Aboriginal organisation.</p> <p>At a minimum, these arrangements should:</p> <ul style="list-style-type: none"> <li>express a whole-of-government commitment to achieving the intent of the <i>Aboriginal Land Rights Act 1983</i> (NSW) (the Act)</li> <li>reflect the relevance of the NSW Government's OCHRE Plan and Closing the Gap reform priorities</li> <li>define how DPC (ORALRA) and DPE's land claim processing activities should be aligned to outcomes and be consistent with obligations</li> <li>conduct strategic planning that results in sustained investment in facilitating land claim processes, and to increase the rate of land claim processing</li> <li>lead the strategic management of risks and opportunities (to Aboriginal Land Councils, state agencies and other parties) given the large number of undetermined claims and which may arise with an increased rate of claim processing</li> <li>establish a mechanism for regular reporting by DPC (ORALRA) and DPE on the coordinated program of land claim processing</li> </ul> | <ul style="list-style-type: none"> <li>NSWALC would welcome the opportunity to design and deliver a more efficient and targeted approach that: <ul style="list-style-type: none"> <li>Reflects equal and genuine partnership arrangements with NSWALC (in line with Closing the Gap commitments)</li> <li>Demarcates and clearly recognises strategic, operational &amp; accountability roles &amp; inputs</li> <li>Provides for state-wide strategic direction from NSWALC and a mechanism for LALCs to provide local level inputs</li> <li>Improves accountability</li> <li>Outcomes-focused and maximises delivery</li> <li>Provides appropriate resourcing to NSWALC and LALCs, recognising that NSWALC and LALCs lean organisations, with limited resources</li> <li>Considers alternative and more appropriate mechanisms to monitor progress of broader reforms</li> <li>Reduces duplication</li> <li>Is situated with a broader framework to accelerate the transfer to and activation of lands to Aboriginal Land Councils</li> </ul> </li> </ul> <p>We suggest the Audit Office consider requesting progress reports, and/or undertake subsequent reviews to ensure efficiency and effectiveness in implementing improvements to Aboriginal land claim processes.</p> |
|                    | <p>activities, including on outputs and outcomes against defined measures, and for annual reporting to the community</p> <ul style="list-style-type: none"> <li>monitor the progress of relevant reform priorities identified in the 2021 statutory review of the Act, including work on the interaction between the Act and native title legislation.</li> </ul>   |   |
| 2.                 | <p><b>DPE and DPC (ORALRA) should jointly establish operational arrangements to deliver a coordinated interagency program for end-to-end Aboriginal land claim processes. These arrangements should be developed and regularly reviewed in collaboration with NSWALC and with input from LALC representatives.</b> These arrangements should be clearly documented and communicated to promote transparency, and at a minimum should:</p> <ul style="list-style-type: none"> <li>express key principles for operational 'ways of working' consistent with the Act</li> <li>define a culturally-informed service charter, reflecting relevant aspects of Closing the Gap priority reform 3 (transforming government organisations)</li> <li>clarify operational roles and responsibilities, particularly with respect to information sharing and capacity building activities with LALCs</li> <li>manage interagency operational risks to effective land claim processing, and contribute to the management of strategic risks by reporting on actions to manage risks and the delivery of the outputs and outcomes from land claim processes to the DPC-led strategic governance group (recommendation 1).</li> </ul>   | <ul style="list-style-type: none"> <li>As above</li> </ul>  |

|    |  |   |
|----|--|---|
| 3. | <b>DPC should implement, in partnership with NSWALC, an education program that enhances understanding of the Act and its operations.</b> The program should incorporate subject-matter expertise from the Registrar and DPE. At a minimum, it should include tailored education for key state agencies and the local government sector that clearly communicates how their activities can impact on land claim processes, land under claim, and the intent of the Act.   | Support in principle<br>NSWALC will seek to engage with the NSW Government regarding resourcing to support this work  |
| 4. | <b>DPC should complete planning for an interagency, Aboriginal land claim spatial information management system.</b> Planning should be done in partnership with the Registrar, DPE and NSWALC, and with input from LALC representatives. The plan should aim to have the information management system operational in 2023.   | <ul style="list-style-type: none"> <li>Support in principle, however, suggest further work to define and clarify appropriate roles and responsibilities</li> <li>NSWALC will seek to engage with the NSW Government regarding resourcing for NSWALC and LALCs to support this work</li> <li>Improving the quality of information, including tenure information, and providing better access to information for NSWALC and LALCs would greatly assist in the land claims process.</li> </ul> |
| 5. | <b>DPE should finalise updates to its land claim assessment procedures</b> to ensure their currency and consistency with the Act, and integration with other DPE policies and functions, and with the activities of other agencies. DPE should seek input from NSWALC and LALC representatives on relevant aspects of these procedures.<br><br>In particular, assessment procedures should be finalised to support: <ul style="list-style-type: none"> <li>transparent approaches to identifying and prioritising land claims for assessment</li> <li>timely and consistent approaches to evidence gathering and escalating related delays, informed by transparent evidentiary thresholds for determining claims</li> </ul> | Support in principle<br><br>NSWALC will seek to engage with the NSW Government to ensure appropriate partnership arrangements with us, particularly relating to prioritising land claims assessments and developing engagement protocols.<br><br>NSWALC will seek to engage with the NSW Government to ensure any land claim assessment protocols, including those relating to escalation, are designed in partnership with us  |
|    | <ul style="list-style-type: none"> <li>clearer protocols for engaging with Aboriginal Land Councils in relation to claim assessments, amendments and withdrawals, and Aboriginal Land Agreements.</li> </ul>   |   |

| By 1 July 2022 |   |   |
|----------------|---|---|
| No.            | Recommendation  | Response  |
| 6.             | <b>DPE should implement a resourced, ten-year plan for its land claim assessment functions that increases the rate of land claim processing, consistent with the Act.</b> DPE's processes for identifying and prioritising claims for assessment, and for identifying opportunities for Aboriginal Land Agreements, should be transparently aligned with this plan.<br><br>At a minimum, this plan should: <ul style="list-style-type: none"> <li>increase the annual rate of land claim processing to be above the five-year average number of claims lodged.</li> <li>set and monitor target timeframes for: <ul style="list-style-type: none"> <li>determining new claims (for example, those made after 30 June 2023)</li> <li>determining 'current' claims (for example, those made after 30 June 2021)</li> <li>determining 'aged' claims (for example, those made before 30 June 2021).</li> </ul> </li> </ul> | <ul style="list-style-type: none"> <li>As above, strategic inputs should be from NSWALC (State-wide) and LALCs (local-level), &amp; ensure alignment with Closing the Gap</li> <li>Appropriate success measures / KPIs need to be designed in partnership with NSWALC</li> <li>More ambitious targets need for determining Aboriginal Land Claims and returning land to Aboriginal Land Councils. Without more ambitious targets, the failure of government to determine Aboriginal land claims is likely to continue along the very slow and inefficient path described in your report, and Aboriginal Land Councils will continue to wait decades for the compensation promised in the ALRA to be delivered.</li> <li>Additional appropriate budgeting and resourcing measures are needed. We are concerned by the inadequate budgeting for land claim processing; this extends to budgetary limitations placed on the value of land that may be transferred in any given year. We welcome the transparency the draft report brings to this and other aspects of claims' processing.</li> </ul> |

|    |   |  |
|----|---|--|
|    | <ul style="list-style-type: none"> <li>focus on determining claims that are likely to result in land grants, at least in the initial years of its implementation</li> <li>detail how DPE will transparently report on the outputs and outcomes of this plan to government and communities.</li> </ul> <p>This plan should be developed with the support of the DPC-led strategic governance group to ensure adequate resourcing and alignment with outcomes (see recommendation 1).</p> |  |
| 7. | <b>DPE should implement a five-year workforce development strategy for its land claim assessment function.</b> This strategy should involve a review of its current resourcing profile, consider options to expand specialist expertise, and ensures access to adequate training for staff. This strategy should be aligned to the NSW Government's Aboriginal Employment Strategy and reflect Closing the Gap priority reform 3 (transforming government organisations).               | NSWALC will seek to engage with the NSW Government to ensure consideration of Closing the Gap Priority reform 2 and appropriate resourcing for NSWALC & LALCs to support land claims processes |
| 8. | <b>DPC (ORALRA) should finalise the remediation and upgrade of the statutory Aboriginal Land Claims Register</b> to ensure its accuracy, enhance functionality, and enable its integration with an interagency land claim information system (recommendation 4).  | Support, provided scoping and execution is shared with DPE and NSWALC to eliminate the threat of duplication, given NSWALC and DPE are working on inter-related systems.                       |

| On an ongoing basis |                |          |
|---------------------|----------------|----------|
| No.                 | Recommendation | Response |



|     |   |   |
|-----|---|---|
| 9.  | <b>DPE should maintain, enhance and formalise information-sharing arrangements</b> with NSWALC and LALCs to inform their claim making and engagement in relevant processes.   | Support   |
| 10. | <b>NSWALC should maintain and enhance information-sharing</b> and other forms of support to LALCs to inform their claim making and continue to build LALC capacity to engage in relevant processes and decision-making about land claims. | <ul style="list-style-type: none"> <li>• NSWALC will continue to share information with, and support LALCs, and investigate opportunities for further enhancements</li> <li>• NSWALC will seek to engage with the NSW Government regarding resourcing for NSWALC and LALCs to support the implementation of this recommendation</li> <li>• We note the ability to improve information-sharing arrangements is contingent on the NSW Government's willingness to engage and share information. NSWALC will seek to engage with the NSW Government to develop and implement appropriate information sharing arrangements</li> </ul> |

<sup>1</sup> Pages 2 & 4, Final report: *Facilitating and administering Aboriginal land claim processes*

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# Appendix two – About the audit

## Audit objective

This audit assessed whether relevant agencies are effectively facilitating and administering Aboriginal land claim processes.

The relevant agencies (auditees) for the purpose of this audit are the Department of Planning and Environment (DPE), the Department of Premier and Cabinet (DPC) – Aboriginal Affairs NSW (AANSW) and the Office of the Registrar, Aboriginal Land Rights Act (ORALRA) – and the NSW Aboriginal Land Council.

## Audit criteria

To assess this objective, we examined whether the relevant agencies meet the following criteria:

- relevant agencies coordinate information and activities to effectively facilitate Aboriginal land claim processes:
  - maintaining adequate, accessible information to facilitate participation in land claim lodgement
  - effective and efficient mechanisms for coordinating operations around land claim processes
  - effective governance for accountability and continuous improvement in land claim processes
- relevant agencies are effectively administering their roles in the Aboriginal land claim process
  - consistent, robust policies and procedures that inform the administration of land claim processes
  - appropriate engagement with agencies and stakeholders in the administration of land claims
  - addressing barriers to effectively administering land claim processes.

## Audit scope and focus

The audit focus was on the administration of the process under section 36 of the *Aboriginal Land Rights Act 1983* (NSW) (the Act) – from claim lodgement to determination, and land transfer – as well as the interagency arrangements required to facilitate this process, efficiently and effectively.

This involved examining governance, operational coordination, information-sharing and stakeholder engagement activities from an agency and interagency perspective, as well as policies, procedures, systems and resources to support administrative functions.

Aboriginal Land Agreements under section 36AA of the Act are also a mechanism for processing land claims through negotiation but do not replace the statutory requirement to determine claims. Aboriginal Land Agreements have been considered in this audit as a mechanism through which the intent of the Act may be met, but the negotiation process itself has not been separately reviewed.

The audit period is from and including 2017. Activities and decisions before 2017 have also been considered where relevant and for context.

## Audit exclusions

The audit did not examine:

- individual land claim assessments, determinations or outcomes
- activities, processes or outcomes relating to Department of Planning and Environment reforms to the Land Negotiation Program and the negotiation of Aboriginal Land Agreements, except to the extent that these activities are relevant to delivering on requirements to determine land claims
- activities and outcomes relating to the use and activation of land by Aboriginal Land Councils
- the merits of NSW Government policy objectives, including legislated policy and reforms.

## Audit approach

We engaged a majority Indigenous-owned consulting firm to provide expertise and cultural advice to inform our audit approach, conduct and assessments, and to facilitate consultations with Local Aboriginal Land Council (LALC) representatives.

We contacted all LALCs in NSW to invite them to make a submission to the audit and facilitated consultations with a sample of LALCs. In total, we heard from 22 LALCs of varying sizes, and from a range of metropolitan and regional areas, through a combination of consultations and submissions. The audit was also open for public submissions until the end of January 2022.

Our audit procedures involved examining the relevant information management systems and data from the audited agencies, including:

- direct observation of the database used by DPC (ORALRA) to maintain the statutory Aboriginal Land Claim (ALC) Register
- direct observation of DPE's CrownTracker system, used to manage land claim related information
- direct observation of the NSW Aboriginal Land Council's GIS mapping tool
- examination of land claim data and reports generated from the ALC Register and DPE's land claim-related information systems.

Our procedures did not include remediating data in the ALC Register or DPE-held land claim information. We assessed these data sources to report the most accurate and current information available and have noted the limitations of these data sources (including their lack of integration) throughout the report.

Our audit procedures also involved assessing a range of relevant documents held by the audited agencies, including:

- strategic and business planning documents
- information about the resourcing of land-claim related functions, and reports from internal reviews of these activities
- risk management and reporting documentation, including risk registers and Audit and Risk Committee reporting
- terms of reference, agendas and minutes (where available) of relevant executive and operational meetings
- policies and procedures, particularly for lodging, registering, and assessing claims
- a sample of land claim recommendation briefs
- statutory reviews, Parliamentary inquiries, and other reports relevant to land claim processes and land rights more broadly, and information on the progress of actions to address relevant recommendations.

Our procedures included interviews with agency staff, experts and stakeholders. Specifically, interviews with:

- relevant from DPE, DPC (AANSW and ORALRA) and the NSW Aboriginal Land Council
- the Registrar of the Aboriginal Land Rights Act
- the Crown Land Commissioner
- relevant staff from other agencies such as NSW Treasury, Transport for NSW, and the Department of Regional NSW, and statutory bodies such as Property NSW
- sector stakeholders such as NTS Corp, Local Government NSW, and representatives from the Indigenous Legal Issues Committee of the Law Council of Australia
- relevant academics.

The audit approach was complemented by quality assurance processes within the Audit Office to ensure compliance with professional standards.

## **Audit methodology**

Our performance audit methodology is designed to satisfy Australian Audit Standard ASAE 3500 'Performance Engagements' and other professional standards. The standards require the audit team to comply with relevant ethical requirements and plan and perform the audit to obtain reasonable assurance and draw a conclusion on the audit objective. Our processes have also been designed to comply with requirements specified in the *Government Sector Audit Act 1983* and the *Local Government Act 1993*.

## **Acknowledgements**

We gratefully acknowledge the co-operation and assistance provided by the Department of Planning and Environment, the Department of Premier and Cabinet, the Office of the Registrar of the Aboriginal Land Rights Act, and the NSW Aboriginal Land Council.

We also acknowledge the input from LALCs and other stakeholders consulted during the audit.

## **Audit cost**

The estimated cost of this audit including disbursements is \$845,000.

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# Appendix three – Performance auditing

## What are performance audits?

Performance audits determine whether State or local government entities carry out their activities effectively, and do so economically and efficiently and in compliance with all relevant laws.

The activities examined by a performance audit may include a government program, all or part of an audited entity, or more than one entity. They can also consider particular issues which affect the whole public sector and/or the whole local government sector. They cannot question the merits of government policy objectives.

The Auditor-General's mandate to undertake performance audits is set out in section 38B of the *Government Sector Audit Act 1983* for State government entities, and in section 421B of the *Local Government Act 1993* for local government entities.

## Why do we conduct performance audits?

Performance audits provide independent assurance to the NSW Parliament and the public.

Through their recommendations, performance audits seek to improve the value for money the community receives from government services.

Performance audits are selected at the discretion of the Auditor-General who seeks input from parliamentarians, State and local government entities, other interested stakeholders and Audit Office research.

## How are performance audits selected?

When selecting and scoping topics, we aim to choose topics that reflect the interests of parliament in holding the government to account. Performance audits are selected at the discretion of the Auditor-General based on our own research, suggestions from the public, and consultation with parliamentarians, agency heads and key government stakeholders. Our three-year performance audit program is published on the website and is reviewed annually to ensure it continues to address significant issues of interest to parliament, aligns with government priorities, and reflects contemporary thinking on public sector management. Our program is sufficiently flexible to allow us to respond readily to any emerging issues.

## What happens during the phases of a performance audit?

Performance audits have three key phases: planning, fieldwork and report writing.

During the planning phase, the audit team develops an understanding of the audit topic and responsible entities and defines the objective and scope of the audit.

The planning phase also identifies the audit criteria. These are standards of performance against which the audited entity, program or activities are assessed. Criteria may be based on relevant legislation, internal policies and procedures, industry standards, best practice, government targets, benchmarks or published guidelines.

At the completion of fieldwork, the audit team meets with management representatives to discuss all significant matters arising out of the audit. Following this, a draft performance audit report is prepared.

The audit team then meets with management representatives to check that facts presented in the draft report are accurate and to seek input in developing practical recommendations on areas of improvement.

A final report is then provided to the head of the audited entity who is invited to formally respond to the report. The report presented to the NSW Parliament includes any response from the head of the audited entity. The relevant minister and the Treasurer are also provided with a copy of the final report. In performance audits that involve multiple entities, there may be responses from more than one audited entity or from a nominated coordinating entity.

## **Who checks to see if recommendations have been implemented?**

After the report is presented to the NSW Parliament, it is usual for the entity's Audit and Risk Committee/Audit Risk and Improvement Committee to monitor progress with the implementation of recommendations.

In addition, it is the practice of Parliament's Public Accounts Committee to conduct reviews or hold inquiries into matters raised in performance audit reports. The reviews and inquiries are usually held 12 months after the report received by the NSW Parliament. These reports are available on the NSW Parliament website.

## **Who audits the auditors?**

Our performance audits are subject to internal and external quality reviews against relevant Australian standards.

The Public Accounts Committee appoints an independent reviewer to report on compliance with auditing practices and standards every four years. The reviewer's report is presented to the NSW Parliament and available on its website.

Periodic peer reviews by other Audit Offices test our activities against relevant standards and better practice.

Each audit is subject to internal review prior to its release.

## **Who pays for performance audits?**

No fee is charged to entities for performance audits. Our performance audit services are funded by the NSW Parliament.

## **Further information and copies of reports**

For further information, including copies of performance audit reports and a list of audits currently in-progress, please see our website [www.audit.nsw.gov.au](http://www.audit.nsw.gov.au) or contact us on 9275 7100.



## OUR VISION

Our insights inform and challenge government to improve outcomes for citizens.

## OUR PURPOSE

To help Parliament hold government accountable for its use of public resources.

## OUR VALUES

Pride in purpose  
Curious and open-minded  
Valuing people  
Contagious integrity  
Courage (even when it's uncomfortable)

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