ABORIGINAL LAND CLAIMS

(NSW Aboriginal Land Rights Act 1983)

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ABOUT THE AUTHOR

JEFF WEILEY has over thirty years experience in Crown Land administration with the former Department of Lands and the now amalgamated Department of Conservation & Land Management, with his basic tertiary qualifications being in Land and Engineering Survey Drafting.

During those years, Jeff has worked for periods in almost every District Lands Office throughout the State and in the Western Lands Commission.

Jeff has been specifically involved with Aboriginal land claims since December 1990 and is currently the Department's State Manager, Aboriginal Land Claim Investigations, responsible for oversighting the Department's investigation of Aboriginal Land Claims and advising the Minister for Land and Water Conservation on all aspects of his involvement with the Aboriginal Land Rights Act 1983, particularly as to how claims should be determined.

ABORIGINAL LAND CLAIMS
UNDER ABORIGINAL LAND RIGHTS ACT 1983

BACKGROUND

The Aboriginal Land Rights Act came into force in New South Wales on 10th June, 1983. The Act is predominantly administered by the Minister for Aboriginal Affairs. However the Minister for Land and Water Conservation, the Crown Lands Minister referred to in the Act, does have responsibility for deciding the outcome of land claims.

The Act recognises the special attachment Aboriginal people have with land and puts in place opportunities for Aborigines to receive some compensation for their past loss of land.

The Act provides for the establishment of Aboriginal Land Councils to pursue this compensation with, amongst other opportunities, the right to make claims to Crown land.

In recognition of the current size of the Crown estate and the limited opportunities for some Aboriginal Land Councils throughout the State to claim Crown lands the Act also provides for the allocation of funds to assist Aboriginal Land Councils to purchase land. These funds are also intended to assist Aboriginal Land Councils with their administrative costs. In this regard the Act requires that an amount equal to 7.5% of land tax collected each year in New South Wales be paid to the New South Wales Aboriginal Land Council for the first 15 years of the Act. Half of this allocation is required to be applied to authorised fixed investments. The interest from these investments is intended to provide the funding necessary to allow Aboriginal Land Councils to continue to function after 1998 when funding otherwise ceases. The other half of the allocation is immediately available for the first mentioned purposes.

While the land claim provisions of the Act are the most important part of the legislation for the Aboriginal community other sections of the Act provide for the acquisition/resumption of lands by the Minister for Aboriginal Affairs for the benefit of Aborigines (Section 39), and for the allocation of lands, by arrangement between the Minister for Aboriginal Affairs and the Minister for Housing, for the housing of Aborigines (Section 56).

Before proceeding further it is perhaps appropriate to briefly explain the distinction between the Aboriginal Land Rights Act, 1983 and the more recent Commonwealth Native Title Act, 1993 (and Native Title (New South Wales) Act, 1994).

Whilst these pieces of Aboriginal land rights legislation came about at quite different times and from different origins they do compliment each other in New South Wales.

Firstly the Commonwealth Native Title Act, 1993 allows Aborigines the opportunity to have continuing, common law rights and interests in Crown land recognised. The full onus in proving these rights or interests, however, rests with the traditional Aboriginal "owners". The Native Title (New South Wales) Act, 1994 largely parallels the Commonwealth Act. Perhaps the main thrust of applications under these Acts is that Aborigines would claim prior title to the land.

Secondly, and where continuing Aboriginal common law rights or interests in Crown land no longer exist, for various reasons, or where traditional Aboriginal "owners" are unable to prove these rights or interests, the option of lodging a land claim under the Aboriginal Land Rights Act, 1983 remains. Under this Act however Aboriginal Land Council's would only be granted title to the land, as compensation, if it is not already being used or occupied or needed for a future public purpose. Aboriginal Land Councils under this Act have no obligation to prove any aspect of their claims or to indicate their intentions in respect of the claimed land if granted. The full onus of investigation of these claims, and all associated costs, rests with Government.

Claims under the Aboriginal Land Rights Act 1983 are initially lodged with the Aboriginal Land Rights Registrar in the Office of Aboriginal Affairs.

The **date of lodgement of claims** with the Aboriginal Land Rights Registrar is the key relevant date for all subsequent investigations. In this regard only evidence/factors known to affect the land at this date can be used to indicate how the claim should be finalised.

Following lodgement, claims are sent to the Minister for Land and Water Conservation who has the sole responsibility for deciding the outcome of claims.

Claimant Aboriginal Land Councils have the right of appeal under the Aboriginal Land Rights Act 1983, (Section 36(6)) to the Land and Environment Court against the Minister's refusal of a claim. Further appeals by either the Minister or the Aboriginal Land Council to the Court of Appeal and ultimately the High Court are possible on points of law.

HOW CLAIMS ARE INVESTIGATED

Investigations of claims are carried out for the Minister by the Department of Conservation and Land Management through its District Crown Lands Service Offices. These offices ultimately prepare submissions to the Minister recommending how the claims should be finalised.

On receipt of claims by the Department any proceeding action in respect of the claimed land ceases pending the Minister's determination of the claim. Also no new or additional interests in the land are created or in fact the land altered or affected in any way.

Investigation of claims includes full status/title searching, inspection as necessary and the sending of references to all public authorities likely to have an interest in the land. References are only made to private individuals directly affected by the claim (eg. Crown lessees). No advertising of claims is carried out by the Department, although some Local Government Councils and Rural Lands Protection Boards have taken such opportunities.

BASES OF MINISTER'S DECISION

Claims are generally either granted or refused on the basis of whether the claimed land is "claimable Crown land" or not, under the criteria set down under Section 36(1), Aboriginal Land Rights Act 1983.

For claims to be successful the claimed land must, when the claim was made be:

(1) lands vested in Her Majesty and
(2) able to be sold or leased, or are reserved or dedicated, under the Crown Lands Acts, and
(3) not protected by the Savings Provisions of the Act (see explanation below), and
(4) not the subject of a native title application, and
(5) not the subject of an approved determination of native title, and
(6) not lawfully used or occupied, and
(7) not needed, or likely to be needed, as residential lands, and
(8) not needed, or likely to be needed, for an essential public purpose.

Conversely, should investigations disclose that the claimed land does not meet the stated criteria the claim will be generally recommended for refusal.

Under the Savings, Transitional and Other Provisions of the Aboriginal Land Rights Act 1983 (Schedule 4, Clause 8) current leases, licences and permissive occupancies (except mining tenures) that predate the commencement of the Act on 10th June 1983 are protected from claim.

Investigation of Criteria (1) to (5) above is the responsibility of the Department of Conservation and Land Management.

References to public authorities likely to have an interest in the claimed land, would only be made if the claimed land passes Criteria (1) to (5) above, and then only in respect of Criteria (6), (7) and (8).

Referenced authorities are normally given two months in which to provide any evidence that might indicate refusal of claims. If no response is received within that time it is usually taken that the particular authority has no objections to granting and transfer of the land.

Should the abovementioned two month period prove to be too short a time frame for the authority to complete its investigations a written request should be made to the Department's District Office concerned seeking an extension of time and nominating the date by which its response should be available. Generally, if the authority fails to provide its response by the nominated date the Department's District Office will proceed to finalise its submission to the Minister recommending how the claim should be decided.

Responses to references should be as detailed as reasonably possible with evidence ideally provided relative to and in specific terms of criteria (6), (7) and (8) (See full wording in Extract from Aboriginal Land Rights Act, 1983 at Annexure "A". Sections 36(1)(b), (b1) and (c) refer).

These considerations/criteria are restated as follows:

(6) when the claim was made was the claimed land lawfully used or occupied.
(7) when the claim was made was the claimed land needed or likely to be needed as residential lands.

(8) when the claim was made was the claimed land needed or likely to be needed for an essential public purpose.

If no evidence contrary to these criteria is disclosed during investigations recommendation to the Minister will be to grant the claim and transfer the land to the claimant Aboriginal land Council. No other factor beyond the criteria provided in the Aboriginal Land Rights Act, 1983, can lead to the refusal of a claim.

Any abovementioned transfer of the land has the effect, under the Aboriginal Land Rights Act, 1983 (Sec.36(10)), of revoking any covering Crown reserve and removing the land from the care, control and management of any appointed Trustee.

Lands transferred as the results of successful claims under the Aboriginal Land Rights Act, 1983 are generally for an estate in fee simple, although transfers of lands in the Western Division of New South Wales outside the urban area of a city, town or village are by way of granting leases in perpetuity (without the necessity of payment of any rent).

With the partial commencement of the Native Title (New South Wales) Act, 1994 on 28th November, 1994 and its associated amendments to the Aboriginal Land Rights Act, 1983 any future transfers will be subject to any native title rights or interests existing in the Crown land immediately before the transfer.

Any public authority seeking the retention of claimed land under the abovementioned criteria will need to produce good sustainable evidence, and as mentioned above, related to the date of lodgement of the claim. Hard cold facts only will be accepted. Any wishes, desires, pleas, unsubstantiated statements, etc will not be used, or interpreted, to indicate refusal of a claim. Should an appeal ultimately be lodged against the Minister's refusal of a claim based on evidence provided by another public authority an appropriate staff member of that authority will be required to provide sworn affidavits in support of such evidence and to attend the Land and Environment Court.

Evidence of whether claimed land was lawfully used or occupied will be required to prove the following:

1) The lawfulness of use and/or occupation of the claimed land. This information/evidence would generally be already available to the Department. However in some instances particularly in regard to Crown reserves short term licences or permits may have issued for various purposes without the Department's knowledge. The Department would also look to the Department of Mineral Resources for details of any mining tenures issued in respect of the claimed land.

2) Evidence of use and/or occupation would need to related to the purpose of the authority issued. Evidence could take either, or both, of two forms. Normally this would be physical improvements to or on the land such as pasture improvement, noxious weed control, buildings, fencing, gates, etc. However in the absence of physical use or occupation if not readily available, or possibly in respect of some purposes not obvious eg. coastal land protection, native flora and fauna protection, etc, the existence of inspection/monitoring/maintenance programs, documented plans

of management or details of proceeding considerations regarding the land, prior to, or at the date of claims may be acceptable.

Consideration of use of lands referred to above should include all lawful uses by other organisations, general public etc.

Evidence presented to support that the claimed land is needed, or likely to be needed, for residential lands will at least need to address the following:

1. demographic details evidencing increasing population/housing pressures within the locality of claims, and associated future projections, and

2. insufficient stocks of suitably zoned Crown or freehold lands in that locality to meet those future projected needs, including those lands which could as necessary be rezoned for residential purposes.

Needs for these lands would normally only relate to lands needed for residential subdivision purposes. However they could in some instances include unsold or undeveloped parcels remaining within existing subdivisions.

Evidence presented to support that the claimed land is needed, or likely to be needed, for an essential public purpose will need to address the following:

1) argument that the purpose concerned is a public purpose,

2) that the public purpose is essential from a community/public perspective, and,

3) that the claimed land, to the exclusion of all other lands, or possibly in association with other lands, is needed or likely to be needed, for the essential public purpose.

New investigations etc initiated after lodgement of claims may not be used as evidence to indicate refusal of claims. Efforts by any public authority towards this end would be completely inappropriate and a waste of time, effort and funds as far as the Department's recommendations to the Minister would be concerned. Only admissible evidence would be those needs that had already been identified prior to the lodgement of the claim.

What is really being determined in regard to Aboriginal land claims is ownership of the claimed land and not future development opportunities per se. In this regard zoning of the land or other planning restrictions when claims are made are largely of little consequence except possibly in some isolated incidents when it would only be a contributing factor indicating a need for an essential public purpose eg. heritage protection.

Beyond the zoning of the land it may be however that environmental or other studies leading towards the current zoning could contain good evidence indicating a need for the land for an essential public purpose.

As previously mentioned all evidence presented to substantiate any of the abovementioned criteria must relate to the date of lodgement of the claim with the Aboriginal Land Rights Registrar.

ALTERNATIVES TO REFUSAL OF CLAIMS

In those cases where evidence exists indicating the refusal of claims on the basis of need, or likely need, for an essential public purpose(s) the Minister is bound to consider another option, or alternative, that could still allow the claim to be granted. This option is contained within Section 36(5A), Aboriginal Land Rights Act 1983 with such option requiring the consent or wish of the claimant Aboriginal Land Council to pursue such a resolution.

Section 36(5A) involves the creation of conditions, covenants, easements, etc that could be attached to the title of any transferred/granted land for the purpose of facilitating the essential public purpose, eg easement for access, transmission line, etc.

In these cases all costs associated with the creation of easements, etc to meet the needs of other authorities for essential pubic purposes together with compensation to the Crown for any equity to be assigned or allocated in respect of the land will be required to be met by the objecting authority. These costs, compensation, etc are no more than the objecting authority would have to bear if it sought to acquire the land from the Crown, otherwise.

Another similar option exists under Section 37 whereby claimant Aboriginal Land Councils can opt, where a claim would be refused on the basis of the land being lawfully used and/or occupied, and/or needed be or likely to be needed, as a travelling stock, to accept a grant of the land on the proviso that the Aboriginal Land Council leases it back to the Government, at a normal rental, for travelling stock purposes. This option may only be offered by the Minister where he is satisfied that Aborigines have traditional rights to the land or have had a long association with the land. This option is the only provision in the Aboriginal Land Rights Act, 1983, that does have some similarity to the Native Title Acts, and placing the onus of proof on the claimant Aboriginal Land Council.

FINALISATION OF CLAIMS AND FUTURE LAND USE

As initially mentioned in these notes the authority for deciding the outcome of claims rests with the Minister for Land and Water Conservation.

The Department of Conservation and Land Management will however in its investigation of claims for the Minister seek full input from authorities with an interest in the claimed land and be receptive wherever possible to evidence tendered which reasonably indicates that claimed lands were, when the claim was made, lawfully used or occupied and/or needed, or likely to be needed, as residential lands, or for an essential public purpose.

Whilst it is predominantly the Department of Conservation and Land Management's responsibility to consider the Minister's options/obligations under Sections 36(5A) and 37, and if either of these options are to be pursued further contact will be made with the public authority concerned, it may be quite appropriate at times for those authorities with a need for

part or the whole of the claimed lands to hold preliminary discussions with claimant Aboriginal Land Councils. Department of Conservation and Land Management officers could be involved as requested.

Assuming that reasonable evidence is tendered as above, one of the following two outcomes would be recommended to the Minister:

1) Outright refusal of claim, or

2) Grant of claim with specific conditions, lease back obligations, etc attaching to title of transferred land that would ensure the essential public purpose(s) for the land.

In either of these outcomes consideration would also need to be given to part determinations ie part refusal, part conditional grant, etc.

The opportunity for Aboriginal Land Councils to make claims under the Aboriginal Land Rights Act 1983 should not be seen as a threat to the continued availability of Crown land for appropriate purposes, but more of a challenge to public authorities to be able, firstly, to defend their current use and occupation of Crown lands and, secondly, to have clearly identified their needs for specific Crown lands into the future for residential lands or essential public purposes.

An obligation also exists on the Minister and other public authorities when claims are refused on the basis of being needed as residential lands or for an essential public purpose(s) to promptly allocate those lands for that purpose(s). Should this action not be undertaken within a reasonably period it could lead to very real difficulties for the Minister in maintaining that a continuing need for the claimed land exists if a second, or more claims were to be subsequently lodged.

FURTHER INFORMATION REQUIRED?

Should any additional explanation or discussion of the details contained therein be necessary please do not hesitate to contact Mr Jeff Weiley, State Manager, Aboriginal Land Claim Investigations, Crown Lands Service, Department of Conservation and Land Management on telephone (02) 228 6423.

ANNEXURE "A"

Extract from Aboriginal Land Rights Act, 1983, incorporating amendments by the Native Title (New South Wales) Act, 1994, which partly commenced on 28th November, 1994.

ANNEXURE A

EXTRACTS FROM

ABORIGINAL LAND RIGHTS ACT 1983 No. 42

(Incorporating recent amendments by the Native Title (NSW) Act 1994)

Reprinted under the Reprints Act 1972

[Reprinted as at 19 August 1991]

NEW SOUTH WALES

An Act to repeal the Aborigines Act 1969 and to make provisions with respect to the land rights of Aborigines, including provisions for or with respect to the constitution of Aboriginal Land Councils, the vesting of land in those Councils, the acquisition of land by or for those Councils and the allocations of funds to and by those Councils; to amend certain other Acts; and to make provisions for certain other purposes.

WHEREAS:

(1) Land in the State of New South Wales was traditionally owned and occupied by Aborigines:

(2) Land is of spiritual, social, cultural and economic importance to Aborigines:

(3) It is fitting to acknowledge the importance which land has for Aborigines and the need of Aborigines for land:

(4) It is accepted that as a result of past Government decisions the amount of land set aside for Aborigines has been progressively reduced without compensation:

Functions of a Local Aboriginal Land Council

12. The functions of a Local Aboriginal Land Council are:

(a) in accordance with any regulations, to acquire land and to hold or dispose of, or otherwise deal with, land vested in or acquired by the Council; and

(b) to make applications in writing to the New South Wales Aboriginal Land Council for the acquisition by the New South Wales Aboriginal Land Council of land on behalf of or to be vested in the Local Aboriginal Land Council; and

(c) to make applications in writing to the New South Wales Aboriginal Land Council for the granting of funds to be applied solely to the payment of the administrative costs and expenses of the Local Aboriginal Land Council; and

(d) to implement the wishes of its members (as decided at a meeting of the Council) with respect to:

(i) the acquisition, management, use, control and disposal of land; and

(ii) the acquisition, establishment and operation of enterprises; and

(e) to consider applications to prospect or mine for minerals on its land and to make recommendations to the New South Wales Aboriginal Land Council; and

(f) to make claims to Crown lands; and

(g) to upgrade and extend residential accommodation for Aborigines in its area; and

(h) to protect the interests of Aborigines in its area in relation to the acquisition, management, use, control and disposal of its land; and

(i) to negotiate with persons desiring to use, occupy or gain access to any part of its land; and

(j) with the consent of the parties concerned, to conciliate disputes between individual Aborigines or groups of Aborigines in its area; and

(k) such other functions as are conferred or imposed on it by or under this or any other Act.

Functions of the Council

23. The functions of the New South Wales Aboriginal Land Council are as follows:

(a) to administer the New South Wales Aboriginal Land Council Account and the Mining Royalties Account established under this Act;

(b) to grant funds for the payment of the administrative costs and expenses of Regional and Local Aboriginal Land Councils;

(c) to acquire land on its own behalf or on behalf of or to be vested in a Local Aboriginal Land Council and to transfer land acquired on behalf of a Local Aboriginal Land Council to such a Council;

(d) to determine and approve or disapprove of the terms and conditions of agreements proposed by Local Aboriginal Land Councils to allow mining or mineral exploration on land;

(e) to make claims to Crown lands, either on its own behalf or, if requested by a Local Aboriginal Land Council, on behalf of that Council;

(f) with the agreement of a Local Aboriginal Land Council, to manage any of the affairs of that Council;

(g) to conciliate disputes between other Aboriginal Land Councils or between those Councils and individuals or between individual members of those Councils;

(h) to make grants or lend money to, or invest money for or on behalf of, Aborigines;

(i) to hold, dispose of, or otherwise deal with land vested in or acquired by it;

(j) to ensure that Regional and Local Aboriginal Land Councils comply with this Act in respect of the establishment and keeping of accounts and the preparation and submission of budgets and financial reports;

(k) to ensure that elections for the Chairpersons and other officers of Regional and Local Aboriginal Land Councils are conducted in accordance with this Act;

(l) to advise the Minister on matters relating to Aboriginal land rights;

(l1) to exercise the functions conferred or imposed, by the Commonwealth Native Title Act, on a representative Aboriginal/Torres Strait Islander body (within the meaning of that Act) if the Council is determined to be such a body by the relevant Commonwealth Minister under that Act;

(m) to exercise such other functions as are conferred or imposed on it by or under this or any other Act.

NOTE: "Representative Aboriginal/Torres Strait Islander body" is defined by s.253 NTA. Sections 23 (7) (c), 26 (4) (b) (i) and 66 (2) (a) (vi) NTA provide that representative Aboriginal/Torres Strait Islander bodies must be notified of specified matters. Section 202 (4) NTA sets out the functions of such bodies while s.203 (1) NTA provides that they may apply to the relevant Commonwealth Minister or the Aboriginal and Torres Strait Islander Commission (established by the Aboriginal and Torres Strait Islander Commission Act 1989 of the Commonwealth) for financial assistance to enable them to perform those functions.

Division 2—Claimable Crown lands

Claims to Crown lands

36. (1) In this section, except in so far as the context or subject-matter otherwise indicates or requires:

"claimable Crown lands" means lands vested in Her Majesty that, when a claim is made for the lands under this Division:

(a) are able to be lawfully sold or leased, or are reserved or dedicated for any purpose, under the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901;

(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; and

(d) do not comprise lands that are the subject of an application for a determination 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 or the Native Title (New South Wales) Act 1994; and

(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) (other than an approved determination that no native title exists in the lands).

"Crown Lands Minister" means the Minister for the time being administering any provisions of the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901 under which lands are able to be sold or leased.

(2) The New South Wales Aboriginal Land Council may make a claim for land on its own behalf or on behalf of one or more Local Aboriginal Land Councils.

(3) One or more Local Aboriginal Land Councils may make a claim for land within its or their area or, with the approval of the Registrar, outside its or their area.

(4) A claim under subsection (2) or (3):

(a) shall be in writing and, if a form for making such a claim has been prescribed, shall be in or to the effect of that form,

(b) shall describe or specify the lands in respect of which it is made;

(b1) [illegible]

(c) shall be lodged with the Registrar, who shall refer a copy thereof (together with a copy of any approval necessary under subsection (3)) to the Crown Lands Minister or, if there is more than one Crown Lands Minister, to each of them.

(5) A Crown Lands Minister to whom a claim for lands (being lands which are, or, but for any restriction on their sale or lease, would be, able to be sold or leased under a provision of an Act administered by him) has been referred under subsection (4) shall:

(a) if he is satisfied that:

(i) the whole of the lands claimed is claimable Crown lands; or

(ii) part only of the lands claimed is claimable Crown lands, grant the claim by transferring to the claimant Aboriginal Land Council (or, where the claim is made by the New South Wales Aboriginal Land Council, to a Local Aboriginal Land Council (if any) nominated by the New South Wales Aboriginal Land Council) the whole or that part of the lands claimed, as the case may be; or

(b) if the Crown Lands Minister is satisfied that:

(i) the whole of the lands claimed is not claimable Crown lands; or

(ii) part of the lands claimed is not claimable Crown lands,

refuse the claim or refuse the claim to the extent that it applies to that part, as the case may require.

(5A) Where, under subsection (5), a Crown Lands Minister is not satisfied that the whole or part of the lands claimed is claimable Crown lands because the lands are needed, or likely to be needed, for an essential public purpose, but that the need for the lands for the public purpose would be met if the claim were to be granted in whole or in part subject to the imposition of a condition (whether by way of covenant or easement or in any other form) relating to the use of the lands, the Crown Lands Minister may, notwithstanding that subsection, where the condition is agreed to by the Aboriginal Land Council making the claim, grant the claim under that subsection subject to the imposition of the condition.

(6) An Aboriginal Land Council may appeal to the Court against a refusal under subsection (5) (b) of a claim made by it.

(7) The Court shall hear and determine any appeal made to it under subsection (6) in respect of any lands claimed and may, if the relevant Crown Lands Minister fails to satisfy the Court that the lands or a part thereof are not or is not claimable Crown lands, order that the lands or the part, as the case may be, be transferred to the claimant Aboriginal Land Council or, where the claim is made by the New South Wales Aboriginal Land Council, to a Local Aboriginal Land Council (if any) nominated by the New South Wales Aboriginal Land Council.

(8) A certificate being:

(a) a certificate issued by a Crown Lands Minister stating that any land the subject of a claim under this section and specified in the certificate is needed or is likely to be needed as residential land; or

(b) a certificate issued by a Crown Lands Minister, after consultation with the Minister administering this Act, stating that any land the subject of a claim under this section and specified in the certificate is needed or likely to be needed for an essential public purpose,

shall be accepted as final and conclusive evidence of the matters set out in the certificate and shall not be called into question in any proceedings nor liable to appeal or review on any grounds whatever.

(9) Except as provided by subsection (9A), any transfer of lands to an Aboriginal Land Council under this section shall be for an estate in fee simple but subject to any native title rights and interests (within the meaning of the Commonwealth Native Title Act) existing in the lands immediately before the transfer

(9A) Where the transfer of lands to an Aboriginal Land Council under this section is of land to which the Western Lands Act 1901 applies but which is not within an area determined by the Minister administering that Act as being the urban area of a city, town or village, the transfer shall be effected by the granting to the Council of a lease in perpetuity under that Act but subject to any native title rights and interests (within the meaning of the Commonwealth Native Title Act) existing in the lands immediately before the transfer

(9B) A lease referred to in subsection (9A):

(a) may be granted without the necessity for the payment of any rent under the lease or may require the payment of a nominal rent; and

(b) notwithstanding the Western Lands Act 1901, shall not be cancelled unless the Minister administering that Act has consulted with the Minister administering this Act.

(9C) Land transferred under this section to 2 or more Aboriginal Land Councils may be transferred to those Councils as joint tenants or as tenants in common.

(10) A transfer of lands pursuant to this section operates to revoke any dedication or reservation under the Crown Lands Consolidation Act 1913 to which the lands were subject immediately before the transfer.

(11) Where, by reason of the existence of an easement over them, any lands claimed under this section could not, but for this subsection, be regarded by a Crown Lands Minister as claimable Crown lands, the Crown Lands Minister may, for the purposes of this section, treat the lands as claimable Crown lands.

(12) A transfer of lands pursuant to this section shall be subject to any easements affecting the lands immediately before the transfer or any condition imposed under subsection (5A).

(13) Where the transfer of lands in accordance with this section would not, but for this subsection, be authorised by the Crown Lands Consolidation Act 1913 or the Western Lands Act 1901, the transfer of the lands in accordance with this section shall be deemed to have been authorised by whichever of those Acts the lands were subject to immediately before the transfer.

(14) The New South Wales Aboriginal Land Council, a Regional Aboriginal Land Council or a Local Aboriginal Land Council may request a Crown Lands Minister to supply or cause to be supplied to it such information in relation to the Crown land or dealings in Crown land as is specified in the request and the Crown Lands Minister shall, so far as is reasonably practicable, comply with that request.

(15) Stamp duty under the Stamp Duties Act 1920 shall not be payable in respect of a transfer of lands in accordance with this section.

NOTE: For the purposes of s.36 (1) (d), "non-claimant application" and "unopposed application" are defined in s.4 (1) of the Native Title (New South Wales) Act 1994.

Aboriginal lands in travelling stock reserves

37. (1) Where a claim by an Aboriginal Land Council is lodged under section 36 in respect of land which is or is part of a travelling stock reserve as defined in section 4 of the Pastures Protection Act 1934 (not being a travelling stock reserve in the Western Division within the meaning of the Crown Lands Consolidation Act 1913), the Registrar shall, in addition to complying with section 36 (4) (c), refer a copy of the claim to the Pastures Protection Board for the district in which that land is situated.

(2) This section has effect notwithstanding the provisions of the Pastures Protection Act 1934 or the Crown Lands Consolidation Act 1913.

(3) Subject to subsection (4), the Crown Lands Minister within the meaning of section 36 may, in respect of the land referred to in subsection (1), enter into an agreement with the claimant Aboriginal Land Council so referred to, so as to achieve the following purposes:

(a) the vesting of the freehold title to that land, subject to any existing easements, in the claimant Aboriginal Land Council;

(b) the leasing in perpetuity of that land to Her Majesty at a nominal rent;

(c) the preparation of a plan of management in respect of that land giving the claimant Aboriginal Land Council or Aborigines defined rights, or conferring or imposing on the claimant Aboriginal Land Council or on Aborigines defined functions, in respect of that land.

(4) The Minister referred to in subsection (3) shall not enter into an agreement under that subsection in respect of land unless he is satisfied that Aborigines have traditional rights to the land or that Aborigines have had a long association with the land.

(4A) The Minister referred to in subsection (3) shall not enter into an agreement under that subsection in respect of land which is or is part of a travelling stock reserve as defined in section 4 of the Pastures Protection Act 1934 without the approval of the Minister administering that Act.

(5) For the purposes of giving effect to an agreement referred to in subsection (3):

(a) the Minister so referred to may, by notification published in the Gazette, vest the freehold title to land, subject to any existing easements, in the claimant Aboriginal Land Council and that notification shall have effect according to its tenor; and

(b) the Minister so referred to and the claimant Aboriginal Land Council may execute any necessary instruments.

(6) Subject to any plan of management prepared as referred to in subsection (3) in respect of the land, the vesting of the freehold title to any land in an Aboriginal Land Council, and the holding of the land under perpetual lease by Her Majesty, under this section shall not affect:

(a) the application of the provisions of the Pastures Protection Act 1934, or any regulations thereunder, to the land; or

(b) the status of the land for the purposes of any other law, other than a law relating to the registration of titles.

(7) There shall be no appeal against, or review of, a decision of the Minister referred to in subsection (3) not to enter into an agreement under this section.

(8) Stamp duty under the Stamp Duties Act 1920 shall not be payable in respect of an agreement or other instrument executed for the purposes of this section.

Appropriation or resumption of land

Acquisition of land

39. (1) The Minister may, for the purposes of this Act, acquire land (including an interest in land) by agreement or by compulsory process in accordance with the Land Acquisition (Just Terms Compensation) Act 1991.

(2) The Minister may do so only if the Minister is of the opinion that there are exceptional circumstances which warrant the acquisition of land for the purpose of satisfying the objectives of this Act.

(3) If so required by the Minister, the New South Wales Aboriginal Land Council or the Local Aboriginal Land Council is to make provision to the satisfaction of the Minister for the payment of the purchase price or of compensation for compulsory acquisition (together with all necessary charges and expenses incidental to the acquisition).

(4) The Minister may transfer land acquired under this section to an Aboriginal Land Council or other organisation or body established for the benefit of Aborigines.

(5) For the purposes of the Public Works Act 1912, an acquisition of land under this section is taken to be for an authorised work and the Minister is, in relation to that authorised work, taken to be the Constructing Authority.

(6) Part 3 of the Public Works Act 1912 does not apply in respect of works constructed under this Act.

Acquisition of land for housing Aborigines

56. (1) The Minister may arrange with the Minister for the time being administering the Housing Act 1912 the terms and conditions upon which, and the cases in which, the Housing Commission shall acquire land for purposes relating to the housing of Aborigines.

(2) Where the acquisition of land in accordance with arrangements made under subsection (1) would not, but for this subsection, be authorised by the Housing Act 1912, such an acquisition shall be deemed to have been so authorised.