



**New South Wales Aboriginal Land Council
Policy No.1 of 2016**

**Policy on the Assessment and Approval of Local Aboriginal
Land Council Land Dealings pursuant to Division 4 of Part 2
of the *Aboriginal Land Rights Act 1983***

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Policy on the Assessment and Approval of Local Aboriginal Land Council Land Dealings pursuant to Division 4 of Part 2 of the *Aboriginal Land Rights Act 1983*

1 What this policy is about

1.1 Statutory framework – NSWALC approval of LALC land dealings (Division 4, Part 2 of the ALRA)

- (1) This policy is about the assessment and approval of LALC land dealings by NSWALC under Division 4 of Part 2 of the *Aboriginal Land Rights Act 1983* (the “ALRA”).

1.1.1 What is the purpose of this policy?

- (2) NSWALC has made this policy in order to give guidance to NSWALC itself, to LALCs, and to persons dealing with LALCs, about how NSWALC will perform its approval functions and exercise its discretions under Division 4 of Part 2 of the ALRA.

1.1.2 What is NSWALC’s role in LALC land dealings?

- (3) NSWALC has an approval function (see section 106(3)(h) and Division 4 of Part 2 of the ALRA) in relation to land dealings (e.g. - approve with or without conditions/ not approve). The expressions “deal with land” and “land dealing” in relation to land “vested” in Aboriginal Land Councils are defined broadly. Most dealings with LALC land must be approved by NSWALC (section 40E(1)).
- (4) The exceptions to this rule are:
 - (a) a lease for less than 3 years (including any option to renew the lease), *other than* a social housing management lease,
 - (b) a land dealing prescribed by the regulations (noting that none are presently prescribed) (section 40E(2)), and
 - (c) a land dealing relating to land that is reserved or dedicated under Part 4A of the *National Parks and Wildlife Act 1974* (including a lease negotiated pursuant to s.36A of the ALRA) (section 42A(2)).

This policy does not apply to land dealings that fall within these exceptions.

- (5) A purchase or other acquisition of land by a LALC is not a dealing with land vested in a LALC.

1.1.3 Why is it important to comply with the ALRA, ALRR and NSWALC Policy in relation to land dealings?

- (6) If a LALC land dealing is done without NSWALC’s approval, or is done contrary to the conditions of NSWALC’s approval (and without the benefit of a dealing approval certificate and, if required, a registration approval certificate), the results will be:

- the dealing will be void (not legally binding) (section 42C(1)), and
- the NSW Registrar-General will not register any registrable instrument that gives effect to or forms part of the dealing (section 42M(2)).

Further, any agreement to deal with land is, if the land dealing is not approved, unenforceable (section 42E(4) & (5) ALRA).

1.1.4 How is NSWALC's approval to be sought?

- (7) A LALC must make an application to NSWALC (section 42F). The application must meet the requirements in section 42F(2) and clause 102 of the ALRR (including being in the form approved by NSWALC).

1.1.5 How will NSWALC process land dealing approval applications?

- (8) If an application is made to NSWALC in the way required by the ALRR, NSWALC must process the application according to the requirements of the ALRA and the ALRR. NSWALC:
- (a) must, as soon as practicable after receiving a proper application from a LALC, give the LALC information about such things as how long the approval process is likely to take, whether an expert assessment panel is to be constituted, and how much it will cost (clause 105 of the ALRR),
 - (b) may convene an "expert advisory panel" to assess the whole or part of an application (section 42I and clauses 106 to 109 of the ALRR).
- (9) Ultimately, NSWALC must determine whether it will approve the proposed land dealing, and, if so, what conditions (if any) it will impose on the approval (section 42G).

1.1.6 When will NSWALC approve a proposed land dealing?

- (10) Subject to its discretion to refuse to approve (see below), NSWALC must approve a proposed land dealing where it is satisfied of the matters set out in section 42G(1), that is:
- (a) that a proper application for approval has been made in accordance with the ALRA and ALRR,
 - (b) that the LALC's members have passed a resolution in accordance with the requirements in section 42G(5), and
 - (c) that the proposed land dealing is in accordance with the members' resolution.

1.1.7 When may NSWALC refuse to approve a proposed land dealing?

- (11) NSWALC may refuse to approve a proposed land dealing if it considers that the proposed land dealing is, or is likely to be, contrary to the interests of the members of the LALC or other Aboriginal persons within the area of the LALC (section 42G(2)).

1.1.8 Can NSWALC impose conditions on an approval?

- (12) If NSWALC determines that it should approve a proposed land dealing, it may do so

subject to conditions that need to be satisfied (section 42G(6)).

1.1.9 Issue of Certificates on approval of land dealings

(13) If NSWALC approves a LALC land dealing, it will issue the LALC with:

- (a) a Dealing Approval Certificate, which is conclusive evidence of the approval and contains the conditions (if any) to which the approval is subject (sections 41(1) and 42K(1)), and
- (b) if required, and if all relevant conditions are complied with, a Registration Approval Certificate, which authorises the NSW Registrar-General (and his agency LPI), to register any registrable instrument that gives effect to or forms part of the dealing (sections 41(2), 42K(2), (3) and (4) and 42M).

These certificates provide LALCs, and persons dealing with them, with certainty that the land dealing has been approved by NSWALC and that the registration of any registrable interest is authorised.

1.1.10 How is NSWALC required to make these decisions?

- (14) The requirements of section 42G(1) (set out in (10) above, and requiring that the decision to deal with the land be made by the LALC's members) do *not* involve NSWALC exercising any discretion: either NSWALC is satisfied that the criteria are in fact met or it is not.
- (15) However, the matters referred to in section 42G(2) confer a broad discretion on NSWALC to refuse a proposed land dealing even though it may satisfy the requirements in section 42G(1).
- (16) Section 42G(3) sets out some things that *may* be taken into account by NSWALC, and in doing so gives an idea of what the purpose of NSWALC's discretion is, but this is not an exhaustive list.
- (17) Similarly, NSWALC's discretion to impose conditions on an approval is broad.
- (18) Further, the ALRA leaves other aspects of the operation of the land dealings approval regime open to NSWALC's consideration or discretion. For example:
 - (a) requiring additional information or documents in relation to a land dealing approval application (section 42F(4)), and
 - (b) constituting expert advisory panels to assess all or part of an application (section 42I and clause 107 of the ALRR).

2 Interpretation

2.1 Definitions

- (1) Words and expressions used in this policy have the same meaning as they have in Division 4 of Part 2 of the ALRA.
- (2) Further, references to section numbers (e.g. section 42G) are references to sections in the ALRA (except where the section number is followed by the name of another

Act).

- (3) In addition, the following words and expressions used in this policy have the following meanings:

ALRA: means the *Aboriginal Land Rights Act 1983*

ALRR: means the *Aboriginal Land Rights Regulation 2014*

LALC's members and others in relation to a LALC: means the LALC's members and other Aboriginal persons in the LALC's area

LALC: means a Local Aboriginal Land Council

NSWALC: means the New South Wales Aboriginal Land Council

LPU: means NSWALC's Land and Property Unit

2.2 Interpreting this policy

- (1) Importantly, this policy is not law and should not be read as such.
- (2) If anything in this policy appears to be in conflict with anything in the ALRA or ALRR (or any other law) then it must be read, if possible, so that it does not conflict.
- (3) If the meaning of anything in this policy is open to doubt, it should be read so as to give best effect to the purposes that are evident throughout this policy (and consistently with the ALRA and ALRR).
- (4) LALCs are encouraged to contact NSWALC (refer to NSWALC's Land Dealing Quick Reference Guide and Contacts (link: <http://www.alc.org.au/land-councils/lalc-land-dealings.aspx>)) and seek clarification if there are any matters in the policy that are unclear.

3 The land dealings approval process

3.1 The 4 stages of the land dealings approval process – from application to completion

- (1) For the purposes of this policy, making a land dealing approval application, the assessment and approval of that application and the implementation and enforcement of the approval, are divided into the following stages:
 - **Stage 1:** Applying for approval, section 42F(2) compliance check, section 42G(1) procedural assessment and preliminary assessment;
 - **Stage 2:** Substantive assessment;
 - **Stage 3:** Determination (including dealing approval certificates); and
 - **Stage 4:** Implementing and enforcing approvals (including registration approval certificates and registration prohibition notices).

(Http: [Insert hyperlink to flowchart](#))

- (2) It is important to recognise that while these are described as discreet and sequential stages in this policy, this does not mean that one stage must be completed before activities relevant to another stage may commence.

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- (3) If, when submitting the application, the LALC advises that the application is urgent, the NSWALC will endeavour wherever possible to accommodate the LALC's timeframes.

3.2 Stage 1 – Applying for approval, procedural check and preliminary assessment

- (1) The LALC makes the land dealing approval application to NSWALC.

3.2.1 What does a LALC have to do when lodging a land dealing approval application

Prescribed information and documents

- (2) The ALRA (section 42F(2)) provides that an application for land dealing approval is:

- (a) *to be made in accordance with the regulations, and*
- (b) *to contain the matters prescribed by the regulations, and*
- (c) *to be accompanied by any application fee, and any documents, prescribed by the regulations.*

- (3) The ALRR (clause 102) sets out the requirements for a proper land dealing approval application. It states:

(1) A land dealing approval application is to be made in the form approved by the New South Wales Aboriginal Land Council.

(2) An application must:

- (a) *identify the land affected by the proposed land dealing, and*
- (b) *specify the manner in which the land is to be dealt with, and*
- (c) *set out any terms or conditions of the proposed dealing, and*
- (d) *be accompanied by a copy of the resolution of the Local Aboriginal Land Council approving the dealing, and*
- (e) *be accompanied by information and other material establishing that the Local Aboriginal Land Council has complied with the requirements of section 42G (5) of the Act, and*
- (f) *be accompanied by a valuation of the land, and*
- (g) *be accompanied by the application fee.*

- (4) An application for approval must be made using the NSWALC approved form. The approved form is available on the NSWALC website (link: <http://www.alc.org.au/land-councils/lalc-land-dealings.aspx>) and from the LPU.

- (5) The LALC resolution approving the dealing that must be provided, is a resolution of the kind described in section 42G(5): the resolution must be passed by not less than 80% of the voting members present at a meeting of which notice was given not less than 7 clear calendar days before the day on which the meeting was held, and the notice for the meeting must have identified the land and nature of the proposed dealing, and must have stated that, *at the meeting it is proposed to decide whether or not to approve of the land dealing* (clause 101 ALRR).

- (6) It is recommended the LALC consider obtaining an independent valuation commissioned by the LALC for the land dealing in question from a registered valuer. In limited circumstances NSWALC may accept a Valuer General valuation (e.g. a LALC is seeking to take out a mortgage over one of its properties as the mortgagee/lender would have obtained its own valuation).
- (7) The application fee that must be paid is the \$250 application fee prescribed in clause 103(1) of the ALRR. This is a non-refundable fee. No fee, however, is payable for the approval of only a development application (clause 103(2)).

Additional information and documents

- (8) In addition to the mandatory requirements detailed above:
 - (a) a LALC may include with its application any additional information and documents that it wants NSWALC to consider (section 42F(3)); and
 - (b) NSWALC may require additional information and documents following an initial assessment of the application (section 42F(4)).
- (9) LALCs should provide all relevant additional information and documents that NSWALC is likely to need to properly assess a proposed land dealing. This is in a LALC's interest as it is likely to greatly speed the assessment and approval process.

3.2.2 NSWALC assistance with making land dealing applications

- (10) NSWALC staff will endeavour to provide reasonable assistance and guidance that a LALC may request to make a complying land dealing approval application. NSWALC staff will also provide assistance to a LALC, if requested, by advising on the further information that NSWALC will require when assessing the application.
- (11) LALCs are encouraged to firstly obtain a title search of the land they want to deal with. The title search will show if there is anything registered on the title that will prevent the LALC from dealing with the land, e.g. a section 42 notation that an approved determination of native title is required. LALCs are then encouraged to approach NSWALC at an early stage – in many cases prior to the making of a formal application (which can only be made after the LALC's members have approved the proposal) – to discuss what further material will best assist in making the approval process a swift and smooth one.
- (12) It is important that when NSWALC staff provide such assistance, LALCs understand that while the assistance is given in good faith:
 - (a) sole responsibility for making complete and adequate applications rests with the LALC, and
 - (b) any assistance given by NSWALC staff is not any kind of representation or promise that the application will be approved.

3.2.3 Compliance and Procedural checks to ensure application is valid

- (13) When NSWALC receives a land dealing application, it will give written notice to the LALC that it has been received and advise the LALC that it will review the application and provide the LALC with feedback on the application, in most cases, within 14 days.
- (14) The LPU will then consider whether the application complies with the requirements of section 42F(2) of the ALRA and clause 102 of the ALRR.

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- (15) If the application does not comply with these requirements, the application is invalid. In those circumstances NSWALC is not required to deal with the application further and the application will not progress through the other Stages of the process described below. The application fee will not be refunded. LPU will advise the LALC of the non-compliance and how to address the non-compliance. If time and resources permit, LPU will carry out the procedural check stated below and provide LALCs with comprehensive feedback on what the LALC can do to comply with the ALRA and ALRR.
- (16) The LALC will be given 28 days (or any longer period that is agreed in writing with the LALC), to rectify the application. If, after that time, the application still does not comply, then the LALC will be advised that NSWALC does not consider the application to be a compliant land dealing approval application and that it will not be considered further. If the LALC still wishes to seek NSWALC's approval for the proposed land dealing it will need to make a fresh application.
- (17) The compliance check does not involve the exercise of any discretion or the consideration of whether the material submitted with the application establishes that the proposal should be approved. It is a mechanical exercise wholly concerned with whether the application is in the form required, and contains the information and documents required, by the ALRA and the ALRR.
- (18) If LPU considers that the application complies with the requirements of section 42F(2) and clause 102, or that it does *not* comply but LPU is able to provide the LALC with the comprehensive feedback stated in (15) above, the LPU will give consideration as to whether the application establishes that the proposed dealing complies with section 42G(1) of the ALRA (which are the basic *procedural* requirements that NSWALC must be satisfied of before it will approve any proposed land dealing). The purpose of this initial consideration is to identify, as early as possible, any defects in a proposed land dealing that may mean that there is little point in proceeding to consider the application further.
- (19) If the land dealing application *complies* with the procedural requirements in section 42G(1), NSWALC staff will proceed with the preliminary assessment.
- (20) If the proposed dealing does *not* comply with the procedural requirements in section 42G(1), the LALC will be given written notice of this fact, and why it does not comply. Any such notice will be given as soon as practicable after the completion of the compliance check. If time and resources permit, LPU will also carry out a preliminary assessment and provide the LALC with comprehensive feedback so that the LALC can rectify all aspects of the Application so that it complies with the ALRA and ALRR.
- (21) If, after being given notice that a land dealing application does not comply, the LALC:
- disputes the non-compliance with section 42G(1), or
 - does *not*, within 28 days (or any longer period that is agreed in writing with the LALC) of the notice being given:
 - provide additional information or documents that demonstrate that the proposed dealing does in fact comply, or
 - withdraw the application in writing,

the Council of NSWALC will proceed to determine the land dealing approval application (*without consideration* of whether the proposed land dealing is, or is likely to be, contrary to the interests of the LALC's members or other Aboriginal

persons on the LALC area) on a procedural compliance basis.

- (22) If, in determining the application, the Council of NSWALC is not satisfied that the proposed land dealing meets the procedural requirements in section 42G(1), it will refuse the application and the LALC will be given written notice of this.
- (23) If, in determining the application, the Council of NSWALC is satisfied that the proposed land dealing meets the procedural requirements in section 42G(1), the LALC will be given written notice of this fact, and that the LPU will proceed with the preliminary assessment of the application.

3.2.4 Preliminary assessment of applications, fees, additional information (if required), expert panel (if required) and estimated time for determining applications

- (24) In the Preliminary assessment, the LPU will form preliminary views in relation to an application, and they will consider:
 - (a) whether additional information or documents are required (pursuant to section 42F(4)),
 - (b) the manner in which it intends to assess the application and whether or not the application, or any part of it, is to be referred to an expert advisory panel (and if so, the details of the panel and the nature and proposed terms of reference for the panel's assessment) (pursuant to section 42I of the ALRA and clause 107 of the ALRR),
 - (c) what the assessment fee for the assessment of the application will be, or how such assessment fee is to be calculated and an estimate of the likely fee (pursuant to section 42F(5) of the ALRA and clause 104 of the ALRR),
 - (d) the time for payment of the assessment fee,
 - (e) whether any security will be required from the LALC to secure the payment of the assessment fee,
 - (f) any application made by the LALC to waive payment of some or the whole of an assessment fee, and
 - (g) the estimated time for determining the application.
- (25) The LALC will then be given the written notice by NSWALC, required by clause 105 of the ALRR, and also notice of NSWALC's consideration of all other matters referred to above (together referred to as the "Clause 105 notice").

3.2.5 NSWALC can request a LALC provide additional information in support of a land dealing application

- (26) NSWALC has a broad discretion under section 42F(4) to require additional information and documents. There is nothing in section 42F(4) which places any time restriction on when, or at what stage, NSWALC may require further information and documents. NSWALC is mindful though that the land dealing assessment and approval process be conducted as efficiently as possible.
- (27) NSWALC staff may discuss the additional information or documents NSWALC requires with the LALC's contact person.
- (28) Where the LALC refuses or fails to provide the additional information or documents required by NSWALC, the application will proceed to the substantive

assessment without the benefit of the additional information or documents.

3.2.6 Referral to an expert advisory panel

- (29) NSWALC may refer all or part of a land dealing approval application to an expert advisory panel if it considers it is appropriate to do so. Where LALCs have obtained independent advice from experts listed on the Expert Panel, NSWALC will, wherever possible, consider that advice instead of consulting another expert on the panel.
- (30) NSWALC will consider it appropriate to constitute an expert advisory panel if:
 - (a) the LALC requests it to do so, or
 - (b) it appears to NSWALC that it is desirable to obtain the report of external experts, having regard to the nature of the proposal, including the strategic significance or value of the land and the complexity of the proposed transactions, or for any other reason.
- (31) If NSWALC gives notice that it proposes to refer a proposed land dealing to an expert advisory panel, it will also give the LALC notice of:
 - (a) at least two (2) persons/companies it proposes to appoint to the panel, and
 - (b) the proposed terms of reference for the panel's assessment.
- (32) If NSWALC proposes to constitute an expert advisory panel to assess a proposed land dealing (or part of it), NSWALC will also provide the LALC with an estimate of the likely costs of the panel.
- (33) The costs of an expert advisory panel are to be paid by the LALC and are the total of:
 - (a) the professional fees of the experts on the panel,
 - (b) the reasonable service charges (including for photocopying and printing) and expenses of the experts on the panel (including travel), and
 - (c) NSWALC's reasonable expenses of providing all necessary administrative and logistical support to the panel).

3.2.7 Time for determining the application

- (34) Estimates of time required to determine a land dealing approval application will be calculated on the following basis:
 - (a) times stated will run from the time when NSWALC receives from the LALC the notification referred to in clause 105(2)(b) of the ALRR (see (37) below), and
 - (b) it will be assumed that requests for additional information or documents will be complied with within 28 days, or such longer time as may have already been agreed between the LALC and NSWALC.
- (35) When the LALC is notified of the estimate of the time required to determine the land dealing application, it will also be notified of:
 - (a) these and any other assumptions upon which the estimate is based,
 - (b) the major variables that are likely to affect the actual time required to determine the application.

3.2.8 Clause 105 notice to the LALC

- (36) Having regard to NSWALC's obligation under clause 105(1) of the ALRR to give the notice referred to in that provision as soon as practicable after receiving a land dealing approval application, NSWALC will ordinarily aim to give the applicant LALC the Clause 105 notice (see (25) above), as soon as reasonably practicable after the completion of the Compliance and Procedural checks (see paragraph 3.2.3 above).

3.2.9 LALC to either accept or reject proposed manner of assessment, fees paid and proposed securities

- (37) After giving the Clause 105 notice referred to above, NSWALC will take no further action in relation to the land dealing approval application unless the LALC:
- (a) agrees to the manner in which the land dealing is to be assessed and any fees payable as per clause 105(2)(b) of the ALRR,
 - (b) provides any security for the payment of an assessment fee that may have been required in NSWALC's notice, and
 - (c) pays any amount by way of assessment fee that may be payable in accordance with NSWALC's notice,
- (38) If the LALC does not agree with NSWALC's Clause 105 notice and agreement cannot be reached in relation to alternative assessment methods/options NSWALC is not required to determine the application or further assess the application and NSWALC will refuse the application.

3.3 Stage 2 – Substantive assessment

- (1) In Stage 2, NSWALC staff will undertake any further substantive assessment required.
- (2) If the application, or part of it, has been referred to an expert advisory panel, NSWALC staff will consider the panel's report.
- (3) The purpose of the Stage 2 substantive assessment is for NSWALC staff to decide what recommendation to make to the Council of NSWALC about:
 - (a) whether the proposed land dealing should be approved or whether it should be considered to be contrary to, or likely to be contrary to, the interests of the LALC's members and other Aboriginal persons in the LALC area and refused, and
 - (b) the conditions, if any, that should be placed on any approval.
- (4) The Stage 2 assessment will be carried out, having regard to:
 - (a) the estimate of the time required by NSWALC to determine the application as set out in the Clause 105 notice, and
 - (b) the need for the land dealing approval process to operate efficiently in general.
- (5) The Stage 2 assessment will be undertaken having regard to:
 - (a) section 42G and each of the matters set out in Sections 4 and 5 of this policy
 - (b) all the materials provided to NSWALC by the LALC (including any additional

- information or documents required by NSWALC),
 - (c) any report of an expert advisory panel that has been obtained, and
 - (d) any other relevant material available to NSWALC.
- (6) NSWALC staff will aim to complete Stage 2 as soon as practicable after:
- (a) receiving all additional information or documents required from the LALC, or
 - (b) receiving any report of an expert advisory panel that has been obtained,
- whichever one comes later and in any case, within 14 days of receipt of the information or report.
- (7) At the end of Stage 2, NSWALC staff will submit the application to the Council of NSWALC with their recommendation.
- (8) If NSWALC has requested additional information or documents and the LALC has *not* provided this information or documents, the Stage 2 assessment will be carried out, and a recommendation made to the Council, without the benefit of the additional information or documents.
- (9) LALCs should note that the Council of NSWALC usually imposes conditions on its approval such as limiting the approval to a year or two (2) years or requiring the LALC to receive at least market value for the land dealing. If, however, NSWALC staff propose to recommend that the Council of NSWALC impose other conditions then the LALC will be given notice of the proposed conditions and an opportunity to comment.
- (10) The LALC will be given written notice of the completion of the Stage 2 assessment and of the date/s of the Council meeting at which the land dealing approval application is expected to be considered and determined.

3.4 Stage 3 – Determination (including Dealing Approval Certificates)

- (1) In Stage 3, the Council of NSWALC will determine the land dealing approval application. The Council of NSWALC's determination will be a determination of:
- (a) whether or not the proposed land dealing is approved, and
 - (b) the conditions, if any, that are placed on any approval.
- (2) The determination will be made, having regard to section 42G of the ALRA and each of the matters set out in Sections 4 and 5 of this policy.
- (3) The determination will be made on the basis of:
- (a) all the material provided to NSWALC by the LALC,
 - (b) any report of an expert advisory panel that has been obtained,
 - (c) any other relevant material available to NSWALC, and
 - (d) the recommendation of NSWALC staff in relation to all of that material.
- (4) Unless, on considering the application, the Council of NSWALC considers that it requires additional information and documents in order to determine the application, the Council of NSWALC will determine an application at the first scheduled meeting after the completion of the Stage 2 substantive assessment.
- (5) If the Council of NSWALC determines that the proposed land dealing should be

approved, NSWALC staff will notify the LALC as soon as possible after the determination and the NSWALC Chief Executive Officer will, as required by section 42K(1) of the ALRA, will issue a Dealing Approval Certificate within 14 days of the determination being made.

- (6) If the Council of NSWALC determines that the proposed land dealing should *not* be approved, NSWALC staff will notify the LALC as soon as possible after the determination.

3.5 Stage 4 - Implementing and enforcing approvals (including registration approval certificates and registration prohibition notices).

- (1) If NSWALC approves a proposed land dealing subject to conditions, compliance with those conditions is critical to whether or not the land dealing is authorised under the ALRA and may proceed (see sections 42C(1), 42E(1), 42K(2) and 119 of the ALRA).
- (2) If NSWALC approves a proposed land dealing subject to a condition that:
 - (a) a party enters a land dealing approval agreement that is registrable under section 42N of the ALRA with NSWALC, or
 - (b) the transferee of the land enters a land dealing approval agreement of another kind with NSWALC (which will only generally be the case where the transferee is a related entity of the LALC and the LALC and/or its members remain interested in the land and further dealings with it),

compliance with the approval agreement may be critical to whether or not the land may be further dealt with by the transferee (see sections 42O and 42P of the ALRA).

- (3) If NSWALC approves a proposed land dealing subject to a condition that the LALC enters a land dealing approval agreement with NSWALC, non-compliance with the land dealing approval agreement will be taken to be a breach of the ALRA, with the potential consequences that breaches of the ALRA may have (section 42G(7)). These include a compliance direction under Part 12 of the ALRA and the appointment of an administrator under Part 11 of the ALRA.

3.6 Registration Approval Certificate

- (1) Where a land dealing involves the registration of a registrable instrument (as defined in section 40 of the ALRA), registration will not be possible without a Registration Approval Certificate ("RAC") from NSWALC. Before a RAC is issued, however, NSWALC's Chief Executive Officer will require proof of compliance with all relevant conditions of the approval including the payment of any applicable community development levy (see section 42K(2) of the ALRA).
- (2) Proving compliance with the conditions, and demonstrating the other matters referred to in section 42K(2), will be the LALC's responsibility. It is also the responsibility of the LALC to provide all information and documents that are required within a reasonable timeframe (14 days prior to requiring the RAC) to NSWALC so that they can be reconciled against the conditions of approval.
- (3) A LALC seeking a RAC should apply to NSWALC (using the form available on the NSWALC website (link:<http://www.alc.org.au/land-councils/lalc-land-dealings.aspx>) or from the LPU, and providing all information and documents requested in that form).

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- (4) If, at the time that this application is made and considered, one or more conditions of approval are still to be fulfilled, NSWALC staff will write to the LALC and tell the LALC what outstanding conditions have not been met and what the LALC needs to do to address this in order to receive the RAC.
 - (5) LALCs should note that the community development levy must be paid *before* NSWALC can issue a RAC.
 - (6) NSWALC staff will consider the application for a RAC and provide a written response to the LALC as soon as practicable after receiving the application. If the LALC has demonstrated compliance with the conditions of approval and section 42K(2) of the ALRA the LPU will make a recommendation to NSWALC's Chief Executive Officer to issue the RAC. NSWALC will issue a RAC within 14 days of receiving a compliant RAC Application.
 - (7) LALCs should note that with some dealings, such as a subdivision into multi lots and sale of those lots, more than one RAC is likely to be required, e.g. one RAC is required for the registration of the plan of subdivision and usually one RAC for each of the lots sold.
 - (8) A RAC, where it is to be issued, will generally be given at a point in time immediately prior to registration being required (e.g. at settlement in the case of a sale and transfer of land).

3.7 Registration prohibition notices

- (1) If there is a land dealing approval agreement:
 - (a) registered under section 42N, or
 - (b) with the transferee of LALC land (which will only generally be the case where the transferee is a related entity of the LALC and the LALC and/or its members remain interested in the land and further dealings with it),

NSWALC may have a registration prohibition notice recorded on the title of the land (section 42O). In that case, compliance with the land dealing approval agreement will be critical to the registered proprietor's ability to further deal with the land (section 42P).

- (2) Proving compliance with a land dealing approval agreement in these circumstances, will be the registered proprietor's responsibility.
- (3) A registered proprietor seeking NSWALC's consent to deal with the land, or the removal of the registration prohibition notice, should apply in writing to NSWALC providing evidence as to why the prohibition notice should be lifted.
- (4) NSWALC will provide a written response to the applicant as soon as possible (in most cases within 14 days of receiving the application).

4 The 5 general matters that NSWALC will take into account when considering whether to refuse approval and/or impose conditions

4.1 Matters NSWALC may consider

- (1) The Council of NSWALC may refuse to approve a land dealing application if it considers the dealing is, or is likely to be, contrary to the interests of the members of the LALC or other Aboriginal persons within the LALC area (section 42G(2)). The Council of NSWALC may also place conditions on an approval of a land dealing (section 42G(6)).
- (2) The ALRA sets out some matters NSWALC may consider when deciding whether to refuse an application (section 42G(3)), but makes it clear that NSWALC is not limited to considering those matters.
- (3) This policy identifies five broad matters that NSWALC will take into account when deciding whether to refuse an application or impose conditions on an approval, as follows:
 - (a) Transparency and probity,
 - (b) Consistency with LALC community, land and business plan,
 - (c) Holding and using proceeds,
 - (d) Cultural concerns, and
 - (e) Commerciality.

These broad headings reflect and are consistent with the matters in section 42G(3).

4.2 Transparency and probity

- (1) Decisions to deal with LALC land must be made transparently and with a high degree of probity. It will always be contrary, or likely to be contrary, to the interests of the LALC's members and others if land is dealt with in circumstances where transparency and probity are not evident in the decision making.
- (2) In all cases, the disclosure requirements in Part 10 of the ALRA must be strictly complied with wherever they apply.

4.2.1 Dealings from which LALC's members and others will otherwise benefit

- (3) Similar considerations apply where one or more of the LALC's members and others will benefit from the land dealing in some particular way. An example of this is where a member of the LALC is to be engaged as a consultant in connection with a land development project. In this case, the same measures as those referred to above should be taken to ensure that transparency and probity are evident.
- (4) Concerns about transparency and probity in these circumstances will, however, be easily allayed if the decision making process was founded on any open and transparent market testing process such as a call for expressions of interest overseen by an external probity officer.
- (5) If NSWALC cannot be satisfied that the decision to undertake a proposed land dealing was made with transparency and probity (and particularly if requests for further information and documents are not answered or are not answered satisfactorily), it will generally consider that the proposed dealing or dealings concerned are likely to be contrary to the interests of the LALC's members and others, and it may refuse to approve the application.

- (6) NSWALC may impose conditions on an approval of a proposed land dealing that aim to ensure that the dealing is done transparently.
- (7) If a proposal anticipates that LALC land be transferred or leased to a LALC's members and others (or otherwise dealt with in favour of a LALC's members and others) according to a community benefits scheme, NSWALC is likely to impose a condition on any approval aimed at ensuring that the land is dealt with only in accordance with that scheme.

4.3 Consistency with LALC community, land and business plan

- (1) Community, land and business plans, are intended to encourage better land use decision making by requiring LALCs to establish a strategic framework within which decisions can be made in the short to medium term. Consistency of a proposed land dealing with a Community, land and business plan is one of the matters specifically listed in section 42G(3) of the ALRA which NSWALC may consider when deciding whether to approve a land dealing application (see section 42G(3)(a)).
- (2) NSWALC acknowledges that it would be unrealistic to expect that all land dealings that a LALC may propose during the life of a community, land and business plan will be specifically anticipated in the plan. However, the more significant a land dealing proposal may be in terms of:
 - (a) the area of the land affected by the proposal,
 - (b) what proportion of the LALC's total lands this area is,
 - (c) the strategic importance of the land to the LALC in other respects,
 - (d) the complexity of the proposal,
 - (e) any investment of LALC resources required to undertake the proposal, and
 - (f) the extent to which the future use of the land will be affected by the proposal,the more important it will generally be that the decision to deal with the land forms part of, or is at least clearly consistent with the objects and strategies in, the LALC's approved community, land and business plan.
- (3) Key considerations for NSWALC in relation to proposed land dealings will be:
 - (a) is the proposed land dealing part of the broader plan for the use of the LALC's land and the achievement of the LALC's objectives in the LALC's community, land and business plan,
 - (b) is the proposed land dealing consistent with the LALC's objectives and strategies set out in the community, land and business plan, and
 - (c) will the proposed dealing support the achievement of the LALC's objectives set out in the community, land and business plan (e.g. by generating income to enable the provision of a proposed or existing community benefits scheme)?

4.4 Holding and using proceeds

- (1) If a LALC disposes of land in order to produce income, it is turning a land asset (which enjoys significant protections under the ALRA, including the protection against compulsory acquisition in section 42B) into cash (which does not enjoy the

same protections).

- (2) The risks are likely to be greater where the LALC has a history of financial and/or management concerns. Indicators of this include where:
 - (a) funding has ceased to the LALC, or frequently ceases, because of section 162(2) of the ALRA,
 - (b) the LALC's most recent audit has raised significant concerns,
 - (c) the LALC has recently been subject to investigation or has recently had an administrator appointed.
- (3) The more significant a land dealing proposal may be in terms of:
 - (a) the area of the land affected by the proposal,
 - (b) what proportion of the LALC's total lands this area is,
 - (c) the strategic importance of the land to the LALC in other respects,
 - (d) any investment of LALC resources required to undertake the proposal,
 - (e) the extent to which the future use of the land will be affected by the proposal, and
 - (f) the proceeds that it is expected to produce,

the more important it is that proper and robust arrangements are in place to hold and deal with the proceeds.

4.5 Cultural concerns

- (1) Land is of cultural and heritage importance to Aboriginal people for many reasons. Some lands, or places and objects on the lands, may be of particular cultural or heritage significance.
- (2) Whether the LALC had proper regard to the cultural and heritage significance of the relevant land to Aboriginal persons is one of the matters specifically listed in section 42G(3) as a matter that NSWALC may consider in deciding whether to approve a land dealing application (see section 42G(3)(e)).
- (3) LALCs, and NSWALC, have statutory functions to take action to protect the culture and heritage of Aboriginal persons (sections 52(4)(a) and 106(7)(a)).
- (4) NSWALC is also conscious that there are processes under other State and Commonwealth legislation relevant to the protection of some aspects of the cultural significance of land. This includes the provisions in Part 6 of the *National Parks and Wildlife Act 1974* that give some protection to significant Aboriginal objects and places.
- (5) NSWALC recognises that the LALC's members are generally the people best placed to ensure that proper consideration is given to the protection of culture and heritage.
- (6) LALC members must consider the impact of a proposed land dealing on the cultural and heritage significance of land when they pass a resolution to approve the land dealing (sections 42G(1)(b) and 42G(5)(c)(ii)). Further, to the extent that the proposed land dealing is foreshadowed in the LALC's approved community, land and business plan, that plan will have been prepared in consultation with any Aboriginal owners of land within the LALC's area (sections 82(2)(b) & 82(6)).

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- (7) If the members of a LALC themselves impose conditions on their decision to approve a proposed land dealing aimed at preserving aspects of the land's cultural or heritage significance, NSWALC will also impose conditions on its approval that aim to ensure that those conditions are satisfied.

4.6 Commerciality

- (1) It is important that LALC land be dealt with according to sound commercial principles. If it is not, it will generally not be in the best interests of the LALC's members and others.
- (2) This is not to disregard the fact that a LALC may have very good reasons for wishing to deal with land for little or no financial return. For example, pursuant to a community benefits scheme, a LALC may propose to lease land for a "peppercorn" to facilitate the provision of a service (e.g. a pre-school) to a LALC's members and others that would otherwise not be available to them.
- (3) Commerciality is a broad concept that involves consideration of:
- (a) whether the proposed land dealing is the highest and best commercial use of the land,
 - (b) the adequacy of the proceeds that the LALC will, or expects to, obtain from dealing with its land in the manner proposed,
 - (c) the risks inherent in proceeding with the land dealing, and
 - (d) the opportunity cost of not proceeding with the proposed land dealing, or of not proceeding with it expeditiously.

These considerations are often interrelated. Which one or more aspect is most important in any given case will depend on the nature and circumstances of the proposal.

- (4) The more significant a proposed land dealing is in terms of:
- (a) the area of the land affected by the proposal,
 - (b) what proportion of the LALC's total lands this area is,
 - (c) the strategic importance of the land to the LALC in other respects,
 - (d) the complexity of the proposal,
 - (e) any investment of LALC resources required to undertake the proposal, and
 - (f) the extent to which the future use of the land will be affected by the proposal,
- the more closely NSWALC will wish to satisfy itself as to the commerciality of the proposal, and the more likely it is that it may wish to refer the proposal, or part of it, to an expert advisory panel. NSWALC will also have regard to whether the LALC has obtained advice and if suitably qualified, experienced and independent consultants (incl. lawyers) have been contracted to develop the LALC's proposal (see also **clause 4.6.1** below).

4.6.1 Where LALCs obtain their own competent and independent advice

- (1) NSWALC does not wish to second guess the LALC's own advice and consideration

of a proposal about what the best use of land may be.

- (2) Where a LALC's proposal is clearly based on competent and independent advice, it is likely that the advice obtained by the LALC will be sufficient to satisfy any concerns NSWALC might otherwise have about the proposal's commerciality.
- (3) It is recommended that where LALCs intend to rely on their own advice for approval purposes, that they contact NSWALC to discuss the proposal, prior to any formal land dealing approval application being made. LALCs should note that advice of NSWALC staff should be taken as guidance only and cannot be taken to be binding on the ultimate determination which can only be made by the Council of NSWALC.

4.6.2 Information and documents that NSWALC may require

- (1) Where a LALC proposes to sell a single residential lot, and proposes to do so by public auction following a marketing campaign conducted by a real estate agent, NSWALC will require less information or documentation than for more complex transactions.
- (2) Where a significant or complex land dealing is proposed such as a proposal that involves the subdivision, development and sale of a large and strategically important parcel of land in joint venture with a third party, NSWALC will generally require, in order to assess the proposed dealing for approval purposes, information and/or documents:
 - (a) setting out the full details of the proposal, including the terms on which it is to be done (e.g. any contract, or other formal documentation of the proposal, that is in existence, such as any project delivery agreement any joint venture agreement and/or any development consent already obtained),
 - (b) concerning the experience of key personnel responsible for the proposal's successful completion,
 - (c) an independent valuation, commissioned by the LALC for the land dealing in question from a registered valuer, not more than 12 months old, and
 - (d) otherwise demonstrating the commerciality of the proposal, such as feasibility studies and business plans and the information on which those studies and plans are based.

5 Further considerations in relation to imposing conditions on approvals

5.1 When will NSWALC impose conditions on an approval?

- (1) Approval conditions provide a means by which the interests of the LALC and the LALC's members and others are protected.
- (2) Where the members of the LALC themselves impose conditions on their decision to approve a proposed land dealing, then NSWALC will impose conditions on its approval that duplicate the members' conditions, or otherwise aim to ensure that the restrictions on the proposed dealing required by the members must be observed.
- (3) NSWALC may reach its own view that it can only be satisfied that a proposed land dealing is not likely to be contrary to the interests of the LALC's members and others

if certain conditions are observed.

5.2 What sorts of conditions might be imposed?

- (1) The ALRA imposes some restrictions on the conditions that may be imposed by NSWALC on a land dealing approval. NSWALC may only impose a condition that is to be satisfied prior to the completion of a land dealing, not after (section 42G(6)(a)).
- (2) Section 42G(6)(b) also enables NSWALC to impose a condition that requires the LALC or other parties to the land dealing to enter into a land dealing approval agreement, the terms of which are to be performed after the completion of the land dealing. NSWALC could impose a condition, for example, requiring a LALC to enter a land dealing approval agreement which states that the proceeds of a sale are to be held and applied according to the terms of a charitable trust.
- (3) NSWALC will give special consideration, when imposing conditions, to ensure that the conditions:
 - (a) effectively protect the interests of the LALC and a LALC's members and others in the manner intended,
 - (b) do not unduly interfere with the conduct of the approved proposal,
 - (c) do not render unworkable any aspect of the approved proposal, and
 - (d) do not raise unintended doubts about the validity of the interests of any participant in the approved proposal.

5.3 Conditions, including land dealing approval agreements, on significant and complex land dealing proposals

- (1) The conditions on which significant and complex land dealing proposals are approved may need to be detailed, and may need to include a land dealing approval agreement, to achieve their purposes.
- (2) In these circumstances, and in order to ensure that the conditions are well understood by all parties and are workable, it may be important that the conditions be the subject of discussions with the LALC's representatives, and in some cases other parties involved in the proposed transactions.
- (3) For this reason, it will generally be preferable that the LALC approach NSWALC at an early stage in the development of any significant or complex proposal, to seek guidance from NSWALC staff about which aspects of the proposal are likely to be of concern to NSWALC and are likely to become the subject of conditions.

In some cases it may be appropriate, and ultimately helpful to all concerned, if NSWALC has visibility of negotiations between the LALC and other parties to the proposal, to ensure that the proposal being developed is likely to be approved by the Council of NSWALC and that the conditions that the Council of NSWALC is likely to impose will not impede the conduct of the proposal if it is approved.

6 Dispute Resolution

In the event of a dispute between NSWALC and a LALC in relation to a Land Dealing Application or the application of the Land Dealings Policy, NSWALC will endeavour to resolve the dispute amicably, at a low level, and in a timely manner. If for some reason this is not possible, a LALC may refer the dispute to the Registrar of the ALRA. Part 13 of the ALRA provides for more formal dispute resolution procedures which may include mediation, arbitration or conciliation with the Registrar of the ALRA (see for example section 239A ALRA).