



**New South Wales Aboriginal Land Council
Policy No. LP 0601 of 2023**

**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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1. WHAT THIS POLICY IS ABOUT

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* (**ALRA**) and Division 1 of Part 2 of the *Aboriginal Land Rights Regulation 2020* (**ALRR**).

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.

All applications to NSWALC for approval of a land dealing from LALCs will be assessed against the provisions of the ALRA and the ALRR.

2. INTERPRETATION

2.1 Definitions

- (1) 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 2020*

LALC means a Local Aboriginal Land Council

NSWALC means the New South Wales Aboriginal Land Council

LPU means Land and Property Unit of NSWALC

Policy means this policy on the Assessment and Approval of Local Aboriginal Land Council Land Dealings by NSWALC

- (2) Words and expressions used in this Policy have the same meaning as they have in Division 4 of Part 2 of the ALRA.
- (3) 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).
- (4) References to clause numbers (e.g. clause 7) are references to clauses in the ALRR (except where the clause number is followed by the name of another Regulation).
- (5) References to Division and Part numbers (e.g. Division 4 of Part 2) are references to Divisions and Parts in the ALRA (except where the Division and Part number is followed by the name of another legislation).

2.2 Interpreting this Policy

- (1) 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 and seek clarification if there are any matters in the Policy that are unclear.

3. STATUTORY FRAMEWORK

3.1 What is a land dealing

- (1) Division 4 of Part 2 sets out the requirements for the application and approval of LALCs' land dealings.
- (2) The expressions "deal with land" and "land dealing" in relation to land vested in Aboriginal Land Councils are defined broadly in section 40(1) to mean:
 - (a) sell, exchange, lease, mortgage, dispose of, or otherwise create or pass a legal or equitable interest in, land,
 - (b) grant an easement or covenant over land or release an easement or covenant benefiting land,
 - (c) enter into a biobanking agreement relating to land under *the Threatened Species Conservation Act 1995*¹ or a conservation agreement under the *National Parks Wildlife Act 1974*,
 - (d) subdivide or consolidate land so as to affect, or consent to a plan of subdivision or consolidation of land that affects, the interests of an Aboriginal Land Council in that land, or
 - (e) make a development application in relation to land.
- (3) A LALC must not deal with land *vested* in it except in accordance with NSWALC's approval (section 42E(1)).
- (4) The term "vested" is broadly defined to include land that the LALC has a legal interest in, land to be transferred to the LALC pursuant to an Aboriginal Land Agreement (under section 36AA), land that is granted to the LALC pursuant to a land claim (under section 36) or land to be transferred to the LALC pursuant to a court order (section 40(2)).

3.2 Restrictions on dealing with LALC land

- (1) Certain LALC lands are restricted from dealings. These are:
 - (a) lands vested in the LALCs that are subject to native title rights and interests under section 36(9) or 36(9AA), and
 - (b) lands vested in the LALCs that are reserved or dedicated under Part 4A of the *National Parks and Wildlife Act 1974*.

¹ **Note:** Biobanking agreements under the *Threatened Species Conservation Act 1995* have been replaced with biodiversity stewardship agreements under the *Biodiversity Conservation Act 2016* following the enactment of the *Biodiversity Conservation Act 2016* on 25 February 2018 which repealed the *Threatened Species Conservation Act 1995*.

- (2) A LALC must not deal with land vested in it that is:
 - (a) subject to native title rights and interests unless the land is the subject of an approved determination of native title under the *Native Title Act 1993 (Cth)* (section 42(1)), or
 - (b) reserved or dedicated under Part 4A of the *National Parks and Wildlife Act 1974* except where the dealing is in accordance with that Act (section 42A(1)).
- (3) The land dealing provisions under Division 4 of Part 2 and this Policy do not apply to lands vested in LALCs that are reserved or dedicated under Part 4A of the *National Parks and Wildlife Act 1974*.

3.3 NSWALC's role in relation to LALCs' land dealings

- (1) NSWALC has an approval function in relation to LALCs' land dealings (section 106(3)(h) and Division 4 of Part 2).
- (2) If a LALC deals with land without NSWALC's approval, or not in accordance with the conditions of NSWALC's approval, the dealing will be void (not legally binding) and any agreement to deal with land is unenforceable (sections 42C(1), 42E(4)). Further, any registrable instrument that gives effect to or forms part of the dealing will not be registered (section 42M(2)).
- (3) All land dealings require approval from NSWALC, except for the following land dealings which do not require approval from NSWALC:
 - (a) a lease for less than 3 years (including any option to renew the lease), other than a social housing management lease (section 42E(2)(a)),
 - (b) a land dealing involving the making of a development application in relation to LALC land if the development has an estimated cost of less than \$500,000 (clause 6, ALRR),
 - (c) a land dealing prescribed by the ALRR to be exempt from NSWALC's approval (section 42E(2)(b)).

3.4 LALCs' acquisition of land

- (1) A purchase or acquisition of land is not a land dealing and the provisions under Division 4 of Part 2 of the ALRA and Division 1 of Part 2 of the ALRR do not apply to LALCs' acquisition of lands.
- (2) A LALC may purchase or acquire land if the purchase price is not more than 15% above the market value of the land (section 38(1A)(a)). The LALC must obtain a market valuation assessed by a qualified valuer to ascertain the market value of the land it proposes to purchase. A valuation is not required if the LALC acquires land for nominal consideration (section 38(1A)(c)).
- (3) If the LALC wishes to purchase land at a price that is more than 15% above market value (as assessed in the valuation report), the LALC must seek approval from NSWALC (not to be confused with land dealing approval which have stricter requirements) to purchase the land at a price of more than 15% above market value (section 38(1A)(b)).

4. THE LAND DEALING APPROVAL PROCESS

4.1 Before applying to NSWALC for approval

- (1) Before undertaking a land dealing, LALCs are encouraged to approach NSWALC at an early stage of the land dealing to discuss the requirements and the information or material needed for the proposed land dealing. In many cases, contacting NSWALC prior to submitting a formal application (which can only be made after the LALC's members have approved the land dealing) can assist in making the approval process a swift and smooth one.
- (2) 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 (such as a section 42 notation that requires an approved determination of native title).
- (3) If requested by a LALC, NSWALC staff will endeavour to provide reasonable assistance and guidance to assist the LALC making a compliant application for land dealing approval. NSWALC staff will also advise the LALC on the further information that NSWALC will require when assessing the application.
- (4) Whilst NSWALC staff will endeavour to provide reasonable assistance to LALCs, it is important that LALCs understand that while the assistance is given in good faith, the sole responsibility for making a complete and adequate application rests with the LALC, and any assistance given by NSWALC staff is not any kind of representation or promise that the application will be approved. The decision whether to approve a LALC's land dealing rests with the Councilors of NSWALC.

4.2 Stages of the land dealing approval process

- (4) For the purposes of this Policy, the land dealing approval process are divided into the following 4 stages:
 - a) Stage 1: Applying for approval
 - b) Stage 2: NSWALC's assessment of a land dealing application
 - c) Stage 3: Determination of a land dealing application
 - d) Stage 4: Implementing and enforcing a land dealing approval
- (5) 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.

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

5. STAGE 1 - APPLICATION FOR LAND DEALING APPROVAL

5.1 How to apply for approval of a land dealing

- (1) The LALC must make an application to NSWALC for land dealing approval using an application form approved by NSWALC (section 42F(1)). The application form is available on the NSWALC website (link: <http://www.alc.org.au/land-councils/lalc-land-dealings.aspx>) and from the LPU.

(2) The application must be made in accordance with the ALRR, must contain the matters prescribed by the ALRR, and must be accompanied by an application fee and any documents prescribed by the ALRR (section 42F(2)).

(3) The ALRR sets out the requirements for an application for land dealing approval. Clause 8(2) of the ALRR provides that:

'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) The application fee is \$250 and is not applicable if the land dealing consists only of a development application (clauses 8(4) and (5), ALRR).

(5) LALCs are encouraged to obtain an independent valuation for the land dealing from a qualified valuer. In limited circumstances, NSWALC may accept a valuation from the Valuer General (e.g. a land dealing involving a development application to build on the land using government funding).

(6) The valuation of the land must be relevant to the land dealing in question. For example, if the land dealing involves granting an easement over the land, then a valuation of the easement is required. If the land dealing involves a development or residential subdivision of land, it is recommended that the LALC obtains a valuation that determines the "as is" market value of the land and an "as if" value based on the highest and best use of the land ("as if" the land is subdivided).

(7) Section 42G(5) sets out the requirements for a resolution approving a land dealing, which provides that –

'A LALC resolution approving a land dealing must:

(a) *be passed at a meeting of which prior notice was given, in accordance with the regulations, and at which a quorum was present, and*

(b) *be passed by not less than 80 per cent of the voting members of the Council present at the meeting, and*

(c) *contain the following matters—*

(i) *the identity of the land,*

(ii) *a statement that the impact of the land dealing on the cultural and heritage significance of the land to Aboriginal persons has been considered in determining whether to approve the dealing,*

- (iii) *the manner in which the land is to be dealt with,*
- (iv) *any conditions to which the approval of the dealing is subject.'*

- (8) The notice referred to in section 42G(5)(a) must be given not less than 7 clear days before the day on which the meeting is to be held; must clearly identify the land subject to the land dealing; must state the manner in which the land is to be dealt with; and must state that at the meeting it is proposed to decide whether or not to approve the land dealing (clauses 7(1) and (2), ALRR).
- (9) The resolution approving the land dealing must be passed by not less than 80% of voting members at a meeting at which a quorum has been established and must contain the matters referred to in section 42G(5)(c).
- (10) It is important to note that the matters prescribed under sections 42F(2), 42G(5) and clauses 7 and 8 of the ALRR are mandatory. Failure to comply with these provisions will render the application for land dealing approval non-compliant and NSWALC does not have the power or discretion to assess and determine the land dealing.

5.2 Documents to be provided with an application for land dealing approval

- (1) The following documents will be required in order for NSWALC to assess compliance with section 42G(5) and clauses 7 and 8 of the ALRR:
 - (a) title search(es)
 - (b) meeting notice and evidence of compliant publication of the notice
 - (c) minutes of meeting and signed resolution approving the land dealing
 - (d) meeting attendance/sign in sheet
 - (e) the LALC's membership roll as at the date of the meeting
 - (f) the LALC's community land and business plan
 - (g) confirmation of payment of the land dealing application fee (currently prescribed at \$250)
- (2) In addition to the mandatory requirements detailed above, a LALC may include with its application any additional information and documents that it wants NSWALC to consider (section 42F(3)).
- (3) NSWALC may require additional information and documents following an initial assessment of the application (section 42F(4)).
- (4) 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 the LALC's interest as it is likely to greatly speed the assessment and approval process.

6. STAGE 2 - ASSESSMENT OF A LAND DEALING APPLICATION

6.1 Compliance and procedural check

- (1) When NSWALC receives an application for land dealing approval, 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.

- (2) The LPU will then consider whether the application complies with the requirements of section 42F(2) and clause 8 of the ALRR.
- (3) 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 and provide LALCs with comprehensive feedback on what the LALC can do to comply with the ALRA and ALRR.
- (4) 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 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.
- (5) If the application for land dealing approval complies with the procedural requirements in section 42F(2), NSWALC staff will proceed with the preliminary assessment.
- (6) If the proposed dealing does *not* comply with the procedural requirements in section 42F(2), the LALC will be given written notice of this fact, and the reason 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.
- (7) If, after being given notice that a land dealing application does not comply, the LALC:
 - (a) disputes the non-compliance with section 42F(2)), or
 - (b) 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 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.
- (8) If, in determining the application, the Council of NSWALC is not satisfied that the proposed land dealing meets the procedural requirements in section 42F(2), it will refuse the application and the LALC will be given written notice of this.
- (9) If, in determining the application, the Council of NSWALC is satisfied that the proposed land dealing meets the procedural requirements in section 42F(2), the LALC will be given written notice of this fact, and that the LPU will proceed with the preliminary assessment of the application.

6.2 Preliminary assessment

- (1) In the preliminary assessment, the LPU will form preliminary views in relation to the application for land dealing approval, and notify the LALC whether additional information or documents are required (pursuant to section 42F(4)).
- (2) The LPU will also notify the LALC, in writing, of the following (clause 10(1)):
 - (a) the manner in which NSWALC 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),
 - (b) the assessment fee for the application, or how such assessment fee is to be calculated, and an estimate of the likely fee (section 42F(5) and clause 10(1)),
 - (c) the time for payment of the assessment fee, and whether any security will be required from the LALC to secure the payment of the assessment fee,
 - (d) the estimated time for determining the application, and
 - (e) that NSWALC is not required to determine the application unless the LALC agrees to the proposed assessment fee, security and manner of determination.
- (3) NSWALC aims to notify the LALC of the above matters as soon as practicable after receiving an application for land dealing approval from the LALC.
- (4) After notifying the LALC of the matters referred to in clause 10(1) of the ALRR, NSWALC may refuse to assess or determine the application for land dealing approval if the LALC:
 - (a) does not agree to the manner in which the land dealing is to be assessed and any fees payable as per clause 10(1)(b) of the ALRR, or
 - (b) does not provide any security for the payment of an assessment fee that may have been required, or
 - (c) does not pay the assessment fee that may be payable.
- (5) If the LALC does not agree with the matters notified by NSWALC pursuant to clause 10(1), 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.

6.3 Additional information

- (1) 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.
- (2) NSWALC staff may discuss the additional information or documents NSWALC requires with the LALC's contact person.
- (3) 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.

6.4 Referral to an expert advisory panel

- (1) NSWALC may refer all or part of an application for approval of a land dealing to an expert advisory panel if it considers it is appropriate to do so (section 42I and clause 12). Where LALCs have obtained independent advice from experts listed on the register of expert advisory panel (formed pursuant to clause 11), NSWALC will, wherever possible, consider that advice instead of consulting another expert on the panel.
- (2) 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.
- (3) 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.
- (4) 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.
- (5) 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).

6.5 Substantive assessment

- (1) After the compliance check and preliminary assessment, 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 substantive assessment is for NSWALC staff to consider 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 substantive 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 notice provided to the LALC pursuant to clause 10(1), and
 - (b) the need for the land dealing approval process to operate efficiently in general.
- (5) The substantive assessment will be undertaken having regard to:
- (a) section 42G and each of the matters set out in Part 7 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 substantive assessment 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) If NSWALC has requested additional information or documents and the LALC has *not* provided this information or documents, the substantive assessment will be carried out, and a recommendation made to the Council, without the benefit of the additional information or documents.
- (8) LALCs should note that the Council of NSWALC usually imposes conditions on its approval such as time 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.

6.6 Timeframes for assessment, nomination and determination

- (1) 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.
- (2) The timeframe required to assess an application for land dealing approval will depend on:
 - (a) whether the information relating to the land dealing provided to NSWALC is sufficient for NSWALC to fully assess the land dealing,
 - (b) whether NSWALC considers it appropriate to refer the land dealing application or part of it to an expert advisory panel for assessment.
- (3) If the information or documentation in relation to the land dealing is not adequate for NSWALC to fully assess the land dealing, having regard to section 42G and the matters set out in Part 7 of this Policy, NSWALC staff will advise the LALC of this and of any additional information is required.
- (4) Estimates of time required to determine an application for land dealing approval will be calculated on the following basis:

- (a) times stated will run from the time when NSWALC receives notification from the LALC that it agrees to the proposed manner of determination, fees and any security, and receipt of any security for payment of the assessment fee, 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.
- (5) 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) assumptions upon which the time estimate for determination of the land dealing is based,
 - (b) the major variables that are likely to affect the actual time required to determine the application.
- (6) At the end of the substantive assessment, the LALC will be given written notice of the completion of the substantive assessment and of the date/s of the Council meeting at which the land dealing approval application is expected to be considered and determined. NSWALC staff will prepare and submit the application to the Council of NSWALC with their recommendation.
- (7) It is noted that the deadline for nominations of agenda items for the Council meeting is about 3 weeks before the meeting date. If NSWALC receives the land dealing application and all information and documents in relation to the land dealing outside this timeframe, then the land dealing application will be considered by NSWALC at the following Council meeting.

7. STAGE 3 - DETERMINATION OF A LAND DEALING APPLICATION

7.1 Determination of a land dealing

- (1) In Stage 3, the Council of NSWALC will determine the application for land dealing approval. 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 Part 7 of this Policy, and 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.
- (3) If the Council of NSWALC determines that the proposed land dealing should be approved and approves the land dealing, NSWALC staff will notify the LALC as soon as possible after the determination. The Chief Executive Officer of NSWALC will, issue a Dealing Approval Certificate within 14 days of the determination being made, as required by section 42K(1). A Dealing Approval Certificate conclusive evidence of the approval and contains the conditions (if any) to which the approval is subject (sections 41(1)(b) and 42K(1)).

- (4) 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.

7.2 NSWALC's consideration in relation to land dealing approvals

- (1) NSWALC's considerations in relation to land dealing approvals fall into 2 categories:
 - (a) procedural compliance, and
 - (b) substantive assessment
- (2) The procedural compliance check is a mechanical exercise wholly concerned with whether the application is in the form required, and contains the information and documents prescribed by the ALRA and the ALRR. It is based on facts and does not involve the exercise of any discretion by the Council of NSWALC.
- (3) If the land dealing application is not procedurally compliant with the requirements of the ALRA and ALRR, NSWALC does not have the power to assess and determine the land dealing. The procedural compliance matters go to ensuring members have transparency and have every opportunity to participate in the decision making relating to land dealings. This in effect forms the basis for NSWALC's second category of considerations, the substantive assessment, in determining whether to approve the land dealing.
- (4) The substantive assessment involves NSWALC's consideration of whether "*the land dealing is, or is likely be, contrary to the interests of the members of the Local Aboriginal Land Council or other Aboriginal persons within the area of that Council*" (section 42G(2), being the only basis for NSWALC's refusal to approve an otherwise procedurally compliant land dealing.
- (5) In considering if a dealing is, or is likely to be, contrary to local interests, NSWALC is reliant upon evidence that the local membership decision has been appropriately informed and is free from undue influence. In practice, this is reliant upon the provision of appropriate and credible advice to the membership (eg valuations, and feasibility advice) and the absence of any evidence of undue influence.

7.3 Matters NSWALC will take into account when determining a land dealing

- (1) Section 42G(2) confers a broad discretion on the Council of NSWALC to refuse to approve a land dealing if it considers that 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. The Council of NSWALC may also place conditions on an approval of a land dealing (section 42G(6)).
- (2) The ALRA sets out some broad, non-exclusive, matters NSWALC may consider when deciding whether to refuse an application.
- (3) Section 42G(3) and this Policy identify some broad, non-exhaustive, matters that NSWALC may take into account when deciding whether to refuse an application. These are:
 - (a) transparency and probity,
 - (b) consistency with LALC community, land and business plan,

- (c) commerciality - whether the terms of the land dealing are fair and equitable to the LALC in all the circumstances,
- (d) whether the members in passing the dealing had proper regard to the cultural and heritage significance of the land,
- (e) assessment of the application for approval of the land dealing by an expert advisory panel, and
- (f) holding and using proceeds

These broad matters reflect and are consistent with the matters in section 42G(3), and are not exhaustive.

7.4 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 Division 3 of Part 10 of the ALRA must be strictly complied with wherever they apply.
- (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.

7.5 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 and the proportion of the LALC's total lands affected by the proposal,
 - (b) the strategic importance of the land to the LALC in other respects,
 - (c) the complexity of the proposal,
 - (d) any investment of LALC resources required to undertake the proposal, and
 - (e) 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)?

7.6 Commerciality and terms of the land dealing

- (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' rent 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 and the proportion of the LALC's total lands affected by the proposal,
 - (b) the strategic importance of the land to the LALC in other respects,
 - (c) the complexity of the proposal,
 - (d) any investment of LALC resources required to undertake the proposal, and
 - (e) 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.
- (5) NSWALC will also have regard to whether the LALC has obtained advice and if suitably qualified, experienced and independent consultants (including lawyers) have been contracted to develop the LALC's proposal.
- (6) 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.
- (7) 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.
- (8) 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.
- (9) 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.
- (10) 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 qualified 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.

7.7 Cultural and heritage significance of the land

- (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 (section 42G(3)(c)).
- (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) and 82(6)).
- (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.

7.8 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 the proportion of the LALC's total lands affected by the proposal,
 - (b) the strategic importance of the land to the LALC in other respects,
 - (c) any investment of LALC resources required to undertake the proposal,
 - (d) the extent to which the future use of the land will be affected by the proposal, and
 - (e) 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.

7.9 Conditions of land dealing approval

- (1) NSWALC may impose conditions in approving a land dealing. 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.
- (4) 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)).
- (5) 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.
- (6) 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.
- (7) Where a land dealing proposal is significant and complex, the conditions of approval may need to be detailed, and may need to include a land dealing approval agreement, to achieve their purposes.

- (8) 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.
- (9) 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.
- (10) 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.

7.10 NSWALC's discretion to refuse to approve a land dealing

- (1) NSWALC has a broad discretion to refuse to approve a land dealing if the Council of NSWALC considers the land dealing is, or is likely to be contrary, to the interest of members of the LALC or other Aboriginal persons in the local area (section 42G(2)).
- (2) If, after having considered all the matters referred to in Part 7 of this Policy, the Council of NSWALC determines that the land dealing is contrary to the interests of members of the LALC or other Aboriginal persons in the local area, NSWALC may refuse to approve the land dealing.

8. STAGE 4 - IMPLEMENTATION OF A LAND DEALING APPROVAL

8.1 Compliance with NSWALC's conditions of approval

- (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).
- (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).

- (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.

8.2 Registration Approval Certificates

- (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 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).
- (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 and sale, 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).

8.3 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,

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).

9. DISPUTE RESOLUTION

In the event of a dispute between NSWALC and a LALC in relation to NSWALC's assessment and determination of a land dealing, or the application of this 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).